

The First Branch: How Congress Manipulates Judicial Review of Administrative Action

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ABSTRACT: The text of the U.S. Constitution is a result of a political compromise that granted Congress the authority to define the jurisdiction of all inferior federal courts and the appellate jurisdiction of the Supreme Court. Although important scholarship has explored the parameters under which Congress may exercise this authority, few studies have examined congressional use of federal jurisdiction-stripping provisions as part of a larger statutory framework designed to control the administrative state.

This Article provides a theoretical and empirical account of the circumstances that motivate Congress to restrict the jurisdiction of federal courts to review administrative action. Notably, Congress engages in jurisdiction stripping in this context to accommodate uncertainty regarding how legislative delegation to the executive branch will result in real-world outcomes.

Using empirical data on the jurisdiction-stripping provisions included in all significant legislation enacted after the passage of the Administrative Procedure Act through 2016, this Article demonstrates that Congress constructs judicial review based on three things: political influence, political uncertainty,

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and ideology. Specifically, Congress is more likely to strip federal courts of their ability to review the final administrative actions of the same agencies that are protected by statute from political review. These findings have profound implications for those who consider the constitutional context in which the administrative state operates.

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[T]he organization of the judicial power, the definition and distribution of the subjects of jurisdiction in the federal tribunals, and the modes of their action and authority, have been, and of right must be, the work of the legislature.¹

INTRODUCTION

In the first one hundred days of his second term in office, President Donald J. Trump issued more than 140 executive orders² and engaged in a flurry of activity designed to block the work of long-established federal agencies such as the Department of the Treasury and the U.S. Agency for International Development (“USAID”), as well as newer agencies like the Consumer Financial Protection Bureau.³ President Trump’s plans to reduce the size and power of the federal bureaucracy through such actions led millions of constituents to contact their members of Congress⁴ and prompted interested persons across federal judicial districts to petition the courts to “call[] balls and strikes and referee[]” the President’s actions.⁵ At the same time, Vice President J.D. Vance posted on X: “Judges aren’t allowed to control the executive’s legitimate power.”⁶

At their core, President Trump’s actions and the public’s response to his actions reflect concerns from those across the political ideological spectrum over both the structure and responsiveness of the administrative state and a reliance on federal courts to adjudicate the legal questions that arise from those concerns. Indeed, in the first months after Trump’s 2025 inauguration,

1. *Cary v. Curtis*, 44 U.S. (3 How.) 236, 245 (1845).

2. See Nat’l Archives & Recs. Admin., *2025 Donald J. Trump Executive Orders*, FED. REG., <https://www.federalregister.gov/presidential-documents/executive-orders/donald-trump/2025> [https://perma.cc/A38X-LCCR] (displaying 143 orders signed from January 20, 2025 through April 30, 2025 (Executive Orders 14147–14289)).

3. See Nigel Chiwaya et al., *Tracking Trump’s Executive Orders*, NBC NEWS (Feb. 20, 2025, 3:02 PM), <https://www.nbcnews.com/data-graphics/tracking-trumps-executive-orders-rcna189571> [https://perma.cc/P25W-974B] (search orders by topic or keyword in the search box attached to dynamic table); Avery Lotz & Sareen Habeshian, *Tracking Trump’s Executive Actions by Category*, AXIOS (Feb. 20, 2025), <https://www.axios.com/2025/02/11/trumps-executive-orders-memos> [https://perma.cc/RXB4-JDCG]; Jake Pearson, *Trump Wants to Crack Down on “Debanking,” but He’s Dismantling a Regulator that Was Doing Just That*, PROPUBLICA (Sept. 9, 2025, 5:00 AM), <https://www.propublica.org/article/trump-debanking-executive-order-cfpb-discrimination-banking> [https://perma.cc/UMR7-KDHB].

4. Maya C. Miller, *As Trump and Musk Upend Washington, Congressional Phones Can’t Keep Up*, N.Y. TIMES (Feb. 7, 2025), <https://www.nytimes.com/2025/02/07/us/politics/congressional-phone-lines-trump-musk.html> (on file with the *Iowa Law Review*).

5. Allison Pecorin & Emily Chang, *Some Republicans Defend Courts Against Trump Administration Attacks*, ABC NEWS (Feb. 11, 2025, 10:44 AM), <https://abcnews.go.com/Politics/republicans-defend-courts-trump-administrations-efforts-push-aside/story?id=118687545> [https://perma.cc/YJ3P-MYQH] (quoting Senate Majority Leader John Thune).

6. JD Vance (@JDVance), X (Feb. 9, 2025, 9:13 AM), <https://x.com/jdvance/status/1888607143030391287> [https://perma.cc/X3XE-VTEH].

both sides of the aisle framed litigation arising out of recent executive action as causing a constitutional crisis.⁷

Although the Trump Administration has pushed debates over the relationship between the executive and judiciary to the forefront of public discussion, questions regarding the balance of power between the two branches have been brewing for decades, if not centuries.⁸

For example, in his *City of Arlington v. Federal Communications Commission* dissent in 2013, Supreme Court Chief Justice John Roberts expressed skepticism of the array of administrative structures that exist in the executive branch, proclaimed that “[t]he administrative state with its reams of regulations would leave [the Framers] rubbing their eyes,” and noted the importance of judicial oversight of federal agency decision-making.⁹ Two hundred ten years earlier, while adjudicating claims arising from the presidential appointment and Senate confirmation process, Chief Justice John Marshall famously declared in the landmark decision of *Marbury v. Madison* that it is “the province and duty of the judicial department to say what the law is.”¹⁰

But what happens if Congress decides to strip federal courts of their jurisdiction to review administrative action?

In designing the Constitution, the Framers made a political compromise to grant Congress authority over the jurisdiction of all inferior federal courts, as well as the appellate jurisdiction of the Supreme Court.¹¹ Using

7. Compare Alexandra Marquez, *Sen. Chris Van Hollen Says U.S. Is in a ‘Constitutional Crisis’ as Trump Disregards Court Orders in the Abrego Garcia Case*, NBC NEWS (April 20, 2025, 10:50 AM), <https://www.nbcnews.com/politics/trump-administration/chris-van-hollen-america-constitutional-crisis-trump-abrego-garcia-rcna202018> [<https://perma.cc/YY4R-H7EL>], with Elena Moore, *As Judges Block Broad Actions, White House Says Courts Causing Constitutional Crisis*, NPR (Feb. 12, 2025, 3:51 PM), <https://www.npr.org/2025/02/12/nx-s1-5294666/trump-white-house-constitutional-crisis-judges> [<https://perma.cc/YP73-EDEE>].

8. For example, President “Thomas Jefferson was famously distrustful of the federal judiciary.” Jerry L. Mashaw, *Reluctant Nationalists: Federal Administration and Administrative Law in the Republican Era, 1801-1829*, 116 YALE L.J. 1636, 1675 (2007).

9. *City of Arlington v. FCC*, 569 U.S. 290, 313–17 (2013) (Roberts, C.J., dissenting) (quoting *Alden v. Maine*, 527 U.S. 706, 807 (1999) (Souter, J., dissenting)).

10. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

11. Lloyd C. Anderson, *Congressional Control over the Jurisdiction of the Federal Courts: A New Threat to James Madison’s Compromise*, 39 BRANDEIS L.J. 417, 419–20 (2000); see U.S. CONST. art. III, §§ 1–2; see also *Turner v. Bank of N. Am.*, 4 U.S. (4 Dall.) 8, 10 n.1 (1799) (holding Congress has power to prescribe the limits of the federal judicial power); *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 448–49 (1850); *Ex parte McCordle*, 74 U.S. (7 Wall.) 506, 512–13 (1868) (“The principle that the affirmation of appellate jurisdiction implies the negation of all such jurisdiction not affirmed having been thus established; it was an almost necessary consequence that acts of Congress, providing for the exercise of jurisdiction, should come to be spoken of as acts granting jurisdiction, and not as acts making exceptions to the constitutional grant of it.”); *United States v. Klein*, 80 U.S. (13 Wall.) 128, 145 (1871) (“Undoubtedly the legislature has complete control over the organization and existence of [the Court of Claims] and may confer or withhold the right of appeal from its decisions.”); *Lockerty v. Phillips*, 319 U.S. 182, 187 (1943) (“All federal courts, other than the Supreme Court, derive their jurisdiction wholly from the exercise of the authority to ‘ordain and establish’ inferior courts, conferred on Congress by Article III, § 1, of

this authority, Congress may design agency- or program-specific statutes to preclude judicial review so long as those statutes provide those affected by administrative action an opportunity to be heard that satisfies constitutional due process requirements.¹²

In this Article, we provide a theoretical and empirical account of the circumstances under which Congress does so. We demonstrate that Congress enacts statutory provisions to strip some or all federal courts of their ability to adjudicate claims arising out of final agency actions (“jurisdiction stripping”) as a result of political compromises that reflect important, particularized policy choices and account for uncertainty in how federal agencies will use their authority in the future.

This Article begins by discussing the evolution of Congress’s approach to designing judicial review of administrative action. Part I’s discussion illustrates that, before enactment of the Administrative Procedure Act (“APA”), federal court review of executive decision-making arose as a result of remedies afforded by common law and equity. However, as the responsibilities of the national government grew and Congress began to experiment with federal agency design, recurring litigation and differential court interpretations of the constitutional powers of each branch of government to review administrative decision-making prompted the legislature to use the APA to provide default provisions regulating judicial review of final agency action. Although these provisions still are the default today, Congress can and does enact statutes that deviate from the APA’s default and preclude review of administrative action. Part I provides the current constitutional rules that govern Congress’s authority to engage in such jurisdiction stripping.

Given those rules, Part II places judicial review of administrative action in the context of the American constitutional system of shared powers. Specifically, Part II contemplates a triad of factors that affect legislative design of judicial review beyond the APA: (1) the dynamics of the legislative process; (2) congressional uncertainty over how the legislature’s delegation decisions

the Constitution.”); William R. Casto, *The First Congress’s Understanding of Its Authority over the Federal Courts’ Jurisdiction*, 26 B.C. L. REV. 1101, 1126 (1985) (“[T]he framers understood the Constitution to grant Congress extensive legislative discretion over the jurisdiction of the federal courts.”); Bruce A. Ragsdale, *Ratification Debates on the Judiciary*, in 1 DEBATES ON THE FEDERAL JUDICIARY: A DOCUMENTARY HISTORY 25–26 (Bruce A. Ragsdale ed., 2013) (discussing Anti-Federalist concerns about a federal judiciary).

12. *Yakus v. United States*, 321 U.S. 414, 444 (1944) (“There is no constitutional requirement that that test [of the validity of a regulation] be made in one tribunal rather than in another, so long as there is an opportunity to be heard and for judicial review which satisfies the demands of due process, as is the case here.”); *see also* 5 U.S.C. § 701(a) (2018) (making the Administrative Procedure Act, providing for judicial review of agency action, inapplicable to statutes that “preclude judicial review” or “commit[] [agency action] to agency discretion”); 28 U.S.C. § 1331 (conferring federal question jurisdiction on the district courts); *Heckler v. Chaney*, 470 U.S. 821, 828–33 (1985) (construing 5 U.S.C. § 701(a) and concluding “an agency’s decision not to take enforcement action should be presumed immune from judicial review under § 701(a)(2)”; *Webster v. Doe*, 486 U.S. 592, 599–600 (1988) (construing 5 U.S.C. § 701(a)).

will play out through administrative implementation; and (3) the likelihood that interested persons will challenge that implementation in the federal courts. Building upon this triad, Part II then provides a theoretical model of congressional decisions to restrict federal court jurisdiction over final agency action.

Part III evaluates whether the theoretical depictions of Part II have empirical support. Using empirical data on the jurisdiction-stripping provisions included in all significant legislation enacted after the passage of the APA through 2016, Part III breaks these provisions down by type, policy area, and time period. The empirical patterns presented in this Part provide initial support for Part II's theoretical claim that political uncertainty shapes how Congress designs judicial review of agency action. In addition, it underscores the need for expert implementation of delegated authority and the corresponding benefits and costs of providing review of such implementation by both elected officials and unelected federal judges.

Part IV then utilizes statistical models to estimate when Congress is most likely to engage in jurisdiction stripping. These models provide statistically and substantively significant evidence that, when engaging in jurisdiction stripping, Congress accounts for federal agency structure and policy, political volatility, and the makeup of all three branches of government. Notably, Part IV suggests that Congress is more likely to strip federal courts of their ability to review final administrative action when the legislature delegates to agencies *whose same actions are protected from political review*.

These findings, along with the analyses in Parts I, II, and III, have profound implications for those who consider the constitutional context in which the administrative state operates.

I. THE HISTORICAL AND CURRENT DESIGN OF JUDICIAL REVIEW OF ADMINISTRATIVE ACTION

Under the Constitution, all federal courts other than the Supreme Court derive their jurisdiction from Congress's power to create and establish inferior courts.¹³ Pursuant to this authority, Congress may dictate federal jurisdiction

13. See U.S. CONST. art. III, § 1. Of course, there are other provisions of the Constitution that limit congressional authority with respect to adjusting the jurisdiction of federal courts. For example, constitutional restrictions on bills of attainder and the suspension of habeas corpus, as well as due process and federalism considerations, factor into determinations of the expanse of congressional power in this area. We largely leave considerations of these aspects of judicial review to other scholars. See, e.g., Joseph Blocher & Brandon L. Garrett, *Fact Stripping*, 73 DUKE L.J. 1, 45-49 (2023) (examining the obstacles the requirements of due process and other constitutional rights provisions place on congressional design of judicial review); James E. Pfander, *Federal Supremacy, State Court Inferiority, and the Constitutionality of Jurisdiction-Stripping Legislation*, 101 NW. U. L. REV. 191, 236 (2007) (noting that "Congress must preserve a measure of supreme judicial oversight" even when assigning state courts jurisdiction over federal causes of action); Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated*

in a manner that is consistent with the public good.¹⁴ In doing so, Congress may confer “limited, concurrent, or exclusive” jurisdiction on a federal court or even withhold jurisdiction altogether.¹⁵

Put another way, federal district, circuit, and specialized courts have no authority except that provided by statute and cannot entertain or decide upon cases outside of that jurisdiction.¹⁶ This includes review of administrative action.

In this Part, we provide a brief historical overview of how Congress has conceptualized and manipulated judicial review over time. We divide our overview into three sections that summarize legislative design of judicial review of administrative action: (1) before the enactment of the APA; (2) at the time Congress passed the APA and in the decades after; and (3) today. Although fairly detailed, our discussion is not intended to be a comprehensive account of historical developments in statutory law that limits federal court review of administrative action. Instead, the overview is designed to provide qualitative context for theoretical consideration of the factors that influence Congress when balancing a desire to capitalize on agency expertise with a need to provide accountability mechanisms that ensure administrators adhere to constitutional and statutory law. In Section I.D, we provide observations regarding how the legislature uses judicial review within this context.

A. BEFORE THE ADMINISTRATIVE PROCEDURE ACT: A JUMBLED MESS

Historical records suggest that, as a matter of policy, the Framers designed the Constitution to grant Congress some degree of discretion over federal court jurisdiction.¹⁷ With respect to this grant of authority, the Constitution’s final text was a political compromise resulting from broader concerns over an independent federal judiciary removed from the people and the need for federal protections of established legal rights and procedures.¹⁸ Although judicial independence was necessary to interpret the Constitution, that independence created a risk that the courts would usurp the will of the political branches of government.¹⁹ Thus, the Framers contemplated that

Guide to the Ongoing Debate, 36 STAN. L. REV. 895, 900 (1984) (discussing relevant constitutional provisions that affect congressional control of federal court jurisdiction).

14. *Lockerty*, 319 U.S. at 187.

15. *Sheldon*, 49 U.S. at 449; *Lockerty*, 319 U.S. at 187. Contemporary debate over the exercise of this power has centered on the meaning of Article III’s Vesting Clause, Article III’s grant of authority to Congress over the jurisdiction of the lower courts and the Supreme Court’s appellate jurisdiction, and the meaning of the selective use and omission of the word “all” in Article III, Section 2. Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1159–60 (1992).

16. *Turner*, 4 U.S. at 10 n.1; *Sheldon*, 49 U.S. at 449; *McCardle*, 74 U.S. at 512–14; *Klein*, 80 U.S. at 145.

17. Casto, *supra* note 11, at 1126.

18. Anderson, *supra* note 11, at 420; Ragsdale, *supra* note 11, at 25–26.

19. MARTIN H. REDISH, THE CONSTITUTION AS POLITICAL STRUCTURE 7–8 (1995); *see also* THE FEDERALIST NO. 78, at 493 (Alexander Hamilton) (Benjamin Fletcher Wright ed., Harvard

Congress, as the branch with direct connection to local constituencies, would be in the best position to make institutional decisions to adjust federal court jurisdiction in light of changing circumstances.²⁰

In the early years of the Republic, litigation over Congress's ability to do so and larger questions about the constitutional power of the judiciary overwhelmed the Supreme Court's docket.²¹ As Congress and the Court navigated the parameters of each branch's constitutional authority, there was little contemplation by the legislature regarding how these constitutional foundations would play out with respect to congressional design of judicial review of executive action.

As a result, any federal court review of administrative decision-making arose as a result of remedies afforded by common law and equity.²² Like the availability of federal court review itself, the nature of judicial consideration of administrative action also varied by the form of action under which aggrieved parties petitioned the courts, and therefore differed across policy areas—customs, navigation, public lands, patents, etc.²³ The only commonality across cases was a tendency of the courts to consider the reviewability of administrative action within common law principles.²⁴

As the executive branch grew in size and authority, the differential nature of judicial review became problematic for public administration. This was particularly true as Congress began to design agencies with different administrative structures and as those agencies began to innovate in their

Univ. Press 1961) ("It can be of no weight to say that the courts, on the pretense of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature.").

20. See Paul M. Bator, *Congressional Power over the Jurisdiction of the Federal Courts*, 27 VILL. L. REV. 1030, 1031 (1982); Casto, *supra* note 11, at 1126; Martin H. Redish & Curtis E. Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. PA. L. REV. 45, 47 (1975). In his foundational work on the central role served by the structural provisions of the Constitution, Professor Redish notes that, theoretically, this places the federal judiciary in a difficult position. REDISH, *supra* note 19, at 8–9 (recognizing that, due to its independence, the federal "judiciary derives no logical or moral authority to invalidate the actions of the [political] branches on grounds other than inconsistency with constitutional dictates").

21. See generally *Wiscart v. Dauchy*, 3 U.S. (3 Dall.) 321 (1796); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); *Stuart v. Laird*, 5 U.S. (1 Cranch) 299 (1803); *Hepburn v. Ellzey*, 6 U.S. (2 Cranch) 445 (1805); *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807); *Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738 (1824); *Am. Ins. Co. v. 356 Bales of Cotton*, 26 U.S. (1 Pet.) 511 (1828). See also David P. Currie, *The Constitution in the Supreme Court: The Powers of the Federal Courts, 1801-1835*, 49 U. CHI. L. REV. 646, 650 (1982) ("Issues of federal jurisdiction dominated the Court's constitutional docket until 1810 . . .").

22. Frederic P. Lee, *The Origins of Judicial Control of Federal Executive Action*, 36 GEO. L.J. 287, 295 (1948).

23. See Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 952–53 (2011).

24. See Nathan Isaacs, *Judicial Review of Administrative Findings*, 30 YALE L.J. 781, 785–86 (1921).

implementation of delegated authority.²⁵ On one hand, Congress needed the judiciary to assess the validity of agency orders and provide a mechanism for enforcement.²⁶ On the other, the legislature recognized that federal courts (and particularly lower courts) might not have the substantive expertise required to evaluate such orders or the resources to handle the proliferation of agency decisions.²⁷

Much of Congress's experimentation with the appropriate solution to these dilemmas occurred within the context of two independent regulatory commissions—the Interstate Commerce Commission (“ICC”) and the Federal Trade Commission (“FTC”).²⁸ For example, in the early decades of the ICC's existence, Congress enacted several different laws adjusting judicial review of the Commission's orders.²⁹ Among the most notable was a 1910 act creating a “commerce court” to have exclusive judicial review over cases involving ICC final orders and precluding federal district and circuit court review from appeals of those orders.³⁰ Congress abolished the court three years later,³¹ in part because the court lacked the perception of apolitical, judicial insulation and was forced to wade into high-stakes battles between the President, Congress, and their supporting political coalitions.³²

The ultimate model for judicial review established through experimentation with the ICC—reserving questions of fact and mixed questions of law and fact for the Commission and relying on federal courts for constitutional determinations and other “pure questions of law”—served as a baseline for judicial review of FTC decision-making.³³ However, in their review of

25. See Daniel Carpenter, *The Evolution of National Bureaucracy in the United States*, in *THE EXECUTIVE BRANCH* 41, 55–56 (Joel D. Aberbach & Mark A. Peterson eds., 2005) (describing the early growth of the bureaucracy and executive agencies as policymaking agents of Congress).

26. Orrin B. Evans, *Historical Jurisdiction of the Federal Courts to Review Federal Administrative Action*, 31 *IOWA L. REV.* 369, 369–71 (1946).

27. See *id.* at 371.

28. See, e.g., Interstate Commerce Act, Pub. L. No. 49-104, 24 Stat. 379 (1887); Federal Trade Commission Act, Pub. L. No. 63-203, 38 Stat. 717 (1914); CARL MCFARLAND, *JUDICIAL CONTROL OF THE FEDERAL TRADE COMMISSION AND THE INTERSTATE COMMERCE COMMISSION, 1920-1930*, at 13–14 (1933).

29. E.g., Expediting Act, Pub. L. No. 57-82, 32 Stat. 823 (1903); Hepburn Act, Pub. L. No. 59-337, 34 Stat. 584, 590 (1906); Urgent Deficiencies Act, Pub. L. No. 63-32, 38 Stat. 208 (1913); see also Eugene D. Anderson, *Judicial Review of Decisions of the Interstate Commerce Commission*, 31 *GEO. WASH. L. REV.* 277, 278 (1962) (describing changes to the mechanics of appeal of ICC decisions); Milton Handler, *The Constitutionality of Investigations by the Federal Trade Commission: I*, 28 *COLUM. L. REV.* 708, 710 (1928) (noting antagonism of the courts to the activities of the FTC); A.M. Tollefson, *Judicial Review of the Decisions of the Interstate Commerce Commission*, 11 *MINN. L. REV.* 504, 506 (1927) (describing judicial review of ICC orders after 1906).

30. Mann–Elkins Act, Pub. L. No. 61-218, 36 Stat. 539 (1910).

31. Urgent Deficiencies Act, Pub. L. No. 63-32, 38 Stat. 208, 219 (1913).

32. George E. Dix, *The Death of the Commerce Court: A Study in Institutional Weakness*, 8 *AM. J. LEGAL HIST.* 238, 239, 253 (1964).

33. Thomas W. Merrill, *The Origins of American-Style Judicial Review*, in *COMPARATIVE ADMINISTRATIVE LAW* 389, 402–03 (Susan Rose-Ackerman & Peter L. Lindseth eds., 2010).

constitutional questions involving the Commission, courts wrestled with foundational separation of powers, delegation, and procedural questions.³⁴ Court review over early FTC decision-making focused on Commission proceedings as a “new device in administrative machinery”³⁵ and worried that the judiciary would be forced to become involved in administrative matters, rather than those which were “judicial” in nature.³⁶

As the courts considered the appropriate extent of judicial review of both ICC and FTC actions, congressional debate over the matter centered around the need for efficient administration as well as concerns that, in exercising their authority to review Commission orders, federal courts made decisions based on their own ideological viewpoints, rather than on interpretation of policy laid out by Congress in statutory law.³⁷ At the same time, there was also debate regarding the structure of the Commissions, their broad economic regulatory missions, and their “departure from traditional legal processes grounded in the supremacy of the courts, because of severely practical considerations—the pressing need of prompt, continuous, flexible, and competent adjustments of technical and highly complicated relationships.”³⁸ Early challenges to the Commissions’ orders forced the district courts to make consequential rulings on the legislature’s constitutional authority to delegate power to the executive branch and innovate in designing administrative agencies as quasi-judicial fact finders.³⁹ Recurring litigation and the lower courts’ differential interpretations of each branch’s constitutional powers (including federal court jurisdiction to hear such claims) often led to the Supreme Court having to step in to rule repeatedly on the same issues.⁴⁰

To resolve this problem, Congress decided to preclude federal district courts from hearing cases involving orders by commissions and instead placed

34. *E.g.*, *Nat’l Harness Mfrs.’ Ass’n v. Fed. Trade Comm’n*, 268 F. 705, 707 (6th Cir. 1920) (holding the Federal Trade Commission Act did not unconstitutionally delegate judicial powers or confer invalid executive power upon the FTC); *Standard Oil Co. of N.Y. v. Fed. Trade Comm’n*, 273 F. 478, 481 (2d Cir. 1921) (explaining that it is for the courts, not the Commission, to determine as a matter of law what is in the statutory phrase “unfair method of competition”); *Fed. Trade Comm’n v. Beech-Nut Packing Co.*, 257 U.S. 441, 455–56 (1922) (holding the FTC exceeded its authority with respect to the breadth of one of its cease and desist orders).

35. *Fed. Trade Comm’n v. Gratz*, 253 U.S. 421, 432 (1920).

36. *See* Merrill, *supra* note 33, at 403–04 (describing early history of the FTC as “instructive” for broader considerations of the development of judicial review).

37. *E.g.*, GERARD C. HENDERSON, *THE FEDERAL TRADE COMMISSION: A STUDY IN ADMINISTRATIVE LAW AND PROCEDURE* 15–16 (1924).

38. I.L. Sharfman, *The Interstate Commerce Commission: An Appraisal*, 46 *YALE L.J.* 915, 919 (1937); *see also* Richard A. Posner, *The Federal Trade Commission*, 37 *U. CHI. L. REV.* 47, 49 (1969) (noting congressional belief that establishing the FTC as “a continuing body with specialized responsibility and broad powers . . . would promote [effective] and expeditious implementation of antitrust policy”).

39. *See, e.g.*, *Interstate Com. Comm’n v. Brimson*, 154 U.S. 447, 468–69 (1894).

40. *See, e.g.*, *Fed. Trade Comm’n v. Claire Furnace Co.*, 274 U.S. 160, 173–74 (1927).

review in the hands of the courts of appeals.⁴¹ This had the benefit of decreasing the number of courts involved in consequential cases and reducing delay in administrative implementation.

However, the New Deal era brought expansion of the federal government and growing constitutional and managerial concerns about executive action.⁴² Initial constitutional considerations involving judicial review, agency expertise, and administrative structure that had developed as the ICC and FTC exercised their delegated authority expanded throughout the administrative state.⁴³ By the end of the 1930s, the sheer number of disputes involving federal agencies and the persons they regulated would have overwhelmed the federal judiciary if all were litigated.⁴⁴ Those claims that did make it to federal court still arose out of differential common law remedies and therefore resulted in a stunning lack of regularity in terms of judicial review and enforcement of executive action.⁴⁵ They also raised lasting questions over the ability of Congress to delegate policy authority and design federal agencies.⁴⁶

These were the types of changing circumstances implicitly contemplated by the Framers when drafting the Constitution.⁴⁷ What was the proper

41. David P. Currie & Frank I. Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 COLUM. L. REV. 1, 5 (1975).

42. See, e.g., *United States v. Morton Salt Co.*, 338 U.S. 632, 644 (1950) (describing the danger of “administrators whose zeal” might “carr[y] them to excesses not contemplated in legislation creating their offices”); JOANNA L. GRISINGER, *THE UNWIELDY AMERICAN STATE: ADMINISTRATIVE POLITICS SINCE THE NEW DEAL* 17–31 (2012); JENNIFER L. SELIN & DAVID E. LEWIS, *SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES* 19–20 (2d ed. 2018). Indeed, historical statistics suggest that federal employment compounded from roughly 600,000 workers in 1933 to over 3 million in 1944. *HISTORICAL STATISTICS OF THE UNITED STATES* 5–127 (Carter et al. eds., 2006).

43. See FELIX FRANKFURTER, *THE PUBLIC AND ITS GOVERNMENT* 50–51 (1930) (contending that judicial review prevented administrative experimentation to address important social and economic issues); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 424 (1987) (arguing New Deal reformers believed that originalist interpretations of constitutional structure prevented the federal government from enacting policy to stabilize the economy). See generally *Fed. Trade Comm’n v. Gratz*, 253 U.S. 421 (1920); *Crowell v. Benson*, 285 U.S. 22 (1932); *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38 (1936); *Swayne & Hoyt, Ltd. v. United States*, 300 U.S. 297 (1937).

44. See O.R. McGuire, *Judicial Reviews of Administrative Decisions*, 26 GEO. L.J. 574, 578–80 (1938).

45. The problem of irregular judicial review was not exclusive to administrative action. Before 1934, there were no standardized rules of civil procedure. In 1934, Congress enacted the Rules Enabling Act, which authorized the Supreme Court to prescribe general rules of practice and procedure for the district and circuit courts. Rules Enabling Act, Pub. L. No. 73-415, 48 Stat. 1064 (1934). The Supreme Court first did so in 1937. JOANNA R. LAMPE, *CONG. RSCH. SERV.*, IF11557, *CONGRESS, THE JUDICIARY, AND CIVIL AND CRIMINAL PROCEDURE* 2 (2020).

46. See, e.g., *Myers v. United States*, 272 U.S. 52, 106 (1926); *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 404 (1928); *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 621, 626 (1935); *Pan. Refin. Co. v. Ryan*, 293 U.S. 388, 411–15 (1935); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30–32 (1937).

47. Of course, there was and still is much disagreement as to whether the New Deal expansion of executive power was consistent with the intent of the Framers.

relationship between the courts and administrative agencies in a shifting policy environment?⁴⁸ Congress needed to design a standardized system of judicial review of administrative action to accommodate the growing activities of the federal government in economic and social life.⁴⁹ Ultimately, it was up to the legislature to decide how to restrain executive implementation of statutes and provide federal courts with jurisdiction to review that implementation based on those restraints.⁵⁰

Yet how could Congress encourage judicial review to ensure the executive branch's adherence to constitutional and statutory law while, at the same time, preserving congressional design of administrative structure to capitalize on benefits of expert fact finding by federal agencies? Congressional and judicial engagement with this question is what gave rise to modern conceptions of administrative law.⁵¹

B. THE ADMINISTRATIVE PROCEDURE ACT: SOLUTION OR STARTING POINT?

In 1946, Congress passed the APA to prescribe fair procedures for federal agencies to follow when implementing their delegated authority.⁵² The enactment of the APA was a political compromise resulting from over a decade's worth of proposals to use legislation to control federal agencies,

48. Reuel E. Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 MICH. L. REV. 399, 401-02 (2007).

49. McGuire, *supra* note 44, at 586 ("The ever expanding activities of modern economic and social life have made indispensable the adoption of procedures more expeditious and better guided by specialized experience than any which the common law technique of the courts have, or could provide.").

50. See, e.g., *Lockerty v. Phillips*, 319 U.S. 182, 187-88 (1943) (upholding the constitutionality of provisions of the Emergency Price Control Act, which withdrew from district courts the authority to enjoin enforcement of price regulations by the Administrator of the Office of Price Administration); *Yakus v. United States*, 321 U.S. 414, 443 (1944) (recognizing that the exclusive statutory procedures set up by the Emergency Price Control Act for administrative and judicial review of regulations provided sufficiently adequate means of review).

51. See McGuire, *supra* note 44, at 589 (describing administrative law as separate from, inter alia, common law, equity, or admiralty law).

52. Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551-559). We recognize that, in this Article, we provide only a cursory description of the historical development of and justifications for the APA. We leave for future research analysis of jurisdiction-stripping provisions in the context of the legislative history of the APA. See generally Emily S. Bremer, *The Administrative Procedure Act: Failures, Successes, and Danger Ahead*, 98 NOTRE DAME L. REV. 1873 (2023) (exploring the compromises and goals of the APA in assessing the statute's successes and failures); Walter Gellhorn, *The Administrative Procedure Act: The Beginnings*, 72 VA. L. REV. 219 (1986) (providing a description of the legislative proposals that preceded the APA); George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557 (1996) (describing the political dynamics that led to the passage of the APA); McNollgast, *The Political Origins of the Administrative Procedure Act*, 15 J.L. ECON. & ORG. 180 (1999) (presenting the APA as a reflection of the desire to "hard wire" New Deal policies in federal agencies).

rather than rely on the possibility of judicial review to check executive action.⁵³ Specifically, the Act's judicial review provisions responded to the "hodge-podge of case law" that governed federal court review of agency decision-making at the time.⁵⁴

The judicial review provisions of the APA balanced practical realities in reconciling constitutional principles, including democratic accountability and the rule of law, with the need for dynamic administrative action.⁵⁵ Two things were abundantly clear to Congress when constructing judicial review. First, both agencies and courts tended to interpret judicial authority in their own ways. Because agencies wanted to avoid costly litigation and the potential for federal courts to reject their decision-making, the executive branch generally advocated for restrictions in federal court jurisdiction. This advocacy reinforced broader political arguments that courts, by nature of the types of claims that parties brought before them, lacked a cohesive vision of the administrative state and therefore undermined legislative intent.⁵⁶ The different ways courts interpreted the law also led some in the legislature to worry that judges used judicial review to supplant policy decisions made by the political branches of government.⁵⁷

Second, Congress recognized that courts had limited expertise and resources. Legislators did not want to overburden the judiciary with cases that required specialized expertise or to create needless delay in agency decision-making resulting from litigation.⁵⁸ Furthermore, drafting legislation to anticipate the varying claims interested persons could bring against the government was time-consuming and ineffective.⁵⁹

Accounting for both of these concerns, the enacted version of the APA expressly specified that interested persons adversely affected by final (as opposed to preliminary, procedural, or intermediate) agency action were entitled to

53. Shepherd, *supra* note 52, at 1565; *see, e.g.*, Bremer, *supra* note 52, at 1873; Gellhorn, *supra* note 52, at 232–33; McNollgast, *supra* note 52, at 195–201.

54. Eric Biber, *The Importance of Resource Allocation in Administrative Law*, 60 ADMIN. L. REV. 1, 7 (2008).

55. *Bowen v. Mich. Acad. of Fam. Physicians*, 476 U.S. 667, 670–71 (1986); William N. Eskridge, Jr. & John Ferejohn, *The APA as a Super-Statute: Deep Compromise and Judicial Review of Notice-and-Comment Rulemaking*, 98 NOTRE DAME L. REV. 1893, 1903 (2023).

56. *Report of the Special Committee on Administrative Law*, in 62 ANNUAL REPORT OF THE AMERICAN BAR ASSOCIATION 789, 795–96 (1937); *see also* John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 130 (1998).

57. Shepherd, *supra* note 52, at 1605 (citing H.R. REP. NO. 76-1149, at 12 (1940)).

58. John Dickinson, *Administrative Procedure Act: Scope and Grounds of Broadened Judicial Review*, 33 A.B.A. J. 434, 435 (1947); *see also* Shepherd, *supra* note 52, at 1605 (citing H.R. REP. NO. 76-1149, at 3).

59. *See* David H. Rosenbloom, 1946: *Framing a Lasting Congressional Response to the Administrative State*, 50 ADMIN. L. REV. 173, 182–83 (1998) (discussing congressional attempts to draft common law tort compensation for persons injured by federal employees).

judicial review by any court of competent jurisdiction.⁶⁰ Importantly, the APA's provisions governing judicial review codified a presumption of federal court review of administrative action but acknowledged the possibility that Congress would adjust court jurisdiction through agency- or policy-specific legislation.⁶¹ This aspect of the statute accommodated concerns that courts lacked a cohesive view of government operations and might undermine a larger regulatory scheme designed by Congress. As explained in 1946 by Senate Judiciary Committee Chair Pat McCarran, "[c]ourts operate in the narrow territorial confines of judicial districts, but agencies have a country-wide jurisdiction."⁶²

Furthermore, Congress recognized that judicial review operates imperfectly in situations that require expertise.⁶³ Mirroring the development and maturity of jurisprudence with respect to the ICC and FTC, when enacting the APA, Congress preserved questions of policy implementation for agencies and larger constitutional questions for the courts. Specifically, the APA provided that, when hearing administrative claims, reviewing courts would "decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action."⁶⁴ The courts could hold unlawful and set aside agency decisions, findings, and conclusions found to be: outside the law or an agency's statutory jurisdiction; contrary to the Constitution; made contrary to legally required procedures; unwarranted by facts that are subject to trial de novo by the reviewing court; or, in the case of legally required hearings on the record, unsupported by substantial evidence.⁶⁵

Both with respect to judicial review and as a whole, the APA is often considered a "super-statute" in that it established the foundational principles against which agencies and those who appear before them make decisions.⁶⁶ Yet, although many in Congress felt the APA was the legislature's conclusive action on the subject of judicial review of agency decision-making, the statute was also the result of a political compromise that avoided entrenched partisan cleavages regarding executive policymaking.⁶⁷ Beyond observations of a lack of uniformity across federal courts, this compromise focused on the dynamics

60. Administrative Procedure Act, Pub. L. No. 79-404, § 10(a)-(c), 60 Stat. 237, 243 (1946) (codified as amended at 5 U.S.C. §§ 551-559).

61. LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 372 (1965).

62. Pat McCarran, *Improving "Administrative Justice": Hearings and Evidence; Scope of Judicial Review*, 32 A.B.A.J. 827, 830 (1946).

63. Ralph F. Fuchs, *Fairness and Effectiveness in Administrative Agency Organization and Procedures*, 36 IND. L.J. 1, 9 (1960).

64. Administrative Procedure Act, § 10(e), 60 Stat. at 243 (codified as amended at 5 U.S.C. § 706).

65. *Id.* § 10(e), at 243-44 (5 U.S.C. § 706).

66. Bremer, *supra* note 52, at 1873; William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1216 (2001); Kathryn E. Kovacs, *Superstatute Theory and Administrative Common Law*, 90 IND. L.J. 1207, 1209 (2015).

67. See Duffy, *supra* note 56, at 130; Eskridge & Ferejohn, *supra* note 55, at 1895-96.

of agency action and tended to disregard existing jurisprudence governing judicial review of that action.⁶⁸

Although the APA can be characterized as an attempt by the legislature to design procedural fairness across the administrative state, it was “utterly impractical to expect Congress, at such a time, to enact a complete procedural law” to accommodate all agency or administrative functions.⁶⁹ Specifically, as the APA’s review provisions began to play out in the real world, it became clear to Congress that agency- and policy-specific adjustments to the general rules established by the Act were needed.

For example, continuing the legacy of federal court skepticism of the FTC, in 1952 the Supreme Court heard a case involving an FTC order that determined one of the nation’s largest manufacturers of asphalt and asbestos roofing materials had engaged in price discrimination.⁷⁰ When evaluating whether the FTC could petition the courts to obtain assistance in enforcing its order, the Court acknowledged prior congressional amendments to court review of FTC decisions, but ultimately found that Congress had failed to provide federal courts with the authority to enforce such orders.⁷¹ Specifically, while the Court noted that effective enforcement of congressional intent might be “handicapped” by a lack of judicial enforcement, federal court jurisdiction was a question of policy reserved for Congress to write clearly into statutory law.⁷²

The executive branch’s implementation of veterans’ benefits legislation provides another (and more well-known) example.⁷³ Prior to and after enacting the APA, Congress routinely included jurisdiction-stripping provisions in laws providing financial or other forms of assistance to veterans and their dependents.⁷⁴ As explained in congressional hearings conducted the same year as the Court’s ruling on federal court jurisdiction over FTC orders, Congress needed to carve out exceptions to the APA’s judicial review presumptions. Congress designed these exceptions to: (1) preserve agency expertise when balancing technical, complex administrative decision-making against the need for uniformity in policy implementation; and (2) ensure that interested persons’ claims would not burden the executive or judicial branches with unnecessary litigation.⁷⁵

To be clear, the FTC and veterans’ benefits legislation are not isolated examples. In the decades that followed the passage of the APA, Congress

68. See Duffy, *supra* note 56, at 133.

69. McCarran, *supra* note 62, at 829.

70. Fed. Trade Comm’n v. Ruberoid Co., 343 U.S. 470, 472 (1952).

71. *Id.* at 478–79.

72. *Id.* at 479.

73. Harold H. Bruff, *Availability of Judicial Review*, in A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES 1, 13 (John F. Duffy & Michael Herz eds., 2005).

74. Johnson v. Robison, 415 U.S. 361, 368–70 (1974).

75. *Id.* at 370.

passed hundreds of laws expressly restricting court review of final agency actions affecting the distribution of social benefits, regulation of private industry, and enforcement of federal policy.⁷⁶ The common theme is clear—Congress responded to changing circumstances in American governance with adjustments to judicial review.

As once observed by Justice Antonin Scalia, while the APA was a hard-fought compromise in which opposing views on the role of administrative agencies in our constitutional system came to rest, “if they have remained at rest since 1946, the landscape has moved beneath them.”⁷⁷

C. BACK TO THE BEGINNING?: JUDICIAL REVIEW TODAY

The APA still provides the default rules for federal judicial review of administrative action, but the Act is just that: a default.⁷⁸ Indeed, the Act specifies Congress may use agency- or program-specific statutes to preclude judicial review so long as those statutes provide some opportunity for parties affected by executive action to be heard that satisfies due process requirements.⁷⁹ Constitutionally, such statutory provisions cannot encroach

76. Dawn M. Chutkow, *Jurisdiction Stripping: Litigation, Ideology, and Congressional Control of the Courts*, 70 J. POL. 1053, 1058 (2008).

77. Antonin Scalia, Vermont Yankee: *The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 375; see also Noah A. Rosenblum, *Making Sense of Absence: Interpreting the APA's Failure to Provide for Court Review of Presidential Administration*, 98 NOTRE DAME L. REV. 2143, 2174–75 (2023) (explaining that the presidency was not as much a driver of administrative action at the time of the APA's enactment as it is today).

78. Bruff, *supra* note 73, at 11–12. The APA provides that its judicial review provisions do not limit or repeal additional requirements imposed by statute or are otherwise recognized by law. 5 U.S.C. § 559. Additionally, the APA specifies that subsequent statutes may not be held to supersede or modify those provisions unless those statutes do so expressly. *Id.* In light of the general principle that one legislature may not bind the authority of its successors, courts have interpreted this aspect of the APA to require that Congress make clear its intent to change the default rules of judicial review. See *United States v. Winstar Corp.*, 518 U.S. 839, 872–73 (1996); *Dickinson v. Zurko*, 527 U.S. 150, 155 (1999); *Ass'n of Data Processing Serv. Orgs., Inc. v. Bd. of Governors of the Fed. Rsrv. Sys.*, 745 F.2d 677, 686 (D.C. Cir. 1984). Thus, a court may conclude that an ambiguous or unclear statute does not override the default judicial review provisions of the APA. JONATHAN R. SIEGEL, *THE ACUS SOURCEBOOK OF FEDERAL JUDICIAL REVIEW STATUTES* 16 (2022).

79. 5 U.S.C. § 701 (a); *Yakus v. United States*, 321 U.S. 414, 444 (1944). This provision works in combination with 28 U.S.C. § 1331, which grants federal courts jurisdiction for claims arising under federal law. Additionally, federal courts may not review agency action committed to agency discretion by law. Although this Article primarily considers statutory decisions to adjust judicial review, the agency discretion exception generally applies when a court would have no meaningful standard against which to judge the agency's exercise of discretion. *Heckler v. Chaney*, 470 U.S. 821, 830 (1985); *Webster v. Doe*, 486 U.S. 592, 599–600 (1988). A worthwhile future endeavor for researchers would be to explore congressional decisions to commit to agency discretion specific actions Congress seeks to shield from judicial review.

upon courts' Article III powers or adjust the jurisdiction of federal courts to prevent judicial review of unconstitutional action.⁸⁰

When precluding review, Congress must indicate intent through statutory language that explicitly removes court jurisdiction to review final agency actions or implicitly specifies that claims involving disputes over executive decision-making should be resolved in an alternative venue.⁸¹ For example,

80. Daniel Epps & Alan M. Trammell, *The False Promise of Jurisdiction Stripping*, 123 COLUM. L. REV. 2077, 2094–95 (2023). The Guantanamo Bay cases provide an interesting case study of modern communication between the branches regarding congressional intent to foreclose judicial review when constitutional claims are at issue. In 2005, in response to litigation over the status and treatment of detainees in Guantanamo Bay, Congress enacted the Detainee Treatment Act and provided that “no court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of” a foreign national detained at Guantanamo Bay or any other action against the United States relating to any aspect of detention at Guantanamo Bay of foreign nationals determined to have been properly detained as an enemy combatant. Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005, 119 Stat. 2739 (codified as amended at 28 U.S.C. § 2241 (e)); *see also* Rasul v. Bush, 542 U.S. 466, 484–85 (2004) (holding that district courts were not barred from exercising habeas corpus claims of foreign nationals being detained in Guantanamo Bay); Hamdi v. Rumsfeld, 542 U.S. 507, 509 (2004) (holding that U.S. citizens being held as enemy combatants must be given “meaningful opportunity to contest the factual basis” for their detention). The Supreme Court then, using principles of statutory construction, determined that the statute did not strip courts of jurisdiction for suits pending at the time Congress enacted the law. Hamdan v. Rumsfeld, 548 U.S. 557, 576–77 (2006). In response, Congress enacted the Military Commissions Act of 2006, which stripped all courts’ jurisdiction to hear or consider applications for writs of habeas corpus or other actions against the United States “relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement” of foreign nationals detained as enemy combatants at Guantanamo Bay. Military Commissions Act of 2006, Pub. L. No. 109-366, § 7, 120 Stat. 2600, 2636 (codified as amended at 28 U.S.C. § 2241). The Supreme Court found that, given statutory text and legislative history, there was little doubt of congressional intent, but held that the provision denying federal courts jurisdiction to hear habeas corpus actions pending at the time of the Act’s enactment was an unconstitutional suspension of the writ of habeas corpus. Boumediene v. Bush, 553 U.S. 723, 737–38, 792 (2008); Martin J. Katz, *Guantanamo, Boumediene, and Jurisdiction-Stripping: The Imperial President Meets the Imperial Court*, 25 CONST. COMMENT. 377, 378 (2008) (placing *Boumediene* in “the long-running debate over jurisdiction-stripping”). *See generally* Janet Cooper Alexander, *Jurisdiction-Stripping in a Time of Terror*, 95 CALIF. L. REV. 1193 (2007) (describing the interactions between the branches over judicial review in the Guantanamo Bay cases).

81. *Axon Enters., Inc. v. Fed. Trade Comm’n*, 598 U.S. 175, 185 (2023); *see, e.g., Morris v. Gressette*, 432 U.S. 491, 501–03 (1977) (finding although there was no legislative history bearing directly on the issue of reviewability, legislative materials indicated a desire to provide a speedy, alternative method of review); *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 10 (2000) (finding that statutory language providing that “[n]o action against the United States, the [Secretary], or any officer or employee thereof shall be brought” in court plainly barred judicial review, irrespective of how those challenges were classified (evidentiary, rule-related, statutory, constitutional, or otherwise) (alterations in original)). *But see Johnson v. Robison*, 415 U.S. 361, 367–68 (1974) (finding a statutory provision that specified “the decisions of the Administrator on any question of law or fact under any law administered by the Veterans’ Administration providing benefits for veterans . . . shall be final and conclusive and no . . . court of the United States shall have power or jurisdiction to review any such decision” did not explicitly bar judicial consideration of constitutional claims (alterations in original) (emphasis omitted)). Courts do

the Supreme Court has held that the language contained in the Financial Institutions Supervisory Act stating “no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any notice or order under any such section, or to review, modify, suspend, terminate, or set aside any such notice or order” is sufficiently clear to demonstrate Congress’s explicit intent to preclude review.⁸² Courts have regularly found preclusion provisions that grant the power of judicial review to a specific court or specify that claimants shall file suit directly in the federal courts of appeals sufficient to implicitly strip jurisdiction.⁸³ Although viewed as channeling litigation to a specific court, preclusion provisions by their nature strip other courts of authority they would have otherwise.

Statutory expression of the enacting coalition’s intent is essential—general legislative deliberation of jurisdiction stripping is not enough to prevent judicial review of executive action. Persons affected by administrative action must demonstrate that their specific claims fall within the type Congress contemplated when enacting provisions that limit judicial review.⁸⁴ In evaluating whether claims fall within the type Congress intended, federal courts consider three things, commonly referred to as the *Thunder Basin* factors.⁸⁵

First, acknowledging the fact that Congress rarely will allow agencies to escape any review of administrative decision-making, courts must evaluate whether precluding judicial review would foreclose all meaningful opportunities for an objective evaluation of executive action.⁸⁶ For example, the Supreme Court recognized that the Civil Service Reform Act’s provision of “exclusive” jurisdiction to the Federal Circuit over Merit Systems Protection Board final decision appeals fully accommodated the need for development of a factual record through agency processes and a specialized federal judicial process for determining constitutional questions.⁸⁷

Second, courts evaluate the extent to which a party’s claim is collateral to the statute’s overall objectives.⁸⁸ This distinction often turns on whether a party’s challenge is to an agency’s proceedings, or whether the challenge relates to the agency’s delegated power or other separation of powers claims.⁸⁹ For example, the Supreme Court found challenges to the Sarbanes–Oxley Act, which created the Public Company Accounting Oversight Board with dual

not lightly infer preclusion of judicial review of administrative action adjudicating private rights. *Barlow v. Collins*, 397 U.S. 159, 166–67 (1970).

82. 12 U.S.C. § 1818(i)(1); *Bd. of Governors of the Fed. Rsv. Sys. v. MCorp Fin., Inc.*, 502 U.S. 32, 44 (1991).

83. *Axon*, 598 U.S. at 185 (citation omitted).

84. *Id.* at 186.

85. *Id.*; see also *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 212–13 (1994).

86. *Thunder Basin*, 510 U.S. at 212–13; *Axon*, 598 U.S. at 186.

87. *Elgin v. Dep’t of the Treasury*, 567 U.S. 1, 21–23 (2012).

88. *Thunder Basin*, 510 U.S. at 212–13; *Axon*, 598 U.S. at 186.

89. See *Axon*, 598 U.S. at 192–93.

for-cause limitations on presidential removal of members of the Board, to be collateral to the Act's judicial review provisions because they were grounded in core constitutional concerns over the distribution of power across the federal government, as opposed to the agency's implementation of its authority.⁹⁰

The third factor involves consideration of whether an interested person's claims question the constitutionality of legislative delegation to expert administrative agencies.⁹¹ Although federal judges should concede that agencies have substantive expertise, questions of law arising under the Constitution—including those relating to separation of powers—are within the skill set of federal courts.⁹² The Supreme Court has routinely found that agencies are ill-suited to evaluate structural constitutional challenges, including those of agency design and delegated authority.⁹³ As explained by the Supreme Court in 1988, “‘serious constitutional question[s]’ . . . would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim.”⁹⁴

If all three factors weigh in favor of the judiciary, then federal courts may review final administrative action.⁹⁵ However, if the answer to the fundamental questions contemplated by the factors is mixed, then the availability of judicial review is not so clear.⁹⁶

Today's jurisprudence stands on the foundation that “there is in our society a profound, tradition-taught reliance on the courts as the ultimate

90. *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 489–90 (2010).

91. *Thunder Basin*, 510 U.S. at 215.

92. *Johnson v. Robison*, 415 U.S. 361, 367–68 (1974); see *Barlow v. Collins*, 397 U.S. 159, 166 (1970) (explaining that judicial application of the canons of statutory construction is beyond the “special competence” of agencies); *Traynor v. Turnage*, 485 U.S. 535, 544 (1988) (observing that the availability of judicial review of an agency's statutory construction was unlikely to “enmesh the courts in ‘the technical and complex determinations and applications of [agency] policy’ . . . ‘or burden the courts . . . with expensive and time-consuming litigation’”); *Free Enter. Fund*, 561 U.S. at 491 (noting that agency expertise tends to be fact bound (even if formulated in constitutional terms), whereas courts are capable of answering statutory questions involving administrative law); *Axon*, 598 U.S. at 194 (providing that questions regarding whether tenure protections for administrative law judges violate Article II of the Constitution are claims detached from agency policy); *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 392 (2024) (differentiating between legal questions and agency policymaking and fact-finding).

93. See *Free Enter. Fund*, 561 U.S. at 491; *Carr v. Saul*, 593 U.S. 83, 92 (2021); *Axon*, 598 U.S. at 194–95. Furthermore, “it is sometimes appropriate for courts to entertain constitutional challenges . . . even when those challenges were not raised in administrative proceedings.” *Carr*, 593 U.S. at 92.

94. *Webster v. Doe*, 486 U.S. 592, 603 (1988). However, this heightened “standard does not apply where Congress simply channels judicial review of a constitutional claim to a particular court.” *Elgin v. Dep't of the Treasury*, 567 U.S. 1, 9 (2012).

95. See *Axon*, 598 U.S. at 186.

96. *Id.* (“The ultimate question is how best to understand what Congress has done—whether the statutory review scheme, though exclusive where it applies, reaches the claim in question.”).

guardian and assurance of the limits set upon executive power by the constitutions and legislatures.”⁹⁷ Fundamentally, courts assume Congress seeks a constitutional mechanism that ensures agencies adhere to legislative preferences as described in statutory law.⁹⁸ Following this fundamental assumption regarding legislative action, federal courts will exercise their jurisdiction unless there is a persuasive reason not to (i.e., specific language, legislative history, or view of statutory scheme as a whole).⁹⁹

But when does Congress design statutes in this way and what are the most common reasons for which it adjusts the ability of federal courts to review administrative action?

D. A POLITICAL DECISION: OBSERVATIONS OF JUDICIAL REVIEW OVER TIME

Our brief historical review suggests a few common themes in congressional intent regarding the statutory design of judicial review of the executive branch.

First, and perhaps most important for considerations of legislative drafting and judicial interpretation of statutes, Congress considers judicial review a mechanism to ensure that agencies adhere to the legislative preferences embedded in statutory law.¹⁰⁰ Superficially, this may seem an obvious observation. Yet it is worth stressing, particularly in times like the present when a majority of the Justices on the Supreme Court not only gives substantial weight to, but expects statutory text to speak clearly when it comes to the delegated parameters of administrative action.¹⁰¹

One may wonder whether, in an era of limited congressional capacity, statutory text expresses a cohesive set of legislative preferences. Facing both fiscal and political pressure to divert limited resources away from careful legislative drafting and toward reelection and partisan pursuits, it may be that the enacting coalition agrees on a general idea, rather than on implementation specifics.¹⁰² Furthermore, the nature of coalition building requires compromise.

97. JAFFE, *supra* note 61, at 321.

98. See *Bowen v. Mich. Acad. of Fam. Physicians*, 476 U.S. 667, 681 (1986).

99. See *Abbott Lab’s v. Gardner*, 387 U.S. 136, 140 (1967); *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 349 (1984); *Bowen*, 476 U.S. at 672–73; *Traynor v. Turnage*, 485 U.S. 535, 542 (1988); *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207 (1994); *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 424–25 (1995); *Elgin*, 567 U.S. at 9–10.

100. See William N. Eskridge, Jr. & John Ferejohn, *Making the Deal Stick: Enforcing the Original Constitutional Structure of Lawmaking in the Modern Regulatory State*, 8 J.L. ECON. & ORG. 165, 187 (1992); John Ferejohn & Charles Shipan, *Congressional Influence on Bureaucracy*, 6 J.L. ECON. & ORG. 1, 17 (1990); John Ferejohn & Barry Weingast, *Limitation of Statutes: Strategic Statutory Interpretation*, 80 GEO. L.J. 565, 579–80 (1992); M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1404–05 (2004).

101. See, e.g., *Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 594 U.S. 758, 763–65 (2021); *Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab.*, 595 U.S. 109, 117–20 (2022); *West Virginia v. EPA*, 597 U.S. 697, 722–23 (2022); *Biden v. Nebraska*, 600 U.S. 477, 497–500 (2023).

102. See, e.g., JAMES M. CURRY, *LEGISLATING IN THE DARK: INFORMATION AND POWER IN THE HOUSE OF REPRESENTATIVES 2* (2015) (finding that, facing capacity constraints, legislators increasingly rely on information and cues from leadership when developing legislation); Abbe R.

Thus, statutory intent involves codifying the results of a bargaining process that conveys instructions to federal agencies and courts regarding post-enactment decision-making.¹⁰³

Because judicial review reinforces the guardrails of agency action as expressed in statutory language, Congress often designs federal court jurisdiction to give interested persons an additional mechanism for review, particularly in policy areas where the market economy does not sufficiently protect people's private and political liberties.¹⁰⁴ Historically, political debate has considered courts to be the superior branch of government for preserving such liberties because they are presumed to be less susceptible to capture by politically influential, but concentrated, interests.¹⁰⁵

However, the legislative history of judicial review demonstrates Congress's concern that agencies might substitute judicial preferences for legislative intent. Indeed, studies of jurisdiction-stripping provisions suggest that such statutory language often relates to actual or perceived judicial obstruction of Congress's substantive policy agenda.¹⁰⁶ Pushed to its most extreme, this line of thinking views adjustments to federal court review of executive action as a "means by which Congress may change the Constitution without amending

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, 992–94 (2013) (finding congressional staff are unfamiliar with and therefore fail to take into account jurisprudential regimes in administrative law); Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463, 1478–79 (2015) (arguing statutory language becomes more ambiguous as legislators shift resources away from lawmaking); Jennifer L. Selin, *The Headless Fourth Branch: Rethinking the Assumptions of Administrative Jurisprudence*, 4 PERSPS. ON PUB. MGMT. & GOVERNANCE 170, 174–75 (2021) (suggesting that legislators accept the political realities of ambiguous legislative text and rely on informal political relationships to fill in the details).

103. McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705, 706–07 (1992); see also William W. Buzbee, *The One-Congress Fiction in Statutory Interpretation*, 149 U. PA. L. REV. 171, 177 (2000) (arguing the idea of "one-Congress" enacting statutory text as a clear statement of policy conflicts with political reality). See generally BUILDING COALITIONS, MAKING POLICY: THE POLITICS OF THE CLINTON, BUSH & OBAMA PRESIDENCIES (Martin A. Levin, Daniel DiSalvo & Martin M. Shapiro eds., 2012) (analyzing how political leaders navigate the politics of policymaking).

104. See *Abbott*, 387 U.S. at 141–42; Richard B. Stewart, *Regulation in a Liberal State: The Role of Non-Commodity Values*, 92 YALE L.J. 1537, 1538 (1983); Cass R. Sunstein, *On the Costs and Benefits of Aggressive Judicial Review of Agency Action*, 1989 DUKE L.J. 522, 522–24.

105. Joseph W. Mead & Nicholas A. Fromherz, *Choosing a Court to Review the Executive*, 67 ADMIN. L. REV. 1, 9 (2015). Of course, scrutiny of the Supreme Court's adherence to codes of conduct raises questions about this assumption. See, e.g., Veronica Root Martinez, *Supreme Impropriety? Assessing the Justices' Conduct*, 87 LAW & CONTEMP. PROBS. 147, 147–51 (2024); Richard W. Painter, *SCOTUS House: Can a Supreme Court Ethics Lawyer and Inspector General Help Get This Fraternity Under Control?*, 37 GEO. J. LEGAL ETHICS 347, 347–51 (2024).

106. Epps & Trammell, *supra* note 80, at 2078, 2086, 2097. According to this view, Congress engages in periodic attempts to adjust federal court jurisdiction as a means of reversing influential Supreme Court opinions. See, e.g., Anderson, *supra* note 11, at 419 ("Congressional hostility to some federal court decisions appears to be a fact of American political life."); Gunther, *supra* note 13, at 895–96.

it.”¹⁰⁷ On the flip (but equally extreme) side, this argument reasons that an unpopular Congress has incentives to empower the executive and allied courts to advance policy goals that are outside the legislature’s political reach.¹⁰⁸

While we engage with these lines of thinking in subsequent parts of this Article, it is worth noting here that judicial decision-making is far less predictable than many scholars assume. In most circumstances, the inherent uncertainty in the policy and political worlds makes it incredibly difficult for any legislator or group of actors to forecast the administrative outcomes that will lead to litigation, the claims the parties will make, where and when those parties will file, the claims that will settle before trial, etc. Even if the possibility of litigation involving a multitude of complex procedural and substantive claims is easily ascertained, each federal court operates independently of others (and has its own preferences) and Congress cannot often predict which court will be most likely to hear a particular challenge.¹⁰⁹

These dynamics reinforce the second aspect of legislative consideration of judicial review. It is often the case that, when crafting national policy, Congress prefers to rely on agency expertise to determine the specific effects of that policy.¹¹⁰ For example, when Congress began to design agencies like the ICC and FTC with more independent structures, the legislature sought to promote impartiality and administrative expertise.¹¹¹ Congress also sought to promote policy continuity.¹¹² Even when drafting the APA, legislators recognized that political pressure to adhere to elected officials’ preferences can be problematic because those actors always have one eye on the next electoral cycle.¹¹³ At the same time, removing agencies from all review not only is problematic constitutionally, but is practically undesirable because it invites the possibility that an expert administrator will use this leeway to make decisions that differ from what Congress would want.¹¹⁴

107. Christopher Jon Sprigman, *Congress’s Article III Power and the Process of Constitutional Change*, 95 N.Y.U. L. REV. 1778, 1784 (2020).

108. Joseph Daniel Ura & Patrick C. Wohlfarth, *Greater Public Confidence in the US Supreme Court Predicts More Jurisdiction Stripping*, 10 POL. SCI. RSCH. & METHODS 831, 838 (2022).

109. Chutkow, *supra* note 76, at 1061.

110. JAFFE, *supra* note 61, at 25.

111. E.g., MARSHALL J. BREGER & GARY J. EDLES, *INDEPENDENT AGENCIES IN THE UNITED STATES: LAW, STRUCTURE, AND POLITICS* 87–92 (2015); Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 19, 24 (2010); Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599, 613 (2010).

112. See GARY J. MILLER & ANDREW B. WHITFORD, *ABOVE POLITICS: BUREAUCRATIC DISCRETION AND CREDIBLE COMMITMENT* 21 (2016).

113. Duffy, *supra* note 56, at 138.

114. Kathleen Bawn, *Political Control Versus Expertise: Congressional Choices About Administrative Procedures*, 89 AM. POL. SCI. REV. 62, 62–63 (1995); Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 437–39 (1989); Richard J. Pierce & Sidney A. Shapiro, *Political and Judicial Review of Agency Action*, 59 TEX. L. REV. 1175, 1195–1200 (1981).

Judicial review can provide a check on agencies' abilities to use their expertise to make decisions that differ from legislative preferences.¹¹⁵ However, our historical overview also suggests that Congress recognizes federal judges often lack the substantive knowledge required to assess the nuanced implications of policy in a given field.¹¹⁶ Thus, it likely is the case that congressional design of judicial review utilizes the courts to force expert agencies to operate in a way that adheres to congressional preferences or, at minimum, incorporates interested parties in agency decision-making so that agency processes adhere to the procedural focus of the courts.¹¹⁷

Although congressional design of judicial review reflects the legislature's theoretical need to utilize the knowledge of administrators in policy implementation but provide a constitutional and political check on agency decision-making, our historical review suggests that Congress is also cognizant of the practical realities of governance. Specifically, given limited judicial resources and an ever-expanding administrative state, Congress often designs administrative procedures funneling disagreements away from courts and to agencies as a strategy to provide a more efficient and less expensive mechanism for parties to seek adjustments to federal policy.¹¹⁸ Courts simply do not have enough resources to handle all grievances arising from executive action, and many elected officials' constituents do not have the time or resources to wait out years-long litigation processes in the hope of correcting administrative behavior.¹¹⁹

115. *E.g.*, D. RODERICK KIEWIET & MATHEW D. MCCUBBINS, *THE LOGIC OF DELEGATION: CONGRESSIONAL PARTIES AND THE APPROPRIATIONS PROCESS* 17–18 (1991) (discussing bureaucrats' ability to evade legislative intent); Francis E. Rourke, *Variations in Agency Power*, in *BUREAUCRATIC POWER IN NATIONAL POLITICS* 240, 247–48 (Francis E. Rourke ed., 2d ed. 1972) (describing agency personnel's pursuit of power); MAX WEBER, *Bureaucracy*, in *FROM MAX WEBER: ESSAYS IN SOCIOLOGY* 196, 233–34 (H.H. Gerth & C. Wright Mills eds. & trans., 1946) (describing how the use of bureaucratic expertise in administration can subvert legislative control).

116. *See* Harold H. Bruff, *Coordinating Judicial Review in Administrative Law*, 39 *UCLA L. REV.* 1193, 1209 (1992). Not to mention the decentralized nature of federal court decision-making or constitutional and statutory designs to separate federal judges from politics through means such as lifetime appointments. *Id.*

117. Scott Limbocker, William G. Resh & Jennifer L. Selin, *Anticipated Adjudication: An Analysis of the Judicialization of the U.S. Administrative State*, 32 *J. PUB. ADMIN. RSCH. & THEORY* 610, 614 (2022); *see, e.g.*, Rosemary O'Leary, *The Impact of Federal Court Decisions on the Policies and Administration of the U.S. Environmental Protection Agency*, 41 *ADMIN. L. REV.* 549, 566–67 (1989); *see also* Jeffrey L. Brudney & F. Ted Hebert, *State Agencies and Their Environments: Examining the Influence of Important External Actors*, 49 *J. POL.* 186, 201 (1987) (discussing how court decisions can force agency policies or procedures to become open to the influence of legislatures and other groups).

118. *See* *Morris v. Gressette*, 432 U.S. 491, 503–05 (1977); *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 836–37, 844–45 (1986).

119. *Compare* MICHAEL ASIMOW, *FEDERAL ADMINISTRATIVE ADJUDICATION OUTSIDE THE ADMINISTRATIVE PROCEDURE ACT 2* (2019) (noting that the system of adjudication of Social Security disability disputes *alone* is the “largest system of adjudication in the western world,” hearing more than one million cases a year), *with* *Federal Judicial Caseload Statistics 2023*, U.S. CTS., <https://www.uscourts.gov/data-news/reports/statistical-reports/federal-judicial-caseload-statisti>

Litigation (or even the possibility of litigation) delays implementation and requires agencies to devote time and resources to framing their decisions in a way that withstands judicial review.¹²⁰ Although this delay can be viewed in the negative because it de-emphasizes substantive expertise in favor of procedural considerations such as those embedded in the APA, it can also create time for Congress and agencies to ascertain how enacted policy affects constituents across the country and for those same constituents to become reliant on a new federal program as the status quo.¹²¹ In this way, judicial review can be a mechanism of information gathering for legislators who seek to learn about the consequences of statutory design and agency implementation.¹²²

Legislative recognition of the nuance regarding agency policy implementation leads us to our last observation. Congressional design of judicial review is tailored to promote the post-enactment implementation of statutory policy in a particularized way.¹²³ When determining congressional intent to adjust the judiciary's jurisdiction, federal courts assess the nature of a litigant's claims and then evaluate the availability of review.¹²⁴ Ultimately, this means that the availability of judicial review rests both on statutory language and on the advocacy of litigants. The same interests that are privileged in the legislative process usually are those of litigants who can afford to contest the legality of administrative action in the courts.¹²⁵

Thus, the development of litigation over administrative action can give Congress constituent-specific information about the particularities of

cs/federal-judicial-caseload-statistics-2023 [https://perma.cc/3GET-JZHG] (reporting that the total civil and criminal cases pending before the U.S. district courts were a little over 700,000).

120. O'Leary, *supra* note 117, at 563–69; see also Evan J. Ringquist, *Political Control and Policy Impact in EPA's Office of Water Quality*, 39 AM. J. POL. SCI. 336, 349 (1995) (observing EPA abatement actions declined ninety-three percent as the agency shifted resources to litigating). There is also some evidence that, dependent upon agency, policy, and environmental resources, the possibility of judicial review leads agencies to devote less effort to policy implementation. Ian R. Turner, *Working Smart and Hard? Agency Effort, Judicial Review, and Policy Precision*, 29 J. THEORETICAL POL. 69, 71 (2017).

121. Epps & Trammell, *supra* note 80, at 2082.

122. Jennifer L. Selin & Pamela J. Clouser McCann, *Constraining the Executive Branch: Delegation, Agency Independence, and Congressional Design of Judicial Review*, 119 NW. U. L. REV. 1273, 1290–91 (2025); Diego A. Zambrano, *Discovery as Regulation*, 119 MICH. L. REV. 71, 75 (2020); David Zaring, *National Rulemaking Through Trial Courts: The Big Case and Institutional Reform*, 51 UCLA L. REV. 1015, 1038–39 (2004).

123. James R. Rogers, *Information and Judicial Review: A Signaling Game of Legislative-Judicial Interaction*, 45 AM. J. POL. SCI. 84, 87, 97 (2001); Joseph L. Smith, *Congress Opens the Courthouse Doors: Statutory Changes to Judicial Review Under the Clean Air Act*, 58 POL. RSCH. Q. 139, 147 (2005); Zambrano, *supra* note 122, at 75; Zaring, *supra* note 122, at 1038–39.

124. See JAFFE, *supra* note 61, at 336 (explaining that, in our system of judicial remedy, those who are most acutely and immediately affected by agency implementation of delegated authority presumptively have a right to secure review of the validity of that action).

125. See Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1284–85 (2006); Wendy Wagner, *Revisiting the Impact of Judicial Review on Agency Rulemaking: An Empirical Investigation*, 53 WM. & MARY L. REV. 1717, 1722–23 (2012).

implementation beyond what is provided through traditional congressional oversight mechanisms, including information provided by the agencies themselves.¹²⁶ However, the same particularized claims arising out of both procedural and substantive challenges dispersed throughout the country can also lead to inconsistencies in judicial interpretation of executive action.¹²⁷

Considered as a whole, legislative design before, during, and after congressional enactment of the APA suggests that Congress balances a multitude of factors when constructing judicial review provisions. The complicated nature of this decision-making means that Congress cannot realistically anticipate or account for the precise relationship between federal courts and the executive branch.¹²⁸

Given the legislature's uncertainty when constructing judicial review, the Supreme Court's assessment of statutory provisions that adjust federal court jurisdiction raises difficult questions regarding congressional intent.¹²⁹ How should federal courts interpret such statutory text when it reflects congressional compromise and inherent uncertainty about policy outcomes? This is an unanswered question in both administrative and constitutional law in large part because most scholars who have studied the preclusion of judicial review *tend to do so from the perspective of the courts*.¹³⁰ Furthermore, the few who have undergone studies of *congressional* decision-making to strip courts of their jurisdiction contemplate judicial review provisions in isolation rather than as parts of a larger statutory framework that includes other procedural and structural decisions.¹³¹

Regardless of perspective, judicial or congressional, scholars' focus on jurisdiction-stripping provisions tends to sidestep many of the legal and

126. See Jeffrey S. Banks & Barry R. Weingast, *The Political Control of Bureaucracies Under Asymmetric Information*, 36 AM. J. POL. SCI. 509, 519 (1992); JOHN MARK HANSEN, GAINING ACCESS: CONGRESS AND THE FARM LOBBY, 1919-1981, at 11-12 (1991); Matthew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 165-66 (1984).

127. Bruff, *supra* note 116, at 1205-07; Brandice Canes-Wrone, *Bureaucratic Decisions and the Composition of the Lower Courts*, 47 AM. J. POL. SCI. 205, 206 (2003); Richard J. Pierce, Jr., *Rulemaking Ossification Is Real: A Response to Testing the Ossification Thesis*, 80 GEO. WASH. L. REV. 1493, 1501 (2012).

128. See Anthony M. Bertelli & Sven E. Feldmann, *Structural Reform Litigation: Remedial Bargaining and Bureaucratic Drift*, 18 J. THEORETICAL POL. 159, 160 (2006).

129. *Barlow v. Collins*, 397 U.S. 159, 166 (1970).

130. E.g., Alex Glashauser, *The Extension Clause and the Supreme Court's Jurisdictional Independence*, 53 B.C. L. REV. 1225, 1225-26 (2012); Tara Leigh Grove, *The Structural Safeguards of Federal Jurisdiction*, 124 HARV. L. REV. 869, 871-72 (2011); Henry P. Monaghan, *Jurisdiction Stripping Circa 2020: What The Dialogue (Still) Has to Teach Us*, 69 DUKE L.J. 1, 1-2, 8-9 (2019); Andrea Olson, *Defining the Article III Judicial Power: Comparing Congressional Power to Strip Jurisdiction with Congressional Power to Reassign Adjudications*, 53 CREIGHTON L. REV. 111, 115 (2019).

131. Bryan W. Marshall, Brett W. Curry & Richard L. Pacelle, Jr., *Preserving Institutional Power: The Supreme Court and Strategic Decision Making in the Separation of Powers*, 42 POL. & POL'Y 37, 37 (2014); Helen Norton, *Reshaping Federal Jurisdiction: Congress's Latest Challenge to Judicial Review*, 41 WAKE FOREST L. REV. 1003, 1003 (2006); Ura & Wohlfarth, *supra* note 108, at 838.

practical complexities we identify in this Part.¹³² To a large extent, this is because the particulars of the legislative, administrative, and judicial processes are almost infinite in their combined variations—researchers must make simplifying assumptions about the way the world works and often do so implicitly.

We tackle this problem head-on by theoretically modeling and empirically assessing how Congress designs judicial review in combination with other aspects of delegation to affect administrative policy outcomes and strategies. Because game-theoretic models require researchers to make their assumptions explicit and structure their analysis accordingly, theoretical modeling is particularly well suited for research such as ours involving the strategic interactions between multiple actors.¹³³ Such models help scholars identify the relevant information, processes, and outcomes that explain the events that play out in the political world.¹³⁴

However, theoretical models' identification of precise criteria for identifying the expected choices actors should make in light of the behavioral assumptions also present some limitations. Notably, theoretical models can seem divorced from real-world observations of these same actors' decisions across space and time.¹³⁵ Empirical evaluation of the models' predictions is thus an important means of assessing their validity.¹³⁶ By integrating both theoretical and empirical accounts of congressional design of judicial review, in the next Part we capitalize on the strengths and overcome the weaknesses of each method of analysis.¹³⁷

II. JUDICIAL REVIEW IN THE CONTEXT OF SHARED POWERS

Any contemplation of congressional design of judicial review should begin with the assumption that federal courts provide a constitutionally essential mechanism for interested persons to petition for an apolitical

132. Certainly, foundational work has established the institutional and procedural arrangements that guide legislative design of administrative action and has discussed the role of the courts in enforcing legislative bargains. However, this scholarship does not contemplate the combined strategic use of agency independence and statutory provisions that adjust agency exposure to the courts as an aspect of delegation, nor does this scholarship model or systematically and empirically estimate how aspects of the political environment affect such use.

133. SCOTT GATES & BRIAN D. HUMES, *GAMES, INFORMATION, AND POLITICS: APPLYING GAME THEORETIC MODELS TO POLITICAL SCIENCE* 6–7 (John Aldrich, Bruce Bueno de Mesquita, Robert Jackman & David Rohde eds., 1997).

134. *Id.* at 8.

135. *E.g.*, Gerardo L. Munck, *Game Theory and Comparative Politics: New Perspectives and Old Concerns*, 53 *WORLD POL.* 173, 185–86 (2001) (noting that game theory “has been subjected to serious criticism” and that the alleged strengths of theoretical models can also pose serious dilemmas for those who use them).

136. REBECCA B. MORTON, *METHODS AND MODELS: A GUIDE TO THE EMPIRICAL ANALYSIS OF FORMAL MODELS IN POLITICAL SCIENCE* 101 (1999).

137. Selin & Clouser McCann, *supra* note 122, at 1280.

assessment of the legality of administrative action.¹³⁸ At the same time, both Congress and the judiciary recognize that the task of defining parameters of federal court review of administrative action is largely legislative.¹³⁹ This includes:

withholding jurisdiction from [the courts] in the exact degrees and character which to Congress may seem proper for the public good. To deny this position would be to elevate the judicial over the legislative branch of the government, and to give to the former powers limited by its own discretion merely.¹⁴⁰

In this Part, we first provide a theoretical account of a triad of influences that affect legislative decision-making when drafting statutory language that delegates authority to the executive branch. We then explain how these influences affect congressional design of judicial review. This Part relies heavily on insights from our prior work on legislative decisions to constrain the executive branch through agency design and adjustments to agencies' exposure to federal courts.¹⁴¹ Specifically, that research finds that by accommodating the extent to which: (1) elected officials can influence agency leadership (structural independence); (2) the political branches are able to review agency decisions (procedural independence); and (3) agencies are exposed to judicial review, legislative decisions to delegate account for the ideological preferences of a wide variety of political actors, as well as how administrative agencies will respond to their policy environments.¹⁴²

A. CONGRESSIONAL BLUEPRINTS FOR JUDICIAL REVIEW

Our theoretical model of legislative decision-making begins with first principles. Ninety-nine percent of major laws delegate authority to the executive branch.¹⁴³ Thus, the real crux of any assessment of congressional design of judicial review of administrative action is to evaluate statutory intent

138. Elizabeth Fisher, Pasky Pascual & Wendy Wagner, *Rethinking Judicial Review of Expert Agencies*, 93 TEX. L. REV. 1681, 1684 (2015).

139. *Palmore v. United States*, 411 U.S. 389, 401–02 (1973) (citing *Cary v. Curtis*, 44 U.S. (3 How.) 236 (1845)); *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848 (1986).

140. *Cary*, 44 U.S. at 245 (footnote omitted).

141. Selin & Clouser McCann, *supra* note 122, at 1358–59.

142. See, e.g., Bawn, *supra* note 114, at 70; Thomas W. Gilligan & Keith Krehbiel, *Complex Rules and Congressional Outcomes: An Event Study of Energy Tax Legislation*, 50 J. POL. 625, 629–31 (1988); David E. Lewis & Jennifer L. Selin, *Political Control and the Forms of Agency Independence*, 83 GEO. WASH. L. REV. 1487, 1509–13 (2015); Jennifer L. Selin, *What Makes an Agency Independent?*, 59 AM. J. POL. SCI. 971, 980–85 (2015); Selin & Clouser McCann, *supra* note 122, at 1285; David B. Spence, *Managing Delegation Ex Ante: Using Law to Steer Administrative Agencies*, 28 J. LEGAL STUD. 413, 415–20 (1999); B. Dan Wood & Richard W. Waterman, *The Dynamics of Political Control of the Bureaucracy*, 85 AM. POL. SCI. REV. 801, 821–24 (1991).

143. Pamela J. Clouser McCann & Charles R. Shipan, *How Many Major US Laws Delegate to Federal Agencies? (Almost) All of Them*, 10 POL. SCI. RSCH. & METHODS 438, 440 (2022).

based on whether constituents can understand congressional decision-making and hold the legislature accountable for its decision to delegate.¹⁴⁴

Viewed in this way, every statute that delegates authority to the executive branch—which empirically means almost every major law that Congress passes—contemplates a triad of influences: congressional delegation, administrative implementation, and litigant (and court) intervention.¹⁴⁵

First, legislators recognize that any major piece of legislation is the result of a process. This process requires elected officials to develop political coalitions that are multidimensional and can withstand the modern legislative procedures that provide opportunities for strategic gatekeeping, agenda manipulation, and last-minute political adjustments to previously agreed-upon text.¹⁴⁶ Such aspects of the legislative process force legislators to compromise on their ideal preferences to form political coalitions. These coalitions seek to maximize the change in real-world outcomes that will reflect the coalition’s aggregate policy preferences.¹⁴⁷

In coalitional development, Congress strategically designs statutory law to specify how much autonomy the legislature wishes to grant administrators and the extent to which other political actors can influence policy.¹⁴⁸ However,

144. Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1373 (1953).

145. See Chutkow, *supra* note 76, at 1054.

146. See, e.g., Andrew O. Ballard, *Bill Text and Agenda Control in the US Congress*, 84 J. POL. 335, 347–49 (2022); JAMES M. CURRY & FRANCES E. LEE, *THE LIMITS OF PARTY: CONGRESS AND LAWMAKING IN A POLARIZED ERA* 24–28 (2020); Gilligan & Krehbiel, *supra* note 142, at 636; Jaehoon Kim & Lawrence S. Rothenberg, *Foundations of Legislative Organization and Committee Influence*, 20 J. THEORETICAL POL. 339, 361–62 (2008); KEITH KREHBIEL, *PIVOTAL POLITICS: A THEORY OF U.S. LAWMAKING* 227–31 (1998); Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 596 (2002); Kathryn Pearson & Eric Shickler, *Discharge Petitions, Agenda Control, and the Congressional Committee System*, 1929–76, 71 J. POL. 1238, 1253–54 (2009); Ganesh Sitaraman, *The Origins of Legislation*, 91 NOTRE DAME L. REV. 79, 93–96 (2015); Jeffery C. Talbert & Matthew Potoski, *Setting the Legislative Agenda: The Dimensional Structure of Bill Cosponsoring and Floor Voting*, 64 J. POL. 864, 866–67 (2002).

147. See Banks & Weingast, *supra* note 126, at 511; Bawn, *supra* note 114, at 62; Kathleen Bawn, *Choosing Strategies to Control the Bureaucracy: Statutory Constraints, Oversight, and the Committee System*, 13 J.L. ECON. & ORG. 101, 120–21 (1997) [hereinafter Bawn, *Choosing Strategies*]; J. Bendor, A. Glazer & T. Hammond, *Theories of Delegation*, 4 ANN. REV. POL. SCI. 235, 243 (2001); DAVID EPSTEIN & SHARYN O’HALLORAN, *DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS* 53 (1999); JOHN D. HUBER & CHARLES R. SHIPAN, *DELIBERATE DISCRETION?: THE INSTITUTIONAL FOUNDATIONS OF BUREAUCRATIC AUTONOMY* 9 (2002); Jordan Carr Peterson, *All Their Eggs in One Basket? Ideological Congruence in Congress and the Bicameral Origins of Concentrated Delegation to the Bureaucracy*, LAWS 2 (May 12, 2018), https://mdpi-res.com/laws/laws-07-00019/article_deploy/laws-07-00019.pdf [https://p^{er}ma.cc/DP6R-RLTK]; Alan E. Wiseman, *Delegation and Positive-Sum Bureaucracies*, 71 J. POL. 998, 1002 (2009).

148. See Bawn, *Choosing Strategies*, *supra* note 147, at 119–20; DAVID E. LEWIS, *PRESIDENTS AND THE POLITICS OF AGENCY DESIGN* 9 (2003); Jonathan R. Macey, *Organizational Design and Political Control of Administrative Agencies*, 8 J.L. ECON. & ORG. 93, 99 (1992); Mathew D. McCubbins, *The Legislative Design of Regulatory Structure*, 29 AM. J. POL. SCI. 721, 725–26 (1985); Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political*

because of the inherent uncertainty that results from delegating authority to executive branch agencies, the political actors who build legislative coalitions may view statutory text in different ways. This uncertainty may lead to a legislative compromise that delegates policy authority to the executive branch, provides for all three branches of government to observe agency decisions resulting from said delegation, and creates opportunities for elected officials and courts to adjust the parameters of delegation based on those observations.¹⁴⁹

Delegating to federal agencies offers two potential benefits. First, by allowing administrators to develop deep understandings of specific issue areas, legislators can overcome their own lack of substantive policy expertise and shift congressional resources toward other governing activities such as casework.¹⁵⁰ Second, because the APA is a “super-statute” designed to force agencies to engage with and accommodate the viewpoints of interested persons, legislators can off-load the burden of interacting with stakeholders by relying on administrative agencies to improve government efficiency by implementing policies that match changing circumstances.¹⁵¹

However, when delegating to federal agencies staffed by administrators whom people do not directly elect and whom elected officials can only indirectly guide, legislators must weigh the benefits of administrative expertise that justify delegation against the desirability of administrative responsiveness to politics.¹⁵² More specifically, Congress seeks to provide enough leeway for administrators to develop specialized knowledge and the corresponding

Control, 3 J.L. ECON. & ORG. 243, 255–57 (1987); McCubbins et al., *supra* note 114, at 441; Terry Moe, *The Politics of Bureaucratic Structure*, in CAN THE GOVERNMENT GOVERN 267, 284–85 (John E. Chubb & Paul E. Peterson eds., 1989); Terry M. Moe & Scott A. Wilson, *Presidents and the Politics of Structure*, 57 LAW & CONTEMP. PROBS., Spring 1994, at 1, 7–9. *See generally* Thomas H. Hammond & Christopher K. Butler, *Some Complex Answers to the Simple Question ‘Do Institutions Matter?’: Policy Choice and Policy Change in Presidential and Parliamentary Systems*, 15 J. THEORETICAL POL. 145 (2003) (conceptualizing institutional systems as a set of rules for aggregating preferences into policy).

149. *See* Jasmine Farrier, *The Contemporary Presidency: Executive Ambition Versus Congressional Ambivalence*, 40 PRESIDENTIAL STUD. Q. 310, 311 (2010); Charles R. Shipan, *The Legislative Design of Judicial Review: A Formal Analysis*, 12 J. THEORETICAL POL. 269, 269–70 (2000).

150. *See* MORRIS P. FIORINA, CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT 46–47 (2d ed. 1989); Mathew D. McCubbins, *Abdication or Delegation? Congress, the Bureaucracy, and the Delegation Dilemma*, 22 REGULATION 30, 33–34 (1999).

151. *See* Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345, 351–57 (2019); McCubbins, *supra* note 150, at 31; McCubbins et al., *Administrative Procedures as Instruments of Political Control*, *supra* note 148, at 244; RACHEL AUGUSTINE POTTER, BENDING THE RULES: PROCEDURAL POLITICKING IN THE BUREAUCRACY 8–12 (2019); William West, *Administrative Rulemaking: An Old and Emerging Literature*, 65 PUB. ADMIN. REV. 655, 656 (2005).

152. Jennifer L. Selin, *Political Control of Regulatory Authorities*, in HANDBOOK OF REGULATORY AUTHORITIES 193, 193 (Martino Maggetti, Fabrizio Di Mascio & Alessandro Natalini eds., 2022); Mark Thatcher, *Delegation to Independent Regulatory Agencies: Pressures, Functions and Contextual Mediation*, 25 W. EUR. POL. 125, 129–31 (2002); *see* Woodrow Wilson, *The Study of Administration*, 2 POL. SCI. Q. 197, 216–17 (1887).

ability to grow their capacity and technical expertise, particularly in complex and uncertain policy arenas.¹⁵³

This leads us to the second part of the triad. Members of Congress consider the benefit of expertise alongside the downsides of delegation. These include the potential for agency choices that differ from what members would want if they had the same knowledge (i.e., agency drift), the possibility that administrators do not work as hard as Congress would want them to (i.e., agency shirking), the possibility that unelected agencies are not accountable to them or their constituents (i.e., agency autonomy), or the chance that agencies become too entwined with constituents (i.e., agency capture).¹⁵⁴ Congress has deployed a variety of statutory devices that attempt to reign in agency drift and set up incentive schemes for agency performance, while still allowing the development of agency expertise.¹⁵⁵ For example, legislators can use procedures that require regular reporting to Congress, annual budgetary leashes on agency actions, and independent inspections, audits or overlapping agency jurisdictions to help reduce the knowledge gap between specialized agencies and legislators.¹⁵⁶ Legislators can also gather information from their constituents and relevant stakeholders to monitor agencies.¹⁵⁷

However, holding agencies accountable for their actions and choices is challenging.¹⁵⁸ Agency oversight as a whole is costly and, in the face of the

153. See Sean Gailmard & John W. Patty, *Slackers and Zealots: Civil Service, Policy Discretion, and Bureaucratic Expertise*, 51 AM. J. POL. SCI. 873, 886 (2007); SEAN GAILMARD & JOHN W. PATTY, LEARNING WHILE GOVERNING 55–56, 76–77 (2013); Sean Gailmard & John W. Patty, *Participation, Process and Policy: The Informational Value of Politicised Judicial Review*, 37 J. PUB. POL'Y 233, 235, 238 (2017).

154. See JOHN BREHM & SCOTT GATES, WORKING, SHIRKING, AND SABOTAGE 75–92 (1999); David Epstein & Sharyn O'Halloran, *Administrative Procedures, Information, and Agency Discretion*, 38 AM. J. POL. SCI. 697, 698–701 (1994); Justin Rex, *Anatomy of Agency Capture: An Organizational Typology for Diagnosing and Remediating Capture*, 14 REGUL. & GOVERNANCE 271, 272–75 (2020); Rourke, *supra* note 115, at 247; WEBER, *supra* note 115, at 233–34; Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765, 767, 792–93 (1983).

155. E.g., Brian D. Feinstein, *Designing Executive Agencies for Congressional Influence*, 69 ADMIN. L. REV. 259, 287–88 (2017); HUBER & SHIPAN, *supra* note 147, at 80; Banks & Weingast, *supra* note 126, at 521; Jonathan Bendor & Adam Meirowitz, *Spatial Models of Delegation*, 98 AM. POL. SCI. REV. 293, 308 (2004); KIEWIET & MCCUBBINS, *supra* note 115, at 231; Wood & Waterman, *supra* note 142, at 804.

156. E.g., JOEL D. ABERBACH, KEEPING A WATCHFUL EYE 130–44 (1990); Michael M. Ting, *A Strategic Theory of Bureaucratic Redundancy*, 47 AM. J. POL. SCI. 274, 287–88 (2003); Ian R. Turner, *Political Agency, Oversight, and Bias: The Instrumental Value of Politicized Policymaking*, 35 J.L. ECON. & ORG. 544, 568 (2019).

157. E.g., McCubbins & Schwartz, *supra* note 126, at 167.

158. See generally Anya Bernstein & Cristina Rodríguez, *The Accountable Bureaucrat*, 132 YALE L.J. 1600 (2023); Janna King, Sean Gailmard & Abby Wood, *Decentralized Legislative Oversight of Bureaucratic Policy Making*, 35 J. THEORETICAL POL. 292 (2023).

variety and scope of legislative mandates and limited legislative resources, perhaps impossible.¹⁵⁹

Thus, Congress contemplates the real possibility that litigants will ask the courts to intervene—the third part of the triad. Exposing an agency to courts can reinforce coalitional decision-making and increase agency responsiveness to political review by providing a forum for review of administrative policy that grants supremacy to the enacting coalition's preferences as expressed through statutory text.¹⁶⁰

Yet uncertainty regarding how major policy questions of today will be implemented tomorrow makes things difficult.¹⁶¹ Review provisions of any kind affect administrators' desire and capacity to implement delegated authority.¹⁶² Review provisions of the judicial kind create pressure on agencies to adjust their policy processes and use of resources strategically in an attempt to ward off legal challenges.¹⁶³

B. USING THE COURTS FOR OVERSIGHT

Based on our theoretical assumptions regarding the triad of influences that affect delegation, our model of delegation explores how Congress reconciles the benefits of administrative autonomy against the need for the administrative state to adhere to constitutional principles such as democratic accountability and the rule of law.¹⁶⁴ In our model, when Congress delegates, it designs statutory text to accommodate the existing constraints statutory law places on elected officials' ability to influence politically appointed agency leadership, congressional and presidential statutory ability to review agency decisions, and the constraints statutory law places on the judiciary's authority to review final agency action.¹⁶⁵

159. Morris S. Ogul & Bert A. Rockman, *Overseeing Oversight: New Departures and Old Problems*, 15 LEGIS. STUD. Q. 5, 21–22 (1990).

160. Eskridge & Ferejohn, *supra* note 100, at 187; Ferejohn & Shipan, *supra* note 100, at 17; Ferejohn & Weingast, *supra* note 100, at 579–80; Magill, *supra* note 100, at 1405.

161. See David Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 YALE L.J. 616, 663 (2013); Edward J. Grenier, Jr. & Robert W. Clark III, *The Relationship Between DOE and FERC: Innovative Government or Inevitable Headache?*, 1 ENERGY L.J. 325, 352 (1980).

162. See B. Dan Wood, *Principals, Bureaucrats, and Responsiveness in Clean Air Enforcements*, 82 AM. POL. SCI. REV. 213, 229 (1988); Bawn, *supra* note 114, at 70; Bawn, *Choosing Strategies*, *supra* note 147, at 114–16.

163. See Caroline Cecot & W. Kip Viscusi, *Judicial Review of Agency Benefit-Cost Analysis*, 22 GEO. MASON L. REV. 575, 606 (2015); Jonah B. Gelbach & David Marcus, *Rethinking Judicial Review of High Volume Agency Adjudication*, 96 TEX. L. REV. 1097, 1157 (2018); Jonathan S. Gould, *Cost-Benefit Analysis in Polarized Times*, 75 ADMIN. L. REV. 695, 758–60 (2023); Emerson H. Tiller, *Controlling Policy by Controlling Process: Judicial Influence on Regulatory Decision Making*, 14 J.L. ECON. & ORG. 114, 115 (1998).

164. Selin & Clouser McCann, *supra* note 122, at 1313–32.

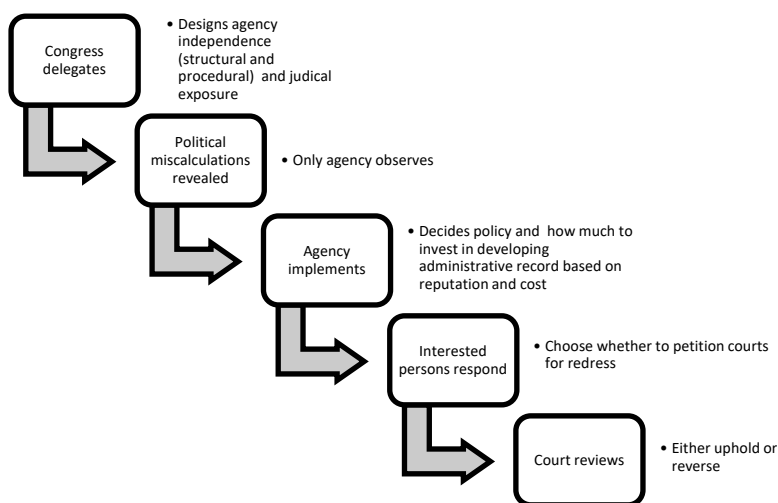
165. See *id.* app. at 1366.

1. Model Specification

Our model provides scholars a more complete explanation of how judicial review, in combination with agency structure, influences legislative design of statutory text. Importantly for the purposes of this Article, the model accounts for the development of legislative coalitions in an uncertain political world, the expertise and reputation of administrative agencies, and the likelihood that interested persons can garner enough resources to petition the federal courts for review of final agency action.¹⁶⁶

Figure 1 depicts a simplified version of our theoretical model.¹⁶⁷ In the model, a political coalition enacts a statute which delegates authority to a federal agency. After the final legislation is enacted, any political miscalculations by the coalition are revealed exclusively to the agency.¹⁶⁸ The agency then implements the statute. This implementation affects a variety of interested persons, who observe final agency actions and decide whether to challenge them in court.

Figure 1. A Theoretical Model of Delegation



166. See generally *id.*

167. The model's equilibrium concept is Perfect Bayesian Equilibrium in weakly undominated strategies, where the political coalition and agency maximize their expected payoffs given each other's strategic actions.

168. This reflects our assumption of information asymmetry between the agency and the political coalition.

i. Congress Delegates

In our model, the sequence of play begins when a political coalition made up of pivotal members of both chambers of Congress and the President crafts legislation that delegates substantive authority to an agency and both accounts for and adjusts the agency's independence from politics and its exposure to the courts.

The coalition's choice involving agency independence can involve a variety of different types of statutory provisions that fall across two general dimensions.¹⁶⁹ The first, structural independence, represents the degree to which agency leadership reflects external political actors' influence over agency decisions. Although a completely independent agency would be one in which leadership was made up of solely career administrators, our model recognizes the Constitution requires agencies to exercise executive power subject to the direction and supervision of an appointed principal officer.¹⁷⁰ Thus, in our model, the political coalition determines how to weight these officers' sensitivity to external (i.e., political) interests versus internal (i.e., careerist) preferences.

Practically, structural independence reflects the constraints a statute places on the President's ability to exercise his appointment and removal powers. Traditionally recognized as the defining legal features of agency independence, these provisions include aspects of agency design such as fixed terms, for-cause protections, expertise, or partisan balancing requirements.¹⁷¹ The provisions also include placement of the agency within the executive branch (i.e., Executive Office of the President, Executive Department, or freestanding agency) and whether some or all of the agency's employees work

169. See Bawn, *supra* note 114, at 63–67; Selin, *supra* note 142, at 972–84; Selin & Clouser McCann, *supra* note 122, at 1315–25.

170. *Edmond v. United States*, 520 U.S. 651, 662–66 (1997); *United States v. Arthrex, Inc.*, 594 U.S. 1, 21–22 (2021).

171. *E.g.*, *Humphrey's Ex'r v. United States*, 295 U.S. 602, 624, 627–29 (1935) (recognizing these provisions combined with the agencies' duties made the FTC, by design, nonpartisan, and “predominantly quasi-judicial and quasi-legislative”); Patrick M. Corrigan & Richard L. Revesz, *The Genesis of Independent Agencies*, 92 N.Y.U. L. REV. 637, 640–57 (2017) (exploring removal protection provisions as important indicia of agency independence); Brian D. Feinstein & Daniel J. Hemel, *Partisan Balance with Bite*, 118 COLUM. L. REV. 9, 39–54 (2018) (examining the influence of partisan balancing requirements on the ideological composition of multimember boards and commissions); Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41, 51–54 (deconstructing the elements of agency independence, focusing primarily on the structural features of multimember leadership, partisan balancing, and restrictions on the President's removal power); Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 ALA. L. REV. 1205, 1227–29 (2014) (examining removal power as an important tool of presidential control); Paul R. Verkuil, *The Purposes and Limits of Independent Agencies*, 1988 DUKE L.J. 257, 259 (describing independence as based largely upon bipartisan appointment, fixed term, and for-cause removal requirements).

outside the constraints of Title 5's civil service appointment and removal provisions.¹⁷²

Yet the design of agency leadership can only do so much; recent research suggests that statutory limits on the President's appointment and removal powers may not be sufficient to configure an agency's decision-making and insulate an agency from political influence.¹⁷³ Indeed, Congress itself has increasingly recognized this reality, using statutory language to adjust the amount of discretion an agency has to interpret its delegated authority or the procedures the agency must use when implementing policy.¹⁷⁴ Our model captures these statutory choices through the political coalition's second choice parameter, procedural independence.

The degree of procedural independence granted to an agency via statute affects the variance in agency outcomes. Our theoretical construct of procedural independence is observed through statutory language designed to insulate agency decisions from political review (e.g., Office of Management and Budget ("OMB") review) or similar adjustments to agency actions ex post (including Department of Justice ("DOJ") representation in legal matters).¹⁷⁵ Because such statutory language influences an agency's ability to gather

172. E.g., Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 585 & n.40, 589 (1984) (noting that the President's reach is somewhat longer in executive departments as opposed to independent commissions); James R. Thompson, *The Federal Civil Service: The Demise of an Institution*, 66 PUB. ADMIN. REV. 496, 499 (2006) (arguing that changes to core civil service principles such as tenure in office can introduce partisan bias into an agency).

173. Neal Devins & David E. Lewis, *Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 B.U. L. REV. 459, 477-78, 491 (2008).

174. E.g., ALEXANDER BOLTON & SHARECE THROWER, CHECKS IN THE BALANCE 14 (2021) (exploring the dynamics of legislative discretion and oversight of the executive); Nuno Garoupa & Jud Mathews, *Strategic Delegation, Discretion, and Deference: Explaining the Comparative Law of Administrative Review*, 62 AM. J. COMPAR. L. 1, 6-7 (2014) (modeling legislative decisions as including statute-specific decisions regarding the scope of agency discretion and procedural mechanisms that facilitate oversight); HUBER & SHIPAN, *supra* note 147, at 9 (arguing politicians deliberately adjust the discretion afforded agencies in statutes as a strategy for achieving preferred policy outcomes); McCubbins et al., *supra* note 148, at 255 (presenting administrative procedures as limiting an agency's range of feasible policy options); Natalie L. Smith & Susan Webb Yackee, *A New Measure of US Public Agency Policy Discretion*, 34 J. PUB. ADMIN. RSCH. & THEORY 404, 404 (2024) (defining "policy discretion as the perceived area within which" political officials "lack influence over an agency[]"); RACHEL VANSICKLE-WARD, THE DEVIL IS IN THE DETAILS 4-5 (2014) (arguing that partisan conflict and fragmentation across government branches and key stakeholders can lead to less statutory precision, particularly in highly salient policy areas).

175. E.g., Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 801, 806 (2013) (arguing independent litigating and OMB bypass authorities are a type of insulation from political control); Alan B. Morrison, *How Independent Are Independent Regulatory Agencies?*, 1988 DUKE L.J. 252, 254 (discussing the importance of considering factors such as independent litigating authority and OMB review alongside structural indicators of independence); Roberta Romano, *Does Agency Structure Affect Agency Decisionmaking? Implications of the CFPB's Design for Administrative Governance*, 36 YALE J. ON REGUL. 273, 291 (2019) (including litigation authority and OMB bypass as criteria for agency independence).

information and rely on its own expertise when making implementation choices, the coalition can use the language to make an agency more or less independent procedurally.

Finally, when delegating to an agency, the coalition considers the degree to which it seeks to involve the judiciary in oversight of agency action beyond the default procedures of the APA. In our model, the coalition can either decide to increase agency exposure to litigation (e.g., provide for *de novo* review) or limit court review (e.g., preclude parties from litigating certain matters). When the coalition does not include provisions related to judicial review in a statute, APA's default level of oversight remains.

Across all parameters—both dimensions of agency independence and judicial review—the coalition can never completely: (1) strip an agency of its own preferences over policy; (2) eliminate agency discretion with statutory language; or (3) prevent courts from acting (i.e., a petitioner files a frivolous complaint and the court dismisses the case). In making its decision, the political coalition understands how the agency, interested persons, and courts would make their decisions in a perfect world. However, the coalition realizes that governance (and life in general) brings uncertainty in terms of how certain political actors influence others and how the policy process will pan out.

Put another way, the political coalition sometimes miscalculates. But the coalition knows it is more likely to miscalculate in certain scenarios than in others. Specifically, when acting in some policy spaces (e.g., highly technical policy areas such as biotechnology or cryptocurrency), each branch—Congress, agencies, and the judiciary—is more likely to make mistakes. Furthermore, when an agency is increasingly insulated from political review, the coalition is more uncertain about the effects of the administrative process on final outcomes. When delegating, the coalition accounts for all of this uncertainty and the decision calculus of other actors in the game.

ii. Agency Acts

In the model, the agency acts under the statute after the political coalition's miscalculations are revealed to the agency. When implementing its delegated authority, an agency will base its decision-making on its (induced) preferences and how it predicts policy will map out in the real world.

These are not the only things that concern an agency. Notably, agencies are "acutely aware" of the fact that political coalitions—and the constituents they represent—monitor them and that this monitoring results in a common set of beliefs among political and judicial actors regarding an organization's capabilities and intentions.¹⁷⁶ This reputation is politically powerful, as it can

176. Daniel P. Carpenter & George A. Krause, *Reputation and Public Administration*, 72 *PUB. ADMIN. REV.* 26, 27 (2012).

enable agencies to counter the influence of external actors and make it costly for the political coalition to ignore the agency's expertise.¹⁷⁷

Theoretically modeling agency reputation is a complicated endeavor. To get at this concept, we assume that two things can enhance agency reputation: the degree of effort an agency puts into developing its administrative record and the agency's procedural independence. These two aspects mirror Professor Susan Moffitt's work on agency reputation building, which suggests that agencies have incentives to promote their reputation (and gather information) publicly and privately.¹⁷⁸

In the face of uncertainty or when agency capacity is weak, agencies publicly gather information from interested persons and document the information in the administrative record in order to cultivate consensus and promote policy stability.¹⁷⁹ Public engagement with interested persons throughout the implementation process and documentation of such engagement can help agencies develop a reputation of efficient, equitable, and effective administration.¹⁸⁰ However, this engagement can also give key stakeholders and political officials information that they may not otherwise have.¹⁸¹ This new information can prompt additional oversight, making it more costly for an agency to make decisions. Thus, in certain instances, agencies have an incentive to gather information internally and avoid unnecessary oversight.

Thus, our model accounts for the rate at which an agency can improve its reputation through the administrative record, given the agency's procedural independence. Insulating an agency procedurally from broadly inclusive, public participation in its policy processes can protect or enhance agency reputation by creating space for the agency to develop its own internal knowledge (private reputational development).¹⁸² With procedural independence, an agency can devote its attention toward building its capacity to understand the nuance of highly technical policy.¹⁸³ Such expertise, combined with its processes' insulation from politics, may also place the agency in a better

177. DANIEL P. CARPENTER, *THE FORGING OF BUREAUCRATIC AUTONOMY* 353–57 (2001).

178. Susan L. Moffitt, *Promoting Agency Reputation Through Public Advice: Advisory Committee Use in the FDA*, 72 J. POL. 880, 882–83 (2010).

179. *Id.*; Joohyung Park, *Procedural Politicking for What? Bureaucratic Reputation and Democratic Governance*, 35 J. PUB. ADMIN. RSCH. & THEORY 73, 74 (2025).

180. *See* OFF. OF THE CHAIR, ADMIN. CONF. OF THE U.S., *STATEMENT OF PRINCIPLES FOR PUBLIC ENGAGEMENT IN AGENCY RULEMAKING 2* (2023), https://www.acus.gov/sites/default/files/documents/Statement_of_Principles_for_Public_Engagement_in_Rulemaking_2023.09.01.pdf [http://perma.cc/29XG-SWJ8].

181. McCubbins & Schwartz, *supra* note 126, at 166; Moffitt, *supra* note 178, at 883.

182. CARPENTER, *supra* note 177, at 46.

183. Stavros Gadinis, *From Independence to Politics in Financial Regulation*, 101 CALIF. L. REV. 327, 330 (2013); Ian R. Turner, *Reviewing Procedure Versus Judging Substance: How Increasing Bureaucratic Oversight Can Reduce Bureaucratic Accountability*, 2 J. POL. INSTS. & POL. ECON. 569, 593–94 (2021).

position to implement policy vis-à-vis unpopular or highly controversial elected officials.

However, investment in expertise requires agencies to incur significant political, opportunity, and resource costs. Additionally, perceptions of agency expertise evolve with time, politicization, and uncertainty.¹⁸⁴ Thus, our model includes weighting variables that account for the importance of outcomes versus reputation and the costliness of administrative effort across agencies and time.

iii. *Litigation Ensues*

In the last stages of the model, an interested person chooses whether to petition the court for review of agency action. We model the probability of litigation as a function of the level of the agency's statutory exposure to the courts and an exogenous parameter that represents stakeholder capacity or will to litigate.

Importantly, our model's contemplation of a petition for review is not limited to challenges to rulemaking or an agency's statutory authority to regulate (i.e., *Loper Bright*¹⁸⁵). "Even though no administrative law decision has received more scholarly attention than *Chevron U.S.A. Inc. v. NRDC* (and now *Loper Bright Enterprises v. Raimondo*), we move beyond" this research to account for the multitude of agency decisions that affect interested persons in a concrete and particularized way.¹⁸⁶ Most contemporary agency decision-making utilizes diverse procedures and often includes staged functions such as the processing of applications and complaints, investigations of alleged legal violations, compliance inspections and examinations, and structured negotiations.¹⁸⁷ While the APA's judicial review provisions arguably provide for challenges to agency fact-finding or adherence to procedural

184. David Demortain & Olivier Borraz, *Managing Technical Reputation: Regulatory Agencies and Evidential Work in Risk Assessment*, 100 PUB. ADMIN. 394, 396 (2022); Mark D. Richardson, Joshua D. Clinton & David E. Lewis, *Elite Perceptions of Agency Ideology and Workforce Skill*, 80 J. POL. 303, 303 (2018).

185. See generally *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024).

186. Selin & Clouser McCann, *supra* note 122, at 1324 (footnotes omitted).

187. E.g., ASIMOW, *supra* note 119, at 2, 23–24 (noting that agencies make millions of these types of decisions each year); Emily S. Bremer, *The Rediscovered Stages of Agency Adjudication*, 99 WASH. U. L. REV. 377, 383 (2021) (arguing these developments render the APA's conceptual foundation "antiquated"); Daniel A. Farber & Anne Joseph O'Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1140 (2014) (noting the mismatch between traditional assumptions of administrative processes under the APA and the actual workings of the administrative state); Christopher J. Walker & Melissa F. Wasserman, *The New World of Agency Adjudication*, 107 CALIF. L. REV. 141, 153 (2019) (arguing administrative law's "fixation" on APA-governed formal adjudication and federal regulatory action misses consequential agency decision-making).

requirements,¹⁸⁸ canonical administrative law based on presumption of these APA judicial review frameworks may miss how agencies operate today.¹⁸⁹

If a petition for review is filed with the court, the court decides whether to uphold or reverse the agency's decision. While, when writing legislation, the political coalition may have an idea of the baseline level of the willingness of various stakeholders to use the courts to challenge agency decisions, the coalition rarely can be certain about how statutory language will eventually influence the future dynamics of administrative litigation. For example, it may be comparatively easy for observers to predict—given existing statutory language, jurisprudence, market conditions, public opinion, the preferences of judicial circuits and the Supreme Court, and the makeup of the political branches of government among other things—the agency actions likely to be challenged right now and perhaps even how any particular court across the country will review that action. But what about in five years? A decade or two? Or even half a century? The coalition recognizes the stickiness of statutory language but cannot possibly anticipate how it will play out that far ahead of time. As a result, we model the probability that a court will uphold an agency's decisions as equivalent to a coin flip.¹⁹⁰

2. Theoretical Expectations

To derive empirically testable hypotheses from our model, we consider a number of comparative statics, focusing on the cross-partial derivatives with respect to legislative design of judicial review. Our model suggests that legislative design of judicial review accounts for three things: political volatility, administrative expertise, and agency independence.

First, when Congress cannot foresee how agencies will implement policy under their delegated authority or how legislators' constituents will respond to new regulatory schemes, Congress increases agency exposure to the courts by writing into statutory law provisions that allow for more judicial review.¹⁹¹ Such uncertainty can arise when there is a new presidential administration, the balance of power within Congress is undecided and the strength of organized interests is in flux, or national and international circumstances produce external shocks to the political environment.¹⁹² In these uncertain

188. 5 U.S.C. § 706; *see also* Joel Beauvais, Steven P. Croley & Elana Nightingale Dawson, *Judicial Challenges to Federal Agency Action*, in ENVIRONMENTAL LITIGATION: LAW AND STRATEGY 1, 28–38 (Kegan A. Brown & Andrea M. Hogan eds., 2d ed. 2019) (describing a variety of claims that arise in environmental litigation over agency decision-making).

189. Farber & O'Connell, *supra* note 187, at 1154.

190. We do not give the court an ideological or legal identity, meaning it can be a single district court judge or a panel of appellate judges. Our only assumption with respect to the court is that its level of technical expertise is the same as or less than that of the agency.

191. Selin & Clouser McCann, *supra* note 122, at 1289.

192. Eskridge & Ferejohn, *supra* note 100, at 176; Sean Farhang, *Legislating for Litigation: Delegation, Public Policy, and Democracy*, 106 CALIF. L. REV. 1529, 1550–51 (2018); Robert M. Howard, *Controlling Forum Choice and Controlling Policy: Congress, Courts and the IRS*, 35 POL'Y STUD.

times, bills that delegate authority to the executive branch often reinforce the APA's presumption of reviewability, expand traditional notions of venue, adjust the requirements for standing, increase the length of time an interested person has to file a complaint against a final agency action, or specify the scope of federal court review of final agency action.¹⁹³

On the flip side, when the electoral connection between regulated entities and politicians is relatively strong and the political coalition feels confident about the continuation of existing political arrangements across government, then the coalition should be more likely to engage in jurisdiction stripping.¹⁹⁴ Not only does litigation (or even the threat of litigation) represent a delay in the implementation process as agencies direct resources toward preparing for court, but the federal court system contains 108 distinct courts, each with its own identity and set of norms.¹⁹⁵

In times of political stability, this variation introduces unwanted uncertainty into the policy process.¹⁹⁶ Thus, our first empirical expectation is:

Expectation 1: As political volatility increases, the political coalition is less likely to engage in jurisdiction stripping.

Of course, insulating an agency from political control is another mechanism available to Congress when drafting legislation that cultivates administrative expertise.¹⁹⁷ By limiting the political branches' influence over

J. 109–10 (2007); Ferejohn & Shipan, *supra* note 100, at 16–17; Shipan, *supra* note 149, at 275; Joseph L. Smith, *Judicial Procedures as Instruments of Political Control: Congress's Strategic Use of Citizen Suits*, 31 LEGIS. STUD. Q. 283, 298–99 (2006); Pablo T. Spiller & Emerson H. Tiller, *Decision Costs and the Strategic Design of Administrative Process and Judicial Review*, 26 J. LEGAL STUD. 347, 360 (1997).

193. Pamela J. Clouser McCann, Charles R. Shipan & Yuhua Wang, *Measuring the Legislative Design of Judicial Review of Agency Actions*, 39 J.L. ECON. & ORG. 123, 135–37 (2021).

194. See generally Justin Fox & Matthew C. Stephenson, *Judicial Review as a Response to Political Posturing*, 105 AM. POL. SCI. REV. 397, 398 (2011) (detailing criticisms of judicial review including the possibility that judges may use their review power in ways that harm voter interests); Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257, 309 (2005) (discussing the politics of judicial review and acknowledging the “threat” and “hope” of judicial review for democratic governance); KIEWIET & MCCUBBINS, *supra* note 115, at 2 (recognizing scholarly consensus that legislators' willingness to engage in delegation is tied to electoral considerations).

195. E.g., Martha Dragich, *Uniformity, Inferiority, and the Law of the Circuit Doctrine*, 56 LOY. L. REV. 535, 544–46 (2010) (“Possibilities for divergent interpretations of federal law abound” in the federal court system); David A. Hoffman, Alan J. Izenman & Jeffrey R. Lidicker, *Docketology, District Courts, and Doctrine*, 85 WASH. U. L. REV. 681, 723–24 (2007) (detailing the complexity of understanding patterns in decision-making across the federal district courts). Furthermore, even within a single circuit on a single issue, there can be variability in decision-making. Lee Petherbridge, *Patent Law Uniformity?*, 22 HARV. J.L. & TECH. 421, 427–28 (2009).

196. E.g., Bruff, *supra* note 116, at 1194 (discussing trade-offs in the decentralization of judicial review of administrative action).

197. E.g., Epstein & O'Halloran, *supra* note 154, at 697–99; Gailmard & Patty, *Slackers and Zealots: Civil Service, Policy Discretion, and Bureaucratic Expertise*, *supra* note 153, at 881; John B. Gilmour & David E. Lewis, *Political Appointees and the Competence of Federal Program Management*,

final agency actions, Congress can make a credible commitment not to interfere with long-term policy vision.¹⁹⁸ In doing so, Congress distinguishes between federal agencies designed in ways that limit the political branches' ability to appoint and remove key agency leaders (structural independence) and procedures which enable the political branches to review agency decision-making (procedural independence).¹⁹⁹

Congressional design of structural features such as assigning final agency action to a group of administrators who were appointed by the President and confirmed by the Senate, serve fixed terms, and cannot be removed from their positions but for cause, indicates a conscious legislative decision to remove hard policy choices from overt political influence exercised through the President's appointment and removal powers.²⁰⁰

But that decision does not necessarily mean Congress desires to remove administrative action from all constitutional means of review. More specifically, crafting statutory language that constructs judicial review offers legislators an opportunity to learn when federal agencies make choices that may depart from preferred legislative outcomes while preserving the autonomy of administrative actors.²⁰¹ Placing oversight in the hands of the federal judiciary means that agencies must justify their decision-making based upon the finding of facts in accordance with legislative constraints.²⁰² Stripping courts of their jurisdiction can handicap Congress in this regard by removing such constraints and closing off a key stream of information about the administrative outcomes. This leads us to our second empirical expectation:

34 AM. POL. RSCH. 22, 42 (2006); DAVID E. LEWIS, *THE POLITICS OF PRESIDENTIAL APPOINTMENTS* 197 (2008).

198. E.g., Barkow, *supra* note 111, at 19, 24; Peter Conti-Brown & David A. Wishnick, *Technocratic Pragmatism, Bureaucratic Expertise, and the Federal Reserve*, 130 YALE L.J. 636, 658–59 (2021); George A. Krause, David E. Lewis & James W. Douglas, *Politics Can Limit Policy Opportunism in Fiscal Institutions: Evidence from Official General Fund Revenue Forecasts in the American States*, 32 J. POL'Y ANALYSIS & MGMT. 271, 271–72 (2013); MILLER & WHITFORD, *supra* note 112, at 21; Selin, *supra* note 152, at 193; Bressman & Thompson, *supra* note 111, at 613.

199. Bawn, *supra* note 114, at 62; Xavier Fernández-i-Marín, Jacint Jordana & Andrea C. Bianculli, *Are Regulatory Agencies Independent in Practice? Evidence from Board Members in Spain*, 10 REGUL. & GOVERNANCE 230, 231–32 (2016); Sharon B. Jacobs, *The Statutory Separation of Powers*, 129 YALE L.J. 378, 438–39 (2019); Lewis & Selin, *supra* note 142, at 1507–10; Kenneth Lowande, *Who Polices the Administrative State?*, 112 AM. POL. SCI. REV. 874, 876–77 (2018); Christel Koop & Chris Hanretty, *Political Independence, Accountability, and the Quality of Regulatory Decision-Making*, 51 COMPAR. POL. STUD. 38, 41–42 (2018); Selin, *supra* note 142, at 974–75; SELIN & LEWIS, *supra* note 42, at 19; Ganesh Sitaraman, *The Political Economy of the Removal Power*, 134 HARV. L. REV. 352, 359–60 (2020).

200. See generally *Humphrey's Ex'r v. United States*, 295 U.S. 602, 628–30 (1935); *Seila L. LLC v. CFPB*, 591 U.S. 197 (2020).

201. Garoupa & Mathews, *supra* note 174, at 11; Selin & Clouser McCann, *supra* note 122, at 1290.

202. See Bawn, *Choosing Strategies*, *supra* note 147, at 108; Garoupa & Mathews, *supra* note 174, at 11; Mead & Fromherz, *supra* note 105, at 8; Selin, *supra* note 142, at 975; Selin & Clouser McCann, *supra* note 122, at 1314.

Expectation 2: As an agency becomes more structurally independent, the political coalition is less likely to engage in jurisdiction stripping.

However, subjecting an agency to any review—political or judicial—manipulates the agency’s implementation costs and can detract from the agency’s ability to engage in expert administration. Holding constant structural considerations,

legislators would like to design administrative procedures so that the agency gathers objective and complete information about policy consequences and then use the information exactly the way the legislators themselves would. The problem is that administrative procedures designed to prevent bureaucratic drift also limit the agency’s ability to research policy consequences or to make decisions that reflect its expertise.²⁰³

Thus, insulating agencies from any review can act as an expertise amplifier. Our final empirical expectation contemplates this dynamic:

Expectation 3: As an agency becomes more procedurally independent, the political coalition is more likely to engage in jurisdiction stripping.

But does the logic of our model extend to empirical observations of congressional decisions to strip federal courts of their jurisdiction?

III. EMPIRICAL PATTERNS IN JURISDICTION STRIPPING: 1947 TO 2016

To evaluate whether these theoretical presumptions have empirical support, we rely upon data originally collected and coded by Professors Pamela J. Clouser McCann, Charles R. Shipan, and Yuhua Wang.²⁰⁴ The professors’ impressive dataset (to which, in this Article, we refer as the “judicial exposure” dataset) catalogues all laws passed from 1947 to 2016 that: (1) journalists at the time or historians in retrospect deemed to be important or significant; and (2) incorporated details about administrative agencies’ relationships with the courts.²⁰⁵

In this Part, we present descriptive statistics that explore when Congress strips federal courts of jurisdiction over administrative action. After cataloging

203. Bawn, *supra* note 114, at 63.

204. See generally Clouser McCann et al., *supra* note 193.

205. See DAVID R. MAYHEW, *DIVIDED WE GOVERN 1946–2002*, at 43–44 (2d ed. 1991) (explaining the derivation of the process of selection of laws utilizing the *New York Times* and *Washington Post* reviews, along with scholarly work on significant, yet underestimated, laws). Professor Clouser McCann, Shipan, and Wang’s keyword search of the full statutory text of these laws included judi, appeal, appel, court, district, suit, action, legal, civil, and review.

broad empirical patterns, we then explore how these provisions differ across policy area and time.

A. *DESCRIPTIVE PATTERNS IN JURISDICTION STRIPPING*

About thirty-six percent of all significant laws enacted from 1947 to 2016 (152 of 420 laws) contained provisions that adjusted the baseline judicial review provisions of the APA.²⁰⁶

However, not all of these agency- or policy-specific statutory provisions limited federal courts' authority to review administrative action. Indeed, the judicial exposure dataset accounts for five categories of adjustments to judicial review, including language governing the scope and reviewability of agency actions and procedural aspects of the judicial process, such as standing, venue, and time limits for litigation.²⁰⁷ Our prior work investigates how Congress relies upon the combination of these provisions to increase or decrease executive branch exposure to the courts over time.²⁰⁸ In this Article, we focus our attention on the extent to which Congress strips federal courts of jurisdiction over agency action.

To measure jurisdiction stripping, we focus on two aspects of statutory language in the judicial exposure dataset. Specifically, the dataset includes information on congressional decisions to preclude review of any agency's final action by any court and congressional decisions to constrain litigation to a particular court venue.²⁰⁹ Of all significant laws enacted by Congress from 1947 to 2016 that adjusted the default judicial review arrangement contemplated by the APA, these jurisdiction-stripping provisions are included sixty percent of the time (92 of 152). Table 1 provides a breakdown of the provisions.

Table 1. Jurisdiction Stripping Frequency in 420 Significant Statutes, 1947 to 2016

Type	Number of Laws	Percent of Laws
Preclusion of Judicial Review	33	7.9
District Court Only Specified	18	4.3
Appellate Courts Only Specified	23	5.5
D.C. Court Only Specified	10	2.4
Special Court Only Specified	8	1.9
Total Degree of Jurisdiction Stripping	92	21.9

Just under eight percent (thirty-three) included complete preclusion of federal court jurisdiction to review final agency actions. These preclusions occurred across agency, time, and policy areas. For example, in 2012, Congress

206. Clouser McCann et al., *supra* note 193, at 135.

207. *Id.* at 127.

208. *See generally* Selin & Clouser McCann, *supra* note 122.

209. Clouser McCann et al., *supra* note 193, at 132.

specified the factors the Department of Transportation must consider when working with the states to improve transportation in metropolitan areas, but then provided that claims the Department failed to consider those factors were not reviewable by any court in any manner.²¹⁰ This provision was the result of a series of compromises to remove transportation improvement projects from stringent environmental review in order to construct a legislative coalition that would sign off on legislation to reform federal surface transportation more generally.²¹¹ Legislators cited concerns about delay of infrastructure projects because of excessive “bureaucratic red tape” and problems with environmental groups repeatedly using the court system to obstruct projects.²¹²

The most widely recognized type of jurisdiction stripping involves congressional decisions to funnel claims to a particular court. Empirically, these statutory provisions are almost twice as common as complete preclusion—fifty-nine laws enacted during our studied time period contained provisions that specified a level of court or a particular court to review final agency action. These include explicitly providing for review in a particular district court (about 4.3 percent of all significant laws) or moving initial determinations of agency actions to the circuit courts (about 5.5 percent of all significant laws). Again, these laws varied across time, agency, and policy area. For example, in 1968 as part of larger regulatory reforms to address new challenges in the increasingly complicated meat and poultry markets, Congress provided that Secretary of Agriculture determinations of false or misleading labeling of poultry products were appealable only in the D.C. Circuit or the U.S. Court of Appeals for the circuit in which the person utilizing such false labeling “has its principal place of business.”²¹³

Some laws contain multiple jurisdiction-stripping provisions. The Dodd–Frank Wall Street Reform and Consumer Protection Act provides a nice example.²¹⁴ When responding to the financial crisis of 2008, Congress established or adjusted the delegation of authority to several independent agencies (including the Commodity Futures Trading Commission, Consumer Financial Protection Bureau, Federal Deposit Insurance Corporation, Financial

210. Moving Ahead for Progress in the 21st Century Act, Pub. L. No. 112-141, § 20005, 126 Stat. 405, 633 (2012) (codified as amended at 49 U.S.C. § 5303(h)(3)).

211. Compare Moving Ahead for Progress in the 21st Century Act, H.R. 4348, 112th Cong. (2012) (as received in the Senate, Apr. 19, 2012), with Moving Ahead for Progress in the 21st Century Act, H.R. 4348, 112th Cong. (2012) (with engrossed Senate amendment, Apr. 24, 2012); see also 158 CONG. REC. H2099 (daily ed. Apr. 25, 2012).

212. *Sitting on Our Assets: Rehabilitating and Improving Our Nation’s Rail Infrastructure: Hearing Before the Subcomm. on R.Rs., Pipelines, and Hazardous Materials of the H. Comm. on Transp. and Infrastructure*, 112th Cong. 37 (2011).

213. Wholesome Poultry Products Act, Pub. L. No. 90-492, § 8(d), 82 Stat. 791, 799–800 (1968) (codified as amended at 21 U.S.C. § 457).

214. See generally Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

Stability Oversight Council, and Securities and Exchange Commission) and paired that delegation with specific restrictions on court review.²¹⁵

Table 1 indicates that almost twenty-two percent of significant laws utilize jurisdiction-stripping provisions to structure federal courts' abilities to review administrative action. Yet what empirical patterns emerge from the context in which Congress enacts such provisions, including the policy arena or the legal climate cultivated by the Supreme Court?

B. CONGRESSIONAL DESIGN OF JUDICIAL REVIEW BY POLICY AREA

As an initial exploration of whether congressional decisions to strip courts of jurisdiction to review administrative action are concentrated in certain policy areas over others, we classify the delegation of authority in the laws containing jurisdiction-stripping provisions by policy area, using the Comparative Agendas Project's ("CAP") classification scheme.²¹⁶ CAP assembles and codes information on policy processes around the world and enables scholars to investigate trends in legislative action across time by classifying policy activities into a universal coding scheme.²¹⁷ Using the CAP codes to classify the overall purpose of the enacted legislation in the judicial exposure dataset, we can place specific congressional decisions regarding the ability of federal courts to review administrative action in a larger context.

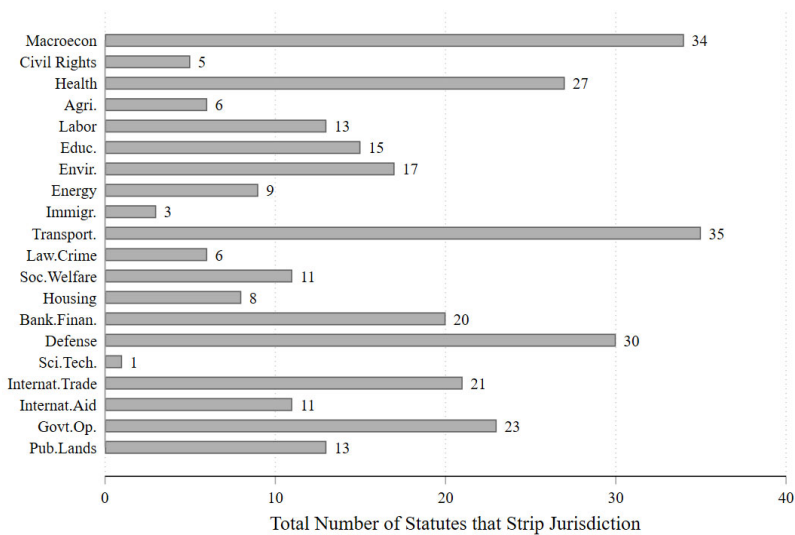
Figure 2 presents congressional use of jurisdiction stripping by CAP policy area. The most common policy areas in which Congress engages in jurisdiction stripping are macroeconomic policies (e.g., laws focused on economic growth, recessions, inflation reduction) and transportation, closely followed by defense and health. Given Part I's historical overview of congressional consideration of judicial review and Part II's theoretical development on legislative adjustments to federal courts' abilities to review final agency actions, these patterns make sense.

215. *Id.*

216. BRYAN D. JONES ET AL., U.S. POLICY AGENDAS PROJECT: TOPICS CODEBOOK 65 (2019), https://comparativeagendas.s3.amazonaws.com/codebookfiles/Codebook_PAP_2019.pdf [<https://perma.cc/3ED7-6PD4>]. In the extensive master codebook, the authors describe the twenty-one major topics (policy areas) they used to categorize each law.

217. *About*, COMPAR. AGENDAS PROJECT, <https://www.comparativeagendas.net/pages/About> [<https://perma.cc/7F43-AHKK>].

Figure 2. Statutory Jurisdictional Constraints by Policy Area from 1947 to 2016



Both in the United States and across the globe, the one arena in which legislators generally and credibly commit not to intervene is economic policy.²¹⁸ This overall principle is reflected in congressional proposals and enactments in areas such as market stability and securities regulation, where delegation to independent regulatory commissions features heavily.²¹⁹ The same considerations that lead Congress to delegate policy authority to independent agencies should also make legislators reluctant to have federal judges, who may not have the accumulated substantive policy knowledge of expert administrators, review final actions by those same agencies.²²⁰

Although laws involving delegation of authority in macroeconomic policy often reflect a need for the legislature to credibly commit not to interfere in expert decision-making, congressional enactments in the area of defense reflect different concerns. The politics of defense policy include both particularized decisions related to locations and management of military bases and defense procurement contracts—what have been termed “structural” defense policies

218. Gary Miller, *Above Politics: Credible Commitment and Efficiency in the Design of Public Agencies*, 10 J. PUB. ADMIN. RSCH. & THEORY 289, 322 (2000); MILLER & WHITFORD, *supra* note 112, at 21.

219. Bressman & Thompson, *supra* note 111, at 623.

220. See Fisher et al., *supra* note 138, at 1682–83 (demonstrating that, in the context of judicial review of the Environmental Protection Agency, courts “openly conceded” a lack of capacity to review agency science, but that over time courts held the agency accountable based on its own analytical processes and methods).

—as well as defense and military strategic initiatives, such as operational choices.²²¹

Political coalitions not only prefer to allow the Department of Defense (“DOD”) and strategic military operations to continue these initiatives without interference but also want to protect decisions regarding DOD contracts and land management from particularized claims that might disrupt administrative decisions made on the basis of larger policy concerns.²²² For example, in the Housing and Urban Development Act of 1965, Congress precluded from review in any court the Secretary of Defense’s choices regarding properties near military bases cited for closure.²²³ This type of protection in defense policy has continued throughout time. Indeed, the National Defense Authorization Act for Fiscal Year 2014 contained similar prohibitions of review with respect to the Secretary of Energy’s procurement authority.²²⁴

The least frequent arena of jurisdictional constraint is in science, space, and technological policies, with only one example in the sample. This finding reinforces our intuition that, while Congress may delegate in these areas and specify that final agency actions are largely removed from traditional mechanisms that enable political review of agency policy decisions, judicial review—at least as provided by the default provisions of the APA—can be helpful to provide a check on how well agency decision-making adheres to the law.

Of note, the one jurisdiction-stripping provision in this area is of a different type than traditionally contemplated as requiring specialized scientific or technological expertise. In 1996, Congress drafted the Communications Decency Act aimed at regulating the distribution of obscene or indecent material on the internet.²²⁵ As part of a larger political compromise resulting in omnibus legislation, Congress then incorporated the Act into the Telecommunications Act, which was designed to promote competition and reduce regulation to secure more efficient and effective telecommunication services and encourage development of new technologies.²²⁶ The Act’s

221. See generally Thomas M. Carsey & Barry Rundquist, *Party and Committee in Distributive Politics: Evidence from Defense Spending*, 61 J. POL. 1156 (1999) (analyzing military procurement decisions and defense committee representation); Edward J. Laurance, *The Congressional Role in Defense Policy Making: The Evolution of the Literature*, 6 ARMED FORCES & SOC’Y 431 (1980) (analyzing how Congress has handled defense spending).

222. E.g., Robert J. Art, *Congress and the Defense Budget: Enhancing Policy Oversight*, 100 POL. SCI. Q. 227, 227 (1985) (observing that, while Congress concerns itself with the details of defense spending, the legislature rarely deals with larger questions of defense policy).

223. Housing and Urban Development Act of 1965, Pub. L. No. 89-117, § 108(c), 79 Stat. 451, 461.

224. National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 4806, 127 Stat. 672, 1053 (2013) (codified as amended at 50 U.S.C. § 2786).

225. Telecommunications Act of 1996, Pub. L. No. 104-104, § 502, 110 Stat. 56, 133 (codified as amended at 47 U.S.C. § 223).

226. *Id.*; see also BARBARA SINCLAIR, UNORTHODOX LAWMAKING 111-12 (4th ed. 2012) (detailing the increasing use of omnibus legislation to forge political compromise).

jurisdiction-stripping provision required any civil action challenging the constitutionality of the Communications Decency Act to be heard by a panel of three district court judges pursuant to 20 U.S.C. § 2284 and that appeals of that panel's decision were reviewable as a matter of right by direct appeal to the Supreme Court.²²⁷ This provision not only exhibits congressional design of judicial review, but its history highlights the practical realities of a complex legislative process we noted in preceding parts of this Article.

C. *JURISDICTION STRIPPING: A RESPONSE TO THE SUPREME COURT?*

Beyond considerations of the policy environment where delegation occurs, scholarship on and media coverage of jurisdiction stripping suggest that Congress responds to the legal environment created by Supreme Court jurisprudence of our constitutional system of shared powers.²²⁸ Changes in legal regimes and/or signals sent by the Supreme Court can shock or reinforce existing relationships between federal agencies and those affected by their actions and add renewed focus on the preferences of a statute's enacting coalition.²²⁹

Engaging with this argument, we investigate whether empirical patterns tie jurisdiction stripping to the makeup of the Supreme Court. Over time, the Court has exhibited trends in its review of federal agency actions, particularly with respect to agency discretion.²³⁰ Many of these trends reflect the ebbs and flows of social forces that have shaped how the political and judicial branches of government view the need for discretion-facilitating or discretion-safeguarding legal mechanisms.²³¹ Such ebbs and flows can be the result of, or lead to, volatility in the political world.

Consistent with the approaches of scholars who have examined other trends in Court decision-making over time, we use Chief Justices to mark such eras.²³² Some jurisdiction-stripping provisions in our data reinforce traditional

227. Telecommunications Act of 1996 § 561, 110 Stat. at 142-43.

228. E.g., Anderson, *supra* note 11, at 419; Chutkow, *supra* note 76, at 1061; Gunther, *supra* note 13, at 895; Warren Snead, *The Supreme Court as an Agent of Policy Drift: The Case of the NLRA*, 117 AM. POL. SCI. REV. 661, 662-63 (2023); Ura & Wohlfarth, *supra* note 108, at 838.

229. James F. Spriggs II, *The Supreme Court and Federal Administrative Agencies: A Resource-Based Theory and Analysis of Judicial Impact*, 40 AM. J. POL. SCI. 1122, 1134-40 (1996); Karen M. Tani, *Foreword: Curation, Narration, Erasure: Power and Possibility at the U.S. Supreme Court*, 138 HARV. L. REV. 1, 6 (2024).

230. See, e.g., Sidney A. Shapiro & Robert L. Glicksman, *Congress, the Supreme Court, and the Quiet Revolution in Administrative Law*, 1988 DUKE L.J. 819, 845, 863.

231. Aaron L. Nielson, *Visualizing Change in Administrative Law*, 49 GA. L. REV. 757, 794 (2015).

232. E.g., Brandon L. Bartels & Andrew J. O'Geen, *The Nature of Legal Change on the U.S. Supreme Court: Jurisprudential Regimes Theory and Its Alternatives*, 59 AM. J. POL. SCI. 880, 888 (2015); Donald Michael Gooch, *Ideological Polarization on the Supreme Court: Trends in the Court's Institutional Environment and Across Regimes, 1937-2008*, 43 AM. POL. RSCH. 999, 1022-23 (2015); Stephen C. Halpern & Charles M. Lamb, *The Supreme Court and New Constitutional Eras*, 64 BROOK. L. REV. 1183, 1197-98 (1998). See generally Joel K. Goldstein, *Leading the Court: Studies in Influence as Chief*

narratives relating to judicial review of administrative action. For example, almost one year after the enactment of the APA, Congress passed the Labor Management Relations Act of 1947 (“Taft–Hartley Act”) over the veto of President Truman. The Taft–Hartley Act, which restrained the power of labor unions, limited district court jurisdiction over labor disputes.²³³ One could argue that, by restricting the pool of litigation related to the Taft–Hartley Act, Congress strategically limited the likelihood a challenge to the Act would make its way to a Supreme Court led by Truman-appointed Chief Justice Vinson.

In Figure 3, we depict how congressional use of different types of jurisdiction-stripping provisions have varied across Supreme Court regimes since the passage of the APA. Interestingly, complete preclusions were at their highest levels during the Rehnquist and Roberts years, when the Court seemed increasingly skeptical of administrative decision-making.²³⁴ In contrast, in the Warren and Burger eras, when the Court was more friendly to administrative action, Congress funneled judicial review of administrative action directly to the appellate level.²³⁵

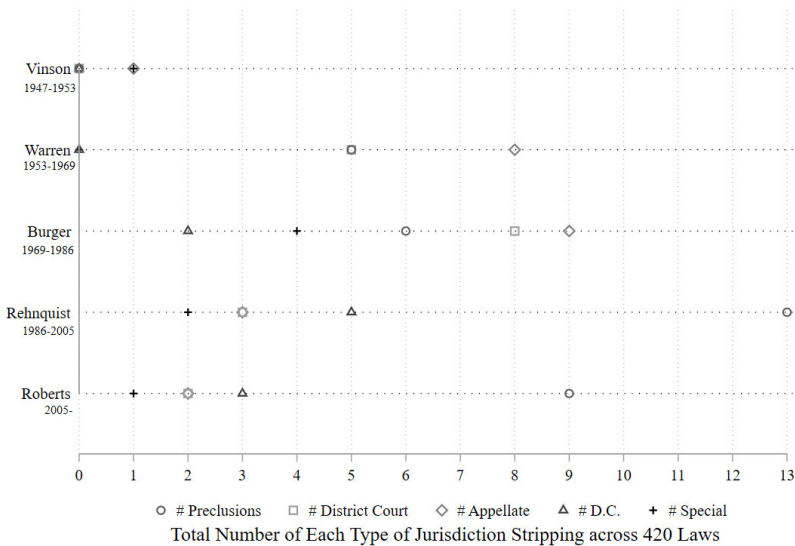
Justice, 40 STETSON L. REV. 717 (2011) (describing the leadership successes and failures of various Chief Justices).

233. Labor Management Relations (Taft–Hartley) Act of 1947, Pub. L. No. 80-101, § 301, 61 Stat. 136, 156 (codified as amended at 29 U.S.C. §§ 151–166).

234. See generally *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218 (1994) (holding that the FCC did not have authority to modify the filing requirements in the Communications Act of 1934); *United States v. Mead Corp.*, 533 U.S. 218 (2001) (holding that tariff classification was not entitled to *Chevron* deference); *City of Arlington v. FCC*, 569 U.S. 290 (2013) (holding that a court must defer to an agency’s interpretation of statutory ambiguity when it concerns the scope of the agency’s jurisdiction).

235. See Shapiro & Glicksman, *supra* note 230, at 845, 863 (noting that the Court during these eras was more accommodating of administrative discretion).

Figure 3. Types of Jurisdiction Stripping by Chief Justice Regime



Of course, Congress’s strategic use of jurisdiction stripping based on legislators’ general perceptions of Court skepticism to administrative action might vary by policy area. Indeed, discussions of Supreme Court “eras” tend to be driven by considerations of how liberal or conservative Court decisions were.²³⁶

Figure 4 depicts these patterns. For example, in the first two eras of our period of study—from Vinson to Warren—the Court became increasingly liberal.²³⁷ In delegating to agencies in certain policy areas, Congress may have sought to protect administrative decision-making from a skeptical Court in policy areas that require specialized agency expertise, while fearing that judicial review of agency action would raise uncomfortable questions of law in a more liberal Court. Indeed, from the 1960s through the mid-1980s, a more liberal elite culture pushed even Republican-appointed Justices toward center left of the aisle.²³⁸ Consistent with this line of thinking, we see more

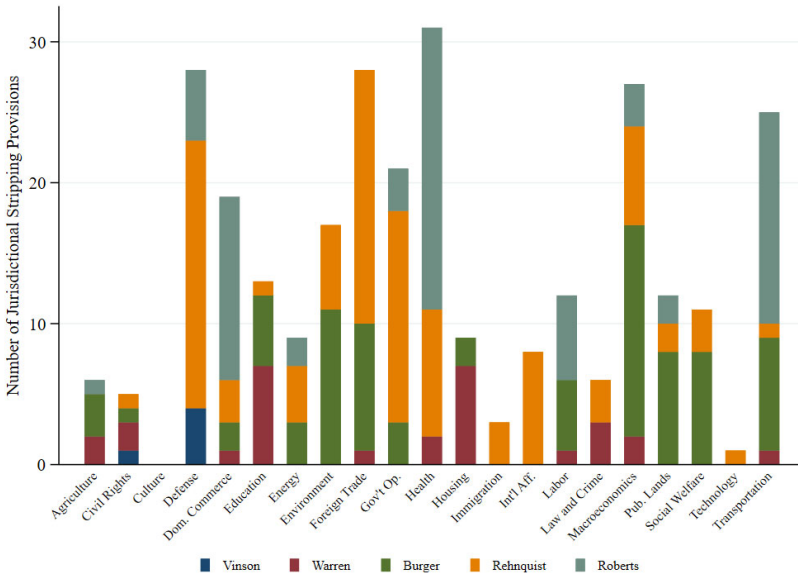
236. See, e.g., Bartels & O’Geen, *supra* note 232, at 888. See generally Neal Devins & Lawrence Baum, *Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court*, 2016 SUP. CT. REV. 301 (describing the implications of polarization for the U.S. Supreme Court); Halpern & Lamb, *supra* note 232 (proposing a model by which the nation and the Supreme Court transition between constitutional eras and applying the model to the contemporary Court); Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999*, 10 POL. ANALYSIS 134 (2002) (analyzing Supreme Court Justices’ preference changes throughout their tenure on the Court).

237. Bartels & O’Geen, *supra* note 232, at 888, 892.

238. Devins & Baum, *supra* note 236, at 308.

jurisdiction stripping included in civil rights and housing statutes enacted during the Warren and Burger eras.

Figure 4. Number of Court Venue Constraints by Chief Justice and Policy Area



While the Burger and early Rehnquist eras delivered a “mixture of conservative and liberal decisions,”²³⁹ by the end of the 1980s and continuing today, the Court has become increasingly conservative.²⁴⁰ As a result, we see more jurisdiction stripping in the Roberts and Rehnquist eras in health, banking, and macroeconomic policy. These empirical patterns reinforce our intuition that, in highly technical policy areas, Congress seeks to insulate from *ex post* review.

Of course, these simple descriptive plots provide only narrow windows into associations between political factors, features across branches of government, and congressional choices, when it comes to congressional decisions to limit court review of agency actions. The discussion in Parts I, II, and our examples in this Part suggest the story is a little more complicated than traditional scholarship suggests. When engaging in jurisdiction stripping, Congress likely accounts for uncertainty in the political world, the need for administrative expertise, and corresponding benefits and costs of providing for review of agency actions by both elected officials and federal judges.

239. Halpern & Lamb, *supra* note 232, at 1198.

240. Martin & Quinn, *supra* note 236, at 151.

IV. STRATEGIC STRIPPING: ESTIMATING CONGRESSIONAL DESIGN OF FEDERAL COURT JURISDICTION

To evaluate the relationship between contemporary aspects of the administrative world (including agency independence) and congressional decisions to use jurisdiction stripping, we estimate statistical models of congressional enactments limiting judicial review of final agency actions.

Doing so requires us to pair enacted jurisdiction-stripping legislation with the federal agencies to which Congress delegates authority in that legislation to account for important aspects of those agencies' structural and procedural features. We use Professors Clouser McCann and Shipan's extension of the judicial exposure dataset to help us in this endeavor.²⁴¹ This extension examines federal agencies' regulatory decisions and the statutory authority agencies cite to justify those decisions.²⁴² Using the extension data, we are able match the public laws in the judicial exposure sample with the agencies that rely on those laws.

Identifying the agencies to which Congress delegated is only half the battle. To explore fully strategic legislative decisions to strip federal courts of their jurisdiction, we also need to classify the features of those agencies that enhance or limit elected officials' abilities to hold those agencies accountable for their decisions. We do so using Professor Jennifer L. Selin's estimates of agency independence.²⁴³ These estimates quantify the: (1) statutory limitations Congress places on the ability of the President to appoint or remove key agency personnel; and (2) provisions of statutory law that limit political review of an agency's policy process.²⁴⁴ The first set of estimates (structural independence) account for, *inter alia*, agency design features such as leadership through a commission structure, for-cause protections, and requirements that persons who serve in key policy roles have expertise in their fields.²⁴⁵ The second set of estimates (procedural independence) relate to *ex post* review of agency policy, including OMB review of agency budgets, regulations, and communications; exceptions to agency reliance on the congressional appropriations process; and the ability of agencies to litigate outside of DOJ control.²⁴⁶

Agencies vary across both dimensions of independence. For example, while the Board of Governors of the Federal Reserve System ranks as one of the most independent agencies on both dimensions, other agencies are more

241. See Clouser McCann & Shipan, *supra* note 143, at 441–43.

242. *Id.*

243. Selin, *supra* note 142, at 972, 979.

244. *Id.* at 972. Professor Selin developed these measures through a Bayesian latent variable model that captures the relationship between observed features of agency designed found in statutory law and these two dimensions of agency independence. *Id.* at 977–78.

245. *Id.* at 978.

246. *Id.* at 977–78.

insulated on one dimension or the other.²⁴⁷ Of note, only two of the agencies traditionally considered as independent by legal scholars (structured as multi-member commissions whose members serve fixed terms and are protected from removal but for cause) rank among the top ten most insulated agencies both in terms of structural and procedural independence.²⁴⁸ This, along with our discussion of Parts I, II, and III, suggests that Congress likely contemplates more nuanced distinctions between the autonomy of federal agencies than traditionally considered in legal literature.

Our discussion in the preceding parts also suggests that uncertainty in the political world may affect congressional decisions to strip federal courts of their ability to review agency actions. By its nature, uncertainty is difficult to measure empirically. We operationalize this variable as the standard deviation of the total number of Republicans in Congress averaged over three-year cycles. We made this choice to capture changes in political coalitions and uncertainty over who (with what ideological stance) will be in power as policies are implemented over time. We anticipate that, as partisan majorities increase and decrease in size over time, they choose to avoid court venue constraints for their constituents.

To examine the associations between jurisdiction stripping and important aspects of the policy environment such as structural and procedural independence and political volatility in Congress, we rely on simple multivariate regression analyses using ordinary least squares. Table 2 presents these models. Because the descriptive statistics in Part III suggest there may be an empirical relationship between jurisdiction stripping and policy area, we include policy area fixed effects. We also rely on robust standard errors clustered by public law-agency to accommodate the fact that many laws delegate to more than one agency.²⁴⁹

We begin by examining associations between jurisdiction stripping and the two forms of agency independence—structural and procedural. Model 1 in Table 2 presents those results. Most notably, Congress uses jurisdiction stripping in ways that vary significantly with structural and procedural independence. As an agency's design increases limitations on the President's appointment and removal powers by one unit, Congress is 8.4 percent less likely to limit federal court review of final agency action.

However, as an agency's procedural independence increases, we see an *increase* in the choice to constrain courts by 7.6 percent. This means that

247. *Id.* at 977–80.

248. These two agencies are the Federal Reserve Board and the Consumer Product Safety Commission. Lewis & Selin, *supra* note 142, at 1510 n.120, 1511.

249. We create a group-level variable for each public law and the agencies that receive delegated authority. For example, the Puerto Rico Oversight, Management, and Economic Stability Act (“PROMESA”), Pub. L. No. 114-187, 130 Stat. 549 (2016), delegated authority to the Department of Labor and the Small Business Administration for implementation. In the dataset the public law agency groups for this law include PROMESA-Labor and PROMESA-SBA.

Congress is more likely to strip federal courts of their ability to review final administrative action when the legislature delegates to agencies *whose same actions are protected from political review* (e.g., OMB, appropriations, and DOJ review). Model 1 has profound implications for our separation of powers system. When Congress delegates to agencies designed to promote administrative expertise by removing elected officials' ex post review mechanisms and then includes jurisdiction-stripping provisions, one could ask whether a constitutional mechanism exists to hold those agencies accountable for their actions.

Of course, while Model 1 holds constant unobserved circumstances resulting from the undercurrents of policy-specific delegation, it does not account for the uncertainty that arises from volatility in partisan and electoral politics. Model 2 explores that relationship and suggests that Congress may opt to refrain from jurisdiction stripping when legislators are uncertain about the future of congressional leadership. As the variation in average number of members of Congress belonging to one political party—Republicans—increases, the legislature is less likely to adjust the default relationships between federal agencies and the courts.

Table 2. Congressional Design of the Pathways to Review of Administrative Action

	Model 1	Model 2	Model 3
	Coeff. (s.e.)	Coeff. (s.e.)	Coeff. (s.e.)
Structural Independence	-0.084**		-0.081**
	(0.029)		(0.030)
Procedural Independence	0.076**		0.077**
	(0.029)		(0.029)
Political Volatility (3-y diff. # R's in Congress)		-0.133*	-0.129*
		(0.057)	(0.056)
Constant	0.178**	0.359**	0.322**
	(0.064)	(0.097)	(0.096)
Policy Area Fixed Effects			
	✓	✓	✓
Clustered Standard Errors (Public Law-Agency)			
	✓	✓	✓
Number of Observations	420	420	420
AIC	473	477.75	471.95
Adj. R²	0.02	0.04	0.02
All models are linear probability models with dependent variable as 0,1 whether a law strips court jurisdiction. **p≤0.01 and *p≤0.05.			

While Models 1 and 2 explore agency independence and political volatility in isolation, Model 3 presents the results of an estimation of jurisdiction stripping that accounts for both agency independence (on structural and procedural dimensions) and political volatility. These results are consistent with those presented in Models 1 and 2. Congress is less likely to use jurisdiction stripping in times of political volatility and when there are existing constraints on the President's ability to appoint and remove key agency officials. Congress is more likely to pair jurisdiction stripping with other limits on review of final agency actions.

To put things in context, Figure 5 presents the likelihood of jurisdiction stripping when Congress delegates to specific agencies. Figure 5 contains a few notable statistically and substantively significant results. First, the Department of Health and Human Services (formerly the Department of Health, Education, and Welfare; collectively referred to as "HHS"), is the agency Congress is most likely to protect from judicial review. This aligns with the expectations we developed from the preceding parts of this Article. HHS is responsible both for particularistic implementation (e.g., grants for local health departments) that may be part of a larger policy scheme, as well as policy that requires substantive expertise (e.g., infectious disease management). In both policy types, Congress has a strategic interest in limiting litigation.

Second, Congress is more likely to strip federal court jurisdiction to review the final administrative actions of almost all agencies traditionally associated with the President's cabinet.²⁵⁰ Moving beyond the more nuanced legal considerations of agency structure contemplated by Professor Selin's estimates of agency independence, this statistical result suggests that Congress looks at those agencies over which the President has the most control politically and then decides to limit federal court review of those agencies' decision-making.

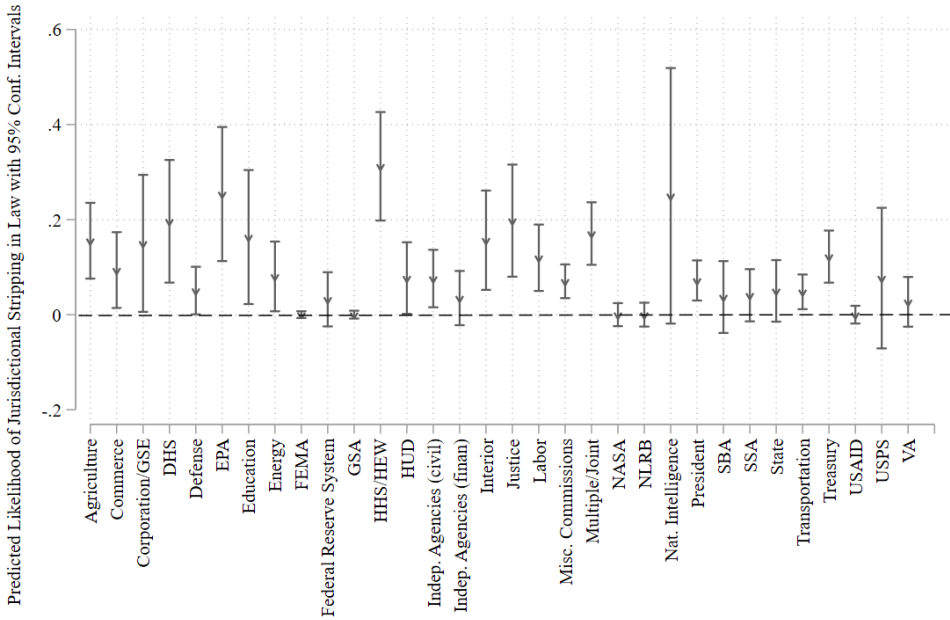
Finally, when delegating to agencies with broad authority, Congress relies on the default judicial review provisions of the APA. This is likely the result of a lack of information on regularities in agency decision-making in these contexts. For example, Figure 5 illustrates that congressional decisions over judicial review of national intelligence agencies (e.g., the National Security Agency and the Central Intelligence Agency) exhibit the widest variation. Such variation reinforces the tension between congressional decisions to allow intelligence agencies to accumulate expertise and the political tendency to want to pass the buck to an unelected judiciary to adjudicate claims resulting from administrative decisions based on classified information.

Table 2 and Figure 5 provide important insights into when Congress limits judicial review of administrative decision-making. However, they do not address the descriptive statistics in Part III that suggest legislators may

250. Distinguish between cabinet agencies (political) and executive departments (legal). See SELIN & LEWIS, *supra* note 42, at 42-44.

contemplate the power and preferences of various eras of the Supreme Court when they engage in jurisdiction stripping. Additionally, the descriptive statistics presented in Part III do not account for the partisan relationships between Congress, the President, and the Supreme Court in those eras.

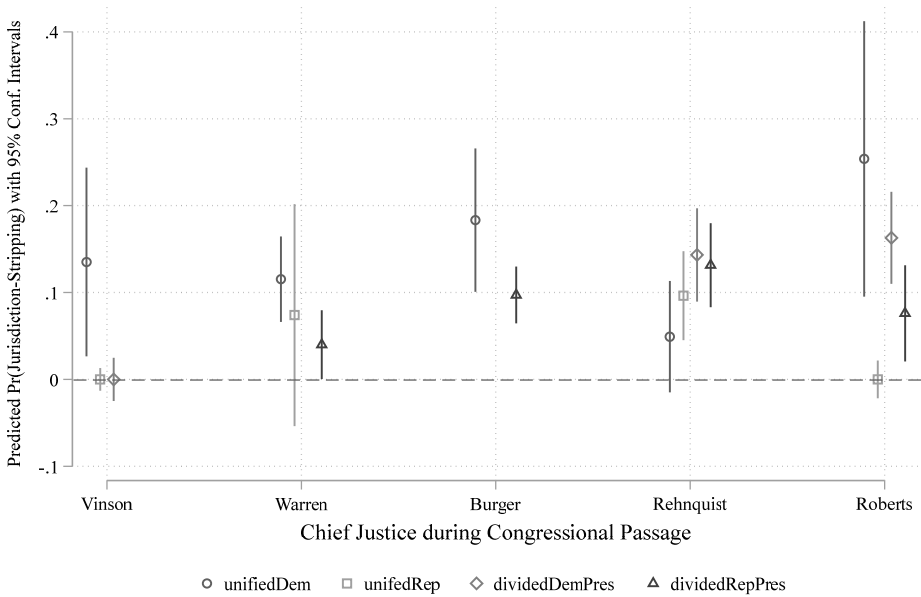
Figure 5. Jurisdiction Stripping by Agency



For example, it may be that Republican congressional majorities working with a Republican President are less likely to engage in jurisdiction stripping when the Supreme Court trends conservative. Strategically, judicial review in such a scenario is a way for Congress to put in place a mechanism to ensure administrative agencies adhere to legislative preferences as expressed in text long beyond traditional election cycles. However, when the President and Congress are from different parties, jurisdiction-stripping provisions may find their way into statutes as a result of political compromise.

To examine the relationship between jurisdiction stripping and different institutional dynamics that result from varying majorities in the political branches, we utilize a simple linear probability model. Figure 6 presents the predicted probabilities of jurisdiction stripping that result from that model.

Figure 6. Predicted Probability of Jurisdiction Stripping by Congress over Time



Considered as a whole, this Part provides statistically and substantively significant evidence that congressional decisions to use jurisdiction stripping are just one part of larger whole. When crafting statutes that limit federal courts' authority to review administrative action, Congress accounts for agency structure and policy, political volatility, and the preferences of all three branches of government.

CONCLUSION

The Supreme Court has largely upheld jurisdiction-stripping provisions so long as Congress does not foreclose all meaningful review of administrative action, the statute is specific regarding the litigation the legislature wishes to foreclose, and the adjustments to exposure rely on the agency's (as opposed to the judiciary's) expertise. Our empirical findings suggest these are the same factors Congress considers when drafting such provisions. This parallel may be unsurprising to some, and it likely is reassuring to others. Specifically, Congress and the Court appear to be in lockstep when it comes to legislative adjustments to judicial review of administrative action.

However, in recent years, almost every major Court decision regarding congressional decisions to strip federal courts of their jurisdiction to review final agency decisions has involved consideration of structurally and procedurally

independent agencies.²⁵¹ Returning to Part I's discussion of congressional experimentation with political and judicial review of the FTC, *Axon Enterprises, Inc. v. Federal Trade Commission* provides a good example of this phenomenon. In a series of challenges to the enforcement authority of the Securities and Exchange Commission and the FTC, the Court sidestepped claims that the agencies' combined structure and procedural processes violated "fundamental, even existential" constitutional separation of powers principles.²⁵² Instead, the Court focused on whether Congress's design of a statutory review scheme that limited judicial exposure of certain administrative decisions was constitutional.²⁵³ In doing so, the Court highlighted the distinction between the role of agency expertise in the administrative implementation of delegated authority and federal courts' responsibilities to interpret constitutional issues that may arise from that implementation.²⁵⁴

Considered as a whole, recent Court jurisprudence and broader rhetoric on the administrative state suggest the constitutionality of dynamic federal agency decision-making in the American constitutional system is in the hands of the judiciary. Unless, of course, Congress says it is not.

251. *E.g.*, *United States v. Fausto*, 484 U.S. 439, 440–42 (1988); *Elgin v. Dep't of the Treasury*, 567 U.S. 1, 7–8 (2012); *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 489 (2010); *Collins v. Yellen*, 594 U.S. 220, 237 (2021); *Axon Enters., Inc. v. Fed. Trade Comm'n*, 598 U.S. 175, 180 (2023).

252. *Axon Enters., Inc.*, 598 U.S. at 180.

253. *Id.* at 186.

254. *Id.* at 194–96.