As has become evident, assuming you have read the cases that precede this section, judicial review of administrative action is one of the fundamental ways of developing and understanding administrative law. In the cases that follow, we explore the question of who can seek judicial review of the rules, regulations, and interpretations that agencies issue.

The Administrative Procedure Act (“APA”) allows any “aggrieved” person to seek out judicial review. It does not guarantee, however, that aggrieved persons will secure judicial review. Furthermore, it does not define what exactly is required to be “aggrieved.” It does not state with specificity when a process is deemed “final” or “ripe” at the agency level. Nonetheless, a person can secure judicial review of agency action – or sue the government when they believe they are harmed by agency action – only if the agency matter is final and ripe, and if the party seeking review has standing.

It is inevitable that a decision regarding standing will be seen as political, activating debates regarding judicial restraint versus judicial activism and separation of powers. When a court reviews the action of an agency to determine the sufficiency of a record or when a court agrees to hear a claim under 28 U.S.C. § 1331, in which a party seeks damages for alleged harm caused by an agency, there are those who believe it impossible for a court to avoid second guessing the actions of the agency. That second guess is, to some, a violation of the clear constitu-
tional mandate of separation of power. To others, judicial review is a critical exercise of the constitutional mandate of checks and balances and a statutory mandate of the Administrative Procedure Act that requires, outside of certain exceptional circumstances, judicial review to ensure the fairness and efficacy of agency action.

In rulemaking cases, the question of standing is slightly more delicate than in adjudicatory proceedings. In an adjudicatory proceeding, the party who litigated the matter usually has a personal stake in the outcome and is able to ensure “concrete adverseness.” In contrast, in rulemaking cases, many members of the public may be affected personally by a rule. Further, many members of the public who may not be affected by the rule may find the process or substance of the rule deeply offensive and violative of fundamental norms.

Quite obviously, it would be impossible to allow every member of the public who takes offense at the process or content of any rule issued by an agency to have his or her day in court. Judicial review is not an opportunity for general political critique of the actions of government. For that reason, determining standing in rulemaking cases becomes rather important. Legitimate standing doctrine must both provide an opportunity for judicial review to address those genuinely aggrieved and must also limit the use of judicial review as a political forum to air one’s grievances against the regulatory state.

I. Review and Basic Jurisdictional Requirements: Standing

Since the Administrative Procedure Act guarantees anyone aggrieved by agency action a right to judicial review, one would think the basic jurisdictional questions are not all that complicated. However, even the most fundamental question – whether the APA constitutes an independent jurisdictional basis for judicial review – can leave one in a state of uncertainty. In *Califano v. Sanders*, 430 U.S. 99 (1977), the Supreme Court held that the APA does not form an independent jurisdictional bases for judicial review. *Califano*, however, dealt with a somewhat unique situation and, while it is cited occasionally (usually erroneously) for the aforementioned proposition, a far better statement of the jurisdictional nature of §701 of the APA is in *Bennett v. Spear*.

*Bennett* clarified that the APA is a critical component of the jurisdictional base for securing judicial review of agency action. Every administrative law decision (or at least every one that we can think of) involves an administrative agency – and it is the enabling statute (the substantive statute that empowers the agency to act) of that agency that provides the “federal question.” The APA, however, plays a vital role in rounding out jurisdiction, leading some courts to characterize cases as an “APA cause of action.” “An APA cause of action accrues at the time of the

Jurisdiction requires not only a consideration of subject matter but also of venue. The “routing” of judicial review of agency action is often determined by statute. There are statutes that route appellants to a Court of Appeals and others that route parties to a District Court. While the Circuit Courts are the traditional venue for review, District Courts are the traditional forum for other lawsuits against the United States government. Further, District Courts hear cases where de novo review is appropriate. See, e.g., NVE Inc. v. HHS, 436 F.3d 182 (3d Cir. 2006); and Farrell v. Principi, 366 F.3d 1066 (9th Cir. 2004).

Assuming one has identified the appropriate venue, the next set of obstacles are the questions that often dominate civil procedure and constitutional law classes: Standing, ripeness, finality, mootness, exhaustion of remedies, and primary jurisdiction. A number of the cases that follow discuss the many – and varied – rules pertaining to standing. We note preliminarily that if the plaintiff is not the object of the agency’s action, but rather a third-party interested in using the court system to critique the work of the agency, the party will have a very difficult time obtaining standing. If the entity attacking the action of the agency is an association, organization, or public interest group, the requirements are also slightly different, as is discussed in the material that follows.

Take Note
The term “enabling act” refers to the legislation that both establishes an agency and delegates the power to exercise authority. As a general rule, agencies, not courts, have the primary responsibility to interpret their enabling legislation.

Practice Pointer
De novo trials can happen based on a statutory directive, a claim by the plaintiff that the agency action is unsupported – or grossly unwarranted – by the facts, an attempt by an agency to enforce an order or sanction where there was little or no fact finding before the order or sanction was issued, constitutional fact cases, and a limited number of other circumstances. Frank R. Strong, Dilemmic Aspects of the Doctrine of “Constitutional Fact,” 47 N. C. L. Rev. 311, 327 (1969). Steven Alan Childress, Constitutional Fact and Process: A First Amendment Model of Censorial Discretion, 70 Tul. L. Rev. 1229, 1240 (1996).
In addition to standing, a party challenging agency action must show that the decision under review is the “consummation of agency action” and demonstrate that legally binding consequences flow from that action. The more advisory the action of the agency, the less likely it is to be construed as final. Ripeness, often linked with finality, requires an identifiable legal question and a showing that the agency action will produce real – as opposed to theoretical or abstract – consequences.

A further consideration is exhaustion of administrative remedies. Exhaustion can be jurisdictional if it is required by the substantive statute governing the agency. Exhaustion allows an agency to “express” its expertise, correct its mistakes, develop a record suitable for review, and ensure that the agency process remains available long enough for those who are interested in participating in it. Exhaustion can be waived if an agency cannot give the requested relief, if continued agency action is futile or unconstitutional, if the agency action displays bias, or if the agency action is outside of the authority of the agency. While primary jurisdiction is often lumped in with exhaustion, it is a separate consideration. See Nicholas A. Lucchetti, Comment, One Hundred Years of the Doctrine of Primary Jurisdiction: But What Standard of Review Is Appropriate for It, 59 Admin. L. Rev. 849 (2008).

The cases that follow show both the evolution of the standing doctrine and the problems the doctrine has produced.

ASSOCIATION OF DATA PROCESSING SERVICE ORGANIZATIONS, INC. v. CAMP

397 U.S. 150 (1970)

[Justice Douglas] Petitioners sell data processing services to businesses . . . . In this suit they seek to challenge a ruling by respondent Comptroller of the Currency that, as an incident to their banking services, national banks, including respondent American National Bank & Trust Company, may make data processing services available to other banks and to bank customers. The District Court dismissed the complaint for lack of standing . . . . The Court of Appeals affirmed . . . .

Generalizations about standing to sue are largely worthless as such. One generalization is, however, necessary and that is that . . . standing in the federal courts is to be considered in the framework of Article III which restricts judicial power to “cases” and “controversies.” As we recently stated in Flast v. Cohen, “In terms of Article III limitations on federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial
resolution.” *Flash* was a taxpayer’s suit. The present is a competitor’s suit. And while the two have the same Article III starting point, they do not necessarily track one another.

The first question is whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise. There can be no doubt but that petitioners have satisfied this test. The petitioners not only allege that competition by national banks in the business of providing data processing services might entail some future loss of profits for the petitioners, they also allege that respondent American National Bank & Trust Company was performing or preparing to perform such services for two customers for whom petitioner Data Systems, Inc., had previously agreed or negotiated to perform such services. The petitioners’ suit was brought not only against the American National Bank & Trust Company, but also against the Comptroller of the Currency. The Comptroller was alleged to have caused petitioners injury in fact by his 1966 ruling which stated:

Incidental to its banking services, a national bank may make available its data processing equipment or perform data processing services on such equipment for other banks and bank customers.

...  

[In] *Tennessee Power Co. v. TVA*, [t]he Court denied the competitors’ standing, holding that they did not have that status “unless the right invaded is a legal right, – one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege.”

The “legal interest” test goes to the merits. The question of standing is different. It concerns, apart from the “case” or “controversy” test, the question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question. Thus the Administrative Procedure Act grants standing to a person “aggrieved by agency action within the meaning of a relevant statute.” 5 U.S.C. § 702. That interest, at times, may reflect “aesthetic, conservational, and recreational” as well as economic values. A person or a family may have a spiritual stake in First Amendment values sufficient to give standing to raise issues concerning the Establishment Clause and the Free Exercise Clause. We mention these noneconomic values to emphasize that standing may stem from them as well as from the economic injury on which petitioners rely here. Certainly he who is “likely to be financially” injured may be a reliable private attorney general to litigate the issues of the public interest in the present case... Where statutes are concerned, the trend is toward enlargement of the class of people who may protest administrative action...
That leaves the remaining question, whether judicial review of the Comptroller’s action has been precluded. We do not think it has been. . . . We find no evidence that Congress in either the Bank Service Corporation Act or the National Bank Act sought to preclude judicial review of administrative rulings by the Comptroller as to the legitimate scope of activities available to national banks under those statutes. Both Acts are clearly “relevant” statutes within the meaning of § 702. The Acts do not in terms protect a specified group. But their general policy is apparent; and those whose interests are directly affected by a broad or narrow interpretation of the Acts are easily identifiable. It is clear that petitioners, as competitors of national banks which are engaging in data processing services, are within that class of “aggrieved” persons who, under § 702, are entitled to judicial review of “agency action.”

Whether anything in the Bank Service Corporation Act or the National Bank Act gives petitioners a “legal interest” that protects them against violations of those Acts, and whether the actions of respondents did in fact violate either of those Acts, are questions which go to the merits and remain to be decided below.

We hold that petitioners have standing to sue and that the case should be remanded for a hearing on the merits.

1. The Fragility of the Data Processing Presumption of Reviewability. In High Country Citizens Alliance v. Clarke, 454 F.3d 1177 (10th Cir. 2006), the court addressed what is required to overcome the presumption of judicial review in Data Processing. “[A]n intent to preclude judicial review must be ‘fairly discernible’ from the statutory scheme.” The fact that a statute does not explicitly provide for judicial review is not outcome determinative. Rather, the Supreme Court set forth specific factors for courts to consider in analyzing whether, absent explicit language or explicit legislative history, the presumption of reviewability has been overcome:

The congressional intent necessary to overcome the presumption [of reviewability] may . . . be inferred from contemporaneous judicial construction barring review and the congressional acquiescence in it . . . or from the collective import of legislative and judicial history behind a particular statute [or] by inferences of intent drawn from the statutory scheme as a whole. Data Processing (citing Block v. Community Nutrition Institute, 467 U.S. 340 (1984)).

The Block decision called into question the solid assumptions on which Data Processing was based. If Congress does not limit or prohibit review explicitly, can it be possible to do so by implication? The Data Processing decision holds that the bar must be explicit – fourteen years later, in Block, things changed: “[W]hether and to what extent a particular statute precludes judicial review is determined not only from its express language, but also from the structure of the statutory scheme,
its objectives, its legislative history, and the nature of the administrative action involved." 467 U.S. at 345. [Emphasis added.]

2. Since the Court allows review to be cut off based on the “structure of the statutory scheme, its objectives, [or] its legislative history”, what remains of the promise of Data Processing? Does this permit courts to bend the intention of Congress? After all, if Congress wanted to prohibit review, it is quite capable of doing so expressly.

In Bowen v. Michigan Academy of Family Physicians, the Court provided a second wind for the Data Processing premise of access to the courts, holding that there is a “strong presumption that Congress intends judicial review of administrative action.” 476 U.S. 667, 669 (1986). How strong can a presumption be if it can be set aside based on an analysis of the “structure of a statutory scheme”?

3. An excellent comment by Colin A. Olivers in 38 ENVTL. L. 243 (2008), Has the Federal Courts Successive Undermining of the APA's Presumption of Reviewability Turned the Doctrine Into Fools Gold?, discusses the Tenth Circuit’s decision in High Country Citizens Alliance v. Clarke (note 1, above). Mr. Olivers notes that “contemporaneous decisions and the manner in which the courts have treated this [reviewability] presumption merits further consideration, as the apparent meaning of Data Processing was possibly not as clear as it seemed.”

4. Data Processing in Context – The D.C. Gun Control Case. In District of Columbia v. Heller, 128 S. Ct. 2783 (2008), involving the constitutionality of the D.C. handgun ban, D.C. Code §§ 7-2502.02(a)(4), 7-2507.02, 22-4504, the Court passed up an opportunity to address some of the unanswered questions from Data Processing. While the Court directed its attention primarily to handgun ownership, in the underlying decision, the D.C. Circuit provided a valuable summary of the problems pertaining to the Second Amendment and standing/reviewability challenges as they relate to injury-in-fact:

We note that the Ninth Circuit has recently dealt with a Second Amendment claim by first extensively analyzing that provision, determining that it does not provide an individual right, and then, and only then, concluding that the plaintiff lacked standing to challenge a California statute restricting the possession, use, and transfer of assault weapons. See Silveira v. Lockyer, 312 F.3d 1052, 1066-67 & n.18 (9th Cir. 2002). We think such an approach is doctrinally quite unsound. The Supreme Court has made clear that when considering whether a plaintiff has Article III standing, a federal court must assume arguendo the merits of his or her legal claim. See Warth v. Seldin, 422 U.S. 490, 501-02 (1975). . . . We have repeatedly recognized that proposition. . . . “Indeed, in reviewing the standing question, the court must be careful not to decide the questions on the merits for or against the plaintiff, and must therefore assume that on the merits the plaintiffs would be successful in their claims.” (citing Warth, 422 U.S. at 502). This is no less true when, as here, the merits involve the scope of a constitutional protection.
Still, we have not always been so clear on this point. Although we recognized in *Claybrook v. Slater*, 111 F.3d 904 (D.C. Cir. 1997), that it was not necessary for a plaintiff to demonstrate that he or she would prevail on the merits . . . the rest of our discussion seems somewhat in tension with that proposition. We did recognize that in *Lujan v. Defenders of Wildlife* [the following case in this text] when the Supreme Court used the phrase “legally protected interest” as an element of injury-in-fact, it made clear it was referring only to a “cognizable interest.” The Court in *Lujan* concluded that plaintiffs had a “cognizable interest” in observing animal species without considering whether the plaintiffs had a legal right to do so. We think it plain the *Lujan* Court did not mean to suggest a return to the old “legal right” theory of standing rejected in *Association of Data Processing Service Organizations, Inc. v. Camp*. . . . Rather, the cognizable interest to which the Court referred would distinguish, to pick one example, a desire to observe certain aspects of the environment from a generalized wish to see the Constitution and laws obeyed. . . .

In sum, we conclude that Heller has standing to raise his § 1983 challenge to specific provisions of the District’s gun control laws.

*Parker v. District of Columbia*, 478 F.3d 370 (D.C. Cir. 2007).

5. Reviewability and Competitive Injury. Among the most important continuing questions in this field are those pertaining to competitive injury. No one suggests that access to the courts is guaranteed if the sole ground for the claim is that a market is increasingly competitive. However, competitive injury and healthy competitive pressure are no easier to figure out in administrative law than in regulatory antitrust cases. Paul S. Dempsey, *Deregulation: A Decade Later, and the Band Played On*, 17 Transp. L.J. 31 (1988). In *Canadian Lumber Trade Alliance v. United States*, 425 F. Supp. 2d 1321 (U.S. Court of Int’l Trade 2006), aff’d 517 F.3d 1319 (Fed. Cir. 2008), the court explored the matter.

The United States Bureau of Customs and Border Protection . . . distributes to domestic producers who are competitors of the Plaintiff Canadian exporters the duties collected as a result of antidumping and countervailing orders on Canadian goods.

[The government] contend[s] that economic injuries are not cognizable within the meaning of the injury-in-fact test. Specifically, relying on the Supreme Court’s statement in *Hardin v. Ky. Utils. Co.*, 390 U.S. 1, 5-6 (1968) that “. . . economic injury which results from lawful competition cannot, in and of itself, confer standing on the injured business to question the legality of any aspect of its competitor’s operations. . . .” The court disagrees . . .

In *Data Processing*, the Supreme Court rejected the “legal interest” analysis which required claimants to demonstrate an injury to their legally protected rights. . . . In repudiating that earlier test, the Court noted that the “legal interest” test [went] to the merits [whereas the] question of standing is different,” and that the legal interest test conflicted with the “broadly remedial purpose” of the APA. The Supreme Court’s rejection of the “legal interest” analysis was absolute and unqualified. See Jonathan R. Siegel, *Zone of Interests*, 92 Geo. L.J. 317, 320 (2004). . . . Any remnants of this analysis are now relevant only to prudential considerations in the context of the zone of interest test . . . .
Go back to the text of *Data Processing*. How does the Court limit or expand reviewability when the interest at stake is economic?

6. History. *Barlow v. Collins*, 397 U.S. 159 (1970), decided along with *Data Processing*, includes a dissent by Justices Brennan and White in which they argue that *Data Processing* did not go far enough. They assert that the only element of the *Data Processing* test required for standing is injury-in-fact and that the statutory zone of interest test is not required as a matter of constitutional imperative. That is not to say that injury-in-fact is lacking in complexity or controversy. The triggering language for injury in administrative law cases comes from § 702 of the APA that provides a “right of review” to “a person suffering a legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of the relevant statute.” During the New Deal, courts weighed in regularly on what it meant to be sufficiently injured or aggrieved. *Tennessee Electric Power v. TVA*, 306 U.S. 118 (1939); *FCC v. Sanders Brothers*, 309 U.S. 470 (1940); *Scripps Howard Radio v. FCC*, 316 U.S. 4 (1942); and *Associated Industries of New York v. Ickes*, 134 F.2d 694 (2d Cir. 1943), vacated as moot 320 U.S. 707 (1943).

As the cases that follow make clear, these questions were not resolved by *Data Processing*. Furthermore, just when it seems there is clarity, a new decision is handed down calling into question our understanding in the field.

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**Textual Note**

We have selected the cases that follow based on our understanding that the vast majority of law students are exposed to reviewability, standing, and related doctrines prior to taking administrative law. However, we also know that law school curricula vary greatly. For those who spent months on this topic prior to taking this course, this should be a pleasant review. For those who have not seen these cases before, we urge you to read the full opinions of the main cases and to recognize that, while agency cases are of great value in the field, standing, ripeness, and mootness are of consequence beyond administrative law.
After the *Data Processing* case, one might have concluded that ascertaining the availability of judicial review of administrative action would be somewhat mechanical. After all, what could be so complicated about figuring out if there was an injury-in-fact to an interest arguably within the zone of a particular statute? Two cases decided shortly thereafter, *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972), and *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 685-90 (1973), followed the ideas underlying *Data Processing* in terms of the nature of the injury. In *SCRAP*, the Court found that injury to a legally protected interest defined by “common law or statute” was not a formal requirement. In *Sierra Club*, the Court held that “injury” could extend to environmental and aesthetic concerns – and neither case appears to demand a clear causal connection between the harm alleged and the government action that was the apparent cause.

If one goal of the Court in *Data Processing* was to “open the courthouse doors,” it was a short-lived objective. The cases that followed *Data Processing* reflect a slow and irregular, but real, set of limits on access to the courts. Some years after the decision, a student Comment noted the following:

This new “zone of interests” test sought to reestablish separation of powers by providing relatively easy access to the courts for regulatory objects and beneficiaries. *Data Processing*, however, was the high water mark of the post-New Deal standing model. In a retreat from the pure “zone of interests” test, the Court subsequently introduced causation and redressability requirements into the standing analysis.


The next step is to begin to think through the criteria for standing. “Standing to sue is part of the common understanding of what it takes to make a justiciable case.” *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 (1990). Justiciability, however, turns out to be nothing resembling a singularity. In a fascinating piece on animal rights, an area where standing concerns are acute, Professor Elizabeth L. DeCoux notes that

[s]tanding is a terrain in which a traveler can become lost, unless he begins his journey by looking out over the vista and locating several landmarks that will serve as reference points. . . . First, there is the distinction between standing and other rules of justiciability [e.g.,] mootness, ripeness, [and] political question. . . . [There is also the] distinction between constitutional standing and prudential standing . . . A claimant who meets the requirements of constitutional standing may nevertheless find the path barred by judge-made law regarding prudential standing. [From Elizabeth L. DeCoux, *In the Valley of Dry Bones: Reuniting the Word “Standing” with Its Meaning in Animal Cases*, 29 WM. & MARY ENVTL. L. & POL’Y REV. 720 (2005).]
Data Processing provided a workable theory for those who set out to challenge what they perceived as ill-conceived regulatory initiatives. As you read the cases that follow, pay attention to the fate of such challengers. Are these cases based genuinely on constitutional constraints, management-based concerns regarding access to the courts, prudential consideration, or other political considerations?

MATCH-E-BE-NASH_SHE-WISH BAND OF POT-TAWATOMI INDIANS V. PATCHAK


[JUSTICE KAGAN] A provision of the Indian Reorganization Act (IRA), 25 U.S.C. § 465, authorized the Secretary of the Interior (Secretary) to acquire property “for the purpose of providing land for Indians.” The Secretary here acquired land in trust for an Indian tribe seeking to open a casino. Respondent David Patchak lives near that land and challenges the Secretary’s decision . . . . Patchak claims that the Secretary lacked authority under § 465 to take title to the land, and alleges economic, environmental, and aesthetic harms from the casino’s operation. We consider . . . whether Patchak has prudential standing to challenge the Secretary’s acquisition. We think he does. We therefore hold that Patchak’s suit may proceed.

I

The Match-E-Be-Nash-She-Wish band of Pottawatomi Indians (Band) is an Indian tribe residing in rural Michigan. Although the Band has a long history, the Department of the Interior (DOI) formally recognized it only in 1999. Two years later, the Band petitioned the Secretary to exercise her authority under § 465 by taking into trust a tract of land in Wayland Township, Michigan, known as the Bradley Property. The Band’s application explained that the Band would use the property “for gaming purposes,” with the goal of generating the “revenue necessary to promote tribal economic development, self-sufficiency and a strong tribal government capable of providing its members with sorely needed social and educational programs.”

In 2005, after a lengthy administrative review, the Secretary announced her decision to acquire the Bradley Property in trust for the Band. In accordance with applicable regulations, the Secretary committed to wait 30 days before taking action, so that interested parties could seek judicial review.

Patchak filed this suit under the APA. He asserted that § 465 did not authorize the Secretary to acquire property for the Band because it was not a federally recog-
nized tribe when the IRA was enacted in 1934. To establish his standing to bring suit, Patchak contended that he lived “in close proximity to” the Bradley Property and that a casino there would “destroy the lifestyle he has enjoyed” by causing “increased traffic,” “increased crime,” “decreased property values,” “an irreversible change in the rural character of the area,” and “other aesthetic, socioeconomic, and environmental problems.” Notably, Patchak did not assert any claim of his own to the Bradley Property.

This Court has long held that a person suing under the APA must satisfy not only Article III’s standing requirements, but an additional test: The interest he asserts must be “arguably within the zone of interests to be protected or regulated by the statute” that he says was violated. Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970). Here, Patchak asserts that in taking title to the Bradley Property, the Secretary exceeded her authority under § 465, which authorizes the acquisition of property “for the purpose of providing land for Indians.” And he alleges that this statutory violation will cause him economic, environmental, and aesthetic harm as a nearby property owner. The Government and Band argue that the relationship between § 465 and Patchak’s asserted interests is insufficient. That is so, they contend, because the statute focuses on land acquisition, whereas Patchak’s interests relate to the land’s use as a casino. We find this argument unpersuasive.

The prudential standing test Patchak must meet “is not meant to be especially demanding.” We apply the test in keeping with Congress’s “evident intent” when enacting the APA “to make agency action presumptively reviewable.” We do not require any “indication of congressional purpose to benefit the would-be plaintiff.” And we have always conspicuously included the word “arguably” in the test to indicate that the benefit of any doubt goes to the plaintiff. The test forecloses suit only when a plaintiff’s “interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.”

Patchak’s suit satisfies that standard, because § 465 has far more to do with land use than the Government and Band acknowledge. Start with what we and others have said about § 465’s context and purpose. As the leading treatise on federal Indian law notes, § 465 is “the capstone” of the IRAs land provisions. F. Cohen, Handbook of Federal Indian Law § 15.07 (hereinafter Cohen). And those provisions play a key role in the IRAs overall effort “to rehabilitate the Indian’s economic life”. “Land forms the basis” of that “economic life,” providing the foundation for “tourism, manufacturing, mining, logging, . . . and gaming.” Cohen § 15.01. Section 465 thus functions as a primary mechanism to foster Indian tribes’ economic development. As the D. C. Circuit explained . . . the section “provide[es] lands sufficient to enable Indians to achieve self-support.” So when the Secretary
obtains land for Indians under § 465, she does not do so in a vacuum. Rather, she
takes title to properties with at least one eye directed toward how tribes will use
those lands to support economic development.

The Department's regulations make this statutory concern with land use
crystal clear. Those regulations permit the Secretary to acquire land in trust under
§ 465 if the “land is necessary to facilitate tribal self-determination, economic
development, or Indian housing.” 25 C.F.R. § 151.3(a)(3). And they require the
Secretary to consider, in evaluating any acquisition, both “[t]he purposes for
which the land will be used” and the “potential conflicts of land use which may
arise.” For “off-reservation acquisitions” made “for business purposes” – like the
Bradley Property – the regulations further provide that the tribe must “provide
a plan which specifies the anticipated economic benefits associated with the
proposed use.” DOI's regulations thus show that the statute's implementation
centrally depends on the projected use of a given property.

The Secretary's acquisition of the Bradley Property is a case in point. The
Band's application to the Secretary highlighted its plan to use the land for gaming
purposes. Similarly, DOI's notice of intent to take the land into trust announced
that the land would “be used for the purpose of construction and operation of a
gaming facility,” which the Department had already determined would meet the
Indian Gaming Regulatory Act's requirements. So from start to finish, the decision
whether to acquire the Bradley Property under § 465 involved questions of land
use.

And because § 465's implementation encompasses these issues, the interests
Patchak raises – at least arguably – fall “within the zone . . . protected or regulated
by the statute.” If the Government had violated a statute specifically addressing
how federal land can be used, no one would doubt that a neighboring landowner
would have prudential standing to bring suit to enforce the statute's limits. The
difference here, as the Government and Band point out, is that § 465 specifically
addresses only land acquisition. But for the reasons already given, decisions under
the statute are closely enough and often enough entwined with considerations of
land use to make that difference immaterial. As in this very case, the Secretary
will typically acquire land with its eventual use in mind, after assessing potential
conflicts that use might create. And so neighbors to the use (like Patchak) are
reasonable – indeed, predictable – challengers of the Secretary's decisions: Their
interests, whether economic, environmental, or aesthetic, come within § 465's
regulatory ambit.

1. The import of this case on the zone of interest test as a prudential consideration
is not transformational but certainly adds to our understanding of who can and
cannot proceed in federal court. A thoughtful student note speculates that the impact of the case may be greater in terms of Indian land rights. Anna O’Brien, *Note: Misadventures in Indian Law: The Supreme Court’s Patchak Decision, 85 U. Colo. L. Rev. 581, 583 (2014)* (“Patchak . . . allows increased litigation to delay an already protracted fee-to-trust process, yet promises only speculative benefits. . . . [It] creates uncertainty and increases transaction costs . . . and can make it difficult for a tribe to finance much-needed development projects. [It] frustrates Congress’s policy of encouraging Indian self-determination while providing little additional benefit to neighboring landowners. . . .”).

Another student piece on the case comes to similar conclusions, asserting that the Supreme Court was incorrect in its interpretation of law and incorrect in its focus on the nature of the claimant’s actions as opposed to the nature of relief requested. Bethany Henneman, *Comment, Artful Pleading Defeats Historic Commitment to American Indians, 14 RRGC 142 (2014).*

2. Professor Frank Pommersheim’s article, *Land into Trust: An Inquiry into Law, Policy and History*, expressed concern about a somewhat counterintuitive effect *Patchak* will have, limiting access to the courts to those concerned about “economic, environmental, or aesthetic harms,” giving preference to those with “right, title, and interest” claims.

*Justice Kagan . . . seems to miss the essential oddity of concluding that an individual with a lesser interest (i.e., no “right, title, or interest” in the property) gets more opportunity than someone with a greater interest to continue to challenge and prolong the administrative process of placing land into trust.” Professor Pommersheim suggests that *Justice Sotomayor’s* dissent depicts more accurately the real impact of this case, noting that it will, “prolong the land-into-trust process all through federal court appeals upon the exhaustion of administrative remedies . . . and may well undermine the ability of the tribe to engage in the planned economic activity (e.g., gaming, retail, and manufacturing activities) . . . [resulting in] economic advances in Indian country [being] sloughed off and cast aside for no good reason.*


3. Much of the criticism of *Patchak* is based on the anticipated economic consequences of limiting the capacity of tribes to fight back “not-in-my-backyard” responses to the use of land designated by the Department of Interior Native American Trust as ‘property’ of a designated tribe. J. Matthew Martin, *The Supreme Court Erects a Fence Around Indian Gaming, 39 Okla. City U.L. Rev. 45 (2014)* (*Patchek* “provides the almost unlimited right of “not in my backyard” locals or competitors to sue the Government for the divestiture of Indian trust lands. . . .[T]ribes are foreclosed from suing states to protect their IGRA rights but are subject to being sued by anyone who objects to a proposed gaming operation.”).
4. Based on the notes above and on Patchak, one might think there is little redeeming about this case. Do you agree? If your goal is access to justice, isn’t designating the Data Processing inquiry as prudential a step forward?

**LEXMARK INT’L V. STATIC CONTROL COMPONENTS**

134 S. Ct. 1377 (2014)


Lexmark manufactures and sells laser printers. It also sells toner cartridges for those printers (toner being the powdery ink that laser printers use to create images on paper). Lexmark designs its printers to work only with its own style of cartridges, and it therefore dominates the market for cartridges compatible with its printers. That market, however, is not devoid of competitors. Other businesses, called “remanufacturers,” acquire used Lexmark toner cartridges, refurbish them, and sell them in competition with new and refurbished cartridges sold by Lexmark.

Lexmark would prefer that its customers return their empty cartridges to it for refurbishment and resale, rather than sell those cartridges to a remanufacturer. So Lexmark introduced what it called a “Prebate” program, which enabled customers to purchase new toner cartridges at a 20–percent discount if they would agree to return the cartridge to Lexmark once it was empty. Those terms were communicated to consumers through notices printed on the toner-cartridge boxes, which advised the consumer that opening the box would indicate assent to the terms—a practice commonly known as “shrinkwrap licensing,” see, e.g., *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1449 (C.A.7 1996). To enforce the Prebate terms, Lexmark included a microchip in each Prebate cartridge that would disable the cartridge after it ran out of toner; for the cartridge to be used again, the microchip would have to be replaced by Lexmark.

Static Control is not itself a manufacturer or remanufacturer of toner cartridges. It is, rather, “the market leader [in] making and selling the components necessary to remanufacture Lexmark cartridges.” 697 F.3d 387, 396 (C.A.6 2012) (case below). In addition to supplying remanufacturers with toner and various replacement parts, Static Control developed a microchip that could mimic the microchip in Lexmark’s Prebate cartridges. By purchasing Static Control’s microchips and using them to replace the Lexmark microchip, remanufacturers were able to refurbish and resell used Prebate cartridges.

As relevant to its Lanham Act claim, Static Control alleged two types of false or misleading conduct by Lexmark. First, it alleged that through its Prebate program Lexmark “purposefully misleads end-users” to believe that they are legally bound by the Prebate terms and are thus required to return the Prebate-labeled cartridge to Lexmark after a single use. App. 31, ¶ 39. Second, it alleged that upon introducing the Prebate program, Lexmark “sent letters to most of the companies in the toner cartridge remanufacturing business” falsely advising those companies that it was illegal to sell refurbished Prebate cartridges and, in particular, that it was illegal to use Static Control’s products to refurbish those cartridges. Id., at 29, ¶ 35. Static Control asserted that by those statements, Lexmark had materially misrepresented “the nature, characteristics, and qualities” of both its own products and Static Control’s products. Id., at 43–44, ¶ 85. It further maintained that Lexmark’s misrepresentations had “proximately caused and [we]re likely to cause injury to [Static Control] by diverting sales from [Static Control] to Lexmark,” and had “substantially injured [its] business reputation” by “leading consumers and others in the trade to believe that [Static Control] is engaged in illegal conduct.” Id., at 44, ¶ 88. Static Control sought treble damages, *1385 attorney’s fees and costs, and injunctive relief.1

The District Court granted Lexmark’s motion to dismiss Static Control’s Lanham Act claim.***The Sixth Circuit reversed the dismissal of Static Control’s Lanham Act claim. ***

[T]he question this case presents is whether Static Control falls within the class of plaintiffs whom Congress has authorized to sue under § 1125(a). In other words, we ask whether Static Control has a cause of action under the statute. *** Thus, this case presents a straightforward question of statutory interpretation: Does the cause of action in § 1125(a) extend to plaintiffs like Static Control? The statute authorizes suit by “any person who believes that he or she is likely to be damaged” by a defendant’s false advertising. § 1125(a)(1). Read literally, that broad language might suggest that an action is available to anyone who can satisfy the minimum requirements of Article III. No party makes that argument, however, and the “unlikelihood that Congress meant to allow all factually injured plaintiffs to recover persuades us that [§ 1125(a)] should not get such an expansive reading.” Holmes, 503 U.S., at 266, 112 S.Ct. 1311 (footnote omitted). We reach that conclusion in light of two relevant background principles already mentioned: zone of interests and proximate causality.
First, we presume that a statutory cause of action extends only to plaintiffs whose interests “fall within the zone of interests protected by the law invoked.”*** We have said, in the APA context, that the test is not “‘especially demanding,’” Match–E–Be–Nash–She–Wish Band of Pottawatomi Indians v. Patchak, 567 U.S.___, 132 S.Ct. 2199, 2210, 183 L.Ed.2d 211 (2012). ***We have made clear, however, that the breadth of the zone of interests varies according to the provisions of law at issue, so that what comes within the zone of interests of a statute for purposes of obtaining judicial review of administrative action under the “‘generous review provisions’” of the APA may not do so for other purposes.” Bennett, supra, at 163, 117 S.Ct. 1154 (quoting Clarke, 479 U.S., at 400, n.16, 107 S.Ct. 750, in turn quoting Data Processing, supra, at 156, 90 S.Ct. 827).

Identifying the interests protected by the Lanham Act, however, requires no guesswork, since the Act includes an “unusual, and extraordinarily helpful,” detailed statement of the statute’s purposes. *** We thus hold that to come within the zone of interests in a suit for false advertising under § 1125(a), a plaintiff must allege an injury to a commercial interest in reputation or sales. A consumer who is hoodwinked into purchasing a disappointing product may well have an injury-in-fact cognizable under Article III, but he cannot invoke the protection of the Lanham Act—a conclusion reached by every Circuit to consider the question.*** Even a business misled by a supplier into purchasing an inferior product is, like consumers generally, not under the Act’s aegis.

***

Applying those principles to Static Control’s false-advertising claim, we conclude that Static Control comes within the class of plaintiffs whom Congress authorized to sue under § 1125(a).

To begin, Static Control’s alleged injuries—lost sales and damage to its business reputation—are injuries to precisely the sorts of commercial interests the Act protects. Static Control is suing not as a deceived consumer, but as a “person[n] engaged in” “commerce within the control of Congress” whose position in the marketplace has been damaged by Lexmark’s false advertising, § 1127. There is no doubt that it is within the zone of interests protected by the statute.

To invoke the Lanham Act’s cause of action for false advertising, a plaintiff must plead (and ultimately prove) an injury to a commercial interest in sales or business reputation proximately caused by the defendant’s misrepresentations. Static Control has adequately pleaded both elements. The judgment of the Court of Appeals is affirmed. [emphasis added]
1. This is a fairly straightforward case that ends a split between three circuits. Just so there is no misunderstanding, standing in Lanham Act cases is not limited to direct competitors. Under the statute, the predicate for standing is a business injury (to direct competitors and others) proximately caused by false statements attributable to the defendant. Moreover, it is clear that the zone of interests test is prudential, not jurisdictional. AICPA v. IRS, 2015 U.S. App. LEXIS 18900 (D.C. Cir. 2015); Crossroads Grassroots Policy Strategies v. FEC, 788 F.3d 312, 319 (D.C. Cir. 2015). It is not clear, however, how broadly “business injury” will be defined.

2. The proximate cause component of this case is familiar territory for almost every administrative law student who, at some point in her or his first semester, labored in the vineyards of proximate cause. The court excludes expressly remote cause, nixing cases where a falsehood is present – and a harm exists – but the relationship between the two is purely speculative, illogical, or entirely conjectural. Perhaps recognizing the challenge proximate causation presents to first-year law students, the Court acknowledges that the “proximate-cause inquiry is not easy to define, and over the years it has taken various forms. . . .” Opting for a language that seems clear – “a sufficiently close connection to the conduct the statute prohibits,” – the Court leaves for you and all who follow the demonic challenge of figuring out just how close a connection must be between the misconduct/falseness and the economic injury. The Court rejects injuries that are “too remote” but fails to clarify the inquiry beyond that. In anything other than purely direct injury cases, the Court at least acknowledges that zone-of-interests tests where there are indirect or third party effects activate “consideration of that doctrine’s proper place in the standing firmament [and] can await another day.” Lexmark at 1387 n.3.

3. As Professor Todd Brown noted recently, designating this aspect of standing prudential does not give those seeking clarity peace of mind. “Prudential principles are flexible until they are deemed inflexible; and seemingly constitutional principles are unchanging until they are changed.” S. Todd Brown, The Story of Prudential Standing, 42 Hastings Const. L.Q. 95, 127 (2014). If clarity is not enhanced by designating the inquiry as prudential, what is gained?

4. Getting back to the question of proximate cause, deciding that a falsehood is the – or a – proximate cause of an economic loss or injury is no small task, particularly when the plaintiff is showing other signs of economic distress. How does one quantify the impact of the falsehood when a company was otherwise in decline? Does “proximate” in this context mean meaningful? For a different perspective on proximate cause, take a look at Sandra F. Sperino, Discrimination Statutes, the Common Law, and Proximate Cause, 2013 U. Ill. L. Rev. 1 (2013), and City of Cleveland v. Ameriquest Mortg. Secs., 615 F.3d 496, 504 (6th Cir. 2010) (proximate cause is not satisfied when the complainant sought to link – proxi-
mately – subprime loans misconduct with waste or neglect causing harm to certain foreclosed properties).

**LUJAN v. DEFENDERS OF WILDLIFE**

504 U.S. 555 (1992)

[Justice Scalia] The ESA (Endangered Species Act) seeks to protect species of animals against threats to their continuing existence caused by man. The ESA instructs the Secretary of the Interior to promulgate by regulation a list of those species which are either endangered or threatened under enumerated criteria, and to define the critical habitat of these species. Section 7(a)(2) of the Act then provides, in pertinent part:

“Each Federal agency shall, in consultation with and with the assistance of the Secretary [of the Interior], insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species . . . or result in the destruction . . . of habitat of such species . . . .”

In 1978, the Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) . . . promulgated a joint regulation stating that the obligations imposed by § 7(a)(2) extend to actions taken in foreign nations. The next year, however, the Interior Department began to reexamine its position. A revised joint regulation, reinterpreting § 7(a)(2) to require consultation only for actions taken in the United States or on the high seas, was . . . promulgated in 1986. Shortly thereafter, respondents, organizations dedicated to wildlife conservation and other environmental causes, filed this action against the Secretary of the Interior, seeking . . . an injunction requiring the Secretary to promulgate a new regulation restoring the initial interpretation. . . .

II.

Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an “injury in fact” – an invasion of a legally protected interest which is (a) concrete and particularized and (b) “actual or imminent, not ‘conjectural’ or ‘hypothetical.’” Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be “fairly . . . trace[able] to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court.” Third, it must be “likely,” as opposed to merely “speculative,” that the injury will be “redressed by a favorable decision.”
When the suit is one challenging the legality of government action or inaction, the nature and extent of facts that must be averred (at the summary judgment stage) or proved (at the trial stage) in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue. If he is, there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it. When, however, as in this case, a plaintiff’s asserted injury arises from the government’s allegedly unlawful regulation (or lack of regulation) of someone else, much more is needed. In that circumstance, causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction – and perhaps on the response of others as well. The existence of one or more of the essential elements of standing “depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict,” and it becomes the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury. Thus, when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily “substantially more difficult” to establish.

III.

We think the Court of Appeals failed to apply the foregoing principles in denying the Secretary’s motion for summary judgment. Respondents had not made the requisite demonstration of (at least) injury and redressability.

A.

Respondents’ claim to injury is that the lack of consultation with respect to certain funded activities abroad “increas[es] the rate of extinction of endangered and threatened species.” Of course, the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing. “But the ‘injury in fact’ test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured.” To survive the Secretary’s summary judgment motion, respondents had to submit affidavits or other evidence showing, through specific facts, not only that listed species were in fact being threatened by funded activities abroad, but also that one or more of respondents’ members would thereby be “directly” affected apart from their “special interest in the subject.”
With respect to this aspect of the case, the Court of Appeals focused on the affidavits of two Defenders’ members – Joyce Kelly and Amy Skilbred. Ms. Kelly stated that she traveled to Egypt in 1986 and “observed the traditional habitat of the endangered nile crocodile there and intend to do so again, and hope to observe the crocodile directly,” and that she “will suffer harm in fact as the result of [the] American . . . role . . . in overseeing the rehabilitation of the Aswan High Dam on the Nile . . . .” Ms. Skilbred averred that she traveled to Sri Lanka in 1981 and “observed the habitat” of “endangered species such as the Asian elephant and the leopard” at what is now the site of the Mahaweli project funded by the Agency for International Development (AID), although she “was unable to see any of the endangered species”; “this development project,” she continued, “will seriously reduce endangered, threatened, and endemic species habitat including areas that I visited[, which] may severely shorten the future of these species”; that threat, she concluded, harmed her because she “intend[s] to return to Sri Lanka in the future and hope[s] to be more fortunate in spotting at least the endangered elephant and leopard.” When Ms. Skilbred was asked at a subsequent deposition if and when she had any plans to return to Sri Lanka, she reiterated that “I intend to go back to Sri Lanka,” but confessed that she had no current plans: “I don’t know [when]. There is a civil war going on right now. I don’t know. Not next year, I will say. In the future.”

We shall assume . . . that these affidavits contain facts showing that certain agency-funded projects threaten listed species – though that is questionable. They plainly contain no facts, however, showing how damage to the species will produce “imminent” injury to Mses. Kelly and Skilbred. That the women “had visited” the areas . . . before the projects commenced proves nothing. . . . And the affiants’ profession of an “intent” to return to the places they had visited before – where they will presumably, this time, be deprived of the opportunity to observe animals of the endangered species – is simply not enough. Such “some day” intentions – without any description of concrete plans, or indeed even any specification of when the some day will be – do not support a finding of the “actual or imminent” injury that our cases require. . . .

Besides relying upon the Kelly and Skilbred affidavits, respondents propose a series of novel standing theories. The first, inelegantly styled “ecosystem nexus,” proposes that any person who uses any part of a “contiguous ecosystem” adversely affected by a funded activity has standing even if the activity is located a great distance away. This approach, as the Court of Appeals correctly observed, is inconsistent with our opinion in National Wildlife Federation, which held that a plaintiff claiming injury from environmental damage must use the area affected by the challenged activity and not an area roughly “in the vicinity” of it. It makes no difference that the general-purpose section of the ESA states that the Act was intended in part “to provide a means whereby the ecosystems upon which endan-
gered species and threatened species depend may be conserved.” To say that the Act protects ecosystems is not to say that the Act creates . . . rights of action in persons who have not been injured in fact, that is, persons who use portions of an ecosystem not perceptibly affected by the unlawful action in question.

Respondents’ other theories are called, alas, the “animal nexus” approach, whereby anyone who has an interest in studying or seeing the endangered animals anywhere on the globe has standing; and the “vocational nexus” approach, under which anyone with a professional interest in such animals can sue. Under these theories, anyone who goes to see Asian elephants in the Bronx Zoo, and anyone who is a keeper of Asian elephants in the Bronx Zoo, has standing to sue because the Director of the Agency for International Development (AID) did not consult with the Secretary regarding the AID-funded project in Sri Lanka. This is beyond all reason. Standing is not “an ingenious academic exercise in the conceivable,” but . . . requires, at the summary judgment stage, a factual showing of perceptible harm. It is clear that the person who observes or works with a particular animal threatened by a federal decision is facing perceptible harm, since the very subject of his interest will no longer exist. It is even plausible – though it goes to the outermost limit of plausibility – to think that a person who observes or works with animals of a particular species in the very area of the world where that species is threatened by a federal decision is facing such harm, since some animals that might have been the subject of his interest will no longer exist. It goes beyond the limit, however, . . . to say that anyone who observes or works with an endangered species, anywhere in the world, is appreciably harmed by a single project affecting some portion of that species with which he has no more specific connection.

B.

The most obvious problem in the present case is redressability. Since the agencies funding the projects were not parties to the case, the District Court could accord relief only against the Secretary: He could be ordered to revise his regulation to require consultation for foreign projects. But this would not remedy respondents’ alleged injury unless the funding agencies were bound by the Secretary’s regulation, which is very much an open question. . . . When the Secretary promulgated the regulation at issue here, he thought it was binding on the agencies. The Solicitor General, however, has repudiated that position here, and the agencies themselves apparently deny the Secretary’s authority. (During the period when the Secretary took the view that § 7(a)(2) did apply abroad, AID and FWS engaged in a running controversy over whether consultation was required with respect to the Mahaweli project, AID insisting that consultation applied only to domestic actions.)
Respondents assert that this legal uncertainty did not affect redressability (and hence standing) because the District Court itself could resolve the issue of the Secretary's authority as a necessary part of its standing inquiry. Assuming that it is appropriate to resolve an issue of law such as this in connection with a threshold standing inquiry, resolution by the District Court would not have remedied respondents' alleged injury anyway, because it would not have been binding upon the agencies. They were not parties to the suit, and there is no reason they should be obliged to honor an incidental legal determination the suit produced. The Court of Appeals tried to finesse this problem by simply proclaiming that “we are satisfied that an injunction requiring the Secretary to publish [respondents' desired] regulation . . . would result in consultation.” We do not know what would justify that confidence, particularly when the Justice Department (presumably after consultation with the agencies) has taken the position that the regulation is not binding. The short of the matter is that redress of the only injury in fact respondents complain of requires action (termination of funding until consultation) by the individual funding agencies; and any relief the District Court could have provided in this suit against the Secretary was not likely to produce that action.

A further impediment to redressability is the fact that the agencies generally supply only a fraction of the funding for a foreign project. AID, for example, has provided less than 10% of the funding for the Mahaweli project. Respondents have produced nothing to indicate that the projects they have named will either be suspended, or do less harm to listed species, if that fraction is eliminated. . . .

[It] is entirely conjectural whether the non-agency activity that affects respondents will be altered or affected by the agency activity they seek to achieve. There is no standing.

IV.

The Court of Appeals found that respondents had standing for an additional reason: because they had suffered a “procedural injury.” The so-called “citizen-suit” provision of the ESA provides, in pertinent part, that “any person may commence a civil suit on his own behalf (A) to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of this chapter.” The court held that, because § 7(a)(2) requires interagency consultation, the citizen-suit provision creates a “procedural right” to consultation in all “persons” – so that anyone can file suit in federal court to challenge the Secretary’s (or presumably any other official’s) failure to follow the assertedly correct consultative procedure, notwithstanding his or her inability to allege any discrete injury flowing from that failure. To understand the remarkable nature of this holding one must be clear about what it does not rest upon: This is not a case where plaintiffs are seeking to enforce a procedural requirement the
disregard of which could impair a separate concrete interest of theirs (e.g., the procedural requirement for a hearing prior to denial of their license application, or the procedural requirement for an environmental impact statement before a federal facility is constructed next door to them). Nor is it simply a case where concrete injury has been suffered by many persons, as in mass fraud or mass tort situations. Nor, finally, is it the unusual case in which Congress has created a concrete private interest in the outcome of a suit against a private party for the Government’s benefit, by providing a cash bounty for the victorious plaintiff. Rather, the court held that the injury-in-fact requirement had been satisfied by congressional conferral upon all persons of an abstract, self-contained, noninstrumental “right” to have the Executive observe the procedures required by law. We reject this view.

We have consistently held that a plaintiff raising only a generally available grievance about government – claiming only harm to his and every citizen’s interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large – does not state an Article III case or controversy. . . .

To be sure, our generalized-grievance cases have typically involved Government violation of procedures assertedly ordained by the Constitution rather than the Congress. But there is absolutely no basis for making the Article III inquiry turn on the source of the asserted right. Whether the courts were to [ignore] the concrete injury requirement described in our cases, they would be discarding a principle fundamental to the separate and distinct constitutional role of the Third Branch – one of the essential elements that identifies those “Cases” and “Controversies” that are the business of the courts rather than of the political branches. “The province of the court,” as Chief Justice Marshall said in Marbury v. Madison, “is, solely, to decide on the rights of individuals.” Vindicating the public interest (including the public interest in Government observance of the Constitution and laws) is the function of Congress and the Chief Executive. The question presented here is whether the public interest in proper administration of the laws (specifically, in agencies’ observance of a particular, statutorily prescribed procedure) can be converted into an individual right by a statute that denominates it as such, and that permits all citizens (or, for that matter, a subclass of citizens who suffer no distinctive concrete harm) to sue. If the concrete injury requirement has the separation-of-powers significance we have always said, the answer must be obvious: To permit Congress to convert the undifferentiated public interest in executive officers’ compliance with the law into an “individual right” vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive’s most important constitutional duty, to “take Care that the Laws be faithfully executed,” Art. II, § 3. It would enable the courts, with the permission of Congress, “to assume a position of authority over the governmental acts of
another and co-equal department,” and to become “virtually continuing monitors of the wisdom and soundness of Executive action.” We have always rejected that vision of our role:

When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted. This permits the courts to participate in law enforcement entrusted to administrative bodies only to the extent necessary to protect justiciable individual rights against administrative action fairly beyond the granted powers. . .

“Individual rights,” within the meaning of this passage, do not mean public rights that have been legislatively pronounced to belong to each individual who forms part of the public.

Nothing in this contradicts the principle that “the . . . injury required by Art. III may exist solely by virtue of ‘statutes creating legal rights, the invasion of which creates standing.’” [This happens by] Congress’ elevating to the status of legally cognizable injuries concrete, de facto injuries that were previously inadequate in law (namely, injury to an individual’s personal interest in living in a racially integrated community and injury to a company’s interest in marketing its product free from competition).

We hold that respondents lack standing to bring this action and that the Court of Appeals erred in denying the summary judgment motion filed by the United States. The opinion of the Court of Appeals is hereby reversed, and the cause is remanded for proceedings consistent with this opinion. . .

[Justice Kennedy, concurring in part.]

. . . With respect to the [nexus] theories . . . respondents’ showing is insufficient to establish standing . . . . I am not willing to foreclose the possibility, however, that in different circumstances a nexus theory similar to those proffered here might support a claim to standing. . . . As Government programs and policies become more complex and far reaching, we must be sensitive to the articulation of new rights of action that do not have clear analogs in our common-law tradition. . . . In my view, Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before, and I do not read the Court’s opinion to suggest a contrary view.

[Justice Blackmun, dissenting.]

To survive petitioner’s motion for summary judgment on standing, respondents need . . . show only a “genuine issue” of material fact as to standing. Fed. Rule Civ. Proc. 56(c). This is not a heavy burden. A “genuine issue” exists so long as “the evidence is such that a reasonable jury could return a verdict for the
nonmoving party [respondents].” . . . . I think a reasonable finder of fact could conclude from the information in the affidavits and deposition testimony that either Kelly or Skilbred will soon return to the project sites, thereby satisfying the “actual or imminent” injury standard. . . .

The Court concludes that any “procedural injury” suffered by respondents is insufficient to confer standing. . . . Whatever the Court might mean with that very broad language, it cannot be saying that “procedural injuries” as a class are necessarily insufficient for purposes of Article III standing. Most governmental conduct can be classified as “procedural.” . . . When the Government, for example, “procedurally” issues a pollution permit, those affected by the permittee’s pollutants are not without standing to sue. . . .

Under the Court’s anachronistically formal view of the separation of powers, Congress legislates pure, substantive mandates and has no business structuring the procedural manner in which the Executive implements these mandates. . . . In complex regulatory areas, however, Congress often legislates, as it were, in procedural shades of gray. . . . Just as Congress does not violate separation of powers by structuring the procedural manner in which the Executive shall carry out the laws, surely the federal courts do not violate separation of powers when, at the very instruction and command of Congress, they enforce these procedures. . . . In conclusion, I cannot join the Court on what amounts to a slash-and-burn expedition through the law of environmental standing. . . .

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Underlying Case Documents

The case referenced:
The affidavit of Ms. Skilbred
The affidavit of Ms. Kelly
The testimony of Ms. Skilbred

For a letter between the agencies discussing concerns over the proposed new rule click HERE.

1. How much is this case driven simply by facts – particularly the descriptions the plaintiffs provide of their interests in travel – and how much is it a change in policy. Does the case simply clarify existing doctrine or does it articulate new standards? Compare Professor Wendy S. Albers’ article, Lujan v. Defenders of Wildlife: Closing the Courtroom Door to Environmental Plaintiffs – The Endangered

2. Most recently, the Court reiterated its concern about suits brought by those who are in stark disagreement with – but not personally harmed by – agency action. “We have consistently held that a plaintiff raising only a generally available grievance about government – claiming only harm to his and every citizen’s interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large – does not state an Article III case or controversy.” Lance v. Coffman, 549 U.S. 437 (2007) (per curiam).

3. What About Psychological Injury? In Hein v. Freedom from Religion Found., 551 U.S. 587 (2007), the Court held that a taxpayer’s “psychological disapproval” that government resources are being used unlawfully is never a concrete and particularized injury sufficient for Article III standing. “As a general matter, the interest of a federal taxpayer in seeing that Treasury funds are spent in accordance with the Constitution does not give rise to the kind of redressable ‘personal injury’ required for Article III standing.” This approach is consistent with Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 485-86 (1982):

[The complainants] fail to identify any personal injury suffered by them as a consequence of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees. That is not an injury sufficient to confer standing under Art. III, even though the disagreement is phrased in constitutional terms. . . . [S]tanding is not measured by the intensity of the litigant’s interest or the fervor of his advocacy.

4. While there may have been some reason to think that the taxpayer standing from Flast v. Cohen, 392 U.S. 83 (1968), possibly covered in both your civil procedure course and in constitutional law, could serve to bypass the post-Lujan limitations on standing, that has been put to rest in the Court’s most recent discussion of Lujan:

Food for Thought
Should access to the courts be as demanding as the Lujan opinion suggests? Is there any proper role for courts vis-à-vis legal and statutory challenges to alleged agency misconduct by those citizens who are deeply concerned – but not personally affected? Maxwell L. Stearns, Standing Back from the Forest: Justiciability and Social Choice, 83 Cal. L. Rev. 1309 (1995). Keep these questions front and center – particularly when you read Bennett v. Spear, 520 U.S. 154, 163 (1997), infra Chapter 4, also involving the Endangered Species Act.
It is significant that, in the four decades since its creation, the Flast exception has largely been confined to its facts. We have declined to lower the taxpayer standing bar in suits alleging violations of any constitutional provision apart from the Establishment Clause [and we] have similarly refused to extend Flast to permit taxpayer standing for Establishment Clause challenges that do not implicate Congress’ taxing and spending power . . . In effect, we have adopted the position set forth by Justice Powell in his concurrence in United States v. Richardson, 418 U.S. 166, 196 (1974), and have “limited the expansion of federal taxpayer and citizen standing in the absence of specific statutory authorization to an outer boundary drawn by the results in Flast . . . .” Hein v. Freedom from Religion Found., 551 U.S. 587, 127 S. Ct. 2553, 2564, 168 L. Ed. 2d 424 (2007).

5. Separation of Powers and Standing. The standing requirement in Lujan appears to be targeted at keeping the federal courts free of claims where injuries are insufficiently personal or concrete. Limitations on standing, as a general rule, go well beyond definitions of “personal” or “concrete.” They constitute “an essential ingredient of separation and equilibration of powers.” Steel Co. v. Citizens for Better Environment, 523 U.S. 83, 101 (1998). The separation of powers link to standing is explicit. “Relaxation of standing requirements is directly related to the expansion of judicial power [and] would significantly alter the allocation of power at the national level, with a shift away from a democratic form of government.” Richardson, 418 U.S. at 188 (Powell, J., concurring).

6. Standing and Chevron. Can you find the connection between Chevron deference – or Skidmore respect – and standing? While the Court may be “improvising” administrative law and diluting or muddying aspects of Chevron in the post-Christensen/Mead era – in some instances expanding the role of the courts – the limitation on judicial interference that forms the foundation of Chevron is alive and well in standing. In recent cases the Court has said bluntly that standing requirements must be observed strictly to avoid “permanent judicial intervention in the conduct of governmental operations to a degree inconsistent with sound principles of federalism and the separation of powers.” Garcetti v. Ceballos, 547 U.S. 410 (2006); see Cheney v. United States Dist. Court for D.C., 542 U.S. 367, 382 (2004).

7. The Mystery of the Three Elements. Current case law relies on Lujan’s “simple statement” of standing. In Stephens v. County of Albemarle, 524 F.3d 485 (4th Cir. 2008), the court found that “[i]t is well-established that, to satisfy Article III’s standing requirements, a plaintiff must show that: (1) [she] has suffered an ‘injury in fact’ that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., 528 U.S. 167, 180-81 (2000) (citing Lujan, 504 U.S. at 560-61).”
8. Take a step back from the opinion and ask yourself whether the Court interpreted fairly the citizen-suit provision in the Endangered Species Act. Why would Congress include such a provision if not to facilitate claims of this type? Compare *Lujan* with *Federal Election Commission v. Akins*, 524 U.S. 11 (1998). *Akins* granted standing to citizens challenging the decision of the FEC to deny “political committee” status to the American-Israel Public Affairs Committee, an organization in which they were not members. The plaintiffs based their challenge on the citizen-suit provision of the Act. The complainants claimed that by denying committee status to the organization, they, the citizens, would be denied information (and thereby aggrieved), since such committees had to report to the FEC and those reports could then become available to the plaintiffs. How is the potential denial of unspecified information regarding events that may or may not have occurred a distinct and palpable injury-in-fact? How is the potential denial of information anything but abstract? The answer to these questions lies in the Court's perception in *Akins* that the citizen-suit provision protects voters “from the kind of harm they say they have suffered.” Fair enough – but why wouldn't the same apply in *Lujan*?

*Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334 (2014) poses this post-*Lujan* question: Can a party have standing to challenge the constitutionality of a state statute even though no legal action had yet been brought pursuant to that statute? Must a party need to expose themselves to actual arrest and/or prosecution in order to bring the action?

In *Susan B. Anthony List*, a former Congressman filed a complaint with a state elections commission alleging that petitioner violated a state false statements provision. After the Congressman lost his bid for re-election, he dropped his claim, but petitioner brought a separate suit in federal court challenging the law on First Amendment grounds. The district court dismissed on justiciability, the Sixth Circuit affirmed but the Supreme Court reversed, holding that both petitioners had an intention to engage in future political speech, conduct that was “arguably proscribed by the statute” they sought to challenge. “Nothing in this Court's decisions requires a plaintiff who wished to challenge the constitutionality of a law to confess that he will in fact violate that law.” How does that square with *Lujan*?

9. In the end, is this all about the quality of causation – or proximate cause? In *Friends of the Earth v. Laidlaw Environmental Services*, 528 U.S. 167 (2000), the Court faced an environmental challenge involving the alleged unlawful discharge of mercury into the Tyger River. The district court and the Fourth Circuit found the discharges were insufficient to constitute the level of degradation required for sanctions or injunctive relief – and the Court reversed. The decision rested on the
distinction between concerns about potentially adverse effects that were reasonably likely to occur as opposed to those where the likelihood of adverse effects was unreasonable. Is this the same hazy and subjective distinction that exists between foreseeable and unforeseeable events? Think back to torts – how many different ways can you list to determine the distinction between these terms?

10. In *Massachusetts v. EPA*, 549 U.S. 497 (2007), infra Chapter 4, the Court granted standing to Massachusetts even though it asserted a claim common to many other states (various harms allegedly associated with global warming). Should the expansive vision in this case be limited to the states? See Bradford Mank, *Should States Have Greater Standing Rights than Ordinary Citizens?* Massachusetts v. EPA *New Standing Test for the States*, 49 WM. & MARY L. REV. 1701 (2008); and Jonathan Remy Nash, *Essay, Standing and the Precautionary Principle*, 108 COLUM. L. REV. 494 (2008): “[A] fundamental principle of environmental law – the precautionary principle – should inform the question left unanswered in *Massachusetts v. EPA*. The precautionary principle . . . explains that the absence of certainty in the face of a large risk does not justify inaction. Application of the precautionary principle to the question of standing would suggest . . . ‘precautionary-based standing’ . . . in which it can be shown that there is uncertainty as to whether irreversible and catastrophic harms may occur.”

**SUMMERS v. EARTH ISLAND INSTITUTE**

555 U.S. 488 (2009)

[JUSTICE SCALIA]

... 

In 1992, Congress enacted the Forest Service Decisionmaking and Appeals Reform Act (Appeals Reform Act or Act). Among other things, this required the Forest Service to establish a notice, comment, and appeal process for “proposed actions of the Forest Service concerning projects and activities implementing
land and resource management plans developed under the Forest and Rangeland Renewable Resources Planning Act of 1974.” Ibid.

The Forest Service’s regulations implementing the Act provided that certain of its procedures would not be applied to projects that the Service considered categorically excluded from the requirement to file an environmental impact statement (EIS) or environmental assessment (EA). 36 CFR §§ 215.4(a) (notice and comment), 215.12(f) (appeal) (2008). Later amendments to the Forest Service’s manual of implementing procedures, adopted by rule after notice and comment, provided that fire-rehabilitation activities on areas of less than 4,200 acres, and salvage-timber sales of 250 acres or less, did not cause a significant environmental impact and thus would be categorically exempt from the requirement to file an EIS or EA. This had the effect of excluding these projects from the notice, comment, and appeal process.

In the summer of 2002, fire burned a significant area of the Sequoia National Forest. In September 2003, the Service issued a decision memo approving the Burnt Ridge Project, a salvage sale of timber on 238 acres damaged by that fire. Pursuant to its categorical exclusion of salvage sales of less than 250 acres, the Forest Service did not provide notice in a form consistent with the Appeals Reform Act, did not provide a period of public comment, and did not make an appeal process available.

In December 2003, respondents [Earth Island] filed a complaint in the Eastern District of California, challenging the failure of the Forest Service to apply to the Burnt Ridge Project § 215.4(a) of its regulations implementing the Appeals Reform Act (requiring prior notice and comment), and § 215.12(f) of the regulations (setting forth an appeal procedure). . .

The District Court granted a preliminary injunction against the Burnt Ridge salvage-timber sale [not in issue at the Supreme Court] . . . and proceeded . . . to adjudicate the merits of Earth Island’s challenges. It invalidated five of the regulations . . . and entered a nationwide injunction against their application. . .

The Ninth Circuit. . . affirmed . .

The Government sought review of the question whether Earth Island could challenge the regulations at issue in the Burnt Ridge Project, and if so whether a nationwide injunction was appropriate relief. . .

II

In limiting the judicial power to “Cases” and “Controversies,” Article III of the Constitution restricts it to the traditional role of Anglo-American courts, which
is to redress or prevent actual or imminently threatened injury to persons caused by private or official violation of law. Except when necessary in the execution of that function, courts have no charter to review and revise legislative and executive action. See Lujan v. Defenders of Wildlife. . . . This limitation “is founded in concern about the proper -- and properly limited -- role of the courts in a democratic society.” Warth v. Seldin. . . .

The doctrine of standing is one of several doctrines that reflect this fundamental limitation. It requires federal courts to satisfy themselves that “the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of federal-court jurisdiction.” He bears the burden of showing that he has standing for each type of relief sought. To seek injunctive relief, a plaintiff must show that he is under threat of suffering “injury in fact” that is concrete and particularized; the threat must be actual and imminent, not conjectural or hypothetical; it must be fairly traceable to the challenged action of the defendant; and it must be likely that a favorable judicial decision will prevent or redress the injury. This requirement assures that “there is a real need to exercise the power of judicial review in order to protect the interests of the complaining party,” Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974). Where that need does not exist, allowing courts to oversee legislative or executive action “would significantly alter the allocation of power . . . away from a democratic form of government. . . .”

The regulations under challenge here neither require nor forbid any action on the part of respondents. The standards and procedures that they prescribe for Forest Service appeals govern only the conduct of Forest Service officials engaged in project planning. “[W]hen the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily ‘substantially more difficult’ to establish.” [Lujan] [emphasis added]. . . .

It is common ground that the respondent organizations can assert the standing of their members. To establish the concrete and particularized injury that standing requires, respondents point to their members’ recreational interests in the National Forests. While generalized harm to the forest or the environment will not alone support standing, if that harm in fact affects the recreational or even the mere esthetic interests of the plaintiff, that will suffice. Sierra Club v. Morton, 405 U.S. 727, 734-736 (1972).

Affidavits submitted to the District Court [were] sufficient to establish Article III standing with respect to Burnt Ridge. . . . [However, after] the District Court had issued a preliminary injunction . . . the parties settled their differences. . . . We know of no precedent for the proposition that when a plaintiff has sued to challenge the lawfulness of certain action or threatened action but has settled that suit, he retains standing to challenge the basis for that action (here, the regulation in
the abstract), apart from any concrete application that threatens imminent harm to his interests. Such a holding would fly in the face of Article III's injury-in-fact requirement.

Respondents have identified no other application of the invalidated regulations that threatens imminent and concrete harm to the interests of their members. The only other affidavit relied on was that of Jim Bensman. [The Court refused to consider after-the-fact affidavits holding: “We do not consider these. If respondents had not met the challenge to their standing at the time of judgment, they could not remedy the defect retroactively.] He [Bensman] asserted, first, that he had suffered injury in the past from development on Forest Service land. That does not suffice for several reasons: because it was not tied to application of the challenged regulations, because it does not identify any particular site, and because it relates to past injury rather than imminent future injury that is sought to be enjoined.

Bensman’s affidavit further asserts that he has visited many National Forests and plans to visit several unnamed National Forests in the future. Respondents describe this as a mere failure to “provide the name of each timber sale that affected [Bensman’s] interests,” Brief for Respondents 44. It is much more (or much less) than that. It is a failure to allege that any particular timber sale or other project claimed to be unlawfully subject to the regulations will impede a specific and concrete plan of Bensman’s to enjoy the National Forests. The National Forests occupy more than 190 million acres, an area larger than Texas. . . . There may be a chance, but is hardly a likelihood, that Bensman’s wanderings will bring him to a parcel about to be affected by a project unlawfully subject to the regulations. Indeed, without further specification it is impossible to tell which projects are (in respondents’ view) unlawfully subject to the regulations. . . . Here we are asked to assume not only that Bensman will stumble across a project tract unlawfully subject to the regulations, but also that the tract is about to be developed by the Forest Service in a way that harms his recreational interests, and that he would have commented on the project but for the regulation. Accepting an intention to visit the National Forests as adequate to confer standing to challenge any Government action affecting any portion of those forests would be tantamount to eliminating the requirement of concrete, particularized injury in fact.

The Bensman affidavit does . . . not assert . . . any firm intention to visit their locations, saying only that Bensman “want[s] to” go there. . . . This vague desire to return is insufficient to satisfy the requirement of imminent injury: “Such some day’ intentions -- without any description of concrete plans, or indeed any specification of when the some day will be -- do not support a finding of the ‘actual or imminent’ injury that our cases require.” [Lujan]
Respondents argue that they have standing to bring their challenge because they have suffered procedural injury, namely that they have been denied the ability to file comments on some Forest Service actions and will continue to be so denied. But deprivation of a procedural right without some concrete interest that is affected by the deprivation -- a procedural right in vacuo -- is insufficient to create Article III standing. Only a “person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy.” . . .

It makes no difference that the procedural right has been accorded by Congress. . . .

“It would exceed [Article III’s] limitations if, at the behest of Congress and in the absence of any showing of concrete injury, we were to entertain citizen suits to vindicate the public’s non-concrete interest in the proper administration of the laws. . . . [T]he party bringing suit must show that the action injures him in a concrete and personal way. . . .”

III

The dissent proposes a hitherto unheard-of test for organizational standing: whether, accepting the organization’s self-description of the activities of its members, there is a statistical probability that some of those members are threatened with concrete injury. . . . This novel approach to the law of organizational standing would make a mockery of our prior cases, which have required plaintiff-organizations to make specific allegations establishing that at least one identified member had suffered or would suffer harm. . . .

. . . . “Standing,” we have said, “is not ‘an ingenious academic exercise in the conceivable’ . . . [but] requires . . . a factual showing of perceptible harm.” In part because of the difficulty of verifying the facts upon which such probabilistic standing depends, the Court has required plaintiffs claiming an organizational standing to identify members who have suffered the requisite harm -- surely not a difficult task here, when so many thousands are alleged to have been harmed.

The dissent would have us replace the requirement of “imminent” harm, which it acknowledges our cases establish . . . with the requirement of “a realistic threat” that reoccurrence of the challenged activity would cause [the plaintiff] harm ‘in the reasonably near future. . . .” That language is taken, of course, from an opinion that did not find standing, so the seeming expansiveness of the test made not a bit of difference [and is rejected in this case as well].

Since we have resolved this case on the ground of standing, we need not reach the Government’s contention that plaintiffs have not demonstrated that the regul-
lations are ripe for review under the Administrative Procedure Act. We likewise do not reach the question whether, if respondents prevailed, a nationwide injunction would be appropriate. And we do not disturb the dismissal of respondents’ challenge to the remaining regulations, which has not been appealed.

. . . .

[Finding a lack of standing, the Court reversed that part of the Court of Appeals decision that had found the Earth Island claims justiciable.]

[Justice Kennedy, concurred and Justices Breyer, Stevens, Souter, and Ginsburg dissented].

1. The Earth Island decision is discussed in Jonathan H. Adler, Business, The Environment, and the Roberts’ Court: A Preliminary Assessment, 49 Santa Clara L. Rev. 943 (2009). Professor Adler calls the case “a small and predictable win for the pro-business decision insofar as it reaffirmed the Court’s long-standing requirement that citizen-suit plaintiffs suffer an injury-in-fact in order to satisfy the requirements of Article III standing. . . . Summers reaffirmed the Court’s hostility to programmatic public interest litigation [making] it more difficult to challenge underlying policy changes. . . . Yet Summers broke no meaningfully new ground in the law of standing, and was thus not a particularly significant win for business interests.”

2. Professor Timothy M. Mulvaney writes that Summers “drastically limited the ability of private persons and conservation organizations to seek redress for environmental wrongs.” Timothy M. Mulvaney, Instream Flows and the Public Trust, 22 Tul. Envtl. L.J. 315 (2009). He writes that the “Court more emphatically rejected the possibility of using probabilistic harms to establish standing. . . .”

3. Probabilistic injury, rejected by the majority, sounds speculative. Keep in mind that this is a discussion about standing – determining if a party ought to have his or her day in court. Moreover, probability or the likelihood of harm is at the core of our jurisprudence. Much of tort law is predicated on notions of probability. The assessment of risk is by no means novel or controversial and is central to the most current notions of environmental law. Bradford Mank, Standing and Statistical Persons: A Risk-Based

Hypothetical

Assume that ten weeks into the semester, after being promised an open-book exam (and preparing accordingly), your professor announces that after thinking it over, the exam will be closed-book. You and your classmates, en masse, complain to your friendly academic dean that a great injustice has occurred. After listening, the dean responds: “You have no way of knowing what will happen on the exam. You are speculating. Probabilistically. There may be no harm at all. What if you all get “A’s”? What if the exam is, by any measure, fair and manageable? What if after the exam you realize that having an open book exam would not have helped one iota? No blood, no foul. I am not interfering with a faculty member’s discretion – our rules declare explicitly that testing procedures are a matter of academic freedom.” Would you be content with this answer? If your response is that this change of policy is unfair procedurally, take a look at the full opinion in Summers where the Court finds procedural harms more often than not insufficient for purposes of standing.

II. Standing: Redressability

Simon v. Eastern Kentucky Welfare Rights Organization

426 U.S. 26 (1976)

[Justice Powell] Several indigents and organizations composed of indigents brought this suit against the Secretary of the Treasury and the Commissioner of Internal Revenue. They asserted that the Internal Revenue Service (IRS) violated the Internal Revenue Code of 1954 (Code) and the Administrative Procedure Act (APA) by issuing a Revenue Ruling allowing favorable tax treatment to a nonprofit hospital that offered only emergency-room services to indigents. We conclude that these plaintiffs lack standing to bring this suit.
The Code . . . accords advantageous treatment to several types of nonprofit corporations, including exemption of their income from taxation and deductibility by benefactors of the amounts of their donations. Nonprofit hospitals have never received these benefits as a favored general category, but an individual nonprofit hospital has been able to claim them if it could qualify as a corporation “organized and operated exclusively for . . . charitable . . . purposes” . . . As the Code does not define the term “charitable,” the status of each nonprofit hospital is determined on a case-by-case basis by the IRS.

In recognition of the need of nonprofit hospitals for some guidelines on qualification as “charitable” corporations, the IRS in 1956 issued Revenue Ruling 56-185. This Ruling . . . set out four “general requirements” that a hospital had to meet . . . to be considered a charitable organization by the IRS. Only one of those requirements is important here, and it reads as follows:

It must be operated to the extent of its financial ability for those not able to pay for the services rendered and not exclusively for those who are able and expected to pay . . . The fact that its charity record is relatively low is not conclusive that a hospital is not operated for charitable purposes to the full extent of its financial ability. It may furnish services at reduced rates which are below cost, and thereby render charity in that manner. It may also set aside earnings which it uses for improvements and additions to hospital facilities. It must not, however, refuse to accept patients in need of hospital care who cannot pay for such services. Furthermore, if it operates with the expectation of full payment from all those to whom it renders services, it does not dispense charity merely because some of its patients fail to pay for the services rendered.

Revenue Ruling 56-185 remained the announced policy . . . for 13 years, until the IRS issued Revenue Ruling 69-545 on November 3, 1969. This new Ruling described two unidentified hospitals . . . The description of Hospital A included the following paragraph:

The hospital operates a full time emergency room and no one requiring emergency care is denied treatment. The hospital otherwise ordinarily limits admissions to those who can pay the cost of their hospitalization, either themselves, or through private health insurance, or with the aid of public programs such as Medicare. Patients who cannot meet the financial requirements for admission are ordinarily referred to another hospital in the community that does serve indigent patients.

Despite Hospital A’s apparent failure to operate “to the extent of its financial ability for those not able to pay for the services rendered,” as required by Revenue Ruling 56-185, the IRS in this new Ruling held Hospital A exempt as a charitable corporation under § 501(c)(3). Noting that Revenue Ruling 56-185 had set out requirements for serving indigents “more restrictive” than those applied to Hospital A, the IRS stated that “Revenue Ruling 56-185 is hereby modified to remove therefrom the requirements relating to caring for patients without charge or at rates below cost.”
II

Issuance of Revenue Ruling 69-545 led to the filing of this suit . . . by a group of organizations and individuals. . . . The 12 individual plaintiffs described themselves as subsisting below the poverty income levels established by the Federal Government and suffering from medical conditions requiring hospital services. The organizations sued on behalf of their members, and each individual sued on his own behalf and as representative of all other persons similarly situated.

Each of the individuals described an occasion on which he or a member of his family had been disadvantaged in seeking needed hospital services because of indigency. Most involved the refusal of a hospital to admit the person because of his inability to pay a deposit or an advance fee, even though in some instances the person was enrolled in the Medicare program. At least one plaintiff was denied emergency-room treatment because of his inability to pay immediately. And another was treated in the emergency room but then billed and threatened with suit although his indigency had been known at the time of treatment.

According to the complaint, each of the hospitals involved in these incidents had been determined by the Secretary and the Commissioner to be a tax-exempt charitable corporation, and each received substantial private contributions. The Secretary and the Commissioner were the only defendants. The complaint alleged that by extending tax benefits to such hospitals despite their refusals fully to serve the indigent, the defendants were “encouraging” the hospitals to deny services to the individual plaintiffs and to the members and clients of the plaintiff organizations. . . .

The obvious interest of all respondents, to which they claim actual injury, is that of access to hospital services. In one sense, of course, they have suffered injury to that interest. The complaint alleges specific occasions on which each of the individual respondents sought but was denied hospital services solely due to his indigency, n.1 and in at least some of the cases it is clear that the needed treatment was unavailable, as a practical matter, anywhere else. . . . But injury at the hands of a hospital is insufficient by itself to establish a case or controversy in the context of this suit, for no hospital is a defendant. The only defendants are officials of the Department of the Treasury, and the only claims of illegal action respondents desire the courts to adjudicate are charged to those officials. “Although the law of standing has been greatly changed in [recent] years, we have steadfastly adhered to the requirement that, at least in the absence of a statute expressly conferring standing, federal plaintiffs must allege some threatened or actual injury resulting from the putatively illegal action before a federal court may assume jurisdiction.” In other words, the “case or controversy” limitation of Art. III still requires that a federal court act only to redress injury that fairly can be traced to the challenged
action of the defendant, and not injury that results from the independent action of some third party not before the court.

n.1 One of the individual respondents complains, not that he was denied service, but that he was treated and then billed despite the hospital's knowledge of his indigency. This variation of the injury does not change the standing analysis.

The complaint here alleged only that petitioners, by the adoption of Revenue Ruling 69-545, had “encouraged” hospitals to deny services to indigents. The implicit corollary of this allegation is that a grant of respondents' requested relief, resulting in a requirement that all hospitals serve indigents as a condition to favorable tax treatment, would “discourage” hospitals from denying their services to respondents. But it does not follow from the allegation and its corollary that the denial of access to hospital services in fact results from petitioners' new Ruling, or that a court-ordered return by petitioners to their previous policy would result in these respondents' receiving the hospital services they desire. It is purely speculative whether the denials of service specified in the complaint fairly can be traced to petitioners' “encouragement” or instead result from decisions made by the hospitals without regard to the tax implications.

We do note, however, that it is entirely speculative whether even the earlier Ruling would have assured the medical care they desire. It required a hospital to provide care for the indigent only “to the extent of its financial ability,” and stated that a low charity record was not conclusive that a hospital had failed to meet that duty. Thus, a hospital could not maintain, consistently with Revenue Ruling 56-185, a general policy of refusing care to all patients unable to pay. But the number of such patients accepted, and whether any particular applicant would be admitted, would depend upon the financial ability of the hospital to which admittance was sought.

It is equally speculative whether the desired exercise of the court's remedial powers in this suit would result in the availability to respondents of such services. So far as the complaint sheds light, it is just as plausible that the hospitals . . . would elect to forgo favorable tax treatment to avoid the undetermined financial drain of an increase in the level of uncompensated services. It is true that the individual respondents have alleged, upon information and belief, that the hospitals that denied them service receive substantial donations deductible by the donors. This allegation could support an inference that these hospitals, or some of them, are so financially dependent upon the favorable tax treatment afforded charitable organizations that they would admit respondents if a court required such admission as a condition to receipt of that treatment. But this inference is speculative at best. . . .
The complaint suggests no substantial likelihood that victory in this suit would result in respondents’ receiving the hospital treatment they desire. A federal court, properly cognizant of the Art. III limitation upon its jurisdiction, must require more than respondents have shown before proceeding to the merits.

Our decision is also consistent with Data Processing Serv. v. Camp. . . . The complaint in Data Processing alleged injury that was directly traceable to the action of the defendant federal official, for it complained of injurious competition that would have been illegal without that action. . . . In the instant case respondents' injuries might have occurred even in the absence of the IRS Ruling that they challenge; whether the injuries fairly can be traced to that Ruling depends upon unalleged and unknown facts about the relevant hospitals.

Accordingly, the judgment of the Court of Appeals is vacated, and the cause is remanded to the District Court with instructions to dismiss the complaint. . . .

1. The complainants in Simon had at least three major problems: (1) associational standing – even though the “named plaintiffs” could each identify individual harm they had or would sustain; (2) redressability – the Court took the position that providing the requested remedy would not solve the problems about which the plaintiff complained; and (3) party designation – the focus of the Court and, to an extent, the plaintiffs' lawyers was the government. Had the case centered on hospitals, would that solve the redressability problem? Is the hospital the right party to attack if the gravamen of the complaint was a regulation issued by a government agency?

2. As with Lujan, it is useful to think about Simon in the familiar terminology of proximate cause. The U.S. Department of Treasury set in motion a course of events that led (according to plaintiff's theory) to hospitals making an independent decision that they either would (or would not) need to protect their tax-exempt status and therefore they would (or perhaps would not) provide additional healthcare services. The decisionmaking of the hospital is an intervening event. If it is prompted by the “initial alleged breach” – the Treasury determination – is the hospital's decision reasonably foreseeable? Is it of “independent origin?” Is it the cause-in-fact of the plaintiff's injury? The more foreseeable an intervening event, the less likely it is to cut off the liability of the original actor, in this instance, the Treasury.

3. Is Simon less about the need of low-to-moderate-income individuals to secure necessary medical care than it is about access to federal courts? At the time the case was decided, the Court was narrowing the hallway to the courthouse door, if not closing it, to large numbers of claimants who wished to contest what they
perceived as inappropriate or unlawful agency activity. It is the business of “prudential” considerations to exercise judgment that transcends the baseline constitutional requirements – is this case a fairly good example of that phenomenon? Broad concerns about associational standing and the activity of public interest groups were certainly part of the discourse surrounding this case.

4. Associational Standing. Associational standing cases raise unique and difficult challenges beyond the general admonition that the courts are not readily available to serve as a form for deeply concerned (but uninjured) persons to challenge the efficacy, legality, or even constitutionality of agency action. *Fleck & Assocs. v. City of Phoenix*, 471 F.3d 1100 (9th Cir. 2006). Deeply held beliefs and intense dedication to a cause are simply not part of the standing calculus.

a. For the last 30 years, the Court has tried to identify criteria for associational standing. In *Warth v. Seldin*, 422 U.S. 490, 511 (1975), the Court explained that an “association must allege that its members, or any one of them, are suffering immediate or threatened injury.” Two years later, the Court found that even if a group or association has failed to demonstrate injury-in-fact, it may have “standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization’s purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.” *Hunt v. Wash. State Apple Adver. Comm’n*, 432 U.S. 333, 343 (1977). The decision regarding the lack of essential participation by group members has been the basis of constant litigation. The Seventh Circuit recently interpreted the third *Hunt* test to require, as a matter of prudential screening, injury to an individual group member or a clearly defined injury affecting the whole group. In *Disability Rights Wisconsin v. Walworth County Board of Supervisors*, 522 F.3d 796 (7th Cir. 2008), the court found: “The third requirement does not derive from the Constitution. Instead, it is a judicially imposed limitation, *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 556-57 (1996), which may be overridden by Congress. . . .”

b. If there is a requirement that one member be able to sue in his or her own right, what is the point of associational standing? Notice the language in *Seafood Exps. Ass’n of India v. United States*, 479 F. Supp. 2d 1367 (U.S. Court of Int’l Trade, 2007): “Plaintiff SEAI has met associational standing requirements, which require that at least one member of the association be able to sue in its own right, that the association seek to protect an interest central to its purpose, and that the relief sought not require individualized testimony by member plaintiffs.” [Emphasis added.]

c. In a case involving the selection of judges in New York State, the court had to “peer inside New York State’s political clubhouses and determine whether party
leaders have arrogated to themselves a choice that belongs to the people.” Lopez Torres v. N.Y. State Bd. of Elections, 462 F.3d 161 (2d Cir. 2006), rev’d on other grounds, New York State Bd. of Elections v. Lopez Torres, 260 Fed.Appx. 845 (6th Cir. 2008). Among others, Common Cause, an association, attacked the New York system of selection. On appeal, the court noted the following:

Although defendants do not challenge the associational standing of Common Cause/NY, and appear not to have done so below, we have considered the issue nostra sponte. At least at this point in the litigation, the record establishes that Common Cause/NY possesses associational standing because (1) there exists a clear likelihood that its members – 20,000 voters from across New York State – have suffered a concrete injury to their First Amendment rights that is fairly traceable to defendants’ conduct and can be remedied by court action; (2) the First Amendment associational interests that this suit seeks to vindicate are germane to Common Cause/NY’s purpose of making “government more responsive and open to citizens, [restoring] ethics in government, and [curbing] the influence of special interest money in politics”; and (3) neither the claim asserted nor the injunctive and declaratory relief requested requires that Common Cause/NY’s individual members participate in the suit. See generally Hunt [supra, note 4a].

While this case was reversed by the Supreme Court in 2008, the section on associational standing was untouched – so is there a requirement of an injury to an individual in these cases?

d. In N.H. Motor Transportation Ass’n v. Rowe, 448 F.3d 66 (1st Cir. 2006), aff’d, Rowe v. N.H. Motor Transportation Ass’n, 552 U.S. 364 (2008), a tobacco liability case, several nonprofit trade associations sought a declaration that federal law pertaining to tobacco preempted state law. On the question of associational standing, the court struggled with the third Hunt factor on injury to an individual in the group and acknowledged that “there is no well developed test in this circuit as to how the third prong of the Hunt test . . . applies in cases where injunctive relief is sought.” Pharmaceutical Care Mgmt. Ass’n v. Rowe, 429 F.3d 294, 313-14 (1st Cir. 2005). . . . We concluded that representational standing is inappropriate if adjudicating the merits of an association’s claim requires the court to engage in a “fact-intensive-individual inquiry . . .”

Is this a new element of justiciability for associational standing?
e. In *Local 491 v. Gwinnett County*, 510 F. Supp. 2d 1271 (N.D. Ga. 2007), a case brought by Local 491 International Brotherhood of Police Officers regarding a prohibition against “off-duty police officers from wearing the Gwinnett County police uniform while attending meetings of the Gwinnett County Board of Commissioners,” the court added yet another variable for associational standing: “Though an association may have standing to seek a ‘declaration, injunction, or some other form of prospective relief’ on behalf of its members, it does not enjoy standing to seek damages for monetary injuries peculiar to individual members where the fact and extent of injury will require individualized proof.” (quoting *Warth v. Seldin*, 422 U.S. 490 (1975)).

f. In *Brady Campaign to Prevent Gun Violence United with the Million Mom March v. Ashcroft*, 339 F. Supp. 2d 68, 73-74 (D.C. Cir. 2004), plaintiff organization sued the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), seeking to get ATF to require discontinuation of policies that made it possible for private citizens to get semiautomatic assault weapons (SAW). There were organization members living in neighborhoods where violent crimes involving SAWs had taken place. After reciting the basic law of standing and the *Hunt* criteria, applicable to associations, the court turned to *Simon*.

The “government argues both that the Brady Campaign fails to demonstrate that it has suffered actual injury that is fairly traceable to the ATF policy and conduct it challenges and sensitive to redress by a favorable judicial decision, and that the complaint presents a mere “generalized grievance” insufficient to satisfy prudential standing requirements. It is important to note that the requirement that the plaintiff allege an “injury in fact” is analytically distinct from the requirement that the alleged injury be “traceable” to the defendant’s conduct and “redressable” by favorable judicial action. This Court finds that while the Brady Campaign has alleged a sufficient injury in fact to support standing, it has failed to allege sufficient facts to demonstrate traceability and redressability.

Now that you have read *Simon*, can you state with clarity what redressability means?

5. *Simon* and *Chevron*. Another consideration in *Simon* involves the question just below the surface in all public interest litigation: Where should the court draw the line? Is it the role of federal courts to be engaged in active and aggressive oversight of the decisions of federal agencies? Judgment regarding the wisdom of tax rulings that have broad and general applicability – as opposed to individual revenue rulings targeting a specific item and a specific tax payer – were, at the time, vested clearly in the discretion of the agency.

6. At the time *Simon* was decided, a pointed public controversy regarding the efficacy of federally funded “reform litigation” was under way. Should taxpayers support legal aid or legal services offices that are funded publicly when those


Since 1990, Frank Krasner Enterprises, Ltd. (“Krasner”) has been in the business of putting on gun shows in . . . Maryland. For his shows in Montgomery County, . . . Krasner has biannually leased between 13,000 to 18,000 square feet of space at . . . the Montgomery County Agricultural Center (“Ag Center”). . . .

On May 16, 2001, the Montgomery County Council amended . . . section 57-13 of the [Montgomery County] Code, entitled “Use of Public Funds.” It states “(a) The County must not give financial or in-kind support to any organization that allows the display and sale of guns at a facility owned or controlled by the organization . . . .” . . . Less than a month after section 57-13 became law, the Ag Center sent a letter to Krasner stating that, “we have been forced to make financial decisions to stop conducting activities which would invoke the County to impose financial sanctions on the Ag Center.” The letter made clear that this decision was a result of the County’s funding restriction, not any problems with Krasner . . . . Krasner . . . responded to the Ag Center’s decision by suing Montgomery County . . . . Importantly, the Ag Center is not a party to this lawsuit . . . .

The requirements of Article III standing are numbingly familiar . . . . We have previously denied standing because the actions of an independent third party . . . stood between the plaintiff and the challenged actions . . . . We . . . find that the Appellees lack standing for failure to establish the causation and redressability prongs. The purported injury here . . . is not directly linked to the challenged law because an intermediary . . . (here, the Ag Center) stands directly between the plaintiffs and the challenged conduct in a way that breaks the causal chain. We freely acknowledge that the law makes it more expensive – perhaps prohibitively so – for the Ag Center to lease space to Krasner . . . . The record leaves no doubt that this was a deal breaker; Krasner only rents space for perhaps four days a year, and the County has given the Ag Center over a half-million dollars in grants. But that the County’s decision may have been easy does not alter the analysis. Likewise, even if we were to hear the case and hold for the Appellees, we could not compel the Ag Center to rent space to Krasner (nor, crucially, could we even direct the County to subsidize the Ag Center in
the future). This would, then, be just the sort of advisory opinion federal courts must not give. . . . Thus, the Appellees lack standing.

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**Duke Power Co. v. Carolina Environmental Study Group, Inc.**

438 U.S. 59 (1978)

[Chief Justice Burger] These appeals present the question of whether Congress may, consistent with the Constitution, impose a limitation on liability for nuclear accidents resulting from the operation of private nuclear power plants licensed by the Federal Government.

I.

A.

When Congress passed the Atomic Energy Act of 1946, it contemplated that the development of nuclear power would be a Government monopoly. Within a decade, however, Congress concluded that the national interest would be best served if the Government encouraged the private sector to become involved . . . . The Atomic Energy Act of 1954 . . . implemented this policy decision, providing for licensing of private construction, ownership, and operation of commercial nuclear power reactors for energy production under strict supervision by the Atomic Energy Commission (AEC).

. . . It soon became apparent that profits from the private exploitation of atomic energy were uncertain and the accompanying risks substantial. Although the AEC offered incentives to encourage investment, there remained in the path of the private nuclear power industry various problems – the risk of potentially vast liability in the event of a nuclear accident of a sizable magnitude being the major obstacle. . . . Thus, while repeatedly stressing that the risk of a major nuclear accident was extremely remote, spokesmen for the private sector informed Congress that they would be forced to withdraw from the field if their liability were not limited by appropriate legislation.

Congress responded in 1957 by passing the Price-Anderson Act. . . . In its original form, the Act limited the aggregate liability for a single nuclear incident to $500 million plus the amount of liability insurance available on the private market – some $60 million in 1957. The nuclear industry was required to purchase the maximum available amount of [private] liability insurance, and the Act provided that if damages from a nuclear disaster exceeded [that amount], the Federal Government would indemnify the licensee . . . in an amount not to exceed
$500 million. Thus, the actual ceiling on liability was the amount of private insurance coverage plus the Government’s indemnification obligation which totaled $560 million.

Since its enactment, the Act has been [amended to require] those indemnified under the Act to waive all legal defenses in the event of a substantial nuclear accident. This provision was based on a congressional concern that state tort law dealing with liability for nuclear incidents was generally unsettled and that some way of insuring a common standard of responsibility for all jurisdictions – strict liability – was needed. A waiver of defenses was thought to be the preferable approach since it entailed less interference with state tort law than would the enactment of a federal statute prescribing strict liability.

In 1975 . . . a new provision was added requiring, in the event of a nuclear incident, each of the 60 or more reactor owners to contribute between $2 and $5 million toward the cost of compensating victims. Since the liability ceiling remained at the same level, the effect . . . was to reduce the Federal Government’s contribution to the liability pool. In its amendments to the Act in 1975, Congress also explicitly provided that “in the event of a nuclear incident involving damages in excess of [the] amount of aggregate liability, the Congress will . . . take whatever action is deemed necessary and appropriate to protect the public from the consequences of a disaster of such magnitude . . . .”

Under the Price-Anderson Act as it presently stands, liability in the event of a nuclear incident causing damages of $560 million or more would be spread as follows: $315 million would be paid from contributions by the licensees of the 63 private operating nuclear power plants; $140 million would come from private insurance (the maximum now available); [and the remaining] $105 million would be borne by the Federal Government.

B.

Duke Power Co. is an investor-owned public utility which is constructing one nuclear power plant in North Carolina and one in South Carolina. Duke Power, along with the NRC, was sued by appellees, two organizations – Carolina Environmental Study Group and the Catawba Central Labor Union – and 40 individuals who live within close proximity to the planned facilities. The action was commenced in 1973, and sought, among other relief, a declaration that the Price-Anderson Act is unconstitutional.

[T]he District Court held . . . that the Price-Anderson Act was unconstitutional in two respects: (a) it violated the Due Process Clause of the Fifth Amendment because it allowed injuries to occur without assuring adequate compensation to the victims; (b) the Act offended the equal protection component of the Fifth
Amendment by forcing the victims of nuclear incidents to bear the burden of injury, whereas society as a whole benefits from the existence and development of nuclear power.

We . . . now reverse.

II.

. . . It is enough for present purposes that the claimed cause of action to vindicate appellees’ constitutional rights is sufficiently substantial and colorable to sustain [subject matter] jurisdiction under § 1331(a).

III.

The District [Court’s] factual findings form the basis for our analysis of these issues.

A.

The essence of the standing inquiry is whether the parties seeking to invoke the court’s jurisdiction have “alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.” As refined by subsequent reformulation, this requirement of a “personal stake” has come to be understood to require not only a “distinct and palpable injury,” to the plaintiff, but also a “fairly traceable” causal connection between the claimed injury and the challenged conduct. Application of these constitutional standards to the factual findings of the District Court persuades us that the Art. III requisites for standing are satisfied by appellees.

We turn first to consider the kinds of injuries the District Court found the appellees suffered. It discerned two categories of effects which resulted from the operation of nuclear power plants in potentially dangerous proximity to appellees’ living and working environment. The immediate effects included: (a) the production of small quantities of non-natural radiation which would invade the air and water; (b) a “sharp increase” in the temperature of two lakes . . . resulting from the use of the lake waters to produce steam and to cool the reactor; . . . (d) threatened reduction in property values of land neighboring the power plants; (e) “objectively reasonable” present fear and apprehension regarding the “effect of the increased radioactivity . . . upon their descendants”; and (f) the continual threat of “an accident resulting in uncontrolled release of . . . radioactive material” with no assurance of adequate compensation for the resultant damage. Into a second category of potential effects were placed the damages “. . . from a core melt or other major accident in the operation of a reactor . . .”
For purposes of the present inquiry, we need not determine whether all the putative injuries identified by the District Court, particularly those based on the possibility of a nuclear accident and the present apprehension generated by this future uncertainty, are sufficiently concrete to satisfy constitutional requirements. It is enough that several of the “immediate” adverse effects were found to harm appellees. Certainly the environmental and aesthetic consequences of the thermal pollution of the two lakes in the vicinity of the disputed power plants is the type of harmful effect which has been deemed adequate in prior cases to satisfy the “injury in fact” standard. And the emission of non-natural radiation into appellees’ environment would also seem a direct and present injury, given our generalized concern about exposure to radiation and the apprehension flowing from the uncertainty about . . . even small emissions like those concededly emitted by nuclear power plants.

The more difficult step . . . is establishing that these injuries “fairly can be traced to the challenged action of the defendant,” . . . or put otherwise, that the exercise of the Court’s remedial powers would redress the claimed injuries. The District Court discerned a “but for” causal connection between the Price-Anderson Act, which appellees challenged as unconstitutional, “and the construction of the nuclear plants . . . .” Particularizing that causal link to the facts of the instant case, the District Court concluded that “there is a substantial likelihood that Duke would not be able to complete [and operate] the McGuire and Catawba Nuclear Plants but for the protection provided by the Price-Anderson Act.”

These findings . . . are challenged on two grounds. First, it is argued that the evidence presented at the hearing, contrary to the conclusion reached by the District Court, indicated that the McGuire and Catawba nuclear plants would be completed and operated without the Price-Anderson Act’s limitation on liability. And second, it is contended that the Price-Anderson Act is not, in some essential sense, the “but for” cause . . . since if the Act had not been passed Congress may well have chosen to pursue the nuclear program as a Government monopoly as it had from 1946 until 1954. We reject both of these arguments.

The District Court’s finding of a “substantial likelihood” that the McGuire and Catawba nuclear plants would be neither completed nor operated absent the Price-Anderson Act rested in major part on the testimony of corporate officials before the Joint Committee on Atomic Energy (JCAE) . . . . During the 1956-1957 hearings, industry spokesmen . . . expressed a categorical unwillingness to participate in the development of nuclear power absent guarantees of a limitation on their liability. By 1975, the tenor of the testimony had changed only slightly. While large utilities and producers were somewhat more equivocal . . . the smaller producers of component parts and architects and engineers – all of whom are essential to the building of the reactors and generating plants – considered renewal
of the Act as the critical variable in determining their continued involvement with nuclear power. Duke Power itself, in its letter to the Committee urging extension of the Act, cited recent experiences with suppliers and contractors who were requiring the inclusion of cancellation clauses in their contracts to take effect if the liability-limitation provisions were eliminated. . . . Considering the [evidence] in the record, we cannot say we are left with “the definite and firm conviction that” the finding by the trial court . . . is clearly erroneous; and, hence, we are bound to accept it.

The second attack . . . warrants only brief attention. Essentially the argument is . . . that Price-Anderson is not a “but for” cause of the injuries appellees claim since, if Price-Anderson had not been passed, the Government would have undertaken development of nuclear power on its own and the same injuries would likely have accrued to appellees from such Government-operated plants as from privately operated ones. Whatever the ultimate accuracy of this speculation, it is not responsive to the simple proposition that private power companies now do in fact operate the nuclear-powered generating plants injuring appellees, and that their participation would not have occurred but for the enactment and implementation of the Price-Anderson Act. Nothing in our prior cases requires a party seeking to invoke federal jurisdiction to negate the kind of speculative and hypothetical possibilities suggested in order to demonstrate the likely effectiveness of judicial relief.

B.

It is further contended that in addition to proof of injury and of a causal link between such injury and the challenged conduct, appellees must demonstrate a connection between the injuries they claim and the constitutional rights being asserted. . . . Since the environmental and health injuries claimed by appellees are not directly related to the constitutional attack on the Price-Anderson Act, such injuries, the argument continues, cannot supply a predicate for standing. n.3 We decline to accept this argument.

n.3 The only injury that would possess the required subject-matter nexus to the due process challenge is the injury that would result from a nuclear accident causing damages in excess of the liability limitation provisions of the Price-Anderson Act.

. . . No cases have been cited outside the context of taxpayer suits where we have demanded this type of subject-matter nexus between the right asserted and the injury alleged, and we are aware of none. . . . We . . . cannot accept the contention that, outside the context of taxpayers’ suits, a litigant must demonstrate something more than injury in fact and a substantial likelihood that the judicial relief requested will prevent or redress the claimed injury to satisfy the “case or controversy” requirement of Art. III. . . . Where a party champions his own rights,
and where the injury alleged is a concrete and particularized one which will be prevented or redressed by the relief requested, the basic practical and prudential concerns underlying the standing doctrine are generally satisfied when the constitutional requisites are met.

We conclude that appellees have standing to challenge the constitutionality of the Price-Anderson Act.

C.

... Since we are persuaded that "we will be in no better position [in the event of a nuclear catastrophe] than we are now" to decide this question, we hold that it is presently ripe for adjudication.

IV.

The District Court held that the Price-Anderson Act contravened the Due Process Clause because "[the] amount of recovery is not rationally related to the potential losses"; because "[the] Act tends to encourage irresponsibility in matters of safety and environmental protection . . ."; and finally because "[there] is no quid pro quo" for the liability limitations. An equal protection violation was also found because the Act "places the cost of [nuclear power] on an arbitrarily chosen segment of society, those injured by nuclear catastrophe." Application of the relevant constitutional principles forces the conclusion that these holdings of the District Court cannot be sustained.

A.

Our due process analysis properly begins with a discussion of the appropriate standard of review. Appellants . . . urge that the Price-Anderson Act be accorded the traditional presumption of constitutionality generally accorded economic regulations and that it be upheld absent proof of arbitrariness or irrationality on the part of Congress. Appellees, however, urge a more elevated standard of review on the ground that the interests jeopardized by the Price-Anderson Act "are far more important than those in the economic due process and business-oriented cases" . . . An intermediate standard . . . is thus recommended for our use here.

As we read the Act and its legislative history, it is clear that Congress' purpose was to remove the economic impediments in order to stimulate the private development of electric energy by nuclear power while simultaneously providing the public compensation in the event of a catastrophic nuclear incident. The liability-limitation provision thus emerges as a classic example of an economic regulation – a legislative effort to structure and accommodate "the burdens and benefits of economic life." "It is by now well established that [such] Acts . . . come
to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way.” That the accommodation struck may have profound and far-reaching consequences, contrary to appellees’ suggestion, provides all the more reason for this Court to defer to the congressional judgment unless it is demonstrably arbitrary or irrational.

B.

When examined in light of this standard of review, the Price-Anderson Act, in our view, passes constitutional muster. The record before us fully supports the need for . . . a statutory limit on liability to encourage private industry participation and hence bears a rational relationship to Congress’ concern for stimulating the involvement of private enterprise in the production of electric energy through the use of atomic power; nor do we understand appellees or the District Court to be of a different view. Rather their challenge is to the alleged arbitrariness of the particular figure of $560 million, which is the statutory ceiling on liability. . . .

Assuming, arguendo, that the $560 million fund would not insure full recovery in all conceivable circumstances – and the hard truth is that no one can ever know – it does not by any means follow that the liability limitation is therefore irrational and violative of due process. The legislative history clearly indicates that the $560 million figure was not arrived at on the supposition that it alone would necessarily be sufficient to guarantee full compensation in the event of a nuclear incident. Instead, it was conceived of as a “starting point” or a working hypothesis. The reasonableness of the statute’s assumed ceiling on liability was predicated on two corollary considerations – expert appraisals of the exceedingly small risk of a nuclear incident involving claims in excess of $560 million, and the recognition that in the event of such an incident, Congress would likely enact extraordinary relief provisions to provide additional relief, in accord with prior practice. . . . [C]andor requires acknowledgment that whatever ceiling figure is selected will, of necessity, be arbitrary in the sense that any choice of a figure based on imponderables like those at issue here can always be so characterized. This is not, however, the kind of arbitrariness which flaws otherwise constitutional action. . . .

[The] District Court’s further conclusion that the Price-Anderson Act “tends to encourage irresponsibility . . . on the part of builders and owners” of the nuclear power plants simply cannot withstand careful scrutiny. We recently outlined the multitude of detailed steps involved in the review of any application for a license to construct or to operate a nuclear power plant, Vermont Yankee Nuclear Power Corp. v. NRDC; nothing in the liability-limitation provision [alters] that process. Moreover, in the event of a nuclear accident the utility itself would suffer perhaps
the largest damages. While obviously not to be compared with the loss of human life and injury to health, the risk of . . . bankruptcy to the utility is in itself no small incentive to avoid the kind of irresponsible and cavalier conduct implicitly attributed to licensees by the District Court.

The remaining due process objection to the liability-limitation provision is that it fails to provide those injured by a nuclear accident with a satisfactory quid pro quo for the common-law rights of recovery which the Act abrogates. Initially, it is not at all clear that the Due Process Clause in fact requires that a legislatively enacted compensation scheme either duplicate the recovery at common law or provide a reasonable substitute remedy. However, we need not resolve this question here since the Price-Anderson Act does, in our view, provide a reasonably just substitute for the common-law or state tort law remedies it replaces. n.4

n.4 We reject at the outset appellees’ contention that . . . prior to the enactment of the Price-Anderson Act, appellees had some right, cognizable under the Due Process Clause, to be free of nuclear power or to take advantage of the state of uncertainty which inhibited the private development of nuclear power. . . . Appellees’ only relevant right prior to the enactment of the Price-Anderson Act was to utilize their existing common-law and state-law remedies to vindicate any particular harm visited on them from whatever sources. After the Act was passed, that right . . . was replaced by the compensation mechanism of the statute, and it is only the terms of that substitution which are pertinent to the quid pro quo inquiry which appellees insist the Due Process Clause requires.

. . . We view the congressional assurance of a $560 million fund for recovery, accompanied by an express statutory commitment, to “take whatever action is deemed necessary and appropriate to protect the public from the consequences of” a nuclear accident to be a fair and reasonable substitute for the uncertain recovery of damages of this magnitude from a utility or component manufacturer, whose resources might well be exhausted at an early stage. The record in this case raises serious questions about the ability of a utility or component manufacturer to satisfy a judgment approaching $560 million – the amount guaranteed under the Price-Anderson Act. Nor are we persuaded that the mandatory waiver of defenses required by the Act is of no benefit to potential claimants. Since there has never been, to our knowledge, a case arising out of a nuclear incident like those covered by the Price-Anderson Act, any discussion of the standard of liability that state courts will apply is necessarily speculative. . . . Further, even if strict liability were routinely applied, the common-law doctrine is subject to exceptions for acts of God or of third parties – two of the very factors which appellees emphasized in the District Court in the course of arguing that the risks of a nuclear accident are greater than generally admitted. All of these considerations belie the suggestion that the Act leaves the potential victims of a nuclear disaster in a more disadvantaged position than they would be in if left to their common-law remedies – not known in modern times for either their speed or economy.
Appellees’ remaining objections can be briefly treated. The claim-administration procedures under the Act provide that in the event of an accident with potential liability exceeding the $560 million ceiling, no more than 15% of the limit can be distributed pending court approval of a plan of distribution taking into account the need to assure compensation for “possible latent injury claims which may not be discovered until a later time.” Although some delay might follow from compliance with this statutory procedure, we doubt that it would approach that resulting from routine litigation of the large number of claims caused by a catastrophic accident. Moreover, the statutory scheme insures the equitable distribution of benefits to all who suffer injury – both immediate and latent; under the common-law route, the proverbial race to the courthouse would instead determine who had “first crack” at the diminishing resources of the tortfeasor, and fairness could well be sacrificed in the process. The remaining contention that recovery is uncertain because of the aggregate rather than individualized nature of the liability ceiling is but a thinly disguised version of the contention that the $560 million figure is inadequate, which we have already rejected.

. . . The Price-Anderson Act not only provides a reasonable, prompt, and equitable mechanism for compensating victims of a catastrophic nuclear incident, it also guarantees a level of net compensation generally exceeding that recoverable in private litigation. Moreover, the Act contains an explicit congressional commitment to take further action to aid victims of a nuclear accident in the event that the $560 million ceiling on liability is exceeded. This panoply of remedies and guarantees is at the least a reasonably just substitute for the common-law rights replaced by the Price-Anderson Act. Nothing more is required by the Due Process Clause.

[The] equal protection arguments largely track and duplicate those made in support of the due process claim. . . . The general rationality of the Price-Anderson Act liability limitations – particularly with reference to the important congressional purpose of encouraging private participation in the exploitation of nuclear energy – is ample justification for the difference in treatment between those injured in nuclear accidents and those whose injuries are derived from other causes. . . .

Accordingly, the decision of the District Court is reversed, and the cases are remanded for proceedings consistent with this opinion. . . .
1. Declaring the Price-Anderson Act unconstitutional would have been an act of some moment in the nuclear power field – and required dozens of massive private investor owned utilities to make judgments about their plans to continue construction on nuclear power plants throughout the United States. But would it mandate cessation of construction or operation? How is this different from Simon? Simon requires that the harm about which the plaintiffs complain is “likely to be redressed by a favorable decision” while Duke requires a “substantial likelihood” that the remedy will address the plaintiff’s alleged injuries. Do you see a significant difference in those two standards? See Richard H. Fallon, Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons, 59 N.Y.U. L. Rev. 1, 18 (1984).

2. Is this case about “but for” causation, attenuated causation theory, or pure politics? Justice Stewart’s concurring opinion notes that a desire to declare constitutional the Price-Anderson Act is not a basis to determine that the constitutional and prudential requirements of standing have been met.

Even assuming that but for the Act the plant would not exist and therefore neither would its effects on the environment, I cannot believe that it follows that the appellees have standing to attack the constitutionality of the Act. Apart from a “but for” connection in the loosest sense of that concept, there is no relationship at all between the injury alleged for standing purposes and the injury alleged for federal subject-matter jurisdiction. . . . Surely there must be

Make the Connection

some direct relationship between the plaintiff's federal claim and the injury relied on for standing. [From 438 U.S. 94-95.]

Justice Stevens expressed a similar concern:

The string of contingencies that supposedly holds this litigation together is too delicate for me. We are told that but for the Price-Anderson Act there would be no financing of nuclear power plants, no development of those plants by private parties, and hence no present injury to persons such as appellees; we are then asked to remedy an alleged due process violation that may possibly occur at some uncertain time in the future, and may possibly injure the appellees in a way that has no significant connection with any present injury. It is remarkable that such a series of speculations is considered sufficient either to make this litigation ripe for decision or to establish appellees’ standing. [From 438 U.S. 103-04.]

Does it seem possible that the majority was determined to resolve a dispute to insure nuclear power generation, coming down on one side of a controversial political issue? What about the Court’s historic commitment to steer clear of political disputes? Courts in this country have a long history of refusing to decide “political questions.” Nixon v. United States, 506 U.S. 224, 228-29 (1993); Luther v. Borden, 48 U.S. (7 How.) 1, 46-47 (1849). But see, Bush v. Gore, 531 U.S. 98, 104 (2000), and Louis Michael Seidman, The Secret Life of the Political Question Doctrine, 37 J. Marshall L. Rev. 441, 460 (2004).

3. Declaring that the complainants had standing in Duke allowed the Court to put to rest the constitutionality challenge to the Price Anderson Act – a decision that the dissenting opinions suggest may have been based more on national energy policy than the law of standing. That said, think about the timing of this case and the energy issues in the United States at the time. An oil embargo had created a national crisis not long before this case was decided and nuclear power may well have seemed one important way to lessen the demand for fossil fuel in the United States. Assuming this is true, is it an appropriate consideration in a case that assesses constitutional and prudential standing requirements? How would you distinguish prudential and political considerations?

4. In Allen v. Wright, 468 U.S. 737 (1984), a group of parents brought suit against the Internal Revenue Service, demanding that IRS cease to provide tax exempt status to those
private schools that discriminated on the basis of race. In part because the parents involved had children in public schools and in part because the Court believed that the denial of a tax exemption might not change the admissions of purely private schools – and probably would not change the pace of integrating public schools – the Court denied standing. Do the claims in Allen seem more highly attenuated than those in Duke? In Professor Cass R. Sunstein’s *Standing and the Privatization of Public Law*, 88 *Columbia L. Rev.* 1432, n.163 (1988), he notes that, “the claim of a causal connection was quite speculative; it was hardly certain that such effects would occur, and their consequences for any particular plaintiff were highly uncertain.

5. The Court has held that “clear precedent requir[es] that the allegations of future injury be particular and concrete.” *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 109 (1998). Years earlier, in *Laird v. Tatum*, 408 U.S. 1 (1972), the Court rejected speculation of future harm as a sufficient injury in a speech case. Recently, the Sixth Circuit dealt with warrantless wiretapping in *ACLU v. United States National Security Agency*, 493 F.3d 644 (6th Cir. 2007). Although the wiretapping program was operating, the harms complained of by the ACLU (invasion of privacy, First Amendment concerns, etc.) were seen as speculative. The court held: “[T]he injury alleged here is just as attenuated as the future harm in *Laird*; the present injury derives solely from the fear of secret government surveillance, not from some other form of direct government regulation, prescription, or compulsion.”


AANR-East is one of several regional organizations affiliated with the American Association for Nude Recreation, a national social nudism organization. In June 2003, AANR-East opened a week-long juvenile nudist camp at a licensed nudist campground ("White Tail Park") operated . . . near Ivor, Virginia. AANR-East leased the 45-acre campground that ordinarily attracts about 1000 weekend visitors who come to engage in nude recreation . . . .

Virginia law requires any person who owns or operates a summer camp or campground facility in Virginia to be licensed by the Food and Environmental Services Division of the Virginia Department of Health ("VDH"). See *Va. Code § 35.1-18*. Prior to the scheduled start of AANR-East’s 2004 youth camp, the Virginia General Assembly amended the statute governing the licensing of summer camps specifically to address
youth nudist camps. The amended statute requires a parent, grandparent or guardian to accompany any juvenile who attends a nudist summer camp . . . 

AANR-East contends that the amended statute will reduce the size of the camp every year because not all would-be campers have parents or guardians who are available to register and attend a week of camp during the summer, as evidenced by the fact that 24 campers who would have otherwise attended camp by themselves in June 2004 were unable to do so because of their parents’ inability or unwillingness to attend. AANR-East contends that the statute encroached on its First Amendment right by reducing the size of the audience for its message of social nudism and will continue to do so as long as it is enforced. We think this is sufficient for purposes of standing.

A regulation that reduces the size of a speaker’s audience can constitute an invasion of a legally protected interest . . .

_Bennett v. Spear_ is of interest both because of its contribution to the standing dialogue and to questions of finality. The excerpted section below pertains primarily to questions of standing. In particular, based on what you have read thus far, how would you define “zone of interest”? What happens when an individual or entity is affected by the action of an agency, but their interests – while affected by the agency action – are at odds with the goals of the statute?

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**Good Questions!**

The Consumer Product Safety Act (CPSA), 86 Stat. 1207, as amended, 15 U.S.C. § 2051 et seq., for example, empowers the Consumer Product Safety Commission (CPSC) to issue orders, interpretations, policy statements, and other steps pertaining to product safety. The purpose of the CPSA is to enhance the quality of consumer goods. Are the interests of manufacturers who produce allegedly defective goods within the “zone of interest” of the CPSA? Are the interests of retailers who sell products that are defective and cause harm within the “zone of interest” of the CPSA? In other words, does a determination of standing pertaining to the zone of interest test require that the complainant have interests that are consistent with the regulatory goals the statute embodies? Does it make sense to allow those who oppose the implementation of a statute to benefit from not only the regulatory process but also the court system?

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**BENNETT V. SPEAR**

520 U.S. 154 (1997)

[Justice Scalia] This is a challenge to a biological opinion issued by the Fish and Wildlife Service in accordance with the Endangered Species Act of 1973 (ESA) concerning the [impact of the] operation of the Klamath Irrigation Project . . . on two varieties of endangered fish. The question for decision is whether the
petitioners, who have [a] competing economic . . . interest[] in Klamath Project water, have standing to seek judicial review of the biological opinion under the citizen-suit provision of the ESA and the Administrative Procedure Act (APA).

I.

The ESA requires the Secretary of the Interior to promulgate regulations listing those species of animals that are “threatened” or “endangered” . . . . The ESA further requires each federal agency to “insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered . . . or threatened species . . . .” If an agency determines that action it proposes to take may adversely affect a listed species, it must engage in formal consultation with the Fish and Wildlife Service, . . . after which the Service must provide the agency with a written statement (the Biological Opinion) explaining how the proposed action will affect the species or its habitat. If the Service concludes that the proposed action will “jeopardize the continued existence of any species . . . ,” the Biological Opinion must outline any “reasonable and prudent alternatives” that the Service believes will avoid that consequence. . . .

The Klamath Project, one of the oldest federal reclamation schemes, is a series of lakes, rivers, dams and irrigation canals in northern California and southern Oregon. The project . . . is administered by the Bureau of Reclamation, which is under the [Secretary of the Interior’s] jurisdiction. In 1992, the Bureau notified the Service that operation of the project might affect the Lost River Sucker (Deltistes luxatus) and Shortnose Sucker (Chasmistes brevirostris), species of fish that were listed as endangered in 1988. After formal consultation with the Bureau . . . the Service issued a Biological Opinion which concluded that the “long-term operation of the Klamath Project was likely to jeopardize the continued existence of the Lost River and shortnose suckers.” The Biological Opinion identified “reasonable and prudent alternatives” the Service believed would avoid [this problem], which included the maintenance of minimum water levels on Clear Lake and Gerber reservoirs. The Bureau later notified the Service that it intended to operate the project in compliance with the Biological Opinion.

Petitioners, two Oregon irrigation districts that receive Klamath Project water and the operators of two ranches within those districts, filed the present action against the director . . . of the Service and the Secretary of the Interior. Neither the Bureau nor any of its officials is named as [a] defendant. The complaint asserts that the Bureau “has been following essentially the same procedures for storing and releasing water from Clear Lake and Gerber reservoirs throughout the twentieth century,” that “there is no scientifically or commercially available evidence indicating that the populations of endangered suckers in Clear Lake and Gerber reservoirs have declined, are declining, or will decline as a result” . . . , that “there is no commercially or scientifically available evidence indicating that the restric-
Petitioners[] allege that the Service’s jeopardy determination with respect to Clear Lake and Gerber reservoirs, and the ensuing imposition of minimum water levels, violated § 7 of the ESA. . . . [They also] claim . . . that the imposition of minimum water elevations constituted an implicit determination of critical habitat for the suckers, which violated § 4 of the ESA, because it failed to take into consideration the designation’s economic impact. Each of the claims also states that the relevant action violated the APA’s prohibition of agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A).

The complaint asserts that petitioners’ use of the reservoirs and related waterways for “. . . their primary sources of irrigation water[]” will be “irreparably damaged” by the actions complained of, and that the restrictions on water delivery “recommended” by the Biological Opinion “adversely affect plaintiffs by substantially reducing the quantity of available irrigation water.” In essence, petitioners claim a competing interest in the water the Biological Opinion declares necessary for the preservation of the suckers.

The District Court dismissed the complaint for lack of jurisdiction. It concluded that petitioners did not have standing because their “. . . interests . . . do not fall within the zone of interests sought to be protected by ESA.” The Court of Appeals for the Ninth Circuit affirmed. It held that “only plaintiffs who allege an interest in the preservation of endangered species fall within the zone of interests protected by the ESA.” We granted certiorari.

In this Court, petitioners raise two questions: first, whether the prudential standing rule known as the “zone of interests” test applies to claims brought under the citizen-suit provision of the ESA; and second, if so, whether petitioners have standing under that test notwithstanding that the interests they seek to vindicate are economic rather than environmental. In this Court, the Government has made no effort to defend the reasoning of the Court of Appeals. Instead, it [argues] (1) that petitioners fail to meet the standing requirements imposed by Article III of the Constitution [and] (2) that the ESAs citizen-suit provision does not authorize judicial review of the types of claims advanced by petitioners . . . .
ers contend that their claims lie both under the ESA and the APA, we look first at the ESA because it may permit petitioners to recover their litigation costs and because the APA by its terms independently authorizes review only when “there is no other adequate remedy in a court.”

. . . In addition to the immutable requirements of Article III, “the federal judiciary has also adhered to a set of prudential principles that bear on the question of standing.” Like their constitutional counterparts, these “judicially self-imposed limits on the exercise of federal jurisdiction,” are “founded in concern about the proper – and properly limited – role of the courts in a democratic society,” but unlike their constitutional counterparts, they can be modified or abrogated by Congress. Numbered among these prudential requirements is the doctrine of particular concern in this case: that a plaintiff’s grievance must arguably fall within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit.

The “zone of interests” formulation was first employed in Association of Data Processing Service Organizations, Inc. v. Camp. There, certain data processors sought to invalidate a ruling by the Comptroller of the Currency authorizing national banks to sell data processing services . . . . In reversing [the Court of Appeals], we stated the applicable prudential standing requirement to be “whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.” Data Processing . . . applied the zone-of-interests test to suits under the APA, but later cases have . . . specifically listed it among other prudential standing requirements of general application. We have made clear, however, that the breadth of the zone of interests varies according to the provisions of law at issue, so that what comes within the zone of interests of a statute for purposes of obtaining judicial review of administrative action under the . . . APA may not do so for other purposes.

Congress legislates against the background of our prudential standing doctrine, which applies unless it is expressly negated. The first question in the present case is whether the ESA’s citizen-suit provision . . . expands the zone of interests. We think it does. The first operative portion of the provision says that “any person may commence a civil suit” – an authorization of remarkable breadth when compared with the language Congress ordinarily uses. Even in some other environmental statutes, Congress has used more restrictive formulations, such as “[any person] having an interest which is or may be adversely affected,” (Clean Water Act) . . . or “any person having a valid legal interest which is or may be adversely affected . . . whenever such action constitutes a case or controversy” (Ocean Thermal Energy Conversion Act). And in contexts other than the environment, Congress has often been even more restrictive. In statutes concerning unfair trade practices and other commercial matters, for example, it has authorized suit
only by “any person injured in his business or property,” . . . or only by “competitors, customers, or subsequent purchasers.”

Our readiness to take the term “any person” at face value is greatly augmented by two interrelated considerations: that the overall subject matter of this legislation is the environment (a matter in which it is common to think all persons have an interest) and that the obvious purpose of the particular provision in question is to encourage enforcement by so-called “private attorneys general” – evidenced by its elimination of the usual amount-in-controversy and diversity-of-citizenship requirements, its provision for recovery of the costs of litigation (including even expert witness fees), and its reservation to the Government of a right of first refusal to pursue the action initially and a right to intervene later. Given these factors, we think the conclusion of expanded standing follows a fortiori from our decision in Trafficante v. Metropolitan Life Ins. Co., which held that standing was expanded to the full extent permitted under Article III by a provision of the Civil Rights Act of 1968 that authorized “any person who claims to have been injured by a discriminatory housing practice” to sue for violations of the Act. There also we relied on textual evidence of a statutory scheme to rely on private litigation to ensure compliance with the Act. The statutory language here is even clearer, and the subject of the legislation makes the intent to permit enforcement by everyman even more plausible.

It is true that the plaintiffs here are seeking to prevent application of environmental restrictions rather than to implement them. But the "any person" formulation applies to all the causes of action authorized by § 1540(g) – not only to actions against private violators of environmental restrictions, and not only to actions against the Secretary asserting underenforcement under § 1533, but also to actions against the Secretary asserting overenforcement under § 1533. . . . The citizen-suit provision does favor environmentalists in that it covers all private violations of the Act but not all failures of the Secretary to meet his administrative responsibilities; but there is no textual basis for saying that its expansion of standing requirements applies to environmentalists alone. The Court of Appeals therefore erred in concluding that petitioners lacked standing under the zone-of-interests test to bring their claims under the ESA’s citizen-suit provision.

III.

[The petitioners have an injury in fact because] it is easy to presume specific facts under which petitioners will be injured – for example, the Bureau’s distribution of the reduction pro rata among its customers. . . . The Government also contests compliance with the second and third Article III standing requirements, contending that any injury suffered by petitioners is neither “fairly traceable” to the Service’s Biological Opinion, nor “redressable” by a favorable judicial ruling,
because the “action agency” (the Bureau) retains ultimate responsibility for determining whether and how a proposed action shall go forward. . . . This wrongly equates injury “fairly traceable” to the defendant with injury as to which the defendant’s actions are the very last step in the chain of causation. . . .

The judgment of the Court of Appeals is reversed, and the case is remanded . . .

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Underlying Case Documents

For a picture of the Lost River Sucker (*Deltistes luxatus*) and the Short-nose Sucker (*Chasmistes brevirostris*) click HERE.

1. In determining the zone of interests a statute protects, does the court use an analysis that focuses on congressional intent? What options are there for statutory interpretation beyond legislative intent? *Bennett* holds that the matter of zone of interests “is to be determined not by reference to the overall purpose of the Act in question . . . but by reference to the particular provision of law upon which the plaintiff relies. . . .” What canon of statutory construction is in play? See *Interfaith Community Organization v. Honeywell International, Inc.*, 399 F.3d 248, 253-54, 257-58, 264, 268 (3d Cir. 2005), and *Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133 (10th Cir. 2005), for expansive readings of citizen suit provisions.

2. Is the focus of the Court on the environmental protection aspects of the Endangered Species Act – or on the citizen suit provision of that legislation? It bears noting that while some citizen suit provisions can be restricted to certain interests, the language in the ESA provides simply that “any person may commence a civil suit.” The Court finds that this produces a “remarkable breadth when compared with the language Congress ordinarily uses.” Does that mean that *Bennett*’s holding is limited to broadly written citizen suit provisions? The Clean Water Act permits “any citizen” to sue any person “who is alleged to be in violation of an effluent standard or limitation. . . .” *Clean Water Act, 33 U.S.C. 1365(a)(1)(2)*. The Court has held that this provision is designed to further the enforcement goals of the act (as opposed to displacing federal agency enforcement efforts). *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.*, 484 U.S. 49, 60 (1987). Can you envision a business that generates pollutants availing itself of this provision? See Michael S. Greve, *The Private Enforcement of Environmental Law*, 65 Tul. L. Rev. 339, 340 (1990) (opining that “citizen suit provisions are an off-budget entitlement program for the environmental movement”).
3. At one point in the opinion, the Court discusses the “any person” citizen suit provision and notes that this language provides “zone of interest” coverage to “all persons” who are affected by environmental determinations – and that is extremely broad. In that same passage in the opinion, the Court refers to the role of “private attorneys general” and the importance of that term in interpreting this legislation. Noting that Congress has eliminated the normal diversity and amount-in-controversy requirements to facilitate access to federal courts for performing the role of private attorneys general, one has to wonder how it is that a litigant opposed to achieving the protections the ESA promises is empowered to initiate the litigation in Bennett? The Court answers that directly, holding that the “any person” language is applicable “to all causes of action . . . not only to actions against private violators of environmental restrictions . . . but also to actions against the secretary asserting over-enforcement. . . .”

4. While Bennett may be somewhat aberrant, it does not depart from the requirement or the necessity of establishing cognizable injury. The injury asserted in this case is entirely commercial: Plaintiffs charge that the action of the Secretary will result in a reduction of water used in the irrigation process. No one doubts that losing a resource constitutes an injury – the question is whether that was the type of injury the statute (even vaguely) contemplates. If you assume for the moment that the Endangered Species Act was not designed to maximize water available to commercial agriculture, why would the Court find that the plaintiffs have standing? Is this, like Duke, a case in which the standing determination is made to get to a substantive question that the Court is anxious to resolve? Could it be that the Court wants to send the message that, to the extent the courthouse doors are open at all, those seeking to protect environmental resources and those who are in the business of exploiting the environment are equally welcome? Most legal scholarship suggests a contrary perspective on citizen suits. Myriam E. Gilles, Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights, 100 COLUM. L. REV. 1384, 1390-91 (2000); Charles F. Sabel & William H. Simon, Destabilization Rights: How Public Law Litigation Succeeds, 117 HARV. L. REV. 1016 (2004). For a parallel analysis of qui tam actions, see Richard A. Bales, A Constitutional Defense of Qui Tam, 2001 WIS. L. REV. 381;

5. In the term following Bennett, the Court decided National Credit Union Administration v. First National Bank, 522 U.S. 479 (1998). At issue was the meaning of statutory terms in the Federal Credit Union Act – and the competitive relationship between commercial banks and credit unions. As in Bennett, there is little question that the Federal Credit Union Act was designed to regulate credit unions, not to protect commercial banks. Nonetheless, the Court found that the Commercial Banking Association had “an interest in limiting the markets that federal credit unions can serve.”

6. One interpretation of the standing component of Bennett involves a procedural assessment of what took place in the District Court and the Court of Appeals. The initial complaint had been dismissed for lack of standing before the plaintiffs had an opportunity to put forward evidence regarding the impact of the application of the Endangered Species Act. Granting summary judgment before providing plaintiffs an opportunity to put forward any evidence on the impact of the enforcement of the ESA may have been one of the decisive factors in the case – and may be a limit on the applicability of Bennett to future decisions. See Peter M. Shane, Returning Separation of Powers Analysis to Its Normative Roots: The Constitutionality of Qui Tam Actions and Other Private Suits to Enforce Civil Penalties, 20 Envtl. L. Rep. 11,081, 11,089-90 (2000).

Good Questions!

Based on the Bennett opinion, would an Oregon association of retail grocery stores have standing to attack the potential implementation of the ESA on the premise that the cost that retailers will have to pay for food products will go up if inexpensive water is not made readily available for irrigation purposes in the district in question? What about an organization that supports and promotes farmers who grow organic crops – the application of the ESA in the irrigation district in question will have an effect on the cost of organically grown goods? What about individual consumers – could anyone challenge the application of the ESA on the premise that the implementation of the statute will cause an increase in the price of food they wish to purchase? Does the language “any person may commence a civil suit” expand the “zone of interest” test this broadly? See Nulankeyuunonen Nkihtaqmikon v. Impson, 462 F. Supp. 2d 86 (D. Me. 2006); and Springs v. Stone, 362 F. Supp. 2d 686 (E.D. Va. 2005).
III. Ripeness

**Abbott Laboratories v. Gardner**

387 U.S. 136 (1967)

[Justice Harlan] In 1962 Congress amended the Federal Food, Drug, and Cosmetic Act to require manufacturers of prescription drugs to print the “established name” of the drug “prominently and in type at least half as large as that used thereon for any proprietary name or designation for such drug,” on labels and other printed material. The “established name” is one designated by the Secretary of Health, Education, and Welfare[;] the “proprietary name” is usually a trade name under which a particular drug is marketed. The underlying purpose of the 1962 amendment was to bring to the attention of doctors and patients the fact that many of the drugs sold under familiar trade names are actually identical to drugs sold under their “established” or less familiar trade names at significantly lower prices. The Commissioner of Food and Drugs [properly] promulgated the following regulation for the “efficient enforcement” of the Act: “[T]he established name . . . corresponding to [the] proprietary name . . . shall accompany each appearance of such proprietary name . . .” A similar rule was made applicable to advertisements for prescription drugs.

The present action was brought by a group of 37 individual drug manufacturers and by the Pharmaceutical Manufacturers Association, of which all the petitioner companies are members, and which includes manufacturers of more than 90% of the Nation’s supply of prescription drugs. They challenged the regulations on the ground that the Commissioner exceeded his authority under the statute by promulgating an order requiring . . . printed matter relating to prescription drugs to designate the established name of the particular drug involved every time its trade name is used anywhere in such material.

[The Court granted certiorari to determine whether pre-enforcement review of the regulations was authorized.] n.1

n.1 That is, a suit brought by one before any attempted enforcement of the statute or regulation against him.

1.

The first question . . . is whether Congress . . . intended to forbid pre-enforcement review of this sort of regulation promulgated by the Commissioner. The question is phrased in terms of “prohibition” rather than “authorization” because a survey of our cases shows that judicial review of a final agency action
by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress. Early cases in which this type of judicial review was entertained have been reinforced by the enactment of the Administrative Procedure Act, which embodies the basic presumption of judicial review to one “suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute,” 5 U.S.C. § 702, so long as no statute precludes such relief or the action is not one committed by law to agency discretion, 5 U.S.C. § 701(a). The Administrative Procedure Act provides specifically not only for review of “agency action made reviewable by statute” but also for review of “final agency action for which there is no other adequate remedy in a court,” 5 U.S.C. § 704. The legislative material elucidating that seminal act manifests a congressional intention that it cover a broad spectrum of administrative actions, and this Court has echoed that theme by noting that the Administrative Procedure Act’s “generous review provisions” must be given a “hospitable” interpretation. Again in Rusk v. Cort, the Court held that only upon a showing of “clear and convincing evidence” of a contrary legislative intent should the courts restrict access to judicial review.

Given this standard, we are wholly unpersuaded that the statutory scheme in the food and drug area excludes this type of action. The Government relies on no explicit statutory authority for its argument that pre-enforcement review is unavailable, but insists instead that because the statute includes a specific procedure for such review of certain enumerated kinds of regulations, not encompassing those of the kind involved here, other types were necessarily meant to be excluded from any pre-enforcement review. The issue, however, is not so readily resolved; we must go further and inquire whether in the context of the entire legislative scheme the existence of that circumscribed remedy evinces a congressional purpose to bar agency action not within its purview from judicial review. As a leading authority in this field has noted, “The mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to others. The right to review is too important to be excluded on such slender and indeterminate evidence of legislative intent.”

II.

A further inquiry must, however, be made. The injunctive and declaratory judgment remedies are discretionary, and courts traditionally have been reluctant to apply them to administrative determinations unless these arise in the context of a controversy “ripe” for judicial resolution. Without undertaking to survey the intricacies of the ripeness doctrine it is fair to say that its basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangl-
ing themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties. The problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.

As to the former factor, we believe the issues presented are appropriate for judicial resolution at this time. First, all parties agree that the issue tendered is a purely legal one: whether the statute was properly construed by the Commissioner to require the established name of the drug to be used every time the proprietary name is employed. Both sides moved for summary judgment in the District Court, and no claim is made here that further administrative proceedings are contemplated. It is suggested that the justification for this rule might vary with different circumstances, and that the expertise of the Commissioner is relevant to passing upon the validity of the regulation. This of course is true, but the suggestion overlooks the fact that both sides have approached this case as one purely of congressional intent, and that the Government made no effort to justify the regulation in factual terms.

Second, the regulations in issue we find to be “final agency action” within the meaning of § 10 of the Administrative Procedure Act, 5 U.S.C. § 704, as construed in judicial decisions. . . . The regulation challenged here, promulgated in a formal manner after announcement in the Federal Register and consideration of comments by interested parties is quite clearly definitive. . . . It was made effective upon publication, and the Assistant General Counsel for Food and Drugs stated in the District Court that compliance was expected.

The Government argues, however, that the present case can be distinguished from [prior] cases . . . on the ground that in those instances the agency involved could implement its policy directly, while here the Attorney General must authorize criminal and seizure actions for violations of the statute. In the context of this case, we do not find this argument persuasive. These regulations are not meant to advise the Attorney General, but purport to be directly authorized by the statute. Thus, if within the Commissioner’s authority, they have the status of law and violations of them carry heavy criminal and civil sanctions. Also, there is no representation that the Attorney General and the Commissioner disagree in this area; the Justice Department is defending this very suit. . . .

This is also a case in which the impact of the regulations upon the petitioners is sufficiently direct and immediate as to render the issue appropriate for judicial review at this stage. These regulations purport to give an authoritative interpretation of a statutory provision that has a direct effect on the day-to-day business of
all prescription drug companies; its promulgation puts petitioners in a dilemma that it was the very purpose of the Declaratory Judgment Act to ameliorate. As the District Court found on the basis of uncontested allegations, “Either they must comply with the every time requirement and incur the costs of changing over their promotional material and labeling or they must follow their present course and risk prosecution.” The regulations are clear-cut, and were made effective immediately upon publication; as noted earlier the agency’s counsel represented to the District Court that immediate compliance with their terms was expected. If petitioners wish to comply they must change all their labels, advertisements, and promotional materials; they must destroy stocks of printed matter; and they must invest heavily in new printing type and new supplies. The alternative to compliance – continued use of material which they believe in good faith meets the statutory requirements, but which clearly does not meet the regulation of the Commissioner – may be even more costly. That course would risk serious criminal and civil penalties for the unlawful distribution of “misbranded” drugs.

It is relevant at this juncture to recognize that petitioners deal in a sensitive industry, in which public confidence in their drug products is especially important. To require them to challenge these regulations only as a defense to an action brought by the Government might harm them severely and unnecessarily. Where the legal issue presented is fit for judicial resolution, and where a regulation requires an immediate and significant change in the plaintiffs’ conduct of their affairs with serious penalties attached to noncompliance, access to the courts under the Administrative Procedure Act and the Declaratory Judgment Act must be permitted, absent a statutory bar or some other unusual circumstance, neither of which appears here.

Finally, the Government urges that to permit resort to the courts in this type of case may delay or impede effective enforcement of the Act. We fully recognize the important public interest served by assuring prompt and unimpeded administration of the Pure Food, Drug, and Cosmetic Act, but we do not find the Government’s argument convincing. First, in this particular case, a pre-enforcement challenge by nearly all prescription drug manufacturers is calculated to speed enforcement. If the Government prevails, a large part of the industry is bound by the decree; if the Government loses, it can more quickly revise its regulation.

The Government contends, however, that if the Court allows this consolidated suit, then nothing will prevent a multiplicity of suits in various jurisdictions challenging other regulations. The short answer to this contention is that the courts are well equipped to deal with such eventualities. The venue transfer provision may be invoked by the Government to consolidate separate actions. Or,
actions in all but one jurisdiction might be stayed pending the conclusion of one proceeding. A court may even in its discretion dismiss a declaratory judgment or injunctive suit if the same issue is pending in litigation elsewhere. In at least one suit for a declaratory judgment, relief was denied with the suggestion that the plaintiff intervene in a pending action elsewhere.

Further, the declaratory judgment and injunctive remedies are equitable in nature, and other equitable defenses may be interposed. If a multiplicity of suits are undertaken in order to harass the Government or to delay enforcement, relief can be denied on this ground alone. The defense of laches could be asserted if the Government is prejudiced by a delay. And courts may even refuse declaratory relief for the nonjoinder of interested parties who are not, technically speaking, indispensable.

In addition to all these safeguards against what the Government fears, it is important to note that the institution of this type of action does not by itself stay the effectiveness of the challenged regulation. There is nothing in the record to indicate that petitioners have sought to stay enforcement of the “every time” regulation pending judicial review. If the agency believes that a suit of this type will significantly impede enforcement or will harm the public interest, it need not postpone enforcement of the regulation and may oppose any motion for a judicial stay on the part of those challenging the regulation. It is scarcely to be doubted that a court would refuse to postpone the effective date of an agency action if the Government could show, as it made no effort to do here, that delay would be detrimental to the public health or safety.

Lastly, although the Government presses us to reach the merits of the challenge to the regulation in the event we find the District Court properly entertained this action, we believe the better practice is to remand the case to the Court of Appeals for the Third Circuit to review the District Court’s decision that the regulation was beyond the power of the Commissioner.

[Justice Fortas, concurring in Toilet Goods – the next case, and dissenting in Abbott Labs.]

The Court, by today’s decisions . . . has opened Pandora’s box. Federal injunctions will now threaten programs of vast importance to the public welfare. . . . [The majority] appear[s] to proceed on the principle that . . . exercise of judicial power to enjoin allegedly erroneous regulatory action is permissible unless Congress has explicitly prohibited it, provided only that the controversy is “ripe” for judicial determination. . . . I believe that this approach . . . unwisely gives individual federal district judges a roving commission to halt the regulatory process, and to do so on the basis of abstractions and generalities instead of concrete fact situations. . . .
The Court . . . moved by petitioners’ claims as to the expense and inconvenience of compliance . . . says that this confronts the manufacturer with a “real dilemma.” But the fact of the matter is that the dilemma is no more than citizens face in connection with countless statutes and with the rules of the . . . other regulatory agencies. . . . Somehow, the Court has concluded that the damage to petitioners . . . outweighs the damage to the public of deferring during the tedious months and years of litigation a cure for the possible danger and asserted deceit of peddling plain medicine under fancy trademarks and for fancy prices which, rightly or wrongly, impelled the Congress to enact this legislation. I submit that a much stronger showing is necessary than the expense and trouble of compliance and the risk of defiance. . . . We should confine ourselves – as our jurisprudence dictates – to actual, specific, particularized cases and controversies . . . .

**Toilet Goods Association, Inc. v. Gardner**

*387 U.S. 158 (1967)*

[Justice Harlan] Petitioners in this case are the Toilet Goods Association, an organization of cosmetics manufacturers accounting for some 90% of annual American sales in this field, and 39 individual cosmetics manufacturers and distributors. They brought this action seeking declaratory and injunctive relief against the Secretary of Health, Education, and Welfare and the Commissioner of Food and Drugs, on the ground that certain regulations promulgated by the Commissioner exceeded his statutory authority . . . . The District Court held that the Act did not prohibit this type of preenforcement suit, that a case and controversy existed, that the issues presented were justiciable, and that no reasons had been presented by the Government to warrant declining jurisdiction on discretionary grounds. . . .

The regulation in issue here was promulgated under the Color Additive Amendments of 1960, a statute that revised . . . the authority of the Commissioner to control the ingredients added to foods, drugs, and cosmetics that impart color to them. The Commissioner of Food and Drugs, exercising power . . . “to promulgate regulations for the efficient enforcement” of the Act, issued the following regulation after due public notice and consideration of comments submitted by interested parties:

(a) When it appears to the Commissioner that a person has: . . .

(4) Refused to permit duly authorized employees of the Food and Drug Administration free access to all manufacturing facilities, processes, and
formulae involved in the manufacture of color additives and intermediates
from which such color additives are derived;

he may immediately suspend certification service to such person and may continue
such suspension until adequate corrective action has been taken.

The petitioners maintain that this regulation is an impermissible exercise of
authority, that the FDA has long sought congressional authorization for free access
to facilities, processes, and formulae, but that Congress has always denied the
agency this power except for prescription drugs. Framed in this way, we agree
with petitioners that a “legal” issue is raised, but nevertheless we are not per-
suaded that the present suit is properly maintainable.

In determining whether a challenge to an administrative regulation is ripe
for review a twofold inquiry must be made: first to determine whether the issues
tendered are appropriate for judicial resolution, and second to assess the hardship
to the parties if judicial relief is denied at that stage.

As to the first of these factors, we agree with the Court of Appeals that the
legal issue as presently framed is not appropriate for judicial resolution. This is
not because the regulation is not the agency’s considered and formalized determi-
nation, for we are in agreement with petitioners that . . . there can be no question
that this regulation – promulgated in a formal manner after notice and evaluation
of submitted comments – is a “final agency action” under § 10 of the Administra-
tive Procedure Act, 5 U.S.C. § 704. Also, we recognize the force of petitioners’
contention that the issue as they have framed it presents a purely legal question:
whether the regulation is totally beyond the agency’s power under the statute, the
type of legal issue that courts have occasionally dealt with without requiring a
specific attempt at enforcement, or exhaustion of administrative remedies.

These points which support the appropriateness of judicial resolution are,
however, outweighed by other considerations. The regulation serves notice
only that the Commissioner may under certain circumstances order inspection
of certain facilities and data, and that further certification of additives may be
refused to those who decline to permit a duly authorized inspection until they
have complied in that regard. At this juncture we have no idea whether or when
such an inspection will be ordered and what reasons the Commissioner will give
to justify his order. The statutory authority asserted for the regulation is the power
to promulgate regulations “for the efficient enforcement” of the Act. Whether the
regulation is justified thus depends not only, as petitioners appear to suggest,
on whether Congress refused to include a specific section of the Act authorizing
such inspections, although this factor is to be sure a highly relevant one, but
also on whether the statutory scheme as a whole justified promulgation of the
regulation. This will depend not merely on an inquiry into statutory purpose,
but concurrently on an understanding of what types of enforcement problems are encountered by the FDA, the need for various sorts of supervision in order to effectuate the goals of the Act, and the safeguards devised to protect legitimate trade secrets. We believe that judicial appraisal of these factors is likely to stand on a much surer footing in the context of a specific application of this regulation than could be the case in the framework of the generalized challenge made here.

We are also led to this result by considerations of the effect on the petitioners of the regulation, for the test of ripeness, as we have noted, depends not only on how adequately a court can deal with the legal issue presented, but also on the degree and nature of the regulation’s present effect on those seeking relief. The regulation challenged here is not [one] where the impact of the administrative action could be said to be felt immediately by those subject to it in conducting their day-to-day affairs.

This is not a situation in which primary conduct is affected – when contracts must be negotiated, ingredients tested or substituted, or special records compiled. This regulation merely states that the Commissioner may authorize inspectors to examine certain processes or formulae; no advance action is required of cosmetics manufacturers, who since the enactment of the 1938 Act have been under a statutory duty to permit reasonable inspection of a “factory, warehouse, establishment, or vehicle and all pertinent equipment, finished and unfinished materials; containers, and labeling therein.” Moreover, no irremediable adverse consequences flow from requiring a later challenge to this regulation by a manufacturer who refuses to allow this type of inspection. Unlike the other regulations challenged in this action, in which seizure of goods, heavy fines, adverse publicity for distributing “adulterated” goods, and possible criminal liability might penalize failure to comply, a refusal to admit an inspector here would at most lead only to a suspension of certification services to the particular party, a determination that can then be promptly challenged through an administrative procedure, which in turn is reviewable by a court. Such review will provide an adequate forum for testing the regulation in a concrete situation.

Underlying Case Documents

The case referenced:
The FDA regulations
Various provisions of the United States Code, available in the appendix to the opinion.
Concerned about the burgeoning rates of childhood obesity, the US Department of Agriculture in partnership with the US Food and Drug Administration (a sub-agency of the Department of Health and Human Services) promulgate a regulation requiring that all foods advertised primarily to children 16 years of age and under (including sugary breakfast cereals and convenience snack foods) contain new labeling disclosing detailed nutritional information and portion recommendations calibrated to children at ages 5, 10 and 15. The regulation includes penalty provisions that include the seizure and forfeiture by the manufacturers of all covered products in interstate commerce that fail to comply with the new labeling requirements. Assume that you are the attorney for the trade association representing the five largest producers of the food products covered by this new regulation and that your client wants to challenge the regulation immediately, before it is enforced. Is pre-enforcement judicial review available in this case? Why or why not?

1. In National Park Hospitality Association v. DOI, 538 U.S. 803, 807-08 (2003), the Court was asked to review a challenge to a National Park Service rule (found at 36 C.F.R. § 51.3) that requires concession operators to resolve all contractual disputes under Contract Disputes Act of 1978, 41 U.S.C. § 601 et seq. The rule stated the Park Service's policy but, arguably, did not change rights, contracts, licenses, or subject parties to civil or criminal liability. It did produce uncertainty for concessionaires, raise a purely legal issue, and constitute final agency action — but did not provide the facts needed to facilitate judicial review. A challenge to policy not applied in a specific case raises ripeness concerns. Given the absence of any current hardship or change in rights and the absence of a good factual record, the Court declared the matter to lack ripeness. The doctrine the Court provided — its most recent statement on ripeness — is straightforward:

Ripeness assessments are both judicial self-protection measures (waiting for cases to “be reduced to manageable proportions”) and based on the importance of avoiding interference with agency proceedings — much like finality, exhaustion, and primary jurisdiction. In Abbott Labs, was the proceeding manageable? How can review of an as-yet unenforced regulation be manageable? While the petitioners in Abbott Labs convinced the Court that they were in a tough position (expensive compliance or running the risk of a damaging enforcement proceeding), wouldn’t the case have been more focused had the Court waited for the dispute to ripen?
Ripeness is a justiciability doctrine designed “to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.” Abbott Laboratories v. Gardner, accord, Ohio Forestry Ass’n v. Sierra Club, 523 U.S. 726, 732-33 (1998). The ripeness doctrine is “drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction.” Reno v. Catholic Social Services, Inc., 509 U.S. 43, 57 n.18 (1993).

Determining whether administrative action is ripe for judicial review requires us to evaluate (1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration. Abbott Laboratories. “Absent [a statutory provision providing for immediate judicial review], a regulation is not ordinarily considered the type of agency action ‘ripe’ for judicial review under the [APA] until the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to the claimant’s situation in a fashion that harms or threatens to harm him. (The major exception, of course, is a substantive rule which as a practical matter requires the plaintiff to adjust his conduct immediately . . . .)” Lujan v. National Wildlife Federation, 497 U.S. 871, 891 (1990).

Hypothetical

The Federal Communications Commission receives a large number of complaints from citizens and civic organizations urging the agency to require broadcast television and radio stations to air a minimum amount of public affairs programming. They argue that as FCC licensees and public trustees transmitting over publicly owned airwaves, broadcasters are required by statute to air programming that covers local civic affairs and governance issues. Studies show that there has been a steep reduction in such local public affairs programming over the last two decades, leaving some localities with no such programming at all. In response, the FCC establishes “Public Affairs Programming Enforcement Thresholds,” which vary according to the size of the local community served by the broadcaster, and are the amounts above which the FCC will deem the broadcast licensee to be in compliance with its statutory obligations. Broadcast licensees who fail to air a quantity of local public affairs programming at or below the relevant enforcement threshold may be subjected to an FCC enforcement action, which could include a financial penalty or even revocation of the station license.
There are three potential plaintiffs: One is a trade association representing local broadcasters who argue that because local public affairs programming attracts very small audiences, compliance with the enforcement thresholds will cost local broadcasters unreasonably large amounts of lost advertising revenue. Another potential plaintiff is a coalition of citizens and local civic organizations, arguing that the enforcement thresholds are too low and will result in too modest of an increase in local public affairs programming. A third potential plaintiff is a coalition of libertarian free speech activists, which argues that the FCC’s new enforcement thresholds are obsolete in light of the vibrant new digital media marketplace and a violation of the First Amendment. If all three plaintiffs file court challenges against the FCC’s new enforcement thresholds, which of the three cases – if any – would be ripe for pre-enforcement review? Why? What additional information might you need?

2. Recently, in New York Civil Liberties Union v. Grandeau, 528 F.3d 122 (2d Cir. 2008), the court set out the distinction between the constitutional and prudential components of ripeness:

Both [criteria] are concerned with whether a case has been brought prematurely, but they protect against prematurity in different ways and for different reasons. The first of these ripeness requirements has as its source the Case or Controversy Clause of Article III of the Constitution, and hence goes, in a fundamental way, to the existence of jurisdiction. The second is a more flexible doctrine of judicial prudence, and constitutes an important exception to the usual rule that where jurisdiction exists a federal court must exercise it.

These two forms of ripeness are not coextensive in purpose. Constitutional ripeness is a doctrine that, like standing, is a limitation on the power of the judiciary. It prevents courts from declaring the meaning of the law in a vacuum and from constructing generalized legal rules unless the resolution of an actual dispute requires it. But when a court declares that a case is not prudentially ripe, it means that the case will be better decided later and that the parties will not have constitutional rights undermined.

Good Questions!

Is the prudential side of the ripeness calculus shorthand for “political” considerations? How are prudential considerations anything other than discretionary and subjective? Is there much of a difference between the discretion inherent in the power to grant or deny certiorari and in the prudential side of ripeness? If the prudential side of ripeness is a matter of judgment and discretion on the part of reviewing courts, does that undermine the APA “right” to judicial review for those aggrieved by agency action?
by the delay. It does not mean that the case is not a real or concrete dispute affecting cognizable current concerns of the parties within the meaning of Article III. . . . Prudential ripeness is, then, a tool that courts may use to enhance the accuracy of their decisions and to avoid becoming embroiled in adjudications that may later turn out to be unnecessary or may require premature examination of, especially, constitutional issues that time may make easier or less controversial. Simmonds v. INS, 326 F.3d 351, 356-57 (2d Cir. 2003).

This distinction is evident also in Suitum v. Tahoe Regional Planning Agency, 520 U.S. 725, 733 n.7 (1997) (ripeness is assessed “both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction”).

3. Can ripeness be used as an affirmative measure to compel judicial review? In Central Delta Water Agency v. Bureau of Reclamation (Central Delta III), 452 F.3d 1021 (9th Cir. 2006), the Plaintiffs, state agencies and commercial farmers, alleged that a plan approved by the U.S. Bureau of Reclamation violated the Central Valley Project Improvement Act (CVPIA), Pub. L. 102-575, 106 Stat. 4600 (1992), by creating a water control system that would, at some future point, contravene the Vernalis Salinity Standard. Using a finality analysis, the court found that despite the Bureau’s acknowledgment that they would likely violate the salinity standard, until the standard was actually violated the case was not final and not justiciable. In a note discussing this case, it is suggested that the court should have used a ripeness analysis, not finality. Had they done so, they would have realized that allowing the agency action to go forward, unchecked by judicial intervention, would lead to significant hardship. Elisabeth Skillen, Note, Central Delta Water Agency v. Bureau of Reclamation: How the Ninth Circuit Paved the Way for the Next Fish Kill, 34 Ecology L.Q. 979 (2007). Is the hardship element likely to be helpful to those seeking review – or to agencies claiming that they have done little more than announce a standard? What kind of hardship is required? Are costs alone enough? What about competitive disadvantage? What about damage to commercial reputation?

4. Ripeness issues at both the state and federal levels focus often on pre-enforcement reviews of agency policy statements and guidance documents. See, e.g., Christopher R. Pieper, Note, No Harm, No Rule: The Muddy Waters of Agency Policy Statements and Judicial Review Under the Missouri Administrative Procedure Act, 69 Mo. L. Rev. 731 (2004); Stephen M. Johnson, Good Guidance, Good Grief!, 72 Mo. L. Rev. 695 (2007). Abbott Labs opened the door to pre-enforcement review – but how do courts decide if the moment is right? In AT&T Corp. v. FCC, 349 F.3d 692, 699-700 (D.C. Cir. 2003), the court considered the adverse consequences of facing downstream litigation in the event a pre-enforcement review was not granted and held:
[T]he primary focus of the ripeness doctrine is to balance the petitioners' interest in prompt consideration of allegedly unlawful agency action against the agency's interest in crystallizing its policy before that policy is subject to review and the court's interest in avoiding unnecessary adjudication and in deciding issues in a concrete setting. . . . If the only hardship a claimant will endure as a result of delaying consideration of the disputed issue is the burden of having to engage in another suit, this will not suffice to overcome an agency's challenge to ripeness.

Interim plans, even those of great consequence and interest to a state and its citizens, are, more often than not, deemed unripe. For example, in Nevada v. DOE, 457 F.3d 78 (D.C. Cir. 2006), dismissed as moot, Nev. v. DOE, 2006 U.S. App. LEXIS 20689 (D.C. Cir., Aug. 9, 2006), the interim transportation plan to move hazardous plutonium across the State of Nevada to be stored in Yucca Mountain was deemed to be unripe. Based on the AT&T standard, what more is required for the harm to be "crystallized"?

5. In some areas, including election law and other first amendment fields, pre-enforcement review is more likely to be granted. In Shays v. FEC, 414 F.3d 76 (D.C. Cir. 2005), Judge Tatel set the stage for a pre-enforcement review:

A landmark reform to the nation's campaign finance laws, the Bipartisan Campaign Finance Reform Act (BCRA) of 2002, Pub. L. No. 107-155, 116 Stat. 81, took aim at two perceived demons of federal electoral contests: “soft money,” i.e., use of unregulated political party activities to influence federal elections, and “sham issue ads,” i.e., ostensibly issue-related advocacy functioning in practice as unregulated campaign advertising. These two tactics, given broad scope by permissive Federal Election Commission rulings, infused federal campaigns with hundreds of millions of dollars in federally unregulated funds, much of it contributed by corporations and labor unions. Now BCRA’s House sponsors (joined by Senate sponsors as amici) claim the FEC has undone their hard work, resurrecting in its regulations practices BCRA eradicated and thus forcing them to seek reelection in illegally constituted electoral contests. If true, given the pace of the electoral process, damage could have been irreparable in terms of the 2006 mid-term election. Moreover, there were “safe harbor” provisions in the law [that would ensure] that these questionable practices “will never be subject to enforcement proceedings.” (As noted earlier, good-faith reliance on FEC regulations affords a defense against FEC sanction, see 2 U.S.C. § 438(e).) For that very reason, moreover, the regulations also cause hardship. By removing certain conduct from any risk of enforcement, the challenged safe harbors establish “legal rights” to engage in that conduct, thus “creating adverse effects of a strictly legal kind.” See Ohio Forestry Ass’n v. Sierra Club, 523 U.S. 726, 733 (1998).

6. While we are absolutely certain you will see immediately the difference between Toilet Goods and Abbott Labs, keep in mind that the Toilet Goods Court found a matter unripe that was a purely legal question regarding an undeniably final agency action -- and finality is all the APA requires. Nevertheless, the Court decided to see what kinds of “enforcement problems are encountered by the FDA, the need for various sorts of supervision in order to effectuate the goals of the Act, and the
safeguards devised to protect legitimate trade secrets.” When would reasoning of this type not be applicable? Wouldn’t a court always have a better sense of “enforcement problems” after an enforcement action?

7. The options available to manufacturers the Court enumerates in Toilet Goods require considerable costs – denying an inspector admission, fighting out licensing cases at FDA, and risking suspension of certification are all risky – and yet they are characterized by the Court as merely an “inconvenience and possibly [a] hardship.” If there are clear legal questions with a newly announced standard, why wait for its first application? Every enforcement action can have reputational consequences – and for publicly held businesses, a pronounced effect on the value of its stock. If a regulation is problematic, are you convinced that judges in Article III courts should be free to balance multiple facts and deny review in the only forum available to challenge the executive assertions of power?

8. Texas Independent Producers & Royalty Owners Ass’n v. EPA, 413 F.3d 479 (5th Cir. 2005):

On March 9, 2005, EPA published a final rule . . . postponing the requirement for obtaining permit coverage for discharges associated with oil and gas construction activity that disturbs one to five acres of land from March 10, 2005 to June 12, 2006. Along with this rule, EPA published a statement that “within six months of [this] action, EPA intends to publish a notice of proposed rulemaking in the Federal Register for addressing these discharges and to invite public comments”. . . . EPA urges this Court to dismiss the petition for review as unripe because it has never issued a final rule with respect to the oil and gas exemption and, further, the Deferral Rule contemplates an additional evaluation and assessment of Section 402(l)(2) during the Deferral Period. . . .

[T]his case is not ripe for review . . . [I]t is clear to us that our ruling on this case would inappropriately interfere with administrative action. Given that EPA has specifically stated its intent to examine, during the Deferral Period, the issue of “how best to resolve questions posed by outside parties regarding section 402(l)(2) of the Clean Water Act”, any interpretation we would provide would necessarily prematurely cut off EPA’s interpretive process.

We are also unpersuaded that . . . the hardship faced by Petitioners at this time is sufficient to override the administrative body’s right to interpret the law. Given that the effective date of the permit requirement for Petitioners is now a year away, we are not convinced that Petitioners will suffer significant hardship if we decline to supersede the administrative process. Petitioners themselves, when discussing the nature of oil and gas exploration and production activities, explain that planning cannot be done far in advance, but rather that “the potential number and approximate location of the oil and gas wells is not known for a comparatively long time after drilling commences”. . . . Further, Petitioners state that “oil and gas activities do not have a long planning process, and instead proceed in a series of stops and starts dictated by the results of the last well and market conditions”. . . . Given this uncertain nature of the oil and gas industry, Petitioners have not demonstrated how a possible
change in permitting requirements a year from now could seriously affect an industry that, by its own admission, is unable to plan far in advance.

9. If you are experiencing some frustration in sorting out ripeness, finality, and standing, you are in good company. The Supreme Court recently concluded that in some instances, “the Article III standing and ripeness issues in this case boil down to the same question.” Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334, 2341 n.5 (2014) (internal quotation marks omitted). Your task is not aided by the practice of some agencies to announce major policy or doctrine in a format designed to block judicial review (guidances, press releases, manuals, interpretive rules, etc.) predicated, inter alia, on the problematic and limiting nature of current versions of ripeness and finality. For a critical look at this problem, see, Lars Noah, Governance by the Backdoor: Administrative Law(lessness?) at the FDA, 93 Neb. L. Rev. 89 (2014). Perhaps you will conclude, as some have, that ripeness has become little more than an argument heading in briefs (and later opinions) designed to limit or block judicial review of agency action. Michael M. Berger, The Ripeness Game: Why Are We Still Forced to Play?, 30 Touro L. Rev. 297 (2014).

### IV. Finality

Section 704 of the Administrative Procedure Act permits judicial review of “final agency action.” The Act permits challenges to intermediate and procedural matters decided in the course of an agency proceeding – but only at the conclusion of that proceeding. In Lujan v. National Wildlife Federation, 497 U.S. 871 (1990), the Department of the Interior’s Bureau of Land Management issued a “land withdrawal review” pertaining to the use of public land for certain commercial purposes, including resource exploitation, mineral removal, and agricultural purposes. When the Federation went to court to stop the Bureau of Land Management from facilitating the use of public land for private commercial gain, the agency responded by arguing that the land withdrawal system did not constitute final agency action. The Supreme Court agreed, holding that there was no “identifiable agency action” and equated the set of rules to general program announcements regarding “drug interdiction.” Presumably, in National Wildlife Federation, there was more to come – specifically the permission to individual contractors to make use of the specified land in question.

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**Key Concept**

Beyond the necessity of a “final agency action,” the finality doctrine generally requires action taken by one who can speak on behalf of and conclusively for the agency. Thus, determinations made by intermediary agency officials, regardless of their immediate effect, may well be deemed to lack finality.
In National Automatic Laundry & Cleaning Council v. Schultz, 443 F.2d 689 (D.C. Cir. 1971), the court held that an advice letter, even one that had significant consequences in an on-going proceeding, would not be presumed final if it had been signed by anyone other than the head of the agency. The court went on to note that an agency could, if it so chose, affirm the decision of an intermediary – but in the absence of that affirmation, the action is lacking in finality. The greater the latitude an agency has after the decision in question, the less likely the decision will be construed as final. Even if the decision comes from the head of the agency, if, in the end, it is a recommendation to the White House to take a particular action (a recommendation that can be accepted or rejected), then the action is construed to lack finality. See Franklin v. Massachusetts, 505 U.S. 788 (1992); and Dalton v. Specter, 511 U.S. 462 (1964).

If one is free to choose between compliance and noncompliance, it would be difficult to argue that one is “bound” by the decision of the agency. See Franklin v. Massachusetts, 505 U.S. 788, 798 (1992); Invention Submission Corp. v. Rogan, 357 F.3d 452 (4th Cir. 2004), and Ipharmacy.md v. Mukasey, 268 Fed. Appx. 876 (11th Cir. 2008). In Flue-Cured Tobacco Cooperative Stabilization v. EPA, 313 F.3d 852 (4th Cir. 2002), the Fourth Circuit found nonreviewable an EPA report that determined that exposure to “second hand smoke” produces a profound health hazard. After the report issued, a number of states began programs to ban smoking in restaurants and other places of public accommodation, predicated in part on the report. Nevertheless, when the report was challenged by the tobacco industry, the court found that the report had no immediate legal effect but was rather a presentation of information.

**National Association of Homebuilders v. United States Army Corps of Engineers**

417 F.3d 1272 (D.C. Cir. 2005)

[JUDGE HENDERSON] The [Clean Water Act] CWA aims to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters” . . . . The
CWA divides the authority to issue permits to discharge pollutants between the United States Environmental Protection Agency and the . . . Army . . . Corps [of Engineers]. Responsibility for the day-to-day administration of the permitting . . . falls to the Corps . . .

[To issue] a permit under section 404 of the CWA . . . on a class-wide (“general permit”) . . . basis . . . the Corps must “determine that the activities . . . will cause only minimal adverse environmental effects . . . and will have only minimal cumulative adverse effect on the environment.” 33 U.S.C. § 1344(e)(1). A general permit has a statutorily-limited lifespan i.e., no longer than five years . . . . The Corps’ individual permit process is, by contrast, “a longer, more comprehensive procedure.” . . .

[A] party desiring to discharge fill or dredged material into our nation’s navigable waters may do so in either of two ways. If the proposed discharge activity is covered by a general permit, the party may proceed without obtaining an individual permit or, in some cases, even without giving the Corps notice of the discharge. On the other hand, if the proposed discharge is not covered by a general permit, the party must secure an individual permit before undertaking the discharge . . . . There are currently 43 [Nationwide Permits (NWPs) in force. NWPs are a type of general permit. They cover] activities ranging from “Single-family Housing” (NWP 29) to “Mining Activities” (NWP 44) to “Cranberry Production Activities” (NWP 34) . . . . In 1996, the Corps proposed to reissue a number of existing NWPs, albeit with modifications, that were otherwise set to expire on January 21, 1997 . . .

Following public comment, the Corps decided to replace NWP 26[, which had allowed discharge of fill material in up to ten acres of wetlands,] with “activity-specific” general permits. To allow ample time to develop replacement permits, however, it reissued NWP 26 for a two-year period but with more stringent conditions. In July 1998, the Corps published a proposed suite of activity-specific general permits to replace NWP 26, and extended, once more, the life of NWP 26 until December 30, 1999 “or the effective date of the new and modified NWPs, whichever comes first” . . . [T]he Corps also reissued the NWP regarding single-family housing (NWP 29), but reduced the authorized maximum acreage impact from one-half to one-quarter acre.

. . . In March 2000, following another round of public comment, the Corps promulgated activity-specific permits consisting of five new NWPs and six modified NWPs, all intended to replace NWP 26. With some of the activity-specific NWPs, the Corps reduced the authorized maximum per-project acreage impact from ten acres to one-half acre and required preconstruction notification for impacts greater than one-tenth acre . . . . [The effect of these new regulations
was to limit opportunity to develop commercial and residential property, pleasing environmentalists and frustrating developers.]

. . . The National Resources Defense Council and the Sierra Club . . . intervened in the district court [challenge] in support of the Corps. . . . In November 2003, the district court granted summary judgment to the Corps, concluding that “the Corps’ issuance of the new NWPs and general conditions, while constituting the completion of a decisionmaking process, does not constitute a ‘final’ agency action because no legally binding action has taken place as to any given project until either an individual permit application is denied or an enforcement action is instituted.” . . . The appellants now appeal the district court’s judgment . . . .

Where, as here, no more specific statute provides for judicial review, the APA empowers a federal court to review a “final agency action for which there is no other adequate remedy in a court.” 5 U.S.C. § 704. “Two conditions,” the United States Supreme Court tells us, “must be satisfied for agency action to be ‘final.’” *Bennett v. Spear.* “First, the action must mark the consummation of the agency’s decisionmaking process – it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow.” In other words, an agency action is final if, as the Supreme Court has said, it is “‘definitive’ and has a ‘direct and immediate . . . effect on the day-to-day business’ of the party challenging it”; or if, as our court has said, “it imposes an obligation, denies a right or fixes some legal relationship.” There can be little doubt that under these standards the Corps’ issuance of the NWPs challenged by the appellants constitutes final agency action subject to judicial review.

We need not tarry long on the finality test’s first prong; plainly, the Corps’ issuance of the revised NWPs “marks the consummation of decisionmaking process.” *Bennett.* There is nothing “tentative” or “interlocutory” about the issuance of permits allowing any party who meets certain conditions to discharge fill and dredged material into navigable waters. The intervenors argue, however, that, by “setting terms and conditions for NWPs, the Corps did not finally decide that a would-be discharger must comply with those terms and conditions, nor did the Corps finally deny authorization for discharges that exceed those terms and conditions.” . . . The district court similarly opined that a party whose activities do not meet the conditions set by the NWPs has not been “denied anything until [she] has exhausted all of [her] permit options.” . . .

But the NWPs do not simply work a change in the Corps’ permitting procedures, thereby disadvantaging some within the class of would-be dischargers. The NWPs are not a definitive, but otherwise idle, statement of agency policy – they
carry easily-identifiable legal consequences for the appellants and other would-be dischargers. Admittedly, our precedent announces no self-implementing, bright-line rule in this regard; the finality inquiry is a “pragmatic” and “flexible” one.

[T]he Corps’ issuance of NWPs likewise satisfies the second prong of the finality test. To our mind, all three constitute challenges to agency action “with legal consequences that are binding on both petitioners and the agency.” The Corps’ NWPs create legal rights and impose binding obligations insofar as they authorize certain discharges of dredged and fill material into navigable waters without any detailed, project-specific review by the Corps’ engineers. The “direct and immediate” consequence of these authorizations for the appellants’ “day-to-day business” is not hard to understand: While some builders can discharge immediately, others cannot.

. . . Because the Corps’ NWPs mark the completion of the Corps’ decision-making process and affect the appellants’ day-to-day operations, they constitute final agency action regardless of the fact that the Corps’ action might carry different (or no) consequences for a different challenger, such as an environmental group. In any event, the notion that “would-be dischargers” like the appellants nevertheless “remain free to pursue an individual or general permit” suggests a ripeness – not a finality – problem.


The Medical Committee for Human Rights acquired by gift five shares of stock in Dow Chemical Co. In March 1968, the Committee’s national chairman wrote a letter to the company . . . request[ing] that there be included in the company’s proxy statement for 1968 a proposal to amend Dow’s Certificate of Incorporation to prohibit the sale of napalm unless the purchaser gives reasonable assurance that the napalm will not be used against human beings. Dow replied that the proposal was too late for inclusion in the 1968 proxy statement . . . , but that it would be reconsidered the following year . . . . On February 7, 1969, Dow responded that it intended to omit the proposal . . . from the 1969 statement under the authority of . . . the SEC Rule . . . that permitted omission of shareholder proposals . . . “[i]f it clearly appears that the proposal is submitted by the security holder primarily for the purpose of . . . promoting . . . social . . . causes” . . . .

The Committee requested that Dow’s decision be reviewed by the . . . SEC. On February 18, 1969, the Chief Counsel for the Division of Corporation Finance wrote both Dow and the Committee to inform them that “this Division will not recommend any action to the Commission if this proposal is omitted from the management’s proxy material.” The SEC Commissioners granted a request by the Committee that they review the Division’s decision and affirmed it . . . .

On July 8, 1970, the Court of Appeals held that the decision of the SEC was reviewable [but] that the case should be remanded to the Commission for reconsideration and
a statement of reasons. The Commission petitioned for review here, and we granted certiorari . . . . [However, in] January 1971, the Medical Committee again submitted its napalm resolution for inclusion in Dow's 1971 proxy statement. This time Dow acquiesced . . . . Less than 3% of all voting shareholders supported it, and [so] Dow may exclude the same or substantially the same proposal from its proxy materials for the next three years. We find that this series of events has mooted the controversy.


On November 19, 1971, petitioner, a . . . stockholder of the Washington Post Company, informed the company[] of his intention to submit three proposals . . . for consideration at the 1972 annual meeting of stockholders. . . . The company, following [proper] procedure . . . ., informed the [Securities and Exchange] Commission's Division of Corporate Finance of its intention to omit petitioner's proposals from its 1972 proxy statements, and sought confirmation that the Division would not urge action by the Commission on that account. Petitioner filed memoranda and supporting materials in opposition to the request for a no-action decision.

The Division issued a letter opinion on March 8, 1972, stating that it would not recommend that the Commission take enforcement action . . . . Petitioner then asked the Commission to reexamine the Division's ruling, but was later informed that the Commission “declined to review the staff's position . . . .” This petition for review followed.

Our authority to directly review Commission action springs solely from Section 25(a) of the Securities Exchange Act of 1934, which confines our jurisdiction to “[orders] issued by the Commission . . . .” We think members of the Commission's staff, like staff personnel of other agencies, “have no authority individually or collectively to make ‘orders,’” and that, on the contrary, “only the Commission makes orders.” Here the Commission made no order on the merits of petitioner's claim; rather, it emphatically “declined to review the staff's position.” It follows that what petitioner seeks to have reviewed in this court is not an “order issued by the Commission.” See *National Automatic Laundry & Cleaning Council v. Shultz*, 443 F.2d 689 (1971), wherein we drew a clear line between opinions reflecting the definitive views of an agency head and the considerably less authoritative rulings by subordinate officials.

We are mindful that administrative inaction may become judicially cognizable [b]ut assuming, without deciding, that the refusal is otherwise encompassed by [the statute], we are not at liberty to override it.

“Agency action,” as defined in the Administrative Procedure Act, “includes . . . . failure to act,” 5 U.S.C. § 551(13), and the Act commands the reviewing court to “compel agency action unlawfully withheld or unreasonably delayed.” § 706(1). . . .

An agency's decision to refrain from an investigation or an enforcement action is generally unreviewable and, as to the agency before us, the specifications of the Act leave no doubt on that score. . . . The Commission offers informal advice by its staff on a vast number of proxy solicitations. Sheer volume of this wholesome activity belies Commission review in every such instance. . . . And finding no legal fault in the Commission's discretionary exercise here, we are powerless to upset it.
V. Preclusion of Judicial Review

The Administrative Procedure Act sets out two situations where judicial review is precluded: Where agency action is committed to the discretion of the agency by law, and statutory preclusion. The study of preclusion is focused on the exceptional circumstance in which the protections promised in §§ 701-706 of the APA are limited or blocked completely.

While Congress anticipated that in some instances agency action would not be subject to judicial scrutiny, that does not address the constitutional argument that a judicial “check” ought to be available to “balance” against arbitrary or unsubstantiated executive action. In United States v. Mendoza-Lopez, 481 U.S. 828 (1987), the Court found that where fundamental interests were at stake — in that instance a deportation case — exclusion of all judicial review was arguably unconstitutional. That case notwithstanding, the Supreme Court has not declared unconstitutional on its face a statute that precludes judicial review. The D.C. Circuit has held that a statute would be constitutionally suspect if it precludes all judicial review in “any forum — federal, state or agency — [required] for the resolution of a federal constitutional claim.” Bartlett v. Bowen, 816 F.2d 695, 703 (D.C. Cir. 1987); Adair v. Winter, 451 F. Supp. 2d 210, 216-17 (D.C. Cir. 2006).

There is then a “strong presumption” that judicial review of administrative action will be available. INS v. St. Cyr, 533 U.S. 289 (2001); McNary v. Haitian Refugee Center, Inc., 498 U.S. 479, 498 (1991); Webster v. Doe, 486 U.S. 592, 603 (1988); and Artichoke Joe’s v. Norton, 216 F. Supp. 2d 1084 (E.D. Cal. 2002). That “strong presumption” is capable of being set aside if there is a “persuasive reason” to believe that Congress meant to limit or prohibit entirely judicial review. Love v. Thomas, 858 F.2d 1347 (9th Cir. 1988). For a recent discussion of this, see Bredesen v. Rumsfeld, 500 F. Supp. 2d 752 (M.D. Tenn. 2007).

Since Abbott Labs, an agency needs to show by “clear and convincing evidence” if judicial review is precluded. Later cases suggest an agency must put forward a “persuasive reason” to demonstrate that review should not be available. Even in those cases where judicial review appears to be limited by statute, there has always been the possibility of attacking the general scheme of decisionmaking, as opposed to individual determinations.

For More Information

In *Johnson v. Robison*, 415 U.S. 361 (1974), the Court dealt with a statute that gave the Veterans Administration the right to make “final and conclusive” determinations regarding certain benefits. The statute went on to note that no court would have the “power or jurisdiction” to review such decisions. Even with that language, the *Robison* Court permitted limited judicial review by allowing the claimant to challenge the entire scheme for allocating certain veterans’ benefits, as opposed to merely review of an individual benefit determination.

Ten years after *Robison*, the Court decided that preclusion of review required an assessment of whether the intention to limit review was “fairly discernible” from the statute in issue. (*Block*, below.) The “fairly discernible” test is fuzzier than the earlier “clear and convincing” language, and has given rise to a good deal of litigation regarding the extent to which Congress intends to block completely access to the courts.

One of the areas where preclusion of judicial review is most likely is in allocation of individual financial benefits in various federally funded programs, such as Medicare, veterans’ claims, and other forms of public assistance. The idea is fairly straight-forward: If the sole basis for a challenge is that the claimant believes an insufficient amount of money has been allocated, the appellate process will devolve into nothing more than a factual review – *de novo* – of an agency determination.

In *Shalala v. Illinois Council on Long Term Care*, 529 U.S. 1 (2000), the Court produced a new test for analyzing congressional intent regarding preclusion of judicial review, the “channeling” test. In effect, *Shalala* asks courts to determine if Congress “channeled” claimants into a specific administrative process that was either terminal or required completion (exhaustion) prior to consideration of judicial review.

The discussion thus far has focused on statutory preclusion. Review can also be precluded where there is “agency action committed to agency discretion by law” – a standard that seems counter-intuitive. After all, a great deal of this field involves determinations committed to the discretion of the agency (outside of clear and unambiguous statutory directives). Accordingly, abuse of discretion (§706 of the APA) is one of the fundamental tests used for judicial review.

Generally speaking, this is an extremely limited exception applicable only when there is “no law to apply,”
Finally, preclusion of judicial review questions are linked directly with the problems associated with compelling an agency to act. For the most part, the decision to move forward with an enforcement action or with a rulemaking is vested to the discretion of the agency and is nonreviewable. *Heckler v. Chaney*. Most mandamus cases explore the expansive discretion permitted for agency action, and agonize over the question whether a court should step in and compel an agency to act when it has delayed or otherwise resisted what it is required to do. *Telecommunications Research & Action Center v. FCC*, 750 F.2d 70 (D.C. Cir. 1984) (“TRAC”).

As you read the cases that follow, keep in mind that preclusion of judicial review is the exception, not the norm.

**Bowen v. Michigan Academy of Family Physicians**

476 U.S. 667 (1986)

[Justice Stevens] The question presented in this case is whether Congress [statutorily] barred judicial review of regulations promulgated under Part B of the Medicare program.

Respondents, who include an association of family physicians and several individual doctors, filed suit to challenge the validity of 42 C.F.R. § 405.504(b) (1985) . . . The District Court held that the regulation contravened several provisions of the statute governing the Medicare program:

There is no basis to justify the segregation of allopathic family physicians from all other types of physicians. Such segregation is not rationally related to any legitimate purpose of the Medicare statute. To lump MDs who are family physicians, but who have chosen not to become board certified family physicians for whatever motive, with chiropractors, dentists, and podiatrists for the purpose of determining Medicare reimbursement defies all reason . . .

The Court of Appeals agreed with the District Court that the Secretary’s regulation was “[obviously inconsistent] with the plain language of the Medicare statute” and held that “this regulation is irrational and is invalid. . . .”

The Secretary of Health and Human Services . . . renews the contention, rejected by both the District Court and the Court of Appeals, that Congress has forbidden judicial review of all questions affecting the amount of benefits payable under Part B of the Medicare program. . . . We [disagree].
We begin with the strong presumption that Congress intends judicial review of administrative action. From the beginning “our cases [have established] that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress.” In *Marbury v. Madison*, a case itself involving review of executive action, Chief Justice Marshall insisted that “very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws.” . . . Committees of both Houses of Congress have endorsed this view. . . . [During] the passage of the Administrative Procedure Act (APA), the Senate Committee on the Judiciary remarked:

> Very rarely do statutes withhold judicial review. It . . . could not be otherwise, for in such a case statutes would in effect be blank checks drawn to the credit of some administrative officer or board.

> [It is understood] that “only upon a showing of ‘clear and convincing evidence’ of a contrary legislative intent should the courts restrict access to judicial review.” This standard has been invoked time and again when considering whether the Secretary has discharged “the heavy burden of overcoming the strong presumption that Congress did not mean to prohibit all judicial review of his decision.”

Subject to constitutional constraints, Congress can, of course, make exceptions to the historic practice whereby courts review agency action. The presumption of judicial review is, after all, a presumption, and “like all presumptions used in interpreting statutes, may be overcome by,” *inter alia*, “specific language or specific legislative history that is a reliable indicator of congressional intent,” or a specific congressional intent to preclude judicial review that is “‘fairly discernible’ in the detail of the legislative scheme.” n.4

n.4 The congressional intent necessary to overcome the presumption may also be inferred from contemporaneous judicial construction barring review and the congressional acquiescence in it or from the collective import of legislative and judicial history behind a particular statute. . . .

In this case, the Government asserts that two statutory provisions remove the Secretary’s regulation from review under the grant of general federal-question jurisdiction found in 28 U.S.C. § 1331. First, the Government contends that 42 U.S.C. § 1395ff(b), which authorizes “Appeal by individuals,” impliedly forecloses administrative or judicial review of any action taken under Part B of the Medicare program by failing to authorize such review while simultaneously authorizing administrative and judicial review of “any determination . . . as to . . . the amount of benefits under part A.” Second, the Government asserts that
42 U.S.C. § 1395ii . . . expressly precludes all administrative or judicial review not otherwise provided in that statute. We find neither argument persuasive.

II

Section 1395ff on its face is an explicit authorization of judicial review, not a bar. As a general matter, “[t]he mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to others. The right to review is too important to be excluded on such slender and indeterminate evidence of legislative intent.”

In the Medicare program, however, the situation is somewhat more complex. Under Part B of that program, which is at issue here, the Secretary contracts with private health insurance carriers to provide benefits for which individuals voluntarily remit premiums. This optional coverage, which is federally subsidized, supplements the mandatory institutional health benefits (such as coverage for hospital expenses) provided by Part A. Subject to an amount-in-controversy requirement, individuals aggrieved by delayed or insufficient payment with respect to benefits payable under Part B are afforded an “opportunity for a fair hearing by the carrier,” in comparison, and subject to a like amount-in-controversy requirement, a similarly aggrieved individual under Part A is entitled “to a hearing thereon by the Secretary . . . and to judicial review.” “In the context of the statute’s precisely drawn provisions,” we held in United States v. Erika, Inc., that the failure “to authorize further review for determinations of the amount of Part B awards . . . provides persuasive evidence that Congress deliberately intended to foreclose further review of such claims.” . . .

Respondents’ federal-court challenge to the validity of the Secretary’s regulation is not foreclosed by § 1395ff as we construed that provision in Erika. The reticulated statutory scheme, which carefully details the forum and limits of review of . . . the “amount of . . . payment” of benefits under Part B, simply does not speak to challenges mounted against the method by which such amounts are to be determined rather than the determinations themselves. As the Secretary has made clear, “the legality, constitutional or otherwise, of any provision of the Act or regulations relevant to the Medicare Program” is not considered in a “fair hearing” held by a carrier to resolve a grievance related to a determination of the amount of a Part B award. As a result, an attack on the validity of a regulation is not the kind of administrative action . . . with respect to which the Act impliedly denies judicial review.

That Congress did not preclude review of the method by which Part B awards are computed (as opposed to the computation) is borne out by the very legislative history we found persuasive in Erika. The Senate Committee Report on the original 1965 legislation reveals an intention to preclude “judicial review of a determin-
nation concerning the amount of benefits under part B where claims will probably be for substantially smaller amounts than under part A.” . . . The legislative history of the pertinent 1972 amendment likewise reveals that judicial review was precluded only as to controversies regarding determinations of amounts of benefits. . . . Senator Bennett’s introductory explanation to the amendment confirms that preclusion of judicial review of Part B awards – designed “to avoid overloading the courts with quite minor matters” – embraced only “decisions on a claim for payment for a given service.” . . . As we found in Erika, Congress has precluded judicial review only “of adverse hearing officer determinations of the amount of Part B payments.”

Careful analysis of the governing statutory provisions and their legislative history thus reveals that Congress intended to bar judicial review only of determinations of the amount of benefits to be awarded under Part B. Congress delegated this task to carriers who would finally determine such matters in conformity with the regulations and instructions of the Secretary. We conclude, therefore, that those matters which Congress did not leave to be determined in a “fair hearing” conducted by the carrier – including challenges to the validity of the Secretary’s instructions and regulations – are not impliedly insulated from judicial review by 42 U.S.C. § 1395ff.

III

[M]atters which Congress did not delegate to private carriers, such as challenges to the validity of the Secretary’s instructions and regulations, are cognizable in courts of law. . . . [W]e will not indulge the Government’s assumption that Congress contemplated review by carriers of “trivial” monetary claims, but intended no review at all of substantial statutory and constitutional challenges to the Secretary’s administration of Part B of the Medicare program. This is an extreme position . . . We ordinarily presume that Congress intends the executive to obey its statutory commands and, accordingly, that it expects the courts to grant relief when an executive agency violates such a command. That presumption has not been surmounted here. The judgment of the Court of Appeals is affirmed.

1. In Giesse v. Sec’y of the HHS, 522 F.3d 697 (6th Cir. 2008), the

   [p]laintiff . . . filed a suit [for] wrongful termination of medical care. Plaintiff . . . alleges constitutional claims, and because these claims are “wholly collateral” to his administrative claims, plaintiff contends that his federal claims do not “arise under” the Medicare Act, and [are reviewable]. . . . We disagree . . .

affected by Medicare administrative determinations may sue in federal court under 28 U.S.C. § 1331, bypassing § 405 preclusion, only where requiring agency review pursuant to § 405(h) would mean no review at all.” This exemption, however, should not serve to circumvent established mechanisms of judicial review. In determining whether the Michigan Academy exception applies to a particular case, this court “must examine whether [the plaintiff] is simply being required to seek review first through the agency or is being denied altogether the opportunity for judicial review.” . . .

A constitutional challenge is not likely to succeed unless review is denied in every “forum, federal, state or agency. . . .” Adair v. Winter, 451 F. Supp. 2d 210, 216 (D.D.C. 2006). Of what value is administrative review of administrative agency action – and how does that provide a check?

2. In High Country Citizens Alliance v. Clarke, 454 F.3d 1177 (10th Cir. 2006), the court found:

To overcome the presumption of reviewability, an intent to preclude judicial review must be “fairly discernible” from the statutory scheme. Ass’n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150 (1970). . . . [That can be] inferred from contemporaneous judicial construction barring review and the congressional acquiescence in it. . . . or from the collective import of legislative and judicial history behind a particular statute [or] by inferences of intent drawn from the statutory scheme as a whole. Block, 467 U.S. at 349.

Why trust something of such great consequence as preclusion of judicial review to an analysis of something as easily manipulated as legislative history? This is not an area about which Congress is unaware – why not block review only when the preclusion is explicit? In Exxon Mobil Corp. v. Allapattah Servs., 545 U.S. 546, 568-69 (2005), the Court noted: “Judicial investigation of legislative history has a tendency to become, to borrow Judge Leventhal’s memorable phrase, an exercise in ‘looking over a crowd and picking out your friends.’” See Wald, Some Observations on the Use of Legislative History in the 1981 Supreme Court Term, 68 Iowa L. Rev. 195, 214 (1983).


When a court considers . . . preclusion . . . judicial review . . . will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress.” Abbott Labs. v. Gardner. . . .

[In footnotes, the court explained that to test if preclusion is present, courts use the] “clear and convincing evidence” [test, which is not meant in the strict evidentiary sense . . . but rather serves as a reminder that courts should decline to review a cause of action only where Congress has clearly exhibited its intent to preclude that cause of action. . . .
[However, the] Supreme Court has recognized the “longstanding principle that a statute whose provisions are finely wrought may support the preclusion of judicial review, even though that preclusion is only by negative implication.” Shalala v. Ill. Council on Long Term Care, Inc., 529 U.S. 1, 34 n.3 (2000). . . .

How do you define “negative implication”? It cannot mean that if review is not mentioned it is precluded – but what does it mean? See, e.g., United States v. Fausto, 484 U.S. 439, 452 (1988).

**BLOCK v. COMMUNITY NUTRITION INSTITUTE**


[Justice O’Connor] This case presents the question whether ultimate consumers of dairy products may obtain judicial review of milk market orders issued by the Secretary of Agriculture (Secretary) under the authority of the Agricultural Marketing Agreement Act of 1937 (Act) . . . .

I

A

[T]he 1937 Act authorizes the Secretary to issue milk market orders setting the minimum prices that handlers (those who process dairy products) must pay to producers (dairy farmers) for their milk products. 7 U.S.C. § 608c. The “essential purpose [of the milk market order scheme is] to raise producer prices,” S. Rep. No. 1011, 74th Cong., 1st Sess., 3 (1935) . . . . [T]he Secretary must conduct an appropriate rulemaking proceeding before issuing a milk market order. The public must be notified of these proceedings and provided an opportunity for public hearing and comment. . . . [B]efore any market order may become effective, it must be approved by the handlers of at least 50% of the volume of milk covered by the proposed order and at least two-thirds of the affected dairy producers in the region. If the handlers withhold their consent, the Secretary may nevertheless impose the order. But the Secretary’s power to do so is conditioned upon at least two-thirds of the producers consenting to its promulgation and upon his making an administrative determination that the order is “the only practical means of advancing the interests of the producers.”

. . . .

[Under this statutory scheme], the Secretary has regulated the price of “reconstituted milk” – that is, milk manufactured by mixing milk powder with water – since 1964. The Secretary’s orders assume that handlers will use reconstituted milk to manufacture surplus milk products. . . . The compensatory payment is equal to the difference between the Class I and Class II milk product prices.
Handlers make . . . payments [pursuant to the orders of the Secretary] to the regional pool, from which moneys are then distributed to producers of fresh fluid milk in the region where the reconstituted milk was manufactured and sold.

B

In December 1980, respondents brought suit in District Court, contending that the compensatory payment requirement makes reconstituted milk uneconomical for handlers to process. Respondents . . . included three individual consumers of fluid dairy products, a handler regulated by the market orders, and a nonprofit organization. The District Court concluded that the consumers and the nonprofit organization did not have standing to challenge the market orders. In addition, it found that Congress had intended by the Act to preclude such persons from obtaining judicial review. . . . The Court of Appeals . . . reversed [and w]e granted certiorari to resolve the conflict in the Circuits. We now reverse the judgment of the Court of Appeals in this case.

[T]he APA confers a general cause of action upon persons “adversely affected or aggrieved by agency action within the meaning of a relevant statute,” 5 U.S.C. § 702, but withdraws that cause of action to the extent the relevant statute “[precludes] judicial review,” 5 U.S.C. § 701(a)(1). Whether and to what extent a particular statute precludes judicial review is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved. Therefore, we must examine this statutory scheme “to determine whether Congress precluded all judicial review, and, if not, whether Congress nevertheless foreclosed review to the class to which the [respondents belong].”

It is clear that Congress did not intend to strip the judiciary of all authority to review the Secretary’s milk market orders. . . . [It did, however,] limit the classes entitled to participate in the development of market orders. . . . Nowhere in the Act . . . is there an express provision for participation by consumers in any proceeding. In a complex scheme of this type, the omission of such a provision is sufficient reason to believe that Congress intended to foreclose consumer participation in the regulatory process.

To be sure, the general purpose sections of the Act allude to general consumer interests. But the preclusion issue does not only turn on whether the interests of a particular class like consumers are implicated. Rather, the preclusion issue turns ultimately on whether Congress intended for that class to be relied upon to challenge agency disregard of the law. The structure of this Act indicates that Congress intended only producers and handlers, and not consumers, to ensure that the statutory objectives would be realized. . . . Congress channelled disputes concern-
ing marketing orders to the Secretary in the first instance because it believed that only he has the expertise necessary to illuminate and resolve questions about them. Had Congress intended to allow consumers to attack provisions of marketing orders, it surely would have required them to pursue the administrative remedies provided in § 608c(15)(A) as well. The restriction of the administrative remedy to handlers strongly suggests that Congress intended a similar restriction of judicial review of market orders.

Allowing consumers to sue the Secretary would . . . provide handlers with a convenient device for evading the statutory requirement that they first exhaust their administrative remedies. A handler may also be a consumer and, as such, could sue in that capacity. Alternatively, a handler would need only to find a consumer who is willing to join in or initiate an action in the district court. The consumer or consumer-handler could then raise precisely the same exceptions that the handler must raise administratively. Consumers or consumer-handlers could seek injunctions against the operation of market orders that “impede, hinder, or delay” enforcement actions, even though such injunctions are expressly prohibited in proceedings properly instituted under 7 U.S.C. § 608c(15). Suits of this type would effectively nullify Congress’ intent to establish an “equitable and expeditious procedure for testing the validity of orders, without hampering the Government’s power to enforce compliance with their terms.” For these reasons, we think it clear that Congress intended that judicial review of market orders issued under the Act ordinarily be confined to suits brought by handlers . . . .

The presumption favoring judicial review of administrative action is just that – a presumption. This presumption, like all presumptions used in interpreting statutes, may be overcome by specific language or specific legislative history that is a reliable indicator of congressional intent. . . . [T]he presumption favoring judicial review of administrative action may be overcome by inferences of intent drawn from the statutory scheme as a whole. See, e.g., Morris v. Gressette, 432 U.S. 491 (1977). In particular, at least when a statute provides a detailed mechanism for judicial consideration of particular issues at the behest of particular persons, judicial review of those issues at the behest of other persons may be found to be impliedly precluded.

In this case, the Court of Appeals did not [follow] Morris . . . . Rather, it recited this Court’s oft-quoted statement that “only upon a showing of ‘clear and convincing evidence’ of a contrary legislative intent should the courts restrict access to judicial review.” Abbott Laboratories v. Gardner. . . . This Court has,
however, never applied the “clear and convincing evidence” standard in the strict
evidentiary sense the Court of Appeals thought necessary in this case. Rather, the
Court has found the standard met, and the presumption favoring judicial review
overcome, whenever the congressional intent to preclude judicial review is “fairly
discernible in the statutory scheme.” Data Processing Service v. Camp. In the con-
text of preclusion analysis, the “clear and convincing evidence” standard is not a
rigid evidentiary test but a useful reminder to courts that, where substantial doubt
about the congressional intent exists, the general presumption favoring judicial
review of administrative action is controlling. That presumption does not control
in cases such as this one, however, since the congressional intent to preclude
judicial review is “fairly discernible” in the detail of the legislative scheme. . . .

. . .

[The] preclusion of consumer suits will not threaten realization of the fund-
damental objectives of the statute. Handlers have interests similar to those of
consumers. Handlers, like consumers, are interested in obtaining reliable sup-
plies of milk at the cheapest possible prices. Handlers can therefore be expected
to challenge unlawful agency action and to ensure that the statute’s objectives
will not be frustrated. Indeed, as noted above, consumer suits might themselves
frustrate achievement of the statutory purposes. . . .

. . . Accordingly, the judgment of the Court of Appeals is reversed.

1. Shalala v. Illinois Council on Long Term Care, 529 U.S. 1, 34 (2000), cites Block for
the proposition that a “statute whose provisions are finely wrought may support
the preclusion of judicial review, even though that preclusion is only by negative
implication. . . .” Both United States v. Fausto, 484 U.S. 439, 452 (1988), and Block
discerned the intent to preclude based on “inferences of intent” in the statutory
schemes taken as a whole.

The uncertainty inherent in “negative implication” and “inferences” is obvious.
The terms “inference” and “implication” leave little doubt: Courts are given con-
siderable latitude to determine the intention to preclude review notwithstanding
the premise that agency actions are presumed reviewable unless there is solid
evidence that Congress decided affirmatively to limit access to the courts.

2. Preclusion of judicial review is only one possible limitation on conventional
Article III “checks” on executive action. There are also situations where review
is confined to a single court or where the remedial potential is limited. In the
majority opinion in Hamdan v. Rumsfeld, 548 U.S. 557 (2006), the Court found
that it had the power to review a claim brought by a detainee, giving a somewhat

Although *Hamdan* appears to reinforce the notion that judicial review is of great consequence, it seems of limited effect when read in conjunction with the evisceration of habeas corpus under the Military Commissions Act (which may well lead to unreviewable confinements of detainees in other U.S. military bases located outside the United States such as the Bagram facility). Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600. On August 6, 2008, a military jury convened under the Military Commissions Act rendered a split decision, finding Mr. Hamdan guilty of lesser offenses but not guilty of conspiracy to commit acts of terrorism. Mr. Hamdan, the personal driver for Osama Bin Laden, the alleged “mastermind” of the 9/11 attacks on the United States, was sentenced to five and one-half years. Given credit for the time already served at Guantanamo, Mr. Hamdan was released in November 2008, and returned to Yemen in January 2009.

The War Powers/judicial review cases are perhaps the most difficult to categorize. Professor Robert J. Pushaw recently commented: “[T]he quest for a coherent jurisprudential framework is futile because the Constitution’s text and history do not clearly reveal any single proper way to reconcile judicial review with war powers. This uncertainty has led the Court to eschew black-letter rules in favor of a flexible approach that reflects political and practical considerations.” Robert J. Pushaw, Jr., *The Enemy Combatant Cases in Historical Context: The Inevitability of Pragmatic Judicial Review*, 82 NOTRE DAME L. REV. 1005, 1013 (2007).

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**For More Information**

Important Note Regarding Military Commissions Proceedings and Administrative Law

The *Hamdan* trial was underway as this text went to the publisher. While proceedings of this type are not easily classified, many rights available in Article III courts are not available to Mr. Hamdan. Pursuant to the Military Commissions Act, while Mr. Hamdan is entitled to a trial by a military jury, the rules of evidence are greatly relaxed, discovery is limited at best, and documents critical to the defense were, in large part, redacted. Accordingly, these proceedings can be seen as an exercise of executive power and therefore worthy of study in administrative law. In a number of places in this text, particularly Chapter 11, we have provided cases and materials regarding military proceedings. We do so with the understanding that these are unique tribunals with rules unlike most other conventional agency proceedings. If you are interested in a human rights critique of the *Hamdan* trial, we suggest: US: *Hamdan Trial Exposes Flaws in Military Commissions, Tribunal Handicaps the Defense*, Guantanamo Bay, August 5, 2008, Human Rights News, http://hrw.org/english/docs/2008/08/05/usint19540.htm, (last visited August 5, 2008).
3. What about the decisions of the Office of the President? In Franklin v. Massachusetts, 505 U.S. 788, 800-01 (1992), and Dalton v. Specter, 511 U.S. 462 (1994), the Court found that APA conventions, including judicial review, are generally not available for presidential decisions since the President is not an agency. However, not everything related to the presidency is immune from either APA process or judicial review. See Kevin M. Stack, The Statutory President, 90 IOWA L. REV. 539 (2005), and Neal Kumar Katyal, Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within, 115 YALE L.J. 2314 (2006).

4. Do you believe (as Block appears to hold) that Congress actually meant to keep the public from having any involvement, judicial or otherwise, in the regulation of milk?

Not surprisingly, among the most controversial of all agency decisions is the determination to cease funding of existing programs. Denying those in need what they perceive as essential resources is predictably characterized as arbitrary and capricious by those who will suffer upon the termination of benefits. The question posed in the next case is whether that deprivation is reviewable, as opposed to falling under the statutory exemption for agency action committed to agency discretion by law.

**Lincoln v. Vigil**

508 U.S. 182 (1993)

[Justice Souter] The Indian Health Service . . . provides health care for some 1.5 million American Indian and Alaska Native people. The Service receives yearly lump-sum appropriations from Congress [and is authorized] to “expend such moneys as Congress may from time to time appropriate, for the benefit, care, and assistance of the Indians,” for the “relief of distress and conservation of health.” . . . This case concerns a collection of related services, commonly known as the Indian Children’s Program, that the Service provided from 1978 to 1985. . . . Congress never expressly appropriated funds for [the Program]. In 1978, however, the Service allocated approximately $292,000 from its fiscal year 1978 appropriation to its office in Albuquerque, New Mexico, for the planning and development of a pilot project for handicapped Indian children, which became known as the Indian Children’s Program. The pilot project apparently convinced the Service that a building was needed, and, in 1979, the Service requested $3.5 million from Congress to construct a diagnostic and treatment center for handicapped Indian children. The appropriation for fiscal year 1980 did not expressly provide the requested funds, however, and legislative reports indicated only that Congress had increased the Service’s funding by $300,000 for nationwide expansion and development of the Program in coordination with the Bureau.
Plans for a national program to be managed jointly by the Service and the Bureau were never fulfilled, however, and the Program continued simply as an offering of the Service’s Albuquerque office. . . . The Program’s staff provided “diagnostic, evaluation, treatment planning and followup services” for Indian children with emotional, educational, physical, or mental handicaps.” . . . Congress never authorized or appropriated moneys expressly for the Program, and the Service continued to pay for its regional activities out of annual lump-sum appropriations from 1980 to 1985, during which period the Service repeatedly apprised Congress of the Program’s continuing operation.

Nevertheless, the Service had not abandoned the proposal for a nationwide treatment program, and in June 1985 it notified those who referred patients to the Program that it was “re-evaluating [the Program’s] purpose . . . as a national mental health program for Indian children and adolescents.” In August 1985, the Service determined that Program staff hitherto assigned to provide direct clinical services should be reassigned as consultants to other nationwide Service programs and discontinued the direct clinical services to Indian children in the Southwest. The Service announced its decision in a memorandum, dated August 21, 1985, addressed to Service offices and Program referral sources:

As you are probably aware, the Indian Children’s Program has been involved in planning activities focusing on a national program effort. This process has included the termination of all direct clinical services to children in the Albuquerque, Navajo and Hopi reservation service areas. During the months of August and September, . . . staff will [see] children followed by the program in an effort to . . . identify alternative resources . . . In communities where there are no identified resources, meetings with community service providers will be scheduled to facilitate the networking between agencies to secure or advocate for appropriate services.

. . .

Respondents, handicapped Indian children eligible to receive services through the Program, subsequently brought this action for declaratory and injunctive relief against petitioners, [alleging it was unlawful to] discontinue direct clinical services [and that this decision] violated the federal trust responsibility to Indians, . . . the Administrative Procedure Act, various agency regulations, and the Fifth Amendment’s Due Process Clause.

. . .

II

First is the question whether it was error for the Court of Appeals to hold the substance of the Service’s decision to terminate the Program reviewable under the APA. The APA provides that “[a] person suffering legal wrong because of agency
action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof,” 5 U.S.C. § 702, and we have read the APA as embodying a “basic presumption of judicial review,” 
Abbott Laboratories v. Gardner. This is “just” a presumption, however, 
Block v. Community Nutrition Institute, 467 U.S. 340 (1984), and under § 701(a)(2) agency action is not subject to judicial review “to the extent that” such action “is committed to agency discretion by law.” As we explained in 
Heckler v. Chaney, § 701 (a)(2) makes it clear that “review is not to be had” in those rare circumstances where the relevant statute “is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.” “In such a case, the statute ('law') can be taken to have ‘committed’ the decisionmaking to the agency's judgment absolutely.” 
Heckler.

Over the years, we have read § 701(a)(2) to preclude judicial review of certain categories of administrative decisions that courts traditionally have regarded as “committed to agency discretion.” . . . [We have] held an agency's decision not to institute enforcement proceedings to be presumptively unreviewable under § 701(a)(2). . . . [Similarly,] an agency's refusal to grant reconsideration of an action because of material error [is unreviewable]. . . . Finally . . . § 701(a)(2) precludes judicial review of a decision . . . to terminate an employee in the interests of national security, an area of executive action “in which courts have long been hesitant to intrude.”

The allocation of funds from a lump-sum appropriation is another administrative decision traditionally regarded as committed to agency discretion. After all, the very point of a lump-sum appropriation is to give an agency the capacity to adapt to changing circumstances and meet its statutory responsibilities in what it sees as the most effective or desirable way . . . Put another way, a lump-sum appropriation reflects a congressional recognition that an agency must be allowed “flexibility to shift . . . funds within a particular . . . appropriation account so that” the agency “can make necessary adjustments for ‘unforeseen developments’” and “changing requirements.”

Like the decision against instituting enforcement proceedings, then, an agency's allocation of funds from a lump-sum appropriation requires “a complicated balancing of a number of factors which are peculiarly within its expertise”: whether its “resources are best spent” on one program or another; whether it “is likely to succeed” in fulfilling its statutory mandate; whether a particular program “best fits the agency's overall policies”; and, “indeed, whether the agency has enough resources” to fund a program “at all.” 
Heckler. As in 
Heckler, so here, the “agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities.” Of course, an agency is not free simply to disregard statutory responsibilities: Congress may always circumscribe
agency discretion to allocate resources by putting restrictions in the operative statutes . . . And, of course, we hardly need to note that an agency’s decision to ignore congressional expectations may expose it to grave political consequences. But as long as the agency allocates funds from a lump-sum appropriation to meet permissible statutory objectives, § 701(a)(2) gives the courts no leave to intrude. “To [that] extent,” the decision to allocate funds “is committed to agency discretion by law.”

The Service’s decision to discontinue the Program is accordingly unreviewable under § 701(a)(2). . . . It is true that the Service repeatedly apprised Congress of the Program’s continued operation, but, as we have explained, these representations do not translate . . . into legally binding obligations. . . . The Court of Appeals saw a separate limitation on the Service’s discretion in the special trust relationship existing between Indian people and the Federal Government. . . . Whatever the contours of that relationship, though, it could not limit the Service’s discretion to reorder its priorities from serving a subgroup of beneficiaries to serving the broader class of all Indians nationwide. . . .

1. The termination action in this case was embodied in a policy statement. Section 553(b)(A) of the APA exempts “interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice” from the notice and comment requirements. Was the basis for this decision rooted in the fact that policy statements are issued without public process from the outset? If the idea behind this particular exemption is that agencies should be free to set policy – and that such statements are designed primarily to communicate with the public the general perspective of the agency (as opposed to articulating an enforceable rule or standard) – then the exception might make a sound basis for the action of the Court.

The problem with this argument is that the issuance in question in Lincoln was dispositive of the fate of an entire program and could hardly be characterized as a simple attempt to keep the public informed.

2. Should the decision to terminate a federally funded program ever be subject to judicial review? The Lincoln decision characterized the process of decision-making
as “committed to the discretion” of the agency and thus nonreviewable. Certainly, the Executive branch is charged with making these types of decisions regularly – but are they always nonreviewable?

What happens if the decision to terminate a program is a patent abuse of authority or is otherwise driven by inappropriate political motives – or worse? What if an ethnic or racial bias appears to be the motivation of a public official – what recourse is available under *Lincoln*? What if a personal moral or religious belief is the motivating force? See Joanna K. Sax, *The States “Race” with the Federal Government for Stem Cell Research*, 15 *Ann. Health L.* 1 (2006), and Francesca Crisera, *Note, Federal Regulation of Embryonic Stem Cells: Can Government Do It? An Examination of Potential Regulation Through the Eyes of California’s Recent Legislation*, 31 *Hastings Const. L.Q.* 355 (2004).

3. Not every program termination case escapes judicial review, notwithstanding the general notion that lump sum funding decisions are committed to agency discretion and inherently political. In *Castellini v. Lappin*, 365 F. Supp. 2d 197 (D. Mass. 2005), a prisoner was sentenced to serve a 21 month sentence in a facility that was characterized as a “boot camp” and where, presumably, some level of career training and personal growth were more likely than in a conventional prison setting. When the Board of Prisons (BOP) decided to close down the boot camp program in question, the prisoner brought suit, claiming, *inter alia*, that his rights to a notice and comment process under the APA had been violated. The court compared his situation to *Lincoln* and held:

> Here, unlike in *Lincoln*, Congress enabled and authorized funding for the program at issue . . . . [However] Congress intended to authorize the BOP to operate a boot camp program but did not intend to require the operation of such a program . . . . Thus, BOP has the authority to reallocate boot camp resources . . . .

Regardless of its authority to reallocate resources, however, the BOP’s termination of the boot camp program violated the APA. The APA “provides generally that an agency must publish notice of a proposed rulemaking in the Federal Register and afford interested persons an opportunity to participate . . . . through submission of written data, views, or arguments . . . .” “Numerous courts have found that the APA applies to BOP rulemaking.” *Iacaboni v. United States*, 251 F. Supp. 2d 1015, 1036 (D. Mass. 2003). . . .

In *Lincoln*, the Supreme Court held that termination of the program at issue was exempt from APA notice and comment requirements, potentially as a rule of agency organization and certainly as a general statement of policy . . . .

However, unlike the Indian Health Service in *Lincoln*, the BOP established the program at issue here, which Congress enabled, through regulation subject to notice and comment. 61 Fed. Reg. at 18,658 (“The Bureau is publishing this regulation as an interim rule in order to provide for public comment . . . .”). The APA requires notice and comment “when an agency adopts a new position inconsistent with any
of the [agency’s] existing regulations.” . . . Where an agency’s “interpretation [of a regulation] has the practical effect of altering the regulation, a formal amendment – almost certainly prospective and after notice and comment – is the proper course.” United States v. Hoyts Cinemas Corp., 380 F.3d 558, 569 (1st Cir. 2004) . . .

The BOP’s abrupt termination of the boot camp program is inconsistent with, and effectively repudiates, the regulations by which the BOP established the program.

Had the health care program in Lincoln been “established” through a notice and comment process, would the outcome of the judicial review issue have been different? Think back to Long Island Care at Home v. Coke. The notice and comment process in that case appeared to be part of the basis for compelling Chevron deference. If the agency involved decided to change its rules on in-home elder care by contract employees from a registered assisted living company, would it be required to do so through notice and comment?

**WEBSTER v. DOE**

486 U.S. 592 (1988)

[JUSTICE REHNQUIST] Section 102(c) of the National Security Act of 1947 provides that:

The Director of Central Intelligence may, in his discretion, terminate the employment of any officer or employee of the Agency whenever he shall deem such termination necessary or advisable in the interests of the United States . . .

In this case we decide whether, and to what extent, the termination decisions of the Director under § 102(c) are judicially reviewable.

Respondent John Doe was first employed by the Central Intelligence Agency (CIA or Agency) in 1973 as a clerk-typist. He received periodic fitness reports that consistently rated him as an excellent or outstanding employee. By 1977, respondent had been promoted to a position as a covert electronics technician.

In January 1982, respondent voluntarily informed a CIA security officer that he was a homosexual. Almost immediately, the Agency placed respondent on paid administrative leave pending an investigation of his sexual orientation and conduct. On February 12 and again on February 17, respondent was extensively questioned by a polygraph officer concerning his homosexuality and possible security violations. Respondent denied having sexual relations with any foreign nationals and maintained that he had not disclosed classified information to any of his sexual partners. . . .

On April 14, 1982, a CIA security agent informed respondent that the Agency’s Office of Security had determined that respondent’s homosexuality posed a threat
to security, but declined to explain the nature of the danger. Respondent was then asked to resign. When he refused to do so, the Office of Security recommended to the CIA Director (petitioner’s predecessor) that respondent be dismissed. After reviewing respondent’s records and the evaluations of his subordinates, the Director “deemed it necessary and advisable in the interests of the United States to terminate [respondent’s] employment with this Agency pursuant to section 102(c) of the National Security Act . . . .” . . . .

Respondent then filed an action against petitioner in the United States District Court for the District of Columbia. Respondent’s amended complaint asserted a variety of statutory and constitutional claims against the Director. Respondent alleged that the Director’s decision to terminate his employment violated the Administrative Procedure Act (APA), 5 U.S.C. § 706, because it was arbitrary and capricious, represented an abuse of discretion, and was reached without observing the procedures required by law and CIA regulations. He also complained that the Director’s termination of his employment deprived him of constitutionally protected rights to property, liberty, and privacy in violation of the First, Fourth, Fifth, and Ninth Amendments. Finally, he asserted that his dismissal transgressed the procedural due process and equal protection of the laws guaranteed by the Fifth Amendment. . . .

Petitioner moved to dismiss respondent’s amended complaint on the ground that § 102(c) of the National Security Act (NSA) precludes judicial review of the Director’s termination decisions under the provisions of the APA . . . . The scope of judicial review under § 702, however, is circumscribed by § 706 and its availability . . . is predicated on satisfying the requirements of § 701, which provides:

(a) This chapter applies, according to the provisions thereof, except to the extent that –

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

. . . .

In Citizens to Preserve Overton Park, Inc. v. Volpe, this Court explained the distinction between §§ 701(a)(1) and (a)(2). Subsection (a)(1) is concerned with whether Congress expressed an intent to prohibit judicial review; subsection (a)(2) applies “in those rare instances where ‘statutes are drawn in such broad terms that in a given case there is no law to apply.’”
We further explained what it means for an action to be “committed to agency discretion by law” in *Heckler v. Chaney*. *Heckler* required the Court to determine whether the Food and Drug Administration’s decision not to undertake an enforcement proceeding against the use of certain drugs in administering the death penalty was subject to judicial review. We noted that, under § 701(a)(2), even when Congress has not affirmatively precluded judicial oversight, “review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency’s exercise of discretion.” Since the statute conferring power on the Food and Drug Administration to prohibit the unlawful misbranding or misuse of drugs provided no substantive standards on which a court could base its review, we found that enforcement actions were committed to the complete discretion of the FDA to decide when and how they should be pursued.

Both *Overton Park* and *Heckler* emphasized that § 701(a)(2) requires careful examination of the statute on which the claim of agency illegality is based (the Federal-Aid Highway Act of 1968 in *Overton Park* and the Federal Food, Drug, and Cosmetic Act in *Heckler*). In the present case, respondent’s claims against the CIA arise from the Director’s asserted violation of § 102(c) of the NSA. As an initial matter, it should be noted that § 102(c) allows termination of an Agency employee whenever the Director “shall deem such termination necessary or advisable in the interests of the United States” (emphasis added), not simply when the dismissal is necessary or advisable to those interests. This standard fairly exudes deference to the Director, and appears to us to foreclose the application of any meaningful judicial standard of review. Short of permitting cross-examination of the Director concerning his views of the Nation’s security and whether the discharged employee was inimical to those interests, we see no basis on which a reviewing court could properly assess an Agency termination decision. The language of § 102(c) thus strongly suggests that its implementation was “committed to agency discretion by law.”

So too does the overall structure of the NSA. Passed shortly after the close of the Second World War, the NSA created the CIA and gave its Director the responsibility “for protecting intelligence sources and methods from unauthorized disclosure.” Section 102(c) is an integral part of that statute, because the Agency’s efficacy, and the Nation’s security, depend in large measure on the reliability and trustworthiness of the Agency’s employees. As we [previously] recognized . . . , employment with the CIA entails a high degree of trust that is perhaps unmatched in Government service.

We thus find that the language and structure of § 102(c) indicate that Congress meant to commit individual employee discharges to the Director’s discre-
tion, and that § 701(a)(2) accordingly precludes judicial review of these decisions under the APA. . .

III

In addition to his claim that the Director failed to abide by the statutory dictates of § 102(c), respondent also alleged a number of constitutional violations in his amended complaint. Respondent charged that petitioner's termination of his employment deprived him of property and liberty interests under the Due Process Clause of the Fifth Amendment, denied him equal protection of the laws, and unjustifiably burdened his right to privacy. Respondent asserts that he is entitled, under the APA, to judicial consideration of these claimed violations.

. . .

Petitioner maintains that, no matter what the nature of respondent's constitutional claims, judicial review is precluded by the language and intent of § 102(c). In petitioner's view, all Agency employment termination decisions, even those based on policies normally repugnant to the Constitution, are given over to the absolute discretion of the Director, and are hence unreviewable under the APA. We do not think § 102(c) may be read to exclude review of constitutional claims. We [previously] emphasized . . . that where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear. . . . We require this heightened showing in part to avoid the “serious constitutional question” that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim.

Our review of § 102(c) convinces us that it cannot bear the preclusive weight petitioner would have it support. As detailed above, the section does commit employment termination decisions to the Director's discretion, and precludes challenges to these decisions based upon the statutory language of § 102(c). A discharged employee thus cannot complain that his termination was not “necessary or advisable in the interests of the United States,” since that assessment is the Director's alone. Subsections (a)(1) and (a)(2) of § 701, however, remove from judicial review only those determinations specifically identified by Congress or “committed to agency discretion by law.” Nothing in § 102(c) persuades us that Congress meant to preclude consideration of colorable constitutional claims arising out of the actions of the Director pursuant to that section; we believe that a constitutional claim based on an individual discharge may be reviewed by the District Court. . .

. . .

[Justice Scalia, dissenting.]
I agree with the Court’s apparent holding in Part II of its opinion, that the Director’s decision to terminate a CIA employee is “committed to agency discretion by law” within the meaning of 5 U.S.C. § 701(a)(2). But because I do not see how a decision can, either practically or legally, be both unreviewable and yet reviewable for constitutional defect, I regard Part III of the opinion as essentially undoing Part II. I therefore respectfully dissent from the judgment of the Court. . . .

**Underlying Case Documents**

The case referenced:
The National Security Act of 1947

For the affidavit of “John Doe” click HERE.
For the letter sent by “John Doe’s” attorney to the CIA in an attempt to prevent the agency from firing “John Doe” click HERE.
For the letter of termination from the CIA click HERE.

1. One of the more powerful issues in *Webster* is whether the presence of a “constitutional issue,” as opposed to a statutory or common law claim, creates a separate constitutional right to and basis for judicial review. See Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 Harv. L. Rev. 915, 950-70 (1988), and Henry P. Monaghan, *Constitutional Fact Review*, 85 Colum. L. Rev. 229, 267 (1985) (asserting that constitutional issues are no more or less important than other issues). The problem becomes pronounced when, as in *Webster*, there is a basis to deny review completely (the government’s position) or to conclude the substantive review summarily on the premise that the agency decision was soundly vested to the discretion of the agency.

The issue was raised – and then passed over – in *United States v. Erika, Inc.*, 456 U.S. 201, 211 n.14 (1982). In his full dissent, Justice SCALIA dismisses the matter directly. Is he right?

a. If an administrative action is arguably unconstitutional, is it unreviewable if there is a statute precluding review? If so, the preclusion statute becomes a shield for unconstitutional action undertaken by those charged with defending and implementing the Constitution’s protections. If not, many actions government officials take that are vested explicitly in their discretion are subject to challenge. After all, due process claims are often part of the arguments made by those who challenge agency action.
b. What if an administrative action vested to the discretion of the agency is arguably unconstitutional – is it unreviewable? The same pro and con arguments apply with this twist: If there is “no law to apply” to judge whether the agency action is proper (a basis to conclude the matter is nonreviewable), the public is left with an executive empowered to act without legislative standards to gauge the propriety of the action and without an opportunity to challenge that action in an Article III court.

2. Based on the Court’s opinion, Webster involved a “perfect storm” of nonreviewability: The statute fairly “exudes” deference to the Director of the CIA, the agency is involved in activity that involves national security, and there are apparently no “law[s] to apply” to employment actions (including dismissals). That meant that a challenge based on the APA standards for judicial review would not be permitted. Do these arguments ring true? See Ronald M. Levin, Understanding Unreviewability in Administrative Law, 74 Minn. L. Rev. 689, 730 (1990), and Kenneth Culp Davis, No Law to Apply, 25 San Diego L. Rev. 1 (1988). Even assuming the unavailability of the APA, was there a constitutional question? The employee was allegedly dismissed based on sexual orientation/preference. There were standards for hiring and retention of government employees (and thus some law to apply) as well as associational rights issue that could have been raised.


4. The statute that was the basis for the dismissal in Webster gave the Director authority to terminate employees as “necessary or advisable.” See 50 U.S.C. 403(c). Is this “unbridled discretion” . . . or is this “law to apply” to judge whether the action of the Director was arbitrary, capricious, or an abuse of discretion?

VI. Review of Agency Inaction

In most administrative agencies – as well in the domain of civil and criminal justice – those charged with promulgating rules and policies, overseeing regulatory systems, and enforcing specific legal standards are vested with considerable (although not unlimited) discretion. Agency enforcement officials as well as those charged with rulemaking tasks – and, outside the administrative law system, criminal prosecutors – are expected to make judgment calls regarding the best use of governmental resources, the overall enforcement scheme, and the prioritization of various policy imperatives. See Daniel P. Selmi, Jurisdiction to Review Agency Inaction Under Federal Environmental Law, 72 Ind. L.J. 65 (1996). There is little question that great deference is due the decision to issue (or not issue) regulations or policies or to enforce (or not enforce) a particular statute. This exercise of dis-

Notwithstanding the deference due discretionary choices in the enforcement and rulemaking domain, there are instances where the decision not to act has significant and adverse consequences. See Christina Larsen, Is the Glass Half Empty or Half Full? Challenging Incomplete Agency Action Under Section 706(1) of the Administrative Procedure Act, 25 PUB. LAND & RESOURCES L. REV. 113 (2004).

In the criminal justice system, it is easy to understand the anger and frustration the victim of a crime will experience if a prosecutor chooses not to go after a perpetrator. Similarly, in the agency context, it takes little imagination to understand the frustration members of the public experience when an agency simply takes no action — or decides affirmatively not to act — allowing a hazard, risk, nuisance, or environmental degradation to continue. This phenomenon was evident in Norton v. Southern Utah Wilderness Alliance, 542 U.S. 55, 60 (2004), which articulated (to the great disappointment of very vocal parties and interest groups) the basic noninterference policy courts follow in most instances.

The fact of an apparent violation of regulatory standards or norms does not create an absolute (or anything close to absolute) obligation, enforceable in court, to go forward. Because agency inaction is generally vested in the discretion of the agency, courts are hesitant to interfere. Similarly, the Office of Management and Budget and the important and somewhat secretive Office of Information and Regulatory Affairs, entities with direct power over certain agency activity, have done next to nothing in the last ten years about agency inaction other than issue occasional informal letters “prompting” agencies to exercise their authority.

There are times, however (rare though they may be) when the inaction or unreasonable delay on the part of an agency can be challenged successfully in court. The most dramatic recent example of this occurred in Massachusetts v. EPA, infra Chapter 4. Frustrated with EPAs failure to address the interrelationship between arguably unacceptable levels of greenhouse gasses (including carbon dioxide), automobile emissions, and global warming, various States brought suit against EPA.

Unlike Southern Utah Wilderness Alliance, the Court found EPAs inaction unacceptable. “In short, EPA has offered no reasoned explanation for its refusal to decide whether greenhouse gases cause or contribute to climate change. Its action was therefore ‘arbitrary, capricious, . . . or otherwise not in accordance with law.’ . . . We hold . . . that EPA must ground its reasons for action or inaction in the statute.” 127 S.Ct. at 1444.
Finally, there is one line of cases that establishes criteria to determine if agency delay has finally reached the point where a court ought to invade the otherwise sacrosanct, discretionary province of the agency and to issue an order directing the agency to act. These criteria, referred to as the TRAC factors, are discussed infra Chapter 6. Telecommunications Research & Action Ctr. [TRAC] v. F.C.C., 750 F.2d 70, 79-80 (D.C. Cir. 1984). TRAC analysis is not without its problems – and contrary case law. See Forest Guardians v. Babbitt, 174 F.3d 1178, 1191 (10th Cir. 1999).

The cases that follow allow you to explore some of the parameters surrounding judicial review of inaction.

**HECKLER v. CHANEY**

470 U.S. 821 (1985)

[Justice Rehnquist] This case presents the question of the extent to which a decision of an administrative agency to exercise its “discretion” not to undertake certain enforcement actions is subject to judicial review under the Administrative Procedure Act (APA). Respondents are several prison inmates convicted of capital offenses and sentenced to death by lethal injection of drugs. They petitioned the Food and Drug Administration (FDA), alleging that . . . the use of these drugs for capital punishment violated the Federal Food, Drug, and Cosmetic Act (FDCA), and requesting that the FDA take various enforcement actions to prevent these violations. The FDA refused their request. . . . [T]he Court of Appeals for the District of Columbia Circuit . . . held the FDA’s refusal to take enforcement actions both reviewable and an abuse of discretion, and remanded the case with directions that the agency be required “to fulfill its statutory function.”
Respondents have been sentenced to death by lethal injection of drugs under the laws of the States of Oklahoma and Texas. . . . Respondents first petitioned the FDA, claiming that the drugs used by the States for this purpose, although approved by the FDA for [other uses], were not approved for use in human executions [and] given that the drugs would likely be administered by untrained personnel, it was also likely that the drugs would not induce the quick and painless death intended. . . . Accordingly, respondents claimed that the FDA was required to approve the drugs as “safe and effective” for human execution before they could be distributed in interstate commerce. They therefore requested the FDA to take various investigatory and enforcement actions to prevent these perceived violations; they requested the FDA to affix warnings to the labels of all the drugs stating that they were unapproved and unsafe for human execution, to send statements to the drug manufacturers and prison administrators stating that the drugs should not be so used, and to adopt procedures for seizing the drugs from state prisons and to recommend the prosecution of all those in the chain of distribution who knowingly distribute or purchase the drugs with intent to use them for human execution.

The FDA Commissioner responded, refusing to take the requested actions. The Commissioner first detailed his disagreement with respondents’ understanding of the scope of FDA jurisdiction . . . . He went on to state:

Were FDA clearly to have jurisdiction in the area, moreover, we believe we would be authorized to decline to exercise it under our inherent discretion to decline to pursue certain enforcement matters. . . . Generally, enforcement proceedings in this area are initiated only when there is a serious danger to the public health or a blatant scheme to defraud. We cannot conclude that those dangers are present under State lethal injection laws, which are duly authorized statutory enactments in furtherance of proper State functions . . . .

. . . For us, this case turns on the . . . extent to which determinations by the FDA not to exercise its enforcement authority . . . may be judicially reviewed. That decision in turn involves the construction of two separate but necessarily interrelated statutes, the APA and the FDCA.

[Under the APA any] person “adversely affected or aggrieved” by agency action, including a “failure to act,” is entitled to “judicial review thereof,” as long as the action is a “final agency action for which there is no other adequate remedy in a court.” The standards to be applied on review are governed by the provi-
visions of § 706. But before any review at all may be had, a party must first clear the hurdle of § 701(a). That section provides that the chapter on judicial review “applies, according to the provisions thereof, except to the extent that – (1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law.” Petitioner urges that the decision of the FDA to refuse enforcement is an action “committed to agency discretion by law” under § 701(a)(2).

. . .

[Section 701(a)(1)] applies when Congress has expressed an intent to preclude judicial review. . . [Section 701(a)(2)] applies in different circumstances; even where Congress has not affirmatively precluded review, review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency’s exercise of discretion. . . . This construction avoids conflict with the “abuse of discretion” standard of review in § 706 – if no judicially manageable standards are available for judging how and when an agency should exercise its discretion, then it is impossible to evaluate agency action for “abuse of discretion.” In addition, this construction [gives effect to every clause in the statute] by identifying a separate class of cases to which § 701(a)(2) applies.

To this point our analysis does not differ significantly from that of the Court of Appeals. That court purported to apply the “no law to apply” standard of Overton Park. We disagree, however, with that court’s insistence that . . . § (a)(2) required application of a presumption of reviewability even to an agency’s decision not to undertake certain enforcement actions. Here we think the Court of Appeals broke with tradition, case law, and sound reasoning.

Overton Park did not involve an agency’s refusal to take requested enforcement action. It involved an affirmative act of approval under a statute that set clear guidelines for determining when such approval should be given. Refusals to take enforcement steps generally involve precisely the opposite situation, and in that situation we think the presumption is that judicial review is not available. This Court has recognized on several occasions over many years that an agency’s decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency’s absolute discretion. This recognition of the existence of discretion is attributable in no small part to the general unsuitability for judicial review of agency decisions to refuse enforcement.

The reasons for this general unsuitability are many. First, an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether
the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing. The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities. Similar concerns animate the principles of administrative law that courts generally will defer to an agency's construction of the statute it is charged with implementing, and to the procedures it adopts for implementing that statute.

In addition to these administrative concerns, we note that when an agency refuses to act it generally does not exercise its coercive power over an individual's liberty or property rights, and thus does not infringe upon areas that courts often are called upon to protect. Similarly, when an agency does act to enforce, that action itself provides a focus for judicial review, inasmuch as the agency must have exercised its power in some manner. The action at least can be reviewed to determine whether the agency exceeded its statutory powers. Finally, we recognize that an agency's refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to “take Care that the Laws be faithfully executed.” U.S. Const., Art. II, § 3.

We of course only list the above concerns to facilitate understanding of our conclusion that an agency's decision not to take enforcement action should be presumed immune from judicial review under § 701(a)(2). For good reasons, such a decision has traditionally been “committed to agency discretion,” and we believe that the Congress enacting the APA did not intend to alter that tradition. In so stating, we emphasize that the decision is only presumptively unreviewable; the presumption may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers. Thus, in establishing this presumption in the APA, Congress did not set agencies free to disregard legislative direction in the statutory scheme that the agency administers. Congress may limit an agency's exercise of enforcement power if it wishes, either by setting substantive priorities, or by otherwise circumscribing an agency's power to discriminate among issues or cases it will pursue. etc.

_Dunlop v. Bachowski_, relied upon heavily by respondents and the majority in the Court of Appeals, presents an example of statutory language which supplied sufficient standards to rebut the presumption of unreviewability. . . . [The statute] provided that, upon filing of a complaint by a union member, “[the] Secretary shall investigate such complaint and, if he finds probable cause to believe that a violation . . . has occurred . . . he shall . . . bring a civil action. . . .” After investigating the plaintiff's claims the Secretary of Labor declined to file suit, and the
plaintiff sought judicial review under the APA. This Court held that review was available. It rejected the Secretary’s argument that the statute precluded judicial review [and was] content to rely on the Court of Appeals’ opinion to hold that the § (a)(2) exception did not apply. The Court of Appeals, in turn, had found the “principle of absolute prosecutorial discretion” inapplicable, because the language of the LMRDA (Labor-Management Reporting and Disclosure Act of 1959) indicated that the Secretary was required to file suit if certain “clearly defined” factors were present. The decision therefore was not “beyond the judicial capacity to supervise.”

_Dunlop_ is thus consistent with a general presumption of unreviewability of decisions not to enforce. The statute being administered quite clearly withdrew discretion from the agency and provided guidelines for exercise of its enforcement power. Our decision that review was available was not based on “pragmatic considerations,” such as those cited by the Court of Appeals that amount to an assessment of whether the interests at stake are important enough to justify intervention in the agencies’ decisionmaking. The danger that agencies may not carry out their delegated powers with sufficient vigor does not necessarily lead to the conclusion that courts are the most appropriate body to police this aspect of their performance. That decision is in the first instance for Congress, and we therefore turn to the FDCA to determine whether in this case Congress has provided us with “law to apply.” . . .

III

[The FDCA grants the FDA discretion whether to take action in a given case.]

IV

We therefore conclude that the presumption that agency decisions not to institute proceedings are unreviewable under 5 U.S.C. § 701(a)(2) is not overcome by the enforcement provisions of the FDCA. . . . In so holding, we essentially leave to Congress, and not to the courts, the decision as to whether an agency’s refusal to institute proceedings should be judicially reviewable. No colorable claim is made in this case that the agency’s refusal to institute proceedings violated any constitutional rights of respondents, and we do not address the issue that would be raised in such a case. The fact that the drugs involved in this case are ultimately to be used in imposing the death penalty must not lead this Court or other courts to import profound differences of opinion over the meaning of the Eighth Amendment to the United States Constitution into the domain of administrative law.

The judgment of the Court of Appeals is reversed.

[Justice Brennan, concurring.]
[T]he Court properly does not decide today that nonenforcement decisions are unreviewable in cases where (1) an agency flatly claims that it has no statutory jurisdiction to reach certain conduct; (2) an agency engages in a pattern of nonenforcement of clear statutory language . . . ; (3) an agency has refused to enforce a regulation lawfully promulgated and still in effect or (4) a nonenforcement decision violates constitutional rights. It is possible to imagine other nonenforcement decisions made for entirely illegitimate reasons, for example, nonenforcement in return for a bribe, judicial review of which would not be foreclosed by the nonreviewability presumption. . . .

[Justice Marshall, concurring.]

Easy cases at times produce bad law . . . . [T]he “presumption of unreviewability” announced today is a product of that lack of discipline that easy cases make all too easy. The majority . . . creates out of whole cloth the notion that agency decisions not to take “enforcement action” are unreviewable unless Congress has rather specifically indicated otherwise. Because this “presumption of unreviewability” is fundamentally at odds with rule-of-law principles firmly embedded in our jurisprudence . . . one can only hope that it will come to be understood as a relic of [this] particular factual setting . . . .

Underlying Case Documents

The case referenced:
The petition to FDA seeking agency action
The FDA response to the petition declining to act

1. Justice Brennan’s concurrence identified a series of circumstances where the general principle of unreviewability of agency inaction may not block judicial review: (1) When an agency “flatly claims” that it is without authority to address particular conduct – when in fact, it has precisely that authority – the nonreviewability prohibition does not apply; and (2) If an agency engages in a “pattern of nonenforcement” or a refusal to enforce a rule that is “lawfully promulgated and still in effect” or undertakes action that is otherwise unconstitutional or illegal (for example accepting a bribe in exchange for inaction) the nonreviewability premise can be overcome. These exceptions to the nonreviewability presumption require some thought.

a. If an agency claims it has no authority to reach a particular area or engages in a pattern of nonenforcement, how is that not defensible as an exercise of discretion?
Regardless of the inaccuracy underlying the claim of “no authority,” the essence of the assertion is that the agency has chosen not to act. What remedy would emerge if an agency claims it has no authority when a plain reading of the statute suggests that it does have such authority? Would a court be limited to interpreting the statute accurately? And then what?

b. “Pattern of enforcement” cases are equally perplexing. The majority in Chaney holds that because agencies have the best sense of their resources, regulatory and enforcement priorities, personnel and time limitations, and expertise in a particular field, their decisions regarding enforcement or regulatory priorities are entitled to deference. If an agency decides – repeatedly – that it will not proceed in a particular direction, presumably that would constitute a “pattern of non-enforcement.” Why is a pattern of nonenforcement less subject to the prohibition on judicial review? Outside of those circumstances where the pattern of nonenforcement can be linked with inappropriate behavior (either discriminatory action or patently illegal behavior), what is the breadth of this exception?

In Schering v. Heckler, 779 F.2d 683 (D.C. Cir. 1985), after the FDA approved a new drug by one manufacturer, a second manufacturer began to market a similar drug without securing FDA approval. The FDA initiated an enforcement proceeding that was soon settled. Shortly thereafter, unsatisfied with the settlement, the first manufacturer brought suit claiming that the FDA had not done its job. It contended that the FDA had not made a determination about whether the second manufacturer’s product was a new drug, nor had it issued guidelines for the type of product the second manufacturer was producing. When the FDA took no further action, the first manufacturer went to court seeking to compel the FDA to do its job. While the FDA had jurisdiction, the court noted that the agency had “elected not to pursue enforcement activities. . . .” These choices, noted the court, were committed to the discretion of the agency and not readily reviewable. The court went on to note however, that had this practice been part of a “policy or pattern of nonenforcement that amounts [to an] abdication of statutory responsibility,” it might have taken action. Further, the court noted that it might have been motivated to act had there been an assertion that the activity of the agency violated “any constitutional rights.” Seeing neither a pattern of nonenforcement nor a violation of constitutional rights, the case was dismissed.
Hypothetical

Assume that a federal communications statute authorizes “the chairman of the Federal Communications Commission, at his or her discretion, to place cities, towns and other population centers across the nation on a National Broadband Priority List.” Localities on the NBPL are targeted for significant federal resources, including subsidies and technical support, designed to promote universal access to high speed residential and commercial broadband Internet services. After two years of petitioning the chairman of the FCC to place metropolitan Sloverlook, TX, on the NBPL, the Sloverlook Town Council has decided to sue the FCC chairman. Is his decision not to place Sloverlook, TX, on the NBPL subject to judicial review?

2. If Congress articulates clear and unequivocal standards for enforcement, and an agency fails to act when those criteria are met, Chaney suggests the possibility of bypassing the deference accorded generally to agency inaction. Likewise, where Congress requires an agency to act as a predicate for a party to secure judicial review or to initiate an independent claim in court, and the agency fails to do so, the prohibition against judicial interference with agency inaction can be set aside. Dunlop v. Bachoski, 421 U.S. 560 (1975). In the area of unfair labor practices and employment discrimination, a claimant cannot easily initiate a proceeding in federal court to secure relief from allegedly unlawful conduct unless the agency has considered and acted upon the claim initially. These requirements are statutory in nature and differ from the general obligation to exhaust administrative remedies. Exhaustion, as a predicate for judicial action, is often not a jurisdictional necessity – unless a specific statute commands a party to exhaust his or her remedies prior to filing suit.

3. Section 553(e) of the APA allows any interested person to request or petition an agency to issue a rule in a particular field. Section 555(e) requires an agency to respond to such petitions and set forth reasons why they will either go forward with some type of rulemaking proceeding – or not. Chaney seems to suggest that the decision to initiate a rulemaking is so solidly vested to the discretion of the agency that parties should have no expectation of judicial review when agencies take no action after such petitions are filed. After Massachusetts v. EPA, infra Chapter 4 decided in 2007, an agency’s obligation to respond to such petitions seems more straightforward.
4. While *Chaney* affirms the principle that agency inaction is usually nonreviewable, it also raises the possibility of a court finding that the agency’s behavior “consciously and expressly . . . represents an abdication of the agency’s statutory responsibilities.” Evidence of lower courts using the “abdication of responsibility” as a foundation to compel agencies to act is scarce at best. *Riverkeeper Inc. v. Collins*, 359 F.3d 156 (2d Cir. 2004). In some areas, however, the abdication discourse is becoming more pronounced. See George Cameron Coggins, “Devolution” in *Federal Land Law: Abdication by Any Other Name*, 14 Hastings W.-NW. J. Envtl. L. & Pol’y 485 (2008).


Almost half the State of Utah, about 23 million acres, is federal land administered by the Bureau of Land Management (BLM) . . . . Protection of wilderness has come into increasing conflict with . . . recreational use of so-called off-road vehicles (ORVs) . . . . Some 42 million Americans participate in off-road travel each year, more than double the number two decades ago. . . .

All . . . claims at issue here involve assertions that BLM failed to take action with respect to ORV use that it was required to take. Failures to act are sometimes remediable under the APA, but not always . . . . [T]he only agency action that can be compelled under the APA is action legally required. . . . Thus, a claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a discrete agency action that it is required to take. . . . [W]hen an agency is compelled by law to act within a certain time period, but the manner of its action is left to the agency’s discretion, a court can compel the agency to act, but has no power to specify what the action must be . . . .

With these principles in mind, we turn to SUWA’s first claim, that by permitting ORV use in certain [Wilderness Study Areas], BLM violated its mandate to “continue to manage . . . in a manner so as not to impair the suitability of such areas for preservation as wilderness.” . . . Section 1782(c) is mandatory as to the object to be achieved, but it leaves BLM a great deal of discretion in deciding how to achieve it. It assuredly does not mandate, with the clarity necessary to support judicial action under § 706(1), the total exclusion of ORV use.

SUWA . . . contends that a federal court could simply enter a general order compelling compliance . . . without suggesting any particular manner of compliance . . . . If courts were empowered to enter general orders compelling compliance with broad statutory mandates, they would necessarily be empowered, as well, to determine whether compliance was achieved – which would mean that it would ultimately become the task of the supervising court, rather than the agency, to work out compliance with the
broad statutory mandate. . . . Allowing general enforcement of plan terms would lead to pervasive interference with BLM’s own ordering of priorities [and we will not do it].


FAA regulations require that air carriers administer periodic drug tests on employees who perform certain safety-sensitive functions. . . . Delta Airlines required its flight attendants to undergo random drug tests as a condition of their employment. In 1993, Drake was selected for testing. . . . His urine sample was sent to Delta’s designated laboratory, CompuChem Laboratories, Inc., which pronounced it “unsuitable for testing.” . . . A subsequent report suggested that this initial result was “indicative of adulteration with glutaraldehyde,” a substance often used to mask the presence of drugs in the body. . . . After Delta learned of this result, Drake was removed from active flight status. One month later, he was asked to resign, and was fired when he refused. . . .

In September 1998, Drake formally requested that the FAA investigate Delta for its allegedly unlawful actions in processing his urine sample. . . . On March 25, 1999, the FAA reported that it had found no evidence to support Drake’s allegations against Delta. . . . The instant case commenced on October 20, 1999, when Drake filed a second pro se action alleging that the FAA’s determination that Delta had not violated [federal regulations on employee drug testing] was unreasonable, and the product of a conspiracy between the agency and the airline. . . . The District Court then dismissed Drake’s action [and] Drake appealed. . . .

We reject this challenge, because we find that the FAA’s decision to dismiss Drake’s complaint without a hearing is “committed to agency discretion by law,” and thus excluded from review under the APA. 5 U.S.C. § 701(a)(2). . . . The FAA’s decision to dismiss Drake’s complaint without a hearing was equivalent to a decision not to commence an enforcement action. . . . The FAA’s action in this case was thus analogous to an exercise of “prosecutorial discretion” of the sort discussed in *Chaney*. And, as *Chaney* makes clear, when prosecutorial discretion is at issue, the matter is presumptively committed to agency discretion by law.

7. *Sierra Club v. Whitman*, 268 F.3d 898 (9th Cir. 2001):

The Nogales International Wastewater Treatment Plant . . . is located in Rio Rico, Arizona . . . . In 1991 the EPA granted a permit to the City of Nogales, Arizona and the United States Section of the Boundary Commission, the joint operators of the Treatment Plant. . . . The Treatment Plant violated its permit limitations 128 times between January 1995 and January 2000. The Clean Water Act provides that, whenever “the Administrator finds that any person is in violation” of permit conditions, the Administrator “shall issue an order requiring such person to comply . . . or . . . shall bring a civil action” against the violator. The EPA Administrator, however, has not made a finding of a violation by the Treatment Plant, nor has she taken any of the enforcement actions authorized by the Act. The Sierra Club brought this action against the EPA to compel it to initiate enforcement action. . . .
The EPA has many plants to monitor and must be able to choose which violations are the most egregious. However, the presumption that the EPA has discretion to decide when to enforce is only a presumption and can be overcome by indications that Congress intended otherwise. It is the word “shall,” upon which the Sierra Club principally relies. It is true that “shall” in a statute generally denotes a mandatory duty. Nonetheless, the use of “shall” is not conclusive. “shall” is sometimes the equivalent of “may.” [Our analysis] of the structure and the legislative history of the Clean Water Act leads to the conclusion that subsection 1319(a)(3) does not create mandatory enforcement duties.

First, the structure of section 1319 suggests that Congress did not intend the enforcement provisions to be mandatory. Subsection (b) merely states that “the Administrator is authorized to commence a civil action . . . .” (emphasis added). The language of authorization shows congressional intent to give the Administrator options, not to require their use in all instances. Another aspect of the statutory structure that suggests that the enforcement mechanisms are discretionary is the availability of citizen suits to enforce the Clean Water Act. By allowing citizens to sue to bring about compliance with the Clean Water Act, Congress implicitly acknowledged that there would be situations in which the EPA did not act. [Therefore the] presumption that it is within the EPA’s discretion whether to enforce or not enforce in any given case has not been overcome.

VII. Agency Action Without Written Opinion

**Ngure v. Ashcroft**

367 F.3d 975 (8th Cir. 2004)

[Judge Colloton] On August 30, 1995, Joseph Ngure, a native and citizen of Kenya, entered the United States . . . to attend Principia College in Elsah, Illinois. The terms of his J-1 visa permitted him to stay in the United States until June 15, 1996. On January 25, 2000, the INS issued a Notice to Appear charging that Ngure was removable . . . Ngure admitted that he was removable, and . . . applied for asylum . . . and relief under the Convention Against Torture.

Ngure is a member of the Kikuyu tribe, which is the largest tribe in Kenya. While Ngure was a student at the University of Nairobi in 1987, he participated in a week-long pro-democracy demonstration . . . Ngure was arrested while he was in his room. Soon after he arrived at the police station, he secured his release because he knew the superintendent of police. . . . Again, in 1990, Ngure participated in a pro-democracy demonstration that became riotous [and] was arrested. . . . [H]e was hit with batons and truncheons. He was detained at a police station for one week, during which time he was interrogated, “roughed up,” and subjected to cold and crowded conditions . . .

Ngure is a follower of the Christian Science faith. In 1993, his Christian Science group met in the park, but police officials advised them that they needed to have a permit to meet in the park and ordered them to disperse. The police took names, but none of the meeting attendees were harmed or arrested.

[I]n 1994 [Ngure] was arrested as he passed by a demonstration-turned-riot at a park. He was . . . released . . . on a recognizance bond. . . . After Ngure left Kenya . . . the Kenyan police went to the home of Ngure’s family because he failed to report as scheduled pursuant to the bond. . . . [A]n arrest warrant was issued on February 5, 1996, . . . ordering him to be brought before the court to answer the charge that he “participated in illegal demonstrations . . .”

. . . The IJ concluded that Ngure was ineligible for asylum because he did not file his application within one year of arriving in the United States and did not demonstrate any “changed” or “extraordinary circumstances” that caused his failure to apply within that time period. Alternatively, the IJ found that although Ngure’s testimony was credible, he did not suffer past persecution or have a well-founded fear of future persecution on account of his membership in the Kikuyu tribe, political opinions, or religious beliefs [and] denied his requests for withholding of removal and relief under the Convention Against Torture. The BIA
subsequently affirmed the IJ’s decision without opinion, pursuant to 8 C.F.R. § 3.1(e)(4) (2003). Pursuant to agency regulations, the IJ’s decision became the final agency determination.

[In 1999, after] concluding that the rapidly growing caseload of the Board of Immigration Appeals was impeding its ability to provide fair, timely, and uniform adjudications, Attorney General Reno instituted the BIA’s affirmance without opinion (“AWO”) procedure . . . . [In 2002, Attorney General Ashcroft amended the AWO process to streamline it further.] The streamlining regulations provide that a single board member shall “affirm without opinion” an IJ’s decision . . . if the member finds that the result reached by the IJ was correct, that any errors by the IJ were harmless or nonmaterial, and that either “the issues on appeal . . . do not involve the application of precedent to a novel factual situation” or “the factual and legal issues raised on appeal are not so substantial that the case warrants the issuance of a written opinion . . . .” The decision to affirm without opinion does not necessarily approve the reasoning of the IJ, but it does signify that the BIA agrees that the result was correct because any errors were harmless or nonmaterial. Once the BIA affirms a decision without opinion, the IJ’s decision becomes the final agency determination.

. . . .

There is a “basic presumption of judicial review” of agency action. “This is ‘just’ a presumption, however,” and in certain instances, agency action is deemed committed to agency discretion by law, and thus unreviewable by the courts. Over the years, the Supreme Court has held that judicial review is precluded for certain administrative decisions that are “traditionally left to agency discretion” . . . . Heckler v. Chaney. These discretionary actions include such matters as whether to institute an enforcement action, how to allocate funds from a lump-sum appropriation, and whether to grant reconsideration of an action because of material error.

The Supreme Court typically has held that actions are committed to agency discretion where it is not possible to devise an adequate standard of review for an agency action . . . . Chaney. Courts often ask whether there is sufficient “law to apply” in reviewing the agency’s action. Citizens to Preserve Overton Park, Inc. v. Volpe. An important factor in discerning whether there is a “meaningful standard” for judicial review is whether the agency decision “involves a complicated balancing of a number of factors which are peculiarly within its expertise.” . . . .

There is no statute that requires the BIA to issue a written opinion in any particular case, and Ngure does not contend that a statute provides the requisite “law to apply.” As noted, however, the judiciary may in certain contexts review an agency’s compliance with its own regulations . . . . The Supreme Court has
conducted judicial review, for example, where agency rules were “intended primarily to confer important procedural benefits upon individuals in the face of otherwise unfettered discretion”. . . . On the other hand, where a procedural rule is designed primarily to benefit the agency in carrying out its functions, judicial review may be circumscribed.

. . .

The Attorney General’s explanation for the AWO procedure demonstrates the applicability of these principles to the immigration review process:

To operate effectively in an environment where over 28,000 appeals and motions are filed yearly, the Board must have discretion over the methods by which it handles its cases. . . . Even in routine cases in which all Panel Members agree that the result reached below was correct, disagreements concerning the rationale or style of a draft decision can require significant time to resolve. The . . . Board’s resources are better spent on cases where there is a reasonable possibility of reversible error in the result reached below.

We believe that the tradition of agency discretion over internal procedures is particularly strong in this case, because “judicial deference to the Executive Branch is especially appropriate in the immigration context where officials ‘exercise especially sensitive political functions that implicate questions of foreign relations.’”

. . .

. . . It is . . . a basic principle of administrative law that where agency action is subject to judicial review, the agency must provide [a] reasoned explanation of its decision. The Attorney General’s streamlining regulations, however, explicitly prohibit the BIA from providing any explanation for its decision to affirm without opinion. The reason seems evident: If the BIA were required to explain in each case why the result reached by the IJ was correct, why any errors were harmless or nonmaterial, why the issues on appeal are squarely controlled by precedent and do not involve application of precedent to a novel factual situation, and why the issues are not so substantial that the case warrants issuance of a written opinion, then the BIA would be required to write the functional equivalent of a written opinion on the merits in every adjudication. . . .

. . . Like other decisions committed to agency discretion by law, the BIA’s streamlining determination “involves a complicated balancing of a number of factors which are peculiarly within its expertise,” Chaney, including the size of the BIA’s caseload and the limited resources available to the BIA. . . . Accordingly, we hold that the BIA’s decision to affirm without opinion in Ngure’s case is not subject to judicial review. . . .

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CHAPTER 4  Basic Reviewability Concerns

Underlying Case Documents

The case referenced:
The Convention Against Torture
The statute governing asylum
The statute governing removal of aliens
The regulation governing asylum
The regulation governing removal of aliens
The regulation governing affirmance without opinion
The 1999 Federal Register publication of the rule allowing summary affirmation
The 2002 Federal Register publication of the streamlining of the summary affirmation rule

1. In a student piece on the situation in Ngure, Jessica R. Hertz, Comment, Appellate Jurisdiction Over the Board of Immigration Appeals’s Affirmance Without Opinion Procedure, 73 U. Chi. L. Rev. 1019 (2006), the basic framework in the case is set out succinctly:

In 2002, the Department of Justice issued administrative reforms that dramatically altered the procedures governing appeals before the BIA. This controversial restructuring changed the traditional system of review by a three-member panel to permit review by a single Board member. This member may now issue an Affirmance Without Opinion (AWO) if he or she finds that the initial factfinder – the Immigration Judge (IJ) – reached the correct result. . . . The First, Third, and Ninth circuits hold that judicial review is proper because the BIA’s decision to affirm without opinion is not committed to agency discretion by law. . . . The [Second,] Eighth and Tenth circuits disagree, finding . . . the AWO procedure . . . discretionary and thus exempt from the APA’s general presumption of review.

How should this split be resolved? Is it possible to issue a decision without an opinion and comply with the requirements of State Farm? What protection against arbitrary action can you identify in Ngure?

2. Another student piece, Martin S. Krezalek, Note, How to Minimize the Risk of Violating Due Process Rights While Preserving the BIA’s Ability to Affirm Without Opinion, 21 Geo. Immigr. L.J. 277, 317 (2007), compares the two approaches on the “decision without opinion” issue in Ngure by looking at Ekasinta v. Gonzales, 415 F.3d 1188, 1189 (10th Cir. 2005) (which found the practice acceptable), and Lanza v. Ashcroft, 389 F.3d 917, 920 (9th Cir. 2004) (which found the practice unacceptable). The Note concludes that:
The mere implementation of the affirmance without opinion procedure has not infringed noncitizens' statutory right to judicial review. . . . [T]he summary affirmance has been a valuable tool in the Attorney General’s efforts to improve the efficiency of immigration adjudication. . . . However, the BIA’s use of the summary affirmance in cases where the IJ’s decision rests on both reviewable and non-reviewable grounds has created an area of jurisdictional ambiguity for the circuit courts. Remanding every questionable affirmance for clarification is inconsistent with the regulatory scheme of adjudicating immigration appeals efficiently. On the other hand, the outright denial of jurisdiction may violate procedural due process. . . .


There is also uncertainty whether the “streamlined process” adopted for BIA decisions is vested in the discretion of the agency. Chen v. Ashcroft, 378 F.3d 1081, 1088 (9th Cir. 2004), holds that the court can review the matter—meaning that it is not committed to agency discretion, while the Second, Eighth, and Tenth Circuits have taken the position that this choice of process is consistent with the agency’s legislative mandate, and thus vested in its discretion. Ngure is testament to that perspective.

Good Questions!

Try putting this in the context of law students. Are you owed an explanation of a grade you receive in a class? Must it be in writing? Presumably your professor has considerable discretion (subject to a curve your school might impose) in grading. Are grade decisions reviewable at your school? What would be the effect on grades of an automatic review by someone other than the professor who entered the grade initially?

Food for Thought

To be clear, these are adjudicatory decisions, not rulemaking cases. They are relevant at this point because they illuminate the extent to which agency action—and process—is vested to the discretion of administrative bodies. Since they are adjudicatory—and the standard for review in formal adjudication is typically “substantial evidence”—how can any review take place? If there is no record, what would a reviewing court assess?

The decision of an agency not to act is generally vested to the discretion of that agency. The following case challenges that notion.
VIII. Extraordinary Remedies for Inaction

**MASSACHUSETTS v. ENVIRONMENTAL PROTECTION AGENCY**

549 U.S. 497 (2007)

J ustice Stevens] A well-documented rise in global temperatures has coincided with a significant increase in the concentration of carbon dioxide in the atmosphere. Respected scientists believe the two trends are related. For when carbon dioxide is released into the atmosphere, it acts like . . . a greenhouse, trapping solar energy and retarding the escape of reflected heat. It is therefore a species – the most important species – of . . . “greenhouse gas.” . . .

[In 1987, Congress] enacted the Global Climate Protection Act. Finding that “manmade pollution – the release of carbon dioxide, chlorofluorocarbons, methane, and other trace gases into the atmosphere – may be producing a long-term and substantial increase in the average temperature on Earth,” Congress directed EPA to propose to Congress a “coordinated national policy on global climate change” . . . .

II.

On October 20, 1999, a group of 19 private organizations filed a rulemaking petition asking EPA to regulate “greenhouse gas emissions from new motor vehicles under § 202 of the Clean Air Act.” Petitioners maintained that 1998 was the “warmest year on record”; that carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons are “heat trapping greenhouse gases”; that greenhouse gas emissions have significantly accelerated climate change; and that the [Intergovernmental Panel on Climate Change’s] 1995 report warned that “carbon dioxide remains the most important contributor to [man-made] forcing of climate change.” The petition further alleged that climate change will have serious adverse effects on human health and the environment [and] observed that the agency itself had already confirmed that it had the power to regulate carbon dioxide. . . .

Fifteen months after the petition’s submission, EPA requested public comment on “all the issues raised in [the] petition,” adding a “particular” request for comments on “any scientific, technical, legal, economic or other aspect of these issues that may be relevant to EPAs consideration of this petition.” EPA received more than 50,000 comments over the next five months. Before the close of the comment period, the White House sought “assistance in identifying the areas in the science of climate change where there are the greatest certainties and uncertainties” from the National Research Council, asking for a response “as soon as possible.” The result was a 2001 report titled Climate Change: An Analysis of
Some Key Questions (NRC Report), which . . . concluded that “greenhouse gases are accumulating in Earth's atmosphere as a result of human activities, causing surface air temperatures and subsurface ocean temperatures to rise. . . .”

On September 8, 2003, EPA entered an order denying the rulemaking petition. The agency gave two reasons for its decision: (1) that contrary to the opinions of its former general counsels, the Clean Air Act does not authorize EPA to issue mandatory regulations to address global climate change; and (2) that even if the agency had the authority to set greenhouse gas emission standards, it would be unwise to do so at this time.

EPA observed that Congress “was well aware of the global climate change issue when it last comprehensively amended the [Clean Air Act] in 1990,” yet it declined to adopt a proposed amendment establishing binding emissions limitations. Congress instead chose to authorize further investigation into climate change. EPA further reasoned that Congress’ “specially tailored solutions to global atmospheric issues,” in particular, its 1990 enactment of a comprehensive scheme to regulate pollutants that depleted the ozone layer, counseled against reading the general authorization of § 202(a)(1) to confer regulatory authority over greenhouse gases. . . .

Even assuming that it had authority over greenhouse gases, EPA explained in detail why it would refuse to exercise that authority. The agency began by recognizing that the concentration of greenhouse gases has dramatically increased as a result of human activities, and acknowledged the attendant increase in global surface air temperatures. EPA nevertheless gave controlling importance to the NRC Report's statement that a causal link between the two “cannot be unequivocally established.” Given that residual uncertainty, EPA concluded that regulating greenhouse gas emissions would be unwise. . . .

III. Petitioners, now joined by intervenor States and local governments, sought review of EPA's order . . . [The court first rejected EPA's claim that the petitioners lacked standing. It then reviewed the agency's rejection of the rulemaking petition.]

V. . . . As we have repeated time and again, an agency has broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities. That discretion is at its height when the agency decides not to bring an enforcement action. . . . Some debate remains, however, as to the rigor with which we review an agency's denial of a petition for rulemaking. There
Chapter 4 Basic Reviewability Concerns

are key differences between a denial of a petition for rulemaking and an agency's decision not to initiate an enforcement action. In contrast to nonenforcement decisions, agency refusals to initiate rulemaking "are less frequent, more apt to involve legal as opposed to factual analysis, and subject to special formalities, including a public explanation." They moreover arise out of denials of petitions for rulemaking which (at least in the circumstances here) the affected party had an undoubted procedural right to file in the first instance. Refusals to promulgate rules are thus susceptible to judicial review, though such review is "extremely limited" and "highly deferential." . . .

EPA . . . argues that it cannot regulate carbon dioxide emissions from motor vehicles because doing so would require it to tighten mileage standards, a job (according to EPA) that Congress has assigned to DOT. But that DOT sets mileage standards in no way licenses EPA to shirk its environmental responsibilities. EPA has been charged with protecting the public's "health" and "welfare," a statutory obligation wholly independent of DOT's mandate to promote energy efficiency. The two obligations may overlap, but there is no reason to think the two agencies cannot both administer their obligations and yet avoid inconsistency. . . . Because greenhouse gases fit well within the Clean Air Act's capacious definition of "air pollutant," we hold that EPA has the statutory authority to regulate the emission of such gases from new motor vehicles.

. . .

VII.

The alternative basis for EPA's decision -- that even if it does have statutory authority to regulate greenhouse gases, it would be unwise to do so at this time -- rests on reasoning divorced from the statutory text. While the statute does condition the exercise of EPA's authority on its formation of a "judgment," that judgment must relate to whether an air pollutant "causes, or contributes to, air pollution which may reasonably be anticipated to endanger public health or welfare." Put another way, the use of the word "judgment" is not a roving license to ignore the statutory text. It is but a direction to exercise discretion within defined statutory limits.

If EPA makes a finding of endangerment, the Clean Air Act requires the agency to regulate emissions of the deleterious pollutant from new motor vehicles. 42 U.S.C. § 7521(a)(1) (stating that “[EPA] shall by regulation prescribe . . . standards applicable to the emission of any air pollutant from any class of new motor vehicles”). EPA no doubt has significant latitude as to the manner, timing, content, and coordination of its regulations with those of other agencies. But once EPA has responded to a petition for rulemaking, its reasons for action or
inaction must conform to the authorizing statute. Under the clear terms of the Clean Air Act, EPA can avoid taking further action only if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do. To the extent that this constrains agency discretion . . ., this is the congressional design.

EPA has refused to comply with this clear statutory command. Instead, it has offered a laundry list of reasons not to regulate. For example, EPA said that a number of voluntary executive branch programs already provide an effective response to the threat of global warming, that regulating greenhouse gases might impair the President's ability to negotiate with “key developing nations” to reduce emissions, and that curtailing motor-vehicle emissions would reflect “an inefficient, piecemeal approach to address the climate change issue.” Although we have neither the expertise nor the authority to evaluate these policy judgments, it is evident they have nothing to do with whether greenhouse gas emissions contribute to climate change. Still less do they amount to a reasoned justification for declining to form a scientific judgment . . .

Nor can EPA avoid its statutory obligation by noting the uncertainty surrounding various features of climate change and concluding that it would therefore be better not to regulate at this time. If the scientific uncertainty is so profound that it precludes EPA from making a reasoned judgment as to whether greenhouse gases contribute to global warming, EPA must say so. That EPA would prefer not to regulate greenhouse gases because of some residual uncertainty . . . is irrelevant. The statutory question is whether sufficient information exists to make an endangerment finding.

In short, EPA has offered no reasoned explanation for its refusal to decide whether greenhouse gases cause or contribute to climate change. Its action was therefore “arbitrary, capricious, . . . or otherwise not in accordance with law.” 42 U.S.C. § 7607(d)(9)(A). We need not and do not reach the question whether on remand EPA must make an endangerment finding, or whether policy concerns can inform EPA’s actions in the event that it makes such a finding. Chevron. We hold only that EPA must ground its reasons for action or inaction in the statute . . .

[Justice Scalia, dissenting.]

I join The Chief Justice’s [dissent] in full, and would hold that this Court has no jurisdiction . . . because petitioners lack standing. The Court having decided otherwise, it is appropriate for me to note my dissent on the merits.

. . . § 202(a)(1) of the Clean Air Act (CAA) . . . provides that the Administrator of the Environmental Protection Agency (EPA) “shall by regulation prescribe . . . standards applicable to the emission of any air pollutant from any class or classes
of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution . . . " There is no dispute that the Administrator has made no such judgment in this case. The question thus arises: Does anything require the Administrator to make a “judgment” whenever a petition for rulemaking is filed? Without citation of the statute or any other authority, the Court says yes . . . The Court points to no . . . provision because none exists.

Instead, the Court invents a multiple-choice question that the EPA Administrator must answer when a petition for rulemaking is filed. The Administrator must exercise his judgment in one of three ways: (a) by concluding that the pollutant does cause, or contribute to, air pollution that endangers public welfare (in which case EPA is required to regulate); (b) by concluding that the pollutant does not cause, or contribute to, air pollution that endangers public welfare (in which case EPA is not required to regulate); or (c) by “providing some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether” greenhouse gases endanger public welfare (in which case EPA is not required to regulate).

I am willing to assume, for the sake of argument, that the Administrator’s discretion in this regard is not entirely unbounded . . . The Court, however, with no basis in text or precedent, rejects all of EPA’s stated “policy judgments” . . . effectively narrowing the universe of potential reasonable bases to a single one: Judgment can be delayed only if the Administrator concludes that “the scientific uncertainty is profound.” . . . As the Administrator acted within the law in declining to make a “judgment” for the policy reasons above set forth, I would uphold the decision to deny the rulemaking petition on that ground alone . . .

The Court’s alarm over global warming may or may not be justified, but it ought not distort the outcome of this litigation. This is a straightforward administrative-law case, in which Congress has passed a malleable statute giving broad discretion, not to us but to an executive agency. No matter how important the underlying policy issues at stake, this Court has no business substituting its own desired outcome for the reasoned judgment of the responsible agency.
Underlying Case Documents

The case referenced:
The Global Climate Protection Act
The Clean Air Act
The October 1999 petition
The EPA request for public comment
The EPA denial of the petition for rulemaking

While it is only indirectly referenced in the opinion, for the full 1995 report on climate change click HERE.

For a site devoted to the Clean Air Act click HERE.

For a recent update on the case click HERE.

1. It is too early to judge the full effect of *Massachusetts v. EPA*. The case certainly raises far more questions than it answers. To what extent does the decision limit the deference due agency decisionmaking – has another hunk of *Chevron* been lopped off? *See Dru Stevenson, Special Solicitude for State Standing: Massachusetts v. EPA, 112 Penn St. L. Rev. 1, 74-75 (2007)._

*Massachusetts v. EPA* redraws the boundaries of judicial deference and agency discretion. In seeming contrast to earlier precedents, the Court held that agencies have substantially less discretion regarding their refusal to regulate than they do about when and how to enforce regulations. This distinction further tips the scales toward the states, who not only have assurances of standing, but also have an invitation to compel federal agencies to regulate new areas where they have been previously silent.

2. a. Is the *Chaney* doctrine regarding the general presumption of nonreviewability of agency inaction now confined exclusively to enforcement actions?

b. Has Section 553(e) of the APA regarding the petitioning process undergone a radical transformation?

c. Since the case appears to give favorable status, in terms of standing, to states seeking to force federal agencies into action, will the states play a more significant role in the federal regulatory process in the future?
3. One certain consequence of the case has been overtly political. In Spring 2008, subpoenas from various congressional committees issued to EPA, ostensibly to learn why, within a year of the decision, no new significant regulatory initiatives have been put into place. The subpoenas seek EPA internal working papers and communication between EPA and the Office of the President, and thus far the agency has not complied.


4. In May, 2008, EPA announced it would issue an advance notice of proposed rulemaking [Federal News Service, May 20, 2008, Tuesday, Hearing of the Oversight and Government Reform Committee: Subject: EPA’s New Ozone Standards, Testimony of Stephen L. Johnson, Administrator, EPA] – but nothing more concrete has been done in response to the Massachusetts v. EPA opinion. See Katherine Boyle, Dems Say Johnson Is a Puppet for White House, 10 Env’t & Energy Daily, 9 (2008). Not to put too fine an edge on this, but is it inappropriate for the Administrator of EPA, a cabinet-level officer, to be responsive to the Office of the President?

5. Assuming the agency does little or nothing, there is one potentially devastating interpretation. If a cabinet-level official – with the approval of the White House – does not appear to be bound to the mandates of the Supreme Court, what are the consequences for the power of the court and the rule of law? If EPA decides to take no further steps, are we back to President Andrew Jackson’s comments (or so legend goes) following Worcester v. Georgia? 31 U.S. (6 Pet.) 515 (1832). (After the Court found the Cherokee Nation entitled to mine ownership and proceeds flowing from the discovery of gold in the State of Georgia on Cherokee land and directed the State to insure those resources stayed with the Cherokees – an order the State did not follow – President Jackson is said to have refused to send federal troops to enforce the Court’s order, commenting: “John Marshall has made his decision; now let him enforce it.” Brian M. Feldman, Evaluating Public Endorsement of the Weak and Strong Forms of Judicial Supremacy, 89 VA. L. REV. 979, 989 (2003), citing Charles Warren, 1 THE SUPREME COURT IN UNITED STATES HISTORY, 1789-1835, at 759 (rev. ed. 1926) (suggesting the Jackson story may be apocryphal).)

a. Problems implementing Massachusetts v. EPA abound as this text goes to press. On July 11, 2008, the D.C. Circuit threw out the newly promulgated EPA Clean Air Interstate Rule, Rule to Reduce Interstate Transport of Fine Particulate Matter and
Ozone (Clean Air Interstate Rule); Revisions to Acid Rain Program; Revisions to the NO\(_x\) SIP Call, 70 Fed. Reg. 25,162 (May 12, 2005) ("CAIR"). The rule derives its authority from 42 U.S.C. § 7410(a)(2)(D)(i)(I). The rule took a regional approach and would have obligated more than half the states and the District of Columbia to take steps to lower vehicle generated sulfur dioxide and nitrogen oxides levels and to reduce power plant emissions. *North Carolina v. EPA*, 531 F.3d 896 (D.C. Cir. 2008). Finding the complex rules the agency issued “unseverable,” the court threw out the entire rule, in all likelihood requiring the agency to commence anew the rulemaking process, a decision certain to delay any further regulatory initiatives in this area until well into 2009.

The announcement of the court’s decision coincided with a statement from the White House that “it would take no steps under the Clean Air Act to regulate greenhouse gas emissions that contribute to global warming, even though the EPA formally announced that it would seek public comment on the issue.” Del Quentin Wilber & Marc Kaufman, *Judges Toss EPA Rule to Reduce Smog, Soot; It Was Agency’s Most Aggressive Air Measure*, Wash. Post, July 12, 2008, at A1.

b. There is a “toehold” theory in administrative law: Every meaningful regulatory initiative needs to start somewhere (i.e., with a toehold). Once an entry point is established, further amendments, revisions, interpretations, or guidances are possible – and may well attract far less attention than the initial rule. Even if the initial rule is less than ideal, in some areas, something is better than nothing. Read *North Carolina v. EPA* (above) in the full version: For those supporting a cleaner environment, would a less-than-perfect rule have been better than no rule at all?

c. The White House’s position in the above note is not subtle. Was President Jackson right? Can the President simply refuse to implement a Supreme Court decision?

d. On January 26, 2009, President Obama issued two memoranda regarding federal rules and policy on fuel efficiency and energy use. In one, he instructed the EPA to “take all measures” to issue a final rule that would implement administration policies on fuel consumption. In the second, the President asked EPA to reconsider the issuance of waivers to the State of California regarding compliance with fuel efficiency rules. To read those memoranda, click HERE and HERE.

6. The Endangerment Finding. How should EPA respond after the “endangerment” finding in *Massachusetts v. EPA* set out in the full text version of this case?

House Oversight and Government Reform Chairman Waxman today accused the White House of stopping an EPA effort to regulate carbon dioxide and other greenhouse gases from motor vehicles. In a letter to EPA Administrator Johnson, Waxman said that senior EPA officials had told his committee that the White House has not acted on an “endangerment finding” that EPA provided to the OMB in December. The finding, Waxman said, argues that vehicular greenhouse gas emissions pose a public health risk and should be reduced.

b. The focus on endangerment is, itself, a change from EPA’s asserted position that regulations were not required or even appropriate in the absence of scientific certainty regarding the harm a pollutant will cause. That change is noted in Professor Sidney A. Shapiro’s Symposium, *OMB and the Politicization of Risk Assessment*, 37 ENVTL. L. 1083, 1088 (2007):

The state of Massachusetts and other parties sued the Environmental Protection Agency (EPA) after it rejected a petition from the parties to regulate greenhouse emissions . . . . The Court held that EPA’s rejection of the petition was “arbitrary and capricious.” EPA defended its rejection of the petition in part on the ground that . . . a causal link between greenhouse gases and global warming could not be “unequivocally” established. The Court concluded that the absence of scientific certainty was “irrelevant” because the question under the statute was whether the scientific evidence was sufficient to make an endangerment finding. Section 202 mandates [EPA to prescribe regulations when an air pollutant] may reasonably be anticipated to endanger the public health or welfare . . . .


Pursuant to the [Highway Beautification Act (HBA)], each state that participates in [the] highway beautification program is responsible for . . . exercising “effective control” over outdoor advertising . . . . It is up to the Secretary, acting through the FHWA, to monitor compliance. If the Secretary determines . . . that a state is not maintaining “effective control,” she may institute formal enforcement proceedings and ultimately withhold 10% of federal highway funds until compliance is achieved . . . . The withholding decisions and the decision to commence enforcement proceedings are reserved exclusively to the Secretary . . . .

In early 1981, the FHWA conducted a fact-finding investigation in South Carolina, based partially on complaints by Dr. Charles Floyd . . . . The resultant report indicated that South Carolina was not maintaining “effective control” over its outdoor advertising and recommended that corrective steps be taken . . . . On January 7, 1982,
the Regional Administrator wrote Dr. Floyd to notify him that . . . no further action, outside routine monitoring, would be taken . . .

[The government claims] that the agency made an unreviewable decision not to recommend a formal penalty action and that Overton Park is inapplicable. We agree. Overton Park is inapposite because it involved a decision by the Secretary to provide funds under a statute that required a specific determination to be made before those funds could be released. In this case South Carolina already receives federal highway funds and the decision by the Regional Administrator was a non-coercive one declining to proceed toward further action to withhold a portion of these funds . . . In this instance, the agency exercised its discretion . . . by declining to proceed any further against South Carolina. This is clearly a decision not to enforce the statute as opposed to an affirmative decision of compliance. Since we have determined that this was an agency decision not to seek enforcement of a statute, it is presumptively unreviewable under Chaney . . .

This case aptly demonstrates the separation of powers underpinning of the presumption of the unreviewability of administrative agency decisions not to pursue enforcement in particular instances. The judiciary is ill-equipped to oversee executive enforcement decisions, whereas the agency is equipped to decide where to focus scarce resources, how to handle delicate federal-state relations and how to evaluate the strengths and weaknesses of particular cases. A decision by this Court to review such agency actions could lead to court intervention in all decisions not to pursue further action after preliminary investigations. The appropriate place for changes of the type sought by appellant is through Congress, not through the judiciary . . .

Reread the last paragraph in the case above. Why was that not the winning argument in Massachusetts v. EPA?

8. Securing a Writ of Mandamus.

a. A writ of mandamus is one option to address agency inaction. While such writs issue rarely, filing a claim to secure a writ may have a strategic value: At a minimum, it will guarantee that the agency, a judge, and (depending on one's approach) the press all focus on the fact that an agency has either failed to act in an area where it would seem action is warranted or delayed unreasonably, causing harm to those either subject to the agency's jurisdiction or who must proceed with the agency to secure a right, benefit, or entitlement.

Section 706(1) of the APA permits a court to “compel agency action unlawfully withheld or unreasonably delayed.” This language ostensibly addresses “failure to act” cases but generates some tough issues. For example, to be in court, a plaintiff must establish that they have standing and that matter is both ripe and final. Bennett v. Spear, supra Chapter 4, holds that finality requires that: “(1) the action should mark the consummation of the agency's decisionmaking process; and (2) the action should be one by which rights or obligations have been determined or from which legal consequences flow.”
b. If the “action” under attack is inaction, it is quite difficult to show that it is the final action of the agency. For example, even in the face of massive delay, if an agency issues a vague interim interpretive rule, it can claim it is “underway” or “in process” and therefore the matter is not final. Assuming one can show that the action the agency has taken is completely insufficient – or virtually nonexistent – the agency will likely argue that if the writ were to issue, it would be a crude and unconstitutional intrusion into the range of discretion Chevron deference (or some variety thereof) demands.

c. One response to this is well expressed in *Intermodal Techs., Inc. v. Mineta*, 413 F. Supp. 2d 834 (E.D. Mich. 2006), where the court held:

   
   [A]n agency’s inaction may itself amount to an exercise of discretion if responsibilities for a particular subject area have been entrusted to the agency without any plainly defined mandate to act, or where construction or application of a particular statute has been left to agency discretion.” The court went on to explain that pushing the agency to act was not an intrusion into the domain of agency decisionmaking: “[E]ven if the outcome of that exercise rests within the agency’s discretion, the agency can be compelled to exercise its discretion [without dictating a substantive response to the matter before the agency]. . . .”

d. Mandamus directed to an individual in an agency responsible for a specific task might be available if that person is not following clear and unambiguous rules. See *Dillard v. Yeldell*, 334 A.2d 578, 579 (D.C. 1975), and *Yeager v. Greene*, 502 A.2d 980, 981 n.3 (D.C. 1983), for the traditional standards applicable to nondiscretionary acts that are performed improperly – or not at all. One last and perhaps most important point: “A writ of mandamus is an extraordinary writ and should only be issued in ‘exceptional circumstances amounting to a judicial usurpation of power. . . .’” See *In re M.O.R.*, 851 A.2d 503 (D.C. App. 2004). Thus, this is a strategy with a low probability of success – though certainly worthy of consideration when delay and inaction cause significant harm. See *Erspamer v. Derwinski*, 1 Vet. App. 3 (U.S. Vet. App. 1990), for an interesting contrast in approach to the writ.
On March 24, 1989, the Exxon Valdez supertanker spilled nearly eleven million gallons of oil into Alaska’s once-pristine coastal ecosystem. Congress responded with the Oil Pollution Act of 1990 (“OPA” or “Act”). The Act not only broadened federal liability for oil spills, it also established [tanker] requirements to prevent such spills from occurring in the first place. The Oil Pollution Act of 1990 is now more than ten-years old, but the Coast Guard, the enforcing agency, still has failed to promulgate regulations required by the Act. Citing the agency’s failures on this score, petitioners Bluewater Network and Ocean Advocates now seek a writ of mandamus to compel the Coast Guard to finally make good on Congress’ commitments.

What makes this case somewhat unusual, albeit not difficult, is the fact that the Coast Guard has episodically engaged in some rulemaking, and promulgated some regulations [as required by the statute]. Approximately three months before the statutorily-imposed deadline [in 1991], the Coast Guard issued an advanced notice of proposed rulemaking seeking comments and suggestions regarding possible proposed rules for complying with §§ 4110(a) and (b). The Coast Guard also commissioned a technical feasibility study of existing [tank level or pressure monitoring (TLPM)] devices . . . which . . . found that “attainable accuracy is expected to be within 1.0-2.0% of the actual level.” Concerned that a 1.0 to 2.0 percent error margin, which translates to between 36,075 and 72,150 gallons of oil for a 400,000 ton tanker, would provide “insufficient warning to allow prompt action by the crew,” the Coast Guard called for a public hearing to augment comments to the original advanced notice.

In its August 1995 notice of proposed rulemaking, the Coast Guard limited its proposed rule to the establishment of standards for TLPM devices pursuant to § 4110(a), leaving questions of installation and use of compliant devices, pursuant to § 4110(b), for another day. . . . In March 1997, nearly six years after the statutory deadline, the Coast Guard adopted the proposed standards in the form of a temporary rule, effective for two years beginning April 28, 1997. The rule did not require installation or use of TLPM devices unless and until § 4110(a) compliant technology had been invented and the appropriate § 4110(b) rulemaking undertaken. . . . The temporary regulations did, in fact, sunset on April 28, 1999. In November of that year, the Coast Guard [said if it] “ever receives information about a device that is accurate enough to meet the standard, the rulemaking will be reinitiated.” . . . [No further regulations issued.]

The temporary regulations questioned whether, in light of [tanker] phaseout schedules, it would be “economically feasible” to require installation of tank level
and pressure monitoring devices if such devices were not developed within two years. But this question was raised because the agency knew that the temporary regulations . . . arguably embodied technology-forcing requirements that were beyond the current capacity of the affected industry. The Coast Guard never suggested, however, that the standards proposed in the temporary regulations were the only viable options to address the statutory mandate compelling the agency to establish some sort of rules as to both compliance standards and use requirements. . . .

The Coast Guard is correct that petitioners cannot use the present mandamus action to challenge the substance of the 1997 temporary regulations . . . [They were non-final and have expired.] Rather, petitioners challenge what the Coast Guard has since failed to do: it has never established permanent § 4110(a) regulations; and it has put off, and now disregards, addressing § 4110(b)’s use and installation requirements.

“An agency’s failure to regulate more comprehensively [than it has] is not ordinarily a basis for concluding that the regulations already promulgated are invalid.” Likewise, an agency’s pronouncement of its intent to defer or to engage in future rulemaking generally does not constitute final agency action reviewable by this court. . . . [However, what] is at issue in this case is the absence of any regulations under § 4110. The statute compels the agency to establish both compliance standards and use requirements. There are no such standards or requirements in existence – none – and the agency has no present intention to promulgate any. Petitioners argue, rather convincingly, that the agency’s current “we-will-not-promulgate-regulations” position is a blatant violation of the Act. That is the question that is before this court. . . .

Our consideration of any and all mandamus actions starts from the premise that issuance of the writ is an extraordinary remedy, reserved only for the most transparent violations of a clear duty to act. In the case of agency inaction, we not only must satisfy ourselves that there indeed exists such a duty, but that the agency has “unreasonably delayed” the contemplated action. See Administrative Procedure Act, 5 U.S.C. § 706(1) (1994). This court analyzes unreasonable delay claims under the now-familiar criteria set forth in Telecommunications Research & Action Center v. FCC, 750 F.2d 70 (D.C. Cir. 1984) (“TRAC”):

(1) the time agencies take to make decisions must be governed by a “rule of reason”; (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by delay; (6) the court
need not “find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed.”

. . . The statute indisputably commands the Coast Guard to establish some sort of compliance standards and use requirements by August 1991. There are no such standards or requirements, and the Coast Guard has disavowed any further action. The Coast Guard contends only that any attempt now to promulgate compliance standards and use requirements will run into the same practical problems encountered in the 1997 rulemaking – namely, that no equipment currently exists to meet the necessary standards. This argument misses the point. . . . Neither the Coast Guard in its prior rulemakings, nor government counsel at argument, dispute that functioning TLPM devices are available on the market. Nor, as a result, do they dispute that some sort of minimum § 4110(a) standard is possible – whether it be a less-stringent numbers standard or a simple technology-based standard.

The Coast Guard has not disputed petitioners’ arguments regarding the specific TRAC factors, and we do not pause to analyze them. Suffice it to say that all favor granting mandamus: a nine-year delay is unreasonable given a clear one-year time line and the Coast Guard’s admission that it will do no more; the delayed regulations implicate important environmental concerns; and the Coast Guard has not shown that expedited rulemaking here will interfere with other, higher priority activities. We will, therefore, retain jurisdiction over the case until final agency action disposes of the Coast Guard’s obligations under § 4110 of the OPA.

Mandamus pursuant to TRAC is an extraordinary remedy, reserved only for extraordinary circumstances. This is just such a circumstance. . . . For the foregoing reasons, we hereby direct the Coast Guard to undertake prompt § 4110 rulemaking.

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CHAPTER 4 Basic Reviewability Concerns

Underlying Case Documents

The case referenced:
The Oil Pollution Act of 1990
The 1991 notice of proposed rulemaking
The 1995 notice of proposed rulemaking
The 1997 temporary rule
The 1999 notice that rules will be issued only if the technology improves enough to make them feasible

For more information on the Exxon Valdez spill click HERE or HERE.

1. The basic requirements for mandamus in Bluewater – and in TRAC – are not hard to articulate. This extraordinary remedy should be considered when (a) there is a legislative timetable, (b) the delay is egregious, (c) the action sought is arguably nondiscretionary, (d) an important interest (like public health) is at stake, (e) the delay is unreasonable and has a prejudicial effect, and (f) the issuance of the writ would serve not only an individual client interest but also the public interest.

Were all these factors present in Bluewater? What makes a delay unreasonable? If the test of reasonability requires a measure against which the delay of the agency can be judged, what measure is appropriate? Generalizing about delay in government is not useful – some processes take longer than others. That said, what facts and evidence would you need to demonstrate that a delay in a specific case is at a level that justifies issuance of the writ? Take a look at Michael D. Sant’Ambrogio, Agency Delays, 79 GEO. WASH. L. REV. 1381 (2011), for an interesting perspective on the problems of delayed agency action.

2. Is a three-year delay in having the FBI complete a “name and background check” unreasonable? Those lawfully present in the United States who seek a visa adjustment for a family member (to change the status of a spouse or children) must have their application processed by the U.S. Citizenship and Immigration Services (USCIS). The backlog in this area is the subject of a number of decisions where applicants have challenged USCIS in court, seeking writs of mandamus, claiming that these delays are unreasonable and destructive. Here is a glimpse of two opinions involving similar claims – and opposite results:


plaintiff Servati, a citizen of the United States, filed a visa petition [in 2004] to bring his then fiancé, now wife . . . into the United States . . . under 8 U.S.C.
§ 1101(a)(15)(K) . . . [More than three years passed and, as of the date of this decision, no action has been taken on the adjustment petition.]

District courts have original jurisdiction over any action in the nature of mandamus [under] 28 U.S.C. § 1361 if . . . (1) the individual's claim is clear and certain; (2) the official's duty is nondiscretionary, ministerial, and so plainly prescribed as to be free from doubt, and (3) no other adequate remedy is available. Kildare v. Saenz, 325 F.3d 1078, 1084 (9th Cir. 2003) . . .

[S]ome district courts have concluded that the pace that U.S. Citizenship and Immigration Services ("USCIS") adjudicates an adjustment of status application is discretionary [and outside] § 1361 . . . . In contrast, other district courts have concluded that courts have jurisdiction to hear a mandamus suit alleging that USCIS [as failed] to adjudicate an immigration application within a reasonable period of time . . .

Victoria Porto ("Porto") [an] Officer [with] USCIS . . . explains that since the terrorist attacks on September 11, 2001, there is a need to conduct more rigorous background checks of those who are seeking immigration status. Because this process is more thorough, it sometimes results in the delay of requested documentation and immigration benefits. However, because of public safety, it is imperative that background checks are conducted properly . . . . [T]he Court finds that the USCIS is properly adjudicating Plaintiff's application [and therefore the writ will not issue].


[t]he plaintiffs . . . are married citizens of China [and] researchers at the University of Kentucky. Along with their daughter . . . , they [sought] Adjustment Status . . . with USCIS to obtain permanent resident status . . . . [More than three years have passed since the applications for adjustment were filed.]

The parties agree that the plaintiffs' I-485 applications, along with thousands of other unrelated applications, are still being processed while the United States Federal Bureau of Investigation ("FBI") conducts a routine background security check . . . . [A]ccording to the [government], the FBI has received "millions of name check requests" from CIS since September 11, 2001, "thus taxing that agency's resources and creating a backlog in FBI's performance of complete security checks . . . ."

The court is persuaded by the reasoning of those courts that have found mandamus jurisdiction exists to review such claims. Although USCIS's ultimate decision on the merits . . . is discretionary, and therefore beyond the scope of mandamus jurisdiction, USCIS has a non-discretionary duty to reach its decision . . . within a reasonable time. Put another way, the defendants' alleged failure to take timely action on the plaintiffs' application is not itself a decision, let alone a discretionary decision, but rather unreasonable inaction, which is the proper subject of mandamus relief . . .


On April 4, 1986, the plaintiffs-appellees, . . . ("Marathon"), filed a Mineral Application with the Colorado State office of the Bureau of Land Management ("BLM"). The application covered six oil shale placer mining claims . . . in western
CHAPTER 4  Basic Reviewability Concerns

Rio Blanco County, Colorado. . . . On June 9, 1987, Marathon was notified that the Colorado division of the BLM would conduct a mineral examination of their claims to determine whether there was a sufficient amount of oil shale to justify the awarding of patents for the claims. . . . The field work for the examination was completed by late July, 1987. By December 9, 1987, Marathon had filed all the necessary papers required to process its application . . . . On February 1, 1989, the Department prepared a draft of its Final Mineral Report. The report unequivocally stated that Marathon’s mineral claims were valid and that the patents should issue. However, by October of 1989, the patents still had not been issued. Marathon . . . filed suit in the United States District Court for the District of Colorado requesting that the court order the defendants to grant the patents. On June 20, 1990, the district court ruled in favor of Marathon and [issued the writ at issue here].

Congress intended the defendants to process oil shale mining patent applications. Therefore, the writ of mandamus ordering appellants to “expeditiously complete administrative action” was entirely appropriate. . . . [The appellants do not contest this] What the appellants do dispute is the district court’s order that the department complete its review of the patent application within thirty days. Although the party seeking issuance of a writ of mandamus has a heavy burden of showing that the conditions are clearly met the issuance of the writ is a matter of the issuing court’s discretion. After reviewing the record, we cannot agree with the defendants that the district court abused its discretion in ordering the agency to take action within thirty days.

When the district court issued the writ, more than four years had elapsed since Marathon had filed its application with the BLM. By December 9, 1987, Marathon had met its obligations . . . . It took the BLM almost three years from the filing of Marathon’s application to complete the mineral report. The report was completed on February 1, 1989, and recommended that the patents be issued. As of February 1, 1989, the only thing standing between Marathon and its patents was the absence of signature “under the authority of the Director [of the Bureau of Land Management] and signed in the name of the United States.” Eight months later when Marathon filed suit in district court, the patent still had not issued. When the district court finally issued the writ of mandamus ordering the Department to finish the process, approximately fourteen months had elapsed since the mineral report recommending approval had been issued.

The district court, however, exceeded its authority when it ordered the defendants to approve the application and to issue the patents. The Department has not yet determined officially that all conditions to issuance of the patents have occurred. Thus, the Department has not yet reached the point when it is left only with the purely ministerial act of issuing the patent. Therefore, the approval of the application should not yet be compelled by a writ of mandamus . . . . In other words, while the district court can compel the defendants to exercise their discretion, it cannot dictate how that discretion is to be exercised . . . .

IX. Judicial Review of Retroactive Agency Action

Our legal system places a high value on notice. At the core of due process is the concept that adverse action cannot be taken unless one has notice and an
opportunity to be heard. This is expressed by the historical disfavor with ex post facto laws and the prohibition against Bills of Attainder.

The premise is fairly straightforward: One should not be sanctioned for behavior that, when it occurred, had not been deemed unlawful. When individuals and entities act, they are subject only to those standards (in the statute, regulation, rule, or common law) that exist.

As a general rule, agencies cannot make rules that condemn theretofore lawful behavior that has already occurred and sanction parties for engaging in that behavior. Were it that simple, there would be no need to study the cases that follow. The complexity arises from both the essential generality of legislation and the necessity of meaningful enforcement of statutes.

Neither statutes nor regulations can articulate with specificity every infraction that might occur. For example, statutes that require fairness in the trading of securities or prohibit activity that contaminates the air and water cannot set forth every conceivable unfair action or every type of polluting event. Some latitude must be provided to allow for definitions to emerge over time. The question, of course, is whether the emergence of a new definition of prohibited conduct will allow for retroactive enforcement or whether such clarification by regulation allows only for prospective enforcement of the newly articulated sanctions.

As the cases demonstrate, balancing the interests of the government in effective enforcement against the interests of the individual in avoiding unfair retroactive application of standards requires a careful assessment of multiple factors.

**Securities & Exchange Commission v. Chenery Corporation**

332 U.S. 194 (1947)

[Justice Murphy] This case is here for the second time. . . . [The first time around] we held that an order of the Securities and Exchange Commission could not be sustained on the grounds upon which that agency acted. We therefore directed that the case be remanded to the Commission for such further proceedings as might be appropriate. On remand, the Commission reexamined the problem, recast its rationale and reached the same result. The issue now is whether the Commission’s action is proper in light of the principles established in our prior decision.
When the case was first here, we emphasized a simple but fundamental rule of administrative law. That rule is to the effect that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis. To do so would propel the court into the domain which Congress has set aside exclusively for the administrative agency. We also emphasized in our prior decision an important corollary of the foregoing rule. If the administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with such clarity as to be understandable. It will not do for a court to be compelled to guess at the theory underlying the agency’s action . . . . Applying this rule and its corollary, the Court was unable to sustain the Commission’s original action . . .

During [a] period when successive reorganization plans proposed by the [Federal Water Service Corporation (Federal)] management were before the Commission, the officers, directors and controlling stockholders of Federal purchased a substantial amount of Federal’s preferred stock on the over-the-counter market. Under the fourth reorganization plan, this preferred stock was to be converted into common stock of a new corporation; on the basis of the purchases of preferred stock, the management would have received more than 10% of this new common stock. It was frankly admitted that the management’s purpose in buying the preferred stock was to protect its interest in the new company. It was also plain that there was no fraud or lack of disclosure in making these purchases.

But the Commission would not approve the fourth plan so long as the preferred stock purchased by the management was to be treated on a parity with the other preferred stock. It felt that the officers and directors of a holding company in process of reorganization under the Act were fiduciaries and were under a duty not to trade in the securities of that company during the reorganization period. And so the plan was amended to provide that the preferred stock acquired by the management, unlike that held by others, was not to be converted into the new common stock; instead, it was to be surrendered at cost plus dividends accumulated since the purchase dates. As amended, the plan was approved by the Commission over the management’s objections.

The Court interpreted the Commission’s order approving this amended plan as grounded solely upon . . . what [the Commission] thought were standards theretofore recognized by courts. . . . On that basis, the order could not stand. The opinion pointed out that courts do not impose upon officers and directors of a corporation any fiduciary duty to its stockholders which precludes them, merely because they are officers and directors, from buying and selling the corporation’s
And the only judge-made rule of equity which might have justified the Commission's order related to fraud or mismanagement of the reorganization by the officers and directors, matters which were admittedly absent in this situation.

After the case was remanded to the Commission, Federal Water and Gas Corp. (Federal Water), the surviving corporation under the reorganization plan, made an application for... an amendment to the plan to provide for the issuance of new common stock of the reorganized company. This stock was to be distributed to the members of Federal's management on the basis of the shares of the old preferred stock which they had acquired during the period of reorganization, thereby placing them in the same position as the public holders of the old preferred stock... The Commission denied the application in an order issued on February 8, 1945. That order was reversed by the Court of Appeals, which felt that our prior decision precluded such action by the Commission.

The latest order of the Commission definitely avoids the fatal error of relying on judicial precedents which do not sustain it. This time, after a thorough reexamination of the problem in light of the purposes and standards of the Holding Company Act, the Commission has concluded that the proposed transaction is inconsistent with the standards of §§ 7 and 11 of the Act. It has drawn heavily upon its accumulated experience in dealing with utility reorganizations. And it has expressed its reasons with a clarity and thoroughness that admit of no doubt as to the underlying basis of its order.

The argument is pressed upon us, however, that the Commission was foreclosed from taking such a step following our prior decision... Under this view, the Commission would be free only to promulgate a general rule outlawing such profits in future utility reorganizations; but such a rule would have to be prospective in nature and have no retroactive effect upon the instant situation.

We reject this contention, for it grows out of a misapprehension of our prior decision and of the Commission's statutory duties. We held no more and no less than that the Commission's first order was unsupportable for the reasons supplied by that agency. But when the case left this Court, the problem whether Federal's management should be treated equally with other preferred stockholders still lacked a final and complete answer. It was clear that the Commission could not give a negative answer by resort to prior judicial declarations... Still unsettled, however, was the answer the Commission might give were it to bring to bear on the facts the proper administrative and statutory considerations, a function which belongs exclusively to the Commission in the first instance. The administrative process had taken an erroneous rather than a final turn. Hence we carefully refrained from expressing any views as to the propriety of an order rooted in the proper and relevant considerations... The fact that the Commission had
committed a legal error in its first disposition of the case certainly gave Federal's management no vested right to receive the benefits of such an order. . . .

The absence of a general rule or regulation governing management trading during reorganization did not affect the Commission's duties in relation to the particular proposal before it. . . . Indeed, if the Commission rightly felt that the proposed amendment was inconsistent with [the Act], an order giving effect to the amendment merely because there was no general rule or regulation covering the matter would be unjustified.

It is true that our prior decision explicitly recognized the possibility that the Commission might have promulgated a general rule dealing with this problem under its statutory rulemaking powers, [b]ut we did not mean to imply thereby that the failure of the Commission to anticipate this problem and to promulgate a general rule withdrew all power from that agency to perform its statutory duty in this case. To hold that the Commission had no alternative in this proceeding but to approve the proposed transaction, while formulating any general rules it might desire for use in future cases of this nature, would be to stultify the administrative process. That we refuse to do.

Since the Commission, unlike a court, does have the ability to make new law prospectively through the exercise of its rulemaking powers, [t]he function of filling in the interstices of the Act should be performed, as much as possible, through this quasi-legislative promulgation of rules to be applied in the future. But any rigid requirement to that effect would make the administrative process inflexible and incapable of dealing with many of the specialized problems which arise. . . . To insist upon one form of action to the exclusion of the other is to exalt form over necessity. In other words, problems may arise in a case which the administrative agency could not reasonably foresee, problems which must be solved despite the absence of a relevant general rule. Or the agency may not have had sufficient experience with a particular problem to warrant rigidifying its tentative judgment into a hard and fast rule. Or the problem may be so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule. In those situations, the agency must retain power to deal with the problems on a case-to-case basis if the administrative process is to be effective. . . . And the choice . . . between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency.

Hence we refuse to say that the Commission, which had not previously been confronted with the problem of management trading during reorganization, was forbidden from utilizing this particular proceeding for announcing and applying a new standard of conduct. That such action might have a retroactive effect was not necessarily fatal to its validity. Every case of first impression has a retroactive
effect, whether the new principle is announced by a court or by an administrative agency. But such retroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles. If that mischief is greater than the ill effect of the retroactive application of a new standard, it is not the type of retroactivity which is condemned by law.

And so in this case, the fact that the Commission's order might retroactively prevent Federal's management from securing the profits and control which were the objects of the preferred stock purchases may well be outweighed by the dangers inherent in such purchases from the statutory standpoint. If that is true, the argument of retroactivity becomes nothing more than a claim that the Commission lacks power to enforce the standards of the Act in this proceeding. Such a claim deserves rejection.

The problem in this case thus resolves itself into a determination of whether the Commission's action in denying effectiveness to the proposed amendment to the Federal reorganization plan can be justified on the basis upon which it clearly rests. As we have noted, the Commission avoided placing its sole reliance on inapplicable judicial precedents. Rather it has derived its conclusions from the particular facts in the case, its general experience in reorganization matters and its informed view of statutory requirements. It is those matters which are the guide for our review.

The Commission concluded that it could not find that the reorganization plan, if amended as proposed, would be “fair and equitable to the persons affected thereby” within the meaning of § 11(e) of the Act, under which the reorganization was taking place. Its view was that the amended plan would involve the issuance of securities on terms “detrimental to the public interest or the interest of investors” . . . and would result in an “unfair or inequitable distribution of voting power” among the Federal security holders within the meaning of § 7(e). It was led to this result “not by proof that the interveners [Federal Water’s management] committed acts of conscious wrongdoing but by the character of the conflicting interests created by the interveners’ program of stock purchases carried out while plans for reorganization were under consideration.”

The Commission noted that Federal's management controlled a large multi-state utility system and that its influence permeated down to the lowest tier of operating companies. . . . The broad range of business judgments vested in Federal's management multiplied opportunities for affecting the market price of Federal's outstanding securities and made the exercise of judgment on any matter a subject of greatest significance to investors. Added to these normal managerial powers, the Commission pointed out that a holding company management obtains special powers in the course of a voluntary reorganization under § 11(e) of
the Holding Company Act. The management represents the stockholders in such a reorganization, initiates the proceeding, draws up and files the plan, and can file amendments thereto at any time. These additional powers may introduce conflicts between the management’s normal interests and its responsibilities to the various classes of stockholders which it represents in the reorganization. Moreover, because of its representative status, the management has special opportunities to obtain advance information of the attitude of the Commission.

Drawing upon its experience, the Commission indicated that all these normal and special powers of the holding company management during the course of a § 11(e) reorganization placed in the management’s command “a formidable battery of devices that would enable it, if it should choose to use them selfishly, to affect in material degree the ultimate allocation of new securities among the various existing classes, to influence the market for its own gain, and to manipulate or obstruct the reorganization required by the mandate of the statute.” In that setting, the Commission felt that a management program of stock purchase would give rise to the temptation and the opportunity to shape the reorganization proceeding so as to encourage public selling on the market at low prices. . . . The Commission further felt that its answer should be the same even where proof of intentional wrongdoing on the management’s part is lacking. Assuming a conflict of interests, the Commission thought that the absence of actual misconduct is immaterial; injury to the public investors and to the corporation may result just as readily. . . . Moreover, the Commission was of the view that the delays and the difficulties involved in probing the mental processes and personal integrity of corporate officials do not warrant any distinction on the basis of evil intent, the plain fact being “that an absence of unfairness or detriment in cases of this sort would be practically impossible to establish by proof.” . . .

The scope of our review of an administrative order wherein a new principle is announced and applied is no different from that which pertains to ordinary administrative action. The wisdom of the principle adopted is none of our concern. Our duty is at an end when it becomes evident that the Commission’s action is based upon substantial evidence and is consistent with the authority granted by Congress. . . . The Commission’s conclusion here rests squarely in that area where administrative judgments are entitled to the greatest amount of weight by appellate courts. It is the product of administrative experience, appreciation of the complexities of the problem, realization of the statutory policies, and responsible treatment of the uncontested facts. It is the type of judgment which administrative agencies are best equipped to make and which justifies the use of the administrative process. Whether we agree or disagree with the result reached, it is an allowable judgment which we cannot disturb.

[Justice Jackson, dissenting.]
As the Court correctly notes, the Commission has only “recast its rationale and reached the same result.” There being no change in the order, no additional evidence in the record and no amendment of relevant legislation, it is clear that there has been a shift in attitude between that of the controlling membership of the Court when the case was first here and that of those who have the power of decision on this second review. . . . The Court's reasoning adds up to this: The Commission must be sustained because of its accumulated experience in solving a problem with which it had never before been confronted! . . .

I suggest that administrative experience is of weight in judicial review only [in that] it is a persuasive reason for deference to the Commission in the exercise of its discretionary powers under and within the law. It cannot be invoked to support action outside of the law. And what action is, and what is not, within the law must be determined by courts, when authorized to review, no matter how much deference is due to the agency's fact finding. . . .

1. While *Chenery* is an adjudication, it is a basic administrative law case and is often referred to in rulemaking cases, in part because the case is about what many see as the articulation of a new rule in an adjudication. “A time-honored principle of administrative law is that the label an agency puts on its actions is not necessarily conclusive.” *Columbia Broadcasting System, Inc. v. United States*, 316 U.S. 407, 416 (1942). Equally true, however, is the fact that agencies can issue rules through adjudication (the process by which orders are normally issued) and orders through rulemaking. *San Diego Air Sports Center, Inc. v. Federal Aviation Administration*, 887 F.2d 966 (9th Cir. 1989). Was the agency issuing a rule in *Chenery*? Did the agency – and thereafter the Court – announce a standard that has the force of law? Was there, prospectively, a prohibition on insiders purchasing preferred stock during a period of corporate reorganization?

2. *Chenery*’s mandate to judge an agency by what it claims to be the basis of its action is referenced frequently as the rule the case sets forth regarding retroactivity. It is not a controversial concept but is of use in client representation. It is, technically speaking, a ban on post hoc rationalization by lawyers charged with the responsibility of defending an agency decision and, at first blush, makes sense. There has always been a prohibition on making appellate arguments “not raised below.” In agency practice, however, particularly with rulemaking, there is no requirement that a statement of basis and purpose include all evidence, comments, arguments, and policies that are relevant.

3. In a recent decision, *Utah Environmental Congress (UEC) v. Richmond*, 483 F.3d 1127 (10th Cir. 2007), the UEC challenged a Forest Service plan to permit logging in an ecologically sensitive area. On appeal, the UEC argued that the Forest
Service had not relied on the best available science to make its decision, an argument not made below. In response, the Forest Service sought to demonstrate the efficacy of its decision, using arguments that were not part of the agency decision. Based on *Chenery*, the court noted as follows:

The fact that UEC never argued that the Forest Service failed to use the “best available science” standard brings into conflict two established lines of precedent. The first is that we will not, absent manifest injustice, vacate or reverse a district court decision based on an argument not made by the plaintiff. See *Sussman v. Patterson*, 108 F.3d 1206, 1210 (10th Cir. 1997). The second [is that] we may not affirm an agency decision based on reasoning that the agency itself never considered. . . . Citing *SEC v. Chenery*.

4. Rulemaking is legislative, and if there is enough to understand the statutory and regulatory context, regulatory history, legal and factual basis for the rule, and purpose of the rule, § 553(c) is satisfied. On appeal, the attack on a rule can be expansive, and it is not necessarily bound by the content of the rule itself and may go to areas the agency did not address. In that moment, would the agency’s ability to respond be hampered by the prohibition on raising arguments not found in the agency decision?

5. In *Yale-New Haven Hosp. v. Leavitt*, 470 F.3d 71 (2d Cir. 2006), the Department of Health and Human Services (HHS) sought to apply a revised Medicare manual (which HHS treated as having the force of law) as a basis to deny coverage in a treatment program “involving investigational cardiac devices provided to 48 patients.” The appellate issue centered on the very limited record used by HHS when the agency completed the revisions to its manual – and the more elaborate information HHS wanted considered in court to explain the basis for the earlier revisions. The court held as follows:

Generally speaking, after-the-fact rationalization for agency action is disfavored. . . . At the same time, an agency may supplement the administrative record before the reviewing court in some circumstances – among them, if “the absence of formal administrative findings makes such investigation necessary in order to determine the reasons for the agency’s choice.” . . . . Some tension is evident between the general principle (disfavoring the after-the-fact rationalization of agency action) and the exceptions. . . . [The court then decided to follow the D.C. Circuit rule] that “new materials should be merely explanatory of the original record and should contain no new rationalizations.”

Food for Thought

Do you think the prohibition against post hoc rationalization might lead to the expensive and inefficient practice of padding the record – and if so, does this create an incentive to issue rules through adjudication?
Under the D.C. Circuit standard, how easy would it be to distinguish between new materials not present in a rulemaking record and new materials that “merely” explain the rule? Once the court opens the door to new explanatory materials, does the basic principle in *Chenery* vanish?


Plaintiff Utah Environmental Congress (UEC) brought this action alleging that defendants, representatives of the United States Forest Service . . . violated federal law by authorizing six separate projects in four national forests in the State of Utah. . . . [While the] Forest Service on appeal asks us to adopt the same approach as the district court and conclude that the analysis actually engaged in by the Forest Service effectively satisfies the best available science standard, UEC takes this position to task, correctly noting that “the reviewing court may not supply the basis for the agency’s decision that the agency itself has not given.” . . . [See *Cheryer* (holding that a reviewing “court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis”)].

The applicability of *Chenery* to rulemaking is longstanding and uncontroversial. If anything, the restrictions on retroactive action are more explicit in rulemaking than in adjudication, as becomes obvious in the following case.

**BOWEN v. GEORGETOWN UNIVERSITY HOSPITAL**

488 U.S. 204 (1988)

[Justice Kennedy] Under the Medicare program, health care providers are reimbursed by the Government for expenses incurred in providing medical services to Medicare beneficiaries. Congress has authorized the Secretary of Health and Human Services to promulgate regulations setting limits on the levels of Medicare costs that will be reimbursed. The question presented here is whether the Secretary may exercise this rulemaking authority to promulgate cost limits that are retroactive.

The Secretary’s authority to adopt cost-limit rules is established by . . . the Social Security Amendments of 1972.

On June 30, 1981, the Secretary issued a cost-limit schedule that [changed] the method for calculating the “wage index,” a factor used to reflect the salary levels for hospital employees in different parts of the country. Under the prior rule, the wage index for a given geographic area was calculated by using the aver-
average salary levels for all hospitals in the area; the 1981 rule provided that wages paid by Federal Government hospitals would be excluded from that computation.

Various hospitals in the District of Columbia area brought suit . . . seeking to have the 1981 schedule invalidated. On April 29, 1983, the District Court struck down the 1981 wage-index rule, concluding that the Secretary had violated the [APA] by failing to provide notice and an opportunity for public comment before issuing the rule. The court did not enjoin enforcement of the rule, however, finding it lacked jurisdiction to do so because the hospitals had not yet exhausted their administrative reimbursement remedies. The court’s order stated:

If the Secretary wishes to put in place a valid prospective wage index, she should begin proper notice and comment proceedings; any wage index currently in place that has been promulgated without notice and comment is invalid as was the 1981 schedule.

The Secretary did not pursue an appeal. Instead, . . . the Secretary settled the hospitals’ cost reimbursement reports by applying the pre-1981 wage-index method.

In February 1984, the Secretary published a notice seeking public comment on a proposal to reissue the 1981 wage-index rule, retroactive to July 1, 1981. Because Congress had subsequently amended the Medicare Act to require significantly different cost reimbursement procedures, the readoption of the modified wage-index method was to apply exclusively to a 15-month period commencing July 1, 1981. After considering the comments received, the Secretary reissued the 1981 schedule in final form on November 26, 1984, and proceeded to recoup sums previously paid as a result of the District Court’s ruling . . . . In effect, the Secretary had promulgated a rule retroactively, and the net result was as if the original rule had never been set aside.

Respondents, a group of seven hospitals who had benefited from the invalidation of the 1981 schedule, were required to return over $2 million in reimbursement payments. After exhausting administrative remedies, they sought judicial review under . . . the APA, claiming that the retroactive schedule was invalid under both the APA and the Medicare Act.

The United States District Court for the District of Columbia granted summary judgment for respondents. . . . [T]he court held that retroactive application was not justified under the circumstances of the case. The Secretary appealed to . . . the District of Columbia Circuit, which affirmed . . . on the alternative grounds that the APA, as a general matter, forbids retroactive rulemaking, and that the Medicare Act, by specific terms, bars retroactive cost-limit rules. . . . [W]e now affirm.
II

It is axiomatic that an administrative agency’s power to promulgate legislative regulations is limited to the authority delegated by Congress. In determining the validity of the Secretary’s retroactive cost-limit rule, the threshold question is whether the Medicare Act authorizes retroactive rulemaking.

Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result. By the same principle, a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms. Even where some substantial justification for retroactive rulemaking is presented, courts should be reluctant to find such authority absent an express statutory grant.

A

The authority to promulgate cost-reimbursement regulations is set forth in § 1395x(v)(1)(A). That subparagraph also provides that:

Such regulations shall . . . (ii) provide for the making of suitable retroactive corrective adjustments where, for a provider of services for any fiscal period, the aggregate reimbursement produced by the methods of determining costs proves to be either inadequate or excessive.

This provision on its face permits some form of retroactive action. We cannot accept the Secretary’s argument, however, that it provides authority for the retroactive promulgation of cost-limit rules. To the contrary, we agree with the Court of Appeals that clause (ii) directs the Secretary to establish a procedure for making case-by-case adjustments to reimbursement payments where the regulations prescribing computation methods do not reach the correct result in individual cases. The structure and language of the statute require the conclusion that the retroactivity provision applies only to case-by-case adjudication, not to rulemaking.

B

The statutory provisions establishing the Secretary’s general rulemaking power contain no express authorization of retroactive rulemaking. Any light that
might be shed on this matter by suggestions of legislative intent also indicates that no such authority was contemplated. . . .

The legislative history of the cost-limit provision directly addresses the issue of retroactivity. . . . [T]he House and Senate Committee Reports expressed a desire to forbid retroactive cost-limit rules:

The proposed new authority to set limits on costs . . . would be exercised on a prospective, rather than retrospective, basis so that the provider would know in advance the limits to Government recognition of incurred costs and have the opportunity to act to avoid having costs that are not reimbursable.

The Secretary's past administrative practice is consistent with this interpretation of the statute. The first regulations promulgated under § 223(b) provided that “[t]hese limits will be imposed prospectively . . . .” . . . . Other examples of similar statements by the agency abound. . . .

The Secretary nonetheless suggests that, whatever the limits on his power to promulgate retroactive regulations in the normal course of events, judicial invalidation of a prospective rule is a unique occurrence that creates a heightened need, and thus a justification, for retroactive curative rulemaking. The Secretary warns that congressional intent and important administrative goals may be frustrated unless an invalidated rule can be cured of its defect and made applicable to past time periods. The argument is further advanced that the countervailing reliance interests are less compelling than in the usual case of retroactive rulemaking, because the original, invalidated rule provided at least some notice to the individuals and entities subject to its provisions.

Whatever weight the Secretary's contentions might have in other contexts, they need not be addressed here. The case before us is resolved by the particular statutory scheme in question. Our interpretation of the Medicare Act compels the conclusion that the Secretary has no authority to promulgate retroactive cost-limit rules.

The 1984 reinstatement of the 1981 cost-limit rule is invalid. The judgment of the Court of Appeals is Affirmed.

[Justice Scalia, concurring.]

I agree with the Court that . . . § 223(b) of the Medicare Act does not permit retroactive application of the Secretary of Health and Human Service's 1984 cost-limit rule. I write separately because I find it incomplete to discuss general principles of administrative law without reference to the basic structural legislation which is the embodiment of those principles, the Administrative Procedure Act . . . .
The first part of the APA’s definition of “rule” states that a rule means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency...


The only plausible reading of the italicized phrase is that rules have legal consequences only for the future. It could not possibly mean that merely some of their legal consequences must be for the future, though they may also have legal consequences for the past, since that description would not enable rules to be distinguished from “orders,” see 5 U.S.C. § 551(6), and would thus destroy the entire dichotomy upon which the most significant portions of the APA are based. (Adjudication – the process for formulating orders, see § 551(7) – has future as well as past legal consequences, since the principles announced in an adjudication cannot be departed from in future adjudications without reason.)

[The House Report accompanying the APA] states that “[t]he phrase ‘future effect’ does not preclude agencies from considering and, so far as legally authorized, dealing with past transactions in prescribing rules for the future.” The Treasury Department might prescribe, for example, that for purposes of assessing future income tax liability, income from certain trusts that has previously been considered nontaxable will be taxable – whether those trusts were established before or after the effective date of the regulation. That is not retroactivity in the sense at issue here, i.e., in the sense of altering the past legal consequences of past actions. Rather, it is what has been characterized as “secondary” retroactivity. A rule with exclusively future effect (taxation of future trust income) can unquestionably affect past transactions (rendering the previously established trusts less desirable in the future), but it does not for that reason cease to be a rule under the APA. Thus, with respect to the present matter, there is no question that the Secretary could have applied her new wage-index formulas to respondents in the future, even though respondents may have been operating under long-term labor and supply contracts negotiated in reliance upon the pre-existing rule...
CHAPTER 4 Basic Reviewability Concerns

Underlying Case Documents

The case referenced:
The Social Security Amendments of 1972
The 1984 notice seeking comment to reissue the 1981 schedule
The 1984 final rule reissuing the 1981 schedule

1. Since the Bowen opinion issued, the argument has surfaced from time to time that the Court's decision in Smiley v. Citibank, 517 U.S. 735 (1996), is a retreat from its clear prohibition against primary retroactivity. The argument was raised – and debunked – in Pauly v. United States Department of Agriculture, 348 F.3d 1143 (9th Cir. 2003). The Ninth Circuit noted that

[the] Supreme Court has observed that “retroactivity is generally disfavored in the law.” Eastern Enters. v. Apfel, 524 U.S. 498, 532 (1998) (plurality opinion). In Bowen the Court held that “administrative rules will not be construed to have retroactive effect unless their language requires this result.” The district court recognized Bowen's limitation on retroactivity, but nonetheless concluded that Smiley v. Citibank “effectively limited” Bowen . . . . The district court's reliance on Smiley was misplaced . . . . No other court has read . . . Smiley [that way] and we refuse to do so today.

2. In Mobile Relay Associates v. FCC, 457 F.3d 1 (D.C. Cir. 2006), two licensees claimed that the FCC's rules directing reconfiguration of the electromagnetic spectrum's 800 MHz band (designed to reduce interference with public safety communications) were unlawful. They argued, inter alia, that the rebanding created a “different communications system architecture[,]” relied on a standard that was not in place at the time their initial licenses were granted, and constituted a taking. The court addressed the retroactivity argument as follows:

Secondary retroactivity – which occurs if an agency's rule affects a regulated entity's investment made in reliance on the regulatory status quo before the rule's promulgation – will be upheld “if it is reasonable,” i.e., if it is not “arbitrary” or

Bottom Line

It is difficult to read Bowen as anything other than a prohibition against primary retroactivity, i.e., a rule that would alter past consequences of past action. As to its affect on secondary retroactivity (a rule that affects future consequences of past action), Bowen does not necessarily resolve the debate. Secondary retroactivity involves “a new rule that legally has only [a] 'future effect,' and is therefore not subject to doctrines limiting retroactive effect, [but] may still have a serious impact on pre-existing transactions.” Indep. Petroleum Ass'n of Am. v. DeWitt, 279 F.3d 1036 (D.C. Cir. 2002).
"capricious."  

The Rebanding Decision was reasonable because . . . the Commission sought to segregate incompatible mobile communications architectures to reduce interference . . ., pursuant to its public interest mandate. . . . A change in policy "is not arbitrary or capricious merely because it alters the current state of affairs. The Commission is entitled to reconsider and revise its views as to the public interest and the means needed to protect that interest if it gives a reasoned explanation for the revision." [Id.]

Good Questions!

The Court held in Bowen v. Georgetown University Hospital that primary retroactive rulemaking is generally unacceptable in the absence of explicit Congressional authorization. Assume the Clean Air Act does not have that authorization. Which if any of the following situations would be prohibited under Bowen:

- a. EPA issues a rule capping CO₂ emissions from existing power plants and only a few plants can meet the standard.
- b. EPA issues the rule but says it will become effective in 2 years; virtually all plants will have to install major new scrubbers.
- c. EPA publishes a new rule that changes the interpretation of an existing rule; as a result, many power plants have been out of compliance for years and face significant penalties if the EPA were to enforce the new interpretation.
- d. A plant applies for an operating permit that would have been granted but for the new rule. Many millions have been spent getting the facility in compliance in anticipation of the review of the license application--but the standards by which these changes were made derived from the old rule.

3. The question of retroactivity for rulemaking is resolved differently than retroactivity for adjudication. In enforcement actions, retroactivity problems are not necessarily resolved as decisively as in Bowen. If a statute gives broad and general authority in a field, the fact that an agency has not yet condemned a specific practice will not prevent the agency from going forward in an enforcement action. As the D.C. Circuit noted in AT&T v. FCC, 454 F.3d 329, 332 (D.C. Cir. 2006),

[r]etroactivity is the norm in agency adjudications no less than in judicial adjudications . . . For our part we have drawn a distinction between agency decisions that "substitut[e] new law for old law that was reasonably clear" and those which are merely "new applications of existing law, clarifications, and additions." The latter carry a presumption of retroactivity that we depart from only when to do otherwise would lead to "manifest injustice."

For the most part, agencies do not have difficulty confronting the manifest injustice standard in adjudications. But see Qwest Services Corp. v. FCC, 509 F.3d 531, 539-40 (D.C. Cir. 2007), where the court held that an agency’s "finding of manifest injustice is completely unconvincing."
Practice Pointer

Questions to contemplate in retroactivity cases:

1. Did Congress intend the agency to issue retroactive rules or adjudicatory orders?
2. Did Congress prohibit the agency from issuing retroactive rules or adjudicatory orders?
3. Is the application of the new rule (to past facts) going to create a manifest injustice?
4. Was the agency action unexpected – did the parties have de facto or de jure notice?
5. Was there justifiable reliance (a settled expectation) on the existing rules or standards prior to the issuance of the retroactive rule or order?
6. Is there a new liability, sanction, legal consequence/obligation, or fine that did not exist before?
7. Were there easy and available other means to change the government policy/program without the harsh effect of a retroactive rule or order?
8. Would the statutory goals be frustrated if the agency is prohibited from issuing the retroactive rule or order?
9. Will “law breakers” go unpunished (thus compromising deterrence and the statutory purpose) if the agency is prohibited from issuing the retroactive rule or order?
10. When you evaluate the retroactive rule or order, consider the level of misconduct or harm the agency is trying to address – which is worse – the fact of a retroactive action or the behavior seeking to be prevented?
11. Is this primary retroactivity (alters past consequences of past action) or secondary (affects future consequences of past action)
12. Is the challenged retroactivity central to the rights, interests or entitlements of the parties or is it collateral, e.g., procedural?
13. Does the retroactivity respond to an emergency or correct a critical error?

**LANDGRAF v. USI FILM PRODUCTS**

511 U.S. 244 (1994)

[Justice Stevens] From September 4, 1984, through January 17, 1986, petitioner Barbara Landgraf was employed in the USI Film Products (USI) plant in Tyler, Texas... operating a machine that produced plastic bags. A fellow employee named John Williams repeatedly harassed her with inappropriate remarks and physical contact. Petitioner's complaints to her immediate supervisor brought her no relief, but when she reported the incidents to the personnel manager, he conducted an investigation, reprimanded Williams, and transferred him to another department. Four days later petitioner quit her job.

Petitioner filed a timely charge with the Equal Employment Opportunity Commission (EEOC or Commission). The Commission... issued a notice of right to sue.... After a bench trial, the District Court found that Williams had sexually harassed petitioner causing her to suffer mental anguish. However, the court concluded that she had not been constructively discharged.... Because....
Title VII did not then authorize any other form of relief, the court dismissed her complaint.

On November 21, 1991, while petitioner’s appeal was pending, the President signed into law the Civil Rights Act of 1991. The Court of Appeals rejected petitioner’s argument that her case should be remanded for a jury trial on damages pursuant to the 1991 Act. Its decision not to remand rested on the premise that “a court must ‘apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary.’”

We assume . . . that if the same conduct were to occur today, petitioner would be entitled to a jury trial and that the jury might find that . . . her mental anguish or other injuries would support an award of damages against her former employer. Thus, the controlling question is whether the Court of Appeals should have applied the law in effect at the time the discriminatory conduct occurred, or at the time of its decision in July 1992. . . .

[T]he antiretroactivity principle finds expression in several provisions of our Constitution. The Ex Post Facto Clause flatly prohibits retroactive application of penal legislation. Article I, § 10, cl. 1, prohibits States from passing another type of retroactive legislation, laws “impairing the Obligation of Contracts.” . . . The prohibitions on “Bills of Attainder” in Art. I, §§ 9-10, prohibit legislatures from singling out disfavored persons and meting out summary punishment for past conduct. The Due Process Clause also protects the interests in fair notice and repose that may be compromised by retroactive legislation. . . .

The Constitution’s restrictions, of course, are of limited scope. Absent a violation of one of those specific provisions, the potential unfairness of retroactive civil legislation is not a sufficient reason for a court to fail to give a statute its intended scope. Retroactivity provisions often serve entirely benign and legitimate purposes, whether to respond to emergencies, to correct mistakes, to prevent circumvention of a new statute in the interval immediately preceding its passage, or simply to give comprehensive effect to a new law Congress considers salutary. However, a requirement that Congress first make its intention clear helps ensure that Congress itself has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness. . . .

A statute does not operate “retrospectively” merely because it is applied in a case arising from conduct antedating the statute’s enactment, or upsets expectations based in prior law. Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment. . . . Even absent specific legislative authorization, application of new statutes passed
after the events in suit is unquestionably proper in many situations. When the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive.

When a case implicates a federal statute enacted after the events in suit, the court’s first task is to determine whether Congress has expressly prescribed the statute’s proper reach. . . . [The Civil Rights Act of 1991 did not address retroactivity. In fact, the court notes, the absence of language empowering retroactive enforcement may be the reason the Act garnered the votes needed to pass. For that reason, the presumption prohibiting retroactivity application stands and the claimant is denied the benefit of the newly passed law.]

[Justice Scalia, concurring.]

I of course agree with the Court that . . . a legislative enactment affecting substantive rights does not apply retroactively absent clear statement to the contrary. The Court, however, is willing to let that clear statement be supplied, not by the text of the law in question, but by individual legislators who participated in the enactment of the law, and even legislators in an earlier Congress which tried and failed to enact a similar law. For the Court not only combs the floor debate and Committee Reports of the statute at issue, the Civil Rights Act of 1991, but also reviews the procedural history of an earlier, unsuccessful, attempt by a different Congress to enact similar legislation, the Civil Rights Act of 1990.

This effectively converts the “clear statement” rule into a “discernible legislative intent” rule – and even that understates the difference. The Court’s rejection of the floor statements of certain Senators because they are “frankly partisan” and “cannot plausibly be read as reflecting any general agreement,” reads like any other exercise in the soft science of legislative historicizing, undisciplined by any distinctive “clear statement” requirement. If it is a “clear statement” we are seeking, surely it is not enough to insist that the statement can “plausibly be read as reflecting general agreement”; the statement must clearly reflect general agreement. No legislative history can do that, of course, but only the text of the statute itself. . . .
1. Justice Scalia’s concurrence highlights a split of opinion regarding the use of legislative history – and the legislative history disagreement is just the tip of the iceberg. The controversy regarding proper authority embraces various types of secondary source material and most international material (including foreign case law, statutes, and regulations).

The split regarding the use of legislative history and floor debates came up in the 2007 Supreme Court term. In a dissent in Zuni Public School District No. 89 v. Department of Education, 551 U.S. 1110 (2007), Justice Scalia accused Justice Breyer of relying on “nothing other than . . . judge-supposed legislative intent [as opposed to] clear statutory text.”

The disagreement on legislative history is reflected in Justice Scalia’s majority opinion – and Justice Breyer’s dissent – in FCC v. NextWave Personal Communications, 537 U.S. 293 (2003). In Justice Breyer’s dissent in Arlington Central School District v. Murphy, 548 U.S. 291, 323 (2006), he notes: “I cannot agree with the majority’s conclusion. Even less can I agree with its failure to consider fully the statute’s legislative history.”

In Landgraf, the majority opinion does not need to rely on legislative history for the most part. Its focus on the general presumption against retroactivity – absent congressional intent to the contrary – is fairly standard, though as the Court notes, any hard retroactivity case “will leave room for disagreement.”

2. Landgraf remains a reliable basis for determining whether a retroactivity problem exists in a particular case. Among other things, it makes it clear that the application of a statute to antecedent conduct requires analysis, not a knee-jerk
negative reaction. The presence of reasonable notice, foreseeable reliance, and settled expectations are part of the equation unless Congress has spoken expressly on retroactive application. See Campos v. INS, 16 F.3d 118, 122 (6th Cir. 1994), and Patel v. Gonzales, 432 F.3d 685, 690 (6th Cir. 2005).

3. In Republic of Austria v. Altmann, 541 U.S. 677, 692-700 (2004), the Court returned to the retroactivity field, discussing the impact of various “pre-statute” activities in a Foreign Sovereign Immunities Act (FSIA) case. 28 U.S.C. § 1330(a). Altmann sued the Austrian government (including the state-owned museum) to recover artwork (including Klimt paintings) that came into possession of the gallery as a result of the Nazi occupation. The Court found the Landgraf anti-retroactivity principles required a careful look at FSIA – and that while not an “express command,” the text of FSIA (relevant, of course, to Austria’s assertion of immunity) anticipated claims based on prior conduct, finding that Congress intended resolution on FSIA principles, without reference to the date of the acts that gave rise to the claim in the first instance.

Nearly a decade later, the Court decided Vartelas v. Holder, 132 S. Ct. 1479 (2012), and, looking at a similar problem, focused on the presumption against the retroactive application of statutory language. Vartelas was a legal permanent resident and pled guilty to a felony in 1994. He traveled outside of the U.S. and was denied re-entry under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 602(a), 110 Stat. 3009. The Court determined that IIRIRA’s did not apply to Vartelas because denial of reentry attached new consequences to past events (his pre-IIRIRA offense and admission of guilt). “This Court has rejected arguments for retroactivity in similar cases . . . and in cases in which the loss at stake was less momentous.” This is an example of primary retroactivity.

4. For a very recent – and comprehensive – application of Landgraf, see Martinez v. INS, 523 F.3d 365 (2d Cir. 2008). There the court dealt with revised “stop time” rules applicable to those seeking to fulfill the seven-year, in-country requirement to secure citizenship status. The claimant was accused of committing a felony one month before completing his seven years. Under the rules in place at the time he entered the United States, it was at least arguable that the “clock” could continue to run until a judgment was entered, either by conviction or plea. Under the revised rules, the date of the crime stops the clock and deportation proceedings can commence. The claimant argued that the new rules should not apply – but the court disagreed.

Landgraf . . . confirmed the continuing viability of the centuries-old presumption against retroactive legislation, emphasizing that “[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly . . . .” At the same time, the Court
acknowledged that Congress had the power, within constitutional limits, to enact laws with retroactive effect . . . to respond to emergencies, to correct mistakes, to prevent circumvention of a new statute in the interval immediately preceding its passage, or simply to give comprehensive effect to a new law Congress considers salutary.

Based on the above principles, the *Landgraf* Court articulated a two-step test for determining when a statute could be applied retroactively: In the first step, the court must ascertain, using the ordinary tools of statutory construction, “whether Congress has expressly prescribed the statute’s proper reach.” If the answer is yes, the inquiry is over. If, however, “the statute contains no such express command,” the court must move on to the second step and decide “the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event,” and determine “whether the new provision attaches new legal consequences to events completed before its enactment.” . . . [The court did not find an express prescription for retroactivity and the analysis moved to step two.]

[Taking into account “familiar considerations of fair notice . . . and settled expectations,” we fail to see how either of these guiding principles was contravened in the instant case. Fair notice was not violated because the law was certain at the time Zuluaga acted. He would have been deportable without possibility of discretionary relief had he been convicted before he accrued seven years [under the existing rules as well as the amended statute]. And settled expectations were not disrupted because, assuming that Zuluaga expected anything with respect to deportation when he committed the offense, his expectation could not have been anything other than that he was subject to deportation without the opportunity for discretionary relief.

**IMMIGRATION AND NATURALIZATION SERVICE v. ST. CYR**

533 U.S. 289 (2001)


Respondent, Enrico St. Cyr, is a citizen of Haiti who was admitted to the United States as a lawful permanent resident in 1986. Ten years later . . . he pled guilty in a state court to a charge of selling a controlled substance in violation of Connecticut law. That conviction made him deportable. Under pre-AEDPA law applicable at the time of his [plea and] conviction, St. Cyr would have been eligible for a waiver of deportation at the discretion of the Attorney General. . . . [It was, arguably, the reason for St. Cyr’s plea.] However, removal proceedings against him were not commenced until . . . after both AEDPA and IIRIRA became effective, and, as the Attorney General interprets those statutes, he no longer has discretion to grant such a waiver. . . .
Section 212 of the Immigration and Nationality Act of 1952 . . . excluded from the United States several classes of aliens, including those convicted of offenses involving moral turpitude or the illicit traffic in narcotics. . . . [T]his section was subject to a proviso granting the Attorney General broad discretion to admit excludable aliens. . . . § 212(c) was literally applicable only to exclusion proceedings, but it . . . has been interpreted by the Board of Immigration Appeals (BIA) to authorize any permanent resident alien with “a lawful unrelinquished domicile of seven consecutive years” to apply for a discretionary waiver from deportation. If relief is granted, the deportation proceeding is terminated and the alien remains a permanent resident. . . . [A] substantial percentage of . . . applications for § 212(c) relief have been granted [and,] in the period between 1989 and 1995 alone, § 212(c) relief was granted to over 10,000 aliens. . . .

[The question is] whether depriving removable aliens of consideration for § 212(c) relief produces an impermissible retroactive effect for aliens who, like respondent, were convicted pursuant to a plea agreement at a time when their plea would not have rendered them ineligible for § 212(c) relief.

. . . As we have repeatedly counseled, the judgment whether a particular statute acts retroactively “should be informed and guided by ‘familiar considerations of fair notice, reasonable reliance, and settled expectations.’” IIRIRA’s elimination of any possibility of § 212(c) relief for people who entered into plea agreements with the expectation that they would be eligible for such relief clearly “attaches a new disability, in respect to transactions or considerations already past.” Landgraf. Plea agreements involve a quid pro quo between a criminal defendant and the government. In exchange for some perceived benefit, defendants waive several of their constitutional rights (including the right to a trial) and grant the government numerous “tangible benefits, such as promptly imposed punishment without the expenditure of prosecutorial resources.” There can be little doubt that, as a general matter, alien defendants considering whether to enter into a plea agreement are acutely aware of the immigration consequences of their convictions. Given the frequency with which § 212(c) relief was granted in the years leading up to AEDPA and IIRIRA, preserving the possibility of such relief would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial.

. . . The potential for unfairness in the retroactive application of IIRIRA § 304(b) to people like . . . St. Cyr is significant and manifest. Relying upon settled practice, the advice of counsel, and perhaps even assurances in open court that the entry of the plea would not foreclose § 212(c) relief, a great number of defendants in . . . St. Cyr’s position agreed to plead guilty. Now that prosecutors have received the benefit of these plea agreements, agreements that were likely facilitated by the aliens’ belief in their continued eligibility for § 212(c) relief, it would surely be
contrary to “familiar considerations of fair notice, reasonable reliance, and settled expectations,” *Landgraf*, to hold that IIRIRA’s subsequent restrictions deprive them of any possibility of such relief.

The INS argues that deportation proceedings (and the Attorney General’s discretionary power to grant relief from deportation) are “inherently prospective” and that, as a result, application of the law of deportation can never have a retroactive effect. Such categorical arguments are not particularly helpful in undertaking [a] commonsense, functional retroactivity analysis. Moreover, although we have characterized deportation as “look[ing] prospectively to the respondent’s right to remain in this country in the future,” *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984), we have done so in order to reject the argument that deportation is punishment for past behavior and that deportation proceedings are therefore subject to the “various protections that apply in the context of a criminal trial.” As our cases make clear, the presumption against retroactivity applies far beyond the confines of the criminal law. And our mere statement that deportation is not punishment for past crimes does not mean that we cannot consider an alien’s reasonable reliance on the continued availability of discretionary relief from deportation when deciding whether the elimination of such relief has a retroactive effect.

Finally, the fact that § 212(c) relief is discretionary does not affect the propriety of our conclusion. There is a clear difference, for the purposes of retroactivity analysis, between facing possible deportation and facing certain deportation. Prior to AEDPA and IIRIRA, aliens like St. Cyr had a significant likelihood of receiving § 212(c) relief. Because respondent, and other aliens like him, almost certainly relied upon that likelihood in deciding whether to forgo their right to a trial, the elimination of any possibility of § 212(c) relief by IIRIRA has an obvious and severe retroactive effect.

We find nothing in IIRIRA unmistakably indicating that Congress considered the question whether to apply its repeal of § 212(c) retroactively to such aliens. We therefore hold that § 212(c) relief remains available for aliens, like respondent, whose convictions were obtained through plea agreements and who, notwithstanding those convictions, would have been eligible for § 212(c) relief at the time of their plea under the law then in effect.
1. The legal issues associated with criminal misconduct for those seeking citizenship are complex. When and whether to “stop the clock” during the seven-year in-country “good conduct” period pursuant to 8 U.S.C. § 1229b(d) is the subject of a number of federal court decisions in cases not unlike St. Cyr, Jimenez-Angeles v. Ashcroft, 291 F.3d 594 (9th Cir. 2002); Castello-Diaz v. United States, 174 Fed. Appx. 719 (3d Cir. 2006); Campbell v. Ashcroft, 2004 WL 1563022 (E.D. Pa. 2004); Falconi v. INS, 240 F. Supp. 2d 215 (E.D.N.Y. 2002).

2. Which crimes “stop the clock?” All crimes? State and federal? Felonies only? Acts of moral turpitude? In 2006, the Court decided Lopez v. Gonzales, 549 U.S. 47 (2006), in part to create workable standards to determine whether a plea or conviction in a drug trafficking case under state criminal law should be treated the same as a conviction under federal law for immigration purposes. “[A] state offense constitutes a ‘felony punishable under the Controlled Substances Act’ only if it proscribes conduct punishable as a felony under that federal law.” Unfortunately the clarity of Lopez v. Gonzales is not the norm.

3. Section 8 U.S.C. § 1446 requires an FBI “name check” before the Bureau of Immigration Affairs process can go forward. Since September 11, 2001, the number of checks the FBI has been asked to make is in the “millions.” Ibrahim v. Chertoff, 529 F. Supp. 2d 611, 614 (E.D.N.C. 2007). As a consequence of such volume, the delays in processing these checks are staggering. Are the retroactivity policies in Landgraf and St. Cyr likely to compound the problem? Regulations change regularly – and compliance with them can be tricky. With each change, the retroactivity issue must be addressed.

4. Given the problems discussed above, those with sufficient resources trying to make their way through the immigration maze secure the assistance of counsel – all too often leading to claims that they have been poorly advised on problems.
relating to various aspects of the process, not the least of which are the St. Cyr issues pertaining to the effect of the commission of a crime during the seven-year good conduct period.

a. The First Circuit recently discussed the general right to legal advice in Zeru v. Gonzales, 503 F.3d 59 (1st Cir. 2007): “While aliens in deportation proceedings do not enjoy a Sixth Amendment right to counsel, they have due process rights in deportation proceedings. As an ‘integral part’ of this procedural due process [they] have a statutory right [8 U.S.C. § 1362] to be represented by counsel at their own expense. . . .”

b. An earlier First Circuit decision weighed in on the problem of questionable legal advice: “Ineffective assistance of counsel in a deportation proceeding is a denial of due process only if the proceeding was so fundamentally unfair that the alien was prevented from reasonably presenting his case”. Lozada v. INS, 857 F.2d 10, 13 (1st Cir. 1988). This claim can only succeed if the claimant can show “a reasonable probability of prejudice” as a consequence of the former representation. Saakian v. INS, 252 F.3d 21, 25 (1st Cir. 2001).

c. For more information on this topic, see John J. Francis, Failure to Advise Non-Citizens of Immigration Consequences of Criminal Convictions: Should this Be Grounds to Withdraw a Guilty Plea?, 36 U. Mich. J. Reform 691 (2003); Hill v. Lockhart, 474 U.S. 52, 56 (1985) (on ineffective assistance of counsel); Magallanes-Damian v. INS, 783 F.2d 931, 933 (9th Cir. 1986) (linking effective counsel and a baseline right to fundamental fairness); and In re Cecilia Rivera-Claro, 21 I. & N. Dec. 232 (BIA 1996) (discussing ineffective assistance and reporting obligations). In re Cecilia Rivera-Claro requires an applicant claiming ineffective assistance to:

(1) file an affidavit explaining the agreement between the applicant and former counsel and listing what actions counsel failed to take; (2) grant former counsel an opportunity to respond; and (3) indicate whether former counsel’s error was reported to disciplinary authorities. [Emphasis added.]

Does it seem reasonable to require one claiming ineffective assistance of counsel to initiate a legal proceeding against his or her attorney?

d. Lu v. Ashcroft, 259 F.3d 127, 131 (3d Cir. 2001), and Fadiga v. United States, 488 F.3d 142 (3d Cir. 2007), discuss the so-called “bar complaint” requirement in an ineffective assistance claim, noting the interests served by requiring claimants to report an ineffective assistance allegation to bar or disciplinary authorities:

These interests include providing a “means of identifying and correcting possible misconduct” in the immigration bar . . . deter[ing] meritless claims of ineffective assistance of counsel [and] highlight[ing] the standards which should be expected of attorneys who represent aliens in immigration proceedings[,] increas[ing] the Board’s
confidence in the validity of the particular claim[,] reduc[ing] the likelihood that an evidentiary hearing will be needed[,] serv[ing the Board's] long-term interests in policing the immigration bar[, a]nd . . . protect[ing] against possible collusion between counsel and the alien client.

[From Fadiga, 488 F.3d at 156.]

What effect will the reporting requirement have on ineffective assistance claims?

5. There are many, many retroactivity cases. Distinguishing between them can be next to impossible. Can you explain the results in the following two decisions?

a. In Hernandez-Rodriguez v. Pasquarell, 118 F.3d 1034 (5th Cir. 1997), the Board of Immigration Appeals denied a permanent resident alien discretionary INA 212(c) relief from exclusion and denied his motion to reopen exclusion proceedings. While his subsequent habeas corpus petition was pending, the agency promulgated new regulations more favorable to him. Because the language of the new regulations did not require retroactivity, however, they did not apply to his case.

b. In Mountain Solutions, Ltd., Inc. v. FCC, 197 F.3d 512, 521 (D.C. Cir. 1999), the FCC refused to allow a radio license bidder to benefit from a fee deadline rule change instituted while the bidder's request for waiver of late payment rules was pending. The court noted that it would be “an unusual procedure for rulemaking” if it allowed the retroactive rule application urged by the radio license bidder.