Placing APA/IQA Jurisprudence into Proper Perspective – Three Possible Prudential Uses of the Separation of Powers Doctrine to Curtail Standing

If it is true that where "a plaintiff has standing Article III places no further restrictions upon the federal courts' ability to infer a cause of action,"[1] then courts presiding over APA/IQA cases must be relying upon other bases for denying judicial review of APA/IQA claims. The work of at least one legal commentator, Professor Heather Elliott, strongly suggests that such other bases may reside in the multiple "separation of powers" functions of standing itself.[2] In addition, to "concrete adversity," "the standing doctrine has two other functions which such courts have arguably relied upon. These include a "pro-democracy" function and an "anti-conscription" function.[3]

i. Concrete Adversity Function

The traditional standing doctrine "case or controversy" or "concrete adversity" function serves to ensure that disputes based on concrete injuries will be resolved, that federal courts' scarce resources are devoted to disputes in which the parties have a sufficient personal concrete stake, and good judicial decisionmaking is assured.[4] It also "serves primarily a formal role: the injury is used to show that the Court's power is properly invoked."[5] Consistent with this role, the U.S. Supreme Court, in *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*,[6] held that, "in the absence of congressional intent, the Judiciary's recognition of an implied private right of action 'necessarily extends its authority to embrace a dispute Congress has not assigned it to resolve."[7] According to the Court, inferring an implied right of action "runs contrary to the established principle that '[t]he jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation . . . .' and conflicts with the authority of Congress under Art. III to set the limits of federal jurisdiction."[8] [9] [10]

Apparently, the *Stoneridge* Court decision continues a line of cases in which the Rehnquist Court had increasingly emphasized, beginning with former Justice Powell's dissent in *Cannon v. University of Chicago*,[11] the importance of congressional clarity in creating private rights.[12] In his dissent in *Cannon*, Justice Powell had "argued that because federal power is limited—that is, each branch of government can exercise only the power that is specifically and affirmatively granted to it—judicial recognition of causes of action risked distorting the constitutional process."[13] The Rehnquist Court's approach, which sought to avoid distortion of the constitutional process, served to "reverse the presumption found in the first implication cases and to place the burden on plaintiffs to show that Congress clearly intended to grant a private right of action in the statute."[14] In an article released during 2008, constitutional lawyer and Federalist Society member, Brian Leske, explained how "[s]everal opinions handed down during the [U.S. Supreme Court's] October 2000 and 2001 Terms [, including *Alexander v. Sandoval*, *Barnes v. Gorman*,[15] and *Gonzaga University v. Doe*[16]] show[ed] that a majority of the Court [had become] hostile to implied private rights of action and [was] unlikely to extend them further."[17]

Indeed, Justice Scalia, in his recent book *Reading Law* identifies as "private-right canon 51" the "presumption *against* implied right of action" (emphasis added).[18] Acknowledging that the Court's prior rulings in *Cort v. Ash* and *Cannon v. University of Chicago* had recognized an implied right of action, he proceeds to set forth the factors it considered in reaching those decisions.

In *Cort v. Ash*, which found a private claim for violations of §10(b) of the Securities Exchange Act, these factors included: 1) "'indication of legislative intent, explicit or implicit,…to create such a remedy;'" 2) "whether the plaintiff is 'one of the class for whose especial benefit the statute was enacted;'" 3) "whether it is *'consistent with* the underlying purposes of the legislative scheme to imply such a remedy'" (emphasis added); and 4) "whether 'the cause of action [is] one traditionally relegated to state law.'"[19]

In *Cannon*, which found a private right of action under Title IX of the Educational Amendments of 1972, the Court relied on the same factors phrased somewhat differently: 1) "whether the statute was enacted for the benefit of a special class of which the plaintiff is a member[, which] is answered by looking to the language of the statute itself;"[20] 2) "whether the legislative history evidenced an intent to create a private right of action;"[21] 3) whether a "private remedy […] implied […] would *frustrate the* underlying purpose of the legislative scheme"[22] (emphasis added); and 4) "whether implying a federal remedy is inappropriate because the subject matter involves an area basically of concern to the States."[23]

Curiously, Justice Scalia identifies the Court's 'factor 3' in *Cannon* as "whether a private remedy would *disturb any* underlying legislative purpose" (emphasis added),[24] which is clearly *not* what the Court had said. It also is contrary to the "ordinary-meaning canon" which, as Justice Scalia has described, provides that "[w]ords are to be understood in their ordinary, everyday meanings – unless the context indicates that they bear a technical sense."[25] This suggests he has massaged the different meanings of the words 'frustrate' and 'disturb' in order to use them interchangeably. The word 'frustrate' means "to block something from being achieved; prevent the success of a plan or effort;"[26] and "to prevent someone or something from succeeding."[27] The word 'disturb' means "to move or change something from its usual position or arrangement;" or "to cause someone to stop what the person is doing, or to interrupt an activity;"[28] or "to interrupt someone and stop them from continuing what they were doing."[29] Although the words 'frustrate' and 'disturb' *can* mean the same thing, as where 'x' stops or prevents 'y' from occurring, they *needn't* mean the same thing, as where 'x' merely interrupts but does not stop or prevent 'y' from occurring. Viewed in this light, while the words 'frustrate' and 'disturb' may potentially overlap, they otherwise can be said to represent different degrees on a continuum, with 'disturb' representing a less severe and/or lasting state of interruption of purpose, and 'frustrate' representing a more severe and/or lasting state of prevention of purpose (e.g., 'frustration' of contractual purpose doctrine).[30] Thus, Justice Scalia's liberal construction of 'factor 3' in *Cannon* is arguably intended to persuade conservative jurists to lower their threshold inquiry, from a finding that an implied remedy would *frustrate the* underlying *overall* purpose of the *entire* legislative scheme to a finding that a private remedy would *disturb any* underlying legislative purpose of that scheme if there is more than one.

Furthermore, Justice Scalia, in his book, also discusses the Court's analysis in *Touche Ross & Co. v. Redington*.[31] He claims that such decision "essentially *repudiated* the approach of *Cannon* and *Cort v. Ash*," (emphasis added)[32] because it had held that the four *Court v. Ash* factors were not entitled to equal weight and instead relied mostly upon the first three factors - "the language and focus of the statute, its history, and its purpose."[33] However, a closer reading of the decision reveals that it indirectly *narrowed* the prior case's holding by reweighting its four factors.

In *Touche Ross*, customers of an insolvent and liquidated brokerage firm subject to the annual financial reporting and recordkeeping requirements of former §17(a) of the Securities Exchange Act of 1934, had not been made whole by the firm's remaining assets and amounts subsequently advanced by the Securities Investor Protection Corporation (SIPC).[34] A court-appointed SIPC liquidation trustee brought suit against the firm's auditor alleging it had improperly audited and certified the brokerage firm's reports and assisted in the concealment of operating losses, and sought damages equal to the shortfall and the amounts it had dispensed to investors.[35] The trustee argued *inter alia* that the discretion the statute vested in the Securities and Exchange Commissioner to impose such requirements "in the public interest or for the protection of investors" effectively provided an implied right of action.[36] The Court rejected the respondent's federal SEA claims, finding that §17(a)'s language was compliance-focused,[37] and thus, prospective rather than retrospective in purpose and intent.[38] It also found that the statute's silence regarding the availability of a private right of action for damages[39] militated against Congress' creation of such a right. The Court based this finding on evidence showing that one or more other provisions within the overall statutory scheme of which §17(a) was a part (e.g., §18(a)) had explicitly granted a private cause of action, and perhaps the exclusive remedy,[40] "against persons, such as accountants, who 'make or cause to be made' materially misleading statements in any reports or other documents filed with the Commission."[41] In addition, the Court also concluded that "the statute [§17(a)] by its terms grant[ed] no private rights to any identifiable class and proscribe[d] no conduct as unlawful."[42]

Moreover, Justice Scalia's book emphasizes how the Court's analysis in *Alexander v. Sandoval* had gone even further than its analysis in *Touche Ross* in focusing on statutory text, strongly suggesting that *it* is now the most heavily weighted of the first three *Cort v. Ash* factors. "Without some discernible basis in the statute, the [*Sandoval*] Court said, a right of action 'does not exist and courts may not create a new one, no matter how desirable that might be as a policy matter, or how compatible with the statute.'"[43] Lastly, Justice Scalia admonishes courts not to "look at large for 'congressional intent'" in legislative history when interpreting a statute,[44] which he considers unreliable, whether in the form of floor speeches or committee reports,[45] precisely because it can be and has been manipulated and distorted for self-serving purposes.[46] "The truth is that '[a]scertaining the 'intention of the legislature'…boils down to finding the meaning of the words used.' If courts do otherwise, they engage in policy-based lawmaking."[47] These are, indisputably, the words of a strict-constructionist.

No doubt, those federal courts which have considered standing issues related to causes of action brought under the APA/IQA (i.e., in the *Salt Institute* cases and the *Family Farm Alliance* case) required plaintiffs to satisfy the concrete injury-in-fact, causation, and redress factors, consistent with the concrete adversity function of the standing doctrine, as interpreted by a conservative-leaning Supreme Court effectively led by Justice Scalia. Given the deficiencies in plaintiffs'

pleadings, however, the jurists deciding these cases were not inclined to infer an implied right of action under the APA/IQA, whether they were ideologically opposed to the IQA or averse to granting Article III standing more generally.

ii. **Pro-Democracy Function**

The "pro-democracy" function "allows the courts to refuse cases better suited to the political process."[48] It sorts cases based on whether "an injury is shared by a large group of people," and often suggests that "such a group can and should take its problem to the legislature or the executive branch, not the courts."[49] In other words, the "pro-democracy function helps assure the "proper—and properly limited—role of the courts in a democratic society."[50] Courts have relied upon this function to "divert […] plaintiffs who assert only 'generalized grievances' […] into the political system."[51] This serves "not only to save courts from being overrun, but also to preserve such general questions for the attention of Congress and the President."[52] Consequently, "if a plaintiff suffers an injury that is 'undifferentiated and common to all members of the public,' the plaintiff has a 'generalized grievance' that must be pursued by political, rather than judicial, means."[53]

To prevent the courts from being overrun,[54] the modern U.S. Supreme Court "has rejected a general federal concept of a pure 'private attorney general,' who pursues lawbreakers through the courts solely from an interest in seeing the law obeyed,"[55] which Congress has encouraged in many environmental and consumer safety statutes by authorizing the recovery of attorney's fees.[56] In the Court's view, "[s]uch a person is indistinguishable from any of thousands or millions of other people who wish to see the law obeyed; rather than sue, those people should band together and ensure that their democratically elected representatives see that the law is enforced."[57] Perhaps, as suggested above, this concern served as partial motivation for Judge Wanger's rulings in each of the delta smelt cases over which he presided, if not also as a primary motivation behind Virginia Eastern Federal District Court Judge Gerald Lee's ruling in *Salt Institute v. Thompson*, which involved informal agency information disseminations untethered to agency rulemakings,

The Court's decision in *FEC v. Akins*,[58] however, has provided an opportunity for a showing of particularized injuries even where the claimant is a member of a large group of aggrieved persons. In *Atkins*, the Court held that "an injury held in common with all voters could nonetheless give rise to standing because the plaintiff suffered that injury concretely *and in a way particular to her*" (emphasis added).[59] And, the Court, in *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., (TOC) Inc.*,[60] confirmed that the type of injury that must be established in environmental cases is "not injury to the environment but injury to the plaintiff."[61] The Court's decision in *Massachusetts v. EPA* provides another example of where the Court afforded a plaintiff the opportunity to show "particularized harm […] even though global warming arguably affects every person on the planet."[62] According to the Court's majority, Massachusetts had demonstrated injury-in-fact "[b]ecause the Commonwealth owns a substantial portion of the state's coastal property [and…] ha[d] alleged a particularized injury in its capacity as a landowner. . . . Remediation costs alone, petitioners allege, could run well into the hundreds of millions of dollars."[63]

A similar argument can be employed to distinguish the particularized economic harm suffered by regulated entities and entities operating along supply-chains that serve them, from all other downstream third parties alleging more general grievances as the result of EPA IQA noncompliance violations. In other words, regulated entities and entities operating along such supply chains can argue in an action brought under the APA/IQA that they do not serve as private attorney generals in the public interest in the same way that environmental or civil rights groups do when empowered by statutory or implied citizen suit provisions. Consequently, if such plaintiffs can show they have in fact sustained particularized injuries, "it is irrelevant […] whether many others share that same injury."[64]

At another level, Professor Elliott has argued that federal courts have often invoked the pro-democracy function of separation of powers to prevent the distortion of politics. Thus, courts have granted standing to "assur[e] that those who are marginalized [i.e., the minority] are not trampled on by the majority."[65] However, since we live in a republic rather than a democracy, there are instances where the minority can undermine the rights of the majority which the requirement of standing can be used to correct. For example, if the congressional representatives (i.e. legislature) of a political majority enact a law that executive agencies "managed" by the President decide not to enforce in favor of a political minority, the grant of standing to permit lawsuits to proceed forward provides "*accountability: if an agency knows it can be sued, it has an incentive not to violate the law. The lawsuit is a brake on runaway agencies and thus serves separation-of-powers functions* (especially important functions, given the uneasy situation of agencies within the federal structure" (emphasis added).[66] This commentator also has argued that Congress may authorize citizen suits to ensure against agency capture, and to such extent, may prevent the Executive from either usurping Congress' authority or unduly expanding its own.[67] While this commentator has focused on regulatory capture (i.e., agencies being held captive to regulated entities), executive agencies are also susceptible to "capture" by other than economic interests. For example, civil society interest groups may seek to embed their own economic, legal, or political positions and preferences at the expense of competing interests through the enactment, repeal, or maintenance of a given regulation—a phenomenon known as "interest group regulatory capture."[68]

Thus, by granting judicial review of APA actions challenging the IQA compliance of agency disseminations of HISAs supporting major rulemakings, it would be possible, in service to political distortion and separation of powers concerns, to discern whether and to what extent agency science and regulatory determinations had actually been influenced by public interest groups on political grounds, and consequently, to hold those agencies accountable therefor. It certainly would be welcome given the rapid expansion of the administrative state during the past six years, growing public interest group regulatory capture, and the current lack of accountability of federal agencies including EPA which have had but little incentive to ensure their compliance with the IQA.

Furthermore, Professor Elliott has argued that courts rarely have denied standing to economic entities suing as regulated entities opposing the exercise of government regulation. In her view, "such entities [aside from small businesses,] are often the least deserving of democratic solicitude from the courts, for they arguably have the most access to the corridors of power."[69] She has found that the U.S. Supreme Court "has repeatedly […] ma[de] it easy for regulated

entities to get standing, and hard for everyone else [which…] has [had] the effect of exacerbating existing inequalities in the democratic system."[70] Were jurists to subscribe to this way of thinking, it would not be difficult to see why they might deny standing to a regulated entity that has otherwise failed to meet the standards of concrete adverseness.

Perhaps, Judge Wilkens' decision to deny standing under the APA/IQA in *Harkonen v. Department of Justice* had been so motivated. After all, plaintiff Harkonen had been a physician with political access and a former Chief Executive Officer of InterMune, Inc., a regulated biotechnology company working on innovative therapies to address "pulmonology and orphan fibrotic diseases;"[71] he was not a member of a disenfranchised minority. Similarly, it is quite possible that Judge Gerald Lee[72] a member of a racial minority responsible for the *Salt Institute v. Thompson* decision, had harbored similar thoughts when he ruled against the Salt Institute, "a trade association of companies that 'produce and market salt for food and other uses,'" and the Chamber of Commerce of the United States of America, "a business federation which includes [regulated] 'companies that use, market, and/or sell food products containing salt" that are politically well-connected.

iii. **Anti-Conscription Function**

Moreover, Professor Elliott has found that those who employ this function of the separation of powers doctrine include among their ranks U.S. Supreme Court Justice Scalia. A known advocate of a strong executive, he believes that a strong standing doctrine "protect[s] the executive branch against an unholy alliance between Congress and the courts,"[73] and "serves as a brake on Congress' efforts to conscript the courts to oversee executive action."[74]

According to Professor Elliott, various cases show that Justice Scalia is averse to Congress "turn[ing] the courts into 'virtually continuing monitors of the wisdom and soundness of Executive action.'"[75] This legal commentator notes how Justice Scalia is particularly concerned with Congress' enactment of federal statutes that authorize "private attorney general" citizen suits to enforce certain of their provisions, because they "sometimes empower[] 'any person' to sue."[76] By empowering practically any person to sue, he believes these statutes enable a level of citizen intervention capable of disrupting Executive agency and office rulemaking priorities, prosecutorial decisions and other core branch activities.[77] [78]

Justice Scalia's concerns are justified in many instances, including where Congress has used citizen suits to take advantage of an otherwise liberal standing doctrine to avoid "tricky political questions" to increase the likelihood of their members' reelection.[79] As Professor Elliot has noted, "Congress could certainly spell out a general directive for agencies in a statute, and then rely on private plaintiffs to push the agency one way or the other, letting the courts decide whether the agency's implementation worked."[80]

However, by severely restricting the grant of standing to prospective litigants, other jurists and commentators have argued that federal courts run the risk of overly limiting and potentially weakening Congress' legislative powers, while simultaneously strengthening those of the Executive branch. In other words, the standing doctrine can and already has been used to effectively "transfer power into the hands of the Executive at the expense of […] Congress from

which that power originates and emanates."[81] Since Congress is fully capable on its own of deciding to create citizen suits to ensure the enforcement of its laws, it is quite possible that federal courts' "use of standing to defeat that congressional purpose would […] exceed the bounds of the judicial power."[82]

Conservative federal jurists must weigh the merits of recognizing an implied right and cause of action in certain APA challenges of federal agency IQA noncompliance. For example, judges should carefully consider the wisdom of granting judicial review of APA challenges of improperly peer reviewed highly influential scientific assessments federal agencies use to support major rulemakings. These types of challenges should not be characterized as 'private attorney general' suits especially where they are not specifically provided for by statute along with prevailing attorney fees,[83] [84]and the plaintiff (e.g., a regulated party or supplier thereof, as opposed to nongovernmental organization) can show a particularized injury-in-fact (e.g., economic injury arising from GHG emissions regulations triggered by EPA's CAA Section 202(a) Endangerment Findings) apart from a procedural injury (e.g., the denial of an adequate review mechanism allowing such "affected persons" to seek and obtain correction of IQA non-compliant agency disseminated HISAs supporting major regulations), which can be relieved by the relief sought.

It is critical that standing be granted in such cases, assuming all constitutional and prudential prerequisites have been satisfied, because federal agency peer review processes can be utilized by a clever White House already engaged in close management of Executive branch administrative actions to advance and ensure consistency with championed political and policy preferences,[85] [86] [87] and to accrete additional constitutional authority for the President at the expense of separation of powers, political democracy and the rule of law.[88] While the objective of preserving such authority at the hands of a politically frustrated or mischievous Congress may warrant application of a restrictive standing doctrine, this objective must necessarily assume the presence of an honorable and beneficent Chief Executive who is mindful and respectful of his/her constitutional limitations. Such an assumption, however, is *not* justified at the present time, and there are no other viable less politically adversarial options available to address Executive branch constitutional overreach.[89] [90] Since current circumstances *demand* Executive accountability, conservative jurists must reevaluate their apparent blind adherence to an evolved doctrine of restrictive standing aimed at protecting Executive prerogatives at all costs. Judicial prudence, *not* judicial restraint is in order.

Indeed, one could argue, consistent with the Supreme Court's holding in *Kucana v. Holder*, [91] [92] that separation of powers concerns preclude federal courts from declining to review actions brought under the APA/IQA, especially those seeking review and correction of agency-developed highly influential scientific assessments ("HISAs") supporting major rulemakings, absent a clear congressional statement suspending the presumption in favor of granting judicial review of administrative action. As the Court had observed,

> "Any lingering doubt about the proper interpretation of [a federal statute] would be dispelled by a familiar principle of statutory construction: the presumption favoring judicial review of administrative action. When a statute is 'reasonably susceptible to divergent interpretation, *we adopt the reading that*

> *accords with traditional understandings and basic principles: that executive determinations generally are subject to judicial review.' Gutierrez de Martinez v. Lamagno,* 515 U. S. 417, 434 (1995). We have consistently applied that interpretive guide to legislation […] particularly to questions concerning the preservation of federal jurisdiction. […] Because the 'presumption favoring interpretations of statutes [to] allow judicial review of administrative action' is 'well-settled,' *Catholic Social Services, Inc.*, 509 U. S., at 63–64 (quoting *McNary*, 498 U. S., at 496), *the Court assumes that 'Congress legislates with knowledge of' the presumption*, id., at 496. *It therefore takes 'clear and convincing evidence' to dislodge the presumption*. *Catholic Social Services, Inc.*, 509 U. S., at 64 (internal quotation marks omitted)" (emphasis added).[93]

According to the Court, "[s]eparation concerns […] caution us against reading legislation, absent clear statement, to place in executive hands authority to remove cases from the Judiciary's domain."[94] Clearly, the Court, recognized how "[t]he "federal government makes little pretense of limiting itself to its constitutionally enumerated powers." [95] Therefore, it had been concerned more with being seen as abdicating its constitutional role of judicial review[96] than as being perceived to "protect the political branches from responsibility for policies that are derived almost exclusively from the administrative process."[97]

Consequently, on the basis of separation of powers concerns alone, federal courts should *not* interpret Congress' failure to expressly provide for judicial review of specific executive agency acts of IQA noncompliance (especially with respect to peer review of HISAs supporting major regulations) as not evidencing an intent to recognize APA case law on the well-established presumption in favor of judicial review.

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[1] *See* Lumen N. Mulligan, *Federal Courts Not Federal Tribunals*, 104 Northwestern University Law Review 175, 181 (2010), *supra* ("contend[ing], in practice, even the most restrictive, originalist reading of the Article III limit upon the power to infer a cause of action is entirely redundant of contemporary standing analysis.") *Id*.

[2] *See* Heather Elliott, *The Functions of Standing*, 61 Stanford Law Review 459 (2008), available at: http://www.stanfordlawreview.org/sites/default/files/articles/Elliott.pdf.

[3] *Id*., at 459, Abstract.

[4] *Id*., at p. 471, citing *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982), *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 191 (2000) and *Baker v. Carr*, 369 U.S. 186, 204 (1962).

[5] *Id*., at p. 474, citing David M. Driesen, *Standing for Nothing: The Paradox of Demanding Concrete Context for Formalist Adjudication*, 89 CORNELL L. REV. 808, 839-55 (2004).

[6] *See Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008).

[7] 552 U.S. at 164

[8] 552 U.S. at 164–65, quoting *American Fire & Casualty Co. v. Finn*, 341 U. S. 6, 17 (1951) and *Cannon v. University of Chicago*, 441 U. S. 677, 746 (1979) (Powell, J., dissenting).

[9] *Id*., at p. 189, citing *Snyder v. Harris*, 394 U.S. 332, 341–42 (1969) ([T]he Constitution specifically vests that power [to expand the jurisdiction of the lower federal courts] in the Congress, not in the courts."). *Id*.

[10] *See* Lumen N. Mulligan, *Federal Courts Not Federal Tribunals*, 104 Northwestern University Law Review 175, 186 (2010), *supra* (discussing former U.S. Supreme Court Justice Powell's aversion to inferring a cause of action from a statute because it "represents an extra-jurisdictional endeavor" that "necessarily vests §1331 jurisdiction by judicial decision instead of legislative fiat."). Professor Mulligan explains that, "under the Holmes test […which

asserts that §1331 jurisdiction vests only if the plaintiff's cause of action is federal in origin], until the court infers the federal cause of action there is no basis upon which to take § 1331 jurisdiction; thus, the entire inference discussion is extrajurisdictional." *See* Lumen N. Mulligan, *Federal Courts Not Federal Tribunals*, 104 Northwestern University Law Review 175, 190 (2010), *supra*.

[11] *See Cannon v. University of Chicago*, 441 U.S. 677 (1979). In *Cannon*, the Court recognized an implied cause of action under Section 901(a) of Title IX of the Education Amendments of 1972.

[12] *See* Brian J. Leske, *U.S. Supreme Court Jurisprudence on Implied Private Rights of Action: The Pendulum Swings Back*, The Federalist Society, (3/26/08), available at: http://corporate.findlaw.com/litigation-disputes/u-s-supreme-court-jurisprudence-on-implied-private-rights-of.html. "[I]n *Cannon v. University of Chicago*, then-Associate Justice William H. Rehnquist recognized the importance of congressional clarity in creating private rights of action and warned that 'this Court in the future should be extremely reluctant to imply a cause of action absent such specificity on the part of the Legislative Branch.' 441 U.S. 677, 717 (1979) (Rehnquist, J., concurring)." *Id*.

[13] *Id*., quoting *Cannon v. Univ. of Chi.*, 441 U.S. 677, 743 (1979) (Powell, J., dissenting) (observing that the *Cort* approach 'allows the Judicial Branch to assume policymaking authority vested by the Constitution in the Legislative Branch'). In *Cort v. Ash*, 422 U.S. 66 (1975), the Court considered "whether a private right of action for damages could be implied under […] a criminal statute prohibiting certain corporate expenditures [18 U.S.C. § 610]. […] The Court concluded that no private right of action existed, and announced a new four-factor test for courts to analyze the implication question: (1) whether the plaintiff belonged to the class of persons the statute was designed to protect; (2) whether Congress intended to create or deny a private remedy; (3) whether that private remedy was consistent with the statutory scheme and/or purpose; and (4) whether the right and remedy traditionally were relegated to state law. [422 U.S. at] 78. Although the Cort factors included consideration of legislative intent, federal courts remained free to imply a cause of action without regard to whether Congress intended to grant one." *See* Brian J. Leske, *U.S. Supreme Court Jurisprudence on Implied Private Rights of Action: The Pendulum Swings Back*, The Federalist Society, supra.

[14] *Id*.

[15] *See Barnes v. Gorman*, 536 U.S. 181 (2002) (holding that while it is "'beyond dispute that private individuals may sue to enforce' Title VI [of the Civil Rights Act of 1964]…an implied punitive damages provision [could not] reasonably be found in Title VI." *Id*., at 185, 188. Existing Court precedent, which "interpreted Title IX [of the Education Amendments of 1972] consistently with Title VI…characterized [the former] statute and other Spending Clause legislation as 'much in the nature of a contract [,…] applied the contract-law analogy in finding a damages remedy available in private suits under Spending Clause legislation[, and found that…] punitive damages, unlike compensatory damages and injunction, are generally not available for breach of contract.") *Id*., at 186-187.

[16] *See Gonzaga University v. Doe*, 536 U.S. 273, 274 (2002) (holding that, while distinct, the inquiry "concerning whether a statutory violation may be enforced through §1983" and the inquiry concerning "whether a private right of action can be implied from a particular statute" overlap to the extent they require a court to "first determine whether Congress intended to create a federal right," citing *Touche Ross & Co. v. Redington*, 442 U. S. 560, 576. *See also Id*., at 283 (holding that a statute's text must be phrased in terms of the persons benefited in order to create private rights), citing *Cannon v. University of Chicago*, 441 U. S. 677, 692, n. 13.

[17] *See* Brian J. Leske, *U.S. Supreme Court Jurisprudence on Implied Private Rights of Action: The Pendulum Swings Back*, The Federalist Society, *supra*.

[18] *See* Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, Thomson West © 2012, *supra* at pp. 313-317. (The bold-faced headline to this section states, "A statute's mere prohibition of a certain act does not imply creation of a private right of action for its violation. The creation of such a right must be either express or clearly implied from the text of the statute.") *Id*., at p. 313.

[19] *Id*., quoting *Cort v. Ash*, 422 U.S. 66, 78 (1975).

[20] *See Cannon v. University of Chicago*, 441 U.S. 677, 690 (1979).

[21] *See* Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, Thomson West © 2012, *supra* at p. 314.

[22] 441 U. S. 703.

[23] *Id*., at 708.

[24] *See* Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, Thomson West © 2012, *supra* at p. 314.

[25] *Id*., at p. 69.

[26] *See* Cambridge Dictionaries Online, American-English, *Frustrate*, available at: http://dictionary.cambridge.org/us/dictionary/american-english/frustrate.

[27] *See* MacMillan Dictionary, American, *Frustrate*, available at: http://www.macmillandictionary.com/us/dictionary/american/frustrate.
[28] *See* Cambridge Dictionaries Online, American-English, *Disturb*, available at: http://dictionary.cambridge.org/us/dictionary/american-english/disturb.
[29] *See* MacMillan Dictionary, American, *Disturb*, available at: http://www.macmillandictionary.com/us/dictionary/american/disturb.
[30] *See, e.g.*, American Law Institute, *Restatement (Second) of Contracts*, §265 (1981), available at: http://home.comcast.net/~rnhauck/BusLaw/201RestConts.pdf ("Where, after a contract is made, a party's principal purpose is substantially frustrated *without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made*, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary." (emphasis added)). *Id*. *See also Id*., at §266 ("Where, at the time a contract is made, a party's principal purpose is substantially frustrated *without his fault by a fact of which he has no reason to know and the non-existence of which is a basic assumption on which the contract is made*, no duty of that party to render performance arises, unless the language or circumstances indicate the contrary." (emphasis added). *Id*.
[31] *See Touche Ross & Co. v. Redington*, 442 U. S. 560 (1979).
[32] *See* Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, Thomson West © 2012, *supra* at p. 315.
[33] 442 U. S. at 575-576.
[34] *Id*., at 563-565.
[35] *Id*., at 565-566.
[36] *Id*., at 569.
[37] *Id*., at 569-570.
[38] *Id*., at 570-571.
[39] *Id*., at 571.
[40] *Id*., at 573-574.
[41] *Id*., at 571-572.
[42] *Id*., at 576.
[43] *See* Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, Thomson West © 2012, *supra* at p. 316, quoting *Alexander v. Sandoval*, 532 U.S. 275, 286-287 (2001).
[44] *Id.*, referencing §67 of his book, entitled, "The false notion that the purpose of interpretation is to discover intent." *Id*., at p. 391.
[45] *Id*., at 376.
[46] *Id.*, at 376, 377. *See also Id*., at p. 378 ("Legislative history greatly increases the scope of manipulated interpretation, making possible some interpretations that the traditional rules of construction could never plausibly support.")
[47] *Id*., at p. 395.
[48] *See* Heather Elliott, *The Functions of Standing*, 61 Stanford Law Review, *supra* at p. 462.
[49] *Id*.
[50] *Id*., at p. 475, citing *Warth v. Seldin*, 422 U.S. 490, 498 (1975). The pro-democracy function of standing asks the question "whether, given the role assigned to the judiciary in a tripartite allocation of power, a plaintiff is bringing an issue to the court that, even if susceptible to judicial resolution, is more properly answered elsewhere." *Id*., citing *Flast v. Cohen*, 392 U.S. 83, 95 (1968).
[51] *See* Heather Elliott, *The Functions of Standing*, 61 Stanford Law Review, *supra* at p. 477.
[52] *Id*., at p. 477.
[53] *Id*., at p. 478, citing 88. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576 (1992).
[54] "[I]f a plaintiff can sue when there is nothing distinctive about him in relation to the lawsuit, then there is literally no limit on the cases that the federal courts could be asked to hear." *Id*., at p. 479, citing *Flast*, 392 U.S. at 130 (Harlan, J., dissenting).
[55] *Id*., at p. 479, citing *Sierra Club v. Morton*, 405 U.S. 727, 737 (1972) (emphasizing that a plaintiff must satisfy standing limitations in order to sue, even if, after surviving that test, the plaintiff may then act as a 'private attorney general' and 'argue the public interest in support of his claim'). *Id*.
[56] *Id*., at p. 479, citing *Newman v. Piggie Park Enters.*, 390 U.S. 400 (1968) (per curiam) (interpreting attorney's fees provision of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 244 (codified at 42 U.S.C. § 2000a-3(b) (2000)). *Id*.

[57] *Id*., at pp. 479-480, citing *Massachusetts v. EPA*, 549 U.S. 497, 535 (2007) ('[R]edress of grievances of the sort at issue here 'is the function of Congress and the Chief Executive,' not the federal courts.' (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576 (1992)))."
[58] *See FEC v. Akins*, 524 U.S. 11 (1998).
[59] *See* Heather Elliott, *The Functions of Standing*, 61 Stanford Law Review, *supra* at 481, citing *FEC v. Akins*, 524 U.S. at 24.
[60] *Id*., at 485-86, fn 126, quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., (TOC) Inc.*, 528 U.S. 167 (2000).
[61] 528 U.S. at 181.
[62] *Id*., at p. 482, citing *Massachusetts v. EPA*, 549 U.S. 497, 516-21 (2007).
[63] *Id*., quoting *Massachusetts v. EPA*, 549 U.S. at 523.
[64] *Id*., at p. 483, citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 581 (1992) (Kennedy, J., concurring).
[65] *Id.*, at p. 487, citing *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).
[66] *Id*., at pp. 489-490, citing Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994); Peter L. Strauss, *The Place of Agencies in the Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984).
[67] *Id*., at p. 500.
[68] *See* Anne Skorkjær Binderkrantza and Simon Krøyer, *Customizing Strategy: Policy Goals and Interest Group Strategies*, 1 Interest Groups & Advocacy 115, 134 (Macmillan Publ. 2012), available at: http://www.palgrave-journals.com/iga/journal/v1/n1/pdf/iga20126a.pdf; Andreas Dür and Gemma Mateo González, *Gaining Access or Going Public? Interest Group Strategies in Five European Countries*, 52 European Journal of Political Research 660 (2013), Working Paper (Sept. 2012), available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2125812 (Discussing how interest groups choose different strategies to influence public policy depending on whether they are business and professional associations or citizen groups); Ryan T. Moore and Christopher T. Giovinazzo, *The Distortion Gap: Policymaking under Federalism and Interest Group Capture*, 42 The Journal of Federalism 189, 194 (Oxford Univ. Press, Sept. 2011), available at: http://rtm.wustl.edu/writings/distortiongap.pdf (discussing how powerful interest groups can distort policymaking by seeking to ensure the adoption of policies contrary to voter preferences); Frederic Boehm, *Regulatory Capture Revisited—Lessons from Economics of Corruption*, 3–6 (Internet Ctr. for Corruption Research, Working Paper No. 22, 2007), available at http://www.icgg.org/downloads/Boehm%20-%20Regulatory%20Capture%20Revisited.pdf.
[69] *See* Heather Elliott, *The Functions of Standing*, 61 Stanford Law Review, *supra* at p. 491.
[70] *Id*., at pp. 491-492.
[71] *See* InterMune, *About InterMune*, available at: https://www.intermune.com/about_intermune.
[72] *See* American University Washington College of Law, Office of Development and Alumni Relations, *Gerald Bruce Lee*, available at: http://www.wcl.american.edu/alumni/dac/lee.cfm (discussing how Judge Lee had been nominated by President Clinton and confirmed as a United States District Judge in the Eastern District of Virginia, Alexandria Division in 1998). *See also* Charlson, Bredehoft, Cohen & Brown, P.C., *Title VII Plaintiff Wins $1.2M for Retaliation* (9/26/13), available at: https://www.cbc-law.com/title-vii-plaintiff-wins-1-23m-for-retaliation-2/.
[73] *See* Heather Elliott, *The Functions of Standing*, 61 Stanford Law Review at 492-493.
[74] *Id*., at p. 493. "Without that brake, courts could, 'with the permission of Congress, . . .assume a position of authority over the governmental acts of another and co-equal department." *Id*., quoting *Lujan v. Defenders of Wildlife*, 504 U.S. at 577.
[75] *Id*., at 493, quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577, (quoting Allen v. Wright, 468 U.S. 737, 760 (1984)).
[76] *Id*., citing Federal Election Campaign Act of 1971 §309, 2 U.S.C. §437g(a)(8)(A) (2006); *Toxic Substances Control Act §20, 15 U.S.C. §2619(a)(1) (2006)*; *Endangered Species Act of 1973 §11, 16 U.S.C. §1540(g)(1) (2006)*; Surface Mining Control and Reclamation Act of 1977 §520, 30 U.S.C. §1270(a) (2006); *Federal Water Pollution Control Act §505, 33 U.S.C. §1365(a) (2006)*; *Safe Drinking Water Act of 1974 §1449, 42 U.S.C. § 300j-8(a) (2000)*; Resource Conservation and Recovery Act of 1976 §7002, 42 U.S.C. § 6972(a) (2000); *Clean Air Act §304, 42 U.S.C. §7604(a) (2000)*" (emphasis added).
[77] *Id*.
[78] "Justice Scalia, dissenting in *Laidlaw*, took a similar approach to citizen suits, warning that the Court's opinion permitting a suit to proceed had 'grave implications for democratic governance.'" *Id*., at 494, quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 202 (2000) (Scalia, J., dissenting). *See also Id*., quoting *Laidlaw*, 528 U.S. at 198, 209, 215 ("by 'marry[ing] private wrong [harm caused to plaintiffs by pollution]

with public remedy [civil penalties],' the Court 'come[s] close to mak[ing] the redressability requirement vanish,' 'turns over to private citizens the function of enforcing the law,' and 'place[s] the immense power of suing to enforce the public laws in private hands.'")

[79] *Id*., at pp. 499-500, citing David R. Mayhew, *Congress: The Electoral Connection* (1974); Maxwell L. Stearns, *From Lujan to Laidlaw: A Preliminary Model of Environmental Standing*, 11 DUKE ENVTL. L. & POL'Y F. 321, 334 (2001) ("[I]n recent decades, Congress has. . .effectively delegated difficult questions of regulatory enforcement to the federal judiciary through the liberalization of standing.") *Id*.

[80] *Id*., at p. 499.

[81] *Id*., at 496, citing *Laidlaw* 528 U.S. at 187 and *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 602 (1992) (Blackmun, J., dissenting).

[82] *Id*., citing Jonathan R. Siegel, *A Theory of Justiciability*, 86 TEX. L. REV. 73, 103-104 (2007).

[83] *See* Pamela S. Karlan, *Disarming the Private Attorney General*, University of Illinois Law Review (2003), at 186 ("The idea behind the "private attorney general" can be stated relatively simply: Congress can vindicate important public policy goals by empowering private individuals to bring suit. […] *It consists essentially of providing a cause of action for individuals who have been injured by the conduct Congress wishes to proscribe, usually with the additional incentive of attorney's fees for a prevailing plaintiff*") (emphasis added). *Id*.

[84] *Id*., at p. 205 ("*Attorney's fees are the fuel that drives the private attorney general engine*. Every significant contemporary civil rights statute contains some provision for attorney's fees, and in 1976, Congress passed a comprehensive attorney's fee statute that provides for fees under the most important Reconstruction Era civil rights statutes as well") (emphasis added). *Id*.

[85] *See* Jody Freeman and Adrian Vermeule, *Massachusetts v EPA: From Politics to Expertise*, Sup. Ct. Rev. 51, 109 (2007), working paper available at: http://www.law.harvard.edu/faculty/freeman/vermeule.freeman.paper.pdf (describing how nontransparent "political considerations [often] come into play in executive agencies headed by political appointees who are accountable to the President", especially in a "strong presidential administration," notwithstanding the constitutional limitations the U.S. Supreme Court previously articulated in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 US 579, 585 (1952), concurrence of Justice Jackson, at 635-638). *See also* Nina A. Mendelson, *Disclosing 'Political' Oversight of Agency Decision Making*, 108 Mich. L. Rev. 1127, 1137 (2010), available at: http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1208&context=articles; Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2324-2327 (2001), available at: http://cdn.harvardlawreview.org/wp-content/uploads/pdfs/vol114_kagan.pdf (interpreting "a delegation straight to an executive branch agency", in the "absen[ce of] some special context", as not evidencing "a particular Congressional intent regarding the extent of presidential direction or even supervision of agency action," but rather, as imposing "a limitation on the President's ability to assign the task elsewhere"). *Cf*. Nina A. Mendelson, *Another Word on the President's Statutory Authority Over Agency Action*, 79 Fordham L. Rev. 2455, 2464, 2474 (2011), available at: http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=4718&context=flr (arguing that, while a President's exercise of "procedural oversight power" to demand reports from agency officials on various issues "supports OMB review of…agency actions", and such "directives, like OMB review, suggest[] a preferred policy position [, t]he President has no [express] authority to act as the decisionmaker, either by resolving disputes in the OMB process or by issuing substantive directives"); Robert V. Percival, *Who's In Charge? Does the President Have Directive Authority Over Agency Regulatory Decisions?*, 79 Fordham L. Rev. 2487, 2489, 2538 (2011), available at: http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=4716&context=flr (recognizing that the fine line that once existed between a President's directive authority and the "'influence' deriving from the use (or threatened use) of…procedural oversight powers" has become increasingly blurred, suggesting that Congress did not generally intend "to disaggregate them in the absence of specific evidence of that desire"); Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. at 2245, 2328.

[86] *See* Robert V. Percival, *Who's In Charge? Does the President Have Directive Authority Over Agency Regulatory Decisions?*, 79 Fordham L. Rev. at 2489, 2538, 2540 (describing how the U.S. Supreme Court has grown increasingly "sympathetic to claims of broad presidential removal power" to enable the President's competent management of the administrative state, and how agency heads no longer able to insulate themselves from presidential influence readily accede to White House directives); Nina A Mendelson, *Disclosing 'Political' Oversight of Agency Decision Making*, 108 Mich. L. Rev. at 1128, 1131, 1176 (discussing how a political accountability gap has arisen in federal agencies due to the types of value-based decisions they are increasingly rendering, which "significant and opaque…presidential supervision of agency rulemaking has likely filled," thereby resulting in more federal agency actions reflecting White House policy preferences driven by "political reasons"

ranging from core values to key constituency positions to simple political will to technical and scientific expert views).

[87] *See, e.g.*, Craig Whitlock and Missy Ryan, *Defense Secretary Hagel, Under Pressure, Submits Resignation*, Washington Post (Nov. 24, 2014), available at: http://www.washingtonpost.com/world/national-security/defense-secretary-hagel-under-pressure-submits-resignation/2014/11/24/77e75422-73e4-11e4-a5b2-e1217af6b33d_story.html (quoting Sen. John McCain (R-Ariz.) in an interview as indicating that Defense Secretary Hagel had previously expressed his frustrations about *"'excessive micro-management' on the part of the White House*," and as "not[ing] that Hagel's predecessors as defense secretary — Robert M. Gates and Leon E. Panetta — had both likewise complained in their memoirs about *excessive political interference from White House aides*") (emphasis added) *Id*.; Kelly O'Donnell, *Hagel's Predecessors Decried White House 'Micromanaging'*, NBCnews.com (Nov. 24, 2014), available at: http://www.nbcnews.com/politics/first-read/hagels-predecessors-decried-white-house-micromanaging-n255231; Mark Landler, *Hagel's Departure Tightens White House Hold on National Security Policy*, New York Times (Nov. 24, 2014), available at: http://www.nytimes.com/2014/11/25/us/politics/hagels-departure-tightens-white-house-hold-on-national-security-policy.html?_r=0.

[88] *See* Steve Kornacki, *Jonathan Turley: Obama Has Effectively Rewritten Laws, 'He Has Crossed The Constitutional Line,'* Real Clear Politics Video (June 25, 2014), available at: http://www.realclearpolitics.com/video/2014/06/25/jonathan_turley_obama_has_effectively_rewritten_laws_he_has_crossed_the_constitutional_line.html; Here & Now, *Law Professor Says U.S. At A 'Constitutional Tipping Point,'* 90.9 WBUR (Feb. 27, 2014), available at: http://hereandnow.wbur.org/2014/02/27/power-presidency-turley; *Written Statement of Jonathan Turley, Shapiro Professor of Public Interest Law George Washington University*, "The President's Constitutional Duty to Faithfully Execute the Laws," Hearing Before the Committee on the Judiciary United States House of Representatives, 113th Cong. 1st Sess. (Dec. 3, 2013), available at: http://judiciary.house.gov/_cache/files/2d1fda91-18a4-467f-818c-62025feaaa6f/120313-turley-testimony.pdf; http://www.gpo.gov/fdsys/pkg/CHRG-113hhrg85762/html/CHRG-113hhrg85762.htm.

[89] *See* Jeremy A. Rabkin, *The Secret Life of the Private Attorney General*, 61 J. of Law and Contemporary Problems, *supra* at p. 201 (discussing various options to remedy suspected criminality in the executive, including Congress' launching of intensive investigations, subpoenaing of files, records and recordings, and impeachment proceedings for refusal(s) to honor such subpoenas, each of which "require[ing] Congress to take an openly adversary stance, which defenders of the President will often decry as "partisan").

[90] *See* Deirdre Walsh and Dana Bash, *Boehner: House GOP Files Obamacare Suit*, CNN.com (Nov. 21, 2014), available at: http://www.cnn.com/2014/11/21/politics/house-gop-sue-the-president-over-obamacare/ (discussing how House Speaker John Boehner had sued the Obama Administration in federal court on constitutional grounds over its decisions to make changes to the President's health care law); David M. Drucker, *Boehner Taps Jonathan Turley for Obamacare Lawsuit*, Washington Examiner (Nov. 18, 2014), available at: http://www.washingtonexaminer.com/boehner-taps-jonathan-turley-for-obamacare-lawsuit/article/2556315 (discussing how one prominent constitutional legal scholar has testified in Congress that the Obama Administration continues to pervasively violate the rule of law). *Cf.* Andrew C. McCarthy, *Boehner Issues Memo Explaining His Feckless Plan to Sue Obama*, National Review Online (June 25, 2014), available at: http://www.nationalreview.com/corner/381244/boehner-issues-memo-explaining-his-feckless-plan-sue-obama-andrew-c-mccarthy.

[91] *See Kucana v. Holder*, 558 U.S. 233 (2010).

[92] *Id*., slip op at 10-14 (holding, in the context of immigration removal proceedings, based on the Court's review of the structure and history of amendments made to the Immigration and Nationalization Act, and taking into account "the character of the decisions Congress […had] insulat[ed] from judicial review," §1252(a)(2)(B)(ii)'s "proscription of judicial review applie[d] only to Attorney General determinations made discretionary by statute, not to determinations declared discretionary by the Attorney General himself through regulation [8 CFR §1003.2(a)]. Slip Op. at 10-14. *See also Id*., at slip op., p. 13 ("If Congress wanted the jurisdictional bar to encompass decisions specified as discretionary by regulation along with those made discretionary by statute, moreover, Congress could easily have said so. […] [W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion").

[93] Slip Op, at 16-17.

[94] 558 U.S. 233 at 237; Slip Op at 2.

[95] *See* Clark M. Neilly, III, *Terms of Engagement: How Courts Should Enforce the Constitution's Promise of Limited Government* (Encounter Books Publ. © 2013), at p. 117.
[96] *Id*.
[97] *See* John Marini, *Abandoning the Constitution*, 12 Claremont Review of Books (Spring 2012), available at: http://www.claremont.org/article/abandoning-the-constitution/#.VKgEvvnF-So (discussing how Congress has long delegated its lawmaking power to politically unaccountable executive branch agencies, and how the courts have either granted those agencies administrative deference or otherwise failed, in the name of judicial restraint, in granting review of challenges to agency actions, all resulting in the Executive Branch usurping Congress' constitutional authority in numerous areas).