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What a pleasure it was to see so many Council members attend the January 31 meeting at the ABA offices in Washington, DC. It was a visible sign that membership in the Section of Administrative Law & Regulatory Practice continues to be an essential component of the success of our members. In 8 hours, we debated many critical issues facing our nation and our members, and took actions to promote the well-being of both. I hope that you will take a moment to visit the Section’s web site and review the Minutes of each Council meeting, to keep abreast of our activities.

Beyond the always fascinating policy discussions, we welcomed our newest council member, Matthew Wiener, as the Ex-Officio, Legislative Branch, and thanked Jeffrey Rosen for his service as the outgoing Ex-Officio, Executive Branch liaison. Jamie Conrad described the goals of a new Legislation Committee, formed to carry forward Section policies that require legislative action. The Membership Committee under Daniel Cohen is actively developing new membership outreach materials—watch for monthly issues of the AdLaw News Express coming in March and a new Members Only Resources area on our web site. Bill Jordan was named Co-Chair of the Publications Committee earlier this year, and along with Anna Shavers is continuing to push for additional books the Section can publish in 2009. And it was a pleasure to meet several of the Executive staff members of the Administrative Law Review, including Andrew Kawel, Alexia Emmerman, and Wendell Phillips. We admire the excellent work of this dedicated group of soon-to-graduate law students, and we thank them for their outstanding contributions to the body of knowledge in administrative law.

Clearly communicating the value of Section membership was an important topic of discussion. It bears mentioning that the annual cost of Section membership dues is less than the combined cost of the three essential publications members receive—Administrative Law Review, Developments in Administrative Law and Regulatory Practice, and Administrative and Regulatory Law News. New last year is the ability for Section members to download the annual Developments book in chapter or complete book PDF format, which makes searching the documents simple from anywhere. Access your download by logging in on the Section’s home page http://www.abanet.org/adminlaw/home.html and scroll to the publications area for the download link (don’t forget to login first or you won’t see the free download). Make a point of visiting now if you have not already downloaded your 2006-2007 copy. The 2007-2008 book will be available within the month.

Congratulations to Renée Landers and Paul Afonso for producing five interesting CLE programs in Boston during the ABA MidYear Meeting in February. A financial bailout program, sponsored by Suffolk University Law School and the Rappaport Center for Law and Public Service, drew more than 100 people. And congratulations as well to Joe Whitley, George Koenig and Lisa Branch for producing an outstanding 4th Annual Homeland Security Law Institute in Washington this past week. Attendance grew 10% over last year, a testament to the high caliber of the more than 86 industry expert presenters and the vital subject matter. A tremendous vote of thanks as well to the 11 law firm and industry sponsors who supported this terrific program. And a special thank you to Lynne Zusman and Joe Whitley, who are nearing completion of a new book, Homeland Security, Legal and Policy Issues. We look forward to publication of this important compendium of knowledge which the Section intends to maintain as a current reference work.

New this year for the Spring Conference April 16-19 at the Kings Mill Resort in Williamsburg, Virginia, is a focus on Regulatory issues as a prelude to the June 10 National Institute of Administrative Law: New Directions in Agency Rulemaking, to be held in Washington, DC. Program Chairs Scott Delacourt, Richard Parker and Jean Cooper are fine-tuning the Williamsburg program, while Vice-Chair Jonathan Rusch is planning the Washington program. Visit our web site for more details on both programs http://www.abanet.org/adminlaw/. Registration opens in mid-March. This will be another opportunity for Section members to participate in a Council meeting and a Publications Committee meeting, so I hope you will take that opportunity.

I am encouraged by the strong commitment Section members have shown to the vital work that we do, and look forward to seeing you in Williamsburg in April.

Visit the Section’s Website at www.abanet.org/adminlaw and click on ONLINE CLE for access to Section programs at WestLegalEdcenter
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Petition Clause Interests and Standing for Judicial Review of Administrative Lawmaking

By Karl S. Coplan*

One of the primary roles of agencies in the modern administrative state is the promulgation of rules and regulations governing primary conduct. Separation of powers and non-delegation concerns have evolved into very weak limits on the scope of agency lawmaking authority. Once the executive branch agencies have acted, Article III courts routinely step in to review the consistency of these regulations with congressional mandates. Particularly in the case of controversial regulations, the lawmaking process is not complete until judicial review. Entities burdened by such regulations—so called “regulatory objects”—enjoy presumed standing to challenge the scope of agency regulations. Groups of individuals benefited by such regulations enjoy no such presumption of “standing,” rather, their right to challenge regulation depends on their ability to establish specific “injury in fact,” and the “redressibility” of that injury through judicial decree.

Yet, all citizens enjoy a First Amendment right to petition government, including the judicial branch, for redress of grievances. Judicial review of administrative rulemaking is a classic example of a petition for redress. The Supreme Court has repeatedly emphasized that petition clause interests are analyzed under the same rubric as speech and press clause interests. First Amendment doctrine recognizes the important role that freedom of expression plays in the process of self-governance, and looks with disfavor on rules governing expressive activity that have the effect of distorting the marketplace of ideas by favoring one viewpoint over another. Current standing doctrine has exactly such a viewpoint discriminatory effect, as it favors petitioning activity by regulatory objects arguing for less regulation, for whom standing is presumed, while it disfavors petitioning activity by regulatory beneficiaries arguing for more regulation, who under cases such as Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) must meet a high burden of establishing distinct “injury in fact,” causation, and redressibility in order to have their grievances considered by the judicial system.

A 2000 case in the District of Columbia Circuit illustrates how standing doctrine results in differential access to judicial review afforded to regulatory objects versus regulatory beneficiaries. In American Petroleum Institute v. EPA, 216 F.3d 50 (D.C. Cir. 2000), various parties challenged a rulemaking by EPA that determined to list certain petroleum industry wastes as “hazardous” and not so to list certain other wastes. The final rule was challenged by both petroleum industry trade associations, who objected to the wastes that were listed as “hazardous,” and by environmental organizations, who objected to the wastes that were not. Without so much as mentioning standing, ripeness, or justiciability issues, the Court of Appeals considered the industry challenges to the EPA “mega rule” governing use and disposal of PCB containing materials, while simultaneously refusing to consider the Sierra Club’s challenge to the same rule. In Texas Independent Producers and Royalty Owners Association v. EPA, 410 F.3d 964 (5th Cir. 2005), the Fifth Circuit considered industry challenges to the EPA “mega rule” governing use and disposal of PCB containing materials, while simultaneously refusing to consider the Sierra Club’s challenge to the same rule.

Other cases in the Courts of Appeals present similar disparities, where industry challenges to an agency rulemaking are considered on the merits while challenges by regulatory beneficiaries to the exact same rule in the exact same case were rejected because the organizations representing the beneficiaries could not identify a member who would certainly be harmed. Thus, in Central and Southwest Services, Inc. v. EPA, 220 F.3d 683 (5th Cir. 2000), the Fifth Circuit considered industry challenges to the EPA “mega rule” governing use and disposal of PCB containing materials, while simultaneously refusing to consider the Sierra Club’s challenge to the same rule.

* Associate Professor of Law, Pace University School of Law (kcoplan@law.pace.edu). The text of this article summarizes the author’s analysis from an article titled Ideological Plaintiffs, Administrative Lawmaking, Standing, and the Petition Clause, which will be published in the Maine Law Review, Volume 61, No. 2 (2009).
industry representatives to proceed. The District of Columbia Circuit has since formalized this disparity in standing analysis; in *Sierra Club v. EPA*, 292 F.3d 895, 898 (D.C. Cir. 2002), it announced that petitioners in rule challenge proceedings must submit affidavits establishing their standing along with their petition, unless their standing to challenge the rule is “self evident” (i.e., they are regulatory objects as opposed to beneficiaries).

These “injury in fact” and redressibility requirements are most difficult to establish precisely in the context that underlies the modern regulatory schema; that is, regulation of societal risks such as environmental and consumer risks. These regulations seek to protect the public against harms that may have a low probability of occurrence for any given individual, but pose significant risks for society at large, or even for substantial groups of individual citizens. Courts have wrestled with the concepts of “injury” and “redressibility” in the context of probabilistic harms, and have split on the question of whether individuals, or combinations of individuals, can establish the requisite of justiciability based on low-probability events.

Several courts have recognized “probabilistic” standing on the part of organizations who can show they have enough members subject to the risk to make it likely that some of their members will suffer, or even on behalf of individuals exposed to the risk. Some courts have accepted that a probabilistic harm may constitute a sufficiently significant injury-in-fact to satisfy standing requirements for an individual plaintiff. These courts have reasoned that where the magnitude of the harm is sufficiently grave, even a very small probability of occurrence may satisfy the “injury in fact” requirement. For example, in *Baur v. Veneman*, 352 F.3d 625, 634 (2d Cir. 2003), the Second Circuit reversed a District Court dismissal of a challenge to a Department of Agriculture regulation allowing sale of meat from “downed” livestock to be sold for human consumption, posing a small threat to all meat consumers of contracting Creutzfeldt Jakob disease, an incurable and invariably fatal disease. The Court reasoned that a very low risk of an exceedingly grave harm (an incurable disease) was a sufficient individual injury in fact even without proof that any one individual was likely to contract the disease. This approach may be at odds with standing doctrine that requires individuation of harm, as the harm in *Baur* was one shared by the population at large.

The District of Columbia Circuit took a more associationally oriented approach in a more recent case, *NRDC v. EPA (Methyl Bromide)*, 464 F.3d 1 (D.C. Cir. 2006). NRDC challenged an EPA regulation exempting methyl bromide, an ozone disrupting chemical, from the ban of the Montreal Protocol. Although EPA did not challenge NRDC’s standing, the industry intervenors did. NRDC presented statistical evidence establishing that some of its 500,000 members would be likely to contract fatal cancers as a result of the incremental ultraviolet exposure caused by continued use of methyl bromide, and some larger number would contract non-fatal skin cancers. The D.C. Circuit panel initially dismissed the petition, finding the annual risk to NRDC’s members to be too vanishingly small to be a cognizable injury in fact. On rehearing, in light of an EPA statistician’s affidavit stating that the court’s attempt to annualize the risk was invalid, the Court reversed itself and found that NRDC had standing based on the aggregate risk to all of its members, as NRDC established a statistical likelihood that at least one of its members would contract skin cancer as a result of the methyl bromide exemption.

Some member of NRDC will certainly be harmed by the methyl bromide regulation, and the D.C. Circuit accepted this harm as sufficient to support standing. The problem is that neither NRDC, nor the Court, can identify who that individual member is! NRDC thus has standing to challenge the methyl bromide exception as an organization, even though no one of its members would have a sufficiently significant increase in cancer risk to challenge the regulation in her own right. This synergistic approach to standing injuries is in tension with the usual formulation for representational standing; that is, that the organization must identify some individual member who would have standing as an individual. This aggregation of risk encapsulates the problem faced by regulatory beneficiaries seeking to challenge agency rules: someone will be harmed by the regulation, but it is impossible at the outset to determine who.

Many, if not most, rulemaking challenges by regulatory beneficiaries are brought by public interest organizations such as NRDC. These organizations usually have memberships ranging from thousands to millions of individuals. These organizational plaintiffs fall into the category of “ideological” plaintiffs, a term originally coined by Professor Louis Jaffe to describe parties who invoke the judicial process to establish and enforce public rights for the benefit of many people, who are not primarily motivated by individual gain. Ideological plaintiffs, litigating everything from religion clause issues to consumers’ rights to environmental and health concerns, have had mixed success in establishing justiciability in Article III courts. These organizations have been required by Supreme Court doctrine to rely on the individual interests of their members to establish standing.

Although barely recognized by the courts in formulating standing doctrine, the Constitution contains a provision specifically meant to ensure the right of individuals to associate and seek remedies from all branches of the government, including the judicial branch. The First Amendment guarantees the “right of the people peaceably to assemble, and to petition the government for a redress of grievances.” Like the First Amendment guarantees of speech and freedom of the press, this constitutional provision is designed to ensure public representation and participation in the lawmaking process. Constitutional jurisprudence likewise has evolved to ensure maximum input to the political processes that lead to legislation. This is particularly true in the area of First Amendment jurisprudence, where the Supreme Court has recognized the functional importance of political speech to a representative democracy.

continued on page 23
Standing and Future Generations: Does Massachusetts v. EPA Open Standing for Generations to Come?

By Bradford C. Mank*

Any issues, especially potential environmental catastrophes caused by climate change, affect not just the living, but also future generations. But our political system is biased against the interests of future generations because only the present generation can vote. Because future generations cannot vote, unelected federal judges are arguably more suited to protect their interests than the political branches.

A key question is whether anyone has standing to sue on behalf of future generations. In procedural cases, especially in suits involving the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4370f (2006), non-government plaintiffs who may be harmed by a proposed government project may have standing to address the reasonably foreseeable future impacts of those projects and thus may be indirectly able to represent the interests of future generations in some cases. In Massachusetts v. EPA, 549 U.S. 497, 127 S.Ct. 1438 (2007), the Supreme Court held that states are entitled to more lenient standing criteria than ordinary citizens and recognized standing in part based on computer models projecting injuries to Massachusetts’ coastline through the year 2100. Massachusetts may allow state attorneys general to file suits to protect future generations of state residents from injury.

Article III Standing Doctrine and Future Generations

A foreign case presents the strongest example of a court protecting the interests of future generations. In Oposa v. Secretary of the Department of Environment and Natural Resources, the Supreme Court of the Philippines in 1994 held that a group of schoolchildren had standing to challenge timber leasing of old growth forests “for themselves, for others of their generation and for the succeeding generations.” The Philippines: S. Ct. Decision in Minor Oposa v. Sec. of DENR, 33 I.L.M. 173, 185 (1994). The Supreme Court of the Philippines recognized that the present generation has responsibility for future generations. Although it relied in part on the Constitution of the Philippines and national law, the Oposa decision emphasized a universal natural law principle that human beings have the right to a healthy environment.

It is questionable whether the schoolchildren would have had standing to sue on behalf of future generations in American federal courts. The Supreme Court’s Article III standing test requires plaintiffs to demonstrate that they have personally suffered an injury that is “actual and imminent,” and not merely “conjectural or hypothetical.” Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 563–64 (1992). For uncertain risks that have a probability of less than fifty percent of occurring during the plaintiff’s lifetime, a court might deny standing because the risks are too “conjectural or hypothetical.”

Furthermore, the Supreme Court has generally rejected standing for private parties based on the legal rights or interests of third parties. Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 80 (1978). In Sierra Club v. Morton, the Court held that the Sierra Club did not have standing to seek declaratory and injunctive relief against the granting of permits for commercial exploitation of Mineral King Valley, a national game refuge adjacent to Sequoia National Park, because the Sierra Club did not allege that any of its members used the park or would be injured by the proposed development. 405 U.S. 727, 734–35 (1972). The Court rejected the Sierra Club’s argument that it was entitled to standing as the representative of the public, the environment or future generations without proof that its members would be injured by the government’s proposed actions. Id. at 734–40 Accordingly, federal courts are likely to deny standing to a non-government plaintiff who seeks only to protect the rights or interests of future generations.

NEPA Consideration of Reasonably Foreseeable Impacts

NEPA provides the strongest basis for a non-government plaintiff to sue regarding future environmental harms because the statute requires agencies to examine the reasonably foreseeable long-term environmental impacts of their proposed projects. NEPA specifically states that “it is the continuing responsibility of the Federal government to use all practicable means, consistent with other essential considerations of national policy, to [ensure] ... that the Nation may ... fulfill the responsibilities of each generation as trustee of the environment for succeeding generations.” 42 U.S.C. § 4331(b)(1). Furthermore, NEPA recognizes “the worldwide and long-range character of environmental problems.” 42 U.S.C. § 4332(2)(F).

Especially in NEPA cases, the Court has relaxed the immediacy and redressability standing requirements for procedural rights plaintiffs who argue that the government has a duty to perform an environmental assessment of a proposed project that could harm them in the future if the government builds the proposed project. Lujan v. Defenders of Wildlife, 504 U.S. 555, 572 n.7 (1992). A few cases have required the

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government to revise an environmental impact statement that failed to address reasonably foreseeable consequences of a project. See Potomac Alliance v. United States Nuclear Regulatory Commission, 682 F.2d 1030, 1031–32 (D.C. Cir. 1982) (per curiam); Concerned About Trident v. Rumsfeld, 555 F.2d 817, 827, 829–30 (D.C. Cir. 1977).

In Nuclear Energy Institute, Inc. v. EPA, 373 F.3d 1251, 1257, 1266–73 (D.C. Cir. 2004), the court of appeals for the District of Columbia Circuit held that a plaintiff who could be affected by groundwater contamination from the proposed Yucca Mountain repository for high-level nuclear waste had standing to sue to challenge, under NEPA and the Energy Policy Act, Pub. L. No. 102–486, § 801, 106 Stat. 2776, 2921–23 (1992) (codified at 42 U.S.C. § 10141 note (2000)), the EPA’s use of a 10,000-year compliance period for predicting the safe storage of the waste as inconsistent with the findings and recommendations of the National Academy of Sciences, which suggested the need for a protective period on the order of a million years. The Nuclear Energy Institute decision is the most dramatic example of a court implicitly allowing a plaintiff to sue on behalf of future generations, although the court did not mention future generations in its standing analysis and instead emphasized the harms that could affect the plaintiff if the government built the project with the EPA’s proposed less stringent radiation standards instead of the National Academy of Sciences’ more stringent recommendations. A plaintiff who seeks to protect future generations must be careful to emphasize how possible harms to future generations will affect her in the present.

Probabilistic Injury Standing

In non-NEPA cases, there is continuing controversy about whether courts should recognize standing for possible future injuries from the government’s alleged under-enforcement of the law. In NRDC v. EPA, 464 F.3d 1, 5–7 (D.C. Cir. 2006), the Natural Resources Defense Council challenged a final rule issued by the EPA exempting for the year 2005 certain “critical uses” of the otherwise banned chemical methyl bromide, a chemical that has beneficial uses, but also destroys stratospheric ozone. A three-judge panel of the D.C. Circuit in 2006 concluded that evidence demonstrating that two to four members of the NRDC’s nearly half a million members would develop skin cancer during their lifetimes as a result of EPA’s rule was more than sufficient injury for the NRDC to have Article III standing.

In a 2007 decision, however, Public Citizen v. National Highway Traffic Safety Administration (NHTSA), 489 F.3d 1279 (D.C. Cir. 2007), a different panel of the D.C. Circuit appeared to be less inclined to find standing where a public interest organization alleged that its members were at a greater risk of future injury from an automobile accident because the NHTSA standards for tire pressure monitors were less stringent than the alternative regulation that the Public Citizen organization supported. The court questioned whether the future traffic injuries alleged by Public Citizen were “imminent” because “no one can say who those several hundred individuals are out of the 300 million people in the United States, nor can anyone say when such accidents might occur. For any particular individual, the odds of such an accident occurring are extremely remote and speculative, and the time (if ever) when any such accident would occur is entirely uncertain.” Id. at 1293–94. After the parties filed supplemental briefs, the D.C. Circuit in its second Public Citizen opinion questioned its earlier NRDC decision and suggested that the circuit sitting en banc should address whether consumers challenging safety regulations that allegedly increase their risk of future harm compared to the plaintiffs’ preferred regulatory approach should ever have standing. Public Citizen v. Nat’l Highway Traffic Safety Admin., 513 F.3d 234, 241 (D.C. Cir. 2008) (per curiam).

Massachusetts v. EPA and Special Standing Rights for States

States, however, arguably have greater standing rights to protect future generations from potential harms. In Massachusetts, the Supreme Court held that states are entitled to more lenient standing criteria than ordinary citizens because under the parens patriae doctrine states have a quasi-sovereign interest in protecting the state’s natural resources for their citizens. Id. at 1452–58; Bradford C. Mank, Should States Have Greater Standing Rights Than Ordinary Citizens?: Massachusetts v. EPA’s New Standing Test for States, 49 Wm. & Mary L. Rev. 1701 (2008). Although it did not directly give states standing to protect future generations, the Court considered evidence from computer models that climate change through the year 2100 would result in ever rising sea levels and damage to Massachusetts coastline. Id. at 1456 n.20. Additionally, the Court stressed that Massachusetts was currently experiencing harms from climate change and rising sea levels. Id. at 1455–1456 It is not clear whether the Court would have recognized standing if all alleged harms were to occur in the future.

Despite the “actual and imminent” requirement limitation of suits on behalf of future generations, Massachusetts supports the protection of future generations in some circumstances. Under the parens patriae doctrine, states have a quasi-sovereign interest in protecting the state’s natural resources, as well as the health and welfare interests of their citizens. Id. at 1454–55; Georgia v. Tennessee Copper Co., 206 U.S. 230, 237 (1907); Mank, supra. There is a good argument that states have a quasi-sovereign interest in protecting not just their current citizens but also the health, environment and natural resources of its future citizens. Furthermore, the public trust doctrine in several states and several state laws implicitly or explicitly recognize that states have a duty to protect natural resources for future generations.

Uncertainties Regarding Standing to Protect Future Generations

There is considerable uncertainty regarding whether plaintiffs have standing to challenge harms that may affect future generations because the Supreme Court’s standing doctrine is complicated, confusing and perhaps contradictory in some instances. The Court has never fully defined under what circumstances
**State Standing after Massachusetts v. EPA**

*By Calvin Massey*

Massachusetts v. EPA, the global warming case, created two tiers of an Article III case or controversy for purposes of ascertaining standing to sue in federal court. The constitutional core of standing requires a litigant to have an actual or immediately threatened injury in fact that is caused by the defendant's actions and susceptible to judicial redress. In *EPA* the Court held that when Congress has created a procedural right a state may bring suit, as *parens patriae*, to vindicate a federal right that implicates the health or well-being of the state's citizens without the quantum of proof of injury in fact, causation, or redressability that would be necessary were an individual the plaintiff. While that conclusion sounds very technical and limited, the principles endorsed stretch far beyond the holding.

Massachusetts v. EPA substantially broadens the scope of state standing. To support their standing as litigants, states may assert proprietary, sovereign, or quasi-sovereign interests. A state’s proprietary interests are no different in nature than those asserted by a private citizen, and the same standing rules apply to each. A state’s sovereign interests are unique to a government, and include such interests as enforcing the law; thus explaining why states have standing to prosecute lawbreakers. A state’s quasi-sovereign interests include preservation of either the health and well-being of a state’s citizens and vindication of the benefits of federal union. Under the *parens patriae* doctrine, a state has standing to protect its quasi-sovereign interests. After *EPA*, a state’s quasi-sovereign interests extend to protection of the undifferentiated public rights of its citizens, including universally shared injuries that inflict no particularized injury. The implication of this conclusion is that such cases as *Schlesinger v. Reservists Committee to Stop the War* and *United States v. Richardson* do not bar states from asserting undifferentiated public rights, though they do continue to prevent ordinary citizens from making such claims.

The complete article describes how *EPA* produces this effect, whether or not intended by the Court, assesses the scope of this increase in state standing, and offers several justifications for two tiers of an Article III case or controversy. These justifications are rooted in principles of federalism, separation of powers, and optimal accountability of our governmental agents.

Before explaining why *EPA* broadens *parens patriae* standing to permit states to litigate pure public rights, a brief detour is needed. There are other possible readings of *EPA*, but none of them is plausible. First, *EPA* might make no change at all to the constitutional core of standing, but reiterates the prior understanding of standing founded on a procedural right. Second, *EPA* might change the elements of the constitutional core of standing for all litigants. Third, *EPA* might have created a different constitutional understanding of a case or controversy when a state is a party, regardless of whether it is acting as *parens patriae*.

The first possibility is implausible because the Court said it was crucial that a state was a litigant, an element hitherto irrelevant to standing to vindicate procedural rights. Moreover, while a litigant asserting a procedural right does not have to demonstrate causation and redressability with the same vigor as in other standing cases, it must show some causation and judicial ability to redress the “concrete interest” that the procedural right is intended to protect. Massachusetts’s concrete interest was the minute loss of its coastal land over the past century and its threatened future loss of such land. But that past loss and threatened future loss is not “fairly traceable” to the *EPA*’s failure to regulate carbon dioxide emissions of American auto engines newly manufactured after the Clean Air Act’s enactment in the 1970s. Given the global scale and multiple sources of greenhouse gas emissions the contribution to these losses by unregulated engines is minute. Redressability fares little better: regulation of carbon dioxide emissions from new auto engines will not restore lost shores, and will have an imperceptible impact on future losses. If *EPA* is only a procedural rights case, it reduced significantly the causal linkage and redressability that are prerequisites to standing. But because the Court emphasized that a state was the litigant, this conclusion is dubious.

The second possibility also founders on the Court’s reliance upon the presence of a state as the litigant. The injury asserted by Massachusetts—loss of coastal land—is adequate personal injury in fact, but causation and redressability are weaker than in previous cases finding a lack of causation and redressability. If the Court intended to relax causation and redressability for all litigants, the fact that a state was the plaintiff is irrelevant.

The third possibility is also not plausible, but to understand why requires a deconstruction of the Court’s conflation of Massachusetts’s injuries. One injury—the past and future loss of coastal land—is injury to a proprietary interest: It is no different from the injury suffered by all private owners of coastal realty in Massachusetts. But Massachusetts asserted, and the Court implicitly acknowledged, another injury: the degradation of the well-being of Massachusetts residents posed by global warming. If the

*continued on next page*
An interest rooted in federal law. To properly act as Massachusetts v. Mellon, it rejected an earlier conclusion, in the constitutional core of standing for states when the public interest in Government observation of powers, 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.’” This objection—that courts will be turned into “convenient forum[s] for policy debates”—is much less forceful when Congress seeks to permit states, as parens patriae, to vindicate quasi-sovereign public rights. First, Congress may only do so with respect to quasi-sovereign interests, which is itself a limiting principle. Second, because state attorneys general have limited resources and are politically constrained by accountability to the state electorate, only the most prominent or pressing of public interests will be asserted by states as litigants, and then only to the extent that Congress has empowered them to do so. Executive violations of public rights are likely to trigger such litigation. Moreover, other justiciability doctrines will control excessively exuberant state attorneys general. Some challenges are surely non-justiciable political questions; others may not be ripe.

This conclusion is reinforced by principles of federalism. A key point of our federal system is the belief that federalism will better preserve liberty by diffusion of governmental power. This principle is no less key to our understanding of separation of powers. Recognition of a congressional power to authorize states to litigate quasi-sovereign public rights is an additional diffusion of power; it introduces a further level of accountability of the executive (to courts) at the behest of any of the discrete polities of the union, a diffusion of power that permits multiple opportunities for checking abuses of authority. Moreover, because parens patriae doctrine recognizes that states are entitled to “observance of the terms under which [they] participate[] in the federal system,” and neither the states nor their citizens may be “excluded from the benefits” of federal union, the implication is that the states have a special right and obligation to insist that the federal government conduct itself lawfully. That right is surely one of the benefits of federal union.

A pragmatic and cynical critic might ask why Congress would permit states to challenge what it could resolve on its own? There are several possible answers. First, most such instances would likely occur when Congress has charged an executive agency to carry out a legislatively prescribed scheme, and Congress might desire to use the states, as parens patriae, to enforce the congressional design. Congress embraced the notion of citizen suits to enforce federal regulatory measures in the years before Lujan curbed such grants of standing, so it is reasonable to think that Congress would be equally willing to adopt this method of enforcing public rights in federal court. Second, there may be some instances in which Congress might wish to allow the courts to resolve a disputed issue of the scope of executive discretion to carry out a legislative directive, rather than directly narrowing the scope of executive discretion. Indeed, global warming might be such an issue. Moreover, there is no persuasive force in the argument that broad delegations of legislative authority to agencies are valid grants of executive discretion concerning enforcement of the legislative charge, but vesting states with power to vindicate public rights in federal court unconstitutionally transfers executive discretion to the judiciary. Such an argument ignores the fact that states, unlike individuals, are appropriate custodians of public rights and state assertion of public rights in federal court does no more than ensure that executive discretion is confined within the boundaries of the Constitution and federal statutory law. Inasmuch as both separation of powers and federalism are structural doctrines designed to check concentration of power, it is reasonable to join federalism with separation of powers principles when the result is to create an additional check on power wielded by a single branch of government.

Lujan may have sought to bury the citizen suit to vindicate public rights, but EPA revives it in at least a new and more limited form. Although Congress may not enable ordinary citizens to prosecute public rights in the absence of a personal
injury in fact caused by the defendant that can be redressed by the courts, Congress may empower states, as parens patriae, to vindicate public rights even when injury, causation, or redressability is insufficient to support citizen standing. Moreover, because the objections to state standing as parens patriae to assert undifferentiated public rights are identity-whether or not a procedural right is present, EPA creates a separate tier of Article III cases or controversies when a state acts as parens patriae.

EPA approves, for states as parens patriae, a relaxed conception of a case or controversy while leaving in place the hard nugget of a case or controversy that is exemplified by Lujan. If the set of cases or controversies is visualized as a sphere, individual litigants are confined to the core of the sphere, while states enjoy the entirety of the sphere. Within the core, individuals and states in their proprietary capacity are required to demonstrate palpable and personal actual injury or imminent threat of such injury, establish that such injury is directly attributable to the defendant, and show a strong probability that judicial action can redress the injury. In the mantle that surrounds the core, states as parens patriae are permitted to assert quasi-sovereign injuries, which can consist of pure public rights that may only be weakly attributable to the injury and which pose merely the possibility that judicial action may ameliorate the injury.

But what justifies two tiers of Article III cases or controversies? There are several justifications for this condition. A two-tiered conception of Article III cases or controversies is consistent with constitutional text, precedent, and structure. It is also justified by prudential considerations that are related to constitutional structure.

Constitutional text does not mandate a uniform conception of a case or controversy. Because federal jurisdiction spans a wide range of categories, varying with party alignment and subject matter, there is reason to suppose that the meaning of a case or controversy might be as variable as the categories of federal jurisdiction. That judgment is, of course, borne out by the variable law of standing prior to EPA with respect to procedural rights.

An elastic conception of case or controversy as applied to standing is not only consistent with constitutional structure, but enhances that design. A fundamental aspect of our constitutional architecture is the diffusion of governmental power in order to prevent its accretion in the hands of a single entity. That principle is the raison d’être of federalism and separation of powers within the federal government. The complete elimination of the ability of any actor—citizen or government—to seek judicial review of the validity of executive actions that inflict no individualized injury grants to the executive a limited but unfettered power to violate law. However narrow that power may be, its very existence is an affront to constitutional structure.

A conception of the case or controversy requirement to permit states as parens patriae to assert claims of undifferentiated public rights is prudent. The nature of lawmaking is that “a certain degree of discretion . . . inheres in most executive . . . action.” While it is untenable to permit any citizen to challenge the exercise of that discretion without a showing of personal injury caused by the challenged exercise of discretion that may be redressed by judicial action, it is prudent to permit states, as partners in the federal system whose officials are accountable to their citizens, to challenge executive discretion that inflicts diffuse and undifferentiated injury.

The problem is one of agency costs, which arise from differing objectives of the principal and the agent. One way to minimize agency costs is to increase the ability of principals to oversee the agents’ actions. Applied to government, the federal executive is the agent of the people, but if the people are stripped of any ability to obtain judicial review of executive action, their oversight capabilities are reduced to the franchise. Voting is important, of course, but the exercise of the franchise is always a choice among prospective agents (who may all share the same disposition to exercise their discretion unlawfully so long as there is no judicial oversight). Moreover, rarely do voters choose their agents on the basis of a single trait and, when they do, that trait is not likely to be the agent’s propensity to take unlawful action that leaves nobody with any personalized injury. By contrast, permitting states to raise in federal court claims of public rights on behalf of their citizens increases the degree of oversight of executive action and thus diminishes agency costs without strangling lawful and desirable executive discretion. Principals retain agents because they cannot, or are unwilling, to do the job, so agents must have the freedom to perform efficiently. The task in controlling agency costs is to minimize those costs without stifling the efficiency gains produced by agency. An appropriate balance must be struck, and permitting states as parens patriae to seek judicial oversight of our executive agents is a prudent judgment.

Of course, the use of states and the federal judiciary as the vehicle for monitoring executive discretion injects another dimension of agency costs, for both state attorneys general and federal judges are agents of the people. There is no perfect control of agency costs, but if the alternative to using these agents to identify and check executive violations of undifferentiated public rights is to abandon all means (short of the ballot box) of controlling such executive misbehavior, one must reckon these added agency costs to be worthwhile. First, there are fifty state electorates that may use the franchise to control state actors who misuse (or fail to use) the parens patriae power, instead of a national electorate acting through the Electoral College to choose a President every four years. Second, while the agency costs of a life-tenured and unelected federal judiciary are not inconsequential, the historical verdict suggests that the judiciary is a reasonable check on executive malfeasance, regardless of whatever agency costs may be the product of a judiciary that ignores popular interpretations of law.

The net result of EPA is a salutary breach of the hitherto impenetrable Maginot Line of standing that prevented judicial consideration of executive lawlessness which inflicts universal but impersonal harm on the citizens of our nation.
In Massachusetts v. EPA, the Supreme Court upheld Massachusetts’s standing to challenge EPA’s refusal to regulate greenhouse gas emissions from mobile sources. The majority and dissent disputed whether the science of global warming was sufficient to establish standing. Absent from both opinions was discussion of whether there would be standing if the science were uncertain but the potential harms large and irreversible. This Essay argues that “precautionary-based standing”—grounded upon a fundamental principle of environmental law, the precautionary principle—should apply in such cases.

Precautionary-based standing would not upset existing standing doctrine. First, its application would be limited, and could be further limited to cases brought by a sovereign. Second, there already are less stringent standing requirements in areas where courts have deemed precaution to be appropriate. Third, the catastrophic and uncertain nature of the injury in a precautionary-based standing approach would satisfy Article III.

Standing and the Court’s Decision in Massachusetts

The Supreme Court grappled with standing in Massachusetts, where environmental organizations and governmental entities—Massachusetts among them—claimed that EPA’s failure to regulate greenhouse gas emissions from motor vehicles violated the Clean Air Act. The majority opinion in Massachusetts, authored by Justice Stevens, adhered to the view that EPA did not contest either that anthropogenic emissions were exacerbating the greenhouse effect, or that over time major ramifications would occur as a result. Nowhere in the heart of the majority’s standing analysis is there consideration given to the facts as presenting a harm that may or may not occur but that, if it does occur, would be catastrophic. Nor is there discussion of, or reliance upon, the existence of uncertainty or the potential for irreversibility. Rather, the majority presented global warming as a problem that is already occurring and is virtually certain to worsen.

Chief Justice Roberts’s dissenting opinion took issue with the majority opinion’s presentation of the facts underlying global warming. The Chief Justice assailed the majority for resting standing on slender evidence. The dissent expressly adhered to the traditional view that harms that have not been shown to be either actual or imminent are not sufficient to support standing.

Absent from both opinions was discussion of whether there would be standing if the science were uncertain but the potential harms large and irreversible. The dissent rejected the application of the precautionary principle implicitly and without discussion. The majority had no need to discuss the possible application of the precautionary principle because, on its presentation of the facts, the presence of standing was clear.

Proposal for Precautionary-Based Standing

My basic proposal for incorporating the precautionary principle into standing doctrine is relatively straightforward. Courts should find that the “injury” prong of standing is satisfied where the plaintiff can show that the harm that it might suffer would be catastrophic and irreversible, and that its occurrence is subject to great uncertainty. Thus, the proposal would allow courts to conclude that plaintiffs have standing without having to decide definitively whether those harms are actually “concrete” and “imminent” in the traditional sense.

Application of precautionary-based standing to the facts in Massachusetts would change the reasoning, but not the outcome, of the case. The emission by humans of greenhouse gases presents the possibility of catastrophic and irreversible harm, but it is uncertain, under current scientific understanding, whether and when this harm will occur.

Invocation of precautionary-based standing would in no way affect the litigation of the issues in the case on the merits. This limited, preliminary reliance upon the precautionary principle avoids the interpretive problems that have dogged the implementation of the principle in other contexts.

The proposal is largely consistent with existing standing doctrine. To be sure, it would work a change in some cases. However, the set of cases in which there is uncertainty as to whether catastrophic, irreversible harm will occur is a limited one.

Even if the proposal would not result in standing being achieved in many more cases, one might worry that the proposal might suboptimally encourage more people to file suit and try to prove standing. To respond to this concern—and to the related argument that the proposal as structured would effect too large a change in existing standing doctrine—the proposal can further be cabined. The relaxed standing rule under circumstances of precaution could be made available only to state governments that bring lawsuits in their sovereign capacity.

Note that this additional possible restriction both accords with existing standing doctrine and responds logically to the criticisms of the basic proposal that I have identified. First, the Court since the Lohner era has recognized that a state’s sovereignty confers upon it greater latitude than private actors typically enjoy in seeking relief. Indeed, the majority in Massachusetts specifically recognized the “special solicitude” due to states that advance claims in federal court in their capacity as sovereigns. Second, there is a certain logic to restricting precautionary-based standing to sovereigns. Even if one is concerned that people are likely to believe that precautionary-based standing applies in a host of cases where it in fact does not, one might be more sanguine.

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that states will be more hesitant to try to invoke a court’s jurisdiction. One also might think that the democratic process would restrain states from bringing suit with great frequency and with little chance for success. And, even if that is not entirely true, the restriction would in any event constrain the number of cases in which standing would be found on the basis of precaution.

Finally, I note that precautionary-based standing provides a workable standard for courts to apply. While the courts would have to develop notions of catastrophic and irreversible harms, that is hardly an insurmountable task. Presumably, the legal standard for catastrophic harm would consider both the scope and extent of possible harm. Courts are already called upon to make analogous judgments. For example, tort law allows one to enter onto land possessed by someone else, and to commit an act which would otherwise be a trespass to a chattel or a conversion, if such actions are necessary to, or are reasonably believed to be necessary to avoid a public disaster.

Moreover, to whatever extent application of precautionary-based standing may pose difficulties to courts, it does not seem to present any more of a challenge—and indeed maybe less of one—than does existing standing doctrine. In many environmental cases, the inquiry as to whether an injury is “concrete” and “imminent” requires courts to analyze scientific evidence, which is generally not the forte of courts. On the other hand, precautionary-based standing asks courts to examine scientific evidence only to determine whether the question of injury has been sufficiently “put at issue” by that evidence, a task to which courts would seem equally, if not better, suited.

Consistency with Existing Doctrine

Precautionary-based standing is consistent with the existing law of standing. To begin, the incorporation of the precautionary principle is foreign neither to domestic law, nor indeed to the law of standing. First, the Supreme Court has fashioned numerous prophylactic rules that are not called for by the language of the Constitution but are designed to minimize the chances that constitutional violations will in fact occur. Second, the precautionary principle can be said to undergird the American approach to criminal law. Consider various devices designed to vindicate the belief that it is worse for an innocent person to be convicted than for a guilty person to go free: the presumption against innocence, the right to remain silent, and the requirement that the prosecution prove all elements of a case beyond a reasonable doubt. Third, the First Amendment has been interpreted to take a similarly cautionary view toward regulation of speech. For example, the doctrine of prior restraints imposes a heavy presumption against attempts to regulate speech before it in fact occurs. These areas of law generally take a precautionary view against government regulation (as opposed to environmental law’s precautionary principle, which generally takes a precautionary view against the absence of government regulation). Still, the reliance upon a precautionary approach remains.

Next, several procedural devices that adopt a precautionary approach. In determining whether to grant preliminary injunctions and temporary restraining orders, courts are directed to weigh, among other things, the irreparable harm to the defendant if the injunction issues against the irreparable harm to the plaintiff if the injunction does not issue. In criminal procedure, bail requirements guard against the risk of irreparable harm that would result if the defendant were to flee the jurisdiction and avoid trial. And, the “collateral order doctrine” provides an exception to the usual rule in federal court that appeals may only be had once a final order has been entered in cases where the occasion of a delayed appeal might itself constitute an irreparable harm.

Finally, standing jurisprudence itself is already a home to special rules premised upon precaution. Overbreadth doctrine allows parties to raise objections to speech regulations that are overbroad, even if the regulations do not by their terms reach the parties’ speech. The justification for this special rule is the concern that overbroad speech restrictions might chill constitutionally protected speech. Precaution is thus seen to justify loosening of traditional standing doctrines. Second, standing under the Declaratory Judgment Act permits federal courts to decide cases at an early stage, again on precautionary grounds.

Having established that precaution is not foreign to standing jurisprudence, I turn to the specific question of whether precautionary-based standing is consistent with existing standing doctrine. As an initial matter, the precautionary-based standing proposal (whether in its basic form, or as further limited to state sovereigns) would not undermine the purposes underlying the doctrine of standing. First, there is little doubt that there would be true disputation of issues with a live adversarial process in a case in which precautionary-based standing would be found. Second, though it would expand standing to a few more cases where it might not exist under existing doctrine, precautionary-based standing would not throw open the floodgates of litigation—especially if access to it is restricted to states in their sovereign capacity.

Third, precautionary-based standing would not displace the political question doctrine. Instead, political question doctrine would be at low ebb in cases where precautionary-based standing is likely to apply. Political economy predicts—and experience unfortunately often bears out—that the political branches are generally unlikely to respond ex ante to catastrophic risks. The benefits of expenditures ex ante are less tangible and more uncertain than benefits associated with government expenditures in general. As such, government actors are comparatively unlikely to supply such expenditures. Public demand for ex ante planning and expenditures is also likely to be muted. To the extent that the political branches are thus less likely to confront possible catastrophic events, the notion of relying upon standing to assure deference to those branches seems misplaced.

The question remains whether application of precautionary-based standing would be consistent with the Article III standing requirements. One answer is that, as some have argued, the Court has been too stringent in its interpretation of Article III in constructing the current

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“injury” component of standing. Under this view, while precautionary-based standing may not be consistent with the current “injury” jurisprudence, that jurisprudence calls for more than is required by the Constitution.

Precautionary-based standing can be seen, however, to be essentially consistent with the Court’s current “injury” jurisprudence. To begin, the Court’s recognition of standing to issue declaratory judgments suggests that Article III tolerates some attenuation between an injury and a possible victim.

Further, when there is uncertainty surrounding an injury’s occurrence and the injury, if it occurs, will be catastrophic and irreversible, a strong case can be made that Article III’s injury requirement has been satisfied. The requirement is designed to ensure that litigants have a true incentive to vigorously pursue their claims. For garden variety injuries, a remote, highly contingent injury is likely to be worth little, and thus to provide litigants with little incentive to pursue a claim in relation thereto. For potentially catastrophic injuries, however, while a low likelihood of the injury occurring and a longer time horizon will tend to reduce the expected value of the injury, the enormity of the injury’s magnitude may serve to offset this reduction. The combination of uncertainty and potentially catastrophic harm yet may combine to produce a sizeable expected injury.

A final objection to Article III compatibility with the application of precautionary-based standing is that, insofar as catastrophic harm is broad in scope, the harm might be said to be “generalized” in many cases in which precautionary standing might be invoked. The usual justification for not allowing standing with respect to generalized harms—that generalized harms are best left to the political branches rather than judicial determination—is not persuasive in the context of catastrophic harms given that (as discussed above) the political branches are unlikely to act in such settings. Moreover, the restriction of precautionary-based standing to states would leave claims that are less likely to be generalized (even among prospective plaintiff states).

### Normative Desirability of Precautionary-Based Standing

Precautionary-based standing is normatively desirable for several reasons. First, commentators have criticized the Court’s opinion in *Massachusetts* for improperly weighing in on scientific matters that are inherently policy-based and political in nature. Reliance upon precaution also would have garnered support for the Court’s holding on standing from those who questioned the strength of the scientific evidence establishing global warming, yet who recognize that global warming poses the possibility of extreme harm in the event that some predictions are accurate.

Second, consider the import of precautionary-based standing for environmental problems in the future. Even one who fully supports the Court’s holding in *Massachusetts* may feel that the majority missed an important opportunity to integrate precaution into the standing inquiry. It may well be that there is adequate scientific consensus to justify action now, but that was not always the case. On this understanding, the absence of precautionary-based standing has already delayed a response to global warming. There likely are other environmental problems lurking down the line where, again, the timing of a response may be critical. To the extent that precautionary-based standing may force the government to address problems at an earlier juncture, its availability is likely to be of recurring importance.

Third, there is in theory no reason why precautionary-based standing needs to be limited to cases raising environmental problems. For example, commentators have argued in favor of extending standing to more cases of stigmatic harm. And stigmatic harm, like some environmental harm, might at least sometimes and in some ways be characterized as irreversible and catastrophic. Perhaps experience with precautionary-based standing in the environmental context will ultimately convince courts to extend its reach to other areas.

There is some degree of inconsistency in arguing, as I have, on the one hand that precautionary-based standing is consistent with existing standing doctrine in part because it is so limited, and on the other hand that precautionary-based standing might be desirable because it could eventually be used as a vehicle to expand standing on a broader scale. Yet while the points may be somewhat inconsistent, they are not incompatible. The introduction of precautionary-based standing in environmental cases would be a very limited step. And it may well be that experience will show that it should not be extended to other areas. On the other hand, experience may show that precautionary-based standing provides a valid basis for the evolution of standing doctrine on a broader scale.
The Misfit Between Standing Doctrine and Its Purposes

By Heather Elliott*

The Supreme Court has stated that standing “is built on a single basic idea—the idea of separation of powers.” Allen v. Wright, 468 U.S. 737, 752 (1984). A close examination of the cases, however, reveals that there is no single “idea” of separation of powers. Instead, the Court has used standing doctrine to pursue several different such ideas. In a recent article, I have sought to understand the tensions within the Court over these separation-of-powers ideas and, given these tensions, to determine how well standing doctrine serves separation-of-powers goals.

Standing is “perhaps the most important” of the justiciability doctrines, Allen, 468 U.S. at 750, which also include ripeness, mootness, political question, and abstention. These doctrines “relate in part, and in different though overlapping ways, to an idea, which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government.” Id. (internal quotation marks and citation omitted).

The requirements of standing doctrine may be stated simply: (1) the plaintiff must have suffered an injury in fact; (2) the plaintiff’s injury must be fairly traceable to the actions of the defendant; and (3) the relief requested in the suit must redress the plaintiff’s injury. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). Despite the concision of the three-part test, the Court has recognized that the standing requirement “incorporates concepts concededly not susceptible of precise definition.” Allen, 468 U.S. at 751.

And, indeed, the doctrine has proven notoriously difficult to apply. Numerous critics have assailed standing jurisprudence, and dissenting members of the Court have described the extremes of standing analysis as a “word game played by secret rules,” Flast v. Cohen, 392 U.S. 83, 129 (1968) (Harlan, J., dissenting). The Court itself has even stated that “[s] tanding has been called one of the most amorphous [concepts] in the entire domain of public law,” id. at 99 (majority opinion) (internal quotation marks and citation omitted), in part because the words “cases” and “controversies” “have an iceberg quality, containing beneath their surface simplicity submerged complexities.” Id. at 94. I argue that the problems with standing doctrine derive at least in part because the Court seems to use standing doctrine to perform at least three different separation-of-powers functions.

First, and most familiarly, the Court has used standing doctrine to restrict the cases heard in the federal courts to those that are properly “cases” and “controversies” under Article III. As the Court noted in Flast v. Cohen, Article III limits “the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process.” Id. at 95. To satisfy such criteria is to make the court’s involvement as a court proper. The adversity demanded under this view of standing also “sharpens the presentation of issues upon which the court so largely depends for illumination.” Baker v. Carr, 369 U.S. 186, 204 (1962). Even this seemingly straightforward separation-of-powers purpose—keeping courts to their role qua courts—has generated significant disagreement among the members of the Court. In Lyons v. City of Los Angeles, for example, Justice Marshall dissents strenuously over what he views as the majority’s diminution, using standing, of the courts’ traditional equitable powers.

Second, the Court has said, standing doctrine allows the courts to refuse cases better suited to the political process, thus (along with other justiciability doctrines) permitting Article III to “assure that the federal courts will not intrude into areas committed to the other branches of government.” Flast, 392 U.S. at 95. Cases are sorted on a rough democratic theory: if an injury is shared by a large group of people, some cases suggest, such a group can and should take its problem to the legislature or the executive branch, not the courts. FEC v. Akins, 524 U.S. 11, 23 (1998). Thus, the Court frequently “has refrained from adjudicating ‘abstract questions of wide public significance’ which amount to ‘generalized grievances,’ pervasively shared and most appropriately addressed in the representative branches.” Valley Forge, 454 U.S. at 475. Recent cases indicate a struggle within the Court over the propriety of adjudication when injuries are particularized and yet widely shared, particularly when Congress has explicitly authorized private enforcement of a statute. Akins, 524 U.S. at 23-24.

Third, the Court (and particularly Justice Scalia) has suggested that standing acts as a bulwark against congressional overreaching, preventing Congress from conscripting the courts in its battles with the executive branch. See, e.g., Lujan, 504 U.S. at 577. On this view, when Congress creates citizen-suit provisions that permit individual citizens to sue to enforce federal law, the federal courts can be forced into the role of “virtually continuing monitors of the wisdom and soundness of Executive action.” Id. When standing serves to deny access to some fraction of citizen suitors, it thereby limits Congress’s ability to conscript the courts in its battles with the executive. This anti-conscription function, in particular, continued on next page
is the subject of profound disagreement within the Court, with some opinions suggesting that this use of standing impermissibly trenches upon Congress’s legislative authority. See Friends of the Earth v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167, 191 (2000).

As this brief review demonstrates, standing serves at least three separation-of-powers functions: ensuring concrete adversity, promoting democracy, and preventing conscription. Standing is, however, ill-suited to the functions it has been asked to serve. While the doctrine performs plausibly in ascertaining concrete adversity, the tripartite test does little to promote the values that underlie such adversity. For example, if the concrete-adversity test is meant to guarantee the best advocacy, see Massachusetts v. EPA, 549 U.S. 497, 517 (2007), standing doctrine does not provide that guarantee. As then-Justice Scalia noted, someone who undoubtedly has standing may well do a poor job of arguing his case, while a national public interest organization with no concrete stake may provide a court with the most helpful arguments. Antonin Scalia, The Doctrine of Standing as an Essential Element of the Separation of Powers, 17 Suffolk U. L. Rev. 881, 891 (1983).

Similarly, standing does not perform the pro-democracy function at all well. If standing is meant to divert into the political branches problems better solved there, then its proper application should result in the dismissal of cases where large numbers of plaintiffs share the same injury. The problem is that this use of standing does not make sense in the doctrine’s own terms: the tripartite test asks whether a plaintiff has suffered injury in fact, causation, and redressability. The other parties before the court possess the ability simply to determine whether those who are marginalized are not trampled on by the majority. But Professor Nichol has convincingly argued that standing doctrine “systematically favors the powerful over the powerless,” and that this bias means that “the power to trigger judicial review is afforded most readily to those who have tradition-ally enjoyed the greatest access to the processes of democratic government.” Gene R. Nichol, Jr., Standing for Privilege: The Failure of Injury Analysis, 82 B.U. L. Rev. 301, note 1 at 304, 333 (2002).

In addition, many issues will not be addressed by the political branches because large numbers of people are harmed but only minimally; environmental problems, for example, are frequently characterized by widespread but mild injuries that are unlikely to lead to political mobilization. Precisely because the courts are less democratic than the executive and legislative branches, they should make sure not to worsen the antidemocratic aspects of the political branches.

As I have demonstrated above, standing doctrine fails utterly in serving the anti-conscription function. As the Court noted in Flast, “[t]he question whether a particular person is a proper party to maintain the action does not, by its own force, raise separation of powers problems related to improper judicial interference in areas committed to other branches of the Federal Government.” 392 U.S. at 100. The question whether a particular plaintiff has standing is essentially unrelated to the question whether Congress violates the Constitution by enlisting the courts to fight its battles with the executive branch.

As I have demonstrated above, standing doctrine is not actually an essential element of the separation of powers, and it is not built on a single idea of separation of powers. Instead, it is used to pursue many such ideas, none of which it serves particularly well, and some of which it diserves. Using standing doctrine in pursuit of these goals has been harmful, inviting harsh criticism and burdening the lower courts. The doctrine in its current form should be discarded.

What to do? Abandoning this sort of threshold inquiry altogether seems unwise; while it is not the purpose of this Article to take sides in the separation-of-powers debate, the Court’s persistent and deep disagreements about how best to view the role of the judiciary in the constitutional structure demonstrate that these issues cannot simply be ignored.

A promising avenue is one that permits the federal courts to explicitly raise the separation-of-powers concerns described in this Article but as a matter of prudence rather than constitutional mandate. I am not the first to suggest this—Professor Jaffe decades ago recommended that a prudential abstention doctrine would be preferable to the standing doctrine. As my analysis above suggests, however, any such abstention doctrine should be informed by specific factors that have not been sufficiently recognized.

An abstention doctrine would continue the Court’s historically venerable inquiry into whether a traditional judicial case is present. This function could even be pursued by a prudential version of the existing standing doctrine, albeit simplified. It seems unnecessary to conduct an extensive inquiry into injury in fact, causation, and redressability simply to determine whether the parties before the court possess the necessary concrete adversity to ensure that a dispute is susceptible of judicial resolution.

An abstention doctrine should also permit courts to consider the extent to which the case involves a question that is better resolved in the political branches. This is more than a simple numerosity issue; as discussed above, it is simply not the case that an issue affecting huge numbers of people will necessarily be addressed by the political branches, even if people would want it to be.

Take, for example, Massachusetts v. EPA, where plaintiffs sued to challenge the EPA’s failure to regulate carbon dioxide (a global-warming contributor) as a pollutant under the Clean Air Act. 549 U.S. 497 (2007). The majority and dissent disagreed over whether court action was suitable, given the political context. But they argued in terms of the plaintiffs’ standing—a fruitless exercise under current doctrine. A debate over whether the Court should have abstained from deciding the case, conducted in terms of the separation-of-powers issues involved, would have been much more
fruitful and, I believe, much more believable. Similarly, the prudential abstention doctrine should permit courts to explicitly consider whether a Carolene Products footnote four issue might be present. After all, the ultimate purpose of our Constitution’s separation of powers is to restrain arbitrary government action; it would be oxymoronic to deny standing to a plaintiff who cannot gain access to the political branches of government to redress arbitrary government action.

If, on the other hand, the issue involves the kind of abstract interest traditionally described as a “generalized grievance,” the courts should continue to have the discretion to spurn such suits. The Court has long forbidden taxpayer suits, for example, on what were originally prudential grounds, and there are common-sense reasons—including docket control—to do so. At the same time, the abstention doctrine should permit consideration of the extent to which the case involves a statute in which Congress has expressly authorized standing.

A prudential standing doctrine should not, however, attempt to resolve the “anti-conscription” function: There is simply no logical relationship between the injury in fact vel non of a particular plaintiff and the extent to which Congress might (or might not) have trampeled on executive power in empowering that plaintiff to sue. The concerns that motivate Justice Scalia are Article II concerns. His true problem is with the transfer of executive power to private citizens. See, e.g., Lujan, 504 U.S. at 576–77. Rather than using standing doctrine to address this question, the Court needs to confront the Article II issue directly.

The factors considered in this abstention doctrine are premised explicitly on the separation-of-powers concerns the Court has emphasized, as well as other concerns they should acknowledge. It is not unreasonable to believe that the other branches deserve not only the solicitude of the courts in separation-of-powers analyses but that Congress and the President might well have something to say on the matter themselves. A prudential abstention doctrine would permit the courts to adjust to the expressed views of the other branches on the appropriate balance of separation of powers (especially in cases that would currently fail under existing standing doctrine), while still giving the courts the power to decline to hear cases should the abstention factors counsel such a result.

By taking these steps, the Court could address the many problems caused by the current state of the doctrine. First, streamlining the functions that standing is used for—and particularly halting the use of standing for purposes to which it is profoundly unsuited—can cut short accusations that standing is merely a devious method to hidden ends. Moreover, a streamlined (or moribund) standing doctrine, and concomitantly expanded doctrines that more precisely address the other separation-of-powers functions, will permit the lower courts to act consistently. A prudential abstention doctrine, in place of the unduly complicated and unintelligible standing doctrine, would permit the Court to pursue these separation-of-powers functions legitimately.

Standing and Future Generations

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an injury is “actual and imminent.” The Court has relaxed this requirement in procedural cases, especially NEPA cases. Thus, a plaintiff who may be injured by a proposed government project has standing to sue the government to seek an environmental assessment for possible future harms to her and probably reasonably foreseeable harms to others. Whether the Supreme Court would endorse the Nuclear Energy Institute decision’s use of possible harms to groundwater to a plaintiff as the basis for granting standing in a case involving harms to those living one million years in the future is unclear.

In non-NEPA cases, there is a reasonable argument that states have standing to represent future generations of their citizens, at least where the suit involves some present injury. The Massachusetts decision invoked the parens patriae doctrine’s recognition of a state’s quasi-sovereign interest in its natural resources to justify relaxed standing for states seeking to protect such interests. Notably, the Court considered the harm that climate change was predicted to cause to the Commonwealth’s coastline to the year 2100, although there were also present injuries as well. Massachusetts v. EPA, 549 U.S. 497, 127 S. Ct. 1438, 1456 n.20 (2007). States are more likely than non-government plaintiffs to have standing to protect future generations because states can argue that they are protecting their quasi-sovereign interest in their natural resources for future citizens. It is questionable whether the Court would have been as lenient if a non-government plaintiff had used computer models to estimate harms ninety-three years in the future.

Even for state plaintiffs, there are uncertainties about when a state may sue regarding possible future injuries. In Shain v. Veneman, 376 F.3d 815 (8th Cir. 2004), private plaintiffs alleged that a government funded sewage-treatment plant would harm them by increasing the risk of flooding on their properties. Affirming the district court’s decision, the Eighth Circuit agreed that the increased risk of a 100-year flood was not an imminent injury and was too “remote and improbable” to give rise to standing because of the significant possibility that a 100-year flood would not occur during the plaintiffs’ lifetimes or ownership of the property at issue. Id. at 818–19.

It is unclear whether Massachusetts would allow a state attorney general to sue in a case involving similar facts as Shain. A state would have the stronger argument than a private plaintiff that it has authority under the parens patriae doctrine or perhaps the public trust doctrine to protect its natural resources for future residents. Someday the Supreme Court may need to address whether states have the same right to sue on behalf of future generations as the schoolchildren in Minors Oposa.
**Abandoning Constitutional Standing: Trading a Rule of Access for a Rule of Defere**

*By Richard Murphy*

An important and intractable debate regarding the notoriously confusing doctrine of constitutional standing has revolved around the relation of its “injury” requirement to separation of powers. This debate has taken on new urgency in recent years with the appointments of Chief Justice Roberts and Justice Alito. Four justices (Roberts, Scalia, Thomas, and Alito) now insist that a plaintiff’s injury cannot take the form of a “generalized grievance” because resolving this type of claim is properly the business of the political branches. Four justices (Stevens, Souter, Ginsburg, and Breyer) insist that widely shared injuries can support standing so long as they are “concrete” enough. On this more permissive view, the core function of constitutional standing is to ensure that a claimant brings the right type of “personal stake” to the litigation. And Justice Kennedy? As you might have guessed, he is somewhere in the middle.

This fight has been going on for many decades. Perhaps one reason it has lasted so long is that both sides are partly right (and partly wrong). Proponents of the more restrictive form of standing are correct that the danger of judicial usurpation of political power is greater where courts resolve disputes that are in some sense “generalized.” Proponents of the more permissive form are right that constitutional standing’s bar on judicial access is a poor way to separate judicial from political power. This doctrine is, in short, a bad way to serve what is, in a government committed to both the rule of law and representative democracy, a vital end.

This short essay uses the Court’s current 4/1/4 split as an occasion to suggest that the great Professor Louis Jaffe proposed a better way almost fifty years ago. Rather than use standing’s confused rule of access to block judicial usurpation of political power, the federal courts should instead develop a rule of judicial deference to this end. See Louis L. Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 Harv. L. Rev. 1265, 1305-14 (1961). See also Heather Elliott, *The Functions of Standing*, 61 Stan. L. Rev. 101 (2009). Under this rule, courts would, when resolving “public actions” defer to the reasonable judgments of political branch officials.

To offer a modicum of support for its claims, this essay will first quickly examine the constitutional standing analysis of the two Roberts Court cases that most clearly highlight its split over the relation of the injury requirement to separation of powers—*Massachusetts v. EPA*, 127 S. Ct. 1438 (2007), and *Hein v. Freedom from Religion Foundation*, Inc., 127 S. Ct. 2553 (2007). (For a third case in which this split is important but the justices’ discussion of it is less direct, see *Sprint Communications Co., L.P. v. APCC Services, Inc.*, 128 S. Ct. 2531 (2008)). This article will then briefly explain why Professor Jaffe’s fifty-year-old advice offers a better way for confining courts to their proper business.

**Massachusetts v. EPA — Does Global Doom Count?**

In the blockbuster case of *Massachusetts v. EPA*, a 5-4 majority of the Court ruled that EPA had arbitrarily rejected a rulemaking petition requesting that it use its Clean Air Act authority to regulate greenhouse gas emissions of motor vehicles. But, before getting to the merits, the Court first had to forge through the standing issue, on which it reached the same 5-4 split.

Justice Stevens’ majority opinion held that Massachusetts had satisfied the injury requirement by demonstrating that global warming threatened to cause rising sea levels that would flood state property. Causation and redressability requirements were satisfied because, were EPA to initiate a rulemaking, it might promulgate a rule limiting at least some greenhouse gas emissions, and any move in that direction would reduce the risk of catastrophic harm at least a little. The majority buttressed its conclusion by dragging in a one-hundred-year-old precedent, *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907), for the Seinfeldian principle that states have a special claim to standing in the federal courts to protect their “quasi-sovereign” interests in “all the earth and air within [their] domain[s].”

Writing for the four-justice dissent, Chief Justice Roberts contended that causation and redressability problems blocked Massachusetts’ claim of standing. He also observed, with some fairness, that the majority’s revivification of *Tennessee Copper* was best understood as a tacit admission that its analysis needed all the help it could get.

The Chief Justice’s core objection, however, was that the majority’s handling of the injury requirement laid waste to standing’s ability to protect separation of powers. The real injury at issue was not the risk that the waves would cover some bit of Massachusetts’ state property; rather, it was “catastrophic global warming.” The problem with basing standing on this injury was that “[t]he very concept of global warming seems inconsistent with the particularization requirement.” 127 S. Ct. at 1467 (Roberts, C.J., dissenting). Calling to mind arguments that Justice Scalia has

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been pushing for decades both on and off the Court, the Chief Justice insisted that correcting such generalized grievances about government action was properly the political work of the legislative and executive branches. Where courts usurp this work, they violate the purpose of standing, which is to “maintain[] the tripartite allocation of power set forth in the Constitution” and ensure “that courts function as courts.” Id. at 1470-71.

As it happens, the Chief Justice’s deployment in Massachusetts of restrictive standing’s generalized-grievance/partialized-injury dichotomy provides an excellent demonstration of one of its gravest defects: Any set of injuries suffered by any group of individuals can be described as either “generalized” or “particularized” by varying the level of abstraction of the description. For instance, consistent with the Chief Justice’s dissent, one can certainly maintain that global warming is causing a generalized harm by threatening everyone in the world with catastrophic climate change. Because we walk through this life in our own bodies, however, global warming will do different things to different people. It might cause Xavier’s crops to fail; it might threaten Yolanda’s coastal home; it might sadden Zeke by killing off all the polar bears. When we focus on the fact that global warming threatens all three by one mechanism, their injuries look “generalized.” When we focus on the differences among their particular circumstances, the injuries look “particularized.”

Strictly speaking, the majority in Massachusetts did not need to address the Chief Justice’s complaint regarding generalized grievances because the majority had concluded that Massachusetts had asserted a sufficiently “particularized” injury. Nonetheless, it did not let his challenge go unanswered. Citing Federal Election Comm’n v. Akins, 524 U.S. 11, 24 (1998), the majority insisted that “widely shared” harms can support standing so long as they are “concrete.” Massachusetts, 127 S. Ct. at 1456. Underlying this approach is the thought that the core function of constitutional standing is to ensure that petitioners bring the type of “personal stake” to litigation that ensures “concrete adverseness.” Id. at 1453 (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)). A petitioner can bring such a “personal stake” to court regardless of how many people share her injury.

Establishment Clause Violations

Though for obvious reasons it has received less attention than a blockbuster global warming case, the Roberts Court’s most revealing discussion of constitutional standing so far came in Hein v. Freedom From Religion Foundation, Inc., 127 S. Ct. 2553 (2007). The Foundation and some of its members had sued to block spending on conferences promoting President Bush’s Faith-Based and Community Initiatives Program for violating the Establishment Clause. Presumably, their motivation was that mixing church and state makes the Foundation’s members very upset. This reaction could not serve as their ticket into federal court, however, because of a bar on standing for ideological injuries. The plaintiffs therefore claimed standing based on injuries they had suffered as federal taxpayers due to illegal spending. Generally speaking, standing doctrine precludes standing based on this type of injury because, if this move were permissible, any federal taxpayer could challenge any federal spending she did not like in federal court. To get around this problem, the plaintiffs relied on Flast v. Cohen, 392 U.S. 83 (1968), which carved a puzzling exception to the bar on federal-taxpayer standing for Establishment Clause claims.

After an interesting, wasteful trip through the lower courts, the case reached the Supreme Court, where the five most conservative justices concluded that the plaintiffs lacked standing under Flast but disagreed as to why. Justice Alito wrote the controlling plurality opinion, which the Chief Justice and Justice Kennedy joined. At the outset of its analysis, the plurality gave strong support to the general rule against federal-taxpayer standing and to the broader principle that courts are not the place to settle generalized grievances. 127 S. Ct. at 2563-64. The plurality did not, however, need to resolve whether this principle justified overruling Flast because it was not on point. The real question was not whether to apply Flast, which, on its facts, had applied to congressional spending decisions; rather, the question was whether to expand it to cover the executive’s spending decisions, too. Expanding Flast to cover executive action would be a terrible idea, however, as it would “effectively subject every federal action — be it a conference, proclamation or speech — to Establishment Clause challenge by any taxpayer in federal court.” Id. at 2569.

Justice Scalia, writing with his customary vigor and joined by Justice Thomas, wrote a forceful concurrence that condemned the plurality’s evasion of Flast as a transparent fraud. He wished to overrule Flast because it was “wholly irreconcilable with the Article III restrictions on federal-court jurisdiction [over generalized grievances] that this Court has repeatedly confirmed are embodied in the doctrine of standing.” Id. at 2574.

The dissenting quartet, led by Justice Souter, agreed with Justice Scalia that Flast was on point but wished to apply it rather than overrule it. As far as they were concerned, Justice Scalia’s familiar claim that generalized grievances cannot support standing was flat-out wrong. Rather, just as the Court had asserted in Akins a scant nine years before, a “widely shared” injury can support standing so long as it is “concrete” rather than “abstract.” Id. at 2587 n.3.

In its most critical passage, the dissent offered a few vague reflections on what it means to be “concrete”:

In the case of economic or physical harms, of course, the “injury in fact” question is straightforward. But once one strays from these obvious cases, the enquiry can turn subtle. Are esthetic harms sufficient for Article III standing? What about being forced to compete on an uneven playing field based on race (without showing that an economic loss resulted), or living in a racially gerrymandered electoral district? These injuries are no more concrete than seeing one’s tax dollars spent on religion, but we have recognized each one as enough for standing. This is

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not to say that any sort of alleged injury will satisfy Article III, but only that intangible harms must be evaluated case by case. Id. at 2587 (citations omitted; emphasis added).

This dissent’s contemplated case-by-case analysis considers “the nature of the interest protected” and whether, ultimately, “the injury alleged is too abstract, or otherwise not appropriate, to be judicially cognizable.” Id.

Such language offers no clear guidance for determining whether injuries are “concrete” enough or “personal stakes” strong enough for standing. Instead, the dissent’s approach invites courts to exercise sound judicial judgment to determine who may proceed in federal court and who may not. If, however, the injury inquiry boils down to whether it is a good idea to let someone sue, then it is far from obvious why a judicial determination on this point should trump a congressional one as constitutional standing doctrine contemplates.

Of course, one way around this problem would be for the Court, whenever confronted by a plaintiff who has been expressly authorized by Congress to sue, to conclude that the plaintiff had, indeed, suffered an injury “concrete” enough for standing. Given the hazy nature of the inquiry, as well as a proper impulse to defer to congressional policy judgments, such outcomes should be easy enough to justify. If, however, the Court never disagrees with Congress over standing, then standing—considered as a constitutional rather than prudential doctrine—becomes toothless. It is tempting to suppose that the four dissenting justices from Freedom from Religion would not mind this result. Their permissive approach seems to be the type a justice would adopt if she thought there should not be a constitutional standing doctrine in an ideal world but that there were too many inconvenient precedents in the real world to get rid of it.

A Good Way Around a Bad Debate?

Notwithstanding any defects they might possess, both permissive and restrictive standing are rooted in important insights. Restrictive standing is correct to stress that the danger of judicial usurpation of political power is greater where courts resolve suits brought by plaintiffs pressing “generalized grievances” to protect the public interest. Permissive standing, however, is correct that this separation-of-powers concern does not justify a constitutional bar on access to the federal courts. The standoff between them suggests that we should look for a better way to serve restrictive standing’s legitimate purpose. The balance of this brief essay will highlight one possibility.

Finding a better way to divide judicial and political power requires thinking about just what, consistent with our constitutional values, we want the judicial power to accomplish. This is a big topic in much the same way the Pacific Ocean is a large body of water. For this little essay, however, suffice it to note that, after a couple of centuries of practice of separation of powers, we expect the federal courts to control other governmental actors in two broad, related ways. First, ever since Marbury, the federal courts have helped ensure that other governmental actors obey the laws limiting their powers. Courts ensure that statutes are constitutional; rules fall within statutory authority, etc. Second, and more vitally, courts provide a relatively neutral forum that helps curb arbitrary application of governmental power to individuals or other vulnerable groups. We want courts rather than prosecutors making final judgments of criminal guilt for rather obvious reasons.

Think of a “public action” as one that serves only the first of these two purposes insofar as its merits in no way depend on the specific factual circumstances of the plaintiff. Given this restriction, by hypothesis, a public action cannot resolve whether the government has singled out the plaintiff for unfair or arbitrary treatment. Understood in this sense, both Massachusetts and Freedom from Religion were public actions. Massachusetts turned on the meaning of “air pollutant” in the Clean Air Act; this meaning would not change even if Massachusetts fell into the Atlantic tomorrow. Freedom from Religion turned on application of the Establishment Clause to discretionary executive spending on programming that was allegedly too religious. True, unlike almost everyone else in the country, the Foundation’s members were mad enough to sue the government to stop this spending. The merits of their case, however, had nothing to do with whatever “personalized” feelings they might have felt.

As Professor Jaffe saw the matter, on balance, both history and good sense led to the conclusion that the Constitution did not bar federal courts from resolving “public actions” to ensure the legality of government action. See generally Louis L. Jaffe, Standing to Secure Judicial Review: Public Actions, 74 Harv. L. Rev. 1265, 1281-82, 1308-14 (1961). When resolving public actions, however, to reduce the risk of judicial usurpation of political power, courts should not overturn other officials’ reasonable determinations of doubtful questions. Rather, consistent with historical mandamus practice, courts should issue orders to other officials only as needed to enforce a “clear legal duty.” Id. at 1305. (This is all, of course, reminiscent of Chevron deference.)

A justification for allocating decision-making power this way is that public actions do not raise concerns that the government has arbitrarily targeted people or treated them differently in a way that implicates interests that the law is willing to recognize. For instance, hearkening back to Massachusetts v. EPA, suppose the EPA declines to regulate the emission of carbon dioxide from motor vehicles on the ground that this gas is not an “air pollutant” within the meaning of the Clean Air Act. Stipulate that one might reasonably conclude as a matter of statutory construction that carbon dioxide is an “air pollutant” or that it is not. EPA’s refusal to regulate will surely have “particularized” effects—as a matter of “fact”—on everyone in the world. Massachusetts’s coastal property will be threatened, but so will California’s different coastal property. As far as the law is concerned, however, the differences among these effects have no bearing on the merits of EPA’s statutory construction, which has, in a legal sense, treated both states in the same way.

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Arbitrated and Capricious: Watch Out for Employee Free Choice Act Issues

By James T. O’Reilly*

The intensity of political debates on issues like abortion and gun control is being joined in the blogosphere and media by the ever-controversial topic of labor union organization of American workplaces. Blindly yawning at the irrelevance of classical labor law, many administrative lawyers turn the page when the proposed Employee Free Choice Act (EFCA) is discussed. “No, we don’t do unions here” and “unionization is dead” are common dismissive responses. Not so fast – administrative lawyers have a lot to contribute, to teach the Congress and their peers about the implementation of the system created by the pending legislation.

In brief terms, our creaking and obsolete 1934–1947–1959 statutory regime in American private sector labor law depends on holding secret ballot elections at worksites, overseen by a shrinking bureaucracy at the National Labor Relations Board. (Yes, there is at least one federal agency that has shrunk in recent years!) After the bitter pre-election counter-claims and then balloting, if the union wins, then NLRB certification of a winning union leads to a mandate for “collective bargaining”. That bargaining is a chronically slow and plodding process that may (or may not) produce a contract after several years of posturing and delays. The system had worked well for massive UAW and mine worker organizing, but fewer and fewer unionized manufacturing jobs remain in America’s “Rust Belt”. Employers in a cost-conscious growth economy with a highly mobile workforce can postpone, delay and restructure sufficiently to assure that actual union contracts take years to ripen, even after the union’s victory in the secret ballot election.

Labor sees the system as one-sided, exploitative, toothless and broken. So it came as no surprise that organized labor was supremely organized in its supportive efforts for 2008 electoral candidates who favored expansion of the labor organizing process through adoption of the proposed EFCA. Most estimates of campaign support in key Senate and congressional races and on the Obama team suggest that labor had bet heavily on the new President’s willingness to take up the House-passed H.R. 800 from the 110th Congress, which had failed 51–48 on a cloture vote in the 2007 Senate. The press has widely speculated that labor’s reward will be Administration support for potential adoption of the EFCA in 2009 or 2010.

One aspect of the EFCA ends the messy antipathy of pre-election propaganda flung against both sides. Recent media exposure has unveiled the tens of millions of dollars being invested in anti-EFCA campaigns, and opponents have all focused on the bill’s use of worker sign-up cards as a sole basis for union certification. Today, labor unions will quietly solicit cards showing worker support, and typically will petition NLRB for an election when 60–70% of the workplace unit has signed the cards. EFCA section 2’s elimination of the ballot election, and adoption of the cards as a viable alternative basis for certification of the union, is the fruit of deep frustration with pre-election tactical advantages held by the employer. The card signing system has been lambasted by the employers but is favored by the unions, as an efficient and less costly means of individual selection with “free choice.”

Amid the big media firefight over the use of ballots versus cards for initial unionization of a worksite, very few scholars have focused on the administrative law issues in EFCA’s proposed addition of a new section 8(h)(3) to the National Labor Relations Act. In this addition, Congress delegates to an obscure federal agency with only 258 employees, the Federal Mediation & Conciliation Service (FMCS), the power to break a worksite’s labor-management contract deadlock with a new weapon. FMCS tries to bring the parties to agreement after they have been unable to agree on a contract:

“(3) If… the Service is not able to bring the parties to agreement by conciliation, the Service shall refer the dispute to an arbitration board established in accordance with such regulations as may be prescribed by the Service. The arbitration panel shall render a decision settling the dispute and such decision shall be binding upon the parties for a period of 2 years, unless amended during such period by written consent of the parties.”

For a tiny federal administrative body, this is a remarkable delegation: write the binding contract for 2009–2010 for workers at your local Wal-Mart. Two private entities, an employer and a union, disagree about the terms of their future relationship. Current law compels them to bargain in good faith, as it has since 1934, and the new law offers “conciliation” between the opposing sides, a task for which FMCS is well suited if not yet well staffed. But then the novel “nuclear weapon” is used: an arbitrator decides terms of the final contract and both private parties must follow that contract for the next two years. This is called “interest arbitration” to differentiate it from the more frequent, well established grievance arbitration process. Making interest arbitration decisions that are “binding upon the parties for a period of 2 years”, the arbitrator(s) have enormous leverage. Imagine a parent splitting a cookie between twin 3 year olds who cannot settle their disagreements. Sometimes one side or the other will gamble on winning the outside arbitration

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process instead of compromising in order to cross the chasm between their positions. Sometimes the threat of a forced decision by a third party “concentrates the mind wonderfully”, and an 11th hour settlement follows.

Administrative lawyers will read the term “such regulations as may be prescribed by the Service” as a broad delegation to FMCS without statutory parameters. Absent the “written consent” of both sides, the federally-determined contract binds each employer and union to certain wages, insurance co-pays, pension terms and the like, for two years. After that initial contract term expires, the classical tools of labor contract formation, up to and including strikes or lockouts, are available for each side in the later years. (The interest arbitration work of EFCA is solely for the first contract of a newly organized workplace.)

I will confess that I am a “recovering” former interest arbitrator, in a system very parallel to the EFCA system. After I wrote extensively about Ohio’s 1983 legislation that created a mandatory arbitration provision for our public agencies, I was asked to serve as one of Southwest Ohio’s first “conciliators.” I served for a dozen years with the State Employment Relations Board’s panel of neutrals. An aphorism about the U.S. Supreme Court came to mind: “We’re not final because we’re infallible, but we’re infallible because we’re final!” Courts deferred to the binding arbitration orders. My decisions raised sheriffs and firefighters’ pay, and prevented one city’s night shift of police from being involuntarily rotated to day shifts without a corresponding concession from the city management. Faced with finality of some decisions, I was alternatively vilified and lionized, as brilliant or stupid, but the contract terms were as I decided them to be—a great deal of delegated responsibility over two private parties for the outside arbitrator.

Experience suggests that private sector employers will hate the speed and “outsider” decisiveness of EFCA’s interest arbitrations. We who have experience in the process are marginally skeptical about its efficacy. The mandatory “shotgun wedding” makes for unhappy relations between the employer who is stuck with a contract that “we can’t live with” for two years, and the union that is new to this workplace and eager to assert its authority in order to win benefits for those who signed its cards. Gaming the system is often attempted. Looking around a loud and rancorous room in a police station at red-faced harsh adversaries, I observed that the arbitrator was the only one in the room who walked in unarmed. After EFCA, the only winner is the side that comes in armed with data and can persuade the arbitrator to adopt their new contract terms.

Three suggestions for administrative lawyers would be, (1) watch the final text of the delegation to FMCS for amendments that give reviewable standards to be followed by arbitrators, as in Ohio and elsewhere; (2) anticipate that this new FMCS rulemaking process will have huge impacts and will draw in more law firm partners than the entire staff of FMCS; and (3) understand that the complexities of judicial review of the decision to enforce the FMCS-imposed contract are tangled in Federal Arbitration Act jurisprudence as well as the APA’s 706 case law. As H.B. 800 in 2007 was a broad delegation to FMCS, so will its 111th Congress version be. Adjudications? Arbitrations? High-Stakes Rulemaking? Broad Delegations? EFCA for administrative lawyers has lots of potential for being called “arbitrated and capricious.” Need steady work but can’t join a union? Learn some interest arbitration skills and, if EFCA passes, join in the evolution of this important field of 21st Century legislation.

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There is, moreover, no danger that EPA will declare that carbon dioxide emitted by your car is an “air pollutant” (and that therefore you should pay a civil penalty) but that the carbon dioxide emitted by my car is not. Absent fears of arbitrarily unequal treatment, respect for representative democracy suggests that politically accountable officials should be free to choose among reasonable interpretations of “air pollutant.”

Stepping back, constitutional standing doctrine has framed the debate over how to block judicial usurpation of political power around a very bad question: What sort of “injury” does the Constitution, which is silent on this point, require a plaintiff to show to gain access to the federal courts? Attempting to answer this question has spawned many decades of confusing (even embarrassing) case law picking apart the metaphysics of injury. A better question might be: Consistent with our historical traditions and constitutional values, how much judicial control is necessary for courts to ensure that government actions are lawful? The need for relatively tight control over government action is greatest where it targets legally cognizable interests of groups smaller than the public at large. Public actions do not implicate this danger of unequal, arbitrary treatment because they chal-
Chief Executive Obama

By John F. Cooney*

Since Ronald Reagan, each new President has issued unilateral directives shortly after entering office to establish his policy priorities and differentiate his Administration from his predecessor’s. In his first month in office, President Obama has reversed many decisions by President Bush, in a series of Executive orders and memoranda that provide important signals about his management style. He also has organized his White House in a manner that suggests that the current statutory structure is obsolete and not helpful in addressing the many problems facing the country. Taken together, these developments indicate that President Obama will attempt to impose a greater degree of centralized authority and management than has been typical of Democratic Administrations.

Initial Policy Decisions.
Unilateral Presidential Action.

President Obama has exercised his authority to manage the Executive Branch to overturn Bush Administration policies in four priority areas.

Openness in Government. The President has issued Executive orders or memoranda establishing procedures for limiting assertion of executive privilege on his own behalf or on behalf of former presidents; encouraging disclosures by agencies in response to FOIA requests; directing agencies to act in a transparent, participatory, and collaborative manner; restricting involvement in government projects by his appointees who previously served as lobbyists; and imposing mandatory, contractual post-employment constraints that would prohibit senior officials from lobbying the Executive Branch for the remainder of his Administration. 74 Fed. Reg. 4669, 4673, 4683, 4685 (Jan. 26, 2009).

Labor Relations. The President exercised his power over federal procurements to overturn four Bush Executive orders and facilitate union organizing. He issued Executive orders requiring federal agencies to insert in all government contracts a clause requiring the contractor to notify employees of their rights to organize under federal labor laws, under pain of debarment; declaring unallowable the costs incurred by government contractors in persuading workers not to unionize; preventing termination of workers upon replacement of one service contractor by another; and requiring use of project labor agreements for federal construction projects. 74 Fed. Reg. 6101, 6103, 6107, 6109 (Feb. 4, 2009); 74 Fed. Reg. 6985 (Feb. 9, 2009).

Energy and the Environment. The President issued policy directives requiring the Secretary of Transportation to accelerate the issuance of required auto fuel economy standards so that they may be imposed on model year 2011 vehicles; directing the Secretary of Energy to issue appliance energy efficiency standards promptly and to prioritize required future standards according to the expected energy savings; and “requesting” the Administrator of EPA to reconsider a prior decision to deny a request for a waiver by the State of California. The requested waiver would permit California and 13 other States to attack global warming by issuing tailpipe emissions standards for new motor vehicles that are more stringent than those required by federal law. 74 Fed. Reg. 6537 (Feb. 9, 2009); 74 Fed. Reg. 4905, 4907 (Jan. 28, 2009).

National Security. The President issued Executive orders overturning highly controversial Bush Administration policies by ordering closure of the Guantanamo detention facility within one year; banning the use of torture or other enhanced interrogation techniques not permitted by the Army Field Manual and revoking all Executive Branch directives, including those issued by the CIA, concerning detention or interrogation of detainees that were inconsistent with his policies. 74 Fed. Reg. 4893, 4897, 4901 (Jan. 27, 2009).

These Bush Administration policies had, for the most part, been created by confidential Presidential orders issued through classified National Security Council processes. President Obama chose to revoke these policies through published, non-classified Executive orders to demonstrate publicly the high priority he attaches to the abandonment of the Bush approach.

Revocation of Midnight Regulations. Beginning with President Reagan, when the White House changes parties, incoming Presidents have ordered their appointees to suspend, where possible, midnight regulations issued by the prior Administration in the weeks after the election. Immediately after his inauguration President Obama issued a memorandum to the heads of Executive departments and agencies directing that they consider extending the effective date of any final rule that had been published in the Federal Register but had not yet taken effect, for the purpose of reviewing questions of law and policy it may present. (See Regulatory Review, Memorandum of Chief of Staff Emanuel to the Heads of Executive Departments and Agencies (Jan. 20, 2009)). Obama appointees at EPA and the Department of the Interior acted promptly to suspend a series of actions by their predecessors.

The EPA suspended the effective date of a rule on the “aggregation” policy, which would permit grouping of multiple, related physical changes to power plants into a single project for purposes of evaluating the application of the New Source Review program. The Administrator also notified the States that in making decisions on air emissions permits, they “should not assume” that a December 2008 Bush EPA memorandum instructing the States that they may not limit carbon dioxide emissions from coal-fired power plants “is the final word on the appropriate interpretation” of the Clean Air Act. The agency also informed the Supreme Court that it was abandoning defense of a Bush Administration rule creating a cap and trade system for air mercury emissions. (See EPA Press

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of service employees contain detailed contractual provisions to which persons seeking to work with the government must subscribe. Utilization of the contract approach allowed the White House to exert maximum control over implementation and to avoid questions about its legal authority.

Second, many of the Obama orders simply repeal Bush policies without specifying new policies to take their place. For example, the President repealed the Bush orders on regulatory review and reverted to the Clinton process, while directing OMB to submit recommendations for process changes within 100 days. He ordered Guantanamo closed without having a plan for dealing with the detainees; instead, he created a separate Special Interagency Task Force on Detainee Disposition and directed it to submit recommendations for a substitute policy within 180 days. Exec. Order No. 13493, § 1(g). In particular, the order prohibiting enhanced interrogation techniques provided that no federal employee may rely upon any legal opinion issued by the Bush Department of Justice between September 11, 2001 and January 20, 2009; however, no replacement Obama opinions were available, and the President created a Special Interagency Task Force on Interrogation and Transfer Policies to make recommendations on interrogation practices within 180 days. Exec. Order No. 13491, §§ 3(c), 5(g). In the interim, any questions about interrogation techniques will have to be resolved by the Attorney General on a case-by-case basis.

The incomplete nature of the policy-making suggests that the President’s principal concern is demonstrating publicly his Administration’s abandonment of discredited policies; the details of the replacement policies are a lesser concern.

Restructuring the White House

President Obama has made significant changes in the organization of the White House by giving officials on his personal staff lead responsibility for policy formulation in critical areas, in disregard of the statutory structure of his office. In corporate terms, the President has reduced his direct reports to concentrate power in his own office.

The President has created a new Office of Urban Affairs in the White House and appointed Carol Browner to coordinate energy and environmental policy, at the expense of the Council on Environmental Quality, and Larry Summers to determine economic policy through the National Economic Council, ignoring the Council of Economic Advisers. He also sought to give Senator Daschle a dual appointment as Secretary of HHS and health-reform czar on his White House staff. This combination would have proved a nightmare; it was virtually certain to have generated difficult executive privilege battles had the Senator not withdrawn. See Letter dated February 23, 2009 from Senator Robert C. Byrd to President Obama.

In these appointments, the President has ignored the existing institutional structure to centralize policymaking on a functional basis. The President’s functional approach to policymaking is most apparent in his announced intention to reconfigure the National Security Council by adding agencies on an issue-by-issue basis and establishing new directorates to deal with department-spanning issues such as cybersecurity, energy, climate change, nation-building, and infrastructure. See “Obama’s NSC Will Get New Power,” Washington Post A1 (Feb. 8, 2009).

The President’s desire to reshape the Executive Office of the President to facilitate functional policymaking, and his acute understanding of the operation of the Executive Branch, are best demonstrated by his combination of energy and environment under a senior adviser on his personal staff. The White House regulatory review process has always concentrated on EPA rules because they offer greater costs, potential benefits, and political controversy than any other regulations. Opponents of EPA rules typically have recruited the Department of Energy to champion objections within the White House policy dispute resolution process.

By concentrating policy responsibility for energy and environment in a single official and appointing a former EPA Administrator to the position, President Obama has exercised direct political control over the issues and substantially reduced the ability of EPA’s opponents to block its rules in the White House.
His intention to exercise authority on a centralized basis is also manifested by statements in multiple Executive orders that nothing in the directives shall be construed to impair or otherwise affect the functions of OMB “relating to budget, administrative, or legislative proposals.” Such a concentration of authority is common for Republican Administrations but unusual for recent Democratic Administrations, which typically are staffed by policy entrepreneurs who thrive under a more distributed allocation of authority.

The statutory design of the Executive Office of the President has not changed significantly since OMB was created in 1974. President Obama’s initial decisions may reflect an understanding that the problems facing the President have changed over the last 35 years and that the White House needs to be reorganized to discharge those responsibilities more effectively.

Petition Clause Interests

The Supreme Court’s approach to the Speech Clause, and its emphasis on the systemic values of speech to a system of self-government over individual autonomy values, contrasts sharply with the Court’s approach to standing doctrine, which emphasizes individual values of “injury in fact” to the near exclusion of consideration of the systemic value that access to court for judicial review has in our system of government. Yet the Court has acknowledged, in *McDonald v. Smith*, 472 U.S. 479, (1985), that the Petition Clause guaranty of the First Amendment includes petitions to the judicial branch for redress and has suggested that the petition and speech clauses are “cut from the same cloth.” If anything, the Petition Clause is textualy more firmly anchored to the system of representative self-government and the relationship between citizen and state than the Speech Clause. After all, the Petition Clause directly guarantees the right to “petition government for the redress of grievances.”

A functional First Amendment analysis of standing doctrine would recognize that the judicial system is not just a First Amendment public forum for the purpose of judicial petitioning rights, but is the only judicial public forum for petitioning rights. Differential access to such a forum should be subject to heightened scrutiny, and should be upheld only where the distinctions are substantially related to an important governmental interest. Similarly, as current standing doctrine has the effect of favoring one viewpoint (challenges to overregulation brought by regulated industry) over another viewpoint (challenges to underregulation brought by regulatory beneficiaries), this viewpoint discriminatory effect should invoke heightened scrutiny under a First Amendment analysis.

Under such a functional analysis, the rationales for a restrictive standing doctrine offered by the Supreme Court fail, as they fall short of the sort of governmental interests that justify restrictions on First Amendment interests or can be achieved with a less restrictive version of standing doctrine. These rationales include the avoidance of judicial intrusion into the Executive role to “take care that the laws are faithfully executed,” avoidance of advisory opinions on hypothetical facts, avoidance of judicial intrusion into the Congressional legislative function, the assurance of sufficiently adverse presentation of concrete issues, and the avoidance of sham or collusive litigation. The separation of powers interest in avoiding judicial intrusion into the executive function is more than adequately protected by the highly deferential standard of judicial review applied to administrative rulemaking under *Chevron, Inc. v. N.R.D.C.*, 467 U.S. (1984). Similarly, the ripeness elements of *Abbott Laboratories v Gardner*, 387 U.S. 136 (1967) assures the avoidance of hypothetical or advisory opinions in judicial review of administrative rulemaking. Both of these independent doctrines assure the functional interests of standing doctrine without compromising petition rights in a viewpoint-differential way. Similarly, challenges to administrative rulemaking do not pose any risk of judicial intrusion into the Congressional legislative function, as the courts are asked to carry out Congressional mandates in such a case, not to countermand them.

These interests in ensuring concrete adverseness and avoiding collusive litigation might likewise be assured in a more viewpoint neutral approach to standing doctrine. Few doubt the institutional capacity and dedication of ideologically interest groups such as the national environmental and consumer organizations to forcefully argue and present the pro-regulatory position, and their capacity is undoubtedly greater than that of individually harmed but resource limited plaintiffs. Both institutional litigating capacity and genuineness of interest are interests that courts routinely assess in a viewpoint neutral fashion—as, for example, where courts qualify lead plaintiffs and lead counsel in class action litigation.

No court has yet accepted the argument that the right to petition is a competing constitutional value that limits the restrictiveness of standing doctrine, although it was raised by amici in *Bennett v. Spear*, 520 U.S. 154 (1997). The Supreme Court is likely to address the issues of ripeness and standing in an environmental organization’s challenge to agency procedural rules in *Summers v. Earth Island Institute*, No. 07–463, argued this Term; however, no petition clause arguments were raised in that case. Nevertheless, First Amendment petition clause interests are in stark contrast to the viewpoint differential application of standing doctrine as a limit on judicial review of agency rulemaking at the behest of public interest organizations. A straightforward application of First Amendment heightened scrutiny argues strongly for expanded standing rights for ideologically motivated organizations challenging agency rulemaking as underregulation.
Spring Regulatory Conference

Kings Mill Resort, Williamsburg, VA
April 16–19, 2009

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Scott D. Delacourt, Richard W. Parker, and Jean S. Cooper

Section Chair
The Honorable H. Russell Frisby, Jr.

Tentative Agenda

Thursday, April 16, 2009
Early Arrivals, Optional Activities
(Golf, Colonial Williamsburg)

Friday, April 17, 2009
10:30 a.m. Welcome & Arrivals, Refreshments
11:00 p.m. – 12:30 p.m. CLE Program 1: OIRA Role in the New Administration
12:30 p.m. – 1:30 p.m. Lunch
1:30 p.m. – 3:00 p.m. CLE Program 2: Ethics in Government: The Obama Executive Order
3:15 p.m. – 4:45 p.m. CLE Program 3: New Financial Rules
5:00 p.m. – 7:00 p.m. Reception
10:00 p.m. – 11:00 p.m. Hospitality

Saturday, April 18, 2009
8:00 a.m. – 9:00 a.m. Breakfast
9:00 a.m. – 12:00 p.m. Council Meeting
12:00 p.m. – 1:00 p.m. Working Lunch & Publications Committee Meeting
6:30 p.m. – 9:30 p.m. Off-Site Dinner

Sunday, April 19, 2009
8:00 a.m. – 9:00 a.m. Breakfast
9:00 a.m. – 12:00 p.m. Council Meeting

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Kings Mill Resort, Williamsburg, VA

A limited block of rooms is available for Thursday, Friday & Saturday nights. Reservations MUST be made prior to March 24, 2009. The room rate is $199 per night single/double (10% tax + $2 per night). Call the hotel at 1-757-253-1703 and request the ABA Administrative Law & Regulatory Practice Section Spring Meeting Rate.
The Supreme Court has decided two cases relevant to administrative law practitioners this quarter. Both raised issues of statutory interpretation.

On January 21, the Court decided *Pearson v. Callahan*,—U.S. —, 129 S. Ct. 808 (2009), a § 1983 case that turned on police officers’ entitlement to qualified immunity. Unusually, however, the Court also asked the parties to argue whether the procedures mandated in *Saucier v. Katz*, 533 U.S. 194 (2001), should be retained, and its decision turned in part on: (1) the role of *stare decisis* in the applications of statutes; and (2) the relative propriety of the Court and Congress overruling prior court decisions related to procedures to use when applying statutes. As the *Pearson* Court explained:

In *Saucier*, 533 U.S. 194, 201, this Court mandated a two-step procedure for resolving government officials’ qualified immunity claims. First, a court must decide whether the facts that a plaintiff has alleged (see Fed. Rules Civ. Proc. 12(b)(6), (c)) or shown (see Rules 50, 56) make out a violation of a constitutional right. 533 U.S., at 201. Second, if the plaintiff has satisfied this first step, the court must decide whether the right at issue was “clearly established” at the time of defendant’s alleged misconduct. *Id.*. Qualified immunity is applicable unless the official’s conduct violated a clearly established constitutional right.

*Pearson*, 129 S. Ct. at 815-16. The Court of Appeals, applying the *Saucier* procedure, concluded that the officers were not entitled to qualified immunity. However, as the Court emphasized, both Supreme Court Justices and lower court judges had criticized the procedure. *Id.* at 816.

In a unanimous opinion by Justice Alito, the *Pearson* Court concluded that the *Saucier* procedures in § 1983 actions should no longer be considered mandatory. *Pearson*, 129 S. Ct. at 818. Principles of *stare decisis*, the Court explained, apply with less force to procedural and evidentiary matters than they do to cases involving contract or property rights, because of the reduced reliance interest. *Id.* at 816 (citing and quoting *Payne v. Tennessee*, 501 U.S. 808, 827, 828 (1991)). Moreover, while the Court recognized that changes to Court interpretations of statutes should normally come from Congress, “the *Saucier* rule is judge made and implicates an important matter involving internal Judicial Branch operations. Any change should come from this Court, not Congress.” *Id.* at 817.

Pragmatic considerations counseled in favor of overturning the mandatory nature of the *Saucier* procedures, given these legal realities. “Because of the basis and the nature of the *Saucier* two-step protocol, it is sufficient that we now have a considerable body of new experience to consider regarding the consequences of requiring adherence to this inflexible procedure. This experience supports our present determination that a mandatory, two-step rule for resolving all qualified immunity claims should not be retained.” *Id.* at 817. Moreover, freed of the strict *Saucier* procedural constraints, the *Pearson* Court found that the officers were entitled to qualified immunity. *Id.* at 822-23.

Five days later, the Supreme Court decided *United States v. Eurodif S.A.*,—U.S.—, 129 S. Ct. 878 (2009), deciding unanimously, in an opinion by Justice Souter, to uphold, pursuant to a *Chevron* analysis, the Commerce Department’s interpretation of a provision of the Tariff Act that calls for “‘antidumping’ duties on ‘foreign merchandise’ sold in the United States at less than its fair value.” 19 U.S.C. § 1673. This provision does not apply to international sales of services.

The issue was whether antidumping duties should apply to separative work unit (SWU) contracts for uranium processing. Under these contracts, domestic utilities send uranium abroad to be processed into low enriched uranium (LEU). Overseas processes mixed sources of uranium, so that it was unlikely that domestic utilities received back exactly the same uranium that they had sent abroad. Moreover, domestic utilities allegedly paid less than fair market value for the LEU they received pursuant to SWU contracts. Thus, the SWU arrangements constitute both a sale of services, exempt from the duty, and a sale of goods, subject to the duty. The Commerce Department determined that the antidumping duties apply to the LEU received pursuant to these contracts.

Almost without pause (or much analysis), the Supreme Court deferred to the Commerce Department, engaging in only an abbreviated *Chevron* analysis—despite the Commerce Department’s change of position regarding how to categorize SWU contracts. The Court emphasized that “[t]he issue is not whether, for purposes of 19 U.S.C. § 1673, the better view is that a SWU contract is one for the sale of services, not goods”; instead, “[t]he statute gives this determination to the Department of Commerce in the first instance, § 1673(1), and when the Department exercises this authority in the course of adjudication, its interpretation governs in the absence of unambiguous statutory language to the contrary or unreasonable resolution of language that is ambiguous.” *Eurodif*, 129 S. Ct. at 886-87 (citing *United States v. Mead Corp.*, 533 U.S. 218, 229-230 (2001) (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984))). Moreover, the Department’s change in position regarding the status of SWU contracts did not affect the *Chevron* analysis. *Id.* at 887 (quoting *National Cable & Telecommunications Assn.*, 545 U.S. 967, 981 (2005)). “[T]he whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency.” *Id.* (quoting *National Cable & Telecommunications Assn.*, 545 U.S. 967, 981 (2005)).
By William S. Jordan III

9th Circuit Corrals Nationwide ADA Injunction Founded on Agency Interpretation

As you follow the adventures of Harry Potter or Angelina Jolie from your comfortable recliner in middle of your local multiplex theater, keep in mind the folks who must watch from wheelchairs. They can't get to the center of the row, and they can't lean back in their rigid chairs. The theater industry failed to consider those limitations when it originally designed stadium seating in the early 1990s. Wheelchair users were relegated to the bottom rows immediately in front of the screen, or to the end of rows on either side of the theater, from whence they had to crane their necks uncomfortably to watch the movie. AMC built 96 such theaters before changing the design to allow wheelchairs to enter and be situated about halfway up the slope.

In United States v. AMC Entertainment, Inc., 549 F.3d 760 (9th Cir. 2008), the Ninth Circuit struck down a nationwide injunction that would have required the 96 problematic theaters to comply with the Department of Justice's interpretation of the Americans With Disabilities Act (ADA), which prohibits discrimination against people with disabilities “in the full and equal enjoyment of . . . any place of public accommodation.” The court refused enforcement because the applicable regulation was too ambiguous and because the government had not provided notice of its demanding interpretation before at least 1998. The Ninth Circuit also held that the District Court had abused its discretion in issuing a nationwide injunction despite the fact that the Fifth Circuit had previously reached a contrary interpretation of the ADA and the regulation.

As to the retroactivity issue, when the theaters in question were built, the applicable regulation required theaters to provide for wheelchair seating, and to assure “lines of sight comparable to those for members of the general public,” but the regulation did not address the viewing angle problems created by the original stadium seating designs. Despite much related litigation leading to differing results, it was not until 1998 that DOJ argued in an amicus brief that facilities had to provide angles of view comparable to those available to the general public. The circuit courts reached varying conclusions on that issue, as well. The Fifth Circuit rejected the argument that the ADA and the applicable regulation required theaters to provide any particular angle of view to disabled patrons. All of the various courts criticized the ambiguity of the regulation.

Then came AMC Entertainment, Inc., in which the question was whether the viewing angle requirement could be imposed retroactively. The court held that the interpretation could be imposed “only as of the date on which AMC received constructive notice,” which would have been the filing of the 1998 amicus brief, at the earliest. The court remanded to the District Court to determine when AMC could reasonably have had notice of the government’s position.

In reaching this conclusion as a matter of due process, the court emphasized that the public must have adequate notice “as to what behavior complies with the law.” It also emphasized that even highly trained circuit judges had not been able to discern this interpretation of the regulation, much less “those of ordinary intelligence.” Given the conflicting litigation outcomes and the much-criticized ambiguity of the regulation, the court refused to apply it retroactively. It made no difference that internal AMC documents apparently revealed that the company had been aware of this issue: “In other words, the capacity of in-house counsel or others to read correctly legislative tea-leaves does not alleviate the government from its obligation to fashion coherent regulations that put citizens of ‘ordinary intelligence’ on notice as to what the law requires of them.”

This ruling cuts both ways for agencies. On one hand, it suggests that the targets of government enforcement action should emphasize any later agency interpretations in an attempt to argue that the law was not sufficiently clear at the time of the other actions. On the other hand, it suggests agencies may significantly strengthen their hands as to future violations by issuing informal interpretations, even in the form of assertions in amicus briefs. Seminole Rock deference, on which the Ninth Circuit had earlier relied in accepting the viewing angles interpretation, coupled with constructive notice, could enhance agency enforcement power.

Having emphasized the need for government to speak clearly before it can expect to be obeyed, the Ninth Circuit also chastised the District Court for imposing nationwide injunctive relief despite the fact that the Fifth Circuit had previously reached a contrary position on the interpretation at issue. According to the majority, principles of comity required the District Court to exempt the Fifth Circuit from the injunction in order to protect the sovereignty of the Fifth Circuit. This ruling drew an extensive dissent from Judge Wardlaw, who argued that principles of comity limit an otherwise appropriate nationwide injunction only where it would be impossible to comply with the legal positions in both of the conflicting circuits. Since compliance with the Ninth Circuit’s ruling would not violate the law of the Fifth Circuit, comity did not apply. The majority’s position threatens to make Swiss cheese of some nationwide injunctions. On the other hand, it may prompt agencies in this situation to seek certiorari in order to have the Supreme Court set a uniform standard.

* C. Blake McDowell Professor of Law, The University of Akron School of Law; Council Member; Chair Judicial Review Committee; and Contributing Editor.
D.C. Circuit Distinguishes Alaska Professional Hunters

Devon Energy Corp. v. Kempthorne, 551 F.3d 1030 (D.C. Cir., 2008), involved the calculation of royalties to be paid under a lease to extract coalbed methane gas from federally owned lands. A Department of Interior rule provided that royalties must be based upon the value of the gas as delivered in “marketable condition,” which was the “gross proceeds” from the lease, minus certain deductions, including transportation costs to the pipeline into which the gas would be inserted. Interior rejected Devon Energy’s attempt to deduct the cost of dehydration and compression, which were necessary to achieve “marketable condition,” when determining the amount of the royalties.

Devon Energy argued that it had consistently relied upon contrary positions taken by Interior officials. In 1995, the Deputy Director of the Minerals Management Service (MMS) had written two memoranda suggesting the dehydration and compression costs could be included in costs of transportation and thereby excluded from the amount considered in determining royalties, and in 1996 an Associate Director issued a “Dear Operator” letter essentially adopting that position. Only in 2003, after Devon Energy sought confirmation that its interpretation was correct, did the Acting Assistant Secretary reject the informal documents and determine that the dehydration and compression costs had to be included in the royalty-basis amount because they were necessary to render the gas in “marketable condition.”

Addressing the merits of the interpretation, the D.C. Circuit deferred to the agency’s interpretation of its own regulation, particularly appropriate in such a complex area. The court then turned to Devon Energy’s argument that the agency had violated the APA by failing to provide notice and comment before issuing the new interpretation. The company based this argument on the logic of Alaska Professional Hunters, under which the court had required notice and comment to change an interpretation long relied upon by the affected industry.

The court rejected this argument, emphasizing that the 1995 and 1996 informal statements had been issued by officials with no authority to bind the agency. Relying on Bennett v. Spear, the court wrote that these informal statements did not have the “force of law” because they did not mark the culmination of the agency’s decisionmaking process, and they did not result in “legal consequences,” as distinct from practical consequences. The fact that the company purported to have relied upon those statements made no difference. The court also noted that the company itself had sought reassurance in 2002, several years after issuance of the informal statements, so it must have had some question about the validity of its position.

Finally, the court distinguished Alaska Professional Hunters on the ground that the agency statement forming the basis for reliance in that case had been upheld in a formal adjudication. This suggests a narrowing of Alaska Professional Hunters, which could be read to require notice and comment in order to change a range of informal agency statements broader than those addressed in formal adjudications.

10th Cir. Finds Counties Have No Standing to Challenge BLM Action

If you are a local government thinking about suing an agency acting against the interests of one of your local industries, you might want to think again about where best to spend your precious litigation resources. Two counties tried just that in Stewart v. Kempthorne, 2009 WL 225874 (10th Cir. 2009), and were dismissed for lack of standing.

The counties and various individuals who wanted grazing permits challenged the Bureau of Land Management’s decision to uphold a transfer of grazing rights to the Canyonlands Grazing Corporation. Although the court never says so directly, it appears from (1) the fact that the Canyonlands Grazing Corp. had only four head of cattle, and (2) the fact that Canyonlands was joined in the litigation by the Grand Canyon Trust, that Canyonlands actually wanted to eliminate or reduce grazing on the lands in question. The counties asserted that the decline in the free-range cattle industry would harm the area economically and aesthetically, causing a decline in sales and property taxes.

On the merits, the challengers argued that Canyonlands was not qualified to hold grazing rights under the Taylor Grazing Act because it did not own livestock or intend to graze livestock on the land. The court upheld the BLM’s decision in light of the ALJ’s holding that Canyonlands had obtained four head of cattle two days before final approval of its grazing rights, and on the ground that there was no requirement that the BLM engage in a subjective inquiry into the intent of the grazing rights applicant. Canyonlands met the applicable criteria, so it was entitled to keep the rights. Any actual grazing requirement would be considered in light of later developments, not at the time of application.

As to standing, the court first found the BLM’s decision caused no direct injury to the counties. The court considered the asserted injury to be “merely conjectural or hypothetical,” and if injury did occur, it was not “fairly traceable to the challenged action of the BLM.” Under principles dating back at least to Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976), a party not directly affected by an agency decision has considerable difficulty establishing standing where the harm it alleges could be caused by developments other than the reaction to the agency’s decision. In the case at hand, for example, the possible decline in grazing would have resulted from a decision by Canyonlands, rather than from the BLM’s decision to grant the grazing rights to a fully qualified applicant. Virtually any local government raising this sort of argument

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against an agency decision or regulation affecting one of its industries would likely have difficulty with this aspect of standing doctrine.

D.C. Circuit Splits on When Agency Has Constructively Reopened Long-Standing Rule

The Clean Air Act (CAA) provides that a challenge to a regulation authorized by the Act must be filed “within sixty days from the date notice” of the regulation’s promulgation is published in the Federal Register. EPA no doubt thought this meant that a regulatory decision reached in 1994 was safe from attack more than a decade later. Not so, according to Judges Rogers and Tatel of the D.C. Circuit in Sierra Club v. EPA, 551 F.3d 1019 (D.C. Cir. 2008), over a vigorous dissent by Judge Randolph.

Section 112 of the CAA imposes on hazardous pollutants a particularly stringent “emission standard” known as Maximum Achievable Control Technology (MACT). The act defines “emission standard” as a limit that controls pollutants “on a continuous basis.”

The “continuous basis” provision can pose difficulties during so-called “SSM” events—startups, shutdowns, and malfunctions. In response to these difficulties, EPA in 1994 exempted SSM events from MACT requirements, but it required each polluter to develop and maintain an “SSM plan” showing how it would best maintain compliance during SSM events. The SSM plan became by 2006, when EPA decided to eliminate the SSM plan requirement, which at least provided some discernable protection when such events occurred. This meant that the stakes of judicial review that time were significantly lower than they became by 2006, when EPA decided to eliminate the SSM plan requirement. An affected interest might well have thought a 1994 challenge not worth the effort, but have made the opposite decision to the result of the change in 2006. To EPA’s dismay, the result was defeat for its longstanding exemption for SSM events.

Judge Randolph dissented, arguing that an agency reopens a regulation for the purpose of a judicial review provision of this sort only when (1) the agency seeks comment on an existing regulation or indicates that it has reconsidered a regulation in response to comments, or (2) the agency gives the old regulation new significance by incorporating it by reference in a new regulation. To him, the 2006 change merely made the 1994 regulation more difficult to enforce, but it did not reopen the substantive decision made in 1994. A noted scholar of administrative law, Judge Randolph argued that the majority’s position would contribute to regulatory instability. “The majority’s rationale implies that each time EPA changes an emissions regulation, it risks subjecting every related regulation to challenges from third parties. Such a regime, and the instability it generates, is intolerable.” He also complained that the court should not have reached the merits because the issue had not been briefed by the parties.

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communications Assn., 545 U.S. at 981 (quoting Smiley v. Citibank (South Dakota), N.A., 517 U.S. 735, 742 (1996))).

The Court emphasized that SWU contracts do not fall neatly into either regulatory category—sale of goods or sale of services— but rather were a blend of both. As such:

This is the very situation in which we look to an authoritative agency for a decision about the statute’s scope, which is defined in cases at the statutory margin by the agency’s application of it, and once the choice is made we ask only whether the Department’s application was reasonable. As to that, the Commerce Department relied on two related characteristics of these transactions in deciding SWU contracts should be treated as a sale of LEU. It stressed that the utility in a SWU contract provides cash plus a fungible commodity that is not tracked after its delivery to the enricher, in exchange for a product owned by the enricher. And it recognized that the enrichment process results in a substantial transformation of the unenriched uranium.

Id. at 888-89. Thus, the Court concluded, “[w]here a domestic buyer’s cash and an untracked, fungible commodity are exchanged with a foreign contractor for a substantially transformed version of the same commodity, the Commerce Department may reasonably treat the transaction as the sale of a good under § 1673.”
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