

THE ADMINISTRATIVE STATE'S PASSIVE VIRTUES

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Fifty years ago, Alexander Bickel famously suggested that courts use tools like standing, ripeness, and the political question doctrine to avoid reaching the merits of difficult cases. Yet despite the increasingly central role of administrative agencies in government, there have been no efforts to date to apply Bickel's insights to the bureaucracy. This Article remedies that deficit. The Article provides a three-part taxonomy of administrative restraint and offers case studies from federal agencies such as the Federal Energy Regulatory Commission, the Environmental Protection Agency, and the Fish and Wildlife Service. It argues that agencies sometimes use restraint strategically for reasons similar to Bickelian courts: to avoid unnecessary conflict with other institutional actors. Moreover, like the passive virtues in the judicial arena, such agency passivity is often normatively desirable. As long as certain internal agency safeguards exist, passivity should be facilitated rather than undermined by reviewing courts.

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The better part of valour is discretion.¹

INTRODUCTION

Consider the following three examples of agency behavior:

- First, consider the Environmental Protection Agency's (EPA's) assertion in its denial of petitions to regulate greenhouse gas (GHG) emissions from new cars and trucks that it was under no obligation to make a judgment about whether those emissions endangered public health and welfare.² After the Supreme Court disagreed in *Massachusetts v. EPA*, the agency ultimately issued an endangerment finding and chose to phase in, gradually, the regulation of mobile and stationary emissions sources.
- Next, consider the Federal Energy Regulatory Commission's (FERC's) approach to encouraging competition in electricity markets. Because transmission is a natural monopoly and generation of electricity is not, FERC set out to separate, or unbundle, sales of transmission service from sales of the actual electrons transmitted. However, in Order 888, the major order on unbundling, FERC focused on the wholesale market only and did not require unbundling of retail transmission from retail sales. Citing the existence of "difficult jurisdictional issues," the Commission postponed resolution of the retail unbundling

1. WILLIAM SHAKESPEARE, *THE FIRST PART OF KING HENRY THE FOURTH* act 5, sc. 3 at 119–20 (Jonathan Bate & Eric Rasmussen eds., Modern Library 2009).

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

question to another day.³

- Finally, consider the Fish and Wildlife Service's (FWS's) approach to species listing and critical habitat designation under the Endangered Species Act (ESA). The ESA provides for the listing of species as endangered or threatened when certain statutory criteria are met. For each species so listed, the habitat that is considered critical to the survival of the species must then be designated.⁴ However, for several species, FWS has deferred these determinations in favor of cooperative agreements with private parties.

One way to understand these behaviors is as evidence of administrative inaction or delay, which have been the subject of almost universal disapprobation in the literature. Inertia and torpor have been called "inherent vices (even pathologies)" of the bureaucracy.⁵ Some scholars have focused on an agency's susceptibility to "corrosive influences when it refuses to act."⁶ Others suggest that the very existence of agency delay signals a principal-agent problem.⁷ Still others recommend the establishment of specialized review bodies whose sole purpose would be to ensure timely agency action.⁸

The work of Alexander Bickel presents another possible frame for thinking about these examples. Half a century ago, Bickel famously suggested that courts sometimes exercise the "passive virtues" by invoking justiciability doctrines and other techniques in order to avoid reaching the merits of difficult cases.⁹ But while "ripeness," "mootness," and "political

3. Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, 18 C.F.R. pts. 35 & 385 (1997) [hereinafter Order 888].

4. See 16 U.S.C. §§ 1531–1532 (2012).

5. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2263 (2001).

6. Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. REV. 1657, 1661 (2004).

7. Michael D. Sant'Ambrogio, *Agency Delays: How a Principal-Agent Approach Can Inform Judicial and Executive Branch Review of Agency Foot-Dragging*, 79 GEO. WASH. L. REV. 1381, 1442 (2011) (suggesting that courts adopt a presumption that rulemaking proceedings lasting longer than two years have been unreasonably delayed).

8. Glen Staszewski, *The Federal Inaction Commission*, 59 EMORY L.J. 369 (2009) (proposing the creation of a new independent agency to police agency inaction).

9. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* (Yale Univ. Press 2d ed. 1986) [hereinafter BICKEL, *LEAST DANGEROUS BRANCH*]; see also Alexander M. Bickel, *Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961) [hereinafter Bickel, *Passive Virtues*]. For recent discussions of Bickel's impact on legal thinking see, for example, *Special Feature: Alexander Bickel Symposium*, SCOTUSBLOG, [http://www.scotusblog.com/category/special-](http://www.scotusblog.com/category/special-features/)

questions” are now part of the legal vernacular, we lack a similar taxonomy for *administrative* prudence. Like courts, administrative agencies faced with difficult decisions sometimes simply decide *not* to decide. Also like courts, agencies take prudential considerations into account when deciding not only how to act but whether and when to do so. This exercise of bureaucratic discretion is the administrative analog to Bickel’s “passive virtues.”

The application of Bickel’s insight to agencies is long overdue. The meteoric rise of the administrative state, first during the New Deal and then in the 1960s and 1970s, has produced a modern bureaucracy that rivals the courts as an organ of day-to-day policymaking.¹⁰ Despite the bureaucracy’s growth, uncertainty remains as to the source of its legitimacy. The Constitution is nearly silent on the subject of administrative agencies. Agencies, like courts, also lack direct ties to the electorate, limiting accountability as a justificatory mechanism. Partly as a result of these features, agencies are subject to a multitude of influences and constraints from other governmental actors and from the public.

To navigate these external pressures, this Article argues, agencies *must* be pragmatic and strategic in the exercise of their authority. Here, restraint is an essential tool. Deferring decisions or taking small steps rather than aggressive ones can be useful where more decisive action would expose the agency to damaging backlash.¹¹

features/alexander-bickel-symposium/ (last updated Aug. 21, 2012) [hereinafter Bickel Symposium].

10. See Cass R. Sunstein, *Is Tobacco a Drug? Administrative Agencies as Common Law Courts*, 47 DUKE L.J. 1013, 1019 (1998). Sunstein argues that administrative agencies “have become modern America’s common law courts, and properly so.” *Id.*; see also Lars Noah, *Interpreting Agency Enabling Acts: Misplaced Metaphors in Administrative Law*, 41 WM. & MARY L. REV. 1463, 1464 (2000) (“More so than do the courts, federal agencies exercise pervasive control over economic and other activities in this country.”). While Noah agrees with Sunstein that the role of administrative agencies has expanded dramatically, he takes exception to the idea that agencies should perform the role of common law courts. *Id.* at 1505–06.

11. It was pragmatic need rather than principle, after all, which led to the administrative state we have today. For an argument that necessity not only explains the administrative state’s evolution but should constrain the exercise of its powers, see Michael Ray Harris, *Breaking the Grip of the Administrative Triad: Agency Policy Making Under a Necessity-Based Doctrine*, 86 TUL. L. REV. 273 (2011). Ronald Levin has offered a defense of administrative law pragmatism as a tool for social problem-solving. See Ronald M. Levin, *Administrative Law Pragmatism*, 37 WASH. U. J.L. & POL’Y 227, 231, 234–35 (2011) (describing administrative law pragmatism as “a belief in trying to accomplish social ends effectively through the use of the administrative process”); see also Sidney A. Shapiro, *Administrative Law After the Counter-Reformation: Restoring Faith in Pragmatic Government*, 48 U. KAN. L. REV. 689, 737–48 (2000) (proposing pragmatism as the proper lens through which to evaluate

A more difficult question is how to reconcile the administrative state's passive virtues with traditional understandings of faithful agency and with the view that agency decisions must be driven primarily by technocratic expertise. In the short term, agencies exercising strategic restraint might appear to be diverging from statutory purposes or refusing to follow where the evidence leads. In the longer term, however, it may sometimes be the case that agencies can *only* remain true to legislative mandates by controlling the timing and extent of their decisions. Agencies possess practical as well as technocratic expertise, and they would be abdicating their statutory responsibilities were they to ignore the practical consequences of their decisions. As Bickel argued with respect to courts, it might sometimes be preferable for an agency to demur when faced with a choice between strict adherence to "principle" and producing a decision whose real world effects are likely to be inconsistent with statutory goals.

The Article proceeds in three parts. Part I offers an overview of Bickel's theory of the passive virtues and connects the theory to the larger literature on leaving questions undecided. It then elaborates a three-part taxonomy of agency restraint illustrated through case studies. First, it examines "decisions not to decide." The EPA's initial decision not to make a judgment about whether GHGs endanger public health and welfare falls within this category. The second type of agency restraint examined is step-by-step regulation. Here, agencies resolve some questions while leaving others open. One example is FERC's unbundling of wholesale transmission from sales of electricity while declining to decide whether retail unbundling should occur. The third category might be called administrative minimalism. A minimalist agency defers more controversial decisions by taking less contentious steps. Under Interior Secretary Bruce Babbitt, for example, FWS entered into voluntary agreements with private parties to avoid deciding whether certain species should be listed as threatened or endangered under the ESA.

Part II explores the motivations behind agency restraint. While the conventional wisdom is that agency inaction is the product of lassitude, personal bias, or interest group influence, the Article posits a less nefarious explanation of restraint. Returning to the Bickelian passive virtues, it argues that agencies sometimes elect restraint over aggressive action to avoid backlash and to preserve their own political capital. This Part also presents a normative justification for agency restraint. It argues that, as long as the agency is ultimately motivated by the desire to effectuate statutory goals over the long term, restraint is a virtue rather than a vice.

Part III suggests that confining the influence of restraint to the first stage

in the administrative decisionmaking process (where the agency determines whether and when to tackle a given question) will actually *preserve* technocratic expertise by leaving the decision about *what* course of action to take place free from prudential considerations. It also makes two prescriptive suggestions that follow from the positive and normative claims. First, it argues that reviewing courts should accommodate the prudential considerations that inform bureaucratic decisionmaking. Second, in order to tease out justified from unjustified restraint, we should encourage agencies to be more transparent about their reasons for deferring action. This mechanism will never be error-proof, as motivation is notoriously hard to discern. However, given that a default must be set one way or the other, it is better to err on the side of allowing a few poorly motivated cases of restraint to slip through than for courts to sharply limit the exercise of agency restraint.

I. BICKELIAN COURTS, BICKELIAN AGENCIES

Alexander Bickel drew on a larger tradition when he posited the idea of the passive virtues in the early 1960s. His theory offered a helpful description of judicial behavior, but its utility is not limited to the courts. Agencies, too, have discretion over the content of their “docket.” In the absence of mandatory statutory provisions, they control the timing and scope of their decisions. Three ways in which they do this are by deferring decisions wholesale, by attacking problems step-by-step, and by regulating minimally as opposed to maximally.

A. *Traditional Bickelian Passive Virtues*

Alexander Bickel is perhaps best known for his work on judicial restraint.¹² Along with other constitutional scholars of his era, Bickel was primarily concerned with justifying the role of judges in society, and especially with justifying judicial review of legislative enactments. Bickel’s first move was to tell the story of judges as they actually behaved. He eschewed both the classical view of judges as paragons of impartiality and the realist instinct that they were unprincipled men and women guided only by preconception and passion. Bickel then built on this more practical foundation by embracing an understanding of judging as an inherently flexible enterprise.

According to Bickel, *Marbury v. Madison*’s lesson—that a court assessing a

12. Bickel was not the first to write about judicial modesty. He acknowledges his debt to James Bradley Thayer’s “clear error” rule in particular. BICKEL, *LEAST DANGEROUS BRANCH*, *supra* note 9, at 35.

statute's validity may legitimate the statute by finding it consistent with the Constitution or may strike it down as unconstitutional—was incomplete.¹³ A court, Bickel suggested, might also “do neither,” postponing a decision on the question to another day.¹⁴ Bickel proceeded to elaborate on the “doing neither” option, cataloging the tools the Supreme Court used to avoid decisions on the merits. On his list were not only standing, ripeness, and mootness but also the political question doctrine, the Supreme Court's discretionary certiorari jurisdiction, and the Court's prerogative to summarily affirm or reverse the judgments of lower courts.

Without this flexibility to decide not only “which principles and how, but also, when and in what circumstances,”¹⁵ Bickel explained, the Court risked three things. First, by jumping into the fray on controversial social issues, it risked engendering opposition and undermining its own legitimacy. Second, the Court risked undermining the integrity and consistency of the principles it articulated. Third, it risked intruding impermissibly into the domains of electorally accountable government actors.

Two major criticisms have been levelled at Bickel. The first, from Gerald Gunther, is that Bickel's treatment of principle was internally inconsistent. Famously, Gunther quipped that Bickel wanted the Court to be 100% principled, but only 20% of the time.¹⁶ It is true that Bickel embraced, to some extent, the idea of Wechslerian principle in judicial decisionmaking. And it is also true that Bickelian “passivity” was not governed by the same set of principles as judicial action. However, Bickel not only acknowledged but embraced this friction. He repeatedly invoked what he called the “Lincolnian tension” between principle and expediency,¹⁷ by which he meant the eternal tension between decisional consistency and the practical necessities of governance. In Bickel's words, “[n]o good society can be unprincipled; and no viable society can be principle-ridden.”¹⁸

13. *Marbury v. Madison*, 5 U.S. 137, 178 (1803).

14. BICKEL, *LEAST DANGEROUS BRANCH*, *supra* note 9, at 69.

15. Bickel, *Passive Virtues*, *supra* note 9, at 41.

16. Gerald Gunther, *The Subtle Vices of the “Passive Virtues”—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 3 (1964).

17. See, e.g., BICKEL, *LEAST DANGEROUS BRANCH*, *supra* note 9, at 65; Bickel, *Passive Virtues*, *supra* note 9, at 50.

18. Bickel, *Passive Virtues*, *supra* note 9, at 49.

The second major criticism of Bickel comes from Mark Tushnet. In a 2002 article, Tushnet argued that the circumstances that gave rise to justiciability doctrines as “appropriate vehicles for prudential judgments” have changed.¹⁹ The Court as an institution is no longer under threat, Tushnet claimed, and thus the need for prudence is muted.²⁰ But the Court’s own assessment of its continuing need to safeguard its legitimacy through the use of restraint apparently differs from Tushnet’s. Put another way, rumors of the death of the passive virtues have been greatly exaggerated. As one commentator remarked, “it is impossible to miss Bickel’s long shadow looming over the contemporary Court.”²¹ And Chief Justice John Roberts makes no secret of his support for the practice of deciding cases narrowly if necessary to achieve consensus.²² During the October 2013 term, the Court dodged a decision on affirmative action²³ as

19. Mark Tushnet, *Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine*, 80 N.C. L. REV. 1203, 1205 (2002). Tushnet points out, for example, that justiciability doctrines were not even mentioned in *Bush v. Gore*, which was precisely the kind of politically charged case where we might have expected the justices to invoke the political question doctrine to avoid reaching the merits. *Id.*

20. *Id.* at 1234. Tushnet also claimed that the jurisdictional techniques Bickel described have been thoroughly doctrinalized so that their invocation no longer represents a truly discretionary judgment but one governed by general, neutral standards. *Id.* at 1205. Thus, to paraphrase Tushnet, Bickel’s allegedly prudential decisions have collapsed into Wechslerian principle. *Id.* at 1204. On this point, Tushnet may well be correct. One of the consequences of naming and studying the jurisdictional tools to avoid decisionmaking was to domesticate them. Precedential norms surrounding their application have developed that, to some extent, circumscribe their use as prudential devices. But, as described below, the administrative state’s discretion to defer decisionmaking is not so encumbered.

21. Steve Vladeck, *Online Alexander Bickel Symposium: The Passive Virtues as Means, Not Ends*, SCOTUSBLOG (Aug. 21, 2012, 12:32 PM), <http://www.scotusblog.com/2012/08/online-alexander-bickel-symposium-the-passive-virtues-as-means-not-ends/> (remarking that the current Court has flexed its muscle in recent terrorism-related detainee decisions but only to protect the judicial power, not to decide the merits of individual cases).

22. See Michael C. Dorf, *Chief Justice Roberts Advocates the Passive Virtues, Even as the Supreme Court’s Docket Reveals their Subtle Vices*, WRIT (Nov. 20, 2006), <http://writ.lp.findlaw.com/dorf/20061120.html>. Consensus is itself a legitimacy-reinforcing device. As Jeffrey Rosen suggested in an article on the Chief Justice, divided decisions “make it harder for the public to respect the Court as an impartial institution that transcends partisan politics.” Jeffrey Rosen, *Roberts’s Rules*, THE ATLANTIC (Jan. 1, 2007), available at <http://www.theatlantic.com/magazine/archive/2007/01/robertss-rules/305559>.

23. *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013); see Jess Bravin, *Justices Take Pass on Texas Affirmative-Action Case*, WALL ST. J. (June 25, 2013), available at <http://online.wsj.com/news/articles/SB10001424127887324412604578517602559504498> (“[T]he justices reached near unanimity only by bypassing the core question in affirmative-action cases—whether racial diversity qualifies as a compelling government objective

well as California's Proposition 8, which prohibited gay marriage.²⁴ Other scholars have noted the Court's restraint in deciding cases that touch on the war on terrorism.²⁵

Bickel's original conception of judicial prudence also survives in the legal academy. Bickel's core ideas have followers from across the political and ideological spectrum, including Robert Bork,²⁶ Samuel Alito,²⁷ Louis Michael Seidman,²⁸ and Cass Sunstein.²⁹ A recent Bickel symposium is a testament to his continued scholarly relevance.³⁰ Moreover, Bickel's insights were part of a continuum of ideas about judicial restraint that can trace its roots to scholars such as James Bradley Thayer³¹ and Edmund Burke³² and that has been carried forward in work on judicial minimalism

justifying preferential treatment").

24. *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013); see Eugene Volokh, *The Roberts Court and the Passive Virtues*, THE VOLOKH CONSPIRACY (Jan. 23, 2006, 11:17 AM), <http://volokh.com/2006/01/23/the-roberts-court-and-the-passive-virtues/> (noting the Court's remands on narrow grounds in two cases, one dealing with abortion and the other with campaign finance).

25. See Vladeck, *supra* note 21 (noting that the Court has preserved its jurisdiction over terrorism cases while declining to actually decide the issues before it).

26. See Abner J. Mikva, *Why Judges Should Not be Advicegivers: A Response to Professor Neal Katyal*, 50 STAN. L. REV. 1825, 1825 (1998) ("Because Bickel had no ideological axes to grind, such diverse judges as Robert Bork and I could find sustenance in his views."); Thomas C. Arthur, *The Influence of Levi's Legal Process on Bork's The Antitrust Paradox*, 17 MISS. C. L. REV. 124, 125 (1996) ("Bickel was [Bork's] best friend and intellectual companion."). While Bork embraced Bickel's premise that the judiciary's lack of electoral accountability posed a threat to democracy and agreed that judges should be restrained in the exercise of their power, he would have resolved that threat by requiring adherence to the original meaning of statutory text. See generally ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990).

27. See *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 381 (2006) (statement of Samuel A. Alito) ("[Bickel] was a great proponent of judicial self-restraint, and that was the main point that I took from my pre-law school study of the Warren court.").

28. See Louis Michael Seidman, *Online Alexander Bickel Symposium: Too Principled to Stand on Principle?*, SCOTUSBLOG (Aug. 14, 2012, 11:01 AM), <http://www.scotusblog.com/2012/08/online-bickel-symposium-too-principled-to-stand-on-principle/> (admitting that Bickel may have "sold his legal soul" but praising him for having done it "for the sake of racial justice").

29. See CASS SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* 6, n.5 (1999) (acknowledging the obvious parallels between the book's argument and Bickel's approach in *THE LEAST DANGEROUS BRANCH*); see also Tushnet, *supra* note 19, at 1233 (describing Sunstein as "Bickel's jurisprudential heir").

30. Bickel Symposium, *supra* note 9.

31. Bickel discusses Thayer's approach at length in *THE LEAST DANGEROUS BRANCH*. BICKEL, *supra* note 9, at 35-45.

32. See Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353 (2006).

by Sunstein and others.³³

Yet surprisingly, the role of the passive virtues in modern government's most active and arguably most influential branch remains largely unstudied. It is therefore to the role of the passive virtues in administrative decisionmaking that the Article now turns.

B. *Bickelian Agencies*

The world has changed since Bickel was writing in the 1960s. Courts are no longer the only, or even the dominant, translators of general statutory pronouncements into more specific guidance. That role belongs to the administrative state, a vast bureaucracy of agencies and commissions in which the majority of law formation, interpretation, and enforcement actually takes place.³⁴

It is therefore high time to apply Bickel's insights to agencies. Agencies, like courts, cannot behave as if there are no other actors in the system. Indeed, they would be abdicating their statutory responsibilities if they failed to consider the practical consequences of their decisions on their relationships with those actors. Agencies are responsible for coordinating programs and policies whose scope and importance eclipse any single decision and for ensuring that those programs and policies endure over the longer term. These responsibilities make strategic inaction an important tool in the agency arsenal.

Administrative restraint can be explicit, for example where an agency documents its decision not to decide in the denial of a petition for rulemaking or in response to comments on a proposed rule. An agency might even announce its choice publicly, as the State Department recently did when it elected not to determine whether the ouster of Egyptian President Mohammed Morsi was a "coup."³⁵ These cases are the most

33. See *infra* notes 83–84 and accompanying text.

34. On the growth of the administrative bureaucracy generally, see STEPHEN SKOWRONEK, *BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES 1877–1920* (1982). Gary Lawson takes a less sanguine view of this development. Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1231 (1994) ("Faced with a choice between the administrative state and the Constitution, the architects of our modern government chose the administrative state, and their choice has stuck."); see also JOHN MARINI, *THE POLITICS OF BUDGET CONTROL: CONGRESS, THE PRESIDENCY, AND THE GROWTH OF THE ADMINISTRATIVE STATE* ix (1992) ("The administrative state rests upon theoretical assumptions that cannot gain constitutional legitimacy.").

35. *Briefing By State Department Spokesperson Jen Psaki*, (July 26, 2013), available at <http://www.state.gov/r/pa/prs/dpb/2013/07/212484.htm#> ("We have determined that we do not need to make a determination . . .").

striking, although they are relatively rare. Restraint can also be implicit, as where the agency takes *some* steps, either deciding some questions while leaving others open or making an easier decision to avoid a more difficult one. What distinguishes these cases from the multiplicity of situations in which agencies take action that falls short of the most aggressive option is that the restraint takes place prior to a decision on the merits. At this earlier decisional stage, the agency determines that it is more pragmatic to substitute a less controversial choice for a more controversial one.

While the administrative equivalents of the court's jurisdictional doctrines are perhaps less easily captured in tidy phrases, the reality is that agencies possess powerful tools to avoid decisionmaking.³⁶ These techniques fall into three categories. First, agencies can avoid entire issues by deciding *not* to decide whether action is warranted. Second, agencies can resolve some questions while leaving others undecided. Finally, agencies might take modest steps to address a problem to avoid more controversial choices.

1. *Decisions Not to Decide*

The first category of agency restraint concerns "decisions not to decide." Here, agencies avoid addressing difficult questions wholesale rather than taking even minimal steps toward their resolution. These choices often involve triggering decisions, which are those decisions that, once made, lead to subsequent, mandatory actions.

In one prominent decision not to decide, EPA contended that it was under no obligation to decide whether GHGs from new cars and trucks endangered public health and welfare under the Clean Air Act (CAA).³⁷ Section 202(a)(1) of the CAA states that the EPA Administrator

36. By the passive virtues, I mean a concept distinct from mere inaction. Lisa Bressman, for example, defines inaction as encompassing "any instance in which an agency fails to take desired or desirable action." Bressman, *supra* note 6, at 1664. Inaction, so defined, is both too broad and too narrow for the purposes of this Article. It is too broad because it covers "merits" decisions to maintain the status quo (such as a decision that greenhouse gases (GHGs) do *not* endanger public health and welfare). And it is too narrow because it does not encompass step-by-step regulation or administrative minimalism, where agencies resolve some issues while leaving others undecided or take less controversial decisions to avoid more controversial ones. There are, of course, situations that fit both definitions, such as where an agency declines to make a statutory triggering decision or simply fails to act on a petition for rulemaking. For clarity, however, this Article will refer to agency "restraint" rather than "inaction."

37. As will be discussed below, the Environmental Protection Agency (EPA) has had more success with this strategy in subsequent denials of petitions to regulate GHG emissions from other mobile sources.

shall by regulation prescribe . . . standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which *in his judgment* cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.³⁸

Once the Administrator has made a positive determination under this section, called an “endangerment finding,” he or she is legally obligated to set limits on emissions of the pollutant.³⁹

In 1999, environmental groups petitioned the EPA to regulate GHG emissions under § 202(a)(1).⁴⁰ The EPA ultimately denied the petition.⁴¹ In its denial, it first disavowed authority over GHG emissions under the CAA, arguing that GHGs were not “air pollutants” as contemplated by the CAA.⁴² Alternatively, EPA argued that *even if* it had jurisdiction over GHG emissions, it would have invoked its discretion not to make the triggering finding that emissions from new motor vehicles and new motor vehicle engines cause or contribute to GHG pollution that threatens the public health or welfare.⁴³ In essence, EPA decided that it was under no duty to exercise its judgment on the question, and that it would be unwise to do so at that time.

In 2007, the Supreme Court held in *Massachusetts v. EPA* that GHGs were “air pollutants” as defined by the CAA and that EPA abused its discretion in declining to make a judgment about the effects on public health and welfare of GHG emissions from motor vehicles.⁴⁴ Once EPA decided to respond to a petition for rulemaking, the Court held “its reasons for action or inaction must conform to the authorizing statute.”⁴⁵

Following the 2008 presidential elections, EPA has continued to exercise restraint in the regulation of GHGs, albeit in a more targeted way. For example, EPA delayed its response to, and finally denied, petitions seeking the regulation of GHG emissions from non road and marine sources. In its denials, EPA explained that it did “not intend at this time to initiate either an endangerment finding or a rulemaking regarding emissions of greenhouse gases and black carbon from nonroad engines and vehicles,

38. 42 U.S.C. § 7521(a)(1) (2006 & Supp. IV 2011) (emphasis added).

39. *Id.*

40. *See Massachusetts v. EPA*, 549 U.S. 497, 510 (2007).

41. *Id.* at 511.

42. *Id.* at 512–13.

43. *Id.* at 513.

44. *Id.* at 532–34.

45. *Id.* at 533. Below, I will suggest that this conclusion was in error, and that courts should permit agencies to consider a broader array of criteria in deciding whether to decide than agencies would be permitted to consider in actually making the relevant judgment, at least where permitted by statutory text.

including marine engines and vessels . . . in the near or medium term.”⁴⁶

Non-enforcement decisions might also be described as decisions not to decide. When an agency decides not to pursue an alleged violation of a statute or rule, it makes no determination as to whether a violation actually occurred. Instead, it chooses not to investigate. In *Heckler v. Chaney*, for example, a group of death row inmates petitioned the Food and Drug Administration (FDA) to enforce its prohibition of the “off-label” use of drugs by barring the use of a drug cocktail in lethal injections.⁴⁷ When FDA declined to take the requested action, respondents appealed. The Supreme Court sided with FDA and took the opportunity to announce a general presumption that judicial review of an agency’s decision not to initiate an enforcement action is unavailable.⁴⁸ The Court cited three primary justifications for this presumption: an agency’s superior expertise in allocating its limited resources among enforcement priorities, the lesser coercive impact of inaction as opposed to action, and the similarity of agency enforcement actions to prosecutorial discretion, an area where the executive has traditionally been granted near total discretion.⁴⁹

A decision not to decide can also manifest as delay. For example, the Mine Safety and Health Administration (MSHA) deferred the issuance of a final rule governing permissible levels of diesel exhaust gases in underground mines for several years. The question was ultimately litigated, at which point the agency explained its delay by stating that it was occupied with other rulemakings that it concluded, and plaintiffs agreed, would more directly and beneficially impact miners’ health.⁵⁰ In another delay case, *Sierra Club v. Thomas*, the Sierra Club challenged EPA’s failure to conclude a rulemaking concerning whether to list strip mines as a source subject to fugitive emissions regulation under the CAA.⁵¹ Noting that more than three years had passed since EPA initially proposed its rulemaking, the Sierra Club sought a writ of mandamus requiring EPA to make its decision within ninety days. The question of whether to add strip mines as a regulated source of fugitive emissions was a controversial one, pitting industry against environmental groups with EPA caught in the middle.⁵²

46. *Memorandum in Response to Petitions Regarding Greenhouse Gas and Other Emissions from Marine Vessels and Nonroad Engines and Vehicles* (June 18, 2012), http://www.eenews.net/assets/2012/06/18/document_pm_06.pdf [hereinafter *Memorandum in Response to Petitions*].

47. *Heckler v. Chaney*, 470 U.S. 821 (1985).

48. *Id.* at 832–33.

49. *Id.* at 831–32.

50. *In re United Mine Workers of Am. Int’l Union*, 190 F.3d 545 (D.C. Cir. 1999).

51. *Sierra Club v. Thomas*, 828 F.2d 783 (1987).

52. See Guy Darst, *EPA Pollution Proposal Sparks Suits*, ASSOCIATED PRESS, Dec. 26, 1984 (describing industry and environmental group positions on proposed regulation).

Recognizing this, the D.C. Circuit ultimately declined to grant the Sierra Club injunctive relief.⁵³ The court noted that extra time to consider whether to list strip mines was warranted given the “highly controversial nature of the proposal.”⁵⁴ It also remarked that additional time to gather information and conduct research to support a decision would allow EPA to reduce the “risk of later judicial invalidation.”⁵⁵

Decisions not to decide tend to be particularly useful where the subject matter at issue is especially controversial. By deferring *all* regulatory steps, an agency might stay out of the spotlight long enough to accumulate information to better support its ultimate decision (as EPA did with respect to strip mines). There is also the possibility that deferring a decision might allow a more accountable government actor step in, obviating the need for agency action. With respect to GHG regulation, for example, players on all sides of the debate acknowledged that the CAA’s language was not perfectly suited to regulate GHGs, and many were hoping that Congress would step in and amend the statute. Some hoped that Congress would make clear that the CAA contemplated regulation of GHGs, while others desired a plainer statement that such regulation was precluded. However, there was general agreement on the desirability of legislative intervention.

Deciding not to decide also preserves the option of regulating in the future. One of the reasons EPA offered for its decision not to decide whether GHGs from non road and marine engines endangered public health and welfare was that it was prioritizing discretionary actions that would affect the largest contributors to GHG emissions in the United States.⁵⁶ However, EPA was clearly not interested in making a finding that emissions from these sources did *not* contribute to carbon pollution. By deferring the question, the agency left its options open.⁵⁷ Similarly, with respect to regulating diesel exhaust levels in mines, although MSHA was prioritizing other approaches to improving miners’ health, it was not suggesting that it would *never* promulgate standards.

53. *Sierra Club v. Thomas*, 828 F.2d at 799.

54. *Id.*

55. *Id.* at 798–99.

56. *Memorandum in Response to Petitions*, *supra* note 46.

57. In its earlier ruling on plaintiffs’ claim that EPA had unreasonably delayed its response to the petitions, the D.C. Circuit agreed with EPA that the agency was under no obligation to determine whether emissions from non road and marine sources should be regulated. See *Memorandum in Response to Petitions*, *supra* note 46, at 11–12 (emphasis added).

2. *Step-by-Step Regulation*

Agencies might also find it prudent to resolve some aspects of a problem while leaving others to another day. This approach might be called step-by-step regulation. Although there is some overlap between the categories suggested in this section depending on how one defines the scope of a problem or issue, it is helpful conceptually to separate incremental action from outright decisions not to decide. Decisions not to decide will be more useful where an issue is so controversial that any moves by the agency will subject it to intense criticism and scrutiny. By contrast, step-by-step regulation will allow the agency to enter the fray but to do so cautiously. It is therefore a helpful strategy for testing the waters and for making progress on an issue while avoiding regulatory fatigue.

FERC took such a step-by-step approach in a landmark order that moved electricity markets toward a more competitive structure. In the 2002 case *New York v. FERC*, the Supreme Court upheld a decision by FERC not to decide whether it had jurisdiction over the transmission of electricity at the retail level (e.g. to individual consumers) when that transmission was sold as part of a bundled product with the electricity itself.⁵⁸

New York v. FERC concerned FERC Order 888, which “unbundled” sales of electricity by requiring utilities to price and sell wholesale electricity separately from the transmission services required to move that electricity from seller to buyer. FERC did this to promote competition in power generation while preserving the natural monopoly in the transmission industry. The unbundling was designed to ensure that new generators entering the market would have non-discriminatory access to transmission services so that their power could reach buyers.⁵⁹

Because FERC has jurisdiction over both wholesale sales of power in interstate commerce (in other words, sales for resale) and interstate transmission of power, it could regulate both pieces of this transaction. However, sometimes *retail* sales of power (or sales to end users) are also sold as a package with transmission services. Since states have jurisdiction over retail sales, there was a question as to whether FERC could regulate the transmission component of these transactions without first unbundling

58. *New York v. FERC*, 535 U.S. 1, 25 (2002).

59. *S. Cal. Edison Co. v. FERC*, 603 F.3d 996, 997 (D.C. Cir. 2010); *see also* Order 888, *supra* note 3, at 21,577 (“Our approach to assuring . . . open access has two broad requirements: (1) Functional unbundling of transmission and generation (which includes separately stated rates for generation, transmission, and ancillary services, and a requirement that a transmission provider take service under its own tariff), except for bundled retail service . . .”).

them.

FERC could have ordered the unbundling of retail sales and asserted jurisdiction over the transmission component of those sales. It could also have allowed the sales to remain bundled, but asserted jurisdiction over the entire transaction. Alternatively, FERC could have found that it lacked jurisdiction to regulate bundled sales. However, FERC took none of these steps, choosing instead to leave the jurisdictional question undecided.⁶⁰

This portion of Order 888 came under fire from independent producers and wholesalers, who argued that FERC not only had jurisdiction to require the de-coupling of retail sales from transmission, but that it was required to do so and to regulate the transmission component.⁶¹ FERC disagreed, based on two separate arguments. Both arguments sounded in prudence. First, in Order 888, FERC argued that although it would be “helpful,” it was “not necessary” at the time to unbundle distribution from retail sales of energy in order to ensure non-discriminatory open access transmission.⁶² Second, the Commission found that asserting jurisdiction over the transmission component of bundled retail sales would raise “numerous difficult jurisdictional issues” that it felt would be better resolved through case-by-case proceedings.⁶³

The case made its way up to the Supreme Court, which deferred to FERC’s decision not to investigate bundled retail sales and consequently not to assert jurisdiction over transmission in that context.⁶⁴ If FERC had investigated and confirmed the alleged discrimination in the retail electricity market, the Court conceded, it would be required to remedy that discrimination under § 206 of the Federal Power Act (FPA).⁶⁵ But even if FERC had jurisdiction under the FPA “to regulate the transmission component of a bundled retail sale,” the Court continued, “the agency had discretion to decline to assert such jurisdiction in this proceeding in part because of the complicated nature of the jurisdictional issues.”⁶⁶ In essence, the Court held, this decision “represent[ed] a statutorily permissible policy choice.”⁶⁷

60. *New York v. FERC*, 535 U.S. at 12.

61. Order 888, *supra* note 3, at 21,577.

62. *Id.*

63. *Id.* at 21,577–78. In 2011, the Federal Energy Regulatory Commission (FERC) expanded this reasoning to the sale of state renewable energy credits, deciding that it would assert jurisdiction when sales of those credits were bundled with sales of wholesale energy, but not when they were sold independently. WSPP Inc., ER12-1144-000, 139 FERC ¶ 61,061 (Apr. 20, 2012).

64. *New York v. FERC*, 535 U.S. at 28.

65. *Id.* at 27.

66. *Id.* at 28.

67. *Id.* (citation omitted). Justices Thomas, Scalia, and Kennedy would have remanded

The EPA's approach to the regulation of GHG emissions under President Barack Obama provides another example of step-by-step regulation. The Obama EPA has made no secret of its support for controlling emissions of GHGs from both mobile and stationary sources.⁶⁸ Despite its enthusiasm, however, EPA's approach to date has been incremental rather than comprehensive.⁶⁹

In December 2009, EPA made the key finding (sought by the petitioners in *Massachusetts v. EPA*) that GHGs constitute a threat to public health and welfare and that GHG emissions from motor vehicles cause and contribute to that threat.⁷⁰ This "endangerment finding" triggered obligations to regulate emissions from new cars and trucks.⁷¹ Regulating vehicular emissions, in turn, made GHGs "subject to regulation" under the CAA, triggering a requirement for so-called "stationary sources," including power plants, businesses, and even, potentially, residences, to seek permits for their GHG emissions.

Under the CAA's Prevention of Significant Deterioration (PSD) permitting program, only stationary sources that are "major" emitters of a given pollutant, as measured by thresholds set in tons-per-year in the statute itself, are required to seek a permit.⁷² For all other regulated pollutants, which are emitted in relatively small quantities, this meant that permitting did not affect them and was limited to the largest sources. Gases like

the matter to FERC to determine whether or not undue discrimination in the retail markets dictated that it assert jurisdiction over the transmission component of bundled retail transactions. *Id.* at 42 (Thomas, J., dissenting in part). The dissenters would have found that FERC's decision not to investigate was an impermissible policy choice not permitted by the terms of the statute, and that FERC had failed to engage in "reasoned decisionmaking." *Id.*

68. See, e.g., Lisa Jackson, Adm'r, Env'tl. Prot. Agency, Remarks on the Endangerment Finding on Greenhouse Gases (Dec. 7, 2009), available at <http://yosemite.epa.gov/opa/admpress.nsf/8d49f7ad4bbcf4ef852573590040b7f6/b6b7098bb1dfa9a85257685005483d5!OpenDocument> (noting that EPA was joining "millions of Americans and billions of global citizens who have seen the overwhelming evidence and called for action on climate change"); *id.* ("[I]f we do not act to reduce greenhouse gases, the planet we leave to the next generation will be a very different place than the one we know today"); see also Gina McCarthy, Adm'r, Env'tl. Prot. Agency, Remarks at Harvard University, Harvard Law School (July 31, 2013), available at <http://yosemite.epa.gov/opa/admpress.nsf/8d49f7ad4bbcf4ef852573590040b7f6/be8f2d864287e57285257bb90067322a!OpenDocument>.

69. The agency itself has described its approach as "common-sense." *Regulatory Initiatives*, EPA, <http://www.epa.gov/climatechange/EPAactivities/regulatory-initiatives.html> (last visited June 2, 2014). Lisa Jackson has also referred to it as "pragmatic." See Jackson, *supra* note 68.

70. Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 40 C.F.R. ch. 1 (2010).

71. 42 U.S.C. § 7521(a) (2006 & Supp. IV 2011).

72. *Id.* § 7479(1) (defining "major emitting facility").

carbon dioxide, however, are emitted in much larger quantities. Thus, many more sources would be required to seek permits under the new rules, including many businesses and even some large residences.

To avoid intense backlash from opponents and to address what could otherwise be an administrative nightmare for state and federal permitting authorities as well as the small stationary sources themselves, EPA took a creative approach to the problem. It issued a “tailoring rule,” proposing to phase in, slowly, the permitting rules for smaller sources of GHGs.⁷³ As of February 24, 2012, when EPA proposed its third step of the phase-in, triggering thresholds remained high.⁷⁴ Thus, smaller sources have continued to be excluded from the CAA’s requirements, notwithstanding EPA’s clear obligation to regulate such sources under the language of the statute.⁷⁵

Although the Supreme Court recently invalidated part of the tailoring rule,⁷⁶ other aspects of EPA’s step-by-step approach to GHG regulation survive. For example, EPA has also postponed decisions about whether to set National Ambient Air Quality Standards (NAAQS) for GHGs. The endangerment finding arguably triggered the sections of the CAA that require EPA to set GHG NAAQS at a level that would protect the public health and welfare.⁷⁷ Setting national standards for GHGs, however, poses significant practical difficulties. Within three years after EPA has determined what level of GHGs will protect public health and welfare with an adequate margin of safety,⁷⁸ states would be required to submit an implementation plan to EPA that detailed the steps they would take to

73. Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 40 C.F.R. § 51 (June 3, 2010).

74. Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule Step 3, GHG Plantwide Applicability Limitations and GHG Synthetic Minor Limitations, 77 Fed. Reg. 14,226 (proposed Mar. 8, 2012) (to be codified at 40 C.F.R. § 51).

75. EPA offered three legal justifications for its approach. First, EPA invoked the “absurd results” doctrine, arguing that aggressive regulation under the letter of the statute would be an absurd reading as Congress would not have wanted small entities to be burdened with permit requirements. Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 40 C.F.R. § 51. EPA also relied on the doctrines of “administrative necessity” and the “one-step-at-a-time” doctrine, both of which, the agency argued, gave it authority to phase in its GHG permitting program. *Id.* at 31,542.

76. See *Util. Air Regulatory Grp. v. EPA*, No. 12-1146, slip op. (U.S. June 23, 2014).

77. 42 U.S.C. § 7408 (2006). For a collection of sources claiming that EPA *must* set National Ambient Air Quality Standards (NAAQS) for GHGs, see Patricia Ross McCubbin, *EPA’s Endangerment Finding for Greenhouse Gases and the Potential Duty to Adopt National Ambient Air Quality Standards to Address Global Climate Change*, 33 S. ILL. U. L.J. 437, 452 (2009).

78. Determining the correct limit for pollutants like GHGs also poses special challenges. See *Regulating Greenhouse Gas Emissions Under the Clean Air Act*, 73 Fed. Reg. 44,354, 44,478 (July 30, 2008); see also McCubbin, *supra* note 77, at 444.

implement, maintain, and enforce the standards.⁷⁹ GHGs, however, become well-mixed once they are emitted into the atmosphere, meaning that emissions from all over the globe contribute to the concentrations in any one state. Thus, it would be impossible for a state, on its own, to achieve any NAAQS for GHGs.⁸⁰ Moreover, the economic burden the effort would impose on states would make any move to set NAAQS for GHGs, in the words of one commentator, “politically impossible.”⁸¹ EPA has therefore prudently deferred requests to set NAAQS for GHGs to date.⁸²

3. *Administrative Minimalism*

Finally, agencies might avoid a particularly controversial decision or action by making a different, less contentious choice. There are parallels here to what Cass Sunstein has described, in the context of the courts, as judicial minimalism.⁸³ Sunstein understands a minimalist judge to be one who seeks “to avoid broad rules and abstract theories,” focusing “attention only on what is necessary to decide particular cases.”⁸⁴ Minimalist agencies, like minimalist courts, also seek to narrow the issues at stake in proceedings. But these agencies do so by electing less ambitious solutions to avoid decisions with more problematic practical consequences.⁸⁵

79. 42 U.S.C. § 7410(a) (2006).

80. See *Regulating Greenhouse Gas Emissions Under the Clean Air Act*, 73 Fed. Reg. at 44,485 (summarizing the challenges of regulating GHGs by setting NAAQS).

81. See Jonathan Miller, Comment, *Double Absurdity: Regulating Greenhouse Gas Under the Clean Air Act*, 47 HOUS. L. REV. 1389, 1404 (2011).

82. In a statement responding to one petition for a carbon dioxide NAAQS, EPA explained that “[o]ur view has been that setting a [NAAQS] for greenhouse gases would not be advisable and is not legally required.” *Activists Petition EPA for CO2 NAAQS, Citing Insufficient Climate Action*, INSIDE EPA (Dec. 4, 2009), available at <http://insideepa.com/Inside-Cal/EPA/Inside-Cal/EPA-12/04/2009/activists-petition-epa-for-co2-naaqs-citing-insufficient-climate-action/menu-id-1097.html>.

83. See SUNSTEIN, *supra* note 29; Cass R. Sunstein, *Beyond Judicial Minimalism*, 43 TULSA L. REV. 825 (2008) (exploring minimalism’s limits); Jonathan T. Molot, *Principled Minimalism: Restriking the Balance Between Judicial Minimalism and Neutral Principles*, 90 VA. L. REV. 1753 (2004) (attempting to reconcile Bickel and Wechsler in a theory of “principled minimalism”). While Charles Sabel and William Simon have used the term “minimalism” to describe administrative practice, they use it to refer to an approach to regulation that minimizes agency discretion and incorporates market concepts and practices. See Charles F. Sabel & William H. Simon, *Minimalism and Experimentalism in the Administrative State*, 100 GEO. L.J. 53 (2011).

84. Cass Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 14 (1996).

85. The parallel to an agency’s quasi-judicial actions is most obvious. Like courts, agencies may prefer to adjudicate narrowly rather than broadly and to leave deeply contested questions undecided, especially when it is necessary to reach agreement on a

Consider FWS's circumvention of listing decisions and critical habitat designations under the ESA in the face of a hostile Republican Congress after the 1994 mid-term elections. Led by Newt Gingrich, Congressional Republicans espoused a deregulatory philosophy embodied in their "Contract with America."⁸⁶ No regulatory scheme exemplified the kind of governmental overreaching they despised better than the ESA, sometimes called the "pitbull" of environmental laws because of its strict, clear prohibitions on harassing or harming endangered species and on federal actions that are likely to jeopardize a listed species or adversely modify the species' critical habitat.⁸⁷

It was because of the ESA's uncompromising stance on harm to endangered species, even where protections are extraordinarily costly, that the incoming Republican majority sought to hobble the agencies tasked with its implementation.⁸⁸ To make matters worse, the outgoing Bush Administration had entered into a litigation settlement with environmental groups committing FWS to listing nearly 400 species over four years.⁸⁹ The settlement put the agency in the position of having to exercise its authority under the statute aggressively at a time when such action would further

multi-member commission. The logic of minimalism, however, extends to the agency's quasi-legislative functions as well. When agencies act in a quasi-legislative capacity, reactions to controversial moves might subject them to reprisals from their political principals or other actors. Thus, it can be to an administrator's advantage to avoid making particularly controversial decisions where those choices are not essential to the resolution of the problem before them.

86. See, e.g., Frank Swoboda, *Plan Combines a Revival of Reaganomics, Reins on Regulation*, WASH. POST, Dec. 14, 1994, at A23.

87. See, e.g., J.B. Ruhl, *Who Needs Congress? An Agenda for Administrative Reform of the Endangered Species Act*, 6 N.Y.U. ENVTL. L.J. 367, 384 (1998) ("Once a species becomes listed and thereby protected, however, the [Endangered Species Act (ESA)] turns into the pitbull of environmental laws."); Sandi B. Zellmer, *Indian Lands as Critical Habitat for Indian Nations and Endangered Species: Tribal Survival and Sovereignty Come First*, 43 S.D. L. REV. 381, 394 (1998) ("The ESA [is] widely known as the 'pitbull' of environmental laws because of its broad-sweeping application and stringent requirements . . ."). For the ESA's prohibitions on taking endangered species and on federal action that jeopardizes a species or its critical habitat, see 16 U.S.C. §§ 1536, 1538 (2012).

88. The best known example of the ESA's protective power even in the face of economic disruption is the story that led to the 1978 case *TVA v. Hill*, 437 U.S. 153 (1978). There, the discovery of a small endangered fish, the Snail Darter, halted, at least temporarily, the completion of a large dam on the Tennessee River. For a compelling version of the narrative by the attorney who brought the case, see ZYGMUNT J.B. PLATER, *THE SNAIL DARTER AND THE DAM: HOW PORK-BARREL POLITICS ENDANGERED A LITTLE FISH AND KILLED A RIVER* (2013).

89. Timothy Noah, *Caught in a Trap: Democrats Get Snared By GOP Pact on List of Endangered Species*, WALL ST. J., Feb. 17, 1995, at A1.

inflame the ESA's opponents.⁹⁰

Congressional Republicans indicated that they were serious about ESA reform. First they imposed a moratorium on the listing of new species.⁹¹ Several bills were subsequently introduced to amend the ESA.⁹² Despite sympathetic-sounding titles, many of these bills would have effectively gutted the statute.⁹³ Court decisions upholding capacious interpretations of some of the ESA's toughest provisions added fuel to the critics' arguments. In *Babbitt v. Sweet Home*, the Supreme Court upheld an interpretation by FWS that "significant habitat modification or degradation that actually kills or injures wildlife" constituted an impermissible "take" of a species under the ESA.⁹⁴ Washington Senator Slade Gorton stated, in response to the opinion, that "[n]ow, more than ever, it is critical that Congress reform the act so that people are part of the equation."⁹⁵

To defuse the anti-ESA animus in Congress, the Department of Interior took a series of actions designed to address concerns about the ESA's costliness. Instead of enforcing the ESA against individual landowners in

90. According to Secretary Babbitt, the settlement "put[] us in a reactive mode, always working from a very tight corner that we've been painted into." *Id.*

91. Emergency Supplemental Appropriations and Rescissions for the Department of Defense to Preserve and Enhance Military Readiness Act of 1995, Pub. L. No. 104-6, 109 Stat. 73. President Clinton was forced to ratify this moratorium because it was included as part of an omnibus defense spending bill.

92. A ranking official in the Department of the Interior's team at the time has referred to "a D.C. sized phone book[] of anti-ESA bills that attacked the ESA from soup to nuts." Donald J. Barry, *Opportunity in the Face of Danger: The Pragmatic Development of Habitat Conservation Plans*, 4 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 129, 132 (1998). A Fish and Wildlife Service (FWS) news release explained that one of the bills, S. 851, would have established "complicated and expensive procedures for compensating private landowners that appear to have been devised simply to bring protection of endangered species on private land to a grinding halt." *Statement by Secretary Babbitt on the 'Endangered Species Conservation and Management Act of 1995'*, BUSINESS WIRE, Sept. 8, 1995, available at <http://www.thefreelibrary.com/Statement+by+Secretary+Bruce+Babbitt+on+the+Endangered+Species...-a017373331>; see also Ruhl, *supra* note 87, at 369 (discussing the "flurries of [ESA] bills introduced from all sides"). The Republican chairman of the House Resources Committee, Representative Don Young (R-AK), promised to block funding for ESA enforcement unless the Act's reach was curtailed. Bob Benenson, *Panel Chief Takes Aim at Endangered Species Act*, MEMPHIS COMMERCIAL APPEAL (TN) (Jan. 15, 1995), 1995 WLNR 3200910.

93. See Craig Holt, *Who's Really Endangered?*, HERALD-SUN (Durham, NC), Feb. 4, 1996, at D11.

94. *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 687, 708 (1995).

95. Robert T. Nelson & Eric Pryne, *Ruling Seen Fueling Species-Act Fight*, SEATTLE TIMES (June 30, 1995), available at <http://community.seattletimes.nwsources.com/archive/?date=19950630&slug=2129064>.

California's San Joaquin valley, for example, the Department entered into an agreement with California's Republican Governor, Pete Wilson, under which the state would purchase water from farmers if needed to protect species. Secretary Babbitt intended the deal to serve as "a demonstration that the Endangered Species Act is workable and that it can play an important role in finding a balance between economic and environmental issues."⁹⁶

In addition, he introduced "candidate conservation agreements." These were formal, voluntary agreements for species that had been designated as candidates for endangered or threatened status but whose candidacy had not yet been evaluated. In lieu of considering their candidacy, the agency entered into agreements with private property owners under which the property owners agreed to take certain conservation actions in exchange for a promise that FWS would not require additional conservation measures even if the species were listed in the future. The goal of the agreements, however, was to make eventual listing unnecessary.⁹⁷

Similarly, the Department entered into voluntary "habitat conservation agreements" to avoid controversial critical habitat determinations. For example, the California gnatcatcher, a small blue-grey songbird, was listed as threatened in March 1993. However, the Department postponed a decision about the bird's critical habitat, finding that habitat designation was not prudent at that time.⁹⁸ Instead, the Department engaged in a cooperative process with developers and conservationists designed to provide protection for the gnatcatcher while allowing economic development to go forward.⁹⁹ By evading the ESA's strict habitat designation provisions in favor of a more collaborative process, the Department sought to avoid both legislative backlash and costly court battles.¹⁰⁰

In this way, the Department deferred several listing and critical habitat

96. *Deal Could Save Endangered Species Act*, SUN-SENTINEL (FL) (Dec. 18, 1994), available at http://articles.sun-sentinel.com/1994-12-18/news/9412170204_1_species-act-environmental-law.

97. Safe Harbor Agreements and Candidate Conservation Agreements, 62 Fed. Reg. 32,189, 32,190 (proposed June 12, 1997) (noting that Candidate Conservation Agreements (CCAs) "should be expected to preclude the need for listing species covered by the Agreement as threatened or endangered under the Act").

98. Endangered and Threatened Wildlife and Plants; Proposed Special Rule To Allow Take of the Threatened Coastal California Gnatcatcher, 58 Fed. Reg. 16,758, 16,758 (Mar. 30, 1993).

99. *Id.*; see also Keith Schneider, *Accord is Reached to Aid Forest Bird*, N.Y. TIMES, Apr. 16, 1993, at A1 (quoting Secretary Babbitt explaining that his motive for the California gnatcatcher plan and others like it was to protect the ESA).

100. Joan Hamilton, *Babbitt's retreat*, 79 SIERRA 52 (1994).

decisions, which were a lightning rod for political opposition.¹⁰¹ As Assistant Interior Secretary George Frampton, Jr. explained in 1995, "It is not a secret that the Endangered Species Act is likely to be under great stress in Congress over the next two years. What the Clinton administration is trying to do across the country is to demonstrate we can make the Endangered Species Act work."¹⁰²

The strategy was successful. Representative Don Yong, chairman of the House Natural Resources Committee and one of the main critics of the ESA, noted in 1995 that he was "encouraged" by Secretary Babbitt's moves and was waiting to see "how far the administration is willing to go toward addressing all of the problems associated with the act."¹⁰³ The Department's minimalism held off congressional Republicans until the elections of 1996, when more moderates were elected.¹⁰⁴

Although the Department's strategy has been criticized as insufficiently aggressive,¹⁰⁵ it is clear that the primary motive was to preserve the ESA, thereby ensuring the longer-term protection of endangered species. For example, Secretary Babbitt defended his approach to managing the California gnatcatcher's habitat in prudential terms, noting that the Pacific Northwest had seen ten years of lawsuits and controversy over the protection of endangered species. "We can't let that happen again," he explained, "There's too much at stake in environment[al] terms and economic terms."¹⁰⁶

101. Secretary Babbitt also used habitat conservation plans to manage state forests, predicting that the approach would influence congressional Republicans not to gut the ESA. See *Babbitt Praises Logging Plan*, SEATTLE TIMES (Oct. 4, 1995), <http://community.seattletimes.nwsource.com/archive/?date=19951004&slug=2145082> ("Babbitt predicted the approach will help persuade the Republican Congress to keep the Endangered Species Act, which has come under fire for neglecting economic concerns while trying to ensure species survival.").

102. *New Clinton Plan Eases Restrictions on Loggers*, ALBANY TIMES UNION, Feb. 8, 1995, at A6.

103. Timothy Noah, *Babbitt Proposes Reforms to Ease Conservation Law*, WALL ST. J., Mar. 7, 1995, at B6.

104. See James Gerstenzang, *Environmentalists See Attacks by Foes Easing*, L.A. TIMES, Jan. 2, 1997, at 14 ("The House floor is clearly a more friendly place than during the last Congress, by seven or eight votes at least," said Greg Wetstone, legislative director of the Natural Resources Defense Council.); see also Jessica Mathews, *Earth First at the Polls*, WASH. POST, Nov. 11, 1996, at A29.

105. As explained by one of the authors of the first Habitat Conservation Plan (HCP) and the Department's "no surprises" policy, which guarantees private landowners governed by an HCP that they will not be required to take more restrictive measures without their consent, those policies, "in the views of many people in the environmental community . . . sort of give[] everything away." Barry, *supra* note 92, at 129.

106. *Babbitt Reaffirms Gnatcatcher Protection Plan*, L.A. TIMES (June 5, 1993),

The Secretary's candor in describing the reasons for his minimalist approach suggests a broader inquiry: why might agencies exercise the passive virtues, and are those motivations justifiable in terms of statutory goals? It is to these questions that the next sections turn.

II. WHY RESTRAINT?

A dominant narrative in the literature posits that agencies engage in inaction and delay primarily for nefarious reasons, including lassitude and narrow interest group influence.¹⁰⁷ Some cases of agency decisions not to decide, step-by-step regulation, and administrative minimalism are undoubtedly so motivated. But this unsympathetic account has crowded out more positive, alternative explanations for agency restraint. Agencies might also postpone decisions to avoid incurring the wrath of other political actors, thereby avoiding backlash that could diminish their authority or limit the impact of their actions going forward. Or they might avoid particularly contentious issues to allow those issues to be resolved, in the first instance, by a more democratically accountable actor.

Both of these are motivations that Bickel originally ascribed to the courts, but there are good reasons to conclude that they drive administrative deferrals as well. First, no less than other governmental actors, agencies must be strategic. Indeed, agencies may have a greater need for strategy than the three "traditional" branches of government because their situation is less secure. Agencies have tenuous constitutional roots and are dependent on their political masters for the authority they exercise. Furthermore, like courts, agencies cannot claim legitimacy by virtue of direct accountability to the electorate. These structural features put agencies in a position where thinking strategically is a survival mechanism. In order to carve out sufficient autonomous space to perform their delegated functions, agencies must consider the practical consequences of their actions.¹⁰⁸ Restraint is a helpful strategy in creating

http://articles.latimes.com/1993-06-05/local/me-43613_1_orange-county-forum.

107. Consider, for example, the statement of Judge J. Skelly Wright in the *Calvert Cliffs* case that "[o]ur duty, in short, is to see that important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy." *Calvert Cliffs' Coordinating Comm., Inc. v. U. S. Atomic Energy Comm'n*, 449 F.2d 1109, 1111 (D.C. Cir. 1971); see also sources cited *supra* notes 5–7.

108. On the desire of agencies to create discretionary space, see Jennifer Nou, *Agency Self-Insulation Under Presidential Review*, 126 HARV. L. REV. 1755 (2013) (arguing that agencies insulate themselves from presidential review by increasing the costs of that review). The argument here does not depend on acceptance of agencies as fully autonomous actors, although there have been gestures in that direction in the scholarly literature. Peter Strauss has provided the strongest defense to date of agencies as independent organs of power in

this space because it deflects scrutiny and criticism. By controlling the timing and pace of regulation, agencies can move forward with their agendas when the likelihood of success is greatest.

A. Structural Considerations

Agencies are, like courts, “at least potentially a deviant institution in a democratic society.”¹⁰⁹ In some ways, the exercise of agency power appears even more threatening than the judiciary’s, given that the entirety of administrative power derives, not from an explicit constitutional grant, but from a flexible understanding of the Constitution’s edicts.¹¹⁰ That document barely mentions administrative agencies, the only exceptions being the references to “Departments” in the Necessary and Proper Clause and in the Appointments and the Opinions Clauses of Article II.¹¹¹ Certainly the framers could not have foreseen the scope of the modern administrative state.¹¹²

Another source of unease with administrative agencies is their lack of direct accountability to the public. Agencies share this problem with courts, although the concern is arguably less pronounced for agencies given the presence of indirect accountability through the political branches.¹¹³ Nevertheless, the accountability deficit remains a threat to agency

government. Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984). Strauss adopted an understanding of the constitutional structure as relying primarily on checks and balances between the branches to prevent tyranny. Agencies, both independent and executive, fit into this structure as a subordinate, but essentially separate, fourth branch. *Id.* at 578–79. In this way, Strauss reconciled the idea of a large, quasi-independent bureaucracy with formal constitutional structure.

109. BICKEL, LEAST DANGEROUS BRANCH, *supra* note 9, at 128.

110. Of course, while federal courts may trace their authority more generally to Article III of the Constitution, the power of judicial review was less obviously envisioned by the framers. See BICKEL, LEAST DANGEROUS BRANCH, *supra* note 9, at 1.

111. U.S. CONST. art. I, § 8, cl. 18; U.S. CONST. art II, § 2, cl. 1–2.

112. For a more extended discussion of the limited constitutional treatment of agencies, see Strauss, *supra* note 108, at 596–99.

113. As part of a recent symposium on Bickel, Sanford Levinson opined that “Bickel, like too many of his legal academic colleagues, wildly over-estimated the ‘democratic’ nature of the American political system in general when he claimed that judicial review presented some ‘special’ difficulty.” Sanford Levinson, *Online Alexander Bickel Symposium: Alexander Bickel Has Left the Building*, SCOTUSBLOG (Aug. 20, 2012, 11:17 AM), <http://www.scotusblog.com/2012/08/online-alexander-bickel-symposium-alexander-bickel-has-left-the-building/>. While the lack of direct electoral accountability clearly poses special problems for courts, Levinson is correct that the judiciary is not the only institution facing democratic deficit concerns. As this section will discuss, administrative agencies, too, suffer from this affliction.

legitimacy.¹¹⁴

One result of the deficit is that agencies, like Bickelian courts, may sometimes defer contentious decisions in the hopes that more accountable actors will resolve the underlying questions, thereby obviating the need for an administrative pronouncement. Bickel argued that the judicial role was not to “resolve issues on which the political processes are in deadlock.”¹¹⁵ Rather, by demurring, courts could refocus the attention of opponents and proponents back onto the legislature, “where the power of at least initial decision properly belongs in our system”¹¹⁶ This “democracy-forcing”¹¹⁷ justification applies in the context of administrative agencies as well. EPA’s decision not to decide the question of whether GHGs could be regulated under the CAA, for example, could be seen as an instance of Bickelian democracy-forcing. It was generally acknowledged that all parties involved, EPA included, would have preferred that Congress amend the CAA to make clear whether it covered GHGs and, if so, how they should be regulated. The agency might therefore have delayed action in the hope that Congress would legislate the problem out of existence.¹¹⁸

114. See, e.g., Michael P. Vandenberg, *The Private Life of Public Law*, 105 COLUM. L. REV. 2029, 2036 (2005) (describing agencies’ democratic legitimacy problem and tracing the history of the agency’s efforts to compensate for it).

115. Bickel, *Passive Virtues*, *supra* note 9, at 60.

116. *Id.* at 61.

117. On the practice of “democracy-forcing” approaches to statutory interpretation more generally, see, for example, Adrian Vermeule, *The Judiciary Is A They, Not An It: Interpretive Theory and the Fallacy of Division*, 14 J. CONTEMP. LEGAL ISSUES 549, 550 (2005). Cass Sunstein suggests that judicial minimalism can be democracy-forcing both by leaving “issues open for democratic deliberation” and by ensuring “that certain important decisions are made by democratically accountable actors.” Sunstein, *supra* note 84, at 7.

118. The so-called “major questions” canon of judicial review may serve similar ends. According to this doctrine, courts may be less inclined to defer to agency interpretations of even ambiguous statutory provisions when the underlying issue is “a large question rather than an interstitial one.” Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 232 (2006) (citing a 1986 article by then-Judge Breyer suggesting that, when it comes to major questions, courts should not defer to agency interpretations of law). Sunstein ultimately concludes that “there is no justification for the conclusion that major questions should be resolved by courts rather than agencies.” *Id.* at 243. One of the reasons he offers is that, under *Chevron*, less-accountable courts should defer to more-accountable agencies on questions both large and small. *Id.* This logic, taken even further, would suggest that agencies might be justified in deferring resolution of statutory ambiguities if they thought an even *more* accountable actor (in this case Congress) was likely to resolve the issue. Abigail Moncrieff has suggested that such a canon might be defended on the ground that agencies should be precluded from weighing in on active legislative issues to avoid interfering “with ongoing congressional bargaining.” Abigail R. Moncrieff, *Reincarnating the “Major Questions” Exception to Chevron Deference as a Doctrine of Noninterference (Or Why Massachusetts v. EPA Got It Wrong)*, 60 ADMIN. L. REV. 593, 621 (2008).

Another effect of the accountability deficit¹¹⁹ is that proxy mechanisms have risen up to ensure that agencies cannot exercise unfettered discretion. Threats come from multiple sources, the most significant of which are the agency's political principals—Congress and the President—and the judiciary. But agencies must also be conscious of reactions by other actors, namely the states and the public, whose opposition might impede regulatory efforts.¹²⁰ For at least the better-known federal agencies, each of those audiences will form a judgment about an agency's actions, and that view will shape their future interactions with the agency and its regulatory programs.¹²¹

Threats to agencies' continued viability are very real. Neither agencies, nor the programs they administer, are immortal. David Lewis made the remarkable finding that *more than half* of agencies created after 1946 were terminated by 1997, with the risk of termination increasing after political turnover in the White House.¹²² Briefly, according to Lewis, "administrative agencies never escape the politics that created them."¹²³

Of perhaps primary importance for agencies is that they do not antagonize Congress, which wields formidable oversight power. By passing new legislation, Congress can destroy an agency as surely as it can create one.¹²⁴ But Congress has many tools available to hobble agencies short of

119. Political scientists Norton Long and John Rohr have made the argument that agencies are actually *more* representative than the other branches of government because the civil service better reflects the citizenry's makeup than either the Executive or Congress. See, e.g., Norton E. Long, *Bureaucracy and Constitutionalism*, 46 AM. POL. SCI. REV. 808 (1953); JOHN A. ROHR, *TO RUN A CONSTITUTION: THE LEGITIMACY OF THE ADMINISTRATIVE STATE* (1986). No matter how well agency actors reflect the pluralistic makeup of society, however, the fact remains that they are insulated from the public due to the absence of direct electoral oversight.

120. One particularly evocative metaphor comes from Harold Bruff, who described regulators as being bound up in complex "webs" with other governmental actors. See Harold H. Bruff, *Presidential Power Meets Bureaucratic Expertise*, 12 U. PA. J. CONST. L. 461, 465 (2010).

121. Daniel Carpenter has written extensively about the importance of reputation to government agencies. See, e.g., DANIEL CARPENTER, *REPUTATION AND POWER: ORGANIZATIONAL IMAGE AND PHARMACEUTICAL REGULATION AT THE FDA* 18 (2010) (recognizing that other actors "also carry power, and they use it constantly").

122. David E. Lewis, *The Politics of Agency Termination: Confronting the Myth of Agency Immortality*, 64 J. POL. 89, 90 (2002). Lewis's data came from the United States Government Manual, which lists all government agencies terminated since 1933. *Id.*

123. *Id.* at 92. A separate study, using a data set derived from the Catalog of Federal Domestic Assistance, found that individual federal programs have a non-trivial likelihood of mutation or death within their first ten years. Christopher R. Berry, Barry C. Burden & William G. Howell, *After Enactment: The Lives and Deaths of Federal Programs*, 54 AM. J. POL. SCI. 1, 6 (2010).

124. Of course, this process requires the signature of the President or a legislative

outright abolishment. It controls agency behavior through decisions about the procedures available to the agency under a given statutory scheme.¹²⁵ Policy disagreements between the agency and Congress tend to cause legislators to reduce the amount of discretion afforded to the agency.¹²⁶ Congress also wields significant power as keeper of the purse. It may cut an agency's budget, but it may also use the budget process to limit the agency's discretion to undertake specific actions. For example, in July 2013, the House Appropriations Committee approved a budget for EPA which not only cut the agency's budget by over a third, but also contained policy riders that would have prohibited spending on rulemaking which limited carbon emissions from power plants.¹²⁷

Even when they do not form a majority in both houses, a majority party in either house of Congress can still inconvenience or at least embarrass an agency by delaying the confirmation of a political appointee or by calling representatives from the agency to testify at congressional hearings. For example, EPA Administrator Gina McCarthy endured a confirmation process that lasted months and involved more than 1,000 questions about EPA rulemaking procedures and agency transparency.¹²⁸ Her nomination was only confirmed after Majority Leader Harry Reid struck a deal with members of the minority party in exchange for backing down on efforts to limit use of the filibuster.¹²⁹ Committees may also issue time consuming

override of his veto.

125. Political scientists Mathew McCubbins, Roger Noll, and Barry Weingast, known collectively by their *nom de plume* McNollGast, have written extensively about Congress's use of structure and process to control agencies. See Mathew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243 (1987) (investigating the political control of agencies through oversight and procedural design); Mathew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431 (1989) (using the example of air pollution regulation to elaborate on the use of process selection to control agency behavior). Jonathan Macey has made similar observations. Jonathan R. Macey, *Organizational Design and Political Control of Administrative Agencies*, 8 J.L. ECON. & ORG. 93 (1992) (concluding that structure and design are effective tools for political principals seeking to control agency behavior and to reduce the ability of later political actors to manipulate that structure).

126. See Jason A. MacDonald & William W. Franko Jr., *Bureaucratic Capacity and Bureaucratic Discretion: Does Congress Tie Policy Authority to Performance?*, 35 AM. POL. RESEARCH 790, 791 (2007).

127. STAFF OF H. COMM. ON APPROPRIATIONS, 113TH CONG., A BILL MAKING APPROPRIATIONS FOR THE DEPARTMENT OF THE INTERIOR, ENVIRONMENT, AND RELATED AGENCIES FOR THE FISCAL YEAR ENDING SEPTEMBER 30, 2014, AND FOR OTHER PURPOSES (Comm. Print 2013).

128. Richard Valdmanis & Valerie Volcovici, *New EPA Chief Takes on Critics of U.S. Agency's Policies*, REUTERS, July 30, 2013, available at <http://www.reuters.com/assets/print?aid=USBRE96T16620130730>.

129. John M. Broder, *After Delayed Vote, E.P.A. Gains a Tough Leader to Tackle Climate Change*,

subpoenas to agencies, as the House Science, Space and Technology Committee recently did when it requested that EPA provide data underpinning key studies assessing the health effects of fine particulate matter and ozone. The Committee also ordered Administrator McCarthy to appear before them.¹³⁰

Second, to be successful in the long term agencies must preserve the goodwill of the White House.¹³¹ Congress may be the creator of executive agencies but the President is their political master. If they are to fulfill their statutory mandates, agencies must survive the winds of political change. New presidential administrations may have very different ideas from their predecessors about the ideal composition of the federal bureaucracy, especially if an agency is perceived as having “failed.”¹³² During the 2008 presidential primaries, for example, Republican candidate Rick Perry promised to abolish no fewer than three cabinet level agencies if elected.¹³³

N.Y. TIMES (July 29, 2013), available at <http://www.nytimes.com/2013/07/29/us/politics/after-delayed-vote-epa-gains-a-tough-leader-to-tackle-climate-change.html?pagewanted%3Dall&r=0>.

130. See Jessica Coomes & Alan Kovski, *House Science Panel Issues Subpoena Seeking EPA Data Used to Justify Air Rules*, BLOOMBERG BNA, Aug. 9, 2013, available at http://news.bna.com/erln/ERLNBW/split_display.adp?fedfid=35452687&vname=ernotalissues&jd=a0e0f5r8y3&split=0.

131. The framework laid out here of necessity adopts an oversimplified version of the pressures faced by any agency. One key qualification is that executive agencies often make decisions in tandem with the White House. In such cases, it may be difficult to disentangle purely political motivations from the good governance motivations that are the focus of this Article. For example, it has been suggested, based on anonymous interviews with senior agency officials, that the White House “systematically delayed enacting a series of rules on the environment, worker safety and health care” to avoid controversy in the run-up to the 2012 presidential election. Juliet Eilperin, *White House Delayed Enacting Rules Ahead of 2012 Election to Avoid Controversy*, WASH. POST (Dec. 14, 2013), http://www.washingtonpost.com/politics/white-house-delayed-enacting-rules-ahead-of-2012-election-to-avoid-controversy/2013/12/14/7885a494-561a-11e3-ba82-16ed03681809_story.html.

An administration might also be motivated to delay some agency regulations to allow others a better chance of success. While the Obama Administration was focusing on costly regulations from the Department of Health and Human Services (HHS) implementing the Affordable Care Act, for example, it would have been a rational strategy to defer costly but less time sensitive regulations from other agencies to avoid regulatory fatigue. An agency that wishes to take a position contrary to the White House’s position must consider the practical consequences of disobedience. In the case of executive agencies, it may be that the power the White House exercises over the agency is so great that the agency will almost always accede to White House preferences. The calculus, however, is still Bickelian.

132. Lewis cautions that even “[t]he termination of agencies ostensibly to improve economy and efficiency or remedy administrative failure” may have political overtones. Lewis, *supra* note 122, at 91.

133. Elspeth Reeve, *Rick Perry Can’t Remember Which Agency He Wants Abolished*, ATLANTIC WIRE, Nov. 9, 2011, <http://www.theatlanticwire.com/politics/2011/11/watch-rick-perry->

These are not empty threats. Agencies that were created by unilateral executive action, a set that includes more than half of the administrative agencies created since the end of World War II,¹³⁴ may be abolished by presidential fiat. Presidents may also reorganize agencies and manipulate budgets to encourage cooperation.¹³⁵ And where an Act of Congress is required to eliminate or reorganize an agency, the President may propose legislation to Congress and use his political influence to encourage passage. Presidents also have the power, in the case of executive agencies, to remove political appointees who fail to adhere to White House policy preferences.¹³⁶

Furthermore, presidents exercise significant oversight over agencies via the review of major rulemakings by the Office of Information and Regulatory Affairs (OIRA), situated within the President's Office of Management and Budget. OIRA was established in 1980 by the Paperwork Reduction Act.¹³⁷ Beginning with Ronald Reagan in 1981, presidents have controlled and shaped OIRA's authority and duties by executive order.¹³⁸ Although originally created to oversee government information collection requests and to ensure that they were not too burdensome, one of OIRA's primary tasks has become the pre-promulgation review of significant government regulations.¹³⁹ In addition,

forget-which-agency-he-wants-abolished/44788/.

134. William G. Howell & David E. Lewis, *Agencies by Presidential Design*, 64 J. POL. 1095, 1096 (2002). Examples of agencies created by the President acting alone or by his political appointees include the Bureau of Alcohol, Tobacco and Firearms, the Defense Intelligence Agency, the National Security Agency, and the Peace Corps. *Id.* at 1097. Agencies created through Presidential reorganization plans, which took effect unless Congress took action on them within a specified time, include the EPA and the Department of Health, Education and Welfare. *Id.*

135. *Id.* at 1095–96.

136. For example, President Nixon demanded the resignations of Attorney General Elliot Richardson and his Deputy Attorney General, William French Smith, because they refused to fire Special Prosecutor Archibald Cox. Finally, acting Attorney General Robert Bork dismissed Cox. Carroll Kilpatrick, *Nixon Forces Firing of Cox; Richardson, Ruckelshaus Quit*, WASH. POST, Oct. 21, 1973, at A1.

137. 44 U.S.C. § 3503 (2006).

138. See, e.g., Exec. Order No. 12,291, 3 C.F.R. 127 (1982) (Ronald Reagan); Exec. Order No. 12,866, 3 C.F.R. 638 (1994) (William Clinton); Exec. Order No. 13,422, 3 C.F.R. 191 (2008) (revoked 2009) (George W. Bush); Exec. Order No. 13,563, 3 C.F.R. 215 (2012) (Barack Obama).

139. A "significant" regulatory action is defined as one that may, among other criteria, have an effect on the economy of \$100 million or more or raise novel legal or policy issues. Exec. Order No. 12,866, 3 C.F.R. §§ 638, 640–41 (1994). Some have criticized the Office of Information and Regulatory Affairs (OIRA) for its role in the rulemaking process, suggesting that the role itself, or the way particular administrations have exploited that role, unconstitutionally interferes with congressional prerogatives. See, e.g., Robin Kundis Craig,

an increasing number of executive orders instruct agencies in everything from how to conduct cost-benefit analyses on proposed rules to how to consider the impact of regulation on small businesses.¹⁴⁰ Agencies ignore these executive orders at their peril.¹⁴¹

Agencies also seek to avoid judicial entanglements. Court battles are expensive, and reversals are even more so. The Government Accountability Office (GAO) estimated that the cost of defending EPA against lawsuits was about \$5.38 million per year from 2008–2010.¹⁴² This figure does not include the considerable expense of reformulating a rule on remand. The agency's reputation with the courts may affect the outcome of lawsuits. An agency that places a premium on deliberateness and consistency, for example, is more likely to garner deference for its interpretations than an agency whose decisions are more impetuous and less thoroughly reasoned.¹⁴³

The Bush Administration's Use and Abuse of Rulemaking, Part I: The Rise of OIRA, 28 ADMIN. & REG. L. NEWS 8 (2003); Morton Rosenberg, *Beyond the Limits of Executive Power: Presidential Control of Agency Rulemaking Under Executive Order 12,291*, 80 MICH. L. REV. 193 (1981). Despite these outliers, and despite some initial uncertainty, today OIRA's legitimacy is largely accepted. See Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 15 (1995) (noting that the Office of Management and Budget (OMB) review of government regulations "has become a permanent part of the institutional design of American government").

140. See, e.g., Memorandum from President Barack Obama to the Heads of Executive Departments and Agencies on Regulatory Flexibility, Small Business, and Job Creation, 3 C.F.R. § 328 (2012); Exec. Order No. 13,563, 3 C.F.R. 215 (2012) (Barack Obama) (outlining the administration's preferred approach to cost-benefit analysis).

141. See Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501, 506 (2005) ("Agency recalcitrance in the face of a valid executive order is neither politically prudent nor constitutionally appropriate."). As a general matter, these orders are directed only to executive agencies rather than independent agencies, with the exception of the requirement that agencies submit a Regulatory Agenda and Plan. Exec. Order No. 12,866, 3 C.F.R. §§ 638, 640–42 (1994). Former OIRA Administrator Sally Katzen is of the view that the President has a legal basis to review decisions from independent regulatory commissions as well, but chooses not to do so out of deference to Congress. Sally Katzen, *OIRA at Thirty: Reflections and Recommendations*, 63 ADMIN. L. REV. 103, 109 (2011) (recommending that review be extended to independent agencies' regulations).

142. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-650, ENVIRONMENTAL LITIGATION: CASES AGAINST EPA AND ASSOCIATED COSTS OVER TIME 19–22 (2011). These costs were borne by the Department of Justice, the U.S. Treasury, and the EPA itself. *Id.*

143. See *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001) (citing *Skidmore v. Swift*, 323 U.S. 134, 139–40 (1944) ("The fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position . . .")); see also JAMES M.

FERC was clearly concerned with crafting a rule that would survive judicial scrutiny when it issued Order 888, even if that meant deferring resolution of some questions to another day. The phrase FERC used in Order 888 to describe its motives for restraint, “difficult jurisdictional issues,”¹⁴⁴ suggests that it was concerned about the practical consequences of deciding too much too quickly. Faced with jurisdictional “hard questions,” where presumably the risks of error are increased (or which at least present a situation where reasonable minds, even reasonable judicial minds, might differ), it was vital for FERC to consider the cost of defending its interpretation against legal challenges and the costs of possible reversal and remand.

With the states, too, federal agencies must preserve goodwill and avoid rancor. The relationship is perhaps one of natural hostility, since the expansion of the federal bureaucracy has largely been at the expense of state power. Areas that were traditionally subject to state regulatory or common law authority such as public utilities, food safety, and clean water are now at least partly governed by federal agencies. This dynamic creates a potentially combustible relationship between federal and state regulators. For that reason, cooperation, where achievable, in many cases provides the most constructive path forward.¹⁴⁵

With respect to the public, although they need not face voters at the polls, agencies still benefit from public cooperation. Public unhappiness with regulatory programs can, if pronounced enough, make an agency’s day-to-day tasks much more difficult by reducing a regulation’s effectiveness, increasing litigation costs, reducing the information available to the agency,¹⁴⁶ limiting cooperation with endeavors such as negotiated

LANDIS, *THE ADMINISTRATIVE PROCESS* 144 (1938) (“A reputation for fairness and thoroughness that attaches to a particular agency seeps through to the judges and affects them in their treatment of its decisions.”).

144. Order 888, *supra* note 3, at 21,577.

145. For a discussion of cooperative federal and state regimes in environmental law, see Robert V. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141 (1995); Robert L. Fischman, *Cooperative Federalism and Natural Resources Law*, 14 N.Y.U. ENVTL. L.J. 179 (2005) (expanding the discussion of cooperative federalism in environmental law from pollution control to natural resources).

146. Agencies depend on the public for much of the information they need to do their jobs. Sometimes information requests are mandatory, such as when regulatory violations are suggested and an enforcement action is contemplated. More often, however, information collection relies on public cooperation. Information is collected either through the standard Administrative Procedure Act (APA) notice and comment process on proposed regulations or through more explicit Requests for Information. For example, in developing energy efficiency measures for commercial products, the Department of Energy actively seeks public comment and feedback. The Department concluded in a recent Request for Information on residential and commercial water heaters published in the Federal Register

rulemaking, or making enforcement more expensive.¹⁴⁷ Public backlash can also have second-order effects by triggering media scrutiny and sparking congressional reaction.¹⁴⁸ For all of these reasons, agencies must consider carefully the possible effects of any decision on its relationships with stakeholders.

B. *Restraint as Strategy*

Certainly, in some cases agencies might best avoid unnecessary confrontation by taking action to appease a political principal or other actor. But avoiding decisions partially (as in the case of step-by-step regulation or administrative minimalism) or fully (as in the case of decisions not to decide) has several clear advantages for agencies wishing to deflect potential ire.

First, postponing a decision is less likely to attract attention than making one. And even other actors who are following an issue closely may be more sympathetic to deferrals than to outright denials, knowing that they still have a chance to influence the ultimate decision. An agency can thus use inaction strategically to buy time to build support, bolster its decision with better information, or prepare to respond to attacks.

As Cass Sunstein has suggested with respect to judicial minimalism, more visible issues are likely to attract more attention to agencies and exacerbate any negative consequences of a decision.¹⁴⁹ Where issues are particularly divisive, therefore, as in the case of climate change, agencies may gain more from playing the long game than from acting aggressively.

that "DOE considers public participation to be a very important part of the process" of developing standards and test procedures. Energy Conservation Program: Test Procedures for Residential Water Heaters and Commercial Water Heaters; Request for Information, 78 Fed. Reg. 2340, 2346 (Jan. 11, 2013).

147. Stakeholder cooperation is also key to the success of agency enforcement programs. Due to limited resources, agencies simply do not have the ability to detect all or even most violations. They are therefore dependent on tips and self-reports. FERC, for example, "strongly encourages companies to submit self-reports of possible violations." FERC, Enforcement, Self Reports, <http://www.ferc.gov/enforcement/self-reports.asp> (last accessed Monday, Jan. 21, 2013). Other agencies with self-reporting or self-disclosure programs include the Securities and Exchange Commission, HHS, and EPA. These programs result in the identification and correction of more internal violations than the agencies could discover and correct on their own.

148. For example, Daniel Carpenter explains that Food and Drug Administration's (FDA's) leaders "worry about how a medical study or a new report by one of the agency's watchdogs will generate embarrassment, legislative and scientific scrutiny, emboldened challenges from the agency's subjects, and perhaps reduced authority." CARPENTER, *supra* note 121, at 18.

149. See SUNSTEIN, *supra* note 29, at 59.

We might be less concerned about the democratic implications of agency restraint where an issue has high visibility, since it is more likely that dialogue will continue in the absence of a decision by the agency.

In periods of divided government, or where the agency's own mission is not embraced by the White House or by Congress, restraint might also be prudent. Under such circumstances, agencies may wish to conserve their resources rather than fight battles they cannot win. FWS's minimalist approach to ESA enforcement might be seen in this light.

Agencies may also find it useful to be more restrained after a period of protracted rulemaking to avoid regulatory fatigue.¹⁵⁰ Financial institutions in the European Union, for example, have repeatedly complained of an overload of regulations following the issuance of the Financial Services Action Plan.¹⁵¹ There have been similar complaints in the United States about rulemakings under the Dodd-Frank financial industry reform legislation, especially from smaller banks.¹⁵² To avoid a backlash from the regulated community that might lead to legislative adjustment of agency authority, therefore, a more deliberate pace of rulemaking going forward might be indicated.

New agencies that do not yet have widespread support might have an incentive to be particularly cautious. The Consumer Financial Protection Bureau is one such agency. Opposition to its creation as part of the Dodd-Frank Act in 2010 was intense, and it has been a target of Republican opposition since its inception.¹⁵³ Given this political climate, Adam Levitin has queried whether the agency's interests would be best served by taking a stand or by "compromising and living to fight another day."¹⁵⁴

Deferrals can also open up a middle way for agencies that find themselves with a menu of unappealing substantive options. It may be

150. Some commentators have argued that we are experiencing regulatory fatigue more generally, and that in response we have shifted from command-and-control models of regulation to government-stakeholder network structures and economic incentive systems. See Richard B. Stewart, *Administrative Law in the Twenty-First Century*, 78 N.Y.U. L. REV. 437, 446 (2003).

151. See Duncan Alford, *The Lamfalussy Process and EU Bank Regulation: Another Step on the Road to Pan-European Regulation?*, 25 ANN. REV. BANKING & FIN. L. 389 (2006).

152. See Ben Goad, *Are Community Banks Too Small to Survive Dodd-Frank Rules?*, THE HILL (July 18, 2013), <http://thehill.com/regulation/finance/312165-are-community-banks-too-small-to-survive-dodd-frank-rules-> (quoting testimony before Congress from the president of a small bank in Florida who complained of regulatory fatigue).

153. See Adam J. Levitin, *The Consumer Financial Protection Bureau: An Introduction*, 32 ANN. REV. BANKING & FIN. L. 321, 365 (2013).

154. *Id.* at 369 ("The [Consumer Financial Protection Bureau] CFPB is a powerful new agency, but it is also one very much aware of its vulnerability and likely to proceed carefully and soberly in the face of its political situation.").

better for an agency not to decide than to choose between a conclusion supported by the weight of available data, but that would entail negative practical repercussions, and one that is more prudent but runs counter to the evidence. The latter would be unlikely to survive judicial review and would earn the agency a reputation for inaccuracy. The former might ultimately be self-defeating.

The State Department found itself in such a situation recently with respect to the military overthrow of President Mohamed Morsi in Egypt. When asked by a reporter from the Associated Press whether the administration had taken a position on whether the overthrow should be designated a "coup," the spokesperson for the State Department responded that, "We have determined that we do not need to make a determination."¹⁵⁵ If the Department were to find that a military coup had taken place, it would be required by law to suspend aid to Egypt under the Foreign Assistance Act of 1961.¹⁵⁶ But a finding that no coup occurred would likely be viewed with skepticism given the military's clear involvement in the ouster of a sitting president.¹⁵⁷ It might also encourage the armed forces of other nations to undertake similar overthrows of elected leaders. As a former chairman of the House Foreign Affairs Committee put it, "The law by its terms dictates one thing, and sensible policy dictates that we don't do that."¹⁵⁸ The Department therefore chose a prudent middle ground: it decided not to decide.

Deferring questions or deciding them in minimalist ways also has practical advantages over making a choice then having to backtrack at a later date. This is because deferral eliminates the transaction costs of changing course. In their work on investment theory, Avinash Dixit and

155. *State Department Spokesperson Jen Psaki is Interviewed on CNN*, CQ-ROLLCALL POL. TRANSCRIPTIONS (Aug. 15, 2013).

156. Section 508 of the Foreign Assistance Act requires that the United States cut aid to any country "whose duly elected head of government is deposed by military coup d'état or decree." This language was somewhat modified in the 2011 omnibus appropriations bill for the Department, which provided that assistance may be resumed once a democratically elected government has taken office and that the aid cutoff does not apply to funds to promote democratic elections or participation in a democratic process. S. 1601, 112th Cong. § 7008 (2011) (enacted).

157. See Max Fisher, *U.S. Has Spotty Record on Law Requiring it to Cut Aid After Coups*, WASH. POST (July 5, 2013), <http://www.washingtonpost.com/blogs/worldviews/wp/2013/07/05/u-s-has-spotty-record-on-law-requiring-it-to-cut-aid-after-coups/> ("[T]here is little doubt that this met the definition of a coup against a democratically elected government.").

158. Peter Baker, *A Coup? Or Something Else? \$1.5 Billion in U.S. Aid Is on the Line*, N.Y. TIMES, July 5, 2013, available at http://www.nytimes.com/2013/07/05/world/middle-east/egypts-arrests-of-islamists-pose-test-to-us-over-military-aid.html?pagewanted=all&_r=0.

Robert Pindyck propose that, all else equal, as the costs of reversing a decision increase, actors will enter into those decisions more carefully.¹⁵⁹ As the costs of regulatory action and the risk of error increase, therefore, we would expect agencies to become more cautious about decisionmaking, especially under conditions of uncertainty.¹⁶⁰ Moreover, to the extent that rulemaking has indeed “ossified” as a result of procedural constraints, reversal of agency decisions has become increasingly costly.¹⁶¹ The courts permit agencies to change course provided agencies acknowledge the change and provide good reasons for the new policy.¹⁶² But rulemaking is resource intensive, and agencies might find it more prudent to defer a judgment in the first instance than to go through the process twice.¹⁶³

Preservation of authority through restraint is a viable strategy for agencies because, like courts, agencies have longer time horizons than political branches do. Congressional time horizons are notoriously short, especially for the House of Representatives, with many scholars suggesting

159. AVINASH K. DIXIT & ROBERT S. PINDYCK, *INVESTMENT UNDER UNCERTAINTY* (1994).

160. Some suggested, for example, that EPA might not have been interested in putting in the time and effort required to revise a regional air pollution rule yet again after the first two versions were invalidated by the D.C. Circuit. *See* *North Carolina v. EPA*, 550 F.3d 1176 (D.C. Cir. 2008) (remanding Clean Air Interstate Rule (CAIR) to EPA but not vacating the rule); *EME Homer City Generation v. EPA*, 696 F.3d 7 (D.C. Cir. 2012) (invalidating Cross-State Air Pollution Rule but leaving CAIR in place). Fortunately for EPA, the Supreme Court recently reversed the D.C. Circuit and upheld the Cross-State Air Pollution Rule. *See* *EPA v. EME Homer City Generation*, 134 S. Ct. 1584 (2014).

161. *See* Peter L. Strauss, *The Rulemaking Continuum*, 41 DUKE L.J. 1463, 1470 (1992) (coining the term ossification to describe the encrustation of the rulemaking process with formal requirements); Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN L. REV. 59 (1995) (providing the seminal discussion of the phenomenon); *see also* Jason Webb Yackee & Susan Webb Yackee, *Testing the Ossification Thesis: An Empirical Examination of Federal Regulatory Volume and Speed, 1950–1990*, 80 GEO. WASH. L. REV. 1414, 1418–19 nn.16–24 (2012) (collecting sources). Note that the ossification thesis has recently been called into question. Yackee and Yackee, for example, claim to have disproved ossification empirically. *Id.* at 1419 n. 25. Of primary importance here, however, is simply that any additional procedural constraints imposed on an agency that wishes to change a preexisting policy will make strategic restraint more appealing. *See, e.g.,* *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579 (D.C. Cir. 1997) (holding that amendments to definitive interpretive rules must go through notice-and-comment rulemaking).

162. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). The Court held that agencies need not provide “detailed justification[s]” for every change or show that “the reasons for the new policy are *better* than the reasons for the old one.” *Id.*

163. It may also be easier to reach agreement on deferrals than on denials. Agreement is especially important on multi member commissions, where no decision can be taken without a majority of commissioners signing on. For the judicial analogue, see Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1758–59 (1995).

that legislators think no further than the next election.¹⁶⁴ Presidents, too, think in terms of what they can accomplish in the space of a single term or, at a maximum, over two terms in office. But while agency political appointees might be focused on what can be accomplished during their tenure, the vast majority of agency employees hold their positions over the longer term. Like federal judges, they have job security and salary protections.¹⁶⁵ Also like federal judges, they are less focused on short-term success than are elected officials.

There is also ample evidence from the political science literature that these career bureaucrats have public-spirited motives and a sense of mission.¹⁶⁶ For most agency employees the tasks before them are part of broader programmatic responsibilities, and success is measured over longer time frames than is the case for the political branches. EPA employees might thus think of their mission as, for example, reducing air pollution, or keeping water bodies usable, or, more generally, minimizing environmental harm. There is additional evidence that civil service members self-select into agencies whose mission they share.¹⁶⁷

Even political appointees may have longer-term visions than their legislative and executive counterparts. A recent study of administrative appointees suggested that their political preferences were not necessarily aligned with either the incumbent President or with Congress.¹⁶⁸ Instead, the study found that most agencies were *more liberal* than both the President and the median in both chambers of Congress, with the exception of traditionally conservative agencies such as the military.¹⁶⁹ This research strongly suggests that agencies are more independent in their preferences than a presidential control model would suggest. Agency heads also clearly

164. See, e.g., CONGRESS RECONSIDERED (Lawrence C. Dodd & Bruce I. Oppenheimer, eds., 7th ed. 2000) (emphasizing the importance of reelection for members of Congress); DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION (2d ed. 2004).

165. See Brendan Koerner, *What Are Civil Service Protections?*, SLATE.COM (July 29, 2002), http://www.slate.com/articles/news_and_politics/explainer/2002/07/what_are_civil_service_protections.html.

166. The term used most frequently to describe this phenomenon is “public service motivation,” or PSM, which posits that public servants have public-serving motivations that distinguish them from workers in the private sector. See, e.g., James L. Perry & Lois Recascino Wise, *The Motivational Bases of Public Service*, 50 PUB. ADMIN. REV. 367 (1990) (examining the nature of PSM and ways to stimulate it); Bradley E. Wright, *Public Service and Motivation: Does Mission Matter?*, 67 PUB. ADMIN. REV. 54 (2007) (suggesting that public sector employees’ sense of mission increases employee work motivation).

167. See, e.g., Sean Gailmard & John W. Patty, *Slackers and Zealots: Civil Service, Policy Discretion, and Bureaucratic Expertise*, 51 AM. J. POL. SCI. 873 (2007).

168. Joshua D. Clinton et al., *Separated Powers in the United States: The Ideology of Agencies, Presidents, and Congress*, 56 AM. J. POL. SCI. 341 (2012).

169. *Id.* at 352.

take pride in the accomplishments of their agencies over time. In her first address as EPA Administrator, Gina McCarthy expressed her understanding of the continuity of the agency's mission by referring to CAA successes since 1970, noting that aggregate emissions of common air pollutants have dropped sixty-eight percent, and that between 1970 and 1990 programs under the CAA helped prevent more than 205,000 premature deaths.¹⁷⁰

For another example of this longer-term viewpoint, consider FERC's step-by-step approach to asserting jurisdiction in electricity markets. Like Chief Justice Marshall in *Marbury v. Madison*, FERC in Order 888 accomplished the twin goals of reserving the right to regulate more aggressively later while avoiding the costly confrontations with states that would undoubtedly have ensued had it asserted jurisdiction more forcefully in Order 888 itself.¹⁷¹ Crucially, while FERC acknowledged in Order 888 "the very legitimate concerns of state regulatory authorities" in choosing if and when to "unbundle[]" retail sales from transmission,¹⁷² it was careful to preserve the possibility that it would claim jurisdiction over the transmission component of retail sales at a later date.¹⁷³ The Commission warned states that it would respect state objectives only insofar as those objectives did not "balkanize interstate transmission of power or conflict with our interstate open access policies."¹⁷⁴ Just as *Marbury* did for judicial power, Order 888 carved out a broad sphere of federal administrative jurisdiction but left the more detailed delineation of that sphere to another day.

FERC's approach may have resulted in less immediate progress in terms of improving the competitiveness of electricity markets, but it made the policy's long term success more viable by avoiding naked confrontations with state regulators, who are understandably highly sensitive to any expansion of FERC's role. Order 888 was already a bold incursion by federal regulators into areas traditionally regulated by state and local authorities. For this reason, it was more prudent for FERC to consolidate its new position requiring wholesale unbundling and to allow states to

170. McCarthy, *supra* note 68. Political appointees may also be drawn from the ranks of the federal or state civil service, in which case they are even more likely to be motivated by a sense of agency mission. Examples of this type of appointee include Stephen Johnson, appointed by President George W. Bush as EPA Administrator after a twenty-seven-year career with the agency.

171. See *Marbury v. Madison*, 5 U.S. 137 (1803) (disclaiming original mandamus jurisdiction but asserting the far more aggressive power of judicial review).

172. Order 888, *supra* note 3, at 21,542.

173. *New York v. FERC*, 535 U.S. 1, 25 (2002) ("FERC chose not to assert such jurisdiction, but it did not hold itself powerless to claim jurisdiction.").

174. Order 888, *supra* note 3, at 21,542.

continue to regulate bundled retail service. One commentator has even suggested that “difficult jurisdictional issues,” the reason FERC gave for its demurral in Order 888, might be “a euphemism for an uprising of state public service commissions.”¹⁷⁵

Two unpalatable consequences might flow from alienating FERC’s state-level counterparts. First, the cooperation of state regulators is essential to the conduct of FERC’s day-to-day business. Second, antagonizing state regulators might lead them to seek a congressional solution to their concerns about statutory overreaching. Indeed, even given FERC’s restraint, after the Supreme Court ruling, some states still intimated that they might lobby Congress to amend the FPA to protect state jurisdiction, and sources implied that conversations with staffers were already underway.¹⁷⁶ But the National Association of Regulatory Utility Commissioners (NARUC), which represents state regulatory bodies, ultimately decided not to push for a statutory amendment.¹⁷⁷ Had FERC gone further in Order 888, however, NARUC might as well have thrown its support behind a legislative solution.

FERC lost little by choosing not to regulate bundled retail transmission in Order 888. It saved itself the expense and headache of an even more divisive jurisdictional battle while preserving its option to regulate retail transmission at a later date.¹⁷⁸ It asserted sufficient jurisdiction to accomplish its immediate goals but avoided antagonizing the state regulators whose cooperation is essential to the long term success of the agency’s mission.¹⁷⁹

175. Christian Schmollinger, *FERC’s Powers Grow in Wake of Court Decision*, NATURAL GAS WEEK, Mar. 11, 2002.

176. *Backing Open-Access Rule, High Court Beckons FERC Into Retail Arena, Too*, ELECTRIC UTILITY WEEK, Mar. 11, 2002 [hereinafter *Backing Open-Access Rule*]. FERC may have been particularly anxious not to antagonize state regulators since it wanted to keep them “on board” with its developing regional transmission program. See Schmollinger, *supra* note 175.

177. *Backing Open-Access Rule*, *supra* note 176.

178. *Id.*

179. An additional benefit of leaving options open here was that it allowed state and local regulators to take the first crack at the problem of ensuring fair prices and nondiscrimination in the retail transmission markets. If the state and local regulators succeeded, FERC would have saved itself the trouble of a federally imposed, top-down solution. If they failed, FERC could always step in. Finally, FERC may have calculated that, were it to become obvious at some later date that undue discrimination plagued the retail transmission markets as well as the wholesale markets, it would face less political opposition in asserting jurisdiction there as well.

C. *Evaluating Agency Restraint*

The previous sections explained why agencies, like courts, must be strategic in the exercise of their authority and the utility of restraint as a strategic tool. This section provides a normative evaluation of restraint. It argues that strategic restraint can be reconciled with our basic understandings of how a “good” agency behaves. One conception of a “good” agency is an obedient agency. This approach understands agencies as strictly bound by the will of the enacting legislature and emphasizes the importance of an agency’s faithfulness to statutory commands. Another approach understands agencies as bound, not by external forces, but by the requirement that their decisions be based on neutral, technocratic expertise. The purpose here is not to express a preference for either frame but to posit that administrative restraint can be consistent with both.

1. *Faithfulness*

Perhaps the earliest version of the faithful agency theory was the “transmission belt” model identified by Richard Stewart.¹⁸⁰ According to this understanding, an agency’s role is to put discrete statutory mandates into practice. It should exercise minimal discretion, leaving all major questions to Congress. Because agencies were meant to be automatons rather than autonomous actors, a strategic agency would be a dangerous agency.

However, as Stewart recognized, the “conveyor belt” frame gave way early on to more nuanced understandings of what it means to be a faithful agent. Congress simply cannot legislate specifically enough to allow administrative agencies to implement its instructions without exercising discretion. Consider, for example, the limited role played today by the nondelegation doctrine, which requires Congress to provide agencies with an “intelligible principle” that agencies may follow, ostensibly limiting their discretion.¹⁸¹ The last time that the Supreme Court struck down a statute as conferring excessive discretion on administrative agencies was during the New Deal.¹⁸² Courts have created further space for agency discretion in implementing statutes by deferring to reasonable agency interpretations of

180. Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1675 (1975).

181. For an argument that the nondelegation doctrine is not dead but has instead been transformed into a series of “nondelegation canons,” see Cass Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315 (2000).

182. See *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (striking down portions of the National Industrial Recovery Act as conferring legislative authority on the Executive Branch); see also *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).

statutes they are tasked with administering, whether or not the Court would reach a similar interpretation.¹⁸³ In sum, many delegations to agencies are capacious and most leave room for interpretation.¹⁸⁴

Today, therefore, the idea of a faithful administrative agency must be more nuanced.¹⁸⁵ The best indicator of Congressional intent is the legislation itself. Thus, a faithful agency is one that takes legislative goals and instructions as its guiding principles. Agencies must be faithful to the will of the enacting Congress as embodied in a piece of legislation unless and until a sitting Congress modifies those views by amending the legislation or enacting new legislation.

Strategic restraint is consistent with this more capacious understanding of bureaucratic actors as faithful agents. Where Congress speaks in mandatory terms and with sufficient specificity, agencies might not have room for flexibility. The CAA, for example, requires that EPA review and revise the NAAQS every five years.¹⁸⁶ But statutory grants of authority are often capacious, and where the specifics are not dictated by statute,

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

184. The Supreme Court recognized this fact of modern life in *Mistretta v. United States*, where it noted that “our jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.” 488 U.S. 361, 372 (1989).

185. The idea of faithful agency is not without its complications. As Jerry Mashaw has explained, faithful agency is complicated by agencies’ “political milieu”—in particular, by their relationship with the President. See Mashaw, *supra* note 141. See also Jerry Mashaw, *As If Republican Interpretation*, 97 YALE L.J. 1685, 1692 (1988) (declaring that the “faithful agency idea can never be much more than a starting point for interpretation”). Mashaw opines that where text is not clear, even the most faithful of agents must use their own creativity to imagine what Congress would have meant, assuming that they were behaving as if they were a good republican legislature. *Id.*

186. 42 U.S.C. § 7409(d) (2006). Of course, even when Congress has issued specific directives, agencies may still have trouble meeting deadlines. EPA, for example, has repeatedly missed deadlines for five-year review of the NAAQS. See, e.g., *Env’tl. Def. Fund v. Thomas*, 870 F.2d 892 (2d Cir. 1989) (finding that EPA had missed the deadline for reviewing and revising the NAAQS for sulfur dioxide); *Am. Lung Ass’n v. Browner*, 884 F. Supp. 345 (D. Ariz. 1994) (finding that EPA had missed the deadline for reviewing and revising the NAAQS for particulate matter); *Cmtys. for a Better Env’t v. EPA*, No. C 07-03678-JSW, 2008 WL 1994898 (N.D. Cal. 2008) (finding that EPA had missed the deadline for reviewing and revising the NAAQS for carbon monoxide). Delays like these that are the result of inadequate agency resources, while they might be justifiable on other grounds, would not be consistent with the idea of faithful agency under the theory put forward here. For more on justifying agency inaction and delay based on resource constraints, see Eric Biber, *The Importance of Resource Allocation in Administrative Law*, 60 ADMIN L. REV. 1 (2008) and Eric Biber, *Two Sides of the Same Coin: Judicial Review of Administrative Agency Action and Inaction*, 26 VA. ENVTL. L.J. 461 (2008).

agencies *must* exercise discretion over whether, when, and how to act. Strategic restraint, therefore, takes place comfortably inside textual boundaries in most instances.

Even where the statutory text seems to suggest the need for more aggressive action than the agency believes is wise, the agency might still invoke interpretive canons to control the pacing and nature of its decisionmaking. This is especially true where the problem before the agency is not one that Congress considered when it enacted the relevant legislation. Where there is a choice between blind adherence to statutory instructions that would produce absurd results and more restrained implementation of statutory schemes that an agency believes would better fulfill the goals and purposes of the enacting Congress, a truly faithful agent will pursue the latter rather than the former.¹⁸⁷ This kind of faithful agent will use the powers delegated to it strategically to achieve the goals set by Congress, even if this counsels restraint in some cases.¹⁸⁸

2. *Expertise*

Another school of thought holds that agencies are prevented from exercising unbridled discretion by the requirement that their decisionmaking be guided by technocratic expertise. This idea has its roots in the New Deal philosophy of James Landis. Landis argued that administration was scientific, that the public interest was objectively discernible, and that the obligation to make decisions based on data and expertise, therefore, limited administrative discretion.¹⁸⁹

One version of the expertise argument might hold that agencies should go wherever their technocratic inquiry takes them, and that pragmatic considerations should be inadmissible at every stage of the decisionmaking process. By this logic, agencies cannot avoid a decision for strategic reasons if the evidence dictates an outcome one way or another.

But this ignores the predicate step in every agency decision, which is whether to investigate the matter in the first place. At this earlier decisional

187. Mashaw presents a slightly different version of this argument when he accepts the idea of a constitutionally "sensitive" faithful agent, by which he means an agency that interprets statutes in the "overall context of the legal order." Mashaw, *supra* note 141, at 508. This Article argues for something similar, with the difference being that agencies should be sensitive, not only to constitutional principles, but to context and practical consequence, when following statutory commands.

188. Further complicating this picture is the fact that agencies must be faithful to multiple legislative goals at once. Congress can legislate piecemeal, delegating diverse responsibilities to a single agency without suffering at the polls. Strategic deferrals can be useful techniques for coordinating these responsibilities.

189. See Kagan, *supra* note 5, at 2261.

stage, a different kind of expertise comes into play. While agencies may be primarily technocratic experts, they also possess what might be called practical or contextual expertise. This is another way of saying that agencies are experts in understanding the practical pressures of their political environment. They are in the best position to predict the likely consequences of making a decision.

This practical expertise is what enables agencies to exercise their subject matter expertise effectively. Consider what would have happened if, for example, FERC had made an expert decision that unbundling of retail transmission from electricity sales was necessary to keep electricity rates just and reasonable, and that it had the jurisdiction to do so. There might have been marginal gains in competitiveness in electricity markets. But those gains would have come at significant cost. State public utility commissioners might have been less willing to enter into collaborations with FERC in the future. An aggressive approach by the federal agency might thus have precluded the highly successful Smart Response Collaborative, which focuses on demand response and smart grid issues, as well as the new "Sunday Morning Collaborative," which provides federal and state commissioners with the opportunity to work through issues from regional governance structures to transmission siting.¹⁹⁰

In essence, then, faithfulness to expertise, like faithfulness to statutory text, still leaves room for flexibility and might even *require* flexibility in some cases.¹⁹¹ The difficulty is to find the right balance between checking undue agency discretion and allowing agencies the flexibility to do their jobs. The argument here is that strategic restraint helps to maintain that balance rather than subverting it. Decisions not to decide, regulating step-by-step, and taking minimalist actions can create more space for agencies to pursue faithful, expert implementation of statutory schemes.¹⁹²

190. See Nat'l Ass'n of Regulatory Util. Comm'rs (NARUC), Smart Response Collaborative (last visited July 23, 2014), www.naruc.org/Policy/FERC/?c=3; see also Press Release, NARUC, FERC, NARUC Revamp 'Sunday Morning Collaborative' (Jan. 25, 2013), available at www.naruc.org/News/default.cfm?pr=348&pdf=.

191. Some administrative flexibility is essential because rigid systems tend to collapse. For a non-legal example, consider the Golden Gate Bridge. A masterpiece of engineering, the bridge has stood since 1937 between the San Francisco Bay and the Pacific Ocean, buffeted regularly by strong winds. The bridge can only survive those winds because its enormous suspension cables can bend up to twenty-seven feet from side to side without damage. Thus, in heavy winds, the bridge sways rather than snaps. John Bernard McGloin, *Symphonies in Steel: Bay Bridge and the Golden Gate*, VIRTUAL MUSEUM OF THE CITY OF SAN FRANCISCO (Museum of the City of San Francisco), <http://www.sfmuseum.org/hist9/mcgloin.html>.

192. This defense of restraint as a tool for preserving expertise has parallels to Bickel's

As suggested below, considering pragmatic factors only at the “whether, when and how much” stage of the decisionmaking process would actually help maintain the expert character of the agency’s substantive decisions. Merits decisions can remain “technocratic, statutory, or scientifically driven,”¹⁹³ and agencies may thus continue to serve as bastions of neutral expertise. To some extent, therefore, bifurcation addresses the concerns that Jody Freeman and Adrian Vermeule proposed were behind the Court’s decision in *Massachusetts v. EPA*.¹⁹⁴ Freeman and Vermeule suggested that the decision represented “[e]xpertise-forcing, . . . the attempt by courts to ensure that agencies exercise expert judgment free from outside political pressures.”¹⁹⁵ But even a court that is concerned about the influence of politics on technocratic decisions might concede that practical concerns can play a role in agency decisionmaking so long as they are isolated from merits decisions.

We place weighty demands on government agencies. We ask them to be obedient. We ask them to follow the letter of the law. We ask them to go where the evidence takes them. But we also ask agencies to administer regulatory schemes successfully. These seemingly irreconcilable demands can only be squared if some flexibility, including the opportunity for restraint, is built into the administrative process. And yet, as this section has sought to demonstrate, agency restraint need not be inconsistent with a conception of agencies as faithful agents nor as neutral experts.

argument about the relationship between principle and pragmatism in the courts. According to one view, the courts are only legitimate institutions to the extent that their decisionmaking adheres to principle, which might be seen as the analogue to administrative technocratic expertise. See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). But, Bickel argued, unyielding adherence to principle is self-defeating in practice. A Supreme Court that required immediate, aggressive implementation of *Brown v. Board of Education*, Bickel suggested, might have faced massive revolts, administrative impossibility, and widespread disobedience. The Court would have remained faithful to principle but failed to achieve its aims and suffered a blow to its legitimacy in the process when its edicts went unenforced. By recognizing the practical limitations before them and choosing to implement the decision more deliberately, Bickel argued, the courts preserved their own political capital while ensuring longer-term compliance with their principled decision in *Brown*. BICKEL, LEAST DANGEROUS BRANCH, *supra* note 9, at 244–72.

193. See Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 5 (2009) (describing the standard understanding of what arbitrary and capricious review requires).

194. See Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 51 (2007).

195. *Id.* at 52.

III. COMING TO TERMS WITH THE ADMINISTRATIVE STATE'S PASSIVE VIRTUES

A theory of the administrative state's passive virtues has implications both for administrative process and for doctrines of judicial review. This Part will first turn to the question of which factors agencies might legitimately consider in deciding whether, when, and how much to decide. It then suggests that permissible prudential considerations should come into play only at this earlier stage, a bifurcation of decisionmaking that preserves the technocratic character of what we might call "merits" decisions—decisions on the substantive question at issue.

This Part also suggests how decisions not to decide might be "domesticated"—driven from the shadows and accommodated within the framework of administrative law—without opening the door to abuse. One tool to avoid potential abuse is transparency, which has the added benefit of preserving the dialogic function of the passive virtues, even where final agency action is postponed. But transparency, to be a successful remedy, must be linked to a more deferential standard of review for agency restraint. Any framework for review must acknowledge the legitimate role played by considerations of relationship management that may counsel restraint while still providing a check on so-called "nefarious" influences such as shirking, self-aggrandizement, and narrow interest-group influence. To that end, this Part offers some preliminary ideas about how restraint might be accommodated within arbitrary and capricious review of agency action under the Administrative Procedure Act (APA).

A. *Bifurcated Decisionmaking*

A crucial question for agencies, and for courts, is which factors count as permissible and which do not. The touchstone here is whether the consideration is in service to the agency's statutory goals. Thus, concerns about the reactions of other actors and the effect of those actions on longer-term implementation of a statutory scheme would be permissible. Pure laziness on the part of bureaucrats (shirking), an individual agency official's desire for personal advancement (self-aggrandizement), or the desire to cater to a one particular interest group would not.

There are parallels here to the argument put forward by Kathryn Watts, Nina Mendelson, and others that consideration of political preferences, as expressed by the President, need not render agency decisions "arbitrary and capricious."¹⁹⁶ Like Watts's and Mendelson's proposals, the case for

196. Watts, *supra* note 193; Nina A. Mendelson, *Disclosing "Political" Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127 (2010) (proposing that the nature of White House

administrative restraint would expand the range of factors that an agency could properly consider. However, there are several key distinctions. First, a theory of administrative restraint would permit agencies to look beyond White House influence to the influence exercised by other actors in the system. Second, a theory of administrative restraint does not turn on the cause of interference by other actors. The President may wish to postpone resolution of an issue because he believes he has a democratic mandate to do so or because of a promise he made to a campaign donor. Watts rejects the legitimacy of the latter influence, which she calls “raw politics or partisan politics.”¹⁹⁷ From the agency’s perspective, however, the crucial point is simply that disobedience might be detrimental to the agency’s own longer-term policymaking efforts—the reason is less salient. It might be prudent, in the situation described, to postpone a decision until the President cares less about the issue or until the agency has built other support sufficient to counter the President’s influence.¹⁹⁸

Finally, while Watts and Mendelson focus their arguments on the stage at which an agency makes a substantive decision, the approach put forward here would confine pragmatic considerations to an earlier stage in the process. Agencies could properly consider the practical consequences of a decision when deciding whether and how much to decide, but those concerns should be absent when a decision is finally taken. In other words, pragmatic considerations should not be built into the “merits” phase of administrative decisionmaking.¹⁹⁹

One advantage of displacement is procedural. Isolation makes it more likely that deliberation on the substantive question will be free from the influence of more contextual, practical considerations, including politics. Within the agency, we would expect to see decisions at each stage spearheaded by a different group of actors. Political appointees and high-

influence on agency rules be disclosed). But see Jodi L. Short, *The Political Turn in American Administrative Law: Power, Rationality, and Reasons*, 61 DUKE L.J. 1811 (2012) (rejecting a model of political reason-giving).

197. Watts, *supra* note 193, at 9.

198. A closer parallel is to the idea put forward, though not elaborated, in Cass R. Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. CHI. L. REV. 653, 672 (1985) (suggesting that agencies may choose not to act based, in part, on “the reaction of the public and of relevant officials in Congress and the executive branch” and that the Court must consider all of these factors in deciding whether the agency has acted arbitrarily).

199. Of course, Congress may have made certain choices for the agency in its authorizing legislation, as in § 202(a) of the Clean Air Act, which specified the criteria upon which any judgment by the Administrator must be based. 42 U.S.C. § 7521(a) (2006 & Supp. IV 2011). However, this observation merely transfers the question of how and when prudential factors should be considered to the legislature. In most cases, the legislature should reinforce the bifurcated decisional scheme suggested here.

level officials would play a greater role in the decision about whether, when, and how much to decide, whereas the substantive decisions would be made primarily by the agency's expert staff, who are typically civil service appointees.

Substantively, displacement makes it less likely that we will see merits decisions that run contrary to the evidence before the agency or that otherwise run afoul of the APA. Of course, much of the criticism currently leveled at merits decisions may be redirected at the prudential stage. However, as discussed below, broadening the standard of review at this stage will help to mitigate the potential increase in litigation.

B. *Reviewing Restraint*

Because agency decisions not to decide, step-by-step regulation, and administrative minimalism might all be motivated by prudentialism that is consistent with the relevant statute and aims to preserve, rather than to undermine, expertise, it is right that review of agency restraint be deferential. In most cases, the courts have rightly resisted calls to police agency restraint more aggressively, although they have not articulated some of the strongest grounds for that deference, namely, the need for agencies to consider prudential factors in choosing how and when to act.²⁰⁰ Here, *Massachusetts v. EPA* is a significant outlier, suggesting, as it did, that prudential concerns had no place in agency decisionmaking.²⁰¹ This section suggests that the reasoning of *Massachusetts v. EPA* on this point should be abandoned. Instead, courts should apply the more capacious understanding of the relevant factors an agency may properly consider articulated in a more recent decision, *Judulang v. Holder*.²⁰² Finally, this section addresses the limits of the passive virtues.

1. *Current Review Frameworks*

Although some statutes contain citizen suit provisions authorizing citizens to commence civil actions where an agency has failed to perform a statutorily mandated act or duty,²⁰³ much agency restraint is reviewed

200. See, e.g., Justice Harlan's concurrence in *American Commercial Lines*, where he noted that he did not "doubt that an administrative agency may, where the orderly processes of adjudication or rulemaking require, defer the resolution of issues to more appropriate proceedings." *Am. Commercial Lines, Inc. v. Louisville & Nashville R. R. Co.*, 392 U.S. 571, 594–95 (1968) (Harlan, J., concurring).

201. *Massachusetts v. EPA*, 549 U.S. 497, 534–35 (2007).

202. *Judulang v. Holder*, 132 S. Ct. 476 (2011).

203. See, e.g., the citizen suit provision in the Clean Water Act, 33 U.S.C. § 1365(a)(2) (2006) (providing that any citizen "may commence a civil action on his own

under the APA. The APA treats restraint differently depending on the species of inaction or delay at issue. Some failures to act are presumptively unreviewable. This is so where the statute either precludes judicial review or where decisions are “committed to agency discretion by law.”²⁰⁴ Courts have found that actions are so committed when the statute provides “no law to apply” or where background understandings delineate areas of presumptive agency discretion.²⁰⁵ These background understandings include the idea that agencies have broad discretion to decide whether to initiate enforcement actions, whether to grant reconsideration of an action because of material error, whether to terminate an employee in the interests of national security, and how to allocate funds from lump-sum appropriations.²⁰⁶

Where there is law to apply, but an agency has delayed or withheld action and has not documented its decision to do so, the relevant standard of review is the one articulated in 5 U.S.C. § 706(1), which states that courts may compel agency action that has been “unlawfully withheld” or “unreasonably delayed.”²⁰⁷ Allegations of unreasonable delay are governed by the so called *TRAC* factors, a test created by the D.C. Circuit.²⁰⁸ By examining earlier cases, the court discerned “the hexagonal contours of a standard” governing when a delay was so egregious as to warrant mandamus.²⁰⁹

behalf . . . against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this [Act] which is not discretionary with the Administrator”). The citizen suit provision in the Clean Air Act, 42 U.S.C. § 7604(a)(2) (2006), is similar.

204. 5 U.S.C. § 701(a)(2) (2012).

205. See, e.g., *Webster v. Doe*, 486 U.S. 592, 592, 600 (1988) (finding dismissal of a Central Intelligence Agency employee unreviewable where standard announced in statute “fairly exudes deference to the Director”); see also *Heckler v. Chaney*, 470 U.S. 821 (1985) (holding that FDA’s decision *not* to investigate possible statutory or regulatory violations and *not* to take enforcement action was presumptively unreviewable).

206. See *Lincoln v. Vigil*, 508 U.S. 182 (1993) (enumerating cases).

207. 5 U.S.C. § 706(1) (2012).

208. *Telecomms. Research & Action Ctr. (TRAC) v. FCC*, 750 F.2d 70, 72 (D.C. Cir. 1984). The *TRAC* case grew out of claims by several public interest groups that the Federal Communications Commission (FCC) had unreasonably delayed a determination of whether AT&T was required to reimburse ratepayers after allegedly overcharging them.

209. *Id.* at 80. The six factors are: “(1) the time agencies take to make [the] decision[]” (governed by a “rule of reason”); (2) a congressionally mandated timetable or other indication of congressional intent with respect to the pace of implementation of a statutory scheme; (3) whether the interests at stake involve human health and welfare, in which case delay is less reasonable than if the consequences are purely economic; (4) the effects of compelling agency action on other agency priorities; (5) the “nature and extent of the interests prejudiced by delay;” and (6) any impropriety or “agency lassitude,” although this finding is not required in order to determine that unreasonable delay has occurred. *Id.*

More formal decisions not to decide, such as denials of rulemaking petitions, as well as step-by-step and minimalist decisions, are reviewed under 5 U.S.C. § 706(2), which states that agency actions may be set aside in six circumstances.²¹⁰ This review often boils down to whether the agency's decision is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."²¹¹

These distinctions make sense. A court cannot assess whether an agency considered relevant factors or made a clear error of judgment in doing so if the agency has not explained which factors were considered. Thus, unless we are prepared to require agencies to create a record in all cases in which they fail to act, including in enforcement cases, the multitrack review is inevitable. Lisa Bressman would impose a reason-giving requirement on all agency inaction, including non-enforcement decisions.²¹² But while such an approach has merit in principle, it would likely be prohibitively expensive in practice.²¹³ Even if the reason-giving requirement were limited to cases in which a specific action had affirmatively been sought by an actor outside the agency, the demands on the agency's time would still be overwhelming, especially if petitions increased as a result of the intervention, exacerbating the already significant problem of insufficient administrative resources.

210. That section states that a reviewing court shall:

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—
(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (D) without observance of procedure required by law; (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

5 U.S.C. § 706(2) (2012).

211. *Id.* § 706(2)(A).

212. Bressman, *supra* note 6, at 1693. Bressman acknowledges the time and expense that would attend implementation of her proposal, but concludes that "these costs are unavoidable if the goal is agency legitimacy." *Id.*

213. EPA, for example, receives citizen petitions seeking agency action in a number of different programmatic areas. Since 2007, EPA has received sixteen petitions seeking regulation under § 21 of the Toxic Substances Control Act. *Section 21 Petitions Filed with EPA Since September 2007*, EPA, <http://www.epa.gov/opptintr/chemtest/pubs/petitions.html> (last updated July 16, 2014). The agency has also received seven rulemaking petitions under § 553(e) of the APA since January 1, 2013. The agency does not make petitions received prior to that date available. *Petitions for Rulemaking*, EPA, <http://www2.epa.gov/aboutepa/petitions-rulemaking> (last updated Mar. 16, 2014). These numbers are in addition to petitions for enforcement actions and petitions for reconsideration, which are not included on the EPA website but which a keyword search on [regulations.gov](http://www.regulations.gov), the federal government's regulatory clearinghouse, revealed to be numerous.

Courts reviewing agency restraint in the form of failure to take an enforcement action or of pure delay therefore assume a deferential posture out of necessity. The alternative justification for agency restraint set forward here provides additional support for this deference. And yet, even though similar justifications for deference exist where restraint is reviewed under the arbitrary and capricious standard, this standard is less forgiving. In *Massachusetts v. EPA*, the Supreme Court took a narrow view of what factors an agency may consider when deciding not to decide. Because this more restrictive reading risks inhibiting needed agency flexibility as well as directing restraint into channels, like delay, that inhibit transparency, a reevaluation of the standard is called for.

2. *Expanding Arbitrariness Review*

Of the three standards of review described above, it is the arbitrary and capricious framework that needs the greatest modification to accommodate an agency's prudential decision to defer decisionmaking. This section therefore proposes a place for pragmatism in arbitrariness review.²¹⁴ Crucially, this review takes place before an agency has made its substantive, or "merits," decision. It is the question of "whether, when and how much"—the decision not to decide, the step-by-step approach, or the minimalist approach—that is the subject of the arbitrariness review.

As applied to administrative restraint, the arbitrariness framework should be thought of as a *Chevron*-like inquiry. In the first instance, a court should ask whether failure to make a decision in the particular case violates specific statutory language. This step recognizes that the question of what factors the agency may consider rests ultimately in legislative hands. If the agency's choice is not a clear violation of the statute, however, the court should move on to the familiar arbitrariness inquiry: did the agency consider the relevant factors in deciding to defer a decision, and did its conclusion represent a clear error of judgment?²¹⁵

At the second stage of the inquiry, the court should align its perspective with the agency's. In other words, it should appreciate that agencies must consider not only the impact of making a decision on the question before them but also on their programmatic agenda more broadly and on the success of their programs over time.²¹⁶ Here, courts should follow the logic

214. This phrase is a nod to the title of Kathryn Watts's piece. See Watts, *supra* note 193.

215. See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971) (articulating this test for the first time); see also *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (developing the test).

216. Jerry Mashaw has made the point that agencies must consider context because they have some responsibility to ensure the coherent development of the legal order. See

of *Judulang v. Holder*, a recent Supreme Court case involving the appeal of a Board of Immigration Appeals (BIA) decision ordering the deportation of an alien.²¹⁷ Judulang, a lawful permanent resident, pled guilty to voluntary manslaughter in 1988 and was subsequently placed into deportation proceedings after he pled guilty to another crime in 2005. To determine whether Judulang was eligible for discretionary relief from deportation, the immigration judge and then the BIA compared his crimes to a list of offenses eligible for relief in a different class of cases (called the “comparable grounds” approach). Judulang argued that this method was “arbitrary and capricious” under the APA.²¹⁸

A unanimous Supreme Court agreed. It applied the *State Farm/Overton Park* test, asking whether the BIA’s decision was “based on a consideration of the relevant factors and whether there has been a clear error of judgment.”²¹⁹ The BIA, the Court found, “flunked that test” because its comparison approach was “irrelevant to the alien’s fitness to reside in this country.”²²⁰ But instead of adopting *Massachusetts v. EPA*’s restrictive understanding of “relevant factors” as limited to statutory factors, the *Judulang* court noted that relevant factors the agency might properly have considered included those “tied, even if loosely, to the purposes of the immigration laws or the appropriate operation of the immigration system.”²²¹ Because the BIA’s policy did not meet even this deferential standard, the Court reversed the Ninth Circuit’s denial of relief to Judulang and remanded the case for further proceedings.

The *Judulang* approach allows agencies flexibility to consider the pragmatic consequences of a decision. While *State Farm* held that “relevant” factors are ones that Congress intended the agency to consider, we should not be so quick to assume that Congress intended agencies to be technocratic automatons. Given the breadth of at least some of its delegations, it seems more likely, or at least *as* likely, that Congress intended agencies to be pragmatic in the exercise of their delegated authority.

This more practical approach to evaluating agency restraint under the arbitrary and capricious framework suggests a different outcome in *Massachusetts v. EPA*. Applying the *Judulang* framework, the Court should

Mashaw, *supra* note 141, at 510 (“[A]gencies must balance their more remote responsibilities as contributors to the unity of the legal order, and hence to the operational feasibility of the rule of law, with their more proximate and primary responsibilities to the development of one segment of it.”).

217. *Judulang v. Holder*, 132 S. Ct. 476 (2011).

218. *Id.*

219. *Id.* at 484.

220. *Id.*

221. *Id.* at 485.

have deferred to EPA's consideration of the practical consequences of forming a judgment about whether GHGs endangered public health and welfare. As Justice Scalia pointed out, § 202 of the CAA "says *nothing at all* about the reasons for which the Administrator may *defer* making a judgment—the permissible reasons for deciding not to grapple with the issue at the present time."²²² This reading of the text, which EPA endorsed, was reasonable. The Court should therefore have deferred to the agency's interpretation.²²³

A further argument for deference is that agencies are far better positioned than courts to engage in this kind of broader balancing. As the Court noted in *Norton v. Southern Utah Wilderness Alliance*, it is for agencies, and not courts, to decide how to achieve broad, programmatic goals.²²⁴ Where discretion exists, therefore, it is for agencies to decide how to exercise it in a way that furthers overarching statutory objectives. Agencies are better qualified than generalist courts to predict other actors' reactions to a decision, as well as the consequences of those reactions for both the individual question before the agency as well as the agency's broader agenda.²²⁵

The *Judulang* approach also better harmonizes with the Court's holdings in earlier cases and in related administrative law doctrines. In an earlier case that bears marked similarities to *Massachusetts v. EPA*, the Court came out the other way on the question of an agency's discretion not to make a

222. *Massachusetts v. EPA*, 549 U.S. 497, 552 (2007) (Scalia, J., dissenting).

223. *Id.* at 552–53. It is possible, of course, that the Court could have adopted a more capacious understanding of what counts as a "relevant factor" and still concluded that the factors EPA considered were inadmissible. For example, it might have found that while an agency is expert in domestic policy dynamics, it lacks the knowledge required to make judgments about foreign policy. Thus, EPA's explanation that it was concerned about the effects of unilateral GHG regulation on international negotiations might have been unpersuasive. *See id.* at 498. Such a holding would have had the advantage of being less restrictive of agency flexibility.

224. *See Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 67 (2004) (declining to require agencies to take specific actions to preserve wilderness areas and noting that "[t]he prospect of pervasive oversight by federal courts over the manner and pace of agency compliance with such congressional directives is not contemplated by the APA").

225. Whether or not agencies may consider goals articulated elsewhere in the U.S. Code is a closer question. As the Court held in *Pension Benefit Guaranty Corp. v. The LTV Corp.*, 496 U.S. 633 (1990), it might be problematic to *require* agencies to consider public policies not articulated in their own enabling act. And yet, this case says nothing about *permitting* agencies to do so. In *Independent U.S. Tanker Owners Committee v. Dole*, 809 F.2d 847 (D.C. Cir. 1987), the D.C. Circuit addressed this second question. It opined that it might be permissible for the Secretary of Transportation to consider factors outside of those identified in the relevant statute, but that the Secretary should explain her decision to do so and how those goals were consistent with the ones in the statute. *Id.* at 854.

judgment in the first instance. In *Young v. Community Nutrition Institute*, the Court deferred to FDA's interpretation of a statute as giving it discretion to decide whether to promulgate tolerance levels for a naturally occurring carcinogen, aflatoxin, found in some foods.²²⁶ More generally, the Court has granted increasing deference to agencies on questions of statutory interpretation. Under the doctrine of *Chevron v. Natural Resources Defense Council*, courts will defer to an agency's reasonable interpretation of a statute it is tasked with administering.²²⁷ In *City of Arlington v. FCC*, the Court clarified that *Chevron* applied even where the relevant statutory provision concerned the scope of the agency's own authority.²²⁸

In light of *Community Nutrition Institute*, decided two years after *Chevron*, as well as *City of Arlington* and *Judulang*, it may be best to see *Massachusetts v. EPA* as an aberration. It may have been the majority's specific interest in forcing action on climate change that led it to take an imprudently narrow view of the agency's discretion. Or, as Jody Freeman and Adrian Vermeule have suggested, the majority opinion may have been the product of a trend of disenchantment with political influence on agency discretion.²²⁹ Either way, the relevant holding is proof of Justice Holmes's statement that "[g]reat cases like hard cases make bad law . . . because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment."²³⁰

C. The Limits of the Passive Virtues

It is important to acknowledge that prudential considerations play a role in agency decisionmaking, and it is sensible for courts to defer to judgments based on those considerations. However, care must be taken not to allow restraint to become a shield for malfeasance. Therefore, courts and other actors can and should still take seriously their responsibility to police agency decisionmaking for the presence of nefarious motivations.

Prudence, as Bickel emphasized, is not a synonym for arbitrariness.²³¹

226. 476 U.S. 974 (1986). Justice Stevens, the author of the majority opinion in *Massachusetts v. EPA*, dissented in *Young*. Stevens would have found the statutory provision at issue unambiguously required the FDA to set tolerance levels for aflatoxin. *Id.* at 984–88 (Stevens, J., dissenting).

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

228. *City of Arlington* addressed the question of whether, under the rubric of *Chevron*, FCC had the authority to interpret a provision of the Federal Communications Act requiring that state and local government act on wireless facility siting applications within a "reasonable period of time." *City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863 (2013).

229. Freeman & Vermeule, *supra* note 194, at 54.

230. *N. Secs. Co. v. United States*, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting).

231. Others writing about discretion have taken the argument one step further,

Threshold determinations about whether and when a decision should be made can be guided by reason even if they are not principled in the sense we have come to associate with Wechslerian generality and neutrality.²³² In his article on the authority of the courts to decline the exercise of jurisdiction that has been granted, David Shapiro makes a similar argument—that “discretion need not mean incoherence, indeterminacy, or caprice.”²³³ Shapiro suggests that discretion might be cabined either by background principles of law or by the body to whom discretion was delegated.²³⁴

With respect to administrative discretion, expanding the permissible range of factors for agency consideration does not alter the basic premise that agencies must exercise their discretion deliberately. Allowing prudential concerns to emerge from the shadows does not grant agencies a roving license to make arbitrary decisions. Agency actors must continue to justify their decisions, either in the first instance for decisions required to be made on the record or, for other decisions, when challenged, with reasoned explanations according to the strictures of the APA. The difference under the proposed regime is simply that those explanations may include broader prudential concerns without risking reversal.

Emphasizing judicial deference where a statute confers broad discretion on an agency would not reduce a judge’s role to a mere “charade.”²³⁵ Two supervisory models might describe the court’s role vis-à-vis administrative agencies: preventive and policing. Jody Freeman and Adrian Vermeule explain that one thing the *Massachusetts v. EPA* court might have been trying to do was to promote the former (they call it a “prophylactic principle.”)²³⁶ But prophylactics risk stifling benign as well as malignant behavior, and the

providing principles by which discretionary decisions can be given structure even while allowing room for prudential considerations. See, e.g., David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543 (1985) (coupling his defense of courts’ discretion in the exercise of their own jurisdiction with suggested principles to govern that discretion).

232. Bickel, *Passive Virtues*, *supra* note 9, at 51 (distinguishing prudence from “judgment proceeding from impulse, hunch, sentiment, predilection, inarticulable and unreasoned”).

233. Shapiro, *supra* note 231, at 545.

234. *Id.* at 547 (arguing that jurisdictional grants to courts are best understood as also delegating the power to choose the criteria that will be applied in making decisions and that the common law tradition helps limit these choices).

235. *Ethyl Corp. v. EPA*, 541 F.2d 1, 68–69 (1976) (Leventhal, J., concurring). In *Ethyl*, the issue was the proper standard of review for an agency decision that implicated highly technical questions. Judge Leventhal was responding to the suggestion in Judge Bazelon’s concurring opinion that courts should leave matters of technical complexity to the agency’s discretion. *Id.* Despite the difference in contexts, however, the fear of unbridled agency discretion is comparable.

236. Freeman & Vermeule, *supra* note 194, at 87.

realities of agency decisionmaking militate in favor of a policing model that limits affirmative malfeasance while permitting discretion within statutory bounds. This type of review would be designed to identify any "corrosive influences" on the agency.²³⁷

For an example of how this type of review might work, consider the inquiry into agency delay. A reviewing court might slightly rework the sixth *TRAC* factor to emphasize the importance of malfeasance to a finding of unreasonable delay. The sixth factor currently states that "the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed."²³⁸ Deemphasizing the sixth factor downplays the importance of finding unreasonable delay if malfeasance is suggested. But as the D.C. Circuit has held, "[i]f the court determines that the agency [has] delay[ed] in bad faith, it should conclude that the delay is unreasonable."²³⁹ Similarly, courts should find agency action arbitrary and capricious where plaintiffs provide actual evidence of improper influences on an agency's decisionmaking process. For example, allegations that an agency's professional staff had come under pressure to alter scientific data, if supported, would lead to grave doubts about the propriety of the agency's choice.²⁴⁰

Greater candor from agencies would make this review more meaningful. It is almost a cliché today to quote Justice Brandeis's exhortation that "sunlight is said to be the best of disinfectants."²⁴¹ As suggested above, agencies can and do weigh prudential considerations in deciding whether, when, and how to act. It is important that our regulatory processes acknowledge this and provide avenues for disclosure of such considerations. By encouraging agencies to be more forthcoming about the practical realities that inform their decisionmaking, we can craft more effective critiques of the process and more effective standards for review of agency

237. The term comes from Bressman, *supra* note 6, at 1661. For an example of how this review might operate in practice, consider the D.C. Circuit's careful scrutiny of EPA's reasoning in *Sierra Club v. Costle*, 657 F.2d 298, 410 (D.C. Cir. 1981) (scrutinizing the record "to assure that nothing unlawful or irrational has taken place").

238. *TRAC v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984) (quotations omitted).

239. See *Cutler v. Hayes*, 818 F.2d 879, 898 (D.C. Cir. 1987); see also *In re Monroe Commc'ns Corp.*, 840 F.2d 942, 946-47 (D.C. Cir. 1988) (retaining jurisdiction over a case because of allegations that the FCC had acted in bad faith).

240. See, e.g., *Freeman & Vermeule*, *supra* note 194, at 54-64 (discussing alleged White House pressure on EPA to alter reports on climate change).

241. Louis D. Brandeis, *What Publicity Can Do*, *HARPER'S WEEKLY*, Dec. 20, 1913, at 10. The full quotation is as follows: "Publicity is justly recommended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman." *Id.* A search for the phrase quoted in the text showed that it had been cited, in full, in no fewer than 138 law review articles and journals.

decisions.²⁴² While exorcising nefarious influences completely from the administrative process may not be possible, if agencies are more forthcoming about the factors that persuaded them to decide not to decide, we can be more sanguine that true motivations are not being hidden, and courts can evaluate the full scope of reasons on the merits.

If the agency is exercising prudence by limiting the scope of a final rule, either in terms of jurisdiction or substance, the requirement of reason-giving already applies.²⁴³ Agencies might also consider adopting procedural rules requiring greater candor when they deny rulemaking petitions, elect to tackle problems in case-by-case adjudications as opposed to general rulemakings, or simply delay action. While the *Vermont Yankee* decision limits courts' ability to require procedures that go beyond those contained in the APA and an agency's organic statute,²⁴⁴ agencies themselves are free to adopt regulations to require more transparent reason-giving.

EPA's denial of a petition to regulate lead emissions from general aviation aircraft piston engines demonstrates the desirable level of candor. In the denial, the EPA stressed the regulatory actions it was already taking to deal with lead pollution, including revising NAAQS for lead, improving the nation's lead monitoring network, and limiting emissions of lead under its program for hazardous air pollutants.²⁴⁵ These programs, EPA explained, had required "considerable time and resources to accomplish."²⁴⁶ Thus, EPA emphasized its efforts to coordinate agency programs to reduce lead and explained why the regulation petitioners sought was not essential to achieve the necessary reductions. If courts were more deferential to prudential explanations, EPA might also have noted the problem of regulatory fatigue in its denial or the polarizing nature of GHG regulation and the resulting need to focus on the most effective and least

242. Transparency has the added benefit of ensuring that the exercise of the passive virtues does not, as Margaret Gilhooley put it, "stall the consensus building process." Margaret Gilhooley, *Tobacco Unregulated: Why the FDA Failed, and What To Do Now*, 111 YALE L.J. 1179, 1200 (2002). In other words, debate about the proper resolution of a problem can continue even if the agency defers action.

243. See Short, *supra* note 196, at 1817–18 (discussing the APA's requirement of reason-giving for formal rulemaking and adjudications and the evolution of a comparable judge-made requirement for informal rulemaking).

244. *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519 (1978) (holding that the APA sets a ceiling on procedural requirements that a court may require an agency to adopt for informal rulemaking).

245. Memorandum from EPA in Response to Petition Regarding Lead Emissions From General Aviation Aircraft Piston-Engines 11–13 (July 18, 2012), available at <http://www.epa.gov/otaq/regs/nonroad/aviation/ltr-response-av-ld-petition.pdf>.

246. *Id.* at 14.

disruptive regulations first.

Additional tools for disclosure include the Advanced Notice of Proposed Rulemaking (ANPRM), which is often used to signal the early stages of a rulemaking process. An ANPRM is especially useful where a proposed rule will likely elicit an especially strong reaction from citizens or other actors.²⁴⁷ The advance notice and invitation to participate in the formulation of the rule through submission of comments and/or participation in public hearings may lessen some of the hostility to the rule by giving parties time to come to terms with its requirements and by making sure they feel their voices have been heard. To make prudential considerations more transparent, ANPRMs might include, and ask commenters to consider, factors such as the likely reactions of other governmental and non-governmental actors.

In delay cases, instead of merely delaying its responses to a rulemaking petition, an agency might post regular status updates on the petition or request and the reasons that no response has yet issued. One way that this could be done is in the agency's Regulatory Agenda and Regulatory Plan, which must be submitted to OIRA annually or semiannually under Executive Order 12866.²⁴⁸ The Order includes minimal requirements for each document, which must be submitted by all agencies, including independent agencies.²⁴⁹ The Regulatory Agenda must contain "all regulations under development or review" as well as "a brief summary of the action, the legal authority for the action, [and] any legal deadline for the action."²⁵⁰ Regulatory Plans need only include the most significant actions an agency plans to undertake that year, but they require a more detailed analysis of those actions, including how they relate to the President's priorities, how the risk addressed by the action relates to other risks within the agency's jurisdiction, and the agency's schedule for action.²⁵¹ All agency Agendas and Plans are compiled into a publicly-available Unified Agenda of Regulatory and Deregulatory Actions.²⁵²

247. Regulation of GHGs is certainly one example of such a rule. Another is rulemaking concerned with the provision of contraceptives to women under the Affordable Care Act. HHS Secretary Kathleen Sebelius issued an advanced notice of proposed rulemaking on this issue, and specifically on the question of how to ensure women's access to preventive care while respecting religious liberty, in March 2012. *Certain Preventive Services Under the Affordable Care Act*, 77 Fed. Reg. 16,501 (Mar. 21, 2012).

248. See Exec. Order No. 12,866, at § 4 (b)-(c), 58 Fed. Reg. 51,735 (Oct. 4, 1993).

249. In Executive Order 13,579, President Obama exhorted independent agencies to comply with the directives set forth in Executive Order 13,563 "[t]o the extent permitted by law." Exec. Order No. 13,579, 3 C.F.R. 256 (2012).

250. Exec. Order No. 12,866, at § 4(b), 58 Fed. Reg. 51,735 (1993).

251. *Id.* at § 4(c).

252. For the current Agenda, see *Current Regulatory Plan and the Unified Agenda of Regulatory*

By executive order, the President could expand the reporting obligations in these documents to include self-imposed planned timelines for each action. Agencies would be required to include brief explanations for deviations from the timeline. Under existing law, there are no reason-giving requirements whatsoever when an agency simply delays action unless and until an agency is required to provide such an explanation by a court. If agencies were required to sketch anticipated timetables in advance, and to publish status updates that included candid reasons for any delay, strategic restraint might become less objectionable. In addition to being included in the Regulatory Agenda, these status updates could be offered on the agency's website.²⁵³

The kind of candor advocated in this section, however, has to date not been rewarded. In *Massachusetts v. EPA*, the Bush Administration cited its concerns about the coordination of domestic GHG policy with negotiating leverage for foreign treaties as a reason for denying the rulemaking petition, but the Administration was rebuffed by the Court. After that decision, agencies may be more inclined to keep their true reasoning to themselves. But the natural and unavoidable pressures on administrative agencies to consider the practical consequences of making a decision are unlikely to be driven from the picture entirely; rather, they will be driven underground. *Massachusetts v. EPA* provides an instructive example. While one method of strategic inaction was foreclosed by the Court's decision, EPA availed itself of an alternative strategy: delaying promulgation of an actual proposed rule on GHGs by issuing an ANPRM. The ANPRM proposed various methods of regulating GHG emissions and sought public comment and reactions. In this way, the actual task of proposing and adopting new regulations was postponed until President Obama took office.

and *Deregulatory Actions*, OFFICE OF INFO. AND REGULATORY AFFAIRS, <http://www.reginfo.gov/public/do/eAgendaMain>. According to former OIRA Administrator Sally Katzen, "the process itself has become more of a paper exercise than an analytical tool." Katzen, *supra* note 141, at 111.

253. Federal agencies have made great strides in recent years in modernizing their web pages, with the result that information posted there is now much easier for the public to locate. Of course, some agency websites are better than others. InformationWeek singled out the Department of Defense, the National Aeronautics and Space Administration (NASA), the Department of Homeland Security, the White House, and the U.S. Postal Service for accolades in 2010, J. Nicholas Hoover, *12 Best Government Websites*, INFORMATIONWEEK (Aug. 26, 2010), <http://www.informationweek.com/government/information-management/12-best-government-websites/227100057?pgno=1>, while GovLoop's favorites were the Department of Energy, the FCC, NASA, the White House, and the National Archives. Jeff Ribeira, *Top 5 US Federal Agency Websites in 2011*, GOVLOOP (Dec. 28, 2011), <http://www.govloop.com/profiles/blogs/top-5-government-agency-websites-2011>.

Thus, exhortations to agencies to disclose prudential motivations for deferring action must, to be successful, be coupled with the more deferential standards of review for agency decisions articulated above that acknowledge, in appropriate cases, the practical value of deciding not to decide.

Of course, even with greater transparency by agencies, policing agency restraint for evidence of malfeasance will miss some cases of poorly motivated inaction and delay. Agencies might conceal their true motivations for restraint, offering plausible alternative justifications for avoiding certain questions. However, this problem is not unique to the restraint context and exists any time courts review the reasonableness of agency justifications. Moreover, to the extent a default must be selected, it is preferable to allow some instances of agency shirking to stand than to block the use of restraint as an administrative tool.

CONCLUSION

Agency restraint, no less than judicial restraint, is a fact of the legal landscape. Administrative inaction has often been conceived of in a pejorative sense. It conjures images of bureaucratic “red tape” such as lines at the DMV or long waits for passport processing. In many cases, however, the understanding of inaction as the product of agency misfeasance or ineptitude is incorrect. We see agencies deferring decisions either wholesale or in part, and making minimalist decisions, strategically, but for reasons that are consistent with their missions and statutory mandates and designed to preserve, rather than frustrate, expertise.

This Article has proposed that we should understand agency decisions about whether, when and how much to decide as falling within three categories: decisions not to decide, step-by-step regulation, and administrative minimalism. What all of these behaviors have in common is that they evince a desire, on the part of the agency, to avoid decisions that would produce negative practical consequences.

Agencies *must* be pragmatic. Their position in government is far from secure, given their lack of constitutional pedigree and the absence of direct accountability to the electorate. Because they are particularly susceptible to pushback from other actors, including not only their political principals but the courts, states and the public, agencies must be especially sensitive to the possible effects of backlash. Deferring decisions, enacting programs piecemeal, or substituting less controversial choices for more controversial ones are all strategies that can help agencies avoid unwanted attention. And because agencies have longer-term time horizons than elected representatives, the strategy of sacrificing battles in order to win wars is more workable.

Fortunately, pragmatic agencies need not be unfaithful agencies. Most statutes have sufficient flexibility built into them to permit agencies to exercise discretion over the scope and timing of decisions. Faithfulness to statutory mandates might even *require* flexibility in application in order to effectuate all parts of the statute and other statutes the agency is tasked with administering. A FERC that insisted on the unbundling of retail transmission from retail sales as part of Order 888 might have found itself unable to make any progress on new transmission siting, which requires state cooperation. And an EPA that insisted on regulating the smallest emitters of GHGs right away might find itself facing overwhelming political opposition or regulatory fatigue that limited its ability to regulate GHGs more broadly.

Moreover, in order to fulfill their statutory mandates most effectively, agencies must balance expertise with flexibility. Bickel saw an inevitable accommodation between the ideals of principle and flexibility. Neither one could exist without the other. For agencies, too, it is often better to preserve legitimacy by deferring a decision than to make a choice that would provoke negative practical repercussions. By separating the pragmatic inquiry—the questions of *whether*, *when* and *how much* to decide—from the substantive inquiry—*what* the decision should be—agencies can preserve their technocratic focus on the back end while making room for pragmatism at the front end.

Of course, we are left with the eternal problem of disentangling “good” restraint from “bad” restraint, where “good” restraint is undertaken in service of statutory goals and “bad” restraint is the product of lassitude, self-serving motivations by individual decisionmakers, or narrow interest-group influence. One way to mitigate this problem would be to require greater candor by agencies in justifying restraint. Agencies may be more willing to disclose pragmatic concerns if those concerns are recognized as legitimate under some of the standard tests for reviewing inaction, such as the arbitrary and capricious test.

It will never be possible to eliminate poorly motivated choices completely. We are then presented with a choice of two worlds: one in which agencies’ feet are held to the fire no matter how sensible their justifications for restraint, and one in which some poorly motivated instances of restraint are permitted as a consequence of allowing well-motivated ones to stand. Unless we think agencies are determined shirkers, a position this Article has challenged, there is no obvious reason for favoring the former over the latter.

The initial exploration of the administrative state’s passive virtues presented in this Article suggests several directions for future research. The Article surveyed several areas of administrative decisionmaking in order to

provide as complete a picture as possible of the tools available to agencies to defer action. However, a more targeted focus on a single agency or single issue area, for example FERC or the regulation of GHGs, would allow a more nuanced look at the practice of restraint in context. To better understand individual actors' motivations for restraint, an ethnographic survey of current and former administrative decisionmakers might also be indicated. Just as Bickel was forced to rely on judicial opinions to explore judges' true thinking, the case for the administrative state's passive virtues presented here has of necessity largely relied on circumstantial evidence, including motive evidence. While an ethnographic survey would be limited in its effectiveness by the candor, or lack thereof, of the subjects interviewed, former agency personnel in particular may be inclined to provide frank responses.

Alexander Bickel first wrote about judicial prudentialism in the early 1960s, a half-century ago. Since that time, the already potent post-New Deal federal bureaucracy has continued to expand and is now truly massive in scope and responsibility. Its actions affect nearly every aspect of our daily lives. It is therefore past time to begin a discussion of the administrative state's own passive virtues.

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