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UNDERSTANDING JUDICIAL REVIEW OF FEDERAL AGENCY ACTION: KAFKAESQUE AND LANGDELLIAN

Gary C. Leedes*

I. INTRODUCTION

This article identifies the key factors that are taken into consideration by federal judges empowered to apply and give doctrinal content to the rules governing judicial review. The original inspiration was more modest. The article, as conceived, was to be simply an attempt to clarify the concept of reviewability. After some thinking about the topic, the close relationship between the concept of reviewability and other concepts of judicial review became clearer to me, and I decided that a useful antidote to the customary analysis, which emphasizes distinctions among these various concepts, is to emphasize their similarities.

What these concepts governing judicial review have in common is the fact that they are all largely shaped by judicial discretion. More to the point, the same factors influence the way a federal court actually exercises its discretion whether the case is labelled a "reviewability" case, or is perceived to be a dispute about jurisdiction, standing, ripeness, exhaustion of remedies or scope of review.


1. A court must consider several concepts in deciding whether a case is subject to judicial review. Questions of jurisdiction, standing, ripeness and exhaustion of remedies may be raised to bar judicial intervention. Because any one of these concepts may bar reviewability, they are often referred to as "threshold obstacles" which must be overcome before a court will proceed to consider the merits of a case. Even if a court reaches the merits, its scope of review may be limited by the same factors that shape the concepts governing availability and timing of review.
The various labels commonly used to analyze the law governing judicial review enable us to differentiate between discretion exercised under circumstances in which the issue narrows down to who may sue, rather than when agency action can be reviewed, or whether judicial review is appropriate or how much judicial review is proper. But this convenience which aids analysis too often obscures the fact that the threshold obstacles, and rules for scope of review, are means by which federal courts balance interests. Words like standing, ripeness and the rest are convenient as shorthand descriptive labels, but should not imprison legal reasoning or unduly constrict the evolving common law—a process that requires large doses of discretion administered by judges sensitive to the often competing needs of the agencies, the courts and the individual. Thus, the argument presented here is that identification of the key factors that channel the exercise of judicial discretion illuminates the relationship among the various rules of judicial review, dictates many answers to the basic questions of administrative law, and yet allows administrative law to adjust to changing conditions and needs of society.

In short, my effort is designed to develop some cross-cutting themes useful to the understanding of judicial review.

II. REVIEWABILITY

There are several ways to teach the law of reviewability as it pertains to federal administrative agency action. There is the

2. The substance of the law governing judicial review can be summarized without labels as follows:

   The more grievous the injury to the challenger of agency action, the greater the likelihood and intensity of review. The more crystallized the legal issue, the more the court is apt to review; conversely, if the question presented primarily involves facts or political choices within agency discretion, review is less likely. Judicial review is more likely if the causal connection between government action and injury is not attenuated and if the remedy requested is traditional, necessary and adequate to provide meaningful relief. Finally, judicial review is more likely if the court can apply neutral principles of law and resolve the controversy without injecting itself into the substantive policymaking area of a program administered by an agency. Judicial review is most likely and most exacting if basic liberties or rights have been abridged by the agency or if the agency procedures have violated due process of law. Of course a court will be more or less activist depending on the judge's perception of the role and duty of the federal courts and his appraisal of the competence of the agency and its need for autonomy.

3. For a list of these key checklist factors, see text Section III infra.
straightforward way, meaning one may simply accept at face value recent Supreme Court opinions that summarize the law as follows:

The Administrative Procedure Act stipulates that the provisions of that Act authorizing judicial review apply “except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law.” 5 U.S.C. § 701(a). It is now well settled that “judicial review of a final agency action by an aggrieved person will not be cut off unless there is a persuasive reason to believe that such was the purpose of Congress.” Abbott Laboratories v. Gardner, 387 U.S. 136, 140 (1967). The reviewing court must determine whether “Congress has in express or implied terms precluded judicial review or committed challenged agency action entirely to administrative discretion.” Barlow v. Collins 397 U.S. 159, 165 (1970).4

From these basics, the teacher of the straightforward law will explain to his students, more or less accurately, that there is a common law presumption of reviewability codified in the Administrative Procedure Act (APA),5 and that a given federal court will always review federal agency action unless it is convinced that: (1) Congress intended to prevent review; or (2) there is no law to apply; or (3) some unusual reason takes the case outside the judicial domain.6 Such teaching is calculated to engender a comfortable feeling on the part of the student that he has a grasp on the concept of reviewability—which he will then learn to distinguish from discrete problems such as standing, ripeness, primary jurisdiction, scope of review, sovereign immunity, jurisdiction and so on. At this level, the law of reviewability can be presented in nutshell fashion to a class in administrative law in an attempt to clear up the cases. And yet, in the end this approach turns out to be Kafkaesque and confusing.6.1 Needless to say, the straightforward teaching method does not

6.1. One justification for the traditional analysis of judicial review is the advantage of reducing the number of legal doctrines to a manageable few. This objective has been accomplished by focusing on standing, reviewability and so on. The traditional analysis is faithful to the Langdellian method which presumes that law is a science which can be made more understandable by proper classification. On the other hand, the inarticulate and overlapping
adequately take into account the variety of competing interests that influence the application of the law of reviewability in a given case.

A second, and substantially more meaningful, way of approaching the law of reviewability is to supplement the straightforward approach with a rationale. Professor Davis accurately describes the statutory preclusion cases as follows:

When statutes are silent concerning judicial review, as many are, the administrative action is sometimes reviewable and sometimes not. When statutes provide that the administrative action “shall be final,” the action is sometimes reviewable and sometimes not. When statutes provide that the action “shall not be reviewed,” the action is sometimes reviewed and sometimes not.\(^7\)

For Davis, the decisions “add up to the simple idea that courts in the future as in the past will continue to be the principal architects of the law of reviewability.”\(^8\) Professor Davis notes that in cases in which the issue is whether action is committed to agency discretion by law, “the best generalization may be that courts limit themselves to issues appropriate for judicial determination.”\(^9\) But Davis points out that courts are the experts in determining the nature and scope of statutory authority, constitutional limitations and the fairness of procedures.\(^10\) Many aspects of agency action, therefore, may amount to reviewable abuse of discretion, so long as courts do not get too enmeshed in specialized agency matters that are beyond its ken. Thus, a rationale is submitted which helps organize apparent chaos. This approach, admittedly somewhat oversimplified here, emphasizes the comparative competency and expertise of courts and agencies, which is a factor of substantial importance although not the whole story. Surely Professor Davis would be the first to admit as much, but he prefers, apparently, not to get bogged down in the formality of making a list of all the other influences which shape the

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7. Id.
8. Id. § 28.08 at 41.
law of reviewability. Of course, Davis's discussion of the cases in the treatise helps us to see for ourselves what these "inarticulate" influences are.

A third and more difficult way to approach the law of reviewability is to attempt to identify in detail the factors that courts actually take into account before holding agency action to be reviewable, nonreviewable, unreviewable or partly reviewable. Mr. Saferstein has compiled a useful list of factors that are relevant to determine whether an agency's action is committed to its discretion by law: (1) the breadth of discretion; (2) the expertise and experience required if the court is to understand the subject matter of agency action; (3) the managerial nature of the agency; (4) the impropriety of judicial intervention; (5) the necessity of informal agency decisionmaking; (6) the inability of the reviewing court to ensure a correct result; (7) the need for the expeditious operation of congressional programs; (8) the quantity of potentially appealable agency actions; and (9) the existence of other methods to prevent agency abuse of discretion.11 These factors comprise the list of considerations which Mr. Saferstein thinks most often influence court decisions labelled "reviewability" cases. But to complicate matters further, Saferstein notes that only rarely "is any of these factors, standing alone, controlling; rather, their cumulative effect on the interests of the individual, the agency and the courts determines whether review should be denied."

The perceptive student whose attention is drawn to Mr. Saferstein's list will perceive that these very same factors are also relevant when courts attempt to determine if Congress intended to preclude review.12 For example, these factors are taken into account in the implied preclusion cases. Implied preclusion13 is a concept which lay more or less dormant for many years until its recent resurrection. In Morris v. Gressette,14 the Supreme Court reminded us that "every judicial holding with respect to implied preclusion of judicial review is unique; 'the context of the entire legislative

12. Id. at 379.
13. For a discussion of the express preclusion cases, see text accompanying notes 29-34 infra, and note 7 supra.
scheme,' [which] differs from statute to statute,”¹⁶ may add up to preclusion even though the statute is silent, and even though “there is no legislative history bearing directly on the issue of reviewability.”¹⁷ But what convinces the Court there is implied preclusion? The factors that influenced the Court in Morris to decide there was implied preclusion are those that Mr. Saferstein identifies, plus a few others.

In short, the cumulative effect of many considerations that affect the interests of the individual, the agency and the courts determine whether a case is reviewable. I have found in my classes that this way of teaching the law of reviewability—using the Saferstein list—is difficult because it leaves many students in the same position as the practitioner and the judge: adrift on a sea of amorphous factors that can be manipulated many ways. The law of reviewability is no longer cut and dried, but is fluid and very elusive; but as I will suggest below, since the very same factors also shape other doctrines of judicial review, the subject is less Kafkaesque than it appears.

III. THE FACTORS THAT INTEGRATE THE LAW OF REVIEWABILITY WITH OTHER CONCEPTS OF JUDICIAL REVIEW

The Davis and Saferstein modes of analysis discussed above view the concept of reviewability as primarily instrumental. This is realistic; one function of the law of reviewability is to allow courts to avoid exercising jurisdiction if a decision on any aspect of the merits is inappropriate. To determine whether a decision is inappropriate, a court should consider its relative ability to decide the issue and how its decision will impact on: (1) the long and short run interests of the individuals who challenge agency action; (2) the public (i.e., the institution acting for the public interest whether it be the Congress, the executive branch or an agency); and (3) the court’s own position and welfare. Obviously, many equitable and utilitarian factors are relevant; Saferstein’s list of factors surely is not exhaustive. To compile an exhaustive list of equitable and utilitarian factors to be used as the ultimate checklist in any given case would

¹⁶. Id. at 505 n.20 (citation omitted).
¹⁷. Id. at 503.
be too unwieldy. Therefore, I prefer to condense the operative factors to five, for use as a quick checklist in the analysis of reviewability questions as well as other concepts of judicial review.

The checklist:

1. The nature and degree of the injury.
2. The nature of the question presented (legal, factual, mixed, discretionary, narrow or broad).
3. The obviousness of the agency error as it relates to the challenger (as shown by the record before the court).
4. The opportunity of the rightholder to obtain relief without court intervention, and the ability of the court to provide the challenger with meaningful relief.
5. The impact of judicial intervention on the orderly conduct of governmental business (including the court's business).

This checklist [hereinafter referred to as the checklist factors] helps illuminate the close relationship of the various concepts of judicial review usually treated as separate chapter headings or key numbers. In the pages that follow, I attempt to explain how reference to the checklist factors integrates and reduces what appears to be an unruly diversity to a more manageable unity. 17.1

A. Jurisdiction

The list of five factors that shape all the concepts of judicial review of federal agency action are relevant, indeed often decisive, in cases where the issue presented is whether a federal court has jurisdiction. The line between the concept of jurisdiction and threshold concepts like reviewability, ripeness and others is not stable; there is quite a bit of overlap. In Morris v. Gressette,18 for example, the Court loosely used the terms "jurisdiction" and "reviewability" interchangeably.19 Indeed, jurisdiction and reviewability concept in administrative law is the analogue of the political question doctrine, or more generally—but also more accurately—the concept of justiciability. There are occasions when federal courts lack jurisdiction when cases are nonjusticiable. Muskrat v. United States, 219 U.S. 346 (1911). In such cases, the concepts of jurisdiction and justiciabil-

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17.1. See diagram Section V infra.
19. The reviewability concept in administrative law is the analogue of the political question doctrine, or more generally—but also more accurately—the concept of justiciability. There are occasions when federal courts lack jurisdiction when cases are nonjusticiable. Muskrat v. United States, 219 U.S. 346 (1911). In such cases, the concepts of jurisdiction and justiciabil-
bility are concepts that are often conflated. Therefore, it should not be surprising that the same factors that shape reviewability also mold the concept of jurisdiction and influence the courts' interpretation (and application) of statutes granting or withdrawing jurisdiction.

This is not to say that Congress does not have tremendous control over the jurisdiction of federal courts. Indeed, it must be recalled that, except for the original jurisdiction of the Supreme Court, the jurisdiction of federal courts is conferred and regulated by Congress. Congress has been generous in this respect. Many statutes that delegate power to federal agencies specifically provide for judicial review in some federal court. If there is no specific statutory review provided, the challenger of agency action can take advantage of the federal question jurisdictional statute. This general grant empowers United States district courts to decide actions for declaratory judgments and injunctions that challengers file against federal agencies, subject (as are all jurisdictional grants) to the limitations of the threshold obstacles to judicial review. For example, the statutory preclusion qualification to the right of review, codified in the APA, is a threshold obstacle which can prevent the district court from exercising its jurisdiction to some extent—even if Congress does not intend to eliminate entirely the general federal question jurisdiction or specifically conferred jurisdiction of the United

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23. 28 U.S.C. § 1331(a) (providing so-called non-statutory review).
States district courts. It is when a court is convinced there is a valid statutory preclusion that the reviewability and jurisdiction concepts are conflated—as in *Morris*, where the Court held federal courts were without power to review the inaction of the Attorney General.

In *Morris*, the plaintiffs sought to enjoin the enforcement of a state reapportionment act on the ground that the state statute had not been subjected to the required federal scrutiny by the Attorney General (hereinafter referred to as the “agency”). The basis of the district court’s jurisdiction would have been 28 U.S.C. section 1343(4) if, and only if, section 5 of the Voting Rights Act authorized the plaintiffs to secure the injunctive relief sought. As noted, the Supreme Court held that Congress had not authorized judicial review of agency inaction, concluding that a reading of the entire legislative scheme disclosed an implied preclusion. Only if the agency does interpose objections to state reapportionment may such agency action be reviewed by the federal courts. This situation, characterized as “bizarre” by Mr. Justice Marshall, is simply illustrative of the point that the federal courts’ general jurisdiction to hear some claims does not necessarily mean the courts have power to review all claims. The distinction between nonreviewable claims and reviewable claims depends on how the exercise of agency discretion affects the challenger’s interests, the character of the legal question presented, the ability of the court to perceive obvious agency error, the availability for the challenger to obtain relief without judicial intervention and the impact of judicial intervention on the orderly conduct of government business. Thus, while Congress

27. 432 U.S. at 516 (dissenting opinion).
28. If the “agency” interposes an objection pertinent to the Voting Rights Act of 1965, judicial review would coordinate rather than disrupt the orderly conduct of governmental business (checklist factor #5), there would not be an opportunity for the rightholder to obtain relief without court intervention (checklist factor #4), there would likely be a more detailed explanation by the “agency” to justify its exercise of discretion which would make an agency error more detectable (checklist factor #3) and the nature of the question presented would have legal dimensions not present when a prosecutor fails to act (checklist factor #2). Of course, the nature and severity of the injury would be different, being irreparable, since there is no other opportunity for the rightholder to obtain relief when the agency interposes an objection (checklist factors #1 and #4). Thus the concepts of jurisdiction and reviewability
has the first word on jurisdiction, the court's interpretation of a
given statute affecting its power to review a case depends largely on
the five factors on the checklist.

Another case illustrative of the way the five checklist factors af-
flect the courts' decision as to whether it has power to review agency
action is Johnson v. Robison,29 in which the challenger appealed a
decision of the Veterans' Administration. Congress had provided
that, with designated exceptions:

the decisions of the Administrator on any question of law or fact
under any law administered by the Veterans' Administration provid-
ing benefits to veterans . . . shall be final and conclusive and no
other official or any court of the United States shall have power or
jurisdiction to review any such decision by an action in the nature of
mandamus or otherwise.30

The intent of Congress seemed clear: the jurisdiction of all courts
to review decisions of the Veterans' Administration was entirely
eliminated. But the Supreme Court held this was not the intent of
Congress at all and the statutory language did not preclude review
of the constitutionality of government action. Again, in Johnson,
the nature of the challenger's injury (viz., the alleged deprivation
of a fundamental right, checklist factor #1),31 the legal question
presented (viz., an issue of statutory construction involving the
constitutionality of veterans' benefits legislation challenged inter alia
on equal protection and first amendment grounds, (checklist factor
#2) and the unavailability of any remedy if the statutory bar to
jurisdiction was upheld (checklist factor #4), were considerations
that combined to induce the Supreme Court to hold that elimina-
tion of jurisdiction was not the intent of Congress. Moreover, judi-

31. The plaintiff alleged the agency's decision that his conscientious objector status did
not qualify him under 38 U.S.C. § 1652(a)(1) (1970) to veterans' educational benefits was a
violation of his first amendment right to religious freedom and the fifth amendment's guaran-
tee of equal protection of the laws. See 415 U.S. at 363-64.
cial review in Johnson did not adversely affect the orderly conduct of governmental business (checklist factor #5). This decision followed long-standing tradition. Recall Professor Jaffe's account of Dr. Bonham's case:

Coke, then Chief Justice of Common Pleas, allowed Dr. Bonham to bring an action for false imprisonment (trespass) against the Royal College of Physicians and Surgeons. This College by royal charter and statute was authorized to regulate the practice of medicine, and it had imprisoned Dr. Bonham for contempt. Coke held that the facts underlying Dr. Bonham's alleged misconduct could be tried by the court; otherwise he would have no remedy against unauthorized power. It seems to have been assumed that the common law courts did have jurisdiction thus to test the validity of official action.\(^2\)

Jaffe goes on to quote Coke's famous statement that if an act of Parliament is "against Common Right and Reason, or repugnant, or impossible to be performed, the Common Law will controll it, and adjudge such act to be void."\(^3\) Coke's doctrine "lays the basis for a highly autonomous and powerful judiciary."\(^3\) It was in this venerable tradition that Johnson was decided. Usually, however, courts do not go to such lengths to obfuscate the intent of Congress unless most of the checklist factors listed above operate to make judicial intervention imperative.

An intriguing question arises by supposing the Supreme Court cannot by the art of statutory construction credibly ignore a partial elimination of federal court jurisdiction by Congress,\(^5\) thus leaving

\(^{32}\) L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 329 (abr. student ed. 1965) [hereinafter cited as JAFFE].

\(^{33}\) Id. at 332-33.

\(^{34}\) Id. at 333.

\(^{35}\) With respect to the scope of the Congressional power to regulate the jurisdiction of the federal courts, there are several distinctions which need to be drawn:

1. The difference between the complete abolition of Supreme Court jurisdiction and the negation of the exercise of some of its jurisdiction.

There is no convincing historical evidence that the framers contemplated granting Congress power to abolish completely the Supreme Court's appellate jurisdiction. See Ratner, Congressional Power over the Appellate Jurisdiction of the Supreme Court, 109 U. PA. L. Rev. 157, 161-65 (1960) [hereinafter cited as Ratner]. It would be an odd usage of the word "exceptions" to take it to mean that the exceptions can completely swallow the rule that it modifies and thereby destroy "the essential characteristics of the subject to which it applies." Id. at 170.
An important function of the Supreme Court is to maintain uniformity of decisions throughout the United States to form the Nation into a more perfect union. *Id.* at 166. This role is essential and attainable even if the Court had not asserted in Marbury v. Madison, 1 U.S. (1 Cranch) 368 (1803), its power to declare Acts of Congress unconstitutional if repugnant to the Constitution. But so long as Marbury v. Madison remains the foundation for modern assertions of Supreme Court authority, the role of the Court includes keeping Congress within its constitutional limits. Therefore, it is doubtful that the Court would rubber-stamp legislation that, in effect, eliminates essential appellate jurisdiction.

Moreover, aside from the need to maintain uniformity, there are other enforceable constitutional limits on Congress's power to regulate and make exceptions to the Court's appellate jurisdiction. These limitations include the Bill of Rights, other fundamental rights implicit or explicit in the Constitution and separation of powers principles; all of which would discourage the Court from deferring to Congress if it attempts to enlarge its sphere of authority and interferes with the effective functioning of the Executive and Judicial branches. United States v. Klein, 80 U.S. (13 Wall.) 128 (1871). See also Nixon v. Administrator of General Services, 433 U.S. 425, 441-46 (1977). Having said there are limits on Congress's power to abolish the Supreme Court's appellate jurisdiction, it must be conceded that it is easy to overstate the case; the question of the extent to which Congress can limit the Court's appellate jurisdiction is still officially open because jurisdictional statutes in force have always been adequate to allow the Court to carry out its essential responsibilities with reasonable effectiveness.

(2) The difference between Congressional control over jurisdiction and Congressional control over the merits of a case or the results in a class of cases.

Congress has attempted to prescribe the rules for Supreme Court decisions; more bluntly, Congress has attempted to dictate the outcome of specific cases. In United States v. Klein, 80 U.S. (13 Wall.) 128 (1871), the Court held such an attempt to be invalid. If the purpose or effect of a statute is to dictate the result of a case by means of a congressionally designed restriction on the kinds of issues the Court can consider, the rationale of the *Klein* case would be applicable. See P. Brest, *Processes of Constitutional Decisionmaking: Cases and Materials* 1332-33 (1975) [hereinafter cited as BREST]. Dictating the result of a case, however, is not necessarily synonymous with specifying the remedy. *Id.* at 1323.

(3) The difference between preclusion of Supreme Court appellate review and preclusion or elimination of lower federal court jurisdiction.

Although a consensus of commentators thinks the Supreme Court may defend its essential role against disruptive Congressional interference, the conventional wisdom is that Congress may abolish the lower federal courts, which are solely creatures of statutes. It has been argued, however, that the caseload increase and changes in the nature of constitutional litigation compel the retention of the lower federal courts in order to provide adequate access to litigants trying to protect their constitutional rights. Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 *Yale L. J.* 498, 511-13 (1974) [hereinafter cited as Eisenberg]. Professor Gunther implies the withdrawals of lower federal court jurisdiction might have to pass muster under § 5 of the fourteenth amendment. See G. Gunther, *Constitutional Law: Cases and Materials* 63 (9th ed. 1975) [hereinafter cited as Gunther]. See also note 38 infra. Thus, the retention by the lower federal courts of its jurisdiction might not be a subject solely in the hands of Congress; the Court, no doubt, will have something to say—if the purpose or effect of abolishing lower court jurisdiction is to destroy constitutional guarantees.

(4) The difference between the theoretical possibility of Congressional action that cripples the federal courts and the practical reality; viz., the unlikelihood of such action.
constitutional right, owing to an official's error of law, is not entitled to test in court the legitimacy of federal agency action? This important question is considered unanswered, but the Supreme Court's answer to the question in a given case would depend, I submit, on the checklist factors listed above. There have been occasions when Congress successfully eliminated the jurisdiction of federal courts to hear certain kinds of cases, such as *Ex parte McCardle*, but the Court's acquiescence and decision (that the repeal of a certain habeas corpus statute was constitutional) can be explained *inter alia* on the ground that other habeas corpus remedies were available to the petitioner (checklist factor #4).

If no remedies are available to a challenger of allegedly illegal agency action who has been obviously deprived of a fundamental constitutional right, what would *prevent* the Court from hearing an appeal? As one of the participants in the well-respected Hart Diatalectic retorted:

Name me one single Supreme Court case that has squarely held that in a civil enforcement proceeding, questions of law can be validly withdrawn from the consideration of the enforcement court where no adequate opportunity to have them determined by a court has been previously accorded. When you do, I'm going back to re-think *Marbury v. Madison*.

I have no cases that squarely support the Court's authority to limit Congress's power to control the appellate jurisdiction of the Supreme Court. But, as Professor Berger argues forcefully, the Constitution itself provides the authority. He notes: "In the sheaf of

36. 74 U.S. (7 Wall.) 506 (1868).
37. Shortly after *Ex parte McCardle*, the Supreme Court held that the 1868 repeal of the statute giving it appellate jurisdiction in habeas corpus cases did not affect another statute under which it could issue original writs of habeas corpus and certiorari. *Ex parte Yerger*, 75 U.S. (8 Wall.) 85 (1869). For other commentary on *Ex parte McCardle*, see materials cited in GUNTHER, supra note 35.
38. Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 HARV. L. REV. 1362, 1378-79 (1953) [hereinafter cited as Hart]. This too must be noted: with the growth of the affirmative welfare state, judicially imposed limits on Congressional withdrawals of jurisdiction might be imposed in situations where the government is withholding benefits as well as in those cases in which the government seeks to subject a person to a civil enforcement action. Of course the nature and degree of the injury (checklist factor #1) will be important in such cases.
Congressional powers, the power to make 'exceptions' to the appellate jurisdiction scarcely ranks higher, when measured by indispensability to the largest national purposes, than the commerce, tax and war powers; yet each of these is subject to the Fifth Amendment. Therefore, if the essential plan of the Constitution, as traditionally understood, is to remain intact, the Court—even when it cannot credibly construe the exercise of Congressional power depriving it of jurisdiction narrowly—will nevertheless review the case at bar depending on:

1. The nature and degree of the injury.\(^{39.1}\)
2. The nature of the question presented.\(^{39.2}\)
3. The obviousness of the agency error as it relates to the person seeking relief.\(^{39.3}\)
4. The opportunity of the rightholder to obtain relief without court


\(^{39.1}\) Justice Douglas thought the distinction between *Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1868), and United States v. Klein, 80 U.S. (13 Wall.) 128, 147 (1872), depended on the nature of the injury sustained by the person seeking access to federal court and concluded that, in an era dominated by laissez faire attitudes, the Court balked at Congressional withdrawals of jurisdiction that had the purpose and effect of impairing property rights. See Glidden v. Zdanok, 370 U.S. 530, 605 (1962) (dissenting opinion). Probably, Congress cannot constitutionally limit criminal appeals of defendants subject to the death penalty to those who waive their sixth amendment right to jury trial. *See Brest, supra* note 35, at 1326 n.25; *cf.* United States v. Jackson, 390 U.S. 570 (1970) (a case in which the Court invalidated the sentencing scheme of the Federal Kidnapping Act on the ground that, by allowing the death penalty to be imposed by a jury but not a judge, the Act unconstitutionally burdened defendant's right to a jury trial).

\(^{39.2}\) Professor Brest asks, rhetorically I presume, whether Congress could "constitutionally limit the Supreme Court's jurisdiction to appeals by whites or Christians or Republicans." *Brest, supra* note 35, at 1326. Such an exercise of power would, of course, present legal questions that would make judicial review most likely—despite withdrawal of jurisdiction. The Court's judicial hackles were raised, in part, in United States v. Klein, 80 U.S. (13 Wall.) 128, 147 (1872), because the legal question presented was whether "Congress has inadvertently passed the limit which separates the executive from the judicial power," and whether it impaired "the effect of a pardon, and thus infring[ed] the constitutional power of the Executive."

\(^{39.3}\) The Court will strain to find a basis for exercising its jurisdiction when the agency is flagrantly in error. In *Estep v. United States*, 327 U.S. 114, 120-21 (1946), Justice Douglas, writing for the Court, said: "We cannot believe that Congress intended that criminal sanctions were to be applied to orders issued by local boards no matter how flagrantly they violated the rules. . . . We cannot readily infer that Congress departed so far from the traditional concepts of a fair trial when it made the actions of local boards 'final' as to provide that a citizen of this country should go to jail for not obeying an unlawful order of an administrative agency." 327 U.S. at 121-22.
intervention and the ability of the court to provide the person seeking relief with a meaningful remedy.\(^{39.4}\)

5. The impact of judicial intervention on the orderly conduct of governmental business.\(^{39.5}\)

In short, jurisdiction is not a metaphysical absolute, but is a concept that often reflects the court's perception of the character and gravity of an agency's error and its own role as the appropriate institution to inquire into the circumstances.\(^{40}\)

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39.4. As indicated in the text, the availability of other habeas corpus remedies was a key factor in *Ex parte* McCardle, a case in which the Court implicitly invited the petitioner to proceed under § 14 of the Judiciary Act of 1789. BREST, supra note 35, at 1326 n.26. Conversely, the unavailability of meaningful preinduction review was decisive in *Estep*.

39.5. The discussion by Professor Hart of the "essential role of the Supreme Court in the constitutional plan," Hart, supra note 38, Professor Ratner's recognition of the need for the Supreme Court to maintain the supremacy of federal law and to provide for "ultimate resolution of inconsistent or conflicting interpretations of federal law by state and federal courts", Ratner, supra note 35, at 161, and Mr. Eisenberg's argument that Congress may no longer restrict the authority of the lower federal courts in all instances, Eisenberg, supra note 35, all focus on the impact of judicial intervention, or non-intervention, on the orderly conduct of governmental business.

40. See also JAFFE, supra note 32, at 633 n.25.

A persuasive, succinct argument in support of federal court power to review a withdrawal of its jurisdiction by Congress is made by Professor Tribe. He concludes that "the Supreme Court possesses the power to review the constitutionality of congressional withdrawals of its appellate jurisdiction, and lower federal courts [also] possess such power even if the congressional withdrawal encompasses general federal jurisdiction itself." Tribe, supra note 19, at 39. Tribe notes that the federal courts cannot be deprived of independent judicial fact-finding power if administrative discretion is an impediment to the exercise of first amendment rights. Id. at 44, 732 n.2 (citing Freedman v. Maryland, 380 U.S. 51, 58 (1965)). Thus the nature of the injury, checklist factor #1, is recognized as crucial. Professor Tribe also notes that "judicial review of agency determinations of questions of law is said to be constitutionally required." Id. at 43 (citing St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 84 (1936) (Brandeis, J., concurring)). Thus, the nature of the question presented, checklist factor #2, is important. However, as Tribe notes, the federal courts do not review many questions decided by military courts, so long as a "rough form of justice" is observed. Id. at 44-45. Thus, checklist factor #3, the obviousness of the error, is relevant. Moreover, federal courts do not usually interfere with military courts operating in the locality of actual war, presumably because the ability of the federal courts to provide meaningful relief is nil (checklist factor #4). Id. at 45. Another limitation noted by Tribe is the impact of judicial intervention on the orderly conduct of government business. Id. at 44 n.45. This limitation, suggested by the Court in Palmore v. United States, 411 U.S. 389 (1973), demonstrates the pertinence of checklist factor #5. The *Palmore* opinion recognized "the requirements of Art. III, which are applicable where laws of national applicability and affairs of national concern are at stake, must in proper circumstances give way to accommodate plenary grants of power to Congress to legislate with respect to specialized areas having particularized needs and warranting distinctive treatment." 411 U.S. at 407-08.
B. Standing to Sue

The federal law of standing is in part a jurisdictional concept and in part a means for screening out improper plaintiffs who lack standing for prudential reasons. Standing generalizations appear largely worthless to some, incoherent to others and admittedly there are some doctrinal labyrinths. But the path is less puzzling if a more macroscopic view is taken, for the standing concept is intimately related to the law of reviewability as well as other threshold doctrines of judicial review. This should not be surprising because the law of standing is shaped by the same five considerations listed above (the checklist factors).

In *Simon v. Eastern Ky. Welfare Rights Organization,* the Supreme Court made it clear that in the absence of a valid statute conferring standing, a challenger to agency action in federal court:


42. 426 U.S. 26 (1976). In *Simon,* the plaintiffs sought judicial review and relief from an Internal Revenue Service (IRS) ruling on the ground that the ruling violated the Internal Revenue Code by giving favorable treatment to non-profit hospitals that provided only limited service to indigents (emergency room service). The action was brought under § 702 of the APA which gives a right to judicial review to any person "adversely affected or aggrieved by agency action within the meaning of a relevant statute." According to the Supreme Court, plaintiffs' allegations fell short of establishing that they stood to profit in some personal interest if the Court declared the IRS ruling invalid. Therefore, the Court held that their abstract concern with the subject matter did not substitute for the concrete injury required by Article III of the Constitution. The Court explained that "it is purely speculative whether the denials of service specified in the complaint . . . result from decisions made by the hospitals without regard to tax implications." 426 U.S. at 42-43. Moreover, it was "equally speculative whether the desired exercise of the court's remedial powers in this suit would result in the availability to [plaintiffs] of such [hospital] services." *Id.* at 43. In short, plaintiffs failed to allege an injury that could be fairly traced to the challenged agency action.

The *Simon* case illustrates the close affinity between the doctrines of ripeness and standing. *Note that Justice Brennan,* who concurred in the judgment, dissented because the "threat" of harm to plaintiffs caused by the alleged encouragement to all non-profit hospitals (that in turn resulted from the Ruling) was unripe for adjudication.

The unripeness, according to Justice Brennan, inhered in the fact that there was need for some further clarification of the IRS ruling: "some further procedure, some further contingency of application or interpretation . . . serves to make remote the issue which was sought to be presented to the Court." 426 U.S. at 51-52. In short, Justice Brennan, dissenting, agreed that the challenged IRS ruling raised questions which should not be adjudicated in the abstract and in general, but which required a "concrete setting" for determination. *Id.* at 52, *quoting* Gardner v. Toilet Goods Ass'n, 387 U.S. 167, 197 (1967). The error of the majority, Brennan asserted, was its failure to isolate the question of standing from questions of reviewability, ripeness and the merits. For my comments on Justice Brennan's position, see note 63 *infra.*
must allege some threatened or actual injury resulting from the putatively illegal (agency) action before a federal court may assume jurisdiction. In other words, the case and controversy limitation of Art. III still requires that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court.\(^\text{43}\)

A decision that a party has standing obviously involves consideration of factor #1 on the list; \textit{viz.}, the nature and degree of the injury. Checklist factor #2—the nature of the question presented—is involved because the plaintiff's injury must be related to an interest created, protected or regulated by common law, statute or constitutional provision.\(^\text{44}\) The causal connection requirement, articulated in \textit{Simon}, also implicates checklist factor #3—the obviousness of the agency error as it relates to the plaintiff as shown by the record.\(^\text{45}\)

An additional standing requirement emphasized in \textit{Simon} is that plaintiff must show that his requested remedy, if granted by the court, will provide him with meaningful relief.\(^\text{46}\) This requirement conforms to checklist factor #4. Finally, checklist factor #5, \textit{i.e.}, the impact of judicial intervention on the orderly conduct of governmental business (including the court's business), is the theme that runs implicitly throughout the \textit{Simon} opinion because it is the dominant underlying policy concern of the Article III case or controversy limitation in the Constitution. Some Supreme Court Justices are at times emphatic about the relevance of checklist factor #5 in standing cases in which prudential concerns are determinative. For example, in \textit{United States v. Richardson},\(^\text{47}\) Mr. Justice Powell notes it is awkward in a democratic society for non-elected judges to supervise the representative branches of government (and their agencies) merely because a taxpayer requested a district court to give him relief.\(^\text{48}\) Justice Powell also notes that wholesale judicial receptivity to public interest suits by persons who cannot distinguish them-

\begin{itemize}
  \item 43. 426 U.S. at 41-42.
  \item 46. \textit{Id.} at 38, 45-46.
  \item 47. 418 U.S. 166 (1974).
  \item 48. \textit{Id.} at 188 (concurrence opinion).
\end{itemize}
selves from other citizens risks impairment of the federal court’s effectiveness in protecting the personal rights and liberties of individuals and minority groups (this also relates to the nature of the legal question presented); moreover, he expresses concern about: (1) uneven and sporadic review of varying quality depending on the resources of the particular plaintiff; and (2) the possibility that Congress might exercise its authority to diminish judicial power.49 In short, the recent retrenchment that has shored up the threshold obstacles that confront “public interest” plaintiffs has occurred, in part, because of prudential concerns relevant to checklist factor #5.50

The law regarding standing to assert the rights of third persons not parties to the litigation is also instrumental: it prevents unwarranted judicial intervention that has a detrimental impact on the orderly conduct of governmental business (checklist factor #5).51 As the Court in Singleton v. Wulff52 notes inter alia, the standing requirement is utilized “as one means by which the courts avoid unnecessary constitutional adjudication.”53 Nevertheless, a plaintiff who has himself suffered an injury in fact can often obtain judicial review by asserting the rights of third parties if there is a genuine, substantial obstacle to the assertion by the third party of his own rights (checklist factor #4); for example, where an organization member’s associational right to anonymity would be relinquished by the publicity attendant upon bringing suit.54 Another required element in jus tertii cases is that the plaintiff and the third party rightholder have a special or close relationship, thus the alleged agency error must relate to the plaintiff at least indirectly55 (checklist factor #3). Moreover, federal courts show a special solicitude for persons asserting the rights of others if the question presented indicates such legal rights are especially important or fundamental56 (checklist factor #2). Obviously, checklist factor #1, the nature of the injury (direct or indirect) and the extent to which rights of third

49. Id. at 188-197.
53. Id. at 114.
56. Id. at 116.
parties have been diluted are important considerations whenever such third party rights are asserted by plaintiffs or defendants.

Clearly then, the law of standing relating to a party's own rights or his privilege to assert the rights of third persons or the public is based on equitable and utilitarian considerations that facilitate the coordination by courts of the interest of the individual, the public and the courts themselves. The most significant considerations coincide with the factors in the checklist.

Before going on to discuss ripeness, the close relationship between standing and reviewability should be pointed out. Standing rules, of course, designate who may bring suit, whereas reviewability relates to whether judicial review is available at the behest of the plaintiff. But section 702 of the APA pertains both to standing and reviewability, virtually lumping together both concepts, and the Court's opinions (e.g., Barlow v. Collins) that articulate the "zone of interests" test also illustrate the connection between the two doctrines. Moreover, standing and reviewability are both, in a sense, jurisdictional concepts, yet both concepts can also be used as vehicles to discuss the Court's prudential concerns. More pertinent to the thesis of this article, the same factors operate to shape both concepts; this integrates their relationship (as instrumental concepts to control agencies without either undue judicial interference on the one hand or abdication of judicial responsibility on the other).

C. Ripeness

There is also a close affinity between the concepts of ripeness and standing. Indeed, in Simon v. Eastern Ky. Welfare Rights Organization, Mr. Justice Brennan concurred in the Court's judgment, but thought lack of ripeness rather than standing was the fatal flaw in the record. Basically the same factors which operated
to convince the majority that plaintiffs lacked standing convinced Justice Brennan that the issues were unripe.

Justice Brennan's preference for liberalized judicial review influences him to treat standing, reviewability, ripeness and other doctrines as discrete entities that can be analyzed in isolation from each other. However useful and legitimate this type of discrete analysis might be in periods of judicial activism, it is misleading to pretend

63. There is an explanation for this preference; Justice Brennan knows there is a presumption of reviewability but not of standing, and that the isolation of reviewability from standing enhances the likelihood of judicial review of the merits if standing barriers are lowered.

Mr. Justice Brennan's technique in standing cases appears to give tremendous weight to checklist factor #1 (injury in fact) and appears to ignore all the other factors on the checklist. This approach results in lower standing barriers because it avoids the cumulative effect of those factors on the checklist that influence more conservative judges to deny a plaintiff standing to sue despite the presence of some trivial injury, basing the denial on tenuous theories of causation. However, Justice Brennan does not actually ignore factor #5 on the checklist; he, as an activist, just views it differently from judges who are not activists. According to Brennan, checklist factor #5 (concern with the impact of judicial intervention on the orderly conduct of government business) is served by liberalizing standing rules because as he sees it:

In our modern-day society, dominated by complex legislative programs and large-scale governmental involvement in the everyday lives of all of us, judicial review is essential both for the protection of individuals harmed by that action, . . . and to ensure that the attainment of congressionally mandated goals is not frustrated by illegal action.

426 U.S. at 65.

Although in standing cases Mr. Justice Brennan does not emphasize other factors on the checklist, even he concedes that "the only constitutional, 'case or controversy,' policy affecting the law of standing," 426 U.S. at 52, is the requirement that the plaintiff have a personal stake in the outcome of the controversy—an allusion to the ability of the Court to provide the plaintiff with meaningful relief (checklist factor #4).

He also concedes that in response to a motion for summary judgment, the plaintiff must make some showing sufficient to create a material issue of fact as to whether there is any connection between challenged agency action and the alleged injury to the plaintiff (checklist factor #3). For example, in Simon, Mr. Justice Brennan concurred in the judgment in part because "[t]here is absolutely no indication in the record that the contested ruling altered the operation of these hospitals in any way, or that the tax-exempt status of these hospitals was in any way related to the Ruling." 426 U.S. at 54.

Justice Brennan does not completely ignore checklist factor #2, the legal question presented, when he recognizes, "If the alleged legal interest is clearly frivolous, . . . the plaintiff can be hastened from court by summary judgment. Barlow v. Collins, 397 U.S. 159, 175 n.10 (1970) (emphasis added). Justice Brennan would also agree that the "more 'distinctive or discriminating' the harm alleged and the more clearly it is linked to the defendant's action, the more easily a plaintiff may meet the constitutional test" for standing. Id. at 172 n.5 (checklist factors #1 and #3). In sum, even a justice who tries to isolate standing from other concepts of judicial review cannot ignore the factors that shape all the concepts including standing.
all these threshold doctrines are not shaped by substantially the same considerations. Although the ripeness cases do focus on the concreteness of the issues, even Mr. Justice Brennan in *Baker v. Carr*\(^64\) recognized that the doctrine of standing (plaintiff's personal stake in the controversy) is a means to "assure that concrete adverseness which sharpens the presentation of issues upon which the Court so largely depends for illumination of difficult questions."\(^65\) In this formulation, there is recognition of the intimate relationship between standing and ripeness.

As with other threshold doctrines, ripeness is an instrumental concept which as Mr. Justice Harlan noted involves balancing the interests of the individual, the agencies and the courts.\(^66\) In a case arguably unripe, the courts "evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration."\(^67\) By his reference to the "parties," Justice Harlan was sensitive both to the interests of the individual challenging agency action and the agency itself; by his reference to fitness of the issues, Justice Harlan meant to protect the interests of the courts who have the responsibility to decide the questions presented as fairly and as accurately as possible.\(^68\)

From the overview just presented, the following points are germane to the thesis of this article: (a) the hardship to the individual and how contingent and speculative it is are considerations pertinent to ripeness concepts (checklist factor #1); (b) in ripeness cases, the fitness of the issues often relates to how broad or narrow the question presented is and whether it is primarily a legal question or a factual question (checklist factor #2); (c) the obviousness of the agency error as it relates to the plaintiff as shown by the record before the court is an extremely important factor in ripeness cases, as Mr. Justice Brennan's dissent in *Simon*\(^69\) indicates (checklist factor #3); moreover, pre-enforcement review of rules and policy is often denied for lack of ripeness when further proceedings will

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\(^{64}\) 369 U.S. 186 (1962).
\(^{65}\) Id. at 204.
\(^{67}\) Id. at 149.
\(^{68}\) Id.
clarify and narrow the focus of the issue; the inability of the plaintiff to obtain adequate relief without timely court intervention was determinative in Abbott (checklist factor #4); and (e) as already noted, the rationale of ripeness which in part focuses on the hardship of the individual challenger, the agency and the courts (if the issues are not fit) are considerations which implicate checklist factor #5. Thus the same factors which shape the concept of reviewability and standing also shape the concept of ripeness.

Before turning to the exhaustion of remedies rules, the reciprocal relationship between the fitness of the issues and the hardship to the plaintiff should be emphasized to demonstrate the affinity between the doctrines of ripeness and standing. As the harm to the plaintiff becomes more distinct and palpable and less trifling, contingent and speculative, the issues narrow and become better focused (fit) to decide. As the causal connection between the alleged harm and the agency's action becomes more obvious and immediate, the issues become clarified. In brief, if the plaintiff has no sufficiently distinctive personal interest in the controversy, he might fail to provide a federal court with the required assurance that the issues will be sufficiently ripe to illuminate the difficult questions presented. In this connection, consider whether Laird v. Tatum was a standing or a ripeness case. What kind of case was Roe v. Wade? Too often in poorly reasoned opinions the various relevant factors have been lumped under the one label or the other. But the Court's decision in Laird and Roe v. Wade turned not on which

70. See, e.g., Citizens Communications Center v. FCC, 447 F.2d 1201 (D.C. Cir. 1971).
73. 408 U.S. 1 (1972). The Laird opinion was based on the premise that the disputed practice challenged, Army surveillance of citizens, did not present the plaintiffs with any present or immediately threatening injury resulting from specific official action.
74. 410 U.S. 113 (1973). The Court dismissed the complaint of John and Mary Doe, a married, childless couple, who claimed that pregnancy would risk Mrs. Doe's health and wanted assurance that an abortion would be legal if Mrs. Doe became pregnant. For some difficult questions posed concerning this claim, see Gunther, supra note 35, at 1589. The Court's dismissal of the Does' claim has been interpreted as a ripeness opinion that was inadvertently flawed by its reliance on the law of standing. See Monaghan, Constitutional Adjudication: The Who and When, 82 YALE L. J. 1363, 1381 (1973).
75. Since the same considerations shape both standing and ripeness, it is not always enlightening to separate both concepts into two watertight compartments.
label was "right" or "wrong," but on each Justice's view of the proper role and duty of the Court (which in turn implicates the five checklist factors).

D. Exhaustion of Remedies

The rule that requires exhaustion of administrative remedies is concerned, in part, with promoting proper relationships between the courts and administrative agencies charged with regulatory duties.\(^7\) The rule is invoked if a federal court is convinced that Congress intends to require the challengers of agency action to pursue opportunities for review at the agency level, or if a court deems it desirable to give the agency an opportunity to correct the alleged illegality.\(^7\) The exhaustion of remedies requirement controls the timing of judicial review; that is, when an individual challenging agency action is entitled to judicial relief. In this respect, it is very similar to the doctrine of ripeness\(^7\) and is often confused with the doctrine of primary jurisdiction (which determines whether the agency or court should act first).\(^7\) Usually the exhaustion of remedies rule is invoked when an individual challenges an agency decision in the nature of an order rather than an agency rule (regulation, ruling, or statement of policy), unless of course the rule is not final and an appeal can be filed within the administrative hierarchy.

The reasons that justify frequent use of the exhaustion of remedies doctrine have been spelled out by the Supreme Court in *McKart v. United States*:\(^50\)

> The reasons for . . . judicial application of the exhaustion doctrine . . . are not difficult to understand. A primary purpose is, of course, the avoidance of premature interruption of the administrative process. The agency, like a trial court, is created for the purpose of applying a statute in the first instance. Accordingly, it is normally desirable to let the agency develop the necessary factual background

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\(^7\) Of course, an issue can be unripe even if the challenger has no opportunity to appeal the agency action within the bureaucracy (i.e., at the agency level).
\(^7\) See United States v. Western Pac. R.R., 352 U.S. 59 (1956). *See generally DAVIS TEXT, supra* note 10, at 373-74. *See also note 93 infra.*
upon which decisions should be based. And since agency decisions are frequently of a discretionary nature or frequently require expertise, the agency should be given the first chance to exercise that discretion or to apply that expertise. And of course it is generally more efficient for the administrative process to seek aid from the courts at various intermediate stages. The very same reasons lie behind judicial rules sharply limiting interlocutory appeals.

Closely related to the above reasons is a notion peculiar to administrative law. The administrative agency is created as a separate entity and invested with certain powers and duties. The courts ordinarily should not interfere with an agency until it has completed its action, or else has clearly exceeded its jurisdiction. As Professor Jaffe puts it, "[t]he exhaustion doctrine is, therefore, an expression of executive and administrative autonomy." This reason is particularly pertinent where the function of the agency and the particular decision sought to be reviewed involve exercise of discretionary powers granted the agency by Congress, or require application of special expertise . . . . Particularly, judicial review may be hindered by the failure of the litigant to allow the agency to make a factual record, or to exercise its discretion or apply its expertise. In addition, other justifications for requiring exhaustion in cases of this sort have nothing to do with the dangers of interruption of the administrative process. Certain very practical notions of judicial efficiency come into play as well. A complaining party may be successful in vindicating his rights in the administrative process. If he is required to pursue his administrative remedies, the courts may never have to intervene. And notions of administrative autonomy require that the agency be given a chance to discover and correct its own errors. Finally, it is possible that frequent and deliberate flouting of administrative processes could weaken the effectiveness of an agency by encouraging people to ignore its procedures.81

The McKart case, quoted above, recognizes that the doctrine of exhaustion of remedies, like most concepts governing judicial review, is subject to numerous exceptions.82 For example, a complaining party will be excused from exhausting administrative remedies when it is obvious that such effort will be wasted or futile.83

81. Id. at 193-95.
Another example is where the administrative appeal or other agency remedy is perceived to be a sham owing to the bad faith of officials, or where the record clearly shows that administrative remedies are inadequate. Exhaustion of remedies is not always required when compliance with the appeal structure within the administrative hierarchy abridges constitutional rights, such as when first amendment rights are chilled, or when the court decides that the agency lacks adequate capability to determine the constitutionality of the statute that empowers it to act.

A recurrent issue in exhaustion of remedies cases is whether an administrative agency's jurisdiction can be challenged before the administrative agency issues its final order. After analysis of many such cases, Professor Davis notes: "When irreparable injury will result from the administrative proceeding and the lack of jurisdiction clearly appears from considerations which are not within the agency's specialized understanding, imposing the exhaustion of remedies requirement would be both unjust and impractical." Davis submits the following three factors are the relevant considerations in these cases involving a claim that the agency is acting without jurisdiction: (1) the extent of injury that would result from pursuit of an administrative remedy; (2) the degree of clarity or doubt about administrative agency jurisdiction; and (3) the involvement of specialized administrative understanding in the question of jurisdiction.

Although not many courts have formally adopted Professor Davis's three-prong test, his list of three factors is pertinent. However, the Davis list is incomplete. Professors Gellhorn and Byse have compiled a more complete list of five factors that, not so coincidentally, track the checklist factors in Section III of this article (the list which I submit shapes all doctrines of judicial review). When the exhaustion of remedies cases are analyzed, and the analysis is not

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84. 3 Davis, supra note 6, § 20.04.
85. For a presentation of the conflicting Supreme Court decisions, see Davis, supra note 6. See also K. Davis, Administrative Law of the Seventies § 20.04 (1976).
86. 3 Davis, supra note 6, § 20.03 at 68.
87. Id. at 69.
88. But see Lone Star Cement Corp. v. FTC, 339 F.2d 505 (9th Cir. 1964).
89. This portion of the discussion is based on an outline by W. Gellhorn and C. Byse which was privately circulated among their colleagues and is not available to the general public.
limited just to those cases involving challenges to agency jurisdiction, it is evident that one or more of the factors identified by Gellhorn and Byse are usually decisive. According to Gellhorn and Byse, when the relevant substantive statute does not provide an explicit answer to the court's inquiry respecting exhaustion of remedies, the following considerations become pertinent: (1) the extent, imminence and gravity of the harm alleged (factor #1 on checklist); (2) the character of the question involved (factor #2 on checklist); (3) the adequacy of the administrative procedure to remedy the alleged error (factor #4 on checklist); (4) the grossness or obviousness of the alleged error (factor #3 on checklist); and (5) the extent to which resort to the court would interfere with the efficient operation of the agency (factor #5 on checklist).

Gellhorn and Byse explain that many of the "exhaustion of remedies" cases turn on these factors and make sense, or can be reconciled, only by appreciating the importance of such factors. I shall not repeat their excellent analysis, except to remark that they say the "strongest case for not requiring exhaustion is one which presents a grievous injury based on a plain error of law in a situation where the injury could not be remedied by following the administrative procedure." Relevant to the thesis of this article, note that such a situation would also be a strong case for not denying the challenger's right to obtain immediate judicial review on the grounds of lack of standing, lack of ripeness or unreviewability. Thus the value of the Gellhorn and Byse list of five factors goes beyond helping us understand the exhaustion of remedies doctrine; with a little tinkering, it can be utilized to make sense out of most cases involving threshold obstacles to judicial review.

E. Scope of Review

Rather than repeat the same analysis undertaken in the foregoing sections with respect to the doctrines of primary jurisdiction and considerations pertinent to the propriety of a court order to stay agency action pending review, I believe it will be more interesting

90. Id.
91. Id.
92. Id.
93. This footnote will sketch the argument the author would make if the topics referred to above in the text were fully discussed.
to demonstrate that the same factors which shape the threshold obstacles to judicial review also influence a court's scope of review.

The Supreme Court has recognized that a judicial stay to postpone the effective date of agency action in order to preserve the status quo "is not a matter of right . . . [it is an exercise of judicial discretion. The propriety of its issue is dependent on the circumstances of the particular case." Virginian Ry. Co. v. United States, 272 U.S. 658, 672-73 (1926). See generally W. GELLHORN & C. BYSE, ADMINISTRATIVE LAW: CASES AND COMMENTS 256-262 (2d ed. 1947) [hereinafter cited as GELLHORN & BYSE]. One federal court has listed the factors governing its issuance of a stay order (or the denial of a Motion for Stay) as follows:

1. Has the petitioner made a strong showing that it is likely to prevail on the merits of its appeal? Without such a substantial indication of probable success, there would be no justification for the court's intrusion into the ordinary processes of administration and judicial review.

2. Has the petitioner shown that without such relief, it will be irreparably injured? The key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm. But injury held insufficient to justify a stay in one case may well be sufficient to justify it in another, where the applicant has demonstrated a higher probability of success on the merits.

3. Would the issuance of a stay substantially harm other parties interested in the proceedings? On this side of the coin, we must determine whether, despite showings of probable success and irreparable injury on the part of petitioner, the issuance of a stay would have a serious adverse effect on other interested persons. Relief saving one claimant from irreparable injury, at the expense of similar harm caused another, might not qualify as the equitable judgment that a stay represents.

4. Where lies the public interest? In litigation involving the administration of regulatory statutes designed to promote the public interest, this factor necessarily becomes crucial. The interests of private litigants must give way to the realization of public purposes. The public interest may, of course, have many facets—favoring at once both the rapid expansion of utilities and the prevention of wasteful and repetitive proceedings at the taxpayers' or consumers' expense; both fostering competition and preserving the economic viability of existing public services; both expediting administrative or judicial action and preserving orderly procedure.

Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n., 259 F.2d 921 (D.C. Cir. 1958). The reader can see that the factors listed by the court substantially track the factors on the checklist.

The primary jurisdiction cases present problems concerning the proper allocation of business between federal courts and administrative agencies. The cases make it clear that a federal court will usually abstain from exercising its jurisdiction whenever the agency has concurrent jurisdiction in the interests of uniformity of regulation, and whenever the judiciary can benefit from prior consideration by an agency. See, e.g., Texas & Pac. R.R. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907) (checklist factor #5). The administrative procedures, however, must be adequate to provide a meaningful remedy. Rosado v. Wyman, 397 U.S. 397 (1970) (checklist factor #4). The question presented is crucial, for if the resolution of the controversy calls "for the exercise of high degree of expert and technical knowledge," Far East Conference v. United States, 342 U.S. 570, 573 (1952), quoting United States Navigation Co. v. Cunard Steamship Co., 284 U.S. 474, 485 (1932), courts are less likely to assume initial jurisdiction. Compare United States v. Western Pac. R.R. Co., 352 U.S. 59 (1956) with Great N. Ry. Co. v. Merchants Elevator Co., 259 U.S. 285 (1922). See also, GELLHORN & BYSE, supra
The scope of judicial review of agency adjudications varies in intensity. Although there are many formulas and gradations of scrutiny noted in the cases and the statutes governing scope of review, the major distinction to keep in mind is the difference between what is correct and what is rational. A federal court is willing to substitute its own independent judgment for the agency if it is vitally concerned with correct decisions; the court, however, will defer to the agency views if simply a rational solution to a controversy is deemed acceptable.

More often than not, a rational solution to an agency-adjudicated controversy is deemed acceptable and the court in such cases will defer to the agency—whether the formula of review be labelled the substantial evidence rule, the arbitrary, capricious and abuse of discretion formula or some other "rational basis" test. This customary deference is justified on the theory that Congress empowered the agency, not the courts, to implement the statute delegating the agency power. However, if the individual challenging the agency adjudication (formal or informal) complains that the agency procedures were unfair, or that the agency erroneously and impermissibly interpreted a statute or the Constitution, a court is more likely to exercise its own independent judgment (as federal courts are empowered to do under the APA). This is not to say the courts exercise independent judgment each time an agency applies a statute or a statutory term to a set of facts; the routine, particularized application of statutes to factual situations is typically reviewed under some kind of rational basis test, unless the court decides the agency impermissibly violated some general policy specified by

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at 293-99 (checklist factor #2). Finally, the nature of some injuries are deemed beyond the reach of administrative agencies, so the doctrine of primary jurisdiction is not invoked, GELLHORN & BYSE, supra at 308, and some common law wrongs resulting in injuries not usually the grist of the administrative process are more likely to be reviewed initially by federal courts—despite the doctrine of primary jurisdiction (checklist factor #1). See Nader v. Allegheny Airlines, 426 U.S. 290 (1978).

94. See generally, H. LEVENTHAL, NATURE AND SCOPE OF JUDICIAL REVIEW IN FEDERAL ADMINISTRATIVE LAW: PRACTICE AND PROCEDURE 295-319 (P.L.I. 1977) [hereinafter cited as LEVENTHAL].


Congress. Deferential review is more commonplace because an agency's application of statutes and statutory terms usually is not novel or peculiar: so long as the agency stays within the bounds of the broad legislative policy articulated in the statute, as interpreted by a court, its routine application will not be disturbed although reasonable men might disagree on the wisdom of the results reached in a particular case. On the other hand, the federal courts (not the agency), being the experts on statutory construction, construe legislation without deference whenever a novel or peculiar agency application of a statute raises a major question of general policy.\(^98\) However, even the rational basis test is made of rubber, not wood, and in some special cases a court takes a harder look at the record, or insists on a more complete record than in other cases.\(^99\)

With respect to the scope of review of agency rules, there is no requirement in the \textit{APA} that federal courts defer to the agency's promulgation of interpretive rules or its statements of policy.\(^100\) If, however, the rule under scrutiny is a legislative rule, then a rational basis test, that is, a minimal level of scrutiny, is applied\(^100\)--unless, as in adjudications, the question presented concerns alleged grossly

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\(^98\). The analysis stated here is arguably more consistent with what courts ought to do rather than descriptive of what they always do. As recognized by Judge Friendly, "there are two lines of Supreme Court decisions on this subject which are analytically in conflict, with the result that a court of appeals must choose the one it deems more appropriate for the case at hand." \textit{Pittston Stevedoring Corp. v. DellaVentura}, 544 F.2d 35, 49 (2d Cir. 1976). The analysis stated above attempts to reconcile the two divergent lines of cases noted by Judge Friendly, but admittedly is not altogether successful in that respect. \textit{See also} \textit{4 Davis, supra} note 6, §§ 30.01, 30.07, 30.14.

Professor Davis is surely right when he states the choice between independent judgment and rational basis is largely for judicial discretion. \textit{Id.} at § 30.08. My point is simply to emphasize the factors that influence which way a court will exercise its discretion if the questions pertaining to scope of review are similar to those factors which shape the law pertaining to the threshold obstacles.


unfair procedures, failure to comply with specified procedures, impermissible statutory or constitutional interpretation, or involves a subject peculiarly within a court’s competence.  

All these generalizations, of course, only give us the relevant conceptual language employed by courts when they review agency action on the merits; they are not very useful to predict the outcome of litigation—as noted, it is not rare for a court ostensibly reviewing the case under a rational basis test to give the record a very hard look; yet is is also not surprising if a court defers to the agency, even though it is empowered to substitute its own judgment.

The outcome of litigation is also difficult to predict because a court’s decision to use a rational basis test or to substitute its independent judgment, and the various refinements and gradations of scrutiny that complicate the subject of scope of review, are influenced to a substantial degree by the same list of factors that shape the concepts governing the power and the propriety of judicial review. The list of factors obviously presents a wide variety of possibilities which makes prediction of outcome difficult. Nevertheless, certain kinds of cases are likely candidates for close judicial scrutiny. For example, if the plaintiff’s injury involves agency interference with a fundamental right such as freedom of speech (checklist factor #1), a court will likely review the facts of the case more carefully, and will engage in more exacting scrutiny of the agency action. Indeed, the nature of plaintiff’s injury controls whether the due process clause is applicable since it obtains only when the agency deprives a person of life, liberty, or property. Checklist factor #2 is always crucial, for, as noted, if the legal question presented is novel, or if it involves constitutional rights, fair procedure or the interpretation of a statute allegedly prohibiting the agency action, a court is more likely to substitute its judgment and search for the

102. Id.
103. See note 99 supra.
correct answer rather than only an acceptable answer.\textsuperscript{106} This be-
comes a safer statement if the record demonstrates the agency error
is obvious and if it relates to the plaintiff (checklist factor #3). A
court’s eagerness to substitute its judgment for that of the agency,
however, will decrease, perhaps to the point of holding the matter
completely unreviewable, depending on the remedy requested and
the challenger’s opportunity to obtain relief elsewhere\textsuperscript{107} (checklist
factor #4). Finally, the purpose of the deferential canons of judicial
review, such as the substantial evidence test, the arbitrary, capri-
cious and abuse of discretion test and similar formulas, is to prevent
agencies from being turned into little more than conduits for the
transmission of cases to the courts.\textsuperscript{108} Thus, a court’s choice of scope
of review, particularly since it is in part governed by the APA, is
influenced by the impact of judicial intervention on the orderly
conduct of governmental business (checklist factor #5). As the At-
torney General’s Report noted in 1941:

If review is to extend to “correctness,” then almost every contested
case would present the issue and almost every losing party would
entertain a reasonable belief that there is a substantial chance of
reversal. Second, if the agency has not exceeded its constitutional or
statutory authority, has made a proper interpretation of the law, has
conducted a fair proceeding and has not acted capriciously, the fea-
tures of expertness and specialization on the part of the administra-
tive agency would lend great weight to its inferences and conclu-
sions.\textsuperscript{109}

Of course, much water has passed over the dam since 1941, and, as
indicated, formulas governing scope of review are made of rubber,
not wood, and therefore expand and contract like other judicial
doctrines. Federal courts today are taking a harder look at some
special cases of interest to them, but as always the intensity of

\textsuperscript{106} See Gellhorn & Byse, supra note 93, at 381, quoting Report of the Attorney
General’s Committee on Administrative Procedure 87-88, 90-91 (1941). Of course, the sub-
stantial evidence rule (a rational basis test) limits the Court’s scope of review of the raw and
basic facts found by the agency. See generally, 4 Davis, supra note 6, § 29.01.


\textsuperscript{108} See B. Schwartz, Administrative Law 579 (1976), citing Report of the Attorney
General’s Committee on Administrative Procedure 91 (1941).

\textsuperscript{109} Report of the Attorney General’s Committee on Administrative Procedure 79
(1941).
judicial review will vary, as the Attorney General's report noted back in 1941, depending on:

the character of the administrative agency, the nature of the problems with which it deals, the nature and consequences of the administrative action, the confidence which the agency has won, the degree to which review would interfere with the agency's function or burden the courts, the nature of the proceedings before the administrative agency and similar factors.\[10\]

This, too, must be said: there is a reciprocal relationship between scope of review and the threshold issues of judicial review. But this is a highly personalized area depending largely on the individual judge. With some judges, as the desire for increased scope of review increases, the difficulty of surmounting the threshold obstacles decreases. But as more and more judges realize that agency expertise has been oversold,\[11\] and that bows "to the mysteries of administrative expertise"\[12\] are increasingly inappropriate, the Supreme Court, aware of the impact of judicial review on the orderly conduct of the government's business including the drain on federal court resources (checklist factor #5), has begun to tighten up the just recently liberalized doctrines of standing, reviewability and the other instrumental doctrines of judicial review that control the quantity of cases, as well as the type of cases, decided by the federal courts.

IV. CONCLUSION

Christopher Columbus Langdell, the first dean of Harvard Law School, believed law to be a science, and he attempted to advance the law by progressively simplifying it. Langdell put his idea this way:

[T]he number of fundamental legal doctrines is much less than is commonly supposed; the many different guises in which the same doctrine is constantly making its appearance, and the great extent to

\[10\] Id. at 91.
which legal treatises are a repetition of each other, being the cause of much misapprehension. If these doctrines could be so classified and arranged that each should be found in its proper place, and nowhere else, they would cease to be formidable from their number.  

Professor Gilmore tells us that the “Langdellians sought with considerable success to formulate theories which would cover broad areas of the common law and reduce an unruly diversity to a manageable unity.” The relevance of the Langdellians is this: the administrative common law governing judicial review conceivably could be reduced to one concept, namely reviewability, which would be shaped primarily by the five factors discussed in this article. There would be no need to distinguish between standing, ripeness, exhaustion of remedies, reviewability and so forth as if such concepts were watertight, separate compartments. A federal court would need only to explain that the matter was unreviewable, or partly unreviewable, either because the injury was too trivial, the issues too vague, the disruption of the government too great, or because of some combination of the operative factors. Whether this Langdellian “simplification” would make administrative law seem more or less Kafkaesque is a question I cannot answer with certainty. I merely wish to point out that any analysis which completely ignores obvious overlap also ignores the reality that administrative law is an unstable mass characterized by many internal inconsistencies precisely because it cannot be set in place and fixed by attaching to it those artificial labels about which we argue so much.

114. Id. at 43.
115. See note 2 supra.
116. Caveat: Professor Gilmore reminisced about the law as his professor, Wesley Sturges, conceived it to be: that which “bore a striking resemblance to the more despairing novels of Franz Kafka.” Gilmore, supra note 113, at 81. Sturges taught Gilmore “to be forever on (his) guard against the slippery generality, the received principle, the authoritative proposition.” Gilmore, supra note 113, at 139 n.31. Sturges taught Gilmore “to trust no one’s judgment except our own—and not to be too sure of that. He [Sturges] taught us, in a word, how to be lawyers.” Id. Yet Gilmore survived his professor’s skepticism and has defined the law as felicitously as anybody when he says: “The process by which a society accommodates to change without abandoning its fundamental structure is what we mean by law.” Gilmore, supra note 113, at 14. The doctrine of judicial review in administrative law is an important part of this process.
To conclude, it has not been my intention to build a model but rather to describe briefly the symbiotic relationship of doctrines usually treated as separate chapter headings or key numbers. It has been my argument that administrative law concepts governing judicial review of agency action can be clarified by viewing them as instrumental doctrines that are all shaped by the same five checklist factors. This information may not help one predict the outcome of a case any better than knowing there must be an offer, acceptance and consideration before there is a contract, but it does demonstrate that administrative law can be Langdellian as well as Kafkaesque.

V. Postscript

Readers of an earlier version of this article have submitted questions that identify matters inadequately addressed above. In this postscript I respond partially to their thoughtful interrogatories.

The five factors do not represent any unified conception of the judicial function, nor are they intended to serve as a model or as an exhaustive list of the factors that shape judicial discretion. They simply add up to a checklist that might be useful to academics and others in the analysis of a case in which a party dissatisfied with agency action seeks judicial review. The checklist can be diagrammed as follows:


118. Professor Richard B. Stewart asks:
1. Precisely why do you emphasize the five factors on the checklist?
2. Do they reflect some unified conception of the judicial function
3. What is the content of these factors? Some of them seem very fuzzy—simply a catch-all for further analysis.
4. Should we abolish the traditional categories as a starting point and use the checklist factors instead? If so, would the traditional categories continue to have a residual role—as rows under your columns?

Professor Paul R. Verkuil comments: "It is not clear to me which factor predominates when they are in opposition to as they inevitably will be." He notes that in my standing example, Simon v. Eastern Ky. Welfare Rights Organization, the result is supported by factor #5 but wonders whether the decision violates factor #4. See note 42 supra, and accompanying text.
Each checklist factor should be evaluated in terms of its potential to induce review in a particular type of controversy; for example, a grievous loss warrants a plus mark next to the checklist factor #1 category whereas a trivial, virtually de minimis loss warrants a minus mark next to checklist factor #1. This process should be repeated with respect to all the checklist factors. The product often is not a sure-fire guide that predicts the outcome of a “standing” case or a “ripeness” case, but it does focus attention on the strengths and weaknesses of the challenger's claim that the agency action should be reviewed.

Admittedly the factors are general, quite fuzzy, and more work needs to be done to sharpen and illuminate their scope. On the other hand, the specific content of the factors is constantly changing as the administrative common law evolves, and the injection of too much substance will reduce the long-run usefulness of the checklist method of analyzing a case. As to which factor predominates, this will depend on the outlook of the judge (whether he is an activist or deferential to the particular federal agency) and the times. During certain periods, for example, factor #4 might often subordinate factor #5 (for some judges), and during other periods factor #5 will be regarded as more important than factor #4. This unstable aspect of judicial review of agency action accounts in part for the Langdellian and Kafkaesque reference in the title of the article. If the factors

119. Factor #4, for example, really embraces two distinct considerations: namely, the opportunity of the rightholder to obtain relief without court intervention and the ability of the court to provide the challenger with meaningful relief.
were not dynamic and often in opposition to each other, there would be hard and fast rules dictating the answers to almost all judicial review controversies—contrary to my (not very radical) argument that the law of judicial review is shaped largely by discretion.\footnote{120. The factors partially describe what H.L.A. Hart calls the “rule of recognition.” H.L.A. Hart, The Concept of Law (passim) (1961). See Weinreb, Law as Order, 91 Harv. L. Rev. 909, 923 (1978).}

A recent case illustrates that the checklist suggested in this essay is no more than a starting point for analysis. In Adamo Wrecking Co. v. United States, 98 S. Ct. 566 (1978), the Court held there was jurisdiction to review an issue that the court of appeals held unreviewable. The Court noted the challenger’s injury was severe (criminal sanctions); the question presented was one of law, not fact; agency errors in designating what are “emission standards” within the meaning of a statute are readily detectable by courts; preclusion would negate the opportunity of many individuals adversely affected by agency action to obtain protection against arbitrary decision; and the narrow judicial inquiry authorized by the Court does not disrupt, but enhances, the orderly conduct of governmental business. Utilizing the same factors, the dissenters concluded the agency action was unreviewable. The dissenting opinion noted, \textit{inter alia}, that the challenger did not claim his constitutional rights were violated; no one had questioned the agency’s statutory authority; the challenged interpretation was within the agency’s “special province” and involved complicated factual and discretionary judgments entitled to deference; the challenger would have been entitled to file a petition for review in a District of Columbia court; and the majority’s construction of the statute denied the agency power to regulate effectively poisonous substances which pose an “especially grave threat to human health.” 98 S. Ct. at 577.

Thus all five checklist factors were marshalled by the majority one way and another way by the dissent. Is administrative law Langdellian or despairingly incongruous?