

ULTRA-APA ULTRA VIRES REVIEW: IMPLIED EQUITABLE ACTIONS FOR STATUTORY VIOLATIONS BY FEDERAL OFFICIALS

Alexandra Nickerson*

After President Trump declared a national emergency and diverted funds to build a wall on the southern border, several litigants challenged his action as ultra vires, or beyond his constitutional and statutory authority. The litigants asserted abstract equitable rights of action, implied in federal courts' equitable powers. The Supreme Court has left unclear, however, whether or not such an implied equitable action for statutory violations by federal officials exists. Many judges and scholars recognize it as part of the Court's longstanding equitable tradition and the common law heritage of the Administrative Procedure Act (APA). Others maintain that the APA is exclusive and forecloses an implied action that does not adhere to its statutory strictures. This Note explores the tension between the Court's modern implied right of action jurisprudence and the long tradition of recognizing "nonstatutory" review in officer suits. It argues that despite the Court's retreat from implied rights, non-APA equitable review is not precluded by the APA. Rather, statutory restrictions applied to APA rights of action should only apply to implied equitable claims where they reflect requirements that previously existed at common law. Such an understanding vindicates the APA's common law origins and upholds important rule of law values.

INTRODUCTION	2522
I. THE IMPLIED EQUITABLE RIGHT OF ACTION AND THE APA.....	2524
A. Origins of the Officer Suit and the Implied Right of Action ..	2525
B. Enactment of the APA	2528
1. The APA's Right of Action and Original Intent.....	2529
2. Affirming the Presumption of Judicial Review.....	2532
C. APA Nonexclusivity in the Courts	2533
1. Implied Equitable Review Disfavored by the Court	2533
2. The D.C. Circuit's Approach to Nonexclusivity	2534

* J.D. Candidate 2022, Columbia Law School. I would like to profoundly thank Professor Gillian Metzger for her invaluable guidance and insights, as well as Thomas Schmidt for the many helpful conversations and support. Special thanks also to Professor Henry Monaghan, Kimberly Chen, and Kelly Petrillo for their careful reads and feedback, to Professors Kellen Funk and David Pozen for related conversations, and to the editorial staff of the *Columbia Law Review* for their diligent work. All errors are my own.

II. REEXAMINING THE IMPLIED EQUITABLE ACTION IN A STATUTE-DOMINATED LANDSCAPE.....	2539
A. The Implied Equitable Action as Distinct From the APA	2540
B. The Supreme Court’s Silence and Recent Litigation.....	2543
C. Retreat From Implied Rights of Action in Other Contexts.....	2546
1. Private Rights of Action Implied in Statutes for Statutory Violations	2546
2. Implied Rights of Action for Federal Preemption	2549
3. Implied Rights to Damages for Constitutional Violations	2552
III. PRESERVING THE IMPLIED EQUITABLE ACTION AND ADMINISTRATIVE COMMON LAW.....	2555
A. Lessons From the Circuits: The Implied Claim as a Last Resort.....	2555
B. Interpreting the APA to Preserve an Implied Equitable Right of Action	2557
CONCLUSION	2561

INTRODUCTION

In 2019, President Donald Trump used an executive proclamation to divert appropriated funds, under the pretense of a national emergency, for the purpose of constructing a wall on the United States–Mexico border.¹ Perceived as a usurpation of congressional authority, this triggered several lawsuits.² Plaintiffs asserted statutory and constitutional claims, as well as claims in equity that the President acted “*ultra vires*,” or beyond the scope of his authority.³

The first two types of claims involved familiar analytic frameworks, but the *ultra vires* claims elicited imprecise references to judicial precedent and equitable powers.⁴ Though courts did not rely on this mode of review

1. See *Sierra Club v. Trump*, 963 F.3d 874, 880–82 (9th Cir. 2020), vacated and remanded sub. nom. *Biden v. Sierra Club*, No. 20-138, 2021 WL 2742775 (U.S. July 2, 2021) (mem.).

2. See, e.g., *Ctr. for Biological Diversity v. Trump*, 453 F. Supp. 3d 11, 23–24 (D.D.C. 2020); *California v. Trump*, 379 F. Supp. 3d 928, 935–36 (N.D. Cal. 2019), aff’d, 963 F.3d 926 (9th Cir. 2020); *Sierra Club v. Trump*, 379 F. Supp. 3d 883, 891 (N.D. Cal. 2019), vacated and remanded sub nom. *Biden*, 2021 WL 27422775.

3. See, e.g., First Amended Complaint for Declaratory and Injunctive Relief at 30–38, *Sierra Club*, 379 F. Supp. 3d 883 (No. 4:19-cv-00892-HSG), 2019 WL 8755199 (asserting violations of several statutes, the Appropriations Clause, the Presentment Clause, and an implied equitable claim for statutory violations).

4. See *California*, 379 F. Supp. 3d at 942 (“[I]n most instances [a] court may grant injunctive relief against executive officers to enjoin . . . *ultra vires* acts The Supreme Court recently reaffirmed this broad equitable power”); *Sierra Club*, 379 F. Supp. 3d at 909.

alone,⁵ two Ninth Circuit judges responded in dissent that an implied equitable claim was not merely unsuccessful but unavailable.⁶ The existence of an Administrative Procedure Act (APA) action, they suggested, precludes nonstatutory review.⁷

Prior to the APA, plaintiffs sought relief for ultra vires administrative action via traditional property and tort actions, common law writs, specific statutory provisions in the violated statute, or “nonstatutory” actions implied in equity—that is, actions understood as inherent in the courts’ “broad equitable power.”⁸ When the APA codified a right of action for this purpose in 1946, the implied equitable claim largely fell out of use.⁹ Nonetheless, the implied action persisted at the margins.¹⁰ The APA’s right of action is not comprehensive, and many have read the Act to presuppose the existence of a review doctrine for cases falling outside of its bounds.¹¹

The Supreme Court continued to recognize an implied equitable action after the APA’s enactment, suggesting that the statutory remedy is not exclusive.¹² More recently, however, the Court has retreated on the availability of implied rights of action in other contexts, reading statutes and the Constitution narrowly to constrain the powers of federal courts.¹³ To what extent the APA’s statutory right of action displaced the preexisting nonstatutory one is a question that the Court has left open, and as illustrated by the disagreement in the Ninth Circuit, the answer is not clear.¹⁴ A more preclusive approach to the APA would be consistent with the Court’s other implied rights doctrines but would constrain judicial review in a way not contemplated by the Court’s precedents nor the APA itself. By leaving a gap in the availability of judicial review, such an approach would undermine the coherence of administrative common law,

5. See *California*, 963 F.3d at 941 (holding that the plaintiffs had a viable APA action); *Sierra Club v. Trump*, 929 F.3d 670, 699 (9th Cir. 2019) (holding that the plaintiffs could succeed either on an Administrative Procedure Act (APA) or nonstatutory claim).

6. See *Sierra Club*, 929 F.3d at 715–17 (Smith, J., dissenting) (contending that nonstatutory review does not exist where APA review is the proper vehicle); cf. *California*, 963 F.3d at 967 (Collins, J., dissenting) (assuming arguendo, with skepticism, that nonstatutory review exists outside of the APA but subjecting it to a zone of interests requirement, so as to render it nearly coextensive with APA review). For discussion of the zone of interests requirement, see *infra* note 55 and accompanying text.

7. See *Sierra Club*, 929 F.3d at 715 (Smith, J., dissenting) (“Where courts can review an agency action under the APA . . . we have no business devising additional ‘equitable’ causes of action.”).

8. *California*, 379 F. Supp. 3d at 942; see also *infra* section I.A. For the seminal discussion of nonstatutory review, see generally Clark Byse, Proposed Reforms in Federal “Nonstatutory” Judicial Review: Sovereign Immunity, Indispensable Parties, Mandamus, 75 Harv. L. Rev. 1479 (1962).

9. See *infra* section I.B.

10. See *infra* sections I.B.2–C.

11. See *infra* section I.B.2.

12. See *infra* section I.C.

13. See *infra* Part II.

14. See *infra* section II.B.

potentially insulate some executive officials from judicial scrutiny, and leave some plaintiffs without a means of recovery.

This Note explores the tension between the Court's modern implied rights jurisprudence and its long tradition of granting "nonstatutory" review in officer suits. It argues that, despite the Court's retrenchment of implied rights, the APA does not preclude non-APA equitable review of acts alleged to be beyond officials' statutory authority¹⁵—that is, *ultra vires*. Statutory restrictions applied to APA rights of action should only transfer to these implied equitable claims where they reflect requirements that previously existed at common law. Part I reviews the history and development of the implied equitable action for officer suits. Part II evaluates its status in the context of the Court's implied rights of actions decisions, illustrating the tension in the ongoing recognition of nonstatutory review. Finally, Part III demonstrates how the broader debate about administrative common law bears on this question. It proposes continued recognition of an implied equitable review doctrine subject to only common law restraints, in order to vindicate the APA's common law origins and uphold important rule of law values.

I. THE IMPLIED EQUITABLE RIGHT OF ACTION AND THE APA

Courts in the Anglo-American tradition have long recognized a claim where an official exceeds the bounds of their statutory authority. Though courts have cited any number of statutory hooks, the implied equitable right of action¹⁶ derives not from particular statutory language or constitutional provisions but rather from the courts' power to fashion equitable remedies.¹⁷ This Part traces the implied equitable action's development in

15. This Note refers to this as an implied equitable action for statutory violations. In citing other works, it at times uses the term "nonstatutory review." See *infra* note 17.

16. Except in citing other works, this Note distinguishes between "right of action" and "cause of action." See Oliver L. McCaskill, *The Elusive Cause of Action*, 4 U. Chi. L. Rev. 281, 282 (1937) ("[A] right of action is a remedial right . . . [and] a cause of action is a formal statement of the operative facts that give rise to such remedial right." (quoting George L. Phillips & P.W. Viesselman, *An Exposition of the Principles of Code Pleading* § 189, at 170 (2d ed. 1932))).

17. It is therefore sometimes referred to as "nonstatutory review." See, e.g., Byse, *supra* note 8, at 1480. But this is a misnomer, as all federal court actions are based on a statute—at the least, the grant of federal subject matter jurisdiction, 28 U.S.C. § 1331 (2018), which grants the courts equitable powers and enables them to award such judicially contrived remedies. See Byse, *supra* note 8, at 1481. The distinction between statutory and nonstatutory review, according to Professor Ralph Fuchs, is "whether the proceedings are specifically authorized by statute in relation to agency action or whether they are available as general remedies (either by statute, such as a code of procedure, or under the common law) and may be used, among other things, for the review of agency action." *Id.* at 1480 n.3 (quoting Ralph F. Fuchs, *Judicial Control of Administrative Agencies in Indiana*: I, 28 Ind. L.J. 1, 11 (1952)).

Understanding the implied right of action as derived from equitable authority, as opposed to statutory text, is consistent with the Court's recent description. See *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015) (describing "[t]he ability to sue to

the federal courts. Section I.A focuses on the origins of judicial review for administrative action. Section I.B considers the impact of the APA, and section I.C evaluates how courts have integrated the implied equitable action into this new landscape. This context informs how scholars and the courts should read the APA and understand the courts' equitable authority today.

A. *Origins of the Officer Suit and the Implied Right of Action*

Federal courts' recognition of the right to sue a federal officer for unlawful action derived from early eighteenth-century British legal practice. Prior to the early 1700s, nearly all suits against British officers were for damages, which meant little could be done to halt or undo the unlawful activity.¹⁸ But around this period, the prerogative writs emerged to enable judicial control of administrative action.¹⁹ In 1700, the King's Bench first annulled an administrative proceeding, exercising its flexible authority to correct public wrongs.²⁰

This judicial review of administrative action for injunctive-like relief was imported into American law.²¹ The Judiciary Act of 1789 provided for prerogative writs against federal officers and vested the courts' equity jurisdiction as provided in the Constitution.²² The Process Acts enabled judicial review of federal executive action through prerogative writs under state law.²³ And *Marbury v. Madison* recognized a common law tradition²⁴—

enjoin unconstitutional actions by state and federal officers" as "the creation of courts of equity" and "a judge-made remedy").

18. See James E. Pfander & Jacob P. Wentzel, *The Common Law Origins of Ex Parte Young*, 72 *Stan. L. Rev.* 1269, 1295 (2020).

19. See *id.* at 1300–05 (describing the institutionalization of the administrative writs and noting their broad availability where there was no "adequate alternative remedy"). The prerogative writs included those of mandamus, certiorari, prohibition, scire facias, quo warranto, and habeas corpus. See Richard H. Fallon, Jr., John F. Manning, Daniel J. Meltzer & David L. Shapiro, *Hart and Wechsler's The Federal Courts and the Federal System* 882 (7th ed. 2015) [hereinafter *Hart & Wechsler*].

20. See *The Case of Cardiffe Bridge* (1700) 91 *Eng. Rep.* 135, 135; 1 *Salk.* 146, 146 (K.B.).

21. See Louis L. Jaffe, *Judicial Control of Administrative Action* 165–93 (1965).

22. See Judiciary Act of 1789, ch. 20, § 11, 1 *Stat.* 73, 78 (codified as amended at 28 *U.S.C.* § 1651 (2018)); see also *U.S. Const.* art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases, in Law and Equity . . .").

23. See Process Act of 1792, ch. 36, 1 *Stat.* 275 (establishing that federal courts should employ state procedures); Process Act of 1789, ch. 20, § 17, 1 *Stat.* 73, 83 (same); Anthony J. Bellia Jr., *Article III and the Cause of Action*, 89 *Iowa L. Rev.* 777, 787 & n.23 (2004) (explaining how the Process Act of 1792 instructed federal courts to use the forms of writs and executions of the supreme court of the state in which it sat, with the power to make alterations as necessary).

24. See Pfander & Wentzel, *supra* note 18, at 1306–07 (explaining how *Marbury* cited Lord Chief Justice Mansfield and other British judges); see also Thomas W. Merrill, *Marbury v. Madison* as the First Great Administrative Law Decision, 37 *J. Marshall L. Rev.* 481, 486–89 (2004) (explaining that, although *Marbury* asserted a statutory cause of action, Justice John Marshall's discussion gives the "impression" that it derived from common law). But cf.

even presumption—of judicial review of administrative action to protect the rule of law.²⁵

In the nineteenth century, the Court reasserted its commitment to reviewing claims against officers but became less concerned with the precise right of action. In *Osborn v. Bank of the United States* and *United States v. Lee*, the Court made clear that plaintiffs' claims would not be barred by sovereign immunity.²⁶ In *Osborn*, the Court also departed from the traditional prerogative writs and common law damages claims to recognize a claim in equity.²⁷ This led to the idea that any official violation of a federal statutory right implied a right to judicial recourse, and federal courts, sitting in equity, had the authority to fashion injunctive relief.²⁸

Two early twentieth-century cases more clearly established an implied right of action against officers and solidified its foothold in the federal courts' equitable tradition.²⁹ In 1902, the American School of Magnetic Healing filed an ultra vires claim against the Postmaster General, J.M. McAnnulty, for refusing to deliver the School's advertisements, which attested to its magical healing powers.³⁰ The Supreme Court granted review, pointing to the presumptive availability of review and the necessity of providing a remedy when an officer violates the law, and awarded the plaintiffs injunctive relief.³¹

Jonathan R. Siegel, *Suing the President: Nonstatutory Review Revisited*, 97 Colum. L. Rev. 1612, 1625 (1997) (stating that *Marbury* was a nonstatutory case).

25. 5 U.S. (1 Cranch) 137, 163 (1803) ("The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."). Although *Marbury's* relief was never granted, the case still stands for the maxim that where there is a right there is a remedy, even if the right is infringed by the government. See, e.g., Vicki C. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 Geo. Wash. Int'l L. Rev. 521, 532 (2003). This concept, *ubi jus, ibi remedium*, is sometimes referred to as the "remedial imperative." This term was popularized by Professor Akhil Reed Amar. See Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1426 (1987).

26. See *Lee*, 106 U.S. 196, 221 (1882) (explaining that to hold otherwise would "sanction[] a tyranny"); *Osborn*, 22 U.S. (9 Wheat.) 738, 857 (1824). Sovereign immunity refers to a sovereign power's insulation from adverse legal judgment. For state officials, this is grounded in the Eleventh Amendment. See Hart & Wechsler, *supra* note 19, at 921–22.

27. See *Osborn*, 22 U.S. (9 Wheat.) at 748–49, 871 (affirming the order of restitution against the Ohio tax officer in favor of the Bank of the United States).

28. The Court in *Leedom v. Kyne*, 358 U.S. 184, 190 (1958), uses the federal subject matter jurisdiction statute, 28 U.S.C. § 1331, to support the availability of an implied right of action. See *infra* note 72.

29. Recently, the Court has described the implied equitable action as "the creation of courts of equity . . . reflect[ing] a long history of judicial review of illegal executive action, tracing back to England." *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015).

30. See *Am. Sch. of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 97–98 (1902).

31. See *id.* at 110. As in *Marbury*, the Court feared unchecked executive caprice. Where an official's violation causes an injury, "the courts generally have jurisdiction to grant relief . . . [o]therwise[] the individual is left to the absolutely uncontrolled and arbitrary action of a public . . . officer." *Id.* at 108, 110.

The Court seemed to confer an implied right of action again in *Ex parte Young*.³² The plaintiff sued to enjoin enforcement of allegedly unconstitutional state-mandated maximum railroad rates.³³ While scholars disagree over the scope of the implied right of action,³⁴ a standard reading, in conjunction with *American School of Magnetic Healing v. McAnnulty*, suggests that injury caused by usurpation of executive authority implies a sufficient independent right to sue.³⁵

Even if *Ex parte Young*'s right of action holding is obscured by its sovereign immunity strip, *Ex parte Young* is still significant in this respect, assuring the availability of the implied right. Despite the Attorney General's assertion of Eleventh Amendment sovereign immunity, the Court granted review.³⁶ It explained that when a state official enforces an unconstitutional law, that individual is stripped of his official character

32. 209 U.S. 123, 149, 167 (1908). For the history of *Ex parte Young* and the expansion of the courts' federal equity jurisdiction (including its sociocultural dimensions), see generally Edward A. Purcell, Jr., *Ex Parte Young and the Transformation of the Federal Courts, 1890–1917*, 40 U. Tol. L. Rev. 931 (2009).

33. See *Ex parte Young*, 209 U.S. at 127–30.

34. One line of thinking is that *Ex parte Young* created an implied right of action in the Fourteenth Amendment of the Constitution. See Hart & Wechsler, *supra* note 19, at 933. Professor John Harrison and others, however, argue that the implied right did not derive from the Constitution, but rather from a “standard tool of equity, an injunction to restrain proceedings at law.” John Harrison, *Ex Parte Young*, 60 Stan. L. Rev. 989, 990 (2008). This is similar to how Justice Antonin Scalia characterizes the equitable right of action when discussing *Ex parte Young* in *Armstrong*, 575 U.S. at 327. See, e.g., Henry Paul Monaghan, *A Cause of Action, Anyone?: Federal Equity and the Preemption of State Law*, 91 Notre Dame L. Rev. 1807, 1827, 1829 (2016) (explaining that “*Ex parte Young* fits very comfortably within the officer suit tradition, that is, a creation of the court of equity”).

Given these potential interpretations, the scope of the implied *Ex parte Young* action—whether restricted to constitutional violations or open to statutory ones as well—remains contested. Professor Henry Paul Monaghan ultimately argues for the narrower construction, see *id.* at 1828, while Professor Daniel Meltzer adheres to the latter, see Daniel J. Meltzer, *The Seminole Decision and State Sovereign Immunity*, 1996 Sup. Ct. Rev. 1, 36–41 (“*Ex parte Young* concerned not only the Eleventh Amendment but also implied remedies for violations of federal law.”). Regardless, in practice, *Ex parte Young* has been extended to vindicate all federal rights. In this Note, the discussion of the implied equitable action for *statutory* violations assumes Professor Meltzer's broader view of *Ex parte Young*, although it finds a more precise doctrinal analog in *McAnnulty* than in *Ex parte Young* itself.

35. See John F. Duffy, *Administrative Common Law in Judicial Review*, 77 Tex. L. Rev. 113, 124 (1998) (“To the *McAnnulty* Court, the . . . right to relief flowed simply from an application of the traditional principles of equity . . .”); Siegel, *supra* note 24, at 1642 (explaining that *Ex parte Young* extended the implied right of action to “cases in which plaintiff lacked a common-law action against the defendant as an individual [but] sued the defendant as an official or because of defendant's official status” (emphasis omitted)). But see Kathryn E. Kovacs, *Revealing Redundancy: The Tension Between Federal Sovereign Immunity and Nonstatutory Review*, 54 Drake L. Rev. 77, 112 (2005) [hereinafter Kovacs, *Revealing Redundancy*] (arguing that interpreting “*McAnnulty*, *Leedom*, and their progeny as precluding the need to state a cause of action” is misguided).

36. See *Ex parte Young*, 209 U.S. at 159–60.

and sovereign immunity does not attach.³⁷ This legal fiction permits courts to grant injunctive relief against officers, which is otherwise akin to impermissibly enjoining a sovereign power.³⁸

Both *McAnnulty* and *Ex parte Young* remain frequently cited when scholars and courts refer to the implied equitable action.³⁹ The plaintiffs in these cases did not rely on a traditional statutory or common law right of action, nor on the prerogative writs. Rather, the Court recognized the existence of a judge-made right in equity allowing for judicial review of exercises of executive authority.

B. *Enactment of the APA*

In 1946, Congress provided a statutory framework for judicial review of federal official action in the APA.⁴⁰ As a result, the *McAnnulty* action implied in equity became largely superfluous.⁴¹ But where APA review was unavailable or undesirable, the prevalent view was that implied equitable actions for conduct that is ultra vires statutory authority remained available. This section reviews the original purpose and scope of the APA. It then details the Court's approach to the implied equitable action in the period following the APA's enactment.

37. See *id.* In the spirit of holding officers accountable, they are considered nonstate actors for purposes of sovereign immunity but state actors for the purposes of the Fourteenth Amendment. See *Home Tel. & Tel. Co. v. City of Los Angeles*, 227 U.S. 278, 292–96 (1913); see also Hart & Wechsler, *supra* note 19, at 927–28 (explaining this paradox).

38. See Siegel, *supra* note 24, at 1642 (“[T]he principle that the remedial imperative overcomes sovereign immunity is more important than the logic of the particular device used . . .”).

39. See, e.g., Duffy, *supra* note 35, at 122 (“Among the cases building administrative common law within equity, the most important is . . . *McAnnulty*[,] [which] articulated a general theory . . . that justified a court’s power to restrain violations of law by federal officials.”); see also *Aid Ass’n for Lutherans v. U.S. Postal Serv.*, 321 F.3d 1166, 1173 (D.C. Cir. 2003); *Chamber of Com. v. Reich*, 74 F.3d 1322, 1328 (D.C. Cir. 1996); *Dart v. United States*, 848 F.2d 217, 224 (D.C. Cir. 1988) (citing *McAnnulty* review). For citations to *Ex parte Young*, see, e.g., *Armstrong*, 575 U.S. at 326–27; Siegel, *supra* note 24, at 1622–44 (describing nonstatutory review).

40. Administrative Procedure Act, Pub L. No. 79-404, 60 Stat. 237 (1946) (codified at 5 U.S.C. § 702 (2018)). The APA responded to two major trends. First, the rise of the administrative state in the post–New Deal era had spurred rapid development in administrative common law, evincing a need for standardization. See Gillian E. Metzger, *Embracing Administrative Common Law*, 80 *Geo. Wash. L. Rev.* 1293, 1309 & n.85 (2012) [hereinafter Metzger, *Embracing Administrative Common Law*] (noting that “[u]niformity is a recognized purpose underlying the APA’s enactment”). Second, *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), and the institution of the Federal Rules of Civil Procedure had abolished the historical system of writs pleading and the creation of causes of action through federal common law. It thus represented a shift toward legislative causes of action. Cf. *id.* at 1342–43 (discussing how *Erie* problematized administrative common law).

41. See, e.g., Siegel, *supra* note 24, at 1614 n.12 (“The success of the statutory reform . . . rendered nonstatutory review much less familiar to most lawyers.”).

1. *The APA's Right of Action and Original Intent.* — The APA codified preexisting administrative law doctrine (i.e., the implied equitable claim and prerogative writs). By one reading, it sought to replace it;⁴² by another, it sought to endorse and perhaps expand the availability of judicial review.⁴³ The latter finds support in contemporaneous sources around the APA's adoption and has important implications for the availability of an independent implied equitable action today.

The APA, 5 U.S.C. § 702 et seq., provides a broad right of action to “[a] person suffering [a] legal wrong because of agency action.”⁴⁴ Where a statute provides for relief, that statute controls, but “in the absence or inadequacy thereof,” § 703 authorizes “any applicable form of legal action.”⁴⁵ Section 704 affirms that “[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.”⁴⁶ Then § 706 provides: “The reviewing court shall . . . hold unlawful and set aside agency action . . . found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; [or] . . . (C) in excess of statutory jurisdiction, authority, or limitations”⁴⁷

The APA thus provides a right of action for executive overreach and illegal administrative acts, but it does not alone provide plaintiffs with a comprehensive review mechanism in all cases of ultra vires administrative action. The 1946 version did not include a waiver of sovereign immunity.⁴⁸ Moreover, § 701 sets out threshold requirements for invoking the APA right of action.⁴⁹ Review is not applicable where statutes foreclose judicial review nor where agency action is committed to agency discretion by law.⁵⁰ The APA's definition of “agency” also restricts review, as it is not inclusive

42. See, e.g., Duffy, *supra* note 35, at 130–31 (lamenting that courts treated the APA as “something less than the ‘comprehensive statement’ it was intended to be . . . [and] subservient to the judge-made law it should have displaced” (quoting 92 Cong. Rec. 5654, 5649 (1946) (statement of Rep. Walter))).

43. Compare Jaffe, *supra* note 21, at 372–76 (explaining that the APA codified the presumption of reviewability and provided a more flexible cause of action than the one previously available), with Kenneth Culp Davis, *Administrative Common Law and the Vermont Yankee Opinion*, 1980 Utah L. Rev. 3, 10 [hereinafter Davis, *Administrative Common Law*] (purporting that the APA sought to codify, but not expand, judicial review), and Caleb Nelson, “Standing” and Remedial Rights in Administrative Law, 105 Va. L. Rev. 703, 727 (2019) (same).

44. 5 U.S.C. § 702.

45. *Id.* § 703.

46. *Id.* § 704.

47. *Id.* § 706.

48. See Administrative Procedure Act, Pub L. No. 79-404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. § 702).

49. Some of these represent statutory codifications of the common law justiciability doctrines. Whether they are coextensive with the common law requirements is a crucial question bearing on whether it is reasonable to conceive of an implied equitable action separate from the APA.

50. 5 U.S.C. § 701(a).

of all governmental action.⁵¹ The President is not an “agency” for APA purposes,⁵² nor are certain bodies like the Tennessee Valley Authority Retirement System (TVARS).⁵³ The APA only applies to “final agency action.”⁵⁴ Courts have also found plaintiffs suing under the APA to be subject to a “zone of interests” prudential standing test, meaning they must fall within the range of concerns that the purportedly violated statute intends to protect.⁵⁵

If the APA subsumed and displaced the implied equitable review doctrine, there would be no getting around the statutory limitations. But to the extent that it left the common law—that is, preexisting review mechanisms developed by judges sitting in equity—untouched, plaintiffs could still find recourse and avoid some of these restrictions by relying upon precedent such as *McAnnulty* and *Ex parte Young*. Early interpretations aligned more with the latter view.

First, the text of the APA suggests it was not meant to exclusively dominate administrative law: “This subchapter . . . do[es] not limit or repeal additional requirements imposed by statute or otherwise recognized by law.”⁵⁶ In particular, § 703 (authorizing “any applicable form of legal action”) has been read to permit implied actions—including the prerogative writs.⁵⁷ Congress had granted courts the power to issue writs as early as the First Judiciary Act.⁵⁸ In 1948, the All Writs Act reauthorized writs, allowing courts to grant relief against federal officers within their subject matter jurisdiction.⁵⁹ In adopting this Act just following the enactment of

51. See *id.* § 701(b)(1).

52. *Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992) (“[T]he President is not an agency within the meaning of the Act.”).

53. See *Duncan v. Muzyn*, 833 F.3d 567, 575 (6th Cir. 2016) (explaining that the TVARS is excluded under 5 U.S.C. § 701(b)(1)(E), which refers to “agencies composed of representatives of the parties . . . to the disputes determined by them”).

54. See 5 U.S.C. § 704 (“Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.”); see also *id.* § 551(13) (defining “agency action” as “the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent, or denial thereof, or failure to act”).

55. See *Match-E-Be-Nash-She-Wish Band of Pottawatomis Indians v. Patchak*, 567 U.S. 209, 224–25 (2012) (describing the requirement as flexible for an APA claim: the plaintiff’s claim need only “arguably” fall within the zone protected by the statute).

56. 5 U.S.C. § 559. It is true that this does not necessarily prohibit constraints on additional grants of judicial review, but it presupposes a preexisting—and residual—independent, unchanged body of law.

57. See *id.* § 703 (“The form of proceeding for judicial review is the special statutory review proceeding . . . or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction.”).

58. See Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78 (codified as amended at 28 U.S.C. § 1651 (2018)); *supra* note 22 and accompanying text.

59. See All Writs Act, Pub. L. No. 80-773, § 1651(a), 62 Stat. 869, 944 (1948) (codified as amended at 28 U.S.C. § 1651) (authorizing the federal courts to “issue all writs necessary

§ 703, Congress suggested that it did not read the APA to foreclose other actions.⁶⁰ Conversely, it delegated the provision of additional rights to the courts.⁶¹

The APA's legislative and administrative history also supports a more flexible approach. A Senate report described the APA as "an express statutory recognition [that] the so-called common-law actions [are an] appropriate and authorized means of judicial review, operative whenever special forms . . . are lacking or insufficient."⁶² In other words, the APA endorsed existing judicial practice of implied equitable review. The Attorney General also described it as "a general restatement of the principles of judicial review embodied in many statutes and judicial decisions."⁶³ He separately explained that the APA just "declares the existing law concerning judicial review. It provides for judicial review except insofar as statutes preclude it."⁶⁴

Scholar John Duffy labels these statements as mere "damage control," with the Attorney General having framed the APA as a continuation of the status quo in order to assuage the aftermath of the rancorous debates and bitter compromises that enabled its passage.⁶⁵ Others writing closer to the time of passage, such as Professors Kenneth Culp Davis and Louis Jaffe, have privileged its common law origins and rejected any sharp distinction between review under the APA and under common law.⁶⁶ Regardless of these scholarly interpretations of the APA's historical context and purpose, the Court understood the APA to affirm the presumption of reviewability and preserve its preexisting review doctrines.

or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law").

60. See 5 U.S.C. § 703. See generally Samuel I. Ferenc, Note, Clear Rights and Worthy Claimants: Judicial Intervention in Administrative Action Under the All Writs Act, 118 Colum. L. Rev. 127, 136 (2018) (explaining the interaction of the All Writs Act and the APA).

61. See Jack M. Beermann, Common Law and Statute Law in Administrative Law, 63 Admin. L. Rev. 1, 10–11 (2011) ("[T]he All Writs Act in effect delegates th[e] determination [of when to grant remedies] to the courts. In administrative law, federal courts fashion appropriate actions . . . where the APA and other . . . statutes do not fulfill the task, applying the same common law methodology they employed before . . . the APA."). But see Fed. R. Civ. P. 81(b) (abolishing the writ of mandamus).

62. S. Rep. No. 79-752, at 26 (1945).

63. U.S. Dep't of Just., Attorney General's Manual on the Administrative Procedure Act 93 (1947).

64. S. Rep. No. 79-752, app. B, at 43 (1945).

65. Duffy, *supra* note 35, at 133.

66. See 1 Kenneth Culp Davis, Handbook on Administrative Law § 234, at 812 (1951) (explaining that judicial review of administrative action is largely common law); Jaffe, *supra* note 21, at 337, 376 ("In most cases the scope of review, whether statutory or common law, is very much the same."); *id.* at 372 ("The Administrative Procedure Act has had a negligible effect on the basic right to judicial review."); see also Duffy, *supra* note 35, at 135–36 (describing Davis's and Jaffe's perspectives).

2. *Affirming the Presumption of Judicial Review.* — In the years following the APA, the Court continued to review ultra vires claims via an equitable action outside of the statutory framework. Its 1958 decision *Leedom v. Kyne* represents an expansive view of its equitable powers.⁶⁷ *Kyne* sued the Chairman of the NLRB for violation of voting provisions in the National Labor Relations Act (NLRA).⁶⁸ The APA did not provide a right of action since the agency action was nonfinal,⁶⁹ nor was a right of action available under the NLRA.⁷⁰ The Court instead invoked an implied equitable action: “Surely . . . a Federal District Court has jurisdiction of an original suit to prevent deprivation of a [federal statutory] right so given.”⁷¹ It integrated the jurisdictional and right-of-action requirements, suggesting that “the statutory provisions governing the general jurisdiction of those courts [ought] to control.”⁷² The Court rejected the argument that the NLRA precluded all review and cited to *McAnnulty* in justifying a presumption of review of agency action.⁷³ The APA, it seemed, provided one path to review; the Court’s judge-made equitable actions provided another that perhaps the APA recognized. And the two could coexist.

Subsequent decisions upheld the viability of an implied equitable action. *Youngstown Sheet & Tube Co. v. Sawyer* indicated that presidential decisions, as carried out by officers, were subject to judicial review.⁷⁴ The Court also continued to voice the presumption of review, holding in *Abbott*

67. 358 U.S. 184 (1958).

68. See *id.* at 185–87.

69. See *id.* at 189.

70. See *id.* at 187. This was also because the action was not a “final order.” *Id.*

71. *Id.* at 189. This language expresses the same commitment to judicial review and checks on executive authority promoted in *Marbury* and *McAnnulty*. See *supra* notes 25, 30–31.

72. *Leedom*, 358 U.S. at 190 (quoting *Switchmen’s Union of N. Am. v. Nat’l Mediation Bd.*, 320 U.S. 297, 300 (1943)) (suggesting that the jurisdictional statute could also confer the right of action or that, because the action is implicit in judge-made equitable remedies, it need not be specified). Professor Duffy explains that *Leedom* conflated jurisdiction and remedy. See Duffy, *supra* note 35, at 148. It is especially valid to critique *Leedom*’s reasoning after cases like *Sosa v. Alvarez-Machain*, which differentiate statutes that create rights of action from those that create jurisdiction. 542 U.S. 692, 724 (2004) (in the context of the Alien Tort Statute); see also *Nestlé USA, Inc. v. Doe*, 141 S. Ct. 1931, 1935 (2021) (reaffirming this holding). Even so, § 1331 may provide the predicate for a common law right of action.

Elsewhere, *Leedom* has been perceived as aberrational. See generally Labor Law: Direct Judicial Review of NLRB Election Orders, 66 Colum. L. Rev. 1546 (1966) (describing how courts have confined its reach in the labor law context).

73. See *Leedom*, 358 U.S. at 188, 190. It distinguished between statutory review of an agency’s action made within its delegated powers and one in abuse of its jurisdiction—the latter not being foreclosed by statutory restrictions to the former. *Id.*

74. 343 U.S. 579, 585–89 (1952); see also Siegel, *supra* note 24, at 1637 (“[T]he Court directly considered the validity of the President’s order to the Secretary of Commerce.”).

Laboratories v. Gardner that it could only be abrogated by clear congressional intent.⁷⁵ It read § 703 as a catchall that acknowledged the availability of review for all final agency actions with no other remedy in court, suggesting a nonstatutory action might remain available.⁷⁶

C. *APA Nonexclusivity in the Courts*

Judicial review under the APA expanded into the 1970s, diminishing the role of the implied equitable action. In 1976, Congress amended § 702 to provide a waiver of sovereign immunity.⁷⁷ The Court read this waiver broadly⁷⁸ and loosened its grip on the zone of interests requirement.⁷⁹ It continued to recognize the implied equitable action but treated it as a last resort. The Court constricted review of presidential action and provided little guidance on the implied equitable action's future viability. As a result, the D.C. Circuit's jurisprudence rose to prominence, filling the gaps and leading to a more expansive understanding of the implied equitable action for statutory violations than can be gleaned from the Supreme Court's decisions alone.

1. *Implied Equitable Review Disfavored by the Court.* — In the later decades of the twentieth century, the Court privileged clear, statutory provisions that aligned with a narrower view of its role. In 1991, it clarified in *Board of Governors of the Federal Reserve System v. MCorp Financial, Inc.* that the kind of ultra vires review in *Leedom* was only available where plaintiffs had no other “meaningful and adequate means of vindicating [their] statutory rights” and where a statute did not provide “clear and convincing evidence” of intent to deny review.⁸⁰ The Court did not retreat on its

75. 387 U.S. 136, 140 (1967), abrogated on other grounds by *Califano v. Sanders*, 430 U.S. 99 (1977).

76. *Id.* at 141. Although the Food, Drug, and Cosmetic Act (the statute in question) provided a remedial scheme that was unavailable to these plaintiffs, the Court explained that “[t]he mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to others.” *Id.* (quoting Jaffe, *supra* note 21, at 357).

77. See Administrative Procedure Act, Pub. L. No. 94-574, § 1, 90 Stat. 2721, 2721 (1976) (codified as amended at 5 U.S.C. § 702 (2018)); see also Kovacs, *Revealing Redundancy*, *supra* note 35, at 92 (“[T]he 1976 amendment ‘essentially mooted’ nonstatutory review.” (quoting Richard H. Fallon, Jr., Daniel J. Meltzer & David L. Shapiro, *Hart and Wechsler’s The Federal Courts and the Federal System* 960, 969 (5th ed. 2003))).

78. See, e.g., *Bowen v. Massachusetts*, 487 U.S. 879, 891–901 (1988) (reading the § 702 waiver to go beyond pure money damages).

79. Compare *Ass’n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970) (requiring that a plaintiff need only be “arguably” in a zone of interest in an APA claim), with *Tenn. Elec. Power Co. v. Tenn. Valley Auth.*, 306 U.S. 118, 137–38 (1939) (requiring a stronger showing of a legal right at common law).

80. 502 U.S. 32, 43–44 (1991) (citing *Abbott Labs*, 387 U.S. at 141). MCorp sued the Federal Reserve System, alleging that its regulatory enforcement proceedings were ultra vires. *Id.* at 34–37. The Court explained that the Foreign Intelligence Surveillance Act expressly provided MCorp with a sufficient opportunity to review the regulation in question and therefore an implied equitable action was inapposite. *Id.* at 44.

rhetoric about the remedial imperative,⁸¹ but it expressed reservation in light of applicable statutory schemes.

In the 1994 case *Dalton v. Specter*, the Court further cast doubt on the availability of an implied equitable action.⁸² Just two years prior, the Court had determined that the President was not an agency under the APA—foreclosing APA review for a presidential violation of a statutory mandate.⁸³ Constitutional review was identified as an exception to this.⁸⁴ Thus, when Specter petitioned the Court to review President Clinton's decision to close the Philadelphia Naval Shipyard,⁸⁵ there were two potential paths to review: constitutional review or, perhaps, implied equitable review for a statutory violation. The Court was careful to distinguish between a statutory and constitutional violation—lest “the exception identified in *Franklin [v. Massachusetts]* [for constitutional review] . . . be broadened beyond recognition.”⁸⁶ It then dismissed the constitutional path to review and instead assumed “for the sake of argument that some claims that the President has violated a statutory mandate are judicially reviewable outside the framework of the APA” in order to address the issue on the merits.⁸⁷

It is difficult to discern the intent behind this enigmatic statement. *Leedom* and its progeny remain good law, and the presumption of judicial review has not been abandoned. But, at the least, *Dalton* suggests some second-guessing of the availability of the implied equitable action in a landscape dominated by statutory causes of action.

2. *The D.C. Circuit's Approach to Nonexclusivity.* — Scholars and jurists alike did not balk at *Dalton's* evasion of the question. Writing shortly after *Dalton*, Professor Jonathan Siegel did not view the Court's position as a retrenchment but rather a nod toward the implied right of action.⁸⁸ He argued that, based on the APA's history, text, and purpose, Congress did not intend to preclude nonstatutory review and make the APA exclusive.⁸⁹ In fact, he contended, the implied equitable action should be available even when the APA provides its own basis for a claim.⁹⁰ Even Professor

81. The Court cites *Abbott Laboratories* and had just recently rearticulated the standard in *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667 (1986), holding that preclusion requires clear congressional intent. *Id.* at 673.

82. 511 U.S. 462, 474 (1994).

83. See *Franklin v. Massachusetts*, 505 U.S. 788, 800–01 (1992) (“Out of respect for the separation of powers and the unique constitutional position of the President, we find that textual silence is not enough to subject the President to the provisions of the APA.”).

84. See *id.* at 801 (citing *Youngstown* for review of presidential actions for constitutionality).

85. *Dalton*, 511 U.S. at 464.

86. *Id.* at 474.

87. *Id.* (citing *Dames & Moore v. Regan*, 453 U.S. 654, 667 (1981)).

88. See Siegel, *supra* note 24, at 1621.

89. See *id.* at 1665–70.

90. See *id.* at 1669 (“It may even be used in cases where the APA does provide a remedy, but the plaintiff, for some reason, prefers to use nonstatutory review.”); see also *id.* at

Duffy, who has taken a more textualist approach to the APA, seemed to concede that relief in equity remained available where a statutory right of action was not.⁹¹ A few other scholars have come to the same conclusion explicitly, while many have implicitly assumed that such an implied equitable action persists.⁹²

The prevailing scholarly perspective on the availability of implied equitable review is largely attributable to the D.C. Circuit. While the Supreme Court hedged, the D.C. Circuit validated a more generous approach. Previously, in *Dart v. United States*, the D.C. Circuit had asserted a strong presumption of reviewability and explained that an implied equitable action for ultra vires review was still available apart from the APA: “Nothing in the subsequent enactment of the APA altered the *McAnnulty* doctrine of review.”⁹³ It further suggested that statutes that precluded review could only be denied APA review—not implied equitable review—under § 701(a)(1)’s restriction.⁹⁴

Dart set the stage for more ardent endorsement of the implied action following *Dalton* in *Chamber of Commerce v. Reich*.⁹⁵ The presidential

1669 n.254 (“The D.C. Circuit made this point quite recently in *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1327–28 (D.C. Cir. 1996).”).

91. See Duffy, *supra* note 35, at 152 (“At a minimum, the plaintiffs should have to prove the inadequacy of statutory remedies. . . . [N]onstatutory review would then achieve a desirable consistency with its historical origins in equity and with prevailing . . . teachings on the . . . limited[] role for federal judge-made law . . .”).

92. See, e.g., Beermann, *supra* note 61, at 10 (discussing the availability of the implied equitable action, derived from federal common law, outside of the APA); Davis, *Administrative Common Law*, *supra* note 43, at 3–4, 10 (explaining that the APA largely codified existing judge-made law and nothing in it “cuts back protections provided by” the common law); Jaffe, *supra* note 21, at 328–39, 372–76 (describing the statutory judicial review mechanisms as operating within the common law framework, not replacing it). Some scholars assume the availability of an implied action. See, e.g., David M. Driesen, *Judicial Review of Executive Orders’ Rationality*, 98 B.U. L. Rev. 1013, 1036–39 (2018) (assuming the availability of an implied right when discussing the standard of review for executive orders); William Powell, *Policing Executive Teamwork: Rescuing the APA From Presidential Administration*, 85 Mo. L. Rev. 71, 96–97 (2020) (assuming the D.C. Circuit jurisprudence is authoritative); Kevin M. Stack, *The Reviewability of the President’s Statutory Powers*, 62 Vand. L. Rev. 1171, 1193 (2009) (accepting “the longstanding acknowledgement that the APA did not eliminate the forms of review of officials’ conduct that existed prior to its enactment”).

93. 848 F.2d 217, 219–24 (D.C. Cir. 1988) (“We ordinarily presume that Congress intends the executive to obey its statutory commands and, accordingly, that it expects the courts to grant relief when an executive agency violates such a command.” (quoting *Bowen v. Mich. Acad. of Fam. Physicians*, 476 U.S. 667, 681 (1986))). The petitioners had claimed that the Secretary of Commerce acted ultra vires by reversing an administrative judge’s decision; the statute allowed him to modify, vacate, or remand—not reverse. *Id.* at 220–21.

94. *Id.* at 224 (explaining that section 701(a)(1) “serves only to take away what the APA has otherwise given . . . [and] does not repeal the review of ultra vires actions that were recognized long before”).

95. 74 F.3d 1322, 1324–25 (D.C. Cir. 1996) (reviewing a presidential directive ordering the administration not to contract with certain companies, allegedly in violation of the NLRA).

directive at issue in *Reich* was not reviewable under the APA or any other statute.⁹⁶ As a result, the D.C. Circuit conducted *McAnnulty* review, explaining, “[W]e never held that a lack of a statutory cause of action is per se a bar to judicial review.”⁹⁷

In addition to validating this form of review in the post-APA landscape, the *Reich* court made two important statements that supported a non-APA review regime. First, the court said that the APA’s abrogation of immunity applies to any suit reviewing agency action—whether under an APA right of action or not.⁹⁸ Because the President was acting ultra vires in *Reich*, the court held that he did not need to waive sovereign immunity: Per the court’s precedent, none had “attached in the first place.”⁹⁹ Just as the court viewed the APA’s judicial review provisions in § 703 as applying beyond the confines of the statute, so as to authorize other forms of review, it viewed the waiver of sovereign immunity as a principle speaking to non-APA rights of action as well.¹⁰⁰ *Reich*, in this respect, clarified what it meant to say that the APA “codified” the common law.¹⁰¹ The APA rearticulated and thus endorsed preexisting principles for review of administrative action. Just because plaintiffs invoke a principle that is now written in the APA does not mean that APA restrictions now apply to a case based on a nonstatutory, implied equitable action.

Second, the *Reich* court suggested that even if APA review were available in a given case, a court was not beholden to the statutory framework; it could conduct review in accordance with the preexisting principles applied to the implied right of action. When the Chamber of Commerce first filed suit, the administrative order had not yet taken effect, making the President the only potential target.¹⁰² By the time the D.C. Circuit received the case, enough implementation had occurred to sue the President’s subordinates under the APA, but the Chamber failed to amend its complaint to request APA review.¹⁰³ The court wrote: “[R]ecognizing the anomalous situation in which we find ourselves—not able to base judicial review on what appears . . . to be an available statutory cause of

96. See *id.* at 1326 (explaining that the APA was unavailable because the President is not an agency under the Act).

97. See *id.* at 1328.

98. *Id.* at 1328–29.

99. *Id.* (citing *Larson v. Domestic & Foreign Com. Corp.*, 337 U.S. 682, 690–91 (1949)). The Court did not go into detail about how an *Ex parte Young* sovereign immunity strip, see *supra* notes 37–38 and accompanying text, might differ when applied to presidential action. It instead pointed to the government’s concession that if the action were ultra vires—a clear violation of an express statutory prohibition—sovereign immunity would not attach. See *Reich*, 74 F.3d at 1330.

100. See *Reich*, 74 F.3d at 1329 (“Although appellants do not rely on the Secretary’s regulations to bring an APA cause of action, they do assert that the APA’s waiver of sovereign immunity applies . . .”).

101. See *supra* section I.B.1.

102. See *Reich*, 74 F.3d at 1326.

103. See *id.* The Court suggested that this was because “they fear[ed] any relief short of a declaration that the Executive Order is illegal would be inadequate.” *Id.*

action—we go on to the issue of whether appellants are entitled to bring a nonstatutory cause of action”¹⁰⁴

The D.C. Circuit endorsed the implied equitable right of action in other respects as well. It suggested in a footnote that the zone of interests test did not apply to the implied equitable right of action in its traditional form;¹⁰⁵ the plaintiff’s interest need only fall within the zone protected by the statute’s outer limits.¹⁰⁶ Several years later, it held that even where APA review is precluded by another statute, implied ultra vires review remains available.¹⁰⁷ Although today the D.C. Circuit employs three threshold requirements that narrow the availability of implied ultra vires review, it continues to recognize the right of action.¹⁰⁸

104. *Id.* at 1327. This is the comment that Professor Siegel used to justify his argument for allowing concurrent APA and nonstatutory review. See Siegel, *supra* note 24, at 1669 n.254. In fact, Professor Siegel and other scholars rely almost exclusively on this peculiar case to maintain the availability of the implied equitable action for statutory violations. See, e.g., Driesen, *supra* note 92, at 1036–37 (citing to Siegel for the principle that “so-called non-statutory review—review pursuant to the common-law writ of mandamus and other remedial customs predating the APA—remains available”); Siegel, *supra* note 24, at 1669 n.254; Kevin M. Stack, *The Statutory President*, 90 *Iowa L. Rev.* 539, 556 n.69 (2005) (citing to *Reich*).

The conclusion that the implied right of action is available even where APA review is available, however, is somewhat undercut by more recent D.C. Circuit jurisprudence establishing restrictions on “the *Kyne* exception.” See *infra* note 108.

105. See *Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794, 811 n.14 (D.C. Cir. 1987). Logically, the plaintiffs’ interest injured by the official action would not fall within the zone of interest of a statute that, according to the plaintiffs, was insufficient to authorize the action. As the court explained, “[Today, in] a case like *Youngstown* . . . the steel mill owners would not be required to show that their interests fell within the zone of interests of the President’s war powers in order to establish their standing to challenge the seizure . . . as beyond the scope of those powers.” *Id.*

106. See *id.* (“It may be that a particular constitutional or statutory provision was intended to protect persons like the litigant by limiting the authority conferred. If so, the litigant’s interest may be said to fall within the zone protected by the limitation.”).

107. See *Aid Ass’n for Lutherans v. U.S. Postal Serv.*, 321 F.3d 1166, 1172–73 (D.C. Cir. 2003). The petitioners had sued the USPS, which was statutorily exempt from the APA’s procedural requirements. *Id.* at 1167, 1172. But the court held that this case did not arise under the APA. *Id.* at 1172–73. It pointed to the implied equitable action as a “narrow exception, closely paralleling the historic origins of judicial review for agency actions in excess of jurisdiction.” *Id.* (quoting *Griffith v. Fed. Lab. Rels. Auth.*, 842 F.2d 487, 492 (D.C. Cir. 1988), which describes it as the *Leedom v. Kyne* exception). “It does not matter, therefore, whether traditional APA review is foreclosed, because ‘[j]udicial review is favored when an agency is charged with acting beyond its authority.’” *Id.* (alteration in original) (quoting *Dart v. United States*, 848 F.2d 217, 221 (D.C. Cir. 1988)).

108. As the court recently articulated in *DCH Regional Medical Center*, the “*Kyne* exception” applies

only when three requirements are met: “(i) the statutory preclusion of review is implied rather than express; (ii) there is no alternative procedure for review of the statutory claim; and (iii) the agency plainly acts in excess of its delegated powers and contrary to a specific prohibition in the statute that is clear and mandatory.”

DCH Reg’l Med. Ctr. v. Azar, 925 F.3d 503, 509 (D.C. Cir. 2019) (quoting *Nyunt v. Chairman*, 589 F.3d 445, 449 (D.C. Cir. 2009)).

While other circuits have not visited the question with the same frequency or depth, several have followed the D.C. Circuit's approach. The First, Sixth, and Ninth Circuits have conducted implied equitable review, promoting a presumption of reviewability. In *Rhode Island Department of Environmental Management v. United States (RIDEM)*, the First Circuit reviewed a nonfinal agency action outside of the APA for constitutionality because no other remedy was available.¹⁰⁹ It followed *Dart* and *Reich* in holding that "[t]he basic premise . . . is that, even after the . . . [APA] some residuum of power remains with the district court to review agency action that is ultra vires."¹¹⁰ In 2016, the Sixth Circuit allowed a claim against the TVA, despite its exclusion from the APA's "agency" definition, explaining that "[f]ar from displacing judicial review that occurs outside of the APA regime—including review of agency action under the general federal-question statute—the APA expressly acknowledges that this review survives."¹¹¹ The Ninth Circuit took comparable stances in *Sierra Club v. Trump* and *Hawaii v. Trump*.¹¹² And the Seventh¹¹³ and Eighth¹¹⁴ Circuits have implicitly recognized the implied equitable action as part of a comprehensive remedial structure.

Following the growth of the administrative state and the enactment of the APA, courts had to grapple with how the preexisting common law review doctrines fit in with the new statutory regime. *Leedom* confronted the question head-on, using the implied equitable action to uphold the remedial imperative, and the circuit courts—led by the D.C. Circuit—established a nonstatutory review doctrine in response. But despite *Leedom*

109. See *R.I. Dep't of Env't Mgmt. v. United States*, 304 F.3d 31, 41–43 (1st Cir. 2002); *infra* notes 232–234 and accompanying text. It held that such an action "finds its jurisdictional toehold in the general grant of federal-question jurisdiction." *Id.* at 42.

110. *Id.*

111. See *Duncan v. Muzyn*, 833 F.3d 567, 575–79 (6th Cir. 2016).

112. See *Sierra Club v. Trump*, 963 F.3d 874, 893 (9th Cir. 2020) ("[T]he APA is not to be construed as an exclusive remedy. Thus, the APA does not displace all constitutional and equitable causes of action."), vacated and remanded sub. nom. *Biden v. Sierra Club*, No. 20-138, 2021 WL 2742775 (U.S. July 2, 2021) (mem.); *Hawaii v. Trump*, 878 F.3d 662, 682 (9th Cir. 2017) ("This cause of action, which exists outside of the APA, allows courts to review *ultra vires* actions by the President that go beyond the scope of the President's statutory authority."), rev'd and remanded, 138 S. Ct. 2392 (2018); see also *E.V. v. Robinson*, 906 F.3d 1082, 1090–96 (9th Cir. 2018) (discussing the ultra vires right of action that exists outside of the APA and distinguishing between a common law and statutory waiver of sovereign immunity); *infra* notes 147–155 and accompanying text.

113. See *Blagojevich v. Gates*, 519 F.3d 370, 371–72 (7th Cir. 2008) (holding that pleading a non-APA right of action did not sabotage the plaintiffs' case, even where an APA action may have been available); see also *Home Builders Ass'n of Greater Chi. v. U.S. Army Corps of Eng'rs*, 335 F.3d 607, 618 (7th Cir. 2003) (denying APA review for a nonfinal action but explaining that if it were ultra vires authority, the outcome would have been different—thus gesturing to a nonstatutory claim).

114. See *Key Med. Supply, Inc. v. Burwell*, 764 F.3d 955, 962–64 (8th Cir. 2014) (explaining that, in the absence of an ultra vires claim, a statutory bar to APA review applied and thus suggesting that there exists an implied equitable claim that, if applicable, would be exempt from APA requirements).

remaining good law, the circuit courts may have run ahead of their charge. It is not clear from the Supreme Court's jurisprudence whether the implied equitable action remains available and free from the APA's restrictions, and thus the future of the implied action, and its remedial and structural aims,¹¹⁵ appears unstable.

II. REEXAMINING THE IMPLIED EQUITABLE ACTION IN A STATUTE-DOMINATED LANDSCAPE

The D.C. Circuit's more permissive approach to implied equitable actions in the wake of the APA did not go uncontested. Scholars have quarreled over the APA's original intent and the meaning of its inconclusive legislative history.¹¹⁶ Professor Nicholas Bagley has challenged the presumption of judicial review, rejecting that the principle is reflected in the APA.¹¹⁷ Professor Duffy has also expressed skepticism of the availability of nonstatutory review—arguing that it is foreclosed where a statutory remedy is available.¹¹⁸

A closer look at the Court's jurisprudence on other implied rights of action lends support to this narrower view. In *Armstrong v. Exceptional Child Center, Inc.*, the Court recognized that implied equitable rights of action exist but explained that they can be precluded by implied or express statutory provisions.¹¹⁹ Similarly, the lines of doctrine set forth in *Alexander v. Sandoval*¹²⁰ and *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*¹²¹ have constrained judge-made rights of action, thus sitting in tension with the *Leedom/Reich* approach. Nonetheless, the unique characteristics of the APA limit the applicability of these trends to the implied equitable action debate. Given the origins of the implied action and the legislative intent of the APA, statutory restrictions should not be superimposed on nonstatutory actions outside the scope of the APA. The implied equitable action remains available to fill a gap otherwise left in administrative review doctrine.¹²²

115. The implied action can both offer a meaningful remedy and keep the executive branch in check. Cf. Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 Harv. L. Rev. 1731, 1787–88 (1991) (describing the two functions of constitutional remedies as redressing individual injury (remedial) and promoting the rule of law (structural)).

116. See supra notes 65–66 and accompanying text. Professor Gillian Metzger points out that the legislative history has been manipulated by both those arguing for broader interpretations and those taking a narrower approach. See Metzger, *Embracing Administrative Common Law*, supra note 40, at 1349.

117. See Nicholas Bagley, *The Puzzling Presumption of Reviewability*, 127 Harv. L. Rev. 1285, 1287–88 (2014).

118. See Duffy, supra note 35, at 152.

119. 575 U.S. 320, 328–29 (2015).

120. 532 U.S. 275 (2001).

121. 403 U.S. 388 (1971).

122. Several authors have creatively formulated this “gap.” See, e.g., Jacob E. Gersen, *Administrative Law's Shadow*, 88 Geo. Wash. L. Rev. 1071, 1072 (2020) (“Gaps within the

Section II.A looks at the dimensions of the implied right of action to illustrate the implications of allowing or foreclosing a non-APA claim. Section II.B then evaluates where the Supreme Court currently stands with respect to the implied equitable action and how other courts have interpreted this in recent litigation. Finally, section II.C examines the implied rights of action doctrines in other contexts and their implications for APA exclusivity.

A. *The Implied Equitable Action as Distinct From the APA*

Before evaluating the Court's treatment of the implied equitable action for actions exceeding statutory authority, it is helpful to examine the dimensions of this doctrine in more detail. Section I.B.1 identifies several restrictions on exercising the APA right of action: commitment to agency discretion, the action requirement, statutory preclusion from judicial review, finality, the "agency" definition, and the zone of interests test. To the extent that each of these differs from common law restrictions, the implied equitable right of action provides a meaningful form of judicial review beyond the APA (as only common law, not statutory, requirements would apply).

First, a commitment to agency discretion or a lack of agency action would also preclude a successful implied equitable action at common law.¹²³ A challenge to agency action that is truly within the agency's statutory authority would necessarily fail ultra vires review.¹²⁴ Whether it fails at the outset because of nonjusticiability¹²⁵ or because the plaintiffs don't have a right of action, the outcome is the same. Similarly, the discrete action requirement under the APA applies to an implied equitable claim. The Court has required an act or a specific failure to act—as opposed to general inactivity, negligence, or underperformance—for a successful APA suit.¹²⁶ Likewise, without a concrete violation of a clear statutory provision, any implied ultra vires review will surely fail.

standard administrative law domain . . . are regularly . . . filled by federal courts."); Adrian Vermeule, *Our Schmittian Administrative Law*, 122 Harv. L. Rev. 1095, 1096 (2009) ("Legal black holes arise when statutes or legal rules 'either explicitly exempt[] the executive from the requirements of the rule of law or explicitly exclude[] judicial review of executive action.'" (quoting David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* 3 (2006))).

123. See 5 U.S.C. § 701(a)(2) (2018).

124. See, e.g., *Harmon v. Brucker*, 355 U.S. 579, 581–82 (1958). Determining whether judicial review is proper in a case sometimes requires exercising review—i.e., interpreting whether the statute commits the issue to agency discretion. If it is truly committed to an agency's discretion, a court cannot intervene. See *id.*

125. If the issue were committed to agency discretion, it might be a political question. See generally *Baker v. Carr*, 369 U.S. 186 (1962) (establishing the political question doctrine); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (distinguishing between individual rights secured by executive duties and other actions committed to executive discretion).

126. See *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 61–65 (2004) (rejecting APA claims against an agency for failure to implement its plans adopted pursuant to a statutory

For the other restrictions, however, there may be some daylight between the statutory and common law formulations. Presumably, the NLRA in *Leedom* might have foreclosed judicial review under the APA.¹²⁷ But the Court held that this statutory preclusion of review did not eliminate the suit in equity; if anything, Congress only prevented one statute (the APA) from overriding others.¹²⁸ Moreover, *Leedom* suggests there may be a distinction between the APA finality requirement and the common law ripeness inquiry, since the NLRB's action was nonfinal yet the Court granted review.¹²⁹ Issues thus may be at an appropriate stage for review, though still preliminary in the agency's course of activities.¹³⁰

The "agency" definition also differentiates the APA from common law. Unlike APA review, the judge-made equitable action could provide relief against a nonagency federal actor: the President, exempt quasi-agencies, and public-private institutions.¹³¹ For instance, the USPS,

directive since it did not constitute a discrete, ministerial failing subject to judicial compulsion under 5 U.S.C. § 551(13)); *supra* note 54.

127. See *Leedom v. Kyne*, 358 U.S. 184, 187–88 (1958). The statutory restrictions on review may have invoked § 701(a)(1). As the dissent explained, "Congress was acutely aware of . . . the predecessor [statute] . . . , which provided that . . . certifications by the Board could be brought directly to the courts for review. Such direct review . . . was specifically eliminated in the Wagner Act." *Id.* at 191–92 (Brennan, J., dissenting).

128. See *id.* at 188–91 (majority opinion); *supra* note 73. In the context of nonstatutory review, according to *MCorp*, implied statutory preclusion would not necessarily foreclose the implied equitable action. See *Bd. of Governors of the Fed. Rsv. Sys. v. MCorp Fin., Inc.*, 502 U.S. 32, 44 (1991) (distinguishing between *Leedom*, where the statute implied preclusion of review, and the instant case, where it was expressly precluded, therefore barring the implied equitable action).

129. See *Leedom*, 358 U.S. at 187. The modern test for APA finality requires that the action "mark the 'consummation' of the agency's decisionmaking process . . . [a]nd . . . be one by which 'rights or obligations have been determined.'" *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (first quoting *Chi. & S. Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103, 113 (1948); and then quoting *Port of Bos. Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970)). Typically, the ripeness inquiry involves evaluating "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Lab'ys v. Gardner*, 387 U.S. 136, 149 (1967). For a discussion of how APA finality and other APA threshold requirements resemble, but are not identical to, ripeness, see *Duffy*, *supra* note 35, at 175–81; see also *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891–93 (1990) (suggesting that the land withdrawal program did not constitute final agency action and therefore was not ripe for review). If *Leedom* is dismissed as an outlier, common law ripeness may be better conceived as coextensive with APA finality. See *supra* note 72.

130. Finality was also an issue in *Puerto Rico v. United States*, 490 F.3d 50, 69–71 (1st Cir. 2007). The court, though, exercised "hypothetical jurisdiction"—it assumed the availability of a statutory right of action—because the merits issue was more straightforward than the question of the statutory right of action. *Id.* at 70. The court differentiated hypothetical statutory jurisdiction from hypothetical Article III jurisdiction, which was barred in *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94 (1998). See *id.*

131. See *Gersen*, *supra* note 122, at 1075–78 (discussing entities targeted by review outside of the APA).

TVARS, and Amtrak are exempt from APA review.¹³² Exempt agencies are still subject to constitutional constraints,¹³³ and some may have their own statutory review provisions,¹³⁴ but where these are narrower or unavailable, there may remain a gap that the implied equitable action could fill.

Similarly, the zone of interests test may operate differently under common law. The zone of interests test for the APA is typically described in statutory terms, suggesting it might not apply to an implied equitable action.¹³⁵ But in fact the inquiry predated the APA, and the Court simply read “aggrieved by agency action”¹³⁶ to incorporate the common law prudential standing requirement.¹³⁷ Therefore, it is reasonable that an implied equitable action would also be subject to an examination of the relationship between the plaintiffs’ claims and the interests of the statute purportedly violated.¹³⁸

The stringency of the common law inquiry, though, is not clear. If the common law inquiry is less searching than the APA’s, the implied equitable action would allow for a broader class of plaintiffs to sue for violations of statutory authority than would the APA alone—eliciting the powerful critique of the implied equitable action as an APA runaround.¹³⁹ The Court, however, has described the zone of interests test for the APA as extremely lenient (requiring that the plaintiffs be only “arguably” within

132. See *id.* at 1076, 1082–96; see also *Duncan v. Muzyn*, 833 F.3d 567, 575 (6th Cir. 2016) (explaining that the TVARS is exempt from APA review).

133. See, e.g., *Lebron v. Nat’l R.R. Passenger Corp.*, 513 U.S. 374, 399–400 (1995) (holding that Amtrak is a state actor for purposes of the First Amendment).

134. See, e.g., 39 U.S.C. § 404a(c) (2018) (establishing a narrow review mechanism for the USPS).

135. See *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 224–25 (2012) (“This Court has long held that a person suing under the APA must satisfy not only Article III’s standing requirements, but an additional test: The interest he asserts must be ‘arguably within the zone of interests to be protected or regulated by the statute’ that he says was violated.” (quoting *Ass’n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970))); see also *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 127 (2014) (explaining that “[w]hether a plaintiff comes within the ‘zone of interests’ is an issue that requires us to determine, using traditional tools of statutory interpretation, whether a *legislatively conferred* cause of action encompasses a particular plaintiff’s claim” (emphasis added) (internal quotation marks omitted)).

136. 5 U.S.C. § 702 (2018).

137. See *Lexmark*, 572 U.S. at 130 n.5 (explaining the origins of the zone of interests test as a common law rule); *Ass’n of Data Processing Serv. Orgs.*, 397 U.S. at 153 (applying the zone of interests test to the APA).

138. Some judges have even framed the zone of interests test as a version of the right of action requirement. It thus provides courts with another way of deciding that an implied equitable claim doesn’t exist in a given case. See *infra* notes 155–157 and accompanying text.

139. See *infra* notes 155, 217 and accompanying text. Enabling a broader class of plaintiffs to sue, however, may be normatively desirable, especially in certain contexts—like appropriations—where the zone of interests test poses a significant barrier to judicial review. See Gillian E. Metzger, *Taking Appropriations Seriously*, 121 *Colum. L. Rev.* 1075, 1122 (2021) (“[T]he zone of interests test can prove more challenging . . . in the appropriations context . . .”).

the zone of interests protected by the statute),¹⁴⁰ making it likely that the APA version would be at least equally favorable to plaintiffs.

Finally, apart from the restrictions in the APA, there could be a difference in an APA and common law right of action with respect to the standard of review. In an implied equitable action, an injunction is awarded where a clear statutory mandate is plainly violated.¹⁴¹ Under the APA, courts will be similarly deferential to the executive branch, reflecting the APA's origins as a codification of the common law.¹⁴² Nonetheless, some plaintiffs may perceive an unspecified advantage in the implied equitable standard as opposed to the APA, as a few have pursued this murkier right of action where the more predictable statutory claim was available.¹⁴³

This poses a corollary question: If the implied equitable action does in fact exist, but an APA action is applicable in a given case, is the implied action then foreclosed? General principles of equity and the Court's limitation of the implied right of action both seem to indicate APA primacy, although this too remains unresolved.¹⁴⁴ In short, where the requirements to bring an APA action have been interpreted to diverge from its common law origins, the implied right of action meaningfully differs and could offer plaintiffs a remedy otherwise unavailable.

B. *The Supreme Court's Silence and Recent Litigation*

The Court's unwillingness to address the availability of an implied equitable action for actions that are ultra vires statutory authority suggests the doctrine may not be as simple as *Leedom* and *Reich* suggest. In *Dalton*, the Court assumed for the sake of argument the availability of an implied equitable action outside of the APA.¹⁴⁵ In 2010, the Court in *Free Enterprise Fund v. Public Co. Accounting Oversight Board* assumed an equitable power to review a constitutional claim, but it gave no indication as to the

140. *Match-E-Be-Nash-She-Wish*, 567 U.S. at 224–35; *infra* note 247 and accompanying text.

141. See *Leedom v. Kyne*, 358 U.S. 184, 188–89 (1958) (requiring a “clear and mandatory” statutory prohibition and action constituting a “[p]lain[] . . . attempted exercise of power that had been specifically withheld”); see also *DCH Reg'l Med. Ctr. v. Azar*, 925 F.3d 503, 509 (D.C. Cir. 2019) (“[T]he agency plainly acts in excess of its delegated powers and contrary to a specific prohibition in the statute that is clear and mandatory.”). See generally Driesen, *supra* note 92 (discussing standards of review for executive orders).

142. Cf. *Aid Ass'n for Lutherans v. U.S. Postal Serv.*, 321 F.3d 1166, 1173–75 (D.C. Cir. 2003) (employing *Chevron*, which is also a standard under the APA, for an implied ultra vires claim).

143. See, e.g., *Sierra Club v. Trump*, 977 F.3d 853, 897 n.6 (9th Cir. 2020) (Collins, J., dissenting) (pointing out that the plaintiffs pleaded the implied equitable claim first and only pleaded the APA claim in the alternative), vacated and remanded sub. nom. *Biden v. Sierra Club*, No. 20-685, 2021 WL 4507558 (U.S. Oct. 4, 2021) (mem.); *Puerto Rico v. United States*, 490 F.3d 50, 60 (1st Cir. 2007) (“We recognize that nonstatutory review might have allowed Puerto Rico to obtain a more favorable standard of review and to circumvent certain of the APA's procedural requirements.”).

144. See *supra* notes 90–91; *infra* note 154 and accompanying text.

145. See *supra* notes 82–87 and accompanying text.

availability of an implied equitable claim for review of statutory violations.¹⁴⁶

In 2018, the Court again passed on an opportunity for clarification. In *Trump v. Hawaii*, the respondents argued that an implied right of action was available to review the President's authority within the Immigration and Nationality Act to impose a travel ban.¹⁴⁷ They relied on the presumption of reviewability; the APA, they suggested, could not be interpreted as exclusive where the plaintiffs would have no other path to relief.¹⁴⁸ In response, the government invoked *Armstrong*, arguing that conferring an implied equitable action would impermissibly sidestep the APA's "express and implied statutory limitations" on judicial review.¹⁴⁹ The Ninth Circuit had concluded that the APA applied (insofar as to review implementation by the President's subordinates), as did an equitable action in the vein of *Reich*.¹⁵⁰ When the case reached the Supreme Court, however, the majority assumed reviewability without further explanation.¹⁵¹

In *Trump v. Sierra Club*, the Court evaded once more.¹⁵² The Ninth Circuit had upheld a preliminary injunction enjoining the executive transfer of funds for border wall construction, holding that the plaintiffs had a cognizable right of action under the APA and an implied equitable action for their constitutional violations.¹⁵³ It recognized that only the APA or the implied equitable claim would be available at a time, but the existence of

146. See *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 489 (2010). In *Armstrong*, Justice Sonia Sotomayor dissented, arguing that an equitable right of action should not be foreclosed, given the Court's prior recognition. See *Armstrong v. Exceptional Child Ctr.*, 575 U.S. 320, 337–38 (2015) (Sotomayor, J., dissenting). She cited *Free Enterprise* as an example where the Court afforded an implied right of action for unconstitutional official acts. *Id.* at 338.

147. See Brief for Respondents at 26, *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (No. 17-965), 2018 WL 1468304 [hereinafter *Trump v. Hawaii*, Respondents]; see also Brief for the Petitioners at 26, *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (No. 17-965), 2018 WL 1050350 [hereinafter *Trump v. Hawaii*, Petitioners].

148. See *Trump v. Hawaii*, Respondents, *supra* note 147, at 18–19, 25–26; see also Brief for Plaintiffs-Appellees at 14–15, *Hawaii v. Trump*, 878 F.3d 662 (9th Cir. 2017) (No. 17-17168), 2017 WL 5623012.

149. *Trump v. Hawaii*, Petitioners, *supra* note 147, at 26 (quoting *Armstrong*, 575 U.S. at 327); see also *infra* section II.B.2.

150. See *Hawaii v. Trump*, 878 F.3d at 682–83.

151. See *Trump v. Hawaii*, 138 S. Ct. at 2407. The Court mentioned consular nonreviewability but did not explore the government's other claims about the right of action. It concluded: "[W]e may assume without deciding that plaintiffs' statutory claims are reviewable, notwithstanding consular nonreviewability or any other statutory nonreviewability issue, and we proceed on that basis." *Id.*

152. See *Trump v. Sierra Club*, 140 S. Ct. 1, 1 (2019) (mem.).

153. See *Sierra Club v. Trump*, 929 F.3d 670, 697 (9th Cir. 2019) (holding that there was no "clear and convincing evidence" of congressional intent "to foreclose a remedy for a constitutional violation"). Note that the court here primarily considered an implied action for conduct *ultra vires* constitutional, rather than statutory, authority—which has a stronger historical grounding. See *id.*; *supra* note 146 and accompanying text.

both did not cancel them out.¹⁵⁴ The dissent rejected the availability of the implied claim. Although these plaintiffs did not fall into the statutory zone of interests, “the APA [was] the proper vehicle,” and the Court could not “fashion[] an equitable claim to bypass the APA’s limitations.”¹⁵⁵

When the case reached the Supreme Court, a majority granted the stay but offered only a cursory explanation: “[T]he Government has made a sufficient showing . . . that the plaintiffs have no cause of action to obtain review of [statutory] compliance”¹⁵⁶ This seems to validate the point made by the Ninth Circuit dissent—perhaps the APA is an exclusive vehicle for review, or a common law zone of interests test applies to the implied action, even if other APA restrictions do not.¹⁵⁷ Any clearer resolution, though, does not seem to be forthcoming. The Supreme Court summarily vacated the lower court judgments following President Biden’s executive order halting construction of the border wall.¹⁵⁸

Thus, while the Supreme Court has danced around the availability of nonstatutory ultra vires claims, opinions in the lower courts have fostered a lively debate invoking the Court’s other precedents—suggesting that a broad theory of non-APA implied equitable review may be under threat.

154. See *Sierra Club v. Trump*, 929 F.3d at 699. In addressing the corollary question regarding which would take precedence, it postulated that because the APA provides a right of action “only [where] . . . ‘there is no other adequate remedy in a court[.]’ . . . it would therefore seem that their equitable claim to enjoin unconstitutional action would preclude their APA claim to enjoin unconstitutional action.” *Id.* (quoting 5 U.S.C. § 704 (2018)). This seems to be somewhat in tension with the principle that equity follows the law, favoring a statutory remedy. See 27 *American Jurisprudence 2d Equity* §§ 123–124 (1966).

155. See *Sierra Club v. Trump*, 929 F.3d at 712–13 (Smith, J., dissenting) (suggesting that the APA is an exclusive remedy).

156. *Trump v. Sierra Club*, 140 S. Ct. at 1.

157. This is how one Fifth Circuit judge read the opinion. See *El Paso County v. Trump*, 982 F.3d 332, 363 (5th Cir. 2020) (Dennis, J., dissenting).

Following the Supreme Court’s decision, the Ninth Circuit considered a permanent injunction to enjoin the transfer of funds and held that an APA action was available, as was an implied equitable action for ultra vires, unconstitutional conduct. See *Sierra Club v. Trump*, 963 F.3d 874, 879, 887 (9th Cir. 2020), vacated and remanded sub. nom. *Biden v. Sierra Club*, No. 20-138, 2021 WL 2742775 (U.S. July 2, 2021) (mem.). It cited D.C. Circuit case law to establish APA nonexclusivity and Supreme Court precedent for the presumption of judicial review. See *id.* at 891–92. It also held that the zone of interests test did not apply to such a nonstatutory form. See *id.* at 893. Judge Collins dissented: “Even assuming [a non-APA claim for conduct ultra vires *statutory* authority] exists alongside the APA . . . it would be subject to the same zone-of-interests limitations as the . . . APA claims.” *Id.* at 914 (Collins, J., dissenting).

The D.C. District Court faced a similar question on a motion to dismiss in *Center for Biological Diversity v. Trump*, 453 F. Supp. 3d 11, 48 (D.D.C. 2020). The court concluded that the plaintiffs had viable APA and implied equitable claims but doubted that the “[p]laintiffs can bring an equitable claim when a statutory cause of action is available to it.” *Id.* It nonetheless allowed the claim to stand, given the case’s provisional posture. *Id.*

158. See *Biden v. Sierra Club*, No. 20-138, 2021 WL 2742775 (U.S. July 2, 2021) (mem.) (“The judgment is vacated, and the case is remanded to the . . . Ninth Circuit with instructions to direct the District Court to vacate its judgment.”).

C. *Retreat From Implied Rights of Action in Other Contexts*

Government attorneys have employed the Court's implied right of action jurisprudence in their arguments against the availability of an implied equitable claim, demonstrating its pertinence to this question.¹⁵⁹ Over the past several decades, the Court has moved away from purposive statutory interpretation and toward stricter, more textual readings, as well as a narrower view of federal courts' powers to confer rights of action not created by Congress.¹⁶⁰ Applying this implied-rights-of-action jurisprudence suggests that the APA could be read to preclude the implied equitable action; however, careful attention to the APA's sui generis position in administrative law, the history of officer suits, and the potential statutory groundings for the implied right of action¹⁶¹ counsels a more nuanced approach.

1. *Private Rights of Action Implied in Statutes for Statutory Violations.* — With its emphasis on congressional intent as defined by text rather than history or purpose, the Court has become increasingly reluctant to read private rights of action into statutes where not expressly provided.¹⁶² During the 1960s and early 1970s, it was willing to find implied rights of action insofar as they helped effectuate the purpose of the statute,¹⁶³ but the Court soon thereafter developed a more stringent standard. In *Cannon v. University of Chicago*, it held that a plaintiff needed to demonstrate evidence of congressional intent for an implied private right of action.¹⁶⁴

159. See, e.g., Response/Reply Brief for Defendants-Appellants-Cross-Appellees at 14, *Sierra Club v. Trump*, 963 F.3d 874 (Nos. 19-16102, 19-16300, 19-16299, 19-16336), 2019 WL 4722342 (arguing the zone of interests test should apply to any nonstatutory review by suggesting it is an implied statutory limitation, per *Armstrong*); Brief for the Petitioners at 26, *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (No. 17-965), 2018 WL 1050350 (arguing the implied equitable action is foreclosed by implied statutory limitations per *Armstrong*); *infra* note 215.

160. See generally Jonathan R. Siegel, *The Legacy of Justice Scalia and His Textualist Ideal*, 85 *Geo. Wash. L. Rev.* 857 (2017) (detailing the impact of Justice Scalia's textualism on the Court's jurisprudence).

161. The potential statutory bases include the APA, 5 U.S.C. §§ 701–706 (2018); the All Writs Act, 28 U.S.C. § 1651 (2018); and the grant of federal subject matter jurisdiction, *id.* § 1331. See *supra* note 28.

162. See generally Hart & Wechsler, *supra* note 19, at 738–41 (describing this evolution).

163. See *J. I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964) (finding an implied right of action in the Securities Exchange Act for stockholders injured by a merger authorized pursuant to a proxy statement containing false or misleading information), abrogated by *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017). Barring legislative history to the contrary, the Court was eager to imply rights of action. See, e.g., *Allen v. State Bd. of Elections*, 393 U.S. 544, 557 (1969) (holding that section 5 of the Voting Rights Act of 1965 implied a private right of action for judicial enforcement), abrogated by *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017).

164. 441 U.S. 677, 688–709 (1979) (applying a four-factor test from *Cort v. Ash*, 422 U.S. 66, 78 (1975), to find an implied right under Title IX). The Court became increasingly skeptical. See *Touche Ross & Co. v. Redington*, 442 U.S. 560, 578 (1979) (effectively overruling *Borak* and requiring affirmative evidence of congressional intent); see also *Transamerica Mortg. Advisors, Inc. v. Lewis*, 444 U.S. 11, 24 (1979) (same).

Statutory schema were to be logically read as exclusive by default.¹⁶⁵ In *Block v. North Dakota ex rel. Board of University & School Lands*, the Court rejected an implied equitable claim as an alternative to a statutory remedy, which was foreclosed by the statute of limitations.¹⁶⁶ Holding the statutory remedy to be exclusive, it explained incisively, “It would require the suspension of disbelief to ascribe to Congress the design to allow its careful and thorough remedial scheme to be circumvented by artful pleading.”¹⁶⁷

In 2001, the Court more forcefully closed the door on implied private rights of action in *Alexander v. Sandoval*.¹⁶⁸ In denying an implied right of action to enforce the regulations under the Civil Rights Act’s disparate impact provision, Justice Antonin Scalia explained that “the express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others.”¹⁶⁹ Congress creates private rights of action to enforce federal laws, the Court held; federal courts, lacking the power to make common law, do not.¹⁷⁰

If this language is applied to the APA, the statute would appear to preclude an action implied in the court’s equitable powers. Much like the plaintiffs in *Block*, litigants could use an implied action—“artful pleading”—to avoid the APA’s zone of interests test or other threshold requirements—the concern expressed by the dissenters in *California* and *Sierra Club*.¹⁷¹ Moreover, the APA would seem to offer little to the project of standardizing the common law if it did not subsume and streamline the common law ultra vires right of action.¹⁷²

At the same time, however, the APA can be read to ratify the implied right of action. The statute’s legislative history and text indicate an intent to uphold—not eradicate—the common law regime,¹⁷³ and the All Writs

165. See *Transamerica Mortg. Advisors*, 444 U.S. at 19 (“[W]here a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it.”).

166. 461 U.S. 273, 286 (1983).

167. *Id.* at 285 (quoting *Brown v. Gen. Servs. Admin.*, 425 U.S. 820, 833 (1976)). The trend continued into the following decade with *Seminole Tribe v. Florida*, 517 U.S. 44, 74–75 (1996). Though not abrogating the *Ex parte Young* doctrine, the Court held that, where there is an extensive federal regulatory scheme, an implied equitable action could be displaced. See *id.* at 74. It expressed concerns over the futility of remedial legislation if equitable claims could be used to bypass the congressional scheme. See *id.* at 75.

168. 532 U.S. 275, 286–87, 293 (2001).

169. *Id.* at 290.

170. *Id.* at 286–87 (“Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress. . . . ‘Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals.’” (quoting *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 365 (1991), superseded by statute, 28 U.S.C. § 1658(b) (2010), as recognized in *Merck & Co. v. Reynolds*, 559 U.S. 633 (2010) (Scalia, J., concurring in part and concurring in the judgment))).

171. See *supra* notes 155–157, 166–167 and accompanying text.

172. See *supra* note 40.

173. See *supra* notes 56–64 and accompanying text.

Act concurrently authorizes judge-made actions against executive officials.¹⁷⁴ After initial support in the 1980s,¹⁷⁵ the Court repudiated the doctrine of implied ratification.¹⁷⁶ But it has not rejected the idea that Congress could incorporate common law into a new statutory regime,¹⁷⁷ and the APA offers explicit, expansive language to support such a reading.¹⁷⁸

Another distinction is the historical nature of the implied equitable action. The Court's major objection in *Sandoval* was with creating a *new* implied right of action.¹⁷⁹ Where the implied right predated the statute,

174. See *supra* notes 57–61 and accompanying text.

175. In *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 394–95 (1982), the Court permitted an implied right of action for damages, given that the private right was available when Congress amended the statute in 1974. Because Congress did not eliminate the action, the Court explained, the statute impliedly ratified it. See *id.* The Court came to a similar conclusion in *Herman & MacLean v. Huddleston*, 459 U.S. 375, 380, 386–87 (1983), explaining that long recognition of an implied remedy counseled in favor of its continued recognition.

It was around this same period (1976) when Congress made its most significant amendment to the APA. See *supra* notes 77–78 and accompanying text. It did so with awareness of the implied equitable action, see *supra* notes 62–63, 73, and intent to expand, rather than contract, the availability of judicial review. See e.g., H.R. Rep. No. 94-1656, at 8–10 (1976) (describing the amendment's purpose in expanding the availability of equitable relief against unlawful government action by abrogating sovereign immunity); see also, e.g., Sharon R. Kronish, Comment, Sovereign Immunity: A Modern Rationale in Light of the 1976 Amendments to the Administrative Procedure Act, 1981 *Duke L.J.* 116, 136 (“Congress’s purpose in passing the amendments was to make it easier to sue the government for non-monetary, specific relief.”).

176. See *Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 186 (1994) (asserting that “Congress’ failure to overturn a statutory precedent” is not equivalent to “affirmative congressional approval of the [courts’] statutory interpretation” (internal quotation marks omitted) (first quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 175 n.1 (1989), superseded by statute, 42 U.S.C. § 1981 (2007), as recognized in *CBOCS West, Inc. v. Humphries*, 553 U.S. 442 (2008); and then quoting *Johnson v. Transp. Agency* 480 U.S. 616, 672 (1987)); see also *Alexander v. Sandoval*, 532 U.S. 275, 292 (2001) (affirming this holding from *Denver*).

177. In *Sandoval*, Justice Scalia denied the plaintiff’s claim that the implied right of action was “incorporated” into the statute and suggested that the “incorporation” theory is flawed to the extent that it relies on congressional inaction or isolated amendments. See *Sandoval*, 532 U.S. at 291–92. But he did not more broadly foreclose the possibility that Congress could affirmatively incorporate common law into a statute.

178. See 5 U.S.C. §§ 702–704 (2018) (endorsing a broad view of judicial review for any party aggrieved by agency action through “any applicable form of legal action,” including equitable remedies and the prerogative writs—seemingly codifying the common law); *supra* text accompanying notes 44–46. The congressional reenactment of the APA in 1976 also differs from the mode of implied ratification through isolated amendments that Scalia rebuked and instead constitutes a fuller endorsement of administrative common law. See *supra* notes 77–78 and accompanying text.

179. See *Sandoval*, 532 U.S. at 286–87 (explaining that “courts may not *create* [a right of action], no matter how desirable that might be as a policy matter” (emphasis added)). With respect to an implied equitable action outside of the APA today, that right of action need not be created; it already exists—from an era where it *was* common practice for courts to create rights of action.

the Court does not create new common law or flout Congress's remedial scheme—so long as it is not expressly precluded. The implied equitable right of action also has legitimacy by virtue of its historical legacy, dating back to Great Britain and early American cases like *Marbury*,¹⁸⁰ and its presence in precedent like *Leedom* and *McAnnulty*. In *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, the Court denied provisional relief to an unsecured creditor because it was not traditionally available at equity.¹⁸¹ Justice Scalia pointed to history as the determinative factor in determining the scope of the courts' equitable powers.¹⁸² Equity, he explained, is flexible but bound by tradition.¹⁸³ This vindicates implied ultra vires review.

2. *Implied Rights of Action for Federal Preemption.* — Recent Supreme Court decisions have also called into question the implied right of action to enjoin enforcement of preempted state statutes, suggesting an inclination for finding statutory preclusion. In 1983, the Court in *Shaw v. Delta Air Lines, Inc.* suggested that a federal court sitting in equity could enjoin state statutory enforcement on preemption grounds under the Supremacy Clause, although it was not explicit about the source of the right of action.¹⁸⁴

In 2012, the Court visited a similar preemption challenge based on the Supremacy Clause but expressed more concern about undermining congressional intent by considering an implied claim.¹⁸⁵ Because circumstances had changed since the suit was initially filed, the Court remanded to the Ninth Circuit to consider if APA review would now be appropriate.¹⁸⁶ If available, the Court suggested, the statutory APA claim ought to be considered—and it ought to produce the same result as an equitable action implied in the Constitution.¹⁸⁷ Otherwise, the Court forewarned, it would “make superfluous or . . . undermine traditional APA review.”¹⁸⁸ Allowing

180. See *supra* section I.A.

181. 527 U.S. 308, 333 (1999).

182. See *id.* at 318, 322, 329.

183. See *id.* at 322 (“We do not question the proposition that equity is flexible; but in the federal system, at least, that flexibility is confined within the broad boundaries of traditional equitable relief.”). Justice Ruth Bader Ginsburg offered a contrary perspective, viewing equity as a truly flexible jurisdiction which exists to avoid manifestly unjust results. See *id.* at 341 (Ginsburg, J., concurring in part and dissenting in part).

184. 463 U.S. 85, 95, 108 (1983); see also Monaghan, *supra* note 34, at 1825 (discussing the legacy of *Shaw* where federal courts have assumed an implied right of action in the Supremacy Clause); David Sloss, *Constitutional Remedies for Statutory Violations*, 89 *Iowa L. Rev.* 355, 365–66 (2004) (explaining that the Court has not considered statutory rights of action in this context). The action could derive from the equitable tradition rather than the Constitution.

185. See *Douglas v. Indep. Living Ctr. of S. Cal., Inc.*, 565 U.S. 606, 614–16 (2012).

186. See *id.* at 610.

187. See *id.* at 615–16.

188. *Id.* at 615; see also *Seminole Tribe v. Florida*, 517 U.S. 44, 75 (1996) (“If § 2710(d)(3) could be enforced in a suit under *Ex parte Young*, [the statute] would have been superfluous . . .”).

a different outcome to occur under an implied equitable action for officials' ultra vires statutory violations would seem to result in the same problem: The APA would be rendered impotent whenever a plaintiff could plead in equity.

In *Armstrong*, the Court considered more squarely an action implied in equity—rejecting the Constitution as a source for a preemption claim—and sharply cabined its reach.¹⁸⁹ The plaintiffs were seeking to enjoin enforcement of state Medicaid reimbursement rates that violated federal law requirements.¹⁹⁰ The Court described three potential sources for implied claims: a constitutional right, a statutory right, and an implied right at equity.¹⁹¹ It dismissed a potential private right of action in the Medicaid Act and rejected that an implied action existed under the Supremacy Clause.¹⁹² Instead, it acknowledged the “ability to sue to enjoin unconstitutional action by state and federal officers” as “the creation of courts of equity . . . reflect[ing] a long history of judicial review of illegal executive action,” citing to *Ex parte Young*.¹⁹³

But the Medicaid Act, the Court determined, foreclosed the implied right in equity. “The power of federal courts of equity to enjoin unlawful executive action,” Justice Scalia wrote, “is subject to express and implied statutory limitations.”¹⁹⁴ An express provision providing one way to enforce a rule implicitly precludes others.¹⁹⁵ The Court then articulated a two-part test for determining if Congress intended to preclude a traditional equitable claim: first, whether there is an administrative remedy exclusively provided,¹⁹⁶ and second, whether the provision sought to be enforced is judicially unadministrable.¹⁹⁷

As Professors Lisa Manheim and Kathryn A. Watts have explained, *Armstrong* rendered unstable the implied equitable right of action.¹⁹⁸ On one hand, *Armstrong* validates this non-APA review as a “creation of courts

189. See *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 322, 327 (2015).

190. See *id.* at 324.

191. See *id.* at 324–32.

192. See *id.*

193. *Id.* at 327 (citing *Ex parte Young*, 209 U.S. 123, 150–51 (1908)).

194. *Id.* The Court continues: “Congress may displace the equitable relief that is traditionally available to enforce federal law.” *Id.* at 329. This echoes principles articulated in *Transamerica Mortgage Advisors* and *Seminole*. See *supra* notes 165, 167, and 188.

195. *Armstrong*, 575 U.S. at 328 (citing *Alexander v. Sandoval*, 532 U.S. 275, 290 (2001)).

196. See *id.* at 329. As Professor Monaghan points out, the Court has been “increasingly unwilling to grant additional relief in the context of a regulatory funding scheme that has its own significant remedial provisions.” Monaghan, *supra* note 34, at 1824.

197. See *Armstrong*, 575 U.S. at 328–29. In this case, the Medicaid Act provided that the sole remedy for statutory noncompliance is the withholding of Medicaid funds, and the Court deemed the “judgment-laden” statutory standard—requiring that “state plans provid[ing] for payments” are “consistent with efficiency, economy and quality of care”—to be “judicially unadministrable” and better left to agency determination. *Id.* (quoting 42 U.S.C. § 1396(a)(30)(A) (2018)).

198. See Lisa Manheim & Kathryn A. Watts, *Reviewing Presidential Orders*, 86 U. Chi. L. Rev. 1743, 1809 (2019).

of equity,” strengthened by its historical stature.¹⁹⁹ On the other, its readiness to find implied statutory exclusions suggests that the APA may impose restrictions on implied equitable actions so as to swallow them entirely. The Court has thus far considered implied exclusions in substantive statutes—those that define the scope of the agency’s authority.²⁰⁰ But when challenging federal agency action, the APA is the preeminent statutory remedy. Should the APA be read as exclusive, any ultra vires review would be subsumed within its strictures and therefore subject to its section 701, 702, and zone of interests requirements. Suits brought by more “peripheral” plaintiffs, suits against the President, and suits challenging “nonfinal” agency actions would all be futile.

Applying the two-part test from *Armstrong* is not illuminating. First, whether the APA is an exclusively provisioned remedy begs the question. In *Armstrong*, the Court looked at whether there was an express *administrative* remedy—that is, whether Congress had provided recourse through an alternate system, foreclosing *judicial* review.²⁰¹ With regard to the APA, Congress did not foreclose judicial review; on the contrary, it expressly granted it.²⁰² The statute’s text and legislative history suggest Congress did not intend to erect barriers for plaintiffs to bring suit.²⁰³

The Court could, however, rely on the plain text of the APA and its implications to suggest that bringing a claim against an official outside of these requirements would undermine congressional authority.²⁰⁴ Moreover, one could reason that the differences between judicial and administrative recourse would actually more strongly counsel in favor of recognizing an implied action in the courts when only an administrative remedy was expressly provided, as opposed to where the mechanism for judicial review has been already fleshed out.

Still, where a judicial remedy has been provided, as here, it makes little sense to foreclose review under circumstances—at least, suits against the President or quasi-agencies—not contemplated by its scope. In this case, instead of precluding a preexisting right of action, APA restrictions such as the definition of “agency” are better understood as functioning to exempt entities from affirmative requirements like notice and comment.

The question about judicial unadministrability is similarly unhelpful, as it does not translate well to the APA context. For an implied ultra vires action, the provision to be enforced would be the outer bounds of the substantive statute. Naturally, issues of statutory interpretation are judicially administrable. Even if the “provision” is the APA itself, the APA

199. See *Armstrong*, 575 U.S. at 327.

200. See, e.g., *id.* at 327–28 (looking at implied exclusions in the Medicaid statute).

201. See *id.* at 328 (referring to the withholding of Medicaid funds by HHS).

202. See *supra* notes 44–46, 56–64 and accompanying text. It also granted review of administrative action in the All Writs Act. See *supra* notes 58–61 and accompanying text.

203. See *supra* notes 56–64 and accompanying text.

204. See *supra* note 155 and accompanying text; *infra* note 217 and accompanying text.

expressly asks for judicial administration. Thus, while it illustrates the tension inherent in the Court's trend toward reading remedies as exclusive and the persistence of the implied equitable action, *Armstrong* is not easily imported into the APA context.

3. *Implied Rights to Damages for Constitutional Violations.* — The Court's antagonism toward implied actions is most apparent, perhaps, in the context of constitutional claims for damages against federal officials. In *Bivens*, the Court found an implied right of action for damages under the Fourth Amendment for an unreasonable search and seizure.²⁰⁵ But it posed two limitations—where “special factors counsel[] hesitation in the absence of affirmative action by Congress” or where Congress has specified an “equally effective” substitute²⁰⁶—that eventually spelled its demise.

Shortly after *Bivens*, the Court read the “equally effective” remedy limitation more broadly and considered any kind of congressional involvement a “special factor counseling hesitation,” foreclosing nearly all *Bivens* suits.²⁰⁷ In *Wilkie v. Robbins*, the Court concluded that the plaintiff had alternative administrative and judicial remedies, and that, fearing a flood of litigation, the factors weighed against finding a new right of action.²⁰⁸ The Court has since rejected *Bivens* claims outside of the original factual context, and some Justices have called for abandoning the doctrine altogether.²⁰⁹ In *Ziglar v. Abbasi*, the Court heralded separations of powers concerns, warning that, if Congress designed its “authority in a guarded way” or presented an alternative remedial structure, it would be unlikely “that Congress would want the judiciary to interfere.”²¹⁰

In 2020, the Court reiterated its skepticism toward judge-made rights of action, invoking *Erie* and the distinction between federal tribunals and

205. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971).

206. *Id.* at 396–97. The Court, as in many previous cases, emphasized the remedial imperative. See *id.* at 392 (“[W]here federally protected rights have been invaded . . . courts will be alert to adjust their remedies so as to grant the necessary relief.” (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946))).

207. See, e.g., *Bush v. Lucas*, 462 U.S. 367, 389–90 (1983) (holding that a *Bivens* claim did not exist for the First Amendment because the Civil Service Commission regulations provided a remedy); *Chappell v. Wallace*, 462 U.S. 296, 298–303 (1983) (finding that Congress's involvement in the military, and its choice to not provide a remedial scheme, counseled against finding a *Bivens* remedy).

208. 551 U.S. 537, 550, 553, 561 (2007) (“[A] *Bivens* action to redress retaliation against those who resist Government impositions on their property rights would invite claims in every sphere of legitimate governmental action. . . . [A] general *Bivens* cure would be worse than the disease.”).

209. See *Hernandez v. Mesa*, 140 S. Ct. 735, 750 (2020) (Thomas, J., concurring, joined by Gorsuch, J.) (“[I]n my view, the time has come to consider discarding the *Bivens* doctrine altogether.”); *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017) (“[E]xpanding the *Bivens* remedy is now considered a ‘disfavored’ judicial activity.” (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009))).

210. *Ziglar*, 137 S. Ct. at 1858.

common law courts.²¹¹ In denying a *Bivens* action for a cross-border shooting incident, the Court promoted a statutory vision of federal law, requiring clear Congressional intent to go beyond the remedies provided in text.²¹² “In both statutory and constitutional cases, our watchword is caution,” Justice Samuel Alito wrote.²¹³

The Court’s reluctance to recognize judge-made rights of action might seem to threaten the implied equitable action outside of the APA. The APA provides an alternative remedy, and permitting such a contravention of APA requirements could result in a flood of unmeritorious claims (particularly where a plaintiff does not fall into the zone of interests).²¹⁴ The Court could take a similar approach to *Bivens* in recognizing claims only in the limited circumstances previously endorsed, conducting a close comparative analysis to the facts in *Leedom* or *McAnnulty*. But such a paltry nonstatutory review doctrine would likely degrade over time as statutory remedies more fully address needs for reviewability.

The defendants in *Center for Biological Diversity v. Trump*, one of the recent border wall cases, cited to *Ziglar* in making separation of powers arguments against an implied equitable action for ultra vires conduct by the President.²¹⁵ “Any expansion of an equitable remedy against the President,” the government wrote, “would create separation-of-powers problems by usurping ‘the role of Congress in determining the nature and extent of federal-court jurisdiction.’”²¹⁶ Referring to the zone of interests test, it argued that an implied equitable action could not allow a broader

211. See *Hernandez*, 140 S. Ct. at 742; supra note 170 and accompanying text.

212. See *Hernandez*, 140 S. Ct. at 742.

213. *Id.* This skepticism is also apparent in the Court’s refusal to read a right of action against foreign corporations into the Alien Tort Statute (ATS). See *Jesner v. Arab Bank PLC*, 138 S. Ct. 1386, 1406–07 (2018); see also *Nestlé USA, Inc. v. Doe*, 141 S. Ct. 1931, 1937 (2021) (“[C]ourts must refrain from creating a cause of action whenever there is even a single sound reason to defer to Congress. . . . Tellingly, we have never created a cause of action under the ATS. Even without reexamining *Sosa*, our existing precedents prohibit us from creating a cause of action here.” (citing *Hernandez*, 140 S. Ct. at 743; *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004))). Only two Justices joined Justice Clarence Thomas in this part of the opinion. See *id.* at 1934, 1937.

214. These factors were dispositive in *Wilkie*. See *Wilkie v. Robbins*, 551 U.S. 537, 550, 553, 561 (2007); supra notes 207–208 and accompanying text.

215. See Memorandum of Points and Authorities in Support of Defendants’ Motion to Dismiss at 44–45, *Ctr. for Biological Diversity v. Trump*, 453 F. Supp. 3d 11 (D.D.C. 2020) (No. 1:19-cv-00408 (TNM)), 2019 WL 5783601 [hereinafter Memorandum of Points, *Ctr. for Biological Diversity*]; see also supra notes 2, 157.

216. Memorandum of Points, *Ctr. for Biological Diversity*, supra note 215, at 44–45 (quoting *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1858 (2017)). The defendants explained that the unique role of the President requires special reluctance on the part of the Court to create a right of action, as does the uniquely legislative responsibility of providing remedies. *Id.*; see also *Nixon v. Fitzgerald*, 457 U.S. 731, 756 (1982) (citing similar concerns in foreclosing a *Bivens* suit against the President by granting him absolute immunity “for acts within the ‘outer perimeter’ of his official responsibility”).

class of plaintiffs to sue than the APA action, which Congress had explicitly provided.²¹⁷

On the other hand, the *Bivens* line of cases is only tangentially relevant. The remedy of monetary damages differs importantly from injunctions, and Justices distinguish between the two.²¹⁸ While the remedial imperative has not persuaded the Court in the *Bivens* context, it has far greater force in the *McAnnulty* and *Ex parte Young* settings where injunctive relief is necessary to halt unlawful action, preserving the rule of law in protecting citizens from abuses of state power—a fundamental aim of our constitutional scheme.²¹⁹

Moreover, even the separation of powers principles expressed in the *Bivens* line have limited applicability. If reading the APA to authorize the implied action through § 703, Congress has not provided an *alternate*, conflicting remedy—it has granted authority for an additional one. The All Writs Act also seems to expressly confer authority for judge-made remedies against federal officials and speak in tandem with the APA through § 703.²²⁰ Further, the Court’s reservations in *Ziglar* are not implicated. Congress did not create a remedial structure in a “guarded way”;²²¹ on the contrary, it invited judicial intervention and offered a reserve of judicial review where “there is no other adequate remedy in a court.”²²² The Court’s concerns about contravening *Erie* by creating federal common law are similarly inapposite. The implied equitable action for violations of statutory authority predates *Erie*.²²³ Upholding this precedent would not be “fashion[ing] new claims in the way that they could before 1938,”²²⁴ but rather logically recognizing the longstanding administrative common law review doctrine.²²⁵

217. See Defendants’ Supplemental Memorandum Addressing Zone of Interests at 6, *Ctr. for Biological Diversity*, 453 F. Supp. 3d 11 (Nos. 19-CV-00720 (TNM), 19-CV-00408 (TNM)), 2020 WL 881218 (“It would turn . . . separation of powers on its head for courts to allow a larger class of plaintiffs to sue . . .”).

218. As Justice John Marshall Harlan II explained, the crucial question in the *Bivens* context is not whether there exists a right of action, since that is within the Court’s inherent equitable powers to grant, but rather whether *damages* are a remedy that must be authorized by Congress. See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 399–401 (1971) (Harlan, J., concurring).

219. For a discussion of what kinds of remedies are constitutionally required, see Fallon & Meltzer, *supra* note 115, at 1787–88.

220. See 28 U.S.C. § 1651 (2018); *supra* notes 57–61 and accompanying text.

221. *Ziglar*, 137 S. Ct. at 1858.

222. 5 U.S.C. § 704 (2018); see also *supra* notes 57, 76 and accompanying text.

223. See *supra* section I.A. This is in contrast to other administrative judicial review doctrines that could be more suspect. See Metzger, *Embracing Administrative Common Law*, *supra* note 40, at 1342–43.

224. *Hernandez v. Mesa*, 140 S. Ct. 735, 742 (2020).

225. See Duffy, *supra* note 35, at 129–30 (“[In conducting nonstatutory review,] [t]he courts were not fashioning novel rights to judicial review of administrative action nor disregarding the ordinary constraints on federal court power to create common law. Rather, they were applying to administrative officers the same system of equitable remedies generally applicable against all equitable defendants.”).

Despite the Court's antagonism toward implied rights of action, the historical legacy of the officer suit and the unique nature of the APA in codifying rights of action at common law distinguish the implied equitable claim. From a predictive standpoint, some language in *Armstrong*, *Sandoval*, and *Ziglar* might suggest an abandonment of *Leedom* and the implied equitable action, but normatively, such a shift would pose doctrinal difficulties, jurisprudential inconsistencies, and unintended consequences.

III. PRESERVING THE IMPLIED EQUITABLE ACTION AND ADMINISTRATIVE COMMON LAW

This Note has thus far addressed the Supreme Court's historical approach to the implied equitable claim against federal officers for statutory violations, the D.C. Circuit's historically permissive stance, and the Supreme Court's modern implied action jurisprudence as it sits in tension with these approaches. This Part demonstrates how the Court can reconcile this tension in order to preserve a logical reading of the APA and protect the right to judicial review and rule of law values. Where APA review is unavailable, the implied equitable action—though subject to common law restrictions similar to the APA's—should offer a potential last resort to avoid leaving litigants subject to unchecked executive caprice.

Section III.A evaluates the circuit courts' approaches to resolving the incongruency and recommends ongoing, albeit cabined, recognition of the implied right of action. As Section III.B illustrates, attention to the aims of administrative law and proper interpretation of the APA more forcefully counsels this nuanced approach. The availability of an implied action outside of the APA is supported—if not compelled—by a common law approach to judicial review under the APA and the rule of law and remedial values embodied by the administrative law tradition. The Supreme Court's retreat on implied rights of action ultimately is not—and should not be—inconsistent with recognition of a non-APA form of ultra vires review.

A. *Lessons From the Circuits: The Implied Claim as a Last Resort*

A cautious reading of the circuit court stances on the implied equitable action suggests that the action persists but may be foreclosed in instances where the APA claim is available. Given the Supreme Court's silence, the implied equitable review doctrine has been a product of the circuit courts since the early 1990s. The D.C. Circuit has been the most prolific in its vision of an implied equitable review doctrine,²²⁶ and the Ninth Circuit has recently offered keen endorsement.²²⁷ Plaintiffs in these jurisdictions may have a choice between statutory and implied equitable

226. See *supra* section I.C.2.

227. See *supra* notes 147–155 and accompanying text.

actions where both exist, selecting which remedial scheme the court must apply.²²⁸

While some circuits have joined the D.C. and Ninth Circuits insofar as acknowledging the existence of the implied equitable action,²²⁹ several others have not been so clear. Four circuits have not yet seen the kind of arguments brought by the government in *Sierra Club v. Trump* and thus have not had the opportunity to revisit the implied equitable action following *Armstrong* and more recent pronouncements.²³⁰ The Second Circuit has shown skepticism toward the implied equitable action, recently remanding a case for consideration of “whether the APA in any way displaces suits in equity.”²³¹

The First Circuit’s nuanced approach, then, may offer a realistic alternative. Before ultimately granting implied equitable review in *RIDEM*, the court established two threshold requirements, drawing on the Supreme Court’s clarification of *Leedom* in *MCorp Financial*.²³² First, the agency’s action must “wholly deprive the [party] of a meaningful and adequate means of vindicating its . . . rights,”²³³ and second, “Congress must not have clearly intended to preclude review of the agency’s particular determination.”²³⁴ This is not entirely satisfying; the current Supreme Court, after all, does not mind leaving plaintiffs without recourse in the *Armstrong* or *Bivens* contexts.²³⁵ But it positions the implied equitable right of action more firmly as a last resort; where an APA claim is available, it is exclusive. When plaintiffs can vindicate their rights through the statutory mechanism, they cannot opt for review in equity. This reflects both the Supreme Court and other circuit courts’ understandings, including the D.C. Circuit’s more recent formulation, that an implied equitable claim is

228. See *supra* notes 102–104, 153–154 and accompanying text.

229. See *supra* notes 109–114 and accompanying text.

230. This includes the Third, Fourth, Tenth, and Eleventh Circuits. The Fifth Circuit considered a case similar to *Sierra Club v. Trump*, 977 F.3d 853 (9th Cir. 2020), but decided it solely on standing grounds. *El Paso County v. Trump*, 982 F.3d 332, 340, 347 (5th Cir. 2020). Only the dissent discussed the right of action issue. See *id.* at 362 (Dennis, J., dissenting) (reading the Supreme Court’s stay as indicating that an implied equitable action either did not exist or was subject to a zone of interests test that it could not satisfy).

231. See *Fed. Defs. of N.Y., Inc. v. Fed. Bureau of Prisons*, 954 F.3d 118, 132–34 (2d Cir. 2020). The plaintiffs had asserted a Sixth Amendment violation, maintaining that a right of action was available in equity. *Id.* at 132. The court explained that the court’s equitable powers are not well defined, and this may raise complex legal issues with respect to the APA that the district court did not appreciate. See *id.* at 133–34.

232. See *supra* notes 80, 109–110 and accompanying text.

233. *R.I. Dep’t of Env’t Mgmt. v. United States*, 304 F.3d 31, 42 (1st Cir. 2002) (alteration in original) (quoting *Bd. of Governors of the Fed. Rsrv. Sys. v. MCorp. Fin., Inc.*, 502 U.S. 32, 43 (1991)).

234. *Id.* at 42–43 (citing *Bd. of Governors*, 502 U.S. at 43).

235. See *supra* notes 189–197 and accompanying text (discussing the Court’s holding in *Armstrong*); *supra* note 219 and accompanying text.

disfavored but available to avoid leaving plaintiffs with no recourse for violation of their rights, contrary to the purpose of the APA.²³⁶

B. *Interpreting the APA to Preserve an Implied Equitable Right of Action*

Given the indeterminacy of the case law, it is also important to return to the statute itself and consider its place in the field of administrative law. Ultimately, the centrality of common law to its history, purpose, and modern review regimes suggests a narrow but crucial gap-filling role for the implied equitable action.

In the APA literature, two interpretive camps emerge: one favoring a textual, originalist approach and another promoting administrative common law.²³⁷ Both are reflected in modern doctrine, as the Court tends to apply a textualist reading to APA procedural requirements while applying a common law approach to judicial review (resulting in the proliferation of standards named by their origin cases: *Chevron*, *Auer*, etc.).²³⁸ Applying common law requirements to the implied equitable action—but exempting it from statutory restrictions—best reflects the merits of both approaches, promoting the Court’s common law vision of judicial review while recognizing its retreat from expansive judge-made rights of action.

A hypertextualist approach would suggest that APA ultra vires review is exclusive. The previously available implied equitable action was subsumed in 5 U.S.C. § 704. Its broad scope—“final agency action for which there is no other adequate remedy in a court”—took any alternative review mechanisms and brought them within the ambit of the APA. The APA’s requirements (finality, “agency,” etc.) would then apply. Professor Kathryn Kovacs advocates for such a textual orientation.²³⁹ But this strict reading would suggest that any remnant administrative common law doctrines, not expressly codified, would be superseded by the text—

236. See *supra* sections I.C.1–2. *Nyunt v. Chairman* presents the standard for the *Kyne* exception: “The . . . exception applies . . . only where (i) the statutory preclusion of review is implied rather than express . . . ; (ii) there is no alternative procedure for review of the statutory claim; and (iii) the agency plainly acts in excess of its delegated powers and contrary to a [clear and mandatory] specific prohibition in the statute” 589 F.3d 445, 449 (D.C. Cir. 2009) (citations omitted).; see also *supra* note 108.

237. Compare Evan D. Bernick, *Envisioning Administrative Procedure Act Originalism*, 70 *Admin. L. Rev.* 807, 810 (2018) (exploring what an originalist framework might look like), and Kathryn E. Kovacs, *Progressive Textualism in Administrative Law*, 118 *Mich. L. Rev. Online* 134, 141 (2019) [hereinafter Kovacs, *Progressive Textualism*] (promoting a progressive textualist approach to the APA), with Metzger, *Embracing Administrative Common Law*, *supra* note 40, at 1320 (explaining and supporting the administrative common law approach).

238. See Gillian E. Metzger, *The Roberts Court and Administrative Law*, 2019 *Sup. Ct. Rev.* 1, 57 [hereinafter Metzger, *The Roberts Court*].

239. See Kovacs, *Progressive Textualism*, *supra* note 237, at 141 (arguing that the common law approach derives from the misconception that the APA codified common law and that textualism better “effectuates the compromise [it] embodied”); see also Duffy, *supra* note 35, at 130–31 (taking a textual, statutory interpretation approach, in light of his view that the APA displaced common law).

Congress's final word. Provision of a zone of interests test, let alone *Chevron* or *Auer* review, is hardly compatible.²⁴⁰

A common law approach to the APA offers a more flexible reading, one that acknowledges the APA's common law origins and the context and purpose surrounding its enactment.²⁴¹ As a quasi-constitution,²⁴² the APA provides broad contours for judicial review of administrative law and allows for judicial elaboration.²⁴³ Unlike a statute, it is not meant to represent every detail of the law or displace common law.²⁴⁴ Given the vagueness of the APA and the breadth of administrative law, this promotes national uniformity and protects the uniquely federal interests at stake.²⁴⁵

While recognizing the dominance of a common law approach for judicial review doctrines,²⁴⁶ it remains important to respect the statutory text and the legislative decisions reflected therein. Both a common law and textualist approach, in fact, might suggest that an implied equitable action should not serve as a runaround to the common law doctrines codified in the APA. Therefore, requirements that preexisted at common law should apply to the implied action, even though their scopes or formulations may have evolved under the APA.²⁴⁷ The implied equitable action should not, however, be artificially limited by exclusions that the common law did not predict—that is, in the areas that the APA has not purported to regulate.

240. See Metzger, *Embracing Administrative Common Law*, supra note 40, at 1300–02, 1301 n.29 (explaining the tension between a textual approach and the deferential judge-made review doctrines).

241. See Metzger, *The Roberts Court*, supra note 238, at 59 (contending that the text of the APA is vague and amenable to conflicting meanings—thus unsuited for a textual approach and explaining that the Court has “never viewed the APA as overturning administrative common law or its judicial review precedents”).

242. See, e.g., Kovacs, *Progressive Textualism*, supra note 237, at 141 & n.68 (discussing scholars' treatment of the APA as “quasi-constitutional”); Alan B. Morrison, *The Administrative Procedure Act: A Living and Responsive Law*, 72 Va. L. Rev. 253, 253 (1986) (“My thesis is a simple one: the APA is more like a constitution than a statute.”).

243. See Duffy, supra note 35, at 130 (“[The APA] did not spell out every detail of administrative law; Congress intentionally wrote some provisions broadly to provide courts with a measure of flexibility in interpreting the Act.”).

244. See *id.*; cf. Metzger, *Embracing Administrative Common Law*, supra note 40, at 1297 (“[A]dministrative common law's constitutional character—reinforcing constitutional prohibitions on arbitrary governmental action and advancing values of fairness, checked power, and political accountability—counsels against imputing congressional displacement.”).

245. Metzger, *Embracing Administrative Common Law*, supra note 40, at 1297.

246. See Metzger, *The Roberts Court*, supra note 238, at 57 (“[T]he common law approach to the APA has dominated, especially in the area of judicial review.”).

247. A prime example of a test that has evolved under the APA is the zone of interests test, in which the APA inquiry is perhaps more lenient. Compare *Tenn. Elec. Power Co. v. Tenn. Valley Auth.*, 306 U.S. 118, 137–38 (1939) (describing the common law “legal interest” test, requiring invasion of a specific right), with *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970) (holding that a plaintiff need only be “arguably” in a zone of interest).

This distinction becomes clearer when applied to the specific statutory restrictions. By providing a right of action against “agency” actions, it should not be read to foreclose review of nonagency actions, which are left untouched by the statute. A strict, textual application of the “agency action” definition is better suited for the APA’s procedural provisions, like its affirmative notice and comment requirement. Instead, an approach more attuned to common law practice should be applied to the question of judicial review, and thus, claims against presidential actions should be entertained via an implied equitable mechanism.²⁴⁸ Similarly, the law may recognize a distinction between APA finality and common law ripeness.²⁴⁹ The APA does not regulate nonfinal agency actions, and so where a court finds ripeness and standing to be satisfied, it may confer an implied equitable right of action.

In contrast, the § 701 restrictions reflect justiciability principles enshrined in common law.²⁵⁰ Plaintiffs should not be able to state an implied claim where an APA claim would be foreclosed because a statute specifically prohibits review (unless it only prohibits APA review)²⁵¹ or when the activity is within the bounds committed to agency discretion. Nor should it apply to indeterminate failures to act.²⁵²

Moreover, the zone of interests test is a function of common law standing doctrine predating the APA, and some version of it should thus apply to both APA and implied equitable actions for statutory violations.²⁵³ As suggested by Judges Daniel P. Collins and N. Randy Smith in the border wall litigation at the Ninth Circuit, plaintiffs should not be able to circumvent APA exclusion where their interests are entirely divorced from the statute’s purview.²⁵⁴ In the context of an ultra vires claim, however, this

248. If courts do not allow an implied equitable action against the President, it could theoretically insulate certain actions from review. But of course, many statutes themselves contain review provisions, and it is rare that an officer or a department cannot be sued in the President’s stead. See *Manheim & Watts*, supra note 198, at 1818 (“Given that a president so rarely executes his orders personally, almost any presidential action effectively can be enjoined through injunctions against the president’s subordinates.”). Further, the most egregious violations will likely invoke constitutional questions, which could provide an independent right of action—although many still may require one implied in equity. See supra sections II.C.2–3 (describing the equitable characterization of the Supremacy Clause claim and the unpopularity of *Bivens* claims).

249. See supra notes 128–130 and accompanying text.

250. See 5 U.S.C. § 701(a)(1)–(2) (2018) (“This chapter . . . applies, according to the provisions thereof, except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law.”).

251. In *Leedom v. Kyne*, 358 U.S. 184 (1958), the statute did not prohibit judicial review altogether but set out requirements that foreclosed *statutory* review if not satisfied. *Id.* at 190.

252. See supra note 126 and accompanying text.

253. See supra notes 135–140 and accompanying text.

254. See *California v. Trump*, 963 F.3d 926, 962–63, 967 (9th Cir. 2020) (Collins, J., dissenting); *Sierra Club v. Trump*, 963 F.3d 874, 914 (9th Cir. 2020) (Collins, J., dissenting), vacated and remanded sub. nom. *Biden v. Sierra Club*, No. 20-138, 2021 WL 2742775 (U.S. July 2, 2021) (mem.); *Sierra Club v. Trump*, 929 F.3d 670, 715–16 (9th Cir. 2019) (Smith, J., dissenting); supra notes 155–157 and accompanying text.

ought to be the most lenient of inquiries. An abuse of statutory authority could adversely affect the interests of those not even contemplated by the drafters,²⁵⁵ and therefore both within and outside the APA, the zone of interests test for an ultra vires claim ought to be almost a pro forma affirmation that challenged action is the cause of a statutory violation and injury.²⁵⁶ Such an approach would vindicate the common law origins of the APA without abrogating congressional intent expressed through its codification.

When a court does conduct review under an implied equitable action, it is likely that the standard employed will look nearly identical to an APA claim. Given the mutual common law origins and the lack of clarity for the implied equitable standard, courts will likely use APA case law for factual comparisons.²⁵⁷ This should eliminate any advantages to relying on an implied equitable action where APA review is available. And should plaintiffs continue to do so, courts can rely on traditional principles of equity in considering only the APA claim duly afforded by statute.²⁵⁸

The implied equitable action, then, simply recognizes courts' authority to hear claims that are within its equitable jurisdiction, recognized by historical practice, and not foreclosed by any statutory text. Congress enacted the APA in order to authorize and protect the courts' ability to conduct judicial review, not to delimit it.²⁵⁹ Read like a constitution that establishes principles like the availability of judicial review, the APA permits rights of action beyond those expressly identified. The All Writs Act further supports Congress's permissive orientation toward judicial fashioning of relief in response to unlawful executive branch action.²⁶⁰

Unless or until Congress forecloses judicial review of the President, quasi-agencies, public-private institutions, and a category of action defined as nonfinal, fundamental values weigh in favor of recognizing the implied action. Professors Richard H. Fallon, Jr. and Daniel Meltzer describe remedies in our constitutional system as having two functions: a structural one to uphold the rule of law and a remedial one to right the wrongs suffered by plaintiffs.²⁶¹ Both are reflected in the history of the

255. See supra note 105 (discussing *Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794 (D.C. Cir. 1987)).

256. See supra note 138. The plaintiffs in *Sierra Club v. Trump*, for instance, should have had standing for their implied equitable actions.

257. See supra notes 141–143 and accompanying text.

258. This is in contrast with the Ninth Circuit's majority opinion in *Sierra Club v. Trump*, see supra note 154 and accompanying text, and the approach intimated by the D.C. Circuit in *Reich*, see supra notes 102–104 and accompanying text, but is consistent with the court in *Ctr. for Biological Diversity*, see supra note 157, and the approach implied by the D.C. Circuit in *DCH Regional Medical Center and Nyunt*, see supra note 108.

259. See supra notes 56–64 and accompanying text.

260. See supra notes 58–61 and accompanying text.

261. See Fallon & Meltzer, supra note 115, at 1787–88. Their importance may be more pronounced for usurpations of constitutional authority, but because conduct that is ultra

implied equitable action, articulated as early as *Marbury*,²⁶² and apply with equal force today. Although separation of powers arguments can cut in both directions,²⁶³ it is important to shield citizens from unchecked executive caprice.²⁶⁴ It is not difficult to imagine a situation—take the diversion of funding for the border wall, for example—where a plaintiff may want to rapidly seek an injunction against an irreparable, illegal executive move before any implementation has occurred (making it a presidential action only) or before a final signatory has approved (a nonfinal action). Where ultra vires executive branch action interferes with a right, both Congress and the Court have shown recognition of the need to provide plaintiffs with a potential remedy.²⁶⁵

The implied equitable action has value even beyond its practical import. Even if the common law exclusions limit it so as to be almost coextensive with the APA action, the implied equitable claim would represent a commitment to not only remedy legal wrongs but to preserve constraints on executive power, so fundamental to a democratic system. As Professor Jaffe put it: “The availability of judicial review is the necessary condition, psychologically if not logically, of a system of administrative power which purports to be legitimate”²⁶⁶

CONCLUSION

If the Court interpreted the APA hypertextually, so as to require any judicial review of administrative action to satisfy all of its requirements to the letter, it would undermine several longstanding precedents and leave an incomplete, fragmented remedial scheme that would fail to vindicate the rule of law. The uniqueness of the APA—not a constitution nor a traditional statute, but a broad, transsubstantive,²⁶⁷ deeply entrenched²⁶⁸ framework for an entire field of law—suggests that the Court’s antagonism toward implied rights of action in traditional contexts offers only limited

vires statutory authority often has constitutional implications, the structural values referenced by Professors Fallon and Meltzer are also applicable here.

262. See supra note 25 and accompanying text.

263. On the one hand, judicial review can be viewed as usurping legislative power, but on the other, it is preventing usurpation of power by the executive.

264. See Siegel, supra note 24, at 1705 (“The most important lesson . . . from the history of nonstatutory review is the larger one about the role of the judiciary in providing injured plaintiffs with relief from unlawful government action.”); see also Manheim & Watts, supra note 198, at 1798, 1810 (discussing these concerns).

265. The APA and core precedents like *Marbury* and *Leedom* provide obvious examples here. See *Leedom v. Kyne*, 358 U.S. 184, 190 (1958); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

266. Jaffe, supra note 21, at 320.

267. See Metzger, The Roberts Court, supra note 238, at 59 (“[Given] [a]dministrative law’s transsubstantive nature . . . [the] effects of not gap-filling or updating would mean inadequate administrative controls across a wide range of executive branch activities . . .”).

268. See Kovacs, Progressive Textualism, supra note 237, at 137 (describing the APA as “deeply entrenched”).

analogical relevance. It may inform a more tempered approach to a non-APA claim, using the common law doctrines enshrined in the APA to cabin review. But the Court's recent jurisprudence does not pose an existential threat. Rather, it counsels renewed attention toward its scope and renewed appreciation of the unique interpretive challenges of the APA.