

REGULATORY HIDE AND SEEK: WHAT AGENCIES CAN (AND CAN'T) DO TO LIMIT JUDICIAL REVIEW

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Abstract: Many authors discuss judicial oversight of agency actions. Our subject, which is less well examined, is agencies' role in modulating that oversight. We consider cases in which the timing or form of an agency action has curtailed judicial review of the agency's policy choices. In some such cases, the agency's choice of form deprived the court of statutory or Article III jurisdiction. In others, the court chose to delay or deny review to avoid interfering with agency policy development. Despite these differences, though, all such "reviewability" cases pose important constitutional questions about the degree to which an agency should be able to limit judicial oversight of its activities. We argue that courts pay too little attention to these questions, and we propose a more systematic framework for evaluating the constitutional implications of allowing an agency to modulate the availability of judicial review by manipulating the structure of its actions.

INTRODUCTION

The "dominant narrative of modern administrative law" states that courts are "key players who help tame, and thereby legitimate, the exercise of administrative power."¹ This narrative underlies the U.S. Su-

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¹ M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1413 (2004); *see also* LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 320 (1965) ("The availability of judicial review is the necessary condition, psychologically if not logically, of a system of administrative power which purports to be legitimate, or legally valid."); Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules for a Complex World*, 72 CHI.-KENT L. REV. 987, 1023 (1997) (stating that judicial review has the potential to "contribut[e] . . . to the legitimization of the regulatory process"); Elena Kagan, *Presidential*

preme Court's familiar "presumption favoring judicial review of administrative action."² The narrative also explains the Court's viscerally negative reaction to the suggestion, in the 2010 case *Kucana v. Holder*,³ that ambiguous language in the Immigration and Nationality Act (INA) should be read to delegate to the Attorney General the authority to shield certain of his asylum decisions from court review.⁴ Such an "extraordinary delegation," the *Kucana* Court said, would give "the Executive . . . a free hand to shelter its own decisions from abuse-of-discretion appellate court" oversight.⁵ Lower courts, too, have objected to the seeming irregularity of permitting agencies to shelter their decisions from review. The U.S. Court of Appeals for the Eleventh Circuit, for example, has stated (without citation) that it is "axiomatic" that Congress cannot delegate to an agency the power "to oust state courts and federal district courts of subject matter jurisdiction."⁶ If agencies could hide their actions from judicial oversight, the dominant narrative asks, what would ensure the fundamental lawfulness of those actions?

Anyone familiar with the convoluted question of "reviewability"⁷ in administrative law must acknowledge, though, that agencies regularly act in ways that either restrict courts' jurisdiction or otherwise limit judicial review. In other words, agencies frequently *do* "shelter [their] own decisions" from court oversight.⁸ More curiously, in reviewability cases, in contrast to statutory interpretation cases like *Kucana*, courts often acquiesce in the resulting curtailment of their purview.⁹

Administration, 114 HARV. L. REV. 2245, 2350 (2001) (identifying "judicial review" as "a simple, if sometimes imperfect, solution to the problem" of presidential lawlessness).

² *Kucana v. Holder*, 130 S. Ct. 827, 839 (2010); see also *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 434 (1995) (recognizing the presumption); *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 63–64 (1993) (same); *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991) (noting the "well-settled presumption favoring interpretations of statutes that allow judicial review of administrative action"); *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986) (invoking the presumption); *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967) (same).

³ 130 S. Ct. at 839–40. One of the authors, Amanda C. Leiter, was appointed by the Court to serve as *Amicus Curiae* in Support of the Judgment Below for this case.

⁴ Immigration and Nationality Act, ch. 477, 66 Stat. 163 (1952) (codified as amended in 8 U.S.C. §§ 1101–1537 (2006)).

⁵ *Kucana*, 130 S. Ct. at 839–40.

⁶ *Miller v. FCC*, 66 F.3d 1140, 1144 (11th Cir. 1995); see also *Carlyle Towers Condo. Ass'n v. FDIC*, 170 F.3d 301, 310 (2d Cir. 1999) ("[I]t is 'axiomatic' that agencies can neither grant nor curtail federal court jurisdiction . . ."). But see *Owens v. Republic of Sudan*, 531 F.3d 884, 890 (D.C. Cir. 2008) (rejecting the Eleventh Circuit's "axiomatic" dicta).

⁷ See generally RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* 1217–1400 (5th ed. 2010) (discussing reviewability doctrines).

⁸ *Kucana*, 130 S. Ct. at 839–40.

⁹ See *infra* notes 133–248 and accompanying text.

Three examples prove this point. First, “[g]enerally speaking, it is much more difficult for plaintiffs to obtain judicial review of agency inaction . . . than of agency action.”¹⁰ Yet the decision to refrain from regulating or taking an enforcement action does as much to delimit the relevant statutory and regulatory regime as would any reviewable rule-making or prosecution. Consider, for example, the paradigmatic inaction case of *Heckler v. Chaney*, decided by the Supreme Court in 1985.¹¹ In *Heckler*, the Food and Drug Administration (FDA) decided not to enforce the Food, Drug, and Cosmetic Act’s (FDCA) “misbranding” provisions, which prohibit the “unapproved use of an approved drug,” against two states that were using otherwise-approved drugs in prison executions without FDA approval.¹² The Supreme Court declared the FDA’s non-enforcement decision “presumptively unreviewable.”¹³ Plainly, though, the agency’s choice not to enforce the misbranding provisions in the execution context embodied substantive decisions about enforcement priorities and, in turn, about the limits of the provisions’ reach. As a practical matter, a statute’s prohibitions extend only as far as the implementing agency is prepared to enforce them. As *Heckler* makes clear, therefore, agencies shield some policy choices from judicial oversight when they decline to act.¹⁴

Second, some statutes permit agencies to establish administrative review schemes that must be exhausted before an affected individual may obtain judicial review. Under the Prison Litigation Reform Act (PLRA), for example, an inmate who asserts that prison officials have violated his civil rights must exhaust any applicable prison review procedures before he may file suit in federal court.¹⁵ If he fails to exhaust

¹⁰ Eric Biber, *Two Sides of the Same Coin: Judicial Review of Administrative Agency Action and Inaction*, 26 VA. ENVTL. L.J. 461, 465 (2008); see Jacob E. Gersen & Anne Joseph O’Connell, *Hiding in Plain Sight? Timing and Transparency in the Administrative State*, 76 U. CHI. L. REV. 1157, 1188 (2009) (“Although agency inaction is sometimes grounds for legal challenge, in practice it is extremely difficult to drag an agency into court to defend its policymaking reticence.”); see also *Heckler v. Chaney*, 470 U.S. 821, 832–33 (1985) (“[A]n agency’s decision not to take enforcement action should be presumed immune from judicial review under [section] 701(a)(2) [of the Administrative Procedure Act].”). *But see* *Massachusetts v. EPA*, 549 U.S. 497, 527–28 (2007) (reviewing the EPA’s denial of a petition for rulemaking).

¹¹ 470 U.S. at 823–24.

¹² *Id.* (citing a prior version of 21 U.S.C. § 352(f)).

¹³ *Id.* at 832–33.

¹⁴ See *id.* See generally Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. REV. 1657 (2004) (arguing that current law on agency inaction allows agencies to shelter arbitrary decisions from outside oversight).

¹⁵ *Woodford v. Ngo*, 548 U.S. 81, 93 (2006) (citing a prior version of 42 U.S.C. § 1997e(a)).

these remedies within applicable time limits, he may find himself permanently barred from obtaining federal court review of his civil rights claim.¹⁶ Thus, agencies can (and do) curtail court review of their actions by establishing administrative review procedures that are sufficiently onerous (without violating due process protections¹⁷) to dissuade or bar some claimants.¹⁸

Finally, some statutes restrict the categories of agency action that courts may review. For instance, the Administrative Procedure Act (APA) and numerous substantive statutes limit judicial review to final agency actions.¹⁹ Other statutes are still more restrictive. The Atomic Energy Act (AEA), for example, limits review to final Nuclear Regulatory Commission decisions “granting, suspending, revoking, or amending” a nuclear power facility’s license or construction permit.²⁰ Under provisions like these, “[t]he form of the regulatory action dictates the

¹⁶ *Id.*

¹⁷ A state bureau of prisons that attempted to curtail judicial review by establishing an absurdly onerous administrative exhaustion precondition—such as a requirement to file any administrative grievance within an hour of an alleged civil rights abuse—would presumably run afoul of the U.S. Constitution’s Due Process Clause. *See* U.S. CONST. amend. XIV, § 1. The *Ngo* majority declined to reach this question, but it did not take issue with the fifteen-working-day period of limitations imposed under California law. 548 U.S. at 86, 102–03.

Respondent contends that requiring proper exhaustion will lead prison administrators to devise procedural requirements that are designed to trap unwary prisoners and thus to defeat their claims. . . . [W]ith respect to the possibility that prisons might create procedural requirements for the purpose of tripping up all but the most skillful prisoners, while Congress repealed the “plain, speedy, and effective” standard, we have no occasion here to decide how such situations might be addressed.

Id. at 102–03 (citation omitted).

¹⁸ *See id.* at 118 (Stevens, J., dissenting).

[T]he Court’s engraftment of a procedural default sanction into the PLRA’s exhaustion requirement risks barring [meritorious] claims when a prisoner fails, *inter alia*, to file her grievance (perhaps because she correctly fears retaliation) within strict time requirements that are generally no more than 15 days, and that, in nine States, are between 2 and 5 days.

Id. (footnotes omitted).

¹⁹ 5 U.S.C. § 704 (2006) (APA finality requirement); *see also* 8 U.S.C. § 1252 (2006) (Immigration and Nationality Act finality requirement for review of removal orders); 10 U.S.C. § 950g(a) (2006 & Supp. III 2009) (Military Commissions Act finality requirement); 42 U.S.C. § 2239 (2006) (Atomic Energy Act finality requirement); 42 U.S.C. § 405(g) (Social Security Act finality requirement).

²⁰ 42 U.S.C. § 2239(a), (b)(1); *see* Natural Res. Def. Council v. U.S. Nuclear Regulatory Comm’n, 680 F.2d 810, 815 (D.C. Cir. 1982).

... availability and nature of judicial review.”²¹ As a result, the implementing agency can choose to begin policy development via ostensibly unreviewable forms of action, thereby potentially “immunizing its law-making from judicial review.”²²

Indeed, the facts of some reviewability cases in this third category strongly suggest that the agency deliberately sought to insulate its policy choices from court oversight. For example, in *Reckitt Benckiser, Inc. v. EPA*, decided by the U.S. Court of Appeals for the D.C. Circuit in 2010, the Environmental Protection Agency (EPA) sent a letter to pesticide manufacturer Reckitt Benckiser, Inc. (“Reckitt”), stating that, unless the company made various safety-enhancing changes to the marketing, packaging, and distribution of its rodenticides, the products “would be considered misbranded” under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) beginning in June 2011.²³ Reckitt sued, claiming the EPA had no authority to issue such a threat without first cancelling the registration of the rodenticides—a move that would have required the agency to prove its case before an administrative law judge and then a federal court of appeals.²⁴ Responding to Reckitt’s suit, the EPA asserted that its initial warning letter was neither final nor ripe for review.²⁵ The EPA thus sought a regulatory outcome (changes to Reckitt’s products), and made two strategic moves in an effort to insulate its regulatory activities from court oversight: first proceeding via a warning letter rather than a cancellation hearing, and then arguing that the letter itself was unreviewable because it was nonfinal and unripe.²⁶

As these three examples illustrate, reviewability doctrines enable agencies to wield significant de facto control over the scope of court oversight. Yet this control is in some tension with both due process principles²⁷ and the “[s]eparation-of-powers concerns” that “caution[ed]” the *Kucana* Court “against reading legislation, absent clear statement, to place in executive hands authority to remove cases from the Judiciary’s domain.”²⁸

²¹ Magill, *supra* note 1, at 1420.

²² *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1020 (D.C. Cir. 2000) (concluding that the EPA’s Periodic Monitoring Guidance, which set out certain requirements for Title V permits issued under the Clean Air Act, was final and reviewable despite its “Guidance” title).

²³ 613 F.3d 1131, 1133 (D.C. Cir. 2010).

²⁴ *Id.* at 1134.

²⁵ *Id.* at 1136.

²⁶ *Id.*

²⁷ *Ngo*, 548 U.S. at 102–03.

²⁸ 130 S. Ct. at 834.

To be sure, reviewability doctrines differ in the degree to which they curtail judicial authority,²⁹ and in the consequences of that curtailment for regulated entities and concerned third parties.³⁰ Moreover, some courts are wise to agency maneuvering and exert oversight authority despite the seemingly unreviewable form or timing of the agency's action. In *Reckitt*, for example, the D.C. Circuit ultimately deemed the EPA's warning letter both final and ripe despite its epistolary form.³¹ Similarly, in a 2000 case, *Appalachian Power Co. v. EPA*, the D.C. Circuit reviewed an EPA Clean Air Act Guidance despite the apparently non-binding and nonfinal form of the document (which had not undergone notice-and-comment rulemaking).³² The tenor of the *Appalachian Power* opinion is quite telling—although the court purported to apply the traditional finality inquiry, it prefaced its discussion with a lengthy critique of agency efforts to evade APA procedural requirements and judicial review provisions.

The phenomenon we see in this case is familiar. Congress passes a broadly worded statute. The agency follows with regulations containing broad language, open-ended phrases, ambiguous standards and the like. Then as years pass, the agency issues circulars or guidance or memoranda, explaining, interpreting, defining and often expanding the commands in the regulations. . . . Law is made, without notice and comment, without public participation, and without publication in the Federal Register or the Code of Federal Regulations. . . . An agency operating in this way gains a large advantage. "It can issue or amend its real rules . . . quickly and inexpensively without following any statutorily prescribed procedures." *The*

²⁹ See, e.g., *Amador Cnty. v. Salazar*, 640 F.3d 373, 380 (D.C. Cir. 2011) (noting that the statutory provisions barring review work to strip courts of jurisdiction, whereas the APA's "committed to agency discretion limitation and the final agency action requirement are 'not . . . jurisdictional bar[s]'" (quoting *Oryszak v. Sullivan*, 576 F.3d 522, 524–26 (D.C. Cir. 2009)) (citing *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 353 n.4 (1984) and *Ass'n of Civilian Technicians, Inc. v. Fed. Labor Relations Auth.*, 283 F.3d 339, 341 (D.C. Cir. 2002))).

³⁰ The exhaustion doctrine, for example, bars review only if the aggrieved party fails to take advantage of whatever administrative procedures the agency has created.

³¹ *Reckitt*, 613 F.3d at 1140. The court then left it to the district judge to decide whether FIFRA permits the EPA to "bring enforcement proceedings for misbranding before, or rather than, regulatory cancellation proceedings . . ." *Id.* at 1141.

³² 208 F.3d 1015, 1020 (D.C. Cir. 2000).

*agency may also think there is another advantage—immunizing its lawmaking from judicial review.*³³

Plainly, the court felt that allowing agencies to achieve significant regulatory outcomes via a string of “unreviewable” actions would defeat administrative law’s ideals of openness, participation, and oversight.³⁴

As *Reckitt* and *Appalachian Power* make clear, reviewability doctrines are malleable, and agencies and courts alike can manipulate the doctrines to achieve widely varying levels of policy oversight.³⁵ The net result is an unpredictable and ad hoc process in which protection of separation of powers and due process principles depends on the relative willingness of agency policymakers (who determine the timing and form of an agency’s actions) and judges (who decide whether to acquiesce in an agency’s reviewability objection or instead to assert oversight authority). In light of “the importance of maintaining a uniform approach to judicial review of administrative action,”³⁶ we argue that courts need a more systematic framework to evaluate the constitutional implications of an agency’s efforts to structure its actions so as to limit court oversight.³⁷

In Part I, we outline such a framework, identifying four constitutional issues that lurk in all reviewability cases.³⁸ Three issues stem from separation of powers principles (we term these “Article III infringement,” “nondelegation,” and “underdelegation”), while one derives from the due process right (we term this “individual rights infringe-

³³ *Id.* (emphasis added) (quoting Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 85 (1995)).

³⁴ *Id.*

³⁵ See *Reckitt*, 613 F.3d at 1140; *Appalachian Power*, 208 F.3d at 1020.

³⁶ *Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704, 707 (2011) (alterations in original) (quoting *Dickinson v. Zurko*, 527 U. S. 150, 154 (1999)) (discussing the proper standard for reviewing Treasury Department regulations). Although the *Mayo* Court was extolling the virtue of maintaining a uniform standard of review across regulatory subject areas, there is equal value in maintaining uniform standards for determining whether such review is available at all.

³⁷ Indeed, except in rare cases like *Kucana* that squarely present the issue, courts in reviewability cases almost never expressly consider whether constitutional principles like separation of powers and due process permit an agency to curtail court oversight. Instead, judges focus their attention on whichever narrow reviewability doctrines apply in the particular case, entirely ignoring the fact that the invocation and applicability of those doctrines are largely within the agency’s control. See, e.g., *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 69 (2004) (focusing on reviewability of Bureau of Land Management’s failure to regulate off-road vehicle use in certain wilderness study areas); *Ohio Forestry Ass’n, Inc. v. Sierra Club*, 523 U.S. 726, 728–32 (1998) (focusing on ripeness of plaintiffs’ challenge to a U.S. Forest Service Land and Resource Management Plan).

³⁸ See *infra* notes 49–132 and accompanying text.

ment”). Then, in Part II, we turn our attention to a more theoretical question: if agencies regularly manipulate the form of their actions to “immuniz[e] [their] lawmaking from judicial review,”³⁹ what remains of the claim that courts are “key players who help tame, and thereby legitimate, the exercise of administrative power”?⁴⁰ To shed some light on this question, we apply our rubric to three recent reviewability cases: (1) *Norton v. Southern Utah Wilderness Alliance (SUWA)*,⁴¹ a 2004 case in which the Supreme Court refused to review the Bureau of Land Management’s (BLM) failure to regulate off-road vehicle use on pristine federal lands in Utah; (2) *Ohio Forestry Ass’n v. Sierra Club*,⁴² a 1998 case in which the Supreme Court fleshed out aspects of the ripeness doctrine in the context of a dispute about a management plan for Ohio’s Wayne National Forest; and (3) *Amador County v. Salazar*,⁴³ a 2011 case in which the D.C. Circuit disagreed with the Secretary of the Interior about the reviewability of the Secretary’s “‘no-action’ approval” of an Indian gaming compact.⁴⁴

Our analysis of these decisions suggests, counterintuitively, that agency manipulation of reviewability doctrines may pose a greater threat to congressional authority and executive legitimacy than to judicial authority. Where Congress has created an administrative regime that relies on judicial review for its legitimacy, as in the National Forest Management Act (NFMA), an agency that invokes reviewability doctrines to evade court oversight undermines that legislative vision and, in turn, erodes the constitutional foundation for the agency’s own actions.⁴⁵

As a remedy for this and the other potential constitutional infirmities that lurk in reviewability cases, we suggest that federal courts evaluating a reviewability objection in an administrative law case should routinely consider the separation of powers and due process implications of delaying or denying review. In the majority of reviewability cases, application of this rubric would be quite simple, and the outcome of the case would not change. As we discuss below, the relevant constitutional concerns are rarely implicated. Yet applying the rubric would not be an

³⁹ *Appalachian Power*, 208 F.3d at 1020.

⁴⁰ Magill, *supra* note 1, at 1413; *see infra* notes 133–249 and accompanying text.

⁴¹ 542 U.S. at 69.

⁴² 523 U.S. at 733.

⁴³ 640 F.3d at 380.

⁴⁴ *Id.* at 373.

⁴⁵ National Forest Management Act of 1976, Pub. L. No. 94-588, 90 Stat. 2949 (codified as amended in scattered portions of 16 U.S.C. (2006)).

empty exercise. Heretofore, courts have largely deferred to agencies' decisions about the form and timing of their actions—even in cases in which those decisions have the consequence of deferring or precluding review. Like the clear statement rule adopted in *Kucana*,⁴⁶ our rubric would ensure that courts think twice before allowing an agency to “immuniz[e] its lawmaking from judicial review.”⁴⁷ Further, the rubric would provide a sounder footing for decisions like *Appalachian Power*, in which courts choose to assert oversight authority despite the ostensibly unreviewable form or timing of the agency's action.⁴⁸

I. THE CONSTITUTIONAL CONCERNS LURKING IN REVIEWABILITY CASES

We posit that executive curtailment of judicial review raises four possible constitutional problems. The first three, which we call “Article III infringement,” “nondelegation,” and “underdelegation,” arise from separation of powers principles and correspond to each of the three branches of government—Judicial, Legislative, and Executive, respectively—whose powers might be infringed or improperly aggrandized by allowing the form or timing of an agency's action to affect the scope of judicial review. Specifically, Article III infringement covers that narrow class of cases in which an agency's curtailment of the scope of judicial review encroaches on some constitutionally irreducible power of the federal courts.⁴⁹ Nondelegation, on the other hand, encompasses two potential congressional misdeeds: (1) delegation of “the wrong kind of power, *i.e.*, ‘non-Executive’ power”; or (2) delegation of “too much power.”⁵⁰ Finally, underdelegation applies to administrative regimes that rely on judicial review of agency action for their legitimacy. When Congress has created such a regime, we contend, an agency that structures its actions so as to curtail or evade review exceeds its statutory mandate and delegitimizes the applicable regime.

The fourth potential constitutional problem, which we term “individual rights infringement,” arises not from the structure of government but from the rights of an individual plaintiff, offended by an agency's action but unable to obtain court review. Sometimes, the bar-

⁴⁶ 130 S. Ct. at 834.

⁴⁷ *Appalachian Power*, 208 F.3d at 1020.

⁴⁸ *Id.*

⁴⁹ *But see* Tara Leigh Grove, *The Structural Safeguards of Federal Jurisdiction*, 124 HARV. L. REV. 869, 874 (2011) (noting that “[m]any commentators have concluded, based on the text and structure of Article III, that” Congress's authority to restrict federal court jurisdiction is “plenary”).

⁵⁰ *Clinton v. City of New York*, 524 U.S. 417, 480 (1998) (Breyer, J., dissenting).

rier to review of the plaintiff's claim derives from Article III or prudential limits on judicial interference with the execution of the laws (as with a plaintiff who lacks standing to pursue claims).⁵¹ In other reviewability cases, though, the individual or entity injured by agency action may have a due process right of access to the courts that the Executive may not constitutionally abridge.⁵²

A. Article III Infringement

In evaluating an agency's claim that something it did (or left undone) is unreviewable, the most obvious separation of powers question is whether acceding to the agency's request to curtail review would infringe on some constitutionally irreducible power of the federal courts. We label this possibility "Article III infringement."⁵³ (The conceptually distinct issue of whether it is appropriate for the *Executive*—rather than

⁵¹ See, e.g., *Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1148–49 (2009) (noting that the standing inquiry "reflect[s] [a] fundamental limitation" on the power of the federal courts, constraining them to "redress or prevent actual or imminently threatened injury to persons caused by private or official violation of law," not to "review and revise legislative and executive action"). But see, e.g., Raoul Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 YALE L.J. 816, 817–18 (1969); Heather Elliott, *Congress's Inability to Solve Standing Problems*, 91 B.U. L. REV. 159, 168 n.39 (2011) (noting that "a number of scholars have demonstrated that [the standing doctrine's] strict limitations to access to the courts would have been foreign to the Founders" (citing Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 170–79 (1992))); George Van Cleve, *Congressional Power to Confer Broad Citizen Standing in Environmental Cases*, 29 ENVTL. L. REP. 10,028, 10,034–37 (1999).

⁵² The Supreme Court has recently observed, for example, that a U.S. citizen is entitled to "make his way to court with a challenge to the factual basis for his detention by his Government," even if that citizen is detained as an enemy combatant. *Hamdi v. Rumsfeld*, 542 U.S. 507, 536–37 (2004); see also *South Carolina v. Regan*, 465 U.S. 367, 393 (1984) (O'Connor, J., concurring in the judgment) (noting that "Congress cannot, consistently with due process, deny a taxpayer with property rights at stake all opportunity for an ultimate judicial determination of the legality of a tax assessment against him").

⁵³ There is, of course, a different sort of Article III problem that could arise in some reviewability cases: a court's decision to deny review of an agency's action could, in theory, infringe a plaintiff's "right to have claims decided before judges who are free from potential domination by other branches of government." *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848 (1986) (quoting *United States v. Will*, 449 U.S. 200, 218 (1980)). That is, there could be an *individual* Article III right distinct from the structural right. That said, the Court has had "little occasion to discuss the nature or significance" of this individual Article III safeguard. *Id.* We therefore assume, for purposes of this Article, that if Article III does indeed bestow an individual right of access to the courts in some cases, that right is adequately protected by enforcing the individual's due process rights, on the one hand, and Article III's structural protections, on the other. The latter is the subject of the present discussion; the former is discussed below. See *infra* notes 113–132 and accompanying text.

Congress—to wield authority over court jurisdiction is addressed below under “Nondelegation.”)

Whether federal courts enjoy a constitutionally protected domain is a subject of longstanding debate.⁵⁴ The “traditional view”⁵⁵ contends that the text of Article III—specifically (1) the Exceptions and Regulations Clause, which subjects the Supreme Court’s appellate jurisdiction to “such Exceptions, and . . . Regulations as the Congress shall make”;⁵⁶ and (2) the belittling reference in Section 1 to “such inferior courts as the Congress may from time to time ordain and establish”⁵⁷—gives Congress plenary power to restrict the Supreme Court’s appellate jurisdiction and the inferior courts’ original and appellate jurisdiction.⁵⁸ Other theorists argue, though, that the structure if not the text of the Constitution provides some limits on Congress’s authority in this regard.⁵⁹ One of the participants in Henry M. Hart, Jr.’s dialogue, for example, famously suggests that “the exceptions [to the Supreme Court’s

⁵⁴ See Grove, *supra* note 49, at 870 (outlining the debate).

⁵⁵ Peter J. Smith, *Textualism and Jurisdiction*, 108 COLUM. L. REV. 1883, 1885 n.4 (2008) (identifying proponents of this view).

⁵⁶ U.S. CONST. art. III, § 2.

⁵⁷ *Id.* art. III, § 1.

⁵⁸ See Grove, *supra* note 49, at 874–75 (identifying the textual support for this traditional view and citing, among others, John Harrison, *The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III*, 64 U. CHI. L. REV. 203, 204 (1997); Martin H. Redish, *Text, Structure, and Common Sense in the Interpretation of Article III*, 138 U. PA. L. REV. 1633, 1637 (1990); and Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1005 (1965)).

⁵⁹ It is beyond the scope of this paper to identify the many authors who have recently expounded this less traditional view. For a few key examples, see Akhil Reed Amar, *Taking Article III Seriously: A Reply to Professor Friedman*, 85 Nw. U. L. REV. 442, 445 (1991); Steven G. Calabresi & Gary Lawson, *The Unitary Executive, Jurisdiction Stripping, and the Hamdan Opinions: A Textualist Response to Justice Scalia*, 107 COLUM. L. REV. 1002, 1005 (2007) (“Simply put, Article III requires that the federal judiciary be able to exercise *all* of the judicial power of the United States that is vested by the Constitution and that the Supreme Court must have the final judicial word in *all* cases . . . that raise federal issues.”); Laurence Claus, *The One Court That Congress Cannot Take Away: Singularity, Supremacy, and Article III*, 96 GEO. L.J. 59, 64 (2007) (“Congress cannot use its Exceptions power to achieve particular desired answers to questions that fall within the judicial Power of the United States.”).

[M]y root textual argument is this: Article III plainly requires that the judicial power of the United States “*shall* [that is, must] be vested” in the federal judiciary, which includes one Supreme Court that “*shall*” (again, must) be established, and inferior federal courts that “*may*,” but need not, be created. And that very same “judicial power *shall* [here too, must] extend,” in the form of either original or appellate jurisdiction, “to *all* cases” involving federal questions, admiralty, and ambassadors.

Amar, *supra*, at 445 (alterations in original).

appellate jurisdiction] must not be such as will destroy the essential role of the . . . Court in the constitutional plan."⁶⁰

We need not take a side in this debate. For our purposes, it is sufficient to identify the implications of the debate for reviewability cases: if Article III restricts Congress's authority to strip federal courts of certain kinds of jurisdiction, then of course those restrictions extend at least equally to executive encroachment on the judicial sphere. It is therefore possible that in some small subset of reviewability cases, an agency's erection of a jurisdictional roadblock (as, for example, when an agency decides to proceed via some statutorily unreviewable form of action⁶¹) could infringe on the courts' constitutionally protected sphere. Importantly, however, this problem can arise only in those cases in which an agency raises a truly jurisdictional, rather than prudential, reviewability objection.⁶² The reason is straightforward: the objection must be jurisdictional in nature because a court's constitutionally protected sphere of influence cannot be threatened by the court's own decision to delay or deny review for purely discretionary reasons.⁶³

As for the mechanics of assessing whether Article III infringement is present, a court must ask itself only whether the Constitution would permit Congress to limit judicial review in the way that the agency purports to do. If Congress could do so, then the agency's assertion of the same authority may pose nondelegation, underdelegation, or individual rights problems, all of which are discussed below, but it does not infringe on an irreducible power of the courts.

B. *Nondelegation*

The next separation of powers question lurking in reviewability cases is whether the agency plausibly has authority to limit judicial review in the way it attempts to. This is really a two-part question. First, does the Constitution *permit* Congress to grant the agency the authority

⁶⁰ Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1365 (1953). For a comprehensive discussion of the current state of the literature on the issue of Congress's power to strip the Supreme Court of appellate jurisdiction and federal inferior courts of appellate and original jurisdiction, see generally Grove, *supra* note 49.

⁶¹ See *Block*, 467 U.S. at 353 n.4 ("[C]ongressional preclusion of judicial review is in effect jurisdictional . . .").

⁶² See *Amador Cnty.*, 640 F.3d at 380 (distinguishing between reviewability arguments that are jurisdictional and those that are prudential).

⁶³ See *id.*

to curtail court oversight? Second, *did* Congress grant the agency that authority in the relevant statute?

Our rubric addresses the first part of this compound question under the heading “Nondelegation.” Complicating matters, nondelegation itself has two subparts, both flagged by Justice Breyer in his dissenting opinion in the 1998 Supreme Court case *Clinton v. City of New York*.⁶⁴ First, at least in theory, Congress may have delegated the wrong *kind* of power to the agency—as, to use an extreme example, if Congress passed a statute calling on the EPA to “write all laws necessary for protection of the environment” (thereby delegating true legislative power to an agency).⁶⁵ Second, Congress may have delegated *too much* power to the agency, even though that power has the right constitutional flavor.⁶⁶ To continue the above example, this kind of nondelegation problem would be present in a statute that called on the EPA to “issue regulations to protect clean air.” Now the problem is not that the delegated power is formally legislative (“write all laws”), but instead that the power is functionally legislative—Congress wrote a statute so broad, and so lacking in content, that the agency is left to make all of the difficult policy choices about how to achieve Congress’s ill-defined objective.⁶⁷

The former, more clear-cut nondelegation problem almost never arises because it is the rare statute that expressly delegates pure legislative power to an agency.⁶⁸ That said, in the 1892 Supreme Court case

⁶⁴ 524 U.S. at 480–81 (Breyer, J., dissenting); see also *Mistretta v. United States*, 488 U.S. 361, 416–17, 419–20 (1989) (Scalia, J., dissenting) (distinguishing between the nature and the extent of a delegation).

⁶⁵ *Clinton*, 524 U.S. at 480–81 (Breyer, J., dissenting).

⁶⁶ *Id.*

⁶⁷ See, e.g., *Indus. Union Dep’t v. Am. Petroleum Inst.*, 448 U.S. 607, 687 (1980) (Rehnquist, J., concurring in the judgment) (concluding—contrary to the plurality’s view—that section 6(b)(5) of the Occupational Safety and Health Act of 1970 runs afoul of the nondelegation doctrine in part because Congress avoided “hard choices” that were “both fundamental for purposes of the statute and yet politically so divisive that the necessary decision or compromise was difficult, if not impossible, to hammer out in the legislative forge”).

⁶⁸ *But see Mistretta*, 488 U.S. at 420 (Scalia, J., dissenting). In evaluating the U.S. Sentencing Guidelines, Justice Scalia concluded:

In the present case, . . . a pure delegation of legislative power is precisely what we have before us. It is irrelevant whether the standards [for writing the Guidelines] are adequate, because they are not standards related to the exercise of executive or judicial powers; they are, plainly and simply, standards for further legislation.

Id.

Field v. Clark, the Court clearly indicated its view of this kind of congressional abdication:

That congress cannot delegate legislative power to the president is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution. . . . “The true distinction . . . is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.”⁶⁹

The real difficulty arises, of course, in determining whether a statute is so vague and lacking in standards that it effectively delegates “power to make the law” even as it purports only to grant “authority or discretion as to [the law’s] execution.”⁷⁰ The Supreme Court has consistently (if not very stringently) policed this line by requiring that “when Congress confers decisionmaking authority upon agencies [it] must ‘lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.’”⁷¹

In practice, the intelligible principle requirement does little to constrain Congress’s ability to transfer sweeping quasi-legislative authority to agencies.

In the history of the Court [it has] found the requisite “intelligible principle” lacking in only two statutes, one of which provided literally no guidance for the exercise of [agency] discretion, and the other of which conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring “fair competition.”⁷²

On the other hand, “the Court has upheld congressional delegations based upon the ‘vague and indefinite’ principles of ‘public interest, convenience, or necessity,’ and what is ‘generally fair and equita-

⁶⁹ 143 U.S. 649, 692–94 (1892) (emphasis added) (quoting *Cincinnati, W. & Z.R. Co. v. Comm’rs of Clinton Cnty.*, 1 Ohio St. 77, 88–89 (1852)).

⁷⁰ *Id.*

⁷¹ *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 472 (2001) (citation omitted).

⁷² *Id.* at 474.

ble,' or 'requisite . . . to protect the public health.'"73 If the "intelligible principle" doctrine retains any force, therefore, it is in its use as an interpretive guide for narrowing ambiguous statutory language that, read broadly, would give an agency too little guidance about how to proceed.⁷⁴ The "doctrine, in other words, now operates exclusively through the interpretive canon requiring avoidance of serious constitutional questions."⁷⁵ Interpret ambiguous statutory language narrowly, the doctrine instructs, to avoid the delegation of "excessively open-ended authority to the President."⁷⁶

To apply the nondelegation doctrine to reviewability cases, courts must first identify the type of power an agency wields when it claims that an action is unreviewable because, for example, the action is nonfinal or unripe, or administrative remedies remain unexhausted. There are three possibilities. First, if the agency's reviewability objection calls on the court to exercise truly *prudential* authority to delay or deny review (as with some ripeness⁷⁷ arguments, for example), then the agency is merely engaging in a conversation with the court about the best uses of the agency's and the court's time and expertise. In such a case, there is no need to apply the nondelegation doctrine, because the agency is discussing the efficient execution of the relevant laws (an eminently executive function) rather than wielding a delegated power over the courts. Second, if the agency's reviewability objection goes to the very existence of "a justiciable case or controversy under Article III"⁷⁸ (as with many

⁷³ Bryan Clark, Comment, *Refining the Nondelegation Doctrine in Light of REAL ID Act 102(c): Time to Stop Bulldozing Constitutional Barriers for a Border Fence*, 58 CATH. U. L. REV. 851, 860 (2009).

⁷⁴ *Mistretta*, 488 U. S. at 373 n.7 ("In recent years, our application of the nondelegation doctrine principally has been limited to the interpretation of statutory texts, and, more particularly, to giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional.")

⁷⁵ John F. Manning, *The Nondelegation Doctrine as a Cannon of Avoidance*, 2000 SUP. CT. REV. 223, 223.

⁷⁶ Adrian Vermeule, *Foreword: System Effects and the Constitution*, 123 HARV. L. REV. 4, 67–68 (2009).

⁷⁷ "The ripeness doctrine is 'drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction . . .'" *Nat'l Park Hospitality Ass'n v. Dep't of the Interior*, 538 U.S. 803, 808 (2003) (quoting *Reno v. Catholic Social Servs., Inc.*, 509 U.S. 43, 57 n.18 (1993)). Here we refer only to the prudential aspects of ripeness, such as the "[p]roblems of prematurity and abstractness' that may prevent adjudication in all but the exceptional case." *Buckley v. Valeo*, 424 U.S. 1, 114 (1976) (quoting *Socialist Labor Party v. Gilligan*, 406 U.S. 583, 588 (1972)).

⁷⁸ *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2717 (2010).

standing⁷⁹ arguments), then the agency is merely reminding the court of preexisting constitutional limits on judicial authority. Again, the non-delegation doctrine is not relevant to such a case, because the limits on the court's authority derive from the Constitution rather than from any affirmative assertion by the agency of delegated power to curtail court oversight.

The third possibility is more interesting. If the agency asserts that the form or timing of its action narrows the court's purview, then the agency is effectively wielding power over the court's jurisdiction. The same is true if the agency argues that jurisdiction is lacking because the plaintiff failed to exhaust an agency-created administrative remedy. In either case, the agency is effectively arguing that something it did (or failed to do, or some administrative review scheme that it created) has the effect of narrowing the Judiciary's sphere of influence. The only possible constitutional root of such power is Congress's authority, in Article III, to "ordain and establish . . . inferior courts,"⁸⁰ and to "regulat[e]" and "make . . . exceptions" to the Supreme Court's "appellate jurisdiction."⁸¹ If an agency argues that its affirmative choices have consequences for the scope of court jurisdiction, the agency must be wielding delegated legislative authority over the jurisdiction of the federal courts.

The Supreme Court long ago accepted that Congress may delegate the power "to regulate the practice and procedure of federal courts" to another branch of government.⁸² Justice Blackmun summarized this history in 1989 in *Mistretta v. United States*, an unsuccessful nondelegation challenge to the U.S. Sentencing Commission's authority to promulgate sentencing guidelines for the Judiciary:

In *Sibbach v. Wilson & Co.*, . . . we upheld a challenge to certain rules promulgated under the Rules Enabling Act of 1934, which conferred upon the Judiciary the power to promulgate federal rules of civil procedure. . . . We observed: "Congress

⁷⁹ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) ("Though some of its elements express merely prudential considerations that are part of judicial self-government, the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III.").

⁸⁰ U.S. CONST. art. III, § 1 ("The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.") (emphasis added).

⁸¹ *Id.* art. III, § 2 ("In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.") (emphasis added).

⁸² *Mistretta*, 488 U.S. at 387 (quoting *Sibbach v. Wilson & Co.*, 312 U.S. 1, 9-10 (1941)).

has undoubted power to regulate the practice and procedure of federal courts, and may exercise that power by delegating to this or other federal courts authority to make rules not inconsistent with the statutes or constitution of the United States.” . . . This passage in *Sibbach* simply echoed what had been our view since *Wayman v. Southard*, decided more than a century earlier, where Chief Justice Marshall wrote for the Court that rulemaking power pertaining to the Judicial Branch may be “conferred on the judicial department.”⁸³

The *Mistretta* Court recognized, however, that while Congress may confer “rulemaking power pertaining to the Judicial Branch . . . on the judicial department,”⁸⁴ it is an entirely different question whether Congress may confer that power on an executive agency. As the Court observed, “had Congress decided to confer responsibility for promulgating sentencing guidelines on the Executive Branch,” the resulting statute might “unconstitutionally . . . assign [] judicial responsibilities to the Executive or unconstitutionally . . . unite[] the power to prosecute and the power to sentence within one Branch.”⁸⁵ Intelligible principles aside, the Constitution may restrict Congress’s ability to delegate to an executive agency the authority to curtail judicial review.⁸⁶

For our discussion of reviewability doctrines, the relevant point is that to assess nondelegation issues in a reviewability case, the court must apply a four-pronged nondelegation doctrine. The first and second prongs are familiar. First, the court must assure itself, as usual, that in permitting an agency to limit review by modifying the form or timing of its action, or by establishing exhaustion procedures, Congress has not inappropriately granted the agency true lawmaking power. Determining the appropriate form and timing of a communication with regulated entities is plainly at least somewhat executive in nature, as is establishing internal agency review procedures by which an agency can double-check its own initial decisions.⁸⁷ Second, also as usual, the court must evaluate whether the statute in question provides an intelligible

⁸³ *Id.* (citations omitted) (quoting *Sibbach*, 312 U.S. at 9–10; *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825)); see also *Booker v. United States*, 543 U.S. 220, 242 (2005) (expressly noting that nothing in the decision “call[s] into question any aspect of our decision in *Mistretta*”).

⁸⁴ *Mistretta*, 488 U.S. at 387 (emphasis added) (internal quotations omitted).

⁸⁵ *Id.* at 391 n.17.

⁸⁶ See *id.*

⁸⁷ Cf. *Bowsher v. Synar*, 478 U.S. 714, 733 (1986) (“Interpreting a law enacted by Congress to implement the legislative mandate is the very essence of ‘execution’ of the law.”).

principle that adequately constrains the agency's choices about form, timing, and exhaustion. This will be a question of statutory interpretation, and may require the court to adopt a narrowing construction of the governing laws for the reasons discussed above.⁸⁸

But the inquiry cannot stop there. Rather, the court must also ask itself whether the statute in question improperly delegates “*judicial* responsibilities to the Executive.”⁸⁹ This third question is parallel to the first, though in this case it turns on the judicial, rather than the legislative, nature of the delegated power. That said, just as “a certain degree of discretion, and thus of lawmaking, *inheres* in most executive or judicial action,”⁹⁰ a certain degree of discretion over the conduct of a case, and thus of judicial responsibility, inheres in the prosecutorial function.⁹¹ As with delegations of quasi-legislative power, therefore, “it is up to Congress, by the relative specificity or generality of its statutory commands, to determine—up to a point—how small or how large”⁹² the agency's judicial responsibility shall be. And, as with ordinary delegations of quasi-legislative authority, courts can ensure that Congress never passes the elusive constitutional endpoint by again using the “intelligible principle” doctrine—the fourth prong of our expanded non-delegation inquiry—as an interpretive guide to narrow ambiguous language that might otherwise grant an agency too much authority over the scope of judicial review.

What does all of this mean in practice? The answer is far simpler than the above discussion would suggest. In a reviewability case, the court should ask itself not only the usual nondelegation questions, but also whether the relevant statute includes an adequate intelligible principle to constrain those agency choices that are relevant to reviewability, including choices about the timing and form of the agency's action and the interposition of administrative review procedures.

C. *Underdelegation*

Assuming that the governing statute satisfies this augmented non-delegation test, the final separation of powers question is whether the relevant statute in fact delegates to the agency the authority to limit

⁸⁸ See *supra* notes 74–76 and accompanying text.

⁸⁹ *Mistretta*, 488 U.S. at 391 n.17 (emphasis added).

⁹⁰ *Id.* at 417 (Scalia, J., dissenting).

⁹¹ To take just one obvious example, when the government is the plaintiff or prosecutor, it drafts the complaint and chooses (within limits) the date on which to file; thus, it controls the timing and content of the ensuing case.

⁹² *Mistretta*, 488 U.S. at 417 (Scalia, J., dissenting).

court oversight. Like nondelegation, this question raises an issue of statutory construction. Now, though, the issue is no longer whether the Constitution permits Congress to delegate to an executive agency some authority over court jurisdiction, but whether Congress intended to delegate to this agency, in this context, the authority to take advantage of jurisdictional or prudential limits on court oversight.

If Congress says, in no uncertain terms, “Agency X’s decisions are reviewable to the extent prescribed by Agency X,” then Congress plainly intended the agency to choose which of its decisions to shelter from review. If, on the other hand, the governing statute includes a broad judicial review provision, then the agency’s invocation of a reviewability limit to shield agency policy choices from court oversight threatens to eviscerate the very remedy that Congress hoped would keep the agency in check. In the latter situation, the problem is not that Congress could not constitutionally delegate to the agency the authority to limit judicial review in the identified manner (nondelegation), but rather that Congress *did not* so delegate (underdelegation). Congress intended to make review broadly available; the agency undermines that intent when it wields the form or content of its action, or the presence of an exhaustion requirement, as a shield against court oversight.

We illustrate this concern, which we term “underdelegation,” with a hypothetical that avoids the complexity of most real world statutes. Suppose Congress passes a statute, the Forest Products Act, that (1) creates a procedure for obtaining a logging permit; (2) identifies certain factual prerequisites (such as age of stand, location of stand, and previous logging history) that any applicant must establish prior to obtaining a permit; (3) entrusts the evaluation of permit applications to a Logging Review Board; and (4) includes a judicial review provision that states, “Any party aggrieved by the Board’s decision granting or denying a logging permit may, within sixty days after its entry, file a petition to review the decision in the court of appeals wherein venue lies.”⁹³ Suppose further that the purpose of the review provision was to ensure that anyone aggrieved by the Board’s choices would have easy and rapid access to a judicial remedy.

Imagine next that the Logging Review Board creates an onerous administrative reconsideration procedure under which all permit applicants and opponents must file motions to reconsider with the Board

⁹³ This provision is styled on 28 U.S.C. § 2344 (2006), which governs judicial review of most alien removal orders. 8 U.S.C. § 1252(a)(1) (2006) (providing that, with some exceptions, “[j]udicial review of a final order of removal . . . is governed only by [28 U.S.C. § 2344]”).

before they may obtain judicial review of a permit decision. Moreover, suppose the Board imposes a ten-day filing deadline for reconsideration motions. Finally, imagine that the Board denies a permit to a small logging company, and the company fails to file the required reconsideration motion within the ten-day window, instead going directly to the appropriate circuit court on day fifteen.

In this scenario, if the Logging Review Board moves to dismiss on exhaustion grounds, and the court agrees to dismiss the challenge, the court is effectively approving the Board's effort to protect its permitting decisions from review. More important for our purposes, the court is doing so in spite of clear congressional intent to create a judicial remedy that is broader than the Board's ten-day limit allows. This is a paradigmatic example of underdelegation: Congress paved the way for expansive judicial review; the agency threw up procedural roadblocks that it had no clear statutory authority to erect; and the court honored those roadblocks, permitting the agency to exercise undelegated authority over judicial review and, in the process, to thwart Congress's intent.⁹⁴

As this example illustrates, the problem of underdelegation is not one of congressional *power* but one of congressional *intent*. As such, Congress can easily overcome any underdelegation concern by being clear about the scope of the agency's authority. Thus, in the invented Forest Products Act, Congress could include a fifth provision that grants the Board the authority to "impose any administrative procedures necessary to ensure prompt, thorough, and accurate review of all logging permit applications." Now the Board has a plausible argument that Congress *did* grant it the authority to establish a reconsideration procedure and to make exhaustion of that procedure a prerequisite for judicial review. Specifically, the Board can argue: (1) Congress intended it to have the opportunity to make "thorough and accurate" determinations on all logging permit-related questions; (2) occasionally, reconsideration may be necessary to ensure both thoroughness and accuracy; and (3) the Board must make the reconsideration procedure a prerequisite to judicial review, because otherwise applicants would choose to forego it. Now there is constitutional room for a court to accept that an applicant's failure to exhaust precludes review. In this context, a court that recognizes the jurisdictional implications of failing to exhaust the reconsideration procedure is simply deferring to the agency's reasonable

⁹⁴ Cf., e.g., *FEC v. Akins*, 524 U.S. 11, 19 (1998) (giving effect to language in the Federal Election Campaign Act that signaled "congressional intent to cast the standing net broadly" and thus allowed for expansive judicial review of agency action).

reading of the Forest Products Act, rather than approving the Board's attempt to exercise undelegated authority to evade judicial review.

Importantly, unlike Article III infringement or nondelegation,⁹⁵ the problem of underdelegation can arise whether the agency's reviewability argument is jurisdictional or prudential in nature. Under court-created, prudential reviewability doctrines, the courts withhold review in certain circumstances so as not to interfere with ongoing agency policy development.⁹⁶ As discussed above,⁹⁷ these prudential reviewability rules, by definition, cannot infringe the Judiciary's protected sphere because the courts make the rules and decide when and whether to follow them. Likewise, these prudential rules do not pose a nondelegation problem, because the rules generally hinge on the timing and form of the agency's actions⁹⁸—choices that are patently executive in nature.⁹⁹ But if the relevant statute indicates Congress's intent that the agency's actions be broadly reviewable regardless of timing or form, then the agency's invocation of a prudential limit on review can infringe on Congress's authority. Congress limited its delegation of quasi-legislative power to the agency, granting the agency the power to formulate policy, but only with judicial oversight. The agency flouted that restriction on its authority by wielding the timing and form of its action as a shield to review. From Congress's point of view, the fact that the resulting shield is prudential rather than jurisdictional is irrelevant—the agency has exceeded its statutory authority by formulating policy without judicial oversight.

How, then, should a court assess underdelegation in a case in which a complainant has challenged an agency's action or policy, and the agency has raised a reviewability objection such as inaction, finality, ripeness, or exhaustion? The issue is one of statutory interpretation,

⁹⁵ See *supra* notes 53–92 and accompanying text.

⁹⁶ See, e.g., *Amador Cnty.*, 640 F.3d at 380 (distinguishing between reviewability arguments that are jurisdictional and those that are prudential in nature).

⁹⁷ See *supra* notes 62–63 and accompanying text.

⁹⁸ See, e.g., *Eagle-Picher Indus., Inc. v. EPA*, 759 F.2d 905, 915 (D.C. Cir. 1985).

[T]he primary focus of the ripeness doctrine as it [concerns] judicial review of agency action has been a prudential attempt to time review in a way that balances the petitioner's interest in prompt consideration of allegedly unlawful agency action against the agency's interest in crystallizing its policy before that policy is subjected to judicial review and the court's interests in avoiding unnecessary adjudication and in deciding issues in a concrete setting.

Id.

⁹⁹ See *supra* note 87 and accompanying text.

with which courts are well acquainted.¹⁰⁰ Three possibilities present themselves. First, the statute could provide for judicial review of all related agency actions.¹⁰¹ In the face of this kind of expansive statutory language, an agency that purports to erect a “reviewability” barrier to court oversight is overreaching. Congress’s intent to allow for judicial review “is clear, [and] that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”¹⁰²

On the opposite extreme, the statute could include express language delegating to the agency the authority to delimit the scope of judicial review. Congress has not chosen to make such an “extraordinary delegation”¹⁰³ very often, but there is at least one real-world example: the Foreign Sovereign Immunities Act (FSIA) expressly conditions review of common law claims against a foreign sovereign on the State Department’s assessment of the sovereign’s terrorist status.¹⁰⁴ In other words, in the FSIA, Congress expressly delegated to the State Department the authority to make a determination that controls federal courts’ jurisdiction to entertain certain common law claims.¹⁰⁵ If the relevant statute in the reviewability case accomplishes its delegation as clearly as the FSIA, the consequence is clear: the court may give effect to the agency’s reviewability objection (assuming there are no nondelegation, Article III infringement, or individual rights infringement problems), because the agency wields expressly delegated authority to limit court oversight.

Finally, the third and most likely possibility is that the statute is ambiguous. For example, the statute could contain both a judicial review provision and language that seems to grant the agency broad au-

¹⁰⁰ The task of determining congressional intent based on statutory interpretation is indeed a familiar one—courts frequently engage in such an inquiry to determine whether a regulation should be afforded deference pursuant to the Supreme Court’s decision in *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984). The *Chevron* inquiry requires courts to discern “whether Congress would have intended, and expected, courts to treat [the regulation] as within, or outside, its delegation to the agency of “gap-filling” authority.” *Mayo Found.*, 131 S. Ct. at 714 (quoting *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 173 (2007)).

¹⁰¹ Interpreting the APA, for example, the Supreme Court has noted the Act’s “generous review provisions,” and accordingly has “construed [the] Act not grudgingly but as serving a broadly remedial purpose.” *Ass’n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 156 (1970) (citations omitted) (internal quotations omitted).

¹⁰² *Chevron*, 467 U.S. at 842–43.

¹⁰³ *Kucana*, 130 S. Ct. at 840.

¹⁰⁴ 28 U.S.C. § 1605A(a)(1) (Supp. II 2008).

¹⁰⁵ *See id.*

thority to choose not to act, to act via nonfinal (and hence unreviewable) guidelines, to create administrative prerequisites to review, or otherwise to curtail the availability or scope of judicial review. In these situations, the court must do what courts do best:¹⁰⁶ try to discern the enacting Congress's intent, keeping in mind both the presumption in favor of judicial review of executive action¹⁰⁷ and the principle articulated in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, that courts defer to an agency's reasonable interpretation of ambiguous statutory provisions.¹⁰⁸

Most cases, of course, will fall into this third category, because, as "the famous hypothetical statute, 'No vehicles shall be allowed in the park,'"¹⁰⁹ illustrates, statutory language is almost always subject to multiple plausible interpretations. But the fact that our suggested under-delegation analysis rarely provides a clear answer and instead requires resort to presumptions and principles does not mean that courts should skip the analysis altogether. As the below discussion of *Ohio Forestry* proves,¹¹⁰ in some reviewability cases, a careful reading of the statute would reveal that Congress intended to provide for broad judicial review. In those cases, a court that nevertheless permits the agency to invoke reviewability doctrines to evade review is sanctioning an uncon-

¹⁰⁶ See *Japan Whaling Ass'n v. Am. Cetacean Soc.*, 478 U.S. 221, 230 (1986) ("[U]nder the Constitution, one of the Judiciary's characteristic roles is to interpret statutes . . ."); *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 511 (1979) (Brennan, J., dissenting) (noting that the "proper role" of the judiciary "in construing statutes . . . is to interpret them so as to give effect to congressional intention"); cf. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.")

¹⁰⁷ See *supra* note 1 and accompanying text (noting that the availability of judicial review is necessary to legitimate agency action).

¹⁰⁸ 467 U.S. at 843–44.

[I]f [a] statute is silent or ambiguous with respect to [a] specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. . . . [In which case] a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

Id. (footnotes omitted).

¹⁰⁹ Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1761 (2010).

¹¹⁰ See *infra* notes 176–225 and accompanying text.

stitutional expansion of agency authority at the expense of both congressional authority¹¹¹ and agency legitimacy.¹¹²

D. *Individual Rights Infringement*

Finally, we note that an agency's invocation of the exhaustion doctrine or another reviewability objection could, in theory, violate the rights of the plaintiff who is challenging his treatment at the hands of the agency. "Article III does not confer on litigants an absolute right to the plenary consideration of every nature of claim by an Article III court,"¹¹³ but plainly the Fifth Amendment's Due Process Clause,¹¹⁴ and perhaps also Article III itself,¹¹⁵ protect an individual's right to "make his way to court with" certain kinds of challenges to agency action.¹¹⁶ A court that denies review based on an agency's inaction, finality, ripeness, or exhaustion objection could, therefore, impinge on this right.

The first point to make about this right of access to the federal courts is that it can be waived by the individual.¹¹⁷ Thus, the only relevant cases in which "individual rights infringement" could possibly arise are those in which an agency has asked the court to curtail review, and

¹¹¹ *Cf. Ngo*, 548 U.S. at 117 (Stevens, J., dissenting). In *Ngo*, the majority determined that, under the PLRA, the respondent's failure to file an administrative grievance with California prison officials was fatal to his attempt to file a section 1983 action against those officials. *Id.* at 93–99 (majority opinion). Justice Stevens disagreed, noting that the PLRA has "competing values": "reducing the number of frivolous filings, on one hand, while preserving prisoners' capacity to file meritorious claims, on the other." *Id.* at 117 (Stevens, J., dissenting). In Justice Stevens's view, the majority's decision to give the state's administrative remedies jurisdictional significance "frustrate[d] rather than effectuate[d] legislative intent." *Id.*

¹¹² The agency legitimacy problem, of course, is the flip-side of the presumption in favor of judicial review: whenever an agency is permitted to escape judicial review, there is a concern that the precluded claim may have been meritorious. *See, e.g., id.* (discussing the need to "preserve prisoners' capacity to file meritorious claims" against prison officials); *supra* notes 15–18 and accompanying text.

¹¹³ *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848 (1986) (citing *Thomas v. Union Carbide Agr. Prods. Co.*, 473 U.S. 568, 583 (1985)); *Crowell v. Benson*, 285 U.S. 22, 87 (1932) (Brandeis, J., dissenting).

¹¹⁴ U.S. CONST. amend. V.

¹¹⁵ *See supra* note 53 and accompanying text.

¹¹⁶ *Hamdi*, 542 U.S. at 536 (observing that a U.S. citizen is entitled to "make his way to court with a challenge to the factual basis for his detention by his Government," even if that citizen is detained as an enemy combatant).

¹¹⁷ *Schor*, 478 U.S. at 848–49 ("[A]s a personal right, Article III's guarantee of an impartial and independent federal adjudication is subject to waiver, just as are other personal constitutional rights that dictate the procedures by which civil and criminal matters must be tried.").

the individual claimant has argued that denying review would infringe his due process (or Article III) rights.¹¹⁸ In such a case, the court must assess whether delaying, abridging, or denying review would, in fact, violate those rights.

The remainder of this article focuses on cases that implicate structural separation of powers issues rather than due process, so we summarize only briefly the due process analysis.¹¹⁹ Due process is generally understood to be “flexible” and situation-dependent,¹²⁰ in essence requiring the government to provide certain procedural safeguards—such as notice and a hearing¹²¹—before (or sometimes after)¹²² depriving a “person” of “life, liberty, or property.”¹²³ The inquiry proceeds in two parts. First, the injured party must have a life, liberty, or property interest at stake. Of these interests, reviewability cases most often implicate liberty. The paradigmatic fact pattern is that of a litigant (usually a prisoner, illegal immigrant, or asylum seeker) who seeks to challenge an agency’s handling of himself or his case but is barred from proceed-

¹¹⁸ See *id.*

¹¹⁹ For a more thorough discussion of the role of due process in constraining agency action, see Evan J. Criddle, *When Delegation Begets Domination: Due Process in the Administrative State*, 46 GA. L. REV. (forthcoming 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1786669.

¹²⁰ *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

¹²¹ *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (“This Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest.”); *Irvin v. Dowd*, 366 U.S. 717, 722 (1961) (“The failure to accord an accused a fair hearing violates even the minimal standards of due process.”); *Grannis v. Ordean*, 234 U.S. 385, 394 (1914) (“The fundamental requisite of due process of law is the opportunity to be heard.”).

¹²² See *Eldridge*, 424 U.S. at 349 (holding that a pre-deprivation hearing is not required prior to terminating the plaintiff’s social security disability benefits); see also *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970) (“The hearing must be ‘at a meaningful time and in a meaningful manner.’” (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965))); Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 330 (1993).

Under the Due Process Clause, government must typically provide notice and some kind of hearing before it can lawfully deprive anyone of life, liberty, or property. Moreover, when pre-deprivation process is not extensive—as it need not be, for example, before someone may be deprived of government employment—a fuller hearing must generally be provided before a temporary deprivation becomes final.

Fallon, *supra*, at 330 (footnotes omitted).

¹²³ U.S. CONST. amend. V; see also *Eldridge*, 424 U.S. at 332 (“Procedural due process imposes constraints on governmental decisions which deprive individuals of ‘liberty’ or ‘property’ interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.”).

ing in court because of a failure to exhaust administrative remedies.¹²⁴ The exact contours of the liberty interest are unclear, but as a general rule, the term is broadly defined,¹²⁵ extending not only to freedom from confinement by the government but also to “protection against government interference with certain fundamental rights” and to enjoyment of those “privileges long recognized . . . as essential to the orderly pursuit of happiness by free men.”¹²⁶

Assuming an individual successfully demonstrates that a challenged agency action will deprive him of a life, liberty, or property interest, the second part of the inquiry requires the court to assess whether any process the individual received “satisf[ies] the dictates of minimal due process.”¹²⁷ To make this assessment, the court must balance “the private interest that will be affected by the official action”; “the risk of an erroneous deprivation of such interest through the procedures used”; and “the Government’s interest.”¹²⁸ As a practical matter, administrative hearings often satisfy this three-factor test.¹²⁹ Thus, the individual may have no right of access to the federal courts. Moreover, many reviewability cases involve finality or ripeness objections in

¹²⁴ See, e.g., *Ngo*, 548 U.S. at 93.

¹²⁵ See *Bd. of Regents v. Roth*, 408 U.S. 564, 572 (1972) (“In a Constitution for a free people, there can be no doubt that the meaning of ‘liberty’ must be broad indeed.”). Although the Court has referred to “liberty” and “property” as “broad and majestic terms,” they are not limitless. *Id.* at 571–75. For example, the Court has found no liberty or property interest at stake in at-will public employment, in *Bishop v. Wood*, 426 U.S. 341, 343–50 (1976); “reputation alone,” in *Paul v. Davis*, 424 U.S. 693, 709–12 (1976); foster family challenges to removal of foster children to natural parents, in *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 846–47 (1977); and state prison regulations that are not “atypical” and do not impose a “significant deprivation,” in *Sandin v. Conner*, 515 U.S. 472, 485–86 (1995) (“[Defendant’s] discipline in segregated confinement did not present the type of atypical, significant deprivation in which a State might conceivably create a liberty interest.”).

¹²⁶ *Washington v. Glucksberg*, 521 U.S. 702, 720, 727 n.19 (1997) (internal quotation marks omitted); *Roth*, 408 U.S. at 572.

[Liberty] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men.

Roth, 408 U.S. at 572 (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)) (internal quotation marks omitted).

¹²⁷ *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 517 (1990).

¹²⁸ *Eldridge*, 424 U.S. at 335.

¹²⁹ See, e.g., *id.* at 349.

which the agency asks the court not to bar but merely to delay review.¹³⁰ The plaintiff in such a case would be hard pressed to argue that the resulting delay so threatens her private interests as to deprive her of due process.¹³¹ Thus, it will be the rare case in which an agency's reviewability objection and a court's consequent curtailment of review implicate an individual plaintiff's due process rights.¹³²

II. APPLYING THE RUBRIC

Each of the four concerns discussed above—Article III infringement, nondelegation, underdelegation, and individual rights infringement—serves as an essential check on agency authority to curtail federal court jurisdiction or otherwise to limit judicial oversight. As noted above, however, courts do not systematically evaluate these concerns in cases in which an agency argues that its choices have consequences for the scope of review. Rather, courts tend to focus narrowly on whichever reviewability doctrine applies in the particular case.

We therefore revisit three reviewability cases that implicate our rubric: two from the Supreme Court—the 2004 case *Norton v. Southern Utah Wilderness Alliance (SUWA)*,¹³³ and the 1998 case *Ohio Forestry Ass'n v. Sierra Club*¹³⁴—and one from the U.S. Court of Appeals for the D.C. Circuit, the 2011 case *Amador County v. Salazar*.¹³⁵ Our analysis suggests that standard reviewability analyses systematically undervalue at least one of the constitutional concerns we identify: underdelegation. That is, those analyses fail to account for the very real possibility that Congress did not intend for the agency to have the authority to wield the

¹³⁰ See, e.g., Brief for Petitioner at 20, *Ohio Forestry*, 523 U.S. 726 (No. 97-16) (arguing that forest management plans would not “forever escape review” because aspects of the plans would be ripe for review “[o]nce a timber sale creates the concrete factual context required for a manageable ripe controversy”) (internal quotation marks omitted).

¹³¹ “The fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’” *Eldridge*, 424 U.S. at 333 (quoting *Armstrong*, 380 U.S. at 552). Thus, delaying review of a nonfinal agency decision until that decision actually deprives the plaintiff of some concrete liberty or property interest would likely satisfy the flexible requirements of the Due Process Clause.

¹³² *But see Ngo*, 548 U.S. at 117–18, 121–23 (2006) (Stevens, J., dissenting). Justice Stevens noted that the Court’s imposition of “procedural default sanction” on a prisoner who “fails, *inter alia*, to file her grievance (perhaps because she correctly fears retaliation) within strict time requirements that are generally no more than 15 days” may “cause the statute to be vulnerable to constitutional challenges” because “the Constitution guarantees that prisoners, like all citizens, have a reasonably adequate opportunity to raise constitutional claims before impartial judges.” *Id.*

¹³³ 542 U.S. 55, 69 (2004).

¹³⁴ 523 U.S. 726, 728–32 (1998).

¹³⁵ 640 F.3d 373, 380 (D.C. Cir. 2011).

timing or form of its action, or the existence of an administrative review procedure, as a shield against court oversight.

A. *SUWA: The BLM Dodges Judicial Review, but Remains
Within Constitutional Limits*

SUWA concerned the Bureau of Land Management's (BLM) handling of so-called "wilderness study areas" ("WSAs") in Southern Utah.¹³⁶ The Federal Land Policy and Management Act (FLPMA) requires the BLM to manage WSAs "in a manner so as not to impair the suitability of such areas for preservation as wilderness"¹³⁷ and "in accordance with . . . land use plans . . . when they are available."¹³⁸ *SUWA* and several other environmental groups alleged that the BLM violated the FLPMA's requirements by failing to protect the Southern Utah WSAs from environmental harms caused by off-road vehicle use.¹³⁹

The question before the Court in *SUWA* was whether section 706(1) of the APA, which empowers courts to "compel agency action unlawfully withheld or unreasonably delayed,"¹⁴⁰ authorized the court to review the BLM's "failure to act to protect public lands in Utah from damage caused by [off-road vehicle] use"¹⁴¹—that is, whether the BLM's failure to act in this context constituted action "unlawfully withheld or unreasonably delayed" within the meaning of the APA. The Court concluded that the FLPMA does not mandate the kind of concrete actions that courts can "compel" under section 706(1).¹⁴² In practical terms, the decision means that courts lack authority under the APA to review the BLM's failure to take action against at least some harmful land use practices in WSAs.

¹³⁶ *SUWA*, 542 U.S. at 59.

¹³⁷ 43 U.S.C. § 1782(c) (2006).

¹³⁸ *Id.* § 1732(a).

¹³⁹ *SUWA*, 542 U.S. at 60–61.

¹⁴⁰ 5 U.S.C. § 706(1) (2006).

¹⁴¹ *SUWA*, 542 U.S. at 61. In managing public lands, the Secretary of the Interior, through the BLM, must, by regulation or otherwise, "take any action required to prevent unnecessary or undue degradation of the lands and their resources or to afford environmental protection." 43 U.S.C. § 1782(c). The BLM uses land management plans to balance environmental protection against other land uses. *See SUWA*, 542 U.S. at 59. Land use plans, which the BLM adopts after notice and comment, are "designed to guide and control future management actions." 43 C.F.R. § 1601.0-2 (2010); *see also* 43 U.S.C. § 1712; *SUWA*, 542 U.S. at 59. A "land use plan describes, for a particular area, allowable uses, goals for future condition of the land, and specific next steps." *SUWA*, 542 U.S. at 59 (citing 43 C.F.R. § 1601.0-5(k)).

¹⁴² *SUWA*, 542 U.S. at 66.

The Court reached this conclusion by narrowly interpreting APA section 706(1) to extend only to cases in which “an agency failed to take a *discrete* agency action that it is *required to take*.”¹⁴³ The Court then held that although the WSA preservation requirement is “mandatory as to the object to be achieved,” it “leaves [the] BLM a great deal of discretion in deciding how to achieve” that object.¹⁴⁴ As for the land use plans that the BLM had developed for the Southern Utah WSAs, the Court observed that the FLPMA precludes the agency from taking affirmative “actions inconsistent with the [plans’] provisions.”¹⁴⁵ The Court made clear, however, that the plans’ statements about future agency action—such as the statement in one plan that a particularly vulnerable area would “be monitored and closed [to off-road vehicle use] if warranted”¹⁴⁶—were merely “‘will do’ projections of agency action,” not binding and enforceable commitments.¹⁴⁷ The Court therefore concluded that neither the FLPMA nor the Southern Utah land management plans require discrete agency actions with respect to off-road vehicles and consequently, the agency’s failure to take any such action is immune from review under APA section 706(1).¹⁴⁸

For our purposes, it is important first to note that the BLM’s failure to prohibit off-road vehicle use in the Southern Utah WSAs had the same practical effect as a regulation affirmatively permitting the activity: off-road vehicle use is permitted in the WSAs. By proceeding via inaction, however, the BLM shielded its decision from judicial review. An affirmative decision to allow off-road vehicles could have been reviewed for consistency with the FLPMA under APA section 706(2),¹⁴⁹ whereas the decision not to disallow off-road vehicles lies outside the scope of section 706(1).¹⁵⁰ For all practical purposes, therefore, this is a case in which an agency made a decision about off-road vehicle use and then, deliberately or otherwise, “shelter[ed] its own decision[] from abuse-of-discretion appellate court” oversight.¹⁵¹

¹⁴³ *Id.* at 64.

¹⁴⁴ *Id.* at 66.

¹⁴⁵ *Id.* at 69.

¹⁴⁶ *Id.* at 68. (internal quotation marks omitted).

¹⁴⁷ *Id.* at 72.

¹⁴⁸ *SUWA*, 542 U.S. at 72.

¹⁴⁹ 5 U.S.C. § 706(2)(C) (2006) (“The reviewing court shall—(2) hold unlawful and set aside agency action, findings, and conclusions found to be— . . . (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right . . .”).

¹⁵⁰ *SUWA*, 542 U.S. at 72.

¹⁵¹ *Kucana v. Holder*, 130 S. Ct. 827, 840 (2010).

The outcome in *SUWA* thus sends a peculiar message to the BLM: if you choose to permit a particular activity in wilderness study areas, implement that policy choice by declining to regulate the activity—a course of (in)action that cannot be second-guessed by courts. Moreover, if you write a management plan for a WSA, make sure that plan is strategic and aspirational, and makes no binding commitments to future action.¹⁵² Indeed, *SUWA* sends that message to all agencies, not just those that manage federal lands. As long as an agency's inaction does not amount to a “fail[ure] to take a *discrete . . . required . . . action*,” the policy choices underlying that inaction remain unreviewable.¹⁵³

SUWA's message is peculiar for two reasons. First, as already noted, the decision provides agencies with a roadmap for achieving certain concrete regulatory outcomes (such as permitting off-road vehicle use) with minimal court oversight. The second peculiarity, though, is more insidious. The very legitimacy of administrative regulation hinges on public participation,¹⁵⁴ yet *SUWA* encourages agencies to implement their choices via inaction where possible, thereby not only evading court review but also eliminating any opportunity for the public to hear about and attempt to influence those choices.¹⁵⁵

Although the APA analysis in *SUWA* is quite thorough, the Court never squarely addresses the questions we raise here—namely, whether the BLM's objection to APA review inappropriately aggrandized agency power at the expense of Congress, the courts, or the objects of regulation. Addressing those issues is critical, we submit, to deciding agency inaction cases like *SUWA*.

We begin the discussion by applying our four-part rubric. As discussed below, we ultimately agree with the Court's opinion—nothing in the Constitution, we conclude, obligated the *SUWA* Court to address

¹⁵² Indeed, in 2005, the Forest Service made this new approach explicit, issuing a post-*SUWA* rule that “emphasize[s] the ‘strategic’ nature of land management plans,” which from 2005 on will “authorize no specific projects, merely ‘characteriz[e]’ future conditions and provid[e] ‘guidance’ for future decisions.” Michael C. Blumm & Sherry L. Bosse, Norton v. *SUWA and the Unraveling of Federal Public Land Planning*, 18 DUKE ENVTL. L. & POL'Y F. 105, 111 (2007) (quoting 36 C.F.R. § 219 (2010)).

¹⁵³ *SUWA*, 542 U.S. at 64.

¹⁵⁴ See, e.g., 5 U.S.C. § 553 (2006) (requiring public notice-and-comment prior to adopting regulations); Blumm & Bosse, *supra* note 152, at 108 (noting that FLPMA “reflect[s] a federal commitment to public involvement, congressional oversight, and long-range planning as the central tenets of public land decision making”).

¹⁵⁵ See Blumm & Bosse, *supra* note 152, at 106 (arguing that “Congress created modern federal land planning as the cornerstone of greater public involvement in public land decision making,” but *SUWA* “and its aftermath have destroyed that vision, making public land plans virtually irrelevant and a large waste of taxpayer dollars”).

the plaintiffs' claims on the merits.¹⁵⁶ In this and many other reviewability cases, our rubric leads to the same outcome as the standard reviewability analysis. That fact does not, however, undermine the importance of the rubric. Our aim is not to obligate courts to hear a significantly larger percentage of cases challenging agency action, but rather to ensure that agencies cannot manipulate courts into declining review in that small subset of inaction, finality, exhaustion, or ripeness cases in which a decision to delay or deny review would undermine the agency's constitutional legitimacy or infringe the parties' rights.

On the facts of *SUWA*, we can dispense quickly with two of the four prongs of our rubric—Article III and individual rights infringement. First, even assuming that Article III protects an inner sphere of court jurisdiction, review of agency inaction certainly falls outside that sphere. Court review of agency inaction is not necessary to preserve the Supreme Court's "essential role" of maintaining the supremacy and uniformity of federal law.¹⁵⁷ Nor is court review necessary to protect the due process rights of the plaintiff in an inaction suit,¹⁵⁸ who (by definition) raises the third-party harm of a regulatory beneficiary rather than the first-party harm of a regulatory object (no regulatory object would think to complain of the absence of regulation).¹⁵⁹ Thus, the BLM's assertion that its decision not to regulate off-road vehicle use is unreviewable does not unconstitutionally infringe on the power of the courts.

Second, and relatedly, nothing in the *SUWA* decision raises due process concerns. Neither *SUWA* nor the other environmental group

¹⁵⁶ See *infra* notes 158–175 and accompanying text. See generally Bressman, *supra* note 14, at 1709–10 (similarly concluding that *SUWA* was rightly decided, though suggesting that the Court did not pay adequate attention to the potential for agency arbitrariness implicit in every decision not to act).

¹⁵⁷ Hart, *supra* note 60, at 1364–65; see also Leonard G. Ratner, *Congressional Power over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157, 161 (1960).

¹⁵⁸ See Lawrence Gene Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 66 (1981).

¹⁵⁹ *Cf.* Lujan v. Defenders of Wildlife, 504 U.S. 555, 561–62 (1992).

When the suit is one challenging the legality of government action or inaction, the nature and extent of facts that must be . . . proved . . . to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue. If he is, there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it. When, however, . . . a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*, much more is needed.

plaintiffs have liberty or property interests in the management of the Southern Utah WSAs that comprise only public lands.¹⁶⁰

Applying the nondelegation prong of our rubric to *SUWA* is somewhat trickier. We must assess whether Congress could constitutionally delegate to the BLM the discretion to implement land management decisions through inaction. As we have noted, this question has four subparts: (1) whether Congress improperly delegated true lawmaking power; (2) whether the FLPMA provides an intelligible principle to constrain the BLM's discretion in making its substantive land management choices; (3) whether, in allowing for the possibility of unreviewable agency inaction, the FLPMA improperly delegated judicial responsibilities to the Executive; and (4) whether the FLPMA provides an intelligible principle to constrain the BLM's discretion in making choices—like the choice not to act—that have implications for the scope of judicial review.¹⁶¹

The first two questions have straightforward answers. This type of agency discretion—the freedom to choose how to achieve a particular statutory objective—lies at the heart of the Supreme Court's functional nondelegation doctrine jurisprudence. That jurisprudence permits flexibility and encourages interbranch coordination to cope with increasingly complex regulatory structures and ever-changing circumstances.¹⁶² True, Congress must lay down an intelligible principle to

¹⁶⁰ See *supra* notes 113–132 and accompanying text.

¹⁶¹ See *supra* notes 70–71 and accompanying text.

¹⁶² See *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (“[O]ur [nondelegation doctrine] jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.”); *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946).

The legislative process would frequently bog down if Congress were constitutionally required to appraise before-hand the myriad situations to which it wishes a particular policy to be applied and to formulate specific rules for each situation. Necessity therefore fixes a point beyond which it is unreasonable and impracticable to compel Congress to prescribe detailed rules; it then becomes constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority.

Am. Power & Light, 329 U.S. at 105; *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 421 (1935) (“The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function”); *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928) (“In determining what [Congress] may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the governmental co-ordination.”).

guide and confine the agency's discretion in achieving the statutory objective, but the FLPMA easily satisfies that test: section 1782(c) of the Act requires the Secretary of the Interior to exercise his discretion in a manner that "prevent[s] unnecessary or undue degradation of the lands and their resources" and does "not . . . impair the suitability of [the WSAs] for preservation as wilderness."¹⁶³ These guidelines easily meet the Court's permissive definition of "intelligible principle."¹⁶⁴

The third subpart of our nondelegation analysis leads us into less-charted waters. In the FLPMA, Congress delegated to the BLM the discretion to manage WSAs in a manner that does not impair their suitability for preservation.¹⁶⁵ That discretion must encompass the freedom not to act, as the BLM must at minimum have authority to decide which of various threatening land use practices deserves its immediate regulatory attention, and which can be monitored for a time until their consequences are better understood.

Yet the BLM's decision not to regulate affects more than the management of the WSAs; as seen in *SUWA*, the decision also has implications for the scope of review.¹⁶⁶ Whether Congress can expressly delegate this type of jurisdiction-altering discretion is unclear. We submit, however, that in this case the BLM's exercise of authority over the scope of court review is unproblematic because it is entirely ancillary to the execution of Congress's nonimpairment mandate,¹⁶⁷ and the execution of that mandate is adequately constrained by the intelligible principles identified above. In other words, in *SUWA* the BLM did not choose a form of action (namely inaction) primarily for the purpose of curtailing court review. Rather, in exercising its legitimately granted and properly constrained authority over the management of public lands, the BLM chose not to take action with respect to off-road vehicle use, and that choice then had ramifications for the scope of review—ramifications that *SUWA* and the other plaintiffs undoubtedly lament, but that raise no nondelegation issue.

That brings us to the underdelegation question in *SUWA*, which is the heart of our analysis. Underdelegation turns on whether Congress

¹⁶³ 43 U.S.C. § 1782(c) (2006).

¹⁶⁴ See *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 474 (2000); see also *supra* notes 70–71 and accompanying text.

¹⁶⁵ 43 U.S.C. § 1782(c).

¹⁶⁶ See *SUWA*, 542 U.S. at 64.

¹⁶⁷ Cf. *Mistretta*, 488 U.S. at 417 (Scalia, J., dissenting) (stating that agency lawmaking, which is ancillary to execution of laws, does not violate the nondelegation doctrine because a certain amount of lawmaking inheres in the power to execute).

intended to give the BLM discretion to choose an unreviewable form of action in implementing the FLPMA. If Congress did not intend to give the BLM such discretion, then there is a clear underdelegation problem. If, on the other hand, Congress intended, even implicitly, to give the BLM the freedom to decide how to achieve the statutory goals set by Congress, including the freedom to achieve those goals via inaction, then there is no underdelegation issue.

The language of the FLPMA leads us to the latter conclusion. First, the Act gives the BLM considerable discretion about how to achieve its goals: “in managing the public lands the Secretary shall by regulation *or otherwise* take *any action* required to prevent unnecessary or undue degradation of the lands and their resources or to afford environmental protection.”¹⁶⁸ This broad language leaves the BLM with room to decide both whether an action is required and, if so, whether to act “by regulation or otherwise.”¹⁶⁹ Second, nothing in the FLPMA itself envisions broad judicial review of land management decisions—rather, plaintiffs must turn to the APA to challenge BLM actions.¹⁷⁰ That is, the FLPMA does not include the sort of expansive judicial review provisions that might lead a court to conclude that Congress did not intend to grant the agency authority to shield its choices from outside oversight.¹⁷¹ Finally, by limiting judicial review of agency inaction to cases “where a plaintiff asserts that an agency failed to take a *discrete* action that it is *required to take*,”¹⁷² the APA itself buttresses the conclusion that Congress intended agencies like FLPMA to have the freedom to decline to act.¹⁷³

In short, because the FLPMA provides no express direction to the BLM to accomplish any specific task in any particular manner, Congress is fairly deemed to have delegated the details of implementation to the BLM.¹⁷⁴ This includes the authority not to take certain actions, even if those actions would arguably help achieve Congress’s goals.¹⁷⁵ And, in

¹⁶⁸ 43 U.S.C. § 1782(c) (emphasis added).

¹⁶⁹ *Id.*

¹⁷⁰ *See id.*

¹⁷¹ *See id.*; see also *supra* notes 80–92 and accompanying text.

¹⁷² *SUWA*, 542 U.S. at 64–65.

¹⁷³ *See* 5 U.S.C. § 706(1) (2006).

¹⁷⁴ 43 U.S.C. § 1782(c) (2006).

¹⁷⁵ *See SUWA*, 542 U.S. at 63–65; cf. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000) (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984)); William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 CORNELL L. REV. 831, 870 (2001).

If Congress has not spoken clearly about how it wishes the law to be administered, it falls by default to the Executive—ordinarily in the form of an admin-

turn, the authority not to act necessarily encompasses the subsidiary authority to shield some implementation decisions from judicial review by choosing not to act.

In sum, although we question the wisdom of the message that *SUWA* sends to land use planners for the reasons discussed above, we conclude that neither separation of powers nor due process concerns required the Court to reach the merits of *SUWA*'s claims. Thus, the Court reached a constitutionally sound outcome even as it acquiesced in what could well have been a strategic attempt by the BLM to achieve a regulatory outcome (continued off-road vehicle use in WSAs) without court oversight.

B. Ohio Forestry: *The U.S. Forest Service's Ripeness Argument Betrays Congressional Intent*

We reach a different conclusion, however, in *Ohio Forestry*.¹⁷⁶ In that case, the U.S. Forest Service successfully wielded the ripeness doctrine to shield from judicial review a final, ten-year Land and Resource Management Plan ("Plan") for Ohio's Wayne National Forest.¹⁷⁷ Required by the National Forest Management Act (NFMA), forest plans like the one at issue in *Ohio Forestry* are used to "guide all natural resource management activities" within the covered forest.¹⁷⁸ They prescribe the total amount of logging that may take place in the forest, the location of that logging, and the type of harvesting that may be employed, though they do not authorize any particular logging activity.¹⁷⁹ The Wayne National Forest Plan, for example, allowed for logging on 126,000 of the forest's 178,000 acres, and capped the total amount of timber that could be taken off the land at roughly 75,000,000 board feet.¹⁸⁰ The Plan estimated that within ten years logging would take place on roughly 8000 acres, 5000 of which would be subject to "clear-cutting"—the "indiscriminate and complete shaving from the earth of

istrative agency—to make the policy choices necessary to giving concrete content to the law. . . . It is perfectly consistent with the Constitution for the President to exercise that power, because Article II devolves upon him not only the duty but also the *power* to execute the laws. That is the theory, at least, of *Chevron*.

Kelley, *supra*, at 870.

¹⁷⁶ 523 U.S. at 729–30.

¹⁷⁷ *Id.*

¹⁷⁸ 36 C.F.R. § 219.1(b) (2010).

¹⁷⁹ See *Ohio Forestry*, 523 U.S. at 729–30.

¹⁸⁰ *Id.* at 729.

all trees—regardless of size or age—often across hundreds of contiguous acres.”¹⁸¹ The Plan did not authorize specific logging projects, but it plainly “ma[de] logging more likely” because without the Plan no tree could be cut.¹⁸²

As encouraged by the NFMA, the Sierra Club and the Citizens Council on Conservation and Environmental Control (together “the Club”) participated in all public phases of Plan development.¹⁸³ At the end of the day, however, the Club objected to the Plan’s contents and filed suit in the U.S. District Court for the Southern District of Ohio asserting that “erroneous analysis le[d] the Plan wrongly to favor logging and clearcutting.”¹⁸⁴ The Club lost on the merits before the district court but prevailed on appeal to the Sixth Circuit.¹⁸⁵

When the case reached the Supreme Court, however, the Court unanimously concluded that the Plan was not ripe for judicial review.¹⁸⁶ The Court applied the traditional ripeness test, which focuses on the “‘fitness of the issues for judicial decision’ and the ‘hardship to the parties of withholding court consideration.’”¹⁸⁷ In the Court’s view, delaying judicial review would not prejudice the Sierra Club, whereas immediate review would interfere with the Forest Service’s statutory prerogative to amend its overarching logging plan before allowing any particular logging project to go forward.¹⁸⁸ Finally, the Court noted that considerations of efficient judicial administration counseled in favor of delaying review to permit the controversy to develop into a more concrete dispute about particular stands of trees.¹⁸⁹

The Court did acknowledge two “exceptions to the traditional ripeness analysis [that] embody a deference to the legislative process”: situations in which Congress either (1) provided expressly for preimplementation review of agency rules, or (2) prescribed a procedure “the violation of which creates an immediate cause of action.”¹⁹⁰ (An example of the latter is the environmental review process required un-

¹⁸¹ *Sierra Club v. Morton*, 405 U.S. 727, 749 n.7 (1972).

¹⁸² *Ohio Forestry*, 523 U.S. at 730.

¹⁸³ *Sierra Club v. Thomas*, 105 F.3d 248, 252 (6th Cir. 1997), *vacated sub nom. Ohio Forestry*, 523 U.S. 726.

¹⁸⁴ *Ohio Forestry*, 523 U.S. at 731.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 728–32.

¹⁸⁷ *Id.* at 733 (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967)).

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*; see also Amanda C. Cohen, *Ripeness Revisited: The Implications of Ohio Forestry Association, Inc. v. Sierra Club for Environmental Litigation*, 23 HARV. ENVTL. L. REV. 547, 551–53 (1999) (detailing the Court’s analysis).

¹⁹⁰ Cohen, *supra* note 189, at 554; see also *Ohio Forestry*, 523 U.S. at 737.

der the National Environmental Policy Act (NEPA).¹⁹¹ In the Court's view, however, neither exception applied to the Sierra Club's challenge to the Wayne National Forest Plan, because (1) Congress did not expressly provide that forest plans be reviewable prior to implementation, and (2) the Club took issue with the Wayne Plan itself, rather than the Service's failure to comply with a NEPA-like procedural requirement.¹⁹²

Like *SUWA*, *Ohio Forestry* creates perverse incentives for managers of public lands. There are many benefits to a system that mandates a rigorous, highly specific, and comprehensive planning phase prior to any "public land decision making."¹⁹³ For example:

The planning process attracts public attention when the focus of land management is on the resources an area possesses, not on the merits of a particular project. Without a project and its momentum, agency personnel are in a posture of unbiased managers rather than project proponents. Moreover, at the planning stage, with an areawide concentration and a focus on land resources, the cumulative effects of various potential resource developments can be evaluated without pressure from project sponsors. The planning process, in short, can encourage rational decision making in advance of specific land use decisions[] . . . [and] produce predictability . . .¹⁹⁴

The *Ohio Forestry* decision ignores these benefits, turning the planning process into an unreviewable procedural hurdle to be cleared—agencies must comply with the letter of NFMA's planning requirement, but the decision gives them free reign to ignore the provision's spirit without risk of judicial reprimand.¹⁹⁵

What is even more insidious is that, while *Ohio Forestry* no doubt dissuades agencies from making any firm and specific—and hence reviewable—commitments in their otherwise unenforceable land management plans, the decision simultaneously gives agencies every incentive to fill planning documents with as many overarching and nonspecific management choices as possible.¹⁹⁶ By doing so, agencies are able

¹⁹¹ Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended in scattered sections of 42 U.S.C. (2006)).

¹⁹² See *Ohio Forestry*, 523 U.S. at 737 ("Congress has not provided for preimplementation judicial review of forest plans.").

¹⁹³ Blumm & Bosse, *supra* note 152, at 159.

¹⁹⁴ *Id.*

¹⁹⁵ See Cohen, *supra* note 189, at 557 (critiquing the *Ohio Forestry* decision).

¹⁹⁶ See *id.* at 557–58.

to entrench their choices at a point at which judicial review is not yet available.¹⁹⁷ True, no trees fall as a result of these management decisions; for forests, the plans typically set broad timber cutting goals and block out areas that will be open or closed to logging. Forest plans do have real world significance, though, because they determine routes for logging roads and other resource-allocation issues that have concrete implications for subsequent decisions about which trees to cut and when and where to cut them.¹⁹⁸ Although courts may later have an opportunity to review individual logging permits, they are unlikely to have an opportunity to revisit these early and broad resource-allocation choices.¹⁹⁹ It is therefore critical to ask whether allowing the Forest Service to wield the ripeness doctrine as a shield to judicial review of its management plans comports with the structure of checks and balances that Congress built into the NFMA.

As with *SUWA*, we begin our analysis with a brief discussion of Article III and individual rights infringement.²⁰⁰ Like the FLPMA, the NFMA implicates no Article III infringement concerns. In *Ohio Forestry*, the Supreme Court chose not to review the Forest Service's land management plan after considering the interests of the parties, the agency, and the courts.²⁰¹ The Court did not expressly indicate whether that balancing test was constitutionally required or instead more prudential in origin, but regardless, a balancing test that expressly weighs the interests of the courts mitigates concerns about executive encroachment on the judicial sphere.²⁰² Likewise, precluding judicial review of the Plan did not violate Sierra Club's due process rights because, as in *SUWA*, the stakeholders in *Ohio Forestry* lacked any liberty or property interest in the management of the Wayne National Forest.²⁰³

The nondelegation analysis again proves more complicated. In *Ohio Forestry*, the question is whether Congress could constitutionally delegate to the Forest Service the discretion to implement forest management decisions through unreviewable planning documents.²⁰⁴ We begin with the first two subparts of our nondelegation rubric—(1) whether the NFMA impermissibly delegates lawmaking power, and (2)

¹⁹⁷ See *id.*

¹⁹⁸ See *id.*

¹⁹⁹ See *id.*

²⁰⁰ See *supra* notes 157–160 and accompanying text.

²⁰¹ *Ohio Forestry*, 523 U.S. at 733.

²⁰² See *id.*

²⁰³ See *id.*

²⁰⁴ See Cohen, *supra* note 189, at 557.

whether it provides an intelligible principle to limit the Service's forest management decisions. These two questions pose no difficulty. First, the detailed management choices laid out in the Plan for the Wayne National Forest fall comfortably within the range of executive powers embraced by the Court's functional nondelegation doctrine.²⁰⁵ In addition, the Forest Service, unlike Congress, has both the bandwidth and expertise to regulate federal land use through planning statements.²⁰⁶ Further, the NFMA provides intelligible principles that properly limit the Forest Service's authority to oversee federal lands through land and resource management plans. For example, the Act supplies detailed requirements regarding the criteria the Service may use in developing the plans, the degree of public participation required, and the manner in which the plans must be reviewed and revised.²⁰⁷

Next, we must ask whether the NFMA improperly delegates judicial responsibilities to the executive, and whether it properly constrains any agency choices that have ramifications for the scope of judicial review. It must be acknowledged up front that, by leaving room for the Forest Service to implement management decisions via unreviewable planning documents,²⁰⁸ Congress delegated to the Service some power over the timing of review of substantive land use choices—a power that is plainly judicial in nature. That said, we nevertheless conclude that Congress did not impermissibly delegate judicial responsibility to the Forest Service, and that the NFMA adequately constrains the Forest Service's choices about when to proceed via an unreviewable planning document. The NFMA directs the Forest Service to begin its land use planning by writing overarching management plans for each forest.²⁰⁹ The jurisdictional consequences follow from the nature of planning documents that anticipate logging but do not actually “authorize the cutting of any trees.”²¹⁰ In other words, Congress has constrained the agency's choice of form, giving the Forest Service little or no ability to manipulate the ripeness doctrine to evade judicial review.²¹¹ Therefore, the NFMA poses no nondelegation problem.

²⁰⁵ See *Mistretta*, 488 U.S. at 372; see also *supra* note 163 and accompanying text.

²⁰⁶ See *supra* note 171 and accompanying text.

²⁰⁷ 16 U.S.C. § 1604 (2006).

²⁰⁸ See *id.* § 1604(a) (instructing the Secretary of Agriculture to “develop, maintain, and, as appropriate, *revise* land and resource management plans for units of the National Forest System”) (emphasis added).

²⁰⁹ See *id.* § 1604.

²¹⁰ *Ohio Forestry*, 523 U.S. at 729.

²¹¹ See *id.*

That brings us, finally, to the underdelegation prong of our test. It is here that we begin to see the risk of unthinking application of standard reviewability doctrines. The *Ohio Forestry* Court's application of the ripeness doctrine properly considered the interests of the parties, the agency, and the court.²¹² At no point, though, did the Court consider whether Congress intended the Forest Service to have the ability to shield some of its substantive policy choices from judicial review by enjoining those choices in the required forest plans.²¹³ True, the Court noted that Congress could have expressly provided for preimplementation review of those plans.²¹⁴ But placing the onus on Congress to provide for preimplementation review reverses the usual presumption.²¹⁵ As we noted earlier, in other circumstances, the Court has been quite adamant that ambiguous statutory language should not be read to delegate to an agency the authority to shield its substantive decisions from review.²¹⁶ Yet the *Ohio Forestry* Court read the absence of preimplementation language in the NFMA to do just that—to delegate to the Forest Service the authority to shield its substantive planning choices from review by including them in a document that makes important policy choices about the location, amount, and timing of logging but does not yet allow any trees to be cut.²¹⁷

Had the Court recognized the need to consider congressional intent before denying review, it might well have concluded that Congress intended to allow for preimplementation review of forest management plans. For example, the NFMA expressly requires the Forest Service to “provide for public participation in the *development, review, and revision* of

²¹² See *id.* at 733.

²¹³ See Cohen, *supra* note 189, at 556–61 (describing the curious regulatory regime endorsed, at least implicitly, by the Court in *Ohio Forestry*, under which agencies may “implement in discrete steps a plan that would likely have been deemed arbitrary or capricious if reviewed as a whole”; as a practical matter, this outcome may “undermine the environmental planning process, because a court may be unable to review an unreasonable management plan until after the majority of the plan has already been implemented in discrete, often irreversible, steps”).

²¹⁴ *Ohio Forestry*, 523 U.S. at 737.

²¹⁵ On at least one other occasion, the Court has also indicated that the ripeness analysis could be altered if Congress expressly provided for preimplementation review. In *Lujan*, the Court noted that “[s]ome statutes permit broad regulations to serve as the ‘agency action,’ and thus to be the object of judicial review directly, even before the concrete effects normally required for APA review are felt.” 497 U.S. at 891. As in *Ohio Forestry*, the default rule from *Lujan* is that an agency's broad policy documents are *not* reviewable unless Congress expressly provided for preimplementation review. See *id.*

²¹⁶ *Kucana*, 130 S. Ct. at 839–40; see also *supra* note 5 and accompanying text.

²¹⁷ See *Ohio Forestry*, 523 U.S. at 737.

land management plans”²¹⁸ and to “appoint a committee of scientists who are not officers or employees of the Forest Service” to “provide scientific and technical advice and counsel on proposed guidelines and procedures to assure that an effective interdisciplinary approach is proposed *and adopted*.”²¹⁹ It stands to reason, then, that Congress may have intended those stakeholders to be able to challenge the plans in federal court: Congress’s emphasis on collaboration and public accountability with respect to the development, review, and revision of forest management plans evinces its intent to make those plans judicially enforceable. In other words, the text of the NFMA suggests that Congress intended to give stakeholders a right of judicial review, not to grant the Forest Service the power to curtail review by acting via unenforceable planning documents.²²⁰

There is room for disagreement on this point. A court could reasonably conclude that Congress did not intend to allow for preimplementation judicial review of forest plans. Our argument does not hinge on the outcome of this analysis of congressional purpose. Rather, we seek only to emphasize that in reviewability cases, as in statutory interpretation cases, “[s]eparation-of-powers concerns . . . caution . . . against reading legislation, absent clear statement, to place in executive hands authority to remove cases from the Judiciary’s domain.”²²¹ To effectuate this principle in the ripeness context, courts should presume that important agency planning documents are ripe for review as soon as they are drafted, unless Congress has specifically instructed the courts *not* to review such measures prior to enforcement. Changing the ripeness analysis in this way would not dramatically expand the category of reviewable agency actions, but it would better ensure that courts do not unwittingly allow agencies to shield from court oversight policy choices that Congress intended to be reviewable. Reasonable minds may disagree over the correct reading of the NFMA, but whatever one’s views about that particular statute, application of our rubric would force courts to face head-on the important question of underdelegation.

The point is important enough to restate in different terms. In *Ohio Forestry*, the Court adopted a flawed default rule of reviewability: no preimplementation review unless Congress has expressly authorized such review (or has created actionable procedural safeguards).²²² As the

²¹⁸ 16 U.S.C. § 1604(d) (2006) (emphasis added).

²¹⁹ *Id.* § 1604(h)(1) (emphasis added).

²²⁰ *See id.*

²²¹ *Kucana*, 130 S. Ct. at 831.

²²² *Ohio Forestry*, 523 U.S. at 737 (citing *Lujan*, 497 U.S. at 891).

Court recognized in *Kucana*, however, “plac[ing] in executive hands authority to remove cases from the Judiciary’s domain” is an “extraordinary delegation.”²²³ Consistent with the traditional “presumption favoring interpretations of statutes [to] allow judicial review of administrative action,”²²⁴ courts should not read statutes to accomplish such a delegation “absent a clear statement” from Congress.²²⁵ In the absence of a clear statement, then, courts should presume that an agency *lacks* the authority to shield its policy choices from judicial review by imbedding those choices in preliminary and hence unripe planning documents.

Our rubric, applied in conjunction with the traditional ripeness analysis, solves this problem by forcing courts to address the possibility that Congress intended, albeit implicitly, to allow immediate judicial review of certain agency actions. In such a case, any attempt by an agency to curtail review by wielding the ripeness doctrine as a shield should be considered an improper encroachment on Congress’s constitutional prerogative to define and confine agency authority.

C. Amador County: *The D.C. Circuit Recognizes the Problem of Underdelegation*

Finally, we turn to the *Amador County* case,²²⁶ in which the court considered the reviewability of the Secretary of the Interior’s so-called “‘no-action’ approval” of a gaming compact between the Buena Vista Rancheria of Me-Wuk Indians and the State of California.²²⁷ The court concluded that the approval *was* reviewable,²²⁸ so we need not proceed through our four-part rubric to the assess separation of powers and due process implications of a counterfactual decision to curtail review. The decision is nevertheless relevant to this discussion because the court appears to have been concerned about the issue we call “underdelegation”—that is, the absence of any statutory authority for the agency to hide behind reviewability objections—yet the opinion itself is somewhat opaque on this point.²²⁹ The case therefore illustrates our dual claims, first that courts sometimes reach out to review ostensibly unreviewable agency actions out of concern about agency overreaching, and second that our rubric would provide a sounder footing for such opinions.

²²³ *Kucana*, 130 S. Ct. at 831.

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ 640 F.3d 373, 380 (D.C. Cir. 2011).

²²⁷ *Id.* at 375.

²²⁸ *Id.*

²²⁹ *See id.* at 379–83.

Some background is necessary to understand the reviewability issue in *Amador County*. As its name suggests, the Indian Gaming Regulatory Act (IGRA)²³⁰ regulates gaming on tribal lands.²³¹ As relevant to *Amador County*, IGRA requires, among other things, that the gaming take place on “Indian lands,” and that it “be conducted in conformance with a tribal-state compact that has been approved by the Secretary” of the Interior.²³² The Secretary may expressly approve the compact, or may implicitly approve it by “do[ing] nothing, in which case the compact is deemed approved after forty-five days ‘but only to the extent the compact is consistent with the provisions’ of IGRA.”²³³ Alternatively, the Secretary may disapprove the compact, “but only if it violates IGRA[,] other federal law,” or other federal obligations.²³⁴

In *Amador County*, the Secretary approved, by *inaction*, an amended compact between the Buena Vista Rancheria of Me-Wuk Indians and the State of California.²³⁵ That is, the Secretary did not act on the Tribe’s request for compact approval within forty-five days, and he subsequently published a notice of approval in the Federal Register in accordance with IGRA.²³⁶ *Amador County* then sued the Secretary alleging that the compact violated IGRA because it did not meet the Act’s “Indian lands” requirement.²³⁷

The Secretary argued that the County’s claims were unreviewable for a variety of reasons, only one of which is relevant here: that the no-action-approval was not a reviewable agency action under APA section 706(1).²³⁸ The U.S. District Court for the District of Columbia did not reach this issue because it found the no-action approval unreviewable for other reasons.²³⁹ The D.C. Circuit, though, relied on the structure of IGRA²⁴⁰ and the “strong presumption that Congress intends agency action to be reviewable”²⁴¹ to find the approval reviewable.

The standard for deciding whether agency inaction is reviewable derives, of course, from *SUWA*: inaction is reviewable under APA sec-

²³⁰ 25 U.S.C. §§ 2701–2702 (2006).

²³¹ *Amador Cnty.*, 640 F.3d at 376.

²³² *Id.*

²³³ *Id.* (quoting 25 U.S.C. § 2710(d)(8)(C)).

²³⁴ *Id.* (citing 25 U.S.C. § 2710(d)(8)(B)).

²³⁵ *Id.* at 377.

²³⁶ *Id.*; *see also* 25 U.S.C. § 2710(d)(8)(D).

²³⁷ *Amador Cnty.*, 640 F.3d at 377.

²³⁸ *Id.*; 5 U.S.C. § 704.

²³⁹ *Amador Cnty.*, 640 F.3d at 377.

²⁴⁰ *Id.* at 380.

²⁴¹ *Id.*

tion 706(1) only when “an agency failed to take a *discrete* agency action that it is *required to take*.”²⁴² The question for the *Amador County* court, therefore, was whether “approval of the Me-Wuk compact through inaction fails [the] discreteness requirement” of *SUWA*.²⁴³

In assessing this issue, the court focused on the fact that the IGRA limits the Secretary’s authority to approve a compact by inaction. Specifically, “compacts deemed approved through secretarial inaction become effective ‘only to the extent the compact is consistent with the provisions of [IGRA].’”²⁴⁴ As a direct consequence of this limit on no-action-approvals, the court continued, the Secretary of the Interior has “an obligation . . . to affirmatively disapprove any compact” that violates IGRA.²⁴⁵ That obligation, in turn, means that when someone challenges an approved compact as violating IGRA, the court has “a discrete agency inaction to review—the . . . failure to disapprove the compact despite its [alleged] inconsistency with the Act.”²⁴⁶

While internally consistent, this reasoning is too acrobatic to be particularly compelling, working backwards as it does from an affirmative limit on no-action-approvals to an implicit agency failure to decide not to disapprove. Far more compelling is the evident underdelegation concern that underlies the court’s approach. In IGRA, Congress drew some lines about which kinds of compacts could be approved, which should be disapproved, and how the Secretary may signal approval. These lines turn on “consisten[cy] with” IGRA, which in turn requires interpretation of IGRA’s terms—necessarily a task for the courts.²⁴⁷ Congress must therefore have intended the courts to play a role in reviewing the Secretary’s approvals and disapprovals—otherwise, there would be no opportunity for the courts to assess “consisten[cy] with” IGRA.²⁴⁸ But that in turn means that any approval or disapproval decision must be reviewable agency action—even a no-action approval. Otherwise, the Secretary could always escape review by issuing only no-action approvals. In other words, Congress plainly intended the courts to play a role in reviewing IGRA approvals and disapprovals; permitting the Secretary to defy that intent by issuing unreviewable no-action ap-

²⁴² *SUWA*, 542 U.S. at 64.

²⁴³ *Amador Cnty.*, 640 F.3d at 382.

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.* at 380 (finding a necessary role for the courts because IGRA “provides that only lawful compacts can become effective,” and “someone—i.e., the courts—must decide whether those provisions are in fact lawful”).

²⁴⁸ *Id.*

approvals would encroach on Congress's power to delimit agency authority and, in turn, undermine the legitimacy of the agency's policy choices. Thus, we suggest, the *Amador County* court could have reached the same result (no-action-approvals must be reviewable) with greater clarity and confidence by considering the separation of powers implications of the Secretary's claim of unreviewability.

CONCLUSION

Agencies are not passive participants in court oversight of administrative action. Rather, they actively modulate oversight by structuring their actions in ways that may induce courts to delay or deny review. We argue that courts should recognize this tactical activity for what it is: executive curtailment of judicial review and, possibly, encroachment on legislative and judicial prerogatives. When a case squarely presents the question whether Congress may delegate to an agency the authority to shield its decisions from judicial oversight, courts almost universally recognize that such an "extraordinary delegation" would raise separation of powers concerns. Yet the same concerns lurk in the background of all so-called "reviewability" cases. In particular, these concerns arise when Congress has created an administrative regime that expressly or implicitly anticipates expansive judicial review and an agency wields reviewability as a shield against court oversight, thereby threatening the legitimacy of both the governing regime and the agency's role in implementing that regime.

