

ADMINISTRATIVE LAW WITHOUT CONGRESS

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INTRODUCTION

Administrative law has re-emerged as a subject of intense controversy. The chief justice of the United States has wondered aloud whether the existing *corpus juris* is sufficient to protect against the “danger posed by the growing power of the administrative state.”¹ Prominent scholars have argued that administrative law canons no longer reflect the actual workings of the administrative state.² Attacks on the foundational *Chevron* canon, while dating back some time, have become more sustained and emphatic.³ And scholars of very different dispositions have argued forcefully that there may be no *law* here at all—only a resurrection of an ancient royal prerogative, of

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¹ *City of Arlington v. FCC*, 133 S. Ct. 1863, 1879 (2013) (Roberts, C.J., dissenting). *See also* *Dep’t of Transp. v. Ass’n of Am. R.R.*, 135 S. Ct. 1225, 1252 (Thomas, J., concurring) (“We should return to the original meaning of the Constitution: The Government may create generally applicable rules of private conduct only through the proper exercise of legislative power.”); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 499 (2010) (“The growth of the Executive Branch, which now wields vast power and touches almost every aspect of daily life, heightens the concern that it may slip from the Executive’s control, and thus from that of the people.”).

² *See, e.g.*, Daniel A. Farber & Anne Joseph O’Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1140 (2014) (“[T]he actual workings of the administrative state have increasingly diverged from the assumptions animating the [Administrative Procedure Act] and classic judicial decisions that followed.”).

³ *See, e.g.*, Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969 (1992); Sidney A. Shapiro & Richard E. Levy, *Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decisions*, 44 DUKE L.J. 1051 (1995). For more recent criticism, *see, e.g.*, William R. Andersen, *Against Chevron—A Modest Proposal*, 56 ADMIN. L. REV. 957 (2004); Jack M. Beermann, *End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779 (2010) [hereinafter Beermann, *End the Failed Chevron Experiment Now*]; Jack M. Beermann, *Chevron at the Roberts Court: Still Failing After All These Years*, 83 FORDHAM L. REV. 731 (2014); Thomas W. Merrill, *Step Zero After City of Arlington*, 83 FORDHAM L. REV. 753 (2014).

a sort the Constitution meant to preclude;⁴ or a collection of black and grey holes, where executive power goes unchecked by formal and effective legal constraints.⁵ The debate, moreover, plays out in a highly charged political context. The Obama administration's often ambitious claims of executive authority, the House Republicans' threat of meeting perceived executive transgressions and derelictions with litigation, and an unusual number of appellate and Supreme Court cases with great political and economic consequences have all prompted intense public controversy.

We agree that administrative law often fails to respond adequately to the challenges posed by modern-day executive government. In this Essay, we suggest that the discordance is bound up with an increasingly salient institutional factor: the mismatch between the debilities of the United States Congress and an administrative regime built on a theory of legislative supremacy.

"[T]he will of Congress must prevail": that is the rock-bottom foundation of administrative law—the law of the New Deal,⁶ and the modern *Chevron* edifice.⁷ Both constructs presuppose a Congress that is jealous of its institutional powers to make law and to appropriate money. But that picture bears increasingly little resemblance to reality. Far from drawing power into its "impetuous vortex" (as the Founders feared),⁸ the modern Congress has increasingly dis-empowered itself. It consistently fails to update or revise old statutes even when those enactments are manifestly outdated or, as actually administered, have assumed contours that the original Congress never contemplated and the current Congress would not countenance (what we refer to as the "old statute" problem). Moreover, when Congress does legislate, it tends to enact highly convoluted, poorly considered, and often incoherent statutes (for want of a better term, "hyper-legislation").

While the causes of this syndrome are a question of great import and consequence, they are beyond the scope of this Essay.⁹ Instead, we examine the *effects* of congressional inaction and hyper-legislation—first on agen-

⁴ See PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014).

⁵ Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095 (2009).

⁶ JEREMY RABKIN, JUDICIAL COMPULSIONS: HOW PUBLIC LAW DISTORTS PUBLIC POLICY 80, 88 (1989).

⁷ See Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 836 (2001) (arguing that *Chevron* "should be regarded as a legislatively mandated deference doctrine").

⁸ THE FEDERALIST NO. 48 (James Madison).

⁹ We will say this: attempts to pin the rise of executive government and the concomitant trend of rising legislative incapacity on the Obama administration or Tea Party Republicans (as the case may be) strike us as too focused on short-term politics. Tendencies toward executive government afflict many Western democracies in one way or another; in the United States, they long pre-date the current political environment. Precisely because the institutional trends are robust to partisan constellations and alignments, it is imperative to think about an appropriate *legal* framework.

cies, and then on courts and their doctrines.¹⁰ The most immediate consequence is a powerful shift in the direction of executive government.¹¹ When Congress fails to update old statutes, agencies may be tempted to teach them new tricks.¹² Hyper-legislation, hastily enacted in response to a crisis or while temporary political conditions permit, will tend to produce similar responses. Knowing that there is no going back to Congress, agencies will be tempted to improvise policies lacking congressional authority, sometimes well beyond the limits of their organic statutes and of conventional legal canons. What, then, happens or should happen to administrative law doctrines that were developed under different institutional conditions and on a premise of reasonably exercised legislative supremacy? They will prove inadequate to the task of containing unauthorized executive authority. They will bend. Or they will be reconsidered.

This train of thought usually arrives on the familiar and fiercely contested territory of *Chevron*, delegation, and judicial deference. If the principal (Congress) cannot be trusted to provide metes and bounds and to legislate against a background rule of delegation,¹³ an administrative law enterprise built on those foundations becomes suspect.¹⁴ The question is whether in *Chevron*'s shadow and under current institutional conditions, statutory law can be more than a prompt for agencies to do good, accompanied by

¹⁰ For a parallel examination—limited to the “old statutes” scenario but strikingly similar to ours in analytical orientation and covering much of the same ground, especially including global warming regulation and its judicial review—see Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1 (2014). The authors argue that in the face of congressional silence, “agencies seek to get this process just right by balancing the perceived need for regulatory innovation with a concern about potential overreach.” *Id.* at 3 (emphasis omitted). Obviously, that is not our assessment. In the interest of parsimony we have refrained from (foot)noting copious points of agreement or dispute throughout this Essay. Instead, we urge readers to consider Professors Freeman and Spence’s informative and thought-provoking article next to ours.

¹¹ For a particularly trenchant analysis, see Neal Devins, *Presidential Unilateralism and Political Polarization: Why Today’s Congress Lacks the Will and the Way to Stop Presidential Initiatives*, 45 WILLAMETTE L. REV. 395 (2009).

¹² Philip A. Wallach, *When Can You Teach an Old Law New Tricks?*, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 689, 698 (2013).

¹³ See *City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517 (interpreting *Chevron* “as a background rule of law against which Congress can legislate”); see also Jack Goldsmith & John F. Manning, *The President’s Completion Power*, 115 YALE L.J. 2280, 2298 (2006) (viewing *Chevron* as a default rule grounded in a constitutionally derived completion power); Michael P. Healy, *Spurious Interpretation Redux: Mead and the Shrinking Domain of Statutory Ambiguity*, 54 ADMIN. L. REV. 673, 674 (2002) (arguing that *Chevron* is a default rule in favor of agency interpretation but that *Mead* shifted the default to interpretation by the courts).

¹⁴ See Merrill & Hickman, *supra* note 7, at 882. The same is true if the supposed background rule is itself unstable or erratically applied. See Beermann, *End the Failed Chevron Experiment Now*, *supra* note 3, at 781-82; Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2379 (2001) (arguing that post-*Chevron* decisions have rendered the background rule unstable and that Congress has proved unwilling to legislate against it).

micro-interventions by congressional subcommittees or individual legislators and by sporadic, more or less random judicial demands for a do-over. Eventually, administrative law may require a fundamental rethinking.

This Essay does not directly engage that debate. It does, however, seek to inform it by examining the institutional pathways from congressional (in)action to agency response to judicial doctrine. We describe three forms of agency action that have taken hold in a variety of regulatory settings: (1) agency “rewrites” of statutes, based on unconventional canons of construction; (2) procedural shell games and manipulation; and (3) broad regulatory waivers without or in excess of a statutory warrant. In casting so wide a net, we hope to show that the problems we identify—administrative improvisation and inadequate judicial canons—extend beyond any individual doctrine, including *Chevron*. All three practices are traceable to, or at least exacerbated by, perceived congressional incapacitation. And beyond ad-hoc judicial interventions, no serious doctrine exists that is commensurate to the potential for effectively unchecked executive government. Administrative law can deal, more or less well, with the ordinary use and abuse of administrative discretion. It does not really know how to deal with rewrites, shell games, and broad regulatory waivers.

We provide illustrations in the “old statutes” and “hyper-legislation” settings. Our principal old-statute example is the protracted litigation over the Environmental Protection Agency’s (“EPA’s”) regulation of greenhouse gases, culminating (for now) in the Supreme Court’s June 2014 decision in *Utility Air Regulatory Group v. EPA* (“*UARG*”).¹⁵ Convenient for our purposes, that case featured all three of our themes: an agency’s statutory rewrite, a procedural shell game, and an extra-statutory waiver of regulatory requirements. In a 5-4 vote, the Court struck down EPA’s claimed authority under the Clean Air Act to regulate greenhouse gas emissions from virtually any stationary source, including small sources that Congress meant to exclude from the reach of the Act. In strong language, the majority criticized EPA for attempting to “seiz[e] expansive power that it admits the statute is not designed to grant.”¹⁶ Despite that dressing down, however, the Court tackled the rewrite, shell game, and waiver problems only partially and, in some respects, not at all. Viewed in a larger context, *UARG* suggests that once a broad and ambitious regulatory program gets underway, the courts will be reluctant to curb the agency’s legal improvisation and to keep it within statutory and doctrinal bounds.

Our examples of agency and judicial responses to hyper-legislation primarily involve the Dodd-Frank Act¹⁷ and the Affordable Care Act.¹⁸ The

¹⁵ 134 S. Ct. 2427 (2014).

¹⁶ *Id.* at 2444 (“[I]t would be patently unreasonable—not to say outrageous—for EPA to insist on seizing expansive power that it admits the statute is not designed to grant.”).

¹⁷ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

institutional difficulties here differ in some respects from the old statute problem. As an initial matter, the statutes simply exceed the bandwidth of administrative agencies. The Dodd-Frank Act requires close to 400 rule-makings, often accompanied by tight deadlines. That has not been done, because it cannot be done.¹⁹ Likewise, the Affordable Care Act has notoriously outstripped the bureaucracy's capacity. Healthcare.gov crashed, only to be pieced together with safety pins and duct tape.²⁰ Core requirements of the Act have been waived;²¹ crucial regulations (for example, for insurers and state administrators) have yet to be promulgated.²² Some problems in this context pose administrative and legal questions that do not arise in the *UARG*-style setting; missed statutory deadlines are an example. For the most part, though, agency responses and legal questions resemble those under the old-statute, new-initiative scenario. Massive statutes running hundreds of pages in length—poorly drafted, hastily debated, and enacted with the expectation that agencies and courts will sort things out—pose significantly heightened risks of administration through rewrites, shell games, and waivers.

The remainder of this Essay elaborates on these themes. *UARG* is incomprehensible without some grasp of its origins; thus, at the risk of tiring readers who know the story, Part I recounts the trajectory and the Court's decision. Parts II, III, and IV consider agency rewrites, shell games, and waivers in turn, in both the old-statute and hyper-legislation scenarios. Our examples are drawn from a range of regulatory agencies and programs, but they do not supply anything close to a full inventory. Instead, we intend to suggest that the identified forms of agency action are more than merely episodic; trace them to the common source of congressional dysfunction; and illustrate that existing legal canons are often inadequate. Part V concludes with a few thoughts about the interplay between institutional dynamics and administrative law doctrine. Our plea is for more institutional realism and less interpretive metaphysics in administrative law.

¹⁸ Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

¹⁹ The Dodd-Frank Act required 398 different rulemakings. As of July 18, 2014, the deadline had passed for 280 of those rulemakings. One-hundred and twenty-seven (45.4%) of the deadlines have not yet been met with final rules. *Dodd-Frank Progress Report*, DAVISPOLK, <http://www.davispolk.com/Dodd-Frank-Rulemaking-Progress-Report/> (last visited Mar. 3, 2015).

²⁰ Kyle Cheney, *Behind the Scenes, Much of HealthCare.gov Is Still Under Construction*, POLITICOPRO (Apr. 25, 2014, 6:01 PM), <http://www.politico.com/story/2014/04/healthcaregov-obama-care-affordable-care-act-106036.html>.

²¹ For legal discussion, see Nicholas Bagley, *The Legality of Delaying Key Elements of the ACA*, 370 NEW ENG. J. MED. 1967 (2014).

²² Jason Millman, *Obamacare 2.0: More Regulation*, POLITICOPRO (Jan. 31, 2014, 6:10 AM), <http://www.politico.com/story/2014/01/obamacare-regulation-102887.html>.

I. GREENHOUSE GAS REGULATION: *UARG*'S BRIEF HISTORY

UARG has its history in a long record of futile efforts, dating back two decades, to enact comprehensive climate change legislation. Congress often considered legislation; however, it never took affirmative action to regulate greenhouse gas emissions.²³ Naturally, environmental advocacy groups pressed for action on multiple fronts. Among their efforts was a petition, later joined by several states, for EPA to make an “endangerment finding”—and eventually to regulate—with respect to greenhouse gas emissions from mobile sources (mainly, automobiles) under the Clean Air Act. EPA rejected the petition on two grounds: (1) it lacked authority to regulate greenhouse gases under the Act; and (2) even if it had such authority, it would decline to exercise it for reasons of prudence.

In *Massachusetts v. EPA*,²⁴ the Supreme Court rejected both arguments. It held that greenhouse gas emissions are “unambiguously” encompassed within the Clean Air Act’s “capacious” definition of “air pollutant.”²⁵ The Court declined to hold, however, that EPA had an obligation to regulate greenhouse gas emissions from automobiles or even to make an endangerment finding. Instead, the Court remanded the case with instructions for EPA to exercise its discretion within the limits of the Clean Air Act and to “ground its reasons for action or inaction in the statute.”²⁶

The true meaning of *Massachusetts* continues to be a matter of debate; we briefly address the question in Section 2.A. below. For present purposes, suffice it to say that *Massachusetts* was read by many as leaving EPA practically no choice *but* to regulate. At the same time, very few experts or policymakers believed that greenhouse gases *could* be regulated sensibly under the architecture of a Clean Air Act that was designed for very different, conventional pollutants.²⁷ *Massachusetts* has thus been understood by some

²³ See, e.g., 149 CONG. REC. 26,204 (2003) (“Climate Stewardship Act of 2003” that would have allowed EPA to regulate greenhouse gas emissions but failed in the Senate); S. REP. NO. 101-228, at 439 (1990), reprinted in 1990 U.S.C.C.A.N. 3385, 3819 (discussing failed proposal to grant EPA authority to regulate carbon dioxide emissions from automobiles); see generally Arnold W. Reitze, Jr., *If Carbon Dioxide Is a Pollutant, What Is EPA to Do?*, in RESOURCES DEVELOPMENT AND CLIMATE CHANGE (Rocky Mtn. Min. L. Found. 2008) (noting that “[s]ince 1999 more than 200 bills were introduced in Congress to regulate [greenhouse gases], but none were enacted”).

²⁴ 549 U.S. 497 (2007).

²⁵ *Id.* at 532 (second internal quotation marks omitted).

²⁶ *Id.* at 535.

²⁷ Véronique Bugnion & David M. Reiner, *A Game of Climate Chicken: Can EPA Regulate Greenhouse Gases Before the U.S. Senate Ratifies the Kyoto Protocol?*, 30 ENVTL. L. 491, 525 (2000) (“[T]he current version of the CAA is not the proper mechanism for regulating emissions in the United States that precipitate climate change.”); Frank H. Murkowski, *The Kyoto Protocol Is Not the Answer to Climate Change*, 37 HARV. J. ON LEGIS. 345, 364 (2000) (“It is clear to me that the Clean Air Act was not designed with carbon dioxide, or any other greenhouse gas, in mind”); Arnold W. Reitze, Jr., *Global Warming*, 31 ENVTL. L. REPORTER 10,253, 10,259 (2001) (“The position that the CAA allows

as an attempt by the courts to prompt congressional action. Once again, however, Congress considered but did not enact global warming legislation.²⁸ It was thus left to EPA to make what it would of the commands of *Massachusetts*.

On remand, EPA initially opened a single regulatory docket, issuing a unified advance notice of proposed rulemaking to deal comprehensively with questions of greenhouse gas emissions controls.²⁹ The agency recognized that applying the Clean Air Act's provisions to greenhouse gas emissions would produce "absurd" results that Congress never intended.³⁰ It also recognized that regulating small stationary sources (such as "apartment buildings, large homes, schools, and hospitals") would require an unprecedented expansion of EPA's authority that would have "a profound effect on virtually every sector of the economy and touch every household in the land."³¹ EPA concluded that the Clean Air Act was "ill-suited for the task of regulating global greenhouse gases."³²

With a change in administrations, however, EPA changed course and, in April 2009, fractured its rulemaking proceedings into four separate rules. First, EPA issued an "Endangerment Rule" under Section 202(a) of the Clean Air Act, finding that greenhouse gases indirectly endanger public health and welfare by creating a worldwide risk of higher temperatures and concluding that new motor vehicles contribute to that risk.³³ Second, EPA concluded that its endangerment finding compelled it to regulate emissions from new cars and light trucks and, accordingly, issued an "Auto Rule" to that effect.³⁴ Third, EPA issued a "Triggering Rule," concluding that its decision to regulate mobile source emissions automatically triggered the imposition of greenhouse gas emissions standards for stationary sources under the Clean Air Act's Prevention of Significant Deterioration ("PSD") and Title V programs.³⁵ Fourth, EPA promulgated its "Tailoring Rule."³⁶

CO₂ to be regulated depends on a narrow reading of the CAA."); Jameel Alsalam, *A Pragmatic Approach to Regulating Greenhouse Gases Under the Clean Air Act*, CTR. FOR CLEAN AIR POL'Y 1 (Mar. 2009), http://ccap.org/assets/A-Pragmatic-Approach-to-Regulating-Greenhouse-Gases-Under-the-Clean-Air-Act_CCAP-March-2009.pdf.

²⁸ Freeman & Spence, *supra* note 10, at 20-21 (cataloging failed legislative initiatives).

²⁹ Regulating Greenhouse Gas Emissions Under the Clean Air Act, 73 Fed. Reg. 44,354 (July 30, 2008).

³⁰ *Id.* at 44,503. *See also id.* at 44,512.

³¹ *Id.* at 44,355.

³² *Id.*

³³ Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15, 2009).

³⁴ Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule, 75 Fed. Reg. 25,324 (May 7, 2010).

³⁵ Reconsideration of Interpretation of Regulations that Determine Pollutants Covered by Clean Air Act Permitting Programs, 75 Fed. Reg. 17,004 (Apr. 2, 2010).

³⁶ Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514 (June 3, 2010).

EPA's Tailoring Rule attempted to address the problem that under the Act, the PSD and Title V programs cover only "major" sources, defined as sources that emit (or have the potential to emit) more than 100 tons-per-year (for certain categories of stationary sources) and more than 250 tons-per-year (for all other categories) of any regulated pollutant.³⁷ When applied to the conventional pollutants that Congress had in mind when it enacted the Clean Air Act and subsequent amendments, those thresholds cover a few hundred large facilities, such as power plants and refineries. When applied to carbon dioxide, in contrast, the thresholds would cover millions of smaller sources. EPA recognized that applying the Clean Air Act as written to greenhouse gas emissions would (1) dramatically expand the Act's scope to encompass millions of entities never before subject to regulation; (2) effectively impose unprecedented energy-efficiency standards on the entire U.S. economy; and (3) result in extraordinary regulatory burdens, requiring an estimated expenditure of \$22.5 billion in paperwork costs and billions more in compliance costs.³⁸ EPA acknowledged (and in fact emphasized) that Congress could not possibly have intended those "absurd" consequences.³⁹ To avoid them, EPA claimed authority to increase the statutory thresholds by a factor of forty to one hundred. For purposes of greenhouse gas emissions, EPA ordained in its Tailoring Rule that the PSD and Title V programs would apply only to sources emitting greenhouse gases in amounts more than 75,000/100,000 tons per year—subject to future revision at EPA's discretion.⁴⁰

Numerous industry coalitions, states, and other petitioners challenged EPA's rules. In a coordinated proceeding, a panel of the D.C. Circuit denied the petitions for review.⁴¹ The panel rejected all challenges to EPA's Endangerment, Auto, and Triggering rules. The agency's position, the court held, was not only permissible but compelled by the Clean Air Act, as authoritatively interpreted in *Massachusetts v. EPA*.⁴² In addition, the panel dismissed challenges to the Tailoring Rule for lack of Article III standing. Industry petitioners' alleged injuries (the costs of greenhouse gas controls), the court held, were caused by "automatic operation of the statute,"⁴³ not by the Tailoring Rule (which merely exempted sources from statutory requirements).

³⁷ 42 U.S.C. §§ 7475(a), 7479(1) (2012).

³⁸ See generally Jonathan H. Adler, *Heat Expands All Things: The Proliferation of Greenhouse Gas Regulation Under the Obama Administration*, 34 HARV. J.L. & PUB. POL'Y 421 (2011).

³⁹ Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,541 (June 3, 2010).

⁴⁰ *Id.* at 31,523-25.

⁴¹ *Coal. for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102, 113 (D.C. Cir. 2012) (per curiam), *aff'd in part, rev'd in part sub nom.*, *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427 (2014).

⁴² *Id.* at 137-38.

⁴³ *Id.* at 146.

Petitioners then filed a request for rehearing en banc, which the D.C. Circuit denied. In response to Judge Brown's and Judge Kavanaugh's separate dissents from the denial of rehearing, the panel emphasized what it viewed as the ordinary nature of its original disposition: the legal issues were "straightforward, requiring no more than the application of clear statutes and binding Supreme Court precedent."⁴⁴

The Supreme Court granted certiorari on a single question: "Whether EPA permissibly determined that its regulation of greenhouse gas emissions from new motor vehicles triggered permitting requirements under the Clean Air Act for stationary sources that emit greenhouse gases."⁴⁵ That grant put beyond purview several of the questions urged upon the Court, including a reconsideration of *Massachusetts* and the D.C. Circuit's standing ruling with respect to the Tailoring Rule. Read for all it is worth, it might have even excluded any consideration of that rule, as not directly under review. In the end, however, the Court's decision was not that narrow. Instead, the Court largely reversed the D.C. Circuit and struck down EPA's interpretation of the statute.

The Court rejected EPA's claim that the Clean Air Act compelled the agency to regulate stationary source emissions of greenhouse gases. While *Massachusetts* had held that the Act's all-encompassing definition of "air pollutant" includes greenhouse gases, Justice Scalia's opinion for the Court declared, that does not mean greenhouse gas emissions *must* be regulated under the Act's PSD and Title V programs.⁴⁶ Moreover, the Court noted that EPA had "routinely" given the term "air pollutant" a narrower meaning. It took "some cheek for EPA to insist that it cannot possibly give 'air pollutant' a reasonable, context-appropriate meaning in the PSD and Title V contexts when it has been doing precisely that for decades."⁴⁷

The Court further concluded that EPA's interpretation was not justified as an exercise of its discretion to adopt "a reasonable construction of the statute."⁴⁸ The Court explained that an "agency interpretation that is 'inconsisten[t] with the design and structure of the statute as a whole,' does not merit deference."⁴⁹ Citing its earlier decision in *FDA v. Brown & Wil-*

⁴⁴ *Coal. for Responsible Regulation, Inc. v. EPA*, Nos. 09-1322 et al., 2012 WL 6621785, at *3 (D.C. Cir. Dec. 20, 2012).

⁴⁵ *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 418 (2013) (internal quotation marks omitted).

⁴⁶ *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2440-41 (2014) (*Massachusetts* "did not hold that EPA must always regulate greenhouse gases as an 'air pollutant' everywhere that term appears in the statute, but only that EPA must 'ground its reasons for action or inaction in the statute,' rather than on 'reasoning divorced from the statutory text.'" (citation omitted) (quoting *Massachusetts v. EPA*, 549 U.S. 497, 535 (2007))).

⁴⁷ *Id.* at 2440.

⁴⁸ *Id.* at 2442 (quoting another source) (internal quotation marks omitted).

⁴⁹ *Id.* (alteration in original) (citation omitted) (quoting *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2529 (2013)).

Williamson Tobacco Corp.,⁵⁰ the Court noted that absent a clear statement in the statute it would not assume that Congress had assigned an agency “decisions of vast ‘economic and political significance.’”⁵¹ EPA’s interpretation was unreasonable “because it would bring about an enormous and transformative expansion in EPA’s regulatory authority without clear congressional authorization.”⁵² Finally, the Court rejected EPA’s assertion that it could make its interpretation reasonable by rewriting the statutory thresholds. Agencies, the Court declared, have “no power to ‘tailor’ legislation to bureaucratic policy goals by rewriting unambiguous statutory terms.”⁵³

The four dissenting justices (Justices Ginsburg, Breyer, Sotomayor, and Kagan) concluded that the Act requires EPA to regulate all “air pollutants,” including greenhouse gases, and reasoned that EPA could rewrite the statutory thresholds as a practical solution to the challenges posed by the Act’s requirements. According to the dissenters, the “underlying purpose” of a statute “may sometimes require” courts and agencies to abandon the statute’s plain text.⁵⁴

The justices also disagreed on whether EPA could impose greenhouse gas controls on large stationary sources that are already subject to PSD and Title V permitting requirements because they emit conventional pollutants. The majority—this time, Justice Scalia joined by Chief Justice Roberts and Justices Ginsburg, Kennedy, Breyer, Sotomayor, and Kagan—concluded that it was reasonable for EPA to require these “‘anyway’ sources” to install “best available control technology” (“BACT”) for greenhouse gases.⁵⁵ The majority reasoned that the “text of the BACT provision is far less open-ended than the text of the PSD and Title V permitting triggers” and that “applying BACT to greenhouse gases is not so disastrously unworkable, and need not result in such a dramatic expansion of agency authority,” as to convince the Court that EPA’s interpretation was unreasonable.⁵⁶ Dissenting from this part of the majority opinion, Justice Alito (joined by Justice Thomas) maintained that the “PSD permitting process is simply not suited for use in regulating this particular pollutant.”⁵⁷

The regulatory and real-world impact of *UARG* remains to be seen. Arguably, *UARG* protects only sources that the agency said it did not want

⁵⁰ 529 U.S. 120 (2000).

⁵¹ *Util. Air Regulatory Grp.*, 134 S. Ct. at 2444 (quoting *Brown & Williamson*, 529 U.S. at 160).

⁵² *Id.*

⁵³ *Id.* at 2445.

⁵⁴ *Id.* at 2451 (Breyer, J., concurring in part and dissenting in part).

⁵⁵ *Id.* at 2447 (majority opinion).

⁵⁶ *Id.* at 2449.

⁵⁷ *Util. Air Regulatory Grp.*, 134 S. Ct. at 2456 (Alito, J., concurring in part and dissenting in part) (“[I]t makes little sense to require the installation of BACT for greenhouse gases in those instances in which a source happens to be required to obtain a permit due to the emission of a qualifying quantity of some other pollutant that is regulated under the Act.”).

to regulate (at least not yet).⁵⁸ But the majority opinion can also be read to sharply limit the *kinds* of BACT controls EPA may impose on “anyway” sources.⁵⁹ Regulators and regulatees will undoubtedly contest these questions some other day, in some Clean Air Act arena or another.

II. REWRITES AND CANONS

UARG affirmed “the core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate.”⁶⁰ Consensus on that seemingly straightforward proposition often crumbles, however, when the proposition is applied in real-world cases.

The injunction against rewrites, as formulated in *UARG* and other cases,⁶¹ applies to *unambiguous* statutory terms. “Unambiguous,” in this (*Chevron*) context, can mean one of two things.⁶² It can mean “obvious”: no sensible reader can understand *this* term (or phrase or sentence) to mean anything other than what it says. Predictably, the *UARG* petitioners emphasized this sense of “unambiguous”: a numerical term (250 tons per year) cannot mean something else.⁶³

In a far larger number of cases, “unambiguous” means something like “certainty”: a statutory provision is “unambiguous” if and when we are confident of its meaning *after we have deployed all ordinary canons of construction*. In that context, “rewrite” can be dismissed as a polemical term for a wrong interpretation. After all, one lawyer’s “rewrite” is another’s permissible interpretation. Moreover, the legal profession lacks a common understanding of what it means for a statute to be “ambiguous.”⁶⁴ Alongside such *Chevron*-esque questions runs the perennial debate over “textualist”

⁵⁸ Freeman & Spence, *supra* note 10, at 27 (characterizing *UARG* as amounting “mostly to a victory for EPA” and noting that “the agency had signaled in its brief that it could accept precisely the mixed result the Court delivered, and there is some reason to think that the agency even prefers it” (footnote omitted)).

⁵⁹ *Util. Air Regulatory Grp.*, 134 S. Ct. at 2458 n.3 (Alito, J., concurring in part and dissenting in part); Robert R. Gasaway, *Supreme Court Rules on Greenhouse Gases—Podcast*, FEDERALIST SOCIETY (June 26, 2014), <http://www.fed-soc.org/multimedia/detail/supreme-court-rules-on-greenhouse-gases-podcast>.

⁶⁰ *Util. Air. Regulatory Grp.*, 134 S. Ct. at 2446.

⁶¹ See, e.g., *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 462 (2002) (agency lacked authority “to develop new guidelines or to assign liability in a manner inconsistent with . . . an unambiguous statute”).

⁶² GARY LAWSON, *FEDERAL ADMINISTRATIVE LAW* 640 (6th ed. 2013).

⁶³ E.g., Joint Reply Brief of Petitioners at 31, *Util. Air Regulatory Grp.*, 134 S. Ct. 2427 (Nos. 12-1248, 12-1254, 12-1268, & 12-1272).

⁶⁴ Beermann, *End the Failed Chevron Experiment Now*, *supra* note 3, at 781; Brian G. Slocum, *The Importance of Being Ambiguous: Substantive Canons, Stare Decisis, and the Central Role of Ambiguity Determinations in the Administrative State*, 69 MD. L. REV. 791, 792, 802 (2010).

versus “purposive” canons of construction.⁶⁵ Our subject here is the institutional context in which those debates occur.

Section A of this Part discusses “rewrite” questions as they played out in the *UARG* litigation. To our minds, the central question is not what the Supreme Court said in *UARG* but what it did in *Massachusetts*. The Court’s boldly “dynamic” interpretation in that case arguably authorized, and in any event made almost inevitable, a concerted agency endeavor to regulate greenhouse gases under the Clean Air Act—a statute obviously designed for very different purposes and pollutants. That approach may be defensible so long as one can reasonably count on corrective intervention by Congress,⁶⁶ and so long as the agency remains constrained by an understanding that the operational provisions of the statute cannot be set aside.⁶⁷ Push hard enough on the dynamic quality of the statute, though, and *count* on the fact that Congress will remain mute: the core principle that an agency must have an affirmative legal basis for its actions will give way to the notion that it may do whatever it takes to address the problem of the day, including perhaps some things the statute affirmatively prohibits.

Section B pursues rewrite questions that have arisen under hyper-legislation. A Congress that enacts massive statutes under frantic conditions is bound to make mistakes—and unlikely to correct them after the fact. Against this backdrop, even ordinarily cautious agencies may resort to de facto rewrites and exotic canons, at least so long as the litigation risks are minimal. Our discussion supplies examples.

A. *UARG: The Wages of Dynamic Interpretation*

UARG firmly rejected EPA’s claim that it could “regulate millions of small sources” and “decide, on an ongoing basis and without regard to the thresholds prescribed by Congress, how many of those sources to regulate.”⁶⁸ “We are not willing to stand on the dock and wave goodbye as EPA embarks on this multiyear voyage of discovery,” Justice Scalia wrote for

⁶⁵ Compare, e.g., Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL’Y 61 (1994), with William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987). See also John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 4 (2001) (“The question of text versus purpose has always troubled the law of statutory interpretation—and it always will.” (footnote omitted)).

⁶⁶ Eskridge, *supra* note 65, at 1523-24 (arguing that courts may interpret statutes based on current problems without undermining republican government because, given the incremental nature of the judicial process, Congress can correct judicial errors).

⁶⁷ *Id.* at 1483. See also *United States v. Home Concrete & Supply, LLC*, 132 S. Ct. 1836, 1852 (2012) (Kennedy, J., dissenting) (“Where the agency exceeds its authority, of course, courts must invalidate the regulation. And agency interpretations that lead to unjust or unfair consequences can be corrected, much like disfavored judicial interpretations, by congressional action.”).

⁶⁸ *Util. Air Regulatory Grp.*, 134 S. Ct. at 2446.

the majority.⁶⁹ The metaphor is characteristically quotable, but it fails to capture the institutional dynamics.

EPA's "voyage" did not begin with its abortive Tailoring Rule. It began in 2007, with the Supreme Court's decision in *Massachusetts*. The majority in that case took three steps, each extraordinary in its own right and momentous in their conjunction. First, the majority reached the merits only by means of a standing analysis that is difficult to understand as anything other than a greenhouse gas exception to well-established principles of justiciability.⁷⁰ Second, the majority adopted a boldly dynamic interpretation of the Clean Air Act, as a statute designed to forestall "obsolescence."⁷¹ The Court brushed aside any argument to the effect that greenhouse gases were wholly unlike the pollutants envisioned by the Clean Air Act and that a greenhouse-gas-inclusive reading would have dramatic and counterintuitive consequences.⁷² Third, the majority took an aggressive approach with respect to the agency action under review—not a rule, but EPA's denial of a rulemaking petition asking the agency to make an endangerment finding with respect to greenhouse gases. At the time of *Massachusetts*, no Supreme Court precedent existed with respect to the judicial standard of review in such cases. The leading D.C. Circuit case had held that while denials of rulemaking petitions—unlike non-enforcement decisions—are presumptively reviewable, they are sufficiently akin to discretionary enforcement decisions to warrant a very high degree of judicial deference.⁷³ *Massachusetts* duly cited the case and its holding⁷⁴—and then subjected EPA's proffered reasons for the denial to something resembling hard look review.⁷⁵ On remand, the agency's discretion would be sharply circumscribed.

⁶⁹ *Id.*

⁷⁰ The standing holding of *Massachusetts*—that states merit "special solicitude" when suing in defense of their "quasi-sovereign interest[s]"—has never been followed by any court outside the global warming context. See generally Jonathan H. Adler, *Standing Still in the Roberts Court*, 59 CASE W. RES. L. REV. 1061, 1071-75 (2009) (internal quotation marks omitted).

⁷¹ *Massachusetts v. EPA*, 549 U.S. 497, 532 (2007) ("While the Congresses that drafted § 202(a)(1) might not have appreciated the possibility that burning fossil fuels could lead to global warming, they did understand that without regulatory flexibility, changing circumstances and scientific developments would soon render the Clean Air Act obsolete."); *id.* ("[T]he fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth." (alteration in original) (quoting *Pa. Dept. of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998)) (internal quotation marks omitted)).

⁷² *Id.* at 528. "Here, in contrast, EPA jurisdiction would lead to no such extreme measures." *Id.* at 531 (distinguishing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)).

⁷³ *Am. Horse Protection Ass'n v. Lyng*, 812 F.2d 1, 4-5 (D.C. Cir. 1987) ("*Chaney* surely reinforces our frequent statements that an agency's refusal to institute rulemaking proceedings is at the high end of the range [of deference]." (citations omitted)).

⁷⁴ *Massachusetts*, 549 U.S. at 527.

⁷⁵ Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 53, 97. It is hard to say what one should make of the Court's opinion as a matter of doctrine. On one interpretation, the decision seems to say that an agency's decision to defer may consid-

The *Massachusetts* majority took care to limit its holding: as noted, it explicitly declined to hold that EPA *had* to regulate greenhouse gas emissions from automobiles, or even to make an endangerment finding. Manifestly, however, the decision was bound to prompt regulatory action—perhaps by Congress or, failing that, by EPA. For reasons mentioned,⁷⁶ the best (and perhaps intended) outcome in the wake of *Massachusetts* may have been for *Congress* to act. But that did not happen.

At the risk of over-generalization: dynamic interpretation (and the standing and review doctrines that, in *Massachusetts*, were necessary to kick it into gear) is an ill-suited instrument to prompt congressional intervention. It is possible, even likely, that even without *Massachusetts*, EPA would have undertaken regulatory action on greenhouse gases (though perhaps not under the PSD program) and that Congress would have remained immobilized. Unquestionably, however, the decision changed both the legislative equilibrium point⁷⁷ and the balance between Congress and the executive. The administration needed no legislative compromise: under the perceived command of *Massachusetts*, EPA regulation had become the default position.⁷⁸

The consequences follow ineluctably. In the absence of congressional intervention (which dynamic interpretation makes less likely), an agency will be tempted to take great liberties in “dynamically” updating a statute, and reviewing courts may well look the other way. In 2007, EPA resisted a greenhouse-gas-inclusive interpretation of the Clean Air Act not solely for political reasons but also because it understood that the Act could be made to accommodate greenhouse gases only with great difficulty, if at all. Clev-

er only the factors that the statute permits (or requires) for the substantive regulation. On this reading, *Massachusetts* runs counter to the general precepts of administrative law. Cass R. Sunstein & Adrian Vermeule, *The Law of “Not Now”* 2 (Harvard Pub. Law Working Paper No. 14-08, 2013), available at <http://papers.ssrn.com/abstract=2355493>. Alternatively, *Massachusetts* may stand for the modest proposition that *American Horse Protection* remains good law with respect to the initial consideration and denial of a petition; however, once an agency has decided to entertain a petition, its reasoning process is subject to more searching review. The D.C. Circuit appears to read *Massachusetts* in this limited sense. *Ctr. for Biological Diversity v. EPA*, 749 F.3d 1079, 1089-90 (D.C. Cir. 2014); *WildEarth Guardians v. EPA*, 751 F.3d 649, 653 (D.C. Cir. 2014).

⁷⁶ See *supra* note 27 and accompanying text.

⁷⁷ Cf. Matthew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 435 (1989).

⁷⁸ R. Shep Melnick, *The Conventional Misdiagnosis: Why “Gridlock” Is Not Our Central Problem and Constitutional Revision Is Not the Solution*, 94 BOSTON U. L. REV. 767, 784 (2014) (describing how administration officials developed flawed proposals to “prod [] reluctant lawmakers” to act and, if Congress failed to act, to put in place their flawed plan as a “default position” (quoting John M. Broder, *Obama, Who Vowed Rapid Action on Climate Change, Turns More Cautious*, N.Y. TIMES, Apr. 11, 2009, at A10) (first internal quotation marks omitted)).

er advocacy in *Massachusetts* by those who favored regulation,⁷⁹ coupled perhaps with the judicial misapprehension that a remand would *at most* prompt regulation of automobile greenhouse gas emissions, obscured the close connection between dynamic interpretation and statutory improvisation.

The problem need not have gone unnoticed, however, for it was hardly unprecedented. There is even a canon to address it: the “major questions” doctrine of *Brown & Williamson*.⁸⁰ FDA jurisdiction over tobacco products, the majority held in that case, would have such momentous consequences that only an explicit command from Congress could confer it. Crucially for present purposes, the majority’s and the dissenters’ opinions in *Brown & Williamson* hinged in large measure on the statutory framework governing the agency’s *future* actions. The majority argued that the rigid structure of the Food, Drug and Cosmetic Act would compel FDA to ban cigarettes—obviously, a *very* big deal and a “counterintuitive” consequence. Justice Breyer’s dissent, in contrast, sketched a “flexible interpretation” that would permit FDA to choose from among a range of regulatory options. “[W]here linguistically permissible,” Justice Breyer wrote, “we should interpret the FDCA in light of Congress’ overall desire to protect health.”⁸¹ The majority in *Brown & Williamson* denied FDA authority over tobacco products; Congress subsequently conferred it to a limited extent.⁸²

Greenhouse gas regulation from *Massachusetts* to *UARG* presents a very different scenario. It would not be quite right to say that *Massachusetts*, instead of triggering legislative action, took Congress entirely out of the picture. Even and especially in the wake of the decision, applying the *actual* statutory emission thresholds would surely have prompted congressional intervention. But EPA chose not to pursue that option. It instead chose to rewrite the statute in the guise of “tailoring” it; all that remained to be determined was the tailor’s address and the fit.

The *UARG* dissent is candid, even blunt, about the doctrinal consequences. The linguistic possibilities contemplated by Justice Breyer’s dissent in *Brown & Williamson* now include a revision of numerical thresholds. Short perhaps of transgressing an unequivocal, highly specific statutory prohibition framed in negative terms as a limitation on agency authority, *any* tailoring that can be said to promote broad statutory purposes would pass muster under the dissenters’ approach.⁸³ The *UARG* majority, for its

⁷⁹ Petitioners avowed that a judgment in their favor would “not mandate regulation of air pollutants associated with climate change.” Brief for the Petitioners at 3, *Massachusetts*, 549 U.S. 497 (No. 05-1120).

⁸⁰ *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000).

⁸¹ *Id.* at 181 (Breyer, J., dissenting).

⁸² Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776 (2009).

⁸³ “Perhaps” because the *UARG* dissent calls even this minimalist limit into doubt. See *infra* note 203 and accompanying text.

part, surrenders to the institutional dynamics, albeit reluctantly. It invokes the “major question” doctrine so conspicuously eschewed in *Massachusetts*, but it does so belatedly. “We are not willing to stand on the dock and wave good-bye,” Justice Scalia writes. The opinion does not so much as gesture in the direction of Congress. Instead, it lays down a few *judicially* discerned BACT buoys⁸⁴ and warns EPA that it will have a judicial pilot. *UARG* is administrative law for a world without a Congress.

B. *Of Paroxysms and Absurdity*

The proposition that agencies may not rewrite statutes has a close corollary: “If Congress enacted into law something different from what it intended, then it should amend the statute to conform it to its intent.”⁸⁵ It is “beyond” the “province” of courts “to rescue Congress from its drafting errors, and to provide for what [courts or agencies] might think . . . is the preferred result.”⁸⁶ That principle applies even when a straightforward reading of the text yields results that policy-wise seem perplexing.⁸⁷ But like the “no rewrite” canon, the principle that congressional errors should be fixed by Congress presumes that Congress is willing and able to do so (and that its failures are an intended separation-of-powers feature, not a bug or pathology). Hyper-legislation often defeats that presumption: the circumstances of enactment render legislative corrections highly unlikely. More improvisational practices and canons then gain currency: the words do not mean what they seem to mean when read in context. If they do mean what they seem to be saying, they should be discarded on account of “absurd results.”

EPA’s Tailoring Rule and its review in *UARG* illustrate the phenomenon of “dynamic” updates of old statutes. We trace a similar dynamic in the context of hyper-legislation by way of three examples—one obscure, one middling, one momentous. We express no view on the ultimate merits of the agency rules and judicial decisions at issue. Our point is to illustrate the stresses that hyper-legislation places on conventional doctrines of administrative law and on the institutions that apply them.

Our obscure example is the Board of Governors of the Federal Reserve System’s interpretation of Section 716 of the Dodd-Frank Act. In substance, Section 716 provides that any U.S. bank that engages in a significant

⁸⁴ *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2449 (2014) (cautioning EPA that the Court’s “decision should not be taken as an endorsement of all aspects of EPA’s current approach, nor as a free rein for any future regulatory application of BACT in this distinct context”).

⁸⁵ *Lamie v. U.S. Trustee*, 540 U.S. 526, 542 (2004).

⁸⁶ *Id.* (quoting *United States v. Granderson*, 511 U.S. 39, 68 (1994) (Kennedy, J., concurring)) (internal quotation marks omitted).

⁸⁷ *E.g.*, *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461-62 (2002).

amount of swaps activity is subject to certain prohibitions and may not benefit from federal assistance to support its swaps business.⁸⁸ The provision is subject to several exceptions; *inter alia*, an “[FDIC-]insured depository institution” that limits its swaps activity to certain specified activities is exempt from most of the prohibitions.⁸⁹ In what is generally acknowledged to be a drafting error, Congress failed to extend the exemption to uninsured U.S. branches and agencies of foreign banks. Efforts to correct the legislation through Congress, however, have proved unsuccessful. The Board has thus issued regulations interpreting the exemption for “insured depository institutions” to apply to “uninsured U.S. branches and agencies of foreign banks.”⁹⁰ The Board has justified its unorthodox reading—“insured” includes “uninsured”—on the grounds that the term “insured depository institution” is not defined in the statute and Congress has ordinarily required that “foreign banking organizations operating in the United States are generally treated no less favorably than similarly-situated U.S. banking organizations.”⁹¹ At the risk of overstating the Board’s position: to make sense of the statute, we read it to mean the opposite of what it says, provided that Congress does not seem to mind. It is safe to say that the Board’s ordinarily cautious lawyers would not adopt that rather exotic position but for the fact that they must make the statute work, without any prospect of congressional help.

That same orientation—and this is our middling example—has driven the Federal Reserve Board’s actions on a more salient issue, the Dodd-Frank Act’s so-called Durbin Amendment on debit card fees.⁹² When a customer uses a debit card, the merchant pays a transaction fee that is split among the merchant’s bank, the network over which the transaction is routed, and the bank that issued the card. The portion of the fee paid to the issuing bank is called an “interchange fee.” Seeking to address concerns about escalating fees, the Durbin Amendment requires the Board to promulgate regulations to ensure that “the amount of any interchange transaction fee” is both “reasonable and proportional to the cost incurred by the issuer with respect to the transaction.”⁹³ In doing so, Congress directed the Board to distinguish between

the incremental cost incurred by an issuer for the role of the issuer in the authorization, clearance, or settlement of a particular electronic debit transaction, which cost shall be considered

⁸⁸ See 15 U.S.C. § 8305(a) (2012).

⁸⁹ *Id.* § 8305(d).

⁹⁰ Prohibition Against Federal Assistance to Swaps Entities (Regulation KK), 79 Fed. Reg. 340 (Jan. 3, 2014) (emphasis added) (first internal quotation marks omitted).

⁹¹ *Id.* at 341.

⁹² See 15 U.S.C. § 1693o-2(a) (2012).

⁹³ *Id.* § 1693o-2(a)(3)(A).

... [and] other costs incurred by an issuer which are not specific to a particular electronic debit transaction, which costs shall not be considered.⁹⁴

The Board promulgated regulations that allowed issuing banks to recover fixed costs, transaction monitoring costs, fraud losses, and network processing fees *in addition to* the incremental costs incurred.⁹⁵ A group of retailers, convenience stores, restaurants, and other merchants challenged those regulations as violating the statute's plain text. In a strongly worded opinion, the district court struck down the Board's regulations. Rejecting the Board's contention that the statute was ambiguous, the court explained that the statute sets out two exclusive categories of costs: "incremental cost[s]" related to a particular debit transaction, and "other costs" incurred by debit card issuers. The Board is explicitly authorized to consider the former but not the latter; the Board's idea that there might be a third kind of cost was unequivocally foreclosed.⁹⁶

A panel of the D.C. Circuit reversed.⁹⁷ According to the panel, in referring to "other costs incurred by an issuer which are not specific to a particular electronic debit transaction" and by not inserting a comma before "which," Congress did not preclude the Board from considering "other costs" specific to a particular transaction.⁹⁸ Because the Board's approach was not strictly foreclosed by the statute, and because the recoverable cost question involved difficult policy determinations in which the Board has expertise, the Board's determinations were entitled to "special deference."⁹⁹

While the panel pushed awfully hard on commas and grammar, its hermeneutic excursion is preceded by a lament over the "confusing" and "poorly drafted legislation," "crafted in conference committee at the eleventh hour."¹⁰⁰ The agency must make of it what it can; but what is a court supposed to do with it? The district court's disposition obviates any inquiry into the circumstances of enactment: if Congress made a mistake, let Con-

⁹⁴ *Id.* § 1693o-2(a)(4)(B)(i)-(ii).

⁹⁵ Debit Card Interchange Fees and Routing, 76 Fed. Reg. 43,394 (July 20, 2011).

⁹⁶ *NACS v. Bd. of Governors of the Fed. Reserve Sys.*, 958 F. Supp. 2d 85, 105 (D.D.C. 2013) (the statute is "clear with regard to what costs the Board may consider in setting the interchange fee standard: [incremental costs] of individual transactions incurred by issuers may be considered. That's it!"), *rev'd*, 746 F.3d 474 (D.C. Cir. 2014).

⁹⁷ *NACS v. Bd. of Governors of the Fed. Reserve Sys.*, 746 F.3d 474, 496 (D.C. Cir. 2014).

⁹⁸ *Id.* at 487 (quoting 15 U.S.C. § 1693o-2(a)(4)(B)(ii)) (internal quotation marks omitted). "In this instance, the absence of commas matters far more than Congress's use of the word 'which' rather than 'that.'" *Id.*

⁹⁹ *Id.* at 489.

¹⁰⁰ *Id.* at 483 ("[W]e think it worth emphasizing that Congress put the Board, the district court, and us in a real bind. Perhaps unsurprising given that the Durbin Amendment was crafted in conference committee at the eleventh hour, its language is confusing and its structure convoluted. But because neither agencies nor courts have authority to disregard the demands of even poorly drafted legislation, we must do our best to discern Congress's intent and to determine whether the Board's regulations are faithful to it.").

gress fix it. The Court of Appeals, in contrast, first casts doubt on whether the legislature that enacted the provision was rational and then subjects its product to grammatical micro-analysis. That may well have been the right approach in this case. But it does suggest a despair of Congress, and it presupposes both a high degree of trust in agency officials and an ability on the part of judges to reconcile conventional canons with institutional realities. The court's opinion hides a whale in a comma. One wonders how much more the canons can bear.

Our momentous example is the litigation over the "exchange" provisions of the Affordable Care Act, pending at this writing before the Supreme Court in *King v. Burwell*.¹⁰¹ Briefly: under the Act, health care and insurance credits and subsidies, as well as individual and employer mandates, are to be administered through "Exchanges." A provision of the Act provides that each state "shall" establish an Exchange.¹⁰² Another provision says that in the event that a state should fail to do so, the U.S. Department of Health and Human Services "shall" establish "such Exchange" in the state.¹⁰³ The central provision at issue in the litigation, enacted as part of Section 36B of the Internal Revenue Code, says that tax credits shall be available to qualified taxpayers enrolled "through an Exchange established by the State."¹⁰⁴

Contrary to Congress's expectations, only a minority of states have in fact elected to establish an Exchange. A plain language reading of the Affordable Care Act would thus render its regime of tax credits (and mandates) inoperative in most of the country. But an IRS rule issued in May 2012 says that tax credits shall be available to qualified taxpayers under federal as well as state Exchanges.¹⁰⁵ Petitioners in *King* and other cases challenge that rule. The statutory language, they say, must mean what it says: *by the State* cannot mean *in the State by the federal government*. The government and its defenders, in contrast, maintain that Congress plainly meant to put federal Exchanges on a par with state Exchanges: hence, "*such Exchange[s]*."

¹⁰¹ 759 F.3d 358 (4th Cir. 2014), *cert. granted*, 135 S. Ct. 475 (Nov. 7, 2014) (No. 14–114). Substantially identical challenges are pending in other courts. *Halbig v. Burwell* is briefly discussed *infra* notes 110–15 and accompanying text. See *Halbig v. Burwell*, 758 F.3d 390 (D.C. Cir. 2014), *reh'g en banc granted, judgment vacated*, No. 14–5018, 2014 WL 4627181 (D.C. Cir. Sept. 4, 2014) (appeal held in abeyance pending the Supreme Court's disposition of *King*, see 114 A.F.T.R. 2014–6576 (Nov. 12, 2014)). In another case posing substantially the same question, a federal district court has found that the IRS rule described in the text violated the plain meaning of the statute: *Oklahoma ex rel. Pruitt v. Burwell*, No. CIV-11-30-RAW, 2014 WL 4854543 (E.D. Okla. Sept. 30, 2014). A fourth case is pending: *Indiana v. IRS*, No. 1:13-cv-1612-WTL-TAB, 2014 WL 3928455 (S.D. Ind. Aug. 12, 2014).

¹⁰² 42 U.S.C. § 18031(b)(1) (2012).

¹⁰³ *Id.* § 18041(c)(1).

¹⁰⁴ I.R.C. § 36B(b)(2)(A) (2012) (emphasis added).

¹⁰⁵ Health Insurance Premium Tax Credit, 77 Fed. Reg. 30,377 (May 23, 2012).

At this writing, two appellate courts have reached different conclusions. In *King v. Burwell*, the U.S. Court of Appeals for the Fourth Circuit deemed the statute ambiguous.¹⁰⁶ While noting that “[t]here can be no question that there is a certain sense to the plaintiffs’ position,”¹⁰⁷ the panel concluded that “the defendants have the stronger position, although only slightly.”¹⁰⁸ Judge Davis joined the majority opinion and concurred, arguing that a contextual reading of the statute demonstrates that Congress unambiguously intended to make subsidies available through federal as well as state Exchanges.¹⁰⁹

In *Halbig v. Burwell*,¹¹⁰ a panel of the D.C. Circuit (Judges Griffith, Randolph, and Edwards) ruled in the plaintiffs’ favor. Judge Griffith’s opinion for the majority concluded that the statute’s plain language applies only to the Exchanges established by states; that this construction does not render other provisions of the Affordable Care Act unworkable or absurd; and that some evidence supports the view that Congress intended only to provide subsidies for Exchanges established by a state as a way of encouraging states to set up exchanges. The panel recognized that its conclusion would likely have “significant consequences” but emphasized that a “duty when interpreting a statute is to ascertain the meaning of the words of the statute duly enacted through the formal legislative process”—to ensure that “policy is made by elected, politically accountable representatives, not by appointed, life-tenured judges.”¹¹¹

Judge Edwards submitted a harsh dissent. When viewed in context of the overall statutory scheme, he wrote, the provisions at issue contain an “obvious ambiguity.”¹¹² That being so, the government’s position merited deference, both in light of the statute’s structure and especially its purpose. It was simply “inconceivable,”¹¹³ Judge Edwards wrote, that a Congress intent upon ensuring universal, affordable health care would leave that project to the states’ mercy. More precisely, it would have stated that position clearly, as opposed to hiding it in a statutory “by the State” mousehole.¹¹⁴ Judge Edwards dismissed the plaintiffs’ arguments as to why Congress

¹⁰⁶ *King*, 759 F.3d at 363.

¹⁰⁷ *Id.* at 368.

¹⁰⁸ *Id.* at 369.

¹⁰⁹ *Id.* at 376 (Davis, J., concurring).

¹¹⁰ 758 F.3d 390 (D.C. Cir. 2014).

¹¹¹ *Id.* at 412. *See also id.* (Randolph, J., concurring) (“What the government asks is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope. To supply omissions transcends the judicial function.” (quoting *Iselin v. United States*, 270 U.S. 245, 251 (1926)) (internal quotation marks omitted).

¹¹² *Id.* at 414 (Edwards, J., dissenting).

¹¹³ *Id.* at 413.

¹¹⁴ *Id.* at 416.

might very well have chosen to adopt such a scheme as “nonsense, made up out of whole cloth.”¹¹⁵

Faced with the identical text, eminently capable and respected jurists have found that the statute unambiguously means one thing; that it unambiguously means another thing; that it is clearly ambiguous; and that it is ambiguous by a hair’s breadth. One might conclude that the *Chevron* canons are not all they are cracked up to be; or that they work tolerably well over the general run of cases but not in exceptionally big and controversial cases.¹¹⁶ But none of that is news, and in any event it is not the stuff of the creedal passions that the *King* and *Halbig* litigation has unleashed even among sober administrative lawyers. We suggest that the acrimony may have little to do with the doctrines, nor even with the obviously great disagreements over how best to provide health care and insurance. It arises from the conviction that Congress will not or cannot provide.¹¹⁷

At the heart of the interpretive question is the repeated use of “Exchange[s] established *by the State*.” In moments of calm, just about everyone agrees on the genesis of this problem: the statute was passed in great haste, in a partisan atmosphere, and without reasoned deliberation.¹¹⁸ No meaningful drafting history exists to shed light on the precise interpretive question now at issue, and it is difficult to be confident of any conscious congressional intent other than to get the statute enacted. The bare-bones rulemaking record contains virtually no legal analysis on the question. Some of the legal materials that ordinarily assist courts especially in close statutory cases are simply missing.

The real-world pressure on the canons and doctrines, however, arises elsewhere. Even if Affordable Care Act supporters are correct in their understanding of the “by the State” provisions, this remains a perfect case for applying the conventional canon: “If Congress enacted into law something different from what it intended, then it should amend the statute to conform it to its intent.”¹¹⁹ Had the Affordable Care Act—like virtually all other major entitlement statutes preceding it—been a bipartisan enactment, a judicial

¹¹⁵ *Id.* at 414.

¹¹⁶ See James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 62 (2005).

¹¹⁷ The point arose in the course of the oral argument in *King*, in a colloquy between Justice Scalia and the U.S. solicitor general:

JUSTICE SCALIA: What about—what about Congress? You really think Congress is just going to sit there while—while all of these disastrous consequences ensue.

....

GENERAL VERRILLI: Well, this Congress, Your Honor, I—I—

(Laughter.)

Transcript of Oral Argument at 54, *King v. Burwell*, 135 S. Ct. 475 (2015) (No. 14-114), 2015 WL 916473, at *54.

¹¹⁸ See Jonathan H. Adler & Michael F. Cannon, *Taxation Without Representation: The Illegal IRS Rule to Expand Tax Credits Under the PPACA*, 23 HEALTH MATRIX 119, 169 (2013).

¹¹⁹ *Lamie v. U.S. Trustee*, 540 U.S. 526, 542 (2004).

disposition to that effect would produce some irritation and inconvenience. It would *not* produce predictions of the destruction of the Affordable Care Act¹²⁰ or heated denunciations of the plaintiffs' lawyers¹²¹ and of Judge Griffith's position as beyond all reason.¹²²

The appellate opinions in *Halbig* (and for that matter *King*), as we read them, confirm the analysis. Judge Griffith and Judge Edwards both dissect the statute with care, and there is a great deal of agreement between them on how to read the text and context of a statute. And there is agreement, albeit unspoken, on the source of the dilemma. What differs is the response. Judge Griffith's opinion terminates in a kind of apology for troubling Congress;¹²³ Judge Edwards's dissent comes to rest on an assumption about what Congress in 2010 would have wanted had it foreseen the States' resistance to establishing Exchanges. In these different ways, the judges seek to fashion administrative law doctrines for a world without Congress.

III. SHELL GAMES, PROCESS, AND PROCEDURES

Through the Administrative Procedure Act ("APA") and the procedural architecture constructed underneath and around it runs a well-recognized tension. On the one hand, conventional administrative law canons dating back to *SEC v. Chenery Corp.*¹²⁴ hold that agencies are free to choose their own procedures within the limits of their organic statutes and the APA.¹²⁵ That principle serves important values—foremost, administrative flexibility. On the other hand, agency procedures serve equally important values, including reasoned decision making, the due process interests of regulated parties, and the availability of meaningful judicial review. The perennial danger that agencies might manipulate their choice of procedures for empire-building purposes or to evade review is a standard concern of the ad-

¹²⁰ *Halbig v. Burwell*, 758 F.3d 390, 409-10 (D.C. Cir. 2014).

¹²¹ Cf. Andrew Koppelman, *Halbig and Hurting the Innocent as a Political Tactic*, BALKINIZATION (July 23, 2014, 1:05 PM), <http://balkin.blogspot.com/2014/07/halbig-and-hurting-innocent-as.html>.

¹²² See, e.g., Neil Siegel, *Halbig, King, and the Limits of Reasonable Legal Disagreement*, BALKINIZATION (July 24, 2014, 9:26 AM), <http://balkin.blogspot.com/2014/07/halbig-king-and-limits-of-reasonable.html>.

¹²³ *Halbig*, 758 F.3d at 412.

¹²⁴ 332 U.S. 194 (1947). See *id.* at 202-03 (agency has discretion to decide whether to proceed by rulemaking, individual adjudication, or by a combination of the two). See also *FPC v. Transcon. Gas Pipe Line Corp.*, 423 U.S. 326, 331 (1976) (per curiam) (court may not dictate "the methods, procedures, [or] time dimension" of agency action). Exceptions to the general principle are exceedingly few and limited. M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1409-10 (2004).

¹²⁵ See *Mobil Oil Expl. & Producing Se., Inc. v. United Distrib. Cos.*, 498 U.S. 211, 230 (1991) (citing *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519 (1978)).

ministrative law literature,¹²⁶ as are the incentive effects of judicial doctrines that might prompt agencies to prefer one set of procedures over another.¹²⁷ Against pleas for close judicial scrutiny stands the suspicion that courts are not very good at distinguishing pragmatic agency choices from law-evading maneuvers.

Those tensions are exacerbated by a pattern of congressional inaction, broken by spasms of hyper-legislation. The statute be may so misshapen or misconceived as to require numerous administrative workarounds. The Affordable Care Act is a notorious example, and there are good reasons to suspect that much of the hectic improvisation that has taken place under the Act is unlawful.¹²⁸ But even sheer regulatory overload may prompt procedural improvisation. Confronted with unmanageable statutory demands under the Dodd-Frank Act, financial regulatory agencies have sought to cope by prioritizing proceedings in accordance with perceived need and constituency demands;¹²⁹ by enacting rules without notice and comment, through “interim final rulemakings” and pursuant to the APA’s “good cause” exception;¹³⁰ and by simply letting the deadlines slip.¹³¹ Again, there are reasons to think that much of this is unlawful. For example, under extant case law, the good cause exception is very narrow;¹³² in particular, a

¹²⁶ See, e.g., Bryan Clark & Amanda C. Leiter, *Regulatory Hide and Seek: What Agencies Can (and Can't) Do to Limit Judicial Review*, 52 B.C. L. REV. 1687 (2011); Magill, *supra* note 124; Nina A. Mendelson & Jonathan B. Wiener, *Responding to Agency Avoidance of OIRA*, 37 HARV. J.L. & PUB. POL'Y 447 (2014); Jim Rossi, *Of Dialogue—and Democracy—in Administrative Law*, 112 COLUM. L. REV. SIDEBAR 147 (2012).

¹²⁷ See, e.g., *United States v. Mead Corp.*, 533 U.S. 218, 246 (2001) (Scalia, J., dissenting) (arguing that limiting *Chevron* deference to agency rulemaking would prompt an orgy of rulemakings); Clark & Leiter, *supra* note 126, at 1691; Mark Seidenfeld, *Substituting Substantive for Procedural Review of Guidance Documents*, 90 TEX. L. REV. 331, 332-33 (2011); Stuart Shapiro, *Agency Discretion as “Whac-a-Mole”: The Challenge of Restricting Agency Use of Nonlegislative Rules*, 37 HARV. J.L. & PUB. POL'Y 523, 526-27 (2014).

¹²⁸ E.g., Bagley, *supra* note 21, at 1969 (arguing that the delays exceed the president’s constitutional authority to enforce the law).

¹²⁹ “[W]e must be deliberate as we consider and prioritize our remaining mandates and deploy our broadened regulatory authority.” Public Statement, Chair Mary Jo White, Sec. & Exch. Comm’n, Statement on the Anniversary of the Dodd-Frank Act (July 17, 2014), http://www.sec.gov/News/PublicStmt/Detail/PublicStmt/1370542321653#.VPt91uG_vf0.

¹³⁰ 5 U.S.C. § 553(b)(B) (2012); see, e.g., Prohibition Against Federal Assistance to Swaps Entities (Regulation KK), 78 Fed. Reg. 34,547 (June 10, 2013) (using the good cause exception to meet a deadline imposed by the effective date of a statutory provision); Alternative Mortgage Transaction Parity (Regulation D), 76 Fed. Reg. 44,226 (July 22, 2011) (issuing interim final rule and using good cause exception to avoid regulatory gap); Interim Final Rule for Reporting Pre-Enactment Swap Transactions, 75 Fed. Reg. 63,083 (Oct. 14, 2010) (invoking the good cause exception because of DFA ninety days after enactment deadline).

¹³¹ See *supra* note 19 and accompanying text.

¹³² E.g., *Util. Solid Waste Activities Grp. v. EPA*, 236 F.3d 749, 754 (D.C. Cir. 2001) (“[T]he ‘good cause’ exception is to be ‘narrowly construed and only reluctantly countenanced.’” (quoting *Tenn. Gas Pipeline Co. v. FERC*, 969 F.2d 1141, 1144 (D.C. Cir. 1992))); *Am. Fed’n of Gov’t Emps. v.*

mere lack of time or resources is not a sufficient reason to rely on the exception.¹³³ It is doubtful that all or perhaps even most of the interim final rules issued under the Dodd-Frank Act would clear that high hurdle.

Then again, few if any claimed exemptions will be put to the test: regulated industries usually prefer an interim rule to no rule at all. And in the larger scheme of things, stringent “good cause” demands may be mismatched to the reality of an overwhelmed regulatory apparatus that attempts to prioritize a profusion of legislative commands. In any individual case, “we have no time” will tend to look like a feeble excuse, readily met with the objection that Congress spoke unmistakably and that the excuse does not count.¹³⁴ In the overall context of congressionally induced overload, it may be the embodiment of good sense. And yet, there remains the potential for evasion and opportunism.

To put the point in a more abstract, doctrinal perspective: most legal regimes (such as constitutional law, patent law, and criminal law) feature rules against circumvention—sometimes contained in the written law itself, but more often supplied by courts.¹³⁵ The impeccable logic of this ancient rule against mischief is that surely the lawgiver did not intend to permit parties to do indirectly what they have been prohibited from doing directly. Administrative law, however, sports exceedingly few procedural anti-circumvention rules.¹³⁶ The few rules that exist are not commonly understood *as* rules against circumvention; and to the extent that one does so understand them, *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*¹³⁷ stands as a (somewhat poorly policed) super-rule *against* anti-circumvention rules.¹³⁸ That is because administrative

Block, 655 F.2d 1153, 1156 (D.C. Cir. 1981) (the exception is not an “escape clause[]” that may be arbitrarily utilized at the agency’s whim” and “use of these exceptions by administrative agencies should be limited to emergency situations”).

¹³³ *E.g.*, U.S. Steel Corp. v. EPA, 649 F.2d 572, 575 (8th Cir. 1981) (“[T]he mere existence of deadlines for agency action, whether set by statute or court order, does not in itself constitute good cause.” (alteration in original) (quoting U.S. Steel Corp. v. EPA, 595 F.2d 207, 213 (5th Cir. 1979)) (internal quotation marks omitted)); Nat’l Ass’n of Farmworkers Orgs. v. Marshall, 628 F.2d 604, 621 (D.C. Cir. 1980) (“[G]ood cause to suspend notice and comment must be supported by more than the bare need to have regulations.”).

¹³⁴ U.S. Steel Corp. v. EPA, 595 F.2d 207, 213 (5th Cir. 1979).

¹³⁵ *See, e.g.*, Polar Tankers, Inc. v. City of Valdez, 557 U.S. 1, 7 (2009) (interpreting the Tonnage Clause as a rule against circumventing the Import-Export Clause).

¹³⁶ There is a general *substantive* rule that agencies may not do indirectly what they are prohibited from doing directly. *See, e.g.*, Altamont Gas Transmission Co. v. FERC, 92 F.3d 1239, 1247-48 (D.C. Cir. 1996).

¹³⁷ 435 U.S. 519 (1978).

¹³⁸ *Id.* at 544-45. To illustrate: the D.C. Circuit’s so-called *Paralyzed Veterans* doctrine held that under certain circumstances, agencies may change rules originally adopted through guidance documents only by means of notice and comment rulemaking. *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 584 (D.C. Cir. 1997), *abrogated by* *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199 (2015). The Supreme Court has unanimously abrogated the doctrine as inconsistent with the Administrative

law begins not with prohibitions but with a grant of authority and with *Chenery*: where agencies may choose their own rules, there is nothing to circumvent. Accordingly, to the extent anti-circumvention rules exist, they have an ad-hoc, “this day and train only” quality. The *Massachusetts* holding on EPA’s discretion in responding to petitions for rulemaking, discussed above, has that quality;¹³⁹ and other examples come readily to mind. Agencies may not buy themselves judicial deference by merely “parroting” statutory language in a regulation:¹⁴⁰ does this mean that deference increases with distance between statutory rule and agency regulation? Surely, that cannot be right. So where does parroting end and faithful adherence to the statute begin? No one knows. What looks like a canon or rule is good for precisely one case.¹⁴¹

Our discussion here is an initial and limited foray into this difficult field. Section A of this Part examines *UARG*, which exemplifies the tensions just described. Section B turns to two issues, both illustrating the courts’ limited capacity in policing agency conduct: the manipulation of procedures in high-stakes, politically charged regulatory proceedings; and the issue of agencies’ choices between rulemaking and adjudication or enforcement proceedings.

A. *UARG: A Sequenced Shell Game*

In response to *Massachusetts*, we explained earlier, EPA initially opened a single rulemaking docket to address the regulation of greenhouse gases under the Clean Air Act. Following the change in administrations, the agency switched course and constructed a carefully sequenced suite of rules: Endangerment Rule, Auto Rule, Triggering Rule, and Tailoring Rule.

From one perspective, there was nothing suspect about the agency’s stacked rulemaking process. One can plausibly argue that the agency’s process faithfully followed the structure of the Clean Air Act: endangerment finding under Section 202; regulation under that Title; triggering, in light of *Massachusetts* and pre-existing agency interpretations of the provisions at issue; and stationary source regulation under the PSD and Title V programs. Even so, the splintering of the rulemaking process quite obviously served to shield the most problematic step, the Tailoring Rule, against effective judi-

Procedure Act and *Vermont Yankee. Mort. Bankers Ass’n*, 135 S. Ct. at 1203. In a concurring opinion, Justice Scalia characterized the *Paralyzed Veterans* doctrine as “a courageous (indeed, brazen) attempt” to control “mischief.” *Id.* at 1212 (Scalia, J., concurring). The doctrine was an anti-circumvention rule—just not the right one. *Id.* at 1212-13.

¹³⁹ See, e.g., Sunstein & Vermeule, *supra* note 75, at 12.

¹⁴⁰ *Gonzales v. Oregon*, 546 U.S. 243, 257 (2006).

¹⁴¹ While “parroting” regulations appear quite common, we have found only one appellate case that clearly applies the *Gonzales* “rule”: *Fogo de Chao (Holdings) Inc. v. U.S. Dept. of Homeland Sec.*, 769 F.3d 1127, 1135 (D.C. Cir. 2014).

cial review. It did so in two ways. First, the sequencing made “tailoring” look like a reasonable measure undertaken only at the end of the agency’s deliberations and in the face of difficult circumstances. Each preceding step was ostensibly compelled, leaving the agency no way out except to revise the statutory thresholds. Second, the Tailoring Rule, when viewed in isolation, merely exempted small sources from otherwise applicable requirements. Those sources would have nothing to complain about. Large sources, meanwhile, would be subject to regulation with or without the Tailoring Rule. And voilà: no petitioner would have standing to challenge the Tailoring Rule.

Remarkably, the D.C. Circuit accepted the agency’s stratagems and arguments. It deemed any consideration of downstream regulatory consequences impermissible in the context of an endangerment finding under Section 202, as that provision had been interpreted in *Massachusetts*.¹⁴² Likewise, the panel’s review of the Triggering Rule relied entirely on the perceived holding of *Massachusetts* and on earlier EPA regulations.¹⁴³ And at the final step, the court curtly dismissed the petitioners’ challenge to the Tailoring Rule on the view that the new regulatory burdens occurred “not because of anything EPA did . . . but by automatic operation of the statute.”¹⁴⁴

The Supreme Court’s *UARG* majority took a more integrated approach. It saw itself confronted with a legal interpretation that entailed a vast expansion of EPA’s authority, the absurd consequences of which the agency then proposed to remedy—in a separate rule—by means of waiver and rewrite. *UARG* held that an agency may not do this; instead, the absurd legal consequences should have alerted the agency to the error of its legal position.¹⁴⁵ That seems right to us. *Especially* if the absurd consequences are as ineluctable as EPA made them out to be, the agency had a duty to consider them before setting its massive regulatory program in motion.

The significance of this integrated view appears in juxtaposition not only with the disposition of the court below but also with the *UARG* dissenters’ acceptance of EPA’s sequential approach. The greenhouse gas designation (the theory goes) is water under the bridge unless we chip away at *Massachusetts*,¹⁴⁶ and no one wants the agency to embark on the senseless

¹⁴² *Coal. for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102,126 (D.C. Cir. 2012) (per curiam), *aff’d in part, rev’d in part sub nom.*, *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427 (2014).

¹⁴³ Tellingly, the panel came close to dismissing the absurd regulatory consequences, emphasized by EPA itself in the Tailoring Rule record, as the petitioners’ (and, in the en banc proceeding, as Judge Kavanaugh’s) invention. *Id.* at 119. See also *Coal. for Responsible Regulation, Inc. v. EPA*, No. 09-1322, 2012 WL 6621785 (D.C. Cir. Dec. 20, 2012) (concurring in the denials of rehearing en banc).

¹⁴⁴ *Coal. for Responsible Regulation*, 684 F.3d at 146. We discuss the standing question at *infra* notes 211-239 and accompanying text.

¹⁴⁵ *Util. Air Regulatory Grp.*, 134 S. Ct. at 2446 (“[T]he need to rewrite clear provisions of the statute should have alerted EPA that it had taken a wrong interpretative turn.”).

¹⁴⁶ *Id.* at 2452 (Breyer, J., concurring in part and dissenting in part).

project of burying small sources and permitting authorities under PSD or Title V requirements. Why then obsess over the technicalities of how EPA goes about its business, and why go back and exempt the pollutant rather than the sources? Why not permit a small-source exemption that Congress must have intended, though not in exactly this form?¹⁴⁷ To borrow a phrase, what difference does it make at this point?

The difference is that under the majority's approach, the exemption remains tied to the statutory rule, thus bounding the agency's discretion on both sides. That mattered in *UARG*—but how much? The majority confronted a “singular situation”¹⁴⁸ of an agency that first created an “absurdity” by means of interpretation and then proposed to cure it, in another rule, by means of a rewrite. Clearly, too, the majority was impressed by the sheer scale of EPA's program. This was a truly exceptional case, and it remains to be seen whether the Court will generalize *UARG*'s lessons to more typical circumstances.

Moreover, the majority's insistence that EPA must consider downstream regulatory consequences at the front end only went so far. The “front end” was not the Triggering Rule. It was the Endangerment Rule, and one can very plausibly argue that the agency's duty to exercise discretion “within defined statutory limits”¹⁴⁹ should have included a consideration of “absurdity” at *that* stage. Several petitioners in *UARG* urged that argument,¹⁵⁰ it disappeared with the limited certiorari grant. The D.C. Circuit's holding that the Clean Air Act (as interpreted in *Massachusetts*) practically precluded EPA from considering anything but science in its endangerment finding thus stands undisturbed. *UARG*'s limited inquiry compressed the entire set of problems into a familiar *interpretive* question with a principally familiar answer: statutes must be construed to avoid absurdity.

B. *Evading Review*

Agencies' procedural maneuvering poses a wide variety of problems. We discuss here two illustrations: the multi-stage litigation in *In re Aiken*

¹⁴⁷ Interestingly, EPA at no point relied on the theory advanced by the dissenting justices. Perhaps the agency deemed the contention that a statute permits waivers unless it specifically prohibits them—which is the dissent's position, and which the agency has propounded in at least one other case, see *Grocery Mfrs. Ass'n v. EPA*, 693 F.3d 169, 191 (D.C. Cir. 2012) (Kavanaugh, J., dissenting)—a bridge too far. Or perhaps, EPA recognized that the dissenters' position runs headlong into a venerable precedent on the provision at issue: *Ala. Power Co. v. Costle*, 636 F.2d 323 (D.C. Cir. 1979).

¹⁴⁸ *Util. Air Regulatory Grp.*, 134 S. Ct. at 2444 (emphasis added).

¹⁴⁹ *Massachusetts v. EPA*, 549 U.S. 497, 533 (2007).

¹⁵⁰ *E.g.*, Opening Brief of Petitioners Chamber of Commerce of the United States of America, State of Alaska, and American Farm Bureau Federation at 25, *Util. Air Regulatory Grp.*, 134 S. Ct. 2427 (No. 12-1272).

County,¹⁵¹ and agency regulation through guidance documents rather than rulemaking. The first illustration is another variation on the familiar theme of agency attempts to amend old statutes; here, in a context where the statute contains unmistakable commands but the current Congress will neither amend the statute nor fund or even tolerate its implementation. The net result in this instance is outright executive defiance of the statute and judicial orders. The second illustration, FDA regulation through guidance rather than regulation, is somewhat removed from our principal theme of congressional inaction. We discuss it to illustrate the limited capacity of courts to discipline agencies' opportunistic conduct.

1. *In re Aiken County*: Of Mandates, Money, and Mandamus

In re Aiken County is part of the long-running saga, dating back three decades, to site and create a depository for nuclear waste.¹⁵² In a 1987 amendment to the Nuclear Waste Policy Act ("NWPA"), Congress commanded the Department of Energy to site the project at Yucca Mountain, Nevada, to the exclusion of any other previously considered sites.¹⁵³ Accompanied by incessant litigation, the siting process and eventual "designation" of Yucca Mountain consumed a full fifteen years. At that point, the NPWA required the Department to submit an application to the Nuclear Regulatory Commission for a construction authorization for the Yucca Mountain site within ninety days.¹⁵⁴ It took the Department another six years, until June 2008, to submit the application to the Atomic Safety and Licensing Board, an adjudicatory body within the Nuclear Regulatory Commission.¹⁵⁵ Promptly, Yucca Mountain became enmeshed in the running presidential campaign. Then-Senator Obama repeatedly voiced his opposition to the project.

President Obama remained true to his campaign promise. Both the Department of Energy and the Nuclear Regulatory Commission proceeded accordingly. The Department sought to withdraw its application to the Licensing Board, asserting that notwithstanding the NPWA it had determined that "Yucca Mountain is not a workable option."¹⁵⁶ At the same time, the Nuclear Regulatory Commission—now chaired by a former staffer to Nevada Senator Harry Reid, appointed at the senator's request—moved to kill

¹⁵¹ 725 F.3d 255 (D.C. Cir. 2013). See also *In re Aiken Cty.*, 645 F.3d 428 (D.C. Cir. 2011).

¹⁵² For a concise account, including a narrative of the *In re Aiken County* litigation, see Bret Kupfer, Note, *Agency Discretion and Statutory Mandates in a Time of Inadequate Funding: An Alternative to In Re Aiken County*, 46 CONN. L. REV. 331, 334-35 (2013).

¹⁵³ Nuclear Waste Policy Amendments Act of 1987, Pub. L. No. 100-203, § 5011(a), 101 Stat. 1330, 1330-228 (1987) (codified as amended at 42 U.S.C. § 10172 (2006)).

¹⁵⁴ 42 U.S.C. § 10134(b) (2012).

¹⁵⁵ *Aiken Cnty.*, 645 F.3d at 431-32.

¹⁵⁶ *Id.* at 432 (quoting another source) (internal quotation marks omitted).

the Yucca Mountain project. The NWPA provides that the Commission “‘shall consider’ the Department of Energy’s license application to store nuclear waste at Yucca Mountain and ‘shall issue a final decision approving or disapproving’ the application within three years of its submission.”¹⁵⁷ Although the Department had submitted its license application in June 2008, the Commission did not act within the three-year statutory deadline. Instead, the record showed that the Commission’s chairman “orchestrated a systematic campaign of noncompliance.”¹⁵⁸ Among other things, he “unilaterally ordered Commission staff to terminate the review process,” “instructed staff to remove key findings from reports evaluating the Yucca Mountain site,” and “ignored the will of his fellow Commissioners.”¹⁵⁹

A group of states, entities, and individuals initially filed a lawsuit in the D.C. Circuit challenging the Department of Energy’s attempt to withdraw the licensing application. The Department argued that petitioners’ claims were unripe and premature. The D.C. Circuit agreed, noting that the Department had not taken any specific action prohibited by the statute and, in fact, had not been permitted to withdraw its application.¹⁶⁰ A denial of that request by the Licensing Board, the panel noted, would render the entire dispute moot. In separate concurrences, however, two judges explained that the petitioners were barking up the wrong tree: to their minds, the Nuclear Regulatory Commission (rather than the Department of Energy) had arguably “abdicated its statutory responsibility.”¹⁶¹

The same petitioners then filed a second lawsuit in the D.C. Circuit requesting a writ of mandamus to the Nuclear Regulatory Commission requiring it to comply with the law. In response, the Commission argued that Congress did not want the licensing process to continue. The D.C. Circuit initially held the case in abeyance to give Congress time to clarify the issue and “alter[] the legal landscape.”¹⁶² After more than a year, however, neither the Commission nor Congress had acted. As a result, the D.C. Circuit granted the writ of mandamus and directed the Commission to “promptly continue with the legally mandated licensing process.”¹⁶³ The unequivocal statutory commands to proceed remained on the books, the Court said; and while Congress had of late zeroed out funding for the licensing process, some \$11.1 million in appropriated funds remained available to restart it. Judge Garland dissented. Mandamus, he wrote, should not issue to command a useless action. The available funds would not be enough to com-

¹⁵⁷ *In re Aiken Cnty.*, 725 F.3d 255, 257 (D.C. Cir. 2013) (emphasis added) (quoting 42 U.S.C. § 10134(d)).

¹⁵⁸ *Id.* at 267-68 (Randolph, J., concurring).

¹⁵⁹ *Id.* at 268.

¹⁶⁰ *Aiken Cnty.*, 645 F.3d at 437.

¹⁶¹ *Id.* at 438 (Brown, J., concurring).

¹⁶² *Aiken Cnty.*, 725 F.3d at 259.

¹⁶³ *Id.* at 267.

plete the licensing proceeding, and Congress had shown no inclination to provide additional funds.¹⁶⁴

Cases of this sort are bound to become more common, though probably not often in so drastic a fashion. The U.S. Code teems with statutes containing ironclad administrative duties and deadlines. Often, those statutes reflect the command-and-control enthusiasms of an earlier era; at other times, as with the NPWA, they reflect an attempt to ensure the completion of projects that are expected to encounter a great deal of resistance. Those commands are the will of Congress, and agencies as well as judges are supposed to give them force. But statutes age, circumstances change, administrations change, resources are scarce, and the current Congress may have no intention of permitting an agency to do what a former Congress told it to do. And Congress has many ways of ensuring that result—foremost, appropriations. Now what?

In re Aiken County illustrates the difficulties that courts confront in fashioning a plausible answer. The D.C. Circuit's initial response to the first lawsuit against the Nuclear Regulatory Commission—holding the case in abeyance for a year—shows respect for a coordinate branch. As Judge Randolph noted on the occasion, however, there is something odd about conditioning a judicial remedy for an *agency's* dereliction of a statutory duty on the future performance of a third actor, the Congress.¹⁶⁵ In any event, the court's ruling merely postponed the inevitable. Congress cannot reconsider the commands of the NPWA without reopening the entire question of nuclear waste disposal. That has not happened since 1987, and it is not going to happen now. Everyone understands, moreover, that Yucca Mountain cannot proceed so long as President Obama and Senator Reid remain in office.

The D.C. Circuit's second response, issuing mandamus, is equally unsatisfying. The decision does not reference any doctrine on agencies' improper failure to comply with statutory requirements. The sparse case law seems to say that while zero appropriated funds excuse a failure to perform non-discretionary duties or to comply with deadlines, a mere lack of adequate resources does not.¹⁶⁶ In keeping with that pattern, the rival opinions in *In re Aiken County* eventually turned on the \$11.1 million remaining in the Nuclear Regulatory Commission's account. On the majority's view, the availability of *some* funds commanded a restart of the licensing process;

¹⁶⁴ *Id.* at 269 (Garland, J., dissenting).

¹⁶⁵ *In re Aiken Cnty.*, No. 11-1271, 2012 WL 3140360, at *2 (D.C. Cir. Aug. 3, 2012) (Randolph, J., dissenting).

¹⁶⁶ *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 189-90 (1978); *Aiken Cnty.*, 725 F.3d at 259. *See also* *Morton v. Ruiz*, 415 U.S. 199, 231 (1974) (permitting the Bureau of Indian Affairs to establish an eligibility standard for beneficiaries in light of limited funds provided that the standard was generally known and did not violate the statute); *City of Los Angeles v. Adams*, 556 F.2d 40, 47 (D.C. Cir. 1977) (even though Congress limited the appropriated funds, the Federal Aviation Administration could not depart from the distributional statutory formula).

speculation as to what Congress might do in the future was irrelevant. On the dissent's view, that order merely entailed that the money would be spent to no discernible purpose.

The true import of the court's order is best captured in Judge Randolph's separate concurrence, describing in detail the Nuclear Regulatory Commission chairman's "systematic campaign of noncompliance" and the agency's dereliction of its statutory duties.¹⁶⁷ As applied, mandamus orders in these types of cases reflect a kind of bad faith test: courts will tolerate noncompliance but not willful disregard of the law. The pattern reflects the practical difficulties of courts compelling agencies to do what they really do not want to, or what the current Congress does not want them to do. In these situations, mandamus orders primarily inflict *reputational* losses.

The dilemma exemplified by the *In re Aiken County* litigation—ironclad legal commands, coupled with congressional resource decisions that render those commands a dead letter—are likely to increase in frequency. It suggests that there *is* no "will of Congress" in any meaningful sense. For an administrative judiciary that sees its role as divining and enforcing that will, this is not an easy proposition to accept.

2. Guidelines and Enforcement Actions

In a 2012 law review article,¹⁶⁸ Judge Douglas Ginsburg examined the D.C. Circuit's docket and petitions seeking review of decisions by administrative agencies. He found that the D.C. Circuit's number of administrative law cases had declined from a peak of 960 cases in 1988 to a low of 277 cases in 2009—even as "the percentage [of administrative law cases] heard in the D.C. Circuit is now actually greater than ever."¹⁶⁹ By virtually all measures, however, the scope and scale of federal regulation continued to grow apace over that period.¹⁷⁰ In that light, the decline of appellate review proceedings requires an explanation.

¹⁶⁷ Judge Randolph declined to join a part of Judge Kavanaugh's opinion that addressed broad separation of powers issues, which he deemed unnecessary to decide the case. *Aiken Cnty.*, 725 F.3d at 267 (Randolph, J., concurring).

¹⁶⁸ Douglas H. Ginsburg, *Remarks Upon Receiving the Lifetime Service Award of the Georgetown Federalist Society Chapter*, 10 GEO. J.L. & PUB. POL'Y 1 (2012).

¹⁶⁹ *Id.* at 2-3. The percent of cases concerning administrative decisions increased from 28 percent in 1986 to 38 percent in 2007 and 36 percent in 2010. *Id.* at 3. Judge Ginsburg excluded cases from the Board of Immigration Appeals and the Social Security Administration. *Id.* at 2-3.

¹⁷⁰ The number of pages published in the Federal Register increased from 53,376 in 1988 to 69,643 in 2009. The number of final rules increased from 16,042 in 1988 to 20,782 in 2009. *Federal Register Pages Published 1936-2013*, FED. REGISTER, <https://www.federalregister.gov/uploads/2014/04/OFR-STATISTICS-CHARTS-ALL1-1-1-2013.pdf> (last visited Mar. 7, 2015). The total number of pages in the Code of Federal Regulations increased from 117,480 to 163,333 over the same time period. *Code of*

Several possible factors come to mind. Increased collegiality on the D.C. Circuit and the relative stability of administrative law canons over the period may have helped to increase legal certainty and reduced incentives to litigate.¹⁷¹ On a less cheerful note, some observers have speculated that regulated firms and industries, for fear of retaliation, may no longer be able to mount legal challenges.¹⁷² Without closer empirical analysis, any explanation remains more or less informed guesswork. We suspect, however, that the pronounced decline of appellate review has something to do with many agencies' shift from notice-and-comment rulemaking procedures to reliance on "non-binding" guidance documents—frequently prepared without much public input, often left in "draft" form, and rarely subject to appellate review.¹⁷³

Agencies may resort to guidance documents and the like (in lieu of rulemaking) for good reasons, prominently including an otherwise unmanageable load of legislative mandates. The difficulty lies in identifying rules of the road that will leave room for sensible administration, while curbing the obvious potential for abuse. A plausible line of argument holds that excessive concerns at this front are misplaced. While an agency that regulates through guidance rather than rulemaking may escape judicial review, the potential for abuse is limited because the agency is giving something up: the binding legal effect of its policies.¹⁷⁴ We fear that this view may be too sanguine. We illustrate the point with what we believe to be a representative (if rather stark) example: the Food and Drug Administration's ("FDA's") heavy reliance on informal guidance documents.¹⁷⁵

In recent years, FDA has largely forsworn regulation through notice-and-comment rulemaking procedures. Instead, it regulates through never-finalized "draft" guidance documents. Those documents do not bind the

Federal Regulations Page Breakdown—1975 Through 2013, Chart 13, FED. REGISTER, <https://www.federalregister.gov/uploads/2014/04/CFR-Actual-Pages-published1-2013.pdf> (last visited Mar. 7, 2015).

¹⁷¹ Ginsburg, *supra* note 168, at 6.

¹⁷² Robert A. Anthony, "Well, You Want the Permit, Don't You?" *Agency Efforts to Make Nonlegislative Documents Bind the Public*, 44 ADMIN. L. REV. 31, 36 (1992); Lars Noah, *Administrative Arm-Twisting in the Shadow of Congressional Delegations of Authority*, 1997 WIS. L. REV. 873, 922.

¹⁷³ Judicial review under the APA is available for persons injured by final agency action. 5 U.S.C. § 704 (2012). A guidance document is considered final agency action only if the agency treats the guidance as a legislative rule that reflects "the agency's settled position" and binds private parties. *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1022 (D.C. Cir. 2000). In contrast, guidance that contains the "language of suggestion" rather than "the language of command" is not final agency action. *Cement Kiln Recycling Coal v. EPA*, 493 F.3d 207, 228 (D.C. Cir. 2007).

¹⁷⁴ Mark Seidenfeld, *Substituting Substantive for Procedural Review of Guidance Documents*, 90 TEX. L. REV. 331, 356 (2011). For a general discussion, see David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut*, 120 YALE L.J. 276 (2010).

¹⁷⁵ Todd D. Rakoff, *The Choice Between Formal and Informal Modes of Administrative Regulation*, 52 ADMIN. L. REV. 159, 168 (2000).

agency, but as a practical matter, they *are* binding on regulated firms.¹⁷⁶ A well-known example is FDA's controversial guidance concerning "off label" promotion—the marketing and sale of FDA-approved drugs for uses that have not been specifically approved by FDA but are generally medically accepted.¹⁷⁷ The regulation of off-label drug promotion—preventing manufacturers from speaking truthfully about their products—raises serious First Amendment concerns that, if subject to judicial review, would require FDA to limit its regulatory impositions and to justify its concerns about the potential risks of off-label uses.¹⁷⁸ Possibly for that very reason, FDA has refused to promulgate regulations.

That does not mean, however, that FDA's guidance documents have no legal consequence. To the contrary, they often play a significant role in agency enforcement actions against individual companies. The legal uncertainty created by the lack of regulations, combined with agency threats to seek massive penalties, produces an *in terrorem* effect sufficient to generate large settlements. In addition, agency guidance documents have been used in a series of *qui tam* lawsuits across the country. The theory is that by violating FDA's guidance and marketing drugs off-label, manufacturers cause the government to make payments it otherwise would not make when providers submit claims for reimbursement under the Medicare or Medicaid programs.¹⁷⁹ In this litigation posture, the First Amendment issues are never directly in play and FDA's guidance documents are never directly reviewed.

This is a perverse way to regulate a sector with very substantial economic consequences and, moreover, enormous health consequences. Those consequences are at the heart of FDA's mission and its authority to regulate the marketing of pharmaceutical drugs. It is barely conceivable that the deterrence value of *qui tam* lawsuits produces suitable incentives for off-label marketing; much more likely, FDA has simply monetized legal uncertainty.¹⁸⁰ For the agency and many of its constituencies, that may well be the optimal strategy,¹⁸¹ but it is at great variance with a system of adminis-

¹⁷⁶ Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1315 (1992).

¹⁷⁷ Gregory Conko, *Hidden Truth: The Perils and Protection of Off-Label Drug and Medical Device Promotion*, 21 HEALTH MATRIX 149, 153 (2011).

¹⁷⁸ See generally Ralph F. Hall & Elizabeth S. Sobotka, *Inconsistent Government Policies: Why FDA Off-Label Regulation Cannot Survive First Amendment Review Under Greater New Orleans*, 62 FOOD & DRUG L.J. 1 (2007).

¹⁷⁹ E.g., *Hopper v. Solvay Pharms., Inc.*, 588 F.3d 1318, 1326 (11th Cir. 2009); *United States ex rel. Duxbury v. Ortho Biotech Prods., L.P.*, 579 F.3d 13 (1st Cir. 2009).

¹⁸⁰ Richard C. Ausness, "There's Danger Here, Cherie!": *Liability for the Promotion and Marketing of Drugs and Medical Devices for Off-Label Uses*, 73 BROOK. L. REV. 1253, 1326 (2008).

¹⁸¹ *Qui tam* suits under the False Claims Act provide private plaintiffs a portion of the litigation or settlement funds and the agency with greater civil fines. Vicki W. Girard, *Punishing Pharmaceutical*

trative law and appellate review calculated to prompt reasoned decision making.

IV. WAIVERS

Executive waivers and exemptions have become a subject of intense partisan controversy, prompted by the Obama administration's decisions to suspend the enforcement of certain marijuana laws and of the immigration laws, as well as to postpone key requirements of the Affordable Care Act.¹⁸² Much of the agitation—which would assume a very different partisan valence under a Republican presidency¹⁸³—has assumed constitutional dimensions. For good or ill, though, extant constitutional doctrines in this domain remain ill-defined.¹⁸⁴ We focus here on administrative law doctrines, bearing in mind that those doctrines will be informed, overtly or just beneath the surface, by constitutional precepts and intuitions.

A useful point of departure is David Barron and Todd Rakoff's "Defense of Big Waiver."¹⁸⁵ Increasingly, the authors note, Congress has come to legislate by means of comprehensive, often highly detailed legislation, coupled with "big waiver" provisions that permit agencies to waive regulatory requirements for (some) regulated parties.¹⁸⁶ Barron and Rakoff contrast such regimes with the New Deal model of delegation and regulation, which rested on broad agency discretion to make law and policy on Congress's behalf. Big waiver inverts that model: Congress itself creates a de-

Companies for Unlawful Promotion of Approved Drugs: Why the False Claims Act Is the Wrong Rx, 12 J. HEALTH CARE L. & POL'Y 119, 135-36 (2009).

¹⁸² Bagley, *supra* note 21, at 1967; Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 673-74 (2014).

¹⁸³ See, e.g., Bagley, *supra* note 21, at 1969 (cautioning that pro-waiver arguments in defense of the Obama administration's actions might also justify a GOP president's gutting the act); R. Craig Kitchen, *Negative Lawmaking Delegations: Constitutional Structure and Delegations to the Executive of Discretionary Authority to Amend, Waive, and Cancel Statutory Text*, 40 HASTINGS CONST. L.Q. 525, 526-27 (2013) (noting that in 2012, then-candidate Mitt Romney proposed to waive major portions of the Affordable Care Act for all states).

¹⁸⁴ David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 COLUM. L. REV. 265, 318 (2013) (arguing that this is to the good).

¹⁸⁵ *Id.* The authors distinguish a "big" waiver from a "little waiver," i.e., "a limited power to handle the exceptional case." *Id.* at 277.

¹⁸⁶ Our discussion here chiefly concerns provisions or agency programs that waive otherwise binding legal obligations for *private*, regulated parties. These differ from waivers of *funding* conditions (for example, under Medicaid or, vis-à-vis private contractors, of compliance conditions with the Davis Bacon Act under certain conditions) and from waivers that exempt *government* actors (for example, from compliance obligations under the Endangered Species Act). While such waivers may pose difficult legal problems, they do not seem quite as troublesome as the supposed executive authority to free selected private parties from binding obligations. It is *that* authority that smacks of a royal prerogative of suspension and dispensation. HAMBURGER, *supra* note 4, at 66-67.

tailed regulatory scheme but grants agencies broad authority to waive regulatory requirements. The authors find such waivers under the No Child Left Behind Act and the Affordable Care Act and in welfare law, budgetary matters, national security, and immigration. They understand the pattern as a response to the pathologies of New Deal (“big delegation”) and of command-and-control legislation. The contemporary Congress must enact creative, proactive legislation under forbidding conditions—a dense thicket of pre-existing law, an entrenched lobbying culture, and deep partisan division.¹⁸⁷ For these reasons, Barron and Rakoff write, the statutory “power to unmake Congress’s law is approaching in significance the delegation of the power to make law on Congress’s behalf.”¹⁸⁸

While we do not share the authors’ sanguine view of big waivers, we agree with much of their analysis and extend it a bit further. Barron and Rakoff address *statutory* waivers. But the pressures that induce Congress to enact “big waivers” often dissuade it from legislating at all. In these circumstances, agencies will often be tempted to waive legal requirements on their own. And somewhat paradoxically, that practice will further weaken the legislature’s incentives and ability to legislate.

The difficulties in this field are considerable. It is widely agreed that barring legislative authorization, there is no executive authority of dispensation or suspension—no power to free (groups of) individuals from the obligations of the law.¹⁸⁹ No agency that we are aware of has been so bold as to claim such authority as a general matter. In many settings, however, improper waivers are difficult to distinguish from other, arguably permissible agency actions.

It is common ground (for the most part) that individual decisions not to enforce the law in certain cases are constitutionally permissible and, on the authority of *Heckler v. Chaney*,¹⁹⁰ presumptively unreviewable.¹⁹¹ But the distinctions come in shades of grey. For example, *Heckler* left open the possibility that the presumption against reviewability extends *only* to individual executive decisions; a general policy of non-enforcement might receive different treatment.¹⁹² Relatedly, the APA is notoriously Janus-faced

¹⁸⁷ Barron & Rakoff, *supra* note 184, at 299-309.

¹⁸⁸ *Id.* at 269.

¹⁸⁹ *Id.* at 335 (“[T]o waive any, or at least major, substantive statutory provisions, there has to be explicit statutory authority.”).

¹⁹⁰ 470 U.S. 821 (1985).

¹⁹¹ *Id.* at 838. For a rare dissent from this position, see Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration’s Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 784-85 (2013) (the Take Care Clause entails an executive duty to enforce the law in all cases, barring a lack of resources).

¹⁹² *Heckler*, 470 U.S. at 833 n.4 (citing *Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973) (en banc)); Barron & Rakoff, *supra* note 184, at 274 (“The general rule regarding the unreviewability of enforcement discretion gives way, however, when an agency adopts an affirmative policy of not enforcing a statutory requirement.” (citing *Heckler*, 470 U.S. at 833 n.4, and citing and quoting Crowley

on the question. While instructing courts to review agency action for “abuse of discretion,” it does *not* apply to “agency action . . . committed to agency discretion by law.”¹⁹³ That exception applies to cases where there is “no law to apply,”¹⁹⁴ to (individual) non-enforcement decisions, to agency decisions to spend or prioritize lump-sum appropriations,¹⁹⁵ and to a handful of other decisions “of the sort that is traditionally unreviewable.”¹⁹⁶ Surely, readily identifiable exercises of a presumed suspending or dispensing power do not fall into *that* category. But ill-deployed jurisdictional doctrines (such as standing or implied preclusion of review) may well have that practical effect;¹⁹⁷ and again, great difficulties arise in not-so-stark cases. For example, agencies need not tackle problems in one fell swoop;¹⁹⁸ yet piecemeal regulation can serve as a temporary suspension of the law for not-yet-regulated industry sectors. Likewise, some canons (of uncertain scope and application) do permit agencies to grant temporary waivers and exemptions from legal requirements;¹⁹⁹ in those cases, the waiver questions turn on contestable canons of statutory construction.

Our discussion proceeds in two parts. Section A examines the lessons of the *UARG* decision with respect to waiver questions. Section B draws on other cases to explore a crucial question elided in *UARG*: the question of standing. We conclude that sensible doctrines in this domain will require a

Caribbean Transp., Inc. v. Peña, 37 F.3d 671, 676 (D.C. Cir. 1994) (noting that, unlike “an agency’s decision to decline enforcement in . . . an individual case,” “an agency’s statement of a *general enforcement policy* may be reviewable for legal sufficiency where [expressed] as a formal regulation after the full rulemaking process or . . . some form of universal policy statement” (citation omitted) (citing Edison Elec. Inst. v. EPA, 996 F.2d 326 (D.C. Cir. 1993); Nat’l Wildlife Fed’n v. EPA, 980 F.2d 765 (D.C. Cir. 1992)))).

¹⁹³ 5 U.S.C. §§ 706, 701(a)(2) (2012).

¹⁹⁴ Webster v. Doe, 486 U.S. 592, 599 (1988) (quoting Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971)) (internal quotation marks omitted).

¹⁹⁵ Lincoln v. Vigil, 508 U.S. 182, 192 (1993).

¹⁹⁶ Webster, 486 U.S. at 610 (Scalia, J., dissenting) (internal quotation marks omitted); Lincoln, 508 U.S. at 191.

¹⁹⁷ See *infra* notes 216-228 and accompanying text.

¹⁹⁸ FCC v. Fox Television Stations, Inc., 556 U.S. 502, 522 (2009) (“Nothing prohibits federal agencies from moving in an incremental manner.”); Massachusetts v. EPA, 549 U.S. 497, 499 (2007); Nat’l Ass’n of Broadcasters v. FCC, 740 F.2d 1190, 1210 (D.C. Cir. 1984).

¹⁹⁹ For varying examples, see, e.g., Mova Pharm. Corp. v. Shalala, 140 F.3d 1060, 1071 (D.C. Cir. 1998) (permitting an agency to deviate from the statute only so far as necessary to protect congressional intent when a literal reading would violate that intent); Pub. Citizen v. FTC, 869 F.2d 1541, 1557 (D.C. Cir. 1989) (requiring agencies to take minor interpretive liberties to address statutory absurdity rather than rewriting the statute); Nat’l Ass’n of Broadcasters v. FCC, 740 F.2d 1190, 1205 (D.C. Cir. 1984) (requiring an agency to modify its own regulations to avoid absurdity rather than creating an exemption); Env’tl. Def. Fund, Inc. v. EPA, 636 F.2d 1267, 1283 (D.C. Cir. 1980) (holding that an agency may not use an exemption to second-guess Congress’s decision as to costs and benefits); Ala. Power Co. v. Costle, 636 F.2d 323, 358-60 (D.C. Cir. 1979) (*per curiam*) (sanctioning *de minimis* exemptions but noting that exemptions are disfavored especially when the administrative necessity argument is based on predictions of future regulatory difficulties).

clearer judicial recognition that regulatory waivers are a distinct problem of growing proportions.

A. *UARG: Some Lessons*

Earlier, we noted the close connection between “dynamic” statutory interpretation and agencies’ perception of their need for regulatory improvisation down the road. Very frequently, that improvisation will take the form of a relaxation or wholesale waiver of regulatory requirements. The connection shows up in the pertinent cases. Justice Stevens’s dissent in *MCI Telecommunications v. AT&T*²⁰⁰ makes it explicit: a dynamic industry requires dynamic regulation, including “a relaxation of a costly regulatory requirement that recent developments had rendered pointless and counterproductive in a certain class of cases.”²⁰¹ The point appears in a somewhat different variation in *Brown & Williamson*, where the majority placed great weight on the fact that FDA jurisdiction would entail an entire ban on tobacco products. In contrast, the dissenters argued that the statute allowed a more permissive approach.²⁰² And the connection appears in another guise in *UARG*: given a greenhouse gas-inclusive reading of the Act-wide definition of “pollutants,” EPA had to make exemptions somewhere, somehow. *No one* in *UARG* disputed that point. EPA insisted on it, as did the various industry petitioners. Justice Breyer’s dissent made the point explicit.²⁰³ The majority’s holding was driven by its insistence that the locus of these “waivers” turn on interpretive considerations, whereas the dissent would ground them in policy considerations.²⁰⁴

In the course of its decision, the *UARG* majority salvaged or announced several doctrinal pieces to support a jurisprudence that might help tackle the distinctive problems of agency waivers.²⁰⁵ The most helpful part

²⁰⁰ 512 U.S. 218 (1994).

²⁰¹ *Id.* at 242 (Stevens, J., dissenting).

²⁰² *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 174-76 (2000) (Breyer, J., dissenting).

²⁰³ *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2450-51, 2454 (2014) (Breyer, J., concurring in part and dissenting in part) (“To apply the programs at issue here to all those sources would be extremely expensive and burdensome, counterproductive, and perhaps impossible . . . [I]t is anomalous to read an unwritten exception into the more important phrase of the statutory definition (‘any air pollutant’) when a similar unwritten exception to less important language (the particular number used by the statute) will do just as well.”).

²⁰⁴ *See id.* at 2456 (Alito, J., concurring in part and dissenting in part) (“[The Court] nevertheless concludes that, as used in the provision triggering PSD coverage, the term ‘pollutant’ actually means ‘pollutant, other than a greenhouse gas.’”); *id.* at 2453 (Breyer, J., concurring in part and dissenting in part) (“The implicit exception that the Court reads into the phrase ‘any air pollutant,’ by contrast, goes well beyond the limited congressional objective.”).

²⁰⁵ Our earlier discussion points to two such pieces: the rehabilitation of a non-delegation canon for major questions, and the insistence on understanding EPA’s carefully sequenced decisions as of one

of the majority opinion is its affirmance and elaboration of a meaningful distinction between regulatory waiver and non-enforcement.

The *UARG* majority's slightly contemptuous summary of EPA's position with respect to the Tailoring Rule—it might or might not impose greenhouse gas controls on smaller sources in future years²⁰⁶—captures a deep ambivalence in the agency's position throughout the rulemaking process. The agency insisted that the imposition of such controls would entail “absurd” consequences; hence, the need to rewrite the permit thresholds. Yet EPA also invoked canons of “administrative necessity” and a crafted-for-litigation “one-step-at-a-time” doctrine, both converging on the unexceptional proposition that an agency need not do everything at once.²⁰⁷ In other words, EPA insisted that the nature of greenhouse gases required different thresholds to avoid absurdity—and that lowering the thresholds was a matter of enforcement discretion. The *UARG* majority did not explore the tension. Instead, it seized on an incontrovertible point, conceded by the solicitor general at oral argument:²⁰⁸ without more, the permit thresholds (as written) would remain enforceable by means of private citizen suits. To obviate *that* result, the agency could not simply recalibrate its enforcement policies or regulatory priorities; it had to change the substantive legal standard.²⁰⁹

That argument was fully sufficient to dispose of the government's defense, rather tentative to begin with, of the Tailoring Rule as merely an exercise of enforcement discretion. For that reason, the *UARG* Court had no need to delve into the rulemaking record—which, in this case, would have

piece. Neither of these pieces, however, is entirely helpful. As noted *supra* notes 83-84 and accompanying text, the “major question” argument in *UARG* is too little, too late. The limits of the statutory analysis with respect to waivers are discussed *supra* notes 145-147 and accompanying text.

²⁰⁶ *Util. Air Regulatory Grp.*, 134 S. Ct. at 2437-38.

²⁰⁷ Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514, 31,518 (June 3, 2010) (internal quotation marks omitted).

²⁰⁸ Transcript of Oral Argument at 87-88, *Util. Air Regulatory Grp.*, 134 S. Ct. 2427 (No. 12-1146).

²⁰⁹ *Util. Air Regulatory Grp.*, 134 S. Ct. at 2445 (“The Solicitor General does not, and cannot, defend the Tailoring Rule as an exercise of EPA's enforcement discretion. The Tailoring Rule is not just an announcement of EPA's refusal to enforce the statutory permitting requirements; it purports to *alter* those requirements and to establish with the force of law that otherwise-prohibited conduct will not violate the Act. This alteration of the statutory requirements was crucial to EPA's ‘tailoring’ efforts. Without it, small entities with the potential to emit greenhouse gases in amounts exceeding the statutory thresholds would have remained subject to citizen suits—authorized by the Act EPA itself has recently affirmed that the ‘independent enforcement authority’ furnished by the citizen-suit provision cannot be displaced by a permitting authority's decision not to pursue enforcement. The Solicitor General is therefore quite right to acknowledge that the availability of citizen suits made it necessary for EPA, in seeking to mitigate the unreasonableness of its greenhouse-gas-inclusive interpretation, to go beyond merely exercising its enforcement discretion.” (citations omitted)).

shown EPA's "enforcement" theory to be altogether incoherent.²¹⁰ In other cases, statutory or other indicia to distinguish enforcement policies from de facto waivers or exemptions will not be so clear. In those instances, reviewing courts should look for them not only in the statute viewed as a whole, but also in the record.

B. *Waivers and Standing*

Big waivers implicate very difficult standing issues,²¹¹ both of the Article III and the statutory or "zone of interest" variety. One problem is straightforward: a waiver for some firms or industries will tend to put entities that remain under regulation at a competitive disadvantage, and it may profoundly affect many other interests—suppliers, customers, workers, and others. If those market participants are barred from challenging the agency's actions, waivers may become effectively immune from judicial review. A second, already-noted problem is institutional: broad waiver authority may enable an agency to tailor its regulations so as to obviate *congressional* review and interventions.²¹² Barring judicial review, the agency may be entirely on its own.

To be sure, difficulties of these kinds have arisen in numerous cases involving an agency's failure to adopt a more stringent regulatory standard under an open-ended safety statute,²¹³ the elimination of regulatory barriers to entry,²¹⁴ and the like. Still, waivers pose those difficulties in particularly sharp relief, and they present additional, unique problems.

²¹⁰ Put aside the citizen suit issue relied upon by the *UARG* Court: even in its absence, EPA's incoherent canons should have doomed the Tailoring Rule. A record explanation that jumps from one sinking ship to another is no reasoned elaboration; it is arbitrary and capricious. *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 48 (1983) ("[A]n agency must cogently explain why it has exercised its discretion in a given manner . . ."); *Natural Res. Def. Council v. EPA*, 571 F.3d 1245, 1267 (D.C. Cir. 2009) ("[W]e require the agency to have identified and explained the reasoned basis for its decision." (quoting *Transactive Corp. v. United States*, 91 F.3d 232, 236 (D.C. Cir. 1996)) (internal quotation marks omitted)).

²¹¹ Barron and Rakoff write that the issue "warrant[s] an article in [its] own right" but then put it aside. Barron & Rakoff, *supra* note 184, at 319 n.201. They acknowledge that special standing issues may arise but suggest that "in a broad range of cases" there will be enough parties to produce litigation. *Id.*

²¹² Medicaid, a statute with comprehensive waiver authority, is a good example. Jonathan R. Bolton, *The Case of the Disappearing Statute: A Legal and Policy Critique of the Use of Section 1115 Waivers to Restructure the Medicaid Program*, 37 COLUM. J.L. & SOC. PROBS. 91, 138-41 (2003); Wallach, *supra* note 12, at 698.

²¹³ See, e.g., *Hazardous Waste Treatment Council v. EPA*, 861 F.2d 277, 279 (D.C. Cir. 1988) (per curiam).

²¹⁴ See, e.g., *Panhandle Producers & Royalty Owners Ass'n. v. Econ. Regulatory Admin.*, 822 F.2d 1105, 1109 (D.C. Cir. 1987).

UARG exemplifies one problem: the conjunction of new, more stringent regulation, coupled with a waiver that minimizes the likelihood of congressional intervention²¹⁵ and, if the agency's maneuver succeeds, against judicial review. The D.C. Circuit, we noted, accepted that approach. The Supreme Court, in contrast, treated EPA's Triggering and Tailoring Rules as a single piece. A grant of certiorari on the interpretation of the Triggering Rule necessarily encompassed the Tailoring Rule; and since the petitioners obviously had standing to challenge the former, no standing problem arose.

For reasons discussed earlier, that seems the right approach. Its unfortunate side effect is that the justices did not directly comment on the lower court's standing analysis. In these circumstances, aggressive advocates may be tempted to claim, notwithstanding *UARG*'s disposition in the Supreme Court, that no firm or industry may ever have standing to contest waivers for competing market participants. That startling prospect is even more troubling in light of the D.C. Circuit's tendency in recent years to deploy both Article III and the zone-of-interest test against (directly or indirectly) regulated industries. *Grocery Manufacturers Ass'n v. EPA*²¹⁶ illustrates the point.

The Energy Independence and Security Act of 2007, part of the Clean Air Act, requires refiners to introduce a specified, annually increasing volume of renewable fuel.²¹⁷ To comply with this "Renewable Fuel Standard," refiners blend corn-based ethanol into the fuel supply. The national gasoline supply consists largely of "E10," a gasoline blended with 10 percent ethanol. E10 has substantially saturated the U.S. gasoline market already. Hence arises the so-called "blend wall" problem. Under the Renewable Fuel Standard, the volume of renewable fuel required to be introduced increases annually.²¹⁸ Yet at the same time, the Clean Air Act prohibits manufacturers from introducing "any fuel or fuel additive for use by any person in motor vehicles manufactured after model year 1974 which is not substantially similar to any fuel or fuel additive" used in the federal emissions certification of those vehicles.²¹⁹ To introduce non-conforming fuels, a manufacturer must apply for a waiver. The administrator of EPA may grant such a waiver only if the applicant has established that such a fuel or fuel additive "will not cause or contribute to a *failure of any emission control device or system*

²¹⁵ For a trenchant analysis of EPA's greenhouse gas regulations in this light, see PHILIP A. WALLACH, U.S. REGULATION OF GREENHOUSE GAS EMISSIONS (2012), available at <http://www.brookings.edu/~media/research/files/papers/2012/10/26-climate-change-wallach/26-climate-change-wallach.pdf>.

²¹⁶ 693 F.3d 169 (D.C. Cir. 2012).

²¹⁷ Energy Independence and Security Act of 2007, Pub. L. No. 110-140, § 202, 121 Stat. 1492, 1519-23 (2007).

²¹⁸ *Id.*

²¹⁹ 42 U.S.C. § 7545(f)(1)(B) (2012).

(over the useful life of the motor vehicle . . . in which such device or system is used).”²²⁰

In 2009, ethanol producers applied for a waiver to introduce E15, an unleaded gasoline blend containing 15 percent ethanol. Uncontested evidence showed that E15 could very well “cause or contribute to” a failure of (or damage to) emission devices in an entire generation of vehicles—those built between 1974 and 2000. After notice and comment, however, EPA issued (in two separate decisions) a *partial* waiver to permit the introduction and use of E15 in light-duty motor vehicles and engines from model-years 2001–2006.

Petitioners in *Grocery Manufacturers* challenged EPA’s waiver decisions on various grounds, including that “any emission control device” really had to mean “any”—in other words, the waiver provision required an on/off decision and prohibited “partial” waivers. The Court’s standing analysis divided the petitioners into three groups: an “engine products group,” which argued that E15-induced failures would expose manufacturers to liability suits or government recalls; a “petroleum group” of refiners, importers, and “downstream” entities (like fuel blenders and terminals), which alleged that EPA’s partial approval of E15 effectively forced refiners of E15 to comply with the Renewable Fuel Standard, thereby causing a substantial economic injury; and a “food group,” whose members produce, market, and distribute food products that require corn and which argued that EPA’s partial approval of E15 would increase the demand and hence the price of corn.

A panel of the D.C. Circuit (Judge Kavanaugh dissenting) held that none of the petitioners had standing. It deemed the engine products group’s claimed injuries too speculative to satisfy Article III.²²¹ It characterized the petroleum group’s injuries—the costs attendant to the production of E15—as “self-inflicted,” inasmuch as there might be some other (unspecified) way of meeting the Renewable Fuel Standard. Moreover, the panel held that to the extent the petroleum group’s injuries could be said to have been caused by EPA, they were caused by the Renewable Fuel Standard, not by the waiver decisions under review. Finally, the panel sidestepped the food group’s Article III standing,²²² holding instead that the group was not in the “zone of interest” contemplated by the statute.

To be sure, the Energy Independence and Security Act—the statutory home of the Renewable Fuel Standard—requires EPA to review “the impact of the use of renewable fuels on . . . the price and supply of agricultural commodities . . . and food prices” in setting renewable fuel volume requirements.²²³ But the petitioners were not challenging the Energy Inde-

²²⁰ *Id.* § 7545(f)(4) (emphasis added).

²²¹ *Grocery Mfrs.*, 693 F.3d at 175-76.

²²² Judge Sentelle would have found that the food group lacked Article III standing. *Id.* at 179 n.1.

²²³ 42 U.S.C. § 7545(o)(2)(B)(ii)(VI) (2012).

pendence and Security Act; they challenged the Clean Air Act's fuel-waiver provision, Section 211(f)(4). Admittedly, both statutes deal with fuel, and "the [Renewable Fuel Standard] may have even incentivized [ethanol producers] to apply for a waiver under Section 211(f)(4)." Still, the panel insisted that "more is required to establish an 'integral relationship' between the statute a petitioner claims is protecting its interests and the statute actually in question; otherwise, 'the zone-of-interests test could be "deprive[d] . . . of virtually all meaning."'"²²⁴ Judge Kavanaugh submitted an extended dissent, arguing that both the petroleum group and the food group plainly had constitutional and "zone of interest" standing.²²⁵

While we believe that the dissent has the better argument, we call attention to *Grocery Manufacturers* for the broader reason that waiver or waiver-style cases present recurring standing problems that must be repeatedly litigated, at least in the D.C. Circuit.²²⁶ To be sure, the D.C. Circuit has not always taken the constricted perspective of *Grocery Manufacturers* and *Coalition for Responsible Regulation*;²²⁷ but it has done so with increased frequency. A decade ago, the Supreme Court case law could still be summarized as holding that "[b]usinesses desiring to complain that the government is regulating their competitors with insufficient stringency are *invariably and automatically* held to fall within the zone of interests of any allegedly violated statute."²²⁸ In the D.C. Circuit, it is no longer that simple.

The Supreme Court for its part has failed to provide clear guidance. In most cases, the Court emphasizes that the zone of interest test "is not meant to be especially demanding"; it serves to exclude plaintiffs whose interests are inconsistent with, or at most marginally related to, "the purposes implicit in the statute."²²⁹ On occasion, however, the Court has stressed that statutory standing is often narrower than under "the generous review provisions" of the APA²³⁰ and that the determination is not a search for amorphous pur-

²²⁴ *Grocery Mfrs.*, 693 F.3d at 179 (quoting *Fed'n for Am. Immigration Reform, Inc. v. Reno*, 93 F.3d 897, 903 (D.C. Cir. 1996)).

²²⁵ Having so found, Judge Kavanaugh declined to address the engine products group's standing. *Id.* at 181 n.1 (Kavanaugh, J., dissenting). On the merits, Judge Kavanaugh would have ruled that EPA's partial waiver violated the plain and unambiguous language of the statute. *Id.* at 181.

²²⁶ For a partial list of cases and extensive discussion, see the (for now) latest entry in this theater—with dreary predictability, also an EPA case: *White Stallion Energy Ctr., LLC v. EPA*, 748 F.3d 1222, 1256-58 (D.C. Cir. 2014) (per curiam).

²²⁷ 684 F.3d 102 (D.C. Cir. 2012) (per curiam), *aff'd in part, rev'd in part sub nom.*, *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427 (2014).

²²⁸ Jonathan R. Siegel, *Zone of Interests*, 92 GEO. L.J. 317, 347 (2004) (emphasis added).

²²⁹ *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2210 (2012) (quoting *Clarke v. Sec. Indus. Ass'n.*, 479 U.S. 388, 399 (1987)) (internal quotation marks omitted).

²³⁰ *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1389 (2014) ("[T]he breadth of the zone of interests varies according to the provisions of law at issue, so that what comes within the zone of interests of a statute for purposes of obtaining judicial review of administrative action

poses but rather for a specific cause of action to be identified through “traditional tools of statutory interpretation” and, apparently, in specific statutory provisions.²³¹ In light of the Supreme Court’s generally skeptical view of implied causes of action,²³² this line of reasoning is a troubling one for would-be challengers of administrative waivers.

It is difficult to exaggerate the importance and the difficulties of these seemingly technical doctrines. For example, the crucial question of whether the statute or provision that creates the cause of action must be the same statute or provision that is under review was thought to have been asked and answered in the foundational *Ass’n of Data Processing Service Organizations v. Camp*²³³ decision (“no”); the D.C. Circuit seems to view it as open. And the zone of interest appears to drift with every at-bat. In that environment, agencies may undertake rewrite-and-waiver initiatives with a not-unrealistic expectation that the D.C. Circuit will decline substantive review and the Supreme Court will step in to correct the agency in only a minority of cases.

The uncertainties, we suggest, are rooted in the institutional dynamics of different types of regulatory regimes.²³⁴ New Deal regulation, for instance, paradigmatically features price and entry restrictions for industries that were meant to be organized as cartels. In that context, considerations of congressional purposes and intent may well prompt courts to block lawsuits by interlopers,²³⁵ while readily permitting suit by entities seeking to protect their rents against deregulation and competition-increasing waivers.²³⁶ Perhaps, though, a somewhat different analysis applies to health and safety regulations. The pervasive command-and-control features of such statutes seem to suggest a “c’mon in” approach to third-party standing: lax regulation raises suspicions of capture, and to counteract that threat, commercial interests insisting on fidelity to the law may usefully complement the efforts of public interest firms (which virtually *always* have statutory standing). Then again, most such statutes grant agencies a great deal of discretion

under the ‘generous review provisions’ of the APA may not do so for other purposes.” (quoting *Bennett v. Spear*, 520 U.S. 154, 163 (1997)) (internal quotation marks omitted).

²³¹ *Id.* at 1387-88 (“Whether a plaintiff comes within ‘the “zone of interests”’ is an issue that requires us to determine, using traditional tools of statutory interpretation, whether a legislatively conferred cause of action encompasses a particular plaintiff’s claim. . . . That question requires us to determine the meaning of the congressionally enacted provision creating a cause of action.”).

²³² *See, e.g.*, *Alexander v. Sandoval*, 532 U.S. 275, 293 (2001).

²³³ 397 U.S. 150 (1970).

²³⁴ For a forthright and sharp-eyed discussion of third-party standing in this light, see *Hazardous Waste Treatment Council v. EPA*, 861 F.2d 277 (D.C. Cir. 1988) (per curiam).

²³⁵ *See, e.g.*, *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 341-42 (1984).

²³⁶ *MCI v. AT&T* posed no standing problem due to its posture, but it illustrates the paradigmatic situation. *MCI Telecomms. Corp. v. AT&T*, 512 U.S. 218, 234 (1994).

in setting standards, and third-party lawsuits by commercial interests might “distort” the agencies’ decision-making calculus.²³⁷

Appellate decisions and law review articles of the 1980s abound with discussions of this sort.²³⁸ That, though, was a different era—a time when courts and commentators struggled to adjust administrative law to the partial demise of price and entry regulation and to bring good sense and reasoned deliberation to command-and-control statutes.²³⁹ However, as Barron and Rakoff have argued convincingly, “big waiver” statutes have a distinct political economy and institutional logic. Standing doctrines, no less than standard-of-review doctrines shaped in engagement with “big delegation” statutes and command-and-control regulation, may have to be revisited.

CONCLUSION

We have described agency rewrites, shell games, and regulatory waivers as connected institutional responses that are exacerbated by a Congress that is often unwilling or unable to enact workable statutes. And we have argued that extant administrative law canons, developed under very different institutional conditions, cannot keep agency conduct within tolerable bounds. *Suppose* we are roughly right: what follows?

Perhaps, nothing. We may have simply described the inexorable march of executive government from a slightly different angle. From one perspective, there is nothing wrong with that march (and even if there were, no one could do anything about it).²⁴⁰ From another perspective, *everything* is wrong with it, and nothing can be fixed until and unless government is re-grounded on firm constitutional foundations.²⁴¹

Having sidestepped such grand questions, we still hope that this Essay can inform the debate. American administrative law, especially in its formative stages, has never been driven exclusively by high-level argument but also by urgent practical institutional and economic concerns—the regulation of network industries with monopolistic tendencies; the perceived need to subject labor and agricultural markets to orderly competition; and the “capture” of regulatory agencies. Eventually, those responses congealed into rough frameworks of reference—the APA, a model of “reasoned deci-

²³⁷ *Hazardous Waste*, 861 F.2d at 285.

²³⁸ In addition to *Hazardous Waste Treatment Council v. EPA*, see, e.g., *FAIC Sec., Inc. v. United States*, 768 F.2d 352, 356-61 (D.C. Cir. 1985); Henry P. Monaghan, *Third Party Standing*, 84 COLUM. L. REV. 277 (1984); Peter L. Strauss, *Considering Political Alternatives to “Hard Look” Review*, 1989 DUKE L.J. 538, 540-42; Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1461 (1988).

²³⁹ See, e.g., *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843 (1984).

²⁴⁰ Vermeule, *supra* note 5, at 1101. See also Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHL L. REV. 1721, 1721-24 (2002).

²⁴¹ HAMBURGER, *supra* note 4, at 493-494.

sion-making.”²⁴² The initial responses, however, have always been—and, given the litigation-oriented nature of administrative law, had to be—piecemeal, improvisational, and somewhat discontinuous with the overall framework of law at the time. There is a great deal of contingency in the system. For example, near-universal agreement on the idea that supposedly “expert” agencies were “captured” produced both a wholesale demolition of some agencies and a reform of administrative law. If the recognition that “Congress does not work” came to be seen as an analogue to “agency capture,” the responses would be, as they were then, a matter of scholarly controversy and lawyerly engagement.

In our estimation, administrative law has already begun to reflect the tensions that arise from an executive government that is only poorly constrained by legislation. Our plea is for more candor and institutionalism in administrative law. In particular, we counsel skepticism with respect to any doctrine that rests on an idealized Congress with an actual collective will. That skepticism may well extend to *Chevron*; but as we have hoped to show, it extends to doctrines and canons that operate at some distance from that spotlight of administrative law.

“Dynamic” statutory interpretation of the sort exemplified by *Massachusetts v. EPA* is a prime example. That style of adjudication is (to our minds) inherently problematic in a system of separated powers and checks and balances: even a Congress composed exclusively of sages is not the House of Commons. In contemplation of the *actual* Congress, dynamic interpretation proves yet more troublesome. As seen in *UARG*, it exacerbates Congress’s worst tendencies and, at the end of the day, prompts agency rewrites. The same is true of dynamic interpretation’s close cousins—“purposive” interpretations that seek to vindicate the abstract objectives of a statute in the teeth of its operational provisions; an “absurdity doctrine” that mobilizes judicial ideas of sound policy against the often flawed statutes that Congress actually wrote; and a ready resort to “ambiguity” that permits agencies to build expansive regulatory programs on gossamer-thin foundations.

Decisions and opinions of this sort are often styled as a judicial “dialogue” with Congress.²⁴³ It is exceedingly difficult, though, to engage in a dialogue with an actor who in all likelihood cannot or will not respond. In that universe, what is needed instead is a set of doctrines that give Congress incentives to legislate.²⁴⁴ Congress may or may not respond to such incen-

²⁴² *Greater Bos. Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970).

²⁴³ *E.g.*, *United States v. Home Concrete & Supply, LLC*, 132 S. Ct. 1836, 1852-53 (2012) (Kennedy, J., dissenting); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985); Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 190 (2006).

²⁴⁴ We recognize that this proposition puts us at odds with distinguished jurists who have diagnosed the underlying problem far more trenchantly than we have attempted here. See especially ROBERT A. KATZMANN, *JUDGING STATUTES* (2014). Judge Katzmann’s proposed response to the chaos of modern-

tives. But then, a system of checks and balances plainly adumbrates the possibility that sometimes, *nothing* may happen. The opposite presumption—that government must perennially respond to perceived needs and contingencies—has to rest on a theory other than a bare assertion that an enacting Congress two or three decades ago wanted it that way. Such a theory is hard to come by.

Put somewhat differently: the institutional context we have described calls for administrative law doctrines that build fences and block, or at least do not accelerate, the unauthorized accretion of executive power. Some such doctrines exist, albeit often in an under-developed and poorly understood form. The “major question” or “mousehole” canon is an example. The deployment of that precept in practice creates considerable disagreement over its scope of application.²⁴⁵ At bottom, the salient question in most cases where the canon is invoked is whether courts ought to freight a past Congress with the intent to authorize agencies decades later to stick-build a regulatory program of massive consequence. The answer to that question should be informed by an institutional calculation: once the program gets underway, both Congress and the Supreme Court will rarely step in to stop it. A more explicit recognition of that point might produce better and more consistent results.

Similarly, the time has come for identifying procedural anti-circumvention rules for agency conduct—for agency shirking²⁴⁶ and for the manipulation of multi-stage regulatory projects.²⁴⁷ Likewise, administrative as well as constitutional canons ought to catch up to the reality that many agencies have become self-funding or even turned into profit centers for a cash-strapped Congress, providing them with an added incentive to monetize legal uncertainty and to optimize their procedural choices on that margin.

And finally, in a thicket of impenetrable statutes, regulation is a given for any serious economic actor. The nastiest problems under comprehensive regulatory schemes often arise over agencies’ powers to defer, exempt, and dispense. Doctrines of reviewability and standing ought to reflect that reality.

Sooner or later, any such doctrines will lead directly back to the foundational precepts and precedents: *Chevron*, *Chenery*, and *Heckler*. At a

day congressional lawmaking is to urge greater judicial reliance on legislative history and purposive statutory analysis. We fear that this response would exacerbate potent tendencies toward executive government.

²⁴⁵ The major questions canon has been described as a nondelegation canon that requires Congress to make significant policy decisions. John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 237; Sunstein, *supra* note 243, at 231-33. In contrast, *Massachusetts v. EPA* applies the major questions doctrine to extend agency authority over policy questions. Freeman & Vermeule, *supra* note 75, at 76.

²⁴⁶ Sunstein & Vermeule, *supra* note 75, at 30.

²⁴⁷ See *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2437-38 (2014).

more general level, we may have to confront the question of how best to contain executive government without a well-functioning legislature. Undoubtedly, administrative law will and should be thoroughly informed by a debate over first principles. But that will take time. For now, there are powerful reasons to reconsider doctrines that exacerbate institutional pathologies and to search for doctrines that respond to the administrative state as it actually is.