NOTES

Restoring the Essential Safeguard: *Why the* Abbott *Test for Preclusion of Judicial Review of Agency Action Is an Inadequate Method for Protecting Separation of Powers*

MICHAEL SEBRING*

ABSTRACT

Judicial review is "an essential safeguard" under the Constitution, allowing the judiciary to mitigate injuries on citizens by unjust government action. Throughout the modern era, Congress has passed statutes that allow administrative agencies to entirely avoid judicial review over their actions, frustrating the Constitution's separation of powers design. That design quarantines governmental powers among three branches for the purpose of protecting individual liberty and ensuring its citizens freedom from arbitrary laws, the right to hold policymakers accountable through elections, and access to an independent judiciary. The modern administrative state already acts outside this design by combining judicial, executive, and legislative powers into one political body. By denying the judiciary its ability to review agency action for constitutional, due process, ultra vires, and arbitrariness violations, Congress further subverts the Constitution's protections.

In light of these purposes, courts should reconsider the Abbott *test, which currently governs whether Congress has validly precluded judicial review over agency actions. The* Abbott *test solely considers whether Congress was clear in its desire to preclude review, placing a presumption against preclusion. Nowhere are courts permitted to consider the effects on individual liberty or the threat to separation of powers caused by a Congressional attempt to preclude judicial review. This paper suggests adding another step to the* Abbott *test to rectify the test's insufficiencies. Rather than stopping at congressional intent, the court should add a final step that weighs the interests of judicial review against the government's interests in stripping jurisdiction. The new step would require a judge to weigh the interests of separation of powers and liberty against the interests of Congress in precluding review. This test properly focuses the judicial inquiry not onto the bare intention of Congress, but rather the impact on due process, judicial independence, and potential for permitting unlawful agency action.*

TABLE OF CONTENTS

INTRODUCTION

Alexander Hamilton described the judiciary's power to halt "unjust and partial laws" and to "operate[] as a check upon the legislative body in passing them" as "an *essential* safeguard."[1] Leveraging judicial power to defend against arbitrary lawmaking is but one benefit of the Constitution's separation of powers framework. Maintaining an independent judiciary and reserving legislative power to a democratically accountable Congress are two others. The Constitution purposefully diffused power in this manner to preserve and protect liberty. Therefore, courts should seek to emphasize liberty interests over other government interests whenever a conflict between the two arises in a separation of powers context. So when Congress acts to strip judicial oversight over administrative agencies, it acts in tension with these principles of constitutional separation of powers.

Admittedly, the division of legislative, executive, and judicial power among the three federal branches is not as strict in the modern era than in the days of the Founders: branches now often exert blended powers and take advantage of blurred lines. Nowhere is this more evident than in the administrative state. A great deal of *legislative* rulemaking, for example, occurs inside *executive* agencies. Exacerbating the problem, Congress sometimes statutorily restricts the judicial branch from reviewing delegated agency action. These restrictions are in deep conflict with the liberty interests advanced by the Constitution's separation of powers framework.

Yet, modern jurisprudence allows Congress to strip the judicial branch of its power to review agency actions. And though skeptical, the Supreme Court has not deemed jurisdiction-stripping unconstitutional. Though there is some nuance here. Manifesting some of its skepticism, the Supreme Court has created a presumption against preclusion. Courts apply this presumption, famously developed in *Abbott Laboratories v. Gardner*,[2] while performing a test (the "*Abbott* test") based entirely in statutory interpretation. The *Abbott* test is used to determine congressional intent and permits no discussion of liberty, separation of powers, or any other due-process-related concerns that one might think critical in the decision to preclude judicial review of agency action. Yet, the presumption's mere existence shows a judicial squeamishness over how preclusion upsets the traditional constitutional role of the judiciary.

Section I discusses the justifications and benefits of the Constitution's separation of powers design. Section II provides an overview of the practice of precluding judicial review of agency actions and describes both the courts' reactions and the development of the *Abbott* test. Section III discusses how the *Abbott* test and the presumption inadequately safeguard key guarantees generated by the separation of powers scheme discussed in Section I, including the right to be free from arbitrary lawmaking, access to an independent judiciary, and the reservation of

1. THE FEDERALIST NO. 78 (Alexander Hamilton).
2. Abbott Labs. v. Gardner, 387 U.S. 136, 139–41 (1967).

legislative power to Congress. Section IV proposes a new step in the test to better address these concerns by requiring courts to weigh the burdens placed on structural and personal separation of powers guarantees against the various government interests in precluding judicial review. Section IV further explains that this new step can be grounded in the Constitution.

I. JUSTIFICATIONS AND BENEFITS OF SEPARATION OF POWERS

The separation of legislative, executive, and judicial powers between the three branches is a fundamental part of the design of the Constitution—a "sacred maxim of free government."[3] Each branch is "vested" with its namesake power to the exclusion of the other branches.[4] Yet, there is no "separation of powers" clause, per se, in the Constitution. Lacking any explicit instruction on how to enforce the separation of powers, courts have examined the issue on a more-or-less ad hoc basis, inviting confusion, inconsistency, and mistakes.[5] Identifying the envisioned benefits of the separation of powers design may clarify the purpose and clear the confusion.

By design, the Constitution restricts and separates the powers of governance among different branches to defend individual liberty.[6] "[T]hat the legislative, executive, and judiciary departments, ought to be separate and distinct" is an "essential precaution in favour of liberty."[7] Among those liberties so protected are preservation of individual rights and freedom from arbitrary, tyrannical uses of governmental power. A firm separation of powers design ensures, for example, that neither the executive nor the judiciary will usurp legislative authority and that the people are protected against the legislative branch abdicating or transferring its authority away. It further provides for an independent, nonpolitical judiciary to oversee the other branches' violations of citizens' rights, the Constitution, and Congress's laws. A closer examination of these justifications and benefits helps to better identify those governmental actions that might infringe on this constitutional guarantee.

A. Defense Against Arbitrary Lawmaking

Freedom from arbitrary lawmaking is among the most fundamental liberties the Constitution protects. Arbitrary lawmaking—or the "inconsistent, uncertain,

---

3. THE FEDERALIST NO. 47 (James Madison).

4. Dep't of Transp. v. Ass'n of Am. Railroads, 135 S. Ct. 1225, 1241 (2015) (Thomas, J., concurring) ("When the Government is called upon to perform a function that requires an exercise of legislative, executive, or judicial power, only the vested recipient of that power can perform it.").

5. Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1517 (1991) ("[T]he Supreme Court's treatment of the constitutional separation of powers is an incoherent muddle.").

6. City of Arlington v. FCC, 569 U.S. 290, 315 (2013) ("The Framers . . . divide[d] governmental power . . . for the purpose of safeguarding liberty.").

7. THE FEDERALIST NO. 47 (James Madison).

unknown, arbitrary will of another man"[8]—is far more likely to occur if one branch is able to aggregate the authority to determine a policy, enact and enforce it, and then adjudicate challenges to its decisions. The Founders considered separation of powers the key protection against arbitrary lawmaking: "The doctrine of the separation of powers was adopted . . . to preclude the exercise of arbitrary power . . . [and] to save the people from autocracy."[9] Indeed, Montesquieu, the fount of separation of powers theory, connected the two at the hip: "[T]here is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator."[10]

B. Legislative Power Reserved to Democratically Accountable Congress

"Deterrence of arbitrary or tyrannical rule is not the sole reason for dispersing the federal power among three branches, however. By allocating specific powers and responsibilities to a branch fitted to the task, the Framers created a National Government that is both effective and accountable."[11] Fittingly, the Constitution vests "[a]ll legislative Powers" with the Congress.[12] Legislative power itself is most safely held by those most accountable to the people.[13] It is axiomatic that, in a republic, the legislative power be retained by the people through their elected representatives. Separation of powers ensures these legislative powers are not aggrandized by the other two, less democratically accountable branches.

Whether the Founders' fears of aggrandizement and usurpation by one branch of another's powers have come to pass—either through judicial activism,[14] the encroachment of the executive on the power to declare war,[15] or other examples—is debatable. But separation of powers operates as a safeguard for abdication and transfer of power *out* of branches as well.[16] Fences keep the wolves out, but they also keep the herd in. This task has proved more difficult than one might imagine. Congress has arguably adopted a "safe-seat" style of

---

8. *American Railroads*, 135 S. Ct. at 1243–44 (Thomas, J., dissenting) ("John Locke echoed this view. '[F]reedom of men under government,' he wrote, 'is to have a standing rule to live by, common to every one of that society, and made by the legislative power erected in it . . . and not to be subject to the inconstant, uncertain, unknown, arbitrary will of another man.' J. Locke, Second Treatise of Civil Government § 22, p. 13 (J. Gough ed. 1947).").

9. *See* Myers v. United States, 272 U.S. 52, 293 (1926).

10. C. MONTESQUIEU, THE SPIRIT OF THE LAWS 151 (T. Nugent trans. 1949) (1748).

11. Loving v. United States, 517 U.S. 748, 757 (1996).

12. U.S. CONST. art. I, § 1.

13. Loving, 517 U.S. at 757–58 ("Article I's precise rules of representation, member qualifications, bicameralism, and voting procedure make Congress the branch most capable of responsive and deliberative lawmaking.").

14. For some discussion on this topic, see Keenan D. Kmiec, *The Origin and Current Meanings of "Judicial Activism"*, 92 CAL. L. REV. 1441, 1447 (2004).

15. *See* Saikrishna Bangalore Prakash, *The Separation and Overlap of War and Military Powers*, 87 TEX. L. REV. 299 (2008) (discussing the Constitution's designed separation of war powers between the executive and legislative branches, and how the design has held up).

16. Panama Ref. Co. v. Ryan, 293 U.S. 388, 421 (1935) ("The Congress manifestly is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested.").

governing: rather than jealously guarding the institution's powers, individual members have adopted a more parochial interest in guarding their own seats by sloughing off difficult decisions to the other branches, to the detriment of Congress's supreme lawmaking authority. "[R]arely has a legislative body been more bent on avoiding responsibility, assuring reelection, and passing all controversial decisions on to someone else."[17] The effect, of course, has been a transfer of policy decision-making authority away from the elected branch to less accountable, unelected agencies. Reservation of legislative power to Congress, where citizens have access to their representatives and may voice their preferences through the electoral process, is the fundamental concept of republican governance and a benefit safeguarded by the Constitution's separation of powers scheme, despite the fact that this value has been somewhat waylaid in recent years.

C. Independent Judiciary

Access to an independent tribunal that will dispassionately and fairly adjudicate disputes—especially those contesting the legislative and executive branches' actions—is an essential benefit and product of separation of powers. The Founders vested all judicial power in the Supreme Court and lower courts to ensure a constitutionally guaranteed judicial branch would always exist to provide checks and balances upon the other branches, and do so independent of their influences. "Article III, § 1, serves both to protect the role of the independent judiciary within the constitutional scheme of tripartite government and to safeguard litigants' right to have claims decided before judges who are free from potential domination by other branches of government."[18] "The Legislature wields the power 'to prescribe general rules for the government of society,' but 'the application of those rules to individuals in society' is the 'duty' of the Judiciary. Article III, in other words, sets out not only what the Judiciary can do, but also what Congress cannot."[19] In this way, an independent judiciary is necessary to keep Congress "within the limits assigned to their authority"—it acts as a "bulwark[] of a limited constitution against legislative encroachments."[20] The ability of the judiciary to oversee and mitigate injuries on citizens by unjust legislative actions is "an *essential* safeguard" and of "vast importance."[21] Limitations on the judicial oversight authority intrude on an independent judiciary.

Because the fundamental purpose and design of separation of powers was the preservation of liberty, all questions of separation of powers should be viewed primarily through the prism of preservation of liberty. Other concerns, such as governmental efficiency, national security, and judicial restraint, are of course

17. Burt Neuborne, *Formalism, Functionalism, and the Separation of Powers*, 22 HARV. J.L. & PUB. POL'Y 45, 49 (1998) ("Once elected, the trick is to do nothing that will jeopardize reelection.").

18. Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 848 (1986) (citations omitted).

19. Patchak v. Zinke, 138 S. Ct. 897, 915 (2018) (Roberts, C.J., dissenting) (citing Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 136 (1810)).

20. THE FEDERALIST NO. 78 (Alexander Hamilton).

21. *Id.*

important considerations, but each is necessarily restricted and subsumed by the spirit of the Constitution's design.[22] The Supreme Court has often been willing to enforce this hierarchy of considerations. For example, in *Youngstown*, the liberty interest inherent in reserving legislative powers to Congress, and not an all-powerful king, overcame a powerful national security interest.[23] In *INS v. Chadha*, the Court placed the liberty interest inherent in requiring Congress to fulfill the entire bicameral and presentment legislative process (designed to "divide and disperse power in order to protect liberty"), over the interest of increased governmental efficiency provided by a legislative veto.[24]

II. PRECLUSION OF JUDICIAL REVIEW OF AGENCY ACTIONS

Nowhere has the structure of separation of powers broken down more than in the modern administrative state, where agencies have the ability to create legislative rules, enforce them, and adjudicate controversies arising from their enforcement. Of particular concern for this note, Congress has gone one step further by claiming the authority to restrict—and sometimes eliminate entirely—judicial review of agency actions. Congress's purpose in doing so is typically to expedite agency action and restrict judicial interference with a process designed for the agency to handle. The courts have responded with severe skepticism bordering on revolt, but have stopped short of finding such jurisdiction stripping to be unconstitutional.

A. Judicial Review

Because agencies are not Congress and are free from traditional measures to ensure accountability (*i.e.*, elections), their actions are generally subject to judicial review. Congress has granted subject matter jurisdiction to all federal district courts to review agency action.[25] The Administrative Procedure Act ("APA") is explicit: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."[26] The scope of judicial review under the APA extends, familiarly, to oversight of agency actions which are: unlawfully withheld; arbitrary, capricious, or an abuse of discretion; contrary to constitutional rights; in excess of statutory jurisdiction or authority; etc.[27]

---

22. Myers v. United States, 272 U.S. 52, 293 (1926) ("The doctrine of the separation of powers was adopted by the convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.").

23. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 648–51 (1952).

24. *See* INS v. Chadha, 462 U.S. 919, 950 (1983).

25. *See* 28 U.S.C. § 1331 (2018); Pub. Citizen, Inc. v. Nat'l Highway Traffic Safety Admin., 489 F.3d 1279, 1287 (D.C. Cir. 2007) (explaining that district courts have jurisdiction to review federal agency actions under their general federal question jurisdictional authority.).

26. 5 U.S.C. § 702 (2018).

27. 5 U.S.C. § 706 (2018).

But even before Congress codified judicial review through the passage of the APA, the judicial branch subjected agency action to judicial review as of right under the common law.[28] Federal courts developed causes of action in equity to allow individuals to request injunctions for agency actions should the court deem them unlawful.[29] For example, in *Peoples Gas, Light and Coke Co. v. U.S. Postal Service*, the Seventh Circuit rejected an argument that the Postal Reorganization Act's exemption of the Postal Service from all federal law, including the APA, preempted judicial review.[30] Instead, the court held that judicial review of agency actions preexisted the APA, which merely codified the already existing common law of reviewability.[31] "It can be reasonably assumed, therefore, that an agency's exemption from the provisions of the Administrative Procedure Act does not negate the applicability of common law review principles that preexisted and operate apart from the subsequent codification."[32] This is all to say that judicial review of agency actions is not simply a product of congressional magnanimity. It also derives from firmly held traditions of the judicial branch.

B. Preclusion of Judicial Review of Agency Action

Though Congress grants judicial review as default procedure under the APA and Section 1331, Congress did reserve to itself the power to preclude judicial review by statute[33]—in other words, to deny access to the courts for those so suffering, adversely affected, or aggrieved by an agency action.[34] Congress claims this authority to preclude judicial review on the basis that federal district and appellate courts are entirely subject to jurisdictional constraints determined by Congress under Article III, Section 1 of the U.S. Constitution.[35] This implied power is gleaned from the syllogism that if Congress has the power to create inferior courts, then Congress has the authority to destroy them. Thus, Congress

28. *See* John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 122 (1998).

29. *Id.*; *see* Am. Sch. of Magnetic Healing v. McAnnulty, 187 U.S. 94 (1902).

30. Peoples Gas, Light & Coke Co. v. U.S. Postal Serv., 658 F.2d 1182 (7th Cir. 1981).

31. *Id.* at 1191 ("The Administrative Procedure Act has been widely interpreted as being merely declaratory of the common law of reviewability and standing existing at the time of the statute's enactment in 1948. As such, the Administrative Procedure Act embodies the basic common law presumption of judicial review.") (citations omitted).

32. *Id.*

33. 5 U.S.C. § 701(a) (2018) ("This chapter applies, according to the provisions thereof, except to the extent that—(1) *statutes preclude judicial review*; or (2) agency action is committed to agency discretion by law.") (emphasis added).

34. *See* 5 U.S.C. § 702 (2018) ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.").

35. U.S. CONST. art. III, § 1; Webster v. Doe, 486 U.S. 592, 611 (1988) (citing Sheldon v. Sill, 8 How. 441, 449 (1850)) ("We long ago held that the power not to create any lower federal courts at all includes the power to invest them with less than all of the judicial power.").

logically retains all power short of destroying them, including limiting their jurisdiction.[36]

As a result, Congress has indeed gone about crafting different types of restrictions of judicial review of agency action: some pertain to time, place, and manner restrictions;[37] others address standards of review or restrictions on fact review;[38] and some restrict judicial review altogether. Those statutes that entirely restrict judicial review appear stark considering the Founders' views on the role of the judiciary to check other branches and to "say what the law is":[39]

> (a) The *Secretary shall decide all questions of law and fact* necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans. Subject to subsection (b), the *decision of the Secretary* as to any such question *shall be final and conclusive* and *may not be reviewed* by any other official or *by any court*, whether by an action in the nature of mandamus or otherwise.[40]

Under this particular statute, not only are questions of fact and abuse of discretion denied review, but the statute grants the agency the exclusive authority to determine questions of *law*. Even more surprising is that the statute strips jurisdiction not only from federal district courts, but also "by any court"—including state courts and, seemingly, the Supreme Court.[41]

It is worth taking a moment to understand the consequences of full preclusion of judicial review. Arbitrary and capricious agency actions cannot be challenged in court. There is no check on abuse of agency discretion. Would-be challengers are precluded from claiming that the agency acted outside the scope of its statutory authority. People who have had their constitutional rights violated by agency action are barred entirely from any judicial remedy.[42]

One possible explanation for why the Constitution grants Congress the authority to restrict inferior federal courts is that the Founders intended that the federal

---

36. Patchak v. Zinke, 138 S. Ct. 897, 919 (2018) ("[T]he greater power to create inferior federal courts generally includes the power to strip those courts of jurisdiction.").

37. For example, the Social Security Act places multiple time, place, and manner restrictions on access to judicial review: parties must file an appeal within sixty days of notice, cannot file in state court, and can only appeal after a final agency decision. 42 U.S.C. § 405 (2018).

38. *See, e.g.*, Lindahl v. Office of Pers. Mgmt., 470 U.S. 768, 787 (1985).

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

40. 38 U.S.C. § 511 (2018) (governing veterans' benefits decisions).

41. *See* Hicks v. Small, 69 F.3d 967, 970 (9th Cir. 1995) (holding § 511 precludes state court judicial review).

42. *See* Webster v. Doe, 486 U.S. 592, 612–13 (1988) (Scalia, J., dissenting) ("I turn, then, to the substance of the Court's warning that judicial review of all 'colorable constitutional claims' arising out of the respondent's dismissal may well be constitutionally required. What could possibly be the basis for this fear? Surely not some general principle that all constitutional violations must be remediable in the courts. . . . [I]t is simply untenable that there must be a judicial remedy for every constitutional violation. Members of Congress and the supervising officers of the Executive Branch take the same oath to uphold the Constitution that we do, and sometimes they are left to perform that oath unreviewed, as we always are.").

government would rely on state courts to maintain concurrent jurisdiction with federal courts and afford injured parties a backstop venue to adjudicate their rights.[43] Yet Congress controls not only inferior court jurisdiction under this reading of the Constitution, but also the authority to exclude state courts from Article III, Section 2 cases[44] under the Supremacy Clause.[45] Concurrent jurisdiction goes only so far as Congress decides it should.[46] This quandary was famously discussed in *Hart's Dialectic*.[47] Congress, in this manner, can deny all avenues of judicial recourse under the Constitution unless some other doctrine—like separation of powers—acts to temper this jurisdiction-stripping authority.

C. The Supreme Court Has Acquiesced to the Constitutionality of Preclusion of Judicial Review over Agency Actions, But Offers Some Resistance Through the Abbott *Test*

Despite registered skepticism, when push comes to shove, the Supreme Court has refused to bar Congress from eliminating judicial review of agency action.[48] On multiple occasions, the Supreme Court has held a statute precluding judicial review to be valid and constitutional.[49] "Congress can, of course, make exceptions to the historic practice whereby courts review agency action."[50] "It is a fundamental precept," after all, "that federal courts are courts of limited jurisdiction," powerless to rectify constitutional violations if Congress so chooses.[51] But that is not to say the Court has provided no resistance.

The primary method of tempering Congress's power to limit judicial review is the application of a presumption of statutory interpretation against such preclusion. In *Abbott Laboratories v. Gardner*, the Supreme Court developed the modern method of determining the scope of a statutory preclusion provision. There, the government argued that the Food, Drug, and Cosmetic Act denied pre-enforcement judicial review over a particular drug labelling regulation because the statute never *explicitly* granted pre-enforcement judicial review for such actions.[52] According to the government, the act explicitly and specifically granted judicial review for other types of regulations, and by implication, no such review was intended for the regulation at issue.[53] The Supreme Court denied the

43. *See id.* at 611–12 (Scalia, J., dissenting).

44. U.S. CONST. art. III, § 2 (cases or controversies involving diversity of citizenship, federal questions, etc.).

45. U.S. CONST. art. VI, para. 2.

46. *See, e.g.*, 28 U.S.C. § 1338(a) (2018) ("No State court shall have jurisdiction over any claim for relief arising under any Act of Congress relating to patents, plant variety protection, or copyrights.").

47. Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1364 (1953).

48. *See* Block v. Cmty. Nutrition Inst., 467 U.S. 340, 349 (1984) ("The presumption favoring judicial review of administrative action is just that—a presumption.").

49. *See, e.g.*, *id.* at 351; Bowen v. Michigan Acad. of Family Physicians, 476 U.S. 667 (1986).

50. *Bowen*, 476 U.S. at 672–73.

51. Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 374 (1978).

52. Abbott Labs. v. Gardner, 387 U.S. 136, 139–40 (1967).

53. *Id.*

government's argument: even before the APA, judicial review over agency actions was presumed to be the default, and the APA's passage only reinforced that presumption.[54] The Court then adopted the *Abbott* statutory interpretation and legislative intent test which is still in use today: "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review."[55] In determining whether a statute meets this test, the courts examine text, structure, and legislative intent. As a part of this test, the statute must overcome a "heavy presumption" against a finding of preclusion of judicial review.[56] "The right to review is too important to be excluded on . . . slender and indeterminate evidence."[57]

This presumption is based partly on the text of the APA, which provided "generous review provisions"[58] including one that specifically encourages judicial review of agency action when there is no other remedy available in court.[59]

But judicial skepticism over preclusion is also founded on the Framers' design to pit the branches' interests against one another. Confronted with a legislative branch intruding on the traditional judicial role to review government actions, the judiciary is expected to instinctively guard its own powers. Compliantly, the Supreme Court has reacted with strong language when encountering congressional attempts to limit their jurisdiction: "Article III, § 1 safeguards the role of the Judicial Branch in our tripartite system by barring congressional attempts" to restrict Article III jurisdiction "for the purpose of emasculating constitutional courts."[60] Since complete preclusion of judicial review over agency actions chafes upon Article III powers, courts' skepticism of such preclusion is based on constitutional, rather than mere statutory, grounds.

In any event, the Supreme Court finds, at bottom, the constitutionality of judicial review rather uncontroversial. So why the skepticism? And why, rather than addressing the separation of powers concerns inherent in such skepticism head on, determine whether judicial review has been precluded solely through statutory interpretation and divination of congressional intent?

III. THE CURRENT PRECLUSION TEST INADEQUATELY SAFEGUARDS SEPARATION OF POWERS

The current *Abbott* test provides no occasion for courts to consider the separation of powers issues raised by preclusion of judicial review, which include the right to be free from arbitrary lawmaking, due process, access to an independent

54. *Id.* at 140.
55. *Id.* at 141.
56. *Id.* at 139–41.
57. *Id.* at 141.
58. *Id.*
59. 5 U.S.C. § 704 (2018) ("Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.").
60. Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 850 (1986) (internal citations and quotations omitted).

judiciary, and the reservation of legislative powers to the democratically elected Congress. A combination of skepticism towards judicial review preclusion and a test that provides neither elaboration nor protection of separation of powers has led to an awkward, dishonest application of the test with inadequate consideration of the underlying issues.

A. Judicial Review Is a Critical Component of Separation of Powers and Its Preclusion Circumvents Separation of Powers Protections

It should be remembered that under the Constitution, separation of powers is an ever-present force underlying the entire design of the U.S. government. The justifications and benefits of separation of powers become more salient for agency action, acting to safeguard freedom from arbitrary lawmaking, access to an independent judiciary, and preservation of legislative power in the legislative branch. These concerns were present even during the Founding Era, when federal agencies had limited power and citizens had easier and more direct access to their legislatures. Modern agencies are at least one step removed from the direct representative governance of the Founding Era, making these three concerns all the more salient and the freedoms they protect all the more fragile.

Without judicial review, agencies are free from any structural limitation on arbitrary lawmaking. Agencies are frequently tasked with decision-making that affects the rights of citizens. Agencies exercise considerable control over Americans' lives by reviewing applications for benefits, promulgating regulations mandating certain conduct, and issuing licenses. What safeguard does a citizen have to ensure the decision was not arbitrary? Agencies and the civil servants who populate them are not accountable to citizens through elections, and Congress does not have the capacity to oversee every agency decision. Judicial review is the last remaining check on agency arbitrariness because agencies operate outside the traditional constitutional order:

> [C]ongressional delegation is . . . deeply troubling from a republican perspective to the extent that it magnifies the federal government's capacity for arbitrary lawmaking. If Congress may authorize federal agencies to decide significant policy questions unilaterally outside the ordinary checks and balances of Articles I and II, this could undermine liberty by concentrating vast tracks of federal lawmaking power within the Executive Branch.[61]

History shows the tendency of agencies towards arbitrariness is too strong for agencies to overcome on their own. Justice Robert Jackson described the state of affairs that led to passage of the APA and statutorily granted judicial review in the first place:

---

61. Evan J. Criddle, *When Delegation Begets Domination: Due Process of Administrative Lawmaking*, 46 GA. L. REV. 117, 145–46 (2011).

> Multiplication of federal administrative agencies and expansion of their functions to include adjudications which have serious impact on private rights has been one of the dramatic legal developments of the past half-century. Partly from restriction by statute, partly from judicial self-restraint, and partly by necessity—from the nature of their multitudinous and semilegislative or executive tasks—the decisions of administrative tribunals were accorded considerable finality, and especially with respect to fact finding. *The conviction developed, particularly within the legal profession, that this power was not sufficiently safeguarded and sometimes was put to arbitrary and biased use*.
>
> Concern over administrative impartiality and response to growing discontent was reflected in Congress as early as 1929, when Senator Norris introduced a bill to create a separate administrative court. Fears and dissatisfactions increased as tribunals grew in number and jurisdiction . . . .[62]

The response to the rise of arbitrary agency lawmaking was to grant citizens generous access to judicial review of arbitrary and capricious agency decision-making. Congress did so in Section 702 of the APA. Courts have since resisted most efforts to restrict the judicial review provisions of the APA because of concern that lawmaking may be arbitrary: "It hardly need be said that the existence of an absolute and *uncontrolled discretion* in an agency of government vested with the administration of a vast program . . . would be an intolerable invitation to abuse."[63]

Even beyond the danger of arbitrary decisions, however, deprivation of judicial review deprives citizens of the right to an independent arbitrator as envisioned by Article III. Under the original design, Congress would craft legislation, the President would execute Congress's will, and the citizen could challenge the action in front of an independent, life-tenured federal judge. Yet preclusion of judicial review creates an alternative design: an agency promulgates a regulation, enforces the rule, and adjudicates disputes that arise from enforcement. Even apart from the *structural* restraints on judicial review preclusion, the right to an independent tribunal inheres in the *individual* subjected to this process: "Article III, § 1's guarantee of an independent and impartial adjudication by the federal judiciary of matters within the judicial power of the United States intimated that this guarantee serves to protect primarily personal, rather than structural, interests."[64] Individual citizens' rights to liberty and an independent judiciary are important reasons to address structural separation of powers concerns, even if the courts hesitate to consider such concerns.

Separation of powers also ensures that legislative power is not wielded by any governmental entity apart from Congress. The elimination of judicial review of agency action potentially violates this precept in two ways: (1) by preventing courts from ensuring Congress does not violate the nondelegation doctrine by

62. Wong Yang Sung v. McGrath, 339 U.S. 33, 36–39 (1950) (emphasis added).
63. Holmes v. N.Y.C. Hous. Auth., 398 F.2d 262, 265 (2d Cir. 1968) (emphasis added).
64. *Schor*, 478 U.S. at 848 (citations omitted).

diffusing excessive legislative authority to agencies, and (2) by preventing courts from scrutinizing *ultra vires* agency action to ensure agencies remain within the bounds set by Congress.

All these concerns take on special significance considering the peculiar nature of agencies. For example, agencies are not responsive to the general welfare of the country but rather solely to the mission of their enabling statute.[65] Courts generally take a more holistic approach and are able to hem in overzealous agency excesses.[66] And, unlike either Congress or the President, agencies have almost no political accountability—even to the chief executive.[67] Agencies wield enormous power and efforts to restain their power are of dubious efficacy.[68] Stripping courts of judicial review curtails one of the few remaining checks on agency power and authority. Agencies cannot use "the absence of statutory controls to claim unrestricted, unreviewable power. The result is an agency fiefdom whose boundaries were never established by Congress, and whose exercise of unrestrained power is free of judicial review. It is hard to imagine a program more at odds with separation of powers principles."[69]

Preclusion of judicial review exacerbates the separation of powers issues already triggered by the creation of the administrative state. Indeed, judicial review is often the only and best remedy for these concerns. Yet the test for preclusion fails to allow judges to consider separation of powers or the freedoms which it protects.

---

65. *See* Frank H. Easterbrook, *Formalism, Functionalism, Ignorance, Judges*, 22 HARV. J.L. & PUB. POL'Y 13, 19 (1998) ("Agencies have their own agendas. It is not simply that they are captured by factions (or more likely are created to serve these groups). Agencies start pursuing their own agendas, with tunnel vision adherence to the goal of their statute at the expense of other, equally worthy objectives.").

66. *Id.*

67. *See* City of Arlington v. FCC, 569 U.S. 290, 313–14 (2013) (Roberts, C.J., dissenting) ("Although the Constitution empowers the President to keep federal officers accountable, administrative agencies enjoy in practice a significant degree of independence. As scholars have noted, 'no President (or his executive office staff) could, and presumably none would wish to, supervise so broad a swath of regulatory activity.' Elena Kagan, *Presidential Administration*, 114 HARV. L.REV. 2245, 2250 (2001); *see also* STEVEN BREYER, MAKING OUR DEMOCRACY WORK 110 (2010) ('the president may not have the time or willingness to review [agency] decisions') . . . . The collection of agencies housed outside the traditional executive departments, including the Federal Communications Commission, is routinely described as the 'headless fourth branch of government,' reflecting not only the scope of their authority but their practical independence.").

68. *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 499 (2010) ("No one doubts Congress's power to create a vast and varied federal bureaucracy. But where, in all this, is the role for oversight by an elected President? The Constitution requires that a President chosen by the entire Nation oversee the execution of the laws. . . . Our Constitution was adopted to enable the people to govern themselves, through their elected leaders. The growth of the Executive Branch, which now wields vast power and touches almost every aspect of daily life, heightens the concern that it may slip from the Executive's control, and thus from that of the people. This concern is largely absent from the dissent's paean to the administrative state.").

69. South Dakota v. U.S. Dept. of Interior, 69 F.3d 878, 885 (8th Cir. 1995).

B. The Abbott *Presumption Inadequately Protects and Addresses Separation of Powers Concerns*

The *Abbott* test for determining whether judicial review is precluded is limited to statutory interpretation with a presumption against preclusion. Even so, the court is not entirely oblivious to the obvious separation of powers concerns at play. Indeed, in many ways, the separation of powers concerns just discussed are the animating principles behind the presumption. But, in the end, the presumption is an entirely inapt means for addressing these concerns. The presumption is inadequate for two main reasons: (1) the presumption allows statutes to overcome constitutional separation of powers restrictions; and (2) the test lacks any outlet for consideration of separation of powers concerns whatsoever, causing confusion and inconsistency in its application. In three particular situations—constitutional claims, *ultra vires* claims, and due process claims—these two inadequacies glaringly reveal that *Abbott*'s statutory interpretation test is insufficient to address the underlying issues.

Recently, the Supreme Court gave a fulsome description on the Court's method for determining whether an agency action is precluded from judicial review:

> We recognize the strong presumption in favor of judicial review that we apply when we interpret statutes, including statutes that may limit or preclude review. This presumption, however, may be overcome by clear and convincing indications, drawn from specific language, specific legislative history, and inferences of intent drawn from the statutory scheme as a whole, that Congress intended to bar review.[70]

Nowhere in the definition is there any room for a judge to consider the implications of denying judicial review, either for the challenger or for the structural integrity of the U.S. government. Because of this insufficiency, courts misuse the presumption. At the broader level, using a presumption to safeguard constitutional separation of powers concerns seems to be an absolute absurdity. It places one limit on Congress's authority to preclude judicial review: whether Congress really wants to or not. A presumption, after all, "is just that—a presumption."[71] All Congress need do to override the presumption—and all the inherent separation of powers concerns imbued therein—is merely say so. No other constitutional constraint is so easily overcome. Judges are then cornered into fabricating creative interpretations to get around the fact that the test relies solely on congressional intent. What was meant as a tool of statutory construction to resolve an ambiguity can become an excuse to reject the plain meaning of a judicial review provision. When used in that manner, the presumption is an inapt tool for judges to perform such analysis. This has led to very awkward opinions.

---

70. Cuozzo Speed Techs., LLC v. Lee, 136 S. Ct. 2131, 2140 (2016) (citations and internal quotation marks omitted).

71. Block v. Cmty. Nutrition Inst., 467 U.S. 340, 349 (1984).

First and foremost, the assertion that Congress can preclude courts from hearing a constitutional claim is highly dubious. Yet the *Abbott* test asserts there is nothing untoward about denying a judicial forum for a violation of a constitutional right. In *Webster v. Doe*, the Supreme Court examined whether the National Security Act's grant to the CIA director the discretion to fire employees precluded judicial review—even for constitutional claims—by those fired.[72] The Court refused to find the constitutional claims were precluded—but not for the reason you would think. Rather than discussing separation of powers concerns or constitutional rights, the Court held that "where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear." [73] The statute in question did not so explicitly preclude the plaintiff's constitutional claims. Thus, a simple statutory interpretation inquiry supplanted constitutional analysis. Justice Scalia, in dissent, even offered a full-throated defense of the *Abbott* test. According to Scalia, it is no surprise that there are constitutional claims that are not remediable by the courts.[74] Neither should we pause at the idea that Congress can determine which constitutional rights can and cannot be brought before the courts.[75] "Members of Congress and the supervising officers of the Executive Branch take the same oath to uphold the Constitution that we do, and sometimes they are left to perform that oath unreviewed, as we always are."[76]

Yet at other times, the courts have not been so sure that constitutional claims may be so barred. Even in *Webster*, the Court hesitated before proceeding with the *Abbott* test, awkwardly admitting its intention to "avoid the serious constitutional question that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim."[77] In *Bowen v. Michigan Academy of Family Physicians*, the Supreme Court qualified its description of Congress's authority to preclude judicial review: "*Subject to constitutional constraints*, Congress can, of course, make exceptions to the historic practice whereby courts review agency action."[78] Is this qualifier accurate? According to *Webster*, it is not.[79] Indeed, the D.C. Circuit has gone so far as to provide us with proof: "In short, we find the evidence clear and convincing that Congress intended § 372(c)(10) to preclude review in the courts for as applied constitutional claims."[80] The

72. Webster v. Doe, 486 U.S. 592, 596 (1988) (The plaintiff's constitutional claims included infringement of his "rights to property, liberty, and privacy in violation of the First, Fourth, Fifth, and Ninth Amendments . . . . [and] procedural due process and equal protection of the laws guaranteed by the Fifth Amendment.").

73. *Id*. at 603–04 (citations omitted).

74. *Id*. at 612–13 (Scalia, J., dissenting).

75. *Id*.

76. *Id*. at 613.

77. *Id*. at 603 (citations and internal quotation marks omitted).

78. 476 U.S. 667, 672–73 (1986) (emphasis added).

79. *Webster*, 486 U.S. 592.

80. McBryde v. Comm. to Review Circuit Council Conduct, 264 F.3d 52, 62–63 (D.C. Cir. 2001), *cert. denied*, 537 U.S. 821 (2002).

Abbott test does not protect constitutional rights from congressional will. This alone should disqualify the test from use.

What about claims which challenge the agency action as beyond its statutory authority—that the agency acted *ultra vires*? Black letter administrative law says that agencies may not exceed the bounds of authority prescribed by Congress.[81] Yet, under the *Abbott* test, if Congress clearly precludes judicial review of agency action, there is no way to check an agency if it acts *ultra vires*. Indeed, in *Cuozzo Speed Technologies, LLC v. Lee*, the Federal Circuit held there was no opportunity for judicial review to determine whether a federal agency (the Patent and Trademark Office) could institute a process called *inter partes* review which even the court determined was "in direct contravention of the statute."[82] Oh well! The Supreme Court affirmed. Again, rather than pausing at the implications of judicial review, the Court relied on the *Abbott* presumption. By creative interpretation, the Court categorized the *ultra vires* claim as a simple challenge to an agency determination, thereby avoiding the need to address the looming constitutional and statutory issues.[83]

This proposition is so counter to traditional judicial functions that some courts rebel against the *Abbott* test, offering alternative methods to decide *ultra vires* cases. The D.C. Circuit, for example, relies on two key Supreme Court cases decided prior to the *Abbott* test's inception to fashion a doctrine that avoids the inadequacies of the *Abbott* test. In *American School of Magnetic Healing v. McAnnulty* (1902), the Supreme Court determined that the postmaster general's decision to withhold the mail of a homeopathic medicine company on the basis that homeopathy was "fraud" (thus triggering his authority to withhold mails pertaining to fraudulent schemes) was not an issue precluded from judicial review by agency discretion.[84] The postmaster's discretion does not extend to mistaken determinations of law which augment his authority; the courts must have the ability to review issues of law as they apply to agency jurisdiction and authorization.[85] "Otherwise, the individual is left to the absolutely uncontrolled and arbitrary action of a public and administrative officer, whose action is unauthorized by any law, and is in violation of the rights of the individual."[86] Similarly, in *Leedom v. Kyne* (1958), the Court drew on separation of powers to find a distinction between allowable preclusion of judicial review of the soundness of a

81. City of Arlington v. FCC, 569 U.S. 290, 297 (2013) ("Both [agencies'] power to act and how they are to act is authoritatively prescribed by Congress, so that when they act improperly, no less than when they act beyond their jurisdiction, what they do is ultra vires.").

82. *In re* Cuozzo Speed Techs., LLC, 793 F.3d 1268, 1274 (Fed. Cir. 2015), *aff'd sub nom.* Cuozzo Speed Techs., LLC v. Lee, 136 S. Ct. 2131 (2016).

83. Cuozzo Speed Techs., LLC v. Lee, 136 S. Ct. 2131, 2140 (2016)

84. Am. Sch. of Magnetic Healing v. McAnnulty, 187 U.S. 94, 95 (1902).

85. *Id.* at 109–10.

86. *Id.*

particular agency decision and improper preclusion of whether the agency acted outside its statutory jurisdiction.[87]

The D.C. Circuit uses the logic of *McAnnulty* and *Kyne* to implement a separate *ultra vires* doctrine: "[T]he APA's stricture barring judicial review to the extent that statutes preclude judicial review does not repeal the review of *ultra vires* actions that was recognized long before, in *McAnnulty*."[88] This doctrine undeniably acts outside the *Abbott* test. Rather than considering Congress's intent, the D.C. Circuit considers the inherent duties of the court and interests of Congress under the Constitution's separation of powers framework.

The presumption also inadequately protects against agency violations of due process. But again, in instances where it is painfully obvious that the *Abbott* test is inadequate, the Court effectively abandons it. In *McNary v. Haitian Refugee Center, Inc*., the Supreme Court reviewed the impact of the Immigration Reform and Control Act of 1986's limited judicial review procedures for applicants for "special agricultural workers" status.[89] In reviewing the scope of the preclusion, the Court did still review the text of the preclusion provision, the context of the statute, and the legislative history of the statute. But in the end, the Court relied instead on extratextual due process arguments to reject preclusion.[90] The dissent strenuously argued that the *Abbott* test precluded the claim—the plain and "natural" meaning of the text unambiguously precludes judicial review.[91] The majority instead provided "ponderously reasoned gloss on the statute's plain language."[92] The Court overruled the plain meaning of the statute by primarily focusing on the due process concerns: "the individual respondents would be unable to obtain meaningful judicial review of their application denials or of their objections to INS procedures if they were required to avail themselves of the INA's limited judicial review procedures."[93] In this case, due process concerns warped the *Abbott* test into something unrecognizable. But if due process

87. Leedom v. Kyne, 358 U.S. 184, 188–89 (1958) ("This suit . . . 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. . . . Plainly, this was an attempted exercise of power that had been specifically withheld. It deprived the professional employees of a 'right' assured to them by Congress. Surely, in these circumstances, a Federal District Court has jurisdiction of an original suit to prevent deprivation of a right so given.").

88. Aid Ass'n for Lutherans v. U.S. Postal Serv., 321 F.3d 1166, 1173 (D.C. Cir. 2003) (citations and internal quotation marks omitted).

89. McNary v. Haitian Refugee Ctr., Inc., 498 U.S. 479, 481–84 (1991).

90. *Id*. at 491–94 (Rehnquist, C.J., dissenting).

91. *Id*. at 500–01.

92. *Id*. at 502.

93. *Id*. at 480 (Stevens, J.) ("Under the statutory scheme, review of an individual determination would be limited to the administrative record, which respondents have alleged is inadequate; aliens would have to surrender themselves for deportation in order to receive any judicial review, which is tantamount to a complete denial of such review; and a court of appeals reviewing an individual determination would most likely not have an adequate record as to a pattern of allegedly unconstitutional practices and would lack a district court's factfinding and record-developing capabilities.").

concerns may be allowed into the analysis, why are separation of powers concerns disallowed?

As the *McNary* dissent points out, the Court warped the *Abbott* test by improperly using a presumption to bring in non-statutory concerns: "The Court bases its conclusion that district courts have jurisdiction to entertain respondents' [due process] allegations in part out of respect for the 'strong presumption' that Congress intends judicial review of administrative action."[94] The presumption is normally used as a tool of statutory interpretation which "comes into play only where there is a genuine ambiguity as to whether Congress intended to preclude judicial review of administrative action."[95] "[S]ince the statute is not ambiguous, the presumption has no force here."[96] Instead of applying a statutory interpretation test with a presumption in cases of ambiguity (which the Supreme Court requires of all other judicial review cases), the Court applied an ad hoc weighing of due process interests against the apparent legislative purpose.

Through these examples, we see that the *Abbott* test allows Congress to trample on separation of powers and constitutional rights. Moreover, lower courts rebel against the test for certain cases, and the Supreme Court warps the presumption to defeat the *Abbott* test when it faces unsavory results. The Court must come face to face with the truth: the test to determine whether Congress may preclude judicial review must include some analysis of the separation of powers and constitutional rights concerns triggered by eliminating citizens' access to remedy through the federal courts.

IV. A NEW STEP: CONSIDERING SEPARATION OF POWERS LIBERTY INTERESTS IN ASSESSING CONGRESSIONAL PRECLUSION OF JUDICIAL REVIEW OVER AGENCY ACTION

The judicial branch must consider the impact of judicial preclusion provisions on separation of powers. "The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted."[97] "And it is our responsibility to 'firm[ly]' and 'inflexibl[y]' resist any effort by the Legislature to seize the judicial power for itself."[98] Rather than simply acquiescing to congressional intent to preclude judicial review after assessing the statutory text, courts should balance Congress' justifications against the liberty interests promoted by judicial review under separation of powers. This balancing test can be grounded by the overall

94. *Id*. at 502–03 (Rehnquist, C.J., dissenting).

95. *Id*.

96. *Id*. ("In this case two things are evident: First, in drafting the Reform Act, Congress did not preclude all judicial review of administrative action; as detailed earlier, Congress provided for judicial review of INS action in the courts of appeals in deportation proceedings, and in the district courts in orders of exclusion. Second, by enacting such a scheme, Congress intended to foreclose all other avenues of relief.").

97. INS v. Chadha, 462 U.S. 919, 951 (1983).

98. Patchak v. Zinke, 138 S. Ct. 897, 922 (2018) (Roberts, C.J., dissenting) (citing THE FEDERALIST NO. 78, at 470 (Alexander Hamilton)).

separation of powers scheme of the Constitution and can also be grounded under specific provisions of the Constitution.

A. The New Test: Weighing Burdens and Interests

The current judicial review preclusion test examines the text and intent of Congress, and dilutes that evidence with a strong presumption against restriction of judicial review of agency action. However, this methodology shortchanges the separation of powers concerns underlying a revocation of judicial review. A presumption is insufficient to safeguard liberty interests. The test for precluding judicial review should include a further step.

Rather than stopping at congressional intent, the court should add a final step that weighs the interests of judicial review against the government's interests in stripping jurisdiction. The existing test can remain unchanged except for this new step. Courts can first assess whether Congress intended to preclude judicial review through the statutory analysis and application of the presumption. If a court finds the requisite intent, however, the new step would require it to weigh the interests of separation of powers and liberty against the interests of Congress in precluding review. This test properly focuses the judicial inquiry not onto the bare intention of Congress, but rather the impact on due process, judicial independence, and potential for permitting unlawful agency action. Moreover, it eliminates the need for courts to furtively cram these considerations into the presumption analysis and allows the presumption to remain a simple, straightforward tool for resolving ambiguity.

Weighing tests are often employed to consider issues of competing constitutional interests. Even in just the context of judicial review of agency action, examples of weighing tests are legion. For example, in determining the proper level of due process required by agencies, courts balance private interests, the risk of deprivation of such interests, the value of additional procedural safeguards, and the government's interest.[99] Also, in determining whether a retroactive agency action is unlawful, the benefits of retroactive application "must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles."[100]

What government interests would a balancing test likely forward? One main justification for restricting judicial review of agency actions is Congress' interest in increasing the efficiency of agency action and reducing the inevitable concomitant delay, expense, and uncertainty of judicial review, both for the agency and the courts.[101] Congress, for example, may seek to avoid judicial review of every

99. Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976).

100. SEC v. Chenery Corp., 332 U.S. 194, 203 (1947).

101. *See* Sackett v. EPA, 566 U.S. 120, 130 (2012) ("Finally, the Government notes that Congress passed the Clean Water Act in large part to respond to the inefficiency of then-existing remedies for water pollution. Compliance orders, as noted above, can obtain quick remediation through voluntary compliance. The Government warns that the EPA is less likely to use the orders if they are subject to judicial review.").

single agency determination on every single application for a particular program. Other purposes have also been asserted, though, including "promot[ing] the adequacy and uniformity of complex [agency] decisions,"[102] and preventing judicial interference with ministerial agency actions that effectuate decisions already resolved by Congress.[103] But under the Constitution, it would seem Congress is empowered to preclude judicial review regardless of the relative merits of the justification compared to the impact on separation of powers concerns. Consequently, courts have never bothered to scrutinize or weigh these justifications for their value. But surely Congress's interest in ensuring its agent acts according to the principal's instructions for example—the main justification for the earlier discussed *ultra vires* doctrine—would act to counter some of these interests.

A weighing test allows for explicit consideration of the numerous issues which have no hearing in the *Abbott* test. Up until now, much of the discussion has focused on absolute judicial preemption, but as intimated earlier, Congress often enacts more limited preclusion, including less-restrictive requirements like assigning review to certain courts, over certain claims, and at certain points in the process. The weighing test allows for such gradation because such restrictions are less severe infringements on constitutional, due process, and separation of powers concerns. Courts can also consider the degree to which remedies are available to challengers, *i.e*. whether the preclusion captures state courts or whether there are alternative opportunities to obtain adequate remedies in courts. This weighing test allows courts to evaluate whether review is precluded for traditionally executive determinations (such as factual issues) versus traditionally judicial determinations (legal issues). Courts could consider the difference between the imperatives of reviewing agency rulemaking apart from the different considerations of adjudication review.

The Supreme Court has shown a glimpse of what this weighing test would look like. As stated, the *Abbott* test restricts courts into examining judicial review through the lens of the presumption, but the Court has sometimes smuggled discussion of extratextual factors into the analysis.[104] In *Sackett v. EPA*, the Court examined whether Congress's intent to increase EPA's ability to efficiently coerce noncompliant parties precluded judicial review over certain EPA

---

102. Sugrue v. Derwinski, 26 F.3d 8, 11 (2d Cir. 1994).

103. *See, e.g*., Nat'l Coal. to Save Our Mall v. Norton, 269 F.3d 1092, 1095 (D.C. Cir. 2001) ("Section 3's preclusion of review of the relevant agency decisions, moreover, tracks § 1's direction that the Memorial described in those decisions be 'constructed expeditiously' in accordance with the named permits, '[n]otwithstanding any other provision of law.' On its face, the phrase *demonstrates Congress's clear intent to go ahead* with the Memorial as planned, *regardless of* the planning's relation to *pre-existing general legislation*." (emphasis added)).

104. *See* Nat'l Ass'n of Postal Sup'rs v. U. S. Postal Serv., 602 F.2d 420, 429 (D.C. Cir. 1979) (stating that the presumption favoring judicial oversight of administrative activities "operates differently depending on a judicial determination of congressional intent, the functional needs of the agency for flexibility and discretion, and the capacity of the courts to resolve the issues presented them").

actions.[105] The Supreme Court weighed the liberty interests against the government interests:

> The APA's presumption of judicial review is a repudiation of the principle that efficiency of regulation conquers all. And there is no reason to think that the Clean Water Act was uniquely designed to enable the strong-arming of regulated parties into "voluntary compliance" without the opportunity for judicial review—even judicial review of the question whether the regulated party is within the EPA's jurisdiction.[106]

The Court dismissed the EPA's desire to have effective compliance orders as less weighty: "Compliance orders will remain an effective means of securing prompt voluntary compliance in those many cases where there is no substantial basis to question their validity." The court weighed the interests of the parties; acknowledged alternative, less-restrictive means for the government to accomplish its goals; and rejected preclusion of judicial review.

Judicial review is an essential safeguard of the Constitution. A test that weighs liberty interests would better resemble the design of the Constitution, reflect the Court's preferred analysis, and prevent the Court from allowing Congress to run roughshod over the separation of powers framework (as shown in the due process, *ultra vires*, and constitutional claim contexts). Moreover, this weighing test can be grounded in the Constitution.

B. Grounding a Judicial Review Balancing Test in the Constitution

The addition of a balancing step limiting Congress's authority to preclude judicial review of agency actions must have a basis in the Constitution. It can be defended as a vindication of Article III, the Due Process Clause of the Fifth Amendment, and Article I, Section I's grant of exclusive legislative authority to Congress.

Conceptually, the complete preclusion of judicial review over the actions of the other two branches should raise all sorts of separation of powers alarms. The Framers intended each branch to be the most authoritative actor in its sphere of power.[107] In the case of jurisdiction stripping, Madison's pronouncement in Federalist No. 48 offers evidence against the idea that Congress could have such an immense impact on judicial authority: No branch of the government "ought to possess, directly or indirectly, an overruling influence over the others in the

105. Sackett v. EPA, 566 U.S. 120, 130–31 (2012).

106. *Id.*

107. Dep't of Transp. v. Ass'n of Am. R.Rs., 135 S. Ct. 1225, 1241 (2015) ("The Constitution does not vest the Federal Government with an undifferentiated 'governmental power.' Instead, the Constitution identifies three types of governmental power and, in the Vesting Clauses, commits them to three branches of Government.").

administration of their respective powers."[108] Allowing Congress to exert a direct influence in the administration of judicial power—to the point of complete annulment—is an affront to the constitutional structure conceptualized by those who designed it.

The Supreme Court has recently acknowledged as much, observing that "[f]or while the greater power to create inferior federal courts generally includes the power to strip those courts of jurisdiction, at a certain point that lesser exercise of authority invades the judicial function."[109] This idea that there is some limitation seems obvious. *Hart's Dialectic* asserted that Congress's jurisdiction stripping authority did have implied limitations: "[T]he exceptions [to jurisdiction] must not be such as will destroy the essential role of the Supreme Court in the constitutional plan."[110] A power of Congress to completely eliminate essential constitutional checks is not rationally harmonious with the constitutional design. The courts must have constitutionally protected judicial review authority, as described above. Even in the application of the *Abbott* test, the Court suggested the idea that Congress's supposed vast authority to restrict judicial review is limited.[111] Recently, the Supreme Court endorsed this truism: "So long as Congress does not *violate other constitutional provisions*, its 'control over the jurisdiction of the federal courts' is 'plenary.'"[112] The protections of these "other constitutional provisions," however, have the ability to whittle down Congress's "plenary" authority.

First and foremost, the independence of the judiciary and Article III's vesting of judicial power in the courts restrict Congress's ability to write Article III courts out of the constitutional process.[113] "[T]he judicial power, as originally understood, requires a court to exercise its independent judgment in interpreting and expounding upon the laws."[114] "Article III also serves a structural purpose, barring congressional attempts to transfer jurisdiction to non-Article III tribunals for the purpose of emasculating constitutional courts and thereby preventing the encroachment or aggrandizement of one branch at the expense of the other."[115] If anything, this principle works *a fortiori* for cases where the Congress does not even bother to create Article I courts, but merely eliminates judicial review altogether.

---

108. THE FEDERALIST NO. 48, at 332 (James Madison) (J. Cooke ed. 1961).

109. Patchak v. Zinke, 138 S. Ct. 897, 919 (2018).

110. Hart, *supra* note 47, at 1365.

111. Webster v. Doe, 486 U.S. 592, 603 (1988) (requiring a heightened showing of congressional intent to avoid "serious constitutional question that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim") (citations and internal quotation marks omitted).

112. Patchak v. Zinke, 138 S. Ct. 897, 906 (2018) (emphasis added) (citing Trainmen v. Toledo, P. & W.R. Co., 321 U.S. 50, 63–64 (1944)).

113. U.S. CONST. art. III, § 1.

114. Perez v. Mortgage Bankers Ass'n., 135 S.Ct. 1199, 1217 (2015) (Thomas, J., concurring in judgment).

115. Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1944 (2015) (citations and internal quotation marks omitted).

Secondly, even assuming Congress's authority to preclude judicial review in the district courts, it may not, while doing so, eliminate due process protections of the Fifth Amendment.[116] "The Due Process Clause generates rights, among other things, to administrative procedures, to judicial review of administrative decisions, to judicial procedures, and to judicial remedies"[117] In the APA, Congress provided judicial review for final agency action that would otherwise violate due process by denying those adversely affected an adequate remedy in court.[118] Without access to courts for a remedy, due process protections are not worth the paper they are printed on.[119] Thus, assuming the Due Process Clause is not meant to be voluntary, the Fifth Amendment ensures judicial review of agency action regardless of any Article I authority to restrict the jurisdiction or existence of Article III courts.[120] Pre-*Abbott*, this proposition was understood: "We think, however, that the exercise of Congress of its control over jurisdiction is subject to compliance with at least the requirements of the Fifth Amendment. That is to say, while Congress has the undoubted power to give, withhold, and restrict the jurisdiction of courts other than the Supreme Court, it must not so exercise that power as to deprive any person of life, liberty, or property without due process of law or to take private property without just compensation."[121]

A third source of constitutional authority is Article I's grant of exclusive legislative power to Congress.[122] Allowing Congress to restrict the courts' ability to review agency action for *ultra vires* violations would result in rampant violations of the nondelegation doctrine. "Courts remain obligated to determine whether statutory restrictions have been violated,"[123] and Congress cannot eliminate this duty by statutory fiat. The nondelegation doctrine, which allows Congress to delegate quasi-legislative authority to agencies, is restricted by the intelligible

116. U.S. CONST. amend. V.

117. Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309 (1993).

118. 5 U.S.C. 704 (2018) ("Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.").

119. Criddle, *supra* note 61, at 182 ("The Due Process Clause's substantive and procedural constraints on congressional delegation would be largely meaningless in practice if administrative agencies could sidestep those constraints without legal review or repercussions.").

120. Crowell v. Benson, 285 U.S. 22, 86–87 (1932) ("The 'judicial power' of Article III of the Constitution is the power of the federal government, and not of any inferior tribunal. There is in that article nothing which requires any controversy to be determined as of first instance in the federal District Courts. The jurisdiction of those courts is subject to the control of Congress. Matters which may be placed within their jurisdiction may instead be committed to the state courts. If there be any controversy to which the judicial power extends that may not be subjected to the conclusive determination of administrative bodies or federal legislative courts, it is not because of any prohibition against the diminution of the jurisdiction of the federal District Courts as such, but because, under certain circumstances, the constitutional requirement of due process is a requirement of judicial process.")

121. Battaglia v. Gen. Motors Corp., 169 F.2d 254, 257 (2d Cir. 1948).

122. U.S. Const. Art. I, § 1.

123. Mountain States Legal Found. v. Bush, 306 F.3d 1132, 1136 (D.C. Cir. 2002).

principle doctrine and enforced by the courts.[124] Elimination of judicial review is tantamount to elimination of the intelligible principle restriction, for there is no one left to ensure the agencies are hewing to congressional directives.[125] In his concurrence in *Touby v. United States*, Justice Thurgood Marshall asserted that the preservation of judicial review is a necessary element for delegation of power to be valid (discussed here in the criminal context): "[J]udicial review perfects a delegated-lawmaking scheme by assuring that the exercise of such power remains within statutory bounds. Because of the severe impact of criminal laws on individual liberty, I believe that an opportunity to challenge a delegated lawmaker's compliance with congressional directives is a constitutional necessity."[126] Beyond individual interests, judicial review protects Congress's legislative purposes as well: "[U]nless members of the protected class may have judicial review the statutory objectives might not be realized."[127]

There is an implied limitation to Congress's authority to deny access to judicial review for agency actions. This limitation can be enforced intelligently by adding the final step suggested here: a weighing of liberty versus governmental interests. Whether the authority to perform the weighing test and denying restrictions on judicial review is grounded in Article III, the Fifth Amendment, or Article I, Section 1, courts may legitimately exercise this power under the constitutional design.

CONCLUSION

It is difficult to believe that the Framers of the Constitution, who expended so much effort to build in separation of powers limitations, and craft checks and balances upon the branches, would have afforded Congress the authority to restrict completely judicial review over agency actions—both in federal and state courts. The constitutional guarantees of due process, an independent judiciary, and the reservation of legislative power to a democratically elected Congress require that the judicial branch exercise some level of inalienable jurisdiction to review acts by both Congress and—more importantly—the agencies (since they are even further removed from democratic accountability than Congress).

---

124. Skinner v. Mid-Am. Pipeline Co., 490 U.S. 212, 214 (1989) ("Earlier this Term, *in Mistretta v. United States*, 488 U.S. 361, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989), we revisited the nondelegation doctrine and reaffirmed our longstanding principle that so long as Congress provides an administrative agency with standards guiding its actions such that a court could 'ascertain whether the will of Congress has been obeyed,' no delegation of legislative authority trenching on the principle of separation of powers has occurred.").

125. Thomas W. Merrill, *Delegation and Judicial Review*, 33 HARV. J. L. & PUB. POL'Y 73 (2010) ("The important thing is to have some standard to control discretion, *plus judicial review*." (emphasis added)).

126. Touby v. United States, 500 U.S. 160, 170 (1991) (Marshall, J., concurring).

127. Barlow v. Collins, 397 U.S. 159, 167 (1970).

The *Abbott* test rests on this idea that Congress has plenary control over whether federal courts have jurisdiction to judicially review agency action. If Congress expresses an intent to remove jurisdiction, so the test goes, then that is the end of the matter. Yet repeatedly, the Court calls into question this premise, either by improperly using a presumption as a tool to bring in extratextual considerations or by the numerous "subject to constitutional constraints" throat-clearings peppering these cases. The Court should instead explicitly consider liberty interests emanating from separation of powers and access to judicial review when determining whether Congress precluded any review over agency actions.