BYPASSING AGENCY ADJUDICATION

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ABSTRACT

This Article examines the contested practice of bypassing agency adjudication to accelerate judicial review of non-final executive action. Parties typically challenge final action under the Administrative Procedure Act (APA). But parties may also seek an injunction or declaratory judgment with respect to a non-final action that violates a statute or the Constitution. Traditionally, such "ultra vires" review required a clearly unlawful action and an inadequate administrative remedy. But modern courts further limit review by applying three judicially developed timing doctrines—exhaustion, ripeness, and Thunder Basin.

This Article explains why the traditional ultra vires model—without the timing doctrines—should govern the bypassing of agency adjudication. Traditional ultra vires review ensures that consequential actions are not shielded from scrutiny and protects plaintiffs against irreparable harm. It simultaneously protects agency discretion by limiting the scope of review and requiring plaintiffs to show the inadequacy of administrative remedies. And the timing doctrines improperly flip the presumption against implied repeals, abdicate the policing of jurisdictional boundaries, and force plaintiffs to rely on inadequate remedies.

More broadly, this Article challenges the scholarly consensus that the APA-style appellate model of judicial review has replaced the older ultra vires model. The ultra vires model ensures review in an important set of cases. And that model rests on a different analogy for the relationship between courts and agency adjudicators. Rather than having only a trial-appellate relationship, courts and agency adjudicators also relate to each other as separate court systems in ultra vires cases.

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INTRODUCTION

Federal agencies and the President take many actions that are subject to agency adjudication before there is "final" action that would be reviewable under the Administrative Procedure Act (APA).[1] Agencies conduct investigations, communicate with regulated parties, announce policies, file administrative charges, and make interim decisions in quasi-judicial hearings. But when a non-final executive action violates a statute or the Constitution, a plaintiff may be able to bypass agency adjudication and seek an injunction or declaratory judgment. Such cases reflect a long tradition of reviewing "ultra vires" executive actions that violate a statute or the Constitution, one that predates the modern administrative state. Since the 1930s, though, courts have restricted ultra vires review by applying judicially developed timing doctrines. Those doctrines—exhaustion, prudential ripeness, and *Thunder Basin*—often bar a plaintiff from bypassing agency adjudication.

This Article explains why courts should shear off the requirements of the timing doctrines and restore the traditional requirements of ultra vires review when plaintiffs seek to bypass agency adjudication. The traditional ultra vires model permits a court to intervene as soon as an agency acts unlawfully. But it also provides important safeguards for agencies by requiring a clear showing of a statutory or constitutional violation and a showing that administrative remedies would be inadequate. The timing doctrines disrupt that balance and contradict the usual principles of statutory interpretation.

More broadly, recognizing and restoring ultra vires review in this posture challenges settled ideas about judicial review of federal agency action. Scholars have long argued that an appellate model of judicial review—familiar today from the APA—replaced ultra vires review in the early twentieth century.[2] And ultra vires cases are mostly familiar today from review of presidential actions (which are not "agency" actions under the APA)[3] and a limited number of cases where a statute implicitly precludes review but an agency violates "a *specific prohibition* in a statute."[4] Some of

1. *See* 5 U.S.C. § 704.

2. *See, e.g.*, Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Action*, 111 COLUM. L. REV. 939, 942 (2011); *see also infra* Section III.A (discussing additional scholarship).

3. *See* Franklin v. Massachusetts, 505 U.S. 788, 800–01 (1992).

4. Nuclear Regul. Comm'n v. Texas, 605 U.S. 665, 681 (2025) (citation and internal quotation marks omitted); *see* Alexandra Nickerson, Note, *Ultra-APA Ultra Vires Review: Implied Equitable Actions for Statutory Violations by Federal Officials*, 121 COLUM. L. REV. 2521, 2550–51, 2560–61 (2021).

those cases involve bypassing agency adjudication, but not all cases bypassing agency adjudication fall within those categories. Ultra vires review thus remains more important than generally acknowledged. Moreover, while APA-style review rests on an analogy to an appeal, ultra vires review rests on an analogy to separate court systems, as with courts of law and equity.[5] The relationship between courts and administrative agencies is thus sometimes appellate in nature and sometimes one between separate adjudicatory systems.

This Article begins by introducing the practice of bypassing agency adjudication.[6] Although these cases represent a fraction of administrative law litigation, they have outsized importance. As a historical matter, plaintiffs sought to bypass agency adjudication to challenge the constitutionality of proceedings before New Deal agencies.[7] In the twenty-first century, litigants have challenged the constitutionality of the structure of the Public Company Accounting Oversight Board,[8] the constitutional and statutory basis for President Trump's "travel ban,"[9] and the constitutionality of agency enforcement proceedings.[10] Indeed, in 2025 alone, parties sought to bypass agency adjudication over birthright citizenship,[11] the restructuring of federal agencies,[12] changes to collective bargaining rights,[13] the detention of a legal permanent resident,[14] executive orders targeting law firms,[15] and numerous other policies.[16]

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5. Ann Woolhandler, *Judicial Deference to Administrative Action—A Revisionist History*, 43 ADMIN. L. REV. 197, 209–24 (1991); James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 727–31 (2004).

6. *See infra* Section I.A (collecting cases).

7. *See, e.g.*, Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938).

8. *See* Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477 (2010).

9. *See* Trump v. Hawaii, 585 U.S. 667 (2018).

10. *See, e.g.*, Axon Enter., Inc. v. FTC, 598 U.S. 175 (2023).

11. Trump v. CASA, Inc., 606 U.S. 831 (2025).

12. Am. Foreign Serv. Ass'n v. Trump, 792 F. Supp. 3d 116 (D.D.C. 2025), *appeal docketed sub nom.* Am. Fed'n of Gov't Emps. v. Trump, No. 25-5290 (D.C. Cir. Aug. 6, 2025) & *appeal docketed sub nom.* Personal Servs. Contractor Ass'n v. Trump, No. 25-5291 (D.C. Cir. Aug. 13, 2025); Am. Fed'n of Gov't Emps. v. Trump, 782 F. Supp. 3d 793 (N.D. Cal. 2025), *stay granted on other grounds*, 145 S. Ct. 2635 (July 8, 2025); Nat'l Treasury Emps. Union v. Trump, 770 F. Supp. 3d 1 (D.D.C. 2025); Rhode Island v. Trump, 781 F. Supp. 3d 25 (D.R.I. 2025); Rural Dev. Innovations Ltd. v. Marocco, No. 25-1631, 2025 WL 1807818, at *4–5 (D.D.C. July 1, 2025).

13. Am. Fed'n of Govt. Emps. v. Trump, 792 F. Supp. 3d 985 (N.D. Cal. 2025), *stay granted on other grounds*, 148 F.4th 648 (9th Cir. 2025); Am. Foreign Serv. Ass'n v. Trump, 783 F. Supp. 3d 248 (D.D.C. 2025), *stay granted on other grounds*, No. 25-cv-01030, 2025 WL 1742853 (D.C. Cir. June 20, 2025); Nat'l Treasury Emps. Union v. Trump, 780 F. Supp. 3d 237 (D.D.C. 2025), *stay granted on other grounds*, No. 25-cv-00935, 2025 WL 1441563 (D.C. Cir. May 16, 2025).

14. Khalil v. Joyce, 780 F. Supp. 3d 476 (D.N.J. 2025).

15. Jenner & Block LLP v. DOJ, 784 F. Supp. 3d 76 (D.D.C. 2025), *appeal docketed*, No. 25-5265 (D.C. Cir. July 22, 2025).

16. *See infra* notes 360–371 and accompanying text.

Over the course of the twentieth century, courts created three timing doctrines—exhaustion, prudential ripeness, and *Thunder Basin*—that limit the ability of plaintiffs to bypass agency adjudication.[17] Exhaustion generally requires a plaintiff to exhaust all available administrative remedies.[18] Prudential ripeness balances "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration."[19] And *Thunder Basin* weighs three factors: (1) whether delaying judicial review "could foreclose all meaningful judicial review"; (2) whether the plaintiff's claim is "wholly collateral to [the] statute's review provisions"; and (3) whether the plaintiff's claim is "outside the agency's expertise."[20]

Taken together, the timing doctrines pose a significant obstacle to review. A timing doctrine barred review, in whole or in part, of non-final action in at least 60 cases between August 1, 2015, and July 31, 2025.[21] As the list of cases discussed above suggests, the doctrines can delay review of significant constitutional and statutory issues.[22]

Courts should restore the traditional ultra vires model of review when plaintiffs seek to bypass agency adjudication. Cases in which plaintiffs seek to bypass agency adjudication are not APA-style cases. They instead reflect a long tradition of ultra vires review. Under that model, plaintiffs may seek injunctions, declaratory judgments, or writs of mandamus when an agency acts ultra vires (i.e., beyond its authority). Both then and now, ultra vires cases are limited to reviewing whether the agency violated the Constitution or a statute, and the plaintiff must show that agency adjudication (or further agency adjudication) would be inadequate.[23]

The ultra vires model provides important protections for plaintiffs and agencies. With respect to plaintiffs, it ensures that agency actions are not shielded from review because of costs, sanctions, or the limitations of agency proceedings. It also provides protection against irreparable harm from the proceeding itself.[24] At the same time, the traditional model protects agency discretion by providing a limited scope of review and requiring proof that administrative remedies would be inadequate.[25]

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17. *See infra* Section I.B.
18. Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50–51 (1938).
19. Abbott Lab'ys v. Gardner, 387 U.S. 136, 149 (1967).
20. Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 207, 212–13 (1994) (internal quotation marks and citation omitted).
21. *See infra* Section I.C (collecting cases).
22. *See, e.g.*, *Myers*, 303 U.S. 41; Am. Foreign Serv. Ass'n v. Trump, 792 F. Supp. 3d 116 (D.D.C. 2025).
23. *See infra* Section II.A.
24. *See infra* Section II.B.1.
25. *See infra* Section II.B.2.

What's more, the timing doctrines are flawed in three significant ways.[26] First, courts applying the doctrines usually find that Congress implicitly repealed Section 1331 (the basis for injunctive relief) and the Declaratory Judgment Act by authorizing agency adjudication, which flips the usual presumption against implied repeals on its head. Second, courts frequently give agencies first crack at interpreting their constitutional and statutory authority, but the duty to decide such questions is a core judicial function.[27] And third, courts fail to ensure that a plaintiff's alternative remedies are adequate.

Recognizing the advantages of traditional ultra vires review and the flaws of the timing doctrines has several implications. First, it challenges the consensus that APA-style appellate review has replaced ultra vires review.[28] Second, rethinking the timing doctrines leads to a reconceptualization of the interactions between courts and agency adjudicators.[29] And finally, as a doctrinal matter, courts should abandon the requirements of the modern timing doctrines and instead focus on two questions. The first is whether the agency's enabling statute has implicitly repealed the federal question statute and the Declaratory Judgment Act. The second question is whether relief is appropriate, based on whether a non-final action clearly exceeds the agency's authority and the plaintiff lacks an adequate alternative remedy.[30]

This Article proceeds in three parts. Part I introduces the practice of bypassing agency adjudication and the timing doctrines. Part II defends the traditional ultra vires model and critiques the timing doctrines. Part III discusses conceptual and doctrinal implications. A brief conclusion follows.

I. BYPASSING AGENCY ADJUDICATION AND THE JUDICIALLY DEVELOPED TIMING DOCTRINES

This Part examines the state of the law on bypassing agency adjudication and identifies the obstacles posed by the timing doctrines. First, this Part surveys the categories of cases in which plaintiffs seek to bypass agency adjudication. Second, it introduces three timing doctrines developed by courts during the twentieth century—exhaustion, prudential ripeness, and *Thunder Basin*. Third, it demonstrates that, in the ten years ending on July

26. *See infra* Section II.C.
27. Loper Bright Enters. v. Raimondo, 603 U.S. 369, 402, 412 (2024).
28. *See infra* Section III.A.
29. *See infra* Section III.B.
30. *See infra* Section III.C.

31, 2025, the doctrines delayed review in at least sixty cases, many of which were significant and potentially meritorious.

A. Examples of Bypassing Agency Adjudication

The regulatory process is rife with non-final actions. Among other things, agencies conduct "routine processing of requests for agency action, advice-giving, inspections, investigations, examinations, correspondence, conferences, mediation, [and] negotiation."[31] Agencies also make decisions to initiate quasi-judicial hearings.[32] In those hearings, the agency may make additional filings wearing its prosecutorial hat[33] and interim decisions wearing its adjudicatory hat.[34] After an administrative law judge or hearing officer makes an initial decision on the merits, there may be one or more appeals to the agency head(s) or an independent agency adjudicatory body before a final adjudicatory decision.[35] This Section surveys some of the actions that plaintiffs have challenged and some of the statutory and constitutional claims they have brought.

Plaintiffs may seek review of investigations and preliminary communications with potential targets of agency action. Although these cases are not exclusively a recent phenomenon, it is noteworthy that several have reached the Supreme Court in recent years. In 2011, the Supreme Court ruled in favor of a regulated firm being investigated by the Public Company Accounting Oversight Board on separation-of-powers grounds.[36] In 2024, the Supreme Court decided a challenge to the constitutionality of the "jawboning" of social-media companies by federal officials.[37]

Plaintiffs also challenge general policies that agencies will apply through adjudication. Sometimes those policies have been set by the president.[38] During the first Trump administration, plaintiffs challenged the "travel

31. Emily S. Bremer, *The Rediscovered Stages of Agency Adjudication*, 99 WASH. U. L. REV. 377, 402–03 (2021).

32. *Id.* at 403; *see, e.g.*, 16 C.F.R. § 3.11 (2025) (FTC); 17 C.F.R. § 201.200(a) (2025) (SEC).

33. *E.g.*, 16 C.F.R. § 3.22 (2025); 17 C.F.R. § 201.250 (2025).

34. *E.g.*, 16 C.F.R. § 3.42(c)(1)–(6), (8) (2025); 17 C.F.R. § 201.111(b)–(d), (f)–(h) (2025).

35. *See, e.g.*, Axon Enter., Inc. v. FTC, 598 U.S. 175, 181 (2023).

36. Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 484 (2010).

37. Murthy v. Missouri, 603 U.S. 43 (2024); *see also* Hobby Distillers Ass'n v. Alcohol & Tobacco Tax & Trade Bureau, 740 F. Supp. 3d 509, 517 (N.D. Tex. 2024) (request for injunction against prohibition on at-home distilleries); Walmart, Inc. v. DOJ, 21 F.4th 300, 305 (5th Cir. 2021) (request for review of drug-enforcement investigation). For more on the harms of such communications, see Genevieve Lakier, *Enforcing the First Amendment in an Era of Jawboning*, 93 U. CHI. L. REV. ___ (forthcoming 2026) (manuscript at 51–52, 69–70) (on file with author).

38. *See, e.g.*, Lisa Manheim & Kathryn A. Watts, *Reviewing Presidential Orders*, 86 U. CHI. L. REV. 1743, 1762–81 (2019); Jonathan R. Siegel, *Suing the President: Nonstatutory Review Revisited*, 97 COLUM. L. REV. 1612, 1622–44 (1997); Kevin M. Stack, *The Reviewability of the President's Statutory Powers*, 62 VAND. L. REV. 1171, 1199–1212 (2009).

bans" on the ground that they violated the Constitution and the Immigration and Nationality Act.[39] Although the orders were called "bans,"[40] they could be waived through case-by-case agency adjudication.[41] To take another relatively recent example, plaintiffs brought constitutional and statutory challenges to a presidential memorandum about a citizenship question in the census—a policy that would be adopted through adjudication.[42] Still other plaintiffs challenged an executive order regarding social media content moderation during the first Trump administration.[43] The use of such presidential actions—and challenges to them—have continued in the second Trump administration.[44] Indeed, even critics have commented that "we live in an era of presidential primacy."[45]

Other general policies are set by agencies themselves. Several municipal plaintiffs successfully brought statutory challenges to the Trump administration's imposition of conditions on grants to "sanctuary cities."[46] And during the Biden administration, a district court enjoined disparate-impact conditions in EPA grants because they violated Title VI of the Civil Rights Act.[47]

Plaintiffs have also challenged the initiation of quasi-judicial processes. The plaintiffs in *Axon Enterprise, Inc. v. FTC* sought review of the constitutionality of ongoing administrative enforcement proceedings.[48] More than twenty other cases have challenged the constitutionality of

39. *E.g.*, Trump v. Hawaii, 585 U.S. 667 (2018); Trump v. Hawaii, 583 U.S. 941 (2017); Trump v. Int'l Refugee Assistance Project, 583 U.S. 912 (2017); Trump v. Int'l Refugee Assistance Project, 582 U.S. 571 (2017) (per curiam).

40. *See, e.g.*, *Trump v. Hawaii*, 585 U.S. at 700.

41. *See id.* at 680.

42. Trump v. New York, 592 U.S. 125, 130 (2020) (per curiam); City of San Jose v. Trump, 497 F. Supp. 3d 680, 745 (N.D. Cal. 2020), *vacated and remanded*, 141 S. Ct. 1231 (2020) (mem.).

43. Ctr. for Democracy & Tech. v. Trump, 507 F. Supp. 3d 213, 217 (D.D.C. 2020) (dismissing as unripe).

44. *See, e.g.*, Am. Foreign Serv. Ass'n v. Trump, 792 F. Supp. 3d 116 (D.D.C. 2025) (defunding of USAID); CASA, Inc. v. Trump, 763 F. Supp. 3d 723 (D. Md. 2025) (birthright citizenship); Nat'l Treasury Emps. Union v. Trump, 770 F. Supp. 3d 1 (D.D.C. 2025) (same); Nat'l Ass'n of Diversity Officers in Higher Ed. v. Trump, 767 F. Supp. 3d 243 (D. Md. 2025) (DEI policies); *see also* Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501, 506 (2005) ("[I]n recent years orders attempting to structure agency deliberative processes have been a prominent means of presidential control over a far-flung federal bureaucracy.").

45. Ashraf Ahmed, Lev Menand & Noah A. Rosenblum, *The Making of Presidential Administration*, 137 HARV. L. REV. 2131, 2133 (2024). For the leading defense of that model, see Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

46. *E.g.*, City of Los Angeles v. Barr, 941 F.3d 931, 934 (9th Cir. 2019); Cnty. of Santa Clara v. Trump, 250 F. Supp. 3d 497, 540 (N.D. Cal. 2017).

47. Louisiana v. EPA, 712 F. Supp. 3d 820, 866 (W.D. La. 2024).

48. Axon Enter., Inc. v. FTC, 598 U.S. 175, 180 (2023).

agency enforcement proceedings on constitutional grounds, both before[49] and after[50] *SEC v. Jarkesy*.[51]

After quasi-judicial proceedings begin, plaintiffs may challenge interim adjudicatory decisions. For instance, the Social Security Act permits a party to ask the Provider Reimbursement Review Board to authorize expedited judicial review.[52] After the Board denied expedited review in one case, a hospital sought a writ of mandamus in district court.[53]

Finally, federal employees may challenge personnel actions that are subject to further agency adjudication. In *Elgin v. Department of the Treasury*, the plaintiffs challenged the constitutionality of the draft-registration requirement for male civil servants.[54] Federal employees have also challenged several of President Trump's executive orders on the grounds that they violated the Constitution and the Federal Service Labor-Management Relations Statute.[55] Federal employees have further challenged the constitutionality of an advisory opinion regarding employee speech about the presidential election.[56] And employees have successfully challenged the constitutionality of COVID-19 vaccination policies.[57]

The foregoing examples cover only some of the significant challenges brought to non-final action without waiting for agency adjudication. I have focused on relatively recent cases to demonstrate the continuing relevance of bypassing agency adjudication, but these cases are not a new

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49. *See, e.g.*, Cochran v. SEC, 20 F.4th 194 (5th Cir. 2021) (en banc), *aff'd sub nom.* Axon Enter., Inc. v. FTC, 598 U.S. 175 (2023); Gibson v. SEC, 795 F. App'x 753 (11th Cir. 2019) (per curiam); TOTAL Gas & Power N. Am., Inc. v. FERC, 859 F.3d 325 (5th Cir. 2017); Bennett v. SEC, 844 F.3d 174 (4th Cir. 2016); Hill v. SEC, 825 F.3d 1236 (11th Cir. 2016); Tilton v. SEC, 824 F.3d 276 (2d Cir. 2016); Bebo v. SEC, 799 F.3d 765 (7th Cir. 2015); Jarkesy v. SEC, 803 F.3d 9 (D.C. Cir. 2015).

50. *See, e.g.*, Medina v. NLRB, No. 24-2401, 2025 WL 1988096, at *4–6 (D.D.C. July 17, 2025); Lemelson v. SEC, 793 F. Supp. 3d 1, 1–3 (D.D.C. 2025), *appeal docketed*, No. 25-5208 (D.C. Cir. June 5, 2025); Vape Central Grp., LLC v. FDA, No. 24-3354, 2025 WL 637416, at *4–9 (D.D.C. Feb. 27, 2025); Alpine Sec. Corp. v. FINRA, 121 F.4th 1314 (D.C. Cir. 2024); ABM Indus. Grps., LLC v. DOL, 756 F. Supp. 3d 468 (S.D. Tex.), *vacated*, 2024 WL 6076919 (S.D. Tex. Dec. 23, 2024); YAPP USA Auto. Sys., Inc. v. NLRB, 748 F. Supp. 3d 497 (E.D. Mich. 2024); Blankenship v. FINRA, No. 24-3003, 2024 WL 4043442 (E.D. Pa. Sept. 4, 2024); Nexstar Media, Inc. Grp. v. NLRB, 746 F. Supp. 3d 464, 468 (N.D. Ohio 2024); Space Expl. Techs. Corp. v. NLRB, 151 F.4th 761 (5th Cir. 2025).

51. 603 U.S. 109 (2024).

52. 42 U.S.C. § 1395oo(f)(1).

53. Mercy Gen. Hosp. v. Becerra, 643 F. Supp. 3d 16, 19, 31 (D.D.C. 2022).

54. 567 U.S. 1 (2012).

55. *See* Am. Fed'n of Gov't Emps. v. Trump, 929 F.3d 748, 752–53 (D.C. Cir. 2019); Nat'l Ass'n of Agric. Emps. v. Trump, 462 F. Supp. 3d 572, 575 (D. Md. 2020).

56. Am. Fed'n of Gov't Emps. v. Off. of Special Couns., 1 F.4th 180, 183 (4th Cir. 2021) (holding case was moot and unripe).

57. U.S. Navy SEALs 1-26 v. Biden, 72 F.4th 666, 669–70 (5th Cir. 2023) (holding on appeal of preliminary injunction that case was moot); Feds for Med. Freedom v. Biden, 63 F.4th 366, 387 (5th Cir.) (en banc) (affirming preliminary injunction), *vacated as moot*, 144 S. Ct. 480 (2023); Doster v. Kendall, 596 F. Supp. 3d 995, 1023 (S.D. Ohio) (granting preliminary injunction), *aff'd on other grounds*, 54 F.4th 398 (6th Cir. 2022), *vacated as moot*, 144 S. Ct. 481 (2023).

development.[58] The key point is that these cases include both statutory and constitutional claims, and they involve a variety of significant challenges to non-final action without waiting for the end of all agency adjudication.[59]

B. The Judicially Developed Timing Doctrines

Over the course of the twentieth century, the Supreme Court developed three timing doctrines that limit plaintiffs' ability to bypass agency adjudication and obtain review of non-final action. The first is exhaustion, which generally requires a plaintiff to exhaust administrative remedies. The second is prudential ripeness, which balances the hardship to the parties from delaying judicial review against the fitness of the issues for judicial review. And the third is *Thunder Basin*, which focuses on the availability of meaningful judicial review after a final agency action, the extent to which the plaintiff's claims are collateral to the statutory scheme, and the extent to which the plaintiff's claims implicate agency expertise.

1. Exhaustion

The doctrine of exhaustion has two variants. The first applies when a statute explicitly requires exhaustion.[60] The second applies when a statute does not explicitly mandate exhaustion, but courts nonetheless require it as a matter of "sound judicial discretion."[61] This Article addresses only that latter, judicially developed variant.[62]

The Supreme Court first articulated the exhaustion requirement for a challenge to federal agency action in 1938 in *Myers v. Bethlehem Shipbuilding Corp*. The Court called exhaustion a rule "of judicial administration—not merely a rule governing the exercise of discretion."[63] Consistent with that characterization, the Court extended exhaustion "to

58. *See, e.g.*, Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938).

59. Parties also sometimes invoke the collateral order doctrine to seek immediate review of a non-final order in a court of appeals when an agency's final order would be directly reviewable there. *See generally* Zoe E. Niesel, *The Collateral Order Doctrine's Administrative Odyssey: Ending the Question of Interlocutory Review for Administrative Agency Determinations*, 76 ALA. L. REV. 647 (2025). Although those cases present many of the same considerations, *see id.* at 672–84, this Article focuses on the more common practice of plaintiffs suing in district court.

60. *See, e.g.*, McCarthy v. Madigan, 503 U.S. 140, 144 (1992).

61. *Id.*

62. Litigants may also be required to exhaust certain issues in administrative processes. *See* Jeffrey S. Lubbers, *Fail to Comment at Your Own Risk: Does Issue Exhaustion Have a Place in Judicial Review of Rules*, 70 ADMIN L. REV. 109 (2018). That, too, is not the focus of this Article.

63. *Myers*, 303 U.S. at 51 n.9; *see* John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 155 (1998).

proceedings at law as well as suits in equity."[64] The Court also stated that "no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted."[65] And the Court declined to make an exception for cases where "the administrative body lacked power over the subject matter."[66]

Since then, courts have made several exceptions. They have done so by "balanc[ing] the interest of the individual in retaining prompt access to a federal judicial forum against countervailing institutional interests favoring exhaustion."[67] As a result of this ad hoc balancing, exhaustion decisions are often difficult to harmonize.[68]

In 1992, the Supreme Court identified three categories of presumptive exceptions where "the interests of the individual weigh heavily against requiring administrative exhaustion."[69] First, exhaustion is generally not required when the plaintiff would "suffer irreparable harm if unable to secure immediate judicial consideration of his claim."[70] The Court gave as an example "an unreasonable or indefinite timeframe for administrative action."[71]

Second, exhaustion is generally not required when the "administrative remedy [is] inadequate 'because of some doubt as to whether the agency was empowered to grant effective relief.'"[72] That may occur where the agency "lacks institutional competence to resolve the particular type of issue presented, such as the constitutionality of a statute," "where the challenge is to the adequacy of the agency procedure itself," or where the agency "lack[s] authority to grant the type of relief requested."[73]

Third, exhaustion is generally not required when the agency "is shown to be biased or has otherwise predetermined the issue before it."[74] The Supreme Court has called exhaustion in those circumstances "a futile act."[75]

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64. *Myers*, 303 U.S. at 51 n.9.
65. *Id.* at 50–51.
66. *Id.* at 51; *see also* F. TROWBRIDGE VOM BAUR, FEDERAL ADMINISTRATIVE LAW § 221, at 204 (1942); Macauley v. Waterman S.S. Corp., 327 U.S. 540, 545 (1946).
67. McCarthy v. Madigan, 503 U.S. 140, 146 (1992).
68. *See* 3 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 20.03, at 67 (1958) (describing the cases as "often irreconcilable").
69. *McCarthy*, 503 U.S. at 146.
70. *Id.* at 147.
71. *Id.*
72. *Id.* (quoting Gibson v. Berryhill, 411 U.S. 564, 575 n.14 (1973)).
73. *McCarthy*, 503 U.S. at 147–48.
74. *Id.* at 148.
75. *Id.* (quoting Houghton v. Shafer, 392 U.S. 639, 640 (1968)).

2. Prudential Ripeness

Ripeness, like exhaustion, has two variants. One "reflects constitutional considerations that implicate 'Article III limitations on judicial power,'" and the other reflects "prudential reasons for refusing to exercise jurisdiction."[76] This Article is concerned only with prudential ripeness, the judicially developed variant.

The Supreme Court first announced the two-part prudential ripeness test in 1967 in *Abbott Laboratories v. Gardner*.[77] On one side of the balance, courts must "evaluate . . . the fitness of the issues for judicial decision."[78] On the other side, courts must "evaluate . . . the hardship to the parties of withholding court consideration."[79] At times the Court has divided the two questions into three: "(1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented."[80] But in general, the Court has used the two-part formulation.[81]

In *Abbott Laboratories*, the challenge to FDA regulations was fit for judicial resolution without an agency enforcement action for two reasons. First, "all parties agree[d] that the issue tendered is a purely legal one: whether the statute was properly construed by the Commissioner to require the [generic] name of the drug to be used *every time* the proprietary name is employed" on a label.[82] Second, the regulations constituted "'final agency action' within the meaning of § 10 of the Administrative Procedure Act."[83] The Court did not elaborate on why this was relevant to the plaintiffs' request for injunctive and declaratory relief.[84]

The Court also concluded that the plaintiffs would suffer "sufficiently direct and immediate" hardship without review.[85] The Court reasoned that the "regulations purport to give an authoritative interpretation of a statutory provision that has a direct effect on the day-to-day business of all prescription drug companies."[86] And failure to comply "would risk serious

76. Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 670 n.2 (2010) (quoting Reno v. Cath. Soc. Servs., Inc., 509 U.S. 43, 57 n.18 (1993)).

77. 387 U.S. 136 (1967); *see also* Gardner v. Toilet Goods Ass'n, 387 U.S. 167 (1967); Toilet Goods Ass'n v. Gardner, 387 U.S. 158 (1967).

78. *Abbott Lab'ys*, 387 U.S. at 149.

79. *Id.*

80. Ohio Forestry Ass'n, Inc. v. Sierra Club, 523 U.S. 726, 733 (1998).

81. *See, e.g.*, Nat'l Park Hosp. Ass'n v. Dep't of Interior, 538 U.S. 803, 808 (2003).

82. *Abbott Lab'ys*, 387 U.S. at 149.

83. *Id.*

84. Abbott Lab'ys v. Celebrezze, 228 F. Supp. 855, 861, 861 n.4 (D. Del. 1964).

85. *Abbott Lab'ys*, 387 U.S. at 152.

86. *Id.*

criminal and civil penalties" for the plaintiffs, who were manufacturers in "a sensitive industry" where "public confidence" mattered greatly.[87]

3. Thunder Basin

In 1994, the Supreme Court created a new timing doctrine in *Thunder Basin Coal Co. v. Reich*.[88] The ultimate question under that doctrine is "[w]hether [the agency's enabling] statute is intended to preclude initial judicial review."[89] The test has two steps, the first of which has evolved into a presumption against review and the second of which is prudential.

The first step examines the enabling statute's "language, structure, and purpose," as well as "its legislative history."[90] In *Thunder Basin*, the Court primarily relied on the fact that the enabling statute "establishes a detailed structure for reviewing violations of 'any mandatory health or safety standard, rule, order, or regulation promulgated' under the Act."[91] More specifically, the Court reasoned that the "comprehensive review process does not distinguish between pre-enforcement and postenforcement challenges," the latter of which are exclusively reviewable in the court of appeals following a decision of the Mine Safety and Health Review Commission.[92] In practice, the first step amounts to a "presumption of initial administrative review."[93]

The second, prudential step has three unweighted factors. The first asks whether "a finding of preclusion could foreclose all meaningful judicial review."[94] The second asks whether the plaintiff's claims are "'wholly collateral' to [the] statute's review provisions."[95] The third asks whether the plaintiff's claims are "outside the agency's expertise."[96] Beginning with *Free Enterprise Fund* in 2010, the Court framed the three factors as the trigger for a presumption in favor of judicial review.[97] But while the Court

87. *Id.* at 153.
88. 510 U.S. 200 (1994).
89. *Id.* at 207.
90. *Id.*
91. *Id.* (quoting 30 U.S.C. § 814(a)).
92. *Thunder Basin*, 510 U.S. at 208–09.
93. Jarkesy v. SEC, 803 F.3d 9, 17 (D.C. Cir. 2015) (quoting E. Bridge, LLC v. Chao, 320 F.3d 84, 89 (1st Cir. 2003)).
94. *Thunder Basin*, 510 U.S. at 212–13.
95. *Id.* at 212 (quoting Heckler v. Ringer, 466 U.S. 602, 618 (1984)).
96. *Thunder Basin*, 510 U.S. at 212.
97. *See* 561 U.S. 477, 489 (2010) (quoting *Thunder Basin*, 510 U.S. at 212–13); Axon Enter., Inc. v. FTC, 598 U.S. 175, 185–86 (2023); Elgin v. Dep't of Treasury, 567 U.S. 1, 10, 15–16 (2012).

has restyled the three-factor test as a presumption, it has never explained what happens when the factors point in different directions.[98]

It is important to note that *Thunder Basin* is a judicially developed doctrine, not one derived from any statute. Although scholars have recognized the judicially developed nature of exhaustion and ripeness,[99] they have accepted the Court's framing of *Thunder Basin* as a (mostly) textual doctrine of statutory interpretation.[100] But courts almost never resolve a *Thunder Basin* case at the first step; the three *Thunder Basin* factors generally do the most work. In *Free Enterprise Fund* and *Axon Enterprise*, the Supreme Court gave barely any attention to the first step and resolved the case at the second step.[101] The Court has never identified a basis for the second step in any particular statute's text, structure, or legislative history, let alone in every statute to which the test has been applied.

The most obvious explanation seems to be that *Thunder Basin* repackaged exhaustion doctrine. The year before *Thunder Basin*, the Court restricted the use of exhaustion doctrine in APA cases for textual reasons.[102] Then, in *Thunder Basin*, it announced a new test. Its opinion relied on

98. *Cf. Axon*, 598 U.S. at 186 (suggesting that review might be precluded "if the factors point in different directions"); *id.* at 207 (Gorsuch, J., concurring in the judgment) (answering "[n]o one knows"). The consensus among the courts of appeals appears to be that the factors are elements of a balancing test. *See, e.g.*, Fed. L. Enf't Officers Ass'n v. Ahuja, 62 F.4th 551, 560 (D.C. Cir. 2023); Zummer v. Sallet, 37 F.4th 996, 1007 (5th Cir. 2022). *But see* Massieu v. Reno, 91 F.3d 416, 424 (3d Cir. 1996) ("[W]e do not think that the courts possess the authority to excuse exhaustion whenever they conclude that a balancing of the relevant factors tips in that direction.").

99. *E.g.*, KRISTIN E. HICKMAN & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 17.2 (7th ed. 2018); Jack M. Beermann, *Common Law and Statute Law in Administrative Law*, 63 ADMIN. L. REV. 1, 19–20 (2011); Duffy, *supra* note 63, at 152–81; Sam Kalen, *The Death of Administrative Common Law or the Rise of the Administrative Procedure Act*, 68 RUTGERS U. L. REV. 605, 652 (2016); Kathryn E. Kovacs, *Superstatute Theory and Administrative Common Law*, 90 IND. L.J. 1207, 1211, 1214 (2015); Ronald M. Levin, *The Administrative Law Legacy of Kenneth Culp Davis*, 42 SAN DIEGO L. REV. 315, 342 (2005); Peter A. Devlin, *Jurisdiction, Exhaustion of Administrative Remedies, and Constitutional Claims*, 93 N.Y.U. L. REV. 1234, 1240–42 (2018); *see also* Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50–51 (1938) (exhaustion); Reno v. Cath. Soc. Servs., Inc., 509 U.S. 43, 57 n.18 (1993) (ripeness).

100. *See Axon*, 598 U.S. at 186; Linda D. Jellum, *The SEC's Fight to Stop District Courts from Declaring Its Hearings Unconstitutional*, 101 TEX. L. REV. 339, 356–59 (2022); William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term—Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 104 (1994); Bernard Schwartz, *Administrative Law Cases During 1994*, 47 ADMIN. L. REV. 355, 366–67 (1995).

101. *See Axon*, 598 U.S. at 185; Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 489 (2010); *see* Jellum, *supra* note 100, at 362. While a few lower courts have suggested that review could be precluded based on the first step alone, no court appears to have declined to consider the second step. *See, e.g.*, Space Expl. Techs. Corp. v. NLRB, 151 F.4th 761, 770–71 (5th Cir. 2025); Feds for Med. Freedom v. Biden, 63 F.4th 366, 379 (5th Cir.) (en banc), *vacated as moot*, 144 S. Ct. 480 (2023); Patten v. District of Columbia, 9 F.4th 921, 927 (D.C. Cir. 2021); Bank of La. v. FDIC, 919 F.3d 916, 924 (5th Cir. 2019).

102. Darby v. Cisneros, 509 U.S. 137, 146 (1993).

several exhaustion cases.[103] And the test looks strikingly like Professor Kenneth Culp Davis's prominent 1958 summary of the considerations in exhaustion cases: (1) the "extent of injury from pursuit of administrative remedy"; (2) the "degree of apparent clarity or doubt about administrative jurisdiction"; and (3) the "involvement of specialized administrative understanding in the question of jurisdiction."[104] That first factor matches the meaningfulness of judicial review, the second matches the relationship between the plaintiff's claims and the statutorily prescribed review process, and the third matches the preference for agency expertise.

C. The Effect of the Timing Doctrines

All three timing doctrines pose a significant obstacle to plaintiffs' ability to bypass agency adjudication. It would be effectively impossible to determine the number of cases in which an agency might have raised a timing doctrine as a defense. But the number in which a court addressed a timing doctrine provides a rough sense of the importance of those doctrines. In the ten years ending on July 31, 2025, federal courts applied one or more of the doctrines in ninety-nine reported cases seeking to bypass agency adjudication. The courts held that a timing doctrine wholly or partially barred review in sixty-one of those cases.[105] And as a qualitative matter, the doctrines appear to delay review in important and potentially meritorious cases.

Exhaustion is the least commonly used doctrine. But in this timeframe, federal courts applied it in ten cases seeking review of non-final action. Those courts denied review in whole or in part six times[106] and permitted it four times.[107]

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103. *See* Whitney Nat'l Bank in Jefferson Parish v. Bank of New Orleans & Trust Co., 379 U.S. 411, 422 (1965) (judicially mandated); Bowen v. Mich. Acad. of Fam. Physicians, 476 U.S. 667, 678–80 (1986) (statutorily mandated); Heckler v. Ringer, 466 U.S. 602, 617–18 (1984) (same); Mathews v. Eldridge, 424 U.S. 319, 330–32 (1976) (same); *see also Axon*, 598 U.S. at 209 n.2 (Gorsuch, J., concurring in the judgment) (referring to *Thunder Basin* as a "judge-made exhaustion requirement").

104. 3 DAVIS, *supra* note 68, § 20.03, at 69.

105. Some claims were barred or permitted by more than one doctrine.

106. Sisley v. DEA, 11 F.4th 1029, 1035–36 (9th Cir. 2021); *Patten*, 9 F.4th at 929; Brito v. Garland, 22 F.4th 240, 255–56 (1st Cir. 2021); Bd. of Dental Examiners v. FTC, 519 F. Supp. 3d 1033, 1043–44 (N.D. Ala. 2021); Wilbanks Secs., Inc. v. FINRA, No. CIV-17-481, 2017 WL 1957058, at *4 (W.D. Okla. May 10, 2017); Bombardier, Inc. v. DOL, 145 F. Supp. 3d 21, 25 (D.D.C. 2015).

107. Crocker v. Austin, 115 F.4th 660, 666 (5th Cir. 2024); Shilling v. United States, 773 F. Supp. 3d 1069, 1087–88 (W.D. Wash. 2025); Talbott v. United States, 775 F. Supp. 3d 283, 311 (D.D.C. 2025), *appeal docketed*, No. 25-5087 (D.C. Cir. Mar. 27, 2025); Padilla v. ICE, 379 F. Supp. 3d 1170, 1176–77 (W.D. Wash. 2019), *aff'd in part and vacated in part on other grounds*, 953 F.3d 1134 (9th Cir. 2020), *vacated*, 141 S. Ct. 1041 (2021).

Prudential ripeness doctrine has been applied more often, and it bars review in a substantial number of cases. Between August 1, 2015, and July 31, 2025, federal courts applied the doctrine in thirty-five cases. They denied review in whole or in part nineteen times[108] and permitted it sixteen times.[109] Perhaps of note, six of the sixteen decisions concluding that claims were prudentially ripe challenged actions taken during the second Trump administration.[110]

Thunder Basin is the most frequently litigated doctrine. Between August 1, 2015, and July 31, 2025, federal courts applied *Thunder Basin* in fifty-nine cases seeking review of non-final action. Courts denied review in

108. Amalgamated Transit Union Int'l v. DOL, Nos. 23-15503, 23-15617, 2024 WL 3565264, at *1–2 (9th Cir. July 29, 2024); Saline Parents v. Garland, 88 F.4th 298, 306–08 (D.C. Cir. 2023); *In re* Al-Nashiri, 47 F.4th 820, 825–27 (D.C. Cir. 2022); Hawk v. Burr, No. 22-1526, 2022 WL 4364740, at *2 (7th Cir. Sept. 21, 2022); Walmart Inc. v. DOJ, 21 F.4th 300, 311–13 (5th Cir. 2021); Am. Fed'n of Gov't Emps. v. Off. of Special Couns., 1 F.4th 180, 188–90 (4th Cir. 2021); Cause of Action Inst. v. DOJ, 999 F.3d 696, 703–05 (D.C. Cir. 2021); South Carolina v. United States, 912 F.3d 720, 731 (4th Cir. 2019); TOTAL Gas & Power N. Am., Inc. v. FERC, 859 F.3d 325, 327 (5th Cir. 2017); Nat'l Urban League v. Trump, 783 F. Supp. 3d 61, 83 (D.D.C. 2025); Broadstreet, Inc. v. SEC, No. 24-cv-803, 2025 WL 417933, at *3–5 (N.D. Tex. Feb. 6, 2025); Consensys Software, Inc. v. SEC, 749 F. Supp. 3d 736, 741–43 (N.D. Tex. 2024); Roth v. Austin, 619 F. Supp. 3d 928, 961–62 (D. Neb. 2022); Holman v. Vilsack, 582 F. Supp. 3d 568, 582 (W.D. Tenn. 2022); Donovan v. Vance, 576 F. Supp. 3d 816, 824 (E.D. Wash. 2021), *aff'd in part and vacated in part on other grounds*, 70 F.4th 1167 (9th Cir. 2023); Ass'n of Cultural Exch. Orgs. v . Blinken, 543 F. Supp. 3d 570, 578 (W.D. Tenn. 2021); Ctr. for Democracy & Tech. v. Trump, 507 F. Supp. 3d 213, 217 (D.D.C. 2020); Common Cause v. Trump, 506 F. Supp. 3d 39, 56 (D.D.C. 2020); Conf. of State Bank Supervisors v. OCC, 313 F. Supp. 3d 285, 300–01 (D.D.C. 2018).

109. Braidwood Mgmt., Inc. v. EEOC, 70 F.4th 914, 930–32 (5th Cir. 2023); Cochran v. SEC, 20 F.4th 194, 212–13 (5th Cir. 2021), *aff'd on other grounds sub nom.* Axon Enter., Inc. v. FTC, 598 U.S. 175 (2023); Int'l Refugee Assistance Project v. Trump, 883 F.3d 233, 263 (4th Cir.) (en banc), *vacated on other grounds*, 585 U.S. 1028 (2018); Int'l Refugee Assistance Project v. Trump, 857 F.3d 554, 586–87 (4th Cir.), *vacated as moot*, 583 U.S. 912 (2017); California v. Trump, 786 F. Supp. 3d 359, 377–79, 381, 384–86 (D. Mass. 2025); Jenner & Block LLP v. DOJ, 784 F. Supp. 3d 76, 104, 111 (D.D.C. 2025); Rhode Island v. Trump, 781 F. Supp. 3d 25, 38–39 (D.R.I.), *appeal docketed*, No. 25-1477 (1st Cir. 2025); *Talbott*, 775 F. Supp. 3d at 311; PFLAG, Inc. v. Trump, 769 F. Supp. 3d 405, 422–25 (D. Md. 2025); Nat'l Ass'n of Diversity Officers in Higher Educ. v. Trump, 767 F. Supp. 3d 243, 271 (D. Md. 2025); Sidak v. U.S. Int'l Trade Comm'n, 678 F. Supp. 3d 1, 6 (D.D.C. 2023); Doster v. Kendall, 596 F. Supp. 3d 995, 1010–11 (S.D. Ohio), *aff'd on other grounds*, 54 F.4th 398 (6th Cir. 2022), *vacated as moot*, 144 S. Ct. 481 (2023); City of San Jose v. Trump, 497 F. Supp. 3d 680, 715 (N.D. Cal.), *vacated on other grounds*, 141 S. Ct. 1231 (2020); New York v. Trump, 485 F. Supp. 3d 422, 467 (S.D.N.Y.), *vacated on other grounds*, 592 U.S. 125 (2020); Stockman v. Trump, No. 17-cv-01799, 2017 WL 9732572, at *13 (C.D. Cal. Dec. 22, 2017), *vacated on other grounds*, No. 18-56539, 2019 WL 6125075 (9th Cir. Aug. 26, 2019); Karnoski v. Trump, No. 17-cv-01297, 2017 WL 6311305, at *6 (W.D. Wash. Dec. 11, 2017), *vacated on other grounds*, 926 F.3d 1180 (9th Cir. 2019).

110. *California*, 786 F. Supp. 3d at 377–79, 381, 384–86; *Jenner & Block*, 784 F. Supp. 3d at 91; *Rhode Island*, 781 F. Supp. 3d at 38–39; *Talbott*, 775 F. Supp. 3d at 311; *PFLAG*, 769 F. Supp. 3d at 422–25; *Nat'l Ass'n of Diversity Officers*, 767 F. Supp. 3d at 271.

whole or in part in thirty-nine cases[111] and permitted review in twenty cases.[112] Once again, it perhaps bears noting that eight of the twenty cases

111. Payne v. Biden, 62 F.4th 598, 607 (D.C. Cir.), *vacated as moot*, 144 S. Ct. 480 (2023); Zummer v. Salet, 37 F.4th 996, 1012 (5th Cir. 2022); Hemp Indus. Ass'n v. DEA, 36 F.4th 278, 289 (D.C. Cir. 2022); Rydie v. Biden, No. 21-2359, 2022 WL 1153249, at *1 (4th Cir. Apr. 19, 2022); *Patten*, 9 F.4th at 926–29; Am. Fed'n of Gov't Emps. v. Trump, 929 F.3d 748, 754 (D.C. Cir. 2019); Bank of La. v. FDIC, 919 F.3d 916, 923–30 (5th Cir. 2019); Gibson v. SEC, 795 F. App'x 753, 756 (11th Cir. 2019); Berkley v. Mountain Valley Pipeline, LLC, 896 F.3d 624, 633 (4th Cir. 2018); Arch Coal, Inc. v. Acosta, 888 F.3d 493, 496 (D.C. Cir. 2018); Scottsdale Cap. Advisors Corp. v. FINRA, 844 F.3d 414, 424 (4th Cir. 2016); Bennett v. SEC, 844 F.3d 174, 188 (4th Cir. 2016); Hill v. SEC, 825 F.3d 1236, 1237 (11th Cir. 2016); Tilton v. SEC, 824 F.3d 276, 279 (2d Cir. 2016); Chau v. SEC, 665 F. App'x 67, 70–73 (2d Cir. 2016); Jarkesy v. SEC, 803 F.3d 9, 12 (D.C. Cir. 2015); Bebo v. SEC, 799 F.3d 765, 767 (7th Cir. 2015); Am. Foreign Serv. Ass'n v. Trump, 792 F. Supp. 3d 116 (D.D.C. 2025); Lemelson v. SEC, 793 F. Supp. 3d 1, 1–3 (D.D.C. 2025); LegalForce RAPC Worldwide PC v. PTO, No. 24-3437, 2025 WL 1235576, at *6–9 (D. Ariz. Apr. 29, 2025), *reconsideration granted in part on other grounds*, 2025 WL 1467669 (D. Ariz. May 22, 2025); Millennia Housing Mgmt. v. HUD, 783 F. Supp. 3d 1051, 1063–68, 1070 (N.D. Ohio 2025); Alpine Sec. Corp. v. Nat'l Sec. Clearing Corp., No. 23-cv-782, 2025 WL 901847, at *3–5 (D. Utah Mar. 25, 2025), *appeal docketed*, No. 25-4050 (10th Cir. Apr. 28, 2025); CBW Bank v. FDIC, 769 F. Supp. 3d 1204, 1210–15 (D. Kan. 2025); Vape Central Grp., LLC v. FDA, No. 24-3354, 2025 WL 637416, at *4–9 (D.D.C. Feb. 27, 2025); Nat'l Treasury Emps. Union v. Trump, 770 F. Supp. 3d 1, 7–11 (D.D.C. 2025); Waffle House, Inc. v. NLRB, No. 24-6751, 2025 WL 602744, at *7–9 (D.S.C. Feb. 10, 2025); Nat'l Ass'n of Blind Merchants v. Army & Air Force Exchange Serv., No. 24-CV-277, 2025 WL 510826, at *3–6 (N.D. Tex. Jan. 28, 2025); Nexstar Media, Inc. Grp. v. NLRB, 746 F. Supp. 3d 464, 473 (N.D. Ohio 2024); Alpine Sec. Corp. v. Nat'l Sec. Clearing Corp., No. 23-cv-782, 2024 WL 1011863, at *4–6 (D. Utah Mar. 8, 2024); Redding v. Ahuja, No. 21-cv-2449, 2023 WL 6065129, at *4–5 (D.D.C. Sept. 18, 2023), *aff'd on other grounds*, 2024 WL 1432729 (D.C. Cir. Apr. 1, 2024); Burnett Specialists v. Abruzzo, No. 22-cv-605, 2023 WL 5660138, at *9 (E.D. Tex. Aug. 31, 2023), *aff'd on other grounds*, 140 F.4th 686 (5th Cir. 2025); Am. Fed'n of Gov't Emps. Local 2586 v. Biden, 616 F. Supp. 3d 1275, 1279–83 (W.D. Okla. 2022); Nat'l Veterans Affairs Council v. Fed. Serv. Impasses Panel, 552 F. Supp. 3d 21, 23 (D.D.C. 2021); Alpine Sec. Corp. v. FINRA, No. 20-cv-794, 2021 WL 4060943, at *3–7 (D. Utah Sept. 7, 2021); Nat'l Ass'n of Agric. Emps. v. Trump, 462 F. Supp. 3d 572, 580 (D. Md. 2020); N.J. Conserv. Found. v. FERC, 353 F. Supp. 3d 289, 309 (D.N.J. 2018); *Wilbanks Sec.*, 2017 WL 1957058, at *4; Kon v. SEC, No. 17-CV-2105, 2017 WL 1153228, at *10–11 (D. Kan. Mar. 28, 2017); *Bombardier*, 145 F. Supp. 3d at 42.

112. CASA, Inc. v. Trump, 763 F. Supp. 3d 723, 730 (D. Md. 2025), *vacated on other grounds*, 606 U.S. 831 (2025); Axon Enter., Inc. v. FTC, 598 U.S. 175, 180 (2023); Nat'l Ass'n of Immigr. Judges v. Owen, 139 F.4th 293, 303–13 (4th Cir. 2025); Feds for Med. Freedom v. Biden, 63 F.4th 366, 379 (5th Cir.) (en banc), *vacated as moot*, 144 S. Ct. 480 (2023); Medina v. NLRB, No. 24-2401, 2025 WL 1988096, at *4–6 (D.D.C. July 17, 2025); Rural Dev. Innovations Ltd. v. Marocco, No. 25-1631, 2025 WL 1807818, at *4 (D.D.C. July 1, 2025); Am. Fed'n of Govt. Emps. v. Trump, 792 F. Supp. 3d 985 (N.D. Cal. 2025), *stay granted on other grounds*, 148 F.4th 648 (9th Cir. 2025); Air Marshal Ass'n v. Sec'y of Dep't of Homeland Sec., No. 22-2254, 2025 WL 1582453, at *2–3 (E.D. Pa. June 4, 2025); Am. Foreign Serv. Ass'n v. Trump, 783 F. Supp. 3d 248, 258–61 (D.D.C. 2025), *stay granted on other grounds*, 2025 WL 1742853 (D.C. Cir. June 20, 2025); Am. Fed'n of Govt. Emps. v. Trump, 784 F. Supp. 3d 1316, 1340–43 (N.D. Cal.), *stay granted on other grounds*, 145 S. Ct. 2635 (July 8, 2025), *vacated and remanded,* 155 F.4th 1082 (9th Cir. 2025); *Rhode Island*, 781 F. Supp. 3d at 41–42; Khalil v. Joyce, 780 F. Supp. 3d 476, 511–44 (D.N.J. 2025); Nat'l Treasury Emps. Union v. Trump, 780 F. Supp. 3d 237, 248–51 (D.D.C. 2025), *stay granted on other grounds*, 2025 WL 1441563 (D.C. Cir. May 16, 2025); Avila v. NLRB, No. 24-1688, 2025 WL 859223, at *3–6 (D.D.C. Mar. 19, 2025); Louisiana v. EPA, 712 F. Supp. 3d 820, 848–50 (W.D. La. 2024); Burgess v. FDIC, 639 F. Supp. 3d 732, 745 (N.D. Tex. 2022), *rev'd on other grounds sub nom.* Burgess v. Whang, 152 F.4th 579, 594 (5th Cir. 2025); New York v. Biden, 636 F. Supp. 3d 1, 20 (D.D.C. 2022), *appeal docketed sub nom.* New York v. Trump, No. 24-5047 (D.C. Cir. Mar. 7, 2024); Allstates Refractory Contractors, LLC v. Walsh, 625

permitting review involved actions taken during the first six months of the second Trump administration.[113]

Of course, those statistics are imperfect. They do not capture every case where the agency could have raised a timing doctrine but chose not to do so. Nor do they capture the strength of the arguments on the merits in cases where a timing doctrine barred review.

That said, a qualitative examination of the cases suggests that the timing doctrines bar immediate review of meritorious claims. The clearest example is the bevy of challenges to the SEC's in-house enforcement proceedings. Numerous plaintiffs (including George Jarkesy) sought to bypass agency adjudication to bring such a challenge. No fewer than seven courts of appeals (including the D.C. Circuit in Jarkesy's case in 2015) held that *Thunder Basin* precluded immediate review.[114] After the Fifth Circuit allowed a case to proceed against the FTC,[115] the Supreme Court affirmed and abrogated the seven contrary circuit decisions.[116] A year later, Jarkesy's case—now on review of a final order—reached the Supreme Court on the merits. And so, nine years after the D.C. Circuit prohibited Jarkesy from bypassing agency adjudication, the Supreme Court sided with Jarkesy on the merits of his Seventh Amendment challenge to that very adjudication.[117]

This Article does not make any detailed empirical claims about the effect of the timing doctrines. What this Article does claim is that the doctrines pose a significant obstacle to review of non-final action, and one that developed in the twentieth century.

II. RESTORING THE TRADITIONAL ULTRA VIRES MODEL

This Part explains why courts should revive the traditional ultra vires model in bypassing cases and abandon the timing doctrines. First, it shows that cases seeking to bypass agency adjudication reflect a model of ultra

F. Supp. 3d 676, 680–81 (N.D. Ohio 2022), *aff'd on other grounds sub nom.* Allstates Refractory Contractors, LLC v. Su, 79 F.4th 755 (6th Cir. 2023); Ironridge Global IV, Ltd. v. SEC, 146 F. Supp. 3d 1294, 1303 (N.D. Ga. 2015); Timbervest, LLC v. SEC, No. 15-cv-2106, 2015 WL 7597428, at *7 (N.D. Ga. Aug. 4, 2015).

113. *CASA*, 763 F. Supp. 3d at 730; *Rural Dev. Innovations*, 2025 WL 1807818, at *4; *Am. Fed'n of Govt. Emps.*, 792 F. Supp. 3d 985; *Am. Foreign Serv. Ass'n*, 783 F. Supp. 3d at 258–61; *Am. Fed'n of Govt. Emps.*, 784 F. Supp. 3d at 1340–43; *Rhode Island*, 781 F. Supp. 3d at 41–42; *Khalil*, 780 F. Supp. 3d at 511–44; *Nat'l Treasury Emps. Union*, 780 F. Supp. 3d at 248–51.

114. *See Jarkesy*, 803 F.3d 9; *Cochran*, 20 F.4th at 237 (Costa, J., dissenting) (collecting cases).

115. *See Cochran*, 20 F.4th at 198 (majority opinion).

116. *Axon*, 598 U.S. at 180.

117. SEC v. Jarkesy, 603 U.S. 109, 140–41 (2024). To be sure, the Supreme Court opened the door to some claims in *Axon*. But *Thunder Basin* continues to bar similar claims. *See, e.g.*, Lemelson v. SEC, 793 F. Supp. 3d 1 (D.D.C. 2025); Vape Central Grp., LLC v. FDA, No. 24-3354, 2025 WL 637416, at *4–9 (D.D.C. Feb. 27, 2025).

vires review that predates, and differs from, APA-style review. Second, this Part discusses how the traditional ultra vires model provides sufficient protections for plaintiffs and safeguards for agencies. Third, this Part analyzes three flaws in the timing doctrines. Fourth, this Part weighs potential arguments in favor of the timing doctrines.

A. Ultra Vires Review

The cases discussed in this Article do not reflect the usual course of administrative law litigation. Judicial review of agency action typically occurs under the APA or a similar statutory provision.[118] Plaintiffs may challenge the reasonableness of the agency's factfinding and policy judgments, as well as its compliance with statutes and the Constitution. But review is typically limited to final agency actions with a closed administrative record.

The bypassing cases instead reflect an older model of ultra vires review.[119] Plaintiffs avail themselves of the court's power to grant injunctions or declaratory judgments, rather than a statutory judicial review provision. Plaintiffs may challenge only the agency's compliance with statutes and the Constitution. And while they need not wait for final agency action, they must demonstrate that further agency adjudication would provide an inadequate remedy.

1. APA-Style Review

APA-style appellate review depends on an explicit judicial review provision. For example, the APA makes "final agency action for which there is no other adequate remedy in court . . . subject to judicial review."[120] A plaintiff who falls within the terms of the cause of action is entitled to review. And the relief available is typically specified in the statute. For instance, under the APA, a court will "hold unlawful and set aside" unlawful agency action.[121] Although many agency enabling statutes contain their own judicial review provisions that supersede the cause of action in the APA, the contours are often the same.[122]

APA-style review is typically limited by statute to final agency action. In 1997, the Supreme Court articulated a two-part test for finality under the

118. *E.g.*, Merrill, *supra* note 2, at 940.
119. Others have used the name "res judicata model." *See* Woolhandler, *supra* note 5, at 209–24.
120. 5 U.S.C. § 704.
121. *Id.* § 706(2).
122. *See, e.g.*, 8 U.S.C. § 1252(a)(1) (Board of Immigration Appeals); 15 U.S.C. § 78y (SEC); 28 U.S.C. §§ 2341–51 (various agencies); 42 U.S.C. § 405(g) (Social Security Administration).

APA. "First, the action must mark the 'consummation' of the agency's decisionmaking process."[123] In other words, "it must not be of a merely tentative or interlocutory nature."[124] "[S]econd, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'"[125] The test for a final action under other statutes is not necessarily the same, although it often is.[126]

Relatedly, APA-style review is also typically limited by statute to a closed administrative record.[127] As the Supreme Court has explained, "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court."[128] When the record is incomplete, the court usually remands to the agency for further proceedings.[129] Only in extraordinary circumstances will the administrative record be supplemented in court.[130]

Finally, plaintiffs may challenge not only the agency's compliance with statutory and constitutional limits on its authority, but also the full range of its factfinding and policy judgment. For example, under the APA, a plaintiff may challenge the agency's policy judgment as "arbitrary, capricious, [or] an abuse of discretion"[131] and its factual findings as "unsupported by substantial evidence."[132] And courts often take a "searching approach to arbitrary-and-capricious review."[133]

2. Ultra Vires Review

Ultra vires cases do not rely on a statutory judicial review provision. A plaintiff seeking ultra vires review today will instead file an action seeking

123. Bennett v. Spear, 520 U.S. 154, 177–78 (1997) (quoting Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 113 (1948)).

124. *Id.* at 178.

125. *Id.* (quoting Port of Bos. Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic, 400 U.S. 62, 71 (1970)).

126. *E.g.*, Smith v. Berryhill, 587 U.S. 471, 481 (2019); *see also* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 478 (2001). Of course, "final" agency action is not always the agency's last word on the matter. A notice-and-comment rule might constitute final action subject to pre-enforcement challenge, even though the agency might later enforce it through agency adjudication. *See, e.g.*, Abbott Lab'ys v. Gardner, 387 U.S. 136, 149 (1967). Similarly, an adjudicatory decision might constitute final action, even though the agency might later initiate further, related proceedings. *See, e.g.*, U.S. Army Corps of Eng'rs v. Hawkes Co., 578 U.S. 590, 597–600 (2016).

127. Merrill, *supra* note 2, at 940.

128. Camp v. Pitts, 411 U.S. 138, 142 (1973); *see* Merrill, *supra* note 2, at 941.

129. *See, e.g.*, Merrill, *supra* note 2, at 941; Christopher J. Walker, *The Ordinary Remand Rule and the Judicial Toolbox for Agency Dialogue*, 82 GEO. WASH. L. REV. 1553, 1554–55 (2014).

130. *See* Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971).

131. 5 U.S.C. § 706(2)(A).

132. *Id.* § 706(2)(E); *see* Merrill, *supra* note 2, at 941, 995.

133. JERRY L. MASHAW ET AL., ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM, CASES AND MATERIALS 624 (9th ed. 2025).

an injunction, a declaratory judgment, or both. With respect to injunctions, Professor John Duffy has explained that, "[v]ery early in their existence, the federal courts concluded that Congress intended its grants of equity jurisdiction to convey power to create a federal law of equitable remedies."[134] Consistent with the usual practice in equity, a plaintiff does not need an explicit statutory cause of action.[135] Instead, a plaintiff merely needs to "stat[e] a grievance that equity recognizes or might recognize as within its jurisdiction."[136] The Supreme Court reaffirmed in 2010 in *Free Enterprise Fund* that a court can enjoin a violation of federal law by a federal agency under the grant of federal question jurisdiction in 28 U.S.C. § 1331.[137]

A court may also issue a declaratory judgment against an agency pursuant to the Declaratory Judgment Act.[138] A plaintiff seeking declaratory relief must identify "a case of actual controversy within [a district court's] jurisdiction."[139] That requirement is typically satisfied when an agency has taken an action that violates a federal statute or the Constitution.[140]

Either way, the scope of review is limited to whether the agency has acted ultra vires.[141] For a while, courts called those questions "jurisdictional."[142] Over time, they began to review "errors of law on uncontested or agency-found facts."[143] And as time went on, courts sometimes asserted power to enjoin actions that were "wholly unsupported by the evidence or clearly arbitrary or capricious,"[144] on the theory the

134. Duffy, *supra* note 63, at 126.

135. Samuel L. Bray & Paul B. Miller, *Getting into Equity*, 97 NOTRE DAME L. REV. 1763, 1770–76 (2022).

136. *Id.* at 1786.

137. Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 491 n.2 (2010); *accord* Am. Sch. of Magnetic Healing v. McAnnulty, 187 U.S. 94, 110 (1902); LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 152–96 (1965).

138. 28 U.S.C. §§ 2201–02.

139. *Id.* § 2201(a).

140. *E.g.*, *Free Enterprise Fund*, 561 U.S. at 513. Less frequently, a plaintiff might seek a writ of mandamus. *See* 28 U.S.C. § 1651.

141. JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW 245, 302 (2012); Merrill, *supra* note 2, at 942; Woolhandler, *supra* note 5, at 209, 211; 4 JOHN NORTON POMEROY, JR., A TREATISE ON EQUITY JURISPRUDENCE, AS ADMINISTERED IN THE UNITED STATES OF AMERICA: ADAPTED FOR ALL THE STATES, AND TO THE UNION OF LEGAL AND EQUITABLE REMEDIES UNDER THE REFORMED PROCEDURE § 1750, at 4062–64 (4th ed. 1919); Noble v. Union River Logging R.R. Co., 147 U.S. 165, 171–72 (1893).

142. Woolhandler, *supra* note 5, at 209; MASHAW, *supra* note 141, at 302.

143. Woolhandler, *supra* note 5, at 220.

144. Ma-King Prods. Co. v. Blair, 271 U.S. 479, 483 (1926).

agency's enabling statute contained an implicit, outer limit of minimal reasonableness.[145]

Regardless of the precise limits of ultra vires review, courts will not disturb discretionary agency judgments within the scope of the agency's power.[146] A plaintiff seeking an injunction must prove that the agency or officer has a "duty to perform not involving discretion."[147] And a plaintiff seeking a declaratory judgment must have "a concrete case admitting of an immediate and definitive determination of the legal rights of the parties."[148] In other words, no relief is available if the agency has acted within its discretion, whether the issue is framed as one of fact or one of policy.

The plaintiff's merits showing also must be clear. As a historical matter, when a plaintiff sought an injunction, the court would decline to "interfere with the decision of [an agency]" on "a question of law . . . unless clearly of opinion that it was wrong."[149] The same was true for other forms of relief used in the nineteenth century in ultra vires cases. A party seeking a writ of mandamus—an order to perform a nondiscretionary duty—had to "satisfy 'the burden of showing that [his] right to issuance of the writ is clear and indisputable.'"[150] And a court might deny a writ of prohibition—an order not to act ultra vires—"where the question" was "doubtful, or depend[ed]

145. *See* Alexander Mechanick, *The Interpretive Foundations of Arbitrary or Capricious Review*, 111 KY. L.J. 477, 495–503 (2023); 1 THOMAS CARL SPELLING, A TREATISE ON INJUNCTIONS AND OTHER EXTRAORDINARY REMEDIES COVERING HABEAS CORPUS, MANDAMUS, PROHIBITION, QUO WARRANTO, AND CERTIORARI OR REVIEW § 619, at 513 (2d ed. 1901); POMEROY, *supra* note 141, § 1751, at 4065.

146. *See, e.g.*, MASHAW, *supra* note 141, at 302; POMEROY, *supra* note 141, § 1744, at 4050; SPELLING, *supra* note 145, § 617, at 511; Woolhandler, *supra* note 5, at 209–10, 220; United States *ex rel*. Carrick v. Lamar, 116 U.S. 423, 426 (1886).

147. *Ex parte* Young, 209 U.S. 123, 158 (1908); *see also* Leach v. Carlile, 258 U.S. 138, 140 (1922) (explaining that factual determinations will be upheld unless they are "palpably wrong and therefore arbitrary"); Bates & Guild Co. v. Payne, 194 U.S. 106, 109–10 (1904) (explaining that "where the decision of questions of fact is committed by Congress to the judgment and discretion of the head of a department, his decision thereon is conclusive; and that even upon mixed questions of law and fact, or of law alone, his action will carry with it a strong presumption of its correctness, and the courts will not ordinarily review it").

148. Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 241 (1937); *see also* 12 MOORE'S FEDERAL PRACTICE – CIVIL § 57.22(c) (2024) (requiring "imminent and inevitable litigation unless the issue is resolved by declaratory relief").

149. Smith v. Hitchcock, 226 U.S. 53, 58 (1912); *see also* JAMES W. EATON, HANDBOOK OF EQUITY JURISPRUDENCE §§ 293–94, at 603 (1st ed. 1901) ("a clear and legal right to the relief demanded"); POMEROY, *supra* note 141, § 1745, at 4055 ("Where the legality of the officer's action is doubtful, but it is not clearly illegal, a court of equity will not interfere."); SPELLING, *supra* note 145, § 617, at 511 ("Injunction will not be granted in any case to restrain . . . the legitimate exercise of judicial or official discretion.").

150. Cheney v. U.S. Dist. Ct. for D.C., 542 U.S. 367, 381 (2004) (alteration in original) (internal quotation marks omitted) (quoting Kerr v. U.S. Dist. Ct. for N. Dist. of Cal., 426 U.S. 394, 403 (1976)); *see also* Kendall v. United States *ex rel.* Stokes, 37 U.S. (12 Pet.) 524, 614 (1838) (requiring a "clear and specific" duty).

on facts which are not made matter of record."[151] Plaintiffs today must still demonstrate a "clear" right to an injunction[152] or a writ of mandamus[153] because of the extraordinary nature of such relief.

In addition to the more limited scope of review, ultra vires review also requires a plaintiff to establish that agency adjudication (and any available judicial review of the agency's final adjudicatory decision) is not a "plain, adequate, and complete remedy."[154] A "plain" remedy is one that is not "doubtful and obscure."[155] The meaning of an "adequate remedy" is not always clear,[156] but it may not "fall[] short of what the party is entitled to."[157] And a "complete" remedy is one that "attains the full end and justice of the case" by "reach[ing] the whole mischief, and secur[ing] the whole right of the party in a perfect manner, at the present time and in future."[158] As Professor Louis Jaffe put it in the mid-twentieth century, a plain, adequate, and complete remedy is "calculated to give relief more or less commensurate with the claim."[159]

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151. Smith v. Whitney, 116 U.S. 167, 173 (1886). In cases challenging the constitutionality of a statute, this requirement is often reinforced by the traditional requirement of "a clear violation of the Constitution." John O. McGinnis, *The Duty of Clarity*, 84 GEO. WASH. L. REV. 843, 845 (2016); *see also* PHILIP HAMBURGER, LAW AND JUDICIAL DUTY 309–16 (2008) (tracing the standard of "manifest contradiction" or "manifest error" to the Middle Ages).

152. 11A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 2942 (3d ed. online 2025).

153. Hollingsworth v. Perry, 558 U.S. 183, 190 (2010).

154. 1 JOSEPH STORY & JAIRUS W. PERRY, COMMENTARIES ON EQUITY JURISPRUDENCE, AS ADMINISTERED IN ENGLAND AND AMERICA 22–23 (12th ed. 1877); *see also* Am. Sch. of Magnetic Healing v. McAnnulty, 187 U.S. 94, 110 (1902) (similar); Cruickshank v. Bidwell, 176 U.S. 73, 80–81 (1900) (similar); *Kendall*, 37 U.S. (12 Pet.) at 614 (similar for a writ of mandamus); *Smith*, 116 U.S. at 173 (similar for a writ of prohibition); HENRY L. MCCLINTOCK, HANDBOOK OF THE PRINCIPLES OF EQUITY 475 (2d ed. 1948) (describing the requirement that there be "no adequate remedy at law, or otherwise prescribed by statute"); EATON, *supra* note 149, §§ 293–94, at 604 (noting the requirement of "irreparable injury"); POMEROY, *supra* note 141, § 1744, at 4050 (noting the requirement that "adequate compensation cannot be had at law"); SPELLING, *supra* note 145, § 626, at 519 (describing "the absence or inadequacy of legal remedies" as "the principal reason for interference with acts of public officers"). In theory, a plaintiff could obtain an injunction by showing "that the case falls under some [other] recognized head of equity jurisdiction," such as "the prevention of multiplicity of suits," but that option does not appear to have been significant in review of executive action. *Cruickshank*, 176 U.S. at 80–81. Courts in administrative law cases appear to have treated the multiplicity of suits as a subcategory of inadequacy. *See, e.g.*, Kirwan v. Murphy, 83 F. 275, 279–80 (8th Cir. 1897).

155. STORY & PERRY, *supra* note 154, at 23.

156. *See, e.g.*, Samuel L. Bray, *The System of Equitable Remedies*, 63 UCLA L. REV. 530, 581 (2016); Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687, 692 (1990).

157. STORY & PERRY, *supra* note 154, at 23.

158. *Id.* at 23–25.

159. JAFFE, *supra* note 137, at 426. Although the Declaratory Judgment Act does not explicitly mention the adequate remedy rule, courts have imposed it in administrative law cases. *See, e.g.*, WALTER GELLHORN, ADMINISTRATIVE LAW: CASES AND COMMENTS 799 (1940); Pub. Serv. Comm'n v. Wycoff Co., 344 U.S. 237, 246 (1952).

Finally, as the foregoing implies, ultra vires review is not limited to final agency actions.[160] And because there is often no final action with an administrative record, a district court may make factual findings, just as it would in any other action for an injunction or declaration, without remanding to the agency for factual findings.[161]

3. Bypassing Cases as Ultra Vires Review

When plaintiffs seek to bypass agency adjudication, they are availing themselves of ultra vires review—albeit now with the superimposition of the timing doctrines. These claims are not brought pursuant to the cause of action in the APA or another express judicial review provision.[162] Instead, plaintiffs seek injunctions pursuant to the general grant of federal question jurisdiction,[163] declaratory judgments pursuant to the Declaratory Judgment Act,[164] or (rarely) writs of mandamus pursuant to the All Writs Act.[165]

Nor has there been final agency action. Plaintiffs instead challenge a range of non-final actions that would be subject to agency adjudication before there is a final agency action. That adjudication might consist of proceedings in front of the Federal Labor Relations Authority,[166] removal proceedings in front of an immigration judge and the Board of Immigration Appeals,[167] or further agency adjudication in an enforcement proceeding.[168]

Furthermore, there is no closed administrative record. Courts instead find facts as they would in any other case seeking injunctive or declaratory relief.[169]

Finally, these cases do not involve claims of arbitrary and capricious action or lack of substantial evidence to support an agency's factual findings. Instead, they are limited to claims that the agency has acted inconsistently with a statute or the Constitution.[170]

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160. *See, e.g.*, JAFFE, *supra* note 137, at 487; Skinner & Eddy Corp. v. United States, 249 U.S. 557 (1919); Waite v. Macy, 246 U.S. 606 (1918).

161. *E.g.*, Merrill, *supra* note 2, at 948–49.

162. *See, e.g.*, Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 491 n.2 (2010).

163. *See, e.g.*, Axon Enter., Inc. v. FTC, 598 U.S. 175, 183 (2023).

164. *See, e.g.*, *id.*

165. *See, e.g.*, Mercy Gen. Hosp. v. Becerra, 643 F. Supp. 3d 16, 19 (D.D.C. 2022).

166. *See, e.g.*, Am. Fed'n of Gov't Emps. v. Trump, 929 F.3d 748, 754 (D.C. Cir. 2019).

167. *See, e.g.*, Khalil v. Joyce, 780 F. Supp. 3d 476, 511–44 (D.N.J. 2025).

168. *See, e.g.*, Axon Enter., Inc. v. FTC, 598 U.S. 175, 183 (2023).

169. *See, e.g.*, Am. Fed'n of Gov't Emps. v. Trump, 139 F.4th 1020, 1030 (9th Cir.), *stay granted on other grounds*, 145 S. Ct. 2635 (2025).

170. *See, e.g.*, Trump v. Hawaii, 585 U.S. 667, 683–710 (2018).

B. The Advantages of the Ultra Vires Model

This Section defends the continued use of the traditional ultra vires model in cases seeking to bypass agency adjudication. First, it shows how ultra vires review ensures scrutiny of consequential agency action and protects plaintiffs against irreparable harm. Second, it explains how the ultra vires model provides adequate safeguards for agencies in the form of a limited scope of review and the adequate remedy rule.

1. Safeguards for Plaintiffs

Ultra vires review provides important protections for individual plaintiffs. Scholars have discussed the harms from agency inaction and decisions not to decide.[171] But the harm from further agency adjudication is different. Sometimes, it unduly increases the agency's settlement leverage by imposing prohibitive direct and indirect litigation costs or prohibitive sanctions. Sometimes it forces plaintiffs to undergo a proceeding that will not address essential issues or provide essential relief. And sometimes agency adjudication inflicts irreparable harm in the form of an unconstitutional adjudication.

a. Costs of Agency Adjudication

Delaying ultra vires review can give the agency unfair settlement leverage in several ways. First, adjudications often impose significant costs. Those costs may be direct (in the form of litigation expense) or indirect (in the form of reputational or emotional costs).[172] An agency investigation could take a year or more,[173] followed by a quasi-judicial hearing and internal appeals process that lasts another year or more.[174] And the harm

171. *See, e.g.*, Christina Larsen, *Is the Glass Half Empty or Half Full? Challenging Incomplete Agency Action Under Section 706(1) of the Administrative Procedure Act*, 25 PUB. LAND & RES. L. REV. 113, 113–14 (2004); Michael D. Sant'Ambrogio, *Agency Delays: How a Principal-Agent Approach Can Inform Judicial and Executive Branch Review of Agency Foot-Dragging*, 79 GEO. WASH. L. REV. 1381 (2011); Sidney A. Shapiro, *Rulemaking Inaction and the Failure of Administrative Law*, 68 DUKE L.J. 1805 (2019); Cass R. Sunstein & Adrian Vermeule, *The Law of "Not Now": When Agencies Defer Decisions*, 103 GEO. L.J. 157 (2014); Bobby Kim, Note, *Missed Statutory Deadlines and Missing Agency Resources: Reviving Historical Mandamus Doctrine*, 121 COLUM. L. REV. 1481 (2021).

172. *See* Adam S. Zimmerman, *The Class Appeal*, 89 U. CHI. L. REV. 1419, 1439–43 (2022); *Axon*, 598 U.S. at 213–14 (Gorsuch, J., concurring in the judgment).

173. *See, e.g.*, *In re Gibson*, Exchange Act Release No. 77466, Investment Advisors Act Release No. 4359, Investment Company Act Release No. 32059, 113 SEC Docket 4212, 2016 WL 1213259 (Mar. 29, 2016).

174. *See*, *e.g.*, *Report on Administrative Proceedings for the Period April 1, 2024, through September 30, 2024*, Exchange Act Release No. 101485, at 4 (SEC Oct. 31, 2024), sec.gov/files/34-101485.pdf [https://perma.cc/4R99-2RN3].

from those proceedings is particularly acute for individuals and small entities.

Such was the case for Michele Cochran, a plaintiff whose case reached the Supreme Court in 2023. Three years after Cochran quit her job, the SEC instituted administrative proceedings against her and her former boss.[175] Cochran represented herself and refused to settle, even after her boss did.[176] The ALJ fined her $22,500 and banned her from practice for five years.[177] In August 2018, three years after the proceedings began, the SEC vacated the ALJ's decision and remanded to a new ALJ.[178] Faced with the prospect of even more agency adjudication, Cochran sued in federal court to challenge the constitutionality of those proceedings.

Adjudications often also involve the risk of severe sanctions. A plaintiff may be able to obtain judicial review by refusing to comply with an agency's ultra vires action, which triggers reviewable sanctions. But the stakes of that gamble are often high.[179] If the Article III court disagrees with the plaintiff on the merits, the plaintiff will be liable for the sanctions. As the Supreme Court recognized in *Free Enterprise Fund*, that choice is intolerable and many rational plaintiffs will not take it.[180] In *Free Enterprise Fund*, the firm under investigation could have sought judicial review by refusing to comply with the agency's demands for documents and testimony.[181] But doing so might have resulted in "a sizable fine."[182] The Supreme Court allowed the plaintiff to bypass further agency proceedings because the law "normally do[es] not require plaintiffs to 'bet the farm'" and risk "severe punishment should its challenge fail."[183]

The foregoing realities will incentivize many plaintiffs with meritorious claims to settle administrative enforcement proceedings. It requires an unusually dedicated plaintiff to proceed through a lengthy administrative process where the odds of success are low and the risks of sanctions are high, just to seek uncertain and costly judicial review in Article III court. The rational plaintiff will often settle, rather than pursue potentially meritorious claims, if prompt review is not available. Indeed, to take one

175. Joint Appendix at 43–44, SEC v. Cochran, No. 21-1239 (U.S. 2023) (decision announced in *Axon*, 598 U.S. 175).
176. *Axon*, 598 U.S. at 213 (Gorsuch, J., concurring).
177. *Id.* at 214.
178. *Id.*
179. *See* Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 490 (2010).
180. *See id.*
181. *See id.*
182. *Id.*
183. *Id.* (citation omitted).

agency as an example, ninety-eight percent of SEC in-house enforcement proceedings between 2002 and 2014 settled.[184]

Moreover, the phenomenon of agencies leveraging the threat of more onerous action (such as sanctions) to extract compliance with non-final action is well-documented. Agencies often choose "less formal mechanisms" or "even deliberately inculcate fear about their formal remedies, and then feel especially free to make very intrusive informal demands" to achieve their objectives without taking a final action.[185] Without ultra vires review, a plaintiff must choose between additional regulatory action (in the form of sanctions) and obtaining timely review of unlawful non-final action.

Even in adjudications other than enforcement proceedings, the costs of administrative benefits adjudications may make waiting for judicial review impractical or impossible. As others have noted, many benefits programs provide for administrative adjudication followed by judicial review.[186] Those systems often involve private parties with limited resources.[187] Would-be plaintiffs who depend on benefits may thus be unable to litigate through the agency process until reaching federal court.

b. Incomplete Agency Adjudication

Apart from costs, an agency may categorically refuse to consider certain claims or provide certain remedies that would be available in court. For instance, agencies generally decline to consider arguments that statutes are unconstitutional.[188] An agency may also fail to provide certain relief, such as a pre-deprivation hearing.[189] Or an agency may refuse to consider broader

184. Gideon Mark, *SEC and CFTC Administrative Proceedings*, 19 U. PA. J. CONST. L. 45, 57 (2016).

185. PHILIP HAMBURGER, PURCHASING SUBMISSION: CONDITIONS, POWER, AND FREEDOM 94 (2021); *see also* Luis Inaraja Vera, *Delayed Judicial Review of Agency Action*, 56 HARV. J. ON LEGIS. 199, 202 (2019) (similar).

186. *See* Zimmerman, *supra* note 172, at 1431.

187. *See id.* at 1431, 1440.

188. *See, e.g.*, Interchangeable Mileage Ticket Investigation, 77 I.C.C. 200, 202 (1923) ("We have repeatedly said that it is our duty to apply a statute as we find it, and that it is for the courts to determine the validity of the statute where that question arises."); *see also* Elgin v. Dep't of Treasury, 567 U.S. 1, 16 (2012) ("This Court has . . . stated that 'adjudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies.'" (quoting Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 215 (1994))). This reasoning is doubtful. *See* Brian M. Lipshutz, Administrative Self-Constitutionalism 21–58 (unpublished manuscript) (on file with author) (explaining why agencies should address constitutional challenges to statutes); *see also* Yonatan Gelblum, *The Myth That Agency Adjudications Cannot Address Constitutional Claims*, 32 GEO. MASON L.J. 223, 301–05 (2025) (suggesting that some constitutional claims should be exhausted at the agency level).

189. *See, e.g.*, Kreschollek v. S. Stevedoring Co., 78 F.3d 868, 874–75 (3d Cir. 1996).

legal issues, such as a system-wide policy that is being applied to an individual.[190]

Those refusals often create bizarre "pinball procedur[es]" that burden plaintiffs and courts.[191] In *Elgin v. Dep't of Treasury*, civil servants facing adverse employment actions sought to challenge the draft-registration requirement. The Supreme Court held that they must proceed through an agency adjudication, even though the agency would not consider their constitutional claim.[192] The Court thus forced plaintiffs to "file their claims with the [agency]"; wait for the agency to "kick the claims up to the Federal Circuit"; and then wait for the court to "remand the claims back to the [agency]" because the court lacks the power to compile a factual record.[193] Then the agency must "develop the record," apparently over its objections, "and send the case back to the Federal Circuit, which can only then consider the constitutional issues."[194] That process is borderline absurd.

The incompleteness of an administrative adjudication imposes two different kinds of harm. First, it subjects a plaintiff to a proceeding in which the agency will ignore a fundamental and potentially meritorious issue. Second, as with the direct and indirect costs and potential sanctions involved in an agency adjudication, it may unduly increase the agency's settlement leverage.[195]

c. Irreparable Harm

In addition, the ultra vires model protects plaintiffs from the irreparable harm of an unconstitutional adjudication. The unanimous Supreme Court in *Axon* recognized that such harm "is impossible to remedy once the proceeding is over."[196] The issue "goes to the core of the [agency's] existence."[197] And if the plaintiff is right, it would "prevent [the agency] from exercising any power."[198]

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190. *See* Am. Fed'n of Gov't Emps. v. Trump, 929 F.3d 748, 758 (D.C. Cir. 2019); *see also* Bank of La. v. FDIC, 919 F.3d 916, 926 (5th Cir. 2019); Bebo v. SEC, 799 F.3d 765, 773 (7th Cir. 2015); Jarkesy v. SEC, 803 F.3d 9, 18 (D.C. Cir. 2015).

191. *Elgin*, 567 U.S. at 33–34 (Alito, J., dissenting).

192. *Id.* at 16–21 (majority opinion).

193. *Id.* at 33 (Alito, J., dissenting).

194. *Id.*

195. *See supra* notes 184–187 and accompanying text.

196. Axon Enter., Inc. v. FTC, 598 U.S. 175, 191 (2023).

197. *Id.* at 189.

198. *Id.* For comparison, a defendant subject to an unlawful enforcement proceeding in federal district court could move to dismiss. *See* FED. R. CIV. P. 12(b)(6). The district court could also certify its decision for interlocutory appeal under 28 U.S.C. § 1292(b), without waiting for final judgment. And if the district court refused to do so, a plaintiff could seek a writ of mandamus from the court of appeals. *See* 28 U.S.C. § 1651.

Although the Court permitted review in *Axon*, lower courts do not always do so. In another case, a medical laboratory sued the FTC for allegedly launching an enforcement proceeding to retaliate for the laboratory's speech.[199] The Eleventh Circuit acknowledged that "the retaliatory conduct was complete at the moment the Complaint was filed."[200] But the court nonetheless held that the First Amendment claim must "await appellate review after the Commission's proceedings are final."[201] At that point, though, the retaliation is complete.

2. Safeguards for Agencies

Not every plaintiff has reasonable grounds for bypassing agency adjudication. Courts have recognized for more than a century that plaintiffs might "attempt to disregard and override the provisions of the statutes and the rules of the department and to swamp the courts by a resort to them in the first instance."[202] But the ultra vires model adequately considers the tradeoffs involved. It provides protection for agencies by limiting the merits issues that plaintiffs may raise and requiring plaintiffs to show that alternative remedies are inadequate.

a. Limited Merits Issues

As discussed above, ultra vires review will not disturb an agency's exercise of discretion within its jurisdiction.[203] That limitation protects agency discretion and optimizes the benefit of agency expertise. The heartland of cases where agencies arguably have a comparative advantage is highly technical cases requiring a complicated factual record. Those cases are not readily subject to ultra vires review because they are so factbound.[204]

Because the traditional ultra vires model requires a clear showing on the merits, courts cannot intervene when the question is a close one.[205] That makes it more difficult—though not impossible—to convert a reasonable exercise of discretion into a clearly ultra vires action. For example, many statutes contain terms such as "appropriate" or "reasonable" that delegate

199. *See* LabMD, Inc. v. FTC, 776 F.3d 1275, 1277 (11th Cir. 2015).
200. *Id.* at 1280.
201. *Id.*
202. United States v. Sing Tuck, 194 U.S. 161, 170 (1904).
203. *See supra* Section II.A.2.
204. Of course, a highly motivated court might disregard these limitations. But that risk is inherent in any judicial review, not just the ultra vires model.
205. *See supra* notes 149–53 and accompanying text.

policymaking jurisdiction to an agency.[206] It seems a stretch to argue that most garden-variety exercises of discretion are *clearly* not "appropriate" or "reasonable." That requirement should alleviate concerns about a slippery slope to second-guessing policy decisions.

In addition, the clear-showing requirement intersects with the limited form of deference recognized by *Loper Bright*. At several points, the Supreme Court recognized that "respect" is "especially warranted when an Executive Branch interpretation was issued roughly contemporaneously with enactment of the statute and remained consistent over time."[207] The Court has since reiterated that, "while 'courts must exercise independent judgment in determining the meaning of statutory provisions,' the contemporary and consistent views of a coordinate branch of government can provide evidence of the law's meaning."[208] Scholars have similarly recognized a tradition of giving weight to "a contemporaneous exposition" and settled "usage."[209] Where an agency's interpretation of an unclear law is contemporaneous and consistent, then a plaintiff is less likely to be able to show that the agency has clearly exceeded its authority.

Constitutional claims might also fall short of the clear-showing requirement. For example, in *Saline Parents v. Garland*, parents challenged on First Amendment grounds a memorandum from Attorney General Merrick Garland instructing the Department of Justice to investigate and address threats of violence against school boards.[210] But the memorandum did not require the parents to say anything or prohibit them from saying anything.[211] Although the parents might have been able to prove a chilling effect on a different record, they pointed to no facts suggesting such an effect.[212]

b. Adequate Remedy Rule

The adequate remedy rule provides further protection for agency discretion by allowing agencies to partly control their own fate. They can limit the need for review of non-final action by offering prompt, cost-

206. *See* Loper Bright Enters. v. Raimondo, 603 U.S. 369, 395 (2024); *see also id.* at 395 n.6 (collecting examples).

207. *Id.* at 386; *see also id.* at 394 ("And interpretations issued contemporaneously with the statute at issue, and which have remained consistent over time, may be especially useful in determining the statute's meaning.").

208. Bondi v. VanDerStok, 604 U.S. 458, 480–81 (2025) (quoting *Loper Bright*, 603 U.S. at 394).

209. Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 933, 937 (2017).

210. *See* Saline Parents v. Garland, 88 F.4th 298, 300–01 (D.C. Cir. 2023).

211. *See id.* at 308.

212. *See id.*

effective adjudications that consider all the claims and offer all the remedies authorized by statute. An agency might even structure its internal rules to permit respondents to seek Article III review (or remove a case to Article III court) early in the proceeding.[213]

Of course, the adequate remedy rule has been the subject of considerable criticism. Scholars have argued that it is not a coherent rule and that it camouflages the considerations truly at work in individual contexts.[214] But this Article proposes a modest application of the rule. Courts are perfectly capable of comparing the adequacy of immediate judicial review and agency adjudication followed by judicial review.[215] In other words, a court need only determine whether the alternative remedy is deficient relative to Article III litigation in some respect, such as unreasonable cost,[216] an intolerable risk of punishment,[217] an inability or refusal to consider certain claims or grant certain forms of relief,[218] or the irreparable harm of an unconstitutional proceeding.[219]

Courts already engage in a similar comparative analysis under the more ill-defined standard of "meaningful review" in *Thunder Basin* cases. In *Hill v. SEC*, the Eleventh Circuit rejected the plaintiffs' argument that they lacked adequate procedures to build a factual record before the agency.[220] The Eleventh Circuit delved into the details of SEC evidentiary procedures and concluded that "[t]hese tools, although less robust than those provided by the Federal Rules of Civil Procedure, do not leave the [plaintiffs] without a meaningful avenue to develop the record."[221] The same kind of analysis would be equally feasible under the clearer standard of the adequate remedy rule.

Moreover, the status quo is hardly a paragon of logical coherence and predictable application. The current timing doctrines all rely on mutable concepts. Courts must evaluate "hardship" to the plaintiff and weigh it

213. *See* Christopher J. Walker & David Zaring, *The Right to Remove in Agency Adjudication*, 85 OHIO ST. L.J. 1, 18 (2024) (proposing a "right to remove" agency proceedings to federal court).

214. *See, e.g.*, DOUGLAS LAYCOCK, THE DEATH OF THE IRREPARABLE INJURY RULE (1991); RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 4(2) cmt. e, reporter's note e (AM. L. INST. 2011); DAN B. DOBBS, LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION 135–42 (2d ed. 1993); OWEN M. FISS, THE CIVIL RIGHTS INJUNCTION 6, 38–40 (1978); 1 GEORGE E. PALMER, THE LAW OF RESTITUTION 36, 427–34 (1978); Tracy A. Thomas, *Justice Scalia Reinvents Restitution*, 36 LOY. L.A. L. REV. 1063, 1073 n.59, 1086 (2003); Alan Schwartz, *The Case for Specific Performance*, 89 YALE L.J. 271, 305–06 n.96 (1979). That scholarship has not deterred federal and state courts from continuing to apply the rule. *See* Bray, *supra* note 156, at 550 n.86 (collecting cases).

215. *See* Bray, supra note 156 at 584.

216. *See, e.g.*, Smith v. Ill. Bell Tel. Co., 270 U.S. 587, 591 (1926).

217. *See, e.g.*, JAFFE, *supra* note 137, at 403.

218. *See, e.g.*, STORY & PERRY, *supra* note 154, at 23–25.

219. *See id.* at 22.

220. *See* 825 F.3d 1236, 1249 (11th Cir. 2016).

221. *Id.* at 1249–50.

against the hardship to the agency and the incommensurate concept of the fitness of issues for judicial review.[222] They must also evaluate "meaningful" judicial review and weigh it against the incommensurate ideas of collateral claims and agency expertise.[223] A shift to the adequate remedy rule, even if that rule is not perfect, would be an improvement and would permit courts to draw on centuries of cases.[224]

Finally, the ability of Congress to regulate judicial review of agency action provides a last-ditch safeguard. If courts go too far in providing review of non-final actions, Congress could always pass a statute expressly restricting judicial review of some or all non-final actions. On balance, then, a return to the adequate remedy rule would be superior to the current timing doctrines.

C. The Flaws of the Timing Doctrines

Despite the ultra vires model's balance between the interests of agencies and plaintiffs, the Supreme Court has imposed timing doctrines that further restrict review. The timing doctrines unjustifiably depart from the historical ultra vires model and standard principles of statutory interpretation in three ways. First, courts presumptively find that Congress intended to preclude ultra vires review when it created an agency adjudication process. Second, courts defer questions of constitutional and statutory authority to agencies. Third, courts fail to ensure that the alternative route to court constitutes an inadequate remedy.[225]

1. The Presumption in Favor of Implied Repeals

Unlike the traditional ultra vires model, the modern timing doctrines typically find that Congress intended to repeal the authority to review non-final action when it created an agency adjudication process. Multiple courts of appeals have applied a "presumption of initial administrative review" based on the creation of an agency adjudication process.[226] That presumption in favor of implied repeals of Section 1331 and the Declaratory Judgment Act is contrary to three canons of statutory interpretation and has no persuasive justification.

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222. *See supra* Section I.B.2.

223. *See supra* Section I.B.3.

224. *See infra* Section II.B.2.

225. Professor Duffy has persuasively criticized the use of exhaustion and ripeness doctrine in APA cases on primarily textual grounds. *See* Duffy, *supra* note 63, at 152–81.

226. Jarkesy v. SEC, 803 F.3d 9, 17 (D.C. Cir. 2015) (quoting E. Bridge, LLC v. Chao, 320 F.3d 84, 89 (1st Cir. 2003)).

a. Contrasting the Traditional and Modern Approaches

Ultra vires review historically did not place a thumb on the scale against review simply because there was an alternative agency adjudication process. For example, in *Skinner & Eddy Corp. v. United States*, the plaintiff sought to challenge a rate set by the Interstate Commerce Commission (ICC) on the ground that the ICC failed to make a required finding.[227] The government argued that the orders could not be challenged "until after a remedy has been sought" from the ICC "under sections 13 and 15 of the Act to Regulate Commerce."[228] The Supreme Court rejected that argument and held that "the courts have jurisdiction of suits to enjoin the enforcement of an order" that "exceeded [the ICC's] statutory powers."[229]

To take another example, the Eighth Circuit affirmed an injunction against a National Labor Relations Board adjudication in 1936.[230] The challengers argued that the National Labor Relations Act was unconstitutional.[231] The officials argued, among other things, that "there is an adequate remedy at law provided by the act itself."[232] The Eighth Circuit rejected the officials' argument, reasoning that "[i]f the act is invalid . . . then the [officials] in carrying on their investigations into the affairs of the [complainants] are virtually trespassers."[233] The court continued that,

> [t]he fact that a cease and desist order of the board, if one were made, could only be enforced by this court, and the fact that the board could not compel the attendance of witnesses without an order of court, does not, in our opinion, preclude the granting of a temporary injunction in a case such as this, where the trial court has found that what the board threatens to do prior to the issuance of any cease and desist order will seriously injure the appellees' business.[234]

By contrast, under current doctrine, an agency adjudication process generally weighs against the availability of immediate judicial review of non-final action. Under *Thunder Basin*, an agency adjudication process is typically treated as implicitly repealing Section 1331 and the Declaratory Judgment Act. The Supreme Court has explained that, "[g]enerally, when

227. 249 U.S. 557, 558, 562 (1919).
228. *Id.* at 562.
229. *Id.* at 562–63.
230. Pratt v. Stout, 85 F.2d 172, 181 (8th Cir. 1936).
231. *Id.* at 174.
232. *Id.* at 180.
233. *Id.*
234. *Id.* at 181. Other courts reached the opposite conclusion. *See* Elliott v. El Paso Elec. Co., 88 F.2d 505, 506 (5th Cir. 1937); E.I. Dupont De Nemours & Co. v. Boland, 85 F.2d 12, 14–15 (2d Cir. 1936).

Congress creates procedures 'designed to permit agency expertise to be brought to bear on particular problems,' those procedures 'are to be exclusive.'"[235] Between 2015 and 2024, the federal courts concluded that an administrative review process implicitly delayed review under *Thunder Basin* thirty-nine times and permitted review only twenty times.[236]

Similarly, the existence of an agency adjudication process usually leads to the imposition of an exhaustion requirement. In holding that exhaustion was required, the Supreme Court has emphasized that "Congress has specifically provided for a tribunal" to resolve the kind of disputes at issue.[237] Even while cataloging the exceptions to exhaustion doctrine, the Court treated exhaustion of a statutorily prescribed review scheme as "the general rule" and reiterated the need for "deference to Congress' delegation of authority to coordinate branches of Government."[238]

So too under prudential ripeness doctrine, a statutorily prescribed review process weighs in favor of delaying judicial review. Courts have reasoned that the administrative process can provide "further factual development [that] would 'significantly advance [the] ability to deal with the legal issues presented.'"[239] Courts have also cited the prospect of further detail on the agency's reasoning, "what types of enforcement problems are encountered," and "the safeguards devised" by the agency to protect private interests.[240]

b. The Flaws of the Modern Approach

The modern approach is at odds with three canons of statutory interpretation and modern decisions in analogous contexts. One of the "cardinal rule[s]" of statutory interpretation is "that repeals by implication are not favored."[241] That rule is a longstanding one, and it applies to statutory conflicts of all kinds.[242] Under the rule, "[i]n the absence of some

235. Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 489 (2010) (quoting Whitney Nat'l Bank in Jefferson Parish v. Bank of New Orleans & Trust Co., 379 U.S. 411, 420 (1965)); *see also* Axon Enter., Inc. v. FTC, 598 U.S. 175, 185 (2023) ("We have several times held that the creation of . . . a review scheme for agency action divests district courts of their ordinary jurisdiction over the covered cases."); Elgin v. Dep't of Treasury, 567 U.S. 1, 10–15 (2012) (concluding that the statutorily prescribed review process in the Civil Service Reform Act precludes immediate judicial review).

236. *See supra* notes 111–12 and accompanying text. In *Axon Enterprise*, the Court abrogated some of those decisions on the ground that they misapplied *Thunder Basin*. *See generally Axon*, 598 U.S. 175.

237. Order of Ry. Conductors v. Pitney, 326 U.S. 561, 565 (1946).

238. McCarthy v. Madigan, 503 U.S. 140, 144–45 (1992).

239. Nat'l Park Hosp. Ass'n v. Dep't of Interior, 538 U.S. 803, 812 (2003) (quoting Duke Power Co. v. Carolina Env't Study Grp., Inc., 438 U.S. 59, 82 (1978)).

240. Toilet Goods Ass'n v. Gardner, 387 U.S. 158, 163–64 (1967).

241. Morton v. Mancari, 417 U.S. 535, 549 (1974) (citation omitted).

242. *See* Wood v. United States, 41 U.S. (16 Pet.) 342, 363 (1842); *see also* Posadas v. Nat'l City Bank, 296 U.S. 497, 503 (1936).

affirmative showing of an intention to repeal, the only permissible justification for a repeal is when the earlier and later statutes are irreconcilable."[243]

Two other canons also weigh against finding an implied repeal of Section 1331 and the Declaratory Judgment Act. One is the "well-established principle of statutory construction" that "[t]he common law . . . ought not to be deemed repealed, unless the language of a statute be clear and explicit for this purpose."[244] That rule too has been applied from the nineteenth century through the modern era.[245] The other canon instructs that "a major departure from the long tradition of equity practice should not be lightly implied."[246] Under it, "[u]nless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied."[247] Once again, that rule is longstanding and in good standing.[248]

Courts applying those canons in analogous contexts are reluctant to find that one grant of jurisdiction implicitly precludes another. A leading nineteenth-century treatise explained that "[a] subsequent statute which institutes new methods of proceeding does not, without negative words, repeal a former statute relative to procedure."[249] When deciding whether a provision making certain court-martial decisions "final" implicitly repealed jurisdiction before the court-martial has even occurred, the Supreme Court applied the presumption against implied repeals.[250] Whatever the need for deference to agencies, the need for deference to courts-martial is surely as great. Similarly, when deciding whether a specific grant of jurisdiction to state courts precludes federal jurisdiction, courts presume that "the familiar default rule" of general federal question jurisdiction applies.[251] And when deciding whether a specific grant of jurisdiction to federal courts implicitly precludes jurisdiction in state courts, federal courts apply the "general rule

243. *Morton*, 417 U.S. at 550.

244. Norfolk Redevelopment & Hous. Auth. v. Chesapeake & Potomac Tel. Co., 464 U.S. 30, 35 (1983) (alterations in original) (quoting Fairfax's Devisee v. Hunter's Lessee, 11 U.S. (7 Cranch) 603, 623 (1812)).

245. *E.g.*, *Fairfax's Devisee*, 11 U.S. (7 Cranch) at 623; Pond v. United States, 69 F.4th 155, 164 (4th Cir. 2023).

246. Weinberger v. Romero-Barcelo, 456 U.S. 305, 320 (1982).

247. *Id.* at 313 (quoting Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946)).

248. *See, e.g.*, Starbucks Corp. v. McKinney, 602 U.S. 339, 346 (2024); Hecht Co. v. Bowles, 321 U.S. 321, 330 (1944); Brown v. Swann, 35 U.S. (10 Pet.) 497, 503 (1836).

249. J.G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION 205 (Chicago, Callaghan & Co. 1891).

250. *See* Schlesinger v. Councilman, 420 U.S. 738, 752 (1975).

251. Mims v. Arrow Fin. Servs., LLC, 565 U.S. 368, 387 (2012).

that the grant of jurisdiction to one court does not, of itself, imply that the jurisdiction is to be exclusive."[252]

The Court has also stated that, in cases of overlapping jurisdictional grants, the presumption against implied repeals trumps the canon that specific provisions govern general ones.[253] That canon dictates that, "[i]f there is a conflict between a general provision and a specific provision, the specific provision prevails."[254] But that canon requires a conflict, and overlapping grants of jurisdiction are perfectly reconcilable. Although the Court did not elaborate when it held that the general/specific canon did not control, that would appear to be its reasoning. The timing doctrines are thus an anomaly in presuming implicit repeals.

The Supreme Court's cases articulating the effective presumption in favor of implied repeal do not acknowledge the traditional presumptions. And at least one court of appeals applying *Thunder Basin* doctrine has rejected the argument that Congress must be "clear[]" when it wishes to preclude ultra vires review.[255] The case law instead suggests two reasons for the presumption: the detailed nature of agency adjudication processes, and the need for predictable jurisdictional lines. Neither of those concerns are persuasive.

The "painstaking detail with which" some statutes set out a review process should not loosen the normal interpretive presumptions.[256] Rather, provisions for agency adjudication followed by judicial review typically provide a broader scope of review, making them complementary to ultra vires review of non-final action. The statute at issue in *Elgin* provides a good example. Courts reviewing agency action under the Civil Service Reform Act may set it aside if it is "arbitrary, capricious, [or] an abuse of discretion"; if it was "obtained without procedures required by . . . rule[] or regulation"; or if it is "unsupported by substantial evidence."[257] It is perfectly sensible for litigants to have more limited review before an agency process has run its course and more thorough review after an agency process has run its course.

The Court has also pointed to the need for "clear guidance" "about the proper forum."[258] But courts have long drawn lines between challenges to an agency's authority and other challenges, such as to the constitutionality

252. United States v. Bank of N.Y. & Tr. Co., 296 U.S. 463, 479 (1936).
253. *See Mims*, 565 U.S. at 379.
254. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW 183 (2012).
255. *See* Hill v. SEC, 825 F.3d 1236, 1245 (11th Cir. 2016).
256. *See* Elgin v. Dep't of Treasury, 567 U.S. 1, 11 (2012).
257. 5 U.S.C. § 7703(a)(1), (c); *see Elgin*, 567 U.S. at 6.
258. *Elgin*, 567 U.S. at 15.

of an agency's policy.[259] Moreover, current doctrine is plenty unpredictable, not least because the Supreme Court's formulation of the *Thunder Basin* test has been unstable.[260] The best approach is thus to apply the normal rules of statutory interpretation. And under those rules, the mere creation of an agency adjudication process followed by judicial review of a final agency action does not implicitly repeal Section 1331 and the Declaratory Judgment Act.

Finally, nothing in the APA implicitly repeals the power to conduct ultra vires review. The APA does not create a cause of action to review non-final action. And nothing in the statute conveys an intent to preclude review of non-final action under other sources of judicial authority. In fact, it provides that nothing in the judicial review provisions "limit[s] or repeal[s] additional requirements . . . recognized by law."[261]

2. The Abdication of Jurisdictional Policing

The modern timing doctrines also unjustifiably defer questions of constitutional and statutory authority to agencies in the first instance. That deferral is out of step with not only the traditional ultra vires model, but also the modern jurisprudence on deference.

a. Contrasting the Traditional and Modern Approaches

The Supreme Court's 1918 decision in *Waite v. Macy* is a prime example of the traditional approach. Several importers sought an injunction to prevent an appraisal board from applying certain standards to block importation of their tea.[262] The board argued that it would "decide according to law" with respect to each import.[263] The Court nonetheless concluded that

259. *See supra* Section II.A.2.

260. The Court quietly restyled step two as the trigger for a presumption of judicial review in *Free Enterprise Fund v. Public Company Accounting Oversight Board*. *See* 561 U.S. 477, 489 (2010). In the same case, the Court stopped considering legislative history as part of the test. *See* Jellum, *supra* note 100, at 357 n.121. Although the Court has never explained its abandonment of legislative history, it appears to be a matter of textualist principles. Justices Scalia and Thomas (the latter of whom wrote *Elgin*) declined to join the discussion of legislative history in *Thunder Basin*. *See* 510 U.S. 200, 219 (1994) (Scalia, J., concurring in part and concurring in the judgment); *see also* John F. Manning, *Second-Generation Textualism*, 98 CAL. L. REV. 1287, 1309, 1309 n.100 (2010) (commenting that Justice Scalia's "main cause for complaint seems to be that the Court invokes legislative history unnecessarily to confirm a result amply established through textual exegesis").

261. 5 U.S.C. § 559.

262. Waite v. Macy, 246 U.S. 606, 607 (1918).

263. *Id.* at 609.

an injunction was warranted because the regulatory standards violated the enabling statute and the plaintiffs had no other adequate remedy.[264]

Another example is the Supreme Court's 1925 decision in *Work v. Louisiana*.[265] The Court affirmed the entry of an injunction prohibiting the Secretary of the Interior from requiring Louisiana to demonstrate that land it claimed had no minerals.[266] The Court rejected the Secretary's argument that the action was "prematurely brought, before the Secretary had exercised his jurisdiction to determine the character of the lands and while the claim was still in the process of administration."[267] As the Court explained, "it is merely a suit to restrain the Secretary from rejecting its claim, independently of the merits otherwise, upon an unauthorized ruling of law illegally requiring it, as a condition precedent, to show that the lands are not mineral in character."[268]

By contrast, the modern timing doctrines frequently defer questions of statutory and constitutional authority to agencies. Between 2015 and 2024, a timing doctrine barred ultra vires review in whole or in part in sixty-one reported cases.[269] And the Supreme Court's discussion of the tests makes clear that the scales are tilted in favor of initial agency resolution of statutory and constitutional issues.

One of the leading exhaustion cases reasoned that an "agency, like a trial court, is created for the purpose of applying a statute in the first instance."[270] "Accordingly," the Supreme Court concluded, "it is normally desirable to let the agency develop the necessary factual background upon which decisions should be based."[271] The Court also explained that, "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."[272]

Prudential ripeness doctrine similarly assigns agencies a role in analyzing some legal issues first. The Supreme Court has invoked a need for the "focus" that a particularized agency action provides and emphasized the difficulty of dealing with "elaborate, technically based" issues that "may change over time."[273]

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264. *Id.* at 610.
265. 269 U.S. 250 (1925).
266. *Id.* at 261.
267. *Id.* at 253–54.
268. *Id.* at 254.
269. *See supra* notes 105–12 and accompanying text.
270. McKart v. United States, 395 U.S. 185, 193–94 (1969).
271. *Id.* at 194.
272. *Id.*; *see also* William Funk, *Exhaustion of Administrative Remedies: New Dimensions Since* Darby, 18 PACE ENV'T L. REV. 1, 2 (2000).
273. Ohio Forestry Ass'n, Inc. v. Sierra Club, 523 U.S. 726, 736 (1998).

Thunder Basin doctrine involves similar considerations. In *Thunder Basin* itself, the Supreme Court remarked that the "statutory claims at root require interpretation of the parties' rights and duties under [the statute and regulations], and as such arise under the Mine Act and fall squarely within the [agency's] expertise."[274] The Court was unmoved by the fact that the plaintiff's claim required interpretation of the National Labor Relations Act and "the [agency] has no particular expertise in construing statutes other than the Mine Act."[275] The Court thought that "agency expertise" nonetheless could be "'brought to bear' on the statutory questions."[276]

The Supreme Court has even extended that reasoning to constitutional questions. In *Thunder Basin*, it noted that the independent Mine Safety and Health Review Commission "has addressed constitutional questions in previous enforcement proceedings."[277] But even though the agency might not consider the plaintiff's due process argument, the Court concluded that the plaintiff's "constitutional claims . . . can be meaningfully addressed in the Court of Appeals."[278] In *Elgin*, where agency precedent totally prohibited constitutional challenges, the Court reached the same conclusion by citing *Thunder Basin*.[279] Lower courts, including the D.C. Circuit in the challenge to President Trump's 2018 executive order on the civil service, have dutifully reached similar conclusions.[280]

b. The Flaws of the Modern Approach

The Supreme Court's decision in *Loper Bright* is inconsistent with the timing doctrines' preference for an initial agency decision. In overruling *Chevron* deference,[281] the Court emphasized that judges "police the outer statutory boundaries" of congressional delegations to agencies.[282] And the Court made it clear that courts are perfectly capable of doing so without help from the agency. That principle is at odds with the courts' tendency to defer those same questions in an otherwise properly presented ultra vires case.

Even under *Chevron*, agencies did not normally receive broad leeway in interpreting the limits on their own authority. In *Arlington v. FCC*, the

274. Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 214 (1994).
275. *Id.* at 215.
276. *Id.* (quoting Whitney Nat'l Bank in Jefferson Parish v. Bank of New Orleans & Tr. Co., 379 U.S. 411, 420 (1965)).
277. *Thunder Basin*, 510 U.S. at 215.
278. *Id.*
279. Elgin v. Dep't of Treasury, 567 U.S. 1, 16 (2012).
280. *See, e.g.*, Am. Fed'n of Gov't Emps. v. Trump, 929 F.3d 748 (D.C. Cir. 2019).
281. *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).
282. Loper Bright Enters. v. Raimondo, 603 U.S. 369, 404 (2024).

Supreme Court held that courts must defer to an agency's reasonable interpretation of its own authority.[283] But the Court cautioned that, "[w]here Congress has established a clear line, the agency cannot go beyond it."[284] As the Court explained elsewhere, "[a] precondition to deference under *Chevron* [was] a congressional delegation of administrative authority."[285] For all of these reasons, the timing doctrines are inconsistent with modern deference precedents.

3. The Failure to Ensure Adequate Remedies

The modern timing doctrines' third flaw has to do with the relaxation of the adequate remedy rule. Although the ultra vires model and timing doctrines both consider harm to the plaintiff, the timing doctrines allow courts to deny relief even when a plaintiff has an adequate remedy, so long as there are countervailing interests. In practice, that means courts leave plaintiffs with inadequate or even nonexistent remedies.

a. Contrasting the Traditional and Modern Approaches

As discussed above, courts historically applied the adequate remedy rule when plaintiffs sought to bypass agency adjudication.[286] Plaintiffs could demonstrate the inadequacy of alternative proceedings on various grounds. For example, when a board stood poised to exclude an import for clearly unlawful reasons, the Supreme Court "satisfied" itself that there was "no other remedy" that would "secure the plaintiffs' rights."[287] And when noncompliance with an administrative subpoena exposed a plaintiff to criminal penalties, delayed judicial review was also inadequate.[288]

By contrast, the timing doctrines permit agencies to delay review until there has been a final agency action by providing only a less-than-adequate remedy or no remedy at all. Under exhaustion doctrine, a court may—but need not—permit immediate review when "irreparable harm" would result or administrative remedies would be "inadequate."[289] Under prudential ripeness doctrine, "hardship" to the plaintiff from "withholding court consideration" may be outweighed by the lack of "fitness of the issues for judicial decision."[290] And *Thunder Basin* replaces the well-established

283. City of Arlington v. FCC, 569 U.S. 290, 307 (2013).
284. *Id.*
285. Adams Fruit Co. v. Barrett, 494 U.S. 638, 649 (1990).
286. *See supra* Section II.A.2.
287. Waite v. Macy, 246 U.S. 606, 610 (1918).
288. FTC v. Millers' Nat'l Fed'n, 23 F.2d 968, 970–71 (D.C. Cir. 1927).
289. McCarthy v. Madigan, 503 U.S. 140, 146 (1992).
290. Abbott Lab'ys v. Gardner, 387 U.S. 136, 149 (1967).

concept of an "adequate remedy" with the slippery idea of "meaningful" review.[291] It then skews the inquiry in the agency's favor by asking whether delaying review "could foreclose *all* meaningful judicial review," making partly adequate review good enough.[292] And on top of that, many lower courts have treated meaningful review as one factor to be balanced against the agency's expertise and the collateral nature of the plaintiff's claims.[293]

A few examples will illustrate how the courts have denied review despite inadequate remedies. When an agency is unable or unwilling to consider certain claims, such as a constitutional challenge to its own authority, the Supreme Court and lower courts have permitted what the dissent in *Elgin* called a "pinball procedural requirement."[294] As discussed above, a plaintiff must wait for the agency to take a final action that does not consider those arguments; the court of appeals must read the briefs, hear argument, and issue a written decision remanding for the agency to consider those claims; the agency must comply with the mandate; and then the court of appeals will read new briefs, hear new argument, and issue a written decision finally addressing the plaintiff's arguments.[295] Lower courts have held that review is meaningful even if the agency will not consider certain claims or even build a factual record on them.[296]

Some lower courts have gone even further and held that an administrative scheme is always, or nearly always, adequate. The Fifth Circuit has stated that the availability of review of final agency action "alone" means "the scheme would provide meaningful judicial review."[297] And the D.C. Circuit has adopted similar reasoning, concluding that delayed review is meaningful because the plaintiff "is already properly before the Commission" and review of the agency's final decision would be available.[298] These decisions forego any inquiry into the sufficiency of plaintiffs' alternative remedies.

Some lower courts have gone further yet and denied review while acknowledging that no other relief would be available. In *Zummer v. Sallet*,

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291. Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 212–13 (1994).

292. *Id.* (emphasis added).

293. *See, e.g.*, Jarkesy v. SEC, 803 F.3d 9, 17 (D.C. Cir. 2015); Payne v. Biden, 62 F.4th 598, 604 (D.C. Cir.), *vacated as moot*, 144 S. Ct. 480 (2023); Zummer v. Sallet, 37 F.4th 996, 1007–08 (5th Cir. 2022).

294. Elgin v. Dep't of Treasury, 567 U.S. 1, 33–34 (2012) (Alito, J., dissenting); *see id.* at 16–21 (majority opinion).

295. *See id.* at 33 (Alito, J., dissenting).

296. *See, e.g.*, Am. Fed'n of Gov't Emps. v. Trump, 929 F.3d 749, 758 (D.C. Cir. 2019); Bank of La. v. FDIC, 919 F.3d 916, 926–27 (5th Cir. 2019); Bebo v. SEC, 799 F.3d 765, 773 (7th Cir. 2015); Hill v. SEC, 825 F.3d 1236, 1250 (11th Cir. 2016); *Jarkesy*, 803 F.3d at 18.

297. *See Bank of La.*, 919 F.3d at 926.

298. *Jarkesy*, 803 F.3d at 20.

the FBI revoked an agent's clearance, causing him to be suspended without pay.[299] When he sued, the government argued that he had to pursue relief before the Merit Systems Protection Board, even though the Board could not reinstate his security clearance.[300] The Fifth Circuit denied review, concluding that "the lack of meaningful review" under *Thunder Basin* "is not enough to overcome the strength of the inference produced by the other two *Thunder Basin* factors and the well-settled, binding implications of the [Civil Service Reform Act's] text and structure."[301]

b. The Flaws of the Modern Approach

That relaxation of the adequate remedy rule violates the interpretive principle that statutes should be read against their historical "backdrops."[302] Section 1331 provides that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."[303] Congress enacted it in 1875 against the backdrop of the traditional exercise of discretion in ultra vires cases. Section 1331 is best read to incorporate those traditional standards for injunctions, including the adequate remedy rule.

The same is true of the Declaratory Judgment Act. That statute uses discretionary language: a court "*may* declare the rights and other legal relations of any interested party seeking such declaration."[304] It too was enacted against the backdrop of the ultra vires model, and the grant of discretion should be exercised in light of that tradition.

Even assuming courts could modify the adequate remedy rule, the Supreme Court has failed to provide reasons for doing so in ultra vires cases. The Court in *Myers* stated the per se exhaustion requirement in conclusory fashion,[305] and the Court's later carve-outs from that rule provide no more reasoning than *Myers*.[306] The Court similarly failed to provide a basis for its

299. 37 F.4th 996, 1002 (5th Cir. 2022).

300. *Id.* at 1004.

301. *Id.* at 1008.

302. *See* Stephen E. Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813, 1819–28 (2012); Nat'l Ass'n of Home Builders v. Defs. of Wildlife, 551 U.S. 644, 662–63 (2007); United States v. Texas, 507 U.S. 529, 534 (1993).

303. 28 U.S.C. § 1331.

304. 28 U.S.C. § 2201 (emphasis added). Less commonly, a plaintiff might seek a writ of mandamus under the All Writs Act, 28 U.S.C. § 1651. That statute uses similarly discretionary language: courts "may issue all writs necessary and appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." *Id.*

305. *See* Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50–51 (1938).

306. *See, e.g.*, McCarthy v. Madigan, 503 U.S. 140, 146–48 (1992).

two-part balancing test for prudential ripeness.[307] And the Court's opinions creating and refining *Thunder Basin* doctrine provide no reason for departing from the adequate remedy rule.[308]

Nor is there any reason to think that agency adjudication changed drastically in 1938 before the Court decided *Myers*. Up until that case, courts had readily applied the adequate remedy rule to modern adjudicatory agencies, including the NLRB.[309]

D. Potential Objections

The cases creating and refining the timing doctrines are light on justifications. But one can identify three purposes: (1) reducing docket pressures, (2) allowing agencies to moot collateral challenges to enforcement proceedings, and (3) avoiding piecemeal litigation. Even if those reasons were persuasive when the doctrines were created, they are no longer persuasive.

1. Reducing Docket Pressures

At least two of the doctrines may have been designed to alleviate docket pressures. As Professor Raoul Berger wrote in 1939, exhaustion doctrine "divert[ed]" a "steadily growing stream of litigation" challenging New Deal adjudicatory agencies.[310] In so doing, it responded to the threat of "swamp[ing] the courts by a resort to them in the first instance."[311] Similarly, the Court created prudential ripeness doctrine in the early stages of the "rulemaking revolution," a period in the late 1960s and 1970s when agencies greatly increased the use of notice-and-comment rulemaking.[312] As Professor John Duffy has shown, prudential ripeness doctrine has the effect

307. Abbott Lab'ys v. Gardner, 387 U.S. 136, 149 (1967); *see* Brian C. Murchison, *On Ripeness and "Pragmatism" in Administrative Law*, 41 ADMIN. L. REV. 159, 168 (1989); *accord* Duffy, *supra* note 63, at 167.

308. *See* Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 212–13 (1994); Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 489–90 (2010).

309. *See, e.g.*, Pratt v. Stout, 85 F.2d 172, 181 (8th Cir. 1936).

310. Raoul Berger, *Exhaustion of Administrative Remedies*, 48 YALE L.J. 981, 984 (1939).

311. *Id.* (quoting United States v. Sing Tuck, 194 U.S. 161, 170 (1904)).

312. Levin, *supra* note 99, at 326; *see also* Wendy Wagner, William West, Thomas McGarity & Lisa Peters, *Dynamic Rulemaking*, 92 N.Y.U. L. REV. 183, 193 (2017); Daniel B. Rodriguez, *The Presumption of Reviewability: A Study in Canonical Construction and Its Consequences*, 45 VAND. L. REV. 743, 759 (1992).

of restricting pre-enforcement review relative to the mid-century case law.[313]

There is no reason to fear overwhelming the courts with collateral attacks on adjudicatory agencies today. For starters, the Supreme Court has now blessed much of the substantive authority given to agencies. The Court decided *Myers* in 1938. It had been only one year since the Court expanded its interpretation of the Commerce Clause in *NLRB v. Jones & Laughlin Steel Corp.*, which began to solidify New Deal economic regulations.[314] And the Court had not yet retreated from its application of the non-delegation doctrine three years earlier in *Panama Refining Co. v. Ryan*[315] and *Schechter Poultry Corp. v. United States*.[316] Nearly a century later, the Supreme Court's broader reading of the Commerce Clause and its reluctance to apply the non-delegation doctrine are firmly ensconced. Would-be plaintiffs have little incentive to challenge agency adjudication on those wholesale grounds.

True, the Supreme Court has opened a new avenue for challenge with its decision in *SEC v. Jarkesy*.[317] In that case, it held that an administrative enforcement proceeding for civil monetary penalties violated the Seventh Amendment.[318] But there has been no flood of litigation in the year since the Court decided *Jarkesy*. A study of one agency (the NLRB) revealed twenty-five challenges in 2024 and three in 2025.[319]

2. Delaying or Avoiding Hard Questions

At least two of the doctrines were further designed to conserve judicial resources and avoid difficult merits decisions. The Court has justified *Thunder Basin* doctrine on the ground that resolution of "preliminary questions" by the agency "may obviate the need to address" the plaintiff's challenge.[320] And the Court has justified prudential ripeness doctrine on the ground that, "depending on the agency's future actions . . . , review now

313. Duffy, *supra* note 63, at 173. That is so despite the announcement of a presumption of judicial review in *Abbott Laboratories*. *See* HICKMAN & PIERCE, *supra* note 99, § 17.12; Thomas W. Merrill, *Capture Theory and the Courts: 1967–1983*, 72 CHI.-KENT L. REV. 1039, 1078 (1997); Paul R. Verkuil, *Congressional Limitations on Judicial Review of Rules*, 57 TUL. L. REV. 733, 734 (1983).

314. 301 U.S. 1 (1937).

315. 293 U.S. 388 (1935).

316. 295 U.S. 495 (1935).

317. 603 U.S. 109 (2024).

318. *See id.* at 140.

319. *See* Robert Iafolla, *Constitutional Attacks on Labor Board Dwindle as Threats Remain*, BLOOMBERG LAW (July 31, 2025), https://news.bloomberglaw.com/daily-labor-report/constitutional-attacks-on-labor-board-dwindle-as-threats-remain [https://perma.cc/K3S5-FT4K].

320. Elgin v. Dep't of Treasury, 567 U.S. 1, 22 (2012).

may turn out to have been unnecessary."[321] One might add that the creation of exhaustion doctrine in *Myers* allowed the Court to avoid a politically controversial decision on the scope of interstate commerce for purposes of the National Labor Relations Act.[322]

Whatever the merits of entrusting initial decisions to agencies may have been in those cases, recent developments in administrative law have illustrated the enormous risks. An agency determined to violate the law presumably will not fairly consider a plaintiff's challenge during administrative proceedings. And that same agency is likely to see administrative proceedings as an opportunity to delay and wait out would-be plaintiffs.

Importantly, the timing doctrines are not simply an instance of constitutional avoidance, as the D.C. Circuit contended in *Jarkesy*.[323] Constitutional avoidance dictates that courts should resolve cases on non-constitutional grounds when possible.[324] But if the non-constitutional grounds do not resolve the case in the plaintiff's favor, the court must still address the constitutional issues.[325] By contrast, the timing doctrines often deny review even when the agency may not (or will not) consider the constitutional questions.[326]

Finally, the traditional ultra vires model provides some protection for courts. For one thing, a court can dismiss a case for failure to show the inadequacy of alternative remedies without addressing the merits,[327] as courts regularly do today.[328] For another, the limited scope of review weeds out the most fact-intensive, highly technical claims of arbitrariness and capriciousness.[329] Ultra vires cases involve pure questions of law, which "the courts are at no disadvantage in answering."[330] And those questions are not fundamentally different from the questions of law posed by ultra vires

321. Ohio Forestry Ass'n, Inc. v. Sierra Club, 523 U.S. 726, 736 (1998).

322. Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 43–44 (1938).

323. *See* 803 F.3d 9, 25 (D.C. Cir. 2015).

324. *See, e.g.*, Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 346–48 (1936) (Brandeis, J., concurring).

325. *See id.*

326. *See, e.g.*, Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 215 (1994); Elgin v. Dep't of Treasury, 567 U.S. 1, 16 (2012).

327. In this respect, the adequate remedy rule mirrors the purpose it originally served: preventing the chancellor from "being overwhelmed." Samuel L. Bray, *The Supreme Court and the New Equity*, 68 VAND. L. REV. 997, 1005 (2015).

328. *See, e.g.*, Leachco, Inc. v. Consumer Prod. Safety Comm'n, 103 F.4th 748, 750 (10th Cir. 2024).

329. *See, e.g.*, Ohio v. EPA, 603 U.S. 279 (2024).

330. Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 491 (2010).

review of non-final action by nineteenth-century departments or early twentieth-century agencies.[331]

3. Reducing Piecemeal Litigation

The *Thunder Basin* cases also invoke efficiency concerns. *Thunder Basin* cited discussions of efficiency in the legislative history of the Mine Act.[332] *Elgin* invoked efficiency under the banner of statutory purpose.[333] And lower courts have referred to the need for "coherence and economy."[334]

But the Supreme Court has elsewhere rejected "the principle that efficiency of regulation conquers all."[335] Moreover, the Court in *Loper Bright* recently reiterated that "the judicial role" entails "interpret[ing] the act of Congress, in order to ascertain the rights of the parties" in a case before it.[336] That reasoning undermines the Court's paean to efficiency in *Thunder Basin*. Indeed, one of the cases that *Loper Bright* cited is an ultra vires case.[337] And in any event, the need for regulatory efficiency is already built into the ultra vires model, with its deference to adequate remedies and its limited scope of review.[338]

Other features of the litigation process should further diminish concern about efficiency. For starters, the agency can continue its adjudication while Article III litigation occurs, unless the court grants a preliminary injunction.[339] Although modern courts liberally grant preliminary injunctions, Article III courts could choose to return to a more traditional, limited understanding of what constitutes irreparable injury and thereby restrict the incidence of preliminary relief.[340] And either way, a preliminary injunction decision (or, in the alternative, expedited summary judgment) might benefit agencies by minimizing uncertainty during Article III review.

What is more, agency adjudications do not always proceed without interruption. Administrative subpoenas and civil investigative demands are subject to judicial review by statute.[341] Indeed, the landmark separation-of-

331. *See supra* Section II.A.2.
332. Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 209–12 (1994).
333. Elgin v. Dep't of Treasury, 567 U.S. 1, 13–15 (2012).
334. Jarkesy v. SEC, 803 F.3d 9, 29 (D.C. Cir. 2015) (citation omitted).
335. Sackett v. EPA, 566 U.S. 120, 130 (2012).
336. Loper Bright Enters. v. Raimondo, 603 U.S. 369, 385 (2024) (quoting Decatur v. Paulding, 39 U.S. (14 Pet.) 497, 515 (1840)).
337. *See Decatur*, 39 U.S. (14 Pet.) at 515.
338. *See supra* Section II.B.2.
339. *See* Vera, *supra* note 185, at 207.
340. *See, e.g.*, Samuel L. Bray, *The Purpose of the Preliminary Injunction*, 78 VAND. L. REV. 809 (2025).
341. *See, e.g.*, 12 U.S.C. § 1833a(g)(2) (FDIC); 15 U.S.C. § 1314 (FTC); 26 U.S.C. § 7609(h) (IRS).

powers case *Seila Law LLC v. Consumer Financial Protection Bureau* began in the middle of a CFPB adjudication when Seila Law refused to comply with a civil investigative demand and the CFPB sought enforcement.[342] Permitting ultra vires review of non-final action is thus not anomalous.

Finally, it bears noting that administrative law has long rejected similar objections to pre-enforcement review of rules. In the *Abbott Laboratories* trilogy, Justice Fortas dissented in part because pre-enforcement review would upset "the requirements of effective administration."[343] Leveling that objection at ultra vires review of non-final executive action seems to call into question the well-settled practice of pre-enforcement review under the APA too.

* * *

In sum, the ultra vires model serves important interests in protecting plaintiffs and ensuring judicial review of salient non-final actions. The timing doctrines distort the ultra vires model and violate the normal rules of statutory interpretation in three ways: (1) by presuming the implied repeal of Section 1331 and the Declaratory Judgment Act; (2) by deferring issues of statutory and constitutional authority to agencies in the first instance; and (3) by watering down the adequate remedy rule through balancing tests.

III. IMPLICATIONS

Thinking about bypassing cases as ultra vires cases has several implications. First, it challenges the scholarly consensus that APA-style review has replaced traditional ultra vires review. Second, it questions the current understanding of the relationship between Article III courts and agency adjudicators as appellate in nature. Third, it suggests several doctrinal reforms to restore the traditional ultra vires model in cases where plaintiffs seek to bypass agency adjudication.

A. The Importance of Ultra Vires Review

Existing scholarship focuses on how APA-style review has run the table, and it largely treats ultra vires review as a defunct alternative. Scholars have typically asserted that ultra vires review is an abandoned forerunner of

342. *See* 591 U.S. 197, 208 (2020).

343. Gardner v. Toilet Goods Ass'n, Inc., 387 U.S. 167, 176 (1967) (Fortas, J., concurring in part and dissenting in part).

APA-style review, except for presidential actions and rare cases where agency action violates a specific statutory prohibition. But ultra vires review is significant beyond those limited categories; it is an important mode of review when plaintiffs seek to bypass agency adjudication.

The "prevailing view" among scholars is that judicial review of agency action conforms to the model now codified in the APA.[344] Scholars have even gone so far as to express regret that the ultra vires model is no longer an option. Professor Jerry Mashaw has written that "there is now too much water over the dam."[345] And Professor Thomas Merrill has likewise relegated ultra vires review to "wistful conjecture" because APA-style review "is so deeply entrenched in American political culture that it is impossible to imagine wrenching free from its influence."[346]

At most, scholars have acknowledged the role of ultra vires review today in two extremely limited contexts. The first category is presidential actions, such as executive orders and presidential memoranda.[347] APA review is unavailable under Supreme Court precedent holding that presidential action is not "agency action" under the APA.[348] As a result, plaintiffs are left with ultra vires review. Some of those presidential actions, discussed above, are ones that depend on agency adjudication for implementation; others, such as the reapportionment decision in *Franklin v. Massachusetts*[349] or the base closure decision in *Dalton v. Specter*,[350] do not.

The second category covers agency action for which review is implicitly precluded but which is "contrary to a *specific prohibition* in a statute."[351] The leading case is *Leedom v. Kyne*, where the plaintiffs sought review of the NLRB's certification of a collective bargaining unit.[352] The Court had previously held that the National Labor Relations Act did not permit judicial review of such an order, but the Court permitted ultra vires review because the certification of that overly broad unit "was an attempted exercise of power that had been specifically withheld."[353] Because such review requires a specific statutory prohibition, it is "essentially a Hail Mary pass" that

344. Walker, *supra* note 129, at 1554 (2014); *see also* Axon Enter., Inc. v. FTC, 598 U.S. 175, 199–201 (2023) (Thomas, J., concurring) (discussing the appellate analogy).

345. MASHAW, *supra* note 141, at 307.

346. Merrill, *supra* note 2, at 1003.

347. *See* Manheim & Watts, *supra* note 38, at 1762–81; Siegel, *supra* note 38, at 1622–44; Stack, *supra* note 38, at 1199–1212.

348. *See* Franklin v. Massachusetts, 505 U.S. 788, 800–01 (1992).

349. *See id.* at 799.

350. 511 U.S. 462, 465 (1994).

351. Nuclear Regul. Comm'n v. Texas, 605 U.S. 665, 681 (2025) (quoting Ry. Clerks v. Ass'n for Benefit of Non-contract Emps., 380 U.S. 650, 660 (1965)); *see* Nickerson, *supra* note 4, at 2550–51, 2560–61.

352. *See* Leedom v. Kyne, 358 U.S. 184, 185 (1958).

353. *Id.* at 189.

"rarely succeeds."[354] Once again, some of these cases involve bypassing agency adjudication.[355] But others, including the Supreme Court's recent decision in *Nuclear Regulatory Commission v. Texas*, do not.[356]

The upshot is that ultra vires review is more important than either of those two limited categories suggest. Review of presidential actions directing agency action may be more important today in an era of "presidential administration."[357] But ultra vires review is available not only for presidential policies that are implemented through adjudication, but also for policies announced by agencies, investigations, communications, administrative charges, and interim quasi-judicial decisions.[358] And ultra vires review is available not only when an action violates an express statutory prohibition, but also when it is taken without statutory authorization or in violation of the Constitution.[359]

What's more, these cases are often legally and politically important. In 2025 alone, parties have litigated ultra vires challenges to President Trump's executive order on birthright citizenship,[360] restructuring federal agencies,[361] changes to collective bargaining rights for federal employees,[362] the detention of a legal permanent resident,[363] restrictions on the speech of immigration judges,[364] military policy on transgender servicemembers,[365] federal policy on care for transgender patients,[366] the denial of bond to

354. *Nuclear Regul. Comm'n*, 605 U.S. at 681–82 (quoting Nyunt v. Chairman, Broad. Bd. of Govs., 589 F.3d 445, 449 (D.C. Cir. 2009)).

355. *See Kyne*, 358 U.S. at 187.

356. *See Nuclear Regul. Comm'n*, 605 U.S. at 681. A recent D.C. Circuit stay opinion suggested that all ultra vires claims are subject to the "specific prohibition" requirement, but it did not cite any precedents applying that requirement in a case where there was no implied statutory intent to preclude review. *See* Am. Foreign Serv. Ass'n v. Trump, No. 25-5184, 2025 WL 1742853, at *2 (D.C. Cir. June 20, 2025) (per curiam).

357. *See supra* notes 44–45 and accompanying text.

358. *See supra* Section I.A (collecting cases).

359. *See supra* Section I.A (same).

360. Trump v. CASA, Inc., 606 U.S. 831 (2025).

361. Am. Foreign Serv. Ass'n v. Trump, 792 F. Supp. 3d 116 (D.D.C. 2025); Am. Fed'n of Govt. Emps. v. Trump, 782 F. Supp. 3d 793 (N.D. Cal.), *stay granted on other grounds*, 145 S. Ct. 2635 (July 8, 2025); Nat'l Treasury Emps. Union v. Trump, 770 F. Supp. 3d 1 (D.D.C. 2025); Rhode Island v. Trump, 781 F. Supp. 3d 25 (D.R.I. 2025); Rural Dev. Innovations Ltd. v. Marocco, No. 25-1631, 2025 WL 1807818, at *4 (D.D.C. July 1, 2025).

362. Am. Fed'n of Govt. Emps. v. Trump, 792 F. Supp. 3d 985 (N.D. Cal.), *stay granted on other grounds*, 148 F.4th 648 (9th Cir. 2025); Am. Foreign Serv. Ass'n v. Trump, 783 F. Supp. 3d 248 (D.D.C.), *stay granted on other grounds*, 2025 WL 1742853 (D.C. Cir. June 20, 2025); Nat'l Treasury Emps. Union v. Trump, 780 F. Supp. 3d 237 (D.D.C.), *stay granted on other grounds*, 2025 WL 1441563 (D.C. Cir. May 16, 2025).

363. Khalil v. Joyce, 780 F. Supp. 3d 476 (D.N.J. 2025).

364. Nat'l Ass'n of Immigr. Judges v. Owen, 139 F.4th 293 (4th Cir. 2025).

365. Shilling v. United States, 773 F. Supp. 3d 1069 (W.D. Wash. 2025).

366. PFLAG, Inc. v. Trump, 769 F. Supp. 3d 405 (D. Md. 2025).

immigrants in removal proceedings,[367] policies on federal funding for "sanctuary jurisdictions,"[368] executive orders targeting law firms,[369] an executive order regulating mail-in voting,[370] and President Trump's executive order to terminate or investigate certain diversity grants and programs.[371] Beyond just the second Trump administration, the Supreme Court has decided landmark cases relating to double for-cause removal protections,[372] the imposition of monetary penalties by administrative agencies,[373] and President Trump's "travel ban."[374]

Nor are these cases simply substituting ultra vires review for APA-style review that would come later anyway. As discussed above, it will often be impractical or downright irrational for individual plaintiffs to wait out an administrative adjudication before obtaining judicial review of an earlier non-final action in federal court.[375] Put differently, ultra vires review fills an important gap in the protections offered by APA-style review of final agency action for plaintiffs who need relief now or otherwise will not obtain it at all.

If anything, the ultra vires model of review is more important than the current cases suggest. Right now, the timing doctrines preclude review of some cases that would otherwise proceed.[376] If courts were to revive the traditional ultra vires model without the timing doctrines, more ultra vires cases would presumably be brought.

Ironically, the timing doctrines thus tend to obscure the continued role of ultra vires review. All three doctrines can be applied in cases brought under the APA or another express judicial review provision, which still account for the majority of administrative law cases.[377] It is accordingly easy to miss the difference between APA-style cases and ultra vires bypassing cases. Furthermore, the timing doctrines tend to favor review after a final agency action.[378] Finality is a feature of APA-style review, but it is not

367. Rodriguez v. Bostock, 779 F. Supp. 3d 1239 (W.D. Wash. 2025).

368. City & Cty. of S.F. v. Trump, 783 F. Supp. 3d 1148 (N.D. Cal. 2025).

369. Jenner & Block LLP v. DOJ, 784 F. Supp. 3d 76 (D.D.C. 2025), *appeal docketed*, No. 25-5265 (D.C. Cir. July 22, 2025).

370. California v. Trump, 786 F. Supp. 3d 359 (D. Mass. 2025).

371. Nat'l Ass'n of Diversity Officers in Higher Ed. v. Trump, 767 F. Supp. 3d 243 (D. Md. 2025); Nat'l Urban League v. Trump, 783 F. Supp. 3d 61 (D.D.C. 2025).

372. Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477 (2010).

373. Axon Enter., Inc. v. FTC, 598 U.S. 175 (2023).

374. Trump v. Hawaii, 585 U.S. 667, 711 (2018).

375. *See supra* Section II.B.1.

376. *See supra* Section I.C. How many cases would ultimately succeed is difficult to predict.

377. *See, e.g.*, Polyweave Packaging, Inc. v. Buttigieg, 51 F.4th 675, 683–85 (6th Cir. 2022) (*Thunder Basin*); Abbott Lab'ys v. Gardner, 387 U.S. 136, 148–56 (1967) (ripeness).

378. *See supra* Section I.C.

required for ultra vires review.[379] By favoring finality, the timing doctrines make ultra vires cases look more like APA-style cases. In this way, too, the timing doctrines tend to camouflage the important, continued role of ultra vires review.

B. Agency Adjudicators as Separate Court Systems

Recognizing the continued importance of ultra vires review also challenges the conventional understanding of the relationship between Article III courts and agency adjudicators. Most administrative law cases involve APA-style review of final agency action. In that model, agency adjudicators act as trial courts and Article III courts act as appellate tribunals. But in the ultra vires model, agency adjudicators and Article III courts are separate court systems, akin to courts of law and equity before fusion. Confusion between the two analogies has significant implications for bypassing cases.

The style of review codified in the APA is self-consciously modeled on the appellate process.[380] The model arose in the early twentieth century under agency-specific review provisions and was later codified in the APA.[381] It analogizes agencies to trial courts or juries and Article III courts to appellate courts.[382] The agency stands in for the trial court or jury with its supposedly superior factfinding ability.[383] And the Article III court stands in for an appellate court with its supposedly superior legal abilities.[384] Scholarship on this analogy has pointed to the use of a closed record, the application of deference on factual issues, and the appellate-style remedies in APA cases.[385] In short, most scholars agree that "the appellate review

379. *See supra* Section II.A.

380. *See, e.g.*, *supra* Section II.A; Nicholas Bagley, *Remedial Restraint in Administrative Law*, 117 COLUM. L. REV. 253, 258 (2017); Emily S. Bremer, *The Unwritten Administrative Constitution*, 66 FLA. L. REV. 1215, 1239 (2014); Adam B. Cox & Emma Kaufman, *The Adjudicative State*, 132 YALE L.J. 1769, 1810 (2023); Daniel A. Farber & Anne Joseph O'Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1143 (2014); Mila Sohoni, *Agency Adjudication and Judicial Nondelegation: An Article III Canon*, 107 Nw. U. L. REV. 1569, 1581–82 (2013); Walker, *supra* note 129, at 1554–55; Ilan Wurman, *Constitutional Administration*, 69 STAN. L. REV. 359, 412 (2017); *see also* Axon Enter., Inc. v. FTC, 598 U.S. 175, 199–201 (2023) (Thomas, J., concurring).

381. Merrill, *supra* note 2, at 953. Professor Woolhandler has observed some precursors in the nineteenth century. *See* Woolhandler, *supra* note 5, at 224–29.

382. Merrill, *supra* note 2, at 940–41; Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 602 (2007); Stern v. Marshall, 564 U.S. 462, 500 (2011).

383. *E.g.*, Merrill, *supra* note 2, at 940–41.

384. *E.g.*, *id.*

385. *See, e.g.*, *id.* at 940–41, 980–81; Walker, *supra* note 129, at 1555–56; Mila Sohoni, *The Power to Vacate a Rule*, 88 GEO. WASH. L. REV. 1121, 1129 (2020).

model has remarkable explanatory power" "[w]ith respect to federal agency adjudication of federal law."[386]

The appellate analogy is not a post hoc creation of scholars. In the late nineteenth and early twentieth centuries, courts reviewed Interstate Commerce Commission actions fairly aggressively.[387] Professor Merrill has shown that Congress threatened to restrict judicial review of ICC decisions during the first decade of the twentieth century, which caused the Court to adopt the appellate review model. In Professor Merrill's words, the Court "looked into the doctrinal tool bag for something that would permit it to back off [from more aggressive review] without losing face."[388] It found the appellate analogy.[389] Other scholars have identified similar analogies to appellate review in the legislative history of the APA, concluding that the statute "reflected a consensus that judicial review of agency action should be modeled on appellate review of trial court judgments."[390]

The ultra vires model of review reflects a different relationship. Agencies are inferior to courts in the sense that their actions are subject to collateral review by Article III courts. But they are not directly subordinate, and they have their own zone of discretion that is normally unreviewable until they take a final action.[391]

The ultra vires model is based on the historical relationship between courts of equity and courts of law and between superior and inferior common-law courts. The injunction was long used by courts of equity in England and America to take jurisdiction in cases that could also be litigated at common law.[392] And as Professor James Pfander has explained, writs of mandamus were used by "King's Bench and other superior courts at Westminster to oversee and control the work of all inferior jurisdictions" and "to keep inferior bodies 'within the limits of their jurisdiction.'"[393]

American courts self-consciously borrowed that analogy in the nineteenth-century as they sought to control the expanding American administrative state. Professor Ann Woolhandler has shown that courts "explicitly analogized federal agencies and federal officials to courts in a

386. Sohoni, *supra* note 380, at 1583. Of course, appellate courts sometimes use ultra vires-style remedies—most notably, writs of mandamus—to supervise trial courts. *See, e.g.*, *Ex parte* Republic of Peru, 318 U.S. 578, 586 (1943). The analogy simply refers to the ordinary appellate process.

387. Merrill, *supra* note 2, at 963.

388. *Id.*

389. *Id.*

390. Bagley, *supra* note 380, at 258.

391. *See supra* Section II.A.2.

392. JOHN BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 114, 116 (5th ed. 2019).

393. Pfander, *supra* note 5, at 690 (quoting Groenwelt v. Burwell [1700] 91 Eng. Rep. 134, 134 (KB)).

different court system."[394] In 1882, for instance, the Supreme Court reasoned that if an agency did not have "jurisdiction to act," its action "would in that event be like that of any other special tribunal not having jurisdiction of a case which it had assumed to decide."[395] When Congress enacted the federal question jurisdiction statute in the late nineteenth century and the Declaratory Judgment Act in the early twentieth century, it did so against that background understanding of the ultra vires model of review.

The difference is more than superficial. The two analogies reflect two distinct rationales for allocating power. The appellate model balances the respective roles of courts and agencies based on their supposed competences. It supposes that agencies have superior factfinding abilities and courts are more expert on legal issues.[396] By contrast, the ultra vires model allocates power based on congressional grants of jurisdiction. When agencies act within their jurisdiction, they are not subject to interlocutory review by Article III courts.[397] But when they exceed the limits on their jurisdiction, Article III courts may act.[398]

One implication of the different analogies is that courts should stop thinking about bypassing cases in terms of an appeal. To take one prominent example, the D.C. Circuit's decision in *Jarkesy v. SEC* conflates the two analogies. Judge Srinivasan rejected Jarkesy's ultra vires claim, based in part on an analogy to "[t]he rule against piecemeal criminal appeals."[399] That reasoning might make sense under the appellate model of review. But the final judgment rule has no purchase under the ultra vires model. The incorrect analogy led the D.C. Circuit to incorrectly deny relief to Jarkesy, an error the Supreme Court corrected eight years later in *Axon*.[400]

Treating agencies as a separate court system also suggests that we should think of agencies as a self-sufficient adjudicatory system in ultra vires cases. From the courts' perspective, this provides further context for the question of implied repeals.[401] If agencies and courts were always part of the same adjudicatory system, then the inference of exclusivity might be stronger. That is, the creation of an administrative adjudication process with direct review of final agency action might imply the repeal of jurisdiction to

394. Woolhandler, *supra* note 5, at 209.

395. Smelting Co. v. Kemp, 104 U.S. 636, 641 (1882); *see also* SPELLING, *supra* note 145, § 617, at 511 (stating that "a board of county commissioners is a court of inferior and limited jurisdiction").

396. *See, e.g.*, Merrill, *supra* note 2, at 940–41, 980–81.

397. *See supra* Section II.A.2.

398. *See id.*

399. Jarkesy v. SEC, 803 F.3d 9, 26 (D.C. Cir. 2015).

400. Axon Enter., Inc. v. FTC, 598 U.S. 175 (2023).

401. *See supra* Section II.C.1.

review non-final action by way of injunction or declaratory judgment. After all, it would be strange to create a process for a "trial" in the agency with an "appeal" to Article III court if one could immediately obtain a "trial" in an Article III district court.

But if agencies and courts are separate adjudicatory systems in the ultra vires model, then any inference of exclusivity is weak or nonexistent. Congress empowered two different systems to decide the matter. Just as old courts of law and equity might both have jurisdiction to decide the same claim, so too can an Article III court and agency adjudicator. And just as a court of equity could direct the parties in a case at law, so too can an Article III court decide a case for injunctive or declaratory relief involving a non-final action.

What's more, there is a tendency in modern cases to treat relief obtained during judicial review of final action as sufficient, even if the agency will not provide adequate relief.[402] But if agencies are a separate court system, then they should provide an adequate remedy before they take final action. In other words, administrative remedies should be evaluated on their own, without reference to the remedy available from a court on direct review, just as legal remedies are evaluated for purposes of choosing between equity and law.[403]

We might also think of agencies as having significant control over the need for ultra vires review. An agency that provides an adequate remedy is less likely to face interlocutory judicial review. For instance, most agencies have concluded that they may not question the constitutionality of statutes.[404] But an agency might conclude that it does have that authority, which would improve the adequacy of its administrative remedies.[405]

Agencies could also mitigate the burdens on plaintiffs that tend to justify ultra vires review. They could suspend sanctions during administrative proceedings. They could increase the speed of adjudications and decrease the cost. And they could structure their proceedings to permit interlocutory judicial review of ultra vires issues at a convenient time.[406] Each of those changes would decrease the likelihood of ultra vires review by improving the adequacy of administrative remedies.

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402. *See, e.g.*, Elgin v. Dep't of Treasury, 567 U.S. 1, 16–21 (2012).

403. *See, e.g.*, Duffy, *supra* note 63, at 152.

404. *See, e.g.*, Interchangeable Mileage Ticket Investigation, 77 I.C.C. 200, 202 (1923) ("We have repeatedly said that it is our duty to apply a statute as we find it, and that it is for the courts to determine the validity of the statute where that question arises.").

405. *See, e.g.*, Lipshutz, *supra* note 188 (manuscript at 21–58).

406. *See* Walker & Zaring, *supra* note 213, at 18 (suggesting that the SEC could create a "right to remove" proceedings to federal court). Congress sometimes provides for such interlocutory review, as when USCIS fails to adjudicate a naturalization application within 120 days of an examination. *See* 8 U.S.C. § 1447(b).

C. Doctrinal Reforms

This Article's defense of the traditional ultra vires model and critique of the timing doctrines has significant doctrinal implications as well. The Supreme Court should abandon the timing doctrines in ultra vires cases, or at least bring them in line with the traditional model and the ordinary rules of statutory interpretation. Courts should ask two discrete questions: (1) whether the agency's enabling statute has implicitly repealed Section 1331 and the Declaratory Judgment Act, and if not, (2) whether a court should exercise its discretion to grant review under those statutes. To answer the first question, courts should apply the usual rules of statutory interpretation. To answer the second question, courts should presumptively review non-final action when the agency clearly exceeded limits on its authority and alternative remedies would be inadequate.[407]

1. Step One: Implied Repeals

At the first step, a court should apply the ordinary tools of statutory interpretation to determine whether the creation of an agency adjudication process has implicitly repealed Section 1331 and the Declaratory Judgment Act. Rather than tilting the scales in favor of implied repeal, as current doctrine does, courts should use the standard tools of statutory interpretation. As discussed, above, the usual rules of statutory interpretation are that "repeals by implication are not favored"[408] and that Congress must speak clearly when it wishes to change the common law or traditional equitable doctrines.[409] Courts have long held that, "[i]n the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable."[410] They have also long held that "[t]he common law . . . ought not to be deemed to be repealed, unless the language

407. Some scholars have called for inadequate remedies and lack of jurisdiction to be independently sufficient exceptions to exhaustion requirement, *see* Marcia R. Gelpe, *Exhaustion of Administrative Remedies: Lessons from Environmental Cases*, 53 GEO. WASH. L. REV. 1, 32–39 (1984), or for any one of the *Thunder Basin* factors to be independently sufficient for immediate review, *see* Jellum, *supra* note 100, at 374. For the reasons discussed above, the ultra vires model suggests that inadequate remedies and an ultra vires action should be conjunctive requirements. *See supra* Section II.A.2. A student note has proposed abandoning the *Thunder Basin* test entirely and applying the test for preliminary injunctive relief. *See* Adam M. Katz, Note*, Eventual Judicial Review*, 118 COLUM. L. REV. 1139, 1179–84 (2018). For the reasons discussed above, the normal rules of statutory interpretation permit implied repeals of jurisdiction, albeit infrequently. *See supra* Section II.C.1.

408. Morton v. Mancari, 417 U.S. 535, 549 (1974) (citation omitted); *see supra* Section II.C.1.

409. *See supra* Section II.C.1.

410. *Morton*, 417 U.S. at 550 (citing Georgia v. Pa. R.R. Co., 324 U.S. 439, 456–57 (1945)).

of a statute be clear and explicit for this purpose,"[411] and that "a major departure from the long tradition of equity practice should not be lightly implied."[412] And the Court has made clear that in other cases of overlapping jurisdiction, the canon that the specific governs the general does not apply.[413] Section 1331 and the Declaratory Judgment Act should thus remain available unless there is an irreconcilable conflict between those grants of authority and the agency's enabling statute.

Such a conflict is vanishingly rare. Congress's decision to expressly provide for agency adjudication with appellate-style review of the final agency action is readily reconcilable with traditional ultra vires review. Indeed, there is a sound reason for having both avenues: explicit judicial review provisions typically authorize broader, but later, review. Ultra vires review of non-final action offers more limited, but prompter, review. Absent some specific evidence of intent to preclude ultra vires review of non-final action, the existence of narrower, ultra vires review of non-final action and broader, statutory review of final action "are capable of co-existence."[414]

The Court might choose to overrule the three timing doctrines. But the language of those doctrines is flexible enough that the Court could potentially leave them in place while restoring more traditional principles. Although all three doctrines effectively presume that the enactment of an administrative adjudication process implicitly repeals Section 1331 and the Declaratory Judgment Act, they do not squarely hold as much. And the Court has shown a willingness to creatively "restate" other administrative law doctrines, such as *Auer* deference.[415] It could do the same here by returning to the usual rules of statutory interpretation within the framework of all three doctrines.[416]

411. Norfolk Redevelopment & Hous. Auth. v. Chesapeake & Potomac Tel. Co., 464 U.S. 30, 35 (1983) (alterations in original) (internal quotation marks and citation omitted); *see supra* Section II.C.1.

412. Weinberger v. Romero-Barcelo, 456 U.S. 305, 320 (1982); *see supra* Section II.C.1.

413. *See* Mims v. Arrow Fin. Servs., LLC, 565 U.S. 368, 379 (2012).

414. *Morton*, 417 U.S. at 551.

415. Kisor v. Wilkie, 588 U.S. 558, 574 (2019). The Court emphasized that "a court should not afford *Auer* deference unless the regulation is genuinely ambiguous" after "exhaust[ing] all the 'traditional tools' of construction." *Id.* at 574–75 (quoting Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984)). The Court also clarified that "the agency's reading must fall 'within the bounds of reasonable interpretation.'" *Id.* at 576 (quoting City of Arlington v. FCC, 569 U.S. 290, 296 (2013)). And it directed "an independent inquiry into whether the character and context of the agency interpretation entitles it to controlling weight." *Id.*

416. *Cf.* CALEB NELSON, STATUTORY INTERPRETATION 701 (2011) (discussing whether *Chevron* deference to agency interpretations of ambiguous statutes was a rule of statutory interpretation that did not need to be overruled).

2. Step Two: Discretion

If the agency's enabling statute has not implicitly repealed Section 1331 and the Declaratory Judgment Act, then courts should make the discretionary decision whether to grant relief. Consistent with the historical ultra vires model, courts should presumptively grant review when two conditions are satisfied.[417] First, the plaintiff must show that the agency has clearly exceeded constitutional or statutory limits on its authority. Second, the plaintiff must show the absence of another adequate remedy. That might occur when an agency cannot provide a requested remedy,[418] gives mere lip service to a requested remedy,[419] or would inflict irreparable harm while adjudicating the party's entitlement to the remedy.[420]

This step of the analysis could fit within all three doctrines if the Court were willing to "restate" them. For now, none of the doctrines capture the first part of the discretionary analysis because each of them has been applied to favor agency development of purely legal issues of agency authority.[421] Likewise, none of the doctrines capture the adequate remedy rule.[422] Exhaustion doctrine's exceptions are only presumptive.[423] Prudential ripeness allows courts to balance away hardship to the plaintiff.[424] And *Thunder Basin* allows courts to deny review even if the agency will not grant certain forms of relief.[425] But it seems feasible to refocus the timing doctrines in this way.

CONCLUSION

There is no single answer to when judicial review of agency action is available. The most common model today is appellate review of final agency action. But ultra vires review remains an important avenue for challenging non-final action. It ensures that significant agency actions are

417. Review is presumptive because a court has discretion to deny relief in unusual circumstances based on a balancing of the equities and the existence of unclean hands. *See, e.g.*, POMEROY, *supra* note 141, § 1745, at 4055. Courts do not appear to have commonly denied relief in cases seeking review of agency action if the other requirements of the ultra vires model were satisfied. Indeed, many decisions concluding that relief was appropriate did not even balance the equities. *See, e.g.*, Waite v. Macy, 246 U.S. 606, 607 (1918).

418. *See, e.g.*, Nat'l Ass'n of Immigr. Judges v. Owen, 139 F.4th 293, 306 (4th Cir. 2025) (agency lacks quorum); K & R Contractors, LLC v. Keene, 86 F.4th 135, 146 (4th Cir. 2023) (agency lacks power to provide remedy).

419. *See supra* notes 188–90 and accompanying text.

420. *See supra* Section II.B.1.

421. *See supra* Section II.C.2.

422. *See supra* Section II.C.3.

423. McCarthy v. Madigan, 503 U.S. 140, 146 (1992).

424. Abbott Lab'ys v. Gardner, 387 U.S. 136, 149 (1967).

425. *See, e.g.*, Elgin v. Dep't of Treasury, 567 U.S. 1, 16 (2012).

not shielded from review by features of the agency adjudication process, and it protects plaintiffs from irreparable harm.

The practice of bypassing agency adjudication through ultra vires review belongs to a long tradition. That tradition analogizes agency adjudicators to a separate, but inferior, court system. And it gives courts a central role in protecting plaintiffs from the harm of delay during further administrative proceedings.

Rather than thinking of the ultra vires model of review as defunct, we should see it as coexisting with the appellate model. And having done so, we should return the timing doctrines to the roots of the ultra vires model and the usual rules of statutory interpretation. Doing so will better safeguard plaintiffs' rights in a time of significant executive activity, as Article III courts navigate their relationship with agency adjudication.