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## DELEGATION AND JUDICIAL REVIEW

THOMAS W. MERRILL\*

One of the subthemes in the delegation debate concerns the importance of judicial review. The Supreme Court has often upheld broad delegations to administrative actors and in so doing has pointed out that judicial review is available to safeguard citizens from the abuse of unconstrained government power.<sup>1</sup> Broad delegations of power to executive actors are constitutionally permissible, the Court has suggested, in significant part because courts stand ready to assure citizens that the executive will discharge its discretion in a manner consistent with Congress's mandate and in a fashion that otherwise satisfies the requirements of reasoned decision making.<sup>2</sup>

Administrative law professors have underscored this point. Professor Kenneth Culp Davis, in his inimitable style, took the theme to the utmost extreme. He argued that what is really significant about the nondelegation doctrine is not that Congress must provide an intelligible principle, but that judicial review is available to make sure that administrative agencies follow the principle.<sup>3</sup> What matters is that someone, somewhere, supplies a standard for the exercise of administrative discretion and that the courts can enforce this standard.<sup>4</sup> It does not really matter where the standard comes from. Congress might supply it, but so too might an agency or even a court. The important thing is to have some standard to control discretion, plus judicial review.

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1. See, e.g., *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946); *Yakus v. United States*, 321 U.S. 414, 426 (1944).

2. See, e.g., *Am. Power & Light Co.*, 329 U.S. at 105; *Yakus*, 321 U.S. at 423, 425.

3. See Kenneth Culp Davis, *A New Approach to Delegation*, 36 U. CHI. L. REV. 713, 729 (1969); see also Lisa Schultz Bressman, *Schechter Poultry at the Millennium: A Delegation Doctrine for the Administrative State*, 109 YALE L.J. 1399, 1425–26 (2000).

4. See Davis, *supra* note 3, at 728.

The Court rejected this particular idea in *Whitman v. American Trucking Associations*.<sup>5</sup> Justice Scalia, writing for the Court, dismissed as “internally contradictory” the notion that an agency could cure a nondelegation problem by adopting a self-limiting standard.<sup>6</sup> As he explained: “The very choice of which portion of the power to exercise—that is to say, the prescription of the standard that Congress had omitted—would *itself* be an exercise of the forbidden legislative authority.”<sup>7</sup>

What has been less noticed about *American Trucking* is that the Court, having interred the self-limiting-standards idea, also omitted the ritual bow to judicial review as an important safeguard against abuses of broad delegations. To be sure, the Court reaffirmed that the question whether a statute violates the nondelegation doctrine is for the courts to decide.<sup>8</sup> And the Court engaged in vigorous judicial review of the agency decision that triggered the nondelegation challenge, holding that the agency’s decision was unreasonable.<sup>9</sup> But neither Justice Scalia nor any of the concurring Justices said that the availability of judicial review was itself a relevant element in resolving the delegation challenge.

Which leads to my topic: What is the role of judicial review in determining the constitutionality of broad delegations of power in a world in which the intelligible principle doctrine is, for practical purposes, dead? To make this question concrete, let me describe a petition for certiorari recently denied by the Supreme Court in *County of El Paso v. Napolitano*.<sup>10</sup> The petition was filed in December 2008 by the Yale Law School Supreme Court Clinic, of which I am currently a supervisor. The Court denied certiorari on June 15, 2009,<sup>11</sup> after the conference relisted the petition seven times.<sup>12</sup> As is usual, the Court gave no explanation for the denial.

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5. 531 U.S. 457 (2001).

6. *Id.* at 473.

7. *Id.*

8. *Id.* (“Whether the statute delegates legislative power is a question for the courts, and an agency’s voluntary self-denial has no bearing upon the answer.”).

9. *See id.* at 486.

10. Petition for Writ of Certiorari, *County of El Paso v. Chertoff*, 129 S. Ct. 2789 (2009) (No. 08-751), *cert. denied sub nom.* *County of El Paso v. Napolitano*, 129 S. Ct. 2789 (2009).

11. *County of El Paso*, 129 S. Ct. 2789.

12. Docket Sheet, *County of El Paso*, 129 S. Ct. 2789 (No. 08-751).

The petition challenged an amendment to the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA),<sup>13</sup> which instructs the Secretary of Homeland Security to build a barrier fence along portions of the border between Mexico and the United States to help control illegal entry into the United States.<sup>14</sup> Congress sought to assure that the fence was built as quickly as possible and, in particular, that this multimillion dollar construction project would not become bogged down in litigation. To achieve this objective, Congress amended IIRIRA in 2005.<sup>15</sup> The amended statute, in Section 102(c), delegates authority to the Secretary of Homeland Security to “waive all legal requirements such Secretary, in such Secretary’s sole discretion, determines necessary to ensure expeditious construction of [the fence].”<sup>16</sup> The statute further provides that federal district courts have exclusive jurisdiction to hear “all causes or claims arising from any” waiver decision and that the only cause of action or claim that may be brought is one “alleging a violation of the Constitution of the United States.”<sup>17</sup> The only avenue for appellate review from the district court’s ruling on constitutionality is by petition for certiorari to the Supreme Court.<sup>18</sup> All other claims and appeals are barred. In effect, IIRIRA now effectively gives the Secretary of Homeland Security very broad discretionary authority to declare the construction site a *no-law zone*, based on a finding that the abrogation of laws is “necessary to ensure expeditious construction.”<sup>19</sup>

In April 2008, Secretary of Homeland Security Michael Chertoff issued orders waiving thirty-seven different federal statutes that might apply to the construction of roughly seven hundred miles of fence stretching across four states.<sup>20</sup> The waived federal

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13. Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) (codified as amended at 8 U.S.C. § 1103 note (2006)).

14. *Id.* § 102(b).

15. Pub. L. No. 109-13, § 102, 119 Stat. 302, 306 (2005) (codified as amended at 8 U.S.C. § 1103 note (2006)).

16. IIRIRA § 102(c)(1).

17. *Id.* § 102(c)(2)(A).

18. *Id.* § 102(c)(2)(C).

19. *Id.* § 102(c)(1).

20. Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended, 73 Fed. Reg. 19,078 (Apr. 8, 2008) (waiving 36 federal statutes); Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as

laws include nearly all federal environmental and land use laws as well as the Administrative Procedure Act (APA).<sup>21</sup> Although IIRIRA is not explicit as to whether it confers authority on the Secretary to preempt state and local laws, Secretary Chertoff also “waive[d]” all state or other laws “related to” the waived federal statutes.<sup>22</sup> The orders recited that the Secretary found these waivers “necessary to ensure expeditious construction” of the fence, but offered no further explanation.<sup>23</sup>

Because Section 102(c) does not cut off challenges to the constitutionality of the IIRIRA, an affected party can file an action in federal district court alleging that the statute authorizing these waivers violates the nondelegation doctrine. Given *American Trucking* and the many other decisions upholding extremely broad delegations against nondelegation challenges,<sup>24</sup> however, it would be futile to challenge Section 102(c) solely on this ground. The standard “necessary in order to assure expeditious completion” is just as intelligible as “fair and reasonable,” “requisite to protect the public health,” or any of the other vague standards that the Court has held not to transgress the limits of permissible delegation.

Yet Section 102(c) also denies affected persons any opportunity to seek judicial review of the merits of a waiver decision: The IIRIRA expressly precludes challenges to the waivers on other than constitutional grounds, and for good measure the Secretary’s order also waives the APA.<sup>25</sup> The *County of El Paso* petitioners had no way, for example, to challenge the finding that it was necessary to waive the Eagle Protection Act or the Native American Graves Protection and Repatriation Act. Nor could they contest the Secretary’s interpretation of IIRIRA as authorizing the waiver of state and local laws as well as federal laws. This last feature of the waiver orders might prove especially vexing because the orders did not spell out which state

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Amended, 73 Fed. Reg. 19,077 (Apr. 8, 2008) (waiving 25 statutes, including one not waived in the other order).

21. *Id.* at 19,078.

22. *Id.* at 19,077.

23. *Id.*; see also IIRIRA § 102(c)(1).

24. See, e.g., *Mistretta v. United States*, 488 U.S. 361, 412 (1989) (holding that the Sentencing Reform Act of 1984 was a constitutional delegation of powers).

25. See IIRIRA § 102(c)(1); see also Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended, 73 Fed. Reg. 19,077 (Apr. 8, 2008).

and local laws they purported to preempt. Consequently, any future dispute over whether the orders did or did not preempt particular state laws would evidently be decided unilaterally by the Secretary, because judicial review of such a nonconstitutional issue would be barred.

The primary issue presented in the *County of El Paso* petition, therefore, was whether it is constitutionally permissible to grant broad discretionary authority to an executive officer *and then cut off all avenues of judicial review* that would assure that the executive has exercised this authority in a lawful manner.<sup>26</sup> In other words, *County of El Paso* presented the question whether the availability of judicial review is a necessary condition of permitting broad delegations to executive agencies.

What is the argument for why judicial review should be required, even if courts do not enforce the intelligible principle doctrine with any rigor? There are perfectly good pragmatic arguments for judicial review, of the kind that Professor Davis and other traditional administrative law scholars have offered.<sup>27</sup> Even if Congress delegates power under the most gossamer of standards, such as “necessary” or “fair” or “just and reasonable,” judicial review is still useful as a check on executive discretion. Judicial review requires the agency to give some reason related to the standard Congress has supplied, to act consistently or explain its departure from past courses of conduct in applying the standard, and to respond to plausible objections grounded in the factual or legal assumptions that support its action.

It is hard to see, however, how these salutary checks on executive discretion are constitutionally compelled. IIRIRA is not unconstitutional because judicial review is a good idea. It is constitutionally suspect only if the denial of judicial review violates principles of separation of powers. To make the case that separation of powers requires judicial review, it is necessary to advance a different claim about the constitutionality of delegation in a post-nondelegation world.

The best argument is this: Just because Congress *may* delegate, it does not follow that agencies (or courts for that matter) may act *without a delegation*. The Constitution, in other words, incor-

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26. Petition for Writ of Certiorari, *supra* note 10, at i.

27. See sources cited *supra* note 3.

porates a principle that Congress has the exclusive power to delegate authority to act with the force of law, even if the Constitution does not impose any enforceable limits on the degree of discretion agencies may exercise once there has been a delegation.<sup>28</sup> To put it another way, the executive has no inherent power to act, at least in the domestic sphere. This principle finds support in the famous *Steel Seizure* case<sup>29</sup> and, more recently, in the general repudiation of the Bush Administration's claims to inherent authority to detain and try enemy combatants<sup>30</sup> and to monitor electronic communications between U.S. citizens and foreign parties without congressional authorization.<sup>31</sup>

Assume the Constitution does reflect such an anti-inherency principle. It would then be unconstitutional for an agency to act with the force of law when Congress has not conferred authority on it to do so. *Ultra vires* action by executive agencies, on this view, would be not only unlawful, but also unconstitutional. The agency would be asserting for itself an authority that only Congress can confer. Citizens faced with executive action that exceeds the bounds of any delegation of power, it would follow, have a constitutional right to some form of judicial review that protects them against such an unsanctioned assertion of governmental power. Judicial review of executive action, at least to assure such action is not *ultra vires*, would be compelled by the Constitution.<sup>32</sup>

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28. See Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097 (2004) (elaborating on this argument).

29. *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 587 (1952).

30. See *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (concluding that military commissions established by the executive to try detainees apprehended in Afghanistan were not authorized by appropriate congressional legislation).

31. See *ACLU v. Nat'l Sec. Admin*, 438 F. Supp. 2d 754, 776–79 (E.D. Mich. 2006), *vacated*, 493 F.3d 644 (6th Cir. 2007) (finding the Administration's program of warrantless wiretaps established without congressional authorization violates separation of powers). For a balanced assessment concluding that the Bush Administration went too far in its claims of inherent authority, see STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* 410–12 (2008).

32. An alternative argument in support of a constitutional right of judicial review might be that conferring unreviewable discretion on an executive actor to apply federal law in resolving particular cases or controversies violates Article III, which confers the "judicial power of the United States" on Article III courts. See Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915 (1988). This argument, which was not raised in

There are a number of difficult problems with this *ultra vires*-means-unconstitutional thesis that would have to be overcome before it could prevail. I will highlight four.

First, the Supreme Court has rejected the thesis. The rejection occurred in *Dalton v. Specter*, a 5-4 decision holding that judicial review is not available to challenge a decision to close military facilities under the Defense Base Closure and Realignment Act of 1990.<sup>33</sup> The Court noted that the final decision to close a base lay with the President, and the President was not subject to judicial review under the APA.<sup>34</sup> The Third Circuit had held that review was available under the Constitution because the President allegedly was acting in excess of his statutory authority and, “whenever the President acts in excess of his statutory authority, he also violates the constitutional separation-of-powers doctrine.”<sup>35</sup> In other words, *ultra vires* means unconstitutional. The Court rejected this thesis, finding that “[o]ur cases do not support the proposition that every action by the President, or by another executive official, in excess of his statutory authority is *ipso facto* in violation of the Constitution.”<sup>36</sup>

*Dalton* seems to foreclose the argument that there is a constitutional right of judicial review to challenge final action taken by the President without statutory authority. But the Court’s assertion that the same conclusion follows for action taken “by another executive official” appears to be dictum. The key precedent relied upon by the Court, *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*,<sup>37</sup> focused on the need to preserve presidential discretion in matters involving foreign affairs. The Court’s reliance on *Waterman* suggests that there may be affirmative reasons to disclaim an inherent constitutional right to review presidential action, certainly in matters implicating military and foreign affairs, which would not extend to decisions taken by subordinate executive officers. *Dalton* is also difficult to square with the *Steel Seizure* case. The Court sought

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*County of El Paso*, would encounter many of the same objections as the separation of powers argument, as discussed below.

33. 511 U.S. 462, 468–70 (1994).

34. *Id.* at 469–71.

35. *Id.* at 471 (citing *Specter v. Garrett*, 995 F.2d 404, 408 (3d Cir. 1993)).

36. *Id.* at 472.

37. 333 U.S. 103 (1948).



to distinguish *Steel Seizure* on the ground that the order to nationalize the steel mills was based on a claim of inherent executive power, not delegated statutory authority.<sup>38</sup> But the administration's lawyers in *Steel Seizure* argued vigorously that the seizure of the steel mills *was* authorized by statute,<sup>39</sup> and the Court closely reviewed and rejected this claim before concluding the government was acting without statutory authority.<sup>40</sup> *Steel Seizure* therefore reinforces the understanding that judicial review is vital, certainly as to subordinate executive actors, in identifying executive action that is *ultra vires*.

The second problem is that Congress is not required to provide for judicial review of executive action. The Constitution does not require Congress to create lower federal courts.<sup>41</sup> If Congress does create them, the Constitution does not require that Congress give such courts jurisdiction to hear particular types of claims, such as challenges to executive action.<sup>42</sup> If Congress does create such courts and does permit them to hear challenges to executive action, the Constitution does not prevent Congress from limiting such claims to facial challenges brought within a short time after the executive acts, in effect precluding after-the-fact judicial review of executive action alleged to be *ultra vires*.<sup>43</sup>

One reason Congress is assumed to have this degree of discretion is that *state courts* may be available to hear claims that the executive is acting in an *ultra vires* fashion.<sup>44</sup> If Congress refuses to create a federal court remedy, aggrieved parties can challenge lawless executive action in state court. Historically, for example, citizens could sue federal officers in state court in tort, although recent immunity doctrines appear to eliminate this option.<sup>45</sup> Whatever might happen in other contexts, IIRIRA

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38. *Dalton*, 511 U.S. at 473.

39. *See, e.g.*, 343 U.S. 579, 670–71, 697–98, 702, 704 (Vinson, C.J., dissenting).

40. *Id.* at 585–87 (majority opinion).

41. U.S. CONST. art. III, § 1.

42. *See, e.g.*, *Lockerty v. Phillips*, 319 U.S. 182 (1943); *Sheldon v. Sill*, 49 U.S. (8 How.) 441 (1850).

43. *See Yakus v. United States*, 321 U.S. 414 (1944).

44. *See Henry M. Hart, Jr., The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1363–64, 1401–02 (1953).

45. *See Federal Employees Liability Reform and Tort Compensation (Westfall) Act of 1988*, 28 U.S.C. § 2679 (2006) (eliminating personal tort liability for federal employees acting within the scope of their employment).

eliminates this safety valve. IIRIRA confers *exclusive* jurisdiction on federal courts over any claim arising out of a waiver decision.<sup>46</sup> State court review is thus precluded by statute, as is federal court review on all but constitutional claims. If this provision is within the constitutional authority of Congress, then Congress can deny both federal and state court review, necessarily raising the question whether there is a constitutional right of review at all.

Another possible way to challenge lawless executive action where Congress has precluded review is through simple defiance. Those who think the executive is acting unlawfully can force the government to arrest them, or to bring suit against them, and can raise the *ultra vires* claim in defense against such action. This tactic might work in some contexts where judicial review has been denied as a matter of statute. If the Secretary had waived the federal statute conferring jurisdiction on the Court of Federal Claims to hear takings claims<sup>47</sup> (which he did not, although there would appear to be nothing in IIRIRA to preclude him from doing so), and the Secretary then seized someone's home because it was in the path of the fence, the owner could chain himself in his home and challenge the necessity of the waiver in his trial for obstructing the construction effort.

Nevertheless, it is hard to see how similar acts of civil disobedience would give rise to opportunities to challenge waivers of the Eagle Protection Act or the National Parks Organic Act. Protestors who chain themselves to the gates of nuclear power plants cannot raise the plants' health risks to the public as a defense to their prosecution for trespass.<sup>48</sup> Similarly, it is unlikely that those who chain themselves across the path of the fence would be allowed to raise the peril to bald eagles or national parkland as a defense to their conviction. So IIRIRA suggests that there will not always be a right of review if the Constitution does not create such a right.

The third problem is Congress's long recognized power to make certain kinds of executive action unreviewable. This

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46. IIRIRA, Pub. L. No. 104-208, § 102(c)(2)(A), 110 Stat. 3009-546 (1996) (codified as amended at 8 U.S.C. § 1103 note (2006)).

47. 28 U.S.C. § 1491 (a)(1) (2006) (conferring jurisdiction "to render judgment upon any claim against the United States founded . . . upon the Constitution").

48. *State v. Warshow*, 410 A.2d 1000, 1002 (Vt. 1979).

principle is enshrined in the APA.<sup>49</sup> The paradigm case of unreviewability, according to the Supreme Court, is when there is no law to apply.<sup>50</sup> Note the tension between the classic non-delegation claim and this unreviewability doctrine. The non-delegation doctrine says that Congress must supply an intelligible principle to guide executive action, in part to provide a basis for meaningful judicial review; the unreviewability doctrine says that if Congress supplies no principle at all the action is unreviewable. Recall that IIRIRA allows the Secretary to waive any law “in [his] sole discretion.”<sup>51</sup> Why is this not an express preclusion of review or, at the least, an implied preclusion based on the commitment of the waiver decision to the Secretary’s discretion?<sup>52</sup>

The answer to this objection may be that our constitutional form of government gives private rights a privileged status relative to public rights.<sup>53</sup> The classic nondelegation doctrine is implicitly limited to cases in which broad discretionary authority threatens private rights of liberty and property. Prominent nondelegation cases involve importers faced with higher tariffs,<sup>54</sup> manufacturing firms faced with price controls,<sup>55</sup> criminal defendants faced with longer deprivations of their liberty,<sup>56</sup> and so forth. The nondelegation doctrine could more accurately be formulated as saying that Congress must supply an intelligible principle to constrain the discretion of the executive *insofar as it seeks to interfere with private rights*. The unreviewability doctrine, in contrast, is usually encountered when Congress has given broad discretionary authority to the executive in disposing of matters involving public rights. Ex-

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49. See Administrative Procedure Act, 5 U.S.C. § 701(a) (2006) (precluding judicial review if statutes preclude review or if agency action is committed to agency discretion by law).

50. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971).

51. IIRIRA § 102(c)(1).

52. See *Webster v. Doe*, 486 U.S. 592 (1988) (holding unreviewable under the APA a decision by the Director of the CIA, “in his discretion,” to terminate any employee).

53. See, e.g., *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989). See generally Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 14–20 (1983) (discussing the tradition of heightened judicial review where the government impinges on private rights).

54. *Field v. Clark*, 143 U.S. 649 (1892).

55. *Yakus v. United States*, 321 U.S. 414 (1944).

56. *Mistretta v. United States*, 488 U.S. 361 (1989).

amples of this broad discretionary authority include determining how to spend the taxpayers' money<sup>57</sup> and whether to bring enforcement actions.<sup>58</sup>

This private right versus public right distinction undoubtedly carries over to challenges based on claims of *ultra vires* government action. If there is a constitutional right to judicial review when the government is acting outside the scope of its delegated authority, the clearest case would be where the government is interfering with private rights. One could argue the executive also acts unconstitutionally when it exceeds the scope of its delegated authority in a manner that affects public rights. This action would be *ultra vires* as well and hence, by hypothesis, unconstitutional. But such a constitutional violation might well be one that Congress, in its judgment, can make unreviewable.

The *County of El Paso* petition asserted that the Secretary's waiver decisions affected private rights and not merely public rights.<sup>59</sup> The petition noted, for example, that the waivers might override established water rights or might interfere with access to Indian burial grounds.<sup>60</sup> Whether these interests qualify as private rights is unclear. The Court has never settled on a definition of private rights.<sup>61</sup> The district court, in denying a preliminary injunction, found that there was little evidence that the construction of the fence would irreparably harm any of these interests. So even if water rights and access to burial grounds are private rights, they might not have been impaired to a sufficient degree to establish standing to claim a constitutional right of review to protect private rights.<sup>62</sup> Other

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57. *Lincoln v. Vigil*, 508 U.S. 182 (1993) (holding agency allocation of lump sum appropriation unreviewable).

58. *Heckler v. Chaney*, 470 U.S. 821 (1985) (holding decision not to bring enforcement action presumptively unreviewable).

59. Petition for Writ of Certiorari, *supra* note 10, at 19.

60. *Id.* at 21.

61. See *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 69 (1982) ("The distinction between public rights and private rights has not been definitively explained in our precedents. Nor is it necessary to do so in the present cases . . ."). See generally Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 565–93 (2007) (discussing the complexities in the nineteenth century conception of private rights).

62. The government, in its opposition, advanced a standing objection to the claims advanced by the petitioners in *County of El Paso*, even though this had not

affected interests, like saving bald eagles or preserving recreational access to the Rio Grande, are obviously even more problematic grounds on which to assert a constitutional right to judicial review because these interests are more naturally classified as public rights.

The fourth problem is that this argument may threaten to constitutionalize all of administrative law. The problem is generated by the nagging thought that practically any violation of administrative law can be characterized as *ultra vires* action. Take the most humdrum type of claim: that an agency decision is not supported by "substantial evidence." A clever lawyer could reason as follows: The statute establishing the agency requires that its decisions must be supported by substantial evidence; therefore Congress has delegated authority to the agency only to make decisions backed by substantial evidence; this decision is not supported by substantial evidence; thus the agency had no authority to make the decision; therefore it is *ultra vires*; therefore I have a constitutional right to judicial review to advance my substantial evidence claim. This potential collapse of the distinction between constitutional and statutory review seems to have been a motivating factor in the Court's decision in *Dalton v. Specter*.<sup>63</sup>

I am not sure that there is a knock-down answer to this problem. Part of the answer may be an appeal to common sense. There is an intuitive distinction between claims that an agency is acting outside its jurisdiction and claims that an agency made a mistake. Most people, most of the time, can readily agree about the category in which a particular claim falls. There will be borderline cases, but there are always borderline cases, whether the distinction is between tall and short or fat and thin. Yet the difficulty of line drawing does not compel us to give up on these distinctions in despair. One can trust courts

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been raised in the district court. See Brief for the Respondents in Opposition at 8-14, *County of El Paso v. Napolitano*, No. 08-751 (U.S. Mar. 13, 2009).

63. See *Dalton v. Specter*, 511 U.S. 462, 474 (1994). In *Dalton*, the Court reaffirmed its decision in *Franklin v. Massachusetts*, 505 U.S. 788 (1992), which held that actions taken by the President can be reviewed for constitutional violations, even though they cannot be reviewed under the APA. *Dalton* observed: "[I]f every claim alleging that the President exceeded his statutory authority were considered a constitutional claim, the exception identified in *Franklin* would be broadened beyond recognition." 511 U.S. at 474.

not to grant a constitutional right of review to oversee relatively inconsequential claims.

Another part of the answer may be that it will be a rare case that requires constitutionalizing judicial review, because ordinary, garden-variety administrative law will nearly always provide a constitutionally adequate substitute. APA-style judicial review, in the form applied by federal courts today, is undoubtedly a constitutionally adequate form of review to assure that agencies stay within the bounds of their delegated discretion. So the constitutional question will be avoided, in ninety-nine percent of the cases, by applying ordinary statutory review principles. The constitutional review requirement would lurk in the background and would be called upon only in the rare case like *County of El Paso* where Congress has tried to close off review altogether and has left the executive to be the judge of its own cause in a matter that arguably affects private rights. Even if the anti-inherency argument could constitutionalize much of administrative law in theory, the danger is minimal in practice.

In the end, it is likely that the cumulative weight of the problems with recognizing a constitutional right of review proved too much for the Court to take on. IIRIRA was an extreme measure, suggesting the potential need for such a doctrine. But the border fence is nearing completion under the oversight of a new administration that (for now) is less given to extravagant claims of inherent authority than its predecessor. Sometimes important constitutional questions are best left unresolved when the urgency of the problem is likely to expire of its own course. Or so the Court may have concluded in its lengthy deliberations about whether to hear *County of El Paso*.