Oregon Law Review
Fall 2001 – Volume 80, Number 3
Cite as: 80 Or. L. Rev. 1107 (2001)

COMMENT: PRE-ENFORCEMENT RIPENESS DOCTRINE: THE FITNESS OF HARDSHIP

David Floren*

* Third-year law student, University of Oregon School of Law. On-Line Editor, Oregon Law Review, 2001-2002.

[*1107]

United States Supreme Court Justice Stephen Breyer urges the student of federal administrative law to develop an understanding of "the basic principles applied by the courts in reviewing agency decisions." n1 Among these basic principles, Breyer lists the doctrine of ripeness, which can "determine when or whether [litigants] can ask a court to review agency action." n2 The basic idea of ripeness asks whether the matter before the court is filed at the right time, but the ripeness doctrine is anything but simple. The doctrine suffers from a murkiness n3 making it "difficult to distinguish" n4 from other closely-related doctrines governing the scope of judicial review. n5 This Comment introduces the ripeness doctrine, analyzes the doctrine's relationship to related doctrines, and criticizes application of the doctrine by courts sensitive to "dilemmas" faced by regulated entities when judicial review is sought prior to agency enforcement or implementation action. n6

[*1108] Part I introduces the ripeness doctrine and discusses the seminal U.S. Supreme Court case addressing the doctrine. Part II examines the relationship between the ripeness doctrine, the Administrative Procedure Act, other federal statutes, and the U.S. Constitution. Part III examines recent Supreme Court articulations of the doctrine. Part IV showcases the basic rationale behind ripeness. Part V explores the relationship between the ripeness doctrine and the doctrine of standing. This Part shows how ripeness is both constitutional and prudential in nature. n7 Part VI observes the interplay between elements of the ripeness doctrine and underscores the strategic importance of characterization of the facts. Part VII describes the dilemma of the regulated entity forced to decide whether or not to risk prosecution by violating a provision of questionable validity. This is followed by a brief excursion into the pre-history of the ripeness doctrine. The Comment proposes no new, bright-line rule, advances no magic formula of universal application, and offers no complete coverage of ripeness cases. n8 The Comment simply attempts a description of an unevenly applied doctrine with emphasis on decisions of the D.C. Circuit Court of Appeals, and offers a few items of advice for practitioners.

I

The Ripeness Test

The seminal Supreme Court case addressing ripeness is Abbott Laboratories v. Gardner. n9 The ripeness test laid down in Abbott Laboratories asks courts to "evaluate the fitness of the issues for judicial decision n10 and the hardship to the parties of withholding court consideration." n11 Judicial review can be established, definitively, by the challenger, but the ripeness doctrine presents a separate hurdle that can shut off access to judicial review. It is the non-discretionary duty of federal courts to place the ripeness hurdle in the path of any challenger. n12 Like that of judicial review [*1109] itself, n13 the scope of this other hurdle has proven to be variable.

In Abbott Laboratories, the Commissioner of the Food and Drug Administration issued a regulation requiring prescription drug manufacturers to print generic names on labels every time the trade name of a drug was printed on the bottle. n14 This regulation was the product of an agency's enforcement powers under the efficient enforcement provision of the Federal Food, Drug, and Cosmetic Act (FDCA). n15 An amendment to the FDCA required the generic name of a prescription drug to be printed below the brand name, to help consumers reduce health expenditures by more easily identifying the generic, and less expensive, equivalents. The drug companies charged that the "every time"

provision would impose massive printing costs and was an excessively harsh regulatory imposition. n16 The Commissioner had not suspended any drug registrations for violation of this new labeling requirement before the companies filed suit. The challenge was not based upon actual damage incurred, but rather the fear that the companies would be placed in the unfortunate dilemma of having to risk suspension in order to challenge the regulations. n17 The Court's new ripeness test asked whether the issues in the case were fit for judicial resolution and whether any party would suffer undue hardship in the absence of judicial resolution.

1. Fitness

The first prong of the ripeness doctrine tests whether the issues are "fit" for judicial consideration. For issues raised in the controversy to be fit for resolution by the court, they should be largely legal in nature and should not require further factual development. In Abbott Laboratories, both parties agreed that the issues were "purely legal" in nature. n18

The D.C. Circuit Court of Appeals has adopted a balancing [*1110] approach to the issue of fitness and will hesitate to vacate any lower court decision adverse to an agency when it recognizes that an agency has neither fully explained its position nor has had an adequate opportunity to do so. n19 Practitioners should emphasize the completeness of any of the factual components in either the record or the briefs (where statutory judicial review provisions bring the parties before an appellate court).

Fitness is also measured by the finality of the disputed action or omission. For an agency, final action "must mark the 'consummation' of [its] decisionmaking process," and not be "of a merely tentative or interlocutory nature." n20 Given the tendency of modern bureaucracies (the "fourth branch" of government n21) to make decisions in a fluid, ongoing manner, the question here is: did the agency reach the last step in its thought process in the matter before the court? To be final, the action "must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" n22

Examples of final agency action are publication of a regulation in the Code of Federal Regulations or issuance of an order denying immigration to an alien applicant. The D.C. Circuit is clear about which indicia it will look to when making the finality determination. n23 An agency cannot "expect to escape judicial review by hiding behind a finality clause." n24 When the challenger's lone obstacle to establishing ripeness is a boilerplate disclaimer by an agency defendant that its action is not to be interpreted as being a final agency action for the purposes of judicial review, the challenger will prevail.

Courts are concerned with constraining the ambit of legal analysis to a set of manageable, legal issues that call on the normal talents and training of the judicial branch. In a recent D.C. Circuit [*1111] case, Clean Air Implementation Project v. EPA, n25 where the plaintiffs challenged the EPA's new "credible evidence" rule, the court was asked to hypothesize what might be the most likely effects of the rule's application. Recognizing the speculative nature of the request, the court stated that "judicial resolution of these issues would benefit significantly from having 'the scope of the controversy ... reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to the [petitioners'] situation in a fashion that harms or threatens to harm' them." n26 The court usually asks: would consideration of the issue benefit from a more concrete setting? n27 Judges enjoy a wide degree of discretion in determining an appropriate level of concreteness.

2. Hardship

The second prong of the ripeness test measures whether the challenger would bear significant hardship if judicial review is postponed. This inquiry focuses not on the ultimate injury claimed (such as the long-term effect of a regulation) but rather on any additional burden imposed by having to wait for the exercise of agency enforcement action before raising a challenge to the rules or regulations underlying the action. The D.C. Circuit is "unwilling to disrupt this administrative process when 'no irremediable adverse consequences flow from requiring a later challenge to [a] regulation.'" n28 But when do adverse consequences become irremediable?

Abbott Laboratories provides an answer that seems at first blush to resolve the issue. Upon further examination, however, the answer raises more questions than it resolves. When the impact of the challenged action results in "sufficiently direct and immediate" consequences to the challenging party, the hardship test is met. n29 If the challenged action requires an "immediate and significant change in the plaintiff's conduct of their affairs with serious penalties attached to noncompliance," n30 the court will recognize a hardship.

Mere financial loss does not qualify as a hardship under this [*1112] approach. “Financial loss is not by itself a sufficient interest.” n31 The harm to the pharmaceutical corporations in Abbott Laboratories went beyond financial loss and included the labor involved in redesigning and reprinting labels. Hardship can also be shown where the challenger alleges it is “adversely affected or aggrieved by agency action within the meaning of a relevant statute.” n32 Hardship endured by the agency faced with pre-enforcement litigation is also taken into account. n33

Normally both fitness and hardship are necessary before a case is considered to be ripe. Laurence Tribe posits that “either or both” are necessary. n34 But Supreme Court decisions seem to suggest that both must be met prior to a finding of ripeness. n35 Erwin Chemerinsky reminds us that “it is unclear whether a greater hardship might compensate for less in the way of factual record or vice versa.” n36

II

Ripeness Under the APA, Statutes, and the U.S. Constitution

Before 1967 the norm in administrative law was that agency action could not be challenged until policies were implemented or the challenging party became the subject of an enforcement action. This was no hard and fast rule. Rather it was a “prevailing opinion” that was effective in discouraging pre-enforcement litigation. n37 Abbott Laboratories changed the norm and opened the floodgates to pre-enforcement challenges.

Abbott Laboratories and its companion case, Toilet Goods [*1113] Ass’n v. Gardner, n38 signaled a new willingness to entertain early challenges and reaffirmed the presumption of reviewability under the APA. New regulatory statutes helped strengthen this understanding by explicitly providing for pre-enforcement judicial review. n39 Certain principles of constitutional law also permit courts to find issues even more ripe for judicial consideration.

A. Finality under the APA

The fitness of the issues for judicial consideration is measured by whether the issues are primarily legal in nature and also by whether the challenged action is final action. Whether an action is considered “final” under the APA is governed by 5 U.S.C. 704. n40 The concept of finality in this section means that, for agency actions, “unless an agency provides by regulation for a stay of challenged actions pending administrative appeal, the actions will be considered ‘final’ and subject to judicial review, if the actions otherwise meet the requirements for judicial review under the APA.” n41 The presence of finality reduces the importance of whether the issues are purely legal.

Some commentators argue that the APA removes the finality element from the ripeness test. Certainly, the timing of the harm is crucial. Congress has affirmed this in the APA. “When agency decisions have an immediate effect, they likely are ‘ripe’ for judicial review.” n42 The ripeness doctrine has been viewed as an undesirable means of going beyond the APA. “The APA does not authorize balancing; it is a one-prong, not a two-prong, test.” n43 But this argument is strictly textualist and ignores the prudential nature of ripeness. Patricia Wald, a former D.C. Circuit judge, notes that “textualism has not taken as big a hold on the D.C. Circuit as on the Supreme Court.” n44 However, the APA has been interpreted to presumptively allow judicial review of [*1114] final action, n45 leading judges to use the ripeness doctrine to rule on issues of hardship.

The Supreme Court has been reluctant to impose its own views upon a scheme “through which Congress enacted ‘a formula upon which opposing social and political forces have come to rest.’“ n46 The courts might also still be wary of New Deal criticisms of insufficient judicial deference to statutory, majoritarian mandates. n47 The APA was enacted in 1946, a decade after the first New Deal legislation, and immediately after the wrenching experience of World War II. Article III judges might believe this historical context increases the comparative strength of the APA over the ripeness doctrine.

B. Ripeness and Other Statutory Pre-Enforcement Review Provisions

Subsequent to Abbott Laboratories, Congress has adopted so many regulatory statutes providing for judicial review prior to enforcement and implementation of regulations that pre-enforcement review has become the norm. n48 Statutes of limitation also encourage litigants and agencies to resolve their differences at the beginning of a regulation’s lifetime to promote consistency and predictability. Generally, the government must show, by a clear and convincing standard of proof, the existence of a congressional intent to restrict pre-enforcement review. n49 Otherwise the presumption is that pre-enforcement review was intended.

Congress actually encourages the development of the ripeness doctrine in the courts. Like federal administrative common law itself, ripeness allows life-tenured judges to mull over complex problems fraught with political

consequences. This lets "overworked federal legislators ... transfer a part of their load to federal [*1115] judges." n50 This may help explain the growth of such provisions. Further rationales for pre-enforcement review are discussed in Part IV.

C. Ripeness and the U.S. Constitution

Connections between ripeness and the U.S. Constitution include the link between the hardship of denying pre-enforcement review and Article III's case or controversy requirement. These connections are discussed in Part V. The Court often dispenses with the hardship prong in certain constitutional cases, like those involving fundamental rights. But the existence of a constitutional issue can also work to a litigant's disadvantage when the Court wishes to avoid ruling on the merits.

In one case, plaintiffs' challenge was ripe for review, even though they did not have to prove harm when alleging a pattern or practice of constitutional harm. African Americans sought injunctive relief against illegal searches of their homes by the Baltimore City Police Department in violation of their rights to privacy. Sometimes courts will find this kind of injury too speculative to be ripe for review. In this case, however, the "sense of impending crisis in police - community relations" motivated a finding that the case was ripe for review. n51

First Amendment cases illustrate the different treatment of ripeness when issues of constitutionality predominate. In First Amendment cases, the Court "has enunciated other concerns that justify a lessening of the usual prudential" requirements for a pre-enforcement challenge to a statute with criminal penalties. n52 The hardship of denying pre-enforcement review of challenged restrictions on First Amendment freedoms takes the form of a "chilling effect" on these freedoms, which are "of transcendent value to all society." n53 The Court is, of course, reluctant to [*1116] find a case ripe for consideration when the constitutional issues underlying the case could be characterized as moot. n54

There is a strong interconnection between ripeness and constitutional issues. At least one commentator feels that this relationship has created current confusion with the doctrine. n55 The Supreme Court, the ultimate arbiter of constitutional issues, revisited ripeness several times since 1967.

III

U.S. Supreme Court Ripeness Articulations

The Supreme Court enjoys great discretion in determining "what is a sufficient likelihood of hardship." n56 In Reno v. Catholic Social Services, n57 illegal aliens seeking amnesty faced the same dilemma of pre-enforcement hardship faced by pharmaceutical companies in Abbott Laboratories. n58 The aliens challenged an INS regulation requiring them to show that they had resided without interruption in the United States for a period of time before they could apply for permanent resident status. The risk of immediate deportation associated with applying for this temporary residence permit was great for those who had been away from the United States for a short time during the period specified in the regulation. Interpreting the conferral of nationality as a benefit rather than a right, the Court denied the aliens' challenge as unripe for judicial consideration, reasoning that since residency was a benefit, not a right, deprivation of residency did not constitute hardship for purposes of ripeness. Justices O'Connor and Stevens disagreed that categorical bifurcation of rights and benefits could govern the "hardship" determination in a ripeness analysis. n59

Citizens enjoy a right to clean air as a fundamental right emanating [*1117] from the penumbras of the First Amendment right to life. Courts, such as the D.C. Circuit Court of Appeals, continue to treat this as a benefit to be enjoyed rather than a right to be protected, despite clear and convincing congressional intent to protect the air under the Clean Air Act and its amendments. n60 All this seems to say that if the alleged hardship of denial of pre-enforcement review is too speculative, then the case will fail on ripeness grounds. n61

The most recent focused review of the Abbott Laboratories ripeness doctrine involved a suit by environmentalists challenging a National Forest Management Plan (NFMP). n62 In Ohio Forestry Association, Inc. v. Sierra Club, a unanimous Court took pains to reexamine the ripeness doctrine and advertise to the district courts its disappointment with the generally cursory ripeness analyses of lower courts. n63

The Ohio Forestry Court, however, seems to have kept the Abbott Laboratories formula intact. The case did "not seem to mark a major turning point in ripeness doctrine." n64 The Court may have missed an opportunity to recognize the special injuries specifically caused by early decisions in forest planning, but the Court does allow for exceptions by which such injury could be shown. n65 The decision clarified a split among the circuit courts concerning the ripeness of NFMP challenges. n66

The Supreme Court prefers a more cautious approach to interpretation of constitutional provisions, taking note of its own restricted competence in the fact-finding and the policy-making. n67 [*1118] The design of the Court simply does not include the tools necessary for conducting a thorough discovery process or crafting a majoritarian consensus in complex policy-making decisions. n68 Thus it is interesting, in certain cases, to witness the D.C. Circuit Court of Appeals behaving comfortably with limited facts and taking pains to construct policy. n69 When limited by the absence of enforcement action and the context-specific facts generated therefrom, the courts tend to shy away from a determination of ripeness.

IV

Policy Rationale: What Does Ripeness Accomplish?

The basic purpose of the ripeness doctrine is to protect both agencies and courts from inappropriate interference. n70 While interference is a straight-forward notion, appropriateness is a notoriously slippery one. Justice Harlan's oft-quoted rationale for ripeness in Abbott Laboratories is "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." n71 Abstract disagreements are theoretical debates stripped of sufficient [*1119] facts specific to the parties. n72

Questions presented must be worked out "not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." n73 The chances of satisfying the purposes of the ripeness doctrine increase when the interests for which protection is sought are already viewed as legally protected. Such interests are "traditionally thought to be capable of resolution through the judicial process." n74

Ripeness is an evaluation of the timeliness n75 of allowing discrete litigation to break the largely unbroken continuum of agency life. It also serves to protect the interests of litigants and the court itself.

In Abbott Laboratories, the Court agreed that a pre-enforcement resolution of issues surrounding a newly announced policy or regulation would be a win-win situation "calculated to speed enforcement," Justice Abe Fortes reasoning that "if the Government prevails, a large part of the industry is bound by the decree; if the Government loses, it can more quickly revise its regulation." n76 Regulated entities want to be able to plan for and predict how regulations will be enforced, and agencies want to resolve legal challenges early in the life of the regulated program. n77 If early challenges are held to be ripe for judicial consideration, [*1120] agencies will have a chance to "function - to iron out differences, to accommodate special problems, [and] to grant exemptions" prior to intervention by a court. n78 Post-enforcement challenges have their own advantages.

Regulated entities generally can violate the standards that apply to their particular activity or industry and escape the full brunt of punishment permissible by statute or regulation. This is referred to as "slippage management" - understanding and exploiting the difference between regulatory standards as they appear on paper and the actual behavior of the regulated parties. n79 The "dilemma," discussed in Part VIII, faced by the regulated entity is not quite the behemoth described by industry counsel.

Enforcement is the crucible for shaping good law. "We think by example and analogy, and we are prompted to act by concrete problems involving specific persons and circumstances." n80 Concreteness of injury is measured by how it plays out in the process of enforcement action. n81 Reviewing the experience of the National Highway Transportation Safety Administration, some commentators feel that early review tends to "overburden rulemaking by 'front-loading' an adversary overlay to the development of agency policy and introducing undue delay, impeding timely and effective highway safety regulation." n82 Quashing the possibility of continuing negotiations with regulated entities "in light of practical experience with implementation" discourages compromise and promotes "abstract court litigation over requirements that have never been implemented." n83

The growth of administrative agencies, especially in the area of adjudication n84 has substantial consequences for private rights and has been "dramatic." n85 "The decisions of administrative tribunals [have been] accorded considerable finality, and especially [*1121] with respect to fact finding." n86 Thus the need grew for doctrinal guidence as the number and complexity of challenges grew. The Abbott Laboratories test emerged as a mechanism to balance all interests with stakes in the controversy. Justice Harlan assured the government that it need not worry about multiple lawsuits over the same issue, since the venue transfer provision in 28 U.S.C. 1404(a) allows for lawsuit consolidation. n87 "Its open inquiry avoids both the rigidity or prior ripeness law and the questionable systems of

classification that characterize other justiciability doctrines." n88 Despite its clear utility, ripeness lacks an equally clear basis for initial justification as a legitimate vehicle of jurisprudence.

Ripeness has roots in both prudential and constitutional considerations, the latter centering on the Case or Controversy Clause of Article III. The hardship prong is said to be constitutional, while the focus on the quality of the trial record is seen as prudential. n89 But Alexander Bickel's "passive virtues" such as ripeness are "deployed as a matter of wise judging or constitutional politics, rather than as a matter of constitutional principle." n90 Irrespective of the relative importance assigned to each foundational justification, the doctrine of ripeness is inextricably linked with that of standing to sue. n91

V

Standing Doctrine and Article III Cases and Controversies

Standing asks whether the parties initiating the litigation are the right ones to bring suit. By contrast, ripeness asks whether the time is right for review. n92 Standing, however, determines the proper party in part by inquiring into the timeliness of an alleged injury. Ripeness can prevent a plaintiff who fails to adequately brief the timeliness issue from litigating any issue.

[*1122] Shifting trends in jurisprudence follow similar shifts in the popularity of the standing doctrine. Justice Breyer asks, "is the issue of irreparable injury distinct from the issue of ripeness?" n93 This inquiry is a reflection of the judicial self-governance "compelled by Article III." n94 "Few courts draw meaningful distinctions between the two doctrines; hence, this aspect of justiciability is one of the most confused areas of the law." n95 Standing and ripeness share a common concern for making certain that the parties' arguments are fleshed out and enriched by actual controversy.

The requirement of an "adversarial, noncollusive dispute - overlaps with the [doctrines'] requirements to ensure that a controversy [exists and is] in need of judicial resolution." n96 The higher the stakes, the better the quality of the presentation of the issues. To this end, the plaintiff needs a "personal stake in the outcome." n97 This personal stake was initially conceived of as being confined to only those injuries that were both imminent and concrete. Cases such as Los Angeles v. Lyons n98 confirmed this. Sierra Club v. Morton clarified that certain aesthetic injuries also invest parties with standing to sue. n99 But notional similarities complicate the application and understanding of standing and ripeness. n100

The nature of the injury to the plaintiff is the touchstone for determining standing. In Lujan v. Defenders of Wildlife, Justice Antonin Scalia emphasized the importance of an actual injury or substantially likely future concrete injury, calling this requirement an "irreducible constitutional minimum." n101 Or, the injury [*1123] could be seen as "informational," hurting the plaintiff who has been denied access to crucial information. n102 In FEC v. Akins, Justice Breyer recognized an injury-in-fact in situations involving the "inability to obtain information" such as lists of donors who failed to disclose under federal requirements. n103 The Court found "no reason to doubt their claim that the information would help them (and others to whom they would communicate it) to evaluate candidates for public offices, especially candidates who received assistance from AIPAC, and to evaluate the role that AIPAC's financial assistance might play in a specific election." n104 Or the injury could be expressive and serve to reinforce attitudes, leading to harm.

Justice O'Connor's opinion in Bush v. Vera n105 recognizes that standing arises when an injury "results from the idea or attitudes expressed through a governmental action, rather than from the more tangible or material consequences the action brings about." n106 In this manner, the expressive harm is similar to the chilling effect of certain government restrictions on freedom of expression.

Article III's restriction of the judicial power to actual disputes permits courts to entertain only those "cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process." n107 But the true concern is that "the Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party." n108 So what is going on here? "With these flexible standards as benchmarks, the judiciary in almost two hundred years' worth of opportunities 'has yet to outline successfully the parameters of a constitutional case.'" n109

[*1124] For injuries that have yet to occur, one commonly raised concern is that judicial remedies might amount to simple advisory opinions. It is clear that "the oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions." n110 This concern leads judges to avoid issuing rulings in cases where the potential for injury is negligible, and functions as a brake on determinations of ripeness.

When interpreting the legal issues posed by statutes, facts are less important. Judge Posner says:

> Besides being unavoidably continuous, statutory interpretation normally proceeds without the aid of elaborate factual inquiries. When it is an executive or administrative agency that is doing the interpreting it brings to the task a greater knowledge of the regulated activity than the judicial or legislative branches have, and this knowledge is to some extent a substitute for formal fact-gathering. n111

Characterization of the facts is nonetheless a crucial component of a successful ripeness defense or challenge.

Finally, the standing doctrine recently underwent remolding by way of several important decisions. In Friends of the Earth, Inc. v. Laidlaw Environmental Services, n112 the definition of injury-in-fact, which had been narrowed in decisions such as National Wildlife Federation and Steel Co., was broadened. The prohibition against third parties, without an original stake in the controversy, bringing suits as the primary parties was somewhat loosened by the decision in Stevens. n113 In a qui tam suit authorized by statute, a third party's interest in obtaining a portion of a damage award combines with the public's interest in adequate enforcement of laws.

VI

The Incredible Lightness of Being Ripe: Uneven Application

There is no touchstone that accurately foresees the outcomes of ripeness determinations. The presentation of issues and facts [*1125] has much to do with the court's determination. n114 However, the degree of hardship necessary to meet the ripeness test remains incredibly difficult to predict. The courts constantly reevaluate their estimates of the costs that can be redressed by judicial review at some later time. n115

The courts have stealthily begun to tuck away the hardship prong of the traditional ripeness doctrine into the fitness prong. The D.C. Circuit, upon finding that a statute expresses a preference for pre-enforcement review, will generally not require a showing of hardship, but will be satisfied with an adequate demonstration that the issues are fit for judicial resolution. This doctrinal wrinkle runs across the gamut of administrative cases. n116 But hardship can emerge in the analysis of the case, showing up in the finality component. Hardship of denial of pre-enforcement review will rarely overcome the finality and concreteness requirements, but finality and concreteness will certainly overcome such hardship. n117 Or when "'the issue of harm and the issue on the merits are intertwined,'" we must assume the challenging party's view of the merits in determining ripeness. n118

In Abbott Laboratories the injury alleged by the pharmaceutical companies was "sufficiently direct and immediate as to render the issue appropriate for judicial review." n119 A denial of early review might have forced the sensitive industry into the position of violating the rule in order to challenge it. The Court saw this as a threat to the public interest as it might have reduced public faith in a vital health industry by blackening the companies' good names with criminal sanctions.

Likewise, in Appalachian Power the alleged hardship of compliance with new EPA pollution monitoring requirements was [*1126] deemed sufficiently immediate. "Monitoring imposes costs. Petitioners represent that a single stack test can 'cost tens of thousands of dollars, and take a day or more to complete,' which is why 'stack testing is limited to once or twice a year (at most).'" n120 If an agency, acting under EPA's control via its Guidance Document, created a permit condition boosting a company's stack test duty (as set down in a state or federal standard) "from once a year to once a month, no one could seriously maintain that this was something other than a substantive change." n121 This might not have constituted real hardship in the context of important public health legislation.

The D.C. Circuit chastised the EPA for promises broken n122 by virtue of significant changes to prior regulatory mandates in the Guidance Document, but the court's dismay is uncalled for. Only the D.C. Circuit follows this logic of narrow, textualist interpretation of the APA. n123 Patricia Wald posits that since so many regulatory cases must be heard by the courts of this circuit, the large docket or case load contributes to the narrowness as a means of relieving some of the stress associated with being unable to adequately consider each case. n124 The steady increase in bureaucratic control over social and economic issues, styled "regulatory creep," has led the D.C. Circuit to use ripeness selectively to combat this phenomenon. The decision in Appalachian Power was viewed by court watchers as a huge victory for industrial plaintiffs in their efforts to be shake off intrusive agency control. n125

A sense of jurisprudential confusion is another factor motivating courts to employ discretionary doctrines. n126 For instance, the tendency of agencies to avoid the inconvenience and costs associated with formal notice-and-comment

procedures by issuing self-styled 'interpretative' rules has led the D.C. Circuit to take a close look at the generally 'fuzzy' techniques employed by the [*1127] court to differentiate interpretative rules from legislative rules (which require notice-and-comment). n127 "Judicial incentives in administrative law favor the development of indeterminate standards of review that facilitate an outcome orientation." n128 This might explain why the ripeness doctrine seems rarefied in its application.

Characterization of the facts remains a crucial predictive factor weighing in favor of the more persuasive and creative litigant. Whether parties will prevail with time-based defenses "often depends on how the 'action' being challenged is characterized." n129 With Forest Service Management Plans, the government should always seek to characterize plaintiff's challenge as one that applies either to an old plan, for which the defense of laches is available, or a challenge to a new plan subject to future decisions by the agency, for which an exhaustion or ripeness defense should be used. It is "not uncommon" for both characterizations to be advanced in one action. n130

Is the ripeness doctrine as fact-specific and flexible as some have described it, n131 and should courts feel free to give it the brush-off? Yes and no. However mandatory in nature the ripeness doctrine was at its conception, today it is implemented in a discretionary manner. The Ohio Forestry Court does not attempt to cabin this discretion, but does urge the lower courts not to completely ignore ripeness analysis in their final written opinions. In other recent D.C. Circuit decisions, the warning seems to have gone unheeded. n132

[*1128] Ohio Forestry underscores the current Supreme Court's annoyance with overly cursory or non-existent ripeness evaluations by lower courts. Justice Breyer's opinion took issue with the lower court's cursory ripeness analysis. n133 Challenges to final agency action should undergo careful ripeness analysis, for instance, in actions under section 307(b) of the Clean Air Act. n134 The Appalachian Power opinion brushed right past Respondent's ripeness argument, consigning it to a footnote. n135 Similar treatment was afforded Respondent's ripeness defense in American Trucking Ass'n v. EPA. n136 In American Trucking, the court summarily dismissed the argument of finality for purposes of satisfying the fitness prong of the ripeness test. n137 Increased lower court attention to ripeness in formal opinions should create additional opportunities for litigants to advance their interpretations.

In the pre-enforcement context, the agency will normally prevail on a ripeness challenge. The agency succeeds when the issues can be framed to require further factual development, when the challenged act or omission seems interlocutory in nature, and when hardship of a denial of early review is difficult to show. From 1998 to 1999 the D.C. Circuit seemed particularly inclined [*1129] to dismiss cases for lack of ripeness. n138 This can be attributed to assorted causes. Claims might be becoming more "bold" than usual, prompting the court to more readily dismiss. n139 It is possible that claims normally dismissed for lack of finality are slightly more convenient to dispense with under the finality component of the ripeness rubric. n140 But courts shy away from full exploration of the relationship of the ripeness doctrine to closely related statutes and doctrines. n141

At least one federal appellate judge specializing in administrative law cases has begun to question this trend of agency victories on ripeness defenses. The "pendulum has swung too far in favor of permitting such review." n142 The contexts and consequences of agency action are becoming increasingly complex n143 and courts are having difficulty absorbing the minutiae necessary for adequate contemplation of highly technical subjects, especially complex scientific matters. n144 Judge Randolph is "more than a little uncomfortable with [the ripeness doctrine], which imposes on courts the burden of deciding the validity of rules in the absence of a concrete factual setting." n145 Courts have become more cautious as the "hard look doctrine" n146 has created incentives for [*1130] agency attorneys to craft more detailed briefs. n147

It may be that the judiciary is simply trying to protect itself by ducking out of highly controversial issues at least until there seems to be sufficient public or political support for an opinion to carry the weight necessary for the ruling to survive attacks on stare decisis. Courts have used justiciability doctrines to take strides only when "the time was right, when acceptance could be anticipated." n148 In contrast, when issues are subject to political deadlock and no clear support is to be found for judicial action, ripeness is used to keep the courts out of the fray. n149 Court watching can provide clues as to the balance of political power in other branches.

During the Clinton Administration, Labor Secretary Robert Reich urged the President to strengthen regulations protecting traditional workers' rights. In Chamber of Commerce v. Reich, n150 the D.C. Circuit held illegal an executive order allowing the Secretary of Labor to disqualify companies from enjoying the benefits of federal contracting if they hired permanent labor replacements during strikes. On the issue of fitness for judicial consideration, the government argued that the lack of clear standards governing traditionally broad Secretary discretion militated against a finding of ripeness. The court disagreed, reasoning that the executive order had an immediate, adverse effect

on companies engaged in collective bargaining because the executive order made it less risky for workers to strike. As for hardship to the challenging party seeking pre-enforcement review, the court felt that losing the option of hiring permanent replacements constituted sufficient hardship to the employer, when measured against the increased assurance the order gave to labor.

To increase the likelihood of a successful ripeness challenge, it is essential to lay out the issues thoroughly and adequately at trial, or at least on the first appeal. n151 In United Public Workers [*1131] of America v. Mitchell, n152 the record was rendered unfit for judicial contemplation due to lack of specificity in allegations of unconstitutional Hatch Act restrictions. When considering fitness of issue for judicial review, the court must ensure there is a record adequate to support an informed decision when the case is heard. n153 While thoroughness is a virtue, overreaching is a vice. An example of overreaching is a "programmatic challenge" not focusing its attack on "an identifiable action or event." n154

VII

The Dilemma of the Regulated Entity

Failure to challenge the validity of rules and regulations prior to violation and subsequent enforcement actions imperils valuable interests held by potential plaintiffs. Prior to enactment of the APA, the Supreme Court recognized that an injury cognizable for judicial review could be created from the expectation of conformity with a regulation or rule. n155 A wry dissent in Poe v. Ullman put the matter succinctly: "Flout the law and go to prison?" n156 The factors encouraging courts to protect regulated entities by allowing early judicial review include the severity of the punishment for violation and the significance of any change, required by the new rule, from the status quo enjoyed by the entity prior to rulemaking. n157

Today's courts look to the Abbott Laboratories test and ask whether the regulated entity faces an "immediate and significant change" with significant penalties for non-compliance. n158 Abbott Laboratories showed the D.C. Circuit the wisdom of "a greater judicial willingness to aid litigants faced with the necessity of risking substantial harm in order to challenge the validity of governmental [*1132] action." n159 Agency action is generally ripe for review when it forces a choice of enduring costly compliance measures or risking civil and criminal penalties. n160

Statutory citizen suit provisions are beginning to encourage courts to accept pre-implementation review of regulations when citizens, rather than industry, challenge those regulations. "Corporate America has long had the right to sue federal agencies under the Administrative Procedure Act. Citizens, however, have had to stand on the sidelines, as the waters were fouled and forests were chopped down." n161 The environmental protection movement continues to press judges to recognize that a healthy environment is a legally cognizable right. Progress here is slow.

According to the Supreme Court, National Forest Management Plans do "not give anyone a legal right to cut trees" since "before the Forest Service can permit logging, it must focus upon a particular site." n162 This sounds odd when compared to the D.C. Circuit's ruling in Appalachian Power that industrial polluters must comply with 'interpretative rules' laid down in a Guidance document, even though, before the EPA can do anything, the state must hold a permit hearing, review and respond to all industry complaints, and submit a particular permit to EPA for ultimate approval. n163 Environmental plaintiffs often face the same dilemma afflicting the regulated entity. n164

Current court consideration of this dilemma tends to work to the benefit of big industry. n165 But there is an argument to be made for protecting the interest of acting in conformity with statutes otherwise subject to challenge. In NLRB Union v. Federal Labor Relations Authority, n166 these interests were underscored. Allowing procedural challenges to rules after the statute of limitations [*1133] for early review had lapsed would "waste administrative resources and unjustifiably impair the reliance interests of those who conformed their conduct to the contested regulation." n167 Short statutes of limitation thus serve to help the regulated entity work with the agency, possibly gaining concessions and compromises, given the limited time during which to raise an expensive and compelling challenge.

Another factor currently favoring regulated entities over groups of citizens suing to promote their interests and the general public interest in enforcement of laws is the Court's current impatience with the "pattern or practice" suit. Such suits challenge agency actions that thread through multiple transactions, but that are not explicitly set out as identifiable "programs." The Court's ripeness jurisprudence has undercut the effectiveness of "pattern and practice" citizen suits. n168 In the context of NFMPs, this "brick wall" problem of challenging individual timber sales arguably creates a tangible, judicially cognizable injury by "allowing timber sales to go forward until a point is reached beyond which sustainability or species viability impairment can be demonstrated." n169 This is the "tyranny of small decisions" which

can allow an agency to "implement in discrete steps a plan that would likely have been deemed arbitrary or capricious if reviewed as a whole." n170 At present, the regulated entity enjoys ample protection from new regulations that might threaten their interests. The new Bush Administration's solicitousness towards corporate and industrial interests bodes well for a continuation of this trend.

VIII

Ripeness Prior to the APA

Prior to adoption of the APA, the ripeness doctrine was a "roller coaster" ride. n171 The pre-history of Abbott Laboratories features cases such as CBS v. United States, where Justice Stone announced that specific licensing "regulations have the force of [*1134] law before their sanctions are invoked as well as after." n172 Justice Frankfurter's dissent in CBS was based on Justice Brandeis' idea of the "finality" doctrine. n173 The general idea was to refuse to recognize a controversy when, upon further inspection, none existed. Others were involved in helping to establish the doctrine. The proposals and arguments raised by Professors Davis and Jaffe were instrumental in shaping the ripeness doctrine. The doctrine follows "a centiori from these precedents," according to Justice Harlan. n174

When enforcement action is not likely to occur, despite clear notice of violation, it is easy to find no hardship in the denial of pre-enforcement review. But in the case of Poe v. Ullman, one Justice, dissenting from the Court's unwillingness to find ripeness in the dispute over Connecticut's law banning contraceptive use, argued that a "sick wife, a concerned husband, a conscientious doctor seek a dignified, discrete, orderly answer to the critical problem confronting them ... . They are entitled to an answer to their predicament here and now." n175 But Frankfurter's plurality opinion in Poe "endures in its own right as a major ripeness precedent." n176

Perhaps the lesson of history is that ripeness considerations require judicial independence and ample discretion. "History will not provide final answers to the question of 'when a court should intervene.'" n177 Consistency and constancy are not always paramount virtues in law. Most laws and regulations are "in practice seriously undercut by a wide toleration of inconsistency in result and in meaning." n178 The ripeness doctrine certainly displays such toleration.

[*1135]

Conclusion

Ripeness thrives thirty-five years after its formal articulation in Abbott Laboratories, but its application remains shrouded in mystery. It is fairly certain that changes in the D.C. Circuit's use of ripeness will not be radical. n179 It remains to be seen whether courts will continue to favor the regulated entity over those claiming environmental harm or hardship. With improved data, growing popular awareness, and an increase in the probative value of evidence of environmental, social, and other harms, the imbalance may be reduced somewhat, but some fear that "the distortion of both the 'aggrieved' requirement and Article III in environmental litigation will, if unchecked, greatly hamstring enforcement of laws aimed at safeguarding public health, not to say human survival." n180

Property interests and rights of both individuals and industries must continue to be weighed against the government's need for efficiency in performing its duties on behalf of the public. Popular skepticism of the bureaucratic institutions of government continues to play into the hand of the party more comfortable navigating the labyrinthine corridors of power. n181 Recent victories by regulated entities against so-called "regulatory creep" do not ensure that the trend will endure. Federal courts still look less favorably on claims of individual plaintiffs than on defenses raised by federal agencies, when plaintiffs challenge manifestly legal agency acts or omissions. n182

[*1136] The Supreme Court will continue to lead the way in determining the scope of ripeness. n183 Government agencies and private litigants should, of course, closely scrutinize each sentence in the Court's ripeness opinions. n184 Despite the recent divisiveness in the ranks, n185 manifested in opinions such as Bush v. Gore, n186 the Court will remain a "flexible and non-dogmatic institution fully alive to such realities." n187 With exclusive statutory jurisdiction to hear a host of different administrative matters, from the simple to the abstruse, federal courts will continue to use the slippery ripeness doctrine to justify decisions on the timeliness of litigation. n188

By discouraging "abstract disagreements" with other branches of government, the doctrine provides legitimacy to and protects the power of the judiciary by prohibiting uninformed and unnecessary inter-branch conflicts. The ripeness doctrine is slippery, and its slipperiness both frustrates commentators and justifies judicial discretion:

> The categorization of a case as unripe for federal adjudication cannot be reduced to an altogether orderly, much less a highly principled and predictable, process. That realization cannot sit well with

anyone concerned to cabin the power of courts to duck controversy without candor. But it is unclear whether judicial discretion to engage in such avoidance of decision could be significantly constrained without unduly restricting [*1137] the flexibility needed to discharge the Article III function wisely. n189

The doctrine also permits the judiciary a large measure of analytic flexibility in taking action, enabling life-tenured judges to produce opinions according to their own notions of appropriate timing, just as Paul Masson will "sell no wine before it is time," according to Orson Welles. n190 Whether this salutary effect was intended by doctrinal design is properly the subject of a separate inquiry.

FOOTNOTES:

n1. Stephen G. Breyer et al., Administrative Law and Regulatory Policy: Problems, Text, and Cases 1 (4th ed. 1999).

n2. Id.

n3. Abbs v. Univ. of Wis., 963 F.2d 918, 926 (7th Cir. 1992). Ripeness "remains a confused mix of principle and pragmatic judgment." Sierra Club v. Yeutter, 911 F.2d 1405, 1410 (10th Cir. 1990). The doctrine's "ill-defined nature and complexity" have boggled many a plaintiff. Edward B. Sears, Lujan v. National Wildlife Federation: Environmental Plaintiffs Are Tripped up on Standing, 24 Conn. L. Rev. 293, 329 (1991).

n4. Jeffrey S. Lubbers, A Guide to Federal Agency Rulemaking 303 (3d ed. 1998).

n5. See, e.g., Ticor Title Ins. Co. v. FTC, 814 F.2d 731 (D.C. Cir. 1987) (dismissing challenge to FTC complaint, but basing dismissal on three doctrines - exhaustion, ripeness and finality).

n6. "Enforcement" here refers to actions or proceedings, both civil and criminal, to carry out statutory mandates or punish violations. "Implementation" refers to the use of agency policies or plans that provide the basis for further action or non-action (e.g., forest management plans).

n7. See Erwin Chemerinsky, Constitutional Law: Principles and Policies 2.6.1, at 94 (1997).

n8. See infra note 131.

n9. 387 U.S. 136 (1967).

n10. Id. at 149.

n11. Id. at 149; Natural Res. Def. Council, Inc. v. EPA, 22 F.3d 1125, 1133 (D.C. Cir. 1994).

n12. "A further inquiry must ... be made." Abbott Lab., 387 U.S. at 148. "It is the duty of the court to make the prudential judgment whether a challenge to agency action is ripe." Eagle-Picher Indus. v. EPA, 759 F.2d 905, 912 (D.C. Cir. 1985).

n13. See Patricia M. Wald, Judicial Review in Midpassage: The Uneasy Relationship Between Courts and Agencies Plays On, 32 Tulsa L.J. 221, 221 (1996).

n14. 21 C.F.R. 1.104(g)(1) (2001).

n15. 21 U.S.C. 371(a) (1994).

n16. Abbott Lab., 387 U.S. at 139.

n17. Id. at 152; see also Part VIII for a general discussion of the classic dilemma faced by the regulated entity.

n18. Abbott Lab., 387 U.S. at 149. Both parties agreed that the issue was one of statutory interpretation by the Commissioner and no argument was raised for further factual elaboration. Id.

n19. See Truckers United for Safety v. Fed. Highway Admin., 139 F.3d 934, 937 (D.C. Cir. 1998).

n20. Bennett v. Spear, 520 U.S. 154, 178 (1997) (citations omitted). In actions under the Administrative Procedure Act, finality is its own criterion and can be established by applying judicial standards. See 5 U.S.C. 704 (1994). Abbott Laboratories demonstrated that finality includes "rules." Abbott Lab., 387 U.S. . at 149.

n21. FTC v. Ruberoid Co., 343 U.S. 470, 487 (1952) (Jackson, J., dissenting).

n22. Id. (citations omitted).

n23. See, e.g., DRG Funding Corp. v. HUD, 76 F.3d 1212, 1214-15 (D.C. Cir. 1996).

N24. Dart v. United States, 848 F.2d 217, 224 (D.C. Cir. 1988).

n25. Clean Air Implementation Project v. EPA, 150 F.3d 1200 (D.C. Cir. 1998).

n26. Id. at 1205 (citing Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 891 (1990)).

n27. See Abbott Lab. v. Gardner, 387 U.S. 136 (1967).

n28. Toilet Goods Ass'n v. Gardner, 387 U.S. 158, 164 (1967).

n29. Abbott Lab., 387 U.S. at 152.

n30. Id. at 153 (emphasis supplied).

n31. Id. at 153-54.

n32. 5 U.S.C. 702 (1994).

n33. Other circuit courts of appeal analyze this as a factor in weighing hardship to both parties. See, e.g., In re Combustion Equip. Ass'n v. EPA, 838 F.2d 35, 39 (2d Cir. 1988).

n34. Laurence Tribe, American Constitutional Law 80 (2d ed. 1988).

n35. See, e.g., Poe v. Ullman, 367 U.S. 497 (1961) (finding entirely legal in nature the question whether to overturn law criminalizing contraceptive sale and use); Socialist Labor Party v. Gilligan, 406 U.S. 583 (1972) (finding hardship but factual record found to be inadequate).

n36. Chemerinsky, supra note 7, 2.6.3, at 102.

n37. Ronald A. Cass et al., Administrative Law: Cases and Materials 373 (3d ed. 1998); Stephen G. Breyer et al., Administrative Law and Regulatory Policy 1136 (2d ed. 1985) ("Before Abbott Laboratories the courts typically reviewed the lawfulness of an agency's rule, not when it was promulgated, but when it was enforced.").

n38. 387 U.S. 158 (1967) (holding as not ripe for review an FDA regulation permitting FDA access to manufacturing facilities).

n39. See Clean Air Implementation Project v. EPA, 150 F.3d 1200 (D.C. Cir. 1998).

n40. 5 U.S.C. 704 (1994).

n41. See Michael D. Axline, Environmental Citizen Suits 6.09, at 6-44 (1995).

n42. Id.

n43. John F. Duffy, Administrative Common Law in Judicial Review, 77 Tex. L. Rev. 113, 177 (1998).

n44. Wald, supra note 13, at 242 (discussing the rise of textualism and its affect on Chevron deference).

n45. Except in matters of traditional prosecutorial discretion. See infra note 138.

n46. Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 547 (1978) (quoting Wong Yang Sung v. McGrath, 339 U.S. 33, 40 (1950)).

n47. Edward Lazarus, Closed Chambers: The Rise, Fall, and Future of the Modern Supreme Court 283-84 (1999); see also Lawrence M. Friedman, A History of American Law 344 (2d ed. 1985); Wald, supra note 13, at 221-32.

n48. See Clean Air Implementation Project v. EPA, 150 F.3d 1200, 1204 (D.C. Cir. 1998) ("'pre-enforcement review of agency rules and regulations has become the norm, not the exception,' a trend accelerated by Congress' enactment of a host of regulatory statutes specifically providing for this") (quoting Breyer, supra note 37, at 37).

n49. Abbott Lab. v. Gardner, 387 U.S. 136, 170 (1967) (citing Professor Jaffe's law review article with approval).

n50. Henry J. Friendly, In Praise of Erie - and of the New Federal Common Law, 39 N.Y.U. L. Rev. 383, 419 (1964); Henry J. Friendly, The Gap in Lawmaking - Judges Who Can't and Legislators Who Won't, 63 Colum. L. Rev. 787 (1963). Judge Friendly provided the template for the Abbott Laboratories ripeness doctrine in his lower court opinion in Toilet Goods Ass'n v. Garder, 360 F.2d 677 (2d Cir. 1966).

n51. Lankford v. Gelston, 364 F.2d 197, 204 (4th Cir. 1966) (en banc). Contemporaneous events help frame the issue, like the Los Angeles, Chicago, and New York City race riots that had recently made headlines. Id. at 203-04. This was cited in the dissent to Los Angeles v. Lyons, 461 U.S. 95, 124 (1983) (Marshall, J., dissenting).

n52. Sec'y of State of Md. v. Joseph H. Munson Co., 467 U.S. 947, 956 (1984).

n53. Dombrowski v. Pfister, 380 U.S. 479, 486-87 (1965) (the practical value of freedom of expression is undercut if not protected prior to enforcement); see also Virginia v. Am. Booksellers Ass'n, 484 U.S. 383, 393 (1988). But see Laird v. Tatum, 408 U.S. 1, 13-14 (1972) (holding that "subjective chill" is insufficient injury caused by an Army intelligence-gathering regulation that was alleged to promote civil unrest).

n54. See generally Evan Tsen Lee, Deconstitutionalizing Justiciability: The Example of Mootness, 105 Harv. L. Rev. 603, 654-68 (1992).

n55. Gene R. Nichol, Jr., Ripeness and the Constitution, 54 U. Chi. L. Rev. 153 (1987) (criticizing the Burger Court for creating unnecessary confusion by constitutionalizing ripeness).

n56. Chemerinsky, supra note 7, 2.6.2, at 100-01.

n57. 509 U.S. 43 (1993).

n58. See Breyer, supra note 1, at 972.

n59. Reno v. Catholic Sch. Servs., Inc., 509 U.S. 43 (1993).

n60. See, e.g., Appalachian Power Co. v. EPA, 208 F.3d 1015 (D.C. Cir. 2000).

n61. Chemerinsky, supra note 7, 2.6.2, at 100.

n62. Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726 (1998).

n63. Id.

n64. Ronald M. Levin, The Year in Judicial Review, 51 Admin. L. Rev. 389, 392 (1999).

n65. Amanda C. Cohen, Ripeness Revisited: The Implications of Ohio Forestry Association, Inc. v. Sierra Club for Environmental Litigation, 23 Harv. Envtl. L. Rev. 547 (1999). But see JEM Broad. Co. v. FCC, 22 F.3d 320 (D.C. Cir. 1994) (holding attack on FCC procedural rule was impermissible since rule was challenged well after promulgation and not within short statutory period).

n66. See Pamela Baldwin, Public Lands Study Materials, Course No. SD47, A.L.I.-A.B.A. 347, 365 (1999).

n67. See, e.g., Bowers v. Hardwick, 478 U.S. 186, 194-95 (1986). But the justices are often Janus-faced: note that the Bowers Court went ahead and ruled on the merits despite the fact that the controversy was effectively dissolved by failure to press charges against the plaintiff. Id. at 219-20 (Stevens, J., dissenting). Judge Richard Posner notes that "discovery is rarely proper in the judicial review of administrative action. The court is supposed to make its decision on the basis of the administrative record, not create its own record." USA Group Loan Servs., Inc. v. Riley, 82 F.3d 708, 715 (7th Cir. 1996).

n68. Robert G. McCloskey, The American Supreme Court 71-77 (1960). The Court "attempts to decide questions of policy without the advantage of conventional political resources." Id. at 71-72.

n69. See, e.g., Appalachian Power Co. v. EPA, 208 F.3d 1015 (D.C. Cir. 2000). The court vacated a nineteen-page EPA Guidance Document filled with highly technical information relatively indecipherable by the court. The court did, however, note that the document was "read like a ukase" and struck it down for failure to have been first subject to public notice and comment. Id. at 1023.

n70. Whereas both of these concerns were underscored in the Abbott Laboratories opinion, at least one basic hornbook in administrative law seems to have omitted one from the calculus. Ripeness doctrine is not properly differentiated from that of exhaustion of remedies by treating ripeness as solely a court concern and exhaustion as an agency "autonomy" concern. See Alfred C. Aman, Jr. & William T. Mayton, Administrative Law 414 (1992). Differentiating these doctrines can be "quite elusive." Cass, supra note 37, at 373. Exhaustion is better understood as pertaining to "steps that the petitioner must take ... as a precondition to securing judicial review. Id.

n71. Abbott Lab. v. Gardner, 387 U.S. 136, 148-49 (1967).

n72. Ethereal conflicts like the one portrayed in painter Wassily Kandinski's "Improvisation 31: Sea Battle" are best resolved outside the courtroom by experts who can discern the "'green pastel redness.'" John H. Ely, Democracy and Distrust 18 (1980).

n73. Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982).

n74. Flast v. Cohen, 392 U.S. 83, 97 (1968).

n75. The struggle is to determine the appropriate moment for interference with another branch of government. The timeliness concern is a familiar one, informed by common sense and generalized human experience.

> If you trap the moment before it's ripe,
> The tears of repentance you'll certainly wipe;
> But if once you let the ripe moment go
> You can never wipe off the tears of woe.

William Blake, The Notebook of William Blake bk.XXXVIII (1791-92). An example of how mushy the standard of timeliness for judgment can be, is provided by a federal district court order (denying a Federal Rule of Civil Procedure 12(b)(6) motion) upholding the argument of Indian tribe plaintiffs that "their claims are better assessed by 'Indian time.'" Gros Ventre Tribe v. United States, No. CV 00-69-M-DWM, at 6 (D. Mont. Jan. 29, 2001).

n76. Abbott Lab., 387 U.S. at 154.

n77. John E. Bonine & Thomas E. McGarity, The Law of Environmental Protection 784 (2d ed. 1992).

n78. Toilet Goods Ass'n v. Gardner, 387 U.S. 158, 164 (1967) (Fortas, J., concurring and dissenting).

n79. See Daniel A. Farber, Taking Slippage Seriously: Noncompliance and Creative Compliance in Environmental Law, 23 Harv. Envtl. L. Rev. 297, 298-99 (1999).

n80. Cass, supra note 37, at 420.

n81. Darby v. Cisneros, 509 U.S. 137 (1993).

n82. Breyer, supra note 1, at 962 (quoting Jerry L. Mashaw & David L. Harfst, The Struggle for Auto Safety 246-47 (1990)).

n83. Id.

n84. Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272 (1855) (granting Congress the right to delegate to executive branch officials the power to adjudicate "public rights" matters).

n85. Wong Yang Sung v. McGrath, 339 U.S. 33, 36-37 (1950).

n86. Id. at 37.

n87. Abbott Lab. v. Gardner, 387 U.S. 136, 155 (1967).

n88. Nichol, supra note 55, at 161.

n89. Chemerinsky, supra note 7, 2.6.3, at 102.

n90. Daniel Farber et al., Constitutional Law: Themes for the Constitution's Third Century 112-13 (2d ed. 1998); see also Chemerinsky, supra note 7, 2.6.1, at 94 n.8.

n91. “Closely akin to the standing requirement, and indeed not always clearly separable from it, is the ripeness doctrine.” Wyoming Outdoor Council v. U.S. Forest Serv., 165 F.3d 43, 48 (D.C. Cir. 1999).

n92. Erwin Chemerinsky, Federal Jurisdiction 2.4.1 (2d ed. 1989).

n93. Breyer, supra note 1, at 970 n.37.

n94. See Aman, supra note 70, at 414.

n95. Wilderness Soc’y v. Alcock, 83 F.3d 386, 389-90 (11th Cir. 1996) (holding as too early a challenge to a National Forest Management Plan while finding ripeness “more useful” than standing for evaluating injuries “that have not yet occurred;” explaining the relationship between each doctrine’s analysis).

n96. Lisa A. Kloppenberg, Measured Constitutional Steps, 71 Ind. L.J. 297, 304 (1996).

n97. Baker v. Carr, 369 U.S. 186, 204 (1962).

n98. 461 U.S. 95 (1983) (holding as too speculative a challenge to a police chokehold policy); see also O’Shea v. Littleton, 414 U.S. 488 (1974) (holding that allegations of racially discriminatory bond setting, sentencing, assessing jury fees, basically unfair targeting for prosecution and harassment of African American population in small town were too speculative).

n99. 405 U.S. 727, 734 (1972).

n100. Eacata Desiree Gregory, No Time is the Right Time: The Supreme Court’s Use of Ripeness to Block Judicial Review of Forest Plans for Environmental Plaintiffs in Ohio Forestry Ass’n v. Sierra Club, 75 Chi.-Kent L. Rev. 613, 616 n.21 (2000).

n101. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

n102. FEC v. Akins, 524 U.S. 11, 24-25 (1998).

n103. Id. at 21.

n104. Id.

n105. 517 U.S. 952 (1996) (finding racial discrimination in redistricting plan in violation of Voting Rights Act).

n106. Id. at 1053.

n107. Steel Co. v. Citizens for a Better Env’t, 523 U.S. 83, 102 (1998); see also Coleman v. Miller, 307 U.S. 433, 460 (1939) (opinion of Frankfurter, J.) (The Constitution established that “judicial power could come into play only in matters that were the traditional concern of the courts at Westminster and only if they arose in ways that to the expert feel of lawyers constituted ‘Cases’ or ‘Controversies’.”); see Vt. Agency of Natural Res. v. United States ex rel. Stevens, 529 U.S. 765, 774 (2000).

n108. Stevens, 529 U.S. at 774 (internal citations omitted).

n109. Note, And Justiciability for All?: Future Injury Plaintiffs and the Separation of Powers, 109 Harv. L. Rev. 1066, 1070 (1996). Although the parameters of a constitutional case are not always revealed by the Court, scholars often devise techniques for litigating test cases. See, e.g., John Hart Ely, United States v. Lovett: Litigating the Separation of Powers, 10 Harv. C.R.-C.L.L. Rev. 1 (1975).

n110. Flast v. Cohen, 392 U.S. 83, 96 (1968).

n111. Hoctor v. USDA, 82 F.3d 165, 170 (7th Cir. 1996).

n112. 528 U.S. 167, 189 (2000).

n113. 529 U.S. 765 (2000).

n114. See infra Part VII.

n115. Toilet Goods Ass’n v. Gardner, 387 U.S. 158, 164 (1967).

n116. See Action for Children’s Television v. FCC, 59 F.3d 1249, 1258 (D.C. Cir. 1995); see also Natural Res. Def. Council, Inc. v. EPA, 22 F.3d 1125, 1133 (D.C. Cir. 1994).

n117. Pub. Citizen Health Research Group v. Comm'r, Food & Drug Admin., 740 F.2d 21, 31 (D.C. Cir. 1984). For a discussion of the shrinkage of the hardship component in the judicial review provisions of the Clean Air Act (section 307), see George E. Warren Corp. v. EPA, 159 F.3d 616, 622 (D.C. Cir. 1998) (holding that EPA's final regulation governing foreign refiners under the reformulated gasoline program of the Clean Air Act was ripe for review because the three factors of Clean Air Implementation Project v. EPA, 150 F.3d 1200, 1204 (D.C. Cir. 1998), were met).

n118. Better Gov't Ass'n v. Dep't of State, 780 F.2d 86, 94 (D.C. Cir. 1986) (quoting Nat'l Wildlife Fed'n v. Snow, 561 F.2d 227, 237 (D.C. Cir. 1976)).

n119. Abbott Lab. v. Gardner, 387 U.S. 136, 152 (1967).

n120. Appalachian Power Co. v. EPA, 208 F.3d 1015, 1027 (2000) (deciding case on grounds other than ripeness).

n121. Id.

n122. Id. at 1026.

n123. Scott H. Angstreich, Shoring up Chevron: A Defense of Seminole Rock Deference to Agency Regulatory Interpretations, 34 U.C. Davis L. Rev. 49, 78-79 (2000).

n124. See Wald, supra note 13, at 232-33.

n125. See Debbi Mack, EPA Guidance on Air Monitoring Gets Tossed, Corp. Legal Times, Aug. 2000, at 108.

n126. See supra notes 3-5 and accompanying text.

n127. See generally Robert A. Anthony, Interpretative Rules, Policy Statements, Guidances, Manuals, and the Like - Should Federal Agencies Use Them to Bind the Public?, 41 Duke L.J. 1311, 1328-29 (1992); James Hunnicutt, Note, Another Reason to Reform the Federal Regulatory System: Agencies' Treating Nonlegislative Rules as Binding Law, 41 B.C. L. Rev. 153 (1999); Christensen v. Harris County, 529 U.S. 576 (2000).

n128. Sidney A. Shapiro & Richard E. Levy, Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decisions, 44 Duke L.J. 1051, 1072 (1995).

n129. Axline, supra note 41, at 6-40.

n130. Id.

n131. Developments in Administrative Law and Regulatory Practice 1998-1999, at 62 n.16 (Jeffrey S. Lubbers ed., 2000) [hereinafter Developments in Administrative Law]. Systematic surveys of the cases where ripeness is applied are avoided because there does not seem to be one touchstone upon which all cases hinge. Some commentators seem flustered by this and feel that this kind of effort would be more trouble than it is worth. "Ripeness cases tend to be highly fact-specific and resist generalization, and it is not worth going into details here." Id.

n132. It is strange that, when many cases fail for lack of ripeness, the court so often fails to elaborate why ripeness does not apply. See id. at 62-63.

n133. Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726, 733-34 (1998).

n134. 42 U.S.C. 7401-7671q (1994 & Supp. III 1997).

n135. Appalachian Power Co. v. EPA, 208 F.3d 1015 (2000).

> EPA also claims that the Guidance is not ripe for review because the court's review would be more focused in the context of a challenge to a particular permit. We think there is nothing to this. Whether EPA properly instructed State authorities to conduct sufficiency reviews of existing State and federal standards and to make those standards more stringent if not enough monitoring was provided will not turn on the specifics of any particular permit. Furthermore, EPA's action is national in scope and Congress clearly intended this court to determine the validity of such EPA actions ... [a] challenge to an individual permit would not be heard in this court. (Petitioners contend that only state courts could adjudicate such cases. We express no view about that.)

Id. at 1023 n.18.

n136. 175 F.3d 1027 (D.C. Cir. 1999).

n137. Craig N. Oren, Run Over by American Trucking Part II: Can EPA Implement Revised Air Quality Standards?, 30 Envtl. L. Rep. 10034, 10038 (2000).

> It is true, technically, that EPA's implementation decisions represented final agency action, especially given the Agency's refusal to reconsider them in subsequent rulemakings. Still, the court would have done well to have given more than two sentences of consideration to the question of whether the issue was ripe - that is, appropriate at this time - for judicial review.

Id. at 10037. Oren continues: "In defense of the court, EPA seems to have given little attention to the issue either." Id. at 10037 n.52.

n138. Developments in Administrative Law, supra note 131, at 63 n.16. A former D.C. Circuit Court judge describes this as "the Chaney approach" (referring to presumptive non-reviewability in areas of traditional prosecutorial discretion announced in Heckler v. Chaney, 470 U.S. 821 (1985)); see also Wald, supra note 13, at 228.

n139. See Developments in Administrative Law, supra note 131, at 62 n.61.

n140. Id.

n141. "Given the frequency with which 'ripeness' ... defenses are raised in citizen suits, it is surprising that Section 704 has not received more judicial attention." Axline, supra note 41, at 6-45.

n142. A. Raymond Randolph, Speech: Administrative Law and the Legacy of Henry J. Friendly, 74 N.Y.U. L. Rev. 1, 9 (1999).

n143. See Wald, supra note 13, at 221.

n144. See, e.g., Appalachian Power Co. v. EPA, 208 F.3d 1015 (2000) (noting the complexity of emissions monitoring requirements in an EPA Guidance Document). "It would serve no useful purpose to explain this or the many other equations in the sequence." Id. at 1019 n.5. "There sometimes occur also events about which men who have had no great experience of affairs, are easily mistaken, since such happenings have plausible features which make men believe that the outcome in such a case will be what they have persuaded themselves it will be." Machiavelli, The Discourses II.22, at 344 (Penguin Classics ed. 1970).

n145. Randolph, supra note 142, at 10.

n146. See Cass Sunstein, In Defense of the Hard Look: Judicial Activism and Administrative Law, 7 Harv. J.L. & Pub. Pol'y 51, 51-59 (1984). The hard look doctrine was first announced in Greater Boston Television Corp. v. FCC, 444 F.2d 841, 851 (D.C. Cir. 1970).

n147. See generally Martin Shapiro, Who Guards the Guardians?: Judicial Control of Administration 153-55 (1988). "For a while some brave judges continued the spirit of the sixties. But how can judges continue to say that agencies are wrong when everyone knows that judges are incapable of understanding the rule-making records that they have insisted be the basis for review?" Id. at 155.

n148. Barry Friedman, Dialogue and Judicial Review, 91 Mich. L. Rev. 577, 681 (1993).

n149. See Alexander Bickel, The Least Dangerous Branch 146-47 (1962).

n150. 57 F.3d 1099 (D.C. Cir. 1995).

n151. Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726, 738-39 (1998) (recreating interest shown to be immediately harmed by the NFMA, but Court would not permit challenger to supplement an insufficient trial record in brief on merits); see also Axline, supra note 41, at 6-40.

n152. 330 U.S. 75 (1947).

n153. Abbott Lab. v. Gardner, 387 U.S. 136, 149 (1967).

n154. Sierra Club v. Peterson, 228 F.3d 559, 566 (5th Cir. 2000) (relying on Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871 (1990)).

n155. See CBS v. United States, 316 U.S. 407 (1942).

n156. 367 U.S. 497, 513 (1961) (Douglas, J., dissenting).

n157. A hardship may be shown when a litigant is forced to choose between risking serious sanctions and incurring substantial costs of complying with an allegedly unlawful agency directive. See Natural Res. Def. Council, Inc. v. EPA, 859 F.2d 156, 166 (D.C. Cir. 1988).

n158. Abbott Lab., 387 U.S. at 153.

n159. Joseph v. United States Civil Serv. Comm'n, 554 F.2d 1140, 1151 (D.C. Cir. 1977).

n160. Ciba-Geigy Corp. v. EPA, 801 F.2d 430, 438-39 (D.C. Cir. 1986).

n161. John E. Bonine, A Voice from the Wilderness, Calling Your Name, 6 Yale J. on Reg. 393, 394 (1989).

n162. Ohio Forestry Ass'n, Inc. v. Sierra Club, 523 U.S. 726, 733-34 (1998) (citing United States v. L.A. & Salt Lake R.R. Co., 273 U.S. 299 (1927)).

n163. See Respondent's Opening Brief at 36-39, Appalachian Power Co. v. EPA, 208 F.3d 1015 (2000). In fairness to the court, Respondent failed to emphasize the finality component by burying it in a footnote. Id. at 34 n.32.

n164. See, e.g., Eagle-Picher Indus., Inc. v. EPA, 759 F.2d 905 (D.C. Cir. 1985).

n165. See, e.g. Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190 (1983).

n166. 834 F.2d 191 (D.C. Cir 1987) (summarizing prior holdings where agency regulations could be attacked despite the running of statutes of limitation).

n167. Id. at 196.

n168. The case-by-case approach was announced by Justice Scalia in National Wildlife Federation. See Axline, supra note 41, at 6-42 to 6-43.

n169. Barton J. Birch, Ohio Forestry and What it Means for the Future, 37 Idaho L. Rev. 141, 142 (2000).

n170. Cohen, supra note 65, at 556-57.

n171. In right-to-privacy cases, the application of ripeness doctrine has been uneven. Farber, supra note 90, at 1059.

n172. 316 U.S. 407, 418 (1942). Similar cases with timing of review holdings are United States v. Storer Broadcasting Co., 351 U.S. 192 (1956) and Frozen Foods Express v. United States, 351 U.S. 40 (1956).

n173. See United States v. L.A. & Salt Lake R.R. Co., 273 U.S. 299, 308-10 (1927) (holding that ICC's evaluations of railroad property, which would be utilized for ratemaking, was not a final order, and which essentially had no effect on the rights, powers, or privileges of plaintiff).

n174. Abbott Lab. v. Gardner, 387 U.S. 136, 151 (1967).

n175. Poe v. Ullman, 367 U.S. at 513 (Douglas, J., dissenting); see also Kloppenberg, supra note 96, at 341 n.257.

n176. Lisa A. Kloppenberg, Playing It Safe 198 (2001).

n177. McCloskey, supra note 68, at 223.

n178. James Boyd White, Heracles' Bow: Essays on the Rhetoric and Poetics of the Law 70 (1985).

n179. "Like changes in the common law, changes in agency law are expected to occur gradually, to fit into pre-existing legal frameworks, and to represent a form of regulatory progress." Alfred C. Aman, Jr., Administrative Law in a Global Era: Progress, Deregulatory Change, and the Rise of the Administrative Presidency, 73 Cornell L. Rev. 1101, 1144 (1988).

n180. Philip Weinberg, Are Standing Requirements Becoming a Great Barrier Reef Against Environmental Actions?, 7 N.Y.U. Envtl. L.J. 1, 12 (1999). "Enforcement" here refers to acts by the sovereign to ensure compliance with, and punish noncompliance. But see supra note 6.

n181. Successful litigation often hinges on familiarity with a place known as "Gucci Gulch." See, e.g., Jeffrey H. Birnbaum & Alan S. Murray, Showdown at Gucci Gulch: Lawmakers, Lobbyists, and the Unlikely Triumph of Tax Reform (1987); Joseph C. Goulden, The Superlawyers: The Small and Powerful World of the Great Washington Law Firms 183 (1971) (suggesting, for example, that the "industry-written Administrative Procedure Act" favors the plaintiff with greater financial resources).

n182. With reference to individual plaintiffs and the federal agencies they challenge,

> history will teach us, that the former has been a much more certain road to the introduction of despotism than the latter, and that of those men who have overturned the liberties of republics, the greatest number have begun their career, by paying an obsequious court to the people; commencing demagogues, and ending tyrants.

The Federalist No. 1, at 9 (Alexander Hamilton) (Masters, Smith & Co. ed., 1857).

n183. Some commentators question the legitimacy of ripeness as a product of federal judicial common law. Duffy, supra note 43, at 167. But the same criticism can be leveled at judicial review itself, beginning with Justice Marshall's formulation in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). "Judicial review doctrine ... has undergone several transformations, ricocheting between extreme deference and intense scrutiny with intermittent, not always successful, attempts to merge the two." Wald, supra note 13, at 221.

n184. For example, in Abbott Laboratories the FDA apparently failed to properly defend the early review challenge. "It is scarcely to be doubted that a court would refuse to postpone the effective date of an agency action if the Government could show, as it made no effort to do here, that delay would be detrimental to the public health or safety." Abbott Lab. v. Gardner, 387 U.S. 136, 156 (1967).

n185. See generally Lazarus, supra note 47.

n186. 531 U.S. 98 (2000); see also FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000) (sharp disagreement over statutory interpretation of FDA power to regulate tobacco under the FDCA).

n187. McCloskey, supra note 68, at 223.

n188. Chemerinsky, supra note 7, 2.6.1, at 95 (stating that ripeness "cannot be reduced to a formula").

n189. 1 Lawrence Tribe, American Constitutional Law 3-10, at 344 (3d ed. 2000).

n190. This quote is from a television commercial that aired during the 1980s in the United States. Wine is to inspiration as Karl Llewellyn is to the Uniform Commercial Code. At least five law review articles published since 1994 are entitled Old Wine in New Bottles. Ripeness doctrine is a new bottle; judicial ingenuity continues apace.