

ARTICLES

Barring Judicial Review

*Laura E. Dolbow**

Whether judicial review is available is one of the most hotly contested issues in administrative law. Recently, laws that prohibit judicial review have sparked debate in the Medicare, immigration, and patent contexts. These debates are continuing in challenges to the recently created Medicare price negotiation program. Yet despite debates about the removal of judicial review, little is known about how often, and in what contexts, Congress has expressly precluded review. This Article provides new insights about express preclusion by conducting an empirical study of the U.S. Code. It creates an original dataset of laws that expressly preclude judicial review of agency action, which this Article refers to as “judicial review bars.” The findings reveal that express preclusion is a phenomenon: at least 190 statutory provisions expressly bar

* Sharswood Fellow, University of Pennsylvania Carey Law School. For detailed feedback on earlier drafts, I thank Cary Coglianese, Kristin Hickman, Mark Lemley, Leah Litman, Amy Motomura, Tejas Narechania, David Noll, Richard Pierce, Shalini Ray, Greg Reilly, and Kevin Stack. For helpful comments and conversations, I thank Rebecca Allensworth, Jonas Anderson, Tom Baker, Emily Bremer, Bridget Dooling, Joseph Fishman, Daniel Gervais, Tim Holbrook, Mark Janis, the late Dmitry Karshedt, Sapna Kumar, Matthew Lawrence, Sophia Lee, Ron Levin, Gillian Metzger, Isaac Park, Nicholson Price, Sarah Rajec, Jason Reinecke, Noah Rosenblum, Rachel Sachs, Mark Seidenfeld, Sean Seymore, Bijal Shah, Jake Sherkow, Ganesh Sitaraman, Wendy Wagner, Chris Walker, Melissa Wasserman, Matt Weiner, and the participants in the Administrative Law New Scholarship Roundtable, the AALS New Voices in Administrative Law Panel, the Vanderbilt IP Colloquium, the Patent Scholars Roundtable, and the Works in Progress for Intellectual Property Scholars Colloquium. Thanks to the *Vanderbilt Law Review* editors for diligent and thoughtful edits.

judicial review of agency actions. This Article then creates a taxonomy of actions barred from review. Most review bars target internal management decisions, such as decisions about how to allocate resources, set priorities, and manage personnel.

Because judicial review has traditionally been considered a core tool for overseeing agencies, this Article next investigates alternative oversight tools for actions barred from judicial review. When judicial review is barred, other structures often exist for political oversight, internal supervision, and public participation. Strikingly, review bar statutes often expressly create structures to facilitate such oversight. Alternative oversight structures include requirements to send reports to Congress, establish internal procedures, consult with stakeholders, and publish decisions. Furthermore, many review bars involve government spending programs, which are subject to appropriations oversight. Like judicial review, alternative oversight tools play an important role in promoting democratic values of deliberation, inclusiveness, and public accountability in the administrative state. A recent example at the Patent Office illustrates how the combination of review bars and alternative oversight tools can balance efficient implementation of programs with the need to protect individual interests and democratic values. Given the significance of alternative oversight tools in monitoring agencies, this Article argues that courts should consider the availability of alternative oversight tools when construing review bars, and policymakers should do the same when designing regulatory programs.

INTRODUCTION.....	309
I. JUDICIAL REVIEW AS AN OVERSIGHT TOOL.....	315
A. <i>The Role of Judicial Review</i>	315
B. <i>Congress's Power to Preclude Review</i>	316
C. <i>The Shift Away from Judicial Review</i>	319
II. THE LANDSCAPE OF JUDICIAL REVIEW BARS.....	323
A. <i>General Observations</i>	323
B. <i>Monetary Decisions</i>	326
1. Medicare Payments	327
2. Financial Benefits.....	328
3. Incentive Payments	329
4. Fees	329
5. Claim Settlements	330
C. <i>Program Implementation</i>	330
1. Eligibility and Compliance Guidance.....	330
2. Setting Priorities	331
3. Enforcement Discretion	331
4. Procedural Choices	333

	5.	Additional Process	333
	D.	<i>Managerial Functions</i>	334
III.		ALTERNATIVE OVERSIGHT TOOLS	336
	A.	<i>Political Oversight</i>	338
	1.	Reports to Congress	340
	2.	Appropriations Oversight	341
	B.	<i>Internal Supervision</i>	343
	1.	Procedural Rules.....	343
	2.	Administrative Review	345
	3.	Interagency Consultation	346
	C.	<i>Public Participation</i>	346
	1.	Notice-and-Comment Procedures	347
	2.	Consultation with Stakeholders	349
	3.	Regulated Entity Involvement	351
	4.	Publication Requirements	352
IV.		EXCEPTIONAL CASES: VETERANS' BENEFITS AND IMMIGRATION	353
	A.	<i>Individual Property and Liberty Interests</i>	355
	B.	<i>Oversight of Mass Adjudications</i>	357
V.		IMPLICATIONS	360
	A.	<i>Normative Considerations</i>	361
	1.	The Political Economy of Agency Oversight.....	362
	2.	A Case Study: The Patent Office	364
	B.	<i>Statutory Interpretation</i>	368
	1.	Significance of Statutory Context	368
	2.	Zone of Agency Discretion	371
	C.	<i>Institutional Design</i>	372
	1.	Fostering Internal Administrative Law	372
	2.	Insulating Agencies from Court Challenges	375
		CONCLUSION	376
		APPENDIX A: METHODOLOGY	378
		APPENDIX B: JUDICIAL REVIEW BAR STATUTES.....	380

INTRODUCTION

The availability of judicial review is one of the most hotly contested issues in administrative law. Judicial review is described as

a “necessary condition” for the legitimacy of agency action.¹ Yet it is not always available;² sometimes it is even prohibited.³ Every lawsuit challenging administrative action therefore faces the threshold issue of whether judicial review is available. When review is not available, courts categorically cannot examine agency actions for arbitrariness or procedural deficiencies.⁴

Given the stakes, it is no surprise that laws with express judicial review bars have sparked numerous litigation disputes. Recently, questions about a review bar in the patent context made it to the U.S. Supreme Court twice.⁵ The patent review bar appears in the America Invents Act of 2011.⁶ In response to concerns that the U.S. Patent and Trademark Office was issuing many legally invalid patents, the America Invents Act created a system for the Patent Office to reconsider patent grants.⁷ As part of this system, third parties can file petitions requesting that the Patent Office institute a proceeding called “inter partes review.”⁸ If the Patent Office declines to institute review, the law bars judicial review over this decision.⁹ If the Patent Office institutes review, it must later issue a final written decision, which can cancel any patent claims that it determines are unpatentable.¹⁰ In this situation, judicial review is available.¹¹ Courts can review the Patent Office’s final decision about whether to cancel a claim.¹² Disputes arose, however, about whether courts can review the Patent Office’s reasons for instituting review in the first place.¹³

1. LOUIS L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 320, 324 (1965) (“It is clear that the country looks, and looks with good reason, not to the agencies, but to the courts for its ultimate protection against executive abuse.”); Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 MINN. L. REV. 689, 702 (1990) (describing the presumption of judicial review as “a symbol of society’s deeply ingrained commitment to the availability of judicial review as a check on administrative action”).

2. See 5 U.S.C. §§ 701(a), 704.

3. See, e.g., 42 U.S.C. § 1395l(i)(2)(D)(vi) (providing “[t]here shall be no administrative or judicial review” of certain decisions related to Medicare payments).

4. See Harvey Saferstein, *Nonreviewability: A Functional Analysis of “Committed to Agency Discretion,”* 82 HARV. L. REV. 367, 367–72 (1968) (explaining the principle of nonreviewability in the Administrative Procedure Act).

5. *Thryv, Inc. v. Click-to-Call Techs., LP*, 140 S. Ct. 1367, 1373–75 (2020); *Cuozzo Speed Techs., LLC v. Lee*, 579 U.S. 261, 272–77 (2016).

6. *Leahy-Smith America Invents Act*, Pub. L. No. 112-29, 125 Stat. 284 (2011) (codified in scattered sections of 26 and 35 U.S.C.).

7. *Thryv*, 140 S. Ct. at 1374.

8. 35 U.S.C. § 311.

9. *Id.* § 314(d).

10. *Id.* § 318.

11. *Id.* § 319.

12. *Id.*

13. See, e.g., *Thryv, Inc. v. Click-to-Call Techs., LP*, 140 S. Ct. 1367, 1371 (2020); *Cuozzo Speed Techs., LLC v. Lee*, 579 U.S. 261, 268–72 (2016).

The language of the review bar provides that the determination of “whether to institute an inter partes review” is “final and nonappealable.”¹⁴ In two separate cases, the Patent Office instituted an inter partes review and cancelled patent claims.¹⁵ In both cases, the patent owners argued on appeal that the Patent Office never should have instituted inter partes review of their patents at all.¹⁶ In both cases, the Supreme Court rejected the patent owners’ arguments, holding that the review bar applies both to Patent Office decisions declining to institute review *and* to the agency’s reasoning for instituting review when it decides to do so.¹⁷ Even after these two decisions, parties continue to litigate the scope of the review bar. For example, the U.S. Court of Appeals for the Federal Circuit recently decided a case about whether the review bar covers not just individual institution decisions but also the Patent Office’s general policy about factors it will consider in exercising its discretion to deny inter partes review.¹⁸

Review bar disputes are not unique to the patent system. In October Term 2021, the Supreme Court considered the scope of statutes that expressly bar judicial review in the Medicare and immigration contexts.¹⁹ Similar debates will inevitably continue. A review bar in the recently passed Inflation Reduction Act,²⁰ for example, has sparked litigation, as drug manufacturers have alleged that barring judicial review over decisions about the Medicare price negotiation program violates due process.²¹

Although laws that expressly bar judicial review have been actively litigated in courtrooms, they have received little academic

14. 35 U.S.C. § 314(d).

15. *Thryv*, 140 S. Ct. at 1371; *Cuozzo*, 579 U.S. at 268–72.

16. *Thryv*, 140 S. Ct. at 1371–72; *Cuozzo*, 579 U.S. at 270–72.

17. *Thryv*, 140 S. Ct. at 1373–75; *Cuozzo*, 579 U.S. at 272–76. The Court left open that review may be available if the Patent Office engages in “shenanigans.” *Cuozzo*, 579 U.S. at 275; *see infra* note 50 and accompanying text.

18. *Apple Inc. v. Vidal*, 63 F.4th 1, 17–18 (Fed. Cir. 2023) (holding that review bar precluded judicial review over claim that the Patent Office’s policy for discretionary denials of inter partes review was arbitrary and capricious and contrary to law, but allowing judicial review over a claim that the Patent Office should have used notice-and-comment procedures to promulgate its policy). The Supreme Court denied certiorari in this case on January 8, 2024. *Intel Corp. v. Vidal*, No. 23-135, 2024 WL 71916, at *1 (U.S. Jan. 8, 2024) (mem).

19. *See Patel v. Garland*, 596 U.S. 328, 331–33 (2022) (immigration); *Am. Hosp. Ass’n v. Becerra*, 142 S. Ct. 1896, 1902 (2022) (Medicare).

20. 42 U.S.C. § 1320f-7 (barring administrative and judicial review for determinations related to drug selections and prices).

21. *See* Complaint at 15, *Nat. Infusion Ctr. Ass’n v. Becerra*, No. 1:23-cv-707 (W.D. Tex. June 21, 2023), 2023 WL 4108622 (“[T]he Program violates the Fifth Amendment’s Due Process Clause by . . . insulating [key decisions] from administrative or judicial review.”).

attention. There is an assumption that express preclusion is rare,²² but little work has been done to explore how often and in what contexts laws expressly preclude review. An empirical understanding of how often and where Congress has expressly precluded review is thus needed. Such empirical information would provide context for courts construing the scope of review bars and inform normative assessments of review bars. Furthermore, empirical information about review bars may help assess the political feasibility of proposals for jurisdiction stripping as a reform tool for an increasingly partisan federal court system.²³ Such potential reform is particularly high stakes in the area of administrative law since the current Supreme Court has shown a tendency to limit the power of agencies, most recently with the development of the major questions doctrine.²⁴

This Article addresses that gap in the literature by providing empirical data about judicial review bars. It surveys the U.S. Code to create an original dataset of laws that expressly bar judicial review over agency actions, which I refer to as “judicial review bars.” The dataset reveals that judicial review bars are a previously unrecognized phenomenon: at least 190 provisions in the U.S. Code expressly preclude judicial review over agency actions.²⁵ Review bars cover a range of actions across a range of regulatory programs. In terms of types of actions, most judicial review bars target internal management decisions, which involve agency choices about how to allocate resources, set priorities, and manage personnel. The review bar over the Patent

22. *E.g.*, JAFFE, *supra* note 1, at 353 (describing statutory preclusion of judicial review as “not common”); Nicholas Bagley, *The Puzzling Presumption of Reviewability*, 127 HARV. L. REV. 1286, 1323 (2014) (“Preclusion is uncommon.”); Ronald M. Levin, *Statutory Time Limits on Judicial Review of Rules: Verkuil Revisited*, 32 CARDOZO L. REV. 2203, 2205 (2011) (“Congress occasionally curtails review . . .”).

23. *See Jurisdiction Stripping as a Tool for Democratic Reform of the Supreme Court: Written Testimony for the Presidential Comm’n on the Sup. Ct. of the U.S.* 2 (2021) (written testimony of Christopher Jon Sprigman, Professor, New York University School of Law, Co-Director, Engelberg Center on Innovation Law and Policy), <https://www.whitehouse.gov/wp-content/uploads/2021/08/Professor-Christopher-Jon-Sprigman.pdf> [<https://perma.cc/BYR8-XRLV>] (“[The most promising strategy for reducing the power of courts] is for Congress to use the power that the Constitution has always given it to override, in appropriate cases, decisions of the Supreme Court and indeed any federal court.”); Ian Millhiser, *10 Ways to Fix a Broken Supreme Court*, VOX (July 2, 2022, 8:00 AM), <https://www.vox.com/23186373/supreme-court-packing-roe-wade-voting-rights-jurisdiction-stripping> [<https://perma.cc/U26W-KNNA>] (discussing several reform proposals); *see also* Daniel Epps & Alan M. Trammell, Essay, *The False Promise of Jurisdiction Stripping*, 123 COLUM. L. REV. 2077, 2081 (2023) (arguing jurisdiction stripping is “a far weaker tool for policy reform than conventional wisdom suggests” because its benefits are “subtle, indirect, and unreliable”); *infra* Subsection V.C.2.

24. *See* West Virginia v. EPA, 142 S. Ct. 2587, 2641 (2022) (Kagan, J., dissenting) (warning that the major questions doctrine adopts an “anti-administrative-state stance” that aims to “[p]revent agencies from doing important work, even though that is what Congress directed”).

25. *See infra* Table 1.

Office's decisions about institution of inter partes review falls within this category because it covers agency decisions about how to allocate resources in deciding whether to grant review petitions.

Next, this Article turns to alternative oversight tools that are available for actions barred from judicial review. Because of its role in overseeing agencies, judicial review has traditionally been considered a core feature of the administrative state.²⁶ Judicial review helps to promote democratic values of fairness, transparency, and deliberation by requiring agency actions to be published, include reasoned explanations, and be monitored by Article III judges.²⁷ Yet judicial review is just one of multiple structures available to oversee administrative agencies.²⁸ Therefore, a normative assessment of review bars requires an analysis of the alternative structures in place to oversee actions barred from judicial review.

Political oversight, internal supervision, and public participation all provide structures to oversee agencies. Like judicial review, these structures can serve to monitor agencies, guard against arbitrary exercises of power, promote reason giving, and allow individuals to present their views. Strikingly, in this study, a pattern emerged that review bar provisions often also expressly create alternative oversight structures. Sixty-five percent of review bar statutes covering internal management decisions expressly require other oversight structures.²⁹ These structures include requirements to send reports to Congress, create internal procedures, consult with stakeholders, follow notice-and-comment procedures, and publish decisions. Moreover, many review bars target government spending programs, which are subject to heightened oversight during the appropriations process. Alternative oversight tools are often available even beyond such express statutory requirements. Other statutes within a regulatory regime may create requirements for alternative oversight, and agencies may voluntarily undertake procedures for internal supervision and public participation.

Therefore, this Article concludes that where statutes expressly bar judicial review over agency actions, alternative oversight tools are

26. See *Abbott Lab's v. Gardner*, 387 U.S. 136, 139–40 (1967); Bagley, *supra* note 22, at 1289–94; Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239, 1281–84 (2017) (explaining that the APA precludes judicial review of actions “committed to agency discretion by law”); see also 4 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 28.07, at 30–32 (1958).

27. See *infra* Section I.A.

28. See, e.g., Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 71–121 (2006); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2285–99 (2001).

29. See *infra* Table 4.

often available. Alternative oversight tools are not a substitute for judicial review, but, like judicial review, they play a role in promoting democratic values in the administrative state. Sometimes alternative oversight tools can even be better than judicial review at promoting democratic values by allowing the public to share views earlier in an agency's decisionmaking process and by providing more transparency to regulated entities and beneficiaries. The combination of judicial review bars and alternative oversight tools can thus be used to make tradeoffs when balancing policy goals, such as efficient implementation of regulatory programs, with the need to protect individual interests and other democratic values, such as transparency, deliberation, fairness, and public accountability. The normative desirability of the balance between judicial review bars and alternative oversight tools will vary based on the type of decision barred from review and the political economy of individual regulatory programs. The recent Patent Office example shows how the combination of review bars and alternative oversight tools can balance individual and institutional interests, while at the same time preserving good governance values.³⁰ Yet those same tools could play out differently in other systems, such as the veterans' benefits and immigration removal systems, where regulated parties tend to have less political power and fewer resources. In each regulatory context, though, both judicial review and alternative oversight tools play a role in preserving democratic values in regulation. The central claim of this Article is that where judicial review bars exist, courts and policymakers should consider them in context with available alternative oversight tools.

This Article proceeds in five parts. Part I describes the existing literature and caselaw on the availability of judicial review and its role in supervising agencies. Part II describes the results of an empirical survey of judicial review bars and creates a taxonomy of actions barred from judicial review. Part III discusses available alternative oversight tools and analyzes how these structures can serve similar purposes to judicial review. Part IV discusses special considerations in two examples that stand out from the typical review bars: veterans' benefits determinations and immigration removal proceedings. Part V then considers implications of the phenomenon of judicial review bars along with alternative oversight tools for normative debates, statutory interpretation, and future regulatory reforms.

30. See Christopher Walker, *Constraining Bureaucracy Beyond Judicial Review*, 150 DAEDALUS 155, 157 (2021) (describing administrative law values of "agency expertise, reasoned decision-making, due process, fairness, consistency, transparency, and public accountability").

I. JUDICIAL REVIEW AS AN OVERSIGHT TOOL

This Part explores the availability of judicial review in the administrative state. It first examines the theory that judicial review is a core administrative oversight tool. It then describes the current state of the law regarding Congress's power to preclude judicial review. Finally, it situates this Article within the existing literature by discussing academic critiques of searching judicial review, the increasing recognition that other tools beyond judicial review also play key roles in overseeing agencies, and the need for empirical information about review bars.

A. *The Role of Judicial Review*

As a default rule, judicial review of administrative actions is presumptively available.³¹ The Administrative Procedure Act (“APA”) provides that judicial review is available for final agency actions unless a statute precludes judicial review or the action is committed to agency discretion by law.³² Courts have interpreted these provisions to broadly provide for judicial review.³³

The availability of judicial review serves several key purposes. First, judicial review monitors whether agencies comply with statutes. Monitoring agency compliance with governing statutes helps to ensure that their actions are legally valid, which promotes legitimacy.³⁴ Judicial review also bolsters legitimacy by helping to maintain public confidence that agencies are subject to the rule of law.³⁵ Second, judicial review prevents abuses of discretion and arbitrary exercises of power. Broad delegations give agencies wide discretion, and the availability of judicial review serves as a check to ensure policies are implemented

31. *Abbott Lab's*, 387 U.S. at 139–40; see also Daniel B. Rodriguez, *The Presumption of Reviewability: A Study in Canonical Construction and Its Consequences*, 45 VAND. L. REV. 743, 751 (1992).

32. 5 U.S.C. §§ 701(a), 704.

33. See, e.g., *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (explaining that judicial review of agency action is barred under § 701(a)(2) only when “statutes are drawn in such broad terms that in a given case there is no law to apply” (internal quotation marks omitted) (citation omitted)); *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1905 (2020) (“To honor the presumption of review, we have read the exception in § 701(a)(2) quite narrowly” (internal quotation marks omitted) (citation omitted)); see also Metzger & Stack, *supra* note 26, at 1281–83; Levin, *supra* note 1, at 758–80.

34. See JAFFE, *supra* note 1, at 320–21, 327 (describing agency actions beyond statutory limits as “not legitimate”); Rodriguez, *supra* note 31, at 751–52; JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW 6* (2012) (explaining the evolution of the administrative state and its reliance on legislative and executive practices).

35. Levin, *supra* note 1, at 742.

fairly.³⁶ Third, judicial review requires agencies to explain their decisions,³⁷ which can improve the quality of agency decisions and promote transparency.³⁸ Fourth, judicial review allows individuals to vindicate their rights.³⁹ When a party has been affected by an agency action in a concrete way, judicial review permits the party to present its views before a neutral arbiter.⁴⁰

A common theme in these justifications is that judicial review serves as an agency oversight tool. Judicial review allows courts to monitor agencies and interested parties to present their views. Its availability guards against arbitrariness and requires agencies to justify their decisions. In turn, as a theoretical matter, the availability of judicial review promotes democratic values of fairness, due process, transparency, reasoned decisionmaking, deliberation, and public accountability.⁴¹

B. Congress's Power to Preclude Review

The Supreme Court has created a presumption of judicial review of agency actions.⁴² Yet despite this presumption, Congress can preclude judicial review over specific types of claims.⁴³ In the APA,

36. See JAFFE, *supra* note 1, at 324 (noting that society looks to courts for “ultimate protection against executive abuse”); Levin, *supra* note 1, at 742 (“[J]udicial review can enhance the quality of administrative action by exposing partiality, carelessness, and perverseness in agencies’ reasoning.”); Bagley, *supra* note 22, at 1318 (suggesting that the presumption of judicial review may be justified by the “prospect of an abusive and antidemocratic exercise of governmental authority” by agencies).

37. See 5 U.S.C. § 706(2)(A); *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016) (requiring agency to “give adequate reasons for its decisions”).

38. See EDWARD H. STIGLITZ, *THE REASONING STATE* 161–77 (2022); Bagley, *supra* note 22, at 1321 (judicial review “encourages agencies to explain themselves” and “to adhere to law”); Levin, *supra* note 1, at 742; Ronald M. Levin, *Administrative Discretion, Judicial Review, and the Gloomy World of Judge Smith*, 1986 DUKE L.J. 258, 271–72 (1986) (noting that judicial review can contribute to democracy by encouraging a more informed political dialogue); Mark Seidenfeld, *Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking*, 87 CORNELL L. REV. 486, 547–48 (2002) (“[A]rbitrary and capricious review provides incentives for agency staff to take appropriate care and to avoid many systemic biases when formulating rules and ushering them through the rulemaking process.”).

39. Bagley, *supra* note 22, at 1321; Levin, *supra* note 1, at 742.

40. See Saferstein, *supra* note 4, at 371; R. SHEP MELNICK, *REGULATION AND THE COURTS* 62–69 (1983).

41. Walker, *supra* note 30, at 157; see also STIGLITZ, *supra* note 38, at 47, 97–100, 140–43 (arguing that through its due process requirements and transparency “the administrative state offers the promise of *credible reasonableness*”).

42. *Abbott Lab’s v. Gardner*, 387 U.S. 136, 139–40 (1967).

43. JAFFE, *supra* note 1, at 346; Rodriguez, *supra* note 31, at 757 (“[T]he APA is clear that the reviewability determination is for Congress.”); *Knapp Med. Ctr. v. Hargan*, 875 F.3d 1125, 1131 (D.C. Cir. 2017) (“The Congress has undoubted power to restrict the jurisdiction of the lower federal courts and, when it does so, we need only determine the scope of the restriction.”).

Congress set forth several contexts where judicial review is not available over agency actions. These include situations where agency actions are not final, are committed to agency discretion by law, or are precluded by statute.⁴⁴ When review is not available, courts cannot examine agency actions for arbitrariness or procedural deficiencies.⁴⁵

Some uncertainty exists about how broad Congress's power to preclude judicial review is, including whether Congress has power to strip federal court jurisdiction entirely over certain claims.⁴⁶ Amid this uncertainty, the Supreme Court has regularly upheld statutes that expressly preclude judicial review of nonconstitutional claims over agency actions.⁴⁷ When a claim involves a public right, which most challenges to agency actions do, the Court has concluded that Congress can foreclose judicial review by an Article III court.⁴⁸ Moreover, judicial review for illegality and arbitrariness was not a feature of the early administrative state.⁴⁹

Doubts remain about whether Congress can preclude constitutional challenges to agency action, such as claims that an agency exercised its discretion in a manner that violates the Equal Protection Clause.⁵⁰ The Court has avoided this question by

44. 5 U.S.C. §§ 701(a), 704.

45. *See* Ascension Borgess Hosp. v. Becerra, 61 F.4th 999, 1002–03 (D.C. Cir. 2023) (holding that the statute clearly precluded judicial or administrative review of the disproportionate share hospital payments from the Department of Health and Human Services (“HHS”)); Saferstein, *supra* note 4, at 367. Other judicial doctrines also limit the scope of judicial review, including standing, ripeness, exhaustion, and deferential standards of review. Christopher J. Walker, *Administrative Law Without Courts*, 65 UCLA L. REV. 1620, 1628–38 (2018).

46. *See* Epps & Trammell, *supra* note 23, at 2088–90 (discussing four different viewpoints on the extent to which Congress can strip federal courts of jurisdiction); Christopher Jon Sprigman, *Congress's Article III Power and the Process of Constitutional Change*, 95 N.Y.U. L. REV. 1778, 1791–1801 (2020) (explaining that while a broad consensus acknowledges Congress's power under Article III to limit the jurisdiction of federal courts, there is uncertainty among its application and constitutional circumscriptions).

47. *E.g.*, Block v. Cmty. Nutrition Inst., 467 U.S. 340, 352–53 (1984); Bagley, *supra* note 22, at 1312–15 (describing Supreme Court precedent holding that express review bars preclude judicial review over nonconstitutional claims, particularly in the context of public rights claims); *cf.* Bowen v. Mich. Acad. of Fam. Physicians, 476 U.S. 667 (1986) (upholding review bar for one of two statutory sections at issue).

48. The Supreme Court has held that a claim involves a public right where the matter arises from the government's performance of its executive or legislative functions. *See* Crowell v. Benson, 285 U.S. 22, 50 (1932); Bagley, *supra* note 22, at 1315; *see also* Richard H. Fallon, Jr., *Jurisdiction-Stripping Reconsidered*, 96 VA. L. REV. 1043, 1048–50, 1123–30 (2010).

49. Bagley, *supra* note 22, at 1295–1303; Rodriguez, *supra* note 31, at 752.

50. Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148, 178 (2019) (“[T]he constitutionality of jurisdiction-stripping proposals remains one of the most significant unanswered questions in the field of federal courts.”); Henry P. Monaghan, *Jurisdiction Stripping Circa 2020: What The Dialogue (Still) Has to Teach Us*, 69 DUKE L.J. 1, 24–25 (2019) (noting that the Supreme Court has been “reluctant” to read any law as precluding judicial review of constitutional claims).

consistently interpreting statutes to not preclude review of constitutional questions.⁵¹ Courts have not allowed constitutional claims to serve as an end run around review bars though. When a statute contains a review bar, courts have refused to consider challenges that do not present colorable constitutional claims.⁵²

Similarly, courts have left open that judicial review may be available if an agency action is ultra vires. D.C. Circuit decisions dismissing challenges covered by Medicare review bars have suggested that judicial review may be available if the agency acts outside its statutory authority.⁵³ In the patent example, the Supreme Court noted that if the Patent Office engages in “shenanigans,” the APA allows review of actions that are in excess of the agency’s statutory jurisdiction.⁵⁴ Although review for claims that actions are ultra vires could threaten to swallow a review bar, courts have held that express review bars preclude review unless a claimant shows that an action is obviously beyond an agency’s statutory authority, such as a patent violation of law.⁵⁵

Moreover, judicial review over whether an agency acted within statutory bounds is still meaningfully different from review over the substance of a decision and the procedures used to reach a decision. The D.C. Circuit illustrated this distinction in a case involving a review bar over adjustments to Medicare reimbursement rates.⁵⁶ There, the court considered whether the type of adjustment was authorized by the

51. See *Webster v. Doe*, 486 U.S. 592, 595 (1988) (interpreting statute not to preclude review of a constitutional claim that a CIA employee was fired because of his sexual orientation); *Johnson v. Robison*, 415 U.S. 361, 366–74 (1974); see also Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1553–73 (2000). Some review bars expressly provide that review is available for constitutional claims. See 8 U.S.C. § 1252(a)(2)(D).

52. See, e.g., *Mylan Lab’ys Ltd. v. Janssen Pharmaceutica, N.V.*, 989 F.3d 1375, 1383 (Fed. Cir. 2021) (reasoning that due process challenge was not colorable); *Webster*, 486 U.S. at 603 (noting constitutional concerns would arise if review was not available for “colorable” constitutional claims).

53. See *DCH Reg’l Med. Ctr. v. Azar*, 925 F.3d 503, 509 (D.C. Cir. 2019); *Mercy Hosp., Inc. v. Azar*, 891 F.3d 1062, 1070 (D.C. Cir. 2018); *Knapp Med. Ctr. v. Hargan*, 875 F.3d 1125, 1131 (D.C. Cir. 2017); *Fla. Health Scis. Ctr., Inc. v. Sec’y of Health & Hum. Servs.*, 830 F.3d 515, 522 (D.C. Cir. 2016); *Amgen, Inc. v. Smith*, 357 F.3d 103, 112–13 (D.C. Cir. 2004). *But see* *Apple Inc. v. Vidal*, 63 F.4th 1, 11 (Fed. Cir. 2023) (concluding that review bar precluded review over claim that Patent Office action was contrary to the statute but did not preclude review over claim that the Patent Office should have followed notice-and-comment procedures).

54. *Cuozzo Speed Techs. LLC v. Lee*, 579 U.S. 261, 275 (2016). Parties have since attempted to challenge Patent Office policies for instituting post-grant review as outside the Patent Office’s statutory authority, but courts have so far rejected these challenges. See, e.g., *Mylan*, 989 F.3d at 1383 (order dismissing appeal and denying mandamus); *Apple*, 63 F.4th at 11.

55. *DCH Reg’l*, 925 F.3d at 509; *Fla. Health*, 830 F.3d at 522; *Sw. Airlines Co. v. TSA*, 554 F.3d 1065, 1071 (D.C. Cir. 2009).

56. *Amgen*, 357 F.3d at 113–17.

statute, but it did not review whether the action itself was arbitrary and capricious or procedurally deficient.⁵⁷ Under the D.C. Circuit approach, courts can review whether agencies have power to take certain actions, but not agencies' reasoning or methods of taking those actions.

Therefore, when Congress creates a comprehensive regulatory program, it has wide discretion to regulate how actions are reviewed, including by specifying that certain actions are categorically barred from judicial review. When statutes include an express review bar, courts have typically held that the express language overcomes the presumption of judicial review.⁵⁸ Courts have typically construed these review bars in turn to limit their ability to review decisions for arbitrariness and for procedural deficiencies.⁵⁹ Even though courts have not resolved whether these review bars can preclude constitutional or ultra vires claims, courts have regularly dismissed challenges where agency actions are neither clearly unconstitutional nor clearly outside an agency's statutory authority.⁶⁰

C. *The Shift Away from Judicial Review*

Commentators have debated the normative desirability of judicial review for decades.⁶¹ Although judicial review has benefits for agency oversight and democratic values, as discussed above,⁶² it also

57. *Id.*

58. *E.g.*, *Patel v. Garland*, 596 U.S. 328, 337–47 (2022); *Cuozzo*, 579 U.S. at 272–75.

59. *Ascension Borgess Hosp. v. Becerra*, 61 F.4th 999, 1002 (D.C. Cir. 2023); *Tex. All. for Home Care Servs. v. Sebelius*, 681 F.3d 402, 408–11 (D.C. Cir. 2012) (review bar precludes review over regulation about financial standards for competitive bidding program); *Knapp Med. Ctr. v. Hargan*, 875 F.3d 1125, 1128 (D.C. Cir. 2017) (review bar precludes review over approval of an expansion application for a physician-owned hospital); *Amgen*, 357 F.3d at 112–18 (review bar precludes review of adjustments to ensure equitable payments for outpatient services); *Fla. Health*, 830 F.3d at 519–23 (review bar precludes review of data underlying estimates for disproportionate share hospital payments); *DCH Reg'l*, 925 F.3d at 506–08 (review bar precludes review of methodology for determining estimates for disproportionate share hospital payments); *Gentiva Healthcare Corp. v. Sebelius*, 723 F.3d 292, 297 (D.C. Cir. 2013) (upholding review bar); *Mercy Hosp., Inc. v. Azar*, 891 F.3d 1062, 1065 (D.C. Cir. 2018) (review bar precludes review of adjustments to prospective payment rates). *But see Apple*, 63 F.4th at 11 (holding that review bar precluded challenges to substance of agency policy but not to procedural choices).

60. *See, e.g.*, *Mylan Lab'ys Ltd. v. Janssen Pharmaceutica, N.V.*, 989 F.3d 1375, 1377 (Fed. Cir. 2021); *DCH Reg'l*, 925 F.3d at 509; *Fla. Health*, 830 F.3d at 522.

61. *See Metzger & Stack, supra* note 26, at 1272–75 (describing political debates over judicial review in negotiations leading to the passage of the APA); *Saferstein, supra* note 4, at 398 (arguing that reviewability doctrine requires weighing interests of agencies, courts, and individuals); *Levin, supra* note 1, at 690, 779–81 (advocating a pragmatic approach to considering questions of unreviewability); *see also* Richard J. Pierce, Jr., *The Unintended Effects of Judicial Review of Agency Rules: How Federal Courts Have Contributed to the Electricity Crisis of the 1990s*, 43 ADMIN. L. REV. 7, 28–29 (1991).

62. *See supra* Section I.A.

has costs. It delays administrative actions and consumes both agency and judicial resources.⁶³ Given these costs, some have questioned whether judicial review is too widely available. Professor Nicholas Bagley, for example, has argued that the presumption of judicial review should be abolished because it impedes efficient administration of government programs by introducing delay, diverting resources, and limiting flexibility.⁶⁴ Furthermore, jurisdiction stripping—or removing judicial review entirely—has been proposed as a response to an increasingly partisan judiciary, which has shown a tendency to limit the power of federal agencies.⁶⁵

Scholars have also questioned the traditional narrative that judicial review is crucial for legitimacy and democratic values. Professors Gillian Metzger and Kevin Stack have argued that searching judicial review may instead work against those goals.⁶⁶ They suggest that widespread availability of judicial review increases incentives to use policymaking tools that are not subject to review. This pushes agencies to keep internal policies hidden, which can undermine transparency and increase risks of arbitrariness and inconsistency.⁶⁷ It also pushes agencies to disclaim the binding nature of internal processes, which can harm legitimacy.⁶⁸

Meanwhile, as scholars have expressed doubt about broad interpretations of reviewability under the APA, scholars have also brought attention to other agency oversight tools beyond judicial review. Even under the Court's broad reviewability jurisprudence, most agency actions are never subjected to judicial review, including in

63. Bagley, *supra* note 22, at 1287, 1323; Saferstein, *supra* note 4, at 371, 387–92; Rodriguez, *supra* note 31, at 766 (describing costs judicial review imposes on courts); *see also* David L. Noll, *Administrative Sabotage*, 120 MICH. L. REV. 753, 814 (2022) (suggesting that increased judicial review of administrative sabotage would interfere with good faith policy implementation).

64. Bagley, *supra* note 22, at 1329, 1332–33; *see also* JERRY L. MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS 185–90 (1983) (concluding judicial review of Social Security benefits did not meaningfully improve the quality of agency decisions, though it imposed costs); Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385, 1412–20, 1452–54 (1992).

65. *See supra* note 23 and accompanying text. The recent development of the major questions doctrine illustrates how agencies have become particularly vulnerable to legal challenges that aim to impede administrative programs through judicial review. *See West Virginia v. EPA*, 142 S. Ct. 2587, 2644 (2022) (Kagan, J., dissenting) (“Yet the Court today prevents congressionally authorized agency action to curb power plants’ carbon dioxide emissions.”). In dissent, Justice Kagan warned that the major question doctrine adopts an “anti-administrative-state stance” that aims to “[p]revent agencies from doing important work, even though that is what Congress directed.” *Id.* at 2641.

66. Metzger & Stack, *supra* note 26, at 1246, 1249, 1278, 1288.

67. *Id.* at 1289–90.

68. *Id.* at 1264; *see also* Christopher J. Walker & Rebecca Turnbull, *Operationalizing Internal Administrative Law*, 71 HASTINGS L.J. 1225, 1233 (2020).

situations where review is theoretically available.⁶⁹ Practical constraints and other doctrines like standing, ripeness, and exhaustion limit the number of cases that are litigated in federal courts.⁷⁰ Furthermore, judicial review operates *ex post*, but *ex ante* constraints are an important means of control.⁷¹

Therefore, scholars have increasingly emphasized the need for other mechanisms to monitor and control agencies.⁷² Several other structures play a role in overseeing administration. Congress and the President oversee agencies through supervision, appropriations, and appointments.⁷³ Internal supervision is also a fundamental tool to constrain agency discretion and to help ensure that agencies comply with statutes.⁷⁴ Furthermore, public participation and transparency promote the democratic legitimacy of administrative actions.⁷⁵

Amid academic debates about the availability of judicial review and alternative oversight tools, there has been little discussion of express review bars. Generally, there has been an assumption that express preclusion is rare.⁷⁶ Yet there has been little systematic study of statutes that expressly preclude judicial review. Recently, Professor Jonathan Siegel prepared a sourcebook for the Administrative Conference of the United States (“ACUS”) to catalog statutes that

69. See, e.g., Cary Coglianese & Daniel E. Walters, *Litigating EPA Rules: A Fifty-Year Retrospective of Environmental Rulemaking in the Courts*, 70 CASE W. RES. L. REV. 1007, 1019–25 (2020) (the “vast majority” of the EPA’s rules “have never been subjected to a petition for judicial review”).

70. Walker, *supra* note 45, at 1625–38; Metzger & Stack, *supra* note 26, at 1264; Rachel E. Barkow, *Overseeing Agency Enforcement*, 84 GEO. WASH. L. REV. 1129, 1131–33 (2016).

71. Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836, 1872, 1893–99 (2015).

72. Metzger & Stack, *supra* note 26, at 1243–44, 1246; Walker, *supra* 30, at 157–59 (“We must develop a theory of administrative law that better incorporates the various other actors who can help monitor, constrain, and protect against agency abuse in regulatory activities insulated from judicial review.”).

73. Beerermann, *supra* note 28, at 71–121; Kagan, *supra* note 28, at 2285–99.

74. Metzger & Stack, *supra* note 26, at 1243; Metzger, *supra* note 71, at 1891–93; Walker & Turnbull, *supra* note 68, at 1233; Sidney Shapiro, Elizabeth Fisher & Wendy Wagner, *The Enlightenment of Administrative Law: Looking Inside the Agency for Legitimacy*, 47 WAKE FOREST L. REV. 463, 465 (2012) (“[W]e need to look inside the agency for administrative legitimacy.”); Jerry L. Mashaw, *Federal Administration and Administrative Law in the Gilded Age*, 119 YALE L.J. 1362, 1367 (2010).

75. See Michael Sant’Ambrogio & Glen Staszewski, *Democratizing Rule Development*, 98 WASH. U. L. REV. 793, 795 (2021) (“Public engagement with rulemaking enhances both the effectiveness and democratic legitimacy of policymaking by federal regulatory agencies.”); Wendy Wagner, William West, Thomas McGarity & Lisa Peters, *Deliberative Rulemaking: An Empirical Study of Participation in Three Agency Programs*, 73 ADMIN. L. REV. 609, 612 (2021) (“It is therefore well-established that ‘democratic deliberation’ is a necessary condition to ensuring the legitimacy of administrative governance within our constitutional system.”).

76. See *supra* note 22.

govern judicial review of agency actions.⁷⁷ Professor Siegel summarized specific types of judicial review statutes, such as provisions that specify the time within which to seek review, how to seek review, and the standard of review. The report did not, however, discuss or comprehensively catalog the contexts where laws altogether bar review.⁷⁸ It repeated the conventional wisdom that preclusion is “unusual.”⁷⁹

A deeper empirical understanding of how Congress has exercised its power to expressly preclude judicial review could have several implications for ongoing debates. First, judicial review bars may be a tool to address suggestions that there is currently too much judicial oversight of agency actions. Second, if review bars are prevalent, the prevalence could reinforce calls for increased focus on alternative oversight tools. Furthermore, outside the academic debates, review bars have been attracting significant attention in litigation disputes.⁸⁰ Empirical information about the use of review bars and alternative oversight tools would provide context for courts construing the scope of review bars.

With respect to each implication, empirical information about the existence of review bars and alternative oversight tools is needed to assess the normative desirability of review bars as features of regulatory programs. This Article aims to fill that gap in the literature by conducting an empirical study of laws that expressly bar judicial review and the alternative oversight tools available for actions barred from judicial review. The empirical study seeks to serve several purposes, both descriptive and normative. First, it makes descriptive claims about the existing landscape of review bars and alternative oversight tools. Second, these descriptive claims aim to inform normative debates by providing context for courts construing review bars and for policymakers considering regulatory reforms. This Article turns to the empirical study next.

77. JONATHAN R. SIEGEL, ADMIN. CONF. OF THE U.S., THE ACUS SOURCEBOOK OF FEDERAL JUDICIAL REVIEW STATUTES (2022), <https://www.acus.gov/sites/default/files/documents/ACUS-Sourcebook-of-Federal-Judicial-Review-Statutes.pdf> [<https://perma.cc/3JVT-HNRB>] [hereinafter SIEGEL, ACUS SOURCEBOOK]. See generally Pamela J. Clouser McCann, Charles R. Shipan & Yuhua Wang, *Measuring the Legislative Design of Judicial Review of Agency Actions*, 39 J.L. ECON. & ORG. 123 (2023) (reviewing statutory provisions designating how judicial review of agency actions will operate).

78. SIEGEL, ACUS SOURCEBOOK, *supra* note 77, at 85.

79. *Id.*

80. See *supra* notes 5–18 and accompanying text.

II. THE LANDSCAPE OF JUDICIAL REVIEW BARS

This Part uncovers the phenomenon of “judicial review bars,” which this Article defines as statutes that expressly preclude judicial review of administrative actions. This Article focuses on statutes where judicial review of a particular decision is categorically precluded.⁸¹ By searching for phrases such as “not subject to judicial review” in the U.S. Code, I identified 190 provisions across 126 statutes that expressly preclude judicial review of agency actions.⁸² The methods I used to identify judicial review bars are described in detail in Appendix A. As discussed further below, most review bars cover internal management decisions, which involve issues such as how an agency allocates resources, sets priorities, and manages personnel. This Part begins with general observations from the empirical survey, followed by a detailed description of the types of internal management decisions covered by review bars.

A. General Observations

Judicial review bars cover a range of actions by a range of agencies. As shown in Appendix B, I located 190 statutory provisions in the U.S. Code that expressly bar judicial review over agency actions.⁸³ Notably, the program with the most review bars is Medicare—63 provisions expressly preclude judicial review over Medicare actions.⁸⁴ Although the frequency of review bars illustrates that judicial review bars are a phenomenon, it is difficult to determine whether a specific number of statutes represents a high or low frequency given the size and complexity of the U.S. Code. On the one hand, 190 provisions across 126 statutes may appear to be a high number of review bars. On the other hand, the APA makes judicial review available as a default matter, and the ACUS Sourcebook located over 650 statutes governing judicial review of agency rules and orders.⁸⁵ Therefore, the patterns of

81. Some statutes preclude review after a certain time period or require administrative exhaustion before judicial review. These laws are important to understand the full landscape of availability of judicial review but are outside the scope of this Article. The ACUS Sourcebook provides a detailed description of laws that place procedural and time limits on judicial review for agency rules and orders. SIEGEL, ACUS SOURCEBOOK, *supra* note 77, at 44–48.

82. *Infra* Appendix B.

83. I searched the following phrases: “final and nonappealable”; “unreviewable”; “shall not be subject to review”; “shall not be subject to judicial review”; “not subject to judicial review”; and “no administrative or judicial review.”

84. *Infra* Appendix B.

85. SIEGEL, ACUS SOURCEBOOK, *supra* note 77, at 37.

review bars located in this study suggest that judicial review bars are a feature of regulatory programs that Congress uses intentionally.

In terms of types of actions insulated from review, I sorted the review bars into five broad categories of agency actions: (1) monetary decisions, (2) program implementation decisions, (3) managerial functions, (4) factual determinations, and (5) decisions in areas where courts have traditionally deferred to the executive, such as national security and immigration. These categories are not meant to provide rigid distinctions. These categories occasionally overlap, as review bars often cover actions that could be viewed as falling within multiple categories. The goal of the categorization is to provide a descriptive analysis of the types of actions that laws expressly insulate from judicial review. Table 1 summarizes the numbers of provisions in each category.

TABLE 1: REVIEW BARS BY CATEGORY

Type of Decision	Number of Review Bars	Percent of Total Review Bars
Monetary Decisions	70	37%
Program Implementation	72	38%
Managerial Functions	20	10%
Factual Determinations	7	4%
Traditionally Executive Functions	21	11%
TOTAL	190	100%

As Table 1 illustrates, the vast majority of review bars (eighty-five percent) fall within the first three categories: monetary payments, program implementation, and managerial functions. In general, these involve decisions about how to allocate resources, set priorities, and manage personnel while implementing programs.⁸⁶ I refer to the decisions in these three categories collectively as “internal management decisions.” This Part focuses on internal management decisions since these decisions represent the most common use of review bars. Special considerations that arise in the latter two review bar categories are discussed in Part IV.

86. These include decisions such as Patent Office decisions about whether to institute inter parties review and EPA decisions about the order in which to review pesticide registration applications. *See infra* Section II.C.

One theme that emerges with internal management decisions is that they often do not implicate individual, concrete interests. These decisions do not target individual claims for benefits or set binding obligations on individual entities. Instead, they involve general decisions about how agencies will allocate resources and set priorities. They include procedural choices and guidance about general criteria that agencies will use to execute programs.

Existing reviewability doctrine highlights how internal management review bars typically do not implicate concrete, individual interests. Although outcomes of individual cases can be unpredictable, various doctrines provide that judicial review is not available when the petitioner has not yet suffered a concrete injury.⁸⁷ Some review bars target actions that could be considered nonfinal and thus unreviewable under the APA.⁸⁸ For example, one statute specifies that an EPA decision “shall not be subject to judicial review until the Administrator takes final action” with respect to an emissions plan submitted to the agency.⁸⁹ Other review bars target actions that could be unreviewable due to lack of standing or ripeness. Many review bars also involve discretionary judgments rather than statutory entitlements, and individuals typically do not have concrete legal rights in a favorable exercise of government discretion.⁹⁰ For instance, petitioners have had difficulty establishing standing to challenge decisions about how agencies allocate funds.⁹¹ In general, Professor Ron Levin observed that cases involving “informal, unstructured agency operations that are closely related to the agency’s management of its workload” are likely to be unreviewable under Supreme Court precedent.⁹² Many internal management decisions fall within this category.

87. See *Nat’l Park Hosp. Ass’n v. Dep’t of Interior*, 538 U.S. 803, 808 (2003) (concluding the case was not ripe for judicial review); *Reno v. Cath. Soc. Servs.*, 509 U.S. 43, 66 (1993) (lack of evidence to determine whether legal claims were ripe); *United States v. Richardson*, 418 U.S. 166, 179–80 (1974) (lack of standing).

88. 5 U.S.C. § 704; see *Ass’n of Flight Attendants-CWA v. Huerta*, 785 F.3d 710, 715–18 (D.C. Cir. 2015) (holding that a notice instructing aviation safety inspectors is not subject to judicial review under the APA because it did not have any legal effect).

89. 42 U.S.C. § 7502(a)(1)(B).

90. See Shalini Bhargava Ray, *Immigration Law’s Arbitrariness Problem*, 121 COLUM. L. REV. 2049, 2069 (2021) (noting that no legal rights are at stake when someone stands to benefit from an exercise of government discretion).

91. See Matthew B. Lawrence (2021), *Congress’s Domain: Appropriations, Time, and Chevron*, 70 DUKE L.J. 1057, 1079 (2021) (“Entities who hope for funding but who are denied may not be able to generate standing—unattainable without the ability to point to a specific denial—unless the approvals process is tightly controlled by law.”); see also Levin, *supra* note 1, at 746 & n.286; JAFFE, *supra* note 1, at 336–37; Saferstein, *supra* note 4, at 371.

92. Levin, *supra* note 1, at 745; see also Barkow, *supra* note 70, at 1132–33 (“An agency’s decision whether to provide guidance or rules for its frontline enforcers is also one that is largely left to the agency’s discretion alone, without interference from the courts.”).

Furthermore, it is worth noting that this Article identifies laws where Congress expressly stated that certain categories of agency actions are not subject to judicial review. It therefore focuses on actions precluded from review by statute under Section 701(a)(1) of the APA.⁹³ Actions that are committed to agency discretion by law are also unreviewable under Section 701(a)(2) of the APA.⁹⁴ There is some overlap between the two categories. For example, some statutes that expressly preclude review provide that a matter is committed to an agency's "unreviewable" discretion. Others expressly preclude review over actions typically considered to be committed to agency discretion, such as decisions about how to exercise enforcement discretion.⁹⁵ Therefore, some statutes discussed below represent examples where express language precludes review of actions that may also be viewed as unreviewable under Section 701(a)(2).

On the whole, internal management review bars appear to expressly state that review is unavailable in places where it may be unavailable anyway. Yet the clear language of review bars makes it more predictable that courts will find the actions unreviewable since courts have regularly held that the express language of review bars overcomes the presumption of judicial review.⁹⁶ The following Sections provide a detailed description of the types of internal management decisions covered by review bars.

B. Monetary Decisions

Many review bars relate to decisions about financial resources. The general types of monetary decisions covered by review bars include determinations about Medicare payment rates, financial benefits, incentive payments, fees, and claim settlements. Table 2 summarizes the numbers of provisions in each subcategory of monetary decisions.

93. 5 U.S.C. § 701(a)(1).

94. *Id.* § 701(a)(2).

95. *See infra* Subsection II.C.3.

96. *See supra* note 58 and accompanying text.

TABLE 2: MONETARY PAYMENT REVIEW BARS

Type of Decision	Number of Review Bars	Percent of Total Review Bars
Medicare Payments	25	13%
Financial Benefits	19	10%
Incentive Payments	17	9%
Fees	4	2%
Claim Settlements	5	3%
TOTAL	70	37%

Monetary decisions highlight an area of overlap between Sections 701(a)(1) and 702(a)(2) of the APA. Courts often view decisions about how agencies allocate funds as committed to agency discretion and therefore unreviewable under Section 701(a)(2).⁹⁷ Express review bars, however, preclude review under Section 701(a)(1). Even if monetary decisions may be considered unreviewable as committed to an agency’s discretion, express review bars provide clear statements that these categories of actions are barred from review. This Section analyzes instances where Congress has made such express statements.

1. Medicare Payments

Twenty-five provisions preclude judicial review of determinations about Medicare reimbursement rates.⁹⁸ Medicare provides health insurance for over sixty million Americans.⁹⁹ Medicare Part A provides coverage for inpatient hospital care, nursing facility care, home healthcare, and hospice services.¹⁰⁰ Part B provides optional supplemental coverage for other services, including those provided in physician’s offices or hospital outpatient departments.¹⁰¹ Medicare Part A and Part B (also referred to as “traditional Medicare”) operate on a fee-for-service framework: the federal government pays certain fees for certain services. Most Medicare review bars target decisions

97. *E.g.*, *Lincoln v. Vigil*, 508 U.S. 182, 191–93 (1993); *see also* Lawrence, *supra* note 91, at 1078–79 (noting that judicial review over spending decisions for permanent appropriations is unlikely); Levin, *supra* note 1, at 716, 745.

98. *Infra* Appendix B, Table 1A.

99. *CMS Releases Latest Enrollment Figures for Medicare, Medicaid, and Children’s Health Insurance Program (CHIP)*, CTRS. FOR MEDICARE & MEDICAID SERVS. (Dec. 21, 2021), <https://www.cms.gov/newsroom/news-alert/cms-releases-latest-enrollment-figures-medicare-medicaid-and-childrens-health-insurance-program-chip> [<https://perma.cc/HE4H-T7ZK>].

100. 42 U.S.C. §§ 1395c to 1395i-5.

101. *Id.* §§ 1395j to 1395w-6.

that the Centers for Medicare & Medicaid Services (“CMS”) makes when setting reimbursement rates for various services under traditional Medicare.

For example, 42 U.S.C. § 1395l provides for reimbursement for outpatient services under Medicare Part B. The law instructs CMS to initially set reimbursement rates through a complex formula.¹⁰² Furthermore, the law instructs CMS to annually review and adjust the payment rates, considering factors like changes in technology and new cost data.¹⁰³ The law then creates a judicial review bar that generally precludes review over decisions made in setting reimbursement rates and annually adjusting them.¹⁰⁴

Similar statutes preclude judicial review of payment amount decisions for ambulance services, clinical diagnostic laboratory tests, dialysis services, and drugs and biologicals.¹⁰⁵ Some statutes preclude review not just of reimbursement rates but also of criteria for determining whether services qualify for reimbursement. For example, 42 U.S.C. § 1395x(kkk) provides for payments for “rural emergency hospital services.” It precludes review over decisions about whether a facility qualifies as a rural emergency hospital, whether services meet the requirements, and payment amounts. Similarly, the recently passed Inflation Reduction Act precludes review over determinations about whether drugs are eligible for price negotiation, in addition to determinations about the maximum fair price that Medicare will pay.¹⁰⁶

2. Financial Benefits

Nineteen review bars target decisions about whether to make payments to regulatory beneficiaries.¹⁰⁷ The statutes cover a variety of public programs. Three statutes preclude judicial review of decisions

102. *See id.* § 1395l(t)(2) (detailing requirements for prospective payment systems for hospital outpatient department services). CMS must develop a “classification system,” which groups together medical services that are “comparable clinically and with respect to the use of resources.” *Id.* § 1395l(t)(2)(A)-(B). CMS must also establish “relative payment weights” for services in each classification group based on hospital costs. *Id.* § 1395l(t)(2)(C).

103. *Id.* § 1395l(t)(9)(A).

104. *Id.* § 1395l(t)(12)(A). This statute contains a scrivener’s error. The text refers to paragraph 6, but it is meant to crossreference paragraph 9. In the initial statute, paragraph 6 required annual adjustments. Paragraph 6 became paragraph 9 after later amendments, but Congress did not update the crossreference. Brief for the Respondents at 2, *Am. Hosp. Ass’n v. Becerra*, 142 S. Ct. 1896 (2022) (No. 20-1114), 2021 WL 4937288, at *4 n.1.

105. 42 U.S.C. §§ 1395m(l)(5), 1395m-1(h)(1), 1395rr(b)(12)(H), 1395rr(b)(14)(G), 1395u(o)(7), 1395w-3a(i)(8).

106. Inflation Reduction Act of 2022, Pub. L. No. 117-169, § 1198, 136 Stat. 1818, 1851–54 (codified at 42 U.S.C. § 1320f-7).

107. *Infra* Appendix B, Table 2A.

about whether to provide public benefits to noncitizens.¹⁰⁸ Other statutes bar judicial review over payments to assist with correcting defects in property that was acquired with government assistance.¹⁰⁹ A few statutes preclude judicial review over payments to compensate parties injured when agencies act in response to emergencies. For example, if someone is injured by an action taken in response to an emergency posed by a plant pest or noxious weed, the Secretary of Agriculture can make payments to compensate the party, but the amount of payment is not subject to review.¹¹⁰

3. Incentive Payments

Seventeen statutes preclude review over payments made as rewards or to incentivize certain behaviors.¹¹¹ These statutes include decisions to encourage or discourage certain behaviors. One provision gives the Secretary of State unreviewable discretion to provide reward payments for information that leads to the arrest or conviction of someone involved in international crimes.¹¹² Ten of the seventeen provisions involve Medicare. These statutes provide payments to incentivize activities such as participation in eligible alternative payment models¹¹³ and the use of electronic health record technology.¹¹⁴ Like some statutes in the prior Subsection, these statutes preclude review over both the criteria for determining whether incentive payments are warranted and the payment amounts.¹¹⁵

4. Fees

Beyond payments to regulatory beneficiaries, four statutes preclude judicial review of the fee amounts that agencies charge regulated parties.¹¹⁶ For example, 15 U.S.C. § 77f prohibits judicial review of the SEC's decisions to adjust the rate for fees to register securities.

108. 8 U.S.C. §§ 1611(b)(1)(D), 1613(c)(2)(G), 1621(b)(4).

109. 42 U.S.C. §§ 1479(c), 3374(f); 38 U.S.C. § 3727(b); 12 U.S.C. § 1735b(e).

110. 7 U.S.C. § 7715(e); *see also id.* §§ 8308(b)(3), 8316(b)(3).

111. *Infra* Appendix B, Table 3A.

112. 22 U.S.C. § 2708(j); *see also id.* 18 U.S.C. § 1031(g)(3) (reward payments for information related to a possible fraud prosecution).

113. 42 U.S.C. § 1395l(z)(4).

114. *Id.* §§ 1395w-4(o)(3)(C), 1395w-23(l)(8), 1395w-23(m)(6), 1395ww(n)(4)(A).

115. *E.g., id.* § 1395l(z)(4) (barring administrative or judicial review of criteria to award incentive payments and payment amounts for participation in alternative payment models); *see infra* notes 98–106 and accompanying text, Appendix B, Table 1A.

116. *Infra* Appendix B, Table 4A.

5. Claim Settlements

Finally, five statutes preclude judicial review of decisions involving monetary claims against the U.S. government.¹¹⁷ For instance, decisions by the Foreign Claims Settlement Commission about how much to pay and whether to settle certain claims are not subject to judicial review.¹¹⁸

C. Program Implementation

A second group of statutes deals with how agencies set priorities and exercise discretion while implementing programs. These statutes bar judicial review over decisions about eligibility and compliance guidance, priorities for regulation, enforcement discretion, and procedural choices. A few statutes also require agencies to engage in additional process but then bar review over that additional process. Table 3 summarizes the frequencies of review bars in these categories.

TABLE 3: PROGRAM IMPLEMENTATION REVIEW BARS

Type of Decision	Number of Review Bars	Percent of Total Review Bars
Eligibility and Compliance Guidance	15	8%
Setting Priorities	16	8%
Enforcement Discretion	17	9%
Procedural Choices	17	9%
Additional Process	7	4%
TOTAL	72	38%

1. Eligibility and Compliance Guidance

Fifteen statutes bar judicial review over guidance about eligibility and compliance criteria for regulatory programs, such as which parties are eligible and what information they must submit.¹¹⁹ One provision gives the National Institutes of Health (“NIH”) funding to award grants to accelerate the development of “high need cures,” and it gives the NIH unreviewable discretion to determine whether a

117. *Infra* Appendix B, Table 5A.

118. 22 U.S.C. §§ 1622g, 1641p(b).

119. *Infra* Appendix B, Table 6A.

product is a “high need cure.”¹²⁰ Moreover, 7 U.S.C. § 136a-1 requires certain pesticides to be reregistered with the EPA. To reregister a pesticide, the applicant must submit summaries of studies and data.¹²¹ The statute directs the EPA to issue guidelines summarizing the types of studies and data that have been previously submitted but provides that the guidelines are not subject to judicial review.¹²² In the Medicare context, statutes preclude review of decisions about whether certain services qualify for payments.¹²³ This group of statutes overlaps with many of the Medicare payment provisions discussed above, as many provisions that preclude review over payment amounts also preclude review over the criteria CMS uses to determine payment amounts.¹²⁴

2. Setting Priorities

Sixteen provisions give agencies unreviewable discretion to set priorities.¹²⁵ For example, one statute requires the EPA to publish lists of the order in which it will review applications to reregister certain pesticides, based on its determination of priorities.¹²⁶ Those lists are not subject to judicial review.¹²⁷ Statutes similarly preclude review over schedules for reviewing pesticide residue in food, reviewing hazardous wastes, and promulgating emission standards.¹²⁸ Other provisions allow agencies to set priorities by giving them discretion over implementation of discrete programs. For example, one statute directs the Department of Agriculture to create a roadmap for agricultural research, education, and extension. This roadmap is barred from judicial review.¹²⁹

3. Enforcement Discretion

Seventeen statutes bar judicial review over how agencies allocate resources in exercising their enforcement discretion.¹³⁰ Some statutes give agencies unreviewable discretion over investigative

120. 42 U.S.C. § 287a(e).

121. 7 U.S.C. § 136a-1(e)(1)(B)-(C).

122. *Id.* § 136a-1(e)(4)(B).

123. *See, e.g.*, 42 U.S.C. § 1395ww(d)(13)(I) (whether a geographic area qualifies for a wage increase).

124. *See infra* Appendix B, Tables 1A & 3A.

125. *Infra* Appendix B, Table 7A.

126. 7 U.S.C. § 136a-1(b).

127. *Id.* § 136a-1(c)(3).

128. 21 U.S.C. § 346a(h)(5); 42 U.S.C. §§ 6924(g)(3), 7412(e)(3).

129. 7 U.S.C. § 7614a(b).

130. *Infra* Appendix B, Table 8A.

activities, such as whether to investigate an employer's labor practices¹³¹ or potential antitrust violations.¹³² One statute creates the Chemical Safety and Hazard Investigation Board, an independent safety board, to investigate accidental releases of hazardous materials that cause harm.¹³³ The Board's investigative reports are not subject to review.¹³⁴

Other statutes preclude judicial review over whether to institute enforcement or review proceedings. As discussed previously, one statute bars judicial review of Patent Office decisions about whether to institute inter partes reviews.¹³⁵ In the Medicare context, one law allows an individual who believes there is a discrepancy with a reimbursement statement for a conditional payment to submit documentation of the discrepancy.¹³⁶ Determinations about whether there is a reasonable basis to conclude that there was a discrepancy are not subject to judicial review.

This category represents another example where statutory preclusion overlaps with preclusion under Section 701(a)(2) of the APA. Agency decisions about how often, whether, and against whom to exercise their enforcement discretion are presumptively committed to the agency's discretion.¹³⁷ Therefore, even without express review bars, actions in this category could be viewed as committed to agency discretion. As discussed above, however, express language makes it clearer that the presumption of judicial review does not apply.¹³⁸ Furthermore, courts have construed express review bars to more broadly preclude judicial review than actions committed to agency discretion under Section 701(a)(2), which can still be reviewed for

131. 8 U.S.C. § 1182(n)(2)(G)(vii).

132. See 15 U.S.C. § 4305(f) (no review of action "taken or not taken" in response to joint venture notification, including whether to start an investigation).

133. 42 U.S.C. § 7412(r)(6)(A)-(B).

134. *Id.* § 7412(r)(6)(R).

135. See *supra* notes 5–17 and accompanying text.

136. For an explanation of the conditional payment system, see *Conditional Payment Information*, CTRS. FOR MEDICARE & MEDICAID SERVS., <https://www.cms.gov/Medicare/Coordination-of-Benefits-and-Recovery/Attorney-Services/Conditional-Payment-Information/Conditional-Payment-Information> (last updated Sept. 26, 2023, 4:57 PM) [<https://perma.cc/F74W-GZHB>].

137. *Heckler v. Chaney*, 470 U.S. 821, 837 (1985) (upholding "the presumption that agency decisions not to institute [enforcement] proceedings are unreviewable" against a challenge based on the enforcement proceedings of the Food, Drug, and Cosmetic Act); Barkow, *supra* note 70, at 1130 ("Most aspects of agency enforcement policy generally escape judicial review."); see also Levin, *supra* note 1, at 715–16 (observing that judicial review of enforcement policies is not practical because it involves decisions about competing uses for limited resources).

138. See *supra* note 92 and accompanying text.

claims of procedural defects.¹³⁹ In the Medicare context, in contrast, the D.C. Circuit has regularly held that express review bars preclude review over both the substance of Department of Health and Human Services (“HHS”) decisions and procedural choices.¹⁴⁰

4. Procedural Choices

Seventeen provisions preclude judicial review of choices about procedures used to implement programs.¹⁴¹ Two provisions provide that generally, decisions to use a negotiated rulemaking committee or to use a dispute resolution process are barred from review.¹⁴² Furthermore, 26 U.S.C. § 6330 gives the IRS discretion to determine whether a hearing is required before imposing a tax, because if the IRS determines that any portion of a request for a hearing is frivolous, the IRS can treat that portion of a request as if it were never submitted without further review. Several provisions also preclude judicial review of Medicare programs to collect information.¹⁴³ For example, 42 U.S.C. § 1395w-4(k) directs CMS to establish a system for professionals to report on quality measures and bars judicial review over implementation of the system.

5. Additional Process

Seven provisions require agencies to engage in additional process during regulation but then bar that additional process from judicial review.¹⁴⁴ A few direct agencies to provide specific information when explaining decisions but then insulate that information from judicial review. For example, 15 U.S.C. § 57a requires the FTC to include a statement of basis and purpose in rules about deceptive and

139. Courts have often held, however, that notice-and-comment rulemaking is not required for policy statements about how agencies will exercise their discretion. *See, e.g.,* *Lincoln v. Vigil*, 508 U.S. 182, 196 (1993) (“The notice-and-comment requirements . . . do not apply to ‘interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice.’” (quoting 5 U.S.C. § 553(b))); *Story v. Marsh*, 732 F.2d 1375, 1384 (8th Cir. 1984) (describing how a rule requiring a notice of hearing must be a “substantive rule” and stating “that a substantive rule is one that affects individual rights and obligations”).

140. *See Ascension Borgess Hosp. v. Becerra*, 61 F.4th 999, 1002–03 (D.C. Cir. 2023); *Tex. All. for Home Care Servs. v. Sebelius*, 681 F.3d 402, 408–11 (D.C. Cir. 2012); *Amgen Inc. v. Smith*, 357 F.3d 103, 113 (D.C. Cir. 2004). The Federal Circuit, however, took a different approach in a recent decision, which held that procedural claims were available despite an express review bar. *See Apple Inc. v. Vidal*, 63 F.4th 1, 14 (Fed. Cir. 2023) (holding review bar inapplicable to “the Director’s choice of whether to use notice-and-comment rulemaking to announce instructions for the institution decision”).

141. *Infra* Appendix B, Table 9A.

142. 5 U.S.C. §§ 570, 581(b).

143. *E.g.,* 42 U.S.C. § 1395w-4(k)(7).

144. *Infra* Appendix B, Table 10A.

unfair trade practices but provides that the content and adequacy of the statement are not subject to judicial review. In the environmental context, when the EPA promulgates standards of performance for marine pollution control devices, 33 U.S.C. § 1322(p) requires the Administrator to consult with interested state governors. If a governor submits an objection, the Administrator must provide a written response, but the response is barred from judicial review.

D. Managerial Functions

Another group of review bars involves managerial functions, including decisions related to agency personnel and contracts. Twenty review bars (around ten percent of the total review bars) cover situations where agencies act as employers or participants in commerce.¹⁴⁵ Some preclude judicial review over agency personnel issues. For example, one provision instructs the Department of Homeland Security (“DHS”) to create internal procedures for a human resources management system and provides that the procedures are not subject to judicial review.¹⁴⁶ Other provisions prohibit judicial review of negotiations with collective bargaining organizations for employees.¹⁴⁷ One statute, 5 U.S.C. § 9701(e), requires DHS and the Office of Personnel Management to collaborate with employee representatives when creating a human resources management system. If at some point the agencies determine further consultation is unlikely to result in agreement, they can implement the system in their “unreviewable discretion.”¹⁴⁸

Other provisions insulate agency decisions about who to hire from judicial review. Under 38 U.S.C. § 4315(c), agency heads must prescribe procedures for ensuring that employees receive reemployment rights after they have been called away for uniformed service. If an agency official determines that reemployment is impossible or unreasonable, however, that determination is barred from judicial review.

Another group of statutes precludes judicial review over decisions to enter into contracts. For example, 42 U.S.C. § 1395w-3(b) creates a competitive acquisition program for certain healthcare services and bars review over decisions about whether to award

145. *Infra* Appendix B, Table 11A. Medicare payment decisions could also be viewed as situations where CMS acts as a participant in commerce, since CMS ultimately makes payments toward medical services purchased in commerce. *See supra* Subsection II.B.1.

146. 5 U.S.C. § 9701(e)(2).

147. *Id.* §§ 9902(e)(1), 9701(e)(1)(C)(ii); 38 U.S.C. § 7403(h)(4)(D).

148. 5 U.S.C. § 9701(e)(1)(C)(ii).

contracts.¹⁴⁹ Finally, a few statutes preclude judicial review over decisions either to delegate authority or to revoke a delegation. For example, one statute allows the Secretary of the U.S. Department of Housing and Urban Development (“HUD”) to delegate authority to mortgagees to insure mortgages involving certain properties. The Secretary may cancel a delegation if a mortgagee violates established requirements or if the Secretary determines other good cause exists. Any decision to cancel the delegation is barred from judicial review.¹⁵⁰

* * *

The above empirical study provides information about places where review bars exist throughout the administrative state. The impact such review bars have in practice, however, is unclear. On the one hand, review bars may not meaningfully change agency behavior since most agency actions are never actually reviewed by courts.¹⁵¹ On the other hand, express language removes—or at least significantly reduces—the *threat* of judicial review, given that courts have regularly held that review bars overcome the presumption of judicial review and thus clearly foreclose review for arbitrariness and procedural deficiencies.¹⁵² Removing the threat of judicial review may affect how agencies operate. A recent study by Professor Jed Stiglitz found that actors are more likely to remain faithful to governing standards and to provide more detailed explanations when the actors are told that their decisions may be subject to review.¹⁵³ Therefore, the phenomenon of judicial review bars raises questions about whether other tools exist to safeguard against arbitrariness.¹⁵⁴ After all, judicial review is not the only tool available to monitor agencies. Indeed, Professor Stiglitz’s study found that simply requiring actors to explain their decisions can increase fidelity to governing standards, even where the actor does not

149. This program has since been suspended. Medicare Program; Payment Policies Under the Physician Fee Schedule and Other Revisions to Part B for CY 2009; E-Prescribing Exemption for Computer-Generated Facsimile Transmissions; and Payment for Certain Durable Medical Equipment, Prosthetics, Orthotics, and Supplies (DMEPOS), 73 Fed. Reg. 69726, 69753 (Nov. 19, 2008) (announcing postponement of program due to “contractual issues with the successful bidders”).

150. 12 U.S.C. § 1715z-21(d).

151. See *supra* note 69 and accompanying text.

152. See *supra* notes 55–60 and accompanying text.

153. STIGLITZ, *supra* note 38, at 162–64, 169–77.

154. See Walker, *supra* note 45, at 1639–40 (“If judicial review provides no safeguard against potential abuses with respect to these regulatory activities, we must turn to other mechanisms to protect liberty and the rule of law.”); Saferstein, *supra* note 4, at 393 (observing that withholding judicial review may be more justified where other oversight tools exist to provide a check against arbitrariness).

face any sanction for reaching an unreasonable decision.¹⁵⁵ The availability of alternative oversight tools for actions barred from judicial review is thus an important consideration to assess the normative desirability of review bars. This Article turns to such alternative oversight tools next.

III. ALTERNATIVE OVERSIGHT TOOLS

Judicial review is not the only structure available to oversee agencies. Other oversight tools, such as political oversight, internal supervision, and public participation, are prevalent throughout the administrative state. Like judicial review, these structures can serve to monitor agencies, guard against arbitrariness, require explanations for decisions, and allow interested parties to present their views.¹⁵⁶ Even when judicial review is available, these types of alternative oversight tools are often also available. Given that many actions that are theoretically subject to judicial review are often not in fact reviewed, alternative oversight tools play a crucial role in the administrative state generally.¹⁵⁷ When an action is barred from judicial review, alternative oversight tools may serve an even heightened purpose. As discussed above, lack of judicial review could increase potential for arbitrariness.¹⁵⁸ Yet if other tools beyond judicial review exist to guard against arbitrariness, policy concerns about the lack of judicial review are reduced. Indeed, if other oversight tools are available, such oversight tools may support the use of review bars to facilitate more efficient regulation.

To explore the availability of alternative oversight tools for actions covered by review bars, I reviewed the entirety of statutes that contain judicial review bars. Strikingly, a pattern emerged with respect to internal management decisions, where nearly two-thirds of statutes that bar judicial review also expressly create at least one type of alternative oversight structure. Table 4 summarizes these results.¹⁵⁹ In practice, the availability of alternative oversight tools is likely even higher because other statutes beyond those containing review bars could create oversight structures. Agencies can also voluntarily choose to implement some of these procedures.¹⁶⁰ Nonetheless, the prevalence

155. STIGLITZ, *supra* note 38, at 157, 161–62, 169–70, 175–76.

156. *See supra* Section I.A.

157. *See supra* note 69 and accompanying text.

158. *See supra* notes 152–154 and accompanying text.

159. *See also infra* Appendix B, Tables 1A–11A.

160. *See* Elizabeth Magill, *Agency Self-Regulation*, 77 GEO. WASH. L. REV. 859, 866–69 (2009) (describing the various ways agencies “self-regulate”).

of alternative oversight structures within review bar provisions reveals a pattern in types of tools Congress regularly employs in monitoring agency action.

TABLE 4: INTERNAL MANAGEMENT REVIEW BARS WITH ALTERNATIVE OVERSIGHT TOOLS

Type of Decision	Review Bars with Alternative Oversight Structure	Percent of Total in Review Bar Category
Monetary Decisions	44	63%
Medicare Payments	13	52%
Financial Benefits	13	68%
Incentive Payments	13	76%
Fees	3	75%
Claim Settlements	2	40%
Program Implementation	47	65%
Eligibility and Compliance Guidance	8	53%
Setting Priorities	13	81%
Enforcement Discretion	12	71%
Choice of Procedures	9	53%
Additional Process	5	71%
Managerial Functions	14	70%
TOTAL	105	65%

The alternative oversight tools required by statute include structures for political oversight, internal supervision, and public participation. The most common alternative oversight tool is a requirement for agencies to publish their decisions. Others include requirements to send reports to Congress, to create binding internal procedures, to provide for review within the agency, to consult with other agencies, to follow notice-and-comment procedures, to consult with stakeholders, and to provide opportunities for regulated entities to be involved or obtain notice of a decision. Table 5 summarizes the distinct types of alternative oversight tools included in review bars covering internal management decisions.

TABLE 5: ALTERNATIVE OVERSIGHT FOR INTERNAL MANAGEMENT DECISIONS

Type of Alternative Oversight Structure	Review Bars with Alternative Oversight Structure	Percent of Total Internal Management Review Bars ¹⁶¹
Reports to Congress	22	14%
Procedural Rules	25	15%
Administrative Review	8	5%
Interagency Consultation	19	12%
Notice-and-Comment Procedures	14	9%
Consultation with Stakeholders	24	15%
Regulated Entity Involvement	15	9%
Publication Requirements	49	30%

This Part describes the patterns observed in internal management review bars and theorizes how the alternative oversight tools can serve similar purposes to judicial review. In addition to describing patterns in review bar statutes themselves, I describe two illustrative examples to take a broader look at the overall regulatory programs: the patent inter partes review system and Medicare reimbursements for outpatient services.¹⁶² I also discuss the general availability of appropriations oversight for review bars aimed at government spending programs.

A. Political Oversight

Congress, the President, and White House officials have a variety of tools for overseeing agencies.¹⁶³ Congress monitors agencies

161. Although sixty-five percent of internal management review bars contain at least one alternative oversight tool, *see supra* Table 4, these percentages add up to more than sixty-five percent because some review bars contain multiple alternative oversight structures. Table 5 shows what percentage of total internal management review bars contain each type of alternative oversight tool.

162. These examples have been involved in Supreme Court cases recently. *See* *Cuozzo Speed Techs., LLC v. Lee*, 579 U.S. 261, 268–72 (2016) (holding that review is barred when the relevant statute reads, “determination by the [Patent Office] whether to institute an inter partes review under this section shall be *final and nonappealable*” (alteration in original)); *Am. Hosp. Ass’n v. Becerra*, 142 S. Ct. 1896, 1902 (2022) (holding that the Medicare statute “does not preclude judicial review of HHS’s reimbursement rates”).

163. Beermann, *supra* note 28, at 71–121 (discussing formal congressional involvement in the execution of the laws); Kagan, *supra* note 28, at 2285–99 (describing techniques of presidential

through reporting requirements, investigations, and oversight hearings.¹⁶⁴ The President can issue directives to agencies and influence policymaking processes.¹⁶⁵ White House officials in the Office of Information and Regulatory Affairs (“OIRA”) within the Office of Management and Budget (“OMB”) also oversee agencies and often review significant regulations.¹⁶⁶ These officials provide guidance for agency decisionmaking processes across the administrative state, such as how to allow for public participation and how to conduct cost-benefit analyses.¹⁶⁷ Furthermore, Congress and the President influence agency budgets and play a role in appointing executive officers.¹⁶⁸

Political oversight can serve similar functions to judicial review by allowing Congress, the President, and White House officials to monitor agencies and by guarding against arbitrary exercises of power.¹⁶⁹ It can also require agencies to explain their decisions.¹⁷⁰

administration in the Clinton years); Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 55 (2006) (discussing OMB, OIRA, and the Council on Competitiveness as White House tools of agency oversight).

164. See Beermann, *supra* note 28, at 66–67 (“Congress requires thousands of periodic reports from agencies, holds numerous hearings and sends the Government Accountability Office (GAO) out looking for problems even in the absence of a pulled alarm.” (footnote omitted)); JOEL D. ABERBACH, KEEPING A WATCHFUL EYE: THE POLITICS OF CONGRESSIONAL OVERSIGHT 14, 34–37 (1990).

165. See Kagan, *supra* note 28, at 2285–99; Anya Bernstein & Cristina Rodríguez, *The Accountable Bureaucrat*, 132 YALE L.J. 1600, 1614, 1619–22 (2023) (discussing White House direct collaboration with and control over federal agencies).

166. See Bressman & Vandenbergh, *supra* note 163, at 57–59; Bernstein & Rodríguez, *supra* note 165, at 1618–22 (discussing OMB and OIRA’s impact on the rulemaking process). Oversight by the President, OIRA, and OMB can also promote internal control because it can force agencies to generate new internal processes. See *infra* Section III.B; Metzger & Stack, *supra* note 26, at 1252–56.

167. See, e.g., Exec. Order No. 14,094, 88 Fed. Reg. 21879 (Apr. 6, 2023) (proposing guidance to modernize regulatory review); OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, DRAFT GUIDANCE IMPLEMENTING SECTION 2(E) OF THE EXECUTIVE ORDER OF APRIL 6, 2023 (MODERNIZING REGULATORY REVIEW) 2 (2023), <https://www.whitehouse.gov/wp-content/uploads/2023/04/ModernizingEOSection2eDraftGuidance.pdf> [<https://perma.cc/F776-PH7B>] (“OIRA welcomes comments on all aspects of this draft guidance, as well as suggestions to achieve the goals of the Modernizing E.O [12866] . . . OIRA also anticipates further opportunities for public participation designed to promote equitable and meaningful participation by a range of interested or affected parties . . .”).

168. See Gillian E. Metzger, *Taking Appropriations Seriously*, 121 COLUM. L. REV. 1075, 1090–92 (2021) (describing the congressional budget process and OMB’s impact on agency budgets); Eloise Pasachoff, *The President’s Budget as a Source of Agency Policy Control*, 125 YALE L.J. 2182, 2207–42 (2016) (describing OMB’s control of agency policymaking through the budget process).

169. See Metzger, *supra* note 71, at 1993; Laura E. Dolbow, *Agency Adherence to Legislative History*, 70 ADMIN. L. REV. 569, 604–08, 613–15 (2018) (discussing the Appropriations Committee’s oversight of the FDA).

170. See Kagan, *supra* note 28, at 2331–32; Pasachoff, *supra* note 168, at 2250 (describing how agencies are required to explain their budget justification materials to Congress and to publish them online).

Furthermore, congressional oversight allows interested parties to share their views by contacting representatives and even participating in oversight hearings.¹⁷¹ More indirectly, scholars have suggested that oversight by Congress and the President may increase responsiveness to the public because those actors are elected and, therefore, democratically accountable.¹⁷²

Two structures for political oversight regularly appear alongside internal management review bars: requirements to send reports to Congress and opportunities for appropriations oversight.

1. Reports to Congress

Nineteen internal management review bars expressly require agencies to send information to Congress.¹⁷³ For example, when the EPA sets a schedule for reviewing hazardous wastes, the statute requires it to submit the schedule to Congress.¹⁷⁴ Similarly, the Chemical Hazard and Safety Board, whose reports are not subject to judicial review, must submit an annual report to Congress and the President about its investigations, recommendations, and priorities.¹⁷⁵ Beyond these statutes, other statutes may require agencies to send reports to Congress. For example, a provision of the America Invents Act separate from the review bar requires the Patent Office to submit a report to Congress about implementation of the program.¹⁷⁶ Like judicial review, reporting requirements can serve to monitor agencies and to require explanations for decisions.¹⁷⁷ Similarly, like the threat of

171. See Beermann, *supra* note 28, at 125 (noting that hearings can include testimony from members of the public and nongovernmental experts).

172. See Kagan, *supra* note 28, at 2332–36 (“[P]residential leadership establishes an electoral link between the public and the bureaucracy, increasing the latter’s responsiveness to the former.”); Beermann, *supra* note 28, at 142–43. *But see* Edward Rubin, *The Myth of Accountability and the Anti-administrative Impulse*, 103 MICH. L. REV. 2073, 2075–83 (2005) (expressing skepticism of whether elections reflect public preferences).

173. *Infra* Appendix B, Tables 1A–11A.

174. See 42 U.S.C. § 6924(g)(1).

175. See *id.* § 7412(r)(6)(C)(ii), (S). While this statute requires a report to Congress and the President, others required reports only to Congress. *E.g.*, 15 U.S.C. § 2625(m); 22 U.S.C. § 2708(g). Two statutes reference other types of congressional oversight. One provision requires the Treasury Department to make certain information available to Congress even if it decides not to publicly disclose the information. 12 U.S.C. § 1464(v)(3). Another provision states that Congress already reviewed a specific environmental impact statement that it barred from review. 16 U.S.C. § 460vv-4(b)(1).

176. Leahy-Smith America Invents Act, Pub. L. No. 112–29, § 26, 125 Stat. 284, 338 (2011).

177. See Beermann, *supra* note 28, at 106 (discussing how “reporting requirements enable the informal supervision of agencies”); Jonathan G. Pray, Comment, *Congressional Reporting Requirements: Testing the Limits of the Oversight Power*, 76 U. COLO. L. REV. 297, 301 (2005) (“In [some] cases, the reports are themselves the subject of hearings held by a committee to further analyze the content of the report.”).

judicial review, reporting requirements provide a constant reminder that Congress is watching agencies.¹⁷⁸

2. Appropriations Oversight

The appropriations process constrains government spending programs.¹⁷⁹ Although appropriations procedures did not expressly appear in review bar statutes, I include them here because many review bars involve spending programs and the appropriations process is an area where Congress and the President have heightened oversight roles. Sixty-six review bars target monetary decisions in government spending programs, including twenty-five review bars about Medicare reimbursements, nineteen about financial benefits, seventeen about incentive payments, and five about claim payments.¹⁸⁰ Other review bars target eligibility criteria for payments made under spending programs and spending program implementation.¹⁸¹ Accordingly, many actions barred from review are subject to oversight by the annual appropriations process.¹⁸² For example, one provision gives the NIH unreviewable discretion to determine whether a product is eligible for a “high need cure” grant, but grant payments are limited by the total funds appropriated to the Cures Acceleration Network.¹⁸³

The annual appropriations process allows Congress, the President, and White House officials to oversee agencies in ways that can serve similar functions to judicial review. First, the appropriations process allows Congress and the White House to monitor and influence agency actions. As a baseline, agencies can only spend funds that Congress authorizes.¹⁸⁴ Appropriations laws dictate how much agencies

178. See Beermann, *supra* note 28, at 106 (“Reporting requirements are also a constant reminder that Congress is interested in agency activity and that all such activity takes place under Congress’s watchful eye.”).

179. Pasachoff, *supra* note 168, at 2204–06.

180. See *supra* Table 2.

181. See *supra* Section II.C.1.

182. Medicare involves a mix of mandatory and discretionary government spending. Mandatory spending is not subject to as much oversight during the annual appropriations process, but it is still subject to some oversight and approval each year. See Metzger, *supra* note 168, at 1094 (describing failures to appropriate full amount of mandatory spending); Pasachoff, *supra* note 168, at 2222–23 (describing oversight of mandatory spending in budget preparation process).

183. 42 U.S.C. § 287a(e)(7), (g); see also 7 U.S.C. § 8316 (authorizing transfer of funds for combatting livestock diseases); 45 U.S.C. § 361 (authorizing appropriations for railroad unemployment insurance fund); 42 U.S.C. § 1395yy(h)(11)-(12) (transferring fixed sums for fiscal years 2023–25).

184. U.S. CONST. art. I, § 9, cl. 7; see also Kevin M. Stack & Michael P. Vandenberg, *Oversight Riders*, 97 NOTRE DAME L. REV. 127, 165–67 (2021) (describing how the Antideficiency Act prohibits executive officials from spending beyond money Congress appropriates). Agencies also need authorization to collect fees. Metzger, *supra* note 168, at 1088; see *supra* Table 4.

can spend, for what purposes, and subject to what conditions.¹⁸⁵ Furthermore, appropriation committee reports strongly influence agencies, since agencies face the threat of lower funding in the future if they do not comply.¹⁸⁶ Executive officials also monitor spending programs when agencies submit their annual budget requests to OMB within the White House.¹⁸⁷ OMB reviews requests and compiles a budget proposal that the President then submits to Congress.¹⁸⁸ Finally, after budgets are passed, the President and OMB oversee the execution of budgets by apportioning appropriated funds and monitoring program implementation.¹⁸⁹

Second, the appropriation process can require agencies to justify their spending decisions during the budget preparation process. Each year, executive agencies must submit budget justifications with their budget requests.¹⁹⁰ The President's proposed budget to Congress also includes justifications.¹⁹¹ At this stage, OMB and agency officials typically provide further explanations to Congress through oral testimony and written justifications.¹⁹² Budget justifications are also typically publicly available, which promotes transparency.¹⁹³

185. See Zachary S. Price, *Funding Restrictions and Separation of Powers*, 71 VAND. L. REV. 357, 367 (2018) (“Today, Congress’s power of the purse remains a vital mechanism of accountability for the executive branch.”); Lawrence, *supra* note 91, at 1066–68. Some appropriations make funds available annually, while others make funds permanently available. While annual appropriations involve more congressional oversight, the initial appropriation involves significant oversight for both types of appropriations. Lawrence, *supra* note 91, at 1072–78.

186. Lawrence, *supra* note 91, at 1074–75; see also, e.g., Dolbow, *supra* note 169, at 588–601 (concluding that the FDA generally obeys directives contained in appropriations committee reports).

187. Pasachoff, *supra* note 168, at 2209–13.

188. *Id.* at 2213–23; 31 U.S.C. § 1105; MICHELLE D. CHRISTENSEN, CONG. RSCH. SERV., R42633, THE EXECUTIVE BUDGET PROCESS: AN OVERVIEW 3 (2012).

189. Pasachoff, *supra* note 168, at 2227–37; Metzger, *supra* note 168, at 1091, 1096–1100. Once OMB has apportioned funds, however, agencies retain discretion in many decisions about implementing their appropriations. See Lawrence, *supra* note 91, at 1070–71.

190. Pasachoff, *supra* note 168, at 2209–13; OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, OMB CIRCULAR NO. A-11, PREPARATION, SUBMISSION, AND EXECUTION OF THE BUDGET § 51 (2021).

191. Lawrence, *supra* note 91, at 1074–75 (noting that agencies are expected to adhere to budget justifications).

192. CHRISTENSEN, *supra* note 188, at 4–5.

193. OFF. OF MGMT & BUDGET, *supra* note 190, § 22.6(c) (requiring agencies to post budget request materials on websites); see also, e.g., DEP’T OF HEALTH & HUM. SERVS., FISCAL YEAR 2023 BUDGET IN BRIEF (2022), <https://www.hhs.gov/sites/default/files/fy-2023-budget-in-brief.pdf> [<https://perma.cc/ASL3-J7MD>] (containing HHS’s 2023 budget proposal and justifications). *But see* Pasachoff, *supra* note 168, at 2251–53 (describing lack of transparency in interactions between OMB and agencies).

B. Internal Supervision

Various internal agency processes, also known as “internal administrative law,” operate to oversee agencies. Internal administrative law refers to measures aimed primarily at agency personnel to control operations.¹⁹⁴ Internal supervision can include decisionmaking processes, guidance and enforcement policies, and internal review systems.¹⁹⁵ It can also include informal practices and coordination between agencies.¹⁹⁶

Internal administrative law serves similar oversight functions to judicial review. Monitoring within an agency can ensure that agencies comply with governing statutes and do not exercise power arbitrarily.¹⁹⁷ Agency supervision can also require agencies to explain decisions and promote transparency.¹⁹⁸ Furthermore, internal procedures can promote responsiveness to interested parties’ views by providing mechanisms for public participation.¹⁹⁹

Three internal control structures regularly appear in review bar statutes: requirements to create decisionmaking processes, requirements for internal review, and requirements to consult with other agencies.

1. Procedural Rules

Twenty-two review bar statutes require agencies to issue regulations to establish a decisionmaking process or to identify the criteria to be used in making decisions, even though individual decisions are barred from judicial review.²⁰⁰ For example, one review bar addresses Medicare reimbursements for costs incurred when

194. Metzger & Stack, *supra* note 26, at 1254.

195. *Id.* at 1252–54.

196. *Id.* at 1254–55; *see also* Bernstein & Rodríguez, *supra* note 165, at 1639–43 (describing the complexities and variations within internal agency processes).

197. Metzger & Stack, *supra* note 26, at 1264–66; Rubin, *supra* note 172, at 2075.

198. Metzger, *supra* note 71, at 1893; Bernstein & Rodríguez, *supra* note 165, at 1639, 1649 (reporting that internal decisionmaking structures encouraged justification, including for “economic feasibility, statutory authorization, normative attractiveness, and technical ease”).

199. Metzger & Stack, *supra* note 26, at 1265–66 (noting that internal administrative law “allows quick intervention and rectification when an agency actor goes astray”); Metzger, *supra* note 71, at 1892–93 (“Internal supervision and oversight . . . allow the public to be informed about administrative actions and provide a mechanism for public participation in administration.”); Bernstein & Rodríguez, *supra* note 165, at 1639 (reporting that “[p]ublic acceptance, including as expressed through litigation risk” factored into agency decisionmaking processes). Requirements to follow procedures to facilitate public participation are discussed in more detail below. *See infra* Section III.C.

200. *Infra* Appendix B, Tables 1A–11A (identifying twenty-two statutes as requiring “procedures” as “Alternative Oversight Tools”).

hospitals train residents. If a hospital closes, CMS can redistribute the hospital's residency slots to other hospitals.²⁰¹ The statute bars judicial review over decisions about the redistribution of residency slots, but it requires CMS to, "by regulation, establish a process" for redistributing slots.²⁰² Moreover, a provision governing value-based Medicare incentive payments requires CMS to promulgate regulations to implement the program, including regulations for the selection of performance measures and the methodology to determine payment amounts.²⁰³ Similarly, one statute bars judicial review over HUD decisions about making payments to assist with defects in mortgaged homes, but it requires the agency to establish regulations prescribing "the terms and conditions under which expenditures and payments may be made."²⁰⁴ Furthermore, beyond express directions to follow procedures, agencies may voluntarily choose to create additional processes.²⁰⁵ For example, the Patent Office issued an advance notice of proposed rulemaking to consider promulgating rules the Patent Office will use to exercise discretion to institute inter partes review, even though the statute does not require the Patent Office to promulgate such a rule.²⁰⁶

Like judicial review, procedural rules can guard against arbitrariness, promote transparency, and allow others to monitor agencies. By constraining agency discretion, internal processes can prevent arbitrary exercises of power as well as promote consistency and procedural fairness.²⁰⁷ Moreover, because procedural rules generally must be published, they promote transparency and put parties on notice

201. 42 U.S.C. § 1395ww(h)(4)(H)(vi).

202. *Id.* § 1395ww(h)(4)(H)(vi)(I), (h)(7)(E); *cf.* 33 U.S.C. § 3611(b)(1) (requiring "post-storm assessment" model to be developed by regulation). These procedural rules can sometimes be subject to judicial review, even where a review bar precludes judicial review of individual final determinations. *See infra* note 209 and accompanying text.

203. 42 U.S.C. § 1395ww(o)(1), (12); *see also id.* § 1395ww(d)(10)(D) (requiring agency to publish guidelines the Board will use to make determinations).

204. 12 U.S.C. § 1735b(c).

205. Emily S. Bremer & Sharon B. Jacobs, *Agency Innovation in Vermont Yankee's White Space*, 32 J. LAND USE & ENV'T L. 523, 525–27 (2017).

206. Changes Under Consideration to Discretionary Institution Practices, Petition Word-Count Limits, and Settlement Practices for America Invents Act Trial Proceedings Before the Patent Trial and Appeal Board, 88 Fed. Reg. 24503 (proposed Apr. 21, 2023) (to be codified at 37 C.F.R. pt. 42). The EPA has also implemented procedures beyond what statutes require. For instance, the EPA held listening sessions with stakeholders when it implemented the proposed Clean Power Plan rule, even though the APA does not require such listening sessions. Bremer & Jacobs, *supra* note 205, at 527.

207. *See Metzger & Stack, supra* note 26, at 1264–66 (describing how internal administrative law aids external legal accountability); Metzger, *supra* note 71, at 1840, 1894–97; Ray, *supra* note 90, at 2098.

about how agencies will exercise discretion.²⁰⁸ Binding internal procedures can also put parties on notice about what they must do to pursue their individual interests, such as obtaining an incentive payment. Under the *Accardi* principle, binding rules can sometimes be judicially enforceable if an agency fails to follow those rules.²⁰⁹ Furthermore, internal processes can allow Congress, the President, and other executive officials to monitor regulatory programs.²¹⁰

2. Administrative Review

Eight review bars include structures for administrative review systems.²¹¹ Five statutes create procedures for review within an agency.²¹² One statute also provides for appeal to the Foreign Service Labor Relations Board, which administers a labor-management relations program for foreign service employees.²¹³ Two provisions about Medicare competitive acquisition programs provide for a process for an ombudsman to review complaints.²¹⁴

Similar to judicial review, administrative review can operate as a form of quality control of decisions.²¹⁵ Internal review can also help to ensure fairness and consistency.²¹⁶ When appellate bodies designate decisions as precedential, precedential opinions can encourage consistency.²¹⁷ Furthermore, internal review can provide an additional

208. See 5 U.S.C. § 552(a)(1)(C) (requiring agencies to publish “rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations” in the Federal Register); Metzger & Stack, *supra* note 26, at 1276–77 (discussing the APA and its goals).

209. Despite some confusion in the doctrine, a self-regulatory measure is typically considered binding if the agency promulgates a legislative rule that constrains its discretion. Magill, *supra* note 160, at 876–82 (“The *Accardi* doctrine, in other words, can transform unreviewable action into reviewable action.”).

210. Metzger, *supra* note 71, at 1892–93; Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1751–54 (2007).

211. *Infra* Appendix B, Tables 1A–11A.

212. 42 U.S.C. §§ 1320a-1(f), 1395w-4(m)(5)(D), 1395w-4(q)(13)(A); 12 U.S.C. § 1821(d)(6); 7 U.S.C. § 2025(k)(4)(C).

213. 22 U.S.C. § 4114(b).

214. 42 U.S.C. §§ 1395w-3(c) to (f), -3b(g). Notably, however, many Medicare review bars relating to payment decisions bar both administrative and judicial review. See, e.g., *id.* § 1320f-7.

215. Walker & Turnbull, *supra* note 68, at 1243–44. *But see* David Ames, Cassandra Handan-Nader, Daniel E. Ho & David Marcus, *Due Process and Mass Adjudication: Crisis and Reform*, 72 STAN. L. REV. 1, 48–76 (2020) (raising doubts about effectiveness of internal review at the Board of Veterans’ Appeals as a quality control tool).

216. Walker & Turnbull, *supra* note 68, at 1243.

217. See CHRISTOPHER J. WALKER & MATTHEW LEE WIENER, ADMIN. CONF. OF THE U.S., AGENCY APPELLATE SYSTEMS 37–38 (2020), <https://www.acus.gov/sites/default/files/documents/Walker%20Wiener%20Agency%20Appellate%20Systems%20Report%20-%202012.14.2020.pdf> [https://perma.cc/U8P5-DFRT] (“[E]ven for those that do not seek to make policy via adjudication,

avenue to allow individual parties to share their views before more agency actors.²¹⁸

3. Interagency Consultation

Eighteen review bars require agencies to consult with another agency.²¹⁹ For example, one statute gives the Attorney General unreviewable discretion to make certain federal public benefits available to noncitizens “after consultation with appropriate Federal agencies and departments.”²²⁰ Similarly, one provision gives HHS unreviewable discretion to determine, “in consultation with the Secretary of Education,” standardized test scores needed to show English competence for immigrants who seek to enter the country as healthcare workers.²²¹ Furthermore, the Chemical Safety and Hazard Investigation Board, whose reports are unreviewable, is instructed to coordinate its activities with and issue periodic reports to other agencies.²²² Similar to judicial review, consultation with other agencies can serve to monitor actions, require explanations, and improve decision quality.²²³ Negotiations with other agencies also require agencies to justify their decisions to a different audience and to consider views of the other agency.²²⁴

C. Public Participation

Administrative law creates a variety of structures to allow the public to participate, including consultation with stakeholders, advisory committees, and notice-and-comment procedures.²²⁵ Transparency requirements also require agencies to publicly share information. Public participation can serve similar functions to judicial

the use of precedential opinions has the potential to bring greater consistency and uniformity to their administrative adjudication programs . . .”).

218. Walker, *supra* note 30, at 165–66.

219. *Infra* Appendix B, Tables 1A–11A.

220. 8 U.S.C. §§ 1611(b)(1)(D), 1613(c)(2)(G), 1621(b)(4); *see also* 22 U.S.C. § 2708 (requiring the Secretary of State to consult with the Attorney General before making reward payments).

221. 8 U.S.C. § 1182(a)(5)(C)(ii).

222. 42 U.S.C. § 7412(r)(6)(C)-(E).

223. Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1184–89 (2012); *see also* Bijal Shah, *Congress’s Agency Coordination*, 103 MINN. L. REV. 1961, 2001 (2019).

224. *See* Bernstein & Rodríguez, *supra* note 165, at 1649 (“[T]he iterative, multinodal negotiations among administrators—working in different modalities, positioned at many hierarchical levels, engaged in ongoing deliberation with one another and the public, responding to the world around them—[] create the conditions for accountability.”).

225. *Id.* at 1656, 1671.

review by requiring agencies to explain their decisions, guarding against arbitrariness, and providing an avenue for interested parties to present their views.²²⁶ Interactions with the public can increase decision quality by providing information to agencies and allowing agencies to assess the real-world impact of regulations.²²⁷ Public involvement can also promote the legitimacy and transparency of agency actions.²²⁸

Three public participation structures regularly appear in review bar statutes: requirements that agencies follow notice-and-comment procedures, consult with stakeholders, and interact with regulated entities. Furthermore, many review bars include publication requirements.

1. Notice-and-Comment Procedures

The APA generally requires rulemaking to follow notice-and-comment procedures, though it exempts interpretive rules, procedural rules, and rules involving matters such as agency management, benefits, personnel, contracts, and foreign affairs.²²⁹ Many review bars cover actions that fall within the APA's notice-and-comment exemptions, such as those that cover decisions about benefits.²³⁰ Some of these review bar statutes, however, expressly require agencies to follow notice-and-comment procedures. Without this express requirement, these decisions would be exempt from notice-and-comment requirements under the APA. The addition of express requirements to follow notice-and-comment thus suggests that Congress occasionally requires additional opportunities for public comment when actions are insulated from judicial review.

One significant example of this appears in the Medicare context. Medicare laws generally require notice-and-comment procedures when CMS makes decisions about reimbursement rates. For example, 42 U.S.C. § 1395l(t) does not expressly require CMS to use notice-and-comment procedures to set or adjust reimbursement rates for outpatient services. Yet 42 U.S.C. § 1395hh(a)(2) provides that CMS

226. Sant'Ambrogio & Staszewski, *supra* note 75, at 802–04; see Bernstein & Rodríguez, *supra* note 165, at 1606–07, 1632 (describing agency action as characterized by “broad participation, multifarious input, and ongoing reason-giving”).

227. Bernstein & Rodríguez, *supra* note 165, at 1650–51; Sant'Ambrogio & Staszewski, *supra* note 75, at 796, 802–03.

228. Cary Coglianese, Heather Kilmartin & Evan Mendelson, *Transparency and Public Participation in the Federal Rulemaking Process: Recommendations for the New Administration*, 77 GEO. WASH. L. REV. 924, 927 (2009).

229. 5 U.S.C. § 553.

230. See *supra* Section II.B (discussing review in the context of monetary decisions).

must follow notice-and-comment procedures if an action involves a Medicare “rule, requirement, or other statement of policy . . . that establishes or changes a substantive legal standard governing the scope of benefits, the payment for services, or the eligibility of individuals, entities or organizations to furnish or receive services or benefits.”²³¹ Annual adjustments to reimbursement rates represent a “legal standard governing . . . the payment for services.”²³² Accordingly, CMS follows notice-and-comment procedures when it makes annual adjustments to reimbursement rates for outpatient services.²³³ Therefore, although the APA exempts Medicare reimbursement rate decisions from notice-and-comment requirements, a separate statute directs CMS to use notice-and-comment procedures.

Beyond the general Medicare notice-and-comment requirement, fourteen review bar statutes expressly require notice-and-comment procedures.²³⁴ For example, one provision requires CMS to use notice-and-comment to make a list of quality measures for incentive payments, though the identification of quality measures is barred from judicial review.²³⁵ Similarly, one provision requires the EPA to provide an opportunity for comment on its schedule for promulgating emissions standards, though the schedule itself is barred from judicial review.²³⁶

Notice-and-comment procedures can serve similar purposes to judicial review by requiring agencies to explain their decisions and providing an avenue for interested parties to present their views.²³⁷ Trade associations, industry groups, and other stakeholders often

231. § 1395hh requires a sixty-day comment period, while the APA requires a thirty-day period. 42 U.S.C. § 1395hh(b)(1); 5 U.S.C. § 553(d).

232. See 42 U.S.C. § 1395hh(a)(2). The government took the position that it must promulgate annual adjustments through notice-and-comment. Brief for the Respondents, *supra* note 104, at 4; see *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1810–11 (2019) (requiring notice-and-comment procedures to determine conversion factor used to calculate payments for disproportionate share hospitals).

233. Medicare Program: Hospital Outpatient Prospective Payment and Ambulatory Surgical Center Payment Systems and Quality Reporting Programs; Price Transparency of Hospital Standard Charges; Radiation Oncology Model, 86 Fed. Reg. 63458 (Nov. 16, 2021) (to be codified at 42 C.F.R. pts. 412, 416, 419, 512 and 45 C.F.R. pt. 180).

234. *Infra* Appendix B, Tables 1A–11A. These statutes do not uniformly require the exact procedures set forth in the APA. See 5 U.S.C. § 553(a) (describing the APA procedures). I included statutes in this group if they require agencies to provide some opportunity for stakeholders or the public to comment.

235. 42 U.S.C. § 1395w-4(q)(2)(D), (13)(B).

236. *Id.* § 7412(e)(3). Furthermore, one provision requires CMS to follow a negotiated rulemaking procedure to set fee schedules for Medicare payments for ambulance services. *Id.* § 1395m(l)(1).

237. Bernstein & Rodríguez, *supra* note 165, at 1677.

comment on proposed rules.²³⁸ Information gained from the public can also improve the quality of decisions.²³⁹ Furthermore, rules adopted through notice-and-comment constrain agency discretion, which promotes consistency and guards against arbitrariness.²⁴⁰ The procedures may also help to ensure that agencies follow statutory requirements.²⁴¹ Moreover, like judicial review, notice-and-comment procedures generally promote democratic values of fairness, due process, transparency, reasoned decisionmaking, and public accountability.²⁴²

A recent example from the Patent Office illustrates how notice-and-comment can provide an avenue for interested groups to present their views. The Patent Office promulgated regulations through notice-and-comment to govern inter partes review proceedings. Part of this rulemaking dealt with how the Patent Office would make determinations about whether to institute inter partes reviews—decisions barred from judicial review.²⁴³ In response to comments on proposed rules, the Patent Office amended its regulations to allow patent owners to include expert declarations when they submit oppositions to petitions to institute inter partes review.²⁴⁴

2. Consultation with Stakeholders

Consultation with stakeholders when developing rules, policies, or guidance provides another tool for public participation. Twenty-four review bars expressly require agencies to consult with stakeholders.²⁴⁵

238. For example, when CMS issued a proposed rule on its 2022 rate adjustments for outpatient services, it received 18,864 timely comments. Medicare Program: Hospital Outpatient Prospective Payment and Ambulatory Surgical Center Payment Systems and Quality Reporting Programs; Price Transparency of Hospital Standard Charges; Radiation Oncology Model, 86 Fed. Reg. at 63466.

239. Sant’Ambrogio & Staszewski, *supra* note 75, at 796, 802–03; Coglianesi et al., *supra* note 228, at 927.

240. Ray, *supra* note 90, at 2099.

241. Professors Anya Bernstein and Cristina Rodríguez recently found that agencies use notice-and-comment procedures to test theories about their legal authorities. Bernstein & Rodríguez, *supra* note 165, at 1659.

242. Sant’Ambrogio & Staszewski, *supra* note 75, at 793–94. Although notice-and-comment can promote these values, it can in practice operate to favor special interest groups. *Id.* at 797. Therefore, how notice-and-comment procedures work to support democratic values will be context dependent and may vary in different circumstances. See *infra* Subsection V.A.1.

243. 35 U.S.C. § 314(d); see *supra* Subsection II.B.4 (discussing fee determinations barred from review).

244. 37 C.F.R. § 42.107 (2016); see Amendments to the Rules of Practice for Trials Before the Patent Trial and Appeal Board, 81 Fed. Reg. 18750, 18750, 18766 (Apr. 1, 2016) (to be codified at 37 C.F.R. pt. 42) (amending USPTO trial rules “by allowing new testimonial evidence to be submitted with a patent owner’s preliminary response”).

245. *Infra* Appendix B, Tables 1A–11A.

For example, one review bar over a Medicare incentive payment program requires CMS to request that stakeholders identify quality measures for the agency to consider.²⁴⁶ Similarly, the review bar on adjustments to Medicare reimbursement rates for outpatient services instructs CMS to “consult with an expert outside advisory panel composed of an appropriate selection of representatives of providers.”²⁴⁷ Other provisions bar judicial review over negotiations with collective bargaining organizations—decisions that necessarily involve collaboration with stakeholders.²⁴⁸

In addition to express statutory requirements, agencies can voluntarily solicit public input.²⁴⁹ For example, the Patent Office has voluntarily taken various public outreach measures while implementing the inter partes review system, including publication of a Trial Practice Guide, publication of statistics, and numerous roadshows.²⁵⁰ Similarly, when CMS issued its 2022 rule to adjust Medicare reimbursement rates for outpatient services, it voluntarily solicited public comments on a number of additional policy issues.²⁵¹

Consultation with stakeholders can serve similar functions as notice-and-comment procedures and, in turn, judicial review.²⁵² Consultation allows stakeholders to monitor agencies and provides an avenue for stakeholders to present their views.²⁵³ Consultation with stakeholders also can generally promote democratic values of

246. 42 U.S.C. § 1395w-4(q)(2)(D), (10); *cf. id.* § 300g-1(b)(1)(B)(i)(I) (requiring the EPA to consult “with the scientific community, including the Science Advisory Board” as part of its regulation of various contaminants).

247. *Id.* § 1395l(t)(9)(A); *see also id.* § 1395w-4(c)(2)(B) (requiring consultation with the Medicare Payment Advisory Commission and organizations representing physicians).

248. *See, e.g.*, 5 U.S.C. § 9902(e); *id.* § 9701(e)(1) (requiring continuing collaboration with employee representatives on human resources system); 38 U.S.C. § 7403 (same).

249. *See* Bremer & Jacobs, *supra* note 205, at 527–31 (describing voluntary public outreach efforts by the EPA and Federal Energy Regulatory Commission).

250. U.S. PAT. & TRADEMARK OFF., REPORT TO CONGRESS: STUDY AND REPORT ON THE IMPLEMENTATION OF THE LEAHY-SMITH AMERICA INVENTS ACT 34 (2015), https://www.uspto.gov/sites/default/files/documents/Report_on_Implementation_of_the_AIA_September2015.pdf [<https://perma.cc/Z29F-XBXG>].

251. *See* Medicare Program: Hospital Outpatient Prospective Payment and Ambulatory Surgical Center Payment Systems and Quality Reporting Programs; Price Transparency of Hospital Standard Charges; Radiation Oncology Model, 86 Fed. Reg. 63458, 63458–60 (Nov. 16, 2021) (to be codified at 42 C.F.R. pts. 412, 416, 419, 512 and 45 C.F.R. pt. 180).

252. *See supra* Subsection III.C.1. Furthermore, consultation may occur earlier in an agency’s decisionmaking process than comments on a proposed rule. In this respect, consultation may give stakeholders a more effective avenue to share their views. *See* Sant’Ambrogio & Staszewski, *supra* note 75, at 798, 808 (“Indeed, there is a widespread perception that agencies are unwilling to make major changes to their policies once they have published an NPRM.”); Wagner et al., *supra* note 75, at 618–21 (“The proposal-development stage of rulemaking can be the place where agencies can best accommodate and reconcile competing interests in informal and often undocumented meetings and discussions.”).

253. Bernstein & Rodríguez, *supra* note 165, at 1650–51.

transparency and public accountability.²⁵⁴ The Medicare example shows how advisory committees can promote transparency. As required by statute, CMS has established an advisory panel to consult on reimbursement rates for outpatient services. The advisory panel holds annual meetings, which are publicly announced in the Federal Register, and has created three subcommittee working groups.²⁵⁵ CMS posts information on its website about meetings of the panel and their recommendations.²⁵⁶ This advisory panel therefore provides yet another avenue for CMS to consider and respond to views of the regulated healthcare providers, while also providing an avenue for the public and the political branches to monitor the agency.

3. Regulated Entity Involvement

Another oversight tool is the involvement of entities who will be particularly affected by actions in the decisionmaking process. Fifteen review bars create procedures for specifically affected entities to participate in the agency's decisionmaking process or to receive information.²⁵⁷ Some statutes require agencies to give the potentially affected party notice and an opportunity to respond before the agency acts. For example, before the Patent Office decides whether to institute inter partes review, the patent owner has the opportunity to file a preliminary response.²⁵⁸ The statute then requires the Patent Office to give the patent owner notice of its decision by issuing a written decision within a statutory deadline.²⁵⁹ Other statutes require agencies to give affected parties written notice of decisions or to respond to objections.²⁶⁰ Moreover, five provisions require CMS to provide feedback to Medicare

254. Sant'Ambrogio & Staszewski, *supra* note 75, at 803.

255. Medicare Program: Hospital Outpatient Prospective Payment and Ambulatory Surgical Center Payment Systems and Quality Reporting Programs; Price Transparency of Hospital Standard Charges; Radiation Oncology Model, 86 Fed. Reg. at 63465.

256. *Advisory Panel on Hospital Outpatient Payment*, CTRS. FOR MEDICARE & MEDICAID SERVS., <https://www.cms.gov/Regulations-and-Guidance/Guidance/FACA/AdvisoryPanelonAmbulatoryPaymentClassificationGroups> (last updated Sept. 6, 2023, 4:57 PM) [<https://perma.cc/2EX2-8XEF>].

257. *Infra* Appendix B, Tables 1A–11A.

258. 35 U.S.C. §§ 312(b), 313; *see also* 7 U.S.C. § 217a(d) (requiring a hearing before the agency revokes authorization).

259. 35 U.S.C. § 314; *see id.* § 324(d) (creating the same structure for post-grant reviews).

260. *E.g.*, 42 U.S.C. § 1395ff(h)(4) (requiring written responses to requests for prior determinations about whether Medicare covers services); *see also* 33 U.S.C. § 1322(p)(4)(A)(iii)(III)(bb) (requiring written responses to governors who object to marine pollution control standards).

participants.²⁶¹ For example, one incentive payment provision requires entities to report data on quality measures for physicians' services.²⁶² The statute requires CMS to provide feedback to physicians on their performance in submitting data.²⁶³ Providing information to regulated entities and allowing regulated entities to respond serve similar purposes to judicial review by promoting due process values, transparency, and legitimacy.²⁶⁴

4. Publication Requirements

Transparency requirements can also facilitate oversight. Notably, many review bars require agencies to publish information about the decisions insulated from judicial review. Forty-nine review bars contain publication requirements.²⁶⁵ Many of these appear in the Medicare context.²⁶⁶ For example, 42 U.S.C. § 1395yy(e)(3) requires CMS to publish in the Federal Register the per diem rates that will be applied to skilled nursing facility services and factors the agency will use to calculate rates. Furthermore, most Medicare incentive payment review bars include publication requirements.²⁶⁷ For example, for value-based incentive payments to skilled nursing facilities, the statute requires publication of the performance scores of each skilled nursing facility and information about payments made.²⁶⁸ Other statutes require CMS to publish information about the criteria it uses to award incentive payments.²⁶⁹ Review bars in other areas also require publication. For instance, one provision requires the EPA to publish its schedule for promulgating standards for emissions reductions.²⁷⁰

261. 42 U.S.C. §§ 1395w-4(m)(5)(H), 1395w-4(q)(12), 1395lll(f); *id.* § 1395w-4(n)(9)(B) (requiring reports on patterns of resource use); *id.* § 1320c-2(h) (requiring reports to organizations about contract performance).

262. *Id.* § 1395w-4(k)(1), (m)(5)(H).

263. *Id.* § 1395w-4(m)(5)(H).

264. Sant'Ambrogio & Staszewski, *supra* note 75, at 803 (“[Public engagement] promotes due-process objectives, particularly from the perspective of regulated entities, by ensuring that those effected by government policies have a meaningful opportunity to be heard before such policies are implemented.”).

265. *Infra* Appendix B, Tables 1A–11A.

266. *See, e.g.*, 42 U.S.C. §§ 1395w-4(k)(2)(B)(iii), 1395m(l)(17)(G).

267. *Infra* Appendix B, Table 3A.

268. 42 U.S.C. § 1395yy(h)(9).

269. *E.g., id.* § 1395l(m)(3).

270. *Id.* § 7412(e)(3); *see also* 7 U.S.C. § 7715(c) (requiring a public announcement before an emergency action is taken); 12 U.S.C. § 1464(v)(2)(B) (requiring a publication where a decision not to disclose information applies to savings institutions generally); 15 U.S.C. § 77f(b)(5) (requiring the publication of rates charged for registering securities).

Moreover, the Patent Office must publish its decisions about whether to institute inter partes review.²⁷¹

Publication requirements promote transparency, which can also facilitate monitoring.²⁷² Transparency guards against arbitrariness by exposing agencies' actions to public scrutiny.²⁷³ Awareness of agency actions can also allow stakeholders to put pressure on elected officials.²⁷⁴ By making information more readily available to the public, transparency can also facilitate public participation, which in turn can promote the democratic values of fairness, reasoned decisionmaking, and public accountability.²⁷⁵ Moreover, transparency can increase the quality of decisions by allowing the public to more effectively check agency actions.²⁷⁶ Therefore, transparency requirements represent another oversight tool for administrative actions barred from judicial review.

IV. EXCEPTIONAL CASES: VETERANS' BENEFITS AND IMMIGRATION

The previous parts have shown that most review bars cover internal management decisions and that alternative oversight tools are often expressly required by the statutes creating review bars in the internal management context. The high percentage of review bars that fall within the internal management categories highlights that review bars in the remaining two categories—factual determinations and traditionally executive areas—are not typical review bars. Only fifteen percent of review bars I located cover factual determinations and decisions in areas where courts have traditionally deferred to the executive, such as national security, immigration, and foreign affairs.²⁷⁷ These review bars are described in detail in Appendix B.²⁷⁸

Only seven review bars cover factual determinations, representing just four percent of total review bars.²⁷⁹ In this group, several statutes prohibit judicial review of factual findings underlying

271. 35 U.S.C. § 314(c).

272. Bernstein & Rodríguez, *supra* note 165, at 1604.

273. Coglianese et al., *supra* note 228, at 927 (“Transparency allows both the public and the other branches of government to assess whether agency decisions are in fact being made on the grounds asserted for them and not on other, potentially improper, grounds.”).

274. Metzger, *supra* note 71, at 1893.

275. *See supra* notes 225–228 and accompanying text.

276. Coglianese et al., *supra* note 228, at 928.

277. *See supra* Table 1.

278. *Infra* Appendix B, Tables 12A–15A.

279. *Infra* Appendix B, Table 12A.

decisions about whether individuals are entitled to benefits.²⁸⁰ A couple of provisions preclude judicial review of factual determinations made while implementing programs.²⁸¹

Twenty-one review bars cover decisions in areas such as national security, foreign relations, and immigration. For example, in the national security context, several provisions bar review over decisions of whether “military necessity” requires members of the uniformed service to be called away from employment urgently.²⁸² Immigration laws broadly bar judicial review over immigration actions specified “to be in the discretion of the Attorney General or the Secretary of Homeland Security,” other than decisions about asylum.²⁸³ With respect to foreign relations, several provisions bar review over interactions with foreign governments.²⁸⁴ Courts have historically deferred to the executive in these areas, either under the political question doctrine or by concluding that the decisions are committed to agency discretion.²⁸⁵ Professor Levin has observed that the rationales for finding these actions unreviewable typically rests on policies including “the courts’ lack of information about foreign affairs, the confidentiality of much of that information, and the need to minimize the incoherence that results when American foreign policy is articulated by multiple voices.”²⁸⁶ Table 6 summarizes the frequencies of review bars in each of these subcategories.

280. These provisions are similar to provisions discussed above about payment amounts and eligibility guidance. *See supra* Section II.B. The statutes in this category differ, however, because they focus on individual determinations rather than general criteria the agency will use to calculate benefits or to determine eligibility.

281. *E.g.*, 42 U.S.C. § 7651a(4)(C) (precluding review over EPA corrections to factual errors in regulations of fossil fuel-fired combustion devices).

282. 38 U.S.C. § 4312; 42 U.S.C. §§ 300hh-11(d)(3)(B), 5165f(j)(2).

283. 8 U.S.C. § 1252(a)(2)(B)(ii). This review bar broadly encompasses any statutory provision that gives discretion to the Attorney General or the Secretary of Homeland Security. Some immigration laws expressly state that decisions are in the Attorney General’s “unreviewable” discretion or “not subject to judicial review,” while others provide that the Attorney General “may,” in his “discretion,” make certain decisions. *Infra* Appendix B, Table 14A. While both likely fall within the review bar of § 1252(a)(2)(B)(ii), only the former appeared in my Westlaw searches. I have included the four review bars that appeared in my Westlaw searches in Table 15, *infra*, even though they are encompassed within § 1252(a)(2)(B)(ii)’s bar, to provide information about where Congress expressly specified that an action was unreviewable.

284. *See, e.g.*, 8 U.S.C. § 1182(a)(10)(C)(iii) (giving the Secretary of State unreviewable discretion to make a foreign government official inadmissible if the official is involved in child abduction).

285. *See* Levin, *supra* note 1, at 744–45.

286. *Id.*; *see also* Saferstein, *supra* note 4, at 386–87.

TABLE 6: EXECUTIVE FUNCTION REVIEW BARS

Type of Decision	Number of Review Bars	Percent of Total Review Bars
National Security	5	3%
Immigration	12	6%
Foreign Relations	4	2%
TOTAL	21	11%

Two review bars that have received significant attention in these exceptional categories are review bars covering veterans' benefits claims and immigration removal decisions. This Part analyzes special considerations that arise in the veterans and immigration contexts, which are distinct from the typical patterns for review bars over internal management decisions. It begins by discussing how the type of actions barred from review are different than internal management decisions, then it examines how the alternative oversight landscape is different as well. Together, these distinctions suggest that review bars in the veterans and immigration contexts raise unique issues that warrant further attention.

A. Individual Property and Liberty Interests

The veterans' benefit and immigration removal review bars are exceptional because unlike the typical internal management decisions, they implicate individual property and liberty interests. Under federal law, veterans may be eligible for a variety of benefits.²⁸⁷ When the law creates an entitlement to benefits, this creates a property interest for the veteran entitled to benefits.²⁸⁸ When a veteran applies for benefits, the Department of Veterans Affairs decides all questions of law and fact necessary to determine whether the veteran is eligible for benefits.²⁸⁹ A specific claim determination can be reviewed through an administrative process within the agency and then appealed to an Article I court, the

287. See U.S. DEPT OF VETERANS AFFS., FEDERAL BENEFITS FOR VETERANS, DEPENDENTS, SURVIVORS, AND CARETAKERS: 2023 EDITION (2023), https://www.va.gov/opa/publications/benefits_book/2023_Federal_Benefits_for_Veterans_Dependents_and_Survivors.pdf [https://perma.cc/M4V5-EHGN] (providing a brief overview of information concerning veterans' benefits and services).

288. *Cushman v. Shinseki*, 576 F.3d 1290, 1296–98 (Fed. Cir. 2009) (holding that a veteran's entitlement to disability benefits is a property interest protected by the Due Process Clause).

289. See 38 U.S.C. § 7261.

U.S. Court of Appeals for Veterans Claims.²⁹⁰ Afterward, veterans can seek judicial review by an Article III court, the U.S. Court of Appeals for the Federal Circuit.²⁹¹ A review bar provides, however, that the Federal Circuit may not review factual issues.²⁹² Therefore, in applications for veterans' benefits, veterans can obtain administrative review of factual determinations about their claims, but they cannot obtain judicial review from an Article III court.

Similarly, a review bar provides that certain aspects of decisions to remove noncitizens from the country can receive administrative review but cannot be reviewed by an Article III court. The immigration laws allow the government to initiate removal proceedings against noncitizens under certain circumstances.²⁹³ When the government initiates removal proceedings against an individual, the individual has a liberty interest at stake.²⁹⁴ Proceedings to remove individuals who are already present within the United States are typically conducted by immigration judges within the DOJ.²⁹⁵ If an immigration judge determines that a noncitizen is removable, the judge may then consider an application for relief from removal. Forms of relief include asylum or discretionary relief, such as a cancellation of removal or an adjustment of status to lawful permanent resident.²⁹⁶ An immigration judge's decision can be appealed within the agency to the Board of Immigration Appeals. If the Board enters a final order of removal, judicial review is available.²⁹⁷ Yet the scope of judicial review is limited. While the law

290. *Id.* § 7252. An Article I court exists within the executive branch, rather than the judicial branch of government. *Id.* § 7251.

291. *Id.* § 7292.

292. *Id.* §§ 511, 7292.

293. 8 U.S.C. §§ 1182, 1227, 1229a.

294. *Bridges v. Wixon*, 326 U.S. 135, 154 (1945); *see also* *INS v. St. Cyr*, 533 U.S. 289, 299–305 (2001) (noting that the Suspension Clause may require judicial review of constitutional claims).

295. 8 U.S.C. § 1229a(a)(1); 8 C.F.R. § 1240.1(a)(1) (2007); 8 C.F.R. § 1245.2(a)(1)(i) (2021). A second type of procedure is available through expedited proceedings. In expedited proceedings, the government may remove noncitizens as they arrive in the United States without a hearing upon certain conditions. 8 U.S.C. § 1225(b). The Attorney General has “unreviewable” discretion to also apply these procedures to noncitizens within the U.S. borders under certain conditions. *Id.* § 1225(b)(1)(A)(iii). If a noncitizen is ordered to be removed without a hearing, judicial review is limited to determinations of whether the person is a noncitizen, whether the person was ordered removed, and whether the person is a lawful permanent resident, an admitted refugee, or has been granted asylum. *Id.* § 1252(e).

296. *See* EXEC. OFF. FOR IMMIGR. REV., DEP'T OF JUST., EXECUTIVE OFFICE FOR IMMIGRATION REVIEW: AN AGENCY GUIDE FACT SHEET 3–4 (2017), https://www.justice.gov/eoir/page/file/eoir_an_agency_guide/download [<https://perma.cc/SHV8-C42R>] (outlining forms of protection from removal). Immigration laws give immigration judges, acting with the authority of the Attorney General, discretion to cancel removal for multiple reasons. For example, 8 U.S.C. § 1182(a)(9)(B)(v) gives the Attorney General discretion to waive inadmissibility if removal would cause extreme hardship to a U.S. citizen.

297. 8 U.S.C. § 1252.

allows review of “constitutional claims or questions of law,” it precludes judicial review of other issues.²⁹⁸ Judicial review is not available for certain discretionary denials of relief²⁹⁹ or for final orders against noncitizens who were found removable based on the commission of certain crimes.³⁰⁰

Therefore, the immigration removal review bar creates a similar structure to the veterans’ benefits review bar. Administrative review of an individual determination is available, followed by an opportunity for partial judicial review. Certain aspects of both decisions, however, are barred from judicial review. The individual interests involved in both of these situations are distinct from the interests involved in typical internal management decisions. Both veterans’ benefits determinations and immigration removal orders are situations where the government makes a final determination about a constitutionally protected interest, either a veteran’s property interest or an immigrant’s liberty interest. Therefore, as a normative matter, review bars in these areas appear more concerning. The concrete nature of individual interests at stake heightens the significance of alternative oversight tools in these areas, which are discussed below.

B. Oversight of Mass Adjudications

Just as the interests at stake are distinct in the veterans’ benefits and immigration removal contexts, the alternative oversight landscape is distinct in these areas as well. Generally, the pattern of review bars creating express alternative oversight tools does not translate into the factual determination and traditionally executive function categories. These categories are much smaller, so information about oversight structures in these statutes may be less indicative of an overall pattern. Nonetheless, for completeness, Table 7 summarizes alternative oversight structures I observed in these categories.

298. *Id.* § 1252(a)(2)(D).

299. *Id.* § 1252(a)(2)(B).

300. *Id.* § 1252(a)(2)(C).

TABLE 7: ALTERNATIVE OVERSIGHT OUTSIDE INTERNAL MANAGEMENT

Type of Decision	Review Bars with Alternative Oversight Structure	Percent of Total in Review Bar Category
Factual Determinations	2	29%
National Security	4	80%
Immigration	2	17%
Foreign Affairs	1	25%
TOTAL	9	32%

Generally, review bars in these categories contain fewer alternative oversight structures than the internal management context, where sixty-five percent of statutes I located expressly contain alternative oversight structures.³⁰¹ Only thirty-two percent of review bars outside the internal management categories expressly create one of the structures described in Part III.³⁰² Even though the size of these categories may be too small to infer a pattern, the findings raise questions about the mechanisms available for agency oversight in these areas. Yet, as discussed above, statutory schemes may generally create oversight structures outside the specific provisions that contain review bars, and agencies may voluntarily adopt measures for internal procedures and public participation. Therefore, this Section takes a broader look at the mass adjudication systems involving veterans' benefit determinations and immigration removal proceedings.

The mass adjudication systems governing veterans' benefits and immigration removal involve two major types of oversight structures: administrative review within the agency and partial judicial review. As a theoretical matter, administrative review can serve as an internal control structure by monitoring the quality of agency decisions and encouraging consistency in decisions.³⁰³ Precedential opinions and binding policies in particular can create consistency across individual determinations by first-level agency adjudicators.³⁰⁴ Moreover, providing an additional opportunity for individuals to present their

301. See *supra* Table 4.

302. Three of the five national security review bars deal with determinations of whether "military necessity" requires members of the uniformed service to leave employment without notice. Two oversight tools in these statutes are requirements to create procedural rules and to consult with other agencies. *Infra* Appendix B, Table 13A; *supra* note 282 and accompanying text.

303. See *supra* notes 215–218 and accompanying text.

304. See *supra* notes 215–218 and accompanying text.

views before more agency actors promotes fairness.³⁰⁵ Yet in practice, scholars have recently raised concerns about how well internal controls are working in the veterans' benefit and immigration removal systems specifically. A study of the Board of Veterans' Appeals internal quality assurance program concluded that the internal program did not improve the quality of veterans' benefits decisions.³⁰⁶ Furthermore, that study observed that the Executive Office of Immigration Review has not developed an effective internal quality assurance program to review immigration removal decisions.³⁰⁷ Moreover, Professor Shalini Ray has argued that immigration removal proceedings lack adequate standards to constrain how immigration judges exercise discretion to show lenience, creating the potential for arbitrariness.³⁰⁸ Therefore, although administrative review is a structure available to oversee mass adjudications, further reforms may be warranted to ensure that those internal controls are being leveraged to promote the goals of consistency and increased decision quality.

In addition to administrative review, the veterans' benefit and immigration review bars create one type of alternative oversight tool that did not appear in the internal management review bars: partial judicial review.³⁰⁹ These statutes provide for judicial review of questions of law and constitutional claims, even though other factual and discretionary decisions are barred from review.³¹⁰ Partial judicial review is an oversight tool that aims to balance individual interests against the efficient allocation of agency and judicial resources. The availability of judicial review over at least some issues provides an avenue to ensure that agencies comply with statutes and to protect individual rights.³¹¹ Moreover, partial review can promote efficient use

305. See *supra* notes 215–218 and accompanying text.

306. Ames et al., *supra* note 215, at 48–50.

307. *Id.* at 40–42. Similar observations about a lack of internal regulation have been made for other administrative immigration proceedings. See WALKER & WIENER, *supra* note 217, at 37 (finding that USCIS “seldom issues precedential decisions”); Patel v. Garland, 596 U.S. 328, 365 (2022) (Gorsuch, J., dissenting) (“The agency issues decisions on [green card] applications in unpublished and terse letters, which appear to receive little or no administrative review within DHS.”).

308. Ray, *supra* note 90, at 2079–87, 2091–93.

309. Moreover, unlike most review bars, the veterans' benefits and immigration review bars appear in general judicial review provisions, rather than provisions specifically addressing particular agency actions. See 38 U.S.C. § 511; 8 U.S.C. § 1252.

310. 8 U.S.C. § 1252; 38 U.S.C. § 511. Limited judicial review is available for one other factual determination. Under 52 U.S.C. § 10503, there is no judicial review when the Director of Census determines that a state is “covered” and therefore must provide bilingual election materials. States, however, may obtain a declaratory judgment that they only need to provide English materials if the literacy rate of non-English speaking residents in the state is below the national illiteracy rate.

311. See Saferstein, *supra* note 4, at 395–98.

of judicial resources because decisions on legal issues give more guidance for future cases.³¹² Furthermore, agencies typically have more expertise with respect to facts, and judicial review of facts imposes more costs on agencies.³¹³ Therefore, the veterans' benefits and immigration removal systems seem to rely on partial judicial review of legal questions as a significant oversight tool. Yet partial judicial review still leaves certain decisions unreviewable. Accordingly, the stakes of review bars in these contexts are high.

In sum, the veterans' benefits and immigration removal review bars raise unique issues that are more concerning than the typical internal management context. Both involve constitutionally protected interests, and they are adjudicated through mass adjudication systems that have been critiqued for lacking adequate internal oversight. These distinctions suggest that veterans' benefits and immigration removal review bars warrant special attention from policymakers, commentators, and courts going forward.

V. IMPLICATIONS

The previous three parts have provided a descriptive analysis of judicial review bars and alternative oversight tools that exist for actions barred from judicial review. So far, this Article has made two descriptive claims. First, judicial review bars of internal management decisions are a phenomenon. At least 190 statutory provisions expressly bar agency actions from judicial review, and most of those review bars cover internal management decisions, such as how agencies allocate resources, set priorities, and manage personnel.³¹⁴ Second, alternative oversight tools are often available for actions barred from judicial review. In the internal management categories, sixty-five percent of review bar statutes expressly require at least one alternative oversight structure, either through political oversight, internal supervision, public participation, or transparency.³¹⁵ Even more alternative oversight tools likely exist in statutes beyond review bar statutes, and agencies can engage in alternative oversight measures voluntarily.³¹⁶ Yet not all review bars fall within this general pattern. A smaller subset targets agency decisions that have a concrete impact on individual rights, such as factual determinations and discretionary judgments

312. See Levin, *supra* note 1, at 746–50.

313. *Id.* at 748–50.

314. See *supra* Table 1.

315. See *supra* Table 4.

316. See *supra* note 160 and accompanying text.

involved in veterans' benefits claims and immigration removal proceedings. These statutes also generally include fewer express requirements for alternative oversight structures.

This Part now turns to the implications of these findings and argues that as a normative matter, judicial review bars should be considered in context with available alternative oversight tools. None of the alternative oversight tools are a perfect substitute for judicial review. Alternative oversight tools may be better than judicial review in some senses, yet worse in others.³¹⁷ The choice to provide for judicial review, alternative oversight tools, or some combination of both involves a set of situational tradeoffs that will vary by context. Yet these alternative oversight tools play an important role in overseeing agency actions and are therefore part of the conversation about agency oversight, just as judicial review is. Therefore, courts and policymakers should consider the availability of alternative oversight tools when interpreting review bars and designing regulatory programs.

This Part begins with an analysis of different normative considerations that play a role in considering tradeoffs between judicial review and alternative oversight tools. Although how review bars and other oversight tools play out in practice will depend on the political economy of individual regulatory regimes, this Part uses a case study from the Patent Office to illustrate one example of how review bars and alternative oversight tools can create a normatively desirable balance between the goals of efficiency and of protecting individual interests and democratic values. This Part then provides several suggestions for courts interpreting review bars and policymakers considering regulatory reforms.

A. Normative Considerations

Normative considerations about the balance between judicial review and other oversight tools are complex. Control of the administrative state implicates a range of democratic values, such as whether structures promote deliberativeness, inclusiveness, and responsiveness to public preferences.³¹⁸ This Section discusses various factors in the political economy of agency oversight that may influence how review bars and alternative oversight tools play out in practice, which in turn influences their normative desirability. It then discusses

317. See, e.g., Mark Seidenfeld, *The Psychology of Accountability and Political Review of Agency Rules*, 51 DUKE L.J. 1059, 1093 (2001) (“[V]iewed through the lens of the psychology of accountability, political review is unlikely to substitute for judicial review . . .”).

318. Bernstein & Rodríguez, *supra* note 165, at 1600, 1604–05; Wagner et al., *supra* note 75, at 612.

a recent example at the Patent Office to analyze how one review bar has operated in practice and argues that this review bar strikes a good balance between individual and institutional interests.

1. The Political Economy of Agency Oversight

Each type of alternative oversight tool has potential strengths and weaknesses for promoting a democratic administrative state that is deliberative, inclusive, and responsive to public preferences. For example, while some scholars have argued that political oversight promotes responsiveness to public preferences because elected officials are democratically accountable,³¹⁹ others have questioned whether political accountability actually translates into policies that are more responsive to public preferences.³²⁰ Indeed, some have argued that public participation increases responsiveness to public preferences more effectively than supervision by politically accountable officials.³²¹ Scholars have also expressed concerns that congressional oversight can skew toward committee preferences and favor special interest groups.³²² Furthermore, some have suggested that oversight by the President and White House officials lacks transparency and sometimes even functions to sabotage administrative programs.³²³ Moreover, though internal controls can promote transparency and rule-of-law values,³²⁴ some have observed that internal administrative law can be influenced by internal pressures and distortions, such as resistance problems, career incentives, and conflicting goals within the agency.³²⁵ With respect to public participation, although there is broad consensus that it is crucial to promote democratic values,³²⁶ scholars have voiced concerns that public participation does not always promote responsiveness and can

319. Kagan, *supra* note 28, at 2332–36; Beermann, *supra* note 28, at 142.

320. See Glen Staszewski, *Reason-Giving and Accountability*, 93 MINN. L. REV. 1253, 1254, 1265–77 (2009); Rubin, *supra* note 172, at 2075–83.

321. Bernstein & Rodríguez, *supra* note 165, at 1604–07.

322. See, e.g., Kagan, *supra* note 28, at 2259–50 (noting that it is difficult for Congress to impose harsh sanctions on agencies and that oversight by committee can favor special interest groups); Beermann, *supra* note 28, at 140–41; Seidenfeld, *supra* note 317, at 1092–94.

323. See Bressman & Vandenbergh, *supra* note 163, at 78–91 (questioning whether presidential oversight promotes political accountability due to the lack of transparency and potential for interest group capture); Noll, *supra* note 63, at 775–84.

324. Metzger & Stack, *supra* note 26, at 1248.

325. Ames et al., *supra* note 215, at 59–67.

326. See Bernstein & Rodríguez, *supra* note 165, at 1605; Sant’Ambrogio & Staszewski, *supra* note 75, at 795–96.

leave agencies vulnerable to capture by the regulated industry.³²⁷ The timing of public participation can also influence its effectiveness.³²⁸

Furthermore, just as judicial review imposes costs on agencies, alternative oversight tools impose their own costs. For example, reporting requirements, public participation procedures, and transparency requirements consume agency resources and can delay actions.³²⁹ Transparency can also deter regulators from engaging in full and open deliberations if they worry that the public could monitor everything said or written within an agency.³³⁰ In the context of enforcement discretion, transparency about sanctions can undermine the agency's goals by reducing the deterrent effects of enforcement actions when they are brought.³³¹

The normative desirability of review bars and alternative oversight tools will thus be context dependent, based on how these tools operate in practice in various settings. Each oversight tool has normative strengths and weaknesses, and the proper balance among oversight tools for each review bar is outside the scope of this Article. Such an analysis would require consideration of who participates in agency procedures, whether agencies take public views into consideration in their decisionmaking processes, whether agencies modify behavior in response to comments, and whether agencies follow statutory requirements in practice. The strengths and weaknesses of alternative oversight tools may also vary based on the resources and political connections that regulated entities have to use political oversight and agency procedures. Individual veterans and immigrants, for instance, typically have fewer resources to hire lawyers to navigate agency procedures than large corporations dealing with FDA, EPA, or Patent Office regulations. Yet as a general matter, review bars appear less concerning where alternative oversight structures are available.

327. Wagner et al., *supra* note 75, at 612–13; Sant'Ambrogio & Staszewski, *supra* note 75, at 797 (“Although *formally* quite open and democratic, *in practice* well-organized groups of sophisticated stakeholders often dominate public participation in notice and comment.”).

328. See Sant'Ambrogio & Staszewski, *supra* note 75, at 798 (“[T]here is a widespread perception that agencies are unwilling to make major changes to their policies once they have published an NPRM.”); Wagner et al., *supra* note 75, at 618–21 (describing the importance of pre-NPRM deliberations and stating that “the agency may be poised to reject constructive input that would lead to significant changes in its proposal by the time the notice-and-comment process rolls around”).

329. Coglianese et al., *supra* note 228, at 928–30; McGarity, *supra* note 64, at 1385; see Pray, *supra* note 177, at 300 (“[T]he financial and personnel burdens placed on agencies compiling individual reports are often extremely high.”).

330. Coglianese et al., *supra* note 228, at 929 (“Decisionmakers do need some protected space in which to think critically and even ask ‘dumb’ questions.”).

331. Ray, *supra* note 90, at 2100–01 (“Similarly, commentators have argued that transparency surrounding categorical nonenforcement in tax essentially legalizes entire sets of tax violations.”).

When judicial review is not available, alternative oversight tools can function to promote democratic values of deliberation, inclusiveness, and responsiveness to public preferences.

Furthermore, judicial review bars appear less concerning when individual interests are not at stake. One central role of judicial review is to provide an avenue for individuals to vindicate their interests.³³² Concerns about cutting off access to courts are therefore reduced when an agency action does not affect an individual in a concrete way. This is particularly true where judicial review is available at a later point in time if the agency takes action that affects an individual in a concrete way. For instance, many Medicare review bars cover decisions about methodology for calculating reimbursement rates and general criteria for evaluating incentive payments.³³³ But when CMS makes an individual determination for a specific Medicare beneficiary or provider, judicial review is often available.³³⁴ Similarly, although the patent review bar precludes review over decisions about whether to institute inter partes review proceedings, judicial review is available if the Patent Office institutes review and issues a final written decision.³³⁵ Therefore, internal management decisions are areas where review bars may be more appropriate as institutional design tools to promote efficiency of government programs.

2. A Case Study: The Patent Office

A recent example at the Patent Office provides a few insights about how a judicial review bar combined with alternative oversight tools can balance individual and institutional interests to promote democratic values such as deliberativeness and responsiveness to public preferences. As discussed previously, the America Invents Act bars judicial review over decisions about whether to institute an inter partes review, which is a proceeding that reconsiders the validity of an issued patent.³³⁶ The Patent Trial and Appeal Board (“PTAB”) conducts inter partes reviews under the supervision of the Patent Office Director.³³⁷ The Patent Office has created standard operating

332. See *supra* notes 39–40 and accompanying text.

333. See *supra* Section II.A.

334. When a party files a claim for Medicare reimbursement, Medicare laws and regulations provide a complex system for redeterminations and appeals within the agency, followed by judicial review. *Original Medicare (Fee-for-Service) Appeals*, CTRS. FOR MEDICARE & MEDICAID SERVS., <https://www.cms.gov/medicare/appeals-grievances/fee-for-service> (last updated Sept. 6, 2023, 4:51 PM) [<https://perma.cc/4JEC-WNRD>].

335. See *supra* notes 10–12 and accompanying text.

336. 35 U.S.C. § 314.

337. *Id.* § 3(a)(2)(A).

procedures that set forth “internal norms for the administration of PTAB.”³³⁸ These standard operating procedures allow decisions to be designated as precedential, and all precedential decisions are then binding on future panels.³³⁹

In what has become known as the “*NHK-Fintiv* rule,” the Patent Office designated two decisions as precedential to detail factors the PTAB will consider in exercising its discretion to deny inter partes review.³⁴⁰ As PTAB judges applied the *NHK-Fintiv* policy in decisions about whether to institute inter partes review, the Patent Office sought public feedback on whether a regulation about the policy would be useful.³⁴¹ In response, the Patent Office received 822 comments. Notably, two comments were from U.S. Senators.³⁴² Other comments came from trade organizations, companies, law firms, and individuals. The Patent Office published a summary of comments received, which noted that most commenters supported the Patent Office’s existing framework.³⁴³

Beyond comments on the request for feedback, the *NHK-Fintiv* policy has attracted significant attention from Congress and the regulated public. Senators Patrick Leahy and John Cornyn introduced a bill that would prohibit discretionary denials at the PTAB.³⁴⁴ No action has been taken on the bill. Senator Cornyn also questioned the current Patent Office Director about the *NHK-Fintiv* policy during her confirmation hearings.³⁴⁵ Furthermore, a group of technology

338. *Standard Operating Procedure 2 (Revision 10): Precedential Opinion Panel to Decide Issues of Exceptional Importance Involving Policy or Procedure*, PAT. TRIAL & APPEAL BD. 2 <https://www.uspto.gov/sites/default/files/documents/SOP2%20R10%20FINAL.pdf> (last visited Feb. 22, 2024) [<https://perma.cc/5CZH-AY6H>].

339. *Id.* at 1, 11.

340. These factors include the status of a parallel district court proceeding about the same patent and the overlap in issues raised. *NHK Spring Co. v. Intri-Plex Techs., Inc.*, No. IPR2018-00752 (P.T.A.B. Sept. 12, 2018); *Apple Inc. v. Fintiv, Inc.*, No. IPR2020-00019 (P.T.A.B. Mar. 20, 2020).

341. U.S. PAT. & TRADEMARK OFF., PUBLIC VIEWS ON DISCRETIONARY INSTITUTION OF AIA PROCEEDINGS 2 (2021), <https://www.uspto.gov/sites/default/files/documents/USPTOExecutiveSummaryofPublicViewsonDiscretionaryInstitutiononAIAProceedingsJanuary2021.pdf> [<https://perma.cc/S27H-SZCL>].

342. *Id.* The Senators commented that Congress intended the Patent Office to use discretion to avoid multiple challenges to the same patent, and they encouraged rulemaking to formalize the discretionary denial policy. *Id.* at 3.

343. *Id.* at 5 (“A majority of commenters also supported use of discretion under § 314(a) to deny institution when considering proceedings in other tribunals . . .”).

344. Restoring the America Invents Act, S. 2891, 117th Cong. (as introduced by Senate, Sept. 29, 2021); see 167 CONG. REC. S6782–83 (daily ed. Sept. 29, 2021) (statement of Sen. Patrick Leahy for himself and Sen. John Cornyn).

345. See *Answers to Questions for the Record: Hearing on Nominations Before the S. Comm. on the Judiciary*, 117th Cong. 15–17 (2021) (written answers of Katherine Vidal, Nominee, United States Patent and Trademark Office Director), <https://www.judiciary.senate.gov/>

companies submitted a letter to the Secretary of Commerce with concerns about the PTAB's policy for discretionary denials.³⁴⁶ After the policy attracted attention from Congress and stakeholders, the Patent Office Director issued binding guidance to the PTAB with several clarifications on the *NHK-Fintiv* policy that responded to some of the concerns stakeholders expressed.³⁴⁷ The Director has also reviewed PTAB decisions denying inter partes review.³⁴⁸

Therefore, although courts have consistently refused to review claims about the policy due to the review bar,³⁴⁹ the PTAB's articulation of a binding policy has allowed Congress, executive officials, and the public to monitor how the agency exercises its discretion. In this example, the Patent Office's actions have promoted democratic values, even without judicial review. The Patent Office has been transparent about its binding policy, which has put regulated parties on notice about factors that the PTAB will consider when reviewing petitions for inter partes review. The Patent Office has also been responsive to the views of the public in its guidance and explained its reasoning, both of which promote democratic values. Furthermore, many of the Patent Office's actions have been voluntary. The statute did not require it to issue precedential decisions, to request public feedback, or to provide clarifying guidance. This suggests that agencies may still be transparent, deliberative, and responsive to the public even without the threat of judicial review.³⁵⁰

imo/media/doc/211213%20Vidal%20Answers%20to%20QFRs%20FINAL%20(1).pdf [https://perma.cc/K5WN-SSBN].

346. Letter from Steven R. Rodgers et al., to Hon. Gina M. Raimondo, Sec'y of Com., U.S. Dep't of Com. (Jan. 28, 2022), <https://s3.documentcloud.org/documents/21194700/12822-nhk-fintiv-letter-to-sec-raimondo.pdf> [https://perma.cc/5QEU-RSU3].

347. KATHERINE KELLY VIDAL, U.S. PAT. & TRADEMARK OFF., INTERIM PROCEDURE FOR DISCRETIONARY DENIALS IN AIA POST-GRANT PROCEEDINGS WITH PARALLEL DISTRICT COURT LITIGATION (2022) https://www.uspto.gov/sites/default/files/documents/interim_proc_discretionary_denials_aia_parallel_district_court_litigation_memo_20220621_.pdf [https://perma.cc/A3CU-8WCT].

348. Ryan Davis, *Vidal's Director Reviews Show Hands-On Approach with PTAB*, LAW360 (Sept. 28, 2022), <https://www.law360.com/articles/1535115/vidal-s-director-reviews-show-hands-on-approach-with-ptab> [https://perma.cc/6XUH-R4ZD]. The Patent Office also considered various reform proposals for administrative review of PTAB decisions. Riddhi Setty, *Patent Office's Vidal Mulls Replacing Precedential Opinion Panel*, BLOOMBERG L. (Dec. 12, 2022, 3:50 AM), <https://news.bloomberglaw.com/ip-law/patent-offices-vidal-mulls-replacing-precedential-opinion-panel> [https://perma.cc/AX9E-A35G].

349. See *supra* notes 51–52 and accompanying text.

350. The Federal Circuit recently held that the 35 U.S.C. § 314(d) review bar precludes judicial review over challenges to the substance of the *NHK-Fintiv* policy, but not review over claims that the Patent Office should have issued the policy through notice-and-comment rulemaking. *Apple Inc. v. Vidal*, 63 F.4th 1, 13–15 (Fed. Cir. 2023). It remanded the case for the district court to determine whether notice-and-comment is required. *Id.* at 18.

The judicial review bar has also served the goal of efficiency.³⁵¹ The America Invents Act created the inter partes review system with the goal of providing a more efficient alternative to district court patent litigation.³⁵² In line with that goal, the review bar has conserved resources that both the Patent Office and the judiciary expend. Judicial review of institution decisions could require significant resources from the Patent Office, the Federal Circuit, and litigants. In fiscal year 2021, 516 petitions for review of Patent Office decisions were filed at the Federal Circuit.³⁵³ In that same year, 1,401 inter partes review petitions were filed at the PTAB.³⁵⁴ Judicial review over each PTAB decision about whether to institute inter partes review could therefore greatly expand the number of cases that the Patent Office and litigants must defend on appeal, as well as the number of cases the Federal Circuit must decide.

By foreclosing judicial review over these decisions, the review bar promotes efficient implementation of the program. Yet at the same time, alternative oversight structures preserve democratic values and protect individual interests—patent owners have an opportunity to respond before the Patent Office issues an institution decision;³⁵⁵ the Patent Office publishes its institution decisions;³⁵⁶ and the PTAB judges operate under publicly available, binding guidance.³⁵⁷ Comments from patent owners also influenced the Patent Office policy to allow patent owners to submit expert declarations along with responses to petitions for inter partes review.³⁵⁸ Furthermore, if the Patent Office institutes review, both parties can seek judicial review of the final written

351. Efficiency is a policy goal of many review bars. For instance, in debates over the 1972 Medicare amendments, Senator Bennett explained that judicial review over Medicare determinations was intended to be “greatly restricted in order to avoid overloading the courts with quite minor matters.” 118 CONG. REC. 33992 (1972). Concerns about burdening courts and the agency with “expensive and time-consuming litigation” were also behind review bars over veterans’ benefits determinations. *Johnson v. Robison*, 415 U.S. 361, 369–72 (1974) (analyzing legislative history of veterans’ benefits review bar); *see also* Bagley, *supra* note 22, at 1331–32 (same).

352. H.R. REP. NO. 112-98, pt. 1, at 40 (2011) (“This legislation is designed to establish a more efficient and streamlined patent system that will improve patent quality and limit unnecessary and counterproductive litigation costs.”).

353. U.S. CT. OF APPEALS FOR THE FED. CIR., APPEALS FILED, TERMINATED, AND PENDING DURING THE TWELVE-MONTH PERIOD ENDED SEPTEMBER 30, 2021, at tbl.B-8 (2021), <https://cafc.uscourts.gov/wp-content/uploads/reports-stats/appeals/AppealsFY2021.pdf> [<https://perma.cc/8N2P-TURL>].

354. U.S. PAT. & TRADEMARK OFF., PTAB TRIAL STATISTICS FY21 END OF YEAR OUTCOME ROUNDUP IPR, PGR, CBM 3 (2021), https://www.uspto.gov/sites/default/files/documents/tab_aia_fy2021_roundup.pdf [<https://perma.cc/B6Y6-JC4Y>].

355. *See supra* note 258 and accompanying text.

356. *See supra* note 271 and accompanying text.

357. *See supra* note 347 and accompanying text.

358. *See supra* notes 244, 336, and accompanying text.

decision, thus allowing an opportunity for review once interests are concretely affected.

Therefore, the patent example illustrates how judicial review bars, coupled with alternative oversight tools, can balance the goal of efficient implementation of an agency program with individual interests and democratic values. Yet these dynamics may play out differently in other contexts. In this example, large corporations tend to be both patent owners and patent challengers, so both sides tend to have resources to advocate for their interests.³⁵⁹ The balance achieved here may not translate to other regulatory regimes that involve different power dynamics. It is a project for future work to consider how alternative oversight tools operate in practice in these other contexts.

B. Statutory Interpretation

The phenomenon of judicial review bars along with alternative oversight tools provides insights for courts interpreting the scope of review bars. This Section provides two suggestions for courts construing review bars.

1. Significance of Statutory Context

First, courts should consider the overall statutory scheme when construing review bars. When judicial review is not available, alternative oversight tools play a significant role in promoting legitimacy and democratic values.³⁶⁰ A lack of alternative oversight tools may warrant caution in broadly construing review bars. Yet in reviewability cases, courts have typically interpreted review bars in isolation, without considering the availability of other oversight tools.³⁶¹ For example, in *Patel v. Garland*, the Supreme Court considered whether an immigration review bar precludes judicial review over discretionary decisions or over both discretionary decisions and underlying factual determinations.³⁶² The Court relied solely on the text to conclude that the review bar broadly precludes review over both exercises of discretion and underlying factual determinations.³⁶³ Justice

359. Greg Reilly, *Patent Office Power and Discretionary Denials*, 55 CONN. L. REV. 589, 646 (2023).

360. *See supra* Part III.

361. *See, e.g.*, *Bowen v. Mich. Acad. of Fam. Physicians*, 476 U.S. 667, 674–80 (1986) (finding that Congress intended to bar judicial review without considering other ways in which the agency in question exercises oversight); *Cuozzo Speed Techs., LLC v. Lee*, 579 U.S. 261, 272–76 (2016) (highlighting congressional intent to bar review).

362. 596 U.S. 328, 331–42 (2022).

363. *Id.* at 335–47.

Gorsuch’s dissent pointed out that this creates a situation that “turns an agency once accountable to the rule of law into an authority unto itself.”³⁶⁴ This Article’s findings about the lack of alternative oversight tools and concrete interests at stake in the immigration context compared to other review bar contexts support Justice Gorsuch’s concerns.

Yet in other contexts where alternative oversight tools exist, courts should consider interpreting review bars more broadly. This supports judicial decisions that have generally given broad effect to the review bars in the patent and Medicare contexts, where alternative oversight tools are available.³⁶⁵ It also supports broadly interpreting the review bars included in the Medicare price negotiation provisions of the Inflation Reduction Act. That statute bars review over CMS’s determinations of maximum fair prices, but it contains multiple alternative oversight tools. The law requires CMS to publish a list of drugs selected as eligible for price negotiation, to develop a negotiation process, to allow manufacturers an opportunity to respond to an initial offer price, to provide written responses to manufacturers, and to publish the ultimate prices.³⁶⁶ Indeed, CMS has already begun implementing these measures. It issued guidance on the negotiation process and voluntarily solicited public comment on a range of implementation issues, including the terms of the manufacturer agreement, the content of explanation for maximum fair prices, and methods for applying the maximum fair price across different dosage forms of a selected drug.³⁶⁷ CMS is also hosting a series of patient-focused listening sessions to solicit public input about the drugs selected

364. *Id.* at 365 (Gorsuch, J., dissenting).

365. *See, e.g.*, *Thryv, Inc. v. Click-to-Call Techs., LP*, 140 S. Ct. 1367, 1373–74 (2020); *Tex. All. for Home Care Servs. v. Sebelius*, 681 F.3d 402, 408–09 (D.C. Cir. 2012).

366. 42 U.S.C. §§ 1320f-1 to -5.

367. MEENA SESHAMANI, CTRS. FOR MEDICARE & MEDICAID SERVS., MEDICARE PRICE NEGOTIATION PROGRAM: INITIAL MEMORANDUM, IMPLEMENTATION OF SECTIONS 1191–1198 OF THE SOCIAL SECURITY ACT FOR INITIAL PRICE APPLICABILITY YEAR 2026, AND SOLICITATION OF COMMENTS (2023), <https://www.cms.gov/files/document/medicare-drug-price-negotiation-program-initial-guidance.pdf> [<https://perma.cc/2LNS-RK2C>]; MEENA SESHAMANI, CTRS. FOR MEDICARE & MEDICAID SERVS., MEDICARE PRICE NEGOTIATION PROGRAM: REVISED GUIDANCE, IMPLEMENTATION OF SECTIONS 1191–1198 OF THE SOCIAL SECURITY ACT FOR INITIAL PRICE APPLICABILITY YEAR 2026 96–98 (2023), <https://www.cms.gov/files/document/revise-medicare-drug-price-negotiation-program-guidance-june-2023.pdf> [<https://perma.cc/5G68-4AVU>].

for the first round of price negotiation.³⁶⁸ These alternative oversight structures support broadly interpreting the review bar.³⁶⁹

Finally, the pattern of Medicare review bars has implications for future Medicare litigation. The regular use of Medicare review bars suggests that Congress generally intends for there to be many limits on judicial review in the Medicare context. This supports court decisions that have regularly refused to review the substance of decisions covered by the plain language of Medicare review bars.³⁷⁰ The combination of clear language and existing precedent also reinforces that Medicare review bars in the Inflation Reduction Act should be construed broadly.

When a dispute involves a decision that is not covered by the plain language of a Medicare review bar, however, the implications are less clear. On the one hand, the prevalence of review bars may suggest Congress intends to allow judicial review where it is not expressly barred. On the other hand, the review bars reveal a pattern of precluding judicial review of Medicare payment amount decisions, the criteria for determining payments, and the methodology used to determine payments. Notably, many review bars were added after the Supreme Court's 1986 decision in *Bowen v. Michigan Academy of Family Physicians*, which held that judicial review was available for the methodology of calculating payment amounts where the statute expressly precluded judicial review over payment amount determinations, but not the methodology.³⁷¹ The legislative history does not provide insight on Congress's intent behind these subsequent review bars, but the pattern suggests a general intent to preclude review. Moreover, Medicare laws are extremely complex. Cross-references to other statutes and frequent amendments can make it difficult to specify in detail each decision that Congress intends to

368. *Medicare Drug Price Negotiation Program Patient-Focused Listening Sessions*, CTRS. FOR MEDICARE & MEDICAID SERVS., <https://www.cms.gov/inflation-reduction-act-and-medicare/medicare-drug-price-negotiation-program-patient-focused-listening-sessions> (last updated Sept. 6, 2023, 4:51 PM) [<https://perma.cc/727S-V7BB>].

369. The types of alternative oversight tools also might be relevant for evaluating the need for judicial review. Congressional oversight, for instance, may encourage bias in agency decisionmaking toward interests of congressional committees, and judicial review can play an important role in countering improper influences of politics on agency actions. See Seidenfeld, *supra* note 317, at 1091–93.

370. See *supra* note 58 and accompanying text.

371. 476 U.S. 667, 674–78 (1986). Thirteen review bars located in this Article were included as part of the 2003 Medicare amendments. Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. No. 108-173, 117 Stat. 2066; see also Inflation Reduction Act of 2022, Pub. L. No. 117-169, §§ 1198, 11101(i)(8), 11102(f), 136 Stat. 1818, 1851, 1869, 1874–75 (limiting administrative and judicial review); Bipartisan Budget Act of 2015, Pub. L. No. 114-74, §§ 603, 6234, 129 Stat. 584, 598, 634–35 (restricting administrative or judicial review); Consolidated Appropriations Act, Pub. L. No. 106-113, § 201, 113 Stat. 1501, 1501A-339 (1999) (limiting judicial review for new adjustments).

preclude from review.³⁷² Therefore, even where a review bar is absent, the pattern may support implicit preclusion over payment decisions. The Supreme Court reached the opposite conclusion in *American Hospital Ass'n v. Becerra*, where it construed the plain text of a Medicare law to allow judicial review because a statutory cross-reference did not bar decisions under a particular paragraph at issue.³⁷³ Yet the broader pattern of Medicare review bars may suggest that the statutory scheme implicitly precludes review over such payment decisions, or perhaps the presumption of judicial review should not apply for Medicare payment decisions.

2. Zone of Agency Discretion

Judicial review bars provide insights about Congress's general policy judgments regarding areas where agencies may appropriately operate with fewer external constraints, which provides guidance on the zone of agency decisions that are committed to agency discretion. Two major external constraints on agencies are (1) judicial review for arbitrariness, and (2) judicial review for procedural deficiencies. The APA reflects a policy judgment that places fewer external constraints on some agency actions than others. For example, the APA requires agencies to follow notice-and-comment procedures during rulemaking.³⁷⁴ Yet the APA exempts interpretive rules from notice-and-comment requirements.³⁷⁵ Notice-and-comment requirements also do not apply if the action involves "military or foreign affairs function" or "a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts."³⁷⁶

Notably, most judicial review bars cover actions that involve exactly the issues that the APA exempts from notice-and-comment requirements. Many review bars target decisions involving agency management, personnel, contracts, benefits, grants, national security, and foreign affairs.³⁷⁷ Insulating these actions from judicial review removes another external constraint because it prohibits review for arbitrariness. Without the review bars, the actions would not be subject to review for failing to follow notice-and-comment procedures, but final actions could still be subject to review for arbitrariness. Therefore, the review bar phenomenon reveals a pattern in the types of agency actions

372. See *supra* note 104 and accompanying text.

373. 142 S. Ct. 1896, 1902–03 (2022).

374. 5 U.S.C. § 553(b).

375. *Id.* § 553(b)(A).

376. *Id.* § 553(a).

377. See *supra* Table 1.

that Congress has subjected to fewer external constraints, both in the APA and in review bar statutes. This pattern provides a roadmap of actions that Congress tends to view as appropriately left to agency discretion: matters involving internal management, such as monetary decisions; program implementation choices about procedures and priorities; personnel and contract decisions; and national security matters.

In cases where courts consider whether actions are committed to agency discretion under Section 701(a)(2) of the APA, the patterns in types of actions covered by review bars provide guidance on Congress's general judgments about areas where judicial review is not necessary. These areas include actions involving agency management, personnel, contracts, benefits, grants, the military, and foreign affairs.³⁷⁸ The review bar patterns also illustrate instances where concrete, individual interests are unlikely to be at stake, such as situations where agencies set criteria for financial assistance, set priorities, and allocate their resources.³⁷⁹ Therefore, courts should consider the patterns of review bars when considering whether actions are committed to agency discretion, in addition to the availability of alternative oversight tools.

C. Institutional Design

Beyond courts construing review bars, policymakers should also consider the availability of alternative oversight tools when designing regulatory programs. This Section suggests two instances where policymakers may consider using review bars and alternative oversight tools as institutional design tools in future regulatory reforms.

1. Fostering Internal Administrative Law

Counterintuitively, review bars may be a tool to encourage agencies to more transparently announce binding internal policies. Professors Metzger and Stack have argued that searching judicial review can undermine internal administrative law by creating incentives for agencies to keep internal policies hidden and to disclaim the binding nature of internal processes.³⁸⁰ Review bars reduce the threat of judicial review, which could reduce agency incentives to keep

378. 5 U.S.C. § 553(a); *see supra* Section II.A (discussing general observations about judicial review bars).

379. *See supra* Section II.B (examining various monetary decisions covered by review bars).

380. Metzger & Stack, *supra* note 26, at 1288–90.

their policy views and decisionmaking processes out of the public eye.³⁸¹ The patent example discussed above provides some support for this hypothesis. Acting under a review bar, the Patent Office publicly announced a binding policy to constrain its discretion, even where the statute does not require that it do so.³⁸² Not only do the precedential decisions constrain the Patent Office's decisions, but they have also allowed the public and Congress to monitor how the Patent Office is exercising its discretion.³⁸³ Furthermore, in response to feedback from the public and Congress, the Patent Office Director voluntarily issued binding guidance that clarified how the precedential decisions will be applied.³⁸⁴ The presence of the judicial review bar may have helped encourage the Patent Office to be more transparent about its decisionmaking process, as the announcement of binding factors did not require the agency to defend the substance of its decisions in court.³⁸⁵

To be sure, an agency's incentives to publicly announce binding policies could be influenced by whether courts find binding policy announcements reviewable. The Federal Circuit recently held that courts could consider whether the *NHK-Fintiv* policy must be issued through notice-and-comment rulemaking, notwithstanding the review bar.³⁸⁶ Yet it did not decide whether notice-and-comment procedures were actually required. If the district court concludes that binding policies about discretionary denials must follow notice-and-comment procedures, it could reduce the Patent Office's incentives to announce binding policies in the future. Yet even if the case comes out that way, other review bars could still protect agencies from judicial review over their binding policy announcements. The D.C. Circuit, for instance, has held that review bars can broadly encompass both the procedures used and the substance of general rules about how agencies will reach discretionary determinations.³⁸⁷

381. *Id.* at 1288–89 (describing how external judicial enforcement “creates incentives for agencies to be less specific, less decisive, and less clear”).

382. *See supra* note 347 and accompanying text.

383. *See supra* notes 349–350 and accompanying text.

384. VIDAL, *supra* note 347, at 2. Similarly, operating under the protection of Medicare review bars, CMS has published a broad range of guidance for both regulatory beneficiaries and agency personnel. *See The Provider Reimbursement Manual—Part 1*, CTRS. FOR MEDICARE & MEDICAID SERVS., <https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Paper-Based-Manuals-Items/CMS021929> (last visited Feb. 22, 2024) [<https://perma.cc/CPU9-N474>].

385. *See, e.g., Mylan Lab's Ltd. v. Janssen Pharmaceutica, N.V.*, 989 F.3d 1375 (Fed. Cir. 2021), *cert. denied*, 142 S. Ct. 874 (2022) (dismissing appeal and denying mandamus after finding that the court lacked subject matter jurisdiction).

386. *See supra* note 18 and accompanying text.

387. *See Ascension Borgess Hosp. v. Becerra*, 61 F.4th 999, 1003 (D.C. Cir. 2023) (observing that the presumption in favor of judicial review may be overcome by clear congressional intent); *DCH Reg'l Med. Ctr. v. Azar*, 925 F.3d 503, 506 (D.C. Cir. 2019) (holding that review bar over

Moreover, beyond using review bars to encourage agencies to be transparent, policymakers can expressly require agencies to engage in alternative oversight structures, as statutes did in sixty-five percent of internal management review bars.³⁸⁸ Express requirements to consult with stakeholders, issue guidance, and publish decisions may be particularly useful in regulatory settings where regulated entities are less likely to have resources to advocate before the agency on their own initiative. Two areas where Congress may consider more explicit oversight structures are the veterans' benefits and immigration mass adjudication systems. Indeed, scholars have called for more robust internal law in these areas, pointing to a lack of transparency and concerns about arbitrariness.³⁸⁹

Medicare review bars provide an example of how review bars can be used in a mass adjudication context to promote internal law. Medicare provides a robust administrative and judicial review system when individual providers submit claims for reimbursement.³⁹⁰ The Medicare review bars discussed in this Article, however, cover centralized decisions made at an earlier stage in the process, before Medicare benefits are given to individuals. The review bars cover decisions such as how much CMS will generally reimburse for certain services or what criteria it will use to determine payment amounts.³⁹¹ In addition to barring judicial review over these actions, the statutes also direct CMS to establish policies for how it will set rates, to provide opportunities for public comment, to consult with stakeholders, and to publish information.³⁹² In the space free from judicial review, the statutes have created structures requiring the agency to develop internal law in the public eye and to explain its decisions. The

agency estimates precluded review of rule setting methodology for determining estimates, in addition to individual estimates); *Knapp Med. Ctr. v. Hargan*, 875 F.3d 1125, 1127, 1129, 1131–32 (D.C. Cir. 2017) (dismissing challenge where statute directed agency to establish a process, then review bar precluded review over the process, “including the establishment of such process” (citation omitted)); *Tex. All. for Home Care Servs. v. Sebelius*, 681 F.3d 402, 410 (D.C. Cir. 2012) (“Likewise here, we do not distinguish between an upfront attack on the financial standards by suppliers not yet injured by them and a challenge brought after-the-fact by a frustrated bidder who has been found to be financially ineligible.”).

388. *See supra* Table 4.

389. *See Ames et al., supra* note 215, at 69–72 (advocating reforms to facilitate internal law in mass adjudication systems, including transparency requirements and reporting requirements); Ray, *supra* note 90, at 2053–54, 2091–94, 2098–2110 (describing concerns about arbitrariness in the immigration system).

390. *See generally* CTRS. FOR MEDICARE & MEDICAID SERVS. & MEDICARE LEARNING NETWORK, MEDICARE PARTS A & B APPEALS PROCESS (2022), <https://www.cms.gov/outreach-and-education/medicare-learning-network-mln/mlnproducts/downloads/medicareappealsprocess.pdf> [<https://perma.cc/V98C-TMCL>] (describing review system associated with the appeals process).

391. *See infra* Appendix B, Tables 1A–3A.

392. *See supra* Part III.

combination of a review bar over generalized guidance and express requirements to consult with stakeholders and publish information thus could be used to increase internal law in the veterans' benefits and immigration contexts.³⁹³

2. Insulating Agencies from Court Challenges

In addition to using review bars to foster internal administrative law, policymakers may consider using review bars to insulate agencies from anti-administrative challenges that have gained traction as the federal court system has become increasingly conservative.³⁹⁴ With an increase in the number of conservative judges on the federal bench and in the partisan nature of judicial decisionmaking in recent years, courts have become more likely to accept anti-administrative arguments that limit the ability of federal agencies to regulate.³⁹⁵ The Supreme Court's recent announcement of the major questions doctrine provides one example of a successful anti-administrative challenge.³⁹⁶ In response to concerns about a highly partisan judiciary, some have proposed jurisdiction stripping, which would remove judicial review entirely over certain issues.³⁹⁷

To be sure, the review bars identified in this Article do not completely strip federal court jurisdiction over entire claims, as Supreme Court reforms have proposed. Review bars leave open the possibility that courts may review agency actions that are obviously outside an agency's statutory authority or that present colorable constitutional claims. Yet review bars meaningfully reduce the power of the judiciary to review an agency's reasoning and procedures.³⁹⁸

393. See Ray, *supra* note 90, at 2100 (noting that the potential for judicial review may deter immigration officials from issuing a legislative rule about how they will exercise discretion).

394. See John Gramlich, *How Trump Compares with Other Recent Presidents in Appointing Federal Judges*, PEW RSCH. CTR. (Jan. 13, 2021), <https://www.pewresearch.org/short-reads/2021/01/13/how-trump-compares-with-other-recent-presidents-in-appointing-federal-judges/> [<https://perma.cc/AH88-4Z52>].

395. See Noll, *supra* note 63, at 776–77, 782–83 (“Courts are increasingly willing to strike or reconfigure statutory programs based on creative legal arguments.”); Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009, 1069 (2023) (“[J]udges may be more inclined to perceive issues or policies as politically significant if the policies are opposed by the political party that appointed the judge.”).

396. *West Virginia v. EPA*, 142 S. Ct. 2587, 2644 (2022) (Kagan, J., dissenting) (“Yet the Court today prevents congressionally authorized agency action to curb power plants’ carbon dioxide emissions.”); see Deacon & Litman, *supra* note 395, at 1023–49; *Petition for Writ of Certiorari, Loper Bright Enters. v. Raimondo*, No. 22-451 (U.S. Nov. 10, 2022), 2022 WL 19770137.

397. See *supra* note 23 and accompanying text.

398. See *supra* note 59 and accompanying text (noting that courts have typically construed review bars to limit review of claims that decisions are arbitrary and that actions are procedurally deficient).

Courts have regularly upheld express review bars,³⁹⁹ and the themes in review bars show areas where review bars may be politically feasible. Barring judicial review over internal management decisions, such as criteria an agency will use to arrive at certain decisions, could be an institutional design tool to insulate at least some aspects of regulatory programs from judicial review. At the same time, alternative oversight tools provide structures that could safeguard individual interests and democratic values of transparency, deliberation, and accountability. Therefore, Congress may consider whether review bars over actions unlikely to implicate concrete individual interests could be used alongside alternative oversight tools in future reforms as a strategy to limit federal court interference with regulatory programs.

CONCLUSION

Judicial review is a significant feature of the administrative state. But judicial review does not occur in isolation. Alternative oversight tools also play a role in overseeing agencies. A wide array of structures can function to guard against arbitrariness, require agencies to explain their decisions, and promote transparency. Alternative oversight tools are not a substitute for judicial review, and their effectiveness may vary based on the political economy of individual regulatory programs. Yet each of these oversight tools plays a role in promoting democratic values of fairness, transparency, reasoned decisionmaking, and public accountability in the administrative state. Therefore, judicial review bars should be viewed in context with available alternative oversight tools within individual regulatory regimes.

This Article has made several contributions. First, it uncovers the phenomenon of judicial review bars. It makes a descriptive claim that Congress has expressly precluded judicial review of agency actions at least 190 times, often in the context of internal management decisions. Many judicial review bars cover decisions involving how agencies allocate resources, set priorities, and manage personnel. Second, it makes a descriptive claim that statutes often create alternative oversight tools for internal management actions barred from judicial review. Indeed, sixty-five percent of internal management review bars expressly create mechanisms to facilitate alternative forms of oversight. These alternative oversight tools include requirements to create internal procedures, provide opportunities for public participation, send reports to Congress, and publish decisions. Many

399. *See supra* Section I.B.

judicial review bars also cover spending decisions that are subject to appropriations oversight. Alternative oversight tools are likely even more prevalent than these patterns suggest, since other statutes may create alternative oversight structures and agencies can engage in voluntary procedures as well. Finally, despite these patterns, not all review bars fit the mold. The veterans' benefits and immigration removal contexts stand out as two areas where concrete individual interests are at stake and where alternative oversight tools appear less prevalent.

In addition to the descriptive claims, this Article begins a normative assessment of judicial review bars and alternative oversight tools. Generally, review bars appear more desirable where they do not implicate concrete individual interests and where alternative oversight tools are available. A full normative analysis of the current landscape of judicial review bars would require inquiry into whether alternative oversight tools in practice have promoted deliberation, inclusiveness, and responsiveness to public preferences. Such an in-depth analysis of each regulatory program is a project for future work. But this Article analyzes how a patent review bar has played out in practice to provide an example of one context where the combination of a review bar and alternative oversight tools is working well. In that context, alternative oversight tools have provided structures for the political branches and the public to monitor the Patent Office and for the agency to respond to the views of both patent owners and patent challengers.

Regardless of how alternative oversight tools function in connection with each individual review bar, they are part of the landscape of structures that oversee agencies alongside judicial review. Each type of oversight structure plays a role in promoting a democratic administrative state that is fair, transparent, deliberative, and accountable to the public. Therefore, courts and policymakers should consider the availability of alternative oversight tools when construing and designing review bars.

APPENDIX A: METHODOLOGY

For purposes of this study, I defined a “judicial review bar” as a statute that (1) expressly bars any judicial review (2) of a decision by an administrative agency. Therefore, I did not include statutes that preclude judicial review of decisions by other actors, such as the President or states.⁴⁰⁰ Furthermore, I excluded provisions that courts interpreted to grant unreviewable discretion if the statute itself did not contain an express statement prohibiting judicial review. Although these limitations are important for debates about the burdens that judicial review imposes on courts and agencies, this study focuses on Congress’s choices to expressly bar judicial review.

To identify judicial review bars, I searched the following phrases in the U.S. Code Annotated on Westlaw:

- “final and nonappealable”
- “unreviewable”
- “shall not be subject to review”
- “shall not be subject to judicial review”
- “not subject to judicial review”
- “no administrative or judicial review”

I then reviewed each statute collected to determine whether it contained a judicial review bar. I sorted these statutes by hand, so there is potential for human error. To guard against human error, I double-checked each statute that I identified.

The Westlaw searches returned hundreds of statutes, so the results provide a broad survey of statutes and a sufficient basis to show that judicial review bars are a phenomenon. Nonetheless, it is possible that other statutes preclude judicial review through other phrases.⁴⁰¹ To evaluate whether my searches missed a broad category of review bars, I cross-referenced the statutes collected against the statutes listed in the appendix to the ACUS Sourcebook of Federal Judicial Review Statutes.⁴⁰² The ACUS study searched for statutes that contained terms

400. See, e.g., 23 U.S.C. § 135 (barring judicial review of decisions by states); 28 U.S.C. § 657 (barring judicial review of decisions by arbitrators); 10 U.S.C. § 949p-1 (barring judicial review of decisions by military commissions); 22 U.S.C. § 1631a (barring judicial review of decisions by the President).

401. Moreover, the results do not include every review bar Congress has enacted because some public laws included review bars that were not codified in the U.S. Code. These review bars appear in statutory notes sections on Westlaw. Examples of this appear in 42 U.S.C. § 1395w-4, -23, -141. These statutory notes include three review bars that were part of the 2003 Medicare amendments but were never codified. Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. No. 108-173, 117 Stat. 2066. For an explanation of statutory notes, see Shawn G. Nevers & Julie Graves Krishnaswami, *The Shadow Code: Statutory Notes in the United States Code*, 112 LAW LIBR. J. 213, 215–17 (2020).

402. SIEGEL, ACUS SOURCEBOOK, *supra* note 77, at 117–28.

including “judicial” or “review,” which captured a broader universe of statutes than the searches I performed.⁴⁰³ The ACUS report therefore captured some provisions not captured in my Westlaw searches, including those with phrases such as “no court shall have jurisdiction to review.” I reviewed the statutes that the ACUS report identified as precluding judicial review, and I added a total of two statutes to my dataset, which reinforced that my Westlaw searches captured a broad universe of review bars.⁴⁰⁴

After identifying judicial review bars, I analyzed the types of decisions that Congress insulated from judicial review. I searched for trends and sorted the review bars into categories. At this stage, if a statute contained multiple provisions that precluded judicial review of distinct agency actions, I included each provision as a separate entry. For example, 42 U.S.C. § 1395l(t) contains a review bar over two separate Medicare reimbursement rate determinations in paragraph (12) and paragraph (21). I coded these as two separate review bars. At this stage, I also coded various alternative oversight tools that I observed in statutes containing review bars.

403. *See id.* at 9.

404. Most statutes located through my Westlaw searches were not included in the ACUS Sourcebook. The likely reason for this is because the ACUS Sourcebook was limited to statutes concerning judicial review of agency orders and rules. *See generally id.* Many discretionary decisions identified in this study would not qualify as rules or orders.

APPENDIX B: JUDICIAL REVIEW BAR STATUTES

TABLE 1A: MEDICARE PAYMENT DECISIONS

Statute	Decisions Not Subject to Judicial Review	Alternative Oversight Tools
42 U.S.C. § 1320f-7	Maximum fair price for drugs subject to Medicare price negotiation process	Publication; regulated entity involvement; procedures
42 U.S.C. § 1395f(l)(5)	Payments for inpatient critical access hospital services	
42 U.S.C. § 1395ff(b)(1)(E)	Medicare claims less than \$1,000	
42 U.S.C. § 1395fff(d)	Payments for home health services	
42 U.S.C. § 1395i-5(c)(2)(D)	Payment adjustments for religious nonmedical healthcare institutional services	Report to Congress
42 U.S.C. § 1395l(i)(2)(D)(iv)	Payments for surgical services furnished in ambulatory surgical centers	
42 U.S.C. § 1395l(t)(12)	Payments for hospital outpatient department services, including classification systems, base amounts, periodic adjustments, and conversion factors	Stakeholder consultation
42 U.S.C. § 1395m(l)(5)	Payments for ambulance services	Stakeholder consultation; notice-and-comment
42 U.S.C. § 1395m-1(h)	Payments for clinical diagnostic laboratory tests	Stakeholder consultation
42 U.S.C. § 1395rr(b)(12)(H)	Payments for dialysis services	
42 U.S.C. § 1395rr(b)(14)(G)	Payments for renal dialysis services	
42 U.S.C. § 1395u(b)(10)(D)	Determinations of prevailing charge for reasonable charge for certain surgeries and reductions for certain localities	
42 U.S.C. § 1395u(o)(7)	Payments for certain drugs and biologicals	
42 U.S.C. § 1395w-3a(i)(8)	Medicare Part B rebates when manufacturers raise prices faster than inflation	Regulated entity involvement
42 U.S.C. § 1395w-3a(j)	Payments for certain drugs and biologicals	

Statute	Decisions Not Subject to Judicial Review	Alternative Oversight Tools
42 U.S.C. § 1395w-4(i)(1)	Payments for physicians' services, including geographic adjustment factors and establishment of a system for coding services	Publication; stakeholder consultation
42 U.S.C. § 1395w-4(p)(10)	Value-based payment modifier for payments for physician services, including establishment of the modifier, evaluation of quality of care, evaluation of costs, and dates of implementation of the modifier	Publication
42 U.S.C. § 1395w-4(t)(2)(B)	Increases in fee schedules for physicians' services provided in 2021 and 2022	
42 U.S.C. § 1395w-114b(f)	Medicare Part D rebates when manufacturers raise prices faster than inflation	Regulated entity involvement
42 U.S.C. § 1395x(kkk)(9)	Payments for rural emergency hospitals	Publication
42 U.S.C. § 1395ww(d)(7)	Payments for Subsection (d) hospitals for inpatient services	Procedures
42 U.S.C. § 1395ww(h)(7)(E)	Payments for direct medical education costs associated with the provision of services, including decisions about the number and distribution of full-time residents	Procedures
42 U.S.C. § 1395ww(j)(8)	Payments for inpatient rehabilitation services	Publication
42 U.S.C. § 1395ww(r)(3)	Payment adjustments for disproportionate share hospitals	
42 U.S.C. § 1395yy(e)(8)	Federal per diem rate for routine service costs for skilled nursing facilities	Publication

TABLE 2A: FINANCIAL BENEFITS

Statute	Decisions Not Subject to Judicial Review	Alternative Oversight Tools
5 U.S.C. § 8128(b)	Whether to allow or deny payments for workplace injuries	
7 U.S.C. § 7715(e)	Payments to anyone injured by an action taken in response to an emergency posed by a plant pest or noxious weed	Publication; stakeholder consultation
7 U.S.C. § 8308(b)(3)	Payments for destruction of property when carrying out operations to detect, control, or eradicate a pest or disease of livestock	
7 U.S.C. § 8316(b)(3)	Decisions to transfer funds during an emergency due to a pest or disease spreading through livestock	
8 U.S.C. § 1611(b)(1)(D)	Whether to provide programs, services, and benefits to noncitizens	Interagency consultation
8 U.S.C. § 1613(c)(2)(G)	Whether to provide programs, services, and benefits to noncitizens with limited 5-year eligibility for benefits	Interagency consultation
8 U.S.C. § 1621(b)(4)	Whether to provide programs, services, and benefits to noncitizens who are ineligible for state and local benefits	Interagency consultation
12 U.S.C. § 1735b	Payments to correct or reimburse structural or other major defects in mortgaged homes	Procedures
38 U.S.C. § 3727	Payments to correct defects or acquire title to property	Procedures
42 U.S.C. § 1320a-1(f)	Payments to states for capital expenditures on healthcare facilities	Administrative review; stakeholder consultation; procedures
42 U.S.C. § 1320a-1(j)	Payments for capital expenditures for eligible healthcare organizations that are needed for the organization to operate efficiently and economically	Stakeholder consultation; procedures
42 U.S.C. § 1395ff(h)(6)(A)	Prior determination about whether certain physician services and items are covered by Medicare before a service is furnished	Procedures; regulated entity involvement

Statute	Decisions Not Subject to Judicial Review	Alternative Oversight Tools
42 U.S.C. § 1395hhh(i)	Provision of loans for capital costs of hospital infrastructure improvement projects	Report to Congress
42 U.S.C. § 1437d	Payments to assist public housing projects in deteriorating condition or other public health emergencies	
42 U.S.C. § 1479(c)	Payments from Rural Housing Insurance Fund to buildings with structural defects to correct defects, pay claims, or help acquire title	
42 U.S.C. § 3374	Payments for acquisition of property at or near military bases	Procedures
42 U.S.C. § 12708	Whether adequate information has been submitted in an application for assistance for fair housing strategy in a jurisdiction	Regulated entity involvement
45 U.S.C. § 361	Whether expenses are properly chargeable to appropriated funds under the Railroad Retirement Act of 1974	
47 U.S.C. § 1021(c)(3)	Termination of DOJ Telecommunications Carrier Fund, which covers costs to comply with compatibility requirements	Reports to Congress

TABLE 3A: INCENTIVE PAYMENTS

Statute	Decisions Not Subject to Judicial Review	Alternative Oversight Tools
7 U.S.C. § 2025(c)(6)(D)	National performance measure used to evaluate performance rates for bonus payments and penalties under the supplemental nutrition assistance (“SNAP”) program	
7 U.S.C. § 2025(c)(7)(C)	Decisions about how states should repay liability for high payment error rate in payments received for administrative costs under SNAP program	
7 U.S.C. § 2025(d)(4)	Bonus payments in FY2003-2017 for low error rates in payments received for administrative costs under SNAP program	Stakeholder consultation
7 U.S.C. § 2025(k)(4)(D)	Reductions in payments for SNAP administrative costs based on payments received from other programs	Administrative review; interagency consultation
18 U.S.C. § 1031(g)(3)	Reward payments to persons who furnish information related to a possible prosecution for major fraud in the United States	
22 U.S.C. § 2708	Reward payments for information that leads to arrest or conviction of someone who committed or assisted in international crimes and to publish information about rewards offered by foreign governments	Interagency consultation; report to Congress
42 U.S.C. § 1395l(z)(4)	Medicare incentive payments for participation in eligible alternative payment models	
42 U.S.C. § 1395rr(h)(5)	Medicare payment reductions when renal dialysis services do not meet quality standards	Publication
42 U.S.C. § 1395w-4(o)(3)(C)	Medicare incentive payments for use of electronic health record technology	Publication; notice-and-comment

Statute	Decisions Not Subject to Judicial Review	Alternative Oversight Tools
42 U.S.C. § 1395w-4(q)(13)(B)	Merit-based Medicare incentive payments for physician services	Notice-and-comment; stakeholder consultation; publication; regulated entity involvement; administrative review
42 U.S.C. § 1395w-23(l)(8)	Medicare incentive payments for use of electronic health record technology	Publication
42 U.S.C. § 1395w-23(m)(6)	Medicare incentive payments for use of electronic health record technology	Publication
42 U.S.C. § 1395ww(n)(4)(A)	Medicare incentive payments for use of electronic health record technology	Publication
42 U.S.C. § 1395ww(o)(11)(B)	Medicare value-based incentive payments	Publication; stakeholder consultation; procedures
42 U.S.C. § 1395ww(q)(7)	Medicare payment adjustments for hospital readmissions	Publication
42 U.S.C. § 1395yy(h)(10)	Medicare value-based incentive payments to skilled nursing facilities	Publication
42 U.S.C. § 7413(d)(1)	Decisions to pursue heightened penalty is warranted for failure to comply with the Clean Air Act	Interagency consultation; regulated entity involvement

TABLE 4A: FEES

Statute	Decisions Not Subject to Judicial Review	Alternative Oversight Tools
15 U.S.C. § 77f	Adjustments to rates for fees to register securities	Publication
15 U.S.C. § 78ee(j)(3)	Adjustments to rates for SEC transaction fees	Publication
49 U.S.C. § 44940	Determination of costs of providing civil aviation services for purpose of imposing fees	Publication
49 U.S.C. § 45301	Adjustments to fees for air traffic control services and services provided to foreign governments, including determinations of costs	

TABLE 5A: CLAIM SETTLEMENTS

Statute	Decisions Not Subject to Judicial Review	Alternative Oversight Tools
12 U.S.C. § 1821	Whether to disallow a claim for uninsured or unsecured claims on a receivership that the FDIC handles	Administrative review; regulated entity involvement
22 U.S.C. § 1622g	Foreign Claims Settlement Commission decisions about payment and settlement of international claims	
22 U.S.C. § 1627	Certification of payment of costs pursuant to the Yugoslavia Claims Agreement of 1948	
22 U.S.C. § 1631o(e)	Decisions about interest payments in property vested under the Trading with the Enemy Act, including allowance or disallowance of claims	
22 U.S.C. § 1641p(b)	Whether to make payment for claim above set maximum	Procedures

TABLE 6A: ELIGIBILITY AND COMPLIANCE GUIDANCE

Statute	Decisions Not Subject to Judicial Review	Alternative Oversight Tools
7 U.S.C. § 136a-1	Guidelines for types of studies and data to submit with application to reregister pesticides	Publication
8 U.S.C. § 1182(a)(5)(C)	Determination of standardized tests and minimum test scores to show competence in English for immigrants who seek to enter the United States as healthcare workers	Interagency consultation
8 U.S.C. § 1641	Guidance for whether a noncitizen qualifies for benefits for people who have been battered or subjected to extreme cruelty	Interagency consultation
42 U.S.C. § 287a	Determination that drug product is a “high need cure” and therefore eligible for grant	
42 U.S.C. § 1395jj(g)	Determinations about shared savings program under Medicare for accountable care organizations, including performance standards and measures to assess quality of care	
42 U.S.C. § 1395l(m)(4)	Criteria to qualify for incentive payments for physicians’ services in underserved areas	Publication
42 U.S.C. § 1395l(t)(21)(E)	Determinations about qualification for Medicare payments for outpatient services	
42 U.S.C. § 1395l(u)(4)(E)	Criteria to qualify for Medicare incentive payments for services in physician scarcity areas	Publication
42 U.S.C. § 1395l(x)(4)	Criteria to qualify for Medicare incentive payments for primary care services	
42 U.S.C. § 1395ll(l)	Determinations of quality data required from post-acute care providers, measure of data, and system to report data	Publication; stakeholder consultation; regulated entity involvement; procedures
42 U.S.C. § 1395m(l)(12)	Criteria to qualify for Medicare payment increase for ambulance services originating in qualified rural areas	

Statute	Decisions Not Subject to Judicial Review	Alternative Oversight Tools
42 U.S.C. § 1395w-4(m)(5)(E)	Criteria to qualify for incentive payments for reporting data on quality measures for physicians' services	Publication; procedures; regulated entity involvement; administrative review
42 U.S.C. § 1395ww(d)(10)(C)(iii)(II)	Geographic classifications for Subsection (d) hospitals	Publication
42 U.S.C. § 1395ww(d)(13)(I)	Determinations about whether a geographic area qualifies for a wage increase for Medicare payments	
42 U.S.C. § 1395ww(p)(7)	Qualifications for Medicare payment adjustments for hospital-acquired conditions	Publication

TABLE 7A: SETTING PRIORITIES

Statute	Decisions Not Subject to Judicial Review	Alternative Oversight Tools
6 U.S.C. § 659(f)	Provision of assistance to other parties from the national cybersecurity and communications integration center	
7 U.S.C. § 136a-1	List of order in which pesticides will be reviewed for reregistration	Publication
7 U.S.C. § 511s	Whether a particular kind of tobacco should be graded	Stakeholder consultation
7 U.S.C. § 7614a(b)	Roadmap for agricultural research, education, and extension	Stakeholder consultation; interagency consultation; publication
16 U.S.C. § 410hh(4)(d)	Determination of most desirable right-of-way for Arctic National Preserve	Interagency consultation
21 U.S.C. § 346a	Schedule for reviewing pesticide residue in food	Publication
42 U.S.C. § 6924	Schedule for reviewing hazardous wastes	Report to Congress
42 U.S.C. § 7412(e)(3)	Schedule for promulgation of emissions standards	Publication; notice-and-comment
42 U.S.C. § 7412(e)(4)	Listing pollutant or source category for future regulation	Publication; notice-and-comment
42 U.S.C. § 300g-1	List every five years of unregulated drinking water contaminants that may require regulation	Publication; stakeholder consultation; notice-and-comment
42 U.S.C. § 1315a	Implementation of program to test innovative payment and service delivery models for Medicare and Medicaid	Interagency consultation; stakeholder consultation; report to Congress
42 U.S.C. § 1395cc-2	Implementation of a Medicare demonstration program, including scope of program, program participation standards, contract performance standards, payment rates, and bonus awards	Reports to Congress

Statute	Decisions Not Subject to Judicial Review	Alternative Oversight Tools
43 U.S.C. § 1611	Reallocations of land among Native American Village Corporations	Procedures
43 U.S.C. § 1634	Decisions about conflicting applications for allotments of Native American land, if reduction in land is less than thirty percent of acreage claimed and adjustment does not exclude improvements claimed	
45 U.S.C. § 718(d)(2)	Modification of plan to reorganize and modernize railroads	
45 U.S.C. § 718(d)(3)(C)	Modification of designations of rail properties in plan to reorganize and modernize railroads	Report to Congress; publication

TABLE 8A: ENFORCEMENT DISCRETION

Statute	Decisions Not Subject to Judicial Review	Alternative Oversight Tools
5 U.S.C. § 8H(f)	Whether to transmit reports of urgent concerns from employees of the Department of Defense	Procedures
8 U.S.C. § 1182(n)(2)(n)(G) (vii)	Decisions not to conduct an investigation	Regulated entity involvement
15 U.S.C. § 4305	Actions taken in response to joint venture notification, including an antitrust investigation	Publication
15 U.S.C. § 6208(a)	Whether to provide evidence to a foreign antitrust authority to conduct an investigation	
15 U.S.C. § 6208(b)	Whether an antitrust mutual assistance agreement satisfies U.S. confidentiality laws	
15 U.S.C. § 8306	Whether to grant a statutory exemption when an entity proposes to list or trade a novel derivative product	Interagency consultation
19 U.S.C. § 1677(18)(D)	Whether a foreign country is a “nonmarket economy country” and thus subject to exercise of antidumping authorities	
19 U.S.C. § 1677i	Whether downstream product should be monitored due to reasonable likelihood that importation will increase diversion of any component part	Publication
31 U.S.C. § 3805(a)(1)	Whether to refer a false claim allegation to a presiding officer	
35 U.S.C. § 135	Whether to institute a patent derivation proceeding	
35 U.S.C. § 303	Whether to institute an <i>ex parte</i> reexamination proceeding for an issued patent	Publication
35 U.S.C. § 314	Whether to institute an <i>inter partes</i> review proceeding for an issued patent	Regulated entity involvement; publication
35 U.S.C. § 324	Whether to institute a post-grant review proceeding for an issued patent	Regulated entity involvement; publication

Statute	Decisions Not Subject to Judicial Review	Alternative Oversight Tools
42 U.S.C. § 1395y(b)(2)(B) (vii)(IV)	Whether there is a reasonable basis to conclude there was a discrepancy in a statement of Medicare reimbursement	Procedures
42 U.S.C. § 7412(r)(6)(R)	Chemical Safety and Hazard Investigation Board reports on accidental releases of hazardous materials	Reports to Congress; publication; interagency consultation
50 U.S.C. § 3033(k)(5)(F)	Whether to transmit complaints of urgent concerns to the Director of National Intelligence	Report to Congress
50 U.S.C. § 3517(d)(5)(F)	Whether to transmit complaints of urgent concerns to the Director of the CIA	Report to Congress

TABLE 9A: PROCEDURAL CHOICES

Statute	Decisions Not Subject to Judicial Review	Alternative Oversight Tools
5 U.S.C. § 570	Whether to use a negotiated rulemaking committee	
5 U.S.C. § 581(b)	Whether to use a dispute resolution proceeding.	
12 U.S.C. § 1464	Whether to disclose reports from Federal Savings Associations based on whether disclosure is in the public interest	Publication; report to Congress
18 U.S.C. § 981(e)	Whether to transfer forfeited property to appropriate federal, state, or local law enforcement agency	
18 U.S.C. § 981(i)	Whether to transfer forfeited property to foreign country	Interagency consultation
26 U.S.C. § 6330(g)	Whether a hearing is unnecessary because a portion of a hearing request to the IRS is frivolous	
31 U.S.C. § 3336	Implementation of pilot program on electronic benefit transfer, including selection of financial agents and design of the program	
41 U.S.C. § 1323(b)	Establishment of committees, working groups, or other bodies to carry out functions of council for federal acquisition supply chain security	
41 U.S.C. § 1323(c)(2)(F)	Whether to include a description of mitigation strategies that could lead to articles being included in executive procurement	
42 U.S.C. § 1395ddd(f)(3)	Determinations that sustained or high level of payment errors justify use of extrapolation to calculate overpayment amounts to be recovered in Medicare Integrity Program	
42 U.S.C. § 1395m(l)(17)(J)	Implementation of data collection system about ground ambulance services	Report to Congress; publication; notice-and-comment

Statute	Decisions Not Subject to Judicial Review	Alternative Oversight Tools
42 U.S.C. § 1395nn(i)(3)(I)	Process for applicable hospitals to apply for exceptions from statutory requirements that prohibit facility capacity expansion	Procedures; notice-and-comment; publication
42 U.S.C. § 1395w-4(k)(7)	Implementation of quality reporting program for measuring resource use of physicians' services	Notice-and-comment; stakeholder consultation; publication
42 U.S.C. § 1395w-4(n)(9)(G)	Establishment of methodology to analyze data for Physician Feedback Program under Medicare	Publication; regulated entity involvement
42 U.S.C. § 1395w-4(r)(7)	Establishment of patient condition groups and classification codes for Medicare resource use analysis	Publication; stakeholder consultation
42 U.S.C. § 2155	Decision not to make a new finding for license to export nuclear material where applicant files multiple applications	Interagency consultation
42 U.S.C. § 7502(a)(1)(B)	Designation of an area as a nonattainment area for purposes of applying attainment date when developing emission standards	Notice-and-comment

TABLE 10A: ADDITIONAL PROCESS

Statute	Decisions Not Subject to Judicial Review	Alternative Oversight Tools
7 U.S.C. § 136a	Review of applications to sell pesticides in a 12-month timeframe when application is solely for a minor use with a new active ingredient	
7 U.S.C. § 2204e	Risk-benefit analysis of effect of major regulation on human health, human safety, or environment	Publication
15 U.S.C. § 57a(e)(5)(C)	Statement of basis and purpose in rules about deceptive and unfair trade practices	Notice-and-comment; report to Congress
15 U.S.C. § 2625(f)	Statement of basis and purpose for final orders under the Toxic Substances Control Act	Stakeholder consultation; report to Congress; publication
16 U.S.C. § 460vv-4(b)(1)	Environmental impact statement with respect to roadless areas in Oklahoma satisfied statute	
33 U.S.C. § 1322(p)(4)(A)(iii) (III)(cc)	Written response to state governor about objection to performance standard for marine pollution control devices	Interagency consultation; stakeholder consultation; regulated entity involvement; notice-and-comment
33 U.S.C. § 3611(b)(5)	Certification of degree of accuracy of post-storm assessment	Interagency consultation; stakeholder consultation; report to Congress; publication; procedures

TABLE 11A: MANAGERIAL FUNCTIONS

Statute	Decisions Not Subject to Judicial Review	Alternative Oversight Tools
5 U.S.C. § 9701(e)(1)(C)(ii)	Decisions that further mediation with employee representatives unlikely to produce agreement	Notice-and-comment; report to Congress; stakeholder consultation
5 U.S.C. § 9701(e)(2)	Procedural rules for DHS human resources management system	Interagency consultation; procedures
5 U.S.C. § 9902	Decisions to bargain with a labor organization above the level of exclusive recognition in implementation of system for performance management and workforce incentives at DOD	Stakeholder consultation; report to Congress
6 U.S.C. § 659(h)(1)(A)	Termination of voluntary information sharing agreement with the National Cybersecurity and Communications Integration Center	
6 U.S.C. § 659(h)(1)(B)	Declining to enter a voluntary information sharing agreement with the National Cybersecurity and Communications Integration Center	
6 U.S.C. § 659(h)(2)(B)	Negotiation of a non-standard agreement for voluntary information sharing with the National Cybersecurity and Communications Integration Center	
7 U.S.C. § 217a	Decisions to revoke an authorization for state agency to collect fees to inspect livestock to determine ownership	Regulated entity involvement
10 U.S.C. § 2410n(d)	Purchasing decisions by DOD from Federal Prison Industries	
12 U.S.C. § 1715z-21	Decisions to cancel delegation of authority to mortgagees to insure mortgages involving property with a dwelling designed principally for occupancy by 1–4 families	Procedures
12 U.S.C. § 1822	Whether someone meets standards to work as a contractor for the FDIC	Procedures
22 U.S.C. § 4114	Resolutions of disputes between Department of State and representatives for a collective bargaining agreement	Administrative review

Statute	Decisions Not Subject to Judicial Review	Alternative Oversight Tools
25 U.S.C. § 17(a)	Whether to permit tribal governments, organizations, and student organizations to use Bureau of Indian Affairs equipment, land, buildings, and other structures.	
38 U.S.C. § 4315(c)(3)	Determinations that reemployment is impossible or unreasonable	Procedures; interagency consultation; report to Congress
38 U.S.C. § 7403(h)(4)(D)	Whether further meeting and conferral with employee representatives would be likely to reach agreement	Report to Congress; stakeholder consultation
42 U.S.C. § 1320c-2(f)	Decisions to terminate or not renew a contract with a quality improvement organization for Medicare and Medicaid	Publication; notice-and-comment; regulated entity involvement
42 U.S.C. § 1395w-3(b)(12)	Decisions to award contracts for certain healthcare items and services under competitive acquisition program	Report to Congress; stakeholder consultation; procedures; administrative review
42 U.S.C. § 1395w-3b(g)	Decisions to award contracts for outpatient drugs and biologicals under competitive acquisition program	Procedures; administrative review
42 U.S.C. § 1490p-2(j)(2)	Decisions to terminate delegation of authority to authorize certain lenders to determine whether loans meet statutory requirements for a guarantee	
50 U.S.C. § 2011(c)	Decisions about benefit systems to protect intelligence sources and methods from unauthorized disclosure	Procedures; report to Congress
50 U.S.C. § 3523(j)	Decisions about retirement benefit systems to protect intelligence operations and sources from unauthorized disclosure	Procedures

TABLE 12A: FACTUAL DETERMINATIONS

Statute	Decisions Not Subject to Judicial Review	Alternative Oversight Tools
7 U.S.C. § 1385	Factual findings underlying payments under the Agricultural Adjustment Act	Procedures
38 U.S.C. § 511	Factual findings for claim for veterans' benefits	
38 U.S.C. § 7292(d)(2)	Factual findings and laws applied to particular facts in veterans' decisions	
42 U.S.C. § 1383(p)(7)(D)	Whether an applicant for Medicare supplemental benefits for the "aged, blind, and disabled" meets conditions for reinstatement	
42 U.S.C. § 1395oo(g)	Certain findings regarding Medicare reimbursement claims	
42 U.S.C. § 7651a	Whether to make factual corrections in baseline calculations for fossil fuels	
52 U.S.C. § 10503	Determinations that a state is "covered" and therefore must be provided with bilingual election materials	Publication

TABLE 13A: NATIONAL SECURITY

Statute	Decisions Not Subject to Judicial Review	Alternative Oversight Tools
6 U.S.C. § 211(k)(3)	Withholding of notification about how to obtain information for reporting concerns about searches of electronic devices at the border	Procedures; report to Congress
18 U.S.C. § 3521(f)	Decision to terminate someone from witness protection program	Written notice
38 U.S.C. § 4312	Determination that "military necessity" precludes giving employer notice about leave from employment for uniformed services in order to have reemployment rights	Procedures
42 U.S.C. § 300hh-11	Determination of "military necessity" to leave employment for service in National Disaster Emergency Medical System	Interagency consultation
42 U.S.C. § 5165f	Determination of "military necessity" to leave employment for service in emergency task forces created by FEMA	

TABLE 14A: IMMIGRATION

Statute	Decisions Not Subject to Judicial Review	Alternative Oversight Tools
8 U.S.C. § 1158(a)(3)	Determination about exception to ability to apply for asylum	Procedures
8 U.S.C. § 1158(b)(2)(D)	Determination that noncitizen not eligible for asylum due to participation in terrorist activity	Procedures
8 U.S.C. § 1182(a)(9)(B)(v)	Discretionary relief to prevent extreme hardship to a U.S. citizen or lawful permanent resident	
8 U.S.C. § 1182(d)(12)	Waiver of inadmissibility based on being subject to a civil penalty	
8 U.S.C. § 1182(h)	Waiver of inadmissibility for certain criminal offenses	
8 U.S.C. § 1182(i)	Discretionary relief to prevent extreme hardship to a U.S. citizen or lawful permanent resident	
8 U.S.C. § 1201(i)	Revocation of visa, unless revocation is sole ground for removal from the United States	
8 U.S.C. § 1225(b)(1)(A)(iii)	Application of expedited removal procedures to a noncitizen who has not been admitted or paroled into the United States and has not shown continuously present in the United States for two years	
8 U.S.C. § 1226(e)	Discretionary judgment regarding detention or release of a noncitizen, or the grant, revocation, or denial of bond or parole during pendency of removal proceedings	
8 U.S.C. § 1252(a)(2)(B)(i)	Discretionary denials of relief for noncitizens from removal proceedings	
8 U.S.C. § 1252(a)(2)(B)(ii)	Any decision or action specified to be in the discretion of the Attorney General or Secretary of Homeland Security under Title 8, Subchapter II (i.e., relating to immigration)	
8 U.S.C. § 1252(a)(2)(C)	Final order of removal based on certain crimes	

TABLE 15A: FOREIGN RELATIONS

Statute	Decisions Not Subject to Judicial Review	Alternative Oversight Tools
8 U.S.C. § 1182(a)(10)(C)(ii) (III)	Discretionary decisions to make spouse or child of a child abductor inadmissible until the abducted child is surrendered	
8 U.S.C. § 1182(a)(10)(C)(iii)	Discretionary decisions to make a foreign government official inadmissible for holding a child outside the custody of the United States	
8 U.S.C. § 1182(d)(3)(B)(i)	Waivers of inadmissibility based on past terrorist activity	Interagency consultation; report to Congress
16 U.S.C. § 2403a(b)(4)	Determinations of whether a joint activity in Antarctica is mainly done by a foreign government and therefore exempt from certain procedural requirements	