

(UN)LIMITING ADMINISTRATIVE REVIEW: *WIND RIVER*,
SECTION 2401(A), AND THE RIGHT TO CHALLENGE FEDERAL
AGENCIES

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INTRODUCTION

IN eight federal circuits, a person's right to sue a federal agency may be time-barred before it exists—an odd result made possible by the *Wind River* doctrine.¹ This Note argues that the doctrine is wrong as a matter of interpretation, despite its widespread acceptance.

A party who is “adversely affected or aggrieved” by a federal agency's decision has a cause of action against the agency under the Administrative Procedure Act (“APA”).² The aggrieved party may challenge the action as *ultra vires* (beyond constitutional or statutory authority), procedurally deficient, or simply as an arbitrary policy choice.³ But each of these claims is subject to a time limit. 28 U.S.C. § 2401(a) directs that “every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues.”⁴

Under the *Wind River* doctrine that provision has two different meanings. For *ultra vires* administrative challenges and every single nonadministrative claim to which Section 2401(a) applies, a party's “right of action first accrues” as soon as (but not before) he or she has suffered a legally cognizable injury and is entitled to seek legal relief. This understanding of accrual is almost universally accepted throughout the law, and has been for over a century. Its rationale is that, while plaintiffs should be encouraged to pursue their rights diligently, they cannot be encouraged to pursue rights they do not yet have.

But Section 2401(a) has been interpreted to have a unique alternative meaning for procedural and policy-based administrative challenges. Under *Wind River*'s gloss on Section 2401(a), a party's right to bring either of these claims “first accrues” as soon as the agency has acted. This is true even if the agency's action has yet to actually cause a legally cognizable injury or even remotely affect the party. It is true even if the party does not yet exist. Under *Wind River*, a party's right of action may ac-

¹ The doctrine was created in *Wind River Mining Corp. v. United States*, 946 F.2d 710 (9th Cir. 1991), so this Note will refer to it as the “*Wind River* doctrine” for readability.

² 5 U.S.C. § 702 (2012). As clarification, the terms “cause of action” and “right of action” can be used interchangeably, and will be in this Note. Compare Cause of Action, Black's Law Dictionary (10th ed. 2014) (defining “cause of action” as “[a] group of operative facts giving rise to one or more bases for suing; a factual situation that entitles one person to obtain a remedy in court from another person”), with Right of Action, Black's Law Dictionary (10th ed. 2014) (defining “right of action” as “[t]he right to bring a specific case to court”).

³ 5 U.S.C. § 706(2)(A)–(D) (2012).

⁴ 28 U.S.C. § 2401(a) (2012).

crue and become time-barred before that party actually has a right of action.

The *Wind River* doctrine seems facially flawed. But it has been accepted by eight federal circuits, often with only a few sentences of analysis, and no circuits have rejected it. This Note stands alone against the wind (pun intended) and argues that the doctrine is clearly inconsistent with the plain meaning of Section 2401(a). Because it takes a position that is novel in the literature and not shared by any court, this Note undertakes an exhaustive analysis of the sources that inform Section 2401(a)'s meaning. To date, no court or commentator has performed such an analysis, which helps explain the *Wind River* doctrine's prevalence. Every source points the same way: the text of the provision itself, its statutory context, cases and treatises from when it was first enacted, its revision history alongside developments in the law, and finally, how it has been interpreted by every federal court (including the U.S. Supreme Court) in every other legal context aside from administrative claims. "Accrual" means, and has always meant, the same thing. A party's right of action cannot accrue until he or she has actually been harmed by the defendant. As a matter of pure statutory interpretation, *Wind River* cannot stand.

Wind River is on stronger footing as a matter of policy. Indeed, the implications of this Note's conclusion are dramatic. If it is right, then there is no general time limit on APA claims. Every decision made by every federal agency during its entire history can be freshly challenged on policy or procedure, so long as the decision has injured the plaintiff within the past six years. Whenever there is a newly injured plaintiff a new challenge may be brought. Following Section 2401(a)'s express instructions would open the floodgates to effectively unlimited administrative review. But these are indeed Section 2401(a)'s express instructions. They cannot and should not be disregarded based on judges' policy concerns. Further, this Note argues that these policy concerns are overblown, and in fact there are competing (and compelling) policy arguments in favor of following Section 2401(a)'s plain meaning.

All APA plaintiffs who find themselves blocked by the *Wind River* doctrine can use this Note as a blueprint for their briefs. It is organized as follows. Part I provides an overview of legal limitations periods generally and Section 2401(a) specifically. Part II provides a more detailed overview of administrative review litigation. Part III outlines the development of the *Wind River* doctrine. Part IV analyzes the doctrine in light

of Section 2401(a)'s textual meaning and contextual interpretive sources. It then briefly reconsiders the doctrine's pragmatic justifications. The final Part offers concluding thoughts.

I. STATUTES OF LIMITATIONS, STATUTES OF REPOSE,
AND 28 U.S.C. § 2401(a)

The *Wind River* doctrine has effectively morphed Section 2401(a) from a statute of limitations into a statute of repose. To understand what this means, it is important to define the terms.

Statutes of limitations and statutes of repose both act as time limits on legal claims, but operate very differently. For statutes of limitations, the “clock starts to tick” when a potential *plaintiff's* legal claim *accrues*—generally the moment when he is able to bring a lawsuit. As defined in *Black's Law Dictionary*, a “statute of limitations” is “a statute establishing a time limit for suing in a civil case, based on the date when the claim accrued (as when the injury occurred or was discovered).”⁵ This definition is basically unchanged from the dictionary's first edition, published in 1891.⁶ Indeed, statutes of limitations like this have existed since the thirteenth century.⁷

In contrast, statutes of repose did not emerge until the 1970s.⁸ For these statutes, the time limit starts running immediately upon the poten-

⁵ Statute of Limitations, *Black's Law Dictionary* (10th ed. 2014). “Accrue” is separately defined as “to come into existence as an enforceable claim or right; to arise <the plaintiff's cause of action for silicosis did not accrue until the plaintiff knew or had reason to know of the disease>.” *Accrue*, *Black's Law Dictionary* (10th ed. 2014). Accrual is also mentioned in the definition of “right,” which notes that an “accrued right” is “[a] matured right; a right that is ripe for enforcement (as through litigation).” *Right, Accrued Right*, *Black's Law Dictionary* (10th ed. 2014).

⁶ See Statute of Limitations, *Black's Law Dictionary* (1st ed. St. Paul, Minn., West Publishing Co. 1891) (defining “statute of limitations” as “[a] statute prescribing limitations to the right of action on certain described causes of action; that is, declaring that no suit shall be maintained on such causes of action unless brought within a specified time period after the right accrued”). “Accrue” was defined as follows: “to arise, to happen, to come into force or existence; as in the phrase, ‘The right of action did not *accrue* within six years.’” *Accrue*, *Black's Law Dictionary* (1st ed. St. Paul, Minn., West Publishing Co. 1891).

⁷ Note, *Developments in the Law—Statutes of Limitations*, 63 *Harv. L. Rev.* 1177, 1177 (1950).

⁸ See Restatement (Second) of Torts § 899 cmt. g (Am. Law Inst. 1979) (“In recent years special ‘statutes of repose’ have been adopted in some states The statutory period in these acts . . . may have run before a cause of action came fully into existence.”); see also *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2185–86 (2014) (noting that although the term

tial *defendant's* last culpable act or omission—regardless of whether the potential plaintiff has actually been injured by the conduct yet, is physically or legally capable of suing, or even exists at all.⁹ *Black's Law Dictionary* defines “statute of repose” as “[a] statute barring any suit that is brought after a specified time since the defendant acted (such as by designing or manufacturing a product), even if this period ends before the plaintiff has suffered a resulting injury.”¹⁰

Simply put, statutes of limitations punish the plaintiff while statutes of repose protect the defendant. The two statutes are targeted at different actors because they have different purposes. The main thrust of statutes of limitations is to encourage plaintiffs “to pursue [their] claims diligently.”¹¹ Since a plaintiff cannot pursue his right to sue before it exists, statutes of limitations “do not preclude claims before they are ripe for adjudication.”¹² But statutes of repose do. These statutes “effect a legislative judgment that a defendant should ‘be free from liability after the legislatively determined period of time,’” offering defendants a “fresh start.”¹³ At some point the potential defendant’s interest in finality outweighs the potential plaintiff’s right to sue, no matter how blameless the plaintiff is for the delay.

28 U.S.C. § 2401(a) is the statute of limitations for civil suits against the U.S. government.¹⁴ It reads in relevant part:

[E]very civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or

“statute of repose” was in the legal lexicon before the 1970s, it was just another name for statutes of limitations).

⁹ *Waldburger*, 134 S. Ct. at 2178–79. This can make a critical difference for late-occurring “latent” injuries, such as when a landowner’s activities contaminate a parcel of land and the environmental harm does not become apparent until decades later, after the old landowner is long gone. See *id.* at 2181.

¹⁰ Statute of Repose, *Black's Law Dictionary* (10th ed. 2014).

¹¹ *Waldburger*, 134 S. Ct. at 2178–79. This explains why statutes of limitations can be “tolled” (effectively hitting the “pause” button on the clock) when the plaintiff is under some sort of legal disability. It would be unreasonable to require such plaintiffs to bring suit or lose their claim. See *id.* at 2179.

¹² 54 C.J.S. Limitations of Actions § 2 (2010).

¹³ *Waldburger*, 134 S. Ct. at 2183 (citation omitted) (quoting 54 C.J.S. Limitation of Actions § 7, at 24 (2010)).

¹⁴ See *Stevens v. Dep't of Treasury*, 500 U.S. 1, 8 n.2 (1991) (describing § 2401(a) as “the general statute of limitations for a civil action against the Government”).

beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.¹⁵

Section 2401(a) originated in the Tucker Act of 1887.¹⁶ The Act simultaneously waived the federal government's sovereign immunity for certain types of claims and granted federal courts jurisdiction over them. It was designed to "give the people of the United States what every civilized nation of the world ha[d] already done—the right to go into the courts to seek redress against the Government for their grievances."¹⁷ But the Tucker Act limited this right with Section 2401(a)'s precursor, which read, "no suit against the Government of the United States, shall be allowed under this act unless the same shall have been brought within six years after the right accrued for which the claim is made."¹⁸ Though the provision's wording and its location in the U.S. Code have changed over the years, its substance has always been an accrual-based framework.¹⁹

Section 2401(a) is merely a default statute of limitations that applies if Congress has not provided a different time limit for the specific claim at issue. Congress often does so, and thus Section 2401(a) does not nearly apply to "every civil action commenced against the United States" despite what its text says.²⁰ However, the universe of cases to which it does apply is still quite large, and includes claims arising under the Freedom of Information Act ("FOIA"),²¹ claims seeking return of property seized through civil and criminal forfeiture,²² state law contract claims under

¹⁵ 28 U.S.C. § 2401(a) (2012).

¹⁶ *Auction Co. of Am. v. FDIC*, 132 F.3d 746, 749 (D.C. Cir. 1997), decision clarified on denial of reh'g, 141 F.3d 1198 (D.C. Cir. 1998).

¹⁷ 18 Cong. Rec. 2680 (1887) (statement of Rep. Bayne).

¹⁸ Act of Mar. 3, 1887, 24 Stat. 505, 505.

¹⁹ See *infra* Subsection IV.B.1.

²⁰ 28 U.S.C. § 2401(a); see, e.g., *id.* § 2401(b) (providing a separate, shorter limitations period for tort claims against the United States as part of the Federal Tort Claims Act, ch. 753, 60 Stat. 842 (codified as amended in scattered sections of 28 U.S.C.)); 28 U.S.C. § 2501 (2012) (claims within the jurisdiction of the U.S. Court of Federal Claims); see also *Howard v. Megginson*, 775 F.3d 430, 438 (D.C. Cir. 2015) (finding "irreconcilable conflict" between § 2401(a) and Title VII's specific limitations provisions, and thus applying the latter). Section 2401(a) also does not apply to claims that have long been understood as exempt from statutes of limitations, such as habeas petitions. See *Walters v. Sec'y of Def.*, 725 F.2d 107, 111–14 (D.C. Cir. 1983).

²¹ *Spannaus v. U.S. Dep't of Justice*, 824 F.2d 52, 56 (D.C. Cir. 1987).

²² *Santiago-Lugo v. United States*, 538 F.3d 23, 24 (1st Cir. 2008) (*per curiam*).

\$10,000 in value,²³ employment-related suits by federal employees,²⁴ suits by service members seeking to correct their allegedly improper discharge designation,²⁵ various claims under Native American-specific statutes,²⁶ and, most importantly, challenges to agency action brought under the APA and various other agency-specific statutes.²⁷

Based on the preceding discussion, Section 2401(a)'s operation would appear clear-cut across all the claims to which it applies. It is, like all statutes of limitations, expressly based on accrual—a legal concept with a well-settled meaning that dates back hundreds of years. Claims accrue once the plaintiff's legal right to relief comes into existence. So based on a plain reading of Section 2401(a), for every claim it covers, potential plaintiffs should have a six-year time limit to bring suit that starts running once their legal right comes into existence, and not a moment before. This plain reading does in fact hold true across all cases to which Section 2401(a) applies, with one exception. For certain APA suits, every court presented with the question has gone against the statute's apparently clear instructions and has instead found that the six-year period begins to run upon the last act of the *defendant* agency rather than the first existence of the *plaintiff's* right of action. For these APA claims, the judiciary has effectively transformed Section 2401(a) from a statute of limitations to a statute of repose. Part II will provide a background on administrative challenges, and Part III will explain how Section 2401(a) has been interpreted for these challenges.

²³ Auction Co. of Am. v. FDIC, 132 F.3d 746, 747, 749 (D.C. Cir. 1997).

²⁴ See Stevens v. Dep't of Treasury, 500 U.S. 1, 8 n.2 (1991) (age discrimination); Saffron v. Dep't of Navy, 561 F.2d 938, 941–42 (D.C. Cir. 1977) (discharged employee seeking reinstatement and damages).

²⁵ Walters, 725 F.2d at 114–15.

²⁶ See, e.g., Christensen v. United States, 755 F.2d 705, 708 (9th Cir. 1985).

²⁷ Preminger v. Sec'y of Veterans Affairs, 517 F.3d 1299, 1307 (Fed. Cir. 2008) (collecting cases from the First, Fourth, Sixth, Ninth, and Tenth Circuits and noting that “our sister circuits have held that actions for judicial review under the APA are subject to the statute of limitations in 28 U.S.C. § 2401(a)”; Coal. for a Sustainable Delta v. FEMA, 812 F. Supp. 2d 1089, 1106 (E.D. Cal. 2011) (Endangered Species Act claims)).

II. MECHANICS OF ADMINISTRATIVE REVIEW

This Part will explain the mechanics of bringing policy-based and procedural administrative challenges. First, it will summarize the substantive standards that govern them. Then it will review their biggest procedural hurdle—standing.

A. *Types of Administrative Challenges*

The APA was enacted in 1946 in response to the rapidly expanding administrative state and was meant to serve as “a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices.”²⁸ In the words of one of its sponsors, it “is a bill of rights for the hundreds of thousands of Americans whose affairs are controlled or regulated” by federal agencies.²⁹ To that end, it grants a right of action to any person who is “suffering legal wrong” or “adversely affected or aggrieved” by a federal agency.³⁰

This right is fleshed out in Section 706, which requires the reviewing court to “hold unlawful and set aside agency action, findings, and conclusions” that violate one of six standards.³¹ Two of them are not relevant here.³² Of the four others, two are not affected by the *Wind River* doctrine: constitutional and statutory challenges.³³ Their operation is fairly self-explanatory—the reviewing court simply interprets the constitutional or statutory provision at issue and determines whether the agency action violates it.³⁴ However, the final two—policy and procedural challenges—require more explanation, both because they are less intuitive and because they are the targets of *Wind River*.

²⁸ *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct 1199, 1211 (2015) (Scalia, J., concurring) (quoting *United States v. Morton Salt Co.*, 338 U.S. 632, 644 (1950)).

²⁹ 92 Cong. Rec. 2149 (1946) (statement of Sen. McCarran).

³⁰ 5 U.S.C. § 702 (2012); see also 3 Charles H. Koch, Jr., *Administrative Law and Practice* § 8:10, at 69 (3d ed. 2010).

³¹ 5 U.S.C. § 706(2) (2012).

³² 5 U.S.C. § 706(2)(E) covers a specific range of administrative claims and § 706(2)(F) is relevant only for administrative adjudications. *Id.* § 706(2)(E)–(F).

³³ *Id.* § 706(2)(B)–(C).

³⁴ Of course, *Chevron* deference to agency interpretations complicates this enterprise. See *Chevron U.S.A. v. Nat. Res. Def. Council*, 467 U.S. 837, 842–43 (1984).

1. *Procedural Challenges*

If an agency did not follow the proper procedures before acting then its action is unlawful.³⁵ There are three possible sources for such procedures—the APA, some other statute, or the agency itself. Sections 551–559 of the APA prescribe various procedures that agencies must follow before acting. For instance, Section 553 requires the agency to give the public notice of and opportunity to comment on proposed regulations before adopting them (commonly referred to as “notice and comment”).³⁶ Congress can also supplement or replace the APA’s requirements with agency-specific procedures. For example, the National Environmental Policy Act requires federal agencies to prepare and publish Environmental Impact Statements prior to undertaking certain actions.³⁷ Finally, an agency may impose additional procedural requirements on itself beyond those required by statute. Once created, these are binding: “One of the most firmly established principles in administrative law is that an agency must obey its own rules.”³⁸ Any agency action taken without observance of all the required procedures can be invalidated.

2. *Policy Challenges*

Congress often grants agencies significant authority to build on top of statutory language with additional regulations.³⁹ These additional regulations are agency policy. “Policymaking has long been characterized as the ‘zenith’ of administrative authority” *vis-à-vis* the courts.⁴⁰ And understandably so: Such actions have been authorized by Congress and are taken within the sphere of the agency’s expertise. A court scrutinizing such activity should proceed with great caution. But proceed they must, since the APA requires them to strike down *any* agency action that was “arbitrary, capricious, [or] an abuse of discretion.”⁴¹ This “generally applicable” standard must be met even for agency actions undertaken with

³⁵ 5 U.S.C. § 706(2)(D) (invalidating actions taken “without observance of procedure required by law”).

³⁶ *Id.* § 553(b)–(c).

³⁷ 42 U.S.C. § 4332 (2012).

³⁸ 1 Koch, *supra* note 30, § 4:22, at 305.

³⁹ Of note, this is different from agency statutory interpretation. For a helpful discussion of the differences between policymaking and statutory interpretation, see Charles H. Koch, Jr., 32 *Federal Practice and Procedure: Judicial Review of Administrative Action* § 8112(d), at 7 (2006).

⁴⁰ 4 Koch, *supra* note 30, § 11:31, at 114.

⁴¹ 5 U.S.C. § 706(2)(A) (2012).

congressional authorization, constitutional authority, and after following appropriate procedures.⁴² These actions are still unlawful if they were an arbitrary policy choice.

Courts have struck a balance between this mandated scrutiny and the need for deference by evaluating the agency's decision-making process rather than the decision itself. The Supreme Court has instructed that:

Review under the arbitrary and capricious standard is deferential; we will not vacate an agency's decision unless it "has relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."⁴³

In other words, "[t]he policy decisions of agencies must be set aside if they are not the product of reasoned decision-making"⁴⁴ but affirmed if the agency "considered the relevant data and articulated a satisfactory explanation for the policy choice made."⁴⁵ This process-based analysis helps ensure that well-reasoned agency policy will not be struck down as arbitrary and capricious simply "because the reviewing court might have made a different determination were it empowered to do so."⁴⁶

B. Standing and Finality Requirements

Standing is "[a] party's right to make a legal claim or seek judicial enforcement of a duty or right."⁴⁷ A brief explanation of standing is necessary, both because there are some wrinkles in the administrative context and because the connection between standing and accrual is crucial for the analysis later in Part IV.

⁴² *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415–16 (1971).

⁴³ *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 658 (2007) (quoting *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

⁴⁴ *Ala. Power Co. v. FCC*, 311 F.3d 1357, 1371 (11th Cir. 2002).

⁴⁵ *Tenneco Gas v. Fed. Energy Regulatory Comm'n*, 969 F.2d 1187, 1196 (D.C. Cir. 1992).

⁴⁶ *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943).

⁴⁷ Standing, *Black's Law Dictionary* (10th ed. 2014).

There are two components of standing that are relevant here—constitutional and statutory.⁴⁸ Constitutional standing stems from Article III’s restriction of the federal judicial power to “Cases” and “Controversies”—words understood to limit the types of disputes that can be resolved in federal court.⁴⁹ In a nutshell, constitutional standing requires that a potential plaintiff have (1) a concrete and particular injury; (2) that was caused by the defendant’s conduct; and (3) is likely to be redressed by a favorable decision.⁵⁰ Without these three elements, a plaintiff’s dispute is not a “case” or “controversy” under the Constitution and thus it cannot be heard in federal court. Statutory standing is the requirement that the plaintiff actually have a cause of action under applicable statute.⁵¹ This requirement is generally met if the plaintiff’s interests “fall within the zone of interests protected by the law invoked.”⁵²

For most administrative challenges the standing inquiry is fairly run-of-the-mill. Constitutional standing is satisfied when a regulation that is somehow invalid (unconstitutional, arbitrary and capricious, etc.) injures a party.⁵³ This could be through a direct application in an enforcement action, or indirectly through some other means—for example, placing restrictions on how a property owner may use his property.⁵⁴ Injury and causation are present, and so is redressability because the reviewing court can strike down the offending regulation.

Statutory standing stems from the APA’s right of action, as glossed by the zone-of-interests test. A party that has been adversely affected or aggrieved by an agency’s action must also fall within the zone of interests protected by the statute that the agency is relying on for its authori-

⁴⁸ So-called “prudential standing” is not relevant here and might be eliminated soon anyway. See 4 Richard Murphy & Charles H. Koch Jr., *Administrative Law and Practice* § 13:14, at 128 (rev. 3d ed. Supp. 2016). (“[I]t seems fair to say that the Court [has] signaled a possible intention to do away with the category of ‘prudential’ standing altogether.” (referring to *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1388 (2014))).

⁴⁹ Richard H. Fallon, Jr. et al., *Hart and Wechsler’s The Federal Courts and The Federal System* 101 (7th ed. 2015).

⁵⁰ *Id.* This formulation of constitutional standing was established by the Supreme Court in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

⁵¹ *Lexmark*, 134 S. Ct. at 1386–88.

⁵² *Id.* at 1388 (quoting *Allen v Wright*, 468 U.S. 737, 751 (1984)) (internal quotation marks omitted). This is known as the “zone of interests” test. 4 Koch, *supra* note 30, § 13:14, at 335.

⁵³ See 4 Koch, *supra* note 30, § 13:10, at 322.

⁵⁴ See, e.g., *Barnum Timber Co. v. EPA*, 633 F.3d 894, 898 (9th Cir. 2011).

ty.⁵⁵ But as applied to APA challenges the test “is not meant to be especially demanding” because of “Congress’s ‘evident intent’ when enacting the APA ‘to make agency action presumptively reviewable.’”⁵⁶ A plaintiff only needs to assert an interest that is “*arguably* within the zone of interests to be protected or regulated by the statute” and this does not require them to be a member of a class that the statute seeks to benefit.⁵⁷ For example, this means when an agency acquires land pursuant to a statute meant to foster Indian tribes’ economic development, a non-Indian owner of an adjacent property can satisfy the zone-of-interests test and mount an APA challenge.⁵⁸

In the context of procedural challenges, statutory standing basically matches the description above, but constitutional standing has some wrinkles. As the Supreme Court has said, “[t]here is . . . much truth to the assertion that ‘procedural rights’ are special.”⁵⁹ Particular attention must be paid to the injury requirement; in contrast, causation and redressability are relaxed. First, the injury requirement: In a sense there is an abstract injury to everyone in the country when an agency violates the law by acting without appropriate procedures, but this injury cannot support standing because it is neither particularized to a plaintiff nor concrete.⁶⁰ Instead, constitutional standing “must be based on harm to a concrete interest [of a particular plaintiff] that the procedure is designed to protect.”⁶¹

On the other hand, given the nature of procedural violations, the tests for causation and redressability are easier to meet.⁶² Because the plaintiff’s concrete injury stems from the substantive agency action rather than the lack of procedure itself, it is possible that even if the agency were to follow proper procedures it would still make the same substan-

⁵⁵ *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2210 (2012).

⁵⁶ *Id.* (quoting *Clarke v. Sec. Indus. Ass’n*, 479 U.S. 388, 399 (1987)) (first internal quotation marks omitted).

⁵⁷ *Id.* (emphasis added) (quoting *Ass’n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970)) (internal quotation marks omitted).

⁵⁸ *Id.* at 2210–12.

⁵⁹ *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 572 n.7 (1992).

⁶⁰ *Id.* at 560, 573–74.

⁶¹ 4 *Murphy & Koch*, *supra* note 48, § 13:11, at 112.

⁶² *Id.* § 13:13, at 127 (“[The] person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy.” (quoting *Lujan*, 504 U.S. at 572 n.7) (internal quotation marks omitted)).

tive decision and still cause the same injury to the plaintiff. But-for causation would be difficult, if not impossible, to prove and thus is not required for standing. In *Lujan v. Defenders of Wildlife*, the Court used the example of a property owner adjacent to a federally licensed dam that was proposed without an environmental impact statement.⁶³ Such a property owner would have standing “even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years.”⁶⁴ The redressability requirement is relaxed for the same reason—were the reviewing court to rule in favor of the plaintiff and make the agency go through the proper procedures, there is no guarantee that it would decide differently.

There is another preliminary hurdle that administrative challengers must meet. Under the APA, a court may only review “final agency action.”⁶⁵ Like the general requirement of standing, this ensures that disputes are focused enough for judicial resolution, avoiding “judicial entanglement in abstract policy disagreements.”⁶⁶ The Supreme Court has broken up finality into two separate requirements: “First, the action must mark the ‘consummation’ of the agency’s decisionmaking process . . . it must not be of a merely tentative or interlocutory nature[.]” such as a preliminary rule that could be changed after the public notice-and-comment process. “[S]econd, the action must be one by which ‘rights or obligations have been determined,’ or from which ‘legal consequences will flow.’”⁶⁷

In most cases, finality overlaps with standing’s injury-in-fact element since the plaintiff is only affected once a regulation is legally binding, and a regulation is only legally binding once it is final.⁶⁸ Since accrual is based on injury, it is often an easy shortcut to say that a claim accrues upon final agency action—and many courts do.⁶⁹ But this does not mean

⁶³ 504 U.S. at 572 n.7.

⁶⁴ *Id.*

⁶⁵ 5 U.S.C. § 704 (2012). This category includes “the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.” *Id.* § 551(13).

⁶⁶ *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 66 (2004).

⁶⁷ *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (citations omitted).

⁶⁸ *Id.*

⁶⁹ See, e.g., *Harris v. FAA*, 353 F.3d 1006, 1009–10 (D.C. Cir. 2004) (“[A] suit challenging final agency action pursuant to section 704 must be commenced within six years after the right of action first accrues. The right of action first accrues on the date of the final agency action.” (citations omitted)).

that the two are absolutely tied together. Instead, finality and injury are two separate concepts: A final agency regulation only causes injury to a party once he or she is actually affected by it, and this could first happen decades after the regulation became final. A recent opinion by Judge Sutton on the U.S. Court of Appeals for the Sixth Circuit recognized this distinction:

Some courts, it is true, have suggested that an APA claim “first accrues on the date of the final agency action.” But these cases show why we don’t read precedents like statutes. These cases all involved settings in which the right of action happened to accrue at the same time that final agency action occurred, because the plaintiff either became aggrieved at that time or had already been injured.⁷⁰

Courts offhandedly noting that administrative claims accrue upon final agency action cannot really mean what they say—they are arguably being led astray by the *Wind River* doctrine.

III. THE *WIND RIVER* DOCTRINE

Section 2401(a)’s six-year time limit applies to all of the administrative challenges discussed above.⁷¹ For statutory and constitutional challenges it operates like a normal statute of limitations, only starting to run once the agency regulation in question has actually caused injury to the potential plaintiff. But for both procedural and policy-based agency challenges, the *Wind River* doctrine has effectively turned Section 2401(a) into a statute of repose. Once six years have passed from the agency’s action, it cannot be challenged on policy or procedural grounds, even if the would-be challenger was not actually injured before the time limit expired. Thus, *Wind River*’s gloss on Section 2401(a) wipes out these rights of action before they come into existence. This Part will first discuss how the *Wind River* doctrine developed in the Ninth Circuit, and then how it came to be the law in seven other circuits.

A. *Development of the Doctrine*

Wind River’s now-prevalent judicial gloss on Section 2401(a) emerged in the early 1990s with two Ninth Circuit cases: *Shiny Rock*

⁷⁰ Herr v. U.S. Forest Serv., 803 F.3d 809, 819–20 (6th Cir. 2015) (citations omitted).

⁷¹ Id. at 817–18.

*Mining Corp. v. United States*⁷² and *Wind River*.⁷³ Of note, though both Section 2401(a) and the APA had been around for many decades before the *Wind River* doctrine emerged, courts did not begin to find that Section 2401(a) applied to APA claims until the 1980s.⁷⁴ This explains why the doctrine emerged when it did—soon after the two statutes were linked together.

Shiny Rock turned on the meaning of accrual under Section 2401(a) in the context of a procedural agency challenge, with the Ninth Circuit concluding that accrual occurred on final agency action.⁷⁵ The case's timeline began in 1964, when the Bureau of Land Management ("BLM") issued a public order that protected a tract of land from appropriation for mining use.⁷⁶ Fifteen years later in 1979, *Shiny Rock* applied to the BLM for a mineral patent that would enable it to mine the tract in question and was rejected because of the prior public order.⁷⁷ *Shiny Rock* then challenged the procedural validity of that order, "arguing that there were errors and violations of statutes and regulations in [its] formulation and publication."⁷⁸ The Ninth Circuit ultimately dismissed the plaintiff's suit as time-barred, holding that its claim accrued upon final agency action in 1964 and thus Section 2401(a) cut it off in 1970—nine years before the plaintiff even applied for a mining permit.⁷⁹ In so doing, the court rejected the plaintiff's arguments that accrual could not have happened until later.⁸⁰

Shiny Rock argued that standing to sue "is a prerequisite to the accrual of a right of action for statute of limitations purposes."⁸¹ But the Ninth Circuit found this seemingly clear-cut point "fatally flawed" because of policy concerns, asserting that adopting the plaintiff's argument "would virtually nullify the statute of limitations for challenges to agency orders."⁸² It also mistakenly relied on *Sierra Club v. Penfold*, a case that

⁷² 906 F.2d 1362, 1366 (9th Cir. 1990).

⁷³ 946 F.2d at 715–16.

⁷⁴ See, e.g., *Sierra Club v. Penfold*, 857 F.2d 1307, 1315 (9th Cir. 1988); *Impro Prods. v. Block*, 722 F.2d 845, 849–50, 850 n.8 (D.C. Cir. 1983).

⁷⁵ *Shiny Rock*, 906 F.2d at 1366.

⁷⁶ *Id.* at 1363.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 1366.

⁸⁰ *Id.* at 1364–66.

⁸¹ *Id.* at 1365.

⁸² *Id.* As a side note, the *Shiny Rock* court does not deserve all of the blame for this error. The plaintiff did not provide a single citation for its accrual argument, despite the wealth of

did involve the application of Section 2401(a) to a procedural challenge, but did not address claim accrual at all.⁸³ Shiny Rock also argued that injury “was necessary for the right of action to accrue,” and the court rejected this argument “for the same reasons” it rejected the standing argument.⁸⁴ The court then vaguely asserted that “the only injury required for the statutory period to commence was that incurred by all persons when . . . the amount of land available for mining claims was decreased” and at that time “any interested party” could have sued.⁸⁵ It is unclear whether the court meant that the statutory period began running against *everyone* when a single “interested party” acquired a right to sue, or whether it meant that anyone could have sued in 1964 regardless of their concrete interest in the case. Either way, the court was wrong: Accrual is analyzed plaintiff-by-plaintiff, and a party cannot bring suit in federal court without a concrete injury.⁸⁶ Ultimately, the best support for *Shiny Rock*’s holding is a pragmatic concern for agency finality that the court expressed in a few one-off sentences.

One year later, the *Wind River* court expanded on these policy rationales to justify *Shiny Rock*’s rule, but still did not adequately analyze the textual meaning of Section 2401(a). Like *Shiny Rock*, *Wind River* involved a mining company frustrated by a BLM order protecting land for environmental reasons.⁸⁷ In 1979 the BLM designated a tract of federal land in California a Wilderness Study Area (“WSA”).⁸⁸ By statute, WSAs are “roadless areas of five thousand acres or more” having certain wilderness characteristics.⁸⁹ Over a several-month period between 1982 and 1983, *Wind River* staked several mining claims within the region,

authority available to support it. *Id.*; see *supra* Part I; *infra* Section IV.A. If the case had been better argued, then maybe the Ninth Circuit would have gone the other way and nipped the *Wind River* doctrine in the bud. The whole episode illustrates that the arguments a lawyer makes for his client in a single case can have far-reaching jurisprudential consequences—like a Chinese butterfly that flaps its wings and causes a thunderstorm in Central Park.

⁸³ *Shiny Rock*, 906 F.2d at 1365 (citing *Sierra Club v. Penfold*, 857 F.2d 1307, 1316 (9th Cir. 1988)). The court would have done better had it instead looked at its own precedent from four years earlier in *Acri v. International Ass’n of Machinists & Aerospace Workers*, 781 F.2d 1393, 1396 (9th Cir. 1986) (“Under federal law a cause of action accrues when the plaintiff is aware of the wrong and can successfully bring a cause of action.”).

⁸⁴ *Shiny Rock*, 906 F.2d at 1365.

⁸⁵ *Id.* at 1365–66.

⁸⁶ See *supra* Section II.B; *infra* Section IV.A.

⁸⁷ *Wind River*, 946 F.2d at 711.

⁸⁸ *Id.*

⁸⁹ *Id.* (citing 43 U.S.C. § 1782(a) (1988)).

but was prevented from actually mining the land due to its designation as a WSA.⁹⁰ In 1987 Wind River asked the BLM to declare its prior decision invalid, alleging that it was both beyond the agency's statutory authority (because the land was not "roadless" as required by the statute) and an unconstitutional taking.⁹¹ After it was rebuffed by the agency's internal review process, Wind River sued in federal court in 1989, making the same statutory and constitutional arguments.⁹² The case eventually came before the Ninth Circuit, where the BLM raised Section 2401(a)'s limitations period as a defense.⁹³

The *Wind River* court recognized that the case turned on the date of accrual and focused on that point.⁹⁴ After summarizing *Shiny Rock*'s analysis of a procedural challenge and surveying other circuits' analyses of statutory challenges, the court adopted a rule that it believed "ma[de] the most sense."⁹⁵ Although it was only faced with statutory and constitutional challenges, it reached out and created an overarching framework that governed accrual for all administrative challenges. First, it announced that a challenge based on either a "mere procedural violation" or on policy grounds must be brought within six years of the agency's action.⁹⁶ Admitting that this result was "not dictated" by Ninth Circuit precedent in *Shiny Rock*, the court justified it on policy grounds.⁹⁷ It argued that for procedural and policy challenges the basis for bringing a claim

will usually be apparent to any interested citizen within a six-year period following promulgation of the decision; one does not need to have a preexisting mining claim in an affected territory in order to assess the wisdom of a governmental policy decision or to discover procedural errors in the adoption of a policy. The government's interest in

⁹⁰ Id.

⁹¹ Id. at 711–12.

⁹² Id. at 712.

⁹³ Id.

⁹⁴ Id. at 714.

⁹⁵ Id. at 715. Although the *Wind River* court attributed its approach to a prior decision of the D.C. Circuit, that case did not come close to announcing *Wind River*'s chosen framework for administrative challenges. Id. (citing *Oppenheim v. Campbell*, 571 F.2d 660, 662–63 (D.C. Cir. 1978)). Indeed, *Oppenheim* held that a cause of action accrues when a plaintiff's "right to resort to federal court [is] perfected." 571 F.2d at 662.

⁹⁶ *Wind River*, 946 F.2d at 715.

⁹⁷ Id.

finality outweighs a late-comer's desire to protest the agency's action as a matter of policy or procedure.⁹⁸

In contrast, the court held that statutory and constitutional challenges may be brought “within six years of the agency’s application of the disputed decision to the challenger” regardless of when the initial decision itself was made.⁹⁹ It reasoned that “[s]uch challenges, by their nature, will often require a more ‘interested’ person than generally will be found in the public at large” and that “[t]he government should not be permitted to avoid all challenges to its actions, even if *ultra vires* [beyond legal authority], simply because the agency took the action long before anyone discovered the true state of affairs.”¹⁰⁰ Notably absent from the Ninth Circuit’s reasoning was a textual analysis of the statute its holding was based on—Section 2401(a). Applying its newly discovered framework, the court held that because Wind River’s challenge was based on statutory authority it did not accrue until the agency’s final decision was applied to the plaintiff in 1987, and thus its 1989 suit was timely under Section 2401(a).¹⁰¹

Departing from the traditional understanding of claim accrual can lead to odd results. *Cloud Foundation v. Kempthorne* is one of many examples.¹⁰² That case involved an environmental group’s policy-based challenge to a 1987 BLM land-use plan that sealed off the land at issue from access by wild horses.¹⁰³ The Montana district court rejected the plaintiff’s 2006 challenge as time-barred by Section 2401(a).¹⁰⁴ The court acknowledged that “[u]nder federal law a cause of action accrues when the plaintiff is aware of the wrong and can *successfully bring a cause of action*”¹⁰⁵ but still found that the plaintiff’s challenge became time-barred six years after the plan was published, even though it admitted that the plaintiff did not even exist at that time.¹⁰⁶ (It probably goes without saying that a plaintiff who does not yet exist cannot “successfully bring a cause of action.”) The court justified this odd result by assert-

⁹⁸ *Id.*

⁹⁹ *Id.* at 716.

¹⁰⁰ *Id.* at 715.

¹⁰¹ *Id.* at 716.

¹⁰² 546 F. Supp. 2d 1003, 1010–11 (D. Mont. 2008).

¹⁰³ *Id.* at 1006–07.

¹⁰⁴ *Id.* at 1010–11.

¹⁰⁵ *Id.* at 1010 (emphasis added) (quoting *Acri v. Int’l Ass’n of Machinists*, 781 F.2d 1393, 1396 (9th Cir. 1986)) (internal quotation marks omitted).

¹⁰⁶ *Id.* at 1011.

ing that publication in the Federal Register was somehow “legally sufficient notice” to the (nonexistent) plaintiff, and by citing *Wind River*.¹⁰⁷ The district court’s result was correct because it was bound by Ninth Circuit precedent, but its twisted legal reasoning illustrates the problems with the *Wind River* doctrine.

B. Spread of the Doctrine

Despite its problems, *Wind River* has been very influential. Its framework has been adopted by the Second,¹⁰⁸ Fourth,¹⁰⁹ Fifth,¹¹⁰ Sixth,¹¹¹ Eleventh,¹¹² D.C.,¹¹³ and Federal¹¹⁴ Circuits.¹¹⁵ Most of them cited *Wind River* in doing so, and none of them discussed the issue in more detail than the *Wind River* court itself. No circuit has rejected it. A reader might be skeptical that a doctrine so troubling could yet become so widely accepted without dissent. But indeed it has, for a variety of reasons.

The most common reason why courts adopt *Wind River*’s approach is a misunderstanding of the relationship between claim accrual and “final agency action” under the APA. As explained above, though both events can and often do happen at the same time, they are not invariably tied together.¹¹⁶ An agency’s final action might not actually injure a party un-

¹⁰⁷ *Id.* (citing *Wind River*, 946 F.2d at 715).

¹⁰⁸ *Wong v. Doar*, 571 F.3d 247, 263 & n.15 (2d Cir. 2009) (holding that a procedural APA challenge was time-barred because, “[u]nder the APA, the statute of limitations begins to run at the time the challenged agency action becomes final” (citing *Wind River*, 946 F.2d at 716)).

¹⁰⁹ *Hire Order Ltd. v. Marianos*, 698 F.3d 168, 170 (4th Cir. 2012) (holding that a policy-based facial challenge was time-barred because “[w]hen, as here, plaintiffs bring a facial challenge to an agency ruling . . . ‘the limitations period begins to run when the agency publishes the regulation’” (quoting *Dunn-McCampbell Royalty Interest v. Nat’l Park Serv.*, 112 F.3d 1283, 1287 (5th Cir. 1997) (citing *Wind River*, 946 F.2d at 715))).

¹¹⁰ *Dunn-McCampbell*, 112 F.3d at 1287 (citing *Wind River*, 946 F.2d at 715).

¹¹¹ *Sierra Club v. Slater*, 120 F.3d 623, 631 (6th Cir. 1997) (holding the procedural challenge had accrued on final agency action and was therefore time-barred when plaintiff brought suit).

¹¹² *Alabama v. PCI Gaming Auth.*, 801 F.3d 1278, 1292 (11th Cir. 2015).

¹¹³ See *JEM Broad. Co. v. FCC*, 22 F.3d 320, 324 (D.C. Cir. 1994) (noting the time limit for bringing a procedural administrative challenge under a different statute of limitations began to run upon final agency action).

¹¹⁴ *Preminger v. Sec’y of Veterans Affairs*, 517 F.3d 1299, 1306–07 (Fed. Cir. 2008).

¹¹⁵ Of course, the Ninth Circuit still follows *Wind River* as well. See *Ctr. for Biological Diversity v. Salazar*, 695 F.3d 893, 904 (9th Cir. 2012) (reaffirming the *Wind River* framework in passing).

¹¹⁶ See *supra* notes 69–70 and accompanying text.

til many years later. But courts can muddle these two concepts together when they cite or quote previous cases out of context. For instance, in *Harris v. FAA*, the D.C. Circuit incorrectly stated that under the APA a “right of action first accrues on the date of the final agency action.”¹¹⁷ As support, it quoted similar language from a previous case, *Impro Products v. Block*.¹¹⁸ But *Impro Products* cannot support such a broad statement; that case just happened to involve a situation where “final agency action” and claim accrual overlapped because the plaintiff was immediately injured.¹¹⁹ Indeed, that court used the proper test for accrual: “Plainly, the cause of action accrues when the ‘right to resort to federal court [is] perfected.’”¹²⁰

The misconception that APA claims accrue on final agency action has become pervasive throughout the law, often appearing where courts adopt *Wind River*’s framework. It has even taken on a life of its own. For instance, in *Sierra Club v. Slater*, the Sixth Circuit noted in passing that “[u]nder the APA, a right of action accrues at the time of ‘final agency action.’”¹²¹ Its only authority was the APA itself, which says nothing about accrual. There was no analysis of the issue beyond that single sentence. Nonetheless, the Federal Circuit relied on *Slater* for that same proposition when it adopted the *Wind River* framework ten years later.¹²² And then the Second Circuit in turn relied on that Federal Circuit case when it adopted *Wind River*.¹²³ It appears that many courts are adopting the *Wind River* doctrine on the basis of a mistaken assumption.

Some litigants have noticed, but their efforts to convince courts have failed. For example, the Fifth Circuit adopted the *Wind River* framework over a plaintiff’s objections.¹²⁴ The plaintiff in that case advocated a

¹¹⁷ 353 F.3d 1006, 1010 (D.C. Cir. 2004).

¹¹⁸ *Id.* (“In this case, where no formal review procedures existed, the cause of action accrued when the agency action occurred.” (quoting *Impro Prods. v. Block*, 722 F.2d 845, 850–51 (D.C. Cir. 1983) (internal quotation marks omitted)).

¹¹⁹ *Impro Prods.*, 722 F.2d at 850–51.

¹²⁰ *Id.* at 850 (alteration in original) (quoting *Oppenheim v. Campbell*, 571 F.2d 660, 662 (D.C. Cir. 1978)).

¹²¹ 120 F.3d 623, 631 (6th Cir. 1997) (quoting 5 U.S.C. § 704 (1994)).

¹²² *Preminger v. Sec’y of Veterans Affairs*, 517 F.3d 1299, 1307 (Fed. Cir. 2008) (citing *Slater*, 120 F.3d at 631 and *Wind River*, 946 F.2d at 714).

¹²³ *Wong v. Doar*, 571 F.3d 247, 263 & n.15 (2d Cir. 2009). The Second Circuit also relied on *Harris*, 353 F.3d at 1010, a case that is similarly unsupported, as shown in the previous paragraph.

¹²⁴ *Dunn-McCampbell Royalty Interest v. Nat’l Park Serv.*, 112 F.3d 1283, 1287–88 (5th Cir. 1997) (citing *Wind River*, 946 F.2d at 715).

“[d]iscovery [r]ule” of accrual—that the statute of limitations should have only started to run against the plaintiff when it actually acquired a possessory interest in the regulated land, rather than the earlier date when the land regulation was passed.¹²⁵ The government responded that *Wind River*’s approach was correct, and the Fifth Circuit agreed.¹²⁶ Its analysis relied heavily on summaries of cases from other circuits.¹²⁷ The Federal Circuit adopted *Wind River* in a similar fashion.¹²⁸ Its only justification was a concern that under the plaintiff’s theory “there effectively would be no statute of limitations”—the same policy concern that motivated *Wind River* itself.¹²⁹

The Fourth Circuit’s opinion in *Hire Order Ltd. v. Marianos*¹³⁰ is a good example of all the issues discussed in the previous three paragraphs. In that case, the Fourth Circuit adopted and then used the *Wind River* doctrine to reject a policy-based administrative challenge as time-barred by Section 2401(a).¹³¹ The two plaintiffs were both gun dealers who first became federally licensed in 2008.¹³² They found themselves unable to sell guns to out-of-state residents because of a Bureau of Alcohol, Tobacco, Firearms, and Explosives (“ATF”) rule promulgated by the agency over thirty years before, in 1969.¹³³ Believing the state residency restriction to be arbitrary and capricious, the plaintiffs brought a policy-based challenge.¹³⁴ The *Marianos* court held that the plaintiffs’ claims had accrued on “final agency action” in 1969 and thus were forever barred by Section 2401(a) six years later in 1975.¹³⁵ Like many other courts, it mistakenly relied on a case where “final agency action” and claim accrual happened to occur at the same time to support the proposition that they *always* occur at the same time.¹³⁶ It then recited the *Wind*

¹²⁵ Brief of Appellants at 47, *Dunn-McCampbell*, 112 F.3d 1283 (No. 95-40770).

¹²⁶ Brief for Appellees at 17–18, *Dunn-McCampbell*, 112 F.3d 1283 (No. 95-40770) (citing *Wind River*, 946 F.2d at 715).

¹²⁷ *Dunn-McCampbell*, 121 F.3d at 1287–88.

¹²⁸ *Preminger v. Sec’y of Veterans Affairs*, 517 F.3d 1299, 1306–07 (Fed. Cir. 2008) (citing *Wind River*, 946 F.2d at 714).

¹²⁹ *Id.* at 1307.

¹³⁰ 698 F.3d 168 (4th Cir. 2012).

¹³¹ *Id.* at 170.

¹³² *Id.* at 169.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.* at 170 (citing *Wind River*, 946 F.2d at 715) (internal quotation marks omitted).

¹³⁶ *Id.* (citing *Jersey Heights Neighborhood Ass’n v. Glendening*, 174 F.3d 180, 186 (4th Cir. 1999)) (internal quotation marks omitted).

River framework without any independent analysis.¹³⁷ The plaintiffs had argued for a normal injury-based understanding of accrual, citing Supreme Court authority in doing so.¹³⁸ But the Fourth Circuit found that this argument “utterly fail[ed]” for no reason other than that the plaintiffs happened to be bringing a policy-based challenge.¹³⁹

Apart from courts and litigants, the *Wind River* doctrine has gone almost entirely unscrutinized by commentators. The one exception is an environmental law treatise—*Public Natural Resources Law*.¹⁴⁰ It contains a section on Section 2401(a) that briefly discusses the doctrine.¹⁴¹ The authors’ principal problem is that it “create[d] exceptions not decreed by Congress.”¹⁴² Section 2401(a) simply states that “civil actions against the United States must be commenced within six years ‘after the right of action first accrues,’” without “distinguish[ing] between procedural and substantive challenges or between ‘policy’ and ‘ultra vires’ challenges.”¹⁴³ In other words, their problem with *Wind River* is not that its understanding of accrual was incorrect, but that it did not pick a uniform accrual date for all administrative claims. The authors did briefly mention what the proper accrual date should be, and they got it right. After acknowledging that “finality” favors the date of agency action and “fairness” favors the date when the plaintiff was affected, they chose the latter because it was more congruent with standing requirements for administrative claims.¹⁴⁴ No other source seriously engages with the *Wind River* doctrine.¹⁴⁵

A reader might wonder how *Wind River* could go virtually unnoticed and unscrutinized for so long. First of all, it is quite possible that many courts share *Wind River*’s policy concern for agency finality, and are predisposed to reject the alternative plain-text reading given its potential to cause a serious increase in the volume of administrative litigation. A

¹³⁷ *Id.*

¹³⁸ Opening Brief of Appellants at 8–10, *Marianos*, 698 F.3d 168 (No. 11-1802).

¹³⁹ *Marianos*, 698 F.3d at 170.

¹⁴⁰ 1 George Cameron Coggins & Robert L. Glicksman, *Public Natural Resources Law* (2d ed. 2015).

¹⁴¹ *Id.* § 8:36, at 8-224 to -25, 8-227 to -30.

¹⁴² *Id.* at 8-230.

¹⁴³ *Id.* at 8-229 (citing 28 U.S.C. § 2401(a)).

¹⁴⁴ *Id.* at 8-230 to -31.

¹⁴⁵ One article about facial constitutional challenges contains a paragraph that mentions the *Wind River* doctrine but then summarily determines that it must not mean what it says, and cites other cases applying a normal accrual rule. Timothy Sandefur, *The Timing of Facial Challenges*, 43 *Akron L. Rev.* 51, 70–71 (2010).

less cynical explanation is that courts have a tendency to mistakenly equate “final agency action” with claim accrual, as discussed above.¹⁴⁶ Indeed, courts have been using imprecise phrasing on this issue for over a hundred years.¹⁴⁷ They can often get away with it because, in the vast majority of cases, the defendant’s allegedly unlawful action immediately causes the plaintiff’s injury without any gap in time.¹⁴⁸ As the discussion above shows, a single court’s confusion of the issue can quite easily be picked up by others,¹⁴⁹ especially when litigants are not vigilant—something that happens all too often.¹⁵⁰ This problem might be magnified here because “accrual” is a transsubstantive concept; lawyers who specialize in administrative law might not be aware of how unusual *Wind River*’s conception of accrual is to the legal world as a whole. Additionally, like all statutes of limitations, Section 2401(a)’s operation is very clear-cut. Thus, *Wind River*’s gloss on the statute provides a very clear signal to any potential litigant, and likely dissuades many of them from even attempting to challenge the doctrine once their circuit has adopted it. Ultimately, as much as we would like to believe otherwise, legal errors really can go unnoticed for many years.¹⁵¹

IV. THE MEANING OF SECTION 2401(a)

This Part will do what no one else has: take an in-depth look at what Section 2401(a) means. The key to evaluating *Wind River*’s fidelity to Section 2401(a) is the meaning of the word “accrue,” and all sources of authority on that issue point in one direction. A litigant’s claim cannot accrue until he has a right to sue. Section IV.A will examine the original meaning of Section 2401(a)’s predecessor, while Section IV.B will trace

¹⁴⁶ See supra notes 117–23.

¹⁴⁷ See infra notes 170–76 and accompanying text.

¹⁴⁸ For example, in a run-of-the-mill battery tort, the plaintiff is immediately affected (and immediately acquires the right to sue) upon completion of the defendant’s harmful/offensive touching.

¹⁴⁹ See supra notes 116–23 and accompanying text.

¹⁵⁰ See, e.g., supra note 82.

¹⁵¹ See, e.g., John F. Duffy, *Are Administrative Patent Judges Unconstitutional?*, 77 *Geo. Wash. L. Rev.* 904, 904–05, 904 n.1, 912 (2009) (discovering that the appointment method for administrative patent judges, which had been in place for nearly ten years, was “almost certainly unconstitutional,” prompting a change in the relevant statute); Jacqueline Bell, *Questions Linger over Patent Judge Appointments*, *Law360* (Aug. 12, 2008), <https://www.law360.com/articles/65957/questions-linger-over-patent-judge-appointments> [<https://perma.cc/E7P7-KJ6D>].

the statute's development over time. Section IV.C will then briefly evaluate *Wind River* on its own terms, as a matter of policy.

A. Textual Analysis

In the absence of “persuasive reasons to the contrary,” the “words used in a statute are to be given their ordinary meaning.”¹⁵² Ordinary meaning refers to the “contemporary, common meaning” of the words “at the time Congress enacted the statute.”¹⁵³ For Section 2401(a) the relevant time is 1887, when its first statutory parent was enacted as part of the Tucker Act.¹⁵⁴ Though its surrounding provisions have been modified and its location moved since then, the substance of its right-accrual framework has remained unchanged.¹⁵⁵ Indeed, the relevant language has only been amended once since 1887, during an organizational recodification in 1948 that was meant to “continu[e] . . . existing law.”¹⁵⁶ Before this recodification, the relevant language barred suits against the government unless brought “within six years after the right accrued for which the claim is made.”¹⁵⁷ After it, the operative provision read (and still reads): “within six years after the right of action first accrues.”¹⁵⁸ It is clear that the legal directive supplied by the text of Section 2401(a) today is the same as was supplied by the original Tucker Act in 1887.

So the key question is this: In 1887, what did it mean for a right of action to “accrue”? There is a wealth of authority on this point, and it all suggests that causes of action accrued when the particular plaintiff was able to bring suit, and not a moment before. Subsection IV.A.1 explains the general understanding of claim accrual in 1887. Subsection IV.A.2 will then specifically analyze the late-nineteenth-century claims that are most analogous to modern APA claims. Subsection IV.A.3 looks at Supreme Court precedent from that time. Finally, Subsection IV.A.4 con-

¹⁵² *Burns v. Alcala*, 420 U.S. 575, 580–81 (1975).

¹⁵³ *BedRoc Ltd. v. United States*, 541 U.S. 176, 184 (2004) (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)) (first internal quotation marks omitted).

¹⁵⁴ See *supra* Part I.

¹⁵⁵ See *supra* Part I.

¹⁵⁶ See Act of June 25, 1948, ch. 646, § 2680, sec. 2(b), 62 Stat. 869, 985 (1948); *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 227 (1957) (“Statements made by several of the persons having importantly to do with the 1948 revision are uniformly clear that no changes of law or policy are to be presumed from changes of language in the revision unless an intent to make such changes is clearly expressed.”).

¹⁵⁷ Act of Mar. 3, 1887, ch. 359, § 1, 24 Stat. 505, 505.

¹⁵⁸ 28 U.S.C. § 2401(a) (2012).

cludes with what this analysis means for the *Wind River* doctrine. Though perhaps a bit copious, these sources offer the best clues to Section 2401(a)'s actual meaning, and conclusively show that the *Wind River* doctrine is inconsistent with that meaning.

1. General Understanding of Claim Accrual

Conveniently enough, the 1887 Tucker Act was bookended in 1883¹⁵⁹ and 1893¹⁶⁰ by the first and second editions of the self-proclaimed “most exhaustive work” on the law of limitations: H.G. Wood’s *Treatise on The Limitation of Actions at Law and in Equity*.¹⁶¹ For reference, the following analysis cites sections of the first edition, but these sections are all either identically worded or at least substantively the same in the second edition.¹⁶² The only difference is ten more years’ worth of cases—there was no drastic change in the law of limitations between 1883 and 1893.

In chapter one the first edition announced: “It may be stated, as the uniform result of the cases decided on the statute of limitations, that it does not deprive a party of his remedy, unless he has been guilty of the laches or default contemplated therein.”¹⁶³ (Laches is basically negligent failure to enforce one’s rights.¹⁶⁴) A plaintiff who does not bring suit until he actually has a cause of action is obviously not “guilty” of negligent delay in any sense. Indeed, this was exactly the point that Wood was making—he cited a wealth of American and English cases refusing to find that a plaintiff’s cause of action had accrued before he had one. For example, Wood cited *Murray v. East India Co.*, where the court de-

¹⁵⁹ H.G. Wood, *A Treatise on the Limitation of Actions at Law and in Equity* (Boston, Soule & Bugbee Law Publishers 1883).

¹⁶⁰ H.G. Wood, *A Treatise on the Limitation of Actions at Law and in Equity* (Boston, The Bos. Book Co., 2d ed. 1893).

¹⁶¹ The Preface to the later third edition began: “Mr. Wood’s treatise upon the Law of Limitations has long been recognized as the most exhaustive work upon the subject existing in America or England.” H.G. Wood & John M. Gould, *A Treatise on the Limitation of Actions at Law and in Equity*, at iii (3d ed. 1901).

¹⁶² For example, compare Wood, *supra* note 159, at 11, with 1 Wood, *supra* note 160, at 18; Wood, *supra* note 159, at 254, with 1 Wood, *supra* note 160, at 311–12; Wood, *supra* note 159, at 330–31, with 1 Wood, *supra* note 160, at 413–14; Wood, *supra* note 159, at 362–64, with 1 Wood, *supra* note 160, at 447–49.

¹⁶³ Wood, *supra* note 159, at 11 (citing cases).

¹⁶⁴ See Laches, *Black’s Law Dictionary* (1st ed. 1891) (defining “laches” as “[n]egligence, consisting in the omission of something which a party might do, and might reasonably be expected to do, towards the vindication or enforcement of his rights”).

clared, “It cannot be said that a cause of action exists unless there be also a person in existence capable of suing.”¹⁶⁵ This plaintiff-focused approach was further confirmed by Wood’s inclusion of an entire chapter on the extent to which potential plaintiffs’ legal disabilities postpone the running of the limitations period against them.¹⁶⁶

Wood backed up his assertion that this general rule was “the uniform result of the cases decided on the statute of limitations” by discussing hundreds of cases in various areas of the law.¹⁶⁷ Take contracts for example. Chapter Ten, entitled “When Statute Begins to Run. Contracts,” starts out:

Must be Party to sue or be sued. — By the express terms of all the statutes, the statute of limitations only begins to run from the time when the right of action accrues; but an important rule to be borne in mind in determining when the statute attaches to a claim is, that at the time when a right of action accrues there must be in existence a party to sue and be sued, or the statute does not attach thereto.¹⁶⁸

The law governing contract claims is quite pertinent to determining Section 2401(a)’s original meaning, since the original Tucker Act primarily applied to contract suits against the federal government.¹⁶⁹ In 1887, as a matter of law, a party’s right of action could not “accrue” until both he and it actually existed.

The same was true of tort claims, though there were some finer distinctions involved. Wood began by noting that for torts, “the statute usually commences to run from the date of the tort” as opposed to when the plaintiff discovers his injury.¹⁷⁰ But he then clarified that there has not actually been a tort until the plaintiff can legally sue, even if only for nominal damages. The relevant distinction is between when there has been a legal wrong done to the plaintiff, at which time his cause of ac-

¹⁶⁵ Wood, *supra* note 159, at 11 n.4 (quoting *Murray v. East India Co.* (1865) 106 Eng. Rep. 1167; 5 B. & Ald. 204) (internal quotation marks omitted).

¹⁶⁶ *Id.* at 471.

¹⁶⁷ *Id.* at 11.

¹⁶⁸ *Id.* at 254 (citing cases). Despite the somewhat ambiguous reference to “a party to sue,” the examples cited and discussed make it clear that the author was not implying that once a single person could sue the statute began to run against everyone.

¹⁶⁹ See Act of Mar. 3, 1887, ch. 359, 24 Stat. 505. Again, the Tucker Act is § 2401(a)’s precursor. See *supra* notes 16–19 and accompanying text.

¹⁷⁰ Wood, *supra* note 159, at 362.

tion accrues, and when the plaintiff discovers the consequences of that legal wrong:

Although, as has been seen, time commences usually to run in a defendant's favor from the time of his wrongdoing, and not from the time of the occurrence to the plaintiff of any consequential damage, yet in order to produce this result it is necessary that the wrongdoing should be such that nominal damages may be immediately recovered. Every breach of duty does not create an individual right of action. . . . *Thus a breach of public duty may not inflict any direct immediate wrong on an individual; but neither his right to a remedy, nor his liability to be precluded by time from its prosecution, will commence till he has suffered some actual inconvenience.*¹⁷¹

Wood deemed this principle “an invariable rule.”¹⁷² The analogy to modern administrative claims is apparent. An agency might breach its public duty to follow proper procedures, but until a specific plaintiff suffers “some actual inconvenience,” his claim against the agency has not accrued and the statute of limitations should not begin to run against him.

Wood's treatise covered a wide variety of causes of action and factual situations but these principles remained consistent throughout all of them. For instance, it discussed what happened to a creditor's claim when he died. In a situation where at time #1 the creditor dies, at time #2 the debtor subsequently defaults, and at time #3 an administrator is appointed to represent the legal interests of the creditor's estate, statutes of limitations did not begin to run until time #3.¹⁷³ This was again based on the principle that “the statute cannot begin to run until there is a person in existence capable of suing or being sued upon the claim.”¹⁷⁴ At time #2 the dead creditor was obviously unable to bring suit, and because an administrator had not yet been appointed, the cause of action was still in legal limbo. The date of the defendant's action was not relevant.

Likewise, in suits by judgment creditors (victorious plaintiffs) against sheriffs who collected their winnings but did not turn them over within the statutorily prescribed period, accrual occurred at the end of the period—the moment when the sheriff's violation was complete and the

¹⁷¹ Id. at 363–64 (emphasis added) (citing cases).

¹⁷² Id. at 364.

¹⁷³ Id. at 399–400 (citing cases).

¹⁷⁴ Id. at 400.

plaintiff could sue him.¹⁷⁵ Wood disapprovingly cited a Georgia case that instead found the cause of action accrued when the defendant sheriff collected the judgment:

[T]his doctrine can hardly be regarded as well founded, because the sheriff has the whole period fixed by law within which to make his return, and until that time has elapsed the creditor has no means of knowing whether the sheriff intends to pay over to him the money collected, or not; *nor, until the return-day has passed, can he maintain an action against him* either for not collecting, or for refusing to pay over the money when collected.¹⁷⁶

The same was true of salaciously named “seduction” actions, in which fathers sued seducers for “the loss of service consequent upon the seduction, debauching, and impregnation of [their] daughter[s].”¹⁷⁷ In these cases, the statute did not begin to run “until the birth of the child and the mother’s recovery therefrom, or in other words, until the loss of service has accrued”—as opposed to the defendant’s act of seduction, which presumably occurred about nine months earlier.¹⁷⁸

It appears that in 1887, Wood’s work was the only American treatise devoted to statutes of limitations. But its comprehensive nature and copious case citations suggest it is fairly reliable as a restatement of the generally existing law at the time. Further, Wood’s conclusions were confirmed by other sources. For instance, John Kelly’s *A Treatise on the Code Limitations of Actions Under All State Codes*, first published in 1903.¹⁷⁹ It contained an entire chapter devoted to “When the Cause of Action Accrues” that begins:

The cause of action accrues at the time *the* party is entitled to sue, demand relief, or make the entry. . . . it is logical that the cause accrue when *the* party has been “hurt” and not when the other party has violated the contract or the law, unless both concur, because there are cases where the breach or the wrong did not cause the “hurt.”¹⁸⁰

¹⁷⁵ Id. at 330–31.

¹⁷⁶ Id. at 331 (citing *Thompson v. Cent. Bank of Ga.*, 9 Ga. 413 (1851)) (emphasis added).

¹⁷⁷ *Wilhoit v. Hancock*, 68 Ky. (5 Bush) 567, 568 (1869).

¹⁷⁸ Wood, *supra* note 159, at 384 (citing *Wilhoit*, 68 Ky. (5 Bush) 567).

¹⁷⁹ John F. Kelly, *A Treatise on the Code Limitations of Actions Under All State Codes* (1903).

¹⁸⁰ Id. at 91 (emphasis added).

This is consistent with Black's definition. The 1891 edition defined "statute of limitations" as "[a] statute prescribing limitations to the right of action on certain described causes of action; that is, declaring that no suit shall be maintained on such causes of action unless brought within a specified period after the right accrued."¹⁸¹ "Accrue" was defined as follows: "to arise, to happen, to come into force or existence; as in the phrase, 'The right of action did not accrue within six years.'"¹⁸²

2. *Accrual of Claims Arising out of Public Duties*

Although in the late nineteenth century there was no cause of action like that currently contained in the APA, there were various claims that could be raised against local government officials for violation of their public duties.

One example: actions against municipal recording officers for errors in registering property titles. These lawsuits were surprisingly common—in fact the question of their accrual date eventually earned its own American Law Reports database.¹⁸³ Much like torts, these causes of action were said to accrue at the time of the wrongful act, but the relevant distinction was still between the time of legal wrong and the time of consequential damages.

It may be observed that there is a difference between situations in which an undiscovered wrong exists, and liability could be enforced if knowledge thereof existed, and those in which the complaining party, who may be damaged, had no previous right or capacity to enforce such a liability. It seems evident that this distinction, among others, must be kept in mind in any discussion of direct and consequential damages, in this connection.¹⁸⁴

In each case discussed in the database, the court focused on when the plaintiff became legally entitled to sue as the earliest possible date of accrual, even if the actual harm was quite slight and the full consequences of the local government official's error did not become apparent until later.¹⁸⁵

¹⁸¹ Statute of Limitations, Black's Law Dictionary (1st ed. 1891).

¹⁸² Accrue, Black's Law Dictionary (1st ed. 1891) (emphasis omitted).

¹⁸³ Annotation, When Statute of Limitation Commences to Run Against an Action Based on Breach of Duty by Recording Officer, 110 A.L.R. 1067 (1937).

¹⁸⁴ Id. at 1068.

¹⁸⁵ Id. at 1067–70.

For example, in *State ex rel. Graham v. Walters*, a municipal recorder incorrectly registered a lender's lien such that it covered a third party's land rather than the borrower's.¹⁸⁶ As a result, when the borrower took out a second mortgage, it gained credit priority over the first one.¹⁸⁷ The first lender's cause of action accrued when the error was made—at that time he was legally capable of suing; even if he had not yet investigated the facts and learned of his right, it still existed:

The fact that a person entitled to an action has no knowledge of his right to sue, or of the facts out of which his right arises, does not prevent the running of the statute, or postpone the commencement of the period of limitation, until he discovers the facts or learns of his rights thereunder. Nor does the mere silence of the person liable to the action prevent the running of the statute. To have such effect, there must be something done to prevent discovery,—something which can be said to amount to concealment.¹⁸⁸

The question was about when the plaintiff first became legally entitled to sue. It was the plaintiff's responsibility to discover that he had such a right, and assuming no concealment by the defendant, it was his fault that he did not do so. The statute of limitations operated to punish the plaintiff who slept on his rights.

But plaintiffs could not be punished for sleeping on rights that they did not yet have, and the cases reflected that. *Bank of Hartford County v. Waterman* is one example.¹⁸⁹ There, a bank had sued a debtor and asked the sheriff to attach his property at the outset to ensure that it was still there if and when the bank obtained a final judgment against him.¹⁹⁰ Several years later the bank won, but to their surprise the sheriff had attached the wrong property, and there was nothing left to satisfy the judgment.¹⁹¹ The bank sued the sheriff, and he raised the statute of limitations as a defense, arguing that the bank's claim against him accrued when he made the error over two years earlier—beyond the limitations period.¹⁹² The court rejected his defense because it found that the bank

¹⁸⁶ 66 N.E. 182, 182 (Ind. App. 1903).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 184.

¹⁸⁹ 26 Conn. 324 (1857).

¹⁹⁰ *Id.* at 325.

¹⁹¹ *Id.* at 326.

¹⁹² *Id.*

was not able to sue until it actually had a legal entitlement to the debtor's property—an entitlement that was frustrated by the improperly recorded title:

The consequences are not, in such a case, mere aggravating circumstances, enhancing a legal injury already suffered or inflicted; nor are they the mere development of such a previous injury, through which development the party is enabled for the first time to ascertain or appreciate the fact of the injury; but, inasmuch as no legal wrong existed before, they are an indispensable element of the injury itself, and must therefore themselves fix, or may fix, the period when the statute of limitations shall commence to run. Authorities can hardly strengthen a proposition so manifestly just. If we are wrong, some strictly legal injuries might never for a moment be capable of redress.¹⁹³

It then elaborated on the unique issues involved in determining accrual for causes of action arising out of public duties:

[W]here the duty is of a public nature, there is no direct relation between the public officer and the party in whose behalf the duty is to be performed. . . . The duty violated is primarily a duty to the public; the violation is therefore unlawful; and when its consequences are the invasion of an individual right, (and then only,) it becomes a proper subject of redress by him.¹⁹⁴

The court analogized the public duty at issue to the duty of a municipality to keep the roads clear. This duty is for the benefit of each individual, and each is harmed by its breach, but that does not entitle each individual to sue.¹⁹⁵ Of course, the sheriff's duty to properly attach property for a particular plaintiff does not seem so generalized, an argument that the court did not address. Regardless, its discussion of public duties is illustrative and could easily be mapped onto a modern discussion of private suits against agencies for violating their public duties under the APA. Finally, even if the court's answer was wrong, it was asking the right question—when was *this particular plaintiff* entitled to bring suit?

¹⁹³ Id. at 331–32 (emphasis omitted).

¹⁹⁴ Id. at 336.

¹⁹⁵ Id.

All of the public duty cases of this era turned on that question.¹⁹⁶ A slightly later case and the commentary it spurred are further evidence of this point. Like *Graham* above, *State ex rel. Daniel v. Grizzard* involved a lender who lost priority on a debtor's assets because of an improperly recorded mortgage.¹⁹⁷ Like other cases, the court determined that the lender could have sued the recorder at the moment he breached his duty, and thus the statute of limitations began to run at that time, rather than when the lender discovered the mistake.¹⁹⁸ It distinguished cases where "there was no one in esse [existence] to sue," consistent with other cases of that era.¹⁹⁹ Still, *Grizzard* was swiftly criticized two months later by a commenter who thought the court's holding was unfair to plaintiffs and out of step with the law:

The theory of the case is that a negligent breach of official duty is in itself an invasion of the rights of all members of the class likely to be affected by it. Such a doctrine is fantastic on its face, and entirely at variance with the principle that actual damage is an essential part of an action for negligence.²⁰⁰

This is probably an exaggeration of *Grizzard's* holding. But it is an accurate description of the reasoning underlying the modern *Wind River* doctrine. Compare the above statement with the discussion in *Shiny Rock Mining Corp. v. United States* of Section 2401(a) in procedural agency challenges:

The only injury required for the statutory period to commence was that incurred by all persons when, in 1964 and 1965, the amount of land available for mining claims was decreased.

¹⁹⁶ See, e.g., *Betts v. Norris*, 21 Me. 314, 319 (1842) ("It is undoubtedly very true, that no man has a right of action against a wrongdoer, unless he is personally injured. But . . . [for] every violation of the rights of a particular individual, the law implies damage. It may be but nominal. But still a right of action accrues for it."); see also *McKinder v. Littlejohn*, 23 N.C. (1 Ired.) 66, 74–75 (1840) ("[U]nless there be a person against whom claim may rightfully be made, the bar of the statute does not attach. It is indispensable to the prosecution of a claim, that there should be a person in being, against whom it may of right be demanded, as that there should be a rightful claimant in existence, to bring it forward; or that the claim be of such a nature as that its performance may be demanded.")

¹⁹⁷ 23 S.E. 93, 93 (N.C. 1895).

¹⁹⁸ *Id.* at 94.

¹⁹⁹ *Id.* at 95.

²⁰⁰ *Recent Cases*, 9 Harv. L. Rev. 356, 363 (1895).

Once notice of the land withdrawals was given by publication in the Federal Register, the six-year limitation period of 28 U.S.C. § 2401(a) was triggered, for at that time any interested party acquired a “right to file a civil action in the courts against the United States.”²⁰¹

To borrow from the language above, this reasoning probably would have been considered “fantastic on its face” in 1887.

3. *Persuasive Supreme Court Precedent*

Unfortunately there is not a wealth of Supreme Court precedent that addresses the question of accrual in suits against the federal government. But the cases that do exist are consistent with the legal principles discussed above.

Rice v. United States was decided three days after the Tucker Act became law and briefly addressed claim accrual in the context of another federal statute of limitations.²⁰² The timeline began as the Civil War was winding down in 1864, when “persons duly authorized and acting in behalf of the United States” seized nearly \$50,000 worth of cotton from a Georgia citizen.²⁰³ The Court found that a statute of limitations enacted in 1877 applied and accordingly denied certiorari.²⁰⁴ The statute barred “[e]very claim against the United States cognizable by the court of claims” that was not brought “within six years after the first claim first accrues.”²⁰⁵ The date of accrual was undisputed because the case turned on whether the statute of limitations applied at all, but the Court still noted in passing that “[a] claim first accrues, within the meaning of the statute, *when a suit may first be brought upon it*, and from that day the six-years limitation begins to run.”²⁰⁶ Though the Court did not go any deeper than that, the very fact that it made this statement so nonchalantly suggests that it reflected a generally understood legal reality. This reality bears strongly on the meaning of the similarly worded and then-recently enacted Tucker Act.

²⁰¹ 906 F.2d 1362, 1365–66 (9th Cir. 1990) (citations omitted) (quoting *Crown Coat Front Co. v. United States*, 386 U.S. 503, 511 (1967)).

²⁰² Act of Mar. 3, 1887, ch. 359, 24 Stat. 505, 505; *Rice v. United States*, 122 U.S. 611, 611 (1887).

²⁰³ *Rice*, 122 U.S. at 612.

²⁰⁴ *Id.* at 620.

²⁰⁵ *Id.* at 616.

²⁰⁶ *Id.* at 617 (emphasis added).

Two years later, the Court analyzed accrual under a state statute of limitations in *Redfield v. Parks*.²⁰⁷ That case involved a dispute over a parcel of land. It was initially owned by the U.S. government, which transferred it to the plaintiff's predecessor in 1875.²⁰⁸ In 1882 plaintiff brought an ejectment action against the defendant, who claimed adverse possession—he had in fact possessed the land since 1868, and the state statute of limitations barred real property claims after seven years.²⁰⁹ Against an ordinary plaintiff this claim would have been successful, but since statutes of limitations do not run against the government, the claim did not accrue until the private plaintiff himself acquired title in 1875:

If it be shown that the plaintiff has not the legal title; that the legal title at the time of the commencement of the action or at its trial is in some other party—the plaintiff cannot recover. The facts in the present case show that this title to the land in controversy was in the United States until the 15th day of April, 1875. Up to that time the statute of limitations could not begin to run in bar of any action dependent on this title. The plaintiff could not sue or recover in the courts of the United States upon the equitable title evinced by his certificate of purchase made by the register of the land office. His title, therefore, being derived from the United States, the right of action at law to oust the defendant did not commence until the making of that patent.²¹⁰

Plaintiff's 1882 claim was (just barely) within the seven-year state statute of limitations. Consistent with the cases discussed above, his claim did not accrue until he was able to bring it in court.

4. Conclusion

In 1887 there were well-established legal principles on what it meant for a claim to “accrue” under a statute of limitations. Then, as today, the rationale behind these statutes was plaintiff-focused. They encouraged potential plaintiffs to pursue their rights diligently by punishing them when they did not. Therefore, it was “the uniform result of the cases” that statutes of limitations did not bar plaintiffs’ claims unless they were “guilty” of negligent delay in pursuing their legal rights.²¹¹ This meant

²⁰⁷ 132 U.S. 239 (1889).

²⁰⁸ *Id.* at 241.

²⁰⁹ *Id.* at 242.

²¹⁰ *Id.* at 244.

²¹¹ See Wood, *supra* note 159, at 11.

that a limitations period did not begin before a plaintiff actually existed, and not just *a* plaintiff—the plaintiff against whom the statute was raised must have been “in existence” and “capable of suing.”²¹² To be capable of suing, the potential plaintiff must have actually suffered some legal harm. So it was an “invariable rule” that the statute of limitations did not begin to run against a plaintiff until “he ha[d] suffered some actual inconvenience.”²¹³ At that time, the plaintiff actually had a legal right to sue—his claim had accrued, and he could be punished for failing to bring it in time.

This proposition was considered “manifestly just” because otherwise “some strictly legal injuries might never for a moment be capable of redress.”²¹⁴ The time of the defendant’s allegedly wrongful action was not independently relevant. It just happened to often match up with when the plaintiff suffered a legal wrong. The same was true of broad public duties to large groups of people. Though the violation of such a duty in a sense caused harm to a wide array of people, a potential plaintiff’s claim did not accrue (and the statute of limitations did not begin to run) until he or she suffered a particularized legal wrong.²¹⁵

This was the legal background against which the Tucker Act was passed, and by extension the legal background against which Section 2401(a) should be interpreted. Though in 1887 there was no cause of action exactly like that currently provided by the APA, these principles are very informative. They strongly suggest that the *Wind River* doctrine’s gloss on Section 2401(a) is inconsistent with its textual meaning.

By its terms, the *Wind River* doctrine considers the plaintiff’s status irrelevant in determining when his claim accrues—all that matters is when the defendant agency acted.²¹⁶ Six years after that date, the covered claims of everyone who then exists or will exist in the future are barred. This is inconsistent with the plaintiff-centered approach embodied in statutes of limitations.²¹⁷ It bars claims of plaintiffs who do not yet exist and claims of existing plaintiffs who are not yet “adversely affect-

²¹² See *id.* at 11 n.4 (citing *Murray v. East India Co.* (1865) 106 Eng. Rep. 1167, 1171; 5 B. & Ald. 204, 214–15).

²¹³ *Supra* notes 171–72 and accompanying text.

²¹⁴ *Bank of Hartford Cty. v. Waterman*, 26 Conn. 324, 331–32 (1857).

²¹⁵ See *supra* notes 183–200 and accompanying text.

²¹⁶ See *supra* Part III.

²¹⁷ *Wood*, *supra* note 159, at 11.

ed or aggrieved” by the agency’s action.²¹⁸ These plaintiffs were clearly not guilty of negligence in failure to pursue their rights, but they are nonetheless barred by Section 2401(a). As a result, their “strictly legal injuries [are] never for a moment . . . capable of redress”—an outcome that any lawyer reading the Tucker Act in 1887 would probably have thought was “manifestly [un]just.”²¹⁹ And it cannot be justified by some hidden intent of Congress either. Again, statutes of repose, which operate like the *Wind River* doctrine, did not come into existence for nearly a hundred years, in the mid-twentieth century.²²⁰ *Wind River*’s defendant-centered doctrine would probably have been beyond comprehension in 1887.

B. Other Interpretive Sources

Any interpretation of Section 2401(a) should be anchored by what it meant for a right of action to “accrue” in 1887. But that is not the end of the matter. This Section will first trace Section 2401(a)’s development as the statute has undergone several minor amendments over the years, amidst the ongoing evolution of the law. Next, this Section will review how modern courts have interpreted Section 2401(a) in contexts outside of the *Wind River* doctrine’s reach. Ultimately, this context further confirms its original meaning. Indeed, were a court to analyze Sec-

²¹⁸ 5 U.S.C. § 702 (2012).

²¹⁹ See *Bank of Hartford Cty.*, 26 Conn. at 331–32.

²²⁰ See Milton F. Lunch, *Statutes of Repose Under Attack; Laws Protecting Design Professionals and Contractors from Suit Are Being Challenged in Oklahoma and Missouri*, *Building Design & Construction*, Aug. 1990, at 29 (noting that the first statute of repose was enacted in 1961); see also Restatement (Second) of Torts § 899 cmt. g (Am. Law Inst. 1979) (noting that statutes of repose had been adopted by some states “in recent years”). The term “statute of repose” is meant to refer to statutes that insulate the defendant from being sued by anyone for an allegedly unlawful act after a specified period of time (as *Wind River* interprets § 2401(a) to do). This is a slight oversimplification, as there were preexisting statutory time limits that operated in a similar way—as substantive conditions on rights themselves. Wood, *supra* note 159, at 1–2. For instance, there were time limits on executing a judgment. *Id.* at 2. But these statutes were meant to serve “public convenience” as opposed to balancing policies of repose against rights of action. See *Battle v. Shivers*, 39 Ga. 405, 409–10 (1869) (explaining the operation of these statutes and how they were not “statutes of limitations”). Similar statutes were later enacted at the federal level to govern specific types of orders issued by specific governmental entities. See 28 U.S.C. § 2344 (2012) (giving aggrieved parties the right to file a petition for review of an agency order “within 60 days after its entry”). Point being, modern statutes of repose were an unknown legal concept when the Tucker Act was enacted in 1887, and the statutes that did operate to cut off rights certainly did not refer to “accrual” of a potential plaintiff’s legal claim.

tion 2401(a)'s meaning today on a blank slate it would likely not follow the *Wind River* approach.

1. Statutory Development

When it was enacted in 1887, Section 2401(a)'s predecessor barred suits against the United States that were not "brought within six years after the right accrued for which the claim is made."²²¹ The very fact that the language mentions a "right" is the first contextual clue that the statute does not begin to run until the plaintiff can actually bring suit. The language presupposes that a right to sue exists and is then cut off after the passage of time, whereas *Wind River* prevents rights of action from coming into existence in the first place.²²²

The statute was first amended in 1911. Congress left the operative sentence unchanged but added a tolling provision that read in relevant part:

Provided, That the claims of married women, first accrued during marriage, of persons under the age of twenty-one years, first accrued during minority, and of idiots, lunatics, insane persons, and persons beyond the seas at the time the claim accrued, entitled to the claim, shall not be barred if the suit be brought within three years after the disability has ceased.²²³

This amendment further confirms the statute's plaintiff-focused approach.²²⁴ It protects the claims of specific individuals who for various reasons might have been practically unable to pursue their claim when it accrued. This language would be pointless if the statute was meant to run against every potential plaintiff when just one became entitled to sue, or if it was meant to run from the time the government acted regardless of potential plaintiffs' legal or practical capacity to sue. Further, to the extent that the reenactment of the operative provision without change

²²¹ Act of Mar. 3, 1887, ch. 359, 24 Stat. 505, 505.

²²² See *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2187 (2014) (making a similar point in interpreting a different statute).

²²³ Act of Mar. 3, 1911, Pub. L. No. 475, § 24, 36 Stat. 1087, 1093.

²²⁴ See *Waldburger*, 134 S. Ct. at 2187–88 (making a similar point in interpreting a different statute).

“sweeps up” then-existing legal meanings, the definition of “accrue” had not changed between 1887 and 1911.²²⁵

The next amendment was in 1948. (Of note, the APA itself was enacted two years earlier,²²⁶ but there is no reason to think that it had any substantive impact on Section 2401(a).²²⁷) The amendment contained three changes: 1) the operative provision was slightly reworded; 2) the tolling provision was broadened into a general catch-all that covered all legal disabilities; and 3) the entire statute was relocated to its current home in Section 2401(a).²²⁸ This relocation alone is not substantively meaningful, and to the extent the tolling amendment matters it merely reaffirms the argument in the paragraph above (perhaps strengthening it because the broader language evinces an enhanced concern for plaintiffs). The operative provision still remained substantially the same: a six-year time limit for bringing claims based on when they accrued. But it could at least be argued that the slight rewording and reenactment of the provision was intended to codify then-existing understandings of accrual.²²⁹

To the extent that this is true, it only further undermines *Wind River*. In 1948 the law had begun a shift towards a more plaintiff-friendly interpretation of accrual. Again, traditional doctrine had found accrual as soon as a plaintiff technically had the legal ability to sue, even if he had not yet discovered the facts that gave him this right.²³⁰ Because this

²²⁵ See Kelly, *supra* note 179, at 91; 1 H.G. Wood, *A Treatise on the Limitation of Actions at Law and in Equity* 615–16 (4th ed. 1916).

²²⁶ See *supra* notes 28–29 and accompanying text.

²²⁷ The APA does not mention claim accrual and does not contemplate any limitations period at all. Indeed, courts did not discover that § 2401(a)’s six-year limit applied to APA claims until thirty years later. See *supra* note 74 and accompanying text.

²²⁸ Act of June 25, 1948, ch. 646, § 2401, 62 Stat. 869, 971. After the amendment it read in full:

Every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

²²⁹ Of course, this argument would have to get over a big hurdle—the 1948 recodification is presumed to have worked no change in the then-existing law. Act of June 25, 1948, ch. 646, § 2680, sec. 2(b), 62 Stat. 869, 985; *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 227 (1957) (“Statements made by several of the persons having importantly to do with the 1948 revision are uniformly clear that no changes of law or policy are to be presumed from changes of language in the revision unless an intent to make such changes is clearly expressed.”).

²³⁰ See *supra* Section IV.A.

could lead to unfair results, some courts had begun to move towards a more liberal “discovery rule,” where a claim did not accrue until it was *both* legally cognizable *and* reasonably discoverable by the plaintiff.²³¹ All courts still maintained that at least the former was required for a plaintiff’s claim to accrue.²³² Indeed, the fact that legislatures enacted *new* statutes in the 1970s when they wanted to create time limits based on the defendant’s action further proves that then-existing accrual-based statutes of limitations *did not* operate in this way.²³³

Section 2401(a) was next amended in 1978, when a preliminary clause was added to remove claims covered by the Contract Disputes Act of 1978 from its reach.²³⁴ Nothing else was changed. Accrual still had the same meaning.²³⁵ In 2011 the provision was amended for the last time, when the phrase “Contract Disputes Act” was replaced with that Act’s location in the code. The preliminary clause now reads: “Except as provided by chapter 71 of title 41”²³⁶ The 1978 and 2011 amendments left the operative provisions untouched.

In short, Section 2401(a) has been amended several times throughout the years, but it has always been a normal, accrual-based statute of limitations. Congress has never changed this basic substance.

2. Congressional Inaction

It could be argued that congressional inaction indicates a tacit approval of the *Wind River* doctrine. After all, the doctrine has been in place for more than twenty years and Congress has failed to override it. However, this argument probably fails for a number of reasons.

First, congressional inaction plays a minor part, if any, in the interpretation of statutes. The Supreme Court itself has said so: “As a general matter . . . we have stated that [arguments based on congressional inac-

²³¹ See Developments in The Law: Statutes of Limitations, 63 Harv. L. Rev. 1177, 1200, 1216–17 (1950). This coincided with and was likely influenced by the merger of law and equity, since the equitable equivalent of statutes of limitations—laches—operated based on discovery rather than accrual. *Id.* at 1213.

²³² *Id.* at 1200.

²³³ See Restatement (Second) of Torts § 899 cmt. g (Am. Law Inst. 1979).

²³⁴ Contract Disputes Act of 1978, Pub. L. No. 95–563, § 14(b), 92 Stat. 2383, 2389.

²³⁵ Compare Accrue, Cause of Action, Black’s Law Dictionary (4th ed. 1968) (“A cause of action ‘accrues’ when a suit may be maintained thereon”), with Accrue, Cause of Action, Black’s Law Dictionary (5th ed. 1979) (same).

²³⁶ 28 U.S.C. § 2401(a) (2012); Act of Jan. 4, 2011, Pub. L. No. 111–350, § 8707, sec. 5(g)(8), 124 Stat. 3677, 3848.

tion] deserve little weight in the interpretive process.”²³⁷ This is particularly true where courts are asked to adopt a gloss that is “inconsistent with the controlling statute,” as *Wind River* apparently is.²³⁸ The reason that congressional inaction is such a weak indicator of intent to acquiesce is that it could indicate many other things as well. It is

impossible to assert with any degree of assurance that congressional failure to act represents (1) approval of the status quo, as opposed to (2) inability to agree upon how to alter the status quo, (3) unawareness of the status quo, (4) indifference to the status quo, or even (5) political cowardice.²³⁹

Second, whatever weight congressional inaction has, it has generally been used as a tool of stare decisis. Specifically, courts use it to add to the precedential force of previous interpretations.²⁴⁰ This plainly limits the doctrine’s impact to jurisdictions that are actually bound by the previous decision. So Congress’s failure to override *Wind River* should be irrelevant in any of the circuits that have not yet adopted the doctrine and, most importantly, in the Supreme Court. Though some individual Justices on the Court have expressed a willingness to use congressional inaction more expansively, their view appears to be disfavored.²⁴¹ For

²³⁷ *Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 187 (1994).

²³⁸ *Brown v. Gardner*, 513 U.S. 115, 121 (1994). In these situations, “congressional silence ‘lacks persuasive significance.’” *Id.* (quoting *Cent. Bank of Denver*, 511 U.S. at 187).

²³⁹ *Johnson v. Transp. Agency*, 480 U.S. 616, 672 (1987) (Scalia, J., dissenting); see also *Zuber v. Allen*, 396 U.S. 168, 185 n.21 (1969) (“Congressional inaction frequently betokens unawareness, preoccupation, or paralysis.”). See generally Caleb Nelson, *Statutory Interpretation* 448–53 (2011) (discussing various problems with using congressional inaction in the interpretative process).

²⁴⁰ See, e.g., *Watson v. United States*, 552 U.S. 74, 82–83 (2007) (“[I]n 14 years Congress has taken no step to modify *Smith*’s holding, and this long congressional acquiescence ‘has enhanced even the usual precedential force’ we accord to our interpretations of statutes.” (quoting *Shepard v. United States*, 544 U.S. 13, 23 (2005) (citation omitted))); see also Nelson, *supra* note 239, at 448 (“[P]eople sometimes maintain that the legislature’s failure to override prominent judicial interpretations of statutes should add to the precedential force of those interpretations.”).

²⁴¹ Nelson, *supra* note 239, at 454; see, e.g., *Hubbard v. United States*, 514 U.S. 695, 711 (1995) (plurality opinion of Stevens, J., joined by Ginsburg and Breyer, JJ.) (finding it persuasive that “Congress has not seen fit to repudiate” either a Supreme Court decision or a “substantial following” of lower court decisions in tension with statutory text); *Custis v. United States*, 511 U.S. 485, 500 (1994) (Souter, J., dissenting, joined by Blackmun and Stevens, JJ.) (“Congress’s failure to express legislative disagreement with the appellate courts’ reading of the [statute] cannot be disregarded, especially since Congress has acted in this area in response to other Courts of Appeals decisions that it thought revealed statutory flaws

good reason. Aside from the general problems discussed above, aggressive use of congressional inaction would effectively allow lower courts to set precedent for the Supreme Court.²⁴²

Third, even assuming that congressional inaction can be considered here, it has little significance for *Wind River*. To be relevant, congressional inaction must indicate actual approval. Congress cannot have approved of a doctrine that it is unaware of, and it is probably unaware of *Wind River*.

Courts look to a number of indicators of congressional awareness, and none are present here. Legislative proposals are one such indicator. If bills dealing with the previous gloss have been proposed and rejected, then courts assume that Congress is aware of and happy with the status quo.²⁴³ The classic example is *Flood v. Kuhn*, where the Court declined to overrule its prior decision exempting baseball from the antitrust laws.²⁴⁴ There, over fifty bills had been introduced on the subject, but none had passed.²⁴⁵ Here, there have been no proposed amendments to Section 2401(a).

In the absence of express proposals on the subject, congressional awareness has to be inferred from a variety of factors. One is subject matter—if the glossed statute covers an area that Congress frequently monitors and changes, such as tax law, then it is more likely that the gloss has been considered.²⁴⁶ Unlike tax, there is no congressional committee charged with overseeing administrative agencies as a whole.²⁴⁷ Instead, administrative issues typically come up in the context of committee oversight over specific subject matters and agencies. It is likely

requiring ‘correct[ion].’” (alternation in original)). But see *Manhattan Props., Inc. v. Irving Tr. Co.*, 291 U.S. 320, 336 (1934) (“What of the activities of the Congress while this body of decisions interpreting section 63a was growing? From 1898 to 1932 the Bankruptcy Act was amended seven times without alteration of the section. This is persuasive that the construction adopted by the courts has been acceptable to the legislative arm of the government.” (footnote omitted)).

²⁴² See Nelson, *supra* note 239, at 454 (expressing this concern).

²⁴³ *Id.* at 453.

²⁴⁴ 407 U.S. 258, 282 (1972).

²⁴⁵ *Id.* at 281.

²⁴⁶ See *Zuber v. Allen*, 396 U.S. 168, 186 n.21 (1969) (noting that the significance of congressional silence “is greatest when the area is one of traditional year-by-year supervision, like tax, where watchdog committees are considering and revising the statutory scheme”); see also 26 U.S.C. § 8001 (2012) (establishing the Congressional Joint Committee on Taxation).

²⁴⁷ See Congressional Committees, GovTrack, <https://www.govtrack.us/congress/committees/> [<https://perma.cc/GKA7-9KRZ>].

that Congress has missed the forest for the trees and is unaware of *Wind River's* gloss on Section 2401(a).

Congressional awareness can also be inferred when Congress amends one part of the relevant statute but does not change the previously glossed section.²⁴⁸ As a preliminary matter, it is important to differentiate this argument from the concept of “implicit codification.” Implicit codification occurs when Congress recodifies *the provision that has actually been interpreted*, rather than neighboring provisions.²⁴⁹ Doing so without change can indicate an intent to “bake in” the previous gloss into the newly enacted provision. Here, Congress amended the first few words of Section 2401(a) in 2011 but did not change or recodify the operative accrual provision.²⁵⁰ Thus, the 2011 amendment cannot be considered an implicit codification of *Wind River's* gloss on that provision. At most it could serve as evidence of acquiescence, but the circumstances indicate that it probably is not.

Regarding acquiescence, the Supreme Court has instructed that when “Congress has not comprehensively revised a statutory scheme but has made only isolated amendments . . . [i]t is impossible to assert with any degree of assurance that congressional failure to act represents’ affirmative congressional approval of the [previous] statutory interpretation.”²⁵¹ The phrase “isolated amendment” describes what happened in 2011 to a T. The amendment was one sentence of a 186-page reorganizational bill, replacing “the Contract Disputes Act of 1978” with “chapter 71 of title 41.”²⁵² The legislative history does not even mention Section 2401(a), let alone *Wind River*. Not only that, but the House Report is quite clear that the amending Congress wanted to “conform to ‘the understood policy, intent, and purpose of the Congress in the *original enactments*’” as opposed to subsequent judicial interpretations.²⁵³ It also repeatedly emphasizes that the bill is simply organizational and thus “not intended to have

²⁴⁸ Nelson, *supra* note 239, at 454.

²⁴⁹ 2B Norman J. Singer & J.D. Shambie Singer, *Statutes and Statutory Construction* § 49:8, at 117 (7th ed. 2012) (“Th[e] rule is based upon the theory that a legislature is familiar with a contemporaneous interpretation . . . and therefore impliedly adopts the interpretation upon *reenactment*.” (emphasis added)).

²⁵⁰ Act of Jan. 4, 2011, Pub. L. No. 111-350, § 8707, sec. 5(g)(8), 124 Stat. 3677, 3848.

²⁵¹ *Alexander v. Sandoval*, 532 U.S. 275, 292 (2001) (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 175 n.1 (1989)).

²⁵² Act of Jan. 4, 2011 § 8707, sec. 5(g)(8).

²⁵³ H.R. Rep. No. 111-42, at 2 (2009) (emphasis added) (quoting 2 U.S.C. § 285b(1) (2006)).

substantive effect.”²⁵⁴ It would be quite difficult to convince a court that this miniscule afterthought in a reorganizational codification was somehow a tacit acceptance of the *Wind River* doctrine.

In sum, (1) congressional inaction deserves little, if any, weight in the interpretive process; (2) to the extent that it matters it should only serve as an argument against overruling *Wind River* in the circuits that have already adopted it, not as an argument in favor of adopting it in new jurisdictions; and (3) even if the doctrine is expanded beyond this use and applied here, the circumstances do not indicate that Congress is aware of *Wind River*. Finally, it is also worth mentioning that adoption by silence would also go against two more prominent legal developments: the move towards a discovery rule of accrual and the existing glosses on Section 2401(a) in every other type of claim that it covers.²⁵⁵ Both of these shifts further deepen the divide between *Wind River*'s understanding of accrual and its meaning in every other area of law. For all of these reasons, Congress's failure to override *Wind River* is irrelevant.

3. Analogous Judicial Interpretations

The Supreme Court and various circuit courts have addressed the meaning of accrual for other claims covered by Section 2401(a) and for other similarly worded statutes of limitations. They have uniformly followed the usual understanding of accrual outlined above in Section IV.A. *Wind River*'s unconventional interpretation sticks out like a sore thumb. Because of *Wind River*, Section 2401(a) has two different meanings: one for procedural and policy-based administrative claims, and another for every other claim to which it applies.

In *Crown Coat Front Co. v. United States*, the Supreme Court found that a contract claim against the federal government “accrued” under Section 2401(a) when the plaintiff could first bring suit, and not before.²⁵⁶ The alleged contract violation occurred in 1956, but under the contract the aggrieved plaintiff had agreed to go through administrative proceedings before it could sue in court.²⁵⁷ These proceedings did not end until 1963, when the agency (unsurprisingly) decided that it had not

²⁵⁴ *Id.*

²⁵⁵ *Rotella v. Wood*, 528 U.S. 549, 555 (2000) (“Federal courts, to be sure, generally apply a discovery accrual rule when a statute is silent on the issue.”). For a discussion of the other types of claims covered by § 2401(a) see *infra* Subsection IV.B.3.

²⁵⁶ 386 U.S. 503, 514 (1967).

²⁵⁷ *Id.* at 505–07.

done anything wrong.²⁵⁸ The plaintiff promptly sued, seeking contract damages and challenging the decision as “arbitrary, capricious and not supported by substantial evidence”—words very much resembling the language of a policy-based challenge under the APA.²⁵⁹ Having delayed the plaintiff’s lawsuit with its administrative process, the agency said that it had become time-barred by Section 2401(a).²⁶⁰ The Supreme Court unanimously rejected that defense, holding that because the plaintiff was unable to bring suit before the review process had finished, its claim did not accrue until that time²⁶¹—“It is only then that his claim or right to bring a civil action against the United States mature[d] and . . . he ha[d] ‘the right to demand payment . . . *the hallmark of accrual of a claim in this court.*’”²⁶² Otherwise, some contract plaintiffs would never be able to seek judicial review for their injuries, an “unfortunate impact” that the Court wanted to avoid.²⁶³ If *Crown Coat*’s holding were extended to APA claims, the *Wind River* doctrine would not stand.

Several circuit courts have read Section 2401(a) the same way. For instance, the D.C. Circuit has stated that “[a] cause of action against an administrative agency ‘first accrues,’ within the meaning of § 2401(a), as soon as (but not before) the person challenging the agency action can institute and maintain a suit in court” and “[t]hat a statute of limitations cannot begin to run against a plaintiff *before* the plaintiff can maintain a suit in court seems virtually axiomatic.”²⁶⁴ But the court was discussing agency challenges under FOIA rather than the APA—in fact, the D.C.

²⁵⁸ Id. at 508.

²⁵⁹ Id. at 507.

²⁶⁰ Id. at 508.

²⁶¹ Id. at 512–14.

²⁶² Id. at 514 (emphasis added) (quoting *Nager Elec. Co. v. United States*, 368 F.2d 847, 859 (1966)) (fourth alteration in original).

²⁶³ Id. The Court also noted:

[T]he hazards inherent in attempting to define for all purposes when a “cause of action” first “accrues.” Such words are to be “interpreted in the light of the general purposes of the statute and of its other provisions, and with due regard to those practical ends which are to be served by any limitation of the time within which an action must be brought.”

Id. at 517. On its face this language is broad enough for the *Wind River* doctrine to pass through. But the Court was merely referring to the specific question of accrual dates in cases where parties have administrative remedies that can or must be pursued before they bring suit in court. Id. at 517–19.

²⁶⁴ *Spannaus v. United States*, 824 F.2d 52, 56 & n.3 (D.C. Cir. 1987).

Circuit actually adopted the *Wind River* doctrine a few years later.²⁶⁵ It still has not tangled with this inconsistency. Other cases contain similar language to the D.C. Circuit's accrual rationale in *Spannaus v. United States*. Examples include the Third Circuit in *United States v. Sams* (“A claim first accrues when all the events have occurred which fix the alleged liability of the United States and entitle the claimant to institute an action”)²⁶⁶ and the Eighth Circuit in *Andersen v. U.S. Department of Housing and Urban Development* (“For purposes of § 2401(a) a claim accrues ‘when the plaintiff either knew, or in the exercise of reasonable diligence should have known, that [he or she] had a claim.’”)²⁶⁷

Wind River's interpretation of Section 2401(a) is not only inconsistent with other interpretations of that statute, it is also inconsistent with how similarly worded statutes of limitations have been interpreted. Section 2401(a)'s statutory neighbor is Section 2401(b): the statute of limitations for tort claims against the United States.²⁶⁸ It bars any claim that was not “presented in writing to the appropriate federal agency within two years after such claim accrues.”²⁶⁹ In *United States v. Kubrick*, the Supreme Court held that such a claim accrues “when the plaintiff knows both the existence and the cause of his injury.”²⁷⁰ The three dissenters read the statute even *more* liberally, wishing to additionally require that the plaintiff have knowledge that his injury was the result of a tort.²⁷¹ Similarly, in *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of California*, the Court rejected a defendant's argument that the Employment Retirement Income Security Act's statute of limitations could begin to run before the plaintiff could file suit, calling it “inconsistent with basic limitations principles.”²⁷² Quoting previous cases, the Court asserted:

²⁶⁵ See *JEM Broad. Co. v. FCC*, 22 F.3d 320, 325–26 (D.C. Cir. 1994).

²⁶⁶ *United States v. Sams*, 521 F.2d 421, 429 (3d Cir. 1975) (quoting *Japanese War Notes Claimants Ass'n of the Phil. v. United States*, 373 F.2d 356, 358 (Ct. Cl. 1967)) (deciding *coram nobis* post-conviction challenge).

²⁶⁷ *Andersen v. U.S. Dep't of Hous. & Urban Dev.*, 678 F.3d 626, 629 (8th Cir. 2012) (quoting *Izaak Walton League of Am., Inc. v. Kimbell*, 558 F.3d 751, 759 (8th Cir. 2009)) (deciding lawsuit challenging removal of eligibility for federal contracts).

²⁶⁸ 28 U.S.C. § 2401(b) (2012).

²⁶⁹ *Id.*

²⁷⁰ 444 U.S. 111, 113 (1979).

²⁷¹ *Id.* at 126–27 (Stevens, J., dissenting).

²⁷² 522 U.S. 192, 200 (1997).

“All statutes of limitation begin to run when the right of action is complete[.]” Unless Congress has told us otherwise in the legislation at issue, a cause of action does not become “complete and present” for limitations purposes until the plaintiff can file suit and obtain relief. [“While it is theoretically possible for a statute to create a cause of action that accrues at one time for the purpose of calculating when the statute of limitations begins to run, but at another time for the purpose of bringing suit, we will not infer such an odd result in the absence of any such indication in the statute.”]²⁷³

Though that particular statute ran from “the date on which the cause of action arose,” the Court’s discussion is still persuasive.²⁷⁴ The analysis was similar in *Franconia Associates v. United States*.²⁷⁵ That case turned on the statute of limitations for claims over which the Court of Federal Claims has jurisdiction, 28 U.S.C. § 2501.²⁷⁶ Such claims are barred unless the aggrieved party files a petition “within six years after such claim first accrues.”²⁷⁷ The Court rejected the argument “that § 2501 creates a special accrual rule for suits against the United States” and applied the traditional definition of accrual for contract claims.²⁷⁸

Supreme Court and circuit precedent make it clear that statutes of limitations operate consistently throughout federal law, and that the government is supposed to play by the same rules as everyone else.²⁷⁹

²⁷³ Id. at 201 (citation omitted) (first quoting *Clark v. Iowa City*, 87 U.S. (20 Wall.) 583, 589 (1875); and then quoting *Reiter v. Cooper*, 507 U.S. 258, 267 (1993)).

²⁷⁴ Id. (quoting 29 U.S.C. § 1451(f)(1) (2012)) (internal quotation marks omitted).

²⁷⁵ 536 U.S. 129 (2002).

²⁷⁶ Id. at 138.

²⁷⁷ Id.

²⁷⁸ Id. at 145.

²⁷⁹ However, that statement might need a slight qualification. Statutes defining the scope of a governmental waiver of sovereign immunity, as limitations periods do, have sometimes been referred to as “jurisdictional” statutes that must be strictly construed. There is now a 4-3 circuit split on whether § 2401(a) is jurisdictional. See *Herr v. U.S. Forest Serv.*, 803 F.3d 809, 817–18 (6th Cir. 2015) (citing cases from each circuit that has addressed the issue). The Supreme Court has yet to weigh in, although it has acknowledged the split. *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 145 (2008) (Ginsburg, J., dissenting) (“Courts of Appeals have divided on the question whether § 2401(a)’s limit is ‘jurisdictional.’”). Ultimately the issue does not impact this Note’s conclusions. A finding that § 2401(a) is jurisdictional would not justify the *Wind River* doctrine—it would simply mean that the statute is not subject to waiver or equitable tolling. The meaning of “accrue” would be unaffected. There is a difference between strictly construing and misconstruing.

C. Policy Considerations

Of course, the *Wind River* opinion did not really try to interpret Section 2401(a). Instead, it balanced the interests of federal agencies against those of potential plaintiffs and picked a result that it thought made sense. Thus, the analysis above does not actually tackle the doctrine on its own terms—policy. This Section will do so and show that the doctrine still cannot stand even when policy considerations are taken into account. First, it will briefly address the relevance of these considerations in statutory interpretation generally. Then, it will explain and respond to the concerns that motivated the *Wind River* court and those that followed it.

1. The Role of Policy in Statutory Interpretation

To start, it is important to clarify the role that policy considerations should play in interpreting statutes. The Supreme Court recently expounded on this issue in a very high profile case—*King v. Burwell*.²⁸⁰ There, the Court stated that “[i]f the statutory language is plain, we must enforce it according to its terms.”²⁸¹ That Court determined that the statutory language was in fact ambiguous, not plain, based on a *purely textual* analysis of the statute.²⁸² It only looked to policy considerations *after* it had found this initial textual ambiguity, as a way to resolve it.²⁸³ Because the plaintiffs’ reading would have effectively destroyed health insurance markets, the Court resolved the ambiguity in favor of the government.²⁸⁴ This approach shows that no matter how dire the policy consequences might be, the Supreme Court only considers them *after* it has found textual ambiguity. As argued above, the plain text of Section 2401(a) is unambiguous. Therefore, policy concerns should not matter at all.

²⁸⁰ 135 S. Ct. 2480, 2488–89 (2015).

²⁸¹ *Id.* at 2489.

²⁸² *Id.* at 2492 (“After reading Section 36B along with other related provisions in the Act, we cannot conclude that the phrase ‘an Exchange established by the State under [Section 18031]’ is unambiguous.” (alteration in original)).

²⁸³ *Id.* at 2492–93 (“*Given that the text is ambiguous*, we must turn to the broader structure of the Act to determine the meaning of Section 36B. . . . Here, the statutory scheme compels us to reject petitioners’ interpretation because it would destabilize the individual insurance market in any State with a Federal Exchange, and likely create the very ‘death spirals’ that Congress designed the Act to avoid.” (emphasis added)).

²⁸⁴ *Id.* at 2496.

Of course, the Court has not always been consistent in its approach. Older opinions give leeway to depart from a statute's text in "rare and exceptional circumstances . . . where the application of the statute as written will produce a result 'demonstrably at odds with the intentions of its drafters' . . . so bizarre that Congress could not have intended it."²⁸⁵ Some Justices take an even more purposivist approach, and "feel freer to go beyond the confines of statutory text" in an effort to "carry out [its] purpose as best [they] can."²⁸⁶ The ongoing debate between textualism and purposivism is outside the scope of this Note; suffice it to say that unambiguous text is a high hurdle to clear, no matter one's interpretive approach.

Section 2401(a)'s plain meaning is unambiguous, so it should control. But even if policy consequences are considered, these consequences are certainly not "so bizarre that Congress could not have intended [them]."²⁸⁷ In fact, the plain-meaning interpretation is *better* as a matter of policy than *Wind River*'s approach.

2. *The Policy Case for Wind River*

The *Wind River* doctrine was initially justified, and has spread, based on a quite reasonable concern for agency finality. Allowing newly injured plaintiffs to challenge regulations decades after they have been promulgated would certainly undermine this goal.

No court has provided a better pragmatic defense of the *Wind River* doctrine than *Wind River* itself. Its holding essentially rested on a balancing of interests. The court reasoned that cutting off policy and procedural challenges six years after an agency action would not significantly undermine agencies' accountability or parties' ability to seek review of

²⁸⁵ *Demarest v. Manspeaker*, 498 U.S. 184, 190–91 (1991) (citations omitted) (quoting *Griffin v. Oceanic Contractors, Inc.*, 485 U.S. 564, 571 (1982)) (finding that, even though "[t]here may [have] be[en] good reasons" in favor of an atextual reading, that was not enough to disregard the unambiguous text of the statute); see also *Burlington N. R.R. Co. v. Okla. Tax Comm'n*, 481 U.S. 454, 461 (1987) ("Unless exceptional circumstances dictate otherwise, 'when we find the terms of a statute unambiguous, judicial inquiry is complete.'" (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981))).

²⁸⁶ Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 *Yale L.J.* 1750, 1764 (2010) (second alteration in original) (quoting Henry M. Hart & Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 1374 (1994)) (internal quotation marks omitted) (placing Justice Breyer in this category).

²⁸⁷ *Demarest*, 498 U.S. at 191 (internal quotation marks omitted).

their decisions.²⁸⁸ Because both types of challenges are based on the soundness of the agency's initial reasoning process, the grounds for bringing either of them "will usually be apparent to any interested citizen within a six-year period following promulgation of the decision."²⁸⁹ Though the court did not elaborate on this point, it was referencing the limited scope of review used in policy and procedural claims. As explained in Section II.A, policy-based review goes only to the arbitrariness of the agency's initial reasoning process, and procedural review goes to the agency's compliance with then-existing procedures.²⁹⁰ Given that later events cannot change the scope of this review, the court concluded that "[t]he government's interest in finality outweighs a late-comer's desire to protest the agency's action as a matter of policy or procedure."²⁹¹

However, the *Wind River* court decided that the balance is flipped for statutory and constitutional challenges. It argued that these challenges "by their nature, will often require a more 'interested' person than generally will be found in the public at large."²⁹² On the agency's side of the ledger, the rule of law would be undermined if it could cement unconstitutional or unauthorized actions simply by the passage of time.²⁹³ "The government should not be permitted to avoid all challenges to its actions, even if *ultra vires*, simply because the agency took the action long before anyone discovered the true state of affairs."²⁹⁴ Given this rough balancing of interests, the *Wind River* court concluded that a bifurcated interpretation of Section 2401(a) "ma[de] the most sense."²⁹⁵

Many other courts have agreed. Again, eight circuits have adopted the doctrine, often with only a cursory or circular analysis.²⁹⁶ For example, the Federal Circuit adopted *Wind River* because it thought that otherwise "there effectively would be no statute of limitations" for administrative claims.²⁹⁷ The Fifth Circuit summarily adopted the doctrine too, and the

²⁸⁸ *Wind River*, 946 F.2d at 715–16.

²⁸⁹ *Id.* at 715.

²⁹⁰ See *supra* notes 35–46 and accompanying text.

²⁹¹ *Wind River*, 946 F.2d at 715.

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ See *supra* notes 108–14.

²⁹⁷ *Preminger v. Sec'y of Veterans Affairs*, 517 F.3d 1299, 1307 (Fed. Cir. 2008) (citing *Wind River*, 946 F.2d at 714).

dissenting opinion, which *did not* disagree with the majority's adoption of *Wind River*, provided a more detailed justification:

Because it is imperative to the administrative process that procedural challenges be posed at the onset of a newly-promulgated regulation, a number of agency statutes set very short deadlines, e.g. 60 days, on initiating such claims. The [defendant agency] lacks such organic statutory protection, however, so the six-year general federal limitations statute governs procedural challenges in this case, and no party, including [the plaintiff], could pursue these challenges after [six years].²⁹⁸

In other words, Section 2401(a) is a catch-all time limit used when Congress does not provide a specific time limit for certain procedural challenges, and so it should apply in the same way as those time limits usually do.

Perhaps the most full-throated defense of *Wind River* is contained in *Wildearth Guardians v. Salazar*.²⁹⁹ That district court explained that using a plaintiff-based concept of accrual for Section 2401(a)

might very well have the effect of vitiating the essential function of the limitations period—to provide repose when parties elect not to act upon their legal rights in a timely manner. In particular, Plaintiffs' theory would require federal agencies to constantly reevaluate and defend their past policy decisions in perpetuity, even in the absence of a mandatory statutory or regulatory duty to do so, whenever they take some action that somehow pertains to or relies upon those past decisions. Simply put, this “theory cannot hold water because . . . it would thwart statutes of limitations by allowing for instant revival of challenges to decades-old agency actions.”³⁰⁰

This is absolutely true. The traditional meaning of accrual does not factor in the date of the defendant's action, only the time of the plaintiff's injury.³⁰¹ Applying this meaning to Section 2401(a) would certainly result in more administrative litigation, as each newly injured party would

²⁹⁸ *Dunn-McCampbell Royalty Interest v. Nat'l Park Serv.*, 112 F.3d 1283, 1289 (5th Cir. 1997) (Jones, J., dissenting) (citations omitted).

²⁹⁹ 783 F. Supp. 2d 61 (D.D.C. 2011).

³⁰⁰ *Id.* at 69 (alteration in original) (quoting *Friends of the Earth v. U.S. Dep't of Interior*, 478 F. Supp. 2d 11, 26 (D.D.C. 2007)).

³⁰¹ See *supra* Section IV.A.

be able to sue, regardless of when the agency action that injured it took place.

3. *The Policy Case Against Wind River*

Wind River's policy arguments are not as compelling as they seem, and in fact there are good reasons to follow the plain meaning of Section 2401(a).

The *Wind River* court asserted that the procedural or policy problems of a regulation "will usually be apparent to any interested citizen within" six years of its promulgation.³⁰² But what about citizens who do not become "interested" or do not even come into existence until later? Even if the grounds for challenging a regulation are apparent to every single person in the country, only those who actually have standing can challenge it in court.³⁰³ In the same vein, the *Wind River* court pointed out that "one does not need to have a preexisting mining claim in an affected territory in order to assess the wisdom of a governmental policy decision or to discover procedural errors in the adoption of a policy."³⁰⁴ This is true, but a preexisting mining claim (or some other concrete interest) *is* needed in order to actually sue the agency, and to get a meaningful assessment of its wisdom by a federal court. If the courthouse doors are closed to a potential challenger until he has met all of the requirements for standing, it only seems fair that they be opened to him when he finally does.

Wind River also argued that statutory and constitutional challenges should be subject to a different rule because "[t]he government should not be permitted to avoid all challenges to its actions, even if *ultra vires*, simply because the agency took the action long before anyone discovered the true state of affairs."³⁰⁵ But this argument applies equally to policy and procedural challenges. An action that violates either of these legal standards is unlawful, just as an action taken without authority is unlawful. It is equally likely that six years could pass before anyone discovers that a regulation is arbitrary and capricious or procedurally invalid. An agency could announce a decision based on a coin flip, and as long as no one was both aware of and actually injured by the decision, it

³⁰² *Wind River*, 946 F.2d at 715.

³⁰³ See *supra* Section II.B.

³⁰⁴ *Wind River*, 946 F.2d at 715.

³⁰⁵ *Id.*

would be completely insulated after six years by the *Wind River* doctrine. Ultimately, it appears that *Wind River*'s decision to treat policy and procedural challenges differently rested on a value judgment that they are less important than statutory and constitutional challenges. This may be true, but it is not a choice that Congress has made in either Section 2401(a) or the APA.

The *Wildearth Guardians* court gave another justification for *Wind River*: A conventional reading of accrual “would require federal agencies to constantly reevaluate and defend their past policy decisions in perpetuity” against a flood of administrative challenges by newly injured plaintiffs.³⁰⁶ These concerns are overblown for a variety of reasons. First, standing doctrines place strict limits on the number of plaintiffs who can bring suit. Again, every plaintiff must have (1) a concrete injury that (2) was caused by the agency’s action and (3) is likely to be redressed by a favorable court decision, and must additionally (4) fall within the zone of interests of the statute at issue and (5) be challenging a final agency action.³⁰⁷ Second, agencies receive quite a bit of deference in policy-based challenges.³⁰⁸ An agency is insulated as long as it simply “considered the relevant data and articulated a satisfactory explanation for the policy choice made.”³⁰⁹ It is not hard for agencies to defend their policy choices and for courts to quickly dispose of challenges to them. Only decisions that are truly beyond the pale are subject to invalidation by the reviewing court.³¹⁰ Third, agencies are already forced to defend their decisions “in perpetuity” from statutory and constitutional challenges. So the proper question is not whether agencies should be completely immune after six years, but rather if they should be immune from certain types of challenges and not others. As argued above, all administrative challenges should be treated the same way.

³⁰⁶ *Wildearth Guardians*, 783 F. Supp. 2d at 69.

³⁰⁷ See *supra* Section II.B.

³⁰⁸ See *supra* Subsection II.A.2.

³⁰⁹ *Tenneco Gas v. Fed. Energy Regulatory Comm’n*, 969 F.2d 1187, 1196 (D.C. Cir. 1992).

³¹⁰ *Nat’l Ass’n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 658 (2007) (“Review under the arbitrary and capricious standard is deferential; we will not vacate an agency’s decision unless it ‘has relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.’” (quoting *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983))).

Finally, the *Wind River* doctrine itself leads to troubling policy results, as this Note has repeatedly pointed out. The purpose of statutes of limitations is to encourage plaintiffs to pursue their rights diligently.³¹¹ But *Wind River*'s gloss on Section 2401(a) indiscriminately eliminates rights of action before they even arise, punishing plaintiffs who have not yet obtained any rights to pursue. This is inconsistent with the fundamental purpose of limitations statutes, and unfair to these plaintiffs. Recall *Cloud Foundation v. Kempthorne*, where the court found that publication in the Federal Register was "legally sufficient notice" to a plaintiff who did not exist when the regulation was published.³¹²

In conclusion, Section 2401(a)'s text is unambiguous, so policy considerations should not matter at all. Even if they are factored in, *Wind River*'s justifications are not as compelling as they seem, and the doctrine has its own policy problems. Maybe if Congress drafted a new statute of limitations for procedural and policy-based challenges, they would choose to make it run from the time of final agency action. But they have not, and Section 2401(a)'s text says what it says. It should be interpreted to mean what it says.

CONCLUSION

If the *Wind River* doctrine were to come before the Supreme Court, it would not survive a close look as it currently stands. To adopt the doctrine, the Court would have to reconceptualize the APA's right of action as a kind of public right that "accrues" against the whole public when an agency acts, or redefine accrual to encompass everyone who exists or will exist as soon as a single person has a right of action arising out of a given set of facts. Either of these efforts would require an impressive feat of legal gymnastics.³¹³ *Wind River*'s reading could possibly be justified on policy grounds. However, the Court has claimed that it does not consider policy consequences if the plain text of a statute is unambigu-

³¹¹ See *supra* Section IV.A; see also *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2182–83 (2014) (discussing the purposes of statutes of limitations and statutes of repose).

³¹² 546 F. Supp. 2d 1003, 1011 (D. Mont. 2008) (quoting *Shiny Rock Mining Corp. v. United States*, 906 F.2d 1362, 1364 (9th Cir. 1990)); see *supra* notes 102–07 and accompanying text.

³¹³ The biggest hurdle would be the APA's text, which plainly contemplates an individual right of action: "A *person* suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action . . . is entitled to judicial review thereof." 5 U.S.C. § 702 (2012) (emphasis added).

ous. This claim would be put to the test if *Wind River* were to reach the Court, because there really is no colorable textual argument for any other reading of Section 2401(a). In the meantime, would-be agency challengers who find themselves time-barred by the *Wind River* doctrine would do well to use this Note as a blueprint for their briefs. Doing so would at least force out some textual argument in support of the doctrine, or alternatively an admission that it is justified on policy alone. That could lead to a circuit split, Supreme Court review, and victory.