

Scalia's Bargain

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Scalia’s Bargain

KATHRYN E. KOVACS*

In 1970, Senator Edward M. Kennedy introduced a bill to add a waiver of sovereign immunity to the Administrative Procedure Act. A series of Supreme Court opinions had left sovereign immunity doctrine hopelessly muddled, making it unclear when plaintiffs could challenge federal agency actions in court. Initially, Kennedy’s bill languished because the Executive Branch opposed it. Then Antonin Scalia became Assistant Attorney General, and the Executive Branch changed its position. As Scalia explained, however, the Executive Branch conditioned its support for the bill on the understanding that the amendment would not throw open the courthouse doors for claims against the United States, but would be subject to the other limitations of the APA. The groups that had drafted the bill shared that understanding. Senator Kennedy accepted Scalia’s conditions, and the bill finally passed in 1976.

Unfortunately, the amendment that was meant to clarify the law has not done so. Instead, the question of how to interpret the APA’s waiver of sovereign immunity has generated inter- and intra-circuit splits and general confusion. Moreover, the majority of the federal courts of appeals have ignored Scalia and Kennedy’s bargain and have held that the waiver of sovereign immunity in the APA is not constrained by the other limitations in the APA. This Article—the first to address this issue—argues that the majority approach misinterprets the waiver and raises serious concerns related to separation of powers, democratic legitimacy, and the institutional competence of the courts, and should not stand.

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I. INTRODUCTION

Sovereign immunity insulates the United States from suit absent a statutory waiver of that immunity. It does not prevent plaintiffs from suing officers of the United States for acting outside the scope of their authority and seeking injunctive relief.¹ Starting in 1949, however, a series of confusing Supreme Court decisions muddled the law by holding that sovereign immunity bars such officer suits if the relief requested would operate against the United States.² The Administrative Procedure Act of 1946 (APA) might have deferred the urgency of clarifying this area of the law; it provided for judicial review of agency action.³ But the federal courts of appeals were split on the question of whether the APA waived the government’s sovereign immunity. The Supreme Court showed no inclination to resolve the question of when a plaintiff could challenge official federal action using either an officer suit or the APA.⁴

To clarify the law, the Administrative Conference of the United States (ACUS) and the American Bar Association (ABA) developed a proposal to add a waiver of sovereign immunity to the APA. The Department of Justice (DOJ) opposed the amendment, and it languished in Senator Edward M. Kennedy’s subcommittee for years. Then, Antonin Scalia became an Assistant Attorney General, and in 1976, he announced the Department’s change in position. The DOJ’s support for the bill, however, was premised on the understanding that the waiver would not throw open the courthouse doors for claims against the United States, but would be subject to the other limitations of the APA. Senator Kennedy accepted Scalia’s conditions, and the bill finally passed.⁵

¹ See *infra* text accompanying notes 20–22.

² See *infra* text accompanying notes 19–52.

³ Administrative Procedure Act § 106(a), 5 U.S.C. § 702 (2012).

⁴ See *infra* Part II.A.

⁵ See *infra* Part II.B.

In the years that have followed, the majority of the federal courts of appeals have ignored Scalia and Kennedy's bargain and held that the waiver is not constrained by the other limitations in the APA.⁶ The majority approach simply misinterprets the text, and the history confirms that the majority is wrong.⁷ Ironically, Justice Antonin Scalia, if called on to interpret this waiver, would have discounted the legislative history that he created as Assistant Attorney General.⁸ Justice Scalia would have focused on the text and probably would have agreed that the majority is interpreting the waiver incorrectly.

I too believe that interpretations of the APA must remain within the boundaries of the text. The APA has been shaped by exceptional legislative effort, before and after its enactment, and no single agency is empowered to interpret the Act. Consequently, if we are to give sufficient respect to public deliberation, interpretations of the APA cannot exceed the scope of the terms Congress enacted. To determine where the boundaries of the text are, however, requires a close examination of the full context and history of each provision of the APA. If we are to implement the compromises codified in the Act, we must know which provisions were compromises, and we cannot know that without studying the statutory history. The history here shows that the waiver of sovereign immunity was a compromise; it opened the courthouse doors, but not all the way.

Misconstruing the APA's waiver of sovereign immunity raises significant concerns. Yet, this Article is the first to raise the alarm on this issue. The APA is among the most important statutes in U.S. law;⁹ it provides the legal framework for federal agencies,¹⁰ including judicial oversight of the "fourth branch."¹¹ Misinterpreting the APA can have vast implications, and doctrinal confusion about the availability of relief under the APA imposes costs on both the government and potential plaintiffs.¹² Moreover, while allowing access to

⁶ See *infra* Part III.

⁷ See *infra* Part IV.

⁸ See ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 29, 375–78 (2012) (asserting that the use of legislative history poses major problems, including the assumption that we are looking for the legislature's intent "rather than the meaning of the statutory text," the "fantasy" that the legislature had a focus "on the narrow point before the court," and the possibility for "manipulation and distortion" in the legislative history).

⁹ See Susan E. Dudley, *Improving Regulatory Accountability: Lessons from the Past and Prospects for the Future*, 65 CASE W. RES. L. REV. 1027, 1032 (2015).

¹⁰ See Steven P. Croley, *The Administrative Procedure Act and Regulatory Reform: A Reconciliation*, 10 ADMIN. L.J. AM. U. 35, 35 (1996).

¹¹ See *Fed. Trade Comm'n v. Ruberoid Co.*, 343 U.S. 470, 487 (1952) (Jackson, J., dissenting) ("[Administrative bodies] have become a veritable fourth branch of the Government, which has deranged our three-branch legal theories much as the concept of a fourth dimension unsettles our three-dimensional thinking.").

¹² Nicholas Bagley, *The Puzzling Presumption of Reviewability*, 127 HARV. L. REV. 1285, 1329–36 (2014) (noting that some costs can include reducing an agency's resources and flexibility and increasing lawyers' influence in decisionmaking).

the courts to remedy government wrongs is generally a good thing, Congress is entitled to decide whether and when to expose the United States to suit. It is not for the courts to upset that constitutional design, even in the pursuit of a laudable goal. Ignoring Scalia's bargain raises separation of powers and democratic legitimacy concerns that outweigh the benefits of expanded judicial review under the APA.¹³

In a recent petition for certiorari, now-Judge Randolph Moss and former-Solicitor General Seth Waxman urged the Supreme Court to resolve the circuit split on the question of whether the APA's waiver of sovereign immunity is constrained by another limitation in the APA.¹⁴ That split, they asserted, "has persisted for years and has only grown worse with time."¹⁵ The Supreme Court denied that petition,¹⁶ but it will have to step in at some point in the near future to clarify the scope of this important statutory provision.

Part II of this Article tells the story of the 1976 amendment, from the doctrinal confusion that inspired it to Senator Kennedy thanking Scalia for his involvement on the Senate floor when the bill passed. Part III lays out the circuit splits and general confusion in the courts of appeals' interpretations of the APA's waiver of sovereign immunity. Part IV argues that the majority of circuit courts have misinterpreted the waiver, and Part V explains why Scalia's bargain should prevail.

II. HISTORY OF THE 1976 AMENDMENT

A. Doctrinal Confusion

To sue the United States, a complaint must state a basis for jurisdiction, a cause of action, and a waiver of sovereign immunity.¹⁷ A single statute may provide all three, but they are distinct requirements. Subject matter jurisdiction implicates "the courts' statutory or constitutional power to adjudicate the case."¹⁸ The APA does not provide jurisdiction.¹⁹ The federal question jurisdiction statute, however, usually gives the federal district courts authority to hear claims against the federal government.²⁰ A complaint must also

¹³ See *infra* Part V.B.

¹⁴ Petition for Writ of Certiorari at i, 11–12, *Cal. Table Grape Comm'n v. Delano Farms Co.*, 133 S. Ct. 644 (2012) (mem.) (No. 11-1371) (presenting the question whether the waiver in § 702 "appl[ies] to a claim that does not challenge the legality of 'agency action' or 'final agency action' within the meaning of the [APA]").

¹⁵ *Id.* at 11–12.

¹⁶ *Delano Farms Co.*, 133 S. Ct. 644.

¹⁷ Kathryn E. Kovacs, *Revealing Redundancy: The Tension Between Federal Sovereign Immunity and Nonstatutory Review*, 54 *DRAKE L. REV.* 77, 79 (2005).

¹⁸ *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998) (emphasis omitted).

¹⁹ *Califano v. Sanders*, 430 U.S. 99, 107 (1977).

²⁰ 28 U.S.C. § 1331 (2012); SECTION OF ADMIN. LAW & REGULATORY PRACTICE, AM. BAR ASS'N, A BLACKLETTER STATEMENT OF FEDERAL ADMINISTRATIVE LAW 47 (2d ed. 2013) [hereinafter BLACKLETTER STATEMENT]; GREGORY C. SISK, LITIGATION WITH THE

identify a “source of substantive law . . . [that] provides an avenue for relief.”²¹ Many statutes provide a cause of action to challenge official action, including the APA which has provided a cause of action since 1946.²² The first sentence of what is now 5 U.S.C. § 702 provides: “A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.”²³ Since 1976, the APA has also waived the United States’ sovereign immunity from suit.²⁴ The boundaries of that waiver, however, are still unsettled.

In 1882, the Supreme Court announced that, although federal sovereign immunity had “never been discussed or the reasons for it given, . . . it ha[d] always been treated as an established doctrine.”²⁵ Sovereign immunity insulates the federal government from suit “in the absence of an express waiver of this immunity by Congress.”²⁶ Unless a statute unambiguously waives sovereign immunity, federal courts have no jurisdiction to hear a claim against the United States.²⁷

Despite that bar, a plaintiff can challenge government action by filing a suit for injunctive relief against a federal officer alleging that the officer acted outside the scope of his authority.²⁸ Such suits rest on the same theory as *Ex parte Young*, which bypasses state sovereign immunity in suits against state officers.²⁹ That is, if the officer acted ultra vires, he did not act “on behalf of

FEDERAL GOVERNMENT 335 (4th ed. 2006). Some statutes provide for exclusive review in the courts of appeals for specific kinds of cases. *See, e.g.*, 28 U.S.C. § 2342; *see also* BLACKLETTER STATEMENT, *supra*, at 47 (noting that the Hobbs Act can provide jurisdiction in some cases).

²¹ Fed. Deposit Ins. Corp. v. Meyer, 510 U.S. 471, 484 (1994).

²² BLACKLETTER STATEMENT, *supra* note 20, at 49.

²³ Administrative Procedure Act § 106(a), 5 U.S.C. § 702 (2012). Section 704 further specifies: “Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.” *Id.* § 704.

²⁴ *Id.* § 702.

²⁵ United States v. Lee, 106 U.S. 196, 207 (1882).

²⁶ Block v. North Dakota *ex rel.* Bd. of Univ. & Sch. Lands, 461 U.S. 273, 280 (1983).

²⁷ Fed. Deposit Ins. Corp. v. Meyer, 510 U.S. 471, 475 (1994) (first citing *Loeffler v. Frank*, 486 U.S. 549, 554 (1988); and then citing *Fed. Hous. Admin. v. Burr*, 309 U.S. 242, 244 (1940)). *See generally* Vicki C. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 GEO. WASH. INT’L L. REV. 521, 523–52 (2003) (documenting the development of sovereign immunity jurisprudence and explaining the distinction between state and federal sovereign immunity).

²⁸ Kovacs, *supra* note 17, at 87–88; *see also* Am. Sch. of Magnetic Healing v. McAnnulty, 187 U.S. 94, 108 (1902) (“[I]n case an official violates the law to the injury of an individual[,] the courts generally have jurisdiction to grant relief.”).

²⁹ *See* Jonathan R. Siegel, *Suing the President: Nonstatutory Review Revisited*, 97 COLUM. L. REV. 1612, 1624 (1997).

the sovereign and hence, is not protected by sovereign immunity.”³⁰ This kind of officer suit is known as “nonstatutory review” because no statute waives the federal government’s sovereign immunity.³¹

The confusion began in 1949 with *Larson v. Domestic & Foreign Commerce Corp.*³² The plaintiff corporation in *Larson* sought to enjoin the War Assets Administration from selling surplus coal to anyone other than the plaintiff.³³ The Supreme Court reiterated the established doctrine that if a federal officer is acting within his statutory authority, sovereign immunity bars any suit challenging his action, but his ultra vires or unconstitutional actions may be restrained because they “are considered individual and not sovereign actions.”³⁴ In *Larson*, the Administrator was acting within the scope of his authority.³⁵ Thus, his action was “inescapably the action of the United States and the effort to enjoin it . . . fail[ed] as an effort to enjoin the United States.”³⁶ What muddied the waters was the Court’s footnote stating that, even if nonstatutory review were otherwise available against an officer who acted ultra vires, suit would be barred nonetheless “if the relief requested can not [sic] be granted by merely ordering the cessation of the conduct complained of[,] but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property.”³⁷

In 1963, the Supreme Court in *Dugan v. Rank* followed *Larson* in holding that, although nonstatutory review is available to enjoin an officer’s ultra vires actions, if the judgment would operate against the government itself, sovereign immunity bars the suit.³⁸ The plaintiffs in *Dugan* were water rights claimants who sought to enjoin federal officials from storing and diverting water at the Friant Dam in California.³⁹ Granting that relief, the Court held, would impair

³⁰ Kovacs, *supra* note 17, at 89; *see also* *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689–90, 693 (1949).

³¹ *See* Kovacs, *supra* note 17, at 78 n.3. As Adrian Vermeule points out, the use of the term “nonstatutory review” is a misnomer because, even in a nonstatutory review case, some statute necessarily provides subject matter jurisdiction. Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1115 (2009).

³² *Larson*, 337 U.S. at 689–90; *see also* Memorandum from Roger C. Cramton to Comm. on Judicial Review (1969) [hereinafter Cramton Memo], reprinted in *Sovereign Immunity: Hearing on S. 3568 Before the Subcomm. on Admin. Practice & Procedure of the S. Comm. on the Judiciary*, 91st Cong. app. I, at 102 (1970) [hereinafter *1970 Hearing*] (supporting statutory reform for sovereign immunity). I do not contend that the law was entirely clear before 1949, but the modern confusion stems from *Larson*. For a more in-depth discussion of this issue, *see generally* Kovacs, *supra* note 17.

³³ *Larson*, 337 U.S. at 684.

³⁴ *Id.* at 689.

³⁵ *Id.* at 703.

³⁶ *Id.*

³⁷ *Id.* at 691 n.11.

³⁸ *Dugan v. Rank*, 372 U.S. 609, 620, 621–22 (1963); *see also* *Hawaii v. Gordon*, 373 U.S. 57, 58 (1963) (per curiam) (“[R]elief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter.”).

³⁹ *Dugan*, 372 U.S. at 610.

the operation of a reclamation project that Congress had authorized and funded, and prevent the government from fulfilling its obligations under water delivery contracts.⁴⁰ Thus, “The Government would, indeed, be ‘stopped in its tracks,’” and sovereign immunity barred the claim.⁴¹

Larson and *Dugan* were part of “a long and bewildering series of Supreme Court decisions”⁴² that led to tremendous confusion about when a party could challenge official government action.⁴³ In 1970, then-professor Antonin Scalia said that “the effect of sovereign immunity upon nonstatutory review . . . truly surpasseth human understanding.”⁴⁴ After analyzing the case law closely, he concluded that reconciliation of the cases was “unattainable.”⁴⁵ Later, as Assistant Attorney General, Scalia said, “No one can read the significant Supreme Court cases on sovereign immunity . . . without concluding that the field is a mass of confusion; and if he ventures beyond that to attempt some reconciliation of the courts of appeals decisions, he will find confusion compounded.”⁴⁶ The Fourth Circuit agreed “that an effort to establish logical consistency in the decisions dealing with sovereign immunity is bound to be frustrating. The authorities are not reconcilable, and there are conceptual conflicts in the various holdings”⁴⁷

Terms used to describe sovereign immunity doctrine in the years leading up to the 1976 APA amendment included “illogical, artificial, erratic, and confusing,”⁴⁸ “unjust or irrational,”⁴⁹ “haphazard, unpredictable, unfair, inconsistent,”⁵⁰ “permeated with sophistry,”⁵¹ and “gross[ly] inefficien[t].”⁵²

⁴⁰ *Id.* at 621.

⁴¹ *Id.* (quoting *Larson*, 337 U.S. at 704).

⁴² Letter from Antonin Scalia, Assistant Att’y Gen., Dep’t of Justice, to Edward M. Kennedy, Chairman, U.S. Senate Subcomm. on Admin. Practice & Procedure (May 10, 1976) [hereinafter Letter from Scalia to Kennedy], in S. REP. NO. 94-996, at 24, 25 (1976).

⁴³ S. REP. NO. 94-996, at 6 (“The doctrinal confusion is such that the courts are divided on the fundamental question of whether or not sovereign immunity bars actions for equitable relief.”).

⁴⁴ Antonin Scalia, *Sovereign Immunity and Nonstatutory Review of Federal Administrative Action: Some Conclusions from the Public-Lands Cases*, 68 MICH. L. REV. 867, 871 (1970).

⁴⁵ *Id.* at 872.

⁴⁶ Letter from Scalia to Kennedy, *supra* note 42, at 25 (citations omitted); *see also* 1970 Hearing, *supra* note 32, at 22 (comment of Roger C. Cramton) (“A series of Supreme Court decisions in recent years has created so much confusion that clear answers to these questions are not possible.”).

⁴⁷ *Littell v. Morton*, 445 F.2d 1207, 1211–12 (4th Cir. 1971).

⁴⁸ 1970 Hearing, *supra* note 32, at 2 (statement of Sen. Kennedy); *see also id.* at 22 (comment of Roger C. Cramton) (“confused, artificial, and erratic”); *id.* at 46 (statement of Roger C. Cramton) (stating that the sovereign immunity doctrine was “totally erratic, haphazard, unpredictable, unfair, inconsistent, and, in some situations, unjust”).

⁴⁹ *Id.* at 3 (statement of Sen. Kennedy); *see* Cramton Memo, *supra* note 32, at 117 (“confused, illogical, and sometimes . . . unjust”); *see also* Kenneth Culp Davis, *Sovereign Immunity Must Go*, reprinted in 1970 Hearing, *supra* note 32, app. II, at 221–22 (arguing that sovereign immunity causes “frequent denial of substantive justice[,] . . . denial of

In more contemporary regulatory statutes, Congress had included waivers of sovereign immunity “authorizing Federal courts to review the legality of administrative action that has adversely affected private citizens.”⁵³ Those waivers, however, generally did not apply to “older executive departments, such as the Departments of State, Defense, Treasury, Justice, Interior, and Agriculture.”⁵⁴ In suits against those agencies, it was impossible to predict when the government would invoke sovereign immunity and whether nonstatutory review would be available or not.⁵⁵ The consensus was widespread among scholars and practitioners outside the government that sovereign immunity doctrine “should be put out of its misery.”⁵⁶

The APA might already have provided a partial solution. The 1946 Act provided a right of review to challenge “agency action.”⁵⁷ Thus, a plaintiff seeking to enjoin a federal officer’s action might have brought an APA claim to avoid the pitfalls of nonstatutory review. The federal courts of appeals, however, were split on the question of whether the APA waived the government’s sovereign immunity.⁵⁸ The D.C. Circuit, for example, reasoned “that one must imply, from a statement by the Congress that judicial review of agency action will be granted, an intention on the part of Congress to waive the right of sovereign immunity; any other construction would make the

procedural justice[,] . . . and gross inefficiency resulting from depriving the courts of authority to resolve controversies the courts are especially qualified to resolve”).

⁵⁰ 1970 *Hearing*, *supra* note 32, at 46 (statement of Roger C. Cramton).

⁵¹ Davis, *supra* note 49, at 213.

⁵² *Id.* at 201.

⁵³ H.R. REP. NO. 94-1656, at 5 (1976); S. REP. NO. 94-996, at 4 (1976).

⁵⁴ H.R. REP. NO. 94-1656, at 5; S. REP. NO. 94-996, at 4.

⁵⁵ 1970 *Hearing*, *supra* note 32, at 24 (comment of Roger C. Cramton); *see also id.* at 46, 47 (statement of Roger C. Cramton) (noting confusion in the “availability of nonstatutory review”).

⁵⁶ *Administrative Procedure Act Amendments of 1976: Hearing on S. 796, S. 797, S. 798, S. 799, S. 800, S. 1210, S. 1289, S. 2407, S. 2408, S. 2715, S. 2792, C. 3123, S. 3296, and S. 3297 Before the Subcomm. on Admin. Practice & Procedure of the S. Comm. on the Judiciary*, 94th Cong. app. F, at 221 (1976) [hereinafter *1976 Hearing*] (statement of Richard Berg); *see also* Cramton Memo, *supra* note 32, at 114 (“Dissatisfaction with the present doctrine of sovereign immunity is widespread.”); *id.* at 114–15 (describing academic and judicial criticism of sovereign immunity doctrine at the time); H.R. REP. NO. 94-1656, at 8 (“[T]he consensus in the administrative law community among scholars and practitioners is strong with regard to the elimination of sovereign immunity.”); S. REP. NO. 94-996, at 7 (same). *See generally* Davis, *supra* note 49, at 201–02 (“Congress should abolish nearly all of what is left of sovereign immunity.”).

⁵⁷ Administrative Procedure Act § 106(a), 5 U.S.C. § 702 (2012). The APA does not provide jurisdiction. *Califano v. Sanders*, 430 U.S. 99, 107 (1977).

⁵⁸ *See* *Schlafly v. Volpe*, 495 F.2d 273, 281 (7th Cir. 1974) (“One question regarding which there exists a clear conflict among the Circuits is whether the APA constitutes a waiver of sovereign immunity.”); H.R. REP. NO. 94-1656, at 10 n.33; S. REP. NO. 94-996, at 10 n.33; Scalia, *supra* note 44, app. at 923.

review provisions illusory.”⁵⁹ The Fourth Circuit, in contrast, reached the opposite conclusion because the Supreme Court had applied sovereign immunity without discussing the APA in cases in which the APA might have provided a waiver.⁶⁰ The Supreme Court showed no inclination to resolve the matter.⁶¹

The confusion about the effect of *Larson* and *Dugan* on nonstatutory review persists.⁶² Pursuing nonstatutory review successfully requires navigating a minefield of often-conflicting Supreme Court precedents.⁶³ The need to map a plaintiff’s path through that muddled doctrine, however, lost its urgency when Congress added a waiver of sovereign immunity to the APA in 1976.⁶⁴ The 1976 amendment paved an avenue to court to challenge the federal government’s actions and bypass nonstatutory review.⁶⁵ The outer boundaries of that avenue, however, are still hazy, as detailed in Part III of this Article.

B. *Deliberative Process*

The ACUS and the ABA jointly developed a proposal to alleviate the confusion permeating sovereign immunity doctrine and nonstatutory review. The ACUS and the ABA did not propose to overturn *Larson* and *Dugan* or codify requirements for officer suits. Instead, they proposed providing an alternative means for challenging official action by adding a waiver of sovereign immunity to the APA.⁶⁶ The proposal made little progress in Congress until the Justice Department, through Antonin Scalia, abandoned its opposition, clearing the way for the proposal to become the 1976 amendment to the APA.

⁵⁹ *Scanwell Labs., Inc. v. Shaffer*, 424 F.2d 859, 874 (D.C. Cir. 1970); *see also* *Kingsbrook Jewish Med. Ctr. v. Richardson*, 486 F.2d 663, 668 (2d Cir. 1973) (quoting *Kletschka v. Driver*, 411 F.2d 436, 445 (2d Cir. 1969)) (noting that the APA waives federal sovereign immunity), *abrogated by* *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402 (1993); *Estrada v. Ahrens*, 296 F.2d 690, 698 (5th Cir. 1961) (“The [APA] . . . makes a clear waiver of sovereign immunity . . .”).

⁶⁰ *Littell v. Morton*, 445 F.2d 1207, 1212–13 (4th Cir. 1971); *see also* *Washington v. Udall*, 417 F.2d 1310, 1320 (9th Cir. 1969) (holding that the APA does not waive federal sovereign immunity); *Motah v. United States*, 402 F.2d 1, 2 (10th Cir. 1968) (same); *Twin Cities Chippewa Tribal Council v. Minn. Chippewa Tribe*, 370 F.2d 529, 532 (8th Cir. 1967) (same); *Cyrus v. United States*, 226 F.2d 416, 417 (1st Cir. 1955) (same).

⁶¹ *Littell*, 445 F.2d at 1213.

⁶² *See, e.g.,* *Siegel, supra* note 29, at 1662 n.234 (noting that the decision in *Idaho v. Coeur d’Alene Tribe*, 521 U.S. 261 (1997) shows that courts continue to mishandle nonstatutory review “by failing to maintain a proper consciousness of its falsity”).

⁶³ *See, e.g.,* *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1550–54 (D.C. Cir. 1984) (Scalia, J., dissenting), *vacated*, 471 U.S. 1113 (1985).

⁶⁴ *See* *Siegel, supra* note 29, at 1664–65.

⁶⁵ *Id.* at 1665.

⁶⁶ *See infra* text accompanying notes 75, 83.

Congress created ACUS in 1966 to study the problems federal agencies face, “exchange information, and develop recommendations for action” in order to protect private rights and carry out federal responsibilities expeditiously.⁶⁷ To those ends, Congress gave ACUS the power to study and make recommendations concerning “the efficiency, adequacy, and fairness of the administrative procedure” in federal agencies, and to collect and facilitate the exchange of information among agencies.⁶⁸

ACUS engages a broad range of people in a public deliberative process.⁶⁹ Its deliberation on the proposal to add a waiver of sovereign immunity to the APA engaged the Conference’s then-eighty-two members, who at the time included the Chairman, officials from thirty-three federal agencies, other individuals appointed by the President, and other members appointed by the Chairman to “provide broad representation of the views of private citizens and utilize diverse experience.”⁷⁰ ACUS also engaged “agency and departmental officials, judges, scholars, practitioners, and bar associations” in its deliberations about sovereign immunity.⁷¹

The Chairman in 1970, Jerre Williams, explained that the sovereign immunity proposal grew out of “a great deal of discussion, correspondence, debate, consultation, drafting, redrafting, and, of course, painstaking legal research.”⁷² ACUS employed Professor Roger Cramton as a consultant to help develop the proposal.⁷³ He produced a lengthy report and developed the text of the proposal.⁷⁴ Throughout the process, ACUS coordinated with the ABA and the Department of Justice, as well as other federal agencies, judges, and law professors.⁷⁵ ACUS finalized its recommendation in October, 1969.⁷⁶ Because the proposal had been so thoroughly vetted, the Chairman was confident that it “would appeal to a broad range of responsible opinion in and out of Government.”⁷⁷

⁶⁷ Administrative Conference Act § 571, 5 U.S.C. § 591 (2012).

⁶⁸ *Id.* § 594.

⁶⁹ Kathryn E. Kovacs, *Superstatute Theory and Administrative Common Law*, 90 IND. L.J. 1207, 1247–48 (2015).

⁷⁰ 5 U.S.C. § 593; *see also* 1970 *Hearing, supra* note 32, at 8 (statement of Jerre S. Williams, Chairman, ACUS) (noting that 82 members of the Assembly, which includes “high officials from 33 agencies and departments,” considered S. 3568).

⁷¹ 1970 *Hearing, supra* note 32, at 8 (statement of Jerre S. Williams).

⁷² *Id.* at 10.

⁷³ *Id.* at 16 (comment of Roger C. Cramton).

⁷⁴ *See generally* Cramton Memo, *supra* note 32, at 92–156.

⁷⁵ 1970 *Hearing, supra* note 32, at 14 (statement of Ashley Sellers, Chairman, Judicial Review Comm.); Cramton Memo, *supra* note 32, at 116; Admin. Conference of the U.S., *Sovereign Immunity Recommendation Discussed* (Oct. 21, 1969), as *reprinted in* 1970 *Hearing, supra* note 32, app. V, at 237 (transcript from plenary session).

⁷⁶ ADMIN. CONFERENCE OF THE U.S., RECOMMENDATION 69-1: STATUTORY REFORM OF THE SOVEREIGN IMMUNITY DOCTRINE (Oct. 1969), <https://www.acus.gov/recommendation/statutory-reform-sovereign-immunity-doctrine> [<https://perma.cc/XP65-VNHJ>].

⁷⁷ 1970 *Hearing, supra* note 32, at 10 (statement of Jerre S. Williams).

The ABA endorsed the ACUS proposal on February 24, 1970,⁷⁸ and ACUS worked with the staff of the Senate Judiciary Committee's Subcommittee on Administrative Practice and Procedure, chaired by Senator Edward M. Kennedy, to draft Senate Bill 3568.⁷⁹ Senator Kennedy recognized that the bill grew out "of extensive deliberations by the Administrative Conference and the ABA."⁸⁰

The bill was designed to accomplish three goals:

1. Eliminate the defense of sovereign immunity in suits for specific relief against the Federal Government.
2. Eliminate the present requirement of a minimum jurisdictional amount in United States district courts where a Federal question is involved.
3. Simplify and clarify the law relating to naming the United States, its agencies, or officers as parties defendant.⁸¹

Section 10(a) of the APA already provided a cause of action: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."⁸² The key provision of S. 3568 for purposes of this discussion was the proposed addition to section 10(a) of the following waiver of sovereign immunity:

An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.⁸³

It was understood from the beginning that adding this waiver to the APA would not affect other common law defenses available to the government, like ripeness and exhaustion.⁸⁴ ACUS proposed including a savings clause following the waiver, which is now the final sentence of § 702:

⁷⁸ *Proceedings of the 1970 Midyear Meeting of the House of Delegates*, 95 ANN. REP. A.B.A. 123, 149–50 (1970); *see also* 1970 *Hearing*, *supra* note 32, at 56 (statement of Dan M. Byrd, Chairman, Administrative Law Section, American Bar Association).

⁷⁹ S. 3568, 91st Cong. (1970); *see also* 1970 *Hearing*, *supra* note 32, at 6, 8 (statement of Jerre S. Williams).

⁸⁰ 1970 *Hearing*, *supra* note 32, at 3 (statement of Sen. Edward M. Kennedy).

⁸¹ *Id.* at 2.

⁸² Administrative Procedure Act, Pub. L. No. 79-404, § 10(a), 60 Stat. 243 (1946) (codified as amended at 5 U.S.C. § 702 (2012)).

⁸³ S. 3568.

⁸⁴ In *Darby v. Cisneros*, the Supreme Court held that the APA requires exhaustion of administrative remedies "only when expressly required by statute or when an agency rule requires appeal before review and the administrative action is made inoperative pending that review." *Darby v. Cisneros*, 509 U.S. 137, 154 (1993).

Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.⁸⁵

In his report for ACUS, Professor Cramton explained that the savings clause would ensure that the waiver would “not result in undue judicial interference with governmental operations or a flood of burdensome litigation” because common law justiciability doctrines would remain available.⁸⁶ Professor Kenneth Culp Davis, who chaired the ABA committee on this issue, wrote an article that took a parallel tack.⁸⁷ The report of the ABA’s Administrative Law Section stated similarly that “all law other than the law of sovereign immunity is unchanged.”⁸⁸ Thus, cases that previously would have been dismissed on sovereign immunity grounds might still be dismissed on other grounds, including ripeness and exhaustion.⁸⁹

It was also understood from the beginning that including the waiver in the APA instead of the Judicial Code in Title 28 would, as Professor Cramton said, “limit[] the effect of the recommendation in important respects.”⁹⁰ First, the waiver would be subject to the exceptions to the definition of “agency” in § 701; the proposal was not meant to override prior congressional judgments about which agencies or functions should be exempt from the APA’s judicial review provisions.⁹¹ Second, by incorporating the waiver in the APA, “the general law governing the availability and scope of judicial review,” as “codified in 5 U.S.C. §§ 701–06,” would give context to the proposal and clarify its limited nature.⁹² For example, judicial review would remain unavailable pursuant to § 701(a) where “statutes preclude judicial review” or “agency action is committed to agency discretion by law.”⁹³ Additionally, courts would retain their equitable authority “to balance the interests of the parties in deciding what kind of relief is appropriate” and, under § 705, to preserve the status quo pending judicial review.⁹⁴ Finally, adding a waiver of sovereign immunity to the APA would not allow judges “to substitute their judgment for that of administrators” because judicial review would be limited by § 706’s provisions governing the scope of review.⁹⁵ The ABA report agreed that by adding the waiver to § 702, “it will be applicable only when that

⁸⁵ ADMIN. CONFERENCE OF THE U.S., *supra* note 76; *see also* 5 U.S.C. § 702.

⁸⁶ Cramton Memo, *supra* note 32, at 131.

⁸⁷ *Id.* at 201–23.

⁸⁸ *Report of the Section of Administrative Law*, 95 ANN. REP. A.B.A. 342, 345 (1970).

⁸⁹ *Id.*

⁹⁰ Cramton Memo, *supra* note 32, at 118.

⁹¹ *Id.*

⁹² *Id.* at 119.

⁹³ 5 U.S.C. § 701(a) (2012); Cramton Memo, *supra* note 32, at 119.

⁹⁴ 5 U.S.C. § 705; Cramton Memo, *supra* note 32, at 136.

⁹⁵ Cramton Memo, *supra* note 32, at 137.

provision is applicable.”⁹⁶ Specifically, the standards of review in § 706 would continue to constrain courts.⁹⁷

Senator Kennedy’s Subcommittee held a hearing on S. 3568 on June 3, 1970.⁹⁸ Kennedy stood firmly in support of the proposal⁹⁹ but acknowledged its limitations. He understood that the bill would not affect other common law defenses, like ripeness and exhaustion.¹⁰⁰ And he understood that the waiver would “not expand the scope of judicial review, which remains limited by the [APA].”¹⁰¹

The Justice Department opposed the bill. William D. Ruckelshaus, Assistant Attorney General for the Civil Division, testified in opposition to the proposal because he thought it would spur “litigation on the merits of large numbers of cases incapable of being accurately classified.”¹⁰² He pointed out that courts need not “decide every dispute in our society”; there are other forums to redress grievances.¹⁰³ Sovereign immunity doctrine, he said, gives Congress the responsibility to decide which agency actions should be judicially reviewable.¹⁰⁴ “[I]nstead of using a shotgun,” he thought, “a rifle would be a better approach.”¹⁰⁵ Hence, he supported the proposal that later became the Quiet Title Act because it was sufficiently specific.¹⁰⁶ The “sweeping nature” of S. 3568, in contrast, would “open up the whole decisionmaking process of the administrative branch to judicial review,” thus spurring “a flood of cases.”¹⁰⁷

Professor Davis tried to influence DOJ to change its position,¹⁰⁸ but the Department stood firm, and the proposal languished for several years. As Senator Kennedy later explained, opposition from the administration and

⁹⁶ *Report of the Section of Administrative Law*, *supra* note 88, at 345.

⁹⁷ *Id.* Professor Davis’s article used the same language. Davis, *supra* note 49, at 222.

⁹⁸ See generally *1970 Hearing*, *supra* note 32. The hearing lasted two and a half hours and generated a transcript of 260 pages. *Id.* at 1, 75.

⁹⁹ *Id.* at 1 (statement of Sen. Kennedy) (“The doctrine that ‘the King can do no wrong’ . . . has no place in 20th-century America.”).

¹⁰⁰ *Id.* at 3; see also *id.* at 75.

¹⁰¹ 122 CONG. REC. 22011 (1976) (statement of Sen. Kennedy); see also *1970 Hearing*, *supra* note 32, at 2 (statement of Sen. Kennedy) (“The scope of judicial review is in no way expanded. It remains limited by section 706 of title 5.”).

¹⁰² *1970 Hearing*, *supra* note 32, at 66 (statement of William D. Ruckelshaus).

¹⁰³ *Id.* at 65.

¹⁰⁴ *Id.* at 66.

¹⁰⁵ *Id.* at 68.

¹⁰⁶ *Id.* at 66, 69.

¹⁰⁷ *Id.* at 66–67; Letter from William D. Ruckelshaus, Assistant Att’y Gen., Dep’t of Justice, to Edward M. Kennedy, Chairman, U.S. Senate Subcomm. on Admin. Practice & Procedure (July 8, 1970), in *1970 Hearing*, *supra* note 32, app. VI, at 255, 256.

¹⁰⁸ Letter from Kenneth Culp Davis to Edward M. Kennedy, Chairman, U.S. Senate Subcomm. on Admin. Practice & Procedure (Apr. 21, 1970), in *1970 Hearing*, *supra* note 32, app. VI, at 246, 246–47; see also *Report of the Section of Administrative Law*, *supra* note 88, at 343–46.

Senator Ervin prevented S. 3568 from reporting out of the Senate Judiciary Committee.¹⁰⁹

Then Antonin Scalia entered the picture. Scalia served as Chairman of ACUS from 1972 to 1974 and was confirmed as Assistant Attorney General for DOJ's Office of Legal Counsel on August 22, 1974, shortly after Gerald Ford became President.¹¹⁰ Scalia was the key to the passage of the 1976 amendment.

Senator Kennedy's subcommittee held a hearing on April 28 and May 3, 1976, which included almost five hours of testimony.¹¹¹ The subcommittee considered fourteen bills, including S. 800 and S. 2407, both of which would have added a waiver of sovereign immunity to section 10(a) of the APA.¹¹² S. 800 was "nearly identical" to the bill that had failed in 1970.¹¹³ Again, the ABA supported the bill, as did ACUS.¹¹⁴

Antonin Scalia testified for DOJ on April 28th.¹¹⁵ He reported that the Department had "undertaken a thoroughgoing reexamination" of its position on the sovereign immunity proposal at the urging of the Senate subcommittee's staff and ACUS, but he was not prepared to discuss the matter yet.¹¹⁶ On May 10th, Scalia submitted DOJ's views by letter to Senator Kennedy.¹¹⁷ "In light of the tenacious and well reasoned support of this proposal by such knowledgeable and responsible organizations as the [ACUS] and the [ABA]," he said, the Department was prepared to endorse S. 800 with "a number of caveats concerning its proper interpretation."¹¹⁸ First, it was Scalia's understanding that the bill would not throw open the courthouse doors for all claims that previously had been dismissed due to sovereign immunity.¹¹⁹ He said:

¹⁰⁹ Cramton Memo, *supra* note 32, at 155.

¹¹⁰ See 120 CONG. REC. 29776 (1974); *Former Chairmen*, ADMIN. CONF. U.S., <https://www.acus.gov/contacts/former-chairmen> [<https://perma.cc/MT78-DTHC>].

¹¹¹ 1976 Hearing, *supra* note 56, at 126–27, 258. A subcommittee of the House Judiciary Committee held a hearing on December 4, 1975, which covered several different proposals and lasted only about an hour. *Administrative Procedure: Hearing on H.R. 10194, H.R. 10195, H.R. 10196, H.R. 10197, H.R. 10198, and H.R. 10199 Before the Subcomm. on Admin. Law & Governmental Relations of the H. Comm. on the Judiciary*, 94th Cong. 1, 75 (1975). Representatives of the ABA and ACUS again testified in support of House Bill 10199, which paralleled the failed Senate Bill 3568. *Id.* at 25, 28, 40.

¹¹² 1976 Hearing, *supra* note 56, at 1, 4.

¹¹³ S. REP. NO. 94-996, at 19 (1976).

¹¹⁴ See 1976 Hearing, *supra* note 56, at 71 (statement of William Ross, Chairman, Comm. on Revision, Administrative Law Section, American Bar Association); *id.* at 221, 230–32 (statement of Richard K. Berg, Exec. Secretary, Administrative Conf. of the United States).

¹¹⁵ *Id.* at 87 (statement of Antonin Scalia, Assistant Att'y Gen.).

¹¹⁶ *Id.* at 92.

¹¹⁷ Letter from Scalia to Kennedy, *supra* note 42, at 24.

¹¹⁸ *Id.* at 25.

¹¹⁹ *Id.*

To the contrary, one of the very premises of the proposal is the fact that many (indeed, I would say most) of the cases disposed of on the basis of sovereign immunity could have been decided the same way on other legal grounds, such as: lack of standing; lack of ripeness . . . [and] failure to exhaust administrative remedies¹²⁰

Scalia's view that "common law doctrines"¹²¹ would remain available to the government was consistent with that of ACUS, the ABA, and Senator Kennedy.¹²² That view is also reflected in the Senate Report, which said that other defenses like standing, exhaustion, and ripeness would be unchanged and "provide a much more rational basis for controlling unnecessary judicial interference in administrative decisions."¹²³

In addition to the continued applicability of those "common law [justiciability] doctrines," Scalia said that "an important factor" in the Department's support for the bill was the waiver's inclusion in § 702.¹²⁴ Since it was added to § 702, Scalia said, it would "only apply to claims relating to improper official action[] and will be subject to the other limitations of the [APA]."¹²⁵ In particular, the exclusions in § 701(a) for cases in which judicial review is precluded by statute or action is committed to agency discretion would continue to apply, as would § 703's provision that, where a statute specifies a form of proceeding, that form should be employed.¹²⁶

Scalia's understanding of the proposed bill was consistent with the ACUS and ABA statements. When the Senate issued its report in June of 1976, however, its statement was significantly narrower. The Report said only that, because the waiver was added to § 702, it would apply "only to functions falling within the definition of 'agency' in 5 U.S.C. section 701," and it would be subject to the exceptions in § 701(a).¹²⁷ The House report was similar.¹²⁸

On the Senate floor, Senator Kennedy recognized the importance of Scalia's involvement. He said that Scalia had "provided substantial momentum in recent years and weeks toward the refinement and ultimately the Judiciary Committee's adoption of this bill."¹²⁹ Senator Hruska also indicated that the

¹²⁰ *Id.* at 25–26.

¹²¹ *Id.* at 26.

¹²² See *supra* text accompanying notes 86–88, 100.

¹²³ S. REP. NO. 94-996, at 9 (1976); see also *id.* at 11. The House Report reflected the same understanding. H.R. REP. NO. 94-1656, at 3, 9–10, 12 (1976).

¹²⁴ Letter from Scalia to Kennedy, *supra* note 42, at 26.

¹²⁵ *Id.*

¹²⁶ 5 U.S.C. §§ 701(a), 703 (2012); Letter from Scalia to Kennedy, *supra* note 42, at 26.

¹²⁷ S. REP. NO. 94-996, at 10.

¹²⁸ H.R. REP. NO. 94-1656, at 11.

¹²⁹ 122 CONG. REC. 22012 (1976) (statement of Sen. Kennedy).

bill had moved only because of DOJ's support.¹³⁰ He read part of Scalia's letter into the record and specifically noted that Scalia had "placed great weight on" ACUS's recommendation, which had specified "that the waiver . . . be subject to the other limitations of the [APA]."¹³¹ The bill passed the Senate on July 1, 1976,¹³² the House on October 1, 1976,¹³³ and President Ford signed it into law on October 21, 1976.¹³⁴

III. JUDICIAL INTERPRETATIONS OF THE 1976 AMENDMENT

The 1976 amendment added to the APA a waiver of the United States' sovereign immunity from suits "seeking relief other than money damages."¹³⁵ Congress's effort to clarify the law, however, succeeded only in part. The question of how the 1976 amendment should be interpreted has generated intra- and inter-circuit splits and general confusion. By and large, the courts rely on the text of the waiver itself but ignore its statutory context. They rely on statements in the House and Senate Reports that the waiver is broad but ignore statements that it is limited. Most importantly, they ignore Congress's deliberate decision to include the waiver in the APA instead of Title 28, and they ignore Scalia's bargain with Senator Kennedy.

This Part first addresses cases discussing the applicability of the waiver to non-APA claims, then cases discussing the related question of whether the waiver is subject to the other limitations in the APA.

A. *Applicability of the Waiver to Non-APA Claims*

1. *Early Cases*

By 1983, the courts of appeals that had addressed the issue were unanimous that the waiver of sovereign immunity in § 702 applied to all actions brought under 28 U.S.C. § 1331, the federal question jurisdiction statute. The courts in these early cases, however, failed to distinguish between subject matter jurisdiction, sovereign immunity, and causes of action, and they drew no distinction between cases using the APA's cause of action and cases using other causes of action.

Shortly after Congress enacted the 1976 amendment, the Second Circuit in *Estate of Watson v. Blumenthal* held that § 702 did not waive the

¹³⁰ *Id.* at 22014 (statement of Sen. Hruska) ("I feel it is important that the history . . . of the consideration of this bill, be registered so that the reasons for congressional action in this area of the law will be well understood.").

¹³¹ *Id.*

¹³² *Id.* (general record).

¹³³ *Id.* at 35113.

¹³⁴ Act of Oct. 21, 1976, Pub. L. No. 94-574, 90 Stat. 2721 (codified at 5 U.S.C. § 702 (2012)).

¹³⁵ 5 U.S.C. § 702.

government's immunity in nonstatutory review suits founded on § 1331.¹³⁶ Watson's estate sought declaratory and mandamus relief in a suit against the Secretary of the Treasury to redeem bonds to pay estate taxes.¹³⁷ The court of appeals recognized that "an action under § 1331 seeking nonstatutory review of agency action is distinct from an action under the APA."¹³⁸ While the 1976 amendment eliminated the defense of sovereign immunity in suits brought under the APA, the court said, it did not do so for "actions under § 1331."¹³⁹

The Second Circuit's analysis was flawed. The court correctly distinguished between nonstatutory review and APA cases. But the court conflated nonstatutory review and § 1331. Instead of saying that the waiver in § 702 does not apply to "actions under § 1331," it would have been more precise to say that the APA's waiver applies only to APA claims.¹⁴⁰ Perhaps it had not sunk in yet that, as the Supreme Court held the year before in *Califano v. Sanders*, the APA does not grant jurisdiction.¹⁴¹ Jurisdiction in APA cases usually is premised on § 1331.¹⁴² Thus, to say that the waiver in § 702 does not apply to suits under § 1331 is nonsensical. In any event, the Second Circuit held correctly that sovereign immunity barred the plaintiff's non-APA claim.¹⁴³

The following year, the Third Circuit reached the opposite conclusion in *Jaffee v. United States*.¹⁴⁴ Jaffee was injured by radiation from nuclear bomb testing while serving in the military.¹⁴⁵ Among other things, he sought an order requiring the government to warn members of a class of the medical risks of their radiation exposure.¹⁴⁶ The court of appeals disagreed with *Estate of Watson* and held "that section 702, when it applies, waives sovereign immunity in 'nonstatutory' review of agency action under section 1331."¹⁴⁷ The court drew that conclusion from statements in the legislative history indicating that Congress intended the waiver to "facilitate nonstatutory . . . review."¹⁴⁸

¹³⁶ See generally *Estate of Watson v. Blumenthal*, 586 F.2d 925 (2d Cir. 1978), abandoned by *Sprecher v. Graber*, 716 F.2d 968 (2d Cir. 1983).

¹³⁷ *Id.* at 926.

¹³⁸ *Id.* at 932.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Califano v. Sanders*, 430 U.S. 99, 107 (1977).

¹⁴² See BLACKLETTER STATEMENT, *supra* note 20, at 47.

¹⁴³ In the alternative, the court held that the 1976 amendment did not affect the relegation of contract claims to the Court of Claims. *Blumenthal*, 586 F.2d at 933. Because the plaintiff's claim was founded on a contract, the Court of Claims had exclusive jurisdiction. *Id.* at 929.

¹⁴⁴ *Jaffee v. United States*, 592 F.2d 712 (3d Cir. 1979).

¹⁴⁵ *Id.* at 714.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 718.

¹⁴⁸ *Id.* at 719 (quoting H.R. REP. NO. 94-1656, at 19 (1976)).

Unlike the Second Circuit, the Third Circuit did not recognize the distinction between nonstatutory review and APA claims. The term “nonstatutory review” was already a misnomer before the APA was enacted because every nonstatutory review case requires a statutory grant of jurisdiction.¹⁴⁹ After 1946, courts used the term to refer to suits founded on the APA’s cause of action, but that is incorrect as well because such claims are authorized by the APA.¹⁵⁰ Moreover, the court in *Jaffee* failed to appreciate that Jaffee’s claim may have been cognizable under the APA itself.¹⁵¹ If so, holding that the waiver in § 702 applied would have been unremarkable. Nonetheless, the court held that § 702 waived the government’s immunity from Jaffee’s suit.¹⁵²

A year later, the Fifth Circuit in *Sheehan v. Army and Air Force Exchange Service*, acknowledged the split between *Estate of Watson* and *Jaffee*, and sided with *Jaffee*, holding “that Congress did intend to waive the defense of sovereign immunity for nonstatutory review under section 1331.”¹⁵³ Again, the court failed to distinguish between APA claims and non-APA claims.

The Ninth Circuit also sided with the Third Circuit in *Glines v. Wade*.¹⁵⁴ Like the Third and Fifth Circuits, the Ninth Circuit failed to distinguish between APA claims and non-APA claims. Similarly, in *Beller v. Middendorf* the court held “that section 702 waives sovereign immunity for . . . action[s] brought under 28 U.S.C. § 1331 seeking nonmonetary relief.”¹⁵⁵ The court acknowledged the circuit split but felt bound by the earlier circuit precedent in *Glines v. Wade*.¹⁵⁶

¹⁴⁹ See Vermeule, *supra* note 31, at 1115.

¹⁵⁰ Jack M. Beermann, *Common Law and Statute Law in Administrative Law*, 63 ADMIN. L. REV. 1, 10 (2011); John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 146 n.167 (1998); Kovacs, *supra* note 17, at 78 n.3; Ronald M. Levin, “Vacation” at Sea: *Judicial Remedies and Equitable Discretion in Administrative Law*, 53 DUKE L.J. 291, 318 (2003); Siegel, *supra* note 29, at 1664; Kevin M. Stack, *The Reviewability of the President’s Statutory Powers*, 62 VAND. L. REV. 1171, 1192 n.106 (2009); Vermeule, *supra* note 31, at 1115.

¹⁵¹ See *Jaffee*, 592 F.2d at 719 (holding that the plaintiff challenged “agency action”).

¹⁵² In *Johnsrud v. Carter*, the court followed *Jaffee* and reiterated that the waiver in § 702 applies in cases under § 1331. *Johnsrud v. Carter*, 620 F.2d 29, 30–32 (3d Cir. 1980) (raising constitutional, statutory, and common law claims, and seeking an injunction for the government to warn residents near Three Mile Island of the health dangers from radiation).

¹⁵³ *Sheehan v. Army & Air Force Exch. Serv.*, 619 F.2d 1132, 1139 (5th Cir. 1980) (challenging discharge from employment as violating regulations and due process), *rev’d*, 456 U.S. 728 (1982).

¹⁵⁴ *Glines v. Wade*, 586 F.2d 675, 681 (9th Cir. 1978) (noting that in “actions seeking nonmonetary relief or actions claiming that a government official acted in violation of the Constitution or of statutory authority,” “Congress has either waived sovereign immunity or the doctrine does not apply”), *rev’d sub nom.* *Brown v. Glines*, 444 U.S. 348 (1980).

¹⁵⁵ *Beller v. Middendorf*, 632 F.2d 788, 797 (9th Cir. 1980), *overruled by Witt v. Dep’t of the Air Force*, 527 F.3d 806 (9th Cir. 2008).

¹⁵⁶ *Id.* In *Assiniboine & Sioux Tribes of the Fort Peck Indian Reservation v. Board of Oil & Gas Conservation*, the court held that the waiver in § 702 applies to suits brought

Then the Second Circuit reversed itself. In *B.K. Instrument, Inc. v. United States*, the court addressed a statutory claim regarding a losing bid for an electronic tool kits contract.¹⁵⁷ Nonstatutory review was not available.¹⁵⁸ Without identifying the source of the plaintiff's cause of action, the court said that "the *Watson* opinion was mistaken in advancing . . . that the 1976 amendment to § 702 of the APA does not constitute . . . a [general] waiver" of sovereign immunity.¹⁵⁹ The legislative history, the court noted, indicates that Congress intended "to eliminate the sovereign immunity defense in all equitable actions for specific relief against a Federal agency or officer acting in an official capacity."¹⁶⁰

The *B.K. Instrument* court concluded correctly that *Estate of Watson* was wrong to hold that § 702 did not waive immunity in actions under § 1331.¹⁶¹ The court's analysis went awry, however, when it said that, after *Califano v. Sanders*, "there can be no action 'brought under the APA,'" so the waiver in § 702 must apply to claims under § 1331, otherwise it would be meaningless.¹⁶² The court should have distinguished between cases founded on the APA's cause of action and those founded on other causes of action. The waiver in § 702 applies to cases brought using the APA's cause of action and the jurisdictional grant in § 1331; it should not apply to cases brought using a different cause of action and the jurisdictional grant in § 1331.

The D.C. Circuit also made broad statements about the applicability of the waiver in § 702 without distinguishing APA claims from non-APA claims. In *Sea-Land Service, Inc. v. Alaska Railroad*, the court stated that § 702 waives immunity in actions seeking injunctive relief under the Sherman Act and in general.¹⁶³ In *Schnapper v. Foley*, the court held that in suits against federal officers for injunctive relief, "section 702 retains the defense of sovereign immunity only when another statute expressly or implicitly forecloses injunctive relief."¹⁶⁴ And in *Clark v. Library of Congress*, the court said that the 1976 amendment "eliminated the sovereign immunity defense in virtually all actions for non-monetary relief against a U.S. agency or officer acting in an

under 28 USC § 1362, which gives district courts jurisdiction over actions arising under federal law brought by federally recognized Indian tribes. *Assiniboine & Sioux Tribes of the Fort Peck Indian Reservation v. Bd. of Oil & Gas Conservation*, 792 F.2d 782, 792 (9th Cir. 1986).

¹⁵⁷ *B.K. Instrument, Inc. v. United States*, 715 F.2d 713, 716 (2d Cir. 1983).

¹⁵⁸ *Id.* at 724.

¹⁵⁹ *Id.* (citation omitted).

¹⁶⁰ *Id.* at 725 (quoting S. REP. NO. 94-996, at 8 (1976)). The Second Circuit reiterated in *Sprecher v. Graber* that the waiver in § 702 applies to actions brought under § 1331. *Sprecher v. Graber*, 716 F.2d 968, 973-74 (2d Cir. 1983) ("We have now abandoned this alternative ground of *Watson* and read section 702 as a waiver of immunity where a proper action is brought under 28 U.S.C. § 1331.").

¹⁶¹ *B.K. Instrument*, 715 F.2d at 725; see also *supra* text accompanying notes 146-47.

¹⁶² *B.K. Instrument*, 715 F.2d at 725.

¹⁶³ *Sea-Land Serv., Inc. v. Alaska R.R.*, 659 F.2d 243, 244 (D.C. Cir. 1981).

¹⁶⁴ *Schnapper v. Foley*, 667 F.2d 102, 108 (D.C. Cir. 1981).

official capacity.”¹⁶⁵ Thus, the early cases held uniformly that the waiver in § 702 applies to all suits brought using the jurisdictional grant in § 1331, regardless of the source of the cause of action. These cases paid no heed to Scalia’s bargain to the contrary.

2. *Later Cases*

In the 1990s, the courts began to distinguish between cases founded on the APA’s cause of action and cases founded on other causes of action. Eventually the courts of appeals that addressed the issue reached unanimity on the holding that the waiver in § 702 applies to both APA claims and non-APA claims.¹⁶⁶ In Part IV I will explain why they are all wrong.

Unfortunately, robust analysis of this issue is almost entirely absent from the case law. The most in-depth analysis came from the D.C. Circuit in *Trudeau v. FTC*, which concerned an FTC press release about the settlement of charges against Trudeau for false and misleading advertising.¹⁶⁷ Trudeau filed suit challenging the press release, seeking declaratory and injunctive relief, alleging that the press release exceeded the agency’s statutory authority and violated his First Amendment rights.¹⁶⁸ He raised claims under the APA and the First Amendment, and sought nonstatutory review.¹⁶⁹ The government

¹⁶⁵ *Clark v. Library of Cong.*, 750 F.2d 89, 102 (D.C. Cir. 1984).

¹⁶⁶ Courts have often made such statements in dicta. In 1993, for example, the Third Circuit announced that the waiver of sovereign immunity in § 702 “is not limited to suits brought under the APA.” *Specter v. Garrett*, 995 F.2d 404, 410 (3d Cir. 1993), *rev’d sub nom.* *Dalton v. Specter*, 511 U.S. 462 (1994). That statement was dicta because, as the court recognized, the plaintiff sought nonstatutory review, for which no waiver of sovereign immunity is required. *Id.* at 409–10 (holding that sovereign immunity is not a bar to suits challenging the constitutionality of executive action (citing *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 693 (1949))). The D.C. Circuit’s statement in *Chamber of Commerce v. Reich* that the waiver in § 702 “applies to any suit whether under the APA or not” was dicta for the same reason. *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1328–29 (D.C. Cir. 1996) (“[T]here is no sovereign immunity to waive—it never attached in the first place.”). In *National Wrestling Coaches Ass’n v. Department of Education*, the D.C. Circuit reiterated that the waiver in § 702 “applies to any suit, whether advanced under the APA or not.” *Nat’l Wrestling Coaches Ass’n v. Dep’t of Educ.*, 366 F.3d 930, 947 (D.C. Cir. 2004). That statement was dicta as well because the plaintiffs lacked standing. *Id.* at 945; *see also Gros Ventre Tribe v. United States*, 469 F.3d 801, 808 n.8 (9th Cir. 2006) (pointing out that the court in *Chamber of Commerce*, 74 F.3d 1322, did not reach the issue of whether § 702 is limited to APA claims). Sometimes courts of appeals state that the APA’s waiver applies to non-APA claims in cases concerning APA claims. *See, e.g., Michigan v. U.S. Army Corps of Eng’rs*, 667 F.3d 765, 768, 775 (7th Cir. 2011) (concerning an APA claim challenging the management of the Chicago Area Waterway System); *Puerto Rico v. United States*, 490 F.3d 50, 56, 57–58 (1st Cir. 2007) (concerning an APA claim challenging the FBI’s refusal to release records).

¹⁶⁷ *Trudeau v. Fed. Trade Comm’n*, 456 F.3d 178, 181 (D.C. Cir. 2006).

¹⁶⁸ *Id.* at 180, 182.

¹⁶⁹ *Id.* at 185.

argued that the waiver of sovereign immunity in § 702 applies only to APA claims, but the court disagreed, “holding that the ‘APA’s waiver of sovereign immunity applies to any suit.’”¹⁷⁰ Thus, the waiver “permit[ted] not only Trudeau’s APA cause of action, but his nonstatutory and First Amendment actions as well.”¹⁷¹ The court premised its holding on the language of § 702, which the court held does not suggest such a restriction, and a brief discussion of the House and Senate Reports, which the court held confirm that Congress expected the waiver to apply to non-APA claims.¹⁷² Ultimately, the court held that all of Trudeau’s claims failed to state a claim because the press release was not false or misleading.¹⁷³

The court made many mistakes in *Trudeau*. Among others, the court erred in treating nonstatutory review as a cause of action. Nonstatutory review allows a court to hear a claim against the government without a waiver of sovereign immunity; it does not provide a cause of action.¹⁷⁴ The Supreme Court distinguished the two requirements in *Larson v. Domestic & Foreign Commerce Corp.*¹⁷⁵ To state a cause of action, the Court said, “the plaintiff [must] claim an invasion of his legal rights.”¹⁷⁶ The plaintiff there claimed that the government’s sale of certain coal constituted conversion.¹⁷⁷ In addition, when suing the federal government, “it must also appear that the action to be restrained or directed is not action of the sovereign.”¹⁷⁸ Alleging that a government officer acted tortuously is not sufficient.¹⁷⁹ So long as the officer acts within “the terms of his valid statutory authority,” he acts on behalf of the sovereign, and his action “cannot be enjoined or directed” absent a waiver of the sovereign’s immunity.¹⁸⁰ If, however, the officer acts outside the scope of his statutory authority or unconstitutionally, the officer does not act on behalf of the sovereign, and no waiver of sovereign immunity is required.¹⁸¹

¹⁷⁰ *Id.* at 186 (quoting *Chamber of Commerce*, 74 F.3d at 1328).

¹⁷¹ *Id.* at 187.

¹⁷² *Id.*

¹⁷³ *Trudeau*, 456 F.3d at 191, 197.

¹⁷⁴ See Kovacs, *supra* note 17, at 113 (stating that the D.C. Circuit, in its holding in *Chamber of Commerce*, 74 F.3d 1322, “was off the mark when it linked *Leedom* and *McAnnulty* to stating a cause of action instead of identifying a waiver of sovereign immunity; the plaintiff in a nonstatutory review case must identify a cause of action”).

¹⁷⁵ *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 693 (1949).

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 692.

¹⁷⁸ *Id.* at 693.

¹⁷⁹ *Id.* at 694.

¹⁸⁰ *Id.* at 695; see also *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 112 (1984).

¹⁸¹ *Larson*, 337 U.S. at 697 (distinguishing *United States v. Lee*, 106 U.S. 196 (1882)). Moreover, the Court has spoken of nonstatutory review in jurisdictional terms, which is inconsistent with the notion that it provides a cause of action. See *Leedom v. Kyne*, 358 U.S. 184, 189, 191 (1958); *Am. Sch. of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 108 (1902); see also *Larson*, 337 U.S. at 690 & n.10 (noting that, in an action based on an ultra

The *Trudeau* court was also mistaken in thinking that it needed to answer the question of whether the waiver in § 702 applies to non-APA claims. Clearly the waiver applied to Trudeau's APA claim, and no waiver was required for his First Amendment claim.¹⁸² Hence, the court's conclusion that the waiver applies to non-APA claims was dicta. In any event, the court's conclusion was flawed for the reasons explained in Part IV.

The Federal Circuit followed *Trudeau* in *Delano Farms Co. v. California Table Grape Commission*.¹⁸³ Grape growers filed a suit for declaratory relief challenging validity of the USDA's patents on table grapes and its conduct in licensing and enforcing the patents.¹⁸⁴ The court held that the waiver in § 702 applies to claims arising under the Patent Act.¹⁸⁵ Like the D.C. Circuit, the Federal Circuit observed that nothing in the text limits the waiver to APA claims, and it claimed that the legislative history "reinforces the breadth of the statutory language."¹⁸⁶ As explained in the next Part, *Trudeau* and *Delano Farms* failed to appreciate the waiver's statutory context and ignored Scalia's bargain.

The Seventh Circuit's consistent holding in *Blagojevich v. Gates*, was premised on the Supreme Court's decision in *Bowen v. Massachusetts*, which the court of appeals believed "treated § 702 as governing when any federal statute authorizes review of agency action."¹⁸⁷ That view of *Bowen*, however, is wrong. *Bowen* concerned an APA claim;¹⁸⁸ the substantive statute at issue, the Medicaid Act, did not provide for judicial review.¹⁸⁹ The Court in *Bowen* held that a challenge to a Medicaid reimbursement decision was not a claim for "money damages."¹⁹⁰ Consequently, the Court held that the claim sought "relief other than money damages" as required by § 702 and was not barred under § 704 by the availability of an adequate remedy in the Court of Claims.¹⁹¹ Those holdings have no bearing on the question of whether the APA's waiver applies to non-APA claims.

The only other support the Seventh Circuit gave for its holding that the APA's waiver applies to non-APA claims was its observation that the waiver appears in the same chapter as § 704, which the court said makes any final agency action reviewable "if either some statute other than the APA makes an

vires claim, whether the act was in fact ultra vires determines whether a court has jurisdiction).

¹⁸² See *Larson*, 337 U.S. at 689–90.

¹⁸³ *Delano Farms Co. v. Cal. Table Grape Comm'n*, 655 F.3d 1337, 1345 (Fed. Cir. 2011).

¹⁸⁴ *Id.* at 1340, 1349 n.6.

¹⁸⁵ *Id.* at 1344.

¹⁸⁶ *Id.*

¹⁸⁷ *Blagojevich v. Gates*, 519 F.3d 370, 372 (7th Cir. 2008).

¹⁸⁸ *Bowen v. Massachusetts*, 487 U.S. 879, 911 (1988) (noting that the district court had authority to grant relief under 5 U.S.C. § 706).

¹⁸⁹ *Id.* at 885.

¹⁹⁰ *Id.* at 893.

¹⁹¹ *Id.* at 891, 909–10.

action reviewable . . . or there is no alternative remedy specified by statute.”¹⁹² But that is merely a restatement of the APA’s cause of action; an action falling within those terms states a claim under the APA.¹⁹³

Other cases have reached the same result, but with little or no discussion of the issue. The Sixth Circuit, for example, held that the APA’s waiver of sovereign immunity applies to non-APA causes of action.¹⁹⁴ In *United States v. City of Detroit*, the district court, acting under the All Writs Act, ordered the U.S. Army Corps of Engineers to accept dredged material to avoid frustrating a Clean Water Act consent judgment between the City of Detroit and the State of Michigan.¹⁹⁵ The court of appeals rejected the United States’ argument that the waiver in § 702 applies only to APA claims.¹⁹⁶ The court cited case law in support of that conclusion, but did not analyze the issue.¹⁹⁷ Similarly, the Tenth Circuit in *Simmat v. United States Bureau of Prisons*, held that the waiver in § 702 applies to non-APA claims.¹⁹⁸ There was an Eighth Amendment claim against prison dentists in their official capacities, but it did not discuss the issue.¹⁹⁹

Thus, the courts of appeals that have addressed the question have ignored Scalia’s bargain and concluded that the APA’s waiver of sovereign immunity applies to claims founded on non-APA causes of action. In-depth analysis, however, is utterly lacking.

B. *Relation Between the Waiver and Other Parts of the APA*

On the question of how the waiver of sovereign immunity in § 702 relates to the other provisions of the APA, the courts of appeals are all over the map, as explained below. Clearly, this second question overlaps significantly with the first. If the waiver of sovereign immunity applies only to APA claims, a plaintiff using the waiver would have to satisfy the elements of an APA claim, such as the final agency action requirement.²⁰⁰ But this question is analytically distinct. Even if plaintiffs may use the APA’s waiver of sovereign immunity to bring non-APA causes of action, as the courts of appeals have concluded, use of the waiver should still hinge on satisfying the other requirements of the

¹⁹² *Blagojevich*, 519 F.3d at 372.

¹⁹³ 5 U.S.C. § 704 (2012).

¹⁹⁴ *United States v. Detroit*, 329 F.3d 515, 521 (6th Cir. 2003).

¹⁹⁵ *Id.* at 517.

¹⁹⁶ *Id.* at 521.

¹⁹⁷ *Id.*

¹⁹⁸ *Simmat v. U.S. Bureau of Prisons*, 413 F.3d 1225, 1233 (10th Cir. 2005).

¹⁹⁹ *Id.* at 1233, 1236–38 (holding that the case was dismissed for a failure to follow the pleading requirements of the Prison Litigation Reform Act); *see also* *We the People Found., Inc. v. United States*, 485 F.3d 140, 143 (D.C. Cir. 2007) (holding that waiver in § 702 applied to a First Amendment Petition Clause claim).

²⁰⁰ *Cf. Reliable Automatic Sprinkler Co. v. Consumer Prod. Safety Comm’n*, 324 F.3d 726, 731 (D.C. Cir. 2003) (“If there was no final agency action here, there is no doubt that appellant would lack a cause of action under the APA.”).

APA. Thus, some of the courts that have concluded that the APA's waiver applies to non-APA claims have also concluded that plaintiffs employing the waiver must satisfy some of the elements of the APA's cause of action.²⁰¹

1. "Agency Action"

The Ninth Circuit in *Presbyterian Church (U.S.A.) v. United States*, held that the APA's waiver is not limited to "agency action."²⁰² The plaintiff churches challenged the recording of church services by Immigration and Nationalization Service agents as a violation of the First and Fourth Amendments, seeking declaratory and injunctive relief.²⁰³ The district court held that sovereign immunity barred all relief against the federal government, but the court of appeals disagreed.²⁰⁴ The court rejected the government's argument that only the forms of "agency action" defined in § 551(13) of the APA can be challenged using the waiver in § 702, and the INS's investigative activities do not constitute "agency action."²⁰⁵ The court said that argument "offends the plain meaning of the amendment" and is unsupported in the legislative history.²⁰⁶ The waiver, the court said, "was clearly intended to cover the full spectrum of agency conduct, regardless of whether it fell within the technical definition of 'agency action.'"²⁰⁷ The court did not account for the agreement between Scalia and Kennedy that the waiver would "be subject to the other limitations of the [APA]."²⁰⁸

The Second and Sixth Circuits disagreed with the Ninth Circuit. In *SEC v. Credit Bancorp, Ltd.*, the United States intervened in an SEC enforcement action against Credit Bancorp to protect related ongoing criminal proceedings.²⁰⁹ The district court ordered that debts to bank customers took priority over federal tax debt and that the receiver would incur no personal liability.²¹⁰ The court of appeals held that the district court lacked jurisdiction

²⁰¹ See *infra* text accompanying notes 237–44.

²⁰² *Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 525 (9th Cir. 1989).

²⁰³ *Id.* at 520–21. The churches also sought nominal damages, but only against individual officers. *Id.* at 521.

²⁰⁴ *Id.* at 521, 523–24.

²⁰⁵ *Id.* at 524.

²⁰⁶ *Id.* at 525.

²⁰⁷ *Id.*; see also *Reno v. Am.–Arab Anti-Discrimination Comm.*, 525 U.S. 471, 510 n.4 (1999) (Souter, J., dissenting) (stating that the waiver in § 702 is not limited to "final agency action" (citing *Presbyterian Church*, 870 F.2d at 523–26)). The Federal Circuit in *Delano Farms* agreed that the waiver in § 702 is not limited to "agency action." *Delano Farms Co. v. Cal. Table Grape Comm'n*, 655 F.3d 1337, 1344 (Fed. Cir. 2011). But the court made that statement in the course of holding that the waiver is not limited to APA claims; the court did not address an argument that the action at issue did not constitute "agency action." *Id.*

²⁰⁸ Letter from Scalia to Kennedy, *supra* note 42, at 26.

²⁰⁹ *Sec. & Exch. Comm'n v. Credit Bancorp, Ltd.*, 297 F.3d 127, 130 (2d Cir. 2002).

²¹⁰ *Id.* at 129–30.

to enter that order because the waiver in § 702 “applies only when there has been an ‘agency action’ within the meaning of 5 U.S.C. § 551(13).”²¹¹ Since there was no agency action, the waiver was not applicable.²¹² In *Blakely v. United States*, the Sixth Circuit agreed that, “[b]y its own terms, § 702 only applies where the party seeks judicial review of agency action.”²¹³ Neither court explained its conclusion further.

2. “Final Agency Action”

The courts are also divided on the closely related question of whether the waiver in § 702 is limited to actions challenging “final agency action” under § 704. The Ninth Circuit is internally divided. Despite the earlier holding in *Presbyterian Church* that the APA’s waiver is not limited to “agency action” as defined in § 551(13),²¹⁴ the panel in *Tucson Airport Authority v. General Dynamics Corp.*, said that the waiver is limited to “[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court.”²¹⁵ Notably, the plaintiff presented non-APA claims in that case, claims that the court held were contractual and thus “impliedly forbid[den]” by the Tucker Act.²¹⁶ A different panel of the Ninth Circuit reached the same conclusion later the same year in *Gallo Cattle Co. v. United States Department of Agriculture*, where a milk producer challenged the denial of a request to pay certain assessments into escrow pending the resolution of administrative proceedings.²¹⁷ Without specifying the source of the claim, the court held that the district court lacked jurisdiction because the plaintiff did not challenge “final agency action.”²¹⁸

In 2006, the panel in *Gros Ventre Tribe v. United States* recognized the intra-circuit conflict between *Presbyterian Church* and *Gallo Cattle*—it did not mention *Tucson Airport Authority*—but declined to resolve the issue because the plaintiffs brought an APA claim and thus had to satisfy the APA’s requirements anyway.²¹⁹ The panel in *Veterans for Common Sense v. Shinseki*, purported to resolve the issue, siding with *Presbyterian Church* in holding that the waiver is not limited to “final agency action” and distinguishing *Gallo*

²¹¹ *Id.* at 141.

²¹² *Id.*

²¹³ *Blakely v. United States*, 276 F.3d 853, 870 (6th Cir. 2002). The plaintiffs claimed that § 702 waived the government’s immunity from their request for the return of forfeited assets. *Id.* The court of appeals held that, “[b]ecause the instant forfeiture took place in the context of a civil judicial proceeding, there is no agency action for the district court or this Court to review.” *Id.*

²¹⁴ *Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 525 (9th Cir. 1989).

²¹⁵ *Tucson Airport Auth. v. Gen. Dynamics Corp.*, 136 F.3d 641, 645 (9th Cir. 1998) (alteration in original) (quoting § 704).

²¹⁶ *Id.* at 647.

²¹⁷ *Gallo Cattle Co. v. U.S. Dep’t of Agric.*, 159 F.3d 1194, 1195–96 (9th Cir. 1998).

²¹⁸ *Id.* at 1198–200.

²¹⁹ *Gros Venture Tribe v. United States*, 469 F.3d 801, 808–09 (9th Cir. 2006).

Cattle as concerning an APA claim.²²⁰ But the court took the case *en banc*, vacated the panel's opinion, and held that the district court lacked jurisdiction under the Veterans Judicial Review Act.²²¹ Hence the Ninth Circuit's internal split persists.

Other courts agree with *Tucson Airport Authority* that the waiver is limited to "final agency action," but they reach that conclusion in cases like *Gallo Cattle* in which the plaintiff either asserted or probably could have asserted an APA claim.²²² Clearly, APA claims are subject to the limitations of § 704, so saying the waiver is subject to those limitations in cases concerning APA claims could simply reflect the courts' failure to distinguish the cause of action from the waiver of sovereign immunity. For example, the Fourth Circuit in *Food Town Stores, Inc. v. EEOC* held that the waiver in § 702 is limited to "final agency action."²²³ The plaintiff there sought to force the EEOC to issue a subpoena in an employment discrimination investigation of the plaintiff, arguing that the agency's subpoena regulation conflicted with the relevant statute.²²⁴ If that was an APA claim, it is unremarkable for the court to have held that the plaintiff could only challenge "final agency action." The court did not specify the source of the right of action. Similarly, in *Blagojevich v. Gates*, the Seventh Circuit declined to decide whether the governor's challenge of a decision to move Air National Guard planes out of state was cognizable under the APA or not because the court believed the waiver in § 702 applied regardless.²²⁵ Nonetheless, the court held that the waiver in § 702 is limited to "final agency action" under § 704.²²⁶

Most courts of appeals disagree. In *Trudeau*, in which the D.C. Circuit held that the waiver in § 702 is not limited to APA claims, the court also held that the waiver is not limited to "final agency action."²²⁷ The court reasoned that, because § 704 does not grant jurisdiction, the "final agency action" requirement is not jurisdictional, but is merely an element of an APA claim.²²⁸ And the waiver in § 702 "applies regardless of whether the elements of an APA cause of action are satisfied."²²⁹ The court found nothing in the language of § 702 or the legislative history to indicate that the waiver is limited to "final

²²⁰ *Veterans for Common Sense v. Shinseki*, 644 F.3d 845, 865–66 (9th Cir. 2011).

²²¹ *Veterans for Common Sense v. Shinseki*, 678 F.3d 1013, 1013 (9th Cir. 2012) (*en banc*).

²²² See *Beamon v. Brown*, 125 F.3d 965, 967 (6th Cir. 1997) (stating in a case concerning an APA claim that the waiver in § 702 is limited to "final agency action").

²²³ *Food Town Stores, Inc. v. Equal Emp't Opportunity Comm'n*, 708 F.2d 920, 922 (4th Cir. 1983).

²²⁴ *Id.* at 921.

²²⁵ *Blagojevich v. Gates*, 519 F.3d 370, 371, 372 (7th Cir. 2008).

²²⁶ *Id.* at 372.

²²⁷ *Trudeau v. Fed. Trade Comm'n*, 456 F.3d 178, 186, 187 (D.C. Cir. 2006).

²²⁸ *Id.* at 184.

²²⁹ *Id.* at 187.

agency action.”²³⁰ Clearly, the D.C. Circuit did not understand the significance of Scalia’s letter of May 10, 1976.

The Federal Circuit agreed with *Trudeau* in *Delano Farms*.²³¹ As explained above, the court held that the waiver applies to non-APA claims and is not limited to “agency action.”²³² The court also held that it is not limited to “final agency action” under § 704.²³³ The court agreed with the D.C. Circuit that nothing in text limits the waiver to “final agency action,” and the legislative history “reinforces the breadth of the statutory language.”²³⁴ The Third and Sixth Circuits agreed, albeit in cases concerning APA claims.²³⁵ The Seventh Circuit joined the chorus, also in a case concerning an APA claim and without acknowledging the earlier panel’s contrary holding in *Blagojevich v. Gates*.²³⁶

3. “No Other Adequate Remedy”

Although the D.C. Circuit and the Federal Circuit have said that the waiver of sovereign immunity in § 702 is not limited to APA claims and is not constrained by the “final agency action” requirement in § 704, both courts have concluded that the waiver is limited to actions for which there is “no other adequate remedy in a court” under § 704. In *National Wrestling Coaches Ass’n v. Department of Education*, the D.C. Circuit said, without explanation, that § 702’s waiver “applies to any suit, whether advanced under the APA or not,” but “is limited by the ‘adequate remedy’ bar” in § 704.²³⁷ The court’s primary holding, however, was that the plaintiffs lacked standing,²³⁸ making the statement about the waiver dicta.

The Federal Circuit’s statement to the same effect in *Christopher Village, L.P. v. United States*, was not dicta.²³⁹ Christopher Village requested a rent

²³⁰ *Id.*

²³¹ See *Delano Farms Co. v. Cal. Table Grape Comm’n*, 655 F.3d 1337, 1344 (Fed. Cir. 2011).

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Muniz-Muniz v. U.S. Border Patrol*, 741 F.3d 668, 673 (6th Cir. 2013); *Treasurer of N.J. v. U.S. Dep’t of the Treasury*, 684 F.3d 382, 393, 397–400 (3d Cir. 2012).

²³⁶ Compare *Michigan v. U.S. Army Corps of Eng’rs*, 667 F.3d 765, 768–69, 775 (7th Cir. 2011) (limiting waiver to final agency action), with *Blagojevich v. Gates*, 519 F.3d 370, 372 (7th Cir. 2008) (holding that waiver was not limited to final agency action).

²³⁷ *Nat’l Wrestling Coaches Ass’n v. Dep’t of Educ.*, 366 F.3d 930, 947 (D.C. Cir. 2004).

²³⁸ *Id.* at 945.

²³⁹ *Christopher Vill., L.P. v. United States*, 360 F.3d 1319, 1329 (Fed. Cir. 2004); see also *Neb. Pub. Power Dist. v. United States*, 590 F.3d 1357, 1364, 1369 (Fed. Cir. 2010) (assuming that the “no other adequate remedy” provision in § 704 limits the waiver in § 702, but holding that it did not apply in that case); *Telecare Corp. v. Leavitt*, 409 F.3d 1345, 1349 (Fed. Cir. 2005) (stating in a case concerning an APA claim that the waiver in

increase for its federally subsidized low-income housing development.²⁴⁰ The Fifth Circuit held that the Department of Housing and Urban Development had violated its contract with Christopher Village by refusing to consider the rent increase request.²⁴¹ Christopher Village then filed suit in the Court of Federal Claims (CFC) for breach of contract, arguing that the Fifth Circuit's judgment precluded the government from relitigating its liability.²⁴² The Federal Circuit said that the APA's waiver is limited "to situations in which 'no other adequate remedy' exists."²⁴³ A damages action in the CFC would have been an adequate remedy for Christopher Village, so the district court (and the Fifth Circuit) lacked jurisdiction, and their holdings did not have preclusive effect.²⁴⁴

Later in *Delano Farms*, the court distinguished *Christopher Village* as concerning an APA claim, which was necessarily subject to the limits in § 704.²⁴⁵ What the *Delano Farms* panel failed to recognize, however, was that the *Christopher Village* panel held that the district court lacked subject matter jurisdiction; holding that Christopher Village did not have a cause of action under the APA would not have mattered for the preclusion question before the Federal Circuit.²⁴⁶ Thus, the holding in *Christopher Village* that the waiver in § 702 is limited to actions for which there is "no other adequate remedy" in a court²⁴⁷ is binding circuit precedent.

IV. WHERE THE COURTS WENT WRONG

The majority of courts of appeals have misinterpreted the 1976 amendment. The waiver should be interpreted to apply only to APA claims and to be limited by the other constraints in the APA, including the "final agency action"²⁴⁸ requirement. This result flows from the plain language of the waiver. The second sentence of § 702 should not be read in isolation, but rather in the context of the rest of § 702 and the surrounding sections of the APA.²⁴⁹ Even if the text were not clear, however, the history of the 1976 amendment confirms that the waiver did not throw open the courthouse doors as wide as the majority of courts believe.

§ 702 is limited by the "adequate remedy" requirement in § 704); *Smith v. Sec'y of the Army*, 384 F.3d 1288, 1292 (Fed. Cir. 2004) (same).

²⁴⁰ *Christopher Vill.*, 360 F.3d at 1322.

²⁴¹ *Id.* at 1324.

²⁴² *Id.* at 1324, 1326.

²⁴³ *Id.* at 1327 (quoting *Bowen v. Massachusetts*, 487 U.S. 879, 902 (1988)).

²⁴⁴ *Id.* at 1329, 1333.

²⁴⁵ *Delano Farms Co. v. Cal. Table Grape Comm'n*, 655 F.3d 1337, 1347–48 (Fed. Cir. 2011).

²⁴⁶ *See Christopher Vill.*, 360 F.3d at 1329–30.

²⁴⁷ *Id.* at 1327.

²⁴⁸ 5 U.S.C. § 704 (2012).

²⁴⁹ *Id.* § 702.

My argument here should appeal to textualists and intentionalists alike. I believe that the text of § 702 is unambiguous, and one need not consult extrinsic materials to conclude that the waiver applies only to APA claims and is contingent on the other requirements in the APA. Even if one disagrees with that conclusion, however, at most the text is ambiguous, and the history of the 1976 amendment provides compelling support for my interpretation. In other words, I do not argue here that the statutory history overrides the text, but rather that the history is reflected in the text.²⁵⁰

A. *Text*

Section 702 in its entirety reads:

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.²⁵¹

Read in context, the “claim that an agency . . . acted or failed to act”²⁵² in the second sentence of § 702 should be read to refer to “agency action” in the first sentence.²⁵³ In other words, the first sentence creates a right of review for any person harmed by “agency action.” The second sentence then waives the government’s sovereign immunity from claims challenging “agency action,” but only where the claim is “that an agency or an officer or employee thereof

²⁵⁰ If one believes that the courts of appeals have adopted the “best reading of the statute,” then the 1976 amendment reflects a “legislative process failure[]” insofar as “most legislators . . . understood the meaning specified in legislative history,” that is, in Scalia’s letter. See Mark Seidenfeld, *A Process Failure Theory of Statutory Interpretation*, 56 WM. & MARY L. REV. 467, 486 (2014). Thus, the history “provides a better reflection of the legislative bargain.” *Id.*

²⁵¹ 5 U.S.C. § 702.

²⁵² *Id.*

²⁵³ See Petition for Writ of Certiorari, *supra* note 14, at 21.

acted or failed to act in an official capacity or under color of legal authority.”²⁵⁴ Necessarily, the government’s immunity is only waived in actions challenging “agency action” under the first sentence of § 702.

It is simply bizarre to read the middle sentence of § 702 as a stand-alone provision that waives the government’s immunity from any cause of action in the U.S. Code. If Congress wanted to create such a stand-alone waiver, it could have included that sentence in Title 28 with the other amendments in the bill. Instead, it added the sentence to Title 5 and, even more tellingly, placed it immediately following the APA’s right of action.²⁵⁵ The natural reading of the section as a whole links the waiver in the second sentence to the right of action in the first sentence. Thus, the majority of courts of appeals are simply misinterpreting (or ignoring) the plain language of the APA based on their misunderstanding of statements in the legislative history.²⁵⁶

The courts also fail to acknowledge established Supreme Court doctrine governing the interpretation of waivers of sovereign immunity. The Court has repeated that waivers “of the Federal Government’s sovereign immunity must be unequivocally expressed in statutory text.”²⁵⁷ Even if reasonable minds could disagree about the plain language of the waiver in § 702, it does not *unequivocally* waive the government’s immunity from non-APA claims. According to the Supreme Court, any ambiguity in the statute must be read in favor of the government’s immunity.²⁵⁸

B. History

If a waiver of sovereign immunity “is not clearly evident from the language of the statute,” legislative history cannot tip the scales against the government.²⁵⁹ In the case of § 702, however, the legislative history favors the

²⁵⁴ 5 U.S.C. § 702.

²⁵⁵ *Id.*

²⁵⁶ *See supra* Part III.A.

²⁵⁷ *Lane v. Pena*, 518 U.S. 187, 192 (1996); *see also* *Fed. Aviation Admin. v. Cooper*, 132 S. Ct. 1441, 1448 (2012) (discussing waiver of sovereign immunity). The normative validity of that rule is questionable. Abbe Gluck and Lisa Bressman’s groundbreaking empirical study of statutory drafting in Congress undermined the assumption that rules of statutory interpretation evince a dialogue between the courts and Congress. Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 942, 945–46 (2013). For example, the people who draft statutes in Congress do not “know, use, or understand” the rule requiring express statutory language to abrogate a state’s immunity from suit. *Id.* at 946. They are thus not likely to be aware of the federal analog to that rule either. Moreover, as I previously argued, federal sovereign immunity doctrine is anachronistic and redundant and “should be left to gather dust.” Kovacs, *supra* note 17, at 79. Nonetheless, the Supreme Court has not yet seen fit to agree with me. The rule requiring express statutory language to waive the federal government’s sovereign immunity is still binding on the lower federal courts.

²⁵⁸ *Cooper*, 132 S. Ct. at 1448.

²⁵⁹ *Id.*

government. The courts of appeals are not giving sufficient weight to the deliberation underlying the 1976 amendment. The courts are only seeing one side of the picture: the side that promoted a broad waiver to overcome the problems with nonstatutory review. The courts are not accounting for the fact that the amendment only passed when the administration withdrew its opposition premised on a much more restrictive view of the waiver's effect.²⁶⁰

The courts' primary mistake is in looking only at the House and Senate Reports and ignoring the broader deliberative process. First, the courts assert that nothing in the language of the waiver indicates that it is limited by other provisions of the APA.²⁶¹ What the courts ignore, however, is that Congress could have added the waiver to Title 28; the bill included amendments to §§ 1331 and 1391 in Title 28.²⁶² Instead, Congress amended § 702 in Title 5, thus implying that the waiver is connected to the other provisions in that chapter.²⁶³ The House and Senate Reports do not explain the decision to place the amendment in Title 5 Chapter 7, but the ACUS and ABA reports make clear that the decision was intended to limit the effect of the waiver.²⁶⁴ Senator Kennedy understood that; the Justice Department's support was premised on that understanding; and Senator Hruska explained that on the Senate floor immediately before the bill passed.²⁶⁵

Second, the courts rely on statements in the House and Senate Reports "that Congress intended [for the amendment] to waive immunity for 'any' and 'all' actions for equitable relief against an agency."²⁶⁶ Those broad statements, however, do not reflect the entirety of the deliberative process that led to the

²⁶⁰ See *supra* text accompanying notes 110–34.

²⁶¹ *Delano Farms Co. v. Cal. Table Grape Comm'n*, 655 F.3d 1337, 1344 (Fed. Cir. 2011) ("[N]othing in the text of section 702 limits its scope to 'agency action,' as defined in section 704 of the APA, or 'final agency action,' for which section 704 of the APA directly provides the right to judicial review."); *Trudeau v. Fed. Trade Comm'n*, 456 F.3d 178, 186 (D.C. Cir. 2006) ("There is nothing in the language of the second sentence of § 702 that restricts its waiver to suits brought under the APA."); *Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 525 (9th Cir. 1989) (holding that nothing in the text limits waiver to "agency action").

²⁶² 28 U.S.C. §§ 1331, 1391 (2012).

²⁶³ 5 U.S.C. § 702 (2012).

²⁶⁴ See *supra* text accompanying notes 90–97. The views of the ACUS and the ABA are particularly important here because they drafted the legislation. See William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 632–34 (1990) (discussing consideration of statements by nonlegislators in statutory interpretation).

²⁶⁵ See *supra* text accompanying notes 129–34.

²⁶⁶ *Trudeau*, 456 F.3d at 187 (citations omitted) (first quoting H.R. REP. NO. 94-1656, at 3, 9 (1976); and then quoting S. REP. NO. 94-996, at 8 (1976)); see *id.* at 186 (pointing to House and Senate Reports as identifying the purpose of the amendment to eliminate "the sovereign immunity defense in *all* equitable actions for specific relief against a Federal agency or officer acting in an official capacity" (quoting *Sea-Land Serv., Inc. v. Alaska R.R.*, 659 F.2d 243, 244 (D.C. Cir. 1981))); see also *Treasurer of N.J. v. U.S. Dep't of the Treasury*, 684 F.3d 382, 400 (3d Cir. 2012); *Delano Farms Co.*, 655 F.3d at 1345; *Presbyterian Church*, 870 F.2d at 525.

amendment's passage.²⁶⁷ As detailed above, the Justice Department's support for the bill was premised on the understanding that the waiver would be subject to the other limitations of the APA. That understanding was consistent with that of the organizations that proposed the amendment and with that of the chair of the relevant Senate subcommittee. Absent that understanding, the bill would have continued to languish.²⁶⁸

Third, the courts point out "that Congress expected the waiver to apply to nonstatutory actions, and thus not only to actions under the APA."²⁶⁹ Professor Cramton was the source of the statement in the Senate Report that the bill was designed to effectuate a "partial elimination of sovereign immunity, as a barrier to nonstatutory review."²⁷⁰ He used that exact language when describing the ACUS proposal.²⁷¹ As explained above, however, courts continued to use the term "nonstatutory review" to refer to claims founded on the APA's cause of action, even though it was a misnomer.²⁷² Importantly, Cramton's report made clear that the waiver would be limited by the other provisions of the APA.²⁷³ The amendment was not written to overturn *Larson*²⁷⁴ and *Dugan*²⁷⁵ or to codify the requirements for officer suits. If it had been, it would have made more sense to include it in Title 28 with the rest of the amendments in the bill. Instead, the amendment was written to modify the APA itself by clarifying that sovereign immunity would not bar APA claims

²⁶⁷ Those broad statements are also inconsistent with the Senate Judiciary Committee's estimation that the bill would not require additional appropriations because it would expand the government's caseload only "slightly." S. REP. NO. 94-996, at 19; *see also* Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 STAN. L. REV. 725, 763–65 (2014) (empirical study finding that budget estimates influence statutory drafting).

²⁶⁸ *See infra* Part II.B.

²⁶⁹ *Trudeau*, 456 F.3d at 186; *see also Presbyterian Church*, 870 F.2d at 525; *Jaffee v. United States*, 592 F.2d 712, 718–19 (3d Cir. 1979).

²⁷⁰ S. REP. NO. 94-996, at 8; *see id.* at 19 ("The partial elimination of sovereign immunity will facilitate nonstatutory judicial review . . ."); *see also* H.R. REP. NO. 94-1656, at 9, 19 (discussing partial elimination of sovereign immunity to facilitate nonstatutory review).

²⁷¹ 1970 *Hearing*, *supra* note 32, at 27 (comment of Roger C. Cramton); *e.g.*, 1976 *Hearing*, *supra* note 56, at 647 n.189 (analysis of the Center for Governmental Responsibility) (arguing that the bill would "abolish the sovereign immunity doctrine for the purpose of allowing nonstatutory review of agency action"); *see also* Cramton Memo, *supra* note 32, at 131 (stating that the committee "abolish[ed] sovereign immunity as a defense in nonstatutory review actions"); *id.* at 139 ("[T]he purpose of the Committee's recommendation is to provide nonstatutory review in some situations in which the doctrine of sovereign immunity now stands in the way."); *id.* at 128–29 (referring to the APA claim as a "nonstatutory review action"). Others perpetuated Cramton's misstatement.

²⁷² *See supra* text accompanying notes 149–50.

²⁷³ *See supra* text accompanying notes 90–95.

²⁷⁴ *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949).

²⁷⁵ *Dugan v. Rank*, 372 U.S. 609 (1963).

challenging agency action where “an agency or an officer or employee . . . acted or failed to act in an official capacity or under color of legal authority.”²⁷⁶ Thus, the casual misstatement in the House and Senate Reports about “nonstatutory review” should not be read to undo the deliberation that led to the bill’s passage.

Committee reports traditionally are thought to be the most reliable form of legislative history.²⁷⁷ “Generally, however, legislators do not even read the committee reports.”²⁷⁸ Moreover, sometimes “legislative history is not reliable because it is generated early in the process and does not reflect the ultimate deals entered to get the statute through Congress.”²⁷⁹ For example, Adrian Vermeule demonstrated that the Court in *Holy Trinity Church* “overlooked or ignored events that made the Senate committee report irrelevant to the statute’s subsequent passage.”²⁸⁰ In the case of § 702, Scalia’s letter of May 10, 1976 should take precedence over any contrary statements in the committee reports.²⁸¹ That letter is, in effect, a trump card because the bill would not have moved without it. Scalia dropped the Executive Branch’s opposition to the bill on the condition that the waiver of sovereign immunity would “only apply to claims relating to improper official action[] and [would] be subject to the other limitations of the [APA].”²⁸² If there is any ambiguity in § 702, the letter resolves it by providing clear evidence of the bargain Congress struck with the Executive Branch to get the 1976 amendment to the APA passed.²⁸³ The courts should interpret the amendment accordingly.²⁸⁴

²⁷⁶ 5 U.S.C. § 702 (2012).

²⁷⁷ WILLIAM N. ESKRIDGE, JR. ET AL., *LEGISLATION AND STATUTORY INTERPRETATION* 311 (2d ed. 2006).

²⁷⁸ Seidenfeld, *supra* note 250, at 498.

²⁷⁹ ESKRIDGE ET AL., *supra* note 277, at 307.

²⁸⁰ Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 *STAN. L. REV.* 1833, 1845 (1998). Vermeule argues that judicial incompetence in the use of legislative history necessitates a rule excluding it as an interpretive source. *Id.* at 1896. I disagree. If used properly, legislative history can be “empirically sound, normatively appealing, and far easier.” Victoria F. Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, 122 *YALE L.J.* 70, 73 (2012). The history here reveals that the courts of appeals’ myopic focus on the committee reports has led to erroneous interpretations of § 702. *Cf.* ESKRIDGE ET AL., *supra* note 277, at 307 (“Invoking *unreliable* legislative history is worse than ignoring such history altogether.”).

²⁸¹ The Senate Report issued on June 26, 1976 includes the text of Scalia’s letter. S. REP. NO. 94-996, at 5 (1976). Apparently, the committee staff did not focus on, or did not understand, the inconsistency between the Justice Department’s position and some of the statements in the report.

²⁸² Letter from Scalia to Kennedy, *supra* note 42, at 26.

²⁸³ See Eskridge, *supra* note 264, at 633–34 (observing that when statutes “reflect carefully crafted compromises among . . . various groups,” the Court looks to the records of those compromises when interpreting the statute).

²⁸⁴ The material I rely on here is in the official legislative history of the 1976 amendment and is thus a reliable indicator of the bargain between Scalia and Kennedy and

V. DEEPER PROBLEMS

My interpretation of the waiver in § 702 as providing a narrow opening for suits against the government is normatively preferable because it respects the public deliberation that freed the 1976 amendment from its legislative quagmire and enabled its passage. The courts of appeals that interpret the amendment as throwing open the courthouse doors, in contrast, disrespect that deliberation, raising concerns about separation of powers, democratic legitimacy, and institutional competence.

A. *Interpreting the APA*

Recently, I developed a theory about how the APA should be interpreted.²⁸⁵ I drew on the work of William Eskridge and John Ferejohn concerning superstatutes.²⁸⁶ Eskridge and Ferejohn conceive of superstatutes as statutes that were born of deep public deliberation, have stood the test of time, and have become entrenched in American law.²⁸⁷ Prime examples are the Civil Rights Acts of 1866,²⁸⁸ 1871,²⁸⁹ and 1964;²⁹⁰ the Sherman Antitrust Act of 1890;²⁹¹ the National Labor Relations Act of 1935;²⁹² and the Fair Labor Standards Act of 1938.²⁹³

Superstatutes inevitably evolve, according to Eskridge and Ferejohn, because they are written broadly and, over their long lifetimes, must be applied

well within the courts' competence to assess. What kinds of material beyond official legislative history would suffice for these purposes is fodder for future inquiry.

²⁸⁵ See generally Kovacs, *supra* note 69.

²⁸⁶ See generally WILLIAM N. ESKRIDGE JR. & JOHN FERREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION (2010) [hereinafter ESKRIDGE & FERREJOHN, REPUBLIC]; William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215 (2001) [hereinafter Eskridge & Ferejohn, *Super-Statutes*].

²⁸⁷ ESKRIDGE & FERREJOHN, REPUBLIC, *supra* note 286, at 111; Eskridge & Ferejohn, *Super-Statutes*, *supra* note 286, at 1216.

²⁸⁸ Civil Rights Act of 1866, 42 U.S.C. §§ 1981–1982 (2012); see also Eskridge & Ferejohn, *Super-Statutes*, *supra* note 286, at 1225–26.

²⁸⁹ Civil Rights Act of 1871, 42 U.S.C. § 1983; see also Eskridge & Ferejohn, *Super-Statutes*, *supra* note 286, at 1225–26.

²⁹⁰ Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 5, 28, and 42 U.S.C.); see also ESKRIDGE & FERREJOHN, REPUBLIC, *supra* note 286, at 88; Eskridge & Ferejohn, *Super-Statutes*, *supra* note 286, at 1237.

²⁹¹ Sherman Antitrust Act, 15 U.S.C. §§ 1–7 (2012); see also ESKRIDGE & FERREJOHN, REPUBLIC, *supra* note 286, at 121; Eskridge & Ferejohn, *Super-Statutes*, *supra* note 286, at 1231–32.

²⁹² National Labor Relations Act of 1935, 29 U.S.C. §§ 151–169 (2012); see also Eskridge & Ferejohn, *Super-Statutes*, *supra* note 286, at 1227.

²⁹³ Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–205; see also Eskridge & Ferejohn, *Super-Statutes*, *supra* note 286, at 1227.

“to new facts, new needs, [and] new ideas.”²⁹⁴ Eskridge and Ferejohn posit that it is normatively preferable for the law to evolve through superstatutes than through constitutional amendments or judicial interpretations of the Constitution, because superstatutory evolution allows the law to respond to changing circumstances in a democratically legitimate way.²⁹⁵ Thus, courts and agencies should interpret superstatutes “broadly and evolutively.”²⁹⁶

Republican deliberation involving the public and representative branches of government legitimizes this superstatutory evolution.²⁹⁷ Sometimes the public gives feedback directly through elections.²⁹⁸ Absent such direct public input, the public gives feedback through the agency that Congress charged with implementing and interpreting the superstatute.²⁹⁹ Eskridge and Ferejohn conceive of this public deliberation as involving a feedback loop between Congress, the agency, the President, the public, and the courts.³⁰⁰ The key to legitimizing superstatutory evolution is “a strong connection to the people and popular needs.”³⁰¹

Courts interpreting superstatutes, according to Eskridge and Ferejohn, should be “*deliberation-respecting*.”³⁰² They should study the statute’s legislative history and “its ongoing statutory and administrative evolution” in order “to understand the statutory scheme from the perspective of Congress and the agency.”³⁰³ They should take the “deliberative process seriously, as having significant normative force” and recognize that a superstatute represents “a thoughtful response to an important social problem adopted after intense public debate and congressional deliberation.”³⁰⁴ And they “should defer to laws and policies that reflect the deliberated views of Congress and the president.”³⁰⁵

I demonstrated previously that the APA is a superstatute: it was born of a lengthy public debate, has taken on normative gravity, and is a fixed feature of

²⁹⁴ ESKRIDGE & FEREJOHN, REPUBLIC, *supra* note 286, at 272–73; *see also id.* at 267, 270.

²⁹⁵ William N. Eskridge, Jr., *America’s Statutory “constitution,”* 41 U.C. DAVIS L. REV. 1, 35 (2007); *see also* ESKRIDGE & FEREJOHN, REPUBLIC, *supra* note 286, at 8–9, 122, 167, 263, 334, 374, 445; Eskridge & Ferejohn, *Super-Statutes*, *supra* note 286, at 1271–76.

²⁹⁶ Eskridge & Ferejohn, *Super-Statutes*, *supra* note 286, at 1249.

²⁹⁷ ESKRIDGE & FEREJOHN, REPUBLIC, *supra* note 286, at 161.

²⁹⁸ *E.g.*, *id.* at 162–63, 213, 225, 238.

²⁹⁹ *Id.*

³⁰⁰ *Id.* at 19, 23, 26, 78, 105; *see also id.* at 436 (“[O]ur theory rests upon a longer back-and-forth process involving popular and expert proposals, statutory enactments, administrative implementation, and popular responses.”).

³⁰¹ Eskridge & Ferejohn, *Super-Statutes*, *supra* note 286, at 1276; *see also* ESKRIDGE & FEREJOHN, REPUBLIC, *supra* note 286, at 103–04.

³⁰² ESKRIDGE & FEREJOHN, REPUBLIC, *supra* note 286, at 22–23.

³⁰³ *Id.* at 266; *see also id.* at 296.

³⁰⁴ *Id.* at 435.

³⁰⁵ *Id.* at 435–36.

our statutory constitution.³⁰⁶ The APA is unlike most superstatutes, however, in that no single agency is charged with its implementation.³⁰⁷ Thus, no agency is at the hub of a deliberative web linking Congress, the President, the courts, and most importantly the public.³⁰⁸ Congress did not anticipate that an agency's interpretation would keep the APA current, but instead anticipated that it would take on that task itself.³⁰⁹ Thus, public deliberation about the meaning of the APA has been in Congress.³¹⁰

One of Eskridge and Ferejohn's central insights is that statutory interpretation should focus on public deliberation. In our democratic republic,³¹¹ if the law is to evolve to keep up with changing times, it should evolve in a way that reflects the public's will.³¹² I concluded that the exceptional legislative effort that shaped the APA, before and after its enactment, and the lack of single-agency implementation must have interpretive consequences. First, interpretations of the APA must stay within the boundaries of the text that Congress enacted.³¹³ Some words leave room for elaboration. The "arbitrary, capricious . . . or otherwise not in accordance with law" standard of review, for example, may mean many things.³¹⁴ Other terms are more definite, like § 704's requirement that administrative remedies be exhausted only in certain circumstances.³¹⁵

Second, interpretations of the APA must give effect to the compromises encoded in the Act. Some provisions were wins for the conservative minority; others were wins for the liberal majority; and many were compromises. One cannot tell which provision is which, and thus cannot "give sufficient weight to the bargain Congress and the President made in 1946," without examining the full context and history of the Act.³¹⁶

Third, interpretations of the APA must respect ongoing deliberation about the Act, including both amendments that were enacted and those that were

³⁰⁶ Kovacs, *supra* note 69, at 1223–37.

³⁰⁷ *See id.* at 1242–48.

³⁰⁸ *See id.* at 1238–39 (describing agency-centered deliberation).

³⁰⁹ S. REP. NO. 79-752 (1945), reprinted in STAFF OF S. COMM. ON THE JUDICIARY, 79TH CONG., ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, 185, 216–17 (2d Sess. 1946).

³¹⁰ *See* Kovacs, *supra* note 69, at 1235.

³¹¹ *See* Eugene Volokh, *Is the United States of America a Republic or a Democracy?*, WASH. POST (May 13, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/05/13/is-the-united-states-of-america-a-republic-or-a-democracy/> [<https://perma.cc/N8E7-YU3N>] (explaining that the United States is both a republic and a democracy).

³¹² ESKRIDGE & FEREJOHN, *REPUBLIC*, *supra* note 286, at 22–24.

³¹³ Kovacs, *supra* note 69, at 1250.

³¹⁴ 5 U.S.C. § 706(2)(A) (2012); *see* Kovacs, *supra* note 69, at 1213.

³¹⁵ 5 U.S.C. § 704; *see* Kovacs, *supra* note 69, at 1213.

³¹⁶ Kovacs, *supra* note 69, at 1251.

defeated after significant debate.³¹⁷ Finally, if the APA needs to be amended, the courts should not be taking on that task themselves, but should be prodding Congress to do its job.³¹⁸ “Judicial deliberation is not a ‘second best’ alternative to public deliberation.”³¹⁹ I concluded that “given the extraordinary legislative process that led to the APA’s enactment and the relative paucity of agency-based deliberative feedback since then, courts should be particularly cautious about interpreting the APA’s text in a way that shifts the balance Congress reached through the political process.”³²⁰

B. *Disrespecting Deliberation*

Judicial disrespect for the outcome of the public deliberative process raises concerns related to constitutionality, democratic legitimacy, and institutional competence. Most importantly, when courts interpret the APA in a way that pays insufficient heed to political bargains, they violate separation of powers and act anti-democratically. The U.S. Constitution assigns to Congress the power to make policy, not the courts.³²¹ That structure was designed to avoid tyranny and safeguard liberty, and relatedly to ensure that law makers are politically accountable.³²² In addition, any statutory interpretation that disrespects public deliberation “runs the risk of alienating fundamental law from popular sources of legitimacy.”³²³

Specifically, Congress is entitled to decide whether to expose the United States to suit. The Supreme Court said in *Larson* that “it is not for this Court to examine” which government activities require the protection of sovereign immunity and which do not.³²⁴ “That is a function of the Congress.”³²⁵ Indeed, the APA itself codifies the principle that Congress may make agency action unreviewable. Section 701(a) precludes judicial review if another statute precludes review or commits agency action to agency discretion by law.³²⁶

³¹⁷ *Id.* at 1251–53; see also Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967–2011*, 92 TEX. L. REV. 1317, 1461 (2014).

³¹⁸ Kovacs, *supra* note 69, at 1253.

³¹⁹ Kathryn E. Kovacs, *Pixelating Administrative Common Law in Perez v. Mortgage Bankers Association*, 125 YALE L.J. F. 31, 36 (2015).

³²⁰ Kovacs, *supra* note 69, at 1254.

³²¹ See Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 19–20 (1985).

³²² *Id.* at 19–20, 24, 27; see also Kovacs, *supra* note 69, at 1255–56.

³²³ ESKRIDGE & FEREJOHN, *REPUBLIC*, *supra* note 286, at 445; see also Kovacs, *supra* note 319, at 42 (stating that courts “lack the connection to the public that renders lawmaking valid in our system of government”).

³²⁴ *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 705 (1949).

³²⁵ *Id.*; see also Bagley, *supra* note 12, at 1320.

³²⁶ 5 U.S.C. § 701(a) (2012); see e.g., *Lincoln v. Vigil*, 508 U.S. 182, 193 (1993) (holding that Indian Health Service’s decision to discontinue a program was “committed to agency discretion by law” and was therefore unreviewable under § 701(a)(2)).

Certainly, judicial review of agency action is crucial, and courts are often swayed by the desire to provide access to the courts. The Supreme Court laid the modern foundation for this concern in *Abbott Laboratories v. Gardner*, where it said “judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress.”³²⁷ As Louis Jaffe observed, “The availability of judicial review is the necessary condition, psychologically if not logically, of a system of administrative power which purports to be legitimate, or legally valid.”³²⁸ Judicial review ensures, among other things, “that agencies engage in reasoned decision making” and act within the confines of their statutory authority.³²⁹ It serves “fundamental values . . . including upholding the ideal of the rule of law, protecting individual rights under the law, and imposing checks and balances on agency discretion.”³³⁰

In his article on the common law presumption that official action is subject to judicial review, Nicholas Bagley acknowledged that judicial review “may enhance agency accountability, improve the quality of agency decisionmaking, and legitimize governmental action.”³³¹ But Bagley trounced the presumption, refuting each of the justifications proffered in its support. He concluded that “discard[ing] the best interpretation of a statute in an effort to advance background values” is “rather openly countermajoritarian” and “is in tension with th[e] assignment of constitutional responsibility” to Congress to determine “when to open the courts to suits against the government.”³³²

Courts addressing the scope of the APA’s waiver of sovereign immunity are thus faced with a choice between two legitimate normative goals: providing access to the courts and adhering to constitutional structure. I

³²⁷ *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967), *abrogated by* *Califano v. Sanders*, 430 U.S. 99 (1977); *see also* *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986).

³²⁸ LOUIS L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 320 (1965).

³²⁹ Mila Sohoni, *The Administrative Constitution in Exile*, 57 WM. & MARY L. REV. 923, 940 (2016); *see also* Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 546 n.6 (2000) (“The purpose of judicial review is to guarantee the legality of agency decision making by monitoring fidelity to legal procedure and compliance with substantive norms of rationality.”); Thomas W. Merrill, *Delegation and Judicial Review*, 33 HARV. J.L. & PUB. POL’Y 73, 77 (2010) (“Judicial review requires the agency to give some reason related to the standard Congress has supplied, to act consistently or explain its departure from past courses of conduct in applying the standard, and to respond to plausible objections grounded in the factual or legal assumptions that support its action.”).

³³⁰ Thomas O. Sargentich, *The Critique of Active Judicial Review of Administrative Agencies: A Reevaluation*, 49 ADMIN. L. REV. 599, 601 (1997).

³³¹ Bagley, *supra* note 12, at 1319; *see also id.* at 1321 (“When it comes to managing bureaucracies, judicial review has a lot going for it: it encourages agencies to explain themselves, to respect individual rights, and to adhere to law.”); Cass R. Sunstein, *On the Costs and Benefits of Aggressive Judicial Review of Agency Action*, 1989 DUKE L.J. 522, 522–26 (summarizing the benefits of judicial review of agency action).

³³² Bagley, *supra* note 12, at 1320–21.

demonstrated above that the best interpretation of § 702 reads the waiver of sovereign immunity as applying only to APA claims and as limited by the other requirements of the APA. Rejecting that interpretation in an effort to advance the values of judicial review raises serious constitutional and legitimacy concerns.³³³

Interpretations of the APA that give insufficient respect to the outcome of the public deliberative process also run the risk of creating unforeseen consequences. Courts usually hear from one agency at a time in “case-by-case snapshots.”³³⁴ Congress, in contrast, can hear from multiple agencies and interest groups, consider multiple proposals, and adjust over time.³³⁵ Thus, Congress is in a better position to determine which rules of administrative law will be most effective.³³⁶ As Nicholas Bagley observed, when Congress strikes a balance “between a host of incommensurate values,” “[t]he courts have no constitutional authority to revise that judgment and no epistemic basis for thinking they can make a better one.”³³⁷ That is particularly true when Congress is deciding whether, when, and how to expose federal agencies to suit, a decision that “turns on a dizzying array of variables that are difficult to measure and even more difficult to weigh against one another.”³³⁸

Judicial decisions that allow access to the courts to challenge official action have many benefits.³³⁹ When those decisions disrespect the balance reached through the political process, however, separation of powers, democratic legitimacy, and institutional competence concerns outweigh those benefits.³⁴⁰

VI. CONCLUSION

Understanding the APA's text and the compromises encoded in that text requires a close examination of the full statutory history and context. This Article provides that analysis and shows that the majority of federal courts of appeals are misinterpreting the waiver of sovereign immunity in § 702. That waiver should be interpreted to apply only to APA claims and to be constrained by the other limitations in the APA. That is the bargain that the Executive Branch struck with Congress that allowed the 1976 amendment to pass.

³³³ I do not contest here the normative value of sovereign immunity doctrine, as I waged that battle elsewhere and lost. *See generally* Kovacs, *supra* note 17.

³³⁴ Bagley, *supra* note 12, at 1322.

³³⁵ *Id.*

³³⁶ *Id.* at 1322, 1330; *see* Kovacs, *supra* note 69, at 1257–58; *see also* Kovacs, *supra* note 319, at 36–37.

³³⁷ Bagley, *supra* note 12, at 1330.

³³⁸ *Id.* at 1322.

³³⁹ *Id.*

³⁴⁰ *Id.* at 1320–21.

The Supreme Court should step in to clarify the scope of the waiver in § 702. Misinterpreting the APA can have significant ramifications. In particular, doctrinal confusion about the availability of relief under the APA imposes costs on the government and potential plaintiffs.³⁴¹ The enduring confusion about officer suits increases the urgency of clarifying the boundaries of the APA's waiver of sovereign immunity.

The courts' misinterpretation of § 702, however, raises even more troubling concerns: it offends separation of powers and lacks democratic legitimacy. Justice Scalia would have been troubled by the use of legislative history to interpret § 702, which is ironic given that he created the most relevant history. I am troubled instead by the shallowness of the courts' analysis and the cherry-picking of bits of history that support a preferred outcome. Historic analysis must appreciate the full legislative context if it is to be valid.³⁴² It must respect the outcome of the public deliberative process. In the case of the waiver in § 702, the history is easily recounted, and the courts' errors are patent. Scalia's bargain must not be ignored.

³⁴¹ *Id.* at 1329–36.

³⁴² See Victoria F. Nourse, *Elementary Statutory Interpretation: Rethinking Legislative Intent and History*, 55 B.C. L. REV. 1613, 1614 (2014).