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The Presumption of Reviewability: A Study In Canonical Construction And Its Consequences

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I. INTRODUCTION

The much-maligned canons of statutory construction stubbornly have survived, largely on the strength of the assertion that whatever the aim of the statute's interpretation, an interpretive canon will improve the chances that the statute's aim will be realized. Canonical construction serves two different functions. Some of the canons ostensibly are designed as short-cuts to the discovery of the legislature's "true" intent. Professor Geoffrey Miller has explained how the canons may reflect the judicial articulations of conversational conventions that help courts un-

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derstand otherwise vexing statutory language.[1] Canons may also serve as surrogates for other, better evidence of legislators' intent. In this regard, canonical construction is a second-best strategy. It is a concession to the intractability of traditional legislative history and the problems inherent in other approaches of discerning both legislative intent and the purposes of the statute.[2]

Other canons represent interpretive rules based upon substantive policy.[3] This sort of canonical construction enables courts to articulate, in the context of their responsibility to interpret the words and history of the statute, critical public values and to implement legislative policy in the light of these values.[4] Statutory interpretation is a more incremental, and less rigid, form of judicial decisionmaking than constitutional interpretation. Hence, canonical construction implements important values with less disruption to the political and legislative processes.[5]

This more substantive form of canonical construction raises a distinct set of concerns. The most central concern is that judicial policymaking through the guise of statutory interpretation is illegitimate. Why should judges be able to substitute their own policy preferences through the creation and application of public values canons for the preferences of Congress as articulated in the words and history of the statute? Canonical construction is an indirect means of doing what courts should be doing, if at all, directly. The role of the courts, in this account, is limited to finding and applying the will of Congress.[6] To do otherwise is to disrupt the constitutional separation of powers between Congress and the courts.

While these questions are critical, I am not terribly concerned, in this Article at least, with exploring the important constitutional and theoretical arguments for and against the use of interpretive canons. Most of the issues raised in the literature on the legitimacy of canonical

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1. See, for example, Geoffrey P. Miller, *Pragmatics and the Maxims of Interpretation*, 1990 Wis. L. Rev. 1179. For descriptions of some of the various maxims of word meaning reflected in certain interpretive canons, see William N. Eskridge, Jr., and Philip P. Frickey, *Legislation: Statutes and the Creation of Public Policy* 639-46 (West, 1987).

2. See Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 Harv. L. Rev. 405, 451-60 (1989); Ronald R. Dworkin, *A Matter of Principle* 316-31 (Harvard, 1985).

3. See Eskridge and Frickey, *Legislation* at 655 (cited in note 1).

4. See William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. Pa. L. Rev. 1007 (1989). See also Sunstein, 103 Harv. L. Rev. 405 (cited in note 2).

5. Constitutional interpretation is disruptive to the extent that it is considerably more difficult for such an interpretation to be overturned. By contrast, statutory interpretations can be overridden by mere legislative and presidential action. See generally William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 Yale L. J. 331 (1991).

6. See Lawrence C. Marshall, *The Canons of Statutory Construction as Judicial Constraints*, 45 Vand. L. Rev. 673 (1992).

construction are subject to the same sort of analyses that characterize the normative literature on statutory interpretation in general.[7] The propriety of canonical construction turns on how we resolve questions of legislative supremacy, separation of powers, and the appropriate role of judicial creativity. Here, I am interested in considering a different sort of claim made on behalf of canonical construction. This interest is prompted by a remark of Professor Cass Sunstein in his recent book *After the Rights Revolution*.[8] Professor Sunstein suggests that the use of canons actually can improve legislative decisionmaking and administration:

> [Another] function of interpretive principles is to promote better lawmaking. Such principles might, for example, minimize judicial and administrative discretion, or push legislative processes in desirable directions. The effort is to improve lawmaking processes and the deliberation and accountability that are supposed to accompany them. In this respect, some interpretive principles fulfill goals associated with the separation of powers and with plausible assessments of comparative institutional competence. They are designed above all to channel certain decisions through certain institutions, or to improve the operation of those institutions.[9]

Professor Sunstein ascribes to canonical construction a tremendously important role. In his account, the canons not only reflect and implement critical public values, but they also improve politics and the legislative process.

The prospect that a certain method of statutory interpretation improves the process of legislative decisionmaking deserves serious consideration. Where controversy rages over the use of various interpretive approaches,[10] defending one method on grounds other than that "it is commanded by the Constitution" may provide a pathway out of dilemmas and difficulties that otherwise are difficult to manage. While the forty-plus years of scholarship on the canons after Professor Llewellyn's famous attack[11] have reflected variations on the theme of supremacy and constitutional authority, it is time to turn our attention toward the largely unexplored questions at the intersection of positive political the-

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7. Id.; Jonathan R. Macey and Geoffrey P. Miller, *The Canons of Statutory Construction and Judicial Preferences*, 45 Vand. L. Rev. 647 (1992).

8. Cass R. Sunstein, *After the Rights Revolution* (Harvard, 1990).

9. Id. at 154.

10. See, e.g., Nicholas S. Zeppos, *Justice Scalia's Textualism: The "New" New Legal Process*, 12 Cardozo L. Rev. 1597 (1991); Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 S. Ct. Rev. 231; William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. Rev. 621 (1990); Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 Am. U. L. Rev. 277 (1990). For a useful reminder that controversies of statutory interpretation are not peculiar to the United States, see the contributions in D. Neil MacCormick and Robert S. Summers, eds., *Interpreting Statutes: A Comparative Study* (Dartmouth, 1991).

11. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 Vand. L. Rev. 395 (1950).

ory[12] and normative legal scholarship and to see whether canonical construction generates a set of institutional consequences and policy outcomes that can justify the continued use of the method.

In my contribution to this Symposium, I want to work outward toward some of the institutional issues posed by canonical construction by taking a close look at one canon, the presumption of reviewability of administrative agency decisions. The Administrative Procedure Act (APA) accords individuals a statutory right of judicial review.[13] However, Congress may preclude judicial review by statute.[14] Since *Abbott Laboratories v. Gardner*,[15] decided in 1967, courts have explained that where Congress has not expressly precluded judicial review of agency action, the reviewing court should presume that Congress did not intend to preclude such review.[16] This presumption may be overcome only by "clear and convincing evidence" that Congress intended otherwise.[17]

The main consequence of this canon is to increase significantly the likelihood that a court will find an administrative action reviewable. Whether courts should take steps—of which the presumption of reviewability is one example—to facilitate judicial scrutiny of agency decisions is, of course, a perennial debate in administrative law. Revisiting this issue is not the principle purpose of this Article. I am interested, however, in the nexus between the presumption of reviewability as a canon of statutory construction and the controversy over judicial review of agency decisions framed by debates over whether and to what extent Congress has precluded judicial review by statute.

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12. See generally Symposium, *Positive Political Theory and Public Law*, 80 Georgetown L. J. 457 (1992).

13. 5 U.S.C. § 702 (1988).

14. 5 U.S.C. § 701 (1988).

15. 387 U.S. 136 (1967).

16. The type of judicial review to which the presumption of reviewability attaches is the review of agency decisions described in Section 706 of the APA. This section provides that

> The reviewing court shall . . .—
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> (1) compel agency action unlawfully withheld or unreasonably delayed; and
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law
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> . . .
>
> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title.

5 U.S.C. § 706 (1988).

The question whether individuals have a constitutional right to review of agency decisions on the basis of an alleged constitutional violation is an open question. See *Webster v. Doe*, 486 U.S. 592 (1988); *Johnson v. Robison*, 415 U.S. 361 (1974). Also unsettled is whether Congress may preclude judicial review of claims based on an alleged violation of the agency's organic statute. See *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667 (1986); *Leedom v. Kyne*, 358 U.S. 184 (1958).

17. *Abbott Laboratories*, 387 U.S. at 140.

The presumption of reviewability reflects an effort by courts to fashion a rule of construction that, in making it substantially more difficult for Congress to demonstrate its intent to preclude judicial review, protects the perogatives of courts to create and shape a body of law—administrative law—free from ultimate control by Congress. To be sure, Congress is the final judge of when review is precluded; but the presumption of reviewability ensures that legislators must expend greater than normal costs to rebut this presumption and thus to exercise their final collective judgment. As with other costs borne by legislators attempting to reach agreement over statutory policies, these costs may have the effect of changing the final bargain.

The interplay between courts and Congress is worthy of study by those concerned with understanding contemporary debates over statutory interpretation. Professor Sunstein's assertion that canonical construction improves the legislative process is provocative and invites just the sort of study reflected in some of the recent scholarship on statutory interpretation and political institutions. In this Article, I am interested in the basic positive question, why do we have canons like the presumption of reviewability and, to a lesser degree, the normative question, what role should these canons play in the process of statutory interpretation?

In Part II of this Article, I describe the role of canons and canonical construction in statutory interpretation. My aim is to situate the canons within a framework of interpretive rules generated by courts and applied within a structure made up of distinct, yet interdependent legal institutions. In Part III, I describe the presumption of reviewability, within the context of the framework of interpretive rules sketched out in Part II and within the context of contemporary administrative law. Part IV assesses the consequences of canonical construction of the sort represented by the presumption of reviewability for the processes of law-making and law-interpreting.

II. The Forms and Functions of Interpretive Rules

The canons of statutory construction have long been featured in analyses of, and arguments over, statutory interpretation methodology.[18] Canons have been described as "the collective folk wisdom of statutory interpretation;"[19] they enable those interpreting the statute to

18. In addition to the contributions contained in this Symposium, see Sunstein, *After the Rights Revolution* (cited in note 8); Richard A. Posner, *The Problems of Jurisprudence* 279-81 (Harvard, 1990); Guido Calabresi, *A Common Law for the Age of Statutes* 2 (Harvard, 1984); Miller, 1990 Wis. L. Rev. 1179 (cited in note 1); Sunstein, 103 Harv. L. Rev. 405 (cited in note 2).

19. See Posner, *Problems of Jurisprudence* at 280 (cited in note 18).

draw inferences from its language, format, and subject matter.[20] The canons of construction are merely one form of an eclectic set of devices used in the process of implementing the statute's meaning through interpretation.[21]

The canons, like all other interpretive rules,[22] help organize the interpretive task. While the statute at issue will differ from case to case, interpretive rules that transcend a particular law can help frame the proper interpretive method for the court and, thereby, aid it in coming up with a "better" construction in the specific case. This organizational function is especially critical where the judge is faced with indeterminate statutory language and inconclusive legislative history.

One way to think about this organizational function is by considering how interpretive rules promote judicial efficiency.[23] Insofar as the opportunity costs of deciding cases are positive, judges will take steps to reduce the costs of deciding cases. Where these cases involve interpretations of statutes, the decisionmaking costs will include the effort to reach a conclusion about the proper method of statutory interpretation. By anchoring statutory interpretation to a set of ready-made rules, judges can more efficiently decide statutory cases. Efficiency-enhancing devices such as canonical construction are increasingly valuable as Congress passes more statutes and therefore courts are faced with a growing number of statutory interpretation cases. Moreover, the efficiency function of interpretive rules is especially important in an era in which controversy rages over how statutes should be interpreted.[24]

Certain interpretive rules also may aid the legislature. Judge Frank Easterbrook explains that

> some rules of statutory construction are useful for the same reason rules are useful in interpreting contracts. They spare legislators the need to decide and announce, law by law, the rules that will be used for interpreting the code of words they select. . . . Rules are desirable not because legislators in fact know or use them in passing laws but because rules serve as off-the-rack provisions that spare legislators the costs of anticipating all possible interpretive problems and legislating solutions for them.[25]

Despite some of the advantages to legislators of creating certain ca-

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20. Id.

21. Eskridge and Frickey, *Legislation* at 639 (cited in note 1).

22. Interpretive rules are ubiquitous and include, in addition to the canons, instructions about how to approach ambiguous statutory language, about whose intent matters in considering the intent of the legislature, and information regarding other structural, institutional, and political questions that arise whenever statutes are interpreted.

23. The connection between legal rules and decision costs is a common theme in the law and economics literature. See, for example, Ronald A. Heiner, *Imperfect Decisions and the Law: On the Evolution of Legal Precedent and Rules*, 15 J. Legal Stud. 227 (1986).

24. See sources cited in note 10.

25. Frank H. Easterbrook, *Statutes' Domains*, 50 U. Chi. L. Rev. 533, 540 (1983).

nons and other interpretive rules, most rules originate in judicial decisions, not in statutes. To be sure, many of the canons are defended on the grounds that they implement what Congress really wanted, but expressed inartfully or incompletely. These types of canons have been described in various ways, as "intrinsic aids,"[26] "linguistic canons,"[27] and "descriptive canons."[28] There is little doubt that several of the canons fulfill this function. This is especially true of the canons that reflect "conversational conventions," and conventions of grammar and syntax. These are conventions that courts could reasonably predict that legislators had or should have had in mind when they enacted a statute.[29] Also, the ubiquitous "absurd results" canon, reflecting the principle that statutes should not be interpreted in a way that ensures an absurd result, no doubt facilitates legislators' shared views that such clear mistakes must be avoided.[30] Most of the canons, however, find little warrant either in the legislative record or in positive analyses of how and why legislators pass statutes. In addition, there is a rich collection of canons that have little to do with predictions about legislative intent or grammar. These so-called "substantive" or "normative" canons represent the courts' decisions to implement an important "public value" through the mechanism of statutory interpretation, subject, as always, to Congress's decision to displace this value with a clear statement to the contrary. These normative canons may or may not coincide with legislators' values or intentions. In any case, it does not matter, since the canons are grounded in values and principles extrinsic to the purposes of a particular statute or the preferences of legislators at various points in time.

Congress seldom legislates interpretive rules for courts to use.[31] Moreover, it is not clear that courts would abide by interpretive rules that Congress lays down. The heated debate over the so-called "plain meaning" approach to statutory interpretation, also called the "new textualism,"[32] is an illustration. Textualism is defended by judges on a

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26. Eskridge and Frickey, *Legislation* at 639 (cited in note 1).

27. William N. Eskridge, Jr. and Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 Vand. L. Rev. 593 (1992) (describing Professor Llewellyn's taxonomy).

28. Stephen F. Ross, *Where Have You Gone, Karl Llewellyn? Should Congress Turn Its Lonely Eyes to You?*, 45 Vand. L. Rev. 561 (1992).

29. See Miller, 1990 Wis. L. Rev. 1179 (cited in note 1).

30. See, for example, *Green v. Bock Laundry Machine Co.*, 490 U.S. 504 (1989); *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440 (1989); *Holy Trinity Church v. United States*, 143 U.S. 457 (1892).

31. This is not to say that Congress refrains from influencing the process of statutory interpretation. See Daniel B. Rodriguez, *Statutory Interpretation and Political Advantage* (manuscript on file, UC Berkeley, 1991).

32. Eskridge, 37 UCLA L. Rev. 621 (cited in note 10); Zeppos, 12 Cardozo L. Rev. 1597 (cited

variety of bases, ranging from constitutional separation of powers to pragmatic judgments about the role of judges and the proper function of statutory interpretation.[33] Congress, however, rarely commands courts to follow a textualist approach to interpretation. Indeed, legislators have reacted to the recent renaissance of textualism as an interpretive strategy with substantial hostility.[34] Textualist judges are digging in, however, claiming that their approach to statutory interpretation is appropriate and legitimate.[35] And despite the hue and cry among textualism's opponents, there seems to be little doubt that courts have the right to craft their own rules of statutory interpretation regardless of congressional action. Courts historically have reserved for themselves the power to fashion these interpretive rules. And while Congress has occasionally unraveled statutory interpretations that it finds unacceptable,[36] it has done so episodically, without a serious attempt to constrict the judiciary's power to establish the ground rules for statutory interpretation. The persistence of the canons of construction shows that the courts' efforts to maintain the power to decide how to decide have withstood change in both legislative politics and theoretical approaches to statutory interpretation.

The principal value of the canons rests on the effects that they have on legislative decisions.[37] The various clear statement rules that form the bulk of the more substantively oriented canons of construction are the best examples of this. A clear statement rule raises the costs that the legislature must bear in enacting its statutory purposes into law. For example, the canon that Congress must speak clearly if it wishes to displace the sovereignty of Indian tribes increases the costs to the legislative coalition that would displace this sovereignty, making this displacement less likely.[38] These costs include the pressures placed on marginal legislators, that is, those legislators whose support is critical to ensuring that the bill passes. Requiring that the legislation be

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in note 10).

33. For an eclectic series of defenses of textualist interpretation, see *Begier v. IRS*, 110 S. Ct. 2258, 2267 (1990) (Scalia dissenting); *Public Citizen v. Department of Justice*, 491 U.S. 440, 473 (1989) (Kennedy concurring); Easterbrook, 50 U. Chi. L. Rev. 533 (cited in note 25). Schauer, 1990 S. Ct. Rev. 231 (cited in note 10).

34. See, for example, Joan Biskupic, *Congress Keeps Eye on Justices As Court Watches Hill's Words*, Cong. Q. Weekly Rep. 2863 (October 5, 1991); Joan Biskupic, *Scalia Takes a Narrow View in Seeking Congress's Will*, Cong. Q. Weekly Rep. 913, 918 (March 24, 1990).

35. See sources cited in note 33.

36. For a comprehensive description and analysis of recent instances of legislative overruling, see Eskridge, 101 Yale L. J. 331 (cited in note 5).

37. See part III.

38. See, for example, *South Carolina v. Catawba Indian Tribe*, 476 U.S. 498, 506 (1986); *Bryan v. Itasca County*, 426 U.S. 373, 381 (1976); *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 412-13 (1968).

clear in order to convince a court that Congress means to displace tribal sovereignty, states' rights or any other important value represented by the canon, may push marginal legislators away from supporting a bill. They may be hesitant to support publicly an explicit statement of this policy. After all, some legislators would prefer to leave the statutory language ambiguous. They would be inclined to shift the blame to the courts if courts interpret the statute wrongly. Legislators may prefer to leave the law unclear in order to provide flexibility to maneuver in the face of future interest groups and shifting coalitions in Congress and in the executive branch. Finally, legislators may prefer to assign authority to an administrative agency to shape the statute in accordance with the law's general principles. In this light, the canon has the effect of making legislators legislate where they would prefer to delegate responsibility to institutions such as agencies. Notwithstanding these reasons for speaking ambiguously, courts may use canons to force Congress to resolve certain issues in the statute. The price of not resolving these issues is an interpretation which may or may not give credence to the will of the legislative majority that enacted the statute. Canonical construction at least encourages the legislature to make its intent more plain and, at most, disables a statutory compromise over certain legislative language, thereby preventing legislators from enacting into law a policy outcome that would threaten important values without bearing substantial political costs.[39]

To illustrate the dynamics of court-Congress interaction in the context of canonical construction, I will describe one interpretive canon in detail, the presumption of reviewability of administrative agency decisions.

III. The Anatomy of a Canon: The Presumption of Reviewability

A. Reviewability and the Politics of Judicial Review

There is a deep sense in which the presumption that courts must be empowered to review agency decisions is a truism. "The availability of judicial review," says Professor Jaffe, "is the necessary condition, psychologically if not logically, of a system of administrative power which purports to be legitimate, or legally valid."[40] Thus, administrative law has come to mean judicial review of agency action, no more and no less. The very notion of a system of administrative law designed to check agency malfeasance and ensure fidelity to both Congress's wishes and constitutional principles entails a role for an external arbiter

39. See part III.B.

40. Louis L. Jaffe, *Judicial Control of Administrative Action* 320 (Little, Brown, 1965).

to control agencies through judicial review power.[41] Indeed, the notion that judicial review is a necessary condition of legitimate administrative power is so deeply ingrained that it takes some effort to think somewhat more dispassionately about the concept and consequences of more rather than less aggressive review.

Judicial review was not always treated as a necessary, or even salutary, element of the modern administrative state. Aggressive judicial review in the early years of the administrative state nearly destroyed the first great regulatory experiments. The Interstate Commerce Commission (ICC), for example, performed its regulatory functions in the shadow of a continuing controversy over the proper role of courts in reviewing ICC decisions.[42] For the first thirty years of the ICC, the agency functioned as an elaborate adjunct to the federal courts with the courts taking the responsibility for setting regulatory policy.[43] The courts frustrated both the purposes of the Interstate Commerce Act and the general purposes underlying Progressive Era regulation, in particular, the vision of the expert agency equipped with the power and resources to craft effective and apolitical regulatory policy.[44]

1. Perspectives on Judicial Review

As Congress vested federal administrative agencies with increased regulatory responsibilities, courts began to develop a "common law of judicial review" designed to check agency malfeasance.[45] This common law expressed the courts' concern that Congress had not adequately cabined administrative discretion. Even if courts were given the authority to review agency decisions for compliance with the organic statute, this would not be enough to circumscribe adequately agency discretion. The premise of administrative law was that courts should construct independent limits on agency action since they could not expect either the agency itself, the President, or Congress to exercise control. Moreover, any control that was exercised by nonjudicial institutions would be statute-specific. There would be no principles that would structure the process of administration. By contrast, courts could delineate gen-

41. See Bernard Schwartz, *Administrative Law* chs. 8 & 9 (Little, Brown, 3d ed. 1991); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 Harv. L. Rev. 421 (1987).

42. See, for example, Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities, 1877-1920* (Cambridge, 1982); Robert Rabin, *Federal Regulation in Historical Perspective*, 38 Stan. L. Rev. 1189 (1986).

43. See Skowronek, *Building a New American State* at 150-62 (cited in note 42).

44. A similar tale of judicial frustration of legislative purpose and agency policymaking is told in connection with labor law and the New Deal. See Rabin, 38 Stan. L. Rev. at 1253-59 (cited in note 42). The experience of the ICC between 1887 and 1920 is one example of a phenomenon characteristic of the court-agency partnership in the early years of the administrative state.

45. Kenneth C. Davis, 4 *Administrative Law Treatise* § 28.07 (West, 1958).

eral principles through a common-law process that was meant to lay down rules and standards appropriate to all agencies and all types of agency decisions.

From Congress's standpoint, this common law of judicial review was troublesome. The notion that courts could overlay statutory law with a blanket of general decisionmaking principles was threatening to a Congress concerned with engineering a machinery of regulation and administration free of unnecessary interference. Moreover, New Dealers continued to fear obstructionist courts filled with Republicans who as of yet had not gotten with the program. Faced with a hostile federal branch, New Dealers took steps to limit the role of judicial review by enacting statutes that provided for greater agency discretion. The ICC mess, for example, drove Congress to amend the Interstate Commerce Act with the Transportation Act of 1920. This act provided the ICC with stronger and more complete regulatory authority and, by implication, mandated a weaker role for the courts.[46] Similarly, Congress cabined the courts' role in labor disputes under both the Railway Labor Act and the National Labor Relations Act.[47] In both instances, Congress sent a message that administrative policy was to be developed in the agencies and not in the courts. But how far was Congress willing to go? With these broad delegation statutes did Congress intend to displace administrative law, leaving courts with "mere" statutory and constitutional instruments of control?

And, at a deeper level, there was a critical question of power. Could Congress preempt administrative law by cordoning off certain agency decisions from judicial control? On the one hand, the notion that courts can, through a sort of federal common law, apply their own standards for proper agency decisionmaking seems to imply that they are the judges of when review is appropriate. On the other hand, if Congress can short-circuit this process by replacing the common law of judicial review with a comprehensive statute, then surely Congress can take the smaller step of precluding judicial review in certain instances.

Out of these real political concerns came the Administrative Procedure Act (APA) in 1946. In one sense, Congress gave its imprimatur on the enterprise of court-driven administrative law by enacting the scope of judicial review provisions currently set out in Section 706.[48] The APA empowered courts to find decisions unlawful not only on the grounds that the agency had transversed the commands of the substantive stat-

46. Transportation Act of 1920, 41 Stat. 456. (1920) See Skowronek, *Building a New American State* at 279-83 (cited in note 42) (describing the history and significance of the Act).

47. Railway Labor Act, 48 Stat. 1185 (1934); National Labor Relations Act, 49 Stat. 449 (1935).

48. 5 U.S.C. § 706 (1988).

ute or the Constitution, but also because the decisions were "arbitrary, capricious, [or] an abuse of discretion"[49] or "unsupported by substantial evidence."[50] Section 706, thus, created statutory authorization for a continuing common law of judicial review.

This authorization was not without limits, however. Although Section 706's instruction to courts to review agency decisions according to these standards is open-ended, the politics of regulation and administration in the APA's early years suggests that the scope of review provisions were designed to rein in judges who had been substituting their substantive judgments for those of the administrative agencies assigned to implement regulatory policy. At bottom, Section 706 reflects an accommodation to the demands for judicial review while, at the same time, an admonition to courts to retreat from the super-strong review that had threatened to dismantle the New Deal.

2. Preclusion, Discretion, and the APA

The relationship between reviewability and the politics of judicial review is aptly illustrated in the most important pre-APA decision on reviewability authored by the quintessential New Dealer, Justice William O. Douglas. *Switchmen's Union v. National Mediation Board*[51] involved a challenge to a National Mediation Board decision concerning a representation election dispute. The Railway Labor Act of 1934, which created the National Mediation Board and authorized it to decide collective bargaining disputes, neither expressly authorized nor expressly precluded review.[52] Writing for a majority of four,[53] Justice Douglas explained how Congress had carefully crafted the Board as a means of handling controversial matters. According to Justice Douglas, it was very important "to provide a neutral tribunal which can make the decision and get the matter settled."[54] Judicial review would disrupt the administrative arrangement structured by Congress. It was, therefore, not at all surprising that Congress did not expressly authorize judicial review for "if Congress had desired to implicate the federal judiciary and to place on the federal courts the burden of having the final say on

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49. 5 U.S.C. § 706(2)(A).

50. 5 U.S.C. § 706(2)(E). This standard is applicable in "a case subject to sections 556 and 557 [of the APA] or otherwise reviewed on the record of an agency hearing provided by statute." Id.

51. 320 U.S. 297 (1943).

52. Railway Labor Act of 1934, 48 Stat. 1185 § 2 (1934).

53. Justices Black and Rutledge did not participate in the decision.

54. 320 U.S. at 303 (quoting Railway Labor Act of 1934, Hearings on H.R. 7650 before the House Committee on Interstate & Foreign Commerce, 73d Cong., 2d Sess. 41 (1934) (statement of Commissioner Eastman, draftsman of § 2, Ninth)).

any aspect of the problem, it would have made its desire plain."[55]

Switchmen's Union was very much a product of its times, that is, a part of a genre of post-New Deal, pre-APA administrative law decisions in which the New Deal's defenders on the Court fashioned rules that would ensure the survival and vitality of this grand regulatory experiment. Since the battle was essentially between a Democratic majority in Congress and President Roosevelt on one side and conservative judges appointed by Roosevelt's predecessors on the other, the Court's New Dealers characteristically would take positions that restricted the role of the courts.[56] Entrusting the reviewability determination to Congress was a fit solution for those who chafed at the courts' campaign of opposition to the New Deal. It is in this light, however, that the APA's solution to the question of reviewability seems on the surface peculiar. After all, if the New Dealers were so afraid of judicial review, what explains Congress's decision to establish a statutory right of review, a right that can be trumped only when Congress acts affirmatively to preclude review? On closer inspection, however, the APA's creation of a statutory right to review is not the significant step that it appears to be on the surface. To begin with, pre-APA administrative law usually accorded a right to judicial review unless Congress had precluded review by statute.[57] Framed as a sort of presumption, the notion was that review was necessary to assuage concerns over the constitutionality of the New Deal regulatory statutes. Review was part of a constitutional quid pro quo: courts would decline to employ the nondelegation doctrine to overturn statutes and, in return, courts would preserve the power to review agency decisions.[58] In any case, the presumption in favor of review (not to be confused with the presumption of reviewability) in the absence of Congressional preclusion was essentially settled law even before the APA provided a right of review in Section 702.[59]

In any event, New Dealers could be quite satisfied with the reviewability structure they wrought in Section 701. The APA provides two separate bases of preclusion. Taken together, they reflect Congress's judgment that whether and to what extent review is precluded is up to Congress to decide. Considered separately, the two parts of Section 701 reflect two different approaches to divining congressional intent with

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55. Id. at 303.

56. As Professor Jaffe put it: "Haunted by a past of judicial arrogance, beguiled by the promise of administrative action, a majority of the judges who participated were easily persuaded of the irrelevance of the judicial role." Jaffe, *Judicial Control* at 344 (cited in note 40).

57. See generally id. at 339-43; Note, *Statutory Preclusion of Judicial Review Under the Administrative Procedure Act*, 1976 Duke L. J. 431, 433-34.

58. See, for example, *Crowell v. Benson*, 285 U.S. 22 (1932). See generally Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 Harv. L. Rev. 915 (1988).

59. See Jaffe, *Judicial Control* at 339-43 (cited in note 40).

regard to review. Section 701(a)(1), the section to which the presumption of reviewability attaches, provides that the statute may preclude review. And Section 701(a)(2) provides that review is precluded to the extent that "agency action is committed to agency discretion by law."[60]

"By law" in this section has no clear referent. If "by law" means the substantive statute, then Section 701(a)(2) is redundant. If the statute precludes judicial review then the decision is committed to the agency's discretion and vice versa. If, however, it means an external source of law, such as administrative common law, then it threatens to subject the question of reviewability, and perhaps judicial review altogether, to unchecked judicial discretion.

Another puzzling feature of Section 701(a)(2) is that it appears to be in conflict with Section 706(2)(A). Although Section 701(a)(2) indicates that there are agency decisions that are discretionary and, thus, immune from judicial review, Section 706(2)(A) authorizes courts to review agency decisions found to be an abuse of discretion.[61] In *Citizens to Preserve Overton Park, Inc. v. Volpe*,[62] the Supreme Court struggled to cure the first paradox by treating Section 701(a)(2) as "a very narrow exception,"[63] applicable only where "statutes are drawn in such broad terms that in a given case there is no law to apply."[64] Even a statutory standard as amorphous as that at issue in *Overton Park*—an instruction that the Secretary of Transportation consider whether there is a " 'feasible and prudent' alternative" to the use of parkland for the creation of an interstate highway—is sufficient to direct the court.[65] At the very least, therefore, a statute that contains a rather broad delegation of power to an agency does not vest the agency with unreviewable discretion. On the other hand, *Overton Park* does confirm that there are situations in which judicial review may be precluded regardless of whether Congress precludes review, expressly or even implicitly, in the substantive statute. Where there is no law to apply, the court may not consider a claim that the agency has abused its discretion. If there is no law to apply, the agency has untrammeled discretion and, notwithstanding Section 706(2)(A), cannot abuse its discretion.[66]

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60. 5 U.S.C. § 701(a)(1) (1988). For a lively early debate over the scope of this section, see Raoul Berger, *Administrative Arbitrariness and Judicial Review*, 65 Colum. L. Rev. 55 (1965); Kenneth C. Davis, 4 *Administrative Law Treatise* § 28.16 (Supp. 1965); Raoul Berger, *Administrative Arbitrariness—A Reply to Professor Davis*, 114 U. Pa. L. Rev. 783 (1966); Kenneth C. Davis, *Administrative Arbitrariness—A Final Word*, 114 U. Pa. L. Rev. 814 (1966).

61. 5 U.S.C. § 706(2)(A).

62. 401 U.S. 402 (1971).

63. Id. at 410.

64. Id.

65. Id. at 405.

66. The determination that there is no law to apply is tantamount to a decision on the mer-

If we can focus on these two provisions without the gloss put upon each of them by important judicial decisions, including those decisions which fashion the presumption of reviewability, we can see a symmetry between Sections 701(a)(1) and (a)(2) that may well explain the political arrangement structured by the APA's framers. It is an arrangement that, in turn, perhaps explains what the coalition that succeeded in getting the APA passed was trying to accomplish with Section 701.

In enacting Section 701(a)(1), Congress may well have limited the instances in which judicial review is precluded to those covered by express statutory language. The danger that such a reading would, by enshrining this clear statement principle, impose too strict a burden on Congress's ability to preclude review is averted by Section 701(a)(2), which section provides that Congress may, with or without a clear statement, commit a decision to the agency's discretion. This commitment must be "by law." Yet, this does not necessarily suggest that Congress must speak plainly to commit the decision to the agency's discretion. Indeed, were such a requirement applicable in this second part of Section 701, it would be redundant. The two parts of Section 701 are explicable if read to require Congress, if it desires to preclude judicial review, to do so expressly or to provide reasons sufficient to persuade a court that review is implicitly precluded, that is, committed to agency discretion by law.

Whatever the proper reading of the two parts of Section 701, the APA is clear that the reviewability determination is for Congress. To be sure, the right of review is ensured by the APA and is, therefore, not dependent on the beneficence of a future Congress.[67] But both bases for preclusion rely, if read in the most sensible political context, on congressional choice.[68]

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its, that is, a determination that the agency has acted in accordance with the law. Needless to say, this result sounds peculiar. The claim is that the agency has acted lawfully because, after all, there is no law to apply. Perhaps in an effort to avoid this asymmetry, the decision is cast as one involving the threshold question of reviewability. See Cass R. Sunstein, *Reviewing Agency Inaction After* Heckler v. Chaney, 52 U. Chi. L. Rev. 653, 659 (1985). Cf. William A. Fletcher, *The Structure of Standing*, 98 Yale L. J. 221 (1988) (arguing that the question of standing be resolved as part of the merits of the case).

67. The most provocative recent attempt to tell a comprehensive political story about the APA and its Congress is contained in the work of "McNollgast." See Matthew D. McCubbins, Roger G. Noll, and Barry R. Weingast, *Positive and Normative Models of Procedural Rights: An Integrative Approach to Administrative Procedures*, 6 J. L., Econ. & Org. 307 (1990); Matthew D. McCubbins, Roger G. Noll, and Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 Va. L. Rev. 431 (1989); Matthew D. McCubbins, Roger G. Noll, and Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J. L., Econ. & Org. 243 (1987).

68. We may well ask why Congress would put so much faith in future Congressional bodies. Is it because New Dealers trusted that they would remain firmly in power? Perhaps that is the reason. Another explanation is that the Congress assumed that most of the statutes that would be

B. *Politics Redux: Fashioning the Presumption of Reviewability*

Some twenty years or so after the APA was passed, liberals and conservatives changed teams.[69] Where the spectre of judicial review had seemed so threatening to New Dealers, liberals in the public interest era[70] understood that federal administrative agencies and a Republican President presented their own set of dangers.[71] Moreover, the Supreme Court now was the Warren Court, or more importantly from the standpoint of administrative law, the D.C. Court of Appeals was the Wright-Bazelon court.[72]

An early example of how this shift played out in reviewability controversies is the Supreme Court's decision in *Leedom v. Kyne*.[73] In *Leedom*, the Court considered whether the National Labor Relations Act (NLRA) precluded review of a claim alleging unlawful action by the National Labor Relations Board. While the NLRA in fact authorized review of Board decisions in certain circumstances, review was not triggered in this case. The Court found that review was nonetheless appropriate, announcing "[t]his suit is not one to 'review,' in the sense of that term as used in the Act, a decision of the Board made within its jurisdiction. Rather, it is one to strike down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the Act."[74] Perhaps. However, the plaintiff in *Switchmen's Union* had made a similar claim fifteen years earlier. And the Court found nothing in the NLRA that expressed an intent on the part of Congress to allow review of these types of decisions without the restrictions imposed on other forms of review. While the Court in *Switchmen's Union* worried about meddlesome judges disturbing the elegant bureaucratic structure fashioned by Congress, the *Leedom* Court saw it differently: "Where, as

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at issue in the future would already have been enacted. With hindsight, consider whether a legislator of the time could have predicted the dramatic new social regulation movement of the 1960s. Most legislators probably thought that the regulatory state would chug along in about the same fashion as it had up until 1946. The New Dealers may well have been less confident that they would remain in power but more confident that there would not be such siguificant statutory action to raise the question of reviewability that would be answered by legislation enacted by a very different group of folks.

69. See Martin Shapiro, *The APA: Past, Present, and Future*, 72 Va. L. Rev. 447 (1986).

70. This term comes from Rabin, 38 Stan. L. Rev. at 1278 (cited in note 42).

71. Presidential influence on administrative decisionmaking and its inherent dangers is a dominant theme in contemporary administrative law scholarship. See, for example, Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 Colum. L. Rev. 452 (1989); Thomas O. McGarity, *Presidential Control of Regulatory Agency Decisionmaking*, 36 Am. U. L. Rev. 443 (1987).

72. See, for example, *Ethyl Corp. v. EPA*, 541 F.2d 1 (D.C. Cir. 1976); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir. 1970); *Automotive Parts & Accessories v. Boyd*, 407 F.2d 330 (D.C. Cir. 1968).

73. 358 U.S. 184 (1958).

74. Id. at 188.

here, Congress has given a 'right' to the professional employees it must be held that it intended that right to be enforced, and 'the courts . . . encounter no difficulty in fulfilling its purpose.' "[75]

Questions of reviewability became considerably more difficult in recent decades not only because the politics of the courts and of Congress changed, but also because of the changing character of regulation and public administration. First, modern regulatory statutes addressed polycentric problems. A growing number of interests and interest groups were taken into account by Congress in enacting the omnibus regulatory statutes of the 1960s and 1970s. The procedural architecture of these statutes reflected the types of regulatory problems confronted by modern administrative government. As the complexity of these statutes grew, so did the number of judicial decisions concerning administrative remedies and procedures, including reviewability. This statutory complexity suggests a second reason for renewed controversies over reviewability. Modern regulatory statutes often required the agency to reach a number of different decisions. Since the APA countenanced partial preclusion, courts had to consider not only whether judicial review existed, but what decisions could or could not be reviewed.[76] Difficult questions of preclusion arose, therefore, in connection with statutes that provided for different categories of agency decisions or different subjects covered by the same agency in the same statute. For example, the statute may well have precluded judicial review of certain factual determinations while retaining review of conclusions of law, or Congress may have authorized judicial review of claims brought by certain individuals covered under the statute and not others. Therefore, the preclusion determinations are often complicated.

The presumption of reviewability was born at the beginning of this era. In *Abbott Laboratories v. Gardner*,[77] the Supreme Court was asked to decide whether Food and Drug Administration (FDA) regulations, enacted under a 1962 amendment to the Federal Food, Drug, and Cosmetic Act, were subject to preenforcement judicial challenge. Congress had not provided for review explicitly. Moreover, the FDA argued that, since Congress had provided a procedure for review of certain regulations under other provisions of the Act, the absence of such a review procedure for these types of regulations implied that Congress intended to preclude review.[78] It was in connection with this argument that Jus-

75. Id. at 191 (quoting *Texas & New Orleans R. Co. v. Railway Clerks*, 281 U.S. 548, 569 (1930)).

76. 5 U.S.C. § 701(a)(1) (1988).

77. 387 U.S. 136 (1967).

78. See 21 U.S.C. §§ 371(e) and (f) (1988). In making this argument, the FDA relied on a venerable interpretive canon of its own, namely, *expressio unius est exclusio alterius*. The Su-

tice Harlan explained that "judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress."[79] More precisely, it is "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent [that the courts should] restrict access to judicial review."[80] *Abbott Laboratories*, like *Switchmen's Union*, was a product of its times. By finding that agency action was reviewable, the Court complemented judicial efforts in this era to increase the various procedural and substantive obligations of administrative agencies.[81] The presumption of reviewability stood alongside decisions expanding standing,[82] scrutinizing the rationality of agency decisions,[83] and crafting additional burdens agencies must meet to withstand judicial scrutiny. Since reviewability was a condition precedent to the courts' increasing scrutiny of agency decisions, the presumption of reviewability was the linch-pin of the courts' expanding power.

Since the Court in *Abbott Laboratories* framed the reviewability decision in the language of burdens of proof and the weighing of evidence, one could surmise that courts were expected to determine whether the evidence met the clear and convincing standard. The actual decisions in which the presumption of reviewability was invoked, however, did not conform to this expectation. The cases decided after *Abbott Laboratories*, and through the heyday of "hard look" judicial review,[84] found more often than not that the statute at issue did not preclude judicial review. But even in those pro-review decisions, it was unclear how much the reviewability canon restructured the court's approach to discerning whether and to what extent Congress intended to preclude review. Later, courts invoked the presumption of reviewability as a sort of judicial mantra, proceeding to declare that Congress had evinced no intent (much less a "clear and convincing" intent) to pre-

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preme Court rejected this canonical argument with the help of a passage from Professor Jaffe's classic treatise on judicial review of agency action. Says Jaffe: "The mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to others. The right to review is too important to be excluded on such slender and indeterminate evidence of legislative intent." Jaffe, *Judicial Control* at 357 (cited in note 40) (quoted in 387 U.S. at 141).

79. 387 U.S. at 140.

80. Id. at 141 (quoting *Rusk v. Cort*, 369 U.S. 367, 379-80 (1962)).

81. See generally Richard B. Stewart, *The Reformation of American Administrative Law*, 88 Harv. L. Rev. 1669 (1975).

82. *Duke Power Co. v. Carolina Environmental Group, Inc.*, 438 U.S. 59 (1978); *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973); *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150 (1970).

83. See cases cited in note 72.

84. See generally Walter Gellhorn, et al., *Administrative Law: Cases and Materials* 475-503 (Foundation Press, 8th ed. 1987); Shapiro, 72 Va. L. Rev. at 462 (cited in note 69).

clude review.[85] Where courts found that Congress had in fact intended to preclude review, the basis was not an accounting of the substantial evidence pointing in the direction of preclusion, but, instead, an examination into the structure and purposes of the statute. In a sense the Court had circled back to the approach of *Switchmen's Union.* The question was whether judicial review would further or frustrate the purposes of the statute in question.[86]

In *Morris v. Gressette*,[87] decided a decade after *Abbott Laboratories*, the Court considered whether the Attorney General's failure to take particular action on voting arrangements brought to the Justice Department's attention under Section 5 of the Voting Rights Act was subject to federal court review.[88] Section 5 instructed all jurisdictions covered by the Act to submit new voting plans or changes to existing plans to the Department of Justice. The Justice Department would review the proposals in order to make sure that the changes would have neither the purpose nor the effect "of denying or abridging the right to vote on account of race or color."[89] These preclearance procedures had become, by the mid-1970s, "the centerpiece of the statute."[90] Through aggressive preclearance, the Justice Department could ensure compliance with the Voting Rights Act without relying on cumbersome, piecemeal litigation. Section 5 placed on the covered jurisdictions the burden of proving in federal court that their electoral proposals did not deny or abridge the right to vote.[91] Failing this burden, the change could not be made. But what happens, the Court was asked in *Gressette*, if the Attorney General declined to object to a voting change within the prescribed time period? Can anyone challenge in federal court that refusal to object?

According to the *Gressette* Court, the reviewability inquiry is driven not by the sort of "weight of the evidence" analysis described in *Abbott Laboratories.* Instead, the question is whether review makes sense within "the context of the entire legislative scheme."[92] As far as Section 5 of the Voting Rights Act is concerned, it was critical that

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85. See generally *Webster v. Doe*, 486 U.S. 592 (1988); *Kries v. Secretary of the Air Force*, 866 F.2d 1508, 1513 (D.C. Cir 1989); *Kramer v. Mosbacher*, 878 F.2d 134, 137 (4th Cir. 1989); *Solar Turbines, Inc. v. Seif*, 879 F.2d 1073, 1076 (3d Cir. 1989); cf. *Natural Resources Defense Council, Inc. v. Hodel*, 865 F.2d 288, 318 (D.C. Cir. 1988) (overriding the presumption of judicial review).

86. See text accompanying notes 50-54.

87. 432 U.S. 491 (1977).

88. 42 U.S.C. § 1973c (1988). On Section 5, see Ahigail M. Thernstrom, *Whose Vote Counts? Affirmative Action and Minority Voting Rights*, ch. 8, 157-91 (Harvard, 1987).

89. 42 U.S.C. § 1973c (1988).

90. See Thernstrom, *Whose Vote Counts?* ch. 3, at 43 (cited in note 88).

91. 42 U.S.C. § 1973c (1988).

92. 432 U.S. at 501 (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967)).

Congress provide an expedited remedy for jurisdictions whose changed voting arrangements were subject to scrutiny by the Justice Department. Congress struck a reasonable bargain by providing for preclearance review as a matter of course while providing covered jurisdictions with two relatively quick methods of compliance. To provide for judicial review at the behest of individuals objecting to the Attorney General's failure to object to a submitted plan would defeat this "expeditious alternative."[93]

Shades of *Switchmen's Union.* In any event, there is no sign in the *Gressette* Court's consideration of the Voting Rights Act of the sort of clear and convincing evidence deemed necessary by the Court a decade earlier. If the Court in *Gressette* was convinced of anything, it was that allowing judicial review of the Attorney General's preclearance decisions would frustrate the purposes of Section 5 of the Voting Rights Act.

The Supreme Court made it rather clear that this evidentiary burden of proof attached to the presumption of reviewability was more hortatory than real. In *Block v. Community Nutrition Institute*,[94] the Court considered whether the Agricultural Marketing Agreement Act of 1937 precluded judicial review of claims brought by milk consumers challenging certain marketing orders issued by the Secretary of Agriculture. The Act in fact authorized judicial review of marketing orders with regard to claims brought by two classes of potential complainants: milk producers and milk handlers.[95] Would-be plaintiffs, in order to seek review, had to exhaust their administrative remedies as spelled out in the statute.[96] While the Act was silent as to whether consumers could seek review, a group of consumers represented by the Community Nutrition Institute argued that they were entitled, along with the producers and handlers, to seek redress in court. Moreover, the absence of any particular exhaustion requirements in the Act indicated that consumers could go directly to federal court.

The Agricultural Marketing Agreement Act, like so many other statutes that the Court had considered in connection with reviewability, was silent on the question of review of consumer claims. It was not silent, however, on review generally. Perhaps the failure to provide a system of review for consumers in light of the producer-handler review provisions suggested that Congress had considered whether to grant review to consumers and had declined to do so. Or perhaps the purpose of

93. Id. at 504.
94. 467 U.S. 340 (1984).
95. See 7 U.S.C. § 608c(15).
96. Id.

describing the reviewability arrangement for producers and handlers in the statute was to make clear the administrative exhaustion requirements for these putative plaintiffs. By omitting descriptions of lawsuits by consumers, perhaps Congress was content to leave the general rule of reviewability, per the APA, intact for this category of plaintiffs. In other words, perhaps Congress intended to give consumers more generous judicial remedies—or at least more generous access to the courts—than either producers or handlers.

As to whether either of these speculations provides the sort of clear and convincing evidence necessary to rebut the presumption of reviewability, the Court in *Block* emphasized that it had "never applied the 'clear and convincing evidence' standard in the strict evidentiary sense. . . . Rather, the Court has found the standard met, and thus the presumption favoring judicial review overcome, whenever the congressional intent to preclude judicial review is 'fairly discernible in the statutory scheme.' "[97] In the end, the " 'clear and convincing evidence,' standard is not a rigid evidentiary test but a useful reminder to courts that, where substantial doubt about congressional intent exists, the general presumption favoring judicial review of administrative action is controlling."[98] And, as the Court's approach in *Gressette* and *Block* makes clear, conclusions about congressional intent may rest on analysis of the statutory scheme and the purposes that would be served or disserved by precluding judicial review.

A recent reviewability decision illustrates how unclear is the Court's sense of how the presumption of reviewability affects the judicial remedy inquiry. Four years ago in *United States v. Fausto*,[99] the Court considered whether the Civil Service Reform Act of 1978 (CSRA) precluded judicial review of claims brought by a certain category of civil service employees under statutes such as the Tucker Act and the Backpay Act, each enacted many years before the CSRA. The CSRA divides employees into three classifications—Senior Executive Service, Competitive service, and Excepted service. Within each of these categories, there is preferential treatment accorded to veterans and close relatives—what the Act describes as "preference eligibles."[100] The claim at issue in *Fausto* was one brought by a nonpreference eligible of the Excepted service. The CSRA was silent regarding judicial review of nonpreference eligible claims. Specifically, it was silent on whether claims brought by nonpreference eligibles under other statutes, such as the

97. 467 U.S. at 350-51.
98. Id. at 351.
99. 484 U.S. 439 (1988).
100. 5 U.S.C. § 2108 (1988).

Tucker and Backpay Acts, were precluded. Silence, said the Supreme Court in *Dunlop v. Bachowski*,[101] does not mean that the statute precludes judicial review. Indeed, it does not matter that the silence might indicate that Congress had not given any thought to whether review is precluded. The presumption of reviewability places the burden squarely on Congress to indicate affirmatively, with clear and convincing evidence, that it intends to preclude judicial review in whole or in part.

Despite the Court's straightforward construction of the reviewability presumption in *Dunlop*, the Court in *Fausto* followed the approach of *Block* by proceeding to examine "the purpose of the CSRA, the entirety of its text, and the structure of review it establishes."[102] In this light, the Court regarded Congress's failure to provide a scheme of judicial review of nonpreference eligible claims in a statute whose subject was legal remedies as indicating a clear preference that there should be no judicial review of such claims. To conclude otherwise, indicated Justice Scalia for the majority, would disrupt the "integrated scheme of administrative and judicial review, designed to balance the legitimate interests of the various categories of federal employees with the needs of sound and efficient administration."[103]

Justice Stevens's dissent took Congress's silence to indicate something quite different, namely, that Congress intended to leave employees whose remedies were not spelled out in the CSRA with the remedies they otherwise enjoyed before the enactment of the statute. Hence, by failing to accord a specific judicial remedy to nonpreference eligibles, Congress left intact these employees' right to bring suits under any other applicable statutes.[104] The dissent took exception with what it regarded as the Court's mistreatment of the presumption of reviewability. "It is remarkable," said Justice Stevens in a footnote, "that the majority finds [Congress's intent in the CSRA] sufficiently well expressed in congressional silence to overcome a presumption that can be rebutted only by 'clear and convincing evidence' that Congress intended to deny judicial review. . . . To meet this standard, congressional intent must be fairly discernible in the statutory scheme."[105]

The methodological disagreement, therefore, turns on the question of how seriously to take the clear and convincing evidence test of *Abbott Laboratories*. For the *Fausto* majority, the presumption of reviewability, at most, organizes the inquiry, framing the issue as one concerning whether the structure and purposes of the statute would be

101. 421 U.S. 560, 567 (1975).
102. 484 U.S. at 444.
102. Id. at 445.
104. See id. at 459-61 (Stevens dissenting).
105. Id. at 463 n.10 (citing *Abbott Laboratories*, 387 U.S. at 141, and *Block*, 467 U.S. at 351).

served or disserved by judicial review. For the dissenters, by contrast, the presumption of reviewability seems to mean a good deal more.

IV. Canons, Courts, and Congress

Canonical construction in the form of the presumption of reviewability is one important part of the courts' strategy of expanding their role in checking agency action in the face of changed political circumstances. But is it a viable and desirable strategy? Is canonical construction the appropriate means by which courts can compete effectively against manipulation by Congress? And, if the answer is yes, is it possible that there will emerge out of this judicial strategy a series of benefits that will improve the legislative and administrative processes?

The task of the preceding section was to explain the origins of the presumption of reviewability and to try to describe how courts use the presumption as an interpretive canon in order to organize the inquiry into reviewability. It is an inquiry set against the backdrop of the Administrative Procedure Act and the conceptual tensions that animate contemporary administrative law. In the final Part of this Article, I explore the consequences associated with canons like the presumption of reviewability and how the enterprise of canonical construction might facilitate or hinder judicial and legislative processes.

A. Canonical Construction and Judicial Decisionmaking

Canonical construction can promote judicial economy by reducing the costs of interpreting statutes. And while we may well regard this enhanced efficiency as outweighed by other, more critical values undermined by canonical construction, more efficient judicial decisionmaking is a value worth taking seriously in considering and evaluating this method of statutory interpretation. Of course, some canons fulfill this efficiency aim better than others. The presumption of reviewability, for example, may or may not reduce the costs of judicial decisionmaking. As explained in the preceding section, there is no easy test for determining what suffices as clear and convincing. Individual judges will conceive of the burden of legislative proof differently. We may require that Congress express its intent to preclude judicial review through clear statutory language. The presumption of reviewability thus becomes equivalent to a clear statement rule. In the alternative, Congress may have to provide substantial and compelling legislative history that indicates the intent of the legislature to preclude judicial review. The process of statutory interpretation in connection with a preclusion issue would be ordinary, but the burden of persuasion on the party arguing in favor of preclusion would be heightened. Finally, the court may hold

that review is precluded where a party is able to adduce persuasive reasons favoring preclusion. This would broaden the scope of the courts' preclusion inquiry to include not only statutory language and legislative history, but also other relevant evidence that indicates that Congress intended to preclude judicial review. Recent reviewability decisions suggest that the Supreme Court is struggling between the second and third approaches.[106] In any case, the task of construing the statute to determine whether the presumption of reviewability has been adequately rebutted involves significant decisionmaking costs, costs similar in kind to those incurred by judges in a canonless world. Nonetheless, faithful use of the reviewability canon will surely limit the discretion of courts to embark on ungrounded expeditions into the labyrinth of legislative intent in each separate instance of statutory interpretation.

The presumption of reviewability increases judicial decisionmaking costs for a more obvious reason. Once the court finds that the statute does not preclude judicial review, it then must proceed to review the agency decision. By using the presumption, the court is creating more work for itself. The costs, of course, are not really the costs associated with finding the agency decision reviewable but, rather, the costs of actually carrying out the review of the agency decision.[107] This may involve close study of the agency record or, at least, scrutiny of the agency's rationale, and a review of extant administrative law doctrine and other sources of law that shed light on the reasonableness of the agency's decision. It does not matter how one allocates these costs. The point is that a court can conserve resources by holding the agency decision unreviewable and thereby avoiding any costs associated with judicial review. The presumption of reviewability stands in the way of this strategy and therefore has the anomalous effect of streamlining the interpretive process at the price of increasing the courts' overall responsibilities, as well as the overall costs, with regard to judicial review of agency decisions. Discretion is a double-edged sword.

There is a different sort of discretion that is at work in debates over the proper role of canonical construction. By developing and applying the canons of construction, courts can recover from the political branches a certain amount of power over the process of interpretation

106. See text accompanying notes 88-105.

107. To understand the nature and scope of these costs, we need to consider the connection between reviewability and the courts' attitude toward review. Historically, courts have invoked the reviewability presumption while they have carried out a strategy of "hard look" review of agency decisions. Reviewability may, however, be a prelude to judicial deference. If courts are inclined to find agency decisions reviewable in order to enshrine agency policies by deferring to those decisions, then the increased decisionmaking costs are much less than where the court engages in hard look review.

and, as a consequence, preserve their role in implementing and making regulatory policy. Canonical construction may have the effect of increasing judicial discretion vis-a-vis the legislature by structuring the interpretive enterprise on the terms and conditions set by judges rather than by legislatures.

One's normative assessment of this judicial strategy depends in part on an assessment of the appropriate place of courts in the constitutional and administrative system and on an assessment of how secure the judicial power is in the contemporary federal order. Like most other issues involving statutory interpretation, we return to constitutional separation of powers concerns. What should be the respective roles of Congress, the courts, and the President in the process of law creation, implementation, and interpretation?

The judiciary's role in statutory interpretation traditionally has been understood as limited in two important ways. First and foremost, legal positivism and constitutional theories of legislative supremacy have constructed a boundary on judicial creativity in interpreting statutes.[108] Statutory interpretation can be a more or less creative enterprise, eclectic in method and directed not simply toward the task of recovering the legislature's true intent. Interpretation nonetheless is grounded in a positivistic theory of judicial and legislative responsibilities under a written constitution.[109] The interpretation cognoscenti's quotation of choice is usually found in *The Federalist* No. 78: "It can be of no weight to say that the courts, on the pretence of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature."[110] Thus, limits on judicial creativity in statutory interpretation flow from these positivistic concerns.

In addition to the will-centered traditions drawn from our constitutional understandings, the legislature may prescribe limits on judicial creativity. These limits ostensibly may be far removed from the task of interpretation per se, but nevertheless may bind judicial creativity in interpreting statutes. Congress may regulate the process of statutory interpretation by instructing courts to interpret statutes in a certain way. It may direct a court to interpret a statutory provision narrowly or broadly.[111] It may instruct the court to interpret certain provisions of

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108. See Reed Dickerson, *The Interpretation and Application of Statutes* 7-12 (Little, Brown, 1975); Daniel B. Rodriguez, *The Substance of the New Legal Process*, 77 Cal. L. Rev. 919, 930 (1989) (reviewing Eskridge and Frickey, *Legislation* (cited in note 1)).

109. Rodriguez, *The Substance of the New Legal Process*, 77 Cal. L. Rev. at 929-31 (cited in note 108).

110. Federalist 78 (Hamilton), in *The Federalist* 502, 507 (Modern Library, 1941).

111. See Charles A. Shanor, *Some Observations on Broadly Construing Civil Rights Laws*, 14 Harv. J. L. & Pub. Pol. 8 (1991).

the statute in light of other provisions in that same statute.[112] Moreover, it may direct the courts to look, in interpreting the statute, to other sources of law, including nonstatutory sources.[113] Congress can, and often does, circumscribe judicial creativity in interpretation by fiat.[114]

Given that Congress has both the power to regulate statutory interpretation and the incentives to do so, I regard canonical construction as an appropriate means by which courts can preserve an important role in the process of creating law against potential encroachments and disruptions by the legislature and the executive. The catch, of course, is that the canons of construction are subject to reversal or revision by Congress. Canonical construction is an interpretive approach carried out at the sufferance of the legislature. To the extent that the use of canons reflects an attempt by the courts to retain prerogatives and to protect their role in statutory interpretation, it is a strategy implemented in an environment in which the dominant voice in interpretation is still that of Congress, and not the courts. This is as it should be. It must be within the province of the legislature to create the statutory framework within which courts carve out their own, special interpretive role. But the Constitution's system of separation of powers and checks and balances does a reasonably good job of ensuring that the fight between the legislature and the courts is a fair one. Canonical construction enables courts to establish and enforce public law principles—"public values"—that, where properly designed, serve the aims of both positivism and principled public law.

B. Canonical Construction and Legislative Decisionmaking

In the paragraph quoted in this Article's introduction, Professor Cass Sunstein ascribes to canonical construction the rather ambitious function of "improv[ing] lawmaking processes and the deliberation and accountability that are supposed to accompany them."[115] To be sure, Professor Sunstein's agenda, however, is not to defend canonical construction per se, but, rather, to defend a distinct set of interpretive principles fashioned by him and designed primarily to improve regulation.[116] But what of his claim as stated? Does the example of the presumption of reviewability suggest that canonical construction in

112. See Eskridge and Frickey, *Legislation* (cited in note 1).

113. See, for example, Rule 501 of the Federal Rules of Evidence (stating that "the privilege of a witness . . . shall be governed by the principles of the common law as they may he interpreted by the courts of the United States in the light of reason and experience").

114. See generally Rodriguez, *Statutory Interpretation* (cited in note 31).

115. Sunstein, *After the Rights Revolution* at 154 (cited in note 8).

116. Id.

general, or this canon in particular, improves the process of lawmaking?

The most critical effect that the presumption of reviewability has on administrative law and regulation is the reduced incidence of preclusion of review and, hence, the greater incidence of judicial review of agency decisionmaking. This, alone, has no apparent direct effect on the process of legislative decisionmaking. Any indirect effects resulting from the phenomenon of judicial scrutiny are difficult to measure.[117] They are, in any event, difficult to ascribe to the enterprise of canonical construction as an interpretive method. If the presumption of reviewability has any process effects it must be because it sets in motion a series of legislative choices that themselves facilitate or hamper intelligent legislative decisionmaking.

The principal consequence of the vigorous enforcement of the reviewability canon is that Congress must produce clear and convincing evidence that it, a majority of legislators, intended to preclude judicial review. This burden may be more or less stringent. It may express little more than an exhortation by Congress to the courts to scrutinize the structure and purposes of the statute to see whether judicial review would undermine the legislation. If the presumption means anything, however, it means that it is harder for Congress to make the case for preclusion than it would be without the reviewability canon.

The principal danger of the reviewability canon is that it will induce a decisionmaking process that, when completed, may leave us—including those who want judicial review—worse off than without the canon. Where Congress must take the appropriate steps to overcome the presumption of reviewability, coalitions that formed to pass a certain version of the statute may break apart. Thus, the result may not be a regulatory regime that provides for judicial review but, instead, no statute. A coalition formed to enact a reviewless statute may collapse in the face of the requirement that they specifically address preclusion in the statute's text. Although it is easy to imagine that the only consequence of the presumption of reviewability is to add judicial review to an otherwise satisfactory statute, another consequence may be the undermining of the bargain struck within the legislature. It is no satisfactory answer to say that we can wait and see whether the statute unravels after the court's reviewability decision. The fear is that legislators, acting in the shadow of the reviewability canon, will be unable to accomplish their goal in the first instance. Naturally, these effects are impossible to measure. What legislation, we would need to ask, failed to pass because of the presumption of reviewability? And yet the mechan-

117. Greater agency caution and less chance for agency capture are two examples of potential indirect effects of judicial scrutiny.

ics of legislative decisionmaking suggest that canonical construction can have this result.

In calling upon Congress to provide clear and convincing evidence to demonstrate that it truly means to preclude judicial review, courts presume that the failure to come forth with such evidence suggests that a majority of the legislature intended review. But this does not necessarily follow, as a simple example shows. Consider a hypothetical one hundred-member legislature faced with a legislative proposal. Assume that legislators have the following options:

(1) A statute with judicial review

(2) A statute with no judicial review

(3) No statute/status quo

Suppose there are two groups of legislators—*A* and *B*—made up of 40 and 20 legislators respectively. While *A* (40 legislators) prefers alternative (2) to (1), and *B* (20 legislators) prefers (1) to (2), an *AB* coalition can form to pass the bill, so long as they agree to leave the reviewability question unspecified in the statute. Clearly, the fact that the statute will be interpreted by a court presents a risk to both sides, the risk that the court will interpret it in a way inconsistent with the legislators' hopes. But the risk is spread between the two groups and so long as they are willing to take this risk the bill will pass. While group *C*, formed of 40 legislators, votes against the bill, this does not mean that all or some of the 40 legislators forming this coalition are ambivalent as to whether, if there is to be a statute, there should be judicial review. Group *C*'s preference ordering may be (3) over (1) and (2), but (1) over (2). If the *AB* coalition is cobbled together and its bill is paired against the status quo, it wins. Does the majority of the legislature intend that the agency's decisions be reviewable? With the presumption of reviewability, the answer is yes because there is no clear and convincing evidence that the legislature intended to preclude judicial review. But this judgment may not reflect the true wishes of a majority of legislators. Indeed, it may be that an overwhelming majority of the legislature prefers no review, for example, 49 members of group *AB*, 40 of group *C* or 89 total members may oppose review with 11 members of *AB* favoring review.[118] In effect, the presumption of reviewability invents a legislative coalition. It presumes that a majority of the legislature considered whether to preclude judicial review and declined to do so. It does not follow, however, that the group of legislators that part company with the group that wants the statute and wants to preclude judicial review amounts to a majority of the legislature as a whole.

118. For simplicity's sake, I am assuming that there are no other tradeoffs involved in the bill. The choice is between these three alternatives only.

Proponents of the presumption of reviewability may concede that it does not necessarily guarantee that the legislature's intent will prevail. What it does guarantee, however, is an increase in the costs the non-judicial review legislators must bear in order to secure a majority coalition to effectuate their aims. This increase in transaction costs may be useful because it forces these legislators to take the necessary steps to forge a coalition. Whether or not the assumption described above reflects true legislative preferences, it may be useful simply because it imposes substantial transaction costs on non-judicial review legislators. The reviewability presumption raises the costs to legislators who propose to overcome this presumption and to secure unreviewable agency decisionmaking.[119] This transaction cost strategy makes sense, however, only if we are willing to accept its consequences. It may be that non-judicial review legislators' failure to assemble a coalition in favor of their position may yield a bill that is silent or ambiguous on the subject of judicial review. Or perhaps, the bill will strike a compromise. As with the Agricultural Marketing Agreement Act at issue in *Block*,[120] Congress might provide for some types of review but not others. The other alternative, however, is no statute. Depending upon the preference functions of the individual legislators, it may be that imposing substantial costs on legislators in order to secure suitable evidence of an intent to preclude judicial review will wreck the coalition that supports the bill. The outcome may thus be no bill at all. Ironically, the presumption of reviewability may, given a set of legislative preferences, be the engine of the regulation's destruction.

The framers of the Constitution understood that a possible outcome of structuring government to ensure separation of powers and checks and balances would be stalemate and, accordingly, less policy overall.[121] Indeed, some regarded this as a salutary result. Those who would structure methods of statutory interpretation in order to impose certain costs on legislators also should understand that a possible outcome is stalemate and inertia. Canonical construction does not simply

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119. Professor Jonathan Macey has constructed a theory of statutory interpretation that acts in a way similar to most forms of canonical construction. Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 Colum. L. Rev. 223 (1986). He suggests that the legislature should be bound by its puhlic-regarding statements in legislation despite the fact that these statements mask the real, private-regarding elements of the statute. Rent-seeking may he the real explanation of statutory language, but construing statutes in accordance with the legislators' advertised intent allows the court to transform private-regarding legislation into good, public-regarding law. Legislators who insist on constructing a private-regarding deal can do so only by incurring the extra political costs of revealing this intent on the face of the statute.

120. See text accompanying notes 94-98.

121. See Jonathan Macey, *Transaction Costs and the Normative Elements of the Public Choice Model: An Application to Constitutional Theory*, 74 Va. L. Rev. 471 (1988).

add a gloss to a statute that would exist whether or not the canon exists. The content of the statute, as Professor William Landes and Judge Richard Posner pointed out a decade and a half ago,[122] is in part a function of the predictions of those who demand this legislation. These predictions which rest on the contemporary legal climate include the current judicial approach to statutory interpretation.[123]

Increasing transaction costs could jeopardize regulatory statutes, but is this consequence likely? Is it reasonable to expect that legislators would prefer to jettison an otherwise acceptable statute on the grounds that agency decisions will be subject to judicial review? To answer this question, consider the two very different institutional arrangements spawned by a statute that precludes judicial review and one that does not. The first statute vests the agency with the authority to make regulatory decisions free of judicial control. Of course, the choice is not between agency autonomy and control. Preclusion merely means no review by the courts. Legislators retain residual power to control agency decisionmaking. Legislators who contemplate whether to support a statute will take into account whether the proposal contains the appropriate means to control agency decisions.[124] If legislators were unable to secure the appropriate control arrangements in the statute, they may prefer to surrender altogether. After all, the discounted present value of the statute may, in the absence of these control arrangements, be negative. For instance, the President may refuse to sign a bill that creates an administrative agency unless Congress agrees that this agency is located in the executive branch. Congress may refuse to go along, fearing that such an arrangement would enable the President to control agency decisionmaking in a way that is costly to Congress.[125]

Judicial review is a sort of independent variable in the legislators' considerations. Legislators can, and do, exercise a certain amount of control over the process by which courts review agency decisions. These control efforts are limited, however. Separation of powers ensures that courts will maintain a residuum of power and prerogatives that Congress cannot touch. Moreover, congressional pressure, even when precisely applied, is unpredictable. Courts are the institutions doing the

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122. William Landes and Richard Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J. L. & Econ. 875 (1975).

123. Id.

124. See, for example, McCubbins, Noll, and Weingast, 75 Va. L. Rev. 431 (cited in note 67). It is not absolutely clear that legislators will construct significant instruments of control in all instances. There is, after all, a difficult temporal dilemma. Legislators must be careful in structuring control devices *ex ante* so that they do not give up too much power to future legislators and legislative coalitions to unravel the bargain struck in this statute.

125. I mean imposing direct costs, not simply faling to provide to legislators suitably generous benefits.

reviewing and Congress is limited in the ways that it can respond to the risk of "bad" judicial decisions.[126] Finally, although Congress can influence judges and judicial decisionmaking, as between agencies and courts, Congress retains a much greater ability to control the former than it does the latter. Of course, this does not mean that Congress will always prefer to vest great authority in agencies and to cordon off agency action from judicial scrutiny. Enhancing agency power may mean enhancing the power of the President as well as creating a source of power—the agency itself—that may act in ways counterproductive to Congressional interests. But, in a given instance, a legislative coalition may regard the risks of judicial review sufficient as outweighing the benefits associated with the statute.

Consider, for example, a statute that creates a Consumer Safety Agency (CSA) and charges it with the responsibility of developing standards for ensuring consumer safety by banning dangerous products, providing public information, and so forth. The statute is the product of a coalition formed by legislators who desire greater consumer safety.[127] The coalition, however, does not desire this statute at any price. The legislative majority fashions the CSA as an independent regulatory agency, an agency subject to a myriad of overlapping executive and legislative controls. In considering whether to preclude judicial review, it knows that courts will scrutinize carefully CSA decisions to abandon safety standards once they have, in the judgment of CSA, outlived their usefulness. Courts, following the teaching of *Motor Vehicle Manufacturers v. State Farm*,[128] look askance at agency deregulation that is not supported by substantial reasons. The legislative majority regards this judicial approach as unacceptable. It cannot take the risk that the CSA will adopt a standard that cannot be changed except when the CSA comes forward with persuasive reasons.[129] The coalition would rather jettison the Consumer Safety Agency altogether than risk establishing a rigid scheme of regulation, a scheme that has the potential to backfire in legislators' faces.

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126. See Matthew McCubbins and Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols versus Fire Alarms*, 28 Am. J. Pol. Sci. 165 (1984).

127. This desire to form a coalition can be for any reason, he it interest group pressure, constituent response, ideology or anything else. It does not matter for the purposes of this argument.

128. 463 U.S. 29 (1983).

129. Reasons which do not include—unfortunately for legislators—changes in political circumstances. Compare *State Farm*, 463 U.S. at 59 (Rehnquist dissenting) (stating that "[a] change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations") with *Chevron U.S.A. Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 865 (1984) (stating that "[w]hile agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make policy choices").

Fashioning a statute that leaves the question of review open may provide a path out of this morass. The legislators can agree to leave the reviewability issue open. Both sides—those favoring review, and those against—bear the risk that the court will construe the statute against their interests. But, by spreading the risk across these two groups, a coalition may be able to form.

The presumption of reviewability assigns the risk of unwanted interpretation to one side. Those against review know that unless they can muster up a majority coalition for this view they will lose, that is, the courts will find that agency decisions are reviewable. If they prefer to sacrifice the statute, fearing that courts will cement a CSA decision to the great detriment of this group of legislators, then the statute does not pass. Legislators may well find a review statute worse than no statute at all. And this group need not be a majority of the legislature, but merely a group large enough to destroy the majority coalition that would otherwise form to pass the statute.

If there is any lesson here it is that judicial strategies of interpretation may have unanticipated consequences. Methods of statutory interpretation may affect legislative choices, and hence outcomes, in deleterious ways. Affixing procedures to statutes may be especially problematic, since rational legislators haggle over both procedure and substance when considering whether to pass legislation. Procedural innovation by courts, therefore, may reconstruct the bargain fashioned by a legislative coalition.

Acting in the shadow of these canons, legislators may well fail to make such bargains where there is a substantial risk that the bargain may be undone. This may be a risk courts are willing to take. After all, a court concerned with protecting its prerogative to construct an independent administrative law as well as protecting its role in statutory interpretation against legislative encroachment may well deem the collapse of a legislative coalition a price worth paying. The losers, of course, are those who would benefit from the existence of this statute, even without judicial review. Paradoxically, they represent a group of regulatory beneficiaries that reap most of the benefits from the presumption of reviewability, where it does not disrupt the statutory bargain. But they also bear most of the costs of the presumption where the presumption does encourage legislative choices that unravel the bargain.

To consider a final aspect of canonical construction and its consequences for legislative decisionmaking, we must circle back to the two models of administrative law described earlier. From the courts' standpoint, the measure of whether the presumption of reviewability has succeeded in furthering the aims of interpretation is whether the

presumption has in fact made it more difficult for Congress to preclude judicial review. Judges' goals in interpretation, as I have suggested, include not only the instrumental goal of furthering an important public value, here the value associated with judicial review of agency decisionmaking, but also the goal of protecting judicial prerogatives against legislative threats. Canonical construction may defeat Congress's aims with respect to reviewability, but it is not so clear that the enterprise of canonical construction will, or even can, have the long-term effect of accomplishing the judiciary's larger aims. To be more specific, if Congress is set on furthering a conception of administrative law which embraces the contingent nature of administrative law and the centrality of political choice and due respect by the courts, then it will wage this war on a number of different fronts. One of these fronts is reviewability; but, faced with a presumption of reviewability, Congress may turn elsewhere.

Congress may structure its substantive statute so that the agency has more discretion. After all, a court may well retain the power to review agency decisions but, where Congress has accorded great discretion to the agency, the courts' practical ability to control agency action will be constricted. Statutes that delegate authority to agencies to regulate in the public interest provide agencies with generous discretion that is more difficult for the courts to supervise. Moreover, Congress may reconstruct administrative procedure to insulate agency decisionmaking from stringent judicial review. If, for instance, requiring the agency to conduct an on-the-record hearing triggers a "substantial evidence" review under the APA,[130] Congress may be more reluctant to have agencies proceed in this more formal fashion. Congress must decide whether the value of the extra procedure is worth the risks associated with stricter judicial review.

Aside from legal controls, Congress may become more vigilant in controlling administrative agencies through various political means, including congressional oversight and budgetary control. Fearing that a greater number of decisions will be reviewed by courts, Congress might take steps to ensure that those judicial decisions are ironclad. It will also try to limit the agencies' ability to send decisions to reviewing courts if the consequence of judicial review may be to leave Congress worse off than if no decision had been reached. The direct result of these legislative machinations is a different pattern of agency decisions. Legislators determined to insulate agency decisionmaking from control while, at the same time, lacking the critical votes to preclude review in a sufficiently clear and convincing fashion, will act to lessen the effects

130. 5 U.S.C. § 706(2)(E) (1988).

of judicial review. In doing so, it may leave us with a different decisional pattern or, perhaps, a very different structure of agency decisionmaking.

The discussion in this section assumes that legislators react to signals from the courts and structure administrative process in response to these signals. It is, I think, a realistic assumption and one that does not depend on a pure rational choice conception of legislative behavior. We must not mistake legislative strategizing in the face of legal rules as a spirited revenge of the rent-seeking legislators.

Legislative responses to the presumption of reviewability may be an outgrowth of the legislators' desire to reassert their powers and prerogatives to engage in reelection-maximizing behavior. On the other hand, a legislature made up of public-regarding individuals may still resist attempts by the courts to install a methodology of statutory interpretation that swipes the legislature's power to make the complex political choices involved in the regulation and the structure of administrative decisionmaking. In the hands of a judiciary made up of judges who set out to exert control over agency decisionmaking in order to destroy regulation, the presumption of reviewability may be the engine that runs over regulation rather than transporting it past its potential enemies in the legislative and executive branches. In this light, legislative responses to heightened incidences of judicial review may be the means of preserving our regulatory tradition.

V. Conclusion

The principal lesson of the presumption of reviewability as a form of canonical construction is that methods of statutory interpretation have consequences not only on legislative outcomes but also on judicial and legislative processes. Some of these consequences are predictable. Others are more uncertain. In any event, to make the normative case in favor or against the use of any canon, we should have a better understanding of these consequences. While I have not tried to offer an accounting of the costs and benefits of the presumption of reviewability, I have suggested some reasons why the canon may serve useful purposes while at the same time obstructing certain aspects of legislative decisionmaking.

As an interpretive method, canonical construction fuels judicial creativity by providing a source of ready-made principles that can be used as a means of safeguarding judicial prerogatives while at the same time furthering critical public values. Canonical construction sounds almost too good to be true. Since the alternative is fidelity to the words and history of the statute regardless of where that method leads, canonical construction commends itself to those skeptical about the tradi-

tional methods of statutory interpretation and concerned that blind obedience to the legislative will sacrifices good government at the altar of inchoate notions like supremacy and separation of powers.[131]

But canonical construction is not costless. The use of interpretive canons as a means of getting around legislative intent or adding to the otherwise stale words and context of a statute pushes legislators in a series of directions. Where we can anticipate and assess these legislative choices triggered by canonical construction, we can evaluate the costs in light of the benefits. In such instances, we may regard some of the consequences described above as prices well worth paying for the salutary policy outcomes generated by the canon's use. Some legislative choices, however, are not easy to predict. For example, it is impossible to describe the statutes not enacted because of the shadow cast by the presumption of reviewability. Moreover, we cannot with confidence ascribe congressional efforts to recapture administrative law from courts to the presumption of reviewability of agency action. Nonetheless, we would do well to appreciate that methods of interpretation have consequences on legislative decisionmaking and public policy.

In light of these consequences, I think the presumption of reviewability may well cause more problems than it solves. This may or may not be true of all or most of the other canons of statutory construction. Close scrutiny of this one particular canon, however, hopefully adds something to the scholarly literature on statutory interpretation and the canons. The central question may remain one of legitimacy: do the courts, in our constitutional system, belong in the business of construing statutes creatively to further important public values? But scholarship directed toward examining the underpinnings of certain canons and considering how the application of these canons may affect the institutions and structures of public law provides an important source of information to use in reflecting on this persistent constitutional question.

131. See Sunstein, 103 Harv. L. Rev. 405 (cited in note 2); William N. Eskridge, Jr., *Spinning Legislative Supremacy*, 78 Georgetown L. J. 319 (1989).