Congress and Judicial Review of Agency Actions

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Government agencies produce the vast majority of public policies in the United States. The textbook version of how these policies are produced is relatively straightforward to describe. First, Congress delegates policymaking responsibility to an agency. Second, the agency develops a policy or policies. And third, a court reviews the agency's actions.

Of course, this simple outline masks all manner of differences. Within each step, there can be considerable variation – Congress might provide an agency with specific directions about what to do, or it might suggest only the broadest of outlines to govern the agency's action; agencies might choose either more formal or more informal approaches to creating policy; and so on. In addition, the courts might take a very close look at the agency's actions, subjecting it to close scrutiny through judicial review, or alternatively might leave the agency's actions untouched.

How the courts act in this last stage is determined in part by judicial actors themselves, and is dependent on their views toward agency expertise, canons of statutory interpretation, and a host of other factors. But there is another political actor that can influence how this last stage plays out: Congress. When Congress writes laws, it has the opportunity to structure the process of judicial review of agency actions, to set the rules of the game that the courts must follow. In so doing, it can act to increase the likelihood of review, opening the agency's actions up to judicial reconsideration. Alternatively, it can act to decrease the likelihood of review, protecting the agency from judicial intrusion.

In this paper we examine the ways in which Congress has attempted to structure judicial review of agency actions. Our approach is both descriptive and analytical. First, we identify and explain the different ways in which Congress can use statutory language

in an attempt to influence judicial review. Second, we provide examples of the various types of review provisions, along with a description of the potential effects of these provisions. Third, we inventory major laws that have been passed over the past seven decades, identifying and classifying the types of judicial review provisions that Congress has included in those laws. We then discuss three factors – partisan differences, Supreme Court rulings, and congressional dissatisfaction with the courts – that might help to explain the variation in the use of these provisions over time, and provide a preliminary look at whether a link exists between these factors and the choice of review provisions.

What We Know (and What We Don't Know)

Given that the specter of judicial review looms over both major and minor agency actions, it should come as no surprise that political scientists have looked closely at the link between courts and agencies. There has been less recognition, however, that Congress, when writing the initial laws that delegate policymaking authority to agencies, can attempt to structure how review will operate. That is, when Congress delegates responsibility to an agency, it knows that the potential exists for the agency's actions to be reviewed by the courts. If and when such review does occur, members of Congress have no reason to be surprised; rather, they likely will have considered the possibility of judicial involvement from the start. As a result, the actions in this last stage of the process – when courts review agency actions – will be something that they can and do take into account when constructing legislation in the first stage of the process.

Does Congress take advantage of the opportunity to anticipate future judicial involvement? Numerous case studies suggest that it does. Evidence exists that in policy

areas including veterans affairs (e.g., Light 1992), environmental policy (e.g., Melnick 1983, Rose-Ackerman 1995, Shipan 2000), communications policy (Cass 1989, Shipan 1997), and welfare (Melnick 1994), members of Congress carefully considered the use of judicial review provisions in statutory law, with an eye toward how agency actions in these areas would be reviewed. And evidence in at least one area – environmental policy – goes beyond case studies and anecdotes. In a pair of papers, Smith (2005; 2006) demonstrates that specific review provisions are used systematically, and that this use can be explained by political factors. That is, by carefully choosing the "*parameters of judicial review*, Congress can set the level and character of the judicial role in national policymaking" (2005, 139; emphasis in original). [1]

Although these case studies provide numerous insights into the design of judicial review provisions – which types of provisions are debated, the potential effects of these provisions, which interest groups and members of Congress pushed for different provisions – the picture they paint is incomplete. In particular, although these studies highlight specific instances in which provisions are included, they do not give us a more systematic understanding of these provisions. How frequently are these provisions inserted into regulatory laws? Does the frequency with which they are incorporated vary over time? Which types of provisions does Congress use? And do these provisions tend to limit the opportunities for judicial review, or do they increase those opportunities? It is to these questions that we now turn.

[1] Another way Congress can attempt to influence review is by carefully constructing legislative history in a way that increases the likelihood that courts will review statutes in particular ways. We do not address this tactic here. On the general issue of connections

Types of Provisions

Statutes can address any aspect of the judicial review process, leading to the possibility that the range of provisions could be quite broad and hard to categorize. In reality, however, the vast majority of these provisions can be placed into one of five categories: reviewability, time limits, venue, scope of review, and standing. In the following sections we discuss these five types, providing examples within each category.

Reviewability

First, Congress can address the *reviewability* of agency actions – that is, whether the courts are permitted to review specific actions of the agency. Such provisions might specifically designate certain agency actions, or types of actions, as reviewable; they can place limits on review; or they can completely preclude review. Provisions that allow for review of agency actions can take many forms. They might, for example, generally state that agency actions are reviewable. Alternatively, they might establish reviewability by asserting that review is *not* precluded (e.g., "Nothing in this subsection shall be construed to preclude judicial review of other final actions and decisions by the Secretary," in the Reclamation Projects Authorization and Adjustment Act of 1992). Or they might specify that certain actions are reviewable, such as when Congress, in the Cable Television Consumer Protection and Competition Act of 1992, ensured that "[a]ny applicant whose application for a second franchise has been denied by a final decision of the franchising authority may appeal such final decision."

Limits on review similarly can take different forms. Sometimes review is limited by the dollar amount involved, as when the Social Security Amendments of 1965 allowed

for judicial review of agency decisions, but only when "the amount in controversy is $1,000 or more." Other times review is limited by identifying the grounds on which an agency can be challenged, such as when the Immigration Act of 1990 limited the conditions under which an alien could seek review of an agency decision.

Finally, laws can preclude review entirely, removing the judiciary from the process and making the agency's action the final word.[2] Although Congress clearly has this option, a general perception exists that preclusion is quite rare. Bagley, for example, contends that "[p]reclusion is uncommon" because "Congress is attentive enough to the importance of judicial review that it typically provides for it" (2014, 1323). Earlier, Rabin sounded a similar note: "Using the federal statutes as a measuring stick, one would search long and hard for an explicit congressional exemption of administrative action from judicial review" (1975, 905). As we will see, preclusion – or other limits on review – are not as uncommon as these observations might suggest.[3]

Time Limits

Once an agency takes an action that is reviewable, its decision often can be appealed to the courts. But when must this appeal occur? Are there specific time limits that govern judicial review? The answer, at least with respect to the APA, is "no" – the APA is silent about whether review must be initiated within a certain amount of time. There is, however, a six-year limit governing when suits can be brought against the U.S. government (28 USC §2401(a)), which includes challenges to agency actions. Thus, in

[2] The most well-known case of preclusion was that concerning the actions of the Veterans Administration prior to when it became a cabinet-level agency in 1988 (Light 1992).
[3] Most (although not all) legal studies assert that preclusion is rare (e.g., Cass and Diver 1987; Verkuil 2002).

the absence of any time limits in authorizing statutes, a relatively long six-year window exists for the initiation of judicial review proceedings.

Congress can, however, put time limits into effect. The Internal Security Act of 1950, for example, allowed for review of decisions of the Subversive Activities Control Board – but only if such review was initiated within 60 days. The Federal Coal Mine Health and Safety Act of 1969 provided an even smaller window, mandating that review must be sought within 30 days of the agency's decision. There are, of course, a number of reasons why Congress might put such time limits in place – to decrease uncertainty for regulated entities that might have to expend funds on compliance, for example, or to facilitate pre-enforcement review (e.g., Verkuil 1983). At the same time, however, there is little doubt that shorter time limits, by narrowing the window during which review can be initiated, act to decrease the likelihood that an agency's action will be reviewed.[4]

Venue

Another approach that Congress can use concerns the venue, or forum, in which review will take place. Statutes can state that review must be sought in the local district court; any district court; the local US appellate court; the DC appellate court; any federal appellate court; or a special court. In the absence of a statutory provision that explicitly designates which court has jurisdiction, the default is provided by 28 USC §1391(e), which generally holds that judicial review must be sought in the local federal district court, usually defined as the district in which the person seeking review works or resides.

[4] As Verkuil has noted, Congress "has occasionally compromised between wide-open judicial review and absolute preclusion of judicial review by limiting review narrowly in time" (1983, 739).

But Congress often does designate the venue for review. For example, the Civil Service Reform Act of 1978 states that employees "may obtain judicial review of the order in the United States court of appeals for the judicial circuit in which the employee resides or is employed at the time of the action." And the Housing and Urban Development Act of 1968 states "[a]ll final orders or decisions…made under this title shall be subject to review by the District of Columbia Court of Appeals."

Once again, there can be a number of reasons why statutes might specify where review can be conducted. Specialized courts may be used for certain policy areas, such as customs or tax-related issues. Appellate courts might be chosen to expedite the process by skipping what might otherwise end up being just the first round of review in district courts. And the DC Court of Appeals might be chosen because of its specific expertise regarding regulatory issues. At the same time, however, there is evidence that by either broadening the number of courts that can conduct review, or by limiting the potential venues, Congress can either increase or decrease the likelihood that an agency's actions will be taken to court (Cass 1989, Shipan 1997).

Scope of review

The scope of review concerns the standards that a court should use when assessing an agency action. The APA spells out a number of standards that should hold – whether, for example, the agency has acted in an arbitrary and capricious manner, or has abused its discretion; whether its actions are not supported by substantial evidence; and so on. The court then assesses the agency's action against these standards when determining whether the action should be set aside. Rather than leaving the choice of a

standard up to the courts, Congress can use enacting statutes to spell out which standard should be used. Furthermore, they have the incentive to do so, since evidence indicates that "when Congress has spoken either on scope of review or on standards of proof, the Court tries to honor Congress' wishes" (Verkuil 2002).

One particular scope provision is especially noteworthy: whether the court can substitute its own judgment for that of the agency (i.e., *de novo* review), or whether it must defer to the agency's expertise and accept its findings of fact.[5] The Food Stamp Act of 1964, for example, states that when judicial review of an agency action is sought in a U.S. district court, there "shall be a trial de novo by the court in which the court shall determine the validity of the questioned administrative action in issue." On the other hand, the Surface Mining Control and Reclamation Act of 1977 takes a different tack, requiring the court to base its decisions "solely on the record made before the Secretary." Thus, as with the other types of provisions, Congress can tailor the scope of review to either open the agency's decisions up to review, or to protect them from review.

Standing

Finally, Congress can specify which person or persons have the right to challenge an agency's decision in court – in other words, which person or persons have *standing*. As with the other provisions already discussed, provisions about standing can affect the likelihood of judicial review. Smith (2006), for example, shows how Congress has

[5] As with reviewability, judicial doctrine comes into play here. We discuss this later, with specific reference to the *Chevron* decision.

strategically utilized citizen suit provisions – which allow proregulatory forces to seek greater enforcement – to achieve the goal of increasing the likelihood of review.[6]

In part, of course, standing has emerged from the decisions of the courts themselves (Shapiro 1988). But Congress can, and does, include provisions about standing in legislation.[7] In some cases, these provisions can be broad, such as the provisions of the Clean Air Act Amendments of 1970s that allow "any interested person" to seek review. At other times, however, they may follow the APA and specify that only a person who has been "adversely affected" can pursue review, as in sections of the Consolidated Appropriations Act of 2004. Furthermore, Congress can spell out *which* person or persons can seek review, as it did in the Toxic Substances Control Act of 1977 when it allowed for review by only an "employee or employer."

Coding Judicial Review Provisions in Major Laws

As the preceding two sections make clear, Congress can – and does – include in statutes a host of provisions that regulate the conduct of judicial review. We do not know, however, how frequently these provisions appear; which provisions are included; whether they generally act to increase or decrease the likelihood of review; or when and why these provisions are included. To address these questions, we identified all judicial

[6] As Smith explains, citizen suit provision come in two forms: "Agency-forcing provisions allow citizens to file suits directly against the agency responsible for implementing policy, asking the court to order the agency to carry out some nondiscretionary duty," while "[c]itizen enforcement provisions allow citizens to file suits against entities thought to be violating the law" (2006, 287).

[7] Laws also contain provisions about the *timing* of review, which is a conceptually distinct category. Since some of the issues subsumed under the category of timing also affect whether a person can bring suit – for example, the doctrine of exhaustion, which holds that an individual wanting to seek review first must have exhausted other means of redress – we consider those under the category of standing.

review provisions in major laws from the post-World War II period, using the well-known list of such laws compiled (and updated) by Mayhew (2005). For each of these laws, we obtained the full text of the law, which we then searched for a series of terms related to judicial review.[8] Once any of these search strings were found, we read each of these sections and dropped the ones that, although they contained one or more of these terms, were clearly not about judicial review.

Because we are interested in judicial review of agency actions, and not other instances in which the courts might be given specific instructions about how to interpret laws, we also drew upon an innovative new paper by Farhang and Yaver (2015) to help focus on the appropriate set of laws. In their analysis of fragmentation in laws – that is, why some laws delegate authority to a broader range of actors while others delegate to a more limited range – they coded each law in Mayhew's list for whether it delegated responsibility to a government agency. We utilized their data to limit our examination to the set of laws that delegated authority to federal agencies.[9] Using this process, and starting from 360 laws in Mayhew's original list of laws from 1947 to 2008, we found 246 laws that delegated authority to federal agencies.[10]

The next task was to code the laws according to each of the categories described above. We proceeded as follows:

[8] These terms included the following: judi, appeal, appel, court, district, suit, action, legal, civil, and review.

[9] We thank Miranda Yaver for providing us with this data.

[10] This includes 217 laws from Farhang and Yaver's (2015) dataset along with 29 other laws found during our full text searches. Additionally, we excluded two laws that incorporate review provisions because they delegated to state, and not federal, agencies. We did not exclude two other laws that specify judicial review of non-federal agency actions (i.e., state implementation actions) since they also delegate to federal agencies.

Reviewability: Each provision was coded as either precluding review, limiting review, or specifically allowing review.[11]

Time Limits: We coded whether a law placed any time limits on when review can be sought. If limits existed, we also coded the number of days.

Venue: We coded whether the law made specific reference to which court or courts would be allowed to conduct the review.

Scope of Review: Laws vary along a continuum in which they give either more or less deference to the agency's actions, and in particular the agency's findings of fact. We coded laws as 0 if the provision directs the court to accept the agency's findings of fact; 1 if the court can suggest that the agency take additional information into account; 2 if the court can require the agency to take additional information into account; and 3 if the court is allowed to conduct the review de novo, in which case it is free to substitute its own judgment for that of the agency.

Standing: We coded two aspects of standing. First, we coded the level of harm required for a person or persons to have standing, where the primary distinction was between whether the law stated that a person needed to be adversely affected or aggrieved (as in the APA), or whether it said that any interested person can seek review. Second, we coded whether the law identified a specific and limited category of people that could seek review.

Before proceeding to an analysis of the data, three additional points are relevant. First, we acknowledge that the existence of provisions that allow, limit, or preclude review – or more generally that increase or decrease opportunities for review – does not

[11] Because some laws had multiple provisions and covered several different agency actions, a law might be coded as both allowing review and limiting or precluding review.

act to completely tie judges' hands. Courts can interpret statutes as allowing for review even when the language of the statute seems to preclude review (Bagley 2014); and they can also do the reverse, interpreting a statute as precluding review when it does not specifically mention preclusion (Breyer et al. 2006). Still, the courts "frequently accept the limitations on review Congress seeks to impose" (Verkuil 1983).[12] More generally, by including these provisions in law, Congress raises the costs to a court of acting in ways inconsistent with the provisions in the statutes, whether those costs come in the form of a higher likelihood of being overturned or in terms of reputational costs.

Second, the laws we examine were constructed in the shadow of the APA, which contains numerous provisions for how judicial review should be carried out. Since our goal is to assess when Congress either increases or decreases the opportunities for review, we need to treat the APA provisions as a baseline. Our coding approach lets us do this, allowing us to distinguish between provisions that simply replicate what is in the APA and those that either increase or decrease the likelihood of review. Third, over time the courts also have constructed new standards for judicial review and have developed new interpretations of how the APA should be interpreted, a point we return to below.

Frequency of Judicial Review

Since there have not, as far as we know, been any systematic assessments of judicial review provisions in laws, we begin by providing some basic information regarding the overall use of such provisions. To begin with, and consistent with previous

[12] Furthermore, courts tend not to interpret the absence of review provisions as implying preclusion (Breyer et al. 2006). Courts do, however, have the option of reviewing actions on constitutional, rather than statutory, grounds, which could allow them to elide specific review provisions, especially those limiting or precluding review (Verkuil 1983).

case studies, Table 1 shows that Congress frequently pays attention to judicial review. More specifically, we see that more than 32% of all significant laws enacted between 1947 and 2008 contain judicial review provisions. And if we consider only those laws that delegate to a federal agency, we find that nearly half (47.6%) contain specific language about how review should be carried out.

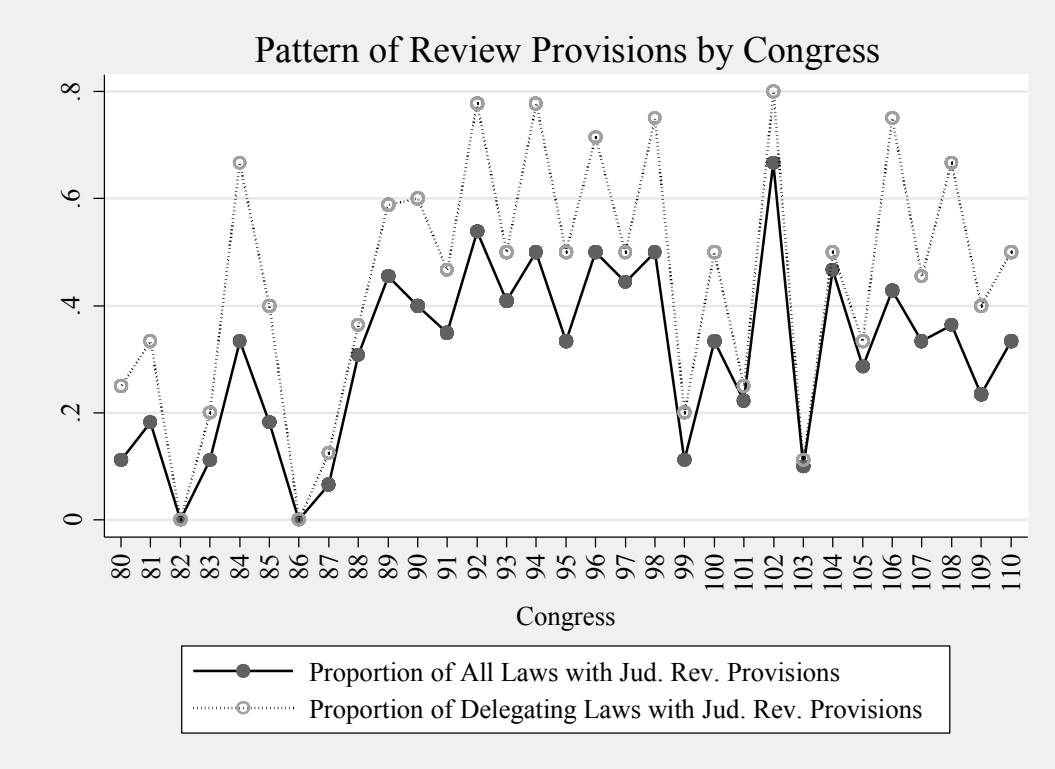
Table 1: Frequency of Judicial Review Provisions, 1947-2008

	All Major Laws	Laws that Delegate to Federal Agency
Total Number	360	246
Number with Judicial Review Provisions	117	117
Proportion with Judicial Review Provisions	0.325	0.476

In Figure 1 we unpack this aggregate data and show how it varies over time. For starters, the figure demonstrates that the proportion of laws with review provisions varies considerably over time, ranging from its high point of 80% for delegating laws in the 102nd Congress (1991-92) to the low of zero in the 82nd and 86th Congresses (1951-52 and 1959-60). A more striking feature of this figure is the extent to which the inclusion of judicial review language appears to be cyclical. Indeed, beginning with the 91st Congress, there is a perfect pattern of alternation, with decreases in the use of review provisions occurring in odd-numbered Congresses – which coincide with the first two years of presidential administrations – and increases occurring in even-numbered Congresses (which coincide with the last two years of presidential administrations). One potential explanation of this pattern is that Congress may take a wait-and-see attitude with a new president to see what type of executive branch administrative choices are

made, and then, based on this information, may use judicial review to sculpt policy outcomes closer to its ideal.

Figure 1



Variation by Type

Judicial review provisions are not only frequent; they also differ by type. As described earlier, we coded five different types of provisions: reviewability, venue, time limits, scope of review, and standing. Focusing now just on laws that delegate policymaking authority to agencies, Table 2 highlights the degree to which laws in the dataset incorporate these specific types of judicial review. For instance, 41.1% of delegating laws specify with which court a petition must be filed, and 31.3% set specific time limits for requesting judicial review of agency actions. Nearly 30% of laws also prescribe the scope of review that courts should follow, while almost 32% of laws delineate which petitioners can file for judicial review. Finally, 47.6% of delegating laws

– and all of the 117 laws that include judicial review provisions – either allow for review, limit it, or preclude judicial review of agency actions.

Table 2: Variation of Judicial Review Attributes

Type	*Number*	*Proportion*
Reviewability	117	0.476
Venue	101	0.411
Time Limits	77	0.313
Scope of Review	72	0.293
Standing	78	0.317

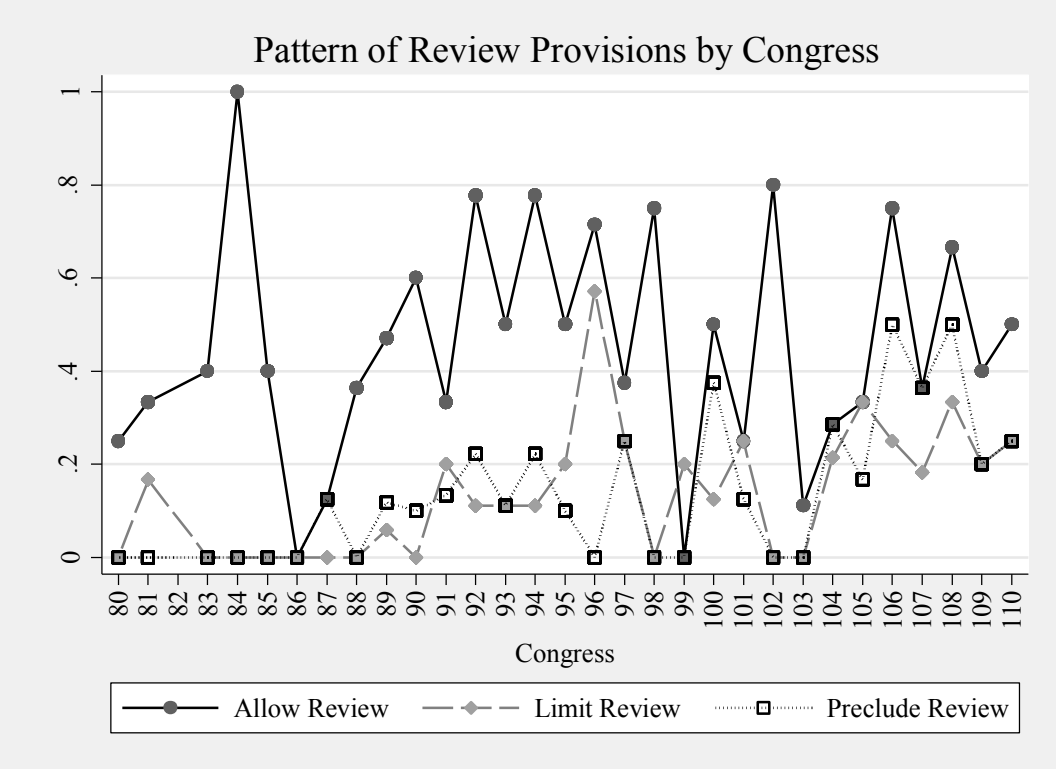
Note: Proportions are based on the 246 laws that delegate authority to federal agencies

Not surprisingly, the use of each of these types of judicial review varies across time. In the Appendix, we provide a figure that shows how the use of four of the types of provisions – timing, scope, venue, and standing – vary over time. In Figure 2, we isolate the fifth type, reviewability, which is the most common and arguably the most important (and most contentious) type. There are a number of interesting patterns to discern from this figure. First, even in the immediate aftermath of the passage of the APA, more than 20% of laws that delegate to federal agencies also included provisions specifically allowing for judicial review. Second, allowing for judicial review of agency actions is generally more common than limiting or precluding review, with a handful of exceptions.[13] Third, although provisions allowing for review are more common, contrary to the standard view, which holds that "[s]ituations of nonreviewability are infrequent and disfavored" (Verkuil 2002, 681), provisions that either explicitly preclude or limit

[13] For example, in the 86th Congress no delegating laws included reviewability provisions of any type; in the 99th Congress 20% limited review of agency actions, while none allowed or precluded review; and in the 101st and 105th Congresses an equal proportion of provisions limited and allowed for review. Given the way we coded reviewability, it could be that a law precluded review in one section while allowing for it in another.

review occur with regularity. Although these preclusion and limiting provisions were fairly rare initially, since the 87th Congress they have become more common. In fact, in a number of Congresses, they occur more frequently than provisions allowing for review.

Figure 2



Explaining the Patterns

The previous sections establish that Congress frequently anticipates future judicial action and attempts to structure how review will be carried out. In addition, it shows that there is variation in both the overall use of review provisions and the specific types. What needs to be explained, then, is *why* this variation exists. In the following sections we embark on a preliminary analysis, focusing on three potential explanations: first, that Congress is motivated by partisan concerns; second, that Supreme Court decisions that

address administrative judicial review influence how Congress writes review provisions; and third, that Congress is motivated by dissatisfaction with the courts.

Divided Government and Review Provisions

A central conflict during debates over the APA concerned the degree to which agency actions should be shielded from judicial review. The final outcome represented a compromise between liberal Democrats, who sought to protect agencies from the courts, and conservative Republicans, who distrusted these agencies (Shepherd 1996). Especially given the New Deal backdrop, Republicans in Congress were skeptical of placing policymaking authority in the hands of agencies operating within an executive branch controlled by Democrats, and saw the courts as a way to potentially constrain these agencies.

Extrapolating from this specific context, we might expect that a party that controls Congress but does not control the executive branch would favor an increased role for the courts as a means of reigning in agency actions, given that those actions might run counter to its preferences. Thus, under divided government, we should expect to see an increase in the use of provisions that increase reviewability, while under unified government we should find an increased use of provisions that decrease reviewability.[14]

Table 3 examines how the use of specific judicial review provisions differs under unified and divided government. Although there are some slight differences within each row – for example, we see that just over 44% of delegating laws allow for review under

[14] Such a pattern would also follow from the findings of studies that show that under divided control, legislatures tend to prefer to place more procedural constraints on agencies (Epstein and O'Halloran 1998).

unified government and 43% do so under divided government – in none of these cases are the differences significant. In addition, there is no difference in the use of time limits (which also can limit opportunities for review). In general, then, this table provides little support for the view that Congress acts to increase judicial review of agency actions under divided government or that it attempts to limit review under unified government.[15]

Table 3: Judicial Review Provisions and Divided Government

Category	*Direction*	*Unified Govt.*	*Divided Govt.*
Reviewability	Allow review	44.4%	42.9%
	Limit/Preclude review	20.0%	25.6%
Time Limits		31.1%	31.4%

Note: Percentages indicate the proportion of delegating laws under Unified Government and under Divided Government that contain each type of provisions.

The Judicial Context

Another factor that might influence Congress's use of judicial review provisions is the judicial context. That is, if Congress is aware of recent changes in judicial doctrine, this awareness might influence the way in which it chooses to structure review. Here we consider two major Supreme Court decisions relevant to judicial review of agency actions: the 1967 case of *Abbott Labs v. Gardner* and the 1984 case of *Chevron U.S.A., Inc. v. Natural Resources Defense Council*.

[15] An alternative perspective can be found in Melnick's (1994) assertion that members of Congress will encourage judicial review when they favor the expansion of programs. The evidence provides some support for this idea: Democratic Congresses are more than three times more likely than Republican Congresses to write laws that allow for review (37% of laws versus 11%), while being only twice as likely to preclude or limit review (14% versus 7%). In addition, under unified Democratic control laws are 2.3 times more likely to allow for review than to limit or preclude it (46.2% versus 20.1%), whereas under unified Republican control provisions that allow and those that limit or preclude occur at roughly the same rate (40% versus 35.6%).

A central tenet of modern administrative law is that there is a *presumption* in favor of judicial review of agency actions. When a statute is silent on the issue of reviewability, this presumption means that courts should interpret the law as allowing for review. Notably, this presumption was not explicitly stated until 1967, when the Supreme Court's issued its *Abbott Labs* decision. In this case, the Court – based in part on its reading of the APA – ruled that when the relevant statute does not specifically preclude review of a particular agency action, review should be allowed. Although recent scholarship (Bagley 2014) has cast serious doubt on the logic supporting this ruling, the *Abbott Labs* view of reviewability quickly became the norm, with courts reading statutes as allowing review unless it explicitly is prohibited.

Is Congress likely to respond to such changes in Court doctrine? The scholarship on this point is limited, but skeptical. Bagley (2014) posits that due to *Abbott Labs*, it is possible that the presumption of review "now serves as an entrenched and stable backdrop against which Congress legislates….Congress knows it must speak clearly before the courts will understand it to have precluded judicial review" (2014, 1327). But he then goes on to argue that existing studies provide little evidence for the claim that Congress knows about the presumption and acts accordingly: "To date, the available evidence – scant as it is – offers meager support for that claim, and in fact suggests to the contrary" (2014, 1327).[16]

[16] One pair of studies (Bressman and Gluck 2013; 2014) revealed that congressional staffers responsible for drafting statutes are usually unaware of even the most significant judicial canons. Furthermore, even when they are aware of these canons, they often misunderstand them. As Bagley observes, it is unlikely that these staffers are more aware of relatively minor canons, like the one setting out the presumption of review, while being generally unaware of those that are major.

We examine whether Congress changed the way that it addresses reviewability in statutes in the aftermath of *Abbott Labs*. As shown in Table 4, prior to the Court's assertion of a presumption to judicial review, Congress specifically limited or precluded review in only 7.6% of statutes. After the decision, however, Congress limited or precluded review in 29.4% of statutes, a nearly fourfold increase. Of course, the table also shows that Congress was more proactive about specifying when review should be allowed, with an increase from 33.3% to 47.2% of all statutes. This could mean that Congress reacted to *Abbott Labs* by carefully specifying *both* whether review should be allowed and when it should be limited; or it might simply indicate that Congress, in dealing with the surge of social regulation that occurred immediately after this decision, was dealing with more and broader regulatory issues.[17] Still, if we look at the ratio of statutes that allow review to statutes that preclude review, we see that it dropped dramatically, from a ratio of 4.4 (i.e., 33.3/7.6) prior to *Abbott Labs* to a ratio of only 1.6 after. Again, this is consistent with the view that Congress began drafting statutes differently after the Court's decision, knowing that if it wanted to keep an agency action from being reviewed, it needed to specifically state this intention.

Table 4: Judicial Review Provisions Before and After *Abbott Labs*

	Before	*After*
Limit/Preclude Review	7.6%	29.4%
Allow Review	33.3%	47.2%

[17] Alternatively, Congress may be reacting to the number of cases of judicial review. If, after *Abbot Labs*, more cases were heard and decided, Congress may have increased judicial review specifications even with no knowledge of the underlying canon.

The second Court decision that we examine is the *Chevron* case. In this case, in which the Environmental Protection Agency drew upon the Clean Air Act Amendments of 1977 to establish new guidelines allowing manufacturing plants more flexibility in meeting standards for pollution, the Court solidified the norm of deference to agency expertise. The question here, then, concerns the *scope* of review: should courts defer to agencies, or should they substitute their own judgment for that of the agencies?

As discussed earlier, we coded whether laws specifically direct the courts to accept, or defer to, the agency's finding of fact; whether courts can suggest or require that the agency take additional information that the court finds important into account; or whether the courts can conduct review de novo, essentially ignoring the agency's decision and hearing the case anew. To the extent that Congress was influenced by the *Chevron* ruling, we might expect to see that it changed the way that it deals with scope of review provisions in laws. More specifically, since *Chevron* provides a new baseline, we should expect to see Congress react by being more likely to incorporate provisions that direct the courts to move away from a strong norm of deference.

A comparison of scope of review provisions in statutes before and after *Chevron*, however, shows little consistent evidence of such a pattern. As Table 5 shows, there is an increase in the rate at which de novo provisions are included after the Court issued this decision, from 17.6% to 22.7%. At the same time, there is also an increase in the rate at which laws spell out that the courts should defer – which, in the post-*Chevron* era, is the default (i.e., what the courts could be expected to do in the absence of statutory instructions). In fact, the increase in the percentage of laws that prescribe deference is more than twice that of laws that provide for de novo review. Congress may have

changed its approach to writing judicial review provisions in a predictable way after *Abbott Labs*, but it did not do so after *Chevron*.

Table 5: Scope of Review Provisions and Chevron		
Category	*Pre-Chevron*	*Post-Chevron*
Defer	10%	23%
Suggest/Require	74%	55%
De Novo	18%	23%
Note: Percentages indicate the proportion of laws with scope provisions that have these specific types of provisions		

Dissatisfaction with the Courts

Finally, there are also times when Congress may be more suspicious of the courts, such as when courts have been striking down recent laws. The most thorough examination of this phenomenon comes from Clark's (2009; 2011) studies of judicial independence. As part of his analyses, Clark compiled a dataset of all "court-curbing" bills since the Reconstruction era – that is, "legislation that threatens to restrict, remove, or otherwise limit the Court's power" (2011, 19). Clark uses these bills as a proxy for public dissatisfaction with the Court, filtered through Congress; here we rely on them as a measure of Congress's discontent with the judicial branch. To the extent that Congress is unhappy with the courts and has introduced more court-curbing laws, we should expect to find more laws with provisions that limit or preclude review.

To assess whether such a relationship exists, we first calculated the correlation between the percentage of laws containing provisions that limit or preclude reviewability in each session of Congress and the number of court-curbing bills in the previous session of Congress. The correlation is mild, but significant ($r=.22$, $p<.01$), indicating that in periods when Congress is more dissatisfied with the courts, in the following Congress limits on review and preclusion are more common.

Table 6 provides another way to assess this relationship. First we calculated, for each law that limits or precludes review, the average number of court-curbing proposals in the previous Congress. Then we did the same for laws that do not limit or preclude review. The results suggest that there are about four more court-curbing proposals in the previous Congress for laws that limit or preclude review than there are for laws that do not, although this relationship does not reach standard levels of significance (p=.15). Taken together, the results appear to indicate a link – albeit small and tenuous – between Congress's dissatisfaction with the courts, as measured by court-curbing proposals, and whether it chooses to limit or preclude review.

Table 6: Court-Curbing and Limitations on Review

	Laws that Limit or Preclude Review	*Laws that do not Limit or Preclude Review*
Mean Number of Court-Curbing Proposal in Previous Congress (s.e.)	24.5 (2.3)	20.9 (1.2)

Discussion and Conclusion

Judicial review provisions hold out the potential to dramatically affect agency policymaking and policy outcomes. Although the Administrative Procedures Act established a baseline for how review should operate, Congress can change this baseline by inserting review provisions into individual statutes in order to spell out how review should be structured in specific cases. Our goal in this paper was to begin the process of learning about the use of these provisions. In part, we sought to build upon the many case studies that have pointed to the controversies that exist over the choice of review provisions in specific contexts, and to get a sense of whether review provisions are included in laws only infrequently, or whether they are a regular – if heretofore little

noticed – part of the process by which Congress structures administrative policymaking. To this end, we found that Congress regularly chooses to include review provisions in major laws. Indeed, judicial review provisions are included in almost half of all major laws that have delegated authority to federal agencies in the post-World War II era.

Furthermore, we found that Congress sets the parameters for review in a variety of ways. These review provisions sometimes allow for review of agency actions, sometimes limit it, and other times preclude review all together. In addition, Congress often specifies the venue for review, the time limit in which review must be initiated, the scope of review, and standing. By using these provisions, and by deciding on the specific form that they take, Congress can substantially affect whether the actions that agencies take are protected from judicial review, or whether they are made vulnerable to judicial review.

We also began to investigate *when* and *why* Congress has chosen to use review provisions. Our initial evidence suggests that in part Congress might be responding to judicial doctrine when deciding how to structure judicial review; and that it might also be motivated by a more general dissatisfaction with the courts. This evidence was fairly limited, however; and we found no evidence that Congress was motivated by a desire to protect agencies that are overseen by an executive branch controlled by the same party that controls Congress, or to expose agencies to judicial review when the executive branch is controlled by the opposing party.

These useful first steps lay the groundwork for future analysis. To begin with, some arguments have spelled out either empirically (e.g., Smith 2005) or theoretically (e.g., Shipan 2000) how decisions regarding the use of review provisions reflect complex

interactions among Congress, agencies, and the courts. Thus, an obvious next step will be to attempt to devise multivariate tests that build on what we have found here and that also draw upon these earlier studies. In addition, in future analysis we plan to consider that judicial review of agency actions may serve a variety of functions – not just as an *ex post* check on agency actions, but also as a substitute for additional delegation or as a pre-emptive threat against agency subversion.

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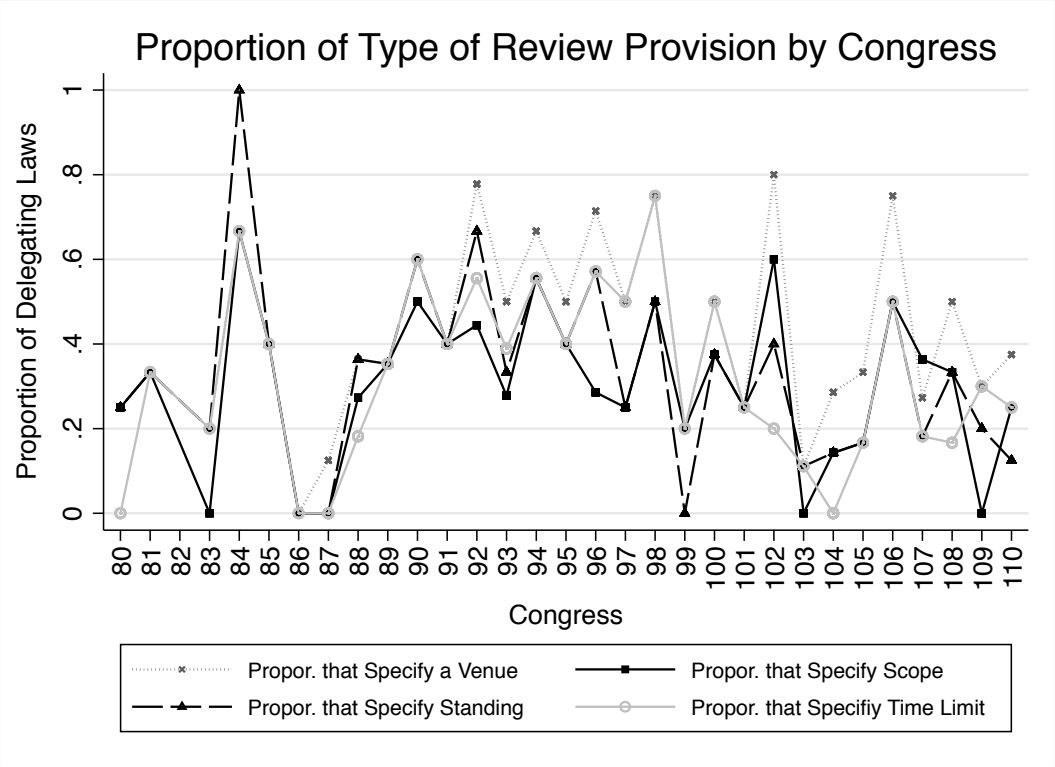
Appendix


Proportion of Type of Review Provision by Congress
Proportion of Delegating Laws
0
.2
.4
.6
.8
1
80 81 82 83 84 85 86 87 88 89 90 91 92 93 94 95 96 97 98 99 100 101 102 103 104 105 106 107 108 109 110
Congress
Propor. that Specify a Venue
Propor. that Specify Scope
Propor. that Specify Standing
Propor. that Specifiy Time Limit