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Judicial Review of Agency Inaction: An Arbitrariness Approach

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ARTICLES

JUDICIAL REVIEW OF AGENCY INACTION: AN ARBITRARINESS APPROACH

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This Article contends that the current law governing judicial review of agency inaction, though consistent with the prevailing theory of agency legitimacy, is inconsistent with the founding principles of the administrative state. The Supreme Court's reluctance to allow judicial review of agency inaction reflects the popular view that agency decisionmaking should be subject foremost to the scrutiny of politically accountable officials. The difficulty is that even scholars who generally support this view of agency decisionmaking reject the Court's treatment of agency inaction. Yet these scholars have failed to appreciate the reason. The reason is that the founding principles of the administrative state are dedicated not only to promoting political accountability, but also to preventing administrative arbitrariness—and reserve a role for judicial review toward that end. This Article shows that agency inaction raises a concern for administrative arbitrariness because it is susceptible to the same narrow influences that derail agency action from public purposes. Agency inaction that reflects such influences, though often rational from a political standpoint, nonetheless is arbitrary and objectionable from a democratic perspective.

This Article therefore suggests that courts eschew any special prohibitions on judicial review of agency inaction, and instead subject agency inaction to the same principles of judicial review that apply to agency action. It proposes changes to the two doctrines that most frequently block judicial review of agency inaction: nonreviewability and standing. Furthermore, it recommends that courts carve any exceptions to judicial review for agency inaction from established constitutional law principles. It argues that nonreviewability should be understood as an analogue to political question doctrine, precluding courts from policing conduct committed to the unfettered discretion of administrative officials. Similarly, it argues that standing should be understood as an analogue to nondelegation doctrine, precluding Congress through citizen-suit provisions from effectively delegating policymaking power to private parties. More broadly, this Article argues that both nonreviewability and standing should be viewed as links to separation of powers doctrine, barring courts from hearing challenges to the generalized manner in which agencies perform their jobs. In offering these analogies, this Article credits the Supreme Court's intuition that important constitutional values place some enforcement discretion beyond the reach of judicial review—even if Congress disagrees. But it recommends using established separation of powers principles to constrain this intuition from producing doctrines that subvert the prevention of arbitrary agency decisionmaking.

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INTRODUCTION

There is a reason that the law governing judicial review of agency inaction has elicited criticism for decades. The Supreme Court's reluctance to allow judicial review of such inaction rests, implicitly, on a theory of agency legitimacy that is inconsistent with the founding principles of the administrative state. Even those who generally subscribe to that flawed theory of agency legitimacy have widely joined in the criticism of the Court's treatment of agency inaction, though they have failed to intuit the cause of the problem.[1]

The cause of the problem relates to an erroneous belief that the constitutional structure is committed foremost to promoting political

[1] *See, e.g.*, Richard J. Pierce, Jr., Lujan v. Defenders of Wildlife*: Standing as a Judicially Imposed Limit on Legislative Power*, 42 DUKE L.J. 1170, 1170-71, 1194-95 (1993) [hereinafter Pierce, Lujan v. Defenders of Wildlife]; Richard J. Pierce, Jr., *The Role of the Judiciary in Implementing an Agency Theory of Government*, 64 N.Y.U. L. REV. 1239, 1280-85 (1989) [hereinafter Pierce, *The Role of the Judiciary*]; Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 186-88, 195-97, 213-14 (1992). Many others have joined in the criticism of the Court's approach. *See* Susan Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227, 276-80 (1989); Cynthia R. Farina, *The "Chief Executive" and the Quiet Constitutional Revolution*, 49 ADMIN. L. REV. 179, 184-85 (1997) [hereinafter Farina, *The "Chief Executive"*]; Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules for a Complex World*, 72 CHI.-KENT L. REV. 987, 1026 (1997) [hereinafter Farina, *The Consent of the Governed*]; Gene R. Nichol, Jr., *Injury and the Disintegration of Article III*, 74 CAL. L. REV. 1915, 1937-38 (1986).

accountability. This belief underlies the "accountability" theory of administrative law, which seeks to subject agency decisionmaking to the control of politically accountable officials.[2] The accountability theory responds to a persistent criticism of agency decisionmaking—specifically, that such decisionmaking is not majoritarian. It does so by bringing agency decisionmaking under the direction of those who represent the majority will. The theory serves other purposes as well, like bringing agency decisionmaking under the direction of those who face an electoral check. But since the 1970s, it primarily has been used to conform agency decisionmaking with the notion, widespread in broader constitutional theory, that popular rule is the cornerstone of democratic legitimacy.[3]

Consistent with the accountability theory, an agency's failure to act should be subject to the scrutiny of politically accountable officials. Indeed, the most popular accountability-based conception of the administrative state asserts that an agency's failure to act should be subject to the scrutiny of the President.[4] That conception is known as the "presidential control" model of administrative law. It prizes presidential control of agency decisionmaking because the President, as the only elected official who represents a national constituency, is more majoritarian than even Congress.

The presidential control model explains, in general, the Court's hesitance to create a role for courts in monitoring agency inaction and, in particular, legal doctrines such as nonreviewability and standing. Nonreviewability doctrine blocks courts from hearing a claim that an agency acted arbitrarily in refusing to enforce legal prohibitions or

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[2] *See* Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1675 (1975) (noting that traditional administrative law theory "legitimates intrusions into private liberties by agency officials not subject to electoral control by ensuring that such intrusions are commanded by a legitimate source of authority—the legislature").

[3] *See* Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 475-91 (2002) (demonstrating that since 1970s, administrative law scholars have sought to respond to charge that agency decisionmaking is not majoritarian).

[4] For a description of this conception of the administrative state, see Bressman, *supra* note 3, at 485–91; Farina, *The "Chief Executive," supra* note 1, at 180-82; Michael A. Fitts, *The Paradox of Power in the Modern State: Why a Unitary, Centralized Presidency May Not Exhibit Effective or Legitimate Leadership*, 144 U. PA. L. REV. 827, 841-57 (1996); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2277-319 (2001) (describing methods used by Reagan and Clinton administrations to exert influence and control over agencies); Peter L. Strauss, *From Expertise to Politics: The Transformation of American Rulemaking*, 31 WAKE FOREST L. REV. 745, 760-68 (1996) (same) [hereinafter Strauss, *From Expertise to Politics*].

requirements against violators.[5] Standing doctrine bars certain plaintiffs from raising such a claim.[6] Both doctrines, as vibrant today as ever before,[7] effectively remit to the President complaints against this prevalent form of agency inaction.

This Article contends that a different approach to judicial review of agency inaction emerges if we step back to first principles. The constitutional structure should be understood as dedicated to preventing arbitrariness and not just promoting accountability.[8] More specifically, the constitutional structure should be viewed as concerned with inhibiting administrative decisionmaking that reflects narrow interests rather than public purposes. Significantly, such decisionmaking is not necessarily "irrational." It may be perfectly rational from a political standpoint for administrative decisionmaking to advance private interests at public expense. Nor is such decisionmaking necessarily "unaccountable." To the contrary, it may be possible to describe narrowly interested administrative decisionmaking, if pursuant to presidential directives, as accountable in a certain sense. In my view, such decisionmaking nonetheless is "arbitrary" and objec-

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[5] *See, e.g.*, Heckler v. Chaney, 470 U.S. 821, 828–35 (1985) (articulating nonreviewability doctrine). The Administrative Procedure Act (APA) contains its own reviewability provision. *See* 5 U.S.C. § 701(a)(2) (2000) ("This chapter applies, according to the provisions thereof, except to the extent that . . . agency action is committed to agency discretion by law.").

[6] *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 559–62 (1992) (articulating standing doctrine). The APA contains its own standing provision. *See* 5 U.S.C. § 702 (2002) ("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."). Other principles that preclude judicial review of agency inaction include ripeness and refusal to imply a private right of action. *See, e.g.*, Reno v. Catholic Soc. Servs., Inc., 509 U.S. 43, 57–61 (1993) (rejecting as unripe challenge by immigrants' rights group to INS regulations in advance of application of those regulations); Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 890–94 (1990) (rejecting on ripeness grounds challenge by environmental group to agency development decisions); Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 145–48 (1985) (refusing to imply private right of action under ERISA). The Supreme Court recently held that section 706 of the APA does not authorize judicial review of another sort of agency inaction. *See* Norton v. S. Utah Wilderness Alliance, 124 S. Ct. 2373, 2379–80 (2004). That section, which permits courts to "compel agency action unlawfully withheld or unreasonably delayed," 5 U.S.C. § 706(1) (2000) does not extend to agency failures to take certain action that comports with general statutory standards but is not both discrete and legally required. *SUWA*, 124 S. Ct. at 2379–80.

[7] *See, e.g.*, McConnell v. Fed. Election Comm'n, 124 S. Ct. 619, 707–09 (2003) (affirming contemporary standing doctrine as set forth in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), and denying standing to groups with injuries that were not imminent, legally cognizable, traceable to statute at issue, or capable of redress through requested relief); *cf.* Vieth v. Jubelirer, 124 S. Ct. 1769 (2004) (finding claim challenging political gerrymandering of voting districts nonjusticiable because it raised political question); *id.* at 1776–78 (analogizing nonreviewability to political question doctrine).

[8] *See* Bressman, *supra* note 3, at 492–553.

tionable because it does not reflect the manner in which good government should operate.

Using an "arbitrariness" approach,[9] this Article reframes the problem of agency inaction. Critics of nonreviewability and standing doctrines typically focus on the possibility that an agency may cause harm when it refuses to act, just as when it decides to act.[10] This Article focuses on the possibility that an agency is susceptible to corrosive influences when it refuses to act, just as when it decides to act. These influences may produce administrative decisionmaking that is arbitrary from a democratic perspective, no matter how rational or accountable it may be from a political standpoint. I contend that courts obligated to police such influences in the domain of agency action also should do so in the domain of agency inaction. Yet current law provides an obstacle.

This Article recommends two changes to current law. The first proposal is that courts eschew any special prohibitions against judicial review of agency inaction. The influences that work upon agency action are no different from the influences that work upon agency inaction. Accordingly, courts generally should treat these agency behaviors similarly and subject agency inaction to judicial review. For example, administrative nonenforcement decisions should be subject to the familiar requirement that agencies articulate reasons supporting their affirmative regulatory decisions. In addition, administrative nonenforcement decisions should be subject to the important requirement that agencies promulgate and follow standards guiding their affirmative regulatory authority. Only by subjecting agency inaction to these principles will courts help agencies resist the influences that produce arbitrary administrative decisionmaking, regardless of how those influences are manifested.

The second change this Article suggests is that courts carve out any exceptions to judicial review of agency inaction from ordinary constitutional law principles. With this proposal, I do more than

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[9] *See id.* (describing approach aimed at addressing arbitrary administrative decisionmaking, defined to include administrative decisionmaking more reflective of narrow interests than public purposes).

[10] *See, e.g.*, *Chaney*, 470 U.S. at 851 (Marshall, J., concurring) ("[O]ne of the very purposes fueling the birth of administrative agencies was the reality that governmental refusal to act could have just as devastating an effect upon life, liberty, and the pursuit of happiness as coercive governmental action"); Sunstein, *supra* note 1, at 187–88 (arguing that "the rise of the regulatory state rendered the distinction between regulatory objects and regulatory beneficiaries a conceptual anachronism, a relic of the *Lochner* period"). The APA defines "agency action" as "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, *or failure to act*." 5 U.S.C. § 551(13) (2001) (emphasis added).

attempt to fit agency inaction back into the governing framework of judicial review; rather, I also attempt to place administrative law back inside the universe of basic constitutional design and purpose. The Supreme Court too often treats administrative law problems as requiring distinct solutions instead of adapting lessons learned elsewhere.[11] The issue of agency inaction is no exception, and can be reconceived as consistent with other constitutional doctrines. Nonreviewability can be better understood as an analogue to political question doctrine, preventing courts from examining conduct committed to the unfettered discretion of administrative officials. Similarly, standing may be compared to nondelegation doctrine, inhibiting Congress from effectively delegating policymaking power to private parties through statutory citizen-suit provisions. More broadly, both nonreviewability and standing (as well as the Administrative Procedure Act provisions that ground them) can be viewed as links to separation of powers doctrine, barring courts from hearing challenges to the generalized manner in which agencies perform their jobs. In offering these connections, this Article, unlike other works criticizing contemporary agency inaction doctrine,[12] intends to reflect some sympathy for the Court's intuition that some agency inaction should be beyond the scope of review, particularly when statutory citizen-suit provisions are involved. But it aims to do so in a manner that produces the right constitutional policies without sacrificing the general judicial scrutiny necessary to inhibit arbitrary administrative decisionmaking.

Finally, this Article provides a way to think about the latest case involving agency inaction. In *Norton v. Southern Utah Wilderness Alliance*, an environmental group challenged the refusal of the Bureau of Land Management (BLM) to prohibit the use of off-road vehicles on public lands while studying those lands for possible wilderness designation and preservation.[13] The group relied on a little-used

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[11] In a previous article, I argued that the Court frequently makes the opposite error as well. It treats administrative law problems as requiring non-distinct, constitutionally-grounded solutions when it might look to ordinary administrative law principles. *See* Lisa Schultz Bressman, *Disciplining Delegation After* Whitman v. American Trucking Ass'ns, 87 CORNELL L. REV. 452, 455–69 (2002) (noting that Court considered and rejected constitutional law as basis for requiring agencies to discipline their authority, and arguing that Court might better embrace administrative law for this purpose). As a general matter, the Court often fails to view administrative law and constitutional law as continuous and addressed to the same project of promoting agency legitimacy. *See* Bressman, *supra* note 3, at 494–503, 515–16.

[12] *See, e.g.*, Pierce, Lujan v. Defenders of Wildlife, *supra* note 1, at 1198–1200 (arguing that Congress should have plenary authority to control class of plaintiffs entitled to bring suit); Sunstein, *supra* note 1, at 211 (same).

[13] 124 S. Ct. 2373, 2377–78 (2004).

provision of the APA, § 706(1), which authorizes courts to "compel agency action unlawfully withheld or unreasonably delayed."[14] The Tenth Circuit applied § 706(1) and ordered BLM to consider prohibiting off-road vehicle use.[15] The Supreme Court unanimously reversed, holding that § 706(1) does not permit courts to compel agency action that, even if consistent with broad statutory standards, is not required by such standards or other any source of law.[16] Because the exclusion of off-road vehicles was not legally required, the Court concluded that § 706(1) did not allow a court to compel BLM to consider it.[17]

Although the Court was able to dispose of *SUWA* with little apparent difficulty, we nonetheless should recognize that the case involves a vexing problem. On the one hand, BLM's refusal raises concerns for private influence and public harm. It allows an interest group (off-road vehicle enthusiasts) to ride rough-shod (literally and figuratively) over a statutory purpose (wilderness preservation). On the other hand, the Tenth Circuit's directive presents a more far-ranging concern for excessive intrusion on executive discretion. It opens the door, in this case and in future ones, for courts and plaintiffs, not agencies and presidents, to manage broad regulatory programs. This feature ultimately must drive the interpretation of § 706(1) and the issue of justiciability. An agency's failure to convert broad statutory mandates into particular requirements or prohibitions is different from an agency's failure to enforce existing requirements or prohibitions.[18] Because the former positions courts to control the content of regulatory programs, it presents the strongest argument for nonjusticiability, whether under § 706(1) or any other APA provision. This Article thus concludes that we might be wise to accept a presumption against judicial review of claims like those in *SUWA* even if we embrace the opposite presumption for agency failure to enforce existing requirements or prohibitions.

This Article proceeds in three parts. Part I briefly describes the Court's treatment of agency inaction through two doctrines: nonreviewability and standing. Part II applies the "accountability"

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[14] 5 U.S.C. § 706(1) (2000).

[15] S. Utah Wilderness Alliance v. Norton, 301 F.3d 1217, 1236–37 (10th Cir. 2002), *rev'd*, 124 S. Ct. 462 (2003).

[16] 124 S. Ct. at 2379–80.

[17] *Id.* at 2382–84.

[18] An agency's failure to convert broad statutory mandates into particular requirements or prohibitions also is different from an agency's failure to initiate rulemaking proceedings, which is reviewable. *See, e.g.*, Nat'l Customs Brokers & Forwarders Ass'n of Am. v. United States, 883 F.2d 93, 96, 98 (D.C. Cir. 1989); Am. Horse Prot. Ass'n v. Lyng, 812 F.2d 1, 4–5 (D.C. Cir. 1987); *infra* notes 260–266 and accompanying text.

theory of agency legitimacy to evaluate the Court's treatment of agency inaction. Part II demonstrates that the accountability theory, as embodied in the "presidential control" model of administrative law, can explain the Court's treatment of agency inaction. This Part observes, however, that the presidential control model has not stopped leading commentators—even some who generally subscribe to that model—from criticizing the Court's treatment. It concludes that these commentators are right in their criticisms, but for a reason that they have not fully appreciated. Although the Court's treatment of agency inaction addresses the need for accountable decisionmaking, it overlooks a substantial concern for arbitrary decisionmaking. Focusing on this concern for arbitrary decisionmaking, Part III re-examines the law governing judicial review of agency inaction. It recommends specific changes to nonreviewability doctrine and standing doctrine, claiming that such changes would begin to realign agency inaction with judicial review and administrative law with constitutional law. In the course of this discussion, Part III also briefly discusses the most recent case involving agency inaction: *Norton v. Southern Utah Wilderness Alliance*.

I
THE LAW GOVERNING JUDICIAL REVIEW OF AGENCY INACTION

Before describing the law governing judicial review of agency inaction, it is helpful to define the idea of agency inaction itself. The notion of agency inaction might encompass any instance in which an agency fails to take desired or desirable action. Often, it specifically refers to an instance in which an agency refuses to enforce statutory or regulatory requirements or prohibitions against known or suspected violators. For example, the Environmental Protection Agency might refrain from enforcing Clean Air Act restrictions against alleged polluters, declining to punish past violations or enjoin future ones.[19] These sorts of examples are the central focus both of the law and this Article.

The law governing judicial review of agency inaction is comprised primarily of two doctrines: nonreviewability and standing. As a theoretical matter, these doctrines address distinct aspects of the justiciability problem. Nonreviewability doctrine concerns the issue of

[19] *See, e.g.*, 33 U.S.C. § 1365(a)(2) (2001) (authorizing citizen suits against EPA for failure to enforce Federal Water Pollution Control Act); 42 U.S.C. § 7604(a)(2) (2000) (authorizing citizen suits against EPA for failure to enforce Clean Air Act).

proper claims and bars courts from hearing a particular issue.[20] Standing doctrine concerns the issue of proper parties and bars particular plaintiffs from raising an issue.[21] Thus, the doctrines have different effects on potential litigants. Nonreviewability doctrine prevents *all* plaintiffs—even those with undisputed standing—from litigating a particular issue. Standing doctrine bars *certain* plaintiffs from litigating an issue, leaving open the possibility that other plaintiffs might.

Despite these potentially disparate effects, the distinction between the doctrines is largely overstated with respect to judicial review of agency inaction. Both doctrines, almost interchangeably, prohibit parties from challenging, and courts from examining, agency refusals to initiate enforcement proceedings. This Part briefly explores the contemporary legal treatment of agency inaction, first examining nonreviewability doctrine and then considering standing doctrine. The discussion demonstrates that these doctrines achieve virtually identical practical results through different theoretical mechanisms, different APA provisions, and different Supreme Court tests.

A. Nonreviewability Doctrine

The discussion of nonreviewability doctrine begins with the provisions of the APA that ground it.[22] Section 702, the "right of review"

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[20] *See* 5 U.S.C. § 701(a) (2000) (barring judicial review of claims where "statutes preclude judicial review" or "agency action is committed to agency discretion by law"); *see also* Heckler v. Chaney, 470 U.S. 821, 828–31 (1985) (examining § 701(a) and finding claims challenging agency inaction "general[ly] unsuitab[le] for judicial review").

[21] *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 574 (1992) (recognizing that standing requires party invoking judicial review to show that such party "'has sustained or is immediately in danger of sustaining some direct injury'" (quoting Massachusetts v. Mellon, 262 U.S. 447, 488–89 (1923))).

[22] Nonreviewability as an issue existed prior to the enactment of the APA. In *Decatur v. Paulding*, 39 U.S. (1 Pet.) 497 (1840), the Court refused to hear a claim challenging the Secretary of the Navy's refusal to award pension benefits to a widow of a war hero under a general pension law and a pension law that Congress had enacted specifically for her. It reasoned that the Secretary's refusal was a product of "deliberate judgment" rather than "ministerial" because it involved consideration of how to calculate awards and how to allocate limited funds among claimants. *Id.* at 509–10, 515–17. The Court worried about the effect of granting review on executive responsibilities: "[I]nterference of the courts with the performance of the ordinary duties of the executive departments of the government, would be productive of nothing but mischief." *Id.* at 516.

In *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94 (1902), the Court entertained a claim challenging the Postmaster General's refusal to deliver mail to an individual operating an allegedly fraudulent mail-order business. It stated that the Postmaster General's refusal was based on a mistaken assertion of jurisdiction and therefore subject to review. *Id.* at 107–11. The Court was unwilling to leave "the individual . . . to the absolutely uncontrolled and arbitrary action of a public and administrative officer, whose action is unauthorized by any law and is in violation of the rights of the individual." *Id.* at 110.

provision, specifies 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."[23] Section 701(a), however, contains two exceptions to this right to review. It states that the judicial review provisions of the APA do not apply "to the extent that . . . (1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law."[24] Thus, § 701(a)(1) and (2) operate as nonreviewability provisions.

In *Abbott Laboratories v. Gardner*,[25] the Court initially linked the interpretation of § 701(a)(1) to § 702.[26] It held that § 702 establishes a "presumption of judicial review," which could be overcome under § 701(a)(1) only upon "clear and convincing evidence of a contrary legislative intent."[27] It located the presumption in the language and structure of the judicial review provisions, as well as in their legislative history: "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."[28] It follows from this language that § 701(a)(1) should be given a narrow interpretation.

The Court since has given § 701(a)(1) a more liberal interpretation, however. It has not construed § 701(a)(1) consistently to demand a clear congressional statement of intent to preclude judicial review, as it said it would in *Abbott Laboratories*. Rather, it has understood § 701(a)(1) to permit an implication of preclusive intent from the statutory scheme as a whole.[29] Thus, the Court has aug-

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In *Switchmen's Union v. National Mediation Board*, 320 U.S. 297 (1943), the Court declined to hear a claim challenging the National Mediation Board's decision to include certain railway workers in a union election and its certification of the result. Reviewing the history of the relevant statutory provision and the role of that provision in the statutory scheme, the Court concluded that "the dispute was to reach its last terminal point when the administrative finding was made." *Id.* at 305. In other words, the Court stated, "There was to be no dragging out of the controversy into other tribunals of law." *Id.* The Court felt compelled to protect from judicial meddling the "few phases of this controversial subject" (railway labor) for which Congress had designated "administrative machinery" for its resolution. *Id.* at 302.

23 5 U.S.C. § 702.

24 5 U.S.C. § 701(a).

25 387 U.S. 136 (1967).

26 *Id.* at 140.

27 *Id.* at 140–41 (internal quotation marks omitted).

28 *Id.*

29 *See, e.g.*, Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 207–09 (1994) (implying statutory preclusion from statutory scheme); United States v. Fausto, 484 U.S. 439, 444–47 (1988) (same); Block v. Cmty. Nutrition Inst., 467 U.S. 340, 345–48 (1984) (same).

mented the scope of § 701(a)(1) by relaxing the method for determining statutory preclusion under that section.[30]

The Court has exhibited a similar but more dramatic pattern with respect to § 701(a)(2), interpreting it more broadly over time. When the Court first grappled with § 701(a)(2), it hesitated to apply the section at all.[31] In *Citizens to Preserve Overton Park, Inc. v. Volpe*, the Court stated that § 701(a)(2) "is applicable in those rare instances where 'statutes are drawn in such broad terms that in a given case there is *no law to apply*.'"[32] Furthermore, it commented that the section is "a very narrow exception."[33]

Since *Overton Park*, the Court has enlarged the reach of the section. In *Heckler v. Chaney*,[34] the Court applied § 701(a)(2) to insulate from judicial review an entire class of administrative decisions—namely, agency inaction. To appreciate why the Court extended § 701(a)(2) in this fashion, consider briefly the facts and reasoning of the case. *Chaney* involved a refusal by the FDA to initiate an enforcement proceeding against the use of certain drugs to administer the death penalty.[35] Prisoners on death row challenged the refusal, arguing that the drugs had not been approved for human execution and that their use violated the Food, Drug, and Cosmetic Act.[36] The FDA justified the refusal as necessary to avoid exercising its jurisdiction (which it found uncertain) in a manner that interfered with the state criminal justice system, and as consistent with its practice of initi-

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30 The Court still demonstrates considerable reluctance to use the organic statute as a reason for denying judicial review. *See, e.g.*, Bowen v. Mich. Acad. of Family Physicians, 476 U.S. 667 (1986) (finding no statutory preclusion of claim challenging agency decision setting higher Medicare reimbursements for services provided by board-certified family physicians than by non-board-certified family physicians).

31 Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971).

32 *Id.* (emphasis added) (citing S. REP. NO. 752, at 26 (1945)). *Overton Park* involved the Secretary of Transportation's decision approving construction of a highway through a federal park. *Id.* at 406. The plaintiffs challenged the decision, arguing that it lacked formal findings indicating the reasons why, in accordance with the relevant statute, the Secretary "believed there were no feasible and prudent alternative routes or why design changes could not be made to reduce the harm to the park." *Id.* at 408. The parties disputed which standard of review applied to the decision under § 706—de novo review, substantial evidence review, or arbitrary and capricious review. *Id.* at 413–14. The Court first addressed the threshold issue of whether § 701(a)(2) prohibited any sort of review. It found that the section did not because the statute in the case clearly provided "law to apply." *Id.* at 413. Although the statute granted the Secretary "discretion" to consider a range of factors in determining whether to approve highway construction, it required that "protection of parkland was to be given paramount importance." *Id.* at 412–13. With such law to apply, the exemption for action "committed to agency discretion" did not apply.

33 *Id.* at 410.

34 470 U.S. 821 (1985).

35 *Id.* at 823–24.

36 *Id.*

ating enforcement proceedings only when the unapproved use of an approved drug presents "a serious danger to the public health or a blatant scheme to defraud."[37]

The Court held the refusal nonreviewable under § 701(a)(2).[38] Although the Court invoked the "no law to apply" formula, it did not actually use that test.[39] It instead rejected the notion that "the 'narrow construction' of § [701](a)(2) require[s] application of a presumption of reviewability even to an agency's decision not to undertake certain enforcement actions."[40] It held that "an agency's decision not to take enforcement action should be presumed immune from judicial review under § 701(a)(2)."[41]

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[37] *Id.* at 824–25.

[38] *Id.* at 837.

[39] *Id.* at 830. Perhaps the Court was responding, implicitly, to the abundant scholarly criticism of the "no law to apply" test while, at the same time, expanding the application of the nonreviewability provision. Scholars have rejected the "no law to apply" test on a variety of grounds. Some have argued that it is not clearly a correct interpretation of the statutory language. *See* Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 MINN. L. REV. 689, 699–700 (1990) (noting that test was one that "neither Berger nor Davis (let alone the framers of the APA) could have foreseen"). Some have argued that it is doctrinal and rigid, rather than pragmatic and flexible. *See* Ruth Colker, *Administrative Prosecutorial Indiscretion*, 63 TUL. L. REV. 877, 891 (1989); Levin, *supra*, at 741; Harvey Saferstein, *Nonreviewability: A Functional Analysis of "Committed to Agency Discretion,"* 82 HARV. L. REV. 367, 370 (1968). Others have noted that it rests on an outmoded law/politics distinction—once we recognize that all law is politics, then unelected courts rarely should substitute their "legal" judgment for political judgment. *See* Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 102–03 (1994) (noting transition from law to politics in administrative decisionmaking); Peter L. Strauss, *Presidential Rulemaking*, 72 CHI.-KENT L. REV. 965, 969–71 (1997) (describing breakdown of law/politics distinction). Finally, commentators have suggested that the "no law to apply" test is just plain awkward. Courts always must acknowledge the existence of some "law to apply" in cases involving political or discretionary judgment. Otherwise, they could not uphold the statutes that delegated such judgment to administrative agencies in the first instance because the statutes would lack the constitutionally requisite "intelligible principle." *See* Pierce, *The Role of the Judiciary*, *supra* note 1, at 1268 ("Given the dearth of substantive standards typically incorporated into intransitive legislation and given the Court's recognition that agencies must be allowed to make those policy decisions Congress has declined to incorporate into statutes, the Court's reasoning in *Chaney* regarding agency inaction seems equally applicable to a high proportion of agency action."); Daniel B. Rodriguez, *The Presumption of Reviewability: A Study in Canonical Construction and Its Consequences*, 45 VAND. L. REV. 743, 756 (1992) (noting that even broadest sorts of delegations to agency, like those present in *Overton Park*, do not vest agency with unreviewable discretion); Strauss, *supra*, at 977 ("[W]e accept the delegation because, we say, a court is able to say whether or not the agency has acted within its authority under the law; if we thought a court could *not* make that judgment, that there was no law to apply, we might quickly conclude that an improper delegation had occurred."). Furthermore, courts could not make sense of the APA provisions that contemplate review of some agency decisionmaking for "abuse of discretion." 5 U.S.C. § 706.

[40] *Chaney*, 470 U.S. at 831.

[41] *Id.* at 832. The Court distinguished the agency's decision in *Overton Park* on the ground that it did not involve an agency's refusal to take requested enforcement action.

The Court provided several reasons for so doing. First, the Court noted that "an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise."[42] The Court continued:

> [T]he 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.[43]

To this reason, the Court briefly added two others. The Court commented 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."[44] The Court also stated 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."[45]

Thus, the Court held that § 701(a)(2) shields agency failures to enforce from judicial review.

B. Standing Doctrine

Section 702 also provides a starting place for discussing standing doctrine. Again, it 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

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Rather, the Court said, the decision involved "an affirmative act of approval under a statute that set clear guidelines for determining when such approval should be given." *Id.* at 831.

[42] *Id.* at 831.

[43] *Id.* at 831–32.

[44] *Id.* at 832.

[45] *Id.* (quoting U.S. CONST. art. II, § 3).

review thereof."[46] In *Association of Data Processing Service Organizations v. Camp*,[47] the Supreme Court interpreted this language to contain two standing requirements. The first is the "injury in fact" requirement.[48] A federal court could entertain a lawsuit on behalf of any plaintiff who alleged an actual injury, defined as an injury to an interest that "may reflect aesthetic, conservational, and recreational as well as economic values."[49] The Court suggested that the injury-in-fact requirement is part of the case or controversy requirement of Article III.[50] The second is the "zone of interests" requirement. A federal court could entertain a lawsuit if "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."[51] The Court indicated that the "zone-of-interests" requirement is a prudential or non-constitutional component.[52] The Court stated that the purpose of both requirements was to broaden the class of plaintiffs who may obtain judicial review.[53]

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[46] 5 U.S.C. § 702. Before the 1930s, no separate standing doctrine existed. Gene R. Nichol, Jr., *Rethinking Standing*, 72 CAL. L. REV. 68, 83 (1984); Sunstein, *supra* note 1, at 170. A federal court could entertain a lawsuit on behalf of any plaintiff who alleged a cause of action, defined as an injury to a common law (tort, contract, property) interest. But proponents of the administrative state feared that courts opposed to their innovative regulatory project would use such lawsuits to negate the effects of expert agency decision-making. *See* Lee A. Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 YALE L.J. 425, 480 (1974) (noting development of standing to insulate administrative expertise from judicial interference); Louis L. Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 HARV. L. REV. 255, 261–88 (1961) (recounting development through 1950s); Sunstein, *supra* note 1, at 179–80 (same); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1452–57 (1988) (same). Justices Frankfurter and Brandeis responded by crafting a standing doctrine that restricted the ability of courts to hear challenges to administrative action. *See, e.g.*, Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 154–55 (1951) (Frankfurter, J., concurring); Ashwander v. TVA, 297 U.S. 288, 341–44 (1936) (Brandeis, J., concurring). For excellent historical discussions of standing, see Albert, *supra*, at 427–42; Raoul Berger, *Standing to Sue in Public Actions: Is it a Constitutional Requirement?*, 78 YALE L.J. 816 (1969); Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1380–83 (1973); Nichol, *supra* note 1, at 1919–24; Sunstein, *supra* note 1, at 168–97; and Winter, *supra*, at 1394–1478.

[47] 397 U.S. 150 (1970).

[48] *Id.* at 152.

[49] *Id.* at 154 (internal quotation marks omitted).

[50] *Id.*; Sunstein, *supra* note 1, at 186 (noting that *Data Processing* was poorly written and failed to clarify precise relationship between standing and Article III).

[51] *Data Processing*, 397 U.S. at 153.

[52] *Id.* Commentators have disputed ever since whether the *Data Processing* Court correctly interpreted the language of § 702. *See* William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 257–58 (1988); Nichol, *supra* note 46, at 73–75.

[53] *Data Processing*, 397 U.S. at 154 ("[T]he trend is toward enlargement of the class of people who may protest administrative action. The whole drive for enlarging the category of aggrieved 'persons' is symptomatic of that trend.").

But the Court has not entirely lived up to its word. While it has continued to interpret the zone-of-interests requirement in a pro-plaintiff manner,[54] the Court has interpreted the injury-in-fact requirement restrictively.[55] Two cases are particularly noteworthy: *Allen v. Wright*[56] and *Lujan v. Defenders of Wildlife*.[57]

In *Allen v. Wright*, the Court denied standing to plaintiffs who sought to challenge agency inaction.[58] African American parents sought to challenge the failure of the IRS to deny tax-exempt status to racially segregated private schools despite an official policy to the contrary.[59] They alleged two injuries.[60] First, they alleged a "direct" injury—they claimed that by continuing to support racially segregated private schools, the IRS stigmatized African Americans and disregarded official policy.[61] Second, they alleged an "indirect" injury—they claimed that the tax exemption subsidized tuition costs at private schools, which facilitated white flight to those schools and deprived their children of an opportunity to attend racially integrated public schools.[62]

The Court held that neither injury was sufficient to confer standing.[63] It determined that the direct injury was shared most

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[54] *See, e.g.*, Clarke v. Sec. Indus. Ass'n, 479 U.S. 388 (1987) (competitors of regulated entities arguably within zone of interests); Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co., 522 U.S. 479 (1998) (same). *But see* Air Courier Conference v. Am. Postal Workers Union, 498 U.S. 517 (1991) (postal service employees not arguably within zone of interests of statute protecting postal service routes).

[55] *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) (denying standing to plaintiffs challenging agency's refusal to enforce provisions of Endangered Species Act because such plaintiffs lacked imminent injury that was fairly traceable to government's conduct); Allen v. Wright, 468 U.S. 737, 752–53 (1984) (denying standing to plaintiffs challenging IRS tax policy because racially segregated schools of which they complained were not fairly traceable to that policy); Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 476–82 (1982) (denying standing to taxpayers raising Establishment Clause challenge to agency action rather than congressional statute); Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 42–44 (1976) (denying standing to plaintiff absent more than "unadorned speculation" that alleged injury is traceable to agency action); Warth v. Seldin, 422 U.S. 490, 508 (1975) (denying standing to plaintiff challenging exclusionary zoning practices absent allegations of concrete injury); Linda R.S. v. Richard D., 410 U.S. 614, 617–18 (1973) (denying standing to individual who "no doubt suffered an injury" because she failed to allege "sufficient nexus" between that injury and challenged agency action); Sierra Club v. Morton, 405 U.S. 727, 736–40 (1972) (denying standing to environmental organization that merely alleged special interest in challenged agency action).

[56] 468 U.S. 737 (1984).

[57] 504 U.S. 555 (1992).

[58] *Allen*, 468 U.S. at 752–61.

[59] *Id.* at 740–47.

[60] *Id.* at 745.

[61] *Id.* at 752, 753–54.

[62] *Id.* at 745–46, 756–58.

[63] *Id.* at 766.

broadly by all citizens interested in ensuring that the government enforces the law, or more narrowly by all African Americans.[64] As to the broadest form, the Court reasoned that "[a]ssertion of a right to a particular kind of Government conduct, which the Government has violated by acting differently, cannot alone satisfy the requirements of Art. III without draining those requirements of its meaning."[65] If any undifferentiated citizen could invoke judicial authority to review government action, then the "case or controversy" requirement would impose no limit on judicial authority to review such action.[66] The Court also rejected the narrower stigmatic injury, stating:

> If the abstract stigmatic injury were cognizable, standing would extend nationwide to all members of the particular racial groups against which the Government was alleged to be discriminating . . . . A black person in Hawaii could challenge the grant of a tax exemption to a racially discriminatory school in Maine. Recognition of standing in such circumstances would transform the federal courts into "no more than a vehicle for the vindication of the value interests of concerned bystanders."[67]

The Court held that the indirect injury, while judicially cognizable, was not "fairly traceable" to the contested agency conduct because it depended on the decisions of white parents to keep their children out of the public schools.[68] And if parental choice rather than governmental behavior had caused the problem of segregated schools, then the courts could not redress it.[69] Under such circumstances, the Court found that a grant of standing simply would cast "the federal courts as virtually continuing monitors of the wisdom and soundness of Executive action."[70] "Such a role," the Court continued, "is appropriate for the Congress acting through its committees and the 'power of the purse'; it is not the role of the judiciary, absent actual present or immediately threatened injury resulting from unlawful governmental action."[71]

In *Lujan v. Defenders of Wildlife*,[72] the Court again denied standing to plaintiffs who sought to challenge agency inaction—*even though such plaintiffs relied on an express statutory citizen-suit provi-*

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64 *Id.* at 753–56.

65 *Id.* at 754 (quoting Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 483 (1982)).

66 *Id.* at 755–56.

67 *Id.* (quoting United States v. SCRAP, 412 U.S. 669, 687 (1973)).

68 *Id.* at 758; *see also id.* at 753 n.19.

69 *Id.* at 756–59.

70 *Id.* at 760 (quoting Laird v. Tatum, 408 U.S. 1, 15 (1972)).

71 *Id.*

72 504 U.S. 555 (1992).

sion. Environmental groups sought to challenge the Secretary of Interior's refusal to enforce the requirements of the Endangered Species Act (ESA) abroad.[73] In particular, they contested the Secretary's refusal to "consult" with the Secretary of Commerce, as the ESA required, before approving federal funding for private construction projects that threatened to harm endangered species and their habitats in countries outside the United States.[74]

The Court held that the environmental groups lacked standing because none of their members had demonstrated concrete plans to return to the foreign lands.[75] Specifically, the Court found that while certain members had previously visited these destinations, none possessed a professional occupation or an airplane ticket that would suggest future travel.[76] The Court concluded that this "[p]ast exposure to illegal conduct [did] not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects."[77] Thus, no member of the environmental groups had established an "imminent" injury.[78]

Moreover, even assuming some member had established an imminent injury, the Court found that the environmental groups had failed to demonstrate that the injury would be "redressed" by a decision in their favor.[79] Whether a decision would prevent damage to endangered species and their habitats depended on a tenuous chain of events.[80] For example, it was far from clear whether "consultation" between the federal agencies would deprive the private construction projects of federal funding, or whether those projects would cease operations because they lost federal funding.[81]

Finally and most significantly, the Court held that the environmental groups could not assert standing to litigate a "procedural injury" on the basis of the citizen-suit provision in the ESA.[82] The citizen-suit provision provided, in relevant part, that "any person may commence a civil suit on his own behalf . . . 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

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73 *Id.* at 558–59.

74 *Id.*

75 *Id.* at 563–64.

76 *Id.*

77 *Id.* at 564 (quoting Los Angeles v. Lyons, 461 U.S. 95, 102 (1983)) (internal quotation marks omitted).

78 *Id.*

79 *Id.* at 568–71.

80 *Id.* at 571.

81 *Id.*

82 *Id.* at 571–74.

this chapter."[83] The environmental groups argued, and the lower court agreed, that the statutory "consultation" requirement constituted a "procedural right," for which the citizen-suit provision created standing in "any person" to enforce.[84] The Court acknowledged that plaintiffs with "procedural rights" need not show redressability—that a judicial decree in their favor would vindicate their asserted rights.[85] But it rejected the notion that such plaintiffs need not establish actual injury.[86] Put differently, it rejected the idea that plaintiffs could establish the requisite constitutional injury by virtue of "congressional conferral upon *all* persons of an abstract, self-contained, noninstrumental 'right' to have the Executive observe the procedures required by law."[87]

The Court characterized the environmental groups' injury as nothing more than "a generally available grievance about government."[88] Article III, the Court reasoned, plainly prohibits courts from adjudicating generalized grievances, even at the behest of Congress:

> 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.[89]

All of the Court's previous agency inaction or generalized grievance cases had involved plaintiffs without express congressional authorization to sue.[90] This distinction made no difference to the

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[83] *Id.* at 571–72 (quoting 16 U.S.C. § 1540(g) (2001)). Citizen-suit provisions, which confer standing on "any person," are broader than provisions, either in the APA or an organic statute, that confer standing on any "person aggrieved." *Compare* Fed. Election Comm'n v. Akins, 524 U.S. 11, 19 (1998) (noting that "[h]istory associates the word 'aggrieved' with a congressional intent to cast the standing net broadly—beyond the common-law interests and substantive statutory rights upon which 'prudential' standing traditionally rested"), *with Lujan*, 504 U.S. at 571–74 (holding that language "any person" reflects congressional intent to grant standing without qualification, and exceeds limits of Article III case and controversy requirement).

[84] Defenders of Wildlife v. Hodel, 851 F.2d 1035–36 (8th Cir. 1988).

[85] *Lujan*, 504 U.S. at 572 n.7.

[86] *Id.* at 573–74.

[87] *Id.* at 573.

[88] *Id.*

[89] *Id.* at 577 (internal citations omitted).

[90] *See, e.g.*, Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464 (1982); Warth v. Seldin, 422 U.S. 490 (1975); United States v.

Lujan Court. It held that Congress lacked power, via private citizens and courts, to interfere with the President's constitutional responsibilities.[91]

As *Allen v. Wright* and *Lujan v. Defenders of Wildlife* demonstrate, standing doctrine has evolved to prohibit parties from challenging agency refusals to initiate enforcement proceedings. But, like nonreviewability doctrine, its ultimate effect is to preclude courts from hearing claims contesting agency failures to enforce. Thus, standing doctrine and nonreviewability doctrine, though theoretically distinct, have similar practical consequences. Fairly interchangeably, they bar judicial review of agency inaction.

II
THE LAW UNDER THE ACCOUNTABILITY THEORY OF AGENCY LEGITIMACY

The question is how to evaluate the Court's treatment of agency inaction: Does this treatment further or frustrate agency legitimacy?[92] In order to answer this question, it first is necessary to determine how agency legitimacy is best achieved. One theory focuses on political accountability, asserting that agency legitimacy is best achieved when agency decisionmaking occurs under the direction of politically accountable officials. The "accountability" theory eases a central concern about agency decisionmaking—namely, that such decisionmaking is not rendered by those who represent the majority will.[93] The accountability theory also addresses other concerns about agency decisionmaking—for example, that such decisionmaking is not rendered by those who confront an electoral check.[94] Since the 1970s, however, administrative law scholars have used the theory primarily to respond to the charge that agency decisionmaking is not majoritarian.[95] Those scholars have followed the lead of constitu-

Richardson, 418 U.S. 166 (1974); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974); *see also* C. Douglas Floyd, *The Justiciability Decisions of the Burger Court*, 60 NOTRE DAME L. REV. 862, 871–74 (1985) (describing Court's generalized grievances cases pre-*Lujan*).

[91] *Lujan*, 504 U.S. at 577.

[92] By agency legitimacy, I mean consistency with the constitutional structure—an aspiration of the regulatory state from the very start. Thus, I do not intend to provoke debate on other possible meanings or modes of "legitimacy."

[93] *See* Stewart, *supra* note 2, at 1687 (noting that administrative law theory shifted focus over time from "checking governmental power" to "'the representation of individuals and interests'" (quoting Ralph F. Fuchs, *Concepts and Policies in Anglo-American Administrative Law Theory*, 47 YALE L.J. 538, 540 (1938))).

[94] *Id.* at 1671–76.

[95] *See* Bressman, *supra* note 3.

tional theorists in asserting that popular rule is the hallmark of democratic legitimacy.[96]

The accountability theory has animated several different models of the administrative state, each focusing on different representatives of the majority will.[97] The prevailing accountability theory model—the "presidential control" model—concentrates on the President and asserts that agency legitimacy is best achieved by bringing administrative decisions under the direction of the one official who is representative of and responsive to the *entire* nation.[98] According to this model, the president speaks for and answers to all the people.[99] It is the

[96] On the ascendance of this claim about majoritarianism among constitutional theorists, see generally Rebecca L. Brown, *Accountability, Liberty, and the Constitution*, 98 COLUM. L. REV. 531 (1998); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333 (1998) [hereinafter Friedman, *Countermajoritarian Difficulty, Part One*]; Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Two: Reconstruction's Political Court*, 91 GEO. L.J. 1 (2002); Barry Friedman, The *History of the Countermajoritarian Difficulty, Part Three: The Lesson of Lochner*, 76 N.Y.U. L. REV. 1383 (2001) [hereinafter Friedman, *Countermajoritarian Difficulty, Part Three*]; Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Four: Law's Politics*, 148 U. PA. L. REV. 971 (2000) [hereinafter Friedman, *Countermajoritarian Difficulty, Part Four*]; Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153 (2002) [hereinafter Friedman, *Countermajoritarian Difficulty, Part Five*]; Laura Kalman, *Law, Politics, and the New Deal(s)*, 108 YALE L.J. 2165 (1999).

[97] For example, the "transmission belt" model understands agencies as responding to Congress by implementing legislative directives. The "interest group representation" model sees agencies as responding directly to the people through the administrative process. For a classic description of these models, see Stewart, *supra* note 2. For a description of how various models capture the theory of political accountability, see Bressman, *supra* note 3, at 478–91.

[98] For a description of the presidential control model, see Bressman, *supra* note 3, at 485–91; Farina, *The "Chief Executive," supra* note 1, at 180–82; Fitts, *supra* note 4, at 841–57; Kagan, *supra* note 4, at 2277–2319; and Strauss, *From Expertise to Politics*, *supra* note 4, at 760–72.

[99] *See* JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE 152 (1997) (arguing that President is particularly responsive to public preferences because he deals with issues national in scope and has no particular constituency demanding benefits in exchange for votes); Matthew D. Adler, *Judicial Restraint in the Administrative State: Beyond the Countermajoritarian Difficulty*, 145 U. PA. L. REV. 759, 875–76 (1997) (collecting political science literature that describes emergence of President who seeks and claims support of national electorate and that demonstrates President's special connection to "Median National Voter," and noting that law scholars have used this literature to justify President's control over administrative agencies); Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 58–70 (1995) (endorsing presidential control as mechanism that best promotes responsiveness to public preferences); Kagan, *supra* note 4, at 2331–37 (same); Pierce, *The Role of the Judiciary*, *supra* note 1, at 1251–54 (arguing that Constitution is premised on belief that government should act as agent of people, and that President is second best to Congress as agent of people for purposes of administrative policymaking); *see also* Mathew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 246 (1987) (arguing that purpose of administrative law is to help elected politicians retain control of policymaking);

President who, even more so than Congress, reflects the majority will. Thus, the presidential control model claims, the President, because of his national constituency, best confers agency legitimacy.

The presidential control model has found unprecedented support among scholars.[100] It is easy to see why this would be so. Not only does the presidential control model reconcile agency decisionmaking with the ultimate form of majority rule, it squares such decisionmaking with the formal structure of our three-branch government by relocating agencies from the headless fourth branch to the executive branch.[101] Furthermore, the model appeals to liberals as well as conservatives. All or nearly all scholars—whether originalists or pragmatists, Democrats or Republicans—now endorse the presidential control model as a critical means for enhancing agency legitimacy.[102] Indeed, if President Reagan pioneered the tools of presidential control, then President Clinton perfected them.[103] As one scholar commented after President Clinton left office, "[W]e are all, or nearly all, Unitarians now."[104]

This Part draws an important connection between the presidential control model and the Court's treatment of agency inaction, specifically showing that the presidential control model can explain and hence justify the Court's treatment of agency inaction. Part II.A shows that the presidential control model can explain nonreviewability doctrine, and Part II.B demonstrates that it can explain standing doctrine as well. Part II.C then offers a surprising observation: Even those who subscribe to the presidential control model have joined others in rejecting the Court's treatment of agency

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Eric A. Posner, *Controlling Agencies with Cost-Benefit Analysis: A Positive Political Theory Perspective*, 68 U. CHI. L. REV. 1137, 1141 (2001) (arguing that purpose of cost-benefit analysis is to ensure that elected officials maintain power over agency regulation); David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 GEO. L.J. 97, 102–28 (2000) (arguing that agency decisionmaking is often preferred by voters because it maximizes their policy preferences).

100 *See* Bressman, *supra* note 3, at 490 & n.146 (collecting scholarship).

101 *Id.* at 490 ("At one level, the model makes a purely formal claim. It contends that popular control legitimates administrative agencies by ensuring that those agencies answer to a governmental actor who is accountable and enumerated, even if they themselves are not. Headless fourth branch solved.").

102 James F. Blumstein, *Regulatory Review by the Executive Office of the President: An Overview and Policy Analysis of Current Issues*, 51 DUKE L.J. 851, 852–53 nn. 2–7 (listing commentators).

103 *See* Kagan, *supra* note 4, at 2248–50 (noting that President Clinton extended and enhanced tools introduced by President Reagan to control administrative state); Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 6–7 (1995) (same).

104 Blumstein, *supra* note 102, at 852.

inaction.[105] I demonstrate, however, that these scholars seem not to have appreciated the true source of their discomfort. The problem is that the very theory that supports the Court's treatment of agency inaction (as well as the presidential control model) is inconsistent with the fundamental values of the administrative state because it fails to address the concern for arbitrary decisionmaking that agency inaction raises.

A. Nonreviewability Doctrine

The presidential control model can explain the salient aspects of *Chaney*: the rationale for the principle of judicial abstention, the relationship between this principle and the principles of judicial deference, the exceptions to this principle, and the cases extending the principle. First, it can explain the most persuasive—perhaps the only persuasive—rationale that the *Chaney* Court offered for insulating agency inaction from judicial review: "administrative concerns."[106] As the Court stated, "[A]n agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise."[107] As such, courts should be reluctant to interfere with such complex and essentially political determinations.

The presidential control model puts this rationale in context, revealing it as a classic expression of "presidential administration."[108] The idea is to preserve administrative control of enforcement priorities to promote presidential control thereof.[109] Courts should have little place micro-managing such issues when the President is available and suited to that function. Rather, they should assert themselves only when the President does not have unfettered authority to dictate enforcement priorities—for example, when Congress has supplied "guidelines for the agency to follow in exercising its enforcement

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[105] *See, e.g.*, Pierce, Lujan v. Defenders of Wildlife, *supra* note 1, at 1170–71, 1194–95; Pierce, *The Role of the Judiciary*, *supra* note 1, at 1280–85; Sunstein, *supra* note 1, at 186–88, 195–97, 213–14. Many others have joined in the criticism of the Court's approach. *See* Bandes, *supra* note 1, at 276–80; Farina, *The "Chief Executive,"* *supra* note 1, at 184–85; Farina, *The Consent of the Governed*, *supra* note 1, at 1026; Nichol, *supra* note 1, at 1937–38.

[106] *Chaney*, 470 U.S. at 831–32.

[107] *Id.* at 831.

[108] *See* Kagan, *supra* note 4.

[109] *See* Harold J. Krent & Ethan G. Shenkman, *Of Citizen Suits and Citizen Sunstein*, 91 MICH. L. REV. 1793, 1806 (1993) (arguing that Article II and notion of unitary executive prohibit Congress from "confer[ring] upon private citizens the general power to vindicate rights shared by the public as a whole").

powers."[110] Then, courts may provide review for administrative (and presidential) compliance with those guidelines, much as they would for administrative compliance with any legal instructions. Such limited review is consistent with presidential control because not even the President possesses the authority to disregard applicable standards.[111]

Second, the presidential control model can explain the link that the *Chaney* Court drew between the principle of judicial abstention and the principles of judicial deference. When the *Chaney* Court commented that "[t]he agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities," it noted that "[s]imilar 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."[112] Of course, similar results do not obtain from the principle of judicial abstention and the principles of judicial deference. The former principle precludes court review and the latter ones merely limit it. But while this difference may matter to individual litigants, it does not raise much concern from a presidential control perspective. In either case, presidential control increases as judicial interference decreases. Perhaps the principle of judicial abstinence enhances presidential control more than the principles of judicial deference. Regardless, they both reflect the notion that agencies (and hence presidents), not courts, should set priorities in the statutes those agencies implement. In the words of

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[110] *Chaney*, 470 U.S. at 833. As the *Chaney* Court stated, "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." *Id.* In the alternative, an agency may limit its own exercise of enforcement powers, in which case the President no longer possesses unfettered authority to do so. In *Chaney*, the FDA had produced a policy statement concerning its enforcement discretion, but the Court characterized the policy statement as "vague" and "attached to a rule that was never adopted." *Id.* at 836. Under these circumstances, the Court found the policy statement insufficient to circumscribe presidential control and authorize judicial review. *Id.*

[111] *See* Sunstein, *supra* note 1, at 212–14. This raises the question of whether courts should exercise review only in cases that involve *binding* standards—such as those found in statutory provisions or administrative regulations—and not in cases that involve nonbinding administrative standards—such as those found in administrative guidance documents. Courts have disagreed on this question. *Compare* Pub. Citizen v. Nuclear Regulatory Comm'n, 845 F.2d 1105, 1108 n.1 (D.C. Cir. 1988) ("While a policy statement is non-binding on an agency, a party may challenge it as contrary to law.") (citations omitted), *with* Big Meadows Grazing Ass'n v. United States *ex rel.* Veneman, 344 F.3d 940, 945 (9th Cir. 2003) ("'We will not review allegations of noncompliance with an agency statement that is not binding on the agency.'" (quoting W. Radio Servs. Co. v. Espy, 79 F.3d 896, 900 (9th Cir. 1996))).

[112] *Chaney*, 470 U.S. at 831–32; *accord* Chevron U.S.A., Inc. v. Nat'l Res. Def. Council, 467 U.S. 837 (1984).

the *Chaney* Court, "[I]t is the Executive who is charged by the Constitution to 'take Care that Laws be faithfully executed.'"[113] In the words of the *Chevron* Court, "While agencies are not accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices."[114]

Third, the presidential control model can explain the exceptions to § 701(a)(2) that the *Chaney* Court articulated. The Court noted two special circumstances that might place a refusal to enforce a rule outside of § 701(a)(2): when an agency refuses to institute proceedings "based solely on the belief that it lacks jurisdiction" and when an agency has "consciously and expressly adopted a general policy that is so extreme as to amount to an abdication of its statutory responsibilities."[115] By announcing these special circumstances, the Court correctly recognized that agencies lack authority to disregard their statutory obligations. Yet it failed to explain why judicial review is necessary to address allegations that they have done so. The implicit reason is that the President lacks authority to permit or instruct agencies to disregard their statutory obligations.[116] When the allegation is that agencies have disregarded their statutory obligations, whether in spite of or because of the President, courts must be available to respond.[117]

Finally, the presidential control model can explain cases that extend *Chaney* beyond refusals to enforce. In *Lincoln v. Vigil*,[118] for

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113 *Chaney*, 470 U.S. at 832 (quoting U.S. CONST. art. II, § 3).

114 *Chevron*, 467 U.S. at 865; *cf.* Keith Werhan, *The Neoclassical Revival in Administrative Law*, 44 ADMIN. L. REV. 567, 598–99 (1992) (connecting *Chaney* to neoclassical concerns about preventing judicial control of administrative policymaking).

115 *Chaney*, 470 U.S. at 833 n.4 (internal quotation marks omitted).

116 *See* Sunstein, *supra* note 1, at 212–14.

117 Lower courts have held that § 701(a)(2) does not preclude review of refusals to initiate rulemaking proceedings. *See, e.g.*, Nat'l Customs Brokers & Forwarders Ass'n of Am. v. United States, 883 F.2d 93, 96 (D.C. Cir. 1989) (differentiating nonenforcement decisions from refusals to institute rulemaking proceedings); Am. Horse Prot. Ass'n v. Lyng, 812 F.2d 1, 3–4 (D.C. Cir. 1987) (allowing review of agency decision not to institute rulemaking). One way to rationalize this result is to view refusals to initiate rulemaking proceedings as analogous to abdications of statutory responsibility rather than as refusals to enforce. Refusals to initiate rulemaking proceedings are distinguishable from refusals to enforce because they are not akin to exercises of prosecutorial discretion. *See* Farmworker Justice Fund, Inc. v. Brock, 811 F.2d 613, 635–36 (Williams, J., concurring and dissenting in part) (making this argument), *vacated as moot*, 817 F.2d 890 (D.C. Cir. 1987). More importantly, they are suitable for judicial review because they are infrequent, "fraught with legal analysis (and therefore potential legal error)," and "characteristically accompanied by public justification under the APA." *Id.* at 636–37. Consequently, refusals to initiate rulemaking proceedings share much in common with abdications of statutory responsibilities. *Id.* at 636. It thus makes sense to subject them to judicial review.

118 508 U.S. 182 (1993).

example, the Court precluded review of an agency's refusal to allocate funds for a certain program from a lump-sum appropriation.[119] The Court reasoned that this refusal was based on the same "complicated balancing" of resources and priorities as a refusal to enforce.[120] The Court concluded that the refusal therefore is ill-suited for judicial control,[121] and might have added that it is appropriate for presidential control. In *Webster v. Doe*, the Court withheld review of a decision of the Director of Central Intelligence under the National Security Act of 1947 to discharge an employee for national security reasons.[122] The Court found that the statute, because of its national security purpose, "exhibits . . . extraordinary deference to the Director in his decision to terminate individual employees."[123] National security is a prime area of presidential control.[124]

B. Standing Doctrine

The presidential control model also can explain the most significant feature of *Lujan*: the insistence on actual injury for plaintiffs who premise standing on a statutory citizen-suit provision. As a general matter, the presidential control model can explain the requirement of actual injury for all plaintiffs. That requirement is an example of the "passive virtues," not in the traditional sense but in an administrative law sense. At the time the Court decided *Data Processing*, Alexander Bickel already had published his influential book advocating the passive virtues, a collection of techniques that courts may employ to "decline the exercise of jurisdiction which is given."[125] Bickel embraced these techniques, including standing, as a means for ensuring the legitimacy of the Court in a democratic society.[126] As he wrote, "the techniques and allied devices for staying the Court's hand . . . mark the point at which the Court gives the electoral institutions their head and itself stays out of politics, and there is nothing paradoxical in finding that here is where the Court is most a political animal."[127] The passive virtues, employed not on the basis of prin-

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119 *Id.* at 193–94.

120 *Id.* at 193 (quoting Heckler v. Chaney, 470 U.S. 821, 831 (1985)).

121 *Id.*

122 486 U.S. 592, 601 (1988).

123 *Id.*

124 Note, however, that the *Webster* Court did not regard this area of presidential control as absolute. The Court held reviewable a constitutional claim against the discharge decision, even though the claim might involve "'rummaging around' in the Agency's affairs to the detriment of national security." *Id.* at 603–04.

125 ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 127 (2d ed. 1986).

126 *Id.* at 132.

127 *Id.*

ciple but prudence,[128] enable the Court—which Bickel viewed as a profoundly countermajoritarian institution—to respect the majority will and thus conserve its moral capital.[129]

Bickel primarily discussed constitutional cases, which involve the interpretation of constitutional provisions rather than statutory provisions. In such cases, Bickel argued that judicial judgment can "come later, after the hopes and prophecies expressed in legislation have been tested in the actual workings of our society."[130] The "case" requirement actually facilitates this result. As he stated, "[T]he 'standing' and 'case' requirement creates a time lag between legislation and adjudication, as well as a shifting line of vision. Hence it cushions the clash between the Court and any given legislative majority."[131]

In regulatory cases, the standing requirement blunts a different sort of clash—one between the Court and any given presidential administration. This clash, not the clash between the Court and Congress, occupies center stage in the administrative state. Recall that in *Allen*, the Court worried that granting standing to challenge "not specifically identifiable Government violations of law, but the particular programs agencies establish to carry out their legal obligations. . . . 'would have the federal courts as virtually continuing

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128 *Id.* at 132–33 ("But this is not to concede unchanneled, undirected, uncharted discretion. It is not to concede decision proceeding from impulse, hunch, sentiment, predilection, inarticulable and unreasoned. The antithesis of principle in an institution that represents decency and reason is not whim or even expediency, but prudence.").

129 *Id.* at 116; *see also* Floyd, *supra* note 90, at 862–63 (attributing standing decisions of Burger Court to belief in "illegitimacy of 'government by the judiciary' in a representative democracy"); Louis L. Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033, 1038, 1043 (1968) (contending that those who would deny standing simply because plaintiffs lack personal injury object to undemocratic nature of judicial review); *cf.* Harold J. Krent, *Reviewing Agency Action for Inconsistency with Prior Rules and Regulations*, 72 CHI.-KENT L. REV. 1187, 1187 (1997) (arguing that courts have been reluctant to grant review in absence of administrable standards because costs of judicial errors outweigh benefits of judicial monitoring). For important arguments exposing and disproving Bickel's essential claim that the Court is a profoundly countermajoritarian institution, see generally Friedman, *Countermajoritarian Difficulty, Part Five*, *supra* note 96 (examining historical divergence between popular and academic views of countermajoritarian difficulty, and showing that perceived legitimacy of judicial review is ultimately rooted in political preferences); Friedman, *Countermajoritarian Difficulty, Part Four*, *supra* note 96 (conducting historical analysis of popular attitudes towards judicial review); Friedman, *Countermajoritarian Difficulty, Part Three, supra* note 96 (arguing that public acceptance of judicial review is based largely upon whether Court's decisions are viewed as socially legitimate); Friedman, *Countermajoritarian Difficulty, Part One, supra* note 96 (tracing history of judicial review through *Dred Scott* and identifying four societal factors that indicate likely emergence of countermajoritarian criticism).

130 BICKEL, *supra* note 125, at 115.

131 *Id.* at 116.

monitors of the wisdom and soundness of Executive action.'"[132] The Court continued,

> When a plaintiff seeks to enjoin the activity of a government agency, even within a unitary court system, his case must contend with the well-established rule that the Government has traditionally been granted the widest latitude in the dispatch of its own internal affairs . . . . [T]hat principle, grounded as it is in the idea of separation of powers, counsels against recognizing standing in a case brought, not to enforce specific legal obligations whose violation works a direct harm, but to seek a restructuring of the apparatus established by the Executive Branch to fulfill its legal duties. The Constitution, after all, assigns to the Executive Branch, and not to the Judicial Branch, the duty to "take Care that the Laws be faithfully executed."[133]

Thus, the injury-in-fact test can be understood as reflecting the passive virtues in the administrative state. It prioritizes presidential control over judicial control of agency decisionmaking.

The injury-in-fact test also prioritizes presidential control over *congressional* control of agency decisionmaking because it applies even to plaintiffs who premise standing on a statutory citizen-suit provision. This feature has caused leading scholars to argue that the injury-in-fact test is wrong-headed: The "passive virtues" simply play no role when Congress designates litigants and courts to monitor agency conduct.[134] As Professor Sunstein has stated, "[When] a democratically enacted statute requires a regulatory agency to take action[,] . . . considerations of democracy point toward rather than against access to court."[135] Withholding judgment in statutory cases

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[132] Allen v. Wright, 468 U.S. 737, 759–60 (1984) (quoting Laird v. Tatum, 408 U.S. 1, 15 (1972)).

[133] *Id.* at 761 (internal quotation marks omitted).

[134] *See* Pierce, Lujan v. Defenders of Wildlife, *supra* note 1, at 1187 (distinguishing constitutional cases from statutory cases because they present increased risk of courts substituting their judgment for politically accountable institutions); Cass R. Sunstein, *Standing Injuries*, 1993 SUP. CT. REV. 37, 59–60 (distinguishing constitutional cases from statutory ones precisely because constitutional cases do not involve democratically enacted statutes); Sunstein, *supra* note 1, at 211 (contending that passive virtues have no role when Congress confers standing); *see also* Albert, *supra* note 46, at 469–73 (offering number of factors that support expansive review of nonconstitutional claims); Fletcher, *supra* note 52, at 250–51 (distinguishing statutory and constitutional rights because Congress creates statutory rights and therefore should have plenary authority to define class of plaintiffs entitled to enforce them); David A. Logan, *Standing to Sue: A Proposed Separation of Powers Analysis*, 1984 WISC. L. REV. 37, 48–61 (endorsing broad standing for statutory claims but not constitutional ones); *cf.* Bandes, *supra* note 1, at 300–04 (arguing that constitutional claims deserve more judicial solicitude than statutory claims).

[135] Sunstein, *supra* note 134, at 60; *see also* Pierce, Lujan v. Defenders of Wildlife, *supra* note 1, at 1198–1200 (arguing that denial of standing to plaintiffs specifically authorized to sue under citizen-suit provisions violates doctrine of legislative supremacy in government

therefore sharpens the clash between the Court and any given legislative majority.[136]

This clash, however, should be beside the point for advocates of the presidential control model, who usually care little for conflict between the Court and Congress. Such advocates applaud judicial decisions invalidating the legislative veto[137] and the Comptroller General,[138] both of which pit the Court against Congress for the benefit of the President.[139] For similar reasons, they should embrace judicial decisions restricting the citizen-suit provision, which has much the same effect.[140] As then-Judge Scalia acknowledged, citizen-suit provisions constitute congressional interference with the President's "ability to lose or misdirect laws[, which] can be said to be one of the prime engines of social change."[141] Citizen-suit provisions achieve such results by granting power to the courts rather than a subset of Congress or even an independent agency. But this distinction should be of no consequence to proponents of the presidential control model. If true to form, those proponents should reject congressionally sponsored intrusions on executive power no matter the mechanism.

C. *Scholarly Rejection*

Yet many supporters of the presidential control model do not reject citizen-suit provisions; instead, they reject the Court's treatment of those provisions. Professor Sunstein is representative.[142] He accuses the Court of *Lochner*ism—of regarding government action and common law interests with more solicitude than government inac-

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policymaking); Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741, 1770–71 (1999) (asserting that Supreme Court's use of standing doctrine to limit class of plaintiffs eligible to use citizen-suit provisions thwarted will of politically accountable institutions).

136 Even some who endorse Bickel's approach to standing believe the Court has misused it. *See* Mark Tushnet, *Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine*, 80 N.C. L. REV. 1203, 1229–33 (2002) (contending that "doctrinalization" of justiciability doctrines deprived them of prudential use that Bickel correctly advocated).

137 *See* INS v. Chadha, 462 U.S. 919 (1983) (invalidating legislative veto of statutory provisions by one House of Congress).

138 *See* Bowsher v. Synar, 478 U.S. 714 (1986) (invalidating provision giving Comptroller General executive functions while subject to legislative removal from office).

139 *See, e.g.*, Calabresi, *supra* note 99, 73–74 (arguing that legislative veto would allow Congress to interfere with presidential control over enforcement of laws).

140 *See* Farina, *The "Chief Executive," supra* note 1, at 183–84; Sunstein, *supra* note 1, at 211–12 (linking *Lujan* to unitary executive theory).

141 Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 897 (1983).

142 *See* Cass R. Sunstein, *Reviewing Agency Inaction After* Heckler v. Chaney, 52 U. CHI. L. REV. 653 (1985); Sunstein, *supra* note 1, at 187–88.

tion and congressionally created interests.[143] Put simply, he argues that the Court, through both nonreviewability doctrine and standing doctrine, privileges certain interests in the administrative process. In particular, he believes the Court advantages interests that belong to the objects of regulation but not the beneficiaries.[144] Sunstein thus identifies a harm that extends beyond reviving anachronistic thinking about protected rights. He faults nonreviewability doctrine and standing doctrine for systematically skewing the administrative process.[145]

Another erstwhile promoter of the presidential control model agrees. Professor Pierce writes that *Lujan* is a "source of widespread harm to the process of agency policymaking, reducing dramatically the range of interests effectively represented in most agency proceedings."[146] The case, Pierce continues, "increase[s] significantly the tendency for agency policies to be distorted by factionalism."[147] Because the principles permit regulated entities but not regulatory beneficiaries to challenge agency decisionmaking, they create an asymmetry of interests not only in the judicial process but in the administrative process.[148] The principles encourage agencies from the start to heed the preferences of regulated entities and flout the preference of regulatory beneficiaries because only the former possess the power to protest.[149]

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143 Sunstein, *supra* note 142, at 666–67; Sunstein, *supra* note 1, at 187–88.

144 Sunstein, *supra* note 1, at 186–88, 195–96.

145 *Id.*; *see also* William W. Buzbee, *Expanding the Zone, Tilting the Field: Zone of Interests and Article III Standing Analysis After* Bennett v. Spear, 49 ADMIN. L. REV. 763, 764–65 (1997) (labeling phenomenon "tilted standing playing field").

146 Pierce, Lujan v. Defenders of Wildlife, *supra* note 1, at 1171; *see also id.* at 1194–95; Pierce, *The Role of the Judiciary*, *supra* note 1, at 1280–85. Many "non-presidentialists" raise a similar concern. *See, e.g.*, Bandes, *supra* note 1, at 280 ("The Court's preference for the adjudication of pecuniary and property rights of individuals has obviously shaped its standing doctrine, within which widely shared constitutional or other collective injuries are devalued unless they can be cast in common law terms."); Farina, *The "Chief Executive," supra* note 1 at 184 ("[C]losing down pre-enforcement review is potentially devastating to those who complain that the agency is doing too little or nothing at all."); *see also* Farina, *The Consent of the Governed*, *supra* note 1, at 1026 ("Decisions in the areas of standing, ripeness, and reviewability all signal a raising of the justiciability threshold for regulatory beneficiaries, without a comparably constraining adjustment for the regulated community. Once we understand that access to judicial review translates into power in the regulatory process, it becomes clear that asymmetrical barriers privilege certain kinds of voices while condemning others to being heard only at the agency's sufferance.").

147 Pierce, Lujan v. Defenders of Wildlife, *supra* note 1, at 1171.

148 *Id.*

149 *See* Buzbee, *supra* note 145, at 770 ("For good or bad, a stakeholder's ability to threaten to stop an agency action by filing a complaint alleging substantive or procedural agency missteps leads to greater agency willingness to provide the requested process, or to respond to stakeholder criticisms and requests.").

As a general matter, we should be skeptical whenever advocates of a particular theoretical model oppose doctrines that seem to follow from that model. In such circumstances, we should doubt the adequacy of that model to produce the proper principles for particular problems. In this instance, we should question the principles themselves: Either the critics are right, or the doctrines are right. I believe that Sunstein and Pierce are correct but for a reason that even they do not fully appreciate. The reason is that the Court's treatment of agency inaction rests on a flawed premise. It mistakenly assumes that political accountability is enough to produce agency legitimacy. In the next Part, I argue that judicial review is necessary for that purpose. Furthermore, I offer a theory of agency legitimacy that can explain why. That theory is dedicated to preventing arbitrary decisionmaking, not just promoting accountable decisionmaking. When we step back to apply the "arbitrariness" approach, a very different picture of agency inaction emerges.

III

THE LAW UNDER AN ARBITRARINESS APPROACH

The arbitrariness approach described in this Part can account for the problem of agency inaction in a way consistent with the critics of modern nonreviewability doctrine and standing doctrine. Yet it invites us to view the problem from a novel angle—in terms of the influences that produce agency inaction, not just the harms that agency inaction inflicts. The insight of the arbitrariness approach is that an agency is subject to improper influences when it refuses to act, just as when it decides to act. Thus, courts committed to combatting such improper influences should do so however they are manifested, whether as inaction or action.

This insight compels changes to contemporary nonreviewability doctrine and standing doctrine. In Part III.A, I argue that courts generally should reject prohibitions on judicial review of agency inaction. Instead, they should subject agency inaction to judicial review, applying principles that require agencies to give reasons explaining their decisions and to supply standards disciplining their discretion. As discussed *infra*, these principles tend to inhibit the improper influences that generate arbitrary administrative decisionmaking.

Part III.B further asserts that courts should recognize any exceptions to judicial review of agency inaction through well-worn constitutional law principles. Specifically, nonreviewability can be better understood as an analogue to political question doctrine and standing as an analogue to nondelegation doctrine. This approach has clear

advantages over any other. It gives effect to the language and intent of the APA provisions and also credits the Court's intuition that constitutional values render some agency inaction immune from judicial review. At the same time, it consciously grounds that intuition in established constitutional law principles to prevent it from escalating into broader legal principles that subvert another entrenched constitutional ideal—the prevention of arbitrary agency decisionmaking.

A. Reintegrating Agency Inaction and Judicial Review

The place to start in reintegrating agency inaction and judicial review is with a sense for the arbitrariness approach that I propose. The arbitrariness approach claims a pedigree in the work of Professor Kenneth Culp Davis and Judge Henry J. Friendly,[150] and it is devoted, above all else, to the prevention of arbitrary agency decisionmaking. Elsewhere, I have defined arbitrary agency decisionmaking in terms of how it manifests itself, whom it harms, and why it occurs:

> [A]rbitrary agency decisionmaking . . . generates conclusions that do not follow logically from the evidence, rules that give no notice of their application, or distinctions that violate basic principles of equal treatment. Importantly, it also may affect individual rights in the absence of an adequate justification—that is, in the absence of reasons reflecting some sufficiently public purpose. These shortcomings may affect individual liberty in the personal sense—for example, when administrative decisionmaking targets a specific individual for unfavorable treatment without good reason. Often these flaws affect individual liberty in a collective sense—for example, when administrative decisionmaking impairs a statutorily protected public good (such as clean air or workplace safety) without a sufficiently public purpose.
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> To a certain extent, this definition of "arbitrary agency decisionmaking" puts the cart before the horse. It describes evidence of a problem rather than its source. Lack of reasoned decisionmaking or lack of public-regarding purpose indicates something amiss—from agency negligence to malfeasance. While negligence is cause for concern, malfeasance is a matter of greater significance because it often results from the corrupting forces that the constitutional structure is designed to inhibit: private interest and governmental self-interest.[151]

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[150] *See generally* KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY (1969) (arguing for mechanisms to constrain arbitrary administrative decisionmaking); HENRY J. FRIENDLY, THE FEDERAL ADMINISTRATIVE AGENCIES: THE NEED FOR BETTER DEFINITION OF STANDARDS (1962) (same).

[151] Bressman, *supra* note 3, at 496.

The crucial point for present purposes concerns why arbitrary agency decisionmaking occurs. Although arbitrary agency decisionmaking appears mainly as the absence of reasoned consideration, it develops primarily as the result of improper influence. Public choice theory has been applied to identify many ways in which politicians pressure agencies on behalf of the private groups that finance their reelection campaigns.[152] For example, Congress often writes broad delegating statutes to create opportunities for narrow interests to dominate agency decisionmaking.[153] Congress similarly grants power without meaningful administrative limits so that its members will have space to push agencies toward preferential outcomes.[154] Congress thus facilitates arbitrary administrative decisionmaking.

This is not to say that Congress or agency heads thereby act irrationally. It is quite rational from a political standpoint for members of Congress to act in ways that enhance their reelection prospects and for heads of agencies to respond in ways that preserve their mandates or jobs. Nevertheless, there is reason to worry from a democratic standpoint. If we aspire to a government that advances public purposes rather than private or selfish interests, then we should seek to structure our government accordingly.

The Framers sought to structure our government to advance public purposes rather than narrow interests. Long before the rise of the modern administrative state, the Framers crafted numerous mechanisms that can be understood to inhibit improper influence at all levels of government.[155] The Framers did not rely exclusively on the

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[152] *See* DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION 9–12 (1993) (applying public choice theory to show how Congress structures delegations to enable private interests to dominate administrative process); Peter H. Aranson et al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 56–58 (1982) (same).

[153] *See* SCHOENBROD, *supra* note 152, at 55–56 (offering example).

[154] *See id.*; *see also* Bressman, *supra* note 3, at 496 ("Broad delegation, by definition, enables Congress to pass statutes, and agencies to exercise authority under such statutes, without any regulatory standards that meaningfully constrain administrative discretion."); Lisa Schultz Bressman, Schechter Poultry *at the Millennium: A Delegation Doctrine for the Administrative State*, 109 YALE L.J. 1399, 1427–31 (2000) (arguing that delegating statutes enable agencies to succumb to private pressure because they lack congressional constraints on such behavior).

[155] THE FEDERALIST NOS. 10, 51 (James Madison) (recognizing corrupting forces that often derail political officials from pursuing public interest and advocating structural methods of controlling them); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 38–44 (1985) (noting that Framers sought to address these corrupting forces). Many scholars have noted that the Framers employed various structural techniques to prevent governmental tyranny. *See, e.g.*, Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1531–40 (1991) (disussing historical development of separation of powers as method of protecting individual rights); Gerhard Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 WM. &

requirement that political officials stand periodically for reelection. Rather, they made the legislative process itself resistant to what Madison famously called faction.[156] Specifically, they devised a process that forced narrow groups to receive support from more than a few easily persuaded legislators.[157] Bicameralism plus presentment increases the cost of all lawmaking to reduce the incidence of narrowly focused lawmaking.[158] Separation of powers can be viewed in a similar light. By divorcing law-enactment from law-enforcement, separation of powers installs the legislative and executive branches as mutual checks against faction and arbitrary government.[159] The contention here is not that separation of powers or bicameralism plus presentment *only* serve this function. Rather, it is that the features of the constitutional structure, among other purposes, can be understood to address the potential for arbitrariness in governmental decisionmaking.

Given this basic framework, the question becomes how to adapt or supplement these features to address the potential for arbitrariness in administrative decisionmaking. Here, too, political checks are not enough. Put simply, agencies are not accountable to the people. They are not headed by those officials who face direct electoral reprisal for their missteps. Furthermore, agencies are beholden to elected officials who cater to private interests while escaping responsibility for that result. If Congress crafts broad delegating statutes to create room for private interests to prevail in the administrative process, it then dodges blame for any non-public decisionmaking by placing the agency on the hook.[160] Congress therefore cannot be relied upon to protect agency decisionmaking from improper influence. Indeed, Congress is a large part of the problem.

MARY L. REV. 211, 212–24 (1989) (discussing difficulties that Framers encountered in developing government of separated powers); M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1155–61 (2000) (describing two different conceptions of separation of powers); Victoria Nourse, *Toward a "Due Foundation" for the Separation of Powers:* The Federalist Papers *as Political Narrative*, 74 TEX. L. REV. 447, 456–63, 471–84 (1996) (conducting extensive analysis of Madison's writings in *The Federalist Papers* to determine Framers' understanding of separation of powers).

156 THE FEDERALIST NOS. 10, 51 (James Madison) (identifying problem of faction).

157 *See* Farina, *The Consent of the Governed*, *supra* note 1, at 114–18 (arguing that requirements of bicameralism and presentment ensure necessity of high degree of political capital before laws can be enacted).

158 *See* William N. Eskridge & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523, 528–33 (1992) (arguing that requirements of bicameralism and presentment reduce production of hasty or unwise laws).

159 Bressman, *supra* note 3, at 499–500; Brown, *supra* note 155, at 1533–34.

160 *See supra* notes 155–57 and accompanying text.

The President often is offered as a salve. Agencies may not be accountable to the people for their misdeeds, but they are accountable to the President. This check, however, is insufficient to protect agency decisionmaking from arbitrariness.[161] The President exercises control in a manner that is too corrupting and sporadic to reduce the potential for faction. Like Congress, he may pressure agencies to depart from broad statutory purposes in favor of personal priorities.[162] Self-dealing aside, he also may fail to prevent members of Congress from engaging in their own election-seeking behavior. The reality is that the President cannot possibly police all or even all major executive branch agency decisions for evidence of improper influence, as even the most ardent proponents of the presidential control model admit.[163] The President has responsibilities in our constitutional democracy that prevent him from exercising the type of comprehensive control upon which agency legitimacy depends.

While political checks do not work reliably to inhibit arbitrariness, administrative checks hold more promise. When agencies act to discipline themselves, they reduce the room for politicians to press other agendas. Two requirements are particularly important in this endeavor. The first is the requirement of reason-giving—that agencies provide reasons explaining the exercise of their authority in a particular case.[164] The second is the requirement of standard-setting—that agencies supply standards controlling the exercise of their authority across all cases.[165] The requirement of reason-giving relies on transparency to restrain administrative decisionmaking. When agencies offer open, public-regarding, and otherwise rational reasons, they reduce opportunities for covert, private-interested, or otherwise

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161 *See* Bressman, *supra* note 3, at 504–05.

162 For an extraordinary example of how one president used his power over the administrative process to obtain favorable results for his campaign supporters, see Michael C. Blumm, *The Bush Administration's Sweetheart Settlement Policy: A Trojan Horse Strategy for Advancing Commodity Production on Public Lands*, 34 ENVTL. L. REP. 10397 (2004) (describing how President George W. Bush encouraged regulated entities to bring lawsuits challenging restrictive Clinton-era policies in order to obtain "sweetheart" settlements from his administration).

163 *See* Kagan, *supra* note 4, at 2250 (examining Clinton administration and noting that "presidential control did not show itself in all, or even all important, regulation; no president (or his executive office staff) could, and presumably none would wish to, supervise so broad a swath of regulatory activity").

164 *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 48–49 (1983) (articulating reason-giving requirement).

165 *See, e.g.*, Pearson v. Shalala, 164 F.3d 650, 660 (D.C. Cir. 1999) (finding agency's failure to issue standards constraining exercise of its authority to be arbitrary and capricious). *But see* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 473 (2001) (holding that agencies cannot cure unconstitutional delegation by issuing standards confining exercise of their authority).

arbitrary ones.[166] The requirement of standard-setting relies on the binding effect of law to restrain administrative decisionmaking. When agencies bind themselves to determinate standards, they inhibit requests for ad hoc departures.[167] It is therefore possible to generalize: When agencies adopt measures that promote transparent and law-bound decisionmaking, they decrease the potential for narrow interests to obtain special treatment.[168]

Furthermore, these measures are applicable to agency inaction as well as agency action. When agencies provide explanations for their nonenforcement decisions, they hinder improper influences from dominating those decisions at public expense. When agencies supply standards for their enforcement authority, they hinder improper influences from diverting the exercise of that authority at public expense. What this reveals is that the risk of arbitrariness appears to turn on *how* decisionmaking occurs, not on *whom* it affects. Moreover, the manner in which agency *inaction* occurs is indistinguishable from the way in which agency *action* occurs. Agency inaction is subject to the same influences that derail agency action from public purposes to private gains. Accordingly, the requirements that tend to fight these influences are equally necessary in both settings.

But these requirements, commonplace in the world of agency action, are anomalous in the world of agency inaction. Modern nonreviewability doctrine and standing doctrine make it so. Those doctrines relieve agencies of the obligation to engage in reason-giving and standard-setting. They immunize agency inaction from judicial review, which is the principal tool for prompting agencies to undertake reason-giving and standard-setting. Nonreviewability doctrine does more than that. It actually provides a disincentive for agencies to issue enforcement standards. This is because nonreviewability doctrine does not preclude judicial review of agency inaction if an agency has issued standards constraining its enforcement authority.[169] In

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166 *See, e.g.*, Kagan, *supra* note 4, at 2337 (endorsing transparency as method of eradicating improper influence).

167 *See* DAVIS, *supra* note 150, at 55–57 (endorsing administrative standards method of reducing arbitrary decisionmaking); FRIENDLY, *supra* note 150, at 19–26 (same).

168 *See* Bressman, *supra* note 3, at 537–40 (endorsing law-like decisionmaking as preventing arbitrary decisionmaking and arguing that Court's decision in *United States v. Mead Corp.*, 533 U.S. 218 (2001), supports this point).

169 As the Ninth Circuit stated in *Socop-Gonzalez v. INS*, 208 F.3d 838 (2000):

> This court and others have recognized repeatedly that "the Supreme Court's holding in [*Heckler*] does not bar judicial review when an agency's regulation provides the Court with law to apply." Similarly, established policies of an administrative agency may provide the law by which to judge an administrative action or inaction: "Though the agency's discretion is unfettered at the outset, if it announces and follows—by rule or by settled course of adjudication—a

such a case, a court can review a nonenforcement decision to determine whether it deviates from such standards.[170] This exception to the general rule of nonreviewability gives agencies less reason to voluntarily issue enforcement standards.

Because nonreviewability doctrine and standing doctrine excuse agencies from the requirements of reason-giving and standard-setting, they tolerate faction and, indeed, facilitate it. They make it more likely that agencies will respond to private or political pressure rather than public welfare by giving those typically harmed by agency action (i.e., regulated entities) more power to protest than those typically harmed by agency inaction (i.e., regulatory beneficiaries). This is the very asymmetry-of-interests problem that other critics of contemporary nonreviewability doctrine and standing doctrine identify,[171] although nonreviewability doctrine and standing doctrine more often accelerate the problem rather than cause it.

At the risk of over-simplifying, the events might unfold as follows: Regulated entities entice politicians to pressure agencies on their behalf in exchange for campaign contributions or votes. When regulated entities do not get their way, they generally may challenge the agency decision in court.[172] When regulated entities do get their way, third parties sometimes may challenge the agency decision in court.[173] But when regulated entities specially succeed in blocking enforcement proceedings, third parties rarely may challenge the results in court. Nonreviewability doctrine bars any plaintiff from raising a claim, and standing doctrine bars particular plaintiffs from so doing. Both, fairly interchangeably, allow regulated entities to skew enforcement decisionmaking at public expense. This is the very definition of arbitrariness.

In light of these considerations, it follows that nonreviewability doctrine and standing doctrine must change—and in ways far more specific than those that other critics of the doctrines have described.

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general policy by which its exercise of discretion will be governed, an irrational departure from that policy (as opposed to an avowed alteration of it) could constitute action that must be overturned . . . ."

208 F.3d at 844 (internal citations omitted).

170 *Id.* at 844.

171 *See, e.g.*, Pierce, Lujan v. Defenders of Wildlife, *supra* note 1, at 1194–95 (identifying asymmetry of interests in administrative process between regulated entities and regulatory beneficiaries); Sunstein, *supra* note 1, at 183–84, 187–88 (same).

172 *See, e.g.*, Nat'l Customs Brokers & Forwarders Ass'n of Am. v. United States, 883 F.2d 93, 96 (D.C. Cir. 1989) (reviewing agency refusal to initiate rulemaking proceedings at request of industry group).

173 *See, e.g.*, Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 46–57 (1983) (reviewing agency rescission of automobile safety standard that would have benefited public but burdened domestic automobile industry).

Specifically, courts generally should reject special rules for agency inaction and should apply the same principles that apply to agency action. Courts should ask agencies to supply explanations for particular nonenforcement decisions.[174] They also should require agencies to promulgate standards governing all such decisions.[175] By enforcing the requirements of reason-giving and standard-setting, courts will promote the conditions that prevent, or at least minimize, corrupting influences from pervading administrative enforcement decisionmaking.[176]

I am aware that this solution has considerable costs, both in terms of administrative flexibility and administrative efficiency, and I do not intend to downplay them. Rather, I would suggest that these costs are unavoidable if the goal is agency legitimacy. Governmental flexibility and efficiency often must yield to rationality, as various provisions of the constitutional structure attest. For example, the provisions that govern legislative decisionmaking—bicameralism plus presentment—are wildly inefficient and yet, if justifiable, are so because they serve other values or because their very inefficiency serves other values.[177] The same might be said of the procedures and doctrines that govern

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[174] *See id.* at 48 ("We have frequently reiterated that an agency must cogently explain why it has exercised its discretion in a given manner . . . .").

[175] The requirement of standard-setting is not as solidly entrenched in judicial review as the requirement of reason-giving, but it is not without precedent. *See, e.g.*, Pearson v. Shalala, 164 F.3d 650, 660 (D.C. Cir. 1999) (imposing requirement of standard-setting under arbitrary and capricious test of APA); Bressman, *supra* note 11, at 465–69 (defending requirement of standard-setting).

[176] This discussion raises the question whether Congress may preclude judicial review. If judicial review is necessary to cultivate the administrative conditions that inhibit arbitrariness, perhaps not even Congress should be able to eliminate it. Although I cannot offer a full discussion of statutory preclusion at this time, I provide the following thoughts as markers for later inquiry. In my view, Congress surely could prohibit some judicial review by depriving certain plaintiffs of statutorily protected interests. Congress need not provide a judicial forum for every complaint, no matter how remote from or contrary to the purpose of the statute invoked. I therefore would read § 701(a)(1) essentially to mirror the "zone of interests" analysis from standing doctrine. Recall that, to establish standing, a plaintiff must be "*arguably* within the zone of interests" protected by statute. Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153 (1970) (emphasis added). I believe that, to avoid statutory preclusion under § 701(a)(1), a plaintiff must not be *deliberately* excluded from that zone of interests. This understanding suggests a narrow construction of § 701(a)(1) and is consistent with the interpretation of that section in the earliest Supreme Court cases. *See, e.g.*, Abbott Labs. v. Gardner, 387 U.S. 136, 141 (1967) (requiring clear statement of congressional intent to preclude judicial review). It also is consistent with the results in later cases. *See, e.g.*, Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 207–09 (1994) (implying statutory preclusion of judicial review from statutory scheme); United States v. Fausto, 484 U.S. 439, 444–47 (1988) (same); Block v. Cmty. Nutrition Inst., 467 U.S. 340, 345–48 (1984) (same).

[177] *See* Eskridge & Ferejohn, *supra* note 158, at 528–33 (observing that legislative process is intentionally cumbersome to reduce production of new law).

administrative decisionmaking under the APA. Requiring administrative explanations and standards (as well as allowing judicial review) pose an inevitable tradeoff with administrative flexibility and efficiency. But the tradeoff also arises with respect to agency action. I see no principled way to defend the tradeoff there (as I have)[178] but not here.

Some may respond that agency inaction is different from agency action in a way that makes administrative flexibility overriding in this context.[179] The Supreme Court itself argued as much in *Chaney*, stating that agency inaction, unlike agency action, is noncoercive and analogous to prosecutorial discretion.[180] If agency inaction is noncoercive, the argument goes, then it is less likely to infringe upon individual rights and therefore presents a weaker case for judicial control of suspected abuses.[181] And if agency inaction is analogous to prosecutorial discretion, then it presents a stronger case for allowing administrative control of enforcement resources and priorities.[182]

Few have found these purported distinctions persuasive. Justice Marshall, concurring in the judgment in *Chaney*, rejected the coercion argument outright.[183] He commented that "one of the very purposes fueling the birth of administrative agencies was the reality that governmental refusal to act could have just as devastating an effect upon life, liberty, and the pursuit of happiness as coercive governmental action."[184] For this reason, agency inaction does not present a weaker case for judicial intervention than agency action. Moreover, it presents a stronger case for judicial intervention than criminal prosecutorial discretion.[185] Requests for enforcement "seek to prevent concrete and future injuries" to "statutory beneficiaries," while

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178 *See* Bressman, *supra* note 3, at 527–53. Some argue that the requirement of reason-giving does not necessarily produce reasoned decisionmaking and is therefore not worth the cost. *See, e.g.*, Jerry L. Mashaw & David L. Harfst, *Regulation & Legal Culture: The Case of Motor Vehicle Safety*, 4 YALE J. ON REG. 257, 294 (1987) (arguing that procedural focus of judicial review "invites courts to invalidate reasonable judgments that are badly explained or perhaps inexplicable in straightforward logical fashion"); Richard J. Pierce, *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 67–68 (1995) ("I am a skeptic with respect to the grand claims of social benefits made by many proponents of the judicially enforced duty to engage in reasoned decisionmaking.").

179 *See, e.g.*, Saferstein, *supra* note 39, at 380–81 (recognizing that requirements of reason-giving and standard-setting would inhibit abuse of agency discretion and facilitate judicial review thereof, but suggesting that such requirements may be undesirable because they would undermine administrative flexibility and creativity).

180 *Chaney*, 470 U.S. at 832.

181 *Id.*

182 *Id.*

183 *Id.* at 850–52 (Marshall, J., concurring in judgment).

184 *Id.* at 851.

185 *Id.* at 847–48.

requests for prosecution seek only to punish the past conduct of particular individuals.[186] Since the societal interest in preventing future harms to statutory beneficiaries is "more focused and in many circumstances more pressing" than the societal interest in punishing the past conduct of particular individuals, it often will justify increased judicial review and reduced administrative control.[187]

Other critics have expressed similar views. Once again, Professor Sunstein captures the relevant points. He rejects the distinction between coercive and noncoercive governmental action, contending that it rests on a specious *Lochner*-esque conception of judicially cognizable rights.[188] Agency inaction, he notes, may cause harm even though such inaction affects nontraditional, statutorily created interests.[189] Sunstein further rejects the analogy between administrative enforcement discretion and criminal prosecutorial discretion, arguing that it is no more apt than an analogy to qui tam and informers suits.[190] Qui tam and informers suits, he observes, historically enabled judicial review of agency inaction even though such suits effectively allowed citizens (or courts) to allocate enforcement resources and dictate enforcement priorities.[191] Thus, there is no reason to think that enforcement discretion demands the special solicitude for administra-

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186 *Id.*

187 *Id.*

188 *See* Sunstein, *supra* note 1, at 187–88, 195–96 (accusing Court of relying on common law notions of judicially cognizable rights and thus replicating errors of *Lochner*); *see also* Bandes, *supra* note 1, at 276–81 (contending that modern understanding of Article III reflects unstated acceptance of private rights model, which excludes from judicial protection collective rights and harms); Levin, *supra* note 39, at 716–17 (characterizing *Chaney* Court's prosecutorial discretion and coercion arguments as weak and even "makeweights"); Henry P. Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1, 24 (1983) (finding it more consistent with Article III "to insist that exercises of 'the judicial power of the United States' cannot vary with whether a private litigant is a plaintiff or a defendant, so long as the court is expected to enter a final judgment on the merits of the claim."); Nichol, *supra* note 1, at 1937 (arguing that private rights model of judicial review has been replaced by modern inquiry into which "values [must be] deemed sufficiently shared or public to be judicially cognizable").

189 *See* Sunstein, *supra* note 1, 187–88.

190 *Id.* at 174–77 (arguing that qui tam and informers actions provide historical precedent for citizen suits).

191 *See id.*; *cf.* Vt. Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 773 (2000) (finding qui tam provision of False Claims Act constitutional under "cases and controversy" requirement because it "can reasonably be regarded as effecting a partial assignment of the Government's damages claim"); Riley v. St. Luke's Episcopal Hosp., 252 F.3d 749, 753–57 (5th Cir. 2001) (en banc) (finding no constitutional problem with qui tam provisions because executive branch exercises sufficient control by virtue of right to intervene, settle, etc.); United States *ex rel.* Taxpayers Against Fraud v. Gen. Elec. Co., 41 F.3d 1032, 1041 (6th Cir. 1994) (same); United States *ex rel.* Kelly v. Boeing, 9 F.3d 743, 755–57 (9th Cir. 1993) (finding no unconstitutional usurpation of executive power when court supervises government intervention in qui tam action).

tive flexibility or the special immunity from judicial review that prosecutorial discretion does.[192]

I should note that I may take this conclusion more seriously than other critics of contemporary nonreviewability doctrine and standing doctrine. Even Professor Sunstein, for example, appears to maintain one special rule for agency inaction. Except in rare circumstances, he would not permit plaintiffs to raise, or courts to hear, "generalized" claims of agency arbitrariness.[193] Rather, consistent with the categories identified by the *Chaney* Court as possible exceptions to the presumption against review, he would permit plaintiffs to raise, and courts to hear, specific claims of agency illegality, including claims based on (1) constitutionally impermissible factors, (2) an asserted absence of statutory jurisdiction, (3) statutorily irrelevant factors, (4) abdications of statutory duty or a pattern of nonenforcement, (5) refusals to enforce agency regulations, and (6) failures to initiate rulemaking.

But these categories seem to leave out "pure" claims of agency arbitrariness, such as a claim that an agency's failure to enforce lacks a reasoned basis and is the product of impermissible private or political pressure. If so, they do not entirely rectify the asymmetry problem that Sunstein identifies.[194] They would provide regulatory beneficiaries with much of the power that regulated entities possess, but not all. Sunstein might justify this result on administrative flexibility or efficiency grounds.[195] He thus might argue that plaintiffs with pure arbitrariness claims seek to challenge the very areas that agencies, not courts, rightly should control: enforcement, resource allocation, and priority setting.[196] This is a tempting defense, a sort of compromise between judicial review and executive discretion.[197] Nevertheless, it is inadequate. Plaintiffs must be able to raise, and courts must be able to hear, pure arbitrariness claims if the very worry is pure arbitrariness of the sort that I describe. Administrative flexibility and effi-

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192 *See* Sunstein, *supra* note 1, at 174–77.

193 Sunstein, *supra* note 142, at 682–83.

194 Sunstein's position really is no more helpful to regulatory beneficiaries than the Court's position in *Chaney*. Indeed, Sunstein acknowledges that the Court in *Chaney* envisioned the possibility of review of the very claims he identifies. *Id.* at 676–82.

195 *See id.* at 672–74.

196 *See id.*

197 Interestingly, Sunstein himself rejects this argument in supporting broad standing under citizen-suit provisions. *See* Sunstein, *supra* note 1, at 212–14 (arguing in favor of citizen suits even though they infringe on unfettered executive control of resource allocation and priority setting). He appears to resurrect the argument, however, in limiting reviewability of arbitrariness claims. *See* Sunstein, *supra* note 142, at 682–83 (finding claims of generalized arbitrariness to "present[ ] the weakest claim for reviewability").

ciency, while important, often are not paramount when the issue is agency legitimacy.

This is not to suggest that agencies must lose arbitrariness challenges. If an agency bases a nonenforcement decision on legitimate reasons of resource allocation and priority setting, then it is entitled to demand judicial respect. I maintain, however, that the agency is not entitled to evade judicial review. At a minimum, it must *demonstrate* to a court that it has rational, public-minded reasons for a particular nonenforcement decision. It also should demonstrate to a court that it has promulgated and followed rational, public-minded standards governing all enforcement decisions.

What I propose may seem more extreme than what other scholars have offered, but it is not far from what Justice Marshall envisioned. Concurring in the judgment in *Chaney*, Justice Marshall argued that "refusals to enforce, like other agency actions, are reviewable in the absence of a 'clear and convincing' congressional intent to the contrary, but that such refusals warrant deference when, as in this case, there is nothing to suggest that an agency with enforcement discretion has abused that discretion."[198] Justice Marshall examined the record for evidence that the FDA declined to initiate an enforcement proceeding for any reason other than the legitimate ones it gave concerning enforcement resources and priorities. Finding none, Justice Marshall intruded no further.[199]

B. Reintegrating Administrative Law and Constitutional Law

Although the arbitrariness approach counsels courts to scrutinize agency inaction, it does not foreclose a sphere of enforcement discretion that is immune from judicial intervention. Preserving such a sphere is important because the APA obviously contemplates one and the Constitution arguably demands one. But no special rules are required here, either. The Supreme Court can be too quick to forge separate administrative law doctrines where existing constitutional doctrines would achieve the correct policies. In my view, the Court has overlooked a better understanding of nonreviewability and standing. By understanding nonreviewability in the context of the political question doctrine and standing in the context of the nondelegation doctrine, we may retain a sphere of enforcement discretion for agencies. Although this understanding is not the only possible one, it is the best one. It can make sense of the language and intent of the APA provisions while effectuating something of a balance between

198 *Chaney*, 470 U.S. at 840–41 (Marshall, J., concurring in judgment).
199 *Id.* at 842.

executive prerogative and arbitrariness prevention. By conceptualizing nonreviewability and standing in the way proposed here, we may limit unchecked enforcement discretion to no more than that which existing constitutional doctrines require and thereby prevent such discretion from infringing excessively on the judicial scrutiny that promotes good government.

1. Nonreviewability as Political Question Doctrine

The idea of restricting nonreviewability to the constitutional minimum was suggested by a famous debate between Professors Raoul Berger and Kenneth Culp Davis that stretched over eight law review articles published in the late 1960s, shortly before the Court decided *Abbott Laboratories*.[200] Berger and Davis agreed on very little concerning the scope of nonreviewability and the interpretation of § 701(a)(2).[201] But they did agree on this: The drafters of the APA

[200] *See* Raoul Berger, *Administrative Arbitrariness and Judicial Review*, 65 COLUM. L. REV. 55 (1965); Raoul Berger, *Administrative Arbitrariness—A Reply to Professor Davis*, 114 U. PA. L. REV. 783 (1966); Kenneth Culp Davis, *Administrative Arbitrariness—A Final Word*, 114 U. PA. L. REV. 814 (1966); Raoul Berger, *Administrative Arbitrariness—A Rejoinder to Professor Davis' "Final Word,"* 114 U. PA. L. REV. 816 (1966); Kenneth Culp Davis, *Administrative Arbitrariness—A Postscript*, 114 U. PA. L. REV. 823 (1966) [hereinafter Davis, *A Postscript*]; Raoul Berger, *Administrative Arbitrariness: A Sequel*, 51 MINN. L. REV. 601 (1967); Kenneth Culp Davis, *Administrative Arbitrariness is not Always Reviewable*, 51 MINN. L. REV. 643 (1967) [hereinafter Davis, *Administrative Arbitrariness is not Always Reviewable*]; Raoul Berger, *Administrative Arbitrariness: A Synthesis*, 78 YALE. L.J. 965 (1969) [hereinafter Berger, *A Synthesis*]; *see also* Levin, *supra* note 39, 694–95 (labeling Davis/Berger exchange "probably the longest—and possibly the most vitriolic—debate in the history of law reviews").

[201] The debate involved reconciling § 701(a)(2), which directs courts to withhold review from agency action that is "committed to agency *discretion*," and § 706(2)(A), which directs courts to set aside agency action that is "arbitrary, capricious, or *an abuse of discretion*." 5 U.S.C. § 706(2)(A) (emphasis added). Davis argued that, as a matter of statutory construction, the judicial review provisions of the APA do not apply to action that § 701(a) covers. *See* Davis, *Administrative Arbitrariness is Not Always Reviewable*, *supra* note 200, at 644. Indeed, the whole purpose of § 701(a) is to exempt action within its purview from the later judicial review provisions, including § 706(2)(A). Thus, Davis argued that action "committed to agency discretion" is exempt from judicial review and that courts cannot invalidate such action even if it constitutes "an abuse of discretion."

Berger argued that, as a historical matter, courts always could invalidate "an abuse of discretion" because the "power to act arbitrarily is not delegated." Berger, *A Synthesis*, *supra* note 200, at 966. The APA, he contended, did not and cannot alter this analysis. Consequently, Section 706(2)(A) applies to all actions. In particular, it instructs courts to review all actions for arbitrariness. *See id.* at 970–71. But once a court determines that an action is reasonable, it may go no further. Section 701(a)(2) prohibits the court from questioning whether the action is wise. *Id.* at 972–74.

Louis Jaffe also weighed in, offering an interpretation that mediated the divide between Davis and Berger. He maintained that § 701(a)(2) only applies to a narrow class of actions, and that § 706(2)(A) applies to the remainder. LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 374–75 (1965). On his reading, § 701(a)(2) exempts from review the small number of actions entirely committed to agency discretion.

may have intended § 701(a)(2) to track constitutional limits on reviewability. In particular, the drafters may have intended the section to exempt from the judicial review provisions of the APA acts of the President himself (or those following executive orders rather than congressional mandates).[202] Scholars, including Berger and Davis, commonly believed that the drafters intended the other provisions of the APA to apply to the acts of the President himself.[203] As a result, scholars believed that the drafters included § 701(a)(2) to observe constitutional constraints on the application of the judicial review provisions to such acts. While Berger and Davis disagreed on whether the drafters intended to build a broader principle against judicial review of agency inaction,[204] both acknowledged that the drafters intended § 701(a)(2) to reflect a constitutional floor.[205] The drafters meant to recognize that not even Congress can make reviewable that which the Constitution makes unreviewable—in a phrase, political questions.[206]

Although neither Berger nor Davis would have limited § 702(a)(1) to political questions, that is the suggestion here.[207] Understanding § 701(a)(2) in this manner has considerable appeal. First, it plausibly explains the language of the section. That language

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Id. at 375. To determine whether an action falls within this category, courts must examine the delegation from which they flow: "A power may appear to be granted in absolute terms and the character of the power or the statutory history of the grant may support the apparent implication." *Id.* Although courts may not review actions that flow from unqualified discretion, such actions are few. On Jaffe's account, Davis and Berger together produced the correct position. Section 701(a)(1) immunizes some action from review, while § 706(2)(A) subjects most action to review.

202 *See* Berger, *A Synthesis*, *supra* note 200, at 997; Davis, *Administrative Arbitrariness is not Always Reviewable*, *supra* note 200, at 645.

203 *See* Berger, *A Synthesis*, *supra* note 200, at 997; Davis, *Administrative Arbitrariness is not Always Reviewable*, *supra* note 200, at 645. It was not until 1992 that the Supreme Court held that the APA did not apply to acts of the President himself. *See* Franklin v. Massachusetts, 505 U.S. 788, 800–01 (1992) (holding that President is not "agency" within meaning of APA).

204 Berger would have allowed courts to review the exercise of enforcement discretion for allegations of arbitrariness, though he carved out classic political questions like foreign affairs. *See* Berger, *A Synthesis*, *supra* note 200, at 983. Davis would have forbidden courts to review the exercise of administrative enforcement discretion, including foreign policy and executive pardon decisions. *See* Davis, *A Postscript*, *supra* note 200, at 832.

205 *See also* Charles H. Koch, Jr., *Judicial Review of Administrative Discretion*, 54 GEO. WASH. L. REV. 469, 499 (1986) (noting that military and foreign affairs are reserved to political branches); Saferstein, *supra* note 39, at 386–87 (arguing that judicial intervention is particularly inappropriate in those "rare circumstances" when political factors govern).

206 *See* Berger, *A Synthesis*, *supra* note 200, at 983.

207 *Cf.* Koch, *supra* note 205, at 502 (arguing that "the law should incorporate a very strong preference against [proliferation of unbridled discretion], and, indeed, should move away from inferring such discretion where it is not clearly established by statute or the Constitution").

echoes the language from *Marbury v. Madison*,[208] which first established the political question doctrine. In *Marbury*, the Court wrote that "[t]he province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties *in which they have a discretion*."[209] It continued, "Questions, in their nature political, or which are, *by the constitution and laws, submitted to the executive*, can never be made in this court."[210] From these declarations, it is a small leap to the statement in § 701(a)(2) exempting from judicial review action "*committed to agency discretion by law*."[211]

Second, understanding § 701(a)(2) as incorporating the political question doctrine suggests a test for applying it to particular claims. That test would incorporate the six factors identified by the Court in *Baker v. Carr*[212] that tend to indicate the presence of a political question: (1) "a textually demonstrable constitutional commitment of the issue to a coordinate political department"; (2) "a lack of judicially discoverable and manageable standards for resolving it"; (3) "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion"; (4) "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government"; (5) "an unusual need for unquestioning adherence to a political decision already made"; or (6) "the potentiality of embarrassment from multifarious pronouncements by various departments on one question."[213] Practically speaking, however, the test only would include the first two factors because these factors are the only ones that the Court has used in recent years to identify the existence of a political question.[214] These factors, not so much distinct elements as mutual reinforcements,[215] track the "committed to agency discretion by law" language of

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208 5 U.S. (1 Cranch) 137 (1803).

209 *Id.* at 170 (emphasis added).

210 *Id.* (emphasis added).

211 5 U.S.C. § 701(a)(2) (emphasis added).

212 369 U.S. 186 (1962).

213 *Id.* at 217.

214 *See, e.g.*, Vieth v. Jubelirer, 124 S. Ct. 1769, 1776–78 (2004) (plurality opinion) (finding political question based on second factor of *Baker v. Carr* test); Nixon v. United States, 506 U.S. 224, 228–38 (1993) (finding political question based on first and second factors of *Baker v. Carr* test); *see also* Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 267–68 (2002) (noting that in forty years since Court decided *Baker v. Carr*, it has found only two political questions, both of which involved textual commitments).

215 *See Nixon*, 506 U.S. at 228–29 (noting that "the lack of judicially manageable standards may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch").

§ 701(a)(2) and its early "no law to apply" elaboration.[216] Thus, the test for applying § 701(a)(2) in many respects would return to the original formulation in *Overton Park*.[217] Although not perfect,[218] the "no law to apply" formulation may best capture the proper scope of § 701(a)(2).

Finally, understanding § 701(a)(2) as political question doctrine prevents the section from swallowing the general presumption of reviewability that is necessary to inhibit arbitrary administrative decisionmaking—which, we now can appreciate, occurs with respect to agency inaction as well as agency action. This approach thereby preserves one constitutional value (executive prerogative) in a manner that does the least damage to another constitutional value (arbitrariness prevention).

Some might object that understanding § 701(a)(2) as political question doctrine will undoubtedly circumscribe the reach of that exception, perhaps to almost nothing. But this is just as it should be. The drafters of the APA may not have intended § 701(a)(2) to encompass any more than the constitutional structure requires, which may well be very little. For good reasons unnecessary to revisit for present purposes, the political question doctrine has come under attack in constitutional theory.[219] Scholars have widely rejected the notion of special immunity from judicial review for acts of the President, as opposed to the acts of Congress or other governmental officials. The Court has demonstrated similar reluctance to invoke the political question doctrine in this capacity.[220] Even with the recent revival of the political question doctrine as applied to the political gerrymandering claim in *Vieth v. Jubelirer*,[221] few legal challenges should be construed as raising genuinely political questions. The upshot for § 701(a)(2) is that the section should revert to its original characteriza-

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216 *See* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971) (articulating "no law to apply" test for § 701(a)(2)).

217 *See id.*

218 *See supra* note 39 (describing scholarly criticism of "no law to apply" test).

219 *See* Barkow, *supra* note 214, at 267 nn.156–57 (citing scholarship); *see also* Rebecca L. Brown, *When Political Questions Affect Individual Rights: The Other* Nixon v. United States, 1993 SUP. CT. REV. 125, 142–143 (arguing that political question doctrine conflicts with protection of individual rights, which is exact constitutional value it is ostensibly intended to protect).

220 *See* Barkow, *supra* note 214, at 299–335 (describing decline of political question doctrine, including utter absence of doctrine in case that fairly demanded analysis under it: *Bush v. Gore*, 531 U.S. 98 (2000)); David J. Bederman, *Deference or Deception: Treaty Rights as Political Questions*, 70 U. COLO. L. REV. 1439, 1441 (1999) (arguing that Supreme Court dislikes political question doctrine, even with respect to traditionally political issues such as foreign affairs).

221 124 S. Ct. 1769, 1776–78 (2004) (holding that claim challenging Pennsylvania's congressional redistricting plan as political gerrymander raised political question).

tion as "a very narrow exception."[222] Rarely should § 701(a)(2) bar a claim on the theory that an agency refusal to enforce is of the paradigmatic *Marbury* variety, governed by pure executive discretion rather than broad legislative mandate.

2. *Standing as Nondelegation Doctrine*

While the idea of restricting nonreviewability to the constitutional minimum might seem startling, the notion of restricting standing to the constitutional minimum should seem less so. That notion arises in connection with arguments for jettisoning the prudential component of current standing doctrine—that is, the zone-of-interests test.[223] The discussion of the constitutional minimum here has nothing to do with arguments against the prudential component, which in general does not pose an obstacle for plaintiffs seeking to challenge agency inaction and in particular does not pose an obstacle for such plaintiffs who premise standing on a citizen-suit provision.[224] Rather, the discussion here centers on the *appropriate* constitutional minimum. This section argues that standing, especially as concerns statutory citizen-suit provisions, should be understood to reflect nondelegation limits rather than case or controversy limits.

Typically, § 702 (granting the "right of review" to "a person . . . adversely affected or aggrieved by agency action")[225] is understood to reflect a constitutional limitation on standing that stems from the "case" requirement of Article III.[226] Although the "case" requirement lacks precise meaning, it generally is thought to prevent courts from engaging in certain activity that would collapse the distinction

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222 *Overton Park*, 401 U.S. at 410.

223 *See* Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 154 (1970) (stating that standing requires complainant to show, in addition to injury in fact, that "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"). Scholars have argued for abandonment of the prudential zone-of-interests test. *See* Robert A. Anthony, *Zone-Free Standing for Private Attorneys General*, 7 GEO. MASON L. REV. 237, 248 (1999) ("[W]here Congress has conferred standing on a plaintiff to initiate judicial review of federal agency action, the prudential zone-of[-]interests test should not be applied to that plaintiff."); Marla E. Mansfield, *Standing and Ripeness Revisited: The Supreme Court's "Hypothetical" Barriers*, 68 N.D. L. REV. 1, 3–4 (1992) (criticizing zone-of-interests test).

224 The argument is that citizen-suit provisions plainly intend to bring *all* potential plaintiffs arguably within the zone of interests protected by the statute. *See* Anthony, *supra* note 223, at 239 (noting that private-attorney-general statutes "negate" prudential zone-of-interests test); Scalia, *supra* note 141, at 886 ("[W]hen the legislature explicitly *says* that a private right [of action] exists, this so-called 'prudential' [zone-of-interests] inquiry is displaced.").

225 5 U.S.C. § 702 (2000).

226 U.S. CONST. art. III, § 2.

between the judicial branch and the executive or legislative branch.[227] For example, the requirement is understood to prohibit courts from issuing advisory opinions on the application of statutory or constitutional provisions, even at the behest of political officials.[228] Political officials may not abdicate, and courts may not assume, responsibility in the first instance for making policy judgments. Similarly, the case requirement is understood to prohibit courts from resolving truly generalized grievances about the application of statutory or constitutional provisions.[229] Private citizens may not ask courts to assert responsibility for making policy judgments except in the course of adjudicating their legal rights, however broadly defined. Neither political officials nor private citizens may enlist courts simply in vindicating their policy preferences. Courts lack the formal designation, popular consent, and structural checks to make free-standing policy determinations.

Those uncomfortable with understanding generalized grievances to present an Article III "case" problem might consider the issue from a fresh perspective. Generalized grievances might be understood to present an Article I delegation problem, particularly when they find their way into court as a result of a statutory citizen-suit provision. The delegation problem does not necessarily arise from the shift of legislative power to courts that citizen-suit provisions effectuate; indeed, the Supreme Court has approved a shift of legislative power to courts before.[230] Rather, it results from the shift of legislative power to private parties. When private parties assume the ability to press generalized grievances in a judicial forum, they introduce "the kind of political battle better waged in other forums."[231] Since the

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227 *See* Allen v. Wright, 468 U.S. 737, 752 (1984) ("[T]he law of Art. III standing is built on a single basic idea—the idea of separation of powers."); Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, 454 U.S. 464 (1982):

> The judicial power of the United States defined by Art. III is not an unconditioned authority to determine the constitutionality of legislative or executive acts. . . . Otherwise, the power "is not judicial . . . in the sense in which judicial power is granted by the Constitution to the courts of the United States."

Id. at 471 (quoting United States v. Ferreira, 54 U.S. (13 How.) 40, 48 (1852)).

228 *See* United States v. Sharpe, 470 U.S. 675, 726 & n.17 (1985) (Stevens, J., dissenting) (noting Court's refusal to render advisory opinions, even at executive request, and quoting Chief Justice Jay's refusal to provide such opinion to President George Washington).

229 *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 573–74 (1992).

230 *See* Mistretta v. United States, 488 U.S. 361, 388 (1989) (holding that "Congress may delegate to the Judicial Branch nonadjudicatory functions that do not trench upon the prerogatives of another Branch and that are appropriate to the central mission of the Judiciary").

231 Nike, Inc. v. Kasky, 123 S. Ct. 2554, 2567 (2003) (Breyer, J., dissenting from dismissal of writ of certiorari); *see also id.* at 2560 ("As a 'private attorney general,' Kasky is in effect enforcing a state law that threatens to discourage Nike's speech."). In *Nike*, the Court dismissed as improvidently granted the writ of certiorari to decide

inception of the administrative state, the Court has prohibited Congress from delegating policymaking power to private parties, even when that power is mediated by an electorally accountable federal official such as the President.[232]

The Court has prohibited Congress from delegating policymaking power to private parties for good reason. When Congress does so, it "imping[es] on democracy by prioritizing private gains over individual rights and public purposes."[233] Furthermore, there is cause for con-

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> (1) whether a corporation participating in a public debate may 'be subjected to liability for factual inaccuracies on the theory that its statements are "commercial speech" because they might affect consumers' opinions about the business as a good corporate citizen and thereby affect their purchasing decisions'; and (2) even assuming the California Supreme Court properly characterized such statements as commercial speech, whether the 'First Amendment, as applied to the states through the Fourteenth Amendment, permit[s] subjecting speakers to the legal regime approved by that court in the decision below.'

Id. at 2555 (opinion of Stevens, J.). The Court dismissed the writ because it concluded that neither party had standing to bring the suit. *Id.* at 2555, 2557–58. Justice Breyer disagreed. He acknowledged that the state court plaintiff, Kasky, "might indeed have had trouble" establishing Article III standing because he was not personally harmed by Nike's statements. *Id.* at 2560 (Breyer, J., dissenting from dismissal of writ of certiorari). He reasoned, however, that the *federal* court plaintiff, Nike, had Article III standing because it was harmed by the state court judgment against it. *Id.* at 2561–62.

[232] *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 541–42 (1935) (invalidating provision of National Industry Recovery Act authorizing President to approve codes proposed by industry and trade groups); Panama Refining Co. v. Ryan, 293 U.S. 388, 415 (1935) (invalidating provision of National Industry Recovery Act giving President "unlimited authority" to determine policy). Although Professor Sunstein does not believe that the Constitution limits citizen-suit provisions, he writes:

> The citizen suit is part of a complex system in which Congress delegates difficult or even impossible tasks, appropriates inadequate resources, imposes firm and sometimes unrealistic deadlines, and enlists courts and citizens in order to produce compliance. The system may well find explanation in terms of the self-interest of elected representatives. Credit-claiming for apparently aggressive regulation can coexist with a range of real-world loopholes, helping industry to escape from government controls. But the public is often the loser.

Sunstein, *supra* note 1, at 221–22; *see also* Krent & Shenkman, *supra* note 109, at 1806 ("Just as Congress presumably cannot delegate to private individuals the authority to regulate workplace safety or environmental hazards nationwide, so it cannot, consistent with Article II's establishment of a unitary executive, delegate to a disinterested citizen the power to prosecute violations of safety or environmental regulations.").

[233] Bressman, *supra* note 154, at 1428; Jody Freeman, *Public Values in an Era of Privatization: Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285, 1304–06 (2003) (noting that delegations to private actors are problematic because such actors are insulated from constitutional obligations applicable to government, are able to escape statutory requirements imposed on public actors designed to promote accountability such as notice-and-comment rulemaking and judicial review, and are neither subject to procedural mandates of APA nor required to observe disclosure provisions of Freedom of Information Act and similar laws); Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 585–87 (2000) (noting that private delegations are problematic because of "unease about anticompetitive behavior and self-dealing among private actors" and because "[n]umerous laws designed to ensure transparency, rationality,

cern whether Congress filters the private delegations through a court or through the President. As Justice Breyer stated in another context, private attorneys general "potentially constitute a large and hostile crowd freely able to bring prosecutions designed to vindicate their beliefs, and to do so unencumbered by the legal and practical checks that tend to keep the energies of public enforcement agencies focused upon more [relevant] harm."[234] Citizen-suit provisions thus enable private parties to pursue narrow interests at public expense. For parties who already have lost the battle in the political process, litigation provides a second bite at the apple, this time before an audience itself unfettered by the political checks that administrators face. On this logic, there is particular reason to fear courts as conduits of private interest. Judicial insulation might encourage faction, rather than prevent it.

From this analysis emerges the need for some principle to preclude the adjudication of truly generalized grievances while still permitting the adjudication of legitimate arbitrariness claims—for example, claims asserting that an agency has not provided an adequate explanation for its failure to enforce the law. This suggestion stands in marked contrast to that of other critics, who would not bar from court any plaintiff with a statutory right to sue.[235] This position is sympathetic to the intuition of the Court that certain plaintiffs operate at the constitutional margin.[236] Certain plaintiffs are difficult to distinguish from citizens asserting complaints about the generalized way in which the executive branch does its job. No plaintiff may ask a court to redress such a complaint, even with express congressional permission.[237]

A recent case is instructive. In *Norton v. Southern Utah Wilderness Alliance*, an environmental group challenged certain

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and accountability in decision making, including the Administrative Procedure Act (APA) and the Freedom of Information Act, apply to agencies, and not to private actors").

[234] *See Nike*, 123 S. Ct. at 2567 (Breyer, J., dissenting from denial of writ of certiorari); *see also* Krent & Shenkman, *supra* note 109, at 1808 (noting that "private parties may have self-interested reasons for bringing suit" and that "[e]mploying private attorneys general to combat the risk of underenforcement also creates the risks of overenforcement and arbitrary rule").

[235] *See, e.g.*, Pierce, Lujan v. Defenders of Wildlife, *supra* note 1, at 1198–200 (arguing that Congress should have plenary authority to control class of plaintiffs entitled to bring suit); Sunstein, *supra* note 134, at 60 (same); Sunstein, *supra* note 1, at 211 (same).

[236] *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 573–74 (1992) (stating that plaintiffs who lack actual injuries merely possess generalized grievances).

[237] *See* Nichol, *supra* note 1, at 1945 ("The line between judicial cognizability and legislative or executive prerogative is not an easily constructed one. It is, however, a constructed one.").

agency inaction.[238] Specifically, the Southwestern Utah Wilderness Alliance (SUWA) contested the failure of the Bureau of Land Management (BLM) to prohibit off-road vehicles (ORVs) on federal lands while studying those lands for possible wilderness preservation.[239] The Federal Land Policy and Management Act (FLPMA) directs the Secretary of the Interior to study "roadless lands of 5000 acres or more" for "'wilderness characteristics'" that would qualify them as Wilderness Study Areas (WSAs).[240] The statute directs the Secretary to review the WSAs and recommend those suitable for wilderness preservation.[241] The statute provides, however, that only Congress may accord any WSA this status. In the interim, the FLPMA requires that BLM "shall continue to manage" all WSAs "in a manner so as not to impair the suitability of such areas for preservation as wilderness."[242]

SUWA contended that BLM should have prohibited ORV use on public lands while studying those lands for possible wilderness designation.[243] SUWA and other environmental groups argued that ORV use on public lands imperiled environmental quality.[244] Furthermore, they argued that such use could create dirt roads across the lands that ultimately would disqualify them from congressional preservation.[245] SUWA based its challenge on § 706(1) of the APA, a little-used provision that requires courts to "compel agency action unlawfully withheld or unreasonably delayed."[246] The Tenth Circuit agreed, compelling BLM to consider prohibiting ORV use.[247]

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238 124 S. Ct. 2373, 2377–78 (2004).

239 *Id.*

240 *Id.* at 2376–77 (quoting 43 U.S.C. § 1782(a) (2000)).

241 *Id.* at 2377.

242 *Id.* (quoting 43 U.S.C. § 1782(c) (2000)).

243 *Id.* at 2378.

244 *Id.* at 2377 ("The use of ORVs on federal land has negative environmental consequences, including soil disruption and compactions, harassment of animals, and annoyance of wilderness lovers.") (citation omitted).

245 *Id.* at 2376 ("A pre-FLPMA enactment, the Wilderness Act of 1964, 78 Stat. 890, provides that designated wilderness areas, subject to certain exceptions, 'shall [have] no commercial enterprise and no permanent road,' no motorized vehicles, and no manmade structures.") (quoting 16 U.S.C. § 1133(c) (2000)).

246 5 U.S.C. § 706(1) (2000)).

247 S. Utah Wilderness Alliance v. Norton, 301 F.3d 1217, 1228 (10th Cir. 2002). The Tenth Circuit did not order the BLM to prohibit ORV use but merely instructed it to consider whether such action is necessary to fulfill its responsibility "to manage [all WSAs in a manner] so as not to impair the suitability of such areas for preservation as wilderness." *Id.* (quoting 43 U.S.C. § 1782(c) (2000)). It reasoned that the agency must retain ultimate discretion over whether to prohibit ORV use. *Id.*

The Supreme Court reversed.[248] In a succinct and unanimous opinion, the Court held that § 706(1) does not authorize a court to compel agency action unless that action is both discrete and legally required.[249] The discrete-action limitation bars plaintiffs from leveling "broad programmatic attack[s]" rather than challenges to specific agency actions that harm them.[250] The required-action limitation "rules out judicial direction of even discrete agency action that is not demanded by law (which includes, of course, agency regulations that have the force of law)."[251]

The Court found both limitations applicable to SUWA's claims. It first determined that the FLPMA "does not mandate, with the clarity necessary to support judicial action under § 706(1), the total exclusion of ORV use."[252] Rather, the statute affords BLM "a great deal of discretion in deciding how to achieve [its objective]."[253] Although the FLPMA does require some agency action—in particular, that BLM comply with the "nonimpairment mandate"—the Court stated that directing BLM generally to comply with this mandate would run afoul of the discrete-action limitation.[254]

The Court next decided that BLM's land use plans did not furnish an adequate basis for applying § 706(1).[255] BLM's land use plan for WSAs stated that the agency would monitor ORV use in designated areas.[256] SUWA argued that this plan obligated the agency to establish an ongoing ORV monitoring program, which it had failed to do.[257] The Court determined otherwise, reasoning that the plan does not contain the kind of "binding commitment that can be compelled under § 706(1)."[258] A land use plan is merely "a statement of priorities; it guides and constrains actions, but does not (at least in the usual case) prescribe them," as is necessary to overcome the required-action limitation.[259]

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248 Norton v. S. Utah Wilderness Alliance, 124 S. Ct. 2373, 2385 (2004).

249 *Id.* at 2379 ("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*.").

250 *Id.*

251 *Id.* at 2380.

252 *Id.*

253 *Id.*

254 *Id.* at 2380–81.

255 *Id.* at 2381–84.

256 *Id.* at 2383.

257 *Id.* at 2382.

258 *Id.*

259 *Id.* at 2383. The Court also rejected SUWA's claim that BLM violated the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C) (2000)). *Id.* at 2384–85 (finding that evidence of increased ORV use did not trigger supplementation of environmental impact statement under NEPA because supplementation is required only if major

Although the Court appeared to have easily handled the interpretation of § 706(1), we should not so easily dismiss the underlying reviewability issue. Failings in the way agencies discharge broad legal obligations straddle the divide between what is reviewable and what is not. On the one hand, such failings may cause public harms and reflect private influences, perhaps far more worrisome than those related to nonenforcement decisions. Consider the facts of *SUWA*. BLM declined to prohibit private conduct in a manner that apparently undercut a statutory purpose—namely, potential wilderness preservation—and benefited a discrete group—namely, ORV users. Now BLM might be able to demonstrate that its refusal to act was a product of reasoned decisionmaking. But the agency is unlikely to do so if the Court withholds review of WSA management shortcomings. A decision to withhold review of WSA management shortcomings thus ignores the possibility of public harms and private influences. It chafes against the arbitrariness approach described above, which seeks to address these pathologies.

On the other hand, a decision in the opposite direction poses risks to agency autonomy. To appreciate this point, consider the remedy that would have satisfied the concern that SUWA raised about the manner in which BLM "continue[d] to manage" the WSAs.[260] While an order directing BLM to consider prohibiting ORV use might satisfy these plaintiffs now, it would not prevent them or another group from challenging other WSA management deficiencies later. A court even might have to impose a structural injunction to ensure that the agency did not underperform in other ways. But plaintiffs are not allowed to "seek *wholesale* improvements of [an agency] program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made."[261] Neither courts nor plaintiffs may dictate the general performance of statutory mandates because agencies and presidents are democratically, if not institutionally, better suited to the task. Although it did not explicitly draw these constitutional connections, the *SUWA* Court invoked these rationales to justify its interpretation of § 706(1).[262]

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federal action remains to be taken, and none remained to be taken once land use plan was approved).

260 *Id.* at 2377.

261 Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 891 (1990).

262 *See SUWA*, 124 S. Ct. at 2379–80 (quoting *Lujan*, 497 U.S. at 871, in support of discrete-action limitation).

> 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

There is another way to view the problem. For practical reasons, courts cannot ask agencies to consider every possible policy choice that they might have pursued under broad statutory standards. In the agency action context, the Supreme Court only asks agencies to consider alternatives within the ambit of existing regulation.[263] The Court has expressed concern about overburdening and overtaking the administrative process,[264] because agencies would spend excessive resources considering every alternative a court might plausibly entertain, or they might refrain from taking any action at all. In an agency inaction case like *SUWA*, the consequences are more perverse. With no existing action to serve as a benchmark for administrative deliberation or a trigger for judicial review, agencies would have to guess which actions plaintiffs and courts might find appropriate for consideration. In these instances, agency inaction *is* distinguishable from agency action because it offers no focal point or logical limit for judging the reasonableness of agency conduct.

We therefore might resist claims like those in *SUWA*, interpreting § 706(1) and other APA sections to preclude judicial review of them.[265] Even when identifying serious flaws in administrative decisionmaking, claims alleging lax agency compliance with broad statutory mandates make untenable, if not unconstitutional, demands on courts and agencies. As a result, they are better left to political officials.

Claims involving specific failures to enforce are different from claims like those in *SUWA*, however. They do not seek to compel agencies to comply in one way or another with broad congressional directives. That is, they do not seek to compel agencies to reduce general statutory standards to specific prohibitions or requirements. Claims involving failure to enforce seek to compel agencies to con-

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> ultimately become the task of the supervising court, rather than the agency, to work out compliance with the broad statutory mandate, injecting the judge into day-to-day agency management. . . . The prospect of pervasive oversight by federal courts over the manner and pace of agency compliance with such congressional directives is not contemplated by the APA.

Id. at 2381.

263 *See, e.g.*, Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 51 (1983) (requiring agency on remand only to consider alternatives within existing ambit of regulation before it).

264 *See id.* (stating that agency rulemaking should not be expected to consider "'every alternative device and thought conceivable by the mind of man . . . regardless of how uncommon or unknown that alternative may have been'") (quoting Vt. Yankee Nuclear Power Corp. v. Nat'l Res. Def. Council, 435 U.S. 519, 551 (1978)).

265 *See SUWA*, 124 S. Ct. at 2380 (demonstrating that agency failure to comply with general statutory mandate is susceptible to characterization under more than one APA provision).

sider pursuing violations of existing prohibitions or requirements, whether embodied in statutes or regulations. While agencies possess discretion in choosing whether to pursue particular violations, they have relatively circumscribed courses of action (e.g., enforcement or indulgence) and reasons for inaction (e.g., magnitude of violation, ease of investigation, allocation of resources).

Under such circumstances, claims involving failures to enforce should not evade judicial review. Agencies should be prepared to negate charges that particular nonenforcement decisions were based on impermissible factors, such as private pressure. Asking agencies to defend their enforcement choices in this way should not introduce "[t]he prospect of pervasive oversight by federal courts over the manner and pace of agency compliance with [general] congressional directives."[266] Furthermore, it should not pose as great a threat of overburdening or overtaking the administrative process. Once an agency sets standards detailing general enforcement priorities, it only would need to show that individual nonenforcement decisions comply with those standards. Furthermore, an agency would not have to provide extensive explanations for routine nonenforcement decisions, because the reason-giving requirement always has applied less rigorously to routine decisions than to high-stakes decisions.[267]

Courts should not entertain all claims challenging failures to enforce, however. Courts should no more hear claims contesting the wisdom of general enforcement policy than the wisdom of general statutory compliance. Rather, courts only should hear claims directed to the regularity of particular nonenforcement decisions.[268] Courts might anticipate difficulty distinguishing permissible from impermis-

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[266] *Id.* at 2381.

[267] *Compare Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43 (stringently applying requirement of reason-giving to high-stakes rulemaking), *with* Dunlop v. Bachowski, 421 U.S. 560, 572–75 (1975) (applying requirement more leniently to agency determination not to sue to set aside allegedly invalid labor union election), *and* Camp v. Pitts, 411 U.S. 138, 142–43 (1973) (applying requirement more leniently to agency action on application for certificate authorizing new bank).

[268] Similar considerations can explain the treatment of agency refusals to initiate rulemaking proceedings. Such refusals are reviewable. *See, e.g.*, Nat'l Customs Brokers & Forwarders Ass'n of Am. v. United States, 883 F.2d 93, 96 (D.C. Cir. 1989); Am. Horse Prot. Ass'n v. Lyng, 812 F.2d 1, 3–4 (D.C. Cir. 1987). Unlike refusals to manage broad regulatory programs in particular ways, refusals to initiate rulemaking proceedings are appropriate for judicial review because they contain a focal point and logical limit. *See* Farmworker Justice Fund, Inc. v. Brock, 811 F.2d 613, 636–37 (Williams, J., concurring and dissenting in part) (noting that refusals to initiate rulemaking proceedings are infrequent, "fraught with legal analysis (and therefore potential error)," and "characteristically accompanied by public justification under the APA"), *vacated as moot*, 817 F.2d 890 (D.C. Cir. 1987). Reviewing refusals to initiate rulemaking proceedings therefore does not pose as great a risk of engaging courts in roving regulatory planning.

sible claims. But courts are not entirely at sea here. They should consider whether a claim targets a particular failure to enforce for lack of *sound* decisionmaking or a lack of *reasoned* decisionmaking. That is, courts should examine whether a litigant simply disagrees with the agency's judgment call, or identifies flaws in the agency's reasoning process—the kind of flaws that, if proven, would merit remand under the arbitrary and capricious standard of judicial review.[269] Of course, there is no precise test for administering the distinction between sound decisionmaking and reasoned decisionmaking. In the agency action context, administrative law has left a related distinction largely to judicial discretion.[270] Reviewing courts are instructed to examine contested agency action for lack of adequate explanation tending to indicate the absence of relevant factors or the presence of impermissible ones (e.g., private pressure), but not to substitute their judgment for the agency's judgment.[271] The same basic concept should guide courts in deciding whether to review claims challenging failures to enforce.[272] Courts should review those claims that challenge particular nonenforcement decisions for lack of adequate explanation tending to indicate the absence of relevant factors or the presence of impermissible ones, and they should reject any claim that effectively questions the propriety of executive enforcement priorities. This idea, while far from a complete prescription or constraint, should provide a useful touchstone for the judicial gate-keeping function.

What does the foregoing analysis portend for citizen-suit provisions? At bottom, plaintiffs would be able to use citizen-suit provisions to challenge the reasonableness of particular nonenforcement decisions but not the soundness of general enforcement priorities. This raises the question of whether Congress must rewrite existing citizen-suit provisions to clarify their limits.[273] The answer is no. As a general matter, the Court rarely has asked Congress to rewrite broad delegating statutes. It simply has approved any delegating statute that contains a so-called "intelligible principle" to guide administrative dis-

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269 *See Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 48 (discussing factors that courts consider in applying arbitrary and capricious standard of review).

270 *See id.* at 52–53 (allowing courts to review for lack of reasoned decisionmaking, but admonishing them not to substitute their judgment for that of agency); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971) (warning reviewing courts not to "substitute [their] judgment for that of the agency").

271 *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 52–53.

272 This concept also should reappear later to prevent courts from overzealously reviewing agency inaction for lack of reasoned decisionmaking.

273 *See* Krent & Shenkman, *supra* note 109, at 1807 (arguing that Congress should "be explicit about the interests it creates").

cretion, no matter how vague or meaningless.[274] Nor has the Court asked Congress to provide narrower citizen-suit provisions, although Justice Kennedy, concurring in *Lujan*, anticipated such a possibility: "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."[275] He continued that "[i]n exercising this power . . . Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit."[276] This approach, while open to Congress, is impractical because it relies on Congress to do what Congress generally has been unwilling or unable to do: assume responsibility for narrowing broad delegations.[277]

Rather than requiring Congress to provide narrower citizen-suit provisions, the Court has followed another course. The Court effectively has adopted a judicial narrowing construction of citizen-suit provisions, much as it did with the overly broad statutory delegation in *Industrial Union Department, AFL-CIO v. American Petroleum Institute* (Benzene Case).[278] In the Benzene Case, a plurality of the Court required the Occupational Safety and Health Administration to demonstrate a threshold showing of significant health risk before regulating a carcinogen under the Occupational Safety and Health Act.[279] In the standing context, the Court similarly has required plaintiffs to

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274 *See* Mistretta v. United States, 488 U.S. 361, 372 (1989) ("Congress simply cannot do its job absent an ability to delegate power under broad general directives.").

275 Lujan v. Defenders of Wildlife, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring in part and concurring in judgment).

276 *Id.*

277 *See* MASHAW, *supra* note 99, at 150–51 (observing that Court's decision in *Chevron* recognized "the uncertainties inherent in dealing with specific contingencies at the legislative level"); John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 725–26 (1997) ("No legislator, however prescient, can predict all the twists and turns that lie ahead for his or her handiwork. The path of a law depends on diverse and unknowable factors, and no one seriously argues the regulation of social problems can be reduced to a pellucid and all-encompassing code."); Michael B. Rappaport, *The Selective Nondelegation Doctrine and the Line Item Veto: A New Approach to the Nondelegation Doctrine and Its Implications for* Clinton v. City of New York, 76 TUL. L. REV. 265, 309 (2001) (noting that Congress encounters difficulty reaching agreements on specific policies because "it is often difficult for a diverse group of legislators to reach agreement on specific provisions. It is even harder for two houses to reach such agreements."); *cf.* Krent & Shenkman, *supra* note 109, at 1807 (arguing that "requiring Congress to be explicit about the interests it creates will force the legislature to pay greater heed to issues of accountability and representativeness, encouraging Congress to think twice about the hazards of authorizing unaccountable citizens to represent broad-based interests in civil law enforcement").

278 448 U.S. 607 (1980) (plurality opinion).

279 *Id.* at 614–15.

show an injury that is "concrete" and "particularized" rather than "abstract" and "undifferentiated" before obtaining standing to challenge agency decisionmaking under a citizen-suit provision.[280] In short, it required plaintiffs to demonstrate an injury in fact.

Although this approach is sensible, the Court has selected the wrong narrowing construction. The injury-in-fact test has been the subject of criticism from its inception. Consisting more of labels than determinations, it never has been a reliable method for deciding which plaintiffs should have access to the courts. Moreover, this test is no longer essential to determining court access once the generalized grievance problem is reconceived as a nondelegation problem rather than a "case" or standing issue. For these reasons, it makes sense to search for an alternative.[281]

The possibility that I suggest involves narrowing citizen-suit provisions by focusing on the nature of a litigant's claim rather than the nature of a litigant's injury. In essence, it involves construction of a nonjusticiability principle in lieu of a standing principle. A standing principle, properly construed, refers to the issue of proper parties. A nonjusticiability principle maintains that no party may press a generalized grievance in a judicial forum. A court should administer the nonjusticiability principle by considering, as described above, whether a claim challenging an agency's failure to enforce alleges a lack of *sound* decisionmaking or a lack of *reasoned* decisionmaking, and review only the latter.

At this juncture, one might begin to question the propriety of allowing courts to hear *any* claim challenging agency inaction. Perhaps the line between sound decisionmaking and reasoned decisionmaking is too fine to prove workable or too uncertain to prove desirable. Why ask courts to perform such a difficult exercise, espe-

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[280] *See Lujan*, 504 U.S. at 576–77 (denying standing to plaintiffs who show "undifferentiated public interest" and not "distinctive concrete harm"); Allen v. Wright, 468 U.S. 737, 755–56 (1984) (holding that "abstract stigmatic injury" will not satisfy injury-in-fact requirement); *see also* Fed. Election Comm'n v. Akins, 524 U.S. 11, 24 (1998) (arguing that harm must be "concrete" rather than "abstract"); *id.* at 34–35 (Scalia, J., dissenting) (arguing that harm must be "particularized" and "differentiated" not "undifferentiated and common to all members of the public" (quoting United States v. Richardson, 418 U.S. 166, 176–77 (1974))).

[281] Some have suggested that courts limit the operation of citizen-suit provisions by inquiring directly into whether a judicial forum is necessary and appropriate. *See* Bandes, *supra* note 1, at 278 (suggesting that in early "constitutional" generalized grievance cases, Supreme Court "might have questioned whether the political branches would in fact be capable of redressing the asserted injuries, and if not, whether the constitutional violations should remain insulated from government oversight"); Nichol, *supra* note 1, at 1944 (suggesting that courts inquire into whether claim involves "interest expressly reserved to the citizenry" or whether "practices challenged render the democratic process substantially askew").

cially when executive prerogative and administrative efficiency hang in the balance? Although the point is well-taken, we should be uncomfortable drawing an artificial line between agency inaction and agency action to address it. Once we agree that agency inaction suffers from similar weaknesses and generates similar harms as agency action, we should resist entirely different rules of judicial review. Instead, we should think hard about more nuanced alternatives, even if they are imperfect. In my view, a nonjusticiability principle that fences out only certain claims against agency inaction moves in the right direction.

Furthermore, such a nonjusticiability principle is worrisome mainly if courts use it to interfere unjustifiably with agency decisionmaking. When courts exercise review of agency inaction, they should adopt the deferential approach to the merits that Justice Marshall suggested when he concurred in the judgment in *Chaney*.[282] As long as agencies get in the habit of treating major refusals to act no differently from major decisions to act, offering adequate explanations and supplying general standards, courts should ask no more. Thus, ordinary judicial review principles can prevent courts from exceeding their bounds. At the same time, such principles can prevent agencies and politicians from exceeding theirs.

CONCLUSION

The current law governing judicial review of agency inaction is an embarrassment to scholars, even some who endorse the premise on which that law implicitly stands.[283] The law immunizes agency refusals to enforce from judicial review because such refusals implicate matters—namely, enforcement resource allocation and priority setting—best left to the control of politically accountable officials. But this rationale reflects a defective conception of the constitutional structure and the administrative state, and those who reject the law governing agency inaction do not appear to appreciate fully the source of their uneasiness or the implications of their position.

The critics reject the Supreme Court's treatment of agency inaction because it creates an asymmetry of interests in the administrative process. Agency decisionmaking reflects the interests of regulated entities more often than the interests of regulatory beneficiaries. The critics maintain that modern nonreviewability doctrine and standing

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[282] Heckler v. Chaney, 470 U.S. 821, 842 (1985) (Marshall, J., concurring in judgment).

[283] *See, e.g.*, Pierce, Lujan v. Defenders of Wildlife, *supra* note 1, at 1170–71, 1194–95; Pierce, *The Role of the Judiciary*, *supra* note 1, at 1280–85; Sunstein, *supra* note 1, at 186–88, 195–97, 213–14.

doctrine are responsible for this result. They claim that those doctrines deprive regulatory beneficiaries of an essential power that regulated entities possess, which is the power to challenge and therefore shape agency decisionmaking.

Although the problem *is* an asymmetry of interests in the administrative process, neither the reason nor the response is as the critics think. Agency decisionmaking *does* reflect the interests of regulated entities more often than the interests of regulatory beneficiaries. But to appreciate why, we must focus on the influences that work upon agency decisionmaking. *All* agency decisionmaking is susceptible to corrupting influences that stem from the nature of delegation and politics. In this respect, agency inaction is no different from agency action. Congress frequently enacts broad delegating statutes to pressure agencies for specific policies that benefit its campaign contributors at public expense.[284] Similarly, the President often utilizes broad delegating statutes to pressure agencies on behalf of his campaign contributors, or at least does little to prevent Congress from doing so.[285] The consequence is that regulated entities possess an advantage in the administrative process. They deliver the dollars that control the politicians who influence the agencies.

Courts can correct this irregularity. By inducing agencies to adopt measures that prevent improper influences, courts can protect regulatory beneficiaries and public-regarding statutes. They can require agencies to give reasons for their decisions and issue standards governing their authority. In these ways, courts may prod agencies to pick up where statutes leave off: ensuring regulatory decisionmaking that is both transparent and constrained.

The difficulty is that contemporary nonreviewability doctrine and standing doctrine bar courts from assuming this function with respect to agency inaction. Nonreviewability doctrine precludes courts from hearing claims challenging agency refusals to initiate enforcement proceedings, and standing doctrine blocks certain plaintiffs from raising such claims. Courts consequently lack a mechanism to help agencies guard their enforcement discretion from the forces that inhibit good government. This leaves too much to the good graces of agencies.

We need a theory of agency legitimacy that can grant courts the ability to compel agencies to help themselves. The prevailing accountability theory of agency legitimacy does not do so. Rather, it validates the Court's current treatment of agency inaction. Under that theory, agency inaction should be subject only to political control—indeed,

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[284] *See supra* notes 152–154 and accompanying text.

[285] *See supra* notes 163–165 and accompanying text.

presidential control. Yet even some who generally subscribe to the presidential control model of the administrative state reject this conclusion. That alone should tell us something about the adequacy of the presidential control model or any model dedicated primarily to the promotion of politically accountable decisionmaking in this context.

There is an alternative approach to agency inaction and agency legitimacy, and that is the arbitrariness approach. This approach is committed primarily to the prevention of arbitrary administrative decisionmaking, rather than promotion of politically accountable decisionmaking. In this, it incorporates a premise central to both the constitutional structure and the administrative state.

The arbitrariness approach dictates changes to current nonreviewability doctrine and standing doctrine. First, the law no longer should contain any special prohibitions on judicial review of agency inaction. Instead, it should reintegrate agency inaction and judicial review. Thus, courts generally should scrutinize agency inaction, applying the same principles that they apply to agency action. At a minimum, courts should require agencies to give reasons explaining particular nonenforcement decisions. Courts also should require agencies to issue standards governing all such decisions. Only by asking agencies to discipline their enforcement discretion in these ways may courts reduce the possibility for arbitrary enforcement decisionmaking.

Second, the law should recognize any exceptions to judicial review for agency inaction under established constitutional law principles and thereby reintegrate administrative law and constitutional law. The Supreme Court often views administrative law problems as demanding distinct doctrines. In my view, the Court would be wise to depart from this practice when constitutional analogues achieve the right policies. That is the case in the context of agency inaction. Courts should interpret nonreviewability as an analogue to political question doctrine, preventing courts from entertaining claims committed to the unfettered discretion of administrative officials. Similarly, courts should interpret standing as an analogue to nondelegation doctrine, preventing Congress through citizen-suit provisions from effectively delegating policymaking power to private parties. These reconstructions give effect to the intent and language of the APA provisions that ground the concepts and also credit the Court's intuition that important constitutional values place some enforcement discretion beyond the reach of judicial review, even if Congress disagrees. But courts should tether that intuition to well-known constitutional law principles to prevent it from generating doctrines that overtake

another important constitutional value: the prevention of arbitrary agency decisionmaking.

The arbitrariness approach to judicial review of agency inaction has significant practical implications for the administrative state. The first concerns remedies. The arbitrariness approach promises regulatory beneficiaries more procedural remedies. At the behest of particular plaintiffs, courts may compel agencies to provide explanations for particular nonenforcement decisions and supply standards for their general enforcement discretion. And courts may order agencies to consider prosecuting specific violators. Courts may not, however, force agencies to abandon any lenience that is the product of reasoned decisionmaking. The approach thus does not permit even the most public-minded courts or plaintiffs to substitute their judgment for that of agencies. The hope is that these procedural remedies alone will go a greater distance than ever before toward rectifying the asymmetry of interests that exists in the administrative process. The reason-giving and standard-setting requirements, through a combination of transparency and lawfulness, should reduce substantially the number of unjustified and unprincipled nonenforcement decisions.

The second practical implication concerns resources. The arbitrariness approach makes agencies less efficient and flexible. Agencies must expend resources defending, and articulate standards constraining, a broader range of decisions. This effect, though significant, is moderated in important ways. Assuming that routine nonenforcement decisions require less justification, agencies might safely conserve time and attention as to these. Agencies also might enjoy relative latitude in determining the "manner and pace" of compliance with broad statutory mandates, as in the recent case of *Norton v. Southern Utah Wilderness Alliance*.[286]

But agencies will have to commit resources to defending major failures to enforce existing prohibitions or requirements. The arbitrariness approach does not allow agencies to escape responsibility for demonstrating that they engaged in transparent and law-like decisionmaking simply because they decide, at the end of the day, not to proceed. In a best case scenario, however, agencies might discover that the cost is worth incurring. The court-imposed obligation to engage in reason-giving and standard-setting across a wider spectrum of decisions might offer agencies more insulation from political pressure that, they would agree, threatens their missions.

In any event, the arbitrariness approach merits serious consideration. It moves past the fiction that presidential control is sufficient to

[286] 124 S. Ct. 2373, 2381 (2004).

produce agency legitimacy, and moves toward a new vision for attaining that elusive and worthy goal. Part of that vision involves reforms to the law governing judicial review of agency inaction. Through willingness to trade ordinary politics for rule-of-law values where appropriate, the arbitrariness approach can claim success where accountability-based theories fall short. It can begin to offer us, after decades of living with the administrative state, a theory for finally reconciling that state with the constitutional structure.