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# The Puzzling Presumption of Reviewability

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ARTICLE

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## THE PUZZLING PRESUMPTION OF REVIEWABILITY

Nicholas Bagley\*

*The presumption in favor of judicial review of agency action is a cornerstone of administrative law, accepted by courts and commentators alike as both legally appropriate and obviously desirable. Yet the presumption is puzzling. As with any canon of statutory construction that serves a substantive end, it should find a source in history, positive law, the Constitution, or sound policy considerations. None of these, however, offers a plausible justification for the presumption. As for history, the sort of judicial review that the presumption favors — appellate-style arbitrariness review — was not only unheard of prior to the twentieth century, but was commonly thought to be unconstitutional. The ostensible statutory source for the presumption — the Administrative Procedure Act — nowhere instructs courts to strain to read statutes to avoid the preclusion of judicial review. And although the text and structure of the Constitution may prohibit Congress from precluding review of constitutional claims, a presumption responsive to constitutional concerns would favor review of those claims, not any and all claims of agency wrongdoing.*

*As for policy, Congress has the constitutional authority, democratic legitimacy, and institutional capacity to make fact-intensive and value-laden judgments of how best to weigh the desire to afford private relief against the disruption to the smooth administration of public programs that such relief may entail. Courts do not. When the courts invoke the presumption to contort statutes that appear to preclude review to nonetheless permit it, they dishonor Congress's choices and limit its ability to tailor administrative and regulatory schemes to their particular contexts. The courts should end this practice. Where the best construction of a statute indicates that Congress meant to preclude judicial review, the courts should no longer insist that their participation is indispensable.*

The presumption in favor of judicial review of agency action is a cornerstone of administrative law. Routinely described as “strong,”<sup>1</sup> “basic,”<sup>2</sup> “fundamental,”<sup>3</sup> “far-reaching,”<sup>4</sup> even a “truism,”<sup>5</sup> the presumption is accepted by courts and commentators alike as both legally appropriate and obviously desirable. Although Congress can overcome the presumption and preclude judicial review, its intent to

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<sup>1</sup> *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986).

<sup>2</sup> *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967).

<sup>3</sup> *Council for Urological Interests v. Sebelius*, 668 F.3d 704, 711 (D.C. Cir. 2011).

<sup>4</sup> M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1413 (2004).

<sup>5</sup> Daniel B. Rodriguez, *The Presumption of Reviewability: A Study in Canonical Construction and Its Consequences*, 45 VAND. L. REV. 743, 751 (1992).

do so must be either expressed in clear and convincing terms<sup>6</sup> or fairly discernible from statutory structure.<sup>7</sup> In practice, the federal courts often invoke the presumption to contort statutes that appear to preclude judicial review to nonetheless permit it.<sup>8</sup> Indeed, the Supreme Court recently drew on the presumption in unanimously rejecting the uniform conclusion of the circuit courts that a statute precluded review of certain orders issued by the Environmental Protection Agency (EPA).<sup>9</sup>

Yet the presumption is puzzling. As with any canon of statutory construction that serves a substantive end, it should find a source in history, positive law, the Constitution, or sound policy considerations. None of these, however, offers a plausible justification for the presumption. As for history, the sort of judicial review that the presumption favors — appellate-style arbitrariness review — was not only unheard of prior to the twentieth century, but was commonly thought to be unconstitutional. The ostensible statutory source for the presumption — the Administrative Procedure Act<sup>10</sup> (APA) — nowhere instructs courts to construe statutes to avoid preclusion. And although the text and structure of the Constitution may prohibit Congress from precluding review of constitutional claims, a presumption responsive to constitutional concerns would favor review of constitutional claims, not any and all claims of agency wrongdoing.

As for policy considerations, judicial review might improve the fairness, quality, and legality of agency decisionmaking. But it also introduces delay, diverts agency resources, upsets agency priorities, and shifts authority within agencies toward lawyers and away from policymakers. Congress has the constitutional authority, democratic legitimacy, and institutional capacity to understand and to trade off these competing values. Courts do not. Nor is there reason to think that the presumption allows courts to better capture Congress's intent. The presumption is sometimes thought to provide a stable backdrop against which to legislate: Congress knows that it must state its intent to preclude review in clear terms and drafts accordingly. The available evidence, however, lends no support for the assumption that Congress is aware of the presumption or keeps it in mind when writing statutes. In fact, the evidence suggests the contrary.

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<sup>6</sup> *Abbott Labs.*, 387 U.S. at 140.

<sup>7</sup> *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 351 (1984).

<sup>8</sup> See STEPHEN G. BREYER ET AL., *ADMINISTRATIVE LAW AND REGULATORY POLICY* 986 (5th ed. 2002) (“[C]ourts frequently interpret language that, on its face, seems explicitly to preclude review not to do so. Implicit preclusion is rare.”); JERRY L. MASHAW ET AL., *ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM* 908 (6th ed. 2009) (observing that, “given judicial skepticism of preclusion in any form, implicit preclusion is a limited category reserved for rather special, verging on unique, circumstances”).

<sup>9</sup> See *Sackett v. EPA*, 132 S. Ct. 1367 (2012).

<sup>10</sup> Pub. L. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

The absence of support for the presumption of reviewability is not just an academic concern. As Justice Frankfurter put it seventy years ago, “engraft[ing] upon remedies which Congress saw fit to particularize . . . impliedly denies to Congress the constitutional right of choice in the selection of remedies.”<sup>11</sup> Dishonoring Congress’s choices limits its ability to tailor its administrative and regulatory schemes to their particular contexts. For one example, consider the Department of Veterans Affairs (VA), which is charged with dispensing disability benefits to wounded veterans.<sup>12</sup> Congress had for many years barred veterans who were denied disability benefits from seeking judicial review. The absence of review was thought to be an essential feature of an efficient, easy-to-navigate, and nonadversarial process for resolving disability claims. Although the system appeared to work well, the federal courts repeatedly invoked the presumption of reviewability to avoid the statutory bar — even after Congress tightened the language to confirm its desire to foreclose judicial review. Finally, in 1988, a frustrated Congress relented to the courts’ insistence and subjected disability claims to court review.

Twenty-five years later, the process for reviewing disability claims is in shambles. Because of the demands of judicial review, disability decisions have swelled in length and intricacy. Far from simple and nonadversarial, the process has become “complex, legalistic, and protracted.”<sup>13</sup> That has in turn frustrated the VA’s efforts to quickly process new claims — an especially troubling development given the surge in disability claims arising from the wars in Iraq and Afghanistan. A backlog of about 600,000 unresolved disability claims has provoked widespread public condemnation.<sup>14</sup>

The presumption’s continuing vitality is especially startling when viewed alongside the Supreme Court’s marked tendency across an array of doctrinal contexts to narrow the range of disputes that it is willing to hear.<sup>15</sup> Among other things, the Court has resisted the im-

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<sup>11</sup> *Stark v. Wickard*, 321 U.S. 288, 314–15 (1944) (Frankfurter, J., dissenting).

<sup>12</sup> For a detailed description, see *infra* section III.B, pp. 1331–36.

<sup>13</sup> *Legislative Hearing on H.R. 952, The “Compensation Owed for Mental Health Based on Activities in Theater Post-Traumatic Stress Disorder Act”: Hearing Before the Subcomm. on Disability Assistance & Mem’l Affairs of the H. Comm. on Veterans’ Affairs*, 111th Cong. 2 (2009) [hereinafter *Veterans’ Compensation Hearing*] (statement of Rep. John Hall, Chairman, Subcomm. on Disability Assistance & Mem’l Affairs).

<sup>14</sup> See Editorial, *The Grim Backlog at Veterans Affairs*, N.Y. TIMES, Mar. 12, 2013, at A22 (“A new report based on previously unreleased data from the Department of Veterans Affairs paints a distressing portrait of an agency buried helplessly in paperwork . . .”).

<sup>15</sup> See generally Erwin Chemerinsky, *Closing the Courthouse Doors: October Term 2010*, 14 GREEN BAG 2D 375 (2011) (“In case after case, in both the civil and the criminal context, the Court has limited the ability of litigants — especially consumers, employees, and criminal defendants — to have their day in court.” *Id.* at 375.).

plication of private rights of action,<sup>16</sup> ratcheted up civil pleading standards,<sup>17</sup> limited habeas suits,<sup>18</sup> restricted standing,<sup>19</sup> and curbed class actions.<sup>20</sup> Yet the presumption of reviewability is alive and well, as the Supreme Court vividly demonstrated in the recent case involving EPA.

And it stands unchallenged. This Article takes systematic aim at the consensus view, reflected in both the courts and the commentary, that the presumption of reviewability is an inevitable and attractive part of administrative law. Part I briefly recounts how the presumption assumed its modern form. Part II explores the various arguments — historical (section II.A), statutory (section II.B), constitutional (section II.C), and prudential (sections II.D and II.E) — that have been invoked to support the presumption, and concludes that none is satisfactory. Part III then turns to the costs of the presumption and argues that, both in principle (section III.A) and in practice (section III.B), it can impede the proper functioning of the regulatory and administrative regimes that Congress has established.

The courts should therefore abandon the presumption of reviewability (section III.C). As I will explain, the APA would still authorize judicial review where, after deploying the orthodox rules of statutory construction, no congressional statute appears to preclude it. But where the best construction of a statute indicates that Congress meant to preclude review, the courts should end their longstanding practice of discarding that construction in favor of a less plausible interpretation that permits review.

The Article closes with a suggestion (section III.D). The presumption of reviewability served as the linchpin of the Supreme Court's conclusion more than fifty years ago that the APA authorizes the preenforcement review of agency rules. Now entrenched in administrative law, preenforcement review has come under searing criticism for undermining effective governance. The fragility of the primary analytical foundation of preenforcement review offers another reason to rethink its place in administrative law.

## I. THE MODERN PRESUMPTION

Under the APA, agency action is typically subject to review in the courts “except to the extent that . . . statutes preclude judicial re-

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<sup>16</sup> See, e.g., *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002).

<sup>17</sup> See, e.g., *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

<sup>18</sup> See, e.g., *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011).

<sup>19</sup> See, e.g., *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436 (2011).

<sup>20</sup> See, e.g., *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

view."<sup>21</sup> The question whether a particular statute precludes review of a particular agency action is a perennial one. Much of the time the answer is clear: Congress has either explicitly provided for review or foreclosed it in equally explicit terms. But challenging interpretive questions recur. Congress is sometimes silent about judicial review in circumstances where such review might disrupt the operation of an administrative scheme.<sup>22</sup> At other times, a statute establishes specific routes for pursuing judicial review, raising the possibility that Congress meant to preclude review by alternate routes.<sup>23</sup> And Congress will occasionally withdraw judicial review in generic terms without addressing whether it really meant to preclude review of atypical challenges to agency action.<sup>24</sup> The presumption of reviewability aids in resolving these sorts of interpretive conundrums.

The presumption took its modern shape in the 1967 decision of *Abbott Laboratories v. Gardner*.<sup>25</sup> *Abbott Labs* presented one of these recurring interpretive problems. By statute, Congress had subjected certain regulations issued by the Food and Drug Administration to judicial review prior to their enforcement — but not the regulations at issue in the case.<sup>26</sup> The question was what to make of Congress's silence. By failing to provide an avenue for preenforcement review of the challenged regulations, did Congress intend to preclude such review? Or was its silence just an oversight? Because the regulations at issue could eventually have been challenged in an enforcement proceeding, the question in *Abbott Labs* boiled down to one of timing.

The Supreme Court's analysis hinged on the principle that "judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress."<sup>27</sup> In the Court's view, the APA, in providing that anyone aggrieved by an agency action "is entitled to judicial review thereof,"<sup>28</sup> embodied that basic presumption.<sup>29</sup> Reinforcing the point was the APA's legislative history, and in particular a House committee report stating that a statute "must upon its face give clear and convincing evidence of an intent to withhold" judicial review before such

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<sup>21</sup> 5 U.S.C. § 701(a) (2012). Also insulated from judicial review are agency actions "committed to agency discretion by law." *Id.* Because agency action is "committed to agency discretion by law" in only the rarest of circumstances, see *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971), hard preclusion questions usually center on whether a statute precludes review.

<sup>22</sup> See, e.g., *Morris v. Gressette*, 432 U.S. 491, 501, 504–05 (1977).

<sup>23</sup> See, e.g., *Reno v. Catholic Soc. Servs.*, 509 U.S. 43, 63–64 (1993).

<sup>24</sup> See, e.g., *Johnson v. Robison*, 415 U.S. 361, 373–74 (1974).

<sup>25</sup> 387 U.S. 136 (1967).

<sup>26</sup> See *id.* at 141.

<sup>27</sup> *Id.* at 140.

<sup>28</sup> 5 U.S.C. § 702 (2012).

<sup>29</sup> *Abbott Labs.*, 387 U.S. at 140.

review will be precluded.<sup>30</sup> Finding no such evidence in the statutory structure or legislative history of the Federal Food, Drug, and Cosmetic Act,<sup>31</sup> the Court allowed the preenforcement challenge to proceed.

Although *Abbott Labs* was about timing, the presumption that it articulated quickly assumed a place of prominence in case law about the outright foreclosure of judicial review. In case after case, the Supreme Court invoked the presumption to enable judicial review where Congress had arguably precluded it.<sup>32</sup> As with all canons of construction, however, the presumption has never been absolute. The Court on occasion has found that the presumption has been overcome even in the absence of language precluding review,<sup>33</sup> most significantly in the 1984 case of *Block v. Community Nutrition Institute*.<sup>34</sup> In *Block*, the Court clarified that it never meant the “clear and convincing” standard to apply in anything like a “strict evidentiary sense,”<sup>35</sup> and held that the presumption could be rebutted where an intent to preclude review was “fairly discernible in the detail of the legislative scheme.”<sup>36</sup>

*Block* did not, however, signal an abandonment of the presumption of reviewability. Two years later, in *Bowen v. Michigan Academy of Family Physicians*,<sup>37</sup> a unanimous Court offered an elaborate defense of the presumption — starting, rather grandly, with Chief Justice Marshall. After reciting from *Marbury v. Madison* the statement

<sup>30</sup> *Id.* at 140 n.2 (quoting H.R. REP. NO. 79-1980, at 41 (1946)).

<sup>31</sup> 21 U.S.C. §§ 301-399d (2012).

<sup>32</sup> See, e.g., *Dunlop v. Bachowski*, 421 U.S. 560, 566-68 (1975) (finding reviewable an agency's decision not to file suit to set aside a union election); *Johnson v. Robison*, 415 U.S. 361, 373-74 (1974) (finding reviewable the constitutionality of a Veterans' Administration denial of pension benefits to a conscientious objector); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (finding reviewable an agency's decision to authorize the use of federal funds for a highway project); *Toohnippah v. Hickel*, 397 U.S. 598, 605-07 (1970) (finding reviewable an Interior Department decision to disapprove a Native American's will); *Barlow v. Collins*, 397 U.S. 159, 165-67 (1970) (finding reviewable an agency regulation connected with a cotton subsidy program); *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 156-57 (1970) (finding reviewable an agency decision to allow national banks to sell data processing services). For an example of a pre-*Abbott Labs* finding of reviewability, see *Harmon v. Brucker*, 355 U.S. 579, 581-82 (1958) (per curiam), where the Court reviewed the Secretary of the Army's decision to give a less-than-honorable discharge to two soldiers.

<sup>33</sup> See *United States v. Fausto*, 484 U.S. 439, 443-44, 455 (1988) (holding that Congress precluded judicial review outside the auspices of the Civil Service Reform Act); *United States v. Erika, Inc.*, 456 U.S. 201, 206-08 (1982) (finding that Congress, in authorizing judicial review of certain Medicare Part A determinations, implicitly precluded review of Part B determinations); *Morris v. Gressette*, 432 U.S. 491, 500-05 (1977) (refusing to allow a challenge to the Attorney General's failure to object to a change in voting procedures under the Voting Rights Act).

<sup>34</sup> 467 U.S. 340 (1984).

<sup>35</sup> *Id.* at 350.

<sup>36</sup> *Id.* at 351 (quoting *Data Processing*, 397 U.S. at 157) (internal quotation marks omitted).

<sup>37</sup> 476 U.S. 667 (1986); see also *Lindahl v. Office of Pers. Mgmt.*, 470 U.S. 768, 778-79, 791 (1985) (finding that a statute barring review of factual determinations of disability eligibility did not preclude review for procedural fairness).



that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws,"<sup>38</sup> the Court quoted from Marshall's 1835 decision in *United States v. Nourse*,<sup>39</sup> which it claimed "laid the foundation for the modern presumption of judicial review"<sup>40</sup>:

It would excite some surprise if, in a government of laws and of principle, furnished with a department whose appropriate duty it is to decide questions of right, not only between individuals, but between the government and individuals; a ministerial officer might, at his discretion, issue this powerful process . . . leaving to the debtor no remedy, no appeal to the laws of his country, if he should believe the claim to be unjust. But this anomaly does not exist; this imputation cannot be cast on the legislature of the United States.<sup>41</sup>

As further support, the Court also invoked the APA and the same committee report that had featured so prominently in *Abbott Labs*.<sup>42</sup>

The awkwardness of the Court's statutory analysis underscored the strength of the presumption. *Michigan Academy* involved a challenge to a regulation issued under Medicare Part B. The Court had previously held that the Medicare statute precluded judicial review of Part B claims: the statute's "precisely drawn provisions," which provided for administrative review of both Part A and Part B claims and for judicial review of a subset of Part A claims, "[c]onspicuously . . . fail[] to authorize further review for determinations of the amount of Part B awards."<sup>43</sup> In *Michigan Academy*, however, the Court was reluctant to infer from those same "precisely drawn provisions" that Congress meant to cut off all review of Part B claims. Instead, the Court distinguished between challenges to the *amount* of Part B reimbursement (precluded) and challenges to the *method* used to determine that amount (not precluded).<sup>44</sup> The Medicare statute made no allowance for such statutory legerdemain.

Since *Michigan Academy*, the presumption of reviewability has featured prominently in a number of Supreme Court decisions. On occasion, the Court has found sufficient statutory evidence, even in the absence of explicit preclusion, to rebut the presumption.<sup>45</sup> More often,

<sup>38</sup> *Id.* at 670 (alteration in original) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803)) (internal quotation marks omitted).

<sup>39</sup> 34 U.S. (9 Pet.) 8 (1835).

<sup>40</sup> *Mich. Acad.*, 476 U.S. at 670.

<sup>41</sup> *Id.* (alteration in original) (quoting *Nourse*, 34 U.S. (9 Pet.) at 28-29); see also *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 44 (2000) (Thomas, J., dissenting) (quoting the same language from *Nourse*); *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 424 (1995) (same).

<sup>42</sup> *Mich. Acad.*, 476 U.S. at 670-71.

<sup>43</sup> *United States v. Erika, Inc.*, 456 U.S. 201, 208 (1982).

<sup>44</sup> *Mich. Acad.*, 476 U.S. at 675-76.

<sup>45</sup> See, e.g., *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207 (1994) (finding that the Mine Act precluded preenforcement review of a mine-inspection regulation); *United States v. Fausto*,

however, the Court has deployed the presumption to confirm the availability of judicial review in the face of a statute that arguably precluded it.<sup>46</sup> Lower courts have followed suit and routinely find in favor of reviewability even in the face of strong statutory evidence that Congress meant to preclude review.<sup>47</sup> A number of state courts likewise draw on federal case law in presuming the reviewability of state agency actions.<sup>48</sup>

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484 U.S. 439, 443–44, 455 (1988) (finding that the Civil Service Reform Act precluded judicial review of certain personnel actions).

<sup>46</sup> See, e.g., *Utah v. Evans*, 536 U.S. 452, 463 (2002) (finding that a statute authorizing pre-census review of the Census Bureau's statistical methodologies did not preclude post-census review); *INS v. St. Cyr*, 533 U.S. 289, 298–99, 314 (2001) (finding no congressional intent to repeal a statutory provision authorizing federal jurisdiction of habeas review); *Gutierrez de Martinez*, 515 U.S. at 424–25 (finding reviewable an Attorney General certification that a government employee was acting within the scope of his employment at the time of an accident); *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 63–64 (1993) (finding that a statute precluding district court review of an individual's immigration status did not preclude facial review of agency regulations); *McNary v. Haitian Refugee Ctr.*, 498 U.S. 479, 496 (1991) (finding that a statute barring review of an individual determination of eligibility for an amnesty program did not preclude review of the manner in which the program was implemented); *Traynor v. Turnage*, 485 U.S. 535, 542, 545 (1988) (finding reviewable an agency regulation defining forms of alcoholism unrelated to psychiatric disorders as “willful misconduct”).

<sup>47</sup> See, e.g., *Council for Urological Interests v. Sebelius*, 668 F.3d 704, 708–11 (D.C. Cir. 2011) (finding reviewable a challenge to a Medicare regulation notwithstanding that the Medicare Act explicitly precluded federal question jurisdiction over all claims, including plaintiff's claims, that were not exhausted before the agency); *Sharkey v. Quarantillo*, 541 F.3d 75, 85 (2d Cir. 2008) (reading a statute providing that “no court shall have jurisdiction to review . . . any judgment regarding the granting of relief under section . . . 1255 of this title” to nonetheless permit review of a decision revoking appellant's status as a lawful permanent resident under § 1255 (alterations in original) (quoting 8 U.S.C. § 1252(a)(2)(B) (2012)) (internal quotation marks omitted)); *Buchanan v. Apfel*, 249 F.3d 485, 488–90 (6th Cir. 2001) (reviewing an agency decision notwithstanding a statute precluding review outside the statutorily prescribed channels); *COMSAT Corp. v. FCC*, 114 F.3d 223, 226–27 (D.C. Cir. 1997) (finding reviewable an FCC fee increase notwithstanding a statute providing that “[i]ncreases . . . in fees made by amendments pursuant to this paragraph shall not be subject to judicial review,” *id.* at 227 (first alteration in original) (emphasis omitted) (quoting 47 U.S.C. § 159(b)(3) (2006)) (internal quotation marks omitted)); *Ry. Labor Execs. Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 661–63 (D.C. Cir. 1994) (*en banc*) (reviewing an agency decision notwithstanding a Supreme Court decision holding that the statutory scheme precluded review); *Int'l Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 795, 807 (D.C. Cir. 1983) (finding that it “borders on the incredible” to believe that the Fair Labor Standards Act, in authorizing judicial review of the claims of both underpaid workers and the Secretary of Labor, implicitly precluded review of other claims); *Lancellotti v. Office of Pers. Mgmt.*, 704 F.2d 91, 96–98 (3d Cir. 1983) (reviewing what seemed to be a “question[] of disability and dependency arising under” § 8347(c) of the Civil Service Retirement Act notwithstanding language providing that “the decisions of [the relevant agency] concerning these matters are final and conclusive and are not subject to review,” *id.* at 96 (emphases omitted) (quoting 5 U.S.C. § 8347(c) (2012))).

<sup>48</sup> See, e.g., *Int'l Ass'n of Fire Fighters, Local 188 v. Pub. Emp't Relations Bd.*, 245 P.3d 845, 850–51 (Cal. 2011); *Alaka'i Na Keiki, Inc. v. Matayoshi*, 277 P.3d 988, 1005 n.38 (Haw. 2012); *Greer v. Ill. Hous. Dev. Auth.*, 524 N.E.2d 561, 577 (Ill. 1988); *Bowen v. Doyal*, 253 So. 2d 200, 203 (La. 1971); *Minn. Pub. Interest Research Grp. v. Minn. Envtl. Quality Council*, 237 N.W.2d 375, 379–80 (Minn. 1975); *Long Island Coll. Hosp. v. Catherwood*, 241 N.E.2d 892, 896 n.3 (N.Y.

The Supreme Court's most recent application of the presumption came in its 2012 decision in *Sackett v. EPA*.<sup>49</sup> *Sackett* involved a "compliance order" that EPA had issued to a husband and wife demanding the removal of fill material that they had deposited on their residential property without the necessary permit. EPA would have had to go to court to enforce the order, but the Sacketts didn't want to wait to see if it would. They wanted to challenge the order immediately.<sup>50</sup> The trouble for the Sacketts was that the Clean Water Act<sup>51</sup> appears to preclude preenforcement review of compliance orders. That, at least, was the conclusion of every circuit to have considered the question.<sup>52</sup> Invoking the presumption of reviewability, the Court nonetheless held that the homeowners could challenge the compliance order. The Court was unimpressed with the federal government's claim that this would hamper enforcement of the Clean Water Act: "The APA's presumption of judicial review is a repudiation of the principle that efficiency of regulation conquers all."<sup>53</sup>

## II. JUSTIFICATIONS FOR THE PRESUMPTION

The presumption in favor of judicial review of administrative action has been a central part of administrative law for almost five decades. But is it defensible? In this Part, I canvass the various justifications that courts and commentators have advanced in its favor.

### A. History

As *Michigan Academy's* references to Chief Justice Marshall's opinions suggest, a presumption of reviewability might be justified with reference to longstanding historical practice. The argument would run like this: Statutory language is not self-executing; interpretation depends on a shared set of linguistic and legal conventions. If the judiciary had "for three hundred years" consistently applied the presumption of reviewability, as Professors Richard Stewart and Cass Sunstein have asserted,<sup>54</sup> the canon could have attained the status of an accepted legal convention, perhaps even one with constitutional sta-

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1968); *Pisano v. Shillinger*, 835 P.2d 1136, 1139 (Wyo. 1992); see also *District of Columbia v. Sierra Club*, 670 A.2d 354, 357–58 (D.C. 1996).

<sup>49</sup> 132 S. Ct. 1367 (2012).

<sup>50</sup> *Id.* at 1370–72.

<sup>51</sup> 33 U.S.C. §§ 1251–1387 (2012).

<sup>52</sup> See *Sackett v. U.S. EPA*, 622 F.3d 1139, 1143 (9th Cir. 2010) ("Every circuit that has confronted this issue has held that the [Clean Water Act] impliedly precludes judicial review of compliance orders until the EPA brings an enforcement action in federal district court."). For a discussion of the statutory language, see *infra* section III.B, pp. 1331–36.

<sup>53</sup> *Sackett*, 132 S. Ct. at 1374.

<sup>54</sup> Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1318 (1982).

tus. Against this backdrop, Congress could properly be understood to have acceded to the courts' practice of subjecting administrative action to review in the face of statutes that appear to foreclose it.<sup>55</sup>

The presumption of reviewability, however, lacks a plausible nineteenth-century antecedent. Keep in mind that the modern presumption doesn't reflect a vague, generalized preference for judicial review of whatever kind. Instead, it favors a specific kind of judicial review: appellate-style review of administrative action for illegality and arbitrariness. As Professors Jerry Mashaw and Thomas Merrill have recently emphasized, however, that kind of court oversight of an agency's discretionary determinations was almost unheard of in the nineteenth century.<sup>56</sup> Indeed, it was commonly thought to be unconstitutional. The federal courts were troubled at the prospect of the judicial revision of discretionary decisions of the executive branch,<sup>57</sup> much as the Supreme Court in *Hayburn's Case*<sup>58</sup> worried about the constitutionality of executive branch review of final judicial determinations.<sup>59</sup> Judicial second-guessing, as Professor Bruce Wyman explained in his 1903 treatise on administrative law, was thought to violate "the life principle in the rule of the separation of powers" that "the judiciary should have no business in the action of the administration."<sup>60</sup>

In the 1854 case of *United States v. Ritchie*,<sup>61</sup> for example, the Supreme Court considered the constitutionality of a federal statute allow-

<sup>55</sup> Cf. Antonin Scalia, Essay, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 581, 583 (1990) (arguing that canons that "have been long indulged . . . acquire a sort of prescriptive validity"). But cf. Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 128 (2010) (arguing that historical pedigree alone is, for textualists, insufficient to legitimate substantive canons of construction).

<sup>56</sup> See JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION 24–25 (2012) (arguing that the nineteenth-century model of judicial review "contrasts sharply with contemporary visions of judicial review in which administrative action is presumptively reviewable and the adequacy of administrative reasons for action is perhaps the most prominent feature of judicial oversight of administrative legality," *id.* at 25); Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 946–53 (2011) [hereinafter Merrill, *Article III*] (similar).

<sup>57</sup> See Merrill, *Article III*, *supra* note 56, at 980 ("During the earlier era, the primary concern was that Article III courts would be drawn into matters of 'administration' that were not properly judicial. In other words, the concern was not dilution of the judicial power but contamination of that power.")

<sup>58</sup> 2 U.S. (2 Dall.) 409 (1792).

<sup>59</sup> See *id.* at 410.

<sup>60</sup> BRUCE WYMAN, THE PRINCIPLES OF THE ADMINISTRATIVE LAW GOVERNING THE RELATIONS OF PUBLIC OFFICERS 84–85 (1903); see also Jerry L. Mashaw, *Rethinking Judicial Review of Administrative Action: A Nineteenth Century Perspective*, 32 CARDOZO L. REV. 2241, 2248 (2011) [hereinafter Mashaw, *Rethinking Judicial Review*] ("The nineteenth century federal courts and federal administrative agencies were not in a partnership. They operated in separate spheres. Courts either decided questions de novo on records made in court, or they effectively declined jurisdiction.")

<sup>61</sup> 58 U.S. (17 How.) 525 (1854).

ing for “appeals” to federal district court of decisions issued by a board of commissioners that had been established to resolve the validity of claims to California land. The Court found the statute constitutional, but only after holding “that the suit in the district court is to be regarded as an original proceeding.”<sup>62</sup> Although the commission would forward what would today be called the administrative record, courts were

not confined to a mere reexamination of the case as heard and decided by the board of commissioners, but [would] hear[] the case *de novo*, upon the papers and testimony which had been used before the board, they being made evidence in the district court; and also upon such further evidence as either party may see fit to produce.<sup>63</sup>

The Court thus, in Mashaw’s words, “upheld the statute by misreading it.”<sup>64</sup> Although the statutory scheme at issue in *Ritchie* was unusual, the Court’s discomfort with what we now think of as arbitrariness review runs like a leitmotif through the nineteenth-century cases. “Not until the early decades of the twentieth century,” Merrill notes, “did courts embrace the salient features of the appellate review model, which allowed decisional authority to be shared between agencies and courts.”<sup>65</sup>

Nineteenth-century judicial review of agency action instead came in two main forms. The first involved the issuance of extraordinary writs, especially mandamus, to compel federal officers to carry out their nondiscretionary duties. Notably, the scope of the writ was quite limited. Only the Circuit Court for the District of Columbia was empowered to issue the writ to federal officers, and only then when those officers worked in the District.<sup>66</sup> Mandamus was irrelevant to federal officers in far-flung customs, land, or post offices.

Still, mandamus bears at least a passing resemblance to the APA’s instruction that courts “compel agency action unlawfully withheld.”<sup>67</sup> That resemblance is misleading, however. Mandamus relief was thought to be constitutional only because it disavowed the sort of interference in the discretionary duties of executive officers that characterizes judicial review today. Instead, the writ was available only to require the performance of a ministerial act that federal law unequivocally demanded. When the officer in question exercised discretionary authority, the courts would decline to intervene.<sup>68</sup>

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<sup>62</sup> *Id.* at 534.

<sup>63</sup> *Id.*

<sup>64</sup> Mashaw, *Rethinking Judicial Review*, *supra* note 60, at 2250.

<sup>65</sup> Merrill, *Article III*, *supra* note 56, at 942.

<sup>66</sup> See *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 619–26 (1838).

<sup>67</sup> 5 U.S.C. § 706(1) (2012).

<sup>68</sup> See *Carrick v. Lamar*, 116 U.S. 423, 426 (1886) (“It is settled by many decisions of this court, that in matters which require judgment and consideration to be exercised by an executive officer

Although the line between ministerial and discretionary duties is not sharp, federal courts almost never found that administrative action was ministerial in nature.<sup>69</sup> Before 1880, the Supreme Court had only once, in the 1838 case of *Kendall v. United States ex rel. Stokes*,<sup>70</sup> affirmed the issuance of mandamus. The case was atypical. Upon assuming the office of Postmaster General, Amos Kendall had disallowed certain excess payments that his predecessor had approved in connection with contracts for transporting the mail. The contractors took the dispute to Congress, which enacted a statute directing the Postmaster General to pay the contractors an amount determined by the Solicitor of the Treasury Department. Kendall refused.<sup>71</sup> With three Justices dissenting, the Court affirmed the lower court's issuance of mandamus because the command to pay was "a precise, definite act, purely ministerial; and about which the postmaster general had no discretion whatever."<sup>72</sup>

*Kendall* was destined to be an anomaly.<sup>73</sup> Just two years later, in *Decatur v. Paulding*,<sup>74</sup> the Supreme Court reaffirmed its reluctance to superintend administrative action through mandamus. The case involved a pension — or, rather, two pensions — sought by the widow of Stephen Decatur, the famous naval hero. An 1837 statute conferred on any widow of any naval officer killed in service a pension at half the pay to which the officer would have been entitled. On the same day it enacted the pension statute, Congress also issued a resolution granting a pension to Decatur's widow, also at half-pay. Decatur's widow sought both pensions. After the Secretary of the Navy denied her request, she sought mandamus relief.<sup>75</sup>

The Supreme Court concluded that the decision whether to pay both pensions was discretionary in nature, not ministerial. In the Court's view, resolving the request of Decatur's widow would have re-

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of the government, or which are dependent upon his discretion, no rule for a mandamus to control his action will issue. It is only for ministerial acts, in the performance of which no exercise of judgment or discretion is required, that the rule will be granted.")

<sup>69</sup> See Mashaw, *Rethinking Judicial Review*, *supra* note 60, at 2248 n.29 ("The Supreme Court of the District of Columbia was at times sympathetic to the extension of mandamus jurisdiction, but in case after case the United States Supreme Court reaffirmed the narrowness of the writ."); *id.* (collecting cases); see also *United States ex rel. Redfield v. Windom*, 137 U.S. 636, 644 (1891) (noting that "in the extreme caution with which this remedy is applied by the courts, there are cases when the writ will not be issued to compel the performance of even a purely ministerial act").

<sup>70</sup> 37 U.S. (12 Pet.) 524 (1838).

<sup>71</sup> See *id.* at 608–09.

<sup>72</sup> *Id.* at 613.

<sup>73</sup> See MASHAW, *supra* note 56, at 213 ("*Kendall* might well have been a bright beacon, but *Decatur v. Paulding* and subsequent cases made clear that its light sho[ne] in a very narrow arc.")

<sup>74</sup> 39 U.S. (14 Pet.) 497 (1840).

<sup>75</sup> *Id.* at 513–14.

quired the Secretary to construe the pension legislation, decide what half-pay constituted, check the condition of the pension fund, and apportion any deficiency among claimants.<sup>76</sup> All this was enough to take the decision out of the realm of the ministerial and to distinguish the case from *Kendall*. Precisely why is not altogether clear: the Postmaster General in *Kendall* also had to interpret statutes and deal with potential deficiencies in order to discharge Congress's instruction. But the lesson of *Decatur* was unmistakable:

In general, such duties, whether imposed by act of Congress or by resolution, are not mere ministerial duties. The head of an executive department of the government, in the administration of the various and important concerns of his office, is continually required to exercise judgment and discretion. He must exercise his judgment in expounding the laws and resolutions of Congress, under which he is from time to time required to act. . . .

The interference of the Courts with the performance of the ordinary duties of the executive departments of the government, would be productive of nothing but mischief. . . .<sup>77</sup>

After *Decatur*, it took another forty years for the Court to find a federal officer who had failed to discharge a ministerial duty — and there (shades of *Marbury*) only upon a flat refusal to deliver a land patent that had been “signed by the President, sealed with the seal of the General Land-Office, countersigned by the recorder of the land-office, and duly recorded in the record-book kept for that purpose.”<sup>78</sup> In the meantime, the Court repeatedly found administrative action — even action that appeared to thwart straightforward legal commands — to be discretionary in nature and outside the purview of mandamus.<sup>79</sup> Nor was the Court more amenable to the issuance of injunctions, holding in 1868 that, as with mandamus, injunctions would not issue to prohibit discretionary action.<sup>80</sup>

<sup>76</sup> See *id.* at 515.

<sup>77</sup> *Id.* at 515–16.

<sup>78</sup> *United States v. Schurz*, 102 U.S. 378, 397 (1880).

<sup>79</sup> See, e.g., *United States ex rel. Dunlap v. Black*, 128 U.S. 40 (1888) (rejecting mandamus because the administrative officer exercised discretion); *Carrick v. Lamar*, 116 U.S. 423 (1886) (same); *Sec'y v. McGarrahan*, 76 U.S. (9 Wall.) 298 (1869) (same); *United States v. Comm'r*, 72 U.S. (5 Wall.) 563 (1866) (same); *Comm'r of Patents v. Whiteley*, 71 U.S. (4 Wall.) 522 (1866) (same); *United States ex rel. Goodrich v. Guthrie*, 58 U.S. (17 How.) 284 (1854) (same); *United States ex rel. Tucker v. Seaman*, 58 U.S. (17 How.) 225 (1854) (same); *Reeside v. Walker*, 52 U.S. (11 How.) 272 (1850) (same); *Brashear v. Mason*, 47 U.S. (6 How.) 92 (1848) (same). Mandamus relief against officers was also unavailable when the relief sought required independent action by the President. Land patents, for example, had to be signed by the President or a designated secretary. Mandamus therefore could not lie to compel the Secretary of the Interior to issue a land patent. See, e.g., *McGarrahan*, 76 U.S. (9 Wall.) at 314.

<sup>80</sup> *Gaines v. Thompson*, 74 U.S. (7 Wall.) 347, 352–53 (1868) (holding that the doctrine that courts will not review discretionary acts “is as applicable to the writ of injunction as it is to the writ of mandamus,” *id.* at 352, and refusing to issue an injunction); see also *Litchfield v. Register*

Suits seeking mandamus relief or injunctions did not exhaust the field of nineteenth-century judicial review. The courts' reluctance to directly superintend administrative action was matched by an equal commitment to protecting against the unlawful invasion of common law rights. The second main form of judicial review of administrative action therefore came in lawsuits against federal officers, who could properly be sued in their individual capacities through the common law forms of action (for example, replevin, trover, assumpsit). The officer could defend on the ground that his action was justified by statute. If the court, aided by a jury, found otherwise, the officer would be treated as a private individual who had committed a legal wrong and could be held personally liable for damages.<sup>81</sup>

Common law actions against federal officers were both common and consequential.<sup>82</sup> For at least three reasons, however, they did not at all resemble presumptive appellate-style oversight of administrative action. First, review of questions of both fact and law was *de novo* and the typical remedy was damages from the officer himself, not vacatur of the agency action.<sup>83</sup> Second, because the availability of review rose and fell with the availability of common law actions, much governmental activity was shielded from judicial attention. Agency failures to act, for example, would rarely, if ever, give rise to common law suits.<sup>84</sup> And the erroneous deprivation of a government benefit — a military pension, for instance — was not considered a common law wrong and thus gave rise to no cause of action.<sup>85</sup> Third, as with mandamus, the question for the court was typically not whether the officer had abused his discretion, but whether he had acted within his juris-

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& Receiver, 76 U.S. (9 Wall.) 575 (1869) (declining to issue injunction against a discretionary act); *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475 (1866) (same). Injunctions against unlawful agency action became more common after Congress created federal question jurisdiction in 1875. See Merrill, *Article III*, *supra* note 56, at 949.

<sup>81</sup> See Ann Woolhandler, *Judicial Deference to Administrative Action — A Revisionist History*, 43 ADMIN. L. REV. 197, 204 (1991).

<sup>82</sup> See MASHAW, *supra* note 56, at 66–73 (noting significance of common law actions, particularly in the early Republic); Woolhandler, *supra* note 81, at 207–08 (cataloging damages actions against federal officers during the Marshall Court era).

<sup>83</sup> Merrill, *Article III*, *supra* note 56, at 947–48.

<sup>84</sup> See Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 16–17 (1983) (explaining that “[j]udicial control of noncoercive government conduct . . . could have been entirely excluded . . . , and where it was available it was of a limited nature,” *id.* at 16, and further, that “[s]o long as public administration made few demands on private persons (apart from taxes and custom duties) no threat was posed to the ‘sacred’ rights of liberty and property,” *id.* at 17).

<sup>85</sup> See, e.g., *Morehouse v. Phelps*, 62 U.S. (21 How.) 294, 302–03 (1858) (holding that the “courts of justice” had no “jurisdiction to interfere” in the political decision to award government property); see also Monaghan, *supra* note 84, at 16 (contrasting review of “coercive governmental conduct” with “noncoercive government conduct, particularly administrative denial of government benefits”).



diction.<sup>86</sup> Courts were not always fastidious about this distinction: in the early Republic in particular, they policed certain federal officers more strictly, especially in the tax and customs contexts.<sup>87</sup> But by midcentury the norms of mandamus review had seeped over into most damages actions.<sup>88</sup>

What binds the nineteenth-century cases together is their rejection of the sort of arbitrariness review that characterizes modern administrative law.<sup>89</sup> The courts, as Wyman explained, “can only inquire whether the action has been in excess of power, never whether the action has been [a]n abuse of power. In legal phrase the question before the court is one of the jurisdiction; it is not one of the merits.”<sup>90</sup> As such, agencies did not need to, and often did not, offer reasons for their actions.<sup>91</sup> The result was what Professor Frederic Lee aptly termed a “doctrine of non-reviewability of administrative discretion.”<sup>92</sup>

The upshot of this system of judicial oversight was that an immense amount of administrative action was shielded from judicial scrutiny. As Mashaw reports:

[T]he Bureau of Pensions was deciding hundreds of thousands of cases in the immediate postwar years, and it continued to do so for decades as

<sup>86</sup> See WYMAN, *supra* note 60, at 11 (observing “the truism . . . that all official action in pursuance of discretion vested in the officer by law is action in accordance with laws in whatever way that discretion may be exercised”); Woolhandler, *supra* note 81, at 212 (“[A]n agency official’s error of law or fact was not grounds for a damages award or injunction against the official. Rather, courts generally accorded an immunity . . . from liability absent a gross lack of jurisdiction.”).

<sup>87</sup> See MASHAW, *supra* note 56, at 66–73 (documenting early common law suits).

<sup>88</sup> See Woolhandler, *supra* note 81, at 216 (arguing that “the judicially activist *de novo* method of review was at its height during the Marshall years, whereas the deferential *res judicata* model of review was at its height during the Taney years”). Even in the early nineteenth century, however, a number of cases “suggest[ed] a judicial tendency to treat administrators by strong analogy either to legislatures or to courts.” Jerry L. Mashaw, *Reluctant Nationalists: Federal Administration and Administrative Law in the Republican Era, 1801–1829*, 116 YALE L.J. 1636, 1689 (2007).

<sup>89</sup> See, e.g., *Quinby v. Conlan*, 104 U.S. 420, 426 (1881) (“It would lead to endless litigation, and be fruitful of evil, if a supervisory power were vested in the courts over the action of the numerous officers of the Land Department, on mere questions of fact presented for their determination.”); *Shepley v. Cowan*, 91 U.S. 330, 340 (1875) (stating that no judicial relief is available “for mere errors of judgment upon the weight of evidence in a contested case before [Land Department officers]”); *Bartlett v. Kane*, 57 U.S. (16 How.) 263, 272 (1853) (noting “general principle, that when power or jurisdiction is delegated to any public officer or tribunal over a subject-matter, and its exercise is confided to his or their discretion, the acts so done are binding and valid as to the subject-matter”); *United States v. Morris*, 23 U.S. (10 Wheat.) 246, 284–85 (1825) (“It is not competent for any other tribunal, collaterally, to call in question the competency of the evidence, or its sufficiency, to procure the remission. The Secretary of the Treasury is, by the law, made the exclusive judge of these facts, and there is no appeal from his decision. . . . It is a subject submitted to his sound discretion.”).

<sup>90</sup> WYMAN, *supra* note 60, at 20.

<sup>91</sup> See MASHAW, *supra* note 56, at 195.

<sup>92</sup> Frederic P. Lee, *The Origins of Judicial Control of Federal Executive Action*, 36 GEO. L.J. 287, 296 (1948).

Congress repeatedly amended and expanded military pension eligibility. The Land Office, the Patent Office, the Court of Claims, the Controller's Office of the Treasury, and the Post Office decided tens of thousands more. In 1869, for example, the Steamboat Inspection Service reported licensing nearly 3,000 vessels and 9,000 pilots and engineers.

These were not trivial cases. Steamboats remained crucial to both commerce and travel notwithstanding the rapid growth of the railroads. Land was still the greatest source of wealth, even as industrial capital, often protected by invention patents, was striving for dominance. Decisions by the Land and Patent Offices and the Steamboat Service were, therefore, economically consequential, as were the decisions of the Pension Office. Although individual pension amounts were small, a remarkable proportion of Northern families depended upon military pensions for a part of their livelihood. Finally, a fraud order by the Post Office often simply ended a firm's capacity to do business. Yet, virtually none of those adjudicatory actions was subject to judicial review . . . .<sup>93</sup>

Against this backdrop, it's difficult to understand the Supreme Court's assertion in *Michigan Academy* that "[f]rom the beginning" — and by "beginning" it meant the beginning of the Republic<sup>94</sup> — "our cases [have established] that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress."<sup>95</sup>

It also becomes apparent just how misplaced the Court's invocation of Chief Justice Marshall was. The soaring language in *Marbury* that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury"<sup>96</sup> should not obscure the narrowness of the power that Marshall actually claimed for the courts. Although Marshall agreed that mandamus was in principle appropriate to compel James Madison, then-Secretary of State, to deliver William Marbury's judicial commission, that was only because Marbury's property right to his judicial commission had vested when the President signed it. At that point, delivery of the commission was "a ministerial act which the law enjoins on a particular officer for a particular purpose."<sup>97</sup> Marshall was at pains to "disclaim all pretensions" to "intermeddle with the prerogatives of the executive"<sup>98</sup>:

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<sup>93</sup> MASHAW, *supra* note 56, at 252 (footnote omitted).

<sup>94</sup> *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986).

<sup>95</sup> *Id.* (alteration in original) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967)) (internal quotation marks omitted).

<sup>96</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803); see also *Mich. Acad.*, 476 U.S. at 670 (quoting this language from *Marbury*).

<sup>97</sup> *Marbury*, 5 U.S. (1 Cranch) at 158.

<sup>98</sup> *Id.* at 170.

An extravagance, so absurd and excessive, could not have been entertained for a moment. The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions, in their nature political, *or which are, by the constitution and laws, submitted to the executive*, can never be made in this court.<sup>99</sup>

Far from calling for presumptive judicial oversight of agency discretion, Marshall's opinion affirmed the primacy of a ministerial-discretionary distinction that, for the next century, would limit almost to the point of vanishing the availability of mandamus relief. In so doing, the opinion endorsed a separate-spheres conception of the separation of powers that called into question the very constitutionality of overseeing the executive's discretionary judgments. Even more to the point, Marshall interpreted the Judiciary Act of 1789<sup>100</sup> to confer on the Supreme Court original jurisdiction to issue writs of mandamus — a conferral of authority that he then found unconstitutional. Although Marshall could easily have construed the ambiguous statute to save its constitutionality and enable judicial review,<sup>101</sup> he chose instead to read the statute in a manner that foreclosed review. If anything, *Marbury* showcases a presumption *against* reviewability, not the reverse.

*Michigan Academy's* selective quotation from Marshall's decision in *Nourse* is similarly unpersuasive. As the longtime register of the Treasury Department, Joseph Nourse had been responsible, among other things, for disbursing certain federal funds. When President Jackson removed Nourse from office, the Treasury Department, pursuant to a statute authorizing summary seizures of the property of federal officers who had not settled their accounts, issued a warrant of distress in connection with \$11,000 that Nourse allegedly owed to Treasury. Nourse, adhering to the terms of the collection statute, filed a bill of complaint in federal district court objecting to the distress warrant. An injunction was entered against the warrant, and the government appealed to the circuit court and then to the Supreme Court. In 1832, the Court concluded that the circuit court lacked jurisdiction to consider a government appeal from an injunction issued under the collection statute.<sup>102</sup>

Lacking the right to appeal, the government took a different tack: it filed a common law action to recover against Nourse — who promptly objected that the matter of his liability had already been ad-

<sup>99</sup> *Id.* (emphasis added).

<sup>100</sup> Ch. 20, 1 Stat. 73.

<sup>101</sup> See Akhil Reed Amar, *Marbury, Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. L. REV. 443, 456 (1989) (“[T]he mandamus clause is best read as simply giving the Court remedial authority — for both original and appellate jurisdiction cases — *after* jurisdiction (whether original or appellate) has been independently established.”).

<sup>102</sup> *United States v. Nourse*, 31 U.S. (6 Pet.) 470, 475–97 (1832).

judicated. The Court, per Marshall, agreed: “It is a rule to which no exception is recollected, that the judgment of a court of competent jurisdiction, while unreversed, concludes the subject matter as between the same parties. They cannot again bring it into litigation.”<sup>103</sup> The dictum quoted in *Michigan Academy* — that “[i]t would excite some surprise if, in a government of laws and of principle,” Congress were to provide no remedy in connection with the issuance of summary proceedings<sup>104</sup> — was made in connection with Marshall’s rather pedestrian observation that Congress had in fact authorized those persons subject to a distress warrant to file a bill of complaint<sup>105</sup> and that the district court therefore had “full jurisdiction” over the original proceeding.<sup>106</sup> Nowhere in the course of a decision turning on basic principles of *res judicata* did Marshall intimate that courts could impute to Congress an intent to provide for judicial review where no such intent was manifest on the face of the statute.

### B. *The Administrative Procedure Act*

The most prominent argument for the presumption of reviewability is that the APA codified it in 1946.<sup>107</sup> Congress does from time to time instruct courts how to interpret its statutory enactments.<sup>108</sup> Such statutes occasionally prompt hand-wringing about the power of a past Congress to bind later Congresses,<sup>109</sup> but it seems unobjectionable to think an interpretive convention that is inscribed in law should command some measure of judicial assent, whether because the later Congress is presumed to be aware of the convention or because of the related canon disfavoring repeals by implication (here, a repeal of the statute establishing the convention).<sup>110</sup>

<sup>103</sup> *United States v. Nourse (Nourse II)*, 34 U.S. (9 Pet.) 8, 28 (1835).

<sup>104</sup> *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986) (quoting *Nourse II*, 34 U.S. (9 Pet.) at 28).

<sup>105</sup> See *Nourse II*, 34 U.S. (9 Pet.) at 29; see also An Act Providing for the Better Organization of the Treasury Department, ch. 107, § 4, 3 Stat. 592, 595 (1820) (authorizing “any person [whom] should consider himself aggrieved by any warrant issued under this act” to “prefer a bill of complaint to any district judge of the United States”).

<sup>106</sup> *Nourse II*, 34 U.S. (9 Pet.) at 29.

<sup>107</sup> See, e.g., *Sackett v. EPA*, 132 S. Ct. 1367, 1373 (2012) (“The APA, we have said, creates a ‘presumption favoring judicial review of administrative action’ . . .” (quoting *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 349 (1984))); LOUIS L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 372 (1965) (“The Administrative Procedure Act has . . . the merit of codifying the presumption of reviewability.”).

<sup>108</sup> See, e.g., 1 U.S.C. § 109 (2012) (providing that the “repeal” of a criminal statute “shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide”).

<sup>109</sup> See, e.g., *Dorsey v. United States*, 132 S. Ct. 2321, 2331 (2012).

<sup>110</sup> For an especially strong articulation of the view that one legislature can properly bind a future legislature, see Eric A. Posner & Adrian Vermeule, *Essay, Legislative Entrenchment: A Reappraisal*, 111 *YALE L.J.* 1665 (2002).

Does the APA in fact instruct courts to presume the reviewability of agency action? At first glance, it seems to. Section 702 provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."<sup>111</sup> Section 704 is similar: "[F]inal agency action for which there is no other adequate remedy in a court [is] subject to judicial review."<sup>112</sup> The Court in *Abbott Labs* invoked both sections in concluding that the APA "embodies the basic presumption of judicial review."<sup>113</sup>

But that's not quite right. Per § 701(a), the sections providing for judicial review apply "*except to the extent that . . . statutes preclude judicial review.*"<sup>114</sup> Preclusion is a threshold inquiry: only where Congress has not precluded judicial review do § 702 and § 704 call for review as the default. The original text of the APA, which kept the judicial review provisions in a single section, drives the point home:

SEC. 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion —

(a) RIGHT OF REVIEW. — Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

....

(c) REVIEWABLE ACTS. — . . . [E]very final agency action for which there is no other adequate remedy in any court shall be subject to judicial review.<sup>115</sup>

As far as the APA's text is concerned, no presumption either for or against judicial review ought to guide the threshold inquiry into whether a statute precludes review.<sup>116</sup>

<sup>111</sup> 5 U.S.C. § 702 (2012).

<sup>112</sup> *Id.* § 704.

<sup>113</sup> *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967); *see also* Rodriguez, *supra* note 5, at 746 (linking the presumption to the APA).

<sup>114</sup> 5 U.S.C. § 701(a) (emphasis added).

<sup>115</sup> Administrative Procedure Act, Pub. L. No. 79-404, § 10(a), (c), 60 Stat. 237, 243 (1946) (codified as amended at 5 U.S.C. §§ 701-702, 704); *see also* S. REP. NO. 79-752, at 26 (1945) ("Section 10 on judicial review does not apply in any situation so far as there are involved matters with respect to which statutes preclude judicial review . . ." (emphasis omitted)).

<sup>116</sup> This was not a controversial position in the aftermath of the APA's enactment:

That the introductory clause of section 10 modifies each of the ensuing subsections is obvious. Therefore, according to the clear and unambiguous language, agency action is left unreviewable to the extent that statutes preclude review or to the extent that agency action is by law committed to agency discretion. Since these two reasons are the only reasons why agency action could be unreviewable before the APA was enacted, the law of reviewability remains unchanged.

Kenneth Culp Davis, *Unreviewable Administrative Action*, 15 F.R.D. 411, 427 (1954).

The point is significant. A presumption must be overcome: to reject it, an interpreter must point to affirmative evidence (how much evidence depends on the strength of the presumption) that Congress meant something other than what it is presumed to have meant. That's not what the APA tells courts to do, however. Instead, the APA establishes a default rule favoring review where no statute precludes it. In other words, it supplies a rule of decision only *after* a court determines that the statute, fairly read, doesn't shut off review.

Nothing turns on the labels here. In operation, the APA's default rule is indistinguishable from a weak presumption that applies only after the traditional tools of statutory construction have been exhausted. (The rule of lenity is an example of one such weak presumption.<sup>117</sup>) The labels — at least as I'm using them — nonetheless help to keep straight two distinct approaches to statutory ambiguity. A presumption is meant to influence the act of interpreting statutory text. The presumption of reviewability, for instance, tells courts to read statutes through review-colored glasses. A default rule, in contrast, is agnostic about the outcome of the interpretive act. It comes into play only when an interpreter, having applied the traditional tools, concludes that the text under consideration doesn't speak to the question at hand.<sup>118</sup>

It can, of course, sometimes be difficult to tell when Congress has "spoken" to preclusion. Congress, for example, might not explicitly address judicial review even as other statutory evidence suggests that Congress meant to preclude it. Deciding whether a statute is so ambiguous that it triggers resort to a decision rule can of course be challenging — think here of sharp fights over application of the avoidance canon,<sup>119</sup> the rule of lenity,<sup>120</sup> or *Chevron* deference.<sup>121</sup> It's nonetheless a familiar judicial exercise. And nothing in the APA tells courts to give up on trying to assign meaning to statutes earlier than they typically would. Instead, all the APA does is authorize review where ambiguity on the silent-spoken question cannot be resolved through orthodox statutory interpretation. That's not because the APA supplies a rule of statutory construction, but rather because ambiguity is tan-

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<sup>117</sup> See Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 395 (2005) (observing that the rule of lenity "kick[s] in only after the Court's primary interpretive tools . . . have failed to identify a single best answer").

<sup>118</sup> Cf. Barrett, *supra* note 55, at 109–10 (distinguishing canons that "express a rule of thumb for choosing between equally plausible interpretations of ambiguous text" from "more aggressive" canons that allow courts "to forgo a statute's most natural interpretation in favor of a less plausible one more protective of a particular value").

<sup>119</sup> See, e.g., *Zadvydas v. Davis*, 533 U.S. 678 (2001) (splitting 5–4).

<sup>120</sup> See, e.g., *Muscarello v. United States*, 524 U.S. 125 (1998) (splitting 5–4).

<sup>121</sup> See, e.g., *Massachusetts v. EPA*, 549 U.S. 497 (2007) (splitting 5–4).

tamount to congressional silence about preclusion — and silence triggers review.

For present purposes, the critical point is that the APA does not tell courts to discard the best interpretation of a statute in favor of a second- or third-best alternative that would allow for judicial review. Had it wanted to, Congress could have easily reduced such an instruction to writing. When the bill that became the APA was introduced in the Senate, it called for review “[e]xcept . . . so far as statutes *expressly* preclude judicial review.”<sup>122</sup> The Attorney General’s influential 1947 manual on the APA argued that the omission of the word “expressly” from the final statute “provides strong support for the conclusion that courts remain free to deduce from the statutory context of particular agency action that the Congress intended to preclude judicial review of such action.”<sup>123</sup> The Attorney General’s conclusion may be too forceful — it’s hard to know for sure why the word was omitted — but adherents of a strong presumption of reviewability undeniably failed to lock their preferred interpretation into the statutory text.

Even in the absence of ambiguity, however, the Supreme Court has turned to the APA’s legislative history to support the presumption. Discussion centers on two committee reports: a 1945 report from the Senate Judiciary Committee and a 1946 report from the House Judiciary Committee. In commenting on the introductory clause of section 10, both reports state:

Very rarely do statutes withhold judicial review. It has never been the policy of Congress to prevent the administration of its own statutes from being judicially confined to the scope of authority granted or to the objectives specified. Its policy could not be otherwise, for in such a case statutes would in effect be blank checks drawn to the credit of some administrative officer or board.<sup>124</sup>

The House report (but, significantly, not the Senate report) continues with the following:

To preclude judicial review under this bill a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it. The mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold review.<sup>125</sup>

From these passages, the Court has drawn the conclusion that section 10 of the APA incorporates a presumption of reviewability.<sup>126</sup>

<sup>122</sup> TOM C. CLARK, U.S. DEP’T OF JUSTICE, ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 94 n.4 (1947) (quoting earlier version of the bill) (internal quotation marks omitted).

<sup>123</sup> *Id.*

<sup>124</sup> H.R. REP. NO. 79-1980, at 41 (1946); S. REP. NO. 79-752, at 26 (1945).

<sup>125</sup> H.R. REP. NO. 79-1980, at 41.

<sup>126</sup> *See, e.g., Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670-71 (1986).

The committee reports, however, are demonstrably unreliable guides to what Congress meant the APA to accomplish. Consider the chronology. When the Senate report was issued in 1945, it didn't endorse any presumption of reviewability. Instead, it confined itself to the bland statements that Congress "[v]ery rarely . . . withhold[s] judicial review" and has no general "policy" of precluding such review.<sup>127</sup> In a letter responding to the Senate report, the Attorney General — who had been closely involved in the drafting process and whose views, as the representative of the President who signed the APA into law, ought to carry some weight — was at pains to distance himself from any notion that Congress must speak explicitly in order to preclude review. In the Attorney General's view, section 10 of the APA just "declares the existing law concerning judicial review. It provides for judicial review except insofar as statutes preclude it . . . . A statute may in terms preclude judicial review or be interpreted as manifesting a congressional intention to preclude judicial review."<sup>128</sup> To reinforce the point, the Attorney General cited three cases,<sup>129</sup> including the 1943 case of *Switchmen's Union v. National Mediation Board*,<sup>130</sup> where the Supreme Court declined to review certain agency actions even in the absence of explicit congressional preclusion.<sup>131</sup>

Only after this exchange of views did the House Judiciary Committee issue its report embracing the "clear and convincing" language that undergirds the modern presumption. Was the House committee trying to secure through legislative history what it could not get in the statute? That was certainly Professor Kenneth Culp Davis's understanding. As he described it, the executive-congressional tension over preclusion reflected the fact "that the Act was a compromise between two points of view and that each side tried to lay a foundation in the legislative history for interpretations favorable to its view."<sup>132</sup> In his history of the APA's enactment, Professor George Shepherd similarly emphasized that the APA was a hard-fought compromise between New

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<sup>127</sup> S. REP. NO. 79-752, at 26.

<sup>128</sup> Letter from Tom C. Clark, Att'y Gen., to Senator Pat McCarran, Chairman, Senate Judiciary Comm. (Oct. 19, 1945), reprinted in S. REP. NO. 79-752 app. B, at 37, 43-44 (emphasis added); see also CLARK, *supra* note 122, at 94 ("A statute may in terms preclude, or be interpreted as intended to preclude, judicial review altogether. . . . *Switchmen's Union* . . . illustrates the interpretation of a statute as intended to preclude judicial review although the statute does not expressly so provide.") (emphasis added).

<sup>129</sup> Letter from Tom C. Clark to Senator Pat McCarran, *supra* note 128, reprinted in S. REP. NO. 79-752 app. B, at 37, 44.

<sup>130</sup> 320 U.S. 297 (1943).

<sup>131</sup> *Id.* at 306; cf. *Ry. Labor Execs.' Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 674 (D.C. Cir. 1994) (en banc) (Williams, J., dissenting) ("Any idea that the APA completely sweeps *Switchmen's* aside is quite inconsistent with the language of that decision and of the APA, with the history of the APA, and with post-APA decisions.")

<sup>132</sup> Davis, *supra* note 116, at 431.



Dealers seeking to shield agencies from judicial interference and conservatives hoping to thwart the administration.<sup>133</sup> “[E]ach party to the negotiations over the bill,” Shepherd explained, “attempted to create legislative history — to create a record that would cause future reviewing courts to interpret the new statute in a manner that would favor the party.”<sup>134</sup>

The absence of an established pre-APA practice of presuming review in the face of statutory ambiguity or silence further undermines the reliability of the House report. By 1946, the federal courts had grown comfortable with the kind of appellate-style review of administrative discretion that they had formerly eschewed.<sup>135</sup> But the courts had yet to presume the availability of such review.<sup>136</sup> They would instead undertake a careful examination of the statutory scheme as a whole and offer a context-rich assessment of the merits and demerits of reviewing the agency action at hand.<sup>137</sup> As Davis observed:

The statement of the House committee . . . to the effect that to preclude review a statute “must upon its face give clear and convincing evidence of an intent to withhold it” . . . runs counter to deeply embedded traditions

<sup>133</sup> See George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1680 (1996).

<sup>134</sup> *Id.* at 1662–63.

<sup>135</sup> See Merrill, *Article III*, *supra* note 56, at 953.

<sup>136</sup> See Davis, *supra* note 116, at 411 (“When statutes are silent concerning judicial review, as many are, the administrative action is sometimes reviewable and sometimes not.” (footnote omitted)).

<sup>137</sup> See *Stark v. Wickard*, 321 U.S. 288, 314 (1944) (Frankfurter, J., dissenting) (“In the numerous cases either granting or denying judicial review, grant or denial was reached not by applying some ‘natural law’ of judicial review nor on the basis of some general body of doctrines for construing the diverse provisions of the great variety of federal regulatory statutes. Judicial review when recognized — its scope and its incidence — was derived from the materials furnished by the particular statute in regard to which the opportunity for judicial review was asserted.”).

Professor Louis Jaffe argued in the mid-1960s that he could discern a pre-APA trend in the case law favoring the presumption of reviewability. See JAFFE, *supra* note 107, at 339–53. For Jaffe, the Supreme Court’s 1902 decision in *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94 (1902), marked “a sudden and dramatic turn” in the law of reviewability. JAFFE, *supra* note 107, at 339. Yet observers in the immediate two decades after *McAnnulty* did not read the decision to mark a change in the law. See, e.g., E.F. Albertsworth, *Judicial Review of Administrative Action by the Federal Supreme Court*, 35 HARV. L. REV. 127, 127–28, 147–48 (1921) (finding “inconsistent results,” *id.* at 128, when it comes to reviewability at the Supreme Court, including in *McAnnulty*, and arguing “that what the Court is really doing, consciously or unconsciously, and what it should do, is balancing the various individual and social interests involved,” *id.* at 128); Frank J. Goodnow, *Private Rights and Administrative Discretion*, 2 A.B.A. J. 789, 802–03 (1916) (noting that “[a]lmost the only instances in which the Supreme Court has not regarded as final the action of [federal] administrative officers . . . are where they have exceeded their jurisdiction,” *id.* at 802, and citing *McAnnulty* as an example). In any event, Jaffe himself acknowledged that *Switchmen’s Union* and other cases ran counter to the nascent presumption he identified. See JAFFE, *supra* note 107, at 343 (“Both in its attitude and in the result to which it leads, [*Switchmen’s Union*] contradicts or at least ignores what I have called a presumption of reviewability.”).

concerning statutory interpretation. . . . Acceptance of the statement of the House committee would mean that a statute like the Railway Labor Act, which was involved in the *Switchmen's* case, would have to be interpreted to mean something other than what the Supreme Court, through analysis of legislative history, finds that Congress intended it to mean.<sup>138</sup>

The Attorney General's Committee on Administrative Procedure — the same committee whose recommendations provided the framework for drafting the APA — likewise emphasized the difficulty and unpredictability of the common law approach to preclusion reflected in *Switchmen's Union*: “No one has ever suggested that all of the acts of . . . agencies should be subject to judicial review. The problem of differentiating between the reviewable and the nonreviewable acts calls for the best judicial talents.”<sup>139</sup>

The point is not that the committee reports are wrong about what Congress as a whole intended (although they may be). The point is that the reports are unreliable evidence of that intent. As such, they provide no basis for reading the presumption of reviewability into the text of the APA. If anything, the reports caution against such judicial embroidery. In revealing that the question of reviewability was both considered and contested, the reports suggest that the deal embodied in the text of the APA offers the surest guide to what Congress intended. That text, again, says nothing about the presumption of reviewability.<sup>140</sup>

### C. *The Constitution*

If neither historical practice nor the APA can justify the presumption of reviewability, perhaps it owes its existence to the Constitution. The notion would be that, although the Constitution vests in Congress the authority to define the jurisdiction of the federal courts, the Constitution also limits that authority. Just how much it limits that authori-

<sup>138</sup> Davis, *supra* note 116, at 430–31 (quoting H.R. REP. NO. 79-1980, at 41 (1946)).

<sup>139</sup> ATT'Y GEN.'S COMM. ON ADMIN. PROCEDURE, ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, S. DOC. NO. 77-8, at 84 (1st Sess. 1941).

<sup>140</sup> Commentators have from time to time suggested that Congress has acquiesced in the Supreme Court's view that the APA codifies the presumption of reviewability. See, e.g., Sandra Day O'Connor, *Reflections on Preclusion of Judicial Review in England and the United States*, 27 WM. & MARY L. REV. 643, 652 (1986) (“[O]ne is left with a sense that to speak of congressional acquiescence in the presumption in favor of judicial review is far from a fiction.”). Because of the difficulties of ascribing meaning to congressional silence, the Supreme Court has insisted on “overwhelming evidence of acquiescence” before it will “replace the plain text and original understanding of a statute.” *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 170 n.5 (2001). As section II.E will discuss in detail, no “overwhelming evidence” suggests that Congress has considered the Supreme Court's elaboration of the presumption of reviewability and, through inaction, blessed it. See *infra* section II.E, pp. 1327–29 (detailing evidence of limited congressional understanding of statutory canons).

ty, however, is maddeningly hard to say.<sup>141</sup> Why should the courts grapple with that thorny question when a statute can be construed (or misconstrued) to avoid it? On this view, the presumption of reviewability would be a special case of the constitutional avoidance canon.

Courts and commentators have advanced three plausible constitutional hooks for the presumption of reviewability: the nondelegation doctrine instinct in Article I; a prohibition, rooted in Article III, on the complete preclusion of judicial review for certain claims; and a more narrowly targeted requirement of procedural due process.

1. *The Nondelegation Doctrine.* — Efforts to ground the presumption in the nondelegation doctrine are the least persuasive.<sup>142</sup> In theory, the nondelegation doctrine requires Congress to provide an intelligible principle to guide the exercise of agency discretion, thereby assuring that an electorally accountable legislature, not a federal bureaucrat, makes policy.<sup>143</sup> In practice, the Supreme Court has declined to invalidate a congressional delegation to a federal agency since 1935<sup>144</sup> and even the vaguest of intelligible principles passes constitutional muster.<sup>145</sup> The constitutionality of nearly all administrative delegations is so secure that there's no constitutional difficulty that a presumption of reviewability could reliably avoid.

Perhaps, however, the presumption of reviewability serves values rooted in the nondelegation doctrine. In this vein, Sunstein has argued that the doctrine undergirds a number of canons of construction that limit agencies' policy discretion.<sup>146</sup> Agencies are discouraged, for

<sup>141</sup> See generally Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1378–79 (1953).

<sup>142</sup> See, e.g., BREYER ET AL., *supra* note 8, at 985 (connecting presumption to “considerations of accountability and legislative supremacy, ideas embodied in article I”); Thomas W. Merrill, *Delegation and Judicial Review*, 33 HARV. J.L. & PUB. POL'Y 73, 73 (2010) [hereinafter Merrill, *Delegation*] (noting that the Supreme Court has at times suggested that “[b]road delegations of power to executive actors are constitutionally permissible . . . in significant part because courts stand ready to assure citizens that the executive will discharge its discretion in a manner consistent with Congress’s mandate and in a fashion that otherwise satisfies the requirements of reasoned decision making”).

<sup>143</sup> See *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 472 (2001) (“[W]e repeatedly have said that when Congress confers decisionmaking authority upon agencies *Congress* must ‘lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.’” (second alteration in original) (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928))); David J. Barron & Elena Kagan, *Chevron’s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 201 (observing that the nondelegation doctrine “refers to Congress’s ability to hand over to a given agency official the authority to make policy decisions”).

<sup>144</sup> The Supreme Court has only twice invalidated congressional delegations of authority to federal agencies under the nondelegation doctrine, both instances having occurred in 1935. See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (invalidating the National Industrial Recovery Act (NIRA), ch. 90, 48 Stat. 195 (1933)); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935) (holding section 9(c) of the NIRA to be unconstitutional).

<sup>145</sup> See *Am. Trucking*, 531 U.S. at 474 (recounting statutes).

<sup>146</sup> See generally Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315 (2000).

example, from reading ambiguous statutes to apply retroactively<sup>147</sup> or in a way that would raise serious constitutional doubts.<sup>148</sup> By forbidding agencies from making certain sensitive policy choices, the “nondelegation canons” pin responsibility on Congress to make those choices itself.

It’s difficult, however, to see the presumption of reviewability as a nondelegation canon. (For his part, Sunstein doesn’t claim that it is.) A court’s decision to presume the existence of judicial review does nothing to shift the onus of responsibility for making critical policy decisions from agencies to Congress. Nor does it matter — at least under current doctrine — that such review might discourage agencies from overstepping their delegated authority. In *Whitman v. American Trucking Associations*,<sup>149</sup> the Court reasoned that a violation of the nondelegation doctrine occurs the moment a statute delegating law-making power is enacted, whatever the agency to which the power has been delegated may later choose to do with it.<sup>150</sup> That’s why the Court held that an agency’s after-the-fact circumscription of its own statutory discretion had no bearing on the nondelegation question.<sup>151</sup> After-the-fact judicial review, even if it encourages agencies to color within the (statutory) lines, is similarly beside the point.

Still, lingering nondelegation concerns might, together with other constitutional values, animate the presumption in a looser sense. Perhaps the presumption makes it harder for Congress to preclude judicial review on the theory that such review encourages good behavior from executive agencies that, in practice if not in doctrine, wield legislative and judicial powers. I take up that possibility below.<sup>152</sup> For

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<sup>147</sup> See *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988).

<sup>148</sup> See *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

<sup>149</sup> 531 U.S. 457.

<sup>150</sup> See *id.* at 472 (“In a delegation challenge, the constitutional question is whether the statute has delegated legislative power to the agency.”).

<sup>151</sup> *Id.*

<sup>152</sup> See *infra* section II.D, pp. 1318–27. It’s also possible that the doctrine could change. Professor Evan Criddle, for example, has urged a reorientation of the nondelegation doctrine toward due process concerns. In his view, Congress should be permitted to delegate to agencies only when it imposes sufficient procedural, substantive, and structural safeguards — including judicial review — to avoid “manifest[ly]” agency arbitrariness. Evan J. Criddle, *When Delegation Begets Domination: Due Process of Administrative Lawmaking*, 46 GA. L. REV. 117, 121 (2011). The presumption of reviewability might plausibly advance a nondelegation doctrine revised along the lines that Criddle suggests.

In a related vein, Merrill has constructed an ingenious argument, rooted in the nondelegation doctrine, that Congress cannot preclude judicial review that tests whether executive action is *ultra vires*. See Merrill, *Delegation*, *supra* note 142, at 77–78. Even if Merrill’s argument is right — and he catalogs a number of reasons to think it probably isn’t, see *id.* at 79–85 — the constitutional necessity of *ultra vires* review would not justify a presumption in favor of judicial review of agency arbitrariness.

now, however, the important point is that the modern nondelegation doctrine lends little direct support for the presumption.

2. *Article III.* — Article III provides a somewhat more plausible foundation for the presumption of reviewability. The argument could take two forms. The first (and less persuasive) version would draw on the line of cases exploring the constitutional limits on the adjudicatory responsibilities that can be parceled out to legislative courts and administrative agencies. To prevent Congress from cutting Article III courts out of the constitutional design, the Supreme Court has held that, “in general, Congress may not ‘withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty.’”<sup>153</sup> Perhaps by encouraging judicial review of agency adjudications, the presumption soothes Article III concerns prompted by adjudication in the executive branch.

This line of argument, however, provides scant support for the presumption of reviewability. The Court has firmly rejected — both in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*<sup>154</sup> and, more recently, in *Stern v. Marshall*<sup>155</sup> — the argument that judicial review under “usual limited appellate standards . . . requir[ing] marked deference” can cure an Article III violation.<sup>156</sup> Unless provision is made for after-the-fact de novo review in an Article III court,<sup>157</sup> a violation of the legislative-courts doctrine occurs when Congress improperly assigns certain front-line adjudicatory responsibilities to non-Article III actors. The presence or absence of deferential appellate review is irrelevant.<sup>158</sup> A presumption that calls for just this sort of review is similarly irrelevant.

More importantly, the Supreme Court has long adhered to the view that Congress may assign to legislative courts and administrative agencies the unreviewable authority to resolve cases involving “public rights.”<sup>159</sup> As Professor Peter Strauss has emphasized, “the whole point of the ‘public rights’ analysis” is that “no judicial involvement at

<sup>153</sup> *Stern v. Marshall*, 131 S. Ct. 2594, 2609 (2011) (quoting *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856)).

<sup>154</sup> 458 U.S. 50 (1982).

<sup>155</sup> 131 S. Ct. 2594.

<sup>156</sup> *Id.* at 2611; see also *id.* at 2618–19; *Northern Pipeline*, 458 U.S. at 86 n.39 (plurality opinion); *id.* at 91 (Rehnquist, J., concurring in the judgment).

<sup>157</sup> See *Crowell v. Benson*, 285 U.S. 22, 62 (1932) (saving an otherwise-unconstitutional allocation of adjudicatory responsibilities by providing for de novo review of jurisdictional facts).

<sup>158</sup> See Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 922 (1988) (“[T]he availability or necessity of appellate review has not been an important theme in legislative courts jurisprudence.”).

<sup>159</sup> See *Northern Pipeline*, 458 U.S. at 67–68 (plurality opinion) (“The understanding of [the public-rights] cases is that the Framers expected that Congress would be free to commit such matters completely to nonjudicial executive determination . . . .” *Id.* at 68.).

all [is] required — executive determination alone would suffice.”<sup>160</sup> Although it’s sometimes hard to distinguish public rights from private rights, it’s safe to say that nearly all challenges to agency action implicate public rights.<sup>161</sup> Yet the presumption in favor of judicial review applies with full force in public rights cases where Article III demands no such review.

A second version of the Article III argument offers better support for the presumption. Article III, together with the Due Process Clause and structural separation of powers concerns, is commonly thought to guarantee a judicial forum for the adjudication of a subset of claims against the federal government or its officers.<sup>162</sup> The Constitution may thus prohibit Congress from altogether precluding judicial review of constitutional claims or, somewhat more controversially, claims that administrative action is *ultra vires*. If so, the presumption of reviewability could potentially be justified as a technique for allowing courts to avoid difficult constitutional questions that would otherwise arise from the complete preclusion of review.

The Supreme Court has been explicit that the presumption sometimes serves this function. In a telling footnote at the end of *Michigan Academy*, the Court observed that reading the Medicare statute to permit judicial review “avoids the ‘serious constitutional question’ that would arise if we construed [the Medicare statute] to deny a judicial forum for constitutional claims.”<sup>163</sup> And in *Johnson v. Robison*,<sup>164</sup> the Court sidestepped a thoroughgoing statutory bar on judicial review in order to hear a conscientious objector’s claim that it violated his reli-

<sup>160</sup> Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 632 (1984). Strauss is careful to emphasize that the Due Process Clause may sometimes require judicial oversight of agency action. *Id.* at 632–33 & 632 n.254. I consider the implications of the Due Process Clause for the presumption of reviewability below. See *infra* section II.C.3, pp. 1316–18.

<sup>161</sup> See, e.g., *Stern v. Marshall*, 131 S. Ct. 2594, 2613 (2011) (characterizing a public right as one that “is integrally related to particular federal government action”); *Crowell*, 285 U.S. at 50 (defining public rights as those rights “between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments”).

<sup>162</sup> See Hart, *supra* note 141, at 1377–79 (exploring the idea that the Constitution limits Congress’s authority to eliminate altogether the courts’ jurisdiction to review agency action); see also *Zadvydas v. Davis*, 533 U.S. 678, 692 (2001) (“This Court has suggested . . . that the Constitution may well preclude granting ‘an administrative body the unreviewable authority to make determinations implicating fundamental rights.’” (quoting *Superintendent v. Hill*, 472 U.S. 445, 450 (1985))); Laurence Gene Sager, *The Supreme Court, 1980 Term — Foreword: Constitutional Limitations on Congress’ Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 23–24 (1981) (arguing that the Constitution requires either appellate or original jurisdiction of constitutional claims).

<sup>163</sup> *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 681 n.12 (1986) (quoting *Weinberger v. Salfi*, 422 U.S. 749, 762 (1975)).

<sup>164</sup> 415 U.S. 361 (1974).

gious freedom to deny him veterans' benefits. Complete preclusion, the Court reasoned, "would, of course, raise serious questions concerning the constitutionality" of the bar.<sup>165</sup>

A desire to avoid constitutional difficulties, however, is at best an incomplete justification of the presumption. Without doubt, courts invoke the presumption of reviewability with particular frequency and force in cases that threaten to eliminate review of constitutional claims. But a canon of construction responsive to the possible unconstitutionality of the total preclusion of judicial review of constitutional (and perhaps *ultra vires*) claims would favor review of those claims — and no others. Where review is only delayed or the challenge involves a quotidian claim of arbitrary action, no presumption would come into play.<sup>166</sup> Yet it does. *Abbott Labs*, for example, involved neither constitutionally sensitive claims nor a total preclusion of review. Similar cases involving no apparent constitutional difficulties abound.<sup>167</sup>

A presumption built to honor Article III concerns could be tailored much more narrowly while remaining well within the bounds of accepted interpretive practice. Courts could simply presume that, when Congress precludes review without mentioning constitutional (or *ultra vires*) claims, it does not mean to preclude review of such claims.<sup>168</sup> The Supreme Court took just this tack in *Webster v. Doe*,<sup>169</sup> where it entertained a constitutional challenge to the CIA Director's determina-

<sup>165</sup> *Id.* at 366; see also *INS v. St. Cyr*, 533 U.S. 289, 298–300 (2001) (invoking the "strong presumption in favor of judicial review of administrative action," *id.* at 298, and the possible constitutional problem posed by denying habeas review in the course of finding that an immigrant subject to a deportation order could seek habeas corpus notwithstanding a complete congressional bar).

<sup>166</sup> In 1965, Professor Raoul Berger advanced the argument that the Constitution requires judicial review of agency arbitrariness. See Raoul Berger, *Administrative Arbitrariness and Judicial Review*, 65 COLUM. L. REV. 55, 88–93 (1965). The argument immediately came in for strenuous criticism. See KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TREATISE* § 28.16, at 17 (Supp. 1965) ("No court has ever held that a federal statute cutting off all judicial review of administrative arbitrariness or abuse of discretion is unconstitutional."). And the claim finds little to recommend it in either historical or modern practice. See *Heckler v. Chaney*, 470 U.S. 821, 837–38 (1985) (refusing to review discretionary determination not to bring enforcement action); *supra* section II.A, pp. 1294–303 (historical practice).

<sup>167</sup> See, e.g., *Traynor v. Turnage*, 485 U.S. 535, 542–45 (1988) (applying the presumption to allow resolution of a Rehabilitation Act claim); *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (allowing a civic group to challenge an agency's authorization to use federal funds to construct a highway through a public park); *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 156–57 (1970) (allowing a data-processing organization to challenge a regulation allowing national banks to provide data-processing services); *COMSAT Corp. v. FCC*, 114 F.3d 223, 226–27 (D.C. Cir. 1997) (allowing a telecommunications corporation to challenge imposition of a regulatory fee).

<sup>168</sup> See, e.g., *South Carolina v. Regan*, 465 U.S. 367, 399–400 (1984) (O'Connor, J., concurring in the judgment) (construing a statutory bar of review in "any court" to exclude the Supreme Court in an effort to allay Article III concerns (internal quotation marks omitted)).

<sup>169</sup> 486 U.S. 592 (1988).

tion to terminate an employee, notwithstanding the Court's view that Congress had, by statute, otherwise committed those decisions to the Director's unreviewable discretion.<sup>170</sup> Invoking the avoidance language from *Michigan Academy* and *Robison*, the Court opined that a "heightened showing" of congressional intent is necessary "to preclude judicial review of constitutional claims."<sup>171</sup>

Reading an implicit exception into a general statute may smack of judicial revisionism, but no more so than when courts misconstrue federal statutes not to preclude review. The judicial invention of an exception to a categorical statutory bar has the added virtue of doing less violence to the text than the complete elimination of the bar. That's especially so given the relative rarity of constitutional challenges to agency action. Why should a small subset of constitutional claims militate for a strong presumption in favor of workaday judicial review?

I should close with an important caveat. The scope of Congress's power to withhold federal court jurisdiction is notoriously uncertain, and it's possible to construct an argument that Article III demands some sort of appellate review of most administrative action. Indeed, Professor Richard Fallon has done just that.<sup>172</sup> Were Fallon's argument accepted, the presumption of reviewability would straightforwardly avoid pressing constitutional difficulties that the preclusion of review would otherwise present. Yet much of what the Supreme Court says and does is inconsistent with Fallon's theory that appellate review is constitutionally necessary. The Court usually honors Congress's instructions when it explicitly forecloses review of nonconstitutional claims.<sup>173</sup> It has confirmed that Congress may altogether preclude judicial review of public rights claims.<sup>174</sup> And it has denied that the availability of appellate review in an Article III court bears on whether legislative courts or administrative agencies can properly adjudicate claims of private right.<sup>175</sup> As Fallon recognizes, adoption of his argument would require the overhaul of a considerable amount of existing doctrine.<sup>176</sup> As it stands, the presumption of reviewability fits poorly with modern constitutional law.

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<sup>170</sup> See *id.* at 603.

<sup>171</sup> *Id.*

<sup>172</sup> See Fallon, *supra* note 158, at 944 (developing an appellate review theory that "treats judicial oversight of legislative courts and administrative agencies as not merely permitted but mandated by article III").

<sup>173</sup> See, e.g., *NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 133 (1987).

<sup>174</sup> See *Stern v. Marshall*, 131 S. Ct. 2594, 2612 (2011).

<sup>175</sup> See *id.* at 2618–19.

<sup>176</sup> See Fallon, *supra* note 158, at 981 (noting the weight of precedent upholding the preclusion of review); *id.* at 953 (arguing for the "narrowing" of public rights doctrine); *id.* at 970–74 (reasoning that the touchstone in legislative courts doctrine should be the availability of Article III appellate review).



3. *Procedural Due Process.* — The presumption might also be defended on the ground that it serves values associated with procedural due process. The concern here would not be with the preclusion of judicial review per se; it would be instead with the lack of sufficient procedures — administrative and judicial procedures, taken together — when agencies move to deprive individuals of liberty or property.<sup>177</sup> Although the usual remedy for a lack of constitutionally adequate procedures is to order a hearing, an alternative remedy might be to allow for prompt judicial review.<sup>178</sup> Perhaps by presuming that Congress intends to allow for such review, courts can avoid inquiring into whether administrative procedures pass constitutional muster.<sup>179</sup>

Due process concerns may have motivated the Court's invocation of the presumption in *Sackett v. EPA*. The Sacketts couldn't plausibly claim that the statutory scheme offended the Constitution in depriving them of access to a judicial forum; after all, EPA had to go to court before the compliance order could be enforced. But the Sacketts could (and in fact did<sup>180</sup>) argue that the failure to afford them a prompt administrative or judicial hearing on the compliance order unconstitutionally deprived them of the immediate use and enjoyment of their property. Although the Court's analysis didn't refer to the Due Process Clause, its language suggested that it took the Sacketts' concerns to heart.<sup>181</sup>

For a number of reasons, however, this procedural explanation for the presumption of reviewability comes up short. First, the Due Process Clause guarantees some kind of hearing only for agency adjudications.<sup>182</sup> But the presumption of reviewability also favors judicial review — indeed, preenforcement review — where an agency promul-

<sup>177</sup> See *Gray Panthers v. Schweiker*, 652 F.2d 146, 150 n.9 (D.C. Cir. 1980) (“[T]he existence of a right to vindicate one’s rights in court is a relevant consideration in deciding whether a given procedure, as a whole, satisfies due process.”).

<sup>178</sup> Cf. *Phillips v. Comm’r*, 283 U.S. 589, 595 (1931) (“Where, as here, adequate opportunity is afforded for a later judicial determination of the legal rights, summary proceedings to secure prompt performance of pecuniary obligations to the government have been consistently sustained.”).

<sup>179</sup> See, e.g., *Sharkey v. Quarantillo*, 541 F.3d 75, 86–87 (2d Cir. 2008) (allowing review of a decision under a statute that precludes review in part because “heightened procedural protections are likely required by the Due Process Clause when an [alien’s] resident status is threatened”).

<sup>180</sup> Petitioners’ Brief on the Merits at 14, *Sackett v. EPA*, 132 S. Ct. 1367 (2012) (No. 10-1062) (opening summary of argument with the contention that “[t]he compliance order violates the Sacketts’ due process rights”).

<sup>181</sup> See *Sackett*, 132 S. Ct. at 1372 (“[T]he Sacketts cannot initiate [judicial review], and each day they wait for the agency to drop the hammer, they accrue, by the Government’s telling, an additional \$75,000 in potential liability.”).

<sup>182</sup> Compare *Londoner v. Denver*, 210 U.S. 373, 385–86 (1908) (finding due process right to a hearing on an agency’s individualized assessment of a tax on particular property owners), with *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445–46 (1915) (rejecting due process right to a hearing prior to a legislative readjustment of property taxes).

gates a rule. Both *Abbott Labs* and *Michigan Academy*, for example, involved challenges to agency regulations promulgated through constitutionally adequate notice-and-comment procedures.<sup>183</sup> Procedural due process concerns cannot explain the presumption's application in such cases.

Second, the presumption of reviewability comes into play even where no protected property or liberty interests are at stake. A recent decision from the D.C. Circuit, *Council for Urological Interests v. Sebelius*,<sup>184</sup> is illustrative. A group of urologists had challenged a Medicare regulation that limited the circumstances under which hospitals could secure payment for radiological services.<sup>185</sup> Because urologists routinely contract to receive a portion of hospitals' Medicare payments, the urologists feared that they would lose money. But the urologists could not raise their complaint about hospital reimbursement through administrative avenues that were open only to hospitals. Although the Medicare statute clearly provides that administrative exhaustion is a jurisdictional prerequisite to securing judicial review,<sup>186</sup> the D.C. Circuit invoked the presumption of reviewability and blessed the urologists' effort to go straight to court.<sup>187</sup>

Procedural due process concerns cannot justify this outcome for the simple reason that the urologists had no protected property interest in hospitals' Medicare reimbursement. The Supreme Court concluded as much in *O'Bannon v. Town Court Nursing Center*,<sup>188</sup> where nursing-home residents maintained that an administrative decision to disqualify their nursing home from participating in Medicare would, by forcing their transfer, violate their due process rights.<sup>189</sup> Acknowledging that a disqualification decision could have an "immediate, adverse impact on some residents," the Court nonetheless held that the loss of Medicare's "indirect benefit[s] . . . does not amount to a deprivation of any interest in life, liberty, or property."<sup>190</sup> The same goes for the benefits that indirectly accrued to the urologists.

Third, it is unlikely that federal agency procedures are so routinely deficient that the Due Process Clause should presumptively necessitate

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<sup>183</sup> See *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 668 (1986); *Abbott Labs. v. Gardner*, 387 U.S. 136, 138 (1967).

<sup>184</sup> 668 F.3d 704 (D.C. Cir. 2011).

<sup>185</sup> *Id.* at 705.

<sup>186</sup> *Id.* at 706–07. Compare 42 U.S.C. § 1395ii (2006) (incorporating a provision of the Social Security Act that eliminates federal question jurisdiction over challenges to administrative determinations), with *id.* § 1395ff(b)(1)(A) (authorizing judicial review only after complainant seeks reconsideration of administrative determination by the Secretary).

<sup>187</sup> See *Council for Urological Interests*, 668 F.3d at 705.

<sup>188</sup> 447 U.S. 773 (1980).

<sup>189</sup> See *id.* at 775.

<sup>190</sup> *Id.* at 787.

judicial review.<sup>191</sup> Not only is it rare for a court to find federal procedures inadequate, but premising the presumption on endemic procedural inadequacy would also clash with the practice under *Mathews v. Eldridge*<sup>192</sup> of giving “substantial weight . . . to the good-faith judgments of [administrators] that the procedures they have provided assure fair consideration of the entitlement claims of individuals.”<sup>193</sup>

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In short, none of the constitutional justifications for the presumption of reviewability suffices to explain its scope. This is not to deny that the Constitution motivates particular applications of the presumption. *Michigan Academy* and *Sackett*, for example, have distinct constitutional overtones. But plenty of cases in which the presumption of reviewability plays a large role — including *Abbott Labs* and *Council for Urological Interests* — do not.

#### D. Background Values

Even if hard constitutional constraints on congressional action do not justify the presumption of reviewability, the presumption may nonetheless serve a complex of values rooted in the Due Process Clause, the separation of powers, and maybe even the nondelegation doctrine.<sup>194</sup> The idea here would be that agencies centralize executive, legislative, and judicial power in a manner that raises the prospect of an abusive and antidemocratic exercise of governmental authority.<sup>195</sup> The scope and power of the modern administrative state heighten the concern. Federal judges with salary protection and life tenure can stand against a President and a bureaucracy that, motivated by political gain or insensitivity to private interests, might otherwise break the law, fail to give reasons for their actions, or run roughshod over the liberties that the Constitution was meant to protect. Maybe the Constitution just prefers judicial review, even where the

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<sup>191</sup> See MASHAW ET AL., *supra* note 8, at 330 (observing that the number of due process cases challenging the adequacy of federal procedures dropped in the 1970s in part because of “the greater attention given to procedural matters in federal statutes”).

<sup>192</sup> 424 U.S. 319 (1976).

<sup>193</sup> *Id.* at 349.

<sup>194</sup> See John F. Manning, Essay, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 413 (2010) (“Although the Court has never definitively identified the constitutional value served by this presumption [of reviewability], the source seems to lie in some background due process conception of the imperative to guard against unauthorized or arbitrary governmental action.”).

<sup>195</sup> See THE FEDERALIST NO. 51, at 317–18 (James Madison) (Clinton Rossiter ed., 2003) (endorsing an “interior structure of the government” that would allow “its several constituent parts . . . by their mutual relations, [to] be the means of keeping each other in their proper places”); Cass R. Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. CHI. L. REV. 653, 655 (1985) (noting the “awkward constitutional position of the administrative agency”).

deprivation of review would not itself violate the Constitution. “The presumption of review might then be regarded as a form of constitutionally inspired federal common law, or constitutionally inspired statutory interpretation.”<sup>196</sup>

The point could also be framed in functional, nonconstitutional terms. By increasing the likelihood of judicial review, the presumption may enhance agency accountability, improve the quality of agency decisionmaking, and legitimize governmental action. Because judicial review is such a good thing — something any reasonable Congress would usually want — it’s appropriate to construe federal statutes to permit such review.<sup>197</sup> As such, the presumption would reflect a convention in our legal and political culture favoring judicial review of administrative action.<sup>198</sup> In Professor Louis Jaffe’s words, “[t]he availability of judicial review is the necessary condition, psychologically if not logically, of a system of administrative power which purports to be legitimate, or legally valid.”<sup>199</sup>

A desire to serve these background values offers the most potent argument in favor of the presumption of reviewability. Yet it too comes up short. As an initial matter, one of the major premises — that the Constitution prefers review — is contestable. The nineteenth-century tradition that the Constitution abhors judicial interference in the exercise of executive-branch discretion is a strike against it. So too are a number of modern judicial practices that echo that tradition. The principle that waivers of sovereign immunity are to be strictly construed in favor of the government seems out of step with a Constitution that ostensibly prefers judicial review.<sup>200</sup> And one implication of standing doctrine, the political question doctrine, and the state secrets privilege is that certain agency actions can never be challenged in court.<sup>201</sup>

<sup>196</sup> BREYER ET AL., *supra* note 8, at 985.

<sup>197</sup> See HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS* 1378 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (1958) (instructing courts to “assume, unless the contrary unmistakably appears, that the legislature was made up of reasonable persons pursuing reasonable purposes reasonably”).

<sup>198</sup> See Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1230 (2013) (arguing that “background principles . . . are best understood as resting on conventions” — regular patterns of behavior that are adhered to out of a sense of obligation — “that courts may recognize when interpreting duly enacted statutes, but may not directly enforce as a legal matter in order to invalidate statutes that are clearly contrary”).

<sup>199</sup> See JAFFE, *supra* note 107, at 320.

<sup>200</sup> See *Lane v. Pena*, 518 U.S. 187, 192 (1996). Although § 702 of the APA serves as a general waiver of immunity, that provision applies only where Congress has not otherwise precluded review.

<sup>201</sup> See *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138, 1154 (2013) (“[T]he assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing.” (quoting *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 489 (1982)) (internal quotation marks omitted)); *Japan Whaling Ass’n v. Am.*

Still, the claim that judicial review advances a variety of constitutional and functional values is plausible. One can accept as much, however, and still reject the presumption. Remember that the concern here isn't with those cases where a statute's preclusive effect remains hopelessly ambiguous even after deploying the traditional tools of statutory construction. In such cases, the APA calls for review. The presumption does work only where courts deviate from the most natural meaning of a statute that, fairly read, appears to foreclose review. It's that deviation that demands a justification. The claim must be that construing statutes to allow for judicial review advances certain background values even where the best statutory evidence suggests that Congress meant to preclude it.

Controversy surrounds the question whether courts can properly discard the best interpretation of a statute in an effort to advance background values. Doing so is rather openly countermajoritarian;<sup>202</sup> it can also generate "a judge-made constitutional 'penumbra' that has much the same prohibitory effect as the judge-made (or at least judge-amplified) Constitution itself."<sup>203</sup> In administrative law, a cognate line of commentary raises similar alarms about the elaboration of judge-made rules that find no source in the APA or other positive law — often called "administrative common law."<sup>204</sup>

The concern that the courts might cut into legislative supremacy is especially prominent when it comes to judicial review. The constitutional authority to "ordain and establish" inferior courts, together with traditional notions of sovereign immunity, is commonly thought to afford to Congress broad latitude in choosing when to open the courts to suits against the government.<sup>205</sup> A judicial practice of rejecting the

Cetacean Soc'y, 478 U.S. 221, 230 (1986) ("The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch."); *United States v. Reynolds*, 345 U.S. 1 (1953) (articulating state secrets privilege).

<sup>202</sup> See William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 598 (1992) ("[S]uper-strong clear statement rules . . . are almost as countermajoritarian as now discredited *Lochner*-style judicial review."); Frederick Schauer, *Ashwander Revisited*, 1995 SUP. CT. REV. 71, 74 ("[I]t is by no means clear that a strained interpretation of a federal statute that avoids a constitutional question is any less a judicial intrusion than the judicial invalidation on constitutional grounds of a less strained interpretation of the same statute.").

<sup>203</sup> Richard A. Posner, *Statutory Interpretation — In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 816 (1983).

<sup>204</sup> See Jack M. Beermann & Gary Lawson, *Reprocessing Vermont Yankee*, 75 GEO. WASH. L. REV. 856, 860 (2007) (reading *Vt. Yankee Nuclear Power Corp. v. Nat'l Resources Defense Council, Inc.*, 435 U.S. 519 (1978), "to forbid imposition of any administrative procedures not firmly grounded in some source of positive statutory, regulatory, or constitutional law"); John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 140, 161 (1998) (arguing that administrative common law dishonors "the supremacy of legislation," *id.* at 161).

<sup>205</sup> U.S. CONST. art III, § 1; see Manning, *supra* note 194, at 436–37.

best interpretation of a statute is in tension with that assignment of constitutional responsibility. For some, then, defending the presumption on the ground that it advances background values concedes its illegitimacy.

Not everyone, however, is troubled by statutory presumptions that advance background norms.<sup>206</sup> On another view, such presumptions ensure that Congress takes responsibility for making decisions that intrude on deeply shared values. Indeed, presumptions may be the only means for honoring constitutional norms that are underenforced in the courts.<sup>207</sup> For its part, administrative common law is defended as an ineradicable and salutary feature of federal adjudication — one that, among other things, salves anxieties in our political culture about the place of agencies in the constitutional structure.<sup>208</sup>

For those willing in principle to endorse this sort of federal common lawmaking, the acceptability of the presumption of reviewability should turn on whether its attempt to advance background values is worth the price of the statutory distortion that it entails. As a matter of relative institutional competence and democratic legitimacy, it is not. When it comes to managing bureaucracies, judicial review has a lot going for it: it encourages agencies to explain themselves, to respect individual rights, and to adhere to law. Like any management tool, however, it also has downsides: it increases costs and slows the pace of agency action, it sensitizes agencies to the concerns of lawyers and judges rather than policymakers and scientists, it discourages agencies from tackling litigation-provoking problems, and so on and so forth. Professor James Q. Wilson makes the point nicely: “[L]ike all human institutions, courts are not universal problem solvers competent to manage any difficulty or resolve any dispute. There are certain things courts are good at and some things they are not so good at . . . .”<sup>209</sup>

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<sup>206</sup> See, e.g., Abbe R. Gluck, *The Federal Common Law of Statutory Interpretation: Erie for the Age of Statutes*, 54 WM. & MARY L. REV. 753 (2013) (exploring the view that the canons of statutory construction, which are widely accepted as legitimate exercises of interpretive authority, are themselves a form of federal common law).

<sup>207</sup> See Matthew C. Stephenson, *The Price of Public Action: Constitutional Doctrine and the Judicial Manipulation of Legislative Enactment Costs*, 118 YALE L.J. 2, 4 (2008) (arguing that “courts often can, do, and should craft doctrines that raise the costs to government decisionmakers of enacting constitutionally problematic policies”); Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1552 (2000) (arguing that the avoidance canon “makes it harder — but still not impossible — for Congress to write statutes that intrude into areas of constitutional sensitivity”).

<sup>208</sup> See Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1776 (2007) (noting “standard efforts of law professors to justify administrative procedures,” including judge-made procedures, “in terms of the values they serve and the goods they deliver”); Gillian E. Metzger, Annual Review of Administrative Law — Foreword, *Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293 (2012).

<sup>209</sup> JAMES Q. WILSON, BUREAUCRACY 290 (1989).

The challenge is telling the difference. For any given agency action, making a sound judgment about the wisdom of judicial review turns on a dizzying array of variables that are difficult to measure and even more difficult to weigh against one another. How often does the agency make mistakes? Do those mistakes threaten important private interests? How often will courts overturn wrong agency decisions? How often will they overturn right ones? Will judicial review foster greater care at the agency level? Or will it distort decisionmaking and make it harder for the agency to do its job?

Congress has powerful institutional advantages over courts in getting answers to these sorts of questions. It can consider competing proposals about the availability and timing of review, learn from agencies how those proposals would enhance or frustrate their efforts, hear from groups whose interests are at stake, and adapt over time to changing circumstances. As important, Congress has the democratic legitimacy to strike the delicate and uncertain balance between the desirability of additional procedures and the need to assure effective and inexpensive administration. Courts, in contrast, learn about agencies in case-by-case snapshots and have only a dim sense of how judicial oversight will affect how agencies go about their business.<sup>210</sup> Courts' well-intentioned efforts to review the claims of those aggrieved by government action — often repeat players with systematic litigation advantages over the public beneficiaries of regulatory programs<sup>211</sup> — may upset Congress's efforts to balance private relief against public benefit.

Congress is of course itself afflicted with its own pathologies, foremost among them its susceptibility to pressure from well-organized interest groups. That susceptibility, however, hardly negates Congress's sizeable institutional and democratic advantages over courts. Indeed, it suggests another argument against the presumption. Most regulatory legislation imposes concentrated costs on discrete groups (say, on polluters) and confers diffuse benefits on the public. Most administrative legislation, in contrast, offers concentrated benefits to discrete groups (say, for those on disability) and spreads the costs to taxpayers. In both cases, public-choice theory predicts that the small, discrete groups with members that are most directly affected by the legislation

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<sup>210</sup> See Peter H. Schuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 985 (“[W]e still know little about what is perhaps the central question in [administrative law]: How does judicial review *actually* affect agency decisionmaking?”).

<sup>211</sup> See Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95, 97–114, 149 (1974) (cataloging how “the architecture of the legal system tends to confer interlocking advantages on overlapping groups whom we have called the ‘haves,’” *id.* at 149).

(the polluters and those on disability) will prove more effective than the disorganized public in the legislative process.<sup>212</sup> Such groups generally favor judicial review because it offers them another chance either to stop an undesirable regulation or to reverse a denial of benefits.<sup>213</sup> Should Congress cater to these groups at the public's expense, the result would be too much judicial review, not too little. If so, the presumption of reviewability would not correct a congressional pathology. It would exacerbate it.

But maybe this story is too pat. Maybe Congress, enamored of the projects it has assigned to the agencies, too readily discounts the harm that arbitrary or unlawful agency action can visit upon individuals or corporations. What's the evidence for this claim, though? Congress is attentive enough to the importance of judicial review that it typically provides for it explicitly.<sup>214</sup> Preclusion is uncommon.<sup>215</sup> More to the point, the claim that Congress lacks a proper regard for judicial review depends on the assumption that there is some way of knowing what the optimal level of such review is. But there isn't. Only those who are convinced that more judicial review is always better than less can confidently defend the blanket claim that Congress doesn't care "enough" about it. For the unconvinced, decisions about the availability of review will necessarily rest on contestable judgments about whether, under the circumstances, the desirability of affording private relief outweighs the costs of judicial interference. It makes sense to assign responsibility for these value-laden and fact-intensive judgments to a democratically accountable legislature, not to courts.

The voluminous literature documenting unhappy consequences of judicial review highlights why Congress might sometimes wish to preclude it.<sup>216</sup> In his exhaustive study of the Social Security disability system, for example, Mashaw concludes that judicial review did little or nothing to improve the quality or accuracy of agency decisionmaking even as it imposed serious costs.<sup>217</sup> Professor Shep Melnick has similarly identified how judicial review introduced extraordinary delays and led to misplaced priorities when EPA moved to implement the

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<sup>212</sup> See MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1971) (describing theory of group organization); George J. Stigler, *The Theory of Economic Regulation*, 2 *BELL J. ECON. & MGMT. SCI.* 3 (1971) (applying Olson's theory to regulatory legislation).

<sup>213</sup> See Terry M. Moe, *The Politics of Bureaucratic Structure*, in *CAN THE GOVERNMENT GOVERN?* 276 (John E. Chubb & Paul E. Peterson eds., 1989) (arguing that interest-group opponents of regulatory legislation "will favor an active, easily triggered role for the courts in reviewing agency decisions").

<sup>214</sup> See MASHAW ET AL., *supra* note 8, at 897.

<sup>215</sup> See *id.*

<sup>216</sup> For an account that generalizes insights from the case studies, see Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 *DUKE L.J.* 1385, 1412-20 (1992).

<sup>217</sup> See JERRY L. MASHAW, *BUREAUCRATIC JUSTICE* 185-90 (1983).



Clean Air Act.<sup>218</sup> Melnick's work is of a piece with Professor Richard Pierce's argument that ill-advised judicial review of decisions of the Federal Energy Regulatory Commission contributed to a crisis in the energy markets.<sup>219</sup> And Mashaw and David Harfst have shown how early rulemaking efforts by the National Highway Traffic Safety Administration were so vulnerable to legal challenge that the agency shifted its attention to after-the-fact recalls that had no proven effect on vehicle safety.<sup>220</sup>

Nor does the preclusion of judicial review signify abandonment of the rule of law. As Professors Dawn Johnsen, Neal Katyal, and Trevor Morrison have recently emphasized, the executive branch has formidable internal resources and powerful incentives to assure the legality of its actions.<sup>221</sup> The centrality of lawyers to the administration of government programs introduces a professional commitment to, and inculcates a culture of respect for, the law.<sup>222</sup> Civil servants with career protection (including approximately 20,000 civil-servant lawyers<sup>223</sup>) guard against the politically expedient defiance of statutes or the Constitution.<sup>224</sup> Agencies are granted overlapping jurisdictions, forcing them to grapple with claims that other agencies have overstepped their powers.<sup>225</sup> And a deep public attachment to law as-

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<sup>218</sup> See R. SHEP MELNICK, *REGULATION AND THE COURTS* (1983).

<sup>219</sup> See Richard J. Pierce, Jr., *The Unintended Effects of Judicial Review of Agency Rules: How Federal Courts Have Contributed to the Electricity Crisis of the 1990s*, 43 ADMIN. L. REV. 7 (1991).

<sup>220</sup> See JERRY L. MASHAW & DAVID L. HARFST, *THE STRUGGLE FOR AUTO SAFETY* 167-71 (1990).

<sup>221</sup> See Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. REV. 1559 (2007); Neal Kumar Katyal, Essay, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314 (2006); Trevor W. Morrison, *Constitutional Alarmism*, 124 HARV. L. REV. 1688 (2011) (book review). For a classic exposition of the view that the constitutional scheme does not require judges to superintend the discretionary judgments of the executive branch, see J. Skelly Wright, *Judicial Review and the Equal Protection Clause*, 15 HARV. C.R.-C.L. L. REV. 1, 4-8 (1980).

<sup>222</sup> See Johnsen, *supra* note 221, at 1601 ("Public cynicism notwithstanding, it is both possible and necessary for executive branch lawyers to constrain unlawful executive branch action.").

<sup>223</sup> See David Fontana, Response, *Executive Branch Legalisms*, 126 HARV. L. REV. F. 21, 21 (2012), [http://www.harvardlawreview.org/media/pdf/forvol126\\_fontana.pdf](http://www.harvardlawreview.org/media/pdf/forvol126_fontana.pdf), archived at <http://perma.cc/CEW5-MYPK>.

<sup>224</sup> See Katyal, *supra* note 221, at 2317 ("Much maligned by both the political left and right, bureaucracy creates a civil service not beholden to any particular administration and a cadre of experts with a long-term institutional worldview."); Peter L. Strauss, *Legislative Theory and the Rule of Law: Some Comments on Rubin*, 89 COLUM. L. REV. 427, 442 (1989) ("Thousands of government attorneys spend much of their time demonstrating in internal memoranda, and when relevant in opinions, rulemakings, and judicial briefs, the bases on which proposed official action can be thought authorized (or not) by governing statutes.").

<sup>225</sup> See Katyal, *supra* note 221, at 2317 ("A well-functioning bureaucracy contains agencies with differing missions and objectives that intentionally overlap to create friction."). See generally Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131 (2012) (discussing the challenges of coordinating the activities of disparate agencies).

sure the executive branch has electoral incentives — reinforced by congressional oversight — to conform its behavior to law.<sup>226</sup> Consider too that critical decisions of many agencies — including the Federal Reserve and Treasury — are rarely challenged in the courts.<sup>227</sup> Although the absence of judicial review undeniably affects the behavior of those agencies, they are neither insensitive to law nor systematically arbitrary.

To be sure, Congress's institutional and democratic advantages would count for little if it didn't take questions about judicial review seriously. But it does. For one example among many, consider Medicare — the subject of *Michigan Academy*. When it was created in 1965, Medicare comprised two separate programs: Part A, which covered hospital and other institutional care, and Part B, which covered physician and outpatient services.<sup>228</sup> “[I]n order to avoid overloading the courts with quite minor matters,”<sup>229</sup> Congress opened the courts only to those beneficiaries challenging benefit denials under Part A that exceeded \$1000 and altogether precluded judicial review of Part B claims.<sup>230</sup>

By the 1980s, Part B had swelled in importance to physicians and beneficiaries alike. They began clamoring for judicial review of Part B claims.<sup>231</sup> In response, Congress held a series of hearings to ventilate the argument that, to an extent not appreciated in 1965, judicial review was essential to assure the fairness and accuracy of Part B determinations.<sup>232</sup> In 1986, over the objections of Medicare administra-

<sup>226</sup> See Morrison, *supra* note 221, at 1749 (“The key” to checking the President “lies . . . in the ‘cultural norms’ of offices like [the Office of Legal Counsel] — norms that prize professional integrity and independence — and in a President, Congress, and public that care whether those norms are preserved.” (footnote omitted) (quoting JACK GOLDSMITH, *THE TERROR PRESIDENCY* 37 (2007))); Julian Davis Mortenson, *Law Matters, Even to the Executive*, 112 MICH. L. REV. (forthcoming 2014) (book review) (exploring how a “culture of legality” constrains executive discretion).

<sup>227</sup> See *Raichle v. Fed. Reserve Bank*, 34 F.2d 910, 915 (2d Cir. 1929) (“It would be an unthinkable burden upon any banking system if its open market sales and discount rates were to be subject to judicial review.”); David Zaring, *Administration by Treasury*, 95 MINN. L. REV. 187, 191, 199 (2010) (noting that “Treasury’s independence from judicial review . . . stretches back to the earliest days of the republic,” *id.* at 191, and that “Treasury, at least in comparison with other agencies, is infrequently subject to judicial review,” *id.* at 199).

<sup>228</sup> See *Schweiker v. McClure*, 456 U.S. 188, 189–90 (1982).

<sup>229</sup> *United States v. Erika, Inc.*, 456 U.S. 201, 209 (1982) (quoting 118 CONG. REC. 33,992 (1972)) (internal quotation marks omitted).

<sup>230</sup> See Social Security Amendments of 1965, Pub. L. No. 89-97, sec. 102, § 1869(b), 79 Stat. 286, 330 (codified as amended at 42 U.S.C. § 1395ff (2006 & Supp. V 2011)); *Erika*, 456 U.S. at 208–10; Eleanor D. Kinney, *The Medicare Appeals System for Coverage and Payment Disputes: Achieving Fairness in a Time of Constraint*, 1 ADMIN. L.J. 1, 85–86 (1987) (detailing the statutory scheme).

<sup>231</sup> See Kinney, *supra* note 230, at 86.

<sup>232</sup> *Medicare Appeals Provisions: Hearing on S. 1158 Before the Subcomm. on Health of the S. Comm. on Fin.*, 99th Cong. (1985); *Health Financing: Hearings on H.R. 2293, H.R. 2864, H.R.*

tors,<sup>233</sup> Congress provided for judicial review of Part B claims. Even then, however, Congress set limits: review was available only where more than \$1000 was at stake.<sup>234</sup>

For Medicare, this dispute over review of Part B claims is only the tip of the iceberg. The U.S. Code is littered with provisions that carefully describe which Medicare determinations can and can't be reviewed. For a small sampling: Congress has authorized hospitals and physicians to go to court to challenge reimbursement decisions, but only where more than \$10,000 is in controversy.<sup>235</sup> Even when that threshold is met, hospitals and physicians can't challenge a Medicare determination that a particular item or service is not medically necessary.<sup>236</sup> Nor can they challenge anything relating to the calculation or establishment of "diagnosis-related groups" or "relative value units,"<sup>237</sup> which serve as the backbones for hospital and physician reimbursement, respectively. Although Congress allows beneficiaries to challenge Medicare decisions not to cover novel or untested treatments, physicians and hospitals are precluded from doing so.<sup>238</sup> The recent health care reform legislation is similarly mindful about judicial review in Medicare. Decisions of a board vested with authority to cut Medicare spending are insulated from judicial review.<sup>239</sup> So too are the decisions of a center tasked with testing innovative payment models that might save money or improve quality.<sup>240</sup>

Congress has no real choice but to attend to judicial review "[i]n the context of a massive, complex health and safety program such as Medicare, embodied in hundreds of pages of statutes and thousands of pages of often interrelated regulations, any of which may become the subject of a legal challenge in any of several different courts."<sup>241</sup> Nor

2342, H.R. 2807, and H.R. 2703 Before the Subcomm. on Health and the Env't of the H. Comm. on Energy & Commerce, 99th Cong. (1985); see also Kinney, *supra* note 230, at 86 (observing that questions relating to preclusion "dominated the discussion" at the hearings).

<sup>233</sup> See Kinney, *supra* note 230, at 87.

<sup>234</sup> See Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, § 9341, 100 Stat. 1874, 2037-38 (codified at 42 U.S.C. § 1395ff); see also H.R. REP. NO. 99-727, at 95-96 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3607, 3685-86 (noting the act affording judicial review "attempt[ed] to resolve [beneficiaries'] concerns by establishing an appeals procedure under Part B that is modeled after that available under Part A," *id.* at 95, *reprinted in* 1986 U.S.C.C.A.N. at 3685).

<sup>235</sup> 42 U.S.C. § 139500(f) (2006) (authorizing review of claims channeled through an administrative review process that, under § 139500(a)(2), is available only if the amount in controversy exceeds \$10,000).

<sup>236</sup> *Id.* § 139500(g)(1).

<sup>237</sup> 42 U.S.C. § 1395ww(d)(7) (2006 & Supp. V 2011); *id.* § 1395w-4(i)(1).

<sup>238</sup> *Id.* § 1395ff(f)(5).

<sup>239</sup> Patient Protection and Affordable Care Act, Pub. L. No. 111-148, sec. 3403, § 1899A(e)(5), 124 Stat. 119, 500 (2010) (codified at 42 U.S.C. § 1395kkk(e)(5) (2006 & Supp. V 2011)).

<sup>240</sup> *Id.* sec. 3021, § 1115A(d)(2), 124 Stat. at 393-94 (codified at 42 U.S.C. § 1315a(d)(2) (2006 & Supp. V 2011)).

<sup>241</sup> *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 13 (2000).

is Medicare unusual: “[T]he prevalent pattern in modern federal regulatory and social legislation is to describe the availability and terms of judicial review in copious detail.”<sup>242</sup> If that’s so, the courts have no business contorting statutes to accord with background values, however widely held courts believe those values to be.

### E. A Stable Interpretive Backdrop

Finally, the presumption might be defended on the straightforward ground that — whether justified or not when first articulated — it now serves as an entrenched and stable backdrop against which Congress legislates.<sup>243</sup> Congress knows it must speak clearly before the courts will understand it to have precluded judicial review. When Congress doesn’t speak clearly, the courts can properly assume it doesn’t mean to preclude review.

As Judge Posner has exhorted, however, “[w]e should demand evidence that statutory draftsmen follow the [interpretive] code before we erect a method of interpreting statutes on the improbable assumption that they do.”<sup>244</sup> With that in mind, the validity of the stable-backdrop justification depends on the claim that Congress knows about the presumption of reviewability, understands how courts deploy it, and drafts accordingly. To date, the available evidence — scant as it is — offers meager support for that claim, and in fact suggests to the contrary.

In a recent study, Professors Lisa Bressman and Abbe Gluck asked 137 congressional counsel responsible for legislative drafting about the prominent substantive canons of construction — including the federalism canons (the presumption against preemption, the eponymous federalism canon, and the clear-statement rule), the canon of constitutional avoidance, and the rule of lenity.<sup>245</sup> Among the counsel, there was widespread awareness of only some of the federalism canons; relatively few had even heard of the avoidance canon (25%) or the rule of lenity (35%).<sup>246</sup> What’s more, knowledge of the canons appears to be differ-

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<sup>242</sup> MASHAW ET AL., *supra* note 8, at 897.

<sup>243</sup> See *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991) (“It is presumable that Congress legislates with knowledge of our basic rules of statutory construction, [including] our well-settled presumption favoring interpretation of statutes that allow judicial review of administrative action . . .”).

<sup>244</sup> Posner, *supra* note 203, at 806.

<sup>245</sup> See Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside — An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 STAN. L. REV. (forthcoming 2014) [hereinafter Bressman & Gluck, *Part II*]; Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside — An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 940–49 (2013) [hereinafter Gluck & Bressman, *Part I*].

<sup>246</sup> See Gluck & Bressman, *Part I*, *supra* note 245, at 942, 945–46, 948. This finding extended to counsel in the Legislative Counsels’ offices. See Bressman & Gluck, *Part II*, *supra* note 245

entially dispersed across committees.<sup>247</sup> Even if counsel on some committees — say, the Senate Judiciary Committee — are well versed in the major canons, counsel on many other committees may not be.<sup>248</sup>

Over and above their lack of awareness, the counsel surveyed by Bressman and Gluck were often mistaken about how the canons actually work. Take the federalism canons. Although most counsel knew they existed, well over half (60%) reported that the canons “did not necessarily cut in a particular direction” when it came to judicial review.<sup>249</sup> Just six percent accurately said that courts used the canons in an effort to preserve state law from preemption.<sup>250</sup> Twice as many believed just the opposite: that courts would construe ambiguities to *favor* preemption.<sup>251</sup> Even more striking were the counsel’s responses to questions about the avoidance canon. Bressman and Gluck asked them to describe the presumptions they believed that courts would deploy in construing statutes that raised constitutional concerns. Almost half the counsel (44%) said that courts would presume that the federal statute should be upheld; roughly the same number (45%) said that any judicial presumptions would depend on a variety of factors.<sup>252</sup> Not one mentioned that courts might construe the statute to avoid the constitutional question.<sup>253</sup>

In their interviews, Bressman and Gluck didn’t ask about the presumption of reviewability. It’s therefore possible that counsel are more conversant with it than the other canons, perhaps because judicial review is often a salient feature of negotiations over agency design.<sup>254</sup> But it’s also possible — even likely — that counsel who lack an intuitive feel for the major substantive canons do not draft statutes with keen attention to a relatively minor one. Certainly, a review of congressional work product offers no evidence to support the assumption that the presumption of reviewability systematically shapes Congress’s thinking.<sup>255</sup>

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(“Legislative Counsels had more faith in the idea that interpretive rules have a role to play in the drafting process, but they do not know all of those rules as well as everyone expects.”).

<sup>247</sup> See Gluck & Bressman, *Part I*, *supra* note 245, at 947.

<sup>248</sup> See Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 581 (2002) (“The Senate Judiciary Committee is likely to be an atypical committee; it is staffed primarily by lawyers and is far more likely to address legalistic or judicially focused issues.”).

<sup>249</sup> Gluck & Bressman, *Part I*, *supra* note 245, at 943 (emphasis omitted).

<sup>250</sup> *Id.* at 944.

<sup>251</sup> *Id.*

<sup>252</sup> *Id.* at 947–48.

<sup>253</sup> *Id.* at 948.

<sup>254</sup> See *supra* section II.D, pp. 1318–27.

<sup>255</sup> In 1980, the presumption made a brief appearance in two committee reports on the same bill; both used near-identical language to express the committees’ views that judicial review of a particular agency action should not be permitted, the presumption notwithstanding. See H.R.

In highlighting the modest importance of statutory canons to statutory drafting, the Bressman and Gluck study dovetails nicely with an earlier study by Professors Victoria Nourse and Jane Schacter. After interviewing staffers on the Senate Judiciary Committee and in the Legislative Counsel's office, Nourse and Schacter concluded that canons of construction are "not systematically a central part" of legislative drafting.<sup>256</sup> Urgent institutional imperatives — the need to get a bill done, to resolve substantive disputes, to assuage interested groups, and the like — tend to dominate the drafting process, drawing attention away from more legalistic concerns like the canons of construction.<sup>257</sup>

In short, the available evidence does not substantiate the assertion that courts best capture what Congress really wants by deviating from the most natural construction of its statutes. If anything, the evidence cuts against that assumption: when even the best-known canons of construction don't provide a secure interpretive backdrop, it's hard to see how a more marginal canon could. As such, application of the presumption may alter the meaning that Congress intended its statutes to convey.

### III. IMPLICATIONS

The presumption of reviewability is therefore puzzling. But is it also pernicious? If so, what, if anything, should be done about it?

#### A. *The Costs of the Presumption (in Principle)*

When courts invoke the presumption of reviewability to twist a statute that would otherwise have been read to preclude review, the additional review will distort the system of remedies that Congress meant to establish. Unwarranted review may introduce delay, divert agency resources, and limit agency flexibility.<sup>258</sup> It may increase the relative influence of lawyers in agency decisionmaking.<sup>259</sup> It may encourage agencies to rely more heavily on guidance documents, which

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REP. NO. 96-1411, at 10 (1980) (Conf. Rep.), *reprinted in* 1980 U.S.C.C.A.N. 3972, 3975-76; S. REP. NO. 96-874, at 20 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3950, 3966-67. In addition, a House Report in 1988, discussed in greater detail below, expressed its disapproval of the practice of presuming judicial review of disability claims for veterans. *See* H.R. REP. NO. 100-963, at 21-22 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5782, 5803-04. For its part, the Congressional Record is nearly silent about the presumption. *But see* 140 CONG. REC. 11,336-37 (1994) (statement of Sen. Arlen Specter); 140 CONG. REC. 3533-34 (1994) (statement of Sen. Arlen Specter); 122 CONG. REC. 22,014 (1976) (statement of Sen. Roman Hruska).

<sup>256</sup> Nourse & Schacter, *supra* note 248, at 614.

<sup>257</sup> *See id.* at 615.

<sup>258</sup> *See* McGarity, *supra* note 216, at 1412.

<sup>259</sup> *See* Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032, 1079-80 (2011).

are relatively difficult to challenge in court.<sup>260</sup> And it may foster a faith in what Merrill has called “a major trope of modern administrative law: Judicial review cures all.”<sup>261</sup>

These objections echo arguments against the judicial practice of implying a private right of action as a remedy for the violation of a federal statute. As many have noted, private rights of action can lead to the overzealous, inefficient enforcement of statutory regimes by unaccountable plaintiffs whose lawsuits may interfere with public enforcement of those same regimes.<sup>262</sup> Sensitive to these concerns, the Supreme Court has cautioned that implying private rights of action risks arrogating to the judiciary the authority to refashion the remedial schemes that Congress has established.<sup>263</sup> If implying a private right of action to enforce federal law should be resisted as judicial usurpation, distorting the language of a statute that appears to preclude review of agency action should — perhaps — be equally resisted as usurpation.

To be sure, application of the presumption may sometimes yield benefits: among other things, it could foster adherence to law, improve agency deliberation, and increase the accuracy of agency decisions. But when courts sidestep constraints on their reviewing authority, they upset the balance that Congress has struck between a host of incommensurate values. It is Congress’s role, not the courts’, to strike that balance. Whatever the countervailing benefits might be, Congress judged that the costs outweighed them. The courts have no constitutional authority to revise that judgment and no epistemic basis for thinking they can make a better one.<sup>264</sup>

The concern with judicial overreach is especially acute to the extent that the presumption operates as a disguised subtype of the constitutional avoidance canon. In a typical avoidance case, the constitutional difficulty is at least identified and discussed, giving policymakers some sense of where treacherous constitutional shoals might lie. The presumption of reviewability operates at one further step of remove and allows courts to avoid deciding whether there are any con-

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<sup>260</sup> See Gwendolyn McKee, *Judicial Review of Agency Guidance Documents: Rethinking the Finality Doctrine*, 60 ADMIN. L. REV. 371, 372 (2008).

<sup>261</sup> Merrill, *Article III*, *supra* note 56, at 976.

<sup>262</sup> See, e.g., Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 114–20 (2005).

<sup>263</sup> See *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001) (“[P]rivate rights of action to enforce federal law must be created by Congress. The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy. Statutory intent on this latter point is determinative.” (citations omitted)). The Court has expressed similar concerns in connection with 42 U.S.C. § 1983 and *Bivens* actions. See *Schweiker v. Chilicky*, 487 U.S. 412 (1988) (regarding *Bivens* actions); *Middlesex Cnty. Sewerage Auth. v. Nat’l Sea Clammers Ass’n*, 453 U.S. 1 (1981) (regarding § 1983).

<sup>264</sup> See *supra* section II.D, pp. 1318–27.

stitutional concerns they ought to avoid. The outcome in *Sackett v. EPA*, for example, may have been driven in part by some Justices' intuitions that the Due Process Clause entitled the Sacketts to immediate judicial review. But it's impossible to say for sure: invocation of the presumption allowed the Court to resolve the case without so much as mentioning the Fifth Amendment.<sup>265</sup>

### B. *The Costs of the Presumption (in Practice)*

In principle, then, the presumption raises serious concerns. But does the presumption really matter much in practice? After all, courts routinely decline to review agency decisions when a statute explicitly precludes review. The presumption doesn't even dictate outcomes when Congress is less than explicit about reviewability.<sup>266</sup> Nor is it clear that the presumption does much work when it's invoked. Sometimes it's trotted out just to bolster a decision reached on other grounds.

But the presumption can matter, and on more than just the margins. Consider first the multiyear dispute over judicial review of VA disability benefits determinations. Historically, veterans who saw their claims for benefits denied could not challenge those denials in court.<sup>267</sup> In 1958, however, the D.C. Circuit, brushing past a statute that precluded judicial review of "any question of law or fact concerning a claim for benefits or payments,"<sup>268</sup> held that VA decisions to terminate benefits were subject to review.<sup>269</sup>

Congress responded in 1970 by strengthening the preclusion language to cover cases of benefit termination.<sup>270</sup> Supporters of the tightened language feared that review would "judicializ[e]" what Congress hoped would be an informal, nonadversarial process; overload the courts with meritless claims; complicate efforts to maintain uniform standards; and interfere with the agency's expertise.<sup>271</sup> There was also little systematic evidence that the adjudicatory process was broken. As Mashaw reported in 1983, "[t]he Veterans Administration has fos-

<sup>265</sup> See *Sackett v. EPA*, 132 S. Ct. 1367, 1371–74 (2012).

<sup>266</sup> See *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 351 (1984).

<sup>267</sup> MASHAW, *supra* note 56, at 252; see also Robert L. Rabin, *Preclusion of Judicial Review in the Processing of Claims for Veterans' Benefits: A Preliminary Analysis*, 27 STAN. L. REV. 905 (1975) (arguing that claims for veterans' benefits ought to be subjected to judicial review).

<sup>268</sup> 38 U.S.C. § 211(a) (1958) (repealed as amended 1991).

<sup>269</sup> See *Wellman v. Whittier*, 259 F.2d 163 (D.C. Cir. 1958).

<sup>270</sup> 38 U.S.C. § 211(a) (1970) (providing that "the decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration . . . shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise").

<sup>271</sup> *Gott v. Walters*, 756 F.2d 902, 916 (D.C. Cir. 1985); see *id.* (describing justifications for the disability scheme); Jonathan Goldstein, Note, *New Veterans Legislation Opens the Door to Judicial Review . . . Slowly!*, 67 WASH. U. L.Q. 889, 891 (1989) (same).



tered a high level of representation of claimants” and “seems to have managed to maintain an acceptable level of satisfaction with its process . . . without subjecting its judgments to judicial review.”<sup>272</sup>

Again, however, the federal courts invoked the presumption of reviewability to evade even this categorical restriction on judicial review.<sup>273</sup> Only at that point, as Professor Gary Lawson puts it, did Congress “surrender[] to the inevitable”<sup>274</sup> and, in 1988, explicitly provide for judicial review.<sup>275</sup> In a remarkable report accompanying the legislation, the House Committee on Veterans’ Affairs explained its reluctant capitulation:

Notwithstanding the fact that the language of [the statute precluding review] is cited as the model for preclusion of review statutes, the courts seem to have little regard for the eroding effect that decisions [subjecting disability claims to judicial review] have on the independence of the executive branch. Because courts always have “the final say” on questions of law, and because of the modern trend to make all administrative decisions reviewable, it appears that Congressional efforts to preclude certain forms of judicial review must be periodically revised. And since at present the courts have arrogated the power to determine whether the Administrator exceeds his authority, as well as whether he reached the proper legal conclusion on a given set of facts, the ineluctable result is that the courts will eventually feel free to review any challenge to the Administrator involving a question of law.<sup>276</sup>

The Committee repeatedly expressed its concern that judicial review might lead to an “inefficient, formalized, and unfair” system, but concluded with the vague hope that the “courts are no less aware of the vital interests which are at stake.”<sup>277</sup>

That hope was not well founded. The Board of Veterans’ Appeals reported in 1996 that judicial review “has had a profound impact on the way the Board adjudicates cases, not only by making Board decisions longer and more complex, but by imposing a more adversarial tone to Board decisions, in contrast to the past.”<sup>278</sup> Far from informal, the process for adjudicating disability claims has become, in the words of the Chairman of the House Subcommittee on Disability Assistance and Memorial Affairs, “complex, legalistic, and protracted, and partic-

<sup>272</sup> MASHAW, *supra* note 217, at 142.

<sup>273</sup> See, e.g., *Traynor v. Turnage*, 485 U.S. 535, 545 (1988) (allowing veterans to challenge VA decisions that allegedly contravene the Rehabilitation Act); *Wayne State Univ. v. Cleland*, 590 F.2d 627, 631-32 (6th Cir. 1978) (allowing review of VA regulations pertaining to veterans’ benefits).

<sup>274</sup> GARY LAWSON, *FEDERAL ADMINISTRATIVE LAW* 959 (6th ed. 2013).

<sup>275</sup> See *Veterans’ Judicial Review Act*, Pub. L. No. 100-687, 102 Stat. 4105 (1988).

<sup>276</sup> H.R. REP. NO. 100-963, at 21-22 (1988).

<sup>277</sup> *Id.* at 26.

<sup>278</sup> CHARLES CRAGIN, *BD. OF VETERANS’ APPEALS, REPORT OF THE CHAIRMAN FOR FISCAL YEAR 1995*, at 5 (1996), archived at <http://perma.cc/X3V4-Z6RM>.

ularly difficult for veterans because of the stresses and uncertainties involved while facing skeptical and cynical attitudes of the VA staff.<sup>279</sup> This legalistic process has contributed to an extensive — and embarrassing — backlog of disability claims.<sup>280</sup>

For one telling illustration, consider the following: Prior to 1988, the Board of Veterans' Appeals included physicians both on the Board and on staff who could aid in evaluating disability claims.<sup>281</sup> After 1988, however, the U.S. Court of Appeals for Veterans Claims issued a series of decisions that prohibited the Board from relying on the expertise of its physician members or staff medical advisers in making benefits determinations.<sup>282</sup> Instead, the Board had to confine its review to "independent medical evidence."<sup>283</sup> Because medical evidence counts only if it comes from an outside expert, no physician has sat on the Board since 1994 — all the Board members are now lawyers.<sup>284</sup> Just one physician is kept on staff.<sup>285</sup>

This banishment of physicians has created a vexing problem. In all but the most straightforward cases, evaluators "must understand the medical evidence and use judgment . . . in weighing conflicting medical opinions."<sup>286</sup> Yet neither the staffers nor the Board members have any particular medical expertise. As one Board chairman explained:

The absence of medical members within [Board] decision teams has significantly increased the amount of time staff attorneys must spend conducting medical research. Staff attorneys must be able to recognize when the need for an expert medical opinion is warranted to fully develop a record. Board members must analyze medical evidence with increased fre-

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<sup>279</sup> *Veterans' Compensation Hearing*, *supra* note 13, at 2 (statement of Rep. John Hall, Chairman, Subcomm. on Disability Assistance & Mem'l Affairs).

<sup>280</sup> *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-89, VETERANS' DISABILITY BENEFITS: TIMELY PROCESSING REMAINS A DAUNTING CHALLENGE 15 (2012), *archived at* <http://perma.cc/3VT9-64GM>; STEVEN L. KELLER, BD. OF VETERANS' APPEALS, REPORT OF THE CHAIRMAN: FISCAL YEAR 2012, at 5-8 (2013), *archived at* <http://perma.cc/4PXD-8B3V>.

<sup>281</sup> *See* INST. OF MED. OF THE NAT'L ACADS., A 21ST CENTURY SYSTEM FOR EVALUATING VETERANS FOR DISABILITY BENEFITS 161 (Michael McGeary et al. eds., 2007), *available at* [http://books.nap.edu/openbook.php?record\\_id=11885](http://books.nap.edu/openbook.php?record_id=11885) ("Prior to passage of the Veterans Judicial Review Act of 1988, [the Board of Veterans' Appeals] had always used expert panels to adjudicate claims. Each three-person section of [the Board] had a physician member 'whose medical judgment often controlled the outcome of an appeal.'" (quoting CHARLES L. CRAGIN, BD. OF VETERANS' APPEALS, FISCAL YEAR 1996 REPORT OF THE CHAIRMAN 32 (1996))).

<sup>282</sup> *See* CRAGIN, *supra* note 278, at 18-19.

<sup>283</sup> *Colvin v. Derwinski*, 1 Vet. App. 171, 172 (1991); *see also id.* at 175 (criticizing the Board for "refuting the expert medical conclusions in the record with its own unsubstantiated medical conclusions" and holding that "BVA panels may consider only independent medical evidence to support their findings"); INST. OF MED. OF THE NAT'L ACADS., *supra* note 281, at 161-62 ("[U]sing [Board] physicians to provide expert opinions was soon barred by court decisions that questioned the fairness and impartiality of [the Board's] own medical advisers.").

<sup>284</sup> *See* INST. OF MED. OF THE NAT'L ACADS., *supra* note 281, at 161.

<sup>285</sup> *Id.* at 162.

<sup>286</sup> *Id.* at 194.

quency and sophistication and provide a thorough explanation of all medical principles upon which their decisions rely, with discussion of and citation to independent authority, such as medical treatises, texts, journals, and epidemiological studies.<sup>287</sup>

The costs of the presumption — and of what then-Judge Scalia called the “judicialization, and even the lawyerization, of this field”<sup>288</sup> — could not be more stark.

For another example, take *Sackett v. EPA*. Recall that every circuit to have considered the matter had found compliance orders unreviewable.<sup>289</sup> And for good reason. The Clean Water Act authorizes EPA, when confronting a violation, *either* to bring a judicial enforcement proceeding *or* to issue a compliance order.<sup>290</sup> Compliance orders themselves impose no penalties on their recipients; instead, EPA must go to court to get them enforced.<sup>291</sup> The implication is that compliance orders are interim measures that EPA, if it so chooses, can deploy on the way to a potential court proceeding.

Now that compliance orders are subject to immediate review, the choice between a compliance order and an enforcement proceeding is illusory. Whatever it does, the agency may find itself in court. That in turn undermines Congress’s apparent effort to arm EPA with the authority to use compliance orders to move expeditiously to prevent water pollution.<sup>292</sup> Reinforcing the point is another provision of the Act specifically providing for judicial review of any penalties that EPA itself imposes after an administrative hearing.<sup>293</sup> It’s suggestive that Congress did not similarly provide for judicial review of compliance orders.

In finding compliance orders reviewable, the Supreme Court repeatedly signaled that its analysis hinged on the presumption of reviewability.<sup>294</sup> Absent the presumption, of course, the Court might have reached the same result. But drafting a defensible opinion in favor of reviewability would probably have required the Court to con-

<sup>287</sup> See CRAGIN, *supra* note 278, at 19.

<sup>288</sup> *Gott v. Walters*, 756 F.2d 902, 916 (D.C. Cir. 1985).

<sup>289</sup> See *Sackett v. U.S. EPA*, 622 F.3d 1139, 1143 (9th Cir. 2010) (“Every circuit that has confronted this issue has held that the [Clean Water Act] impliedly precludes judicial review of compliance orders until the EPA brings an enforcement action in federal district court.”).

<sup>290</sup> See 33 U.S.C. § 1319(a)(3) (2012) (distinguishing between “issu[ing] an order requiring such person to comply with [the Act]” and “bring[ing] a civil action” to enforce the order).

<sup>291</sup> See *id.* § 1319(d).

<sup>292</sup> See S. REP. NO. 92-414, at 64 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3730 (“One purpose of these new requirements is to avoid the necessity of lengthy fact finding, investigations, and negotiations at the time of enforcement.”).

<sup>293</sup> 33 U.S.C. § 1319(g)(8).

<sup>294</sup> See *Sackett v. EPA*, 132 S. Ct. 1367, 1373 (2012) (framing its analysis of preclusion around the “presumption favoring judicial review of administrative action” (quoting *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 349 (1984)) (internal quotation marks omitted)).

strue the statute to avoid due process concerns. It's not obvious that five Justices believed that the case presented such constitutional difficulties. The courts of appeals had unanimously rejected the same type of due process claim that the Sacketts raised.<sup>295</sup> Perhaps for that reason, the Court had just months earlier denied certiorari in a high-profile case that squarely presented the question.<sup>296</sup>

The presumption thus appeared to matter to the outcome. That outcome in turn matters on the ground. Consider *Sackett*'s scope. As EPA recently concluded, the Court's reasoning is not restricted to the Clean Water Act. It applies with equal force to administrative enforcement orders issued under nearly all of the major environmental statutes.<sup>297</sup> After *Sackett*, the rate of issuance of these enforcement orders has predictably declined. To compensate, EPA now issues more "notices of violation" (NOVs) to inform people about potential violations of the Clean Water Act. By itself, this shift to a more informal posture may not change much: whether denominated a compliance order or an NOV, both serve the same functional purpose of identifying a violation, inducing compliance, and opening a line of communication with the agency. Violating a compliance order exposes a recipient to larger penalties, but not much else is different. That's why the Director of EPA's Water Enforcement Division has downplayed *Sackett*'s significance: "Internally, it's same old, same old."<sup>298</sup>

*Sackett* has nonetheless had two consequences worth noting. First, savvy litigants have invoked *Sackett* — and the presumption of reviewability — to argue that NOVs are *also* subject to immediate judicial review.<sup>299</sup> Although it remains to be seen whether the argument gets any traction, it is by no means frivolous. Its acceptance would se-

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<sup>295</sup> See, e.g., *S. Pines Assocs. v. United States*, 912 F.2d 713, 717 (4th Cir. 1990) (rejecting constitutional challenge to compliance order because recipients were "not subject to . . . penalties until EPA pursues an enforcement proceeding"). The Clean Air Act, 42 U.S.C. §§ 7401–7671q (2006 & Supp. V 2011) (CAA), and the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601–9675 (2006) (CERCLA), have functionally similar schemes for pre-enforcement compliance orders. Due process challenges to those schemes have likewise failed. See *Gen. Elec. Co. v. Jackson*, 610 F.3d 110, 113 (D.C. Cir. 2010) (CERCLA); *Union Elec. Co. v. EPA*, 593 F.2d 299, 304 (8th Cir. 1979) (CAA).

<sup>296</sup> See *Gen. Elec. Co. v. Jackson*, 131 S. Ct. 2959 (2011) (mem.), *denying cert. to* 610 F.3d 110.

<sup>297</sup> See Memorandum from Susan Shinkman, Dir., Office of Civil Enforcement, & Elliot J. Gilberg, Dir., Office of Site Remediation Enforcement, to EPA Regional Counsel (Mar. 21, 2013). The major exception is for administrative enforcement orders issued under CERCLA.

<sup>298</sup> Bridget DiCosmo, *Downplaying High Court Ruling, EPA Floats Options for CWA Enforcement*, INSIDEEPA.COM (May 7, 2012), <http://insideepa.com/Inside-EPA-General/Inside-EPA-Public-Content/downplaying-high-court-ruling-epa-floats-options-for-cwa-enforcement/menu-id-565.html>, archived at <http://perma.cc/FC7M-CRS9> (quoting Mark Pollins, Director, EPA Water Enforcement Division).

<sup>299</sup> See Principal Brief of Petitioners Luminant Generation Company LLC, and Energy Future Holdings Corp. at 53–60, *Luminant Generation Co. v. U.S. EPA*, No. 12-60694 (5th Cir. Jun. 12, 2013), archived at <http://perma.cc/HX7J-JMHE>.

riously compromise EPA's efforts to achieve compliance with environmental statutes at low cost.

Second, because compliance orders are supposed to be interim steps in the enforcement process, they typically issue before EPA has resolved whether it will file a civil complaint in the face of intransigence. When a compliance order is challenged, however, EPA must immediately confront that choice. If it doesn't file a compulsory counterclaim seeking penalties, the agency won't be able to bring the case later. Any future EPA action would involve the same transaction or occurrence as the litigation over the validity of the compliance order and would hence be precluded.<sup>300</sup> If the agency does file a counterclaim, however, it may find itself litigating a case that — but for judicial review of the compliance orders — would either have been resolved through voluntary compliance or, on further review, dropped altogether. Either way, this dynamic complicates the agency's efforts to use compliance orders to incrementally escalate the threat of enforcement without expending the resources of bringing (or defending) a lawsuit.

### C. *Abandoning the Presumption of Reviewability*

Because it is unjustified in principle and harmful in practice, the presumption of reviewability should be scrapped. To be more precise: the federal courts should end the judge-made practice of selecting a second- or third-best interpretation of a statute just because that interpretation permits review. The APA's default rule would remain in place. As such, judicial review would still be available where the traditional tools of construction have been exhausted and the statute in question, fairly read, either does not preclude review or remains ambiguous on that point. Likewise, the canon of constitutional avoidance would continue to help in those rare cases where the preclusion of review would raise serious constitutional concerns.

How would this new regime play out on the ground? To begin with, the courts would stop organizing their statutory analysis around a "strong" presumption that can be rebutted only by "clear and convincing" statutory evidence. Invoking the presumption at the outset of the statutory analysis, as courts almost always do,<sup>301</sup> frames preclusion as a deviation from a powerful norm. That framing orients the courts away from their usual task of giving the statute the fairest construction

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<sup>300</sup> See FED. R. CIV. P. 13(a).

<sup>301</sup> See, e.g., *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986) ("We begin with the strong presumption that Congress intends judicial review of administrative action."); *COMSAT Corp. v. FCC*, 114 F.3d 223, 226 (D.C. Cir. 1997) ("As with most administrative agency decisions, we start with the assumption that there is a 'strong presumption' of reviewability." (quoting *Bowen*, 476 U.S. at 670)).

possible. Discarding the presumption of reviewability would allow the preclusion inquiry to start from a neutral point.

The degree to which abandoning the presumption would make a difference to case outcomes would depend on the willingness of courts to infer preclusion from statutory structure. Take, for example, a statute that explicitly subjects one agency action to judicial review but remains silent as to another. What should the courts make of that? Does it suggest a congressional intent to shield the unprovided-for action from judicial review? Or is it impossible to say what Congress meant? Resolving the ambiguity will demand close examination of statutory text and structure. Silence is more likely to signify preclusion where the unprovided-for agency action is an obvious member of a class of actions to which Congress has devoted attention<sup>302</sup> and where judicial review would interfere in the operation of the regulatory or administrative scheme.<sup>303</sup> As with most questions of statutory interpretation, there will be no one-size-fits-all answer. Much will depend on context.

Where that context cannot dissolve ambiguity about whether Congress meant to preclude review, the APA provides the rule of decision and would authorize judicial review. To be clear, judges will differ over whether Congress's preclusive intent can be discerned from text that does not address the question directly. That variability makes it difficult to know just how often the presumption's abandonment will change case outcomes. Even acknowledging the context-sensitive nature of the inquiry, however, it's not difficult to identify cases that would probably have come out differently in the absence of the presumption.<sup>304</sup> *Sackett* is only the latest and most salient example.

#### D. Rethinking Preenforcement Review

Finally, the feebleness of the justifications for the presumption of reviewability should perhaps unsettle our commitment to preenforcement review of agency rules. Preenforcement review — which is to say, judicial review of an agency rule before the agency moves to enforce it in an adjudication — is today widely accepted as an essential feature of the administrative law landscape. Before the Supreme Court's 1967 decision in *Abbott Labs*, however, federal courts rarely

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<sup>302</sup> See *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003) (“[T]he canon *expressio unius est exclusio alterius* does not apply to every statutory listing or grouping; it has force only when the items expressed are members of an ‘associated group or series,’ justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence.” (quoting *United States v. Vonn*, 535 U.S. 55, 65 (2002))).

<sup>303</sup> See *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 351 (1984) (finding in the face of silence that “the congressional intent to preclude judicial review is ‘fairly discernible in the statutory scheme’” (quoting *Ass’n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 157 (1970))).

<sup>304</sup> See cases cited *supra* note 47 (collecting partial list of cases).

entertained preenforcement challenges to agency rules, often rejecting them as unripe.<sup>305</sup> Only after *Abbott Labs* did the courts embrace the practice of presuming that Congress, when it was silent on the question, meant to authorize preenforcement review.<sup>306</sup> Significantly, the Court's analysis in *Abbott Labs* centered on "the basic presumption of judicial review," which it linked to longstanding judicial practice and the enactment of the APA.<sup>307</sup>

The outcome in *Abbott Labs* was far from inevitable. In a dissent joined by two other Justices, Justice Fortas expressed bewilderment at the Court's announcement of the "new and startling" doctrine that the courts would assume the availability of preenforcement review absent clear and convincing evidence that Congress meant to preclude it.<sup>308</sup> "As authority for this," Fortas wrote, "the Court produces little support."<sup>309</sup> Fortas feared that the Court's decision would provide "a license for mischief because it authorizes aggression which is richly rewarded by delay in the subjection of private interests to programs which Congress believes to be required in the public interest."<sup>310</sup>

A number of scholars have echoed Fortas's concerns. Not long after *Abbott Labs* came down, Professor Paul Verkuil raised the worrisome possibility that preenforcement review would lead to a new era of invigorated judicial oversight of informal rulemaking, including the imposition of onerous obligations associated with producing an extensive written record.<sup>311</sup> The rise of hard-look review of rulemaking and persistent worries about agency ossification have seemed to bear out Verkuil's concerns.<sup>312</sup> Sounding a similar note, Mashaw has urged that the ready availability of preenforcement review provokes abstract litigation over "a laundry list of potential frailties in a rule's substantive content or procedural regularity" and encourages regulated entities to challenge agency rules even where, if they were put to the choice of complying or risking an enforcement proceeding, they might have complied without ever filing suit.<sup>313</sup> He concludes that "[a] period of attempted compliance, experimentation, and negotiation between

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<sup>305</sup> See Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 89 (1995) ("Before *Abbott*, most rules could be reviewed only in the context of an enforcement action.").

<sup>306</sup> *Id.*

<sup>307</sup> *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967).

<sup>308</sup> *Gardner v. Toilet Goods Ass'n*, 387 U.S. 167, 183 (1967) (Fortas, J., concurring in part and dissenting in part).

<sup>309</sup> *Id.* at 184.

<sup>310</sup> *Id.* at 183.

<sup>311</sup> See Paul R. Verkuil, *Judicial Review of Informal Rulemaking*, 60 VA. L. REV. 185, 205 (1974).

<sup>312</sup> See Pierce, *supra* note 305, at 89 ("*Abbott* played a major role leading to ossification of rulemaking.").

<sup>313</sup> JERRY L. MASHAW, *GREED, CHAOS, AND GOVERNANCE* 178 (1997); see *id.* at 177-78.

the agency and affected parties, induced by the unavailability of immediate review, might well produce better rules, swifter compliance, and less litigation.”<sup>314</sup> Exposure of the weak analytical foundations of *Abbott Labs* should prompt further reflection about the wisdom of the presumption of preenforcement review.

That’s not to say that the presumption should be discarded. Preenforcement review is entrenched in administrative law, the costs of precluding such review to regulated entities and beneficiaries would be substantial, and judicial curtailment of preenforcement review would be difficult without congressional support.

Still, the courts should be open to the possibility of dismissing a greater number of preenforcement challenges as unripe.<sup>315</sup> The suggestion is a tentative one, but there is no hard doctrinal obstacle to its implementation. The ripeness inquiry that the Court articulated in *Abbott Labs* is malleable enough to accommodate a more skeptical judicial attitude toward facial attacks on agency rules.<sup>316</sup> Dismissal would be most appropriate where compliance costs appear modest, where precipitate intervention would frustrate an agency’s effort to address a multifaceted problem, and where the gravamen of the challenge turns on predictions about the future.<sup>317</sup> (Heightened skepticism would also jibe with the Supreme Court’s stated reluctance to entertain facial constitutional challenges to congressional statutes.<sup>318</sup>) More optimistically, perhaps an invigoration of the ripeness doctrine would sensitize Congress to the option of foreclosing preenforcement review where too-hasty court intervention could frustrate important governmental objectives.<sup>319</sup>

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<sup>314</sup> *Id.* at 179. *But see* Mark Seidenfeld, *Playing Games with the Timing of Judicial Review: An Evaluation of Proposals to Restrict Pre-Enforcement Review of Agency Rules*, 58 OHIO ST. L.J. 85, 97–98 (1997) (arguing that Mashaw’s analysis “is incomplete,” *id.* at 97, and “fails to address when compliance with a rule might be detrimental rather than beneficial,” *id.*).

<sup>315</sup> *But see* Duffy, *supra* note 204, at 162–81 (criticizing ripeness as an illegitimate federal common law norm that ought to have been supplanted by the APA).

<sup>316</sup> *See* Ronald M. Levin, *The Story of the Abbott Labs Trilogy: The Seeds of the Ripeness Doctrine*, in ADMINISTRATIVE LAW STORIES 477 (Peter Strauss ed., 2006) (noting that a “more measured reading” of *Abbott Labs* “helps to explain why the courts do continue to deny direct review of rules from time to time”).

<sup>317</sup> *See* Ohio Forestry Ass’n v. Sierra Club, 523 U.S. 726, 733 (1998) (stating that the ripeness inquiry turns on “(1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented”).

<sup>318</sup> *See* Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 450 (2008) (“Facial challenges are disfavored . . .”).

<sup>319</sup> *See* Seidenfeld, *supra* note 314, at 124 (“[C]oncerns about ad hoc judicial determinations of the timing of review suggest[] that Congress may be in a better position to preclude pre-enforcement challenges to rules under particular statutory provisions.”).



## IV. CONCLUSION

The presumption of reviewability has not been around for three hundred years, it finds no source in the Constitution or the APA, and it does not make for good policy. Congress can decide, and usually does decide, whether opening the courts to those aggrieved by agency action strikes the appropriate balance between competing concerns of fairness, political accountability, and agency efficiency. Where the best construction of a statute indicates that Congress meant to preclude judicial review, the courts should no longer insist that their participation is indispensable.