ARTICLES

THE IMPORTANCE OF RESOURCE ALLOCATION IN ADMINISTRATIVE LAW

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ABSTRACT

The Supreme Court's landmark decision in Massachusetts v. EPA*, requiring the federal government to reconsider its refusal to regulate greenhouse gases as an air pollutant, is the most recent example of judicial review of an agency's decision not to take a regulatory action. Despite the importance of this type of judicial review, it has received little analysis by scholars, and the case law in the field is confused. Accordingly, there are serious questions about the nature and scope of judicial review of agency decisions not to act—with some scholars and leading judges calling for sharp limitations on this type of judicial review to protect "individual liberty." This paper examines an alternative set of principles to guide judicial review of agency decisions not to regulate—a trade-off between judicial deference to agency decisions as to how to allocate their resources and judicial enforcement of clear congressional commands to agencies.*

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This framework provides guidance for understanding how and why courts should be intervening in situations where agencies have refused to act. Moreover, the trade-off helps explain both varying levels of judicial deference outside the context of judicial review of agency inaction and why the Court has found some agency decisions reviewable and others unreviewable—including the Court's decision in Massachusetts v. EPA *that agency refusals to regulate are reviewable. Finally, when courts strike the proper balance between judicial deference to agency resource allocation and enforcement of clear congressional commands they will be able to counteract public choice failures in the implementation of regulatory programs.*

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INTRODUCTION

The Supreme Court's decision in *Massachusetts v. EPA* last year was one of the Court's highest-profile decisions, and rightly so. The Court's conclusion that the Environmental Protection Agency (EPA) had jurisdiction to regulate the emission of greenhouse gasses from automobiles under the Clean Air Act (CAA), and its conclusion that the state and environmental plaintiffs had standing to challenge the EPA's refusal to regulate, were both watershed rulings in environmental and administrative law.[1] The Court's decision contributed to a fundamental change in the political dynamic surrounding climate change policy.[2]

However, *Massachusetts v. EPA* is important in administrative law for yet another major issue: it affirmatively concluded that private parties could seek judicial review of an agency's decision not to issue a regulation.[3] To date, that conclusion has received very little attention in the press or in scholarly literature—perhaps because administrative law scholars have perceived it as a relatively technical or obscure question in administrative law.

The Court's conclusion is important nonetheless, as it was only the third time the Court has seriously considered questions of when and how courts may intervene in administrative agency decisions over whether or not to take action.[4] Even more interesting is the Court's reluctance in *Massachusetts v. EPA* to discuss its prior precedent on the subject. The Court never cited *Norton v. Southern Utah Wilderness Alliance*, and it only discussed in passing its prior decision in *Heckler v. Chaney*, which had concluded that agency decisions not to enforce the law were presumptively unreviewable.

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1. Massachusetts v. EPA, 127 S. Ct. 1438, 1455, 1459-63 (2007).

2. *See* Jody Freeman & Adrian Vermeule, Massachusetts v. EPA*: From Politics to Expertise*, SUP. CT. REV. (forthcoming 2008) (manuscript at 2) (discussing what the authors call "expertise-forcing," which is the courts' attempt to ensure that agency expertise is not suborned to outside political pressures).

3. *See* 127 S. Ct. at 1458-59 & n.24 ("Refusals to promulgate rules are thus susceptible to judicial review . . . . ").

4. The prior two cases were *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55 (2004), and *Heckler v. Chaney*, 470 U.S. 821 (1985).

Justice Stevens's majority opinion in *Massachusetts v. EPA* may have been reluctant to discuss these prior precedents because, on the surface, they do not create a cohesive structure for judicial review of agency decisions not to take action, whether through the issuance of regulations or the pursuit of enforcement actions. For instance, under current Supreme Court doctrine, some decisions are now presumptively unreviewable,[5] while others are reviewable (albeit with greater discretion).[6]

Thus, despite the Supreme Court precedent, judicial review of agency inaction is a confused and uncertain field that, on a simple doctrinal level, calls out for a fundamental reanalysis and reevaluation. That reanalysis and reevaluation is all the more important because judicial review of agency inaction is a field where fundamental questions are still undecided. In particular, both academia and the courts have yet to resolve whether agency inaction is a fundamentally different type of agency decisionmaking that should be outside the scope of judicial review, as the conflicts between *Heckler* and *Massachusetts v. EPA* make clear.

Much of the confusion in the case law stems from an incoherent and hard-to-apply action/inaction distinction that courts have been applying in their analysis, a distinction that is ultimately unworkable and unpredictable in the long run. Instead, the case law is much better viewed as the result of a balancing test between judicial deference to agency allocation of resources among various priorities and the judicial duty to uphold the supremacy of Congress's statutory mandates and commands to the agencies.

This balancing test provides us with three important insights into judicial review of agency decisionmaking in general, not just agency inaction. First, where courts strike the balance between resource allocation and upholding congressional instructions to agencies will often be an important factor in determining the level of deference that courts provide to agency decisionmaking, whether action or inaction is involved.

Second, resource allocation is sometimes outcome-determinative, in that it requires courts to make some agency decisions fundamentally

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5. *See Heckler*, 470 U.S. at 834-35 (limiting judicial review of agency decisions against enforcement to situations where Congress "has indicated an intent to circumscribe agency enforcement discretion, and has provided meaningful standards for defining the limits of that discretion, there is 'law to apply' under § 701(a)(2)," in that "courts may require that the agency follow that law").

6. *See* Massachusetts v. EPA, 127 S. Ct. at 1459 (insisting that review of agency refusals to issue a rule is "extremely limited" and "highly deferential" (quoting Nat'l Customs Brokers & Forwarders Ass'n of Am., Inc. v. United States, 883 F.2d 93, 96 (D.C. Cir. 1989))).

unreviewable—such as agency decisions whether to pursue enforcement actions, as in *Heckler*. In such a situation, even the possibility of judicial review would frustrate agency resource allocation.

Third, where statutory supremacy and resource allocation are both important in an agency decision, public choice considerations support the general judicial trend to enforce explicit statutory duties and mandates against agencies even where there could be severe intrusions into the agency's authority to allocate its resources. If the courts failed to enforce these duties, the gap between statutory language and agency implementation might further weaken the already difficult position that regulatory beneficiaries have to organize, monitor, and lobby the government to ensure that their interests are represented.

Ultimately, my analysis does not call for a revolution in the case law of judicial review of agency inaction. Despite their reliance on an incoherent doctrinal distinction, courts have generally been reaching the right results, albeit for the wrong reasons. Indeed, the Court's recent decision in *Massachusetts v. EPA* to allow judicial review of agency refusals to promulgate rules is entirely consistent with the framework.

However, my conclusions have important practical and theoretical ramifications beyond simply supporting the current doctrine of judicial review in this area. The practical ramifications stem from general trends in the nature and scope of regulatory decisionmaking in the federal government. Over the past thirty years, more and more of the initiative in making decisions about the nature and scope of federal regulatory policy has moved from Congress to the agencies. Accordingly, important decisions about whether and how the federal government will regulate in fields such as environmental law are largely left to agencies deciding whether or not to take action to regulate, deregulate, or change the type of regulation. Because those agency decisions are often decisions about whether or not to take action, if courts are to be involved, it will be through judicial review of agency decisions not to act. Both *Massachusetts v. EPA* and *Norton v. Southern Utah Wilderness Alliance*[7] (*SUWA*)—where the Court rejected efforts by environmental groups to force federal land management agencies to regulate the use of off-road vehicles on public lands—highlight this trend.

The theoretical ramifications include providing a solid basis for justifying judicial review of agency inaction. This theoretical basis for judicial review of agency decisions not to act allows us to reject an

7. Norton v. S. Utah Wilderness Alliance (*SUWA*), 542 U.S. 55 (2004).

alternative vision of the role of judicial review as solely intended to protect individual rights, a vision that would lead to a narrow and cramped role for courts in forcing agencies to act.

This piece does not just provide a new framework for the understanding of judicial review of agency inaction—it is also a new way of understanding administrative law in general. Accordingly, this Article is part of a larger project where I will look at the role that judicial deference to administrative agency resource allocation plays in administrative law. A companion paper demonstrates how the theoretical framework I develop in this piece actually drives important doctrinal questions in judicial review of administrative agency inaction.[8] As I tentatively indicate at the end of this piece, later portions of the project will examine the role that resource allocation and related issues play in questions such as standing and ripeness.

I begin in Part I of this Article by providing a brief overview of the statutory provisions and significant case law for judicial review of agency inaction; I also show how the law in this field is incoherent, and how legal scholars and the courts have debated the question of whether courts should even review agency inaction. Part II then presents a rationale for judicial deference to agency decisions not to act—the need for the Executive Branch to have discretion as to how it allocates its resources—and develops it in detail to explain how courts should be reviewing agency decisions not to act. I start by defining what the concept of resource allocation means and how it necessarily requires a trade-off with other principles that might justify judicial review, specifically judicial enforcement of congressional statutory commands. I then construct a framework that allows courts to understand whether and how they should review agency decisions not to act; this framework also provides a limited normative justification for judicial refusals to review certain types of agency decisions and a broader normative justification (based in large part on public choice theory) for why courts should be enforcing clear congressional mandates that agencies must act. Part III concludes by showing how resource allocation is superior to other rationales for judicial review (or non-review) of agency decisions not to act, and then spins out the possible implications that the resource allocation theory might have for other fields of administrative law, such as the doctrine of standing.

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8. Eric Biber, *Two Sides of the Same Coin: Judicial Review Under APA Sections 706(1) and 706(2)*, 26 VA. ENVTL. L.J. (forthcoming Spring 2008).

I. THE CURRENT STATUS OF JUDICIAL REVIEW OF AGENCY INACTION

Judicial review of agency inaction is based on the provisions of the Administrative Procedure Act (APA) that lay out the standards and scope of judicial review of agency decisionmaking. The plain text of the APA leaves many questions unanswered, and accordingly, the courts have developed an extensive common law-like system of precedent to apply and explicate the APA. That case law has, however, failed to answer underlying questions about the nature and scope of judicial review of agency decisionmaking; indeed, the case law is extremely incoherent and inconsistent. That uncertainty about the nature and scope of judicial review of agency inaction has left the door open for serious questions about whether courts should review agency inaction at all, or in the vast majority of cases.

A. Judicial Review Provisions of the APA

Congress enacted the APA in 1946 in part to rationalize a hodge-podge of case law covering judicial review of agency decisionmaking.[9] The judicial review provisions of the APA are in § 10 of the original statute, now codified at 5 U.S.C. §§ 701-706. These provisions define the scope of agency actions subject to judicial review, and also provide the standard of review the courts must use.

Section 701 details which types of agency actions are reviewable, and excludes two types of agency action from judicial review: those that another statute specifically excludes from judicial review, and those that the law commits to agency discretion.[10] Section 704 generally limits judicial review to "final agency action."[11] In turn, "agency action" is not just an affirmative action, "the whole or a part of any agency rule, order, license, sanction, relief, or the equivalent or denial thereof," but is also a "failure to act."[12]

Section 706 of the APA describes both the standard of review for courts reviewing agency actions, and the types of remedies that courts may afford. Section 706(1) allows courts to "compel agency action unlawfully withheld and unreasonably delayed," and § 706(2) allows courts to "set aside agency action."[13] Section 706 then proceeds to provide a list of specific grounds for courts to overturn an agency decision.

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9. *See* S. REP. NO. 79-752, at 1 (1945) (noting that "[t]here are no clearly recognized legal guides for either the public or the administrators").
10. 5 U.S.C. § 701(a) (2000).
11. *Id.* § 704.
12. *Id.* § 551(13).
13. *Id.* § 706.

1. Section 706(1)

From a cursory reading of the APA's statutory text, it is not obvious that the APA would set a higher standard for judicial review of agency inaction as opposed to agency action. In practice, however, the courts have been much more reluctant to review agency inaction. An excellent example is the Supreme Court's recent decision in *Norton v. Southern Utah Wilderness Alliance* (*SUWA*).[14] In *SUWA*, the Supreme Court addressed claims by environmental groups that the Bureau of Land Management had shirked its statutory responsibility to protect federal lands from harm caused by off-road vehicles.[15] While the Tenth Circuit had given the environmental groups a fairly receptive hearing,[16] the Supreme Court firmly rejected each of the plaintiffs' claims. In response to the plaintiffs' requests that the Court require the agency to take affirmative steps to fulfill its statutory duties to prevent damage to certain wilderness-quality public lands, the Court responded that such a request "would mean that it would ultimately become the task of the supervising court, rather than the agency, to work out compliance with the broad statutory mandate, injecting the judge into day-to-day agency management."[17] Such a step would result in "undue judicial interference" in agency discretion, contrary to the purposes of the APA.[18] Accordingly, the Court held that federal courts could force an agency to act only where "an agency [has] failed to take a *discrete* agency action that it is *required to take*."[19]

The Supreme Court's decision in *SUWA* is not an aberration. Indeed, both the Supreme Court and the lower federal courts have long been skeptical of claims that they should force agencies to take action. Case law has generally only allowed private parties to force agencies to act where the agency has some sort of "clear" or "nondiscretionary" duty to do so.[20] In contrast, judicial review of an agency action is possible even where an

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14. 542 U.S. 55 (2004).
15. *Id.* at 57-61.
16. S. Utah Wilderness Alliance v. Norton, 301 F.3d 1217, 1222-23 (10th Cir. 2002).
17. *SUWA*, 542 U.S. at 66-67.
18. *Id.* at 66.
19. *Id.* at 64.
20. *See, e.g.*, S.F. Baykeeper v. Whitman, 297 F.3d 877, 885-86 (9th Cir. 2002) (finding that the EPA did not have a statutory duty to issue certain water pollution standards, and so the plaintiff's claim of unreasonable delay could not survive); *In re* Bluewater Network, 234 F.3d 1305, 1315 (D.C. Cir. 2000) (concluding that the Oil Pollution Act of 1990 did not compel the Coast Guard to promulgate certain regulations); Estate of Smith v. Heckler, 747 F.2d 583, 591 (10th Cir. 1984) (holding that § 706(1) relief was appropriate where a "ministerial, clearly defined and peremptory" duty exists (quoting Carpet, Linoleum & Resilient Tile Layers, Local Union No. 419 v. Brown, 656 F.2d 564, 566 (10th Cir. 1981))).

agency has broad discretion in how or whether to act, with courts taking a "hard look" to ensure that the agency decision is not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[21] Thus, it is far more difficult as a practical matter to obtain judicial review of agency inaction under § 706(1) than judicial review of agency action under § 706(2).

2. Section 701(a)(2)

Section 701(a)(2) of the APA excludes from judicial review agency actions "committed to agency discretion by law." The Supreme Court has applied this provision in a series of cases to restrict judicial review of agency decisionmaking, including agency decisions not to act.[22]

Here, I focus on the most important of the Supreme Court's cases, *Heckler v. Chaney*, where the Court concluded that suits challenging an agency's failure to exercise its enforcement powers must establish that the statute definitively provides for judicial review of that decision, contrary to the standard presumption that judicial review is available.[23] The decision at issue in *Heckler* was the Food and Drug Administration's (FDA) refusal to undertake investigatory and enforcement actions against the use of drugs for human executions.[24] In concluding that the agency's refusal to undertake these actions were presumptively exempt from judicial review, the Court relied upon four primary factors:

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21. *See* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 413 n.30 (1971) (quoting 5 U.S.C. § 706(2)(A) (2000)).

22. *See, e.g.*, Lincoln v. Vigil, 508 U.S. 182 (1993) (concluding that the Indian Health Service decision to discontinue a children's treatment program was part of the agency's authority to allocate funds from a lump sum appropriation, and was thus committed to agency discretion and not subject to judicial review); Webster v. Doe, 486 U.S. 592 (1988) (finding no meaningful standard by which to review the CIA Director's termination decisions and determining that this decision was unreviewable); ICC v. Bhd. of Locomotive Eng'rs, 482 U.S. 270 (1987) (holding that the Interstate Commerce Commission (ICC) had unreviewable discretion in determining whether to reopen certain decisions for material error); Heckler v. Chaney, 470 U.S. 821 (1985) (holding immune from judicial review the Food and Drug Administration's (FDA) non-enforcement of safety regulations with regard to lethal injection of drugs); S. Ry. Co. v. Seaboard Allied Milling Corp., 442 U.S. 444 (1979) (maintaining that the ICC had unreviewable discretion not to investigate the legitimacy of shipping rate increases).

Another major category of unreviewability includes agency action under a statute "drawn in such broad terms that in a given case there is no law to apply." *Overton Park*, 401 U.S. at 410 (citation omitted). Because this branch of § 701(a) depends (at least explicitly) more on the particularities of individual statutes than on general principles of administrative law, I set it aside for purposes of this paper. *See* Milk Train, Inc. v. Veneman, 310 F.3d 747, 749-52 (D.C. Cir. 2002) (concluding that the court could not review an agency decision as to milk subsidies under a statute that allowed agencies to allocate funds "in a manner determined by the Secretary" because the statute provided "no relevant 'statutory reference point' for the court other than the decisionmaker's own views of what is an 'appropriate' manner of distribution" (quoting Drake v. FAA, 291 F.3d 59, 72 (D.C. Cir. 2002))).

23. Heckler v. Chaney, 470 U.S. 821, 837-38 (1985).

24. *Id.* at 824.

> First, an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing. The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities . . . .
>
> In addition to these administrative concerns, we note that when an agency refuses to act it generally does not exercise its *coercive* power over an individual's liberty or property rights, and thus does not infringe upon areas that courts often are called upon to protect. Similarly, when an agency *does* act to enforce, that action itself provides a focus for judicial review, inasmuch as the agency must have exercised its power in some manner. The action at least can be reviewed to determine whether the agency exceeded its statutory powers. . . . Finally, we recognize that an agency's refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to "take Care that the Laws be faithfully executed."[25]

Heckler sets out a potentially sweeping exception to the general presumption that agency decisionmaking is reviewable. Because *Heckler* might cover any agency "enforcement" decision, it might indeed include all, or almost all, judicial review of agency inaction.

B. The Incoherence of Judicial Review of Agency Inaction

A fundamental problem with the current doctrine for judicial review of agency inaction is that it relies in large part on a distinction between agency "action" that should be reviewed under § 706(2), and agency "inaction" that should be reviewed under § 706(1).[26] This is a distinction that has long bedeviled courts, even before the passage of the APA. For example, many

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25. *Id.* at 831-32 (internal citations omitted).

26. *See, e.g.*, PGBA, LLC v. United States, 389 F.3d 1219, 1227 n.5 (Fed. Cir. 2004) (stating that § 706(1) speaks only to improper failure to act, and not to arbitrary or capricious conduct pursuant to § 706(2)); Georgia v. Army Corps of Eng'rs, 302 F.3d 1242, 1249 n.4 (11th Cir. 2002) (stating that "the review conducted under the two sections [§§ 706(1) and (2)] is different"); Envtl. Def. Fund, Inc. v. Costle, 657 F.2d 275, 283 (D.C. Cir. 1981) (noting that courts have construed review under § 706(1) to generally inquire whether the agency has violated its statutory mandate in failing to act, or whether any delay in action was unreasonable).

pre-APA mandamus cases involved agency denials of petitions for action by private parties—cases that one could categorize as agency action (denial of the petition) or inaction (the underlying petition sought affirmative action by the agency).[27] Trying to categorize these cases under either §§ 706(1) or 706(2) would be problematic. Likewise, many post-APA cases reflect this difficulty of distinguishing between a claim that falls under § 706(1) versus a claim that falls under § 706(2). For instance, in *Antone v. Block*, the agency issued—after the relevant statutory deadline had passed—a timetable for the promulgation of future regulations.[28] Of course, one could interpret the issuance of the timetable as an act reviewable under § 706(2), but the substance of the timetable itself was only a prediction of when the agency would accomplish additional actions. If the plaintiffs had argued that the timetable was too slow, should not that, in effect, have been an argument that the agency had unreasonably delayed action? The *Antone* court appeared to dodge the question by lumping the §§ 706(1) and 706(2) analysis together.[29]

In *Clouser v. Espy*,[30] plaintiffs challenged the Forest Service's decision to prohibit motorized access to a mining claim. Instead of challenging the decision under § 706(2), plaintiffs characterized the agency decision as unlawfully withholding motorized access to the mining claim, in violation of § 706(1).[31] The court obliged the plaintiffs and treated their claim under the § 706(1) standard, but aside from the plaintiffs' own strategic choice to pursue that route, there is no reason why the § 706(1) standard, and not the § 706(2) standard, would apply. Indeed, in the same case plaintiffs challenged the denial of motorized access to another mining claim, which the court treated as a § 706(2) claim.[32] The only apparent difference between the two claims was that the first one involved a temporary denial of motorized access, while the second one involved a permanent denial of

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27. *See, e.g.*, United States *ex rel.* McLennan v. Wilbur, 283 U.S. 414, 418 (1931) (challenge to the Interior Secretary's denial of oil and gas prospecting permits); Goldsmith v. U.S. Bd. of Tax Appeals, 270 U.S. 117, 119-20 (1926) (mandamus challenge to the denial of admission of certain attorneys to practice before the Board of Tax Appeals); United States *ex rel.* Chi., N.Y. & Boston Refrigerator Co. v. ICC, 265 U.S. 292, 293 (1924) (mandamus challenge to a denial of a company's application to qualify as a category of carrier entitling them to special rates); United States *ex rel.* West v. Hitchcock, 205 U.S. 80, 83 (1907); Decatur v. Paulding, 39 U.S. (14 Pet.) 497 (1840) (mandamus challenge to the Navy's denial of pension funds to a deceased soldier's widow).

28. 661 F.2d 230, 231-33 (D.C. Cir. 1981).

29. *Id.* at 233.

30. 42 F.3d 1522, 1533-34 (9th Cir. 1994).

31. *Id.*

32. *Id.* at 1538.

motorized access.[33] This distinction, without a meaningful difference, has profound consequences for the standard of judicial review that applies.[34]

Even *Heckler v. Chaney* reflects this ambiguity between agency action and inaction. While the Court characterized the case in *Heckler* as a challenge to agency inaction, the prisoners who sought judicial review, in fact, had filed a petition with the FDA seeking enforcement by the agency, and filed their complaint only after the agency denied that petition.[35] Similarly, courts have struggled with whether agency decisions to grant or deny waivers from regulations should be reviewable under *Heckler*. A decision to grant a waiver, for example, could be seen as an agency refusal to enforce, and therefore unreviewable; on the other hand, an agency denial of a waiver could be seen as agency inaction and therefore also unreviewable (or reviewable with a high degree of deference).[36]

In *SUWA*, the Supreme Court did make a brief effort to distinguish between action and inaction. The Court claimed that a "failure to act" is different from a "denial" (for example) of a request for agency action because the "latter is the agency's act of saying no to a request; the former is simply the omission of an action without formally rejecting a request."[37] Although the Court never develops the point, presumably a "failure to act" would be reviewable under § 706(1) while a denial would be reviewable under § 706(2).

The Court's distinction is ultimately unworkable. On a purely doctrinal level, it misstates the case law. Before the APA, courts regularly allowed mandamus challenges (a remedy to require an agency to act) to challenge an agency's failure to act, as well as an agency's denial of a request for action, without drawing any distinction in terms of the standard of review that would apply.[38]

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33. *Id.* at 1533-34, 1536.

34. Of course, in some situations judicial review of agency decisionmaking can be pigeonholed without too much difficulty. For instance, it is relatively clear that in *Massachusetts v. EPA*, the agency's refusal to regulate could be categorized as an agency action. *See* 127 S. Ct. 1438, 1459 (2007) (distinguishing a refusal to regulate from the denial of a petition for rulemaking). Even so, there might be substantial confusion. When a court reviews an agency's refusal to issue a regulation, as in *Massachusetts v. EPA*, we may nonetheless want to have substantial deference on resource allocation grounds, even though doctrinally the case involves judicial review of agency action. *See infra* Part II.

35. Heckler v. Chaney, 470 U.S. 821, 824-25 (1985).

36. *See also* Jim Rossi, *Waivers, Flexibility, and Reviewability*, 72 CHI.-KENT L. REV. 1359, 1369-70 (1997) (noting the difficulties in distinguishing between agency action and agency inaction). *Compare* Crowley Caribbean Transp., Inc. v. Peña, 37 F.3d 671, 674-77 (D.C. Cir. 1994) (concluding that an agency decision to waive a maritime transport licensing requirement was unreviewable), *with* Transp. Intelligence, Inc. v. FCC, 336 F.3d 1058, 1062-64 (D.C. Cir. 2003) (holding that agency refusal to revoke a license is reviewable).

37. Norton v. S. Utah Wilderness Alliance (*SUWA*), 542 U.S. 55, 63 (2004).

38. *See* Biber, *supra* note 8, at 7-9.

More fundamentally, however, the Court's distinction is without any difference. Why should key questions about standards of review and the applications of fundamental principles of reviewability potentially turn on whether the agency has bothered to provide a piece of paper that says, simply, "no" to a request for agency action? What fundamental issues—constitutional or otherwise—could turn on that distinction?

In short, there is no articulated principled basis for the purported doctrinal distinction between agency action and inaction—the distinction that justifies a set of very different rules being applied to judicial review of agency inaction. That being said, I will nonetheless continue to refer on occasion to the terms of "action" and "inaction" throughout this paper, primarily because they are the terms used in the existing court opinions and scholarly literature.

C. Should Agency Decisions Not to Act Be Unreviewable?

One might reply that the doctrinal incoherence in the field of judicial review of agency inaction is perhaps a problem for academics, but not one that would concern us in the real world of agency decisionmaking and regulatory practice. But the ambiguities surrounding judicial review of agency inaction are more than just theoretically problematic. The uncertainty surrounding the exact role of the courts in reviewing agency inaction could be resolved by concluding that agency inaction is a fundamentally different type of agency decision that courts should not be in the business of reviewing. For instance, *Heckler v. Chaney*'s presumption against reviewability could expand to swallow most, if not all, of judicial review of agency decisions not to act.

As noted above, the *Heckler v. Chaney* presumption has very uncertain bounds as to its scope—it applies agency decisions to "enforce" the law, whatever that might mean.[39] Accordingly, the rationales the Court presented for its decision in *Heckler* are particularly important in understanding the scope of the presumption. One of those rationales was the Court's statement that judicial review is predominantly about protecting individual rights from government action—and judicial review of agency inaction might instead result in government action that might infringe on individual rights. In fact, some appellate courts have used this rationale to broadly extend the *Heckler* doctrine.[40]

The possibility of a broad expansion of the *Heckler* doctrine is all the greater because the individual rights rationale connects closely with the

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39. *Massachusetts v. EPA* clarified that *Heckler* did not apply to agency decisions not to promulgate regulations. Massachusetts v. EPA, 127 S. Ct. at 1459.

40. *See* Biber, *supra* note 8, at 20-21 (citing decisions that have relied on *Heckler*'s assertion that courts should avoid forcing agencies to regulate private parties).

Court's own statements about the purposes of judicial review in the context of standing.[41] One could easily connect the *Heckler* rationale with these statements by the Court to develop a sweeping statement that all judicial review of agency inaction is out of bounds.

The Court itself has not fully articulated why it would limit judicial review of agency decisionmaking to the protection of individual rights; however, one of the Court's most influential members in the field of administrative law, Justice Scalia,[42] has more fully developed the rationale behind this approach.[43] Justice Scalia argued that the doctrine of standing should be limited so as to restrict or limit the ability of plaintiffs to "complain[] of an agency's unlawful *failure* to impose a requirement or prohibition upon *someone else*," because the "democratic process," should correct such failures, and not the courts.[44] He claimed that the courts are "perfect" in protecting "the individual against the people," but that they are "terrible" in deciding whether the majority is being sufficiently protected because the courts are an unelected and inherently elitist branch of government.[45] Accordingly, "where the courts, in the supposed interest of all the people, do enforce upon the Executive Branch adherence to legislative policies that the political process itself would not enforce, they are likely (despite the best of intentions) to be enforcing the political prejudices of their own class."[46] Indeed, Justice Scalia embraced the possibility that "important legislative purposes, heralded in the halls of Congress, can be lost or misdirected in the vast hallways of the federal bureaucracy" as a "good thing."[47] For Justice Scalia, failure to enforce laws is simply a way that the government keeps up with social changes.[48]

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41. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 561-62 (1992) (stating that it is more difficult for regulatory beneficiaries to assert standing to challenge agency decisionmaking when the agency has not directly regulated them).

42. *See id.* (authored by Justice Scalia); Bret C. Birdsong, *Justice Scalia's Footprints on the Public Lands*, 83 DENV. U. L. REV. 259, 261-62 (2005); Richard J. Pierce, Jr., *Legislative Reform of Judicial Review of Agency Actions*, 44 DUKE L.J. 1110, 1124 n.86 (1995) (noting the importance of Scalia's standing jurisprudence).

43. Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983) [hereinafter Scalia, *Doctrine of Standing*] (suggesting that courts emphasize the requirement of standing).

44. *Id*. at 894-96. Scalia has mentioned his preference for deregulation in a number of other articles. *See, e.g.*, Antonin Scalia, *A Note on the Benzene Case*, REG., July/Aug. 1980, at 25, 26-27 (arguing for a revival of the unconstitutional delegation doctrine); Antonin Scalia, *Regulatory Reform—The Game Has Changed*, REG., Jan./Feb. 1981, at 13, 14 (describing the "[e]xecutive-enfeebling" approach to regulatory reform as misguided); Antonin Scalia, Vermont Yankee*: The APA, the D.C. Circuit, and the Supreme Court*, SUP. CT. REV. 1978, at 345, 388-89.

45. Scalia, *Doctrine of Standing*, *supra* note 43, at 896.

46. *Id.* at 896-97.

47. *Id.* at 897.

48. *Id.* Coincidentally, Justice Scalia dissented from the D.C. Circuit decision that *Heckler v. Chaney* overturned. Chaney v. Heckler, 718 F.2d 1174, 1192-1200 (D.C. Cir. 1983) (Scalia, J., dissenting). However, Justice Scalia's dissent largely centered on his

Justice Scalia's vision of individual rights as the sole basis for judicial review of agency decisionmaking has not gone unchallenged in the context of agency decisions not to act. Professor Lisa Bressman has advanced an alternative approach that calls for much broader judicial review of agency decisions not to act, based on a theory that courts should be preventing arbitrary agency decisionmaking.[49] Professor Bressman accordingly calls for the abandonment of *Heckler v. Chaney*'s broad presumption against judicial review of agency decisions not to enforce the law.

Bressman notes that the risk of arbitrariness is hardly limited to the area of agency action—and that agency inaction can just as well be the result of arbitrary agency decisionmaking.[50] Bressman adds that the *Heckler* doctrine of non-reviewability for agency enforcement decisions heightened this risk. Because agency decisions not to prosecute at the behest of powerful regulated entities and/or congressional pressure are essentially shielded from judicial review, the *Heckler* doctrine "allow[s] regulated entities to skew enforcement decisionmaking at public expense."[51]

Accordingly, Bressman argues for significantly expanding judicial review of agency decisions not to act—and discarding the *Heckler* presumption of non-reviewability for agency non-enforcement decisions.[52] Bressman calls for courts to "ask agencies to supply explanations for particular nonenforcement decisions" and to further "require agencies to promulgate standards governing all such decisions."[53]

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belief that the majority in the Circuit Court ignored binding D.C. Circuit and Supreme Court precedent, and he did not develop any of the themes raised in this paper. *Id.* Justice Scalia's only theoretical argument was that the Constitution reserves to the Executive the responsibility to execute the laws. *Id.* at 1192. Others have drawn the connection between Justice Scalia's standing arguments (in the academic literature and in his opinions) and the Supreme Court's skepticism for judicial review of agency inaction. *See* Noah Perch-Ahern, *Broad Programmatic Attacks:* SUWA*, The Lower Courts' Responses, and the Law of Agency Inaction*, 18 TUL. ENVTL. L.J. 411, 431 (2005) (finding in Scalia's tendency to link "failure to act claims with the concept of standing" an implicit tenet that "agency inaction will not result in a concrete individualized injury"); Thomas O. Sargentich, *The Critique of Active Judicial Review of Administrative Agencies: A Reevaluation*, 49 ADMIN. L. REV. 599, 616 n.95 (1997) ("The object-beneficiary distinction drawn by Justice Scalia . . . is similar to the action-inaction distinction drawn in *Heckler*: both rely on the image of negative liberty."); *see also* Jonathan H. Adler, *Stand or Deliver: Citizen Suits, Standing, and Environmental Protection*, 12 DUKE ENVTL. L. & POL'Y F. 39, 54 (2001) (noting that the narrow standing requirements articulated in Scalia's jurisprudence that favor regulatory subjects bar "pure" citizens' suits to force agency action); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 476 (1987) (connecting Supreme Court decisions on standing and inaction).

49. Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. REV. 1657 (2004) [hereinafter Bressman, *Judicial Review of Agency Inaction*].

50. *Id.* at 1692-93; *see also infra* note 54.

51. *Id.* at 1692.

52. *Id.* at 1692-93.

53. *Id.* at 1693.

II. RESOURCE ALLOCATION AS AN ALTERNATIVE THEORY FOR JUDICIAL REVIEW OF AGENCY DECISIONS NOT TO ACT

So we are faced with an uncertain and confused case law, and two sharply conflicting calls for how to resolve that case law—one in favor of dramatically reducing or even eliminating judicial review of agency decisions not to act, and the other in favor of dramatically increasing judicial review of agency decisions not to act. The debate to this point has not considered an important factor, perhaps the most important factor—one highlighted in *Heckler v. Chaney* itself—the role that judicial deference to agency resource allocation should play in administrative law.[54]

A. The Importance of Resource Allocation to Executive Power

Protection of individual rights was only one of the four rationales that *Heckler v. Chaney* laid out for its presumption against judicial review. One of those other three rationales was an explicit concern about interfering with how the Executive Branch allocates its resources among various priorities.[55]

The Executive Branch of the federal government (by far the largest branch) consists of an enormous bureaucracy. It has a budget of about $2.7 trillion[56] and 2.6 million employees,[57] 15 cabinet-level departments,[58] and 89 independent agencies.[59] But even the leviathan that is the United States

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54. Two scholars have discussed the issue of resource allocation in the context of judicial review of agency inaction. Professor Dan Selmi explored the issue, but in the context of judicial review of EPA decisionmaking and specific statutory provisions that allocate judicial review of action or inaction between the district court and court of appeals. *See* Daniel P. Selmi, *Jurisdiction to Review Agency Inaction Under Federal Environmental Law*, 72 IND. L.J. 65 (1996). Professor Cass Sunstein examined the *Heckler v. Chaney* Court's reliance on the resource allocation rationale in its decision, and concluded that while it was a significant factor, it did not justify a sweeping exemption of agency decisionmaking from judicial review. *See* Cass R. Sunstein, *Reviewing Agency Inaction After* Heckler v. Chaney, 52 U. CHI. L. REV. 653 (1985) [hereinafter Sunstein, *Reviewing Agency Inaction*]. Sunstein concluded that there should be judicial review of agency inaction where statutory standards provide a guideline for the court. *Id.*

55. *See* Heckler v. Chaney, 470 U.S. 821, 831-32 (1985).

56. *See* OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2008 (2007), Summary Table 1, *available at* http://www.whitehouse.gov/omb/budget/fy2008/pdf/budget/tables.pdf (showing the budget for fiscal year 2008 as $2.662 trillion).

57. *See Office of Pers. Mgmt., Federal Civilian Personnel Summary*, http://www.opm.gov/feddata/html/2006/march/table1.asp (last visited Jan. 5, 2008) (specifying the total civilian employment of the federal government as 2,688,096, as reported in March 2006).

58. *See* President Bush's Cabinet, http://www.whitehouse.gov/government/cabinet.html (last visited Nov. 19, 2007) (displaying photographs and titles of each of the department heads).

59. *See Office of Pers. Mgmt., Table 2–Comparison of Total Civilian Employment of the Federal Government by Branch, Agency, and Area as of October 2005 and November 2005*, http://www.opm.gov/feddata/html/2005/november/table2.asp (last visited Jan. 5, 2008).

government is not exempt from the laws of nature and economics that dictate that resources are inherently limited. As the *Heckler* court noted, no agency has limitless resources, and perfect enforcement of any statute is impossible.[60] An administrative agency cannot function without setting priorities.[61]

Accordingly, the federal government must make difficult choices every day about how to allocate its resources between different problems, concerns, dreams, and goals. Congress makes many of those decisions through legislation—whether it is appropriations bills or substantive statutes that create new agencies to tackle certain problems or require existing agencies to focus on particular issues. The President and other officers of the Executive Branch make many more of those decisions in the course of deciding which of a range of activities the administrative agencies should pursue—the issuance of a regulation, the pursuit of an aggressive investigation, or the development of a new policy manual.

Given the centrality of resource allocation to decisionmaking in any organization, even one as large as the federal government, it is not surprising that the Court has viewed resource allocation as so central to agency discretion, and not just in the *Heckler* case. For instance, the *SUWA* court noted the resource allocation issues present in that case.[62] A cursory examination of lower court case law under § 706(1) makes clear that the analysis of whether an agency must act under § 706(1) often turns on whether the courts have concluded that the case involves important resource allocation issues.[63] As the Third Circuit put it, "the quintessential

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60. *Heckler*, 470 U.S. at 831-32.

61. *See* Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1454-59 (1992) (discussing agency prioritizing in the context of increasing the possibility for outsiders to instigate rulemaking); *see also* Harold J. Krent, *Reviewing Agency Action for Inconsistency with Prior Rules and Regulations*, 72 CHI.-KENT L. REV. 1187, 1196-97 (1997) (discussing various ways agencies direct the actions of their officials); Richard J. Pierce, Jr., *Judicial Review of Agency Actions in a Period of Diminishing Agency Resources*, 49 ADMIN. L. REV. 61, 82-87 (1997) (noting that setting priorities through litigation leaves decisions about resource allocation to the whim of those litigants who obtain final judgments first); Selmi, *supra* note 54, at 132-33 (1996) (discussing the assertion by critics that agencies need more discretion to establish their own regulatory priorities and to assign resources accordingly).

62. Norton v. S. Utah Wilderness Alliance (*SUWA*), 542 U.S. 55, 71 (2004) ("But allowing general enforcement of plan terms would lead to pervasive interference with BLM's own ordering of priorities."); *see also* S. Ry. Co. v. Seaboard Allied Milling Corp., 442 U.S. 444, 457 (1979) (noting that judicial review of agency decisions not to suspend rates would cause a "tremendous" increase in the agency's workload). Justice Scalia has also embraced this rationale as a reason for courts to be reluctant to force agencies to act. *See* Antonin Scalia, *Responsibilities of Regulatory Agencies Under Environmental Laws*, 24 HOUS. L. REV. 97, 105 (1987); Antonin Scalia, *The Role of the Judiciary in Deregulation*, 55 ANTITRUST L.J. 191, 195 (1986).

63. For examples of courts refusing to force agency action because of resource allocation, see *Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1100-02 (D.C. Cir. 2003) (reversing and remanding a district court judgment that held a

discretion" of an agency is "to allocate [its] resources and set its priorities."[64]

Priority setting is therefore central to the role that an Executive Branch, headed by an elected officer, plays in our constitutional system of government. The Executive's discretion as to what priorities it will set in enforcing and implementing statutes, in drafting regulations, in processing applications, and in funding programs, is crucial to the independence of the Executive vis-à-vis Congress or the judiciary. Without that discretion, the Executive's scope for policymaking would be sorely reduced—limited to its discretion about the content of the rules it writes or the administrative adjudications that it performs.[65]

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decision by the Secretary of the Interior to have been unreasonably delayed, because the district court did not first consider the limited resources and competing priorities of the Bureau of Indian Affairs); *In re Cal. Power Exch. Corp.*, 245 F.3d 1110, 1125 (9th Cir. 2001) (deferring to the agency's decision to "focus [] its resources" and give "higher priority" to structural remedies of the California electricity market instead of retroactive refund determinations); *Envtl. Def. Fund, Inc. v. Nuclear Regulatory Comm'n*, 902 F.2d 785, 790 (10th Cir. 1990) (noting a reason asserted by the Nuclear Regulatory Commission (NRC) for refraining from rulemaking included "its preference for concentrating NRC resources on site-specific enforcement"); *Panhandle Coop. v. EPA*, 771 F.2d 1149, 1152-53 (8th Cir. 1985) (finding that without proof of the agency's workload or the priority of Panhandle's appeal in relation to other matters before the EPA, the court could not determine that the EPA violated its regulation on timeliness); *Blankenship v. Sec'y of HEW*, 587 F.2d 329, 335 (6th Cir. 1978) (declining to require a ninety-day deadline for Social Security Administration hearings for plaintiffs in Kentucky, and citing the agency's assertion that compliance with that court order would "merely result in shifting resources from other parts of the country to handle hearings in Kentucky, thereby aggravating hearing delays in other areas"). For examples of courts forcing agency action because they conclude that no resource allocation concerns exist, see *In re Bluewater Network*, 234 F.3d 1305, 1316 (D.C. Cir. 2000) (granting mandamus to require an agency to promulgate rules where the agency "has not shown that expedited rulemaking here will interfere with other, higher priority activities"); *Farmworker Justice Fund, Inc. v. Brock*, 811 F.2d 613, 623 n.11 (D.C. Cir. 1987) (requiring an agency to act on regulation and rejecting the agency's resource allocation argument because the agency decision barely discussed this issue); *Pub. Citizen Health Research Group v. Auchter*, 702 F.2d 1150, 1158 (D.C. Cir. 1983) ("We would hesitate to require [an agency] to expedite the . . . rulemaking if such a command would seriously disrupt other rulemakings of higher or competing priority. But we do not confront such a case."); see also *In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 420 (D.C. Cir. 2004) (compelling the Federal Energy Regulatory Commission to answer a petition because it has not indicated "that any 'agency activities of a higher or competing priority' have required its attention" (quoting In re United Mine Workers of Am. Int'l Union, 190 F.3d 545, 549 (D.C. Cir. 1999))).

64. Oil, Chem. & Atomic Workers Union v. OSHA, 145 F.3d 120, 123 (3d Cir. 1998); *see also In re* Monroe Commc'ns Corp., 840 F.2d 942, 946 (D.C. Cir. 1988) ("[W]e must give agencies great latitude in determining their agendas."); FEC v. Rose, 806 F.2d 1081, 1091 (D.C. Cir. 1986) ("It is not for the judiciary to . . . sit as a board of superintendance directing where limited agency resources will be devoted. We are not here to run the agencies."); Med. Comm. for Human Rights v. SEC, 432 F.2d 659, 674 (D.C. Cir. 1970) ("[E]ven the boldest advocates of judicial review recognize that the agencies' internal management decisions and allocations of priorities are not a proper subject of inquiry by the courts.").

65. *See* Richard M. Thomas*, Prosecutorial Discretion and Agency Self-Regulation:* CNI v. Young *and the Aflatoxin Dance*, 44 ADMIN. L. REV. 131, 143 (1992) (noting the inherently political decisions that agencies must make about how to allocate resources and

Finally, courts might well conclude that, based on how they are structured as organizations, they are just not well suited to the task of regularly supervising and monitoring large organizations.[66] Accordingly, courts might well be reluctant to interpose themselves in day-to-day decisionmaking of the agency—and resource allocation is perhaps the archetypal example of this type of decisionmaking.[67]

The importance of resource allocation can be understood by looking at another factor that the Court in *Heckler v. Chaney* indicated was important to its conclusion not to review agency decisions not to enforce the law—the traditional discretion that government prosecutors have as to whether to proceed with criminal charges, or "prosecutorial discretion."[68] The Supreme Court has repeatedly held that prosecutors' decisions as to whether or not to file criminal charges are generally unreviewable by the courts.[69] In many of the Court's decisions (and those of the lower courts), it has justified this position by simply referring to separation of powers concerns.[70] When the Court has discussed functional grounds for those separation of powers concerns, it has often referred to concerns about resource allocation. For instance, deference to prosecutor's determinations that some cases would have higher deterrence value and so would be worth

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set priorities); WILLIAM F. WEST, CONTROLLING THE BUREAUCRACY: INSTITUTIONAL CONSTRAINTS IN THEORY AND PRACTICE 43 (1995) (asserting that agenda setting is an "'executive function' best left to administrators" because of the "subtle balancing considerations" agencies face when allocating resources).

66. *See* Frank H. Easterbrook, *The Supreme Court 1983 Term–Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 42 (1984) (arguing that courts should not become involved in resource allocation decisionmaking by agencies because courts could "control the decisionmaking effectively only by taking charge of the entire operation"); Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1268-70 (1982) (expressing similar concerns).

67. This judicial reluctance to take over supervisory functions of agencies—particularly in the resource allocation context—may help explain other barriers to judicial review under the APA, such as the Supreme Court's conclusion that only specific "agency action" can be challenged under the APA. *See* Norton v. S. Utah Wilderness Alliance (*SUWA*), 542 U.S. 55, 62 (2004) (defining and giving examples of "agency action," all of which "involve circumscribed, discrete agency actions"); Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 873 (1990).

68. *See* 470 U.S. 821, 832 (1985) ("[W]e recognize that an agency's refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to 'take Care that the Laws be faithfully executed.'" (quoting U.S. CONST. art. II, § 3)).

69. *See, e.g.*, United States v. Armstrong, 517 U.S. 456, 464 (1996) ("'[I]n the absence of clear evidence to the contrary, courts presume that [prosecutors] have properly discharged their official duties.'" (quoting United States v. Chem. Found., Inc., 272 U.S. 1, 14-15 (1926))); Wayte v. United States, 470 U.S. 598, 607-08 (1985) ("[T]he courts [are] properly hesitant to examine the decision whether to prosecute.").

70. *See, e.g.*, *Armstrong*, 517 U.S. at 464 (rejecting a selective-prosecution claim because judicial review would involve intrusion of a "'special province' of the Executive"); *see also* United States v. Doe, 125 F.3d 1249, 1255 (9th Cir. 1997).

more resources, or determinations that other cases involve only marginal violations of the law that would be ultimately counter-productive to challenge, or determinations that given limited resources, only certain types of cases or crimes can be pursued.[71] In other words, resource allocation is apparently a fundamental basis for a core component of executive power—prosecutorial discretion.[72]

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71. *See, e.g.*, *Armstrong*, 517 U.S. at 465 (stating that prosecutorial decisions involve "'[s]uch factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan'" (quoting *Wayte*, 470 U.S. at 607)); Town of Newton v. Rumery, 480 U.S. 386, 396 (1987) (stating that prosecutors "must consider other tangible and intangible factors, such as government enforcement priorities" and "must decide how best to allocate the scarce resources of a criminal justice system that simply cannot accommodate the litigation of every serious criminal charge"); *see also* United States v. Jarrett, 133 F.3d 519, 540 (7th Cir. 1998) ("[The] decision [to prosecute] is administrative in nature, made after a studied assessment of the Government's policy visions and priorities, as well as practical considerations like budgetary constraints . . . ."); United States v. Redondo-Lemos, 955 F.2d 1296, 1299 (9th Cir. 1992) (stating that prosecutorial decisions "are normally made as a result of careful professional judgment as to . . . the availability of resources"); United States v. Brock, 782 F.2d 1442, 1444 (7th Cir. 1986) (declaring that prosecutors must weigh "the limited availability of prosecutorial resources and the government's enforcement priorities"); EUGENE BARDACH & ROBERT A. KAGAN, GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS 39 (1982) (describing that in addition to the strength of a case, a "violation [must be] sufficiently serious to warrant criminal prosecution and a portion of [the prosecutor's] scarce legal resources"); Shelby A. Dickerson Moore, *Questioning the Autonomy of Prosecutorial Charging Decisions: Recognizing the Need to Exercise Discretion—Knowing There Will Be Consequences for Crossing the Line*, 60 LA. L. REV. 371, 378 (2000) ("The government simply does not have sufficient resources to investigate, charge, and prosecute all offenses which come to its attention."); Leslie C. Griffin, *The Prudent Prosecutor*, 14 GEO. J. LEGAL ETHICS 259, 264 (2001) (explaining that prosecutors cannot pursue all crimes because of limits on enforcement resources, and that administrators develop policies that provide for the prosecution of certain crimes at the exclusion of others); Robert Heller, Comment, *Selective Prosecution and the Federalization of Criminal Law: The Need for Meaningful Judicial Review of Prosecutorial Discretion*, 145 U. PA. L. REV. 1309, 1328 (1997) (discussing the "limited resources of . . . prosecutors' offices" asserted in *Armstrong* as a reason for broad prosecutorial discretion); Cynthia Kwei Yung Lee, *Prosecutorial Discretion, Substantial Assistance, and the Federal Sentencing Guidelines*, 42 UCLA L. REV. 105, 163 (1994) ("Charging decisions are made with an eye to efficient allocation of scarce law enforcement resources."); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1547-49 (1981) (discussing prosecutors' screening and selecting of cases under resource limitations).

72. Other justifications commonly advanced for prosecutorial discretion, and in particular shielding that discretion from judicial review include the need to reduce the potentially over-broad scope of criminal laws, and the need to shield prosecutors' strategic decisions about enforcement from public view. *See, e.g.*, *Wayte*, 470 U.S. at 607 (maintaining that if a "prosecutor has probable cause to believe that the accused committed an offense defined by statute," then the prosecution decision "generally rests entirely in his discretion," and that evaluating the basis for a prosecution "threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy"); *Redondo-Lemos*, 955 F.2d at 1300 n.4 ("The confidential nature of the charging process serves important institutional functions . . . ."); Dickerson Moore, *supra* note 71, at 377-78 (explaining that a reason asserted for allowing prosecutorial discretion "is that it serves to mitigate the ill effects of the trend toward legislative over-criminalization"); Griffin, *supra* note 71, at 263-65 (stating that "'prosecutors must exercise *judgment* about

Another example of the importance of resource allocation to the Executive Branch is the Supreme Court's decision in *Lincoln v. Vigil*.[73] In *Lincoln*, the Supreme Court held that the clearest instance of agency resource allocation—how to allocate lump sum appropriations among various agency programs—is unreviewable under the APA absent specific congressional directives as to how the money should be spent.[74] In so holding, the Court emphasized that decisions as to how to allocate resources involve

> "a complicated balancing of a number of factors peculiarly within [the agency's] expertise" [including] whether its "resources are best spent" on one program or another; whether it 'is likely to succeed' in fulfilling its statutory mandate; whether a particular program "best fits the agency's overall policies"; and, "indeed, whether the agency has enough resources" to fund a program "at all."[75]

B. Understanding the Role that Resource Allocation Plays in Judicial Review

Of course, if a relatively simple definition of resource allocation and a method for the courts to consider it in cases cannot be developed, then this principle is useless in practice. Fortunately, neither is particularly difficult.

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which of the many cases that are technically covered by the criminal law are really worthy of criminal punishment"' (quoting Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2136-37 (1998))); Heller, *supra* note 71, at 1333-34 (explaining the argument for strong judicial deference to prosecutors' decisions based on a concern that "reveal[ing] prosecutorial and law enforcement strategies" could "undermin[e] effective crime control" by reducing the effect of deterrence); Kwei Yung Lee, *supra* note 71, at 159-60; William T. Pizzi, *Understanding Prosecutorial Discretion in the United States: The Limits of Comparative Criminal Procedure as an Instrument of Reform*, 54 OHIO ST. L.J. 1325, 1364-65 (1993) (discussing the issue of official guidelines for prosecutors and their potential impact on deterrence); Vorenberg, *supra* note 71, at 1547-50. Both arguments, however, appear to have far more traction in the particular realm of criminal law rather than in the broader realm of regulatory decisionmaking. With respect to the first argument, we may be concerned about overly broad criminal statutes because of the shame, symbolic statements, and individualized punishment that result from a criminal statute—but we need not be nearly as concerned about broad regulatory provisions enforced by licensing requirements and (generally speaking) civil penalties. Indeed, the fact that most environmental regulatory statutes only provide criminal penalties for particularly egregious violations of the regulatory provisions reflects this distinction. Memorandum from Earl E. Devaney, Director, Office of Criminal Enforcement, EPA, to EPA Employees, on The Exercise of Investigative Discretion 6 (Jan. 12, 1994), *available at* http://www.epa.gov/Compliance/resources/policies/criminal/exercise.pdf. As for the second argument, it has the most force when judicial review is sought of an uncompleted agency decision (such as an investigation), and does not support complete denial of judicial review. In any case, in the regulatory field where broad, sweeping regulatory statutes of unclear scope are allowed—in contrast to criminal statutes—we would want to encourage or even require agencies to provide more specific guidance to allow regulated parties to understand how they might comply with the law.

73. 508 U.S. 182 (1993).

74. *Id*. at 192.

75. *Id*. at 193 (quoting Heckler v. Chaney, 470 U.S. 821, 831 (1985)).

First of all, resource allocation can be understood as an agency's decision about what issues it wants to address with how many limited resources at what time and at what speed. In other words, it is the question that agency heads (or, assuming perfect agent-principal relationships, every agency employee) ask themselves as they walk in the door for work every morning: "What am I going to do with my time today?"

The agency can—and often will—answer that question at multiple levels and at multiple stages of the decisionmaking process. At the highest level, an agency may decide whether or not to place a higher priority on one of many substantive areas it is in charge of regulating. For instance, the FDA may decide that, of food inspection, drug regulation, and cosmetics regulation, it will place the lowest priority on cosmetics regulation.[76] At the next level, an agency may decide on an approach to deal with the problems in a particular area. For instance, an agency may decide to pursue adjudications for violations of existing regulations in order to tighten up the regulatory system, rather than develop new regulations to cover new problems within the field. Likewise, an agency may decide that only some of the problems within a particular area—for instance, contamination of food with bacteria, as opposed to pesticide residues on food—should be a higher priority for either enforcement or rulemaking efforts. And at the field level, an agency will have to decide whether or not to seek enforcement efforts against particular violations of rules or statutes, or whether particular loopholes or flaws in individual regulations are worth the time and effort to correct through amendment of the regulations or the issuance of guidance documents.

Decisions at each of these levels will have substantially different impacts on the agency's allocation of its resources. Decisions at the two highest levels—which of the policy areas within the agency's jurisdiction should be the highest priority and the prioritization of major topics within those policy areas—will often involve the most important resource allocation decisions. For instance, an agency's decision to issue a major regulation or to proceed with a significant enforcement proceeding (such as a complex antitrust case) would require enormous amounts of resources for that particular task, and likely will only begin if the agency has committed to making that particular area a priority. Accordingly, a judicial order to commence or redo such a proceeding will have significant effects on the agency's resources. On the other hand, decisions at the field level will often have relatively little resource allocation concerns. For example, an agency might have a regular administrative system based on hearings or other regularized procedures that decide claims for benefits, waivers from regulations, or applications for licenses. Requiring an agency to process a

76. I am indebted to Prof. Jerry Mashaw for this example.

particular case that it has refused to handle, or to rehear a decision that it has improperly decided, is unlikely to greatly affect the agency's resource allocation decisions. The agency has already committed significant amounts of resources to the overall process, and the one particular case is often only a fraction of the overall workload.

It is important to note that the above generalizations are just that—generalizations. Consider the systemic consequences of judicial review of a wide range of agency field decisions. If, for example, a court orders an agency to process a significant number of individual applications, that can have significant resource allocation implications, even if the agency already has a regularized process to consider those applications.[77] Such a situation may lead us to conclude that we may want to limit or even exclude judicial review of certain types of field level actions because of resource allocation concerns.[78]

The next, and somewhat trickier question, is how courts should, and do, consider resource allocation. Resource allocation cannot be the only factor that courts consider in reviewing agency decisionmaking, or judicial review would never take place. Any time a court reviews an agency decision, the court is in some way interfering with agency resource allocation, and not just where a court compels an agency to take a particular action. For example, in one classic example of judicial review of an agency decisionmaking—judicial review of an agency's issuance of a rule—judicial review imposes a demand on the agency to spend time and effort to defend the rule in court that it could spend on another activity.[79] If an agency loses, it may redo the rule—after all, the agency decided that the issue warranted time and effort to issue a regulation in the first place, so it may not just simply give up.[80] In that case, the agency will have been forced to divert time and effort into redrafting the rule—time and effort that it otherwise likely would have spent on other priorities. Agencies will also siphon additional resources in future activities subject to judicial review in order to avoid having those struck down as well.

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77. *See, e.g.*, Blankenship v. Sec'y of HEW, 587 F.2d 329, 335 (6th Cir. 1978) (refusing in part to impose a uniform ninety day deadline for the agency to hold all Social Security disability hearings because such an order "will merely result in shifting resources from other parts of the country to handle hearings in Kentucky, thereby aggravating hearing delays in other areas").

78. *See infra* text accompanying notes 103-14.

79. *See* Emerson H. Tiller, *Controlling Policy by Controlling Process: Judicial Influence on Regulatory Decision Making*, 14 J.L. ECON. & ORG. 114 (1998).

80. *See* William S. Jordan, III, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability to Achieve Regulatory Goals Through Informal Rulemaking?*, 94 NW. U. L. REV. 393, 412-42 (2000) (compiling empirical data that shows that most agencies, after remand, continue to pursue their regulatory goals); *see also* Peter H. Schuck & E. Donald Elliott, *To the* Chevron *Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1048 chart 18 (1990) (reporting the agency dropped only about five percent of all federal agency decisions remanded by courts).

So courts must consider other fundamental values. Here, I build on Bressman's point that one of the fundamental purposes for judicial review of agency decisionmaking is to prevent arbitrary action.[81] The difficulty, of course, is in defining what, exactly, arbitrary action consists of. Bressman herself notes that the concept is a slippery one.[82] Arbitrariness cannot mean irrationality, since (absent an Equal Protection rational review challenge) a court will uphold an agency action that is consistent with an irrational congressional statute.[83] Indeed, a tentative examination of the concept might indicate that arbitrariness is in large part, if not entirely, coterminous with the constitutional value of "statutory supremacy," and ensuring that agency action is consistent with that value.[84] Accordingly, there must inherently be a trade-off between holding agencies to their obligations under the law—including situations where Congress has commanded the agency to make an issue a high priority[85]—and deferring to their decisions as to how to spend their limited resources.[86]

Ultimately what we have is a balance that courts must strike between deferring to administrative agency resource allocation and upholding the statutory commands and directions of Congress. This understanding of the interaction of resource allocation and statutory supremacy concerns in judicial review of agency decisionmaking leads to the important conclusion that agency inaction is not some discrete category of administrative law that should be rendered off-limits from judicial review. Instead, the appropriate paradigm is one in which judicial review of agency inaction is

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81. Bressman, *Judicial Review of Agency Inaction*, *supra* note 49, at 1687-89.

82. *See* Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 495-96 (2003) (stating that she (the author) will "forego[] a grand definition of the term 'arbitrary'" and instead will focus on the "evidence of a problem rather than its source").

83. Searching judicial review of the rationality of congressional statutes would, of course, raise the specter of Lochnerian substantive due process review. Agency action that is consonant with a congressional statute based on an irrational purpose, or a non-public-regarding purpose, should be upheld simply because it is consistent with the law, even if that law is a poor one.

84. The Constitution requires the President to "take Care that the Laws be faithfully executed," U.S. CONST. art. II, § 3, and the Supremacy Clause makes congressional statutes the "supreme Law of the Land," U.S. CONST. art. VI, cl. 2. Accordingly, unless there is another even more fundamental cross-cutting constitutional value, congressional commands in the form of statutes control both presidential action and judicial interpretation—what I call "statutory supremacy." Of course, resource allocation might be just such a cross-cutting value, and I discuss below why we might want to privilege one or the other value where there is a direct conflict.

Bressman identifies the strong connection between arbitrariness and statutory supremacy. *See* Lisa Schultz Bressman, Schechter Poultry *at the Millenium: A Delegation Doctrine for the Administrative State*, 109 YALE L.J. 1399, 1424-25 (2000) (quoting commentators who make connections between arbitrariness and statutory supremacy).

85. Krent, *supra* note 61, at 1196 (noting that Congress can always impose requirements on the agency as to how to set its priorities).

86. *See* Selmi, *supra* note 54, at 138-39 (noting the trade-off between agency autonomy and accountability).

not fundamentally different from judicial review of agency action—in both situations, deference to resource allocation decisions by agencies is usually only one of a number of elements that helps determine the overall deference that courts apply in reviewing agency decisionmaking.

Accordingly, courts should construe *Heckler v. Chaney* narrowly—only in a few limited situations, where the mere possibility of judicial review might fundamentally alter an agency's allocation of resources, should resource allocation be outcome-determinative such that courts should apply the non-reviewability principle laid out in *Heckler*. In any case, where Congress has spoken clearly to the priorities it wishes agencies to follow, courts should be enforcing those priorities.

The above framework helps us understand not only judicial review of agency inaction, but indeed, much of judicial review of agency decisionmaking in general. Below, I provide some initial development of that framework. I begin by explaining how courts should generally apply the tradeoff between deference to resource allocation and statutory supremacy and how these principles in fact should apply across the board to judicial review of agency action and inaction. I then explore the proper scope of non-reviewability of agency decisions pursuant to *Heckler* to demonstrate that it is an example of how resource allocation concerns might require the elimination of any judicial review in relatively limited circumstances. I conclude with an analysis of why statutory supremacy concerns should trump deference to agency resource allocation when the two principles conflict.

1. Understanding Judicial Review as a Balance Between Resource Allocation and Statutory Supremacy

As noted above, at times courts have stated that judicial review of agency inaction under § 706(1) is fundamentally different from judicial review of agency action under § 706(2). If that is the case, then arguments for fundamentally different standards of judicial review—perhaps even a lack of review, as in *Heckler*—suddenly have a much greater appeal. Thus, an important contribution that a framework of judicial review based on deference to resource allocation can provide is to answer the question of whether judicial review under § 706(1) is fundamentally different from review under § 706(2).

The answer to that question is that there is no fundamental difference. Instead, judicial review of agency inaction is simply a specific application of the general framework of judicial balancing between deferring to resource allocation and upholding congressional mandates. As outlined above, in general, the more that judicial review in a particular situation implicates statutory supremacy and the less it implicates resource

allocation, the less deferential (all other things being equal) courts will be to the agency in undertaking review.[87] We can accordingly lay out four categories of agency decisions, including both action and inaction—those involving: (1) important questions of resource allocation and statutory supremacy; (2) important questions of resource allocation but minimal questions of statutory supremacy; (3) minimal questions of resource allocation but important questions of statutory supremacy; and (4) minimal questions of resource allocation and minimal questions of statutory supremacy. In category two, deference by a court will be high. In category three, deference by a court will be low. In category one, courts will be faced with difficult questions, though usually statutory supremacy will trump resource allocation (as discussed below). Category four will turn on other questions (such as deference to agency expertise or accuracy of agency fact-finding) besides statutory supremacy and resource allocation.

We can expand some on what it means for a case to have important or minimal questions of resource allocation or statutory supremacy. At a most basic level, the agency's decision may explicitly and directly implicate the amount of resources an agency will have to expend. Such situations are relatively rare, and will almost never be outcome determinative, but they are informative for my analysis.

Second, and far more important for all practical purposes, there are situations where the type of agency decision at issue will necessarily implicate resource allocation concerns. In these types of cases, resource allocation may determine not just the deference that courts will grant, but even the possibility of review. There are two ways in which the type of agency decision may implicate resource allocation concerns. One, resource allocation questions will be less important in situations where the agency has proceeded some or all of the way towards acting compared to situations where the agency has not proceeded at all to act. Two, statutory supremacy questions will be more important in situations where the agency acts through a rulemaking or other generally applicable policy-setting procedure versus situations where the agency is acting in a case-by-case process.

a. Resource Allocation as a Direct Factor in Agency Decisionmaking

There may be occasions where an agency explicitly decides not to act, or shapes the form of the action that it takes, based on concerns about how it will expend its resources.[88] Given the centrality of such decisions to

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87. *See id.* at 141-42 (concluding that deference to agency resource allocation should be reduced where it conflicts with congressional mandates, and increased where Congress has not spoken and the agency is relying on its expertise and policy setting autonomy).

88. *See, e.g.*, NLRB v. Cedar Tree Press, Inc., 169 F.3d 794, 797 (3d Cir. 1999) (discussing an NLRB policy prohibiting the provision of absentee ballots for representation

agency discretion—and the difficult task that courts would have in closely examining the veracity of these claims by an agency—it is no surprise that courts provide at least some deference to such arguments, and properly so (as with any of the other important factors in judicial review in administrative law, such as agency expertise).[89] Moreover, courts will also defer to explicit agency decisions as to whether to fund a particular program or not—and as noted above, agency decisions as to how to allocate funds from lump sum appropriations are in fact unreviewable.[90]

Likewise, big picture agency decisions—an FDA decision to prioritize food regulation over cosmetics regulation, for instance—inherently and obviously implicate resource allocation concerns. Those types of decisions also tend to be outside the scope of judicial review by courts because plaintiffs seeking to attack these types of decisions do not qualify under the specific "agency action" that the APA requires for judicial review.[91]

However, the vast majority of agency decisions are not the high-level ones made in the corner offices of agency buildings in Washington, D.C. Agencies often will not explicitly base decisions on resource allocation concerns, perhaps because they are prohibited from doing so (for example, because of a statutory mandate to act). Furthermore, agency invocation of "limited resources" cannot be talismanic because agencies would then strategically be able to alter the extent or nature of judicial review with the use of some magic words or phrases. Indeed, to the extent that we are attempting to use resource allocation concerns to determine the level of deference or draw the lines between reviewable and unreviewable decisions, the possibility that agencies might strategically use resource allocation rationales is worrisome. Courts accordingly need some way of determining when deference to agency resource allocation is truly called for. The structure of the agency decisionmaking process can in fact reveal those types of clues.

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elections because of agency resources that would be required to consider thousands of requests for individual absentee ballots).

89. *See, e.g.*, *id.* (deferring to agency policy of not providing absentee ballots for labor representation elections because of resource allocation concerns. The court wrote: "We believe the Board has made a valid, well-reasoned determination to deploy its limited resources elsewhere and that this determination should not be disturbed without good cause or clear statutory authority."). In considering claims that an agency has "unreasonably delayed" acting under § 706(1) of the APA, courts will explicitly consider the various other decisions and issues that the agency considers high priority. *See* Biber, *supra* note 8, at 17-18.

90. *See* Lincoln v. Vigil, 508 U.S. 182, 192-94 (1993).

91. *See* Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871 (1990).

b. Indirect Consideration of Resource Allocation

For the reasons given above—lack of an explicit agency reliance on resource allocation issues, or concerns about strategic agency use of resource allocation rationales—we might well want to rely on more "objective" indications of when a particular agency decision implicates resource allocation concerns. There are two primary ways we can categorize agency decisions that allow us to understand whether resource allocation concerns are greater or lesser, and whether the balance between resource allocation deference and upholding statutory supremacy should go in one direction or another: (1) the extent to which an agency has completed its decisionmaking process; and (2) whether the agency decision involves general rulemaking or particularized adjudications.

i. Comparing Situations Where an Agency Has Acted Versus Situations Where the Agency Has Not Acted at All

Resource allocation is based on deferring to the agency's discretion to prioritize which particular issues, problems, or concerns warrant expenditures of limited time and resources. If an agency has already expressed what its priorities are, there is much less reason for a court to defer to the agency. For example, if an agency has already issued a regulation and the court is being asked to review the legality of that regulation, then resource allocation is of minimal concern. The agency cannot object that any additional time and effort it must spend to defend the regulation and rewrite the regulation on remand (if the regulation is struck down) is an improper interference with its priority-setting. After all, the agency has already made it abundantly clear that the issue is of high priority to the agency—it has spent plenty of time and energy drafting and promulgating the regulation.[92] In contrast, the need to ensure the legality of the agency action is undiminished. The trade-off implies minimal deference to the agency action (at least on the basis of resource allocation),

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92. *See* Med. Comm. for Human Rights v. SEC, 432 F.2d 659, 674, 675 & n.19 (D.C. Cir. 1970) (reviewing the agency decision because "the full Commission has exercised its discretion to review this controversy" and distinguishing situations where courts might "compel the Commission . . . either to entertain administrative review of a staff decision in the first instance"); *see also* N.Y. State Dep't of Law v. FCC, 984 F.2d 1209, 1214 (D.C. Cir. 1993) (stating that an agency decision to settle an administrative proceeding may be reviewable where the agency has completed much of the proceeding); Inv. Co. Inst. v. FDIC, 728 F.2d 518, 527-28 (D.C. Cir. 1984) (noting same); Robbins v. Reagan, 780 F.2d 37, 46-47 (D.C. Cir. 1985) (concluding the agency decision to close a homeless shelter was reviewable because the agency had already committed resources to the shelter, and the court was only considering rescission of that commitment); Ernest Gellhorn, *Public Participation in Administrative Proceedings*, 81 YALE L.J. 359, 381 (1972) ("[O]nce an action is begun the agency's resource commitment has already been made.").

and judicial review under § 706(2), which tends to focus on completed agency action, is much less deferential than review under § 706(1).[93]

Courts would owe more deference to resource allocation if the agency action was partially completed. For instance, an agency's decision to initiate rulemaking and then abandon the proceedings midway through would imply that the issue was initially of high priority and then the agency changed its mind—courts would want to defer to some extent to the agency's change of heart. After all, agency priorities obviously will dynamically change based on numerous factors and external events, such as changes in administration, budget cuts or increases, changes in a regulated industry, or broader economic or social currents. On the other hand, the agency at one point did think this issue was worth time and effort to pursue, and the change of position should require at least some explanation (at least if the change of position has harmed a party sufficiently to support standing to sue).[94] Any agency claims of interference with resource allocation to some extent are weak given that extensive resources were put into the aborted process by the agency—the harm of requiring the agency to expend additional resources to ensure meaningful judicial review is relatively minimal, and if the agency truly erred in abandoning the proceedings, then requiring the agency to recommence those proceedings will be less intrusive to the extent that the agency can rely on its earlier efforts as a starting point.[95] Obviously, the above analysis makes it clear that the

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93. As an example of this principle, consider *United Steelworkers of Am. v. Pendergrass*, 819 F.2d 1263 (3d Cir. 1987). The court had previously held that the agency's decision to issue a narrowly drawn workplace safety regulation was arbitrary and capricious—the agency responded by reinitiating the regulatory process, essentially from scratch. *Id.* at 1266-67. The court's response was sharp—the agency was required to issue a broader regulation (or an explanation as to why a broader regulation was improper) based on the existing rulemaking record within sixty days. Any additional delay would be unreasonable. *Id.* at 1269-70. The short timetable for agency reworking of a completed action contrasts strongly with judicial review of agency delays on completing action, where unreasonable delay is usually measured in years. *Compare* Potomac Elec. Power Co. v. ICC, 702 F.2d 1026, 1033-35 (D.C. Cir. 1983) (requiring the agency to act after a ten year delay although refusing to rely explicitly upon deadlines in the underlying statutory scheme), *with In re* Cal. Power Exch. Corp., 245 F.3d 1110, 1124-25 (9th Cir. 2001) (concluding that a four month delay was not egregious).

94. *Cf.* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 40-42 (1983) ("[A]n agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.").

95. *See* WWHT, Inc. v. FCC, 656 F.2d 807, 816-17 (D.C. Cir. 1981) ("[T]he greater the agency's investment of resources in considering the issues . . . and the more complete the record compiled during the course of the agency's consideration, the more likely it is that the ultimate decision not to take action will be a proper subject of judicial review." (internal quotations omitted)); Raymond Murphy, Note, *The Scope of Review of Agencies' Refusals to Enforce or Promulgate Rules*, 53 GEO. WASH. L. REV. 86, 114 (1985) (explaining judicial review of agency refusal to promulgate smoking rules on the grounds that "once the agency had expended the resources to study the proposals in depth, the agency was obligated to address the major issues in its final decision").

farther advanced an agency proceeding has become, the less deference the courts owe the agency. Indeed, the (scant) case law on judicial review of partially completed agency actions is consistent with this principle.[96]

At a similar level of deference would be claims that an agency has unreasonably delayed in completing an ongoing action.[97] Again, in such a situation the agency has already committed to undertaking the action (or a statute already requires the agency to act), and to this extent resource allocation is less of an issue. On the other hand, the agency certainly has discretion to proceed at different rates of speed to complete the various items on its agenda, and to give each of those items more or less priority. Thus, significant discretion exists for the agency in these types of claims, with considerable deference to agency protestations that it is proceeding at an adequate pace to resolve the issue and/or that there are other issues of higher priority within the agency.[98]

The next and higher level of deference would be situations where an agency explicitly denies a petition or other motion by a private party for the agency to initiate action, and the statutes or regulations impose a duty on the agency to respond to the petition or motion. The most important example of such a duty would be the APA's requirement that agencies shall respond to petitions for rulemaking in a timely manner.[99] Such a situation implicates the agency's resource allocation decisionmaking, and deference is warranted. On the other hand, the agency has a duty to respond to the petition or motion, and should not be able to evade that duty through a lack of a response or an irrational response. If there is a legitimate reason for the agency not to act, that reason should receive deference—if there is no legitimate reason for the agency not to act, then the agency should be required to act (although the agency would have significant discretion in how speedily it may act). Thus, even though resource allocation weighs

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96. *See* State Farm Mut. Auto. Ins. Co. v. Dep't of Transp., 680 F.2d 206, 221 (D.C. Cir. 1982), *aff'd on other grounds*, *State Farm*, 463 U.S. 29; and cases cited therein. Of course, it is possible that agencies might take advantage of this by delaying completion or progress on rulemakings (e.g., issuing notices of proposed rulemaking but avoiding issuing draft regulations) in order to take advantage of heightened deference. But that kind of action might then open the agency up to claims of unreasonable delay.

97. *See* Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 MINN. L. REV. 689, 774 (1990) (noting the parallels between an unreasonable delay claim and a claim that an agency has improperly abandoned an action in midstream).

98. *See* Biber, *supra* note 8, at 15-17 (describing that as part of a balancing test for judicial review of a claim that agency action has been unreasonably delayed, "the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority").

99. *See* 5 U.S.C. § 553(e) (2000) (requiring agencies to accept petitions for rulemaking); *id.* § 555(e) (requiring agencies to respond to petitions made "in connection with any agency proceeding"). The two provisions have generally been read together by courts to require agencies to respond to petitions for rulemaking. *See* Massachusetts v. EPA, 127 S. Ct. 1438, 1459 (2007).

significantly and great deference is owed to agency denials of petitions or other motions, courts should, and do, provide at least some judicial review in order to vindicate the statutory or regulatory requirements.[100]

Finally, there are situations where an agency has not made any decision whether or not to initiate work on a particular issue, project, or concern.[101] In such a situation, deference would be at its highest, and only in the most egregious situations—for instance, where a statute explicitly requires an agency to commit resources to the particular issue, project, or concern, as in the "clear duty" of mandamus law—would the courts require the agency to act. Only in these types of situations where there is a clear, even blatant, violation of the law by the agency will courts interfere with the heart of agency discretion in resource allocation.[102]

ii. Statutory Supremacy: Collective Actions Versus Individual Actions

Because courts balance upholding statutory supremacy with deference to agency resource allocation, courts should be more willing to step in when the benefits to enforcing statutory supremacy are higher—i.e., when the judicial action will result in the correction of legal errors that might harm a wide range of private parties or public interests. Agencies have two major paths by which they can choose to make policy and implement a regulatory scheme: they can issue regulations or similar guidance that sets policy that is generally applicable, or they can set policy through case-by-case adjudications.[103] Generally, agency decisions to promulgate regulations (or similar policy statements that are binding on private parties and/or the agency) will impose a far broader and more sweeping legal rule than an agency decision in an individual adjudication or proceeding. The rule is binding on the world as a matter of law, while the individual proceeding is

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100. For examples of courts providing judicial review of agency decisions not to issue a regulation, but with great deference, see *Am. Horse Protection Ass'n v. Lyng*, 812 F.2d 1, 4 (D.C. Cir. 1987), concluding that agency refusals to institute rulemaking are reviewable, and *Rockbridge v. Lincoln*, 449 F.2d 567 (9th Cir. 1971), reviewing agency refusal to issue regulations regarding business on an Indian reservation. *See also* Biber, *supra* note 8, at 13-14.

101. Alternatively, an agency may even explicitly decide against initiating any work on a particular issue, project, or concern outside of responding to a petition, as discussed above.

102. *See* Biber, *supra* note 8, at 13-14 (explaining that "courts are very reluctant to interfere with an agency's ordering of its priorities" except where Congress has imposed a "clear duty").

103. Courts will generally defer to an agency's decision whether or not to pursue its policy goals through regulation or adjudication. *See, e.g.*, Nat'l Petroleum Refiners Ass'n v. FTC, 482 F.2d 672, 674 (D.C. Cir. 1973) (explaining that the court's duty "is not . . . to make a policy judgment as to what mode of procedure—adjudication alone or a mixed system of rule-making and adjudication, as the Commission proposes—best accommodates the need for effective enforcement of the Commission's mandate").

only binding on the particular parties affected.[104] Of course, the individual proceeding may announce a legal rule that is binding as precedent on subsequent proceedings, but if that new rule is erroneous, the agency can correct it in the subsequent proceeding as easily (or almost as easily) as in the prior proceeding.[105] On the other hand, issuance of a regulation often consumes more time and resources than an individual adjudication, and therefore any errors will only be corrected in the (less likely) event that the agency revisits its regulation. Thus, judicial review in the context of regulations is much more likely to produce a significant benefit in terms of making sure the agency is complying with the law and protecting private parties from legal error, i.e., the benefit of judicial review is much higher.[106] In addition, individual proceedings by agencies will occur more frequently, raising concerns that the possibility of judicial review will substantially increase the resources the agency expends in order to buttress its many decisions against judicial review.[107] Moreover, individual adjudications will usually depend on close evaluations of the facts in the case, rather than the underlying law.[108] Accordingly, courts should be much more willing to review agency decisions that establish binding legal standards (such as regulations) than individual adjudications, at least where resource allocation is a significant issue.[109]

The case law reflects this distinction. For instance, agencies have argued that a decision to set standards (or not to set standards) through rulemaking

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104. *See* John A. Ferejohn, *The Structure of Agency Decision Processes*, *in* CONGRESS: STRUCTURE AND POLICY 441, 443-45 (Matthew D. McCubbins & Terry Sullivan eds., 1987) (discussing how rulemaking by agencies allows for the "grouping [of] broad classes of decisions into categories" while adjudication is much more focused on the particularities of individual cases).

105. *See* STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY 453 (4th ed. 1999) (stating that an agency "surely can change" a policy developed through adjudication as long as it explains its change in course) (citing NLRB v. Int'l Union of Operating Eng'rs, 460 F.2d 589, 604 (5th Cir. 1972) and WLOS T.V. v. FCC, 932 F.2d 993, 998 (D.C. Cir. 1991)).

106. *See* CORNELIUS M. KERWIN, RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY 35 (2d ed. 1999) ("Clearly articulated rules offer judges an efficient way to review and determine agencies' stewardship of the law and public policy.").

107. *See* Massachusetts v. EPA, 127 S. Ct. 1438, 1459 (2007) ("[A]gency refusals to initiate rulemaking 'are less frequent'" than agency decisions not to enforce (quoting Am. Horse Prot. Ass'n v. Lyng, 812 F.2d 1, 4 (D.C. Cir. 1987))); *see also* Schuck & Elliott, *supra* note 80, at 1013-14 (reporting that adjudications consisted of approximately 87% to 98% of agency decisions reviewed by courts in published opinions from the 1960s to the 1980s).

108. *See* Massachusetts v. EPA, 127 S. Ct. at 1459 (concluding that agency refusals to institute rulemaking remain reviewable after *Heckler*, in part because decisions not to prosecute, unlike rulemaking decisions, are "numerous" and are "typically based mainly on close consideration of the facts of the case at hand, rather than on legal analysis" (quoting *Lyng*, 812 F.2d at 4)).

109. *See* Schuck & Elliott, *supra* note 80, at 1021-22 (reporting that affirmance rates in judicial review of agency decisions are much higher for adjudications (57.8%) than rulemaking (43.9%)).

or similar proceedings should be exempt from review, in particular under *Heckler v. Chaney*. The Supreme Court, in *Massachusetts v. EPA*, specifically rejected this argument.[110] Lower courts have also rejected these agency claims on the grounds that an agency decision involves broad policy-setting decisions, rather than an individual enforcement decision, and therefore judicial review is appropriate.[111]

c. Conclusion: Resource Allocation as a Determinant of Deference to Agency Decisionmaking

Under the framework developed above, courts would provide more or less deference to an agency decision based on the trade-off between resource allocation and statutory supremacy. It is important to keep in mind that this would be just one of a number of factors that play into the deference given by the court to an agency decision—i.e., that resource allocation is not determinative of the level of discretion that applies. Other factors that might apply include an agency's expertise on a particular

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110. Massachusetts v. EPA, 127 S. Ct. at 1459 (remarking that in contrast to decisions not to enforce in individual cases, "[r]efusals to promulgate rules are . . . susceptible to judicial review, though such review is 'extremely limited' and 'highly deferential'" (quoting Nat'l Customs Brokers & Forwarders Ass'n of Am., Inc. v. United States, 883 F.2d 93, 96 (D.C. Cir. 1989))).

111. *See* Crowley Caribbean Transp., Inc. v. Peña, 37 F.3d 671, 676-77 (D.C. Cir. 1994) (distinguishing between "expressions of broad enforcement policies" which are reviewable and which "are more likely to be direct interpretations of the commands of the substantive statute rather than . . . mingled assessments of fact, policy, and law" and "individual enforcement decision[s]" which are unreviewable); Nat'l Wildlife Fed'n v. EPA, 980 F.2d 765, 773 (D.C. Cir. 1992) (reviewing an agency regulation that allowed discretion in revoking state drinking water regulatory authority, in part because plaintiff "raise[d] a facial challenge to the EPA statutory interpretation . . . and d[id] not contest a particular enforcement decision"); Nat'l Treasury Employees Union v. Horner, 854 F.2d 490, 496-97 (D.C. Cir. 1988) (allowing judicial review of an OPM personnel policy decision, and distinguishing between a "major policy decision" and "day-to-day personnel management decisions," in part because review of major policy decisions does not run the risk subjecting "hundreds of thousands of employment decisions" each year "to the possibility of judicial review," which would be "utterly impractical"); *Lyng*, 812 F.2d at 4 (concluding that agency refusals to institute rulemaking remain reviewable after *Heckler* in part because decisions not to prosecute, unlike rulemaking decisions, are "numerous," and are "typically based mainly on close consideration of the facts of the case at hand, rather than on legal analysis"). Of course, the standard of review is quite deferential, as noted above. *See* Murphy, *supra* note 95, at 107-14. *But see* Levin, *supra* note 97, at 764-68 (arguing that courts should be less likely to review refusals to issue regulations). Levin rests his critique in part on an assertion that judicial review of refusals to issue regulations will increase the burden on agencies because private parties are more likely to seek review of refusals to issue regulations than to seek review of refusals to enforce in individual proceedings. *Id.* at 764-65. This analysis does not address the fact that the chilling effect on the agency from the mere potential for judicial review may be what matters most for agency resource allocation (as discussed *supra* notes 15-17 and accompanying text). Where individual proceedings are far more frequent, the chilling effect (and the agency's concomitant diversion of resources to immunize the decisions from judicial review) will be significantly larger. Levin concedes that regulations differ from individual proceedings primarily in terms of the number of people impacted by the regulation, and that this would justify more searching judicial review. *Id.* at 765, 768.

question, the statutory scheme that Congress has laid out, and the court's own determination as to whether the agency is acting in good faith.

The Court's decision in *Massachusetts v. EPA* illuminates this point. The Court properly noted that the default level of judicial review of an agency's failure to initiate a rulemaking proceeding is "extremely limited" and "highly deferential."[112] The Court then noted that if the agency reached certain conclusions (i.e., that certain air pollutants present a threat to human health or welfare), the agency had a mandatory duty to issue regulatory standards (in this case, to control those air pollutants).[113] The agency's mandatory duty to regulate if it finds that certain conditions exist greatly reduced the agency's legal room to maneuver. According to the Court, the plain text of the statute made clear that Congress intended to strip away most of the agency's discretion over resource allocation—and that instead, the agency was restricted to a narrow, focused analysis about whether an air pollution problem existed. If such a problem existed, the agency was required to regulate. Because the agency had never squarely considered the question of whether an air pollution problem existed, its refusal to regulate was arbitrary and capricious—even under what first started out as a highly deferential standard of review.

In short, the key conclusion of this Article is not that there are no other factors that are important to understanding how judicial review functions both for agency action and inaction. What is significant is the realization that agency inaction is not a fundamentally different type of agency decision that receives fundamentally different treatment by the courts, and it is not always, or even often, unreviewable. Instead, agency inaction is subject to the same general scheme of judicial review—including deference on issues such as expertise—as the rest of agency decisionmaking.[114] Resource allocation is and should be a significant factor in that judicial review process—albeit one with particularly important weight in certain types of agency decisions that we tend to identify as "inaction."

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112. Massachusetts v. EPA, 127 S. Ct. at 1459 (explaining that judicial review of the agency's refusal to act in the case was based on a special judicial review provision in the Clean Air Act, but the Court's analysis was based on APA case law and the Court did not indicate that its analysis was in any material way affected by that difference (citing 42 U.S.C. § 7607(b)(1) (2006))).

113. *Id.* at 1459-60 (discussing 42 U.S.C. § 7521(a)(1), which requires the EPA to issue regulatory standards for any "air pollution which may reasonably be anticipated to endanger public health or welfare").

114. *See* Biber, *supra* note 8, at 11-18.

2. Explaining Why Agency Decisions May Be Unreviewable Based on Resource Allocation

The analysis above explains why agency inaction should be reviewable by the courts—albeit with some level of deference in certain circumstances. However, what about the presumption of non-reviewability laid out by the Supreme Court in *Heckler v. Chaney* for agency decisions not to enforce? Is it simply wrong? Or, if it is not wrong, why does it not cover the field of agency inaction?

My answer is that *Heckler* is not wrongly decided—but that it has a (relatively) narrow application in the field of administrative law. The underlying purpose of the *Heckler* presumption of non-reviewability is to protect agency resource allocation, and it applies even where the mere possibility of judicial review would excessively interfere with agency resource allocation. In other words, while in general resource allocation is simply an important factor that helps determine the level of deference that courts give to agency decisions, in some situations resource allocation is so important that it becomes the overriding factor that requires courts to refuse judicial review altogether.

What types of situations would warrant such a draconian limitation on judicial power? Situations where the agency must make many informal and quick judgments on a regular basis, and where the possibility of judicial review would force the agency to fundamentally change how it made those decisions. In such situations, the possibility of judicial review would require an agency to make those decisions in a more formal and regularized manner, require a vast increase in resources for the decisionmaking process, and sharply circumscribe its ability to address other issues or problems.[115]

The classic example of this is, in fact, the *Heckler* situation—an agency decision about whether to enforce a regulation or statute against a private party. Agencies receive a plethora of reports of possible violations of the

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115. *See* Krent, *supra* note 61, at 1214 (noting that the possibility of judicial review will cause an agency to "devote considerable time and resources into papering the record to withstand review"); Sunstein, *Reviewing Agency Inaction*, *supra* note 54, at 673 (noting that if there is judicial review of agency decisions not to act, "it might become necessary to formalize inaction decisions, a step that could have considerable costs"); Thomas, *supra* note 65, at 140 n.67 (noting that judicial review cannot only restrict the ability of agencies to substantively choose where they should allocate their resources, but also that imposition of judicial review entails enormous transaction costs as agencies and private parties must comply with more formal procedures); *see also* Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1772-76 (1975) (arguing that an increase in judicial review of informal agency decisions has led to much more formality, delay, and use of resources by agencies to make those decisions); Stewart & Sunstein, *supra* note 66, at 1270 n.324 (noting the risk that judicial review of inaction will increase resource demands on the agency to justify its decisions).

law on a regular basis, and must make quick and informal decisions about which possible violations are worth further investigation and which ones to ignore. After further investigation, the agency again must make a large number of decisions about whether or not to pursue formal proceedings. Judicial review of these enormous numbers of agency decisions would destroy their informal nature and require agencies to spend significant time and effort on keeping records on their decisionmaking.[116] Judicial review might even force all agencies to conduct at least some investigation on all complaints, if only to justify a refusal to investigate further, which would drain even more resources from the agency. Accordingly, it makes perfect sense that the courts have refused to allow judicial review of these types of decisions. Moreover, given that individual enforcement decisions rarely, if ever, set any sort of legal precedent, the benefit of enforcing agency compliance with the law is relatively low.[117]

Indeed, the *Heckler* court appeared to recognize this factor, albeit obliquely, in its analysis. The Court specifically stated that one factor in denying judicial review in the case was that an agency action (as opposed to an inaction) "itself provides a focus for judicial review, inasmuch as the agency must have exercised its power in some manner."[118] Lower courts have interpreted this *Heckler* rationale as requiring that an agency act in such a manner that it has created a record or similar material that a court can review.[119] Of course, if courts began to impose judicial review on an

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116. The informality of the agency decisions in *Heckler* is important in distinguishing the absence of judicial review in that case from judicial review of an agency's refusal to, for example, process a Social Security disability claim, where the agency has already established a formal system for adjudicating disputes and the possibility of judicial review will not seriously alter the agency's resource calculus.

117. There is case law that preceded *Heckler* that reaches similar results. *See, e.g.*, Bays v. Miller, 524 F.2d 631 (9th Cir. 1975) (finding no judicial review of NLRB refusal to file unfair labor practice complaint). *But see* REA Express v. Civil Aeronautics Bd., 507 F.2d 42 (2d Cir. 1974) (reviewing agency dismissal of complaint). The Supreme Court has raised similar concerns about judicial review of prosecutorial charging decisions in the criminal context. *See* Wayte v. United States, 470 U.S. 598, 607 (1985) (noting that judicial review of charging decisions might "chill law enforcement"); *see also* United States v. Redondo-Lemos, 955 F.2d 1296, 1299 (9th Cir. 1992) (noting the "host of virtually insurmountable practical problems" of allowing judicial review of prosecutor charging decisions).

118. Heckler v. Chaney, 470 U.S. 821, 832 (1985).

119. *See* Transp. Intelligence, Inc. v. FCC, 336 F.3d 1058, 1063 (D.C. Cir. 2003) (concluding that the agency's denial of a petition to revoke a license was reviewable because the agency's grant of the license in the first place "provides a focus for judicial review") (internal citations omitted); Crowley Caribbean Transp., Inc. v. Peña, 37 F.3d 671, 677 (D.C. Cir. 1994) ("[A]n agency will generally present a clearer (and more easily reviewable) statement of its reasons for acting when formally articulating a broadly applicable enforcement policy" in contrast to "individual decisions to forego enforcement [which] tend to be cursory, ad hoc, or post hoc" confronting courts "with the task of teasing meaning out of agencies' side comments, form letters, litigation documents, and informal communications"); Nat'l Treasury Employees Union v. Horner, 854 F.2d 490, 496 (D.C. Cir. 1988) (reviewing an OPM policy decision because it must follow notice and comment rulemaking, a procedure that "provides a focal point for judicial review"); Int'l Union,

agency's decision not to enforce, that would in turn prompt the agencies to begin developing records that could be reviewed—as happened in the wake of the Court's decision in *Citizens to Preserve Overton Park, Inc. v. Volpe*. In doing so, the courts would be forcing the agency to fundamentally readjust and formalize its decisionmaking process, with dramatic impacts on the agency's resource allocation priorities described above.

An excellent example of how the courts have explicitly recognized this logic is a pair of D.C. Circuit cases (pre-*Heckler*) in which the court considered whether to judicially review the Security and Exchange Commission's (SEC) decision to issue "no-action" letters. In a no-action letter, the SEC indicates to a publicly traded company that it will not take action against the company for failing to include a particular motion in the proxy materials for a shareholder meeting. In *Medical Committee for Human Rights v. SEC*,[120] the D.C. Circuit allowed judicial review of the SEC's issuance of a "no-action" letter, relying in significant part on the fact that the full SEC itself had explicitly reviewed the agency decision in question. The court explicitly recognized that judicial review must be limited to avoid interfering with an agency's informal ability to deal with "a formidable number of proxy statements in limited time and with insufficient manpower," especially given that "not all proxy proposals can or should be given detailed consideration by the full Commission."[121] Thorough judicial review of all "no-action" decisions by the agency would interfere with "agencies' internal management decisions and allocations of priorities" because they might require the agency to give full review to all proxy proposals.[122] Judicial review in that particular instance was appropriate because the full SEC had examined the case, an unusual circumstance. Accordingly, the agency had already gone through the formal review process, and judicial review of that particular decision was unlikely to force the agency to formalize all of the many decisions that never went to the full SEC.[123] The D.C. Circuit explicitly relied on this language in *Medical Committee* to limit its prior holding to its facts. In *Kixmiller v. SEC*,[124] the court stated that judicial review under *Medical Committee* was limited to situations where the full SEC has reviewed a staff decision, and refused to subject informal staff advice to judicial

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United Mine Workers v. Mine Safety & Health Admin., 823 F.2d 608, 616 n.5 (D.C. Cir. 1987) (concluding that an agency's grant of interim relief from regulation was reviewable because the agency had exercised its power in a manner that at least allowed review to determine whether the agency had exceeded its powers).

120. 432 F.2d 659, 674 (D.C. Cir. 1970).
121. *Id.*
122. *Id.*
123. *Id.*
124. 492 F.2d 641, 645-46 (D.C. Cir. 1974).

review in part because the "[s]heer volume" of such advice precludes detailed, formal agency review.[125]

Therefore, now we can understand *Heckler v. Chaney* not as an anomaly in the world of administrative law, nor as the basis for an exception to judicial review that might swallow all of judicial review of agency decisions not to act. Instead, it is simply the result of the principled application of judicial deference to resource allocation in a relatively limited subset of cases of agency decisionmaking.[126]

3. Resolving Conflicts Between Resource Allocation and Statutory Language

Ultimately, however, courts will face situations where both statutory supremacy concerns and resource allocation concerns are high. Which goal in the end is paramount for a court? In practice, when push comes to shove and there is a direct conflict between statutory language (such as a deadline) and an agency claim that its resource allocation priorities are different, courts have consistently chosen clear statutory language over the agency claims of resource allocation discretion. This choice is most

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125. *Id.* Of course, there might be situations where constitutional requirements of procedural due process require judicial imposition of significant procedural formalities on agency decisionmaking, even when that might result in significant changes in how agencies allocate their resources. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254 (1970) (imposing procedural protections on agency decisions to terminate welfare benefits).

126. *Contra* Bressman, *Judicial Review of Agency Inaction*, *supra* note 49, at 1693-94 (arguing that the *Heckler v. Chaney* exception to judicial review should be essentially abandoned, whatever the "considerable costs" "in terms of administrative flexibility and administrative efficiency," because there is "no principled way to defend" nonreviewability for agency enforcement decisions while advancing reviewability for agency actions).

There is another alternative explanation for the Court's decision in *Heckler*, albeit one that the Court itself never expressed. To the extent that the agency is being forced to take enforcement action in court, we might have concerns about a supposedly neutral arbiter (the court) requiring a party to initiate an adversarial proceeding in front of that arbiter. A recalcitrant agency, for instance, might decide to initiate the proceeding but only in a pro forma or indifferent manner. However, a supposedly impartial arbiter (i.e., the court) will have a very difficult task of supervising the litigation efforts of one of the adversarial parties and requiring it to make better efforts on its behalf to litigate. These concerns have animated the judicial reluctance to reject settlement agreements between litigants and force further litigation of the case. *See, e.g.*, County of Santa Fe v. Pub. Serv. Co. of N.M., 311 F.3d 1031, 1047-50 (10th Cir. 2002) (noting judicial deference to motions by parties to dismiss cases pursuant to FED. R. CIV. P. 41 and noting concerns that if a motion to dismiss by a plaintiff is denied, the plaintiff "may seek effective dismissal of his case through non-prosecution or poor litigation tactics" and that courts will be ill-placed to force parties to submit higher-quality litigation materials for the court's own consideration in an adversarial proceeding). But this concern has only limited application in the context of judicial review of agency inaction, where much agency activity occurs informally or administratively, such that courts are not directly involved. Indeed, even in *Heckler*, at least one of the tools available to the agency (suspension of the registration of the drugs for use) would not have required judicial action. *See* Heckler v. Chaney, 470 U.S. 821, 853 (1985). Accordingly, it would support a narrower application of the *Heckler* doctrine than would resource allocation.

evident in situations where, absent the statutory language, the courts would certainly defer to an agency's decision to act or not to act—for instance, where a private party claims that an agency has completely failed to address a problem. Where the statute states that an agency "shall" take a particular action—the "clear" or "ministerial" or "nondiscretionary" language that most courts search for in many § 706(1) cases—then the agency can be required to act, deference to resource allocation notwithstanding.[127] Similarly, "unreasonable delay" cases, which might be very difficult for a private party to win, become simple claims that the agency has "unlawfully withheld" action where the relevant statute imposes a clear deadline on the agency to act.[128] It is also shown in the context of agency allocation of funds appropriated by Congress—even in this area, where agency decisions are unreviewable absent congressional instruction, courts will enforce explicit statutory instructions from Congress on how to allocate funds.[129] Finally, the *Heckler v. Chaney* presumption that an agency decision not to enforce is unreviewable can be overcome by clear statutory language indicating that the agency has a duty to enforce the law.[130]

Why, however, should statutory duties trump an agency's decision about how to allocate its own resources? This is not an idle question—there are those who believe that judicial interference in agency decisionmaking is so pernicious and inappropriate that even a clear statement by Congress as to what an agency should do and when does not warrant judicial intervention.[131] These scholars usually do not argue that courts should explicitly disregard statutory language; instead they contend that courts

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127. *See, e.g.*, Forest Guardians v. Babbitt, 174 F.3d 1261, 1270 (10th Cir. 1998) (taking a "'shall'-means-shall approach" and holding that an agency can be required to perform tasks that Congress has mandated).

128. *Id.* at 1272 ("[T]he distinction between agency action 'unlawfully withheld' and 'unreasonably delayed' turns on whether Congress imposed a date-certain deadline on agency action."); *see also* Stewart & Sunstein, *supra* note 66, at 1272, 1285-86 (explaining that courts are more likely to force agencies to act where there is strict, statutory duty).

129. *See* Lincoln v. Vigil, 508 U.S. 182, 193 (1993) ("Of course, an agency is not free simply to disregard statutory responsibilities: Congress may always circumscribe agency discretion to allocate resources by putting restrictions in the operative statutes . . . .").

130. *Heckler*, 470 U.S. at 832-33.

131. *See, e.g.*, Frank B. Cross, *Pragmatic Pathologies of Judicial Review of Administrative Rulemaking*, 78 N.C. L. REV. 1013, 1027-36, 1068-69 (2000) (arguing that judicial review of any kind, and particularly of agency failure to comply with deadlines, is flawed and illegitimate); R. Shep Melnick, *The Political Roots of the Judicial Dilemma*, 49 ADMIN. L. REV. 585, 597 (1997) [hereinafter Melnick, *Political Roots*] (calling for narrow standing to prevent litigation of agency deadline cases: "Some will complain that denying standing to private attorneys general will make statutory deadlines unenforceable and will thereby discourage Congress from putting specific mandates in statutes. Right. That's the point."); R. Shep Melnick, *Administrative Law and Bureaucratic Reality*, 44 ADMIN. L. REV. 245 (1992) (questioning the propriety of having courts require agencies to take actions).

should avoid claims that agencies have illegally failed to act through the use of various justiciability and reviewability doctrines, such as standing.[132]

There are multiple possible answers in response. One answer would be that from a strictly formalist constitutional perspective, it is the duty of the courts to interpret the law, not to write it, rewrite it, or repeal it.[133] Accordingly, it would be inappropriate and even unconstitutional for the courts not to enforce congressional statutes that require an agency to allocate its resources in a particular way.[134] Another answer would be that it is Congress's role, in general, to have the first and primary voice in setting policy, and that the role of agencies is to implement Congress's policy decisions, not to override them.[135]

A third answer is more important in the specific context of agency decisions not to act, and accordingly, it is one that I will discuss in more depth. This answer is based on a public choice theory understanding of how the political and regulatory process works. At its heart, this answer states that agency failures to implement regulatory statutes may be the result of asymmetries in the ability of regulatory subjects and regulatory beneficiaries to monitor and influence the political process. Thus, in order to counterbalance those asymmetries, at least in the most egregious situations, courts should uphold clear, specific congressional requirements for agencies to act.

According to public choice theory, regulatory actions that benefit small groups of voters in a concentrated manner are more likely to be enacted than regulatory actions that benefit a large group of voters in a diffuse manner.[136] The more distributed the benefits of a regulatory action, the less

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132. *See* Melnick, *Political Roots*, *supra* note 131.

133. *Cf.* U.S. CONST. art. VI, cl. 3 (stating that congressional statutes are the "supreme Law of the land").

134. *See, e.g.*, Pierce, *supra* note 61, at 90 (rejecting judicial failure to enforce deadlines because "[a]ny judicial action that places the judiciary in a position inconsistent with that of the 'honest agent' of the Framers or the legislative branch imposes high costs on the legitimacy of the political and legal structure of government"); *see also* Selmi, *supra* note 54, at 139-42 (noting the conflict between resource allocation and upholding congressional deadlines, but concluding that courts should uphold deadlines because "it is entirely appropriate for courts to determine whether the agency's inaction violates a purely statutory command. In [such a case], the need for agency accountability is more important than protecting its autonomy"); Sunstein, *Reviewing Agency Inaction*, *supra* note 54, at 670 (while the executive has "power to set enforcement priorities and to allocate resources to those problems that, in the judgment of the executive, seem most severe" that does not "authorize the executive to fail to enforce those laws of which it disapproves"); *cf.* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

135. *See* EDWARD L. RUBIN, BEYOND CAMELOT, RETHINKING POLITICS AND LAW FOR THE MODERN STATE 224 (2005) (developing the distinction between Congress's role in setting policy and the Executive's role in implementation).

136. *See, e.g.*, ROBERT E. MCCORMICK & ROBERT D. TOLLISON, POLITICIANS, LEGISLATION, AND THE ECONOMY: AN INQUIRY INTO THE INTEREST-GROUP THEORY OF

likely that it will be in the self-interest of any individual voter to take action to obtain that regulatory action—the ratio of the benefits to the costs are necessarily lower.[137] In contrast, where the impacts of a regulatory action are concentrated, it may well be worthwhile for individuals to invest the large initial costs to organize themselves and fellow beneficiaries, monitor and engage the political process, and achieve their regulatory goals.[138]

These asymmetries in the political arena could be directly reflected in the elections for legislators.[139] They may be reflected in the lobbying, persuasion, or influence of administrative agencies in their own decisionmaking.[140] They may also be reflected in the monitoring by citizens of the actions of their legislators and regulatory agencies. In any event, they have real implications for the regulatory process and agency decisionmaking.[141]

GOVERNMENT 16-25, 42-44 (1981); Steven P. Croley, *Public Interested Regulation*, 28 FLA. ST. U. L. REV. 7, 35-36 (2000) [hereinafter Croley, *Public Interested Regulation*].

137. *See* Croley, *Public Interested Regulation*, *supra* note 136, at 35-36; MCCORMICK & TOLLISON, *supra* note 136, at 16-21, 42-44. The terms "concentrated" or "distributed" are widely used in the scholarly literature. *See, e.g.*, R. DOUGLAS ARNOLD, THE LOGIC OF CONGRESSIONAL ACTION 25-26 (1990); James Q. Wilson, *The Politics of Regulation*, *in* THE POLITICS OF REGULATION 357, 370 (James Q. Wilson ed., 1980).

138. *See* Croley, *Public Interested Regulation*, *supra* note 136, at 14-16, 36-38.

139. *See, e.g.*, DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 137 (1974) (arguing that the electoral process means Congress favors organized interests). "Congress will be reluctant to legislate new programs benefiting the unorganized over the opposition of the organized." *Id.*

140. *See* JOHN E. CHUBB, INTEREST GROUPS AND THE BUREAUCRACY: THE POLITICS OF ENERGY (1983) (providing case studies of the expense of monitoring and being involved in administrative process, and how accordingly process tended to be dominated by industry groups with larger resources and more benefits from lobbying); LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 11-14 (1965) (noting the cost of participation in agency proceedings and that public interest groups participate in only a fraction of those proceedings); Ernest Gellhorn, *supra* note 92, at 389-94 (same); Roger C. Cramton, *The Why, Where and How of Broadened Public Participation in the Administrative Process*, 60 GEO. L.J. 525, 538 (1972); Roger Noll, *Political Foundations of Regulatory Policy*, *in* CONGRESS: STRUCTURE AND POLICY 462, 479-80 (Mathew D. McCubbins & Terry Sullivan eds., 1987) (same); Roger G. Noll, *Government Regulatory Behavior: A Multidisciplinary Survey and Synthesis*, *in* REGULATORY POLICY AND THE SOCIAL SCIENCES 31, 44 (Roger G. Noll ed., 1985) (noting this dynamic); Peter H. Schuck, *Public Interest Groups and the Policy Process*, PUB. ADMIN. REV. 132, 137-39 (Mar./Apr. 1977) (same); *see also* KAY LEHMAN SCHLOZMAN & JOHN T. TIERNEY, ORGANIZED INTERESTS AND AMERICAN DEMOCRACY 316 (1986) (providing evidence as to greater resources available to industry groups).

141. I recognize that there are important, and in many ways valid, critiques of the public choice theory. Any casual observer of the political landscape will note that a wide range of groups at least purport to represent widely diffused interests, and at times represent those interests rather effectively. Examples are environmental, consumer interest, and taxpayer groups. *See* Croley, *Public Interested Regulation*, *supra* note 136, at 92-95; R. Shep Melnick, *Strange Bedfellows Make Normal Politics: An Essay*, 9 DUKE ENVTL. L. & POL'Y F. 75, App. A (1998) (providing data as to size of national environmental groups). There are a variety of theories to explain the existence of these groups, and their existence at least to some extent calls into question whether the collective action problems described by the public choice theory are the sole determinants of the political system. *See* Croley, *Public Interested Regulation*, *supra* note 136, at 19-22 (describing how moral imperatives and

In the context of agency decisions not to act, this dynamic can have particularly problematic results. Legislatures are notorious for enacting broadly worded regulatory statutes that provide glowing rhetoric about the benefits that the statute will provide to the broader citizenry—statutes for which there is little if any chance that the goals announced will ever be achieved. In environmental law, a classic example is the Clean Water Act's call for fishable and swimmable waters throughout the United States by 1983 and zero discharge of pollutants into the waters of the United States by 1985.[142]

Setting aside the feasibility of such sweeping goals, even partial achievement requires the creation and governance of a large, complex regulatory system. Such a system requires cooperation by both Congress and the agencies. The Legislature must fund the agency to develop the regulatory system on an ongoing basis, and not meddle with the substantive regulation in a way that undermines the program. On the agency side, regulations must be drafted, personnel hired, administrative capacity developed, research conducted, and laws and regulations enforced.

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suasion, inherent rewards from participation in group activities, and political entrepreneurship might explain how diffuse beneficiary organizations are created and run); *id.* at 46-48 (describing the fundamental problems that collective action theory has in explaining how any group organization might occur); Mark Kelman, *On Democracy-Bashing: A Skeptical Look at the Theoretical and "Empirical" Practice of the Public Choice Movement*, 74 VA. L. REV. 199, 202-03 (1988) (challenging the assumptions and empirical evidence underlying public choice theory); V. Kerry Smith, *A Theoretical Analysis of the "Green Lobby"*, 79 AM. POL. SCI. REV. 132 (1984) (developing models to demonstrate that environmental groups can develop despite collective action problems). Moreover, public choice theory necessarily requires basic assumptions about human nature and behavior that are clearly false in important and significant ways. Edward L. Rubin, *Public Choice, Phenomenology, and the Meaning of the Modern State: Keep the Bathwater, But Throw Out That Baby*, 87 CORNELL L. REV. 309, 340-46 (2002). Nonetheless, a number of scholars have concluded that there appears to be at least some truth to the collective action problems identified in public choice theory. *See* Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 24-25 (1998) [hereinafter Croley, *Theories of Regulation*] ("[A]ny serious theory must somehow consider that collective goods, including monitoring, will in the absence of some catalyst tend to be underproduced."); *id.* at 52-56, 63-65, 145-47 (noting that the empirical evidence for the public choice theory is mixed but that there is at least some "modest support" for the theory); Michael E. Levine & Jennifer L. Forrence, *Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis*, 6 J.L. ECON. & ORG. 167, 170-71 (1990); Jerry L. Mashaw, *The Economics of Politics and the Understanding of Public Law*, 65 CHI.-KENT L. REV. 123, 146 (1989) [hereinafter Mashaw, *Economics of Politics*] (concluding that public choice theory provides a partial explanation of the motives of legislators); Lars Udéhn, *Twenty-Five Years with* The Logic of Collective Action, 36 ACTA SOCIOLOGICA 239, 240, 256 (Scandinavian Sociological Ass'n 1993) (noting same). To the extent there is some truth to the public choice story, we would want to design our regulatory structure in a way to minimize the risks that public choice flaws would pose to the decisionmaking process. *See* JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 25-29 (1997).

142. *See* 33 U.S.C. § 1251(a)(1)-(2) (2000). Obviously, these environmental goals are yet to be achieved in the United States, even if those goals are achievable.

All of these steps allow for slippage between the initial passage of the statutory scheme and its implementation. That slippage creates an opportunity that can be exploited through the political system. For many of these symbolic regulatory statutes, particularly in fields such as environmental law, the benefits of the regulatory scheme often redound to all or almost all of the public, but in a diffuse manner, while the costs are concentrated on a relatively small number of individuals or businesses—an asymmetry that will then be reflected in the political process of implementation of the regulatory statute.[143]

For instance, instead of aggressively funding the expansion of the regulatory state in an effort to achieve the goals, Congress might instead impose restrictions on the agency's ability to act through budget cuts for the agency as a whole or refuse to fund program expansions—decisions that need not be explicitly linked to the underlying substantive issues, either in the text of the statute, the congressional debates, or in the press coverage (if any) of the budget decisions.[144] Alternatively, Congress might

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143. For an account of how symbolic regulatory legislation may be passed that does not actually benefit the public in practice, see MURRAY EDELMAN, THE SYMBOLIC USES OF POLITICS 22-29 (1964).

144. *See* Bressman, *Judicial Review of Agency Inaction*, *supra* note 49, at 1688 (noting that "Congress often writes broad delegating statutes to create opportunities for narrow interests to dominate agency decisionmaking" and that "Congress similarly grants power without meaningful administrative limits so that its members will have space to push agencies toward preferential outcomes"); James V. DeLong, *New Wine for a New Bottle: Judicial Review in the Regulatory State*, 72 VA. L. REV. 399, 434-35 (1986) (noting same); Richard J. Lazarus, *The Tragedy of Distrust in the Implementation of Federal Environmental Law*, 54 LAW & CONTEMP. PROBS. 327, 328-29 (1991) (noting that appropriations committees, often skeptical of environmental laws, had purposefully passed low budgets to undermine enforcement, and that the committees "felt far more secure in undermining the statutory mandates in a less visible way through the appropriation process" as opposed to direct attempts at repeal); Mark Seidenfeld, *Bending the Rules: Flexible Regulation and Constraints on Agency Discretion*, 51 ADMIN. L. REV. 429, 443-44 (1999) (noting that Congress often imposes stringent duties on agencies but refuses to provide resources to carry out those duties, thus simultaneously rewarding the public and private interests). Interference with agency implementation may be the result not of a decision by Congress as a whole, but instead of decisions by individual congressional committees or even individual members of those committees. *See* R. DOUGLAS ARNOLD, CONGRESS AND THE BUREAUCRACY: A THEORY OF INFLUENCE (1979); Harold H. Bruff & Ernest Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369, 1421-22 (1977) (providing examples of appropriations and other congressional committees putting pressure on agencies to prevent regulation); J.R. DeShazo & Jody Freeman, *The Congressional Competition to Control Delegated Power*, 81 TEX. L. REV. 1443 (2003) (providing empirical evidence of committee influence on agency decisionmaking); Eric Helland, *The Waiver Pork Barrel: Committee Membership and the Approval Time of Medicaid Waivers*, 17 CONT. ECON. POL'Y 401 (1999); MICHAEL W. KIRST, GOVERNMENT WITHOUT PASSING LAWS 6-7 (1969) (describing the ways in which appropriations committees can use legislative history, oversight hearings, and other non-statutory tools to control an agency's substantive decisions); Jeremy Rabkin, *Micromanaging the Administrative Agencies*, 100 PUB. INTEREST 116 (1990) (providing examples of appropriations committees closely controlling agency decisionmaking); Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765 (1983) (noting

impose procedural hurdles that make it impossible for the agency to promptly fulfill these responsibilities.[145] If questions arise about the fact that the glowing rhetoric has not been realized in practice, the Legislature might call oversight agencies and blame the agency for failing to achieve those results, while keeping for itself the credit of striving to reach the ideal.[146]

Likewise, the Executive Branch can instruct its agencies to make fulfillment of these goals a low priority, with the same goal of rewarding groups with concentrated costs at stake.[147] Blame can be transferred back to the Legislature by, for example, accusing it of not providing sufficient resources or by interfering with the Executive's ability to enforce the law. Alternatively, the Executive Branch may make implementation of the statute a lower priority based not on any intent to benefit particular groups, but simply in response to the relatively stronger ability of those who bear the concentrated costs to participate in agency proceedings, provide information to the agency, and lobby the agency. [148]

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same); *see also* JOSEPH L. SAX, DEFENDING THE ENVIRONMENT 1 (1970) (describing a case study of how lobbying by individual Congressmen had an important impact on agency decisionmaking).

145. Matthew D. McCubbins, Roger G. Noll, & Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 442-44, 457, 468-70 (1989) (noting capture of the House of Representatives Commerce Committee by specific pro-business interests, and the imposition of elaborate procedures by Congress on the agency, in order to restrict the agency's ability to implement statutory programs).

146. *See* Bressman, *Judicial Review of Agency Inaction*, *supra* note 49, at 1689 (stating that Congress can dodge blame by "placing the agency on the hook"); Pierce, *supra* note 61, at 69 ("The path of least resistance for any politician is to enact or retain the politically valuable rhetoric embodied in absolutist regulatory statutes; to decline to appropriate the funds necessary to implement the statutes; and then to chastise the agencies for failing to perform their statutorily assigned tasks.").

147. The Bush Administration's Clear Skies initiative, in which the administration declined to enforce existing air laws against major industries, has been cited as an example of this type of behavior. *See* Bressman, *Beyond Accountability*, *supra* note 82, at 507-08; *see also* Bressman, *Judicial Review of Agency Inaction*, *supra* note 49, at 1689 (noting that agencies frequently act in a manner to reward narrow interests and that agencies "are beholden to elected officials who cater to private interests while escaping responsibility for that result"); Lazarus, *supra* note 144, at 328-29 (noting how agency officials cooperated with Congress in underfunding the enforcement of environmental laws); Seidenfeld, *supra* note 144, at 459-63 (noting the risk of agency capture by regulated groups).

148. For empirical evidence of interest group influence on agency decisionmaking, see, for example, WESLEY A. MAGAT, ALAN J. KRUPNICK & WINSTON HARRINGTON, RULES IN THE MAKING: A STATISTICAL ANALYSIS OF REGULATORY AGENCY BEHAVIOR 147, 156-57, 170-71 (1986); LAWRENCE S. ROTHENBERG, REGULATION, ORGANIZATIONS, AND POLITICS: MOTOR FREIGHT POLICY AT THE INTERSTATE COMMERCE COMMISSION (1994); DAVID VOGEL, NATIONAL STYLES OF REGULATION: ENVIRONMENTAL POLICY IN GREAT BRITAIN AND THE UNITED STATES 164-68 (1986); Amy Whritenour Ando, *Waiting to be Protected Under the Endangered Species Act: The Political Economy of Regulatory Delay*, 42 J.L. & ECON. 29 (1999); Daniel P. Carpenter, *Groups, the Media, Agency Waiting Costs, and FDA Drug Approval*, 46 AM. J. POL. SCI. 490 (2002); Joseph Cooper & William F. West, *Presidential Power and Republican Government: The Theory and Practice of OMB Review of Agency Rules*, 50 J. POL. 864, 879 (1988); Maureen L. Cropper et al., *The Determinants of Pesticide*

Because of the increased deference courts will generally pay to agency decisions not to act, when it comes to substantive judicial review, agencies generally have great leeway in their ability to implement (or not implement) statutory mandates.[149] Moreover, the APA places few explicit procedural requirements on agencies that choose not to act—certainly no more than the bare-bones requirement that the agency provide a reasonable explanation of its decision not to act.[150] Thus, agencies (and/or congressional allies) may well be tempted to use agency inaction, rather than agency action, as their primary tool to avoid enforcement by the judicial branch and/or outside parties.[151]

Even more importantly, inaction allows both the Legislature and the Executive to reduce the ability of the public to monitor. Because of the lack of APA procedures, agencies usually need not make any announcements about whether they are choosing to act. If they do—as

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Regulation: A Statistical Analysis of EPA Decision Making, 100 J. POL. ECON. 175 (1992); Lea-Rachel D. Kosnik, *Sources of Bureaucratic Delay: A Case Study of FERC Dam Relicensing*, 22 J.L. ECON. & ORG. 258, 285 (2005); Michael R. Moore, Elizabeth B. Maclin & David W. Kershner, *Testing Theories of Agency Behavior: Evidence from Hydropower Project Relicensing Decisions of the Federal Energy Regulatory Commission*, 77 LAND ECON. 423 (2001); Hilary Sigman, *The Pace of Progress at Superfund Sites: Policy Goals and Interest Group Influence*, 44 J.L. & ECON. 315 (2001).

149. Croley, *Public Interested Regulation*, *supra* note 136, at 34-35.

150. For instance, in the vast majority of individual adjudicatory decisions, an agency's decision not to take action will not be made explicit through a formal adjudicatory proceeding, where the APA places substantial procedural requirements on the agency, according to 5 U.S.C. § 554, but instead through informal decisions about which cases to pursue or not. Such informal adjudicatory decisions require almost no procedural steps under the APA, aside from providing a reasoned explanation for the decision to a court should the decision be reviewed judicially. *See* CHRISTINE A. KLEIN, FEDERICO CHEEVER, & BRET C. BIRDSONG, NATURAL RESOURCES LAW: A PLACE-BASED BOOK OF PROBLEMS AND CASES 185 (2005). As for rulemaking decisions, the decision to terminate a rulemaking proceeding, reject a petition for rulemaking, or not to initiate a rulemaking in the first place at most would trigger the notice and comment obligations for informal rulemaking on the APA, and in many cases might not even trigger those requirements—leaving the procedural standard at the very low level of providing a reasoned explanation for the decision to a court.

151. *See* Croley, *Public Interested Regulation*, *supra* note 136, at 34-35; Peter L. Kahn, *The Politics of Unregulation: Public Choice and Limits on Government*, 75 CORNELL L. REV. 280, 292 (1990) ("[O]pposition to government actions which harm [a small] group will often be a more productive investment of lobbying dollars than is support for actions which help the group. The courts in general hold administrative agencies to a far lower standard of judicial review when agencies fail to act than when they do affirmatively act."). Some scholars have argued that the public choice theory of regulation is undermined because only informal agency decisionmaking is without significant procedural requirements, and accordingly it would be relatively difficult for particular special interests to monopolize the administrative process. *See* Croley, *Theories of Regulation*, *supra* note 141, at 144-45. Given the importance of agency resource allocation decisions to the implementation of regulatory programs, agencies are unlikely to miss the opportunity to use inaction (a form of informal agency decisionmaking) to reach substantive outcomes. *See* Croley, *Public Interested Regulation*, *supra* note 136, at 34; *see also* Stewart, *supra* note 115, at 1754 & n.404 (noting judicial concerns that informal agency decisionmaking was being used to benefit regulated industry).

when they choose to terminate an ongoing rulemaking proceeding—those decisions can be buried in a short notice in a large volume of the Federal Register.[152] As for appropriations bills, often the relevant provisions can be tucked away inside a massive omnibus spending reconciliation bill.[153] Moreover, neither agency resource allocation decisions nor congressional appropriations decisions are likely to ever have nearly the same kind of political resonance that the passage of the original symbolic statute would have.[154] The press coverage of the symbolic statute's passage is likely to be far greater—and however inaccessible the text of the United States Code would be to the average citizen, it is still far more accessible than the intricacies of the appropriations and budget processes.[155] In essence, agencies and Congress can use the symbolic substantive statute, filled with public interest language that promises action on a particular issue, to "mask" the actual implementation that betrays that promise—and thereby reduce or eliminate any political costs for failing to address the substantive question.[156] In doing so, both agencies and Congress can increase the

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152. *See* Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397, 424-33 (2007) (discussing the difficulty that regulatory beneficiaries have in monitoring informal agency action); *cf.* Jonathan R. Macey, *Separated Powers and Positive Political Theory: The Tug of War Over Administrative Agencies*, 80 GEO. L.J. 671, 682-83 (1992) (noting that the requirement that agencies provide explanations for their decisions reduces monitoring costs for the public and thus opportunities for agencies to hide special-interest rewards).

153. *See* D. RODERICK KIEWIET & MATHEW D. MCCUBBINS, THE LOGIC OF DELEGATION: CONGRESSIONAL PARTIES AND THE APPROPRIATIONS PROCESS 13-14 (1991) (discussing the rise of the use of continuing appropriations resolutions in the late twentieth century and the increase in power provided to appropriations committees).

154. *See* Ferejohn, *supra* note 104, at 455 (describing agency administrative processes as less public than legislative processes).

155. As two scholars have put it: "[T]hese internal dynamics play out behind the scenes, invisible to all but a handful of sophisticated academics and Washington insiders. Surely, the 'median voter' would be surprised to discover that a small group of well-positioned legislators have such a powerful and potentially undermining influence on laws passed by earlier majorities." DeShazo & Freeman, *supra* note 144, at 1448; *see also* R. DOUGLAS ARNOLD, THE LOGIC OF CONGRESSIONAL ACTION 102-03, 119-20 (1990) (noting how large appropriations and reconciliation bills can mask political choices); Levine & Forrence, *supra* note 141, at 185 (acknowledging the difficulty citizens have in monitoring the complex administrative process); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV 405, 416 (1989) [hereinafter Sunstein, *Interpreting Statutes*] ("[C]itizens have access to the statutory words and can most readily order their affairs in response to those words."). Appropriations bills are often a mystery to members of Congress not on the appropriations committees, let alone the public at large. *See, e.g.*, CHRISTOPHER H. FOREMAN, JR., SIGNALS FROM THE HILL: CONGRESSIONAL OVERSIGHT AND THE CHALLENGE OF SOCIAL REGULATION 98-102 (1988) (pointing out that appropriations committee reports often contain key language to guide agencies that cannot be easily revised or controlled by Congress as a whole).

156. *See* NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 95-96 (1994) (noting that administrative action is often "less observable and more complex" and therefore "the advantages of concentrated interests are greater and the likelihood of minoritarian influence increases," with environmental issues being a particularly strong example of the risk); Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*,

monitoring costs for the public on the issue and therefore their ability to operate without significant public constraints.[157]

There is often little, if anything, that courts can do to address much of this statutory masking without sharply intruding upon the inherent discretion of the Executive Branch to allocate resources. However, judicial enforcement is possible in the most blatant of cases—where the Legislature makes an explicit promise to the electorate that specific goal X shall be achieved by the government (whether or not at time Y in the future). That kind of specific promise is most likely to deceive the broader public. Most sensible citizens might discount vapid generalities about eliminating crime or pollution as mere puffery. However, a promise to regulate toxic waste discharges to rivers by June 1992 is specific.[158] If car dealers made that kind of promise to customers, they could be liable in court if they did not follow through on it. The same should be true in government. If the Legislature does not like the substantive results when the judiciary enforces those clear duties—perhaps because it places too much of a bite on the regulated community—then it will be forced to at least go on the record, repeal the duty, and make its intentions clear.[159] If the Executive does not

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86 COLUM. L. REV. 223, 232-33 & n.47 (1986) [hereinafter Macey, *Interest Group Model*] ("Interest groups and politicians have incentives to engage in activities that make it more difficult for the public to discover the special interest group nature of legislation. This often is accomplished by the subterfuge of masking special interest legislation with a public interest façade."); SCHLOZMAN & TIERNEY, *supra* note 140, at 311, 314-15, 395-96 (commenting that the key to interest group success is in the implementation of statutes, not just the passage of statutes, and arguing that interest groups are more likely to be successful in influencing low-profile implementation decisions than high-profile decisions, particularly when the goal is to block government action rather than initiate government action); Martin Shapiro, *Dishonest Corporatism: Who Guards the Guardians in an Age of Soft Law and Negotiated Regulation?*, *in* CREATING COMPETITIVE MARKETS: THE POLITICS OF REGULATORY REFORM 319, 327-30 (Marc K. Landy, Martin A. Levin, & Martin Shaprio eds., 2007) (arguing that close cooperation in regulatory policy between government and business may result in hidden arrangements that undermine achievement of the public interest).

157. As Neil Komesar has put it:

> What a politician would never do on the soap box, he or she can afford to do in the more complex, more hidden world of the bureaucracy. A politician may declare an abiding concern for the environment and even support broad (albeit vague) legislation and at the same time block implementation by halting prosecution under the guise of some procedural or jurisdictional rationale or by inhibiting particular prosecutions through pressure on the implementing agency. In turn, more sophisticated, concentrated interests may feel satisfied to know that what they appeared to have lost in the legislature they can recover in the administrative process.

KOMESAR, *supra* note 156, at 96.

158. *See* 33 U.S.C. § 1314(l) (2000); *see also* ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, POLICY (2d ed. 1996).

159. "[W]e would prefer to see a statute repealed, amended, or reauthorized, than to see it systematically undermined out of public view." DeShazo & Freeman, *supra* note 144, at 1504-05 (adding that the result of forcing changes to occur through the legislative process would be to "render the trade-offs transparent to the voters, which would generate greater electoral accountability"); *see also* Keith Werhan, *The Neoclassical Revival in Administrative Law*, 44 ADMIN. L. REV. 567, 619 (1992) (arguing that courts should strictly

have enough funds to implement the duty, and the Legislature will not provide the funds, the responsibility will at least be more clearly assigned to the Legislature and not to the agency (in this case).[160]

There is one final puzzle here. The APA is a statutory creation of Congress, and it is the source of the judicially-enforced duty in § 706(1) that requires agencies to comply with congressional deadlines. However, if Congress may in part want to impose deadlines that it does not want agencies to be able to comply with, why would Congress want courts to enforce § 706(1), and indeed why would Congress have created § 706(1) in the first place? At heart, I believe the answer lies in the words "in part." Certainly there will be times when members of Congress will find it advantageous for agencies not to comply with mandatory deadlines. However, there may also be times when they do not—such as when Congress put in mandatory language because it truly wanted the agency to act. There may also be times when Congress may want the agencies to act but the President does not. In such a case, § 706(1) provides a useful tool of control for Congress in the never ending battle between the Legislature and Executive for control over the bureaucracy. Because members of Congress enacting the APA in 1946 could not have known, a priori, in

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enforce statutes with "public-regarding" purposes, even those broadly worded, in order to counteract public choice failures in the administrative and legislative branches).

Repeal could happen not just through a direct amendment of the underlying substantive law, but also through a congressional repeal of the underlying appropriations authority that directly and specifically targets the substantive program at issue. In such a situation, there will be tension between Congress's clear statements in the substantive law and its clear statements in the appropriations statutes. Perhaps the best solution would be to follow the path taken by the Ninth Circuit—find that a recalcitrant agency is in violation of the law for failure to complete its obligations in a timely manner, but also refuse to impose sanctions against the agency, since after all, its failures are only due to congressional action. *See* Envtl. Def. Ctr. v. Babbitt, 73 F.3d 867 (9th Cir. 1995). This result both highlights the contradictions in congressional action while also respecting the legal status of congressional appropriations decisions.

160. *See* Pierce, *supra* note 61, at 88 (noting the possibility that strict judicial enforcement of deadlines will "increase the pressure on the politically accountable branches to take some . . . actions that can yield an improvement in agencies' performance," whether through structural reform, elimination of deadlines and other substantive requirements, or increases in resources, while lax judicial enforcement of deadlines will result in less pressure); Sargentich, *supra* note 48, at 606 (Agency "problems of being overworked and underfunded should be taken to Congress and the President"); Patricia M. Wald, *Judicial Review in the Time of Cholera*, 49 ADMIN. L. REV. 659, 662-63 (1997) (arguing for strict judicial review because it will require Congress to confront questions of resource allocation: "Why should one branch, the courts, be asked to lower its standards for performing constitutionally assigned tasks while the other, Congress, is allowed to play the prince on stage and the pauper behind the scenes?"); *see also* WILLIAM L. CARY, POLITICS AND THE REGULATORY AGENCIES 57 (1967) (arguing that it is normatively preferable to have decisions made explicitly by Congress in full public view, than in informal and secret ways by agencies that are vulnerable to industry pressure). This conclusion contrasts with commentary that has argued that courts should defer to congressional decisions not to fund agencies because they are declarations that the issue in question is low priority. *See* DeLong, *supra* note 144, at 442.

which circumstances they would truly want a deadline to be enforced and when they would not, they apparently made a choice (consciously or unconsciously) that they would be better off with enforceability as an insurance mechanism against wild variations of future agencies from congressional intent[161]—thus, the existence of § 706(1).

To summarize, a strong reason exists for courts to intervene and enforce "clear duties" against agencies. The "clear duty" doctrine puts at least some limits on the deception that elected representatives in the Legislature, an elected Executive, and unelected agency bureaucrats can attempt to practice on the citizenry.[162] In doing so, it corrects in part (and perhaps only in small part) what could be a serious public choice flaw in government.[163]

C. A Typology of Judicial Review Based on Resource Allocation

Putting the previously developed principles together, it is possible to lay out a typology of how courts should be addressing resource allocation questions. In category one, resource allocation concerns and statutory supremacy are both significant concerns. An example of this type of situation would include judicial review of an agency failure to initiate a regulatory task that has been specifically mandated by Congress. In such situations, statutory supremacy concerns would trump concerns about

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161. *Cf.* Matthew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice Between Agencies and Courts*, 119 HARV. L. REV. 1036, 1054, 1058 (2006) (developing a model that shows that a legislature will prefer judicial implementation of statutes when it has a strong desire to ensure consistent interpretation over time); Matthew C. Stephenson, *"When the Devil Turns . . .": The Political Foundations of Independent Judicial Review*, 32 J. LEGAL STUD. 59 (2003) (arguing that political branches may create an independent judiciary as an insurance mechanism against wild variations in policy outcomes in the future).

162. *See* Sunstein, *Constitutionalism After the New Deal*, *supra* note 48, at 458 n.160, 472-73 (noting the importance of judicial review of agency decisions to ensure implementation of statutory programs); *see also* DeShazo & Freeman, *supra* note 144, at 1504 ("[W]e think it normatively problematic that a small handful of powerful and well-placed legislators can exert pressure on agencies to frustrate statutory directives intended to have general and diffuse effects out of self-interest.").

163. One might respond that the dynamic just described is not a flaw at all, but instead is simply the natural result of individuals with very strong preferences being better able to organize and influence the political process—and that there is nothing necessarily wrong with a democratic system registering not just the preferences of citizens, but their intensity as well. *See* Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 49-58 (1991) (noting that, absent a normative baseline to measure political outcomes, public choice theory does not in and of itself provide a basis for criticizing those outcomes). To the extent that citizens with stronger preferences are able to maintain their political advantage through their use of organizational advantages to manipulate the political process through the passage of symbolic statutes that are subsequently not implemented, I would argue that there is a serious normative concern. *See* Levine & Forrence, *supra* note 141, at 176-77 (defining "special interests" as policies that result only because of differential levels of "information, organization, and transaction and monitoring costs").

resource allocation but judicial review should be limited to the question of whether the agency has complied with its statutory obligations.

In category two, resource allocation concerns clearly outweigh concerns about statutory supremacy. Examples of this category would include situations where an agency has not even initiated consideration of whether to deal with a particular problem, as well as high-volume, informal agency decisions about individual compliance with the law. In such situations, we would exclude judicial review entirely, or allow at most a highly deferential and cursory review.

In category three, resource allocation concerns are minimal and statutory supremacy concerns are high. The most extreme example would be a completed agency rulemaking decision where Congress has laid out stringent standards for the agency's decision. Here, judicial review should not consider the question of resource allocation at all, or at most make it a minimal factor in the review.[164] Agency compliance with its statutory responsibilities would be paramount.

In category four, neither resource allocation concerns nor statutory supremacy concerns are high. An example might be a completed agency action in an area where Congress has given the agency great latitude in its decisionmaking. Here, the level of judicial review will depend in large part on other factors, such as deference to agency expertise.

Of course, there are situations that will fall somewhere in between the extremes of each of these four categories. For instance, an agency's abandonment of a partially completed rulemaking proceeding implicates moderate levels of concern over agency resource allocation, but also some level of concern about the impact of the agency's decision on statutory supremacy. A middle level of judicial review might be desirable in that context. The following chart lays out on a two-axis scale how various decisions might rank. The top regions implicate high levels of resource allocation concern, and therefore greater deference to the agency; areas to the left implicate high levels of statutory supremacy concerns, and therefore, less deference to the agency.[165] Of course, as noted earlier, this typology only considers two of the many possible factors that the courts will consider in reviewing agency decisionmaking.

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164. The difference between judicial review of an agency refusal to initiate proceedings and judicial review of completed proceedings can be shown by comparing *Heckler v. Chaney*, 470 U.S. 821, 837-38 (1985) (denying judicial review of agency decision not to initiate enforcement), with *FTC v. Klesner*, 280 U.S. 19, 30 (1929) (reviewing agency decision to initiate administrative proceedings and concluding agency had improperly filed complaint).

165. *See also infra* Table 1, which provides a rough overview of the rank order of judicial review of agency decisions based on deference due to resource allocation concerns.

FIGURE 1
Typology Chart for Judicial Review of Agency Decisionmaking and Resource Allocation

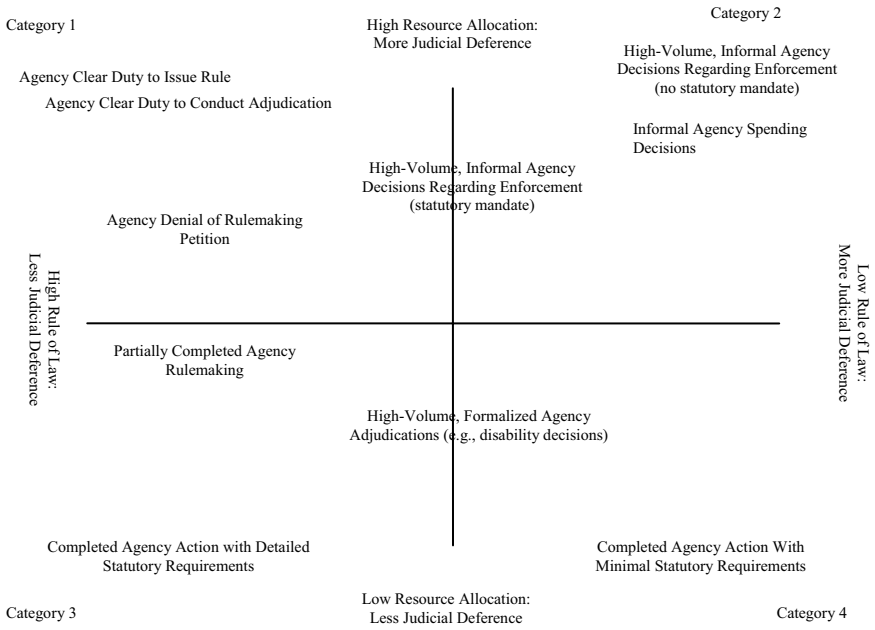
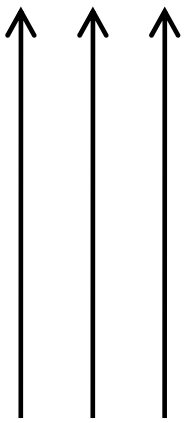


TABLE 1
Judicial Review of Agency Decisionmaking and Deference by Courts to Agencies Based on Resource Allocation

Higher Level of Deference  Lower Level of Deference	High-Volume Informal Agency Decisions Regarding Individual Enforcement Decisions with No Statutory Mandate (*Heckler v. Cheney*)
	Informal Agency Spending Decisions
	Agency Denial of Rulemaking Petition
	Partially Completed Agency Rulemaking
	Completed Agency Action with Minimal Statutory Requirements
	Agency Clear Duty to Conduct Adjudication
	Agency Clear Duty to Issue Regulation
	Completed Agency Regulation or Adjudication with Detailed Statutory Requirements

As previously demonstrated, this typology in fact aligns closely with how the courts generally review agency decisionmaking, whether it is action or inaction.[166] The principle of judicial deference to resource allocation therefore has great descriptive power in explaining the level of judicial review across much of administrative law—and it also explains one of the fundamental reviewability doctrines in administrative law. Moreover, the principle has normative power as a bulwark against public choice failures in the political process, while at the same time ensuring proper deference to the crucial administrative task of allocating resources in an enormous federal bureaucracy.

III. IMPLICATIONS

I have now laid out the affirmative case for why the concept of resource allocation is essential to administrative law. Equally important, I have laid out how and why resource allocation does not usually interfere with judicial review of most types of agency decisionmaking, but instead, at most calls for deference by the courts. Agency inaction is not a form of agency decisionmaking that is fundamentally different from agency action and is somehow unreviewable by courts. Like agency action, judicial review of agency inaction is a result in part of the trade-off courts make between deferring to agency resource allocation and upholding congressional commands, or as Professor Bressman puts it, ensuring that agencies do not act arbitrarily.

My analysis provides strong support for the Court's reasoning and analysis in *Massachusetts v. EPA*. At least one recent commentator has argued that the Court's decision to make the EPA's refusal to issue greenhouse gas regulations reviewable was wrong because "[d]ecisions to initiate a prosecution or a rulemaking—or not to start them—generally are not reviewed by courts."[167] However, as shown above, courts have reviewed agency decisions not to issue rules, and should be reviewing such decisions. Far from being a novel extension of administrative law theory, the Court's decision was both descriptively and normatively well-grounded.

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166. *See also* Biber, *supra* note 8, at 10-14 (describing levels of deference in the context of judicial review of agency action and inaction).

167. Ronald A. Cass, Massachusetts v. EPA*: The Inconvenient Truth About Precedent*, 93 VA. L. REV. IN BRIEF 73, 78, May 21, 2007, *available at* http://virginialawreview.org/inbrief/2007/05/21/cass.pdf.

A. Responding to the Individual Rights Approach

However, I have not yet rebutted the argument that courts should be intervening only in the administrative process to protect individual rights, and that accordingly, courts should not be in the business of forcing agencies to act, which would only result in increased regulation and a reduction in individual rights. As previously noted, this argument based on negative liberty is not only present in the academic literature, but it is also a theme in the Court's decision in *Heckler* and more broadly in its standing jurisprudence.

The problem with the individual rights argument is that—even assuming that the primary purpose of judicial review should be to protect individual rights—it says nothing about why courts should or should not be reviewing agency inaction. The individual rights argument implicitly assumes that agency action will tend towards interference with personal liberty. However, this is not necessarily true. After all, in an era of deregulation, for instance, an agency's decision to repeal a regulation is an agency action that would clearly be subject to judicial review, yet it would (arguably) create more personal liberty. For instance, an agency might decide to repeal a regulation requiring car manufacturers to provide passive restraints, such as airbags or automatic seatbelts, in the automobiles they produce. Such a decision would clearly increase—at least in a narrow sense—the individual liberty of the car manufacturers, but it is hardly an agency decision not to act. Instead, it is very clearly an agency decision to act, and the Supreme Court has treated it as such.[168] Similarly, an agency might decide to grant an exemption for an industry from a licensing or rule requirement—that decision would be an agency act, but again, it would increase liberty for that particular industry. Reciprocally, refusal to act on a waiver petition would reduce liberty for that particular industry. Indeed, there is a dramatic historic example of agency action leading to deregulation—the efforts by the Civil Aeronautics Board to deregulate the airline industry, which were so successful that they essentially forced Congress to codify that deregulation through statutory changes.[169]

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168. An agency's decision to repeal a regulation is not treated deferentially like an agency's decision not to regulate, but instead under the same standard as an agency's decision to issue a regulation and regulate. *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 40-42 (1983).

169. *See* Bradley Behrman, *Civil Aeronautics Board*, *in* THE POLITICS OF REGULATION 75 (James Q. Wilson ed., 1980). As an example of agency inaction leading to regulation, there is evidence that after his 1980 election win, President Reagan had the Interstate Commerce Commission delay or refuse to issue new trucking licenses as a political reward to the Teamsters Union, partially undoing deregulatory efforts by the ICC before

One could avoid this dilemma by changing the dichotomy from agency action versus inaction to agency decisions that infringe on individual liberty and agency decisions that do not.[170] But such a dichotomy is plainly unworkable.[171] While it may be difficult to distinguish between agency action and inaction, as discussed above, it would be almost impossible to distinguish between agency decisions that infringe on liberty and those that do not.[172] For instance, does an agency's decision to grant an exemption from a licensing requirement to a particular corporation increase liberty? Perhaps, but it also increases the burden on the corporation's competitors who are still subject to the licensing requirement, and in that sense, surely decreases their own individual liberty by effectively restricting their ability to compete, conduct their business, and make a profit.[173] Or how about an agency's decision to grant a license to a business seeking to enter a regulated industry? On the one hand, the agency's decision increases liberty, since it removes an absolute barrier on the business. On the other hand, the agency's decision limits liberty because the license will carry conditions and require the business to obey the agency's various regulations.[174]

Finally, in our federal system of government, there is yet another flaw with any attempt to connect an action/inaction distinction with a negative-liberty/positive-liberty dichotomy. Just because the federal government

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1980. *See* B. DAN WOOD & RICHARD W. WATERMAN, BUREAUCRATIC DYNAMICS: THE ROLE OF BUREAUCRACY IN A DEMOCRACY 35-37 (1994).

170. *See Active Judges and Passive Restraints*, REGULATION, July-Aug. 1982, at 10.

171. It is also a distinction that the Supreme Court has already rejected. In the pre-APA judicial review case law, a distinction between an agency decision to regulate and not to regulate was developed for a while under the Supreme Court's "negative order" doctrine, with an agency decision not to regulate constituting an unreviewable "negative order." Only an agency decision requiring a private party to act in some way constituted a reviewable order. *See* Rochester Tel. Corp. v. United States, 307 U.S. 125, 126-29 (1939) (describing the doctrine). The Supreme Court explicitly rejected this distinction and concluded that any agency action that finally determines legal rights or obligations was reviewable. *Id.* at 140-43 (rejecting the doctrine).

172. *See* Sunstein, *Reviewing Agency Inaction*, *supra* note 54, at 666 n.85 (stating that "the very concepts of 'inaction' and 'action' are coherent only if one has a background understanding of the normal or desirable functions of government").

173. Indeed, it is precisely this situation that has led the Court to recognize competitor standing and allow businesses to challenge the grants of licenses or license exemptions to competitors. *See, e.g.*, Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150 (1970).

174. For an example of the difficulties of determining whether an agency's action is coercive and restrictive, see *Transp. Intelligence, Inc. v. FCC*, 336 F.3d 1058, 1062-64 (D.C. Cir. 2003), and *Crowley Caribbean Transp., Inc. v. Peña*, 37 F.3d 671, 674-75 (D.C. Cir. 1994)—case law regarding whether agency waivers of licensing requirements is reviewable. There are numerous examples of judicial review of agency actions that prompted (sometimes enormous) expansion of regulatory programs. *See, e.g.*, R. SHEP MELNICK, REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT 71-192 (1983) (describing judicial review of EPA decisions regarding air pollution that resulted in dramatic expansion of regulatory powers under the Clean Air Act).

chooses to regulate or not deregulate does not by any means ensure that there is no regulation at all. States may instead choose to fill the vacuum of a lack of federal regulation. Indeed, a federal agency's decision not to regulate may result in less "negative liberty" than a decision to regulate—take, for instance, the example of a federal agency issuing regulations that have the effect of preempting state regulation that is stricter.

In short, the dichotomy between negative liberty and positive liberty—whether it is correct, and whether it has a proper role in our constitutional system—is not one that can justify a difference in judicial review between agency action and agency inaction. In our present-day administrative state, where regulations have been woven into the fabric of most every element of our economy, the claim that an agency's decision not to act inherently preserves negative liberty is simply incorrect.

Even assuming these objections can be overcome, there is a more fundamental problem with this rationale for limited judicial review of agency inaction. It assumes a particular vision of the role of government—a vision that has been sharply contested throughout the history of the Republic. It is a libertarian vision that is inherently skeptical of governmental power, and while this vision has deep roots in our political system, the contrary vision of a strong central government that provides for the commonweal has equally deep roots.[175] This libertarian vision has been sharply criticized for providing an overly narrow vision of liberty—after all, what about the liberty of individuals to be free to breathe clean air? Why should that be valued any less than the liberty of a corporation to conduct its business without governmental regulation?[176]

Indeed, the APA legislative history provides no indication that its drafters were concerned about courts forcing agencies to exercise their coercive authority.[177] Nor is this a concern in the pre-APA mandamus case

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175. *See, e.g.*, David P. Currie, *The Constitution in Congress: The Public Lands, 1829-1861*, 70 U. CHI. L. REV. 783 (2003) (describing the conflict in the pre-Civil War arena over the proper constitutional role of the federal government in supporting internal improvements and economic development).

176. *See, e.g.*, Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 186-87, 219-20 (1992); Cass R. Sunstein, *Reviewing Agency Inaction*, *supra* note 54, at 666-68 (comparing the *Heckler* rationale that courts should not attempt to impose regulation on private parties to the Lochner-era of judicial review); *see also* Bressman, *Judicial Review of Agency Inaction*, *supra* note 49, at 1695-96 (agreeing with Sunstein).

177. There is plenty of concern in that legislative history about the expansion of administrative agencies exercising their coercive authority, and that concern was the basis for the procedural reforms implemented in the APA. *See* S. REP. NO. 79-752, at 193-94 (1945) (discussing procedural requirements imposed by the APA); H.R. REP. NO. 79-1980, at 242-44 (1946) (discussing the need for standardized procedural requirements given the great expansion of the administrative state); *see also* Walter Gellhorn, *The Administrative Procedure Act: The Beginnings*, 72 VA. L. REV. 219, 232 (1986) (describing how the APA was inspired by anti-New Deal reaction to growth of regulatory agencies); George

law.[178] Instead, the legislative history and the pre-APA case law limits itself to broad discussions about deferring to agency "discretion."

Finally, the individual rights approach fails to incorporate the lessons of public choice theory. In his article, Scalia celebrated the fact that "important legislative purposes, heralded in the halls of Congress, [can be] lost or misdirected in the vast hallways of the federal bureaucracy."[179] For Scalia, judicial enforcement of programs that benefit the majority pose the risk of courts overstepping their bounds, imposing their political prejudices.[180] Scalia justifies his conclusion by arguing that "[t]here is surely no reason to believe that an alleged governmental default of such general impact" would harm most (if not all) of the population who "would not receive fair consideration in the normal political process."[181] Public choice theory teaches the exact opposite—it is precisely those types of defaults that might be most likely not to receive fair consideration in the normal political process, assuming an asymmetry between the distribution

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B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1559, 1678 (1996) (chronicling how the APA began as an effort by conservatives to kill the New Deal and, as a result of compromise, became a more moderate check on agency powers). This is not to deny that elements of the conservative coalition that initiated the reform efforts that eventually led to the APA sought to use increased procedural restrictions and judicial review of agency decisionmaking to obstruct regulatory action. *See* Shepherd, *supra*, at 1600, 1606, 1680. However, given the compromising nature of the APA as passed by Congress, one can hardly interpret the act as intended to stymie all agency regulation. *See id.* at 1649-83; *see also* Stewart & Sunstein, *supra* note 66, at 1248 (noting compromise nature of APA). Moreover, increasing procedural requirements and judicial review in order to reduce regulatory power over individual rights is an entirely different matter from whether courts should prod agencies into taking steps to regulate—steps that would have to comply with the APA's procedural reforms in any case. Indeed, a number of conservatives who pushed for strict procedural requirements and judicial review of agency action also advocated for a petition system by which parties could seek agency action, with judicial review of such denials. *See* Shepherd, *supra*, at 1665. Presumably, the rationale was that conservatives wanted the ability to petition agencies to either repeal rules or grant licenses or waivers—i.e., agency action for deregulatory purposes.

178. Scholars have argued that until the 1960s and 1970s, courts were generally unwilling to hear the claims of regulatory beneficiaries seeking to challenge agency decisionmaking, using doctrines such as standing to deny any review. *See, e.g.*, Stewart & Sunstein, *supra* note 66; Stewart, *supra* note 115. Even if true, however, these arguments do not address the question of whether courts would consider claims concerning agency inaction. As noted above, agency inaction can involve questions that harm regulatory subjects as well as regulatory beneficiaries.

179. Scalia, *Doctrine of Standing*, *supra* note 43, at 897.

180. *Id.* at 895-96 (arguing that the doctrine of standing is essential to restricting the courts' role to protecting minority rights).

181. *Id.* at 896; *see also* Melnick, *Political Roots*, *supra* note 131, at 596-97 (arguing against standing for environmental groups because they "have clout in Washington. We should encourage them to spend less time in court and more time lobbying the House Appropriations Committee.").

of costs and benefits.[182] Thus, the individual rights approach as a rationale for not allowing courts to enforce at least egregious breaches of governmental duties is fatally flawed.[183]

B. Broader Implications for the Administrative Law Literature

This same flaw infects a strand of academic commentary that calls for sweeping judicial review of regulatory legislation and action in order to cutback or eliminate the regulatory state.[184] This literature, ironically based on public choice theory, argues that stringent judicial review of regulatory legislation would prevent rent-seeking by concentrated interests and restrict the inherent propensity of the regulatory state to harm the public interest.[185] The doctrinal tools usually relied on are sweeping interpretations and strict enforcement of constitutional provisions such as the Takings Clause, the Commerce Clause, and the Contracts Clause.[186] While these scholars

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182. These concerns were familiar to the Founding Fathers, albeit not under the "public choice" label. *See* Bressman, *Beyond Accountability*, *supra* note 82, at 498.

183. *See* Sargentich, *supra* note 48, at 616 (also raising this critique of the individual rights approach). As a result, broad and sweeping exceptions to judicial review of agency inaction, for example, will result in asymmetries where the regulated community's narrow interests will be overrepresented in the political and judicial process, while the broader interests of the public will be underrepresented. Bressman, *Judicial Review of Agency Inaction*, *supra* note 49, at 1692-93.

184. *See generally* BERNARD H. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION 3 (Univ. of Chicago Press 1980) (analyzing the history of judicial review); James D. Gwartney & Richard E. Wagner, *Public Choice and the Conduct of Representative Government*, *in* PUBLIC CHOICE AND CONSTITUTIONAL ECONOMICS 3, 4 (James D. Gwartney & Richard E. Wagner eds., 1988) (discussing the importance of constitutional controls over legislative actions).

185. *See* MANUEL F. COHEN & GEORGE J. STIGLER, CAN REGULATORY AGENCIES PROTECT CONSUMERS? 14-16, 47-50, 83-84 (Am. Enterprise Inst. for Pub. Policy Research ed., 1971) (laying out the debate on regulation as a means to promote competition); RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 165, 263-65 (Harvard Univ. Press 1985) (discussing judicial review of land use regulation); SIEGAN, *supra* note 185, at 22, 120-21, 143, 188-89, 191-93, 269, 277-86 (explaining how historically, the legislature favored special interests rather than the public interest); Peter H. Aranson, *Procedural and Substantive Constitutional Protection of Economic Liberties*, *in* PUBLIC CHOICE AND CONSTITUTIONAL ECONOMICS 285, 290-91; Gwartney & Wagner, *supra* note 184, at 22-23.

186. *See* EPSTEIN, *supra* note 185, at 19-20, 30-31, 214-15, 263-65, 277-82, 299-300 (discussing the Takings clause); SIEGAN, *supra* note 184, at 7, 316-21 (explaining the use of constitutional clauses to protect property rights); Aranson, *supra* note 185, at 301-11 (contending that over the last two centuries, constitutional protections for property rights under the takings clauses, the contracts clause, and the commerce clause have been eroded by Supreme Court decisions); Richard A. Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. CHI. L. REV. 703 (1984) (discussing the Supreme Court's interpretation of the Contract Clause); Gwartney & Wagner, *Public Choice and the Conduct of Representative Government*, *supra* note 184, at 23-25 (describing Congress's tax and spending power); Richard E. Wagner & James D. Gwartney, *Public Choice & Constitutional Order*, *in* PUBLIC CHOICE AND CONSTITUTIONAL ECONOMICS, *supra* note 184, at 29, 37-40, 77-80, 82-83 (discussing the constitutional provisions that provide protection from takings and the freedom to contract); *see also* Croley, *Theories of Regulation*, *supra* note 141, at 40-41 (categorizing this group of scholars as "public choice" theorists, and stating that "for the

correctly note the importance of public choice theory, their solution is 180 degrees wrong. To the extent we are concerned about concentrated interests, in many cases, the concerns are about concentrated interests preventing government action that will benefit the public as a whole.[187] As discussed above, concentrated interests may use the public promise of government action—and the low-profile failure to fulfill that promise—to undercut the broader public monitoring and mobilization efforts by the broader public to force public interested government action. Judicial review to force agency action in the face of explicit congressional promises of action in fact prevents the worst sorts of this type of activity. In other words, the public choice analysis properly understood leads to calls for courts to intervene to force regulatory action, not to prevent it—at least where the political branches have made explicit public promises to undertake such action.[188]

Indeed, this Article's conclusions are similar to scholars who, while recognizing the concerns raised by public choice theory for the regulatory state, have not called for aggressive judicial action to uproot the administrative state, but instead have argued that limited judicial action can result in improved legislative and administrative regulatory action. For instance, Professor Jonathan Macey has called for courts, when presented with regulatory statutes that purport to advance the public interest but are in fact truly special interest bargains, to take the statutes at face value and interpret them in a way to advance the public interest.[189] In doing so, the argument runs, the courts will make it more costly for special interest groups to pursue narrowly focused legislation at the expense of the public

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public choice theory regulatory reform means not reform of the regime, but its abandonment"); Elhauge, *supra* note 163, at 44 (noting same); Kahn, *supra* note 151, at 280, 283-87; Macey, *Interest Group Model*, *supra* note 156, at 226 (identifying this thread of argument in the scholarly literature); Jerry L. Mashaw, *Constitutional Deregulation: Notes Towards a Public, Public Law*, 54 TUL. L. REV. 849 (1980) (arguing for a weaker version of judicial review to prevent special interest regulation). In reaching these conclusions, these scholars often equate all groups that attempt to mobilize and lobby the government—whether they purport to represent industry, consumers, or environmental interests—as "special interests" that are seeking "rents" and therefore are normatively undesirable. *See* Mashaw, *Economics of Politics*, *supra* note 141, at 132-33.

187. *See* Elhauge, *supra* note 163, at 43 n.54 (stressing the problems generated by the influence of well-organized interest groups).

188. *See also* Kahn, *supra* note 151, at 287, 292-95 (arguing that "schemes designed to obstruct the power of government to adopt regulation . . . risk serious error" because such "[b]arriers to government action would bias the political process" against regulation, a threat that is particularly dangerous since the system may already be biased against regulatory action, and further noting that the public choice literature has ignored this possibility); *id*. at 308-09 (noting that regulation that provides broad benefits to the public at the expense of regulation of a number of different industries is unlikely to be the result of special-interest lobbying).

189. *See* Macey, *Interest Group Model*, *supra* note 156.

interest—either special interest groups will be required to be open about their efforts to extract rents (and run the risk of political backlash) or they can seek to conceal their efforts (and run the risk of having courts construe the statute in a very different way).[190]

Like Macey's proposal, and other similar efforts to develop statutory interpretation principles that restrict rent-seeking,[191] strong judicial enforcement of explicit congressional deadlines would not require courts to strike down statutes, reorder the regulatory state, or otherwise interfere with the political process in a manner that raises serious concerns about democratic legitimacy.[192] Instead, by simply interpreting and applying the statutory language of Congress, strict enforcement of deadlines means that courts are upholding the commands of the most politically accountable branch of government—the Legislature.

In contrast to Macey's proposal and other similar proposals, however, strict enforcement of congressional commands does not require courts to undertake contestable and uncertain analyses of what is a "public interested" statute or to determine what the purpose of a "public interested" statute is.[193] Instead, courts simply must determine whether Congress has clearly imposed a duty on an agency to take an action. If so, the courts should (generally speaking) enforce that duty. In doing so, the salutary results laid out above will necessarily follow—efforts by special interests, Congress, and the agencies to obfuscate exactly what steps the government is taking to address problems that have diffuse costs will be undermined, and public choice failures will necessarily be reduced, even if only marginally.[194]

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190. *Id*. at 250-55 (explaining judicial statutory interpretation).

191. *See, e.g*., William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 291 (1988) (advocating the development of constitutional rules to reduce rent-seeking); Sunstein, *Interpreting Statutes*, *supra* note 155, at 478 (discussing judicial interpretation of regulatory statutes); Easterbrook, *supra* note 66.

192. *See* Macey, *Interest Group Model*, *supra* note 156, at 241-42 (noting that extensive judicial review of legislation for rent-seeking would require drastic revision of regulations and intrusive judicial review).

193. *See id*. at 254 (recommending that courts should interpret statutes "so as to serve the public" but never specifying the terms of what it means for a statute to "serve the public"); *see also* Elhauge, *supra* note 163, at 48-59 (noting that claims that courts should rule in order to advance the "public interest" and to prevent public choice failures in administrative law necessarily depend on often unarticulated normative determinations about what the "public interest" is); *id*. at 45, 59-66 (noting problems with Macey's, Sunstein's, and Eskridge's theories on these grounds); Jonathan R. Macey, *Transaction Costs and the Normative Elements of the Public Choice Model: An Application to Constitutional Theory*, 74 VA. L. REV. 471, 472-73 (1988) (asserting the difficulty of distinguishing between government activities involving rent-seeking and activities "that represent wealth-increasing 'public interest'"); Mashaw, *Economics of Politics*, *supra* note 141, at 155 (noting the difficulty of reaching such conclusions).

194. Thus, courts will not be called upon to make difficult decisions about whether the political decisions made by the agency are appropriate or inappropriate. *Cf.* CHRISTOPHER

C. Implications for Other Doctrines in Administrative Law

The implications of the resource allocation principle go far beyond the academic literature. The success of the resource allocation principle in explaining judicial review under both § 706(1) and § 706(2) of the APA shows promise for helping us understand other areas of administrative law. In particular, the principle might be useful in explaining a range of administrative law doctrines that potentially implicate separation of powers concerns—concerns that include resource allocation and prioritization. For instance, judicial deference to agency resource allocation might shed light on doctrines such as standing for plaintiffs to sue,[195] the question of whether a plaintiff is challenging a particular agency "action" such that review under the APA is available,[196] and the question of whether an agency decision is "final" and "ripe" such that judicial review is available.[197] These are all doctrines where the analysis by the courts has tended to be remarkably fluid, even confused.

To the extent that the Supreme Court has articulated a foundational principle for standing (and to a lesser extent, other doctrines such as ripeness), it has been a vision of judicial review as intended to protect individual rights.[198] According to some of the more prominent statements by the Court, that vision, if properly followed, would call for a narrow, formalistic interpretation and application of current standing doctrine, which would prevent parties such as regulatory beneficiaries

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F. EDLEY, JR., ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY 199-203 (1990) (calling on agencies to be explicit about political judgments and courts to review those political judgments for their appropriateness). By focusing judicial review on the situations where a public choice failure might be most likely to occur, courts may nonetheless be able to at least correct some of the worst political abuses. *Id.* at 174-75, 180-81, 184 (criticizing courts for ignoring the clear implications of politics for agency decisionmaking).

195. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (requiring that, to have standing, the plaintiff must show a "concrete and particularized, and []actual or imminent . . . invasion of a legally protected interest").

196. *See* Norton v. S. Utah Wilderness Alliance (*SUWA*), 542 U.S. 55, 61 (2004) (enunciating the APA requirement that the plaintiff suing be "'[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute"' (quoting 5 U.S.C. § 702 (2000))); Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 882-83 (1990) (requiring first, that the plaintiff identify the agency action that affects him and second, that the plaintiff show that he has "suffered legal wrong" because of the agency action).

197. *See* Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726, 732 (1998) (discussing ripeness); Bennett v. Spear, 520 U.S. 154, 178 (1997) (ruling that the lower court erred for dismissing a claim on the basis of finality).

198. *See Lujan*, 504 U.S. at 555.

from being able to sue in court.[199] If, in the context of judicial review of agency decisions not to act, the "individual rights" principle is not coherent or normatively desirable, and the resource allocation principle is a superior basis for understanding when judicial review should proceed, then very different conclusions about the basis, scope, and future direction of standing jurisprudence would have to be drawn. The resource allocation principle would have courts step in where agencies are flouting the will of Congress, but otherwise defer to agency decisions about resource allocation, regardless of whether there are particular individual rights that are being infringed upon. In other words, the resource allocation principle might shape standing and other doctrines in a very different way while still potentially responding to the important separation of powers concerns that are at the heart of what it means to have an Article III court judicially review the actions of the Article II Executive.

Finally, resource allocation may also be a promising tool to understand the proper scope of the Supreme Court's *Chevron* doctrine, under which courts defer to administrative agency interpretation of ambiguous statutes.[200] The Court in *Chevron* justified such deference on the basis of agency expertise and democratic accountability.[201] The two steps of *Chevron* bear striking similarities to the trade-off developed here between statutory supremacy and resource allocation; where the congressional statement is clear, it should trump the agency's discretion, but where Congress has not made a clear statement, deference to the agency is appropriate.[202] Indeed, if resource allocation is truly fundamental to the ability of the Executive Branch to develop and implement policy (as I have argued above), then the proper basis for *Chevron* deference may be resource allocation concerns, not expertise or accountability.

CONCLUSION

As noted above, the resource allocation principle is certainly not the only factor in administrative law; factors such as agency expertise, democratic accountability, the procedures followed by the agency, congressional language, and certainly the stakes at issue in the agency's

199. *See id.* at 559-67, 571-78 (majority opinion).
200. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865-66 (1984).
201. *Id.*
202. *Id.* at 842-43.

decision will all matter for the standards of judicial review. In situations where neither resource allocation nor statutory supremacy are primary concerns, for example, these other factors will often be outcome determinative.

Nonetheless, in a wide range of administrative law, the proper balance between deferring to agency resource allocation and upholding congressional mandates is a vital factor in judicial review of agency decisionmaking—particularly in areas where there are questions of whether agency decisions are even reviewable by the courts. And striking that balance will be particularly important in the context of judicial review of agency inaction.

Judicial review of agency inaction will only increase in importance in the future, as two recent cases in the Supreme Court make clear. In both *Norton v. SUWA* and *Massachusetts v. EPA*, the Supreme Court confronted questions about whether and how it should force agencies to take actions to address rising environmental concerns—increasing damage to the public lands from the use of recreational off-road vehicles, and greenhouse gas emissions from automobiles, respectively.[203] In both cases, the Court had to grapple with difficult questions about the proper role that the courts should play in prodding the Executive Branch to take action—questions that are at heart of the Executive Branch's prerogative to allocate its resources.[204]

The stakes in this type of litigation can also be high—as high as any of the stakes in the more "traditional" field of judicial review of agency action. The media coverage of the Court's decision in *Massachusetts v. EPA* and the potential political fallout of that decision for the national discussion about the proper policy response to the threat of global warming, are evidence of those stakes. The potential consequences of EPA regulation of motor vehicle emissions of greenhouse gasses—or of a broader statutory scheme that the decision might prompt Congress to act—are sweeping, both in terms of the environmental implications and the implications for the national economy.[205]

These cases are not likely to be an aberration. Federal regulatory agencies will continue to apply, implement, and develop their regulatory programs under the sweeping regulatory statutes passed by Congress in the 1960s and 1970s. Accordingly, the responsibility for agenda-setting will continue to lie (perhaps increasingly so) with these agencies. The framework I have developed above would tell us that courts do have a role

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203. *See* Norton v. S. Utah Wilderness Alliance (*SUWA*), 542 U.S. 55, 57-58 (2004); Massachusetts v. EPA, 127 S. Ct. 1438, 1446-47 (2007).
204. *See SUWA*, 542 U.S. at 71-72.
205. *See* Freeman & Vermeule, *supra* note 2 (manuscript at 2, 29).

to play in this agenda-setting process—through a deferential, but nonetheless important, review process to ensure fidelity to congressional mandates and non-arbitrary decisionmaking.

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ON PRESIDENTS, AGENCIES, AND THE STEM CELLS BETWEEN THEM: A LEGAL ANALYSIS OF PRESIDENT BUSH'S AND THE FEDERAL GOVERNMENT'S POLICY ON THE FUNDING OF RESEARCH INVOLVING HUMAN EMBRYONIC STEM CELLS

YANIV HELED*

ABSTRACT

On August 9, 2001, President George W. Bush announced his policy on research involving human embryonic stem cells and proclaimed that federal funding would be allocated only to research involving human embryonic stem cell lines produced prior to his announcement (the Directive). Immediately thereafter, the National Institutes of Health (NIH) announced that it would act in accordance and full compliance with the Directive and took action to implement it. Since then, the Directive has dictated the nature and extent of scientific research involving human embryonic stem cells. Yet, astonishingly, despite being the subject of a boisterous debate, the Directive's legality as well as the legality of the NIH's actions have never been questioned nor ascertained. This Article seeks to fill this gap.

After analyzing the Directive and the NIH's ensuing actions in light of the NIH Revitalization Act of 1993 and the Administrative Procedure Act, this Article argues that the Directive and the NIH's actions taken to

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implement it were illegal. Based on this conclusion, the Article discusses the possible legal challenges that may be raised with respect to the Directive and the NIH's actions.

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INTRODUCTION

On August 9, 2001 at about 8:00 p.m., surrounded by families of children conceived from embryo donations and by members of Congress, President George W. Bush addressed the nation from his ranch in Crawford, Texas and announced his new policy on federal funding for research involving human embryonic stem cells (hESCs).[1] President Bush started by describing the deep religious and ethical sentiments that brought him to make this policy decision[2] and ultimately proclaimed that federal funding would be allocated only to research involving hESC lines produced prior to his Address.[3] Immediately following President Bush's Address, the Acting Director of the National Institutes of Health (NIH), Dr. Ruth Kirschstein, and the Secretary of Health and Human Services (HHS), Tommy G. Thompson, both released statements announcing that they would act in accordance and in full compliance with the Directive.[4] And so, President Bush's Directive became "the law of the land" and stands unwavering at the crux of the Federal Government's policy regarding the funding for research involving hESCs.

The Directive and subsequent policies adopted by the Bush Administration have been the topic of a multitude of articles dealing with their ramifications. The Directive has inspired an abundance of state legislation either embracing the decision or rejecting and undermining it.[5] The Bush Administration's policies even became one of the focal points of Senator John Kerry's presidential election campaign in 2004 and of the

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1. President George W. Bush, Address to the Nation on Stem Cell Research, 2 PUB. PAPERS 953 (Aug. 9, 2001) [hereinafter President Bush's Address]. I will subsequently refer to this speech as President Bush's Address, President Bush's Stem Cell Decision, or President Bush's Directive.

2. *Id.* at 955 ("My position on these issues is shaped by deeply held beliefs. I'm a strong supporter of science and technology . . . . I also believe human life is a sacred gift from our Creator.").

3. *See id.* ("I have concluded that we should allow Federal funds to be used for research on these existing stem cell lines, where the life and death decision has already been made.").

4. *See* Press Release, Ruth Kirschstein, Acting Director of the National Institutes of Health, NIH Statement on the President's Stem Cell Address (Aug. 9, 2001), *available at* http://www.nih.gov/news/pr/aug2001/od-09.htm [hereinafter Kirschstein Statement] (describing President Bush's Decision as "sound" and expressing "understand[ing of] the President's clear desire to move forward with care"); Press Release, Tommy G. Thompson, Secretary, Dep't of Health and Human Servs., Regarding the President's Decision on Human Embryonic Stem Cell Research (Aug. 9, 2001), *available at* http://www.hhs.gov/news/press/2001pres/20010809.html [hereinafter Thompson Statement] (praising the President's decision as a courageous one that shows leadership and stating that he would be proud to carry it out).

5. *See generally* Lauren Thuy Nguyen, *The Fate of Stem Cell Research and a Proposal for Future Legislative Regulation*, 46 SANTA CLARA L. REV. 419, 433-37 (2006) (detailing efforts in some states such as California and New Jersey to protect and endorse stem cell research funding).

Democratic Party's platform in the recent congressional elections.[6] Yet, with all that has been written and said about President Bush's Directive and the policies implementing it, the focus was always on the economical, ethical, scientific, and social implications and justifications; quite astonishingly, their legality seems to have never been questioned or analyzed.[7] This Article seeks to fill this void by answering the question whether President Bush's Directive and the Administration's policy on funding for research involving hESCs is legal.

Part I of this Article provides the scientific background necessary for understanding President Bush's Directive and surveys the regulatory history of research involving embryos and hESCs in the United States. Part II then examines and evaluates the validity of President Bush's Directive and of the ensuing actions taken by the NIH, arguing that they were illegal and not legally sustainable. Part III then discusses the possible legal challenges that may be raised with respect to the Directive and the NIH's actions. This Article concludes with predictions about the future of the regulation of research involving hESCs.

I. HUMAN EMBRYONIC STEM CELLS–SCIENTIFIC AND REGULATORY BACKGROUND

A. Human Embryonic Stem Cells and Their Uses in Medicine and Science

Prior to delving into the legal discussion, it may be helpful to review what embryonic stem cells are, their scientific purpose and medical potential, and why they incite such a bitter ethical debate.

Stem cells in general (rather than embryonic stem cells) are living cells that are unspecialized; namely, they have not (yet) undergone a process called "differentiation," which turns them into cells that fulfill a specific

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6. *See, e.g.*, Charlie Savage, *Stem Cell Issue Opens Campaign Divide*, BOSTON GLOBE, Aug. 8, 2004, at A1; Dan Vergano, *Stem-Cell Debate Another Division Between Bush, Kerry*, USA TODAY, Oct. 26, 2004, *available at* http://www.usatoday.com/news/politicselections/nation/issues/2004-10-26-stem-cell-research_x.htm.

7. A number of articles have dealt with the issue of the legality of President Bush's Directive indirectly by analyzing it alongside similar administrative and presidential actions. *See, e.g.*, Tara L. Branum, *President or King? The Use and Abuse of Executive Orders in Modern-Day America*, 28 J. LEGIS. 1, 45-47 (2002) (classifying President Bush's Directive as improper because it did not leave the issue for Congress to decide); Christopher S. Yoo, Steven G. Calabresi & Anthony J. Colangelo, *The Unitary Executive in the Modern Era, 1945-2004*, 90 IOWA L. REV. 601, 725-26 (2005) (praising President Bush's Directive for what the authors view as being exemplary of his leadership and strong principled pro-life stance). However, President Bush's Directive itself was never the focus of an in-depth legal analysis as it is in this Article.

function within the body (e.g., red blood cells, heart-muscle cells).[8] Under certain conditions, they may undergo differentiation into specialized cell types that are able to fulfill specific bodily functions.[9] Finally, unlike most of the other cells in our body, stem cells may continue to divide (proliferate) over extended periods of time without "committing" themselves to a certain specialized cell type or function—they may remain in a "stem cell state."[10]

Because of these characteristics, stem cells are a potentially unlimited source of specialized cells for research and for transplantation therapies meant to "replenish" injured tissues that need specific kinds of cells. Some of these therapies, like bone marrow transplantation,[11] already exist, while others are currently being researched.[12] Furthermore, because of their special qualities, stem cells may also have other beneficial uses—in research meant to develop methods of prevention and treatment of birth defects; in creation of models, which would make drug development processes faster and cheaper;[13] and in gene therapy.[14]

Stem cells may be subdivided into three classes. The first type of stem cells, with the most differentiation potential, is "totipotent stem cells," which make up an early embryo, and which are a potential source of any

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8. National Institutes of Health (NIH), Stem Cell Basics, I.A., What are stem cells and why are they important?, http://stemcells.nih.gov/info/basics/basics1.asp (last visited Oct. 21, 2007) [hereinafter Stem Cell Basics]; NIH, Stem Cell Basics, II., What are the unique properties of all stem cells?, http://stemcells.nih.gov/info/basics/basics2.asp (last visited Oct. 21, 2007) [hereinafter Unique Properties of Stem Cells].

9. Stem Cell Basics, *supra* note 8; Unique Properties of Stem Cells, *supra* note 8.

10. Stem Cell Basics, *supra* note 8; Unique Properties of Stem Cells, *supra* note 8.

11. Bone marrow transplantations are essentially stem cell transplantations where patients lacking the capability of replenishing their own blood cells receive hematopoietic stem cells (blood stem cells), which are meant to proliferate and differentiate to replenish the blood cells they need. For further discussion of bone marrow transplantation and other, more modern techniques for acquiring hematopoietic stem cells, see Jos Domen, Amy Wagers & Irving L. Weissman, *Bone Marrow (Hematopoietic) Stem Cells*, *in* NIH REGENERATIVE MEDICINE REPORT 13, 14, 22 (2006), *available at* http://stemcells.nih.gov/info/scireport/2006report.htm [hereinafter REGENERATIVE MEDICINE].

12. Some of the uses for stem cells, which are currently in the research and development stage, include using stem cells as a source of pancreatic cells for treatment of diabetes, using dopamine-secreting cells for the treatment of Parkinson's disease, and so forth. *See generally id.* at 13-34; David M. Panchision, *Repairing the Nervous System with Stem Cells*, *in* REGENERATIVE MEDICINE, *supra* note 11, at 35-44 (discussing how stem cells could be used to treat nervous system disorders); Thomas P. Zwaka, *Use of Genetically Modified Stem Cells in Experimental Gene Therapies*, *in* REGENERATIVE MEDICINE, *supra* note 11, at 45-52 (illustrating how stem cells can be used in gene therapies for persons with cystic fibrosis and severe combined immunodeficiency).

13. Junying Yu & James A. Thomson, *Embryonic Stem Cells*, *in* REGENERATIVE MEDICINE, *supra* note 11, at 3 (illustrating how stem cells can help to identify drug targets as well as prevent and treat birth defects). For further information on the uses of human embryonic stem cells (hESCs), see *id.* at 4, 8.

14. *See, e.g.*, NIH, *Use of Genetically Modified Stem Cells in Experimental Gene Therapies*, *in* STEM CELLS: SCIENTIFIC PROGRESS AND FUTURE RESEARCH DIRECTIONS 99-105 (2001), *available at* http://stemcells.nih.gov/staticresources/info/scireport/PDFs/chapter11.pdf (discussing the benefits of embryonic stem cells in gene therapy).

cell type in an organism's body.[15] The second type of stem cells, with slightly less differentiation potential, is "pluripotent stem cells," also known as embryonic stem cells (ESCs).[16] These cells may be a source of all of the different kinds of cells that make up an organism's body, save early totipotent embryonic cells.[17] Lastly, there are "multipotent stem cells," which have differentiated further than pluripotent stem cells.[18] Within this group of multipotent stem cells are "adult stem cells," which serve as a source of replenishment of cells in the bodies of adult organisms.[19]

A general agreement has emerged among leading scientists in the area of stem cell research that research involving pluripotent stem cells holds numerous advantages over research involving adult stem cells.[20] Among the reasons for this agreement is the fact that pluripotent stem cells are more readily available[21] than adult stem cells (which are rare), difficult to extract from the tissues in which they reside, and extremely hard to proliferate while keeping undifferentiated.[22] Another reason is that ESCs' low level of commitment makes them potentially more versatile than other, more "committed" stem cells—they may differentiate into more types of specialized cells.[23]

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15. *See* NIH, Stem Cell Information, Frequently Asked Questions, http://stemcells.nih.gov/info/faqs.asp (last visited Oct. 21, 2007) [hereinafter NIH FAQs] (categorizing stem cells into three classes).

16. *Id.* It is noteworthy that according to recent scientific publications, a group of scientists managed to create hESC lines from totipotent cells rather than from pluripotent cells. *See* Irina Klimanskaya et al., *Human Embryonic Stem Cell Lines Derived from Single Blastomeres*, NATURE, Nov. 23, 2006, at 481.

17. NIH FAQs, *supra* note 15.

18. *Id.*

19. *See* NIH, Stem Cell Basics, IV., What are adult stem cells?, http://stemcells.nih.gov/info/basics/basics4.asp (last visited Oct. 21, 2007) (describing the differences between adult stem cells and embryonic stem cells).

20. *See* NIH Statement Before the Senate Appropriations Subcomm. on Labor, Health and Human Services, Education and Related Agencies (Apr. 26, 2000), *available at* http://stemcells.nih.gov/policy/statements/state.asp [hereinafter NIH Statement] (noting that human pluripotent stem cells hold promise for advances in the prevention, treatment, and diagnosis of many diseases).

21. Currently, in the United States there are about 400,000 unused frozen embryos from which embryonic stem cells may be extracted, which, if remain unused for a prolonged period of time, will be disposed of. *See* Junying Yu & James Thomson, *Embryonic Stem Cells*, *in* REGENERATIVE MEDICINE, *supra* note 11, at 1, 3.

22. *See* NIH Statement, *supra* note 20; NIH FAQs, *supra* note 15; NIH, Stem Cell Basics, V., What are the similarities and differences between embryonic and adult stem cells?, http://stemcells.nih.gov/info/basics/basics5.asp (last visited Oct. 21, 2007) [hereinafter Embryonic and Adult Stem Cells].

23. NIH Statement, *supra* note 20; NIH FAQs, *supra* note 15; Embryonic and Adult Stem Cells, *supra* note 22.

To be able to utilize ESCs, researchers have to extract these cells from very early embryos and turn them into cell lines[24]—a process that destroys the embryos.[25] This practice, when applied in human embryos, encounters strong opposition on two main grounds. The first is an ethical ground according to which human embryos have a "special moral status" as "early humans," and thus the practice of destroying such embryos for research purposes constitutes a denial of the respect they are entitled to as an early form of human life. The second ground for opposition is established upon the religious premise that embryos are endowed with God-given life, and that destroying them in the research process constitutes killing. Despite this opposition, since the derivation of the first hESCs in 1998,[26] over 120 hESC lines have been created worldwide.[27]

B. The Regulation of Embryo Research Prior to 1998

Though hESCs were first derived only in 1998, in order to fully understand the regulation of research involving hESCs,[28] it is necessary to revisit some constituting events in the regulation of human embryo research, which directly led to and shaped the regulation of research involving hESCs.

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24. A cell line is essentially a culture of identical cells that have been transformed in a way that allows them to proliferate in culture indefinitely and that have been kept in that state (of continuous proliferation) for a prolonged period of time. In other words, it is an "immortal" cell culture that will keep on proliferating for as long as it is provided with proper nourishment. This is as opposed to "normal" cells, which proliferate only a limited number of times. For further information on the method of creating ESC lines, see the National Institutes of Health, Stem Cell Basics, III., What are embryonic stem cells?, http://stemcells.nih.gov/info/basics/basics3.asp (last visited Oct. 21, 2007). Another method of obtaining pluripotent stem cells is by creating embryos solely for research purposes from egg and sperm donations. *Id.*

25. It is worth noting that some scientists have recently published claims that they have developed methods for creating hESC lines without destroying embryos. *See* Klimanskaya et al., *supra* note 16, at 481; Xin Zhang et al., *Derivation of Human Embryonic Stem Cells from Developing and Arrested Embryos*, STEM CELLS, Sept. 21, 2006, *available at* http://www.StemCells.com/cgi/content/full/24/12/2669; Constance Holden, *Stem Cells Without the Fuss?*, SCIENCENOW, June 6, 2007; Elizabeth Finkel, *Researchers Derive Stem Cells from Monkeys*, SCIENCENOW, June 19, 2007; Rick Weiss, *Lab Cites Stem Cell Advance: Method of Harvest Could Leave Embryos Undamaged*, WASH. POST, Jan. 11, 2008, at A4. Yet, these publications have encountered skepticism by both proponents and opponents of research involving hESCs. *See, e.g.*, Alison Abbott, *"Ethical" Stem Cell Paper Under Attack*, NATURE, Sept. 7, 2006, at 12; Nicholas Wade, *In New Method for Stem Cells, Viable Embryos*, N.Y. TIMES, Aug. 24, 2006, at A2; Constance Holden, *Life From Arrested Development?*, SCIENCENOW, Sept. 22, 2006; *Scientists Create Stem Cell Line from Already Dead Embryo*, ASSOCIATED PRESS, Sept. 22, 2006.

26. *See infra* note 68.

27. Yu & Thomson, *supra* note 21, at 6.

28. I distinguish between hESC research, which is the research *of* hESCs, and research involving hESCs, which is any research that makes use of hESCs even for purposes that do not include learning about the hESCs themselves. Since President Bush's Directive affects both kinds, I will use the latter more inclusive term—research involving hESCs—throughout this Article.

Throughout the 1980s, HHS did not allocate federal funding for research involving human embryos.[29] This was because under HHS regulations, funding of such research required the pre-approval of an Ethics Advisory Board (EAB).[30] But since the mandate of the last EAB lapsed in 1980[31] and no new EAB was appointed in its stead, the HHS practically imposed a de facto moratorium on federal embryo research,[32] which lasted until Congress passed the NIH Revitalization Act (NIHRA) in 1993.[33]

The change in the federal research policy regarding human embryos brought about by the NIHRA can be traced back to a set of events, seemingly unrelated to the aforementioned de facto moratorium, about six years prior to the passing of the NIHRA. In October 1987, the NIH received a request by some of its own investigators to approve a research protocol involving an experimental implantation of human fetal cells taken from aborted human embryos into the brain of a Parkinson's patient.[34] Because of the "broad scientific and ethical implications surrounding this area of research,"[35] although there was no existing regulatory barrier posed before such research at that time, the Director of the NIH voluntarily decided to request the approval of the Assistant Secretary for Health (ASH) to support this study.[36] On March 22, 1988, the Assistant Secretary announced that he was withholding approval of the project and placed a temporary moratorium on the federal support of research involving fetal tissue transplantation pending further consideration "of the relevant ethical, legal, and scientific issues by an outside group of experts"[37] that "would

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29. *See* THE PRESIDENT'S COUNCIL ON BIOETHICS, MONITORING STEM CELL RESEARCH 23 (2004), *available at* http://www.bioethics.gov/reports/stemcell/pcbe_final_version_monitoring_stem_cell_research.pdf [hereinafter PRESIDENT'S COUNCIL REPORT] (explaining that members of Congress became concerned about the potential use of aborted fetuses following *Roe v. Wade*).

30. 40 Fed. Reg. 33,526, 33,529 (Aug. 8, 1975); *see also* 1 NAT'L BIOETHICS ADVISORY COMM'N, ETHICAL ISSUES IN HUMAN STEM CELL RESEARCH 34 (1999), *available at* http://bioethics.georgetown.edu/nbac/stemcell.pdf [hereinafter NBAC REPORT] (describing the Ethics Advisory Board's recommendations with respect to research involving human embryos).

31. NBAC REPORT, *id.* at 34.

32. *Id.*

33. National Institutes of Health Revitalization Act of 1993, Pub. L. No. 103-43, 107 Stat. 122 (1993).

34. NAT'L INSTS. OF HEALTH, REPORT OF THE ADVISORY COMMITTEE TO THE DIRECTOR: HUMAN FETAL TISSUE TRANSPLANTATION RESEARCH 1 (1988) [hereinafter HUMAN FETAL TISSUE REPORT].

35. *Id.*

36. *Id.*; *see also* NAT'L INSTS. OF HEALTH, THERAPEUTIC HUMAN FETAL TISSUE TRANSPLANTATION RESEARCH ACTIVITIES FUNDED BY THE NATIONAL INSTITUTES OF HEALTH IN FY 1998: REPORT TO CONGRESS PART III (1999), *available at* http://ospp.od.nih.gov/policy/fetal.asp [hereinafter REPORT TO CONGRESS] (stating that the ASH advised the NIH that it was withholding approval of the project pending consideration of the issues from the Human Fetal Tissue Transplantation Research Panel (HFTTRP)).

37. REPORT TO CONGRESS, *supra* note 36.

examine comprehensively the use of human fetal tissue from induced abortions for transplantation" and advise "whether this kind of research should be performed, and if so, under what circumstances."[38] Pursuant to these instructions, the NIH formed the Human Fetal Tissue Transplantation Research Panel (HFTTRP) to the Advisory Committee to the Director (ACD).[39] The HFTTRP held numerous meetings and, in December 1988, submitted its report to the ACD.[40] The HFTTRP found the use of tissue from induced abortions in therapeutic transplantation research to be "acceptable public policy" and proposed guidelines to assure that such research would be conducted in an ethical manner.[41] The ACD unanimously accepted the recommendations[42] and passed them on to the Director of the NIH, who also accepted them and recommended to the Secretary to lift the moratorium.[43] Interestingly, in November 1989, Secretary Louis Sullivan decided to reject these recommendations and continue the moratorium on federal funding for transplantation research involving human fetal tissue indefinitely.[44]

However, Secretary Sullivan's moratorium did not go unchecked by Congress. Outraged by the Secretary's actions,[45] in a clear and rare expression of discontent with the administrative handling of legislatively delegated powers and of legislative intent to promote human embryo research, Congress passed the NIHRA in 1993.[46] The NIHRA explicitly abolished Secretary Sullivan's moratorium,[47] rescinded the requirement for an EAB's approval of research applications involving embryo research,[48]

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38. Human Fetal Tissue Transplantation Research Panel; Advisory Committee to the Director; Meeting, 53 Fed. Reg. 24,500 (June 29, 1988).

39. *Id.* The Advisory Committee to the Director of the NIH was formed in 1966 to "assist the Office of the Director, NIH, in the making of major plans and policies, especially those related to the allocation of NIH funds and resources." Advisory Committee to the Director, Charter of the ACD, http://www.nih.gov/about/director/acd/index.htm (last visited Dec. 2, 2007).

40. HUMAN FETAL TISSUE REPORT, *supra* note 34, at 2.

41. *Id.* at 4-5; *see also* S. REP. NO. 103-2, at 13 (1993) (describing the HFTTRP and its recommendations).

42. HUMAN FETAL TISSUE REPORT, *supra* note 34, at 4-5.

43. S. REP. NO 103-2, at 13.

44. *Id.* Congress lifted this moratorium in 1993 in the National Institutes of Health Revitalization Act (NIHRA). *See* Michael Specter, *Fetal-Tissue Research Ban Formally Extended; Moral and Ethical Problems Said To Outweigh Possible Benefits*, WASH. POST, Nov. 3, 1989, at A5.

45. S. REP. NO 103-2, at 13.

46. National Institutes of Health Revitalization Act of 1993, Pub. L. No. 103-43, 107 Stat. 122 (1993).

47. *Id.* § 113, 107 Stat. at 132.

48. *See* S. REP. NO 103-2, at 12-15. Congress actually turned the HHS's de facto moratorium on research involving embryos "upside down" so that the default would no longer be that grant applications for research involving embryos could not be accepted unless ethically approved, but rather that such research proposals were eligible for funding unless an independent Ethics Advisory Board explicitly recommended otherwise. For further discussion, see *infra* Part II.B.1.

and imposed restrictions on the HHS's ability to withhold funds for research on ethical grounds so that such a withholding could not take place without the recommendation of an independent EAB.[49]

Following the enactment of the NIHRA, the NIH began to receive applications for funding of research involving human embryos.[50] The Secretary of HHS at that time, Donna Shalala, aware of the bioethical issues stemming from such research, decided to establish an EAB in accordance with the NIHRA, and instructed the NIH to proceed accordingly.[51] The NIH, acting under these instructions and in accordance with the requirements of the NIHRA,[52] formed the Human Embryo Research Panel. The Panel's mandate was to "consider various areas of research involving the ex-utero preimplantation human embryo[53] and to provide advice as to those areas that (1) [were] acceptable for Federal funding, (2) warrant additional review, and (3) [were] unacceptable for Federal support."[54] In September 1994, after seven months of work, the Human Embryo Research Panel published its final report and recommendations regarding research involving human embryos.[55] First, the Panel concluded that in principle, and pending the fulfillment of some preliminary requirements, there were numerous types of research involving preimplanted human embryos that were ethically permissible.[56] Most importantly, the Panel determined that creation of human embryos solely for research purposes was permissible if such research could not otherwise be conducted and when "a compelling case can be made that [the research] is necessary for the validity of a study that is potentially of outstanding scientific and therapeutic value."[57] The report also specifically held that research aimed at the development of human embryonic stem cells should

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49. National Institutes of Health Revitalization Act of 1993 § 101, 107 Stat. at 126. For further discussion of the NIHRA and its requirements, see *infra* Part II.B.1.

50. *See* Doe v. Shalala, 862 F. Supp. 1421, 1424-25 (D. Md. 1994) ("With the passage of the Revitalization Act, NIH in fact received a number of applications seeking financial support of research. . . .").

51. *Id*.

52. 42 U.S.C. § 289a-1(b)(5) (2000).

53. The Human Embryo Research Panel used the term "ex-utero preimplantted embryo" to describe human embryos that were the result of IVF treatments, which yielded more embryos than the women treated actually cared to have implanted in them and which were therefore kept frozen. *See* 1 THE NATIONAL INSTITUTES OF HEALTH, REPORT OF THE HUMAN EMBRYO RESEARCH PANEL, at ix (1994).

54. *Id.*

55. *Id.* at x-xx.

56. *Id.* at x-xi, xvii. These preliminary requirements included conditions such as: that the research on the human embryo could not be otherwise accomplished by using alternative means (e.g., experimentation with animals), that strict informed consent requirements had been met, that only the minimum number of embryos possible for the purposes of the research would be used, that the embryos used would not be older than fourteen days, and so forth.

57. *Id.* at xii.

be permitted, subject to the conditions that the source of the embryos used for the creation of the hESCs would be surplus embryos produced for infertility treatments or clinical research and that the progenitors consented.[58] On December 1, 1994, the NIH's ACD unanimously accepted the Panel's Report,[59] but on the very next day, President Clinton released a terse statement (President Clinton's Embryo Decision) instructing the NIH not to allocate funds for supporting the creation of embryos for research purposes.[60] Thus, President Clinton's Embryo Decision negated one of the Panel's most controversial recommendations, namely the creation of embryos exclusively for research purposes. Nevertheless, his Decision did not prohibit research involving surplus embryos left from in-vitro fertilization (IVF) treatments, and so the NIH proceeded to develop guidelines for funding research using embryos not created solely for research purposes.[61] However, on January 26, 1996, before the NIH was

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58. *Id.* at xvii. In addition, the Panel recommended *not* to support numerous kinds of research that were deemed to pose "serious ethical concerns," including research involving human cloning, research of embryos beyond the stage of the closure of the neural tube, pre-implantation diagnosis for the purpose of sex selection, development of human-nonhuman chimeras, cross species fertilization, and more. *See id.* at xix-xx.

59. NBAC REPORT *supra* note 30, at 34.

60. *See* William J. Clinton, Statement on Federal Funding of Research on Human Embryos, 30 WEEKLY COMP. PRES. DOC. 2459, 2459-60 (Dec. 2, 1994) [hereinafter President Clinton's Embryo Decision]. President Clinton's Embryo Decision only noted the following:

> The Director of the National Institutes of Health has received a report regarding federal funding of research on human embryos. The subject raises profound ethical and moral questions as well as issues concerning the appropriate allocation of Federal funds. I appreciate the work of the committees that have considered this complex issue, and I understand that advances in vitro fertilization research and other areas could derive from such work. However, I do not believe that Federal funds should be used to support the creation of human embryos for research purposes, and I have directed that NIH not allocate any resources for such research. In order to ensure that advice on complex bioethical issues that affect our society can continue to be developed, we are planning to move forward with the establishment of a National Bioethics Advisory Commission over the next year.

Id. President Clinton's Embryo Decision was not backed or followed by any officiating action such as issuing an executive order and was never published in the Federal Register, but rather only in the Weekly Compilation of Presidential Documents. *See id.* at 2459-60. For further discussion of President Clinton's Embryo Decision and its legal status, see *infra* Part III.A. Interestingly, President Clinton repeated the practice of instructing executive agencies not to fund certain kinds of research that he perceived as bioethically problematic at least once more in a statement released to the media and titled "memorandum," where he explicitly directed "that no Federal funds will be used for human cloning." *See* President William J. Clinton, Memorandum on the Prohibition on Federal Funding for Cloning of Human Beings, 33 WEEKLY COMP. PRES. DOC. 281 (Mar. 4, 1997) [hereinafter President Clinton's Cloning Decision].

Ironically, as I will later show, President Bush's Directive seems to have been the spitting image of President Clinton's Embryo Decision.

61. *See* IRENE STITH-COLEMAN, CRS REPORT FOR CONGRESS: HUMAN EMBRYO RESEARCH 2 (1998), *available at* http://www.law.umaryland.edu/marshall/crsreports/crsdocuments/95-910_STM.pdf (stating that after the President's December 1994 Order, the agency proceeded with plans to develop guidelines to support research using spare embryos); *see also* NBAC REPORT, *supra* note 30, at 34.

able to approve any application for funding embryo research,[62] Congress passed the Dickey Amendment, which amended the 1996 Departments of Labor, Health and Human Services, and Education and Related Agencies Appropriations Act,[63] cutting the NIH's efforts short.

The Dickey Amendment prohibited federal funding for research involving "the creation of a human embryo or embryos for research purposes"[64] and any research in which "a human embryo or embryos are destroyed, discarded, or knowingly subjected to risk of injury or death" greater than a measure allowed by the regulations governing research on fetuses in utero.[65] Congress has passed similar clauses in the respective appropriations bill every year since,[66] thus rendering research involving the creation, harming, or destruction of human embryos ineligible for federal funding. And since the creation of hESC lines inevitably involves the

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62. *See* PRESIDENT'S COUNCIL REPORT, *supra* note 29, at 25 (noting mildly that Congress "did not endorse this course of action").

63. The Balanced Budget Downpayment Act, I, Pub. L. No. 104-99, § 128(2), 110 Stat. 26, 34 (1996).

64. *Id.* The Dickey Amendment, which was named after former Representative Jay Dickey who originally sponsored it, reiterated President Clinton's Embryo Decision from 1994 and provided it with legislative backing. For further discussion of this point, see *infra* Part III.A.

65. The Balanced Budget Downpayment Act, I, § 128(2), 110 Stat. at 34. The full language of the Amendment includes:

> None of the funds made available [in this Act] may be used for—
>
> (1) the creation of a human embryo or embryos for research purposes; or
>
> (2) research in which a human embryo or embryos are destroyed, discarded, or knowingly subjected to risk of injury or death greater than that allowed for research on fetuses in utero under 45 CFR 46.208(a)(2) and 42 U.S.C. 289g(b) [of the Public Health Service Act].
>
> For purposes of this section, the phrase "human embryo or embryos" shall include any organism, not protected as a human subject under 45 CFR 46 as of the date of the enactment of this Act, that is derived by fertilization, parthenogenesis, cloning, or any other means from one or more human gametes.

Id.

66. *See, e.g.*, Omnibus Consolidated Appropriations Act, Pub. L. No. 104-208, § 512, 110 Stat. 3009-270 (1996); Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, Pub. L. No. 105-78, § 513, 111 Stat. 1467, 1517 (1997); Omnibus Consolidated and Emergency Supplemental Appropriations Act, Pub. L. No. 105-277, § 511, 112 Stat. 2681-386 (1998); Consolidated Appropriations Act, Pub. L. No. 106-113, § 510, 113 Stat. 1501A-275 (1999); Consolidated Appropriations Act–FY 2001, Pub. L. No. 106-554, § 510, 114 Stat. 2763A-71 (2000); Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, Pub. L. No. 107-116, § 510, 115 Stat. 2177, 2219 (2002); Consolidated Appropriations Resolution, Pub. L. No. 108-7, § 510, 117 Stat. 11 (2003); Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, § 510, 118 Stat. 3277 (2004); Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, § 509, 118 Stat. 2809-3163 (2004); Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, Pub. L. No. 109-149, § 509, 119 Stat. 2833-80 (2005).

destruction of a human blastocyst,[67] the Dickey Amendment has rendered research involving the creation of such hESC lines similarly ineligible for federal funding.[68]

C. Federal Regulation of Stem Cell Research Between Two Presidents—1998 to the Present

The news about the creation of the first hESC line in late 1998 brought about an abundance of regulatory activity aimed at evaluating the moral and legal status of such cells. In November 1998, President Clinton asked his National Bioethics Advisory Commission (NBAC) to "undertake a thorough review of the issues associated with human stem cell research, balancing all ethical and medical considerations."[69] In the meantime, it was unclear whether the Dickey Amendment, which excluded the *creation* of hESC lines with federal funding—because such creation inevitably involves the destruction of embryos—also meant that the federal government could not partake in research involving such hESC lines that already existed, and which were created without federal funding.[70] To answer this question, the Director of the NIH, Dr. Harold Varmus, approached the General Counsel of HHS, Harriet Rabb, and asked for her opinion regarding the legality of federal funding for research involving hESC lines that were created without federal support.[71] On January 15, 1999, in a legal opinion sent to Dr. Varmus, Harriet Rabb opined that the wording of the Dickey Amendment did not prevent the NIH from funding research involving already-created hESC lines because such hESCs—once extracted from an embryo—did not meet the definition of a human embryo, and hence did not fall under the Amendment's prohibition on the funding

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67. *See infra* Part I.A and text accompanying note 25.

68. Congress, however, did not prohibit such research from taking place altogether; it was (and still is) possible for private entities to conduct such research. Hence, when a group of scientists led by Dr. James Thomson from the University of Wisconsin finally managed to create hESC lines from embryos donated by couples undergoing IVF treatments, they did so without federal funding. *See* James A. Thomson et al., *Embryonic Stem Cell Lines Derived from Human Blastocysts*, SCIENCE, Nov. 6, 1998, at 1145-47; *see also* Statement of Harold Varmus, M.D., Director, NIH, Department of Health and Human Services, Before the Senate Appropriations Subcomm. on Labor, Health and Human Services, Education and Related Agencies (Dec. 2, 1998), *available at* http://stemcells.nih.gov/policy/statements/120298.asp [hereinafter Statement of Harold Varmus] ("Federal funds were not used in either of the experiments that you will hear about today.").

69. Letter from President William J. Clinton to Dr. Harold Shapiro, Chair of the National Bioethics Advisory Commission (Nov. 14, 1998), *reprinted in* NBAC REPORT, *supra* note 30, at 88.

70. *See* PRESIDENT'S COUNCIL REPORT, *supra* note 29, at 27 (describing this confusion).

71. Statement of Harold Varmus, *supra* note 68.

of the destruction of human embryos.[72] In other words, the Rabb Opinion held that federal funding could be granted for research involving hESCs, so long as the destruction of the embryos that led to the creation of the hESC lines had not been federally funded.[73] Pursuant to the Rabb Opinion, the NIH assigned a Working Group to develop guidelines and oversight mechanisms for research involving human stem cells, and announced a withholding of funds for such research[74] until the Working Group developed such guidelines.[75]

In September 1999, the NBAC at last published the report requested by President Clinton almost one year earlier.[76] The underlying premise of the NBAC Report was that "although the human embryo and fetus deserve respect as forms of human life, the scientific and clinical benefits of stem cell research should not be foregone."[77] In its report, the NBAC recommended, first and foremost, that federal legislation and regulation be changed so as to allow funding for the use and derivation of hESCs from embryos remaining unused after infertility treatments (namely, not embryos created solely for research purposes).[78] The NBAC further recommended that any donation of such embryos must fulfill numerous requirements, including obtaining informed consent from the embryos' donors, approaching potential donors only once they had already decided to discard their excess frozen embryos, informing the donors that their embryos would be destroyed, and regulating the entire area of research through "appropriate regulations that include public oversight and review."[79]

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72. *See* Memorandum from Harriet S. Rabb, General Counsel of the Department of Health and Human Services, to Harold Varmus, M.D., Director, NIH, on Federal Funding for Research Involving Human Pluripotent Stem Cells (Jan. 15, 1999), http://www.georgetown.edu/research/nrcbl/documents/rabbmemo.pdf [hereinafter Rabb Opinion]. According to the Rabb Opinion, hESCs are not subject to the definition of an "embryo" under the Dickey Amendment because an embryo is defined under the Amendment as an "organism" whereas scientific and medically accepted definitions of "organism," namely an individual constituted to carry out all life functions, do not cover hESCs.

73. *Id.* It is noteworthy that even though the Rabb Opinion was accepted as legally valid and as "stay[ing] within the letter of the law," it was nonetheless criticized for "contradict[ing] both the spirit of the law and the principle that underlies it." *See* PRESIDENT'S COUNCIL REPORT, *supra* note 29, at 27; O. Carter Snead, *The Pedagogical Significance of the Bush Stem Cell Policy: A Window into Bioethical Regulation in the United States*, 5 YALE J. HEALTH POL'Y L. & ETHICS 491, 494 (2005).

74. The source of the NIH Director's authority to announce this (yet another) moratorium on human embryonic research is not clear, especially in light of the provisions of the NIHRA, which explicitly require a prior EAB recommendation to impose such a moratorium. *See* 42 U.S.C. §§ 289a-1(b)(1), (3) (2000).

75. Statement of Harold Varmus, *supra* note 68.

76. NBAC REPORT, *supra* note 30.

77. *Id*. at xi.

78. *Id*. at iii-iv.

79. *Id*. at iv-ix.

Pursuant to the publication of the NBAC Report, and having considered its recommendations,[80] the NIH Working Group that was appointed in early 1999[81] finished developing its guidelines for ensuring that NIH-funded hESC research "is conducted in an ethical and legal manner."[82] In December 1999, the NIH published these proposed guidelines, calling for comments from the public (Proposed Guidelines).[83] The Proposed Guidelines followed the recommendations of the NBAC Report and allowed federal funding for research utilizing hESCs if: (1) the hESCs were derived from surplus embryos that were originally created for infertility treatments; (2) the decision to donate excess embryos was clearly separate from the decision to create the embryos; and (3) the decision to donate was made at the time the donors decided to dispose of the embryos.[84] The Proposed Guidelines also outlined areas of research involving hESCs that were ineligible for NIH funding, including the derivation of hESCs from human embryos and research on hESCs that were derived from embryos created for research purposes (thus explicitly applying the Dickey

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80. Press Release, National Institutes of Health, NIH Publishes Draft Guidelines for Stem Cell Research (Dec. 1, 1999), http://www.nih.gov/news/pr/dec99/od-01.htm (last visited Dec. 2, 2007).

81. *See* NIH, NIH Fact Sheet on Human Pluripotent Stem Cell Research Guidelines (Jan. 2001), http://stemcells.nih.gov/news/newsarchives/stemfactsheet.asp (last visited Dec. 2, 2007) [hereinafter NIH Fact Sheet] ("In April 1999, the NIH convened a working group of the Advisory Committee to the Director.").

82. National Institutes of Health, Draft National Institutes of Health Guidelines for Research Involving Human Pluripotent Stem Cells (December 1999), 64 Fed. Reg. 67,576, 67,576 (Dec. 2, 1999) [hereinafter Proposed Guidelines].

83. *Id.* It is worth noting that since the Proposed Guidelines involved "a matter relating to . . . public property, loans, grants, benefits, or contracts," the NIH was presumably exempt from following the notice and comment requirements of the Administrative Procedure Act in promulgating them. *See* Administrative Procedure Act (APA), 5 U.S.C. § 553(a)(2) (2000). However, the NIH, like all other HHS agencies, has been subject since 1971 to a direction by the Secretary of the Department of Health, Education, and Welfare (HEW) to "utilize the public participation procedures of the APA, 5 U.S.C. § 553" regardless of the exemption. *See* Statement of Policy: Public Participation in Rule Making, 36 Fed. Reg. 2,532, 2,532 (Feb. 5, 1971). As a result of this voluntary election to abide by the notice and comment requirements of § 553, courts have held the HHS to strict compliance with these requirements. *See, e.g.*, Mt. Diablo Hosp. Dist. v. Bowen, 860 F.2d 951, 956-57 n.6 (9th Cir. 1988) ("In 1971 . . . the Secretary waived the public benefits exception . . . . Rules promulgated by the Secretary after 1971 are therefore subject to the normal section 553 requirements."); Cubanski v. Heckler, 781 F.2d 1421, 1428 (9th Cir. 1986) ("The Secretary voluntarily waived the APA 'benefits' exception in 1971 . . . . The [HHS] thereby imposed upon itself procedural requirements 'not required by law'. . . . The Secretary's waiver has a binding effect independent of the APA."); Buschmann v. Schweiker, 676 F.2d 352, 356 n.4 (9th Cir. 1982); Humana of S.C., Inc. v. Califano, 590 F.2d 1070, 1084 (D.C. Cir. 1978) ("[T]he Secretary in 1971 elected to waive the exemption and to submit to the normal requirements of the [APA], and regulations promulgated since that time are subject to mandatory rulemaking procedures.") (citation omitted). For discussion of the NIH's compliance with the APA's requirements in repealing the Guidelines, see *infra* Part II.C.

84. Proposed Guidelines, 64 Fed. Reg. at 67,577. Other requirements set by the Draft Guidelines include strict and detailed informed consent requirements, privacy requirements and more. *Id.* at 67,577-78.

Amendment to the context of research involving hESCs), human-nonhuman research, and various kinds of cloning research.[85] In addition, as the NBAC recommended, the Proposed Guidelines suggested the creation of mechanisms to oversee research involving hESCs, including a Human Pluripotent Stem Cell Review Group (HPSCRG), which would review applications for research involving hESCs submitted to the NIH.[86]

On August 25, 2000, almost nine months after the publication of the Proposed Guidelines and extensive review of comments received on them,[87] the NIH published the Guidelines for Research Using Human Pluripotent Stem Cells (Final Guidelines) in the Federal Register.[88] The Final Guidelines included all the main components of the Proposed Guidelines as mentioned above (including the areas of research ineligible for funding and the establishment of the HPSCRG)[89] and lifted the moratorium on research using human pluripotent stem cells derived from human embryos that was announced by the Director of the NIH in January 1999.[90] Yet, it took the NIH almost another seven months to appoint the HPSCRG and start receiving requests for funding for research in accordance with the Final Guidelines.[91] In fact, the process of the regulation of funding for research involving hESCs was so slow, and lingered for so long, that even after more than two years following the initiation of the process by President Clinton and his Director of NIH, it was still not possible to receive federal funding for such research.

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85. *Id.* at 67,579.

86. *Id.*

87. During the comment period, "[t]he NIH received approximately 50,000 comments from members of Congress, patient advocacy groups, scientific societies, religious organizations, and private citizens." *See* National Institutes of Health Guidelines for Research Using Human Pluripotent Stem Cells, 65 Fed. Reg. 51,976, 51,976-79 (Aug. 25, 2000) [hereinafter Final Guidelines].

88. *Id.*; *see also* Press Release, National Institutes of Health, NIH Publishes Final Guidelines for Stem Cell Research (Aug. 23, 2000), http://www.nih.gov/news/pr/aug2000/od-23.htm (last visited Dec. 2, 2007) (announcing the publication of the Final Guidelines).

89. Final Guidelines, 65 Fed. Reg. at 51,976-81.

90. *Id.* at 51,976. *See supra* notes 74-75 and accompanying text.

91. *See* NIH, Approval Process for the Documentation of Compliance with NIH Guidelines on the Use of Human Pluripotent Stem Cells in NIH Research Proposed for Support Under Grants and Cooperative Agreements, Notice OD-02-007 (Nov. 7, 2001), *available at* http://grants.nih.gov/grants/guide/notice-files/NOT-OD-01-003.html [hereinafter Notice OD-02-007] (stating that the first meeting of the Human Pluripotent Stem Cell Review Group (HPSCRG) would take place on March 15, 2001); NIH, Approval Process for the Documentation of Compliance with NIH Guidelines on the Use of Human Pluripotent Stem Cells in NIH Intramural Research (Jan. 16, 2001), *available at* http://stemcells.nih.gov/news/newsarchives/irpnotice_011601.asp; NIH Fact Sheet, *supra* note 81 ("The NIH is in the process of finalizing the members of the HPSCRG in preparation for a March deadline for the receipt of requests for NIH funding for human pluripotent stem cell research.").

In January 2001, close to the beginning of President Bush's presidency, the NIH was still dragging its feet regarding the appointment of the HPSCRG in preparation for the submission of research applications involving hESCs, which were due by March 15, 2001.[92] It soon became clear that the change in office was going to have a radical influence on the administration's policy regarding stem cell research. Almost as soon as President Bush took office, he charged his Secretary of HHS, Tommy Thompson, with conducting a review of the Final Guidelines and with putting the Guidelines "on hold" pending the results of that review.[93] In addition, in April 2001, HHS officials ordered the Acting Director of the NIH, Ruth Kirschstein, to indefinitely postpone a scheduled meeting of the newly appointed HPSCRG, which was supposed to review the first applications for research grants under the Final Guidelines,[94] thus de facto revoking the Final Guidelines.

Although the legality of this de facto revocation was highly questionable,[95] a district court order upheld and even bolstered the Bush Administration's actions.[96] On March 8, 2001, a group of plaintiffs consisting of religious groups and pro-life activists filed an action against the Government seeking an order and declaratory relief, which would determine that the Final Guidelines were unlawful and would enjoin the Government from applying them and from funding research involving

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92. *See* Notice OD-02-007, *supra* note 91 (illustrating the schedule for receipt and review by the HPSCRG).

93. PRESIDENT'S COUNCIL REPORT, *supra* note 29, at 28; Gretchen Vogel, *Stem Cell Review Setback*, SCIENCENOW, Apr. 16, 2001.

94. Though such an order or instruction was never officially published, and though it was not known whether Secretary Thompson or President Bush gave this order, the HHS Spokesman, Bill Hall, admitted that such instruction was in fact given and explained that "the department felt that it makes the most sense to hold off until the guideline review that the department is doing is complete." *See* Rick Weiss, *Bush Administration Order Halts Stem Cell Meeting; NIH Planned Session to Review Fund Requests*, WASH. POST, Apr. 21, 2001, at A2; Nicholas Wade, *Grants for Stem Cell Work Are Delayed*, N.Y. TIMES, Apr. 24, 2001, at F6.

95. According to federal case law "an agency decision which effectively suspends the implementation of important and duly promulgated standards . . . constitutes rulemaking subject to notice and comment requirements of 5 U.S.C. § 553." *See* Envtl. Def. Fund, Inc. v. Gorsuch, 713 F.2d 802, 816-17 (D.C. Cir. 1983); Envtl. Def. Fund, Inc. v. EPA, 716 F.2d 915, 920 (D.C. Cir. 1983) ("The suspension or delayed implementation of a final regulation normally constitutes substantive rulemaking under APA § 553. Thus . . . [it is] subject to APA notice and comment provisions.") (citations omitted); Natural Res. Def. Council, Inc. v. EPA, 683 F.2d 752, 761-63 (3d Cir. 1982) ("[The] EPA's action in indefinitely postponing the effective date of the amendments . . . was subject to the APA's rulemaking requirements."). The Bush Administration's suspension of the Final Guidelines did not meet the notice and comment requirements of the APA. Thus, the suspension of the Final Guidelines was illegal. For further discussion of why the APA's notice and comment requirements apply to the Final Guidelines despite the exemption of matters involving grants or benefits from these requirements, see *supra* note 83.

96. Nightlight Christian Adoptions v. Thompson, No. 1.01 CV 00502-RCL (D.D.C. May 4, 2001) (order staying lawsuit).

hESCs.[97] Ironically, the Bush Administration was apparently only too happy to comply with the Plaintiffs' demands. The Administration quickly yielded to them and entered into a stipulation in which the Administration took it upon itself to avoid: (1) any funding of hESC research; (2) the approval of any application thereof; and (3) the convening of the HPSCRG, at least until the completion of its own review of the Final Guidelines, which was not subject to any timetable.[98] On May 4, 2001, Judge Lamberth of the District Court cemented the agreement between the parties by entering an order to stay the proceedings subject to the terms of the parties' stipulation.[99] Thus, the Judge gave his stamp of approval to the Bush Administration's illegal suspension of the Final Guidelines[100] and effectively sealed their indefinite suspension,[101] which continues until today.

During the following months, President Bush was engaged in the reexamination of the issue of research involving hESCs. He consulted with clergymen (including the late Pope John Paul II), religious groups, ethicists (including the bioethicists Daniel Callahan and Leon Kass, whom President Bush would later appoint to be the head of his Council on Bioethics), members of Congress, patient groups, and scientists (including a group of NIH scientists who told President Bush that more than sixty-five hESC lines existed at that time).[102]

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97. Complaint for Declaratory and Injunctive Relief at 2, Nightlight Christian Adoptions v. Thompson, No. 1.01 CV 00502-RCL (D.D.C. Mar. 8, 2001).

98. Nightlight Christian Adoptions v. Thompson, No. 1.01 CV 00502-RCL (D.D.C. May 4, 2001) (order staying lawsuit).

99. *Id.*

100. *See supra* note 95.

101. *Id.*; *see also* Joseph Curl, *Judge Halts Stem Cell Research Pending HHS Review*, WASH. TIMES, May 11, 2001, at A3 (summarizing recent political and judicial efforts to curtail stem cell research). It is worth noting that shortly after the *Nightlight* decision, a group of scientists led by the creator of the first hESC lines, Dr. James Thomson, and three patients, including the late actor Christopher Reeve, filed another lawsuit in the same court asking the court to declare the Final Guidelines legal and instruct the government to apply them. *See* Complaint for Declaratory and Injunctive Relief, Thomson v. Thompson, No. 1:01-CV-00973-RCL (D.D.C. May 8, 2001)*; see also* Gretchen Vogel, *Researchers Sue to Study Stem Cells*, SCIENCENOW, May 22, 2001. On August 8, 2001, a day before President Bush's Statement, Judge Lamberth landed a final blow to the application of the Final Guidelines by staying this lawsuit "pending the decision by [the Government] whether to provide federal funding for human embryonic stem cell research." Thomson v. Thompson, No. 1:01-CV-00973-RCL (D.D.C. Aug. 8, 2001) (order staying lawsuit). Thus, Judge Lamberth's decision practically afforded the government unlimited time to review the Final Guidelines.

102. Richard Lacayo, *How Bush Got There*, TIME, Aug. 12, 2001, at 17; Allessandra Stanley, *Bush Hears Pope Condemn Research in Human Embryos*, N.Y. TIMES, July 24, 2001, at A1. Apparently, the number of hESC lines, which scientists claimed already existed at that time made a crucial impact on the formulation of President Bush's Directive. *See* Lacayo, *supra*.

At this point, with respect to the issue of federal funding for research involving hESCs, President Bush no longer made a distinction between his opinions and those of his Administration. Rather, he viewed the issue as *his own personal matter*, which was to be decided *solely and exclusively by him*. This position was well-reflected in some of President Bush's descriptions of the way he approached the issue of research involving hESCs and in the way he addressed it.[103] For example, President Bush repeatedly stressed that *he* personally, was the one considering the issue of research involving hESCs, that *he* was the one who encountered the dilemmas involved in this issue, and that *he* was taking *his* time making *his* decision.[104] President Bush's posture in this respect was well-reflected in the language he used in his Address:

> *I've* asked those questions and others of scientists, scholars, bioethicists, religious leaders, doctors, researchers, Members of Congress, my Cabinet, and my friends. *I* have read heartfelt letters from many Americans. *I* have given this issue a great deal of thought, prayer, and considerable reflection. And *I* have found widespread disagreement.
>
> . . . .
>
> *My* position on these issues is shaped by deeply held beliefs. *I'm* a strong supporter of science and technology . . . .
>
> *I* also believe human life is a sacred gift from our Creator.
>
> . . . .
>
> *I* have concluded that we should allow Federal funds to be used for research on these existing stem cell lines . . . .
>
> . . . *I* have made this decision with great care, and I pray it is the right one.[105]

And so, when President Bush finally made *his* decision with respect to the funding of research involving hESCs, he chose to deliver it directly to *his* constituents in the first televised address he made since taking office.[106]

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103. *See* Lacayo, *supra* note 102 ("For a while this year it seemed that George W. Bush buttonholed everybody he met to get his or her view on stem-cell research.").

104. President Bush said: "I take this issue very seriously . . . . It's also an issue that has got serious moral implications, and our nation must think carefully before we proceed . . . . And, therefore, my process has been, frankly, unusually deliberative for my administration. I'm taking my time." Stanley, *supra* note 102. In another place, President Bush explained his Decision by saying that "[u]nder *my* policy, existing stem cell lines, to be used in publicly supported research, must be derived (1) with the informed consent of donors, (2) from excess embryos creates solely for reproductive purposes and (3) without any financial inducements to the donors." *See* George W. Bush, *Stem Cell Science and the Preservation of Life*, N.Y. TIMES, Aug. 12, 2001, at WK13 [hereinafter *President Bush's Op-Ed Piece*] (emphasis added).

105. President Bush's Address, *supra* note 1, at 954-56 (emphasis added).

106. *Id.*

On August 9, 2001, President Bush delivered his Stem Cell Decision, which allowed only for funding of research involving hESC lines that were: (1) created prior to his Address;[107] (2) made of excess embryos created strictly for reproductive purposes; (3) where the embryos were obtained with the informed consent of the donors; and (4) without any financial inducement to the donors.[108] In addition, President Bush's Directive forbade any funding of research involving the creation of human embryos solely for research purposes and the cloning of human embryos for any purpose.[109]

A curious fact about President Bush's Directive is that, unlike most presidential executive orders and directives, it was never published in the Federal Register and was only delivered as a televised Address (along with a Fact Sheet). Failing to publish the Directive seems even stranger in light of the fact that President Bush *did* sign an executive order establishing his new Council on Bioethics, which he also announced in his Address,[110] but refrained from doing the same with respect to the crux of his Address, namely the prohibition on funding for research involving hESCs created thereafter.[111]

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107. According to the NIH, "prior to his Address" means that the hESC derivation process should have been initiated prior to 9:00 p.m. EDT on August 9, 2001. *See* NIH Update on Existing Human Embryonic Stem Cells (Aug. 27, 2001), http://stemcells.nih.gov/policy/statements/082701list.asp (last visited Dec. 2, 2007) [hereinafter NIH Update].

108. President Bush's Address, *supra* note 1.

109. The White House Fact Sheet: Embryonic Stem Cell Research (Aug. 9, 2001), http://whitehouse.gov/news/releases/2001/08/20010809-1.html (last visited Dec. 2, 2007) [hereinafter Fact Sheet]. It is interesting to note that in delivering his decision, President Bush refrained from directly referring to the kinds of research that may not receive federal funding, and used a rhetoric which only addressed the types of research he *would* allow his Administration to fund. The "forbidden" types of research were thus enumerated only in a "fact sheet," which was released concurrent with the Address and which strictly held that "[f]ederal funds will *only* be used for research on existing stem cell lines" and that "[n]o federal funds will be used for . . . the derivation or use of stem cell lines derived from newly destroyed embryos." *Id.* (emphasis added). The use of this language allowed President Bush's Administration and supporters to portray his Decision as actually *allowing funding* for stem cell research rather than withholding such funding. *See, e.g.*, Rick Weiss, *Promising More–and Less; Scientists See Growth in Field, Lament Limits*, WASH. POST, Aug. 10, 2001, at A1; President Council's Report, *supra* note 29, at 28; Testimony of Tommy G. Thompson, Secretary of Health and Human Services Before the Senate Health, Education, Labor and Pensions Comm. (Sept. 5, 2001), *available at* http://www.hhs.gov/news/speech/2001/010905.html ("President Bush has opened the laboratory door. Now, let's get our best and brightest scientists into the lab so they can go to work."). However, it is important to note that it was in fact the Administration's actions prior to President Bush's Address that hindered the implementation of the Final Guidelines, which would have probably allowed for such funding much sooner.

110. Exec. Order No. 13,237, 66 Fed. Reg. 59,851 (Nov. 28, 2001). The established Council, which was headed by Dr. Leon Kass and which was mostly manned by members holding a conservative viewpoint, later published its report on stem cell research, which retroactively, ethically endorsed President Bush's Directive. *See generally* PRESIDENT'S COUNCIL REPORT, *supra* note 29.

111. For further discussion of this omission and its possible reasons, see *infra* Part II.A and note 283.

Despite the fact that President Bush did not "formalize" his Directive and did not specifically instruct HHS and the NIH to follow his Stem Cell Decision, within hours of his Address, both Secretary Thompson and the Acting Director of the NIH, Ruth Kirschstein published their endorsement of President Bush's Directive,[112] and thus sealed the fate of the portion of the Final Guidelines that dealt with hESCs.[113] Two weeks after President Bush's Address, the NIH announced that it was initializing a new process to enable funding of research involving hESCs in accordance with President Bush's Directive and a prohibition on its intramural investigators (in what was apparently yet another moratorium) to conduct research on any hESCs until the new procedures were in place.[114]

On November 7, 2001, the NIH officially announced that it was accepting grant applications for research involving hESC lines that complied with President Bush's Directive[115] and the creation of hESC registry, which included all of the hESC lines that met those requirements.[116] Notably, around the time of President Bush's Address, there was some confusion and disagreement regarding the actual number of viable and available hESC lines that complied with President Bush's Directive.[117] To date, the NIH hESC registry includes sixty-seven lines, and only twenty-one are actually available for researchers who wish to apply for federal funding.[118]

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112. Kirschstein Statement, *supra* note 4; Thompson Statement, *supra* note 4.

113. Ironically, it was Ruth Kirschstein who only a year earlier, signed the publication of the Final Guidelines. For further discussion of Ruth Kischstein's actions, see *infra* Part II.C.

114. NIH Funding of Research Using Specified Existing Human Embryonic Stem Cells, NOT-OD-01-058 (Aug. 23, 2001), *available at* http://grants.nih.gov/grants/guide/notice-files/not-od-01-058.html, *superseded by* NOT-OD-01-059 (Aug. 27, 2001).

115. Notice of Extended Receipt Date and Supplemental Information Guidance for Applications Requesting Funding that Proposes Research with Human Embryonic Stem Cells, NOT-OD-02-006 (Nov. 7, 2001), *available at* http://grants.nih.gov/grants/guide/notice-files/not-od-02-006.html; Notice of Criteria for Federal Funding of Research on Existing Human Embryonic Stem Cells and Establishment of NIH Human Embryonic Stem Cell Registry, *available at* http://grants.nih.gov/grants/guide/notice-files/NOT-OD-02-005.html.

116. *See* NIH, NIH Human Embryonic Stem Cell Registry, http://stemcells.nih.gov/research/registry (last visited Dec. 2, 2007) (listing the derivations of stem cells that are eligible for federal funding).

117. While one NIH publication stated that there were sixty-four hESC lines, another mentioned seventy-eight, a third mentioned seventy-one, and so forth. *See* NIH Update, *supra* note 107 (sixty-four); Department of Health and Human Services, Fact Sheet–Embryonic Stem Cell Research (July 14, 2004), http://www.hhs.gov/news/press/2004pres/20040714b.html (seventy-eight); NIH, NIH's Role in Federal Policy–Stem Cell Research (Aug. 12, 2005), http://stemcells.nih.gov/policy/NIHFedPolicy.asp (seventy-one).

118. Yu & Thomson, *supra* note 21, at 6. The discrepancy between the number of hESC lines in the registry and the number of such lines actually available results from various reasons. According to the NIH hESC registry, some of the hESCs never became cell lines due to halted growth or failure to remain undifferentiated. One line was withdrawn by its donor, others are "unavailable for shipping," and so forth. The number of hESC lines available for research is significantly smaller than the number of such lines President Bush was led to believe were available prior to reaching his Stem Cell Decision, which was

On November 14, 2001, the NIH announced the demise of the parts of the Final Guidelines dealing with funding for research involving hESCs.[119] The only reason mentioned by the NIH for the withdrawal of the Final Guidelines was that "[t]he President has determined the criteria that allow Federal funding for research using existing embryonic stem cell lines . . . . Thus, the NIH Guidelines as they relate to human pluripotent stem cells . . . are no longer needed."[120] This last notice essentially gave the regulatory framework for research involving hESCs its final form as it exists today.

Since August 2001, Congress has tried to change the regulatory scheme of funding for research involving hESCs numerous times[121] without much success.[122] Most notably, on July 18, 2006, the Senate passed the Stem Cell Research Enhancement Act of 2005.[123] This Act was supposed to add § 498D to the Public Health Service Act (PHSA),[124] which would have instructed the Secretary of HHS to start conducting and supporting research involving hESCs so long as the hESC lines involved in the research complied with the following "ethical requirements":

> (1) The stem cells were derived from human embryos that have been donated from in vitro fertilization clinics, were created for the purposes of fertility treatment, and were in excess of the clinical need of the individuals seeking such treatment.
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> (2) Prior to the consideration of embryo donation and through consultation with the individuals seeking fertility treatment, it was determined that the embryos would never be implanted in a woman and would otherwise be discarded.

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actually even smaller at the time he gave his Address—only one or two in the spring of 2002! *See President Bush's Op-Ed Piece*, *supra* note 104; NIH FAQs, *supra* note 15.

119. National Institutes of Health Guidelines for Research Using Human Pluripotent Stem Cells, 66 Fed. Reg. 57,107 (Nov. 14, 2001).

120. Notice of Withdrawal of NIH Guidelines for Research Using Pluripotent Stem Cells, NOT-OD-02-007 (Nov. 7, 2001), *available at* http://grants.nih.gov/grants/guide/notice-files/not-od-02-007.html.

121. *E.g.*, Stem Cell Replenishment Act of 2005, H.R. 162, 109th Cong. (2005); Human Cloning Ban and Stem Cell Research Protection Act of 2003, S. 303, 108th Cong. (2003); Science of Stem Cell Research Act, H.R. 4011, 107th Cong. (2002); Stem Cell Research Act of 2001, H.R. 2059, 107th Cong. (2001); Stem Cell Research for Patient Benefit Act of 2001, H.R. 2747, 107th Cong. (2001) (sought to codify the Final Guidelines); New Century Health Advantage Act, H.R. 2838, 107th Cong. (2001) (sought to require the NIH to conduct human embryonic stem cell research and repeal the Dickey Amendment).

122. None of Congress's bills or acts, save two, were ever voted into law, and the only bills that were actually voted for by both Houses were vetoed by President Bush. *See infra* notes 126-31.

123. Stem Cell Research Enhancement Act of 2005, H.R. 810, 109th Cong (2006).

124. Public Health Service Act, ch. 373, 58 Stat. 682 (1944) (codified as amended at 42 U.S.C. §§ 201-300ii-4 (2000)).

> (3) The individuals seeking fertility treatment donated the embryos with written informed consent and without receiving any financial or other inducements to make the donation.[125]

The passing of the Stem Cell Research Enhancement Act by a Republican Congress[126] expressed an unequivocal congressional discontent with the current regulatory scheme for funding research involving hESCs, which is based on the policy set by President Bush's Directive. Yet eventually, on July 19, 2006, President Bush vetoed the Stem Cell Research Enhancement Act.[127] Attempts to raise the two-thirds majority in the House failed and the Act was abandoned.[128] In 2007, the newly formed Democratic majority in Congress again passed the Stem Cell Research Enhancement Act.[129] Once more, President Bush vetoed the Act[130] and there was no two-thirds majority in Congress to override the veto.[131] And so, since President Bush's Address in August 2001, and until today, the only federal funding available for research involving hESCs is for research that uses the twenty-one hESC lines that meet President Bush's Directive's criteria.

II. LEGAL ANALYSIS OF PRESIDENT BUSH'S DIRECTIVE AND HIS ADMINISTRATION'S ENSUING POLICY

Having described the regulatory framework of research involving hESCs, it is now possible to begin its legal examination. The first step in analyzing President Bush's Directive and the NIH's ensuing actions is to identify the type of presidential directive it is and the ramifications of the Directive's form, if any, on its enforceability. Once the question of form is addressed, this Article will discuss the main substantive question of whether President Bush had the legal authority to give his Directive and

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125. These requirements are almost identical to those set in President Bush's Directive except for the fact that they do not restrict federal funding to hESC lines created prior to August 9, 2001, at 9:00 p.m. In this respect, the Human Stem Cell Research Enhancement Act of 2005 would have essentially enacted the Final Guidelines into law.

126. Despite the fact that the first session of the 109th Congress was clearly Republican, the Stem Cell Research Enhancement Act of 2005 passed by a majority of 238-194 in the House of Representatives, and 63-37 in the Senate.

127. Press Release, White House, Message to the House of Representatives, 2006 WL 2007324 (July 19, 2006).

128. In a vote in the House of Representatives that same day, the supporters of the Act managed to raise a majority of 235 yeas against 193 nays.

129. On January 11, 2007, the House of Representatives passed a bill identical to the Stem Cell Research Enhancement Act of 2005. *See* Stem Cell Research Enhancement Act of 2007, H.R. 3, 110th Cong. (2007). Three months later, on April 11, 2007, the bill passed in the Senate. *See* S. 5, 110th Cong. (2007).

130. Press Release, White House, President Bush Discusses Stem Cell Veto and Executive Order, 2007 WLNR 11640195 (June 20, 2007).

131. *See* Sheryl Gay Stolberg, *Bush Vetoes Bill Removing Stem Cell Limits, Saying 'All Human Life is Sacred'*, N.Y. TIMES, June 21, 2007, at A21 ("Democrats concede they do not have enough votes for a veto override.").

require the NIH to comply, and—assuming he had such authority—whether he used it appropriately. Finally, if the answer to the previous question is in the affirmative, in order to evaluate the legality of the current regulatory scheme of funding for research involving hESCs, it is necessary to determine whether the NIH's actions implementing President Bush's Directive were in accord with the NIH's own authorities, duties, and responsibilities under the law.

A. Classification of President Bush's Directive's Form and Evaluation of Its Validity from a Procedural Standpoint

It is said that presidential directives are the "most elusive in [their] capacity to be legally analyzed and constrained."[132] There are over twenty types of such ill-defined presidential directive instruments including, but not limited to: executive orders, proclamations, presidential memoranda, and signing statements.[133] In addition, neither the Constitution nor any statute or case law defines exactly what presidential directives are, how to distinguish among their different kinds,[134] how the President may use them and to what end, what procedural requirements must be fulfilled in using them in general and each of them in particular, and what is the permissible scope of their substance.[135] The only exceptions are those presidential directives categorized as executive orders and proclamations, which are subject to the Federal Register Act[136] and to Executive Order No. 11,030.[137] Therefore, so long as their directives bear forms other than "executive

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132. PETER L. STRAUSS, TODD D. RAKOFF & CYNTHIA R. FARINA, ADMINISTRATIVE LAW: CASES AND COMMENTS 193 (10th ed. 2003).

133. *See* Harold C. Relyea, *Congressional Research Service Report for Congress: Presidential Directives: Background and Overview* (2005), *available at* http://www.fas.org/irp/crs/98-611.pdf (providing an overview of the different kinds of directives used by presidents in the twentieth century).

134. *See* Todd F. Gaziano, *The Use and Abuse of Executive Orders and Other Presidential Directives*, 5 TEX. REV. L. & POL. 267, 282, 290-91 (2001) (discussing the difficulties in discerning between different presidential directives); *see also* COMMITTEE ON GOVERNMENT OPERATIONS, 85TH CONG., EXECUTIVE ORDERS AND PROCLAMATIONS: A STUDY OF A USE OF PRESIDENTIAL POWERS 1 (1957) [hereinafter CONGRESSIONAL STUDY OF EXECUTIVE POWER] ("There is no law or even Executive order which attempts to define the terms 'Executive order' or 'proclamation.'").

135. *See* Gaziano, *supra* note 134, at 282 (emphasizing the broad discretion presidents have in using directives).

136. The Federal Register Act, ch. 417, 49 Stat. 500 (1935) (codified as amended at 44 U.S.C. §§ 1501-1511) (1964), requires that executive orders and proclamations generally be published in the Federal Register. *See* 44 U.S.C. § 1505(a).

137. Exec. Order. No. 11,030, 27 Fed. Reg. 5847 (June 21, 1962). The Order requires, among other things, that executive orders and proclamations "contain a citation of the authority under which [they are] issued" and that they be submitted to the Attorney General who must approve their substance, form, and legality. *Id.*; *see also* Gaziano, *supra* note 134, at 292-93 (discussing procedures for issuing proclamations and executive orders).

orders" or "proclamations," presidents may tailor their directives in any way they want, giving them any title they want, and using them for any means they see fit, without having consequences on the enforceability of the directives from a formal standpoint.[138]

President Bush and his Administration, probably well aware of this situation, seem to have taken advantage of it in designing President Bush's Directive so as to ensure that its form would be impervious to judicial review.[139] First, the President delivered his Address orally, on television, and it was never published in the Federal Register.[140] The accompanying Fact Sheet was never published in any formal government publication.[141] Second, neither the Address nor the Fact Sheet bears the signature of the President, and the Address does not include any specific operational instructions directed at executive officers, but is merely a vague pronouncement of moral preferences.[142] Finally, the Address and Fact Sheet carry none of the conventional titles, which could have helped to classify them under one of the known forms of presidential directives (e.g., "executive order" or "memorandum").[143] Thus, President Bush's Directive does not seem to fall squarely under any of the known types of

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138. According to Gaziano, "a new President and a creative bureaucracy could come up with twenty-four new 'types' [of presidential directives] if they wished to do so." *See* Gaziano, *supra* note 134, at 291.

139. Had the Administration chosen to issue the Directive in the more conventional form of an executive order, it would have been obliged to state its source of authority as well as to have its content approved by the Attorney General. *See supra* notes 136-37. As I will later show, the Bush Administration would have been hard pressed to do either of these things. *See infra* Part II.B. And so, it is prudent to assume that the Administration's omission to cement the Stem Cell Decision—which is one of President Bush's Administration's landmark policies—in such a duly issued executive order since August 2001 has not been the result of neglect, but rather of a deliberate effort by the Administration to avoid having to state the Directive's source of authority, which might cast its legal legitimacy in a questionable light.

140. President Bush's Address was only published in the Weekly Compilation of Presidential Documents, and in the Public Papers of the Presidents of the United States. *See* President Bush's Address, *supra* note 1; President George W. Bush, Address to the Nation on Stem Cell Research, 37 WEEKLY COMP. PRES. DOC. 1151 (Aug. 9, 2001).

141. The Fact Sheet seems to be available only through the White House Office of the Press Secretary. *See* Fact Sheet, *supra* note 109.

142. *Id.* The "operative" part of President Bush's Directive only surfaces in the accompanying Fact Sheet.

143. The title of the written version of the Address is "President Discusses Stem Cell Research," and the title of the Fact Sheet is "Fact Sheet: Embryonic Stem Cell Research." According to Gaziano, the primary method of classification of presidential directives relies almost exclusively on the title they are given. *See* Gaziano, *supra* note 134, at 288-89; *see also* CONGRESSIONAL STUDY OF EXECUTIVE POWER, *supra* note 134, at 1; Branum, *supra* note 7, at 7.

presidential directives.[144] As a result, there are no formal or procedural requirements applicable to it, so it cannot suffer from any formal or procedural flaw, which might have affected its validity or enforceability.

B. Analysis and Evaluation of President Bush's Authority to Issue His Directive and Enforce It on the NIH

Similar to the lack of regulation characterizing the formal and procedural aspects of presidential directives, there is very little law regulating the President's authority to issue such directives[145] and how one can evaluate the legality of such directives. Except for the axiomatic premise that presidential acts must be based on a legal source of authority (or else the President would actually be acting as an autocrat),[146] the most important source of guidance on these issues is found in Justice Jackson's famous and highly influential opinion in the matter of *Youngstown Sheet & Tube Co. v. Sawyer*.[147] According to Justice Jackson, when evaluating the legitimacy of presidential actions, a court should weigh the actions' sources of statutory and constitutional authority, and assess their compatibility with congressional powers and legislation.[148] Justice Jackson describes three "tiers" of authority for presidential actions.[149] In the "first tier" are presidential actions taken "pursuant to an express or implied authorization

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144. President Bush's Address does bear some resemblance to a loosely defined, somewhat obscure, class of presidential directives mentioned by Relyea, called "Presidential Announcements" and defined as "oral presidential directives . . . captured in an announcement which records what the President has prescribed or instructed." *See* Relyea, *supra* note 133, at 12. Yet, Relyea adds that Presidential Announcements "often are recorded in the *Weekly Compilation of Presidential Documents* . . . . However, they do not appear in the *Federal Register* or in the *Public Papers of the Presidents of the United States*." *Id.* President Bush's Address, while not published in the Federal Register, *was* published in the Public Papers of the Presidents of the United States, and thus falls outside the definition of this type of presidential directive.

It is interesting to note that a similar conclusion could also be drawn with respect to President Clinton's 1993 Embryo Decision, which was titled "Statement on Federal Funding of Research on Human Embryos" and was never published in the Federal Register but rather only in the *Weekly Compilation of Presidential Documents* and in the *Public Papers of the Presidents of the United States*. *See supra* note 60; *see also* President William J. Clinton, Statement on Federal Funding of Research on Human Embryos, 2 PUB. PAPERS 2142 (Dec. 2, 1994). Hence, President Clinton's Embryo Decision may also be viewed as falling outside of any of the known types of presidential directives.

145. Such authority is sometimes mentioned in particular statutes or may be construed as implied from powers constitutionally or statutorily granted to the President. *See* Gaziano, *supra* note 134, at 271-72, 276.

146. Some analogize such a president, who makes unrestricted use of executive power, to a "regulatory policy czar" or even to a king. *See* Cynthia R. Farina, *The "Chief Executive" and the Quiet Constitutional Revolution*, 49 ADMIN. L. REV. 179, 181 (1997); Branum, *supra* note 7, at 1, 33.

147. 343 U.S. 579 (1952).

148. *Id.* at 635-38 ("Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.").

149. *Id.*

of Congress," in which the President's authority "is at its maximum."[150] The "second tier" includes presidential actions taken "in absence of either a congressional grant or denial of authority."[151] Finally, the "third tier" includes presidential actions that are "incompatible with the expressed or implied will of Congress," in which the President's power "is at its lowest ebb."[152] This Article begins its examination of the validity of President Bush's Directive with a survey of the law governing the area of funding for scientific research in general and research involving hESCs in particular. Then, this Article classifies President Bush's Directive and analyzes its validity under the appropriate "tier" offered in Justice Jackson's *Youngstown* opinion (*Youngstown* Analysis).

1. The Legal Framework of Federal Funding for Scientific Research

Generally, the authority to fund biomedical research is granted to the Secretary of HHS, who acts through officers within NIH. The Public Health Service Act (PHSA) provides that "the Secretary is authorized to . . . make grants-in-aid to universities, hospitals, laboratories, and other public or private institutions, and to individuals for . . . research projects."[153] Section 405 of the PHSA authorizes the Secretary, acting through the Directors of the NIH's Research Institutes[154] to "encourage and support research, investigations, experiments, demonstrations, and studies in the health sciences."[155] All funding decisions are subject to policies set by the Director of NIH, who is authorized to make such policies for the entire NIH.[156]

Several statutes expressly affect the funding of human embryo research.[157] The most important is the Dickey Amendment. According to the Amendment:

> None of the funds made available in [HHS Appropriations Acts] may be used for . . . the creation of a human embryo or embryos for research purposes . . . or . . . research in which a human embryo or embryos are destroyed, discarded, or knowingly subjected to risk of injury or death greater than that allowed for research on fetuses in utero.[158]

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150. *Id.* at 635.
151. *Id.* at 637.
152. *Id.*
153. 42 U.S.C. § 241(a)(3) (2000).
154. The NIH itself is an assemblage of individual research institutes, each of which charged with a particular area of research. *See id.* § 281.
155. *Id.* § 284(b)(1)(A).
156. *Id.* § 282(b)(1).
157. For instance, the NIHRA determines that "[t]he Secretary may conduct or support research on the transplantation of human fetal tissue for therapeutic purposes." *See id.* § 289g-1(a)(1).
158. The Balanced Budget Downpayment Act, I, Pub. L. No. 104-99, § 128(2), 110 Stat. 26 (1996).

In light of the Rabb Opinion, which found that the NIH could fund research involving already-created hESC lines because such research would not qualify as the destruction of human embryos under the Dickey Amendment, it is widely accepted that the Dickey Amendment does not prohibit the funding of research that indirectly involves the destruction of human embryos (e.g., research involving stem cell lines created from destroyed embryos).[159] When read alongside each other, the Dickey Amendment and the PHSA authorize the Directors of the NIH's Research Institutes to support and conduct research involving hESCs so long as the research does not involve the creation of hESC lines or pose substantial risk to human embryos.

Most importantly, all funding for research conducted and supported by the NIH, including research involving embryos and hESCs, is also subject to the general instruction of § 101 of the NIHRA:

> (b) Ethical review of research
>
> (1) Procedures regarding withholding of funds
>
> If research has been recommended for approval . . . the Secretary [of HHS] may not withhold funds for the research because of ethical considerations unless—
>
> (A) the Secretary convenes an advisory board in accordance with paragraph (5) to study such considerations; and
>
> (B)(i) the majority of the advisory board recommends that, because of such considerations, the Secretary withhold funds for the research; or
>
> (ii) the majority of such board recommends that the Secretary not withhold funds for the research because of such considerations, but the Secretary finds . . . that the recommendation is arbitrary and capricious.
>
> . . .
>
> (3) Applicability
>
> The limitation established in paragraph (1) . . . shall apply without regard to whether the withholding of funds on such basis is characterized as a disapproval, a moratorium, a prohibition, or other characterization.
>
> . . .

159. *See supra* note 72 and accompanying text. Interestingly, by allowing for funding for research involving hESC lines (even if very few) President Bush's Directive seems to have accepted this premise. This position is also reflected in President Bush's op-ed piece, in which he explicitly stated that "[f]ederal funding for research on existing stem cell lines will move forward." *See President Bush's Op-Ed Piece*, *supra* note 104.

> (5) Ethics advisory boards
>
> (A) Any advisory board convened for purposes of paragraph (1) shall be known as an ethics advisory board . . .
>
> (B)(i) An ethics board shall advise, consult with, and make recommendations to the Secretary regarding the ethics of the project of biomedical or behavioral research with respect to which the board has been convened.
>
> (ii) . . . [T]he board shall submit to the Secretary . . . a report describing the findings of the board regarding the project of research involved and making a recommendation under clause (i) of whether the Secretary should or should not withhold funds for the project. . .
>
> (C) An ethics board shall be composed of no fewer than 14, and no more than 20, individuals who are not officers or employees of the United States. The Secretary shall make appointments to the board from among individuals with special qualifications and competence to provide advice and recommendations regarding ethical matters in biomedical and behavioral research. Of the members of the board—
>
> (i) no fewer than 1 shall be an attorney;
>
> (ii) no fewer than 1 shall be an ethicist;
>
> (iii) no fewer than 1 shall be a practicing physician;
>
> (iv) no fewer than 1 shall be a theologian; and
>
> (v) no fewer than one-third, and no more than one-half, shall be scientists with substantial accomplishments in biomedical or behavioral research.[160]

The basis of this section was Congress's belief that "[c]ontinued progress in health research is seriously threatened by . . . administrative actions that undermine the peer review process at NIH and block research that holds promise for millions of Americans suffering from disease."[161] Accordingly, § 101 was "intended to prohibit unilateral actions that block research approved by the merit review system"[162] by forbidding "unreasonable prohibitions . . . imposed in an arbitrary manner on exceptional and promising research that have received approval by NIH's rigorous scientific, technical, and ethical review system"[163] and to "restore the freedom of inquiry essential to the continued success of the country's biomedical research."[164]

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160. 42 U.S.C. § 289a-1(b)(1)-(5).
161. S. REP. NO. 103-2, at 13 (1993).
162. *Id.* at 15.
163. *Id.* at 13.
164. *Id.* at 15.

To achieve these goals, § 101 establishes a "default" under which such funding for scientifically meritorious research should be granted unless it is duly withheld.[165] Furthermore, while the Secretary, acting through his subordinates, has authority to support and conduct research involving hESCs that meets the restrictions of the Dickey Amendment, § 101 takes away the Secretary's authority to withhold funding from scientifically meritorious research involving hESCs because of ethical considerations without first receiving a recommendation to do so from an independent, duly-appointed Ethics Advisory Board. With this conclusion in mind, it is now possible to turn to the *Youngstown* Analysis of President Bush's Directive.

2. Classification of President Bush's Directive Under Justice Jackson's Taxonomy

The question is now: under which of the "tiers" described by Justice Jackson does President Bush's Directive fall? In order to fall under the "first tier," a presidential action should rely on express or implied statutory authority.[166] If this had been the case, we could have expected that President Bush's Address or the Fact Sheet would state the source of authority which they may have relied on,[167] yet neither of them does.[168] Therefore, we must determine whether President Bush's Directive could have relied on such an express or implied authorization in legislation.

A survey of congressional legislation reveals that no statute explicitly grants the President the authority to decide the permissible object or means of scientific research in general or for purposes of funding in particular.

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165. *Id.* at 20 ("It is the committee's intent that . . . all research proposals that are approved by the merit review system and are awarded funding, and for which there is no justifiable reason for withholding or withdrawing funding, should be funded."); *see also supra* note 48.

166. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (noting that in such cases, the President's power is at its maximum).

167. According to Branum, presidential directives normally state the source of their authority (whether legal or constitutional). In the rare case that a presidential directive totally disregards the issue of its authority, courts tend to question the validity of the presidential directive. *See* Branum, *supra* note 7, at 67-68.

168. Puzzlingly, no one has ever explicitly stated the source of President Bush's authority to give his Directive and enforce it upon the NIH. The only reference I was able to find to the possible source of President Bush's authority to give his Directive was by O. Carter Snead, the General Counsel of President Bush's own Council on Bioethics. In an article dedicated entirely to President Bush's Stem Cell Decision, Snead briefly mentioned that "the Bush policy demonstrates . . . a robust exercise of the *President's authority as head of the executive branch* to allocate the appropriated funding according to the Administration's priorities" (emphasis added). *See* Snead, *supra* note 73, at 498. Hence, according to Snead, the President's source of authority to give his Directive was simply his being the "head of the Executive Branch." As will be explained later in this section, this laconic explanation insinuates an "inherent" or "aggregate" constitutional presidential authority based on Article II of the Constitution. *See infra* Part II.B.3.

Hence, the question becomes whether President Bush's Directive relied on implied statutory authority.

Examining the statutes that regulate HHS and NIH funding of scientific research[169] reaffirms that the legislative language, on its face, does not lend itself to a construction implying that the President has the authority to intervene in the regulation of the funding for any type of scientific research, either inside or outside the context of research involving hESCs. Nevertheless, some scholars argue that there is more to the concept of implied presidential statutory authority.

The issue of implied presidential statutory authority is part of a lively debate regarding the measure of the President's control over the way executive officers carry out their statutorily-granted discretionary authorities and the President's power to affect the policies and decisions they make. This dispute is part of the longstanding and hotly debated controversy over the "unitary executive."[170] In this particular context, the debate revolves around the existence of a presidential takeover power—whether the President has the power to set policies and make decisions for executive agencies by "taking over" the duties bestowed upon them in legislation.[171] One of the most prominent proponents of this "presidential takeover power" stemming from an implied presidential statutory authority is Dean Elana Kagan. According to Dean Kagan, the President has (and should have) the power to direct executive agencies by setting their policies and making decisions for them.[172] Yet, unlike most proponents of the "unitary executive" theory, Dean Kagan does not find the source of the President's authority to take over the powers granted to agencies in the Constitution; rather, she reads legislation in a way that includes an implied presidential authority to take control of almost all of the legislative powers granted by Congress to particular agencies and executive officers.[173] Dean Kagan asserts that where a statute does not *explicitly exclude* the President

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169. *See generally* 42 U.S.C. §§ 201-300ii-4 (2000).

170. For opposing views on the issue of the "unitary executive" and presidential powers to exert control over administrative agencies, see generally Yoo et al., *supra* note 7; Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725 (1996). *See also* Elana Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2272-81 (2001). This dispute will be further discussed later in this section. *See infra* Part II.B.3.

171. For further discussion of this issue, see *infra* Part II.B.3.a.

172. *See* Kagan, *supra* note 170, at 2320, 2326-28 (noting that the President does not have authority to direct officials from independent agencies without the express grant of Congress).

173. *Id.* Kagan bases this construction of legislation on public policy reasons rather than on an historical reading of the Constitution. *See id.* at 2331-46.

from having the power to *possess* the discretionary authorities it grants to executive agencies, the statute should be construed to imply that the President has the power to use such authorities as his own.[174]

Under Kagan's Doctrine, President Bush had the power to take over all of the authorities granted to the HHS and the NIH with respect to the funding of scientific research, including hESC research. Thus, to the extent that the HHS and the NIH had the authority to make a policy decision prohibiting the allocation of funding to research involving hESCs created after August 9, 2001, Kagan's Doctrine would assert that President Bush had the same authority and could have relied on this power in issuing his Directive.

However, even if we accept Dean Kagan's argument—which some scholars vehemently do not[175]—President Bush's Directive could not have relied on this supposed implied statutory authority because NIHRA § 101 explicitly prevents HHS and the NIH from withholding funding for scientific research on ethical grounds without the prior recommendation of a duly appointed EAB.[176] Even if we espouse Kagan's Doctrine and presume that President Bush had all of the powers Congress granted to HHS and the NIH, he could still not have had a power that Congress did not grant to these agencies. In other words, since HHS and the NIH lack the authority to make decisions regarding the funding of scientific research based on ethical grounds without the prior approval of an EAB, so does President Bush.

We can surmise that President Bush's Directive could not have relied on an express or implied statutory authority, and thus does not fall within the boundaries of the "first tier" described in *Youngstown*. In addition, in light of the legislation regulating the funding of biomedical research[177]—which indicates that Congress did not leave this area "an open field" for presidential action—we can determine that President Bush's Directive does

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174. *Id.* at 2251. It is important to note that to date there seems to be no court decision implementing or even mentioning Dean Kagan's unitary executive theory (Kagan's Doctrine) or anything similar in analyzing presidential powers.

175. Some of the most convincing arguments against Kagan's Doctrine's basis and rationales are made by Kevin Stack. *See* Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263 (2006). One of Stack's main arguments is that, contrary to Dean Kagan's assertions, Congress's practice of granting, in a handful of cases, legislative authorities to the President in name indicates that when Congress intends to grant the President legislative powers it does so explicitly and hence that her inference that wherever Congress did not do so indicates the existence of presidential powers goes not only against interpretation principles but also against common sense. *See id.* at 268, 276-99. Stack makes a compelling case against Kagan's Doctrine. His arguments and examples put the thesis promoted by Dean Kagan in a new light and substantially undermine the statutory construction that lies at the base of Kagan's Doctrine.

176. *See* 42 U.S.C. § 289a-1(b) (2000); *see also supra* Part II.B.1.

177. *See supra* Part II.B.1.

not fall under Justice Jackson's "second tier," which applies to presidential acts in the absence of a congressional grant or denial of authority.[178]

Subsequently, and taking into consideration the language of NIHRA § 101—a language which explicitly seeks to *remove* from executive officers the power to make bioethical decisions with respect to the funding of research and requires them to have the bioethical issues properly deliberated in a highly visible public forum beforehand—President Bush's Directive seems to fall neatly under the definition of the "third tier" described in *Youngstown*. In giving his Directive, President Bush did exactly what Congress expressly sought to prohibit: in his capacity as the highest executive officer in the federal government, he made a decision to withhold funding for biomedical research involving hESCs. He did so based on his own moral and ethical beliefs, and without first receiving a recommendation to do so from an independent EAB, thus rendering his actions incompatible with § 101. Having reached this conclusion, this Article will now proceed to analyze the validity of President Bush's Directive under the premises of the "third tier."

3. Analysis of the Validity of President Bush's Directive as Presidential Action Incompatible with the Expressed Will of Congress

According to Justice Jackson:

> When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.[179]

Following this "roadmap" for judicial review of presidential actions, we will assess the validity of President Bush's Directive by weighing the possible constitutional powers, which may have granted him the authority to give his Directive despite NIHRA § 101.

Lacking express constitutional language granting the President the authority to decide on matters involving scientific research and its funding, President Bush's Directive's only other possible source of authority is

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178. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637, 639 (1952) (Jackson, J., concurring) (explaining that "in absence of either a congressional grant or denial of [presidential] authority," Congress and the President have concurrent authority, which requires a more flexible examination than under either the "first tier" or the "third tier").

179. *Id.* at 637-38.

inherent presidential authority under the "Vesting Clause."[180] In order to determine whether such inherent authority could have empowered President Bush to give his Directive, we need to answer the following two questions: (1) what is the measure of direction Presidents may exert over executive agencies and does the presidential power to direct executive agencies, which presumably stems from the President's inherent authority, include the authority to set policies for agencies as President Bush did in his Directive; and (2) could inherent authority have empowered President Bush to "override" and act in variance with NIHRA § 101.

a. Inherent Presidential Authority and Its Applicability to President Bush's Directive

"Inherent" or "aggregate" authority, as it has been referred to, is a somewhat controversial source of presidential constitutional power. The central proposition of the claim of inherent presidential constitutional authority is that under the auspices of the Vesting Clause,[181] the President, as Chief Executive, is endowed with the power to direct the actions of executive agencies.

The controversy surrounding the existence of an inherent authority derives not only from its origin and undefined scope,[182] but mostly from the fact that the Supreme Court has never explicitly acknowledged the existence of such authority.[183] This may be attributed, at least in part, to the

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180. U.S. CONST. art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America.").

181. *Id.*

182. *See* PHILLIP J. COOPER, BY ORDER OF THE PRESIDENT: THE USE AND ABUSE OF EXECUTIVE DIRECT ACTION, 4-5 (2002) (discussing the origins of "inherent authority"). Similar and even stricter words may be found in Justice Jackson's concurring opinion in *Youngstown*:

> Loose and irresponsible use of adjectives colors all non-legal and much legal discussion of presidential powers. "Inherent" powers, "implied" powers, "incidental" powers, "plenary" powers, "war" powers and "emergency" powers are used, often interchangeably and without fixed or ascertainable meanings.
>
> The vagueness and generality of the clauses that set forth presidential powers afford a plausible basis for pressures within and without an administration for presidential action beyond that supported by those whose responsibility it is to defend his actions in court. . . . While it is not surprising that counsel should grasp support from such unadjudicated claims of power, a judge cannot accept self-serving press statements of the attorney for one of the interested parties as authority in answering a constitutional question . . . . But prudence has counseled that actual reliance on such nebulous claims stop short of provoking a judicial test.

See Youngstown, 343 U.S. at 646-47 (Jackson, J., concurring).

183. The Supreme Court has referred to the concept of inherent presidential authority on numerous occasions, but the author is unaware of any case in which the Supreme Court has ever actually acknowledged the existence of an inherent authority in the President as a source of presidential power in a matter before the court. *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507, 516-17 (2004); *id.* at 552 (Souter J., concurring in part, dissenting in part, and concurring in the judgment); Loving v. United States, 517 U.S. 748, 773 (1996); *see also* Branum, *supra* note 7, at 68; George v. Ishimaru, 849 F. Supp. 68, 71-73 (D.D.C. 1994)

fact that the language of inherent authority only surfaces when it is clear that the President does not have any other identifiable source of authority from which his acts may draw legitimacy.[184]

Nonetheless, in light of the frequent invocation of inherent authority arguments by the Government—especially by the Clinton and Bush Administrations[185]—and for the sake of completeness of the analysis of President Bush's Directive, this Article assumes that inherent authority is as valid a source of presidential power as these Administrations have held it out to be. Thus, this part of the analysis assumes that, hypothetically, President Bush could have established his Directive on his Article II power to direct administrative agencies' actions and policies.[186]

("This court rejects the argument that the President has 'inherent' appointment authority under the Take Care Clause of Article II of the Constitution to appoint persons to positions like this one. . . . No court has ever recognized that the President has such inherent authority. . . . The important work of the Commission on Civil Rights should not be impeded by continuing to argue about "inherent" Presidential power which no court in the nation's history has ever recognized.").

184. Henry Monaghan captured the essence of this phenomenon:

> [W]hen . . . no readily identifiable legislative warrant exists, and arguably the President is implementing presidential policy alone, a different constitutional vocabulary surfaces. The Vesting Clause, the Take Care Clause, the Presidential Oath to 'preserve, protect and defend the constitution of the United States,' and the Presidents 'inherent,' . . . or 'aggregate' powers are all invoked in defense of the President's conduct . . . . Each of these terms is simply a different formulation of the fundamental claim that the President's conduct is valid even though no statutory authority exists.

See Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 14 (1993).

185. *See, e.g.*, Doolin Sec. Sav. Bank, F.S.B. v. Office of Thrift Supervision, 139 F.3d 203, 211 n.6 (D.C. Cir. 1998) (rejecting an inherent power argument made by the Clinton Administration); *Ishimaru*, 849 F. Supp. at 71-72 (rejecting the argument that the President has "inherent" appointment authority under Article II of the Constitution); *Hamdi*, 542 U.S. at 516-17 (avoiding the issue of inherent presidential authority by finding that Congress authorized the President to order the plaintiff's detention); ACLU v. NSA, 438 F. Supp. 2d 754, 780-81 (E.D. Mich. 2006) (holding that the President, as Commander in Chief, did not have inherent power to authorize the NSA to intercept international telephone and internet communications without a warrant)*; see also* Yoo et al., *supra* note 7, at 729-30 ("Support for the unitariness of the executive branch does not necessarily require supporting the broad claims of inherent executive authority advanced by the Bush Administration."); Kagan, *supra* note 170, at 2320-21 (addressing "President Clinton's repeated invocation of a vaguely defined 'executive authority' to direct administrative officials to adopt certain presidential policies"); Gaziano, *supra* note 134, at 281 ("Some of President Clinton's claims of implied and inherent authority were outrageous.").

186. Despite my approach to the concept of "inherent authority" in this part of the Article, it is my opinion that "inherent authority" is a superfluous and sometimes even dangerous concept that the courts must not allow to exist as a valid source of presidential authority. In most cases in which the government raises "inherent authority" arguments, the use of this concept is misleading and mistaken and the government actually means to argue that the authority for the presidential action was implied from one of the President's express constitutional powers. (This type of mistake often occurs with relation to the President's powers under the "Commander in Chief" Clause.) Yet, in other cases, as described by Monaghan, the government has been invoking "inherent authority" to bolster arguments that the President had the power to take certain actions unsanctioned by any other express or implied constitutional or statutory authority. *See* Monaghan, *supra* note 184, at 24-32

However, President Bush's Directive did much more than merely provide direction to the NIH with respect to the funding of research involving hESCs: it set its policies for it. Can the President do that? Does the scope of the President's inherent authority include the ability to set policies for executive agencies? As mentioned above, a lively dispute persists with respect to the extent of control the President may exert over administrative agencies' actions and the measure of his ability to direct their policies.

i. The Unitary Executive Debate over the Presidential Power to Direct Executive Agencies

Three schools of thought predominate the debate surrounding the President's power to control discretionary authorities granted to executive officers. The first school, which I will refer to as Constitutional Unitarianism, envisions the President as somewhat of a "super-executive" who may, under the Constitution, "take over" almost any responsibility assigned to any inferior officer,[187] including policymaking authorities, and act in their stead in his own capacity as President or, alternatively, nullify the actions of which he does not approve.[188] According to this school of thought, the "presidential takeover power" exists even when the authorizing statute explicitly grants a discretionary executive power to a particular officer.[189]

The main rationale of Constitutional Unitarianism is that the Vesting Clause grants "executive power" solely and exclusively to the President, who is the source of the executive power in the Government and who merely delegates it to entities and officers that Congress has charged with tasks, whereas these entities and officers are otherwise powerless to act

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(critiquing this approach). I believe that accepting the government's inherent authority arguments in such cases may be dangerous since it would ratify the existence of presidential powers beyond those granted to the President by the Constitution or in legislation and thus beyond the checks and balances set forth in our constitutional scheme and the framework of the Separation of Powers Doctrine. This type of authority resembles the kind of power that an autocrat would have, not a President of a democracy. *See* Branum, *supra* note 7, at 33.

187. The exception to this is quasi-judicial administrative functions, namely when an agency is required to make decisions which affect specific individuals in specific cases. *See* Myers v. United States, 272 U.S. 52, 135 (1926) (explaining that the President has no power to influence or control executive officers when they are acting in a quasi-judicial manner); Portland Audubon Soc'y v. Endangered Species Comm., 984 F.2d 1534, 1546-48 (9th Cir. 1993) (acknowledging that "when an agency performs a quasi-judicial . . . function its independence must be protected" and that "[t]here is no presidential prerogative to influence quasi-judicial administrative agency proceeding").

188. *See* Yoo et al., *supra* note 7, at 607.

189. *See* Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 595 (1994) ("Because the President alone has the constitutional power to execute federal law, it would seem to follow that, notwithstanding the text of any given statute, the President must be able to execute that statute.").

unless and until such presidential delegation takes place.[190] Therefore, according to Constitutional Unitarians, Congress simply cannot grant executive power to any entity that is beyond the reach of the President,[191] who is vested with the residual power to do, essentially, "whatever remains to be done after the formal Article I lawmaking process is concluded."[192] Accordingly, under Constitutional Unitarianism, executive agencies are merely a means to "assist" the President in carrying out the duties of the Chief Executive.[193] Thus, under the Constitutional Unitarian theory, because President Bush himself was the source of the NIH's authorities, he had the authority to make funding decisions and set funding policies for the NIH, as he did in his Directive, as well as to nullify the NIH's previously promulgated Final Guidelines, which he did not approve of and which did not align with his Stem Cell Decision.

The second school of thought, which I will refer to as Non-Constitutional Unitarianism, believes, like Constitutional Unitarians, that the President has takeover powers as well as the power to nullify executive policies and actions. However, unlike Constitutional Unitarians who rely on originalist-historical arguments, Non-Constitutional Unitarians argue that the President ought to have such Powers as a matter of public policy and desirable constitutional interpretation.[194] For the purposes of the analysis of President Bush's Directive, the Non-Constitutional Unitarian view is identical to that of the Constitutional Unitarian theory in the sense that it too would perceive President Bush's Directive as properly relying on a presidential authority to set and nullify policies for executive agencies.

Finally, the third school of thought, which I will call Moderate Unitarianism, consists of those who believe that the President's authorities to direct executive agencies do not and must not entail the power to set policies and make decisions for agencies and in their stead but merely allow the President to "stir them in the right direction" through various means.[195] Unlike the two previous schools of thought, Moderate Unitarians

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190. *See id.* at 593 ("[T]he Executive Power Clause grants 'the executive Power' solely and exclusively to the President. . . . Until and unless the President delegates 'the executive Power' to . . . entities or officers, they are constitutionally disempowered from acting.").

191. *Id.*

192. Farina, *supra* note 146, at 181 (emphasis omitted) (criticizing the Constitutional Unitarian approach).

193. Constitutional Unitarians believe that although the President is the one who has the executive power, the President obviously cannot fulfill all the tasks imposed by Congress upon executive agencies alone and thus enlists the assistance of executive officers. *See* Calabresi & Prakash, *supra* note 189, at 593-94, 597-98.

194. *See* Kagan, *supra* note 170; *see also* Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994) (basing their support of a unitary executive on constitutional interpretation).

195. *See* Farina, *supra* note 146 (condemning what she referred to as "the cult of the Chief Executive"); Peter L. Strauss, *Presidential Rulemaking*, 72 CHI.-KENT L. REV. 965, 968 (1997) [hereinafter Strauss, *Presidential Rulemaking*] (arguing that President Clinton's

perceive the President as more of a "manager" and view presidential power over executive agencies as stopping short of the ability to dictate policies for and instruct such agencies on how they should use their discretionary powers.[196] Under the Moderate Unitarian approach, agencies "have relationships with the President in which he is neither dominant nor powerless."[197] Moderate Unitarians therefore contend that in matters involving substantive decisions, executive officers are required to resist attempts by the President to impose his opinions upon them.[198] In a nutshell: supervision and direction are acceptable and even welcome, but substitution is not.

The Moderate Unitarian contention most relevant to this Article is that in setting policies for agencies, the President undermines the Separation of Powers Doctrine by partaking in the agencies' rulemaking function, thereby overstepping into the "quasi-legislative" dimension of agencies.[199]

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practice of "owning" administrative actions "insufficiently respects the tension inherent in the Constitution between Congress's power . . . and the fact of a single chief executive"); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984) [hereinafter Strauss, *Separation of Powers and the Fourth Branch*] (proposing a framework for analysis of the relationship between the President and agencies that balances the need for presidential oversight of the agencies with congressional authority and role in government); *see also* Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 25 (1995) (claiming that the President cannot make decisions for executive agencies if Congress previously allocated authority to the agencies). Moderate Unitarianism acknowledges that the President has (and should have) various means of influencing agencies, like the constitutional power to remove executive officers and appoint others in their stead (with the limited exception of independent commissions created by Congress) as well as numerous 'procedural' authorities over agencies including the authority to provide information to agencies so as to promote coordination in matters touching upon national policies, the authority to require agencies' response on policy concerns relevant to them, or even the authority to direct agencies to further consider certain perspectives on a certain policy issue. *See* Strauss, *Separation of Powers and the Fourth Branch*, *supra*, at 649-50. *See generally* Peter L. Strauss & Cass R. Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 ADMIN. L. REV. 181 (1986).

196. For a discussion of policy issues as they relate to Constitutional and Non-Constitutional Unitarianism as opposed to Moderate Unitarianism, see generally Thomas O. McGarity, *Presidential Control of Regulatory Agency Decisionmaking*, 36 AM. U. L. REV. 443, 445-63 (1987).

197. Strauss, *Separation of Powers and the Fourth Branch*, *supra* note 195, at 583; *see also* Strauss, *Presidential Rulemaking*, *supra* note 195, at 981-84 (arguing that the President may inquire into the duties delegated to agencies as long as he understands that the final decisions regarding the duties belong to the agency).

198. *See* Strauss, *Presidential Rulemaking*, *supra* note 195, at 973 ("That means that it is [an executive officer's] right, and in some cases it may be his obligation, to refuse the President's direction, even if he realizes that his disappointed boss may immediately send him out of office.").

199. *See id.* at 967-68 (finding that the President's practice insufficiently respects the tension between Congress's power and his own office, namely "between the legal and the political"); *see also* Kagan, *supra* note 170, at 2320 ("Congress indeed has delegated discretionary power, but only to specified executive branch officials; by assuming responsibility for this power, the President thus exceeds the appropriate bounds of his office.").

In addition, Moderate Unitarians contend that the Executive Office of the President lacks the resources necessary for making decisions, which require expertise and are therefore better left to executive agencies and officers.[200] Thus, under the Moderate Unitarian theory, President Bush was prohibited from setting policies regarding the funding of research involving hESCs for the NIH, could not have simply nullified the Final Guidelines' part regulating such research, and did not have the power to give a presidential directive to that effect.

ii. The Unitary Executive Debate in Court—Which School of Thought Prevails?

Courts seem to have never directly endorsed any of the above schools of thought.[201] Yet, in numerous cases involving issues pertaining to the "unitary executive" debate, the Supreme Court rejected the Constitutional Unitarian positions and leaned more toward the theory of Moderate Unitarianism. The most obvious example of this judicial inclination is the pair of presidential removal-power cases, *Myers v. United States*[202] and *Humphrey's Executor v. United States.*[203] In both cases, the issue was the extent of the President's authority to remove executive officers, and in both cases, the Government, taking the Constitutional Unitarian stance, argued that the President had constitutional authority to remove any executive officer at will. In *Myers,* the Supreme Court found that the President has an almost unlimited removal power stemming from the Article II vested executive powers.[204] But only nine years later, the Supreme Court in *Humphrey's Executor* ruled that Congress may restrict the President's

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200. *See* Farina, *supra* note 146, at 185 ("[I]t is unrealistic to think that the President can supervise the entire regulatory enterprise in any comprehensive and meaningful way."). Allowing presidential involvement in such decisions would obviously increase the political component in these decisions at the expense of the expertise component. The Moderate Unitarian stance is that in this politics/expertise tradeoff, we must not allow "politics" to completely take over "expertise," which plays a vital role in many executive decisions.

201. *See* Kagan, *supra* note 170, at 2250, 2271, 2322 (asserting that "the courts never have recognized the legal power of the President to direct even removable officials as to the exercise of their delegated authority"); *see also* Stack, *supra* note 175, at 270 (mentioning that although the question of whether the President has directive authority when a statute grants power to an executive officer was already prevalent during the nineteenth century, it "has never been squarely addressed by the Supreme Court").

202. 272 U.S. 52 (1926).

203. 295 U.S. 602 (1935).

204. *Myers,* 272 U.S. at 134-35. In *Myers*, the Supreme Court decided the constitutionality of a statute providing that certain postmasters could only be removed with the approval of the Senate. The Court ruled that the statute was unconstitutional due to its infringement upon the principle of separation of powers and thus upheld the President's removal of a postmaster without the approval of the Senate. However, it is important to note that the *Myers* Court acknowledged, though in dictum, that Congress may be able to limit the President's ability to direct executive officials. *Id.* at 135.

removal power, thus practically rejecting the Constitutional Unitarian contention that Article II, § 1 grants the President an almost unlimited power to run the executive branch as the President sees fit.[205]

Another example of the Supreme Court's rejection of the Constitutional Unitarian position is the seminal case of *Morrison v. Olson.*[206] In *Morrison,* the Supreme Court was once again called on to decide the constitutionality of a statute, namely the Ethics in Government Act, which insulated the position of Special Prosecutor from the influence and control of the President. The Supreme Court held that the Act was constitutional and that the Attorney General, as the President's representative, lacked the power to remove the Special Prosecutor at will (i.e. without "good cause") or control the way in which the Special Prosecutor carried out those duties. By doing so, the Supreme Court once again acknowledged Congress's ability to insulate certain executive officers and functions from the control of the President, and basically declined to accept the Constitutional Unitarian argument regarding the exclusivity and scope of the President's reign over all that is executive.[207]

These cases may suggest the existence of a "judicial trend" in the Supreme Court towards Moderate Unitarianism in general.[208] Notably, these cases lie at the base of the conventional scholarly view, which also seems to follow the Moderate Unitarian approach: that the President lacks the authority to set policies and make decisions for executive agencies and in their stead.[209] However, it appears that a "judicial trend" and a scholarly

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205. *Humphrey's Ex'r*, 295 U.S. at 629-32. The issue in *Humphrey's Executor* was similar to that in *Myers*. Once again the President sought to remove an executive officer, only this time the officer was a Federal Trade Commissioner and the Supreme Court had to decide whether Congress could limit the President's powers of removal as it did with respect to FTC Commissioners. The Supreme Court ruled that Congress's law "insulating" the FTC Commissioners from the removal powers of the President was constitutional. However, the Court distinguished this case from *Myers* by holding again that actual participation of Congress in the removal process would be unconstitutional.

206. 487 U.S. 654 (1988).

207. *See id.* at 693-96 ("It is undeniable that the Act reduces the amount of control or supervision that the Attorney General and, through him, the President exercises over . . . investigation and prosecution . . . . The Attorney General . . . does not determine the counsel's jurisdiction; and his power to remove a counsel is limited.").

208. A much earlier indication of this "trend" (and possibly one of its precursors) is dictum in the Supreme Court's decision in *Kendall v. United States*, which seems to advocate the Moderate Unitarian approach with respect to presidential takeover powers. 37 U.S. 524, 610 (1838).

209. *See* Kagan, *supra* note 170, at 2320, 2324. As Dean Kagan observed:

> The conventional view in administrative law, in apparent accord with [*Myers* and *Humphrey's Executor*], holds that the President lacks the power to direct an agency official to take designated actions within the sphere of that official's delegated discretion. The President has no authority to act as the decisionmaker, either by resolving disputes in the OMB process or by issuing substantive directives. This is because Congress, under the removal precedents, can insulate administrative policymaking from the President, and Congress has exercised this power by

convention are not authoritative enough to provide us with an unequivocal determination regarding the President's power to set policies for executive agencies. Furthermore, any attempt to predict whether this Moderate Unitarian inclination of the Supreme Court—which appears to have existed when *Morrison* was decided about twenty years ago[210]—will persist (especially in the realigned Roberts Court), should be taken with a grain of salt. Therefore, it appears that we remain without any conclusive answer regarding the existence of presidential takeover powers in general and their applicability to President Bush's Directive in particular.

Nonetheless, as before, for the sake of completeness of the analysis, this Article will make the assumption that setting a policy for the NIH was within the boundaries of President Bush's constitutional inherent authority. This is not to say that in the particular case of President Bush's Directive, he properly used this inherent authority or that he may set funding policies for the NIH as he did, but merely that in principle, it is assumed that he could have found the power to do so with the inherent authority arguably vested in him. Thus, it is now necessary to determine whether President Bush's presumable inherent authority (to set policies for the NIH) gave him the power to override NIHRA § 101.

b. Inherent Authority as a Power to Override NIHRA § 101

This Article will now return to the "third tier" framework laid out in *Youngstown* and use it to evaluate the validity of President Bush's actions. At the heart of this part of the discussion lies the question of whether President Bush's supposed inherent authority to set policies for the NIH enabled him to give his Directive in spite of the NIHRA's instruction that a recommendation from a duly-established EAB precede an administrative decision to withhold federal funding from scientific research on ethical grounds.

A longstanding Supreme Court rule prohibits the President from acting in variance with a clear and valid statutory instruction,[211] even in a state of

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delegating the relevant discretion to a specified agency official, rather than to the President.

Id. at 2323, 2325; *see also* Pildes & Sunstein, *supra* note 195, at 24 ("What we might call the conventional view relies on the following three points[:] . . . (c) the President has no authority to make the decision himself, at least if Congress has conferred the relevant authority on an agency head.").

210. *See supra* notes 206-07 and accompanying text.

211. *See* Little v. Barreme, 6 U.S. (2 Cranch) 170, 177-78 (1804) (holding that the congressional statute was clear and that the President had no power to expand its scope); *see also* CONGRESSIONAL STUDY OF EXECUTIVE POWER, *supra* note 134, at 10; Pildes & Sunstein, *supra* note 195, at 24-25 ("[N]either the President nor the agency head may violate the law, and to that extent both must follow the substantive statutory standard, whatever their policy views may be.").

emergency.[212] Yet, in light of the fact that the presidential act in the matter before us claims reliance on an inherent constitutional power, the issue at hand is somewhat more intricate than that which came before the Court in *Little v. Barreme*, which set this precedent.

Using "third tier" terminology, we can say that in his Directive, President Bush "took a measure" that was clearly "incompatible with the expressed will of Congress," as manifested in NIHRA § 101. Hence, President Bush's power was "at its lowest ebb," and he could only have relied on his Constitutional powers, which presumably consisted of the President's inherent authority to direct executive agencies. Following Justice Jackson's scheme, we should determine whether this presidential power supersedes Congress's constitutional legislative power under Article I, §§ 1 and 18 to legislate the NIHRA. According to *Youngstown*, presidential measures incompatible with the will of Congress would only be upheld by the courts where the President can claim an *exclusive* power to act and where such claim has been "scrutinized with caution" by the court. In other words, courts would only uphold presidential acts that go against clear statutory instructions in cases where it is clear that the Constitution empowers the President to act exclusively and Congress has no business interfering.[213] But is funding for scientific research in general, or for research involving hESCs in particular, an area that the Constitution designates as exclusively within the realm of the President's powers? The answer appears to be in the negative and so the conclusion of this *Youngstown* Analysis is that President Bush's Directive could not have overridden the NIHRA, even if it did rely on an inherent presidential authority to set funding policies for the NIH.

Still, as convincing and widely quoted as Justice Jackson's *Youngstown* opinion may be, it is only dicta, and is therefore not instructive, but rather suggestive, and so are the conclusions it yields. Nevertheless, several court decisions dealing with presidential acts that violated congressional statutes bolster our conclusion that President Bush's Directive could not have overridden the NIHRA. These decisions indicate that Justice Jackson's opinion in *Youngstown* is a true reflection of the law, of the way courts perceive presidential acts that transgress congressional legislation, and of the very narrow latitude they are willing to afford to such acts.

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212. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (rejecting the argument that the President's "inherent power" to take action in a state of emergency legitimized the seizure of the steel mills); *see also* Monaghan, *supra* note 184, at 24-32 ("Whether or not any president can live with it, the literary theory of 'The executive Power' recognizes no presidential license to disregard otherwise concededly applicable legislation, even in an emergency.").

213. Examples of such cases may include the President's powers to set foreign policies (not including the signing of treaties) and to act as Commander in Chief.

The first example is, appropriately, the *Youngstown* Court's own majority opinion, which examined the validity of an executive order that facilitated the governmental seizure of privately owned steel mills.[214] Indeed, the presidential directive in *Youngstown*, which, according to the Government, relied on the President's inherent authority,[215] did not directly violate any particular congressional statute. However, as the Court acknowledged, the executive order not only failed to comply with statutory requirements for governmental seizures,[216] but also strove to settle a labor dispute by using seizure—a method Congress had previously refused to adopt.[217] Hence, the presidential directive in *Youngstown*, which the court refused to uphold, was really an attempt by the President to circumvent Congress's will by ignoring the law in much the same way President Bush's Directive simply ignored NIHRA § 101 requirements and the congressional will behind it.

Furthermore, in analyzing the Government's claim of inherent constitutional authority to issue the executive order, the *Youngstown* Court ruled that:

> In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker . . . . The President's order does not direct that a congressional policy be executed in a manner prescribed by Congress—it directs that a presidential policy be executed in a manner prescribed by the President.[218]

Accordingly, the *Youngstown* Court upheld the District Court's injunction against the President's executive order.

This case demonstrates the Supreme Court's reluctance to uphold an executive order, which implemented a presidential policy that both contravened and was at the expense of congressional policy properly set in legislation.[219] Although the majority's opinion in *Youngstown* apparently

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214. *See Youngstown,* 343 U.S. at 582-83.

215. *See id.* at 582-84 (noting that the Government asserted that "a strike disrupting steel production for even a brief period would so endanger the well-being and safety of the Nation that the President had 'inherent power' to do what he had done").

216. *See id.* at 585-86 ("There are two statutes which do authorize the President to take both personal and real property under certain conditions. However, the Government admits that these conditions were not met and that the President's order was not rooted in either of the statutes.").

217. *See id.* at 586 ("Moreover, the use of the seizure technique to solve labor disputes in order to prevent work stoppages was not only unauthorized by any congressional enactment; prior to this controversy, Congress had refused to adopt that method of settling labor disputes.").

218. *Id.* at 587-88.

219. *See id.* at 588 ("The power of Congress to adopt such public policies as those proclaimed by the order is beyond question."). As explained above, the congressional policy took shape in two forms: one, in two statutes regulating governmental taking of property, and two, in refusal to allow for taking as means of settling labor disputes.

would have perceived the presidential action there as falling within the boundaries of the "second tier," it nonetheless reflects the general sentiment expressed in Justice Jackson's opinion with respect to presidential actions that circumvent legislation.

Another testament to the validity of the insights encapsulated in Justice Jackson's opinion and to their applicability to President Bush's Directive may be found in two cases—*State Highway Commission of Missouri v. Volpe*[220] and *Train v. City of New York*[221]—both of which deal with the President's power to set money spending policies where such policies go against positive statutory instruction to spend certain sums. Though these cases did not involve direct judicial review of presidential instruction of executive officers, in both cases, the courts acknowledged that the administrative act under review was the result of a presidential instruction to act in spite of federal legislation.[222] Subsequently, in both cases, the courts overruled the administrative acts that implemented the presidential instruction not to spend,[223] thus once again indicating the courts' aversion to presidential policies and acts that are in clear conflict with legislation. These cases are also a testament to the courts' unwillingness to defer to presidential instruction of executive agencies to implement presidential policies in a manner blatantly inconsistent with the law. Applying *State Highway* and *Train v. City of New York* to President Bush's Directive not only indicates that courts would not accept the Directive, but also that the courts would frown upon the NIH's implementation of President Bush's Stem Cell Decision.[224]

The D.C. Circuit's decision in *Chamber of Commerce v. Reich*[225]—the second case ever in which a presidential executive order was overruled in its entirety[226]—is another example of the courts' unwillingness to tolerate

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220. 479 F.2d 1099 (8th Cir. 1973).

221. 420 U.S. 35 (1975).

222. In *State Highway*, the Eighth Circuit reviewed a decision by the Secretary of Transportation to defer his authority to allocate funds apportioned by Congress to highway development in Missouri due to a presidential policy to limit government expenditures to control the inflation. 479 F.2d at 1103, 1108. In *Train v. City of New York*, the Supreme Court reviewed a decision by the Environmental Protection Agency (EPA) not to allot the City of New York funds appropriated by Congress for development of water and sewage infrastructure, whereas the EPA's decision was the result of a direct instruction by the President to limit the sums which were originally appropriated for this purpose. 420 U.S. at 40.

223. *See State Highway*, 479 F.2d at 1118 (enjoining the defendants from withholding authority to appropriate funds under the Federal Aid Highway Act in Missouri); *City of New York*, 420 U.S. at 44, 47 (finding that the letter from the President and the Administrator's withholding of the funds could not "be squared with the statute").

224. For a discussion of the NIH's policy implementing President Bush's Directive, see *infra* Part II.C.

225. 74 F.3d 1322 (D.C. Cir. 1996).

226. *See* Branum, *supra* note 7, at 38 (explaining that President Clinton was "only the second President to have an executive order struck down by the courts in its entirety").

presidential actions intended to circumvent statutes. In *Reich*, the Government attempted to defend an executive order issued by President Clinton, which clearly contradicted a congressional act, by arguing that another later, though more general statute granted the President the authority to issue his order in abrogation of the former statute.[227] The D.C. Circuit did not accept the Government's arguments and held that the earlier, more specific statute preempted President Clinton's executive order.[228] Although the Court's reasoning in this matter seemed to involve mere statutory construction, its decision indicated the Court's reluctance to uphold a presidential action that stands in clear conflict with a valid statute.[229]

Lastly, the D.C. Circuit's decision in *Building & Construction v. Allbaugh*[230] addressed the validity of an executive order issued by President George W. Bush that prohibited executive agencies entering into agreements with contractors from requiring or prohibiting the implementation of certain pro-union labor practices,[231] and which was presumably in conflict with the National Labor Relations Act (NLRA).[232] In its arguments during the trial, the Government contended that the President's authority to issue the executive order stemmed from his inherent constitutional power to direct executive agencies.[233] The District Court did not accept the Government's arguments regarding the President's authority to issue the order, but rather found it to be "presidential lawmaking" a lá *Youngstown*, and overruled the relevant part in the executive order as preempted by the NLRA.[234] On appeal, the D.C. Circuit accepted the Government's argument that the President's authority to issue the executive order stemmed from his "supervisory authority over the Executive Branch"[235] in an area of regulation that is not preempted by the

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227. *See Reich*, 74 F.3d at 1332-33 (rejecting the argument that the Procurement Act of 1949 granted broad power to the President over the more specific National Labor Relations Act).

228. *Id.* at 1332-39.

229. *See id.* at 1338-39 (concluding that "the Executive Order is regulatory in nature and is pre-empted by the NLRA which guarantees the right to hire permanent replacements"); *see also* Gaziano, *supra* note 134, at 287 ("*Reich* stands for the seemingly obvious proposition that the President may not use his statutory discretion in one area to override a right or duty established in another law.").

230. 295 F.3d 28 (D.C. Cir. 2002).

231. Exec. Order No. 13,202, 66 Fed. Reg. 11,225 (Feb. 17, 2001).

232. National Labor Relations Act (NLRA), ch. 372, 49 Stat. 449 (1935) (codified at 29 U.S.C. §§ 151-169 (2000)); *see* Bldg. & Constr. Trades Dep't v. Allbaugh, 172 F. Supp. 2d 138, 162 (D.D.C. 2001) (making two sections of President Bush's executive order invalid because they were preempted by the NLRA).

233. *See Allbaugh*, 172 F. Supp. 2d at 159 ("Defendants' constitutional argument rests on the 'well-established' power . . . to supervise and guide subordinate executive officials to ensure the consistent execution of the laws.").

234. *Id.* at 172.

235. *Allbaugh*, 295 F.3d at 32-33.

NLRA,[236] and thus overturned the District Court's decision and upheld the executive order.[237] Yet, the important part of the D.C. Circuit's decision for our purposes is its reasoning. The D.C. Circuit did not base its decision on the premise that the President's inherent authority empowered him to act in variance with congressional statutes, but rather on the fact that the disputed segment in the executive order was preceded by the words "[t]o the extent permitted by law."[238] In the eyes of the D.C. Circuit, the prefix "to the extent permitted by law" was assurance enough that "if [an agency implementing the executive order] is prohibited, by statute or other law, from implementing the Executive Order, then the Executive Order itself instructs the agency to follow the law."[239] In fact, the D.C. Circuit found the redeeming qualities of this prefix so great that had the presidential directive in *Youngstown* been supplemented with this qualification, the court opined that it would have made most of the discussion regarding its validity moot.[240] *Building & Construction* therefore demonstrates once more the courts' view that presidential actions are permissible and will be tolerated only to the extent they do not contravene valid congressional legislation.

The aforementioned cases indicate that Justice Jackson's opinion is a true crystallization of how courts perceive and rule in matters involving presidential actions that run against valid statutory instruction. Evidently, courts tend to be suspicious of presidential directives that do not comport with legislation, and they tend not to uphold such directives or their progeny.[241] The conclusion to be drawn from the above is that Justice

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236. *Id.* at 34.
237. *Id.* at 36.
238. *Id.* at 33.
239. *Id.*
240. *Id.* Thus, it appears that according to the D.C. Circuit, if all presidential directives had the prefix "to the extent permitted by law" there would never be questions regarding their legality or validity. As a side note, I find it worth adding that I believe the D.C. Circuit was wrong in its decision that practically allows the President to leave the legal inquiry about the legality of his executive orders' instructions to agencies and expect them to find what is "permitted by law" and what is not. Turning the phrase "to the extent permitted by law" into a "kosher stamp" for just any presidential directive—outrageous and outright illegal as it may be—might encourage the President to issue directives of dubious legality which might eventually be enforced by executive officers who wish to avoid direct confrontations with the President. This clearly undesirable situation cannot simply be cured via semantic maneuvers.
241. Notably, an even broader possible implication of these cases is that courts would not hastily acknowledge and enforce a presidential claim of authority that has no, or hardly any checks on it, especially as Justice Jackson says, when such a right is in direct contradiction of the legitimate use of constitutional authority by another branch of the government (e.g., Congress's Article I authority to legislate the NIHRA). *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637-38 (1952). The *Youngstown* decision and the majority opinion in *Morrison* both support this proposition. According to the *Morrison* Court, the President's powers may not be construed to be entirely separate or detached from the powers granted to the other branches of government. Morrison v. Olson, 487 U.S. 654,

Jackson's opinion may well be viewed as the judicial standard—or blueprint for such a standard—that courts would apply in cases of presidential claims of inherent authority to instruct executive agencies to take action in contravention of legislation. Application of this standard would mean that inherent authority may not serve the President as a power to override federal statutes in general, and that to the extent that President Bush relied on such an authority in giving his Directive, it could not have enabled him to give his Directive in contradiction to the NIHRA.

Having found that inherent authority—despite the permissive assumptions made here regarding its existence and expansive scope—could not have empowered President Bush to give his Directive in contravention to the NIHRA, and with the lack of any other source of authority that President Bush's Directive could have relied on, we must determine that the Directive is illegal, and thus invalid.

C. The NIH's Actions Examined

The immediate implication of President Bush's Directive's invalidity is that it did not, and does not carry any authority over executive agencies. However, prior to discussing the implications of its illegality in more detail, there is merit in an examination of the measures taken by the NIH following President Bush's Address and their legality.

Professor Peter Strauss once wrote that "[i]t is far easier [for an executive officer] to act as a servant, than as an independent authority under instructions from one's principal."[242] This epigram seems to concisely capture the NIH's response to President Bush's Directive. On the day President Bush gave his Address, Dr. Ruth Kirschstein, the Acting Director of the NIH at that time, subordinated her discretion[243] and the

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693-94 (1988). In other words, the *Morrison* Court opined that the President's actions do not occur in a "vacuum," but rather are in constant interaction with other powers that exist within the Government—powers which the President's actions must reckon with. *See also* William J. Olson & Alan Woll, *Executive Orders and National Emergencies: How Presidents Have Come to "Run the Country" by Usurping Legislative Power*, 358 CATO INST. POLICY ANALYSIS 8-10 (1999) ("The Court's preference for constitutionally enacted laws over presidential directives not clearly based on constitutional or statutory authority is evident from its treatment of the implementation of regulations promulgated under such directives.").

242. Strauss, *Presidential Rulemaking*, *supra* note 195, at 974.

243. Under 42 U.S.C. § 282(b)(1), the Director of NIH has the authority to set policies for the entire NIH. For further discussion of this policymaking authority, see *supra* Part II.B.1.

discretion of the Directors of the NIH's Research Institutes[244] to that of the President by immediately and unreservedly endorsing President Bush's Stem Cell Decision.[245]

A Moderate Unitarian scrutiny of the NIH's actions following President Bush's Directive implicates that the NIH's actions amounted to unjustified obsequiousness towards the President, which is not only repugnant to principles of proper administration, but is also illegal. According to Moderate Unitarianism, regardless of NIHRA § 101, the NIH's Acting Director had an obligation to not simply accept President Bush's imposition of his own personal policy upon the NIH, even if that would have meant that she might risk her office.[246] Rather, Dr. Kirschstein, as an acting head of an agency, was duty bound to use her autonomous discretion. She ought to have seriously considered the President's stance on the issue of research involving hESCs[247] (and was indeed under a constitutional obligation to do so), but nonetheless eventually make the decision by herself and with the best interests of the public in mind rather than the personal sentiments of the President. Thus, under a Moderate Unitarian approach, the submissiveness of the NIH and its Acting Director constituted an illegal substitution of their own discretion with that of the President. Moreover, under Moderate Unitarian theory, the NIH's actions amounted to abandonment of its public stewardship and statutory charge, which are meant to serve as an important check on the President's executive authority from becoming all-inclusive and all-reaching.[248] In simpler terms, the Moderate Unitarian approach would hold that the NIH forsook its duties and acted as the President's lackey, thus allowing the President's beliefs to become the law of the land. Hence, under the Moderate Unitarian approach, the NIH's actions pursuant to President Bush's Directive constituted a capricious executive decision and an abuse of the NIH's discretion to make its own research funding decisions, such that a court should set them aside.[249]

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244. Under 42 U.S.C. § 284(b)(1), the Secretary, acting through the Directors of the NIH's research institutes, may grant funding for scientific research.

245. *See* Kirschstein Statement, *supra* note 4. For a detailed discussion of the actions taken by the NIH to implement President Bush's Directive, see *supra* Part I.C.

246. *See supra* text accompanying note 198.

247. *See* Stack, *supra* note 175, at 314 (stating that executive officials are subject to "an obligation to carefully consider the President's position[s]").

248. *See id.* at 316 ("[T]he mere possibility of resistance [by executive officials to the President's preferred construction or use of a statute] creates a legal check on presidential abuse internal to the executive branch. . . .").

249. *See* 5 U.S.C. § 706(2)(A) (2000) (directing reviewing courts to hold unlawful and set aside actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"). For further discussion of this possible cause of action, see *infra* Part III.D.

However, it appears that Dr. Kirschstein's NIH did not share the Moderate Unitarian viewpoint. In what seems to be the NIH's only explanation for its unqualified acceptance of President Bush's Directive, the NIH proclaims on its website:

> As the head of the executive branch of the federal government, which includes the National Institutes of Health, the President of the United States has the final responsibility and authority to set federal government policy for funding human embryonic stem cell research. But Congress has appropriations authority and can possibly override the President's decision.[250]

Indeed, this is a true statement of the Constitutional Unitarian view. And yet, even under a Constitutional Unitarian approach, the NIH's actions were clearly illegal.

First and foremost, regardless of President Bush's authority to give his Directive, the Directors of the NIH Research Institutes and its Acting Director (NIH Officers) were still bound to follow the numerous requirements of NIHRA § 101,[251] including the requirement that, before they impose a moratorium on certain kinds of scientific research (e.g., involving hESCs produced after August 9, 2001 at 9:00 p.m.), they must receive a recommendation to do so from a duly-established Ethics Advisory Board.[252] Having not fulfilled this requirement, the NIH Officers' actions pursuant to President Bush's Directive were in excess of the Officers' statutory authority, and thus illegal.[253]

Moreover, the NIH's announcement of its withdrawal of the Final Guidelines' part relating to research involving hESCs (the Repeal) constitutes in and of itself an illegal action under the Administrative Procedure Act. Since the Final Guidelines came under the definition of a

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250. NIH FAQs, *supra* note 15.

251. *See supra* Part II.B.1. It is worth noting that both the NIH's Research Institutes Directors' authority to fund scientific research under 42 U.S.C. § 284(b)(1) and the NIH Director's authority to make general policies for the entire NIH under 42 U.S.C. § 282(b)(1) stem from the power of the Secretary. Specifically, both sections state that the duties and authorities they grant are actually the Secretary's, who is acting *through* his subordinates, the NIH Officers. Hence, to the extent that the funding granting authority in 42 U.S.C. § 284 and the policymaking authority in 42 U.S.C. § 282(b)(1) are being used by the NIH Officers, these Officers are duty-bound by limitations imposed on the source of their own authority, namely the Secretary, such as those enumerated in the NIHRA § 101. This proposition is also supported by the principle that a principal may not delegate powers greater than the powers she possesses herself. Thus, a delegate cannot possibly have more power than the principal could have delegated to her and the NIH Officers could not have ignored the NIHRA § 101 simply because it is addressed to the Secretary.

252. 42 U.S.C. § 289a-1(b) (2000).

253. It is also worth mentioning in the context of the grants' allocation proceedings, which the NIH Officers failed to follow, that although there is no question that the NIH Officers had ample discretion in making funding decisions with respect to particular kinds of research or a particular research project, they did not have such discretion with respect whether or not *to consider* the allocation of such funding to begin with.

"rule"[254] in the APA and were not exempt from its notice and comment requirements,[255] their promulgation and repeal were subject to these requirements.[256] These requirements dictate that prior to repealing the Final Guidelines or a part thereof, the NIH was under an obligation to publish a general notice in the Federal Register about its intention to repeal the Guidelines, provide interested parties an opportunity to comment on the planned repeal, consider the comments and the relevant matters presented, and only then use its discretion to make an informed decision about repealing the Guidelines.[257] The NIH indeed published a notice in the Federal Register announcing the Repeal.[258] Yet, it did not provide interested parties the opportunity to comment on the planned Repeal and subsequently, did not weigh any opposition prior to the Repeal. Rather, the announcement unilaterally imposed the restrictions in violation of the APA's notice and comment requirements[259] (which, as mentioned earlier, HHS undertook to follow[260]). It appears that the NIH attempted to justify these omissions by arguing that President Bush's Directive made compliance with these requirements unnecessary, thus invoking the "good cause" exception to the notice and comment requirements.[261] Specifically, in its withdrawal notice, the NIH stated that "[t]he President has determined the criteria that allow Federal funding for research using existing embryonic stem cell lines . . . . Thus, the [Final] Guidelines as they relate to [hESC] derived from human embryos are no longer needed."[262] Nonetheless, although HHS's undertaking to follow the notice and comment requirements does not apply to cases where the "good cause" exception is applicable,[263] it is doubtful whether courts would accept this explanation as justification for the NIH's noncompliance with the APA's notice and comment requirements. According to several Courts of Appeals' decisions, the "good cause" exception would not only be narrowly construed, but would also apply only in a limited set of

254. The Final Guidelines fell under the definition of a "rule" under 5 U.S.C. § 551(4), and therefore, their repeal was considered "rulemaking" under 5 U.S.C. § 551(5).

255. *See supra* note 83.

256. 5 U.S.C. § 553 (2000); *see also* Consumer Energy Council of Am. v. FERC, 673 F.2d 425, 446 (D.C. Cir. 1982); Envtl. Def. Fund, Inc. v. Gorsuch, 713 F.2d 802, 816 (D.C. Cir. 1983); Natural Res. Def. Council, Inc. v. EPA, 683 F.2d 752, 761-65 (3d Cir. 1982).

257. 5 U.S.C. § 553(c).

258. National Institutes of Health Guidelines for Research Using Human Pluripotent Stem Cells, 66 Fed. Reg. 57,107 (Nov. 14, 2001).

259. *Id.*

260. *See supra* note 83.

261. 5 U.S.C. § 553(b)(B).

262. Guidelines for Research Using Stem Cells, 66 Fed. Reg. at 57,107.

263. Because the HHS's undertaking involves only matters of grants and benefits, it does not necessarily apply to matters coming under the premise of 5 U.S.C. § 553(b), i.e., "when the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(B).

circumstances that do not exist in this case.[264] Hence, it seems that the NIH's explanation of its noncompliance with the APA's notice and comment requirements was not sufficient to exempt it from these requirements, and the Repeal was illegal under the APA.

An interesting question that arises in this context is whether President Bush's Directive was authoritative enough to enable the NIH to simply disregard the APA's instructions. In other words, could the President have lawfully given the NIH instructions and empowered it to act in violation of the APA? Following the Supreme Court's reasoning in *Franklin v. Massachusetts*,[265] it may be argued that, just like presidential actions are not reviewable under the APA out of "respect for the separation of powers and the unique constitutional position of the President,"[266] agency actions that follow and implement such presidential actions may be exempt from the APA.[267] Applying this proposition to the matter at hand would result in the conclusion that since President Bush's Directive's disregard of the APA's notice and comment requirements is not reviewable under the APA, so too are the pursuant actions taken by the NIH to implement the Directive. However, even if we assume that President Bush's Directive's violation of the APA would be deemed non-reviewable under the APA,[268]

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264. According to 5 U.S.C. § 553(b)(B), there are three grounds for finding "good cause," namely when "notice and comment" would be "impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(B). "Impracticability" is interpreted as applicable in cases of emergency. Am. Fed'n Gov't Emp. v. Block, 655 F.2d 1153, 1156 (D.C. Cir. 1981) (limiting use of the good cause exceptions to "emergency situations"). However, no such emergency existed in the matter of President Bush's Directive, and so it is unlikely that courts would accept a "good cause" for emergency argument. *See* Consumer Energy Council of Am. v. FERC, 673 F.2d 425, 447-48 (D.C. Cir. 1982) (holding that an emergency does not exist when an agency finds regulations to be defective); *see also* Envtl. Def. Fund, Inc. v. EPA, 716 F.2d 915, 920 (D.C. Cir. 1983); Natural Res. Def. Council, Inc. v. EPA, 683 F.2d 752, 764 (3d Cir. 1982). As for non-necessity, according to the D.C. Circuit, this ground would have applied only had the Repeal been a "routine determination, insignificant in nature and impact and inconsequential to the industry and to the public." *See* Util. Solid Waste Activities Group v. EPA, 236 F.3d 749, 755 (D.C. Cir. 2000) (quoting South Carolina v. Block, 558 F. Supp. 1004, 1016 (D.S.C. 1983)). Since the Repeal is anything but "routine," "insignificant in nature and impact," and is consequential to the industry and the public, this ground too, would not be available to the NIH in attempting to rely on the "good cause" exception. And as for the "public interest" ground for the "good cause" exception, according to the D.C. Circuit it would only apply when "the interest of the public would be defeated by any requirement of advance notice." *Id.* at 755 (quoting United States Department of Justice, Attorney General's Manual on the Administrative Procedure Act 31 (1947)). As before, it is hard to see how following the notice and comment requirements in this case would defeat the public's interest, and so we should surmise that none of the grounds enumerated in 5 U.S.C. § 553(b)(B) are applicable to the Repeal and thus that the NIH could not have relied on them.

265. 505 U.S. 788 (1992).

266. *Id.* at 800-01.

267. In so doing, courts following *Franklin* would actually accept a narrow set of circumstances in which the President may act in violation of the APA.

268. Opposing this proposition is the aforementioned courts' intolerance of presidential actions that may contradict valid law. *See supra* Part II.B.3.

this conclusion seems to be far-fetched with respect to the NIH. The APA is unequivocal about its applicability to agency actions.[269] Despite the *Franklin* Court's holding that applying the APA to the President would require an express statement by Congress to this effect,[270] Congress has made it clear that the APA applies to executive agencies. Therefore, it is highly unlikely that courts would require a further "statement of applicability" of the APA to executive actions, including actions that are the direct result of presidential directives. In other words, even if we accept the proposition that presidential actions may legitimately run in the face of the APA, it does not follow that agencies may wield *Franklin* as a shield against judicial review when they are acting under such Presidential instructions.[271] Hence, the NIH could not have used President Bush's Directive as a justification for its disregard of the APA's notice and comment requirements.

III. THE IMPLICATIONS OF THE ILLEGALITY OF PRESIDENT BUSH'S DIRECTIVE AND OF THE ENSUING ACTIONS TAKEN BY THE NIH

The severity of the findings reached in the previous Part—that President Bush's Directive lacked authority and that the NIH's implementation of his Directive was blatantly illegal (the Contestable Actions)—is undeniable and invites a judicial challenge. This Part will discuss some possible challenges that the Contestable Actions may face and enumerate some legal remedies called for by such challenges. But, prior to discussing such challenges, it is important to address the preliminary issue of standing.

One would assume that scientists seeking to secure federal funding for scientifically meritorious research proposals[272] involving hESC lines created after August 9, 2001, or otherwise not in compliance with President Bush's Stem Cell Decision would have standing. Such scientists would

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269. *See* 5 U.S.C. § 551(1) (2000) ("'[A]gency' means each authority of the Government of the United States, whether or not it is within or subject to review by another agency. . . .").

270. *Franklin*, 505 U.S. at 801.

271. Such a situation not only runs against the basic principle that agency action must be based on legal mandate, but also goes directly against the Separation of Powers Doctrine and the important principle of checks and balances since it proposes a sphere in which a President may be allowed to act and authorize actions that go against the law without such actions being subject to judicial review. It is most improbable that courts would seriously consider such a proposition.

272. It may be argued that scientific merit and allocation of funding thereof is a matter "committed to agency discretion by law" under 5 U.S.C. § 701(a)(2), and therefore, not subject to judicial review. *See* Lincoln v. Vigil, 508 U.S. 182, 192-94 (1993). However, the arguments possibly raised by scientist-plaintiffs with respect to the Contestable Actions would not involve the non-allocation of research funds by the NIH for hESC research, but rather the actions taken by the NIH with respect to the repeal of the mechanism that would have allowed for the allocation of such funding. Hence, 5 U.S.C. § 702(a)(2) should not be a justiciability barrier in the matter at hand.

probably not have a particular hardship establishing that their claims fall within the "zone of interests"[273] under the APA[274] as well as under the NIHRA.[275] However, a question may arise with respect to such scientists' ability to show that the Contestable Actions have caused them an injury-in-fact[276] and that they have a personal stake in the lawsuit's outcome.[277] Presumably, since there is no certainty that such scientists would have been able to secure discretional funds from the NIH to support their hESC research had the Final Guidelines been in place, it is unclear whether they may be able to convince a court that they have been injured by the Contestable Actions and therefore, have a personal stake in overturning them.

Nevertheless, it is unlikely that the issue of injury-in-fact and stake in the outcome of the proceedings would bar scientists whose research involves hESCs from establishing that they would have standing. First, the Supreme Court has held in cases involving a hardship posed by the government to obtain a benefit, that it is not necessary for the plaintiff to prove that she would have obtained the benefit "but for the hardship" in order to establish standing. Rather she must show only that the she is able and ready to apply for the benefit and that the governmental policy is preventing her from doing so.[278] Second, the Supreme Court has held on more than one occasion that the injury-in-fact requirement may be satisfied not only by demonstrating an economic injury, but that an injury may be of other kinds.[279] For example, a group of hESC researchers could claim that their

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273. *See* Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153, 156 (1970); *see also* Clarke v. Sec. Indus. Ass'n, 479 U.S. 388, 399-400 (1987) (discussing the "zone of interests" test).

274. 5 U.S.C. § 702 (2000); *see also Data Processing*, 397 U.S. at 154 ("Where statutes are concerned, the trend is toward enlargement of the class of people who may protest administrative action.").

275. 42 U.S.C. § 289a-1 (2000).

276. *See Data Processing*, 397 U.S. at 152 ("The first question is whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise.").

277. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW, § 2.12(f)(2), 91 (7th ed. 2004) ("Whether a party has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues' is, we are told, 'the gist' of the question of standing.").

278. *Id.*; *see, e.g.*, N.E. Fla. Chapter of the Associated Gen. Contractors of Am. v. Jacksonville, 508 U.S. 656, 666 (1993). Notably, this case involved an equal protection matter and the injury-in-fact element therein was "the [plaintiffs'] inability to compete on an equal footing in the bidding process, not the loss of a contract." *Id.* Similarly, it may be argued that in the matter at hand the scientist-plaintiffs' injury-in-fact has been their inability to apply for federal funding for research involving hESCs not in accordance with President Bush's Directive rather than the loss of the funds themselves.

279. *See, e.g.*, *Data Processing*, 397 U.S. at 154 ("That interest, at times, may reflect 'aesthetic, conservational, and recreational' as well as economic values." (quoting Scenic Hudson Preservation Conf. v. FPC, 354 F.2d 608, 616 (2d Cir. 1965))); United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 686-89 (1973) (granting standing where aggrieved party claimed injury due to diminished use and enjoyment of local natural resources).

injury relates to their interest in the advancement of science as it pertains to hESC research, which is hindered by the impediments to scientific progress put in place by the Contestable Actions. Similarly, they may argue that their injury relates to an interest they have as biomedical researchers in the harm caused to the public's health by the impediments on advancement of stem cell based therapies placed by the Contestable Actions. It therefore appears that researchers partaking in research involving hESCs may arguably have standing to challenge the Contestable Actions.

A. Challenging President Bush's Directive

A challenge to President Bush's Directive is likely to be based on the argument that it essentially constitutes forbidden presidential lawmaking. President Bush's and the NIH's emphasis that the Directive is "*the President's policy*"[280] bolsters this argument. Furthermore, the fact that the Directive runs against the explicit instructions of the NIHRA makes it all the more clear that President Bush's Directive "does not direct that a congressional policy be executed in a manner prescribed by Congress—it directs that a presidential policy be executed in a manner prescribed by the President."[281]

The basic premise of this challenge is that allowing President Bush's Directive to persist despite its clear undermining of a constitutionally valid congressional statute would legitimize the usurpation of legislative authority by presidents.[282] Furthermore, in issuing his Directive, despite his likely awareness of his lack of authority to promote *his* policy (i.e., his Stem Cell Decision),[283] President Bush's actions run against one of most basic understandings about the nature of the Government of the United States, namely that it is "a government of laws, and not of men."[284] Thus, courts would likely find that President Bush's Directive is in clear violation of the Doctrine of Separation of Powers and strike it down in its entirety, despite their basic reluctance to revoke presidential directives.[285]

"But He [the Democratic President] Started It"

A popular defense argument among Presidents whose actions are challenged is that their actions did not go beyond prior unchallenged

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280. *See supra* Part I.C, notes 102-05 and accompanying text.
281. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579*,* 588 (1952).
282. *See* Olson & Woll, *supra* note 241, at 8 ("Although some directives are proper exercises of executive power, others are clearly usurpations of legislative authority.").
283. It is highly improbable that President Bush and his advisors were unaware of the potential conflict between his Stem Cell Decision and the NIHRA.
284. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).
285. *See* Branum, *supra* note 7, at 59-60, 78-79 (emphasizing how few presidential directives have been modified, revoked or struck down).

Presidential acts.[286] Thus, the Government might try to defend President Bush's Directive by arguing that similar directives issued by President Clinton went unchallenged and that President Bush's Directive "operates" in an area that has already been influenced by the actions of President Clinton and should be left to work its effect without court interference.[287]

Indeed, President Clinton's use of presidential directives to impose his policies on executive agencies[288]—like in the cases of his Embryo Decision and Cloning Decision mentioned earlier[289]—sometimes amounted to presidential lawmaking.[290] And indeed, it appears that President Clinton's Embryo Decision,[291] which was never challenged although it too prohibited funding for certain kinds of embryo research in abrogation of NIHRA § 101, is almost identical in its legal circumstances to President Bush's Directive.[292] However, President Clinton's earlier illegal directives cannot immunize or cure the similar illegality of President Bush's Directive. The contention that one defective presidential action may draw legitimacy from

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286. *See Youngstown*, 343 U.S. at 646 ("The Solicitor General lastly grounds support of the seizure upon nebulous, inherent powers never expressly granted but said to have accrued to the office from the customs and claims of preceding administrations.").

287. Branum alludes to this argument contending that President Bush was forced to give his Directive because of the Clinton Administration's allegedly illegal prying into this area, which required President Bush "to negate actions of President Clinton that had effectively taken the policy decision away from the legislature and placed it in the realm of the executive." *See* Branum, *supra* note 7, at 45.

288. *See Executive Orders and Presidential Directives: Hearing Before the House Subcomm. on Commercial and Administrative Law of the Comm. on the Judiciary*, 107th Cong. 2 (2001) [hereinafter *Hearing on Presidential Directives*] (criticizing this "attitude" and quoting President Clinton's Senior Domestic Policy Advisor, Paul Begalla, who said "Stroke of a pen, law of the land, kind of cool."); Gaziano, *supra* note 134, at 272-73; Kagan, *supra* note 170, at 2249, 2290; Strauss, *Presidential Rulemaking*, *supra* note 195, at 967.

289. *See supra* note 60.

290. *See* Branum, *supra* note 7, at 36-37 ("Clinton may have misused executive orders more blatantly than his predecessors . . . ."); Kagan, *supra* note 170, at 2320-21 (contrasting President Clinton's invocation of "executive authority" with Justice Black's opinion in *Youngstown*); *see also Hearing on Presidential Directives*, *supra* note 288, at 2 (discussing the threat posed to legislative authority from the Executive branch's prevalent use of executive orders and citing President Clinton's administration as an example).

291. *See supra* note 60.

292. Neither directive mentions its source of authority nor was published in the Federal Register. *See supra* note 144. Also, both directives have an undefined form, and both run in clear violation of the NIHRA. President Clinton's Embryo Decision even blatantly disregarded the recommendations of a duly appointed EAB, the Human Embryo Research Panel. *See supra* Part I.B, notes 51-60 and accompanying text. It is worth noting that President Clinton's Cloning Decision also violates the NIHRA in much the same way as President Clinton's Embryo Decision and President Bush's Directive. *See supra* note 60. Yet, unlike President Bush's Directive that has been subject to ongoing challenges by Congress (*see supra* notes 121-31 and accompanying text), President Clinton's Embryo Decision was ratified by Congress's subsequent passing of the Dickey Amendment. *See supra* notes 63-68 and accompanying text. Interestingly, it appears that should Congress henceforth refrain from reenacting the Dickey Amendment as it has been doing every year, President Clinton's Embryo Decision would lose its "blanket of legitimacy" making it as illegal as President Bush's Directive.

the defectiveness of an earlier similar presidential action seems too feeble to hold water in court. Hence, although the aforementioned directives issued by President Clinton also appear to constitute a usurpation of legislative authority, they do not in any way justify such usurpation by President Bush's Directive. Rather, they too are challengeable as presidential lawmaking.

B. Challenging the NIH's Withholding of Funding for Research Involving hESCs

Probably the most significant challenge to the NIH's actions pursuant to President Bush's Directive would rely on the fact that these actions were taken in spite of, and contrary to, the instructions of the NIHRA. As explained above, the NIHRA prevents NIH officers from withholding funding for scientific research due to ethical reasons.[293] Hence, a challenge to the NIH's withholding of funding for research involving hESCs would contend that taking these actions without relying on the recommendation of a duly-established EAB constituted an imposition of a moratorium on research involving hESCs and an ongoing violation of the NIHRA.[294]

In other words, a challenge to the NIH's denial of funds for research involving hESC lines that do not comply with President Bush's Stem Cell Decision would argue that unless and until the NIH abides by the requirements of the NIHRA, it may not withhold funding from research involving any kind of hESCs and must allocate funding for such research projects subject only to their scientific merit.[295] It therefore follows that the NIH is currently acting outside of its statutory authority and in violation of statutory limitations imposed on it,[296] and thus its withholding of funding is unlawful and courts should set it aside.

C. Challenging the NIH's Unilateral Repeal of the Final Guidelines

As explained above, the Repeal violated the APA's notice and comment requirements.[297] A possible challenge posed to the Repeal would argue that it should have complied with the notice and comment requirements of 5 U.S.C. § 553, namely, that it should have taken place after giving interested parties an opportunity to comment on the planned withdrawal, weighing of the objections, and only then making an informed and properly reasoned decision on the withdrawal of the Final Guidelines. This kind of

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293. *See supra* Part II.C, notes 251-52 and accompanying text.
294. 42 U.S.C. § 289a-1(b)(1), (3)-(5) (2000).
295. *Id.*
296. 5 U.S.C. § 706(2)(C) (2000).
297. *See supra* Part II.C, notes 254-71 and accompanying text.

challenge would stress that the NIH's failure to take these measures constituted a substantive flaw in the Repeal that conflicts with the APA's requirements.[298] As a result, courts should set aside the Repeal, thereby reinstating the part of the Final Guidelines that regulates the funding of research involving hESCs. The practical implication of such a ruling would be that parties seeking federal funding for research involving hESC lines that do not comply with President Bush's Stem Cell Decision, would be able to do so subject to the more lenient standards of the reinstated Final Guidelines.[299]

D. Challenging the NIH's Decision to Abide by President Bush's Stem Cell Decision

One may pose several challenges to the NIH's adoption and implementation of President Bush's Stem Cell Decision. First, one can argue that Acting Director Kirchstein's surrender of statutory authority to President Bush to make policy decisions for the NIH by adopting his Stem Cell Decision without actually using her own discretion was an abuse of her discretion to set policies for the NIH,[300] which amounted to an unlawful abuse of discretion under the APA.[301] One could further contend that the Acting Director's adoption of President Bush's Stem Cell Decision as the NIH's own policy in its entirety—without any qualms or reservations, without paying respect to its underlying rationale and considering its alternatives,[302] without considering whether it promotes good public policy, and without weighing such considerations—may also tag her actions, and thus the actions of the NIH, as arbitrary and capricious.[303]

Furthermore, Moderate Unitarians would probably add that the Acting Director's omission of her own discretion in this matter was not in accordance with *her* statutory duty[304] to make such a discretionary decision by herself under the authority granted to her in the Public Health Service Act.[305] Should a court accept this argument, it may serve to justify an

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298. 5 U.S.C. § 706(2)(D).
299. *See supra* Part I.C, notes 84-86 and accompanying text.
300. 42 U.S.C. § 282(b).
301. 5 U.S.C. § 706(2)(A).
302. It may be argued that the NIH's policy, which is in fact President Bush's Stem Cell Decision, did not properly weigh different aspects of the issues related to research involving hESCs. One could argue, for example, that the NIH's policy gives excessive weight to ethical and religious considerations while giving very little if any weight to important scientific and public policy considerations. *See, e.g.*, Ryan Fujikawa, Note, *Federal Funding of Human Embryonic Stem Cell Research: An Institutional Examination*, 78 S. CAL. L. REV. 1075 (2005).
303. 5 U.S.C. § 706(2)(A); *see also supra* Part II.C.
304. *Id.* § 706(2)(C).
305. 42 U.S.C. § 282(b). This argument would be based on the Moderate Unitarian reading of statutory duties as applying exclusively to the specific executive officers named

injunction against the NIH, enjoining it from enforcing President Bush's Directive and instructing the Director of the NIH to use her own discretion in making a decision regarding the NIH's funding policy of research involving hESCs (to the extent the NIHRA leaves this issue to the discretion of the Director of the NIH).

It is worth adding a few words in this context on the standard of review courts would probably apply to such challenges. Courts generally grant agencies' discretionary decisions and actions a great measure of deference and are not easily persuaded to set them aside.[306] However, in order to merit this measure of deference, agency decisions must be based on the agency's expertise in the area of regulation it is charged with implementing.[307] Without demonstration of reliance on such expertise by the agency, courts would not defer to the agency's decision.[308] Accordingly, since the NIH's policy on the funding of research involving hESCs does not reflect its expertise on this issue, but merely its reliance on the President's opinions,[309] courts would probably not grant it the deference they normally would have under the *Chevron* Doctrine.[310] Furthermore, courts only defer to and uphold agency decisions that are properly reasoned.[311] According to the Supreme Court, this is especially true where,

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in the authorizing statute. However, it is important to note that to date there is no court decision accepting such Moderate Unitarian contentions, so it is hard to assess how willing courts would be to entertain this argument.

306. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-44 (1984) ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme. . . . .").

307. *See* Pub. Citizen Health Research Group v. Tyson, 796 F.2d 1479, 1505 (D.C. Cir. 1986) ("While we acknowledge our deference to the agency's expertise in most cases, we cannot defer when the agency simply has not exercised its expertise.").

308. *Id.*

309. Despite his outspoken efforts to inform himself prior to making his Stem Cell Decision, President Bush may not be considered an expert in the area of research involving hESCs.

310. In addition, in the NIHRA, Congress directly spoke on the precise question of withholding of federal funding for scientific research on ethical grounds and its instruction on this matter constitutes an explicit congressional prohibition on actions such as those taken by the NIH with respect to the funding of research involving hESC. Therefore, courts should not grant *Chevron* deference to the NIH's policy on funding for research involving hESCs. *See Chevron*, 467 U.S. at 842-43. It is also worth mentioning that, according to Stack, courts should only grant *Chevron* deference to agency actions and decisions that follow presidential directives where a statute expressly grants authority to make such a decision specifically to the President. *See* Stack, *supra* note 175, at 263, 268-69, 307, 310-11.

311. *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) ("[T]the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'") (citation omitted); *see also* BellSouth Corp. v. FCC, 162 F.3d 1215, 1222 (D.C. Cir. 1999) ("Where the agency has failed to provide a reasoned explanation, or where the record belies the agency's conclusion, we must undo its action." (quoting Petroleum Communications, Inc. v. FCC, 22 F.3d 1164, 1172 (D.C. Cir.1994))).

as here, the agency is repealing a previous policy.[312] The NIH failed to provide a reasoned explanation for its actions and only justified the Repeal and its adoption of President Bush's Stem Cell Decision as its policy by stating that these measures were compatible with President Bush's Stem Cell Decision.[313] Arguably, even under the assumption that agency action may be greatly influenced by presidential policy preferences, this hardly seems like the kind of reasoning that courts would accept in order to uphold an agency's decision. Hence, it is likely that in a challenge to the NIH's policy—like the ones mentioned above—a court would not grant it *Chevron* deference, but would find the policy lacking in reasoning and would thus set it aside as arbitrary and capricious.

In conclusion, an interesting question arises: if there are so many ways and reasons to challenge President Bush's Directive and its implementation by the NIH, how can we explain the fact that no one has ever raised such challenges in court? One plausible explanation may lie in Dean Kagan's description of a shift in what Strauss called the "psychology of government"[314]—namely, that executive officers have become so "desensitized" to the accelerating use of presidential directives that impose policies on them and have become so used to the Constitutional Unitarian rhetoric accompanying such directives that they no longer doubt the applicability or validity of such directives. A second parallel phenomenon apparently has accompanied this phenomenon and intensified its effects. The media, and as a result the general public, have grown "numb" to the ever increasing intrusions of presidential directives—especially during the Clinton and Bush Administrations[315]—into what used to be perceived as the sole domain of executive agencies' discretion.[316] By the time President Bush gave his Directive, the public, the media, and the agencies themselves had grown so accustomed to such presidential assertions of authority that evidently no one proceeded to challenge what seemed to be yet another assertion of the rising presidential power, no more or less outrageous than many others before it. Add to these factors what Gaziano describes as a low level of public understanding of the legal foundation and proper uses

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312. *See State Farm*, 463 U.S. at 41-42 ("[A]n agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.").

313. *See supra* text accompanying note 120.

314. Kagan, *supra* note 170, at 2299; Strauss, *Presidential Rulemaking*, *supra* note 195, at 986.

315. *See generally* Strauss, *Presidential Rulemaking*, *supra* note 195; Branum, *supra* note 7; Olson & Woll, *supra* note 241 (discussing President Clinton's presidential directives).

316. For a similar argument related to the regulation of funding of research involving hESCs, see Branum, *supra* note 7, at 46-47.

of presidential directives[317] and the legal community's preoccupation with the debate over the "unitary executive,"[318] and the result is that President Bush's Directive and its progeny were allowed to pass unchallenged.

Another, less dramatic explanation as to why President Bush's Directive and the ensuing NIH policy remain uncontested may be that no party partaking in research involving hESCs in the United States has been ready and willing to spend the time, money, and effort necessary to challenge them in court. Despite these hurdles, I hope that this Article would serve to encourage interested parties to challenge President Bush's Directive and its implementation by the NIH.

CONCLUSION

For over six and a half years, President Bush's Stem Cell Decision has been dictating the nature and extent of scientific research involving human embryonic stem cells. Yet, astonishingly, despite being the subject of a boisterous debate, its legality, as well as that of the actions taken by the NIH to carry it out, have never been questioned nor ascertained. This Article sought to fill this vacuum.

This Article has shown that even under the most permissive assumptions President Bush's Directive cannot be reconciled with NIHRA § 101. This Article further demonstrated that the actions taken by the NIH to implement President Bush's Directive constituted clear violations of the NIHRA and the APA—the extent of which depends on one's viewpoint in the "unitary executive" debate. Finally, this Article argued that these flaws render both President Bush's Directive and the ensuing actions taken by the NIH illegal and thus challengeable in court. I anticipate that such challenges would result in striking down President Bush's Directive and in setting aside the NIH's adoption of his Stem Cell Decision as its policy. Furthermore, such a challenge may also prompt a court to overrule the NIH's withdrawal of the Final Guidelines' language dealing with research involving hESCs and to reinstate language allowing federal funding for types of research involving hESCs disallowed by President Bush's Directive.

An interesting issue that remains, which may justify a separate, more elaborate inquiry, is what President Bush and the NIH could do in order to *legally* enforce President Bush's Stem Cell Decision. Arguably, the NIH may entrust the entire issue of the ethical soundness of research involving hESCs to an Ethics Advisory Board, which it could establish pursuant to the NIHRA. Alternatively or additionally, President Bush might use his

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317. Gaziano, *supra* note 134, at 269-70.
318. *See supra* Part II.B.3.a.i.

authority to direct executive agencies in a less controversial manner to pile up procedural requirements or obstacles for any attempt to actually fund such research involving hESCs, so as to render such funding practically impossible or prohibitively burdensome.

Though it is hard to anticipate whether the current Administration would elect to take any of these measures or whether President Bush's Directive and the NIH's ensuing actions will eventually face a challenge in court, it is prudent to assume that President Bush's Stem Cell Decision will eventually be discarded. With the newly formed Democratic majority in Congress, we should probably expect more bills akin to the Stem Cell Research Act of 2005, which would seek to impose federal funding for research involving hESCs, though potential presidential vetoes await. Furthermore, rapid encroachments on the efficacy of the current federal government's policy by state funding and international research, increasing public pressure to fund research involving hESCs, development of new techniques to produce hESCs without destroying embryos, and the United States' incentive to stay in the forefront of scientific research will all, sooner or later, bring the demise of the current policy in favor of one that is more permissive. President Bush's Stem Cell Decision swims against the current and—as other cases of ethically controversial though useful scientific technologies teach us—will eventually yield to progress; it is only a matter of time. Yet, the way this chapter in our regulatory history will end may have bearing on crucial issues regarding the nature of the Chief Executive and the extent of its "unitariness." Will it finally be limited by courts or by Congress, or will it remain uninhibited as is reflected in President Bush's Directive? In addition, hopefully Congress will take heed of the regulatory knot described in this Article as a cue that the time has finally come to create a federal mechanism for the formulation of government-wide bioethical policies, as other countries have done.

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THE FTC, THE UNFAIRNESS DOCTRINE, AND DATA SECURITY BREACH LITIGATION: HAS THE COMMISSION GONE TOO FAR?

MICHAEL D. SCOTT*

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Everyone recognizes that there are imperfections and deficiencies in the state of privacy on the Internet, but let us not make the search for the perfect the enemy of the good.[1]

INTRODUCTION

The Federal Trade Commission (FTC or the Commission) has taken the lead in the United States in regulating privacy issues online.[2] The Commission began studying online privacy issues in 1995.[3] It initially supported industry self-regulation as the preferred method for dealing with online privacy.[4] However, various FTC surveys of websites showed that self-regulation was not working.[5] The FTC became concerned that, without strong privacy protection, there would be an erosion of confidence in the Web and a concomitant negative impact on the growth of electronic commerce.[6] As a result, over the last decade the agency has become increasingly active in protecting consumer privacy rights online.[7]

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1. FEDERAL TRADE COMMISSION, DISSENTING STATEMENT OF COMMISSIONER ORSON SWINDLE IN PRIVACY ONLINE: A REPORT TO CONGRESS FAIR INFORMATION PRACTICES IN THE ELECTRONIC MARKETPLACE 26 (May 2000), *available at* http://www.ftc.gov/reports/privacy2000/swindledissent.pdf [hereinafter Swindle Dissent].

2. FEDERAL TRADE COMMISSION, PRIVACY ONLINE: A REPORT TO CONGRESS FAIR INFORMATION PRACTICES IN THE ELECTRONIC MARKETPLACE 3 (May 2000), *available at* http://www.ftc.gov/reports/privacy2000/privacy2000.pdf [hereinafter 2000 FTC REPORT] (statement of FTC Chairman Robert Pitofsky) ("Since 1995, the Commission has been at the forefront of the public debate on online privacy.").

3. *See* FEDERAL TRADE COMMISSION, PRIVACY ONLINE: A REPORT TO CONGRESS 2 (June 1998), *available at* http://www.ftc.gov/reports/privacy3/priv-23a.pdf [hereinafter 1998 FTC REPORT] ("In April 1995, staff held its first public workshop on Privacy on the Internet, and in November of that year, the Commission held hearings on online privacy as part of its extensive hearings on the implications of globalization and technological innovation for competition and consumer protection issues."); *see also* FEDERAL TRADE COMMISSION, A REPORT FROM THE FEDERAL TRADE COMMISSION STAFF: THE FTC'S FIRST FIVE YEARS PROTECTING CONSUMERS ONLINE (Dec. 1999), *available at* http://www.ftc.gov/os/1999/12/fiveyearreport.pdf.

4. *See* 1998 FTC REPORT, *supra* note 3, at i-ii ("Throughout, the Commission's goal has been to encourage and facilitate effective self-regulation as the preferred approach to protecting consumer privacy online.").

5. *See id.* at 41; *see also* 2000 FTC REPORT, *supra* note 2, at ii-iii; FEDERAL TRADE COMMISSION, SELF-REGULATION AND PRIVACY ONLINE: A REPORT TO CONGRESS 12 (July 1999), *available at* http://www.ftc.gov/os/1999/9907/privacy99.pdf [hereinafter 1999 FTC REPORT].

6. *See* 1998 FTC REPORT, *supra* note 3, at 3-4 ("These findings suggest that consumers will continue to distrust online companies and will remain wary of engaging in electronic commerce until meaningful and effective consumer privacy protections are implemented in the online marketplace. If such protections are not implemented, the online

Section 5 of the Federal Trade Commission Act[8] (FTCA or FTC Act or the Act) empowers the Commission to "prevent persons, partnerships, or corporations" from using "unfair or deceptive acts or practices in or affecting commerce."[9] Pursuant to those powers, the Commission has aggressively pursued websites that have violated their own privacy policies.[10] More recently, the agency made a "dramatic shift"[11] by filing complaints against organizations that have experienced data security breaches. Some of these companies made representations concerning the security of their computer systems, which the agency attacked as deceptive trade practices.[12] But the Commission sued other companies that made no such representations under § 5 of the Act for "unfair" trade practices.[13]

This Article will look at this new line of attack by the FTC. It will also analyze whether the Commission has exceeded its authority by pursuing the victims of malicious computer attacks who have made no misrepresentations as to the security of their systems or engaged in any other deceptive conduct. This Article will conclude with a proposal for

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marketplace will fail to reach its full potential."); *see also* Letter from Mozelle W. Thompson, Fed. Trade Comm'n, to Sen. John McCain, Chairman, Comm. on Commerce, Science, and Transportation (Apr. 24, 2002), *available at* http:// www.ftc.gov/os/2002/04/sb2201thompson.htm (stating that "73% of online consumers who refused to purchase online did so because of privacy concerns"). It was estimated that $1.9 billion in e-commerce sales were lost in 2006 because of consumer concerns about Internet security. *See* Press Release, Gartner Consulting, Gartner Says Nearly $2 Billion Lost in E-Commerce Sales in 2006 Due to Security Concerns of U.S. Adults (Nov. 27, 2006), http://www.gartner.com/it/page.jsp?id=498974.

7. *See infra* Parts III-IV. The FTC's role as privacy enforcer is not without its detractors. *See, e.g.*, Joel R. Reidenberg, *Privacy Wrongs in Search of Remedies*, 54 HASTINGS L.J. 877, 887-88 (2003) ("In many ways, this agency is an illogical choice for protection of citizens' privacy. . . . Reliance on the FTC as a primary enforcer of citizen privacy is misplaced.").

8. *See generally* Federal Trade Commission Act, 15 U.S.C. §§ 41-58 (2000).

9. Section 5 of the current FTC Act provides, in pertinent part:

> (1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.
>
> (2) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, [except certain specified financial and industrial sectors] from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

Id. § 45.

10. *See, e.g.*, Agreement Containing Consent Order, Geocities, No. 9823015 (F.T.C. Aug. 13, 1998), *available at* http://www.ftc.gov/os/1998/08/geo-ord.htm; *In re* Doubleclick, Inc. Privacy Litigation, 154 F. Supp. 2d 497 (S.D.N.Y. 2001); *In re* Intuit, Inc. Privacy Litigation, 138 F. Supp. 2d 1272 (C.D. Cal. 2001).

11. Goodwin Proctor LLP, *Data Security Breaches—The DSW and Other Recent FTC Actions Expand Requirements for Safeguarding Customer Data. What Can You Do to Reduce Your Exposure?* 1 (Dec. 6, 2005), *available at* www.goodwinprocter.com/getfile.aspx?filepath=/Files/publications/CA_DataSecurityBreaches_12_6_05.pdf.

12. *See infra* Part II.

13. *See infra* Part III.C.

legislation that would give the Commission specific authority to take action against companies that have experienced data security breaches, but only under well-defined guidelines.[14]

I. EARLY FTC ONLINE PRIVACY ACTIVITIES

The FTC initially sought to deal with online privacy issues by encouraging industry self-regulation.[15] It argued that the growth of the Internet in general, and electronic commerce in particular, mandated against sweeping regulations that might inhibit the growth of both.[16] Commentators believed that market forces would punish those companies that did not adequately protect consumer privacy, while rewarding companies that protected privacy with increased sales.[17] The main element of self-regulation included FTC enforcement of those privacy policies that companies collecting personal information posted on their websites.[18]

By 2000, however, the Commission recognized that industry self-regulation was not working,[19] and that "substantially greater incentives" would be required to protect consumer privacy online.[20] In its 2000 Report, the Commission indicated that while it had the power under § 5 of the FTC Act to pursue deceptive practices, such as a website's failure to abide by a stated privacy policy (i.e., breach of contract claims),[21]

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14. *See infra* Part IV.B.

15. *See generally* 1999 FTC REPORT, *supra* note 5, at 6 ("[S]elf-regulation is the least intrusive and most efficient means to ensure fair information practices, given the rapidly evolving nature of the Internet and computer technology."); 1998 FTC REPORT, *supra* note 3, at i-ii.

16. *See* 1998 FTC REPORT, *supra* note 3, at i-ii (explaining that "the Commission's goal has been to encourage and facilitate effective self-regulation as the preferred approach to protecting consumer privacy online").

17. *See, e.g.*, FRED H. CATE, PRIVACY IN THE INFORMATION AGE 131 (1997) ("Individual responsibility, not regulation, is the principal and most effective form of privacy protection in most settings. The law should serve as a gap-filler, facilitating individual action in those situations in which the lack of competition has interfered with private privacy protection. In those situations, the law should only provide limited, basic privacy rights . . . . The purpose of these rights is to facilitate—not interfere with—the development of private mechanisms and individual choice as a means of valuing and protecting privacy."); *see also* 2000 FTC REPORT, *supra* note 2, at 4 (statement of Commissioner Thomas B. Leary, concurring in part and dissenting in part) [hereinafter Leary Statement] ("The Report does not explain why an adequately informed body of consumers cannot discipline the marketplace to provide an appropriate mix of substantive privacy provisions.").

18. *See* Prepared Statement of the Federal Trade Commission on "Consumer Privacy on the World Wide Web," Before the Subcomm. on Telecomms., Trade and Consumer Prot. of the House Comm. on Commerce (July 21, 1998), *available at* http://www.ftc.gov/os/1998/07/privac98.

19. *See* 2000 FTC REPORT, *supra* note 2, at ii ("The 2000 Survey, however, demonstrates that industry efforts alone have not been sufficient.").

20. 1998 FTC REPORT, *supra* note 3, at iii.

21. *See* Steven Hetcher, *The FTC as Internet Privacy Norm Entrepreneur*, 53 VAND. L. REV. 2041, 2057 (2000) ("The FTC's promotion of privacy policies is instructively viewed as an attempt to cause websites to make quasi-contractual statements in writing. The more contractual these statements are, the more enforceable they will be.").

it could not require companies to adopt privacy policies in the first place.[22] Accordingly, the Commission proposed legislation that would provide it with the authority to issue and enforce specific privacy regulations.[23]

However, the agency changed its position after the election of President George W. Bush and a change in leadership at the Commission. The new FTC Chairman, Timothy Muris, announced that the agency would expand enforcement of existing laws rather than pursue new legislation.[24] Muris indicated that the Commission was "primarily a law enforcement agency" that "best carries out its consumer protection mission" through "aggressive enforcement of the basic laws of consumer protection."[25] He further indicated that in his opinion, "the particular issue of broad based, Internet only legislation is still premature at this moment."[26]

II. FTC'S PURSUIT OF WEBSITES FOR DECEPTIVE ACTS OR PRACTICES

One of the pillars of Chairman Muris's privacy enforcement efforts was to pursue websites for deceptive trade practices.[27] The first FTC case involving Internet privacy was *In re GeoCities*.[28] The complaint focused on two activities that the agency identified as deceptive trade practices.[29]

First, the complaint alleged that GeoCities misrepresented "the uses and privacy of the information it collect[ed]" from consumers—namely, that the website had "sold, rented or otherwise marketed and disclosed

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22. 2000 FTC REPORT, *supra* note 2, at 34 ("As a general matter, however, the Commission lacks authority to require firms to adopt information practice policies or to abide by the fair information practice principles on their Web sites . . . .").

23. *Id.* at 36-38.

24. Devin Gensch, *Putting Enforcement First*, THE RECORDER, Nov. 7, 2001, at 5; *see also* Timothy J. Muris, Chairman, FTC, Remarks at the Privacy 2001 Conference (Oct. 4, 2001), http://www.ftc.gov/speeches/muris/privisp1002.shtm (last visited Aug. 14, 2007).

25. *Challenges Facing the Federal Trade Commission: Hearing on H.R. 68 Before the Subcomm. on Commerce, Trade, and Consumer Protection of the H. Comm. on Energy and Commerce*, 107th Cong. 12 (2001) (statement of Timothy J. Muris, FTC Chairman), *available at* http://energycommerce.house.gov/reparchives/107/hearings/11072001Hearing403/print.htm.

26. *Id.*

27. Federal Trade Commission Act, 15 U.S.C. § 45(a) (2000). "Deceptive practices" under the FTCA are material representations or omissions likely to mislead a reasonable consumer. FTC v. Tashman, 318 F.3d 1273, 1277 (11th Cir. 2003). *See* Hetcher, *supra* note 21, at 2058 ("[I]t is clear that once websites provide privacy policies, the FTC will be in a position to exercise its deceptive practices jurisdiction if those policies are not followed. By encouraging websites to provide privacy policies in the first place, the FTC has created a situation in which it is now able to extend its enforcement jurisdiction onto the Internet.").

28. Press Release, FTC, Internet Site Agrees to Settle FTC Charges of Deceptively Collecting Personal Information in Agency's First Internet Privacy Case: Commission Establishes Strong Mechanisms for Protecting Consumers' Privacy Online (Aug. 13, 1998), *available at* http://www.ftc.gov/opa/1998/08/geocitie.shtm.

29. *See* Complaint, GeoCities No. C-3850 (F.T.C. Feb. 5, 1999), *available at* http://www.ftc.gov/os/1999/02/9823015cmp.htm.

[personal data] to third parties who have used this information for purposes other than those for which members have given permission," contrary to the website's stated privacy policy.[30]

Second, the complaint alleged that GeoCities made "[m]isrepresentations involving sponsorship" when the site stated that it personally collected and maintained children's personal information for an online club.[31] Instead, the complaint alleged that third parties were collecting and maintaining this personal data from children.[32] The FTC claimed that GeoCities' conduct constituted "unfair or deceptive acts or practices" in violation of § 5 of the Act. The case quickly settled with the *GeoCities* Consent Order (Consent Order).[33]

The Consent Order required GeoCities to clearly post a privacy notice telling consumers "what information is being collected . . . its intended use[s] . . . , the third parties to whom it will be disclosed," and how consumers can access and remove the information.[34] This Consent Order became the blueprint for a series of complaints filed against websites that, *inter alia*, failed to comply with their own posted privacy policies.[35]

Since *Geocities*, the Commission has brought a number of cases against companies for violating their own published privacy policies.[36] These actions generally alleged that the companies made implicit or explicit promises to protect sensitive consumer information, but failed to do so (either because hackers were able to gain unauthorized access to consumers' personal information[37] or the company intentionally disclosed

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30. *See id.* paras. 12-16 (setting forth all of the misrepresentations involving information collected by Geocities alleged by the FTC).

31. *Id.* paras. 17-20.

32. *Id.* para. 19.

33. Decision and Order, Geocities, No. C-3850 (Feb. 5, 1999), *available at* http://www.ftc.gov/os/1999/02/9823015.do.htm.

34. *Id.* at IV. These requirements reflected the Commission's earlier pronouncement that website privacy policies should reflect the Fair Information Practice Principles (FIPPs), including the Notice/Awareness Principle, the Choice/Consent Principle, and the Access/Participation Principle. *See generally* 1998 FTC REPORT, *supra* note 3, at 7-11. For a further discussion of these Principles, see *infra* Part III.B.

35. In addition, the provisions of the Geocities Consent Order (Consent Order) relating to the collection and use of information from children formed the basis for the Children's Online Privacy Protection Act of 1998 (COPPA), Pub. L. No. 105-277, 112 Stat. 2681-2728 (1998), codified at 15 U.S.C. §§ 6501-6506 (2000), and its implementing regulations. 16 C.F.R. pt. 312 (2000).

36. Documents related to these enforcement actions are available at http://www.ftc.gov/privacy/privacyinitiatives/promisesenf.html (last visited Feb. 1, 2008).

37. *See* Agreement Containing Consent Order, Guidance Software, Inc., No. 0623057, (F.T.C. Nov. 16, 2006), *available at* http://www.ftc.gov/os/caselist/0623057/0623057%20-Guidance%20consent%20agreement.pdf; Decision and Order, Nations Title Agency Inc., No. C-4161 (F.T.C. June 20, 2006), *available at* http://www.ftc.gov/os/caselist/0523117/0523117NationsTitleDecisionandOrder.pdf; Decision and Order, Petco Animal Supplies, Inc., No. C-4133 (F.T.C. Mar. 4, 2005), *available at* http://www.ftc.gov/os/caselist/0323221/050308do0323221.pdf; Decision and Order, MTS Inc., No. C-4110 (F.T.C. May 28, 2004), *available at* http://www.ftc.gov/os/caselist/0323209/040602do0323209.pdf;

the information to others[38]), making their privacy representations either deceptive or unfair.[39] The consent orders settling these cases required the companies to comply with their own privacy policies, as well as to implement "reasonable security measures" to safeguard customer data from unauthorized disclosure.[40]

The Commission has also used its § 5 powers to pursue deception claims against online companies for a variety of Internet-related claims unrelated to a violation of published privacy policies. These include claims against:

1. Spyware[41] and adware[42] distributors who surreptitiously downloaded software onto unsuspecting users' computers;[43]

Decision and Order, Guess?, Inc., No. C-4091 (F.T.C. July 30, 2003), *available at* http://www.ftc.gov/os/2003/08/guessdo.pdf; Decision and Order, Microsoft Corp., No. C-4069 (F.T.C. Dec. 20, 2002), *available at* http://www.ftc.gov/os/caselist/0123240/microsoftdecision.pdf; Decision and Order, Eli Lilly & Co., No. C-4047 (F.T.C. May 8, 2002), *available at* http://www.ftc.gov/os/2002/05/elilillydo.htm.

Another line of cases arising from the *Geocities* Consent Order relates to the improper collection and use or disclosure of information from children. Because this Article does not address the FTC's enforcement efforts concerning the privacy of children's information online, it will not discuss these cases.

38. *See, e.g.*, Agreement Containing Consent Order, Vision I Props. LLC, No. 0423068 (F.T.C. Mar. 10, 2005), *available at* http://www.ftc.gov/os/caselist/0423068/050310agree0423068.pdf; Decision and Order, Gateway Learning Corp., No. C-4120 (F.T.C. Sept. 10, 2004), *available at* http://www.ftc.gov/os/caselist/0423047/040917do0423047.pdf.

39. In most of these cases, the complaint contained a "catch-all" allegation that the respondent's failure to comply with the FTC's own website privacy policy was either a deceptive or unfair act or practice, but the acts upon which the FTC grounded the complaint were the respondent's failure to comply with its own privacy policy. *See, e.g.*, Complaint, Petco Animal Supplies, Inc., No. C-4133 (F.T.C. Mar. 4, 2005), *available at* http://www.ftc.gov/os/caselist/0323221/041108comp0323221.pdf (alleging that through the privacy policies posted on the website, the "respondent represented, expressly or by implication, that the personal information it obtained from consumers through www.PETCO.com was maintained in an encrypted format and was therefore inaccessible to anyone but the customer providing the information"). *Id.* para. 11. The concluding paragraph of the complaint alleged generally that: "The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act." *Id.* para. 15. Importantly, nowhere in any of these complaints was it alleged that the failure of the respondents to implement reasonable security measures was itself either a deceptive or unfair act or practice.

40. The provisions of the consent orders relating to the implementation of reasonable security measures foretold the settlement terms that the Commission would later impose upon respondents charged with engaging in "unfair" trade practices. However, at the time of these earlier consent orders, there was no indication that the Commission would attempt to impose these provisions on companies other than those that had violated the Commission's own privacy policies.

41. Spyware "includes 'adware' and other programs that 'secretly install on your computer without your permission or knowledge' and may cause 'pop ups,' banner advertisements, and other extraneous ads, send 'spam' e-mail messages, hijack search engine links or home pages, track online activity, allow others to remotely access a computer, record private information or steal passwords. It also includes 'adware, keyloggers, trojans, hijackers, dialers, viruses, spam, and general ad serving.'" FTC v. MaxTheater, Inc., No. 05-CV-0069-LRS, WL 3724918, at *2 (E.D. Wash. Dec. 6, 2005).

42. Adware is "[a] type of 'spyware' that uses collected information to display targeted advertisements . . . ." FTC v. Seismic Entm't Prod, Inc., No. 04-377-JD, 2004 WL 2403124, at *1 (D.N.H. Oct. 21, 2004).

2. Companies or individuals who made materially deceptive representations in marketing a spyware removal product;[44]

3. Those who made fraudulent claims in selling prescription drugs online;[45]

4. A credit reporting company that failed to verify the identity of persons to whom it was disclosing confidential consumer information and failed to monitor unauthorized activities;[46]

5. A reverse auction site that used improper promotional activities to solicit users of a competitive auction site;[47] and

6. Unauthorized charges in connection with "phishing."[48]

Most of these complaints included general allegations that the conduct was a deceptive or unfair act or practice,[49] but the focus was always on the deceptiveness of the targeted practices.

III. FTC'S CHANGE OF TACTICS: APPLYING THE "UNFAIRNESS" PRINCIPLE TO DATA SECURITY BREACHES

Recently the FTC filed complaints against three companies that experienced data security breaches without any violation of published privacy policies. The Commission claimed in each of these cases that the respondent failed to adopt "reasonable security measures" to protect sensitive data, and that such failures alone amounted to an unfair act or practice in violation of § 5 of the FTC Act.

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43. *See, e.g.*, Complaint, Zango, Inc., No. C-4186 (F.T.C. Mar. 7, 2007), *available at* http://www.ftc.gov/os/caselist/0523130/0523130c4186complaint.pdf; *MaxTheater, Inc.*, 2005 WL 3724918 at *2; *Seismic Entm't Prod. Inc.*, 2004 WL 2403124 at *1.

44. FTC v. Trustsoft, Inc., No. H05-1905, 2005 WL 1523915, at *1 (S.D. Tex. June 14, 2005).

45. Complaint, FTC v. Rennert (F.T.C. July 6, 2000), *available at* http://www.ftc.gov/os/2000/07/iogcomp.htm.

46. United States v. ChoicePoint, Inc., No. 106-CV-0198 (N.D. Ga. Jan. 26, 2005), *available at* http://www.ftc.gov/os/caselist/choicepoint/0523069stip.pdf.

47. Complaint, FTC v. ReverseAuction.com (D.D.C. Jan. 6, 2000), *available at* http://www.ftc.gov/os/2000/01/reversecmp.htm.

48. Complaint, FTC v. Hill, No. H 03-5537 (S.D. Tex. Dec. 3, 2003), *available at* http://www.ftc.gov/os/caselist/0323102/040322cmp0323102.pdf; FTC v. C.J., No. 03-CV-5275-GHK (RZX) (C.D. Cal. July 24, 2003), *available at* http://www.ftc.gov/os/2003/07/phishingcomp.pdf. "Phishing" is a high-tech scam that uses spam or pop-up messages "to lure personal information (credit card numbers, bank account information, Social Security numbers, passwords, or other sensitive information) from unsuspecting victims." *See* Office Of Consumer & Bus. Educ., Federal Trade Comm'n, FTC Consumer Alert, How Not to Get Hooked by a "Phishing" Scam 1 (2006), *available at* http://www.ftc.gov/bcp/edu/pubs/consumer/alerts/alt127.pdf.

49. *See, e.g.*, Complaint, Zango, Inc., No. C-4186, paras 16-18 (F.T.C. Mar. 7, 2007) (claiming deceptive failure to adequately disclose adware, unfair installation of adware and unfair uninstall practices).

While the concept of "unfairness" has developed within the FTC and the courts over the last three decades, it has a checkered history.[50] Generally, the doctrine has been limited to the advertising, marketing, and sale of products or services.[51]

The question remains whether the FTC should extend the unfairness doctrine, as it currently exists, to activities unrelated to the advertising, marketing, or sale of products or services, and in particular, whether the Commission should apply the doctrine *sua sponte* to companies that have suffered data security breaches.

A. Evolution of the Unfairness Doctrine

Congress established the Federal Trade Commission in 1915.[52] Its purpose "was to prevent unfair methods of competition in commerce as part of the battle to 'bust the trusts.'"[53] Congress expanded FTC's authority over the ensuing decades. In 1938, Congress passed the Wheeler-Lea Amendment,[54] which amended the FTC Act "to prohibit 'unfair or deceptive acts or practices' in addition to 'unfair methods of competition'—thereby charging the FTC with protecting consumers directly, as well as through its antitrust efforts."[55]

Congress granted the FTC jurisdiction over "unfair" acts or practices in § 5 of the FTC Act in 1938.[56] The FTC did not use the "unfairness" prong of § 5 extensively until 1972. In that year, a U.S. Supreme Court decision encouraged the Commission to apply the unfairness doctrine to protect

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50. *See* J. Howard Beales, III, Director, Bureau of Consumer Prot., Fed. Trade Comm'n, *The FTC's Use of Unfairness Authority: Its Rise, Fall, and Resurrection* (June 2003), *available at* http://www.ftc.gov/speeches/beales/unfair0603.shtm (last visited Aug. 14, 2007) (noting that "the Commission's unfairness powers have been both used and avoided inappropriately").

51. *See, e.g.*, Bureau of Consumer Prot., Federal Trade Comm'n, Dot Com Disclosures, http://www.ftc.gov/bcp/conline/pubs/buspubs/dotcom (last visited Feb. 1, 2008).

52. The Commission was created by the Federal Trade Commission Act (Act of Sept. 26, 1914, ch. 311, § 5, 38 Stat. 717 (codified as amended at 15 U.S.C. §§ 41-58 (2000)). The Commission consists of a five-member board with broad authority to regulate unfair and deceptive business practices. No more than three FTC board members can be from the same political party, and they are appointed for overlapping seven-year terms. *Id.*§ 41.

53. FTC, About the Federal Trade Commission, http://ftc.gov/ftc/about.shtm (last visited Feb. 1, 2008). Yet, even at this early date, Congress recognized how vague the concept of "unfairness" was. *See* H.R. REP. NO. 1142, at 19 (1914) (Conf. Rep.) ("It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field. Even if all known unfair practices were specifically defined and prohibited, it would be at once necessary to begin over again. If Congress were to adopt the method of definition, it would undertake an endless task."); *see also* S. REP. NO. 597, at 13 (1914) (relaying the committee's decision to leave it up to the Commission to determine what practices are unfair).

54. Pub. L. No. 75-447, 52 Stat. 111 (1938) (codified as amended at 15 U.S.C. § 45(a)(1)).

55. Beales, *supra* note 50.

56. Wheeler-Lea Amendment of 1938, Pub. L. No. 75-447, 52 Stat. 111 (codified as amended at 15 U.S.C. § 45(a)(1)).

consumers in the area of advertising.[57] In *FTC v. Sperry & Hutchinson Co.*,[58] the Court noted that the consumer, as well as the competitor, needed protection from unfair trade practices, stating:

> [L]egislative and judicial authorities alike convince us that the Federal Trade Commission does not arrogate excessive power to itself if, in measuring a practice against the elusive, but congressionally mandated standard of fairness, it, like a court of equity, considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws.[59]

In a footnote,[60] the Court approvingly cited the criteria for unfairness that the Commission set forth in an earlier proposed rule relating to cigarette advertising and labeling (Cigarette Rule).[61] The factors set forth in the Cigarette Rule were:

> 1. [W]hether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—whether, in other words, it is within at least the penumbra of some common law, statutory, or other established concept of unfairness;
>
> 2. [W]hether it is immoral, unethical, oppressive, or unscrupulous;
>
> 3. [W]hether it causes substantial injury to consumers (or competitors or other businessmen).[62]

This decision, and the 1975 Magnuson-Moss Warranty-Federal Trade Commission Improvement Act,[63] which provided the FTC with rulemaking authority,[64] resulted in an "ensuing decade of 'over-exuberance' as the agency tested the outer limits of its powers."[65] The FTC's actions were widely criticized,[66] and the matter came to a head in 1980.

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57. *See* Dorothy Cohen, *Unfairness in Advertising Revisited,* 46 J. MARKETING 73, 73 (1982) ("A 1972 Supreme Court decision (*FTC v. Sperry & Hutchinson Co.*), encouraging the FTC to apply unfairness in protecting consumers, added a new dimension to advertising regulation and control.").

58. 405 U.S. 233 (1972).

59. *Id.* at 244. This language has been criticized as "suggesting almost unlimited agency authority." Robert A. Skitol, *How BC and BCP Can Strengthen Their Respective Policy Missions Through New Uses of Each Other's Authority*, 72 ANTITRUST L.J. 1167, 1168 (2005).

60. *Sperry & Hutchinson*, 405 U.S. at 244 n.5.

61. Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. 8,355 (July 2, 1964) (to be codified at 16 C.F.R. pt. 408) [hereinafter Cigarette Rule].

62. *Id.*

63. Pub. L. No. 93-637, 88 Stat. 2183 (1974) (codified as amended at 15 U.S.C. §§ 2301-2312 (2000)).

64. Cohen, *supra* note 57, at 74 ("In 1975 the Magnuson-Moss Act provided the Commission with rulemaking authority, permitting the FTC to establish trade regulation rules that specify unfair or deceptive acts or practices that are prohibited. This Act neither defined nor clarified the concept of unfairness.").

65. Skitol, *supra* note 59, at 1169; *see also* Ernest Gellhorn, *Trading Stamps,* S&H*, and the FTC's Unfairness Doctrine*, 1983 DUKE L.J. 903, 906 ("The progeny of *S&H* has been a

1. 1980 Unfairness Statement

In 1980 Congress enacted the Federal Trade Commission Improvement Act,[67] which "prohibited application of the unfairness doctrine in several specified proceedings and curtailed its use in rulemaking for at least three years while Congress engaged in oversight hearings."[68]

Later that year, the Consumer Subcommittee of the Senate Committee on Commerce, Science, and Transportation held oversight hearings on the unfairness doctrine. In connection with those hearings, the Commission wrote a letter (Unfairness Statement)[69] to the ranking members of the Committee in which it "narrow[ed] the unfairness doctrine."[70] The letter stated:

> We recognize that the concept of consumer unfairness is one whose precise meaning is not immediately obvious, and also recognize that this uncertainty has been honestly troublesome for some businesses and some members of the legal profession. This result is understandable in light of the general nature of the statutory standard.[71]

The Unfairness Statement noted, however, that:

> The statute was deliberately framed in general terms since Congress recognized the impossibility of drafting a complete list of unfair trade practices that would not quickly become outdated or leave loopholes for easy evasion. The task of identifying unfair trade practices was therefore assigned to the Commission, subject to judicial review, in the

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series of unsound decisions, persistent and unwise use of FTC resources, and imposition of costly and unnecessary requirements on retailers and advertisers.").

66. *See, e.g.*, Teresa M. Schwartz, *Regulating Unfair Practices Under the FTC Act: The Need for a Legal Standard of Unfairness*, 11 AKRON L. REV. 1 (1977) (observing that the unfairness theory was undefined, which allowed the FTC to shape it according to the conditions the agency was attempting to regulate); William C. Erxleben, *The FTC's Kaleidoscopic Unfairness Statute: Section 5*, 10 GONZ. L. REV. 333, 351 (1975) (analogizing the unfairness directives to the articles of the United States Constitution in that both were intentionally flexible and allow for interpretation and thus acknowledging that the result "may be alarming to some").

67. Pub. L. No. 96-252, 94 Stat. 374 (1980) (codified as amended in scattered sections of 15 U.S.C.).

68. Gellhorn, *supra* note 65, at 942.

69. *See* FTC Policy Statement on Unfairness, Letter from Michael Pertschuk, Chairman, Fed. Trade Comm'n to Wendell H. Ford, Chairman, and John C. Danforth, Ranking Minority Member, S. Comm. on Commerce, Science, and Transp., Consumer Subcomm. (Dec. 17, 1980), *reprinted in* Int'l Harvester Co., 104 F.T.C. 949, 1070-76 (1984) [hereinafter Unfairness Statement]. *See generally* TIMOTHY J. MURIS & J. HOWARD BEALES, III, THE LIMITS OF UNFAIRNESS UNDER THE FEDERAL TRADE COMMISSION ACT 23-25 (1991) (discussing the developments that led to the preparation of the Unfairness Statement, especially the Commission's use of unfairness subsequent to 1980); Neil W. Averitt, *The Meaning of "Unfair Acts or Practices" in Section 5 of the Federal Trade Commission Act*, 70 GEO. L.J. 225 (1981) (tracing the development of the law from early unfairness issue and deception theory cases to the unfairness statement and its effects on consumer sovereignty).

70. Gellhorn, *supra* note 65, at 956.

71. Unfairness Statement, *supra* note 69, at 1071.

> expectation that the underlying criteria would evolve and develop over time.[72]

The Unfairness Statement also noted that by 1964 the Commission had identified three factors to be considered in applying the unfairness doctrine:

1. "[W]hether the practice injures consumers;"
2. "[W]hether it violates established public policy;" and
3. "[W]hether it is unethical or unscrupulous."[73]

The Unfairness Statement stated that the Commission now agreed to abandon the third element, and "pledged to proceed only if either the unjustified consumer injury test or the violation of public policy test was satisfied."[74]

In 1984, the Commission formally adopted its 1980 Unfairness Statement as the standard that it would apply in proceedings challenging specific acts or practices as unfair.[75]

2. 1994 Amendment to the FTC Act

In 1994, Congress amended the FTC Act by effectively codifying the agency's definition of unfairness from the Unfairness Statement. Section 5(n) now states:

> The Commission shall have no authority under this section or section 18 to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition. In determining whether an act or practice is unfair, the Commission may consider established public policies as evidence to be considered with all other evidence. Such public policy considerations may not serve as a primary basis for such determination.[76]

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72. *Id*. at 1072.

73. *Id.* These factors were adapted from the factors set forth in the Cigarette Rule, *supra* note 61. The Supreme Court appeared to "put its stamp of approval on the Commission's evolving use of a consumer unfairness doctrine not moored in the traditional rationales of anticompetitiveness or deception." Am. Fin. Servs. Ass'n v. FTC, 767 F.2d 957, 971 (D.C. Cir. 1985) (citing FTC v. Sperry & Hutchinson, 405 U.S. 233, 244-45 n.5 (1972)). However, "the FTC's use of its unfairness doctrine has substantially evolved since *Sperry*." Letter from Timothy J. Muris, Chairman, FTC to the U.S. Dep't of Transp. (June 6, 2003), *available at* http://www.ftc.gov/os/2003/06/dotcomment.htm.

74. Gellhorn, *supra* note 65, at 942.

75. Unfairness Statement, *supra* note 69.

76. Federal Trade Commission Act Amendments of 1994, Pub. L. No. 103-312, 108 Stat. 1691 (1994) (codified at 15 U.S.C. § 45(n)).

B. The FTC's 2000 Report and Data Security

The issue of data security[77] predates the Internet. Data security is one of the lynchpins of what are generally referred to as the Fair Information Practice Principles.[78] A report by the Department of Health, Education and Welfare first articulated the Fair Information Practice Principles in 1973.[79] Since then, "a canon of fair information practice principles has been developed by a variety of governmental and inter-governmental agencies."[80]

One of the Fair Information Practice Principles, referred to as the Security Principle and articulated in various FTC documents over the last several decades, provides general guidance as to what data security should include, but nothing specific. In particular, as noted in the 1998 FTC Report:

> Security involves both managerial and technical measures to protect against loss and the unauthorized access, destruction, use, or disclosure of the data. Managerial measures include internal organizational measures that limit access to data and ensure that those individuals with access do not utilize the data for unauthorized purposes. Technical security measures to prevent unauthorized access include encryption in the transmission and storage of data; limits on access through use of passwords; and the storage of data on secure servers or computers that are inaccessible by modem.[81]

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77. The term data security means "[p]rotection of data from unauthorized (accidental or intentional) modification, destruction, or disclosure." COMM. ON NAT'L SECURITY SYS., NATIONAL INFORMATION ASSURANCE (IA) GLOSSARY 21 (2006), *available at* http://www.cnss.gov/Assets/pdf/cns si_4009.pdf.

78. There are five Fair Information Practice Principles: (1) Notice/Awareness; (2) Choice/Consent; (3) Access/Participation; (4) Integrity/Security; and (5) Enforcement/Redress. *See* 1998 FTC REPORT, *supra* note 3, at 7. It is the fourth principle that is relevant to this discussion. *See also* 2000 FTC REPORT, *supra* note 2, at iii ("Web sites would be required to take reasonable steps to protect the security of the information they collect from consumers.").

79. *See* SECRETARY'S ADVISORY COMMITTEE ON AUTOMATED PERSONAL DATA SYSTEMS, DEP'T OF HEALTH, EDUC. AND WELFARE, RECORDS, COMPUTERS AND THE RIGHTS OF CITIZENS xxiii (1973).

80. 1998 FTC REPORT, *supra* note 3, at 48 n.27. Numerous reports, European legislation, and foreign standards set forth the core fair information practice principles. *See, e.g.*, CANADIAN STANDARDS ASS'N, MODEL CODE FOR THE PROTECTION OF PERSONAL INFORMATION, Council Directive 95/46, 1995 O.J. (L281) 30, 31 (EC); DEP'T OF COMMERCE, PRIVACY AND THE NII: PRINCIPLES FOR PROVIDING AND USING PERSONAL INFORMATION (1995); ORG. FOR ECON. CO-OPERATION AND DEV., GUIDELINES ON THE PROTECTION OF PRIVACY AND TRANSBORDER FLOWS OF PERSONAL DATA 7-8 (1981); PRIVACY WORKING GROUP, INFO. INFRASTRUCTURE TASK FORCE, PRIVACY AND THE NATIONAL INFORMATION INFRASTRUCTURE: PRINCIPLES FOR PROVIDING AND USING PERSONAL INFORMATION 4-5 (1995); THE REPORT OF THE PRIVACY PROT. STUDY COMM'N, PERSONAL PRIVACY IN AN INFORMATION SOCIETY 1 (1977).

81. 1998 FTC REPORT, *supra* note 3, at 10.

"Fair information practice codes have called for some government enforcement, leaving open the question of the scope and extent of such powers."[82] The Commission promoted the Fair Information Practice Principles[83] as appropriate benchmarks for companies in self-regulating their promulgation and use of online privacy policies.[84] They also served as the basis for the Consent Order in the *Geocities* case,[85] and were implemented in the Children's Online Privacy Protection Act of 1998.[86]

In December 1999, the Commission established the Advisory Committee on Online Access and Security.[87] The Advisory Committee was asked to "consider the parameters of 'reasonable access' to personal information collected from and about consumers online and 'adequate security' for such information."[88] The Advisory Committee submitted its Final Report on May 15, 2000.[89]

In its Final Report, the Advisory Committee indicated that:

1. Security is a process, and no single standard can assure adequate security because technology and security threats are constantly evolving;[90]
2. Each Web site should have a security program to protect personal data that it maintains, and that the program should specify its elements and be "appropriate to the circumstances;"[91]
3. The "appropriateness" standard, which would be defined through case-by-case adjudication, takes into account changing security needs over time as well as the particular circumstances of the Web site, including the risks it faces, the costs of protection, and the type of the data it maintains.[92]

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82. *Id.* at 11.

83. *See* 2000 FTC REPORT, *supra* note 2, at 34 (presenting the Commission's statement that "[a]s a general matter, however, the Commission lacks authority to require firms to adopt information practice policies").

84. *Consumer Privacy on the World Wide Web: Hearing Before the Subcomm. on Telecomms., Trade and Consumer Prot. of the H. Comm. on Commerce*, 105th Cong. (1998) (statement of Robert Pitofsky, Chairman, FTC), *available at* http://www.ftc.gov/os/1998/9807/privac98.htm.

85. *See generally* Geocities, No. C-3850 at IV (Feb. 5, 1999), *available at* http://www.ftc.gov/os/1999/02/9823015.do.htm (requiring GeoCities to provide clear and prominent notice to consumers regarding the collection and use of personal information).

86. Pub. L. No. 105-277, 112 Stat. 2681-728 (1998) (codified at 15 U.S.C. §§ 6501-6506 (2000), and its implementing regulations codified at 16 C.F.R. pt. 312 (2000)).

87. *See* FTC Advisory Committee on Online Access and Security, http://www.ftc.gov/acoas/ (last visited Feb. 1, 2008).

88. 2000 FTC REPORT, *supra* note 2, at 28.

89. *See generally* FED. TRADE COMM'N ADVISORY COMM., FINAL REPORT ON ONLINE ACCESS AND SECURITY (2000), http://www.ftc.gov/acoas/papers/acoasfinal1.pdf [hereinafter ACOAS].

90. *Id.* at 19.

91. *Id.* at 25.

92. *Id.*

The FTC, in its 2000 Report, called for the passage of broad privacy protection legislation that would: (i) "set forth a basic level of privacy protection for all visitors to consumer-oriented commercial websites to the extent not already provided by the COPPA"; (ii) apply the Fair Information Practice Principles to online data privacy generally;[93] and (iii) give the Commission specific authority to "promulgate more detailed standards pursuant to the Administrative Procedure Act."[94] It indicated that:

> The Commission recognizes that the implementation of these practices may vary with the nature of the information collected and the uses to which it is put, as well as with technological developments. For this reason, the Commission recommends that any legislation be phrased in general terms and be technologically neutral. Thus, the definitions of fair information practices set forth in the statute should be broad enough to provide flexibility to the implementing agency in promulgating its rules and regulations.
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> Such rules and regulations could provide further guidance to Web sites by defining fair information practices with greater specificity. For example, after soliciting public comment, the implementing agency could expand on what constitutes "reasonable access" and "adequate security" in light of the implementation issues and recommendations identified and discussed by the Advisory Committee . . . .
>
> . . . . The Commission hopes and expects that the industry and customers would participate actively in developing regulations under the new legislation . . . .[95]

Orson Swindle strongly dissented to the 2000 Report by objecting to the Commission's seeming abandonment of self-regulation in favor of "extensive government regulation."[96]

> The Commission owes it to Congress—and the public—to comment more specifically on what it has in mind before it recommends legislation that requires all consumer-oriented commercial Web sites to comply with breathtakingly broad laws whose details will be filled in later during the rulemaking process.

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93. 2000 FTC REPORT, *supra* note 2, at 36.

94. *See id.* at ii-iii, 36 (referencing the Administrative Procedure Act, 5 U.S.C. § 553 (2000), and noting that self-regulatory efforts by industries were insufficient to protect certain data, and calling for the FTC to implement its own regulations). While the Report refers to the "implementing authority" generally, it is clear from the context of the Report that the Commission considered itself to be the appropriate agency to implement the Fair Information Practice Principles. *See, e.g.*, Swindle Dissent, *supra* note 1, at 1 ("The majority recommends that Congress give rulemaking authority to an 'implementing agency' (presumably the Commission) to define the proposed legislation requirements. . . .").

95. 2000 FTC REPORT, *supra* note 2, at 37-38.

96. Swindle Dissent, *supra* note 1, at 1.

> Most disturbing, the Privacy Report is devoid of any consideration of the costs of legislation in comparison to the asserted benefits of enhancing consumer confidence and allowing electronic commerce to reach its full potential.[97]

He concluded by warning:

> The current recommendation, however, defies not just logic but also fundamental principles of governance. In recognition of some of the complexities of regulating privacy—particularly Access and Security—the Commission asks Congress to require all commercial consumer-oriented Web sites to comply with extensive, yet vaguely phrased, privacy requirements and to give the Commission (or some other agency) a blank check to resolve the difficult policy issues later. This would constitute a troubling devolution of power from our elected officials to unelected bureaucrats.[98]

Commissioner Thomas B. Leary also dissented from portions of the Report, including the provisions relating to data security.[99] He argued that the legislative recommendation in the Report was "too broad because it suggests the need for across-the-board substantive standards when, in most cases, clear and conspicuous notice alone should be sufficient."[100]

Leary also disagreed with the Commission's claim that the fair information practices are "widely-accepted" in the online and offline worlds.[101] Leary indicated that the Report failed to explain the meaning of "'reasonable' standards" and expressed concern that the legislation, as proposed in the Report, "could in many cases lead to vast expense for trivial benefit and which provides an ominous portent for the content of any substantive rules."[102] He noted that "[i]n some cases, involving particular kinds of information or particular uses, the risk of harm may be so great that specific substantial standards are required. This is a legislative judgment. Congress can, and already does pass industry-specific legislation to deal with these situations."[103]

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97. *Id.* at 1-2.
98. *Id.* at 27.
99. *See* Leary Statement, *supra* note 17, at 4.
100. *Id.* at 1.
101. *See id.* at 5-6 (citing a survey implying that the "fair information practices" are far from widely-accepted in the business community and in "the offline world").
102. *Id.* at 6 (observing that the Commission never really defined what "reasonable standards" actually meant).
103. *Id.* at 7 (citing Fair Credit Reporting Act, 15 U.S.C. § 1681 (2000); Gramm-Leach-Bliley Act, Pub. L. No. 106-102, 113 Stat. 1338 (1999) (codified in scattered sections of 15 U.S.C.); Video Privacy Protection Act of 1988, 18 U.S.C. § 2710 (2000); Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified in scattered sections of 47 U.S.C.); and Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (1984) (codified in scattered sections of 47 U.S.C.)).

Over seven years have passed since the Commission pushed for specific legislation to provide broad consumer privacy protection, but Congress thus far has declined to act. Recently, the FTC decided to move forward on its own without any new, specific privacy laws or delegation of authority from Congress. Instead, the Commission chose to proceed pursuant to the "unfairness" prong of § 5 of the FTC Act.

C. A Data Security Breach as an "Unfair Act or Practice"

The FTC recently began to apply the unfairness doctrine to situations in which a company has suffered a data security breach. The Commission has not held hearings, solicited public comments, engaged in rulemaking, or issued any policy statements or guidelines on when, if ever, the unfairness doctrine can or should be applied to data security breaches.[104] Instead, the agency merely began filing complaints against companies that suffered such breaches.

The application of the unfairness doctrine to data security breaches constitutes a significant shift in how the Commission has used the doctrine in the last few years. As recently as 2003, J. Howard Beales III, Director of the FTC Bureau of Consumer Protection, indicated that:

> As codified in 1994, in order for a practice to be unfair, the injury it causes must be (1) substantial, (2) without offsetting benefits, and (3) one that consumers cannot reasonably avoid. Each step involves a detailed, fact-specific analysis that must be carefully considered by the Commission. *The primary purpose of the Commission's modern unfairness authority continues to be to protect consumer sovereignty by attacking practices that impede consumers' ability to make informed choices.*[105]

Some commentators question whether the mere fact that a party has suffered a data security breach constitutes an "unfair act or practice," without a showing of some overt act on the part of the respondent.[106]

Since all of the actions brought to date have quickly settled, no judicial opinions exist on the efficacy or legality of the Commission's actions

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104. Prior statements from FTC officials seemed to indicate that the Commission believed that its power in the online privacy area was limited to deceptive trade practices. *See, e.g.*, Jeffrey Benner, *FTC Powerless to Protect Privacy*, WIRED, May 31, 2001, http://www.wired.com/politics/security/news/2001/05/44173 ("'The agency's jurisdiction is (over) deception,' Lee Peeler, the FTC's associate director for advertising practices, said. 'If a practice isn't deceptive, we can't prohibit them from collecting information. The agency doesn't have the jurisdiction to enforce privacy. It has the authority to challenge deceptive practices.'").

105. Beales, *supra* note 50, at Part III (emphasis added).

106. *See, e.g.*, Holly K. Towle, *Let's Play "Name that Security Violation!"*, 3 CYBERSPACE LAW., Apr. 2006, at 11 (questioning the link between a data security breach and an actual "unfair act or practice" under the existing law), *available at* http://www.klgates.com/newsstand/Detail.aspx?publication=3220.

brought under the unfairness doctrine. As discussed below, it is unclear whether the Commission should apply the unfairness doctrine at all in this context, particularly where the company that is the victim of the data security breach has engaged in no acts that could be deemed "unfair"—as that term has been interpreted by the Commission and the courts.[107]

More troublesome has been the lack of any rulemaking proceedings, policy statements or guidelines from the Commission explaining what conduct it deems "reasonable," and therefore not actionable under the unfairness doctrine, and what conduct it deems "unreasonable," and hence actionable. As commentator Holly K. Towle stated: "[T]he FTC seems to have found a heretofore unknown, federal, general obligation to maintain security for personally identifiable data."[108]

1. Data Security Breaches

A data security breach "generally refers to an organization's unauthorized or unintentional exposure, disclosure, or loss of sensitive personal information, which can include personally identifiable information such as Social Security numbers (SSN) or financial information such as credit card numbers."[109] Data security breaches can take many forms and do not necessarily lead to any consumer injury.[110]

A variety of activities may give rise to data security breaches. Breaches can result from intentional actions, including hacking,[111] employee theft,[112]

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107. *See* Thomas B. Leary, Commissioner, FTC, Remarks at the Conference on Unfairness and the Internet, http://www.ftc.gov/speeches/leary/unfairness.shtm (last visited Aug. 14, 2007) [hereinafter Leary Speech] (stating "'unfair' is a particularly imprecise and flexible term, so its meaning has evolved over time").

108. Towle, *supra* note 106.

109. GEN. ACCOUNTING OFFICE, PERSONAL INFORMATION: DATA BREACHES ARE FREQUENT, BUT EVIDENCE OF RESULTING IDENTITY THEFT IS LIMITED; HOWEVER, THE FULL EXTENT IS UNKNOWN, GAO-07-737 2, *available at* (2007), http://www.gao.gov/new.items/d07737.pdf?source=ra [hereinafter GAO Report]; *see id.* at 2 n.2 (defining personally identifiable information as "information that can be used to distinguish or trade an individual's identity—such as name, Social Security number, driver's license number, and mother's maiden name").

110. The GAO reported that in a study of the twenty-four largest data security breaches reported in the media from January 2000 through June 2005, that only four included evidence of subsequent fraudulent activities. *Id.* at 5-6. The vast majority (eighteen) showed no clear evidence of any identity theft, and the remaining two lacked sufficient information to make any determination. *Id.*

111. In early 2007, TJX Companies reported unauthorized intrusions into its computer systems that may have led to the disclosure of credit card information and driver's license numbers on 45.7 million customers. *See, e.g.*, Dan Kaplan, *45.7 Million-Victim TJX Companies Breach Could Lead to Federal Notification Law,* SC MAG., Mar. 29, 2007, http://scmagazine.com/us/news/article/647277/457-million-victim-tjx-companies-breach-lead-federal-notification-law; *see also* Orders, Bell v. Acxiom Corp., No. 4:06CV00485-WRW (E.D. Ark. Oct. 3, 2006) (unpublished decision) (stating that in 2003 Acxiom's computer databanks were compromised and client files revealed to the hackers).

112. *See, e.g.*, Towle, *supra* note 106 (listing and describing the many forms of data security breaches).

theft of equipment (such as laptop computers[113] and hard drives[114]), and deception or misrepresentation to obtain unauthorized data.[115] They can also arise from negligent conduct by the organization that suffered the security breach, including the loss of laptop computers or hard disks,[116] loss of data tapes,[117] unintentional exposure of data on the Internet,[118] and improper disposal of data.[119] Security breaches can also arise from an organization's implementation of software that the organization reasonably believes to be secure, but which contains vulnerabilities that render it insecure.[120]

To date, the Commission has filed complaints against three companies—BJ's Wholesale Club, DSW, Inc. and CardSystems Solutions, Inc.[121]—that

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113. *See, e.g.*, Robert Ellis Smith, *Laptop Hall Of Shame*, FORBES, Sept. 7, 2006, http://www.forbes.com/columnists/2006/09/06/laptops-hall-of-shame-cx_res_0907laptops.html (detailing security risks and breaches that have plagued the on going and widespread use of laptop computers).

114. *See, e.g.*, Kahle v. Litton Loan Servicing, LP, 486 F. Supp. 2d 705 (S.D. Ohio 2007) (involving the theft of a hard drive from Litton's Atlanta office); Forbes v. Wells Fargo Bank, N.A., 420 F. Supp. 2d 1018 (D. Minn. 2006) (including an example of a stolen hard drive containing unencrypted customer information as a security breach).

115. *See, e.g.*, Press Release, FTC, ChoicePoint Settles Data Security Breach Charges; to Pay $10 Million in Civil Penalties, $5 Million for Consumer Redress (Jan. 26, 2006), http://www.ftc.gov/opa/2006/01/choicepoint.shtm (recalling that the FTC charged ChoicePoint with a violation of the Fair Credit Reporting Act by providing customer data to individuals who did not have a permissible purpose to obtain that data).

116. *See, e.g.*, Randolph v. ING Life Ins. & Annuity Co., 486 F. Supp. 2d 1, 2-3 (D.D.C. 2007) (entailing facts where the plaintiffs alleged that an ING employee's negligent conduct led to the loss of a computer and thus a security breach).

117. Paul Shread, *Bank's Tape Loss Puts Spotlight on Backup Practices*, ENTERPRISE STORAGE FORUM, Feb. 28, 2005, http://www.enterprisestorageforum.com/continuity/news/article.php/3486036 (describing Bank of America's loss of computer data tapes containing customer and account information for 1.2 million federal employees).

118. *See, e.g.*, Press Release, Texas Woman's University, Data Exposure Response (Jan. 25, 2007), http://www.twu.edu/response/index.asp (disclosing a personal data compromise via the internet at Texas Woman's University).

119. *See, e.g.*, Debra Black, *Rogers Pins Data Dump on Sales Firm*, THESTAR.COM, Apr. 9, 2007, http://www.thestar.com/article/200900 (covering a case where a third party sales company improperly disposed of sensitive data leading to the compromise of that data).

120. *See* Michael D. Scott, *Tort Liability for Vendors of Insecure Software: Has the Time Finally Come?*, 62 MD. L. REV. (forthcoming 2008). An earlier draft of the article is available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1010069 (last visited Feb. 1, 2008) (noting that even systems and networks that are seemingly secure may still be vulnerable to hackers).

121. Some might argue that the FTC has actually filed four unfair trade practice actions for data security breaches. However, in *United States v. ChoicePoint, Inc.*, the allegations were qualitatively different than those contained in the other three cases. Complaint at 7-9, United States v. ChoicePoint, Inc., No. 1 06-CV-0198 (N.D. Ga. Jan. 30, 2006), *available at* http://www.ftc.gov/os/caselist/choicepoint/0523069complaint.pdf. In the *BJ's Wholesale Club, DSW*, and *CardSystems* cases discussed *infra*, the respondents were accused of failing to implement proper security measures, thereby allowing hackers to gain access to consumers' personal information. The *Choicepoint* complaint, in contrast, alleged that the respondent failed to properly verify or authenticate the identity and qualifications of prospective subscribers before granting them access to its databases of consumer data, and failed to properly monitor the activities of these unauthorized subscribers. *Id.* para. 25. The case did not relate to data security breaches at all. *See* Press Release, FTC, ChoicePoint

suffered data security breaches, and are alleged to have engaged in unfair trade practices. Each of these cases is discussed in detail below.

2. BJ's Wholesale Club

In 2005, thieves used a Wi-Fi[122] system at a BJ's Wholesale Club store in Miami to gain access to the store's on-site computers. The Wi-Fi system only connected the on-site computers to inventory scanning devices, but the thieves were able to use default user IDs and passwords to download bank card information and make fraudulent purchases with BJ's customers' credit and debit cards. The losses from fraudulent transactions using counterfeit credit cards garnered from the stolen data allegedly totaled around $13 million.[123]

The FTC filed a complaint[124] against BJ's for an unfair act or practice due to BJ's failure to provide "reasonable security" for its computer network, alleging that BJ's:

> 1. [D]id not encrypt the information while in transit or when stored on the in-store computer networks;
>
> 2. [S]tored the information in files that could be accessed anonymously—that is, using a commonly known default user id and password;
>
> 3. [D]id not use readily available security measures to limit access to its computer networks through wireless access points on the networks;
>
> 4. [F]ailed to employ sufficient measures to detect unauthorized access or conduct security investigations; and
>
> 5. Created unnecessary risks to the information by storing the data for up to thirty days when it no longer had a business need to keep the information, and in violation of bank rules.[125]

"As a result, a hacker could have used the wireless access points on an in-store computer network to connect to the network and, without authorization, access personal information on the network."[126]

Settles Data Security Breach Charges; to Pay $10 Million in Civil Penalties, $5 Million for Consumer Redress (Jan. 26, 2006), http://www.ftc.gov/opa/2006/01/choicepoint.html.

122. "Wi-Fi" is an acronym for "wireless fidelity," which is defined as "a local area network that uses high frequency radio signals to transmit and receive data over distances of a few hundred feet, and uses ethernet protocol." *See* The Free Dictionary, http://www.thefreedictionary.com/wifi.

123. Perkins Coie LLP, *Is It an Unfair Practice to Lack Adequate Security for Consumer Information?*, July 5, 2005, http://www.perkinscoie.com/news/pubs_detail.aspx?publication=735&op=updates (estimating the financial damage of the BJ's security breach at around $13 million).

124. *See* Complaint, BJ's Wholesale Club, Inc. No. C-4148 (F.T.C. Sept. 20, 2005), *available at* http://www.ftc.gov/os/caselist/0423160/092305comp0423160.pdf.

125. *Id.* para. 7.

126. *Id.*

The question of whether any or all of the acts alleged in the complaint constituted "unfair acts or practices" was never adjudicated. BJ's immediately capitulated and agreed to a consent order. Under that Order, which lasts for twenty years, BJ's must:

- designate "an employee or employees to coordinate and be accountable for the information security program";
- identify "material internal and external risks to security" including risks in "employee training and management, information systems . . . , and . . . response to . . . system failures";
- design and implement "reasonable safeguards to control risks identified through risk assessment and regular testing"; and
- adjust the information security system to the results of the assessments and changes in the company's operations.[127]

BJ's must also obtain a biennial assessment and report "from a qualified, objective, independent, certified third-party professional" concerning BJ's compliance with the Order.[128]

As one commentator noted, "[t]he agency will likely consider the terms of the BJ's settlement (which will last for twenty years) as the standard that all companies that obtain and store consumer financial information must meet."[129]

3. DSW, Inc.

On December 1, 2005, the FTC announced[130] that it had entered into a settlement and consent judgment[131] with retail shoe discounter DSW, Inc. The agency claimed that DSW's "failure to take reasonable security measures to protect sensitive customer data was an unfair practice that violated federal law."[132]

According to the FTC's complaint,[133] DSW used computer networks to obtain authorization for credit card, debit card, and check purchases at its stores as well as to track inventory. For credit and debit card purchases,

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127. Decision and Order, at 2-3, BJ's Wholesale Club, No. C-4148 (F.T.C. Sept. 20, 2005), *available at* http://www.ftc.gov/os/caselist/0423160/092305do0423160.pdf.

128. *See id.* at 3 (ordering BJ's to improve security by obtaining an assessment of its data safeguards).

129. Perkins Coie LLP, *supra* note 123.

130. *See* Press Release, FTC, DSW Inc. Settles FTC Charges (Dec. 1, 2005), http://www.ftc.gov/opa/2005/12/dsw.shtm (announcing the settlement between the FTC and DSW Inc.).

131. *See* Decision and Order, DSW, Inc., No. C-4157 (F.T.C.), *available at* http://www.ftc.gov/os/caselist/0523096/0523096c4157DSCDecisionandOrder.pdf (forming an agreement between DSW and the FTC).

132. *See* Press Release, FTC, DSW Inc. Settles FTC Charges (Dec. 1, 2005), http://www.ftc.gov/opa/2005/12/dsw.shtm (announcing the settlement between the FTC and DSW Inc.).

133. *See* Complaint, DSW, Inc., No. C-4157 (F.T.C. Dec. 1, 2005), *available at* http://www.ftc.gov/os/caselist/0523096/051201comp0523096.pdf (alleging that DSW stored sensitive consumer data that became vulnerable to computer hackers and identity thieves).

DSW collected information, such as name, card number, and expiration date, from the magnetic stripe on the back of the cards. The magnetic stripe information also contained a security code that thieves could use to create counterfeit cards that would appear to be genuine in the authorization process.[134] DSW collected information, including the routing number, account number, check number, and the consumer's driver's license number and state, when they accepted personal checks for payment.[135] According to the complaint, DSW's data security failures allowed hackers to gain access to information on more than 1.4 million customers.[136]

The FTC alleged that DSW:

> 1. [C]reated unnecessary risks to [sensitive] information by storing it in multiple files when it no longer had a business need to keep the information;
>
> 2. [Failed to] use readily available security measures to limit access to its computer networks through wireless access points on [those] networks;
>
> 3. [S]tored the information in unencrypted files that could be accessed easily by using a commonly known user ID and password;
>
> 4. [Failed to] limit sufficiently the ability of computers on other in-store and corporate networks; and
>
> 5. [Failed to] employ sufficient measures to detect unauthorized access.[137]

As in *BJ's Wholesale Club*, no adjudication addressed the question of whether any of these acts constituted "unfair acts or practices" under § 5 because DSW immediately settled. Under the Order, which also lasts for twenty years, DSW must:

> • "[D]esignat[e] . . . an employee or employees to coordinate and be accountable for the information security program";
>
> • "[I]dentif[y] . . . material internal and external risks to the security, confidentiality, and integrity of consumer information that could result in the unauthorized disclosure, misuse, loss, alteration, destruction or other compromise of such information, and assess[] the sufficiency of any safeguards in place to control these risks";
>
> • "[D]esign and implement[] . . . reasonable safeguards to control the risks identified through risk assessment, and regular[ly] test[] or monitor[] . . . the effectiveness of the safeguards' key controls, systems and procedures"; and

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134. *See id.* para. 5 (detailing how the personal data stored by DSW could be hacked, stolen, and used to create quite authentic-looking credit cards).

135. *See id.* (explaining that when taking checks from customers, DSW recorded sensitive financial data and stored it in such a fashion that made it vulnerable to hackers and identity thieves).

136. *Id.* para. 9.

137. *Id.* para. 7.

> • "[E]valuat[e] and adjust[] . . . [its] information security program in light of the results of the testing and monitoring . . . , any material changes to [its] operations or business arrangements, or any other circumstances that [DSW] knows or has reason to know may have a material impact on the effectiveness of its information security program."[138]

DSW must also obtain a biennial assessment and report "from a qualified, objective, independent, third-party professional" concerning DSW's compliance with the Order.[139]

Interestingly, in commenting on the *DSW* decision, the Commission indicated that it might use its enforcement discretion under § 5 of the FTC Act to go beyond the substantive requirements of the Safeguards Rule under the Gramm-Leach-Bliley Act and protect personal consumer information even where the information is public.[140]

4. CardSystems Solutions, Inc.

Unlike BJ's Wholesale Club and DSW, CardSystems Solutions, Inc. (CSS) is not a retailer. According to the complaint,[141] CSS provides merchants with products and services used in "authorized processing" of credit and debit card purchases from the banks that issue the cards, and CSS uses the Internet and web-based software applications to provide information to client merchants about authorizations it performed for them.

Specifically, CSS collects information from a customer's credit or debit card magnetic stripe, including, but not limited to, the customer name, card number and expiration date, a security code used to verify electronically that the card is genuine, and certain other information; formats and transmits the information to a computer network operated by or for a bank association (such as Visa or MasterCard) or another entity (such as American Express), which then transmits the information to the issuing bank. The issuing bank receives the request, approves or declines the purchase, and transmits its response to the merchant over the same computer networks used to process the request. The response includes the personal information included in the authorization request that the issuing bank received.

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138. Decision and Order, at 2-3, DSW, Inc., No. C-4157 (F.T.C. Dec. 1, 2005), *available at* http://www.ftc.gov/os/caselist/0523096/051201comp0523096.pdf.

139. *Id.* at 3.

140. *See* Letter from Donald Clark, FTC, Secretary, to Kathryn D. Kohler, Asst. General Counsel, Bank of America Corp., Re: DSW, Inc., Matter No. 0523096 (Mar. 7, 2005), *available at* http://www.ftc.gov/os/caselist/0523096/0523096DSWLettertoCommenterBankofAmerica.pdf.

141. Complaint, CardSystems Solutions, Inc., No. C-4168 (F.T.C. Sept. 8, 2006), *available at* http://www.ftc.gov/os/caselist/0523148/0523148CardSystemscomplaint.pdf.

According to the complaint, CSS "engaged in a number of practices that, taken together, failed to provide reasonable and appropriate security for personal information stored on its computer network."[142] In particular, the complaint alleges that CSS:

> 1. [C]reated unnecessary risks to the [customers'] information by storing it in a vulnerable format for up to 30 days;
>
> 2. [D]id not adequately assess the vulnerability of its web application and computer network to commonly known or reasonably foreseeable attacks, including but not limited to "Structured Query Language" (or "SQL") injection attacks;
>
> 3. [D]id not implement simple, low-cost, and readily available defenses to such attacks;
>
> 4. [F]ailed to use strong passwords to prevent a hacker from gaining control over computers on its computer network and access to personal information stored on the network;
>
> 5. [D]id not use readily available security measures to limit access between computers on its network and between such computers and the Internet; and
>
> 6. [F]ailed to employ sufficient measures to detect unauthorized access to personal information or to conduct security investigations.[143]

According to the complaint, a hacker exploited these "failures" and installed software on CSS's computer network that allowed him to collect and transmit magnetic stripe data stored on CSS's network to computers located outside the network.[144] The hacker then used this information to manufacture counterfeit cards that were subsequently used to make fraudulent purchases.[145]

As in the two prior cases, no adjudication addressed the question of whether any of these acts constituted "unfair acts or practices" under § 5, since CSS immediately agreed to settle. Under the Order in this case, which again lasts for twenty years, CSS must:

> • [D]esignat[e] an employee or employees to coordinate and be accountable for the information security program;
>
> • [I]dentif[y] . . . material internal and external risks to the security, confidentiality, and integrity of personal information that could result in the unauthorized disclosure, misuse, loss, alteration, destruction, or other compromise of such information, and assess[] . . . the sufficiency of any safeguards in place to control these risks. At a minimum, this risk assessment should include consideration of risks in each area of relevant

142. *Id.* para. 6.
143. *Id.*
144. *Id.* para. 7.
145. *Id.* para. 8.

> operation, including, but not limited to: (1) employee training and management; (2) information systems, including network and software design, information processing, storage, transmission, and disposal; and (3) prevention, detection, and response to attacks, intrusions, or other systems failures.
>
> • [D]esign and implement[] . . . reasonable safeguards to control the risks identified through risk assessment, and regular testing or monitoring of the effectiveness of the safeguards' key controls, systems, and procedures.
>
> • [E]valuat[e] and adjust[] . . . respondent's information security program in light of the results of the testing and monitoring required by [the Order], any material changes to respondent's operations or business arrangements, or any other circumstances that respondent knows or has reason to know may have a material impact on the effectiveness of its information security program.[146]

As in the two previous cases, CSS must also obtain a biennial assessment and report from a qualified, objective, independent, third-party professional concerning DSW's compliance with the Order.[147]

D. Applying the Unfairness Doctrine to Data Security Breaches

While the courts and Congress give the Commission broad authority to take action against unfair practices, "[t]he Commission is hardly free to write its own law of consumer protection."[148] The Commission's exercise of its unfairness authority in any particular instance remains subject to judicial review and may be affirmed or set aside for abuse of agency discretion.[149]

In analyzing whether the Commission properly applied the unfairness doctrine in a particular situation, it is important to look at the requirements set forth in the 1980 Unfairness Statement:

1. "[W]hether the practice injures consumers;" and
2. "[W]hether it violates established public policy."[150]

The following analysis applies these requirements to the unfairness claims made by the FTC in the three data security breach cases discussed above.

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146. Decision and Order at 3, CardSystems Solutions, Inc. No. C-4168) (F.T.C. Sept. 8, 2006), *available at* http://www.ftc.gov/os/caselist/0523148/0523148CardSystemsdo.pdf.

147. *Id.*

148. Nat'l Petroleum Refiners Ass'n v. FTC, 482 F.2d 672, 693 (D.C. Cir. 1973).

149. *See* FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 249 (1972) (clarifying that a court can vacate an agency's unfairness determination for failure to adequately set forth the grounds for its determination); FTC v. R.F. Keppel & Bro., Inc., 291 U.S. 304, 314 (1934) (holding that courts can review agency unfairness determinations).

150. *See* Unfairness Statement, *supra* note 69, at 1072; *supra* notes 74-75 and accompanying text.

1. Injury to Consumers

Unjustified consumer injury from a party's conduct constitutes the primary and most important factor in an unfairness analysis.[151] Indeed, if the injury to consumers is significant enough, it can be the *sole* basis for a finding of unfairness.[152] However, not every consumer injury is actionable. To justify a finding of unfairness, a consumer injury must satisfy three requirements: (1) the injury must be substantial; (2) it must not be outweighed by any offsetting benefits to consumers or competition; and (3) the injury must be one that consumers could not reasonably have avoided.[153]

a. Substantial Injury

First, the injury must be "substantial."[154] "Substantial injury is an objective test."[155] As noted by the Commission:

> [T]he Commission believes that considerable attention should be devoted to the analysis of whether substantial net harm has occurred, not only because that is part of the unfairness test, but also because the focus on injury is the best way to ensure that the Commission acts responsibly and uses its resources wisely.[156]

The most common form of injury suffered by consumers is monetary harm.[157] A small degree of harm to a large number of consumers may be deemed "substantial," as may a significant risk of harm to each consumer.[158] Emotional harm, "other more subjective types of harm," and "trivial or merely speculative harm[s]" generally would not be considered "substantial."[159]

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151. *See* Unfairness Statement, *supra* note 69, at 1073 ("Unjustified consumer injury is the primary focus of the FTC Act.").
152. *Id.*
153. *Id.*; *see also* 15 U.S.C. § 45(n) (2000) (setting forth the standard for unfairness determinations).
154. Unfairness Statement, *supra* note 69, at 1073.
155. *See* Beales, *supra* note 50, at Part III (discussing the elements of the unfairness doctrine and the role the FTC's unfairness authority should play in fashioning consumer protection policy).
156. Unfairness Statement, *supra* note 69, at 1073.
157. *See id.* (discussing examples of monetary harm that amount to "substantial injury" under the unfairness doctrine, such as "when sellers coerce consumers into purchasing unwanted goods or services[,] or when consumers buy defective goods or services on credit but are unable to assert against the creditor claims or defense arising from the transaction"). However, in some situations (not presented to date in the case of data security breaches), the consumer injury may be unnecessary health or safety risks. *Id.*
158. *Id.* at n.12.
159. *Id.*

Interestingly, the Commission has not claimed that consumers suffered any monetary losses in any of the FTC complaints filed to date. In the *BJ's Wholesale Club* complaint, for example, the FTC made only the following allegation relating to injury:

> Beginning in late 2003 and early 2004, banks began discovering fraudulent purchases that were made using counterfeit copies of credit and debit cards the banks had issued to customers. The customers had used their cards at Respondent's stores before the fraudulent purchases were made, and personal information Respondent obtained from their cards was stored on Respondent's computer networks. This same information was contained on counterfeit copies of cards that were used to make several million dollars in fraudulent purchases. In response, banks and their customers cancelled and re-issued thousands of credit and debit cards that had been used at Respondent's stores, and customers holding these cards were unable to use their cards to access credit and their own bank accounts.[160]

Instead of alleging any specific consumer injury caused by BJ's Wholesale Club's actions, the Commission only conclusorily alleged that BJ's "failure to employ reasonable and appropriate security measures to protect personal information and files caused or is likely to cause substantial injury to consumers that is not offset by countervailing benefits to consumers or competition and is not reasonably avoidable by consumers," which constituted an "unfair act or practice."[161] Similarly, in *In re DSW, Inc.*, the only allegation of consumer injury in the complaint stated:

> To date, there have been fraudulent charges on some of these accounts. Further, some customers whose checking account information was compromised were advised to close their accounts, thereby losing access to those accounts, and having incurred out-of-pocket expenses such as the cost of ordering new checks. Some of these checking account customers have contacted DSW requesting reimbursement for their out-of-pocket expenses, and DSW has provided some amount of reimbursement to these customers.[162]

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160. *See* Complaint, BJ's Wholesale Club, Inc., No. C-4148 (F.T.C. Sept. 20, 2005) *available at* http://www.ftc.gov/os/caselist/0423160/092305comp0423160.pdf. In paragraph 9, the Commission alleged conclusorily that:

> As described in Paragraphs 7 and 8 above, respondent's failure to employ reasonable and appropriate security measures to protect personal information and files caused or is likely to cause substantial injury to consumers that is not offset by countervailing benefits to consumers or competition and is not reasonably avoidable by consumers. This practice was an unfair act or practice.

Id. para. 9.

161. *Id.* at 3.

162. Complaint para. 9, DSW, Inc., No. C-4157 (F.T.C. Dec. 1, 2005) *available at* http://www.ftc.gov/os/caselist/0523096/051201comp0523096.pdf. As in the *BJ's Wholesale Club* complaint (see *supra* note 124), there was only a conclusorily allegation of consumer injury in the *DSW* complaint.

And in *CardSystems Solutions, Inc.*, the sole allegation of consumer injury stated:

> In early 2005, issuing banks began discovering several million dollars in fraudulent credit and debit card purchases that had been made with counterfeit cards. The counterfeit cards contained complete and accurate magnetic stripe data, including the security code used to verify that a card is genuine, and thus appeared genuine in the authorization process. The magnetic stripe data matched the information respondent had stored on its computer network. In response, issuing banks cancelled and re-issued thousands of credit and debit cards. Consumers holding these cards were unable to use them to access their credit and bank accounts until they received replacement cards.[163]

Federal law limits consumers' liability for unauthorized credit card charges to fifty dollars per card as long as the credit card company is notified within sixty days of the unauthorized charge.[164] In fact, many credit card companies do not require consumers to pay the fifty dollars and will not hold consumers liable for the unauthorized charges, no matter how much time elapsed since the discovery of the loss.[165] As such, consumers affected by these security breaches may suffer no monetary loss at all.[166]

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163. Complaint para. 8, CardSystems Solutions, Inc., No. C-4168 (F.T.C. Sept. 8, 2006), *available at* http://www.ftc.gov/os/caselist/0523148/0523148CardSystemscomplaint.pdf. As in the prior two complaints, the CSS complaint contained only a single, general allegation of consumer injury:

> As set forth in Paragraphs 6, 7, and 8, respondent's failure to employ reasonable and appropriate security measures to protect personal information it stored caused or is likely to cause substantial injury to consumers that is not offset by countervailing benefits to consumers or competition and is not reasonably avoidable by consumers. This practice was, and is, an unfair act or practice.

Id. para. 9.

164. *See* 12 C.F.R. § 226.12(b) (2007) ("The liability of the cardholder for unauthorized use of a credit card shall not exceed the lesser of $50 or the amount of money, property, labor or services obtained by the unauthorized use before notification to the card issuer.").

165. *See Identity Theft: Innovative Solutions for an Evolving Problem: Hearing Before the Subcomm. on Terrorism, Tech., and Homeland Sec.*, 110th Cong. 3 n.3 (Mar. 21, 2007) (statement of Lydia Parnes, Dir., FTC Bureau of Consumer Protection), *available at* http://judiciary.senate.gov/pdf/3-21-07Parnestestimony.pdf [hereinafter Parnes Testimony] (discussing limitations on consumer liability for unauthorized credit charges); *see also* ACOAS, *supra* note 89 (Statement of Stewart Baker), *available at* http://www.ftc.gov/acoas/papers/individual_statements.pdf ("The Committee did not hear any evidence that consumers had actually suffered significant losses from exposure of their personal data on the Internet (it appears that losses from the well-publicized hacker thefts of credit card information fell mainly or exclusively on merchants and banks).").

166. Parnes Testimony, *supra* note 165, at 4 ("Of course, not all data breaches lead to identity theft; in fact, many prove harmless or are caught and addressed before any harm occurs."); *see also* Fred H. Cate, *Information Security Breaches and the Threat to Consumers*, 60 CONSUMER FIN. L.Q. REP. 344, 346 (2006) ("Information security breaches are among the least common ways that personal information falls into the wrong hands.").

Out of all the cases brought by consumers against the three entities discussed above, only one reported decision discussed consumer injury.[167] In *Key v. DSW, Inc.*,[168] the plaintiff filed a class action suit against DSW for negligence, breach of contract, conversion, and breach of fiduciary duty. The plaintiff claimed that as a result of DSW's failure to secure the personal financial information of its customers (including the plaintiff), "unauthorized persons obtained access to and acquired the information of approximately 96,000 customers."[169] The complaint alleged that as a consequence of DSW's actions, the plaintiff and the class members were subjected to "'a substantially increased risk of identity theft, and . . . incurred the cost and inconvenience of, among other things, canceling credit cards, closing checking accounts, ordering new checks, obtaining credit reports and purchasing identity and/or credit monitoring.'"[170] However, the court dismissed the complaint on the ground that the plaintiff lacked standing to sue because she had identified *no actual injury* suffered as a result of DSW's conduct. As the court explained:

> In the identity theft context, courts have embraced the general rule that an alleged increase in risk of future injury is not an "actual or imminent injury." Consequently, courts have held that plaintiffs do not have standing, or have granted summary judgment for failure to establish damages in cases involving identity theft or claims of negligence and breach of confidentiality brought in response to a third party theft or unlawful access to financial information from a financial institution.
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> . . . . .
>
> In sum, Plaintiff's claims are based on nothing more than a speculation that she will be a victim of wrongdoing at some unidentified point in the indefinite future. Because Plaintiff has failed to allege that she suffered injury-in-fact that was either "actual or imminent," this Court is precluded from finding that she has standing under Article III.[171]

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167. *See* Key v. DSW, Inc., 454 F. Supp. 2d 684 (S.D. Ohio 2006) (dismissing for lack of standing where the plaintiffs merely alleged that their information was subjected to a substantially higher risk of identity theft). A second case, *Parke v. CardSystems Solutions, Inc*., 2006 WL 2917604 (N.D. Cal. Oct. 11, 2006), contains allegations similar to the *Key* case against CardSystems Solutions and others, but did not address the issue of consumer injury. In *Richardson v. DSW, Inc.*, 2005 WL 2978755 (N.D. Ill. Nov. 3, 2005), the court dismissed the plaintiff's claim based on the Illinois Consumer Fraud Act because that law requires that the conduct be intentional and the plaintiff had not alleged intentionality. The decision did not address the consumer injury issue, but held that there might be an implied contract upon which recovery could be founded obviating a motion to dismiss. In the subsequent decision in *Richardson v. DSW, Inc.*, 2006 WL 163167 (Jan. 18, 2006), the court allowed the plaintiff to amend her complaint to allege a violation of the Illinois Consumer Fraud Act based on an alleged breach of contract between DSW and the credit card issuers. However, consumer injury was not discussed in that opinion either.

168. *Key*, 454 F. Supp. 2d at 686.

169. *Id.*

170. *Id.*

171. *Id.* at 689, 690 (citations omitted).

Other cases brought by consumers for data security breaches have been dismissed for a failure to show any actual injury to the plaintiff-consumer.[172]

This result remains consistent with the findings of a recently released report from the Government Accountability Office (GAO).[173] In that report, the GAO examined two dozen highly publicized incidents involving breaches of sensitive personal information and the extent to which such breaches resulted in actual damages to consumers. The report concluded that:

> The extent to which data breaches have resulted in identity theft is not well known, largely because of the difficulty of determining the source of the data used to commit identity theft. However, available data and interviews with researchers, law enforcement officials, and industry representatives indicated that *most breaches have not resulted in detected incidents of identity theft*, particularly the unauthorized creation of new accounts. For example, in reviewing the twenty-four largest breaches reported in the media from January 2000 through June 2005, GAO found that three included evidence of resulting fraud on existing accounts and one included evidence of unauthorized creation of new accounts. For eighteen of the breaches, no clear evidence had been uncovered linking them to identity theft; and for the remaining two, there was not sufficient information to make a determination.[174]

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172. *See, e.g.*, Pisciotta v. Old Nat'l Bancorp., 499 F.3d 629, 639 (7th Cir. 2007) (finding that "[w]ithout more than allegations of increased risk of future identity theft, the plaintiffs ha[d] not suffered a harm that the law is prepared to remedy"); Kahle v. Litton Loan Servicing, LP, 486 F. Supp. 2d 705, 712-13 (S.D. Ohio 2007) (granting defendant's motion for summary judgment in a suit against a mortgage loan service provider for negligence in protecting the personal information of its customers); Randolph v. ING Life Ins. & Annuity Co., 486 F. Supp. 2d 1, 7-8 (D.D.C. 2007) (holding that an increased risk of identity theft did not constitute injury-in-fact sufficient to confer standing); Forbes v. Wells Fargo Bank N.A., 420 F. Supp. 2d 1018, 1021 (D. Minn. 2006) (granting bank's motion for summary judgment in a suit for breach of contract, breach of fiduciary duty, and negligence after computers containing bank customer's personal information were stolen from the bank); Order, Bell v. Acxiom Corp., 2006 WL 2850042, at *2 (E.D. Ark. Oct. 3, 2006) (granting defendant's motion for summary judgment because the injuries plaintiff complained of were merely speculative and failed to satisfy the injury-in-fact test); Giordano v. Wachovia Sec. LLC, 2006 WL 2177036, at *4 (D.N.J. July 31, 2006) (remanding to state court for plaintiff's failure to establish a concrete and personalized injury); Guin v. Brazos Higher Educ. Serv. Corp., 2006 WL 288483, at *4-*5 (D. Minn. Feb. 7, 2006) (dismissing a suit by plaintiffs alleging that the defendant had negligently allowed an employee to keep unencrypted customer data on a laptop computer stolen from the employee's home); Stollenwerk v. Tri-West Healthcare Alliance, 2005 WL 2465906, at *3 (D. Ariz. Sept. 6, 2005) (granting defendant's motion for summary judgment in a suit for negligence after a theft of computer hard drives containing personal information of the plaintiffs).

173. *See* GAO Report, *supra* note 109.

174. *Id.* (emphasis added). While the security breach cases evaluated by the GAO predated the three cases discussed in the article, the conclusion reached by the report, namely, that few data security breach cases actually result in measurable injury to consumers, is still relevant to this discussion. *See also* Steve Lohr, *Surging Losses, but Few Victims in Data Breaches*, N.Y. TIMES, Sept. 27, 2006, at G1, *available at* http://www.nytimes.

The President's Identity Theft Task Force recently reached the same conclusion.[175]

In a speech in early 2007, FTC Chairman Majoras responded to criticism that the cases discussed above did not establish any consumer injury:

> What is the substantial injury to American consumers? First, millions of dollars of fraudulent purchases were made using personal information obtained from the companies' computer networks. Some customers may end up liable for some of these fraudulent purchases, particularly if they failed to spot fraudulent purchases on their statements in a timely manner. In addition, some customers experienced substantial injury in the form of inconvenience and time spent dealing with the blocking and re-issuance of their credit and debit cards.[176]

However, none of these "injuries" constitute "substantial consumer injury" as required by the unfairness doctrine. As noted above,[177] it remains unlikely that consumers bore any of the cost of the asserted fraudulent transactions. Furthermore, the fact that some consumers "may" have been liable "if" they failed to report the fraudulent purchases is pure speculation, which is also not actionable under the unfairness doctrine.[178] Finally, the "inconvenience or time" customers may spend in obtaining replacement credit/debit cards fails to qualify as monetary damages.[179] Thus, even at this late date, after the FTC has had ample opportunity to thoroughly investigate these three data breaches in detail, the Commission cannot point to *any* consumer injury cognizable under the unfairness doctrine.

An earlier FTC enforcement action that did not involve a data security breach highlighted the difficulty of establishing substantial consumer injury when applying the unfairness doctrine to online privacy violations. In *Federal Trade Commission v. ReverseAuction.com, Inc.*, the FTC alleged

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com/2006/09/27/technology/circuits/27lost.html (quoting Fred H. Cate, Director of the Center for Applied Cybersecurity Research, Indiana University in Bloomington, who stated "[t]he threat of identity theft from data losses is being greatly exaggerated, . . . because a lot of people have fallen into the trap of equating data loss with identity theft").

175. *See* PRESIDENT'S IDENTITY THEFT TASK FORCE, COMBATING IDENTITY THEFT: A STRATEGIC PLAN 2-3 (2007), *available at* http://www.identitytheft.gov/reports/StrategicPlan.pdf [hereinafter Task Force Report] ("The loss or theft of personal information by itself, however, does not immediately lead to identity theft . . . . [D]uring the past year, the personal records of 73 million people have been lost or stolen, but there is no evidence of a surge in identity theft or financial fraud as a result.").

176. Deborah Platt Majoras, Chairman, Remarks at the Internet Security Summit, Protecting Consumer Information in the 21st Century: The FTC's Principled Approach, The process and Freedom Foundation, Securing the Internet Project 8 (May, 10, 2006), *available at* http://ftc.gov/speeches/majoras/060510ProgressFreedomFoundationRev051006.pdf [hereinafter Marjoras Reparks].

177. *See supra* notes 166-68 and accompanying text.

178. *See supra* note 169.

179. *See supra* notes 172-73 and accompanying text.

that the respondent, an online auction provider, became a member of eBay and was thereby granted access to the e-mail addresses, eBay user IDs, and feedback ratings of other eBay members.[180] When registering as a member, respondent agreed to abide by eBay's privacy agreement, which prohibited members from using the personal identifying information of any eBay member obtained through eBay's website to send unsolicited commercial e-mail.

The Commission alleged that ReverseAuction violated § 5 by using other eBay members' user IDs, feedback ratings, and e-mail addresses for the purpose of sending those members unsolicited commercial e-mail, in contravention of its agreement with eBay. The complaint pled in the alternative that ReverseAuction engaged in deception by falsely representing to eBay that it would abide by the privacy agreement,[181] or that ReverseAuction's use of eBay member information for the purposes of sending unsolicited commercial e-mail constituted an unfair practice.[182]

All of the commissioners voted to support the deception claim, but two of the commissioners voted against the unfairness claim.[183] Commissioners Swindle and Leary dissented from the Commission's decision on the ground that there was no proof of substantial consumer injury as a result of the respondents' activities:

> The Commission has no authority to declare an act or practice unfair unless it "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition." The statutory requirement of substantial injury is actually derived from the Commission's own Statement of Policy, issued in 1980. The Commission explained at that time that, "[t]he Commission is not concerned with trivial or merely speculative harms. In most cases a substantial injury involves monetary harm . . . . Unwarranted health and safety risks may also support a finding of unfairness. Emotional impact and other more subjective types of harm, on the other hand, will not ordinarily make a practice unfair."
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> We do not say that privacy concerns can never support an unfairness claim. In this case, however, ReverseAuction's use of eBay members' information to send them e-mail did not cause substantial enough injury to meet the statutory standard.[184]

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180. Complaint para. 8, FTC v. ReverseAuction.com, Inc. (D.D.C. Jan. 6, 2000), *available at* http://www.ftc.gov/os/2000/01/reversecmp.htm.

181. *Id.* para. 16.

182. *Id.* para. 17.

183. *See* Statement of Commissioners Orson Swindle and Thomas B. Leary Concurring in Part and Dissenting in Part, in ReverseAuction.com, Inc., File No. 0023046, *available at* http://www.ftc.gov/os/2000/01/reversesl.htm.

184. *Id.* (internal citations and emphasis omitted).

The dissenting Commissioners further explained their position on the unfairness claim:

> The injury in this case was caused by deception: that is, by ReverseAuction's failure to honor its express commitments. It is not necessary or appropriate to plead a less precise theory.
>
> Industry self-regulation and consumer preferences, as expressed in the marketplace, are the best and most efficient ways to formulate privacy arrangements on the Internet and in commerce generally. Because proliferation of the kind of deceptive conduct in which ReverseAuction allegedly engaged could undermine consumer confidence in such privacy arrangements, we believe that it is appropriate to pursue this matter under a deception theory. The unfairness theory, however, posits substantial injury stemming from ReverseAuction's use of information readily available to millions of eBay members to send commercial e-mail. *This standard for substantial injury overstates the appropriate level of government-enforced privacy protection on the Internet, and provides no rationale for when unsolicited commercial e-mail is unfair and when it is not. We are troubled by the possibility of an expansive and unwarranted use of the unfairness doctrine.*[185]

The same concern applies to unfairness claims based on data security breaches. Without any rules or guidelines, applying the unfairness doctrine to data security breaches offers the possibility of "an expansive and unwarranted use of the unfairness doctrine."

b. Cost-Benefit Analysis

The second requirement for an unfairness finding is that the injury "not be outweighed by any offsetting consumer or competitive benefits . . . ."[186] The Commission will consider the cost-benefit trade offs of the practice, and will not find a practice unfair "unless it is injurious in its net effects."[187] The agency will also take into account the cost to remedy the alleged injury to the parties involved, as well as "the burdens on society in general in the form of increased paperwork, increased regulatory burdens on the flow of information, reduced incentives to innovation and capital formation, and similar matters."[188]

There is no question that there is a potential cost, and in some cases a substantial cost, in a company not properly protecting consumers' personal information from unauthorized access or disclosure. However, there is also

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185. *Id.* (emphasis added).
186. Int'l Harvester Co., 104 F.T.C. 949, 1073 (1984); *see also* 15 U.S.C. § 45(n) (2000).
187. *Int'l Harvester*, 104 F.T.C. at 1073. "When making this determination the Commission may refer to existing public policies for help in ascertaining the existence of consumer injury and the relative weights that should be assigned to various costs and benefits." *Id.* at n.17.
188. *Id.* at 1073-74.

a cost, and in many cases an enormous cost, in providing a high level of protection for that information.[189] To properly assess the "cost-benefit trade-offs" in this area, some attempt must be made to quantify the cost of increasing the protection of consumers' data above a certain threshold level.

It is clearly unreasonable for an entity to gather sensitive consumer information and invest no money in implementing security techniques to safeguard that information. It is also clear that there is no such thing as absolute security—no matter how much money is spent. Computer systems simply cannot be made 100% secure.[190] That remains a fact of life, and the Commission itself recognizes this shortfall: "For example, perfect security, if it existed, would come at such a high cost that the failure to have perfect security would not violate the Commission's unfairness standard . . . ."[191]

So, given the two extremes—no security as unacceptable and absolute security as unattainable—how is an entity to conduct the cost-benefit analysis of how much security is "enough" to avoid being deemed "unfair" by the Commission, and at what cost? A cost-benefit analysis depends invariably "on subjective valuations which may vary from person to person, as well as across sociological or income groups."[192] Without formal hearings and rulemaking, it remains impossible for the FTC, or a court, to make that determination.

As noted by FTC Commissioner Swindle, in dissenting from the 2000 FTC Privacy Report:

> [T]he Privacy Report fails to pose and to answer basic questions that all regulators and lawmakers should consider before embarking on extensive regulation that could severely stifle the New Economy. *Shockingly, there is absolutely no consideration of the costs and benefits*

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189. *See* ACOAS, *supra* note 89, at 23 (asserting that security can be set at almost any level depending on the costs one is willing to incur, not only in dollars but in inconvenience for users and administrators of the system).

190. *See* Prepared Statement of the Federal Trade Commission Before the House Subcomm. on Technology, Information Policy, Intergovernmental Relations, and the Census, Comm. on Government Reform (Apr. 21, 2004) at 4, *available at* http://www.ftc.gov/os/2004/04/042104cybersecuritytestimony.pdf [hereinafter FTC Statement] ("[T]he Commission recognized that there is no such thing as 'perfect' security and that breaches can occur even when a company has taken all reasonable precautions."); *see also* Deborah Platt Majoras, *The Federal Trade Commission: Learning from History as We Confront Today's Consumer Challenges*, 75 UMKC L. REV. 115, 128 (2006) (explaining, in terms of a cost benefit analysis, the balance between the possible injury to consumers and the cost that a company must pay to safeguard information while stressing the agency's focus on reasonableness and indicating that a consumer's data was the currency of the information economy).

191. Majoras Remarks, *supra* note 176, at 9.

192. Richard Craswell, *The Identification of Unfair Acts and Practices by the Federal Trade Commission*, 1981 WIS. L. REV. 107, 134.

> *of regulation; nor the effects on competition and consumer choice*; nor the experience to date with government regulation of privacy; nor constitutional implications and concerns; nor how this vague and vast mandate will be enforced.[193]

To date, the Commission has conducted no cost-benefit analysis of the economic impact of its application of the unfairness doctrine to data security breaches, or if it has, it has not disclosed the result of that analysis to the public.

c. Consumers' Ability to Avoid Injury

The third element of the test is whether the consumer could have reasonably avoided the injury:[194] "[I]f consumers could have made a different choice, but did not, the Commission should respect that choice."[195] However, where the harm is not one that the consumer could have avoided by choosing not to engage in trade with the vendor, the agency may take action to halt behavior "that unreasonably creates or takes advantage of an obstacle to the free exercise of consumer decisionmaking."[196]

While it remains possible for a consumer to live a reasonably full and productive life without using a credit or debit card or personal check (i.e., conducting all of her transactions with cash only), and would, therefore, result in a significantly lower chance of suffering injury as a result of a data security breach, it is likely that the FTC would consider such an alternative "unreasonable." Further, while the three cases discussed above all involved credit/debit cards and checks, other instances of data security breaches have involved other forms of financial transactions, such as student loans,[197] bank accounts,[198] and other types of financial,[199] as well as health insurance,[200] transactions.

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193. Swindle Dissent, *supra* note 1, at 16 (emphasis added).

194. Int'l Harvester Co., 104 F.T.C. 949, 1074 (1984) (spelling out the three-part test used to determine if a consumer's injury was legally unfair); *see also* 15 U.S.C. § 45(n) (2000).

195. Beales, *supra* note 50.

196. Unfairness Statement, *supra* note 69, at 1074. However, the examples given by the Commission—coercion, unduly influencing susceptible consumers, and not making available important price or performance information—are not in any way analogous to conduct by a company that results in a data security breach.

197. *See* Guin v. Brazos Higher Educ. Serv. Corp., 2006 WL 288483 (D. Minn. Feb. 7, 2006) (addressing a student loan company's information security breach after confidential unencrypted information on an employee laptop was stolen).

198. *See* Forbes v. Wells Fargo Bank N.A., 420 F. Supp. 2d 1018 (D. Minn. 2006) (discussing a bank's information security breach when granting summary judgment in finding that the plaintiffs suffered no injury in fact from increased likelihood of information breach).

199. *See, e.g.*, Giordano v. Wachovia Securities, LLC, No. 06-476 (JBS), 2006 WL 2177036 (D.N.J. July 31, 2006) (dealing with a financial institution's loss of personal information relating to retirement accounts).

Further, in the *BJ's Wholesale Club* and *DSW* cases,

> customers could not know that their personal information was vulnerable on respondents' computer networks, and thus had no reason to avoid using their credit and debit cards at these stores. Further, after providing their information to BJ's or DSW, customers could not prevent the breach from occurring . . . . And in the case of payment processor CardSystems, consumers did not even know that CardSystems processed their transactions, let alone that it stored their personal information on its computer network, or left their information vulnerable.[201]

The Commission or a court hearing a case involving an allegation of unfairness under the circumstances presented in these cases would likely find that the consumer did not have the ability to avoid injury, and hence, that this prong of the consumer injury analysis had been met.

2. Violation of an Established Public Policy

The second factor in an unfairness analysis is whether the practice violates a public policy "as it has been established by statute, common law, industry practice, or otherwise."[202] In its Unfairness Statement, the Commission observed that, "[a]lthough public policy" has been listed "as a separate consideration, it is used most frequently by the Commission as a means of providing additional evidence on the degree of consumer injury caused by specific practices."[203]

However, public policy may be an independent basis for a finding of unfairness when "the policy is so clear that it will entirely determine the question of consumer injury, so there is little need for a separate analysis by the Commission."[204]

The agency will use public policy to support a finding of unfairness when laws and judicial decisions have formally acknowledged the policy, and legislatures and courts have widely recognized it. If a public policy is not well-established, the agency will "act only on the basis of convincing independent evidence that the practice was distorting the operation of the market and thereby causing unjustified consumer injury."[205]

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200. *See* Stollenwerk v. Tri-West Healthcare Alliance, No. Civ. 03-015PHXSRB, 2005 WL 2465906 (D. Ariz. Sept. 6, 2005) (addressing a health care manager's loss of personal information that led to identity theft).
201. Majoras Remarks, *supra* note 176, at 10.
202. Unfairness Statement, *supra* note 69, at 1074.
203. *Id.* at 1075.
204. *Id.*
205. *Id.* at 1076.

In 1982, the Commission further limited the role of public policy, stating that it was not an independent basis for unfairness,[206] but rather it "may provide additional evidence" of unfairness.[207] Congress subsequently codified this reduced role in 1994:[208] "Under the statutory standard, the Commission may consider public policies, but it cannot use public policy as an independent basis for finding unfairness. The Commission's long and dangerous flirtation with ill-defined public policy as a basis for independent action was over."[209]

The question here is whether the Commission is applying a *clearly established* public policy in the data security breach cases. For a policy to be clearly established, "it must be widely-followed, and embodied in statutes, judicial decisions or the Constitution."[210]

Since 2000, Congress has authorized the Commission to hold hearings and to promulgate rules under several statutes, including Title V of the Gramm-Leach-Bliley Financial Services Modernization Act (GLB),[211] the Fair Credit Reporting Act,[212] and the Sarbanes-Oxley Public Company Accounting Reform and Investor Protection Act of 2002.[213]

Some commentators suggest[214] that the unfairness complaints filed by the Commission for data security breaches are actually being brought pursuant to the Safeguards Rule[215] that the Commission promulgated under

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206. Letter from James C. Miller, Chairman, FTC to Bob Packwood, Chairman, Comm. on Commerce, Sci., and Trasnp., and Bob Kasten, Chairman, SubComm. On Consumer Comm. on Commerce, Sci., and Transp. (Mar. 5, 1982), *reprinted in* Antitrust & Trade Reg. Rep. (BNA) No. 1055, at 568-70 (Mar. 11, 1982).

207. *Id.* The reduced role of public policy was reflected in the Commission's Credit Practices Rule adopted by the Commission in 1984.

> Earlier articulations of the consumer unfairness doctrine have also focused on whether "public policy" condemned the practice in question. In its December 1980 statement, the Commission stated that it relies on public policy to help it assess whether a particular form of conduct does in fact tend to harm consumers. We have thus considered established public policy "as a means of providing additional evidence on the degree of consumer injury caused by specific practices.

Trade Regulation Rule; Credit Practices, 49 Fed. Reg. 7,740, 7,743 (Mar. 1, 1984).

208. Federal Trade Commission Act Amendments of 1994, Pub. L. No. 103-312, 108 Stat. 1691 (1994), codified at 15 U.S.C. § 45(n) (2000).

209. Beales, *supra* note 50.

210. Chris Jay Hoofnagle, Privacy Practices Below the Lowest Common Denominator: The Federal Trade Commission's Initial Application of Unfair and Deceptive Trade Practices Authority to Protect Consumer Privacy (1997-2000), at 2-3 (Jan. 7, 2007), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=507582.

211. Gramm-Leach-Bliley Financial Services Modernization Act (GLB), 15 U.S.C. §§ 6801-6809, 6821-6827 (2000).

212. *Id.* § 1681.

213. Pub. L. No. 107-204, 116 Stat. 745 (2002).

214. *See* FTC Statement, *supra* note 190, at 5; *see also infra* note 267 and accompanying text.

215. Standards for Safeguarding Customer Information (Safeguards Rule), 16 C.F.R. pt. 314 (2002); *see also* Privacy of Consumer Financial Information Rule (Privacy Rule), 16 C.F.R. pt. 313 (2000).

the authority granted to it in the GLB.[216] The Safeguards Rule requires financial institutions to maintain reasonable policies and procedures to ensure the security, confidentiality, and integrity of customer information.[217] The financial institutions covered by the Rule include not only lenders and other traditional financial institutions, but also companies providing other types of financial products and services to consumers.[218] These institutions include, for example, payday lenders, check-cashing businesses, professional tax preparers, auto dealers engaged in financing or leasing, electronic funds transfer networks, mortgage brokers, credit counselors, real estate settlement companies, and retailers that issue credit cards to consumers.[219]

The Rule is intended to be flexible to accommodate the wide range of entities covered by GLB, as well as the wide range of circumstances companies face in securing customer information. Accordingly, the Rule requires financial institutions to implement a written information security program that is appropriate to the company's size and complexity, the nature and scope of its activities, and the sensitivity of the customer information it handles.[220] Each financial institution must also: (1) assign one or more employees to oversee the program; (2) conduct a risk assessment; (3) put safeguards in place to control the risks identified in the assessment and regularly test and monitor them; (4) require service providers, by written contract, to protect customers' personal information; and (5) periodically update its security program.[221]

However, the GLB is limited to financial institutions and does not, by its very language, apply to retailers like BJ's Wholesale Club and DSW or to credit card processing services like CardSystems. As such, the GLB and the Safeguards Rule should not be deemed to be the "clearly established public policy" on which the FTC can base its unfairness actions against entities that do not come within the carefully delineated definition of

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216. The Safeguards Rule, implementing Section 501(b) of the GLB (15 U.S.C. § 6801(b) (2000)), was promulgated by the Commission on May 23, 2002 and became effective on May 23, 2003.

217. 16 C.F.R. § 314.1(a) (2007).

218. 15 U.S.C. § 6809(3)(A) (2000). "Financial institutions" are defined as businesses that are engaged in certain "financial activities" described in § 4(d) of the Bank Holding Company Act of 1956 (12 U.S.C. § 1843(k) (2000)) and its accompanying regulations. 12 C.F.R. §§ 225.28, 225.86 (2007).

219. 15 U.S.C. § 6809.

220. 16 C.F.R. § 314.3.

221. *Id.* § 314.4.

"financial institutions." If the GLB or other industry-specific laws are to be extended to cover entities not currently within their limited purview, it is up to Congress to make that determination, not the FTC.[222]

No established public policy existed at the time of the filing of these three complaints that the Commission could have relied upon to justify its actions. One commentator noted that "[t]o suddenly create and enforce a list in hindsight, as the FTC apparently did, is to govern more by the concept of 'shock and awe' than by publicly considered and published public policy."[223]

E. The FTC Has Provided No Meaningful Guidance on What It Considers Unfair in the Data Security Breach Context

Before the Commission filed its first unfairness action against BJ's Wholesale Club, it issued no policy statements, conducted no rulemaking,[224] and made no pronouncements that it was even considering the application of the unfairness doctrine to those who suffered data security breaches without a concomitant violation of a published privacy policy. And even now, with three complaints and three consent orders[225] on record, it remains far from clear whether the Commission will file an action in a specific set of circumstances, or what actions companies can proactively take to avoid an FTC enforcement action if they later suffer a data security breach.[226]

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222. FTC Statement Before the Senate Comm. on Commerce, Sci. & Transp. on Data Breaches and Identity Theft 9-10 (June 15, 2005), *available at* http://www.ftc.gov/os/2005/06/050616databreaches.pdf.

> Although we believe that Section 5 already requires companies holding sensitive data to have in place procedures to secure it if the failure to do so is likely to cause substantial consumer injury, we believe Congress should consider whether new legislation incorporating the flexible standard of the Commission's Safeguards Rule is appropriate.

Id.

223. Towle, *supra* note 106.

224. FTC, A Brief Overview of the Federal Trade Commission's Investigative and Law Enforcement Authority (Sept. 2002), *available at* http://www.ftc.gov/ogc/brfovrvw.shtm.

> Under . . . 15 U.S.C. Sec. 57a, the Commission is authorized to prescribe "rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce" within the meaning of Section 5(a)(1) of the FTC Act. The statute requires that Commission rulemaking proceedings provide an opportunity for informal hearings at which interested parties are accorded limited rights of cross examination.

Id.

225. *See* Leary Speech, *supra* note 107 (stating that "[t]he uncertainties associated with lawmaking by consent decree is, of course, one of the unintended consequences of an otherwise efficient and increasingly popular process").

226. *See, e.g.*, Christopher Wolf, *Dazed and Confused: Data Law Disarray,* BUS. WK., Apr. 2, 2006, *available at* http://www.businessweek.com/technology/content/apr2006/tc20060403_290411.htm?campaign_id=search (indicating that regarding "the underlying security of the systems storing personal data, the FTC takes a 'we know it when we see it approach,' suing companies whose weak data security it believes amounts to an unfair consumer practice");

A review of the allegations in the three complaints filed to date does not provide much in the way of meaningful guidance.[227] As shown in Table 1, the allegations against the three respondents were virtually identical. The variations between the allegations in BJ's and DSW on one hand, and CardSystems on the other, resulted primarily from the different roles that the entities play in the credit/debit card processing system—BJ's and DSW are retailers, while CardSystems is a credit card processor used by retailers.

TABLE 1

Respondent / *Allegations*	*BJ's Wholesale Club*	*DSW, Inc.*	*CardSystems Solutions, Inc.*
No data encryption	Failed to encrypt information in transit or when stored on in-store computer networks	Failed to encrypt information in files	Stored information in a "vulnerable format"
Failed to limit access	Stored information in files that could be accessed using default user ID and password	Stored information in files that could be accessed using default user ID and password ——— Failed to limit the ability of computers on one in-store network to connect to computers on other in-store and corporate networks	Failed to use strong passwords to prevent hacker from gaining control of computers on its network and accessing personal information stored on the network ——— Failed to use readily available security measures to limit access between computers on its network and between such computers and the Internet

see also Goodwin Proctor LLP, *supra* note 11, at 2-3 ("The FTC did not provide any general guidance or standards for what would be reasonable for other companies to avoid similar liability."). The FTC recently issued a publication, that provides general advice on what a business can do to protect the personal information it collects and stores. However, the publication does not indicate whether a company following the suggested actions will be deemed in compliance with the Commission's "reasonable security measures" standard in the event of a data security breach, or whether a failure to do so will be deemed an "unfair" business practice. FTC, PROTECTING PERSONAL INFORMATION: A GUIDE FOR BUSINESS (Apr. 2007), *available at* http://www.ftc.gov/bcp/edu/pubs/business/privacy/bus69.pdf.

227. *Panel Probes Revival of Unfairness Doctrine in FTC and States' Consumer Protection Cases*, Antitrust & Trade Reg. Rep. (BNA) No. 2150, at 352 (Apr. 9, 2004) (quoting Prof. Steven Calkin, Wayne St. Univ. School of Law) [hereinafter Panel Probes Revival] (noting that "while codified, the unfairness test 'was not explained satisfactorily'" because there was no legislative or judicial guidance, "leaving practitioners with a 'variety of consent orders and anecdotal' evidence for guidance").

Readily available security measures not used	Failed to use readily available security measures to limit access to its computer networks through wireless access points	Failed to use readily available security measures to limit access to its computer networks through wireless access points	Failed to implement simple, low-cost, and readily available defenses
Security measures to detect unauthorized access not used	Failed to employ sufficient measures to detect unauthorized access or conduct security investigations	Failed to employ sufficient measures to detect unauthorized access	Failed to employ sufficient measures to detect unauthorized access to personal information or conduct security investigations
Stored information too long	Created unnecessary risks to information by storing it for up to thirty days when no longer needed and in violation of bank rules	Created unnecessary risks to sensitive information by storing when it no longer had a business need to keep information	Created unnecessary risks to customers' information by storing it for up to thirty days
Failed to properly assess security risks			Did not adequately assess the vulnerability of its web application and computer network to commonly known or reasonably foreseeable attacks, including but not limited to, Structured Query Language (or SQL) injection attacks

Those that support the agency's unfairness actions could argue that even though the Commission gave no advanced notice of its intent to pursue data security breaches as unfair acts or practices, the respondents were still "on notice" because the FTC's prior deceptiveness complaints contained allegations that the respondents' failure to implement reasonable security measures made the statements in their privacy policies deceptive. Indeed, in many of the previous deceptiveness cases, the complaints identified security failures that were similar, and in some cases identical, to those set forth in the later *BJ's Wholesale Club, DSW*, and *CardSystems* complaints.[228]

228. For example, in *Guess?*, the Commission alleged that:
> Since at least October 2000, Respondents' application and website have been vulnerable to commonly known or reasonably foreseeable attacks from third parties attempting to obtain access to customer information stored in Respondents' databases. These attacks include, but are not limited to, web-based application attacks such as "Structured Query Language" (SQL) injection attacks.

The simple response is that in the earlier deceptiveness cases, the alleged security failures were not the basis for the claim of deception; the deception occurred in the statements made by respondents in their privacy policies. The security breaches merely constituted evidence of the deceptiveness of their privacy policies.[229] In reading the deceptiveness complaints, one could only conclude that as long as an entity made no privacy representations, a security breach alone would not give rise to an action under § 5.

Those that support the agency's unfairness actions could also argue that even if BJ's Wholesale Club could claim lack of notice, subsequent respondents like DSW and CardSystems (as well as future respondents) were now on notice of the Commission's intent to bring unfairness claims for data security breaches as a result of the allegations set forth in the *BJ's Wholesale Club* complaint[230] and Consent Order.[231] The problem with that argument is that the allegations in the *BJ's Wholesale Club* complaint, and the complaints in *DSW* and *CardSystems,* only identify six general types of acts and omissions (as identified in Table 1) that the Commission deemed unfair in those particular circumstances. It remains unclear whether all of these failures must occur before the FTC will bring an unfairness action,[232] or whether only one or a subset of the failures would be sufficient for an unfairness action,[233] or whether there are other security shortcomings that either alone or in combination with those enumerated in the complaints would constitute unfair acts or practices in the eyes of the Commission. Indeed, one commentator has argued that at least one of the acts alleged to have been unfair is actually a proper and legal business practice.

Complaint at 3, para. 8, *Guess?*, No. C-4091 (F.T.C. June 18, 2003), *available at* http://www.ftc.gov/os/2003/08/guesscomp.pdf. This allegation is virtually identical to one of the allegations made in the *CardSystems* complaint. *See CardSystems* Complaint, *supra* note 141, at 2, para. 6 (alleging a failure of the Respondent "to provide reasonable and appropriate security for personal information stored on its computer network").

229. FTC Statement, *supra* note 190, at 4. As noted by the Commission, "[t]he companies that have been subject to enforcement actions have made explicit or implicit promises that they would take appropriate steps to protect sensitive information obtained from consumers. Their security measures, however, proved to be inadequate; their promises, therefore, deceptive." *Id.*

230. *See BJ's Wholesale Club* Complaint, *supra* note 124, at 3, para. 10 (alleging the acts and practices of BJ's Wholesale Club to constitute "unfair acts or practices" in violation of § 5(a)).

231. *See BJ's Wholesale Club* Decision and Order, *supra* note 128 (ordering BJ's Wholesale Club to establish a comprehensive information security program).

232. *See Panel Probes Revival*, *supra* note 227, at 352 (describing the uncertainties of the unfairness doctrine as practitioners have no formal guidance as to its application); *see also* Marjoras Remarks, *supra* note 176 ("[T]he respondents engaged in a number of practices, *taken together*, that failed to supply reasonable security for sensitive consumer information.").

233. Majoras Remarks, *supra* note 176, at 8 ("While any one of the failures may have been a problem, combined, they created an open invitation for a cyberheist.").

> Parts of the FTC's list are simply wrong. Look at the allegation that BJ's "created unnecessary risks to the information by storing it for up to 30 days when it no longer had a business need to keep the information, and in violation of bank rules." There was a business need to keep at least part of the Info. For one thing, the federal Truth in Lending Act (12 CFR § 226.13) gives a credit card holder 60 days to dispute a transaction and gives the card issuer another 90 days to investigate it and make a reasonable determination regarding the validity of the transaction. This investigation is done by contacting the retailer and making it supply, essentially, proof that the transaction occurred with the cardholder. The issuer conducting the investigation might determine to side with the cardholder and that will initially relieve the cardholder of the repayment obligation. But that is not necessarily the end of it. If the retailer does not agree with that determination, the retailer can take it all up in court. How long does a court action take? Several years in most states.
>
> In short, there is a business need to keep Info for more than 30 days.[234]

Further, while the three FTC complaints discussed above all claim that the respondents' shortcomings included their failure to encrypt data stored on their computer systems, neither the GLB nor the Safeguards Rule promulgated by the Commission under the GLB require that stored data be encrypted.[235] In fact, in a comment relating to the *DSW* proposed order, the Commission stated that a failure to encrypt personal consumer information would not, in and of itself, establish a lack of reasonable security measures.[236]

Earlier statements from the Commission create further uncertainty as to the precedential value of these complaints. As noted in a 2004 congressional statement:

> First, a company's security procedures must be appropriate for the kind of information it collects and maintains. Different levels of sensitivity may dictate different types of security measures. . . .

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234. Towle, *supra* note 106.

235. *See, e.g.*, Guin v. Brazos Higher Educ. Serv. Corp., 2006 WL 288483, at *4 & n.2 (D. Minn. Feb. 7, 2006) ("While it appears that the FTC routinely cautions businesses to '[p]rovide for secure data transmission' when collecting customer information by encrypting such information 'in transit,' there is nothing in the GLB Act about this standard, and the FTC does not provide regulations regarding whether data should be encrypted when stored on the hard drive of a computer.").

236. Letter from Donald S. Clark, Secretary, FTC, to Russell W. Schrader, Senior Vice President and Assistant General Counsel, VISA U.S.A. Inc., in DSW, Inc. (Mar. 7, 2005), *available at* http://www.ftc.gov/os/caselist/0523096/0523096DSWLettertoCommenterVisa.pdf ("The Commission agrees that the failure to encrypt does not *ipso facto* establish that a company lacked reasonable procedures to safeguard the information. Accordingly, the complaint in this matter alleges that DSW's overall security procedures were not reasonable, and cites several deficiencies (including the failure to encrypt) which, taken together, support this conclusion.").

> The second principle . . . is that not all breaches of information security are violations of FTC law—the Commission is not simply saying "gotcha" for security breaches. Although a breach may indicate a problem with a company's security, breaches can happen . . . even when a company has taken every reasonable precaution. In such instances, the breach will not violate the laws that the FTC enforces. Instead, the Commission recognizes that security is an ongoing process of using reasonable and appropriate measures in light of the circumstances.[237]

The FTC Statement itself highlights the ad hoc nature of the inquiry into the "adequacy" of security measures:

> When breaches occur, our staff reviews available information to determine whether the incident warrants further examination. If it does, the staff gathers information to enable us to assess the reasonableness of the company's procedures in light of the circumstances surrounding the breach. This allows the Commission to determine whether the breach resulted from the failure to have procedures in place that are reasonable in light of the sensitivity of the information. In many instances, we have concluded that FTC action is not warranted. When we find a failure to implement reasonable procedures, however, we act.[238]

The primary objection to the FTC's position on unfairness in the data breach context is its unconstrained nature. No guidelines exist under which the Commission will act or refrain from acting if a data security breach occurs. Companies cannot know in advance whether the steps they have taken and the costs they have incurred to implement data security measures will be deemed adequate. Adequacy becomes what three commissioners say it is.[239] And because data security is a moving target, what the Commission might consider adequate today could be considered inadequate next week; "[s]tated differently, mechanical mitigation of the specific vulnerabilities or poor practices cited in prior FTC actions is inadequate."[240] As noted by the Commission:

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237. FTC Statement, *supra* note 190, at 4-5; *see also* Deborah Platt Majoras, Chairman, FTC, Remarks at the IAPP Privacy Summit, Building a Culture of Privacy and Security—Together 4-5 (Mar. 7, 2007), *available at* http://www.ftc.gov/speeches/majoras/070307iapp.pdf ("In bringing each case, our message has been the same: companies must maintain reasonable and appropriate measures to protect sensitive consumer information. This requirement is process-oriented, rather than technology-oriented . . . . Our standard is not perfection; it is reasonableness. But I want to underscore that the FTC will enforce aggressively this standard to protect data security.").

238. FTC Statement, *supra* note 190, at 5-6.

239. Beales, *supra* note 50 (indicating that "the moral" of the history of the FTC's use of unfairness authority "is that unfairness can be misused, particularly when there is no principled basis for applying it").

240. Ronald D. Lee & Amy Ralph Mudge, *Reasonable Security: The FTC's Focus on Personal Privacy Initiatives Highlights the Importance of Integrated Information Security Programs*, 1 PRIVACY & DATA SECURITY L.J. 643, 651 (2006).

> The risks companies and consumers confront change over time. Hackers and thieves will adapt to whatever measures are in place, and new technologies likely will have new vulnerabilities waiting to be discovered. As a result, companies need to assess the risks they face on an ongoing basis and make adjustments to reduce these risks.[241]

The results of the vagueness of this "adequacy" standard are twofold. First, some companies will avoid engaging in commercial activities that have a significant risk of consumer injury in case of a data security breach, which will lessen competition in those activities.[242] Second, rational companies may over-invest in new technologies to ensure that their security measures will be deemed adequate, resulting in increased costs that will be passed on to consumers in the form of higher prices, without proof that such additional costs will, in fact, provide enhanced protection for consumer data. If the security costs become too high, companies simply will go out of business.[243]

Thus far, the FTC has made no effort to determine whether the increased cost or reduced competition that may result from enforcement of its vague "adequacy" standard is worth the potential benefit of making it more difficult, but certainly not impossible, for determined cybercriminals to obtain the personal data anyway.

IV. A LEGISLATIVE PROPOSAL

If Congress enacted legislation providing for specific FTC oversight of corporate data security under carefully constrained rules and regulations, the legislation could alleviate much of the uncertainty and negative effects of the FTC's seemingly ad hoc enforcement actions under the unfairness doctrine against companies that have suffered data security breaches.

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241. Prepared Statement of the Federal Trade Commission on Cybersecurity and Consumer Data: What's at Risk for the Consumer? Before the Subcomm. on Commerce, Trade & Consumer Prot. of the House Comm. on Energy and Commerce (Nov. 19, 2003), *available at* http://www.ftc.gov/os/2003/11/031119swindletest.shtm.

242. *See, e.g.*, Kent Walker, *Where Everybody Knows Your Name: A Pragmatic Look at the Costs of Privacy and the Benefits of Information Exchange*, 2000 STAN. TECH. L. REV. 2, 24, *available at* http://stlr.stanford.edu/pdf/walker-information-exchange.pdf. (indicating that "[l]egislators should consider the reality of regulatory costs and the resulting contraction of services and opportunities before . . . they act. As shown by the FTC's Advisory Committee on Access and Security, the issues created by even seemingly simple rules quickly grow complicated when set against the extraordinarily wide variety of information exchange practices that run throughout modern society.").

243. *See* ADVISORY COMMITTEE ON ONLINE ACCESS AND SECURITY, FED. TRADE COMM'N, FINAL REPORT, Statement of Daniel E. Geer, Jr., *available at* http://www.ftc.gov/acoas/papers/individual_statements.pdf (pointing out that, although it is natural that "[s]tern rules create stern costs," if "these stern costs tax day-to-day operation rather than taxing exception handling, then the sterner those rules are the fewer will be the entities that can bear the overhead").

Several laws and regulations already exist under which the FTC has authority to conduct rulemaking and file enforcement actions for data security breaches. These laws and regulations include the Commission's Safeguards Rule[244] under Title V of the Gramm-Leach-Bliley Act,[245] which contains data security requirements for financial institutions,[246] and the Fair Credit Reporting Act (FCRA),[247] which "includes certain diligence requirements for consumer reporting agencies and safe disposal obligations for companies that maintain consumer report information."[248]

While each of these laws applies to specific, narrowly defined industries, this existing legislation can provide guidance for the type of legislation that Congress might enact to give the FTC authority to proceed against entities not currently covered by the GLB or FCRA for data security breaches.

A recent report from the President's Identity Theft Task Force[249] recommends that Congress establish "a national standard imposing safeguards requirements on all private entities that maintain sensitive consumer information."[250] It further recommends that "[c]oordinated rulemaking authority under the Administrative Procedure Act should be given to the FTC [and other federal agencies] to implement the national standards," and that the agencies be given enforcement authority of the standards "against entities under their respective jurisdictions."[251]

Currently, four bills remain pending in Congress that relate to data security breach notification.[252] These include: (1) H.R. 836, the Cyber-Security Enhancement and Consumer Data Protection Act of 2007;[253] (2) H.R. 958, the Data Accountability and Trust Act;[254] (3) S. 239, the Notification of Risk of Personal Data Act;[255] and (4) S. 495, the Personal Data Privacy and Security Act of 2007.[256] Each of these bills would establish a national law governing data security breach notification obligations and would preempt state notification laws.

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244. Standards for Safeguarding Consumer Information, 16 C.F.R. pt. 314 (2007).
245. The entities covered by the GLB are defined and identified in 15 U.S.C. § 6809, including financial institutions. 15 U.S.C. § 6809 (3) (2000).
246. *See* 15 U.S.C. § 6801(a), (b)(1-3) (2000) (listing obligatory safeguards for financial institutions to implement to protect their customers' nonpublic personal information).
247. 15 U.S.C. §§ 1681-1681x.
248. Parnes Testimony, *supra* note 165, at 4-5 (internal citations omitted).
249. Task Force Report, *supra* note 178.
250. *See id.* at 35 (recommending standards to provide "clarity and predictability for businesses and consumers").
251. *Id.* at 37.
252. New bills will undoubtedly be introduced, and existing bills amended or abandoned. However, these bills are useful exemplars of the types of federal security breach notification legislation currently being proposed.
253. Cyber-Security Enhancement and Consumer Data Protection Act of 2007, H.R. 386, 110th Cong. (2007).
254. Data Accountability and Trust Act, H.R. 958, 110th Cong. (2007).
255. Notification of Risk to Personal Data Act of 2007, S. 239, 110th Cong. (2007).
256. Personal Data Privacy and Security Act of 2007, S. 495, 110th Cong. (2007).

Three of the four bills (S. 239, S. 495, and H.R. 958), as currently written, would give the FTC responsibility to establish guidelines for data security breach notification. However, none of these bills currently address the FTC's jurisdiction to take action against entities that experience data security breaches, or the rules the Commission should apply in determining when to take such action.

If Congress intends the FTC to become the primary agent for data security breach notification regulations, it is only natural that it also provide specific guidance for when the Commission can take enforcement actions against companies for such breaches.

A. The Gramm-Leach-Bliley Act as a Model for Data Security Breach Legislation

The primary purpose of the Gramm-Leach-Bliley Act[257] was to remove restrictions that prevented the merger of certain types of financial institutions.[258] The Act contained a number of provisions requiring financial institutions to implement measures to secure customer personal information against unauthorized access, use, or disclosure.[259] The Act requires financial institutions to provide privacy notices that explain their information-sharing practices.[260] Financial institutions must also inform their customers of the right to "opt-out" if they do not want their information shared with certain nonaffiliated third parties.[261] Finally, the Act requires financial institutions to safeguard the security and confidentiality of customer information.[262] It is these latter provisions that are relevant to this discussion.

The Act provides that information security standards established by the FTC must include various safeguards to protect against both "unauthorized access to" and the "use of" customer information in a manner that could result in "substantial harm or inconvenience to any customer."[263] The FTC has authority to enforce the privacy provisions.[264]

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257. 15 U.S.C. § 6801(a)-(b)(1)-(3) (2000).
258. *See id.* § 6809 (identifying the entities covered by the GLB).
259. Lydia Parnes, Acting Dir., FTC Bureau of Consumer Protection, Remarks before the IAPP, The FTC and Consumer Privacy: Onward and Upward 8 (Oct. 28, 2004), *available at* www.ftc.gov/speeches/parnes/041028conprivparnes.pdf [hereinafter Parnes Remarks].
260. 15 U.S.C. § 6802(a).
261. *Id.* § 6802(b)(1)(A)-(C).
262. *Id.*
263. *Id.* § 6801(b)(3).
264. *Id.* §§ 6805(a)-(d), 6822(a).

The Safeguards Rule[265] requires financial institutions to protect the security, confidentiality, and integrity of customer information by developing a comprehensive written information security program that contains reasonable administrative, technical, and physical safeguards, including:

> A. Designat[ing] one or more employees to coordinate [the] information security program;
>
> B. Identifyi[ng] reasonably foreseeable internal and external risks to the security, confidentiality, and integrity of customer information . . . and assessing the sufficiency of any safeguards in place to control these risks;
>
> C. Design[ing] and implement[ing] information safeguards to control the risks [identified] through risk assessment, and regularly test[ing] or otherwise monitor[ing] the effectiveness of the safeguards' key controls, systems, and procedures;
>
> D. Overseei[ng] service providers . . . and requiring [them] by contract to [protect the security and confidentiality of customer information]; and
>
> E. Evaluat[ing] and adjust[ing] [the] information security program in light of the results of testing and monitoring . . . changes to [the business operation, and other relevant circumstances].[266]

It appears that the Commission, in the absence of more specific legislation, is looking to the Safeguards Rule for guidance in filing complaints against non-financial institutions for data security breaches. As noted by Lydia Parnes, an FTC director:

> Although the Safeguards Rule only applies to financial institutions, it serves as a useful guide for good information security practices in all industries. Indeed, the final orders in our four information security cases draw on the requirements of the Rule and, conversely, if the businesses followed the requirements of the Rule, they would not have faced the FTC law enforcement actions.[267]

More recently, FTC Chairman Majoras stated, "The consent orders settling these cases have required the companies to implement appropriate information security programs that generally conform to the standards that

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265. 16 C.F.R. § 314.3 (2007).

266. *Id.*

267. Parnes Remarks, *supra* note 259; *see also* Parnes Testimony, *supra* note 165, at 7-8 ("The FTC Safeguards Rule promulgated under the GLB Act serves as a good model of this approach . . . . It also is a flexible and adaptable standard that accounts for the fact that risks, technologies, and business models change over time, and that a static technology-based standard would quickly become obsolete and might stifle innovation in security practices. The Commission will continue to apply the "reasonable procedures" principles in enforcing existing data security laws.").

the Commission set forth in the GLBA Safeguards Rule."[268] Chairman Majoras specifically requested that Congress extend the existing Safeguards Rule to non-financial institutions.[269]

While it remains undoubtedly tempting for the Commission to unilaterally adopt the Safeguards Rule in connection with its enforcement actions against non-financial institutions, thereby avoiding the time and effort required to conduct new rulemaking, it is inappropriate to do so. Financial institutions are already heavily regulated by the federal government,[270] unlike retailers and other organizations that might come under this new legislation. The Safeguards Rule was adopted after lengthy rulemaking[271] and the review of myriad submissions from interested parties.[272] The Safeguards Rule was specifically tailored to the financial industry and its concerns. Entities outside the financial industry were not involved in that rulemaking process and had no input into that process.

While the Safeguards Rule may provide important insights into the issues that new rules aimed at non-financial institutions should address, it would be a mistake to simply reenact the Safeguards Rule without going through a formal rulemaking process, which will allow a complete analysis of where non-financial institutions may differ from financial institutions in terms of security procedures and how the rules need to be tailored to

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268. Prepared Statement of the FTC Before the Senate Comm. on Commerce, Sci. and Transp., Data Breaches and Identity Theft 5 (June 16, 2005), *available at* http://www.ftc.gov/os/2005/06/050616databreaches.pdf. *But see supra* note 140 and accompanying text (indicating that this statement is at odds with an earlier statement by the Commission indicating that it might go beyond the substantive requirements of the Safeguards Rule under certain circumstances).

269. Prepared Statement, *supra* note 268, at 7 ("The Commission recommends that Congress consider whether companies that hold sensitive consumer data, for whatever purpose, should be required to take reasonable measures to ensure its safety. Such a requirement could extend the FTC's existing GLBA Safeguards Rule to companies that are not financial institutions."); *see also id.* at 9-10 ("Although we believe that Section 5 already requires companies holding sensitive data to have in place procedures to secure it if the failure to do so is likely to cause substantial consumer injury, we believe Congress should consider whether new legislation incorporating the flexible standard of the Commission's Safeguards Rule is appropriate."). *Accord* GAO, PERSONAL INFORMATION: KEY FEDERAL PRIVACY LAWS DO NOT REQUIRE INFORMATION RESELLERS TO SAFEGUARD ALL SENSITIVE DATA, HIGHLIGHTS FROM GAO-06-674, A REPORT TO THE COMM. ON BANKING, HOUSING AND URBAN AFFAIRS, U.S. SENATE 56, *available at* http://www.gao/gov/new.items/d06674.pdf.

270. Financial institutions are regulated by myriad federal agencies, including the Federal Deposit Insurance Corporation, the National Credit Union Administration, the Securities Exchange Commission, the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, and the Office of Thrift Supervision, as well as comparable state agencies.

271. *See* Standards for Safeguarding Customer Information, 66 Fed. Reg. 41,162 (Aug. 7, 2001) (codified at 16 C.F.R. pt. 314); *see also* Privacy of Customer Financial Information—Security, 65 Fed. Reg. 54,186 (Sept. 7, 2000) (codified at 16 C.F.R. pt. 313).

272. *See* Standards for Safeguarding Customer Information, 67 Fed. Reg. 36,484 (May 23, 2002) (codified at 16 C.F.R. pt. 314) (noting that the Commission received thirty comments in response to the Advanced Notice of Proposed Rulemaking and forty-four comments in response to its Notice of Proposed Rulemaking).

address those differences. Without that rulemaking process, it seems impossible for anyone to predict how similar or how different the final rules will be from the Safeguards Rule.

For example, numerous internationally recognized standards in the information technology industry exist that could be adopted, either in whole or in part, as part of the rulemaking process. These standards could provide the "reasonable" information security measures the FTC is looking for. These standards include:

> 1. International Standards Organization—ISO 17799. This standard consists of a comprehensive set of controls comprising best practices in information security and forms an internationally recognizable generic information security standard . . . .
>
> 2. International Standards Organization—ISO 27001. This standard focuses on data security and requires that a company strictly follow a set of stringent business practices and policies that have been developed to facilitate data security and systems uptime, limit vulnerabilities, mitigate risks and perform other steps to ensure data security.
>
> 3. National Institute of Standards and Technology—NIST Advanced Encryption Standard. This standard specifies a FIPS-approved cryptographic algorithm that can be used to protect electronic data.
>
> 4. NIST Electronic Authentication Guideline (Special Publication 800-63). This publication, along with OMB E-Authentication Guidance (OMB 04-04), provide technical guidance on how to implement e-authentication. The publication covers topics including: providing a model for e-authentication, registration and identity proofing, authentication protocols and technical requirements. This publication also adopts the OMB's four-level system which rates the consequences of authentication errors and misuse of credentials.
>
> 5. NIST Information Security Handbook (Special Publication 800-100). This publication provides wide-ranging information on various aspects of information security . . . . It also provides guidance for facilitating a more consistent approach to information security programs throughout the federal government. This publication states that it can be used by CIOs and CSOs in a variety of fields to construct security requirements for their company.
>
> 6. Payment Card Industry Data Security Standard (PCI DSS). The PCI DSS is a set of comprehensive requirements for enhancing payment account data security. It was developed by the founding brands of the PCI Security Standards Council, including American Express, Discover Financial Services, JCB, MasterCard Worldwide and Visa International, to help facilitate the broad adoption of consistent data security measures on a global basis. The PCI DSS is a multifaceted security standard that includes requirements for security management, policies, procedures,

> network architecture, software design and other critical protective measures. This comprehensive standard is intended to help companies to proactively protect customer account data . . . .
>
> 7. BITS—Financial Institution Shared Assessments Program—Standardized Information Gathering (SIG). This program was designed to create a standardized approach to obtaining consistent information about a service provider's information technology practices and controls. It consists of a questionnaire and a set of executable tests, both designed to document a service provider's ability to actively manage information security controls. It is supposed to be used by financial institutions to assess the information security policies of the companies to which they have outsourced functions, however it can be utilized more broadly as it provides useful questions and document requests companies can request from service providers.[273]

Adopting an internationally recognized standard, or at least basing its new rules on one or more of these standards, would provide companies with a much more specific set of guidelines for compliance than the vague "adequacy" standard currently being used by the Commission.

B. Proposed Statutory Language

Legislation to implement regulations on information security breaches and provide for FTC enforcement of those regulations can be proposed as a stand alone law or as part of another bill, such as one that requires entities to notify customers of an information security breach. As noted above,[274] a number of currently pending federal bills exist that would give the FTC authority to develop regulations regarding data security breach notifications and to enforce those regulations. It may make sense to amend one or more of those pending bills to address the FTC's authority to develop and enforce regulations concerning data security breaches as well.

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273. John B. Kennedy & Anne E. Kennedy, *What Went Wrong? What Went Right? Corporate Responses to Privacy and Security Breaches*, 903 PLI/Pat 11, 29-31 (PLI June-July 2007); *see also* NAT'L INST. OF STANDARDS AND TECH., FED. INFORMATION PROCESSING STANDARD PUB. 199, STANDARDS FOR SECURITY CATEGORIZATION OF FEDERAL INFORMATION AND INFO. SYSTEMS (Feb. 2004); NAT'L INST. OF STANDARDS AND TECH., FED. INFO. PROCESSING STANDARD PUB. 200, MINIMUM SECURITY REQUIREMENTS FOR FEDERAL INFORMATION AND INFORMATION SYSTEMS (Mar. 2006); NAT'L INST. OF STANDARDS AND TECH. SPECIAL PUB. 800-53, RECOMMENDED SECURITY CONTROLS FOR FEDERAL INFORMATION SYSTEMS (Feb. 2005); NAT'L INST. OF STANDARDS AND TECH., SPECIAL PUB. 800-37, GUIDE FOR THE SECURITY CERTIFICATION AND ACCREDITATION OF FEDERAL INFORMATION SYSTEMS (May 2004) (articulating other data security standards for federal computer systems that might be instructive).

274. *See supra* notes 253-56 and accompanying text.

PROPOSED LEGISLATION[275]

§ 1. Protection of Sensitive Personally Identifiable Information

(a) Privacy obligation policy – It is the policy of Congress that each business entity that collects sensitive, personally identifiable information has an affirmative and continuing obligation to respect the privacy of and protect the security and confidentiality of such information.

(b) Business Entity Safeguards – In furtherance of the policy in subsection (a) of this section, the Federal Trade Commission shall establish and enforce appropriate standards for those business entities subject to its jurisdiction relating to administrative, technical, and physical safeguards—

(1) to insure the security and confidentiality of customer records and information;

(2) to protect against any anticipated threats or hazards to the security or integrity of such records; and

(3) to protect against unauthorized access to or use of such records or information which could result in substantial harm or inconvenience to any customer.

§ 2. Rulemaking.

(a)(1) Rulemaking – Not later than one (1) year after the date of enactment of this Act, the Federal Trade Commission shall promulgate regulations under section 553 of title 5, United States Code, to require each business entity subject to its jurisdiction that uses, accesses, transmits, stores, disposes of, or collects sensitive personally identifiable information, or contracts to have any third party entity maintain such data for such person, to establish and implement policies and procedures regarding information security practices for the treatment and protection of sensitive personally identifiable information taking into consideration—

(A) the size of, and the nature, scope, and complexity of the activities engaged in by such business entity;

(B) the current state of the art in administrative, technical, and physical safeguards for protecting such information; and

(C) the cost of implementing such safeguards.

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275. Portions of the following text were adapted from the GLB (15 U.S.C. § 6801(a)-(b)), the Fair Credit Reporting Act (*id.* §§ 1681a-1681s), the Telemarketing and Consumer Fraud and Abuse Prevention Act (*id.* § 6101(1)-(5)), and the proposed bills identified in *supra* notes 253-56.

In connection with subsection (B), the Commission shall take into consideration existing, generally accepted national and international information security standards, including but not limited to, ISO 17799, ISO 27001, NIST Advanced Encryption Standard, NIST Electronic Authentication Guideline (Special Publication 800-63), NIST Information Security Handbook (Special Publication 800-100), the Payment Card Industry Data Security Standard (PCI DSS), and BITS-Financial Institution Sharing Assessments Program-Standardized Information Gathering (SIG).

(2) Requirements – Such regulations shall require the policies and procedures to include the following:

(A) A security policy with respect to the collection, use, sale, other dissemination, and maintenance of such sensitive personally identifiable information;

(B) The identification of an officer or other individual as the point of contact with responsibility for the management of information security;

(C) A process for identifying and assessing any reasonably foreseeable vulnerabilities in the system maintained by such person that contains such sensitive personally identifiable information, which shall include regular monitoring for a breach of security of such system;

(D) A process for taking preventive and corrective action to mitigate against any vulnerabilities identified in the process required by subparagraph (C), which may include implementing any changes to security practices and the architecture, installation, or implementation of network or operating software;

(E) A process for disposing of obsolete data in electronic form containing sensitive personally identifiable information by shredding, permanently erasing, or otherwise modifying the sensitive personally identifiable information contained in such data to make such sensitive personally identifiable information permanently unreadable or undecipherable.

(3) Treatment of Entities Governed by Other Law – In promulgating the regulations under this subsection, the Commission may determine to be in compliance with this subsection any business entity that is required under any other Federal law to maintain standards and safeguards for information security and protection of sensitive personally identifiable information that provide equal or greater protection than those required under this subsection.

§ 3. Enforcement.

(a)(1) Enforcement by Federal Trade Commission – Compliance with the regulations promulgated under § 2 of this title shall be enforced under the Federal Trade Commission Act [15 U.S.C. §§ 41 et seq.] by the Federal Trade Commission with respect to any business entity under its jurisdiction that collects, stores, uses, or discloses sensitive personally identifiable information and all other persons subject thereto, except to the extent that enforcement of the requirements imposed under this title is specifically committed to some other government agencies.

(2) For the purpose of the exercise by the Federal Trade Commission of its functions and powers under the Federal Trade Commission Act, a violation of any requirement or prohibition imposed under this title shall constitute an unfair or deceptive act or practice in commerce in violation of § 5(a) of the Federal Trade Commission Act [15 U.S.C. § 45(a)] and shall be subject to enforcement by the Federal Trade Commission under § 5(b) thereof [15 U.S.C. § 45(b)] with respect to any entity or person subject to enforcement by the Federal Trade Commission pursuant to this subsection.

(3) The Federal Trade Commission shall have such procedural, investigative, and enforcement powers, including the power to issue procedural rules in enforcing compliance with the requirements imposed under this title and to require the filing of reports, the production of documents, and the appearance of witnesses as though the applicable terms and conditions of the Federal Trade Commission Act were part of this title.

(4) Any person violating any of the provisions of this title shall be subject to the penalties and entitled to the privileges and immunities provided in the Federal Trade Commission Act in the same manner, by the same means, and with the same jurisdiction, power, and duties as though the applicable terms and provisions thereof were incorporated into and made a part of this title.

(5)

(A) In the event of a knowing violation, which constitutes a pattern or practice of violations of this title, the Commission may commence a civil action to recover a civil penalty in a district court of the United States against any person that violates this title. In such action, such person shall be liable for a civil penalty of not more than $2,500 per violation.

(B) In determining the amount of a civil penalty under subparagraph (A), the court shall take into account the degree of culpability, any history of prior such conduct,

ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

(6) Notwithstanding paragraph (2), a court may not impose any civil penalty on a person for a violation of this title unless the person has been enjoined from committing the violation, or ordered not to commit the violation, in an action or proceeding brought by or on behalf of the Federal Trade Commission, and has violated the injunction or order, and the court may not impose any civil penalty for any violation occurring before the date of the violation of the injunction or order.

(7) State Law – This Act shall not be construed as superseding, altering, or affecting any statute, regulation, order, or interpretation in effect in any State, except to the extent that such statute, regulation, order, or interpretation is inconsistent with the provisions of this Act, and then only to the extent of the inconsistency. For purposes of this section, a State statute, regulation, order, or interpretation is not inconsistent with the provisions of this subchapter if the protection such statute, regulation, order, or interpretation affords any person is greater than the protection provided under this subchapter and the amendments made by this subchapter, as determined by the Federal Trade Commission.

(8) No Private Right of Action. This statute shall not be construed to provide a private right of action on any individual or entity other than the Federal Trade Commission.

§ 4. Definitions.

In this Act, the following definitions shall apply:

(a) AFFILIATE – The term "affiliate" means persons related by common ownership or by corporate control.

(b) BUSINESS ENTITY –The term "business entity" means any organization, corporation, trust, partnership, sole proprietorship, unincorporated association, venture established to make a profit, or nonprofit, and any contractor, subcontractor, affiliate, or licensee thereof engaged in interstate commerce.

(c) SECURITY BREACH—

(1) IN GENERAL – The term "security breach" means compromise of the security, confidentiality, or integrity of computerized data through misrepresentation or actions that result in, or there is a reasonable basis to conclude has resulted in, acquisition of or access to sensitive personally identifiable information that is unauthorized or in excess of authorization.

(2) EXCLUSION – The term "security breach" does not include—
  (i) a good faith acquisition of sensitive personally identifiable information by a business entity, or an employee or agent of a business entity, if the sensitive personally identifiable information is not subject to further unauthorized disclosure; or
  (ii) the release of a public record not otherwise subject to confidentiality or nondisclosure requirements.

(d) SENSITIVE PERSONALLY IDENTIFIABLE INFORMATION – The term "sensitive personally identifiable information" means any non-public information or compilation of information, in electronic or digital form that includes—

(1) an individual's first and last name or first initial and last name in combination with any 1 of the following data elements:
  (i) A non-truncated social security number, driver's license number, passport number, or alien registration number.
  (ii) Any 2 of the following:
    (I) Home address or telephone number.
    (II) Mother's maiden name, if identified as such.
    (III) Month, day, and year of birth.
  (iii) Unique biometric data such as a fingerprint, voiceprint, retina or iris image, or any other unique physical representation.
  (iv) A unique account identifier, electronic identification number, user name, or routing code in combination with any associated security code, access code, or password that is required for an individual to obtain money, goods, services, or any other thing of value; or

(2) a financial account number or credit or debit card number in combination with any security code, access code, or password that is required for an individual to obtain money, goods, services, or any other thing of value.

CONCLUSION

Identity theft remains a significant problem.[276] Data security breaches which reveal consumers' personal information are one source of the problem.[277] The question is what is the best way to deal with data security breaches.

The FTC has taken the lead in the area of online privacy. It initially promoted self-regulation, but eventually realized that self-regulation was not working. Thereafter, it began taking legal action against entities that violated the terms of their own privacy policies as deceptive trade practices under § 5 of the FTC Act. More recently, the Commission began filing cases against companies that have experienced data security breaches under its unfairness doctrine.

These latest actions were seemingly filed at random,[278] without any guidelines, and without any advance notice to the respondents that their actions might violate § 5 of the FTC Act. The complaints and consent orders entered into in these cases provide limited guidance as to what a company should do (or not do) to avoid being the target of an unfairness action by the FTC if it experiences a security breach.

This Article proposes legislation that would give the Commission express authority to take action against companies that experience data security breaches, but only under well-defined regulations that the FTC would develop in collaboration with the affected industries and with input from all interested parties.

Data security and identity theft are too important to be left to the whim of the FTC or any other government agency. Companies need to know what is expected of them so that they can implement appropriate technologies and procedures to provide the proper level of protection for sensitive consumer data. Enacting specific legislation, like that proposed in this Article, would go a long way toward achieving that goal.

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276. *See* Javelin Strategy and Research, U.S. Identity Theft Losses Fall: Study (Feb. 1, 2007), http://www.javelinstrategy.com/2007/02/01/us-identity-theft-losses-fall-study (indicating that 8.4 million Americans were the victims of identity theft last year, with total losses reaching $49 billion).

277. Identity theft can result from many different types of activities, including lost laptops, dumpster diving, theft of credit cards and individual identification, as well as data security breaches. *See supra* notes 111-20 and accompanying text.

278. For example, the largest data security breach incident ever reported involved retailer TJX Companies. It involved information on over forty-six million credit and debit cards stolen by hackers over a multiyear period. *See, e.g.*, TJX Companies, Inc., Annual Report (Form 10-K), at 8-10 (Mar. 28, 2007), *available at* http://ir.10kwizard.com/download.php?format=PDF&ipace=4772887&source=487; Press Release, TJX Companies, Inc., The TJX Companies, Inc. Victimized by Computer Systems Provides Information to Help Protect Consumers (Jan. 17, 2007). Despite this massive data loss, to date the Commission has taken no action against the company.

* * *

NOTES AND COMMENTS

ON MEDIA CONSOLIDATION, THE PUBLIC INTEREST, AND NOTICE AND AGENCY CONSIDERATION OF COMMENTS

MARY M. UNDERWOOD*

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INTRODUCTION

Commissioner Adelstein, in dissent to the Federal Communications Commission's (FCC or Commission) decision to relax media ownership restrictions, defended the importance of public comments:

> The Americans I heard from know what they're talking about. This is the media they watch, listen to, and read every day. We have heard from people who have collectively spent billions of hours watching television, listening to the radio, and reading newspapers . . . . There is no more objective jury than the American people. They take it very personally, and they are very articulate.[1]

The Telecommunications Act of 1996 (1996 Act) requires the FCC to review regulations regarding media ownership periodically and to determine whether they are "necessary in the public interest."[2] To comply with this statutory provision, the Commission conducted the 2002 Biennial Regulatory Review (2002 Review),[3] which resulted in a relaxation of the ownership rules to permit greater levels of ownership on a national and local level, and across mediums. Hundreds of thousands of individual citizens weighed in on the proposal by filing comments with the Commission, and the vast majority opposed the possibility of further consolidation.[4] Despite this opposition, the FCC voted to go ahead and promote further consolidation. Public outcry continued, resulting in increased attention from Congress and the courts.[5] Many different public interest and consumer advocacy groups brought suit against the FCC, consolidated as *Prometheus Radio Project v. FCC*, claiming that the

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1. Statement of Commissioner Jonathan S. Adelstein, Dissenting, Report and Order In the Matter of 2002 Biennial Regulatory Review of the Commission's Broadcast Ownership Rules and Other Rules, 18 F.C.C.R. 13974, 13978 (July 2, 2003) [hereinafter Adelstein Dissent] ("It has been said that the public comments [received by the FCC] are too simple and offer no substantive basis from which to make our decision."). Commissioner Adelstein rejects this notion, having "read many of these comments" and "listened to hundreds of people firsthand in city halls, schools, churches and meeting rooms." *Id.*

2. Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 111-12 (1996) (codified at 47 U.S.C. § 161(a) (2000)).

3. In the Matter of 2002 Biennial Regulatory Review–Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Report and Order and Notice of Proposed Rulemaking, 18 F.C.C.R. 13620 (2003) [hereinafter 2002 Review].

4. *See* Adelstein Dissent, *supra* note 1, at 13978 (exclaiming that 99.9% of all comments received opposed the Federal Communications Commission's (FCC) consolidation efforts).

5. *See* Byron L. Dorgan, *The FCC and Media Ownership: The Loss of the Public Interest Standard*, 19 NOTRE DAME J.L. ETHICS & PUB. POL'Y 443, 451-53 (2005) (noting the strong public opposition to the regulation, and the FCC's failure to consult with the public). Further, once the Commission released the 2002 Review, Senator Dorgan described the rules as "outrageous" and the FCC's action as "totally contraven[ing] statutory intent." *Id.*

deregulatory rules in the 2002 Review "contravened the Commission's statutory mandates as well as the Administrative Procedure Act."[6] As a result of the suit, the court remanded several of the challenged rules for further explanation by the FCC.[7] The FCC has reviewed the rules challenged by the *Prometheus* court as a part of its 2006 Quadrennial Regulatory Review (2006 Review),[8] in accordance with the 1996 Act, and has faced similar public opposition to media ownership proposals.[9] In November 2007, after the 2006 Review had been ongoing for eighteen months, Chairman Kevin Martin called for the proceeding to be wrapped up, and he narrowed the scope of the proceeding. Chairman Martin successfully pushed the rulemaking proceeding through just before the end of 2007, amidst public anger and despite threats from Congress and a much shortened period for comment on the modifications made in November.[10]

The importance of the current ownership proceedings cannot be understated: Commissioner Copps has referred to the 2002 Review as "the granddaddy of all reviews,"[11] and the 2006 Review has proven to be no different. Both deal with the future of media ownership—a topic that has aroused the intense scrutiny of the American public. The reality of American media is that powerful companies dominate nearly all of the media outlets that most Americans rely on daily for news and entertainment.[12] Media concentration can threaten democracy itself by

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6. Prometheus Radio Project v. FCC, 373 F.3d 372, 381 (3d Cir. 2004).

7. *See id.* at 382 (remanding several FCC rules that had relaxed ownership limits because the FCC had "not sufficiently justified its particular chosen numerical limits for local television ownership, local radio ownership, and cross-ownership of media within local markets").

8. In the Matter of 2006 Quadrennial Regulatory Review–Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Further Notice of Proposed Rulemaking, 21 F.C.C.R. 8834 (2006) [hereinafter 2006 Review].

9. In January 2004, Congress amended § 202(h) to provide for a quadrennial rather than a biennial review. Consolidated Appropriations Act, 2004, § 629, Pub. L. No. 108-199, 118 Stat. 3, 99-100 (2004).

10. *See* Press Release, FCC, Joint Statement by Commissioners Copps and Adelstein on Chairman Martin's Cross-Ownership Proposal 1 (Nov. 13, 2007), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-278142A1.pdf (arguing that the time for public comment was "grossly insufficient"); *see also* Frank Ahrens, *FCC Chief Rejects Call to Delay Vote*, WASH. POST, Dec. 14, 2007, at D02 (describing a hearing in which the Senate Commerce Committee demanded an explanation for "ramming" through this "unpopular" regulation and asked that he consider postponement).

11. Statement of Commissioner Michael J. Copps, Dissenting, 2002 Biennial Regulatory Review–Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 18 F.C.C.R. 13951, 13955 (July 2, 2003) [hereinafter Copps Dissent] (reacting negatively to the suggestion that those "who feel strongly . . . are being too emotional or are laying too much on one set of decisions"). Instead, Commissioner Copps characterizes this Review as "the granddaddy of all reviews" that will set "the direction for how the next review will get done and for how the media will look for many years to come." *Id.*

12. For a list of media holdings of the major firms, see Columbia Journalism Review, http://www.cjr.org/resources/ (last visited Dec. 29, 2007).

reducing the number of speakers, thus reducing the diversity of outlets for listeners.[13] Many people sense this threat to democracy posed by further consolidation and, as a result, hundreds of thousands of people filed comments in opposition to the 2002 review, while hundreds of thousands more filed opposition to the 2006 Review.[14] The FCC's only response to the citizen comments was a single paragraph in the 2002 Review:

> We received more than 500,000 brief comments and form letters from individual citizens. These individual commenters expressed general concerns about the potential consequences of media consolidation, including concerns that such consolidation would result in a significant loss of viewpoint diversity and affect competition. We share the concerns of these commenters that our ownership rules protect our critical diversity and competition goals . . . and we believe that the rules adopted herein serve our public interest goals, take account of and protect the vibrant media marketplace, and comply with our statutory responsibilities and limits.[15]

The Commission did not give the comments specific consideration but assured these thousands of voices that the FCC had heard their concerns, and that they had nothing to fear.[16]

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13. *See* Pennekamp v. Florida, 328 U.S. 331, 354 n.2 (1946) (Frankfurter, J., concurring).

> Today ideas are still flowing freely, but the sources from which they rise have shown a tendency to evaporate. . . . The controlling fact in the free flow of thought is not diversity of opinion, it is diversity of the *sources* of opinion—that is, diversity of ownership. . . . There are probably a lot more words written and spoken in America today than ever before, and on more subjects; but if it is true, as this book suggests, that these words and ideas are flowing through fewer channels, then our first freedom has been diminished, not enlarged.

Id. (quoting E.B. White, Comment, THE NEW YORKER, Mar. 16, 1946, at 97); *see also* C. Edwin Baker, *Media Structure, Ownership Policy, and the First Amendment*, 78 S. CAL. L. REV. 733, 735 (2005) (arguing that on any level, be it local, state, or national, a concentrated media market allows owners to exercise market power in a way that is "undemocratic, largely unchecked, and potentially irresponsible" and that "no democracy should risk the danger").

14. *See infra* note 43 (comparing the number of comments from the 2006 Review to those from the 2002 Review); *see, e.g.*, Comment from Michele Sutter to the FCC; Martin, Copps, Adelstein, Tate, and McDowell (Oct. 12, 2006), http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6518538168 [hereinafter Comment of Michele Sutter] (demonstrating the kind of thoughtful response that some of the public commenters submitted to the FCC).

> Fewer people owning more and more and more media outlets equals less and less information making its way to the people . . . . It is the responsibility of the Federal Communication Commission to oversee the holders of the broadcast licenses on behalf of the people of the United States of America to support the free exchange of ideas to inform the populace. The result of responsible stewardship is a vibrant democracy.

Id.; *see also* Copps Dissent, *supra* note 11, at 13955 (noting "outright alarm" on the faces of citizens with regard to the threat of media concentration).

15. 2002 Review, *supra* note 3, at 13624.

16. *Id.* (noting that the Commission will address the "core concerns" of the commenters); *see, e.g.*, Comment of Jeff Jordan, M.B. Docket 02-277 (June 2, 2003),

If such generalized treatment of citizen comments is sufficient when an agency promulgates new regulations, then what is the link between comments filed and rules promulgated? This Comment argues that with regard to the FCC, the link should be a well-defined public interest standard, and for all agencies, there should be stronger guidelines for what it means to "consider" public comments under the Administrative Procedure Act (APA). Without further guidelines on how the Commission should consider citizen comments in a notice and comment rulemaking, or a stricter interpretation as to what constitutes the public interest, the FCC's ownership proceedings violate the requirements of notice and comment rulemaking under § 553 of the APA[17] and the agency's statutory obligation to regulate in the public interest.[18] Through a discussion of a specific proceeding at a specific agency, this Comment ultimately seeks to generate greater discussion of the role that public comment is meant to play in agency rulemakings, and to think about how to foster a better public trust relationship between the administrative state and the citizens being governed by that state.

In Part I, this Comment examines the FCC's actions in the media ownership proceedings in further detail. Part II discusses the laws and policies that govern the FCC's actions, mainly the public interest standard and § 553 of the APA. Part III compares the FCC's actions to the legal requirements and discusses the dissonance between them. Consequently, Part III develops the main contention of this Comment: the FCC's requirement to promulgate regulations in the public interest informs and heightens the Commission's obligations under APA § 553 to take citizen comments into consideration, but the FCC has not met this standard. Part IV explores how to solve this problem from a number of different perspectives. It suggests that because of the FCC's requirement to promulgate regulations in the public interest, the FCC should give more

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http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6514152584 ("Allowing media consolidation is just one more nail in the coffin of the average American's opportunity to hear the diverse and necessary other side of the story."); *see also* Comment of Charles Tillinghast, M.B. Docket 02-277 (Jan. 31, 2003), http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513405997 (calling attention to the different effects that competition would have on entertainment as opposed to news, asserting that "[c]ompetition surely won't produce better news coverage and analysis since competition relies on monetary return and a groundswell of public demand for more news coverage and analysis, creating a boutique niche for great advertising revenue, is unlikely").

17. Administrative Procedure Act, 5 U.S.C. § 553 (2000).

18. Federal Communications Act of 1934, 47 U.S.C. § 303(f) (2000); *see also* Michael J. Copps, *Where is the Public Interest in Media Consolidation*, *in* THE FUTURE OF MEDIA: RESISTANCE AND REFORM IN THE 21ST CENTURY 117, 118 (Robert McChesney, Russell Newman & Ben Scott eds., 2005) (discussing the importance of the role of the public interest standard in FCC regulation, and saying that while "some claim it's unworkable, even unknowable . . . there it is, appearing some 110 times in our enabling telecommunications statute, put there to be our lodestar").

substantive consideration to public comments. Further, both Congress and the courts need to play a role in protecting the public interest. Congress should consider legislation that clarifies what it means to consider public comments. The courts must also focus on enforcing the procedural requirements of the APA more strictly with regard to the public interest.

I. THE UNFOLDING OF THE MEDIA OWNERSHIP PROCEEDINGS AT THE FCC

The 2002 Review represented the FCC's articulation of the final ownership rules, promulgated after the notice and comment rulemaking procedure as prescribed by APA § 553.[19] The Commission conducted this review pursuant to § 202(h) of the 1996 Act, which required the FCC to review ownership rules, determine whether any of those rules are necessary in the public interest as the result of competition, and "repeal or modify" any such regulation.[20]

The 2002 Review affected three basic media ownership rules. First, it threw out the cross-ownership prohibition so that one entity could own both a broadcast station and a newspaper in a single market, and it weakened the restrictions against owning a television station and radio station in one market.[21] Second, it relaxed local television ownership rules, permitting

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19. *See* 2002 Review, *supra* note 3, at 13621 (stating that the Commission addressed the rules in light of the requirements imposed by Section 202(h) of the 1996 Act).

> In the Notice of Proposed Rulemaking in this proceeding . . . , we initiated review of four ownership rules: the national television multiple ownership rule; the local television multiple ownership rule; the radio-television cross-ownership rule; and the dual network rule. . . . In addition, the Commission previously initiated proceedings on the local radio ownership rule and the newspaper/broadcast cross-ownership rule. Comments filed in those proceedings have been incorporated into this docket . . . .

Id. at 13621-22 (citations omitted).

20. Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 112 (1996) (codified at 47 U.S.C. § 161(a)-(b) (2000)). In the 2002 Review, the FCC interpreted § 202(h) as appearing "to upend the traditional administrative law principle requiring an affirmative justification for the modification or elimination of a rule." *See* 2002 Review, *supra* note 3, at 13624 (instructing courts to set aside agency actions, findings and conclusions if arbitrary, capricious or an abuse of discretion (citing 5 U.S.C. § 706(2)(A))); *see also* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 30 (1983) (requiring agencies that decide to change an existing rule by rescinding that rule, to provide an explanation and justification that goes beyond that offered when the agency first promulgated the rule). However, the *Prometheus* court would later disagree, holding that instead of weakening the justification requirement for regulations that the Commission was modifying, § 202(h) extended the justification requirement to existing regulations. *See* Prometheus Radio Project v. FCC, 373 F.3d 372, 395 (3d Cir. 2004) ("This interpretation avoids a crabbed reading of the statute under which we would have to infer, without express language, that Congress intended to curtail the Commission's rulemaking authority and to contravene 'traditional administrative law principles.'").

21. *See* 2002 Review, *supra* note 3, at 13751-810 (evaluating the basis of the cross-ownership rule and finding it unnecessary in the public interest).

> In consideration of the record and our statutory charge, we conclude that neither an absolute prohibition on common ownership of daily newspapers and broadcast outlets in the same market . . . nor a cross-service restriction on common ownership

one entity to own two stations in markets with less than eighteen outlets, and three stations in markets with eighteen or more outlets, so long as not more than one of those stations was in the top four in the market based on audience share.[22] Third, it modified the national television ownership rule to permit an entity to own broadcast stations that reach forty-five percent of television households in the United States.[23]

The highly unusual characteristic of the 2002 Review was the public comment period. The Commission received its normal array of responses from industry players and special interest groups.[24] But this proceeding also caught the attention of the American public—hundreds of thousands of whom expressed their thoughts to the Commission via comments of their own.[25] The vast majority of these citizen comments opposed the measure.[26] While the FCC noted that it received these "brief" comments, it characterized them as "general concerns about the potential consequences of media consolidation," and never addressed them specifically.[27]

Once the FCC released the new relaxed rules, it faced a maelstrom of criticism from all sides, including media companies that argued the deregulations were not deregulatory enough.[28] Congress was concerned

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> of radio and television outlets in the same market . . . remains necessary in the public interest.

Id. at 13622-23.

22. *See id.* at 13668 (increasing the levels of ownership permitted in single markets).

23. *See id.* at 13814-15 (raising the cap from thirty-five percent).

24. *See id.* at 13876-77 (listing commenters, including Clear Channel Communications; Communications Workers of America; Consumer Federation of America; Fox Entertainment Group, Inc.; Gannett Company, Inc.; Minority Media and Telecommunications Council; National Association of Broadcasters; National Association of Black-Owned Broadcasters; Newspaper Association of America; Sinclair Broadcasting Group, Inc.; Tribune Company; United Church of Christ; Walt Disney Company).

25. There are contradictory statements as to how many comments were actually filed. *Compare* Adelstein Dissent, *supra* note 1, at 13977 ("Judging from our record, public opposition is nearly unanimous, from ultra-conservatives to ultra-liberals and virtually everyone in between. We have heard from nearly two million people in opposition to relaxing ownership rules, and only a handful in support."), *with* 2002 Review, *supra* note 3, at 13624 ("We received more than 500,000 brief comments and form letters."). Interestingly, the characterizations of such comments differ—the majority opinion referring to them as "brief comments and form letters," and Commissioner Adelstein referring to having "heard from" the public.

26. *See* Adelstein Dissent, *supra* note 1, at 13978 (saying that 99.9% of citizen comments opposed further media concentration); *see also* Michael A. McGregor, *When the "Public Interest" Is Not What Interests the Public*, 11 COMM. L. & POL'Y 207, 208 (2006) (distinguishing the ownership proceeding, to which the population at large responded in almost universal opposition, from typical agency proceedings, to which only regulated firms and special interest groups respond).

27. 2002 Review, supra note 3, at 13624. *But see* Adelstein Dissent, *supra* note 1, at 13978 (pointing out that "the statute does not let us simply dismiss the public's views with a passing reference in one paragraph").

28. *See* Prometheus Radio Project v. FCC, 373 F.3d 372, 381-82 (3d Cir. 2004) (including broadcasters, newspaper owners, and network associations such as the National Association of Broadcasters, and affiliate associations of each of the networks); *see also* Dorgan, *supra* note 5, at 453 (categorizing the complaints of public interest and consumer

about the FCC's loosening of the media ownership regulations, with some members suggesting that the FCC had gone beyond its statutory authority.[29] In reaction to the FCC, Congress passed legislation to lower the national television cap back to thirty-nine percent from the FCC's increase to forty-five percent.[30]

In *Prometheus Radio Project v. FCC*,[31] the Third Circuit Court of Appeals remanded the rules expanding local and national television ownership as well as the cross-ownership of limits of media in local markets. Using the "arbitrary and capricious" standard of review under the APA, the court found that the agency's obligation under § 202(h) is to determine whether its rules remain useful in the public interest, and, if not, repeal or modify those rules.[32] In articulating this standard, the court noted that whatever the Commission decided to do with a rule, its decision must be in the public interest and supported by a reasoned analysis.[33] The court held that the agency did not do enough procedurally to explain and justify its decisions in the 2002 Review, and that the numerical limits the FCC used to announce the new ownership scheme for local television and local radio ownership and for cross-media ownership required additional justification or modification.[34] This decision did not limit the Commission's discretion, nor did it specifically point to its treatment of the thousands of citizen comments.[35] The main thrust of this decision, at least as it pertains to this Comment, is that despite opposition to the substance of

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groups as not regulating enough, compared to the media interests' complaints that the rules did not deregulate enough).

29. *See* Dorgan, *supra* note 5, at 453 (describing congressional disapproval of the FCC's action, adding that it "contravened statutory intent").

30. *See id.* (noting that initially Congress decreased the cap to thirty-five percent). But subsequently, in the 2004 Appropriations Act, Congress increased "the national audience reach limitation for television stations" to 39%. *See* Pub. L. No. 108-199, § 629, 118 Stat. 3, 99 (2004). The Senate further attached a resolution to the Appropriations Act, reading "Congress disapproves the rule submitted by the Federal Communications Commission relating to broadcast media ownership . . . and such rule shall have no force or effect," but the resolution was tabled in the House of Representatives. S.J. Res. 17, 108th Cong. (2003).

31. 373 F.3d at 382 (describing the terms of the remand); *see also* Stephanie N. DeClerk, Prometheus Radio Project v. FCC*: Where Will the Media Deregulation Trend End?*, 58 ARK. L. REV. 705, 728-29 (2005) (parsing out the precise issues that the FCC needed to address on remand and arguing that parts of the *Prometheus* decision signal that courts are still willing to attach some procedural requirements to the public interest standard).

32. *See Prometheus*, 373 F.3d at 395 (summarizing the standard of review analysis).

33. *See id.* (emphasizing that the court requires this reasoned analysis in the public interest whether or not the agency chooses to retain, repeal, or modify any rule regarding media ownership).

34. *See id.* at 435 (affirming much of the FCC's order, but finding that several provisions required more justification of its decision to "retain, repeal, or modify" in order to pass the threshold of lawful agency action).

35. *See id*. at 382 ("[W]e reject the contention that the Constitution or § 202(h) of the 1996 Act somehow provides rigid limits on the Commission's ability to regulate in the public interest.").

the rules from Congress and the public, the court did not have the power to object to the substance of the rule, but did have the power to overturn or remand a rulemaking if it found a procedural problem.[36] Thus, as long as the FCC fixes its procedural defects in the future, including consideration of comments, little else prevents the FCC from successfully relaxing ownership limits, at least in the eyes of the Third Circuit.[37]

The FCC used the 2006 Review to respond to the *Prometheus* remand, where the same ownership issues were vetted to the public. The rules under examination in the 2006 Review originally included the local television ownership limit,[38] the local radio ownership limit,[39] the newspaper-broadcast cross-ownership ban, the radio-television cross-ownership limit,[40] the dual network ban,[41] and a rule regarding certain discounts given in calculating the national television ownership limit.[42] The process proved to be lengthy because the FCC was likely trying to beef up its record in order to survive a potential future review of its findings in the 2006 Review. After publishing its proposed rule in the Federal Register in August 2006, the FCC accepted public comments and reply comments through January 2007.[43] Between October 2006 and November 2007, the FCC held a series of public hearings across the country addressing issues such as localism, diversity, competition, and minority ownership.[44] In addition, the FCC commissioned and released a number of studies about

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36. *See id.* (affirming that the power of the FCC to regulate the substance of media ownership is not rigidly limited by the Constitution or by § 202(h) of the 1996 Act); *see also* DeClerk, *supra* note 31, at 729 (noting that the *Prometheus* decision will not get in the way of further deregulation of media ownership, as the decision found fault in the procedure, not in the substance).

37. *See* DeClerk, *supra* note 31, at 729 (arguing further that the *Prometheus* decision leaves "the future of media ownership . . . predominantly in the hands of Congress and the FCC," as opposed to with the courts).

38. *See* 2006 Review, *supra* note 8, at 8839-42.

39. *See id.* at 8842-44.

40. *See id.* at 8844-48 (combining the discussion of both types of cross-ownership limits).

41. *See id.* at 8848.

42. *See id.* at 8848-49.

43. *See* In the Matter of 2006 Quadrennial Regulatory Review–Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Order, 21 F.C.C.R. 14460 (2006) (extending the deadline to January 16, 2007). While the number of comments received in total has not been released, signs indicate that the public commented as much as it did in the 2002 Review. The FCC's online comment viewing system retrieves 143,999 comments filed (as of Feb. 2, 2007), with roughly 143,639 presumably citizen comments. *See* Search for Filed Comments, FCC, http://gullfoss2.fcc.gov/prod/ecfs/comsrch_v2.cgi (last visited Dec. 29, 2007) (select "Eliminate Brief Text Comments" checkbox and conduct search for comments to the 2006 Review).

44. *See* Public Hearings on Media Ownership Issues, FCC, http://www.fcc.gov/ownership/hearings.html (last visited Dec. 29, 2007) (listing the factors to be considered at public hearings, as well as the locations—Chicago, IL, Tampa, FL, Harrisburg, PA, Nashville, TN, Los Angeles, CA, El Segundo, CA, and Seattle, WA).

the different aspects of the ownership debate to the public for comment and response.[45] Overall, the FCC went to great lengths and great expense to conduct this review. But while adding these studies and results from public hearings to the record will no doubt make the record larger, it will not on its own cure the Commission's failure to adequately consider public comments. In November 2007—after spending over a year talking to the public in meetings across the country and conducting different studies—Chairman Martin, in an effort to push through the proceeding before 2008, modified the proposal to exclude all rules from consideration except the cross-ownership ban between newspapers and television or radio stations; he also established a deadline for public comment which was shorter than that normally given.[46] The reason for this move is mysterious: why should an agency commit so many resources to a proceeding only to push through a rule at the last minute, thereby clouding the potential transparency that the FCC had worked so hard to achieve? On December 18, 2007, Chairman Martin's proposal passed, and the thirty-two year old ban that prohibited one entity from owning both a television or radio station and a newspaper in the same city or area ended.[47] Although the scope of the 2006 Review narrowed, the primary issue was one the FCC had dealt with in the 2002 Review: cross-ownership is now permitted between a newspaper and a radio or television station in the twenty largest markets, citing the loss of newspaper viability due to the explosion of Internet news sources.[48] In opposition to this proposal, Commissioners Adelstein and Copps noted that this could lower the number of news sources for 120 million people or 43% of the population.[49] And while members of Congress requested ninety days for public comment, the Chairman gave the public only nineteen working days to comment on the actual proposal (as

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45. *See* Research Studies on Media Ownership, FCC, http://www.fcc.gov/ownership/studies.html (last visited Dec. 29, 2007) (listing ten studies that have been released, including "How People Get News and Information," "The Effects of Cross-Ownership on the Local Content and Political Slant of Local Television News," and "Station Ownership and Programming in Radio").

46. *See* Press Release, FCC, Chairman Kevin J. Martin Proposes Revision to the Newspaper/Broadcast Cross-Ownership Rule (Nov. 13, 2007), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-278113A1.pdf (directing the public to file comments by December 11, 2007).

47. See Press Release, FCC, FCC Adopts Revision to Newspaper/Broadcast Cross-Ownership Rule (Dec. 18, 2007), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-278932A1.pdf (describing the ban, the reasons for ending it, and the presumptive parameters of the new rule). The rule has not been released as of the time of this publication.

48. *See id.* (proposing that no changes to the other media ownership rules currently under review be considered at that time).

49. *See* Press Release, FCC, Joint Statement by Commissioners Copps and Adelstein on Chairman Martin's Cross-Ownership Proposal 1 (Nov. 13, 2007), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-278142A1.pdf (suggesting that Chairman Martin's proposal "could propel a frenzy of competition-stifling mergers across the land").

opposed to the notice, which is a general call for comments).[50] As far as giving more substantial consideration to public comment, this series of events has called into question whether the FCC has done a better job in the 2006 Review than it did in the 2002 Review. As Senator Daniel Inouye said, "A transparent regulatory process is essential. When agencies short-circuit the decision making process, public trust in their authority erodes."[51] The effects of the FCC's short circuiting of the 2006 Review decision remain to be seen.

II. THE PUBLIC INTEREST STANDARD AND § 553 GOVERN THE FCC'S ACTIONS

A. Requirements of the Public Interest Standard

Media ownership is first an issue of licensing. In order to broadcast television or radio signals over the spectrum, the FCC must grant a license authorizing a particular person or entity to broadcast over a certain wavelength. In turn, Congress decided that the FCC should grant licenses to broadcasters based on their commitment to "public convenience, interest, [and] necessity."[52] The 2006 Review of media ownership limits must define the point at which concentration of ownership is no longer in the public interest.

Historically, the public interest standard evolved out of the scarcity of the broadcast spectrum. Because the frequencies over which speakers may broadcast are a naturally scarce resource,[53] not every person who wants to broadcast is able to do so.[54] Because of this natural limitation, those whom

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50. *See id.* (arguing that nineteen days is grossly insufficient and that the American people should have just as many days as members of Congress).

51. *See* Daniel K. Inouye, Statement at the Federal Communications Commission Oversight Hearing (Dec. 13, 2007), *available at* http://commerce.senate.gov/public/index.cfm?FuseAction=Hearings.Statement&Statement_ID=312.

52. 47 U.S.C. § 303 (2000).

53. *See* Red Lion Broad. Co., Inc. v. FCC, 395 U.S. 367, 390 (1969) (explaining that the scarcity of radio frequencies justifies the governmental restraints on licensing "in favor of [those] whose views should be expressed on this unique medium"). But the Court also recognized that because this natural scarcity greatly restricted the average person's ability to broadcast, those who use the radio waves primarily for listening "retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and the listeners, not the right of the broadcasters, which is paramount." The landscape of media has changed dramatically in the almost forty years since the Court's decision in *Red Lion*. Cable and satellite systems are now the norm in television, not broadcast. Because of this evolution, many question whether the original justifications of *Red Lion* still apply. While this is an interesting question, this Comment will maintain the assumption that *Red Lion*'s reasoning is still sound, or at least still applies in force to broadcasters, regardless of the evolution of cable and satellite systems.

54. *See id.* at 388-89 ("If 100 persons want broadcast licenses but there are only 10 frequencies to allocate, all of them may have the same 'right' to a license; but if there is to be any effective communication . . . only a few can be licensed and the rest must be barred from the airwaves.").

the FCC decides to license carry an extra burden to broadcast in the "public convenience, interest, [and] necessity."[55] Through this licensing system, the FCC can permit broadcasters to use the public's airwaves for free, so long as they are serving the public interest.[56] But actually determining what the public interest is has varied greatly over time.[57] The Federal Radio Commission, the precursor agency to the FCC, defined the public interest in terms of a public trustee relationship, in which stations would be operated as if owned by the public.[58] The FCC made several additional attempts to define the public interest standard throughout the 1940s to the 1970s.[59] The FCC reversed its stance in the 1980s and took a deregulatory approach. It determined that competition in competitive markets was in the public's interest, and subsequently, the FCC has undone most of the public interest regulations that were in place.[60]

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55. 47 U.S.C. § 303.

56. *See Red Lion*, 395 U.S. at 376 n.5 (quoting a congressional sponsor of the Radio Act of 1927, who emphasized that licenses should be "issued only to those stations whose operation would render a benefit to the public, are necessary in the public interest, or would contribute to the development of the art" and that the "broadcasting privilege will not be a right of selfishness . . . [but] will rest upon an assurance of public interest to be served").

57. Some have argued that this delegation of power by Congress to the FCC to promulgate regulations in the public interest, convenience, or necessity violates the Delegation Doctrine, which requires Congress to make important legislative and policy decisions itself, and not delegate those responsibilities to administrative agencies, which are organized under the Executive Branch. Indeterminate delegations permit the Executive Branch to exercise legislative power, which violates Article I of the Constitution—"[a]ll legislative Powers herein granted shall be vested" in Congress. U.S. CONST. art. 1, § 1; *see, e.g.*, Randolph J. May, *The Public Interest Standard: Is it Too Indeterminate to Be Constitutional?*, 53 FED. COMM. L.J. 427, 428 (2001) (arguing that "[t]his standard has proven so indeterminate that, in adopting it, Congress passed off to the new agency the power to make law in a way that would surely shock [John] Locke and the founders of our nation"); Gary Lawson, *Delegation and the Constitution*, 22 REGULATION No. 2, 23, 29 (1999), http://www.cato.org/pubs/regulation/regv22n2/delegation.pdf (identifying the public interest standard as "[e]asy kill number [one]" in terms of statutory provisions that should be struck down on Delegation Doctrine grounds).

58. *See* Anthony E. Varona, *Out of Thin Air: Using First Amendment Public Forum Analysis to Redeem American Broadcasting Regulation*, 39 U. MICH. J.L. REFORM 149, 151 (2006) (describing the Federal Radio Commission's interpretation of the public trustee doctrine as requiring broadcasters to broadcast "[a]s if people of a community should own a station and turn it over to the best man in sight with this injunction: Manage this station in our interest" (quoting *The Federal Radio Commission and the Public Service Responsibility of Broadcast Licensees*, 11 J. FED. COMM. B. ASS'NS 5, 14 (1950))).

59. *See* Victoria F. Phillips, *On Media Consolidation, the Public Interest, and Angels Earning Wings*, 53 AM. U. L. REV. 613, 621-22, 624 (2004) (discussing the timeline of the FCC's various attempts at defining the public interest. It issued a report in 1946 known as the BLUEBOOK, which outlined the basic components of a broadcaster's obligations under the public interest standard. Another policy statement in 1960 listed fourteen components that are "usually necessary to meet the public interest." Finally, the Fairness Doctrine and Ascertainment requirements round out the FCC's public interest regulations through the early 1980s.).

60. *See id.* at 624-25 (describing the state of the FCC under Chairman Mark Fowler as a "deregulatory frenzy"). Chairman Fowler interpreted the public interest standard as "above all, to assure the maximum service to the public at the lowest cost and with the least amount of regulation and paperwork." *Id.*

In the current concentration of mass media, more scholars and citizens are arguing that the FCC's deregulatory stance[61] does not create a marketplace best suited for serving the needs and interests of the public.[62] Further, the change in stance between pro-public interest regulations and the deregulated marketplace theory demonstrates the manipulability of the public interest standard. Generally, those in support of further consolidation argue that it is in the public's interest to create an environment of efficiency, while those against consolidation argue that it is in the public's interest to foster diversity in ownership and viewpoint over the nation's airwaves.[63] This uncertainty of what constitutes the public

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61. In an interesting discussion, Robert McChesney suggests that this deregulatory stance is deregulatory only in name. *See* JOHN NICHOLS & ROBERT W. MCCHESNEY, TRAGEDY AND FARCE: HOW THE AMERICAN MEDIA SELL WARS, SPIN ELECTIONS, AND DESTROY DEMOCRACY 173 (2005) (discussing why the term "deregulation" is misleading).

> Any media system . . . requires extensive government policymaking.
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> That is why the term "deregulation" is so misleading and propagandistic when applied to media policy debates. We are often told, for example, that radio broadcasting was deregulated in 1996, when the Telecommunications Act removed any limit on the number of monopoly radio licenses a single firm could possess. As a result a company like Clear Channel, which for generations had been limited to owning less than a dozen stations nationally, could gobble up over 1,200 radio stations within a few years. . . . Is this deregulation? Try to broadcast on one of the frequencies Clear Channel is presently using, saying that since radio is now deregulated, it is your turn to use the airwaves. If you persist, you will do twenty years in Leavenworth or some other federal abode.
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> In fact, radio is as regulated today as it has ever been, only it is regulated to serve the interest of corporations like Clear Channel. . . . The fact is that regulation is unavoidable; the question is how that regulation will be deployed and in whose interests.

Id. at 173-74.

62. *See* Copps Dissent, *supra* note 11, at 13954 (arguing that due to the loss of a strong public interest doctrine, the realization of the FCC's goals of localism, diversity, and competition has suffered, and that without change, the FCC is coming "perilously close to taking the 'public' out of the public airwaves"); *see also* Phillips, *supra* note 59, at 629 (arguing that "a renewed focus on regulation based on the public interest standard has never been more vital"); Cass R. Sunstein, *Television and the Public Interest*, 88 CAL. L. REV. 499, 505-06 (2000) (rejecting the view that public interest regulating has no business in the expanding and diversifying media market, and suggesting "that television is no ordinary commodity, partly because of the collective benefits of good programming, partly because of the link between television and democracy, and partly because viewers are more like products offered to advertisers than consumers paying for entertainment on their own").

63. *See, e.g.*, Howard A. Shelanski, *Antitrust Law as Mass Media Regulation: Can Merger Standards Protect the Public Interest?*, 94 CAL. L. REV. 371, 383-84 (2006) (indicating that each side has developed a distinct definition of public interest).

> Given that each side of the debate over regulating media ownership invokes the "public interest" as supporting its position, it is not surprising that the opposing sides have developed two distinct definitions of that concept. Proponents of deregulation define the public interest . . . in terms of fostering a market that does the best possible job of satisfying consumers' programming preferences. . . .
>
> Opponents of deregulation . . . typically define the public interest in terms of fostering constitutional and social values of quality and diversity, as well as preserving an effective forum for informed public debate.

Id.

interest could be used to justify nearly any outcome of an FCC rulemaking, simply by generalizing which public interests a proposal may serve and then reasoning backwards. The public interest standard is so vague that former Chairman Powell once noted that:

> The best that I can discern is that the public interest standard is a bit like modern art, people see in it what they want to see. That may be a fine quality for art, but it is a bit of a problem when that quality exists in a legal standard.[64]

B. Requirements of the Administrative Procedure Act

Every year, administrative agencies like the Department of Homeland Security, the Environmental Protection Agency, and the FCC create thousands of regulations, which are as binding on the public as any law passed by Congress and signed by the President.[65] In turn, the APA, which provides the legal framework for rulemaking, binds the agencies.[66] Adopted in 1946, the APA represented a compromise, giving agencies the leeway and discretion to carry out regulatory work, but normalizing required procedures and establishing a method for judicial review.[67] APA § 553 establishes three procedural requirements—known as notice and comment rulemaking—in order for an agency to promulgate a substantive rule: notice of a proposed rule, an opportunity for interested persons to comment, and "*[a]fter consideration of the relevant matter presented* . . . adopt[ion of] a concise general statement of their basis and purpose."[68] On the requirements imposed by the phrase, "consideration of the relevant matter presented," the APA is nearly silent; it does not explicitly require agencies to rely on any of the views expressed in public comments as the basis for their decision.[69] While it is well settled that consideration of

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64. Michael K. Powell, Comm'r, FCC, The Public Interest Standard: A New Regulator's Search for Enlightenment (Apr. 5, 1998), *available at* http://www.fcc.gov/Speeches/Powell/spmkp806.html.

65. *See* Cary Coglianese, *The Internet and Citizen Participation in Rulemaking*, 1 I/S J. L. POL'Y 33, 33-34 (2004) (estimating that agencies promulgate approximately fifteen times as many rules as Congress).

66. Administrative Procedure Act (APA), 5 U.S.C. § 553 (2000); *see also* Coglianese, *supra* note 65, at 36-37 (including requirements in the rulemaking framework to publish notices of proposed rules and provide an opportunity for interested people to comment).

67. *See generally* STEPHEN G. BREYER, RICHARD B. STEWART, CASS R. SUNSTEIN & ADRIAN VERMEULE, ADMINISTRATIVE LAW AND REGULATORY POLICY 20-21 (6th ed. 2006) (discussing how lawmakers, through the APA, reached a compromise in order to address the problem of agency discretion).

68. 5 U.S.C. § 553(b)-(c) (emphasis added).

69. *See, e.g.*, Coglianese, *supra* note 65, at 37.

> [T]he APA imposes a rather weak requirement for public participation. It does not require government to engage in any open deliberation with the public or even to adhere to the views contained in any comments submitted by the public. . . . [The APA] does not require that [agencies] rely on any expressed views of the public as a basis for their decisions.

Id.

relevant comments is required,[70] there is no clear standard of what constitutes actual consideration by the agency.[71]

What is clear is that agencies are not conducting a popularity contest when they consider relevant comments.[72] Agencies operate as expert bodies,[73] so one of the reasons for notice and comment procedures is to educate the agency on any issues it may have overlooked.[74] Agencies do not have to promulgate rules the way public opinion would have them promulgate rules.[75] If this were required, then interest groups commanding the most participation would easily capture the agencies.[76]

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70. *See* 5 U.S.C. § 553(c) (indicating that interested persons may participate through submission of "written data, views, or arguments with or without opportunity for oral presentation"); *see also* Home Box Office, Inc. v. FCC, 567 F.2d 9, 35 (D.C. Cir. 1977) (emphasizing the consideration agencies must give to relevant comments, saying "there must be an *exchange* of views, information, and criticism between interested persons and the agency").

71. *See* Auto. Parts & Accessories Ass'n, Inc. v. Boyd, 407 F.2d 330, 338 (D.C. Cir. 1968) (suggesting that agencies should take into account the realities of judicial scrutiny).

> We do not expect the agency to discuss every item of fact or opinion included in the submissions made to it in informal rulemaking. We do expect that . . . "the concise general statement of basis and purpose" . . . will enable us to see what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them as it did.

Id.; *see also* Am. Med. Ass'n v. Mathews, 429 F. Supp. 1179, 1204 (N.D. Ill. 1977) ("The agency is not required to supply specific and detailed findings and conclusions, but need only 'incorporate in the rules a concise general statement of their basis and purpose.'" (quoting 5 U.S.C. § 553(c))).

72. *See* McGregor, *supra* note 26, at 223 ("Commission decision making is not based on polls or comment tallies."); *see also* Copps Dissent, *supra* note 11, at 13958 ("The FCC is not, of course, a public opinion survey agency. Nor should we make our decisions by weighing the letters, cards and e-mails 'for' and the letters, cards and e-mails 'against' and awarding the victory to the side that tips the scale.").

73. *See, e.g.*, Mark C. Niles, *On the Hijacking of Agencies (and Airplanes): The Federal Aviation Administration, "Agency Capture," and Airline Security*, 10 AM. U. J. GENDER SOC. POL'Y & L. 381, 385 (2002) (listing two main reasons why federal administrative agencies have been created).

> [I]t is generally accepted that an administrative body that is granted regulatory authority over a specific set of issues will naturally develop a certain level of "expertise" in that area, and that this development will result in better and more effective regulation of that area than would have been possible if it had been subject, instead, to more generalized governmental oversight.

Id. at 385-86 (citation omitted).

74. *See* Texaco, Inc. v. Fed. Power Comm'n, 412 F.2d 740, 744 (3d Cir. 1969) (citing two justifications for notice and comment rulemaking: to give the public the opportunity to participate in rules that will bind them, and to enable "the agency promulgating the rule to educate itself before establishing rules and procedures which have a substantial impact on those regulated") (citation omitted); *see also Am. Med. Ass'n*, 429 F. Supp. at 1205 (providing that while courts bind agencies to consider the evidence in the record, they do not bind agencies to consider only the record, and agencies may make decisions based on their expertise).

75. *See* Adelstein Dissent, *supra* note 1, at 13978 ("I have heard it said we cannot make this decision by polls or by weighing postcards. That is fair enough.").

76. *See, e.g.*, Niles, *supra* note 73, at 385-90 (describing the theory of agency capture, the conditions which make it possible, and defining it as "when a regulated entity—like a large corporation, or more likely an association of corporate interests— . . . succeeds at

If the majority opinion dictated a rule's outcome, agencies would not be able to use their expertise, and instead would be subject to the ebbs and flows of public opinion. But ultimately, this is not a Comment asking the agency to listen to the braying mob. It seeks to ask the more important questions about the precise meaning of "consideration," the parameters of the agency's responsibility thereto, and the point at which an agency's neglect of such consideration rises to the level of being arbitrary and capricious.

III. DISSONANCE BETWEEN THE FCC'S ACTIONS IN THE MEDIA OWNERSHIP PROCEEDINGS AND BOTH THE PUBLIC INTEREST AND NOTICE AND COMMENT REQUIREMENTS

While it is true that the standard for consideration that an agency owes to relevant comments is vague, the FCC's lack of consideration with regard to citizen comments reflects a failure to uphold the public interest standard or meet the APA requirements. While overwhelming public opinion does not determine the outcome of a noticed rule, the fact that many thousands of people are commenting intensifies the FCC's obligation to consider these comments because the Commission is obligated to consider all of the relevant comments it receives.[77] The reality that the FCC has received thousands of comments thus becomes relevant in and of itself.

The FCC has fallen short of its procedural obligations in two ways. First, the FCC's current treatment of citizen comments should not be considered adequate for any rulemaking, even under the vague standards of APA § 553. This treatment exposes the rule to accusations of being arbitrary and capricious.[78] Second, the public interest standard should inform the FCC's obligation to consider relevant comments. Together, § 553 and the public interest standard heighten the level and quality of the consideration that the Commission should give to citizen comments.

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winning 'the hearts and minds of the regulators,' [then] regulation becomes 'a method of subsidizing private interests at the expense of the public good'") (citations omitted).

77. *See* Administrative Procedure Act, 5 U.S.C § 553(c) (2000) (mandating consideration after notice is given); *see also* Copps Dissent, *supra* note 11, at 13958 (suggesting that the "overwhelming response" on the part of the public obligates the FCC to "take notice"). *But see* Home Box Office, Inc. v. FCC, 567 F.2d 9, 35-36 n.58 (D.C. Cir. 1977) (recognizing that not all comments are relevant including those which are conjectural or reflect someone's unsubstantiated opinion, which are not deserving of consideration).

78. *See* Copps Dissent, *supra* note 11, at 13958 (demanding that "when there is such an overwhelming response on the part of the American people and their representatives in Congress assembled, we ought to take notice").

A. The FCC's Consideration of Citizen Comments Is Insufficient Under Standards of Judicial Review

The major question remains: what does it mean to consider comments under the APA? When a court reviews agency rulemakings, what sorts of action (or inaction) will give rise to a finding that the rule was arbitrary and capricious?

While the APA left a gap in articulating a clear idea of what it means for an agency to "consider" comments, several courts have offered various interpretations of this term.[79] In its 2002 Review, the FCC's consideration of public comments amounted to one paragraph in the final rule.[80] In that paragraph, the Commission summed up the comments of around one million voices as "general concerns about the potential consequences of media consolidation" and simultaneously dismissed these voices by saying that the FCC "share[s] the concerns of these commenters" and assures readers that the Commission "believe[s] that the rules adopted . . . serve our public interest goals."[81]

While the APA does not explicate the standard for what constitutes "consideration of relevant comment," a few cases offer guideposts for such a determination. In reviewing agency decisions, one court has noted that "[c]ertainly the Administrative Procedure Act's requirement that an agency 'consider' the public comments received . . . must mean something more than a mere listing of abstracts of the comments totally unintegrated with the Order itself."[82] Except for that one paragraph in the 2002 Review, this is precisely what the FCC did: the only other mention of any citizen

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79. *See HBO*, 567 F.2d at 35-36 n.58 (recognizing that some public comments have no relevance to the rule and therefore do not deserve agency consideration).

80. *See supra* text accompanying note 15. Furthermore, Commissioner Copps identified additional procedural shortcomings with the 2002 Review. Before the vote on the new rules was to take place, the Commission refused to make public the proposed text of the rules until just three weeks prior to the vote. The Commission denied requests by Commissioners Adelstein and Copps to have more than three weeks time to review the proposals. Commissioner Copps has argued that these events further point out the deep flaws of the 2002 Review. *See* Copps Dissent, *supra* note 11, at 13955-58 (discussing the Commissioner's disappointment with the 2002 Review).

81. 2002 Review, *supra* note 3, at 13624.

82. ALASCOM, Inc. v. FCC, 727 F.2d 1212, 1221 n.38 (D.C. Cir. 1984) (identifying such action as preventing effective judicial review of agency action).

> Furthermore, we note that the Commission's method in this case of offering generalized justifications of its decisions often without discussing the opposing comments received on each issue, and then appending to the Order a separate unpublished summary of comments received containing no response to any of the comments, makes it difficult for a reviewing court to determine whether the agency has truly evaluated the comments it has received.

Id.

comments was an incomplete listing of commenters in an Appendix to the Order.[83]

The D.C. Circuit described the "consideration" required by agencies in the notice and comment process as a dialogue and a two-way street between the agency and the commenters.[84] Given the FCC's public attitude toward citizen comments, it is not a stretch to say that the FCC has not engaged in a back-and-forth dialogue with citizen comments. Commissioner Adelstein, in his dissent to the 2002 Review, said that the majority had "simply dismiss[ed] the public's views with a passing reference in one paragraph."[85]

In instructing agencies on their role with regard to public comments, the D.C. Circuit has also stated that "the opportunity to comment is meaningless unless the agency responds to significant points raised by the public."[86] The FCC would likely argue that many of these citizen comments do not raise any significant points, and that instead, they only tell of general opposition. While in general this might be true on an individual basis, taken together, the overwhelming opposition ought to be treated as a significant point raised by the public. Given this guidance, the FCC's current treatment of citizen comments does not rise to the level of a "dialogue" or what should qualify as consideration, and has rendered meaningless the public's opportunity to comment.[87]

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83. *See* 2002 Review, *supra* note 3, at 13876-77 (listing commenters for MB Docket 02-277, primarily including names of associations and trade groups, along with a few individuals, mostly associated with universities, for instance, "Kidd, Dorothy (Univ. of San Francisco)").

84. *See HBO*, 567 F.2d at 35-36 (acknowledging that both notice by the agency and comment by the public are necessary to assist with judicial review and to provide fair treatment for individuals affected by the agency rule); *cf.* Prometheus Radio Project v. FCC, 373 F.3d 372, 412 (3d Cir. 2004) (warning that "the APA's notice obligations are not supposed to result in a notice-and-comment 'revolving door.' 'Rulemaking proceedings would never end if an agency's response to comments must always be made the subject of additional comments.'" (quoting Cmty. Nutrition Inst. v. Block, 749 F.2d 50, 58 (D.C. Cir. 1984))); William Fishman, *Comments on the FCC's Recent Mass Media Ownership Decision*, 53 AM. U. L. REV. 583, 588 (2004) ("One can always do more, consider more, think longer or deeper, but neither common sense nor the law requires . . . the FCC . . . to seek a degree of comprehensiveness or profundity which is unrealistic and would require incremental effort disproportionate to the presumptive improvement in the analysis.") (citation omitted).

85. Adelstein Dissent, *supra* note 1, at 13978. Adelstein further describes the FCC's reaction as "overrid[ing] the better judgment of the American people. [The FCC's decision] instead relies on the reasoning of a handful of powerful media companies who have a vested financial interest in massive deregulation. Those who would benefit by buying and selling the public airwaves won out over the public." *Id.*

86. *HBO*, 567 F.2d at 35-36 (citation omitted).

87. *See* Copps Dissent, *supra* note 11, at 13958 (stating that the only opportunity citizens have to comment is to file petitions after decisions have already been made).

> The FCC is not, of course, a public opinion survey agency. . . . But even this independent agency is part of our democratic system of government. And when there is such an overwhelming response on the part of the American people and their representatives in Congress assembled, we ought to take notice. Here the

How the agency deals with comments on a practical level is a different issue from whether a court will find that insufficient consideration of comments will rise to the level of arbitrariness and capriciousness. While it seems clear that the FCC did not give adequate consideration to the many thousands of comments filed in opposition to its proposed rule, a court finding that the result is arbitrary and capricious involves additional analysis.

The arbitrary and capricious standard underlies all action that an agency takes under the APA. Under arbitrariness review, courts must uphold the agency's rules unless they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[88] Despite being the underlying standard, the APA does not specifically define the term "arbitrary and capricious." Even though courts have developed different standards of judicial review that apply to various types of agency action, agency action must always pass the arbitrary and capricious test. This test is the most deferential test that courts will apply to agency action.[89] The Supreme Court's opinion in *Motor Vehicle Manufacturers Ass'n, Inc. v. State Farm Mutual Automobile Insurance Co*. fleshed out the court's role in determining whether an agency's actions satisfied the standard.[90] "The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action."[91] With regard to agency consideration of comments, the D.C. Circuit described an arbitrary and capricious review as "searching and careful" and designed "to ensure that the agency's decision . . . has support in the record . . . includ[ing] the agency's addressing the significant comments made in the rulemaking proceeding."[92] This decision in the D.C. Circuit gives helpful guidance, connecting an agency's consideration of comments to arbitrary and capricious review.

> right call is to take these proposals, put them out for comment and then—only then—call the vote. Plausible arguments have been put forward that the letter of the Administrative Procedure Act requires this. Other legal experts demur. I do know this: the spirit underlying notice and comment is that important proposed changes need to be seen and vetted before they are voted. Today we vote before we vet.

Id.

88. APA, 5 U.S.C. § 706(2)(A) (2000).

89. *See, e.g.*, JAMES T. O'REILLY, ADMINISTRATIVE RULEMAKING: STRUCTURING, OPPOSING, AND DEFENDING FEDERAL AGENCY REGULATIONS 383 (2d ed. 2007) ("The APA standard never aimed at the type of sophisticated questions of methodology, consideration of factors, and other quirks of review that are so important today.").

90. *See* Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 40-43 (1983) (having little difficulty in determining the appropriate scope of judicial review).

91. *Id.* at 43.

92. NAACP v. FCC, 682 F.2d 993, 997-98 (D.C. Cir. 1982) (citation omitted).

Most of the time when courts examine an agency's consideration of comments, they do not find that consideration—or lack thereof—leads to an arbitrary rule. For instance in *Thompson v. Clark*, the D.C. Circuit found that the agency's failure to respond to 1,854 written comments did not result in an arbitrary and capricious rule. Instead, the court stated that the agency is under no obligation to respond to every comment.

> [A]dministrative proceedings should not be a game or a forum to engage in unjustified obstructionism by making cryptic and obscure reference to matters that "ought to be" considered and then, after failing to do more, to bring the matter to the agency's attention, seeking to have that agency determination vacated on the ground that the agency failed to consider matters "forcefully presented."[93]

Furthermore, in *Conference of State Bank Supervisors v. Office of Thrift Supervision*, the plaintiff argued that the agency failed to respond to substantive arguments in promulgating its final rule, undermining the plaintiff's right to provide meaningful comment.[94] The court found in favor of the agency, holding that agencies need not respond to every comment that is submitted, and that the agency effectively responded to the major issues that the comments raised.[95]

Because of this precedent, it is difficult, although not impossible, to make a successful argument that the FCC has ignored public comments to the point that its rule was arbitrary and capricious. In *Baltimore Gas & Electric Co. v. United States*,[96] the D.C. Circuit articulated the point at which an agency's lack of consideration becomes arbitrary and capricious. "Under the 'arbitrary and capricious' standard of review, an agency is . . . required to respond to significant comments that cast doubt on the reasonableness of the rule the agency adopts."[97] In other words, the court established that in order to find that the agency failed to consider and respond to comments, the challenging party needs to demonstrate an error in judgment on the part of the agency.[98] Arguing that the FCC acted arbitrarily and capriciously by virtually ignoring the mass of public comments that it received could be a successful argument under this

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93. Thompson v. Clark, 741 F.2d 401, 408-09 (D.C. Cir. 1984) (quoting Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 553-54 (1978)).

94. *See* Conference of State Bank Supervisors v. Office of Thrift Supervision, 792 F. Supp. 837, 846 (D.D.C. 1992) (arguing that even if the agency did respond to the comments, its responses were "conclusory or cursory in fashion").

95. *See id.* at 846-47 (interpreting 5 U.S.C. § 553(c)) (citations omitted).

96. 817 F.2d 108 (D.C. Cir. 1987).

97. *Id.* at 116.

98. *See* Hussion v. Madigan, 950 F.2d 1546, 1554 (11th Cir. 1992) (holding that because the agency's rulemaking accounted for objections raised by the plaintiff's comments and "f[e]ll far short" of a clear error of judgment by the agency, the rulemaking was neither arbitrary or capricious).

standard articulated in *Baltimore Gas*. The differentiating factors in this case are the number of public commenters, the seeming universality of their opinions, and the FCC's statutory relationship with the public interest. Together, this could show an error in judgment on the part of the FCC.

One way that a court could find that the agency has committed an error of judgment, and acted arbitrarily and capriciously, is by characterizing these public comments as a single piece of evidence—the overwhelming opposition out of concern for the number of speakers—which the agency must formally address as a procedural requirement. Put differently, the agency should have to deal explicitly with the sheer amount of ubiquitous opposition when it justifies its rule. The issue here is not just that any particular person voiced opposition in a comment and the FCC did not address his or her concerns personally. It is also not an issue of forcing the agency to listen to the voices of a braying mob that does not know the reasoning behind its own position. The issue is that the American public has collectively expressed its dismay and opposition to this rulemaking. And because the FCC must promulgate regulations in the public interest, it must deal with the overwhelming record evidence of these opinions in a more compelling way than the FCC has done thus far. Without more explanation in light of this overwhelming opposition in the record, the FCC faces a significant argument that its actions were so contrary to the record evidence that these actions approach the threshold of arbitrary and capricious.

B. The FCC Has a Heightened Duty to Consider Citizen Comments

The second way the FCC's current treatment of citizen comments falls short is the result of a logical argument, as opposed to a legal one. Even if the FCC did give basic consideration to citizen comments, this consideration would not rise to the level required by the APA under the influence of the public interest standard. This Comment's main argument is that the 2002 Review called for, and the 2006 Review now calls for, a heightened level of consideration for citizen comments because of the public interest standard and the level of public participation.

This so-called heightened level of consideration arises as a result of the FCC's own procedures. In the 2002 Review, the Commission knew that the public overwhelmingly opposed further media consolidation. In other rulemakings that do not engender such response, the Commission has more freedom to determine on its own what the public interest calls for in a given situation. But in the media consolidation proceeding, the FCC asked for

public comments,[99] outwardly displayed interest in what citizens had to say, effectively disregarded them, and subsequently claimed that it had satisfied its obligations under § 553 and the public interest standard.[100] There is a good reason for a heightened level of consideration: once the FCC ascertains the interests of the public through citizen comments, it has a duty to actively and in good faith take that information into consideration when promulgating rules in the public's interest. Here, the FCC has successfully ascertained the interests of the public, given the hundreds of thousands of comments it received through public hearings and the Commission's improved systems for submitting Internet and email comments.[101] To disregard these comments and still claim to be promulgating in the public interest is a logical disconnect, and it makes a sham of the notice and comment proceeding.

In an age where the Internet has made public comments more feasible,[102] where the Commission is saying that it urges public comment, and when the Commission has received record numbers of comments, the FCC cannot then ignore these comments and still stay true to either the public interest standard or to § 553 of the APA.

IV. FINDING A SOLUTION THROUGH FCC PROCEDURE AND JUDICIAL OVERSIGHT

Diversity of viewpoint implicates the First Amendment rights of viewers, as well as the democratic principles of the United States. As the logic goes, the greater the number and kind of speakers, the greater the

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99. *See* 2002 Review, *supra* note 3, *passim* (repeating in many paragraphs of the notice that the agency was seeking comment on various ownership issues); *see also* ROBERT W. MCCHESNEY, THE PROBLEM OF THE MEDIA: U.S. COMMUNICATION POLITICS IN THE 21ST CENTURY 282 (2004) [hereinafter THE PROBLEM OF THE MEDIA] (saying that Chairman Michael Powell "had encouraged Americans to use the Internet to let the FCC know their thoughts on media ownership").

100. *See* THE PROBLEM OF THE MEDIA, *supra* note 99, at 283 ("Shamelessly, Powell boasted about the 'extraordinary amount of public comment' the FCC had received, enabling it to address the issues 'through the eyes and ears of the American public.'") (citation omitted).

101. *See* Copps Dissent, *supra* note 11, at 13956 (listing the locations of hearings and forums attended either by Commissioner Copps or Adelstein before promulgation of the rules in the 2002 Review, including New York, Seattle, Austin, Durham, Phoenix, Chicago, Burlington, San Francisco, Los Angeles, Philadelphia, Marin County, Detroit and Atlanta); Adelstein Dissent, *supra* note 1, at 13977 (ascertaining the public's interest in the course of these hearings and through email). Adelstein stated, "[o]f the hundreds of citizens I heard from directly at field hearings . . . not one stood up to call for relaxing the rules. Of the thousands of emails I personally received, only one did not oppose allowing further media concentration." He concluded that the "American people appear united in believing that media concentration has gone too far already and should go no further." *Id.*

102. While the increase in the quantity of comments might be a result of the e-rulemaking trend, any change in quality is debatable. For an excellent discussion of the effect of e-rulemaking on the administrative process, see Cary Coglianese, *Citizen Participation in Rulemaking: Past, Present, and Future*, 55 DUKE L.J. 943, 948 (2006).

diversity in what is spoken.[103] The FCC's role should be to foster that diversity, encouraging speakers and listeners to "create and perpetuate an educated, informed and empowered electorate."[104] It is not a fact that every large media outlet necessarily limits diversity, but allowing concentration in the hands of the few threatens democratic values.[105] Because consolidation of media ownership threatens these values, the FCC has a responsibility to correct the dissonance between the spirit of the law and its recent handling of the media ownership proceedings.

To correct this dissonance, the FCC needs to take greater and substantive notice of the opinions it has received. The outpouring of responses has continued from both the American people and their representatives in Congress—the FCC has a duty to respond.[106] Commissioner Copps has suggested that the FCC establish both "a longer timetable and procedure for implementation of these changes to the rules."[107] In the 2006 Review, the FCC conducted public hearings with commissioner participation to discuss viewpoint diversity and how it affects speakers and listeners, and has conducted studies that it publishes and opens for comment.[108] While these

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103. *See* Baker, *supra* note 13, at 734-35 ("For many people (and most theories), true democracy implies as wide as practical a dispersal of power within public discourse.") (citation omitted).

104. Anthony E. Varona, *Changing Channels and Bridging Divides: The Failure and Redemption of American Broadcast Television Regulation*, 6 MINN. J.L. SCI. & TECH. 1, 53-54 (2004) (discussing the competing schools of free speech theories: the Holmesian view, which argued that "the unencumbered exchange of conflicting ideas comes closest to yielding truth and the common good"; and the Madisonian perspective, which "was not principally interested in keeping the 'marketplace of ideas' free from government interference, but was concerned with ensuring that all voices were present and heard in the marketplace" (citation omitted)). It is the Madisonian conception of the First Amendment that Varona posits "lies at the heart of the broadcast public trustee doctrine." *Id.*

105. *See* Baker, *supra* note 13, at 735 ("But democratic values mean that it makes a huge difference whether any lack of a particular type of diversity is imposed by a few powerful actors or reflects the independent judgments of many different people, for example, owners, with the ultimate power to determine content.").

106. *See* discussion *supra* Part III.B. The FCC first has a duty to consider relevant comments under § 553, but further, it has a heightened duty to consider citizen comments when required to take the public interest into consideration.

107. Copps Dissent, *supra* note 11, at 13958.

> [Longer timetables and a procedure for implementation of new rules] would allow the Commission to consider petitions for reconsideration on these specific rules to protect against irreversible, unintended and unforeseen negative consequences. This would also allow the Commission to examine its proposed rules and determine if additional measures are needed to protect the public interest before consolidation occurs, and it would allow Congress opportunity for any input that it may deem appropriate.

Id.

108. *See* Adelstein Dissent, *supra* note 1, at 13996-97 (arguing that minority ownership "tends to foster diverse editorial viewpoints" and that the 2002 Review allows for more concentrated media markets that pose harm to small businesses, minorities and women). Further, he notes that "[w]e should have made sure we understood the full impact of consolidation on minority ownership, minority employment, issue coverage, and the

are important steps, Chairman Martin's decision to push through the rulemaking at the end of the year signals that the Commission still did not take these public comments into consideration.

Congress should also consider legislation to clarify and better articulate the public interest standard and what that standard entails. Such legislation would eliminate much of the confusion within the Commission with regard to ascertaining the public's interest, and it would limit the manipulability of the standard, hopefully guiding the Commission to give significant consideration to public opinion, especially citizen comments.

To ensure that the FCC makes sound rulemaking decisions, the courts also have a responsibility to hold the FCC to its procedural requirements under the APA and its statutory requirements under the Communications Act. In effect, the FCC has deferred to competition in the market in hopes that the outcome will be in the public's interest.[109] As a result, the FCC has ignored the overwhelming evidence in the record that the public does not agree with that determination. In this instance, procedural issues are just as important as substantive issues because procedure implicates the extent to which the agency gives real weight to the voice of the regulated public.[110] Reviewing courts should not permit the FCC to abdicate its obligation to the public interest or its obligations under the APA, and should require a well-reasoned response and real consideration of public comments. When the FCC has determined the public interest through notice and comment rulemaking, the court must hold the FCC to such determinations when the FCC issues its final rules. This is not just an issue of procedure. It gives real weight to the voice of the regulated public.

Courts that are reviewing the rules of administrative agencies should look deeper into § 553's consideration requirements, defining them more precisely and holding agencies to a stricter standard. For instance, when the *Prometheus* court said that deference is appropriate when the issue is "elusive," it noted that the agency's decision cannot run counter to the

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portrayal of minorities before rushing ahead with massive new consolidation opportunities." *Id.*

109. *See* Phillips, *supra* note 59, at 624 ("A new deregulatory FCC determined that competition and the marketplace would better serve the needs of the listening and viewing public.") (citation omitted).

110. *See* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971) (explaining the Court's course of judicial review under the arbitrary and capricious standard as "based on consideration of relevant factors," with a "searching and careful" review of the facts, but that substantively, the Court "is not empowered to substitute its judgment for that of the agency").

evidence before it.[111] In the future, a reviewing court should look at the evidence provided by citizen comments and give guidance to the FCC on how best to consider them.

Looking at the problems that the FCC faces in dealing with public comments on a massive scale is a way to look at an agency-wide problem with a real-world example. What standards should an agency be held to in considering and responding to comments? In terms of the FCC and the ownership proceedings, the answer may lie in a reconstruction of the public interest standard, either by the FCC or Congress. It would then be for the Commission to give due consideration to comments such that it satisfies the public interest standard. But this does not address the greater problem of what it means for an agency to consider public comments in a way that satisfies the APA. The answer is not to require the agency to tally the comments pro and con and to enact a rule as though a vote has taken place. Nor would it make sense, as this FCC proceeding demonstrates, to require thoughtful responses to every comment submitted. That would result in final rules that are thousands of pages in length, having inefficiently allocated agency resources and making those rules prohibitively long.

The appropriate locale for rectifying this procedural gap in the APA is Congress. Congress should address this lack of clarity of what "consideration" means in order to affect a clear standard in agency response to comments. Congress could give further definition to the current statutory direction: "After consideration of the relevant matter presented, the agency shall . . . adopt a concise general statement of their basis and purpose."[112] For instance, in the definitions section to the APA subchapter on procedure, Congress could add: "'consideration' means close examination of evidence to determine categories of responses by subject, and provide a reasoned response to issues brought up in those categories."

While this suggestion does not completely eliminate the abstract notion of a "close examination," this definition still gives more substance to the idea, and could better articulate the standard, which would then allow the courts to decide whether an agency has considered such comment evidence to an extent that satisfies its statutory duty. The creation of a categorical requirement would avoid an interpretation mandating the agency to respond to individual comments, and also prohibit an agency from clumping an entire class of comments—like the FCC did with citizen comments—to inadequately explain them away. This proposed legislation would not require agencies to keep a tally of comments. It would, however, give more meaning to the kind of response that should be required.

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111. *See* Prometheus Radio Project v. FCC, 373 F.3d 372, 390 (3d Cir. 2004) (adding that agency decisions also cannot be "patently unreasonable") (citation omitted).

112. APA, 5 U.S.C. § 553(c) (2000).

CONCLUSION

Given the number and character of the citizen comments filed against the FCC's proposals to permit greater media concentration, the FCC is violating the public interest standard and § 553 of the APA. The FCC should give greater consideration to these comments, and the courts should impose a higher burden on the Commission to show that it has complied.

"When all of us are united on an issue, then one of two things has happened. Either the Earth has spun off its axis and we have all lost our minds or there is universal support for a concept."[113] Media ownership is an issue that transcends normal divisions by party lines, geographic lines, and lines of race, sex, and age. And the American people are outspoken in their opposition. While the FCC had an opportunity in the 2006 Review to deal with this powerful opposition in a transparent, procedurally sound way, it seems to have again fallen short. Now it risks the wrath of the public, and investigation by Congress,[114] as well as the loss of viewpoint diversity on the public airwaves of this country.

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113. Copps Dissent, *supra* note 11, at 13957 (quoting Brent Bozell of the Parents Television Council).

114. Associated Press, House Committee Launches Probe of FCC Management, Jan. 8, 2008.

NO CHILD LEFT BEHIND WAIVERS: A LESSON IN FEDERAL FLEXIBILITY OR REGULATORY FAILURE?

KRISTINA P. DOAN*

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INTRODUCTION

On January 8, 2002, President George W. Bush signed the No Child Left Behind Act (NCLB or the Act) into law.[1] NCLB reauthorized and amended federal educational programs under the Elementary and Secondary Education Act of 1965 (ESEA), the main source of federal

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1. 20 U.S.C. § 6301 (2000 & Supp. V 2005).

legislation and funding for public schools.[2] NCLB brought accountability measures and increased budgets to states and local educational agencies (LEAs), leading to an unprecedented expansion of federal influence over education policy.[3]

Although Congress passed NCLB with overwhelming bipartisan support, opponents from both parties have since criticized and challenged numerous provisions of the Act.[4] For example, members of Congress have proposed legislation allowing states to opt out of NCLB, and state legislators have introduced legislation rejecting federal funds.[5] States and LEAs have also unsuccessfully challenged NCLB in court.[6] However, states and LEAs have now found a safer and more successful way to cope with NCLB—rather than completely opting out of NCLB, states and LEAs are applying to the Department of Education (ED) for waivers from particular NCLB provisions.[7]

Although waivers appear to provide ED with the flexibility to adapt legislation to the realistic needs of states, and thus help states meet NCLB goals, waivers also pose problems. This Comment argues that granting waivers is a short-sighted procedure that highlights the problems in an already unworkable education policy. Part I focuses on state and local federalism concerns and the growing trend of states and LEAs seeking exemptions from portions of NCLB. Part II examines ED's congressionally authorized ability to grant waivers and the judicial review of such waivers. Part III highlights the trouble with relying on waivers to address the problematic features of NCLB. Finally, Part IV provides recommendations to Congress and ED to reduce reliance on waivers.

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2. *See* DEP'T OF EDUC., 10 FACTS ABOUT K-12 FUNDING (2005), http://www.ed.gov/print/about/overview/fed/10facts/index.html (demonstrating that the Elementary and Secondary Education Act, which was reauthorized by No Child Left Behind (NCLB), will contribute over thirteen billion dollars to local districts to improve schools with high poverty rates).

3. *See* Benjamin Michael Superfine, *Using the Courts to Influence the Implementation of No Child Left Behind*, 28 CARDOZO L. REV. 779, 780 (2006) (arguing that although "statutory provisions regarding standards and assessments are not entirely new at the federal level, the accountability mandates included in NCLB are unprecedented").

4. *See* Claudia Wallis & Sonja Steptoe, *How to Fix No Child Left Behind*, TIME, June 4, 2007, at 34 (summarizing the areas of controversy over NCLB as whether: (1) math and reading tests are the right tools for measuring achievement, (2) individual states are setting the bar high enough for students, (3) the heavy focus on reading and math distorts education, (4) the requirements for teacher qualifications are effective, (5) the Federal Government is playing an appropriate role in fixing schools, and (6) states receive enough funds to implement the policy).

5. *See infra* notes 14-23 and accompanying text.

6. *See infra* notes 24-26 and accompanying text.

7. *See* Brandi M. Powell, Comment, *Take the Money or Run?: The Dilemma of the No Child Left Behind Act for State and Local Governments*, 6 LOY. J. PUB. INT. L. 153, 178-79 (2005) (contending that requesting a waiver is one of the few realistic options for states and local educational agencies (LEAs) within an unworkable system).

I. RESISTANCE TO NO CHILD LEFT BEHIND

A. State and Local Concerns About NCLB

The United States has traditionally considered education a state and local issue.[8] NCLB's language appears to protect states' control over education by preventing the federal government from imposing an unfunded mandate.[9] However, state and LEA officials from both political parties have nonetheless expressed federalism concerns over NCLB requirements.[10] Many conservatives believe that NCLB is a "federal intrusion" into public schools, whereas many liberals believe that NCLB focuses too greatly on standardized tests that states and LEAs must report to ED.[11] Furthermore, many states and LEAs claim that NCLB's usurpation of local control over education policy produces rigid federal guidelines that do not fit local needs and are not economically feasible to implement.[12] States and LEAs have raised these federalism concerns since

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8. *See* Michael Heise, *The Political Economy of Educational Federalism*, 56 EMORY L.J. 125, 130-31 (2006) (explaining that people regard education as a local issue because local property tax revenues fund local schools, and because all states, except Hawaii, delegate most policy-making to local school boards); Wallis & Steptoe, *supra* note 4, at 36 (noting that, even today, the federal government only contributes nine cents for every dollar spent on schools). *See generally* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 42-53 (1973) (suggesting that the Supreme Court has recognized that local financing and control over public schools are valuable roles that the Court wishes to respect).

9. 20 U.S.C. § 7907(a) (Supp. V 2005).

> Nothing in this chapter shall be construed to authorize an officer or employee of the Federal Government to mandate, direct, or control a State, local educational agency, or school's curriculum, program of instruction, or allocation of State or local resources, or mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this chapter.

Id.

10. *See* Aaron J. Saiger, *Legislating Accountability: Standards, Sanctions, and School District Reform*, 46 WM. & MARY L. REV. 1655, 1721-23 (2005) (explaining that states do not have much control under NCLB because they only have genuine flexibility in making two decisions: deciding whether to completely opt out of the program and defining their standards for AYP); Heise, *supra* note 8, at 127 (asserting that states understood the "education federalism status quo" to mean that the federal government only focused on discrete subpopulations of students; thus states are upset that the federal government has departed from the status quo with a policy that impacts all participating states and schools); Scott Young, *NCLB: Feds Crack the Door*, 31 ST. LEGIS., June 2005, at 24, ("'We believe the federal government's role has become excessively intrusive in the day-to-day operations of public education,'" [New York Senator Saland] says. 'States that were once pioneers are now captives of a one-size-fits-all educational accountability system.'").

11. *See* Amit R. Paley, *'No Child' Needs to Expand Beyond Tests, Chair Says*, WASH. POST, July 31, 2007, at A04 [hereinafter Paley, *'No Child' Needs to Expand*] (explaining that although NCLB has support of leading Democrats and Republicans in Congress, there are still federalism concerns by both parties).

12. *See* Superfine, *supra* note 3, at 781-82 ("[M]ajor problems plaguing the implementation of NCLB stem from the failure to provide states, districts, and schools with the needed capacities, such as financial resources, to comply with NCLB mandates.").

the moment NCLB was introduced, leading some to believe that federal partisan politics stifled debate and led both houses of Congress to pass NCLB over local objection.[13]

B. Legislative and Judicial Challenges to NCLB

Prior to NCLB's expiration on September 30, 2007, members of Congress began introducing and discussing amendments rather than simply reauthorizing the Act.[14] To date, Democratic and Republican members of Congress have introduced over thirty bills to address NCLB's problems.[15] While congressional Democrats have pushed for increased funding,[16] some Republican-backed amendments have proposed legislation allowing states to opt out of NCLB testing provisions.[17] But in general, Congress has resisted large-scale changes of NCLB during the past five years.[18] Unless Representative George Miller, chairman of the House Education and Labor Committee, and Senator Edward Kennedy, chairman of the Senate Health, Education, and Pensions Committee, can rewrite NCLB and gather bipartisan support on a revised version for reauthorization, NCLB will likely remain the law in its current form until a new President takes office.[19]

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13. *See* Note, *No Child Left Behind and the Political Safeguards of Federalism*, 119 HARV. L. REV. 885, 893-906 (2006) [hereinafter *Safeguards of Federalism*] (claiming that members of the Republican-controlled Congress were cognizant of the federalism concerns voiced at local levels, but members of Congress ignored those concerns because they were pressured to support a "major piece of President Bush's domestic reform agenda").

14. *See* Stephen Langel, *Miller Unveils No Child Left Behind Proposal with Performance Bonuses for Teachers*, ROLL CALL, Sept. 7, 2007 (reporting that NCLB expired on Sept. 30, 2007); David J. Hoff, *Provision on Tutoring Raises Renewal Issues*, 27 EDUC. WK. 7, Oct. 10, 2007, at 1 (explaining that NCLB expired but was automatically extended for another year); Paley, *'No Child' Needs to Expand*, *supra* note 11 (noting that members of Congress are debating proposals to amend NCLB before voting on NCLB reauthorization).

15. *See* Susan Milligan, *No Child Law's Authors Work on a Revision, Respond to Complaints*, BOSTON GLOBE, July 16, 2007, at A1 (highlighting the criticism of NCLB in its current form and noting that members of Congress had proposed legislation before Congress voted to reauthorize NCLB at the end of 2007).

16. *See* Jonathan Weisman & Amit R. Paley, *Dozens in GOP Turn Against Bush's Prized 'No Child' Act*, WASH. POST, Mar. 15, 2007, at A01 (reporting that key Democrats strongly support the renewal of NCLB but demand "large increases in funding and more emphasis on teacher training and development").

17. *See, e.g.*, H.R. 1539, 110th Cong. (2007) (giving states the flexibility to improve their educational programs); Weisman & Paley, *supra* note 16 (describing how more than fifty Republican members of the Senate and House, including the House's second ranking Republican, introduced legislation allowing states to opt out of NCLB testing mandates).

18. *See* Milligan, *supra* note 15 (reporting that several years ago Sen. Dodd "annoyed" members of Congress when he authored "the most sweeping package on Capitol Hill to overhaul [NCLB]" because members of Congress believed that NCLB was too new to be completely rewritten).

19. David J. Hoff, *Bush Presses NCLB Renewal on His Terms*, 27 EDUC. WK. 19, Jan. 16, 2008, at 16-18 [hereinafter Hoff, *Bush Presses NCLB Renewal*] (stating that NCLB will stay in effect in its current form if it is not amended or reauthorized, and pointing out a

State legislatures have also sought ways to repair NCLB and regain control of educational policy. Utah has been at the forefront of the opposition to NCLB and has passed legislation that will allow it to cut NCLB programs if federal funding decreases.[20] Additionally, legislators from twenty-one states introduced bills or resolutions within three years of the NCLB's enactment, seeking to amend the implementation of the Act.[21] Although NCLB contains no provision that allows states to decide how to enact the law, ED has threatened to sever federal funding from states that refuse to comply with NCLB requirements.[22] Thus to date, no state has sacrificed federal funds by opting out of NCLB.[23]

States and LEAs have also challenged NCLB through the judicial system. Initially, the lawsuits challenging NCLB came from private parties and local school districts.[24] Then in 2005, Connecticut became the first state to judicially challenge ED, claiming that NCLB was an unfunded

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clause in NCLB that allows Congress to fund NCLB's current programs without formally reauthorizing the law); Public Education Network, No Child Left Behind, http://www.publiceducation.org/nclb_main/Reauth_What_It_Means.asp (last visited Jan. 26, 2008) (speculating that NCLB reauthorization may be delayed until 2009 due to the 2008 congressional calendar, which is shortened for the 2008 election).

20. *See* 2005 First Spec. Sess. Utah Laws H.B. 1001. Enacted in 2005 after passing overwhelmingly in the state legislature, H.B. 1001 will allow schools to eliminate federal education programs when federal funds for those programs are reduced or eliminated. *See also Nation*, THE YORK DISPATCH, Feb. 17, 2005, at 1 ("'The legislation and a companion resolution represent the sharpest denunciation among 35 states taking up measures on No Child mandates,' said the sponsor, Republican Rep. Margaret Dayton."). *See generally* Young, *supra* note 10, at 22 (noting that before Utah passed H.B. 1001, the Utah legislature considered an even more controversial bill that would prohibit the state from participation in NCLB and jeopardize "$46 million [in] Title I funding and possibly as much as $107 million of formula funding tied to Title I").

21. *See* National Education Association, 21 States Seek Changes to "No Child Left Behind," http://www.nea.org/lawsuit/stateres.html (last visited Jan. 25, 2008) (listing the pending bills and resolutions states that have introduced to address a diversity of concerns).

22. *See Safeguards of Federalism*, *supra* note 13, at 887-89 (noting that schools may feel compelled to abide by NCLB requirements to avoid losing federal funds). The author points out that Utah avoided losing federal funds by passing a bill "that would have Utah employ U-PASS in place of the NCLBA's progress measures without technically opting out of the federal program." *Id.* at 898. However, Secretary Spellings sent Utah Senator Orrin Hatch a letter warning him that the government will closely monitor Utah's compliance with NCLB and will "yank" most of the state's education funds if it does not "stay in line." *Id.* at 899.

23. *See* Powell, *supra* note 7, at 178 (providing suggestions about how states can work within the provisions of NCLB since no state has opted out of the Act); *Safeguards of Federalism*, *supra* note 13, at 886 ("All that talk, however, seemed just that—talk. Four years after the Act's passage, and with many states continuing to complain about its stringent requirements, not one state had made good on its threat to walk.").

24. *See, e.g.*, Ctr. for Law & Educ. v. U.S. Dep't of Educ., 315 F. Supp. 2d 15, 17-18 (D.D.C. 2004) (dismissing the plaintiffs' claims challenging testing regulations due to lack of standing); City of Pontiac v. Spellings, No. 05-CV-71535-D, 2005 WL 3149545, at *8 (E.D. Mich. 2005) (dismissing the plaintiffs' claims—that ED had not provided sufficient funds to states to enable districts and schools—for lack of standing); Bd. of Ottawa Twp. v. U.S. Dep't of Educ., No. 05 C 00655, 2007 WL 1017808, at *1 (N.D. Ill. 2007) (dismissing the plaintiffs' claims—that portions of NCLB are invalid since they violate the Individuals with Disabilities Education Act—because of lack of standing).

mandate violating the U.S. Constitution's Spending Clause and the Tenth Amendment.[25] Despite the different legal strategies parties have used to challenge NCLB, thus far no plaintiffs have been successful.[26]

C. Increasing Momentum for Waivers

After encountering setbacks through legislation and lawsuits, states and LEAs have increasingly sought flexibility in implementing NCLB by applying for waivers for specific provisions of the law.[27] States and LEAs may view waivers as a safer strategy because waivers do not jeopardize federal funding. Instead of forgoing federal funds by abandoning NCLB[28] or failing to make adequate yearly progress (AYP),[29] states have applied for waivers so they can opt out of particular NCLB provisions and still retain NCLB funds.[30] Waivers also appear to be a safer alternative to expensive litigation that has had a low success rate.[31] Finally, many states and LEAs are turning to waivers because they believe that the current Secretary of

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25. *See infra* notes 64-67 and accompanying text; Connecticut v. Spellings, 453 F. Supp. 2d 459, 482 (D. Conn. 2006) (dismissing Connecticut's claim for lack of subject matter jurisdiction over a pre-enforcement challenge because Secretary Spellings had yet to take action against Connecticut, such as withholding NCLB funds).

26. *See* Superfine, *supra* note 3, at 806-19 (highlighting legal hurdles faced by NCLB challenges such as standing issues, judicial deference to administrative decisions, specific statutory language, and the lack of an express private cause of action).

27. *See* Powell, *supra* note 7, at 178 (suggesting that waivers are state and LEA's most realistic option "to make sure all state and local costs are accounted for . . . and to simply hold ground or push for a change in the law" during George W. Bush's second term).

28. *See, e.g.*, *Safeguards of Federalism*, *supra* note 13, at 897 (describing how ED informed Virginia that it would lose $330 million per year if it "pulled out or refused to comply with NCLB" after a Virginia delegate introduced a bill that would reject NCLB testing standards).

29. *See* 20 U.S.C. § 1234(c) (2000) (allowing the Secretary of Education to: (1) withhold funds; (2) obtain compliance through a cease and desist order; (3) enter into a compliance agreement with the recipient; or (4) take any other action authorized by law if a recipient of NCLB funds is substantially failing to comply with any requirement of the law). *See generally* Lynne Olsen, *Data Shows Schools Making Progress on Federal Goals*, 24 EDUC. WK. 2, Sept. 8, 2004, at 24-25 (highlighting that many people feared "a tidal wave of schools" would not be able to meet adequate yearly progress goals "because schools must meet multiple targets both for their total student populations and for subgroups of students who are poor, show limited skills in English, have disabilities, or come from racial- or ethnic-minority backgrounds").

30. *See infra* Part II.

31. *See generally* William T. Gormley, Jr., *Money and Mandates: The Politics of Intergovernmental Conflict*, 36 PUBLIUS 523, 539 tbl.7 (2006) (showing that between 1980 and 2004, there were fifty-one challenges made by states and LEAs, and that the Federal Circuit Court of Appeals ruled in favor of the federal government for education policy matters eighty percent of the time).

Education, Margaret Spellings, is more receptive to states than her predecessor, Roderick Paige, and therefore more willing to increase flexibility by granting waivers.[32]

Upon taking office, Secretary Spellings announced that there would be a "more workable, common-sense approach"[33] to applying NCLB.[34] Fulfilling her promise, she granted her first waivers to four Virginia school districts in 2005.[35] States have since sought exemptions from different NCLB provisions, ranging from measuring special education proficiency in Colorado to utilizing alternatives to standardized testing in Minnesota.[36] Even smaller LEAs, such as the Anchorage and Hillsborough County school districts in Alaska, received waivers to provide subsidized tutoring.[37]

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32. *See State, Local Efforts Seeking More NCLB Flexibility Are Gaining Momentum*, 35 YOUR SCHOOL & THE LAW 4 (2005) ("'The tone out of the White House has definitely changed since Spellings has replaced Paige,' [Scott Young, a senior policy specialist with the National Council of State Legislatures] said. 'We're optimistic because every indication we're getting from the U.S. Department of Education is the fact that they are willing to work with the states now.'"). *But cf.* Amit R. Paley, *Ex-Aides Break With Bush on 'No Child*,*'* WASH. POST, June 26, 2007, at A04 ("But former officials said Education Secretary Margaret Spellings, the top White House education adviser in Bush's first term, stymied efforts by top department officials to grant states more control over how they carried out the law.").

33. *See* Young, *supra* note 10, at 22, 24 (explaining that Secretary Spellings would offer states flexibility if they could prove that they were meeting the general goals of NCLB).

34. *See* Heise, *supra* note 8, at 127 (contending that the Bush Administration and ED are granting an increasing amount of waiver requests because they are on "the political defensive").

35. *See Virginia School Districts to Offer SES in Lieu of Choice; ED's Flexibility May Pave Way for Other States to More Easily Achieve NCLB Goals*, 35 YOUR SCH. & THE LAW 19 (2005) [hereinafter *Virginia School Districts Offer SES*] (describing how ED's waiver allows the four Virginia school districts to offer free school tutoring instead of school choice, a departure from the order of procedures proscribed by the NCLB); *see also Spellings Announces NCLB Flexibility for Select Districts*, 35 YOUR SCH. & THE LAW 17 (2005) [hereinafter *Spelling Announces NCLB Flexibility*] ("The decision [to grant Virginia districts waivers] is noteworthy because it demonstrates the Education Department's ability to waive NCLB requirements. Most flexibility so far has been created within the structure of the law through policy and regulations.").

36. *See, e.g.*, *Spellings Announces NCLB Flexibility*, *supra* note 35 (describing how ED granted Colorado's wavier request, allowing Colorado to measure some special education students' AYP against lower academic goals); Charley Shaw, *Debate Continues Over No Child Left Behind Rules*, ST. PAUL L. LEDGER, Sept. 8, 2005, at 1 (reporting that the Minnesota legislature has requested nine waivers to NCLB, including using "multiple measures of student achievement" as opposed to standardized test scores).

37. *See* Notice of Waivers Granted Under Section 9401 of the Elementary and Secondary Education Act, as Amended, 72 Fed. Reg. 10,990, 10,992 (Mar. 12, 2007) [hereinafter Notice of Waivers Granted] (showing that Anchorage and Hillsborough County School Districts received a waiver allowing them to provide free supplemental educational services (SES), such as math and reading tutoring to low income students outside of class even though the schools are labeled "in need of improvement").

Furthermore, whereas Secretary Paige primarily granted waivers to individual school districts for specific programs, Secretary Spellings's waivers have been much broader.[38] For example, in 2006, Secretary Spellings granted waivers to five states so they could develop and implement their own models to measure their AYP.[39] Secretary Spellings has also granted waivers to provide subsidized tutoring in large cities and in states, such as Boston, Chicago, and the state of New York.[40] Finally, Secretary Spellings has granted many waivers for school districts affected by Hurricane Katrina.[41] Though Secretary Spelling has granted waivers across the country for programs large and small, the only provision she has refused to waive is the requirement that states report yearly testing results.[42]

II. THE WAIVER PROCESS

A. Statutory Authority to Grant Waivers

NCLB § 7861 authorizes the Secretary of Education to grant waivers.[43] Although administrative agencies may generally refuse to grant such requests,[44] NCLB explicitly allows the Secretary of Education to "waive any statutory or regulatory requirement . . . for a State educational agency, local educational agency, Indian tribe, or school through a local educational agency" that receives NCLB funds and requests a waiver.[45] The only provisions that NCLB forbids the Secretary to waive are enumerated in § 7861(c).[46] Most significantly, § 7861(c) forbids the Secretary from

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38. *See id.* at 10,992 (explaining that prior to 2005, the only waivers that ED granted dealt with general programming and extending the obligation period of funds).

39. *See id.* (noting that Secretary Spellings granted growth model waivers to Arkansas, Delaware, Florida, North Carolina, and Tennessee in 2006).

40. *See* Nick Anderson, *Bush Administration Grants Leeway on 'No Child' Rules*, WASH. POST, Nov. 22, 2005, at A1, A11 (reporting that ordinarily, NCLB would not allow subsidized tutoring in areas that have schools that are deemed "in need of improvement," but exemptions were made for New York, Boston, and Chicago).

41. *See* Notice of Waivers Granted, *supra* note 37, at 10,990-91 (showing that Secretary Spellings granted eighteen waivers to states affected by Hurricane Katrina and states accommodating students displaced by the hurricane).

42. *See* Lois Romano & Shankar Vedantam, *'No Child' Rules to be Eased for a Year*, WASH. POST, Sept. 30, 2005, at A10 (explaining that Secretary Spellings relaxed standards for five states affected by Hurricane Katrina for a year, but denied waiving the student progress requirements because she believes the requirements are the "linchpin" of NCLB).

43. 20 U.S.C. § 7861 (Supp. V 2005).

44. *See* Heckler v. Chaney, 470 U.S. 821, 837-38 (1985) (holding that FDA's decision not to enforce actions requested by the respondents was not judicially reviewable under the Administrative Procedure Act).

45. 20 U.S.C. § 7861(a).

46. *See id.* § 7861(c) (listing the restrictions on the Secretary of Education's power to grant waivers of NCLB requirements).

waiving requirements relating to the allocation of funds,[47] the "use of Federal funds to supplement, not supplant, non-Federal funds,"[48] and "applicable civil rights requirements."[49]

To apply for a waiver, states and LEAs must submit a proposal that describes how the waiver will increase the quality of instruction and improve the students' academic achievement.[50] State and LEA waiver proposals must also include "specific, measurable educational goals . . . and the methods to be used to measure annually such progress for meeting such goals and outcomes."[51] State and local officials must provide notice of the proposal and allow time for public comment before submitting the waiver proposal.[52] Although NCLB specifies minimum elements that must be included in the proposal and steps that must be taken, the Act does not require the Secretary to grant a waiver if these elements have been fulfilled.[53]

If the Secretary approves a proposal, the Secretary may grant a waiver for up to four years,[54] and the decision must be published in the Federal Register.[55] Throughout the duration of the waiver, states and LEAs must submit reports describing the waiver's use and evaluating its progress.[56] In turn, ED must submit a report to Congress summarizing the wavier's uses and describing any state or LEA improvements.[57] These reporting measures may help ED decide whether to extend the waivers it previously granted.[58] However, the Secretary may terminate a waiver if there has been poor performance or if a waiver is no longer needed to achieve its intended purposes.[59]

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47. *Id.* § 7861(c)(1).
48. *Id.* § 7861(c)(4).
49. *Id.* § 7861(c)(7).
50. *Id.* § 7861(b)(1)(B)(i)-(ii).
51. *Id.* § 7861(b)(1)(C).
52. *Id.* § 7861(b)(3)(A)-(B).
53. *See* Connecticut v. Spellings, 453 F. Supp. 2d 459, 496 (D. Conn. 2006) (asserting that without guidance or restrictions regarding the denial of waivers, Congress intended the Secretary to have "broad and unfettered discretion" when deciding which states should receive waivers).
54. *See* 20 U.S.C. § 7861(d)(1).
55. *Id.* § 7861(g).
56. *See id.* § 7861(e)(1)-(2) (noting that LEAs must submit reports to the state at the end of the second year and each subsequent year, and that states must report information they receive from LEAs to the Secretary).
57. *Id.* § 7861(e)(4).
58. *See id.* § 7861(d)(2) (allowing the Secretary to renew the waiver if it has been effective and if renewal is in the public interest).
59. *See id.* § 7861(f)

> The Secretary shall terminate a waiver under this section if the Secretary determines, after notice and an opportunity for a hearing, that the performance of the State or other recipient affected by the waiver has been inadequate to justify a continuation of the waiver or if the waiver is no longer necessary to achieve its original purposes.

Although states and LEAs see the "substantive and administrative requirements" for NCLB waivers as a burden,[60] Secretary Spellings claims that obtaining information from states and LEAs through the waiver process helps other states improve the quality of educational services.[61] Therefore, it is unlikely that the waiver process will be eased for states and LEAs given that ED finds the process valuable to the implementation of NCLB.

B. Judicial Review of Waivers

ED's decisions to grant NCLB waivers are subject to judicial review under the Administrative Procedure Act (APA),[62] and thus are protected by a procedural safeguard to agency action.[63] However, when the State of Connecticut sued Secretary Spellings, the district court held that not only did the court lack subject matter jurisdiction because Secretary Spellings had never withheld NCLB funds from Connecticut, the court also noted that the Secretary's denial of waivers was not judicially reviewable.[64] The

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Id.

60. *See* Powell, *supra* note 7, at 179 (arguing that states and LEAs should "weigh the cost of compliance with the time, effort and paperwork required to apply for a waiver" because waivers are burdensome and difficult to obtain).

61. *Virginia School Districts Offer SES*, *supra* note 35 (quoting Secretary Margaret Spellings after approving Virginia's request: "I hope to gain valuable information about SES from these pilot programs—information that can be shared with other States and districts to help them improve the quality of these services").

62. *See* 5 U.S.C. § 706(2)(A) (2000) (allowing a reviewing court to "hold unlawful and set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"); *see also* Beno v. Shalala, 30 F.3d 1057, 1066, 1076 (9th Cir. 1994) (holding that the Secretary of Health and Human Services' waiver to California from provisions of the Aid to Families With Dependent Children Act was subject to judicial review, subsequently invalidating the waivers granted to California).

63. *See generally* Recent Case, *Ninth Circuit Holds Statutory Waivers for Welfare Experiments Subject to Judicial Review*, 108 HARV. L. REV. 1208 (1995) [hereinafter *Waivers for Welfare Experiments*] (arguing that although judicial review provides necessary oversight to the waiver process, a systematic and central federal oversight process is also needed to ensure that waivers are in the public interest).

64. Connecticut v. Spellings, 453 F. Supp. 2d 459, 482 (D. Conn. 2006). The court dismissed Connecticut's claims challenging the implementation of NCLB under the Spending Clause and the Tenth Amendment. The court found that it lacked subject matter jurisdiction to review Connecticut's claim because Secretary Spellings had not taken any action against the state. The court also dismissed Connecticut's claim that Secretary Spellings "violated the Administrative Procedure Act (the APA) by denying the State's requests for waiver from the Act's requirements and also by denying certain plan amendments submitted by the State." *Id.* at 464. Finally, the court noted that:

> Case law also supports the Court's conclusion that the Secretary's decision to deny a waiver request is committed to agency discretion and thus not reviewable . . . . [T]here is no judicial review in circumstances that are similar to that presented by the Secretary's denial of waiver requests under the Act.

Id. at 497. *See, e.g.*, Schneider v. Feinberg, 345 F.3d 135, 149 (2d Cir. 2003) (dismissing the plaintiffs' challenge to the Special Master's decision because the court held that Congress intended for the Special Master to have a great deal of discretion administering the September 11th Victim Compensation Fund); Dina v. U.S. Att'y Gen., 793 F.2d 473, 476 (2d Cir. 1986) (holding that the denial of a waiver request made by a foreign exchange

court reasoned that the statutory language giving the Secretary discretion to deny waiver requests did not provide "any standard—let alone a meaningful one" that a court could use to evaluate a denial of a waiver request.[65] Thus, courts may review the issuance of waivers, but cannot review the denial of waivers unless a statute provides a clear standard of review.[66]

III. PROBLEMS WITH WAIVERS

Although waivers may provide agencies with a way to adapt generalized rules to special cases and promote administrative equity, they are not viable long-term solutions.[67] Because of the problems that waivers create—such as decreasing participation in NCLB and ignoring systematic problems—ED should not depend on waivers as a way to salvage NCLB.

A. Decreasing Participation by Increasing Frustration

One of the main problems with waivers is that states and LEAs cannot rely on receiving waivers to address problems associated with NCLB's implementation.[68] Even though Secretary Spellings promised more flexibility, she has only issued twenty-three non-Katrina-related waivers.[69] Congress gave a great deal of discretion to the Secretary to determine

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student to stay in the United States was not judicially reviewable because the U.S. Information Agency has discretion to deny waivers, and there was no criteria established by Congress to review waiver denials).

65. Connecticut v. Spellings, 453 F. Supp. 2d at 495.

66. *See id.* at 499 ("To construct a standard by which a court could meaningfully review the Secretary's decision to deny a waiver of the Act's requirements, the Court would be required to rewrite the waiver provision of the Act for Congress and guess at the precise contours of such a standard.").

67. *See generally* Alfred C. Aman, Jr., *Administrative Equity: An Analysis of Exceptions to Administrative Rules*, 1982 DUKE L.J. 277, 278 (arguing that agencies at all levels promote fairness and equity for particular cases by granting exceptions to regulations and agency rules, particularly for unforeseen economic situations); Peter H. Schuck, *When the Exception Becomes the Rule: Regulatory Equity and the Formulation of Energy Policy Through An Exceptions Process*, 1984 DUKE L.J. 163, 283-89 (acknowledging that granting exceptions for hardships and unforeseen situations can be a "safety valve," and thus, have become an important regulatory device for the Department of Energy); Jeffrey M. Sellers, Note, *Regulatory Values and the Exceptions Process*, 93 YALE L.J. 938 (1984) (reasoning that granting formal regulatory exceptions through waivers and variances is a better way to promote predictability, efficiency, and equal treatment for special cases than simply choosing not to enforce statutory provisions).

68. *See generally* Tim Conlan & John Dinan, *Federalism, the Bush Administration, and the Transformation of American Conservatism*, 37 PUBLIUS 279, 288 (2007) (stating that "the number of waivers approved by [Secretary] Spellings [has been] far outpaced by the waiver requests that she denied").

69. *See* Notice of Waivers Granted, *supra* note 37, at 10,990 (listing all of the waivers ED has granted).

whether to issue waivers.[70] Although this level of discretion has led to allegations that ED grants waivers arbitrarily and treats states unequally,[71] these allegations are difficult both to prove and to remedy when courts cannot review denied waiver requests.[72] Furthermore, many states and LEAs cannot rely on receiving waivers because they may not have the time or money to successfully navigate the waiver process.[73]

Although policymakers often view exemptions as methods that preserve accountability and retain parties by presenting states and LEAs with an alternative to opting out completely,[74] NCLB waivers may lead to the opposite result. Even ED stated that waivers "undermine the progress being made toward accountability."[75] The exceptions to NCLB could become the norm when agencies weaken the rule of law by relying on waivers.[76] Furthermore, in the same way that students have less incentive to follow classroom rules if a teacher does not apply them equally to all students, states and LEAs may become frustrated and violate NCLB rules that ED has exempted other parties from following.[77] States and LEAs that are struggling with NCLB guidelines and cannot find relief through legislation, the courts, or waivers may ultimately abandon NCLB if Congress reauthorizes the Act in its current form.

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70. *See* Connecticut v. Spellings, 453 F. Supp. 2d at 495-96 (finding the Act's lack of guidance indicative of the Secretary's broad discretion).

71. *See Utah Lawmaker: ED Plays Favorites*, 35 YOUR SCH. & THE LAW 11 (2005) [hereinafter *ED Plays Favorites*] (reporting that a Utah legislator did not believe that ED was not treating states equally when granting flexibility to NCLB because Utah has been waiting while ED approved "significant changes" to accountability plans for Florida and Massachusetts).

72. *See supra* Part II.B.

73. *See supra* note 60 and accompanying text.

74. *See* Sellers, *supra* note 67, at 948 (insisting that a formalized exceptions process with notice and comment for affected parties, published criteria for decision-making, and written decisions promotes greater and more effective participation).

75. *See* Powell, *supra* note 7, at 179 (quoting Comm. of Educ. and the Workforce, Fact Sheet: No Child Left Behind Is Flexible, http://republicans.edlaborhouse.gov/archive/issues/108th/recess/nclbflex.htm (last visited Jan. 5, 2008).

76. *See* Harold Leventhal, *Principled Fairness and Regulatory Urgency*, 25 CASE W. RES. L. REV. 66, 78 (1974) ("Care must be taken that the rule be proved and not swallowed by the exception . . . . A safety valve is one thing, a dissipation of all force another.").

77. *See ED Plays Favorites*, *supra* note 71 ("The relationship between Utah and ED grew tense after the state legislature approved a bill in April to give Utah's accountability system—known as U-Pass—precedence over NCLB. The bill was passed after ED repeatedly rejected Utah's plan to use U-Pass for NCLB.").

B. Providing Only a Temporary Remedy

By addressing NCLB's problems on a case-by-case basis through waivers that can only extend up to four years, ED is providing only a temporary remedy to broader problems with NCLB. Unlike most agency waivers that are granted for unforeseen and temporary situations,[78] ED grants waivers for larger and systemic problems of NCLB. For example, Secretary Spellings granted a waiver to five states for one of the most contentious provisions of NCLB: measuring AYP.[79] However, many states who have not received a waiver for AYP, such as California, still struggle to meet AYP despite achieving significant gains in testing.[80] In other states, NCLB requirements have led teachers and administrators to cheat in order to meet AYP.[81] Instead of fixing the AYP requirement, which has been controversial since NCLB's inception,[82] ED has merely decided to give waivers to some states. As a result, states that did not apply for or receive AYP waivers must continue to deal with AYP requirements and penalties.[83] If ED continues to issue waivers to states for NCLB's larger problems, states and LEAs will have less incentive to challenge NCLB's provisions.[84]

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78. *See, e.g.*, Schuck, *supra* note 67, at 283 ("Exceptions for hardship and unforeseen circumstances constitute the 'bread and butter' of the [Department of Energy] exceptions process, surely accounting for the vast majority of the [Office of Hearings and Appeals'] decisions.").

79. *See supra* note 39 and accompanying text; *see also* Gershon M. Ratner, *Why the No Child Left Behind Act Needs to be Restructured to Accomplish Its Goals and How To Do It*, 9 D.C. L. REV. 1, 14 (2007) (claiming that "twenty states have greatly reduced the portion of students needed to be brought to proficiency," such as Michigan which "reduced the percentage of students needed to pass a test for a school to satisfy AYP from 75% to 42%"); Heise, *supra* note 8, at 143-44 (asserting that one major problem of NCLB is that sanctions for failure to achieve AYP create incentives for states to dilute their academic proficiency standards in order to avoid future sanctions).

80. *See* Anderson, *supra* note 40, at A11 (reporting that 56% of the 9,200 schools in California failed to make AYP even though 80% of "schools made significant gains").

81. See Brian Grow, *A Spate of Cheating—by Teachers: No Child Left Behind Link Test Results to School Funding. Is That a Recipe for Deceit?*, BUS. WK., July 5, 2004, at 94, for a description of how NCLB has led to a widespread cheating, not only by students, but by "hundreds of teachers, principals, and administrators. . .doing anything they can to boost their schools' test scores." According to Grow, "[t]ransgressions include changing students' answers on tests, handing out exams—and even answers—in advance, tutoring students with real tests, blocking weak students from taking exams, and giving students extra time to finish." *Id.* at 94-95.

82. *See Safeguards of Federalism, supra* note 13, at 889 ("Experts criticize [AYP] testing for teaching children to be hyper-competitive and focusing teachers only on particular aspects of performance and aptitude.") (citations omitted).

83. *See* Schuck, *supra* note 67, at 289 (asserting that the more effectively agencies use exceptions, the more it encourages policymakers to rely upon exceptions rather than make necessary improvements).

84. *See id.* at 283 ("By reducing the hardships and the sense of injustice suffered by those to whom a rule applies, exceptions diminish the pressure to challenge the rule itself.").

In turn, Congress will have less motivation to reform NCLB's widespread problems through legislation, which is detrimental to education policy in the long run.[85]

IV. REDUCING RELIANCE ON WAIVERS

A. Legislative Remedies

Although Secretary Spellings announced that NCLB is working and "is here to stay,"[86] Congress must vote to reauthorize NCLB.[87] If Congress decides to reauthorize NCLB, it should adopt the recommendations suggested by Representative Miller and Senator Kennedy.[88] In particular, Miller and Kennedy have stressed that some of the most problematic measures of NCLB can be resolved by increasing the flexibility of NCLB itself,[89] rather than forcing states and LEAs to gain flexibility through waivers. The problems with measuring AYP, for instance, can be alleviated by amending NCLB and allowing states to find their own ways to report student achievement.[90] Miller, Kennedy, and other members of Congress have proposed amendments that would allow states to incorporate graduation and Advanced Placement Test passage rates into AYP, and

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85. *See id.* at 286 ("[T]he exceptions process became a fig leaf concealing the incompetence, indecision, and political weakness of the [Department of Education's] regulatory apparatus.").

86. Dan Liston, Jennie Whitcomb & Hilda Borko, *NCLB and Scientifically-based Research: Opportunities Lost and Found*, 58 J. OF TCHR. EDUC. 99 (2007) (arguing that Secretary Spellings's claims about NCLB's effectiveness are premature).

87. *See* Milligan, *supra* note 15 (noting that everything in NCLB is up for review, and Congress must decide whether to extend NCLB); *see also* President George W. Bush, State of the Union 2007 (Jan. 23, 2007) (calling on Congress to reauthorize NCLB "without watering down standards, without taking control from local communities, and without backsliding and calling it reform").

88. *See* Rep. George Miller, Remarks on the Future of No Child Left Behind Education Law (July 30, 2007) (transcript available at http://www.house.gov/apps/list/speech/edlabor_dem/RelJul30NCLBSpeech.html) (outlining six features that should be the focus of NCLB reauthorization: provide more flexibility, encourage innovation, support teachers and principals, continue to hold schools accountable, improve high schools, and invest in schools); Senator Edward M. Kennedy, *How to Fix 'No Child,'* WASH. POST, Jan. 7, 2008, at A17 (suggesting that NCLB has produced noticeable improvements, but needs to be more flexible, support teachers more effectively, and provide schools with greater resources).

89. *See* Miller, *supra* note 88 (contending that flexibility is necessary for educators and administrators to achieve NCLB's high standards); Kennedy, *supra* note 88 (claiming that NCLB's current "one-size-fits-all approach" discourages innovation in the classroom).

90. *See Miller, supra* note 88 ("[M]any Americans do not believe that the success of our students or our schools can be measured by one test administered on one day. . . . We will allow the use of additional valid and reliable measures to assess student learning and school performance more fairly, comprehensively, and accurately.").

permit states to measure growth.[91] Congress should be careful, however, not to sacrifice accountability for flexibility.[92] By incorporating suggestions to increase state and LEAs flexibility and increasing NCLB funding,[93] ED can reduce state and LEAs' reliance on waivers.

Congress should also look at those provisions that states and LEAs have asked ED to waive if Congress decides to amend and reauthorize NCLB. For example, Congress should allow more subsidized tutoring given that ED granted twelve waivers to LEAs requesting the use of subsidized tutoring.[94] In addition to providing a temporary fix for NCLB provisions, waiver requests highlight some of the most common and pressing problems with having rigorous proficiency standards in a national policy for education.[95] Finally, Congress should also evaluate the process that ED uses to examine waiver proposals. Congress does not need to go as far as prescribing guidelines that dictate when ED must accept or deny a waiver proposal—ED works with NCLB daily and is thus better suited to determine how to issue waivers. However, by looking at the reports that ED provides to Congress[96]

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91. *See, e.g.*, Paley, *'No Child' Needs to Expand*, *supra* note 11 (explaining that Congressman George Miller believes that schools should also be measured by "graduation rates or the number of students passing Advanced Placement exams"); Wallis & Steptoe, *supra* note 4, at 37-38 (suggesting that states should be able to measure AYP using growth models, a system which measures success by tracking student progress which is defined by how much students improve rather than whether students are all testing at a specific grade level); Milligan, *supra* note 15 (highlighting a bill introduced by two Republican members of Congress that would amend NCLB and allow schools to have more time to achieve test standards for children learning English, and not punish schools with "small populations of low-achieving students" as harshly as schools with "widespread problems").

92. *See* Hoff, *Bush Presses NCLB Renewal*, *supra* note 19, at 16 (revealing that President Bush threatened to veto any bill that weakens NCLB's accountability system); Paley, *'No Child' Needs to Expand*, *supra* note 11 (reporting that many Republican members of Congress, as well as civil rights groups such as Citizens' Commission for Civil Rights and the Education Trust, are concerned that adding too much flexibility to NCLB will "undermine transparency for parents and the ability to hold schools accountable for student performance"); Saiger, *supra* note 10, at 1722 (arguing that suburban schools districts who are "at little risk of disestablishment under state accountability programs," have a larger incentive under NCLB's national accountability system to "reform their treatment of difficult-to-educate students").

93. *See* Milligan, *supra* note 15, at A1 (noting that Sen. Kennedy believes that "states are still not getting the money they need to develop appropriate tests and provide the extra help students need to make the test-score improvements demanded in the law").

94. *See* Notice of Waivers Granted, *supra* note 37, at 10,990 (showing that ED granted waivers allowing six LEAs to use subsidized tutoring instead of public school choice in the first year of school improvement and granted waivers allowing six more LEAs to use subsidized tutoring even though the district was identified for improvement).

95. *See supra* Part III.B.

96. *See supra* note 57 and accompanying text.

and examining the proposals that ED has granted and denied, Congress can provide oversight that will complement the judicial review of the waiver process.[97]

B. Agency Remedies

ED can also reduce reliance on NCLB waivers by exercising more prudence. Although Secretary Spellings should not stop granting waivers, ED should ensure that the waiver approval process is transparent and fair to all regulated bodies.[98] Currently, there is no public record describing why ED granted or denied waiver applications.[99] Thus, many states cannot comprehend why ED denied their waiver requests while granting other states' waivers based on similar requests.[100]

Because Congress gave the Secretary broad discretion to review waiver applications, ED could achieve transparency by articulating more clearly how it reviews waiver applications.[101] For example, ED could promulgate guidelines describing that it is more likely to grant waivers to states with financial hardships. ED could also clarify whether it prefers granting waivers to small or large populations, and whether it prefers short or long term proposals. ED should then give feedback to states regarding their proposals, explaining its final decision based on these guidelines. Although guidelines and feedback would not help states challenge waivers that ED has denied,[102] they could reduce frustration with the waiver process. States and LEAs would be able to make more informed choices about whether to use their time and resources to apply for a waiver.[103] Additionally, applicants who did not receive waivers would know why ED had rejected their proposals.

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97. *See Waivers for Welfare Experiments*, *supra* note 63 at 1211 ("Judicial oversight alone . . . cannot remedy the dissatisfaction with the existing waiver process.").

98. *See* Aman, *supra* note 67, at 302 ("[R]andom, unprincipled granting of exceptions could easily undermine a regulatory scheme.").

99. *See* 20 U.S.C. § 7861(g) (requiring that the Secretary must give notice, but not an explanation, when granting a waiver); Notice of Waivers Granted, *supra* note 37, at 10,990 (listing the waivers and descriptions of waivers ED granted from the date of NCLB's enactment through 2006, but not providing information as to why the Secretary chose to waive those requests).

100. *See, e.g.*, *ED Plays Favorites*, *supra* note 71 (contrasting ED's unjustified months-long delay in reviewing Utah's proposal while approving proposals from Florida and Massachusetts).

101. *See supra* note 53 and accompanying text.

102. *See* Connecticut v. Spellings, 453 F. Supp. 2d 459, 496 (D. Conn. 2006) (holding that without a specific statutory requirement stating that the Secretary must grant a waiver if particular elements are met, the court cannot review waiver denials because there is no standard governing waiver denials).

103. *See supra* note 60 and accompanying text (recognizing the burdens of the waiver application process).

ED should grant waivers only for special cases and treat similar special cases equally.[104] Although waivers are necessary in emergency circumstances, such as Hurricane Katrina,[105] ED should not grant a limited number of waivers for problems that face the vast majority of states and LEAs. Instead, ED should decide whether to exempt all parties regulated from problematic provisions or determine whether to work with Congress to revise the provision. By limiting individual waivers to special cases, ED can reduce frustration and allegations of unequal treatment.[106]

CONCLUSION

NCLB's implementation problems demonstrate the tension between a broad national policy and its application to states and LEAs who have individual circumstances.[107] As Congress decides whether to reauthorize NCLB, members of Congress have a prime opportunity to address NCLB's problems. One of the many revisions necessary to improve NCLB is increasing flexibility. Although flexibility can help states and LEAs raise their schools to national standards,[108] the flexibility needs to come from NCLB itself rather than waivers. In particular, Congress should amend NCLB to allow all states to use alternative methods to measure AYP.[109] Permitting states to use different ways to measure AYP is a reasonable way to increase flexibility and retain accountability, and therefore should not be limited to states who apply and receive waivers. Even though states and LEAs may now see waivers as a more viable approach to increase flexibility than legislative action and judicial challenges, waivers are an unreliable and temporary way to alleviate problems. In the same way that members of Congress came together to overwhelmingly pass NCLB, Congress now has the responsibility to address the problems that have arisen since NCLB's implementation.

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104. *See* Sellers, *supra* note 67, at 939, 944-46. The author explains that special cases are "isolated hardships" and conflicts that rule-makers failed to anticipate. *Id.* The author emphasizes that agencies should be required to write down reasoned decisions to make sure that exceptions are thought through and used as precedent for similar special cases.

105. *See supra* note 41 and accompanying text.

106. *See supra* Part III.A.

107. *See* Sellers, *supra* note 67, at 938 (contending that special exceptions for special cases can reduce the tension between general rules and individualized application that is characteristic of all legal systems).

108. *See* Wallis & Steptoe, *supra* note 4, at 41 (reasoning that local officials who work more closely with students are better equipped to effect "school turnaround").

109. *See supra* notes 91-92 and accompanying text.

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RECENT DEVELOPMENTS

SEARCHING FOR *CHEVRON* IN MUDDY *WATTERS*: THE ROBERTS COURT AND JUDICIAL REVIEW OF AGENCY REGULATIONS

ANN GRAHAM*

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PREFACE

During Chief Justice John Roberts's first two terms at the helm, the Supreme Court decided eleven cases involving judicial review of agency interpretations of federal statutes. These cases presented golden opportunities to clarify the *Chevron* Doctrine,[1] which has been the foundation for determining judicial deference to agency rulings and regulations for more than twenty years.[2] Two Justices, Antonin Scalia and Stephen Breyer, have analyzed judicial deference to agency regulations from an academic perspective[3] in addition to their current focused involvement with the limited number of cases that reach the Supreme Court.[4]

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1. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984). The 1984 decision in *Chevron* marks a watershed in the Supreme Court's approach to judicial review of agency constructions of agency-administered statutes. "*Chevron* is one of the most important decisions in the history of administrative law. It has been cited and applied in more cases than any other Supreme Court decision in history." RICHARD J. PIERCE, JR., ADMININISTRATIVE LAW TREATISE 140 (4th ed. 2002). Innumerable law review articles and cases discuss the *Chevron* doctrine. *See, e.g.*, Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452 (1989) (examining *Chevron* from an early perspective). Farina starts from the premise, as I do, that "[f]or those who study the interaction of courts and agencies, one of the most persistently intriguing puzzles has been to define the appropriate judicial and administrative roles in the interpretation of regulatory statutes." *Id.* at 452.

2. *Chevron* is "the undisputed starting point for any assessment of the allocation of authority between federal courts and administrative agencies." Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 188 (2006).

3. *See generally* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511 (1989); Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363 (1986).

4. During the 2006-2007 term, the Supreme Court accepted seventy-two cases and decided only sixty-eight cases after oral argument. Jonathan H. Adler, *How Conservative Is This Court?*, NAT'L REV. ONLINE, July 5, 2007, http://article.nationalreview.com/print/?q=Y2Y3NjNkM2ZkYTcxNzQwYTBhZWZkNzEyZGYyMWExMjE.

The Roberts Court[5] seemed perfectly positioned to articulate a clear, predictable framework. However, in ten of the eleven decisions discussed in this Article, the Court did not invoke the classic administrative law analysis prescribed by the two-step *Chevron* Doctrine. The minority opinions, on the other hand, frequently railed about the need to apply *Chevron*. This Article reviews each of the eleven cases, searching for a coherent standard to distinguish a case of appropriate exercise of federal administrative authority to interpret a statute from a case in which the courts should strike down an agency's statutory interpretation.

The Introduction to this Article highlights *Watters v. Wachovia Bank, N.A.*[6]—a striking example of the Roberts Court's result-oriented approach to potential *Chevron* cases. Part I lays the groundwork for analyzing *Watters* as well as the other agency interpretation cases reviewed. To provide context, the section includes a brief outline of the *Chevron* Doctrine as generally understood at the end of the Rehnquist Court and the beginning of the Roberts Court, marking disputed areas of the doctrine that could benefit from Supreme Court clarification. Part II reviews individual cases in which the Roberts Court examined a federal agency interpretation of a statute. Based on this case review, Part III provides a detailed composite analysis derived from case categorizations. In this section, trends and predictions can be discerned from the Roberts Court track record. Part IV addresses potential implications for federal government agencies and their interaction with the courts in the future. Legal outcomes frequently depend on the analytical framework selected; therefore, the critical need to identify and apply the appropriate framework in future cases drives this search for the current Supreme Court model used to analyze whether agency interpretations of statutes will stand or fall.

INTRODUCTION: SEARCHING FOR *CHEVRON* IN MUDDY *WATTERS*

Watters v. Wachovia Bank, N.A.,[7] a high-stakes case from the financial institutions arena with worthy opponents on each side, initially motivated this search for a Roberts Court standard. This Article uses *Watters,* for *Chevron* purposes, as an intriguing lens through which to examine and compare administrative law decisions rendered by the Roberts Court. The

5. Chief Justice John G. Roberts, Jr. assumed office Sept. 29, 2005, succeeding the late Chief Justice William H. Rehnquist, for whom Roberts served as a law clerk. Justice Sandra Day O'Connor retired in January 2006 and was replaced by Samuel A. Alito, Jr. on Jan. 31, 2006. The Roberts Court also includes Justices John Paul Stevens, Antonin Scalia (former law professor), Anthony M. Kennedy (former law professor), David H. Souter, Ruth Bader Ginsburg (former law professor), Stephen G. Breyer (former law professor), and Clarence Thomas. *See* The Justices of the Supreme Court, http://www.supremecourtus.gov/about/biographiescurrent.pdf (last visited Jan. 31, 2008).

6. 127 S. Ct. 1559 (2007).

7. *Id.*

impact of these eleven cases, analyzed together, affects all federal agencies and their constituencies.

Back to the spring of 2007: For financial institution lawyers and administrative law scholars, the *Watters* case had it all—competition between the dual state and national bank systems, consumer protection concerns, preemption of state law and states rights issues, the benefits of nationwide banking operations, and most importantly, the potential for clarifying to what extent the courts should defer to federal agency interpretation of statutes, especially when the interpretation is one of federal preemption that increases that same agency's sphere of authority. The Court's decision in this hotly contested case has troubling ramifications for our dual banking system,[8] but the fact that the majority ruled in favor of a federal agency's statutory interpretation is not surprising—until we realize that the majority opinion bypassed *Chevron* altogether. To discover that *Chevron*, the administrative law touchstone of cases involving judicial review of agency interpretation, is somehow "missing in action," is more than enough to trigger a search operation.

I. PARSING THE *CHEVRON* DOCTRINE

A. Chevron*—A Simple Framework for a Complicated Question*

To establish a starting point for this expedition into currently developing Supreme Court doctrine, a short recapitulation of the *Chevron* Doctrine is in order. In 1984, the Supreme Court announced a two-step model for determining when the courts should defer to agency interpretations of statutes.[9] *Chevron* involved judicial review of the Environmental Protection Agency's (EPA) interpretation of a statutory term from the Clean Air Act (CAA).[10] Justice Stevens, writing for a unanimous Court, articulated the key test as:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously

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8. *Id.* at 1566-69. *See generally* Arthur E. Wilmarth, Jr., *The OCC's Preemption Rules Exceed the Agency's Authority and Present a Serious Threat to the Dual Banking System and Consumer Protection*, 23 ANN. REV. BANKING & FIN. L. 225 (2004) (providing extensive discussion of dual banking system issues).

9. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984). This section of the article is not intended to be an exhaustive explication of the *Chevron* doctrine. It briefly sets the stage for the Roberts Court cases.

10. *See id.* at 840-42 (describing EPA's interpretation of the term "stationary source," as compared to that of the reviewing courts).

> expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if 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.[11]

There have been many twists and turns in the more than twenty years since the Rehnquist Court formulated the *Chevron* standard.[12] My purpose is to determine how the Roberts Court has applied, modified, and avoided that standard.

B. Justice Scalia and Justice Breyer

Early *Chevron* scholarship set up two camps that continue to provide a useful contrast: the "strong" reading of *Chevron* vs. the "weak" version.[13] Justice Scalia promotes the "simple," or "strong," reading of *Chevron*.[14] He has been called "the Court's most vocal *Chevron* enthusiast."[15] Justice Breyer, on the other hand, urges a more flexible approach.

As a member of the Roberts Court, Justice Scalia is an articulate force with which to be reckoned in any case that could trigger questions of *Chevron* deference. Although he was not a member of the Court when the *Chevron* case was decided, his 1989 Duke Law Journal article, *Judicial Deference to Administrative Interpretations of Law*,[16] provides excellent insight. In that early analysis, Justice Scalia saw *Chevron* as "a highly important decision—perhaps the most important in the field of administrative law . . . ."[17] Justice Scalia signaled his position with respect to *Chevron* deference from the outset, finding:

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11. *Id.* at 842-43 (1984) (internal footnotes omitted).

12. Administrative law scholars recognized the Court's inconsistency in applying *Chevron* before the 2005-2006 Supreme Court term. *See, e.g.*, PIERCE, *supra* note 1, at 175-91 (focusing on how *Chevron*'s analytical framework has fared prior to the Roberts Court cases discussed here).

13. *See* Richard J. Pierce, Jr., Chevron *and Its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301, 302-03 (1988) (discussing the "strong" and "weak" forms of *Chevron* analysis—a dichotomy apparent as early as 1988).

14. *See* United States v. Mead Corp., 533 U.S. 218, 236-38 (2001) (characterizing the majority's disagreement with Justice Scalia's dissenting position in the case). Justice Souter wrote the Court's opinion in *Mead*. *Id.* at 220. Justice Souter noted that "Justice Scalia would pose the question of deference as an either-or choice" and opposed "Justice Scalia's efforts to simplify." *Id.* at 237-38. In dissent, Justice Scalia said flatly, "To decide the present case, I would adhere to the original formulation of *Chevron*." *Id.* at 256.

15. Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of* Chevron, 73 U. CHI. L. REV. 823, 826 (2006) (suggesting that while Scalia is the least deferential justice, Breyer is the most deferential).

16. Scalia, *supra* note 3.

17. *Id.* at 512.

> [A] fairly close correlation between the degree to which a person is . . . a "strict constructionist" of statutes, and the degree to which that person favors *Chevron* and is willing to give it broad scope . . . . One who finds *more* often (as I do) that the meaning of a statute is apparent from its text and from its relationship with other laws, thereby finds *less* often that the triggering requirement for *Chevron* deference exists.[18]

Justice Scalia is still a "strict constructionist" and he argues vociferously for application of the *Chevron* analysis—even when he has no intention of granting *Chevron* deference because he has settled the question by the only plausible reading of the statute: his own.

Justice Breyer also wrote about *Chevron* soon after the Court announced its decision, and well before he became a Supreme Court Justice. In his 1986 article, *Judicial Review of Questions of Law and Policy*,[19] he addressed what he called "The Problem of the *Chevron* Case."[20] Then-Judge Breyer[21] noted that the *Chevron* opinion may be read to embody a "complex approach,"[22] giving lower courts leeway to determine whether an agency interpretation is a "permissible"[23] construction by allowing them to include "a range of relevant factors."[24] Then and now, Justice Breyer opposes a simple approach to *Chevron* analysis because:

> [T]here are too many different types of circumstances, including different statutes, different kinds of application, different substantive regulatory or administrative problems, and different legal postures in which cases arrive, to allow "proper" judicial attitudes about questions of law to be reduced to any single simple verbal formula . . . . To read *Chevron* as laying down a blanket rule, applicable to all agency interpretations of law, such as "always defer to the agency when the statute is silent," would be seriously overbroad, counterproductive and sometimes senseless.[25]

Justice Breyer continues to advocate for this more flexible reading of *Chevron*. He has been described as "the Court's most vocal critic of a strong reading of *Chevron.*"[26] His approach does not immediately defer to

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18. *Id.* at 521.
19. Breyer, *supra* note 3.
20. *See id.* at 372 (discussing the conflicting interpretations that courts may derive from the *Chevron* language).
21. *See id.* at 363 (naming Justice Breyer's position at the time of the article's publication as Judge for the United States Court of Appeals for the First Circuit).
22. *See id.* at 373 (noting that the wording used in the decision is general and therefore open to different judicial readings).
23. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984).
24. Breyer, *supra* note 3, at 373.
25. *Id.*
26. *See* Miles & Sunstein, *supra* note 15, at 826 (comparing how Justice Breyer and Justice Scalia's opinions differ as well as their practical levels of deference).

the agency's position; however, when the votes are in, he has been "the most deferential in . . . practice"[27]—at least until the end of the Rehnquist Court era.

C. Skidmore*,* Chevron*,* Mead*, and Back Again*

Before the 1984 *Chevron* opinion became the standard for judicial deference to agency interpretation, *Skidmore v. Swift & Co*.[28] provided the following test:

> [T]he rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.[29]

The *Chevron* standard is much more deferential, at least in its strong form, to agency interpretations than is *Skidmore*. The current Justices have not resolved their ongoing debate about whether *Chevron* abrogated *Skidmore*, although on balance, *Skidmore* remains a viable alternative theory.[30] Justice Breyer uses *Skidmore*; Justice Scalia, however, rejects it as too indeterminate, saying that, "totality-of-the-circumstances *Skidmore* deference is a recipe for uncertainty, unpredictability, and endless litigation."[31]

If *Chevron*, which can be read to require judicial deference to agency interpretations, is no longer a reliable analytical model, we are left with the *Skidmore* standard. *Skidmore* does no more than state the obvious: (1) courts will approve agency interpretations if persuaded by a wide-open accumulation of supporting evidence; and (2) they will reject agency interpretations that do not coincide with their own background analysis and conclusions of law.

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27. *Id.* (presenting a quantitative analysis of the Justices' voting records on agency interpretations).

28. 323 U.S. 134 (1944).

29. *Id.* at 140.

30. *See, e.g.*, United States v. Mead, 533 U.S. 218, 234 (2001). In *Mead* the majority opinion states explicitly that "*Chevron* did nothing to eliminate *Skidmore*'s holding . . . ." The decision to remand the case in *Mead* turned on "the possibility that [the Customs ruling] deserves some deference under *Skidmore*" even though it did not, in the Court's opinion, qualify for *Chevron* deference. *Id.* at 227.

31. *Id.* at 250 (Scalia, J., dissenting).

United States v. Mead Corp. is frequently used to modify or explain *Chevron*.[32] *Mead* itself involved a challenge to a U.S. Customs Service's tariff classification made through a letter ruling. One of the significant facts in this case was "the reality that 46 different Customs offices issue 10,000 to 15,000 [letter rulings about tariff classifications] each year."[33] Thus, at a minimum, we would expect this case to clarify the issue of whether *Chevron* deference requires agency interpretation to be established by notice and comment rulemaking or by another standard of formality. Justice Souter, writing for the Court, claimed much more, saying, "We granted certiorari in order to consider the limits of *Chevron* deference owed to administrative practice in applying a statute."[34]

Despite Justice Souter's initial buildup, the *Mead* opinion did not draw any bright lines. The Court gave very flexible guidance about the form of agency interpretation that can warrant deference. In the *Mead* Court's search for congressional intent to delegate authority to grant the type of ruling at issue, the range of acceptable indicia of delegation was broad and open-ended: Congress can show its intent by giving the agency power to engage in adjudication or notice and comment rulemaking, "or by some other indication of a comparable congressional intent."[35]

The *Mead* opinion also drew on language from *Chevron* supporting implicit rather than explicit delegation to the agency.[36] The opinion referred to past Supreme Court decisions in which the court had "sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded."[37]

The bottom line in *Mead* is that, although acceptable agency interpretations assume many forms, the Court knows the type of agency ruling that would merit *Chevron* deference when it sees one—and this Customs ruling was not it.[38] Although the letter ruling was not entitled to

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32. *See infra* Part III. Many of the Roberts Court cases analyzed here include discussion of *Mead* and the composite case analysis that examines trends, including the interaction between *Mead* and *Chevron*.

33. *See Mead*, 533 U.S. at 233.

34. *Id.* at 226 (citation omitted).

35. *Id.* at 227.

36. *Id*. at 229 (expanding on the original language in *Chevron* and emphasizing that agencies can have authority in particular legal areas through implicit congressional authorization).

37. *Id*. at 231. The *Mead* opinion cited *Christensen v. Harris County*, 529 U.S. 576, 587 (2000), for the proposition that some agency interpretations, including policy statements, agency manuals, and enforcement guidelines, are viewed like this Customs letter ruling: "beyond the *Chevron* pale." *Id.* at 220.

38. This paraphrases Justice Stewart's reasoning about "pornography" in which he wrote, "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

Chevron deference, the *Mead* Court awarded a consolation prize: the Customs interpretation might be upheld on remand by application of the *Skidmore* standard.[39]

As the Roberts Court case reviews in Part II demonstrate, Justice Breyer supports the *Chevron*-as-limited-by-*Mead* approach, but Justice Scalia does not. If the Roberts Court cannot agree on a coherent application of *Chevron*, with or without the *Mead* gloss, we may have come full circle to a vague and variable standard for when a court will approve or reject an agency interpretation—such as *Skidmore*.

D. Open Questions

Definitive Supreme Court answers to the following questions in the *Chevron* arena could yield a much higher degree of consistency and predictability in litigation involving federal interpretations of statutes. If these answers were known in advance of agency action, the effect could be greater congruence with a standard known to all parties and therefore, reduced litigation.

1. How is judicial deference to federal agency interpretation of statute affected by the procedure the agency chose to assert its interpretation?[40]

2. How does an agency's statutory interpretation that expands its jurisdiction affect judicial deference?[41]

3. Is a federal agency entitled to deference when it makes a determination that state law is preempted—an interpretation that goes beyond its own substantive, technical expertise?[42] How does the

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39. *Mead*, 533 U.S. at 238 (remanding the case because "the *Skidmore* assessment called for here ought to be made in the first instance by the Court of Appeals").

40. *See* Lisa Schultz Bressman, *How* Mead *Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443 (2005) (analyzing opinions from the courts of appeals indicating confusing inconsistencies regarding whether *Chevron* deference extends only to agency interpretations promulgated through notice and comment rulemaking or whether interpretations issued through informal procedures can also be entitled to judicial deference). However, *Long Island Care at Home, Ltd. v. Coke*, a unanimous decision by the Roberts Court at the very end of the 2006-2007 term, may indicate that the current Supreme Court will favorably consider any form of agency interpretation. 127 S. Ct. 2339, 2349 (2007). That case gave deference to an Advisory Memorandum explaining and defending the agency interpretation, even though the Memorandum was "issued only to [agency] personnel . . . and written in response to this litigation." *Id.*

41. For a discussion of the Supreme Court's failure to resolve whether *Chevron* deference applies to jurisdictional questions, see Bressman, *supra* note 40; Elizabeth Garrett, *Legislating* Chevron, 101 MICH. L. REV. 2637, 2674 (2003).

42. *See* Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 68 (2007) (arguing that "courts would be well advised to leave state law unpreempted, secure in the knowledge that congresspersons will have strong incentives to strengthen the statutes' preemptive force if this is the wish of their constituents").

presumption against preemption interact with deference to agency interpretation?[43]

4. Will the Supreme Court require explicit congressional delegation of interpretive authority to a federal agency? Should courts infer congressional intent for agency authority from silence or from the court's own analysis of legislative and regulatory history?

5. Is the Supreme Court's own reading of the "plain meaning" of the statute the actual rationale applied most often in agency interpretation cases? If so, does this rationale have any predictive value about future case outcomes?

The Roberts Court has had ample opportunity to resolve these questions. Unfortunately, the Court has not answered any of them directly. They remain fair game for future law review articles and inconsistent lower court rulings.[44] With regard to the question of requiring explicit versus implicit delegation, we can draw some conclusions even without a clear holding, by placing the Justices and the cases showing support for one view or the other into an array of categories. After discussing the individual cases in Part II, I have grouped and categorized the eleven cases identified in order to discern trends. Using that approach, it is also possible to posit some present and future directions regarding the "plain language" approach. Given the lineup of Roberts Court cases reviewed, it is not possible—even indirectly—to distill definitive answers to questions about the required formal or informal nature of agency interpretations, about territory-enlarging interpretations, or about agency determinations of preemption. These questions await another case with the requisite fact situation and a Supreme Court willing and able to reach a clear ruling.

II. *CHEVRON* DEFERENCE AND THE ROBERTS COURT

The Court's opinion in *Watters*, considered here as a starting point for evaluating the Roberts Court's views on *Chevron* deference, is inconsistent with the expectation of most administrative lawyers—not for its result, which supported the agency, but for its failure to follow the classic *Chevron* analysis. My analysis of eleven Roberts Court cases involving potential application of *Chevron* yields several conclusions that are critical

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43. *See* Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996) (making a clear statement of presumption *against* preemption). *But see* Erwin Chemerinsky, *Empowering States When It Matters: A Different Approach to Preemption*, 69 BROOK. L. REV. 1313, 1318-24 (2004) (advocating presumption *in favor of* preemption); Mary J. Davis, *Unmasking the Presumption in Favor of Preemption*, 53 S.C. L. REV. 968 (2002) (suggesting presumption *in favor of* preemption).

44. *See* Bressman, *supra* note 40, at 1445 (reviewing courts of appeals' opinions after *Mead* was decided by the Supreme Court in 2001 and concluding that they have been inconsistent).

to the practice of administrative law in the future: the *Watters* approach is not an aberration. Classic *Chevron* analysis is dead. In place of *Chevron*, the older *Skidmore* approach is a better predictor of whether courts will uphold or overrule federal agency interpretations of statute. We can also expect courts generally to follow a model like *Watters*, which bypasses any consideration of agency regulations and goes right to the court's own reading of the statute.

Research yields three agency interpretation cases from the 2005-2006 Supreme Court term and eight cases, including *Watters*, from 2006-2007, the second year of the Roberts Court. No opinions in these cases from the second year had been released prior to oral argument in the *Watters* case. There was a breathing space after the November 29, 2006 oral arguments in *Watters* and *Massachusetts v. EPA* (another agency interpretation case argued on the same day) then the Court published the eight second-year cases in the next three months, between April 2, 2007 and June 25, 2007.[45] Following is a discussion of each of the eleven Roberts Court cases, including *Watters*, that involved judicial review of agency interpretation. At the beginning of each case analysis, I characterize each decision as: For or Against the Agency; For or Against the State; For or Against Public Interest Groups; For or Against Business Interests; and "Liberal" or "Conservative."[46] Following the case review is an analysis of trends and predictions that can be derived from these eleven Roberts Court cases.

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45. Of the eight second-year cases, the first two opinions were announced on Apr. 2, 2007. Another three were published on Apr. 17, 2007. Because these opinions were so tightly clustered in time, we have reason to expect consistency. In Part III of this Article, I examine how this expectation played out.

46. Miles & Sunstein, *supra* note 15. This thought-provoking article used similar case categorizations in analyzing the Rehnquist Court approach to *Chevron* deference. Miles and Sunstein analyzed eighty-four Supreme Court cases from 1989 through 2005 that reviewed agency interpretations of law. Sixty-nine of those decisions applied *Chevron* analysis and fifteen did not expressly apply *Chevron*. By comparison, my analysis of Roberts Court cases identified ten cases that did not follow a strict *Chevron* analysis and only one that did. Miles and Sunstein concluded that their "Realist Hypothesis" (that Supreme Court Justices will vote to affirm a federal agency's conclusion when it conforms with their policy judgments, regardless of whether the statutory text is clear or ambiguous) best explains the Rehnquist Court decisions. The Roberts Court decisions examined in Parts II and III of my Article support this Realist Hypothesis to an even greater degree. Miles and Sunstein found that the "justices enjoy wide discretion in deciding whether to apply *Chevron* and that they employ *Chevron* deference strategically." *Id.* at 842. My analysis here shows this finding to be true of the Roberts Court as well.

Categorizing the Justices as "liberal" or "conservative" may be somewhat artificial, but it establishes a means to determine whether the decisions analyzed follow ideological lines. I have used Miles and Sunstein's categorization of Justices Stevens, Souter, Breyer, and Ginsburg as "liberal" and Justices Scalia and Thomas as "conservative," with Justices O'Connor (no longer on the Court) and Kennedy as "moderate" or "swing" votes. *Id.* at 834. I have assigned Chief Justice Roberts and Justice Alito to the "conservative" group. I have also categorized the case decisions as "conservative" or "liberal" using the criteria employed by Miles and Sunstein, based chiefly on the identity of the party challenging the agency regulation, e.g., "Conservative" if the decision favors the agency when challenged

A. Gonzales v. Oregon[47]

The Supreme Court heard arguments for *Gonzales v. Oregon* on October 5, 2005, during the first week of Chief Justice Roberts's tenure and decided the case on January 17, 2006. The decision was 6-3, with Justice Kennedy writing the Court's opinion, joined by Justices Stevens, O'Connor (a member of the Roberts Court only during the first three months of the first term), Souter, Ginsburg, and Breyer. Justice Scalia filed a dissenting opinion in which Chief Justice Roberts and Justice Thomas joined. Justice Thomas also filed a dissenting opinion. This decision can be categorized as: Against the Agency (U.S. Attorney General); For the State; For Public Interest Groups (patients seeking to use physician assisted suicide); and "Liberal."[48]

The *Gonzales* case involved a conflict between state law and a federal agency's interpretive rule. The U.S. Attorney General issued a rule interpreting the federal Controlled Substances Act (CSA)[49] to prohibit doctors from prescribing regulated drugs for use in physician-assisted suicide, notwithstanding the fact that the Oregon Death With Dignity Act [50] permits the practice.

Although the *Gonzales* case rejected the application of any deference and declared the federal interpretive rule invalid, it provides clear insight into how the Roberts Court viewed agency deference at the beginning of the term. As a benchmark, the majority opinion laid out in simple terms, three types of deference that the courts might afford to a federal agency: (1) *Auer* deference;[51] (2) *Chevron* deference;[52] and (3) *Skidmore* deference.[53]

Substantial deference under the *Auer* standard is appropriate for an "administrative rule . . . interpret[ing] the issuing agency's own ambiguous regulation,"[54] and calls for treating the agency's interpretation as "controlling unless plainly erroneous or inconsistent with the regulation."[55] Justice Kennedy, writing for the Court, distinguished *Auer* deference from

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by a public interest group and "Liberal" if the decision favors the agency when challenged by a business interest. *Id.* at 830-31.

47. 546 U.S. 243 (2006).

48. *See* discussion *supra* note 46.

49. 21 U.S.C. § 801 (2000).

50. OR. REV. STAT. §§ 127.800-127.897 (1994) (holding that deference is due to an agency's interpretation of its own rule).

51. *See* Auer v. Robbins, 519 U.S. 452 (1997).

52. *See supra* Part I.A.

53. Skidmore v. Swift & Co., 323 U.S. 134 (1944).

54. Gonzales v. Oregon, 546 U.S. 243, 255 (2006).

55. *Id.* at 256 (quoting *Auer*, 519 U.S. at 461).

Chevron deference. In his view, courts apply *Auer* deference when a case involves interpreting an agency regulation, and *Chevron* deference when the case involves interpretation of an ambiguous statute.[56]

Justice Kennedy used *Mead*[57] to explain and limit *Chevron* deference which, he said, should be used only "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."[58] The *Mead* catch phrase is: *Chevron* deference "is not accorded merely because the statute is ambiguous and an administrative official is involved."[59]

According to the *Gonzales v. Oregon* opinion, *Skidmore* deference was not displaced by *Chevron*, but remains a third, very limited deference standard. Under *Skidmore* analysis, "the [federal agency] interpretation is 'entitled to respect' only to the extent it has the 'power to persuade.'"[60] Justice Kennedy relied on *Christensen v. Harris County*[61] to bolster this post-*Chevron* application of *Skidmore* deference.[62]

Interestingly, after presenting a tutorial on the law of agency deference, the majority opinion in *Gonzales* did not defer to the agency under any theory because "the underlying regulation does little more than restate the terms of the statute itself."[63] The Court went on to note that, "[s]imply put, the existence of a parroting regulation [did] not change the fact that the question here is not the meaning of the regulation but the meaning of the statute."[64] In his dissent, Justice Scalia questioned this "newly invented" parroting exemption from agency deference.[65] Justice Kennedy, writing for the Court, expressly rejected both *Auer* and *Chevron* deference.[66] In accordance with *Skidmore* analysis, he concluded that the Attorney General's interpretation was not persuasive and thus, not entitled to deference.[67]

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56. *Id.* at 255.
57. 533 U.S. 218, 226-27 (2001).
58. *Gonzales*, 546 U.S. at 255-56 (quoting *Mead*, 533 U.S. at 226-27).
59. *Id.* at 258.
60. *Id.* at 256 (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).
61. *See* 529 U.S. 576, 587 (2000) (relying on *Skidmore* for deference to opinion letters only when the letters were persuasive).
62. *Gonzales*, 546 U.S. at 269.
63. *Id.* at 257.
64. *Id.*
65. *Id.* at 280 (Scalia, J., dissenting) (suggesting that the agency's interpretation might still survive).
66. *Id.* at 258 (majority opinion) (refusing to defer to the Interpretive Rule on either *Auer* or *Chevron* grounds).
67. *Id.* at 268-69.

Unlike the *Watters* decision, in this balancing of state and federal authority, the Roberts Court ruled in the state's favor. Unquestionably, this case differs from *Watters* in that the federal statute in question contained an explicit rejection of congressional intent to "occupy the field" to the exclusion of any state law on the same subject matter unless there was positive conflict.[68] Nevertheless, the opinion contains strong philosophical statements that contrast sharply with the *Watters* majority opinion. For example, the Court found in *Gonzales* that congressional silence regarding federal agency authority to override state law "is understandable given the structure and limitations of federalism, which allow the States 'great latitude under their police powers to legislate . . . .'"[69]

Another contrast with *Watters* is the majority opinion's focus on explicit delegation provisions. The Court in *Gonzales* concluded that:

> Congress is unlikely to alter a statute's obvious scope and division of authority through muffled hints, the background principles of our federal system also belie the notion that Congress would use such an obscure grant of authority to regulate areas traditionally supervised by the States' police power. It is unnecessary even to consider the application of clear statement requirements, or presumptions against preemption, to reach this commonsense conclusion.[70]

Justice Scalia, on the other hand, opined in his *Gonzales* dissent that:

> The Court's exclusive focus on the *explicit* delegation provisions is, at best, a fossil of our pre-*Chevron* era; at least since *Chevron*, we have not conditioned our deferral to agency interpretations upon the existence of explicit delegation provisions. *United States v. Mead Corp*. left this principle of implicit delegation intact.[71]

Both Justice Scalia and Justice Kennedy seem to have flip-flopped on the issue of explicit delegation, taking the opposite of their positions articulated in *Gonzales* by the time of *Watters*.[72] In *Gonzales*, Justice Scalia strongly opposed a requirement for explicit delegation, as demonstrated by the language quoted above, but in *Watters*, discussed earlier in the Introduction, Justice Scalia agreed with the dissenting opinion requiring explicit delegation before a court will grant deference to an agency interpretation.

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68. 21 U.S.C. § 903 (2000) (rejecting "field preemption" but recognizing the potential for "conflict preemption").

69. *Gonzalez*, 546 U.S. at 270 (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 475 (1996)).

70. *Id.* at 274 (citations omitted).

71. *Id.* at 294 (Scalia, J., dissenting) (citation omitted).

72. *See* discussion *infra* Part II.F.

Although Justice Kennedy later voted with the majority in *Watters*, finding explicit delegation unnecessary, in *Gonzales* he favored explicit delegation:

> The idea that Congress gave the Attorney General such broad and unusual authority through an implicit delegation in the [statute] is not sustainable. "Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."[73]

In both *Gonzales* and *Watters*, the Supreme Court skipped over the agency's statutory interpretation and conducted its own statutory analysis, making its decision on a *de novo* reading of the statute. While this could be viewed as *Chevron* step one (is congressional intent clear from the statute's language?), the Court appears to bypass any consideration of congressional intent and decide these cases based on its own independent thinking.

B. S.D. Warren Co. v. Maine Board of Environmental Protection[74]

The Supreme Court heard arguments for *S.D. Warren Co. v. Maine Board of Environmental Protection* on February 21, 2006, and decided the case on May 15, 2006. Justice Souter authored this unanimous opinion. However, Justice Scalia chose not to join the portion of the opinion discussing legislative history.

This decision can be characterized as: For the Agency (Federal Energy Regulatory Commission); Against Business Interests (hydroelectric dam operator); For the State; For Public Interest Groups; and "Liberal."[75] The Court made an initial determination that the *Chevron* framework did not apply.[76]

S.D. Warren sought authorization from the Federal Energy Regulatory Commission (FERC) to renew federal licenses for its hydroelectric dams in Maine.[77] The Clean Water Act (CWA) provides that if a dam may result in "discharge" into navigable waters, a federal license may not be issued without state certification, and in this case, FERC required state certification.[78] The CWA does not define "discharge"; therefore, the Supreme Court found that the courts are "left to construe [the statutory language] 'in accordance with its ordinary or natural meaning.'"[79] Although the Supreme Court affirmed FERC's decision, the Court read the

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73. *Gonzalez*, 546 U.S. at 267 (quoting Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 468 (2001)).
74. 126 S. Ct. 1843 (2006).
75. *See supra* note 46.
76. *S.D. Warren Co*., 126 S. Ct. at 1848-49.
77. *Id.* at 1847.
78. *Id.* at 1846-47.
79. *Id.* at 1847 (quoting FDIC v. Meyer, 510 U.S. 471, 476 (1994)).

statute and arrived at its own definition of the word "discharge," in the "common sense" meaning of the term, to support the determination that "a dam does raise a potential for a discharge and state approval is needed."[80]

The Supreme Court offered a weak explanation for not utilizing *Chevron* analysis: that FERC had not formally settled the definition and had not adequately set forth its reasoning. The Court said that "expressions of agency understanding" in recent adjudication "do not command [*Chevron*] deference,"[81] but it failed to acknowledge contrary pronouncements in its own cases.[82] This case strongly suggests that Justice Breyer's preference for a case-by-case approach is gaining ground over Justince Scalia's preference for the simple application of *Chevron*.[83]

C. Rapanos v. United States[84]

The Supreme Court heard arguments for *Rapanos v. United States* on February 21, 2006, and decided the case on June 19, 2006. The Court reached a decision categorized as: Against the Agency (Army Corps of Engineers); For the State (because the decision favors states' rights); For Business Interests (developers); Against Public Interest Groups (environmental protectionists); and "Conservative."[85] This opinion supports states' rights by limiting federal agency intrusion, although in this case, thirty-three states filed amicus briefs which favored ceding their traditional jurisdiction and responsibility to the Army Corps of Engineers. The plurality opinion did not discuss *Chevron* deference at all, instead it relied on its own plain reading of the statute to contradict the federal agency's interpretation.

Justice Scalia wrote the plurality opinion, joined by Chief Justice Roberts and Justices Thomas and Alito. The Chief Justice wrote a separate concurring opinion. Justice Kennedy concurred in the judgment. Justice Stevens authored a dissenting opinion that Justices Souter, Ginsburg, and Breyer joined. Justice Breyer also submitted a separate dissenting opinion.

Justice Scalia, writing for the plurality, found that the CWA term "navigable waters" did not have the expansive meaning that the Army Corps of Engineers gave it in a regulation, in administrative enforcement

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80. *Id.* at 1846.
81. *Id.* at 1848.
82. *See generally* United States v. Mead, 533 U.S. 218, 231 n.12 (2001) (listing cases in which the Court reviewed agency adjudications and applied *Chevron* deference).
83. *See* Sunstein, Chevron *Step Zero*, *supra* note 2, at 192-93 (discussing the "intense and longstanding disagreement between the Court's two administrative law specialists" and suggesting that while Justice Scalia has historically triumphed, Justice Breyer has recently celebrated significant victories).
84. 126 S. Ct. 2208 (2006).
85. *See* discussion *supra* note 46.

proceedings, and in judicial litigation.[86] This decision presents an interesting comparison with *Watters*. What is not surprising about the two decisions is that Justices Scalia and Breyer were on opposite sides in both cases. What is surprising is the degree of inconsistency throughout the Court with respect to whether a particular Justice supported or opposed allowing an agency to expand its jurisdiction through statutory interpretation.

Rapanos was a pro-business decision limiting a federal agency's jurisdictional reach. Justice Scalia and the Court's other "conservative" Justices constituted the plurality in *Rapanos*; Justice Kennedy was the swing vote.

Watters was also a pro-business decision, but it upheld an aggressive federal agency's expansion of its own jurisdiction. In *Watters*, Justice Kennedy again joined the majority, this time including "liberal" Justices Ginsburg, Souter, and Breyer and "conservative" Justice Alito.

Justice Stevens, author of a dissent in *Rapanos*, in which he argued in favor of expanding an agency's jurisdiction by means of its own statutory interpretation, also authored the dissent in *Watters* in which he took an inconsistent position, opposing an agency's jurisdictional expansion through its own regulation. Chief Justice Roberts and Justice Scalia joined Justice Stevens's *Watters* dissent; however, their positions in these two cases remained consistent in opposing a federal agency's efforts to bootstrap its way into expanded jurisdiction by broadly construing a statutory term.

Justices Alito and Kennedy moved from a restrictive statutory interpretation in *Rapanos* to an expansive statutory analysis supporting the federal agency in *Watters*. Justices Ginsburg, Souter, and Breyer also changed from voting against a jurisdiction-expanding agency interpretation in *Rapanos* to voting for a jurisdiction-expanding agency interpretation in *Watters*.

The plurality opinion in *Rapanos* considered prior Supreme Court CWA cases and reacted adversely to the Army Corps of Engineers's incremental expansion of its jurisdiction. The plurality found that because the Court did not rein in the agency sooner, "the Corps adopted increasingly broad interpretations of its own regulations under the [Clean Water] Act"[87] and used subsequent agency rules to "clarify" the reach of its expanding jurisdiction.[88]

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86. *Rapanos*, 126 S. Ct. at 2225.
87. *Id.* at 2216.
88. *Id. Compare id.*, *with* Watters v. Wachovia Bank, N.A., 127 S. Ct. 1559, 1577-78 (2007) (describing how the OCC's "clarifying" regulation broadened its jurisdiction to cover operating subsidiaries of national banks).

In *Rapanos*, Justice Scalia conducted his own analysis of the "plain language of the statute" and the "commonsense understanding of the term."[89] He concluded that his interpretation was the "only natural definition of the term"[90] and the "only plausible interpretation."[91] He found that even if the statutory phrase at issue was ambiguous, the Court would "ordinarily expect a 'clear and manifest' statement from Congress to authorize an unprecedented intrusion into traditional state authority."[92] Justice Scalia gave no weight to the theory of longstanding agency interpretation as an indication of congressional delegation by deliberate acquiescence. In characteristically colorful metaphor, he criticized it as "a sort of [thirty]-year adverse possession that insulates disregard of statutory text from judicial review."[93] He reminded the dissenters that "Congress takes no governmental action except by legislation."[94]

Justice Scalia did not discuss *Chevron* deference, but instead relied on his own "plain meaning" interpretation of the statute. Chief Justice Roberts's concurrence did acknowledge *Chevron*, recognizing that "[a]gencies delegated rulemaking authority under a statute such as the [CWA] are afforded generous leeway by the courts in interpreting the statute they are entrusted to administer."[95] He opined that the Army Corps of Engineers "would have enjoyed plenty of room to operate in developing *some* notion of an outer bound to the reach of their authority"[96] by rulemaking; however, "the Corps chose to adhere to its essentially boundless view of the scope of its power. The upshot [of the matter] is another defeat for the agency."[97] Clearly, this federal agency's efforts to expand its own jurisdiction represented a strong negative factor for the Chief Justice. However, the Chief Justice concurred in the judgment, not because he agreed with the plurality's reasoning, but rather because he found that neither the agency nor the lower courts had properly considered various issues; therefore, both he and the plurality favored remand.

Justice Stevens, writing for the dissent, found this case to be "a quintessential example of the Executive's reasonable interpretation of a statutory provision."[98] The focus on *Chevron* deference is consistent with Justice Stevens's dissent in *Watters*. Another remarkable aspect of Justice

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89. *Rapanos*, 126 S. Ct. at 2222.
90. *Id.* at 2220.
91. *Id.* at 2225.
92. *Id.* at 2224 (quoting BFP v. Resolution Trust Corp., 511 U.S. 531, 544 (1994)).
93. *Id.* at 2232.
94. *Id.* at 2231.
95. *Id.* at 2235-36 (Roberts, C.J., concurring) (citing Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-45 (1984)).
96. *Id.* at 2236.
97. *Id.*
98. *Id.* at 2252 (Stevens, J., dissenting) (citing *Chevron*, 467 U.S. at 842-45).

Stevens's dissenting opinion in *Rapanos* is his less than collegial characterization of the plurality Justices' viewpoint as "antagonism to environmentalism."[99] In turn, the plurality Justices criticized Justice Stevens's rationale as "policy-laden."[100]

Like Justice Stevens's dissent, Justice Breyer's separate dissenting opinion called for resolution of these cases through the application of *Chevron* deference to agency regulations. To head off any confusion upon remand, Justice Breyer called for the Army Corps of Engineers "to write new regulations, and speedily so."[101]

D. Massachusetts v. EPA[102]

The Supreme Court heard arguments for *Massachusetts v. EPA* on November 29, 2006, and decided the case on April 2, 2007. It presents the mirror image of the *Watters* case, which was argued the same day. *Massachusetts v. EPA* is characterized as: Against the Agency (EPA); Against Business Interests (automobile manufacturers); For Public Interest Groups (environmentalists); For the States; and "Liberal."[103] Compare this with the *Watters* case characterization: For the Agency; For Business Interests; Against Public Interest Groups; Against the States; and "Conservative."[104]

In this case, the Commonwealth of Massachusetts sought to compel the EPA to conduct a rulemaking, while the agency argued that it lacked statutory authority to extend its jurisdictional reach by regulation.[105] In *Watters*, the federal agency (Office of the Comptroller of the Currency) did issue a regulation "clarifying" and extending its jurisdiction over state objection.[106] Justice Stevens wrote the majority opinion in *Massachusetts v. EPA* and the dissenting opinion in *Watters*.

The majority did not apply *Chevron* analysis in its review of EPA's denial of a rulemaking petition that the Commonwealth of Massachusetts and nineteen public interest groups had filed requesting EPA to regulate greenhouse gas emissions from new motor vehicles pursuant to the CAA.

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99. *Id.* at 2259 n.8.
100. *Id.* at 2229 (plurality opinion).
101. *Id.* at 2266 (Breyer, J., dissenting).
102. 127 S. Ct. 1438 (2007).
103. *See* discussion *supra* note 46.
104. *See* discussion *supra* note 46.
105. Massachusetts v. EPA, 127 S. Ct. at 1450.
106. The named petitioner in *Watters* was the Michigan Commissioner of the Michigan Office of Insurance and Financial Services. Forty-four states and the District of Columbia filed an amicus brief supporting Watters and opposing both Wachovia Bank, N.A., and its primary federal regulator, the OCC. Watters v. Wachovia Bank, N.A., 127 S. Ct. 1559 (2007).

Instead, the Court conducted its own reading of the statute and ruled against the agency on general Administrative Procedure Act grounds.[107]

EPA offered two reasons for its denial of the rulemaking petition. First, EPA argued that the CAA did not authorize it to issue mandatory regulations to address global warming—climate change being so important that unless Congress spoke with "exacting specificity," it could not have intended for the agency to address it. Second, EPA asserted that even if the agency had authority to set greenhouse gas emission standards, it would have been unwise to do so at that time.[108] The Court found that EPA had refused to comply with a clear statutory command, that it had offered no reasoned explanation for its refusal, and that EPA's denial of the rulemaking petition was "arbitrary, capricious, . . . or otherwise not in accordance with law."[109]

Chief Justice Roberts's dissenting opinion addressed only the question of standing. He argued that the Commonwealth of Massachusetts lacked standing to challenge the federal agency's refusal to conduct rulemaking proceedings.[110] Justice Scalia, on the other hand, based his dissenting opinion squarely on *Chevron*:

> EPA's interpretation of the discretion conferred by the statutory reference to "its judgment" is not only reasonable, it is the most natural reading of the text. The Court [in its majority opinion] nowhere explains why this interpretation is incorrect, let alone why it is not entitled to deference under *Chevron* . . . ."[111]

E. Environmental Defense v. Duke Energy Corp.[112]

The Supreme Court heard arguments for *Environmental Defense v. Duke Energy Corp.* on November 1, 2006, and decided the case on April 2, 2007. This is another case involving EPA and the CAA. This decision is categorized as: For the Agency (EPA); For Public Interest Groups (environmentalists); Against Business Interests (generator plant owner); and "Liberal."[113] In this case, the United States sued the owner of coal-

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107. Massachusetts v. EPA, 127 S. Ct. at 1460 (rejecting EPA's interpretation that the Clean Air Act did not authorize EPA to regulate greenhouse emissions by new motor vehicles).

108. *Id.* at 1462-63 (discussing EPA's policy reasons to delay agency response to global warming issues).

109. *Id.* at 1463; *cf.* 42 U.S.C. § 7607(d)(9)(A) (2000) (authorizing courts to overturn actions judged to be arbitrary and capricious).

110. Chief Justice Roberts recited the elements of the standing requirement: (1) a personal injury; (2) that is fairly traceable to the allegedly unlawful conduct; and (3) that is likely to be redressed by the requested relief. Massachusetts v. EPA, 127 S. Ct. at 1464 (Roberts, C.J., dissenting) (quoting DaimlerChrysler v. Cuno, 126 S. Ct. 1854, 1861 (2006)).

111. Massachusetts v. EPA, 127 S. Ct. at 1473 (Scalia, J., dissenting).

112. 127 S. Ct. 1423 (2007).

113. *See* discussion *supra* note 46.

fired electricity generating plants for violations of the CAA, and environmental groups intervened as plaintiffs.[114] The Fourth Circuit Court of Appeals affirmed a District Court grant of summary judgment in favor of the plant owner, which claimed that EPA was inconsistent in its statutory interpretations and had retroactively targeted twenty years of accepted practice.[115] The Supreme Court vacated the judgment and remanded the case to the District Court.[116]

Justice Souter penned the Court's opinion joined by all the Justices except Justice Thomas, who concurred in part and filed a separate opinion. The Court held that EPA was not required to interpret a statutory term congruently in its regulations promulgated pursuant to two separate sections of the CAA.[117] Rather than basing its decision on *Chevron* deference, the Court relied on *United States v. Cleveland Indians Baseball Co.*[118] In that case, the Court rejected a categorical rule that would have required the resolution of ambiguities in identical statutory terms by ascribing the same meaning to both (i.e., treating the terms identically).[119] Justice Souter, again with no reference to *Chevron*, pointed out that in *Cleveland Indians*, "we gave 'substantial judicial deference' to the 'longstanding,' 'reasonable,' and differing interpretations adopted by [the agency] . . . in its regulations . . . ."[120] Articulating a new non-*Chevron* standard for judging agency discretion, Justice Souter wrote, "EPA's construction need do no more than fall *within the limits of what is reasonable*, as set by the Act's common definition."[121]

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114. *Duke Energy Corp.*, 127 S. Ct. at 1430 (alleging that the respondent's modifications to its coal burning plants violated the Act).

115. *Id.* at 1436-37.

116. *Id.* at 1437.

117. *Id.* at 1433-34.

118. 532 U.S. 200 (2001).

119. *See id.* at 217-18 ("It is, of course, true that statutory construction 'is a holistic endeavor' and that the meaning of a provision is 'clarified by the remainder of the statutory scheme . . . [when] only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.'"). The *Cleveland Indians* case could, in some respects, be read as foreshadowing the majority's analysis in *Watters*. Justice Ginsburg authored both opinions. Neither *Cleveland Indians* nor *Watters* applied *Chevron* analysis, but rather involved the Court's own reading of statute and a "holistic" statutory scheme to find in favor of the federal agency. Both cases found that Congress, though providing no express language, had given approval to the agencies' interpretations because it did not affirmatively overrule them. *See also infra* Part II.F.

120. *Duke Energy Corp.*, 127 S. Ct. at 1433 (discussing the Court's willingness, where appropriate, to ascribe different meanings to identical terms within the same statute).

121. *Id.* at 1434 (emphasis added).

F. Watters v. Wachovia Bank, N.A.[122]

The Supreme Court heard arguments for *Watters v. Wachovia Bank, N.A.* on November 29, 2006, and decided the case on April 17, 2007. The case can be characterized as: For the Agency (Office of the Comptroller of the Currency); For Business Interests (national banks and their operating subsidiaries); Against Public Interest Groups (consumer protection advocates); Against the States; and "Conservative."[123]

1. The Majority Opinion

Justice Ginsburg delivered the opinion of the Court, joined by Justices Kennedy, Souter, Breyer, and Alito. Justice Stevens (author of the *Chevron* opinion) wrote a dissenting opinion, joined by Justice Scalia and Chief Justice Roberts. Justice Thomas took no part in the case. The *Watters* case came to the Supreme Court on appeal from a Sixth Circuit Court of Appeals decision, which held that "the Comptroller's regulations preempt conflicting Michigan laws."[124]

Wachovia Mortgage Corporation held a corporate charter from the State of Michigan. Under a Michigan consumer protection statute, state-chartered corporations engaged in mortgage lending were required to register with the Michigan Office of Insurance and Financial Services. Wachovia Mortgage Corporation originally registered in Michigan but terminated its registration when it became a wholly-owned "operating subsidiary" of the national bank.[125]

Michigan Financial Services Commissioner Linda Watters advised the mortgage corporation that, without a Michigan registration, it could no longer make mortgage loans in Michigan. Wachovia Bank, N.A., and Wachovia Mortgage Corporation filed suit, arguing that a regulation promulgated by the federal regulator of national banks preempted the Michigan law.[126]

The regulation at issue provided that "State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank."[127] The Comptroller of the Currency (OCC), as federal regulator, has exclusive "visitorial powers" over national banks,[128] meaning that no other entity can examine or supervise a national bank. By adopting the regulation cited above, the OCC "clarified" its exclusive visitorial

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122. 127 S. Ct. 1559 (2007).
123. *See* discussion *supra* note 46.
124. *See* Wachovia Bank, N.A. v. Watters, 431 F.3d 556, 563 (6th Cir. 2005).
125. *Id.* at 558.
126. *Id.*
127. 12 C.F.R. § 7.4006 (2007).
128. *See* 12 U.S.C. § 484(a) (Supp. V 2005).

power over "operating subsidiaries" as well as national banks. Wachovia prevailed at the district court level and again before the Sixth Circuit. Commissioner Watters appealed to the Supreme Court.

Perhaps the most striking aspect of the Supreme Court's majority opinion was the fact that it did not turn on judicial deference to agency interpretation at all. In addition to the Sixth Circuit opinion in the *Watters* case, the Second,[129] Fourth,[130] and Ninth Circuit[131] Courts of Appeals had all ruled in favor of national banks and their federal regulator—the OCC. Each of these decisions, as well as briefs and arguments in the *Watters* case, asserted preemption of state laws by OCC regulation. The Supreme Court, however, based its finding of preemption directly on the National Bank Act (NBA),[132] despite the fact that the NBA does not use the term "operating subsidiary" nor does it expressly declare state laws impacting "operating subsidiaries" preempted.

The Court in *Watters* inferred congressional intent from its own interpretation of legislative and regulatory history and from the fact that Congress had not overruled applicable OCC regulations.[133] This opinion said nothing about whether a federal agency should receive deference when it expands its own jurisdiction by regulation. It cavalierly dismissed any need to deal with the question of whether an agency's determination of preemption is entitled to deference.[134] It did not satisfactorily explain why it did not follow the presumption against preemption,[135] especially with regard to a state consumer protection statute—traditionally an area reserved to the states. It completely rejected any Tenth Amendment claim.[136] In short, the *Watters* opinion represents a troubling departure from the expected *Chevron* framework. It may be possible, however to limit the scope of *Watters* to the banking arena. The majority opinion referred to a

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129. Wachovia Bank, N.A. v. Burke, 414 F.3d 305, 321 (2d Cir. 2005).
130. Nat'l City Bank of Indiana v. Turnbaugh, 463 F.3d 325 (4th Cir. 2006).
131. Wells Fargo Bank, N.A. v. Boutris, 419 F.3d 949, 966-67 (9th Cir. 2005).
132. *See* Watters v. Wachovia Bank, N.A, 127 S. Ct. 1559, 1567-69 (2007) ("[W]hen state prescriptions significantly impair the exercise of authority, enumerated or incidental under the NBA, the State's regulations must give way.").
133. I credit a colleague, who remains nameless for his or her own protection, for calling this the "stop me before I regulate again" school of federal agency assumption of congressional delegation.
134. "Because we hold that the NBA itself—independent of OCC's regulation—preempts the application of the pertinent Michigan laws . . ., we need not consider the dissent's lengthy discourse on the dangers of vesting preemptive authority in administrative agencies." *Watters*, 127 S. Ct. at 1572 n.13.
135. See *supra* notes 42-43 for an explanation of the presumption against preemption.
136. *Watters*, 127 S. Ct. at 1573 (concluding briefly that the Tenth Amendment argument is "unavailing").

string of prior Supreme Court decisions supporting the OCC,[137] which may indicate that the *Watters* decision turned more on the OCC's favored status than on any other reasoned rationale.

2. The Minority Opinion

Justice Stevens's dissenting opinion in *Watters* opened with the following cannon shot:

> Congress has enacted no legislation immunizing national bank subsidiaries from compliance with nondiscriminatory state laws regulating the business activities of mortgage brokers and lenders. Nor has it authorized an executive agency to preempt such state laws whenever it concludes that they interfere with national bank activities. Notwithstanding the absence of relevant statutory authority, today the Court endorses an agency's incorrect determination that the laws of a sovereign State must yield to federal power.[138]

The dissent called for application of the *Chevron* analysis, but rejected *Chevron* deference. Although the minority Justices would have given "some weight" to expert agency opinions regarding which state laws conflict with a federal statute, they found that "when an agency purports to decide the scope of federal preemption, a healthy respect for state sovereignty calls for something less than *Chevron* deference."[139]

According to Justice Stevens, the majority engaged in its own reading of the NBA, relying on their own interpretation of congressional intent through a patching together of various statutes and congressional silence in the face of an agency regulation.[140] The dissenting Justices found no support for that reading. This is not the *Chevron* way—and it is not the way the dissent would have adopted.[141]

Justice Stevens did not use the term "*Chevron* step one," but he unmistakably found that that Congress had expressed no intent to preempt

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137. Beneficial Nat'l Bank v. Anderson, 539 U.S. 1 (2003); Barnett Bank of Marion County, N.A. v. Nelson, 517 U.S. 25 (1996); NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251 (1995); Franklin Nat'l Bank of Franklin Square v. New York, 347 U.S. 373 (1954).

138. *Watters*, 127 S. Ct. at 1573 (Stevens, J., dissenting).

139. *Id.* at 1584.

140. *Id.* at 1578 (arguing that the majority's reading of the National Bank Act (NBA) reaches an untenable and unsupported conclusion).

141. Justice Stevens expressed amazement at the majority's determination that the NBA settled all questions at issue, noting that each of the four Circuit Courts of Appeals which had ruled on similar cases had considered agency preemption claims to turn on whether the courts would extend *Chevron* deference to agency regulation, saying:

> I must consider (as did the four Circuits to have addressed this issue) whether an administrative agency can assume the power to displace the duly enacted laws of a state legislature.
>
> To begin with, Congress knows how to authorize executive agencies to preempt state laws. It has not done so here.

Id. at 1582 (citations omitted).

state consumer protection laws nor had it spoken to the OCC's authority to decide preemption.[142] The dissent also found that Congress had not spoken directly to the issue of the existence of "operating subsidiaries," much less their ability to avoid state consumer protection laws.[143] Again, without using the term "*Chevron* step two," the dissenting opinion clearly found the agency interpretation "impermissible."

G. Zuni Public School District No. 89 v. Department of Education[144]

The Supreme Court heard arguments for *Zuni Public School District No. 89* on January 10, 2007, and decided the case on April 17, 2007. This case involved local school districts challenging the Department of Education's interpretation of the federal Impact Aid Act's statutory formula, which affects federal financial assistance to local school districts. This case is categorized as: For the Agency; For the State. Other categorizations, including whether the case is for or against a business interest or a public interest group, or whether this case is "Liberal" or "Conservative" are inapplicable.[145]

Justice Breyer delivered the opinion of the Court, in which Justices Stevens, Kennedy, Ginsburg, and Alito joined. Justice Stevens filed a concurring opinion. Justice Kennedy also filed a concurring opinion, joined by Justice Alito. Justice Scalia filed a dissenting opinion joined by Chief Justice Roberts and Justices Thomas and Souter (in part). Justice Souter filed a separate dissenting opinion.

The Court recognized that the Zuni Public School District's strongest argument was based on a literal reading of the statute.[146] Acknowledging *Chevron*, the Court invoked the classic standard that "if the language of the statute is open or ambiguous—that is, if Congress left a 'gap' for the agency to fill—then we must uphold the Secretary's interpretation as long as it is reasonable."[147] Having said that, Justice Breyer then departed from *Chevron* analysis to conduct his own evaluation of congressional intent: "Considerations *other than language* provide us with unusually strong

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142. *Id.* at 1581-82 (discussing Gramm-Leach-Bliley Act provisions that protect state insurance laws from preemption).

143. *Id.* at 1578.

> Congress itself has never authorized national banks to use subsidiaries incorporated under state law to perform traditional banking functions. Nor has it authorized OCC to "license" any state-chartered entity to do so. The fact that [Congress] may have acquiesced in the OCC's expansive interpretation of its authority is a plainly insufficient basis for finding preemption.

Id.

144. 127 S. Ct. 1534 (2007).

145. *See* discussion *supra* note 46.

146. *Zuni*, 127 S. Ct. at 1540.

147. *Id.*

indications that Congress intended to leave the Secretary free to use the calculation method before us and that the Secretary's chosen method is a reasonable one."[148]

The School District conceded that the calculations were correct under the agency's regulations, but argued that the regulations themselves were inconsistent with the statutory authorization.[149] In rejecting the School District's claims, Justice Breyer placed great weight on the fact that the interpretation at issue was contained in regulations first promulgated thirty years ago.[150] This alleged discrepancy between law and regulation went undisputed until the *Zuni* case. The *Zuni* opinion suggests that the Roberts Court may be more likely to defer to a longstanding federal interpretation than to a recent one.[151]

Relying more heavily on *Mead* than on *Chevron*, Justice Breyer emphasized that in a "highly technical, specialized interstitial matter [such as this] Congress often does not decide itself, but delegates to specialized agencies to decide" how best to implement federal statutory provisions.[152] Looking to the history and purpose of the statutory provision, as well as the fact that Congress did not step in and correct the agency, the Court ultimately favored the Department of Education's interpretation to support the holding in *Zuni*. In this case, the Court specifically asked the critical question, "But why is Congress' silence in respect to these matters significant?"[153] Unfortunately, the answer we discern from the holding is unsatisfactory: congressional silence equals both delegation of authority and ratification of agency interpretation.

Zuni is a remarkable opinion because the Supreme Court upheld the federal agency regulation even though the literal language of the statute, in its plain meaning, says something different.[154] Throughout the *Zuni* opinion, Justice Breyer struggled with the statute's literal language and his conclusion that the agency interpretation could be made fit, through some Procrustean logic, is both disingenuous and troubling. The nods to *Chevron* cannot disguise the fact that the majority has flatly rejected *Chevron* step one. Is the statutory language ambiguous? If not, under *Chevron*, that should be the end of the inquiry. This case indicates that Justice Breyer has swayed the Court to his view that strict *Chevron* analysis

148. *Id.* at 1541 (emphasis added).
149. *Id.* at 1540.
150. *Id.* at 1541.
151. *But see supra* note 93 and accompanying text (discussing the *Rapanos* case).
152. *Id.*
153. *Id.* at 1544.
154. *Id.* at 1540-41. The opinion specifically asks, "But what of the provision's literal language?" *Id*. at 1543.

is "out," and a case-by-case analysis of what the courts determine to be the intent of Congress, coupled with a general reasonableness standard for agency regulation, is "in."

Justice Kennedy's concurring opinion, joined by Justice Alito, stated simply that the courts should follow the framework set forth in *Chevron*, "even when departure from that framework might serve purposes of exposition."[155] Quoting *Chevron*, these Justices said:

> When considering an administrative agency's interpretation of a statute, a court first determines "whether Congress has directly spoken to the precise question at issue." If so, "that is the end of the matter." Only if "Congress has not directly addressed the precise question at issue" should a court consider "whether the agency's answer is based on a permissible construction of the statute."[156]

In another remarkable display of stretching to uphold this agency's statutory interpretation, concurring Justices Kennedy and Alito not only quoted *Chevron*, they structured their very brief opinion to follow the *Chevron* framework. Without analysis or explanation, they found the language of the statute ambiguous and invoked *Chevron* deference.[157] They found fault with Justice Breyer's opinion not because of its conclusion, but because it "inverts *Chevron*'s logical progression [and] [w]ere the inversion to become systemic, it would create the impression that agency policy concerns, rather than the traditional tools of statutory construction are shaping the judicial interpretation of statutes."[158] Their complaint is that the majority opinion failed to march through the *Chevron* steps in the expected order. That is, the majority first examined the intent of Congress and then the language of the statute, which the Court found ambiguous only in light of the intent as they discerned it.

Based on the majority opinion, I categorize this as a case in which the Court did not find traditional *Chevron* analysis applicable. At best, the majority opinion shows confusion about the proper analytical framework for future agency deference cases. At worst, this case supports the pragmatic conclusion that the Supreme Court "reverse-engineers"[159] agency cases, deciding the result and backing into the analysis.

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155. *Id.* at 1550 (Kennedy, J., concurring) (advocating a strict application of the *Chevron* rule).

156. *Id.* at 1550-51 (citations omitted).

157. *Id.* at 1551 ("[T]he Court is correct to find that the plain language of the statute is ambiguous. It is proper, therefore, to invoke *Chevron*'s rule of deference.").

158. *Id.* After reading both the majority and concurring opinions, one is indeed left with the overwhelming conclusion that agency policy concerns were the driving force behind the *Zuni* decision.

159. This is Justice Scalia's criticism in *Gonzales v. Oregon*, 546 U.S. 243, 287 (2006) (Scalia, J., dissenting).

As expected, Justice Scalia's dissenting opinion in *Zuni*, joined by Chief Justice Roberts, Justice Thomas, and Justice Souter (in part), took the Court to task.[160] In Justice Scalia's view, the Court resurrected the "judge-empowering"[161] standard set forth in an 1892 case, *Church of the Holy Trinity v. United States*.[162] In that case, the Supreme Court adopted an interpretation contrary to the language of the statute, opining that "a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers."[163] Justice Scalia vehemently disagreed with such "elevation of judge-supposed legislative intent over clear statutory text"[164] in *Zuni*, finding that "[t]he plain language of the federal Impact Aid statute clearly and unambiguously forecloses the Secretary of Education's preferred methodology . . . Her selection of that methodology is therefore entitled to zero deference under *Chevron*."[165]

Justice Scalia insisted that the proper analytical starting point must always be the text of the statute.[166] In this case, he probed,

> How then, if the text is so clear, are respondents managing to win this case? . . . In order to contort the statute's language beyond recognition, the Court must believe Congress's intent so crystalline, the spirit of its legislation so glowingly bright, that the statutory text should simply not be read to say what it says.[167]

In closing, he reminded us that "[t]he only sure indication of what Congress intended is what Congress enacted; and even if there is a difference between the two, the rule of law demands that the latter prevail."[168]

What are the merits of Justice Scalia's expressed concern that the Court has moved to a blatant substitution of the Justices' own policy judgment for the plain language of the statute? This dark assessment certainly appears to be gaining validity as we trace the progression of cases decided by the Roberts Court. In fairness, however, Justice Scalia himself is not immune to the risk of deciding an agency interpretation case on the basis of his own policy conclusions. He merely takes a different path to that pitfall in that he usually identifies his own reading of the statute as both unambiguous and the only plausible construction.

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160. Justice Scalia calls the statutory interpretation adopted by the Secretary of Education and the Court "sheer applesauce." *Zuni*, 127 S. Ct. at 1554 (Scalia, J., dissenting).
161. *Id*. at 1551.
162. 143 U.S. 457 (1892).
163. *Id.* at 459.
164. *Zuni*, 127 S. Ct. at 1551 (Scalia, J., dissenting) (citing *Church of the Holy Trinity*, 143 U.S. at 459).
165. *Id.*
166. *Id.* at 1552 ("We must begin, as we always do, with the text.").
167. *Id*. at 1555.
168. *Id*. at 1559.

H. Global Crossing Telecommunications, Inc. v. Metrophones Telecommunications, Inc.[169]

The Supreme Court heard arguments for *Global Crossing Telecommunications, Inc. v. Metrophones Telecommunications, Inc.* on October 10, 2006, and decided the case on April 17, 2007. This case involved a payphone service provider suing a long distance carrier to recover compensation authorized by the Communications Act and Federal Communications Commission (FCC) regulations. I have categorized the case as: For the Agency (FCC); other categories are inapplicable.[170] I characterize this case as a modified, rather than classic *Chevron* deference case because, as in *Zuni*, the majority opinion expressly began with regulatory history rather than beginning with the language of the statute.[171]

Justice Breyer delivered the opinion of the Court, joined by Chief Justice Roberts and Justices Stevens, Kennedy, Souter, Ginsburg, and Alito. Justices Scalia and Thomas each filed dissenting opinions. After discussing the history of Congress's enactment of the Communications Act in 1934 and the FCC's subsequent regulation of interstate telephone communications, Justice Breyer turned to the statutory language at issue. He relied on classic *Chevron* deference to uphold the agency's "reasonable" interpretation of statute.[172] Unfortunately, however, he clouded an otherwise straightforward analysis by adding the following remark about Congress's revision of the statute that left one of the sections at issue untouched: "[T]his circumstance, by indicating that Congress did not *forbid* the agency to apply [the statute] differently in the changed regulatory environment, is sufficient to convince us that the FCC's determination is lawful."[173] If the Supreme Court truly intends to give strong weight to congressional failure to override federal agency interpretations, that would be a troubling direction indeed.

In addition to *Chevron* deference and an endorsement-by-inaction justification (the agency is right simply because Congress did not say it is wrong), Justice Breyer expressly relied on *Mead* for the proposition that:

> [W]here "Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law," a court "is obliged to accept the agency's position if

169. 127 S. Ct. 1513 (2007).
170. *See* discussion *supra* note 46.
171. *See* discussion *supra* Part II.G.
172. *Global Crossing*, 127 S. Ct. at 1520 ("In our view the FCC's . . . determination is a reasonable one" in light of Congress's broad delegation of authority to FCC).
173. *Id.* at 1521-22.

> Congress has not previously spoken to the point at issue and the agency's interpretation" (or the manner in which it fills the "gap") is "reasonable."[174]

Neither Justice Scalia's dissent, nor that of Justice Thomas, provides much meat in terms of a consistent, intellectually congruent system pursuant to which we can predict how the Supreme Court will analyze and decide future federal agency interpretation cases. Interestingly, Justice Thomas objects to the Court's application of *Chevron* deference because, in his words,

> [A] court may not, in the name of deference, abdicate its responsibility to interpret a statute. Under *Chevron*, an agency is due no deference until the court analyzes the statute and determines that Congress did not speak directly to the issue under consideration:
>
> > "The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. . . . If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect."[175]

Justice Scalia bases his dissent on his own interpretation of what constitutes "just and reasonable" practices pursuant to § 201(b) of the Communications Act of 1934. He disagrees with the FCC's determination that Global Crossing violated the requirement for "just and reasonable" practices. He says that absent the FCC's regulation implementing the Communications Act, Global Crossing's action would be neither unjust nor unreasonable;[176] therefore, the only unjustness or unreasonableness lies in violating an FCC regulation which is incorrect. This led the Court to a "departure from ordinary usage,"[177] which is inconsistent with Justice Scalia's view of congressional intent[178]and the public good.[179]

This case highlights a trend that appears to be gaining momentum. Justice Scalia is most likely to begin his case analysis with his own reading of the statutory terms at issue. If the agency interpretation matches his view, he discusses *Chevron* deference. If not, he follows a "plain language" analysis, concluding that the agency interpretation violates congressional intent as expressed in the statute.[180] Justice Breyer and his

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174. *Id.* at 1522 (citing United States v. Mead Corp., 533 U.S. 218, 229 (2001)).
175. *Id.* at 1533 (Thomas, J., dissenting) (quoting Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984)).
176. *Id*. at 1527 (Scalia, J., dissenting).
177. *Id*. at 1529 n.3.
178. *Id.* at 1529.
179. *Id*. at 1530.
180. An interesting tiff involving this issue of "plain language" interpretation of statutes occurred among the Supreme Court Justices at the very end of the 2006-2007 term in

adherents are also pushing away from classic *Chevron* deference to a framework that calls for the Court first to make its own historical analysis of the regulatory scheme evidencing congressional intent. If the agency interpretation matches the court's view of congressional intent—whether or not supported by the language of the statute—then the agency will be affirmed, perhaps mentioning *Chevron* and usually relying on *Mead*'s reasoning that Congress intended agencies to fill statutory "gaps."

I. Ledbetter v. Goodyear Tire & Rubber Co., Inc.[181]

The Supreme Court heard arguments for *Ledbetter v. Goodyear Tire & Rubber Co., Inc.* on November 27, 2006, and decided the case on May 29, 2007. The case is categorized as: For Business Interests; Against the Agency (Equal Employment Opportunity Commission (EEOC)); and "Conservative."[182] The Court did not apply *Chevron* analysis in this case.

This decision severely limited gender-based discrimination claims, holding that a claimant must file a complaint within 180 days from the initial alleged unlawful employment practice and that a new statutory filing period does not begin with each paycheck that incorporates past discrimination.[183] Justice Alito wrote the majority opinion, joined by the Chief Justice and Justices Scalia, Thomas, and Kennedy. Justice Ginsburg filed a dissenting opinion, joined by Justices Stevens, Souter, and Breyer. This is another 5-4 decision, split along conservative-liberal lines, in which Justice Kennedy is the swing vote.

The *Ledbetter* decision interpreted Title VII of the Civil Rights Act of 1964.[184] Justice Alito did not analyze this case in terms of agency deference, but rather on the basis of stare decisis, relying on five prior Supreme Court cases. The plaintiff argued for judicial deference to the EEOC's Compliance Manual and prior administrative adjudications, but the Court declined to extend *Chevron* deference to the EEOC's Compliance

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Tellabs, Inc. v. Makor Issues & Rights, Ltd., 127 S. Ct. 2499 (2007). Though this case is not an agency deference case—*Tellabs* involved the Court's analysis of the Private Securities Litigation Act—Justice Scalia, in his concurring opinion, reminded the other Justices that "just weeks ago . . . the author of the dissent [Justice Stevens], joined by the author of today's opinion for the Court [Justice Ginsburg], concluded that a statute's meaning was 'plain'. . . . Was plain meaning then . . . 'in the eye of the beholder'?" *Id.* at 2515 (Scalia, J., concurring). Justice Stevens, in turn, scolded Justice Scalia for his conclusion that the statute is susceptible to only one reading—Scalia's own. *See id.* at 2517 n.1 (Stevens, J., dissenting).

181. 127 S. Ct. 2162 (2007).

182. *See* discussion *supra* note 46.

183. *Ledbetter*, 127 S. Ct. at 2177 ("We apply the statute as written, and this means that any unlawful employment practice, including those involving compensation, must be presented to the EEOC within the period prescribed by statute.").

184. Civil Rights Act of 1964, § 706(e)(1), 42 U.S.C. § 2000e-5(e)(1) (2000).

Manual or to the EEOC's adjudicatory positions.[185] Because the opinion relied on case law analysis, Justice Alito made it clear that "[a]gencies have no special claim to deference in their interpretation of our decisions."[186]

Nor did the dissenting opinion rely on *Chevron* deference. In a footnote, without specifically naming the *Skidmore* doctrine, Justice Ginsburg wrote, "The Court dismisses the EEOC's considerable 'experience and informed judgment,' as unworthy of any deference in this case. But the EEOC's interpretations . . . merit at least respectful attention."[187] Nevertheless, the dissenting Justices in this case were willing to forego agency deference analysis and engage in their own reading of the statute, which of course, was at odds with that of the majority Justices.[188]

J. Long Island Care at Home, Ltd. v. Coke[189]

The Supreme Court heard arguments for *Long Island Care at Home, Ltd. v. Coke* on April 16, 2007, and decided the case on June 11, 2007. This opinion is unanimous and upholds the agency interpretation of the Fair Labor Standards Act (FLSA) by the Department of Labor (DOL).[190] The case is categorized as: For the Agency (DOL); For Business Interests (employers); and "Conservative."[191]

Justice Breyer, writing for the Court, phrased the question at issue as, "whether, in light of the statute's text and history, and a different (apparently conflicting) regulation [in addition to the regulation at issue in this case], the Department's regulation is valid and binding."[192] In this opening statement, Justice Breyer began with Justice Scalia's analytical preference for starting with the text of the statute. In the same breath, however, he asserted his own analytical order (exemplified in *Zuni* and *Global Crossing Telecommunications, Inc.*[193]), which determines congressional intent by beginning with legislative and regulatory history. He then signaled, right up front, that the case would turn on *Chevron* deference, which it, in fact, did with a few new wrinkles.

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185. *See Ledbetter*, 127 S. Ct. at 2177 n.11 (pointing out that the Court has refused to extend *Chevron* deference to the Compliance Manual in the past and again refuses to do so here in regard to the EEOC's prior adjudications).
186. *Id.*
187. *Id.* at 2185 n.6 (Ginsburg, J., dissenting) (citations omitted).
188. *Id.* ("In any event, the level of deference due the EEOC here is an academic question, for the agency's conclusion that Ledbetter's claim is not time barred is the best reading of the statute even if the Court 'were interpreting [Title VII] from scratch.'" (quoting Edelman v. Lynchburg College, 535 U.S. 106, 114 (2002))).
189. 127 S. Ct. 2339 (2007).
190. *See id.* at 2344 (finding that the DOL's regulation was "valid and binding").
191. *See* discussion *supra* note 46.
192. *Long Island Care at Home*, 127 S. Ct. at 2344.
193. *See supra* Parts II.G and II.H.

First, the Court again placed substantial reliance on *Mead*'s language that Congress may impliedly delegate authority to an agency to fill "gaps," especially with regard to "interstitial matters."[194] This seems to indicate a shift away from a clear *Chevron* template towards a more flexible deference analysis, giving agencies more room to find and fill statutory "gaps."

Second, the Court "inferred" that Congress intended to grant broad authority to the agency, including the authority to answer policy questions.[195] Finding congressional intent in silence once again gives agencies more unbridled authority.

Third, the Court agreed that the literal language of two regulations promulgated by the same agency conflicted with each other. Nevertheless, it acceded to the agency's authority to choose which one applied.[196] Past cases have indicated that an agency does not lose judicial deference merely because it changes its statutory interpretation;[197] however, this extension of the limits of deference seems to grant the agency even more power.[198]

Fourth, prior cases have turned, in part, on the form of the agency interpretation, with differing results depending on whether the Justices view the interpretation as a regulation adopted through formal rulemaking,

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194. *See Long Island Care at Home*, 127 S. Ct. at 2346 (noting that the FLSA gives the DOL the authority to "fill . . . gaps through rules and regulations" and that the regulation at issue in this case involves an "interstitial matter, *i.e.*, a portion of a broader definition, the details of which . . . Congress entrusted the agency to work out").

195. *Id.* at 2347 ("[I]t is consequently reasonable to infer (and we do infer) that Congress intended its broad grant of definitional authority to the Department to include the authority to answer these kinds of questions.").

196. *See id.* at 2349 (concluding that the Department of Labor's interpretation of the two regulations was controlling because it was not plainly erroneous and was not inconsistent with the regulations it was interpreting).

197. *See, e.g.*, Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005) (addressing the question of what weight should be given to the fact that an agency changes its interpretation of the same statutory provision). This case was one of the last involving judicial review of agency regulation to come before the Rehnquist Court, with this opinion being reported on June 27, 2005. Justice Thomas, writing for the majority, emphasized the strict application of *Chevron*'s analytical framework. *Id.* This decision overruled the Ninth Circuit's ruling on the basis of that court's interpretation of the Communications Act, which contradicted the FCC's interpretation. *Id.* at 982. Responding to the argument that the FCC's present interpretation is inconsistent with its past practice, the majority wrote, "We reject this argument. Agency inconsistency is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework." *Id.* at 981. As long as the agency provides a reasonable explanation for the change, which overcomes a finding of arbitrary and capricious agency action under Administrative Procedure Act standards, courts are required to accept the agency's current interpretation if it is "permissible" under *Chevron*. *Id.*

198. *See, e.g.*, *id.* at 980 (supporting the proposition that "*Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation").

an interpretive letter, or a position taken in litigation.[199] Here, DOL had two conflicting regulations, both adopted through formal rulemaking.[200] Subsequently, DOL "set forth its most recent interpretation of these regulations in an 'Advisory Memorandum' issued only to internal Department personnel and which the Department appears to have written in response to this litigation."[201] Surprisingly, the Court did not seem bothered at all by the restricted distribution of the agency interpretation in question, indicating in the very next sentence: "We have 'no reason,' however, 'to suspect that [this] interpretation' is merely a '*post hoc* rationalization[n]' of past agency action . . . ."[202] *Long Island Care* thus seems to end the debate about whether the agency's interpretation must follow any formalities—or even be available to the public at all—in order to receive judicial deference, a troubling result to apply generally.

Fifth, the unanimous Court concluded its analysis with the following statement:

> Finally, the ultimate question is whether *Congress* would have intended, and expected, courts to treat an agency's rule, regulation, application of a statute, or other agency action as within, or outside, its delegation to the agency of "gap-filling" authority. [1.] Where an agency rule sets forth important individual rights and duties, [2.] where the agency focuses fully and directly upon the issue, [3.] where the agency uses full notice-and-comment procedures to promulgate a rule, [4.] where the resulting rule falls within the statutory grant of authority, and [5.] where the rule itself is reasonable, then a court ordinarily assumes that Congress intended it to defer to the agency's determination.[203]

This five-part test, asserted for the first time in *Long Island Care*, could be either the new framework for analyzing cases involving judicial deference to agency interpretation or simply one more in a confusing muddle of decisions which turn on internecine disputes, back-filling from the desired result, and flavor-of-the-week analytical models.

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199. For pro and con opinions about the various forms agency interpretation may take—formal rulemaking, interpretive letters, positions taken in litigation—and discussing whether the degree of formality of any of those should matter when courts review agency interpretations, see *United States v. Mead Corp.*, 533 U.S. 218 (2001). Justice Souter, writing for the majority, and Justice Scalia, in his dissent, go toe to toe on this issue.

200. *See* Long Island Care at Home v. Coke, 127 S. Ct. 2339, 2344-45 (2007) (describing both regulations as being promulgated as part of the same set of proposed regulations—one as a "General Regulation," the other as an "Interpretation").

201. *Id.* at 2349.

202. *Id.*

203. *Id.* at 2350-51.

K. National Ass'n of Home Builders v. Defenders of Wildlife[204]

The Supreme Court heard arguments for *National Ass'n of Home Builders v. Defenders of Wildlife* on April 17, 2007, and decided the case on June 25, 2007. This is another environmental case in which public interest groups challenged EPA's decision to transfer permitting power to Arizona agency officials. I have categorized the case as: For the Agency (EPA); For the State; For Business Interests (homebuilders); Against Public Interest Groups; and "Conservative."[205]

This is another 5-4 opinion, split along ideological lines, with Justice Kennedy as the deciding fifth vote. Justice Alito wrote the majority opinion, joined by the Chief Justice and Justices Scalia, Thomas, and Kennedy. Justice Stevens authored a dissenting opinion, joined by Justices Ginsburg, Souter, and Breyer. Justice Breyer also wrote a dissenting opinion.

In the last of this series of cases involving judicial review of federal agency interpretation, Justice Alito reverted to a classic *Chevron* analysis, clearly restating the two steps: (1) Has Congress spoken directly to the precise question at issue? If so, and the statutory language is clear, that is the end of the inquiry.[206] (2) If not, and the statute is silent or ambiguous, is the agency's answer based on a permissible construction of the statute? If so, the court gives *Chevron* deference to the agency's interpretation.[207] With this simple analysis, Justice Alito, writing for the Court concludes that "[a]pplying *Chevron*, we defer to the agency's reasonable interpretation of [the statute]."[208]

Although this case adopted the straightforward framework described above, the majority opinion also included a brief reference to the Court's independent review of statutory language and legislative history, finding that the agency "interpretation is reasonable in light of the statute's text and the overall statutory scheme."[209] Either of these grounds—the Court's reading of statutory terms or its view of legislative history—has stood alone without recourse to *Chevron* as a basis for upholding or rejecting agency interpretation in other Roberts Court cases.

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204. 127 S. Ct. 2518 (2007).
205. *See* discussion *supra* note 46.
206. *See Nat'l Ass'n of Home Builders*, 127 S. Ct. at 2534 (noting that deference to agency interpretation is "appropriate only where 'Congress has not directly addressed the precise question at issue' through the statutory text" (quoting Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984))).
207. *See id.* ("[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." (quoting *Chevron*, 467 U.S. at 842-43)).
208. *Id.* at 2538.
209. *Id.* at 2534.

Justice Stevens, in his dissenting opinion, made his own determination of legislative history and plain language of the statute.[210] He concluded that Congress has not charged the EPA with administering the Endangered Species Act and, for that reason, determined that the EPA was not entitled to deference.[211] Another ground for his opinion was his determination that this case is contrary to the Supreme Court's prior statutory interpretation in *Tennessee Valley Ass'n v. Hill*.[212] Thus, instead of relying on the *Chevron* analytical model, Justice Stevens would rely on: (1) the Court's independent determination of legislative history; (2) the Court's own reading of the "plain language" of the statute; (3) an examination of the agency's limited jurisdiction and expertise; and (4) prior judicial precedent, of which the agency is not the final arbiter. Justice Breyer also filed a dissenting opinion, which he based in large part on his own analysis of the statute and the regulatory scheme.[213]

III. THE ROBERTS COURT TRACK RECORD

The eleven Roberts Court cases reviewed above indicate that challenges to agency interpretation face an uphill battle, without regard to the analytical framework applied to reach this result. Of the eleven cases, seven were rulings in favor of the agency—in fact, six different federal agencies.[214] Only four cases did not support the agency interpretation of a statute.[215]

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210. *See id*. at 2541-42 (Stevens, J., dissenting) (finding that the plain language of the section in question does not limit the section's coverage to discretionary actions and that nothing in the legislative history of the section leads to the conclusion that the "pre-existing understanding of the scope of [the section's] coverage" should be limited).

211. *See id*. at 2543-44.

212. *See id.* at 2541 ("[O]ur opinion in *Hill* compel[s] the contrary determination that Congress intended the [statute] to apply to 'all federal agencies' and to all 'actions authorized, funded, or carried out by them.'" (quoting Tenn. Valley Auth. v. Hill, 437 U.S. 153, 173 (1978))).

213. *See id.* at 2552 (Breyer, J., dissenting) ("My own understanding of agency action leads me to believe that the majority cannot possibly be correct in concluding that the" agency interpretation is proper).

214. *See id.* at 2518 (finding for the EPA); Long Island Care at Home, Ltd. v. Coke, 127 S. Ct. 2339 (2007) (finding in favor of the DOL); Global Crossing Telecomms., Inc. v. Metrophones Telecomms. Inc., 127 S. Ct. 1513 (2007) (finding in favor of the FCC); Watters v. Wachovia Bank, N.A., 127 S. Ct. 1559 (2007) (finding in favor of the OCC); Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 127 S. Ct. 1534 (2007) (finding in favor of the Department of Education); Envtl. Def. v. Duke Energy Corp., 127 S. Ct. 1423 (2007) (finding in favor of EPA); S.D. Warren Co. v. Me. Bd. of Envtl. Prot., 126 S. Ct. 1843 (2006) (finding in favor of the FERC).

215. *See* Ledbetter v. Goodyear Tire & Rubber Co., Inc., 127 S. Ct. 2162 (2007) (denying deference to the EEOC's Compliance Manual); Massachusetts v. EPA, 127 S. Ct. 1438 (2007) (finding against the EPA); Rapanos v. United States, 126 S. Ct. 2208 (2006) (finding against the Army Corps of Engineers); Gonzales v. Oregon, 546 U.S. 243 (2006) (finding against the U.S. Attorney General).

Five of the eleven cases reviewed involved environmental issues,[216] as did *Chevron*. In the environmental cases, the federal agency won in three of the cases[217] and lost in two.[218] In those same cases, business interests prevailed in two cases[219] and lost in three.[220] Public interest groups prevailed in three cases[221] and lost in two.[222] These cases, therefore, demonstrate that money does not always talk. Nor do they indicate that the agencies have an overwhelming edge in cases involving their interpretation of environmental laws.

Turning next to the entire selection of eleven cases, rather than limiting our consideration to environmental cases, five of the cases supported business interests[223] and three did not.[224] Public interest groups won four cases[225] and lost three.[226] However, not all cases dealt exclusively with business or public interest group perspectives. Six of the cases favored the state interest.[227] Only one, the *Watters* decision, takes power away from the states.[228] In four cases, no clear state issue was at stake.[229]

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216. *See Nat'l Ass'n of Home Builders*, 127 S. Ct. 2518 (examining the Endangered Species Act); *Duke Energy Corp.*, 127 S. Ct. 1423 (reviewing the Clean Air Act); Massachusetts v. EPA, 127 S. Ct. 1438 (involving the Clean Air Act); *Rapanos*, 126 S. Ct. 2208 (interpreting the Clean Water Act); *S.D. Warren Co.*, 126 S. Ct. 1843 (addressing the Clean Air Act).

217. *See Nat'l Ass'n of Home Builders*, 127 S. Ct. 2518 (holding for EPA); *Duke Energy Corp.*, 127 S. Ct. 1423 (holding for EPA); *S.D. Warren Co*, 126 S. Ct. 1843 (ruling in favor of FERC).

218. *See* Massachusetts v. EPA, 127 S. Ct. 1438 (holding against EPA); *Rapanos*, 126 S. Ct. 2208 (holding against Army Corps of Engineers).

219. *See Nat'l Ass'n of Home Builders*, 127 S. Ct. 2518 (ruling in favor of home builders); *Rapanos*, 126 S. Ct. 2208 (ruling for landowner and developer).

220. *See Duke Energy Corp.*, 127 S. Ct. 1423 (holding against electricity plant); Massachusetts v. EPA, 127 S. Ct. 1438 (ruling against automobile manufacturers); *S.D. Warren Co.*, 126 S. Ct. 1843 (holding against hydroelectric dam operator).

221. *See Duke Energy Corp.*, 127 S. Ct. 1423 (holding in favor of environmental groups); Massachusetts v. EPA, 127 S. Ct. 1438 (ruling in favor of environmental groups); *S.D. Warren Co*., 126 S. Ct. 1843 (ruling in favor of environmental groups).

222. *See Nat'l Ass'n of Home Builders*, 127 S. Ct. 2518 (holding against public interest groups); *Rapanos*, 126 S. Ct. 2208 (ruling against environmental protectionists).

223. *See Nat'l Ass'n of Home Builders*, 127 S. Ct. 2518 (holding in favor of developers); Long Island Care at Home, Ltd. v. Coke, 127 S. Ct. 2339 (2007) (holding for employers); Ledbetter v. Goodyear Tire & Rubber Co., Inc., 127 S. Ct. 2162 (2007) (holding for employers); Watters v. Wachovia Bank, N.A., 127 S. Ct. 1559 (2007) (holding in favor national banks); *Rapanos*, 126 S. Ct. 2208 (holding for developer).

224. *See Duke Energy Corp.*, 127 S. Ct. 1423 (holding against electricity plant); Massachusetts v. EPA, 127 S. Ct. 1438 (holding against automobile manufacturers); *S.D. Warren Co.*, 126 S. Ct. 1843 (holding against hydroelectric dam operator).

225. *See Envtl. Def.*, 127 S. Ct. 1423 (ruling in favor of environmentalists); Massachusetts v. EPA, 127 S. Ct. 1438 (ruling in favor of environmental groups); *S.D. Warren Co*., 126 S. Ct. 1843 (ruling in favor of the Maine Board of Environmental Protection); Gonzales v. Oregon, 546 U.S. 243 (2006) (ruling in favor of patients seeking right to physician-assisted suicide).

226. *See Nat'l Ass'n of Home Builders*, 127 S. Ct. 2518 (holding against public interest groups); *Watters*, 127 S. Ct. 1559 (ruling against consumer protection advocates); *Rapanos*, 126 S. Ct. 2208 (ruling against environmental protectionists).

227. *See Nat'l Ass'n of Home Builders*, 127 S. Ct. 2518 (upholding transfer of permit authority to the State); Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 127 S. Ct. 1534

The Court decided four of these agency interpretation cases by a vote of 5-4,[230] with Justice Kennedy providing the swing vote in each. These close cases split along ideological lines. The conservative Justices prevailed in three,[231] while the "liberal" Justices claimed the majority in one of the 5-4 cases.[232] Of all eleven cases, I have categorized five as conservative[233] and five as "liberal";[234] in one, neither category is applicable.[235] Three of the decisions were unanimous: *S.D. Warren Co.*; *Duke Energy Corp.*; and *Long Island Care*.

Moving to the substance of these Roberts Court decisions, in the first ten cases reviewed here, the majority opinion did not employ a simple *Chevron* analysis. In *Long Island Care* (the penultimate case considered with a unanimous opinion authored by Justice Breyer, a "liberal" Justice), the Court employed what I call "*Chevron* Plus," a new five-part test for when a court may assume that Congress intended judicial deference to agency interpretation.[236] Only in the last of these cases, *National Ass'n of Homebuilders* (a 5-4 decision written by Justice Alito, a "conservative" Justice), did the majority opinion return to a classic *Chevron* framework.

(2007) (ruling in favor of New Mexico and the Department of Education); Massachusetts v. EPA, 127 S. Ct. 1438 (holding in favor of Massachusetts); *Rapanos*, 126 S. Ct. 2208 (holding that the waters in question were not federal waters, thereby limiting federal intrusion); *S.D. Warren Co.*, 126 S. Ct. 1843 (upholding a requirement for state certification); *Gonzales*, 546 U.S. 243 (finding for the state of Oregon).

228. *See Watters*, 127 S. Ct. 1559 (holding against the Michigan Financial Services Commissioner and against the interests of state financial services regulators and state attorneys general who filed amicus briefs).

229. *See* Long Island Care at Home, Ltd. v. Coke, 127 S. Ct. 2339 (2007) (involving a private employer being sued by an employee); Ledbetter v. Goodyear Tire & Rubber Co., Inc., 127 S. Ct. 2162 (2007) (involving a private citizen and her non governmental employer); Global Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc., 127 S. Ct. 1513 (2007) (involving two private telecommunications companies); *Duke Energy Corp.*, 127 S. Ct. 1423 (involving the United States, private generating plant owners, and environmental groups, but no states and no states' rights issues).

230. *See Nat'l Ass'n of Home Builders*, 127 S. Ct. 2518; Massachusetts v. EPA, 127 S. Ct. 1438; *Ledbetter*, 127 S. Ct. 2162; *Rapanos*, 126 S. Ct. 2208. *See generally supra* Part III.

231. *See Nat'l Ass'n of Home Builders*, 127 S. Ct. 2518; *Ledbetter*, 127 S. Ct. 2162; *Rapanos*, 126 S. Ct. 2208.

232. *See* Massachusetts v. EPA, 127 S. Ct. 1438.

233. *See Nat'l Ass'n of Home Builders*, 127 S. Ct. 2518; *Long Island Care at Home*, 127 S. Ct. 2339; *Ledbetter*, 127 S. Ct. 2162; *Watters*, 127 S. Ct. 1559 (providing a pro-business result by "liberal" Justices); *Rapanos*, 126 S. Ct. 2208.

234. *See Global Crossing Telecomms., Inc.*, 127 S. Ct. 1513 (involving a case between two corporations categorized as liberal because it upholds a federal cause of action to redress injuries); *Duke Energy Corp.*, 127 S. Ct. 1423; Massachusetts v. EPA, 127 S. Ct. 1438; S.D. Warren Co. v. Me. Bd. of Envtl. Prot., 126 S. Ct. 1843 (2006); Gonzales v. Oregon, 546 U.S. 243 (2006).

235. *See* Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 127 S. Ct. 1534 (2007).

236. *See* discussion *supra* Part II.J.

Of the ten cases that did not adopt a classic *Chevron* analysis, the "liberal" Justices,[237] who tend to vote with Justice Breyer, wrote seven of them.[238] Justice Kennedy, often noted as the "swing vote", authored another one of the opinions[239] in which he was joined by the "liberal" Justices, bringing the total number of the "Breyer influence group" opinions to eight out of ten. Justice Breyer himself authored three of the ten opinions: *Zuni*, *Global Crossing*, and *Long Island Care*. This analysis clearly demonstrates the strength of Justice Breyer's voice in cases involving judicial review of a federal agency's statutory interpretation and explains, at least in part, the Roberts Court's movement away from a strict *Chevron* analysis and towards a more flexible framework.

When the "conservative" Justices formed the majority, however, they did not consistently apply the *Chevron* framework either. Justice Scalia wrote the majority opinion in *Rapanos* and relied not on *Chevron* deference, but on his own statutory analysis.[240] Interestingly, Justice Breyer's separate dissent in *Rapanos* squared off with the majority by calling for the application of the *Chevron* model.[241] Justice Alito wrote for the majority in *Ledbetter*. This case is one of "dueling footnotes" in terms of applying *Chevron* as Justice Alito and Justice Ginsburg, for the dissent, discussed *Chevron* only in footnotes.[242] Justice Alito also wrote the opinion in *National Ass'n of Home Builders*, which was the only decision to follow a simple *Chevron* analysis—and that was a 5-4 opinion, split along ideological lines.

If neither the "conservative" Justices nor the "liberal" Justices grounded their majority opinions in *Chevron*, the reverse is true when we review the dissenting opinions. Both "conservatives" and "liberals" played the *Chevron* card if their group had lost the case vote. Seven of the minority

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237. *See* discussion *supra* note 46.

238. *See Global Crossing Telecomms., Inc.*, 127 S. Ct. 1513 (written by Justice Breyer); *Zuni*, 127 S. Ct. 1534 (written by Justice Breyer); *Long Island Care at Home*, 127 S. Ct. 2339 (written by Justice Breyer); *Duke Energy Corp.*, 127 S. Ct. 1423 (written by Justice Souter); *S.D. Warren Co.*, 126 S. Ct. 1843 (written by Justice Souter); Massachusetts v. EPA, 127 S. Ct. 1438 (written by Justice Stevens); *Watters*, 127 S. Ct. 1559 (written by Justice Ginsburg).

239. *See Gonzales*, 546 U.S. 243 (written by Justice Kennedy and joined by "liberal" Justices Stevens, Souter, Ginsburg, and Breyer, together with O'Connor (also characterized as a "swing vote")).

240. *See* Rapanos v. United States, 126 S. Ct. 2208, 2225 (2006) (basing the decision on what Scalia considers the "only plausible interpretation" of the statute).

241. *See id.* at 2252-53 (Breyer, J., dissenting) (stating that the proper analysis is "straightforward" under *Chevron*).

242. *See, e.g.*, Ledbetter v. Goodyear Tire & Rubber Co., Inc., 127 S. Ct. 2162, 2177 n.11 (2007) (discussing Alito's reasons for refusing to apply *Chevron* deference to the EEOC's Compliance Manual); *id.* at 2185 n.6 (Ginsburg, J., dissenting) (noting that the EEOC's interpretations require "at least respectful attention").

opinions argued that the case should have received *Chevron* analysis.[243] Justice Scalia wrote four of these dissenting opinions calling for the *Chevron* approach.[244] Three of the cases analyzed were unanimous.[245] It was only in the last case, *National Ass'n of Home Builders*, that the "liberal" dissenting Justices did not argue for *Chevron* analysis but preferred their own view of congressional intent.

"Plain language" of the statute is a ground for deciding agency interpretation cases most often associated with Justice Scalia.[246] "Plain language" analysis may seem to follow the classic *Chevron* step one inquiry, which would focus on congressional intent embodied in the words of the statute. However, under the "plain language" framework, the Court imposes its own independent analysis of statutory terms. As expected, Justice Scalia called upon the Court to apply the "plain meaning" of the statute in his dissenting opinions in *Gonzales*, *Massachusetts v. EPA*, and *Zuni*, as well as in the plurality opinion in *Rapanos*.[247] Justice Scalia's dissent in *Global Crossing* turned on his own reading of congressional intent based on the regulatory scheme rather than *Chevron* analysis, although he did not use "plain meaning" language.[248]

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243. *See Ledbetter*, 127 S. Ct. at 2185 n.6 (claiming *Chevron* deference only in footnotes); *Global Crossing Telecomms., Inc.*, 127 S. Ct. at 1529 (Scalia, J., dissenting) (finding that *Chevron* deference is warranted in reviewing the FCC's decision); *Zuni*, 127 S. Ct. at 1551 (Kennedy, J., dissenting) (using *Chevron* to find no entitlement to deference because the language of the statute is not ambiguous); Massachusetts v. EPA, 127 S. Ct. at 1473-74 (Scalia, J., dissenting) (criticizing the majority for not explaining why the EPA's interpretation of the statute does not deserve *Chevron* deference); *Rapanos*, 126 S. Ct. at 2252-53 (Stevens, J., dissenting) (arguing that the Army Corps of Engineers' decision was a "quintessential example" of a reasonable interpretation of a statute under *Chevron*); *Gonzales*, 546 U.S. at 276 (Scalia, J., dissenting) (arguing that the attorney general's interpretation of the statute should be awarded *Chevron* deference); *Watters*, 127 S. Ct. at 1584 (Stevens, J., dissenting) (contending that the OCC's regulation cannot withstand *Chevron* analysis).

244. *See Global Crossing Telecomms.*, *Inc*., 127 U.S. 1513; *Zuni*, 127 U.S. 1534; Massachusetts v. EPA, 127 U.S. 1438; *Gonzales,* 546 U.S. 243.

245. *See* Long Island Care at Home, Ltd. v. Coke, 127 S. Ct. 2339, 2343 (2007); Envtl. Def. v. Duke Energy Corp., 127 S. Ct. 1423, 1427 (2007); S.D. Warren Co. v. Me. Bd. of Envtl. Prot., 126 S. Ct. 1843, 1845 (2006).

246. *See generally* William N. Eskridge, Jr., *No Frills Textualism*, 119 HARV. L. REV. 2041 (2006) (reviewing ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY (2005)).

247. *See Gonzales*, 546 U.S at 283 (Scalia, J., dissenting) (looking to the "ordinary meaning" of words used in the statute); Massachusetts v. EPA, 127 S. Ct. at 1473 (Scalia, J., dissenting) (referring to the "most natural reading of the statute"); *Zuni*, 127 S. Ct. at 1551 (Scalia, J., dissenting) (finding the plain language of the statute clear and unambiguous); *Rapanos*, 126 S. Ct. at 2225 (Scalia, J., dissenting) (basing his decision on the "only plausible interpretation" of the statutory language).

248. *See Global Crossing Telecomms.*, *Inc.*, 127 S. Ct. at 1529-30 (Scalia, J., dissenting) (criticizing the majority's interpretation of congressional intent).

Other Justices have also relied on the plain meaning of a statute, including Justice Kennedy, writing for the majority in *Gonzales*;[249] Justice Stevens, basing the majority opinion in *Massachusetts v. EPA* on the Court's own reading of a statute and finding the agency's reading "arbitrary, capricious . . . or otherwise not in accordance with law;"[250] and Justice Thomas, in his separate dissenting opinion in *Global Crossing*.[251] Justice Souter, author of the unanimous opinion in *S.D. Warren*, also relied on his own analysis of statutory language.[252]

The Roberts Court has applied the "plain meaning" paradigm instead of *Chevron* analysis in some cases and in conjunction with *Chevron* deference in others. This model—using the Court's own reading of a statute—appears more vibrant across the spectrum of the Roberts Court than does a classic *Chevron* analysis.

Four of the eleven cases reviewed expressed more reliance in the majority opinion on *Mead* than on *Chevron*. In *Gonzales*, Justice Kennedy used *Mead* to modify *Chevron*.[253] Justice Breyer also wrote three majority opinions—*Zuni*, *Global Crossing*, and *Long Island Care*—that rely on *Mead* to explain his flexible standard for reviewing agency interpretation.[254] In light of the fact that simple *Chevron* analysis carried the day only in *National Ass'n of Home Builders*, we must recognize the strong influence of Justice Breyer and the continued importance of the *Mead* rationale.

Another issue bubbling under the surface of these eleven cases is the question of whether the Court will require explicit congressional delegation of authority to the agency to interpret statutes or whether these Justices will

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249. *See Gonzales*, 546 U.S. at 250 (using the text of the statute as the starting point for his analysis).

250. *See* Massachusetts v. EPA, 127 S. Ct. at 1463 (quoting 42 U.S.C. § 7607(d)(9)(A)).

251. *See Global Crossing Telecomms., Inc.*, 127 S. Ct. at 1531 (Thomas, J., dissenting) (finding the meaning of the statute to be clear).

252. *See* S.D. Warren Co. v. Me. Bd. of Envtl. Prot., 126 S. Ct. 1843, 1847 (2006) (finding that since certain language in the statute is neither defined nor a term of art, the court must interpret the language based on its "ordinary or natural meaning").

253. *See Gonzales*, 546 U.S. at 258 (emphasizing that *Chevron* deference is warranted only when an agency interpretation is promulgated pursuant to authority delegated by Congress to the agency (citing United States v. Mead Corp., 533 U.S. 218, 226-27 (2001)).

254. *See* Long Island Care at Home, Ltd. v. Coke, 127 S. Ct. 2339, 2345-46 (2007) (finding that where agencies fill statutory gaps in a reasonable manner and in accordance with any other requirements, courts will uphold the result as legally binding (citing *Mead*, 533 U.S. at 227)); Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 127 S. Ct. 1534, 1541 (2007) (relying on *Mead* for the proposition that the issue being decided by the court is "the kind of highly technical, specialized interstitial matter that Congress often does not decide itself, but delegates to specialized agencies to decide" (quoting *Mead*, 533 U.S. at 234)); *Global Crossing Telecomms., Inc.*, 127 S. Ct. at 1522 (holding that "where 'Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law,' a court 'is obliged to accept the agency's position if Congress has not previously spoken to the point at issue and the agency's interpretation' . . . is 'reasonable'" (quoting *Mead*, 533 U.S. at 229)).

find implicit congressional delegation of authority. Explicit statutory delegation was required in *Gonzales* (with Justice Kennedy writing the majority opinion) and *Rapanos* (with Justice Scalia writing the plurality opinion).[255] Supporting the proposition that the Court may infer congressional intent to delegate authority to the agency, we have the majority opinion in *Watters* (authored by Justice Ginsburg), Justice Scalia's dissent in *Gonzales*, and Justice Breyer's majority opinion in *Long Island Care*.[256] The Roberts Court cases demonstrate that the explicit-versus-implicit-delegation issue remains unsettled.

In light of these case reviews, I conclude that the *Watters* case was not an aberration in its failure to employ *Chevron* analysis. Unfortunately, no clear standard has replaced *Chevron*. Instead, we can expect the Roberts Court to follow a flexible, case-by-case analysis much like the *Skidmore* standard. Justice Breyer appears to have the most influence on the cadre of Justices who most often make up the majority in these agency interpretation cases. Justice Scalia serves most often as the colorful, critical voice of the dissent.

CONCLUSION: SHOWDOWN AT THE *CHEVRON* CORRAL

As *Chevron* approaches its twenty-fifth anniversary in 2009, and the Roberts Court enters its third full year, I have identified a total of eleven Roberts Court cases which have considered the question of how much deference courts should give to federal agency interpretation of a statute. In these opinions, sparks have flown between two contingents within the Court. Given the fact that two of the current Justices, Antonin Scalia and Stephen Breyer, have analyzed judicial deference to agency regulations from an academic perspective in addition to their current Supreme Court vantage point, we expect vigorous discussions of administrative law theory and have not been disappointed. Because these two administrative law scholars espoused clearly different views of the *Chevron* doctrine before

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255. *See Gonzales*, 546 U.S. at 255-56 (stating that an agency decision is only entitled to *Chevron* deference when Congress has delegated the authority to make rules carrying the force of law to that agency (citing *Mead*, 533 U.S. at 226-27)); *see also* Rapanos v. United States, 126 S. Ct. 2208, 2224 (2006) (noting that in order to authorize an intrusion into an area traditionally relegated to the states, a "clear and manifest statement" is needed) (citations omitted).

256. *See Long Island Care at Home*, 127 S. Ct. at 2346 (finding that the Fair Labor Standards Amendments give the DOL the implied authority to fill any gaps that may exist in the statute with rules and regulations); Watters v. Wachovia Bank, N.A., 127 S. Ct. 1559, 1567-70 (2007) (relying on the NBA's incidental powers clause to indicate an implicit congressional intent to allow the OCC to grant "operating subsidiaries" the same exemptions from state law that would be available to national banks themselves); *Gonzales,* 546 U.S. at 259 (determining that the Attorney General can create rules relating to "registration" and "control" and "for the efficient execution of his functions" based on implied authority under the Controlled Substances Act).

they ascended to the highest bench, the division within the Court is not surprising. But are the verbal bullets exchanged merely a sideshow or does one viewpoint within the Roberts Court hit the target with a coherent theory, based on *Chevron* or otherwise, that administrative lawyers can use to analyze cases involving the question of judicial review of agency interpretations?

Analysis of the Roberts Court cases shows that classic *Chevron* analysis is dead—or at least critically wounded. Unfortunately, it appears that stray bullets, in the form of inconsistent applications of the doctrine, may have done it in.[257] Close reading of the majority opinions in these eleven Roberts Court cases shows that only *National Ass'n of Home Builders*, the last of the series, relied on the "strong form" *Chevron* analytical framework.

So what is an administrative lawyer to do? *Chevron* may be dead, but my recommendation is to retain its framework on Ockham's Razor[258] grounds alone: All things being equal, the simplest solution tends to be the best one. It is imperative, however, to recognize that none of the current Supreme Court Justices blindly apply a simple *Chevron* analysis. In any case involving agency interpretation of a statute, a well-prepared lawyer—whether arguing for the agency or against the agency—must also address "plain reading" of the statute as well as legislative and regulatory history, which can demonstrate or disprove congressional intent in the teeth of arguably contrary statutory language.

Justice Scalia's arguments for a classic *Chevron* framework may be cleaner and more predictable. Realistically, however, the current Court has been much more likely to adopt Justice Breyer's case-by-case evaluation of agency interpretation. In an unmistakable pattern, *Chevron* has become the argument for the losing side, with failure by the majority to adhere to a straightforward *Chevron* analysis emerging as a recurring criticism in

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257. Furthering the theory that there are country western song lyrics that cover every situation, one can almost hear *Chevron* singing:

> Well I ain't afraid of dyin', it's the thought of being dead
> I wanna go on being me once my eulogy's been read
> Don't spread my ashes out to sea, don't lay me down to rest
> You can put my mind at ease if you fulfill my last request
> Prop me up beside the jukebox if I die

JOE DIFFIE, PROP ME UP BESIDE THE JUKE BOX (IF I DIE) (Epic Records 1993).

Apparently, the Supreme Court is doing just that for the *Chevron* doctrine—propping up a popular but unreliable doctrine, reciting it when the Justices would otherwise agree with the agency, and ignoring it when it might dictate an inconvenient result.

258. *See* REGA WOOD, OCKHAM ON THE VIRTUES 20 (1997) (explaining the principle attributed to the fourteenth century English logician and Franciscan friar William of Ockham, sometimes expressed in Latin as the lex parsimoniae, "law of parsimony" or "law of succinctness").

dissenting opinions. Although the Roberts Court still quotes *Chevron*, the older *Skidmore* analysis appears to be the one the Court actually applies: A federal agency's statutory interpretation is entitled to judicial deference only to the extent it is persuasive to at least five Justices.