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Toward Adequacy

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ABSTRACT

Each year, hundreds of people, companies, organizations, and associations sue the federal government for injuries they have suffered at the hands of federal agencies. Such suits are often brought under the judicial review provisions of the Administrative Procedure Act ("APA"), which Congress enacted expressly to allow broad access to courts in an age of increasing administrative agency action. By the terms of the APA itself, all final agency action for which there is no other adequate remedy in a court is reviewable under the APA.

But the very language meant to welcome such suits into court also acts as a bar: to be eligible for judicial review under the APA, agency actions must have "no other adequate remedy in a court" (NOARC). Despite the facial ambiguity of the NOARC requirement—"adequacy is in the eye of the beholder," as one scholar recently wrote—NOARC is a provision that has long been ignored by academia, treatise writers, and the Supreme Court. The Justices have only explicitly addressed the meaning of NOARC in one case, Bowen v. Massachusetts*, 487 U.S. 879 (1988), with a patchwork opinion marked by its meandering analysis and muddled reasoning. With only* Bowen *as a guide, confusion has abounded—in the Court's own jurisprudence, in the lower courts, and in the active advocacy of practitioners.*

Recent cases demonstrate that the question of NOARC is not an esoteric one. Rather, the rights of children in need of state-provided mental health care services, of women and Hispanic farmers to retain long held family lands, and of U.S. citizens with Mexican-American surnames to get U.S. passports have all depended on the meaning of the NOARC requirement. And yet, no consensus about NOARC exists. In light of the NOARC requirement's wide impact and high stakes, our anemic NOARC jurisprudence must be replaced with robust dialogue about the meaning of NOARC and its implications for judicial review under the APA. This dialogue should be informed by a close and faithful reading of the NOARC provision itself.

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INTRODUCTION

Each year, hundreds of plaintiffs sue the federal government under the judicial review provisions of the Administrative Procedure Act (APA).[1] These plaintiffs claim to have been hurt by a federal agency, so they file a suit in federal district court for redress. With hundreds of millions of U.S. citizens and nationals, and an untold number

[1] 5 U.S.C. §§ 701-706. This estimate is derived from a rough calculation using the Westlaw search function. The number of results for a search of federal district court cases citing to 5 U.S.C. § 706—the provision establishing the court's standard of review for APA cases—between January 2012 and December 2012 is 408. Search terms: "5 /2 "u.s.c." /2 706 & da(aft 1/2012 & bef 12/2012)"; database: dct.

of corporations, organizations, and associations, interacting daily with fifteen executive branch departments, housing hundreds of offices, agencies, and programs,[2] it is inevitable that injuries—real, perceived, or merely alleged—will result.

Congress anticipated these agency-inflicted injuries. That is why it included 5 U.S.C. §§ 701-706, the judicial review provisions of the APA. Although these provision were drafted broadly, they do include one bar that has long gone unnoticed, misapplied, and misunderstood: the language in 5 U.S.C. § 704 that confines APA review to those agency actions that are "final" and "for which there is *no other adequate remedy* in a court."[3]

In recent years, the "no other adequate remedy in a court" (NOARC) language has had real consequences for a variety of people—for children in need of state-provided mental health care services; for women and Hispanic farmers trying to hold onto their family lands; and for U.S. citizens who, despite their best efforts and documentary evidence, cannot get the U.S. government to issue them a passport, merely because of the ethnicity of their names and the circumstances of their births. Each of these groups of people have had the redress for their government-inflicted injuries turn on the meaning of § 704's NOARC language.

Yet the meaning of NOARC remains unclear. As Professor Richard Pierce has written, "Adequacy is in the eye of the beholder."[4] Despite this facial ambiguity, this congressionally imposed bar to review has not received much attention from anyone—not academia, not the lower courts, and not the Supreme Court. The Justices have expressly adjudicated the provision once, and when they did, they fumbled badly.[5]

This Article presents the problems raised by the NOARC language of the APA. Part I reviews the general grant of judicial review provided under the APA, including the context for the NOARC bar included in § 704. Part II turns to the only Supreme Court case on point, *Bowen v. Massachusetts*, arguing that though the Court in *Bowen* purported to be undertaking a single NOARC analysis—by determining whether there existed an applicable other "adequate remedy in a court" (ARC)—the Court actually pursued *four* lines of ARC inquiry. Part III argues that *Bowen*'s confused ARC analyses have created confusion about NOARC for everyone else, including the Supreme Court, the lower courts, and practitioners. Against this backdrop of confusion and uncertainty, Part IV proposes a four-step NOARC framework by which courts can conduct a NOARC determination in accordance with the language of § 704. Finally, Part IV attempts to square the proposed NOARC framework with the ARC inquiries undertaken by the Supreme Court in its *Bowen* opinion. The Article concludes that our current NOARC jurisprudence is no jurisprudence at all, and it will not be unless we think more

[2] The Louisiana State University Libraries maintains the Federal Agency Directory. These agency numbers are derived from the Executive Branch component of their directory. See http://www.lib.lsu.edu/gov/index.html.

[3] 5 U.S.C. § 704 also authorizes APA review where expressly authorized by statute. But it is the "final agency action" provision that allows for broad review and interests me here.

[4] RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW 84-85 (2008) (quoted in Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 85 (2009)).

[5] *See* Bowen v. Massachusetts, 487 U.S. 879 (1988).

carefully and more faithfully about § 704 and what it requires. Until then, courts' NOARC decisions are going to resemble *Bowen*, erratic, poorly reasoned, and inadequate.

I. JUDICIAL REVIEW UNDER THE APA

In 1946, Congress enacted the APA, which Senator Pat McCarran, then chairman of the Senate Judiciary Committee, called a "comprehensive charter of private liberty and a solemn undertaking of official fairness."[6] The APA was intended as "a guide" to both "those invested with executive authority" and "to him who seeks fair play and equal rights under law."[7] Thus, the APA governs federal agencies and *those who interact with* federal agencies—the citizens affected by agency action and the courts required to resolve citizen-agency disputes.

The APA comprises twelve sections or chapters.[8] In contrast to the other chapters, chapter 10 provides the APA's insurance policy: it guides courts in checking agency action. Chapter 10 expressly allows suits against the federal government for agency action, providing a mechanism by which individuals may hold agencies to the limits and protocols established by the other eleven sections. Thus, in an important way, chapter 10 is the linchpin of the APA.

Chapter 10 is now 5 U.S.C. §§ 701-706. These six sections work together to create a mechanism whereby sovereign immunity is waived (§ 702) for individuals to seek review in district court (§ 703) of agency actions (§ 704). While review is pending, either agencies or the court can forestall the consequences of agency action (§ 705). Should the court find that, upon review, an agency action is "arbitrary," "capricious," "an abuse of discretion," "contrary to constitutional right, power, privilege, or immunity," "in excess of statutory jurisdiction . . . or short of statutory right," "without observance of procedure required by law," "unsupported by substantial evidence," or "unwarranted by the facts," the reviewing court shall "hold [the action] unlawful" and "set [it] aside" (§ 706).

Though nothing in §§ 701-706 provides courts with jurisdiction to hear claims brought under the APA—for that, plaintiffs must rely on federal question jurisdiction, 28 U.S.C. § 1331[9]—the Supreme Court has clarified that the APA's judicial review provisions are meant to give the "aggrieved"[10] wide access to courts. As the Court stated in *Abbott Laboratories v. Gardner*, the APA "manifests a congressional intention

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[6] Pat McCarran, Foreword, ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, at III (1946).
[7] *Id.*
[8] These chapters are Chapter 1, Title; Chapter 2, Definitions; Chapter 3, Public Information; Chapter 4, Rule Making; Chapter 5, Adjudication; Chapter 6, Ancillary Matters; Chapter 7, Hearings; Chapter 8, Decisions; Chapter 9, Sanctions and Powers; Chapter 10, Judicial Review; Chapter 11, Examiners; and Chapter 12, Construction and Effect. By their terms, chapters 1, 2, and 12 generally guide those construing and interpreting the text of the APA; chapters 3, 4, and 9 guide agencies in exercising their quasi-legislative powers; and chapters 5-9 and 11 guide agencies in fulfilling their quasi-judicial functions. 5 U.S.C. §§ 501 *et seq.*
[9] Califano v. Sanders, 430 U.S. 99, 105 (1977).
[10] 5 U.S.C. § 702.

that it cover a broad spectrum of administrative actions."[11] Thus, "[t]he Administrative Procedure Act provides specifically not only for review of 'agency action made reviewable by statute,' but also for review of 'final agency action for which there is no other adequate remedy in a court,' 5 U.S.C. § 704."[12]

But what the Supreme Court explained in *Abbott Laboratories* as broadening components of the APA's judicial review provisions—the two categories of actions made reviewable under the APA by § 704—are also *limitations* on courts' jurisdiction under the APA. In other words, notwithstanding the "hospitable interpretation[s]" courts must give the APA's "generous review provisions,"[13] courts *cannot* review agency actions unless those actions are expressly "made reviewable by statute" or are "final" and with "no other adequate remedy in a court."[14]

In other words, before courts review agency actions under the APA, they must ensure the actions are of the kinds made reviewable by the APA. Without this assurance, APA review is barred, and as far as the APA governs, the agency action must stand.

II. *BOWEN* AT BAT

For the forty years following the enactment of the APA, the Supreme Court largely ignored the limitations of § 704, which require that courts only review "agency action made reviewable by statute" and "final agency action for which there is no other adequate remedy in a court." In 1958, Professor Kenneth Davis noted that judicial opinions had almost completely overlooked § 704.[15] Twenty-five years later, he noted that § 704 was "relevant in hundreds of cases" but still was "customarily" ignored.[16]

In at least one important way, this oversight remains true today: since the enactment of the APA in 1946, only one Supreme Court case has directly addressed the meaning of "no other adequate remedy in a court" (NOARC) limitation in § 704.[17] Despite the ambiguity inherent in an "adequacy" requirement, not until 1988 did the Supreme Court attempt to interpret this language. In *Bowen v. Massachusetts*,[18] the Court finally and squarely addressed the question of whether "§ 704 bars relief because the [plaintiff] has an adequate remedy" in another court.[19]

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[11] Abbott Labs. v. Gardner, 387 U.S. 136, 140 (1967).
[12] *Id.* (internal brackets omitted).
[13] *Id.* at 141 (quoting Shaughnessy v. Pedreiro, 349 U.S. 48, 51 (1955)).
[14] 5 U.S.C. § 704.
[15] Darby v. Cisneros, 509 U.S. 137, 145 (1993) (citing 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 20.08, p. 101).
[16] *Id.* (quoting 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 26.12, pp. 468-69 (2d ed. 1983)).
[17] *See* Bowen v. Massachusetts, 487 U.S. 879 (1988). Compare the NOARC gap with the finality requirement imposed by the "final agency action" language in § 704, which is much more fully explicated. *See, e.g.*, *Darby*, 509 U.S. 137; *Abbott Labs.*, 387 U.S. 136.
[18] 487 U.S. 879 (1988).
[19] *Id.* at 891.

Unfortunately, the Court's analysis is a mess. In an effort to determine whether another "adequate remedy in a court" (ARC) existed, the Court purported to undertake a single ARC analysis. In fact, the Court analyzed the proposed alternative ARC in at least *four* discrete ways. Those individual ARC analyses contradict and overlap, and the Court did not choose among them. Consequently, the NOARC law remains this way today—conflicting, indefinite, and ambiguous, Supreme Court precedent notwithstanding.

A. *The Facts of* Bowen

The central controversy in *Bowen* was a Medicaid payment dispute between the Commonwealth of Massachusetts and the Secretary for the U.S. Department of Health and Human Services (HHS). Massachusetts had expended funds on certain services provided to Medicaid patients, which HHS had paid for, as it does, in lump advance payments. HHS's practice is to reimburse states in anticipation of cost expenditures and then to disallow costs it later decides were improperly incurred. HHS then withholds the disputed amount from future payments or requires the state to return the disputed amount.

In *Bowen*, HHS made payments to Massachusetts to reimburse it for medical and rehabilitative services it had provided to mentally disabled patients. Later, HHS disallowed some of those costs because they were provided by educational providers rather than healthcare providers. It did so by withholding from Massachusetts's lump sum payments the value of the disputed services.

Massachusetts sued in federal district court, alleging the United States had waived its sovereign immunity through 5 U.S.C. § 702. Using the language of the APA, Massachusetts requested that the district court set aside HHS's order and provide declaratory and injunctive relief. The district court found for Massachusetts and reversed HHS's action disallowing the reimbursement.

On appeal to the First Circuit, HHS lost again.[20] HHS petitioned the Supreme Court for certiorari, raising a new argument: the district court had *no* jurisdiction over the disallowance claim. Rather, HHS argued, the U.S. Claims Court had exclusive jurisdiction over Massachusetts's claim. Massachusetts cross-petitioned, asking the Supreme Court "to decide that the district court had jurisdiction to grant complete relief."[21] The Supreme Court granted both petitions.

B. *The Four ARCs*

The Court framed its inquiry in terms of 5 U.S.C. § 704: "The basic jurisdictional dispute is over the meaning of the Administrative Procedure Act (APA), 5

[20] *Id.* HHS also argued the district court did not have the authority to order the Secretary to pay money to Massachusetts. The First Circuit accepted this argument but found for Massachusetts on the basis that federal district courts "had jurisdiction to review [HHS]'s disallowance decision, and to grant declaratory and injunctive relief." *Id.* at 889.

[21] *Id.* at 891 (capitalization changed).

U.S.C. § 704."[22] Specifically, the Court addressed the argument that "§ 704 bars relief because the State has an adequate remedy in the Claims Court."[23] In other words, the Court's task was to determine if the Claims Court provided an ARC such that review of HHS's disallowance decision was precluded under the APA.

In a patchwork majority opinion by Justice Stevens, the Court held Massachusetts did not have another adequate remedy precluding APA review. Therefore, the case could be remanded to the district court for decision on the merits. To arrive at this decision, the majority introduced four categories of remedies that could serve as ARCs precluding APA review. Though the Court did not name these categories—nor, in fact, did the Court appear to have recognized that it used four separate inquiries—they can be roughly described as follows:

1. Jurisdictional remedies
2. Special statutory remedies
3. Unexhausted administrative remedies
4. Practical remedies

1. *The Jurisdictional ARC*

The logic of *Bowen*'s jurisdictional ARC goes as follows: If a court other than the district court has the ability as a matter of *jurisdiction* to grant relief to a plaintiff, that plaintiff then has a remedy in another court that is adequate. Thus, the existence of an alternative court with jurisdiction over a plaintiff's claim is an ARC, triggering § 704 preclusion and preventing § 706 review.

The *Bowen* majority introduced the possibility that district courts should look to other courts' jurisdiction as part of their § 704 NOARC analysis by accepting HHS's framing of the dispute. The question posed to the Court by HHS was, essentially, "Does the United States Claims Court have exclusive jurisdiction over the State's claim?"[24] Conversely, the question posed to the Court by Massachusetts was, "Does the District Court have jurisdiction to grant complete relief?"[25]

Though these questions are clearly related, they focus the inquiry on different courts. HHS's question focuses the court's NOARC analysis on the *Claims Court's* jurisdiction, whereas Massachusetts's question requires the Court to consider the *district court's* jurisdiction.

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[22] The Court also addressed HHS's argument that 5 U.S.C. § 702 did not allow for actions against the government seeking money damages, that this was an action for money damages, and that, therefore, § 702 was a bar to review and recovery. The Court rejected this argument in Part II of the majority opinion. *Bowen*, 487 U.S. at 891.

[23] *Id.* at 891.

[24] *See id.* at 890 ("In his petition for certiorari, the Secretary asked us to decide that the United States Claims Court had exclusive jurisdiction over the State's claim.").

[25] *See id.* at 890-91 ("In its cross-petition, the State asked us to decide that the District Court had jurisdiction to grant complete relief.").

The Court could have adopted Massachusetts's question at the expense of HHS's. If the Court had not assumed that alternative jurisdiction was relevant to the question of § 704 ARCs, it could have undertaken a NOARC analysis without addressing the issue of the Claims Court's jurisdiction. Instead, the Court reviewed the Claims Court's jurisdiction under the Tucker Act and its ability to give the kinds of relief requested by the plaintiffs here and found the Claims Court wanting: "The Claims Court does not have the general equitable powers of a district court to grant prospective relief. Indeed, we have stated categorically that the Court of Claims has no power to grant equitable relief."[26]

As part of its § 704 NOARC analysis, the Court even constructed a counterfactual scenario in which the Claims Court could not have jurisdiction. "[I]f a State elects to retain the amount covered by a disallowance until completion of review by the Grant Appeals Board," the Court wrote, "it will not be able to file suit in the Claims Court until after the disallowance is recouped from a future quarterly payment."[27] It is no answer, the Court warned, that the state has the money in its possession—it will need to plan. "Such planning may make it important to seek judicial review—perhaps in the form of a motion for a preliminary injunction—as promptly as possible."[28]

The Court's concern for a hypothetical plaintiff to have access to the kind of relief it requests (if merited) is just one manifestation of the Court's jurisdictional ARC analysis. The others include the Court's frequent conflating of the § 704 question in this case with the question of the Claims Court's jurisdiction: "[T]he novel proposition that the Claims Court is the *exclusive forum* for judicial review of this type of agency action does not appear to have been advocated by the Secretary until this case reached the Court of Appeals"[29]; "[The Secretary] argues that . . . § 704 bars relief *because the State has an adequate remedy in the Claims Court*"[30]; "Further, the District Court's jurisdiction to award complete relief in a case such as this is not barred by the possibility that *a purely monetary judgment may be entered in the Claims Court*."[31]

The Court acknowledged the possibility of a jurisdiction-related category of ARC. In the clearest holding, the Court found that "[t]he Secretary's novel submission that the entire action is barred by § 704 must be rejected, because the doubtful and *limited relief available in the Claims Court* is not an adequate substitute for review in the District Court."[32] Thus, the Court clearly determined that NOARC existed here where *as a jurisdictional matter* the Claims Court could not grant complete relief to the aggrieved party.

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[26] *Id.* at 905 (internal brackets omitted).
[27] *Id.* at 906.
[28] *Id.* at 907.
[29] *Id.* at 887 (emphasis added).
[30] *Id.* at 891 (emphasis added).
[31] *Id.* at 910 (emphasis added).
[32] *Id.* at 901 (emphasis added).

Upon inspection it is clear to us what may not have been clear to the Court: one category of ARC district courts should or could look for when undertaking a § 704 NOARC analysis is the jurisdictional ARC. That is, whether an alternative court has the legal authority to give the aggrieved something more than "limited relief." [33] It does not matter that, in *Bowen*, the Court did not find this ARC—what matters is that the Court *looked* for an ARC. Left wanting, it moved on.

2. *The Special Statutory ARC*

The Court considered a second category of ARC in reviewing the APA's legislative history. The Court noted that "[a]t the time the APA was enacted, a number of statutes creating administrative agencies defined the specific procedures to be followed in reviewing a particular agency's action."[34] The Court listed the Federal Trade Commission (FTC), the National Labor Relations Board (NLRB), and the Interstate Commerce Commission (ICC) as three examples of agencies with congressionally specified judicial review procedures. By statute, judicial review of FTC and NLRB actions occurred directly in the courts of appeals, and ICC orders were subject to review by three-judge district courts.[35]

Against the backdrop of these specific statutory review procedures, Congress enacted the APA and its broad grant of judicial review. The *Bowen* court held that this contrast supports one interpretation of § 704—"the provision [§ 704] as enacted . . . makes it clear that Congress did not intend the general grant of review in the APA to duplicate existing procedures for review of agency action."[36]

Thus, one possible ARC the *Bowen* court raises is the special statutory ARC. That is, "where Congress has provided special and adequate review procedures," § 704 "does not provide additional judicial remedies."[37]

In the case of *Bowen*, HHS argued that the special statutory ARC existed in the form of the Tucker Act,[38] which provided the U.S. Claims Court with jurisdiction over claims "founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."[39] The Court paraphrased HHS's special statutory ARC argument "that § 704 should be construed to bar review of the agency action in the District Court because monetary relief against the United States is available in the Claims Court under the Tucker Act."[40]

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[33] *Id.*
[34] *Id.* at 904.
[35] *Id.*
[36] *Id.* at 903.
[37] *Id.* at 904 (quoting ATTORNEY GENERAL TOM C. CLARK, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT (1947)).
[38] 28 U.S.C. § 1491.
[39] 28 U.S.C. § 1491(a)(1).
[40] *Bowen*, 487 U.S. at 904.

The Court rejected HHS's special statutory ARC argument, calling it a "restrictive—and unprecedented—interpretation of § 704."[41] The Court then held that "the remedy available to the State [Massachusetts] in the Claims Court is plainly not the kind of 'special and adequate review procedure' that will oust a district court of its normal jurisdiction under the APA."[42] The Court then transitioned into a discussion of the Claims Court's inability to give the plaintiff all of what it sought in *Bowen*; namely, the Claims Court's lack of "general equitable powers . . . to grant prospective relief."[43]

This discussion relates to the Court's discussion of the jurisdictional ARC, although the two ARCs are conceptually different. What matters for the jurisdictional ARC analysis is another court's *power* to hear the case and grant relief. What matters for the special statutory ARC, on the other hand, is Congress's intent for judicial review of particular agency actions to be heard in a special and specific way. For instance, Congress has specified that appeals by Medicare providers of certain Medicare payments must happen according to the judicial review procedures outlined by statute.[44] This provision is a special statutory remedy drafted by Congress with the intent that Medicare appeals by providers would occur through this statutory procedure. For this reason, 42 U.S.C. § 1395oo precludes direct APA review.[45]

What § 1395oo is not, however, is a *Bowen* jurisdictional ARC. Appeals brought for judicial review under either § 703 or 42 U.S.C. § 1395oo begin in the district court. Therefore, no *other* court is applicable as a forum, no other court's *jurisdiction* is under review, and no jurisdictional ARC argument can be made. In short, 42 U.S.C. § 1395oo is an example of a special statutory ARC that is not a jurisdictional ARC; highlighting the difference between the two categories.

3. *The Unexhausted Administrative ARC*

Early in its majority opinion, the Court wrote, "Professor Davis, a widely respected administrative law scholar, . . . has discussed § 704's bar to judicial review of agency action when there is an 'adequate remedy' elsewhere as merely a restatement of the proposition that '[o]ne need not exhaust administrative remedies that are inadequate.'"[46]

In the footnote to this proposition, the Court briefly explored the validity of the unexhausted administrative remedies ARC. The Court reasoned that "§ 704 is titled 'Actions reviewable,' and it discusses, in the two sentences that follow the one at issue today, matters regarding finality."[47] This brief textual analysis led the Court to conclude "it is certainly arguable that, by enacting § 704, Congress merely meant to ensure that

[41] *Id.* at 904.
[42] *Id.*
[43] *Id.* at 905.
[44] *See* 42 U.S.C. § 1395oo.
[45] *See* Shalala v. Illinois, 529 U.S. 1 (2000) (implicitly finding APA review precluded because Congress anticipated Medicare appeals would occur through the judicial review provisions of Medicare).
[46] *Bowen*, 487 U.S. at 902.
[47] *Id.* at n.35.

judicial review would be limited to final agency actions and to those nonfinal agency actions for which there would be no adequate remedy later."[48]

This almost verbatim restatement of the language of § 704 makes for an unremarkable proposition, but the Court may have been emphasizing that even "nonfinal" agency actions can be reviewable as long as the further actions necessary to finalize them would not serve as an adequate remedy. As the Court pointed out, this is arguably a statement that the NOARC language in § 704 contemplates courts looking to unexhausted administrative remedies as possible ARCs, which would preclude § 704.

Having raised and briefly addressed Professor Davis's proposed ARC, the *Bowen* court then apparently conceded the unexhausted administrative remedies ARC. But it did so cursorily—on its way to its much more detailed and thorough special statutory ARC discussion. The Court wrote, "However, although *the primary thrust of § 704 was to codify the exhaustion requirement*, the provision as enacted also makes clear that Congress did not intend the general grant of review in the APA to duplicate existing procedures for review of agency action."[49]

Admittedly, the Court's "concession" of the unexhausted administrative remedies ARC might be characterized as a statement about the general purposes of § 704 rather than a statement about an interpretation of NOARC specifically. But because it follows the Court's discussion of the unexhausted administrative remedies ARC as it does, it seems clear the Court meant to address the validity of Davis's ARC. The Court certainly did not reject the unexhausted administrative remedies ARC—nowhere in the opinion did the *Bowen* court say anything to negate or to contextualize its point that "Professor Davis, a widely respected administrative law scholar" believes the NOARC language in § 704 is "merely a restatement" that inadequate unexhausted administrative remedies need not be exhausted prior to review.[50]

It should be noted, of course, that the *Bowen* court did not rely upon the unexhausted administrative remedies ARC for its § 704 holding, arguably making it dicta. But the Court raised it as a possibility. Certainly, the Court does not need to accept—or even to discuss—the work of legal academics. But it did so in *Bowen*, indicating that the Court thought it a possibility worth raising.

Despite the Court's anemic discussion of the unexhausted administrative remedies ARC, it does appear to have conceded it as viable ARC, one district courts may look to when they try to determine if NOARC exists prior to APA review. Though the *Bowen* court itself did not rely upon this ARC for its holding, the unexhausted administrative remedies ARC remains a possibility in precedential law.

4. *The Practical ARC*

The fourth possible category of ARC raised in *Bowen* received only one paragraph of discussion. But it is a paragraph that stands in contrast to the others

[48] *Id.*
[49] *Id.* at 903 (emphasis added).
[50] *Id.* at 902.

because it addresses a line of analysis unlike any other in the Court's opinion. After the Court's discussion of the jurisdiction and powers of the Claims Courts (the jurisdictional ARC), the Court turned to a discussion of the *expertise* of the Claims Court: "Further, the nature of the controversies that give rise to disallowance decisions typically involve state governmental activities that a district court would be in a better position to understand and evaluate than a single tribunal headquartered in Washington."[51]

The Court continued:

> We have a settled and firm policy of deferring to regional courts of appeals in matters that involve the construction of state law. That policy applies with special force in this context, because neither the Claims Court nor the Court of Appeals for the Federal Circuit has any special expertise in considering the state law aspects of the controversies that give rise to disallowances under grant-in-aid programs.[52]

The *Bowen* court seemed to be interested in the *quality* of the review that would be provided to plaintiffs if they were forced to bring their claims in the Claims Court, rather than in the district court. The Court was implying—if not outright stating—that, regardless of jurisdiction, remedies available in the Claims Court might not be adequate as a practical matter.

This argument could be characterized as raising the possibility of "the practical ARC." The rationale behind this ARC is that if no other remedy in a court is adequate as a practical matter—jurisdiction, statutory procedure, and unexhausted administrative remedies notwithstanding—then there is NOARC triggering § 704 preclusion and barring § 706 review.

The Court's ninth-inning consideration of the practical ARC illuminates a single word choice early in the Court's opinion. As discussed earlier, the Court began its § 704 analysis by stating its holding: "The Secretary's novel submission that the entire action is barred by § 704 must be rejected, because the doubtful and limited relief available in the Claims Court is not an adequate substitute for review in the District Court."[53] The Court here used two adjectives to describe the Claims Court's potentially available—but ultimately inadequate—relief: "doubtful" and "limited."

The jurisdictional ARC discussion above gives force to the Court's choice of "limited"; Claims Court relief is inadequate here because, as a jurisdictional matter, the Court is limited in its ability to grant the requisite relief. Jurisdictionally limited relief is inadequate relief, according to the jurisdictional ARC.

But it is the practical ARC that is particularly relevant to the Court's choice to cast the alternative relief proffered as "doubtful." None of the other ARCs the Court

[51] *Bowen*, 487 U.S. at 908.
[52] *Id.*
[53] *Id.* at 901.

discussed—jurisdictional, special statutory, and unexhausted administrative—are concerned with the *quality* of relief. The jurisdictional ARC line of inquiry is concerned with the *comprehensiveness* of relief (i.e., a court's ability to grant both equitable and monetary relief); the special statutory ARC inquiry focuses on the *topicality* of relief (i.e., Did Congress prescribe a statutory remedy for this specific kind of problem?); and the unexhausted administrative ARC inquiry considers the *fruitfulness* of unpursued administrative relief.

In contrast, the practical ARC inquiry as framed by the *Bowen* court allows the Court to consider the actual adequacy of the relief—in this case, the justness of having the Claims Court decide "complex questions of federal-state interaction."[54] Thus, the Court cast as "doubtful" the kind of relief available in the Claims Court. With that single addition, the Court was able to say, *Legally it might look like adequate relief, but practically, it is not.* In this way, the Court underscored the viability of a practical ARC, though in this case, none was to be found.

C. *ARCs in the Other* Bowen *Opinions*

In addition to the majority opinion, which was authored by Justice Stevens and joined by Justices Brennan, Marshall, Blackmun, and O'Connor, two other opinions were filed in *Bowen*.[55] Justice White filed a concurrence, and Justice Scalia authored a dissent in which Chief Justice Rehnquist and Justice Kennedy joined.[56] Though neither of these opinions is precedential, they both raise and rely upon ARC inquiries.

Justice White's short concurrence set forth his understanding of the Court's analysis on the § 704 claim.[57] He wrote: "The Court is correct in holding that § 704 does not bar District Court review of the challenged orders, the reason being that the Claims Court could not entertain and grant the claims presented to and granted by the District Court."[58] Justice White clearly relied upon the jurisdictional ARC inquiry—and that ARC inquiry only. His concurrence does not even acknowledge the Court's other adequacy considerations. On this basis alone, he concurred: "I thus agree with the result reached in Part III [the § 704 analysis] of the Court's opinion."[59]

Whereas Justice White concurred on narrower grounds than those relied upon in the majority opinion, Justice Scalia, Chief Justice Rehnquist and Justice Kennedy dissented on *broader* grounds. First, Justice Scalia addressed the special statutory category of ARC. He explained that "[t]he purpose and effect of this provision [the

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[54] *Id.* at 908.
[55] *Id.* at 881.
[56] *Id.*
[57] *Id.* at 913. Though the concurrence does outline Justice White's understanding of the § 704 issue, it focuses primarily on the § 702 question raised in the case. Specifically, the parties dispute whether the action filed is a request for money damages, or if it is a request for some other kind of relief. Because § 702 only provides a waiver of sovereign immunity for actions "seeking relief other than money damages," an action *for* money damages would not allow APA review.
[58] *Id.* at 912.
[59] *Id.*

NOARC requirement of § 704] is to establish that the APA 'does not provide additional judicial remedies in situations where the Congress has provided special and adequate review procedures.'"[60] For this proposition, he quoted Attorney General Clark's manual and cited to a string of federal court of appeals decisions, as well as to Professor Davis's administrative law treatise.[61]

Justice Scalia then analyzed the Tucker Act, which he concluded was a special statutory ARC precluding § 706 review. The Tucker Act gives the Claims Court jurisdiction over Massachusetts's Medicaid claim, Justice Scalia reasoned, because the Tucker Act establishes the Claims Court's jurisdiction over two relevant kinds of action: (1) "Government grant instruments" and (2) "a claim 'founded . . . upon [an] Act of Congress.'"[62] Each is applicable to Massachusetts's claim for Medicaid disallowance review.

First, the Medicaid Act is analogizable to "a unilateral offer for contract" made by the federal government and extended to the states, which the states then accept by performance. Second, the Medicaid provision that mandates the Secretary "shall pay to each State"[63] the amounts required for providing Medicaid services is a statutory act of Congress. And under the express terms of the Tucker Act, claims "founded upon . . . Act[s] of Congress" are reviewable by the Claims Court.[64]

Thus, Justice Scalia concluded, the Claims Court *does* have jurisdiction over the claim. Justice Scalia then took one additional step: he analyzed whether the Claims Court's jurisdiction was such that the court could grant adequate relief. Specifically, Justice Scalia considered the "established, centuries-old, common-law meaning" of "adequate remedy": "to wit, that specific relief will be denied when damages are available and are sufficient to make the plaintiff whole."[65] Justice Scalia explained this definition of "adequate remedy" clarifies that "in all but the most extraordinary cases," damages will suffice to make plaintiffs whole. This is true though plaintiffs "may often prefer a judicial order enjoining a harmful act or omission."[66]

Justice Scalia noted there may be circumstances under which money would not be adequate. For example, "if a State could prove the Secretary intended in the future to deny Medicaid reimbursement in bad faith, forcing the State to commence a new suit for each disputed period," then money damages may not be adequate. In this circumstance, "an action for injunctive relief in district court would lie."[67]

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[60] *Id.* at 922 (quoting ATTORNEY GENERAL'S MANUAL ON THE APA, *supra*, note 40) (Scalia, J., dissenting).
[61] *Id.*
[62] *Id.* at 923 (Scalia, J., dissenting).
[63] 42 U.S.C. § 1396b(a) (added emphasis omitted).
[64] 28 U.S.C. § 1491(a)(1).
[65] *Bowen*, 487 U.S. at 925 (Scalia, J., dissenting).
[66] *Id.* at 925 (Scalia, J., dissenting).
[67] *Id.*

But Justice Scalia deemed this an "unusual circumstance[]."[68] He argued that typically, the Claims Court's ability to reward monetary relief would constitute NOARC. Consequently, district court review under the APA would be precluded *typically*.

All this adds up to the introduction of what is arguably a new, additional ARC: the money damages ARC. Had Justice Scalia's dissent received the force of law, federal courts reviewing cases for § 704 compliance would be required to consider whether money damages are likely to make plaintiffs whole. This ARC inquiry would direct most plaintiffs seeking APA review for cases involving money determinations out of district court for APA review and into the Claims Court for Tucker Act determinations.[69] Or so Justice Scalia anticipated.

Justice Scalia's dissent takes issue with the majority's approach to the jurisdictional ARC inquiry. Specifically, Scalia argued that the Court inappropriately relied upon an analysis of whether "as a *category of case*" Medicaid disallowances would be adequately served in the Claims Court[70]: "This novel approach completely ignores the well-established meaning of 'adequate remedy,' which refers to the adequacy of a remedy for a particular plaintiff in a particular case rather than the adequacy of a remedy for the average plaintiff in the average case of the sort at issue."[71] Notably, when Scalia referred to the "well-established meaning" of ARC, he was not relying upon any express language in § 704 or any prior court's interpretation of the APA's NOARC language. Rather, he derived this meaning from a "traditional legal presumption (and the common-sense presumption)" that "money damages are ordinarily an adequate remedy" under statutes that require the government to pay parties money.[72]

Clearly, Justice Scalia reads § 704's NOARC language as an importation of law developed outside the context of the APA, at least in the context of money-related claims. Money is involved? Money is an ARC. This is the thrust of the Scalia dissent.

D. Bowen *in Summary*

In summary, in an effort to determine if the U.S. Court of Federal Claims provided an "adequate remedy" to Massachusetts's claim for review of a Medicaid disallowance decision, the *Bowen* majority undertook four lines of inquiry. The Court asked if the Claims Court had jurisdiction to give the plaintiff relief it wanted; the answer was no. The Court asked if Congress passed the Tucker Act to allow plaintiffs like Massachusetts to bring actions like Massachusetts's in the Claims Court; here,

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[68] *Id.* at 926 (Scalia, J., dissenting).

[69] Interestingly, the Tucker Act provides that at least certain claims brought into Claims Court for judicial review will be reviewed "pursuant to the standards set forth in section 706 of title 5." 28 U.S.C. § 1491(b)(4). "Section 706 of title 5" is, of course, 5 U.S.C. § 706, APA review. Thus, whether Massachusetts's claim was adjudicated by the Claims Court or the district court would appear to have had no difference on the level of scrutiny that would have been applied.

[70] *Bowen*, 487 U.S. at 927 (Scalia, J., dissenting) (quoting majority).

[71] *Id.* (Scalia, J., dissenting).

[72] *Id.* (Scalia, J., dissenting).

again, the answer was no. The Court noted that a widely regarded administrative law scholar suggested that the adequate remedy requirement in § 704 was really Congress's determination that plaintiffs did not need to pursue administrative remedies if they would not help sufficiently; the Court did not apply that possibility here. Finally, the Court reviewed the quality of review Massachusetts would get in Claims Court—i.e., the Claims Court's expertise with state law issues, the Claims Court's ability to make decisions regarding complicated and ongoing state-federal relationships, the difference between the cause of action here and the specialized nature of the Claims Court's typical work. On this basis, too, the Court found the Claims Court's remedies inadequate.

In his dissent from the Court's opinion, Justice Scalia introduced yet another line of inquiry. He asked, could money be an adequate remedy? He decided that here, probably yes. Unlike the majority, Justice Scalia found an adequate remedy. If the Court had adopted Justice Scalia's view, the inquiry would have ended. No district court review for Massachusetts.

What matters from all of this is not that the *Bowen* majority did not find a § 704 ARC. What matters are the factors the Court considered in analyzing the issue—the kinds of adequate remedies it was looking for.

III. THE CONFUSION ABOUT *BOWEN*

The problem with *Bowen* is it purports to reach a clear holding by undertaking a cohesive analysis. In actuality, the Court's opinion confuses its ARC analyses, jumping from one ARC to another without identifying transitions or conclusions. Even the Court's statement of its own holding does not fully or clearly reflect the ARCs the Court considered and rejected.

This confusion has had consequences. Lower courts and petitioners do not know what *Bowen* means or what its holding entails. They pick and choose between the kinds of analysis the *Bowen* court undertook—they do so because without clear guidance and with internally inconsistent analyses they *can*. Even the Supreme Court is confused, sometimes without knowing it, and sometimes without knowing why.

This Part will present the manifestations of *Bowen*'s mess in three representative venues: (a) the Supreme Court; (b) the U.S. Court of Appeals for the District of Columbia Circuit; and (c) the District Court for the Southern District of Texas. The melee should demonstrate that a new, revitalized understanding of *Bowen* is necessary. Anything less would be an inadequate remedy.

A. *Confusion in the Supreme Court*

Since the Supreme Court issued its *Bowen* decision in 1988, it has heard no other cases directly addressing the meaning of 5 U.S.C. § 704's NOARC language. In 1993, the Court did hear a case requiring its interpretation of § 704—*Darby v.*

Cisneros[73]—but the language in question was the last sentence of § 704, which addresses finality and, implicitly, exhaustion of remedies.[74]

Though the *Darby* court's holding did not rely upon any § 704 analysis, the Court did summarize the central holding of *Bowen*. It reviewed *Bowen* as part of an overview of the Court's § 704[75] cases—by the Court's own admission, a small group.[76] The *Darby* court explained that, in *Bowen*, it had concluded that "although the primary thrust of [§ 704] was to codify the exhaustion requirement, Congress intended by that provision to avoid duplicating previously established special statutory procedures for review of agency actions."[77]

The *Darby* court's summary of *Bowen*, then, casts *Bowen* as equating § 704 with the special statutory ARC. It ignores the *Bowen* court's discussion of and reliance upon (1) the Claims Court's inability to grant equitable relief (an element of its jurisdictional ARC inquiry); and (2) the Claims Court's specialized focus and lack of state law expertise (as part of its practical ARC).

While *Darby* mentions *Bowen*'s discussion of § 704's administrative remedy exhaustion requirement, it fails to mention that the *Bowen* court raised without rejecting Professor Davis's pronouncement that NOARC itself represented a limit on that requirement.

Notably, the *Darby* opinion was unanimous as to the section including the *Bowen* summary.[78] Thus, this summary of *Bowen* passed muster with Justices Stevens, White, and Scalia—the authors of all three opinions in Bowen. It is possible these Justices understood they were approving an opinion "reaffirming" the central holding of a related, previous case though it differed from their own analysis in that case. Justice Stevens' might have insisted that *Darby*'s paraphrase of *Bowen* at least reflect the Court's conclusion that § 704 NOARC preclusion was not triggered because "the

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[73] 509 U.S. 137 (1993).

[74] The last line of 5 U.S.C. § 704 reads:

> 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.

5 U.S.C. § 704. It is this language—and the "*final* agency action" language of § 704's first sentence—at issue in *Darby*.

[75] In *Darby*, the Court consistently uses "§ 10(c)" in lieu of "§ 704." Section 10(c) is the original designation for § 704, as it was codified in the original Public Law. Pub. L. No. 79-404.

[76] The Court itself pointed out the rarity of its § 704 interpretations:

> It perhaps is surprising that it has taken over 45 years since the passage of the APA for this Court definitively to address this question. Professor Davis noted in 1958 that § 10(c) had been almost completely ignored in judicial opinions; he reiterated that observation 25 years later, noting that the provision is relevant in hundreds of cases and is customarily overlooked.

Darby, 509 U.S. at 145 (internal citations removed).

[77] *Id.* at 146 (internal citations removed).

[78] *Id.* at 138.

doubtful and limited relief available in the Claims Court is not an adequate substitute for review in the District Court," a holding based upon the Court's inquiry into the jurisdictional and, arguably, the practical ARC.[79]

Justice White might have required that *Darby*'s *Bowen* summary adhere to his understanding that the Claims Court failed to provide an ARC because "the Claims Court could not entertain and grant the claims presented to and granted by the District Court."[80]

Interestingly, though Justice Scalia dissented in *Bowen*, it is his *Bowen* opinion that most closely aligns to the *Darby* characterization of *Bowen*. Though Justice Scalia's *Bowen* analysis is perhaps best understood as raising the possibility of a money damages ARC, he cast his analysis in terms of the special statutory ARC. At the outset of his dissent, he wrote that "[t]he purpose and effect of this provision is to establish that the APA 'does not provide additional judicial remedies in situations where the Congress has provided special and adequate review procedures.'"[81] This maps closely to *Darby*'s characterization of *Bowen* as concluding that "Congress intended by [§ 704] simply to avoid duplicating established special statutory procedures for review of agency actions."[82] Thus, it is Scalia's concurrence with this part of *Darby* that is, of all the Justices', most reasonable.

Perhaps Justices Stevens and White—as well as the other Justices who had concurred in the *Bowen* majority and who unanimously joined in *Darby*[83]—recognized the differences between the *Darby* summary of *Bowen* and *Bowen* itself. Perhaps they each decided their concurrence in *Darby* was not dependent on the Court's revising of the section discussing *Bowen*. But at least Justice Blackmun, who drafted *Darby* and joined the majority in *Bowen*, would have drafted *Darby* differently if he had realized the difference between the Court's representations of *Bowen* in *Darby* and the Court's representation of *Bowen* in *Bowen* itself.

It seems plausible, if not likely, that even the Justices who comprised the *Bowen* majority were confused about what *Bowen* itself had held. They are not alone.

B. *Confusion in the Lower Courts:* Garcia v. Vilsack

In 2000, three Hispanic farmers filed a class action suit against the United States Department of Agriculture (USDA), alleging widespread discriminatory lending and benefits practices. The case*, Garcia v. Vilsack*,[84] was one of four filed by the same lead counsel, alleging the same causes of action for four categories of plaintiff farmers: black

[79] Bowen v. Massachusetts, 487 U.S. 879, 901 (1988).
[80] *Id.* at 913.
[81] *Id.* at 922 (Scalia, J., dissenting) (quoting ATTORNEY GENERAL'S MANUAL ON THE APA, *supra*, note 40, at § 10(c)).
[82] *Darby*, 509 U.S. at 146.
[83] Only Justice Thomas joined the Supreme Court after *Bowen* but before *Darby*. He was confirmed an Associate Justice in 1991.
[84] 563 F.3d 519 (D.C. Cir. 2009), *cert. denied*, 130 S. Ct. 1138 (2010).

farmers—*Pigford v. Glickman*[85]; Native American farmers—*Keepseagle v. Glickman*[86]; and women farmers—*Love v. Johanns*.[87]

In each case, the plaintiffs alleged three violations: (1) the USDA had violated the Equal Credit Opportunity Act (ECOA), which prohibits all creditors—including the federal government—from discriminating against credit applicants "with respect to any aspect of a credit transaction" on the basis of the applicant's "race, color, religion, national origin, sex or marital status, or age"[88]; (2) the USDA had discriminated against plaintiffs as related to non-credit benefits; and (3) the USDA had failed to investigate the plaintiff classes' complaints of discrimination.

1. *The NOARC Question*

At first pass, the District Court for the District of Columbia denied the plaintiffs' motion for class certification, as well as the plaintiffs' failure-to-investigate claims.[89] The plaintiffs had brought their failure-to-investigate claims on both the ECOA and the APA. But the district court rejected the claims on both grounds.[90] In a short memorandum order, the court reasoned: (1) the plaintiff farmers failed to state a failure-to-investigate claim under the ECOA because "the investigation of a complaint is not a 'credit transaction' within the ECOA," and the ECOA only governs credit transactions.[91] And (2) the failure-to-investigate claim was "not cognizable under the APA because ECOA provides 'an adequate remedy.'"[92]

The adequate remedy the district court was referring to was 7 U.S.C. § 2279 (also referred to as § 741). This section, enacted in 1998, was Congress's response to a 1997 report characterizing the USDA's civil rights program as being "in a persistent state of chaos"[93] and a "failure."[94] As a result of the report, Congress conducted hearings and determined that the USDA had "dismantled" its civil rights mechanisms, including discrimination complaint processing and investigating.[95]

[85] 206 F.3d 1212 (D.C. Cir. 2000).
[86] 194 F.R.D. 1 (D.D.C. 2000).
[87] 439 F.3d 723 (D.C. Cir. 2006).
[88] 15 U.S.C. § 1691(a)(1).
[89] Garcia v. Veneman, 2002 WL 33004124 (D.D.C. Mar. 20, 2002).
[90] *Id.* at *1 (holding that "plaintiffs' allegations of failure to investigate civil rights complaints do not state claims under ECOA or the APA").
[91] Garcia v. Johanns, 444 F.3d 625, 630 (D.C. Cir. 2006).
[92] Garcia v. Johanns, 444 F.3d at 630 (quoting Garcia v. Veneman, 2002 WL 33004124 (D.D. C. Mar. 20, 2002).
[93] GOVERNMENT ACCOUNTABILITY OFFICE, GAO/RCED-99-38: USDA'S DISCRIMINATION COMPLAINT PROCESS, 4 (1999) (describing the report, U.S. DEPARTMENT OF AGRICULTURE, CIVIL RIGHTS AT THE UNITED STATES DEPARTMENT OF AGRICULTURE: A REPORT BY THE CIVIL RIGHTS ACTION TEAM, (1997)).
[94] GOVERNMENT ACCOUNTABILITY OFFICE, GAO-08-755T: MANAGEMENT OF CIVIL RIGHTS EFFORTS CONTINUES TO BE DEFICIENT DESPITE YEARS OF ATTENTION, 4 (2008).
[95] Love v. Connor, 525 F. Supp. 2d 155, 157 (D.D.C. 2007).

In response, Congress enacted § 741, amending the statute of limitations for filing certain complaints under the ECOA's anti-discriminatory lending provisions.[96] Section 741 allows those who had filed "eligible complaint[s]" with the USDA between 1981 and 1996 two years to file a complaint.[97] Thus, the district court concluded, the ability to bring an otherwise time-barred suit alleging past discrimination under the ECOA, as now allowed by § 741, provides an adequate remedy to the plaintiffs' claims that the USDA failed to investigate the plaintiffs complaints of discrimination. The district court dismissed the plaintiffs' failure-to-investigate claims.

On interlocutory appeal, the D.C. Circuit affirmed the dismissal of the failure-to-investigate claims the plaintiffs had brought under the ECOA. The ECOA only provides causes of actions for discriminatory credit transactions,[98] and a failure to investigate is not a "credit transaction," the court of appeals held.

But the court declined to exercise its jurisdiction regarding the district court's denial of the APA failure-to-investigate claims.[99] The D.C. Circuit decided the issue was insufficiently briefed.[100] Based upon the limited record on appeal, the court dismissed the appeal of the APA failure-to-investigate claims. The court of appeals remanded to the district court for closer inspection of the § 704 NOARC issue: Does the ECOA provide an adequate remedy to the plaintiffs' failure-to-investigate claims, precluding APA review?

2. *The Courts' NOARC Analyses*

The district court complied with the court of appeals's remand to consider the NOARC question. In doing so, the district court first—and obligatorily—addressed *Bowen*: "The definitive interpretation of this section [§ 704] comes from *Bowen v. Massachusetts*."[101] The district court then selected one line from the *Bowen* opinion, identifying that as the "definitive interpretation" of § 704. Notably, the district court chose a line quoting Attorney General Clark's manual: "[T]he Supreme Court cited Attorney General Clark's manual on the APA for the proposition that § 704 'does not provide additional judicial remedies in situations where the Congress has provided special and adequate review procedures.'"[102]

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[96] Pub. L. No. 105-277 (codified at 7 U.S.C. § 2279).

[97] *See* Pub. L. No. 105-277 ("To the extent permitted by the Constitution, any civil action to obtain relief with respect to the discrimination alleged in an eligible complaint, if commenced not later than 2 years after the date of the enactment of this Act, shall not be barred by any statute of limitations."); *see also* Love v. Connor, 525 F. Supp. 2d at 157.

[98] 15 U.S.C. § 1691(a).

[99] Garcia v. Johanns, 444 F.3d 625, 637 (D.C. Cir. 2006); *see* 28 U.S.C. § 1292(b) (identifying interlocutory appeal as being within the "discretion" of the court of appeals).

[100] Garcia v. Johanns, 444 F.3d at 637 (noting "the appellants used slightly more than four pages of their 59-page brief and no time at oral argument addressing the APA failure-to-investigate claim").

[101] *Love*, 525 F. Supp. 2d at 158. Because *Love* and *Garcia* raised the same legal questions simultaneously and were docketed as companion cases, the district court typically reviewed the merits of *Love* and then incorporated by reference the analysis into its decision in *Garcia*, as it did here.

[102] *Id.*

Relying entirely upon this single-sentence *Bowen* holding, the district court bifurcated its special statutory ARC inquiry into a "special" component and an "adequate" component. The court concluded § 741 was a "special" remedy because it was Congress's "express response to the injuries of the[] very plaintiffs" who brought suit here.[103] The specialness of the response was evident both from the legislative history, which included on point testimony in the Congressional Record, as well as from the situation-specific tailoring evident in the elements of the law (e.g., "the definition of 'eligible complaint' and the limitation of the extension remedy to those persons who actually filed complaints that had been neglected").[104]

The court also concluded § 741 was an ARC because it was "plainly 'adequate.'"[105] To adequacy, the court credited a variety of components of the law: that it allowed the injured to file a complaint or pursue administrative remedies, at her preference; that it required the agency to process the complaints in a timely fashion, make its determination after a hearing on the record, and award appropriate relief; and that it provided for de novo review of any agency determination in federal court.[106]

After this inquiry, the district court held that, Congress's special and adequate remedy notwithstanding, § 741 is an adequate remedy for the plaintiffs' failure-to-investigate discriminatory complaint claims because "a direct cause of action for discrimination exists."[107] For this, the district court relied on a line of D.C. Circuit cases, beginning pre-*Bowen*, which have "repeatedly affirmed" this holding.[108]

Writing for the D.C. Circuit, then Judge Ruth Bader Ginsburg wrote that the court is "hesita[nt] to position [itself] as a supreme supervisor of federal agency enforcement,"[109] issuing injunctions or contempt orders for what the D.C. Circuit had earlier referred to as "every instance of agency recalcitrance."[110] As Judge Ginsburg explained, such a "role [is] more effectively performed by the Executive under congressional scrutiny."[111]

With this analysis, the district court decided again NOARC did not exist. It dismissed the plaintiffs' APA-based failure-to-investigate claims.

For the second time, *Garcia*'s § 704 NOARC question went before the D.C. Circuit. This time, the court analyzed the merits of the NOARC arguments. As did the district court, the court of appeals turned to *Bowen*, summarizing *Bowen* as having "interpreted § 704 as precluding APA review where Congress otherwise provided a 'special and adequate procedure.'"[112]

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[103] *Id.* at 157.
[104] *Id.* at 158.
[105] *Id.* at 159.
[106] *Id.*
[107] *Id.*
[108] *Id.*
[109] *Id.* (quoting Coker v. Sullivan, 902 F.2d 84, 89 (D.C. Cir. 1990)).
[110] *Id.*
[111] *Id.* (quoting *Coker*, 902 F.2d at 89).
[112] Garcia v. Vilsack, 563 F.3d 519, 522 (D.C. Cir. 2009) (quoting Bowen v. Massachusetts, 487 U.S. 879, 904), *cert. denied*, 130 S. Ct. 1138 (2010).

Unlike the district court, however, the court of appeals further clarified that *Bowen* does not find another remedy adequate "if the remedy offers only 'doubtful and limited relief.'"[113] The court of appeals interpreted this to be the Supreme Court's pronouncement of the D.C. Circuit's own established case law—"the alternative remedy need not provide relief identical to relief under the APA, so long as it offers relief of the 'same genre.'"[114] Thus, alternative remedies will be adequate where another statute enables de novo district court review or where Congress has afforded a private cause of action against a third party who is subject to agency regulation.[115]

On this review of its own NOARC jurisprudence, the court of appeals overlay one Supreme Court maxim, established in *Abbott Laboratories* and reiterated in *Bowen*: "[i]n evaluating the availability and adequacy of alternative remedies, however, the court must give the APA 'a hospital interpretation' such that 'only upon a showing of clear and convincing evidence of a contrary legislative intent should the courts restrict access to judicial review.'"[116]

The court of appeals then held that "there is clear and convincing evidence" that by enacting § 741, Congress expressed its intent that complainants not be able to pursue their ECOA claims and their failure-to-investigate claims simultaneously.[117] This intent was expressed by the choice Congress embedded within § 741: give USDA another chance to investigate your claim of discrimination *or* seek judicial review of the alleged discrimination directly. Section 741 itself does contain those options—§ 741(a) enables complainants to file directly in district court, while § 741(b) allows eligible complainants to pursue administrative remedies, after which judicial review would be available. The court characterized these alternatives as requiring the complainants to make a clear choice: "go[] to court immediately or first renew[] their administrative complaints."[118]

The court of appeals concluded that if the plaintiffs were allowed to pursue § 741(a) direct review *and* APA failure-to-investigate review, they could obtain both the direct relief allowed under the ECOA and declaratory relief requiring the agency to investigate their complaints. This would provide the complainants with *both* the kind of relief allowed by § 741(a) *and* the kind of relief afforded by § 741(b), despite Congress's clear intent that complainants be required to choose.

According to the court of appeals, the appellants sought this § 741(a) run-around of § 741(b) because, in practice, there was no meaningful § 741(b) option. The court

[113] *Id.* at 522 (quoting *Bowen*, 487 U.S. at 901).
[114] *Id.* (quoting El Rio Santa Cruz Neighborhood Health Ctr. v. U.S. Dep't of Health & Human Servs., 396 F.3d 1265, 1272 (D.C. Cir. 2005)).
[115] *Id.* (quoting *El Rio*, 396 F.3d at 1272).
[116] *Id.* (quoting *El Rio*, 396 F.3d at 1272 (quoting Abbott Labs. v. Gardner, 387 U.S. 136, 141 (1967))). The court of appeals also cited to *Bowen v. Massachusetts*, 487 U.S. 879, 904 (1988), for this canon of construction.
[117] *Garcia*, 563 F.3d at 523.
[118] *Id.*

noted that "appellants offered *unrebutted* evidence that the USDA never successfully implemented the required administrative process."[119]

The court first rejected this futility argument, based upon the statutory reading of § 741 discussed above (i.e. the run-around argument), but then it held that "even giving credence to the appellants' futility suggestion," the appellants must lose their APA failure-to-investigate claims: § 704 precludes them.[120] As the court stated it: "[T]hey still would be unable to show that they lack an adequate remedy at law."[121]

The adequate remedy the court was referring to was the ECOA itself: "[T]o the extent appellants can offer proof that the USDA discriminated against them in the administration of its credit programs, [under the ECOA] appellants will be entitled to recover money damages and attorneys' fees, and, as appropriate, also injunctive and declaratory relief."[122] The court of appeals derived this holding from its precedent finding private rights of action against a third party monitored by a federal agency sufficiently adequate to remedy wrongdoing as to preclude APA claims against the agency itself.[123]

Such alternative remedies are adequate, the court explained in *Garcia*, because "[t]he relevant question under the APA . . . is not whether private lawsuits against the third-party wrongdoer are *as effective* as an APA lawsuit against the regulating agency, but whether the private suit remedy provided by Congress is *adequate*."[124] Thus, in the D.C. Circuit, an alternative remedy can be adequate even if its precipitating action is "more arduous[] and less effective"[125] than a case brought under the APA.[126] As long as the alternative remedy is "of the same genre as that offered by an APA," it will be a § 704 ARC.[127]

Finally, the court of appeals held that such a construction of § 704 is consistent with *Bowen*.[128] For its reasoning, the court referred to *El Rio Santa Cruz Neighborhood Health Center, Inc. v. U.S. Department of Health and Human Services*,[129] in which the court of appeals reviewed *Bowen* and then held that private causes of action against third parties can be ARCs precluding APA review. In *El Rio*, the D.C. Circuit expressed its understanding that *Bowen* was the Supreme Court's articulation of "the meaning of 'adequate remedy' under § 704 of the APA":

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[119] *Id.* at 524 (emphasis added).
[120] *Id.*
[121] *Id.*
[122] *Id.*
[123] *Id.* at 525 (citing Women's Equity Action League v. Cavazos, 906 F.2d 742 (D.C. Cir. 1990); Coker v. Sullivan, 902 F.2d 84 (D.C. Cir. 1990); Council of and for the Blind of Delaware County Valley, Inc. v. Regan, 709 F.2d 1521 (D.C. Cir. 1983)).
[124] *Garcia*, 563 F.3d at 525 (emphasis added).
[125] *Id.*
[126] *Id.* (quoting *Women's Equity Action League*, 906 F.2d at 751).
[127] *Id.* (internal quotation marks removed).
[128] *Id*.
[129] 396 F.3d 1265 (D.C. Cir. 2005).

> While observing that § 704 was not intended to provide additional judicial remedies "where the Congress has provided special and adequate review procedures," the Court explained that "[t]he exception that was intended to avoid such duplication should not be construed to defeat the central purpose of providing a broad spectrum of judicial review of agency action." In that case, the Court concluded that relief in the Claims Court "is plainly not the kind of 'special and adequate review procedure' that will oust a district court of its normal jurisdiction under the APA." Not only was reviewability of a disallowance decision by the Claims Court "doubtful," the Claims Court lacked equitable jurisdiction to grant prospective relief, which the Court considered appropriate in light of the interaction between the states' administration of an approved Medicaid plan and the HHS Secretary's regulatory interpretation. The Court was unwilling to assume a money judgment "will always be an adequate substitute for prospective relief . . . ."[130]

Neither the court in *El Rio* nor the court in *Garcia* explained how this description of *Bowen* leads to the D.C. Circuit's practice of "focus[ing] on whether a statute provides an independent cause of action or an alternative review procedure,"[131] which practice the court was presumably following when it held in *Garcia* that an APA failure-to-investigate claim was not available. The appellants were left to seek relief through their "other adequate remedy"—the ECOA.[132]

3. *Comparing* Garcia *and* Bowen

The D.C. District Court's decision in *Garcia* employed *Bowen* in two contradictory ways: (1) explicitly construing *Bowen* as holding that a § 704 ARC is a remedy that is both "special" and "adequate"; and (2) drawing upon *Bowen*'s varied ARC analyses to conduct its own analysis, though without acknowledgment and without faithful application. Each of these moves merits discussion.

First, it is noteworthy that the D.C. District Court selected a single sentence out of *Bowen* upon which to rest its own analysis: "§ 704 does not provide additional judicial remedies in situations where the Congress has provided special and adequate review procedures."[133] This statement is one *Bowen* itself drew from the Attorney General's Manual on the Administrative Procedure Act,[134] to counter or complement Professor Davis's contention that § 704 primarily codified an exhaustion requirement—the unexhausted administrative remedies ARC.

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[130] *El Rio*, 396 F.3d at 1270 (quoting Bowen v. Massachussetts, 487 U.S. 879, 903-05 (1988)) (internal citations removed).
[131] *El Rio*, 396 F.3d at 1270.
[132] *Garcia*, 563 F.3d at 527 (affirming the dismissal of the appellants' APA failure-to-investigate claims but remanding the appellants' APA non-credit disaster benefit claims, as well as the other jurisdictional or dismissal arguments raised by the government but not adequately briefed for interlocutory appeal).
[133] *Bowen*, 487 U.S. at 903 (cited by Love v. Connor, 525 F. Supp. 2d 155, 158 (D.D.C. 2007)).
[134] ATTORNEY GENERAL'S MANUAL ON THE APA, *supra*, note 40.

The Court uses this sentence from the Attorney General's Manual as a starting point to discuss the special statutory ARC, of course, but it also includes an interesting footnote explaining what "special and adequate" could likewise mean. In *Bowen*'s footnote 36, the Court construes the Attorney General's reference to "special and adequate review procedures" as "also fit[ting] the interpretation that § 704 was intended only to codify traditional rules of finality."[135] The Court explains that "the 'special and adequate review procedures' to which [Attorney General Clark] referred could well have been the various administrative-level procedures that litigants have been traditionally been required to exhaust before coming into court."[136]

Thus, according to the Supreme Court itself, the line singled out by the D.C. District Court in *Garcia* is both a restatement of the unexhausted administrative ARC, as well as a direction that the court should require plaintiffs to follow "the specific procedures" statutorily created for "review[] of a particular agency's action."[137] This contrasts with the district court's determination that there is a single, "definitive interpretation" of ARC.[138]

Additionally, the analysis the district court undertook based the "special and adequate" language of *Bowen* does not, in and of itself, follow *Bowen*. First, it contradicts the *Bowen* court's conclusion that the Attorney General's "special and adequate" language is a reiteration of the unexhausted administrative ARC; namely, the district court does not undertake an inspection of any administrative remedy exhaustion in this case. Second, it constructs a new two-part test based on the "special and adequate" language. Of all the analytical methods used by the Court in *Bowen* to decide the § 704 NOARC question, this two-part test is not one.

This second move by the *Garcia* district court would not be as much of problem, of course, if it were not for the first problem, namely that it is entirely unclear *if* or *how* the Supreme Court relied on the Attorney General's "special and adequate" language. Because the Supreme Court itself was unclear as to its reliance upon or construal of the "special and adequate" language, it was probably not advisable for the district court to rely so heavily and closely upon the "special and adequate" two-part test it derived for its NOARC determination—regardless of how clear and useful as a "special and adequate" test would be.

The second way the *Garcia* district court used *Bowen* was by choosing from among the many *Bowen* analyses to support its NOARC conclusion—even after it purported to rely heavily on the "definitive interpretation" of § 704 it derived from *Bowen*. The district court buttressed its holding that the plaintiffs had a "special and adequate" remedy precluding APA review by expressing its "concern about traversing

[135] *Bowen*, 487 U.S. at n.36.
[136] *Id.*
[137] *Id.* at 903.
[138] Love v. Connor, 525 F. Supp. 2d at 158. Because *Love* and *Garcia* were being heard simultaneously before one district court judge, the judge elected to incorporate his analysis from *Love* into his order in *Garcia*. For this reason, we must cite to *Love* to understand *Garcia*'s NOARC implications.

unnecessarily into territory beyond the institutional competence of the courts."[139] If APA claims were allowed where direct causes of action would suffice, the courts might be put into the position of needlessly monitoring agency functioning, acting as a federal agency overseer rather than a case or controversy decider. Thus, the district court's reliance upon then Judge Ruth Bader Ginsburg's statement that "if other remedies are adequate, federal courts will not oversee the overseer."[140] This reasoning sounds more like a practical ARC inquiry than a special statutory ARC inquiry. Here, the court is more concerned with what remedies the deciding court can provide *well* than whether Congress wanted this kind of problem to be solved in a particular way. This mirrors the *Bowen* court's intonation of the limitations of the Claims Court.

Additionally, the district court in *Garcia* reasoned that "the critical *injury* plaintiffs allege is only a different kind of government benefit."[141] With this analysis, the district court advocated yet another departure from the special statutory ARC inquiry. Rather than analyzing whether Congress contemplated this injury and how it should be redressed in court, the district court focused its sights on the plaintiffs' injury—rather than its action—and whether or not a court has jurisdiction to grant real relief, even if it is not the expressly requested relief.

This real-relief inquiry is more like the jurisdictional ARC inquiry than it is like either the practical ARC or special statutory ARC inquiry, both of which were also raised by the district court, as discussed above. But it is also not *quite* the jurisdictional ARC inquiry undertaken in *Bowen*. In *Bowen*, the Court was focused on whether real relief could be granted by the powers of another court—a non-district-court court—but in *Garcia*, the district court was addressing a situation in which real relief could be granted under a different *law*, not in a different *court*.

Too, the district court's quasi-jurisdictional ARC and *Bowen*'s jurisdictional ARC analyses differed in that *Bowen*'s ostensibly focused on a court's jurisdiction to grant *all the relief requested*, including relief that was not requested in the *Bowen* action but could be requested in cases categorically like the *Bowen* action. Conversely, the district court in *Garcia* expressly ignored the relief requested, focusing instead on what relief the court believed would actually redress the injury.[142]

These strings of analysis indicated that the *Garcia* court was as untethered in its § 704 NOARC methodology as it could be, despite its early invocation of a "definitive interpretation" of § 704 offered by *Bowen*. Because the *Bowen* court was entirely

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[139] *Id.* at 159.
[140] *Id.* (quoting Coker v. Sullivan, 902 F.2d 84, 89 (D.C. Cir. 1990).
[141] *Id.* at 160 (emphasis in original; internal quotation marks omitted).
[142] The district court also concluded that the identity of the defendant of the non-APA alternative action is irrelevant to its inquiry regarding the adequacy of the remedy. The plaintiffs had tried to argue that much of the D.C. Circuit § 704 precedent was distinguishable because it concerned actions against the agency to enforce third-party actions, whereas in *Garcia*, the plaintiffs sued the USDA to redress its own actions. *See id.* The district court went so far as to cast this holding as being intrinsic to a § 704 analysis: "As the cases make clear, what matters is whether the *injury* can be remedied in a non-APA suit, not the identity of the target in that potential alternative action." *Id.* This is an issue entirely unaddressed by the *Bowen* court's analysis.

unclear about what in its analysis was central to its various holdings—and what was not—the district court has little or no guidance to draw upon. This has resulted in the *Garcia* district court's analysis looking something like the *Bowen* ARC inquiries, but on the other hand, maybe looking nothing like them at all.

The D.C. Circuit's decision in *Garcia* similarly applied and misapplied *Bowen*. Like the district court, the court of appeals started its analysis with a summary of *Bowen* that relied upon the "special and adequate review procedure" language the Supreme Court had imported from the Attorney General.[143] But unlike the district court—and unlike *Bowen*—the court of appeals did not bifurcate its "special and adequate" ARC inquiry. Rather, its special and adequate ARC looked something like *Bowen*'s special statutory ARC, with a gestalt approach to the inquiry. Did Congress consider this particular sort of injury and how it should be remedied? If yes, then ARC. The court of appeals determined that in this case, when Congress extended the statute of limitations for actions under the ECOA, it did.[144] Thus, despite reaching a different conclusion than the *Bowen* court, which found NOARC, the court of appeals undertook a similar special statutory ARC inquiry.

But also like the district court, and like *Bowen* court, the court of appeals's analysis meandered through other ARC inquiries, without explicitly acknowledging it was doing so. First, it quoted *Bowen* for the proposition that "doubtful and limited relief" will render an alternative remedy inadequate.[145] But rather than trying to determine how *Bowen* applied this holding—or reached it—the court of appeals determined that this allowed the D.C. Circuit to apply its own precedent that "the alternative remedy need not provide relief identical to relief under the APA, so long as it offers relief of the 'same genre.'"[146] This meant that, for example, an alternative remedy would be an ARC if it also afforded de novo review by a district court.[147]

This sort of ARC inquiry invokes *Bowen*'s jurisdictional ARC inquiry, which is focused on a court's jurisdictional ability to give the aggrieved sufficient relief. But it also differs from the *Bowen* jurisdictional ARC inquiry because it focuses on the district court's ability to offer sufficient relief under a different statute, rather than on another court's ability to offer relief. In this way, the court of appeals seemed to be guided by the lower court's analysis.

But the court of appeals's jurisdictional ARC inquiry differed from *Bowen*'s in an additional way—it introduced an inquiry into the *standard of review* that would be afforded a plaintiff if it were to receive an alternative ARC rather than the APA review. The court of appeals found the § 741 options sufficient alternatives to § 706 APA

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[143] Garcia v. Vilsack, 563 F.3d 519, 523 (D.C. Cir. 2009) (quoting Bowen v. Massachussetts, 487 U.S. 879, 904 (1988)) (internal quotations omitted)), *cert. denied*, 130 S. Ct. 1138 (2010).
[144] *Id.*
[145] *Id.* (quoting *Bowen*, 487 U.S. at 901).
[146] *Id.* (quoting El Rio Santa Cruz Neighborhood Health Ctr. v. U.S. Dep't of Health & Human Servs., 396 F.3d 1265, 1272 (D.C. Cir. 2005)).
[147] *Id.* (quoting *El Rio*, 396 F.3d at 1270).

review because both § 741(a) and (b) ultimately allowed de novo review in a district court.[148]

Setting aside the D.C. Circuit's failure to explain how de novo review is an adequate alternative for § 706 review—which allows, among other things, arbitrary or capricious review—the D.C. Circuit also fails to explain where in *Bowen* the Supreme Court considered an alternative remedy's *standard of review*. In fact, it could not, because at no point in *Bowen* did the Supreme Court consider the *standard of review* a plaintiff would get under alternative ARCs. Rather the Supreme Court's only relevant analysis—its jurisdictional ARC analysis—focused on the court's powers of relief: equitable and/or legal. In this way, the court of appeals's jurisdictional ARC inquiry looks nothing like *Bowen*.

The *Garcia* court of appeals's opinion differed from the *Bowen* analysis in at least a third way. Where the *Bowen* court considered and credited practical ARC concerns (to Justice Scalia's bewilderment), the court of appeals expressly dismissed them. The court noted that the appellants had introduced unrebutted evidence that "the USDA never successfully implemented the required administrative process" under § 741(b).[149] The appellants had submitted two declarations by Rosalind Gray, director of the USDA Office of Civil Rights (OCR) during the years just after § 741 was enacted. Ms. Gray had testified that when she started at the OCR in 1998, it was "in a state of confusion and disorder."[150] "Many" of the OCR staffers "were responsible for the poor service provided farm customers," and they were "at best, indifferent to the exclusion of minority farmers from USDA programs."[151] After describing the disarray and destruction of complaints she witnessed at the OCR, as well as the efforts she expended and obstacles she confronted to change OCR's complaint processing system, she testified:

> After all the investigations and findings of discrimination, after all the findings that FSA [Farm Service Administration] was not in compliance with civil rights regulations, after all the millions paid by FSA in settlement of administrative complaints and after the many more millions in debts that FSA has forgiven, there still has not been any change in the way programs are administered. . . . [S]ystemic exclusion of minority farmers remains the standard operating procedure for FSA. . . . Consequently, there have been countless farmers who have lost their land or died waiting for USDA to process their complaints.[152]

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[148] *Id.* at 522.
[149] *Id.* at 524.
[150] Declaration by Rosalind Gray, Former Director of the USDA, p. 1 (Apr. 6, 2002), available at http://www.garciaclassaction.org.
[151] *Id.* at 3.
[152] *Id.* at 7-8. Ms. Gray submitted a supplemental declaration on Oct. 18, 2006, testifying that the problems at OCR she described in her earlier testimony "continue to plague OCR." *Id.* at 1.

Despite this uncontroverted evidence that the USDA administrative appeals process was not a meaningful option, the court of appeals rejected the appellants' argument that this should render § 741(b) not adequate for purposes of § 704. Such practical considerations are trumped by a textual reading of § 741, which indicates Congress *meant* § 741 to present a meaningful choice to appellants. The court of appeals held this intention for a meaningful choice was enough for an § 704 ARC, regardless of whether that intention was borne out or not.[153] Even though, as appellants demonstrated, such a choice was not in reality adequate.

Thus the court of appeals in *Garcia* rejected the practical ARC inquiry the Supreme Court considered—and credited—in *Bowen*. A door *Bowen* opened, *Garcia* refused even to acknowledge. Despite this, in January 2010, the Supreme Court denied the appellants' petition for certiorari.[154]

Both the D.C. District Court and the D.C. Circuit Court of Appeals attempted to apply *Bowen*. But without clear direction from *Bowen*, their analyses meandered. These courts applied *Bowen*, misapplied *Bowen*, and rejected *Bowen*, without any apparent recognition that they were mangling Supreme Court precedent. But with *Bowen*'s labyrinthine analysis, how were they to know?

C. *Confusion Among Practitioners:* Castelano v. Clinton

With both the Supreme Court and the federal courts confused by § 704 and the *Bowen* jurisprudence, it should be no surprise that practitioners themselves are unsure how NOARC operates. One recent case, litigated in but not decided by the U.S. District Court for the Southern District of Texas, illustrates how a lack of clear § 704 guidance leaves practitioners to argue NOARC for themselves, whether their arguments make sense or not: *Castelano v. Clinton*.[155]

As part of the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA), Congress required the Department of Homeland Security (DHS) and the Department of State (DOS) to develop and implement a plan for ensuring that all travelers present a passport or secure identification at all U.S. borders.[156] This border-identification plan became known as the Western Hemisphere Travel Initiative (WHTI).[157]

The impending WHTI requirement that every person, including U.S. citizens, present a passport at the U.S. borders prompted a flurry of passport applications, particularly from those living in U.S. border states. Sometime thereafter, some passport

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[153] *Garcia*, 563 F.3d at 524.
[154] 563 F.3d 519 (D.C. Cir. 2009), *cert. denied*, 130 S. Ct. 1138 (2010).
[155] Also known as *Castelano v. Rice*, as the case was originally filed against Secretary of State Condoleeza Rice in her official capacity. Castelano v. Clinton, CA-M-08-057 (S.D. Tex. First Amended Complaint Filed 2008), available at <http://www.aclu.org/pdfs/immigrants/passport_amendedcomplaint.pdf>.
[156] Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. 108-458, as amended, 118 Stat. 3638 (2004).
[157] 8 C.F.R. §§ 212, 235.

applicants began receiving notice from DHS indicating their applications had been "filed without further action."

Apparently, when DHS identified an application as "filed without further action," it was expressing its intent not to adjudicate the application further. In other words, the applications would neither be granted nor denied. They would just be "filed *without further action*." In some cases, DHS even refused to return the original documentation submitted with the application. Birth certificates, school records, immunization records—all held by DHS without an expression of DHS's intent to return them.

Perhaps even worse, these applicants all were either of Mexican-American descent or had Hispanic-sounding surnames, and they had all been birthed—or had their citizenship that depended on an individual birthed—by a midwife in Texas or other border state.

A number of these passport applicants filed suit in the U.S. District Court for the Southern District of Texas. The case, *Castelano v. Clinton*, centered on a proposed class of plaintiffs seeking judicial review of these DHS actions. The *Castelano* plaintiffs sought relief on three grounds: (1) 8 U.S.C. § 1503(a), which allows individuals to have their claims to U.S. citizenship reviewed by a district court if they have been denied a U.S. national right on the basis of their not being a U.S. citizen; (2) 5 U.S.C. § 706 (the APA); and (3) constitutional Equal Protection and Due Process grounds.

1. *The NOARC Question(s)*

In response to the plaintiffs' complaint, DOS filed a partial motion to dismiss, relying upon a § 704 argument.[158] DOS argued the plaintiffs' APA claim was precluded because the citizenship determination under § 1503(a) was an ARC for purposes of § 704. Therefore, § 1503(a) frustrates the plaintiffs' ability to get relief under the APA, and the court is precluded from conducting a § 706 arbitrary and capricious analysis.

The plaintiffs countered. In response to their arguments, which are discussed below, DOS filed a reply, which raised a second NOARC question: Are the plaintiffs' APA claims also or alternatively precluded by yet another ARC—the plaintiffs' constitutional remedies?

2. *The Parties' NOARC Analyses*

Notably, DOS's partial motion to dismiss did not cite to or quote from *Bowen* as part of its § 704 argument. Rather, DOS argued that § 1503(a) precluded APA review because of the express language of § 704 ("no other adequate remedy in a court"). Additionally, DOS cited to language in § 702 that it argued "provid[es] that there is no APA jurisdiction where 'any other statute that grants consent to suit expressly [or

[158] *Castelano*, Defendants' Partial Motion to Dismiss, at 5, 7-8, CA M-08-057, 7:08-cv-00057 (S.D. Tex. Oct. 15, 2008).

impliedly forbids the relief which is sought].'"[159] And, finally, DOS cited to *U.S. v. Fausto*, a non-APA Supreme Court case closely predating *Bowen*, which DOS relied on for the proposition that "general grants of jurisdiction cannot be relied upon in the face of a specific statute that confers and conditions jurisdiction."[160]

The plaintiffs countered DOS's motion. They cited first to *Bowen*, quoting to its special statutory ARC analysis: "When Congress enacted the APA to provide a general authorization for review of agency action in the district courts, it did not intend that general grant of jurisdiction to duplicate the previously established special statutory procedures relating to specific agencies."[161] The plaintiffs argued that, this *Bowen* sentence notwithstanding, Congress did intend that the APA would "cover a broad spectrum of administrative actions."[162]

According to the plaintiffs, federal courts applying "these principles" are "reluctant" to find § 704 NOARC preclusion.[163] The plaintiffs then cited the example of an unpublished Western District of Washington case, in which the district court found that an alternative remedy would only be adequate for purposes of NOARC if it were "duplicative" of the remedy available under the APA.[164] The plaintiffs concluded that § 704's intent to avoid duplication leads to this restatement of the proper § 704 NOARC analysis: "If APA review can result in relief that is different from that which is available under an alternative statutory scheme, then the latter does not afford an 'adequate' remedy and APA review is still available.[165]

Bowen makes clear that the § 704 NOARC exception is limited, the plaintiffs argued. They summarized *Bowen* as finding that Massachusetts could seek APA review for agency action "even though the State could seek a refund for such reimbursements in the Claims Court under the Tucker Act."[166] The plaintiffs then quoted from *Bowen*'s discussion of the Claims Court's lack of equitable powers and concluded that, by applying *Bowen* to their case, "[i]t is clear under *Bowen* that the ability to seek a declaration of citizenship is not an 'adequate remedy' that precludes Plaintiffs from also challenging Defendants' policies, procedures, and practices and seeking prospective injunctive relief under the APA."[167]

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[159] *Id.* at 8 (quoting 5 U.S.C. § 702).
[160] *Id.*
[161] *Castelano*, Plaintiffs' Opposition to Defendants' Partial Motion to Dismiss for Failure to State a Claim, at 8, CA M-08-057, 7:08-cv-00057 (S.D. Tex. Nov. 4, 2008) (quoting Bowen v. Massachusetts, 487 U.S. 879, 903 (1988)).
[162] *Id.* (quoting Abbot Labs. v. Gardner, 387 U.S. 136, 140 (1967)) (internal citation omitted).
[163] *Id.* at 9.
[164] *Id.* (quoting Roshandel v. Chertoff, 2008 WL 1969646, at *5 (W.D. Wash. May 5, 2008). The district court in *Roshandel* cited to *Bowen*, 487 U.S. at 903, for support of its holding that "This exception to judicial review under the APA [§ 704 ARCs] was intended to avoid duplication and is narrowly construed." *Roshandel*, 2008 WL 1969646, *4.
[165] *Castelano*, Plaintiffs' Opposition to Defendants' Partial Motion to Dismiss for Failure to State a Claim, at 9, CA M-08-057, 7:08-cv-00057 (S.D. Tex. Nov. 4, 2008).
[166] *Id.*
[167] *Id.*

DOS replied to the plaintiffs' opposition, adopting the plaintiffs' "duplicative" language and arguing that "the entirety of the relief they seek is adequate and available under their Due Process, Equal Protection and 8 U.S.C. § 1503(a) claims."[168] In this way, DOS introduced its argument that the plaintiffs' § 1503 and constitutional claims *together* provide an ARC.

DOS argued that the plaintiffs were wrong about *Bowen*. The Supreme Court in *Bowen* "found that a claim brought only in the Claims Court would deny Massachusetts an adequate remedy," thus the Claims Court did not provide an ARC. DOS argued this holding established that "[t]he converse is true": "[W]ere Massachusetts able to obtain the requested relief in the Claims Court, it could not then seek relief in the district court."[169]

DOS then reviewed the plaintiffs' requests for relief. First, the plaintiffs wanted individual adjudications of their citizenship for purposes of obtaining a passport—such adjudications are available de novo under § 1503(a). In fact, DOS argued, "Congress enacted § 1503(a) for such circumstances."[170]

Second, the plaintiffs sought a declaration that "Defendants' policy, pattern, and practice in reviewing, denying or failing to adjudicate the passport applications violates due process, equal protection, the Administrative Procedure Act, and other applicable law."[171] DOS argued that "by their own words, Plaintiffs concede that such relief is available through equal protection and due process."[172] Together, therefore, § 1503(a) and constitutional remedies can give the plaintiffs all the relief they requested. Therefore, there is an ARC and § 706 review is precluded. The plaintiffs' APA claims must be dismissed.

The plaintiffs responded to DOS's new constitutional remedies argument in a sur-reply. They noted that the APA itself provides for judicial review of agency action that is "contrary to constitutional right."[173] Adopting DOS's argument about what constitutes a § 704 ARC would render § 706(2)(B) "void and superfluous," a disfavored statutory interpretation at least.[174]

And, the plaintiffs noted, constitutional claims and APA claims are subject to differing standards of review: APA claims are subject to the standards embedded in § 706, including "arbitrary" and "capricious,"[175] where constitutional Due Process claims require a demonstration of a liberty interest and constitutional Equal Protection claims

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[168] *Castelano*, Defendants' Reply to Plaintiffs' Opposition to Defendants' Partial Motion to Dismiss for Failure to State a Claim, at 3, CA M-08-057, 7:08-cv-00057 (S.D. Tex. Nov. 17, 2008).
[169] *Id.* at 4.
[170] *Id.* at 9.
[171] *Id.* at 5.
[172] *Id.*
[173] 5 U.S.C. § 706(2)(B); *Castelano*, Plaintiffs' Sur-Reply in Opposition to Defendants' Reply to Plaintiffs' Opposition to Defendants' Partial Motion to Dismiss for Failure to State a Claim, at 1, CA M-08-057, 7:08-cv-00057 (S.D. Tex. Nov. 26, 2008).
[174] *Id.*
[175] 5 U.S.C. § 706(2)(A).

require "sufficient evidence of intentional discrimination."[176] The arguably higher but inarguably different burdens placed on the plaintiffs trying to demonstrate constitutional claims means that direct relief under the Constitution might not constitute an "adequate substitute for review."[177] The plaintiffs further argued that a party's decision to "invok[e] multiple theories to support a request for relief" is not a concession that each theory is an "adequate remedy" for purposes of § 704.[178]

The plaintiffs also argued that the structure and history of the APA suggest that Congress never anticipated constitutional remedies to be included in the remedies that could qualify as ARCs. They base this argument on *Bowen* itself. According to the plaintiffs, *Bowen* makes clear that at the time the APA was enacted, "a number of agency organic acts also provided 'specific procedures to be followed in reviewing a particular agency's action.'"[179] Thus, as the *Bowen* court explained, § 704 was not meant to displace these statutory review mechanisms. If Congress meant NOARC only to refer to *statutory* ARCs, *constitutional* remedies are necessarily excluded from possibly falling within the scope of NOARC.[180]

The NOARC briefing in *Castelano* concluded with the plaintiffs' sur-reply. Before the district court could decide the issue, the parties reached an agreement: DOS would stop using the "filed without further action" determinations, re-adjudicate the passport applications of the proposed class, and train its employees as to adjudications requiring review of midwife birth certificates.[181] On August 14, 2009, six weeks after the WHTI deadline, the case settled.[182]

3. *Comparing* Castelano *and* Bowen

In the *Castelano* briefing, DOS did not address *Bowen* until it was raised by the plaintiffs. This oversight is noteworthy, particularly in light of DOS's first attempts to use other law—a partial quote from § 702 and *U.S. v. Fausto*—to do what *Bowen* easily could have been construed to do. Though DOS did not substantively explain either law's relevance to *Castelano*, it appears that DOS was using the two to argue that where

[176] *Castelano*, Plaintiffs' Sur-Reply in Opposition to Defendants' Reply to Plaintiffs' Opposition to Defendants' Partial Motion to Dismiss for Failure to State a Claim, at 3, CA M-08-057, 7:08-cv-00057 (S.D. Tex. Nov. 26, 2008).
[177] *Id.* (quoting Bowen v. Massachussetts, 487 U.S. 879, 901 (1988)).
[178] *Castelano*, Plaintiffs' Sur-Reply in Opposition to Defendants' Reply to Plaintiffs' Opposition to Defendants' Partial Motion to Dismiss for Failure to State a Claim, at 3, CA M-08-057, 7:08-cv-00057 (S.D. Tex. Nov. 26, 2008).
[179] *Id.* at 5 (quoting *Bowen*, 487 U.S. at 903).
[180] *Id.* at 5.
[181] Castelano v. Clinton, Proposed Class Settlement, No. CA M-0857 (S.D. Tex. Jun. 24, 2009), *available at* www.aclu.org/pdfs/racialjustice/castelanovclinton_agreement.pdf. With the 2009 change in administration, Hillary Rodham Clinton had been automatically substituted into the case in her official capacity as Secretary of State. *Id.* at 1.
[182] *Castelano*, Final Order and Judgment Approving Class Action Settlement, CA No. M-08-57, 7:08-cv-00057 (S.D. Tex. Aug. 14, 2009).

another statute forbids relief under the APA, relief is forbidden.[183] Or, as DOS wrote, "Where Congress specifically provides for district court jurisdiction over such a claim, assertion of any other basis of jurisdiction contradicts Congressional [sic] intent."[184]

Any number of *Bowen* quotes could have supported this assertion. The whole of *Bowen*'s special statutory ARC inquiry, for instance, would have been relevant to DOS's argument here. Even the language and analysis within *Bowen*'s jurisdictional ARC inquiry could have supported DOS's § 1503(a) as ARC arguments, as DOS finally recognized in its reply to the plaintiffs' opposition. There, DOS argued that when the *Bowen* court held APA review was available in the district court because the Claims Court could not grant Massachusetts's "requested relief," the Supreme Court was also holding that where the proposed alternative ARC is in a *district court*, the district court loses jurisdiction under § 704 of any APA claims.[185]

In contrast, the *Castelano* plaintiffs relied directly upon *Bowen* for their first NOARC arguments. Despite this principal reliance, it is clear even the plaintiffs could not apply *Bowen* entirely faithfully. The plaintiffs seemed to rely primarily on one sentence they extracted from *Bowen*: "When Congress enacted the APA to provide a general authorization for review of agency action in the district courts, it did not intend that general grant of jurisdiction to duplicate the previously established special statutory procedures relating to specific agencies."[186]

But, for the plaintiffs, this sentence appears to have been a double-edged sword. The sentence falls squarely within the *Bowen* court's special statutory ARC inquiry, which the plaintiffs should be wary to rely upon. Too close of an inspection of the "special statutory" language could lead the *Castelano* district court to decide that § 1503(a) is Congress's "special and adequate" process for allowing individuals to challenge citizenship determinations, including passport adjudications. Read in this light, the plaintiffs' choice of a *Bowen* line item supports DOS's argument that "Congress enacted § 1503(a) for such circumstances."[187]

The plaintiffs attempt to dull this special statutory edge by focusing on the "duplicate" language of the *Bowen* quote they extracted. If, as the unpublished Western District of Washington case held, this *Bowen* language was meant to codify Congress's concern that the aggrieved not bring entirely *duplicative* claims—rather than codifying

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[183] *See* 5 U.S.C. § 702 ("Nothing herein . . . confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought."); U.S. v. Fausto, 484 U.S. 439, 448-49 (1988) (a non-APA case holding that a specific statute, which did not expressly forbid judicial review, nevertheless implicitly foreclosed it).

[184] *Castelano*, Defendants' Partial Motion to Dismiss, at 8, CA M-08-057, 7:08-cv-00057 (S.D. Tex. Oct. 15, 2008).

[185] *Castelano*, Defendants' Reply to Plaintiffs' Opposition to Defendants' Partial Motion to Dismiss for Failure to State a Claim, at 4, CA M-08-057, 7:08-cv-00057 (S.D. Tex. Nov. 17, 2008).

[186] *Castelano*, Plaintiffs' Opposition to Defendants' Partial Motion to Dismiss for Failure to State a Claim, at 8, CA M-08-057, 7:08-cv-00057 (S.D. Tex. Nov. 4, 2008) (quoting Bowen v. Massachussetts, 487 U.S. 879, 903 (1988)).

[187] *Castelano*, Defendants' Reply to Plaintiffs' Opposition to Defendants' Partial Motion to Dismiss for Failure to State a Claim, at 9, CA M-08-057, 7:08-cv-00057 (S.D. Tex. Nov. 17, 2008).

congressional intent that certain kinds of injuries be handled in certain, congressionally appointed ways, regardless of whether or not the available remedy is redundant—then the *Castelano* plaintiffs are safe. None of their three grounds for relief entirely overlap another. With this focus on duplication, the plaintiffs tightened *Bowen*'s inquiry, framing their alternative ARCs out of the special statutory ARC's possible applicable scope.

On the other hand, *Bowen*'s special statutory ARC inquiry, as represented by the plaintiffs' selected quotation, is more easily read to support the plaintiffs' argument that constitutional remedies could not be ARCs for § 704 purposes. In fact, the plaintiffs use it this way. Their sur-reply introduces *Bowen*'s discussion of the history of the APA. While the *Bowen* court most obviously introduced this history to discuss examples of *special* statutory ARCs that existed in the background against which the APA was drafted, the *Castelano* plaintiffs used the discussion to argue that *Bowen* makes clear Congress was contemplating special *statutory* ARCs.

But this reading of *Bowen* as precluding constitutional remedies as possible ARCs does not address the parts of *Bowen* that could be read to allow constitutional remedies to qualify as ARCs. The jurisdictional ARC inquiry in *Bowen* focuses entirely on a court's jurisdictional ability to grant the relief requested. As DOS argues, the district court has jurisdiction to grant the kinds of remedies the plaintiffs are requesting with their constitutional claims. *Bowen*'s jurisdictional ARC inquiry certainly does not foreclose an interpretation that constitutional remedies could be ARCs precluding APA review. And none of the other *Bowen* ARC inquiries—i.e., the practical ARC and the unexhausted administrative ARC—preclude such a holding either. Thus, it is an open question whether the *Bowen* court intended for constitutional remedies to be categorically ineligible for ARC consideration, despite the plaintiffs' arguments to the contrary.

Finally, in one key way both *Castelano* parties' NOARC arguments departed from *Bowen*. In *Castelano*—both the plaintiffs and DOS argued that standards of review are relevant to a § 704 NOARC analysis. [188] This is an issue *Bowen* never addressed.

In *Castelano*, DOS argued that the availability of de novo review under § 1503(a) helped to render § 1503(a) adequate for purposes of § 704. Conversely, the plaintiffs argued that because constitutional remedies would impose higher or different burdens on the plaintiffs than would an APA remedy, neither the Equal Protection nor the Due Process clauses provided an ARC.[189]

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[188] Standards of review were also raised by the court in *Garcia* as relevant to its NOARC analysis. (See Part III.B.3 above.)

[189] Though this characterization of the plaintiffs' arguments appears to be more about the plaintiffs' burden of proof than about the court's standard of review, in this case, these considerations seem to be related. A court must review Equal Protection and Due Process claims with particular standards in view; these standards impose coterminous burdens on the plaintiffs. Thus, for purposes of argument here, I have collapsed the plaintiffs' burden concerns into a discussion of standards of review.

Both of these arguments ignore or fail to acknowledge the truth about *Bowen*: nowhere does it address the relevance of standards of review to a NOARC inquiry. It is not clear if such a failure arises from the peculiar facts of the case on review, or if it was an intentional omission by the Court as a signal that standards of review should not be considered as part of a NOARC inquiry. Thus, in this contested area, practitioners—and the courts that regulate them—have no guidance about whether their standard of review arguments even have § 704 NOARC legs.

In summary, the practitioners in *Castelano*, including the U.S. Department of Justice in its capacity as legal counsel to DOS's legal counsel, applied *Bowen* in much the same way the D.C. Circuit and District Courts did in *Garcia*—selectively, contradictorily, and sometimes not at all. Like the *Garcia* courts, the *Castelano* practitioners did so apparently unwittingly. Neither *Castelano* party acknowledged *Bowen*'s inherent contradictions, omissions, or multi-faceted ARC inquiry. And neither party appeared to feel limited by the contours or specifics of the *Bowen* majority.

The confusion within *Bowen*, its incompleteness, and its unusual elasticity do allow for easy adjudication of one disagreement raised by DOS in its NOARC briefing. DOS briefed the argument as follows: "Plaintiffs rely on the Supreme Court decision in *Bowen*[] as support for their argument that without the APA . . . they do not have an adequate remedy available. *Bowen*, however, actually supports the Defendants' position."[190] It turns out both parties are right—the spectre of *Bowen* can support almost anything at all.

IV. TOWARD ADEQUACY IN OUR NOARC JURISPRUDENCE

At this point, it should be clear that the current NOARC jurisprudence is problematic at best. As discussed above, the problem is exemplified by the Supreme Court's inconsistent approach to NOARC in its majority opinion in *Bowen*, the one Supreme Court case dealing with § 704's NOARC language. Lower courts and practitioners have similarly struggled with the difficulties of a consistent NOARC analysis; their attempts to apply *Bowen* have not helped.

Against the backdrop of Parts I and II, the purpose of Part III is to make brief recommendations toward a faithful, consistent NOARC analysis. These recommendations are preliminary. A more comprehensive and thorough set of recommendations can and should be undertaken more fully elsewhere. But without a coherent NOARC jurisprudence at the Supreme Court level—or, apparently, anywhere else—any attempt at clarity is a move in a positive direction.

A. *Statutory Parsing*

An analysis of NOARC should begin with the relevant statutory text, 5 U.S.C § 704:

[190] *Castelano*, Defendants' Reply to Plaintiffs' Opposition to Defendants' Partial Motion to Dismiss for Failure to State a Claim, at 4, CA M-08-057, 7:08-cv-00057 (S.D. Tex. Nov. 17, 2008).

> 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 close reading of this statutory language gives some guidance about what a court should do. This guidance is presented below in four steps (with one preliminary step), a sort of NOARC primer for courts wanting to undertake a faithful analysis anew. As per the dictates of § 704, a court's NOARC analysis must be confined to particular kinds of agency action. Thus, the analytical method detailed below begins with step zero.

0. *Check Your Action*

Read broadly, the NOARC-containing sentence from § 704 indicates that where a statute does not expressly make an action reviewable, judicial review is available only for those "final agency action[s] for which there is no other adequate remedy in a court."[191] It is the reviewability of the latter category of action that is restricted by the NOARC requirement; therefore, our NOARC analysis will apply only to final agency actions not made reviewable by statute.

In short, before a court undertakes a NOARC analysis, it must determine that the action in question is not "made reviewable by statute" but is a "final agency action." These analyses are guided by case law and precedent set forth elsewhere. This is step zero.

1. *Clear the Court*

"No other adequate remedy in a court" requires that the alternative remedy being proposed be a remedy *in a court*. Thus, the reviewing court must determine that the alternative proposed ARC is one that would allow review in a court. Section 704 does not specify that the court must be a federal court or that it must be an Article III court, so it would be reasonable for a court to hold that state court or administrative court remedies could offer adequate review for purposes of § 704.

Section 704 likewise does not make explicit a requirement that the proposed remedy start in a court. In *Garcia*, for instance, the D.C. Circuit held that the § 741(b) option of pursuing administrative remedies could qualify as a § 704 ARC because such a remedy would, upon an unfavorable determination by the agency, ultimately allow for judicial review in a court.[192]

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[191] Though the language of § 704 does not expressly limit the "judicial review" offered for "final agency action for which there is no other adequate remedy in a court" to the kind of review available under the APA, it seems safe to presume that Congress intended such limitation. The alternative interpretation—that only those final agency actions for which there is NOARC can get any kind of judicial review under any claim—does not appear to have been adopted by any court. Thus, with some cautiousness, we presume that the judicial review extended by § 704 is judicial review under the standards of § 706.

[192] Garcia v. Vilsack, 563 F.3d 519 (D.C. Cir. 2009), *cert. denied*, 130 S. Ct. 1138 (2010).

2. *Review the Remedy*

Section 704's express language also requires that the proposed alternative ARC be a *remedy*. The APA does not explicitly define "remedy." Nor does chapter 10 use the word "remedy" other than in § 704's NOARC phrase.[193]

Black's Law Dictionary (2d ed. 1910) defined "remedy" as "the means by which the violation of a right is prevented, redressed, or compensated." The dictionary explains there are four kinds of remedies: (1) "By act of the party injured" (e.g., recaption, abatement, seizure); (2) "by operation of law, as in the case of retainer and remitter,"; (3) "by agreement between the parties, e. g., by accord and satisfaction and arbitration"; and (4) "by judicial remedy, e. g., action or suit."[194] It is possible that this pre-APA definition of "remedy" accords with Congress's understanding of "remedy" when it drafted the NOARC language in § 704; however, it is unclear what this definition adds to a court's understanding of what it should be evaluating when it undertakes a NOARC analysis. A more modern definition adds some direction. Black's Law Dictionary (8th ed. 2004) defines "remedy" as "[t]he means of enforcing a right or preventing or redressing a wrong; legal or equitable relief" or "remedial action."[195] As another treatise explains, "A remedy is anything a court can do for a litigant who has been wronged or is about to be wronged."[196] If we are to be guided by these modern (and possibly anachronistic) definitions, we can infer that a remedy is what a court can *do* for a litigant.

By the express language of § 704, the only viable alternative ARCs are those that will remedy an agency action, as dictated by this language: "final agency *action for which* there is no . . . *remedy* . . . ." Thus, a proposed alternative remedy will only be an ARC for purposes of § 704 if it allows a court to *do* something to an agency action.

This point might seem obvious, were it not for the next step—determining adequacy. What a clear understanding of the remedy-action relationship provides is

[193] Interestingly, chapter 10 does use the word "relief": in § 701 to indicate that "'relief' . . . ha[s] the meaning[] given [it] by section 551" of the APA; five times in § 702; and once in the heading of § 705 ("Relief pending review"). But, as per § 551, "relief" in the APA is defined as "includ[ing] the whole or part of an agency—(A) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy; (B) recognition of a claim, right, immunity, privilege, exemption, or exception; or (C) taking of other action on the application or petition of, and beneficial to, a person." This definition indicates that, for purposes of the APA, the word *relief* refers to agency action that extends a benefit to a person. Thus, in the APA, the word relief focuses on beneficial or positive agency action, rather than on a person's attempt to claim ex post the remedying of detrimental or negative agency action. Note: The § 702 additions of the word "relief" were added with the 1976 amendments to the APA. Pub. L. 94-574, 1976 S 800. But the definition of relief in § 551 was codified in the original 1946 version, so it pre-dates the 1976 amendments. Pub. L. 404-79th Congress, Chapter 324, 2d Session (S.7).

[194] BLACK'S LAW DICTIONARY (2d ed. 1910) [hereinafter BLACK'S 2d ed.], remedy.

[195] BLACK'S LAW DICTIONARY (8th ed. 2004) [hereinafter BLACK'S 8th ed.], remedy.

[196] DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES 1 (3d ed. 2002), *quoted in* BLACK'S LAW DICTIONARY (8th ed. 2004), remedy.

additional clarity about what needs to be adequate. Namely, the proposed alternative ARC needs to provide an adequate remedy for the agency action—not an adequate remedy for the aggrieved's injury. Thus, the court's adequacy inquiry must focus on remedies for agency actions, not remedies for injuries caused by agency action.

At this point, this might be a mere semantic difference. But a difference in an inquiry's focus can dictate different outcomes. Thus, being clear about the proper focus is advisable.

3. *Determine Adequacy in Conjunction with Other*

Perhaps the most difficult and perplexing word in NOARC is the adjective "adequate." The meaning of this word is facially unclear. "Adequate" appears to require a relative analysis, if not a subjective determination. It should immediately raise questions such as, Adequate in regards to what? How much is adequate? How little is not adequate?

These questions are difficult to answer, though they are helped by the discrete remedy-action analysis of step 2. As discussed above, recognizing that the alternative remedy we are looking for must be a remedy for an action, it becomes clear that we must evaluate the remedy's adequacy in terms of its ability to *adequately remedy an agency action*. Thus a court's focus should be on the agency's action itself, not, for instance, on the aggrieved's claims for relief or even the court's own assessment of the aggrieved's injury. It is a remedy for an agency action that must be scrutinized.

Now that we know *what* a court is evaluating for adequacy (i.e., a remedy for an agency action), we must ask how a court should determine what *is* adequate. A return to the text gives additional help.

Section 704 requires that to preclude APA review, an alternative remedy be "[an]other adequate remedy in a court." This implies that the APA itself presents one "adequate remedy," which will be supplanted by there being any other adequate remedy in a court. Thus, determining what kind of remedy the APA affords will allow courts to establish some level of adequacy, against which they can measure—and determine—the "adequacy" of a proposed alternative remedy.

While it seems necessary that we consider how all the sections of chapter 10 contribute to the judicial review remedy provided by the APA, the only section of chapter 10 directing the court to *do* something to agency action is § 706. Thus, it seems reasonable to conclude that § 706 describes the thrust of the APA's remedy, which remedy, by the terms of the APA itself (by virtue of § 704's "no *other* adequate remedy in a court"), should be adequate.

Section 706 mandates that, upon review of agency action, the court *shall* do one of two things:

> (1) "*compel* agency action," if the court determines that action was "unlawfully withheld or unreasonably delayed"; and

> (2) "*hold unlawful and set aside* agency action, findings, and conclusions," if that action or those findings or conclusions are found to be one of six negative things.[197]

Thus, judicial review under the APA allows a court to either compel agencies to act or set aside agency action, findings, or conclusions the court has held were unlawful, for any of a variety of defects.

A court may conclude that any proposed alternative ARC must, at a minimum, allow an equally adequate remedy. That is, the proposed alternative must provide a remedy that either allows a court to compel or set aside agency action, or a remedy that allows a court to do something else that would be adequate. It is unclear what that something else adequate would or could be. Perhaps that it something a court must determine on a case-by-case basis.

In other words, it appears that under the language of § 704, in order to dismiss a plaintiff's APA claims on the basis that another ARC exists, a court must ensure that the proposed alternative ARC would allow the aggrieving agency action to be compelled or set aside—perhaps for reasons similar to (or equally adequate to) those detailed in § 706(2). In the alternative, the reviewing court must make a finding that the proposed alternative ARC allows the court to do something to the agency action that is comparable, or more specifically, comparably adequate.

This analysis still leaves unanswered what adequacy looks like in this context, other than that it must include the ability (or be comparable to the ability) for a court to compel or set aside agency action. A return to Black's Law Dictionary merely adds more adjectives to the mix. "Adequate remedy" is defined as "[a] remedy which is plain and complete and as practical and efficient to the ends of justice and its prompt administration as the remedy in equity."[198]

Though this definition refers explicitly to the outdated separation between law and equity (discussed in more detail in Part III.B below), which separation was abolished before the 1946 enactment of the APA and was not preserved by the APA, this early definition of "adequate remedy" at least identifies qualities a court could be using to assess an ARC.

If a court were to trade "as the remedy provided in § 706" for "as the remedy in equity" in this definition, that court would be able to analyze a proposed alternative

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[197] 5 U.S.C. § 706 (emphasis added). The six negative categories into which an action might fall, thus allowing a court to hold it unlawful and set it aside, are (a) "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"; (b) "contrary to constitutional right, power, privilege, or immunity"; (c) "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right"; (d) "without observance of procedure required by law"; (e) "unsupported by substantial evidence in a case" heard by an administrative law judge "or otherwise reviewed on the record of an agency hearing provided by statute"; and (f) "unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court." 5 U.S.C. § 706. Section § 706 is sometimes referred to as providing "arbitrary and capricious" review or, perhaps more accurately, "APA review."

[198] BLACK'S 2d ed., *supra* note 197, adequate.

ARC by asking this question: "Is this proposed alternative ARC 'a remedy [that] is plain and complete and as practical and efficient to the ends of justice and its prompt administration as the remedy provided in § 706?" This is a sprawling, subjective test about which reasonable minds are likely to differ. But it is nevertheless a test, and in the field of NOARC, such a specific analysis might be a beginning.

4. *Say No*

The only remaining word in the NOARC phrase is "no." Thus, it appears that Congress intended courts to make an exhaustive determination, or at least a negative determination, regarding other possible ARCs. This absolute statement—"*no* other"—raises questions about whose burden it is to prove NOARC exists, rendering APA review available. Section 704 does not allocate the burden. It does not say "final agency action for which the plaintiff demonstrates there is no other adequate remedy in a court," nor does it say "final agency action is subject to judicial review, unless the defendant demonstrates there is another adequate remedy in a court."

Rather, "no other" seems to imply that the bar is essentially jurisdictional; without NOARC, no APA review. This could give rise to a presumption that demonstrating NOARC is the responsibility of the court; the court should raise the issue sua sponte, regardless of the briefing of the parties.

Requiring parties to raise and review NOARC seems more workable than does requiring courts to sua sponte make an exhaustive determination about the existence of any other ARC. Where parties might be incentivized to search the code and the common law for potential alternative ARCs, so as to ensure their APA claims could be heard or to mandate dismissal, the court is not so well equipped or incentivized. Overworked or unmotivated judges and court staff might overlook their jurisdictional responsibility to ensure sua sponte that *no* other ARCs exist; they might rely instead upon the parties to bring possible alternative ARCs and NOARC issues to the court's attention. In fact, this is what may currently be happening.

For these reasons, "no" might not add much to a court's NOARC analysis. Although it might reasonably require that a court take at least the following steps, when applicable: (1) A court should not overlook a NOARC problem it notices, though the problem may not have been raised or briefed by the parties. This seems consonant with the reasonable textual inference that courts have are required to ensure NOARC, regardless of the parties' actions. And (2), a court should undertake as thorough a NOARC analysis as it properly can and, when necessary, consider multiple possible ARCs or multiple ways in which a proposed ARC could be § 704 adequate. These two steps could go toward a more meaningful application of the "no" component of § 704's NOARC requirement.

B. *Historical Context: "Adequate Remedy" in 1946*

Admittedly, the five steps recommended above arise out of a very close reading of § 704 and the judicial review provisions of the APA more broadly. Such a close

reading does not accommodate a point made in Justice Scalia's dissent in *Bowen*—that "adequate remedy" is actually a term of art, with a robust history of common law to define its meaning. This argument bears some weight, though it cannot do the work in the APA that Justice Scalia would want it to do.

1. *"Adequate Remedies" Before the APA*

The phrase "adequate remedy" pre-dated the APA, appearing in statutes, common law cases, and the 1938 Federal Rules of Civil Procedure. The phrase appeared in the Judiciary Act of 1789, which denied relief in equity "in any case where plain, adequate and complete remedy may be had at law."[199] That is, a court sitting in equity could not grant equitable remedies (i.e., injunctions, decrees) where legal remedies (i.e., monetary damages) were "plain, adequate and complete."[200] Thus, from early in U.S. legal history, and as discussed above, the "adequate remedy" phrase was associated to some extent with the difference between courts of equity and courts of law.[201]

That distinction may have given context to "adequate remedy" as it appeared in the 1938 Federal Rules of Civil Procedure.[202] Though some argue the 1938 Rules effectively ended the division between courts of law and courts of equity, with the inclusion of Rule 8(a) allowing parties to plead in the alternative,[203] the equity/law distinction might have informed the inclusion of "adequate remedy" in Rule 57, Declaratory Judgments. Rule 57 provides that "[t]he existence of another adequate remedy does not preclude a declaratory judgment that is otherwise appropriate." Read in historical context, this rule could have been an articulation that even if money damages are available, a court may issue a declaratory judgment.

"Adequate remedy" continued to appear in federal cases after 1938 and before 1946. In these cases, federal courts denied particular federal remedies because some other "adequate remedy" was available. No apparent, consistent pattern governs the courts' use of the "adequate remedy" phrase during these years. Sometimes a court precluded federal equitable remedies because state remedies, either equitable or legal, were adequate.[204] And sometimes the court was concerned with unexhausted

[199] Section 16, 1 Stat. 82, Judicial Code § 267, *formerly* 28 U.S.C. § 384.
[200] *Id.*
[201] *See, e.g.*, Yakus v. United States, 321 U.S. 414, n.8 (1944); Atlas Life Ins. Co. v. W.I. Southern, Inc., 306 U.S. 563, 569 (1939); Matthews v. Rodgers, 284 U.S. 521, 525 (1932).
[202] Federal Rules of Civil Procedure (1938); *see also* BLACK'S 2d ed., *supra* note 197, adequate remedy.
[203] *See, e.g.*, Brian S. Felton, *Jury Computation of Front Pay Under the Age Discrimination Employment Act*, 76 Minn. L. Rev. 985, 995 (1992).
[204] *See, e.g.*, Lawrence Print Works, Inc. v. Lynch, 146 F.2d 996 (1st Cir. 1945) (holding that where "plaintiffs have a plain, adequate and complete remedy at law or in equity in the state court," federal declaratory judgment is not needed); Griffith v. Bank of N.Y., 147 F.2d 899, 904 (2d Cir. 1945) (holding that though some cases have held the plaintiffs bound to state procedures for the setting aside of certain judgments, "probably because the state practice provides an adequate remedy at law, no such restriction has governed the fraud cases"); Guardian Life Ins. Co. of Am. V. Kortz, 151 F.2d 582 (10th Cir. 1945) (holding that the Declaratory Judgment

administrative remedies, which also could have precluded the court's issuance of equitable remedies.[205] Thus, before the passage of the APA, courts used "adequate remedy" to refer to legal remedies, equitable remedies, unexhausted administrative remedies, and state court remedies.

2. *Congressional Intent for NOARC*

Drawing upon this body of law as a whole, it is unclear what Congress meant to codify when it incorporated a NOARC requirement into § 704. Importantly, Congress was not clear about what it meant either. The Senate Judiciary Committee Print, June 1945, explains that § 704 (then Subsection (c)) was "designed to negative any intention to make reviewable merely preliminary or procedural orders where there is a subsequent and adequate remedy at law available, as is presently the rule."[206] Here, it is unclear if the Committee is using the word "law" as a reference to the now-nonexistent courts of law, perhaps thereby equating ARC[207] with money damages. Or, possibly, the Committee really is focused on clarifying the finality requirement imposed by the "final agency action" language, as the thrust of this explanation seems directed toward ensuring finality.

Likewise, the Senate Committee Report, printed in November 1945, explains the NOARC requirement with a mere one-sentence restatement: "'Final' action includes any effective agency action for which there is no other adequate remedy in any court."[208] The quotation marks around the "final," and the use of the NOARC phrase as part of the Committee's definition of "final," seems to imply that, at this point, the Senate Judiciary Committee anticipated the NOARC requirement would be part of the finality requirement, perhaps even without independent meaning.

This possible shift in understanding—from the Committee's June 1945 explanation, which raised the possibility that they understood ARC to be "money damages," to the NOARC requirement's collapse into § 704's finality requirement—is buttressed by the changed language of § 704. By this time, the NOARC requirement was really the NOAJR requirement: "no other adequate judicial remedy." The Committee offered no explanation for the change in language or its operative consequences, if any. But what appears clearly to be gone is the ambiguous "at law"

Act required the court to determine "whether there is such a plain, adequate, and speedy remedy afforded [in a pending state court action] that a declaratory judgment will serve no useful purpose").

[205] *See, e.g.*, Georgia v. Pennsylvania R. Co., 324 U.S. 439, 477 (1945) ("[T]he State has not availed itself of or exhausted the administrative remedies provided by the Interstate Commerce Act, which may afford an adequate remedy and which must in any case precede the institution of the present suit in equity.").

[206] ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, at 37 (1946).

[207] The version of the APA being considered by the Senate Committee in this print articulates the NOARC requirement as being "no other adequate remedy in *any* court." Senate Committee Print, June 1945, *included in* ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, at 37 (1946) (emphasis added). The use of "any" here does not appear to affect the Committee's explanation or the meaning of the NOARC language.

[208] Administrative Procedure Act, Report of the Committee on the Judiciary on S. 7, 79th Cong. 1st. Session, Rep. No. 752, included in The Administrative Procedure Act Legislative History, Senate Doc. No. 248, 79th Congress, 2d Session, p. 213 (printed Washington 1946).

language. Thus, unless the Committee understood "judicial remedies" to be synonymous with "legal remedies," this alteration seems to indicate that, by November 1945 at least, the Senate Judiciary Committee no longer considered the § 704 adequate remedy requirement in terms of money damages.[209]

On May 3, 1946, the Committee on the Judiciary of the House of Representatives issued its APA report.[210] The version of § 704 then being considered by the House Judiciary Committee was the same as that before the Senate when it issued its report in November 1945: "no other adequate judicial remedy."[211] And its explanation of the sentence likewise parallels the Senate Committee Report's explanation, as does its long explanation of the last sentence of § 704, which relates solely to the finality requirement imposed in § 704.

Despite the House Judiciary Committee's anemic explanation for the "adequate remedy" phrase in § 704, the relevant text underwent one final, pre-enactment change—back to the language first considered by the Senate Judiciary Committee in its June 1945 print. When the APA was codified in June 1946, the § 704 language was once again NOARC: "no other adequate remedy in any court." About this, too, the legislative history is silent.

Though then-Attorney General Tom Clark tried to assure everyone that § 704—like much of the APA—would "involve no departure from the usual and well understood rules of procedure in this field," it is not entirely clear what the applicable "usual and well understood rules of procedure" dictate about NOARC.[212] Nor does Attorney General Clark's encouragement that the NOARC requirement "be interpreted in the light of other statutory and case law" add much illumination.[213]

Thus, a preliminary review of NOARC's related legal and legislative history resists what NOARC itself resists—easy answers.

C. *Squaring the Four Step with the* Bowen *ARC Inquiries*

Part II.A of this Article reviews the Supreme Court's treatment of the NOARC requirement in § 704 of the APA, as represented in the Court's only case on point, *Bowen v. Massachusetts*. Though in *Bowen* the Court purports to undertake a NOARC analysis, in fact, the majority alone undertakes at least *four*:

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[209] BLACK'S 8th ed., *supra* note 198, defines "judicial remedy" as "a remedy granted by a court."

[210] Administrative Procedure Act, Report of the Committee on the Judiciary House of Representatives on S. 7, 79th Cong. 2d Session, House Rep. No. 1980 (May 3, 1946), included in The Administrative Procedure Act Legislative History, Senate Doc. No. 248, 79th Congress, 2d Session, p. 233 (printed Washington 1946).

[211] Administrative Procedure Act, Report of the Committee on the Judiciary House of Representatives on S. 7, 79th Cong. 2d Session, House Rep. No. 1980 (May 3, 1946), included in The Administrative Procedure Act Legislative History, Senate Doc. No. 248, 79th Congress, 2d Session, p. 276 (printed Washington 1946).

[212] ATTORNEY GENERAL'S MANUAL ON THE APA, *supra*, note 40, available at http://www.law.fsu.edu/library/admin/1947ix.html (quoting Representative Walter, 92 Cong. Rec. 5654 (Sen. Doc. p. 369)).

[213] ATTORNEY GENERAL'S MANUAL ON THE APA, *supra*, note 40.

- jurisdictional ARC (i.e., the Claims Court does not have jurisdiction to provide the equitable relief the plaintiffs might need);
- special statutory ARC (i.e., Congress did not consider the particular kind of claim the plaintiff alleged when it drafted the Tucker Act, the Claims Court's authorizing statute[214]);
- unexhausted administrative ARC (in fact, the Claims Court has nothing to do with exhaustion of administrative remedies); and
- practical ARC (i.e., the Supreme Court's concerns about the Claims Court's narrow focus and lack of expertise was a mark against the Claims Court's adequacy under § 704).

This chunking of analysis and labeling is original to this Article. In fact, the *Bowen* court gave no indication it realized it was doing anything but straightforwardly applying the statute.

In contrast, Part III.A undertakes a very close reading of § 704's NOARC requirement, in order to develop a process by which a court could analyze whether in a given case, an ARC exists. The four-step process derived from § 704 and outlined in Part III.A encourages a court to analyze four components of a potential alternative ARC:

(1) the alternative ARC's court;
(2) the proposed ARC's remedy;
(3) the adequacy of the ARC in light of courts' power under the APA to compel agency action and set it aside; and
(4) the possible existence of additional alternative ARCs.

Though the Supreme Court in *Bowen* neither undertook a close reading of § 704, nor explicitly utilized the four-step analysis derived in Part III.A, the Court's meandering does loosely map onto the framework recommended by a close § 704 NOARC analysis.

1. Bowen *and NOARC Step One: Clear the Court*

The *Bowen* court did not undertake a clear effort to determine whether the proposed alternative ARC was a remedy *in a court*. But the alternative ARC it was considering was an ARC in the Claims Court, so the ARC under analysis was clearly in a court, if it was going to be at all. Thus, by the nature of the case presented before the Court, it may not be surprising the Court did not expend effort on determining the courtly qualifications of the proposed alternative ARC.

[214] In fact, Congress could not have anticipated that plaintiffs would bring Medicaid challenges to the Claims Court when it enacted the Tucker Act. The Tucker Act predated Medicaid by seventy-eight years. *Compare* Tucker Act, 28 U.S.C. § 1491 (enacted March 3, 1887), to the Social Security Amendments of 1965 (Pub. L. 89-97).

It is worth noting, however, that the *Bowen* court raised—but did not meaningfully consider—the possibility of an unexhausted administrative ARC. In fact, it acknowledged that Professor Davis, the respected APA scholar, had explained § 704's NOARC language as codifying the exhaust-administrative-remedies-first principle, but then quickly turned to a discussion of the special statutory ARC. What the Court skipped was an analysis of whether unexhausted administrative remedies could be an ARC if they are not remedies available in or leading to those available in a *court*.

Under the facts of *Bowen*, such an analysis was not necessary. It was, however, in *Garcia*, where the proposed alternative ARC was an administrative remedies option. The D.C. Circuit in *Garcia* held that because those administrative remedies, once exhausted, could lead the plaintiffs back into court, the statute enabling those administrative remedies was an ARC. By this the court meant that at the end of the administrative process, the aggrieved would still get judicial review, which would be a remedy in a court. Therefore, unexhausted remedies with judicial review ultimately available could be an ARC, even under the § 704 NOARC framework described above.

2. Bowen *and NOARC Step Two: Review the Remedy*

Much of *Bowen*'s analysis falls within this step of the § 704 NOARC framework. To review a remedy, a court must determine whether the alternative ARC allows the correction of an agency action. This maps pretty closely to the *Bowen* court's consideration of the Claims Court's equitable powers (or lack thereof), under the Court's jurisdictional ARC inquiry.

The special statutory ARC inquiry could be said to be part of the Court's efforts to complete this step, as well. The Court raised the possibility of a special statutory ARC in an effort to consider what Congress intended for a particular class of problems that would arise. In *Bowen*, the Court rejected that idea on the facts of the case—Congress had not provided for "special and adequate" review procedures—but it left open the possibility that in future a special statutory ARC could be found, thereby precluding § 706 review. In those instances, in which an alternative ARC would be found to be adequate on special statutory ARC grounds, Congress would have stipulated the kinds of actions it wanted or would allow the Court to take to remedy the agency's bad acts.

Thus, a special statutory ARC inquiry might require the Court to consider whether a particular alternative law would in fact allow the remedying of the challenged action. If the alternative law, specifically provided by Congress and specially passed, does not allow for the injurious agency action to be corrected, it is unlikely the Court would find that the injury raised falls within the category of injuries for which Congress intended to specially provide. In this way, the *Bowen* court's special statutory ARC analysis could have served to ensure that the proposed alternative ARC would be a remedy to the agency action. But on the facts of *Bowen*, the Court had no opportunity to do so. Its special statutory ARC analysis was stopped at the special part of the analysis—the Court found that the Tucker Act was not the result of congressional intent

to specially address the kind of claim Massachusetts was bringing, regardless of whether the Tucker Act would have allowed the challenged agency action to be remedied.

3. Bowen *and NOARC Step Three: Determine Adequacy in Conjunction with Other*

The adequacy component of a faithful NOARC analysis implicates much of the *Bowen* majority opinion. This is to be expected since (1) it is the *adequacy* of the proposed remedy that was largely in question, probably due to the facially ambiguous nature of the word "adequate"; and (2) the Court probably did not realize it was doing—or should have been doing—anything other than adjudicating adequacy, since it is clear from the *Bowen* opinion that the Court did not undertake its NOARC inquiry with a clear analytical framework or in accordance with any clear operating principles.

Thus, in some ways, all four of the Court's ARC inquiries in *Bowen* address the *adequacy* of the proposed ARC, or the proposed alternative ARC's ability to stand in for the APA in delivering agency correction that is "plain and complete" and that is "as practical and efficient to the ends of justice and its prompt administration as the remedy provided in § 706."[215] For instance, the jurisdictional ARC inquiry addressed the *completeness* of the proposed alternative ARC's remedy. For this reason, the Court couched its holding in terms of the Claims Court's ability to deliver relief that was only "limited."

Similarly, the special statutory ARC inquiry in some ways addressed the *plainness* of the proposed alternative ARC's remedy. If Congress had presented a clear intent for the kind of injury alleged to be handled in a specific, specially created, statutory way, it might be plain that such a remedy would be an adequate alternative.

The unexhausted administrative ARC inquiry explored the *efficient to the ends of justice and its prompt administration* component of the close NOARC adequacy framework. If Massachusetts were to have unexhausted administrative options that could remedy the alleged injury, without judicial review, requiring them to pursue such remedies would be just and efficient.

And the practical ARC inquiry—the Court's consideration of non-legal but real conditions that would affect the adequacy of the alternative ARC—revealed consequences largely applicable to much of the adequacy inquiry. First, it would impact the *completeness* of the remedy (if the inexpert adjudication by the Claims Court resulted in a faulty judgment against plaintiff, those practical considerations would have affected the completeness of the remedy). Second, it would clearly impact the *practicality* of the remedy. Practical considerations, such as the *Bowen* court's review of the narrow focus and off-point expertise of the Claims Court, or such as the on-the-ground conditions of the USDA, rendering futile the proposed alternate administrative

[215] See BLACK'S 2d ed., *supra* note 197 (discussed in Part IV.A.3 above).

remedy in *Garcia*, could affect the practicality of the remedy. Such "futile" or "doubtful" ARCs are, practically speaking, not adequate.

Third, practical considerations could reveal information about the *promptness* of the proposed alternative ARC's ability to render justice. Again, this is tellingly illustrated in *Garcia*, in which a practical ARC inquiry would have revealed information about the timeline of the proposed alternative administrative remedies—that is, practically speaking, the USDA's OCR being mismanaged as egregiously as the unrebutted evidence indicated would weigh against the proposed alternative ARC as being a viable means for providing a *prompt administration of justice*, as is required by the NOARC framework.

For these reasons and in at least these described ways, the adequacy determination required by the faithful NOARC framework was undertaken by the Supreme Court in *Bowen*. It may not have articulated its primary adequacy inquiry in the terms suggested in Part IV.A, but its analysis was consistent with it.

4. Bowen *and NOARC Step Four: Say No*

The final step of the NOARC framework articulates a court's responsibility to determine not just that the proposed alternative ARC is not adequate, but that there is *no other* ARC. As discussed above, it is unclear how a court is to fulfill this responsibility.

At minimum, this requirement imposes on the court some obligation to be thorough in its analysis. In this way, the *Bowen* opinion arguably achieved the purpose of this fourth step. Even though the Court did not appear to consider more than one ARC—an alternative remedy under the Claims Court was the only alternative being considered—and even though the Court did not include a statement to the effect of "this Court has determined that the only possible alternative ARC is review in the Claims Court; therefore, that is the proposed alternative ARC we will consider," the *Bowen* court was nevertheless successful at analyzing the one proposed alternative in multiple ways.

As demonstrated in Part II.B of this Article, the *Bowen* court clearly came at the NOARC question from more than one angle, introducing to my count at least four separate lines of inquiry designed to answer the question, "Is this proposed alternative ARC really an 'adequate remedy in a court'?" And though its analyses were confusingly intermingled, without clear transitions or signaling, and with internal contradiction, the Court's analyses nevertheless did reveal different aspects of the Claims Court as a possible alternative ARC. The *Bowen* opinion demonstrates that the Court did not rest until it had exhausted analyzing all the ways it could conceive of the proposed alternative ARC to be adequate. And having found none of them to be sufficient, the Court determined NOARC existed and remanded the case so the lower courts could conduct the § 706 review the appellant had always wanted.

In this way, the *Bowen* court's multifaceted efforts went to its obligation to assure that there was truly "*no* other adequate remedy in a court." The Court could have

done so more explicitly and more thoroughly, but it certainly appears to have tried to be thorough, as the fourth step of the NOARC framework requires.

In these ways, what sense we could make from the *Bowen* opinion does align with the results of a close reading of NOARC itself. Such backfilling and puzzle-piecing would not be necessary, however, if the Court had undertaken its initial analysis with a clearer eye to the obligations and difficulties of determining adequacy under § 704's NOARC requirement. Hopefully, in future the Supreme Court and others courts will be better guided.

CONCLUSION

The difficulties with NOARC arise for two reasons: (1) the NOARC language of § 704 resists easy analysis; and (2) the legal community has yet to realize that the NOARC language of § 704 resists easy analysis. The primary purpose of this Article is to alleviate the problems caused by reason number two—a lack of awareness of NOARC's entrenched difficulties. If courts, practitioners, and the legal community writ broad begin to recognize some of the opacity in NOARC's language and the confusion within the Supreme Court's only case on point, perhaps we will undertake our future NOARC analyses with some cognizance that it might not be clear whether an ARC exists and that adequacy (and inadequacy) can be demonstrated in a variety of ways.

But concluding this Article without any positive discussion of a coherent NOARC analysis would leave the first reason for pervasive confusion—NOARC's resistance of easy analysis—entirely unremedied. Thus, Part IV.A undertook a close reading of § 704's NOARC language and derived a four-step framework that could guide future NOARC analyses.

This first effort is likely insufficient in itself to guide courts to careful and faithful NOARC outcomes. In some ways, this is inherent to the problems of NOARC itself; building a requirement on a word like "adequate" may necessarily require courts to make judgment calls with which other reasonable courts might disagree. But the NOARC framework itself does provide what *Bowen* did not—and courts, practitioners, would-be plaintiffs, and the larger legal community have not yet had—a systematic method of determining whether an APA case meets § 704's NOARC requirement, thereby making way for APA review and getting the aggrieved into federal court.

Thus, this Article is an effort to revitalize the academic and judicial conversations surrounding NOARC. As *Garcia* and *Castelano* make clear, the question of § 704 NOARC is not an esoteric issue. Livelihood is on the line, along with citizenship, the right to travel, family farms, and racial and gender discrimination. These issues—about which we care so much—can turn on whether or not we understand and faithfully apply the requirements of § 704. For these reasons, and for all the grievances caused by the thousands or millions or thousands of millions of agency-person interactions each year, we must have a more robust NOARC dialogue. Anything less would not be adequate.