Preserving Review of Undeclared Programs: A Statutory Redefinition of Final Agency Action

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Congress included judicial review provisions in the Administrative Procedure Act (APA) of 1946[1] to serve as "a check against excess of power and abusive exercise of power in derogation of private right."[2] Section 10(c) of the APA limits the scope of review to "final agency action for which there is no other adequate remedy."[3] However, because the APA does not define what

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1. Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 500, 551-559, 701-706 (1988)) [hereinafter APA].

2. U.S. ATTORNEY GENERAL'S COMM. ON ADMINISTRATIVE PROCEDURE, ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, S. DOC. NO. 8, 77th Cong., 1st Sess. 76 (1941) [hereinafter ATTORNEY GENERAL REPORT]; *see also* Califano v. Sanders, 430 U.S. 99, 104 (1977) (APA "undoubtedly evinces Congress' intention and understanding that judicial review should be widely available to challenge the actions of federal administrative officials"); H.R. REP. NO. 1149, 76th Cong., 1st Sess. 2 (1939), *reprinted in* SENATE COMM. ON THE JUDICIARY, ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, S. DOC. NO. 248, 79th Cong., 2d Sess. 244 (1946) [hereinafter APA: LEGISLATIVE HISTORY] ("[T]he law must provide that the governors shall be governed and the regulators shall be regulated, if our present form of government is to endure.").

3. Section 10(c) reads as follows:

> 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. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

Administrative Procedure Act, § 10(c), 5 U.S.C. § 704 (1988).

Statutes encompassed in the first clause of § 10(c) ("[a]gency action made reviewable by statute") are also generally construed to require finality. *See* Carter/Mondale Presidential Comm. v. Federal Election Comm'n, 711 F.2d 279, 284-85 n.9 (D.C. Cir. 1983) (§ 10(c) requires finality of all agency actions unless statutory language delineates set of directly reviewable actions or otherwise "raise[s] doubts about maintaining the finality requirement").

The APA does not contain an independent grant of subject matter jurisdiction. Califano v. Sanders, 430 U.S. at 107. Rather, litigants must allege a "legal wrong" or an injury "within the meaning of a relevant statute." § 10(a), 5 U.S.C. § 702. A "relevant statute" under § 10(a) includes the original statutory grant of authority to the agency (i.e., an agency's "organic" statute) as well as subsequent statutory grants of power to the particular agency. Section 10(a) also applies to statutes that apply uniformly to some or all agencies (i.e., a "trans-substantive" statute). *See, e.g.*, Sunshine Act, 5 U.S.C. § 552b (1988) (requiring agencies headed by "collegial body" to provide open meetings and advance notice to interested parties); National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370 (1988) (setting forth requirements to assure agency consideration of environmental values). The APA is thus a trans-substantive statute that supplies procedures for agency action and judicial review thereof when the agency's organic statute does not contain specific instructions. *See* JERRY L. MASHAW & RICHARD A. MERRILL, ADMINISTRATIVE LAW:

constitutes "final agency action," courts must ascertain when the lack of finality precludes review.

The question of finality arises when an agency contests an allegation that its own determination was conclusive. A court must then "establish[] a point on the time line of the administrative process"[4] early enough to protect the litigant's rights to a remedy for an injury, yet late enough to respect the agency's desire to develop policy completely. Courts resolve the finality question by focusing on whether an agency has made a "definitive" determination[5] that has a conclusive *effect* on a party's rights or obligations.[6]

Courts review both allegations of injury from individual agency actions and challenges to agency programs. A "program" is defined as an agency decision calling for the consistent application of a general policy to individual parties.[7] This Note distinguishes two types of programs. "Declared" programs are publicly announced through rules, using either "on the record" or "notice and comment" procedures.[8] "Undeclared" programs, which are the focus of this Note, operate through announced general directives (e.g., policy statements) or result from procedures internal to the agency.[9] Before the Supreme Court's decision in *Lujan v. National Wildlife Federation*,[10] no court had invoked section 10(c)'s finality requirement to deny jurisdiction in a challenge to an agency program.[11]

In *Lujan*, the Supreme Court declared that a series of discrete agency determinations was not "final agency action" within the meaning of section 10(c).[12] The case involved a challenge by the National Wildlife Federation (NWF) and several of its members to the Department of Interior's "land withdrawal review program."[13] This undeclared program involved hundreds of

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THE AMERICAN PUBLIC LAW SYSTEM 50 (2d ed. 1985).

4. Carter/Mondale Presidential Comm. v. Federal Election Comm'n, 711 F.2d at 287.

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

6. *See infra* notes 46-50 and accompanying text.

7. *See* RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1546 (2d ed. 1987) (defining "program" as "1. a plan of action to accomplish a specific end . . . 2. a plan or schedule of activities, procedures, etc., to be followed"). Commentators assume this definition when discussing review of ongoing agency decisionmaking. *See, e.g.*, Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1195 (1982) (assuming this definition in discussion of availability of legal remedies for administrative beneficiaries).

8. "On the record" rulemaking requires agencies to publish proposed rules, hold hearings, and republish rules over several months or years. Administrative Procedure Act §§ 7-8, 5 U.S.C. §§ 556-557 (1988). "Notice and comment" rulemaking merely requires agencies to publish rules and allow time for public response. § 4, 5 U.S.C. § 553.

9. These may include personnel directives, operating standards, training programs, or performance reviews.

10. 110 S. Ct. 3177 (1990).

11. Instead, courts tended to limit jurisdictional reach by invoking standing requirements to determine the justiciability of complaints seeking programmatic or systemic redress. *See, e.g.*, Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1441-51, 1463 (1988) (discussing evolution of standing and prudential limits on jurisdiction to suits seeking to redress "systemic or probabilistic harms").

12. 110 S. Ct. at 3189-90.

13. *Id.* at 3182.

determinations that reclassified over 170 million acres of federal wilderness land as open to mineral exploration and development. In deciding the case, the Court concluded that it had no jurisdiction under the APA to review NWF's challenge to the program because the land withdrawal review program was "not an identifiable 'final agency action' for purposes of the APA."[14]

The Court did not deny the existence of an agency program.[15] Rather, it reasoned that the challenged program did "not refer to a single [agency] order or regulation, or even to a completed universe of particular [agency] orders and regulations."[16] On its reading of the APA, the Court inferred that a program is only final if it is formally declared by rule or regulation. Consequently, a litigant injured by an ongoing undeclared program can challenge *only* the agency's discrete determinations made pursuant to that program as only declared determinations constitute "final agency actions" under section 10(c).[17] Because the *Lujan* Court initially determined that the individual plaintiffs alleging injury from specific reclassification determinations lacked standing, it concluded that the actions of the Bureau of Land Management were not subject to judicial review.[18]

Lujan's narrow interpretation of "final agency action" significantly weakens the presumption of judicial review underlying the APA.[19] It is now extraordinarily difficult for parties injured by the effects of an undeclared program to vindicate their rights.[20] Those parties are forced to either pursue the costly and time-consuming process of litigating each individual agency determination constituting the undeclared program or suffer the injury. *Lujan* therefore represents a jurisprudential change[21] that: (1) produces results inconsistent with the policy of administrative accountability underlying the APA;[22] (2) presents a jurisdictional barrier to litigants whose rights are definitively altered by an undeclared agency program;[23] and (3) presents "a roadmap [for] agencies wishing to take actions without risking judicial review."[24]

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14. *Id.* at 3189 n.2. The Court also noted that the land withdrawal review program did not constitute "agency action" under APA § 10(a). *Id.*; *see also infra* notes 82-84 and accompanying text.

15. *Id.* at 3189 n.2.

16. *Id.* at 3189-90 & n.2.

17. *Id.* at 3190-91.

18. *Id.* at 3188-89. The Court held that respondents failed to establish specific facts sufficient to demonstrate injury from agency action under an applicable statute. *Id.* at 3187 (citing Sierra Club v. Morton, 405 U.S. 727, 740 (1972)).

19. *See infra* note 28 and accompanying text.

20. The Tenth Circuit has already relied on *Lujan* to limit § 10(c) finality to discrete agency determinations and to preclude review of an undeclared program. *See* Sierra Club v. Yeutter, 911 F.2d 1405, 1418-21 (10th Cir. 1990) (citing *Lujan* to deny jurisdiction to public interest plaintiff's claim that Forest Service determinations not to seek water rights in wilderness areas violated Wilderness Act of 1964).

21. *See infra* Part I.C.

22. *See infra* Part II.B.1.

23. *See supra* text accompanying note 5.

24. Air Cal. v. United States Dep't of Transp., 654 F.2d 616, 622 (9th Cir. 1981) (Nelson, J., dissenting) (criticizing holding that letter from FAA administrator applying agency policy to plaintiffs was not final agency action); *see also infra* note 96 and accompanying text.

This Note argues that the vision of final agency action set forth in *Lujan* excessively limits judicial review, and therefore requires legislative repair. Part I discusses judicial review of final agency action prior to *Lujan*. It describes Congress' intent to create a general presumption of reviewability in the APA, the traditional concerns of the finality doctrine, and the constructive finality of agency programs. Part II analyzes the *Lujan* decision and its ramifications. Part III proposes an amendment to section 10(c) of the APA to rectify the *Lujan* Court's interpretation of that section.[25] The proposed amendment grants courts jurisdiction over a "pattern or practice"[26] of agency determinations that collectively comprise an agency program.[27]

I. JUDICIAL REVIEW OF "FINAL AGENCY ACTION" PRIOR TO *LUJAN*

A. *The APA's Broad Jurisdictional Mandate Over Final Agency Action*

The strong common law presumption of judicial review of agency action is entrenched in the APA.[28] The Senate Judiciary Committee, when recommending the APA to Congress, declared that judicial review was "indispensable since its mere existence generally precludes the arbitrary exercise of powers or assumption of powers not granted."[29] The Supreme Court recognized this presumption by noting that "[t]he legislative material . . . manifests a congressional intention that it cover a broad spectrum of administrative actions, and this Court has echoed that theme by noting that the Administrative Procedure Act's generous review provisions must be given a hospitable interpretation."[30] Section 10(c) establishes a jurisdictional barrier,[31] restricting the APA's broad

25. The proposed amendment to § 10(c) would read: "Agency action made reviewable by statute, ~~and~~ *or* final agency action, *or actions which demonstrate a pattern or practice* for which there is no other adequate remedy in a court, are subject to judicial review." (amended as emphasized)

26. The phrase is derived from Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, § 707(a), 78 Stat. 261 (1964) (codified as amended at 42 U.S.C. § 2000e-6(a) (1988)).

27. This Note focuses on undeclared programs and does not discuss the finality of declared programs, which remains unaffected by the *Lujan* decision.

28. *See* LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 372 (1965) ("The [APA has] the merit of codifying the presumption of reviewability.").

29. S. REP. NO. 752, 79th Cong., 1st Sess. 31 (1945), *reprinted in* APA: LEGISLATIVE HISTORY, *supra* note 2, at 217.

30. Abbott Lab. v. Gardner, 387 U.S. 136, 140-41 (1967) (citations omitted); *see also id.* at 141 ("[O]nly upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." (quoting Rusk v. Cort, 369 U.S. 367, 380 (1962))).

31. Section 10(c) is a jurisdictional requirement, distinct yet essentially related to the doctrines of exhaustion and ripeness. *See* McKart v. United States, 395 U.S. 185, 193-95 (1969) (outlining prudential concerns underlying exhaustion); Toilet Goods Ass'n v. Gardner, 387 U.S. 158, 162-64 (1967) (distinguishing § 10(c) finality determination from ripeness). Ripeness and exhaustion, while not at issue in this Note, are often confused with statutory finality. *See, e.g.*, Ticor Title Ins. Co. v. FTC, 814 F.2d 731 (D.C. Cir. 1987) (three separate opinions dismissing action on grounds of exhaustion, § 10(c) finality, and ripeness). While courts assess ripeness and exhaustion to determine whether a case meets either prudential or Article III "case or controversy" requirements, finality is a jurisdictional requirement that a litigant must meet to state a claim under § 10 of the APA. *See McKart*, 395 U.S. at 193-95; Eagle-Picher Indus. v. EPA, 759

review powers to "effective agency action for which there is no other adequate remedy in any court."[32] This restriction, however, is a mild one;[33] section 10(c) was designed merely to preclude review of preliminary agency decisions.[34]

The presumption of judicial review persists despite the evolution of methods of administrative action since Congress passed the APA.[35] Commentators

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F.2d 905, 915 (D.C. Cir. 1985). The determination of finality therefore precedes consideration of either ripeness or exhaustion, and informs both inquiries.

Finality is an essential precondition to ripeness. The ripeness doctrine seeks "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative determination has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Lab.*, 387 U.S. at 148-49. Ripeness analysis requires courts to determine both the "fitness of the issues" and the "hardship to the parties." The "fitness of the issues" test assesses whether an issue is purely legal and whether the agency action is final. *Id.* at 149. The "hardship to the parties" test assesses the impact of "withholding court consideration." *Id.* Courts therefore look to finality to determine ripeness.

The exhaustion requirement "prevent[s] premature interference with agency processes," allows the agency "an opportunity to correct its own errors," and enables the agency to develop a factual record. Weinberger v. Salfi, 422 U.S. 749, 765 (1975). The doctrine states that "no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51 (1938). Courts assess finality to determine whether the administrative decisionmaking has indeed concluded. FTC v. Standard Oil Co. of Cal., 449 U.S. 232 (1980) (FTC issuance of complaint not sufficiently final under § 10(c) to constitute exhaustion). The exhaustion requirement is suspended, however, if appeal to the agency would be "futile." Courts suspend the requirement that a litigant exhaust her administrative remedies when the agency has decided its position, or administrative recourse would otherwise be "futile." Futility therefore creates constructive finality when a court sees little or no chance that the agency will change its position. *See infra* note 72. When exhaustion is required by statute, or when agency rules require administrative review of determinations by junior officers before those determinations are regarded as final, § 10(c) precludes review. Section 10(c) was not intended to extend exhaustion beyond these limits. S. REP. NO. 752, 79th Cong., 1st Sess. 27 (1945), *reprinted in* APA: LEGISLATIVE HISTORY, *supra* note 2, at 185, 213 ("There is a fundamental inconsistency in requiring a person to continue 'exhausting' administrative processes after administrative action has become, and while it remains, effective.").

Thus, the ripeness and exhaustion doctrines both require courts to inquire whether the administrative activity is sufficiently advanced to warrant judicial review. Courts resolve that question through the finality determination. *See* Robert C. Power, *Help is Sometimes Close At Hand: The Exhaustion Problem and the Ripeness Solution*, 1987 U. ILL. L. REV. 547, 611 ("All cases must be ripe, and ripeness depends in large part on the finality of agency action. The failure to exhaust detracts from finality, thus it detracts from the fitness of the issues for judicial resolution." (citation omitted)); *see also* 4 KENNETH C. DAVIS, ADMINISTRATIVE LAW TREATISE § 26:10, at 458-59 (2d ed. 1983) (discussing overlap between ripeness, exhaustion, and finality).

32. S. REP. NO. 752, 79th Cong., 1st Sess. 27 (1945), *reprinted in* APA: LEGISLATIVE HISTORY, *supra* note 2, at 185, 213.

33. A restrictive interpretation of § 10(c) finality has implications for the finality requirements of statutes which were modeled after the APA. *See, e.g.*, Federal Insecticide, Fungicide, and Rodenticide Act of 1972 § 4(a), 7 U.S.C. § 136n(a) (1988) (providing judicial review of "final Agency actions"); Social Security Act of 1935 § 205(g), 42 U.S.C. § 405(g) (1988) (providing judicial review of "any final decision of the Secretary"); Clean Air Act of 1977 § 307(b), 42 U.S.C. § 7607(b) (1988) (providing judicial review of "final action taken . . . by the Administrator").

34. SENATE COMM. ON THE JUDICIARY, 79TH CONG., 2D SESS., ADMINISTRATIVE PROCEDURE ACT 27 (Comm. Print 1945) (Section 10(c), "defining reviewable acts, [was] designed also to negative any intention to make reviewable merely preliminary or procedural orders."), *reprinted in* APA: LEGISLATIVE HISTORY, *supra* note 2, at 37.

35. Congress intended to provide generous judicial review to injured parties regardless of the method of action used:

> The term "agency action" brings together previously defined terms in order to simplify the language of the judicial-review provisions of [sections 701-706,] *and to assure the complete*

note two changes in agency methodology: (1) a shift from the development of policy through the adjudication of individual cases, to the issuing of rules of general applicability; and (2) a shift from formal "on the record" rulemaking to more informal "notice and comment" rulemaking.[36] These changes indicate a growing preference for less formal methods of agency action.[37] What previously may have been implemented by formal means, i.e., issuance of a rule of general applicability, may now be implemented through undeclared programs. Indeed, agencies use undeclared programs to guide case-by-case decisionmaking and to avoid the promulgation of rules or the public declaration of guidelines. Because undeclared programs are, by definition, unacknowledged by the agency, judicial review is the only method by which a private party can seek to require the agency to identify such a program.[38] Consequently, the broad jurisdictional mandate contemplated by the APA must extend to undeclared programs.

Lujan contains a classic example of an undeclared program. Over several years the petitioner, the Bureau of Land Management (BLM), reclassified the protective status of hundreds of individual plots of federal wilderness land.[39] The National Wildlife Federation (NWF) alleged that BLM implemented the individual determinations through a "land withdrawal review program."[40] NWF claimed that, under this program, BLM ultimately declassified or withdrew from protection 180 million acres of wilderness land,[41] in violation of

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coverage of every form of agency power, proceeding, action, or inaction. In that respect the term includes the supporting procedures, findings, conclusions, or statements or reasons or basis for the action or inaction.

H.R. REP. NO. 1980, 79th Cong., 2d Sess. 21 (1946), *reprinted in* APA LEGISLATIVE HISTORY, *supra* note 2, at 255 (emphasis added).

36. *See supra* note 8. Many commentators have remarked on the significant changes in agency methods since the promulgation of the APA in 1946. *See, e.g.*, Alan B. Morrison, *The Administrative Procedure Act: A Living and Responsive Law*, 72 VA. L. REV. 253, 268 (1986) (noting courts expanded scope of judicial review within APA framework during shift from adjudication to rulemaking as preferred method of agency action); Antonin Scalia, Vermont Yankee: *The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 375-82 (noting "massive post-APA change" to informal methods of action, creating "drastic alteration of the old 'settlement'" of APA); *see also* Sidney A. Shapiro & Robert L. Glicksman, *Congress, the Supreme Court, and the Quiet Revolution in Administrative Law*, 1988 DUKE L.J. 819, 820 (noting increasing congressional effort to narrow administrative discretion at policymaking stage accompanied decreasing judicial control over application of agency discretion to specific parties).

37. Courts have condoned the use of the more informal methods of decisionmaking. *See, e.g.*, Permian Basin Area Rate Cases, 390 U.S. 747 (1968) (upholding constitutional and statutory authority of major rate-making agency (FPC) to prescribe maximum rates on area-wide, rather than individual-producer, basis); United States v. Storer Broadcasting Co., 351 U.S. 192 (1956) (upholding FCC's use of general disqualifying criteria for denying licenses; exempting decisions made thereunder from "full hearing" requirement); National Petroleum Refiners Ass'n v. FTC, 482 F.2d 672 (D.C. Cir. 1973) (upholding FTC authority to promulgate rules for determining meaning of statutory standard for illegal trade practices), *cert. denied*, 415 U.S. 951 (1974).

38. For discussion of cases alleging the existence of undeclared programs, see *infra* Part I.C.

39. National Wildlife Fed'n v. Burford, 676 F. Supp. 271, 277-78 (D.D.C. 1985) (*Burford I*), *aff'd*, 835 F.2d 305 (D.C. Cir. 1987) (*Burford II*), *on remand*, 699 F. Supp. 327 (D.D.C. 1988) (*Burford III*), *rev'd*, 878 F.2d 422 (D.C. Cir. 1989) (*Burford IV*), *rev'd sub nom.* Lujan v. National Wildlife Fed'n, 110 S. Ct. 3177 (1990).

40. *Burford I*, 676 F. Supp. at 272.

41. *Id.*

the Federal Land Policy and Management Act (FLPMA).[42] Section 202 of the Act requires the Secretary of Interior to develop "land use plans" and provides that "the Secretary may modify or terminate any [land] classification consistent with such land use plan";[43] section 309(3) requires the agency to allow public participation in all land classification determinations.[44] The district court judge, as well as the two panels of circuit court judges that heard separate appeals, assumed without question that these alleged statutory violations resulted from the existence of a final, reviewable program, even though BLM never officially declared the program through promulgated rules or regulations.[45]

B. *The Effects-oriented Focus of the Pre-*Lujan *Finality Inquiry*

The APA does not define "finality."[46] Instead, courts faced with a question of finality under section 10(c) follow the pragmatic approach first outlined in *Abbott Laboratories v. Gardner*, a case which involved a preenforcement challenge to a Food and Drug Administration regulation on drug labeling.[47] The Supreme Court, questioning the ripeness of the challenge for judicial review, addressed the issue of finality. The Court concluded that because the regulation had a "direct effect on the day-to-day business" of the petitioning drug manufacturers, the challenge was sufficiently final for review.[48] Following *Abbott Laboratories*, courts consistently held that for an agency determina-

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42. 43 U.S.C. §§ 1701-1784 (1988).

43. *Id.* § 1712(d).

44. *Id.* § 1739(e) (1988). BLM did not deny that it had completed "only a fraction" of the plans required for the declassified land and had not provided for public participation. *Burford I*, 676 F. Supp. at 277-78.

45. *See Burford I*, 676 F. Supp. at 272; *Burford II*, 835 F.2d at 307; *Burford III*, 699 F. Supp. at 329; *Burford IV*, 878 F.2d at 425 n.3.

46. The legislative history makes clear that Congress composed § 10(c) as "a statement of the present general state of the law." SENATE COMM. ON THE JUDICIARY, 79TH CONG., 2D SESS., ADMINISTRATIVE PROCEDURE ACT 27 (Comm. Print 1945), *reprinted in* APA: LEGISLATIVE HISTORY, *supra* note 2, at 38. Judicial decisions prior to 1946 required courts to find that an agency action definitively determined a party's rights or obligations before granting review. *See, e.g.*, Switchmen's Union of N. Am. v. National Mediation Bd., 320 U.S. 297 (1943) (holding National Mediation Board's certification of union as sole representative of yardmen did not definitively determine rights cognizable under Railway Labor Act and thus was not reviewable); Shields v. Utah Idaho Cent. R.R., 305 U.S. 177 (1938) (permitting suit in equity against Interstate Commerce Commission, on grounds that ICC determination was definitively binding on carrier); *see also* ATTORNEY GENERAL REPORT, *supra* note 2, at 85 ("Legislation which limits judicial review to 'final' orders merely enacts the self-imposed policy of the courts.").

47. 387 U.S. 136, 149-51 (1967). The *Abbott Laboratories* Court reviewed precedent from both before and after the passage of the APA and concluded that "[t]he cases dealing with judicial review of administrative actions have interpreted the 'finality' element in a pragmatic way." *Id.* Subsequent decisions have maintained this judicial preference for a flexible, as opposed to a formalistic, approach to the finality inquiry. *See, e.g.*, FTC v. Standard Oil Co. of Cal., 449 U.S. 232, 242 (1980) (citing *Abbott Laboratories* in holding that issuance of complaint was not "final agency action" under § 10(c)); Ciba-Geigny Corp. v. EPA, 801 F.2d 430, 435 & n.7 (D.C. Cir. 1986) (*Abbott Laboratories* requires application of "finality requirement in a 'flexible' and 'pragmatic' way . . . [§ 10(c) does not] convey[] some settled, inflexible meaning that precludes pragmatic or functional considerations." (citations omitted)).

48. 387 U.S. at 152; *see also* Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 193 (1985) ("[T]he finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury . . . .").

tion to be final under section 10(c), it must be a "definitive" determination of the rights or obligations of the complaining party.[49] Consequently, the finality inquiry is concerned with the practical *effect* the agency action has on a party, not with the agency's label for its actions.[50]

C. *Pre-*Lujan *Review of Finality: The Constructive Finality of Agency Programs*

An attack on an agency program alleges that an agency decision directing the application of policy to individual parties violates either an applicable statute or the Constitution, thereby causing legal injury to the plaintiff. If the agency decision is undeclared, a plaintiff must demonstrate the violation deductively, using as evidence specific applications of the policy to individual parties. A single application cannot establish the existence of an undeclared program; rather, a plaintiff can only demonstrate the existence of the program through evidence of regularity of applications. Courts have consistently assumed that such a demonstration of an undeclared program is constructively final. They thus conclude that decisionmaking of a routinized nature demonstrates that an agency has definitively adopted a program.

Courts have only considered the finality issue in connection with an attack on an agency program where an agency's organic statute explicitly limits finality jurisdiction to individual adjudications of parties' rights or obligations. *Haitian Refugee Center v. Smith*,[51] for example, involved a class action filed on behalf of over four thousand Haitians living in America, who claimed that the Immigration and Naturalization Service (INS) pursued a "program of accelerated processing" of asylum claims in violation of the Immigration and

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49. *See Standard Oil*, 449 U.S. at 242 (relying on *Abbott Laboratories*' pragmatic analysis of finality to hold FTC issuance of complaint not final as it had no significant "legal force or practical effect upon Socal's daily business"); Ukiah Valley Medical Ctr. v. FTC, 911 F.2d 261, 264 (9th Cir. 1991) (FTC issuance of complaint did not "constitute a definitive determination" of party's rights); *see also* Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic, 400 U.S. 62, 71 (1970) (defining finality inquiry as "whether the process of administrative decisionmaking has reached a stage where judicial review will not disrupt the orderly process of adjudication and whether rights or obligations have been determined or legal consequences will flow from the agency action." (citation omitted)); *cf.* Brian C. Murchison, *On Ripeness and "Pragmatism" in Administrative Law*, 41 ADMIN. L. REV. 159 (1989) (outlining post-*Abbott Laboratories* development of "pragmatic" approach in context of finality and ripeness).

50. As Judge Bazelon noted:

> Whether or not the statutory requirements of finality are satisfied in any given case depends not upon the label affixed to its action by the administrative agency but rather upon a realistic appraisal of the consequences of such action . . . . Thus, administrative orders are ordinarily reviewable when "they impose an obligation, deny a right, or fix some legal relationship as a consummation of the administrative process."

Isbrandtsen v. United States, 211 F.2d 51, 55 (D.C. Cir.) (Bazelon, J.) (quoting Chicabor & S. Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 113 (1948)), *cert. denied*, 347 U.S. 990 (1954).

51. 676 F.2d 1023 (5th Cir. Unit B 1982).

Nationality Act (INA)[52] and the Fifth Amendment.[53] The INA presented a jurisdictional barrier to the challenge: section 106(a) gives exclusive jurisdiction over "all final orders of deportation" to the courts of appeals.[54] The INS argued that section 106(a) therefore precluded the district court from asserting jurisdiction to review a challenge to the program.[55] The Fifth Circuit held, however, that the program amounted to "a pattern and practice by immigration officials to violate the constitutional rights of a class of aliens."[56] In so doing, the court distinguished between an appeal of individual "final orders," reviewable under the INA only in a federal court of appeals, and an allegation of an undeclared program raising a "separate matter" that is independently cognizable in the district courts under federal question jurisdiction.[57]

In *Jean v. Nelson* the Eleventh Circuit applied the *Haitian Refugee Center* analysis to the statutory claims of a class of Haitian refugees.[58] The plaintiffs claimed that the government consistently failed to provide the statutorily mandated notice of the right to apply for asylum to individuals involved in exclusion proceedings. The court distinguished between an "individual challenge on a preliminary procedural matter," barred by section 106(a), and "allegations of widespread abuses by immigration officials"[59] amounting to a program or policy, and upheld the district court's exercise of jurisdiction.

The Supreme Court recently addressed the distinction between individual and systemic statutory violations in *McNary v. Haitian Refugee Center, Inc.*[60] Provisions of the Immigration Reform and Control Act (IRCA)[61] provide

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52. Immigration and Nationality Act, Pub. L. No. 414, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§ 1101-1524 (1988)).

53. U.S. CONST. amend. V.

54. 8 U.S.C. § 1105a(a) (1988).

55. 676 F.2d at 1032.

56. *Id.* at 1033. None of the Haitians processed under the program had been granted asylum. *Id.* at 1032.

57. *Id.* at 1033. The court noted that § 106(a) limited jurisdiction over an appeal of "all final orders of deportation" to the courts of appeals. A court of appeals could only review allegations of procedural irregularities in such a case if it provided a basis for reversing an individual deportation order. *Id.* However, the court held that § 106(a) did not preclude a district court from assuming jurisdiction "to wield its equitable powers when a wholesale, carefully orchestrated, program of constitutional violations is alleged." *Id.* The court thus distinguished between allegations of procedural irregularities affecting the legitimacy of a single asylum determination, and allegations of a widespread, undeclared program of substantive or procedural irregularities affecting the legitimacy of all asylum determinations. *See also* Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 675 (1986) (distinguishing between "*method* by which [individual adjudications] are to be determined [and the] *determinations* themselves" to extend jurisdiction over former in challenge to Medicare regulation); Mathews v. Eldridge, 424 U.S. 319, 326-32 (1976) (extending jurisdiction over decision of Secretary of Health, Education, and Welfare to establish guidelines governing assessment of continuing disabilities); White v. Mathews, 559 F.2d 852 (2d. Cir. 1977) (holding Social Security Act provision limiting review to "any final decision" did not preclude review of challenge to pattern of delays in processing claims of erroneous termination of disability benefits), *cert. denied*, 435 U.S. 908 (1978).

58. 727 F.2d 957 (11th Cir. 1984) (en banc), *aff'd on other grounds*, 472 U.S. 846 (1985).

59. *Id.* at 980 & n.32. On the merits the court held that the INA did not require notice of opportunity to apply for asylum. *Id.* at 981-83.

60. 111 S. Ct. 888 (1991).

61. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.).

amnesty to alien farmworkers by awarding the workers "Special Agricultural Workers" (SAW) status.[62] Section 302(a) of IRCA limits judicial review to "an order of exclusion or deportation" and states that "[t]here shall be no administrative or judicial review of a determination respecting an application for adjustment of status" except in the courts of appeals, as provided in section 106(a) of the INA.[63] The Court confronted the question of whether these sections preclude general federal question jurisdiction over "an action alleging a pattern or practice of procedural due process violations" by the INS in administering the SAW program.[64] The Court noted that Congress narrowly tailored section 302(a) to limit the courts of appeals' original jurisdiction to individual "final orders."[65] Therefore, the Court held, section 302(a) did not preclude the district court from exercising its jurisdiction over a challenge to "procedures and practices" of the INS.[66]

Courts have also reviewed allegations of injury resulting from undeclared programs of agency nonacquiescence, suggesting that constructive finality can also be inferred in that context. "Nonacquiescence" involves an agency's refusal to change its internal decisionmaking methods, affecting individual adjudications, to comply with decisions by courts of appeals.[67] Courts have reviewed allegations of nonacquiescence even when agencies have not declared programs of decisionmaking contradictory to adverse rulings of courts of appeals.[68] In *Schisler v. Heckler*,[69] for example, the Second Circuit reviewed a claim that the Social Security Administration (SSA) pursued an undeclared program of nonacquiescence. The plaintiffs alleged that the SSA consistently failed to comply with court of appeals judgments that required the SSA to rely on testimony of an applicant's treating physician when adjudicating disability benefits. The Second Circuit found that internal SSA guidelines embodied standards different from those required by prior judicial decisions and held them

62. *Id.* § 302, 8 U.S.C. § 1160 (1988).

63. *McNary*, 111 S. Ct. at 893 n.6 (quoting 8 U.S.C. § 1160(e)).

64. *Id.* at 892.

65. *Id.* at 897.

66. *Id.* at 896-97. The Supreme Court did not discuss the Eleventh Circuit's extension of jurisdiction over statutory claims in its review of Jean v. Nelson, 472 U.S. 846 (1985), or *McNary*, 111 S. Ct. 888. The *McNary* opinion did not mention *Lujan*, which was decided only eight months previously.

These cases demonstrate that jurisdictional limits on review of individual agency determinations do not preclude review of allegations that the method or policy guiding each determination violated the organic statute. These cases also presume the constructive finality of decisionmaking programs, creating a conflict with the Supreme Court's decision in Lujan v. National Wildlife Fed'n, 110 S. Ct. 3177 (1990). *See infra* Part II.A.

67. *See* Heckler v. Lopez, 464 U.S. 879, 887 (1983) (Brennan, J., dissenting) (defining nonacquiescence as express policy of "refusing to implement the binding decisions of the [court of appeals]"). *See generally* Samuel Estreicher & Richard L. Revesz, *Nonacquiescence By Federal Administrative Agencies*, 98 YALE L.J. 679 (1989) (analyzing problem of nonacquiescence); Michael J. Froelich, Note, *Administrative Nonacquiescence in Judicial Decisions*, 53 GEO. WASH. L. REV. 147 (1984) (same).

68. *See* Hyatt v. Heckler, 807 F.2d 376, 379 (4th Cir. 1986), *cert. denied*, 484 U.S. 820 (1987). Commentators refer to undeclared decisions not to follow adverse court rulings as "silent" nonacquiescence. *See* Estreicher & Revesz, *supra* note 67, at 699 n.94.

69. 787 F.2d 76 (2d Cir. 1986).

to be illegal.[70] The court did not, however, question the finality of the pattern of agency activity composing the program of nonacquiescence.[71]

The cases discussed in this section suggest that, until *Lujan*, courts regarded programs encompassing a series or "pattern" of determinations as constructively final.[72] This presumption is consistent with an effects-oriented approach to finality jurisdiction;[73] a pattern of agency determinations demonstrates that an agency has conclusively established its position concerning the rights and obligations of successive parties. *Lujan*'s approach to statutory finality, however, adds a significant new jurisdictional hurdle to judicial review of undeclared programs.

II. *LUJAN*'S SUSPECT CONCEPT OF FINAL AGENCY ACTION

Prior to *Lujan*, a court's finality inquiry focused on whether the agency's program had a final *effect* on the plaintiff—not whether the agency labeled that decision a "program."[74] In *Lujan*, however, the Supreme Court limited section 10(c) finality to discrete agency determinations. Statutory finality under the APA is now intimately linked to the *announcement* of agency guidelines. It no longer matters whether an agency's conduct has the effect of a final determination of a party's rights or obligations.[75] If *Lujan* is followed, courts will no longer have jurisdiction under the APA to review undeclared agency programs. This part of the Note will demonstrate that *Lujan*'s interpretation of section 10(c) (1) severely burdens litigants injured by ongoing, undeclared programs; (2) contradicts the legislative intent underlying the APA; and (3) provides agencies with a means to evade judicial review.

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70. *Id.* at 83-85.

71. *See also* Hyatt v. Heckler, 807 F.2d 376, 381 (4th Cir. 1986) (series of benefits decisions provided evidence of "systematic, unpublished policy that denied benefits in disregard of law," thereby constituting nonacquiescence), *cert. denied*, 484 U.S. 820 (1987); *cf.* Floyd v. Bowen, 833 F.2d 529, 532 (5th Cir. 1987) (differences in language do not constitute nonacquiescence: plaintiffs must offer "evidence of a system-wide pattern of mistaken adjudication"); Stieberger v. Sullivan, 738 F. Supp. 716, 729 (S.D.N.Y. 1990) (plaintiff must provide evidence of pattern of agency decisions that demonstrate "impact upon the adjudicatory process" to constitute nonacquiescence).

72. A parallel conception exists under the exhaustion doctrine, discussed *supra* note 31. Courts hold that if a series of agency determinations demonstrates that further appeal to the agency is futile, the exhaustion requirement is excused. *See, e.g.*, Bowen v. City of N.Y., 476 U.S. 467, 482-86 (1986) (exhaustion excused as agency's unrevealed, illegal policy precluded claimants from discovering that it routinely denied benefits); Mathews v. Eldridge, 424 U.S. 314, 330 (1976) ("unrealistic to expect" agency to consider challenges to its own procedural regulations in adjudicatory proceedings); Sioux Valley Hosp. v. Bowen, 792 F.2d 715, 724 (8th Cir. 1986) ("The futility exception to the exhaustion requirement applies when there is nothing to be gained other than an agency decision adverse to the plaintiff." (citation omitted)); Frontier Airlines, Inc. v. Civil Aeronautics Bd., 621 F.2d 369, 371 (10th Cir. 1980) (further appeal to agency futile as prior decisions demonstrated agency's established position). *See generally* JAFFE, *supra* note 28, at 446-49 (discussing history of application of futility exception to exhaustion requirement); Power, *supra* note 31, at 587 ("Futility seems most pertinent to gauging the pragmatic finality of agency action."); *id.* at 578-87 (citing futility cases).

73. *See supra* Part I.B.

74. *See supra* Part I.B.

75. Lujan v. National Wildlife Fed'n, 110 S. Ct. 3177, 3189-90 (1990).

A. *The* Lujan *Decision*[76]

In the initial *Lujan* decision, the district court upheld NWF's claims and granted a preliminary injunction to prevent mining, reasoning that the program "removed the only absolute shield against private exploitation of these federal lands."[77] The court of appeals affirmed on the grounds that "BLM determined that [land] classifications would be systematically reviewed as part of the Bureau's Land Withdrawal Review Program . . . [and the] Bureau's stated objective was to cancel a large portion of the [land] classifications created under the [statute]."[78] On remand for review of NWF's motion for a permanent injunction as well as the government's countermotion for summary judgment, the district court found that the pattern of statutory noncompliance existed, but held that the higher standard of review accorded to motions for summary judgment rendered the plaintiff's affidavits insufficient to establish standing to challenge the program.[79] The court of appeals reversed, holding that both the affidavits and NWF's representational interest established federal jurisdiction.[80]

In a five-to-four decision, the Supreme Court held that, because NWF's affidavits failed to allege that BLM's activities caused specific and concrete injury to its members by diminishing their enjoyment of federal wilderness land, the organization lacked standing.[81] Writing for the Court, Justice Scalia stated that, collectively, BLM's declassification determinations failed to constitute "an 'agency action' from the meaning of [section 10(a)], much less 'final agency action' within the meaning of [section 10(c)]."[82] He reasoned that "[u]nder the terms of the APA, [the plaintiff] must direct its attack against some *particu-*

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76. National Wildlife Fed'n v. Burford, 676 F. Supp. 271, 272 (D.D.C. 1985) (*Burford I*), *aff'd*, 835 F.2d 305 (D.C. Cir. 1987) (*Burford II*), *on remand*, 699 F. Supp. 327 (D.D.C. 1988) (*Burford III*), *rev'd*, 878 F.2d 422 (D.C. Cir. 1989) (*Burford IV*), *rev'd sub nom.* Lujan v. National Wildlife Fed'n, 110 S. Ct. 3177 (1990); *see also supra* notes 40-44 and accompanying text (discussing statutory basis for NWF's claims).

77. *Burford I*, 676 F. Supp. at 278-79.

78. *Burford II*, 835 F.2d at 309.

79. *Burford III*, 699 F. Supp. at 332.

80. *Burford IV*, 878 F.2d at 428-33.

81. The Court held that the NWF failed to set forth the "specific facts" necessary to establish standing under § 10(a) of the APA. *Lujan*, 110 S. Ct. at 3186-87 (citing Sierra Club v. Morton, 405 U.S. 727, 740 (1972)). The bulk of the *Lujan* decision concerns standing and follows precepts Justice Scalia advocated as a professor. *See* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983). Scalia disputed the prevailing view that the standing doctrine had a constitutional core whose exact contours vary according to prudential limitations; rather, he argued that standing fell largely within the control of Congress in that Congress could create individual legal rights that the judiciary must then enforce. *Id.* at 885-86. *Lujan* could represent Justice Scalia's attempt to narrow the definition of "final agency action" so that it serves as another jurisdictional limit on judicial review. However, this Note argues that Congress sought to entrench a presumption of judicial review in the APA that included review of undeclared agency programs.

82. *Lujan*, 110 S. Ct. at 3189; *see also id.* at 3189-90 n.2 ("[W]e do not contend that no 'land withdrawal review program' exists . . . . We merely assert that it is not an identifiable 'final agency action' for purposes of the APA."). This narrow reading contradicts the expansive definition intended by the drafters of the APA. *See supra* note 35.

lar 'agency action' that causes it harm."[83] Justice Scalia thus literally construed the statutory language to exclude a *series* of determinations from the meaning of "agency action," refusing to recognize that the consistency of BLM's declassification determinations demonstrated the existence of an undeclared programmatic decision.[84]

In a dissent, joined by three other Justices, Justice Blackmun criticized the majority's characterization of the land withdrawal review program.[85] He argued that the real issue in the case was "whether the actions and omissions that NWF contends are illegal are themselves part of a plan or policy."[86] The existence of such a policy, he concluded, was sufficient to satisfy the section 10(c) finality requirement.[87]

B. *The Flaws of the* Lujan *Approach to Finality*

1. *Violating the Intent of the APA*

Ideally, programmatic decisionmaking allows an agency to implement a statutory mandate consistently and predictably. However, it is often difficult or impossible for affected parties to influence the formal, let alone informal, decisionmaking of large agency bureaucracies through the political process.[88] Therefore, legislative accountability of administrative agencies requires judicial oversight of agency programs to unearth systematic deviation from statutory

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83. 110 S. Ct. at 3190 (emphasis added).

84. *Id.* at 3189. The Court went on to conclude that because the land withdrawal review program did not constitute final agency action, the complaint was not ripe for review. *Id.* at 3190.

Justice Scalia's interpretation ignores the gravamen of the NWF's complaint: BLM made a single decision to open the lands to mineral exploration without providing for public participation or preparing land use plans. This decision, although undeclared, certainly lies within the definition of agency action contained in either § 2(g) of the APA, 5 U.S.C. § 551(13) (1988) (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") or in §10(a) of the APA, 5 U.S.C. § 702 (1988) (stating in part: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."). Congress could demonstrate its desire that § 10(a) be read broadly by adopting the proposed amendment to § 10(c). *See supra* note 25.

85. 110 S. Ct. at 3202 (Blackmun, J., dissenting).

86. *Id.* at 3201 (Blackmun, J., dissenting).

87. *Id.* at 3202 (Blackmun, J., dissenting). Justice Blackmun correctly perceived the fundamental error in the majority's conception of § 10(c) finality. His analysis, however, stopped short of considering whether those "acts or omissions" had a cumulative *final effect* on the plaintiff. Finality requires not merely the existence of a policy, but also the application of the policy to individual parties through a program.

88. Congressional oversight of administrative agencies is inherently limited. *See* MARCUS E. ETHRIDGE, LEGISLATIVE PARTICIPATION IN IMPLEMENTATION: POLICY THROUGH POLITICS 31 (1985) ("[L]egislative control [of administrative implementation] became consistently less comprehensive as administrative power expanded."); Carl McGowan, *A Reply to* Judicialization, 1986 DUKE L.J. 217, 224-26 (arguing that "Congress has neither the resources nor the inclination to exercise more than occasional oversight of administrative proceedings" and that executive oversight is also insufficient and potentially unconstitutional (citation omitted)); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1695 n.128 (1975) (same); Peter H.A. Lehner, Note, *Judicial Review of Administrative Inaction*, 83 COLUM. L. REV. 627, 638-42 (1983) (discussing inability of both Congress and Executive adequately to control agency nonimplementation of statutory commands).

norms. Informal decisionmaking requires additional judicial oversight because individual parties may be unaware that the source of their perceived injuries is, in fact, an agency program.[89]

Administrative agencies' evolution toward increasingly informal decisionmaking processes is legitimate only if the judiciary maintains the oversight role contemplated by the APA.[90] The interpretation of section 10(c) outlined in *Lujan*, however, will prevent judicial review of a significant form of agency decisionmaking. This interpretation directly contradicts the purpose of the APA, whose section 10(c) finality requirement was intended to bar only preliminary or tentative agency actions.[91] The agency decision in *Lujan*, which led to the declassification of 180 million acres of wilderness without public participation or land use plans, was neither tentative nor preliminary.

2. *Raising Jurisdictional Barriers to Adversely Affected Parties*

Because programs are implemented through a series of discretionary determinations, they are difficult for a plaintiff to challenge if he or she must prove that an agency abused its discretion in each instance.[92] Moreover, a focus on an individual determination can ignore systemic irregularities; what may appear to be within the boundaries of agency discretion in a single factual instance may prove to violate statutory requirements when applied consistently.[93] *Lujan*, therefore, creates a significant jurisdictional barrier to plaintiffs who allege injury from an undeclared program.[94] By limiting the definition of "final agency action" to each discrete declassification determination,[95] the *Lujan*

89. This is particularly true when individual parties are isolated and lack access to any advocacy group.

90. *See* JAFFE, *supra* note 28, at 320.

91. *See supra* Part I.B.

92. It is difficult for a litigant to challenge agency discretion exercised through a single determination solely on the ground that that determination was inconsistent with prior determinations. This is because general principles of judicial deference limit review of factual determinations by agencies. *See, e.g.*, Historic Green Springs, Inc. v. Bergland, 497 F. Supp. 839, 856-57 (E.D. Va. 1980) (deciding on merits that Department of Interior acted within discretion when designating land as historic district, although determination was inconsistent with prior determinations in locale); Charles H. Koch, *Judicial Review of Administrative Discretion*, 54 GEO. WASH. L. REV. 469 (1986) (discussing exercise of discretion through individual adjudications and consequent difficulties of judicial review). Courts have, however, held that the *cumulative* effect of a series of discretionary determinations can establish an abuse of discretion. *See, e.g.*, Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584, 598 & n.54 (D.C. Cir. 1971) (extending jurisdiction over claim that refusal to suspend federal registration of pesticides would have cumulative negative effect on organization's members and environment).

93. The litigation leading up to the *Lujan* decision is one example. A court might uphold a single land reclassification determination that violated statutory requirements of public participation and the development of land use plans on the ground that the determination was a discretionary response to a particular exigency. The scope of the harm to the environment only emerges, however, through a larger analysis of the whole program reclassification determinations. A challenge based on such an injury would allege that BLM's consistent failure to follow statutory requirements constituted an abuse of discretion. *See supra* notes 39-43 and accompanying text (discussing NWF's statutory claims).

94. These injuries are caused by the undeclared decision mandating individual determinations, which either violates statutorily proscribed procedures or produces substantive results contrary to the organic statute.

95. Lujan v. National Wildlife Fed'n, 110 S. Ct. 3177, 3185 (1990).

Court signaled that, unless the agency has declared a program by publishing a rule of general applicability, a litigant can only challenge an agency's particular determinations.

3. *Creating a Roadmap for Agency Evasion*

Agencies desiring to implement unpopular programs or programs arguably in conflict with their organic statutes now have a means of concealing their actions. *Lujan* permits agencies seeking to evade judicial scrutiny of their programs to conceal their implementing guidelines by particularizing their actions. In fact, agencies have already relied on *Lujan* to argue that their undeclared programmatic activities are unreviewable.[96] Thus, agencies now are able to avoid statutory requirements, because courts no longer have jurisdiction to review an undeclared program.[97]

III. SOLUTION: AN AMENDMENT TO SECTION 10(C) OF THE APA

A. *The Concept of a "Pattern or Practice" to Determine the Finality of Undeclared Agency Programs*

1. *Prior Statutory Use of "Pattern or Practice" Language*

An amendment to section 10(c) defining consistent patterns of agency activity as "final agency action" would have three important effects: (1) it could return section 10(c) to its intended scope; (2) it could facilitate judicial oversight of undeclared agency programs; and (3) it could provide an incentive for agencies to declare their programs. A logical source of statutory language for the amendment to section 10(c)[98] is section 707(a) of Title VII of the Civil Rights Act of 1964.[99] Section 707(a) permits the Attorney General of the

96. *See* Sierra Club v. Yeutter, 911 F.2d 1405, 1414 (10th Cir. 1990) (relying on *Lujan* to hold consistent agency refusals to contest water rights of federal wilderness lands in state court adjudications was not final agency action); *see also* Brief for Petitioners at 25, McNary v. Haitian Refugee Ctr., Inc., 111 S. Ct. 888 (1991) (No. 89-1332) (INS arguing that *Lujan* precludes plaintiffs' claim that agency activity constituted existing program, asserting that *Lujan*'s holding limited "final agency action" to individual immigration application determinations).

97. Curtailing judicial review of undeclared programs also makes it easier for special interest groups to "capture" the agency decisionmaking process, because the consequences of "capture" are now easier to conceal. *See* EDMUND S. PHELPS, POLITICAL ECONOMY: AN INTRODUCTORY TEXT 395 (1985) (noting desirability of regulation, but concluding citizen oversight is price society pays to ensure agencies are not controlled by industries they regulate); Stewart, *supra* note 88, at 1684-87, 1713-15 (discussing causes of capture, suggesting more effective representation of "public" interests as remedy). *See generally* RICHARD J. PIERCE, JR. ET AL., ADMINISTRATIVE LAW AND PROCESS 19-20 (1985) ("An agency is captured when it favors the concerns of the industry it regulates . . . over the interests of the general public . . . .").

98. *See supra* note 25.

99. Civil Rights Act of 1964 § 707(a), 42 U.S.C. § 2003e-6(a) (1988). Applying statutory language to other areas of law is common legislative practice. For example, the standard of "unfair methods of competition" was set out in the Federal Trade Commission Act, ch. 311, § 5, 38 Stat. 719 (1914) (codified as amended at 15 U.S.C. § 45 (1988)), was later added to the Sherman Antitrust Act in the District of

United States to bring suit to prevent discriminatory employment practices that are not included in the prohibitions against discrete discriminatory acts outlined in other sections of Title VII, but instead are evidenced only through consistent behavior.[100] This Note proposes the incorporation of section 707(a)'s "pattern or practice" language into section 10(c) of the APA to permit federal district courts to exercise finality jurisdiction over undeclared agency programs that violate either the APA, other trans-substantive statutes, or the agency's organic statute.[101]

It is useful to draw upon the Civil Rights Act of 1964 because it establishes federal court jurisdiction over a pattern or practice of discriminatory employment decisions that could be characterized as an undeclared discriminatory employment "program."[102] Senator Humphrey, floor manager of the Civil Rights Act in the 88th Congress, explained the phrase as follows: "[A] pattern or practice would be present only where the denial of rights consists of something more than an isolated, sporadic incident, but is repeated, routine, or of a generalized nature."[103] Congress therefore intended the phrase to refer to a consistent set of actions directed by an undeclared guideline or policy decision.

2. *Application to Administrative Agencies*

The proposed amendment to section 10(c) enables a litigant to demonstrate the existence of an undeclared program by focusing the inquiry on whether a consistent pattern or practice of agency determinations definitively established its rights or obligations.[104] The proposed amendment would apply to all agen-

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Columbia Act of 1937, ch. 690, tit. VIII, 50 Stat. 693, (codified as amended at 15 U.S.C. § 1 (1988), *repealed by* Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, § 2, 89 Stat. 801, and was applied to the Tariff Act of 1930, ch. 497, § 337, tit. III, pt. II, 46 Stat. 703 (codified as amended at 19 U.S.C. § 1337 (1988)).

The "pattern or practice" language of Title VII applies to, among other things, federal agencies, and specifically allows a party alleging a discriminatory employment program to sue the agency directly. 42 U.S.C. § 2000e-16(c). A federal district court has the power to enjoin any employer, including the federal government, from engaging in an unlawful employment practice. 42 U.S.C. § 2000e-5. The "pattern or practice" phrase is therefore applicable to the judicial review of undeclared agency programs.

100. 42 U.S.C. § 2000e-6(a) (1988). The 1972 amendments to this subsection transferred the Attorney General's functions to the Equal Employment Opportunity Commission. Law of Mar. 24, 1972, Pub. L. 92-261, §5, 86 Stat. 107 (codified as amended at 42 U.S.C. § 2000e-6(c) (1972)).

101. Courts engage in similar investigations of patterns of agency activity in determining standards to measure administrative performance. *See* MASHAW & MERRILL, *supra* note 3, at 17.

102. *See* 110 CONG. REC. 14,239 (1964) (Senator Humphrey explained to Congress that the "pattern or practice" provision was "meant to exclude action in sporadic instances of violation of rights . . . . It would be clear that an establishment or employer that consistently or avowedly denies rights under [Title VII] is engaged in a 'pattern or practice of resistance.'").

103. *Id.* at 14,270.

104. *See supra* Part I.B. A plaintiff must allege that prior agency determinations demonstrate a sufficiently clear pattern or practice of agency decisionmaking to enable a court to infer the existence of an undeclared decision guiding those individual determinations. The prior determinations would not have to be final in and of themselves, but merely a part of an agency's ongoing decisionmaking.

cy decisionmaking in which the agency consistently determines the rights or obligations of successive parties. A court reviewing a pattern or practice allegation would have to judge whether prior agency determinations were sufficiently similar to the determination affecting the plaintiff to constitute consistent decisionmaking.[105]

To resolve this question a court could look to section 2(g) of the APA. That section states that "'agency action' includes the whole or part of an agency rule, order, license, sanction, relief *or the equivalent* or denial thereof, or failure to act."[106] Prior determinations would evidence a consistent pattern or practice if they demonstrated the existence of "the equivalent" of a rule of general applicability. A plaintiff would allege that this de facto rule "definitively" determined her rights[107] and was thus constructively final. A pattern or practice of determinations therefore demonstrates constructive finality when it supports the inference of an underlying program governing an agency's determination in each particular instance.[108]

Had the proposed amendment been in place at the time *Lujan* was decided, the Supreme Court's inquiry would have been very different. The element sufficient to confer finality jurisdiction would have been the consistency of BLM's land declassification determinations. The district court would have

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An agency could rebut a prima facie showing of a pattern or practice by arguing that the prior determinations were dissimilar from the determination in the plaintiff's case. Alternatively, the agency could admit that a final, undeclared program exists, but demonstrate that the program was consistent with the authorizing statute, thereby reducing the plaintiff's claim to that of an illegal application of a generally lawful agency program. In either case, the proposed amendment permits litigants to bring a previously undeclared program to light.

105. Since the APA generally instructs agencies to act as finders of fact, this amendment would require district courts to determine a pattern or practice as a matter of law. While courts resolve issues of both fact and law under Title VII, the proposed amendment does not require courts to forgo reliance upon agencies to develop factual records.

106. 5 U.S.C. § 551(13) (1988) (emphasis added).

107. *See supra* note 5 and accompanying text.

108. A court would ask whether the underlying decision provided the practical equivalent of a "rule" formally declared under § 4 or § 7 of the APA, 5 U.S.C. §§ 553, 556 (1988). The amount of evidence necessary to establish the underlying decision would vary according to the nature of the agency's statutory mandate and the particular decisionmaking method employed.

The feasibility of the proposed amendment is demonstrated by the operation of other statutes that also permit courts to review agency actions and determine the existence of undeclared programs. For example, the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370 (1988) (NEPA), is a transsubstantive statute (like the APA) that applies to all agencies regardless of their organic statutes. Section 102(2)(C) of NEPA requires all federal agencies to prepare an environmental impact statement (EIS) for "every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment . . . ." 42 U.S.C. § 4332(2)(C) (1988). The Council on Environmental Quality, established under NEPA, has promulgated regulations that define "major Federal actions" to include the "[a]doption of programs, such as a group of concerted actions to implement a specific policy or plan[, and] systemic and connected agency decisions allocating agency resources . . . ." 40 C.F.R. § 1508.18(b)(3) (1990). These regulations are consistent with the requirements for the determination of program environmental impact statements outlined by the Supreme Court in Kleppe v. Sierra Club, 427 U.S. 390 (1976). *See* DANIEL R. MANDELKER, NEPA LAW AND LITIGATION §§ 9:01-9:04 (1984); *see also* James M. Koshland, Note, *The Scope of the Program EIS Requirement: The Need for a Coherent Judicial Approach*, 30 STAN. L. REV. 767, 779-93 (1978) (outlining judicial interpretation of program EIS requirement).

assessed whether the individual determinations were sufficiently similar to suggest that the agency had a policy of not writing land use plans or providing for public participation in each discrete declassification. The court would then have decided whether the case presented a pattern or practice evidencing governing guidelines or merely a set of tentative policies.[109] If it found the former, the court would then reach the merits: whether the undeclared program violated applicable statutes.

B. *The Consequences of the Proposed Amendment*

Fairness and due process require decisions that distribute benefits or impose burdens upon individuals to be open and discernible.[110] The interpretation of section 10(c) set forth in *Lujan* presents a jurisdictional barrier to parties alleging injury from undeclared agency programs and shields these programs from judicial inquiry. The proposed amendment removes this barrier.[111] In addition, by adopting the proposed amendment Congress would signal its intent to maintain rigorous judicial review of agency programs and would promote candor on the part of administrative agencies.

1. *Reinvigorating the Intent of the APA*

The pattern or practice analysis contained in the proposed amendment returns the focus of section 10(c) finality to the effect of the agency decisions on the individual litigant.[112] A pattern or practice analysis will enable a court to determine whether successive agency decisions indicate that the agency has definitively determined the rights or obligations of that litigant. The amendment will thereby maintain the presumption of judicial review underlying the APA, enabling the legitimate evolution of methods of administration to continue.[113]

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109. This distinction is narrower than the conclusion reached by Justice Blackmun, who argued that a policy itself could be final agency action. *See supra* note 87 and accompanying text.

110. *See generally* Holmes v. New York City Hous. Auth., 398 F.2d 262 (2d Cir. 1968) (upholding grant of jurisdiction over claim that lack of publicly known housing allocation standards violated plaintiffs' due process rights).

111. *See supra* Part II.A.2.

A natural objection to any proposed amendment expanding the jurisdictional provisions of the APA is that the proposal will add to the caseload of the federal courts. In fact, the Supreme Court's rule in *Lujan* presents a greater burden to the courts than does the proposed amendment. Plaintiffs now must challenge each individual application of an undeclared program, creating far greater potential for judicial overburdening. Further, it is not true that incremental changes in subject matter jurisdiction necessarily lead to a significant increase in the number of cases filed. For example, the creation of private rights to initiate regulatory action did not lead to a substantial increase in litigation. *See* Joseph Dimento, *Citizen Environmental Legislation in the States: An Overview*, 53 J. URB. L. 413 (1976) (finding no significant increase in caseload following expansion of federal environmental citizen suit provisions); Adeeb Fadil, *Citizen Suits against Polluters: Picking Up the Pace*, 9 HARV. ENVTL. L. REV. 23 (1985) (same). For a discussion of the problems of judicial overburdening, see RICHARD POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 59-166 (1985) (discussing causes and consequences of caseload explosion).

112. *See supra* notes 46-50 and accompanying text.

113. *See supra* Part I.B.

2. *Promoting Agency Candor*

Administrative power is legitimate only when it is exercised openly and when it is judicially controlled.[114] If an agency's decisionmaking methods are open and accessible to the public, parties are able to recognize how their interests are affected. They therefore can appeal to the executive or legislative branches to change agency conduct.

The proposed amendment promotes agency candor by enabling injured parties to challenge undeclared agency programs. Agencies may still decide to act through undeclared programs, yet the proposed amendment assures that those programs are also subject to judicial review. While it may be more costly in the short run for an agency to seek public participation, it will do so, because it ultimately will be more successful if its decision is challenged in court. Courts are more likely to refuse to find an agency decision to be an "abuse of discretion" under section 10(e) of the APA[115] if an agency can demonstrate that it provided "adequate consideration" of the issue, including public notice and comment.[116] Agencies therefore will be encouraged to declare programs by following rulemaking procedures.[117]

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114. *See* JAFFE, *supra* note 28, at 320 ("The availability of judicial review is the necessary condition, psychologically if not logically, of a system of administrative power which purports to be legitimate, or legally valid."). *See generally* Cass R. Sunstein, *On the Costs and Benefits of Aggressive Judicial Review of Agency Action*, 1989 DUKE L.J. 522, 525 (outlining arguments supporting aggressive judicial review of agency action).

115. 5 U.S.C. 706 (1988).

116. *See, e.g.*, Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 46-52 (1983) (holding agency rescission of passive restraint requirement an abuse of discretion as it failed to provide adequate consideration of all facts). *See generally* STEPHEN G. BREYER & RICHARD B. STEWART, ADMINISTRATIVE LAW AND REGULATORY POLICY 341-73 (1985) (discussing application of "adequate consideration" standard).

117. Section 4(d) of the APA, 5 U.S.C. § 553(e) (1988), which outlines requirements for notice and comment rulemaking, states in part: "Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule." The proposed amendment thus will result in increased public participation in programmatic decisionmaking by agencies.

It may be argued that by encouraging agency candor, the proposed amendment does not sufficiently protect an agency's discretion (if its organic statute so prescribes) to choose between developing policy through a declared rule or through a series of adjudications. *See* NLRB v. Bell Aerospace Co., 416 U.S. 267, 294 (1974) (stating that NLRB "is not precluded from announcing new principles in an adjudicative proceeding and that the choice between rulemaking and adjudication lies in the first instance within the Board's discretion."). However, the proposed amendment will not diminish agency discretion to choose between rulemaking and adjudication to formulate policy. It will merely encourage agencies to declare their programs publicly. *See* David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921, 940-42 (1965) (discussing necessity of accessibility in world of voluminous rules; noting advantages if "a formal announcement of [an] agency's position in a regulation may permit an individual to obtain judicial review"); Note, *Sales of Public Land: A Problem in Legislative and Judicial Control of Administrative Action*, 96 HARV. L. REV. 927, 941 (1983) (discussing advantages of devices that expose agency policy to "public input and judicial scrutiny").

IV. CONCLUSION

The proper focus of the section (10(c) finality inquiry should be the *effect* of the agency action on the plaintiff and not the label the agency affixes to the action. In *Lujan v. National Wildlife Federation*, however, the Supreme Court rejected this effects-oriented approach, and rested the finality inquiry upon the agency's decision to declare (or in this case, not to declare) its actions a "program." Consequently, the prevailing interpretation of section 10(c) now prevents federal district courts from exercising statutory jurisdiction over injuries caused by undeclared agency programs. This interpretation violates the presumption of reviewability underlying the APA. This allows agencies to evade judicial review by not declaring programs and by acting through particularized determinations.

An amendment to section 10(c) of the APA offers a solution. A "pattern or practice" analysis, based on section 707(a) of Title VII of the Civil Rights Act of 1964,[118] returns the focus of finality to the effect of the agency action on the plaintiff. In short, the amendment enables district courts to exercise subject matter jurisdiction over injuries caused by the effects of undeclared programs. This result is consistent with the presumption of reviewability underlying the APA. It further encourages agencies to publicize their programs, maintaining the legitimacy of the administrative state.

118. 42 U.S.C. § 2000e-6(a) (1988).