Coalition Formation and the Presumption of Reviewability: A Response to Rodriguez

*Robert K. Rasmussen**

Professor Dan Rodriguez's paper *The Presumption of Reviewability: A Study in Canonical Construction and Its Consequences*[1] makes several important contributions to the literature on statutory interpretation in the modern regulatory state. It provides a coherent explanation for the curious review provisions of the Administrative Procedure Act (APA), and analyzes the continuing battle over judicial review of agency action as part of a continuing dialogue among Congress, the courts, and the President. Rodriguez recognizes that those who study statutory interpretation must take account of both the existence of administrative agencies and the fact that interpretive practices have the potential to affect future action by Congress. These points are too often overlooked by modern theories of statutory interpretation. Indeed, the latter point—that interpretive practices may affect future legislation—is one of the unexplored areas in the current literature on statutory interpretation.[2]

Despite these laudable points, I think that ultimately Rodriguez fails to perform the task which he sets for himself. He asserts that his Article in large part is designed to explore the effects which one particular canon of statutory construction may have on future legislation. Specifically, Rodriguez attempts to delineate the *ex ante* effects of the canon which creates a presumption of judicial review of agency action. To the extent that Rodriguez traces the historical development of this canon, I have little to add to Rodriguez's account. Rodriguez carefully examines the enactment of the APA, the change in judicial and legislative attitudes toward the administrative state which led the Supreme

---

* Assistant Professor of Law, Vanderhilt Law School. B.A. Loyola University of Chicago, 1982; J.D. University of Chicago, 1985. I would like to thank Jason Johnston and Nicholas Zeppos for their helpful comments and observations on the potential effects of the presumption of judicial review of agency action, and Michael Smith for his valuable research assistance.

1. 45 Vand. L. Rev. 743 (1992).

2. My colleague Jason Johnston and I make this point in Jason S. Johnston and Robert K. Rasmussen, *White Noise: Statutory Interpretation and Legislative Strategy and Performance*, a working paper ("*White Noise*").

Court to create the presumption of reviewability in *Abbott Laboratories v. Gardner*,[3] and the continuing change which has led the Supreme Court to be somewhat less enthusiastic in its application of this canon of construction. Rodriguez, however, also attempts to specify the manner in which the existence of this canon may affect Congress's deliberation over future legislation. Rodriguez's account of this impact is less convincing than his analysis of the creation of the canon.

Rodriguez ultimately concludes that the presumption of judicial review may lead to the passage of less legislation than if the courts simply addressed the issue of reviewability on a case-by-case basis without putting the judicial thumb on the scales either in favor of reviewability or against it. Rodriguez asserts that this state of affairs exists because the presumption of reviewability may prevent the formation of a coalition in favor of a given bill where such a coalition would have formed had the presumption not existed. When one examines the dynamics of coalition formation and how the presumption of reviewability affects these dynamics, however, it becomes clear that Rodriguez's claim cannot be supported.

In the first part of this Response, I set forth Rodriguez's argument as to the effect of the presumption of reviewability. In the next part, drawing on work which Professor Jason Johnston and I are doing, I specify, more precisely than Rodriguez does, the way in which legislative coalitions form. Finally, I show that in the case of the presumption of reviewability, the presumption will neither promote the passage of legislation which otherwise would have failed to garner a majority of the legislators nor prevent the passage of legislation which otherwise would have secured a winning coalition. While the presumption may have some effect on the extent to which the legislation expressly addresses the question of judicial review, it can neither prevent nor encourage the enactment of a particular bill.

I. RODRIGUEZ AND THE PRESUMPTION OF REVIEWABILITY

Professor Rodriguez's Article focuses on the rule of statutory construction which states that courts, when faced with a statute that neither mandates nor precludes judicial review of agency action, will presume that judicial review is available.[4] Rodriguez explains the question of reviewability in terms of a political give and take among the courts, Congress, and the President.[5] When Congress began to create a

3. 387 U.S. 136 (1967).

4. See id.

5. Professor Barry Friedman has explained federal court jurisdiction as a similar dialogue between the courts and Congress. See Barry Friedman, *A Different Dialogue: The Supreme Court,*

number of administrative agencies, the courts were hostile to the growth of the administrative state. This hostility manifested itself in decisions reviewing the actions of the new agencies which placed significant constraints on agency action. The response to this hostility was predictable. Four members of the Supreme Court sympathetic to the New Deal attempted to fashion a presumption of no judicial review in *Switchmen's Union v. National Mediation Board.*[6] The consequence of such action was, in the then-extant political climate, to ensure outcomes which were more liberal than they otherwise would have been had there been judicial review. While the Supreme Court—or at least the plurality in *Switchman's Union*—may have been sympathetic to the aims of the New Deal, many lower court judges were not. The Supreme Court, given its limited resources, cannot review every lower court decision which it views as problematic. By shifting the final decision to the administrative agency—over which the President has a great deal of infiuence—the Supreme Court removed the ultimate authority from the reviewing courts and gave it to the administrators.[7]

Congress then enacted the APA, which, while creating a general right of modest judicial review in Section 702, also emphasized congressional control over the issue of reviewability in Section 701. President Roosevelt had vetoed an earlier law in part on the grounds that it provided for too much judicial review.[8] The political landscape changed once again after passage of the APA. Courts became enamored of the rights created by regulatory statutes, but the other branches of government became more conservative. This change led the Supreme Court in *Abbott Laboratories v. Gardner*[9] to create the presumption of reviewability. This switch in the Court's attitude toward review promoted more liberal outcomes than would have otherwise been reached. As the Supreme Court's personnel has changed once again, Rodriguez explains, the Court has become less vigilant in its attempt to find agency decisions reviewable, even though the canon presuming review continues to be invoked. The effect of this latest switch is to shift outcomes toward the more conservative end of the spectrum. The rigor with which the presumption of reviewability is applied has decreased, thereby giving a freer reign to the agencies. Nevertheless, the Supreme Court has yet to

---

Congress and Federal Jurisdiction, 85 Nw. U. L. Rev. 1 (1990).

6. 320 U.S. 297 (1943).

7. Peter Strauss makes a similar argument regarding the development of the *Chevron* doctrine. See Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 Colum. L. Rev. 1093 (1987).

8. See 86 Cong. Rec. 13,942-43 (Dec. 18, 1940) (veto message of President Roosevelt on the Walter-Logan Bill, H.R. 6324).

9. 387 U.S. 136 (1967).

question the canon's basic premise—that judicial review is the norm; and any movement away from judicial review must be justified. Thus, although the canon has varied over time, it remains an important part of the landscape of administrative law.

In assessing the merits of this canon of construction, Rodriguez spares the reader any discussion of the canon's legitimacy.[10] Such a deliberate omission is refreshing. I am myself, at least as far as law is concerned, a consequentialist.[11] Indeed, with the rise of pragmatic thinking on the question of statutory interpretation,[12] I find the repeated references to legitimacy in statutory interpretation more than a little ironic. For those who view law as a social instrument, the question for any theory of statutory construction must be what will the effects of such theory be both on the outcomes in actual cases, and on other players in the political system. It is these effects, rather than *a priori* notions of legitimacy, which provide the ultimate test of the merits of any particular interpretive regime.[13] Thus, I concur with Rodriguez that

> it is time to turn our attention toward the largely unexplored questions at the intersection of positive political theory and normative legal scholarship and to see whether canonical construction [or, I would add, any regime of statutory interpretation] generates a set of institutional consequences and policy outcomes that can justify the continued use of the method.[14]

In looking at the consequences of the presumption of reviewability, Rodriguez inquires into the ways in which the existence of this canon may affect future congressional lawmaking. Rodriguez claims that the existence of the presumption can affect whether future legislation is passed. Indeed, he states that the "principal danger of the reviewability canon is that it will induce a decisionmaking process that, when completed, may leave us—including those who want judicial review—worse off than without the canon."[15] He asserts that this is so because the existence of the canon may prevent the formation of a coalition in favor of a given bill where such a coalition would have formed if the canon

---

10. See Rodriguez, 45 Vand. L. Rev. at part I (cited in note 1).

11. See Robert K. Rasmussen, *Debtor's Choice: A Menu Approach to Bankruptcy*, a working paper (analyzing the consequences of an optional bankruptcy scheme).

12. See Richard A. Posner, *The Problems of Jurisprudence* 262-309 (Harvard, 1990); William N. Eskridge, Jr. and Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 Stan. L. Rev. 321 (1990); William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 Va. L. Rev. 275 (1988).

13. See Johnston and Rasmussen, *White Noise* (cited in note 2).

14. Rodriguez, 45 Vand. L. Rev. at part I (cited in note 1). Unfortunately, Rodriguez at times shifts from this consequentialist stance to a more formalist approach by implying that at some level the desirability of the presumption in favor of reviewability in particular and interpretive practices in general turn on separation of powers concerns. See id. at part IV.A.

15. Id. at part V.B. Rodriguez equates, but does not justify, having less legislation with being "worse off." See id.

did not exist.

Rodriguez's reasoning behind this conclusion is as follows. He starts with a legislature that is considering whether to pass a bill giving regulatory power to an administrative agency. His legislature contains three types of legislators. One type of legislator prefers the current state of affairs and thus opposes the legislation regardless of whether or not there will be judicial review of regulatory action. The other two types of legislators both support the substance of the proposed law, but they disagree over whether agency action taken under the putative law should be subject to judicial review. Rodriguez asserts that whether or not these latter two types can reach agreement and pass a statute turns on whether the canon presuming judicial review exists. If the canon is in force, Rodriguez claims that the coalition may not form because one group of the legislators may prefer no statute to a statute with judicial review. This group, thus, would join with the legislators who prefer the status quo to any statute, thereby defeating the proposed legislation. However, if there is no presumption as to reviewability—in other words the courts decide the issue of reviewability on a case-by-case basis under which the outcome is uncertain—Rodriguez claims that the two types of legislators who favor the bill would come together to form a coalition to pass the bill. The legislation which is passed will be silent on the issue of judicial review. Both types of legislators recognize the inherent risk that a court with no explicit textual guidance on the review issue may or may not decide that aggrieved parties have the right to seek judicial review of agency action. By forming a coalition to pass a statute which is silent on the question of judicial review, the two groups spread this risk between them.[16]

Rodriguez offers a hypothetical Consumer Safety Agency to illustrate his argument. He posits that a majority of the legislators favor the creation of such an agency, but that there is disagreement within this majority as to whether judicial review of the agency's actions should exist.[17] Neither those who want judicial review nor those who are op-

16. Id.

17. I find the reasons Rodriguez offers for this disagreement suspect. He suggests that those favoring no judicial review are worried about the inability of an agency to change its regulations once the agency decides that they are no longer useful. This story strikes me as implausible for two reasons. First, Rodriguez overstates the difficulty in amending regulations. See *American Trucking Ass'n, Inc. v. Atchison, Topeka & Santa Fe Railway Co.*, 387 U.S. 397, 416 (1967) (stating that an agency may "in light of reconsideration of the relevant facts . . . alter its past interpretation and overturn past administrative rulings"); *Chevron U.S.A. Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 863-64 (1984) (stating that "[a]n initial agency interpretation is not instantly carved in stone"); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970) (stating that "[a]n agency's view of what is in the public interest may change, either with or without a change in circumstances"). Second, he ignores the phenomenon of discounting future events. I would be surprised if any legislators place great weight on events which might occur many

posed to such review constitute a majority of the legislature. Rodriguez states that in this situation the interpretive rule which the courts will apply may determine whether the statute passes. If the current interpretive practice makes it unclear whether or not a court would find judicial review where the statute does not specify such review, Rodriguez suggests that the two groups favoring the statute may form a coalition. In such a situation, the risk of review is spread between the two groups. If, however, judicial practices leave no doubt that the courts will review agency action so long as the statute is silent on the matter, the Consumer Safety Agency will not come into being.

Rodriguez finds the collapse of the coalition to support the Consumer Safety Agency problematic. He notes that the potential beneficiaries of the legislation, who are the people for whom the presumption in favor of reviewability is ostensibly designed to protect, are the ultimate losers because they may be better off with a statute without review than with the status quo. In the end, Rodriguez concludes that "the presumption of reviewability may well cause more problems than it solves."[18]

Rodriguez makes a second point as well. He argues that the presumption of reviewability, when it does not prevent the formation of a coalition to pass the bill at issue, does not necessarily enforce the will of Congress on the question of judicial review. He suggests that even though a majority of legislators may favor no judicial review, this majority will not coalesce because some of the legislators in this group favor no statute at all while others would be willing to pass a statute with judicial review rather than maintain the status quo. Thus, Rodriguez concludes that the presumption may prevent the passage of a statute, and, even where a statute is passed, the presumption may not represent the preferences of the majority of the legislators.

II. Coalition Formation

To assess the effect that any interpretive practice, including the presumption of judicial review of agency action, may have on future legislative action, it is necessary to specify the way in which legislative coalitions form. Failure to be precise about coalition formation may lead to results which, upon further examination, cannot be supported. Indeed, I think that my objections to Rodriguez's conclusions stem in large part from his failure to delineate coalition formation in a systematic way.

---

years in the future. For a more expansive explanation of this point, see Johnston and Rasmussen, *White Noise* (cited in note 2).

18. Rodriguez, 45 Vand. L. Rev. at part V (cited in note 1).

Professor Jason Johnston and I have set forth elsewhere a theory by which such legislative coalitions come together.[19] Suffice it to say that this model in many respects is similar to that put forward by Rodriguez. We posit a legislature with three representatives, which is for all intents and purposes the same as Rodriguez's one hundred-person legislature divided into three types of legislators. In both models, two legislators or types of legislators have to come together to pass a bill. Like Rodriguez, we also do not examine possible trades between legislators either across bills or within the various provisions of a single bill.

One crucial area in which our models differ is the motivations of the legislators. We assume that legislators attempt to maximize both their personal preferences as to public policy and their chances of reelection. Thus, on any given piece of legislation, the legislator's vote depends on her own preferences and those of her constituents. We also assume that the legislators in our model are risk averse. In other words, they view movement away from their preferred policy as harming them more than a corresponding movement toward their preferred policy would benefit them. Stated formally, their utility functions are concave. This is a standard modeling assumption.[20] Rodriguez is more ambiguous as to the motivation of his legislators, stating that they may either be attempting to get reelected or they may be pursuing what they perceive as good public policy. Rodriguez does not identify his legislators' attitudes toward risk, though risk sharing is usually thought to be efficient only with risk averse actors.[21]

As a general matter, we have, using our model, shown that interpretive practices can at times make a difference in the passage of future legislation.[22] This is especially true where legislators, by using their knowledge of judicial interpretive practices, can send different signals to the courts than they send to their constituents.[23] This signalling game allows the legislators in our model to deceive the voters, if they so choose. The voters, ignorant of interpretive practices, think that the effect of the legislation is based on the language of the statute. The real

---

19. This model is formally set out in Jason S. Johnston, *Statutory Interpretation and Legislative Incentives*, a working paper (*"Legislative Incentives"*). It is also used in Johnston and Rasmussen, *White Noise* (cited in note 2).

20. See David M. Kreps, *A Course in Microeconomic Theory* 82 (Princeton, 1990) (stating that "[i]n economic theory, risk aversion is typically assumed").

21. For example, see id. at 91-93; Thomas H. Jackson and Robert E. Scott, *On the Nature of Bankruptcy: An Essay on Bankruptcy Sharing and the Creditors' Bargain*, 75 Va. L. Rev. 155, 167-69 (1989); Robert E. Scott, *Conflict and Cooperation in Long-Term Contracts*, 75 Cal. L. Rev. 2005 (1987).

22. See Johnston, *Legislative Incentives* (cited in note 19); Johnston and Rasmussen, *White Noise* (cited in note 2).

23. See Johnston, *Legislative Incentives* (cited in note 19); Johnston and Rasmussen, *White Noise* (cited in note 2).

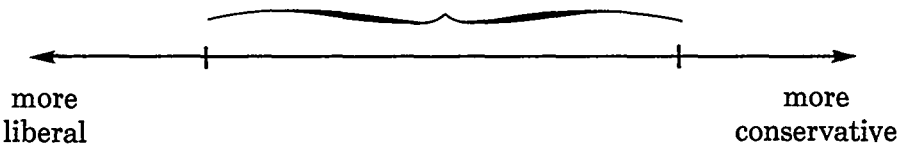
effects of the legislation, however, will turn on the courts' application of their current interpretive practices. Such a game of asymmetric information, however, is not present in the model which Rodriguez employs. Rodriguez does not assume that constituents lack knowledge of the interpretive practices of courts. Like us, however, he does assume that the interpretive practices of the courts are known to all legislators.

III. THE *EX ANTE* EFFECTS OF THE PRESUMPTION OF REVIEWABILITY

As a general matter I thus agree with Rodriguez that the courts' methods of statutory interpretation can affect the passage of legislation in some cases. It can indeed be the case that one interpretive practice may facilitate the formation of a coalition while a competing practice might frustrate such formation.[24] Unfortunately, the presumption of judicial review of agency action does not have such monumental effects, at least not on the assumptions provided by Rodriguez. To understand why Rodriguez's account of the *ex ante* effect of the presumption of reviewability fails, it is helpful to first examine the consequences that reviewability may have. Ultimately, if a legislator decides not to vote for a piece of legislation because it provides for judicial review, it must be because she does not like the consequences produced by such review.

The question of reviewability always is tied to a particular statute granting substantive authority to a specific agency. When Congress passes such a statute, this action creates a set of possible future outcomes. The outcomes are not necessarily specified by the statute, but not all potential outcomes are possible. In other words, while the statute may be ambiguous, it does impose limits on what the agency may do. It simply is not the case that a statute gives an agency carte blanche to do whatever it pleases in every given subject area. Stated more formally, a statute contains a certain range in policy space. One can visualize such a statute as follows:

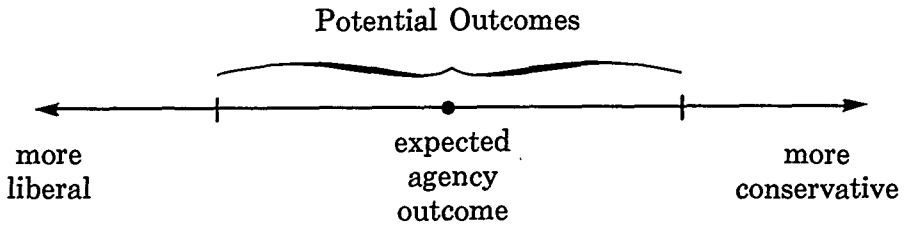
Figure 1



24. See Johnston and Rasmussen, *White Noise* (cited in note 2), for examples of such practices.

Each legislator must decide whether to vote for the statute. In doing so, the legislator assesses the likely outcome under the statute and compares it with the status quo. If the expected outcome is more preferable, she will vote for the statute. While a statute thus may encompass a broad range of political outcomes, the legislator will base her vote on the expected utility from the statute.

Figure 2

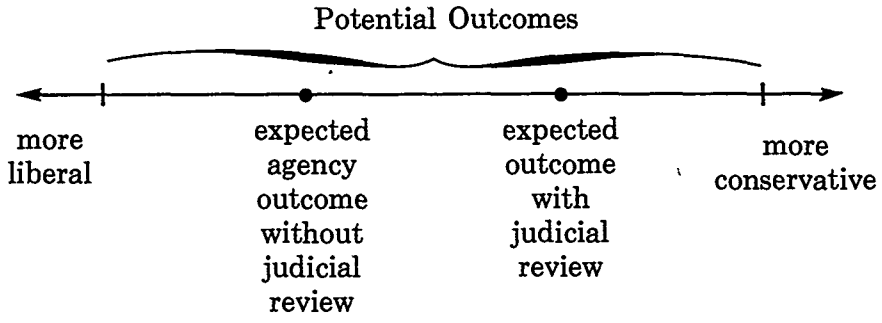


This does not mean that the legislator who votes for a bill favors all possible outcomes under the statute. Rather, she values the possible outcomes which she prefers more than the possible outcomes which she views as worse than the status quo. Once one recognizes that a statute selects a certain range of potential outcomes and that legislators vote based on the utility they receive from the expected outcome, one can then inquire into the ways in which the existence of judicial review would affect a legislator's perception of these outcomes and, consequentially, her vote.

If there is no judicial review, the agency will select its preferred outcome from the range of possible outcomes. In deciding to vote for this legislation the legislator thus would consider the expected agency action under the statute. If, on the other hand, there is judicial review, the judiciary may change the agency's selection of policy. For example, by imposing a strong requirement of what it views as reasonable action, the judiciary may forbid an agency from selecting outcomes at the extreme edge of possible outcomes and thereby force the agency into a more moderate position. In this situation, the legislator must base her vote on the expected policy outcome which will result after the judiciary has reviewed the agency action. Stated differently, the issue of judicial review affects the legislative decision to the extent that it affects the expected outcome under the legislation. Referring to my earlier diagram [Figure 2], one can visualize the impact of judicial review as follows:[25]

25. This outcome can result either from actual judicial review or from the agency anticipating the effects of judicial review.

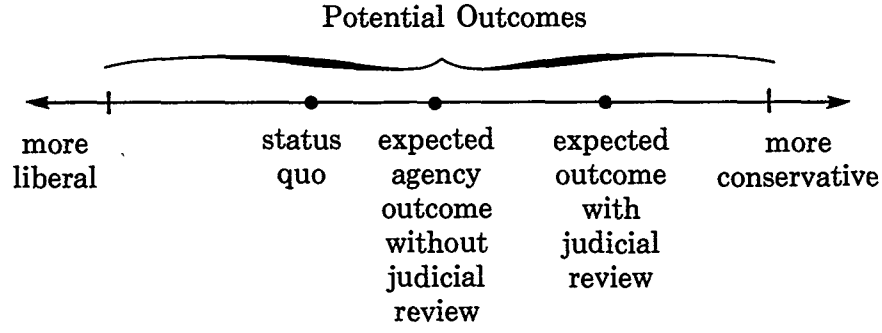
Figure 3



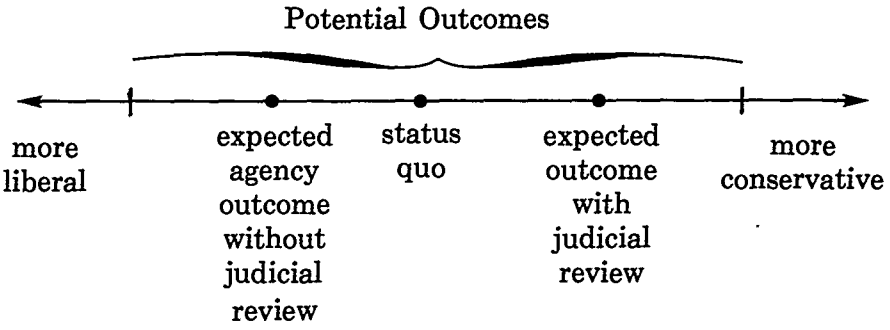
The question which Rodriguez seeks to examine is how the possibility of judicial review would affect the passage of a statute whose substantive provisions are already fixed. Like Rodriguez, I assume that one group of legislators favors the status quo to the possible outcomes under the statute. If any coalition can form to pass the statute, it has to be between the two groups that, assuming they were satisfied on the issue of judicial review, favor the statute to the status quo. In this situation, there are two possibilities: either both groups view the expected outcomes under the statute as being superior to the status quo, regardless of the review provisions, or each group views the statute as preferable to the status quo only if its position on review is adopted. These two states of affairs can be represented as follows:

Figure 4

Both Types Prefer Legislation to the Status Quo



Each Legislator Prefers Legislation Only
with Its Preference As to Review Included



In the first situation, it is clear that the two legislative groups in favor of the statute will form a coalition to pass the statute regardless of the judicial treatment of the issue of reviewability. Each group favors both the expected outcome with judicial review and the expected outcome without judicial review over the status quo. Both groups of legislators gain utility from the passage of some statute. There is no theory of bargaining which suggests that these two groups would fail to reach an accord. To be sure, the existence of the canon presuming judicial review may affect the deal which the two groups ultimately strike, but they will strike a deal. Either group is worse off if it joins with the third group which prefers the status quo to any statute than if it gives in to the other group's demand on the question of judicial review. In this situation, Rodriguez's claim as to the potential effect of the presumption of reviewability fails.

In the second situation, where at least one group views the expected outcome concerning judicial review as worse than the status quo, there will not be a coalition which would form to pass the statute, regardless of the judicial practices towards the question of judicial review. I refer now to Rodriguez's Consumer Safety Agency example where one group does not prefer the expected outcome with judicial review to the status quo, while the other group does not prefer the expected outcome with no judicial review to the status quo. As Rodriguez concludes, a statute would not be passed under these circumstances if the canon favoring review exists. This is because each group which would favor the creation of the Consumer Safety Agency provided it could get its preferred result on the issue of judicial review would rather join with those who favor the status quo than lose on the issue of reviewability.

This result, however, would not change if the Supreme Court eliminated the presumption of judicial review. The net effect of such a

change would be to introduce uncertainty into what would happen if a statute which was silent as to judicial review were enacted. The legislators would not know for certain at the time the legislation is being considered whether a court would find that a right to judicial review exists. Rodriguez asserts that the two groups which prefer the creation of the agency to the status quo only if their own review provision were attached would nevertheless form a coalition and pass the bill, leaving the issue of review unaddressed. The groups would reach such a compromise because, according to Rodriguez, they would be willing to share the risk as to what the ultimate outcome would be on the question of review.

This cannot be right. Rodriguez overlooks the fact that each legislator always has the option of voting for the status quo. Regardless of the probabilities one wants to assign to the likelihood of a court concluding that there would be judicial review of agency action, ultimately the expected outcome under the statute must be a set value which would fall to one side or the other of the status quo. This being the case, one group of legislators is always going to prefer the status quo to the expected outcome under the statute and thus would join with the third group which favors the status quo over any statute in order to defeat the legislation.

The flaw in Rodriguez's argument lies in his use of risk spreading. Usually, when individuals share risk, they share the same risk. For example, when I buy health insurance, I join with other individuals to share the risk that one of us will contract a serious medical illness.[26] Yet in the case of whether courts will review agency action, the risks are not the same. The risk that one group wants to reduce, the possibility of review, is the exact opposite of the risk which the other group wants to reduce, the possibility of no review. Since there is no common risk, the two groups cannot increase their expected utilities by sharing the risk. Regardless of how one wants to divide the risk of judicial review, one group is always going to find the status quo preferable to assuming its share of the risk.

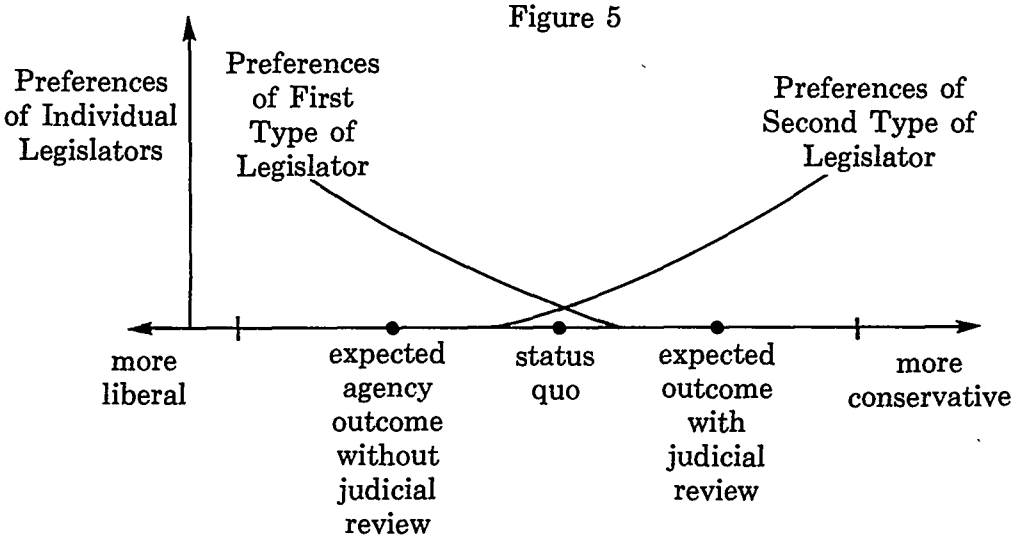
IV. CHANGING RODRIGUEZ'S ASSUMPTIONS

Rodriguez's account thus fails. Yet the problem that he raises is undoubtedly an interesting one. Indeed it is possible, by changing some of Rodriguez's assumptions, to generate the results which he seeks. The first possible change is to assume that legislators are risk preferring, or, put in more formal terms, that they have convex utility functions.

26. Such pooling of risk will only occur if the parties are risk averse. Risk aversion is a necessary, but not sufficient, condition for risk sharing.

Stated in the context of Rodriguez's Consumer Safety Agency example, the legislator who prefers the statute with judicial review finds that her utility increases at a greater rate the closer she gets to her desired outcome. The other legislator who prefers no review also has a preference for risk, but in the opposite direction. In this situation, if the question of judicial review were sufficiently uncertain, it may indeed be the case that both sets of legislators would find it in their interests to form a coalition. The preferences of the legislators in this situation can be shown as:

Figure 5



Any result which depends on a preference for risk, however, is certainly open to question. Most models assume either risk neutrality or risk aversion.[27] Indeed, the whole notion of risk sharing, on which Rodriguez bases his argument, is driven by risk aversion: people will pay the transaction costs necessary to reach a risk sharing agreement only because they value a fixed cost over a lower expected cost which has a high variance.[28]

There is a second way in which one may change Rodriguez's model to obtain his purported results where the presumption of reviewability will affect coalition formation. As noted earlier, the model of coalition formation which Jason Johnston and I have developed has legislators attempting to maximize two separate goals: their chances for reelection, which increase by implementing the preferences of a majority of their

27. See Johnston, *Legislative Incentives* (cited in note 19); but see Kenneth A. Shepsle, *The Strategy of Ambiguity: Uncertainty and Electoral Competition*, 66 Am. Pol. Sci. Rev. 555 (1972) (using a model with convex utility functions).

28. See Richard A. Posner, *Economic Analysis of Law* 91-92 (Little, Brown, 3d ed. 1986).

constituents, and their own policy preferences. We also assume that whereas the legislators know the effect of the courts' interpretive practices, the general voters do not. In other words, there is asymmetric information.

Where the preferences of the legislators and those of their constituents are aligned, the above analysis holds. The courts' interpretive practices as to judicial review will not affect the formation of legislative coalitions. While legislators have the potential to send different signals to their constituents and to the courts, they have no incentive to do so. Thus, as I have shown, whether or not a statute will pass turns not on the courts' interpretive practices, but on the preferences of the two types of legislators who favor the bill at some level but disagree over the issue of judicial review.

It may be the case, however, that the preferences of legislators differ from those of their constituents. In our model, Professor Johnston and I call such a legislator a "bad" representative. She is "bad" because she desires to enact her preferences at the expense of those of her constituents. In the case of a bad representative, the representative may, knowing the interpretive regime, attempt to send different signals to her voters and to the courts. For example, using this model Professor Johnston and I have demonstrated that the existence of the *Chevron* doctrine[29] allows a bad representative to send one signal to her voters and yet satisfy her own preferences if these preferences are shared by the agency charged with administering the statute.[30] A similar result may be obtained here if the legislators believe that the courts are biased in favor of their policy preferences.

The analysis would run as follows: Assume that the voters, reading the statute, would perceive the statute as shifting policy to the right of the status quo, and that a majority of the voters from a legislator's district favor this shift. Assume further that the agency charged with implementing the statute would attempt to obtain outcomes which pull the statute to the right of the status quo. The legislator herself, however, favors the status quo. She knows that the courts, when they engage in judicial review of agency action tend either to frustrate such action by imposing procedural requirements, or to read the statute in a way which is as close as possible to the status quo. This can be illustrated as follows:

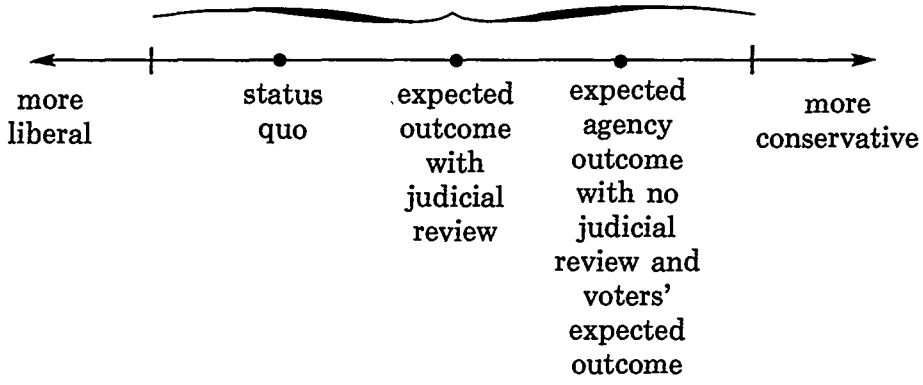
---

29. See *Chevron U.S.A. Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984).

30. See Johnston and Rasmussen, *White Noise* (cited in note 2).

Figure 6

Potential Outcomes



In this situation, the legislator would want judicial review while her constituents would not. The legislator, however, does not want to include an explicit judicial review provision in the statute for fear that voters, who vaguely know that the courts are liberal, would not approve of giving the courts an explicit role in overseeing the implementation of the statute. If the interpretive practice is to presume judicial review in the face of a silent statute, the legislator would vote for a statute which contains no explicit mention of judicial review. By doing this, the legislator pleases her voters by passing a statute which they think will move policy to the right of the status quo, but she also satisfies her personal preferences by ensuring that the actual policy outcome remains near the status quo.

If the presumption of reviewability were reversed, so that courts presumed no judicial review, our legislator could not send these differing signals to the voters and to the courts. In this situation, the legislator would have to face the tradeoff between personal preferences and the preferences of the voters. If her personal preferences are strong enough, she will not vote for the statute and the legislation will not pass.[31]

There exists a third way one could generate Rodriguez's outcome: the choice of interpretive rule as to reviewability of agency action may affect coalition formation. This is to assume that different legislators have different perceptions of the outcome of the courts' interpretive practice. Such divergence in beliefs is not likely to happen if courts em-

31. While the existence *vel non* of the presumption of judicial review thus affects the legislation in this situation, the ultimate effect is the opposite of that which Rodriquez posits. Namely, the presumption facilitates, rather than impedes, the enactment of the legislation.

ploy a clear rule either in favor of or against judicial review. But assume that the Supreme Court adopts a case-by-case approach, and consider once again Rodriguez's example of a Consumer Safety Agency with one legislator whose preference is judicial review/status quo/no judicial review and a second whose preference is no judicial review/status quo/judicial review. If these two legislators have different subjective beliefs about the probability of a court holding that there is judicial review of agency action under a given statute, it is possible that a coalition may form even though the legislators are risk averse. One legislator may view the expected outcome as moving from the status quo to the right, while the other may view the expected outcome as moving from the status quo to the left. These two legislators may both vote for the bill.

At the end of the day, what are we to think about the presumption of reviewability? I have identified situations where the presumption would have no effect upon coalition formation, other situations where the existence of the presumption may induce coalition formation, and still other situations where a case-by-case analysis would lead to the passage of a statute. In assessing these various situations, the question devolves to which assumptions best fit the real world.

This is also true of Rodriguez's claim that the presumption of reviewability may create a congressional intent where none exists. Rodriguez surmises that of those who form a coalition to pass a bill which is silent on judicial review, there may well be a split on the issue of reviewability. To know the intent of Congress, one would have to know the attitude toward judicial review of the group which voted against the bill in favor of the status quo. If all those in the latter group would favor no review, the presumption of reviewability creates an intent which does not exist.

Central to this result, however, is the assumption that the review question cannot be addressed separately. Rodriguez's model only allows for an up or down vote on the statute as proffered by the coalition. If Rodriguez's model were to allow for amendments, the result might very well change. An amendment foreclosing review would pass under the conditions Rodriquez posits. Rodriguez might argue that those favoring the statute would all vote against the amendment because specifying no judicial review would break up the coalition, but, as I have shown, this would not be the case.

The lesson here is a common one. When crafting economic arguments, the results often are dependent on the assumptions made.[32] Depending on the model, it may make a significant difference whether

32. A similar point is made in David M. Kreps, *Game Theory and Economic Modelling* 6-7 (Oxford, 1990).

there is risk averse, risk neutral, or risk preferring behavior; whether there is complete or incomplete information; or whether there is symmetric or asymmetric information.[33] It is thus always necessary to state your assumptions clearly. Oftentimes it is the plausibility of your assumptions which gives weight to your results. For example, I have shown three different sets of assumptions under which the Supreme Court's interpretive practices as to the availability of judicial review would affect whether or not legislation is passed. I find none of these assumptions plausible. I do not think that, as a general matter, legislators are risk preferring. I also do not think that legislators have differing subjective probabilities regarding the potential outcomes under a given method of review. Finally, while I think that voters generally know about the substance of a statute, the impact of judicial review on statutory outcomes is too subtle a matter for most voters to spend time comprehending. Thus, my analysis leads me to conclude that the courts' attitudes toward reviewability will have no impact on coalition formation. Some interpretive practices do affect coalition formation while others do not. The presumption of judicial review falls into the latter category.

V. CONCLUSION

For too long, those studying statutory interpretation have ignored the effects that competing methods of interpretation may have on future legislation. Professor Rodriguez's analysis as to the potential effects of the canon of construction of judicial reviewability is a significant attempt to fill this void. Although his claims as to the effects of the presumption cannot be supported, his analysis demonstrates the difficult nature of study in this area. Coalition formation often depends upon the assumptions which one employs. While I have offered various assumptions which generate different results, I believe that the most plausible conclusion is that the courts' treatment of reviewability will not affect coalition formation, though it certainly may affect the context of any statute which is passed. To be sure, some scholars will undoubtedly question the limited nature of many of the assumptions of the model which I used, but I do not purport to offer the final analysis on this issue. Rather, I simply hope to carry on the discussion.

33. For a general explanation of the difference among these various assumptions, see Eric Rasmusen, *Games and Information: An Introduction to Game Theory* 51-54 (B. Blackwell, 1989).