



ARTICLES

Calibrating *Chevron* for Preemption..... Gregory M. Dickinson 667

A Cost–Benefit Interpretation of the “Substantially Similar” Hurdle
in the Congressional Review Act: Can OSHA Ever Utter
the E-Word (Ergonomics) Again?..... Adam M. Finkel 707
Jason W. Sullivan

Fixing the Flaws in the Federal Vaccine Injury
Compensation Program Peter H. Meyers 785

COMMENT

Setting Labor Policy Prospectively: Rulemaking, Adjudicating,
and What the NLRB Can Learn from the NMB’s
Representation Election Procedure RuleEmily Baver 853

RECENT DEVELOPMENTS

Legal Issues in E-Rulemaking..... Bridget C.E. Dooling 893

A Regulatory Quick Fix for *Carcieri v. Salazar*:
How the Department of Interior Can Invoke an Alternative Source
of Existing Statutory Authority to Overcome an Adverse Judgment
Under the *Chevron* Doctrine Howard L. Highland 933

ADDRESS

Mr. Justice Marshall Rothstein, Supreme Court of Canada,
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and Regulatory Practice961



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CALIBRATING *CHEVRON* FOR PREEMPTION

GREGORY M. DICKINSON*

TABLE OF CONTENTS

Introduction.....	668
I. The <i>Chevron</i> –Preemption Clash.....	671
A. Federal Preemption of State Law	671
B. The Presumption Against Preemption	672
C. The <i>Chevron</i> Doctrine	674
D. Indeterminacy and Incompatibility: Canons as Rules of Thumb	675
E. Defeasibility, Conflict, and <i>Chevron</i>	678
II. The Court’s <i>Chevron</i> –Preemption Jurisprudence.....	680
A. Doctrinal Inconsistency and Unpredictable Decisions.....	680
B. Explaining the Court’s Haphazard Approach.....	682
1. Sidestepping the Danger of Conflicting-Canon Gridlock	682
2. Selective Use of the Presumption Against Preemption.....	684
3. Varying Deference to Agency Determinations.....	685
4. The <i>Chevron</i> – <i>Mead</i> Failure	686
III. Unmuddling the Court’s <i>Chevron</i> –Preemption Jurisprudence.....	689
A. A Bright-Line Alternative to the Court’s Haphazardry.....	690
B. Respecting Congressional Intent and State Sovereignty	691
C. Consistency with <i>Chevron</i> ’s Rationale and Reconciliation of Conflicting Canons.....	696

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D. A Narrow and a Broad Framework for Implementation	700
1. A <i>Mead</i> -Like Delegation Rule	700
2. A <i>Chevron</i> -Based Delegation Rule.....	701
3. Contrasting the Approaches	703
Conclusion.....	705

INTRODUCTION

For years now, courts and commentators have struggled to reconcile the presumption against preemption—the interpretive canon that presumes against federal incursion into areas of traditional state sovereignty—with the Court’s *Chevron* doctrine, which instructs courts to defer to reasonable agency interpretations of ambiguous federal statutes. Where Congress’s preemptive intent is ambiguous, should courts defer to agency interpretations under *Chevron*, or do preemption’s federalism implications demand a less deferential approach? Despite numerous opportunities, the Supreme Court has failed to clearly define the level of deference due to preemptive agency interpretations.¹ In some cases the Court appears quite deferential and in others almost entirely nondeferential.

Academic treatment of the Court’s jurisprudence has been rightly critical. The Court’s unpredictable approach sows uncertainty among regulated parties, the lower courts, and the agencies themselves. As alternatives to the Court’s current case-by-case approach, commentators have advocated a variety of more rule-like regimes: universal nondeference, universal *Chevron* deference, and, most commonly, universal *Skidmore* deference.² Advocates of across-the-board nondeference point to the lack of political and procedural safeguards protecting states from agency-

1. See, e.g., *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999, 1010–12 (2008); *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 20–21 (2007) (noting but failing definitively to resolve the “academic question” of what deference is owed to an agency’s preemption determination).

2. See Nina A. Mendelson, *Chevron and Preemption*, 102 MICH. L. REV. 737, 797–800 (2004) (suggesting a regime of lower, *Skidmore*-style deference as an alternative to the *Chevron* doctrine); Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727, 729 (2008) (suggesting significant deference to agency assessments of the need for federal preemption); Catherine M. Sharkey, *Products Liability Preemption: An Institutional Approach*, 76 GEO. WASH. L. REV. 449, 491–98 (2008) (suggesting a *Skidmore*-like regime in which, though courts do not defer to agency conclusions regarding preemption, they recognize agencies’ superior ability to supply and analyze empirical data relevant to the desirability of a uniform federal regulatory system); Ernest A. Young, *Executive Preemption*, 102 NW. U. L. REV. 869, 871 (2008) (suggesting that the *Chevron* doctrine should give way in the face of the constitutionally grounded presumption against preemption); *The Supreme Court, 2008 Term—Leading Cases*, 123 HARV. L. REV. 262, 271–72 (2009) (discussing *Wyeth v. Levine* and suggesting that a *Chevron*-based regime would most appropriately recognize agency expertise).

initiated preemption.³ Those advocating across-the-board *Chevron* deference, on the other hand, point to agencies' technical expertise on preemption questions and the availability of the *Mead* doctrine as a screen to protect the values of federalism where agencies act other than with the force of law.⁴ Finally, a third set of commentators attempts to reconcile these competing approaches by adopting a middling standard of *Skidmore* deference based on the thoroughness and persuasiveness of an agency's judgment in a particular case.⁵

Thus far, none of these approaches have tempted the Court. Instead, the Court continues to apply deference haphazardly from case to case with no clearly articulated reason for its variation. A close study of the cases, however, reveals both why the Court has been reluctant to adopt any of the proposed across-the-board standards of deference and what an appropriate framework for agency deference might look like. The Court's inconsistent decisionmaking stems from its high regard for congressional intent when considering questions that implicate federalism. *Chevron* and the presumption against preemption provide conflicting indicia of congressional intent, and rather than universalize one principle at the expense of the other, the Court has applied deference selectively depending on its case-specific analysis of congressional intent. When the Court thinks it reasonable to presume delegation of preemptive authority, it is quite deferential to agency views. But, when it thinks congressional intent to delegate is unlikely, it accords little deference to preemptive agency interpretations.

Critics of the Court's *Chevron*-preemption jurisprudence correctly note its major flaw—its inconsistency—but they fail to recognize its purpose and benefits. By looking to congressional intent rather than universalizing a sometimes-inapplicable, across-the-board rule, the Court respects

3. See, e.g., Young, *supra* note 2, at 869 (“As the constitutional limits on national action fade into history, the primary remaining safeguards for state autonomy are political, stemming from the representation of the states in Congress, and procedural, arising from the sheer difficulty of navigating the federal legislative process. These safeguards have little purchase on executive action.”).

4. See, e.g., *Leading Cases*, *supra* note 2, at 272 (“[W]hile there are enduring concerns with respect to agency interpretation of preemption questions, the traditional *Chevron*/*Mead* deference framework can address these concerns, with no need for a singular approach for preemption questions. Bringing the doctrine in this area in line with the overall agency deference approach promises . . . to take advantage of agency interpretive strengths . . .”).

5. See, e.g., Mendelson, *supra* note 2, at 797–800 (suggesting that although full *Chevron*-style deference is inappropriate in the preemption context, agencies' expertise in interpreting and administering complex regulatory statutes counsels in favor of *Skidmore* deference); Sharkey, *supra* note 2, at 491–98 (suggesting a *Skidmore*-like regime because of agencies' peculiar competency to interpret the complexity of the statutes that they administer).

congressional intent where it intends to delegate preemptive authority, while protecting state sovereignty where it does not. Of course, the Court's good intentions do not excuse the approach's unpredictability. A superior approach would package the Court's concern for state sovereignty and congressional intent into a predictable and easily administrable bright-line rule.

The Court's existing doctrinal distinction between express and implied preemption points to a possible solution. In express preemption cases, the Court does not need to enforce federalism values through the presumption against preemption because Congress has spoken clearly in favor of displacing state law. And if the scope of preemption is ambiguous, *Chevron's* presumption of delegation through ambiguity to agency expertise is entirely reasonable. Agencies are quite competent to decide the proper scope of preemption once Congress has duly authorized it. On the other hand, where Congress has not spoken clearly through an express preemption clause, and the question is whether there is to be any preemption at all, *Chevron's* rationale is particularly weak. Agencies are least competent when considering unbounded questions of federal-state power allocation, and Congress is unlikely to delegate authority of this sort.

Given the waxing and waning force of *Chevron's* rationale across cases, the Court should adopt a rule of variable deference that accords full *Chevron*-style deference to agency interpretations of ambiguously broad express preemption clauses and withholds deference altogether where Congress is silent regarding preemption. Such a rule, unlike any of the proposed across-the-board regimes, would recognize the factors that underlie the Court's unpredictable case-by-case approach—respect for state sovereignty and congressional intent—while providing the rule-like certainty demanded by the Court's critics.

Part I presents a brief overview of current preemption law and the conflicting rationales underlying the *Chevron* doctrine and the presumption against preemption. Part II closely examines the Court's recent case law and concludes that the Court's inconsistency stems from its direct scrutiny of legislative intent. Because of its effort to respect federalism values while sidestepping the conflicting canons, the Court's analysis has descended to an unpredictable case-by-case search for congressional intent. Part II also explains why no regime of uniform, across-the-board deference can adequately account for the Court's concerns: *Chevron's* presumption of congressional delegation applies in some cases more than others. Finally, Part III presents a framework for deference in *Chevron*-preemption cases that conditions deference, in rule-like fashion, on the presence of an express preemption clause—accounting for congressional intent to delegate while ensuring predictability.

I. THE *CHEVRON*-PREEMPTION CLASH

To evaluate the Court's handling of the conflict between *Chevron* and the presumption against preemption, it is useful first to pause and consider the rationales underlying those doctrines and the current state of preemption law generally.

A. *Federal Preemption of State Law*

Congress's power of preemption, rooted in the Supremacy Clause of the Constitution,⁶ permits federal law to trump state law where it is undesirable or impossible for two independent legal regimes to coexist. The Supreme Court has recognized two primary categories of preemption: express and implied.⁷ Express preemption occurs where a federal statute expressly withdraws regulatory power over a particular area of law from the states.⁸ Express preemption doctrine therefore involves the difficult but familiar judicial task of determining the intended preemptive reach of statutory language.⁹ Implied preemption is subdivided into two types: field preemption and conflict preemption.¹⁰ Field preemption occurs where a federal regulatory regime is so pervasive as to imply that Congress intended to occupy an entire field of the law, leaving no room for states to supplement that federal regulation.¹¹ Similarly, but on a smaller scale,

6. U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

7. See *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992) ("Pre-emption may be either expressed or implied, and 'is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.'" (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977))).

8. Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 226–27 (2000).

9. See *id.* (explaining that judges faced with an express preemption clause must determine both the meaning of the clause and whether the Constitution allows Congress to forbid the states from exercising the powers in question); Daniel E. Troy & Rebecca K. Wood, *Federal Preemption at the Supreme Court*, 2007–2008 CATO SUP. CT. REV. 257, 258 (2008).

10. *Gade*, 505 U.S. at 98.

11. See *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992) ("In the absence of an express congressional command, state law is pre-empted if that law actually conflicts with federal law, or if federal law so thoroughly occupies a legislative field 'as to make reasonable the inference that Congress left no room for the States to supplement it.'" (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)); *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990) ("[I]n the absence of explicit statutory language, state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively."); see also Nelson, *supra* note 8, at 227.

conflict preemption occurs where, though Congress has demonstrated no intent to occupy an entire field of law, federal law conflicts with a particular state law.¹² This conflict may take either of two forms: First, state law will be preempted “where it is impossible for a private party to comply with both state and federal law.”¹³ Second, state law will also be preempted where, though it is not literally impossible to comply with both state and federal law, state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”¹⁴ This taxonomy of preemption yields four fundamental varieties: express preemption, field preemption, impossibility preemption, and obstacle preemption. Though this Article will not dwell on the nuanced distinctions among the doctrines, it is important at the outset to recognize the basic distinction between express and implied varieties of preemption. The Court is much more skeptical of implied preemption claims than it is of express preemption claims,¹⁵ and that skepticism factors heavily in its treatment of agency determinations for or against preemption.¹⁶

B. *The Presumption Against Preemption*

Regardless of the particular preemption doctrine involved, preemption questions are enormously important. The extent to which federal law displaces state law determines the legal regime or regimes under which particular cases will be decided and, more broadly, the balance of power between the states and the federal government.¹⁷ Overpreemption threatens to extinguish the states’ traditional sovereign roles as checks on federal power and guarantors of individual rights,¹⁸ while underpreemption

12. See Nelson, *supra* note 8, at 228.

13. Crosby v. Nat’l Foreign Trade Council, 530 U.S. 363, 372–73 (2000); see, e.g., Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142–43 (1963) (upholding a California statute where dual compliance with both state and federal law was possible).

14. Hillsborough Cnty. v. Automated Med. Labs., Inc., 471 U.S. 707, 713 (1985) (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

15. See *id.* at 714 (noting that a defendant advancing an argument of implied preemption “faces an uphill battle”); Mary J. Davis, *The Battle over Implied Preemption: Products Liability and the FDA*, 48 B.C. L. REV. 1089, 1132–33 (2007) (arguing that the Supreme Court demands strong clear evidence of implied conflict because it is a weak substitute for congressional intent).

16. See *infra* Part II.B.

17. Nelson, *supra* note 8, at 225–26.

18. See Betsy J. Grey, *Make Congress Speak Clearly: Federal Preemption of State Tort Remedies*, 77 B.U. L. REV. 559, 613–18 (1997) (arguing that overpreemption threatens states control over tort law); Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 16–18 (2007) (arguing that Congress has institutional tendencies to defer politically sensitive issues to bureaucratic resolution and that less

threatens the efficiency provided by uniform federal regulatory schemes.¹⁹ And of course, in any given case, the parties will have their own self-interested views on the proper law to apply as well.

Recognizing the delicacy and importance of preemption questions, the Supreme Court has generally applied a presumption against preemption of state law, requiring from Congress a clear statement of intent to preempt before it is willing to find state law preempted by a federal statute.²⁰ The Court's classic statement of the principle is found in *Rice v. Santa Fe Elevator Corp.*²¹: “[W]e start with the assumption that the historic police powers of the States [are] not to be superseded by [a] Federal Act unless that was the clear and manifest purpose of Congress.”²² This presumption, which effectively forces congressional deliberation by requiring an explicit preemption clause or its equivalent, can be justified under a number of theories.

First, the presumption represents an embrace of federalism values and a reluctance to risk incidental interference with state sovereignty.²³ By forcing Congress to speak clearly, the Court protects parallel state legal regimes from federal incursion and thereby promotes all of the traditionally recited advantages of divided sovereignty.²⁴ Second, the presumption against preemption also reflects an empirical assumption regarding legislative intent. Given our nation's traditional system of limited federal government and respect for state autonomy, courts may be justified in presuming, absent clear evidence to the contrary, that federal legislators do not intend their efforts to displace existing state law.²⁵

preemption would permit states to force issues onto the congressional agenda through state legislative efforts); S. Candice Hoke, *Preemption Pathologies and Civic Republican Values*, 71 B.U. L. REV. 685, 710–14 (1991) (arguing that overpreemption threatens public participation in state political processes).

19. See Alan Schwartz, *Statutory Interpretation, Capture, and Tort Law: The Regulatory Compliance Defense*, 2 AM. L. & ECON. REV. 1, 20–22 (2000) (arguing that inefficiencies result from nonuniform state safety standards).

20. Mendelson, *supra* note 2, at 752.

21. 331 U.S. 218 (1947).

22. *Id.* at 230.

23. See Mendelson, *supra* note 2, at 756 (citing as an example the *Medtronic* Court's description of federal preemption as a “serious intrusion into state sovereignty” (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 488 (1996))).

24. See *id.* at 756–57 & n.76 (collecting sources and including government responsiveness, promotion of self-governance, efficiency, and interstate competition for citizens in a list of federalism's traditionally recited values).

25. *Id.* at 755.

C. *The Chevron Doctrine*

Like the presumption against preemption, the *Chevron*²⁶ doctrine also relies on a presumption regarding congressional intent to interpret difficult statutory language. The doctrine presumes that Congress would prefer agencies to resolve ambiguities in the statutes they administer and so directs courts to defer to an agency's reasonable interpretation of an ambiguous statute. Courts first apply the "traditional tools of statutory construction"²⁷ to determine "whether Congress has directly spoken to the precise question at issue."²⁸ If the statutory language is ambiguous, however, courts infer congressional intent to delegate interpretive authority to the agency and defer to the agency's construction as long as it is reasonable.²⁹

The inference of intent to delegate is, in many instances, quite reasonable. Congress is a body of generalists with no particular expertise other than lawmaking itself. When drafting or updating the organic statutes underlying complex regulatory regimes, Congress is predictably eager to shift responsibility for technical policy minutiae to experts in executive agencies.³⁰ Congress may also have other reasons for granting decisionmaking authority to agencies. By enacting skeletal statutes and relying on agencies to fill in the details, Congress is able to take credit for broad initiatives while avoiding blame for more detailed and sometimes controversial policy choices.³¹ Thus, statutory ambiguity on a particular question may be a sign that Congress preferred to use imprecise language and thereby delegate ultimate interpretive authority to the agency

26. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

27. *Id.* at 843 n.9.

28. *Id.* at 842.

29. *Id.* at 843–44 (distinguishing explicit and implicit delegations of rulemaking authority and directing that courts defer to the reasonable interpretation of the agency in ambiguous cases).

30. David Epstein & Sharyn O'Halloran, *The Nondelegation Doctrine and the Separation of Powers: A Political Science Approach*, 20 CARDOZO L. REV. 947, 966–67 (1999) ("As policy becomes more complex, Congress will rationally rely more on the executive branch to fill in policy details. . . . The first and most obvious reason is that the executive branch is filled (or can be filled) with policy experts who can run tests and experiments, gather data, and otherwise determine the wisest course of policy, much more so than can 535 members of Congress and their staff.").

31. See DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* 99–106 (1993) (describing the political cover that broad delegation provides to Congress); Theodore J. Lowi, *Two Roads to Serfdom: Liberalism, Conservation and Administrative Power*, 36 AM. U. L. REV. 295, 296 (1987) ("[T]he delegation of broad and undefined discretionary power from the legislature to the executive branch deranges virtually all constitutional relationships and prevents attainment of the constitutional goals of limitation on power, substantive calculability, and procedural calculability.").

responsible for administering the statute. The *Chevron* doctrine recognizes this principle and incorporates it into an interpretive canon of deference to agencies' reasonable interpretations of ambiguous statutes.

D. Indeterminacy and Incompatibility: Canons as Rules of Thumb

Though intuitive and quite helpful, both the presumption against preemption and the *Chevron* doctrine are, like all canons of construction, frequently fallible generalizations. They are useful "rules of thumb" but do not always produce the correct result.³² One can imagine, for instance, scenarios in which Congress does not explicitly state its intent to preempt state law but where its intent to do so is so clear that it would be foolish for a court to allow the presumption against preemption to determinatively affect its interpretation. Indeed, entire branches of preemption doctrine have been built around such cases:

Even in the absence of an express preemption clause, the Court sometimes is willing to conclude that a federal statute wholly occupies a particular field and withdraws state lawmaking power over that field. The Court has indicated that a federal regulatory scheme may be "so pervasive" as to imply "that Congress left no room for the States to supplement it." . . . In essence, judges who infer such "field" preemption are reading an implicit preemption clause into the federal statute . . .³³

Where congressional intent to preempt is clear, that intent wins out despite the general presumption in favor of state sovereignty.

One can imagine similar exceptions to the *Chevron* doctrine. Even where statutory language is imprecise and an agency presents a reasonable construction of that language, deference may be inappropriate if an inference of congressional intent to delegate would be unreasonable. As with the presumption against preemption, the *Chevron* doctrine's rule of thumb can be overcome by sufficiently strong evidence that the canon will incorrectly discern congressional intent in a case or set of cases.³⁴

32. See *Varity Corp. v. Howe*, 516 U.S. 489, 511 (1996) ("Canons of construction . . . are simply rules of thumb which will sometimes help courts determine the meaning of legislation." (internal quotation marks omitted)); see also James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 7–14, 29–69 (2005) (providing an overview of recent academic treatment of the canons and an empirical assessment of their use by modern courts).

33. Nelson, *supra* note 8, at 227 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

34. See Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 872 (2001) (arguing that, because *Chevron* should only apply in cases where Congress intends it to apply, it is important to determine whether Congress would want agencies to have primary interpretational authority).

Accordingly, in a series of post-*Chevron* cases the Court has gradually softened *Chevron*'s rule of deference, carving out exceptions where congressional intent to delegate seems unlikely. In *Adams Fruit Co. v. Barrett*³⁵ the Court hinted in dicta that *Chevron*-style deference might be inappropriate if Congress did not intend to delegate authority to decide a particular interpretive question.³⁶ Ten years later, in *Christensen v. Harris County*,³⁷ the Court declined to extend deference to an agency interpretation contained in an opinion letter rather than in a formal regulation.³⁸ Citing lack of formality and force of law, the Court appears to have been motivated by a concern that Congress would not have intended to delegate authority to the agency to make important interpretive decisions in such an informal way.³⁹

The pattern of exception carving culminated in *United States v. Mead Corp.*⁴⁰ where the Court transformed *Chevron*'s hard-and-fast rule of deference to agency interpretations to a more context-specific inquiry into congressional intent to delegate. Similar to *Christensen*, the *Mead* Court declined to extend deference to an agency interpretation contained within an informal agency tariff classification rather than a formal regulation.⁴¹ The Court pushed *Christensen*'s logic a step further, however, reasoning that

35. 494 U.S. 638 (1990).

36. In *Adams Fruit Co.*, a group of injured migrant farm workers, who had already received workers' compensation benefits under Florida state law, brought a claim for further benefits under the motor vehicle safety provisions of the Migrant and Seasonal Agricultural Worker Protection Act (AWPA). *Id.* at 640–41. Their employer, Adams Fruit Company, argued that the Court should defer to the Department of Labor's position that where state workers' compensation is available, it should serve as the exclusive remedy. *Id.* at 649–50. The Court rejected this contention, finding the statutory language to unambiguously support the farm workers' position. *Id.* at 650–51. Moreover, the Court reasoned that even were the language ambiguous, Congress had established the Judiciary and not the Department of Labor as the adjudicator of private actions arising under the statute:

Congress clearly envisioned, indeed expressly mandated, a role for the Department of Labor in administering the statute by requiring the Secretary to promulgate *standards* implementing AWPA's motor vehicle provisions. This delegation, however, does not empower the Secretary to regulate the scope of the judicial power vested by the statute. Although agency determinations within the scope of delegated authority are entitled to deference, it is fundamental that an agency may not bootstrap itself into an area in which it has no jurisdiction.

Id. at 650 (internal quotation marks omitted) (citations omitted).

37. 529 U.S. 576 (2000).

38. *Id.* at 586–87.

39. *Id.* at 587 (stating that interpretations contained in opinion letters do not merit the *Chevron*-style deference they otherwise would if made pursuant to notice-and-comment rulemaking).

40. 533 U.S. 218 (2001).

41. *Id.* at 231–32.

even an agency interpretation embodied in a formal regulation would not necessarily be entitled to deference.⁴² Such formality is a “very good indicator” of congressional intent to delegate but is not alone dispositive.⁴³ In every instance the Court must ascertain whether the *Chevron* presumption of intent to delegate is reasonable or whether, given the unique circumstances of the case, the doctrine yields an incorrect picture of congressional intent.

Thus, neither the presumption against preemption nor the *Chevron* doctrine of deference erects an unyielding, across-the-board rule. Both interpretive principles are subject to qualification where the Court finds their underlying rationales to be inapplicable to a particular category of cases.⁴⁴ The difficulty comes, of course, in delineating areas of inapplicability in a way that is principled and rule-like enough to preserve the utility of the general rule. One might, for instance, along with Justice Scalia, question whether the *Mead* exception to *Chevron* has been framed so loosely as to eviscerate the rule altogether, leaving only a naked inspection of intent to delegate.⁴⁵ Such objections raise important questions of proper exception drawing but do not undermine the enterprise itself.⁴⁶ Passing over questions of the appropriateness of this or that particular exception, the concern here is simply to illustrate the defeasibility of the canons in the presence of sufficiently strong evidence of contrary congressional intent.

42. *Id.* at 229–30. Neither does a lack of formality necessarily preclude *Chevron*-style deference. Post-*Mead*, formality is neither necessary nor sufficient to support judicial deference.

43. *Id.* at 229.

44. The *Christensen–Mead* line is the Court’s most direct effort to curtail the scope of *Chevron*, but it has engaged in other instances of exception making as well. See Lisa Schultz Bressman, *Chevron’s Mistake*, 58 DUKE L.J. 549, 550–59, 589–602 (discussing two additional cases that eschew traditional *Chevron* analysis where its result would be inconsistent with a theory of congressional delegation: *Zuni Public School District No. 89 v. Department of Education*, 550 U.S. 81 (2007), and *Gonzales v. Oregon*, 546 U.S. 243 (2006)).

45. See *Mead*, 533 U.S. at 240–41 (Scalia, J., dissenting) (“Today the Court collapses [the *Chevron*] doctrine, announcing instead a presumption that agency discretion does not exist unless the statute, expressly or impliedly, says so. . . . The Court has largely replaced *Chevron*, in other words, with that test most beloved by a court unwilling to be held to rules (and most feared by litigants who want to know what to expect): th’ol’ ‘totality of the circumstances’ test.”).

46. Courts are in agreement, for instance, that agencies’ views on the proper interpretation of the Administrative Procedure Act (APA) are not entitled to *Chevron* deference because no particular agency is assigned a special role in construing that statute. See *Metro. Stevedore Co. v. Rambo*, 521 U.S. 121, 137 n.9 (1997) (noting that *Chevron* deference to an agency interpretation of the APA’s burden of proof provision would be inappropriate); cf. *Rapaport v. Office of Thrift Supervision*, 59 F.3d 212, 216 (D.C. Cir. 1995) (determining *Chevron*-style deference to be inappropriate where multiple agencies are responsible for administering a single statute).

In addition to the possibility that in a particular category of cases a canon's rationale will be undercut by stronger, contradictory evidence of congressional intent, interpretive canons are indeterminate in another way as well: often two canons will come into conflict, each pointing toward an opposing result. This possibility of conflict and consequent indeterminacy is amply demonstrated by Karl Llewellyn who, in his classic critique of the canons, presented twenty-eight canons, each side-by-side with its respective countercanon.⁴⁷ To say that the canons are indeterminate, however, is not to disclaim their usefulness as interpretive tools. A rule of thumb is useful not for its perfect accuracy but for its broad applicability and ease of application. Canons may be overridden on occasion by superior evidence of statutory meaning without diminishing their utility as tools of interpretation.⁴⁸

The possibility of conflicting canons can be understood as a subset of the more general possibility, discussed in the previous section, that in a particular set of cases superior evidence of congressional intent may defeat a canon. Contrary canons of interpretation are simply one particular way in which congressional intent can be discerned. As in the more general case, the difficulty in resolving canon conflicts lies in determining where each canon should and should not apply (that is, which canon ought to prevail in a particular set of cases) and drawing lines in a rule-like enough fashion that the utility of the general rule is not obliterated.

E. Defeasibility, Conflict, and Chevron

Notwithstanding interpretive canons' usefulness as tools of statutory construction, they are, as the previous sections have shown, merely rules of thumb, defeasible in the face of sufficiently strong evidence of contrary congressional intent. So, inevitably, when the canons are invoked to solve novel, delicate, or otherwise extraordinary interpretive questions, we begin to question their applicability. We may wonder whether a canon's rationale is applicable at all or, if there is a conflict, which of two canons should win out. These problems pop up with particular severity in the preemption context.

As the modern administrative state has expanded and agencies have become responsible for administering a substantial number of statutes that raise preemption issues, courts have been forced to wrestle with a

47. See Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401–06 (1950).

48. See ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 25–27 (Amy Gutman ed., 1997); CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* 147–57 (1990).

particularly vexing conflict between the *Chevron* doctrine—which requires deference to an agency’s reasonable construction of an ambiguous statute—and the presumption against preemption, which requires a “clear statement” from Congress before a court may conclude that a federal statute preempts state law.⁴⁹ Does the federalism-inspired interpretive canon presuming against preemption serve as a “traditional tool[] of statutory construction”⁵⁰ resolving ambiguity and obviating the need for *Chevron* deference to agency views? Or does the peculiar competence of agencies within their statutory spheres require deference even regarding such sensitive questions as preemption? And if agency views require deference, should that deference be tempered in light of countervailing federalism concerns? Such questions reflect a deep tension among the *Chevron* doctrine, the presumption against preemption, and their underlying rationales. The question is whether, in the context of preemption, the conflict between *Chevron* and its rationale is severe enough to warrant an exception to the general rule. And if so, how should that exception be framed?

Chevron’s rule of deference is based on the presumption that Congress intends to delegate interpretive authority to agencies to resolve statutory ambiguities. Where such a presumption would be unreasonable, however, *Chevron*’s rationale is undercut. Pointing to the importance of federalism values, agency inexperience in considering preemption questions, the risk of arbitrary decisionmaking, and the danger of agency self-aggrandizement, Nina Mendelson suggests that preemption questions present just the sort of exceptional circumstance that requires amendment of the general *Chevron* rule.⁵¹ She and other commentators suggest that courts should grant something less than full *Chevron*-style deference to agency determinations of preemption.⁵²

As with all instances of exception making, the most difficult question (once it is determined that an exception is indeed necessary) is how best to draw the exception. Line drawing of this sort requires a careful balance. On the one hand, courts must be careful to carve out from the general rule only those instances where the underlying rationale of *Chevron* is inapplicable. On the other hand, overly fine distinctions or case-by-case applications of *Chevron*’s underlying logic risk destroying the utility of *Chevron* as a rule of decision. The remainder of this Article will first examine the

49. See generally Mendelson, *supra* note 2, at 739–40.

50. See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984).

51. See, e.g., Mendelson, *supra* note 2, at 779–97.

52. See *supra* notes 2–5 and accompanying text.

Court's halting treatment of the *Chevron*–preemption puzzle and second present a novel, rule-like framework for addressing *Chevron*–preemption cases.

II. THE COURT'S *CHEVRON*–PREEMPTION JURISPRUDENCE

A. *Doctrinal Inconsistency and Unpredictable Decisions*

The Court's treatment of *Chevron*'s applicability to questions of federal preemption is notoriously convoluted.⁵³ Even now, twenty-six years after the *Chevron* decision, it is unclear to what extent *Chevron*'s rule of deference applies in preemption cases. The ambiguity is threefold. First, though the cases generally seem to suggest that full, *Chevron*-style deference is inappropriate in preemption cases,⁵⁴ and at least a few Justices are willing to formally renounce the doctrine,⁵⁵ the Court has yet to disavow *Chevron*'s

53. See Davis, *supra* note 15, at 1093–94 (“The proper weight of an agency’s determination of preemptive scope has generated much debate within the Supreme Court and among commentators. The Court has not answered the question of how an agency position affects the operation of implied conflict preemption doctrine, nor has it addressed how the historic primacy of state regulation in the area of health and safety is to be considered in the balance.” (footnote omitted)); Paul E. McGreal, *Some Rice With Your Chevron?: Presumption and Deference in Regulatory Preemption*, 45 CASE W. RES. L. REV. 823, 826 (1995) (“While the Court has spoken on regulatory preemption, it has neither explained nor justified its position. Instead, the Court merely has applied *statutory* preemption rules to *regulatory* preemption cases. To the extent that statutory and regulatory preemption are different—under the Court’s larger jurisprudence—difficulty may be expected in applying the same set of preemption rules to both areas.”); Mendelson, *supra* note 2, at 739 (“When faced with an agency interpretation addressing a statute’s preemptive effect, courts have trod unevenly in reconciling *Chevron* deference with the *Rice* presumption against preemption.”); Nelson, *supra* note 8, at 232–33 (“Most commentators who write about preemption agree on at least one thing: Modern preemption jurisprudence is a muddle.”); Sharkey, *supra* note 2, at 454 (“It is exceedingly difficult to demonstrate that any consistent principle or explanatory variable emerges from the Supreme Court’s products liability preemption jurisprudence.”).

54. See, e.g., *Wyeth v. Levine*, 129 S. Ct. 1187, 1201 (2009) (citing *Skidmore* and reasoning that the weight accorded to an agency’s preemption determination depends on its “thoroughness, consistency, and persuasiveness”).

55. See *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 41 (2007) (Stevens, J., dissenting) (“Even if the [agency] did intend its regulation to pre-empt the state laws at issue here, it would still not merit *Chevron* deference. No case from this Court has ever applied such a deferential standard to an agency decision that could so easily disrupt the federal–state balance. . . . [U]nlike Congress, administrative agencies are clearly not designed to represent the interests of States, yet with relative ease they can promulgate comprehensive and detailed regulations that have broad pre-emption ramifications for state law. For that reason, when an agency purports to decide the scope of federal pre-emption, a healthy respect for state sovereignty calls for something less than *Chevron* deference.” (citation omitted) (internal quotation marks omitted)).

applicability in preemption cases. Without a clearly articulated standard, *Chevron's* applicability must be relitigated in each successive case, and regulated parties are left wondering whether agency determinations will withstand judicial scrutiny.

Second, even in the not-entirely-certain category of cases in which the court deems “something less” than *Chevron* deference to be appropriate, it is unclear what precisely something less entails. Thus, in *Medtronic, Inc. v. Lohr*⁵⁶ the Court was “substantially informed by”⁵⁷ an agency’s view of its regulations’ preemptive scope, whereas in *Wyeth v. Levine*⁵⁸ the Court accorded deference only based on the “thoroughness, consistency, and persuasiveness”⁵⁹ of the agency’s explanation, and in *Riegel v. Medtronic, Inc.*⁶⁰ the Court proceeded “[n]either accepting nor rejecting the proposition that [a] regulation can properly be consulted to determine [a] statute’s meaning.”⁶¹ The Court’s unwillingness or inability to articulate a clearly defined standard has invited heavy criticism and no shortage of proposals from commentators.⁶² Until the Court charts a clear course, the doctrine remains in limbo.

Third, the Court’s view on the presumption against preemption is severely fractured. In any given preemption case it is nearly impossible to predict whether the presumption will make an appearance.⁶³ Commentators have long criticized the Court’s halfhearted and haphazard application of the doctrine.⁶⁴ Where it makes an appearance, a finding against preemption is sure to follow, but predicting its appearances is difficult at best.⁶⁵ The Court’s recent three-way split in *Wyeth v. Levine* regarding the presumption’s applicability illustrates the problem nicely.

56. 518 U.S. 470 (1996).

57. *Id.* at 495. Compare the *Medtronic* Court’s language with that of *Geier v. American Honda Motor Co.*, 529 U.S. 861, 863 (2000), according “some weight” to an agency’s conclusion that state law would stand as an obstacle to federal goals.

58. 129 S. Ct. 1187 (2009).

59. *Id.* at 1201 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

60. 128 S. Ct. 999 (2008).

61. *Id.* at 1011.

62. See *supra* Parts I, II.E.

63. Compare, e.g., *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 484–85 (1996) (applying the presumption to interpret the Medical Device Act), with *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999 (2008) (failing even to mention the presumption when interpreting the same statute).

64. See Sharkey, *supra* note 2, at 458 (“Here, I join a veritable chorus of scholars pointing out the Court’s haphazard application of the presumption. In the realm of products liability preemption, the presumption does yeoman’s work in some cases while going AWOL altogether in others.” (footnotes omitted)); Calvin Massey, “Joltin’ Joe Has Left and Gone Away”: *The Vanishing Presumption Against Preemption*, 66 ALB. L. REV. 759 (2003).

65. Sharkey, *supra* note 2, at 506 (“[W]here [the presumption] rears its head, its effect is seemingly outcome determinative.”).

Although the *Wyeth* majority relied on the presumption as a “cornerstone” of its decision, the dissent countered that the presumption is irrelevant in the context of conflict preemption.⁶⁶ Concurring in judgment and splitting the Court a third way, Justice Thomas reserved the question of the applicability of the presumption, finding its resolution unnecessary given the clarity of the relevant statutes and regulations.⁶⁷ Given such diversity of views even among the Justices, it is unsurprising that commentators criticize the doctrine as an ad hoc rationalization lacking explanatory power.⁶⁸

B. *Explaining the Court’s Haphazard Approach*

Commentators have rightly criticized the Court’s inconsistent approach to *Chevron*–preemption questions. The cases present a haphazard jumble of noncommittal and ambiguous statements of selective deference to agency determinations of preemption. Echoing that vein of criticism, this Article began with a critique of the Court’s inconsistency. Before moving on, it is useful to pause and reflect on the reasons underlying the Court’s reluctance to articulate a clear standard. Several fundamental causes appear to animate the Court’s jurisprudence, and an examination of these causes explains both why the Court has been reluctant to apply across-the-board *Chevron* deference to agency preemption determinations and, perhaps more interestingly, what an appropriate framework for *Chevron*-style deference might look like in the preemption context.

1. *Sidestepping the Danger of Conflicting-Canon Gridlock*

At root, the Court’s inconsistency stems from the clash between two competing interpretive canons. *Chevron* suggests deference to agency views, whereas the presumption against preemption counsels against preemption absent strong evidence of congressional intent. Where the two conflict—that is, where an agency views state law as an obstacle to congressional statutory objectives but Congress does not itself clearly state an intent to preempt—the canons pull in opposite directions, leaving the Court with no clear-cut answer. Faced with such a conflict, the Court could simply assert the superiority of one canon over the other and proceed to apply that canon as usual.⁶⁹ This would be the proper course were it obvious that the

66. *Wyeth v. Levine*, 129 S. Ct. 1187, 1194–95 & n.3 (2009); *id.* at 1228–29 (Alito, J., dissenting).

67. *Id.* at 1208 n.2 (Thomas, J., concurring).

68. Sharkey, *supra* note 2, at 506.

69. This is the approach of those who advocate across-the-board *Chevron* deference, treating preemption cases no differently than other instances of agency interpretation, and also of those who argue that no deference at all is due to agency preemption determinations.

rationale underlying one canon or the other was simply inapplicable given the unique circumstances of agency preemption determinations. Both canons, however, retain at least some persuasive force. It is neither unreasonable to suppose that Congress would intend an expert agency to make some preemptive determinations nor to suppose that Congress would speak clearly if it intended a statute to have preemptive effect. Therefore, it would be a mistake to privilege one canon to a position of complete superiority over the other.

Recognizing this, the Court has avoided conclusively embracing or rejecting the *Chevron* doctrine's applicability to preemption questions.⁷⁰ Instead, the Court has sidestepped canon-conflict gridlock by digging beneath the canons and focusing directly on congressional intent. In *Wyeth*, for example, the Court began its analysis with the "cornerstone" principle that "the purpose of Congress is the ultimate touchstone in every preemption case."⁷¹ Later, considering the preemptive effect of a preamble published with a Food and Drug Administration (FDA) regulation, the Court refused deference to the agency's view because it conflicted with the Court's interpretation of congressional intent.⁷² This focus on congressional intent results from an intense consciousness of the Court's role as a protector of federalism and skepticism regarding the applicability of *Chevron's* underlying rationale.⁷³ Preemption determinations implicate federalism values, the consideration of which is outside agencies' traditional realms of expertise.⁷⁴ So, rather than blindly defer to agency determinations where the *Chevron* rationale may be inapplicable, the Court is careful to ascertain whether Congress intended a preemptive result.

See, e.g., Young, *supra* note 2, at 869–71 (arguing that any deference is inappropriate in preemption cases); *Leading Cases*, *supra* note 2, at 272 (advocating universal application of *Chevron*).

70. *See supra* Part II.A.

71. *Wyeth*, 129 S. Ct. at 1194–95 (majority opinion) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)).

72. *Id.* at 1201.

73. *Cf. Mendelson*, *supra* note 2, at 755–56 (attributing the Court's use of the presumption against preemption to a "reluctance to risk incidental statutory interference with federalism values and with state sovereignty" and "attaching substantive value to federalism goals"); *id.* at 779–91 (suggesting that agency determinations regarding preemption should not be accorded *Chevron* deference because agencies lack institutional competence to make such decisions).

74. *Id.*

2. *Selective Use of the Presumption Against Preemption*

This focus on congressional intent helps to explain the Court's selective and seemingly haphazard application of the presumption against preemption.⁷⁵ Though the Court has expressed greater-than-average concern for congressional intent in the context of preemption, it still works within the traditional doctrinal framework. One element of that framework is the presumption against preemption. Rather than abandon the presumption in the face of canon conflict, the Court has, by selective application, converted the presumption into an important component of its intent-focused jurisprudence.

Although the presumption's influence has gradually waned over the last few decades, it has retained its force in cases of implied preemption, where congressional intent is least certain.⁷⁶ The principle's selective invocation allows it to serve as a thumb on the balance against preemption where the Court is least certain of congressional intent. Thus, the presumption was absent from *Riegel v. Medtronic, Inc.*, where an express preemption clause revealed an unmistakable intent to preempt,⁷⁷ but was invoked with force in *Wyeth*, where congressional intent was far less certain. Of course, the presumption is not invoked in every implied preemption case. As the *Wyeth* dissent points out, for instance, the presumption was notably absent in *Geier v. American Honda Motor Co.*⁷⁸ Even there, however, the presumption's use

75. See *supra* Part II.A.

76. See *Altria Grp., Inc. v. Good*, 129 S. Ct. 538, 556 (2008) (Thomas, J., dissenting) ("Since *Cipollone*, the Court's reliance on the presumption against pre-emption has waned in the express pre-emption context."). Compare *Rowe v. N.H. Motor Transp. Ass'n.*, 552 U.S. 364 (2008), *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999 (2008), *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1 (2007), *Engine Mfrs. Ass'n. v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246 (2004), *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002), *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000), *United States v. Locke*, 529 U.S. 89 (2000), and *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995) (failing to apply the presumption against preemption in the presence of an express preemption clause), with *Wyeth*, 129 S. Ct. at 1194–95, *Pharm. Research and Mfrs. of Am. v. Walsh*, 538 U.S. 644, 666 (2003), *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 365–66 (2002), *Johnson v. Fankell*, 520 U.S. 911, 918 (1997), *California v. ARC Am. Corp.*, 490 U.S. 93, 101 (1989), and *Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 716 (1985) (applying the presumption in the context of implied preemption). But see *Altria Group*, 129 S. Ct. at 543–44 (majority opinion); *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005); *Lohr*, 518 U.S. at 485; *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 518 (1992) (applying the presumption in the context of express preemption).

77. 128 S. Ct. at 1003.

78. *Wyeth*, 129 S. Ct. at 1228–29 (Alito, J., dissenting) ("[T]he *Geier* Court specifically rejected the argument (again made by the dissenters in that case) that the 'presumption against pre-emption' is relevant to the conflict pre-emption analysis. Rather than invoking

appears tied to congressional intent. *Geier* was ultimately decided on a theory of implied preemption,⁷⁹ but the statute at issue did contain an express preemption clause.⁸⁰ Congress had explicitly stated its intent to preempt *something*; the Court was simply faced with the question of whether it might implicitly have intended to preempt other aspects of state law as well. Thus, while there was a danger of overpreempting within an area already the target of some preemption, there was no danger of preempting an area of law where Congress had intended no preemption whatsoever.

In the absence of a congressionally expressed intent to preempt, the Court is hesitant to infringe on areas of traditional state sovereignty, and it demonstrates that concern by its selective use of the presumption against preemption. This insight explains why the Court's use of the principle appears haphazard at first glance. By selective application, the principle's invocation curtails the reach of agency power where the Court is concerned that congressional intent may be lacking.

3. *Varying Deference to Agency Determinations*

The Court's inconsistent standard of deference to agency determinations of preemption, like its inconsistent application of the presumption against preemption, appears to hinge on its concern for congressional intent and state sovereignty.⁸¹ The Court reserves its most deferential language for cases where congressional intent to preempt is clear. Where, on the other hand, congressional intent is less certain, the Court either neglects to mention agency views or treats them as useful only to the extent persuasive. Thus in *Medtronic, Inc. v. Lohr*, the Court was "substantially informed by"⁸² the agency's view, and in *Geier*, the agency's position was entitled to "some weight,"⁸³ but in *Wyeth*, where an express preemption clause was lacking, the Court treated the agency's view as merely one among many potentially

such a 'presumption,' the Court emphasized that it was applying 'ordinary,' 'longstanding,' and 'experience-proved principles of conflict pre-emption.'" (citations omitted)).

79. *Geier*, 529 U.S. at 866.

80. *Id.* at 867.

81. Deference to agency determinations and the presumption against preemption are two sides of the same interpretive coin, and so it is unsurprising that both doctrines' applicability in a given case depends on the same considerations. If the presumption against preemption is accorded its full weight as a traditional tool of statutory construction capable of resolving textual ambiguities, statutes would rarely, if ever, be found to contain the ambiguously preemptive language necessary for *Chevron* deference to apply. The Court can either give *Chevron* its full weight or give the presumption its full weight, but not both. See Mendelson, *supra* note 2, at 745–46.

82. *Id.* at 495.

83. *Geier*, 529 U.S. at 883.

persuasive authorities.⁸⁴ When certain of congressional intent to preempt, the Court appears willing to accord substantial weight to agency views, even on questions that implicate federalism.

4. *The Chevron–Mead Failure*

We are now in a position to understand the Court's unwillingness to define the relationship between the *Chevron* doctrine of deference and the presumption against preemption. Confronted with a clash between the canons, the Court sidesteps the gridlock by focusing on congressional intent. But it does not always sidestep in the same direction. In some cases, particularly express preemption cases where congressional intent to preempt is fairly clear, the Court is willing to rely heavily on agency determinations. In such cases the *Chevron* rationale of congressional delegation to superior agency expertise appears quite reasonable. Congress has an objective in mind that will require some preemption of state law, but rather than define the precise contours of that preemption, Congress delegates that decision to an expert agency. In other cases, where congressional intent is less clear, the Court is unwilling to defer to agency determinations. There the *Chevron* rationale is undercut because Congress has not clearly articulated an intent to preempt, and the agency is claiming power not only to define the scope of preemption but to determine whether there is to be any preemption at all. It is much less likely that Congress intended to delegate this greater power. So, focusing on intent, the Court selectively invokes the presumption against preemption or deference to agency determinations depending on which is a more accurate indicator of likely congressional intent in a given case.

This focus on intent explains why the Court has been unwilling to articulate a clear standard. Neither across-the-board *Chevron* deference, nor across-the-board *Skidmore* deference, nor even across-the-board nondeference would permit the Court to focus on congressional intent. The Court's jurisprudence suggests a desire to vary deference based on the presence or absence of congressional intent to delegate decisionmaking authority to the agency, and any across-the-board framework is, by definition, incapable of such variation.

Consider a rule of universal *Chevron* deference. As a number of scholars have noted, such a regime would risk errant intrusion into areas of traditional state sovereignty because agencies, while experts within certain congressionally delegated spheres, lack competence to balance power

84. *Wyeth v. Levine*, 129 S. Ct. 1187, 1201 (2009).

between the federal and state governments.⁸⁵ Although in some instances congressional delegation of narrow preemptive power to an agency would be quite reasonable,⁸⁶ such a delegation would be unthinkable (or at least highly unusual) in other contexts. Across-the-board *Chevron* deference would sweep up both sets of cases together, ignoring their significant differences.

Even *Mead*'s modification of the *Chevron* doctrine to account for congressional intent to delegate fails to remedy the difficulty. *Mead*'s focus is on formality: "[E]xpress congressional authorization[] to engage in the process of rulemaking" is "a very good indicator of delegation meriting *Chevron* treatment."⁸⁷ Such formal rulemaking authority, while arguably⁸⁸ a useful indicator of intent to delegate generally, is a less useful indicator of intent to delegate *preemptive* authority.

In some circumstances, congressional silence regarding preemption may quite reasonably be viewed as an ambiguous gap into which an agency may insert its reasonable interpretation via its rulemaking power. Where Congress expressly indicates an intent to preempt all state law that poses an obstacle to a particular statutory objective, for instance, it intentionally leaves the scope of preemption vague.⁸⁹ Under such circumstances, the grant of rulemaking authority to the administering agency indicates a desire to have that gap filled by the agency. Where, however, Congress says nothing at all about preemption, it is much harder to read that silence, even if accompanied by rulemaking authority, as an implicit delegation of preemptive authority. Preemption is the sort of question about which

85. See *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 41 (2007) (Stevens, J., dissenting) (arguing that "state sovereignty calls for something less than *Chevron* deference" because administrative agencies' regulations have "broad pre-emption ramifications for state law" despite their role in representing only federal interests); Mendelson, *supra* note 2, at 779–91.

86. For instance, power to define the precise contours of an express preemption clause. See *infra* Part III.B discussing, as examples, the Medical Device Act and the Motor Vehicles Safety Act.

87. *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001).

88. *Mead*'s formulation requires both that an agency be granted official rulemaking authority by Congress and, further, that the agency exercise that authority in promulgating its resolution of the statutory ambiguity. *Id.* As Justice Scalia notes in dissent, the connection between a grant of rulemaking authority and intent to delegate is not itself particularly strong, and it is even harder to see why an agency should be required to exercise that authority when pronouncing its interpretation. If Congress intended to delegate authority it should make no difference how an agency makes its view known. *Id.* at 246 (Scalia, J., dissenting).

89. Express but ambiguously broad preemption of this sort is quite common. See, e.g., *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996) (considering the preemptive effect of the Medical Device Act's preemption clause).

silence is often not ambiguous, and so the presence or absence of rulemaking power says little about Congress's intent to delegate.

Of course, *Mead* leaves open the possibility that factors other than force-of-law formality could guide the Court's analysis of congressional intent. Notice-and-comment rulemaking is neither necessary nor sufficient for deference to an agency's view.⁹⁰ At least in theory, then, the Court could avoid *Mead*'s force-of-law test and engage in naked examination of congressional intent to delegate. In practice, however, the *Mead* doctrine has been applied in a rule-like fashion. And furthermore, were the doctrine actually to devolve into a case-by-case search for congressional intent, *Chevron* would lose all utility as a bright-line rule, and all *Chevron* cases would be thrown into the same unpredictable chaos that currently grips the *Chevron*–preemption line. In short, all of Justice Scalia's worst fears would be realized.⁹¹

A rule of across-the-board *Skidmore* deference would suffer from similar defects. *Skidmore* deference initially presents itself as an appropriately middling alternative to a strict regime of *Chevron* deference or across-the-board nondeference. It avoids problems of agency incompetence to strike federal–state power balances by varying deference to agency interpretations depending on their “thoroughness, consistency, and persuasiveness.”⁹² A number of commentators have suggested such an approach,⁹³ and the Court itself at times appears inclined toward such a rule.⁹⁴ If deference varies based on agency competence, what could possibly go wrong? The Court's love–hate relationship with the doctrine hints at the answer.

Although the Court sometimes applies *Skidmore*-like deference to agency determinations of preemption, other times it hints at something more—“*Skidmore*-with-bite” it might be called.⁹⁵ The Court applies deference in

90. See *Mead*, 533 U.S. at 230–31 (majority opinion) (“That said, and as significant as notice-and-comment is in pointing to *Chevron* authority, the want of that procedure here does not decide the case, for we have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded.”).

91. See *id.* at 246–61 (Scalia, J., dissenting) (opposing vigorously *Mead*'s exception to the *Chevron* rule).

92. *Wyeth v. Levine*, 129 S. Ct. 1187, 1201 (2009) (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

93. See *supra* notes 2–5.

94. See, e.g., *Wyeth*, 129 S. Ct. at 1201 (noting that deference depends on the agency's “thoroughness, consistency, and persuasiveness” and citing *Skidmore*); *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999, 1009 (2008) (finding it unnecessary to consider the agency's view because the statute itself was clear, but noting that had it considered the agency's position, “mere *Skidmore* deference would seemingly be at issue”).

95. See, e.g., *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 495 (1996) (where the Court was “substantially informed by” the agency's view).

this way because it recognizes that not all agency preemption decisions are created equal. Sometimes Congress may very well intend to delegate limited preemptive authority to agencies. To apply the traditional *Skidmore* analysis of agency persuasiveness would be to second-guess Congress's decision to delegate. Something more akin to *Chevron* deference is really in order, and so the Court applies *Skidmore-with-bite*.

A pure rule of *Skidmore* deference cannot accommodate this need. Although an across-the-board *Skidmore* regime would eliminate the possibility of errant preemption due to agency inexpertise where Congress does not intend to delegate, it cannot provide full *Chevron*-style deference in those situations where congressional intent so requires. In such cases a pure *Skidmore* regime would take interpretive power given to agencies by Congress and subject it to the determination of a judiciary applying the notoriously malleable *Skidmore* test.⁹⁶

The unpredictable nature of the Court's *Chevron*-preemption jurisprudence ultimately stems from its focus on congressional intent. Any across-the-board framework would be too inflexible to produce the varying levels of deference that are appropriate in preemption cases, and so the Court has avoided committing to a particular approach. In failing to provide a consistent framework, however, the Court has sacrificed predictability. Under *Chevron*, regulated parties can rely on courts to uphold agency determinations. But in the preemption context, all certainty has been lost. The analysis has devolved into a case-by-case assessment of congressional intent.

III. UNMUDDLING THE COURT'S *CHEVRON*-PREEMPTION JURISPRUDENCE

The Court's inconsistency in *Chevron*-preemption cases stems from the perceived need to undertake a case-by-case search for congressional intent. Congressional intent to delegate preemptive authority varies widely from case to case, and rather than sweep up all cases into the same across-the-board framework of deference, the Court has applied deference selectively in some cases but not others. The Court has carved out an area of law where the *Chevron* rule of deference is not universally applicable and, within

96. See Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235, 1237 (2007) ("All agree that *Skidmore* is less deferential than *Chevron*, but how much less and in what way remain open questions."). A rule of across-the-board nondeference would suffer all of the same flaws as a pure *Skidmore* regime. A rule of general nondeference would prevent errant agency determinations of preemption, but it would ignore the will of Congress where Congress decided to delegate limited preemptive authority to expert agencies.

that area, replaced the *Chevron* rule with a policy of case-by-case weighing of congressional intent.

This imprecise and unpredictable approach has attracted a great deal of academic criticism, and rightly so.⁹⁷ Regardless of which side of the rules–standards debate one takes, the Court’s jurisprudence is entirely unsatisfactory. Not only has the Court failed to produce a clear rule, it has failed even to produce a consistent fuzzy standard. Given this inconsistency, the uniformity of an across-the-board *Skidmore* or *Chevron* rule is an attractive alternative. Bright-line rules are by nature over- and underinclusive, and imperfect accuracy is a necessary sacrifice to obtain predictability.

But the Court has rightly resisted such approaches. The stakes are unusually high in preemption cases, and the Court should ensure that it is Congress initiating any and all preemptive lawmaking.⁹⁸ Relying on an across-the-board assumption of *Skidmore* or *Chevron* deference disrespects actual congressional intent because, in the context of preemption, neither a presumption of full deference nor a presumption of limited deference is appropriate across all cases. Sometimes Congress intends to delegate preemptive authority to agencies, and in such cases *Chevron* deference is warranted and mere *Skidmore* deference is overly intrusive. Other times, when Congress does not intend to delegate preemptive authority, even *Skidmore* deference is inappropriate. Across-the-board solutions fail to account for Congress’s intent to delegate because preemption is unique. Because of preemption’s importance and agencies’ relative lack of expertise, statutory ambiguity does not always (but sometimes does) imply congressional intent to delegate.

A. A Bright-Line Alternative to the Court’s Haphazardry

Faced with a choice between rule-like certainty and respect for congressional intent, the Court has sided with congressional intent. But it need not make this either–or decision. A bright-line rule carefully crafted to account for congressional intent would avoid both horns of the dilemma, providing much needed certainty while still respecting *Chevron*’s variable applicability to preemption questions.

97. See *supra* Part II.A.

98. So great is Justice Thomas’s concern for state sovereignty in preemption cases that he would even go so far as to abandon the Court’s obstacle preemption jurisprudence altogether. Instead he would find preemption only where Congress has clearly spoken or it would be impossible to comply with both state and federal requirements. See *Wyeth*, 129 S. Ct. at 1204–08 (Thomas, J., concurring).

The Court's recent decisions point to a possible solution. The Court, guided in large part by its concern to protect federalism and its respect for congressional intent, has balanced the *Chevron* doctrine and presumption against preemption quite differently depending on the presence or absence of an express preemption clause.⁹⁹ When considering a statute with an express preemption clause, the Court is much less likely to invoke the presumption against preemption and much more likely to defer to preemptive agency determinations. Alternatively, when considering a statute that lacks an express preemption clause, the Court is less deferential to agency determinations and more likely to apply the presumption against preemption.

This pattern is unsurprising given the Court's focus on intent. Congress speaks most clearly when it utilizes an express preemption clause. But the Court should rely on the presence or absence of an express preemption clause as much more than a strong indicator of congressional intent. It should replace its fuzzy, intent-focused analysis with a bright-line rule of full *Chevron* deference to agency interpretations when a statute contains an express preemption clause and nondeference in the absence of such a clause. Such a rule would provide the certainty of a bright-line rule while still respecting congressional intent. Furthermore, it would reconcile the purposes underlying both the *Chevron* doctrine and the presumption against preemption and relieve tension between the doctrines by allocating to each determinative power within an exclusive category of cases.

B. *Respecting Congressional Intent and State Sovereignty*

A rule that varies deference based on the presence or absence of an express preemption clause closely follows congressional intent to delegate. Where Congress has expressly stated an intent to preempt state law but has left the statute ambiguous as to the scope of that preemption, it is reasonable to infer an intent to delegate authority to the administering agency to determine the appropriate scope of preemption. For instance, in *Medtronic, Inc. v. Lohr* the Court considered the preemptive effect of the Medical Devices Act of 1976, which reads in pertinent part: “[N]o State . . . may establish or continue in effect with respect to a [medical] device . . . any requirement—(1) which is different from, or in addition to, any requirement applicable under this chapter . . . and (2) which relates to the safety or effectiveness of the device.”¹⁰⁰ Such language is clearly intended to preempt *something*, but the scope of preemption is left

99. See *supra* Part II.B.2–3.

100. Medical Device Act of 1976 § 521, 21 U.S.C. § 360k (2006).

unelaborated. Given its intentional vagueness, it is hard to read this language as anything but an intentional delegation of preemptive authority to the agency responsible for administering the statute. Indeed, the Court itself all but concluded as much:

The FDA regulations interpreting the scope of [the statute's] pre-emptive effect support the [plaintiffs'] view, and our interpretation of the pre-emption statute is substantially informed by those regulations. . . . Because the FDA is the federal agency to which Congress has delegated its authority to implement the provisions of the Act, the agency is uniquely qualified to determine whether a particular form of state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," and, therefore, whether it should be pre-empted.¹⁰¹

Where Congress has clearly expressed an intent to preempt state law but left the scope of that preemption vague, courts can reasonably presume an intent to delegate and full *Chevron*-style deference is in order. Doubts of agency competency and canons respecting traditional areas of state sovereignty have no place where Congress has expressed an intent to displace state law and affirmed its faith in the administrative agency's competency to handle the task.

Full *Chevron* deference is occasionally in order even in somewhat less obvious cases. In *Geier v. American Honda Motor Co.*,¹⁰² for instance, the Court considered the preemptive effect of the National Traffic and Motor Vehicle Safety Act,¹⁰³ which includes both an express preemption clause and a

101. *Medtronic*, 518 U.S. at 495–96 (footnote omitted) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). Note, though, that the Court refrained from granting full *Chevron*-style deference to the agency's view. Its determinations only "substantially informed" the Court. *Id.* Justice Breyer, concurring in part and in the judgment, was even more explicit regarding the deference due to an agency under such circumstances:

[T]he MDA's [Medical Device Act's] pre-emption provision is highly ambiguous. That provision makes clear that federal requirements may pre-empt state requirements, but it says next to nothing about just when, where, or how they may do so. . . . Thus, Congress must have intended that courts look elsewhere for help as to just which federal requirements pre-empt just which state requirements, as well as just how they might do so

[T]his Court has previously suggested that, in the absence of a clear congressional command as to pre-emption, courts may infer that the relevant administrative agency possesses a degree of leeway to determine which rules, regulations, or other administrative actions will have pre-emptive effect."

Id. at 505–06. (Breyer, J., concurring in part and concurring in the judgment) (citing, *inter alia*, *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)).

102. 529 U.S. 861 (2000).

103. National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §§ 1381–1431 (1988).

savings clause explicitly preserving state common law.¹⁰⁴ In that case, after finding the plaintiff's negligence claim not expressly preempted, the Court considered the possibility of obstacle preemption.¹⁰⁵ When considering obstacle preemption in the shadow of an express preemption clause, the Court should be deferential to reasonable agency views.¹⁰⁶ In such cases Congress has already clearly expressed an intent to preempt some state law, and the agency is an expert within its sphere of authority. An inference of intent to delegate in such circumstances is at least as reasonable as the inference¹⁰⁷ of congressional intent to preempt that is implicit in any finding of obstacle preemption.¹⁰⁸

In both types of cases the concerns that typically militate against the application of *Chevron* deference to agency preemption determinations are absent. Where Congress is silent on the question of preemption, Courts are rightly hesitant to defer to agencies' preemptive decisions. The Constitution empowers Congress, not executive agencies, to preempt state

104. The Act's preemption clause reads as follows:

Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.

Id. § 1392(d). The effect of that clause was tempered, however, by the Act's savings clause: "Compliance with [a federal safety standard] does not exempt any person from any liability under common law." *Id.* § 1397(k).

105. *Geier*, 529 U.S. at 869–70 (concluding that neither a savings clause nor an express preemption clause prohibits the ordinary workings of obstacle preemption). The dissenters in *Geier* disputed the majority's consideration of obstacle preemption after an express preemption clause has already been found to be inapplicable. *Id.* at 900 n.16 (Stevens, J., dissenting). Without taking a position on that debate, this Article simply assumes that such analysis is sometimes appropriate and considers the level of deference due.

106. In *Geier* the agency expressed its interpretation only in its brief to the Court. *See id.* at 911. In light of *Mead*, an agency would now likely need to express its view more formally to merit deference.

107. The obstacle preemption doctrine assumes that Congress would have intended to displace state law that poses an obstacle to federal objectives. *See Nelson, supra* note 8, at 228–29 ("So-called 'obstacle preemption' potentially covers not only cases in which state and federal law contradict each other, but also all other cases in which courts think that the effects of state law will hinder accomplishment of the purposes behind federal law.").

108. In recent years commentators have advanced strong arguments that the Court should curtail or eliminate its use of implied preemption doctrines. I do not intend, here, to take a position on the advisability of obstacle preemption as a general matter. I merely note that as long as the Court continues to embrace the doctrine, it should apply the appropriate level of deference to agency views. *See id.* at 229 n.16; *Wyeth v. Levine*, 129 S. Ct. 1187, 1204–08 (2009) (Thomas, J., concurring) (criticizing the Court's obstacle preemption jurisprudence).

law,¹⁰⁹ and agency decisions are not subject to the political and procedural safeguards that protect states against preemptive congressional action. Agencies lack the direct democratic accountability of Congress, and their actions are not restrained by the elaborate procedural requirements of the federal legislative process.¹¹⁰ These arguments have less force, however, where Congress has made a decision to preempt state law and the only question is the scope of that preemption. In such cases, the question of preemption has already been subjected to the rigors of the democratic process. Where Congress has spoken clearly but imprecisely in favor of preemption, Courts should defer to reasonable agency determinations of preemptive scope.

Where, on the other hand, Congress has said nothing at all about an intent to preempt state law, it is much less likely that Congress intended to delegate preemptive authority to the agency. The possibility of illegitimate federal incursion into spheres of state sovereignty looms large. The Court's recent decision in *Wyeth v. Levine* provides a useful example. There, the Court considered the preemptive effect of the Food, Drug, and Cosmetic Act (FDCA) in relation to the plaintiff's common-law negligence claim.¹¹¹ The defendant, Wyeth, argued that even though the statute contains no express preemption clause, it should nonetheless be read to preempt the plaintiff's claim because state negligence law stands as an obstacle to Congress's purpose of creating a uniform federal regulatory regime.¹¹² In support of its preemption argument, Wyeth cited a preamble to a 2006 FDA regulation in which the agency declared that the FDCA should be

109. U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."); see Bradford R. Clark, *Process-Based Preemption*, in PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM'S CORE QUESTION 192, 192–93 (William W. Buzbee ed., 2009) (noting the Supremacy Clause's negative implication that state law governs in the absence of "supreme Law" and that the Senate holds an absolute veto over the adoption of every source of law identified by the Supremacy Clause as supreme law).

110. See Young, *supra* note 2, at 869–70 ("The states have no direct role in the 'composition and selection' of federal administrative agencies, and much of the point of such agencies is to be more efficient lawmakers than Congress. Agency action thus evades both the political and the procedural safeguards of federalism." (footnotes omitted)). See generally Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000); Herbert Wechsler, *The Political Safeguards of Federalism: The Rôle of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

111. *Wyeth*, 129 S. Ct. at 1191.

112. *Id.* at 1193–94.

read to establish both a floor and a ceiling for drug labeling, preempting conflicting State labeling laws.¹¹³

Unlike both the Medical Device Act and the Motor Vehicles Safety Act, the FDCA contains no express preemption clause. In the absence of an express preemption clause, the Court was rightly critical¹¹⁴ of the agency's interpretation:

If Congress thought state-law suits posed an obstacle to its objectives, it surely would have enacted an express pre-emption provision at some point during the FDCA's 70-year history. But despite its 1976 enactment of an express pre-emption provision for medical devices, Congress has not enacted such a provision for prescription drugs. Its silence on the issue, coupled with its certain awareness of the prevalence of state tort litigation, is powerful evidence that Congress did not intend FDA oversight to be the exclusive means of ensuring drug safety and effectiveness.¹¹⁵

Where Congress has not spoken regarding preemption, courts should be skeptical of agency views. Indeed, they should be more than skeptical; they should be completely nondeferential. Where Congress is silent, its intent to delegate preemptive authority to an agency is least plausible, and the possibility of unauthorized federal intrusion is at its highest. Even *Skidmore* deference would unacceptably undervalue federalism and flout congressional intent. As applied, the *Skidmore* standard tends to be highly deferential to agency views.¹¹⁶ And even if applied in the less deferential fashion that the Court sometimes employs,¹¹⁷ *Skidmore* would interfere with Congress's ability to call the preemptive shots.¹¹⁸

In the absence of an express preemption clause assuring congressional intent to preempt, agency views should be accorded no special weight.

113. *Id.* at 1200; Requirements on Content and Format of Labeling for Human Prescription Drug and Biological Products, 71 Fed. Reg. 3922, 3934–35 (Jan. 24, 2006) (codified at 21 C.F.R. pts. 201, 314, 601 (2011)).

114. The Court did, however, grant the agency's position *Skidmore*-like deference based on its "thoroughness, consistency, and persuasiveness." *Wyeth*, 129 S. Ct. at 1201.

115. *Id.* at 1200.

116. See Hickman & Krueger, *supra* note 96, at 1280–81 ("[A]nalysis of 106 identified *Skidmore* applications in the federal courts of appeals demonstrates that, in a strong majority of cases, the *Skidmore* doctrine represents a bona fide standard of review, rather than merely an excuse for reviewing courts to follow their own interpretive preferences. Additionally, the evidence shows that *Skidmore* review is highly deferential—less so than *Chevron*, but still weighted heavily in favor of government agencies over their challengers.").

117. See *id.* at 1252–53 (reading *Christensen v. Harris County*, 529 U.S. 576, 587 (2000), to apply a particularly nondeferential version of the *Skidmore* standard).

118. See Young, *supra* note 2, at 891 ("What any version of *Skidmore* appears to rule out, moreover, is any sort of presumption *against* the agency's interpretation, such as that which the *Rice* presumption against preemption would impose if the agency's interpretation displaced state law.").

Where, however, Congress has expressed its intent to preempt clearly but has only vaguely defined the statute's preemptive scope, agencies should be accorded full *Chevron*-style deference.¹¹⁹ This approach would provide a much more rule-like and predictable framework than the Court's current case-by-case analysis while still preserving state sovereignty and respecting congressional intent.

C. Consistency with Chevron's Rationale and Reconciliation of Conflicting Canons

Not only would a rule of variable deference predicated on express preemption respect state sovereignty and congressional intent, it would also reconcile the *Chevron* rule of deference with the presumption against preemption by allocating to each an independent sphere of influence. The various across-the-board proposals for *Chevron*-preemption deference resolve the tension between the two canons in one of two ways. First, blending together the two offsetting concerns and producing a happy medium, several commentators have suggested *Skidmore* deference as the universal solution in *Chevron*-preemption cases.¹²⁰ This approach successfully reconciles the canons but at the expense of ignoring their full force.

In cases where Congress almost certainly did not intend to delegate preemptive authority to an agency, undermining *Chevron*'s rationale, *Skidmore* applies even though nondeference and application of the presumption against preemption would be a more appropriate solution. In cases where Congress did intend to delegate authority and *Chevron*'s rationale does apply, *Skidmore* is applied in its stead. In both instances a

119. With this proposed rule I do not intend to suggest that the presence or absence of an express preemption clause qualitatively distinguishes two distinct types of congressional action for only one of which deference is due to agency views. The qualitative distinction between statutes that do and do not demand deference hinges solely on congressional intent. I suggest merely that the presence or absence of an express preemption clause is a predictable, text-based proxy for such intent, reliance on which would be superior to the Court's current approach. Like any bright-line rule, it is both over- and underinclusive. Congress may sometimes intend delegation and fail to include an express preemption clause, or vice versa.

Rules of this sort suffer another common limitation as well: they are definitionally incapable of accommodating fine distinctions in legislative intent. If, for instance, without expressly indicating so, Congress intended a middling standard of judicial review between *Chevron* and nondeference, or delegation of authority only to decide a particular preemptive question, the framework would be unable to produce the intended result. A text-based rule of variable deference tracks congressional intent more closely than do across-the-board rules, but as it remains a bright-line rule, it still suffers their familiar shortcomings, though to a lesser degree.

120. See *supra* note 5 and accompanying text.

single one-size-fits-all standard is applied, ignoring the fit of the canons' rationales.

Second, another set of commentators, rather than blend the conflicting canons together into a happy medium, pits them in a fight to the death, maximizing the victor across all cases.¹²¹ Such solutions, which claim either that the interests underlying the presumption against preemption trump *Chevron* or vice versa, ignore an entire set of cases where the competing canon's rationale is actually the stronger of the arguments. Across-the-board nondeference, for instance, would withhold deference even where Congress has included an express preemption clause and seems to have intended an agency to resolve the statute's ambiguous preemptive scope.

Neither across-the-board maximization nor across-the-board compromise accurately reflects *Chevron's* waxing and waning force. Deference contingent on the presence of an express preemption clause, however, accounts for the variable applicability of *Chevron* across cases. Consider three factors often cited as weighing against *Chevron* deference in preemption cases: federalism, agency inexperience, and agency self-aggrandizement.¹²²

First, because agencies are not politically accountable directly to the states and their procedure for making law is much freer than Congress's, some argue that agency preemption poses a special danger to state sovereignty.¹²³ *Chevron* deference would be inappropriate, they argue, because it circumvents the traditional safeguards of federalism. But when deference is made contingent on an express preemption clause, this danger is significantly lessened. An agency unilaterally undertaking a decision as to whether there is to be any preemption at all would pose a potentially serious danger to state sovereignty. Only the federal legislature is authorized to exercise such power. But where Congress, a democratically elected and procedurally burdened body has already made a decision to preempt state law, and an agency is tasked with determining only the scope of that preemption, the danger of illegitimate federal incursion is significantly reduced. The agency is working within a limited sphere of delegated authority, and most importantly, *Congress* has already made the decision to displace obstacular state law.

Second, relative agency inexperience is also commonly advanced against *Chevron* deference to preemptive agency interpretations. Agencies are frequently criticized for their "tunnel vision." They tend to focus intensely on particular programmatic objectives to the detriment of broader, system-

121. See *supra* notes 3–4 and accompanying text.

122. See Mendelson, *supra* note 2, at 779–97; Young, *supra* note 2, at 869–71, 890–91.

123. See, e.g., Young, *supra* note 2, at 869–71.

wide goals.¹²⁴ Although agencies have great familiarity with the statute they are responsible for administering, they are relatively inexperienced in allocating power between the federal and state governments.¹²⁵ Given their limited competence to address the constitutional dimension of preemption questions, the argument goes, full *Chevron*-style deference to agency views would be inappropriate in the preemption context.¹²⁶

These criticisms are well founded. Congress is far better suited than agencies to strike the proper federal–state balance of power. But where Congress has already struck the balance in favor of preemption and the only question is preemptive scope, agency competency is no longer such an issue. Agencies are quite well suited to answer questions of this second sort. Their skill is in the particularization of broad policy objectives, and it is precisely this skill that is called into use when Congress ambiguously calls for preemption of any state law that poses an obstacle to its goals. Of course, there may be a bit of overpreemption at the margins. Agencies are most skilled only in determining where uniformity would further federal objectives, not whether a certain level of nonuniformity might nonetheless be desirable in light of federalism values. But such overpreemption would occur only where Congress had already expressed a desire to preempt at least some state law. Furthermore, one might argue that agency federalism expertise is not even relevant to the question of *Chevron* deference once Congress has spoken clearly in favor of preemption. At that point Congress has already devalued federalism in a particular context, and agencies are not responsible for revaluing it in determining preemptive scope.¹²⁷

Third, the danger of agency self-aggrandizement is sometimes cited as weighing against the application of *Chevron* deference. An agency could, by reading an ambiguous statute to preempt state law, increase its own importance by making itself the exclusive regulator. “[A]llowing agencies to define the scope of their own authority runs headlong into the venerable constitutional principle that ‘foxes should not guard henhouses.’”¹²⁸ Where federal preemption is at stake, *Chevron* deference would inappropriately permit an agency to define the limits of its own power.¹²⁹ Where Congress has already expressly preempted some indeterminate amount of state law,

124. See Mendelson, *supra* note 2, at 780–81 (noting as an example environmental agencies’ tendency to focus on eliminating the last bit of risk presented by known hazards rather than addressing more significant risks).

125. See Merrill, *supra* note 2, at 755–56.

126. See Mendelson, *supra* note 2, at 779–85.

127. *Id.* at 790–91.

128. Young, *supra* note 2, at 889 (quoting Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 446 (1989)).

129. See Mendelson, *supra* note 2, at 795–96 n.243.

however, this argument carries somewhat less weight. An agency might face a temptation to expand its power slightly at the edges, but those edges are defined by Congress, which makes the initial call for uniformity. When Congress has already gone so far as to aggrandize an agency with an express preemption clause, only a relatively insignificant amount of additional self-aggrandizement is possible.

Unlike across-the-board deference, a rule of variable deference made contingent on an express preemption clause accounts for *Chevron's* varying applicability in preemption cases. Congress is unlikely to delegate preemptive authority in a way that endangers federalism or risks agency self-aggrandizement. Neither is it likely to delegate questions about which agencies lack expertise. For these reasons *Chevron's* rationale of delegation to agency expertise is undermined in implied preemption cases. Recognizing that *Chevron* deference would be inappropriate and that Congress likely did not intend to delegate preemptive authority, courts should grant no special deference to agency views. Instead they should apply the presumption against preemption along with all other tools in their interpretive arsenal and treat the agency's view as just one coequal voice among many.

This nondeference, however, should not be applied across the board. Just as the presumption against preemption has its exclusive sphere of influence where *Chevron's* rationale is undercut, *Chevron* should enjoy its sphere of influence as well. Where Congress has spoken through an express preemption clause, concerns of federalism, expertise, and self-aggrandizement are outweighed by Congress's expressed intent and *Chevron's* rationale of agency delegation. Ambiguity regarding the scope of express preemption is just the sort of question that Congress might reasonably intend to be decided by an expert agency. Courts should recognize this and defer to reasonable agency interpretations of ambiguous preemptive scope.

Only a rule of variable deference can account for the waxing and waning force of *Chevron's* underlying rationale. Such a rule would relieve the tension between *Chevron* and the presumption against preemption by assigning to each a sphere¹³⁰ of independent influence. Further, it would

130. Note that this framework's provision for independent spheres of influence also resolves, at least in the agency preemption context, the protracted disagreement among the Justices regarding the applicability of the presumption against preemption where a statute contains an express preemption clause. Does the presumption continue to hold force in express preemption cases, militating in favor of a narrow construction, or does the presumption lose force in the face of conclusive preemptive intent? See *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 545 (1992) (Scalia, J., dissenting) (disputing the majority's use of

provide a more rule-like determinate of deference than does the Court's current case-by-case investigation of congressional intent.

D. A Narrow and a Broad Framework for Implementation

A rule of variable deference contingent on express preemption could be grafted onto the Court's current *Chevron*-preemption jurisprudence in at least two ways: one conservative, the other slightly more daring.

1. A Mead-Like Delegation Rule

First, the Court could craft a new rule modeled after *Mead*'s force-of-law test. The *Mead* Court recognized congressional authorization to engage in rulemaking to be "a very good indicator of delegation meriting *Chevron* treatment."¹³¹ Although the *Mead* test itself is not well suited to the preemption context,¹³² the Court could simply announce a new preemption-specific interpretive principle: the presence of an express preemption clause indicates delegation meriting *Chevron* deference, and the absence of such a clause indicates nondelegation.¹³³

This approach would meld neatly with the Court's existing *Chevron*-preemption jurisprudence. The Court has consistently applied something like *Skidmore* deference, but it has varied its use of the presumption against preemption and tailored its application of *Skidmore* deference on a spectrum ranging from *Skidmore*-with-bite to minimal deference. Because, under *Mead*, even a finding of nondelegation results in *Skidmore* deference,¹³⁴ the

the presumption against preemption to narrowly interpret a statute's express preemption clause).

This debate would be rendered largely moot if full *Chevron* deference were granted to an agency's interpretation of an express preemption clause. A court's only interpretive role would be to assess the reasonableness of the agency's construction—an analysis in which the presumption against preemption would be unlikely to play a part. The presumption is useful as a tiebreaking rule of thumb and does not offer the degree of certainty that would be required to support a finding that an agency's interpretation was unreasonable.

131. *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001).

132. *See supra* Part II.B.4.

133. This formulation, unlike the *Mead* test, presents a condition that is both necessary and sufficient for *Chevron* deference. Without a bright-line safe harbor for agency deference, the Court's jurisprudence could fall back into its current pattern of unpredictable case-by-case decisionmaking. *Compare Mead*, 533 U.S. at 230–31 (leaving open the possibility of *Chevron* deference even in the absence of formal agency action), *with id.* at 245–46 (Scalia, J., dissenting) (interpreting the *Mead* majority to announce a more rule-like safe-harbor rule and fearing that the majority's *Chevron* exception making and invocation of the notoriously indeterminate *Skidmore* standard will lead to "protracted confusion").

134. *Id.* at 234 (majority opinion) ("To agree with the Court of Appeals that Customs ruling letters do not fall within *Chevron* is not, however, to place them outside the pale of any

Court could apply a similar range of deference under the proposed framework. Currently the Court reserves its most deferential version of *Skidmore* deference for express preemption cases and its least deferential version of *Skidmore* for implied preemption cases.¹³⁵ The only change that the proposed framework would demand is a transition from *Skidmore*-with-bite to full *Chevron*-style deference. Everything else would remain the same. The Court's decisions would be more predictable because they would be based on a concrete rule, and they would be slightly more deferential to agency views where Congress provides an express preemption clause, but on the whole the Court's decisions would look much as they now do.

The one flaw of this framework, of course, is that it would grant *Skidmore* deference where nondeference would be more appropriate. While the rule would recognize *Chevron*'s full force in express preemption cases, it would ignore the force of the presumption against preemption in implied preemption cases. Agency decisions regarding preemptive scope, made in the shadow of an express preemption clause, suffer from none of the defects that militate against the application of *Chevron* to preemption questions. But where Congress has not spoken, these defects weigh heavily against any deference at all to agency views. The risk of agency self-aggrandizement is at its highest, agencies lack expertise to consider federal–state constitutional issues, and it is unlikely that Congress intended to delegate such power. Under such circumstances nondeference and application of the presumption against preemption and other traditional tools of interpretation are the more fitting solutions.

2. *A Chevron-Based Delegation Rule*

Second, and more daring, the Court could graft a new preemption rule onto *Chevron* itself. *Chevron*'s traditional formulation for review of agency statutory interpretations requires a two-step inquiry: first a court examines the statute to determine whether Congress has “directly spoken to the precise question at issue”;¹³⁶ second, if the statutory language is indeed ambiguous, the question is whether the agency's interpretation is a

deference whatever. *Chevron* did nothing to eliminate *Skidmore*'s holding that an agency's interpretation may merit some deference whatever its form, given the ‘specialized experience and broader investigations and information’ available to the agency, and given the value of uniformity in its administrative and judicial understandings of what a national law requires.” (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 139–40 (1944)).

135. See *supra* Part II.B.2–3.

136. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

reasonable construction of the statute. If both requirements are met, a court must defer to the agency's interpretation.¹³⁷

As we have seen, a rule that makes deference contingent on an express preemption clause allocates nonoverlapping spheres of applicability to the *Chevron* principle and the presumption against preemption. *Chevron*'s rationale wins out in express preemption cases, and the presumption against preemption's rationale wins out in implied preemption cases. It is reasonable to presume congressional intent to delegate preemptive authority where Congress supplies an express preemption clause, and it is reasonable to presume against such delegation where Congress supplies no such clause. If these canons are viewed not only as "winning out" within their respective spheres but as doing so in a very particular way—definitively answering a question of congressional intent—the presumption against preemption that applies absent an express preemption clause can be seen as resolving the *Chevron* inquiry at step one and thus eliminating any need for deference at *Chevron* step two. Put simply, if absent an express preemption clause the presumption against preemption resolves any statutory ambiguity as to delegation of preemptive authority,¹³⁸ *Chevron* deference is applicable in express preemption cases and inapplicable in implied preemption cases.

*U.S. Telecom Ass'n v. FCC*¹³⁹ provides a usefully analogous example. There the Court of Appeals for the District of Columbia Circuit considered whether the Telecommunications Act of 1996¹⁴⁰ permits the Federal Communications Commission (FCC) to subdelegate a portion of its authority under the Act to state commissions.¹⁴¹ Because the statute did not explicitly foreclose the possibility of subdelegation, the FCC argued that its interpretation of the statute to permit subdelegation should be entitled to deference under *Chevron*.¹⁴² The court forcefully rejected this argument at

137. *Id.* at 843–44.

138. Under this formulation the presumption serves not to answer the question of preemption itself but, rather, the question of congressional delegation. It would more accurately be called a "presumption against delegation of preemptive authority" than a "presumption against preemption." The presumption resolves, at *Chevron* step one, only the question of delegation. Otherwise, it would be impossible for a court ever to find in favor of nonexpress varieties of preemption. If the statute contained an express preemption clause, *Chevron* deference would be in order, and if it contained no such clause, it would be found unambiguously nonpreemptive. I do not advocate such a use of the presumption. Rather, at *Chevron* step one, the presumption merely rules out congressional delegation of preemptive authority, not the possibility of preemption itself.

139. 359 F.3d 554 (D.C. Cir. 2004).

140. Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. § 151 (2006).

141. See *U.S. Telecom Ass'n*, 359 F.3d at 564–65.

142. *Id.* at 565.

Chevron step one, finding the statute not even to be ambiguous on the question of subdelegation:

The Commission's plea for *Chevron* deference is unavailing. A general delegation of decision-making authority to a federal administrative agency does *not*, in the ordinary course of things, include the power to subdelegate that authority beyond federal subordinates. It is clear here that Congress has not delegated to the FCC the authority to subdelegate to outside parties. The statutory "silence" simply leaves that lack of authority untouched. In other words, the failure of Congress to use "Thou Shalt Not" language doesn't create a statutory ambiguity of the sort that triggers *Chevron* deference.¹⁴³

Congress need not create a laundry list of every action that an agency is prohibited from undertaking in order to avoid *Chevron*-inducing ambiguity. "Were courts to *presume* a delegation of power absent an express *withholding* of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well."¹⁴⁴ In some contexts congressional silence is best read not as an ambiguity but as a clear intent not to delegate a particular power.

Just as a statute that fails to use the magic words "thou shalt not subdelegate to nonagency bodies" is not truly ambiguous as to subdelegative power, a statute that includes no express preemption clause is not ambiguous as to Congress's desire to delegate preemptive authority to an agency.¹⁴⁵ Federal preemption, like extraagency subdelegation, is an unusual administrative power, and when it is left unmentioned, it is reasonable to read a statute not to confer it. By not speaking, Congress actually speaks quite clearly.

3. *Contrasting the Approaches*

A rule of variable deference enforced at *Chevron* step one is superior to a *Mead*-like rule for several reasons: it offers greater predictability, it more accurately reflects the canon's modes of operation, and it respects the exclusive spheres of *Chevron* and the presumption against preemption. First, and most obviously, a *Chevron*-based rule would provide a much more predictable standard of deference in *Chevron* preemption cases. Both *Mead*

143. *Id.* at 566.

144. *Ry. Labor Executives' Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994) (emphasis in original).

145. As noted *supra* note 138, the statute may, of course, still be ambiguous as to preemptive effect. A court may find a statute clearly not to delegate preemptive authority while still finding, and judicially resolving in favor of implied preemption, an ambiguity regarding the implied preemptive effect of the statutory scheme.

and *Skidmore* provide fairly indeterminate rules of decision, and the incorporation of both into a single rule is a recipe for uncertainty.¹⁴⁶ A *Mead*-like rule could be rendered much more predictable if, contrary to *Mead* itself, the presence of an express preemption clause was made both a necessary and sufficient condition for delegation, but *Skidmore*'s indeterminacy is irredeemable.

Second, a *Chevron*-based rule would more accurately reflect the canons' modes of operation. A *Mead*-like rule would be predicated on the notion that an express preemption clause of ambiguous scope demonstrates an intent to delegate preemptive authority and the lack thereof demonstrates intent not to delegate. But the lack of an indeterminate express preemption clause is more appropriately seen not as nondelegation but as nonambiguity. A statute that includes no express preemption clause unambiguously intends no delegation of preemptive authority, just as a statute making no mention of extraagency subdelegation unambiguously confers no such power.

Third, a rule enforced at *Chevron* step one would, unlike a *Mead*-based rule, fully respect the power of the presumption against preemption. Under *Mead*, an agency is entitled to *Skidmore* deference even if it is found ineligible for full *Chevron* deference.¹⁴⁷ The application of *Skidmore* deference in implied preemption cases (where *Chevron*'s rationale is entirely inapplicable) would needlessly blunt the effect of the presumption against preemption within its sphere of applicability. *Skidmore* as applied tends to be quite deferential and its application could counterbalance or completely outweigh the presumption against preemption.¹⁴⁸ A *Chevron*-based rule, by contrast, would recognize the full force of both canons. In express preemption cases an agency would be entitled to full *Chevron*-style deference and in implied preemption cases it would receive no deference at all, giving the presumption against preemption free range.

Considered collectively, these factors weigh in favor of a *Chevron*-based rule rather than a *Mead*-based one. The first promotes clarity and respects

146. See *United States v. Mead Corp.*, 533 U.S. 218, 246–250 (2001) (Scalia, J., dissenting) (opposing the *Mead* exception to *Chevron* partially on the ground that it would lead to uncertainty in the lower courts). See generally Hickman & Krueger, *supra* note 96, at 1311–20 (presenting an empirical analysis of *Skidmore*'s varied application across 106 cases).

147. See *Mead*, 533 U.S. at 234 (majority opinion) (“To agree with the Court of Appeals that Customs ruling letters do not fall within *Chevron* is not, however, to place them outside the pale of any deference whatever. *Chevron* did nothing to eliminate *Skidmore*'s holding that an agency's interpretation may merit some deference whatever its form, given the specialized experience and broader investigations and information available to the agency, and given the value of uniformity in its administrative and judicial understandings of what a national law requires.” (citation omitted) (internal quotation marks omitted)).

148. See *supra* note 116 and accompanying text.

the scope and rationales of the canons, whereas the second provides somewhat less clarity and deviates from its foundational rationales. Ultimately, however, the choice of *Mead* or *Chevron* is much less significant than the project as a whole. *Chevron* is best, but either would be a significant improvement.

CONCLUSION

This analysis begins the project of unraveling the Court's tangled knot of *Chevron*-preemption jurisprudence. The Court's haphazard decisionmaking stems from its high regard for congressional intent when considering questions that affect the federal-state balance of power. The rule of *Chevron* deference and the presumption against preemption provide conflicting measures of congressional intent, and, rather than universalize one principle or the other, the Court has applied a middling standard of *Skidmore* deference on a sliding scale—sometimes quite deferentially and sometimes almost nondeferentially—depending on its case-by-case analysis of congressional intent.

Critics who propose uniform, across-the-board deference in all cases recognize the flaw in the Court's approach—its unpredictability—but they fail to recognize its merits: respect for congressional intent, state sovereignty, and *Chevron*'s underlying rationale. In express preemption cases, the Court does not need to enforce federalism values through the presumption against preemption because Congress has spoken clearly in favor of displacing state law. And if the scope of preemption is ambiguous, *Chevron*'s presumption of delegation through ambiguity to agency expertise is quite reasonable. On the other hand, where Congress has not spoken clearly through an express preemption clause, *Chevron*'s rationale is particularly weak. Nondeference and application of the presumption against preemption are in order. A regime of uniform deference across all cases is unable to account for *Chevron*'s waxing and waning force.

Instead, the Court should adopt a rule of variable deference that accords full *Chevron*-style deference to agency interpretations of ambiguously broad express preemption clauses and withholds deference altogether where Congress is silent regarding preemption. Such a rule would recognize the factors that underlie the Court's unpredictable case-by-case approach—respect for state sovereignty and congressional intent—while providing the rule-like certainty demanded by the Court's critics.

A COST–BENEFIT INTERPRETATION OF THE “SUBSTANTIALLY SIMILAR” HURDLE IN THE CONGRESSIONAL REVIEW ACT:

CAN OSHA EVER UTTER THE E-WORD (ERGONOMICS) AGAIN?

ADAM M. FINKEL* & JASON W. SULLIVAN**

Introduction.....	708
I. Regulatory Reform and the Congressional Review Act.....	711
A. The 1994 Midterm Elections and Antiregulatory Sentiment.....	711
B. The Contract with America and the CRA.....	715
1. From Moratorium to Congressional Review.....	715
2. Regulatory Reform.....	718
3. The CRA.....	721
II. Exercise of the Congressional Veto	724
A. The OSHA Ergonomics Rule	725
B. Midnight Regulations and Other Threats to Use the CRA.....	728
C. Enforcement of the Substantial Similarity Provision.....	730
III. The Spectrum of Interpretation of “Substantially Similar”.....	734
A. Hierarchy of Possible Interpretations	734
B. How Others Have Interpreted “Substantially the Same”	737
IV. Why “Substantially the Same” Should Not Be Interpreted Ominously	740

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A.	Congressional Intent and Language	741
1.	Events Leading up to Passage	742
2.	Statutory Text	742
3.	The Signing Statement	745
4.	Ergonomics Floor Debate—Substantive Clues	748
5.	Subsequent Activity	749
B.	All or Nothing	750
C.	Deference to Agency Expertise	751
1.	<i>Chevron</i> Deference	751
2.	Ultra Vires Limitation	753
3.	Lawmaking Limitation	755
D.	Good Government Principles	758
1.	Reluctance to Amend Congress’s Delegation to the Agency	759
2.	A Cost–Benefit Justification for Rarely Invoking the Circumvention Argument	760
V.	What Does “Substantially the Same” Really Mean?	761
VI.	Practical Implications for OSHA of a Cost–Benefit Interpretation of the CRA	764
A.	Preconditions for a Sensible Discussion About the Stringency of an Ergonomics Rule	765
B.	Specific Suggestions for Worthwhile Revisions to the Ergonomics Rule	770
VII.	Recommendations to Amend the CRA	777
	Conclusion	783

INTRODUCTION

Congress has always had the power to overturn a specific regulation promulgated by an executive branch agency and, as the author of the underlying statutes under which the agencies regulate, has also always been able to amend those statutes so as to thwart entire lines of regulatory activity before they begin. But in 1996, Congress carved out for itself a shortcut path to regulatory oversight with the passage of the Congressional Review Act (CRA),¹ and can now veto a regulation by passing a joint resolution rather than by passing a law.² There is no question that Congress can now kill a regulation with relative ease, although it has only exercised that ability once in the fifteen years since the passage of the

1. Congressional Review Act of 1996, Pub. L. No. 104-121, tit. II, subtit. E, 110 Stat. 868–74 (codified as amended at 5 U.S.C. §§ 801–808 (2006)).

2. See 5 U.S.C. §§ 801–802 (2006).

CRA.³ It remains ambiguous, however, whether Congress can use this new mechanism to, in effect, due to a regulation what the Russian nobles reputedly did to Rasputin—poison it, shoot it, stab it, and throw its weighted body into a river—that is, to veto not only the instant rule it objects to, but forever bar an agency from regulating in that area. From the point of view of the agency, the question is, “What kind of phoenix, if any, is allowed to rise from the ashes of a dead regulation?” This subject has, in our view, been surrounded by mystery and misinterpretations, and is the area we hope to clarify via this Article.

A coherent and correct interpretation of the key clause in the CRA, which bars an agency from issuing a new rule that is “substantially the same” as one vetoed under the CRA,⁴ matters most generally as a verdict on the precise demarcation of the relative power of Congress and the Executive. It matters broadly for the administrative state, as all agencies puzzle out what danger they court by issuing a rule that Congress might veto (can they and their affected constituents be worse off for having awakened the sleeping giant than had they issued no rule at all?). And it matters most specifically for the U.S. Occupational Safety and Health Administration (OSHA), whose new Assistant Secretary⁵ is almost certainly concerned whether any attempt by the agency to regulate musculoskeletal disorders (“ergonomic” hazards) in any fashion would run afoul of the “substantially the same” prohibition in the CRA.

The prohibition is a crucial component of the CRA, as without it the CRA is merely a reassertion of authority Congress always had, albeit with a streamlined process. But whereas prior to the CRA Congress would have had to pass a law invalidating a rule *and* specifically state exactly what the agency could not do to reissue it, Congress can now kill certain future rules semiautomatically and perhaps render them unenforceable in court. This judicial component is vital to an understanding of the “substantially the same” prohibition as a legal question, in addition to a political one: whereas Congress can choose whether to void a subsequent rule that is substantially similar to an earlier vetoed rule (either for violation of the “substantially the same” prohibition or on a new substantive basis), if a court rules that a reissued rule is in fact “substantially the same” it would be obligated to treat the new rule as void *ab initio* even if Congress had failed to enact a new veto.⁶

3. See *infra* Parts II.A and IV.A.4 (discussing the Occupational Safety and Health Administration (OSHA) ergonomics rule and the congressional veto thereof in 2001).

4. 5 U.S.C. § 801(b)(2).

5. David Michaels was confirmed December 3, 2009. See 155 CONG. REC. S12,351 (daily ed. Dec. 3, 2009).

6. See *infra* notes 122–125 and accompanying text.

In this Article, we offer the most reasonable interpretation of the three murky words “substantially the same” in the CRA. Because neither Congress nor any reviewing court has yet been faced with the need to consider a reissued regulation for substantial similarity to a vetoed one, this is “uncharted legal territory.”⁷ The range of plausible interpretations runs the gamut from the least daunting to the most ominous (from the perspective of the agencies), as we will describe in detail in Part III.A. To foreshadow the extreme cases briefly, it is conceivable that even a verbatim identical rule might not be “substantially similar” if scientific understanding of the hazard or the technology to control it had changed radically over time. At the other extreme, it is also conceivable that any subsequent attempt to regulate in any way whatsoever in the same broad topical area would be barred.⁸ We will show, however, that considering the legislative history of the CRA, the subsequent expressions of congressional intent issued during the one legislative veto of an agency rule to date, and the bedrock principles of good government in the administrative state, an interpretation of “substantially similar” much closer to the former than the latter end of this spectrum is most reasonable and correct. *We conclude that the CRA permits an agency to reissue a rule that is very similar in content to a vetoed rule, so long as it produces a rule with a significantly more favorable balance of costs and benefits than the vetoed rule.*⁹

We will assert that our interpretation of “substantially similar” is not only legally appropriate, but arises naturally when one grounds the interpretation in the broader context that motivated the passage of the CRA and that has come to dominate both legislative and executive branch oversight of the regulatory agencies: the insistence that regulations should generate benefits in excess of their costs. We assert that even if the hazards addressed match exactly those covered in the vetoed rule, if a reissued rule has a substantially different cost–benefit equation than the vetoed rule, then it cannot be regarded as “substantially similar” in the sense in which those words were (and also should have been) intended.

The remainder of this Article will consist of seven Parts. In Part I, we

7. Kristina Sherry, ‘Substantially the Same’ Restriction Poses Legal Question Mark for *Ergonomics*, INSIDE OSHA, Nov. 9, 2009, at 1, 1, 8.

8. See *infra* Part III.A.

9. For a thorough defense of cost–benefit (CBA) analysis as a valuable tool in saving lives, rather than an antiregulatory sword, see generally John D. Graham, *Saving Lives Through Administrative Law and Economics*, 157 U. PA. L. REV. 395 (2008). *But cf.* James K. Hammitt, *Saving Lives: Benefit–Cost Analysis and Distribution*, 157 U. PA. L. REV. PENNUMBRA 189 (2009), <http://www.pennumbra.com/responses/03-2009/Hammitt.pdf> (noting the difficulties in accounting for equitable distribution of benefits and harms among subpopulations when using cost–benefit analysis).

will lay out the political background of the 104th Congress, and then explain both the substance and the legislative history of the Congressional Review Act. In Part II, we discuss the one instance in which the fast-track congressional veto procedure has been successfully used, and mention other contexts in which Congress has considered using it to repeal regulations. In this Part, we also discuss the further “uncharted legal territory” of how the courts might handle a claim that a reissued rule was “substantially similar.” In Part III, we present a detailed hierarchy of possible interpretations of “substantially similar,” and in Part IV, we explain why the substantial similarity provision should be interpreted in among the least ominous ways available. In Part V, we summarize the foregoing arguments and give a brief verdict on exactly where, in the seven-level hierarchy we developed, we think the interpretation of “substantially similar” must fall. In Part VI, we discuss some of the practical implications of our interpretation for OSHA as it considers its latitude to propose another ergonomics rule. Finally, in Part VII, we recommend some changes in the system to help achieve Congress’s original aspirations with less inefficiency and ambiguity.

I. REGULATORY REFORM AND THE CONGRESSIONAL REVIEW ACT

The Republican Party’s electoral victory in the 1994 midterm elections brought with it the prospect of sweeping regulatory reform. As the Republicans took office in the 104th Congress, they credited their victory to public antigovernment sentiment, especially among the small business community. Regulatory reform was central to the House Republicans’ ten-plank Contract with America proposal, which included provisions for congressional review of pending agency regulations and an opportunity for both houses of Congress and the President to veto a pending regulation via an expedited process.¹⁰ This Part discusses the Contract with America and the political climate in which it was enacted.

A. *The 1994 Midterm Elections and Antiregulatory Sentiment*

An understanding of Congress’s goal for regulatory reform requires some brief familiarity with the shift in political power that occurred prior to the enactment of the Contract with America. In the 1994 elections, the Republican Party attained a majority in both houses of Congress. In the House of Representatives, Republicans gained a twenty-six-seat advantage over the House Democrats.¹¹ Similarly, in the Senate, Republicans turned

10. Congressional Review Act of 1996, Pub. L. No. 104-121, tit. II, subtit. E, 110 Stat. 868–74 (codified as amended at 5 U.S.C. §§ 801–808 (2006)).

11. See ROBIN H. CARLE, OFFICE OF THE CLERK, U.S. HOUSE OF REPRESENTATIVES,

their minority into a four-seat advantage.¹²

The 1994 election included a large increase in participation among the business community. In fact, a significant majority of the incoming Republican legislators were members of that community.¹³ Small business issues—and in particular the regulatory burden upon them—were central in the midterm election, and many credited the Republican Party's electoral victory to its antiregulatory position.¹⁴ Of course, it was not only business owners who campaigned to decrease the volume of federal regulation—seeking more autonomy and fewer compliance costs, farmers and local governments also aimed to decrease the size of the federal government.¹⁵

One catalyst for the wave of antigovernment sentiment and the Republicans' related electoral victory was the increasing regulatory burden. By some estimates, the annual costs of federal regulation had increased to more than \$600 billion by 1995.¹⁶

Regulatory reform was not merely an idle campaign promise. Republicans had spent a great deal of effort in prior years to push for fewer regulations, to little avail. When the 104th Congress was sworn in, changes to the regulatory process ranked highly on the Republican Party's agenda.¹⁷ The party leaders were aggressive in their support of regulatory reform. Senator Don Nickles of Oklahoma declared, "We're going to get regulatory reform We can do it with a rifle or we can do it with a shotgun, but we're going to do it."¹⁸

STATISTICS OF THE CONGRESSIONAL ELECTION OF NOVEMBER 8, 1994, at 50 (1995), http://clerk.house.gov/member_info/electionInfo/1994election.pdf (reporting the results of the 1994 U.S. House elections, in which the Republicans won a majority of 230–204).

12. See *id.* (reporting the results of the 1994 U.S. Senate elections, after which the Republicans held a majority of 52–48).

13. Newt Gingrich, *Foreword* to RICHARD LESHNER, *MELTDOWN ON MAIN STREET: WHY SMALL BUSINESS IS LEADING THE REVOLUTION AGAINST BIG GOVERNMENT*, at xi, xiv (1996) ("Of the 73 freshman Republicans elected to the House in 1994, 60 were small businesspeople . . .").

14. See, e.g., Linda Grant, *Shutting Down the Regulatory Machine*, U.S. NEWS & WORLD REP., Feb. 13, 1995, at 70, 70 ("Resentment against excessive government regulation helped deliver election victory to Republicans . . .").

15. See *id.* at 72 ("Business has gained a number of allies in its quest to rein in regulation. State and local governments, ranchers and farmers, for example, also want to limit Washington's role in their everyday dealings.").

16. *Id.* at 70 (reporting the annual costs of federal regulation in 1991 dollars).

17. See, e.g., Bob Tutt, *Election '94: State; Hutchinson Pledges to Help Change Things*, HOUS. CHRON., Nov. 9, 1994, at A35 (reporting that Senator Kay Bailey Hutchinson of Texas named "reduction of regulations that stifle small business" as one of the items that "had her highest priority").

18. Stan Crock et al., *A GOP Jihad Against Red Tape*, BUS. WK., Nov. 28, 1994, at 48

The case that the federal government had been hurtling toward a coercive “nanny state,” and the need to deregulate (or at least to slam on the brakes) in response, was bolstered in the early 1990s by a confluence of new ideas, new institutions, and new advocates.¹⁹ The rise of quantitative risk assessment (QRA), and the rapid increase in the capability of analytical chemistry to detect lower and lower amounts of contaminants in all environmental media and human tissues, made possible an ongoing stream of revelations about the apparent failure to provide an ample margin of safety below safe levels of substances capable of causing chronic disease and ecological damage. But at the same time, the successes of the 1970s and 1980s at picking the low-hanging fruit of the most visible manifestations of environmental pollution (for example, flaming rivers or plumes of soot rising from major point sources) made possible a compelling counterargument: that unlike the first generation of efficient remedies for intolerable problems, the mopping up of the purportedly last small increments of pollution threatened to cost far more than the (dubious) benefits achieved. This view was supported by the passage of time and the apparent lack of severe long-term consequences from some of the environmental health crises of the early 1980s (for example, Love Canal, New York and Times Beach, Missouri).²⁰ In the early 1990s, several influential books advanced the thesis that regulation was imposing (or was poised to impose) severe harm for little or nonexistent benefit. Among the most notable of these were *The Death of Common Sense: How Law Is Suffocating America*,²¹ which decried the purported insistence on inflexible and draconian strictures on business, and *Breaking the Vicious Circle*.²² In this latter book, then-Judge Stephen Breyer posited a cycle of mutual amplification between a public eager to insist on zero risk and a cadre of

(quoting Senator Nickles).

19. This section, and the subsequent section on the regulatory reform legislation of the mid-1990s, is informed by one of our (Adam Finkel’s) experiences as an expert in methods of quantitative risk assessment, and (when he was Director of Health Standards at OSHA from 1995–2000) one of the scientists in the executive agencies providing expertise in risk assessment and cost–benefit analysis during the series of discussions between the Clinton Administration and congressional staff and members.

20. See generally *Around the Nation: Times Beach, Mo., Board Moves to Seal Off Town*, N.Y. TIMES, Apr. 27, 1983, at A18 (reporting attempts by officials to blockade a St. Louis suburb that had been contaminated by dioxin); Eckardt C. Beck, *The Love Canal Tragedy*, EPA J., Jan. 1979, at 16, available at <http://www.epa.gov/aboutepa/history/topics/lovecanal/01.html> (describing the events following the discovery of toxic waste buried beneath the neighborhood of Love Canal in Niagara Falls, New York).

21. PHILIP K. HOWARD, *THE DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA* (1995).

22. STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* (1994).

risk assessors and bureaucrats happy to invoke conservative interpretations of science to exaggerate the risks that remained uncontrolled.²³ Although the factual basis for the claim that risk assessment is too “conservative” (or even that it does not routinely *underestimate* risk) was and remains controversial,²⁴ enough of the individual common assumptions used in risk assessment were so clearly “conservative” (for example, the use of the upper confidence limit when fitting a dose–response function to cancer bioassay data) that this claim had considerable intuitive appeal. Around the same time, influential think tanks and trade associations (for example, the Cato Institute and the American Council on Science and Health) echoed the indictment against overregulation, and various media figures (notably John Stossel) advanced the view that the U.S. public was not just desirous of a safer world than common sense would dictate, but had scared itself into irrationality about how dangerous the status quo really was.²⁵

The scholars and advocates who made the most headway with Congress in the period leading up to the passage of the CRA made three related, compelling, and in our opinion very politically astute arguments that still influence the landscape of regulation fifteen years later. First, they embraced risk assessment—thereby proffering a “sound science” alternative to the disdain for risk assessment that most mainstream and grassroots environmental groups have historically expressed²⁶—although they insisted that each allegedly conservative assumption should be ratcheted back. Second, they advocated for the routine quantitative comparison of benefits (risks reduced) to the cost of regulation, thereby throwing cold water even on large risks if it could be shown that once monetized, the good done by controlling them was outweighed by the economic costs of that control. And perhaps most significantly, they emphasized—particularly in the writings and testimony of John Graham, who went on to lead the White House’s Office of Information and Regulatory Affairs (OIRA) in the George W. Bush Administration—that regulatory overkill was tragic not just because it was economically expensive, but because it could ill serve the very goal of maximizing human longevity and quality of life. Some regulations, Graham and others emphasized,²⁷ could create or exacerbate

23. See *id.* at 9–13.

24. See Adam M. Finkel, *Is Risk Assessment Really Too Conservative?: Revising the Revisionists*, 14 COLUM. J. ENVTL. L. 427 (1989) (discussing numerous flaws in the assertion that risk assessment methods systematically exaggerate risk, citing aspects of the methods that work in the opposite direction and citing empirical evidence contrary to the assertion).

25. *Special Report: Are We Scaring Ourselves to Death? The People Respond* (ABC television broadcast Apr. 21, 1994).

26. See Alon Tal, *A Failure to Engage*, 14 ENVTL. F., Jan.–Feb. 1997, at 13.

27. See John D. Graham & Jonathan Baert Wiener, *Confronting Risk Tradeoffs*, in RISK

similar or disparate risks and do more harm to health and the environment than inaction would. Many other stringent regulations could produce non-negative net benefits, but far less benefit than smarter regulation could produce. Graham famously wrote and testified that going after trace amounts of environmental pollution, while failing to regulate risky consumer products (for example, bicycle helmet requirements) or to support highly cost-effective medical interventions, amounted to the “statistical murder” of approximately 60,000 Americans annually whose lives could have been saved with *different* regulation, as opposed to deregulation per se.²⁸

The stage was thus set for congressional intervention to rationalize (or, perhaps, to undermine) the federal regulatory system.

B. *The Contract with America and the CRA*

When the Republicans in the 104th Congress first began drafting the Contract with America, they intended to stop the regulatory process in its tracks by imposing a moratorium on the issuance of any new regulations. After the Clinton Administration resisted calls for a moratorium, Congress compromised by instead suggesting an amendment to the Administrative Procedure Act (APA) that allowed Congress and the President to veto pending regulations via an expedited process. This compromise led to a subtitle in the Contract with America now known as the Congressional Review Act of 1996. This Part describes the history of the CRA and its substance as enacted.

1. *From Moratorium to Congressional Review*

Even before being sworn in, Republican leaders had their sights set on imposing a moratorium on the issuance of all new federal regulation and urged President Clinton to implement a moratorium himself.²⁹ When he

VERSUS RISK: TRADEOFFS IN PROTECTING HEALTH AND THE ENVIRONMENT 1, 1–5 (John D. Graham & Jonathan Baert Wiener eds., 1995); *see also* Cass R. Sunstein, *Health–Health Tradeoffs* (Chi. Working Papers on Law & Econ., Working Paper No. 42, 1996), *available at* http://www.law.uchicago.edu/files/files/42.CRS_Health.pdf.

28. Republican Representative John Mica stated:

Let me quote John Graham, a Harvard professor, who said, “Sound science means saving the most lives and achieving the most ecological protection with our scarce budgets. Without sound science, we are engaging in a form of ‘statistical murder,’ where we squander our resources on phantom risks when our families continue to be endangered by real risks.

141 CONG. REC. 6101 (1995) (statement of Rep. Mica).

29. *See* Melissa Healy, *GOP Seeks Moratorium on New Federal Regulations*, L.A. TIMES, Dec. 13, 1994, at A32 (reporting that House Speaker Newt Gingrich of Georgia and Senate

declined to do so,³⁰ House Republicans called for a legislative solution—they intended to enact a statute that would put a moratorium on new regulations³¹ so that Congress could implement regulatory reform without the distraction of having the federal bureaucracy continue to operate. A moratorium would also allow any new procedural or substantive requirements to be applied to all pending regulations without creating a “moral hazard”—agencies rushing to get more rules out (especially more unpalatable ones) in advance of a new set of strictures.³² Members of Congress put particular emphasis on the importance of cost-benefit analysis (CBA) and risk assessment, noting that the moratorium might be lifted early if stricter CBA guidelines were implemented.³³ These ideas formed the basis of House Bill 450, the proposed Regulatory Transition Act of 1995, which would have imposed a retroactive moratorium period starting November 20, 1994, and lasting until either December 31, 1995, or the date that CBA or risk assessment requirements were imposed, whichever came earlier.³⁴

The proposed moratorium, despite passing in the House,³⁵ met strong opposition in the Senate. Although Senate committees recommended enactment of the moratorium for largely the same reasons as the House leadership,³⁶ a strong minority joined the Clinton Administration in

Majority Leader Bob Dole of Kansas sent a letter to the White House urging President Clinton to issue an executive order imposing a moratorium on new federal rules).

30. See Letter from Sally Katzen, Exec. Office of the President, Office of Mgmt. & Budget, to Tom DeLay, U.S. House of Representatives (Dec. 14, 1994), *reprinted in* H.R. REP. NO. 104-39, pt. 1, at 38–39 (1995) (expressing, on behalf of President Clinton, concern about the efficiency of federal regulation but declining to issue an executive order imposing a moratorium on federal regulation).

31. See Grant, *supra* note 14, at 70 (“To halt the rampant rule making, Rep. David McIntosh . . . co-sponsored a bill with House Republican Whip Tom DeLay that calls for a moratorium on all new federal regulation . . .”).

32. See H.R. REP. NO. 104-39, pt. 1, at 9–10 (1995) (“[A] moratorium will provide both the executive and the legislative branches . . . with more time to focus on ways to fix current regulations and the regulatory system. Everyone involved in the regulatory process will be largely freed from the daily burden of having to review, consider and correct newly promulgated regulations . . .”); S. REP. NO. 104-15, at 5 (1995) (same).

33. See H.R. REP. NO. 104-39, pt. 1, at 4 (“The moratorium can be lifted earlier, but only if substantive regulatory reforms (cost/benefit analysis and risk assessment) are enacted.”); *see also id.* (noting that agencies would not be barred from conducting CBA during the moratorium).

34. H.R. 450, 104th Cong. §§ 3(a), 6(2) (1995) (as passed by House of Representatives, Feb. 24, 1995).

35. 141 CONG. REC. 5880 (1995) (recording the House roll call vote of 276–146, with 13 Representatives not voting).

36. See S. 219, 104th Cong. §§ 3(a), 6(2) (1995) (as reported by S. Comm. on Governmental Affairs, Mar. 16, 1995) (proposing a moratorium similar to that considered in

opposition to the bill.³⁷ Six of the fourteen members of the Senate Committee on Governmental Affairs argued that a moratorium was overbroad and wasteful, and “does not distinguish between good and bad regulations.”³⁸ In their view, a moratorium would hurt more than it would help, since it would “create delays in good regulations, waste money, and create great uncertainty for citizens, businesses, and others.”³⁹ The Republicans, with only a slim majority in the Senate,⁴⁰ would face difficulty enacting a moratorium.

While House Bill 450 worked its way through the House, Senate Republicans drafted a more moderate (and, from the Senate’s perspective, more realistic) proposal for regulatory reform through congressional oversight. Senate Bill 348 would have set up an expedited congressional review process for all new federal regulations and allowed for their invalidation by enactment of a joint resolution.⁴¹ Faced with a Senate that was closely split over the moratorium bill, Senators Don Nickles of Oklahoma and Harry Reid of Nevada reached a compromise: they introduced the text of Senate Bill 348 as a substitute for the moratorium proposal, which became known as the Nickles–Reid Amendment.⁴² Senate Democrats saw the more nuanced review process as a significant improvement over the moratorium’s prophylactic approach,⁴³ and the Nickles–Reid Amendment (Senate Bill 219) passed the chamber by a roll call vote of 100–0.⁴⁴

Disappointed in the defeat of their moratorium proposal, House leaders did not agree to a conference to reconcile House Bill 450 with Senate Bill

the House, but with a retroactivity clause that reached even further back); *see also* S. REP. NO. 104-15, at 1 (“The Committee on Governmental Affairs . . . reports favorably [on S. 219] . . . and recommends that the bill . . . pass.”).

37. *See* S. REP. NO. 104-15, at 25–32 (calling the moratorium “dangerous” and “unnecessary”); *see also* Letter from Sally Katzen to Tom DeLay, *supra* note 30 (calling the moratorium a “blunderbuss” and noting that it was so overbroad that it would impede regulations addressing tainted meat in the food supply and assisting the diagnosis of illnesses that veterans may have suffered while serving in the Persian Gulf War).

38. S. REP. NO. 104-15, at 25.

39. *Id.* at 26.

40. *See supra* note 12 and accompanying text.

41. S. 348, 104th Cong. (as introduced in Senate, Feb. 2, 1995).

42. *See* 141 CONG. REC. 9426–27 (1995) (statement of Sen. Baucus) (noting withdrawal of the moratorium in favor of a fast-track process for congressional review).

43. *See id.* (“To my mind, this amendment is much closer to the mark. . . . Congress can distinguish good rules from bad. . . . [I]f an agency is doing a good job, the rule will go into effect, and public health will not be jeopardized.”).

44. *Id.* at 9580 (recording the roll call vote); *see* S. 219, 104th Cong. § 103 (as passed by Senate, Mar. 29, 1995) (including the congressional review procedure in lieu of the moratorium proposal).

219.⁴⁵ Pro-environment House Republicans eventually convinced House leaders that their antiregulatory plans were too far-reaching,⁴⁶ and over the following year, members of Congress attempted to include the review provision in several bills.⁴⁷ The provision was finally successfully included in the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), a part of the larger Contract with America Advancement Act (CWAA), as Subtitle E.⁴⁸ The congressional review provision was ultimately enacted without debate, as more controversial parts of the Contract with America occupied Congress's attention.⁴⁹ On March 28, 1996, the CWAA passed both houses of Congress.⁵⁰ In a signing statement, President Clinton stated that he had "long supported" the idea of increasing agency accountability via a review procedure, but he also noted his reservations about some of the provision's specific terms, which he said "will unduly complicate and extend" the process.⁵¹

2. Regulatory "Reform"

At the same time as they considered the idea of a regulatory moratorium, both houses of Congress considered far more detailed and sweeping changes to the way federal agencies could regulate. As promised by Speaker Newt Gingrich, within 100 days of the installation of 104th Congress, House Bill 9, the Job Creation and Wage Enhancement Act was

45. See 142 CONG. REC. 6926–27 (1996) (statement of Rep. Hyde) (summarizing the procedural history of the Congressional Review Act (CRA)).

46. See John H. Cushman, Jr., *House G.O.P. Chiefs Back Off on Stiff Antiregulatory Plan*, N.Y. TIMES, Mar. 6, 1996, at A19 ("Representative Sherwood Boehlert, a Republican from upstate New York who has emerged as the leader of a block of pro-environment House members, persuaded Speaker Newt Gingrich at a meeting today that this legislation went too far.").

47. However, each bill eventually failed for reasons unrelated to the congressional review provision. See 142 CONG. REC. 6926–27 (statement of Rep. Hyde) (discussing the procedural history of the CRA).

48. See Congressional Review Act of 1996, Pub. L. No. 104-121, tit. II, subtit. E, 110 Stat. 868–74 (codified as amended at 5 U.S.C. §§ 801–808 (2006)).

49. See 142 CONG. REC. 6922–30 (statement of Rep. Hyde) (inserting documents into the legislative history of the Contract with America Advancement Act (CWAA) several weeks after its enactment, and noting that "no formal legislative history document was prepared to explain the [CRA] or the reasons for changes in the final language negotiated between the House and Senate"); see also *id.* at 8196–8201 (joint statement of Sens. Nickles, Reid, and Stevens).

50. See *id.* at 6940 (recording the House roll call vote of 328–91 with 12 nonvoting Representatives, including several liberals voting for the bill and several conservatives voting against it); see also *id.* at 6808 (reporting the Senate unanimous consent agreement).

51. Presidential Statement on Signing the Contract with America Advancement Act of 1996, 32 WEEKLY COMP. PRES. DOC. 593 (Apr. 29, 1996).

introduced and voted on.⁵² This bill would have required most regulations to be justified by a judicially reviewable QRA, performed under a set of very specific requirements regarding the appropriate models to select and the statistical procedures to use.⁵³ It also would have required agencies to certify that each rule produced benefits to human health or the environment that justified the costs incurred.⁵⁴ Although the House passed this bill by a vote of 277–141, the Republican Senate majority made no public pledge to reform regulation as had their House counterparts,⁵⁵ and the analogous Senate Bill 343 (the Comprehensive Regulatory Reform Act, sponsored primarily by Republican Robert Dole of Kansas and Democrat J. Bennett Johnston of Louisiana), occupied that body for months of debate.⁵⁶ The Senate took three separate cloture votes during the summer of 1995, the final one falling only two votes shy of the sixty needed to end debate.⁵⁷

Professors Landy and Dell attribute the failure of Senate Bill 343 largely to presidential politics: Senator Dole (who won the Republican nomination that year) may have been unwilling to tone down the judicial review provisions (under which agencies would face remand for deficiencies in their risk assessments or disputes over their cost–benefit pronouncements) because he was looking to his base, while President Clinton threatened a veto as an attempt to “tap into the public’s longstanding support for environmental regulation.”⁵⁸ However, serious substantive issues existed as well. Public interest groups actively opposed the bill; with each untoward event in the news as the debate continued (notably a cluster of deaths and illnesses caused by fast-food hamburgers contaminated with *E. coli*⁵⁹), the

52. See H.R. 9, 104th Cong. §§ 411–24 (1995) (as passed by House, Mar. 3, 1995).

53. See, e.g., *id.* § 414(b)(2) (setting forth specific requirements for the conduct of risk assessments).

54. *Id.* § 422(a)(2).

55. See Marc Landy & Kyle D. Dell, *The Failure of Risk Reform Legislation in the 104th Congress*, 9 DUKE ENVTL. L. & POL’Y F. 113, 115–16 (1998).

56. S. 343, 104th Cong. (1995) (as introduced in Senate, Feb. 2, 1995).

57. 141 CONG. REC. 19,661 (1995) (recording the roll call vote of 58–40).

58. See Landy & Dell, *supra* note 55, at 125.

59. In a hearing on Senate Bill 343, Senator Paul Simon read from a February 22 letter in the *Washington Post*:

“Eighteen months ago, my only child, Alex, died after eating hamburger meat contaminated with *E. coli* 0157H7 bacteria. Every organ, except for Alex’s liver, was destroyed. . . . My son’s death did not have to happen and would not have happened if we had a meat and poultry inspection system that actually protected our children.”

Regulatory Reform: Hearing on S. 343 Before the S. Comm. on the Judiciary, 104th Cong. 19 (1995) (statement of Sen. Simon). Simon urged caution in burdening the agencies with new requirements, saying, “The food we have is safer than for any other people on the face of the earth. I don’t think the American people want to move away from that.” *Id.*; see also James

bill's "green eyeshade" tone (dissect all costs and benefits, giving inaction the seeming benefit of the doubt) became a flashpoint for concern. For its part, the White House aggressively charted its own course of reform, strengthening the executive order giving OIRA broad authority over regulatory agencies and making regulatory transparency and plain language cornerstones of Vice President Gore's broader Reinventing Government initiative.⁶⁰ As Professor John Graham concluded, "The Democratic leadership made a calculation that it was more profitable to accuse Republicans of rolling back protections (in the guise of reform) than it was to work collaboratively toward passage of a bipartisan regulatory reform measure."⁶¹

Nevertheless, the majority of both houses of Congress believed that each federal regulation should be able to pass a formal benefit-cost test, and perhaps that agencies should be required to certify this in each case. Although no law enshrined this requirement or the blueprint for how to quantify benefits and costs, the CRA's passage less than a year after the failure of the Dole-Johnston bill can most parsimoniously be interpreted as Congress asserting that if the agencies remained free to promulgate rules with an unfavorable cost-benefit balance, Congress could veto at the finish line what a regulatory reform law would have instead nipped in the bud.

The CRA can also be interpreted as one of four contemporaneous attempts to salvage as much as possible of the cost-benefit agenda embodied in the failed omnibus regulatory reform legislation.⁶² During 1995 and 1996, Congress also enacted the Unfunded Mandates Reform Act (which requires agencies to quantify regulatory costs to state and local governments, and to respond in writing to suggestions from these stakeholders for alternative regulatory provisions that could be more cost-effective),⁶³ the Regulatory Compliance Simplification Act (which requires

S. Kunen, *Rats: What's for Dinner? Don't Ask*, NEW YORKER, Mar. 6, 1995, at 7 (discussing the continuing importance of Upton Sinclair's *The Jungle* as it relates to regulation of food contaminants).

60. See Exec. Order No. 12,866, 3 C.F.R. 638 (1994), *reprinted as amended* in 5 U.S.C. § 601 app. at 745 (2006); AL GORE, CREATING A GOVERNMENT THAT WORKS BETTER AND COSTS LESS: REPORT OF THE NATIONAL PERFORMANCE REVIEW (1993).

61. John D. Graham, *Legislative Approaches to Achieving More Protection Against Risk at Less Cost*, 1997 U. CHI. LEGAL F. 13, 57 (1997). However, as a participant in numerous executive-branch and congressional discussions at the time, one of us (Adam Finkel) hastens to add that many in the executive agencies believed that the specific provisions in the Dole-Johnston bill were in fact punitive, and were indeed offered merely "in the guise of reform."

62. James T. O'Reilly, *EPA Rulemaking After the 104th Congress: Death from Four Near-Fatal Wounds?*, 3 ENVTL. LAW. 1, 1 (1996).

63. Unfunded Mandates Reform Act of 1995, Pub. L. No. 104-4, 109 Stat. 48 (codified in amended at scattered sections of 2 U.S.C.).

agencies to prepare compliance guides directed specifically at small businesses),⁶⁴ and a series of amendments to the Regulatory Flexibility Act (which makes judicially reviewable the agency’s required analysis of why it should not adopt less costly regulatory alternatives favoring small businesses).⁶⁵ Against this backdrop, the CRA is more clearly seen as serving the primary purpose of giving special scrutiny—before aggrieved parties would have to plead their case in court—to rules that arguably conflict with other strong signals from Congress about the desired flexibility and cost-effectiveness of agency regulatory proposals.

3. *The CRA*

The CRA established a procedure by which Congress can oversee and, with the assent of the President, veto rules promulgated by federal agencies. Before any rule can take effect, the promulgating agency must submit to the Senate, House of Representatives, and the Comptroller General of the Government Accountability Office (GAO) a report containing, among other things, the rule and its complete CBA (if one is required).⁶⁶ The report is then submitted for review to the chairman and ranking member of each relevant committee in each chamber.⁶⁷ Some rules—for example, rules pertaining to internal agency functioning, or any rule promulgated by the Federal Reserve System—are exempted from this procedure.⁶⁸

During this review process, the effective date of any major rule is postponed.⁶⁹ However, the President has discretion to allow a major rule

64. Contract with America Advancement Act of 1996, Pub. L. No. 104-121, tit. II, subtit. A, 110 Stat. 858–59 (codified as amended in scattered sections of 2, 5, 15, and 42 U.S.C.).

65. *Id.* subtit. D, 110 Stat. 864–68 (codified as amended at 5 U.S.C. §§ 601–605, 609, 611 (2006)).

66. 5 U.S.C. § 801(a)(1)(A)–(B) (2006). Senator Pete Domenici of New Mexico inserted the provision requiring submission of the report to the Comptroller General because the Government Accountability Office (GAO) would be able to effectively review the CBA and ensure that the regulation complies with legal requirements, such as unfunded mandates legislation. *See* 141 CONG. REC. 9428–29 (1995) (statement of Sen. Domenici).

67. 5 U.S.C. § 801(a)(1)(C).

68. *Id.* § 804(3) (defining *rule* for the purposes of the CRA so as to exclude certain categories); *id.* § 807 (exempting all regulations promulgated by the Federal Reserve and Federal Open Market Committee from CRA requirements).

69. *Id.* § 801(a)(3). A “major rule” under the CRA is any rule that: (1) has an annual effect on the economy of \$100 million or more; (2) results in a “major increase in costs or prices” for various groups, such as consumers and industries; or (3) is likely to result in “significant adverse effects on competition, employment, investment,” or other types of enterprise abilities. *Id.* § 804(2). Any rule promulgated under the Telecommunications Act of 1996 is not a major rule for purposes of the CRA. *Id.*

that would otherwise be suspended to go into effect for a limited number of purposes, such as national security.⁷⁰ The Act also exempts from suspension any rule for which the agency finds “for good cause . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.”⁷¹

If Congress chooses to repeal any rule through the CRA, it may pass a joint resolution of disapproval via an expedited process. The procedure is expedited “to try to provide Congress with an opportunity to act on resolutions of disapproval before regulated parties must invest the significant resources necessary to comply with a major rule.”⁷² From the date that the agency submits its report of the rule, Congress has sixty days in session to pass a joint resolution.⁷³ The procedure is further expedited in the Senate, where debate over a joint resolution of disapproval is limited to a maximum of ten hours, effectively preventing any possibility of a filibuster.⁷⁴ The House does not have a similar expedited procedure.⁷⁵ When a disapproval resolution passes both houses of Congress, it is presented to the President for signing.⁷⁶ The CRA drafters developed this structure to meet the bicameralism and presentment requirements of the Constitution, which had thwarted an earlier congressional attempt to retain veto power over certain agency actions.⁷⁷

70. *Id.* § 801(c).

71. *Id.* § 808. The good cause exception is intended to be limited to only those rules that are exempt from notice and comment by statute. *See* 142 CONG. REC. 6928 (1996) (statement of Rep. Hyde).

72. 142 CONG. REC. 8198 (joint statement of Sens. Nickles, Reid, and Stevens); *see also* 147 CONG. REC. 2816 (2001) (statement of Sen. Jeffords) (noting that “scarce agency resources are also a concern” that justifies a stay on the enforcement of major rules).

73. 5 U.S.C. § 802(a). The sixty-day window excludes “days either House of Congress is adjourned for more than 3 days during a session of Congress.” *Id.* If an agency submits a report with fewer than sixty days remaining in the session of Congress, the sixty-day window is reset, beginning on the fifteenth day of the succeeding session of Congress. *See id.* § 801(d)(1), (2)(A).

74. *Id.* § 802(d)(2); *cf.* STANDING RULES OF THE SENATE R. XXII § 2 (2007) (requiring the affirmative vote of three-fifths of Senators to close debate on most legislative actions).

75. *See* Morton Rosenberg, *Whatever Happened to Congressional Review of Agency Rulemaking?: A Brief Overview, Assessment, and Proposal for Reform*, 51 ADMIN. L. REV. 1051, 1063 (1999) (criticizing the CRA for its lack of an expedited House procedure because, “As a practical matter, no expedited procedure will mean engaging the House leadership each time a rule is deemed important enough by a committee or group of members to seek speedy access to the floor”).

76. 5 U.S.C. § 801(a)(3)(B). If the President vetoes a resolution disapproving of a major rule, the suspension of the effective date is extended, at a minimum, until the earlier of thirty session days or the date that Congress votes and fails to override the President’s veto. *Id.*

77. U.S. CONST. art. I, § 7, cls. 2–3 (requiring, for a bill to become law, passage by both houses of Congress and either signing by the President or a presidential veto followed by a

Upon the enactment of a joint resolution against a federal agency rule, the rule will not take effect.⁷⁸ If the rule has already taken effect by the time a joint resolution is enacted—for example, if the rule is not a major rule, or if the President has exercised the authority to override suspension of the rule’s effective date⁷⁹—then it cannot continue in force.⁸⁰ The effect of a joint resolution of disapproval is also retroactive: any regulation overridden by the CRA process is “treated as though [it] had never taken effect.”⁸¹

The CRA places a further limitation on agency action following a successful veto, which is the focus of this Article. Not only does the regulation not take effect as submitted to Congress, but the agency may not be free to reissue another rule to replace the one vetoed. Specifically, the CRA provides that:

A rule that does not take effect (or does not continue) under [a joint resolution of disapproval] may not be reissued in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule.⁸²

An agency’s ability to promulgate certain rules after a veto thus turns on the CRA’s meaning of “substantially the same form.” We will discuss the range of scholarly and editorial interpretations of how ominously executive agencies should regard the prohibition against reissuance of “substantially similar” rules in Part III.B. But to foreshadow the main argument, we

two-thirds congressional override in each house of Congress). Under these principles, the Supreme Court struck down § 224(c)(2) of the Immigration and Nationality Act, which allowed a single house of Congress to override the Attorney General’s determination that deportation of an alien should be suspended. *See INS v. Chadha*, 462 U.S. 919, 959 (1983), *invalidating* 8 U.S.C. § 1254(c)(2) (1982). Curiously, while the CRA was intended to give respect to the Constitution’s bicameralism and presentment requirements, 142 CONG. REC. 6926 (statement of Rep. Hyde) (noting that, after *Chadha*, “the one-house or two-house legislative veto . . . was thus voided,” and as a consequence the authors of the CRA developed a procedure that would require passage by both houses and presentment to the President); 142 CONG. REC. 8197 (joint statement of Sens. Nickles, Reid, and Stevens) (same), the 104th Congress enacted the unconstitutional line item veto in violation of those very principles less than two weeks after it had enacted the CRA. *See Line Item Veto Act*, Pub. L. No. 104-130, 110 Stat. 1200 (1996) (codified as amended at 2 U.S.C. §§ 691–692 (Supp. II 1997)), *invalidated by* *Clinton v. City of New York*, 524 U.S. 417 (1998).

78. 5 U.S.C. § 801(b)(1).

79. *See supra* notes 69–70 and accompanying text.

80. 5 U.S.C. § 801(b)(1).

81. *Id.* § 801(f). For a summary of the disapproval procedure created by the CRA, with emphasis on its possible use as a tool to check midnight regulation, see Jerry Brito & Veronique de Rugy, *Midnight Regulations and Regulatory Review*, 61 ADMIN. L. REV. 163, 189–90 (2009).

82. 5 U.S.C. § 801(b)(2).

believe that most commentators have offered an unduly pessimistic reading of this provision. One of the most respected experts in administrative law, Professor Peter Strauss, testified before Congress a year after the enactment of the CRA that the substantial similarity provision has a “doomsday effect.”⁸³ Because, Strauss opined, the provision precludes the affected agency from ever attempting to regulate in the same topical area, Congress may well have tied its own hands and as a result will refrain from vetoing rules altogether.⁸⁴ Although we agree wholeheartedly with Strauss’s recommendation that Congress should amend the CRA to require a statement of the reasons for the initial veto, we simply observe here that events subsequent to his 1997 testimony demonstrate that Congress did *not* in fact blanch from invoking a veto even when it was not primarily concerned about an agency exceeding its statutory authority: Congress overturned the OSHA ergonomics rule in 2001 ostensibly because of concern about excessive compliance costs and illusory risk-reduction benefits.⁸⁵ Therefore, § 801(b)(2) of the CRA represents a very influential consequence of a veto power that Congress is clearly willing to use, and its correct interpretation is therefore of great importance to administrative law and process.

With very little evidence in the CRA’s legislative history discussing this provision,⁸⁶ and only one instance in which the congressional veto has actually been carried out,⁸⁷ neither Congress nor the Judiciary has clearly established the meaning of this crucial clause. In the next several Parts, we will attempt to give the CRA’s substantial similarity provision a coherent and correct meaning by interpreting it in the context of its legislative history, the political climate in which it was enacted and has been applied, and the broader administrative state.

II. EXERCISE OF THE CONGRESSIONAL VETO

The CRA procedure for congressional override of a federal regulation

83. *Congressional Review Act: Hearing Before the Subcomm. on Commercial & Admin. Law of the H. Comm. on the Judiciary*, 105th Cong. 89 (1997) [hereinafter *Hearing on the CRA*] (statement of Peter L. Strauss, Betts Professor of Law, Columbia University), available at http://commdocs.house.gov/committees/judiciary/hju40524.000/hju40524_0f.htm.

84. *Id.*

85. *See infra* Part VI and VII.

86. *See* 142 CONG. REC. 6926 (1996) (statement of Rep. Hyde) (noting that, although the measure had already been enacted into law, “no formal legislative history document was prepared to explain the [CRA]”); *id.* at 8197 (joint statement of Sens. Nickles, Reid, and Stevens) (same).

87. *See infra* Part II.A (discussing Congress’s use of the veto in 2001 to disapprove of OSHA’s ergonomics rule).

has only been used once.⁸⁸ In 2001, when the Bush Administration came into office, Republicans in Congress led an attempt to use the measure to strike down a workplace ergonomics regulation promulgated by OSHA.⁸⁹ The joint resolution generated much debate, in Washington and nationwide, over whether Congress should use the CRA procedure.⁹⁰ This Part discusses the joint resolution disapproving OSHA’s ergonomics rule and briefly notes some other instances in which Congress has brought up but has not successfully executed the CRA. It then explores potential means by which the substantial similarity provision might be enforced.

A. *The OSHA Ergonomics Rule*

In 1990, Secretary of Labor Elizabeth Dole stated that ergonomic injuries were one “of the nation’s most debilitating across-the-board worker safety and health illnesses,” and announced that the Labor Department, under President George H.W. Bush, was “committed to taking the most effective steps necessary to address the problem of ergonomic hazards.”⁹¹ As we will discuss briefly in Part VI, in 1995 OSHA circulated a complete regulatory text of an ergonomics rule, but it met with such opposition that it was quickly scuttled. Five years after abandoning the first ergonomics proposal, OSHA proposed a new section to Title 20 of the *Code of Federal Regulations* “to reduce the number and severity of musculoskeletal disorders (MSDs) caused by exposure to risk factors in the workplace.”⁹² The regulation would, among other things, have required employers to provide employees with certain information about ergonomic injuries and MSDs and implement “feasible” controls to reduce MSD hazards if certain

88. See U.S. GOV’T ACCOUNTABILITY OFFICE, CONGRESSIONAL REVIEW ACT (CRA) FAQs, http://www.gao.gov/legal/congressact/cra_faq.html#9 (last visited Nov. 3, 2011) (explaining that the Department of Labor’s ergonomics rule is the only rule that Congress has disapproved under the CRA).

89. See Ergonomics Rule Disapproval, Pub. L. No. 107-5, 115 Stat. 7 (2001), *invalidating* Ergonomics Program, 65 Fed. Reg. 68,262 (Nov. 14, 2000).

90. Compare Robert A. Jordan, *Heavy Lifting Not W’s Thing*, BOS. SUNDAY GLOBE, Mar. 11, 2001, at E4 (arguing that President Bush’s support of the joint resolution to overturn OSHA’s ergonomics rule sends the message, “I do not share—or care about—your pain”), with Editorial, *Roll Back the OSHA Work Rules*, CHI. TRIB., Mar. 6, 2001, at N14 (calling the ergonomics rule “bad rule-making” and arguing that Congress should “undo it”). See generally 147 CONG. REC. 3055–80 (2001) (chronicling the floor debates in the House); *id.* at 2815–74 (chronicling the floor debates in the Senate).

91. Press Release, Elizabeth H. Dole, Sec’y, Dep’t of Labor, Secretary Dole Announces Ergonomics Guidelines to Protect Workers from Repetitive Motion Illnesses/Carpal Tunnel Syndrome (Aug. 30, 1990), *reprinted in* 145 CONG. REC. 24,467–68 (1999).

92. Ergonomics Program, 65 Fed. Reg. at 68,846; see also Ergonomics Program, 64 Fed. Reg. 65,768–66,078 (proposed Nov. 23, 1999).

triggers were met.⁹³ OSHA published the final rule in the *Federal Register* during the lame-duck period of the Clinton Administration, and it met strong opposition from Republicans and pro-business interest groups.

After the 107th Congress was sworn in, Senate Republicans led the charge against the ergonomics rule and proposed a joint resolution to disapprove of the regulation pursuant to the CRA.⁹⁴ Opponents of the OSHA regulation argued that it was the product of a flawed, last-minute rulemaking process in the outgoing Clinton Administration.⁹⁵ Although the Department of Labor had been attempting to develop an ergonomics program for at least the previous ten years,⁹⁶ the opponents called this particular rule “a regulation crammed through in the last couple of days of the Clinton administration” as a “major gift to organized labor.”⁹⁷ Senator Mike Enzi of Wyoming argued that the proposed regulation was not published in the *Federal Register* until “a mere 358 days before [OSHA] made it the law of the land, one-quarter of the time they typically take.”⁹⁸ He further suggested that OSHA ignored criticisms received during the notice-and-comment period, and instead relied on “hired guns” to provide information and tear apart witness testimony against the rule.⁹⁹

This allegedly flawed and rushed procedure, OSHA’s opponents argued, coupled with an overly aggressive posture toward the regulated industries,¹⁰⁰ led to an inefficient and unduly burdensome rule. Congressional Republicans and other critics seemed unconvinced by the agency’s estimate of the costs and benefits. OSHA estimated that the regulation would cost \$4.5 billion annually, while others projected that it could cost up to \$100 billion—Senator Don Nickles of Oklahoma noted this wide range of estimates and said, “There is no way to know how much this would cost.”¹⁰¹ Democrats, however, argued that the rule was not

93. Ergonomics Program, 65 Fed. Reg. at 68,847, 68,850–51.

94. See S.J. Res. 6, 107th Cong. (2001) (enacted).

95. See, e.g., 147 CONG. REC. 2815–16 (statement of Sen. Jeffords) (“[T]he ergonomics rule certainly qualifies as a ‘midnight’ regulation . . .”).

96. See Ergonomics Program, 65 Fed. Reg. at 68,264 (presenting an OSHA Ergonomics Chronology); see also *supra* note 91 and accompanying text (noting the Department of Labor’s commitment in 1990 to address ergonomic injuries).

97. 147 CONG. REC. 2817–18 (statement of Sen. Nickles).

98. *Id.* at 2823 (statement of Sen. Enzi).

99. *Id.* (estimating that “close to 2 million pages” of materials were submitted to OSHA during the public comment period, yet “there were only 94 days between the end of the public comment period and the date of the OSHA-published [rule]”).

100. See, e.g., Lisa Junker, *Marthe Kent: A Second Life in the Public Eye*, SYNERGIST, May 2000, at 28, 30 (quoting former OSHA Director of Safety Standards as saying: “I was born to regulate.”) and “I don’t know why, but that’s very true. So as long as I’m regulating, I’m happy. . . . I think that’s really where the thrill comes from. And it is a thrill; it’s a high”).

101. 147 CONG. REC. 2818 (statement of Sen. Nickles); see also Editorial, *supra* note 90, at

wasteful. Senator Edward Kennedy of Massachusetts said, in contrast, that the ergonomics rule was “flexible and cost-effective for businesses, and . . . overwhelmingly based upon scientific evidence.”¹⁰² The rule’s proponents also emphasized its benefits, arguing that the rule’s true cost of \$4.5 billion would be more than offset by a savings of “\$9.1 billion annually . . . recouped from the lost productivity, lost tax payments, administrative costs, and workers comp.”¹⁰³ Critics argued that these benefits were overstated as businesses were naturally becoming more ergonomically friendly on their own.¹⁰⁴ Democrats also noted scientific evidence favoring the rule, including two reports by the National Academy of Sciences (NAS) and the Institute of Medicine reporting the enormous costs of work-related ergonomic injuries.¹⁰⁵ But critics cited reports in their favor,¹⁰⁶ and responded that the NAS report did not endorse the rule and could not possibly have shaped it, as the report was not released until after OSHA went forward with the regulation.¹⁰⁷

Following expedited debate in Congress during which the legislators argued about the costs and benefits of the OSHA rule, both houses passed the joint resolution in March 2001.¹⁰⁸ When President Bush signed the joint resolution into law, he emphasized the need for “an understanding of the costs and benefits” and his Administration’s intent to continue to “pursue a comprehensive approach to ergonomics.”¹⁰⁹

However, OSHA has never since made any attempt to regulate in this area, although it has issued four sets of voluntary ergonomics guidelines—

N14 (“Although [OSHA] puts the price tag on its rules at \$4.5 billion, the Economic Policy Foundation gauges the cost to business at a staggering \$125.6 billion.”).

102. 147 CONG. REC. 2818 (statement of Sen. Kennedy).

103. *Id.* at 2827 (statement of Sen. Wellstone).

104. *Id.* at 2815–16 (statement of Sen. Jeffords). Of course, if a market-driven move toward ergonomically friendly business meant that the future benefits of OSHA’s rule were overstated, then its future costs must have been simultaneously overstated as well.

105. *See id.* at 2830 (statement of Sen. Dodd) (citing a report finding that “nearly 1 million people took time from work to treat or recover from work-related ergonomic injuries” and that the cost was “about \$50 billion annually”).

106. *See id.* at 2833–34 (statement of Sen. Hutchinson) (citing a report that “shows that the cost-to-benefit ratio of this rule may be as much as 10 times higher for small businesses than for large businesses”).

107. *See id.* at 3056 (statement of Rep. Boehner) (“OSHA completed its ergonomics regulation without the benefit of the National Academy study.”).

108. *See* Ergonomics Rule Disapproval, Pub. L. No. 107-5, 115 Stat. 7 (2001), *invalidating* Ergonomics Program, 65 Fed. Reg. 68,262 (Nov. 14, 2000); 147 CONG. REC. 3079 (recording the House roll call vote of 223–206, with 4 Representatives not voting); *id.* at 2873 (recording the Senate roll call vote of 56–44).

109. Presidential Statement on Signing Legislation to Repeal Federal Ergonomics Regulations, 37 WEEKLY COMP. PRES. DOC. 477 (Mar. 20, 2001).

for nursing homes, retail grocery stores, poultry processing, and the shipbuilding industry. Even without a specific standard, OSHA could use its general duty authority¹¹⁰ to issue citations for ergonomic hazards that it can show are likely to cause serious physical harm, are recognized as such by a reasonable employer, and can be feasibly abated. However, in the more than ten years after the congressional veto of the ergonomics rule, OSHA issued fewer than one hundred such citations nationwide.¹¹¹ For purposes of comparison, in an average year, federal and state OSHA plans collectively issue more than 210,000 violations of all kinds nationwide.¹¹²

B. Midnight Regulations and Other Threats to Use the CRA

The repeal of the OSHA ergonomics regulation has so far been the only instance in which Congress has successfully used the CRA to veto a federal regulation. However, the option of congressional repeal of rules promulgated by federal agencies has been considered in several other arenas, and in some instances threats by legislators to call for a CRA veto have led to a type of “soft veto” in which the agency responds to the threat by changing its proposed regulation. This has surfaced often, though not always, in the context of possibly repealing so-called midnight regulations.¹¹³

Some Republican lawmakers argued that the OSHA ergonomics standard circumvented congressional oversight because it was finalized in the closing weeks of the Clinton Administration.¹¹⁴ Years later, these same arguments were echoed by the Obama Administration and some

110. See Occupational Safety and Health (OSH) Act of 1970 § 5(a)(1), 29 U.S.C. § 654 (2006).

111. The OSHA website permits users to word-search the text of all general duty violations. See OCCUPATIONAL SAFETY & HEALTH ADMIN., DEP'T OF LABOR, GENERAL DUTY STANDARD SEARCH, <http://www.osha.gov/pls/imis/generalsearch.html> (last visited Nov. 3, 2011). A search for all instances of the word *ergonomic* between March 7, 2001, (the day after the congressional veto) and August 18, 2011, (the day we ran this search) yielded sixty violations. The busiest year was 2003 (fifteen violations), and there were eight violations in 2010. An additional search for the term *MSD* yielded thirteen violations during this ten-year span, although some of these were duplicative of the first group of sixty.

112. See SAFETY & HEALTH DEP'T, AFL-CIO, DEATH TOLL ON THE JOB: THE TOLL OF NEGLECT 61 (19th ed. 2010), http://www.aflcio.org/issues/safety/memorial/upload/dotj_2010.pdf.

113. See Jack M. Beermann, *Combating Midnight Regulation*, 103 NW. U. L. REV. COLLOQUY 352, 352 n.1 (2009), <http://www.law.northwestern.edu/lawreview/colloquy/2009/9/LRColl2009n9Beermann.pdf> (“‘Midnight regulation’ is loosely defined as late-term action by an outgoing administration.”). Colloquially, the term is usually reserved for situations in which the White House changes parties.

114. See *supra* notes 95–99 and accompanying text.

Democrats in the 111th Congress with respect to other rules. As the Bush Administration left office in January 2009, it left behind several last-minute regulations, including rules that would decrease protection of endangered species, allow development of oil shale on some federal lands, and open up oil drilling in the Utah wilderness.¹¹⁵ The Bush Administration also left behind a conscientious objector regulation that would allow certain healthcare providers to refuse to administer abortions or dispense contraception.¹¹⁶ Congressional Democrats brought up the CRA as an option for repealing the Bush Administration’s midnight regulations, while the Obama Administration searched for an executive strategy to scuttle them.¹¹⁷ Although the CRA may be at its most useful when there is a significant realignment in party control over the Legislative and Executive Branches (as occurred in 2001 and 2009),¹¹⁸ the Democrats of the 111th Congress did not use the CRA to achieve their goal of overturning the Bush Administration’s regulations—in the end, the Obama Administration used executive procedures.¹¹⁹

However, not all threats to use the CRA have occurred immediately

115. See, e.g., Stephen Power, *U.S. Watch: Obama Shelves Rule Easing Environmental Reviews*, WALL ST. J., Mar. 4, 2009, at A4 (noting executive and administrative decisions to “shelve” a Bush Administration rule allowing federal agencies to “bypass” consultation on whether new projects could harm endangered wildlife).

116. See Jennifer Lubell, *Conscientious Objectors: Obama Plan to Rescind Rule Draws Catholic Criticism*, MOD. HEALTHCARE, Mar. 23, 2009, at 33 (discussing the Obama Administration’s plans to prevent the Bush Administration’s conscientious objector rule from going into effect); Charlie Savage, *Democrats Look for Ways to Undo Late Bush Administration Rules*, N.Y. TIMES, Jan. 12, 2009, at A10 (“Democrats are hoping to roll back a series of regulations issued late in the Bush administration that weaken environmental protections and other restrictions.”).

117. See Peter Nicholas & Christi Parsons, *Obama Plans a Swift Start*, L.A. TIMES, Jan. 20, 2009, at A1 (reporting that “Obama aides have been reviewing the so-called midnight regulations” and noting that “Obama can change some Bush policies through executive fiat”); Savage, *supra* note 116 (reporting that “Democrats . . . are also considering using the Congressional Review Act of 1996” to overturn some Bush Administration regulations).

118. See Brito & de Rugy, *supra* note 81, at 190 (“[T]he CRA will only be an effective check on midnight regulations if the incoming president and the Congress are of the same party. If not, there is little reason to expect that the Congress will use its authority under the CRA to repeal midnight regulations. Conversely, if the president is of the same party as his predecessor and the Congress is of the opposite party, it is likely that the new president will veto a congressional attempt to overturn his predecessor’s last-minute rules.” (footnote omitted)). *But see* Rosenberg, *supra* note 75 (pointing out flaws in the CRA and proposing a new scheme of congressional review of federal regulation).

119. See, e.g., Rescission of the Regulation Entitled “Ensuring That Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law,” 74 Fed. Reg. 10,207, 10,209–10 (proposed Mar. 10, 2009) (rescinding the Bush Administration’s “conscientious objector” rule).

following a party change. In early 2010, one year after President Obama's inauguration, Senator Lisa Murkowski of Alaska considered proposing a resolution to disapprove of the Environmental Protection Agency's (EPA's) "endangerment finding" that greenhouse gases threaten the environment and human health.¹²⁰ Senator Murkowski's idea never came to fruition.

C. *Enforcement of the Substantial Similarity Provision*

Since there has never yet been an attempt by an agency to reissue a rule following a CRA veto, there remains ambiguity not only over what kinds of rules are barred, but how any such restrictions would be enforced. In this Part, we briefly discuss three possible ways the substantial similarity provision may affect agency action: one administrative response, one legislative, and one judicial.

One possible means of application of the substantial similarity provision begins in the Executive Branch, most likely within the administrative department whose regulation has been vetoed. With the threat of invalidation hanging overhead, an agency may be deterred from promulgating regulations within a certain area for fear of having its work nullified—or worse, of having ruined for posterity the ability to regulate in a given area (if it interprets the CRA ominously). In other words, agencies might engage in a sort of self-censorship that itself enforces the CRA. Indeed, the continuous absence of ergonomics from the regulatory agenda for an entire decade following the veto of OSHA's rule—and well into the Obama Administration—arguably provides evidence of such self-censorship. In prepared testimony before a Senate subcommittee of the Committee on Appropriations, Secretary of Labor Elaine Chao testified that, due to the exercise of the veto, the Department of Labor would need to work with Congress to determine what principles to apply to any future regulation in the ergonomics field. She did not want to "expend valuable—and limited—resources on a new effort" if another regulation would be

120. See Editorial, *Ms. Murkowski's Mischief*, N.Y. TIMES, Jan. 19, 2010, at A30. Note, however, that it is unclear that an agency "finding" is sufficiently final agency action for a CRA veto. *But cf. infra* note 268 (noting attempts to bring a broader range of agency actions under congressional review, including the recently introduced Closing Regulatory Loopholes Act of 2011). Nor is it clear that a joint resolution of disapproval may be inserted as part of a large bill, as Senator Murkowski considered. *Cf.* 5 U.S.C. § 802(a) (2006) (setting forth the exact text to be used in a joint resolution of disapproval). Murkowski intended to insert the resolution into the bill raising the debt ceiling. See Editorial, *supra*. Doing so would not only have run afoul of the provision setting the joint resolution text, but would impermissibly have either expanded debate on the resolution, *see* 5 U.S.C. § 802(d)(2) (limiting debate in the Senate to ten hours), or limited debate on the debt ceiling bill, which is not subject to the CRA's procedural restrictions.

invalidated as substantially similar.¹²¹

In addition to agency self-censorship, there is, of course, a potential Legislative application of the substantial similarity provision. If an agency were to reissue a vetoed rule “in substantially the same form,” then Congress could use the substantial similarity provision as a compelling justification for enacting another joint resolution, perhaps voicing its objection to the substance of the new rule, but using “similarity” to bypass a discussion of the merits. For example, if OSHA reissued an ergonomics rule that members of Congress thought was substantially similar to the Clinton Administration rule, then they might be motivated to repeal the rule simply because they would see the new rule as outside the law, and a disrespect to their prior action under the CRA. Of course, as with the original ergonomics rule, the notion that an agency is acting outside its authority may be considered as merely one factor among others—procedural, cost-benefit related, and even political—in determining whether to strike down an agency rule. But a congressional belief that an agency is reissuing a rule in violation of the CRA may cut in favor of enacting a second joint resolution of disapproval, even if certain members of Congress would not be inclined to veto the rule on more substantive grounds. Indeed, this could even turn Congress’s gaze away from the rule’s substance entirely—a sort of “us against them” drama might be played out in which opponents could use the alleged circumvention as a means to stir

121. *Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations for Fiscal Year 2002: Hearing on H.R. 3061/S. 1536 Before a Subcomm. of the S. Comm. on Appropriations*, 107th Cong. 72 (2001) [hereinafter *Hearing on H.R. 3061/S. 1536*] (statement of Elaine L. Chao, Secretary, U.S. Department of Labor). However, Secretary Chao had promised immediately before the veto that she would do exactly the opposite and treat a CRA action as an impetus to reissue an improved rule. See Letter from Elaine L. Chao, Sec’y, U.S. Dep’t of Labor, to Arlen Specter, Chairman, Subcomm. on Labor, Health & Human Servs., Educ., S. Comm. on Appropriations, U.S. Senate (Mar. 6, 2001) (promising to take future action to address ergonomics), *reprinted in* 147 CONG. REC. 2844 (2001) (statement of Sen. Specter). More recently, OSHA Assistant Secretary David Michaels, appointed by President Obama, has repeatedly indicated that OSHA has no plans to propose a new ergonomics regulation. For example, in February 2010, he addressed the ORC Worldwide Occupational Safety and Health Group (an audience of corporate health directors for large U.S. companies) and explained his proposal to restore a separate column for musculoskeletal disorder (MSD) cases in the required establishment-specific log of occupational injuries with this caveat: “It appears from press reports that our announcement of this effort may have confused some observers. So, let me be clear: This is *not* a prelude to a broader ergonomics standard.” David Michaels, Assistant Sec’y of Labor for Occupational Safety & Health Administration, Remarks at the Quarterly Meeting of the ORC Worldwide Occupational Safety & Health Group & Corp. Health Dirs. Network (Feb. 3, 2010), http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=SPEECHES&p_id=2134. For a discussion of similar about-faces in statements by members of Congress immediately before and after the veto, see *infra* Part III.B.

up opposition to a rule that the majority might find perfectly acceptable if seeing it *de novo*.

The Judiciary might also weigh in on the issue. If an agency were to reissue a rule that is substantially similar to a vetoed rule, and Congress chose not to exercise its power of veto under the CRA, then a regulated party might convince the courts to strike down the rule as outside of the agency's statutory authority. Although the text of the CRA significantly limits judicial review of a congressional veto (or failure to veto), the statute does *not* prohibit judicial review for noncompliance with the substantial similarity clause of a rule promulgated after a congressional veto.¹²² In other words, while Congress may have successfully insulated its own pronouncements from judicial review, that does not stop a plaintiff from asking a court to rule—without considering Congress's silence or statements—whether a rule that was allowed through should have been struck down as substantially similar.

There appear to be two primary ways in which judicial review would arise. First, a party might raise invalidity as a defense if an agency were to try enforcing a rule it arguably did not have authority to promulgate under the CRA. The defendant in the administrative proceedings could appeal agency enforcement of the rule to the federal courts under Chapter 7 of the APA, and a court might then strike down the regulation as a violation of

122. See 5 U.S.C. § 805 (2006) (“No determination, finding, action, or omission under this chapter shall be subject to judicial review.”). The legislative record makes clear that “a court with proper jurisdiction may review the resolution of disapproval and the law that authorized the disapproved rule to determine whether the issuing agency has the legal authority to issue a substantially different rule.” 142 CONG. REC. 8199 (1996) (statement of Sen. Nickles). Indeed, the CRA prohibits a court only from inferring the intent of Congress in *refusing* to enact a joint resolution of disapproval, implying that courts should (1) consider congressional intent in considering enacted resolutions, and (2) not infer substantial dissimilarity from Congress's failure to veto a second rule. See 5 U.S.C. § 801(g) (“If the Congress does not enact a joint resolution of disapproval under section 802 respecting a rule, no court or agency may infer any intent of the Congress from any action or inaction of the Congress with regard to such rule, related statute, or joint resolution of disapproval.”); see also 142 CONG. REC. 8199 (statement of Sen. Nickles) (referring to § 801(g) and noting that the “limitation on judicial review in no way prohibits a court from determining whether a rule is in effect”). While some may call into question the constitutionality of such strong limits on judicial review, the CRA drafters' constitutional argument defending the provisions suggests that the limits are meant to address procedure. See *id.* (“This . . . limitation on the scope of judicial review was drafted in recognition of the constitutional right of each House of Congress to ‘determine the Rules of its Proceedings’ which includes being the final arbiter of compliance with such Rules.” (citing U.S. CONST. art. I, § 5, cl. 2)). Thus, since a court may rule upon whether a rule is in effect, yet lacks the power to weigh Congress's omission of a veto *against* a finding of substantial similarity, a court could conduct its own analysis to determine whether a non-vetoed second rule is substantially similar and hence invalid.

the substantial similarity provision.¹²³ But a regulated party need not wait until an agency attempts to enforce the rule in order to raise a challenge; as a second option, one may go on the offensive and bring suit for declaratory judgment or injunctive relief to prevent the agency from ever enforcing the rule in the first place.¹²⁴ In either of these situations, assuming a justiciable case or controversy under Article III,¹²⁵ a federal court would need to interpret the CRA to determine whether the reissued rule was substantially similar to a vetoed rule and thus invalid.

Since such a lawsuit has not yet been brought to the federal courts, there is no authoritative interpretation of the CRA to guide agency rulemaking following a congressional veto.¹²⁶ Where an agency does not wish to risk invalidation of a rule that merely *may* skirt the outer margins of substantial similarity (whatever those might be), the effect of the CRA may be to overdeter agency action via “self-censorship” even where its regulation may be legally valid. Until the federal courts provide an authoritative interpretation of the CRA, those outer margins of substantial similarity are quite large.¹²⁷ For this reason, it is important to provide a workable and realistic interpretation of the CRA to guide agency action and avoid overdeterrence. It is also important to set boundaries with an eye toward the problem of agency *inaction*—agencies should not hide behind the CRA as an excuse not to do anything in an area where the public expects some action and where Congress did not intend to block all rulemaking.

In the next two Parts we will attempt to reconcile the vast spectrum of possible “substantial similarity” interpretations with the political and legislative history of the CRA, with the joint resolution overturning the OSHA ergonomics rule, and with the background principles of CBA and administrative law.

123. See 5 U.S.C. § 702 (conferring a right of judicial review to persons “suffering legal wrong because of agency action”); *id.* § 706(2)(C) (granting courts the authority to strike down agency action that is “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right”); see also *id.* § 704 (requiring that an aggrieved party exhaust its administrative remedies before challenging a final agency action in federal court).

124. See, e.g., *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687 (1995) (entertaining a declaratory relief action brought by parties challenging a regulation promulgated by the Department of Interior under the Endangered Species Act).

125. U.S. CONST. art. III, § 2 (granting the federal courts jurisdiction only over cases and controversies); see also *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (explaining the requirement of plaintiff standing); *O’Shea v. Littleton*, 414 U.S. 488 (1974) (requiring that the plaintiff’s case be ripe for adjudication).

126. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).

127. See *infra* Part III (providing a spectrum of possible interpretations, and noting the vastly different interpretations of the substantial similarity provision during the debates over the ergonomics rule).

III. THE SPECTRUM OF INTERPRETATIONS OF “SUBSTANTIALLY SIMILAR”

In this Part, we develop seven possible interpretations of the key term “substantially similar,” argue that interpretations offered by partisans during the ergonomics debate should be uniformly ignored as posturing, and suggest that interpretations offered after the ergonomics veto are too pessimistic.

A. *Hierarchy of Possible Interpretations*

Rather than constructing a definition of “substantially the same” from first principles, we will ground this discussion with reference to the spectrum of plausible interpretations of that key phrase, arrayed in ascending order from the least troublesome to the issuing agency to the most daunting. We use this device not to suggest that the center of gravity in the struggle of competing ideologies in Congress at the time the CRA was enacted should point the way toward a particular region of this spectrum, but rather to erect some markers that can be rejected as implausible interpretations of “substantially the same” and thereby help narrow this range. Although we will support our interpretation with reference to specific items in the legislative history of the CRA, starting out with this hierarchy also allows us to focus on what Congress could have made less frustratingly vague in its attempt to prevent agencies from reissuing rules that would force duplicative congressional debate.

We can imagine at least seven different levels of stringency that Congress could plausibly have chosen when it wrote the CRA and established the “substantially the same” test to govern the reissuance of related rules:

Interpretation 1: An identical rule can be reissued if the agency asserts that external conditions have changed. A reissued rule only becomes “substantially the same,” in any sense that matters, if Congress votes to veto it again on these grounds. Therefore, an agency could simply wait until the makeup of Congress changes, or the same members indicate a change of heart about the rule at hand or about regulatory politics more generally, and reissue a wholly identical rule. The agency could then simply claim that although the regulation was certainly in “substantially the same form,” the effect of the rule is now substantially different from what it would have been the first time around.

Interpretation 2: An identical rule can be reissued if external conditions truly have changed. We will discuss this possibility in detail in Part V. This interpretation of “substantially the same” recognizes that the effects of regulation—or the estimates of those effects—can change over time even if the rule itself does not change. Our understanding of the

science or economics behind a rule can change our understanding of its benefits or costs, or those benefits and costs themselves can change as technologies improve or new hazards emerge. For example, a hypothetical Federal Aviation Administration (FAA) rule banning smoking on airliners might have seemed draconian if proposed in 1960, given the understanding of the risks of second-hand smoking at the time, but it was clearly received much differently when actually issued thirty years later.¹²⁸ Safety technologies such as antilock brake systems that would have been viewed as experimental and prohibitively expensive when first developed came to be viewed as extremely cost-effective when their costs decreased with time. In either type of situation, an identical rule might become “substantially different” not because the vote count had changed, but because the same regulatory language had evolved a new meaning, and then Congress might welcome another opportunity to evaluate the costs and benefits.

Interpretation 3: The reissued rule must be altered so as to have significantly greater benefits and/or significantly lower costs than the original rule. Under this interpretation, the notion of “similar form” would not be judged via a word-by-word comparison of the two versions, but by a common-sense comparison of the stringency and impact of the rule. We will discuss in Part IV a variety of reasons why we believe Congress intended that the currency for judging similarity should be costs and benefits rather than the extent of narrative revision to the regulatory text per se or the extent to which a reissued rule contains wholly different provisions or takes a different approach. At this point, it should suffice to point out that as a practical matter, two versions of a regulation that have vastly different impacts on society might contain 99.99% or more of their individual words in common, and thus be almost identical in “form” if that word was used in its most plebian sense. An OSHA rule requiring controls on a toxic substance in the workplace, for example, might contain thousands of words mandating engineering controls, exposure monitoring, recordkeeping, training, issuance of personal protective equipment, and other elements, all triggered when the concentration of the contaminant exceeded some numerical limit. If OSHA reissued a vetoed toxic substance rule *with one single word changed* (the number setting the limit), the costs and burdens could drop precipitously. We suggest it would be bizarre to constrain the agency from attempting to satisfy congressional concerns by fundamentally changing the substance and import of a vetoed rule merely because doing so might affect only a

128. Prohibition Against Smoking, 55 Fed. Reg. 8364 (Mar. 7, 1990) (codified at 14 C.F.R. pts. 121, 129, 135) (2006).

small fraction of the individual words in the regulatory text.¹²⁹

Interpretation 4: In addition to changing the overall costs and benefits of the rule, the agency must fix all of the specific problems Congress identified when it vetoed the rule. This interpretation would recognize that despite the paramount importance of costs, benefits, and stringency, Congress may have reacted primarily to specific aspects of the regulation. Perhaps it makes little sense for an agency to attempt to reissue a rule that is substantially different in broad terms, but that pushes the same buttons with respect to the way it imposes costs, or treats the favored sectors or constituents that it chooses not to exempt. However, as we will discuss in Part IV.B, the fact that Congress chose not to accompany statements of disapproval with any language explaining the consensus of what the objections were may make it inadvisable to require the agency to fix problems that were never formally defined and that may not even have been seen as problems by more than a few vocal representatives.

Interpretation 5: In addition to changing the costs and benefits and fixing specific problems, the agency must do more to show it has “learned its lesson.” This interpretation would construe “substantially the same form” in an expansive way befitting the colloquial use of the word *form* as more than, or even perpendicular to, substance. In other words, the original rule deserved a veto because of how it was issued, not just because of what was issued, and the agency needs to change its attitude, not just its output. This interpretation comports with Senator Enzi’s view of why the CRA was written, as he expressed during the ergonomics floor debate: “I assume that some agency jerked the Congress around, and Congress believed it was time to jerk them back to reality. Not one of you voted against the CRA.”¹³⁰ If the CRA was created as a mechanism to assert the reality of congressional power, then merely fixing the regulatory text may not be sufficient to avoid repeating the same purported mistakes that doomed the rule upon its first issuance.

Interpretation 6: In addition to the above, the agency must devise a wholly different regulatory approach if it wishes to regulate in an area Congress has cautioned it about. This would interpret the word *form* in the way that scholars of regulation use to distinguish fundamentally different kinds of regulatory instruments—if the

129. It is even conceivable that a wholly identical regulatory text could have very different stringency if the accompanying preamble made clear that it would be enforced in a different way than the agency had intended when it first issued the rule (or that Congress had misinterpreted it when it vetoed the rule).

130. 147 CONG. REC. 2821 (2001) (statement of Sen. Enzi).

vetoed rule was, for example, a specification standard, the agency would have to reissue it as a performance standard in order to devise something that was not in “substantially the same form.” An even more restrictive reading would divide *form* into the overarching dichotomy between command-and-control and voluntary (or market-based) designs: if Congress nixed a “you must” standard, the agency would have to devise a “you may” alternative to avoid triggering a “substantially similar” determination.

Interpretation 7: An agency simply cannot attempt to regulate (in any way) in an area where Congress has disapproved of a specific regulation. This most daunting interpretation would take its cue from a particular reading of the clause that follows the “same form” prohibition: “unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule.”¹³¹ Such a reading could have been motivating the dire pronouncements of congressional Democrats who argued, as did Senator Russ Feingold of Wisconsin, that a “vote for this resolution is a vote to block any Federal ergonomics standard for the foreseeable future.”¹³² However, we will argue below that it is clear that Congress meant this interpretation only to apply in the rare cases where the organic statute only allowed the exact rule that the agency brought forward, and thus the veto created a paradox because the agency was never authorized to promulgate a different regulation.

B. How Others Have Interpreted “Substantially the Same”

By far the majority of all the statements ever made interpreting the meaning of “substantially the same” were uttered by members of Congress during the floor debate over the OSHA ergonomics standard. None of these statements occupied the wide middle ground within the spectrum of possible interpretations presented above. Rather, at one extreme were many statements trivializing the effect of the veto, such as, “the CRA will not act as an impediment to OSHA should the agency decide to engage in ergonomics rulemaking.” The members who disagreed with this sanguine assessment did so in stark, almost apocalyptic terms, as in, “make no mistake about the resolution of disapproval that is before us. It is an atom bomb for the ergonomics rule. . . . Until Congress gives it permission, OSHA will be powerless to adopt an ergonomics rule”

Surely the Democrats in Congress generally prefer an interpretation of legislative control over the regulatory system that defers maximally to the

131. 5 U.S.C. § 801(b)(2) (2006).

132. 147 CONG. REC. 2860 (statement of Sen. Feingold).

executive agencies, allowing them to regulate with relatively few constraints or delays, while Republicans generally favor an interpretation that gives Congress the power to kill whole swaths of regulatory activity “with extreme prejudice.” But in both cases, what they want the CRA to mean in general is the opposite of what they wanted their colleagues to think it meant in the run-up to a vote on a specific resolution of disapproval. Hence the fact that the first quote above, and dozens like it, came not from the left wing but from Republican James Jeffords of Vermont;¹³³ whereas the “atom bomb” and similarly bleak interpretations of the CRA came from Democrats such as Edward Kennedy of Massachusetts.¹³⁴ Clearly, both the trivialization of a possible veto by those hoping to convince swing voters that their disapproval was a glancing blow, as well as the statements cowering before the power of the CRA by those hoping to dissuade swing voters from “dropping the bomb,” should not be taken at face value, and should instead be dismissed as posturing to serve an expedient purpose. Indeed, when the smoke cleared after the ergonomics veto, the partisans went back to their usual stances.¹³⁵

The set of less opportunistic interpretations of “substantially the same,” on the other hand, has a well-defined center of gravity. Indeed, most legal and political science scholars, as well as experts in OSHA rulemaking, seem to agree that a veto under the CRA is at least a harsh punishment, and

133. *Id.* at 2816 (statement of Sen. Jeffords).

134. *Id.* at 2820 (statement of Sen. Kennedy). This particular pattern was also clearly evident in the House floor debate on ergonomics. Consider, for example, this sanguine assessment from a strident opponent of the OSHA rule, Republican Representative Roy Blunt: “When we look at the legislative history of the Congressional Review Act, it is clear that this issue can be addressed again. . . . [T]he same regulation cannot be sent back essentially with one or two words changed. . . . [But] this set of regulations can be brought back in a much different and better way.” *Id.* at 3057 (statement of Rep. Blunt). At the opposite end of the spectrum were proponents of ergonomics regulation such as Democratic Representative Rob Andrews: “Do not be fooled by those who say they want a better ergonomics rule, because if this resolution passes . . . [t]his sends ergonomics to the death penalty. . . .” *Id.* at 3059 (statement of Rep. Andrews).

135. For example, in June 2001, Republican Senator Judd Gregg strongly criticized the Breaux Bill for encouraging OSHA to promulgate what he called a regulation “like the old Clinton ergonomics rule, super-sized.” See James Nash, *Senate Committee Approves Bill Requiring Ergonomics Rule*, EHS TODAY (June 20, 2002, 12:00 AM), http://ehstoday.com/news/ehs_imp_35576/; see also *infra* Part IV.A.5 (describing the Breaux Bill). But at roughly the same time, Democratic Senator Edward Kennedy was encouraging OSHA to reissue a rule, with no mention of any possible impediment posed by the CRA: “It has been a year now that America’s workers have been waiting for the Department of Labor to adopt a new ergonomics standard. We must act boldly to protect immigrant workers from the nation’s leading cause of workplace injury.” *Workplace Safety and Health for Immigrants and Low Wage Workers: Hearing Before the Subcomm. on Emp’t, Safety & Training of the S. Comm. on Health, Educ., Labor & Pensions*, 107th Cong. 3 (2002) (statement of Sen. Kennedy).

perhaps a death sentence. For example, Charles Tiefer described the substantial similarity provision as a “disabling of the agency from promulgating another rule on the same subject.”¹³⁶ Morton Rosenberg, the resident expert on the CRA at the Congressional Research Service, wrote after the ergonomics veto that “substantially the same” is ambiguous, but he only reached a sanguine conclusion about one narrow aspect of it: an agency does not need express permission from Congress to reissue a “substantially different” rule when it is compelled to act by a statutory or judicial deadline.¹³⁷ He concluded, most generally, that whatever the correct legal interpretation, “[T]he practical effect . . . may be to dissuade an agency from taking any action until Congress provides clear authorization.”¹³⁸ Similarly, Julie Parks criticized § 801(b)(2) as “unnecessarily vague,” but concluded that it at least “potentially withdraws substantive authority from OSHA to issue *any* regulation concerning ergonomics.”¹³⁹

Advocates for strong OSHA regulation, who presumably would have no interest in demonizing the CRA after the ergonomics veto had already passed, nevertheless also take a generally somber view. Vernon Mogensen interprets “substantially the same” such that “the agency that issued the regulation is prohibited from promulgating it again without congressional authorization.”¹⁴⁰ A.B. (Butch) de Castro—who helped write the ergonomics standard while an OSHA staff member—similarly opined in 2006 that “OSHA is barred from pursuing development of another ergonomics standard unless ordered so by Congress.”¹⁴¹ In 2002, Parks interviewed Charles Jeffress, who was the OSHA Assistant Secretary who “bet the farm” on the ergonomics rule, and he reportedly believed (presumably with chagrin) that “OSHA does not have the authority to issue

136. Charles Tiefer, *How to Steal a Trillion: The Uses of Laws About Lawmaking in 2001*, 17 J.L. & POL. 409, 476 (2001).

137. MORTON ROSENBERG, CONG. RESEARCH SERV., RL 30116, CONGRESSIONAL REVIEW OF AGENCY RULEMAKING: AN UPDATE AND ASSESSMENT AFTER NULLIFICATION OF OSHA’S ERGONOMICS STANDARD 23 (2003).

138. *Id.*

139. Julie A. Parks, Comment, *Lessons in Politics: Initial Use of the Congressional Review Act*, 55 ADMIN. L. REV. 187, 200 (2003) (emphasis added); see also Stuart Shapiro, *The Role of Procedural Controls in OSHA’s Ergonomics Rulemaking*, 67 PUB. ADMIN. REV. 688, 696 (2007) (concluding that “[a]ttempts to create an ergonomics regulation effectively ended” with the 2001 veto because of the language of § 801(b)(2)).

140. Vernon Mogensen, *The Slow Rise and Sudden Fall of OSHA’s Ergonomics Standard*, WORKINGUSA, Fall 2003, at 54, 72.

141. A.B. de Castro, *Handle with Care: The American Nurses Association’s Campaign to Address Work-Related Musculoskeletal Disorders*, 4 CLINICAL REVS. BONE & MIN. METABOLISM 45, 50 (2006).

another ergonomics rule, because the substantially similar language is vague and ambiguous.”¹⁴²

As we will argue in detail below, we believe that all of these pronouncements ascribe to Congress more power to preemptively bar reissued regulations than the authors of the CRA intended, and certainly more anticipatory power than Congress should be permitted to wield.

IV. WHY “SUBSTANTIALLY THE SAME” SHOULD NOT BE INTERPRETED OMINOUSLY

In this Part, we argue that so long as the rule as reissued makes enough changes to alter the cost–benefit ratio in a significant and favorable way (and, we recommend, as long as the issuing agency also corrects any procedural flaws that Congress deplored as essentially arbitrary and capricious), the purposes of the CRA will be served, and the new rule should not be barred as “substantially the same” (although it would not be immunized against a second veto on new substantive grounds). We find four sets of reasons for this interpretation of the substantial similarity provision. First, the legislative history—both in the mid-1990s when the Republicans took control of Congress and enacted the CRA, and when Congress struck down the OSHA ergonomics rule in 2001—indicates that CBA and risk assessment were the intended emphases.¹⁴³ Congress wanted more efficient regulations, and requiring an agency to go back and rewrite rules that failed a cost–benefit test served Congress’s needs.¹⁴⁴ Along with the legislative history, the signing statement interpreting the Act and Senate Bill 2184 introduced in the wake of the ergonomics veto also provide some strong clues as to the intended definition of “substantially the same.” Secondly, the constraint that the text of any joint resolution of disapproval must be all-or-nothing—all nonoffending portions of the vetoed rule must fall along with the offending ones—argues for a limited interpretation, as a far-reaching interpretation of “substantially the same” would limit an agency’s authority in ways Congress did not intend in exercising the veto. Third, in a system in which courts generally defer to an agency’s own interpretation of its authority under an organic statute, agency action

142. Parks, *supra* note 139, at 200 n.69. Note that Jeffress’ statement that the language is “vague and ambiguous” expresses uncertainty and risk aversion from within the agency, rather than a confident stance that issuance of another ergonomics standard would actually be illegal. *See also supra* Part II.C (noting agency self-censorship as one means of enforcing the CRA’s substantial similarity provision).

143. *See infra* Parts IV.A.1, IV.A.4.

144. *But see* Parks, *supra* note 139, at 199–205 (arguing that in practice the CRA has been used not to increase accountability, but to appease special interest groups, leaving no clear statutory guidance for agencies).

following a joint resolution of disapproval should also be given deference. Finally, since a joint resolution of disapproval, read along with too broad an interpretation of “substantially the same,” could significantly alter the scope of an agency’s authority under its organic statute, one should avoid such a broad interpretation, since it seems implausible (or at least unwise) that Congress would intend to significantly alter an agency’s delegated authority via the speedy and less-than-deliberative process it created to effect the CRA.

A. Congressional Intent and Language

Whether the plain language of the CRA is viewed on its own or in the context of the events leading up to the passage of the statute and the events surrounding the first and only congressional disapproval action in 2001, it is clear that Congress intended the new streamlined regulatory veto process to serve two purposes: one pragmatic and one symbolic. Congress needed to create a chokepoint whereby it could focus its ire on the worst of the worst—those specific regulations that did the greatest offense to the general concept of “do more good than harm” or the ones that gored the oxen of specific interest groups with strong allies in Congress. Congress also felt it needed, as the floor debate on the ergonomics standard made plain, to move the fulcrum on the scales governing the separation of powers so as to assert greater congressional control over the regulatory agencies whose budgets—but not always whose behavior—it authorizes. Neither of these purposes requires Congress to repudiate whole categories of agency activity when it rejects a single rule, as we will discuss in detail below. To use a mundane behavioral analogy, a parent who wants her teenager to bring home the right kind of date will clearly achieve that goal more efficiently, and with less backlash, by rejecting a specific suitor (perhaps with specific detail about how to avoid a repeat embarrassment) than by grounding her or forbidding her from ever dating again. Even if Congress had wanted to be nefarious, with the only goal that of tying the offending agency in knots, it would actually better achieve that goal by vetoing a series of attempts to regulate, one after the other, then by barring the instant rule and all future rules in that area in one fell swoop.

The plain language of the statute also shows that the regulatory veto was intended to preclude repetitious actions, *not to preclude related actions informed by the lessons imparted through the first veto*. Simply put, Congress put so much detail in the CRA about when and how an agency could try to reissue a vetoed rule that it seems bizarre for analysts to interpret “substantially the same” as a blanket prohibition against regulating in an area. We will explain how congressional intent sheds light on the precise meaning of

“substantially the same” by examining five facets of the legislative arena: (1) the events leading up to the passage of the CRA; (2) the plain text of the statute; (3) the explanatory statement issued a few weeks after the CRA’s passage by the three major leaders of the legislation in the Senate (and contemporaneously issued verbatim in the House); (4) the substantive (as opposed to the polemical) aspects of the ergonomics floor debate; and (5) the provisions of Senate Bill 2184 subsequently proposed to restart the ergonomics regulatory process.

1. *Events Leading up to Passage*

One cannot interpret the CRA without looking at the political history behind it—both electoral and legislative. The political climate of the mid-1990s reveals that congressional Republicans sought to reform the administrative process in order to screen for rules whose benefits did not outweigh their costs.¹⁴⁵ A Senate report on the moratorium proposal stated, “As taxpayers, the American people have a right to ask whether they are getting their money’s worth. Currently, too few regulations are subjected to stringent cost–benefit analysis or risk assessment based on sound science. Without such protections, regulations can have unintended results.”¹⁴⁶ This led to the inclusion in the CRA, for example, of a requirement that agencies submit the report of their rule not only to Congress, but also to GAO so that it can evaluate the CBA.¹⁴⁷ Although there were some complaints about the number or volume of regulations as opposed to merely their efficiency¹⁴⁸—possibly suggesting that some members of Congress would not support even regulations whose benefits strongly outweighed their costs—the overall political history of the CRA in the period from 1994 to 1996 sends a clear sign that CBA and risk assessment were key. A statute enacted to improve regulation should not be interpreted so as to foreclose regulation.

2. *Statutory Text*

The plain language of the CRA provides at least three hints to the intended meaning and import of the “substantially the same” provision.

145. See *supra* Parts I.A–B; see also *infra* Part IV.D (arguing that allowing an agency to reissue a rule with a significantly better cost–benefit balance is a victory for congressional oversight).

146. S. REP. NO. 104-15, at 5 (1995).

147. See 5 U.S.C. § 801(a)(1)(B) (2006); 141 CONG. REC. 9428–29 (1995) (statement of Sen. Domenici).

148. See, e.g., S. REP. NO. 104-15, at 5 (“Without significant new controls, the volume of regulations will only grow larger.”).

First, we note that in the second sentence of the statute, the first obligation of the agency issuing a rule (other than to submit a copy of the rule itself to the House and Senate) is to submit “a complete copy of the cost–benefit analysis of the rule, if any” to the Comptroller General and each house of Congress.¹⁴⁹ Clearly, as we have discussed above, the CRA is a mechanism for Congress to scrutinize the costs and benefits of individual regulations for possible veto of rules that appear to have costs in excess of benefits (a verdict that Congress either infers in the absence of an agency statement on costs and benefits, makes using evidence contained in the agency CBA, or makes by rejecting conclusions to the contrary in the CBA).¹⁵⁰ Moreover, the CRA’s application only to major rules—a phrase defined in terms of the rule’s economic impact¹⁵¹—suggests that Congress was primarily concerned with the overall financial cost of regulations. As we discuss in detail below, we believe the first place Congress therefore should and will look to see if the reissued rule is “in substantially the same form” as a vetoed rule is the CBA; a similar-looking rule that has a wholly different (and more favorable) balance between costs and benefit is simply not the same. Such a rule will be different along precisely the key dimension over which Congress expressed paramount concern.

In addition, in the very sentence that bars an agency from reissuing a “substantially similar” rule, the Act provides for Congress to specifically authorize it to do just that via a new law enacted after the veto resolution passes.¹⁵² We will discuss below, in the context of the April 1996 signing statement, how Congress in part intended this provision to apply in the special case in which Congress had previously instructed the agency to issue almost precisely the rule it did issue, thereby leaving the agency caught between an affirmative requirement and a prohibition. So, other than needing such a mechanism to cover the rare cases where the agency is obligated to reissue a similar rule, why would Congress have specifically reserved the right to authorize a very similar rule to one it had recently taken the trouble to veto? We assert that there are only two logical explanations for this: (1) Congress might use the new specific authorization to clarify exactly what minor changes that might *appear* to leave the rule

149. 5 U.S.C. § 801(a)(1)(B).

150. Though not the subject of this Article, it is worth noting that CBA’s quantitative nature still leaves plenty of room for argument, particularly in regards to valuation of the benefits being measured. See Graham, *supra* note 9, at 483–516 (defending the use of cost–benefit analysis despite its “technical challenges” as applied to lifesaving regulations).

151. 5 U.S.C. § 804(2).

152. See *id.* § 801(b)(2) (“[A] new rule that is substantially the same as [a vetoed] rule may not be issued, *unless* the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving of the original rule.” (emphasis added)).

“substantially the same” would instead be sufficient to reverse all concerns that prompted the original veto; or (2) Congress might come to realize that new information about the harm(s) addressed by the rules or about the costs of remedying them made the original rule desirable (albeit in hindsight). Because the passage of time can make the original veto look unwise (see *supra* interpretations 1 and 2 in the hierarchy in Part III.A), Congress needed a way to allow something “substantially similar” to pass muster despite the prohibition in the first part of § 801(b)(2). Whatever the precise circumstances of such a clarifying or about-face authorization, the very fact that Congress also anticipated occasional instances where similar or even identical rules could be reissued means, logically, that it clearly expected different rules to be reissued, making the interpretation of “substantially the same” as barring all further activity in a given problem area quite far-fetched.

Finally, § 803 of the CRA establishes a special rule for a regulation originally promulgated pursuant to a deadline set by Congress, the courts, or by another regulation. This section gives the agency whose rule is vetoed a one-year period to fulfill the original obligation to regulate. Such deadlines always specify at least the problem area the agency is obligated to address,¹⁵³ so there is little or no question that Congress intended to allow agencies to reissue rules covering the same hazard(s) as a vetoed rule, when needed to fulfill an obligation, so long as the revised rule approaches the problem(s) in ways not “substantially the same.” Further support for this common-sense interpretation of “substantially the same” is found in the one-year time period established by § 803: one year to repropose and finalize a new rule is a breakneck pace in light of the three or more years it not uncommonly takes agencies to regulate from start to finish.¹⁵⁴ Thus, in § 803, Congress chose a time frame compatible only with a very circumscribed set of “fixes” to respond to the original resolution of disapproval. If “not substantially the same” meant “unrecognizably different from,” one year would generally be quite insufficient to re-promulgate under these circumstances. Admittedly, Congress could have

153. See, e.g., Needlestick Safety and Prevention Act, Pub. L. No. 106-430, § 5, 114 Stat. 1901, 1903-04 (2000) (establishing the procedure and deadline by which OSHA was required to promulgate amendments to its rule to decrease worker exposure to bloodborne pathogens). In this case, Congress went further and actually wrote the exact language it required OSHA to insert in amending the existing rule.

154. See Stuart Shapiro, *Presidents and Process: A Comparison of the Regulatory Process Under the Clinton and Bush (43) Administrations*, 23 J.L. & POL. 393, 416 (2007) (showing that, on average, it takes almost three years for a regulation to move from first publication in the *Unified Agenda* of rules in development to final promulgation, with outliers in both the Clinton and Bush (43) Administrations exceeding ten years in duration).

intended a different meaning for “substantially the same” in cases where no judicial, statutory, or regulatory deadline existed, but then one might well have expected § 803 to cross-reference § 802(b)(2) and make clear that a more liberal interpretation of “substantially the same” only applies to compliance with preexisting deadlines.

3. *The Signing Statement*

In the absence of a formal legislative history, the explanatory statement written by the prime sponsors of the CRA¹⁵⁵ serves its intended purpose as “guidance to the agencies, the courts, and other interested parties when interpreting the act’s terms.”¹⁵⁶ This document contains various elaborations that shed light on congressional expectations regarding agency latitude to reissue rules after disapproval.

The background section clarifies that Congress sought not to “become a super regulatory agency” speaking directly to the regulated community, but needed the CRA to tip the “delicate balance” between congressional enactment and executive branch implementation of laws toward slightly more policymaking authority for Congress.¹⁵⁷ Notably, the sponsors repeatedly referred to “a rule” in the singular noun form, rather than to whole regulatory programs, whenever they discussed the need for review (for example, “Congress may find *a rule* to be too burdensome, excessive, inappropriate or duplicative”¹⁵⁸). In other words, agencies may take specific actions that usurp policymaking activity from Congress, so the remedy is for Congress to send them back to try again (to regulate consistent with their delegated authority), not to shut down the regulatory apparatus in an area. A CRA that had a “one strike and you’re out” mechanism would, we believe, not redress the “delicate balance,” but rewrite it entirely.

As discussed above,¹⁵⁹ the passage of time or the advance of knowledge

155. 142 CONG. REC. 8196–8201 (1996) (joint statement of Sens. Nickles, Reid, and Stevens).

156. *Id.* at 8197.

157. *Id.*

158. *Id.* (emphasis added). In one instance only, the authors of this statement refer to “regulatory schemes” as perhaps being “at odds with Congressional expectations,” possibly in contrast to individual rules that conflict with those expectations. *Id.* However, four sentences later in the same paragraph, they say that “[i]f these concerns are sufficiently serious, Congress can stop *the rule*,” *id.* (emphasis added), suggesting that “schemes” does not connote an entire regulatory program or refer to all conceivable attempts to regulate to control a particular problem area, but simply refers to a single offending rule that constitutes a “scheme.”

159. *See supra* Part III.A.

can ruin a well-intentioned rule and demand congressional intervention—Nickles, Reid, and Stevens explain how “during the time lapse between passage of legislation and its implementation, the nature of the problem addressed, and its proper solution, can change.”¹⁶⁰ The principle that costs and benefits can be a moving target must, we believe, also inform the meaning of “substantially the same.” If the “proper solution” Congress envisioned to an environmental or other problem has changed such that an agency regulation no longer comports with congressional expectations, then it must also be possible for circumstances to change *again* such that a vetoed rule could turn out to effect “the proper solution.” The signing statement sets up a predicate for intervention when the regulatory solution and the proper solution diverge—which in turn implies that an agency certainly cannot reissue “the same rule in the same fact situation,” but in rare cases it should be permitted to argue that what once was improper has now become proper.¹⁶¹ Whether in the ten years since the ergonomics veto the 2000 rule may still look “improper” does not change the logic that costs and benefits can change by agency action or by exogenous factors, and that the purpose of the CRA is to block rules that fail a cost–benefit test.

The signing statement also offers up the “opportunity to act . . . before regulated parties must invest the significant resources necessary to comply with a major rule”¹⁶² as the sole reason for a law that delays the effectiveness of rules while Congress considers whether to veto them. Again, this perspective is consistent with the purpose of the CRA as a filter against agencies requiring costs in excess of their accompanying benefits, not as a means for Congress to reject all solutions to a particular problem by disapproving one particular way to solve it.

The (brief) direct explanation of the “substantially the same” paragraph provides additional general impressions of likely congressional intent, as well as some specific elaboration of the remainder of § 801(b)(2). The only mention given to the purpose of the “substantially the same” prohibition is as follows: “Subsection 801(b)(2) is necessary to prevent circumvention of a resolution [of] disapproval.”¹⁶³ The use of the pejorative word *circumvention* seems clearly to signal congressional concern that an agency could fight and win a war of attrition simply by continuing to promulgate near-identical variants of a vetoed rule until it finally caught Congress asleep at the switch or wary of having said “no” too many times. This rationale for invoking the substantial similarity prohibition was echoed many times in the

160. 142 CONG. REC. 8197 (joint statement of Sens. Nickles, Reid, and Stevens).

161. *See infra* Part V.

162. 142 CONG. REC. 8198 (joint statement of Sens. Nickles, Reid, and Stevens).

163. *See id.* at 8199.

ergonomics floor debate, notably in this statement by Senator James Jeffords of Vermont: “an agency should not be able to reissue a disapproved rule merely by making minor changes, thereby claiming that the reissued regulation was a different entity.”¹⁶⁴ Viewed in this light, “substantially the same” means something akin to “different enough that it is clear the agency is not acting in bad faith.”

The remainder of the paragraph explaining § 801(b)(2) sheds more light on the process whereby Congress can even specifically authorize an agency to reissue a rule that is *not* “substantially different.” Here the sponsors made clear that if the underlying statute under which the agency issued the vetoed rule does not constrain the substance of such a rule, “the agency may exercise its broad discretion to issue a substantially different rule.”¹⁶⁵ *Notice that the sponsors make no mention of the agency needing any permission from Congress to do so.* However, in some cases Congress has obliged an agency to issue a rule *and* has imposed specific requirements governing what such a rule should and should not contain.¹⁶⁶ When Congress disapproves of this sort of rule, “the enactment of a resolution of disapproval for that rule may work to prohibit the reissuance of *any* rule.”¹⁶⁷ In these unusual cases, the sponsors clarify, the “debate on any resolution of disapproval . . . [should] make the congressional intent clear regarding the agency’s options or lack thereof.”¹⁶⁸ If an agency is allowed by the original statute to issue a substantially different rule, Congress has no obligation to speak further, but if the veto and the statute collide, then Congress must explain the seeming paradox. Such a case has never occurred, of course (the Occupational Safety and Health (OSH) Act does not require OSHA to issue any kind of ergonomics rule), but we can offer informed speculation about the likely contours of such an event. Suppose that in 2015, Congress was to pass a law requiring the Department of Transportation (DOT) to issue a regulation by January 1, 2018, prohibiting drivers from writing text messages while driving. But by 2018, suppose the makeup of Congress had changed, as had the party in control of the White House, and the new Congress was not pleased that DOT had followed the old Congress’s instructions to the letter. It could veto the rule and make clear that DOT had no options left—perhaps Congress could save face in light of this flip-flop by claiming that new technology had made it possible to text safely, and it could simply assert that the original order to regulate was now moot.

164. 147 CONG. REC. 2816 (2001) (statement of Sen. Jeffords).

165. 142 CONG. REC. 8199 (joint statement of Sens. Nickles, Reid, and Stevens).

166. *See, e.g., supra* note 153.

167. 142 CONG. REC. 8199 (joint statement of Sens. Nickles, Reid, and Stevens) (emphasis added).

168. *Id.*

Or, Congress could observe (or claim) that DOT had followed the original instructions in a particularly clumsy way: perhaps it had brushed aside pleas from certain constituency groups (physicians, perhaps) who asserted that more harm to public safety would ensue if they were not exempted from the regulations. Congress could resolve this paradox by instructing DOT to reissue the rule with one additional sentence carving out such an exemption. That new document would probably be “substantially the same” as the vetoed rule and might have costs and benefits virtually unchanged from those of the previous rule, but it would be permissible because Congress had in effect amended its original instructions from 2015 to express its will more clearly.

Because Congress specifically provided the agency with an escape valve (a written authorization on how to proceed) in the event of a head-on conflict between a statutory obligation and a congressional veto, it is clear that no such authorization is needed if the agency can craft on its own a “substantially different” rule that still comports with the original statute. Although Democratic Senators did introduce a bill in the several years after the ergonomics veto that (had it passed) would have required OSHA to promulgate a new ergonomics rule,¹⁶⁹ we believe it is clear that a new law requiring an agency to act (especially when an agency appears more than content with the prior veto) is not necessary to allow that agency to act, as long as it could produce a revision sufficiently different from the original so as not to circumvent the veto. The special process designed to avoid situations when the veto might preclude all regulation in a particular area simply suggests that Congress intended that none of its vetoes should ever have such broad repercussions.

4. *Ergonomics Floor Debate—Substantive Clues*

Although we argued above that many of the general statements about the CRA itself during the ergonomics debate should be dismissed as political posturing, during that debate there were also statements for or against the specific resolution of disapproval that provide clues to the intended meaning of “substantially similar.” Statements about the actual rule being debated, rather than the hypothetical future effect of striking it down, can presumably be interpreted at face value—in particular, opponents of the rule would have a disincentive to play down their substantive concerns, lest swing voters decide that the rule was not so bad after all. And yet, while several of the key opponents emphasized very specific concerns with the rule at hand, and stated their objections in heated

169. See *infra* Part IV.A.5.

terms, they yet clearly left open the door for OSHA to take specific steps to improve the rule. For example, Republican Representative John Sweeney of New York made plain: “My vote of no confidence on the ergonomics regulations does not mean I oppose an ergonomics standard; I just oppose this one”—primarily in his view because it did not specify impermissible levels of repetitive stress along the key dimensions of workplace ergonomics (force, weight, posture, vibration, etc.) that would give employers confidence they knew what constituted compliance with the regulation.¹⁷⁰ Similarly, Republican Representative Charles Norwood of Georgia emphasized that the vagueness of the OSHA rule “will hurt the workers,” and said that “when we have [a rule] that is bad and wrong . . . then we should do away with it and begin again.”¹⁷¹

Interpretations of “substantially similar” that assume the agency is barred from re-regulating in the same subject area therefore seem to ignore how focused the ergonomics debate was on the consternation of the majority in Congress with the specific provisions of the OSHA final rule. Although opponents might have felt wary of stating emphatically that they opposed any attempt to control ergonomic hazards, it nevertheless was the case that even the staunchest opponents focused on the “wrong ways to solve the ergonomics problem” rather than on the inappropriateness of any rule in this area.

5. *Subsequent Activity*

Legislative activity following the veto of the ergonomics rule might seem to suggest that at least some in Congress thought that OSHA might have required a specific authorization to propose a new ergonomics rule. In particular, in 2002 Senator John Breaux of Louisiana introduced Senate Bill 2184, which included a specific authorization pursuant to the CRA for OSHA to issue a new ergonomics rule.¹⁷² The presence of a specific authorization in Senate Bill 2184 may imply that the bill’s sponsors believed that such an authorization was necessary in order for OSHA to promulgate a new ergonomics regulation.

Other circumstances, however, suggest more strongly that the inclusion of this specific authorization may have been merely a safeguard rather than

170. 147 CONG. REC. 3074–75 (2001) (statement of Rep. Sweeney); *see also infra* Part VI.B.

171. *Id.* at 3056 (statement of Rep. Norwood)

172. *See* S. 2184, 107th Cong. § 1(b)(4) (as introduced in the Senate, Apr. 17, 2002) (“Paragraph (1) [which requires OSHA to issue a new ergonomics rule] shall be considered a specific authorization by Congress in accordance with section 801(b)(2) of title 5, United States Code . . .”). Senate Bill 2184 never became law.

the purpose of the bill. The bill's mandate that OSHA issue a new rule within two years of the enactment of Senate Bill 2184¹⁷³ clearly indicates that the sponsors intended to spur a recalcitrant agency to take some action under the Republican administration. The bill's findings do not state that OSHA had been otherwise prohibited from issuing a new ergonomics rule—indeed, the findings do not mention Congress's 2001 veto at all.¹⁷⁴ Thus, the congressional authorization may have instead served to preempt a Bush Administration belief (or pretext) that Congress's earlier veto prohibited OSHA from further regulating workplace ergonomics.¹⁷⁵

B. All or Nothing

Another tool for interpreting the substantial similarity provision lies in the CRA's choice to provide only a “nuclear option” to deal with a troublesome rule. The CRA provides a nonamendable template for any joint resolution of disapproval, which allows only for repealing an entire rule, not just specific provisions.¹⁷⁶ Furthermore, there is “no language anywhere [in the CRA that] expressly refers in any manner to a part of any rule under review.”¹⁷⁷ An inability to sever certain provisions while upholding others is consistent with the CRA contemplating a “speedy, definitive and limited process” because “piecemeal consideration would delay and perhaps obstruct legislative resolution.”¹⁷⁸

Because an offending portion of the rule is not severable, Congress has decided to weigh only whether, on balance, the bad aspects of the rule outweigh the good. For example, even when they argued against certain provisions of the OSHA ergonomics regulation, congressional Republicans still noted that they supported some type of ergonomics rule.¹⁷⁹ Since the CRA strikes down an entire rule even though Congress may support certain portions of that rule, it only makes sense to read the substantial

173. *Id.* § 1(b)(1) (“Notwithstanding any other provision of law, not later than 2 years after the date of enactment of this Act, the Secretary of Labor shall, in accordance with section 6 of the [OSH Act], issue a final rule relating to ergonomics.”).

174. *See id.* § 1(a).

175. *Cf. supra* note 121, at 72 (statement of Elaine L. Chao, Secretary, U.S. Department of Labor) (hesitating to “expend valuable—and limited—resources on a new effort” to regulate workplace ergonomics following Congress's 2001 veto).

176. *See* 5 U.S.C. § 802 (2006) (requiring that a joint resolution of disapproval read: “That Congress disapproves the rule submitted by the ___ relating to ___, and such rule shall have no force or effect”).

177. Rosenberg, *supra* note 75, at 1065.

178. *Id.* at 1066.

179. *See, e.g.*, 147 CONG. REC. 2843–44 (2001) (statement of Sen. Nickles) (expressing support for a “more cost effective” ergonomics rule).

similarity provision as allowing the nonoffending provisions to be incorporated into a future rule. If an agency were not allowed to even reissue the parts of a rule that Congress does support, that would lead to what some have called “a draconian result”¹⁸⁰—and what we would be tempted to call a nonsensical result. To the extent that interpreting the CRA prevents agencies from issuing congressionally approved portions of a rule, such an interpretation should be avoided.

C. *Deference to Agency Expertise*

Because courts are generally deferential to an agency’s interpretation of its delegated authority,¹⁸¹ a joint resolution of disapproval should not be interpreted to apply too broadly if an agency wishes to use its authority to promulgate one or more rules addressing the same issues as the repealed rule. There are, however, two important limitations to this general principle of deference that may apply to agency actions taking place after Congress overturns a rule. First, where Congress overturns a rule because it believes the agency acted outside the scope of its delegated authority under the organic statute, a court might choose to weigh this congressional intent as a factor against deference to the agency, if the reissued rule offends against this principle in a similar way. Second, where Congress overturns a rule because it finds that the agency was “lawmaking,” this raises another statutory—if not constitutional—reason why agency deference might not be applied. This section presents the issue of deference generally, and then lays forth the two exceptions to this general rule.

1. *Chevron Deference*

In *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, the Supreme Court held that, unless the organic statute is itself clear and contrary, a court should defer to an agency’s reasonable interpretation of its own delegated authority.¹⁸² The Court’s decision was based on the notion of agency expertise: since agencies are more familiar with the subject matter over which they regulate, they are better equipped than courts to understand their grant of rulemaking authority.¹⁸³ Where Congress delegates rulemaking authority to an administrative agency, it is inevitable that the delegation will include some ambiguities or gaps.¹⁸⁴ But in order

180. Rosenberg, *supra* note 75, at 1066.

181. See *infra* Part IV.C.1.

182. 467 U.S. 837 (1984).

183. *Id.* at 866.

184. See *Morton v. Ruiz*, 415 U.S. 199, 231 (1974) (noting that such a “gap” may be explicit or implicit).

for an agency to effectively carry out its delegated authority, there must be a policy in place that fills the gaps left by Congress. In *Chevron*, the Court reasoned that gaps were delegations, either express or implicit, granting the agency the authority “to elucidate a specific provision of the statute by regulation.”¹⁸⁵ Explaining the reason for deference to agencies, the Court has recognized that “[t]he responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones.”¹⁸⁶ The *Chevron* Court thus created a two-part test that respects agency expertise by deferring to reasonable interpretations of ambiguity in a delegation of authority. First, a court must determine “whether Congress has directly spoken to the precise question at issue.”¹⁸⁷ If so, both the court and the agency “must give effect to the unambiguously expressed intent of Congress.”¹⁸⁸ If Congress has not spoken to the issue directly, however, the second step of *Chevron* requires a court to defer to the agency’s construction of the statute if it is a “permissible” interpretation, whether or not the court agrees that the interpretation is the correct one.¹⁸⁹

Because a resolution repealing a rule under the CRA limits an agency’s delegated authority by prohibiting it from promulgating a rule that is substantially similar, the *Chevron* doctrine should apply here. The CRA proscription against an agency reissuing a vetoed rule “in substantially the same form” is an ambiguous limitation to an agency’s delegated authority. That limitation could have been made less hazy but probably not made crystal clear, since a detailed elucidation of the substantial similarity standard would necessarily be rather complex in order to cover the wide range of agencies whose rules are reviewable by Congress. However, the other relevant statutory text, the joint resolution of disapproval itself, does not resolve the ambiguity. It cannot provide any evidence that Congress has “directly spoken to the precise question at issue”¹⁹⁰—namely, what form of regulation would constitute a substantially similar reissuance of the rejected rule—because the text can only effect a repeal of the rule and no more.¹⁹¹ Although a court, in the absence of clear, enacted statutory

185. *Chevron*, 467 U.S. at 843–44.

186. *Id.* at 866.

187. *Id.* at 842.

188. *Id.* at 842–43.

189. *Id.* at 843.

190. *Id.* at 842.

191. *See supra* Part IV.B (discussing the limited text of the joint resolution and its effect on severability). Trying to infer congressional intent, however, may be relevant to the scope of an agency’s authority following action under the CRA in cases where the subject matter is politically and economically significant, and where there is a broader legislative scheme in

language, might look to legislative history to determine whether Congress has “spoken to” the issue, too many disparate (and perhaps disingenuous) arguments on the floor make this unworkable as a judicial doctrine without any textual hook to hang it on.¹⁹²

Chevron step one, then, cannot end the inquiry; we must proceed to step two. The agency’s interpretation, if permissible, should then receive deference. While some minor transposition of a rejected rule’s language effecting no substantive change could certainly be deemed impermissible under the CRA, changes that are significant enough to affect the cost–benefit ratio are similar to the “policy choices” that the Court has held are not within the responsibility of the Judiciary to balance.¹⁹³ Thus, comparing side-by-side the language of a vetoed rule and the subsequently promulgated rule is inadequate without considering the substantive changes effected by any difference in language, however minor. Under the reasoning in *Chevron*, a court should give substantial deference to an agency in determining whether, for purposes of the CRA, a rule is substantially different from the vetoed rule.

2. *Ultra Vires Limitation*

Admittedly, there are important considerations that may counsel against applying *Chevron* deference in particular situations. One such situation might occur if Congress’s original veto were built upon a finding that the agency misunderstood its own power under the organic statute. In that case, a court might choose to consider Congress’s findings as a limitation on the applicability of *Chevron* deference. Such a consideration provided the background for the Supreme Court’s decision in *FDA v. Brown & Williamson Tobacco Corp.*, in which the Court struck down regulation of tobacco products by the Food and Drug Administration (FDA).¹⁹⁴ The Court looked to congressional intent in determining the boundaries of FDA’s authority under the Food, Drug and Cosmetic Act (FDCA), finding that the statute’s use of the words *drug* and *device* clearly did not grant FDA the power to regulate tobacco products, and the regulation thus failed the first

place. See *infra* Part IV.C.2 (discussing the effect of *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), on the application of the *Chevron* doctrine).

192. See, e.g., *Zedner v. United States*, 547 U.S. 489, 509–11 (2006) (Scalia, J., concurring) (filing a separate opinion for the specific purpose of admonishing the majority’s citation to legislative history, noting that use of legislative history in statutory interpretation “accustoms us to believing that what is said by a single person in a floor debate or by a committee report represents the view of Congress as a whole”).

193. *Chevron*, 467 U.S. at 866.

194. 529 U.S. 120 (2000).

prong of the *Chevron* test.¹⁹⁵ The FDCA “clearly” spoke to the issue, according to the Court, and therefore FDA’s contrary interpretation of its power was not entitled to deference. Importantly, the Court found this clarity not within the text of the FDCA itself, but in other legislative actions since the FDCA’s enactment. In writing for the majority, Justice O’Connor pointed out that, in the decades following the FDCA’s enactment, Congress had passed various pieces of legislation restricting—but not entirely prohibiting—certain behavior of the tobacco industry, indicating a congressional presumption that sale of tobacco products would still be permitted.¹⁹⁶ The Court found that this presumption clearly contradicted FDA’s interpretation that “drug” and “device” in the FDCA included tobacco products because, if FDA’s interpretation were correct, the agency would be *required* to ban the sale of tobacco products because safety is a prerequisite for sale of a drug or device under the FDCA, and no tobacco product is “safe.”¹⁹⁷ The four dissenting Justices criticized the majority’s reliance on inferred congressional intent, arguing that the *Chevron* approach to statutory interpretation should principally focus on the text of the organic statute.¹⁹⁸

If Congress, in enacting a joint resolution pursuant to the CRA, was to make clear that it thought an agency’s regulation was outside the scope of its statutory grant of authority,¹⁹⁹ a court might consider this a factor limiting its deference to the agency. In other words, the CRA veto might be considered a “clarification” of the organic statute in a way similar to the tobacco-related legislative activity considered by the Court in *Brown & Williamson*.²⁰⁰ Republicans hinted at this issue in the congressional debates over the ergonomics rule, where they argued that part of the rule contravened a provision in the OSH Act because, under their

195. *Id.* at 160–61 (“It is . . . clear, based on the [Food, Drug, and Cosmetic Act’s] overall regulatory scheme and the subsequent tobacco legislation, that Congress has directly spoken to the question at issue and precluded the [Food and Drug Administration (FDA)] from regulating tobacco products.”).

196. *Id.* at 137–39.

197. *Id.* at 133–35 (“These findings logically imply that, if tobacco products were ‘devices’ under the FDCA, the FDA would be required to remove them from the market.”).

198. *Id.* at 167–81 (Breyer, J., dissenting) (arguing for a “literal” interpretation of the FDCA).

199. Because of the one-sentence limit on the text of the CRA joint resolution, see 5 U.S.C. § 802 (2006), the clarity would have to come from other legislative enactments as in *Brown & Williamson*, see 529 U.S. at 137–39, or from the legislative history of the joint resolution. *But see supra* note 192 and accompanying text (criticizing reliance on legislative history). Alternatively, if Congress were to amend the CRA to allow alteration of the resolution’s text, a clear legislative intent might be more easily discerned. *See infra* Part VII.

200. *See supra* note 196 and accompanying text.

interpretation, the regulation superseded state worker’s compensation laws.²⁰¹ In a more obvious instance of an agency acting outside of its delegated authority, however, *Brown & Williamson* might require (or at least encourage) a court to consider the congressional rationale for overturning a rule as a factor in evaluating the validity of a new rule issued in the same area. Like the decision in *Brown & Williamson*, however, the factor might only be compelling if there was also a broader legislative scheme in place.

3. *Lawmaking Limitation*

Another limiting principle on agency discretion is found where the agency action blurs the lines of regulation and steps into the field of lawmaking. Where such an action takes place, the nondelegation doctrine is implicated and can present questions of constitutionality and agency adherence to its limited grant of authority. In the debates over the ergonomics rule, opponents of the regulation contended that OSHA was writing the “law of the land” and that the elected members of Congress, not bureaucrats, are supposed to exercise that sort of authority.²⁰² Senator Nickles made clear that he saw the ergonomics rule as a usurpation of Congress’s legislative power. He referred to the rule as “legislation” and argued, “we are the legislative body. If we want to legislate in this area, introduce a bill and we will consider it.”²⁰³ This argument that an administrative agency has exercised legislative power has constitutional implications. Article I of the Constitution provides that the Senate and House of Representatives have the sole legislative power.²⁰⁴ In the administrative state, this constitutional provision has given rise to the nondelegation doctrine, by which Congress may not delegate its lawmaking authority to an executive agency.²⁰⁵ To meet constitutional requirements

201. See Occupational Safety and Health Act of 1970 § 4(b)(4), 29 U.S.C. § 653(b)(4) (2006) (“Nothing in this [Act] shall be construed to supersede or in any manner affect any workmen’s compensation law . . .”); 147 CONG. REC. 2816 (2001) (statement of Sen. Jeffords) (“[OSHA] ignored, in issuing its ergo standard, the clear statutory mandate in section 4 of the OSH Act not to regulate in the area of workmen’s compensation law.”). Senator Nickles argued that, even if it were within OSHA’s delegated power, the regulation would supersede “more generous” state worker’s compensation law. 147 CONG. REC. 2817 (statement of Sen. Nickles). We argue below that this interpretation may have been incorrect on its face. See *infra* Part VI.B.

202. 147 CONG. REC. 2817 (statement of Sen. Nickles).

203. *Id.*

204. U.S. CONST. art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”).

205. See, e.g., *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (holding that the National Industrial Recovery Act’s authorization to the President to

under this doctrine, the organic statute needs to provide the agency with an “intelligible principle to which [the agency] is directed to conform.”²⁰⁶

Violations of the nondelegation doctrine, however, are rarely found. Instead, the courts employ a canon of constitutional avoidance to minimize delegation problems. Under this canon of interpretation, a court confronted with a statute that appears to delegate lawmaking power to an agency will search for a narrower, constitutionally permissible interpretation of the statute. If such an interpretation is available, the court will not invalidate the statute, but will instead strike down agency action that exceeds the (narrower, constitutionally permissible) grant of authority.²⁰⁷ The *Benzene Case* is one example in which the Supreme Court has employed this canon to avoid striking down a delegation of authority to an administrative agency.²⁰⁸ In that case, the Court considered an OSHA rule which limited permissible workplace exposure levels to airborne benzene to one part per million (ppm). OSHA set that standard pursuant to the statutory delegation of authority instructing it to implement standards “reasonably necessary or appropriate to provide safe or healthful employment.”²⁰⁹ Rather than finding that the “reasonably necessary or appropriate” standard was unintelligible and unconstitutionally broad, the Court instead held that OSHA exceeded its rulemaking authority because the agency did not make the necessary scientific findings and based its exposure rule on impermissible qualitative assumptions about the relationship between cancer risks and small exposures to benzene, rather than on a quantitative assessment that found a “significant risk” predicate for regulating to one ppm.²¹⁰

prescribe “codes of fair competition” was an unconstitutional delegation of legislative power because the statutory standard was insufficient to curb the discretion of the Executive Branch).

206. *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).

207. See generally Matthew D. Adler, *Judicial Restraint in the Administrative State: Beyond the Countermajoritarian Difficulty*, 145 U. PA. L. REV. 759, 835–39 (1997) (describing the canon of constitutional avoidance and arguing that “the criteria bearing on constitutionality figure in the best interpretation of statutes, at least where statutes are otherwise taken to be indeterminate”).

208. *Indus. Union Dep’t v. Am. Petroleum Inst. (Benzene Case)*, 448 U.S. 607 (1980).

209. *Id.* at 613 (quoting *Am. Petroleum Inst. v. OSHA*, 581 F.2d 493, 502 (1978)).

210. *Id.* at 662. For two contrasting views on whether the *Benzene Case* either curtailed OSHA’s ability to regulate effectively, or gave OSHA a license (that it has failed to employ) to use science to promulgate highly worker-protective standards, compare Wendy Wagner, Univ. of Tex. Sch. of Law, Presentation at the Society for Risk Analysis Annual Meeting 2010, The Bad Side of *Benzene* (Dec. 6, 2010), <http://birenheide.com/sra/2010AM/program/presentations/M4-A.3%20Wagner.pdf>, with Adam M. Finkel, Exec. Dir., Penn Program on Regulation, Univ. of Pa., Presentation at the Society for Risk Analysis Annual Meeting 2010, *Waiting for the Cavalry: The Role of Risk Assessors in an*

If Congress vetoes an agency regulation on the ground that it is lawmaking, this may be taken to mean one of two things: either Congress believes that the agency was acting outside of its delegated authority, or it believes that the organic statute unconstitutionally grants the agency legislative power. Since, reflecting the avoidance canon, unconstitutional delegations have only been found twice²¹¹ in the history of our administrative state, and since repealing a single rule would be insufficient to correct that type of constitutional defect in the organic statute, it seems clear that by “lawmaking” Congress must mean that the agency exceeded its lawfully-granted statutory authority.²¹² In other words, if Congress actually did mean that the organic statute is impermissibly broad, the legislature’s responsibilities lie far beyond vetoing the single rule, and would seem to require curing the constitutional defect by amending the organic statute. But if instead the veto means only that the agency has exceeded its authority, this brings us back to the *Brown & Williamson* issue, discussed above, where an agency still deserves deference in promulgating subsequent rules, although congressional intent may limit that deference if there is a legislative scheme in place.²¹³

On the other hand, it is possible—even likely—that Senator Nickles and his colleagues were merely speaking colloquially in accusing OSHA of lawmaking, and meant that the agency was “legislating” in a softer, nonconstitutional sense. If their objection meant that they found the regulation a statutorily—but not constitutionally—excessive exercise, then they are in essence making the ultra vires objection discussed above.²¹⁴ Alternatively, if their objection meant that OSHA did have both the statutory and constitutional authority to promulgate the regulation, but that the agency was flexing more power than it should simply as a matter of policy, then a veto on those grounds would in essence be an attempt to

Enlightened Occupational Health Policy (Dec. 6, 2010), <http://birenheide.com/sra/2010AM/program/presentations/M4-A.4%20Finkel.pdf>.

211. The two cases are *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), and *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935). For a discussion of the constitutionality of OSHA’s organic statute, see Cass R. Sunstein, *Is OSHA Unconstitutional?*, 94 VA. L. REV. 1407 (2008).

212. In this respect, it is worth noting that the Republicans’ lawmaking objections during the ergonomics rule debate were rather nonspecific. The legislators did not point to any “unintelligible” principle under which the rule was promulgated, or define what characteristics of the ergonomics rule brought it out of the normal rulemaking category and into the realm of lawmaking, besides voicing their displeasure with some of its substance. Indeed, the lawmaking argument was apparently conflated with the notion that OSHA had acted outside of its authority, properly delegated. See *supra* note 201 and accompanying text.

213. See *supra* Part IV.C.2.

214. See *id.*

retract some of the authority that Congress had delegated to the agency. As discussed below, Congress should be hesitant to use the CRA to substantively change an intelligible principle provided in the organic statute, and a court should hesitate to interpret the CRA to allow for such a sweeping change—the CRA process is an expedited mechanism that decreases deliberativeness by imposing strict limitations on time and procedure.²¹⁵

In any case, the lawmaking objection during a congressional veto essentially folds back up into one of the problems discussed previously—either it presents an issue of the agency exceeding its statutory authority and possibly affecting the deference due subsequent agency actions, or, failing that, it means that some members of Congress are attempting to grab back via an expedited process some authority properly delegated to the agency.

In summary, the issue of deference to an agency ought not differ too much between the CRA and the traditional (pre-1996) context. Both of these contexts involve an agency's judgment about what policies it can make under its authorizing legislation, since the "substantial similarity" provision is an after-the-fact limitation on the agency's statutorily-authorized rulemaking power. Neither the CRA nor its joint resolution template provide enough guidance to end the inquiry at *Chevron* step one. A court, then, should employ a narrow interpretation of the CRA's substantial similarity provision, giving significant deference to an agency's determination that the new version of a rejected rule is not "substantially similar" to its vetoed predecessor. This interpretation would, however, be limited by the permissibility requirement of *Chevron* step two.

D. Good Government Principles

Various members of Congress argued during the ergonomics floor debate that OSHA and other regulatory agencies should be chastened when they stray from their mission (regulation) into congressional territory (legislation). Arguably, Congress itself should also eschew legislation by regulation, even though Congress clearly has the legislative authority. In this section, we argue that Congress should not use a veto of an isolated piece of rulemaking to effect statutory change—it should do so through a direct and deliberative process that the CRA does not offer. In addition, we offer a second "good government" rationale for interpreting "substantially the same" in a narrow way.

215. See *infra* Part IV.D.1.

1. *Reluctance to Amend Congress’s Delegation to the Agency*

One should be hesitant to interpret the substantial similarity provision too broadly, because doing so could allow expedited joint resolutions to serve as de facto amendments to the original delegation of authority under the relevant organic statute. If the bar against reissuing a rule “in substantially the same form” applied to a wide swath of rules that could be promulgated within the agency’s delegated rulemaking authority, this would be tantamount to substantively amending the organic statute.

The OSHA ergonomics regulation illustrates this point nicely. Section 6 of the OSH Act grants OSHA broad authority to promulgate regulations setting workplace safety and health standards.²¹⁶ With the exception of one aspect of the ergonomics rule,²¹⁷ congressional Republicans admitted that OSHA’s broad authority did in fact include the power to promulgate the regulation as issued.²¹⁸ If it is within OSHA’s delegated authority to promulgate rules setting ergonomics standards, and enactment of the joint resolution would prevent OSHA from promulgating any ergonomics standards in the future, then the joint resolution would constitute a significant amendment to the organic statute. Indeed, one of the two parts of OSHA’s mission as put in place by the OSH Act—the responsibility to promulgate and enforce standards that lessen the risk of chronic occupational disease, as opposed to instantaneous occupational accidents—in turn involves regulating four basic types of risk factors: chemical, biological, radiological, and ergonomic hazards. In this case, vetoing the topic by vetoing one rule within that rubric would amount to taking a significant subset of the entire agency mission away from the Executive Branch, without actually opening up the statute to any scrutiny.

We see two major reasons why courts should not interpret the CRA in such a way that would allow it effectively to amend an organic statute via an expedited joint resolution. First, there is a rule of statutory interpretation whereby, absent clear intent by Congress to overturn a prior law, legislation should not be read to conflict with the prior law.²¹⁹ Second,

216. See OSH Act § 6, 29 U.S.C. § 655 (2006); see also 147 CONG. REC. 2816 (2001) (statement of Sen. Jeffords) (“OSHA, of course, has enormously broad regulatory authority. Section 6 of the OSH Act is a grant of broad authority to issue workplace safety and health standards.”).

217. See *supra* note 201 and accompanying text.

218. See 147 CONG. REC. 2822 (statement of Sen. Enzi) (“The power for OSHA to write this rule did not materialize out of thin air. We in Congress did give that authority to OSHA . . .”).

219. See, e.g., *Finley v. United States*, 490 U.S. 545, 554 (1989) (“[N]o changes in law or policy are to be presumed from changes of language in [a] revision unless an intent to make such changes is clearly expressed.” (internal quotation marks omitted) (quoting *Fourco Glass*

it seems especially doubtful that Congress would intend to allow modification of an organic statute via an expedited legislative process.²²⁰ Significant changes, such as major changes to a federal agency's statutory grant of rulemaking authority, generally take more deliberation and debate. The CRA process, on the other hand, creates both a ten-hour limit for floor debates and a shortened time frame in which Congress may consider the rule after the agency reports it.²²¹ For these reasons, it would be implausible to read the substantial similarity provision as barring reissuance of a rule simply because it dealt with the same subject as a repealed rule.

2. *A Cost-Benefit Justification for Rarely Invoking the Circumvention Argument*

Allowing an agency to reissue a vetoed rule with a significantly more favorable cost-benefit balance is a victory for congressional oversight, not a circumvention of it. "Substantially the same" is unavoidably a subjective judgment, so we urge that such judgments give the benefit of the doubt to the agency—not so that a prior veto would immunize the agency against bad conduct, but so that the second rule would allow the agency (through its allies in Congress, if any) to defend the rule a second time on its merits, rather than having it summarily dismissed as a circumvention. A "meta-cost-benefit" analysis of the decision to allow a rule of arguable dissimilarity back into the CRA veto process would look something like this: the cost of allowing debate on a rule that the majority comes to agree is either a circumvention of § 801(b)(2), or needs to be struck down a second time on the merits, can be measured in person-hours—roughly 10 hours or less of debate in each house. The benefits of allowing such a debate to proceed can be measured in the positive net benefit accruing to society from allowing the rule to take effect—assuming that Congress will act to veto a rule with negative net benefit.²²² The benefits of the additional

Co. v. Transmirra Prods. Corp., 353 U.S. 222, 227 (1957)), *superseded by statute*, 28 U.S.C. § 1367 (2006); Williams v. Taylor, 529 U.S. 362, 379 (2000) (plurality opinion) (arguing that if Congress intended the Antiterrorism and Effective Death Penalty Act to overturn prior rules regarding deference to state courts on questions of federal law in habeas proceedings, then Congress would have expressed that intent more clearly); *cf.* United States v. Republic Steel Corp., 264 F.2d 289, 299 (7th Cir. 1959) ("[T]here should not be attributed to Congress an intent to produce such a drastic change, in the absence of clear and compelling statutory language."), *rev'd on other grounds*, 362 U.S. 482 (1960).

220. See also Rosenberg, *supra* note 75, at 1066 (noting that the CRA "contemplates a speedy, definitive and limited process").

221. See *supra* Part I.B.3 (describing the CRA procedure).

222. As for the number of such possibly cost-ineffective debates, we simply observe that if OSHA were to repropose an ergonomics rule, and Congress were to allow brief debate on it despite possible arguments that any ergonomics rule would be a circumvention of § 801(b)(2), this would be the first such "wasteful" debate in at least ten years.

discussion will not always outweigh the costs thereof, but we suggest that whenever “substantially the same” is a controversial or close call, the opportunity for another brief discussion of the rule’s merits is a safer and more sensible call to make than a “silent veto” invoking § 801(b)(2).

V. WHAT DOES “SUBSTANTIALLY THE SAME” REALLY MEAN?

In light of the foregoing analysis, we contend that only among the first four interpretations in Part III.A above can the correct meaning of “substantially the same” possibly be found. Again, to comport literally with the proper instructions of § 801(b)(2) does not insulate the agency against a subsequent veto on substantive grounds, but it should force Congress to debate the reissued rule on its merits, rather than the “faster fast-track” of simply declaring it to be an invalid circumvention of the original resolution of disapproval. To home in more closely on exactly what we think “substantially the same” requires, we will examine each of the four more “permissive” interpretations in Part III.A, in reverse order of their presentation—and we will argue that any of the four, except for Interpretation 1, might be correct in particular future circumstances.

Interpretation 4 (the agency must change the cost–benefit balance and must fix any problems Congress identified when it vetoed the rule) has some appeal, but only if Congress either would amend the CRA to require a vote on a bill of particulars listing the specific reasons for the veto, or at least did so *sua sponte* in future cases.²²³ Arguably, the agency should not have unfettered discretion to change the costs and benefits of a rule as it sees fit, if Congress had already objected to specific provisions that contributed to the overall failure of a benefit–cost test. A new ergonomics rule that had far lower costs, far greater benefits, or both, but that persisted in establishing a payout system that made specific reference to state workers’ compensation levels, might come across as “substantially the same” in a way Congress could interpret as OSHA being oblivious to the previous veto.²²⁴ However, absent a clear statement of particulars from Congress, the agencies should not be forced to read Congress’s mind. A member who strenuously objected to a particular provision should be free to urge a second veto if the reissued rule contains an unchanged version of that provision, but if she cannot convince a majority in each house to call for that specific provision’s removal, Congress, or a court, should not dismiss as “substantially the same” a rule containing a provision that might have been, and might still be, supported by most or nearly all members.

223. *See infra* Part VII.

224. In this specific case, though, we might argue that OSHA could instead better explain how Congress misinterpreted the original provision in the rule. *See infra* Part VI.B.

Interpretation 3 (the agency's task is to significantly improve the cost-benefit balance, nothing more) makes the most sense in light of our analysis and should become the commonly understood default position. The CRA is essentially the ad hoc version of the failed Dole-Johnston regulatory reform bill²²⁵—rather than requiring agencies to produce cost-beneficial rules, and prescribing how Congress thought they should do so, the CRA simply reserves to Congress the right to reject on a case-by-case basis any rule whose stated costs exceed stated benefits, or, if the votes are there, one for which third-party assertions about costs exceed stated or asserted benefits. The way to reissue something distinctly different is to craft a rule whose benefit-cost balance is much more favorable. Again, this could be effected with a one-word change in a massive document, if that word, for example, halved the stringency as compared to the original, halved the cost, or both. Or, a rule missing one word—thereby exempting an industry sector that the original rule would have regulated—could be “distinctly different” with far lower costs. If the original objection had merit this change would not drastically diminish total benefits, and it could arouse far less opposition than the previous nearly identical rule.

Interpretation 2 (even an identical rule can be reissued under “substantially different” external conditions), while it may seem to make a mockery of § 801(b)(2), also has merit. Congress clearly did not want agencies to circumvent the CRA by waiting for the vote count to change, or for the White House to change hands and make a simple majority in Congress no longer sufficient, and then reissuing an identical rule. Even that might not be such a bad outcome; after all, a parent's answer to a sixteen-year-old's question, “Can I have the car keys?,” might be different if the child waits patiently and asks again in two years. But we accept that the passage of time alone should not be an excuse for trying out an identical rule again. However, time can also change everything, and the CRA needs to be interpreted such that time can make an identical rule into something “substantially different” than what used to be. Indeed, the Nickles-Reid signing statement already acknowledged how important this is, when it cited the following as a good reason for an initial veto: “agencies sometimes develop regulatory schemes at odds with congressional expectations. Moreover, during the time lapse between passage of legislation and its implementation, the nature of the problem addressed, and its proper solution, can change.”²²⁶ In other words, a particular rule Congress might have favored at the time it created the organic statute might not be appropriate anymore when finally promulgated because time can change

225. *See supra* Part I.B.2.

226. 142 CONG. REC. 8197 (1996) (joint statement of Sens. Nickles, Reid, and Stevens).

both problems and solutions. We fail to see any difference between that idea and the following related assertion: “During the time lapse between *the veto of a rule and its subsequent reissuance*, the nature of the problem addressed, and its proper solution, can change.” It may, of course, change such that the original rule seems even less sensible, but what if it changes such that the costs of the original rule have plummeted and the benefits have skyrocketed? In such a circumstance, we believe it would undercut the entire purpose of regulatory oversight and reform to refuse to debate on the merits a reissued rule whose costs and benefits—even if not its regulatory text—were far different than they were when the previous iteration was struck down.

Interpretation 1 (anything goes so long as the agency merely *asserts* that external conditions have changed), on the other hand, would contravene all the plain language and explanatory material in the CRA. Even if the agency believes it now has better explanations for an identical reissued rule, the appearance of asking the same question until you get a different answer is offensive enough to bedrock good government principles that the regulation should be required to have different costs and benefits after a veto, not just new rhetoric about them.²²⁷

We therefore believe Interpretation 3 is the most reasonable general case, but that Interpretations 2 or 4 may be more appropriate in various particular situations. But there is one additional burden we think agencies should be asked to carry, even though it is nowhere mentioned in the CRA. The process by which a rule is developed can undermine its content, and beneficial changes in that content may not fix a suspect process, even though Congress modified with “substantially the same” the word “form,” not the word “process.” Indeed, much of the floor debate about ergonomics decried various purported procedural lapses: the OSHA

227. We conclude this notwithstanding the irony that in one sense, the congressional majority did just that in the ergonomics case—it delayed the rule for several years to require the National Academy of Sciences (NAS) to study the problem, and when it did not like the NAS conclusion that ergonomics was a serious public health problem with cost-effective solutions, it forced NAS to convene a different panel and answer the question again. See, e.g., *Ergonomics in the Workplace: NewsHour with Jim Lehrer* (PBS television broadcast Nov. 22, 1999), www.pbs.org/newshour/bb/business/july-dec99/ergonomics_11-22.html (“We’ve already had one [NAS] study . . . [T]hey brought in experts, they looked at all the evidence in this area and they reached the conclusion that workplace factors cause these injuries and that they can be prevented. The industry didn’t like the results of that study so they went to their Republican friends in the Congress and got another study asking the exact same seven questions. . . . The study is basically just being used as a way to delay a regulation, to delay protection for workers. We’ll get the same answers from the NAS-2 that we got from NAS-1.” (Peg Seminario, Director, Occupational Safety and Health for the AFL-CIO)). For the NAS studies, see *infra* note 231.

leadership allegedly paid expert witnesses for their testimony, edited their submissions, and made closed-minded conclusory statements about the science and economics while the rulemaking record was still open, among other flaws.²²⁸ We think agencies should be expected to fix procedural flaws specifically identified as such by Congress during a veto debate, even if this is not needed to effectuate a “substantially different form.”²²⁹

VI. PRACTICAL IMPLICATIONS FOR OSHA OF A COST–BENEFIT INTERPRETATION OF THE CRA

We have argued above that the agency’s fundamental obligation under the CRA is to craft a reissued rule with substantially greater benefits, substantially lower costs, or both, than the version that Congress vetoed. As a practical matter, we contend it should focus on aspects of the regulation that Congress identified as driving the overall unfavorable cost–benefit balance. When, as is often the case, the regulation hinges on a single quantitative judgment about stringency (How low should the ambient ozone concentration be? How many miles per gallon must each automobile manufacturer’s fleet achieve? What trace amount of fat per serving can a product contain and still be labeled fat-free?), a new rule can be made “substantially different” with a single change in the regulatory text to change the stringency, along with, of course, parallel changes to the Regulatory Impact Analysis tracking the new estimates of costs and benefits. The 2000 OSHA ergonomics rule does not fit this pattern, however. Although we think it might be plausible for OSHA to argue that the underlying science, the methods of control, and the political landscape have changed enough after a decade of federal inactivity on ergonomic issues that the 2000 rule could be repropounded verbatim as a solution to a “substantially different” problem, we recognize the political impracticality of such a strategy. But changing the costs and benefits of the 2000 rule will require major thematic and textual revisions, because the original rule had flaws much more to do with regulatory design and philosophy than with

228. See 147 CONG. REC. 2823 (2001) (statement of Sen. Enzi) (“Maybe OSHA didn’t think it needed to pay attention to these [public] comments because it could get all the information it wanted from its hired guns. . . . OSHA paid some 20 contractors \$10,000 each to testify on the proposed rule. They not only testified on it; they had their testimony edited by the Department. . . . Then—and this is the worst part of it all—they paid those witnesses to tear apart the testimony of the other folks who were testifying, at their own expense. . . . Regardless of whether these tactics actually violate any law, it clearly paints OSHA as a zealous advocate, not an impartial decisionmaker.”).

229. See *infra* Part VI.B (urging OSHA to consider, among many possible substantive changes to the 2000 ergonomics rule, specific changes in the process by which it might be analyzed and promulgated).

stringency per se. In this Part, therefore, we offer some broad suggestions for how OSHA could make substantially more favorable the costs and benefits of a new ergonomics regulation.

A. Preconditions for a Sensible Discussion About the Stringency of an Ergonomics Rule

In our opinion, reasonable observers have little room to question the fact of an enormous market failure in which occupational ergonomic stressors cause musculoskeletal disorders (MSDs) in hundreds of thousands of U.S. workers annually.²³⁰ Hundreds of peer-reviewed epidemiologic studies have concluded that prolonged or repeated exposures to risk factors such as lifting heavy objects, undertaking relentless fine-motor actions, and handling tools that vibrate forcefully can cause debilitating MSDs that affect the hands, wrists, neck, arms, legs, back, and other body parts.²³¹ Most of these studies have also documented dose–response relationships: more intense, frequent, or forceful occupational stress results in greater population incidence, more severe individual morbidity, or both. In this respect, ergonomic risk factors resemble the chemical, radiological, and

230. According to the Bureau of Labor Statistics, there were more than 560,000 injuries, resulting in one or more lost workdays, from the category of “sprains, strains, tears”; by 2009, that number had declined, for whatever reason(s), to roughly 380,000. See *Nonfatal Cases Involving Days Away from Work: Selected Characteristics (2003)*, U.S. BUREAU OF LABOR STATISTICS, <http://data.bls.gov/timeseries/CHU00X021XXX6N100> (last visited Nov. 14, 2011).

231. For a very comprehensive survey of the epidemiologic literature as it existed at the time OSHA was writing its 1999 ergonomics proposal, see NAT’L INST. FOR OCCUPATIONAL SAFETY & HEALTH, U.S. DEP’T OF HEALTH & HUMAN SERVS., *MUSCULOSKELETAL DISORDERS AND WORKPLACE FACTORS: A CRITICAL REVIEW OF EPIDEMIOLOGIC EVIDENCE FOR WORK-RELATED MUSCULOSKELETAL DISORDERS OF THE NECK, UPPER EXTREMITY, AND LOW BACK*, NO. 97B141 (Bruce P. Bernard ed., 1997), <http://www.cdc.gov/niosh/docs/97-141/pdfs/97-141.pdf>. See also PANEL ON MUSCULOSKELETAL DISORDERS & THE WORKPLACE, COMM’N ON BEHAVIORAL & SOC. SCIS. & EDUC., NAT’L RESEARCH COUNCIL & INST. OF MED., *MUSCULOSKELETAL DISORDERS AND THE WORKPLACE: LOW BACK AND UPPER EXTREMITIES (2001)*, available at <http://www.nap.edu/catalog/10032.html> (reviewing the complexities of factors that cause or elevate the risk of musculoskeletal injury); STEERING COMM. FOR THE WORKSHOP ON WORK-RELATED MUSCULOSKELETAL INJURIES: THE RESEARCH BASE, NAT’L RESEARCH COUNCIL, *WORK-RELATED MUSCULOSKELETAL DISORDERS: REPORT, WORKSHOP SUMMARY, AND WORKSHOP PAPERS (1999)*, available at <http://www.nap.edu/catalog/6431.html> (examining the state of research on work-related musculoskeletal disorders); STEERING COMM. FOR THE WORKSHOP ON WORK-RELATED MUSCULOSKELETAL INJURIES: THE RESEARCH BASE, NAT’L RESEARCH COUNCIL, *WORK-RELATED MUSCULOSKELETAL DISORDERS: A REVIEW OF THE EVIDENCE (1998)*, available at <http://www.nap.edu/catalog/6309.html> (reflecting on the role that work procedures, physical features of the employee, and other similar factors have on musculoskeletal disorders).

biological exposures OSHA has regulated for decades under the OSH Act and the 1980 Supreme Court decision in the *Benzene Case*—if prevailing exposures are sufficient to cause a “significant risk” of serious impairment of health, OSHA can impose “highly protective”²³² controls to reduce the risk substantially, as long as the controls are technologically feasible and not so expensive that they threaten the fundamental competitive structure²³³ of an entire industry.²³⁴

The fundamental weakness of OSHA’s ergonomics regulation was that it did not target ergonomic risk factors specifically or directly, but instead would have required an arguably vague, indirect, and potentially never-ending series of ill-defined improvements in broader industrial management systems at the firm level, ones that in turn could have reduced stressors and thereby reduced MSDs. The decision to craft a management-based regulation²³⁵ rather than one that directly specified improvements in technological controls (a design standard) or reductions in specific exposures (a performance standard) was perhaps an understandable

232. *Indus. Union Dep’t v. Am. Petroleum Inst. (Benzene Case)*, 448 U.S. 607, 643 n.48 (1980).

233. *See Am. Textile Mfrs. Inst., Inc. v. Donovan (Cotton Dust Case)*, 452 U.S. 490, 513 (1981).

234. Ergonomic stressors may appear to be very different from chemical exposures, in that person-to-person variation in fitness obviously affects the MSD risk. Some people cannot lift a seventy-five-pound package even once, whereas others can do so over and over again without injury. However, substantial (though often unacknowledged) inter-individual variability is known to exist in susceptibility to chemical hazards as well. *See* COMM. ON IMPROVING RISK ANALYSIS APPROACHES USED BY THE U.S. EPA, NAT’L RESEARCH COUNCIL, SCIENCE AND DECISIONS: ADVANCING RISK ASSESSMENT ch.5 (2009), available at <http://www.nap.edu/catalog/12209.html> (recommending that the EPA adjust its estimates of risk for carcinogens upwards to account for the above-average susceptibility to carcinogenesis of substantial portions of the general population); COMM. ON RISK ASSESSMENT OF HAZARDOUS AIR POLLUTANTS, NAT’L RESEARCH COUNCIL, SCIENCE AND JUDGMENT IN RISK ASSESSMENT ch.10 (1994), available at <http://www.nap.edu/catalog/2125.html>. For both kinds of hazards, each person has his or her own dose-response curve, and regulatory agencies can reduce population morbidity and mortality by reducing exposures (and hence risks) for relatively “resistant,” relatively “sensitive” individuals, or both—with or without special regulatory tools to benefit these subgroups differentially. *See* Adam M. Finkel, *Protecting People in Spite of—or Thanks to—the “Veil of Ignorance,”* in GENOMICS AND ENVIRONMENTAL REGULATION: SCIENCE, ETHICS, AND LAW 290, 290–341 (Richard R. Sharp et al. eds., 2008) (arguing that the government should use its technological capacities to estimate individualized assessments of risk and benefit).

235. *See, e.g.,* Cary Coglianese & David Lazer, *Management-Based Regulation: Prescribing Private Management to Achieve Public Goals*, 37 LAW & SOC’Y REV. 691, 726 (2003) (“The challenge for governmental enforcement of management-based regulation may be made more difficult because the same conditions that make it difficult for government to impose technological and performance standards may also tend to make it more difficult for government to determine what constitutes ‘good management.’”).

reaction on OSHA Assistant Secretary Charles Jeffress' part to history and contemporary political pressures.

In 1995, OSHA drafted a complete regulatory text and preamble to a proposed ergonomics regulation that would have specified performance targets for the common risk factors in many industrial sectors. Of necessity, these targets in some cases involved slightly more complicated benchmarks than the one-dimensional metrics industry was used to seeing from OSHA (e.g., ppm of some contaminant in workplace air). For example, a "lifting limit" might have prohibited employers from requiring a worker to lift more than X objects per hour, each weighing Y pounds, if the lifting maneuver required rotating the trunk of the body through an angle of more than Z degrees. OSHA circulated this proposed rule widely, and it generated such intense opposition from the regulated community, and such skepticism during informal review by the Office of Information and Regulatory Affairs, that the agency withdrew it and went back to the drawing board. Because the most vehement opposition arose in response to the easily caricatured extent of "micro-management" in the 1995 text,²³⁶ when OSHA began to rework the ergonomics rule in 1998, it acted as if the most important complexion of the new rule would be its reversal of each feature of the old one. Where the 1995 text was proactive and targeted exposures, the 2000 text²³⁷ was reactive, and imposed on an employer no obligation to control exposures until at least one employee in a particular job category had already developed a work-related MSD. Where the 1995 text provided performance goals so an employer could know, but also object to, how much exposure reduction would satisfy an OSHA inspector, the revised text emphasized that inspectors would be looking for evidence of management leadership in creating an ergonomically appropriate workplace and employee participation in decisions about ergonomic design.

OSHA intended this pendulum swing with respect to the earlier version

236. For two examples cited by Congressmen of each political party, see *OSHA's Regulatory Activities and Processes Regarding Ergonomics: Hearing Before the Subcomm. on Nat'l Econ. Growth, Natural Res. & Regulatory Affairs of the H. Comm. on Gov't Reform & Oversight*, 104th Cong. (1995). At that hearing, Republican Representative David McIntosh stated:

A questionnaire in the draft proposal asks employers of computer users if their employees are allowed to determine their own pace, and discourages employers from using any incentives to work faster. In other words, employers would not be allowed to encourage productivity. If the Ergonomics rulemaking is truly dead, we have saved more than just the enormous cost involved.

Id. at 7 (statement of Rep. McIntosh). Similarly, Democratic Representative Collin Peterson expressed concern about governmental micromanagement of industrial processes: "I have to say that I am skeptical that any bureaucrat can sit around and try to figure out this sort of thing." *Id.* at 9 (statement of Rep. Peterson).

237. See Ergonomics Program, 64 Fed. Reg. 65,768 (proposed Nov. 23, 1999).

in large part to provide the opposition with what it said it wanted—a “user-friendly” rule that allowed each employer to reduce MSDs according to the unique circumstances of his operation and workforce. Instead, these attributes doomed the revised ergonomics rule, but with hindsight they provide a partial blueprint for how OSHA could sensibly craft a “substantially different” regulation in the future. American business interpreted OSHA’s attempt to eschew one-size-fits-all requirements not as a concession to the opposition around the 1995 text, but as a declaration of war. The “flexibility” to respond idiosyncratically to the unique ergonomic problems in each workplace was almost universally interpreted by industry trade associations as the worst kind of vagueness. Having beaten back a rule that seemed to tell employers exactly what to do, industry now argued that a rule with too much flexibility was a rule without any clear indication of where the compliance burden would end. Small business in particular characterized the lack of specific marching orders as being “left to their own devices,” in the sense of federal abdication of responsibility to state plainly what would suffice.²³⁸ But in light of what had already transpired in 1995, and exacerbated by the publication of the final rule after the votes were cast in the Bush v. Gore election, but before the outcome was known, it turned out that OSHA opened itself up to much worse than charges of insufficient detail—it became dogged by charges that the regulatory text was a Trojan horse, hiding an apparatus that was specific and onerous, but one it was keeping secret.²³⁹ The requirement—not found in the OSH Act or in its interpretations in the *Benzene Case* or *Cotton Dust Case*,²⁴⁰ but having

238. 147 CONG. REC. 2837 (2001) (statement of Sen. Bond) (“The Clinton OSHA ergonomics regulation . . . will be devastating both to small businesses and their employers because it is incomprehensible and outrageously burdensome. Too many of the requirements are . . . like posting a speed limit on the highway that says, ‘Do not drive too fast,’ but you never know what ‘too fast’ is until a State trooper pulls you over and tells you that you were driving too fast.”).

239. One author opined:

The [2000] ergonomics standard . . . is one of the most vague standards OSHA has ever adopted. It leaves the agency with tremendous discretion to shape its actual impact on industry through enforcement strategy. In other words, OSHA’s information guidance documents will likely play a large role in the practical meaning of the standard. This will allow the agency to work out details while bypassing the rigors of notice-and-comment rulemaking. However, it will also expose OSHA to more accusations of “back door” rulemaking.

Timothy G. Pepper, *Understanding OSHA: A Look at the Agency’s Complex Legal and Political Environment*, 46 PROF. SAFETY, Feb. 2001, at 14, 16, available at <http://www.allbusiness.com/government/government-bodies-offices-legislative/11443343-1.html>.

240. *Am. Textile Mfrs. Inst., Inc. v. Donovan (Cotton Dust Case)*, 452 U.S. 490, 513 (1981).

evolved out of OSHA’s deference to the instructions issued by OIRA—that OSHA compare the costs and benefits of compliance with each final rule²⁴¹ played into this conspiratorial interpretation: because OSHA provided cost information, it was reasonable for industry to infer that OSHA knew what kinds of controls it would be requiring, and that inspectors would be evaluating these controls rather than management leadership and employee participation to gauge the presence of violations and the severity of citations. Both the extreme flexibility of the rule and the detail of the cost–benefit information may have been a road paved with good intentions, but ironically or otherwise these factors combined to fuel the opposition and to provide a compelling narrative of a disingenuous agency, a story that receptive ears in Congress were happy to amplify.

Not only was OSHA’s attempt to write a regulation whose crux was “choose your controls” misinterpreted as “choose our controls by reading our minds,” but it undermined any tendency of Congress to defer to the agency’s conclusion that the rule had a favorable benefit–cost balance. Because the projected extent of compliance expenditures depended crucially on how many firms would have to create or improve their ergonomics management systems, and what those improvements would end up looking like, rather than on the more traditional cost accounting scenario—the price of specified controls multiplied by the number of controls necessary for regulated firms to come into compliance—opponents of the rule did not need to contest OSHA’s data or price estimates; they simply needed to assert that the extreme ambiguity of the regulatory target could lead to much greater expenditures than OSHA’s rosy scenarios predicted. The ominous pronouncements of ergonomic costs²⁴² were the single most important factor in justifying the congressional veto, on the grounds that the costs of the regulation swamped benefits it would deliver, and the vagueness of the rule played into the hands of those who could benefit from fancifully large cost estimates. The reactive nature of the rule—most of the new controls would not have to be implemented until one or more MSD injuries occurred in a given job category in a particular workplace—also made OSHA’s benefits estimates precarious. All estimates of reduced health effects as a function of reduced exposures involve uncertainty in dose–response, whether or not the promulgating agency quantifies that uncertainty, but to make future costs and benefits contingent

241. See Exec. Order No. 12,866, 3 C.F.R. 638 (1994), *reprinted as amended in* 5 U.S.C. § 601 app. at 745 (2006).

242. For cost estimates ranging up to \$125 billion annually, see *supra* note 101. See also Editorial, *supra* note 90 (“Although the Occupational Safety and Health Administration puts the price tag on its rules at \$4.5 billion, the Economic Policy Foundation gauges the cost to business at a staggering \$125.6 billion.”).

on future cases of harm, not merely on exposures, added another level of (unacknowledged) uncertainty to the exercise.

Whatever the reasons for a veto under the CRA, we argued above that the affected agency's first responsibility, if it wants to avoid being thwarted by the "substantially similar" trap, is to craft a revised rule with a much more favorable balance of benefits to costs. But because the 2000 ergonomics rule had chosen no particular stringency per se, at least not one whose level the agency and its critics could even begin to agree existed, OSHA cannot tweak the benefit-cost balance with any straightforward concessions. In the case of ergonomics, we contend that OSHA probably needs to abandon the strategy of a flexible, management-based standard, since that approach probably guarantees pushback on the grounds that the true cost of complying with a vague set of mandates dwarfs any credible estimates of benefits, in addition to pushing the hot button of the "hidden enforcement manual." In the next section, we list some practical steps OSHA could take to comport with the CRA, motivated by a catalog of the strongest criticisms made during the floor debate on the 2000 rule, as well as our own observations about costs, benefits, and regulatory design.

B. Specific Suggestions for Worthwhile Revisions to the Ergonomics Rule

A "substantially different" ergonomics rule would have benefits that exceeded costs, to a high degree of confidence. We believe OSHA could navigate between the rock of excessive flexibility—leading to easy condemnation that costs would swamp benefits—and the hard place of excessive specificity—leading essentially to condemnation that the unmeasured cost of losing control of one's own industrial process would dwarf any societal benefits—simply by combining the best features of each approach. The basic pitfall of the technology-based approach to setting standards—other than, of course, the complaint from the left wing that it freezes improvements based on what can be achieved technologically, rather than what needs to be achieved from a moral vantage point—is that it precludes clever businesses from achieving or surpassing the desired level of performance using cheaper methods. However, a hybrid rule—one that provides enough specificity about how to comply that small businesses cannot claim they are adrift without guidance, and that also allows innovation so long as it is at least as effective as the recommended controls would be—could perhaps inoculate the issuing agency against claims of too little or too much intrusiveness. From a cost-benefit perspective, such a design would also yield the very useful output of a lower bound on the net benefit estimate because by definition any of the more efficient controls some firms would freely opt to undertake would either lower total costs,

reap additional benefits, or both. It would also yield a much less controversial, and less easily caricatured, net benefit estimate because the lower-bound estimate would be based not on OSHA’s hypotheses of how much management leadership and employee participation would cost and how many MSDs these programs would avert, but on the documented costs of controls and the documented effectiveness of specific workplace interventions on MSD rates. In other words, we urge OSHA to take a fresh look at the 1995 ergonomics proposal, but to recast specific design and exposure-reduction requirements therein as recommended controls—the specifications would become safe harbors that employers could implement and know they are in compliance, but that they could choose to safely ignore in favor of better site-specific, one-size-fits-one solutions to reduce intolerable ergonomic stressors.

The other major philosophical step toward a “substantially different” rule we urge OSHA to consider involves replacing ergonomic “exposure floors” with “exposure ceilings.” With the intention of reassuring many employers that they would have no compliance burden if their employees were subjected only to minimal to moderate ergonomic stressors, OSHA created a Basic Screening Tool demarcating exposures above which employers *might* have to implement controls.²⁴³ For example, even if one or more employees developed a work-related MSD, the employer would have no obligation to assess the jobs or tasks for possible exposure controls, unless the affected employees were routinely exposed to stressors at or above the screening levels. These levels are low, as befits a screening tool used to exclude trivial hazards; for example, only a task that involved lifting twenty-five pounds or more with arms fully extended, more than twenty-five times per workday, would exceed the screening level and possibly trigger the obligation to further assess the situation. Unfortunately, it was easy for trade associations and their allies in Congress to misrepresent these floors as ceilings, as if OSHA had set out to eliminate *all* “twenty-five times twenty-five pounds workdays” rather than to treat any lifting injuries caused by occupational duties below this level as the employee’s tough luck.²⁴⁴ Hence the debate degenerated into warnings about “the end of Thanksgiving” under an OSHA rule that “prohibited” grocery checkout workers from lifting twenty-six-pound turkeys off the conveyor belt.²⁴⁵ In a

243. See Ergonomics Program, 65 Fed. Reg. 68,262, 68,848–49 (Nov. 14, 2000).

244. For example, Republican Senator Don Nickles of Oklahoma began the Senate debate on the rule by flatly stating, “Federal bureaucrats are saying you can do this; you can’t do that. You can only move 25 pounds 25 times a day. . . . Employees would say: I have to stop; it is 8:25 [a.m.], but I have already moved 25 things. Time out. Hire more people.” 147 CONG. REC. 2817 (statement of Sen. Nickles).

245. Republican Representative Ric Keller of Florida said, “It is also true that if a

revised rule, approaching the dose–response continuum from above rather than from below might make much more practical and political sense. As with all of its health standards for chemicals, OSHA’s goal, as reinforced by the “significant risk” language of the *Benzene* decision, is to eliminate where feasible exposures that are intolerably high; defining instead exposures that are not insignificantly low may help narrow this window, but it obviously backfired in the case of ergonomics. Making the tough science-policy decisions about which levels of ergonomic stressors must be ameliorated wherever feasible, just as OSHA and other agencies do routinely for toxic substances with observed or modeled dose–response relationships, would have four huge advantages: (1) it would clearly transform the ergonomics rule into something “substantially different” than the 2000 version; (2) it would ally OSHA with the science of MSD dose–response—because the 2000 version triggered controls upon the appearance of an MSD, instead of treating certain exposures as intolerably risky regardless of whether they had already been associated with demonstrable harm, it certainly made it at least appear that OSHA regarded MSDs as mysterious events, rather than the logical result of specific conditions;²⁴⁶ (3) it could insulate OSHA from some of the political wrangling that caused it to exempt some obviously risky major industries (e.g., construction) from the rule entirely, while subjecting less risky industries to the specter of costly controls, because controlling intolerable exposures wherever they are found is a neutral means of delimiting the scope of the rule; and (4) it would shift the rhetorical burden from government having to argue that small exertions might be worthy of attention to industry having to argue that herculean exertions must be permitted. Adjusting the ceiling to focus mandatory controls on the most intolerable conditions is, of course, the quintessential regulatory act and the most direct force that keeps costs down and pushes benefits up—and this is the act that OSHA’s management-based ergonomics rule abdicated.

Continuing with recommendations that improve the cost–benefit

bagger in a grocery store lifts a turkey up and we are in the Thanksgiving season, that is 16 pounds, he is now violating Federal law in the minds of some OSHA bureaucrats because they think you should not be able to lift anything over 15 pounds. We need a little common sense here.” 147 CONG. REC. 3059–60 (statement of Rep. Keller). Although the Basic Screening Tool nowhere mentions fifteen pounds (but rather twenty-five), or fewer than twenty-five repetitions per day, this exaggeration is over and above the basic misinterpretation of the function of the screening level.

246. The decision to make the ergonomics rule reactive rather than proactive arguably played right into the hands of opponents, who essentially argued that OSHA had come to agree with them that science did not support any dose–response conclusions about MSD origins.

balance and also respond to specific hot buttons from the congressional veto debate, we believe that OSHA should also consider targeting an ergonomics rule more squarely at MSDs that are truly caused or exacerbated by occupational risk factors. The 2000 rule defined a work-related MSD as one that workplace exposure “caused or contributed to,”²⁴⁷ but the latter part of this definition, intentionally or otherwise, subsumes MSDs that primarily arise from off-the-job activity and that repetitive motion merely *accompanied* (the easily mocked tennis elbow hypothetical). On the other hand, a redefinition that simply required a medical opinion that *the MSD would not have occurred absent the occupational exposure(s)* would cover any exposures that pushed a worker over the edge to a full-blown injury (and, of course, any exposures that alone sufficed to cause the injury), but not those that added marginally to off-work exposures that were already sufficient by themselves to cause the MSD. In this regard, however, it will be important for OSHA to correct an egregious misinterpretation of the science of ergonomics bandied about freely during the congressional veto debate. Various members made much of the fact that one of the NAS panel reports concluded that “[n]one of the common MSDs is uniquely caused by work exposures.”²⁴⁸ Senator Kit Bond and others took this literally true statement about the totality of all cases of one single kind of MSD—for example, all the cases of carpal tunnel syndrome, all the cases of Raynaud’s phenomenon—and made it sound as if it referred to every individual MSD case, which is of course ridiculous. “Crashing your car into a telephone pole is not uniquely caused by drunk driving,” to be sure—of the thousands of such cases each year, some are certainly unrelated to alcohol, but this in no way means that we cannot be quite sure that what was to blame in a *particular* case in which the victim was found with a blood alcohol concentration of, say, 0.25 percent by volume, enough to cause stupor. Many individual MSDs are caused solely by occupational exposure, and any regulation worth anything must effect reductions in those exposures that make a resulting MSD inevitable or nearly so.

The other hot-button issue specifically mentioned repeatedly in the veto debate was OSHA’s supposed attempt to create a separate workers’ compensation system for injured employees. Paragraph (r) of the final ergonomics rule²⁴⁹ would have required employers who had to remove an employee from her job due to a work-related MSD to pay her at least ninety percent of her salary for a maximum of ninety days, or until a health care professional determined that her injury would prevent her from ever

247. Ergonomics Program, 65 Fed. Reg. at 68,854 (defining work-related).

248. 147 CONG. REC. 2838 (statement of Sen. Bond).

249. Ergonomics Program, 65 Fed. Reg. at 68,851.

resuming that job, whichever came first. OSHA deemed such a “work restriction protection” program necessary so that employees would not be deterred from admitting they were injured and risk losing their jobs immediately. But various members of Congress decried this provision of the rule as “completely overrid[ing] the State’s rights to make an independent determination about what constitutes a work-related injury and what level of compensation injured workers should receive.”²⁵⁰ Worse yet, because § 4(b)(4) of the OSH Act states that “[n]othing in this [Act] shall be construed to supersede or in any manner affect any workmen’s compensation law,”²⁵¹ various members argued that OSHA “exceeded [its] constitutional authority” by legislating a new workers’ compensation system rather than regulating.²⁵² Other members disputed these allegations, noting that providing temporary and partial restoration of salary that would otherwise be lost during a period of incapacity is very different from compensating someone for an injury. As Senator Edward Kennedy said, “It has virtually nothing to do with workers compensation, other than what has been done traditionally with other kinds of OSHA rules and regulations such as for cadmium and lead.”²⁵³ Indeed, the Court of Appeals for the District of Columbia Circuit settled this issue years ago in upholding the much more generous eighteen-month protection program in the OSHA lead standard. In *United Steelworkers of America v. Marshall*,²⁵⁴ that court held that § 4(b)(4) of the OSH Act bars workers from using an OSHA standard to assert a private cause of action against their employers and from obtaining state compensation for a noncompensable injury just because OSHA may protect a worker against such an injury.²⁵⁵ But more generally, the circuit court concluded that “the statute and the legislative history both demonstrate unmistakably that OSHA’s statutory mandate is, as a general matter, broad enough to include such a regulation as [medical removal protection (MRP)].”²⁵⁶

It is ironic, therefore, that the only mention of workers’ compensation in the vetoed ergonomics rule was a provision that allowed the employer to

250. 147 CONG. REC. 2824 (statement of Sen. Enzi)

251. OSH Act § 4(b)(4), 29 U.S.C. § 653 (2006).

252. 147 CONG. REC. 2817 (2001) (statement of Sen. Nickles); *see also supra* Part II.A.

253. 147 CONG. REC. 2818 (2001) (statement of Sen. Kennedy).

254. 647 F.2d 1189 (D.C. Cir. 1980).

255. *Id.* at 1235–36.

256. *Id.* at 1230. Medical removal protection (MRP) is the provision of salary while an employee with a high blood lead level (or a similar biomarker of exposure to cadmium, methylene chloride, etc.) is removed from ongoing exposure until his level declines. *See id.* at 1206. The court’s decision stated in relevant part: “We conclude that though MRP may indeed have a great practical effect on workmen’s compensation claims, it leaves the state schemes wholly intact as a *legal* matter, and so does not violate Section 4(b)(4).” *Id.* at 1236.

reduce the work restriction reimbursement dollar for dollar by any amount that the employee receives under her state’s compensation program!²⁵⁷ If OSHA had not explicitly sought to prohibit double dipping, the ergonomics rule would never have even trespassed semantically on the workers’ compensation system. It is tempting, then, to suggest that OSHA could make the work restriction program “substantially different” by removing the reference to workers’ compensation and making it a more expensive program for employers to implement. However, both the spirit of responding to specific congressional objections and of improving the cost–benefit balance would argue against such a tactic, as would the practical danger of arousing congressional ire by turning its objections against the interests of its favored constituents. It is possible that an exposure-based ergonomics rule that does not rely on the discovery of an MSD to trigger possible controls would reduce the disincentive for workers to self-report injuries, but the problem remains that without some form of insurance against job loss, workers will find it tempting to hide injuries until they become debilitating and possibly irreversible. Perhaps the Administration could approach Congress before OSHA issued a new ergonomics proposal, and suggest it consider creating a trust fund for temporary benefits for the victims of MSD injuries, as has been done for black lung disease and vaccine-related injuries.²⁵⁸ Employers might find work-restriction payments from a general fund less offensive than they apparently found the notion of using company funds alone to help their own injured workers.

OSHA could obviously consider a wide variety of other revisions to make a new ergonomics rule “substantially different” and more likely to survive a second round of congressional review. Some of the other changes that would accede to specific congressional concerns from 2001—such as making sure that businesses could obtain all the necessary guidance materials to implement an ergonomics program free of charge, rather than having to purchase them from private vendors at a possible cost of several hundred dollars²⁵⁹—are presumably no-brainers; this one being even easier to accommodate now than it would have been before the boom in online

257. See Ergonomics Program, 65 Fed. Reg. 68,262, 68,851 (Nov. 14, 2000) (“Your obligation to provide [work restriction protection] benefits . . . is reduced to the extent that the employee receives compensation for earnings lost during the work restriction period from either a publicly or an employer-funded compensation or insurance program . . .”).

258. See 26 U.S.C. § 9501 (2006) (creating the Black Lung Disability Trust Fund with the purpose of providing benefits to those who were injured from the Black Lung); *id.* § 9510 (forming the Vaccine Injury Compensation Trust Fund for the purpose of providing benefits to those who were injured by certain vaccinations).

259. See 147 CONG. REC. 2825–26 (2001) (statement of Sen. Enzi).

access to published reports. Other redesigns are up to OSHA to choose among based on its appraisal of the scientific and economic information with, we would recommend, an eye toward changes that would most substantially increase total benefits, reduce total costs, or both.

There is one other category of change that we recommend even though it calls for more work for the agency than any literal reading of “substantially the same form” would require. The CRA is concerned with rules that reappear in the same “form,” but it is also true that the process leading up to the words on the page matters to proponents and opponents of every regulation. The ergonomics rule faced withering criticism for several purported deficiencies in how it was produced.²⁶⁰ We think the CRA imposes no legal obligation upon OSHA to develop a “substantially different” process the second time around—after all, “form” is essentially perpendicular to “process,” and had Congress wanted to force an agency to change how it arrived at an offensive form, it surely could have said “reissued in substantially the same form or via substantially the same process” in § 801(b)(2). Nevertheless, well-founded complaints about flawed process should, we believe, be addressed at the same time an agency is attempting to improve the rule’s form in the cost–benefit sense. Although courts have traditionally been very reluctant to rescind rules signed by an agency head who has telegraphed his personal views on the subject at issue,²⁶¹ we assume the Obama Administration or a future Executive would be more careful to avoid the appearance of a general bias for regulation as a “thrill” (or, for that matter, against it as a “menace”) by the career official leading the regulatory effort.²⁶² We, however, do not expect OSHA to overreact to ten-year-old complaints about the zeal with which it may have sought to regulate then. Other complaints about the rulemaking process in ergonomics may motivate a “substantially different” process, if OSHA seeks to re-promulgate. For example, Senator Tim Hutchinson accused OSHA of orchestrating a process with “witnesses who were paid, instructed, coached, practiced, to arrive at a preordained outcome,”²⁶³ and although an agency need not confine itself to outside experts who will testify pro bono, we suggest it would be politically unwise for OSHA to edit again the testimony of the experts it enlists. Similarly, a different ergonomics rule that still had the cloud of improper and undisclosed conflict of interest in

260. See *supra* note 228 and accompanying text.

261. See, e.g., *United Steelworkers of Am. v Marshall*, 647 F.2d 1189, 1208 (D.C. Cir. 1980) (finding that the head of OSHA “served her agency poorly by making statements so susceptible to an inference of bias,” but also finding that she was not “so biased as to be incapable of finding facts and setting policy on the basis of the objective record before her”).

262. See *supra* note 100.

263. 147 CONG. REC. 2832 (statement of Sen. Hutchinson).

the choice of specific outside contractors to do the bulk of the regulatory impact analysis work²⁶⁴ would, we believe, fail to comport with the spirit of § 801(b)(2), in that it would have circumvented the instructions of at least some in Congress to “clean up” the process.

On the other hand, we think some objections to the process by which a rule is developed ought more properly to be the subject of judicial review rather than congressional interference. Some members of Congress accused OSHA of not having enough time to read, let alone digest and thoughtfully respond to, the more than 7000 public comments received as late as August 10, 2000, before the final rule was issued barely three months later.²⁶⁵ Senator Enzi also said that OSHA “took the comments they got, and they opposed everything and incorporated things in this that were worse than in the law that was passed.”²⁶⁶ But although a reviewing court could not punish OSHA *per se* for crafting a rule with costs exceeding benefits, or for engaging in conduct with expert witnesses that Congress might find unseemly, the courts are empowered and required to judge whether OSHA arbitrarily ignored evidence in the record, or twisted its meaning.²⁶⁷ The CRA, therefore, should emphasize those substantive—and procedural—concerns for which aggrieved parties have no other remedy.

VII. RECOMMENDATIONS TO AMEND THE CRA

Congress has voted on just one attempt to amend the CRA in the fourteen years since its passage: the inconsequential Congressional Review Act Improvement Act, which unanimously passed the House in June 2009, and that would have eliminated the requirement that an agency transmit each final rule to each house of Congress, leaving the Comptroller General as the only recipient.²⁶⁸ Here we suggest several more substantive changes

264. See Letter from Rep. David M. McIntosh, Chairman, Subcomm. on Nat'l Econ. Growth, to Alexis M. Herman, Sec'y of Labor, U.S. Dep't of Labor (Oct. 30, 2000), *available at* <http://insidehealthpolicy.com/Inside-OSHA/Inside-OSHA-11/13/2000/mcintosh-letter-to-herman/menu-id-219.html>. McIntosh alleged that the career OSHA official who led the ergonomics rulemaking did (with OSHA's approval) assign task orders to a consulting firm that she had been an owner of before coming to government (and after signing a Conflict of Interest Disqualification requiring her to recuse herself from any such contractual decisions involving her former firm).

265. See, e.g., 147 CONG. REC. 2823 (statement of Sen. Enzi).

266. *Id.* at 2821.

267. See 5 U.S.C. § 706(2)(A) (2006) (mandating that the reviewing court shall set aside arbitrary and capricious agency actions, findings, and conclusions).

268. See Congressional Review Act Improvement Act, H.R. 2247, 111th Cong. (2009) (as passed by House of Representatives, June 16, 2009); 155 CONG. REC. H6849 (daily ed. June 16, 2009) (recording the House roll call vote). The Senate did not take significant

action on the bill. See *H.R. 2247: Congressional Review Act Improvement Act*, GOVTRACK.US, <http://www.govtrack.us/congress/bill.xpd?bill=h111-2247> (last visited Nov. 14, 2011).

Various legislators have drafted other bills that have not made it to a vote. Recently, Republican Senator Mike Johanns of Nebraska introduced a bill that would bring administrative “guidance documents” within the purview of the CRA, making them subject to the expedited veto if they meet the same economic impact guidelines that subject rules to congressional scrutiny under the CRA in its current form. See *Closing Regulatory Loopholes Act of 2011*, S. 1530, 112th Cong. (2011) (as referred to committee, Sept. 8, 2011); cf. *supra* note 69 (describing the economic criteria currently used to determine whether a rule is subject to congressional review). Importantly, the bill would make vetoed guidance documents subject to the CRA’s “substantially the same” provision. See S. 1530 § 2(b)(1)(B). Supporters of the bill have argued that agencies have used such guidance documents to craft enforceable policies while sidestepping congressional review, while opponents take issue with the potential new costs the bill would impose on agencies. See Stephen Lee, *Agency Guidance Would Be Subject To Congressional Review Under House Bill*, 41 OCCUPATIONAL SAFETY & HEALTH REP. 788, 788–89 (Sept. 15, 2011). At the time this Article went to press, the bill had only been introduced and referred to committee. See *S. 1530: Closing Regulatory Loopholes Act of 2011*, GOVTRACK.US, <http://www.govtrack.us/congress/bill.xpd?bill=s112-1530> (last visited Nov. 14, 2011).

One other recent and as-yet unsuccessful attempt to amend the CRA would make profound changes in how Congress overrules federal regulatory activity, although it would also incidentally change the “substantially similar” standard to an unambiguous and more permissive one. Early in 2011, Republicans in both houses introduced very similar versions of the Regulations from the Executive in Need of Scrutiny Act (REINS Act), which would replace all of 5 U.S.C. §§ 801–807 with a very different set of procedures governing agency rulemaking. See S. 299, 112th Cong. (as introduced in Senate, Feb. 7, 2011); H.R. 10, 112th Cong. (as introduced in House, Jan. 20, 2011). Senator Rand Paul’s bill had attracted 29 cosponsors as of November 3, 2011, and Representative Geoff Davis’ had attracted 193 cosponsors by that day. As this Article went to press, however, only one committee had voted on either bill—a strict party-line vote of 22–14 on October 25, 2011, in which the House Judiciary Committee favorably reported on H.R. 10. *Full Committee Markup of H.R. 822, H.R. 420, H.R. 10, H.R. 2870, H.R. 1254, & H.R. 3012*, 112th Cong. 128–135 (Oct. 25, 2011), available at judiciary.house.gov/hearings/pdf/10_25_11_HR_822_HR_10.pdf (follow “Markup Transcript – 10/25/2011” hyperlink). Pundits for and against the legislation were not predicting it had much chance of passing both houses, let alone garnering the two-thirds majority that would be needed in both houses following an anticipated veto by President Obama. See *S. 299: Regulations from the Executive in Need of Scrutiny Act of 2011*, GOVTRACK.US, <http://www.govtrack.us/congress/bill.xpd?bill=s112-299> (last visited Nov. 14, 2011); *H.R. 10: Regulations from the Executive in Need of Scrutiny Act of 2011*, GOVTRACK.US, <http://www.govtrack.us/congress/bill.xpd?bill=h112-10> (last visited Nov. 14, 2011).

On November 3, 2011, the White House released a Statement of Administration Policy about the REINS Act, in which it specifically described REINS as a

radical departure from the longstanding separation of powers between the Executive and Legislative branches [that] would delay and, in many cases, thwart implementation of statutory mandates and execution of duly enacted laws, increase business uncertainty, undermine much-needed protections of the American public, and create unnecessary confusion. There is no justification for such an unprecedented requirement.

Office of Mgmt. & Budget, Exec. Office of the Pres., Statement of Administration Policy: S.

Congress should consider to improve the CRA, emphasizing the reissued-rules problem but including broader suggestions as well. We make these suggestions in part to contrast with several of the pending proposals to change the CRA that have been criticized as mischievous and possibly unconstitutional.²⁶⁹

Improvement 1: Codification of the Cost-Benefit-Based Standard. First, Congress should explicitly clarify within the CRA text the meaning of “substantially the same” along the lines we suggest: any rule with a substantially more favorable balance between benefits and costs should be considered “substantially different” and not vulnerable to a preemptory veto. In the rare cases where a prior congressional mandate to produce a narrowly tailored rule collides head-on with the veto of the rule

1786—Long-Term Surface Transportation Act of 2011 (Nov. 3, 2011), http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/112/saps1786s_2011103.pdf.

The REINS Act is so controversial because it would reverse the paradigm under which executive branch agencies have been issuing regulations under delegated authority for more than two centuries. Instead of regulations being presumed valid unless struck down by a CRA resolution, specific act of Congress, or order of a reviewing court, major rules would be presumed invalid unless *approved* by both houses of Congress. *See* S. 299 § 3. The introduction of the REINS Act prompted an interesting debate over whether it would violate the constitutional principle of separation of powers. *Compare* Sally Katzen, *Why the REINS Act is Unwise If Not Also Unconstitutional*, REG BLOG (May 3, 2011), <http://www.law.upenn.edu/blogs/regblog/2011/05/why-the-reins-act-is-unwise-if-not-also-unconstitutional.html>, *with* Jonathan H. Adler, *The REINS Act: A Constitutional Means to Control Delegation*, REG BLOG (July 25, 2011), <http://www.law.upenn.edu/blogs/regblog/2011/07/the-reins-act-a-constitutional-means-to-control-delegation.html>. Of course, the broader public policy issue is whether limiting all major regulations to those specifically approved by Congress would “impose a slow-motion government shutdown, and . . . replace a process based on expertise, rationality and openness with one characterized by political maneuvering, economic clout and secrecy.” *Regulations from the Executive in Need of Scrutiny Act of 2011: Hearing on H.R. 10 Before the Subcomm. on Courts, Comm. & Admin. Law of the H. Comm. on the Judiciary*, 112th Cong. 124 (2011) (statement of David Goldston, Director of Government Affairs, Natural Resources Defense Council).

But if the REINS Act were to become law, although regulating would become much more difficult, reissuing a rule that fails to win congressional approval would actually become easier! Section 801(a)(5), as amended by both S. 299 and H.R. 10, would bar an agency whose rule had not been approved by both houses within seventy session days of being presented to Congress from seeking a second joint resolution of approval “relating to the same rule” during the remainder of the entire congressional session. *See* S. 299 § 3; H.R. 10 § 3. The ambiguous and potentially broad restriction against reissuing something “substantially the same,” therefore, would under the REINS Act be replaced by a clear prohibition only against seeking a second chance to issue the *exact same* rule. Although we have no first-hand basis to support this assumption, perhaps this particular change the REINS Act would make to the CRA reflects a realization that the original “substantially the same” provision was needlessly broad and uncertain.

269. *See supra* note 268.

as promulgated, Congress has already admitted that it owes it to the agency to “make the congressional intent clear regarding the agency’s options or lack thereof after enactment of a joint resolution of disapproval.”²⁷⁰ But there is currently no legal obligation for Congress to do so. In a hypothetical case where Congress has effectively said, “Promulgate this particular rule,” and then vetoed a good-faith attempt to do just that, it seems particularly inappropriate for Congress not to bind itself to resolve the paradox. But we believe it is also inappropriate for Congress to perpetuate the ambiguity of “substantially the same” for the much more common cases in which the agency is not obligated to try again, but for good reasons wishes to.

Improvement 2A: Severability. The CRA veto process might also be improved by permitting a resolution of disapproval to strike merely the offending portion(s) of a proposed rule, leaving the rest intact. If, as a clearly hypothetical example, the only thing that Congress disliked about the ergonomics regulation was the additional entitlement to benefits different from those provided by state workers’ compensation laws, it could have simply struck that provision. Charles Tiefer has made the interesting observation that one would not want to close military bases this way (but rather craft a take-it-or-leave-it approach for the proposed list as a whole) to avoid horse-trading,²⁷¹ but a set of regulatory provisions can be different: it is not zero-sum in the same way. The allowance for severability would pinpoint the offending portion(s) of a proposed regulation and therefore give the agency clearer guidance as to what sort of provisions are and are not approved.

Severability would have the added benefit of lowering the chances of there being a null set of reasons for veto. In other words, a generic joint resolution may be passed and overturn a regulation even though no single substantive reason has majority support in Congress. Suppose, for example, that the FAA proposed an updated comprehensive passenger safety regulation that included two unrelated provisions. First, due to passengers’ disobeying the limitations on in-flight use of personal electronic devices and mobile phones, the rule banned possession of personal electronics as carry-on items. Second, in order to ensure the dexterity and mobility of those assisting with an emergency evacuation, the rule increased the minimum age for exit-row seating from fifteen to eighteen. If thirty senators disliked solely the electronics ban, but thirty different senators disliked only the exit row seating restriction, then under the current law the

270. 142 CONG. REC. 8199 (1996) (joint statement of Sens. Nickles, Reid, and Stevens).

271. Tiefer, *supra* note 136, at 479 & n.311 (relying on the Supreme Court’s reasoning in *Dalton v. Spector*, 511 U.S. 462 (1994)).

entire regulation is at risk of veto even though a majority of Senators approved of all of the rule’s provisions. An ability to strike just the offending portion of a regulation decreases the potential²⁷² for this sort of null set veto.

Improvement 2B: Codified Rationale. On the other hand, some might well consider a scalpel to be a dangerous tool when placed into the hands of Congress. Although Congress may understand what it means to send an agency back to square one with a rule under the current procedure, the availability of a partial veto might lead to overuse of the CRA, turning it into a forum for tinkering with specific words in complicated regulations produced with fidelity to the science and to public comment, perhaps in ways that a court would consider arbitrary and capricious if done by the issuing agency.

Alternatively, Congress could also go much further than the limited resolution template²⁷³ and take on more responsibility by living up to the literal promise embodied in the signing statement. The drafters of the CRA stated: “The authors intend the debate on *any* resolution of disapproval to focus on the law that authorized the rule”²⁷⁴ This goal would be served (though admittedly at the expense of some speed) by requiring the joint resolution of disapproval to include a statement of the reason(s) for the veto. That is to say, whenever Congress disapproves of a rule, it should surround what Cohen and Strauss called the “Delphic ‘No!’”²⁷⁵ with some attempt to explain the “why ‘No?’” question the agency will rightly be preoccupied with as it regroups or retreats. From the agency’s point of view, it is bad enough that Congress can undo in ten hours what it took OSHA ten years to craft, but to do so without a single word of explanation, beyond the ping-pong balls of opposing rhetoric during a floor debate, smacks more of Congress flexing its muscle than truly teaching the agency a lesson. Indeed, it is quite possible that the act of articulating an explanatory statement to be voted on might reveal that there

272. Admittedly, severability would not entirely eliminate this possibility—the risk would still remain where dueling minorities of legislators opposed the *same* provision but for different reasons. For example, if the Environmental Protection Agency were to propose an ozone standard of 60 parts per billion (ppb), the regulation is at risk of being vetoed if thirty senators think the standard should be 25 ppb while another thirty Senators think it should be 200 ppb.

273. See 5 U.S.C. § 802 (2006) (requiring that a joint resolution of disapproval read: “That Congress disapproves the rule submitted by the ___ relating to ___, and such rule shall have no force or effect”).

274. 142 CONG. REC. 8199 (1996) (joint statement of Sens. Nickles, Reid, and Stevens) (emphasis added).

275. Daniel Cohen & Peter L. Strauss, *Congressional Review of Agency Regulations*, 49 ADMIN. L. REV. 95, 105 (1997).

might be fifty or more unhappy Senators, but no majority for any particular view of whether and why the rule should be scrapped.

Improvement 3: Early Veto. We hasten to add, however, that this bow to transparency and logic should be a two-way street; we also enthusiastically endorse the proposal Professor Strauss made in 1997 that the CRA should be “amended to provide that an agency adopting the same or ‘substantially the same’ rule to one that has been disapproved must fully explain in its statement of basis and purpose how any issues ventilated during the initial disapproval process have been met.”²⁷⁶ We would go further, however, and suggest that the overwhelmingly logical time to have the discussion about whether a reissued rule runs afoul of the “substantially the same” provision is when the new rule is *proposed*, not after it is later issued as a final rule. Surely, needless costs will be incurred by the agency and the interested public, needless uncertainty will plague the regulated industries, and other benefits will be needlessly foregone in the bargain, if Congress silently watches a regulatory proposal go through notice and comment that it believes may be invalid on “substantially the same” grounds, only to veto it at the finish line. We suggest that whenever an agency is attempting to reissue a vetoed rule on the grounds that it is not “substantially the same,” it should be obligated to transmit the notice of proposed rulemaking (NPRM) to both houses, and then that Congress should have a window of time—we suggest sixty legislative days—to decide whether the proposal should not be allowed to go forward on “substantially the same” grounds, with silence denoting assent. Under this process, failure to halt the NPRM would preclude Congress from raising a “substantially the same” objection at the time of final promulgation, but it would of course not preclude a second veto on any substantive grounds.²⁷⁷ The

276. *Hearing on CRA*, *supra* note 83, at 135 (statement of Peter L. Strauss, Betts Professor of Law, Columbia University). Assuming that our proposal immediately above was adopted, we would interpret Strauss’ amendment as then applying only to issues specifically called out in the list of particulars contained in the expanded text of the actual resolution of disapproval—not necessarily to every issue raised by any individual member of Congress during the floor debate.

277. Enforcement of a limit on tardy congressional “substantial similarity” vetoes would require additional amendments to the CRA. First, the section governing judicial review would need to be amended so that a court can review and invalidate a CRA veto on the basis that Congress was making an after-the-fact “substantial similarity” objection. *Cf.* 5 U.S.C. § 805 (“No determination, finding, action, or omission under this chapter shall be subject to judicial review.”). Second, Congress would need to insert its substantive basis for the veto into the text of the joint resolution, which is currently not allowed (but which we recommend as Improvement 2B above). Absent a textual explanation of the substantive basis for a veto, the ban on a tardy congressional “substantial similarity” veto would be an empty prohibition; members of Congress could vote in favor of a blanket veto without any substantive reason, and courts would likely decline to review the veto under the political

agency would still be vulnerable to charges that it had found a second way to issue a rule that did more harm than good. With this major improvement in place, a vague prohibition against reissuing a similar rule would at worst cause an agency to waste half of its rulemaking resources in an area.

Improvement 4: Agency Confrontation. Currently, the CRA does not afford the agency issuing a rule the opportunity that a defendant would have under the Confrontation Clause²⁷⁸ to face his accusers about the conduct at issue. Even within the confines of an expedited procedure, and recognizing that the floor of Congress is a place for internecine debate as opposed to a hearing, the CRA could still be amended to allow some limited dialogue between the agency whose work is being undone and the members. Perhaps in conjunction with a requirement that Congress specify the reasons for a resolution of disapproval, the agency should be allowed to enter a response into the official record indicating any concerns about misinterpretation of the rule or the accompanying risk and cost analyses. This could, of course, become somewhat farcical in a case (like the ergonomics standard) where the leadership of the agency had changed hands between the time of promulgation and the time of the vote on the disapproval—presumably, Secretary Chao would have declined the opportunity to defend the previous administration’s ergonomics standard on factual grounds. However, each agency’s Regulatory Policy Officer could be empowered to craft such a statement.²⁷⁹

CONCLUSION

The CRA can be a helpful hurdle to check excesses and spur more favorable actions from a CBA standpoint, but it makes no sense to foreclose the agency from doing what Congress wants under the guise of the substantial similarity provision. OSHA should not reissue the ergonomics rule in anything like its past form—not because of “substantial similarity,” but because it was such a flawed rule in the first place. But a different rule with a more favorable cost–benefit ratio has been needed for decades, and

question doctrine.

278. See U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .”).

279. Note that these officers usually were career appointees, who would therefore generally hold over when administrations changed. See Exec. Order No. 12,866, 3 C.F.R. 638 (1994), *reprinted as amended in* 5 U.S.C. § 601 app. at 745 (2006). President Bush issued an executive order that redefined these officers as being political appointees, but President Obama rescinded that order in January 2009, redefining these officials as careerists who might be better able to fulfill this function objectively. See Exec. Order No. 13,497, 3 C.F.R. 218 (2010), *invalidating* Exec. Order No. 13,422, 3 C.F.R. 191 (2007).

“substantial similarity” should not be raised again lightly, especially since at least ten years will have passed and times will have changed.

The history and structure of the CRA, and its role in the larger system of administrative law, indicate that the substantial similarity provision should be interpreted narrowly. More specifically, it seems that if, following disapproval of a rule, the agency changes its provisions enough that it alters the cost–benefit ratio in a significant and favorable way, and at least tries in good faith to fix substantive and procedural flaws, then the new rule should not be barred under the CRA. The rule can still be vetoed a second time, but for substantive reasons rather than for a technicality. The framers of the CRA were concerned with federal agencies creating costly regulatory burdens with few benefits, and this consideration arose again in the debates over the OSHA ergonomics rule. The disapproval procedure—with its expedited debates, narrow timeframe, and failure to provide for severability of rule provisions—suggests that the substantial similarity provision is not intended to have broad effects on an agency’s power to issue rules under its organic statute, especially in a system in which we generally defer to agencies in interpreting their own delegated authority. Instead, the history and structure of the procedure suggest that the CRA is intended to give agencies a second chance to “get it right.” In an ideal world, Congress would monitor major regulations and weigh in at the proposal stage, but sending them back to the drawing board, even though regrettably not until after the eleventh hour, is what the CRA most fundamentally does, and therefore it is fundamentally important that such a drawing board not be destroyed. If one believes, as we do, that well-designed regulations are among “those wise restraints that make us free,” then Congress should not preclude wise regulations as it seeks to detect and rework regulations it deems deficient.

FIXING THE FLAWS IN THE FEDERAL VACCINE INJURY COMPENSATION PROGRAM

PETER H. MEYERS*

TABLE OF CONTENTS

Introduction.....	786
I. The Flawed Federal Vaccine Injury Compensation Program.....	792
A. History of the Vaccine Act and Its Key Provisions.....	792
B. The Vaccine Injury Table and Its Significance in the Program.....	796
C. Major Changes in the Table and the Program and Their Consequences	799
D. The Special Masters' Role in the Decisionmaking Process	805
E. Procedural Innovations in the Vaccine Compensation Program.....	809
1. The Expanded Role of Expert Witnesses at Hearings.....	810
2. Front-Loading of Documents and Evidence.....	811
3. Informal Procedures, Including Telephonic Conferences	812
4. Omnibus Proceedings.....	813
II. Other Recent Federal Compensation Programs	816

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A.	The Radiation Exposure Compensation Program.....	817
B.	The Japanese–American Internment Compensation Program	820
C.	The Smallpox Compensation Program.....	823
D.	The September 11th Compensation Program	828
E.	The Countermeasures Injury Compensation Program.....	833
III.	Comparative Evaluation of the Vaccine Compensation Program and Other Recent Compensation Programs	837
A.	The Adequacy of a Compensation Program Is Sometimes Crucial and Sometimes Irrelevant.....	837
B.	Inquisitorial/Adversarial Models of Adjudication.....	839
C.	Industry Protection/Altruism	841
D.	Types and Amounts of Compensation Awarded.....	842
E.	The Role of Judicial Review.....	843
F.	Future of the Compensation Program Model	844
IV.	Proposals to Fix the Vaccine Compensation Program	845
A.	Adopt a Legal Standard of Proof More Generous to Petitioners	845
B.	Provide that All Provisions of the Vaccine Act Be Construed Liberally.....	847
C.	Amend and Expand the Statute of Limitations.....	847
D.	Fix Attorney Compensation Problems	848
E.	Allow Parents to Sue for Their Own Injuries.....	849
F.	Raise the Caps on Death Benefits and Pain and Suffering Benefits	849
G.	Allow Expenses for Guardianships and Conservatorships and Family Counseling.....	850
H.	The Court of Federal Claims Should Undertake a Comprehensive Review of the Vaccine Injury Compensation Program	850
I.	The GAO Should Conduct Another Oversight Review of the Program.....	850
	Conclusion.....	851

INTRODUCTION

Hannah Bruesewitz was born on October 20, 1991. Her pediatrician administered doses of the [diphtheria, pertussis, and tetanus (DTP)] vaccine according to the Center for Disease Control’s recommended childhood immunization schedule. Within 24 hours of her April 1992 vaccination, Hannah started to experience seizures. She suffered over 100 seizures during the next month, and her doctors eventually diagnosed her with “residual

seizure disorder” and “developmental delay.” Hannah, now a teenager, is still diagnosed with both conditions.¹

In 1995, Hannah Bruesewitz’s parents embarked on an unsuccessful fifteen-year odyssey through the courts. Claiming that Hannah suffered vaccine-related injuries for which she was entitled to compensation, her parents litigated her case in every available forum, culminating in their recent loss in the U.S. Supreme Court.² Hannah’s parents first sought compensation, as they were required to do, under the National Childhood Vaccine Injury Act (Vaccine Act),³ a pioneering no-fault federal tort reform law that took effect two decades ago. The statute, preempting state product liability laws, mandates that all claims for compensation for injuries caused by the vaccines routinely given in the United States must first be brought and litigated in the U.S. Court of Federal Claims, with the Secretary of Health and Human Services (HHS) as the respondent.⁴ After exhausting this remedy, petitioners have the option of filing a civil action in state or federal court, on grounds not foreclosed by the Vaccine Act, against the manufacturer of the vaccine or the healthcare provider who administered it.⁵

After the Court of Federal Claims rejected Hannah’s parents’ petition for compensation, her parents filed a civil tort suit against the vaccine’s manufacturer.⁶ The complaint was dismissed in large part by the District Court, which held that the Vaccine Act’s preemption clause forbids a claim against a vaccine manufacturer based upon a design defect, which was Hannah’s parents’ most promising remaining ground for relief.⁷ On February 22, 2011, the U.S. Supreme Court affirmed the dismissal.⁸

Hannah’s case highlights a number of problems with the National Vaccine Injury Compensation Program (Vaccine Program or Vaccine Compensation Program)⁹ today. The program represented a legislative compromise involving the major interest groups working in the vaccine area, including vaccine manufacturers, physicians’ groups, healthcare providers, federal health agencies, and parent groups advocating on behalf

1. *Bruesewitz v. Wyeth L.L.C.*, 131 S. Ct. 1068, 1074–75 (2011) (footnotes omitted).
2. *Id.* at 1082.
3. National Childhood Vaccine Injury Act (Vaccine Act) of 1986, Pub. L. No. 99-660, 100 Stat. 3755 (codified as amended at 42 U.S.C. §§ 300aa-1 to -34 (2006)).
4. 42 U.S.C. § 300aa-11(a)(1) to (4) (2006).
5. *Id.* § 300aa-21(a).
6. *Bruesewitz*, 131 S. Ct. at 1075.
7. *Id.*
8. *Id.* at 1082.
9. 42 U.S.C. § 300aa-10.

of injured children.¹⁰ Now that the Vaccine Program has been operating for more than twenty years, we can reach several broad conclusions about its successes and failures in satisfying the objectives of these groups and the objectives of the legislation. First, it appears that the Program has been largely successful in providing excellent liability protection for the pharmaceutical industry that makes vaccines, as well as for the doctors and other healthcare providers who administer them. These groups have been extremely concerned about possible tort liability for alleged vaccine-related injuries.¹¹ While the Vaccine Act has not entirely eliminated all potential tort liability for manufacturers and healthcare providers, it has significantly minimized such liability, particularly after *Bruesewitz v. Wyeth*.¹² The interests of the federal health agencies involved in the vaccine area, including HHS, the Centers for Disease Control (CDC), the Food and Drug Administration (FDA), and several other agencies, have also been largely satisfied by ensuring a relatively constant supply of vaccines to the public and ensuring that a high number of Americans receive inoculations.¹³ However, the objectives of parents' groups and other advocates for children and adults who have suffered serious injuries after receiving vaccines have not been satisfied. For persons who may have been injured by vaccinations, the need for expeditious, generous, and predictable compensation remains unmet. Moreover, the process of adjudicating vaccine cases today is seriously flawed and in need of repair.

In this Article, I will examine the process of litigating vaccine injury claims in the Vaccine Compensation Program. The adjudicative process has changed over time, such that the program has become much different today than it was when the law was first enacted. The Vaccine Compensation Program is also very different from the program that the

10. Denis J. Hauptly & Mary Mason, *The National Childhood Vaccine Injury Act: The Federal No-Fault Compensation Program that Gives a Booster for Tort Reform*, 37 FED. B. NEWS & J. 452, 452 (1990); Lainie Rutkow et al., *Balancing Consumer and Industry Interests in Public Health: The National Vaccine Injury Compensation Program and Its Influence During the Last Two Decades*, 111 PENN ST. L. REV. 681, 711–12 (2007).

11. Prior to the passage of the Vaccine Act, the persistent threat of tort liability claims caused pharmaceutical companies to consider and threaten to abandon the vaccine market, and some had already done so. There was real concern that there might be no manufacturers for certain vaccines in the United States. H.R. REP. NO. 99-908, pt. 1, at 6–7 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6344, 6347–48.

12. 131 S. Ct. 1068 (2011).

13. See Walter A. Orenstein et al., *Immunizations in the United States: Success, Structure, and Stress*, 24 HEALTH AFF. 599, 599–60 (2005) (highlighting the correlation between record highs of immunization levels among young children and the reduction of disease incidence); *cf.* Rutkow et al., *supra* note 10, at 717–18 (describing the program as a “moderate success” that has “succeeded in reducing the number of lawsuits brought under the tort system”).

Supreme Court described in *Bruesewitz*. In the *Bruesewitz* opinion, the Supreme Court characterized the underlying proceedings before the special masters as involving “informal adjudication” which moves quickly to final resolution within 240 days of filing “except for two limited exceptions.”¹⁴ The Court added: “Fast, informal adjudication is made possible by the Act’s Vaccine Injury Table”¹⁵

These descriptions of the Vaccine Program would have been largely accurate when the Act was initially passed, but they are substantially inaccurate in describing how the program actually operates today. The adjudications today are typically not informal at all, virtually no cases are concluded within the 240-day deadline, and the Vaccine Injury Table,¹⁶ which was originally a central feature of the Vaccine Act and a key innovative provision of the Act, has been significantly changed and narrowed over the years so that today it plays only a limited role in Vaccine Act cases.¹⁷

The Vaccine Injury Table lists the specific injuries that the court recognizes as presumptively caused by a vaccine and the specified time limit for the occurrence of the onset of each listed injury.¹⁸ When the Vaccine

14. *Bruesewitz*, 131 S. Ct. at 1073.

15. *Id.*

16. 42 U.S.C. § 300aa-14(a) (2006).

17. See *infra* notes 72–74 and accompanying text; see also *Stevens v. Sec’y of the Dep’t of Health & Human Servs.*, No. 99–594V, 2001 WL 387418, at *8 (Fed. Cl. Mar. 30, 2001) *abrogated in part by* *Althen v. Sec’y of Health & Human Servs.*, 418 F.3d 1274, 1281 (Fed. Cir. 2005).

18. The Vaccine Injury Table lists Table injuries as follows (partial list of vaccines):

Vaccine	Adverse Event	Time Interval
Measles, mumps and rubella virus-containing vaccine in any combination (e.g., MMR, MR, M, R)	Anaphylaxis or anaphylactic shock Encephalopathy (or encephalitis) Any acute complication or sequela (including death) of the above events	0–4 hours 5–15 days Not applicable
Tetanus toxoid-containing vaccines (e.g., DTaP, Tdap, DTP-Hib, DT, Td, TT)	Anaphylaxis or anaphylactic shock Brachial neuritis Any acute complication or sequela (including death) of above events	0–4 hours 2–28 days Not applicable
Varicella vaccine	No condition specified for compensation	Not applicable
Rotavirus vaccine	No condition specified for compensation	Not applicable
Pneumococcal conjugate vaccines	No condition specified for compensation	Not applicable

HEALTH RES. & SERVS. ADMIN, NATIONAL CHILDHOOD VACCINE INJURY ACT: VACCINE INJURY TABLE (2008), <http://www.hrsa.gov/vaccinecompensation/pdfs-do-not-use/vaccineinjurytable.pdf>. Updates to the Vaccine Injury Table are also codified in the *Code of Federal Regulations*. See, e.g., 42 C.F.R. § 100.3 (2010).

Program began, the overwhelming majority of cases that were litigated in the program involved the relatively simple question of whether the Table requirements had been satisfied.¹⁹ However, the situation today, and for the foreseeable future, is the reverse. The overwhelming majority of cases litigated in the program do not involve Table injuries. In these cases, petitioners are asserting only non-Table claims and must prove that the vaccine caused the injury.

There are a number of reasons for this, but the most important is that the Table was substantially modified and narrowed by the Secretary of HHS in 1995 through an administrative rulemaking proceeding.²⁰ In addition, the nine vaccines added to the Table by the Secretary of HHS since 1988 generally have no specified Table injuries at all or have the immediate onset of anaphylactic shock as the only listed Table injury.²¹

These changes in the Table have resulted in other major changes in the operation of the program. The cases are now substantially more difficult, complex, and time-consuming to litigate. The science is less clear, and the special masters have much more difficult and complex scientific disputes to resolve than they did for the relatively simpler Table injury claims. Both petitioners' counsel and government counsel now need to search for experts in cutting-edge medical areas, such as genetics and neurology, where a great deal of uncertainty still exists. This contributes to a much more adversarial process than was supposed to exist in a program that was designed to be less adversarial.

The present focus of the Vaccine Program on virtually all off-Table cases has also resulted in a series of recent decisions from the U.S. Court of

19. The Vaccine Compensation Program's former Chief Special Master, Gary J. Golkiewicz, described how substantially the program had been changed by the 1995 Health and Human Services (HHS) Table changes:

With the enactment of the administrative Table amendments, effective Mar. 10, 1995, there was a dramatic shift in the percentage of cases decided pursuant to the Table versus those decided under an actual causation theory. While possessing no empirical data, experience and anecdotal evidence suggests that the percentages flip-flopped; prior to the amendments 90% of cases were Table cases, while after the amendments 90% of cases were actual causation cases. In fact, the undersigned has yet to adjudicate a case involving the interpretation of the amended Table; all litigated claims have been causation cases.

Stevens, 2001 WL 387418, at *8.

20. National Vaccine Injury Compensation Program Revision of the Vaccine Injury Table, 60 Fed. Reg. 7678, 7694 (Feb. 8, 1995) (codified at 42 C.F.R. § 100.3 (2011)).

21. The most recently added vaccines, which have no listed Table injuries, are the HPV vaccine, added in 2007; the seasonal flu vaccines, added in 2005; and the Hepatitis A vaccine, added in 2004. The only Table injury for several other vaccines, including the inactivated polio vaccine and the Hepatitis B vaccine, is anaphylactic shock within zero to four hours of receipt of the vaccine. See HEALTH RES. & SERVS. ADMIN, *supra* note 18.

Appeals for the Federal Circuit, purportedly clarifying but sometimes confusing the standards that the special masters are required to apply in deciding off-Table cases. A number of the Federal Circuit's recent rulings have observed that Congress intended compensation to be provided generously, and that "close calls regarding causation are [to be] resolved in favor of injured claimants."²² To the contrary, other recent Federal Circuit rulings have emphasized the importance of strict compliance with traditional tort standards of causation.²³ Such inconsistencies have illuminated the need for clear standards.

In this Article, I seek to evaluate what the Vaccine Compensation Program has accomplished and what it has not, assessing its evolution over the past two decades. I will also undertake a comparative assessment, evaluating the Vaccine Compensation Program in light of the experiences of other federal compensation programs that Congress has recently adopted.

Part I of this Article provides a brief history of the Vaccine Act and describes how the Act created a blend of inquisitorial and adversarial features for litigating vaccine cases. It then describes a number of the Vaccine Program's procedural and case management innovations. It also describes the major changes that have occurred in the program since it began in 1988, and the negative consequences that some of those changes have had on the way the program operates today. This Part also argues that there are a number of serious problems with the Vaccine Compensation Program that require systemic correction.

Part II briefly describes the five other major compensation programs that Congress has created since the passage of the Vaccine Act, each of which responded to a special circumstance: the Radiation Exposure Compensation Program (Radiation Program),²⁴ the Japanese-American internment compensation program,²⁵ the Smallpox Compensation Program,²⁶ the September 11th Victim Compensation Fund,²⁷ and the Countermeasures Injury Compensation Program.²⁸

22. *Andreu v. Sec'y of Health & Human Servs.*, 569 F.3d 1367, 1378 (Fed. Cir. 2009) (quoting *Capizzano v. Sec'y of Health & Human Servs.*, 440 F.3d 1317, 1325–26 (Fed. Cir. 2006); *Walther v. Sec'y of Health & Human Servs.*, 485 F.3d 1146, 1150 (Fed. Cir. 2007) (quoting *Althen*, 418 F.3d at 1280).

23. *See, e.g., Moberly v. Sec'y of Health & Human Servs.*, 592 F.3d 1315, 1322 (Fed. Cir. 2010), *reh'g en banc denied*, 380 F. App'x 142 (Fed. Cir. 2010).

24. Radiation Exposure Compensation Act, Pub. L. No. 101-426, 104 Stat. 920 (1990) (codified as amended at 42 U.S.C. § 2210 note (2006) (Radiation Exposure Compensation)).

25. Civil Liberties Act of 1988, Pub. L. No. 100-383, 102 Stat. 904 (codified as amended at 50 U.S.C. app. § 1989b (2006)).

26. Smallpox Emergency Personnel Protection Act of 2003, Pub. L. No. 108-20, 117 Stat. 638 (codified at 42 U.S.C. § 239–239h (2006)).

Part III undertakes a comparative evaluation of these compensation programs. Several features of these newer programs, such as a reduced burden of proof for petitioners, could successfully be adopted to improve the Vaccine Compensation Program. Perhaps the most important lesson for the Vaccine Compensation Program, and for other compensation programs that Congress may adopt in the future, comes from the failed Smallpox Vaccination Program in 2002–2003, where a major reason for its failure was the perceived (and actual) inadequacy of its injury compensation plan.

Based upon both recent developments in the Vaccine Program and lessons learned from the other compensation plans, Part IV argues that a number of legislative and other measures should be undertaken to remedy the problems that exist in the Vaccine Compensation Program.

I. THE FLAWED FEDERAL VACCINE INJURY COMPENSATION PROGRAM

A. *History of the Vaccine Act and Its Key Provisions*

The federal vaccine injury compensation law, which took effect in 1988, was a pioneering example of no-fault federal tort reform legislation.²⁹ The specific provisions of the Act represented a legislative compromise among the major interest groups working on vaccine issues, including the vaccine manufacturers, physicians and healthcare groups, federal health agencies, and groups advocating on behalf of injured children. The compensation fund was part of a broader statute that also created new programs to increase the safety and availability of vaccines and provided vaccine manufacturers and healthcare providers with legal protections against lawsuits involving vaccine-induced injuries.³⁰

The Supreme Court in *Bruesewitz* described the Vaccine Act as involving a quid pro quo from the vaccine manufacturers, who received substantial

27. September 11th Victim Compensation Fund of 2001, Pub. L. No. 107-42, 115 Stat. 237 (2001) (codified as amended at 49 U.S.C. § 40101 note (2006) (Air Transportation Safety and System Stabilization)).

28. Public Readiness and Emergency Preparedness Act, Pub. L. No. 109-148, 119 Stat. 2818 (2005) (codified at 42 U.S.C. § 247d-6d (2006)).

29. Vaccine Act, Pub. L. No. 99-660, 100 Stat. 3755 (1988) (codified as amended at 42 U.S.C. §§ 300a-1 to -34 (2006)).

30. 42 U.S.C. § 300aa-1 (2006). Now that *Bruesewitz* has eliminated all potential design defect claims against vaccine manufacturers, remaining claims that could be brought against manufacturers include claims based upon fraud, wrongful withholding of information about the safety or effectiveness of a vaccine, and manufacturing defects. See 42 U.S.C. § 300aa-22(b), -23(d)(2)(A) to (C); see also *Bruesewitz v. Wyeth L.L.C.*, 131 S. Ct. 1068, 1079–1080 (2011) (noting that judgments about vaccine design are properly left to the Food and Drug Administration (FDA)).

liability protection in return for establishing the Vaccine Injury Compensation Program that the “vaccine manufacturers fund from their sales.”³¹ While perhaps literally accurate, this statement is substantially misleading because the manufacturers contribute no money of their own to the fund, instead only transferring to the Vaccine Injury Compensation Trust Fund the excise taxes paid by others.³²

The Vaccine Act mandates that a claim for compensation from any person believed to have suffered a serious reaction to one of the vaccines recommended almost universally in the United States must be brought first in the U.S. Court of Federal Claims, in Washington, D.C. Claimants must litigate their cases through the Court of Federal Claims³³ before seeking other possible legal remedies against the manufacturer of the vaccine or the healthcare provider who administered it.³⁴ A claimant’s petition must assert that the vaccine either caused an injury from which the petitioner did not previously suffer, or that the vaccine “significantly aggravated” a pre-existing condition.³⁵ The petition must be filed in court prior to the expiration of the relatively short statute of limitations contained in the

31. *Bruesewitz*, 131 S. Ct. at 1080.

32. The Vaccine Compensation Fund obtains its funding from an excise tax levied on each vaccine dose administered. See Derry Ridgway, *No-Fault Vaccine Insurance: Lessons from the National Vaccine Injury Compensation Program*, 24 J. HEALTH POL. POL’Y & L. 59, 62 (1999). The tax is paid by either the private citizen who is vaccinated or by the federal government when it buys vaccines for free distribution under one of the government’s health and welfare programs. The current excise tax is \$0.75 per dose for each covered vaccine; some vaccines are two-, three-, or four-in-one shots that are then taxed at \$1.50, \$2.25, and \$3.00, respectively. *CDC Vaccine Price List*, CTRS. FOR DISEASE CONTROL & PREVENTION (last updated Nov. 2, 2011), <http://www.cdc.gov/vaccines/programs/vfc/cdc-vac-price-list.htm>.

33. To exhaust this remedy, the petitioner must receive a final decision on the merits from the special master, and then formally “reject” this decision. U.S. CT. OF FED. CLAIMS VACCINE R. 12(a)–(b). The petitioner can then file a civil action in state or federal court. 42 U.S.C. §§ 300aa-11(a)(1) to (2)(A), -21(a).

34. One of the compromises contained in the Vaccine Act made it more difficult for an injured person to subsequently bring a successful tort claim against a vaccine manufacturer by foreclosing manufacturer liability if the injury or death was “unavoidable even though the vaccine was properly prepared and was accompanied by proper directions and warnings.” 42 U.S.C. § 300aa-22(b)(1). The Supreme Court held in *Bruesewitz* that this provision barred all claims based upon design defects. 131 S. Ct. at 1080.

35. To establish a significant aggravation of a pre-existing condition, petitioner must show that he or she suffered a “change for the worse in a preexisting condition which results in markedly greater disability, pain, or illness accompanied by substantial deterioration of health.” 42 U.S.C. § 300aa-33(4). The leading case explaining the criteria for a showing of significant aggravation is *Whitecotton v. Secretary of Health & Human Services*, 81 F.3d 1099, 1107–08 (Fed. Cir. 1996).

Act—thirty-six months from the first manifestation of the injury or twenty-four months from the time of death.³⁶

Vaccines play a vital role in protecting the health of the population as a whole,³⁷ resulting in what is generally recognized as one of the greatest public health successes of the past hundred years.³⁸ However, a relatively small percentage of people will suffer serious adverse effects from vaccines because no vaccine can be one hundred percent safe,³⁹ and vaccines are routinely given to tens of millions of Americans every year. Congress passed the Vaccine Act not only to encourage vaccination in America and to provide legal protection against vaccine-injury claims for vaccine manufacturers and healthcare providers, but also to create a safety net for those few who would be injured by the vaccinations so that compensation to injured petitioners would be provided “quickly, easily, and with certainty and generosity.”⁴⁰

Vaccinations usually begin shortly after a baby is born, before the infant leaves the hospital. The principal mechanism for enforcing mandatory vaccinations in America are laws in every state and the District of Columbia that generally require proof of childhood immunizations prior to entry into school or childcare centers.⁴¹ All of these statutes make exceptions for individuals who can certify that the vaccination is likely to cause death or serious injury. Most states also exempt persons with

36. 42 U.S.C. § 300aa-16(a). In a case brought by The George Washington University Law School Vaccine Injury Clinic, a divided panel of the U.S. Court of Appeals for the Federal Circuit held that the statute of limitations must be strictly applied, and was not subject to equitable tolling for any reason. *Brice v. Sec’y of Health & Human Servs.*, 240 F.3d 1367, 1373–74 (Fed. Cir. 2001), *cert. denied sub nom. Brice v. Thompson*, 534 U.S. 1040 (2001). The Federal Circuit, sitting en banc, recently overruled *Brice* and held that equitable tolling is available under the Vaccine Act in appropriate situations. *See Cloer v. Sec’y of Health & Human Servs.*, No. 2009–5052, 2011 WL 3374302, at *15–18 (Fed. Cir. Aug. 5, 2011).

37. *See* H.R. REP. NO. 99-908, pt. 1, at 4 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6344, 6345 (“While most of the Nation’s children enjoy great benefit from immunization programs, a small but significant number have been gravely injured.”).

38. Rutkow et al., *supra* note 10, at 681 (“Vaccines are widely hailed as one of the greatest medical and public health accomplishments of the twentieth century.”).

39. Robert T. Chen, *Safety of Vaccines*, in *VACCINES* 1144, 1144 (Stanley A. Plotkin & Walter A. Orenstein eds., 3d ed. 1999); *see also* *Terran v. Sec’y of Health & Human Servs.*, 195 F.3d 1302, 1306–07 (Fed. Cir. 1999) (“Childhood vaccinations, though an important part of the public health program, are not without risk. Because vaccines often contain either killed bacteria or live but weakened viruses, they can cause serious adverse effects.”).

40. H.R. REP. NO. 99-908, pt. 1, at 3, *reprinted in* 1986 U.S.C.C.A.N. 6344, 6344.

41. Timothy J. Aspinwall, *Religious Exemptions to Childhood Immunization Statutes: Reaching for a More Optimal Balance Between Religious Freedom and Public Health*, 29 LOY. U. CHI. L.J. 109, 109 (1997); *see also* *Vaccine Law Information*, NAT’L VACCINE INFO. CTR., <http://www.nvic.org/vaccine-laws.aspx> (last visited Sept. 20, 2011).

religious objections to vaccinations, and a minority of states exempt persons with moral or philosophical objections to immunization.⁴² The scope of these exemptions, and the enforcement policies, vary substantially from state to state.⁴³

In the Vaccine Compensation Program's early years, the overwhelming majority of the cases brought, and compensation awarded, involved injuries to children. This has changed dramatically, and in the past few years the majority of cases brought, and awards made, have involved adults.⁴⁴

The procedures to be followed in adjudicating vaccine cases are set forth in the Vaccine Act, in the Vaccine Rules adopted by the judges of the U.S. Court of Federal Claims, and in the Guidelines for Practice adopted by the special masters.⁴⁵ The petition for compensation, in contrast to a complaint typically filed in a civil case, should not be a formalistic document that merely tracks statutory language, but instead should be a "short and plain statement" of the facts and the grounds for compensation.⁴⁶ The petition must be accompanied by all medical records that might possibly shed light on the case, including all available prenatal and pediatric records for an infant petitioner, affidavits from any persons who might be called to testify in the case, and medical expert opinions (if appropriate) from the medical experts that petitioner intends to rely upon in the case.⁴⁷ The respondent then files a report replying to the petition, which similarly should not be a

42. Aspinwall, *supra* note 41, at 109 & n.1 (referring to the great majority of states allowing religious exemptions); *see also Vaccine Law Information, supra* note 41. In 1905, the U.S. Supreme Court upheld the constitutionality of imposing a criminal conviction for failing to comply with a mandatory vaccination law involving the smallpox vaccine. *Jacobson v. Massachusetts*, 197 U.S. 11, 39 (1905).

43. *See Vaccine Law Information, supra* note 41.

44. Dee Lord, Chief Special Master, U.S. Court. of Fed. Claims, *Evolving Caseload of the Office of Special Masters* (Oct. 2010) (unpublished presentation) (on file with Author) (covering 1995–2010); *Statistics Report, HUMAN RES. & SERVS. ADMIN.*, <http://www.hrsa.gov/vaccinecompensation/statisticsreports.html> (last visited Sept. 20, 2011) (covering 1989–2011). The principal reason for this change appears to be the addition of seasonal flu vaccines to the Vaccine Act in 2005, and the widespread use of these vaccines by adults. *Id.* A total of 2,713 awards have been made in the Vaccine Compensation Program through September 9, 2011. *Id.*

45. The Vaccine Rules originally took effect in 1990. Hauptly & Mason, *supra* note 10, at 453.

46. U.S. CT. OF FED. CLAIMS VACCINE R. 2(c)(1)(A).

47. *See* 42 U.S.C. § 300aa-11(c)(2) (2006); OFFICE OF SPECIAL MASTERS, GUIDELINES FOR PRACTICE UNDER THE NATIONAL VACCINE INJURY COMPENSATION PROGRAM § II(B) (2004) [hereinafter GUIDELINES FOR PRACTICE]. New Vaccine Rules, effective July 15, 2011, require all medical records to be filed electronically, after the petition for compensation is filed, except for pro se cases and other special circumstances. *See* U.S. CT. OF FED. CLAIMS VACCINE R. 17(b)(3).

mere formalistic opposition to the petition, but should include only those medical or other issues that respondent intends to contest.⁴⁸ Respondent's report must be accompanied by all medical expert reports that respondent will rely upon in the case.⁴⁹ The special master is then statutorily bound to issue a final decision in the case within 240 days of the date that the petition was filed.⁵⁰ This procedure sounds straightforward, but in practice the cases rarely proceed so smoothly, for the reasons discussed below.

B. The Vaccine Injury Table and Its Significance in the Program

Among the key legislative compromises, and the central innovative provision of the Vaccine Act, was the creation of the Vaccine Injury Table. This Table represents the substantive law that would be used to adjudicate most cases. All vaccines covered by the Vaccine Act are listed on this Table. The Table also lists the specific injuries recognized as presumptively related to the vaccine, and for each listed injury, the Table specifies a time limit for the onset of that injury.⁵¹ If a petitioner can show that a specified injury more likely than not occurred in the specified time frame after receipt of the vaccine, a presumption is created that the vaccine caused the injury, and petitioner is relieved of the often difficult burden of introducing medical proof that the vaccine did in fact cause the injury.⁵²

If petitioner makes this showing, the burden then shifts to the government to show, by a preponderance of evidence, that another cause (a factor unrelated to the vaccine) is the real source of the injury.⁵³ Unless the government can make this showing—rebutting the presumption that the vaccine caused the injury—the petitioner will prevail in the case. The statute also provides that the government cannot base its rebuttal on an idiopathic cause—a cause of unknown origin.⁵⁴

The original Table adopted by Congress contained ten vaccines: measles, mumps, and rubella (commonly given together as an MMR shot); diphtheria, tetanus, and pertussis (commonly given together as a DTP shot); and the two polio vaccines (IPV and OPV).⁵⁵ The current Table contains

48. U.S. CT. OF FED. CLAIMS VACCINE R. 4(c).

49. *Id.* R. 4(c)(2); GUIDELINES FOR PRACTICE, *supra* note 47, at § IV.

50. 42 U.S.C. § 300aa-12(g); U.S. CT. OF FED. CLAIMS VACCINE R. 10(b).

51. 42 U.S.C. § 300aa-14(a); *see also* HEALTH RES. & SERVS. ADMIN, *supra* note 18.

52. *See* 42 U.S.C. § 300aa-11.

53. *Id.* § 300aa-13(a)(1)(B).

54. *Id.* § 300aa-13(a)(2)(A). Sudden Infant Death Syndrome (SIDS) is such an idiopathic cause. *Doe v. Sec'y of the Dep't of Health & Human Servs.*, 83 Fed. Cl. 157, 159 (2008); *Davis v. Sec'y of the Dep't of Health & Human Servs.*, 54 Fed. Cl. 230, 235 (2002).

55. Vaccine Act, Pub. L. No. 99-660, § 2114(a), 100 Stat. 3755, 3764–65 (1986) (codified as amended at 42 U.S.C. § 300aa-14(a)).

these ten vaccines and nine additional vaccines that were added to the Table in the years since the Act was adopted.⁵⁶

The Table was intended to play a central role in resolving cases in the Vaccine Program for several reasons. First, there is still a great deal of scientific uncertainty concerning the nature of potential vaccine-related injuries. Although there are a few definitive conclusions that can be made about vaccine-induced injuries,⁵⁷ there are many more areas where the illnesses or diseases are poorly understood. The relationship between the diseases and vaccines has not been thoroughly investigated.⁵⁸ Definitive answers about whether a vaccine caused an injury are often impossible to make in a specific case.⁵⁹

56. These vaccines are: Hepatitis A and B, HPV, seasonal flu vaccines, meningococcal, pneumococcal conjugate, rotavirus, and varicella (chicken pox). HEALTH RES. & SERVS. ADMIN, *supra* note 18.

57. For example, the now-discontinued oral polio vaccine caused a limited number of paralytic polio cases in the United States. This vaccine used live, attenuated viruses, causing an estimated eight to ten cases of polio in America each year, out of millions of doses given. To eliminate these injuries, the United States switched several years ago to the inactivated or killed polio virus vaccine, even though the killed vaccine was less effective in a number of ways. See Peter Paradiso & Peter Wright, *Oral Poliovirus Vaccine Only*, in OPTIONS FOR POLIOMYELITIS VACCINATION IN THE UNITED STATES: WORKSHOP SUMMARY 14, 16 (Cynthia J. Howe & Richard B. Johnstone eds., 1996); Frederick Robbins & Walter Orenstein, *U.S. Experience*, in OPTIONS FOR POLIOMYELITIS VACCINATION IN THE UNITED STATES: WORKSHOP SUMMARY, *supra*, at 3; *Poliomyelitis Prevention in the United States: Updated Recommendation of the Advisory Committee on Immunization Practices (ACIP)*, MORBIDITY & MORTALITY WKLY. REP., May 19, 2000, at 2.

58. The Federal Circuit has described the vaccine injury area as “a field bereft of complete and direct proof of how vaccines affect the human body.” *Althen v. Sec’y of Health & Human Servs.*, 418 F.3d 1274, 1280 (Fed. Cir. 2005). The Centers for Disease Control and Prevention’s (CDC’s) Vaccine Information Statements (VIS) acknowledge serious acute consequences from a number of vaccines, including the following “Moderate Problems” from the current diphtheria, tetanus, and pertussis (DTaP) vaccination: “Seizure (jerking or staring) (about 1 child out of 14,000)”; “Non-stop crying, for 3 hours or more (up to about 1 child out of 1,000)”; “High fever, over 105°F (about 1 child out of 16,000).” CTRS. FOR DISEASE CONTROL & PREVENTION, *DIPHTHERIA, TETANUS & PERTUSSIS VACCINES: WHAT YOU NEED TO KNOW* (2007). However, the VIS fail to acknowledge any chronic problems caused by the vaccines. For example, the CDC’s VIS on DTaP states, “Several other severe problems have been reported after DTaP,” including “long-term seizures” and “permanent brain damage.” *Id.* The VIS concludes that these problems “are so rare it is hard to tell if they are caused by the vaccine.” *Id.*

59. There are generally no definitive biological markers to prove that a vaccine was the cause of an injury, except for rare cases like the now-discontinued live polio vaccine. It is often impossible to determine conclusively that a person suffered the onset of a disease or illness as a result of a vaccine, as opposed to an illness that was caused by other, often unknown reasons. The fact that an adverse event occurred after a vaccination is not, in itself, proof that the vaccine caused the adverse event, but it is suggestive of such an effect.

Moreover, litigation in Table cases is relatively simple. The focus in these cases is first on whether the injury alleged is the injury specified in the Table. While there have been cases where medical experts disagreed on the nature of the injury involved in the vaccine injury claim, most of the time there will be no substantial dispute on the nature of the injury or on the date of onset for the claimed injury. While experts sometimes disagree about which symptoms represent the date of onset of the claimed injury, in the great majority of cases the medical and hospitalization records sufficiently document the nature of the injury and the date of its onset. Thus, in Table injury cases, the medical and scientific issues involving the nature of the injury and the onset of its first manifestation would generally not be expected to create serious difficulties for the resolution of cases in the vaccine program. In most cases it would be expected that the doctors would agree on the nature of the injury and its likely date of onset. Even in rarer cases where issues are disputed, the scientific matters requiring resolution by the special masters are relatively easy to decide.⁶⁰

The use of the Table is also essential to the expeditious and efficient processing of vaccine injury claims. As a former special master in the vaccine program, Denis J. Hauptly, along with his co-author, wrote:

“[T]his type of program only works when issues can be converted into formulas to a significant degree. That is, the use of the “table” to establish presumptive causation in vaccine cases makes it possible to handle most cases with minimal effort.”⁶¹

In vaccine cases where no Table injury claim can be made, the special masters have much more difficult and complex issues to decide. In such off-Table cases, the special masters must base their decisions on medical opinions or published articles linking the vaccine to the injury involved in the case. These off-Table cases often involve complex medical questions about which there is likely to be no definitive consensus among experts.

This has become a particular problem for the Vaccine Program because of the dramatic shift from the early years of the program, 1989 to 1992, when more than 90% of the petitions filed asserted Table injuries, to the most recent years, 2007 to 2010, when almost 90% of the petitions filed assert only non-Table injuries.⁶²

See Neal A. Halsey, *The Science of Evaluation of Adverse Events Associated with Vaccination*, 13 SEMINARS IN PEDIATRIC INFECTIOUS DISEASES 205, 207 (2002).

60. See 42 U.S.C. § 300aa-13(b).

61. Hauptly & Mason, *supra* note 10, at 457.

62. See *Stevens v. Sec’y of the Dep’t of Health & Human Servs.*, No. 99-594V, 2001 WL 387418, at *8 (Fed. Cl. Mar. 30, 2001).

C. Major Changes in the Table and the Program and Their Consequences

The National Vaccine Injury Compensation Program changed substantially in 1995, when the Secretary of HHS announced modifications to the Vaccine Injury Table that would drastically change not only the Table, but also the nature of the Vaccine Compensation Program. The Table changes have in effect created a new and different vaccine compensation program.

This change in the Table also affected Hannah Bruesewitz's case. Hannah's parents filed their petition for compensation in the U.S. Court of Federal Claims in April of 1995, one month after the new Vaccine Injury Table,⁶³ which eliminated residual seizure disorder as a Table injury, went into effect. Hannah had a strong claim of a residual seizure disorder under the prior table;⁶⁴ but unfortunately for her family this Table injury had been eliminated. The special master ruled that Hannah had not proven that she either suffered an injury recognized by the Vaccine Injury Table in effect at the time she filed her case, or that her seizure disorder and related problems were caused in fact by the DTP vaccines she received.⁶⁵

In 1995, because of the administrative rulemaking proceeding instituted by the Secretary of HHS⁶⁶ that modified both the Table and the Qualifications and Aides to Interpretation (QAI) of the Table, the Table was substantially narrowed.⁶⁷ The two most important changes that affected the largest number of people were the elimination of residual seizure disorder and hypotonic hyporesponsive episode (HHE) as Table

63. 42 C.F.R. § 100.3 (1995).

64. To establish a residual seizure disorder under the original Vaccine Injury Table, Hannah would have had to show that she suffered her first seizure within three days of her DTP vaccination and suffered two or more seizures within one year that were essentially afebrile. 42 U.S.C. § 300aa-14(a), (b)(2)(B) (1988).

65. *Bruesewitz v. Sec'y of the Dep't of Health & Human Servs.*, No. 95-0266V, 2002 WL 31965744, at *17 (Fed. Cl. Dec. 20, 2002).

66. National Vaccine Injury Compensation Program Revision of the Vaccine Injury Table, 60 Fed. Reg. 7678 (Feb. 8, 1995).

67. 42 C.F.R. § 100.3 (2010). The Vaccine Act gave the Secretary of HHS the authority to modify the Table, as agency officials are often empowered by Congress to modify the regulations they implement. *See* 42 U.S.C. § 300aa-14(c), (e)(2) (2006). The authority of the Secretary of HHS to make the 1995 Table changes was challenged in the U.S. Court of Appeals for the Federal Circuit in *Terran v. Secretary of Health & Human Services*, 195 F.3d 1302 (Fed. Cir. 1999). A divided panel of the court upheld the authority of the Secretary of HHS to make the 1995 Table changes, rejecting arguments that the changes violated the Constitution's Presentment Clause and were an unlawful delegation of legislative authority to an administrative official to amend a statute. *Id.* at 1314-15. Judge Plager dissented on the ground that the 1995 changes violated the Presentment Clause. *Id.* at 1317.

injuries,⁶⁸ and the redefining of the Table injury of encephalopathy from a broad, inclusive definition to a hyper-technical and narrow definition that is extremely difficult, if not impossible, to satisfy.⁶⁹ Moreover, as noted above, practically all of the vaccines added to the Table in recent years have either no specified Table injuries, or else they have only the listed injury of an immediate anaphylactic shock reaction.⁷⁰

The Secretary of HHS based the 1995 Table changes largely on a then-recent report from the Institute of Medicine.⁷¹ Several persons who submitted comments to the Secretary on the proposed new Table pointed out that the Secretary had not considered the results of several large databases on vaccine injuries, and urged the Secretary to wait for more definitive information before modifying the Table.⁷² The Secretary responded that it was unnecessary for the information it relied upon to be “definite and conclusive before any changes are made.”⁷³ Several persons also submitted comments indicating that the 1995 rule change would substantially change the nature of the Vaccine Injury Compensation Program, but the Secretary responded that “the benefits of the proposed regulation outweigh the possibility of more protracted and complex hearings.”⁷⁴

68. The Table changes substantially reduced the proportion of compensated petitioners. This point is dramatically made by the fact that 45% of all claims that had been awarded compensation as of 1999 involved injuries later dropped from the Table. Clearly, changes to the Table by the Secretary drastically altered the prospect for compensation for large numbers of petitioners.

Jeffrey A. McLellan, Note, *The Constitutional Challenge to the Vaccine Act in Terran v. Secretary of Health & Human Services and its Policy Implications*, 12 FED. CIR. B.J. 687, 692 (2004) (footnotes omitted).

69. *Encephalopathy* was initially defined broadly as any “injury to, or impairment of function of the brain.” 42 U.S.C. § 300aa-14(b)(3)(A) (1988). The 1995 amendment to the Table redefined it much more narrowly to include only those injuries that satisfied the criteria for an acute and then a chronic encephalopathy. 42 C.F.R. § 100.3(b)(2) (1995). An acute encephalopathy requires a “significantly decreased level of consciousness” for more than twenty-four hours, and a chronic encephalopathy requires a “change in mental or neurologic status, first manifested during the applicable time period, persist[ing] for a period of at least 6 months from the date of vaccination. Individuals who return to a normal neurologic state after the acute encephalopathy shall not be presumed to have suffered residual neurologic damage from that event.” *Id.* § 100.3(b)(2)(i)(A), (b)(ii).

70. *Stevens v. Sec’y of the Dep’t of Health & Human Servs.*, No. 99-594V, 2001 WL 387418, at *8 n.11 (Fed. Cl. Mar. 30, 2001), *abrogated in part by* *Althen v. Sec’y of Health & Human Servs.*, 418 F.3d 1274, 1281 (Fed. Cir. 2005).

71. National Vaccine Injury Compensation Program Revision of the Vaccine Injury Table, 60 Fed. Reg. 7678, 7678 (Feb. 8, 1995) (codified at 42 C.F.R. pt. 100).

72. *Id.* at 7681, 7685–86.

73. *Id.* at 7681.

74. *Id.* at 7682.

According to former Chief Special Master Gary J. Golkiewicz, the 1995 rule change did produce a tremendous change in the nature of the vaccine claims litigated in the program.⁷⁵ In the first few years, practically all cases involved only satisfying the Table requirements and adjudicating whether another factor unrelated to the vaccine was the likely cause of the injury. With the changes in the Table and the subsequent addition of many new vaccines without any Table injuries, the focus of vaccine case adjudication is now dramatically different. Ninety percent of vaccine cases are now causation-in-fact cases.⁷⁶ The Table was intended to be a crucial innovation, a key to the quick, hospitable, and less adversarial Vaccine Act proceedings. It is now central to only a small minority of cases. The Table has little significance in resolving the overwhelming majority of vaccine cases that come before the court today.

The recent focus on causation-in-fact cases has also generated other major changes in the nature of the Vaccine Injury Program. First, the cases are substantially more difficult and complex to litigate. The special masters have much more challenging scientific disputes to resolve in these cases than they do for Table claims.

Second, both sides need to locate experts in cutting-edge areas, where substantial uncertainty still exists. For the old Table injuries, a neurologist would testify whether a petitioner's injury did or did not meet the definition of encephalopathy listed in the Table, and its Qualifications and Aides to Interpretation, and whether the onset of the injury did or did not occur within the time period required by the Table. In off-Table cases, the experts now have to present much more complex testimony concerning whether the vaccine was the likely cause of the problems that the petitioner subsequently experienced.

The complex off-Table cases that now predominate in the Vaccine Compensation Program also proceed more slowly than the simpler Table injury cases, and typically result in more adversarial litigation than Table cases because the parties and their experts usually begin from polar opposite positions. The relatively easy question of determining whether an injury satisfies the Table criteria has become the much more difficult question of whether a vaccine in fact caused an injury. These changes have encouraged the type of adversarial litigation that the Vaccine Act was designed to minimize.

The result of these changes is that the Vaccine Compensation Program today is not at all like the program that the Supreme Court described in *Bruesewitz* as involving "fast, informal adjudication," focusing on Vaccine

75. *Stevens*, 2001 WL 387418, at *8.

76. *Id.*

Injury Table requirements.⁷⁷ Instead, it is a much slower and more adversarial process that focuses on formally adjudicating non-Table causation-in-fact cases.

The shift in focus to off-Table cases has also led to the creation of several “omnibus proceedings,” in which the special masters consolidate a number of similar cases into one proceeding. The largest and most controversial omnibus proceeding is the ongoing proceeding concerning autism, which involves more than 5,000 petitioners. Other omnibus proceedings have involved the rubella vaccine and arthritic conditions, the hepatitis B vaccine, and other vaccines.⁷⁸

A final important consequence of the massive switch to off-Table cases has been a series of decisions from the U.S. Court of Appeals for the Federal Circuit, beginning in 2005, which have attempted to clarify the legal standards for proving causation-in-fact cases.⁷⁹ Under the principles enunciated in these cases, petitioners’ burden in off-Table cases is to demonstrate that a vaccine was a substantial factor in causing an injury, but not necessarily the sole or even the predominant factor causing the injury.⁸⁰ Petitioners must also demonstrate that the vaccine was a “but for” cause of the injury, in that the injury would not have occurred except for the administration of the vaccine.⁸¹ Petitioners are not required to prove that a specific biological mechanism was the means by which the vaccine caused the injury, and are also not required to show that all other possible causes for the injury have been eliminated.⁸² In *Althen v. Secretary of Health & Human Services*, the Federal Circuit specified that to satisfy these burdens, petitioners must demonstrate: “(1) a medical theory causally connecting the vaccination and the injury; (2) a logical sequence of cause and effect showing that the vaccination was the reason for the injury; and (3) a showing of a proximate temporal relationship between vaccination and injury.”⁸³

These legal standards are noncontroversial and widely accepted. However, a controversy emerged from a line of Federal Circuit cases that

77. *Bruesewitz v. Wyeth L.L.C.*, 131 S. Ct. 1068, 1073 (2011).

78. *See infra* Part II.E.4.

79. *Andreu v. Sec’y of Health & Human Servs.*, 569 F.3d 1367 (Fed. Cir. 2009); *Walther v. Sec’y of Health & Human Servs.*, 485 F.3d 1146 (Fed. Cir. 2007); *Pafford v. Sec’y of Health & Human Servs.*, 451 F.3d 1352 (Fed. Cir. 2006); *Capizzano v. Sec’y of Health & Human Servs.*, 440 F.3d 1317 (Fed. Cir. 2006); *Althen v. Sec’y of Health & Human Servs.*, 418 F.3d 1274 (Fed. Cir. 2005).

80. *Althen*, 418 F.3d at 1278.

81. *Id.*

82. *Walther*, 485 F.3d at 1150; *Capizzano*, 440 F.3d at 1324; *Knudsen v. Sec’y of the Dep’t of Health & Human Servs.*, 35 F.3d 543, 549 (Fed. Cir. 1994).

83. *Althen*, 418 F.3d at 1278.

began with *Althen* in 2005, continued in *Walther v. Secretary of Health & Human Services* in 2007, and included *Andreu v. Secretary of Health & Human Services* in 2009. In these cases, the Federal Circuit emphasized that “close calls regarding causation are [to be] resolved in favor of injured claimants.”⁸⁴ Such a rule is consistent with Congress’s intent that the vaccine law create a generous compensation program that was to be liberally construed in favor of compensating injured petitioners.⁸⁵ However, a second line of cases, including *De Bazan v. Secretary of Health & Human Services* in 2008 and *Moberly v. Secretary of Health & Human Services* in 2010, takes a very different perspective, emphasizing that traditional tort standards should be strictly applied to off-Table cases.⁸⁶ These cases treat the Vaccine Act as if it were a waiver of sovereign immunity, calling for legal principles that require the courts to strictly construe the Act against petitioners.

It is striking that *Andreu* and *Moberly* reached such divergent conclusions, as they were so factually similar. In both cases, young children developed seizure disorders shortly after receipt of a DTP vaccination. In *Andreu*, the onset of the seizure disorder was one day; in *Moberly* it was two days.⁸⁷

In *Andreu*, the petitioner’s vaccine expert and the child’s neurologist both testified that the vaccine likely caused the seizure disorder, and the government’s expert testified that, while he did not agree that the vaccine caused the seizure disorder, he did not contest the biological plausibility of that view.⁸⁸ The Federal Circuit held that petitioner had satisfied the applicable burdens under *Althen* and ordered that compensation be paid.⁸⁹ In *Moberly*, the Federal Circuit affirmed the special master’s denial of compensation and distinguished *Andreu* on two grounds.⁹⁰ First, the *Moberly* court pointed out that in *Andreu* the treating physician supported the vaccine–injury link, while in *Moberly* the principal treating physician was not supportive but was instead skeptical of the vaccine–injury link.⁹¹ Second, the court noted that in *Andreu* the government’s expert witness had

84. *Andreu*, 569 F.3d at 1378 (quoting *Cappizano*, 440 F.3d at 1325–26); *Walther*, 485 F.3d at 1150 (quoting *Althen*, 418 F.3d at 1280).

85. *See Andreu*, 569 F.3d at 1378 (stating that requiring epidemiological studies or generally accepted medical principles would impermissibly raise a claimant’s burden).

86. *Moberly v. Sec’y of Health & Human Servs.*, 592 F.3d 1315, 1322–23 (Fed. Cir. 2010); *De Bazan v. Sec’y of Health & Human Servs.*, 539 F.3d 1347, 1351 (Fed. Cir. 2008); *see also Grant v. Sec’y of the Dep’t of Health & Human Servs.*, 956 F.2d 1144, 1148 (Fed. Cir. 1992).

87. *Moberly*, 592 F.3d at 1318; *Andreu*, 569 F.3d at 1370.

88. *See Moberly*, 592 F.3d at 1325.

89. *Andreu*, 569 F.3d at 1370.

90. *Moberly*, 592 F.3d at 1325.

91. *Id.*

not contested the biological plausibility of the vaccine–injury link, while in *Moberly* the government’s expert did contest the biological plausibility of this link.⁹² These distinctions confuse rather than clarify the law.

One crucial consideration for the special masters should not be whether the current principal treating physician supports a vaccine injury link. Instead, the key consideration should be the weight and authority behind the views of the expert witnesses who testify in the case. Similarly, another crucial consideration for the special masters should not be whether the government’s expert accepts the plausibility of the petitioner’s proposed vaccine injury link. Instead, the key consideration should be the extent of the agreement and disagreement between the experts who testify on both sides and the strength of the grounds in support of the experts’ views. The Federal Circuit’s two bases to distinguish *Moberly* from *Andreu* are unhelpful at best in giving guidance to the special masters or the parties who appear before them.

Unfortunately, the Federal Circuit denied en banc review in *Moberly*,⁹³ leaving in place substantial uncertainty regarding the appropriate legal standards to apply in off-Table cases. Further action from the Federal Circuit, the Supreme Court, or Congress will be needed to remedy this serious problem and bring clarity to the law that should be applied in off-Table cases.

After the Vaccine Compensation Program had been operating for a decade, three major U.S. government organizations evaluated and published reports on the program—the Federal Judicial Center,⁹⁴ the U.S. Government Accountability Office (GAO),⁹⁵ and the House Subcommittee on Criminal Justice, Drug Policy, and Human Resources.⁹⁶ The three reports raised similar concerns about the operation of the Vaccine Program, including delays in resolving cases that stretched far beyond the statutory 240-day limit,⁹⁷ and the overly adversarial nature of the cases in a compensation program intended to be less adversarial.⁹⁸ All three reports

92. *Id.*

93. *Moberly v. Sec’y of Health & Human Servs.*, 380 F. App’x 142 (Fed. Cir. 2010).

94. MOLLY TREADBURY JOHNSON ET AL., FED. JUDICIAL CTR., USE OF EXPERT TESTIMONY, SPECIALIZED DECISION MAKERS, AND CASE-MANAGEMENT INNOVATIONS IN THE NATIONAL VACCINE INJURY COMPENSATION PROGRAM (1998).

95. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO/HEHS-00-8, VACCINE INJURY COMPENSATION: PROGRAM CHALLENGED TO SETTLE CLAIMS QUICKLY AND EASILY (1999) [hereinafter GAO VACCINE COMPENSATION REPORT].

96. H.R. REP. NO. 106-977 (2000).

97. *Id.* at 12; GAO VACCINE COMPENSATION REPORT, *supra* note 95, at 2; JOHNSON ET AL., *supra* note 94, at 5.

98. H.R. REP. NO. 106-977, at 2; GAO VACCINE COMPENSATION REPORT, *supra* note 95, at 3; JOHNSON ET AL., *supra* note 94, at 5.

also noted concerns about payment of attorneys' fees, including concerns that the fees were too low, took too long to process, and were subject to unnecessarily adversarial review by Department of Justice (DOJ) attorneys.⁹⁹ These same concerns have continued to be raised by others,¹⁰⁰ and they remain valid today. Problems with delays and the overly adversarial nature of the program have been exacerbated by the change in the Vaccine Table and the related developments described above.

Other problems that have been noted with the Vaccine Program include the short, inflexible three-year statute of limitations to file a claim in the program; the low \$250,000 award for death cases; the low \$250,000 cap on pain and suffering in injury cases; and the burden of proof imposed on petitioners in off-Table cases.¹⁰¹ Part IV of this Article proposes specific steps to try to correct these problems.

D. The Special Masters' Role in the Decisionmaking Process

The Vaccine Act created a partially inquisitorial and partially adversarial process for adjudicating vaccine injury claims.¹⁰² The special

99. H.R. REP. NO. 106-977, at 17; GAO VACCINE COMPENSATION REPORT, *supra* note 95, at 11; JOHNSON ET AL., *supra* note 94, at 5; *see also* Besty J. Grey, *The Plague of Causation in the National Childhood Vaccine Injury Act*, 48 HARV. J. ON LEGIS. 343, 355 n.87 (2011) (noting that the Act encourages use of the Vaccine Program because fees are awarded even when the petitioning party fails to qualify for compensation, as long as the petition was brought in good faith).

100. *See, e.g.*, Joanna B. Apolinsky & Jeffrey A. Van Detta, *Rethinking Liability for Vaccine Injury*, 19 CORNELL J.L. & PUB. POL'Y 537, 635–36 (2010) (arguing for a totally new holistic framework for vaccine injury compensation); Elizabeth A. Breen, Note, *A One Shot Deal: The National Childhood Vaccine Injury Act*, 41 WM. & MARY L. REV. 309, 319–20 (1999); Brittani Scott Miller, Note, *The National Childhood Vaccine Injury Compensation Program: The Unavailability of Experienced Attorneys Places Petitioners at an Institutional Disadvantage*, 19 FED. CIR. B.J. 253, 272 (2010); Ridgway, *supra* note 32, at 74 (“No aspect of the [National Vaccine Injury Compensation Program] has been more intensively disputed than the awarding of attorney fees.”); Elizabeth C. Scott, Comment, *The National Childhood Vaccine Injury Act Turns Fifteen*, 56 FOOD & DRUG L.J. 351, 362 (2001); Lisa J. Steel, Note, *National Childhood Vaccine Injury Compensation Program: Is This the Best We Can Do for Our Children?*, 63 GEO. WASH. L. REV. 144, 170–71 (1994) (discussing the lack of definitive evidence in the vaccine injury area).

101. Apolinsky & Van Detta, *supra* note 100, at 580; Breen, *supra* note 100, at 319–20; Miller, *supra* note 100, at 172; Scott, *supra* note 100, at 361; Steel, *supra* note 100, at 170.

102. American legal procedures are said to flow from the British common law adversarial tradition, in contrast to the legal procedures used in the inquisitorial tradition of continental Europe. *See* Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181, 1198–1210 (2005) (detailing the development of the common law in the United States). Although all court systems seem to combine some elements of both models, *id.* at 1187, the two contrasting models have been described as follows:

masters have much greater control and responsibility in processing cases than a state or federal judge has in the typical civil case. The special masters are given authority to participate actively in the cases and to structure the process for each case. They are not expected to play the neutral umpire's role as are judges in other sorts of civil litigation.¹⁰³ This model of the decisionmaker in an adversarial system is one of a largely passive receiver of information who listens to what both sides have to say and then renders a decision based only on the most persuasive evidence introduced and the arguments made by counsel.¹⁰⁴

In the adversarial model, the parties are responsible for . . . conducting the litigation. They gather all the evidence and present it orally, in open court, subjecting witnesses to examination and cross-examination, and the court serves as a neutral umpire, deciding questions of fact and law raised by the parties. In addition, the parties bear primary responsibility for determining the sequence and manner in which evidence is presented and legal issues are argued. In contrast, in the inquisitorial model, the court . . . undertakes significant responsibility for gathering evidence, not just for ruling on the conclusions that should be drawn from it Furthermore, the court is largely responsible for determining the sequence and manner in which issues of fact and law are considered and decided.

Id. at 1188 (footnotes omitted); see also Ellen E. Sward, *Values, Ideology, and the Evolution of the Adversary System*, 64 IND. L.J. 301, 313–14 (1989). In the inquisitorial model, the decisionmaker can be the individual who initiates the litigation, as opposed to one of the parties. *Id.* at 313. The inquisitorial model relies more heavily on written documents, such as witness affidavits obtained by the investigating magistrate, as opposed to relying largely on oral testimony from witnesses introduced in court hearings by counsel for the parties. *Id.* at 314.

103. GUIDELINES FOR PRACTICE, *supra* note 47, at § V; U.S. CT. OF FED. CLAIMS VACCINE R. 3(b). See generally *United States v. Marzano*, 149 F.2d 923, 926 (2d Cir. 1945); *Robinson v. United States*, 513 A.2d 218, 220 (D.C. Cir. 1986).

104. The Guidelines for Practice and the Vaccine Rules describe the many informal, inquisitorial procedures that the program employs, including an informal off-the-record status conference shortly after the petition and respondent's report are filed, pursuant to Vaccine Rule 5. At this conference the special master "(1) gives each party an opportunity to address the other's position, (2) states a tentative view on the merits of the case, and (3) establishes with the parties what issues remain to be addressed and the most efficient means for deciding those issues." GUIDELINES FOR PRACTICE, *supra* note 47, at § VI. The Guidelines continue:

The special master will be more actively involved in the early stages of proceedings than is usually the case with a judge in a traditional civil proceeding, e.g., identifying and assisting a party in obtaining information, making tentative findings where appropriate Further, in recognition of Congress's intent that the special masters be more "inquisitorial" than in typical litigation, the special master will question witnesses where appropriate, ask for more documents when such a need is determined, and keep the parties informed at all stages concerning what further proof is necessary to prove their cases.

Id. at § V. Special masters are given the authority to receive evidence in person, by telephone, or in writing; there is no right of parties to cross-examine witnesses, and neither

In contrast to this familiar image, the special masters were intended to be expert decisionmakers¹⁰⁵ with substantial knowledge of vaccine injuries and substantial authority to structure how each case proceeds.¹⁰⁶ The Vaccine Act also mandates procedural rules that “provide for a less-adversarial, expeditious, and informal proceeding”¹⁰⁷ which will have “flexible and informal standards of admissibility of evidence.”¹⁰⁸

The Vaccine Act, as originally passed by Congress, gave the special masters the more limited role of only making proposed findings of fact, proposed conclusions of law, and recommended decision to a judge of the U.S. Court of Federal Claims, who would then make the actual decision in the case.¹⁰⁹ The judges would often give substantial deference to the findings and proposed decision of the special master who presided over the evidentiary hearing in the case.¹¹⁰

A few years later, an amendment to the Vaccine Act changed this situation, giving the special masters full authority, like any trial judge or administrative law judge, to issue decisions.¹¹¹ This created an unusual structure in the Court of Federal Claims. The Office of Special Masters is an “adjunct” to the Court. The special masters now make all final decisions, which are subject to review first by a judge of the Court of Federal Claims,¹¹² then by the U.S. Court of Appeals for the Federal

the Federal Rules of Evidence nor the Federal Rules of Civil Procedure apply. Vaccine Rule 8(b) provides: “In receiving evidence, the special master will not be bound by common law or statutory rules of evidence” U.S. CT. OF FED. CLAIMS VACCINE R. 8(b)(1).

105. See JOHNSON ET AL., *supra* note 94, at 14–15 (stating that even though Congress envisioned some nonlawyer scientists serving as special masters, all special masters have had a law degree).

106. There is always a tension between the desirability of having an expert decisionmaker, who can bring specialized knowledge and experience in the area, and the problems that can arise, such as when the expert decisionmaker can become biased or come to regard himself or herself as the “real” expert who has heard many similar cases before, and will only use the testimony received from the medical experts who testify at hearings insofar as that testimony supports the special master’s preexisting positions. See Sward, *supra* note 102, at 338–39. Similar tensions exist for decision makers on other specialized courts, such as bankruptcy and tax courts on the federal level, and in probate, family, and other special courts at the state level. *Id.* at 338 & n.197.

107. 42 U.S.C. § 300aa-12(d)(2)(A) (2006).

108. *Id.* § 300aa-12(d)(2)(B).

109. Hauptly & Mason, *supra* note 10, at 452.

110. The Claims Court judge could accept the special master’s recommendations in whole or in part, remand the decision with instructions, or undertake de novo review. *Id.* at 457 n.19.

111. *Id.* at 452.

112. This puts the Claims Court judge in an unusual position, because in most other cases, the judge acts as the initial decisionmaker, but in vaccine cases, the judge acts as a reviewing authority.

Circuit, with discretionary certiorari review by the Supreme Court.¹¹³ Judges from the Court of Federal Claims and the Federal Circuit apply familiar principles of judicial review to special masters' decisions, giving substantial deference to findings of fact, credibility decisions, and discretionary judgments, but reviewing the special masters' application of principles of law de novo.¹¹⁴

In the first months of the Vaccine Compensation Program, the Department of Justice withdrew from all cases before the special masters, citing budgetary constraints.¹¹⁵ During this time, the vast majority of cases before the special masters proceeded without the Secretary of HHS being represented by counsel.¹¹⁶ These cases proceeded in a relatively informal and nonadversarial manner, with the special masters playing the largely inquisitorial role that Congress had envisioned for them. However, when the Department of Justice began representing HHS in 1989–1990, the relatively informal and nonadversarial nature of the litigation began to change substantially.¹¹⁷ The Department of Justice established a group of attorneys specializing in litigating these vaccine cases, and the HHS established both an in-house group of experts to evaluate vaccine injury claims and an outside group of expert witnesses to testify for the government in its defense of the cases.¹¹⁸ Since that time, there has been criticism that the vaccine cases have become too adversarial, and that the informal, inquisitorial manner in which the special masters had initially processed these cases has changed to a more traditional adversarial

113. 42 U.S.C. § 300aa-12(e)–(f). The Supreme Court has reviewed only one case on direct appeal from the vaccine court. *Shalala v. Whitecotton*, 514 U.S. 268 (1995). *Whitecotton* dealt with the standards for determining when the onset of the first manifestation of an illness occurred. *Id.* at 269.

114. The Vaccine Act contains the usual standards for judicial review, allowing the judge from the U.S. Court of Federal Claims or the Federal Circuit to “set aside any findings of fact or conclusion of law of the special master found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law and issue its own findings of fact and conclusions of law.” 42 U.S.C. § 300aa-12(e)(2)(B). Findings of fact are reviewed under the deferential “arbitrary and capricious” standard. *See Lampe v. Sec’y of Health & Human Servs.*, 219 F.3d 1357, 1360 (Fed. Cir. 2000). Discretionary rulings are reviewed under a deferential “abuse of discretion” standard. *Saunders v. Sec’y of the Dep’t of Health & Human Servs.*, 25 F.3d 1031, 1033 (Fed. Cir. 1994). Finally, conclusions of law are reviewed under the nondeferential de novo standard. *Id.*

115. *Hauptly & Mason*, *supra* note 10, at 457 n.21.

116. *See id.* (noting that the majority of cases proceeded ex parte with the respondent unrepresented).

117. In 1989, Congress urged the participants in the Vaccine Program to re-dedicate themselves to the nonadversarial resolution of cases. H.R. REP. NO. 101-386, at 512–13 (1989) (Conf. Rep.), *reprinted in* 1989 U.S.C.C.A.N. 3018, 3115–16.

118. GAO VACCINE COMPENSATION REPORT, *supra* note 95, at 10.

process.¹¹⁹ Off-Table cases, particularly, have become much more burdensome for petitioners and have moved more slowly, with very few cases actually decided within the statutory 240-day deadline for a final decision.¹²⁰

Another reason for delay in Vaccine Act cases is that they are generally bifurcated into two separate stages. In the first stage, the sole issue is whether the petitioner has proven entitlement to receive compensation for a vaccine injury. If petitioner is successful at this stage, the case then proceeds to the second stage, which involves a determination of the amount of compensation to be awarded. The damages stage is often complex and protracted and commonly exceeds, by itself, the 240-day statutory deadline for final resolution of the entire case.¹²¹

Delays in the Vaccine Program have been caused by counsel for petitioners as well as by counsel for the government for a number of reasons, including difficulties in obtaining medical records and expert reports. There can be times when it is advantageous for petitioner's counsel to seek delays, such as when petitioner's retained expert recommends new, time-consuming medical testing of the petitioner. Additionally, delay could be proper where it might be beneficial in preparing a life-care plan involving an infant to learn more over time about that infant's degree of impairment, and to get a better idea of the infant's likely future medical and therapeutic needs.

E. Procedural Innovations in the Vaccine Compensation Program

There are a number of successful procedural and case-management innovations that have been developed in the Vaccine Program, some as a result of mandates contained in the initial legislation and some as a result of innovative practices that the special masters have adopted over the years. Pretrial innovations such as front-loading of evidence and expert reports, and a variety of informal procedures such as telephonic "off the record"

119. Lawrence O. Gostin, *Medical Countermeasures for Pandemic Influenza: Ethics and the Law*, 295 J. AM. MED. ASS'N. 554, 555 (2006).

120. GAO VACCINE COMPENSATION REPORT, *supra* note 95, at 2.

121. The Vaccine Act specifies the damages that can be awarded. When the vaccine reaction resulted in the death of the petitioner, a lump-sum payment in the amount of \$250,000 will be made to petitioner's estate. 42 U.S.C. § 300aa-15(a)(2) (2006). For vaccine-related injuries, the petitioner is entitled to receive payment for past and future pain and suffering (capped at \$250,000), future lost income, and reasonably necessary future medical, therapeutic, and related expenses. *Id.* § 300aa-15(a)(1), (3)–(4).

status conferences, have generally worked out well and could serve as a model in other types of litigation.¹²²

In many ways, the evidentiary hearings held before the special masters look like typical civil trials. Counsel for both sides may make opening statements and then introduce the testimony of fact witnesses, such as family members, as well as medical exhibits and testimony from medical experts. At the conclusion of the evidence, counsel may make closing arguments or may submit post-hearing briefs at a later date. While these trials look similar to other civil trials in some respects, they are also unique in several important ways. In this Author's opinion, the most important innovation is the wholesale integration by the special masters of the expert witnesses into the evidentiary hearings rather than the usual procedure of sequestering the expert witnesses when they are not testifying in open court.

1. *The Expanded Role of Expert Witnesses at Hearings*

The standard rule of procedure used in virtually all courtrooms in America, civil and criminal, is to exclude nontestifying witnesses from the courtroom while other witnesses in the case are testifying.¹²³ The "rule on witnesses," a rule that was hundreds of years old in the British judicial tradition when it was brought over to the American colonies, directs the removal or sequestration of all nontestifying witnesses so they cannot hear the testimony that other witnesses in the case give in court under oath. This sequestration procedure has been praised as "one of the greatest engines that the skill of man has ever invented for the detection of liars in a court of justice."¹²⁴

Rule 615 of the Federal Rules of Evidence gives the parties the right to exclude all nontestifying witnesses from the courtroom upon request to the judge.¹²⁵ Federal Rule 615 does create some exceptions,¹²⁶ but the only relevant one provides that the judge may allow a person to remain in the courtroom "whose presence is shown by a party to be essential to the

122. The Federal Judicial Center noted that these pretrial innovations appeared to be working well in its 1998 Report on the Vaccine Program. JOHNSON ET AL., *supra* note 94, at 25–39.

123. See *Geders v. United States*, 425 U.S. 80, 87 (1976) (discussing the sequestering of witnesses); Sarah Chapman Carter, *Exclusion of Justice: The Need for a Consistent Application of Witness Sequestration Under Federal Rule of Evidence 615*, 30 U. DAYTON L. REV. 63, 63–64 (2004).

124. *Opus 3 Ltd. v. Heritage Park, Inc.*, 91 F.3d 625, 628 (4th Cir. 1996) (*citing* 6 JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 1838, (James H. Chadbourne ed., 1976)).

125. FED. R. EVID. 615.

126. *Id.*

presentation of the party's cause."¹²⁷ The courts have read this exemption, and the other exemptions in Rule 615, quite narrowly and have found it insufficient that the expert witness a party sought to have remain in the courtroom was merely "desirable" or "helpful"; the standard is a much higher one of the witness's continued presence in the courtroom being "essential," in that counsel would be unable to function effectively without the presence of the expert witness in court.¹²⁸

In vaccine cases, by contrast, the expert witnesses are not sequestered until they testify, but generally sit at counsel table throughout the entire proceeding, including all of the opening discussions, the testimony, and the legal arguments of the lawyers. They even consult with counsel during the proceeding. The experts can testify after having heard all prior fact testimony, and do not have to give their opinions based upon hypothetical facts or facts related to them from prior testimony. Not only do the experts in vaccine hearings have the opportunity to consult with counsel for their side during the entire hearing, but the special master may also grant requests for one expert to ask questions of the other side's expert who is currently testifying on the witness stand. A special master can even allow the experts to have a dialogue between themselves on the record.

This modified procedure has a number of advantages. Knowing that each side's expert is listening to the other's every word encourages the experts to avoid more extreme or unsupported claims. It also provides opportunities to ask the experts about what points they agree upon, which can substantially narrow the issues in dispute between the experts. The experts can also point out the problems they see with the other experts' expressed views. This procedure encourages a more informed and less attorney-controlled decisionmaking process.

2. *Front-Loading of Documents and Evidence*

Congress imposed a front-loading requirement, which in theory requires that all petitions for compensation be accompanied by complete documentation, including all medical records (which for a young child would include prenatal, birth, and pediatric records) and affidavits or

127. *Id.*

128. *United States v. Klaphake*, 64 F.3d 435, 437 (8th Cir. 1995); *United States v. Agnes*, 753 F.2d 293, 307 (3d Cir. 1985). It would seem difficult for either counsel in a typical vaccine injury case to claim that the presence of an expert witness at counsel table was "essential" because these counsel are typically very experienced and knowledgeable about vaccine injury litigation, and they could function effectively at the hearing even if their expert witnesses were not present at counsel table. Moreover, experts routinely submit their reports prior to hearing, and these are routinely shared and discussed by counsel and counsel's expert witnesses.

statements from all fact witnesses and expert witnesses that petitioner intends to rely on in the case.¹²⁹ The Secretary of HHS is also directed to respond to the petition for compensation with all objections and include all supporting medical documentation and expert opinions on which HHS seeks to rely.¹³⁰ Although these requirements have the desired effect of getting some potentially relevant information into the record at the earliest possible date, the typical case is usually burdened by substantial delays in completing the record. Hospitals or other healthcare providers delay or resist providing the needed documentation, and delays occur for other reasons as well. This procedure has certainly been an improvement over the “hide the ball” discovery that can be typical in civil cases, but it has not substantially expedited the cases. Reports issued by the GAO and the Federal Judicial Center have documented both the advantages of the front-loading procedure and the continuing problems with the delays in vaccine cases.¹³¹

3. *Informal Procedures, Including Telephonic Conferences*

There are a number of other informal and electronic pretrial procedures that the Vaccine Compensation Program has adopted to good effect. For example, shortly after the parties have submitted the petition and report, an informal, off-the-record status conference is generally held by telephone, during which the special master provides counsel with preliminary thoughts or ideas about the strengths and weaknesses of the case, and the parties can also talk informally about procedures for resolving the case.¹³² These conferences also identify omissions in the record, the need for additional testimony, and matters of timing that need to be addressed.

In the Vaccine Program, virtually all pretrial status conferences and other pretrial proceedings are conducted telephonically, with the special master’s office connecting counsel for both sides. Telephonic pretrial proceedings are much more efficient than the typical practice of bringing counsel and parties into a courtroom to wait while other cases are heard, resulting in attorneys wasting time and generating unnecessary fees.

The telephonic status conferences are a necessity in a court with nationwide jurisdiction, involving petitioners’ counsel and pro se petitioners located in all parts of the United States. However, the clear benefits in

129. 42 U.S.C. §§ 300aa-11(c) to (e) (2006). These records must be filed electronically. *See supra* note 47.

130. U.S. CT. OF FED. CLAIMS VACCINE R. 4(c).

131. GAO VACCINE COMPENSATION REPORT, *supra* note 95, at 2–3, 5; JOHNSON ET AL., *supra* note 94, at 25–27.

132. U.S. CT. OF FED. CLAIMS VACCINE R. 5(a).

time, cost, and efficiency in holding routine status conferences and other pretrial proceedings telephonically should be experimented with by other courts regardless of geographical considerations. The usefulness of these procedures has been documented in several governmental reports on the Vaccine Compensation Program.¹³³

4. *Omnibus Proceedings*

Another creative solution invented by the Office of Special Masters to consider multiple cases raising similar vaccine injury issues is the “omnibus proceeding.” In these omnibus proceedings, multiple cases are consolidated for purposes of joint evidentiary hearings and decisions on general questions of causation. Sometimes omnibus proceedings are formed to unify decisions on specific test cases, and sometimes to apply new “Tables” of presumed vaccine injury causation that are issued by the special masters themselves.

The omnibus autism proceeding has been the largest and longest running omnibus proceeding, involving more than 5,000 individual petitioners.¹³⁴ It began in 2002, and is still ongoing in 2011.¹³⁵ It is also the omnibus proceeding that has generated the most controversy.¹³⁶ This

133. See GAO VACCINE COMPENSATION REPORT, *supra* note 95, at 2–3; JOHNSON ET AL., *supra* note 94, at 34–43, 44.

134. Snyder v. Sec’y of the Dep’t of Health & Human Servs., No. 01-162V, 2009 WL 332044, at *4–5 n.12 (Fed. Cl. Feb. 12, 2009).

135. *Id.* at *4–7.

136. See generally Steven J. Meyers, Note, *Denying the Obvious: Why the Special Masters Should Have Found for Petitioners in the Autism Omnibus Test Cases*, 20 FED. CIR. B.J. 633 (2011). These controversies have included the excessive time it is taking to resolve the cases, the improper exclusion of evidence offered by petitioners, and the division of the omnibus proceeding between three special masters who heard the general causation evidence together in one consolidated hearing. See, e.g., Hazlehurst v. Sec’y of Health & Human Servs., 604 F.3d 1343, 1345 (Fed. Cir. 2010) (noting that the full record encompassed “tens of thousands of pages of medical literature, more than four thousand pages of hearing testimony, and fifty expert reports”); Snyder v. Sec’y of Health & Human Servs., 88 Fed. Cl. 706, 721 (2009) (attempting to exclude expert reports because of the “last-minute” nature of the evidence); Joëlle Anne Moreno, *It’s Just a Shot Away: MMR Vaccines and Autism and the End of the Daubertista Revolution*, 35 WM. MITCHELL L. REV. 1511, 1514–15 (2009) (discussing how Special Master George L. Hastings reviewed “23 separate medical expert reports, heard live testimony from 16 expert witnesses, and reviewed 658 medical journal articles” all on his own); Gordon Shemin, Comment, *Mercury Rising: The Omnibus Autism Proceeding and What Families Should Know Before Rushing Out of Vaccine Court*, 58 AM. U. L. REV. 459, 513 (2008) (recommending changes in the autism proceeding and the elimination of all omnibus proceedings); *Parents and Physicians Outraged Over Comments from NBC’s Dr. Snyderman on Autism Omnibus Hearings*, BIOTECH WK., July 4, 2007, available at 2007 WLNR 12218153; Jordan

complex proceeding is exploring several alternate links between vaccines and autistic spectrum disorders, and it is divided between three different special masters who are considering issues simultaneously.¹³⁷ The three special masters have issued their rulings in the test cases, finding no likely relationship between the measles, mumps, and rubella (MMR) vaccines or thimerosal and autistic spectrum disorders, and these cases have been affirmed on appeal to date.¹³⁸

In 1992–1993, an omnibus proceeding was held involving the rubella vaccine and arthritis-like conditions before Special Master George L. Hastings. After conducting extensive hearings, Special Master Hastings issued a final ruling in which he concluded that the evidence more likely than not showed that the rubella vaccine caused a chronic arthropathy if a number of specific conditions were satisfied.¹³⁹

Special Master Hastings in effect grafted a new Table for the rubella vaccine into the Vaccine Act. The criteria he established functioned exactly as did the criteria for other Table injuries—they created a

Weissmann, *Lawyers: Autism Rulings Won't End Litigation*, LAW.COM (Feb. 16, 2009), <http://www.law.com/jsp/article.jsp?pid=1202428201092>.

137. The principal questions that have been litigated are whether the measles, mumps, and rubella (MMR) vaccines cause autism and whether the vaccine additive thimerosal causes autism.

138. *Dwyer v. Sec'y of the Dep't of Health & Human Servs.*, No. 03-1202V, 2010 WL 892250 (Fed. Cl. Mar. 12, 2010) (Special Master Denise K. Vowell); *King v. Sec'y of Health & Human Servs.*, No. 03-584V, 2010 WL 892296 (Fed. Cl. Mar. 12, 2010) (Special Master George L. Hastings); *Mead v. Sec'y of Health & Human Servs.*, No. 03-215V, 2010 WL 892248 (Fed. Cl. Mar. 12, 2010) (Special Master Patricia Campbell-Smith); *Cedillo v. Sec'y of Health & Human Servs.*, No. 98-916V, 2009 WL 331968 (Fed. Cl. Feb. 12, 2009) (Special Master George L. Hastings), *aff'd*, 89 Fed. Cl. 158; *Hazlehurst v. Sec'y of the Dep't of Health & Human Servs.*, No. 03-654V, 2009 WL 332306 (Fed. Cl. Feb. 12, 2009) (Special Master Patricia Campbell-Smith), *aff'd*, 88 Fed. Cl. 473, *aff'd*, 604 F.3d 1343 (Fed. Cir. 2010); *Snyder v. Sec'y of the Dep't of Health & Human Servs.*, No. 01-162V, 2009 WL 332044 (Fed. Cl. Feb. 12, 2009) (Special Master Denise K. Vowell), *aff'd*, 88 Fed. Cl. 706 (2009). The cases decided to date have not rejected all possible links between vaccines and autism. For example, one autism case was recently settled where the vaccination significantly aggravated a pre-existing mitochondrial disorder. *See Poling v. Sec'y of Health & Human Servs.*, No. 02-1466V, 2011 WL 678559 (Fed. Cl. Jan. 28, 2011) (judgment issued July 30, 2010).

139. These conditions were that: (1) the petitioner was at least eighteen years old when the vaccination was given, (2) the onset of the arthropathic symptoms occurred between one and six weeks after the vaccination, (3) petitioner developed an antibody response to the vaccine, (4) petitioner was free of polyarthropathy joint pain for at least three years prior to the vaccination, (5) there was no alternative explanation for the arthropathy, such as a diagnosis of rheumatoid arthritis, and (6) there was a continuation of symptoms for at least six months. *Ahern v. Sec'y of the Dep't of Health & Human Servs.*, No. 90-1435V, 1993 WL 179430, at *13 (Fed. Cl. Jan. 11, 1993).

rebuttable presumption that the rubella vaccine caused the injury, but this presumption could be overcome by a showing that some other condition was the actual cause of the symptoms. It is true, as Special Master Hastings indicated in his final decision,¹⁴⁰ that the criteria he established did not conclusively determine any future case that a petitioner might bring because a future petitioner was free to introduce additional evidence and argue for a different result. However, it is also true that any party in any case can always ask the decisionmaker to reconsider a previously taken position. Yet without providing dramatic new evidence, a petitioner is not likely to be successful.¹⁴¹

Another omnibus proceeding, held in 2006, involved whether the hepatitis B vaccine causes four demyelinating conditions: transverse myelitis (TM), chronic inflammatory demyelinating disease (CIDP), Guillain–Barre syndrome (GBS), and multiple sclerosis (MS). Special Master Laura D. Millman ruled in favor of the petitioners in each of the four paradigm cases¹⁴² and created a judicial scheme that operated almost as if it were a “Table” for the hepatitis B vaccine, with a presumption that the vaccine caused the conditions if the onset was between three and thirty days of the vaccination.¹⁴³ Other omnibus proceedings have involved improperly

140. *Id.* at *11.

141. Dramatic new evidence in the form of new studies did appear a few years later involving the rubella vaccine and arthropathy. This led the Department of Justice to ask Special Master Hastings to reopen the omnibus proceeding and, in light of the new studies, to throw out the prior standards he had established for presumed causation. *See Snyder*, 2002 WL 31965742, at *11. Special Master Hastings agreed to re-open the omnibus proceeding, held hearings on the newly published studies, and concluded that he should keep his prior criteria for entitlement with two minor modifications: (1) he broadened the requirement that the petitioner must be at least eighteen years of age to a requirement that the petitioner be past puberty, but (2) he narrowed the time period for the onset of the arthropathy from a one to six week period to a seven to twenty-one day period. *Id.* at *20.

142. *Werderitsh v. Sec’y of the Dep’t of Health & Human Servs.*, No. 99-310V, 2006 WL 1672884, at * 27 (Fed. Cl. May 26, 2006) (finding a connection between the vaccine and multiple sclerosis); *Peugh v. Sec’y of the Dep’t of Health & Human Servs.*, No. 99-638V, 2006 WL 5668229, at *13 (Fed. Cl. Apr. 21, 2006) (finding a connection between the vaccine and Guillain–Barre syndrome); *Gilbert v. Sec’y of the Dep’t of Health & Human Servs.*, No. 04-455V, 2006 WL 1006612, at *12 (Fed. Cl. Mar. 30, 2006) (finding a connection between the vaccine and chronic inflammatory demyelinating disease); *Stevens v. Sec’y of the Dep’t of Health & Human Servs.*, No. 99-594V, 2006 WL 659525, at *25 (Fed. Cl. Feb. 24, 2006) (finding a connection between the vaccine and transverse myelitis).

143. *Stevens*, 2006 WL 659525, at *12, *15. In a subsequent decision, based on new evidence, Special Master Millman extended the appropriate temporal relationship out to two months for TM. *Pecorella v. Sec’y of the Dep’t of Health & Human Servs.*, No. 04-1781V, 2008 WL 4447607, at *5 (Fed. Cl. Sept. 17, 2008).

manufactured polio vaccines¹⁴⁴ and the relationship of the hepatitis B vaccine to type I diabetes.¹⁴⁵

These omnibus proceedings conducted by the special masters have been a creative and effective use of the program's resources, despite the fact that some of the proceedings have been controversial.¹⁴⁶ There is no explicit authority in the Vaccine Act for such omnibus proceedings, so the special masters have based their authority to hold such consolidated proceedings on the broad discretion and authority that the Act gives the special masters to structure and control proceedings in the Vaccine Compensation Program.¹⁴⁷ These omnibus proceedings are also the result of the major shift in the Vaccine Compensation Program to off-Table cases, so that the special masters are seeking in effect to create their own "Tables" to address some of the difficult off-Table injuries that commonly recur in the program.

II. OTHER RECENT FEDERAL COMPENSATION PROGRAMS

Subsequent to the adoption of the Vaccine Act, Congress enacted five other major federal compensation programs: the Radiation Exposure Compensation Program, the Japanese–American internment compensation program, the Smallpox Compensation Program, the September 11th Compensation Program, and the Countermeasures Compensation Program. These compensation programs were, like the Vaccine Act, often a blend of humanitarian, compassionate concerns for injured individuals, and a desire to protect industries that were too big or important to fail.

144. *Gherardi v. Sec'y of the Dep't of Health & Human Servs.*, No. 90-1466V, 1997 WL 53449, at *1 (Fed. Cl. Jan. 24, 1997); *Baggott v. Sec'y of the Dep't of Health & Human Servs.*, No. 90-2214V, 1992 WL 79987, at *1 (Cl. Ct. Apr. 2, 1992).

145. *Hennessy v. Sec'y of the Dep't of Health & Human Servs.*, No. 01-190V, 2009 WL 1709053, at *2, *59 (Fed. Cl. May 29, 2009), *aff'd*, 91 Fed. Cl. 126, 142 (2010) (holding that there was no proven relationship between the hepatitis B vaccine and type I diabetes).

146. *See supra* note 136 and accompanying text. In both *Snyder* and *Cedillo*, the Court of Federal Claims judges ruled that it was not improper for the omnibus proceeding to be divided between three special masters who heard the evidence of general causation together in one consolidated hearing. The *Snyder* court said that this procedure "reflects a common-sense, cost-saving approach to complex litigation." *Snyder v. Sec'y of Health & Human Servs.*, 88 Fed. Cl. 706, 721 (2009). The *Cedillo* court called it "an eminently reasonable case management approach." *Cedillo v. Sec'y of Health & Human Servs.*, 89 Fed. Cl. 158, 174 (2009).

147. *Snyder*, 2009 WL 332044, at *2. Special Master Denise K. Vowell has noted that omnibus proceedings "bear some resemblance to multi-district litigation in federal district court." *Dwyer v. Sec'y of the Dep't of Health & Human Servs.*, No. 03-1202V, 2010 WL 892250, at *2 n.9 (Fed. Cl. Mar. 12, 2010). Omnibus proceedings also share similarities with administrative rulemaking proceedings and class action lawsuits. *Hazlehurst v. Sec'y of the Dep't of Health & Human Servs.*, No. 03-654V, 2009 WL 332306, at *2–3 (Fed. Cl. Feb. 12, 2009).

Additionally, there was a desire to promote other important national interests, including public health and national security interests. While each of these programs arose from unique circumstances, they share many similarities and some important differences.

Some of the features of these newer compensation programs, such as the relaxed burden of proof imposed on petitioners, should be adopted in the Vaccine Program. These newer programs also offer valuable lessons for compensation programs that Congress may consider adopting in the future. The background and key features of these newer compensation programs are briefly described below.¹⁴⁸

A. *The Radiation Exposure Compensation Program*

Congress passed the Radiation Exposure Compensation Act (RECA) in 1990.¹⁴⁹ The Act contained an apology and provided limited compensation to individuals who developed serious diseases as a result of exposure to radiation from above-ground atomic weapons testing, and to individuals who participated in the mining or transportation of radioactive materials used in making the nuclear devices.¹⁵⁰

RECA recognized, after many years of official government denials, that persons exposed to radiation in connection with the nuclear weapons production program “were subjected to [an] increased risk of injury and disease to serve the national security interests of the United States,”¹⁵¹ and that it was appropriate “to make partial restitution . . . for the burdens they

148. The descriptions of these five compensation programs must, out of space considerations, be necessarily brief. For similar space reasons, it is not possible to discuss, in this Article, other earlier federal compensation programs, such as the 1969 Black Lung Compensation Plan, 30 U.S.C. § 901–944 (2006), or other federal programs that pay disability benefits to military veterans, law enforcement officers, and a variety of other groups. This Article does not discuss the swine flu vaccination program in 1976–1977. *See* RICHARD E. NEUSTADT & HARVEY L. FINEBERG, *THE EPIDEMIC THAT NEVER WAS* (1983). International compensation laws are also outside the scope of this Article. *See, e.g.*, Rob Henson, Comment, *Inoculated Against Recovery: A Comparative Analysis of Vaccine Injury Compensation in the United States and Great Britain*, 15 *TULSA J. COMP. & INT’L L.* 61 (2007) (discussing the vaccination compensation program of Great Britain).

149. Radiation Exposure Compensation Act, Pub. L. No. 101-426, 104 Stat. 920 (1990) (codified as amended at 42 U.S.C. § 2210 note (2006) (Radiation Exposure Compensation)).

150. The Department of Justice reports that, as of September 22, 2011, a total of 24,468 claims for compensation have been approved, 9,492 have been denied, and 467 claims are currently pending. CIVIL DIV., U.S. DEP’T OF JUSTICE, RADIATION EXPOSURE COMPENSATION SYSTEM: CLAIMS TO DATE SUMMARY OF CLAIMS RECEIVED BY 09/22/2011 (2011), http://www.justice.gov/civil/omp/omi/Tre_SysClaimsToDateSum.pdf. A total of \$1,620,884,889 has been paid out. *Id.*

151. 42 U.S.C. § 2210 note (Radiation Exposure Compensation § 2(a)(5)).

have borne for the nation as a whole.”¹⁵² As in the Vaccine Act, RECA created a “Table” of eligible individuals who could collect compensation if they could establish that they suffered a specified illness within a specified timeframe.¹⁵³ Petitioners were required to submit documentation showing that they satisfied the eligibility criteria in the Act.¹⁵⁴ However, RECA also contained a provision that “all reasonable doubt with regard to whether a claim meets the requirements of this Act shall be resolved in favor of the claimant.”¹⁵⁵

RECA created a largely inquisitorial procedure for resolution of the radiation injury claims. The petition for compensation was filed with, and reviewed by, officials in the Civil Division of the Department of Justice.¹⁵⁶ The claim was evaluated by a claims examiner, by an attorney, and then by the assistant director of the Civil Division, before a final decision was made.¹⁵⁷ Petitioners who were denied compensation could either file an appeal in court or refile their claim up to three times with the Department

152. *Id.* § 2210 note (§ 2(b)). The U.S. Government Accountability Office explained in a report on the program:

From 1945 through 1962, the United States conducted a series of aboveground atomic weapons tests as it built up its Cold War nuclear arsenal. Around this same time period, the United States also conducted underground uranium-mining operations and related activities, which were critical to the production of the atomic weapons. Many people were exposed to radiation resulting from the nuclear weapons development and testing program, and such exposure is presumed to have produced an increased incidence of certain serious diseases, including various types of cancer.

U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-1037R, RADIATION EXPOSURE COMPENSATION ACT: PROGRAM STATUS 1 (2007) [hereinafter GAO RADIATION EXPOSURE ACT REPORT].

153. The Radiation Exposure Compensation Act (RECA) created three classes of individuals who were eligible for compensation. First, “unwitting participants” who resided in certain areas of Utah, Nevada, and Arizona, who had been exposed to radiation as a result of their proximity to above-ground nuclear testing and who developed specified diseases (including leukemia and a number of forms of cancer) within five years of their first exposure to the radiation, were entitled to receive a one-time lump-sum payment of \$50,000. 42 U.S.C. § 2210 note (Radiation Exposure Compensation § 4(a)(1)(B)(i)). Second, “onsite participants” in the testing program who developed the same specified diseases within five years of their first exposure to the radiation were entitled to receive a lump payment of \$75,000. *Id.* § 2210 note (§ 4(a)(1)(B)(ii), (a)(2)(C)). Third, individuals who were employed for at least one year in uranium mining, milling, or transportation, or who were exposed to forty or more “working level months of radiation,” and who subsequently developed specified diseases (including lung and renal cancers, respiratory disease, or other chronic renal diseases) within the applicable time period, were entitled to receive a lump sum payment of \$100,000. *Id.* § 2210 note (§ 5(a)(1)).

154. *Id.* § 2210 note (§§ 4(a)(2)(C), 5(a)(1)(A)(ii)(I)–(II)).

155. *Id.* § 2210 note (§ 6(b)(1)).

156. *Id.*

157. GAO RADIATION EXPOSURE ACT REPORT, *supra* note 152, at 15.

of Justice to try to correct an alleged deficiency that was the basis for the denial of the claim.¹⁵⁸ RECA allows petitioners to be represented by lawyers, who are authorized to charge a small contingency fee for successful claims.¹⁵⁹

RECA has been criticized on a number of grounds. The GAO expressed concern that claims were often being resolved outside of the RECA-mandated twelve-month period of time.¹⁶⁰ The GAO also noted that the program's efforts to assist potential petitioners with the application process were uneven at best.¹⁶¹ Inadequate assistance was a particular concern in cases involving older people suffering from cancers or other serious health problems who needed substantial and compassionate assistance in providing the detailed information and compiling the documentation necessary to demonstrate eligibility for compensation. The program has also been criticized for its failure to "fully compensate" or "fully apologize" to injured persons,¹⁶² and for its "burdensome" procedures" and "excessive regulatory hurdles."¹⁶³ Congress has taken

158. *Id.* at 16. Petitioners could also refile if they believed that they became eligible for compensation as a result of regulatory changes adopted by the Department of Justice in 1999 or because of an amendment to the Act in 2000. *Id.*

159. 42 U.S.C. § 2210 note (Radiation Exposure Compensation § 9); 28 C.F.R. § 79.74(a)–(b) (2010). The percentage varies from under two percent to up to ten percent depending on the type of case. *Id.* § 79.74(b).

160. According to the Government Accountability Office (GAO), only 89% of claims have been resolved within the required time period. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-01-1043, RADIATION EXPOSURE COMPENSATION: ANALYSIS OF JUSTICE'S PROGRAM ADMINISTRATION 2 (2001) [hereinafter GAO RADIATION COMPENSATION ANALYSIS].

161. The GAO contacted eleven nongovernmental organizations involved in RECA-related activities, including radiation survivor groups and Native American assistance groups. *Id.* at 22. Of the organizations, six of the eleven organizations believed that the Radiation Exposure Compensation Program (RECP) "was of little to no help in explaining the requirements for documentation to substantiate applicant claims, but five believed that RECP was generally to very helpful." *Id.* at 23.

162. Jessica Barkas Threet, *Testing the Bomb: Disparate Impacts on Indigenous Peoples in the American West, the Marshall Islands, and in Kazakhstan*, 13 U. BALT. J. ENVTL. L. 29, 50 (2005).

163. A. COSTANDINA TITUS, *BOMBS IN THE BACKYARD: ATOMIC TESTING AND AMERICAN POLITICS* 149 (2d ed. 2001). The relatively low lump-sum payments given in the program

did little to assuage grief, placate anger, mete out justice, or restore a community's faith in Washington. As one reporter summarized the views of the downwinders, the money was "too little, too late, and too grudgingly given to fill the void left in their lives by the deaths of parents and children whose only sin was to be in the wrong place at the wrong time."

Id. at 149 (citation omitted).

some action to address these concerns.¹⁶⁴

B. The Japanese–American Internment Compensation Program

In 1942, President Franklin D. Roosevelt signed an executive order directing the Secretary of War to designate military areas for the internment of American citizens and residents of Japanese ancestry.¹⁶⁵ More than 120,000 Japanese–Americans, 70% of whom were U.S. citizens, were forced into these camps until the end of World War II, suffering the loss of liberty, economic losses, and the stigma of suspected disloyalty.¹⁶⁶ In 1988, Congress passed a compensation law that authorized the payment of \$20,000, and a letter of apology, to persons of Japanese ancestry, or surviving family members, who were interned in camps in the United States shortly after the attack on Pearl Harbor.¹⁶⁷

The Japanese–American internment compensation program involved an essentially inquisitorial procedure within the Department of Justice. The Attorney General, through the Office of Redress Administration, was directed to “identify and locate” all potentially eligible individuals and to notify them of their right to apply to the program.¹⁶⁸ Each was also to be

164. In 2000, Congress passed a compensation law that provided additional benefits to be paid to certain workers who had previously been found eligible to receive compensation under RECA. Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, Pub. L. No. 106-398, § 3611, 114 Stat. 1654A-1, 1654A-497 to 513 (codified as amended at 42 U.S.C. § 7384d to 7385s-15). This Act also created the Energy Employees Occupational Illness Compensation Program for Department of Energy employees involved in the production of nuclear weapons. 42 U.S.C. § 7384(d). With respect to petitioner’s burden of proof in this program, in most instances, the petitioner had the ordinary preponderance burden, but for injuries involving certain cancers, petitioners need only show that “the cancer was at least as likely as not” caused by the occupational exposure. 20 C.F.R. § 30.210(b)(1) (2010). For an overview and critique of this program, see generally U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-10-302, ENERGY EMPLOYEES COMPENSATION: ADDITIONAL INDEPENDENT OVERSIGHT AND TRANSPARENCY WOULD IMPROVE PROGRAM’S CREDIBILITY (2010).

165. Exec. Order No. 9066, 3 C.F.R. 1092–93 (1943).

166. Peter G. Chronis, *Infamous Relocation Recalled: Japanese–Americans Remember the Pain*, DENVER POST, Aug. 11, 1998, at B1. The U.S. Supreme Court upheld the constitutionality of the internments in *Korematsu v. United States*, 323 U.S. 214 (1944). In 1948, Congress authorized a limited reimbursement for property losses suffered as a result of the internment. Act of July 2, 1948, Pub. L. No. 80-886, 62 Stat. 1231.

167. Civil Liberties Act of 1988, Pub. L. No. 100-383, 102 Stat. 904 (1988) (codified at 50 U.S.C. app. §§ 1989a to 1989b-9 (2006)).

168. 50 U.S.C. app. § 1989b-4.

sent a letter from the President apologizing on behalf of the U.S. government for the internment actions.¹⁶⁹

Under the program, a petitioner files an application for compensation with the Office of Redress Administration, which makes a determination as to the claimant's eligibility.¹⁷⁰ If the petitioner was found ineligible, the petitioner could seek reconsideration from the Appellate Section of the Department of Justice's Civil Rights Division, and then judicial review in the U.S. Court of Federal Claims.¹⁷¹

As with the Radiation Compensation Law, the Japanese–American internment compensation law contained a “benefit of the doubt” provision mandating that compensation be awarded if there was “an approximate balance of positive and negative evidence” with respect to a claimant's eligibility.¹⁷² Also similar to the Radiation Compensation Law, the Japanese–American internment compensation law provided substantial, but only partial, monetary compensation, together with an apology from the U.S. government for its actions. Another important, more intangible, objective of the Japanese–American internment compensation law was the educational purpose of informing the American people of the injustices involved in the internment program.¹⁷³

169. See 50 U.S.C. app. § 1989 (offering Presidential pardons to persons who were recommended by the Attorney General).

170. 50 U.S.C. app. § 1989b-4(a). In this program, 82,219 individuals were found to satisfy the requirements for compensation. *Japanese Americans: Check for Compensation and Reparations for the Evacuation, Relocation, and Internment*, NAT'L ARCHIVES, <http://archives.gov/research/japanese-americans/redress.html> (last visited Sept. 24, 2011). The total amount of compensation paid was approximately \$1.6 billion. *Id.* It was initially estimated that about 60,000 claims would be paid from the fund, and this underestimation was based upon the mistaken use of actuarial tables containing the life expectancies of Caucasian males. ALICE YANG MURRAY, *HISTORICAL MEMORIES OF THE JAPANESE AMERICAN INTERNMENT AND THE STRUGGLE FOR REDRESS* 352 (2008).

171. 50 U.S.C. app. § 1989b-4(h). The Act imposed no limitations on a claimant's ability to be represented by, or to compensate, an attorney.

172. Section 1989b-4(a)(3) provides:

(3) Benefit of the doubt

When, after consideration of all evidence and relevant material for determining whether an individual is eligible individual, there is an approximate balance of positive and negative evidence regarding the merits of an issue material to the determination of eligibility, the benefit of the doubt in resolving each such issue shall be given to such individual.

50 U.S.C. app. § 1989b-4(a)(3). This provision was not included in the compensation law as originally passed, but was added by an amendment in 1992. Civil Liberties Act Amendments of 1992, Pub. L. No. 102-371, § 4(a), 106 Stat. 1167, 1167.

173. MITCHELL T. MAKI, HARRY H.L. KITANO & S. MEGAN BERTHOLD, *ACHIEVING THE IMPOSSIBLE DREAM: HOW JAPANESE AMERICANS OBTAINED REDRESS* 225 (1999). The advocates of the Act saw the publicity generated by its introduction and passage as having

The battle for the compensation fund was led on Capitol Hill by Representatives Robert T. Matsui and Norman T. Mineta, two well respected and influential men of Japanese–American ancestry who had both been in the camps as young children.¹⁷⁴ Also influential were two Japanese–American Senators, Dan Inouye and Spark Matsunaga, both of whom had been war heroes in World War II.¹⁷⁵ The Japanese American Citizens League, and other community groups, also pressed for this legislation.¹⁷⁶

One scholar has concluded that this compensation program was successful because it was cathartic for many Japanese–Americans, because it restored a measure of dignity lost through the internment, and because the government’s apology and the symbolic reparations payment fostered long-overdue healing in the Japanese–American community.¹⁷⁷ Another scholar has described this compensation law, and others like it, as “primarily symbolic,” bringing a sense of closure.¹⁷⁸

an important educational value. See, e.g., Robert L. Koenig, *Internment Bill Is Meant to “Admit, Redress Wrongs.”* ST. LOUIS POST-DISPATCH, May 1, 1988, at 1A; *A National Apology*, TIME, Oct. 22, 1990, at 35. Funding was also provided for a permanent museum exhibition in Washington, D.C., to tell the story of the internment and the compensation law. Eric K. Yamamoto & Ashley Kaiao Obrey, *Reframing Redress: A “Social Healing Through Justice” Approach to United States–Native Hawaiian and Japan–Ainu Reconciliation Initiatives*, 16 ASIAN AM. L.J. 5, 18 (2009).

174. Koenig, *supra* note 173.

175. LESLIE T. HATAMIYA, *RIGHTING A WRONG: JAPANESE AMERICANS AND THE PASSAGE OF THE CIVIL LIBERTIES ACT OF 1988* 111–13 (1993). This book also contains a detailed history of the Act’s passage. *Id.* at 111–28.

176. *Id.* at 113–16. The different Japanese–American groups had different perspectives on the meaning of the internment and on the appropriate redress for it. MURRAY, *supra* note 170, at 3. The \$20,000 amount reflected a political compromise between those who were concerned that too low a figure would make the financial payment seem like a mere token amount, and those who thought too high a figure would make passing the compensation bill impossible. *Id.* at 353.

177. Eric K. Yamamoto, *Racial Reparations: Japanese American Redress and African American Claims*, 40 B.C. L. Rev. 477, 477–78 (1998). Professor Yamamoto quoted one former internee who said that “although monetary payments ‘could not begin to compensate . . . for his . . . lost freedom, property, livelihood, or the stigma of disloyalty,’ the reparations demonstrated the sincerity of the government’s apology.” *Id.* at 518 (alteration in original) (quoting NICHOLAS TAVUCHIS, *MEA CULPA: A SOCIOLOGY OF APOLOGY AND RECONCILIATION* 107 (1991)).

178. GREG ROBINSON, *A TRAGEDY OF DEMOCRACY: JAPANESE CONFINEMENT IN NORTH AMERICA* 302 (2009).

C. The Smallpox Compensation Program

President George W. Bush, concerned that the nation was vulnerable to a bioterrorism attack using the smallpox virus, announced his plan for a nationwide civilian smallpox vaccination program on December 13, 2002.¹⁷⁹ President Bush's vaccination plan did not initially include any provision for compensating those injured by the vaccinations. At the end of January 2003, the Secretary of HHS, Tommy G. Thompson, promised that in Phase I of the plan 500,000 healthcare providers and other emergency responders would volunteer to be vaccinated within a month. However, when that one-month mark was reached, only 4,200 people—less than one percent of the promised amount—had agreed to be vaccinated.¹⁸⁰

An important reason for such an abysmal start to the smallpox immunization program appeared to be the lack of a plan to create a safety net for those injured by the smallpox vaccine, either by receiving it themselves or by coming into contact with someone who had recently been vaccinated.¹⁸¹ The Bush Administration had suggested that, even without a federal compensation program, persons injured by the smallpox vaccinations could seek compensation through other avenues, but these other avenues for relief were speculative at best.¹⁸² Moreover, the

179. Suzanne Malveaux, *Bush Gets Smallpox Vaccine*, CNN.COM (Dec. 21, 2002, 10:13 PM), <http://archives.cnn.com/2002/US/12/21/bush.smallpox/index.html>.

180. See Ceci Connolly, *Bush Smallpox Inoculation Plan Near Standstill*, WASH. POST, Feb. 24, 2003, at A6 (noting that the intent of the program was to initially inoculate 500,000 frontline emergency response personnel, such as doctors, nurses, police officers, and firefighters, who would volunteer to participate in the vaccination program).

181. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-03-578, SMALLPOX VACCINATION: IMPLEMENTATION OF NATIONAL PROGRAM FACES CHALLENGES 4-5 (2003). In addition to a lack of an adequate compensation program, other factors that likely contributed to the failure of the smallpox program include difficulties in getting the smallpox vaccine doses to the appropriate authorities, the speculative and uncertain nature of smallpox threat to America, and overextended public health and hospital resources. Michael Greenberger, *The 800 Pound Gorilla Sleeps: The Federal Government's Lackadaisical Liability and Compensation Policies in the Context of Pre-Event Vaccine Immunization Programs*, 8 J. HEALTH CARE L. & POL'Y 7, 8 (2005).

182. Among the suggested possibilities was seeking compensation under the Homeland Security Act of 2002, but this Act only provided compensation if the injury was the result of negligent conduct. Since the real concern was with the inherent dangerousness of the vaccine, and not its negligent administration, this provision afforded "little likelihood" of recovery. Greenberger, *supra* note 181, at 17-18. Another possibility for recovery suggested by the Bush Administration was under state workers' compensation laws, but this was problematic for a number of reasons, including the fact that the inoculations were not mandated as part of the job but had instead been volunteered for by the emergency personnel. *Id.* at 19. Another questionable suggested alternative was compensation under private health insurance policies, but such policies might not have covered smallpox injuries, and would never have included compensation for lost income or pain and suffering. *Id.*

healthcare providers who were to be vaccinated in Phase I of the program were well aware that the smallpox vaccine is generally considered the most dangerous vaccine available today.¹⁸³

The combination of possible serious adverse health effects from the smallpox vaccine, the unclear risk of a bioterrorism attack using smallpox, and the lack of a compensation plan for those injured, “dealt the smallpox campaign a near-death blow.”¹⁸⁴ Hundreds of major hospitals, several statewide nurses’ associations, and the health departments in several states refused to participate in the program.¹⁸⁵ A number of other organizations, including the AFL-CIO, the American Hospital Association, the American Nurses Association, and the American Public Health Association, expressed concerns about participation in the smallpox program until the liability compensation issues were resolved.¹⁸⁶

In an effort to resuscitate its smallpox program, the Bush Administration finally supported, and Congress adopted in late 2003, a compensation program for persons injured as a result of the program. The Smallpox Emergency Personnel Protection Act of 2003 (SEPPA)¹⁸⁷ created a limited compensation program for the emergency responders injured by the smallpox vaccination, as well as for persons who suffered injuries as a result of having come into contact with the emergency responders who had been

183. Anthony Fauci, Director of the National Institute of Allergy and Infectious Diseases, described the current live virus smallpox vaccine as the “least safe human vaccine” available today. Susan J. Landers, *Smallpox Vaccine Hazards Dictate Cautious Approach*, AMEDNEWS.COM (Aug. 19, 2002), <http://www.ama-assn.org/amednews/2002/08/19/hlsb0819.htm>; see also Rutkow et al., *supra* note 10, at 725 (stating that the smallpox vaccine carries significant health risks). The Centers for Disease Control and Prevention has estimated that one person out of every 1,000 vaccinated would experience a serious adverse reaction, and that one to two persons out of 1,000,000 vaccinated with the smallpox vaccine would die as a result of it. CTRS. FOR DISEASE CONTROL & PREVENTION, SMALLPOX FACT SHEET 2 (2003), <http://www.bt.cdc.gov/agent/smallpox/vaccination/pdf/vaccine-overview.pdf>.

184. Cynthia P. Schneider & Michael D. McDonald, “*The King of Terrors*” Revisited: *The Smallpox Vaccination Campaign and Its Lessons for Biopreparedness*, 31 J.L. MED. & ETHICS 580, 583 (2003).

185. See *id.* (noting that hospitals and states suspended the program because of possible adverse effects stemming from the vaccination).

186. Elin Gursky & Avani Parikh, *Some Right Jabs and Back in the Ring: Lessons Learned from the Phase I Civilian Smallpox Program*, 8 J. HEALTH CARE L. & POL’Y 162, 174–75, 175 nn.105 & 107–108 (2005).

187. Pub. L. No. 108-20, 117 Stat. 638 (2003) (codified at 42 U.S.C. §§ 239–239h (2006)).

vaccinated, such as hospital patients or family members of the emergency responder.¹⁸⁸

SEPPA, and its implementing HHS regulations, created a Smallpox Vaccine Injury Table containing a list of injuries and the specified interval for the first manifestation of those injuries.¹⁸⁹ Under SEPPA, the petitioner had the burden of proving by a preponderance of the evidence that the Table requirements were satisfied. If this burden was satisfied, then a presumption was created that the smallpox vaccine caused the injury.¹⁹⁰ The burden then shifted to the Secretary of HHS to show that something other than the smallpox vaccine actually caused the injury.¹⁹¹ If the injury suffered was not listed on the Table, or occurred outside of the timeframe specified in the Table, then the petitioner had the burden of proving by a preponderance of the evidence that the vaccine in fact caused the injury.¹⁹²

188. A total of sixty-three requests for compensation were filed under the Smallpox Compensation Program as of November 29, 2007. Some fifteen people had been determined to be eligible for compensation, sixteen requests were denied because they were filed too late, twenty-one requests were denied because no supporting medical records had been submitted or the medical records submitted were insufficient to support the claim, and six other claims were denied for other reasons or withdrawn. These statistics were provided to this Author in response to a Freedom of Information Act request filed with the Smallpox Vaccine Program. Letter from Mona Finch, Freedom of Info. Officer, Dep't of Health & Human Servs. to Peter H. Meyers, Professor, The George Wash. Univ. Law Sch. (Nov. 29, 2007) (on file with Author).

189. 42 C.F.R. § 102.21(a) (2010).

190. 42 U.S.C. § 239a(c) (2006).

191. *See id.*

192. 42 C.F.R. § 102.20(d).

For those persons who could establish entitlement to compensation, SEPPA provided less than total compensation for the injuries incurred:

- No compensation for pain and suffering was authorized in the statute.
- Lost income could be recovered, but it would not be 100 percent of the injured person's lost income, but only a prorated amount.¹⁹³
- No lost income would be paid if the claimant missed five days of work or less.¹⁹⁴
- A cap was placed on lost income that allowed no more than \$50,000 to be paid in any year.¹⁹⁵
- Although death benefits could be awarded under the statute, no more than \$50,000 in death benefits could be paid to the claimant's beneficiaries in any year.¹⁹⁶

SEPPA contained several other provisions that also raised substantial difficulties for potential petitioners. The statute of limitations required vaccine recipients to file their claim within one year of the administration of the smallpox vaccine.¹⁹⁷ For persons who suffered injuries as a result of contact with the vaccinated individual, the statute of limitations was two years.¹⁹⁸ The regulations explicitly provided that no judicial review was available from a decision refusing to award compensation.¹⁹⁹ No time limitation was placed on the Secretary of HHS for ruling on pending applications for compensation.²⁰⁰

The proceeding at HHS was purely inquisitorial, and it was conducted without any active participation by the petitioner. Moreover, the Secretary was authorized to consult with medical experts in making determinations of eligibility, without offering the petitioner an opportunity to respond.²⁰¹ If the Secretary denied compensation, the only recourse for the claimant was to file a request for reconsideration within sixty days.²⁰² The request for

193. If the injured petitioner had no dependents at the time that the injury occurred, the petitioner would receive 66.6% of his or her lost gross income, and if the petitioner did have dependents, then the petitioner could receive 75% of his or her lost income. *Id.* § 102.81(a)(1)(i)–(ii).

194. *Id.* § 102.81(c)(3).

195. *Id.* § 102.81(c)(1).

196. *Id.* § 102.82(d)(2)(i).

197. *Id.* § 102.42(c).

198. *Id.* § 102.42(d).

199. *Id.* § 102.92.

200. The Secretary of HHS was directed to “make the decision in a timely manner,” but there were no standards or timeframes elucidating what a “timely manner” meant. *Id.* § 102.70(c).

201. *Id.* § 102.20(a).

202. *Id.* § 102.90(a).

reconsideration could not include or make reference to any additional information not included in the initial petition for compensation.²⁰³ A final decision was then made by the Associate Administrator and no further administrative review was allowed unless the President specifically directed otherwise; as noted above, no judicial review was authorized.²⁰⁴ HHS regulations allowed petitioners to be represented by a lawyer or a nonlawyer, but it did not authorize for payment of attorneys' fees and costs.²⁰⁵

Not surprisingly, given the limited compensation and the inhospitable procedures contained in SEPPA, the new law was unable to resuscitate the Smallpox Vaccination Program. SEPPA's compensation regime was simply too little, too late.²⁰⁶ On October 15, 2003, the Director of Smallpox Preparedness and Response at the Centers for Disease Control announced that the program was effectively over: "The fact is, it's ceased . . . not that anyone's issued an edict to say stop."²⁰⁷ In fact, over the entire life of the smallpox vaccination program, fewer than 40,000 emergency responders ever volunteered to be vaccinated, which was less than ten percent of the 500,000 people that HHS promised would be vaccinated within the first month of the program.²⁰⁸ In sum, the smallpox vaccination program was a resounding failure, and a major reason for that failure was the perception that it lacked an adequate compensation plan to protect individuals who might be injured by the vaccination.²⁰⁹

203. *Id.*

204. *Id.* § 102.90(c), .92.

205. *Id.* § 102.44(a), (d).

206. Greenberger, *supra* note 181, at 21.

207. Anita Manning, *Smallpox Vaccination Plan "Ceased"; Program is Cog of Bioterror Response*, USA TODAY, Oct. 16, 2003, at A1.

208. *Smallpox Vaccination Program Status by State*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/media/pressrel/smallpox/spvaccin.htm> (last updated Oct. 31, 2011).

209. Greenberger, *supra* note 181 at 8; Gursky & Parikh, *supra* note 186, at 176. Gursky and Parikh concluded:

Among the most regrettable "losses" [from the smallpox program] was a loss of trust, a phenomenon that occurred across multiple levels. Hospitals, clinicians, professional organizations, labor unions, and potential vaccines expected that their sacrifices of time and the potential risk to self and others would be met with appropriate levels of legal protections. In fact . . . inadequate regimes of liability and compensation eroded—early on—attempts to vaccinate anywhere near the intended number of 500,000 civilian emergency responders.

Id. at 184.

D. The September 11th Compensation Program

Congress passed the September 11th Victim Compensation Fund just eleven days after the attacks on the Twin Towers in New York City and on the Pentagon outside of Washington, D.C., in 2001.²¹⁰ The fund was established in part for compassionate reasons, to help those who were injured or who had a family member die as part of the September 11th attacks.²¹¹ Congress also made clear, however, that the most important objective of the Act was “to protect the airline industry, the World Trade Center’s owners and others from protracted, uncertain litigation.”²¹² Indeed, the very name of the omnibus legislation that created the September 11th Compensation Fund was the Air Transportation Safety and System Stabilization Act (ATSSSA).²¹³ There also appear to have been other very important intangible objectives for the program, reflecting important but difficult to quantify societal values. As Kenneth R. Feinberg, the September 11th Compensation Fund’s Administrator, wrote about the passage of the September 11th Compensation Fund:

Lawmakers . . . also wanted to show the world that, in the face of such an unprecedented attack, the American people would rally around the victims. Like the Marshall Plan that rescued Europe after World War II, the 9/11 Fund was a demonstration of American resolve in the wake of tragedy. The Nation would stand as one.²¹⁴

To be eligible for compensation under the September 11th Fund, the individual had to have been “present at the site” of one of the four airplane

210. September 11th Victim Compensation Fund of 2001, Pub. L. No. 107-42, 115 Stat. 237 (2001) (codified as amended at 49 U.S.C. § 40101 note (2006) (Air Transportation Safety and System Stabilization)).

211. Gillian K. Hadfield, *Framing the Choice Between Cash and the Courthouse: Experiences with the 9/11 Victim Compensation Fund*, 42 LAW & SOC’Y REV. 645, 649 (2008); see also Robert M. Ackerman, *The September 11th Victim Compensation Fund: An Effective Administrative Response to National Tragedy*, 10 HARV. NEGOT. L. REV. 135, 159–60 (2005) (noting, however, that the Victim Compensation Fund must be seen as a component of a larger measure to protect the airline industry).

212. Kenneth R. Feinberg, *9/11 Fund: Once Was Enough*, WASH. POST, Sept. 11, 2008, at A17. The Act was initially conceived as an emergency response to the crisis in the airline industry. The immediate problem was that “airline carriers, initially grounded for safety reasons, would stay on the ground indefinitely because their insurers would refuse to continue their coverage and capital markets would refuse to provide funds to the airlines in the face of potentially ‘unlimited’ liability.” Hadfield, *supra* note 211, at 649.

213. 49 U.S.C. § 40101 note (Air Transportation Safety and System Stabilization Act § 101(1)). The Act took other steps to address the financial problems facing the airlines, including a limit on the liability of the air carriers for all claims arising from the September 11th attacks to \$1.5 billion for each airplane. Hadfield, *supra* note 211, at 649.

214. Feinberg, *supra* note 212.

crashes and “physically harmed” as a result of the crashes, or be the appropriate representative of such person.²¹⁵ These eligible persons had to make a choice of seeking compensation from the fund or filing a civil suit for damages.²¹⁶ This was an “either/or” choice, in contrast to the Vaccine Act’s staggered requirement of going to the Court of Federal Claims first, then having the option of rejecting the decision issued by that court and filing a civil action in state or federal court. Once a petitioner decided to go into the September 11th Fund, the petitioner was bound by the final decision of the special master.²¹⁷

The Act established a special master, appointed by the Attorney General, who was given very broad authority to authorize and pay compensation in appropriate cases. ATSSSA provided few specifics as to how the special master, or the September 11th compensation program, would operate.²¹⁸ For example, the Act did not set forth specific amounts of compensation to award to different petitioners for injury or death claims, although it did provide that payment should be made for both economic and noneconomic losses.²¹⁹ Both types of injuries were broadly defined in the Act.²²⁰

215. 49 U.S.C. § 40101 note (Air Transportation Safety and System Stabilization Act § 405(c)(2)(A)–(B)).

216. *Id.* § 40101 note (§ 405(c)(3)(B)(i)).

217. *See id.* (noting that upon submission of a claim an applicant would waive the right to file a civil action).

218. *Id.* § 40101 note (§ 404).

219. Special Master Feinberg developed a grid of presumed economic loss for decedents based on lost earnings or economic opportunities, age, and other information. *See* KENNETH R. FEINBERG, FINAL REPORT OF THE SPECIAL MASTER FOR THE SEPTEMBER 11TH VICTIM COMPENSATION FUND OF 2001, VOL. 1, at 7 (2004). The program’s regulations established a presumption of noneconomic losses for death at \$250,000 plus \$100,000 for any spouse and for each dependent. 28 C.F.R. § 104.44 (2010). Petitioners could seek to obtain more than the presumed amount by showing “extraordinary needs or circumstances” in their individual case. FEINBERG, *supra*, at 8. For September 11th survivors, the \$250,000 presumed noneconomic injuries could also be adjusted depending of the gravity of the injuries. 28 C.F.R. §§ 104.45–.46.

220. Economic awards for physically injured victims consist primarily of “actual income or expenses incurred as a direct result of the injury and future lost income and costs caused by the future effects of the injury.” 49 U.S.C. § 40101 note (Air Transportation Safety and System Stabilization Act § 402(7)). The economic award also includes, in appropriate cases, “the value of household services the victim provided to the household.” *Id.* Compensable noneconomic losses were defined in very broad manner, to include:

[L]osses for physical and emotional pain, suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of enjoyment of life, loss of society and companionship, loss of consortium (other than loss of domestic services), hedonic damages, injury to reputation, and all other nonpecuniary losses of any kind or nature.

The Act required the special master to issue a final decision within 120 days of the filing of the claim, and it provided for no administrative or judicial review of the special master's decisions. The special master was given extraordinary authority to fill in the procedures and standards to be applied in the Act, and also very broad and unreviewable authority to process individual claims under the Act. One author has described Special Master Feinberg as being "unilaterally responsible for filling in nearly every detail of the program."²²¹ Among the important details that Special Master Feinberg created were a number of Tables showing presumptive amounts of compensation for each category of economic or noneconomic injury. In special circumstances individual petitioners could seek increases over the presumed Table amounts.²²²

The September 11th program was designed to process claims in an informal, nonadversarial manner, with the special master playing a basically inquisitorial role. The Final Report on the program states that all hearings involving either entitlement or the amount of compensation to be awarded "were designed to be non-adversarial."²²³ Any testimony received at the hearing was required to be under oath, but there was no right of cross-examination.²²⁴ Fund officials worked with various federal government agencies in verifying and gathering necessary information to process a claim.²²⁵ Petitioners had the right to be represented by an attorney, and the Act had no restrictions on payment of attorney's fees.²²⁶

One author has challenged the view that the September 11th Fund was nonadversarial, noting that since no government lawyer was present to

Id. § 40101 note 402(9).

221. Elizabeth Berkowitz, *The Problematic Role of the Special Master: Undermining the Legitimacy of the September 11th Victim Compensation Fund*, 24 *YALE L. & POL'Y REV.* 1, 2 (2006).

222. See FEINBERG, *supra* note 219, at 8.

223. *Id.* at 10. A total of 3,962 hearings were held for 3,629 claims, and the majority of hearings—3,044—were regarding the calculation of the award. *Id.* at 18. The Air Transportation Safety and System Stabilization Act (ATSSSA) gives petitioners the right to have an attorney represent them and the right to present appropriate witnesses and documents at the hearing, including expert witnesses where appropriate. 49 U.S.C. § 40101 note (Air Transportation Safety and System Stabilization Act § 405(b)(4)); September 11th Victim Compensation Fund of 2001, 66 Fed. Reg. 66,274, 66,280 (Dec. 21, 2001) (interim final rule). Special Master Feinberg initially indicated that hearings would generally not proceed for longer than two hours, but subsequently clarified in the Final Rule that there were "no firm time limit[s] for hearings." September 11th Victim Compensation Fund of 2001, 67 Fed. Reg. 11,233, 11,244 (Mar. 13, 2002) (final rule).

224. FEINBERG, *supra* note 219, at 10.

225. See *id.* at 65–66 (noting that procedures were created to facilitate coordination with various government and private organizations).

226. 49 U.S.C. § 40101 note (Air Transportation Safety and System Stabilization Act § 405(b)(4)(A)).

protect the fund, the special master or his designated hearing officers were repeatedly put in the position of having to defend the fund against potentially fraudulent claims.²²⁷ On a “significant number of occasions, victims and decision-makers [were] in an adversarial posture.”²²⁸

The first objective of this compensation program was to capture a very substantial share of the potential petitioners and get them to file in the Fund rather than in civil court.²²⁹ After these claims were filed with the Fund, the Fund’s objectives would then be to compensate the eligible parties generously, promptly, and fairly. Special Master Feinberg believed that after the September 11th Fund had expired, “everybody will agree it was a successful program.”²³⁰ It does appear that the compensation fund met its first objective very well. Ninety-seven percent of those eligible to file claims in connection with the September 11th attacks filed with the Fund.²³¹ Only ninety-six individual civil claims were filed by persons who selected that option instead of participation in the Fund.²³²

The September 11th Fund awarded compensation for 5,560 claims.²³³ The average award involving the death of the claimant was \$2,082,035, and the average award in an injury case was \$392,968.²³⁴ All but one of the ninety-six civil cases involving the September 11th attacks have now settled, for an average of approximately \$5.3 million per claim.²³⁵ The

227. Stephan Landsman, *A Chance to be Heard: Thoughts About Schedules, Caps, and Collateral Source Deductions in the September 11th Victim Compensation Fund*, 53 DEPAUL L. REV. 393, 403 (2003).

228. *Id.*

229. One author has noted that Special Master Feinberg “made urging victims to join the Fund one of his top priorities.” Berkowitz, *supra* note 221, at 27.

230. Kenneth R. Feinberg, Speech, *Negotiating the September 11 Victim Compensation Fund of 2001: Mass Tort Resolution Without Litigation*, 19 WASH. U. J.L. & POL’Y 21, 27–28 (2005). Special Master Feinberg continued:

The recipe for success was pretty clear: make very generous payments; outreach to the families; keep going after them and corral them; let them know that there are no tricks, and that nothing is hidden here. This is a transparent attempt by the American people to help. Offer due process considerations. Give everybody the opportunity to be heard. Make yourself available. Reach out to these people. It worked.

Id. at 27.

231. Hadfield, *supra* note 211, at 650.

232. *In re September 11 Litigation*, 600 F. Supp. 2d 549, 552 (S.D.N.Y. 2009)

233. FEINBERG, *supra* note 219, at 98–99. The fund received a total of 7,403 claims. *Id.* at 109.

234. *Id.* at 110.

235. Mark Hamblett, *9/11 Mediator Wraps Up Work; Only 3 Cases Left Unsettled*, N.Y.L.J., Mar. 6, 2009, at 1; Colin Moynihan, *Timetable Is Set for the Only Civil Trial in a 9/11 Death*, N.Y. TIMES, Oct. 21, 2010, at A32. The court-approved mediator for the civil cases reported to the court that settlements in the first ninety-three cases totaled approximately

court-approved mediator for the September 11th civil actions concluded that it was impossible to completely answer the question of whether similarly situated claimants did better in the September 11th Fund or by filing a civil suit.²³⁶

Many commentators have concluded that the September 11th Fund largely succeeded in providing compensation that was generous, prompt, and fair to the petitioners,²³⁷ as well as providing vital assistance to the airline industry at a time of exceptional distress.²³⁸ Other commentators have been critical of the September 11th Fund on a number of grounds, including the procedural fairness of the decisionmaking process, the arbitrary principles involved in determining individual awards, and the excessive discretion given to the special master with little accountability or oversight.²³⁹ In this Author's view the September 11th program was very largely successful, and it was so because Special Master Feinberg used his

\$500 million, although the specific amount of each settlement was confidential. Report of the Mediator on the Mediation and Settlement Efforts of the Parties in the Cases Previously Docketed Under 21 MC 97 at 13, *In re* September 11 Litigation, No. 21 MC 101 (AKH) (S.D.N.Y. Mar. 3, 2009) [hereinafter Report of the Mediator].

236. One reason why it was difficult to compare the amounts of the awards from the September 11th Fund and from the civil cases was that awards in the civil cases were generally subject to payment of substantial attorneys' fees and costs, while the September 11th fund case awards generally did not involve substantial attorneys' fees and costs. Report of the Mediator, *supra* note 235, at 14–15. Moreover, as the mediator noted, compensation in the civil cases was generally provided a substantial number of years after the September 11th Fund moneys were distributed, and the civil claimants had to bear the toll of prolonged and uncertain litigation as well as the delay in achieving some closure and financial security. *Id.* at 15. The mediator added that the “families of decedents with very high incomes probably achieved settlements that would have been unlikely achievable through the Fund because of the rules governing the Fund, including deductions for collateral sources of recovery such as life insurance policies.” *Id.*

237. James C. Harris, *Why the September 11th Victim Compensation Fund Proves the Case for a New Zealand-Style Comprehensive Social Insurance Plan in the United States*, 100 NW. U. L. REV. 1367, 1372 (2006) (comparing the Victim Compensation Fund to the New Zealand Plan and noting that both plans fairly compensate victims with minimal bureaucratic delay); Robert L. Rabin, *September 11 Through the Prism of Victim Compensation*, 106 COLUM. L. REV. 464, 478 (2006) (reviewing KENNETH R. FEINBERG, *WHAT IS LIFE WORTH?: THE UNPRECEDENTED EFFORT TO COMPENSATE THE VICTIMS OF 9/11 (2005)*) (“In fact, the resultant mix of presumptive scheduling tempered by personal empathy and pecuniary adjustments at the margin was the touchstone to the success of the program.”); Joe Wientge, Comment, *Foreseeable Change: The Need for Modification of the Foreseeability Standard in Cases Resulting From Terrorist Acts After September 11th*, 74 UMKC L. REV. 165, 195 (2005) (noting that the Fund “by most accounts awards a very just sum to participants”).

238. Ackerman, *supra* note 211, at 159–60; Hadfield, *supra* note 211, at 649.

239. Matthew Diller, *Tort and Social Welfare Principles in the Victim Compensation Fund*, 53 DEPAUL L. REV. 719, 725–26, 753–60 (2003); see also Ackerman, *supra* note 211, at 138–39 (discussing the funds two major shortcomings).

almost complete and unreviewable discretion to find a good balance between presumptive damages tables and personalized meetings with petitioners advocating for higher amounts of compensation. It was a unique inquisitorial procedure with a friendly face and a largely transparent decisionmaking process, resulting in relatively generous compensation awards.²⁴⁰

E. The Countermeasures Injury Compensation Program

In 2005, the Bush Administration became extremely concerned about a potential H1N1 avian flu pandemic as well as potential bioterrorism threats from anthrax and other toxins.²⁴¹ In order to encourage industry to participate in creating countermeasures to such threats, including making new vaccines, the Administration proposed a bill to provide industry with very sweeping liability protection. The bill also contained a compensation program for persons injured by the countermeasure that was so limited and restricted that Senators Ted Kennedy, Tom Harkin, and Christopher Dodd memorably noted, “Without a real compensation program, the liability protection in the . . . bill provides a Christmas present to the drug industry and a bag of coal to everyday Americans.”²⁴²

The Public Readiness and Emergency Preparedness Act of 2005,²⁴³ which contained the Countermeasures Injury Compensation Program, was passed on December 30, 2005, after Majority Leader Bill Frist attached the

240. More recently, Special Master Kenneth Feinberg was asked by President Barack Obama to administer the \$20 billion compensation program funded by British Petroleum in connection with the Gulf oil spill in 2010. Sheryl Gay Stolberg, *Administering the Fund, a Master Mediator*, N.Y. TIMES, June 17, 2010, at A18. Special Master Feinberg was even asked to administer a multimillion dollar compensation fund, created from funds donated to Virginia Tech that were dispersed to persons injured in a horrendous shooting incident on campus in 2007. Ian Urbina, *Sept. 11 Compensation Chief to Oversee Virginia Tech Payouts*, N.Y. TIMES, July 6, 2007, at A10. The September 11th program’s success sprang from giving Special Master Feinberg virtually total and unreviewable discretion in designing the compensation program and then in adjudicating the awards that were made in the program. So, as we look to the future, is the best answer we can come up with for a successful compensation program in a mass disaster situation to ask Kenneth Feinberg to take care of it, and get out of his way?

241. See HOMELAND SEC. COUNCIL, NATIONAL STRATEGY FOR PANDEMIC INFLUENZA (2005) (addressing the threat of pandemic influenza); SARAH A. LISTER, CONG. RESEARCH SERV., RL 33145, PANDEMIC INFLUENZA: DOMESTIC PREPAREDNESS EFFORTS 32 (2005) (discussing the use of influenza as a bioterrorist weapon).

242. *Pandemic Funding, Liability Shield Clear Congress*, CTR. FOR INFECTIOUS DISEASE RES. & POL’Y (Dec. 28, 2005) (quoting Sen. Edward Kennedy) <http://www.cidrap.umn.edu/cidrap/content/influenza/panflu/news/dec2805liability.html>.

243. Pub. L. No. 109-148, 119 Stat. 2818 (2005) (codified at 42 U.S.C. §§ 247d-6d to -6e (2006)).

Countermeasures bill to a “must pass” military authorization bill.²⁴⁴ Under this Act, the Secretary of HHS is authorized to declare a public health emergency with respect to a naturally-occurring pandemic, a bioterrorism threat, or any other actual or potential public health emergency.²⁴⁵ To date, the Secretary has declared eight such public health emergencies, and has issued six subsequent amendments to these declarations.²⁴⁶

Once the Secretary declares a public health emergency, all parties who participate in the manufacture, testing, development, or distribution of the specified countermeasures are protected by the liability provisions of the Act.²⁴⁷ The Act requires that any person who believes that he or she may have been seriously injured by one of the covered countermeasures must first bring a claim for compensation in the Countermeasures Injury Compensation Program before bringing a civil suit for damages.²⁴⁸

Unfortunately, HHS refused to adopt procedural rules to decide cases brought under the Countermeasures Injury Compensation Program for almost five years after the law was passed. It was only in October of 2010 that HHS issued an Interim Final Rule authorizing the administrative implementations of the compensation program.²⁴⁹ HHS had previously announced that it would not process the claims it has already received involving adverse reactions to the 2009–2010 H1N1 swine flu vaccine or the other covered countermeasures until the agency issued rules for

244. See 151 CONG. REC. 30,726 (2005) (statement of Sen. Hatch); Sheryl Gay Stolberg, *Legal Shield for Vaccine Makers Is Inserted Into Military Bill*, N.Y. TIMES, Dec. 20, 2005, at A26.

245. 42 U.S.C. § 247d-6d(b)(1) (2006).

246. The Secretary of HHS has issued emergency declarations regarding: (1) Pandemic Influenza Countermeasures, on February 1, 2007; (2) Anthrax Countermeasures, on October 6, 2008; (3) Acute Radiation Syndrome Countermeasures, on October 17, 2008; (4) Smallpox Countermeasures, on October 17, 2008; (5) Pandemic Antiviral Countermeasures, on October 17, 2008; (6) Botulism Countermeasures, on October 17, 2008; (7) Pandemic Influenza Diagnostics, Personal Respiratory Protection Devices and Respiratory Support Devices Countermeasures, on December 22, 2008; and (8) the Pandemic Antiviral Peramivir Countermeasure, on October 22, 2009. *Covered Countermeasures*, HEALTH RES. & SERVS. ADMIN., <http://www.hrsa.gov/getthehealthcare/conditions/countermeasurescomp/declarations.html> (last visited Sept. 24, 2011) (listing *Federal Register* notices of emergency declarations). The Secretary has amended the Pandemic Influenza Declaration five times and the Pandemic Antiviral Peramivir Countermeasure Declaration once. *Id.*

247. 42 U.S.C. § 247d-6d(a)(1), (b)(1).

248. *Id.* § 247d-6e(d)(1).

249. Countermeasures Injury Compensation Program (CICP): Administrative Implementation, Interim Final Rule, 75 Fed. Reg. 63,656 (Oct. 15, 2010) (to be codified at 42 C.F.R. pt. 110).

adjudicating these cases.²⁵⁰ HHS disclosed, in response to a Freedom of Information Act request filed by this Author, that 230 claims had been filed involving the H1N1 swine flu vaccine, and that a few additional claims had been filed involving other countermeasures.²⁵¹

In this program, petitioners can bring a claim for compensation in one of two ways. First, petitioners can meet their burden of showing that there was a preponderance of evidence establishing that the specified countermeasure probably caused the injury.²⁵² In the alternative, if and when HHS publishes a Table of injuries with respect to any of the countermeasures, petitioners will then be entitled to a presumption that the countermeasure caused any injury listed on the Table, if it occurred within the time frame specified by the Table.²⁵³

The legislation for this program clearly intended nonadversarial processing of claims for compensation, with HHS officials making decisions after conducting nonpublic investigations.²⁵⁴ Judicial review is expressly precluded.²⁵⁵ The statute of limitations requires the claim to be filed within one year of the administration of the countermeasure that caused the injury,²⁵⁶ rather than one year from the onset of the first manifestation of the injury. Neither attorneys' fees nor costs are recoverable.²⁵⁷ The types of compensation available are very similar to those available through the Smallpox Compensation Program, with no compensation allowed for pain and suffering, and only partial, prorated amounts available for lost income,

250. U.S. DEP'T OF HEALTH & HUMAN SERVS., HEALTH RES. & SERVS. ADMIN., COUNTERMEASURES INJURY COMPENSATION PROGRAM: PROGRAM UPDATE 7-8 (2010), <http://www.hhs.gov/nvpo/nvac/meetings/pastmeetings/nvac2010hrs2-4v2.ppt#7>.

251. HHS indicated that as of July 12, 2010, it had received 230 requests for benefits regarding the H1N1 swine flu vaccine, 3 requests regarding the anthrax vaccine, and 1 request each with respect to the smallpox vaccine, the Japanese encephalitis vaccine, Relenza (zanamivir), and Tamiflu (oseltamivir). Letter from Thomas Flavin, Freedom of Info. Officer, Dep't of Health & Human Servs., to Peter H. Meyers, Professor, The George Wash. Univ. Law Sch. (July 21, 2010) (on file with Author).

252. 42 U.S.C. §§ 239a(c)(2), 247d-6e(b)(4). There is language in the Act indicating that petitioners must satisfy their burden of proof by introducing "compelling, reliable, valid, medical and scientific evidence." *Id.* § 247d-6e(b)(4). This language does not appear to change the preponderant evidence requirement of the Act.

253. *Id.* § 247d-6e(b)(5)(A).

254. *Cf. id.* § 247d-6e(b)(4) (giving the Secretary of HHS broad authority to promulgate regulations).

255. *Id.* § 247d-6e(b)(5)(C).

256. *Id.* § 239a(d).

257. *Id.* § 247d-6e(b)(2); *Countermeasures Injury Compensation Program, How to File and Deadline for Filing*, HEALTH RES. & SERVS. ADMIN., <http://www.hrsa.gov/gethealthcare/conditions/countermeasurescomp/howtofile.html> (last visited Sept. 24, 2011).

as well as other applicable caps and exclusions.²⁵⁸ The Act allows all persons who have first exhausted their remedies in the compensation program to then file a suit for civil damages against a manufacturer or other provider covered by the Act. The Act specifies, however, that liability can only be found if the covered person was guilty of “willful misconduct.”²⁵⁹

The Act has been subjected to substantial criticism for the sweeping protections it affords industry and the restrictive provisions of the compensation program.²⁶⁰ However, these concerns did not appear to be a consequential factor during the H1N1 swine flu pandemic in 2009–2010. When supplies of the vaccine became widely available in December 2009, most Americans did not seek the vaccine for themselves or their families. *The New England Journal of Medicine* published a comprehensive evaluation of why this occurred.²⁶¹ The two principal reasons were safety concerns about the vaccine, including possible side effects, and the lack of concern about getting a serious case of swine flu if unvaccinated.²⁶² Other reasons were

258. 42 U.S.C. § 247d-6e(b)(2); see also *id.* §§ 239c–e. One area in which the Countermeasures Compensation Program appears to be more generous than the Smallpox Compensation Program is that the death benefit that a survivor can receive in the Countermeasures Compensation Program is not reduced depending on the amount awarded for lost income. *Id.* § 247d-6e(b)(2) (excluding the death benefit reduction provision of 42 U.S.C. § 239e(a)(2)(B)).

259. *Id.* § 247d-6d(d)(1).

260. See, e.g., George W. Conk, *Will the Post 9/11 World be a Post-Tort World?*, 112 PENN ST. L. REV. 175, 227–232 (2007) (criticizing the various provisions of the Act); Lawrence O. Gostin & Benjamin E. Berkman, *Pandemic Influenza: Ethics, Law, and the Public’s Health*, 59 ADMIN. L. REV. 121, 135 (2007). A report issued by Public Citizen commented that:

Frist gave the companies immunity, but then went still further and stripped victims of meaningful recourse. In this regard, the bill was a drastic departure from precedent, shielding corporations from legal and financial accountability, but failing to replace them with a government surrogate or establish a guaranteed source of funds to cover losses. The recipients of pandemic products, their families, and society at large would be forced to shoulder the consequences of industry’s gross negligence, recklessness, deceptive claims, and failures to warn, among other egregious acts.

PUBLIC CITIZEN, WILLFUL MISCONDUCT: HOW BILL FRIST AND THE DRUG LOBBY COVERTLY BAGGED A LIABILITY SHIELD 19 (2006). Some have argued that the broad liability protections in the Act are desirable. See, e.g., Paul Taylor, *We’re All in This Together: Extending Sovereign Immunity to Encourage Private Parties to Reduce Public Risk*, 75 U. CIN. L. REV. 1595, 1646–47 (2007).

261. Gillian K. SteelFisher, Robert J. Blendon, Mark M. Bekheit & Keri Lubell, *The Public’s Response to the 2009 H1N1 Influenza Pandemic*, 362 NEW ENG. J. MED. e65(1) (2010). This study was based upon an evaluation of twenty national public opinion polls. *Id.* at e65(1). By mid-January of 2010, 40% percent of polled parents had had their children vaccinated, and 21% of polled adults had received the vaccine. *Id.* at e65(5).

262. *Id.* at e65(3) to e65(4).

also given for not vaccinating, but concern about the lack of a meaningful compensation program was never raised in the public debate about the H1N1 program.²⁶³

This is in marked contrast to the earlier smallpox vaccination program, where the lack of a meaningful compensation program for injured people was a major cause of its failure. The next section of this Article will explore possible reasons for this different result, and compare this compensation program with the other compensation programs discussed.

III. COMPARATIVE EVALUATION OF THE VACCINE COMPENSATION PROGRAM AND OTHER RECENT COMPENSATION PROGRAMS

A comparative analysis and evaluation of the Vaccine Injury Compensation Program with other recent federal compensation programs reveals several important lessons.

A. The Adequacy of a Compensation Program Is Sometimes Crucial and Sometimes Irrelevant

The perceived adequacy or inadequacy of the compensation program regime can be essential to the viability of a mass vaccination or other governmental health program. One of the principle reasons that the Smallpox Vaccination Program for first responders collapsed was because of the inadequate safety net for those vaccinated and for those with whom they came in contact, including patients and their own family members. Doctor groups, nurses associations, hospitals, and even state health agencies were urging nonparticipation in the Smallpox Program, in part because of the inadequate injury compensation plan in an otherwise questionable program. Less than ten percent of the promised 500,000 first responders ever volunteered to receive the vaccine and become part of the program. The program was an abysmal failure, and the lack of an adequate compensation program played an important part in that result.

The history of the Smallpox Program has important lessons for the Vaccine Injury Compensation Program and for other potential government health or bioterrorism programs that Congress may consider adopting in the future. The Vaccine Compensation Program must be sure to maintain the confidence of the American people as a meaningful compensation program, and future programs must give careful consideration to

263. *Id.* at e65(4). Other significant reasons that people gave for not getting the vaccine included distrust that public health officials would provide correct information about vaccine safety, dislike of injections, a recommendation from a healthcare provider not to be vaccinated, and the expense of the vaccine. *Id.*

compensation provisions and procedures to ensure that they are adequate, and that they will be perceived to be adequate, by the effected groups.

The September 11th Compensation Program is a good example of how a user-friendly compensation program is essential to ensuring the success of the compensation plan. All persons injured in the September 11th attacks, or surviving family members, were required to make an irreversible decision up front about whether to file a civil action for damages, or file a petition in the compensation program and accept the damages awarded by the special master, with no chance for any review of the special master's decision. The fact that virtually everyone (97%) went into the compensation program, as opposed to filing a civil action, made the program a success in terms of seeking nearly universal participation. This could only have happened because the special master adopted presumptive compensation amounts with the opportunity for petitioners to advocate in person for upward adjustments in appropriate cases, creating both reasonable expectations of the damages that likely would be awarded and the flexibility to modify the damage amounts in special circumstances. This combination of an inquisitorial procedure with a friendly face, the opportunity for petitioners to participate in the compensation determination, and the relatively generous awards resulted in the success of this program.

There has also been one situation where the adequacy or inadequacy of a compensation program appears to have been irrelevant to the operation of the vaccination program. During the H1N1 swine flu pandemic in 2009–2010, the absence of a meaningful, operating compensation program was not a consequential factor in whether people decided to get the swine flu vaccine for themselves or their families. Why did the lack of a meaningful compensation program play an important role in the failure of the smallpox vaccination program, but the lack of a meaningful, operating compensation program turned out to be irrelevant to the H1N1 swine flu vaccination program?

There appear to be several reasons for this anomalous result. First, the lack of a meaningful smallpox compensation program was a large concern for doctors, nurses, and other first responders because they knew of the dangerous potential of the smallpox vaccine. However, the lack of a meaningful compensation program was not a substantial concern for the general public with respect to the swine flu vaccine because the issue for most people was whether to get the vaccination for an illness that they did not perceive as a particularly dangerous threat. People were thus not particularly concerned about the adequacy of the compensation program for a vaccine-related injury.

Second, there was a substantial time lag between the swine flu vaccination program in 2009–2010 and the Countermeasures Compensation Program, which was passed by Congress in 2005. This four-year gap meant that the details of the compensation program were remote and obscure when the government began the swine flu program. This is in sharp contrast to the Smallpox Compensation Program, where the inadequacies of the program were immediately apparent and were a large concern to the first responders who were being asked to take the smallpox vaccination.

Moreover, the target audiences for the smallpox and swine flu vaccine programs were very different. The smallpox vaccinations were intended for doctors, nurses, and other first responders, who were very sophisticated about the potential risks of the vaccine and therefore very sensitive to the need for an adequate compensation program to protect themselves, their families, and their patients. The focus of the swine flu vaccinations was the general public, and most people were not overly concerned about getting a serious case of the swine flu, so they did not focus on the adequacy of the compensation program.

It could be argued, based upon the swine flu example, that the details of the Vaccine Injury Compensation Program, and even whether the program is operational at all, are not important to the general public, and thus the success of vaccine immunization in the United States is not dependent on a petitioner-friendly injury compensation plan. However, this argument is risky at best. Vaccinations remain controversial for many Americans, including the parents of young children, and any action that undermines the public's confidence that the Vaccine Injury Compensation Program offers a safety net to those injured by the vaccines could substantially impair the continued success of the immunization program in this country.²⁶⁴

B. Inquisitorial/Adversarial Models of Adjudication

All of the compensation programs discussed in this Article, with the exception of the Vaccine Program, were based upon a nonadversarial, inquisitional model, in which the official who decides the case is primarily responsible for gathering the necessary evidence. In all of these programs,

264. Whenever a childhood vaccination is given in this country, the Vaccine Act requires that the recipient receive a statement from the healthcare provider that includes information from the CDC on possible adverse reactions to the vaccination and about the Vaccine Injury Compensation Program in case of a serious adverse event. 42 U.S.C. § 300aa-26. A public loss of faith in this compensation program risks lower immunization rates and undercuts the government's interest in encouraging parents to vaccinate their children and themselves.

except for the September 11th program, the final decision was made after a proceeding in which the person seeking compensation had no right to meaningful, active participation in the proceeding and no right to notice and a hearing on contested issues. The September 11th program's essentially inquisitorial procedure was made open and consumer-friendly in a number of ways. Only the Vaccine Compensation Program was created with a blend of inquisitorial and adversarial features in which counsel for the parties play important roles in conducting the litigation, which usually involves contested evidentiary hearings focusing on the testimony of expert witnesses.

Why should these compensation programs have such different procedures for resolving claims? It may be that the legal and medical questions that the special masters have to decide in vaccine cases are more complex and thus require a more complex procedure than the eligibility issues presented in these other compensation programs. The task in those other programs is often more clerical: that of determining whether the submitted documentation supports eligibility in the program. There is certainly an important screening role to determine if the applicant does meet the criteria that Congress established, but the full-blown and expensive protections of a formal trial are generally not going to be necessary to resolve these cases, except perhaps in exceptional situations. The inquisitorial model might work well in resolving the relatively simple question of whether a Vaccine Table injury has been established, but the much more complex causation-in-fact cases that now predominate in the vaccine compensation program benefit from using adversarial procedures, including opposing counsels' ability to bring in leading experts from numerous medical disciplines to testify in court. The adversarial model approach, in which petitioners get to actively participate in a hearing that is the basis for the resolution of the case, is also likely to appear fairer to the petitioners than a decision in which they did not participate that is issued after what will be perceived as a secret review of the case file.

One important reason for the success of the September 11th program was that the special master recognized that within the inquisitorial structure created to decide cases, it was desirable to provide the opportunity for petitioners to advocate face-to-face with the decisionmaker, and thus to feel they were heard and had the opportunity to participate in the proceeding. It is far different, and far less satisfying to a petitioner, to merely file a request for compensation with supporting documentation and then wait for the decision.²⁶⁵ There are, of course, transactional costs of the

265. All of the compensation programs allow attorneys to assist the persons petitioning for compensation, but only the Vaccine Act and the Radiation Exposure Compensation

petitioners' greater involvement in the proceeding, including a potentially substantial additional commitment of time, possible financial costs, as well as the wear and tear of being involved in litigation. Despite these costs, petitioners generally seek and benefit from active participation in the proceeding.

C. Industry Protection/Altruism

Most of the compensation programs discussed in this Article were adopted primarily to protect industries that Congress considered too big or important to fail. This is certainly true for the Vaccine Injury Compensation Program, where Congress was responding principally to the need to prevent vaccine manufacturers from leaving the United States' market because of concerns over tort liability. Similarly, the principal purpose behind the Smallpox Compensation Program was to make the vaccine manufacturers exempt from any legal liability, with the federal government taking over the manufacturers' liability under the Federal Tort Claims Act.²⁶⁶ The September 11th Compensation Fund was passed primarily to protect the viability of the airline industry in a moment of severe crisis. Most recently, the Countermeasures Injury Compensation Program was adopted in 2005, primarily to shield vaccine manufacturers and other industries with liability protection and to encourage them to participate in governmental programs responding to major health threats.

The two exceptions are the Radiation Compensation Program and the Japanese–American internment compensation program, both of which appeared to be adopted for altruistic reasons to bring a measure of assistance and closure to the affected groups. Neither statute appeared motivated by a desire to protect any industry or commercial interests. When these two compensation programs were adopted in 1988 and 1990, there did not seem to be concerns about any industry liability problems.²⁶⁷

Program have provisions relating to attorneys' fees. The Vaccine Act provides for the payment of attorneys' fees and costs separate from the compensation that the petitioners receive, and authorizes fees even if the petitioner is unsuccessful so long as the case was not frivolous and was brought in good faith. 42 U.S.C. § 300aa-15(e). RECA authorizes the attorney to charge up to 2% or up to 10% of the award received, depending of the type of case. *See id.* § 2210 note (Radiation Exposure Compensation § 9(b)); 28 C.F.R. § 79.74 (2010).

266. *See* 28 U.S.C. § 1346(b) (2006) (stating liability provisions under the Federal Tort Claims Act); 42 U.S.C. § 239–239h (listing liability provisions for Smallpox Compensation Program).

267. Congress had immunized nuclear weapons contractors from suits for damages in 1985. *See* HENRY COHEN, CONG. RESEARCH SERV., 95-717 A, FEDERAL TORT CLAIMS ACT: CURRENT LEGISLATION AND JUDICIAL ISSUES 13–15 (2001). The federal government,

Instead, these compensation programs “fit with the national penchant for righting old wrongs, which seemed to pervade Washington during this period.”²⁶⁸

D. Types and Amounts of Compensation Awarded

The nature of the compensation awarded, and the monetary and nonmonetary components of the award, vary substantially among the different compensation programs. In cases where the petitioner has died, the Vaccine Program, as well as the Smallpox Compensation Program and the Countermeasures Program, award a statutorily determined amount of \$250,000 to the family.²⁶⁹ No specific death benefit was provided in the September 11th Fund legislation; the average amount awarded in that program by the special master in a death case was \$2,082,035.²⁷⁰ In both the Japanese–American internment program and the Radiation Program, the family was eligible to receive the full amount of compensation that would have been awarded to the deceased.²⁷¹

Two of the compensation programs, the Radiation Program and the Japanese–American internment compensation program, provided “compensation” consisting of an official government apology and a limited monetary award. In the Radiation Program, qualified individuals received between \$50,000 and \$100,000; in the Japanese–American internment compensation program, the monetary award was fixed at \$20,000. The partial monetary awards in these two programs served very different purposes. The \$20,000 award in the Japanese–American compensation internment program represented a meaningful, non-*de minimis* payment reinforcing the seriousness of the apology, which might have seemed hollow if it was only words, unaccompanied by a respectful gesture of monetary payment. Acceptance of the compensation and the apology allowed many Japanese–Americans to feel some measure of closure over their internment. In contrast, the partial monetary payments made in the Radiation Program were intended to provide some funds to pay for medical care or related services for sick or injured individuals. Acceptance of these limited payments proved especially problematic for many persons with serious medical conditions, such as former atomic workers who had developed

and not private companies, had been responsible for the Japanese–American internment process.

268. TITUS, *supra* note 163, at 153.

269. See 42 U.S.C. §§ 239e(a), 3796(a); *id.* § 247d-6e(b)(2); *id.* § 300aa-15(a)(2).

270. FEINBERG, *supra* note 219, at 116.

271. 50 U.S.C. app. § 1989b-4(a)(8) (2006); 42 U.S.C. § 2210 note (Radiation Exposure Compensation § 6(c)(4)).

cancer, where the provided compensation did not come close to covering their medical needs.

The Vaccine Act's mandate in injury cases was to provide complete, not partial, compensation for present and future medical needs, including all necessary and appropriate future therapeutic and related care, with no caps or specific limitations, plus additional money for pain and suffering (capped at \$250,000), and lost income (with certain limitations). Both the Smallpox Program and the Countermeasures Program have substantial limitations and caps on the compensation awarded that make them much less petitioner-friendly programs than the Vaccine Compensation Program.²⁷²

E. The Role of Judicial Review

The three most recent compensation programs—the Smallpox Program, the September 11th Compensation Fund, and the Countermeasures Program—do not allow judicial review of final decisions involving eligibility for compensation. The other three compensation programs do provide for judicial review, and the availability of judicial review has played a meaningful role in these programs.

There have been many important decisions from the U.S. Court of Appeals for the Federal Circuit that have defined the parameters of the Vaccine Act, and instructed the special masters on what criteria to apply in deciding cases, as was discussed in detail above. The Japanese–American internment compensation program also allowed judicial review, and several appeals were filed in court from denials of compensation. Most of these cases focused on the requirement in the Act that the individual was either forced to enter a camp or was “otherwise deprived of liberty” by governmental action during that time period.²⁷³ The court decisions played an important role in determining when an individual was “deprived of liberty” within the meaning of the Act, and therefore entitled to compensation.²⁷⁴ The Radiation Exposure Compensation Program also

272. See *supra* notes 193–200, 255–258 and accompanying text.

273. 50 U.S.C. app. § 1989b-7(2)(B)(i).

274. There are eight reported appeals from denials of compensation in the Japanese–American internment compensation program. Three appeals concluded that compensation was appropriate because the petitioners had shown that they satisfied the eligibility criteria: *Ishida v. United States*, 59 F.3d 1224, 1234 (Fed. Cir. 1995) (holding that petitioner born to parents of Japanese ancestry during the internment period is entitled to redress); *Odow v. United States*, 51 Fed. Cl. 425, 433 (2001) (ruling that federal curfews and travel restrictions preventing petitioner from returning to her home and limiting how far she could travel were sufficient restrictions on her liberty to justify compensation); *Sato v. United States*, 33 Fed. Cl. 818, 822 (1995) (determining that children born after parents fled their home during the detention period, who were thereafter prohibited by law from returning home, were

authorized judicial review, and the Court of Appeals helped define a number of the important provisions of the Act.²⁷⁵ Judicial review has thus played an important role in the three compensation programs that authorized it. There have been a number of appellate decisions in all three programs that have defined key terms in these statutes, sometimes reversing the denials of eligibility for compensation, and providing oversight of agency decision making.

F. Future of the Compensation Program Model

There has been substantial scholarly debate on the desirability of using the compensation program model to provide redress in mass tort situations. Thirty years ago, Professor Richard J. Pierce, Jr. argued that the tort system had failed to encourage safety or reduce accident costs, and he proposed the creation of a large new federal compensation program that would be responsible for compensating victims of virtually all accidents or safety-related injuries in America.²⁷⁶ Other scholars have argued for the creation of specific compensation programs, such as a permanent federal compensation program for victims of domestic terrorist attacks.²⁷⁷ Others

sufficiently deprived of liberty to justify compensation). Five cases affirmed the denial of compensation: *Murakami v. United States*, 398 F.3d 1342, 1353 (Fed. Cir. 2005) (refusing to grant relief to a petitioner, born to parents of Japanese ancestry under the Act, based on the alleged constitutional harms suffered by his father); *Higashi v. United States*, 225 F.3d 1343, 1349 (Fed. Cir. 2000) (stating that petitioner born to parents of Japanese ancestry after restrictions on parents were rescinded not eligible for redress); *Kaneko v. United States*, 122 F.3d 1048, 1053–54 (Fed. Cir. 1997) (holding that petitioner of Japanese ancestry was not eligible for compensation where termination of his employment with a railroad was not due to government action); *Shibayama v. United States*, 55 Fed. Cl. 720, 745 (2002) (concluding that petitioner of Japanese ancestry who was not a citizen or permanent resident during the internment period is not eligible for redress under the Act); *Obadele v. United States*, 52 Fed. Cl. 432, 442 (2002) (holding that Americans of African ancestry do not have a right to seek reparations under the Act), *cert. denied*, 540 U.S. 876 (2003).

275. See, e.g., *Sharp v. United States*, 80 Fed. Cl. 422, 429 (Fed. Cl. 2008) (holding that RECA payments and Department of Veterans Affairs benefits offset each other); *Hackwell v. United States*, No. 04-cv-00827-EWN, 2008 U.S. Dist. LEXIS 56641, at *23 (D. Colo. 2008) (stating that limitations on payment of attorneys' fees do not include expenses incurred in the litigation); *Howell v. Reno*, 939 F. Supp. 802, 807–09 (D. Colo. 1996) (ruling that RECA can constitutionally distinguish between cigarette smokers and nonsmokers in determining eligibility for compensation).

276. Richard J. Pierce, Jr., *Encouraging Safety: The Limits of Tort Law and Government Regulation*, 33 VAND. L. REV. 1281, 1320 (1980).

277. See Betsy J. Grey, *Homeland Security and Federal Relief: A Proposal for a Permanent Compensation System for Domestic Terrorist Victims*, 9 N.Y.U. J. LEGIS. & PUB. POL'Y 663, 749 (2006).

have argued that the compensation program model should be abandoned in favor of reform of the tort laws.²⁷⁸

The experience of the compensation programs adopted by Congress in recent years present a mixed picture of success and failure. The Smallpox Program for first responders failed in part because of its inadequate injury compensation plan. The Countermeasures Compensation Program was totally dysfunctional for almost five years, with no procedural rules in place to process cases. The September 11th program is generally agreed to have been a successful compensation program that provided compensation quickly, transparently, and with relative generosity. The Vaccine Compensation Program does some things well, but also continues to have serious problems.

IV. PROPOSALS TO FIX THE VACCINE COMPENSATION PROGRAM

The Vaccine Injury Compensation Program has succeeded very well in accomplishing many of its objectives, particularly in providing excellent liability protection for the pharmaceutical industry that makes the vaccines, as well as the doctors and other healthcare providers who administer them. The interests of federal health officials have also been largely satisfied, as there has been a generally constant supply of vaccines available to the public, and a large percentage of the American public receive the inoculations.

However, Congress's other objectives of ensuring that the Compensation Program works "quickly, easily, and with certainty and generosity"²⁷⁹ have not been satisfied. This Article proposes a number of changes that would allow the Vaccine Act to much more effectively fulfill these important goals.

A. Adopt a Legal Standard of Proof More Generous to Petitioners

The Vaccine Act currently requires petitioners to prove their cases by the "more likely than not" or "preponderance of the evidence" standard.²⁸⁰ There is substantial confusion and uncertainty in applying this standard today. Several recent Federal Circuit decisions, emphasizing Congress's compassionate intent in the statute, have held that "close calls regarding causation" should be resolved in favor of petitioners,²⁸¹ while other recent Federal Circuit cases have emphasized that traditional tort causation

278. See Conk, *supra* note 260, at 257.

279. H.R. REP. NO. 99-908, pt. 1, at 3 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6344, 6344.

280. 42 U.S.C. § 300aa-13(a)(1) (2006).

281. *Andreu v. Sec'y of Health & Human Servs.*, 569 F.3d 1367, 1378 (Fed. Cir. 2009); *Walther v. Sec'y of Health & Human Servs.*, 485 F.3d 1146, 1150 (Fed. Cir. 2007); *Althen v. Sec'y of Health & Human Servs.*, 418 F.3d 1274, 1280 (Fed. Cir. 2005).

standards should be strictly applied in off-Table cases.²⁸² This has created an unpredictable and confusing situation. Congress should act to clarify the burden of proof requirement central to the resolution of off-Table cases.

In this Author's view, the Vaccine Act should be amended to allow petitioners the benefit of a more explicitly relaxed standard of proof of causation, similar to the standard of proof adopted for petitioners in other recent American and international compensation laws, which give petitioners the "benefit of the doubt" in close cases.²⁸³ Several of the other recent federal compensation laws have adopted more relaxed standards of proof for petitioners. The Radiation Exposure Compensation Act provides that any "reasonable doubt with regard to whether a claim meets the requirements of this Act shall be resolved in favor of the claimant."²⁸⁴ The Japanese-American internment compensation law contained a "benefit of the doubt" provision that mandated compensation if there was "an approximate balance of positive and negative evidence" with respect to a claimant's eligibility.²⁸⁵ Similarly, the Department of Veterans Affairs statute provides that an injured veteran is entitled to the benefit of the doubt on whether the veteran is entitled to disability compensation in a close case.²⁸⁶ There are also a number of international compensation programs that have adopted a more lenient standard for petitioners to satisfy.²⁸⁷ This generous standard should be incorporated into the Vaccine

282. *Moberly v. Sec'y of Health & Human Servs.*, 592 F.3d 1315, 1322–23 (Fed. Cir. 2010); *De Bazan v. Sec'y of Health & Human Servs.*, 539 F.3d 1347, 1351 (Fed. Cir. 2008).

283. An excellent article advocating for a "benefit of the doubt" standard favoring petitioners in vaccine cases is Katherine E. Strong, Note, *Proving Causation Under the Vaccine Injury Act: A New Approach for a New Day*, 75 GEO. WASH. L. REV. 426 (2007). Adopting this standard would increase the payments made from the vaccine fund, but the fund has had a substantial surplus that should not make this a problem. See U.S. DEP'T OF THE TREASURY, VACCINE INJURY COMPENSATION TRUST FUND 75X8175 at 5 (2011), <ftp://ftp.publicdebt.treas.gov/dfi/tfmb/dfivi0811.pdf>.

284. 42 U.S.C. § 2210 note (Radiation Exposure Compensation § 6(b)(1)).

285. 50 U.S.C. app. § 1989b-4(a)(3) (2006).

286. 42 U.S.C. § 300aa-13(a)(1).

287. For example, the Claims Resolution Tribunal for Dormant Accounts in Switzerland, which provides compensation for victims whose assets were deposited in Swiss banks and then lost during the reign of the Nazis, are only required to show that it is "plausible" that they are entitled to compensation. The CRT Rules of Procedure, Article 17, as amended, provides that: "Each Claimant shall demonstrate that it is plausible in light of all the circumstances that he or she is entitled, in whole or in part, to the claimed Account." CLAIMS RESOLUTION TRIBUNAL, RULES GOVERNING THE CLAIMS RESOLUTION PROCESS (AS AMENDED) 10 (2000). Similarly, the United Nations Compensation Commission, established to pay compensation for injuries suffered as a result of Iraq's invasion and occupation of Kuwait, required that a claim be supported by "appropriate evidence sufficient to demonstrate the circumstances and amount of the claimed loss," with a "lesser degree" of documentary evidence necessary "for smaller claims." Decision Taken

Act. It is justified by both the compassionate intent of Congress in adopting the Vaccine Injury Compensation Program, and the uncertainty and unknowns in the vaccine-injury area that often make it very difficult to show a causal relationship between a vaccination and a subsequent adverse event.

B. Provide that All Provisions of the Vaccine Act Be Construed Liberally

As noted above, there are unresolved questions about the underlying philosophy of the Vaccine Act. The Act is sometimes described as a generous compensation statute that should be liberally construed in favor of compensating injured parties, but it has also been described as a statute waiving sovereign immunity that is to be strictly construed in favor of the government. There is language in the Federal Circuit's decisions supporting both points of view.²⁸⁸ It would be desirable for Congress to resolve these inconsistent rulings. Congress should recognize that the compassionate intent behind the Act is best embodied in a generous application of its terms that will allow the Vaccine Compensation Program to operate with the "generosity" that Congress intended.²⁸⁹

C. Amend and Expand the Statute of Limitations

The current statute of limitations provision contained in the Vaccine Act²⁹⁰ requires a person to file a claim within three years of the first onset of the manifestation of an illness, or within two years after a death (and within four years of the first symptom that lead to the death). According to the Federal Circuit's *Brice* decision, if the petition is filed late, the court has no jurisdiction to consider it, and there can be no equitable tolling of the statute to permit excusable failures to meet the statutory deadlines.²⁹¹ Many petitioners have missed filing deadlines for reasonable and potentially excusable reasons, such as in *Brice*, where the pro se petitioners were facing

by the Governing Council of the United Nations Compensation Commission at the 27th Meeting, Sixth Session, held June 26, 1992, at 19, U.N. Doc. S/AC/.26/1992/10 (June 26, 1992).

288. Compare *Andreu v. Sec'y of Health & Human Servs.*, 569 F.3d 1367, 1378–80 (Fed. Cir. 2009) (holding that causation standards are to be liberally construed in generous compensation law), with *Moberly v. Sec'y of Health & Human Servs.*, 592 F.3d 1315, 1322–23 (Fed. Cir. 2010) (declaring that traditional tort standards should be strictly applied in off-Table cases).

289. H.R. REP. NO. 99-908, pt. 1, at 3 (1986), reprinted in 1986 U.S.C.C.A.N. 6344, 6344.

290. 42 U.S.C. § 300aa-16(a)(2)–(3).

291. *Brice v. Sec'y of Health & Human Servs.*, 240 F.3d 1367, 1367–68 (Fed. Cir.), cert. denied 534 U.S. 1040 (2001).

delays in getting complete medical records to file along with the petition, while simultaneously trying to find an attorney to represent them.²⁹² The statute should be amended to extend the time for filing both injury and death cases. Three years is an unnecessarily short time limit to file a petition in the Vaccine Program. The HHS Advisory Committee on Childhood Vaccines recommended a six-year statute of limitations, and bills proposing the six-year period have been introduced in Congress.²⁹³ A modification to six years, or even ten years, would reflect the basic “generous” purpose of the Vaccine Act.²⁹⁴ In addition, equitable tolling should be allowed, as determined by the courts, on a case-by-case basis. Once a new statute of limitations has been adopted, the special masters should also have the option of reconsidering old cases dismissed for late filing that would have met the new statute of limitations deadline.

D. Fix Attorney Compensation Problems

The payment of attorneys’ fees and costs has generated considerable litigation in the Vaccine Program. The statute should be amended to pay appropriate market rates for these complex vaccine injury cases,²⁹⁵ and make both interim and final fee payment procedures quicker, less adversarial, and more predictable.²⁹⁶ The U.S. Court of Federal Claims currently has a dedicated and experienced, but small, bar of petitioners’ counsel, and it must support those attorneys with reasonable, promptly paid fees. This is also necessary to encourage other experienced attorneys to assist in these cases in the future. The switch to predominantly off-Table cases in the Program has also resulted in cases that are often much more complex, both medically and legally, requiring substantially greater time and work, and imposing higher expert witness fees and other costs that the court must pay promptly and fully.

292. *Id.* at 1369.

293. *See, e.g.*, National Vaccine Injury Compensation Program Improvement Act of 2008, H.R. 6391, 110th Cong. § 7 (2008).

294. H.R. REP. NO. 99-908, pt. 1, at 3.

295. The Federal Circuit has held that attorneys’ fees are to be calculated using the rate of the forum where the case is pursued. *Avera v. Sec’y of Health & Human Servs.*, 515 F.3d 1343, 1348 (Fed. Cir. 2008).

296. *Avera* also held that the special masters could grant interim payments of attorneys’ fees and costs in appropriate circumstances. *Id.* at 1352. No effective process has yet been developed before the special masters to make interim fee payments quicker and more predictable. Unless the courts act to remedy this on an administrative level, the attorney fee section of the Vaccine Act, 42 U.S.C. § 300aa-15(e) (2006), could be amended to provide for the prompt payment of interim fees according to a formula provided by Congress.

E. Allow Parents to Sue for Their Own Injuries

As currently drafted, the Vaccine Act allows only the party directly injured by the vaccine to bring a claim for compensation under the Act.²⁹⁷ As a result of this limitation, the Vaccine Act provides no protection for manufacturers or doctors being sued by family members of vaccine-injured persons for injuries recognized by state law, such as loss of companionship and loss of consortium.²⁹⁸ The Vaccine Act should be amended to allow the parents of a minor child, or the spouse of an adult, to be named as an additional party to the case, in order to seek compensation for their own pain and suffering, lost income, and expenses incurred. Of course, if such a petitioner accepts the award in the vaccine case, the petitioner must forgo the possibility of collecting an award in a separate civil action.

F. Raise the Caps on Death Benefits and Pain and Suffering Benefits

Under the Vaccine Act, as originally enacted in 1986, the payment for a vaccine-related death is a one-time lump sum payment of \$250,000. Similarly, compensation for any pain and suffering that an injured petitioner may have experienced, and will likely experience in the future, is capped at \$250,000.²⁹⁹ Even assuming that \$250,000 was appropriate when the law was first adopted, \$250,000 in 1986 dollars is not the same as \$250,000 in 2010 dollars. Accounting only for inflation, \$250,000 in 1986 dollars is equivalent to over \$500,000 in 2011 dollars.³⁰⁰ The awards in death cases should be raised to this amount, not only to reflect the actual value of the award in 2011 dollars, but also to better reflect the value of a human life, and to reach a result more consistent with the awards made in

297. See 42 U.S.C. § 300aa-13(a)(1).

298. Several decisions have held that the Vaccine Act only applies to the person injured by the vaccination, and that family members are not precluded from bringing their own civil action for compensation for injuries such as loss of companionship and loss of consortium. *Moss v. Merck & Co.*, 381 F.3d 501, 505 (5th Cir. 2004); *Schafer v. Am. Cyanamid Co.*, 20 F.3d 1, 5 (1st Cir. 1994); *McDonald v. Lederle Labs.*, 775 A.2d 528, 535 (N.J. Super. Ct. App. Div. 2001).

299. In fact, in this Author's experience, the statutory cap of \$250,000, as currently interpreted by the special masters, means that the total amount assigned to pain and suffering can virtually never be \$250,000, because any money allocated to future pain and suffering is reduced to present day value, but money allocated to past pain and suffering is not increased to present day value.

300. The U.S. Bureau of Labor Statistics Inflation Calculator indicates that \$250,000 in 1986 had the same buying power that \$516,754 has in 2011. See *CPI Inflation Calculator*, U.S. BUREAU OF LABOR STATISTICS, <http://data.bls.gov/cgi-bin/cpicalc.pl> (last visited Sept. 24, 2011). The Vaccine Compensation Program routinely uses Bureau of Labor Statistics calculations in computing final damage awards.

the September 11th program. Similarly, the cap for pain and suffering should also be raised to \$500,000, to reflect the value of the award in 2011 dollars, and to more accurately reflect the value of the pain and suffering that many people with seriously injuries suffer for their entire lives.

G. Allow Expenses for Guardianships and Conservatorships and Family Counseling

Petitioners are sometimes required to set up court-ordered guardianships and conservatorships in state court as part of a vaccine case settlement. The expenses in setting up these proceedings have been considered reimbursable expenses to the petitioner in some cases, but not in other cases in the Vaccine Program. It would be fair and appropriate to compensate petitioners for these expenses in all cases, because they are incurred only as a result of court-mandated procedures in the vaccine case. Expenses for family counseling services are generally not reimbursable to petitioners today. These services can be of critical importance to the injured person and their family members, and should also be reimbursable to petitioners. In addition to these suggestions for legislative action, there are important steps the Court of Federal Claims and the Government Accountability Office could take.

H. The Court of Federal Claims Should Undertake a Comprehensive Review of the Vaccine Injury Compensation Program

The U.S. Court of Federal Claims, perhaps under the leadership of the Chief Judge and the Chief Special Master, could convene meetings at which all the applicable stakeholders, including attorneys from petitioners' bar, the Department of Justice, the Department of HHS, the special masters, and advocates for vaccine-injured individuals could discuss the operation of the compensation program and seek some consensus on measures that could be taken to improve it. The court does facilitate dialogue among the participants through Process Committee meetings, brown bag lunches, conferences, and other mechanisms. However, these mechanisms have proven insufficient to address the serious ongoing systemic problems with the Vaccine Compensation Program.

I. The GAO Should Conduct Another Oversight Review of the Program

The U.S. Government Accountability Office has conducted a number of evaluations of the Vaccine Injury Compensation Program over the years, and it has documented a number of serious problems in the operation of the program, including delays in resolving cases, the overly adversarial nature of the cases, and problems with payment of attorneys' fees. The

GAO has a long history of reviewing this compensation program, but it has been more than a decade since the GAO conducted a comprehensive review. It would be desirable for the GAO to investigate and report on the current operations of, and problems with, the Vaccine Compensation Program, as discussed in this Article. The flaws in the current operation of the Vaccine Injury Compensation Program should be investigated and fixed.

CONCLUSION

The Vaccine Injury Compensation Program is no longer the quick, informal, and less adversarial program that Congress intended it to be—and that it was in its early years, when the program focused on cases involving the law’s innovative Vaccine Injury Table. The Vaccine Program has changed substantially over the past two decades, with more complex, time-consuming, and controversial off-Table cases predominating the court’s docket today and for the foreseeable future. In light of these changes and the lessons learned from the five other major compensation programs that Congress has passed in the years since the adoption of the Vaccine Act, this Article argues for a number of statutory changes, including a lowered burden of proof for petitioners, so that the Vaccine Act can operate in the manner that Congress intended and that petitioners deserve.

The Vaccine Act has succeeded in satisfying the interests of vaccine manufacturers, the interests of doctors and other healthcare providers, and the interests of the federal health agencies involved in the vaccine area. However, the Act has not succeeded in satisfying the interests of the petitioners. While the Vaccine Program does a number of things well, it must be substantially reformed to become much friendlier to petitioners if it is to fulfill the final key Congressional goal of insuring that the interests of those people who are injured by vaccines will receive compensation that is provided “quickly, easily, and with certainty and generosity.”³⁰¹

301. See H.R. REP. NO. 99-908, pt. 1, at 3 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6344, 6344.

COMMENT

SETTING LABOR POLICY PROSPECTIVELY: RULEMAKING, ADJUDICATING, AND WHAT THE NLRB CAN LEARN FROM THE NMB'S REPRESENTATION ELECTION PROCEDURE RULE

EMILY BAVER*

TABLE OF CONTENTS

Introduction.....	854
I. The NLRB and Rulemaking: A History of Apprehension and Avoidance.....	858
A. The NLRB's Ability and Reluctance to Engage in Rulemaking.....	859
1. Political Concerns with Increased Rulemaking	860
2. Judicial Review Concerns with Increased Rulemaking.....	862
3. Ossification Concerns with Increased Rulemaking.....	863
II. Arguments for Increased Rulemaking at the NLRB.....	865
III. Case Study of the NMB Representation Election Procedures.....	868
A. NMB's Rulemaking Procedures.....	869
1. The Proposed Rule Change.....	869

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a.	Selecting Less Controversial Policies Ripe for Rulemaking.....	870
b.	Promoting Internal Cooperation Among Members.....	872
2.	Comments and Statutory Ossification Imposed a Low Burden.....	875
3.	The Final Rule.....	879
B.	The Litigation: How the NMB's Processes Paid Off.....	881
1.	Motion for Expedited Discovery.....	882
2.	The Decision.....	884
3.	Post-Decision: Appeal, Effect of the Rule, and Congressional Intervention.....	887
IV.	Looking Ahead: The NLRB's Most Recent Notice of Proposed Rulemaking.....	889
	Conclusion.....	891

INTRODUCTION

For years, scholars have criticized the National Labor Relations Board's (NLRB's or Board's) reliance on adjudication rather than rulemaking.¹ The use of adjudication rather than rulemaking is problematic for the NLRB because of continued “policy oscillation”—frequent changes in agency policy between presidential appointments—in Board adjudications, which “sows disrespect for the agency.”² Additionally, the NLRB's sole use of adjudication precludes public participation, encourages fact-specific policymaking, and fosters the problem of agency nonacquiescence.³

1. See generally Samuel Estreicher, *Policy Oscillation at the Labor Board: A Plea for Rulemaking*, 37 ADMIN. L. REV. 163 (1985); Joan Flynn, *The Costs and Benefits of “Hiding the Ball”: NLRB Policymaking and the Failure of Judicial Review*, 75 B.U. L. REV. 387 (1995); Mark H. Grunewald, *The NLRB's First Rulemaking: An Exercise in Pragmatism*, 41 DUKE L.J. 274 (1991); Cornelius J. Peck, *The Atrophied Rule-Making Powers of the National Labor Relations Board*, 70 YALE L.J. 729 (1961); Scott A. Zebrak, Comment, *The Future of NLRB Rulemaking: Analyzing the Mixed Signals Sent by the Implementation of the Heath Care Bargaining Unit Rule and by the Proposed Beck Union Dues Regulation*, 8 ADMIN. L.J. AM. U. 125 (1994).

2. See Estreicher, *supra* note 1, at 171 (noting that the Seventh Circuit denied enforcement in *Mosey Manufacturing Co. v. NLRB*, 701 F.2d 610 (7th Cir. 1983), because the policy at issue had oscillated seven times and the only changed circumstance was “in the Board's membership”).

3. See *id.* at 175 (expressing that agency nonacquiescence occurs when an agency pursues an issue rejected in one circuit in another to obtain a favorable result). For example, *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469, 470 (D.C. Cir. 2009), held that the National Labor Relations Board (NLRB or Board) could not decide unfair labor practice cases with only two members, but the Seventh Circuit held the opposite in *New Process Steel, L.P. v. NLRB*, 564 F.3d 840, 845–47 (7th Cir. 2009). Despite the unfavorable

Scholars argue that by rulemaking, the NLRB could ameliorate the appearance of political bias, articulate clear precedents, and encourage public participation in policymaking.⁴

Despite the promise of clearer precedents and a more politically neutral appearance, the NLRB has largely refrained from notice-and-comment rulemaking.⁵ The NLRB claims that rulemaking procedures are too rigid for union policymaking, which must be quick to respond to specific fact patterns.⁶ This raises ossification of rulemaking issues, including problems posed by the Regulatory Flexibility Act (RFA)⁷ and the Congressional Review Acts (CRA),⁸ and the threat of judicial review. The threat of congressional intervention also influences the NLRB's decision to refrain from rulemaking.⁹

There has been renewed scholarship criticizing the NLRB's avoidance of rulemaking and suggesting that the current Board is in a good position to begin rulemaking.¹⁰ Heeding scholars' pleas, on December 22, 2010, the

decision in the Court of Appeals for the District of Columbia Circuit, the NLRB continued to issue decisions with two Members until the Supreme Court resolved the circuit split against the NLRB. *See* *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635, 2645 (2010) (invalidating the NLRB's power to issue decisions before the President appointed new members because of a three-person quorum requirement).

4. *See, e.g.*, Estreicher, *supra* note 1, at 176 (arguing that rulemaking "should not[] prevent policy reversal," but should allow for more legitimate and certain laws); William B. Gould, IV, *New Labor Law Reform Variations on an Old Theme: Is the Employee Free Choice Act the Answer?*, 70 LA. L. REV. 1, 43 (2009) (noting rulemaking has a "stare decisis gravitas" as it invites public input).

5. *See, e.g.*, Jeffrey S. Lubbers, *The Potential of Rulemaking by the NLRB*, 5 FLA. INT'L UNIV. L. REV. 411, 412–13 (2010) (noting three recent attempts—only one of which was successful—at NLRB rulemaking).

6. *See* Brief for NLRB at 15, *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969) (No. 463) (explaining the NLRB's view that the "cumbersome process of amending formal rules would impede 'the law's ability to respond . . . to changing industrial practices'" (citation omitted)).

7. 5 U.S.C. §§ 601–612 (2006).

8. 5 U.S.C. §§ 801–808 (2006).

9. *See, e.g.*, Lubbers, *supra* note 5, at 420 (concluding that although the NLRB must address the Regulatory Flexibility Act (RFA) and Congressional Review Act (CRA) by performing additional analyses when rulemaking, ossification concerns should be minor); Note, *NLRB Rulemaking: Political Reality Versus Procedural Fairness*, 89 YALE L.J. 982, 995 (1980) [hereinafter *NLRB Rulemaking*] (arguing that the NLRB's use of adjudication lessens congressional and judicial oversight as rulemaking is more conspicuous than adjudicatory policymaking).

10. *See, e.g.*, Samuel Estreicher, *Improving the Administration of the National Labor Relations Act Without Statutory Change*, 25 A.B.A. J. LAB. & EMP. L. 1, 13–14 (2009) (arguing that the Obama Board should engage in rulemaking to stabilize fluctuating policies); Gould, *supra* note 4, at 44 (suggesting that the Obama Board should resume the rulemaking process that

NLRB issued its first notice of proposed rulemaking since its only recent successful rule in 1989 defining bargaining units in healthcare facilities.¹¹

In light of this renewed discussion about the benefits of rulemaking in the inherently political unionization context, this Comment will examine the recent and controversial representation election procedure rulemaking by the National Mediation Board (NMB)—the federal agency charged with overseeing labor relations in the railway and airline industries—as a point of comparison for the NLRB.¹² Both agencies are bipartisan, independent, and facing the challenge of regulating in a highly political industry.¹³ In November 2009, the NMB proposed a change in the way it counts union election ballots.¹⁴ For seventy-five years, the NMB’s election procedure required that a majority of all eligible voters in the voting class cast valid ballots in favor of representation to certify the union.¹⁵ Under the new rule, the NMB counts a majority of the valid ballots actually cast to determine if the class has elected a representative, a process which conforms to NLRB voting procedures.¹⁶ The NMB engaged in notice-and-comment rulemaking under the Administrative Procedure Act (APA), invited written

the Clinton Board was unable to complete “because of political pressure from a hostile Republican Congress”).

11. Proposed Rules Governing Notification of Employee Rights Under the National Labor Relations Act, 75 Fed. Reg. 80,410 (proposed Dec. 22, 2010) (to be codified at 29 C.F.R. pt. 104). *See generally* Grunewald, *supra* note 1 (suggesting that the NLRB model many of its future rulemaking procedures off of the procedures it used during the successful healthcare bargaining unit rulemaking).

12. *See* Gould, *supra* note 4, at 42 n.116 (recognizing the National Mediation Board (NMB) as an “analogue to the NLRB . . . in the railway and airline industries”); *see also* Lubbers, *supra* note 5, at 431 (noting that the NMB’s rulemaking is a “‘dress rehearsal’ for future NLRB rulemaking”).

13. The Railway Labor Relations Act (RLRA) establishes the NMB as a bipartisan “independent agency” composed of three members appointed by the President. 45 U.S.C. § 154, First (2006). Likewise, the National Labor Relations Act (NLRA) creates a bipartisan NLRB with five members “appointed by the President by and with the advice and consent of the Senate.” 29 U.S.C. § 153(a) (2006).

14. *See* Representation Election Procedure (NPRM), 74 Fed. Reg. 56,750, 56,750 (proposed Nov. 3, 2009) (codified at 29 C.F.R. pts. 1202, 1206 (2010)) (proposing a change in the NMB’s tallying procedures to “provide a more reliable measure/indicator of employee sentiment”).

15. *See id.* at 56,751–52 (describing that since 1935, abstentions from voting counted as a “no” vote).

16. *See id.* at 56,751 (relying in part on the similar language in the agencies’ statutes to justify the change).

submissions, and even held a public hearing on the issue¹⁷ before adopting the final rule on May 11, 2010.¹⁸

Controversy surrounded the rule change—the agency received almost 25,000 comments during its sixty-day comment period and heard thirty-one witnesses at the open hearing.¹⁹ Those who opposed the rule argued that the NMB rushed through the notice-and-comment process just before Delta, whose employees were traditionally anti-union, merged with Northwest, a traditionally pro-union organization.²⁰ Additionally, NMB Chairman Elizabeth Dougherty dissented from both the proposed and final rules, complaining that as the minority Republican member of the NMB she was given insufficient time to review the rule before its publication.²¹ Ultimately, the NMB successfully defended itself in the U.S. District Court for the District of Columbia against arguments that it lacked statutory support to alter election procedures, that the majority prejudged the issues involved, and that it lacked factual support to justify the policy change.²² Although the Air Transport Association (ATA) has appealed the decision,²³ the rule has also withstood a Senate joint resolution vote to return to the old election procedures.²⁴

Given the similarities between the NMB and the NLRB, the NMB's successful rulemaking attempt demonstrates that the NLRB has the wherewithal to engage in notice-and-comment rulemaking, and it should look to the NMB's procedures as a guideline for conducting rulemaking in the future. This Comment analyzes the predictive and instructive value of the NMB's representation election procedure rulemaking for the NLRB. Part I will explore why the NLRB has refrained from setting its agenda through notice-and-comment rulemaking in the past, including its political

17. See Meeting Notice, 74 Fed. Reg. 57,427 (Nov. 6, 2009) (inviting interested parties to share their views on the proposed changes in writing or orally during an open hearing).

18. Representation Election Procedure (Final Rule), 75 Fed. Reg. 26,062 (May 11, 2010) (codified at 29 C.F.R. pts. 1202, 1206).

19. *Id.* at 26,063.

20. See generally *Air Transp. Ass'n of Am. v. Nat'l Mediation Bd.*, No. 10-0804, (D.D.C. June 4, 2010) (order denying motion for expedited discovery) (rejecting the plaintiff's argument that the timing of the proposal proved that the NMB conspired to certify unions running for election at Delta).

21. Representative Election Procedures (Final Rule), 75 Fed. Reg. at 26,083 (Dougherty, Chairman, dissenting) (worrying that the public would perceive the rule as political because the majority excluded her from the rulemaking).

22. See generally *Air Transp. Ass'n of Am. v. Nat'l Mediation Bd.*, 719 F. Supp. 2d 26 (D.D.C. 2010) (denying the plaintiff's preliminary injunction and affirming the final rule).

23. *Air Transp. Ass'n of Am. v. Nat'l Mediation Bd.*, 719 F. Supp. 2d 26 (D.D.C. 2010), *appeal docketed*, No.10-5254, (D.C. Cir. Jul. 29, 2010).

24. S.J. Res. 30, 111th Cong. (2010). The Senate rejected it by a vote of 43 to 56. *Id.*

considerations, problems with judicial review, and complications caused by the RFA and the CRA. Part II will survey scholarship calling for increased rulemaking at the NLRB. Part III will conduct a case study of the NMB representation election procedure rulemaking—analyzing the rulemaking from its inception through the court decision—and will address how the process overcame the NLRB’s concerns about notice-and-comment rulemaking. Part IV will discuss the NLRB’s recent notice of proposed rulemaking, showing how it has mirrored the NMB rulemaking procedure, and make recommendations for the rule going forward. Finally, this Comment concludes that both the NMB and NLRB’s recent rulemaking activities demonstrate that the agencies can successfully set labor policy prospectively by using APA rulemaking correctly and carefully.

I. THE NLRB AND RULEMAKING: A HISTORY OF APPREHENSION AND AVOIDANCE

Since its inception, the NLRB has set its substantive policies by adjudicating rather than engaging in APA notice-and-comment rulemaking.²⁵ Although agencies can generally choose between rulemaking and adjudication to set policy, scholars as far back as the 1960s have criticized how the NLRB avoids notice-and-comment rulemaking.²⁶ This Part identifies the reasons the NLRB has been reluctant to engage in rulemaking.

25. See, e.g., Zembrak, *supra* note 1, at 126 n.4 (explaining that the NLRB has chosen to enforce almost all of its substantive policies exclusively through adjudications, with a few minor exceptions concerning rules about the jurisdictional standards for symphony orchestras, private colleges and universities, and horse racing); see also Lubbers, *supra* note 5, at 412 (noting that the NLRB completed its last successful rulemaking in 1989, when it issued a rule specifying collective bargaining units in healthcare facilities; since then the NLRB has proposed and withdrawn two substantive rules).

26. See *supra* note 1. Since *SEC v. Chenery Corp.*, the Supreme Court has recognized agencies’ ability to set policy by adjudication or rulemaking. 332 U.S. 194, 202 (1947) (holding that the Securities and Exchange Commission (SEC) had the discretion to promulgate a policy during “*ad hoc* adjudication” concerning the Federal Water Service Corporations’ reorganization plan); see also *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974) (affirming that the NLRB may choose how to form policy). *But see* *Retail, Wholesale & Dep’t Store Union v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972) (listing cases of first impression and abrupt departures from well-established practices as factors militating toward a finding of agency abuse of discretion).

A. NLRB's Ability and Reluctance to Engage in Rulemaking

Congress granted the NLRB statutory authority to engage in rulemaking in accordance with the APA.²⁷ Yet, the NLRB is unique among major federal agencies in making its policy almost exclusively through adjudication rather than rulemaking.²⁸ The history of substantive NLRB rulemaking is sparse; since 1970, the NLRB has promulgated very few substantive rules following the procedures set forth in § 553 of the APA.²⁹ The NLRB has chosen to pursue adjudication over rulemaking for several reasons. First, agencies may avoid rulemaking because it imposes a burden on staff trying to simultaneously adjudicate cases.³⁰ Second, agencies use adjudication rather than rulemaking to avoid setting clear policies susceptible to judicial intervention and overruling and to avoid the more binding effect that policies set in rulemaking have over precedential rules announced in adjudicatory opinions.³¹

The NLRB in particular has expressed reluctance to engage in notice-and-comment rulemaking, claiming that the rulemaking process is too rigid and inflexible for the labor industry and that adjudication “permits ‘gradual development of the law through specific fact patterns’”³² The complex areas the NLRB regulates—such as “secondary boycotts, picketing, [and] the duty to bargain in good faith”—supposedly evolve too quickly and unpredictably to accommodate rulemaking.³³ When adjudicating, on the other hand, the agency is free to amend its policies with less delay from public input and political pressure.³⁴

27. See 29 U.S.C. § 156 (2006) (“The Board shall have authority from time to time to make, amend, and rescind . . . such rules and regulations as may be necessary . . .”).

28. Flynn, *supra* note 1, at 388 (noting that although the NLRB is unlike any other major federal agency in not utilizing its rulemaking power, it is entitled to set policy through adjudication unless it disguises policymaking as fact-finding (citing *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 819 (1990) (Scalia, J., dissenting))).

29. See *supra* note 25 and accompanying text.

30. See Zebrak, *supra* note 1, at 128 (explaining that it may be more plausible for agencies to adjudicate because rulemaking requires a greater devotion of resources than adjudication, and doing both can be a financial burden).

31. See JEFFREY S. LUBBERS, *A GUIDE TO FEDERAL AGENCY RULEMAKING* 103 (3d ed. 1998) (noting that agencies must engage in subsequent rulemaking proceedings to change policies adopted in rules); Zebrak, *supra* note 1, at 128 n.16 (describing how courts require administrative agencies to provide reasons for departing from a policy set in a rulemaking).

32. Brief for NLRB at 15, *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969) (No. 463).

33. See *id.* (arguing that case-by-case adjudication creates labor policies that respond to “actual industrial experience” and better cater to the regulated).

34. See *NLRB Rulemaking*, *supra* note 9, at 999 (arguing that Congress is more likely to take notice of rulemaking proceedings because they are more public than adjudications).

This proffered reason disguises three of the agency's underlying concerns. First, rulemaking may attract congressional attention, making the agency's policies more susceptible to congressional intervention. Second, just as Congress is more likely to challenge a policy clearly stated in a rule, the Judiciary can more easily overturn agency policy developed during rulemaking than it can adjudicatory policies.³⁵ Third, rulemaking has become ossified in recent years, as Congress has enacted regulatory statutes that impose on agencies additional analytical requirements.³⁶ These concerns are each discussed below.

1. *Political Concerns with Increased Rulemaking*

"Labor relations is one of the most polarized and controversial subjects of national political debate,"³⁷ so it is unsurprising that the NLRB works to limit congressional intervention when setting national labor policy. Adjudications minimize the contact an agency has with Congress, as they set policy incrementally and disguise policies behind the factual circumstances of discrete cases.³⁸ If the NLRB engages in rulemaking, congressional intervention into policymaking might increase, and the agency fears this will undercut the flexibility it needs to adapt its policies to rapidly changing political and industrial conditions.³⁹

Even when adjudicating, the NLRB cannot avoid congressional contact altogether because it is an executive agency and derives its power from the National Labor Relations Act (NLRA).⁴⁰ The NLRB's contact with Congress, however, is mostly informal.⁴¹ The agency formally interacts with the Legislature when Congress confirms new members, issues

35. *See id.* (noting that increased congressional oversight and judicial review of policies set forth in rulemaking cause delay and impede the NLRB's function); *see also* Flynn, *supra* note 1, at 433–34 (suggesting that courts often overturn the NLRB's policy decisions without remanding).

36. *See, e.g.*, Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1391 (1992) (noting that the purpose of most statutes is to "accomplish progressive public policy goals," but ossification of the informal rulemaking process delays agencies from accomplishing their goals).

37. *NLRB Rulemaking*, *supra* note 9, at 988.

38. *See id.* at 995 (observing how the NLRB uses adjudication to adopt policies over time without articulating their implications, giving Congress no clear policy to attack).

39. *See id.* at 999 (finding that adjudication affords the NLRB independence to respond to changes in politics, which it does as new presidents appoint members from the dominant political party).

40. 29 U.S.C. §§ 151–169 (2006).

41. *See NLRB Rulemaking*, *supra* note 9, at 993 (noting that Congress mostly communicates with the NLRB privately, irregularly, and without exposing the agency to public scrutiny).

appropriations, and reviews the NLRB's annual report to Congress—but these contacts are routine and rarely controversial.⁴² Problems arise for the NLRB when congressional committees substantively review agency policies during oversight hearings, as Congress has used hearings to harass the Board in the past.⁴³ By “hid[ing] the ball” behind adjudicatory facts, adjudication may disguise policy choices, avoid attacks on the agency's use of empirical data during the rulemaking process, and avoid attracting congressional attention for a longer period of time.⁴⁴ Additionally, Congress can impose riders on the NLRB's appropriations to prevent it from using funds to enact policies, and rulemaking could expose the agency to such intervention.⁴⁵ The NLRB has refrained from rulemaking in part to avoid the “delay, administrative inconvenience, and harassment” that may come from clearly articulating labor policy.⁴⁶

However, a clear articulation of a policy decision will lead to a more legitimate final rule.⁴⁷ For example, the NLRB recently changed its

42. *See id.* (observing how Congress has confirmed every presidential nominee to the Board, has approved appropriations routinely, and has largely ignored the NLRB's annual report). Recently, Obama appointees have faced controversy from the Senate. Craig Becker, an Obama appointee to the NLRB, faced opposition from the Senate before Obama appointed him to the NLRB as a recess appointee. *See* Mark Hemingway, *Controversial National Labor Relations Board Nominee Craig Becker Shot Down in Senate*, WASHINGTONEXAMINER.COM (Feb. 9, 2010, 5:00 AM), <http://washingtonexaminer.com/blogs/beltway-confidential/controversial-national-labor-relations-board-nominee-craig-becker-shot-dow> (describing how the Senate prevented Obama's pick, Craig Becker, from being nominated to the NLRB because of his pro-union background); *see also* Hunton & Williams LLP, *President Makes Controversial Recess Appointments to NLRB and EEOC*, HUNTON EMP'T & LABOR PERSPECTIVES (Mar. 29, 2010), <http://www.huntonlaborblog.com/2010/03/articles/nlr-1/president-makes-controversial-recess-appointments-to-nlr-and-eoc/> (noting Obama's controversial recess appointment Craig Becker).

43. *See* Joan Flynn, “Expertness for What?": *The Gould Years at the NLRB and the Irrepressible Myth of the “Independent” Agency*, 52 ADMIN. L. REV. 465, 468 n.15 (2000) (identifying two oversight hearings in 1996 in which congressional Republicans criticized the Clinton Board's “apparent loss of respect for the rule of law” when they disapproved of Chairman Gould's leadership).

44. *See NLRB Rulemaking*, *supra* note 9, at 995 (contending that adjudicatory lawmaking results in the rule developing gradually over several years without giving Congress a clear policy).

45. Jeffrey M. Hirsch, *Defending the NLRB: Improving the Agency's Success in the Federal Courts of Appeal* 26 n.84 (Univ. of Tenn. Knoxville, Ctr. of Law, Legal Studies Research Paper No. 113, 2010) (forthcoming in FLA. INT'L U. L. REV. 2011), *available at* <http://ssrn.com/abstract=1660215> (recounting how Congress quashed the NLRB's proposed rule establishing single-location units by attaching riders to its budget).

46. *NLRB Rulemaking*, *supra* note 9, at 999.

47. *See* Catherine L. Fisk & Deborah C. Malamud, *The NLRB in Administrative Law Exile: Problems with Its Structure and Function and Suggestions for Reform*, 58 DUKE L.J. 2013, 2057–58

long-standing policy known as the “recognition bar,” whereby the NLRB will wait a reasonable amount of time before entertaining a petition to decertify a newly recognized union.⁴⁸ In *Dana Corp.*, the NLRB changed this policy to allow for decertification at any point after recognition by signed authorization card.⁴⁹ Neither the majority nor the dissent relied on factual evidence to support their conclusions and left their policy choices unexplained, which led to a confusing and unjustified policy change.⁵⁰ A notice-and-comment proceeding would have provided the agency “access to social science data or other factual research” to create a well-reasoned and explained policy choice.⁵¹

2. *Judicial Review Concerns with Increased Rulemaking*

Just as hiding the ball behind adjudicative facts shields the NLRB from congressional review, the NLRB fears that a shift to rulemaking would increase judicial oversight.⁵² The Judiciary reviews NLRB adjudications—but adjudicative legislation forces the reviewing courts to scrutinize the application of the policy to the discrete facts of the case, which insulates the policy from outright judicial rejection.⁵³ Judges review policies made during rulemaking in isolation, only examining the empirical data, legislative facts, and agency procedure found in the rulemaking record.⁵⁴

The NLRB fears that promulgating clearer policies through rulemaking will facilitate judicial imposition of individual judges’ own policy decisions,

(2009) (stating that the Bush II Board’s “methods and choices are [not] perceived as legitimate” because of its failure to articulate its policy decisions).

48. See *Keller Plastics E. Inc.*, 157 N.L.R.B. 583, 586 (1966) (“[C]ertification must be honored for a reasonable period, ordinarily 1 year in the absence of unusual circumstances . . .”).

49. See *Dana Corp.*, 351 N.L.R.B. 434, 441 (2007) (allowing immediate decertification where the employer chooses to recognize a union elected via informal signed authorization cards).

50. See *Fisk & Malamud*, *supra* note 47, at 2062 (articulating the undefended policy premises behind the *Dana* opinion, including a preference for allowing challenges to the validity of union recognitions).

51. *Id.* at 2065; see *Estreicher*, *supra* note 1, at 176 (noting that rulemaking allows agencies to analyze a broader range of empirical data than what parties to an adjudication present in their briefs).

52. *Flynn*, *supra* note 1, at 422 (noticing how the NLRB diverts the Judiciary’s attention from the policy to the facts in adjudication while rulemaking provides a clear policy target).

53. See *id.* at 413 (describing a “de jure/de facto” gap in adjudications—a difference between a policy and its application—which forces the courts to focus only on the policy’s application).

54. See *id.* at 417 (noting that courts can assess the agency’s accuracy when reviewing a rule, but have a harder time justifying reversing policies the NLRB promulgated to fit a set of facts).

especially where labor relations are concerned.⁵⁵ This assertion seems counter to the deferential role of the Judiciary after the creation of *Chevron* doctrine.⁵⁶ Yet scholars argue that while the Judiciary has always afforded the NLRB a deferential standard of review,⁵⁷ this has never deterred judicial hostility toward unions.⁵⁸ Judicial hostility toward collective bargaining increases the risk of judicial intervention, which leads to administrative “delay and uncertainty.”⁵⁹ Additionally, the NLRA contains no provision prescribing preenforcement judicial review in the courts of appeals, so challenges to rulemaking must first go through the federal district court and are subject to appeal.⁶⁰

3. *Ossification Concerns with Increased Rulemaking*

Some scholars have suggested that rulemaking has become “ossified” in recent years, which dissuades agency rulemaking.⁶¹ The concept of agency ossification denotes the idea that over the last few decades, Congress, the Judiciary, and the Executive Branch have imposed additional procedures for notice-and-comment rulemaking with the result “that the process has

55. See *id.* at 444–45 (arguing that the Judiciary has a persistent suspicion of and hostility toward the institution of collective bargaining); see also *NLRB Rulemaking*, *supra* note 9, at 999 (stating that courts’ lack of deference makes labor policy less able to respond to evolving circumstances).

56. See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984) (commanding courts to defer to any reasonable agency interpretation of its governing statute where Congress has not specifically spoken to the issue involved). NLRA language is ambiguous, which should leave the NLRB free to reasonably make policies. See, e.g., Cornelius J. Peck, *A Critique of the National Labor Relations Board’s Performance in Policy Formulation: Adjudication and Rule-Making*, 117 U. PA. L. REV. 254, 257 (1968) (noting the Act has “general provisions” and little legislative history, which leaves agencies free to interpret its provisions).

57. See *NLRB v. Baptist Hosp., Inc.*, 442 U.S. 773, 787 (1979) (stating that courts must defer to NLRB decisions that are rational and consistent with the Act).

58. See Flynn, *supra* note 1, at 439–40 (arguing that the *Lechmere* decision, where despite *Chevron* the Court overturned an agency interpretation and factual findings, illustrates judicial animus toward collective bargaining (citing *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992))).

59. See *id.* at 425 (“Judicial review has subjected [the NLRB] to . . . uncertainty” as courts disregard its policymaking agenda); see also R. Shep Melnick, *Administrative Law and Bureaucratic Reality*, 44 ADMIN. L. REV. 245, 257 (1992) (“[C]ourts often make a mess of policy because they have a poor understanding of administrative agencies . . .”).

60. See Lubbers, *supra* note 5, at 427–29 (calling for Congress to remove this unnecessary double judicial review procedure from the NLRA to facilitate rulemaking).

61. See generally LUBBERS, *supra* note 31 (describing how most agencies have moved from rulemaking to issuing informal guidance documents as rulemaking has ossified and decreased).

become . . . inefficient.”⁶² The RFA and the CRA are the primary statutes that apply to independent agencies like the NLRB, and each imposes additional procedural requirements when rulemaking.⁶³

First, any NLRB rulemaking will have to address the RFA,⁶⁴ which requires agencies to consider the impact that their proposed rules will have on small businesses and come up with less burdensome alternatives.⁶⁵ Unless the agency certifies to the Small Business Administration’s Chief Counsel for Advocacy that the rule will not have a significant impact on small businesses, the agency must prepare an initial regulatory flexibility analysis to be published in the *Federal Register* alongside the proposed rule.⁶⁶ If the rule will have a significant economic impact, the agency must also use special techniques to give small entities the opportunity to participate in the rulemaking process.⁶⁷ Although it is unclear how much of a burden the RFA imposes on the NLRB, an NLRB rule could have a significant impact on a substantial number of small businesses.⁶⁸

The CRA⁶⁹ requires that the agency submit all major rules of general applicability with impact statements to both Congress and the Comptroller General before rules take effect.⁷⁰ The Act’s purpose is to give Congress a fast way to disapprove agency rules, but its impact has been slight—although hundreds of rules go to Congress each month, Congress has only

62. Stephen M. Johnson, *Junking the “Junk Science” Law: Reforming the Information Quality Act*, 58 ADMIN. L. REV. 37, 61 (2006).

63. See Lubbers, *supra* note 5, at 420, 426 (noting that the National Environmental Protection Act (NEPA) also applies, as does reporting to the Office of Management and Budget (OMB) vis-à-vis Executive Order 12,866, but those requirements are insignificant to the NLRB). The Paperwork Reduction Act (PRA) may also pose an obstacle to the NLRB, which would require approval from the OMB for information collection requests. *Id.* at 420–21 (citing 44 U.S.C. § 3507(f) (2006)).

64. 5 U.S.C. §§ 601–612 (2006).

65. *Id.* § 603(a)–(c).

66. *Id.* § 605(b); see Lubbers, *supra* note 5, at 421–22 (explaining that the initial regulatory flexibility analysis is subject to judicial review).

67. See Lubbers, *supra* note 5, at 422 & n.60 (explaining additionally that if the rule has a significant economic impact, the agency must also publish a final regulatory flexibility analysis (citing 5 U.S.C. § 604(a))).

68. See *id.* at 422 (noting that, should the NLRB’s rule have a “significant economic impact on a substantial number of small entities . . . [it] would need to [perform] the requisite analysis” under the RFA). In the NLRB’s healthcare bargaining unit rule, the RFA imposed a slight burden on the NLRB, which issued a second notice of proposed rulemaking to add an RFA certification. *Id.*

69. 5 U.S.C. §§ 801–808 (2006).

70. A “major” rule has an impact of \$100,000, *id.* § 804(2)(A), and it has a delayed effectiveness of sixty days, *id.* § 801(a)(2)(B)(3)(A). A nonmajor rule goes into effect immediately. *Id.* § 801(a)(4).

ever disapproved of one using the CRA.⁷¹ It remains on the books as a potential tool for congressional intervention, but Congress uses the CRA so infrequently that the NLRB should not fear its impact when deciding to engage in rulemaking.⁷²

Additionally, the agency faces internal burdens when rulemaking,⁷³ and the NLRB is concerned that it lacks the capacity to concentrate on rulemaking without diverting its resources away from adjudication.⁷⁴ Rulemaking would be a more realistic prospect for the NLRB in the future if the agency had a staff of experts to call upon should it choose to create policy through the notice-and-comment process.⁷⁵

II. ARGUMENTS FOR INCREASED RULEMAKING AT THE NLRB

Despite these perceived drawbacks, scholars have been urging the NLRB to engage in rulemaking for years with little success.⁷⁶ Recently, scholars have renewed this discussion because the NLRB and the political climate in general are currently “more hospitable to collective bargaining.”⁷⁷ Professor Samuel Estreicher, for example, published an article suggesting that the NLRB engage in rulemaking to “promote certainty and establish a process likely to lead to better rules.”⁷⁸ Similarly, William Gould, a retired Chairman of the NLRB, suggested that the new Board “might be better served by engaging in rulemaking” instead of simply reversing old precedent.⁷⁹

71. See Lubbers, *supra* note 5, at 425 & n.78 (describing how Congress successfully used the CRA to overturn the Clinton Administration’s controversial Occupational Safety & Health Administration (OSHA) ergonomics regulations). See also Adam M. Finkel & Jason W. Sullivan, *A Cost-Benefit Interpretation of the “Substantially Similar” Hurdle in the Congressional Review Act: Can OSHA Ever Utter the E-Word (Ergonomics) Again?*, 63 ADMIN. L. REV. 707 (2011).

72. See LUBBERS, *supra* note 31, at 255–56 (explaining that although the CRA is basically moribund, agencies cannot be sure Congress will not oppose their final major rules).

73. See *id.* at 261–63 (stating that agencies now devote more resources to write longer preambles because courts rely on them during arbitrary and capricious review (citing *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983))).

74. See Grunewald, *supra* note 1, at 322 (suggesting the agency could solve this by hiring staff “that could be called upon to provide support regardless of the . . . subject of the rulemaking”).

75. See *id.* (indicating that in the wake of the healthcare bargaining unit rule, the NLRB should hire a staff of rulemaking experts to facilitate future rulemaking).

76. See sources cited *supra* note 1.

77. Gould, *supra* note 4, at 44 (arguing that the current NLRB should take advantage of its Democratic majority to reverse Bush II Board decisions permanently).

78. Estreicher, *supra* note 10, at 14.

79. Gould, *supra* note 4, at 44.

Rulemaking presents many advantages for the NLRB. First, policies promulgated through rulemaking set a clearly articulated standard and provide the public with more guidance as to their legal responsibilities.⁸⁰ It also encourages the agency to engage in empirical analysis when formulating policy, thus reaching a more reasoned decision.⁸¹ The NLRB recognized the value of such data when they decided to engage in notice-and-comment rulemaking to create a concrete rule preventing further confusion when defining healthcare bargaining units on a case-by-case basis.⁸²

Second, rulemaking leads to a fairer and more effective administration of the rule because it allows the NLRB to set agency policy prospectively, encourages interested parties to participate, and avoids relitigating ambiguities.⁸³ Rulemaking allows the agency to act in a quasi-legislative capacity and express its policy preferences, unlike its role in adjudicating where agency fact-finders are expected to be impartial.⁸⁴

Finally, rulemaking would reduce the problem of “policy oscillation” at the NLRB that occurs with every new Administration, and thus enhance public and judicial respect for the Board.⁸⁵ While not all subjects are

80. See Estreicher, *supra* note 1, at 173–74 (discussing why fact-specific policymaking results in hard-to-follow rules for the public); Flynn, *supra* note 1, at 394 (criticizing the NLRB for manipulating the adjudicatory process to disguise policymaking as fact-finding); Grunewald, *supra* note 1, at 282 (asserting that rulemaking provides clarity and stability).

81. See Estreicher, *supra* note 1, at 176 (declaring that collecting empirical data creates an aura of legitimacy); see also Administrative Conference of the United States Recommendations Regarding Administrative Practice and Procedures, 56 Fed. Reg. 33,841, 33,852 (July 24, 1991) (codified at 1 C.F.R. pt. 305 (1991)) (arguing that rulemaking allows the agency to analyze empirical data not collected in adjudications).

82. See Grunewald, *supra* note 1, at 293 (noting that the NLRB considered “whether rulemaking would stimulate the submission of useful empirical data” in deciding to make the rule).

83. See *id.* at 282 (emphasizing how rulemaking facilitates agency planning because accidental litigation facts do not influence policymaking); *id.* at 288–89 (noting the NLRB embraced rulemaking after the Ninth Circuit rejected and “misunderstood the Board’s rationale” for its healthcare bargaining unit adjudications).

84. See LUBBERS, *supra* note 31, at 103 (arguing that rulemaking procedures are more flexible for the agency because it does not have to separate its judicial from its policymaking function as it does when adjudicating). But see Alan B. Morrison, *Administrative Agencies Are Just Like Legislatures and Courts—Except When They’re Not*, 59 ADMIN. L. REV. 79, 91 (2007) (highlighting the difference between notice-and-comment rulemaking and congressional legislation, which does not require public participation).

85. See Estreicher, *supra* note 1, at 171 (policy oscillations foster court reluctance to defer to agency policymaking); Gould, *supra* note 4, at 43 (rulemaking would decrease policy oscillations because an agency can only overturn policy set in rulemaking by engaging in another rulemaking); Hirsch, *supra* note 45, at 26 (rulemaking would provide the NLRB with more judicial deference).

appropriate for rulemaking, the NLRB could engage in rulemaking when an issue has been highly litigated and requires further clarification, and where nationwide uniformity makes sense.⁸⁶ Further, the NLRB could prevent policy oscillations by rulemaking in areas that fluctuate frequently to create longer lasting policy and increase deference to the NLRB.⁸⁷ The Administrative Conference of the United States (ACUS) recommended that the NLRB identify subjects appropriate for rulemaking by considering the need for empirical data on the subject, the value of participation by the affected public, the need to establish stable policy in a subject area, and the degree to which rulemaking would curb future litigation and enforcement costs by setting clear policy.⁸⁸

Since policymaking via APA notice-and-comment rulemaking could benefit the NLRB's public image and create more stable agency policies, it is useful to analyze the recent rulemaking at the NMB—a “sister agency” of sorts to the NLRB in that it also deals with national labor relations, simply in a more narrow slice of the economy—and to pinpoint the ways in which the NMB successfully promulgated its new election rule despite the obstacles of rulemaking in a highly political industry.⁸⁹ The NMB faced challenges when it engaged in rulemaking in the labor industry: its members did not agree that rulemaking was the proper course of action,⁹⁰ trade organizations challenged the final rule in the District Court for the District of Columbia,⁹¹ and Congress tried to issue a joint resolution against the rule.⁹² However, the NMB carefully solicited comments from the interested public and issued a thorough final rule refuting opposing views, and the rule has so far survived judicial review.⁹³ The NLRB can use these

86. See Estreicher, *supra* note 10, at 13–14 (suggesting that the NLRB engage in rulemaking for nationwide uniformity to prevent disparate results in litigation in different circuits); Gould, *supra* note 4, at 42–43 (noting that rulemaking would save money where an issue is highly adjudicated).

87. See Hirsch, *supra* note 45, at 26 (finding rulemaking's “increased predictability” would strengthen judicial deference to the NLRB's clearly articulated policy decisions).

88. Administrative Conference of the United States Recommendations Regarding Administrative Practice and Procedures, 56 Fed. Reg. 33,841, 33,852 (July 24, 1991) (codified at 1 C.F.R. pt. 305 (1991)); see Estreicher, *supra* note 10, at 13 (recommending that the NLRB promulgate a rule describing a model authorization card used for ascertaining election interest and card majority).

89. Final Rule, 75 Fed. Reg. 26,062 (May 11, 2010) (codified at 29 C.F.R. pts. 1202, 1206 (2011)).

90. See *id.* at 26,083–89 (Dougherty, Chairman, dissenting) (arguing the NMB acted to aid unions).

91. *Air Transp. Ass'n of Am. v. Nat'l Mediation Bd.*, 719 F. Supp. 2d 26 (D.D.C. 2010).

92. See H.R.J. Res. 97, 111th Cong. (2010); S.J. Res. 30, 111th Cong. (2010).

93. See *infra* Part III.B. (examining the history of the rule since its promulgation).

techniques moving forward in its own rulemaking efforts to overcome obstacles and promulgate successful, long-lasting policies.

III. CASE STUDY OF THE NMB REPRESENTATION ELECTION PROCEDURES

Given the statutory and structural similarities between the NLRB and the NMB, the model of the NMB's procedures should be especially illuminating for the NLRB.⁹⁴ Congress created the NMB in the 1934 amendments to the Railway Labor Act (RLA)⁹⁵ so that "[e]mployees . . . have the right to organize and bargain collectively through representatives of their own choosing."⁹⁶ The NMB resolves representation disputes, certifies collective bargaining elections, and "establish[es] the rules to govern the election" of employees' representative unions.⁹⁷

The NMB is an independent, bipartisan agency composed of three members;⁹⁸ the NLRB is also a bipartisan, independent agency with an odd number of members "appointed by the President by and with the advice and consent of the Senate."⁹⁹ Moreover, § 2, Fourth of the RLA is quite similar in construction to § 9(a) of the NLRA, each requiring its respective agency to certify unions that have achieved a majority of votes in the craft or class.¹⁰⁰ Neither statute contains a provision for judicial review of

94. See Lubbers, *supra* note 5, at 431 (noting that the NMB is the NLRB's "sister agency").

95. Pub. L. No. 73-442, ch. 691 sec. 2, 48 Stat. 1185 (1934).

96. Railway Labor Act (RLA), 45 U.S.C. § 152, Fourth (2006).

97. *Id.* § 152, Ninth. The Supreme Court has afforded the NMB discretion to enforce election procedures. See *Bhd. of Ry. & S.S. Clerks v. Ass'n for the Benefit of Non-Contract Emps. (ABNE)*, 380 U.S. 650, 668-69 (1965) (stating that as long as the NMB "insure[s] freedom from carrier interference . . . [i]ts determinations . . . [are] not subject to judicial review").

98. 45 U.S.C. § 154, First. At least one member must be from an opposing party, appointed by the President with advice and consent of the Senate, and members are removable only for cause. *Id.*

99. National Labor Relations Act (NLRA), 29 U.S.C. § 153(a). The five NLRB members are appointed for five-year terms, and members are only removable for neglect of duty. *Id.*

100. The NLRA § 159(a) reads: "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit . . . shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining," while RLA § 152, Fourth reads, "The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class . . ." The NMB relied on the opinion of Attorney General Clark in 1947, stating that § 9(a) of the NLRA was modeled after § 152, Fourth of the RLA. See Representation Election Procedure (NPRM),

rulemaking in the courts of appeals.¹⁰¹ The similarities between the two agencies demonstrate that the NLRB can also successfully engage in notice-and-comment rulemaking, and it should look to the NMB's procedures as a guideline for its future rulemaking endeavors.¹⁰²

This Part will analyze the processes that the NMB used during its union election rulemaking, from its inception through the decision in the District Court for the District of Columbia, and discuss how the NMB overcame the NLRB's concerns about notice-and-comment rulemaking.

A. NMB's Rulemaking Procedures

1. The Proposed Rule Change

In moving forward with its future rulemaking activities, the NLRB should learn from the NMB's mistakes and triumphs by closely examining how the NMB followed APA procedures in going about its rulemaking, an adherence which allowed for meaningful participation and facilitated judicial approval of the final rule.¹⁰³ On November 3, 2009, the NMB published a notice of proposed rulemaking in the *Federal Register* proposing a change to its tallying mechanism during representation elections.¹⁰⁴ The RLA provides that a "majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class."¹⁰⁵ Under the old rule, the NMB interpreted this provision to require a majority of eligible voters in the craft or class to cast ballots in favor of a union, counting any abstentions as "no" votes.¹⁰⁶ The NMB had used the old interpretation since 1935 because it was based on "what seemed . . . best [to the 1935 Board] from an administration point of

74 Fed. Reg. 56,750, 56,751 (proposed Nov. 3, 2009) (codified at 29 C.F.R. pts. 1202, 1206 (2011)).

101. See Lubbers, *supra* note 5, at 427 (noting that the NLRA, like the RLA, does not provide for pre-enforcement review in the courts of appeals, making rulemaking potentially more onerous).

102. See, e.g., Gould, *supra* note 4, at 42 n.116 (describing the NMB as "an analogue to the NLRB on recognition issues in the railway and airline industries").

103. See *Air Transp. Ass'n of Am. v. Nat'l Mediation Bd.*, 719 F. Supp. 2d 26, 37–45 (D.D.C. 2010) (affirming the rule in part because of the detail with which the agency explained its reasoning and refuted commentators' concerns).

104. See generally Representation Election Procedure (NPRM), 74 Fed. Reg. 56,750 (proposed Nov. 3, 2009) (codified at 29 C.F.R. pts. 1202, 1206) (suggesting that the new procedure will better measure sentiment).

105. 45 U.S.C. § 152, Fourth (2006). The NMB has discretion to decide the manner in which that right should be exercised. *Id.* § 152, Ninth; *Virginian Ry. Co. v. Sys. Fed'n No. 40*, 300 U.S. 515, 560 (1937).

106. Representation Election Procedure (NPRM), 74 Fed. Reg. at 56,752.

view.”¹⁰⁷ The NMB proposed a new rule amending its long-held interpretation to mean that the majority of valid ballots cast would determine the craft or class representative, thus deeming an abstention to be indifference rather than an automatic “no” vote.¹⁰⁸ This Part will summarize two lessons the NLRB can learn from the NMB’s proposed rule: First, the NLRB may wish to select a less controversial rule to begin rulemaking, and second, the NLRB should work to promote internal agency harmony, even where members disagree over a rule change, to avoid appearances of political bias.

a. Selecting Less Controversial Policies Ripe for Rulemaking

Given its concern that rulemaking will attract unnecessary congressional and judicial attention, the NLRB may wish to choose less controversial areas to focus on than the NMB chose. The NMB’s controversial decision to change election procedures fueled the arguments against rulemaking.¹⁰⁹ Its representation election rule change was particularly controversial because the NMB had already twice rejected requests to alter the old rule.¹¹⁰ The NMB first considered the rule change in 1987 when the Chamber of Commerce petitioned to change the NMB’s decertification procedures to make it easier for employees to end the union relationship and the International Brotherhood of Teamsters requested a change in election procedures whereby a majority of voters would determine the election.¹¹¹ The NMB consolidated the requests and held a full evidentiary hearing with witnesses subject to cross-examination, but ultimately denied both requests because the NMB has “made it a policy to limit rulemaking activities only to those matters required by statute.”¹¹² Similarly, when during a disputed election at Delta in 2008, the Association of Flight

107. *Id.* at 56,751.

108. *Id.* at 56,750, 56,752.

109. *See id.* at 56,753 (Dougherty, Chairman, dissenting) (suggesting the rule survived several political eras and the NMB erred by abandoning its practice of proposing only essential changes).

110. *See generally* Chamber of Commerce, 14 N.M.B. 347 (1987) (declining to change a functional rule); Delta Air Lines, Inc., 35 N.M.B. 129 (2008) (deeming the change nonessential).

111. *See* Chamber of Commerce, 14 N.M.B. at 347, 349, 352 (describing how the Chamber of Commerce wished to change the decertification process, which is complex because the RLA contains no provisions for decertifying unions).

112. *Id.* at 355.

Attendants–CWA, AFL–CIO requested its election be subject to a “yes/no” ballot, the NMB refused the request.¹¹³

Despite its past decisions, the NMB issued the representation election procedure proposal one month after the Transportation Trades Department of the AFL–CIO wrote a letter to the Board requesting it to change its election policy and “allow employees to more effectively exercise their statutory right” to collectively bargain.¹¹⁴ This time, instead of holding a hearing on the proposal before initiating rulemaking procedures as it did in *Chamber of Commerce*, the NMB decided to use APA procedures to change the election rule.¹¹⁵ The APA does not require the NMB—or any agency—to hold a hearing or consider public comments before engaging in rulemaking.¹¹⁶ Yet, to quell appearances of political bias the agency could have been more careful to explain in the proposal the reason it changed the policy at this particular time, as opposed to in 2008 when it was last rejected.¹¹⁷ In her dissent, Chairman Dougherty argued that politics motivated the majority’s rule change, as the majority disregarded *Chamber of Commerce* and *Delta*’s mandate to proceed only with essential rules, and overturned a rule that “has been applied consistently for 75 years—including by Boards appointed by Presidents Roosevelt, Truman, Johnson, Carter, and Clinton.”¹¹⁸ Moving forward, the NLRB may wish to address any such issues carefully in its notices of proposed rulemaking through detailed explanation of the nonbiased circumstances that led to the decision, especially given the NLRB’s propensity to change its policies.¹¹⁹

However, the NLRB can take solace in the fact that even without addressing why it decided to change the rule at this time—as opposed to

113. See *Delta Air Lines, Inc.*, 35 N.M.B. at 129, 132 (rejecting the change as nonessential to uphold the RLA).

114. Letter from Transp. Trades Dep’t, AFL–CIO to the NMB (Sept. 2, 2009) (on file with Author).

115. See NPRM, 74 Fed. Reg. 56,750, 56,750 (proposed Nov. 3, 2009) (codified at 29 C.F.R. pts. 1202, 1206 (2011)) (noting that this proposal is a part of the agency’s “efforts to further the statutory goals of the Railway Labor Act”).

116. See 5 U.S.C. § 553(b) (2006) (providing that the Administrative Procedure Act (APA) requires only a general notice of proposed rulemaking to be published in the *Federal Register*).

117. The majority mentioned that the 2008 *Delta Air Lines* decision relied on the assumption that the old rule helped maintain labor stability, but that they now believed this stability was more directly related to the NMB’s mediation function. Representation Election Procedure (NPRM), 74 Fed. Reg. at 56,751. Yet, the dissent still argued that the NMB had not answered why views have changed at this particular time. See *id.* at 56,753 (Dougherty, Chairman, dissenting) (arguing that stability explanation is insufficient reason to depart from its past precedent).

118. *Id.* at 56,753.

119. See Estreicher, *supra* note 1, at 163–64 (noting the frequency and import of policy oscillations).

contemporaneously with the 2008 *Delta* election—the NMB wrote a detailed notice of proposed rulemaking that explained its reasons for the change in policy and survived judicial review.¹²⁰ The NMB published a thorough preamble delineating its justifications for the proposed rule change that spanned two pages of the *Federal Register*.¹²¹ The NMB first described its statutory authority to enact the change and discretion to interpret § 2, Fourth of the RLA.¹²² It drew on the similarity in language between this section of the RLA and § 9(a) of the NLRA to show that it had reasonably interpreted the RLA when enacting the new rule.¹²³ Further, the NMB stated that the election procedure would not hinder the labor stability because the low incidence of strikes among railway and airline unions was, in its opinion, more directly related to the NMB’s mediation function than to its representation functions.¹²⁴ Finally, the NMB described how changed circumstances since the enactment of the RLA justified this new rule.¹²⁵ Thus, the NLRB should carefully select issues for rulemaking that may be less controversial to acclimate itself to rulemaking, and should also explain in some detail its neutral reasons for the policy change to avoid appearances of political bias.

b. Promoting Internal Cooperation Among Members

Like the NMB, the members of the NLRB may split along ideological lines when deciding whether to create agency policy through rulemaking and also over the content of the policy.¹²⁶ The NMB’s notice of proposed rulemaking contained a dissent by the only Republican Member of the

120. *See infra* Part III.B.

121. Representation Election Procedure (NPRM), 74 Fed. Reg. at 56,750–52.

122. *Id.* at 56,751 (citing the opinion of Attorney General Tom C. Clark in 1947, stating that the NMB has the power to certify any organization which receives a majority of votes cast).

123. *Id.* (noting that the Attorney General’s opinion relied on the way in which the NLRB had interpreted its election procedures, especially because the House Committee report on the bill that became the NLRA contained a statement that the NLRA is “merely an amplification and further clarification of the principles enacted into law by the Railway Labor Act”).

124. *See id.* (stating that the RLA’s mandatory mediation process stabilizes labor relations).

125. *See id.* at 56,752 (finding the new rule is more democratic and prevents the NMB from substituting its opinion for that of the employee by registering an abstention as a “no” vote).

126. Republican Member Johansen dissented from the NLRB’s healthcare rule, for example, because the “language of the Act” foreclosed the rule. Collective-Bargaining Units in the Health Care Industry, 54 Fed. Reg. 16,336, 16,347 (Apr. 21, 1989) (codified at 29 C.F.R. pt. 103.30 (2011)).

NMB, Chairman Elizabeth Dougherty, who implied that politics influenced the majority's decision to change the old rule.¹²⁷ She argued that the NMB did not articulate a rationale for the policy reversal, that it lacked statutory authority to make such a change under the RLA, and that to be fair to both management and unions, the NMB must simultaneously consider changing decertification procedures.¹²⁸ Indeed, Chairman Dougherty pointed out that “this independent agency has never been in the business of making controversial, one-sided rule changes at the behest of only labor or management.”¹²⁹

By isolating Chairman Dougherty, the only Republican Member, the NMB attracted congressional attention. In a letter to several Republican senators written after the NMB published the notice of proposed rulemaking, Chairman Dougherty claimed that her colleagues had prejudged the issue. She argued that the majority excluded her from the drafting process, did not provide her with sufficient time to prepare a dissent, and denied her the opportunity to publish her full dissent in which she complained publically about the internal Board proceedings.¹³⁰ When an agency acts to relegate a Commissioner of a minority party, the agency is more likely to attract congressional interest—which can lead to the type of congressional intervention the NLRB fears.¹³¹ Up until this point, the NMB did not have contact with Congress regarding the proposed rule; so to quell its fears of congressional intervention, the NLRB may wish to allow dissenting member more time to formulate their arguments and publish them in the *Federal Register*.¹³²

127. See Representation Election Procedure (NPRM), 74 Fed. Reg. at 56,753 (Dougherty, Chairman, dissenting) (noting that “the composition of the Board” should not influence rule changes made “at the behest of only labor or management”).

128. *Id.* at 56,754 (faulting the majority for not requesting comment on “several related issues” including decertification procedures and soliciting comments on these issues specifically).

129. *Id.* at 56,753.

130. Letter from Elizabeth Dougherty, Chairman, Nat'l Mediation Bd., to Sens. McConnell, Isakson, Roberts, Coburn, Gregg, Enzi, Hatch, Alexander, and Burr (Nov. 2, 2009) (on file with Author) (describing that she had little time to review the proposal and that the NMB removed her complaints about the Board's “exclusionary” partisan behavior from the published dissent).

131. If the NLRB avoids rulemaking to avoid presenting an open “target” to Congress, it should not create internal dissension leading a member to reach out to Congress specifically. *Cf.* Flynn, *supra* note 1, at 412 (noting that “it in no way benefits the Board to alert Congress to a judgment it has made in a politically divisive area”).

132. The APA does not contain a publication requirement for dissenting views. See 5 U.S.C. § 553(b) (2006) (requiring the NPRM to only contain a statement of basis and purpose and legal grounds for the rule change to constitute constructive notice).

The split among the NMB members along party lines evidences the highly political nature of the proposed rule.¹³³ The NLRB's fears of rulemaking in a political arena are not unfounded.¹³⁴ However, this rule is the type envisioned by scholars as ripe for rulemaking—it is a form of “policy oscillation” or change in policy that makes sense to unify in the national labor market.¹³⁵ As discussed, the NLRB may wish to choose a less divisive policy to change during rulemaking to avoid some of the issues the NMB faced in its representation election proceeding.¹³⁶ But even if it does not, it can learn from the NMB, which overcame its obstacles by carefully explaining its rationale for the change in policy and eliciting comments from the interested public.¹³⁷ That Chairman Dougherty dissented is unsurprising, and it is not uncommon for agency members to file such opinions in rulemakings.¹³⁸ The APA does not address whether agencies must publish separate opinions in the *Federal Register*, but many agencies, as a matter of comity, choose to do so to promote internal harmony.¹³⁹ To prevent displeased minority members from seeking congressional assistance and to make its policies less susceptible to congressional intervention, the NLRB should publish any dissenting opinions in the *Federal Register*.¹⁴⁰

133. At the time of the rulemaking, the Board was composed of Chairman Elizabeth Dougherty, appointed by George W. Bush, Member Harry R. Hoglander, a Clinton appointee, and Member Linda Puchala, appointed by President Obama. NAT'L MEDIATION BD., www.nmb.gov/directory/prinoffs.html (last visited Nov. 1, 2011).

134. See *supra* Part I.A.1 (discussing concerns with rulemaking and the impact of congressional intervention).

135. See *supra* notes 86–88 and accompanying text.

136. See *supra* note 109 and accompanying text.

137. Commenters argued that the NMB did not have to engage in APA rulemaking, as the Court in *ABNE*, 380 U.S. 650, 669 (1965), held that the NMB's election procedures were unreviewable by the Judiciary, but the Board chose to proceed per the APA anyway. Representation Election Procedure (Final Rule), 75 Fed. Reg. 26,062, 26,070 n.15 (May 11, 2010) (codified at 29 C.F.R. pts. 1202, 1206 (2011)).

138. Jeffrey Lubbers cites to six proposed and final rules from federal administrative agencies that include the dissenting views of their members. Lubbers, *supra* note 5, at 431–32 n.102. For example, the Consumer Product Safety Commission posted a dissenting view on its website. Substantial Product Hazard Reports, 71 Fed. Reg. 42,028 (July 25, 2006) (codified at 16 C.F.R. pt. 1115 (2010)).

139. See Lubbers, *supra* note 5, at 431–32 n.102 (noting that many agencies choose to allow the public to see dissents by publishing, paraphrasing, or referring readers to online dissenting opinions).

140. Perhaps Chairman Dougherty would not have alleged that the majority prejudged the issues had she felt included in the process. Cf. Letter from Elizabeth Dougherty, Chairman, Nat'l Mediation Bd., to Sens. McConnell, Isakson, Roberts, Coburn, Gregg, Enzi, Hatch, Alexander, and Burr (Nov. 2, 2009) (on file with Author) (writing of the NMB's partisan and “exclusionary behavior”).

2. *Comments and Statutory Ossification Imposed a Low Burden*

The second stage of the NMB's representation election rulemaking, during which the agency conducted a public hearing, reviewed thousands of comments, and conducted analysis under the RFA, demonstrates that the NLRB's concerns regarding its capacity to engage in a rulemaking while continuing its adjudicatory duties are less founded than the agency fears.¹⁴¹ Additionally, the NMB encountered few congressional hurdles—representatives and senators responded during the comment period but did not hold any additional hearings—which shows that the agency remained free to formulate its own policymaking agenda.¹⁴²

First, the NMB had the resources to hold a public hearing regarding the representation election rulemaking and to receive and respond to nearly 25,000 written comments, which should alleviate the NLRB's concerns that it lacks the capacity to engage in rulemaking.¹⁴³ The NMB is a much smaller agency than the NLRB, so its ability to handle a large public response is encouraging for rulemaking in the labor industry.¹⁴⁴

In addition to providing for a sixty-day comment period,¹⁴⁵ the NMB published a meeting notice in the *Federal Register*, inviting all interested parties to attend an open meeting with the NMB and share their views on the proposed rule change.¹⁴⁶ The NMB held the meeting on December 7, 2009, at the NLRB's facilities, where thirty-one speakers presented their

141. See *supra* notes 73–75 and accompanying text.

142. This interaction with Congress did not “embarrass” or “paralyze” the agency, as the NLRB fears. See *NLRB Rulemaking*, *supra* note 9, at 994 (stating that oversight hearings embarrass the NLRB and impede work because staff members spend all of their time preparing for hearings instead of completing other necessary tasks).

143. See, e.g., Zebrak, *supra* note 1, at 128 & n.14 (finding the NLRB reluctant to promulgate rules because the cost of adjudication is relatively lower than the cost of rulemaking).

144. In 2010, the NLRB received \$283.4 million in congressional appropriations, while the NMB received \$13.4 million. See S. REP. NO. 111-243, at 254 (2010) (summarizing the agencies' budgets in fiscal year 2010 and suggesting a new budget for 2011). Of course, the NLRB regulates all private sector labor relations excluding airlines and railway industries, see 29 U.S.C. § 152(2) (2006) (defining *employer* under the NLRA to exclude government employers and those subject to the Railway Labor Act), so it may receive more comments than the NMB did, *id.*

145. See Representation Election Procedure (NPRM), 74 Fed. Reg. 56,750, 56,750 (proposed Nov. 3, 2009) (codified at 29 C.F.R. pts. 1202, 1206 (2011)) (instructing parties to submit comments by January 4, 2009). The APA does not specify a minimum comment period but only that final rules be published at least thirty days before going into effect. 5 U.S.C. § 553(d). Additionally, Executive Order 12,866 provides that most rulemakings should provide at least a sixty-day comment period. Exec. Order 12,966, § 6(a), 3 C.F.R. 638, 644 (1994), *reprinted as amended* in 5 U.S.C. § 601 app. at 745 (2006).

146. Meeting Notice, 74 Fed. Reg. 57,427 (Nov. 6, 2009).

comments orally.¹⁴⁷ Speakers included representatives from unions, universities, trade organizations, flight attendants, pilots, and others involved in the industry.¹⁴⁸ The hearing took place in one day, the NMB allotted each speaker ten minutes to present their comments, and no NMB member made any remarks.¹⁴⁹

The type of evidence the agency heard varied—some organizations presented their written comments orally,¹⁵⁰ while others presented nonlegal, anecdotal testimony.¹⁵¹ Through the process, the agency was able to hear not only legal arguments but also personal experiences—which the agency may not have the chance to consider through written comments alone.¹⁵² Thus, even though the APA does not require a hearing in an informal rulemaking proceeding,¹⁵³ here the agency had the capacity to conduct an abbreviated hearing, without cross-examination, to collect additional empirical data it would not have gathered in an adjudication. Additionally, the NMB heard first-hand accounts of how the rule affected the witnesses personally, as it would have in an adjudication.¹⁵⁴

147. See Representation Election Procedure (Final Rule), 75 Fed. Reg. 26,062, 26,062–63 (May 11, 2010) (codified at 29 C.F.R. pts. 1202, 1206) (explaining the NMB’s response to the oral and written comments).

148. For a full text transcript of the hearing, visit: NMB REPRESENTATION RULEMAKING, http://www.nmb.gov/representation/transcript_voting-proposal-hearing_12-07-09.pdf (last visited Nov. 1, 2011).

149. See *id.* at 5 (statement of Mary Johnson, General Counsel) (stating for the record that no cross-examination would take place at the hearing and that speakers would have no opportunity to ask the NMB questions).

150. See, e.g., *id.* at 6–7 (statement of Robert Siegel, Air Transport Association (ATA)) (noting the ATA’s full comments would be in writing, but outlining three main subjects about which he would speak).

151. See, e.g., *id.* at 185–91 (statement of David Boehm, Sky West) (a pilot for SkyWest telling the agency “a story” about his unsuccessful union campaign in 2007, in which only a small fraction of employees voted because of a lack of education among the new, young employees at the airline).

152. See Grunewald, *supra* note 1, at 297–98 (finding that the NLRB held an oral hearing during its healthcare bargaining unit rulemaking procedure to hear from as many interested parties as possible and allow those who otherwise may not write in a chance to comment).

153. See 5 U.S.C. § 553(c) (2006) (providing that the APA contemplates opportunity for comment in informal rulemaking “with or without opportunity for oral presentation”); see also *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519 (1978) (explaining that courts cannot impose upon agencies additional procedural requirements other than those required by the APA). A hearing is required only when the agency’s enabling statute requires a hearing “on the record.” LUBBERS, *supra* note 31, at 305 (stating that §§ 556 and 557 of the APA are triggered only if the statute requires rules “to be made on the record after opportunity for an agency hearing” (citing 5 U.S.C. § 553(c) (2006))).

154. See Administrative Conference of the United States Recommendations Regarding Administrative Practice and Procedures, 56 Fed. Reg. 33,841, 33,851–52 (July 24, 1991)

In the past, the NLRB has recognized the value of gathering empirical data by holding hearings during the rulemaking process.¹⁵⁵ During its one successful rulemaking attempt in recent years—where it engaged in notice-and-comment rulemaking to formulate a rule defining bargaining units in the healthcare industry—the NLRB invited public participation through a series of hearings before an administrative law judge in which the NLRB cross-examined witnesses.¹⁵⁶ At the time, the NLRB used the hearing process both to ensure the broadest public participation possible while engaging in a new method of policy formation, and to get a nonlegal perspective on the issue that it would not have gotten through written comments alone.¹⁵⁷ Both the healthcare bargaining rule and the NMB's final rule survived judicial review, suggesting that courts feel more comfortable upholding a rule where the agencies seek broad participation.¹⁵⁸ Although the NLRB is not required to hold public hearings, an abbreviated hearing excluding cross-examination may be valuable in controversial rulemakings in the labor industry because it encourages wide-ranged public participation and reassures reviewing courts that the agency acted fairly and democratically.¹⁵⁹

Just as the NMB's hearing procedures facilitated public participation which, contrary to the NLRB's fears, allowed for fact-specific information

(codified at 1 C.F.R. pt. 305 (1991)) (suggesting that data gathered while adjudicating is relevant to discrete parties, and that rulemaking provides empirical data upon which the agency forms policy).

155. See *Collective-Bargaining in the Health Care Industry*, 52 Fed. Reg. 25,142 (notice of proposed rulemaking and notice of hearing, Jul. 2, 1987) (inviting the public to orally participate in the healthcare bargaining unit proposed rule at several hearings).

156. See Grunewald, *supra* note 1, at 298 (hearings took place in D.C., Chicago, and San Francisco).

157. See *Administrative Conference of the United States Recommendations Regarding Administrative Practice and Procedures*, 56 Fed. Reg. at 33,852 (noting that the NLRB managed to gather a wide range of empirical data during the hearings that it would not have gotten in an adjudication); see also Grunewald, *supra* note 1, at 300, 319 (noting that the NLRB heard 144 oral comments during its hearings, which was a good idea in such a controversial rulemaking).

158. See generally *Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606 (1991) (finding that the rule was within the NLRB's broad rulemaking power and was not arbitrary and capricious); *Air Transp. Ass'n of Am. v. Nat'l Mediation Bd.*, 719 F. Supp. 2d 26 (D.D.C. 2010) (finding the NMB did not have to hold an evidentiary hearing before initiating the rulemaking).

159. See LUBBERS, *supra* note 31, at 205 (noting that the ACUS has recommended that agencies decide whether to hold public meeting or trial-type hearings in informal rulemaking under the circumstances). In moving forward, the NLRB may also wish to hold a less formal hearing without the opportunity to cross-examine witnesses to cut costs. See Grunewald, *supra* note 1, at 319–20 (finding the healthcare hearings were perhaps “procedural overkill” and the NLRB should conduct a cost–benefit evaluation in the future).

to come into the record,¹⁶⁰ the NMB also showed that handling a large amount of comments from a divisive and interested public is manageable. The NMB had to respond to a deceptively high number of comments—although the NMB received 24,962 written comments, it only deemed 2% of them to be substantive.¹⁶¹ A majority of the commentators supported the rule change.¹⁶² Those who did not claimed, among other things, that the NMB lacked statutory authority to proceed and that Members of the majority party should be disqualified from participating in the rulemaking because they had “unalterably closed mind[s]” and were therefore unfit to make objective labor policy.¹⁶³

The NLRB’s fears concerning congressional intervention were somewhat realized during the NMB’s rulemaking, as several members of Congress commented on the rule change.¹⁶⁴ Predictably, some of the congressional members supported the rule change, and some strongly opposed the new rule.¹⁶⁵ The rulemaking proceeding may have attracted congressional attention in a way that went beyond a policy made through adjudication.¹⁶⁶ Although the NLRB’s fear of political intervention is legitimate, the NMB responded to all of the comments and Congress did not subject the agency to an additional oversight hearing during or after the rulemaking procedure.¹⁶⁷ Although congressional intervention will likely take place

160. See Brief for NLRB at 15, *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969) (No. 463) (arguing that labor policy is better developed through “specific factual patterns . . . [that] emerge from actual industry experience” (alteration in original) (internal citation omitted)).

161. See Representation Election Procedure (Final Rule), 75 Fed. Reg. 26,062, 26,063 (May 11, 2010) (codified at 29 C.F.R. pts. 1202, 1206 (2011)) (estimating that approximately 98% of the comments received were either form letters, or personal anecdotes).

162. See *id.* (explaining that those in favor agreed that the NMB had the statutory authority to change the election procedures and that the current rule is contrary to democratic principles).

163. See *id.* at 26,063–64 (describing the ATA’s motion to disqualify Members Puchala and Hoglander from the rulemaking because they had previously worked for unions and excluded the one Republican Member from the proposal process).

164. See *NMB Representation Rulemaking*, NAT’L MEDIATION BD., <http://www.nmb.gov/representation/proposed-rep-rulemaking.html> (last visited Nov. 1, 2011) (showing that the NMB received a total of eight letters from congressional members during the comment period).

165. In its final rule, the NMB cited Democrat Glenn Nye who believed rail workers should not be subjected to a more “onerous process” than other private sector workers and refuted the position of Republican members who believed two appointed, unelected Democrats should not change the election procedure. Representation Election Procedure (Final Rule), 75 Fed. Reg. at 26,063, 26,066.

166. See *supra* Part I.A.1.

167. See *generally* Representation Election Procedure (Final Rule), 75 Fed. Reg. at 26,062 (showing that the agency was not bound by congressional involvement).

during the rulemaking process, it was not in the NMB's case nearly as intrusive as the NLRB fears.¹⁶⁸

Finally, the NLRB can rest assured that ossification did not pose a large obstacle for the NMB.¹⁶⁹ The NMB did have to publish a rule clarification because the notice of proposed rulemaking omitted the factual basis for its certification that the rule would not affect a significant number of small businesses to trigger the RFA, but the revised notice only included a short statement concerning the agency's conclusion on the matter.¹⁷⁰ The NLRB should not let its concerns with ossification stand in the way of its rulemaking efforts.¹⁷¹ Although the NLRB will have to address the RFA and, depending on the rule, may have to devise alternative options to accommodate small businesses, the NMB addressed the statute quickly and was able to move forward with little interference.¹⁷²

3. *The Final Rule*

The NLRB should publish its future final rules with a detailed preamble, as the NMB's preamble to its election procedure rule addressed each substantive comment and refuted arguments against the rule change.¹⁷³ On May 11, 2010, only six months after the NMB published its notice of proposed rulemaking, it published the final rule with a preamble spanning twenty-seven pages in the *Federal Register* adopting the proposed rule.¹⁷⁴ The NMB painstakingly reviewed each substantive comment, took a considerable amount of time addressing the negative commentators' concerns, responded to Chairman Dougherty's dissent, and thoroughly

168. See *NLRB Rulemaking*, *supra* note 9, at 997 (predicting debilitating congressional intervention in NLRB rulemaking).

169. See Representation Election Procedure (NPRM), 74 Fed. Reg. 56,750, 56,754 (proposed Nov. 3, 2009) (codified at 29 C.F.R. pts. 1202, 1206 (2011)) (certifying that the rule would not affect small businesses under the RFA, and OMB need not approve of the rule under the PRA).

170. Proposed Rule Clarification, 74 Fed. Reg. 63,695, 63,695 (Dec. 4, 2009) (codified at 29 C.F.R. pts. 1202, 1206) (describing that the rule change would not directly affect any small entities as defined under the RFA).

171. See *supra* Part I.A.3.

172. See Lubbers, *supra* note 5, at 422 ("It is certainly possible that a Board rule might have a 'significant economic impact on a substantial number of small entities,' and if so the agency would need to do the requisite [RFA] analysis.").

173. See generally Final Rule, 75 Fed. Reg. 26,062 (May 11, 2010) (codified at 29 C.F.R. pts. 1202, 1206) (refuting arguments that the NMB was required to hold a comment period before initiating rulemaking, that the rule lacked statutory authority, and that the rule was arbitrary and capricious because it did nothing to create a parallel decertification procedure).

174. See *id.* (explaining its rationale for the final rule in detail).

discussed its rationale for adopting the new election procedure, which “more accurately measure[s] employee choice in representation elections.”¹⁷⁵

An example of the amount of detail the NMB used to refute commentators’ counterarguments is the way it responded to allegations of agency bias.¹⁷⁶ ATA and Right to Work, two trade associations, filed a motion for disqualification of Members Hoglander and Puchala, the two Members supporting the proposed rule.¹⁷⁷ They argued the NMB’s process for proposing changes to its election procedure was inadequate because it did not follow the preliminary hearing method used in the *Chamber of Commerce* proceeding. Additionally, the trade associations argued that the majority excluded Chairman Dougherty from the rulemaking proceedings and that the rule was rushed through notice-and-comment to accommodate the unions that had elections pending in postmerger Delta Air Lines.¹⁷⁸ The NMB took each argument in turn and explained that the petitions failed to make the requisite clear and convincing showing that the two Democratic Members each had an “unalterably closed mind on matters critical to the disposition of the rulemaking” and should have been disqualified.¹⁷⁹

The NLRB should adhere to the same level of detail in formulating its own final rules. To the extent possible, it should substantively address each valid argument for and against the final rule, including the dissenting opinions of its members.¹⁸⁰ Formally, the APA only requires that final rules

175. *Id.* at 26,072. Additionally, the NMB stated that the new rule brings the agency in line with private sector unionism nationwide and that it conforms to basic principles of democracy. *Id.* at 26,074. Finally, according to the NMB, adopting the new rule ensures that all employees can register their support for or opposition to a union affirmatively rather than passively, and allow abstainers the right to be indifferent about unionization. *Id.* at 26,076.

176. *See id.* at 26,063 (“Rulemaking requires a decision maker to choose between competing priorities Prejudgment and/or bias is not established by the mere fact . . . that a [rule] is controversial . . .”).

177. *Id.*

178. *See id.* at 26,064 (arguing also that Hoglander and Puchala prejudged the issues because they worked with unions in the past).

179. *Id.* at 26,063 (quoting *Ass’n of Nat’l Advertisers v. FTC*, 627 F.2d 1151, 1154 (D.C. Cir. 1979)). The Board also relied on *United States v. Morgan*, 313 U.S. 409, 421 (1941), for the presumption that agency heads are capable of acting neutrally despite their political leanings. *Id.* at 26,065.

180. An NLRB member dissented from the healthcare bargaining rule; in the highly political labor industry, bipartisan members will not always agree. *See Grunewald, supra* note 1, at 306 (noting that Member Johansen formally dissented from the NLRB’s healthcare bargaining rule in 1989).

contain “a concise general statement of their basis and purpose.”¹⁸¹ Yet today, judges look primarily to the published preamble when reviewing final rules.¹⁸² Given its concerns that the Judiciary will look unfavorably upon its policies promulgated during rulemaking, the NLRB should include a detailed statement of basis and purpose—taking into consideration and refuting any counterarguments—in any future rulemaking endeavors, especially since the reviewing judge in the NMB rulemaking case looked favorably upon the NMB’s detailed preamble.¹⁸³

Thus, the NMB had the capacity to substantively respond to an overwhelming number of comments and took the time to articulate its rationale for rejecting those comments.¹⁸⁴ In labor relations, there will be several competing views, so it is likely that any rulemaking by the NLRB will similarly encounter large backlash.¹⁸⁵ But by explaining its rationale thoroughly in the preamble to the final rule, the agency may be able to overcome accusations of politicking in rulemaking.

B. *The Litigation: How the NMB’s Processes Paid Off*

The NLRB’s fear of pre-enforcement judicial review came to light in the NMB representation election rulemaking; yet, the Judiciary afforded the NMB deference and ultimately upheld the rule, suggesting that the Judiciary is not inherently suspicious of collective bargaining in all circumstances.¹⁸⁶ On May 17, 2010, shortly after the final rule was published, ATA filed a lawsuit in the District Court for the District of Columbia alleging that the new rule violated the RLA, that the rule change was arbitrary and capricious, and that Members Hoglander and Puchala had prejudged the issue and ignored comments against the final rule.¹⁸⁷ Although the NMB’s success in one case cannot prove the NLRB will

181. 5 U.S.C. § 553(c) (2006).

182. See LUBBERS, *supra* note 31, at 261–62 (explaining that the APA does not require long preambles, but that judges do look to them during judicial review). After the Supreme Court’s decision in *Motor Vehicles Manufacturer’s Ass’n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983), agencies must address and refute major opposition to the rule in the preamble to survive arbitrary and capricious review. *Id.* at 262–63, 265.

183. See *Air Transp. Ass’n of Am. v. Nat’l Mediation Bd.*, 719 F. Supp. 2d 26, 37–45 (D.D.C. 2010) (describing how the NMB’s detailed explanation for its rule change helped it survive judicial review under both *Chevron* and arbitrary and capricious review).

184. See *supra* notes 173–76 and accompanying text.

185. See Grunewald, *supra* note 1, at 301 (noting that the NLRB in its healthcare bargaining rule received 114 oral and 33 substantive comments during the notice-and-comment period).

186. See generally *Air Transp. Ass’n of Am.*, 719 F. Supp. 2d at 26 (upholding the final rule as a reasonable interpretation of the RLA).

187. *Id.* at 29–30.

prevail in future cases, studying the path that the NMB rulemaking took demonstrates that it is possible for collective bargaining rules to survive judicial review if the agency follows APA rulemaking procedures. This section will first explain how the court presumed that the NMB majority did not prejudge the issues in its order denying ATA's motion for expedited discovery, and then will demonstrate how the court ultimately deferred to the agency's policy choice to argue that the NLRB's fears concerning the federal Judiciary's inherent suspicion of labor policymaking should not prohibit the agency from undertaking rulemaking.

1. *Motion for Expedited Discovery*

The district court afforded deference to the NMB when rejecting the plaintiff's allegation that Members Hoglander and Puchala showed bias during the rulemaking, which refutes the NLRB's fear that the Judiciary will not defer to the agency's policy choices and will instead seek to undercut its decisions.¹⁸⁸ Courts place a very high burden on the party alleging bias, as judges presume that agency members are "collaborative instrumentalities of justice" acting in good faith.¹⁸⁹ Courts also recognize that agency heads act as legislatures and not as neutral adjudicators when rulemaking, so agency members are only disqualified when "there has been a clear and convincing showing that the agency member[s] ha[ve] an unalterably closed mind on matters critical to the disposition of the proceeding."¹⁹⁰

First, the NMB litigation rebuts the NLRB's fear that the Judiciary will impose its own policy choices because the party challenging the rulemaking must overcome a general presumption that an agency head acts in good faith.¹⁹¹ In its motion for expedited discovery, the ATA argued that the majority had prejudged the issues, as evidenced by Chairman Dougherty's letter to the Republican senators detailing the internal procedures of the Board and by the fact that unions withdrew their election campaigns just

188. *See* *Air Transp. Ass'n of Am. v. Nat'l Mediation Bd.*, No. 10-0804, at 11 (D.D.C. June 4, 2010) (order denying motion for expedited discovery) (concluding that the plaintiffs failed to show evidence of "bad faith or improper behavior" as to warrant discovery on the issue of bias).

189. *See id.* at 6 (quoting *United States v. Morgan*, 313 U.S. 409, 422 (1941)) (explaining that without this presumption, courts frequently look into the agencies' deliberative process).

190. *Ass'n of Nat'l Advertisers, v. FTC*, 627 F.2d 1151, 1170 (D.C. Cir. 1979).

191. *See, e.g., Morgan*, 313 U.S. at 421 (finding agency heads "are not assumed to be flabby creatures any more than judges are" and courts presume both to be impartial).

before the NMB published the proposal in the *Federal Register*.¹⁹² The court, however, concluded that even a direct accusation by a colleague that the majority was acting with “unalterably closed minds” was insufficient to grant the plaintiff’s discovery on the issue.¹⁹³ The letter merely showed “dysfunction” at the Board and that the NMB did not act in the “spirit of collegiality.”¹⁹⁴ Yet, the court recognized the political composition of the NMB at the time, saying the Chairman’s alleged exclusion was the product of her being in the political minority. Further, the court concluded that the structure of the internal debate was not appropriate for the judicial review.¹⁹⁵ This assertion should reassure the NLRB if it moves forward with a rule that may polarize the bipartisan Board, as the court recognized that internal agency disputes exceed the scope of judicial review and would not overturn a policy without concrete allegations that agency members predetermined the outcome.¹⁹⁶

Second, courts recognize that agency heads act in a quasi-legislative capacity when promulgating rules, and thus are not held to the same standard as a neutral adjudicator.¹⁹⁷ When adjudicating, agency heads are disqualified when “a disinterested observer may conclude that [the agency] has . . . adjudged the facts as well as the law of a particular case in advance of hearing it.”¹⁹⁸ When rulemaking, the test is much less stringent: an agency member is only disqualified if the member acts with “an unalterably closed mind on matters critical to the disposition of the proceeding.”¹⁹⁹ In this case, Chairman Dougherty’s letter and the timing of the rulemaking were not enough to show Members Hoglander and Puchala had “unalterably closed minds” because the NMB carefully proceeded through

192. *Air Transp. Ass’n of Am.*, No. 10-0804, at 2–6 (claiming that Hoglander and Puchala had a pro-union agenda because each had a labor background, and that they excluded Chairman Dougherty to further that agenda).

193. *Id.* at 11 (denying the plaintiff’s motion and discovery on the prejudgment issue).

194. *Id.* at 7.

195. *See id.* (finding even Chairman Dougherty was unsurprised that she “was not included in the initial crafting of the proposed rule” given her policy disagreement with the majority).

196. *See id.* at 6 (noting that internal dysfunction does not “require the inference that the majority Board Members were acting with closed minds . . . regarding issuance of the New Rule”).

197. *See, e.g., Ass’n of Nat’l Advertisers v. FTC*, 627 F.2d 1151, 1168–69 (D.C. Cir. 1979) (noting that the neutral and detached role of an adjudicator is inapplicable to rulemaking).

198. *Cinderella Career & Finishing Schs., Inc. v. FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970) (alteration in original) (quoting *Gilligan, Will & Co. v. SEC*, 267 F.2d 451, 469 (2d Cir. 1959)).

199. *Ass’n of Nat’l Advertisers*, 627 F.2d at 1170.

the rulemaking.²⁰⁰ Indeed, the court found that the “level of detail with which the agency considered and discussed negative comments in the Final Rule belies ATA’s allegations that the Board rushed its consideration.”²⁰¹

Thus, if the NLRB engaged in rulemaking rather than adjudicatory policymaking, it would be further insulated from any bias claims that may arise.²⁰² In moving forward, the NLRB may wish to avoid internal conflicts by being more open among the Board members so as not to allow a court to accuse them of being “dysfunctional,” even though the internal agency proceedings exceed the scope of judicial review.²⁰³ Even if the agency faces internal disagreements, the NMB rulemaking demonstrates that when the agency writes a detailed preamble, the court can see if the agency considered alternate views; thus, the NLRB should attempt to achieve the level of detail the NMB used in its final rule.²⁰⁴

2. *The Decision*

In its decision, the District Court for the District of Columbia deferred to and upheld the NMB’s collective bargaining policy choice, showing that, at least in the case of the NMB rulemaking, the Judiciary has no inherent suspicions of collective bargaining as the NLRB fears.²⁰⁵ On June 28, 2010, two months after the ATA filed its lawsuit, the court held for the NMB, denying the plaintiff declaratory and injunctive relief and finding that the new rule did not violate the APA or the RLA.²⁰⁶

200. See *Air Transp. Ass’n of Am.*, No. 10-0804, at 7–8 (looking at the “context of the rulemaking as a whole” to conclude that the agency did not rush the rule, as it took six months).

201. *Id.* at 8.

202. Compare *Ass’n of Nat’l Advertisers*, 627 F.2d at 1170 (rulemakers are disqualified only if they act with “unalterably closed mind[s]”), with *Cinderella Career & Finishing Schs.*, 425 F.2d at 591 (adjudicators are disqualified if “a disinterested observer may conclude that [the agency] has . . . adjudged the facts as well as the law of a particular case in advance of hearing it” (alteration in original) (citation omitted)).

203. See *Air Transp. Ass’n of Am.*, No. 10-0804, at 6 (stating that the contents of the letter show the Board has been “dysfunctional” since President Obama appointed a second Democrat).

204. See *id.* at 8 (noting that the detailed preamble to the final rule demonstrates the majority’s willingness to waver from its policy decisions during the rulemaking).

205. See Flynn, *supra* note 1, at 439–40 (arguing that the Court in *Lechmere* overturned agency interpretation of its own ambiguous statute, proving the Judiciary’s inherent animus toward collective bargaining (citing *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992))).

206. See *Air Transp. Ass’n of Am. v. Nat’l Mediation Bd.*, 719 F. Supp. 2d 26, 45 (D.D.C. 2010) (granting summary judgment in favor of the NMB and denying the plaintiff’s request for relief).

The court used two deferential doctrines, which should demonstrate to the NLRB that collective bargaining rules can survive pre-enforcement review in the federal district courts.²⁰⁷ First, the court used *Chevron* to conclude that “nothing in the statute unambiguously requires that a majority of all eligible voters select the representative of the employees This silence creates ambiguity.” Second, the agency reasonably interpreted the RLA.²⁰⁸ In the first step, the court relied in part on the similarity between the RLA and the NLRA and the NMB’s broad discretion to determine the method of resolving election disputes.²⁰⁹ Under the second *Chevron* prong, the court cited to the NMB’s reliance on empirical evidence and explanation of the changed circumstances in both the notice of proposed rulemaking and final rule to conclude that the new policy consistently upheld the broad construction and statutory mission of the RLA.²¹⁰

In theory, *Chevron* should insulate the NLRB from judicial overreaching: the NLRA is inherently ambiguous, so the agency should move to the deferential second step of the test.²¹¹ Yet, scholars argue that *Chevron* has not prevented the Judiciary from imposing its own views on the agency.²¹² While courts have overturned agency decisions using *Chevron* in the past, several recent cases show just the opposite.²¹³ Additionally, one scholar

207. See Lubbers, *supra* note 5, at 427–28 (suggesting that Congress amend the NLRA to account for preenforcement review of final rules in the federal court of appeals to encourage rulemaking).

208. *Air Transp. Ass’n of Am.*, 719 F. Supp. 2d at 33–34.

209. See *id.* at 33–37 (concluding that the NMB’s interpretation of the RLA—to allow for a majority vote where management interferes with an election—proves statutory ambiguity).

210. *Id.* at 39 (“The Board’s explanation of its reasons for adopting the New Rule shows that the New Rule is compatible with the Board’s statutory mission to investigate representation disputes . . .”).

211. E.g., Flynn, *supra* note 1, at 437 (“The NLRA is by its terms extremely general, and the legislative history on most points is either nonexistent or unilluminating.”).

212. See *id.* at 442 (arguing that the Court imposed its own value judgment in deciding that § 7 of the NLRA was unambiguous under *Chevron* step one, which shows that *Chevron* does not prevent judicial overreaching (citing *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992))).

213. See, e.g., *Loparex LLC v. NLRB*, 591 F.3d 540, 550 (7th Cir. 2009) (granting *Chevron* deference to the NLRB’s interpretation of § 2(11) of the NLRA defining “responsible direction”); *SEIU v. NLRB*, 574 F.3d 1213, 1214 (9th Cir. 2009) (affirming the NLRB’s determination that § 8(g) applies only to hospitals because the *Chevron* doctrine requires deference to the NLRB); *Va. Mason Med. Ctr. v. NLRB*, 558 F.3d 891, 894 (9th Cir. 2009) (enforcing an NLRB enforcement order because of *Chevron*). But see *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 510 (D.C. Cir. 2009) (finding that single-route drivers were independent contractors rather than “employees” under the NLRA, overturning the agency’s interpretation despite *Chevron*).

argues that the Judiciary may be hesitant to apply a deferential standard because it is suspicious of the NLRB's resistance to rulemaking—perhaps then rulemaking could restore judicial confidence in the agency and lead to a more deferential standard of review.²¹⁴

Second, in light of the Supreme Court's ruling in *FCC v. Fox Television Stations, Inc.*,²¹⁵ an agency action is not subject to a heightened standard of review when it changes administrative policy.²¹⁶ Thus, should the NLRB wish to change its policy interpretations through rulemaking, it would need only to provide a "reasoned explanation" for its action that demonstrates it is changing policy.²¹⁷ The district court's analysis under *Chevron* step two and of the arbitrary and capricious standard under the APA addressed the NMB's policy reversal in the new rule.²¹⁸ The court rejected the plaintiff's argument that the longevity of the old rule necessarily makes the change to the new rule unreasonable because the NMB presented empirical data that showed a "no union" option would improve representation elections and explained that "there is evidence that the [Original Rule's] procedures were adopted in response to an era of widespread company unionism."²¹⁹ *Fox Television Stations* provides an additional layer of deference for agencies changing policy and an incentive to carefully craft a detailed preamble in a final rule.²²⁰ Thus, the NLRB should be able to take advantage of the

214. See Hirsch, *supra* note 45, at 26 ("Rulemaking's increased predictability may also reduce the hostility that some courts exhibit towards the Board's adjudications.").

215. 129 S. Ct. 1800 (2009).

216. *Id.* at 1810 (finding the APA mentions no heightened standard for reviewing policy reversals).

217. *Id.* at 1811 (explaining that an agency may deviate from a past practice when "the new policy is permissible under the statute, . . . there are good reasons for it, and . . . the agency believes it to be better, which the conscious change of course adequately indicates").

218. *Air Transp. Ass'n of Am. v. Nat'l Mediation Bd.*, 719 F. Supp. 2d 26, 40 (D.D.C. 2010) ("[M]uch of the analysis regarding the Board's stated reasons for its promulgation of the New Rule overlaps with that under *Chevron* step two.").

219. *Id.* at 38 (alteration in original) (citation omitted). The court rejected the plaintiff's argument that the NMB's decision in *Chamber of Commerce*, 13 N.M.B. 90 (1986), bound the agency to a full evidentiary hearing. The court further stated that even if that decision had been binding, "the Board has not run afoul of the APA because . . . the Board has adequately explained its reasons for the change." *Id.* at 44.

220. Since the *Fox* decision, courts have upheld well-reasoned policy changes that acknowledge their departure from agency precedent in the preamble. See, e.g., *Modesto Irrigation Dist. v. Gutierrez*, 619 F.3d 1024, 1035 (9th Cir. 2010) (agency explicitly recognized it was changing a policy when it determined a new policy better served the statutory function). Courts have rejected policy alterations that fail to acknowledge a departure. See, e.g., *Wyoming v. U.S. Dep't of Interior*, Nos. 09-CV-118J, 09-CV-138J, 2010 WL 4814950, at *2 (D. Wyo. Nov. 18, 2010) (overturning a final rule where the Fish and Wildlife Service failed to acknowledge a change in its recovery criteria and provide reasoned analysis for that change).

deferential standards the district court afforded to the NMB when rulemaking if it adequately explains its reasons for changing policy and adopting a new rule in a detailed preamble.²²¹

3. *Post-Decision: Appeal, Effect of the Rule, and Congressional Intervention*

To date, the procedures the NMB utilized during its representation rulemaking created a successful final rule—indeed, the postmerger Delta flight attendants somewhat ironically rejected union representation in November 2010 using the new rulemaking procedures.²²² The outcome of the NMB's rulemaking refutes the NLRB's concern that judicial review will delay its policies significantly, as litigation at the district court only delayed the NMB rule's effective date by twenty days.²²³ However, the NMB has faced two of the NLRB's primary concerns with rulemaking: pre-enforcement review in the federal district courts²²⁴ and an attempted congressional intervention.²²⁵

On October 7, 2010, the ATA appealed to the U.S. Court of Appeals for the District of Columbia Circuit, so now the rule faces at least one more layer of judicial scrutiny.²²⁶ Scholars have recommended that Congress amend the NLRA to facilitate pre-enforcement judicial review in the courts of appeals to avoid this double layer of judicial review.²²⁷ There is no way to predict how the appeals court will rule because the courts of appeals

221. By rulemaking, the NLRB may increase the Judiciary's faith in the legitimacy of the NLRB's policy choices. See Hirsch, *supra* note 45, at 26 (rulemaking would increase judicial deference because of the "more thorough explanation of the Board's reasons for a policy and a more explicit recognition of competing views on an issue").

222. Charles Riley, *Delta Flight Attendants Reject Union*, CNNMONEY.COM (Nov. 4, 2010, 9:09 AM), http://money.cnn.com/2010/11/04/news/companies/delta_union/index.htm.

223. See Representation Election Procedure (Final Rule; Delay of Effective Date), 75 Fed. Reg. 32,273, 32,273 (June 8, 2010) (codified at 29 C.F.R. pts. 1202, 1206 (2011)) (notifying the public that the NMB pushed back the effective date of the representation election procedure from June 10, 2010, to June 30, 2010, due to ongoing litigation).

224. See *Air Transp. Ass'n of Am. v. Nat'l Mediation Bd.*, 719 F. Supp. 2d 26 (D.D.C. 2010), *appeal docketed*, No.10-5254 (D.C. Cir. July 29, 2010) (recounting the ATA's argument that the new rule exceeds the scope of the RLA, is arbitrary and capricious, and that the majority prejudged the issue).

225. H.R.J. Res. 97, 111th Cong. (2010); S.J. Res. 30, 111th Cong. (2010).

226. *Air Transp. Ass'n of Am. v. Nat'l Mediation Bd.*, 719 F. Supp. 2d 26 (D.D.C. 2010), *appeal docketed*, No.10-5254 (D.C. Cir. July 29, 2010).

227. See Grunewald, *supra* note 1, at 321 (suggesting that Congress increase NLRB rulemaking, by amending the NLRA to require that any pre-enforcement review take place in the courts of appeals); see also Administrative Conference of the United States Recommendations Regarding Administrative Practice and Procedures, 56 Fed. Reg. 33,841, 33,852 (July 24, 1991) (codified at 1 C.F.R. pt. 305 (1991)) (recommending a congressional amendment to the NLRA because the double judicial scrutiny is unnecessary).

defer only to agencies' policy choices and not to the judgment of lower courts.²²⁸ The agency has followed APA procedures and written a thorough preamble to the final rule, which should facilitate a favorable decision when the court of appeals applies *Chevron*, *State Farm*, and *Fox Television Stations*.²²⁹

Second, both houses of Congress attempted to use their power under the CRA to disapprove of the final rule.²³⁰ Republican Senator Johnny Isakson of Georgia sponsored the Senate joint resolution, which the Senate rejected by a narrow vote of 43 to 56.²³¹ Likewise, Republican Representative Phil Gingrey of Georgia's eleventh district sponsored the House joint resolution, which died out before a vote took place.²³² Even if the resolutions had passed, the President would have to sign the joint resolution into law before invalidating the final rule.²³³ The NLRB's fear that rulemaking will increase its congressional contact is legitimate—indeed, under a different political circumstance, these joint resolutions could have passed, thwarting the NMB's ability to make labor law independently.²³⁴ However, this process has only succeeded once, so it should not be a prohibitive consideration should the NLRB commence rulemaking activities, especially if it first begins rulemaking in a less divisive area.²³⁵

Congress has otherwise not posed a problem for the NMB, as it held no oversight hearings about the policy change during or after the

228. See, e.g., *Barnhart v. Walton*, 535 U.S. 212, 215 (2002) (applying *Chevron* independently to uphold the Social Security Administration's statutory interpretation and overturn the Fourth Circuit's decision); *Republican Nat'l Comm. v. FEC*, 76 F.3d 400, 407 (D.C. Cir. 1996) (overturning the district court's finding that a final rule was not arbitrary and capricious and that it was reasonable under *Chevron* by performing its own analysis).

229. See *supra* Part III.A.3; see, e.g., *Animal Legal Def. Fund, Inc. v. Glickman*, 204 F.3d 229, 234 (D.C. Cir. 2000) (upholding a final rule under *Chevron* step two and arbitrary and capricious review because the Secretary of Agriculture "took account of [negative] comments, just as the designers of 'notice and comment' rulemaking intended").

230. See H.R.J. Res. 97, 111th Cong. (2010); S.J. Res. 30, 111th Cong. (2010).

231. See S.J. Res. 30, 111th Cong. (2010) (the vote took place on September 23, 2010).

232. See H.R.J. Res. 97, 111th Cong. (2010) (the House referred the rule to a subcommittee on September 24, 2010, and has not since acted on the resolution).

233. Congressional Review Act, 5 U.S.C. § 801(a)(2)(B)(3)(B) (2006) (explaining that it takes both houses of Congress to override a presidential veto of the resolution).

234. The Senate Resolution lost by a narrow 46 to 53 vote. S.J. Res. 30, 111th Cong. (2010).

235. Lubbers, *supra* note 5, at 425 & n.78 (describing that the only time Congress successfully used the CRA to overturn a final rule was with the Clinton Administration's controversial OSHA ergonomics regulations in 2001).

rulemaking.²³⁶ Congress is free to intervene in an agency's activities at any time—whether the agency is making policy through rulemaking or adjudication.²³⁷ In 2008, for example, the NMB faced a congressional oversight hearing regarding its decision to refrain from making an election procedure rule change in connection with the disputed 2008 Delta election.²³⁸ Many representatives in that hearing expressed a desire that the NMB make the rule change.²³⁹

These drawbacks are unpredictable and could come during adjudication or rulemaking. The NLRB thus should consider the significant benefits of rulemaking, including increased agency legitimacy, public participation, and data gathering when deciding to engage in rulemaking.²⁴⁰ Further, the political timing of any rule change may be key to avoiding unwanted congressional intervention.²⁴¹

IV. LOOKING AHEAD: THE NLRB'S MOST RECENT NOTICE OF PROPOSED RULEMAKING

On December 22, 2010, the NLRB issued its first substantive notice of proposed rulemaking in years.²⁴² If adopted, the rule would require employers subject to “the NLRA to post notices of employee rights under the NLRA .”²⁴³ Thus, the NLRB is beginning to heed scholar's cries to promulgate long-lasting, stable, and legitimate labor policy through notice-and-comment rulemaking, and has thus far mirrored the procedures the NMB used in its rulemaking.²⁴⁴

236. See generally Representation Election Procedure (Final Rule), 75 Fed. Reg. 26,062 (May 11, 2010) (codified at 29 C.F.R. pts. 1202, 1206 (2011)) (noting congressional participation in the comment period but no hearings).

237. See *supra* notes 51–53 and accompanying text.

238. See generally *National Mediation Board Oversight of Elections for Union Representation: Hearing Before the H. Comm. on Transp. and Infrastructure*, 110th Cong. (2008) (hearing testimony about the NMB's refusal to alter the representation election procedures when petitioned to do so by a union that contested the 2008 Delta election, alleging interference by management).

239. See, e.g., *id.* at 14 (statement of Rep. Jerrold Nadler) (asking the current NMB Chairman, Read C. Van de Water, why the union election procedures are unlike any other democratic election).

240. See *supra* Part II.

241. See Gould, *supra* note 4, at 44 (arguing that the current political climate presents a good opportunity to clarify the application of the Bush II Board's decisions by engaging in rulemaking instead of reversing its decisions permanently).

242. Proposed Rules Governing Notification of Employee Rights Under the National Labor Relations Act, 75 Fed. Reg. 80,410 (proposed Dec. 22, 2010) (to be codified at 29 C.F.R. pt. 104).

243. *Id.* at 80,412.

244. See *supra* Part II.

First, like the NMB's rule, the NLRB's rule is of the type scholars have suggested that the NLRB undertake.²⁴⁵ In fact, Samuel Estreicher suggested that the NLRB propose a rule "setting forth the text of a poster reciting the rights of employees under the NLRA that employers would be required to post" to avoid its past problems with rulemaking where the NLRB tried to rigidify Board standard.²⁴⁶ The rule appears to be less controversial than the NMB's representation election procedure rulemaking, which should lead to an easier process—however, like the NMB's representation election rule, some have suggested the NLRB lacks the statutory authority to promulgate the rule.²⁴⁷

The NLRB appears to have heeded the NMB's example by writing a thorough preamble to the proposed rule, explaining its reasoning for undertaking the process and the statutory authority for the new rule.²⁴⁸ To anticipate any challenges to the final rule, if the NLRB chooses to adopt it, the agency should respond substantively to any negative commentators and explain its reasons for adoption in detail.²⁴⁹

Additionally, the NLRB chose to publish the dissenting view of Brian E. Hayes, a Republican Obama nominee, whose appointment came after the majority of the NLRB decided to grant the rulemaking petitions and proceed with the rule.²⁵⁰ Member Hayes expressed his view that the NLRB lacked statutory authority to promulgate the rule.²⁵¹ He did not, however, allege any impropriety within the agency or that his colleagues had "prejudged" the issues, as did Chairman Dougherty in the representation

245. See, e.g., Estreicher, *supra* note 10, at 13 (suggesting that the NLRB make rules to stabilize policy oscillations and encourage nationwide uniformity).

246. *Id.*

247. Proposed Rules Governing Notification of Employee Rights Under the National Labor Relations Act, 75 Fed. Reg. at 80,415 (Hayes, Member, dissenting) (encouraging public comment on the NLRB's lack of statutory authority).

248. See *id.* at 80,410–20 (explaining in its ten-page preamble that "the NLRA stands out as an exception to the widespread notice-posting practice that has long been common in the workplace").

249. The thorough preamble helped the NMB survive judicial review. See *Air Transp. Ass'n of Am. v. Nat'l Mediation Bd.*, 719 F. Supp. 2d 26, 37–39 (D.D.C. 2010) (relying on the NMB's explanation of the its reasons for the policy change to uphold the rule under *Chevron* step two).

250. See Proposed Rules Governing Notification of Employee Rights Under the National Labor Relations Act, 75 Fed. Reg. at 80,415 (Hayes, Member, dissenting) (noting that had he been a member earlier, he would have voted against rulemaking).

251. *Id.* ("The absence of . . . express language in [the NLRA] is a strong indicator, if not dispositive, that the Board lacks the authority to impose such a requirement.").

election rulemaking, which makes it less likely that commentators will allege agency bias.²⁵²

Finally, like the NMB, the NLRB spent time conducting an analysis under the RFA and concluded that the proposal would not affect small businesses.²⁵³ So the ossification statutes have not prohibited the NLRB from rulemaking.²⁵⁴ It appears as though the NLRB has mirrored the NMB's early processes in its rulemaking, which bodes well for the agency should it adopt the rule and should parties challenge it during judicial review. The NLRB should continue to learn from the NMB by considering going above and beyond the requirements of the APA and holding an abbreviated public hearing on the issue without opportunity for cross-examination, and writing a thorough preamble to the final rule addressing negative commentators and Member Hayes's dissent.²⁵⁵

CONCLUSION

The NLRB recently dipped its toes into rulemaking, despite its previously expressed fears of political and judicial intervention into its ability to set labor policy. The NLRB should look at the NMB's controversial rulemaking concerning union elections as a guideline in conducting itself in the future. Like the NLRB, the NMB is an independent, bipartisan agency operating in the inherently controversial and political labor field. The care the NMB took in addressing its constituents' concerns in its final rule and its lengthy explanation of its reasons for the policy change instilled confidence in the reviewing court that the NMB had not acted with bias or in dereliction of its duties under the RLA and the APA. The ATA has since appealed the decision, meaning the NMB will have to devote more court time and resources to the litigation, but the deferential standards of review the District Court for the District of Columbia applied in its decision bodes well for the agency on appeal.

It is impossible to argue that the NMB's success will translate precisely to successful rulemaking at the NLRB. Considering, however, the significant

252. Representation Election Procedure (NPRM), 74 Fed. Reg. 56,750, 56,752 (proposed Nov. 3, 2009) (codified at 29 C.F.R. pts. 1202, 1206 (2011)) (Dougherty, Chairman, dissenting) (alleging the majority "prejudged" the issue and should have engaged in a prerulemaking comment period to hear alternative viewpoints).

253. See Proposed Rules Governing Notification of Employee Rights Under the National Labor Relations Act, 75 Fed. Reg. at 80,415-16 (explaining that the rule will affect many entities, but each employer will only have to spend around two hours posting).

254. The NLRB also certified that the rule did not trigger the PRA and invited comment if parties believed otherwise. *Id.* at 80,416.

255. See *supra* Parts III.B.2.

benefits of rulemaking—increased public participation in agency policymaking, agency legitimacy, and perhaps judicial confidence in the agency’s policies—the NLRB can learn from the NMB’s experiment and successfully set stable labor policy through notice-and-comment rulemaking in the inherently controversial labor industry. The NLRB will have to consider the political circumstances and the context in deciding whether to make policy through adjudication or rulemaking. In the NMB’s case, that Congress was unwilling to dispose of a seemingly pro-union final rule contributed to the rule’s success. In addition to writing a thorough preamble to both the proposed and final rules, the NLRB may also consider going beyond the APA requirements and holding an informal, abbreviated public hearing and working cooperatively with its dissenting members throughout the process to avoid allegations of bias and instill confidence in any potential reviewing courts.

In a field such as labor relations, there will always be groups opposing a rule they feel will harm trade interests, and unions opposing rules they feel are pro-management. But the NMB experience shows that even in a highly controversial area, APA notice-and-comment rulemaking procedures, when followed correctly, can be a successful way of overcoming challenges to a divisive policy choice adopted in a rulemaking proceeding. Hopefully, the NLRB will continue to engage in rulemaking even after concluding its current rulemaking proceeding, looking to the NMB’s processes to create strong and stable prospective policies in the highly political and controversial labor industry.

RECENT DEVELOPMENTS

LEGAL ISSUES IN E-RULEMAKING

BRIDGET C.E. DOOLING*

TABLE OF CONTENTS

Background.....	895
I. Do We Need an APA 2.0?	897
A. Ensuring “Consideration” of Organized Mail Campaigns	899
B. An Electronic Comment Requirement?	903
II. Processing Public Comments.....	905
A. Why Process Comments?	905
B. Is Screening Required?	909
1. Personal Information	909
2. Trade Secret or Confidential Information.....	911
3. Copyrighted Information.....	913
4. Illegally Obtained Information	914
5. Obscene or Threatening Comments	915
C. An Alternative Approach.....	915
III. The Electronic Record on Review	917
A. Destroying Paper Comments.....	920
B. Recording Physical Objects and Organized Mail Campaigns in the Electronic Docket.....	922
1. Physical Objects.....	922

* Adjunct Professor of Law, George Mason University. This Article grew from the Author’s report to the Administrative Conference of the United States (ACUS), prepared while the Author was on detail as Special Assistant to the Chairman. Although the report provided the research basis for ACUS Recommendation 2011-1, the views expressed are those of the author and do not necessarily reflect those of the ACUS Assembly. The author is grateful for discussions of e-Rulemaking legal issues with knowledgeable federal agency staff, and kindly thanks Frank Massaro for research assistance and the ACUS staff for their support.

2. Organized Mail Campaigns	923
C. Docketing Online, Public Collaborations.....	924
D. Certifying the Electronic Docket	926
IV. Recordkeeping Requirements	929
A. Agency Statements	931
B. Public Comments in Agency Fora.....	932
Conclusion	932

Since the enactment of the Administrative Procedure Act (APA) in 1946, the technological landscape has changed dramatically while the basic framework for notice-and-comment rulemaking has largely gone unchanged. Federal regulators, looking to embrace the benefits of electronic rulemaking, face considerable ambiguity about how established, procedural legal requirements apply to the web.¹ For example, does the APA permit agencies to require comments to be submitted online? Are agencies required to screen the content of public comments before they are placed on Regulations.gov? Are electronic dockets a legally sufficient means of preserving the rulemaking record? Many of these issues and others have been swirling around electronic rulemaking (e-Rulemaking) since its inception, and exist whether rulemaking is accomplished entirely on paper or using more electronic means.² This Article focuses on the legal

1. Others have taken stock of these legal issues. *See generally* Barbara H. Brandon & Robert D. Carlitz, *Online Rulemaking and Other Tools for Strengthening Our Civil Infrastructure*, 54 ADMIN. L. REV. 1421, 1471–78 (2002) (anticipating the rise of Internet technology in rulemaking during the Bush Administration); Jeffrey S. Lubbers, *The Transformation of the U.S. Rulemaking Process—For Better or Worse*, 34 OHIO N.U. L. REV. 469, 480 (2008) (noting the docketing, copyright, and spam issues that accompany e-Rulemaking); Jeffrey S. Lubbers, *The Future of Electronic Rulemaking: A Research Agenda* (Regulatory Policy Program, John F. Kennedy Sch. of Gov't, Working Paper RPP-2002-04, 2002), available at <http://www.hks.harvard.edu/m-rcbg/research/rpp/RPP-2002-04.pdf> (highlighting issues to be resolved with e-Rulemaking and urging further research); HENRY H. PERRITT, JR., ELECTRONIC DOCKETS: USE OF INFORMATION TECHNOLOGY IN RULEMAKING AND ADJUDICATION: REPORT TO THE ADMIN. CONFERENCE OF THE UNITED STATES (1995) [hereinafter PERRITT REPORT], available at http://www.kentlaw.edu/faculty/rstaudt/classes/oldclasses/internetlaw/casebook/electronic_dockets.htm (discussing hurdles faced by the Department of Transportation and Nuclear Regulatory Commission during their initiatives to automate agency proceedings); Neil Eisner, Ass't Gen. Counsel, U.S. Dep't of Transp., Presentation at the Joint ACUS–Brookings Forum, E-Rulemaking: Digital Dilemmas (Nov. 30, 2010), available at http://www.brookings.edu/~media/Files/events/2010/1130_electronic_rulemaking/1130_electronic_rulemaking_eisner.pdf (discussing legal questions e-Rulemaking raises pertaining to copyright, obscenities, and the legal record, among other issues).

2. This Article follows up on previous ACUS research. On October 19, 1995, a mere twelve days before ACUS closed its doors on October 31, 1995, Professor Henry H. Perritt, Jr. delivered a report titled *Electronic Dockets: Use of Information Technology in Rulemaking and*

issues that present themselves entirely, or more prominently, when agencies engage in e-Rulemaking.

Following a short background section on e-Rulemaking, Part I explains why updating the APA to address e-Rulemaking is unnecessary. Part II explores whether and how agencies should screen public comments before sharing them online and suggests a fundamental change to the way comments are posted on the biggest online rulemaking website, Regulations.gov. Part III analyzes the legal issues associated with using an electronic docket to compile the rulemaking record, finding that well-designed electronic dockets pose no significant legal risks but that the courts could probably do more to embrace electronic filing. Part IV shows that the most basic of federal requirements, the recordkeeping requirements of the Federal Records Act, apply to e-Rulemaking and suggests ways to ensure compliance. The Article concludes with a recap of the Article's recommendations.

BACKGROUND

E-Rulemaking has been described as “the use of digital technologies in the development and implementation of regulations.”³ While there are many ideas about how agencies might use technology to enforce or otherwise implement their rules, for the purposes of this Article, e-Rulemaking is defined as using web technologies before or during the APA's informal rulemaking process, i.e., notice-and-comment rulemaking under 5 U.S.C. § 553. This includes many types of activities, such as: posting notices of proposed and final rulemakings; sharing supporting materials; accepting public comments; managing the rulemaking record in electronic dockets; and hosting public meetings online or using social media, blogs, and other web applications to promote public awareness of and participation in regulatory proceedings.⁴

Adjudication. Professor Perritt's report focused on the efforts of two federal agencies, the Department of Transportation and the Nuclear Regulatory Commission, to use information technology to automate certain agency proceedings. Although it was not published, the Perritt Report continues to be a helpful resource on the legal issues and policy choices facing increased use of information technology (IT) in administrative proceedings. See PERRITT REPORT, *supra* note 1.

3. Cary Coglianese, *E-Rulemaking: Information Technology and the Regulatory Process*, 56 ADMIN. L. REV. 353, 355 (2004).

4. For a detailed discussion on the timeline and development of e-Rulemaking, see Coglianese, *supra* note 3, at 363–66. See also Cynthia R. Farina et al., *Rulemaking 2.0*, 65 U. MIAMI L. REV. 395, 399–403 (2011); COMM. ON THE STATUS & FUTURE OF FED. E-RULEMAKING, A.B.A. SECTION OF ADMIN. LAW & REGULATORY PRACTICE, *ACHIEVING THE POTENTIAL: THE FUTURE OF FEDERAL E-RULEMAKING* 21–32 (2008), available at <http://ceri.law.cornell.edu/documents/report-web-version.pdf>.

A system that brings several of these activities together is operated by the eRulemaking Program Management Office (eRulemaking PMO or PMO), which is housed at the Environmental Protection Agency (EPA) and funded by contributions from partner federal agencies. This program contains two components: Regulations.gov, which is a public website where members of the public can view and comment on regulatory proposals, and the Federal Docket Management System (FDMS), which is a restricted-access website that agency staff can use to manage their internal files and the content on Regulations.gov. According to the Office of Management and Budget (OMB), FDMS provides “better internal docket management functionality and the ability to publicly post all relevant documents on [R]egulations.gov (e.g., Federal Register documents, proposed rules, notices, supporting analyses, and public comments).”⁵ A recent report estimated the federal government’s cost savings at \$30 million over five years when compared to paper-based docketing.⁶ Additionally, electronic docketing enables the agencies to make proposed and final regulations, supplemental materials, and public comments widely available to the public. These incentives and the statutory prompt of the E-Government Act of 2002, which required agencies to post rules online, accept electronic comments on rules, and keep electronic rulemaking dockets,⁷ have helped ensure that over 90% of agencies post regulatory material on Regulations.gov.⁸

The Obama Administration recently placed its imprimatur on Regulations.gov in Executive Order 13,563, which directs agencies to provide, *inter alia*, “timely online access to the rulemaking docket on [R]egulations.gov, including relevant scientific and technical findings, in an open format that can be easily searched and downloaded.”⁹ As more

5. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, REPORT TO CONGRESS ON THE BENEFITS OF THE E-GOVERNMENT INITIATIVES 10 (2010), http://www.whitehouse.gov/sites/default/files/omb/assets/egov_docs/FY10_E-Gov_Benefits_Report.pdf.

6. *Id.*

7. E-Government Act of 2002, Pub. L. No. 107-347, § 206, 116 Stat. 2899, 2915–16 (codified in scattered sections of 44 U.S.C. (2006)).

8. eRULEMAKING PROGRAM MGMT. OFFICE, IMPROVING ELECTRONIC DOCKETS ON REGULATIONS.GOV AND THE FEDERAL DOCKET MANAGEMENT SYSTEM: BEST PRACTICES FOR FEDERAL AGENCIES at D-1 (2010), http://www.regulations.gov/exchange/sites/default/files/doc_files/20101130_eRule_Best_Practices_Document_rev.pdf. Some agencies rely on their own electronic docketing systems, such as the Federal Trade Commission (which uses a system called CommentWorks) and the Federal Communications Commission (FCC), which has its own electronic comment filing system. See Fed. Comm’ns Comm’n, *Welcome to the New Electronic Comment Filing System*, FCC.GOV, <http://fjallfoss.fcc.gov/ecfs/> (last visited Nov. 2, 2011).

9. Exec. Order No. 13,563 § 2(b), 76 Fed. Reg. 3821, 3821–22 (Jan. 21, 2011).

agencies explore e-Rulemaking as a way to promote openness in government, its benefits and its challenges are becoming more apparent.¹⁰ The time may be right to evaluate the legal frameworks that surround rulemaking. The most central of these is the APA.

I. DO WE NEED AN APA 2.0?

Given that the APA was enacted in 1946, well ahead of the Internet, one could question whether the statute needs to be amended to account for and support the rise of e-Rulemaking. In 1995, toward the beginning of the federal government's efforts to explore ways to use the Internet in rulemaking, Professor Henry H. Perritt, Jr. explored this issue in a report (the Perritt Report) to the Administrative Conference of the United States (ACUS) and concluded that the APA provided no legal barriers to what is now known as e-Rulemaking.¹¹ Since then, many federal agencies have adopted at least some form of e-Rulemaking.

The apparent compatibility between e-Rulemaking and the APA may result from the APA's design as a flexible, procedural statute. The statute provides agencies with flexibility to use different procedural devices so long as they meet the basic statutory requirements.¹² For example, the APA requires an agency to provide notice on proposed rules in the *Federal Register* but does not prevent it from doing more. Agencies have developed other devices, not described in the APA, to engage the public ahead of a proposed rule. Agencies sometimes use an advance notice of proposed rulemaking (ANPRM) to gather early feedback on regulatory issues.¹³ The APA contains no reference to ANPRMs or other "pre-rule" efforts such as

10. See, e.g., Jeffrey S. Lubbers, *A Survey of Federal Agency Rulemakers' Attitudes About e-Rulemaking*, 62 ADMIN. L. REV. 451, 474 (2010) ("[W]hile rulemakers are quite impressed with the internal administrative and coordination benefits provided by the new technology, they also have heightened concerns about hacking and the potential problems of inappropriate worldwide exposure of certain information in their electronic dockets.").

11. Perritt found that "there is no reason that electronic formats may not be used for all aspects of an informal rulemaking proceeding, as long as an appropriate [notice of proposed rulemaking (NPRM)] is published in the Federal Register." PERRITT REPORT, *supra* note 1, at VIII.A. The Perritt Report also notes that the *Federal Register* was only available in paper format. *Id.* While the paper copy is still the official record, the *Federal Register* is now available online, going back to 1994.

12. See George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1559 (1996) (explaining that the Administrative Procedure Act (APA) "has provided agencies with broad freedom"). See generally Peter L. Strauss, *Changing Times: The APA at Fifty*, 63 U. CHI. L. REV. 1389 (1996) (highlighting that the essence of the Administrative Procedure Act over the years has been its flexibility).

13. E.g., OSHA Combustible Dust, 74 Fed. Reg. 54,334 (proposed Oct. 21, 2009) (to be codified at 29 C.F.R. pt. 1910) (publicizing an advance notice of proposed rulemaking).

Requests for Information (RFIs),¹⁴ but that has not precluded the practice. Similarly, agencies seeking to conduct other pre-rule activities online, such as encouraging the public to participate in an online forum to discuss ideas for regulatory reform, can do so without concern of violating the APA. Of course, in both the online and offline contexts, the APA requires agencies to conduct notice-and-comment rulemaking if the agency intends to revise or promulgate new regulations.

Still, some have questioned whether the federal government's current approach to APA rulemaking in general, and e-Rulemaking in particular, does enough to engage the public.¹⁵ This includes a concern that e-Rulemaking merely moves the APA's existing notice-and-comment procedure online, rather than using technology in a more transformational manner, thus failing to "exploit opportunities to enhance on-line deliberation and more robust forms of interpersonal communication" in rulemaking.¹⁶ This is not a critique of the APA's notice-and-comment framework, but rather a critique of how the government uses technology to operate within that framework. Expanding on this concept, one scholar recently called on the federal government to use social media to seek public feedback before rules are drafted and solicit evidence-backed proposals from the public on problems the government plans to address.¹⁷ Both of these ideas are pre-rule activities that do not implicate the APA.

In keeping with scholarly critiques of e-Rulemaking, which have not sought amendments to the APA, this Article concludes that at this point the APA does not need to be amended to support e-Rulemaking. Some scholars have called for innovative approaches to supplement the APA's notice-and-comment requirements with more meaningful engagement, such as consulting members of the public who might not otherwise take an

14. *E.g.*, HIPAA Privacy Rule Accounting of Disclosures Under the Health Information Technology for Economic and Clinical Health Act; Request for Information, 75 Fed. Reg. 23,214 (May 3, 2010).

15. *See generally* Mariano-Florentino Cuéllar, *Rethinking Regulatory Democracy*, 57 ADMIN. L. REV. 411 (2005) (analyzing aspects of the notice-and-comment process in recent regulatory proceedings to explore whether exiting methods for obtaining public input on regulations work); Beth Simone Noveck, *The Future of Citizen Participation in the Electronic State*, 1 I/S J.L. & POL'Y FOR INFO. SOC'Y 1 (2005) (suggesting that electronic rulemaking should focus on developing software to enable participation from the public to its fullest extent).

16. Noveck, *supra* note 15, at 8; *see also* Coglianesi, *supra* note 3, at 385 ("[E]-rulemaking has the potential to go well beyond just digitizing the current process.").

17. Beth S. Noveck, *Turning Rule Writers Into Problem Solvers: Creating a 21st Century Government That's Open and Competent by Improving Regulation and Regulatory Review*, CAIRNS BLOG (Jan. 26, 2011, 8:31 AM), <http://cairns.typepad.com/blog/2011/01/turning-rule-writers-into-problem-solvers-creating-a-21st-century-government-thats-open-and-competen.html>.

interest in the regulation¹⁸ or using social media to improve pre-rule consultation.¹⁹ These suggestions are consistent with the notion that the APA contains adequate flexibility for agencies to explore alternative ways to engage the public—online and offline.

Moving on from this general concern, this Article turns to two other APA-related inquiries. First, the following section will explore whether an increased number of organized mail campaigns present challenges for agency “consideration” of public comments as required by the APA. Second, this Article will address whether the APA permits agencies to require the public to comment electronically.

A. Ensuring “Consideration” of Organized Mail Campaigns

If e-Rulemaking tends to increase the number of comments received by agencies, how can agencies ensure consideration of material received as required by the APA? A threshold issue is whether e-Rulemaking increases the number of comments. One scholar explored e-Rulemaking by the Federal Communications Commission (FCC) between 1999 and 2004, finding that, in general, e-Rulemaking merely shifted commenters from paper to online means.²⁰ That is, with a few exceptions, the increase of electronic comments was offset by the decrease in paper comments.²¹ The study uncovered notable exceptions when the number of electronic comments “spiked.” One of these events was during the FCC’s revision of the media ownership rules.²² The study found despite the “complex” subject matter of the rulemaking, it drew tens of thousands of public comments, many of which were “largely identical texts” and “mass electronic mailings.”²³

While there is no comprehensive study of how online commenting behavior differs from its offline counterpart, the results of the study on the

18. Cuéllar, *supra* note 15, at 493–95. This proposal includes an acknowledgement that the benefits of a redesigned process that engages the public more fully must be weighed against its costs, which might include increased staff and other resources. *See id.* at 492 n.245.

19. *See* Noveck, *supra* note 17.

20. John M. de Figueiredo, *E-Rulemaking: Bringing Data to Theory at the Federal Communications Commission*, 55 DUKE L.J. 969, 986–87 (2006).

21. *Id.*

22. Press Release, Fed’l Commc’ns Comm’n, FCC’s Media Bureau Adopts Procedures for Public Access to Data Underlying Media Ownership Studies and Extends Comment Deadlines for 2002 Biennial Regulatory Review of Commission’s Media Ownership Rules (Nov. 5, 2002), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-02-2980A1.pdf.

23. de Figueiredo, *supra* note 20, at 988. The comments so overwhelmed the FCC’s system that staff contacted one “mass marketer” to slow down the submissions. *Id.* at 989.

FCC suggest that, at least for some subset of rules, e-Rulemaking increases the number of comments received due to organized mail campaigns or to the increased ease of commenting in general.

This conclusion is consistent with anecdotal evidence of other sporadic increases in comments received through online advocacy campaigns, which have sometimes generated the submission of hundreds of thousands of comments.²⁴ One scholar has described this phenomenon as “notice and spam.”²⁵ As currently designed, e-Rulemaking reduces the costs of viewing proposals and submitting comments, especially when the proposals and calls for comments are aggregated on a government-wide website such as Regulations.gov.²⁶ The risk of this approach to e-Rulemaking is that “quality input will be lost; malicious, irrelevant material will rise to the surface, and information will not reach those who need it. In short, e-rulemaking will frustrate the goals of citizen participation.”²⁷ Those concerned with the strain on agency resources caused by large spikes in comments echo this sentiment.²⁸

Of course, organized mail campaigns are not unique to e-Rulemaking; letter-writing campaigns have long been used to convey views to regulators.²⁹ The legal question for e-Rulemaking is the extent to which agencies must consider duplicative comments received online. The Supreme Court explained that not all comments must be scrutinized in

24. Dr. Stuart Shulman has written most extensively on this topic. *E.g.*, Stuart W. Shulman, *Perverse Incentives: The Case Against Mass Email Campaigns* (U. Pitt. Ctr. for Soc. & Urban Research, Working Paper, 2007), available at <http://shulman.ucsur.pitt.edu/Doc/Papers/APSA07-Perverse.pdf>; Stuart W. Shulman, *Whither Deliberation? Mass E-Mail Campaigns and U.S. Regulatory Rulemaking*, 3 J. E-GOV'T 41, 44–47 (2006) [hereinafter Shulman, *Whither Deliberation*]; Stuart W. Shulman, *The Internet Still Might (But Probably Won't) Change Everything*, 1 I/S.J.L. & POL'Y FOR INFO. SOC'Y 111, 115 (2005) [hereinafter Shulman, *The Internet*].

25. Beth Simone Noveck, *The Electronic Revolution in Rulemaking*, 53 EMORY L.J. 433, 441 (2004).

26. *See id.* at 441–42; *see also* de Figueiredo, *supra* note 20, at 992 (“[T]here are initial indications that electronic filings and e-mail may make it cheaper for parties to express preferences.”); Lubbers, *supra* note 10, at 455 (“Blizzards of comments have become increasingly common in controversial rulemakings, and e-rulemaking can only further this trend.”).

27. Noveck, *supra* note 25, at 442. Professor Cuéllar has suggested that several factors, such as the topic of the regulation, the level of media interest, and the dynamics of the relevant interest groups, can influence the likelihood of an organized mail campaign on a particular proposed rule. Cuéllar, *supra* note 15, at 470.

28. *See, e.g.*, Farina et al., *supra* note 4, at 408.

29. Letter-writing campaigns are sometimes directed at members of Congress, too. *See* Reggie Beehner, *Does Congress Read its E-mail?*, PCWORLD (Apr. 30, 2001, 4:00 PM), http://www.pcworld.com/article/48788/does_congress_read_its_email.html.

exhaustive detail: “[C]omments must be significant enough to step over a threshold requirement of materiality before any lack of . . . consideration becomes of concern.”³⁰ It is reasonable to argue that duplicative comments, perhaps except for some acknowledgment of the number of them, do not cross the materiality threshold.³¹ The APA’s provisions on formal hearings, which note, “Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or *unduly repetitious* evidence,”³² provide some support for this. Although this provision technically applies only to formal adjudication and the rarely used formal rulemaking, it suggests that the APA does not require slavish consideration of repetitive submissions.

An overly cautious approach to APA requirements in mass comment scenarios forces agencies to sink considerable staff resources into reading or at least skimming comments that are word-for-word identical. For example, if an agency takes this approach with a docket that contains 250,000 comments from an organized mail campaign, even if it takes less than ten seconds to identify and skim each comment, that effort still accounts for almost 700 staff hours or \$21,000.³³ This excludes any time needed to summarize the comments for use internally or for the preamble of the final rule. The voluminous influx of comments can drive some agencies to turn to contractors, either to help organize and save public comments in the docket, or to actually review and summarize those comments.³⁴

The APA, however, does not require such an exhaustive approach to identical or nearly identical comments. It permits agencies to leverage technology to bolster consideration by sorting through comments once they

30. *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 553 (1978) (alteration in original) (quoting *Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 375, 394 (D.C. Cir. 1973)); *see also* *North Carolina v. FAA*, 957 F.2d 1125, 1135 (4th Cir. 1992) (“An agency establishing a rule need not respond to every comment. It must, however, reasonably respond to those comments that raise significant problems.”).

31. This does not imply that rulemaking is a plebiscite. That point is settled. *See, e.g.*, Farina et al., *supra* note 4, at 430 (citing Stuart Shulman’s work on this topic). Some have characterized duplicative comments as “the poster child for public participation that completely misses the point of the process.” *Id.* at 417. This Article does not opine on the value of these comments; it just explores whether they trigger any legal issues. For an interesting discussion of the weight that agencies could assign to this type of public comments, *see* generally Nina A. Mendelson, *Rulemaking, Democracy, and Torrents of E-Mail*, 79 GEO. WASH. L. REV. 1343 (2011).

32. 5 U.S.C. § 556(d) (2006) (emphasis added).

33. This estimate assumes staff members are paid at the level of GS-11, Step 1 in Washington, D.C. U.S. OFFICE OF PERS. MGMT., SALARY TABLE 2011-DCB (2011), http://www.opm.gov/oca/11tables/html/dcb_h.asp.

34. *See* Noveck, *supra* note 25, at 442–43.

have been loaded into the electronic docket. Software that uses natural language processing is one promising technology,³⁵ because it could help staff identify duplicate comments, providing confidence that all unique comments and personalized portions of partially duplicative comments are considered efficiently.³⁶ This time-saving approach does not diminish agency consideration because it would still give agencies access to the number and content of all comments received.

Agencies should cooperate with each other and the eRulemaking PMO to explore whether the use of these tools makes sense for them. While some agencies are already using or exploring software to perform more efficient review of public comments, for others such software is unavailable, either because of budget or procurement constraints, or because agency staff are unaware of or uncertain about the value of using software in this manner. This Article recommends that agencies assess how much staff time and other resources are devoted to organizing and considering duplicative comments. If the amount is high, this Article recommends evaluating

35. A description of how this would work:

Text analysis software can identify letters that are exact duplicates (e.g., form letters from a letter-writing campaign) and near-duplicates (e.g., “form+” letters that have been modified to represent their opinions better or append extra information). Simple phrase recognition techniques can identify concepts that people mention frequently, which can serve as a starting point for “drill down” activities that examine comments addressing particular topics or points of view. People often identify their roles with respect to a particular regulation—for example, “As a mother, I believe . . .,” or “I have been a truck driver for 25 years and . . .” Relatively simple techniques can be used to find and organize such references, enabling policy makers, rule writers, and other interested parties to understand better who commented on a particular aspect of the rule.

These and a wide variety of similar techniques are possible in the near future. Today regulatory agencies are struggling with basic ICT [information and communications technologies] issues related to capturing public comments electronically. Soon these will be mastered, and attention will turn to better use of language analysis and text mining software. At present there is an opportunity to provide better tools for rapidly analyzing large public comment databases, and, consequently, for increasing transparency and efficacy in the comment submission and analysis process.

Shulman, *The Internet*, *supra* note 24, at 116–17 (further noting, “Although computers cannot understand human language the way people do, they can still be useful in helping people make sense of large public comment databases”); *see also* Farina et al., *supra* note 4, at 435, 445 (discussing natural language software and “algorithms that aggregate, categorize or summarize comment text”); Noveck, *supra* note 17 (arguing that the White House should employ a software platform that provides templates by which agencies can organize and respond to public comments).

36. *See* Cuéllar, *supra* note 15, at 487 (noting that “some senders edit the underlying language and others leave it in place”).

whether software could help. Additionally, interagency discussion might help raise awareness and encourage agency staff to explore whether these technologies are worth pursuing. Such interagency discussion should include the staff of the eRulemaking PMO, who are already exploring whether natural language comment analysis tools could be incorporated into FDMS.³⁷ Steps in this direction would alleviate the need for agencies to evaluate and purchase these tools separately, while learning from agencies that have already used these tools.

B. An Electronic Comment Requirement?

Whether the APA permits agencies to require comments to be submitted electronically is less clear, but there are policy reasons why the time may not be right for such an approach. Although the APA does not explicitly address this issue, it does require agencies to “give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments.”³⁸ One could argue that this language prohibits agencies from restricting the methods by which interested persons are given the opportunity to participate. The problem with this argument is that agencies already do restrict the ways in which members of the public can file comments. At present, agencies typically offer many ways to submit comments—by mail, courier, fax, e-mail, or Regulations.gov, for example. If, however, a member of the public wanted to file a comment by leaving a voicemail, this would generally not be accepted into the docket without prior agreement from the agency to provide a voicemail transcription service. This may be because agencies have determined that the cost of operating such a system for each proposed rule is prohibitive, despite the fact that this decision may preclude some individuals from participating in rulemaking in the manner they prefer. To argue, however, that the APA requires agencies to offer a voicemail transcription service, translation of comments in foreign languages, or other accommodations suggests that by requiring agencies to provide “an” opportunity, the APA requires that agencies provide “every” opportunity without consideration of costs. In balancing efficiency against the goal of public participation, it appears that agencies are already operating under the perception that it is lawful to place some limits on commenting practice for the sake of efficiency or cost reduction, so long as those limits do not foreclose the public’s opportunity

37. See ERULEMAKING PROGRAM MGMT. OFFICE, *supra* note 8, at 22–23 (identifying uses for an improved rulemaking docket, such as categorizing, analyzing, and summarizing public comments).

38. 5 U.S.C. § 553(c) (2006).

to participate.³⁹

Whether agencies could require electronic submission of comments without statutory amendment to the APA may depend on the availability of the Internet⁴⁰ and an understanding of how it is used. If almost all members of the public have access to the Internet, even if that access is not at home, it is at least conceivable that concerns about foreclosing the public's opportunity to participate are outweighed by the efficiency gains of electronic commenting.⁴¹

To be clear, this Article does not advocate that agencies require electronic submission of comments in the near future. There may be good policy reasons why it is not the best practice in 2011. For example, studies that have explored the extent to which different groups have access to the Internet have found that certain segments of the population lag behind others.⁴² Instead, this Article more modestly suggests that the APA does not, in and of itself, preclude an electronic commenting requirement as long as the agency can demonstrate that it has provided the public with an opportunity to participate in its rulemakings.

In summary, while some might welcome the opportunity to update the

39. Henry H. Perritt, Jr., *The Electronic Agency and the Traditional Paradigms of Administrative Law*, 44 ADMIN. L. REV. 79, 88–89 (1992).

40. Estimates from the U.S. Census Bureau's Current Population Survey show that Internet access at home is on the rise, with the 2009 figure at 68.7%. U.S. CENSUS BUREAU, INTERNET USE IN THE UNITED STATES: OCTOBER 2009 (2010), <http://www.census.gov/hhes/computer/publications/2009.html>. However, this estimate does not give the complete picture of Americans' Internet access because it does not include Internet access from work, public libraries, schools, or other locations. As a result, these are underestimates of overall Internet access. Based on updated statistics from the U.S. Department of Commerce, one could argue that availability of Internet access in the United States is rising. *See generally* NAT'L TELECOMM'NS & INFO. ADMIN., U.S. DEP'T OF COMMERCE, DIGITAL NATION: 21ST CENTURY AMERICA'S PROGRESS TOWARD UNIVERSAL BROADBAND INTERNET ACCESS (2010), http://www.ntia.doc.gov/reports/2010/NTIA_internet_use_report_Feb2010.pdf (noting increased Internet availability, but that not all homes actually utilize this availability).

41. Any analysis should include a consideration of costs to process comments. While the expense of processing paper comments does not entirely disappear when comments are sent electronically, it is reduced. *See infra* Part II.A.

42. *See, e.g.*, SUSANNAH FOX, PEW RESEARCH CTR., AMERICANS LIVING WITH DISABILITY AND THEIR TECHNOLOGY PROFILE 3 (2011), http://www.pewinternet.org/~media/Files/Reports/2011/PIP_Disability.pdf (recognizing that only 54% of its survey respondents living with disabilities use the Internet as compared to 81% of adults not living with disabilities, and those who do use the Internet are less likely to have high-speed or wireless access). A recent report from the FCC found that 22% of survey respondents did not use the Internet, for reasons including cost and lack of interest. John B. Horrigan, *Broadband Adoption and Use in America* 24–25, 27 (Fed. Commc'ns Comm'n OBI Working Paper Series No. 1, 2010), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-296442A1.pdf.

APA for other reasons, it does not appear that explicit inclusion of e-Rulemaking is a necessary statutory amendment. In fact, revised statutory language specifically requiring the use of certain technologies to engage the public would build rigidity into what is now a very flexible set of procedures. Regarding how to ensure consideration of organized mail campaigns, this Article encourages agencies to explore the use of software to assist staff review. If now or in the future agencies seek to require electronic commenting, a statutory change could clear up any ambiguity around whether the move would impermissibly narrow the public's opportunity to comment. But it is probably not necessary. It is also important to note that there may continue to be sound policy reasons not to require electronic comments. Overall, this Article finds that the APA, despite having been drafted well before the Internet was a communications channel between the public and government agencies, does not impede agencies from using e-Rulemaking techniques.

II. PROCESSING PUBLIC COMMENTS

As agencies are directed to place their regulatory dockets online,⁴³ they face questions about whether and how to screen the content of public comments placed on Regulations.gov and other websites. First, this section will explore why agencies might screen comments in the first place. It will then explore what kind of information they might be required to redact and suggest how agencies can manage these requirements.

A. *Why Process Comments?*

Members of the public might be surprised to learn that their comments are processed before they are placed in the public regulatory docket. Some measure of organizational processing is essential—after an agency receives a paper comment it must be routed to the correct agency staff, logged in, and either scanned into the electronic docket or placed into physical files. For an electronic comment received online through Regulations.gov, little organizational processing is necessary because FDMS automatically

43. *E.g.*, Exec. Order No. 13,563, § 2(b), 76 Fed. Reg. 3,821, 3,821–22 (Jan. 21, 2011). Previous guidance clarified Office of Management and Budget's (OMB's) expectation that agencies "post public comments and public submissions to the electronic docket on Regulations.gov in a timely manner, regardless of whether they were received via postal mail, email, facsimile, or web form documents submitted directly via Regulations.gov." Memorandum from Cass R. Sunstein, Adm'r, Office of Information & Regulatory Affairs, to the President's Mgmt. Council 2 (May 28, 2010), *available at* http://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/edocket_final_5-28-2010.pdf.

generates and saves metadata associated with the comment (e.g., date received), even if that metadata is not displayed on Regulations.gov.⁴⁴ Organizational processing is generally limited to posting the comments on Regulations.gov. These practices ensure that comments are retrievable by the public, by staff preparing the final rule, and by staff preparing the regulatory record for judicial review.

Another kind of processing is more akin to screening than organizing, and it can apply equally to electronic and paper comments. Some scenarios might help illustrate the dilemmas an agency could face and why they might screen the content of comments before posting them online.

Scenario 1:

A Social Security beneficiary, used to writing her Social Security number (SSN) on correspondence to the Social Security Administration (SSA), might include her SSN on a letter providing comments on a proposed SSA regulation. Even if the agency included a disclaimer in its preamble alerting all commenters that comments will be posted as they are received, agency staff may be reluctant to place the unredacted comment on a public website such as Regulations.gov.

Scenario 2:

A teacher sends a letter to the Department of Education explaining his perspective on a proposed regulation for programs aimed at students with disabilities. The letter includes information about his professional background with detailed examples about how his approach to teaching will be different under the proposed regulations. As support, he provides a summary of the learning disabilities of particular students in his class, using their names. Although the comment might shed light on possible effects of the proposed rule, it also shares private information about individuals other than the commenter. While the commenter may be free to share his own information, it is not clear that he has permission to share information about his students, and so staff at the Department of Education may wrestle with whether to include this private information in the online, electronic docket.

44. A feature recently added to Regulations.gov permits any website user to download a table that lists the contents of the public docket (e.g., notices, public comments, supplemental documents) for any rulemaking. This includes a column for the date a comment was received and the date a comment was posted. The difference between these two provides some insight into the length of total processing time. Although this measure does not provide insight into how much time is spent organizing comments versus screening them, it can be used by agencies to track their own performance with posting comments online.

There is no statute or government-wide manual that explicitly instructs agency staff how to handle situations like these. While all agencies take steps to organize public comments in the docket, only a subset screen the content of comments. These agencies have constructed their own approaches to screening for a variety of issues, from inappropriate disclosures (e.g., private information, information protected by intellectual property rights, illegally obtained information) to inappropriate conduct (e.g., obscenity, threatening language).

E-Rulemaking amplified but did not create the issue of whether to screen comments. Decades before the Internet was popular or agencies adopted electronic dockets, the public had access to dockets in reading rooms at agency offices.⁴⁵ Under this system, comments, including any inappropriate disclosures or inappropriate conduct therein, were available to the public. While technically a public resource, the arrangement provided little access as a practical matter to individuals outside of Washington.⁴⁶ Agencies began placing all or part of their rulemaking dockets online in the 1990s, a transition that continues today. Public comments posted online are lifted out of the “practical obscurity” of the public reading room and made more accessible.⁴⁷ In short, while concerns about the content of comments may always have been present to some degree, they were mitigated by the practical obscurity of the comments themselves.

So long as agencies keep the unredacted version of each comment in the docket, the APA’s legal requirement to compile the administrative record is probably fulfilled. But greater accessibility to rulemaking documents via the web brings greater urgency to whether and how to screen comments. While a letter including a commenter’s SSN might be reasonably safe in the

45. See Brandon & Carlitz, *supra* note 1, at 1426 (noting that merely providing public access to dockets in Washington, D.C. docket rooms may unduly restrict access to individuals outside of Washington, D.C.); PERRITT REPORT, *supra* note 1, at III.F.

46. See Brandon & Carlitz, *supra* note 1, at 1426.

47. This issue is similar to issues that have faced the courts regarding how and whether to protect the privacy of the data in their electronic dockets. In paper form, court filings, which might rightly include social security numbers, bank account numbers, and other personal information, were partially shrouded by practical obscurity in the clerk’s office. E.g., Arminda Bradford Bepko, *Public Availability or Practical Obscurity: The Debate Over Public Access to Court Records on the Internet*, 49 N.Y.L. SCH. L. REV. 967, 976–78 (2005); Peter A. Winn, *Judicial Information Management in an Electronic Age: Old Standards, New Challenges*, 3 FED. COURTS L. REV. 135, 152–61 (2009). While filings were technically available to the public, the costs of obtaining the information—particularly time spent—gave the filings, and most importantly the data therein, a measure of protection. Winn, *supra*, at 153. To address this issue, courts adopted new rules placing the onus on filers to redact certain personal information. FED. R. CIV. P. 5.2.

confines of a public reading room, placing the same letter online increases the chances that it will be seen by those who might use it for harm. In light of this reality, some agencies direct staff to identify and redact certain content before a comment is placed on a public government website. While comments placed online might be redacted, the original, unredacted versions are retained for the rulemaking record.

A key assumption is that the agency bears some responsibility—legal or otherwise—to monitor the content of Regulations.gov, even if the content was not crafted by the agency. The setup of Regulations.gov encourages this assumption because it requires agencies to affirmatively post materials, including public comments. As of this writing, agencies do not have the option to permit public comments to post automatically to Regulations.gov. Instead, staff must act to post comments on Regulations.gov.⁴⁸ The question is whether screening is required before comments are posted. If not, agencies should consider whether screening is worth the costs involved.

Screening, undertaken in the spirit of protecting the public, is not free. First, screening comments occupies staff time that could be directed elsewhere. For example, screening 10,000 comments for two minutes each accounts for over 333 staff hours, or \$8,200.⁴⁹ This excludes any time taken to redact comments. Second, screening comments before posting them online delays their posting.⁵⁰ This delay might range from a few hours to a few weeks, depending on the number of comments received and the level of screening taking place. But comments advance the public debate, so any delays should be scrutinized. Third, and less tangible, screening raises legal and policy questions about the appropriateness of screening under the First Amendment and the standards used to screen, and also a more general concern about why Regulations.gov does not work

48. Comments remain in the ‘Received Comments’ section of [FDMS] until they are posted or set to the Deferred, Do Not Post or Withdrawn status. However, the comments are pending post until the Docket Manager chooses to post the Public Submissions out to the Public using the Posting function. Users can choose to post all comments as listed, or can choose to select and order the comments to be posted using the Posting Wizard. Users can also post comments directly from the Comments screen.

Federal Docketing Management. System Agency Help Guide 19.2.2: Post Received Comments, REGULATIONS.GOV, http://fdms.erulemaking.net/fdms-web-agency/help/en/AgencyHelpGuide/19_2_2_Post_Received_Comments.htm (last visited Nov. 2, 2011).

49. This figure assumes staff members are paid at the level of GS-11, Step 1 in Washington, D.C. U.S. OFFICE OF PERS. MGMT., *supra* note 33.

50. As described in a 2002 article, agencies range from a twenty-four-hour delay to delays in posting until after the comment period has closed. See Brandon & Carlitz, *supra* note 1, at 1436 n.59. While this article does not explore the reasons for the delay, one contributor is likely to be agency screening policies.

like other popular websites that allow users to post comments instantly.⁵¹

B. Is Screening Required?

Agencies face legal questions with regard to how, when, and whether to screen comments. Agencies are legally required to prevent the disclosure of some types of information, and must therefore establish some mechanism to prevent it from being posted online. Other information is not subject to such a requirement. This section explores an agency's legal responsibilities with regard to certain categories of information, including personal information, trade secret or confidential information, copyrighted information, illegally obtained information, and obscene or threatening content.

1. Personal Information

As highlighted above in scenarios 1 and 2, agency staff might screen comments because they are concerned that posting a commenter's personal information, or that of another individual discussed in a comment, on Regulations.gov is an unlawful disclosure or otherwise violates a policy of protecting personal information. In general, the Privacy Act protects against unauthorized disclosures of records about individuals.⁵² FDMS is an example of a system of records subject to the Privacy Act, in part because it contains records with the names of individuals who submit public comments. The fact that FDMS is subject to the Privacy Act triggers an obligation to protect the information in the system from impermissible disclosure.

The Privacy Act allows for disclosure with the written consent of the individual to whom the record pertains. Absent written consent, the statute provides agencies with twelve additional types of permissible disclosures, one of which is an agency's "routine use."⁵³ To qualify as a routine use, a disclosure must be "appropriate and necessary for the efficient conduct of government,"⁵⁴ and the use must be compatible with the purpose for which

51. The Frequently Asked Questions section on Regulations.gov addresses this: "Why can't I see a comment I submitted?" The answer: "Once your comment is received, the appropriate agency must process it before it is posted to Regulations.gov. Given the fact that certain regulations may have thousands of comments, processing may take several weeks before it may be viewed online." *Frequently Asked Questions*, REGULATIONS.GOV, <http://www.regulations.gov/#!faqs> (last visited Nov. 15, 2011).

52. 5 U.S.C. § 552a(a) (2006).

53. *Id.* § 552a(b).

54. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB CIRCULAR A-108: RESPONSIBILITIES FOR THE MAINTENANCE OF RECORDS ABOUT INDIVIDUALS BY

the information was collected. To establish routine uses, an agency can publish a “systems of records notice” in the *Federal Register*. The eRulemaking PMO issued a Privacy Act system of records notice⁵⁵ for FDMS. This notice helps to comply with the Privacy Act and, along with the Privacy Impact Assessment,⁵⁶ it helps explain aspects of the system including how data is collected, accessed, and disclosed. However, as the FDMS system of records notice explains, agencies may need to publish a separate system of records notice if they disclose personal information in ways that are not described by the FDMS system of records notice.⁵⁷

Regarding personal information, this Article recommends that the eRulemaking PMO consider whether these documents should be updated in light of system upgrades and other changes. This Article also recommends that agencies assess whether their use of Regulations.gov results in disclosures beyond those contemplated in the FDMS system of records notice.⁵⁸ If so, agencies should work with each other and the eRulemaking PMO to update the FDMS system of records notice to account for crosscutting routine uses or update agency-specific systems of records notices for agency-specific disclosures.

Beyond technical compliance with the Privacy Act, agency staff may seek to protect members of the public who inadvertently disclose personal information in comments. The concern is that members of the public may not understand that their information will be posted online, rather than just being read internally by the agency. To address this concern, Regulations.gov places the following warning on the webpage where comments are submitted:

Any information (e.g., personal or contact) you provide on this comment form or in an attachment may be publicly disclosed and searchable on the Internet and in a paper docket and will be provided to the Department or Agency issuing the notice. To view any additional information for submitting comments, such as anonymous or sensitive submissions, refer to the Privacy and Use Notice, the Federal Register notice on which you are

FEDERAL AGENCIES, *reprinted in* 40 Fed. Reg. 28,948, 28,953 (July 9, 1975) (“The term ‘routine use’ was introduced to recognize the practical limitations of restricting use of information to explicit and expressed purposes for which it was collected.”).

55. Establishment of a New System of Records Notice for the Federal Docket Management System, 70 Fed. Reg. 15,086 (Mar. 24, 2005).

56. *Privacy Impact Assessment: eRulemaking*, EPA.GOV, <http://www.epa.gov/privacy/assess/fdms.htm> (last updated Oct. 15, 2009).

57. *See* Establishment of a New System of Records Notice for the Federal Docket Management System, 70 Fed. Reg. at 15,086.

58. *E.g.*, Privacy Act of 1974: System of Records, 71 Fed. Reg. 586, 586 (Jan. 5, 2006).

commenting, and the Web site of the Department or Agency.⁵⁹

Some agencies include similar notifications in the preambles of their proposed rules. At present, each agency independently decides whether to rely on a notification like this or to screen comments before posting them.

2. *Trade Secret or Confidential Information*

Agencies may need to screen comments to protect intellectual property rights. A recent case highlights the potential liabilities agencies may face if they fail to engage in such screening. A drug company recently sought \$1.5 billion in damages under the Federal Tort Claims Act, claiming that the Food and Drug Administration (FDA) misappropriated trade secrets and breached a confidential relationship by posting the drug company's information on its website.⁶⁰ After the district court dismissed these claims for lack of subject matter jurisdiction,⁶¹ the U.S. Court of Appeals for the District of Columbia Circuit reinstated them and remanded to the district court for additional proceedings.⁶² Notably, this case arose under a New Drug Approval proceeding before the FDA, not a rulemaking, but it highlights potential liabilities for disclosure of confidential or trade secret information. In addition to claims of damages, agency staff could theoretically face criminal sanction under 18 U.S.C. § 1905, which contains a provision that subjects federal employees to a fine, imprisonment, and removal if they disclose information obtained through official duties including trade secrets and other confidential information.⁶³

The potential penalties for failing to protect certain information are eye opening, but it is not clear whether agencies are legally required to screen information submitted by a commenter if the commenter provides no indication that the information should be protected. Some agencies discourage commenters from providing confidential or trade secret

59. *Submit a Comment*, REGULATIONS.GOV, <http://www.regulations.gov/#!submitComment;D=PHMSA-2009-0151-0016> (last visited Nov. 14, 2011); see also *Privacy Notice*, REGULATIONS.GOV, <http://www.regulations.gov/#!privacyNotice> (last visited Nov. 14, 2011).

60. *Jerome Stevens Pharm., Inc. v. FDA*, 402 F.3d 1249, 1251–52 (D.C. Cir. 2005).

61. *Jerome Stevens Pharm., Inc. v. FDA*, 319 F. Supp. 2d 45, 46–47 (D.D.C. 2004).

62. *Jerome Stevens Pharm.*, 402 F.3d at 1258.

63. Trade Secret Act, 18 U.S.C. § 1905 (2006); see Jerry Cohen, *Federal Issues in Trade Secret Law*, 2 J. HIGH TECH. L. 1, 2–3 (2003) (discussing the Trade Secrets Act's penalties for federal employees). *But see* *United States v. Wallington*, 889 F.2d 573, 575 n.2 (5th Cir. 1989) (noting that “convictions for violations of 18 U.S.C. § 1905 are very rare”); Peter J.G. Toren, *The Prosecution of Trade Secrets Thefts Under Federal Law*, 22 PEPP. L. REV. 59, 65 n.36 (1994) (explaining that § 1905 is “only very infrequently used in prosecution and is limited in scope”).

information in comments, but they also recognize that including such information sometimes may be appropriate. To handle this possibility, some agencies have adopted procedures for handling confidential or trade secret information.⁶⁴ These procedures differ from agency to agency. For example, the preamble to a recent joint proposed rule from the EPA and the Department of Transportation (DOT) included the following language⁶⁵:

How Do I Submit Confidential Business Information?

Any confidential business information (CBI) submitted to one of the agencies will also be available to the other agency. However, as with all public comments, any CBI information only needs to be submitted to either one of the agencies' dockets, and it will be available to the other. Following are specific instructions for submitting CBI to either agency.

EPA: Do not submit CBI to EPA through <http://www.regulations.gov> or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD ROM that you mail to EPA, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR Part 2. In addition, you should submit a copy from which you have deleted the claimed confidential business information to the Docket by one of the methods set forth above.

NHTSA: If you wish to submit any information under a claim of confidentiality, you should submit three copies of your complete submission, including the information you claim to be confidential business information, to the Chief Counsel, NHTSA, at the address given above under FOR FURTHER INFORMATION CONTACT. When you send a comment containing confidential business information, you should include a cover letter setting forth the information specified in our confidential business information regulation. In addition, you should submit a copy from which you have deleted the claimed confidential business information to the Docket by one of the methods set forth above.

64. PERRITT REPORT, *supra* note 1, at VIII.F.2 (discussing Executive Order 12,600 on the treatment of confidential commercial information by Federal agencies); *see also* Heather E. Kilgore, Comment, *Signed, Sealed, Protected: Solutions to Agency Handling of Confidential Business Information in Informal Rulemaking*, 56 ADMIN. L. REV. 519, 526–32 (2004) (describing different agencies' procedures for handling confidential business information).

65. Revisions and Additions to Motor Vehicle Fuel Economy Label, 75 Fed. Reg. 58,078, 58,080 (proposed Sept. 23, 2010) (to be codified at 40 C.F.R. pts. 85, 86, 600 & 49 C.F.R. pt. 575) (footnotes omitted).

After a comment is submitted with a claim of confidentiality or trade secret status, agency attorneys review the claim to make a determination before placing the material in the public docket.

3. *Copyrighted Information*

Copyrighted material finds its way into the regulatory docket every day. This is because of how copyright protection is afforded in the United States; it is automatically granted to creative works at the moment of their creation.⁶⁶ Therefore, a member of the public holds the copyright on her comment, even when she sends it to the agency through Regulations.gov. It would be peculiar for a commenter to complain of a copyright violation upon seeing his or her comment posted to Regulations.gov because by submitting the comment to a public docket the commenter was on notice that the material would be shared with the public. If challenged, an agency could assert that it had an implied license to post the material, especially if the preamble or the proposed rule explained that comments would be shared online.⁶⁷

A more pressing concern is presented by comments that include material apparently copyrighted by a third party. Suppose, for example, that the owner of a small business submits a copy of a voluntary industry standard or a trade journal article as part of her argument that government regulation is unnecessary. Suppose also that this individual does not hold the copyright on the voluntary standard or the article. The legal issue facing the agency is whether this material may be posted on Regulations.gov without permission from the copyright holder.

In practical terms, this issue does not appear to present significant litigation risk.⁶⁸ However, agency attorneys may be called upon to provide guidance to docket staff on how to handle comments that appear to contain copyrighted material. In some instances, legal uncertainty causes agencies to avoid posting material that appears to be copyrighted. The downside of this practice is that it keeps potentially useful information out of the online docket. This Article finds that if agencies limit the amount of copyrighted information posted, it is very unlikely that this would be copyright

66. 17 U.S.C. § 302(a) (2006).

67. See 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 10.03[A][7] (Matthew Bender rev. ed. 2010) (explaining that an implied license can be inferred from behavior).

68. See PERRITT REPORT, *supra* note 1, at VIII.G (noting that few copyright controversies have arisen over submission to agencies containing copyright information because inclusion of third-party works to the degree necessary to harm the third party is rare).

infringement because of the doctrine of fair use.

Fair use is determined using a four-factor statutory test that explores:

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.⁶⁹

Fair use analysis is nuanced and fact intensive, but a good practice is to share only the pertinent portions of copyrighted material in the online docket. For example, if a commenter sends a book, the agency could merely scan and share the relevant pages or a table of contents, rather than uploading the entire volume. Some agencies are already doing this. This approach provides members of the public with enough information to locate the book if they are interested, while avoiding the costs and legal risks of adding an entire book in the online docket. If an agency is approached by someone asserting to be a copyright holder who is concerned about the amount of his or her work that is included in the docket, this Article encourages agencies to consider the copyright holder's request to display less material. This is consistent with the "notice and takedown" approach of the Digital Millennium Copyright Act, which provides a safe harbor for certain entities that "expeditiously . . . remove, or disable access" to allegedly infringing material upon notice.⁷⁰

4. *Illegally Obtained Information*

Agencies may also be concerned that, in posting comments online, they are legally obligated to remove information that was obtained illegally. An example of such information would be that obtained using an illegal wiretap. However, even more so than with confidential, trade secret, or copyrighted information, it is not clear how agency staff would be in a position to know that a comment contains material that was obtained illegally unless it was brought to their attention. Absent notification, it is not clear that even the most well-intentioned agency would be able to identify this material during pre-posting screening. Once notified, however, the requirements of section 18 U.S.C. § 2511 may apply, which prohibit disclosure or use of illegally obtained information. A good practice

69. 17 U.S.C. § 107 (2006); *see also* 4 NIMMER, *supra* note 67, at § 13.05[A] (presenting a typical discussion on fair use).

70. 17 U.S.C. § 512(b)-(d).

upon receiving notice that the information was obtained illegally is therefore to investigate the material and remove it from Regulations.gov if warranted.

5. *Obscene or Threatening Comments*

Comments containing language that some might deem inappropriate, such as obscene or threatening comments, pose a challenge for agencies. There are no specific statutory requirements that compel an agency to redact obscene or threatening comments posted to Regulations.gov. However, concerns about how to treat such comments in e-Rulemaking are real. In an admittedly exploratory and nonrepresentative survey, Professor Jeffrey Lubbers polled federal agency staff on their attitudes toward various issues in e-Rulemaking.⁷¹ Asked whether they worry about the disclosure of docket materials that “might contain indecent or obscene language,” most respondents indicated that they were more worried about the issue in e-Rulemaking than under a paper-based comments system.⁷² While agency staff may be concerned about posting offensive comments on Regulations.gov, they might also be sensitive to First Amendment concerns and uncertain about the standards to apply.

C. *An Alternative Approach*

While screening is well intentioned, it is resource intensive and causes delays between when comments are received and when they are posted. As mentioned above, comments are not automatically posted on Regulations.gov, which builds in some amount of “processing,” even if agencies do not screen for content.

An alternative approach could involve making system changes to Regulations.gov. The following two changes together would allow commenters to post on Regulations.gov much faster, while providing a feedback loop to the agencies about any inappropriate content. First, the eRulemaking PMO could explore changing Regulations.gov to autopost comments received online, with the exception of confidential or trade secret information. Second, the eRulemaking PMO can explore creating a flag for inappropriate content that can be used by those reading comments on Regulations.gov. Part of this analysis should include a consideration of how other governmental and nongovernmental websites handle issues of screening, i.e., content moderation, and whether there is good reason for Regulations.gov to differ.

71. Lubbers, *supra* note 10, at 457–58.

72. *Id.* at 463–64.

Agencies should consider whether a system of flagging could replace a policy of screening comments for illegally obtained information or obscene or threatening language. This Article finds that there is no legal requirement to screen for such information before posting comments on Regulations.gov or other websites. Perhaps a different approach could better serve agency policies in favor of protecting such information from disclosure, while also furthering the goals and purposes of e-Rulemaking. Agencies that place a premium on ensuring a civil discourse on their portion of Regulations.gov could work with the eRulemaking PMO to explore a flag for Regulations.gov users to report inappropriate content already posted. Of course, agencies would still face questions about the standards to use when deciding how to handle any flagged comments. This could perhaps be added as a discussion item for the interagency working groups that advise the eRulemaking PMO.

It may help to broaden the discussion beyond rulemaking. The issue of online content moderation is not isolated to Regulations.gov. Rather, administrators of other government websites that accept comments from the public must grapple with whether to moderate content submitted by the public. One resource to consider is the ongoing work of the U.S. General Services Administration, which operates WebContent.gov, “the online guide to managing U.S. government websites, [which] helps agency web managers share experiences, common challenges, lessons learned, successes, and new ideas about best practices, content management, as well as usability and design issues.”⁷³ Deeper collaboration between the e-Rulemaking PMO and the General Services Administration could be helpful here in sharing best practices for content moderation.

Agencies should develop procedures to handle this information appropriately.⁷⁴ Agencies could work with the eRulemaking PMO to develop a way to allow commenters to notify an agency that their comments contain confidential or trade-secret information. While this does not alleviate the need for agency staff to review claims of confidentiality or

73. *WebContent.gov*, U.S. GEN. SERVS. ADMIN., <http://www.gsa.gov/portal/content/103353> (last visited Sept. 19, 2011) (“WebContent.gov is managed by the Federal Web Managers Council, an inter-agency group of about 40 web managers from every cabinet-level agency and many independent agencies. Representatives from both headquarters and field operations participate in the group.”).

74. Such procedures should probably already be in place under Executive Order 12,600, § 3(b), which states, “For confidential commercial information . . . , the head of each Executive department or agency shall, to the extent permitted by law, establish procedures to permit submitters of confidential commercial information to designate, at the time the information is submitted to the Federal government or a reasonable time thereafter, any information the disclosure of which the submitter claims could reasonably be expected to cause substantial competitive harm.” 3 C.F.R. 235, 236 (1987).

trade secret status, it may help reduce confusion for commenters that submit this information to more than one agency. It may also reduce some of the processing burden by alerting the docket manager that a comment needs or is under review, and help ensure that submissions are docketed in a timely fashion. If the system permits comments to autopost to Regulations.gov, such a flag would be essential to prevent inappropriate disclosures.

When a commenter submits material that appears to be copyrighted, agencies should include only the pertinent portion of the material in the online docket. This will require some staff resources, but this tailored approach strikes an appropriate balance between protecting the copyrights of others while making the online docket as useful as possible.

III. THE ELECTRONIC RECORD ON REVIEW

A key component of e-Rulemaking is the use of electronic docketing to compile the rulemaking record. This refers to the use of an electronic system to hold files that may be needed in court if the rulemaking is challenged. When an agency's informal rulemaking action is reviewed under the APA, "the court shall review the whole record or those parts of it cited by a party."⁷⁵ Therefore, agencies recognize that taking care in preparing the rulemaking record is a critical task for rule writers.⁷⁶ While many agencies had already begun to explore ways to use technology to

75. 5 U.S.C. § 706 (2006). Unless an enabling statute provides a standard of review, the APA's standard of review controls. *See, e.g.*, *Alaska Dep't of Env'tl. Conservation v. EPA*, 540 U.S. 461, 496–97 (2004) (noting that § 706 of the Administrative Procedure Act applies because "the Act itself does not specify a standard for judicial review"); *see also* 15 U.S.C. § 2618(c)(1)(B) (2006) (limiting judicial review of Toxic Substances Control Act regulations and requiring that Secretary's determinations be upheld if "supported by substantial evidence in the rulemaking record . . . taken as a whole"); 21 U.S.C. § 360g(c) (2006) (limiting judicial review of Medical Device Amendments of 1976 and requiring that orders be upheld if supported "by substantial evidence in the record taken as a whole"); 29 U.S.C. § 655(f) (2006) (limiting judicial review of Occupational Safety and Health Act regulations and requiring the Secretary's determinations be upheld "if supported by substantial evidence in the record considered as a whole"); 42 U.S.C. § 7607(d)(9) (2006) (limiting judicial review of Clean Air Act regulations and allowing reversal of the Administrator's action if found "(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or (D) without observance of procedure required by law").

76. *See, e.g.*, Memorandum from David L. Bernhardt, Deputy Solicitor, U.S. Dep't of the Interior, to Assistant Sec'y's and Dir. of Bureaus and Offices, Standardized Guidance on Compiling a Decision File and an Administrative Record 1–2 (June 27, 2006), *available at* <http://www.fws.gov/policy/e1282fw5.pdf> (highlighting the importance of maintaining a complete record).

make their dockets more efficient, the E-Government Act of 2002 required regulatory agencies, to the extent practicable, to move their regulatory dockets to electronic systems.⁷⁷ As agencies take steps to fulfill this statutory requirement, they encounter issues regarding how well electronic docketing satisfies the legal obligations for the rulemaking record.

The APA does not specify the contents of the rulemaking record on review before a court.⁷⁸ Instead, the Federal Rules of Appellate Procedure (FRAP) explain that the record on review before the court “consists of: (1) the order involved; (2) any findings or report on which it is based; and (3) the pleadings, evidence, and other parts of the proceedings before the agency.”⁷⁹ The FRAP also place the burden on the agency to file “(A) the original or a certified copy of the entire record or parts designated by the parties; or (B) a certified list adequately describing all documents, transcripts of testimony, exhibits, and other material constituting the record, or describing those parts designated by the parties.”⁸⁰ Therefore, while the APA does not explicitly require an agency to keep a rulemaking record, the FRAP essentially impose that requirement for items under judicial review. Because agencies do not always know which rules will be reviewed in court, a common practice is to compile a rulemaking record for each regulation, rather than assembling it after the fact.⁸¹ This approach may also aid agency compliance with the Supreme Court’s holding in

77. E-Government Act of 2002, Pub. L. 107-347 § 206(d), 116 Stat. 2899, 2916 (codified as amended at 44 U.S.C. § 3501 (2006)); Memorandum from Joshua B. Bolten, Dir., Office of Mgmt. & Budget, to Dep’t and Agency Heads, Implementation Guidance for the E-Government Act of 2002 (Aug. 1, 2003), *available at* <http://www.whitehouse.gov/sites/default/files/omb/memoranda/m03-18.pdf>.

78. A helpful source on many aspects of the APA, the Attorney General’s Manual, does not explore this issue, except to cite a Senate Hearing report for the idea that “the phrase ‘whole record’ was not intended to require reviewing courts to weigh the evidence and make independent findings of fact; rather, it means that in determining whether agency action is supported by substantial evidence, the reviewing court should consider all of the evidence and not merely the evidence favoring one side.” TOM C. CLARK, U.S. DEP’T OF JUSTICE, ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 110 n.9 (1947), *available at* <http://www.law.fsu.edu/library/admin/1947ix.html>.

79. FED. R. APP. P. 16(a).

80. FED. R. APP. P. 17(b)(1). If an agency does not provide the entire record, it must retain the portions not submitted and provide them upon request by the court or a party. FED. R. APP. P. 17(b)(3).

81. *See, e.g.*, U.S. FISH & WILDLIFE SERVICE, RECORDS MANAGEMENT: COMPILING A DECISION FILE AND AN ADMINISTRATIVE RECORD (2007), <http://www.fws.gov/policy/282fw5.html>. For an interesting discussion of agency procedures in compiling a rulemaking record after the fact, see William F. Pederson, Jr., *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38, 66–70 (1975) (discussing Environmental Protection Agency procedures and incentives for overinclusive records).

Burlington Truck Lines, Inc. v. United States,⁸² which prohibits agencies from proffering post hoc rationalizations of agency decisions while rules are under judicial review.⁸³

ACUS has explored the content of the rulemaking record in at least two recommendations.⁸⁴ Most recently, in 1993, ACUS recommended that an agency prepare a “rulemaking file” in advance of judicial review that includes the following:

1. [A]ll notices pertaining to the rulemaking;
2. [C]opies or an index of all written factual material, studies, and reports substantially relied on or seriously considered by agency personnel in formulating the proposed or final rule (except insofar as disclosure is prohibited by law);
3. [A]ll written comments submitted to the agency ; and
4. [A]ny other material required by statute, executive order, or agency rule to be made public in connection with the rulemaking.⁸⁵

While not binding, this recommendation gives a sense of the items that agencies include in a rulemaking record. Some agencies have promulgated regulations to outline the contents of or ground rules for their rulemaking dockets to “guide all persons in their dealings with the agency.”⁸⁶ For a

82. 371 U.S. 156 (1962).

83. *Id.* at 168–69 (“The courts may not accept appellate counsel’s *post hoc* rationalizations for agency action; *Chenery* requires that an agency’s discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself.”) (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)); *see also* *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419 (1971).

84. 3 ADMIN. CONFERENCE OF THE UNITED STATES, RECOMMENDATIONS AND REPORTS 48; RECOMMENDATION 74-4: PREENFORCEMENT JUDICIAL REVIEW OF RULES OF GENERAL APPLICABILITY (1974) [hereinafter ACUS 74-4]; ADMIN. CONFERENCE OF THE UNITED STATES, RECOMMENDATIONS AND REPORTS; RECOMMENDATION 93-4: IMPROVING THE ENVIRONMENT FOR AGENCY RULEMAKING (1993) [hereinafter ACUS 93-4].

85. ACUS 93-4, *supra* note 84, at 29–30. In 1974, ACUS made the following recommendation on the contents of the record in the absence of a specific statutory requirement:

- (1) the notice of proposed rulemaking and any documents referred to therein; (2) comments and other documents submitted by interested persons; (3) any transcripts of oral presentations made in the course of the rulemaking; (4) factual information not included in the foregoing that was considered by the authority responsible for promulgation of the rule or that is proffered by the agency as pertinent to the rule; (5) reports of any advisory committees; and (6) the agency’s concise general statement or final order and any documents referred to therein.

ACUS 74-4, *supra* note 84, at 49.

This recommendation grew out of a report from current ACUS Chairman, Paul Verkuil. *See generally* Paul R. Verkuil, *Judicial Review of Informal Rulemaking*, 60 VA. L. REV. 185 (1974).

86. Administrative Practices and Procedures, 43 Fed. Reg. 51,966, 51,966 (proposed

complex or controversial rule that generates hundreds of thousands of public comments,⁸⁷ the rulemaking record can be incredibly large, time consuming to assemble, costly to maintain over time, and frustrating to courts presented with large and “unwieldy” records.⁸⁸ The stakes are high because an inaccurately compiled regulatory record can cause significant problems on judicial review.⁸⁹

Electronic dockets can help address these concerns. As noted above, FDMS is the largest federal docket system.⁹⁰ It is a restricted-access website for use by agency staff to manage their internal files and the content on Regulations.gov. By using electronic dockets like FDMS, agencies may be able to lower their costs by abandoning or seriously curtailing the use of paper dockets. As agencies look to FDMS or other systems for electronic docketing, they must grapple with how requirements to preserve the rulemaking record apply to electronic items. For example, may agencies destroy a comment received by mail or fax once it is scanned into the electronic docket? How can agencies provide good faith certification for large electronic records? What should agencies do with physical objects or organized mail campaigns that are a part of the rulemaking record? Should online public collaborations always be included in the docket? Although these questions are in the weeds of day-to-day agency activities, they illustrate the kinds of questions presented to federal agency attorneys.

A. *Destroying Paper Comments*

Many agencies permit the public to submit comments through Regulations.gov, in addition to other means such as mail, courier, fax, or e-mail. As noted above, one of the central goals of an electronic docket is to reduce costs and improve efficiency, and this includes the integration of nonelectronic items into the electronic docket. The full benefits of

Nov. 7, 1978) (preamble to proposed rule). The Food and Drug Administration’s (FDA’s) regulation on the contents of the administrative record is in 21 C.F.R. § 10.40(g) (2011); *see also* 49 C.F.R. § 5.7 (2010) (Department of Transportation).

87. *See generally* Shulman, *Whither Deliberation*, *supra* note 24, at 44 (discussing several rulemakings with hundreds of thousands of public comments each).

88. Pedersen, *supra* note 81, at 61, 70 & n.119 (discussing presentation of large records to courts).

89. For example, while promulgating a rulemaking on potato products, the FDA failed to make its entire factual record available to the public during the comment period in the FDA docket office. At litigation, the FDA initially certified that the record was complete, but later asserted that the record was not complete. The Third Circuit remanded the regulation to the FDA to formulate its rule based on what was actually included in the docket office. *Hanover Potato Prods., Inc. v. Shalala*, 989 F.2d 123, 125–27 (3d. Cir. 1993).

90. *See supra* note 5 and accompanying text.

electronic docketing, including costs savings estimated at \$30 million over five years,⁹¹ cannot be realized if an agency keeps comments received on paper in one place and electronic items in another. However, if a comment comes in by fax, for example, does an agency face legal risks if it scans the fax, saves it in the electronic docket (e.g., FDMS), and destroys the paper copy?

One could question whether items received electronically or converted to electronic versions from paper would be admissible on judicial review. However, admissibility is not a significant concern. As noted in the Perritt Report, admissibility would only be an issue if the rulemaking were subject to de novo review, which would be highly unusual given the APA's provision for judicial review in an appellate proceeding.⁹² A review of federal cases reveals no instances of de novo review of rulemaking under APA § 706(2)(F) or cases in which the admissibility of the rulemaking record was otherwise challenged. However, even if de novo review was granted, recent decisions in non-APA contexts suggest that courts do not exclude electronic evidence solely because of its electronic nature; rather, courts have admitted electronic evidence under the Federal Rules of Evidence.⁹³ In the remote instance of de novo review, the key issue would be reliability of the electronic docket, which agencies may be called upon to explain.⁹⁴ This is discussed in additional detail in the Perritt Report.⁹⁵

Another concern, which appears similarly unfounded, is that electronic dockets are not reliable and might not preserve documents adequately. While some degree of risk is probably inevitable in a remote storage database, that risk is probably not greater than the risk presented by relying on paper records, which can be destroyed by water or fire, or simply misplaced.⁹⁶

91. OFFICE OF MGMT. & BUDGET, *supra* note 5, at 10.

92. PERRITT REPORT, *supra* note 1, at VIII.C.2 (absent de novo review, "the evidentiary issue is not whether the evidence would be admitted in federal court, but whether it was in fact admitted and became part of the record in the agency proceeding" (citing *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971))).

93. *See, e.g.*, *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 538 (D. Md. 2007) (explaining the rule of evidence that must be considered when determining the admissibility of electronically stored evidence). *See generally* Paul W. Grimm et al., *Back to the Future: Lorraine v. Markel American Insurance Co. and New Findings on the Admissibility of Electronically Stored Information*, 42 AKRON L. REV. 357 (2009). *But see* Colin Miller, *Even Better than the Real Thing: How Courts Have Been Anything But Liberal in Finding Genuine Questions Raised as to the Authenticity of Originals Under Rule 1003*, 68 MD. L. REV. 160, 162-63 (2008) (noting that courts have no specific or consistent approach to admitting electronic evidence).

94. PERRITT REPORT, *supra* note 1, at VIII.C.2.

95. *Id.*

96. *Id.* at VIII.A.

While there may be lingering reluctance to destroy paper documents that have been scanned into the electronic docket, the law does not appear to validate that reluctance. From a legal perspective, once a paper comment has been scanned and saved into the docket, this Article concludes that agencies may rely on the electronic version to preserve the rulemaking record.

*B. Recording Physical Objects and Organized Mail Campaigns
in the Electronic Docket*

Two types of comments pose particular challenges to electronic docketing—physical objects received with comments and comments received as part of organized mail campaigns. If an agency relies on an electronic docket to compile a regulatory record for judicial review, but fails to capture these kinds of comments adequately, it may pose a risk, however slight, to the agency in certifying that the electronic record is the complete rulemaking record.⁹⁷

1. Physical Objects

From time to time, a commenter might send a physical object, such as a large poster board display or a model, to lend support to the submission. For an agency that relies on electronic dockets, submission of physical objects may challenge the agency's ability to fulfill its obligation to include it in the docket. In reading rooms, this might be less of a concern because the object could be placed in the docket alongside other documents and made available for public review. However, when an agency relies on an electronic docket, how can an agency ensure that it does not misplace a physical object?

There are several solutions for coping with this challenge. One potential solution is to place an entry in the electronic docket with a summary of where to find the physical object. FDMS already permits this type of entry. When agency staff add a paper comment into FDMS, they can classify the "document type" of the comment as "Public Submissions." Staff can also indicate that a comment has attachments. Working within this framework, agency staff could add an entry into FDMS for the comment, with an attachment that includes a description of an accompanying physical item and an explanation of where the item is located in the agency's office building. The eRulemaking PMO could also consider adding "physical

97. Although this case did not involve electronic docketing, it highlights the risks of storing parts of the record in different, undocumented locations. *See Hanover Potato Prods., Inc. v. Shalala*, 989 F.2d 123, 126 (3d. Cir. 1993).

item” or something similar as a document subtype as part of its Best Practices work.⁹⁸ On the item itself, the agency could label the physical object with the docket number and a warning that the object should not be thrown away or moved without an agency attorney’s consent, as a way to demonstrate the object’s importance for any well-intentioned de-clutterers. An alternative to retaining the physical object might be to take photos of it or describe it in writing, but either practice may raise concerns upon judicial review if the agency is viewed as altering the public comment or failing to properly consider the submission.

2. *Organized Mail Campaigns*

A more common problem agencies face is how to docket duplicative items, such as those sent in as part of an organized letter, e-mail, or postcard campaign. An agency can receive tens of thousands of these in a matter of days, which can be costly to process. A high-speed scanner could seriously shorten this amount of time, but not all agencies have immediate access to one. If an agency only occasionally receives the proceeds of organized letter campaigns, it might be better to have an informal partnership with another agency to handle processing.

FDMS provides a useful feature that permits agencies to scan and save batches of letters into one file, note how many times the form letter was received, and upload them together.⁹⁹ This cuts down on staff hours needed to scan and provide metadata for comments that are almost completely identical, but it does not entirely eliminate the administrative burden. At the moment, this appears to be the best option. Another option is to scan one letter and save it into FDMS, noting how many times it was received.¹⁰⁰ However, this raises the legal issue of how to handle docketing the letters that were not scanned, which might differ in minor ways such as their signature block. For completeness of the record, agencies might retain copies of the unscanned letters in physical form, partially defeating the purpose of electronic docketing. To fully rely on the electronic docket, the better practice is probably to upload all letters into the electronic docket.

98. See generally ERULEMAKING PROGRAM MGMT. OFFICE, *supra* note 8.

99. The Department of Education took this approach in a recent regulation. See *Huntington-500 Letters*, REGULATIONS.GOV <http://www.regulations.gov/#!documentDetail;D=ED-2010-OPE-0012-14265.1> (last visited Nov. 14, 2011).

100. The Environmental Protection Agency took this approach in a recent regulation. See, e.g., *Support Wildlife and Ban Predator Poisons*, REGULATIONS.GOV, <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OPP-2010-0753-0094> (last visited Nov. 14, 2011).

These two examples show that, despite some initial puzzlement, agencies can leverage electronic dockets to record physical objects and organized mail campaigns. A work-around solution for physical objects falls short of the full promise of electronic docketing, because it requires agencies to retain physical objects. As agencies move or reorganize offices, it may become difficult to use the location descriptions in the electronic docket to ensure that these physical items remain connected to the rulemaking record. However, at least by logging the items into the electronic docket the agency has a chance to pass some clues on to those who need to assemble a rulemaking record down the road. In handling organized mail campaigns, agencies that frequently receive these may find it cost-beneficial to invest in a high-speed scanner to help process these items into the docket. Agencies that only infrequently encounter these campaigns might seek out partner agencies to help shoulder the burden of processing these comments.

C. *Docketing Online, Public Collaborations*

Another challenge in e-Rulemaking arises when members of the public convene in an open, online forum to discuss their reactions to a proposed rule. In one sense, this collection of views could be considered a public comment on the proposed rule, whether or not the comments are formally submitted to the agency, because they are publicly available on the Internet. Agency staff might wonder whether they have obligations to collect and preserve these discussions for the record, or if they can rely on interested parties to submit comments to the record.

In these or similar situations, the APA does not require agency staff to seek out public comments and capture them in the rulemaking record. The APA provides: “After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making *through submission* of written data, views, or arguments with or without opportunity for oral presentation.”¹⁰¹ The word *submission* connotes that members of the public must elect to send their comments to the rulemaking docket before they are subject to agency consideration. This textual argument is supported by policy considerations. First, members of the public might use online fora to discuss preliminary ideas leading to a decision about whether to file a comment or about the content of that comment. It is not clear why federal agencies should be required to capture these iterative discussions in their dockets. Second, it may not be wise to expend limited agency resources to scour the Internet for ongoing dialogues when the public comment process is already open to receive the public’s views if they choose

101. 5 U.S.C. § 553(c) (2006) (emphasis added).

to send them.

Agencies are, however, taking action to explore the benefits of online collaboration. In a recent experiment, the DOT joined with Cornell University e-Rulemaking Initiative (CeRI) to engage the public in regulatory development using Web 2.0 technologies.¹⁰² In this pilot project, CeRI opened a blog on RegulationRoom.org that focused entirely on the DOT's proposed rule on distracted driving. As comments flowed in from the public to RegulationRoom.org, Cornell law students and researchers moderated the comments and "attempted to summarize the diverse, often impassioned, and not always substantive comments for the department's benefit."¹⁰³ CeRI submitted this summary, without attribution to specific public participants, to the DOT docket through Regulations.gov.¹⁰⁴ Submission of the comments to the DOT by CeRI was a critical step because in the preamble of the proposed rule, the DOT explained that "Regulation Room is not an official DOT Web site, and so participating in discussion on that site is not the same as commenting in the rulemaking docket."¹⁰⁵ The preamble invited members of the public to submit individual comments to the DOT docket through Regulations.gov. This nuanced approach folded innovative use of technology into the DOT's existing docket regulations, which provide that "comments *received* in response to [proposed rules]" are included in the regulatory docket.¹⁰⁶

This approach is echoed by other agency uses of the web. The Department of Education (DOE), for example, maintains a blog to promote current events and usually permits website users to post comments in response to agency blog posts.¹⁰⁷ This type of forum provides one way for agencies to interact with members of the public. The DOE recently used

102. Press Release, Cornell Univ. Law Sch., Cornell e-Rulemaking Initiative (CeRI) Partners with U.S. Department of Transportation for Open Government (Apr. 1, 2010), available at http://www.lawschool.cornell.edu/news-center/press-kits/regulation-room/upload/Regulation_Room_DOT_Press_Release.pdf; Aliya Sternstein, *Law School Tries to Get the Public Hooked on Rule-Making*, NEXTGOV (Apr. 1, 2010), http://www.nextgov.com/nextgov/ng_20100401_9153.php.

103. Charles Clark, *E-rule-making Has Potential, but Kinks Must Be Ironed Out, Expert Says*, NEXTGOV (Dec. 1, 2010), http://www.nextgov.com/nextgov/ng_20101201_6557.php (based on remarks of Cynthia Farina at the National Archives).

104. Comments of Cornell e-Rulemaking Initiative (CeRI), Summary of Discussion on RegulationRoom.org: Enhancing Airline Passenger Protections at 1 (Sept. 22, 2010), <http://www.regulations.gov/#!documentDetail;D=DOT-OST-2010-0140-1510>.

105. Limiting the Use of Wireless Communications Devices, 75 Fed. Reg. 16,391, 16,391-92 (proposed Apr. 1, 2010) (to be codified at 49 C.F.R. pts. 383, 384, 390, 391, & 392).

106. 49 C.F.R. § 5.7(a) (2010) (emphasis added).

107. See ED.GOV BLOG, <http://www.ed.gov/blog/> (last visited Nov. 14, 2010).

its blog to encourage the public to comment on a proposal published in the *Federal Register*.¹⁰⁸ Rather than permit website users to post comments in response to this blog entry, however, the DOE disabled the commenting function. Instead, the blog entry explained how the public could comment through Regulations.gov or by using offline means. This approach to rerouting potential commenters is one way to ensure that public comments are sent to the docket for agency consideration, rather than unincorporated on other portions of an agency's website.

D. *Certifying the Electronic Docket*

As discussed above, rulemaking records, electronic or nonelectronic, can be very lengthy, up to hundreds of thousands of pages. Upon judicial review, a copy of this record, or selections of it along with a joint appendix, must be presented to the court. An agency must certify that the copy is the same as the original.¹⁰⁹ One legal question is whether use of an electronic docket presents any challenges to making this certification. In that unlikely instance, the original record might be files saved on FDMS or other agency servers. To submit the record, agency staff could either print paper copies or provide a copy of the electronic files to the court.

The decision about whether to provide paper or electronic files—or both—can be a negotiation between the parties and the judge. If the agency provides paper copies of the rulemaking record, this can be costly (e.g., labor, printing costs, courier costs) and can take up a significant amount of physical space. This Article finds that the better approach is to default to providing the rulemaking record (i.e., the entire record or just the parts designated by the parties) electronically, overriding the default if there is a very compelling reason to provide paper. The D.C. Circuit allows for electronic filing with a rule that requires parties to use the court's case management and electronic case filing system, rather than provide paper service.¹¹⁰ One caveat is that motions, briefs, pleadings, memoranda, and some other documents must be provided in paper even if they are filed electronically.¹¹¹ This may be due to the court's limited resources for printing these documents. Another caveat is that items that exceed 500

108. J. Johnson, *Investing in Innovation Webinar*, ED.GOV BLOG (Oct. 9, 2009) <http://www.ed.gov/blog/2009/10/investing-in-innovation-webinar/>.

109. FED. R. APP. P. 17(b)(1).

110. See Administrative Order Regarding Electronic Case Filing, ECF-1 (D.C. Cir., May 15, 2009), available at [http://www.cadc.uscourts.gov/internet/home.nsf/Content/Administrative%20Order%20Regarding%20Electronic%20Case%20FilingEffective%20June%202009/\\$FILE/Admin%20Order%20ECF%20May%202009.pdf](http://www.cadc.uscourts.gov/internet/home.nsf/Content/Administrative%20Order%20Regarding%20Electronic%20Case%20FilingEffective%20June%202009/$FILE/Admin%20Order%20ECF%20May%202009.pdf).

111. *Id.* at ECF-6.

pages or 1,500 kilobytes may not be filed electronically.¹¹² If an agency has a lengthy rulemaking record it needs to provide, one practice is to save the files onto a CD-ROM and provide it to the court. As of this Article, the website of the Judicial Conference of the United States shows that eleven of the twelve U.S. Courts of Appeals accept electronic filing.¹¹³ This Article encourages the work of the Judicial Conference of the United States and the U.S. Courts of Appeals in taking steps to embrace electronic filing. While it may be a cost-sharing step to require paper copies, this Article finds that agencies would benefit from a filing system that does not require paper submission.

Whether the docket is paper or electronic, the next step is for the agency to submit the docket along with a certification affidavit that looks something like the following¹¹⁴:

Declaration of [Certifying Official]

I, [name of certifying official], declare under penalty of perjury that the following is true and correct to the best of my knowledge, information, and belief:

1. I am the [certifying official's title].
2. In this capacity, I have participated, in connection with the above-captioned lawsuit, in the compilation and preparation of the administrative record related to [description of subject matter of the administrative record].
3. This Declaration is part of [agency]'s certification of the contents and completeness of the administrative record for its final agency decision in [description of final agency decision]. [Agency] is not filing the administrative record with the Court because of the volume of the records involved.
4. Attached and incorporated by reference as if fully set forth herein is an index itemizing the contents of the administrative record for [agency]'s final agency decision in [description of final agency decision].
5. I certify that the documents listed in the attached indices comprise the complete administrative record for [agency]'s final agency decision in [description of final agency action], and are official records of [agency].

[Date]

[Signature & Signature Block]

112. *Id.* at ECF-8(C).

113. Judicial Conference of the United States, *Courts Accepting Electronic Filing*, USCOURTS.GOV, <http://www.uscourts.gov/FederalCourts/CMECF/Courts.aspx> (last visited Nov. 14, 2011).

114. Adapted by the Author from a sample certification provided by staff at FDA. *See also* Bernhard, *supra* note 76, at Appendix 3.

As such, a staff member at the agency certifies that the copy reflects the record as reviewed by the agency; nothing more. If the validity of a certification were challenged, that challenge might focus on the reliability of the electronic docket. In that instance, an agency might need to demonstrate that the electronic docket itself is a reliable storage and retrieval system. While this issue does not appear to have presented itself yet, the Perritt Report explored these issues in some depth, concluding that electronic copies of paper files do not present significant authentication issues so long as they can be shown to be reliable.¹¹⁵ This Article finds no reason to disturb that conclusion or the suggestions for how to demonstrate reliability.¹¹⁶ If an electronic docket is maintained and audited well, it may, in fact, be easier to demonstrate the reliability of an electronic system than the reliability of a paper recordkeeping system.¹¹⁷ As the Perritt Report states, “The more inflexible the routine, and the less human intervention in the details of the computer’s management of the database, the better the evidence.”¹¹⁸ Overall, the use of electronic dockets does not appear to present any greater risk than a paper docket, and may in fact provide greater protection. To the extent that courts can fully support electronic filing of the rulemaking record, this will help federal agencies.

In summary, from a legal perspective, electronic dockets do not present significant legal issues that would discourage their use, and they may in fact provide additional benefits. Agencies may rely on the electronic version to preserve the rulemaking record, which allows them to destroy the paper copies of submissions that are captured in the electronic docket. With some creativity, agencies can also use electronic dockets to record physical objects and organized mail campaigns. While agencies are exploring different methods for online collaboration with the public, the APA does not require them to capture online discussions in the record unless they are submitted. Finally, while the courts have taken steps to embrace electronic filing, they could consider additional steps like not also requiring paper copies of certain documents.

115. PERRITT REPORT, *supra* note 1, at VIII.C.3.

116. *Id.* at VIII.C.4.

117. As noted by one author, the U.S. Court of Appeals for the Fifth Circuit appears to have accepted that electronic records can be more reliable than paper records when they are “not even touched by the hand of man.” Leah Voigt Romano, Comment, *Electronic Evidence and the Federal Rules*, 38 LOY. L.A. L. REV. 1745, 1750–51 n.33 (2005) (quoting *United States v. Vela*, 673 F.2d 86, 90 (5th Cir. 1982)).

118. PERRITT REPORT, *supra* note 1, at VIII.C.4.

IV. RECORDKEEPING REQUIREMENTS

Another set of “records” issues present themselves in the course of e-Rulemaking, apart from questions about how to preserve the e-Rulemaking items into the “rulemaking record” for litigation purposes (discussed above in Part II). How do the requirements of the Federal Records Act intersect with e-Rulemaking activities? For example, might an agency official’s tweet about a rulemaking, or a public comment submitted on a blog entry about the rule, trigger the requirements of the Federal Records Act?

The Federal Records Act of 1950 requires the head of each federal agency to preserve records to document the “policies, decisions, [and] procedures” of the agency.¹¹⁹ A key concept is whether an item is a federal record—the statutory definition includes “all books, papers, . . . or other *documentary materials*, regardless of physical form or characteristics, *made or received* by an agency of the United States Government . . . or *appropriate for preservation* . . . as evidence of the . . . policies, decisions, procedures, operations, or other activities . . . or because of the informational value of data in them.”¹²⁰

Records schedules, which set out an agency’s disposition instructions for records, must be approved by the National Archives and Records Administration (NARA).¹²¹ NARA also maintains General Records Schedules (GRS) for the items common to federal agencies, such as records on personnel, accounting, and procurement, and NARA estimates that these schedules cover approximately one third of agency records.¹²² Notably, and although rulemaking is a common function of most federal agencies, the GRS do not include records developed or received during the rulemaking process.

In the course of rulemaking, an agency might prepare or receive several different types of documentary materials. This includes, for example, comments received from the public or agency guidance documents regarding the rule. These are likely to be federal records because they are documentary materials “made or received” by an agency, depending on their evidentiary or informational value.¹²³ NARA guidance indicates that

119. 44 U.S.C. § 3101 (2006).

120. *Id.* § 3301 (emphases added).

121. *See* 36 C.F.R. §§ 1220.18, 1228.16 (2010); 44 U.S.C. § 3303.

122. Nat’l Archives and Records Admin., *Introduction to the General Records Schedules*, NATIONAL ARCHIVES (Apr. 2010), <http://www.archives.gov/records-mgmt/grs/intro.html>.

123. 44 U.S.C. § 3101. For example, several agencies have approved records schedules for public comments collected during rulemaking. The Department of Commerce has an approved records schedule for public comments collected in the course of changes to its Export Administration Regulations. Request for Records Disposition Authority from U.S.

files related to the “development, clearance, and processing of proposed and final rules for publication in the Federal Register . . . may be, but are not necessarily, permanent,” and notes that they “must be scheduled individually by each agency so NARA can conduct an analysis and appraisal to determine their appropriate disposition.”¹²⁴

Turning to e-Rulemaking, agency officials might make statements through social media to drum up interest in the rulemaking or encourage the public to comment. These statements and resulting public comments present a novel question for records management—are they federal records? To determine the answer, agencies may consult NARA’s October 2010 Guidance that explores the intersection between Web 2.0 technologies and federal records management requirements.¹²⁵ First, the Guidance states that the medium of the content (i.e., online) does not determine its status as a record, so the issue of whether online content is “documentary material” does not appear to be open. Second, the Guidance sets out five questions to consider when determining whether content is a Federal record:

- Is the information unique and not available anywhere else?
- Does it contain evidence of an agency’s policies, business, mission, etc.?
- Is this tool being used in relation to the agency’s work?
- Is use of the tool authorized by the agency?
- Is there a business need for the information?¹²⁶

The Guidance explains that answering “yes” to any of these questions suggests that an item is likely to be a federal record. However, the guidance provides an escape hatch—agencies may consider duplicate content to be nonrecords, citing the example of reposting public affairs content through social media platforms.¹²⁷

Dep’t of Commerce Bureau of Export Admin. to Nat’l Archives & Records Serv. (Oct. 29, 1992), *available at* http://www.archives.gov/records-mgmt/rcs/schedules/departments/department-of-commerce/rg-0476/n1-476-93-001_sf115.pdf; *see also* Request for Records Disposition Authority from U.S. Dep’t of Educ. to Nat’l Archives & Records Admin. (Feb. 5, 2009), *available at* http://www.archives.gov/records-mgmt/rcs/schedules/departments/department-of-education/rg-0441/n1-441-09-004_sf115.pdf.

124. Nat’l Archives and Records Admin., *supra* note 122.

125. Bulletin from Nat’l Archives and Records Admin. to Heads of Fed. Agencies, on Guidance on Managing Records in Web 2.0/Social Media Platforms (Oct. 20, 2010), *available at* <http://www.archives.gov/records-mgmt/bulletins/2011/2011-02.html>.

126. *Id.*

127. *Id.*

A. Agency Statements

An agency might use blogs or other social media to drum up interest in the rulemaking. Based on the NARA' Guidance, these efforts are not federal records if they simply duplicate existing content (e.g., *Federal Register* notice, fact sheet designed to explain a regulation, press release) or post a link to that content. For example, consider the FDA's recent twitter post on a new investigational new drug rule:

IND Safety Reporting rule and guidance. <http://bit.ly/INDsafety>
11:06 AM Sep 28th via web

Note that it includes a link to the FDA's website.¹²⁸ Applying the NARA Guidance, this is not a federal record because it simply directs followers to other FDA website content.¹²⁹ In contrast, a statement issued by an agency official through social media that presents previously unavailable information—such as a statement that explains a fresh perspective on the rationale or benefits of the rule—may be a federal record because of its uniqueness.

Limiting the use of social media to duplicative content is one way to minimize the applicability of Federal Records Act requirements. Agencies may choose to develop internal policies along these lines. However, some have questioned this limitation as holding the government back from a fully collaborative web presence.¹³⁰ Instead, agencies could consider refreshing their records schedules to account for uses of social media in e-Rulemaking. Some agencies have already begun this process, including the Department of Justice,¹³¹ which has an approved records schedule for the content it places on social media websites. Even before NARA approves the records schedule, this can serve as a way to convene internal conversations with program staff, communications or public affairs staff, records management staff, and counsel about how the agency plans to use these tools to communicate with the public about rulemakings. Agencies might also consider confirming that they have adequate rulemaking records schedules

128. Food & Drug Admin., posting to *@FDA_Drug_Info*, TWITTER (Sept. 28, 2010), http://twitter.com/FDA_Drug_Info.

129. Note, however, that the website content may itself be a federal record that may be subject to the Federal Records Act. *See supra* note 119 and accompanying text.

130. *See, e.g.*, Alice Lipowicz, *Is Every Tweet and Facebook Post Worth Archiving?*, FED. COMPUTER WK. (Nov. 17, 2010), <http://fcw.com/articles/2010/11/29/home-page-nara-social-media-records.aspx>.

131. Request for Records Disposition Authority from Dep't of Justice to Nat'l Archives & Records Admin. (Oct. 13, 2009), *available at* http://www.archives.gov/records-mgmt/rcs/schedules/departments/department-of-justice/rg-0060/n1-060-10-002_sf115.pdf.

in place, with an eye to synching records retention policies with the length of time agencies hold these records for judicial review.

B. Public Comments in Agency Fora

Agencies might use social media to encourage public participation in a rulemaking while the comment period is open. As discussed in Part III.C, an agency might post an entry on its blog alerting readers that the agency has published a new proposed rule. Sometimes agencies open the blog entry to receive comments from the public. One question is whether any comments received on the blog entry are federal records. Applying the NARA Guidance, if the comment is unique to the blog (i.e., not otherwise a part of the rulemaking docket) and provides evidentiary or informational value, the answer is probably yes. However, the question of evidentiary or informational value may turn on whether these comments will become part of the rulemaking record where they will be considered by agency staff. In Part III.C., this Article encouraged agencies to signal on their blogs whether they intend to treat comments received there as public comments for the rulemaking record. If an agency incorporates blog comments into the rulemaking record, they are subject to recordkeeping provisions just like other items in the rulemaking record. In this scenario, however, there would be no need to preserve the blog comments as separate federal records, because they would already be swept into the recordkeeping provisions for the rulemaking record. If, on the other hand, an agency does not incorporate blog comments into the rulemaking record, this diminishes the evidentiary or informational value of the comments, which also reduces the likelihood that they are federal records.

In sum, agencies should be aware that e-Rulemaking activities, just like other activities, might carry Federal Records Act requirements. As agencies explore new technologies, they should ensure they continue to consider Federal Records Act implications of fresh approaches to the regulatory process.

CONCLUSION

This Article has shown that the legal issues that present themselves in e-Rulemaking are varied but surmountable. With the analysis and recommendations above, this Article aims to address legal issues that have been raised by e-Rulemaking since its inception. As federal rule writers explore new ways to engage the public and solicit their views for the record, new legal issues may arise. Overall, agency staff have found and continue to find creative ways to satisfy their legal obligations while exploring the possibilities of e-Rulemaking.

A REGULATORY QUICK FIX FOR
CARCIERI V. SALAZAR:
 HOW THE DEPARTMENT OF INTERIOR
 CAN INVOKE AN ALTERNATIVE SOURCE
 OF EXISTING STATUTORY AUTHORITY
 TO OVERCOME AN ADVERSE JUDGMENT
 UNDER THE *CHEVRON* DOCTRINE

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TABLE OF CONTENTS

Introduction.....	934
I. Relevant Case History of <i>Carcieri v. Salazar</i>	939
II. Regulatory “Quick Fix” of <i>Carcieri</i> : Invoking Existing Statutes and Federal Regulations to Validate Fee-into-Trust Transactions on Behalf of Tribes Acknowledged After 1934	942
A. 25 U.S.C. §§ 2 and 9 Authorize the Secretary to Make Land-into-Trust Acquisitions for Tribes Not Under Federal Jurisdiction in 1934 Under 25 C.F.R. Part 151 and 25 C.F.R. Part 83.....	943
B. The Supreme Court’s Ruling in <i>Carcieri</i> Affects the IRA Alone and Not the Secretary’s Authority Under 25 U.S.C. §§ 2 and 9.....	947

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1. The Indian Canons of Construction Severely Restrict Any Interpretation of 25 U.S.C. § 479 as a Limit to the Secretary’s Power to Promulgate Legislative Regulations Under 25 U.S.C. §§ 2 and 9.....	948
2. Congressional Policy Prefers that the Secretary Have Exclusive Authority to Acknowledge Previously Unrecognized Tribes and Grant Them Federal Benefits.....	949
III. Pandora’s Box of Other Administrative Law Issues: Addressing Concerns Arising from <i>Chenery II</i> , the Nondelegation Doctrine, and the Intersection of the Indian Canons of Construction with the <i>Chevron</i> Doctrine	951
A. Problem One: Taking a Second Bite at the Apple	952
B. Problem Two: The Nondelegation Challenge to 25 U.S.C. §§ 2 and 9.....	953
C. Problem Three: Shedding Light on the Intersection of the Indian Canons of Construction and the <i>Chevron</i> Doctrine.....	954
Conclusion	959

INTRODUCTION

At the Solicitor’s Indian Law Practitioner’s Conference on March 3, 2011, Secretary of the Interior Ken Salazar reiterated his desire for a “legislative fix” for the Supreme Court opinion in *Carcieri v. Salazar*.¹ In *Carcieri*, the Court interpreted the Indian Reorganization Act of 1934 (IRA)² to effectuate a perverse distinction between Indian tribes under federal jurisdiction in June 1934 and Indian tribes whose relationship with the federal government was not established until after June 1934.³ Applying step one of the doctrine articulated in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, which inquires “whether Congress has directly

1. 129 S. Ct. 1058 (2009). Ken Salazar, Sec’y of the Interior, Address at the Solicitor’s Indian Law Practitioner’s Conference (Mar. 3, 2011); see also News Release, U.S. Dep’t of the Interior, Secretary Salazar Welcomes American Indian Leaders to Second White House Tribal Nations Conference (Dec. 16, 2010), <http://www.bia.gov/idc/groups/public/documents/text/idc012558.pdf> (calling the *Carcieri* decision “devastating”).

2. Ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461–479 (2006)).

3. See *Carcieri*, 129 S. Ct. at 1069–70 (Breyer, J., concurring) (“[A] tribe may have been ‘under Federal jurisdiction’ in 1934 even though the Federal Government did not believe so at the time . . . [however,] nothing in the briefs . . . suggests the Narragansett Tribe could prevail . . . on grounds that implied a 1934 relationship between the tribe and Federal Government that could be described as jurisdictional.”).

spoken to the precise question at issue,”⁴ the majority opinion of Justice Thomas declared that “the term ‘now under Federal jurisdiction’ in [the IRA] unambiguously refers to those tribes that were under the federal jurisdiction of the United States when the IRA was enacted in 1934.”⁵ As a result, § 5 of the IRA, codified at 25 U.S.C. § 465, only authorizes the Secretary of the Interior to “provid[e] land for Indians” whose tribe fits within the IRA’s definition of an “Indian,” codified at 25 U.S.C. § 479: “The term ‘Indian’ as used in this Act shall include all persons of Indian descent who are members of any *recognized Indian tribe now under Federal jurisdiction*.”⁶ A cloud now hangs over any land-into-trust transactions that the Secretary has made for Indian tribes which were not federally recognized until after 1934, and which are now unable to prove that their “post-1934 recognition [was granted] on grounds that implied a 1934 relationship between the tribe and Federal Government that could be described as jurisdictional.”⁷

The cries for a legislative fix began to pour out as soon as the *Carcieri* decision was delivered.⁸ A slew of proposed reform bills have made their way into the public discussion of federal land-into-trust policies.⁹ And yet, because the Department of the Interior’s land-into-trust acquisitions for Indian tribes are “not without passionate opposition,”¹⁰ Congress is wading slowly into this potentially explosive controversy.¹¹ While Congress hesitates to fix *Carcieri*, the Secretary continues to contemplate whether to promulgate a new regulation to mitigate the decision’s harshness. Unfortunately, “a proposed regulation being considered by the Obama

4. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

5. *Carcieri*, 129 S. Ct. at 1068.

6. 25 U.S.C. §§ 465, 479 (emphasis added).

7. *Carcieri*, 129 S. Ct. at 1070 (Breyer, J., concurring).

8. See Heidi McNeil Staudenmaier & Ruth K. Khalsa, *A Post-Carcieri Vocabulary Exercise: What if “Now” Really Means “Then”?* 1 UNLV GAMING L.J. 39, 53–66 (2010) (summarizing legislative proposals from the House Committee on Natural Resources hearing on April 1, 2009 and the Senate Committee on Indian Affairs hearing on May 21, 2009).

9. See, e.g., G. William Rice, *The Indian Reorganization Act, The Declaration on the Rights of Indigenous Peoples, and a Proposed Carcieri “Fix”: Updating the Trust Land Acquisition Process*, 45 IDAHO L. REV. 575, 594–619 (2009) (calling for the United States to become a leader in “implementation of human rights on a global scale” as it develops its legislative fix of *Carcieri*). See generally Amanda D. Hettler, Note, *Beyond a Carcieri Fix: The Need for Broader Reform of the Land-into-Trust Process of the Indian Reorganization Act of 1934*, 96 IOWA L. REV. 1377 (2011) (calling for Congress to take this opportunity to undertake fundamental legislative reforms to the land-into-trust process).

10. Hettler, *supra* note 9, at 1389.

11. See Staudenmaier & Khalsa, *supra* note 8, at 70.

administration . . . is generally disfavored by tribal leadership, owing largely to the perception that a regulatory fix will delay, or even halt, progress towards a legislative remedy, which is regarded as a more permanent measure.”¹²

Unlike older proposals, which presume the need for new legislation or regulations to fix *Carcieri*, this Recent Development argues that existing statutes and regulations already authorize the Secretary to overcome the effects of *Carcieri*. Even though the IRA no longer authorizes the Secretary to take land into trust for Indian tribes not under federal jurisdiction in June 1934, the Secretary’s fee-into-trust regulations under 25 C.F.R. Part 151 rest on several other pillars of statutory authority. 25 U.S.C. §§ 2 and 9 are the strongest alternative sources of statutory authority under which the Secretary may claim delegated authority for fee-into-trust acquisitions on behalf of Indian tribes not under federal jurisdiction in June 1934.¹³ The Supreme Court has already recognized that 25 U.S.C. §§ 2 and 9 vest the Secretary with the power to

formulat[e] policy and [to make] rules to fill any gap left, implicitly or explicitly, by Congress. In the area of Indian affairs, the Executive has long been empowered to promulgate rules and policies, and the power has been given explicitly to the Secretary and his delegates at the [Bureau of Indian Affairs (BIA)].¹⁴

Under the *Chevron* doctrine, 25 U.S.C. §§ 2 and 9 constitute an explicit delegation of authority to the Secretary to promulgate “legislative regulations [which] are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.”¹⁵ Such legislative regulations are thus entitled to the maximum amount of *Chevron* deference.

25 U.S.C. §§ 2 and 9 also form the statutory basis for 25 C.F.R. Part 83, which codifies the federal administrative process for the acknowledgment of Indian tribes previously lacking federal recognition.¹⁶ Because 25 C.F.R. § 83.12(a) entitles acknowledged tribes “the privileges and immunities available to other federally recognized historic tribes,” and renders them “eligible for the services and benefits from the Federal government that are available to other federally recognized tribes,”¹⁷ federal acknowledgment under 25 C.F.R. Part 83 ought to include the benefits available to tribes

12. *Id.* at 69 (footnote omitted).

13. 25 U.S.C. §§ 2, 9 (2006).

14. *Morton v. Ruiz*, 415 U.S. 199, 231 (1974) (footnotes omitted).

15. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

16. 25 C.F.R. §§ 83.1–83.13 (2011).

17. *Id.* § 83.12.

under 25 C.F.R. Part 151. Accordingly, this Recent Development urges that the ruling in *Carcieri* does not prohibit the Secretary from asserting that he has always held statutory authority under 25 U.S.C. §§ 2 and 9 to transfer land into trust for Indian tribes acknowledged under 25 C.F.R. Part 83.¹⁸ Although not every tribe federally recognized after 1934 was given status under 25 C.F.R. Part 83,¹⁹ the regulatory quick fix proposed in this paper would minimize the devastating consequences of *Carcieri* while a legislative fix stalls in Congress.

This Recent Development is divided into three Parts. Part I outlines the case history of *Carcieri v. Salazar*, which is relevant to the proposed regulatory quick fix for *Carcieri*. Part II explains the legal reasoning behind the proposed *Carcieri* quick fix. Briefly restated, Congress expressly delegated authority under 25 U.S.C. §§ 2 and 9 for the Secretary to establish a process under 25 C.F.R. Part 83, which has brought many tribes not recognized in 1934 under federal jurisdiction, entitling them to receive any benefits and services which the IRA granted to tribes that were under federal jurisdiction in 1934 including land-into-trust transfers under 25 C.F.R. Part 151. Under the *Chevron* doctrine, the Secretary is owed the greatest amount of administrative deference possible when the Secretary invokes authority under 25 U.S.C. §§ 2 and 9. These statutory provisions are explicit delegations from Congress for the Secretary to promulgate legislative regulations, which are given “controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.”²⁰ Nothing in *Carcieri* or in the IRA prevents the Secretary from exercising authority under 25 U.S.C. §§ 2 and 9 to make land-into-trust acquisitions under 25 C.F.R. Part 151 for tribes acknowledged under 25 C.F.R. Part 83.

Part III addresses three collateral issues within federal administrative law jurisprudence that the *Carcieri* quick fix raises. Part III.A anticipates that when an administrative agency offers an alternative justification to perform an action previously invalidated by a federal court, the agency must be prepared for the court’s inevitable perception that such a rejustification is

18. Cf. *SEC v. Chenery Corp. (Chenery II)*, 332 U.S. 194 (1947) (upholding the validity of an agency’s ruling, which was previously declared ultra vires and subsequently re-justified based on the agency’s legitimate authority).

19. See, e.g., Staudenmaier & Khalsa, *supra* note 8, at 67 (summarizing the legal challenge facing Fond du Lac Band of Minnesota Chippewa Tribe Indians based on government allegations that, because their Constitution and Charter were approved in 1936 and 1937, respectively, the tribe lacks proof of earlier existence under federal jurisdiction as *Carcieri* requires).

20. *Chevron*, 467 U.S. at 844.

“a ‘*post hoc* rationalization’ and thus must be viewed critically.”²¹ Secondly, the explicit delegation of power to the Secretary under 25 U.S.C. §§ 2 and 9 necessitates discussion in Part III.B concerning the constitutional authority of Congress to delegate its plenary power over Indian affairs almost entirely to a federal agency. As Part III.B indicates, even though the nondelegation doctrine arose in the early twentieth century to invalidate statutes as broadly phrased as 25 U.S.C. §§ 2 and 9, statutes directed toward Indian tribes are an exception to traditional nondelegation analysis. Since the nineteenth century, the “avowed solicitude of the Federal Government for the welfare of its Indian wards”²² has supplied an inherent intelligible principle to every statute directed toward Indian tribes. Furthermore, the Indian canons of construction, which “are rooted in the unique trust relationship between the United States and the Indians,”²³ require that any “doubtful [statutory] expressions . . . are to be resolved in favor” of Indian tribes.²⁴

Finally, Part III.C describes how the use of 25 U.S.C. §§ 2 and 9 in the proposed *Carcieri* quick fix sheds light on our understanding of the relationship between the *Chevron* doctrine and the Indian canons of construction. In response to the legitimate criticism that “competing versions of Step One [and] conflicting lines of cases [have made] the application of the *Chevron* doctrine . . . highly unpredictable,”²⁵ Part III.C first re-conceptualizes *Chevron*’s two-step inquiry as a quasi-prudential doctrine.²⁶ Step one preserves judicial use of the “traditional tools of statutory construction”—whatever those may be²⁷—to discern “whether Congress has directly spoken to the precise question at issue”;²⁸ whereas step two functions like a prudential doctrine, to the extent that the *Chevron*

21. *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971).

22. *United States ex rel. Hualpai Indians of Ariz. v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 354 (1941).

23. *Cnty. of Oneida v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 247 (1985).

24. *Choate v. Trapp*, 224 U.S. 665, 675 (1912).

25. 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, 783 (2010).

26. Cf. Maureen B. Callahan, *Must Federal Courts Defer to Agency Interpretations of Statutes?: A New Doctrinal Basis for Chevron* U.S.A. v. Natural Resources Defense Council, 1991 WIS. L. REV. 1275 (making an argument for the prudential not mandatory nature of *Chevron*, and summarizing the view of a mandatory rule).

27. See Beermann, *supra* note 25, at 817–22 (examining four different perspectives on the permissible tools of statutory construction at *Chevron* step one: the “original directly spoken *Chevron*,” the “traditional tools *Chevron*,” the “plain meaning *Chevron*,” and the “extraordinary cases *Chevron*”).

28. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

doctrine obliges a federal court to defer to a reasonable administrative interpretation, and consequently narrows the range of justiciable challenges to a federal agency's statutory authority. Part III.C concludes that there can be no one-size-fits-all approach to the use of the Indian canons of construction when the *Chevron* doctrine applies. Even though the Indian canons of construction typically apply at *Chevron* step one alongside the "traditional tools of statutory construction,"²⁹ a federal agency cannot dissociate itself from any fiduciary obligations of the United States to Indian tribes simply because it has convinced a federal court to proceed to *Chevron* step two.

I. RELEVANT CASE HISTORY OF *CARCIERI V. SALAZAR*

The Narragansett Tribe formally entered into relations with the federal government of the United States in 1983, when the Secretary acknowledged the tribe under 25 C.F.R. Part 83.³⁰ In 1991, the Narragansett purchased thirty-one acres of land in Rhode Island, which would become the center of controversy in the *Carcieri* litigation.³¹ When the Secretary agreed in 1998 to convert this thirty-one acre parcel into federal land held in trust for the Narragansett under § 5 of the IRA,³² the State of Rhode Island, Governor Donald L. Carcieri, and the Town of Charlestown, Rhode Island challenged the taking in federal court, on the grounds that the Secretary exceeded her statutory authority under the IRA.³³

At trial and on appeal, the Secretary defended her authority to acquire land on behalf of the Narragansett under 25 U.S.C. § 465.³⁴ In reply, Rhode Island specifically countered that 25 U.S.C. § 465 cannot apply to

29. *Id.* at 843 n.9.

30. Final Determination for Federal Acknowledgement of Narragansett Indian Tribe of Rhode Island, 48 Fed. Reg. 6177 (Feb. 2, 1983).

31. See Brief for Petitioner Donald L. Carcieri at 9, *Carcieri v. Salazar*, 129 S. Ct. 1058 (2009) (No. 07-526).

32. See *id.* at 10.

33. See *id.* The other issues raised by the plaintiffs both in trial and on appeal were ultimately not dispositive to the outcome of the case.

34. Under 25 U.S.C. § 465 (2006):

The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

the Narragansett because the definition of *Indian* under 25 U.S.C. § 479 prevents the application of the IRA to tribes not recognized in June 1934:

The term “Indian” as used in this Act shall include all persons of Indian descent who are members of *any recognized Indian tribe now under Federal jurisdiction*, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation³⁵

The Secretary rejoined that her interpretation of 25 U.S.C. § 479 was owed deference under *Chevron* step two, which mandates that when “the legislative delegation to an agency on a particular question is implicit . . . a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.”³⁶ With respect to the phrase “any recognized Indian tribe now under Federal jurisdiction,” the Secretary asserted that “‘now’ can mean either at the time of a statute’s enactment or at the time of its application.”³⁷ The Secretary thus claimed an implicit delegation to place land into trust for the Narragansett under 25 U.S.C. § 465. Rhode Island, however, reiterated that the case ought to be disposed at *Chevron* step one on grounds that “Congress has directly spoken to the precise question at issue,”³⁸ and unambiguously intended the term *now* in 25 U.S.C. § 479 to refer to the date that the IRA was enacted in 1934.³⁹

The U.S. District Court for Rhode Island and the U.S. Court of Appeals for the First Circuit upheld the Secretary’s taking of the thirty-one acre parcel into trust on behalf of the Narragansett.⁴⁰ Citing *Chevron*, the First Circuit deferred to the Secretary’s interpretation of 25 U.S.C. § 479 as a reasonable construction of an ambiguous term.⁴¹ The Supreme Court, however, reversed the First Circuit. Writing for the majority, Justice

35. 25 U.S.C. § 479 (emphasis added).

36. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

37. Brief for Respondents at 14, *Carcieri v. Salazar*, 129 S. Ct. 1058 (2009) (No. 07-526).

38. *Chevron*, 467 U.S. at 842.

39. See Brief for Petitioner Donald L. Carcieri at 17–29, *Carcieri v. Salazar*, 129 S. Ct. 1058 (2009) (No. 07-526) (arguing that Congress intentionally chose to bind the authority of the Secretary through its choice of words).

40. *Carcieri v. Norton*, 290 F. Supp. 2d 167 (D.R.I. 2003), *aff’d sub nom.* *Carcieri v. Kempthorne*, 497 F.3d 15 (1st Cir. 2007) (en banc), *rev’d sub nom.* *Carcieri v. Salazar*, 129 S. Ct. 1058 (2009).

41. See *Kempthorne*, 497 F.3d at 22 (concluding that the Secretary’s interpretation is entitled to deference under the *Chevron* doctrine because the Secretary’s position has not been inconsistent or arbitrary).

Thomas held that “the term ‘now under Federal jurisdiction’ in § 479 unambiguously refers to those tribes that were under the federal jurisdiction of the United States when the IRA was enacted in 1934.”⁴² Justices Stevens, Souter, and Ginsburg dissented. The most notable point of dissent was raised by Justice Souter, who urged a remand for reconsideration of an issue not raised previously:

The disposition of the case turns on the construction of the language from 25 U.S.C. § 479, “any recognized Indian tribe now under Federal jurisdiction.” Nothing in the majority opinion forecloses the possibility that the two concepts, recognition and jurisdiction, may be given separate content.⁴³

Accordingly, Justices Souter and Ginsburg voted to remand the case and afford “the Secretary and the Narragansett Tribe an opportunity to advocate a construction of the ‘jurisdiction’ phrase that might favor their position here.”⁴⁴ As Justice Breyer’s concurring opinion noted, “The statute, after all, imposes no time limit upon recognition.”⁴⁵ The majority and a concurring Justice Breyer, however, believed that the evidence on the record demonstrated that the Narragansett, which did not receive federal acknowledgment until 1983,⁴⁶ were expressly excluded from federal jurisdiction in 1934.⁴⁷

In response to the Supreme Court decision in *Carcieri*, the Secretary has asked Congress to enact corrective legislation of the Supreme Court majority’s ruling. Although both houses of Congress were quick to hold hearings in 2009 to discuss their options to “fix” *Carcieri*,⁴⁸ more than two years have passed without congressional action. No legislative fix appears imminent, especially since members of Congress intend to consider “the views of the states, counties and cities who advanced this case all the way to

42. *Carcieri*, 129 S. Ct. at 1068.

43. *Id.* at 1071 (Souter, J., concurring in part and dissenting in part).

44. *Id.*

45. *Id.* at 1070 (Breyer, J., concurring).

46. See Final Determination for Federal Acknowledgement of Narragansett Indian Tribe of Rhode Island, 48 Fed. Reg. 6177, 6178 (Feb. 2, 1983) (announcing formal acknowledgement of the Narragansett Tribe).

47. See *Carcieri*, 129 S. Ct. at 1068 (holding that the Narragansett Tribe was not included in the statute in 1934 upon further construction). Breyer concurred with the majority, rather than joining the dissent in urging a remand for consideration of this issue, on grounds that “both the State and Federal Government considered the Narragansett Tribe as under *state*, but not under *federal*, jurisdiction in 1934.” *Id.* at 1070–71 (Breyer, J., concurring).

48. See Staudenmaier & Khalsa, *supra* note 8, at 53–66 (providing a summary of the House and Senate hearings triggered by the *Carcieri* decision).

the United States Supreme Court where their legal arguments prevailed.”⁴⁹ In the meantime, the Department has contemplated whether to promulgate a new regulation addressing the decision in *Carciere*. Such a resolution is generally disfavored, however, as it could delay (and perhaps even diminish) the possibility of a more permanent legislative solution.⁵⁰ As none of the available options for new legislation or regulations appear to be forthcoming, Part II of this Recent Development will expound how the Secretary might overcome the consequences of *Carciere* without having to wait either for an Act of Congress or for public comments on proposed regulatory reforms.

II. REGULATORY “QUICK FIX” OF *CARCIERE*: INVOKING EXISTING STATUTES AND FEDERAL REGULATIONS TO VALIDATE FEE-INTO-TRUST TRANSACTIONS ON BEHALF OF TRIBES ACKNOWLEDGED AFTER 1934

Even though the Secretary may no longer claim authority under the IRA to purchase land for tribes that were not under federal jurisdiction in 1934, the Department’s regulations for land-into-trust acquisitions on behalf of tribes, codified at 25 C.F.R. Part 151,⁵¹ are authorized under numerous statutes. Accordingly, the Secretary can rely on existing statutory authority other than the IRA to legitimize land-into-trust transactions for tribes not under federal jurisdiction in 1934. The *Carciere* quick fix would enable the Secretary to immediately defend his power to convert land-into-trust for tribes excluded from the IRA without any need to promulgate new regulations or to await corrective legislation.

Among the statutes which undergird 25 C.F.R. Part 151, 25 U.S.C. §§ 2 and 9 offer the strongest authority for the Secretary to convert fee-into-trust for tribes not under federal jurisdiction “when the IRA was enacted in 1934.”⁵² According to the *Chevron* doctrine, 25 U.S.C. §§ 2 and 9 have been classified as “an express delegation of authority to the agency to elucidate . . . legislative regulations [which] are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the

49. *Id.* at 70 (quoting *To Amend the Act of June 18, 1934, to Reaffirm the Authority of the Secretary of the Interior to Take Land into Trust for Indian Tribes: Hearing on H.R. 3697 and H.R. 3742 Before the H. Comm. on Natural Res.*, 111th Cong. 3 (2009) (statement of Rep. Doc Hastings, Ranking Republican Member, H. Comm. on Natural Res.)).

50. *See id.* at 69 (summarizing the tribal position in the wake of *Carciere*).

51. 25 C.F.R. §§ 151.1–151.8 (2011).

52. *Carciere*, 129 S. Ct. at 1068; *see also* 25 U.S.C. §§ 2, 9 (2006).

statute.”⁵³ Furthermore, 25 U.S.C. §§ 2 and 9 also undergird 25 C.F.R. Part 83, which enables the Secretary to grant federal acknowledgment to previously unrecognized tribes. 25 C.F.R. Part 83 specifically entitles tribes that obtain acknowledgment under the federal administrative process “to the privileges and immunities available to other federally recognized historic tribes,” and renders them “eligible for the services and benefits from the Federal government that are available to other federally recognized tribes.”⁵⁴

The question arises whether the interpretation of 25 U.S.C. § 479 in *Carcieri* operates to restrict the Secretary from extending such “services and benefits” to tribes acknowledged under 25 C.F.R. Part 83. Conspicuously, the Indian canons of construction make it difficult for the federal Judiciary to interpret 25 U.S.C. § 479 as an unambiguous limitation upon the Secretary’s authority under 25 U.S.C. §§ 2 and 9 to extend the benefits of 25 C.F.R. Part 151 to tribes acknowledged under 25 C.F.R. Part 83. Quite the opposite, since Congress ended the federal tradition of treaty making with Indian tribes in 1871, Congress has continued to diminish its role in the establishment of government-to-government relationships between the United States and newly recognized Indian tribes. Since the Department promulgated 25 C.F.R. Part 83 in 1978, Congress has routinely avoided recognition bills for previously unrecognized tribes and emphasized its preference that the Department alone handle the federal acknowledgment process for unrecognized tribes under 25 C.F.R. Part 83, pursuant to 25 U.S.C. §§ 2 and 9.⁵⁵

A. 25 U.S.C. §§ 2 and 9 Authorize the Secretary to Make Land-into-Trust Acquisitions for Tribes Not Under Federal Jurisdiction in 1934 Under 25 C.F.R. Part 151 and 25 C.F.R. Part 83

Enacted in 1832, 25 U.S.C. § 2 vests the Secretary with the plenary power to regulate Indian tribes:

53. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984); *see also* *Morton v. Ruiz*, 415 U.S. 199, 231 (1974) (announcing the principle that the “power of an administrative agency to administer a congressionally created and funded program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress. In the area of Indian affairs, the Executive has long been empowered to promulgate rules and policies, and the power has been given explicitly to the Secretary and his delegates at the BIA.” (citing 25 U.S.C. §§ 2, 9)).

54. 25 C.F.R. § 83.12(a).

55. *See* discussion *infra* Part II.B.2.

The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations.⁵⁶

25 U.S.C. § 9, enacted in 1834, further empowers the Executive to have the widest latitude in administering statutes relating to Indian affairs:

The President may prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs, and for the settlement of the accounts of Indian affairs.⁵⁷

The symbiotic relationship between 25 U.S.C. §§ 2 and 9 forms the quintessential legislative gap *explicitly* left by Congress for a federal agency to fill. In *Morton v. Ruiz*, the Court first recognized that:

The power of an administrative agency to administer a congressionally created and funded program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress. In the area of Indian affairs, the Executive has long been empowered to promulgate rules and policies [under 25 U.S.C. § 9], and the power has been given explicitly to the Secretary and his delegates at the BIA [under 25 U.S.C. § 2].⁵⁸

Whenever 25 U.S.C. §§ 2 and 9 supply the Secretary's statutory authority to perform an action, the holding in *Morton v. Ruiz* compels the federal Judiciary to afford the Secretary the maximum amount of deference possible under the *Chevron* doctrine. In fact, Justice Stevens's opinion in *Chevron* incorporates the reasoning of *Morton v. Ruiz* directly into its explanation of when deference is owed at step two:

[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

"The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a

56. 25 U.S.C. § 2; *see* Act of July 9, 1832, ch. 174, § 1, 4 Stat. 564, 564.

57. 25 U.S.C. § 9; *see* Act of June 30, 1834, ch. 162, § 17, 4 Stat. 735, 738.

58. *Ruiz*, 415 U.S. at 231–32 & nn.25–26 (1974).

case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.⁵⁹

The Supreme Court has recognized that the combination of 25 U.S.C. §§ 2 and 9 reflects the intent of Congress: “In the area of Indian affairs, the Executive has long been empowered to promulgate rules and policies, and the power has been given *explicitly* to the Secretary and his delegates at the BIA.”⁶⁰ Under the *Chevron* framework, 25 U.S.C. §§ 2 and 9 amount to an explicit delegation to the Secretary of the power to promulgate legislative regulations, which are entitled to the maximum amount of deference: “If Congress has explicitly left a gap for the agency to fill . . . [s]uch legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.”⁶¹

25 C.F.R. Part 151, which regulates the Secretary’s “acquisition of land by the United States in trust status for individual Indians and tribes,”⁶² was promulgated under numerous statutes, including 25 U.S.C. §§ 2 and 9. Although the Secretary failed in *Carcieri* to persuade the Supreme Court that the IRA implicitly authorized use of 25 C.F.R. Part 151 for the Narragansett, nothing in the *Carcieri* majority opinion prevents the Secretary from alternatively claiming that 25 U.S.C. §§ 2 and 9 explicitly left a gap for the Secretary to apply 25 C.F.R. Part 151 to place land into trust for the Narragansett. In *Carcieri*, the question was strictly limited to “[w]hether the Indian Reorganization Act authorizes the Secretary of the Interior to take land into trust on behalf of an Indian tribe that was not a recognized Indian tribe under federal jurisdiction on June 18, 1934, the date on which that statute was enacted.”⁶³ The Supreme Court considered only two possible outcomes: either (1) the phrase *now under Federal jurisdiction* in 25 U.S.C. § 479 applied only to tribes under federal jurisdiction in 1934, or (2) 25 U.S.C. § 479 left a narrow definitional gap in the IRA for the Secretary to interpret that 25 U.S.C. § 465 could extend 25 C.F.R. Part 151 to tribes not under federal jurisdiction in 1934 because “the word ‘now’ is an ambiguous term that can reasonably be construed to authorize the

59. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984) (emphasis added) (footnotes omitted) (quoting *Ruiz*, 415 U.S. at 231).

60. *Ruiz*, 415 U.S. at 231 (emphasis added) (footnote omitted).

61. *Chevron*, 467 U.S. at 843–44.

62. 25 C.F.R. § 151.1 (2011).

63. Brief for Respondents at I, *Carcieri v. Salazar*, 129 S. Ct. 1058 (2009) (No. 07-526) (citation omitted).

Secretary to take land into trust for members of tribes that are ‘under Federal jurisdiction’ at the time that the land is accepted into trust.”⁶⁴

This proposed regulatory quick fix for *Carcieri*, on the other hand, allows the Secretary to tap into the deep roots of statutory authority available through 25 U.S.C. §§ 2 and 9, which explicitly delegate comprehensive authority to manage “all Indian affairs and . . . all matters arising out of Indian relations” to the Secretary.⁶⁵ Under the *Chevron* doctrine, 25 U.S.C. §§ 2 and 9 would transmute 25 C.F.R. Part 151 into legislative regulations carrying controlling weight in federal court. Wherefore, the Secretary would be afforded the greatest amount of *Chevron* deference available to justify land-into-trust transactions under 25 C.F.R. Part 151 for tribes not under federal jurisdiction in 1934.

25 C.F.R. Part 83 also reinforces the Secretary’s authority to extend the benefits of land-into-trust acquisitions to tribes not included in the IRA’s statutory definition of *Indian*. Promulgated pursuant to 25 U.S.C. §§ 2 and 9 in 1978, 25 C.F.R. Part 83 empowers the Secretary to extend official acknowledgement, and thereby federal jurisdiction, to Indian tribes previously unrecognized by the federal government.⁶⁶ The power of the Secretary to acknowledge previously unrecognized Indian tribes under 25 C.F.R. Part 83 illustrates how expansive the delegation of power over Indian affairs to the Secretary is under 25 U.S.C. §§ 2 and 9. Whereas Congress formerly recognized tribes primarily through treaties, the Secretary now handles this process administratively, explicitly filling a gap that Congress left for the Secretary to address under 25 U.S.C. §§ 2 and 9. Most important to the *Carcieri* quick fix, under 25 C.F.R. § 83.12(a), the Secretary has promulgated a legislative regulation that enables him to

64. *Carcieri*, 129 S. Ct. at 1061. Although the Secretary’s brief on the merits did attempt to make arguments in favor of an unambiguous intent of Congress to define *now* just as the Secretary had defined it, the Supreme Court majority did not directly reference these arguments in its opinion, as the force of its own reasoning supported its finding of an unambiguous intent of Congress to the contrary.

65. 25 U.S.C. § 2 (2006); *see also id.* § 9 (“The President may prescribe such regulations as he may think fit for carrying into effect the provisions of any act relating to Indian affairs . . .”).

66. *See* Sarah Washburn, Comment, *Distinguishing Carcieri v. Salazar: Why the Supreme Court Got It Wrong and How Congress and Courts Should Respond to Preserve Tribal and Federal Interests in the IRA’s Trust-Land Provisions*, 85 WASH. L. REV. 603, 629–30 (2010) (summarizing the history and procedures which govern federal administrative acknowledgment of Indian tribes since 1978) (citing Procedures for Establishing that an American Indian Group Exists as an Indian Tribe, 43 Fed. Reg. 39,361 (Aug. 24, 1978) (codified as amended at 25 C.F.R. pt. 83 (2011))).

extend the benefit of 25 C.F.R. Part 151 to federally acknowledged tribes, including the Narragansett:

Upon final determination that the petitioner exists as an Indian tribe, it shall be considered *eligible for the services and benefits from the Federal government that are available to other federally recognized tribes*. The newly acknowledged tribe shall be considered a historic tribe and *shall be entitled to the privileges and immunities available to other federally recognized historic tribes* by virtue of their government-to-government relationship with the United States.⁶⁷

The regulatory quick fix for *Carcieri* thus empowers the Secretary to extend the fee-into-trust program under 25 C.F.R. Part 151 to Indian tribes acknowledged under 25 C.F.R. Part 83. When the explicit delegation of authority to promulgate legislative regulations in the area of Indian affairs under 25 U.S.C. §§ 2 and 9 is properly invoked as the grounds for agency action, the *Chevron* doctrine obliges courts to provide the maximum deference allowable to the Secretary.⁶⁸ The Secretary may once again defend against lawsuits like the one in *Carcieri v. Salazar* by relying upon alternative pillars of existing statutory authority, which empower the Secretary to place land into trust for tribes that were not under federal jurisdiction when the IRA was enacted in 1934.”⁶⁹

B. The Supreme Court’s Ruling in Carcieri Affects the IRA Alone and Not the Secretary’s Authority Under 25 U.S.C. §§ 2 and 9

The *Chevron* deference generally owed to the Secretary’s legislative regulations promulgated under 25 U.S.C. §§ 2 and 9 may only be avoided if such regulations are adjudged to be “arbitrary, capricious, or manifestly contrary” to congressional intent.⁷⁰ The IRA, as interpreted in *Carcieri*, is the most likely source of any legislative intent to circumscribe the Secretary’s authority under 25 U.S.C. §§ 2 and 9 with respect to placement of land into trust under 25 C.F.R. Part 151 for tribes acknowledged under 25 C.F.R. Part 83. Two factors militate against the interpretation of 25 U.S.C. § 479 as a limitation on the power of the Secretary to extend land-into-trust acquisitions to acknowledged tribes: the Indian canons of construction and the manifest desire of Congress that the Secretary have exclusive responsibility for the affairs of Indian tribes that have been or

67. 25 C.F.R. § 83.12(a) (2011) (emphases added).

68. See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) (explaining that “the question for the court is whether the agency’s answer is based on a permissible construction of the statute”).

69. See *Carcieri*, 129 S. Ct. at 1068.

70. *Chevron*, 467 U.S. at 843–44.

hope to be acknowledged under 25 C.F.R. Part 83. Part II concludes with a discussion of why 25 U.S.C. § 479 should not interfere with the proposed *Carcieri* quick fix.

1. *The Indian Canons of Construction Severely Restrict Any Interpretation of 25 U.S.C. § 479 as a Limit to the Secretary's Power to Promulgate Legislative Regulations Under 25 U.S.C. §§ 2 and 9*

First and foremost, the Indian canons of construction are an enormous obstacle to interpreting 25 U.S.C. § 479 as a restraint against the proposed regulatory fix under 25 C.F.R. Part 83. Because “the standard principles of statutory construction do not have their usual force in cases involving Indian law,”⁷¹ the traditional canon of statutory construction (*lex specialis derogat generali*, i.e., the specific law circumscribes the general one) is not available in this instance to support any claim that 25 U.S.C. § 479 circumscribes the powers of the Secretary under 25 U.S.C. §§ 2 and 9. An unambiguous legislative intent that the IRA should prevent the Secretary from placing land into trust for tribes acknowledged under 25 C.F.R. Part 83 “cannot be lightly implied in view of the avowed solicitude of the Federal Government for the welfare of its Indian wards.”⁷² Instead, “When we are faced with these two possible constructions, our choice between them must be dictated by a principle deeply rooted in this Court’s Indian jurisprudence: ‘[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.’”⁷³

While 25 U.S.C. § 479 was undoubtedly construed in *Carcieri* to exclude many tribes from the benefits of the IRA, the IRA should never be construed to terminate or reduce the benefits and services available to these excluded Indian tribes *under other statutory provisions* that authorize the Secretary to regulate Indian affairs. The overriding purpose of the IRA was “to strengthen tribal government while continuing the active role of the BIA, with the understanding that the Bureau would be more responsive to the interests of the people it was created to serve.”⁷⁴ Although Congress also has the authority to enact statutes that extend benefits to one class of

71. *Montana v. Blackfoot Tribe of Indians*, 471 U.S. 759, 766 (1985).

72. *United States ex. rel. Hualpai Indians of Ariz. v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 354 (1941).

73. *Cnty. of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 269 (1992) (alteration in original) (quoting *Blackfeet*, 471 U.S. at 764).

74. *Morton v. Mancari*, 417 U.S. 535, 543 (1974).

Indians or tribes to the exclusion of another class,⁷⁵ nothing in the IRA prevents the Secretary from extending the benefits of land-into-trust regulations under other statutes. On the contrary, numerous statutes authorize extension of 25 C.F.R. Part 151 to individual tribes whose members were not included within the definition of *Indian* in the IRA.⁷⁶ The power of the Secretary to perform the same land-into-trust transfers for tribes acknowledged under 25 C.F.R. Part 83 and 25 U.S.C. §§ 2 and 9 is similarly situated in relation to the IRA.

Even though the IRA was enacted after 25 U.S.C. §§ 2 and 9, federal courts may not invoke the “last-in-time” canon of construction to impute that the IRA is a restraint on the Secretary’s authority under 25 U.S.C. §§ 2 and 9; after all, the Indian canons of construction require “doubtful expressions . . . to be resolved in favor” of Indian tribes.⁷⁷ Absent an unambiguous repeal in the IRA of the Secretary’s power under 25 U.S.C. §§ 2 and 9 to extend services and benefits to tribes acknowledged under 25 C.F.R. Part 83, the Indian canons of construction militate against any interpretation of the IRA that would preclude the Secretary from exercising the statutory authority under 25 U.S.C. §§ 2 and 9. Under the circumstances, it would even seem to defy the spirit and the letter of the IRA to stretch the meaning of 25 U.S.C. § 479 if courts were to infer an unambiguous prohibition against granting the benefits and privileges of 25 C.F.R. Part 151 to tribes acknowledged under 25 C.F.R. Part 83.

2. *Congressional Policy Prefers that the Secretary Have Exclusive Authority to Acknowledge Previously Unrecognized Tribes and Grant Them Federal Benefits*

Finally, since 1978, Congress has demonstrated its growing preference that the Secretary have exclusive responsibility for formulating policies related to acknowledged tribes under 25 C.F.R. Part 83. In stating his opposition to H.R. 1294, the Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act of 2007, Representative Hastings of Washington exemplified the growing desire of Congresspersons not to be involved in the affairs of tribes eligible to petition for acknowledgment under 25 C.F.R. Part 83:

75. See *Delaware Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 85 (1977) (denying equal protection among Indian tribes or individuals when “special treatment can be tied rationally to the fulfillment of Congress’ unique obligation toward the Indians”) (quoting *Mancari*, 417 U.S. at 555).

76. See, e.g., 25 U.S.C. §§ 501, 502, 573, 574, 576, 608, 608a, 610, 610a, 622, 624, 640d-10, 1466, and 1495 (2006) (authorizing land acquisitions for individual tribes).

77. *Choate v. Trapp*, 224 U.S. 665, 675 (1912).

This . . . consideration of a bill to Federally recognize six new Indian tribes in the State of Virginia . . . marks the first time in over 20 years that the House of Representatives has considered legislation to extend Federal recognition to a tribe.

While I will acknowledge Congress can grant Federal recognition to individual tribes, the Department of Interior's Bureau of Indian Affairs has the administrative process by which a group may establish itself as an Indian tribe and become eligible for services and benefits extended to other tribes under Federal law.⁷⁸

Representative Hastings is not alone in his desire to avoid congressional responsibility for establishing direct government-to-government relationships with individual Indian tribes. In fact, congressional participation in tribal recognition has been in dramatic decline since 1871 when Congress ended the federal policy of treaty making with Indian tribes.⁷⁹ The advent of the Secretary's tribal acknowledgment regulations in 1978 has further alienated Congress from its traditional role of enacting federal recognition of individual tribes and defining the scope of benefits afforded to such newly recognized tribes. Nowadays, there is a growing preference in Congress that only the Department of the Interior handle the affairs of acknowledged tribes. 25 U.S.C. §§ 2 and 9 continue to be statutory authority on which Congress relies in the twenty-first century to delegate power explicitly to the Secretary over the affairs of tribes acknowledged under 25 C.F.R. Part 83.⁸⁰

For the foregoing reasons, the Court's interpretation of 25 U.S.C. § 479 in *Carciari* cannot stop the Secretary from asserting that all lands taken into trust on behalf of acknowledged tribes were validly acquired under 25 U.S.C. §§ 2 and 9. Congress has manifested in numerous ways its

78. 153 CONG. REC. 11,496 (2007) (statement of Rep. Doc Hastings).

79. Indian Appropriation Act of Mar. 3, 1871, ch. 120, 16 Stat. 544, 566 (codified at 25 U.S.C. § 71 (2006)).

80. The general desire of Congress to reduce its legislative activities in Indian affairs and to increase the regulatory duties of the Department of the Interior and the Board of Indian Affairs (BIA) is exemplified in *Morton v. Ruiz*, 415 U.S. 199 (1974). In *Ruiz*, the Supreme Court discerned a legislative intent behind the Snyder Act of 1921 from post-1948 Congressional appropriations subcommittee hearings, which demonstrated that the testimony of BIA agents in the 1950s and 1960s had misled members of Congress to believe that BIA policies concerning off-reservation Indians were implemented as (inaccurately) portrayed to the subcommittee. *Id.* at 212–30. Although Congress still finds occasion to enact legislation particular to Indian affairs, *e.g.*, the Tribal Law and Order Act of 2010, H.R. 725, 111th Cong. (2010), with respect to recognition of indigenous peoples in the United States, 25 C.F.R. Part 83 is quickly becoming viewed in Congress as an essential area of expertise belonging properly to the Secretary alone.

continuing approval of 25 C.F.R. Part 83, within which § 83.12(a) specifically empowers the Secretary to acquire land in trust under 25 C.F.R. Part 151 for acknowledged tribes. Even if any doubt exists concerning the intent of Congress with respect to the effect of the IRA on 25 U.S.C. §§ 2 and 9, as well as 25 C.F.R. Parts 83 and 151, the Indian canons of statutory construction require that such uncertainties be resolved in favor of the Indian tribe.

III. PANDORA'S BOX OF OTHER ADMINISTRATIVE LAW ISSUES:
ADDRESSING CONCERNS ARISING FROM *CHENERY II*, THE
NONDELEGATION DOCTRINE, AND THE INTERSECTION OF THE INDIAN
CANONS OF CONSTRUCTION WITH THE *CHEVRON* DOCTRINE

Before the Secretary can adopt the proposed *Carcieri* quick fix, it is necessary to anticipate three collateral legal issues that would arise from its implementation. Although none of these three issues should overturn the proposed regulatory quick fix for *Carcieri*, the gravity of these issues warrants advanced deliberation. First, when an administrative agency asserts an alternative justification to perform an action identical to one a federal court has previously invalidated, the next reviewing court can and should scrutinize the new legal justifications closely. Second, considering that 25 C.F.R. Part 151 and the IRA land-into-trust provision under 25 U.S.C. § 465 have been subject to nondelegation challenges in the past, the federal Judiciary could find occasion to express uneasiness with the broad statutory language of 25 U.S.C. §§ 2 and 9. Finally, the relationship between the *Chevron* doctrine and the Indian canons of construction remains somewhat obscure after the decision in *Carcieri*. Existing jurisprudence on the subject is somewhat misleading, and consequently this Recent Development concludes by clarifying how the Indian canons of construction intersect with the *Chevron* doctrine in the context of federal cases and controversies. The most significant general contribution of this Recent Development comes from the reconceptualization of *Chevron*'s two-step inquiry as a quasi-prudential doctrine: Step one preserves traditional judicial practices of statutory construction, whereas step two functions like a prudential doctrine to the extent that the *Chevron* doctrine obliges a federal court to defer to a reasonable administrative interpretation, and consequently narrows the range of justiciable challenges to a federal agency's statutory authority.

A. *Problem One: Taking a Second Bite at the Apple*

Though it may seem disingenuous for an agency to adopt an alternative basis to justify an act previously deemed ultra vires, it is well settled in federal administrative law that a federal agency can take a “second bite at the apple.” The infamous saga of the *SEC v. Chenery Corp.* litigation epitomizes the power of federal agencies to sidestep an existing precedent to achieve a desired regulatory result. Whereas the Supreme Court could not accept the Securities and Exchange Commission’s (SEC’s) administrative decision in *SEC v. Chenery Corp. (Chenery I)*⁸¹ due to a procedural deficiency, in *Chenery II* the Court had no choice but to accept the SEC’s second ruling, even though the result on remand was identical to the original ruling, because the SEC’s subsequent explanation for its decision on remand “rests squarely in that area where administrative judgments are entitled to the greatest amount of weight by appellate courts.”⁸²

In *Chenery I*, the Supreme Court rejected a ruling of the SEC that rested “solely on the basis of its adherence to principles of equity derived from judicial decisions . . . [that] do not establish principles of law and equity which in themselves are sufficient to sustain its order.”⁸³ Because “an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained,”⁸⁴ the Court remanded the case. On remand, the SEC ordered an identical result, but supplied a different rule for its decision and concluded that “the proposed transaction is inconsistent with the standards of §§ 7 and 11 of the Act.”⁸⁵ When the case was again appealed, the Supreme Court in *Chenery II* had no problem affirming the result the second time around, for the SEC had properly decided the case based on its valid authority: “[The SEC] has drawn heavily upon its accumulated experience in dealing with utility reorganizations. And it has expressed its reasons with a clarity and thoroughness that admit of no doubt as to the underlying basis of its order.”⁸⁶

Similarly, the Secretary could re-examine the basis for the acquisition of land into trust for the Narragansett and overcome the negative ruling in *Carcieri* by invoking a different statutory authorization than the IRA. Certainly Rhode Island and Charlestown would be forgoing a legitimate

81. 318 U.S. 80 (1943).

82. *Chenery II*, 332 U.S. 194, 209 (1947).

83. *Chenery I*, 318 U.S. at 88–89.

84. *Id.* at 95.

85. *Chenery II*, 332 U.S. at 199.

86. *Id.*

cause of action if they did not assert a due process challenge on grounds that a renewed attempt to convert the thirty-one acres of Narragansett fee into trust is “a ‘*post hoc* rationalization” that “must be viewed critically”;⁸⁷ even so, because federal courts are obligated to extend the greatest amount of deference permitted under *Chevron* to the Secretary when the explicit delegation of authority to promulgate legislative regulations is invoked under 25 U.S.C. §§ 2 and 9, such a renewed challenge to the Secretary’s authority would face a much higher hurdle under *Chevron* than the ones which the petitioners overcame in *Carcieri*.

B. Problem Two: The Nondelegation Challenge to 25 U.S.C. §§ 2 and 9

Additionally, since *South Dakota v. U.S. Department of Interior*⁸⁸ nearly ruled that “the total absence of procurement principles and safeguards in [the IRA § 5] violates the nondelegation doctrine,”⁸⁹ the specter of nondelegation hangs over every case involving 25 C.F.R. Part 151. Just as the Court of Appeals for the Eighth Circuit nearly voided the land-into-trust section of the IRA on grounds that there are “no perceptible boundaries, no intelligible principles, within the four corners of the statutory language that constrain this delegated authority,”⁹⁰ a federal court could find it even more disconcerting to examine the expansive language of 25 U.S.C. §§ 2 and 9. Were 25 U.S.C. §§ 2 and 9 applicable to any other subject matter other than Indian tribes, the apparent lack of an intelligible principle would potentially render it unconstitutional under the nondelegation doctrine.⁹¹ However, the “unique historical origins of tribal sovereignty make it generally unhelpful to apply to federal enactments regulating Indian tribes those standards . . . that have emerged in other areas of the law.”⁹² Because “Congress has plenary authority to legislate for the Indian tribes in all matters, including their form of government,”⁹³ it

87. *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971).

88. 69 F.3d 878 (8th Cir. 1995), *vacated*, 519 U.S. 919 (1996).

89. *Id.* at 884.

90. *Id.* at 882. *But cf.* *United States v. Roberts*, 185 F.3d 1125, 1136 (10th Cir. 1999) (rejecting the reasoning of the Eighth Circuit in a subsequent challenge to 25 U.S.C. § 465).

91. *See, e.g., Panama Ref. Co. v. Ryan*, 293 U.S. 388, 430 (1935) (declaring a statute unconstitutional because “Congress has declared no policy, has established no standard, has laid down no rule”).

92. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980).

93. *United States v. Wheeler*, 435 U.S. 313, 319 (1978) (citing *Winton v. Amos*, 255 U.S. 373, 391–92 (1921)).

follows that Congress “may waive or withdraw these duties of guardianship or entrust them to such agency—state or federal—as it chooses.”⁹⁴

No matter how broadly Congress phrases a delegation of its plenary authority over Indian tribes to the Secretary, the “intelligible principle” intrinsic to all federal Indian laws emanates from the fiduciary duty of the federal government to Indian tribes. 25 U.S.C. §§ 2 and 9 have survived since the 1830s on account of “Congress’ unique obligation toward the Indians,”⁹⁵ which imposes an “overriding duty . . . to deal fairly with Indians.”⁹⁶ According to the Court in *Morton*, not only has “the formulation of policy and the making of rules to fill any gap left . . . been given explicitly to the Secretary,”⁹⁷ but the Secretary’s ability to exercise this authority is also restricted by “the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people.”⁹⁸ When the fiduciary duty of the United States to Indian tribes underlies the purpose of a statute, violations of the nondelegation doctrine become much more difficult to prove.

C. Problem Three: Shedding Light on the Intersection of the Indian Canons of Construction and the Chevron Doctrine

This Recent Development concludes with an important correction to existing opinions concerning the relationship of the Indian canons of construction and the *Chevron* doctrine: there is a popular misconception stating, “The tension between *Chevron* and the Indian law canons is strong in cases involving agency interpretations of statutes affecting Indians because both principles come into play upon finding ambiguity in such statutes The circuit courts are split over which canon prevails, and the Supreme Court has avoided the issue.”⁹⁹ Quite to the contrary, there is no

94. *United States v. Hellard*, 322 U.S. 363, 367 (1944).

95. *Cnty. of Oneida v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 253 (1985) (quoting *Morton v. Mancari*, 417 U.S. 535, 555 (1974)).

96. *Morton v. Ruiz*, 415 U.S. 199, 236 (1974).

97. *Id.* at 231; *see also* *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (quoting *Ruiz*, 415 U.S. at 231).

98. *Ruiz*, 415 U.S. at 236 (quoting *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942)); *see also* Alex Tallchief Skibine, *Indian Gaming and Cooperative Federalism*, 42 ARIZ. ST. L.J. 254, 271 (2010) (arguing “when *Chevron* is applicable, the Indian canon of statutory construction and the trust doctrine should still play a role in the agency’s interpretation”).

99. Scott C. Hall, *The Indian Law Canons of Construction v. The Chevron Doctrine: Congressional Intent and the Unambiguous Answer to the Ambiguous Problem*, 37 CONN. L. REV. 495, 543–52 (2004) (relying on opinions from the D.C. Circuit and the Ninth Circuit to demonstrate a circuit split).

conflict between *Chevron* and the Indian canons of construction. *Chevron* is not a canon of statutory construction; rather, the *Chevron* doctrine functions more like a prudential doctrine.¹⁰⁰

At step one, *Chevron* confines judicial review of “an agency’s construction of the statute which it administers” to an inquiry regarding whether an administrative interpretation is inconsistent with “the unambiguously expressed intent of Congress.”¹⁰¹ At step two, *Chevron* precludes any judicial encroachment upon the “sphere of mandatory deference”¹⁰² that shields every “reasonable interpretation made by the administrator of an agency.”¹⁰³ Consequently, the Indian canons of construction are regularly applied at *Chevron* step one, along with all other “traditional tools of statutory construction” which tend to eliminate textual ambiguities.¹⁰⁴ “When we are faced with [multiple] possible constructions, our choice between them must be dictated by a principle deeply rooted in this Court’s Indian jurisprudence: ‘[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.’”¹⁰⁵ Certainly the Supreme Court has approved of several extrinsic aids or interpretive rules that enable courts to disregard or override the Indian canons of construction at *Chevron* step one.¹⁰⁶ Nonetheless, any judicial

100. See generally Callahan, *supra* note 26 (making an argument for the prudential, not mandatory, nature of *Chevron* and summarizing the view of a mandatory rule).

101. *Chevron*, 467 U.S. at 842–43.

102. Michael C. Tolley, *Judicial Review of Agency Interpretation of Statutes: Deference Doctrines in Comparative Perspective*, 31 POLY STUD. J. 421, 425 (2003). Even before the *Chevron* doctrine was articulated, “The prevailing rule in American administrative law . . . was that the agency charged with administering the statute that is the subject of litigation is entitled to deference by courts so long as the interpretation had a reasonable basis in law.” *Id.* at 424 (citing *NLRB v. Hearst Pubs., Inc.*, 322 U.S. 111, 130–31 (1944)).

103. *Chevron*, 467 U.S. at 844.

104. *Id.* at 843 n.9.

105. *Cnty. of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 269 (1992) (alteration in original) (quoting *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985)).

106. Even though the Indian canons of construction may reduce the likelihood that an agency will be entitled to *Chevron* deference for its own construction of a statute, federal agencies may resort to numerous other tools of statutory construction at *Chevron* step one to assert that Congress unambiguously intended to authorize an agency to act to the detriment of Indian tribes. Most notoriously, “the Supreme Court has used a diluted form of such a rule in applying the Indian law canons—permitting congressional intent to be found from often vague ‘surrounding circumstances.’” Hall, *supra* note 99, at 557; see also *DeCoteau v. District Court*, 420 U.S. 425, 446 (1975) (finding a clear congressional intent in the “surrounding circumstances” of an 1891 act to terminate the Lake Traverse Indian Reservation, even though the statutory language was “virtually indistinguishable from that used in” a statute which the Supreme Court interpreted *not* to have terminated the Klamath

devices that may disarm the Indian canons of construction also apply at *Chevron* step one. Their existence does not change the fact that the court will proceed to *Chevron* step two only if any statutory ambiguities remain unresolved after the court exhausts its traditional tools of interpretation in search of an unambiguous legislative intent with respect to the precise issue at controversy.¹⁰⁷

In analyzing the role of the Indian canons of construction within *Chevron*'s framework, it is helpful to remember that "realiz[ing] that the concepts and tools of statutory interpretation are heuristic in nature . . . keep[s] us from the morass created by confusing statutory interpretation concepts and tools with substantive rules having the force and effect of law."¹⁰⁸ Accordingly, the mechanical principles of the Indian canons of construction are less important than the underlying policy that the Indian canons of construction reflect: "The canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians."¹⁰⁹ Whenever the relationship between the *Chevron* doctrine and the Indian canons of construction is examined, the appropriate judicial inquiry is whether the "overriding duty of our Federal Government to deal fairly with Indians"¹¹⁰ has any legal effect on the number of "permissible construction[s] of the statute" which would otherwise be considered "a

River Indian Reservation in *Mattz v. Arnett* (citing *Mattz v. Arnett*, 412 U.S. 481, 504 n.22 (1973)).

Federal agencies that have expertise in areas outside of Indian affairs may also claim at Step One that their enabling statute was unambiguously intended to apply equally to Indian tribes and nonnative landowners. In *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99 (1960), the Supreme Court interpreted that a federal agency's exercise of eminent domain under the Federal Power Act "applies to these lands owned in fee simple by the Tuscarora Indian Nation," *id.* at 118, on grounds that "it is now well settled by many decisions of this Court that a general statute in terms applying to all persons includes Indians and their property interests," *id.* at 116, and also because "[i]t would be very strange if the national government, in the execution of its rightful authority, could exercise the power of eminent domain in the several states, and could not exercise the same power in a Territory occupied by an Indian nation or tribe, the members of which were wards of the United States, and directly subject to its political control," *id.* at 121–22 (quoting *Cherokee Nation v. S. Kan. Ry. Co.*, 135 U.S. 641, 656–57 (1890)).

107. Tolley, *supra* note 102, at 421.

108. Morell E. Mullins, Sr., *Tools, Not Rules: The Heuristic Nature of Statutory Interpretation*, 30 J. LEGIS. 1, 55 (2003).

109. *Cnty. of Oneida v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 247 (1985) (emphasis added).

110. *Morton v. Ruiz*, 415 U.S. 199, 236 (1974).

reasonable interpretation made by the administrator of an agency.”¹¹¹ Although the Indian canons of construction typically apply at *Chevron* step one alongside the “traditional tools of statutory construction,”¹¹² a federal agency cannot dissociate from the fiduciary obligations of the United States to Indian tribes simply because it has convinced a federal court to proceed to *Chevron* step two.

Hence, there can be no one-size-fits-all hybrid “*Chevron*–Indian canons” heuristic for every future federal controversy involving an Indian tribe, an administrative agency, and the fiduciary duty of the United States to Indian tribes. For example, the regulatory quick fix for *Carcieri* proposed in this Recent Development rests entirely upon the Secretary’s power under 25 U.S.C. §§ 2 and 9, which constitute “an express delegation of authority to the agency to elucidate . . . legislative regulations” under *Chevron* step two.¹¹³ As was explained in *Morton v. Ruiz*, this statutory authority cannot be exercised in any way “inconsistent with ‘the distinctive obligation of trust incumbent upon the Government in its dealings’” with Indian tribes.¹¹⁴ Similarly, if a court deliberates at *Chevron* step two whether it must defer to “a reasonable interpretation made by the administrator of an agency” that has resulted in an agency action detrimental to an Indian tribe,¹¹⁵ it appears that the court must first answer whether the agency involved is legally obligated to honor the fiduciary duty of the United States to Indian tribes¹¹⁶ before it is able to declare that an agency charged with administering a

111. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984).

112. *Id.* at 843 n.9.

113. *Id.* at 843–44.

114. *Ruiz*, 415 U.S. at 236 (quoting *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942)).

115. *Chevron*, 467 U.S. at 844.

116. See Skibine, *supra* note 98, at 272 (arguing that courts must first determine whether an agency has the power to enact legislative rules before engaging in *Chevron* analysis (citing Cass Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187 (2006))). Cf. *United States v. Mead Corp.*, 533 U.S. 218 (2001) (establishing an alternative option to step two implicit delegation analysis based on *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)). *Mead* noted that “‘some weight’ is due to informal interpretations though not ‘the same deference as norms that derive from the exercise of . . . delegated lawmaking powers,’” in light of “*Skidmore*’s holding that an agency’s interpretation may merit some deference whatever its form, given the ‘specialized experience and broader investigations and information’ available to the agency, and given the value of uniformity in its administrative and judicial understandings of what a national law requires”. *Id.* at 234–35 (quoting *Martin v. Occupational Safety & Health Review Comm’n*, 499 U.S. 144, 157 (1991)).

statute “enacted pursuant to the trust doctrine” may not “escape [its] role as trustee by donning the mantle of administrator.”¹¹⁷

Were Felix Cohen still an Assistant Solicitor for the Interior in twenty-first century, he would caution against abstract theorizing about the relationship between the Indian canons of construction and the *Chevron* doctrine “in their absolute purity, freed from all entangling alliances with human life,” lest these legal concepts be misused to

press an indefinite number of meanings out of any text or statute, an apparatus for constructing fictions, and a hair-splitting machine that could divide a single hair into 999,999 equal parts and, when operated by the most expert jurists, could split each of these parts again into 999,999 equal parts.¹¹⁸

Although it is especially true in cases requiring statutory interpretation within the *Chevron* framework that American jurists must embrace “a more conscious recognition of the legislative function of the courts,”¹¹⁹ the federal Judiciary’s prudential doctrines and doctrines of justiciability promote an opposite “goal of limiting judicial intervention . . . to situations in which a decision is necessary to resolve the underlying dispute and in which intervention does not usurp authority constitutionally delegated to the representative branches.”¹²⁰

[T]he case and controversy limitations found in Article III . . . preserve[] the vitality of the adversarial process by assuring both that the parties before the court have an actual, as opposed to professed, stake in the outcome, and that

117. Skibine, *supra* note 98, at 272–73 & 273 n.113 (quoting *Jicarilla Apache Tribe v. Supron Energy Corp.*, 728 F.2d 1555, 1567 (10th Cir. 1984), *reconsideration en banc*, 782 F.2d 855 (10th Cir. 1986) (adopting the dissenting opinion of Judge Seymour)).

118. Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 809 (1935).

119. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 36 (1881).

120. Jonathan D. Varat, *Variable Justiciability and the Duke Power Case*, 58 TEX. L. REV. 273, 274–75 (1980) (footnote omitted). *Cf. Chevron*, 467 U.S. at 865–66 (“Judges are not experts in the field, and are not part of either political branch of the Government. . . . In contrast, an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration’s views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency’s policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones . . .”).

“the legal questions presented . . . will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.”¹²¹

In identifying the quasi-prudential nature of the *Chevron* doctrine, the relationship between the *Chevron* doctrine and the Indian canons of construction can only be expounded on a case-by-case basis, as necessary to the holding of the court within each respective controversy, either at step one or step two, depending on the varied “statutory circumstances” of the federal agency and challenged administrative actions.¹²²

CONCLUSION

The regulatory quick fix for *Carcieri* proposed in this Recent Development would enable the Secretary to claim existing statutory and regulatory authority to acquire land into trust for tribes acknowledged under 25 C.F.R. Part 83. Under 25 U.S.C §§ 2 and 9, the Secretary has been delegated the power to promulgate rules and policies to fill any gap *explicitly* left by Congress in “all matters arising out of Indian relations.”¹²³ Since 1978, 25 C.F.R. Part 83 has enabled the Secretary to acknowledge Indian tribes not previously under federal jurisdiction and to ensure that acknowledged tribes are “eligible for the services and benefits from the Federal government that are available to other federally recognized tribes,” such as the benefits which tribes that were under federal jurisdiction when the IRA was enacted in 1934 presently enjoy under 25 C.F.R. Part 151.¹²⁴

121. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 580–81 (1992) (second alteration in original) (quoting *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982)).

122. *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001). For a comprehensive summary of the cases involving both the *Chevron* doctrine and the Indian canons of construction prior to 2004, see Hall, *supra* note 99, at 543–49, 550–52. In addition to *Carcieri*, another important decision involving these two principles of statutory interpretation can be found in *Cobell v. Kempthorne*, 455 F.3d 301, 304 (D.C. Cir. 2006) (quoting *Cobell v. Norton*, 240 F.3d 1081, 1101 (D.C. Cir. 2001), and *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985)) (“Under [*Chevron*], ‘ordinarily we defer to an agency’s interpretations of ambiguous statutes entrusted to it for administration,’ but we declined to defer to Interior’s interpretation of the Act. . . . [T]he normally-applicable deference was trumped by the requirement that ‘statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit’”).

123. *Morton v. Ruiz*, 415 U.S. 199, 231 n.26 (1974) (quoting 25 U.S.C. § 2 (1970)).

124. 25 C.F.R. § 83.12(a) (2011).

The Secretary thus holds explicit authority under 25 U.S.C §§ 2 and 9 to acquire land for the tribes acknowledged under 25 C.F.R. Part 83, just as he does for any other Indian tribe entitled to the benefit of 25 C.F.R. Part 151 under the IRA.

ADDRESS

MR. JUSTICE MARSHALL ROTHSTEIN, SUPREME COURT OF CANADA

TO THE AMERICAN BAR ASSOCIATION
SECTION OF ADMINISTRATIVE LAW AND REGULATORY PRACTICE
AT THE ANNUAL SECTION DINNER,
TORONTO, ONTARIO
FRIDAY, AUGUST 5, 2011

Thank you, Jonathan Rusch,¹ for your generous introduction. And let me add my words of welcome to you and tell you that we are delighted that you chose Toronto for your annual meeting. And thank you for inviting me to address your Section. Although from what I can tell, this Section operates more like a family.

Like the Supreme Court of the United States, the Supreme Court of Canada is a generalist court. We don't decide too many administrative law cases each year, so I am only too mindful that I am speaking to an audience of experts in the field. It brings to mind the story of the Pope.

He had an engagement, so he came down to the car that was waiting for him. He decided that he wanted to drive, so he told the chauffeur to get in the back and he got in and started driving. Unfortunately, he was going too fast and he was stopped. The officer came to the car window. When he saw the Pope, he decided he had better call headquarters. He called headquarters and said, "We have an incident here." The desk sergeant said, "What's the problem?" The officer said, "Well I've stopped someone really important for speeding." The desk sergeant said, "Who is he?" The officer said, "I'm not sure, but the Pope is his chauffeur."

So today with this expert audience I feel like the guy sitting in the back seat with the Pope as my chauffeur.

1. *Editors' note:* Jonathan Rusch served as the 2011 Chair of the American Bar Association Section of Administrative Law and Regulatory Practice.

In view of your expertise, I'm going to have to be really careful. Like the story of the Old West. The farmer's wife had died, they put her in the casket, loaded the casket on the wagon for the trip to the cemetery. Along the way there was a hole in the road. The wagon hit the hole, the casket popped open and the farmer's wife revived. Well, they went back home. However, a year later she died again. They put her into the casket and loaded it on to the wagon. As they came to the place on the road where the hole was, the farmer said, "Now this is where we really have to be careful." So I'm going to have to be careful today.

Now, when I thought about the topic I should select for my presentation, I had to bear in mind that I certainly don't know very much about American administrative and regulatory law. And then coincidentally, I found in my sock drawer a little box and when I opened it I found a little document entitled, "2005 Chief Justice John Marshall Silver Dollar—Certificate of Authenticity." Unfortunately, the silver dollar wasn't there. However, it got me thinking about the only case I know that Chief Justice Marshall decided, which of course was the seminal *Marbury v. Madison*.²

And at the same time, I had just read a paper on the subject of justiciability by the most eminent scholar in administrative law in Canada today, Professor David Mullan, recently retired from Queen's University.³

So, today, I am going to speak to you about justiciability—what government decisions can be subject to review by the courts. In particular, the role of Canadian courts in reviewing the power exercised by the Executive Branch of government. And I am very confident in the accuracy of my remarks today because I have cribbed shamelessly from Professor Mullan's work.

The principle of the Judiciary having the power to review the actions of the Executive or Legislative Branches of government is well established in American, as well as Canadian, law. Where I'll start is with *Marbury v. Madison*. As you all know better than I do, there, in 1803, your Supreme Court established the basis for the exercise of judicial review in the United States. Chief Justice Marshall held that your courts could oversee and review the actions of other branches of the government and in doing so declare statutes unconstitutional.

Chief Justice Marshall also dealt with the question of justiciability. He wrote that "the question [of] whether the legality of an act of the head of a department be examinable in a court of justice or not, must always depend

2. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

3. David Mullan, *Judicial Review of the Executive—Principled Exasperation*, 8 N.Z.J. PUBLIC & INT'L L. 145 (2010).

on the nature of that act.”⁴ He indicated that for some acts, which are political in nature and do not concern individual rights, that the decision of the Executive is conclusive and, in his words “can never be examinable by the Courts.”⁵ While for other acts, again in his words, “where a specific duty is assigned by law, and individual rights depend upon the performance of that duty . . . the individual who considers himself injured, has a right to resort to the laws of his country for a remedy.”⁶

There are interesting parallels between the American approach and the Canadian approach to justiciability, which I hope will become clear as I further discuss the Canadian attitude towards the subject.

First, I should give you some background about the authority of the Executive Branch of government in Canada. There are two sources of power that enable the Executive Branch to exercise some form of discretion. The first being power granted by statute; the second, a residual discretion known as the Crown prerogative.

Why Crown prerogative? Because we didn’t have a revolution. Queen Elizabeth is still our Head of State, and in legal matters, the State is often referred to as the Crown or the Queen. But the Queen’s role is generally formal or ceremonial only. In practice, the prerogative power is exercised in Canada by the Executive Branch of government.⁷ Scholars have described the Crown prerogative as “the residue of discretionary or arbitrary authority, which at any time is left in the hands of the Crown.”⁸

The modern exercise of the prerogative power includes, among other things: foreign affairs, the making of treaties, national defence, the prerogative of mercy, the grant of honours, the dissolution of Parliament, and the appointment of ministers.⁹

Traditionally, the power of the court to review the prerogative was limited. Courts could determine if a prerogative power existed, what its scope was, and whether the power had been restricted by statute. However, once a court determined that the prerogative power was in play, it would not review how that power was exercised.¹⁰

Canadian courts are still reluctant to find the review of certain exercises of the prerogative power justiciable. Recent examples of areas that

4. *Marbury*, 5 U.S. at 165.

5. *Id.* at 166.

6. *Id.*

7. See *Black v. Canada (Prime Minister)* (2001), 54 O.R. 3d 215 (Can. Ont. C.A.) para. 32.

8. ALBERT DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 424 (10th ed. 1959).

9. *Black*, 54 O.R. 3d 215 para. 36.

10. *Id.* para. 45.

Canadian courts have concluded are nonjusticiable include: a government decision to enter into a treaty with aboriginal groups, the validity of a treaty with another country, the recall of a diplomat, and the decision to send troops on a combat mission. Two assumptions form the basis for this reluctance.

First, there is a divide between law and politics. There is some sense of illegitimacy that arises when courts engage in political matters. Some conflicts in a democratic society are best left to the political process to resolve, and should not be the subject of litigation.

Second, there are practical and functional limitations with respect to the ability of courts to determine certain matters. For some questions of policy, courts do not have the institutional competency to evaluate the merits of decisions made by the Executive. Courts deal with the litigants before them, rather than carrying out widespread public consultations. They don't have the resources of other branches of government to fully research the public policy implications of decisions.

While these two arguments have merit, in some instances Canadian courts today are no longer as reluctant to engage in the review of decisions of the Executive as they once were. In part, this is because of the constitutionalization of our Bill of Rights, the *Charter of Rights and Freedoms*, that occurred in the 1980s. The rule of law and our Constitution require courts to engage in the judicial review of executive decisions when they conflict with the Constitution or impact on individual rights. Just as in *Marbury v. Madison*.

A starting point about the increased willingness of Canadian courts to engage in the review of decisions of the Executive is a case heard by the Supreme Court of Canada in the 1980s called *Operation Dismantle v. The Queen*.¹¹ In this case, a number of peace groups alleged that the Canadian government's decision to allow American cruise missile testing in Canada violated their rights to life, liberty, and security of the person under the Charter of Rights. They claimed it did so because it increased the risk of nuclear conflict.

The majority of the Court struck the peace groups' claim, and concluded that the claim did not disclose any facts which, if taken as true, would prove that the testing of cruise missiles would violate their Charter rights. While the majority did not base its approach on the concept of justiciability, it agreed with the concurring judgment of Madam Justice Wilson, who wrote that some "disputes of a political or foreign policy nature may still be properly cognizable by the courts."¹²

11. [1985] 1 S.C.R. 411 (Can.).

12. *Id.* para. 38.

She found that the peace groups' claim was justiciable because, in her view, it did touch on the violation of rights protected by the Charter, despite the fact that it dealt with the subject of foreign affairs. However, like the majority, she ultimately concluded that the facts, if taken as true, could not establish a violation of the Charter and dismissed the peace groups' appeal.

The questions of justiciability dealt with by *Operation Dismantle* were elaborated upon by the Ontario Court of Appeal in the 2001 case of *Black v. Canada*.¹³ At issue was the decision of the Canadian Prime Minister to advise the Queen not to appoint a Canadian citizen, Conrad Black, as a member of the House of Lords of the United Kingdom. Black sought judicial review of that advice. The question of appointments being a prerogative power, the Canadian government argued that matter was nonjusticiable and not subject to judicial review.

The Court of Appeal observed that the proper way of determining if a matter involving the prerogative power is justiciable is to examine the subject matter of the decision. If the subject matter is concerned with matters of high policy or moral and political considerations, then it would be nonjusticiable.¹⁴ In contrast, if the matter involved questions of individual rights, then it would be justiciable.¹⁵ Like *Marbury v. Madison*. You might ask why it took us two hundred years to get to this point. We're a very cautious nation.

The Court of Appeal ultimately concluded that the Prime Minister's advice to the Queen about Mr. Black's peerage was nonjusticiable. Perhaps surprisingly, it held that no important individual interests were at stake, and that no Canadian citizen could have a legitimate expectation of receiving a British honour.¹⁶

I now turn to two recent cases that touch on the concept of justiciability in the context of foreign affairs. These two cases again illustrate the increased willingness of Canadian courts to subject certain decisions made by the Executive to judicial review. But they also illustrate that there may be a restrained approach to remedies when dealing with the judicial review of complex policy decisions.

The first case is *Smith v. Canada*,¹⁷ a 2009 trial-level decision of the Federal Court of Canada. In Canada the death penalty was abolished in 1976. When a Canadian is convicted and sentenced to death in another

13. See *Black*, 54 O.R. 3d 215.

14. *Id.* paras. 52, 62.

15. See *id.* para. 54.

16. *Id.* paras. 60–61.

17. *Smith v. Canada* (Att'y Gen.), [2009] F.C. 228 (Can. Fed. Ct.).

country, it had been the practice of the Canadian government to seek clemency and ask for commutation of the death sentence to a sentence of imprisonment. In *Smith*, the government of Canada decided not to seek clemency for Mr. Smith, a Canadian citizen sentenced to death in Montana. Mr. Smith was seeking a court order compelling the government to assist him in his attempts to obtain clemency. The government claimed that this decision was nonjusticiable, as it involved questions of foreign policy, and involved moral and political questions rather than legal questions.

Despite the matter involving questions of foreign policy, the trial judge concluded that Mr. Smith's complaint was justiciable. He held that this case involved specific individual rights. The government's decision not to seek clemency involved a change in the long-standing previous policy, and as a matter of due process Mr. Smith was entitled to be consulted and to make submissions about the change and how it might affect him.

The trial judge ordered the government to continue to apply the previous policy, and assist Mr. Smith in his attempts to obtain clemency. The government did not appeal. However, when the Canadian government requested clemency, the family of the victim retaliated by petitioning the Governor to proceed with the execution. Today Mr. Smith is still on death row awaiting execution pending resolution of a challenge he has raised in the U.S. courts about the constitutionality of the lethal injection method of execution. So it looks like the Governor rejected the Canadian government's request of clemency. Am I being too cynical if I observe that there aren't too many Montana voters in Canada?

What *Smith* illustrates is that even in matters involving foreign relations that courts will be willing to engage in judicial review when individual rights are at stake and order governments to engage in some sort of positive action. But, not always.

Which brings me to the final case that I want to discuss, *Khadr v. Canada*.¹⁸ This case involved Omar Khadr, a Canadian citizen, who has been detained in Guantanamo Bay since 2002. He was accused of killing a U.S. army sergeant in combat in Afghanistan in 2001 when he was fifteen. Khadr's father was a follower of Osama Bin Laden and brought his son to Afghanistan to fight for Al Qaeda. During Khadr's detention in Guantanamo Bay, Canadian officials interrogated him knowing that he had been subjected to sleep deprivation and then shared the information they obtained with U.S. authorities. The Canadian government refused Khadr's requests to seek his repatriation. Khadr sought judicial review of the decision, claiming it violated his rights to liberty and security of the

18. *Khadr v. Canada (Prime Minister)*, [2010] S.C.R. 44 (Can.).

person guaranteed under the Canadian Charter.

The trial and appeal courts concluded that Khadr's Charter rights had been violated. They ordered the Canadian government to request his repatriation. The Crown appealed to the Supreme Court of Canada.

Our Court agreed that the Canadian government had violated Khadr's Charter rights to liberty and security of the person.¹⁹ Canadian officials interrogated him after knowing he had been subjected to sleep deprivation.²⁰ It was determined that Khadr's treatment in Guantanamo Bay offended Canadian standards about the treatment of detained youth suspects.²¹

But the Court also recognized that Khadr's situation involved the Crown's prerogative power over foreign affairs.²² If the Court ordered the Canadian government to ask the U.S. government to repatriate Khadr, then it would be stepping into the area of foreign relations—an area clearly within the competence of the Executive as opposed to the courts. Nevertheless, the Court found that this case was justiciable.

It relied on *Operation Dismantle* and found that “courts clearly have the jurisdiction and the duty to determine whether a prerogative power asserted by the Crown does in fact exist and, if so, whether its exercise infringes the *Charter*.”²³ Again, shades of *Marbury v. Madison*.

What is interesting about the *Khadr* case is that the Court recognized that it had a duty to review the exercise of the prerogative power for constitutionality, yet it had to give weight to the constitutional responsibility of the Executive to exercise that power. The Executive made such decisions in the context of “complex and ever-changing circumstances” and had to take into account Canada's broader national interests.²⁴ The Court also recognized the limitations on its institutional competence with respect to making foreign affairs decisions.²⁵

The Court concluded that the appropriate remedy was to issue a declaration that Canada had infringed Khadr's Charter rights and “leave it to the government to decide how to best respond to [the] judgment in light of current information, its responsibility for foreign affairs, and in conformity with the *Charter*.”²⁶ So no specific positive duty was imposed by the Court on the government. The government did not ask the U.S.

19. *Id.* para. 26.

20. *Id.* para. 20.

21. *Id.* para. 25.

22. *Id.* para. 35.

23. *Id.* para. 36.

24. *Id.* para. 39 (emphasis omitted).

25. *Id.* para. 46.

26. *Id.* para. 39.

government to repatriate Khadr. However, it did ask the United States not to use any information obtained by Canadian officials and transmitted to U.S. officials in Khadr's prosecution. Just to complete the story, Khadr pleaded guilty and was sentenced to eight years. There is some speculation he may return to Canada in a few months to serve the rest of his sentence here. But right now, he is in Guantanamo Bay.

So, in some cases, ordering the government to take positive action has been found to be warranted as a remedy—such as the order in *Smith* requiring the government to assist a prisoner in his attempts to obtain clemency. However, in other cases, the government decision under consideration may be such that courts ought not to order the government to take positive action. This was the case in *Khadr*, where the Court issued a declaration that the government's actions were unconstitutional, but left it to the government to determine how best to respond in light of the complex nature of foreign policy.

Even in quiet, sedate Canada those cases can bring out strong reaction. The civil liberties groups in Canada praised the Federal Court decision in *Smith*. But did they ever condemn the Supreme Court decision in *Khadr*? Some of the comments from the academic community: the decision was objectionable; a remedial abdication; rights without meaningful remedies; dangerous deference; excess of restraint; missed opportunity to send a powerful statement; inadequate; lacking in courage; disappointing; timid.

Although not as noisy, other segments of Canadian society found the Federal Court decision in *Smith* to constitute judicial activism at its worst and endorsed the cautious approach adopted by the Supreme Court in *Khadr*.

And it probably won't surprise you to know that hot debate took place in our Court when we were considering the remedy in *Khadr*. But this was a case where all of us felt the Court should speak with unanimity and so we all put a little water in our wine and ended up where I told you—telling the government that there had been a Charter breach, but leaving it to the government to select the appropriate remedy.

What if the government chose not to take any remedial action? What if Khadr thought the remedial relief the government provided was inadequate and asked for judicial review of that decision? What if the Court did order the government to carry out a special remedy, like asking the U.S. government to repatriate Khadr, and the government just didn't do it? It brings to mind President Jackson, who didn't like another of Chief Justice Marshall's decisions and is supposed to have said, "Well, John Marshall has made his decision, now let him enforce it." Fortunately for us, these are all questions that we haven't yet had to answer. We'll cross those bridges if we come to them.

2011]

ADDRESS TO THE AMERICAN BAR ASSOCIATION

969

It's time for me to conclude. Jonathan's introduction was very generous. But that is not the universal view. A couple of months ago I left home and went to the office. That morning my wife Sheila had asked me to remove the bed linen for washing which I thought I had done before I left.

E-mail: Sheila Rothstein to Justice Rothstein—10:53 a.m.

I told you to remove all the linen including the blanket cover. You did not listen to my instructions and only did half a job. I hope you do your legal opinions / judgments better than removal of linen from a bed. When you get home you will make the bed all by yourself! Washing all the linen and pillows is enough of a job for me. We need . . . the fluff for the dryer, and pads for the swiffer, that's the floor mop . . . the length should be as long as possible . . . 8 to 12 inches . . . 12 is preferable but I'll accept shorter if they don't have 12. We need Kraft cheese fat free, fruit, egg whites and peanuts. Get peanuts that don't have that gawd awful brown covering over them. What's wrong with shelled naked peanuts? Why do you buy gross peanuts? Time to wake up and smarten up.

I'm sure glad you didn't ask Sheila to introduce me this evening.

I wish you well in your deliberations and I thank you for coming to Canada and for your attention.



***The Administrative Law Review* is
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The *Administrative Law Review* is accepting, on an ongoing basis, submissions to be considered for publication in the Recent Developments section.

Papers should be from five to twenty pages in length and report new, exciting events in administrative law and regulatory practice.

Topics may encompass recent events, case decisions, administration changes, new appointments, emerging trends, or review recently published literature that has the potential to change the face and practice of administrative law. The Recent Developments section updates our readers on the latest developments of administrative law and spurs discussion within the industry with concise, topical pieces.

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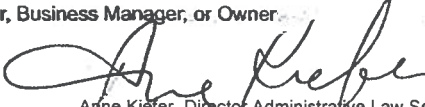
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