ARTICLES

STAYING AGENCY RULES: CONSTITUTIONAL STRUCTURE AND RULE OF LAW IN THE ADMINISTRATIVE STATE

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Today, administrative rules are far more numerous than the laws enacted by Congress, cover far more pages in the relevant legal codes, account for far more regulatory commands, and have profound effects on American economy and society. Although administrative rules can provide substantial public benefit, legal constraints on the scope of administrative authority and on the processes by which it is employed provide critical protections. Courts, when asked, can review the legality of these rules; courts also can stay rules' effectiveness pending review, both preserving the status quo and reducing costs entailed by rules of questionable legality. Holding rules in abeyance until they can be reviewed often is the best—and at times the only—vehicle for guaranteeing a meaningful review. Canons of deference to both administrative and judicial discretion should be revisited in light of the vast reach of federal administrative regulation, the concentrated impact regulations often have on specific individuals and entities, and the frequent experience that staying rules' effects is critical to limiting administrative adventurism and avoiding irreparable harm. Greater attention to the harm from failure to stay questionable rules can protect rule-of-law values, preserve liberties that were central to our constitutional design, and provide space for serious evaluation of the rules' consistency with law.

TABLE OF CONTENTS

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INTRODUCTION—JUDGING STAYS: FROM PRIVATE PRIVILEGE TO THE MODERN ADMINISTRATIVE STATE

In the span of one month in the winter of 2016, justices of the U.S. Supreme Court took divergent positions on applications to stay agency rules pending appeal of the rules to the courts. In February, the Court, by a 5-4 vote, decided to stay the EPA's so-called "Clean Power Plan," preventing the regulation adopted to promote the agency's plan from taking effect while the courts reviewed its legality.[1] Less than one month later, Chief Justice Roberts, who voted with the majority in the Clean Power matter after referring that matter to the full Court, decided not to refer another application for stay to the Court, instead denying a stay of the EPA's Mercury and Air Toxics Standards (MATS) rule.[2]

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1. *See* West Virginia v. EPA, 136 S. Ct. 1000, 1000 (2016) (staying the EPA's regulation, Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015)).

2. *See* Michigan v. EPA, No. 15A88 (June 29, 2016) (denying stay of the EPA's regulation, National Emission Standards for Hazardous Air Pollutants from Coal and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units, Final Rule, 77 Fed. Reg. 9,304 (Feb. 16, 2012))) [hereinafter MATS]. As Circuit Justice for the District of Columbia Circuit, where

The standards used by the courts to decide whether to stay an administrative rule are matters of enormous importance, both practically and doctrinally. Traditionally, the decision to stay or not stay a rule was treated, as other matters of equitable relief were, as a determination within the discretion of the judge.[3] Unlike questions that historically have been seen as issues "of law," questions that used to be presented to courts of equity were not matters of entitlement but of privilege.[4] While standards guided the exercise of discretion by the judge, higher courts routinely deferred to the equity court's decision.[5]

Both the content of temporary orders seeking to preserve the status quo in private actions and routine deference to the trial-level judge make sense in this context. When remedies such as stays and temporary injunctions are used to prevent ongoing harm or new harm from private conduct for which compensation after the fact would be unlikely or unavailing, the range of highly individualized, fact-based considerations central to these conclusions generally are the kind of matters properly left to the judicial officer most familiar with the case, subject to deferential appellate review.[6] Should one spouse, for example, be ordered not to abandon a house during divorce proceedings (a move that could reduce the value of marital assets and prejudice aspects of the divorce decree)? Should the other spouse be required to maintain a payment account for the mortgage (again, a decision with implications for the value of marital assets)? Should one partner in a small business be enjoined from setting up a competing venture or selling an asset that is critical to the venture's success (steps that, once taken, have effects on the business's value that cannot readily be undone)?

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the two cases originated, Chief Justice Roberts was responsible for disposing of the applications for stay by deciding the matters or referring them to the full Court.

3. *See, e.g.*, Ronald M. Levin, *"Vacation" at Sea: Judicial Remedies and Equitable Discretion in Administrative Law*, 53 DUKE. L.J. 291, 324–25 (2003).

4. *See, e.g.*, Zygmunt J.B. Plater, *Statutory Violations and Equitable Discretion*, 70 CAL. L. REV. 524, 533–34 (1982).

5. For contrasting views on the roles of law-boundedness and discretion, see Doug Rendelman, *The Triumph of Equity Revisited: The Stages of Equitable Discretion*, 15 NEV. L.J. 1397 (2015); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987).

6. *See, e.g.*, Nederlander v. Nederlander, 958 N.Y.S.2d 45, 46 (N.Y. App. Div. 2013) (deferring to the trial judge and observing that "in order to . . . maintain the status quo, and to prevent the dissipation of marital property, the court must be able to issue orders to ensure that . . . marital property [that could be subject to equitable division in a divorce proceeding] is protected").

These are hardly matters that rise to the level of broad public importance, nor are they apt to turn on legal principles that are seriously contested. What judicial action will best protect the rights of all parties in such cases turns on particularized judgments about individual risks and about particular individuals' likely behavior. Yet the typical presumption in a range of private actions also favors routine use of temporary orders to prevent the sort of changes that could reduce one party's ability to satisfy legitimate claims of the opposing party.[7]

The two EPA cases, however, demonstrate the different setting in which issues related to stays commonly arise today and the greater importance of protecting against harms associated with departure from the status quo. The modern administrative state is characterized not only by expansive lawmaking, but also by extraordinarily expansive lawmaking by unelected administrative officials.[8] Congressional lawmaking has produced a complex array of statutes covering more than 20,000 pages of the United States Code.[9] As daunting as it is to know what these laws command, it is far more daunting to master the mass of administrative rules, which cover something on the order of nine to ten times as many pages of the Code of Federal Regulations.[10] While many rules consist of relatively minor, technical commands, others are as sweeping, intrusive, and consequential as any congressionally-passed law.

Allowing these rules to apply immediately often gives the individuals and entities that are subject to them a choice between investing in costly compliance or risking serious sanctions, including potential criminal liability; to the extent that this induces compliance with rules that were not well-grounded in law, courts' ability to provide an effective check on

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7. *See id.*; Erika Driskell, Comment, *Dissipation of Marital Assets and Preliminary Injunctions: A Preventive Approach to Safeguarding Marital Assets*, 20 J. AM. ACAD. MATRIM. LAW. 135, 144–45 (2006) (exploring legal rules providing increased preference for orders preserving status quo to protect marital assets).

8. *See, e.g.*, Ronald A. Cass, *Overcriminalization: Administrative Regulation, Prosecutorial Discretion, and the Rule of Law*, 15 ENGAGE 14 (2014) [hereinafter Cass, *Overcriminalization*]; Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994) [hereinafter Lawson, *Rise and Rise*].

9. *See, e.g.*, Gary Fields & John R. Emshwiller, *Many Failed Efforts to Count Nation's Federal Criminal Laws*, WALL ST. J. (July 23, 2011), http://online.wsj.com/news/articles/SB10001424052702304319804576389601079728 92.

10. *See, e.g.*, CLYDE WAYNE CREWS, JR., TEN THOUSAND COMMANDMENTS: AN ANNUAL SNAPSHOT OF THE FEDERAL REGULATORY STATE 65 (2016); Wayne Crews & Ryan Young, *Twenty Years of Non-Stop Regulation*, AM. SPECTATOR (June 5, 2013, 10:08 AM), http://spectator.org/articles/55475/twenty-years-non-stop-regulation.

administrative officials can be substantially eroded. Obviously, expensive, time-consuming litigation contesting the legality of an administrative decision is a far less attractive option if the only remedy at the end of the case is a Pyrrhic declaration of victory. Once a rule's targets decide that the risk of sanctions requires immediate compliance, the only "remedy" a court can offer is recognition that the litigants need not have spent the millions already invested in complying with an illegal rule, were under no lawful obligation to have undertaken economically damaging modifications of their operations, or need not have made other disruptive changes to their lives. However satisfying it is to hear someone say, "you're right, the barn door *should* have stayed shut," it's more rewarding to get confirmation while the horse is still inside.

Reducing incentives to challenge unlawful official action in turn expands the probability that officials will exceed their authority, both in what they do and how they do it—as with any human endeavor, removing a constraint on misbehavior (intentional or not) almost axiomatically leads to more misbehavior, something every parent knows. If agency officials already have incentives to push beyond the boundaries of their legal mandates, to overregulate, to impose restrictions on private conduct that is not sanctioned by—much less commanded by—statute, the absence of meaningful judicial review to constrain those tendencies will increase officials' willingness to engage in this behavior.[11]

Of course, the answer is not to impose unwise constraints. If a rule contains mandates essential to protection of health and safety, delaying its implementation also could have serious, harmful consequences.[12] As with a

11. While the exact goal of officials is a matter of debate, it is widely understood that the goal for officials generally includes personal returns correlated with expanded use of the powers of their offices. *See, e.g.*, WILLIAM A. NISKANEN, JR., BUREAUCRACY AND REPRESENTATIVE GOVERNMENT 24–38 (1971); KENNETH A. SHEPSLE & MARK S. BONCHEK, ANALYZING POLITICS: RATIONALITY, BEHAVIOR, AND INSTITUTIONS 348–77 (1997). This predicate dovetails with incentives for legislators to assign authority to other officials—especially officials subject to informal legislative influences—in less than crystal clear terms. *See, e.g.*, Peter H. Aronson et al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1 (1982); David Epstein & Sharyn O'Halloran, *The Nondelegation Doctrine and Separate Powers: A Political Science Approach*, 20 CARDOZO L. REV. 947, 949 (1999); Mathew McCubbins, Roger Noll & Barry Weingast, *Structure and Process, Politics and Policies: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431 (1989); Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463 (2015); Kenneth A. Shepsle, *The Strategy of Ambiguity: Uncertainty and Electoral Competition*, 66 AM. POL. SCI. REV. 555 (1972).

12. Apart from the prospect for public-interest-advancing legislation and regulation, it

regime that lets rules almost always take effect, automatically staying all rules could have serious, and at times seriously harmful, effects.

In this context, the courts must take a hard look at the way the private-privilege approach to issuing stays affects the legal and practical landscape when applied to government regulation. Continuing to treat requests for stays as matters of largely unreviewable discretion for individual judges has important consequences for the scope and locus of government power as well as for the rule of law.

I. STARTING WITH STRUCTURE

When the framers of the American Constitution were writing the document that would define successful government design—an experiment in structuring government power that produced a combination of liberty, security, and economic progress that has been the envy of the world—they were pursuing two overarching goals. They sought to create a set of government structures that would enable the new nation to achieve ends that could be attained only if the national government were given power to pursue goals that require uniform rules or united efforts—providing for the common defense, for example, or for the unimpeded flow of commerce throughout the nation.[13] The framers also endeavored to divide and check power in a manner that would constrain governmental discretion and inhibit the use of power to reduce liberty or entrench the preferences of a transient majority.[14]

While the goal of more effective national government was a response to perceived defects in the Articles of Confederation, protection of liberty was seen as the more important goal, the essence of any good constitution, and the major benefit of the rule of law.[15] One feature after another of the

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should be noted that officials often have mixed incentives for action and that *both* legislating and regulating (and *not* legislating or *not* regulating) can confer benefits on the relevant official decisionmakers. *See, e.g.*, ADAM SMITH & BRUCE YANDLE, BOOTLEGGERS AND BAPTISTS: HOW ECONOMIC FORCES AND MORAL PERSUASION INTERACT TO SHAPE REGULATORY POLITICS (2014); Fred S. McChesney, *Rent Extraction and Rent Creation in the Economic Theory of Regulation*, 16 J. LEGAL STUD. 101 (1987).

13. *See, e.g.*, THE FEDERALIST NOS. 23–25 (Alexander Hamilton), NO. 42 (James Madison).

14. *See, e.g.*, THE FEDERALIST NOS. 10, 45–51 (James Madison).

15. *See, e.g.*, THE FEDERALIST NO. 10 (James Madison), NOS. 21–23, 84 (Alexander Hamilton); ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 4–5 (1990); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 524, 536–47 (1969).

Constitution was directed primarily at assuring accomplishment of that goal. Major structural features—such as the division of power among three branches of government, each vested with responsibility for one type of authority; the assignment of powers to each branch that provided checks against excesses of the other branches; the division of the legislature into two houses composed of members elected from different constituencies at different times, for different terms of office, and by different means—all of these provisions in the Constitution were designed to prevent the exercise of un-cabined discretion by particular government officials and official bodies.[16]

Even the most casual reading of *The Federalist Papers* underscores the importance of the Constitution's structural features as limitations on unchecked power and protections of liberty. The writings by Alexander Hamilton, John Jay, and James Madison focus almost entirely on these themes. Madison, for example, cautioned that "the public good, the real welfare of the great body of the people is the supreme object to be pursued; and . . . no form of government whatever has any other value than as it may be fitted for the attainment of this object."[17] He observed that the most dangerous failing in a Constitution—the risk to liberty most critical to be minimized—is the accumulation of power in one set of hands or one body.[18]

Madison first applied this maxim to the separation of power between state and federal governments, exploring the Constitution's division of authority between the two sets of governments, the basis for allocation of powers to one or the other, and the reasons for supposing that the power of the states would predominate.[19] Among other things, the states are more numerous, closer to the individual citizens, and divided in their interests on many matters—which provides greater natural affinity of citizen to government than at the federal level while also reducing the prospect of a unified government power being brought to bear against individual liberties.[20] Moreover, the state governments were given several means for asserting authority over federal government officials and bodies, further

16. *See, e.g.*, THE FEDERALIST NOS. 23–25 (Alexander Hamilton), NOS. 41–42, 45–51 (James Madison), NO. 78 (Alexander Hamilton); BORK, *supra* note 15, at 4–5; ALEXIS DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA 112–21, 246–71 (1835).

17. THE FEDERALIST NO. 45 (James Madison).

18. *See* THE FEDERALIST NO. 47 (James Madison).

19. *See* THE FEDERALIST NOS. 45–46 (James Madison).

20. *See* THE FEDERALIST NO. 46 (James Madison).

checking the risk that the national government would invade state prerogatives without the support of the states.[21]

That was not enough, however, as the national government's power, even once marked as limited and in many respects subservient to state powers, required further division to prevent tyranny. Madison famously declared, "No political truth is certainly of greater intrinsic value or is stamped with the authority of more enlightened patrons . . . than" the maxim "that the legislative, executive and judicial departments ought to be separate and distinct."[22] He explained at length how the Constitution embraces and implements that maxim.[23]

More than merely separating the three major types of government power among three branches of the national government, the Constitution provides a variety of mechanisms for assuring that none of the branches of government can impose its will upon another (and by doing that, effectively arrogate to itself the other's power).[24] This protects individuals against invasions of their liberty by making the branches guardians of their own power and making effective government action turn on cooperation among the different branches with different powers.[25] Again, Madison makes the point succinctly about the need not merely to design a government of separate powers but to incorporate in that design features that allow it to sustain itself:

> Power is of an encroaching nature, and . . . it ought to be effectually restrained from passing the limits assigned to it. After discriminating therefore in theory, the several classes of power, as they may in their nature be legislative, executive, or judiciary; the next and most difficult task, is to provide some practical security for each against the invasion of the others. What this security ought to be, is the great problem to be solved.[26]

Combatting efforts to extend the power of one branch of government into matters committed to a different branch requires constant effort. The branch the framers most feared was the legislative branch, which Madison characterized as "everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex."[27] True to Madison's fears,

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21. *See* THE FEDERALIST NOS. 45–46 (James Madison).

22. THE FEDERALIST NO. 47 (James Madison).

23. *See, e.g.*, THE FEDERALIST NOS. 47–51 (James Madison).

24. *See, e.g.*, THE FEDERALIST NOS. 47–48, 51 (James Madison), NOS. 67–73, 78–80 (Alexander Hamilton).

25. *See* THE FEDERALIST NO. 47 (James Madison).

26. THE FEDERALIST NO. 48 (James Madison).

27. *Id.*

the legislative branch has shown considerable ingenuity at finding ways to expand power and diminish protections for liberty associated with structural provisions in the Constitution.[28] The executive branch also has engaged in behavior that strains the bounds of its authority, endeavoring to expand its power into matters reserved for the legislative or judicial branches,[29] but more often expansion of executive authority has occurred at the direction of the legislative branch.[30]

This apparent contradiction disappears when one understands that "the grant of power from one entity to another is never an act of pure generosity; the grantor invariably gains something from the grant."[31] Simply put, legislators gain release from accountability and also secure a greater influence for the most intensely interested among them when they circumvent cumbersome restrictions on legislating, including requirements for bicameral majorities and presentment to the President.[32] The whole point of the Constitution's creation of separate Houses of Congress with different numbers of members, differently chosen from different constituencies at different times for different terms of office, and of the need for majorities of both Houses plus the President to agree on legislation (or supermajorities of both Houses after a presidential veto), was to make it difficult to enact laws.[33] So long as laws are needed to impose government controls on the private behavior of individuals and entities, liberty is likely to enjoy considerable protection against abuse.

II. DELEGATION OF DISCRETIONARY AUTHORITY: ORIGINAL PRACTICE AND UNDERSTANDING

Unfortunately, the predicate of the sentence ending the previous section

28. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1 (1976); INS v. Chadha, 462 U.S. 919 (1983) (finding that the one-house legislative veto implemented by Congress violated the constitutional separation of powers); Mistretta v. United States, 488 U.S. 361 (1989).

29. *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (limiting the power of the President to seize private property in the absence of specifically enumerated authority under the Constitution or statutory authority conferred on him by Congress); Texas v. United States, 809 F.3d 134 (5th Cir. 2015), *aff'd*, No. 15-674 (Jun. 23, 2016).

30. *See, e.g.*, Clinton v. City of New York, 524 U.S. 417 (1998) (holding that the grant of line-item veto power to the President is unconstitutional).

31. Ronald A. Cass, *Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State*, 40 HARV. J. L. & PUB. POL'Y 147, 153 (2017) [hereinafter Cass, *Delegation Reconsidered*].

32. *See, e.g.*, *id.*

33. *See, e.g.*, THE FEDERALIST NO. 22 (Alexander Hamilton), NO. 51 (James Madison), NO. 73 (Alexander Hamilton); *Chadha*, 462 U.S. 919.

of this paper—that liberty will be protected "so long as laws are needed to impose government controls on the private behavior of individuals and entities"—is no longer realistic. Despite the vesting clause of Article I of the Constitution, declaring that, "All legislative powers herein granted shall be vested in a Congress of the United States,"[34] much of the national government's lawmaking power now effectively rests in administrators' hands.

Administrative officers inevitably enjoy some scope for deciding how to implement instructions contained in congressionally-enacted law. That has been true since the beginning of the Republic. But the existence of a degree of discretion in implementing the law is not the same as the existence of broad policymaking discretion in making law.[35] Administrative discretion involves the concrete application of a command in the context of a matter that does not implicate major choices for society or impose special burdens on private behavior; the discretion associated with lawmaking comprehends (or, at least, can comprehend) important choices on the regulation of society at large, choices not confined to any restricted set apart from limits on the power of the government that makes the law.[36] The same point applies to the distinction between judicial interpretation of law, including legal mandates contained in the Constitution, and the legislative function of making law. Courts invariably exercise a degree of discretion in interpreting law, but the interpretive role, properly conceived, is both limited in nature and falls within the judicial power only insofar as it is necessary to decide cases and controversies properly before the courts.[37]

Although the division between the legislative and executive spheres (as with the legislative and judicial functions) is not susceptible to a bright-line test, the separation of legislative and executive powers has been recognized

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34. U.S. CONST. art. I, § 1.

35. *See, e.g.*, Mistretta v. United States, 488 U.S. 361, 417–22 (1989) (Scalia, J., dissenting); Wayman v. Southard, 23 U.S. 1, 46 (1825); Cass, *Delegation Reconsidered*, *supra* note 31, at 4.

36. *See, e.g.*, Dep't of Transp. v. Ass'n of Am. Railroads, U.S. Sup. Ct. No. 13-1080 (Mar. 9, 2015), slip op. at 14, 17, 20 (Thomas, J., concurring); *Wayman*, 23 U.S. at 42–47; THE FEDERALIST NO. 48 (James Madison); PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 4–8 (2014); Cass, *Delegation Reconsidered*, *supra* note 31; David Schoenbrod, *Separation of Powers and the Powers that Be: The Constitutional Purposes of the Delegation Doctrine*, 36 AM. U. L. REV. 355 (1987) [hereinafter Schoenbrod, *Purposes*].

37. *See, e.g.*, *Mistretta*, 488 U.S. at 417–22; Marbury v. Madison, 5 U.S. 137, 177 (1803); THE FEDERALIST NO. 78 (Alexander Hamilton); RONALD A. CASS, THE RULE OF LAW IN AMERICA, 46–97 (2001) [hereinafter CASS, RULE OF LAW]; DE TOCQUEVILLE, *supra* note 16, at 98–105.

from the start of the Republic as critical to the preservation of liberty and of the rule of law.[38] Maintenance of separate powers was sufficiently critical that the framers repeatedly took up the question of what combination and distribution of powers would best serve to protect against the invasion by one branch of the power assigned to another.[39] The Constitution they gave us very consciously divided what its framers saw as quintessentially executive authority from legislative authority and further subdivided legislative power among different officials to assure that this power—which they saw as the most expansive, least limitable by express command, and most dangerous to liberty—was checked from within the legislative process as well as from outside it, so far as practicable.[40]

The early practice of the nation was to permit Congress to authorize executive (or, at times, judicial) action that consciously permitted a degree of discretion but limited the discretion only to relatively minor matters pertaining to topics within the other branch's domain.[41] For example, early Congresses authorized executive officials to set the exact boundaries for the nation's capital city, but only after determining the location with sufficient specificity to resolve the political concerns over its placement.[42] Similarly, Congress authorized presidential decisions on matters respecting veterans' benefits, but only on relatively modest process issues and only after, again, resolving the contested political question about these benefits.[43] The President was also authorized to make determinations on imposition of embargoes, and was given a broader scope of discretion than in most other

38. *See, e.g.*, *Wayman*, 23 U.S. at 42–47; THE FEDERALIST NO. 48 (James Madison); Cass, *Delegation Reconsidered*, *supra* note 31, at Part II. Indeed, recognition of the importance of this distinction can be traced much further back in English history and in the philosophical writings that informed the framing of the American Constitution. *See, e.g.*, HAMBURGER, *supra* note 36. While modern scholarship, steeped in linguistic and philosophical arguments, exhibits extraordinary skepticism about the ability of words to circumscribe determinate meanings, the practical men who designed our government accepted common classifications as sufficient to mark the separate spheres of government.

39. *See, e.g.*, THE FEDERALIST NOS. 47–48, 51 (James Madison), Nos. 66–80 (Alexander Hamilton).

40. *See, e.g.*, THE FEDERALIST NOS. 47–48, 51 (James Madison), Nos. 67–73, 78 (Alexander Hamilton).

41. *See, e.g.*, HAMBURGER *supra* note 36; Cass, *Delegation Reconsidered*, *supra* note 31, at Part II; Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 335–53 (2002) [hereinafter Lawson, *Delegation*].

42. *See* Act of July 16, 1790, 1 Stat. 130.

43. *See* Act of Sept. 29, 1789, 1 Stat. 95; Act of Mar. 3, 1791, 1 Stat. 218.

authorizations.[44] This authority, however, was limited to instances in which Congress was not in session and expired within 15 days of the commencement of the next congressional session.[45] And, critically, it also concerned a matter that was within the President's core competences over deployment of military assets as Commander-in-Chief. Congress similarly used the Judiciary Act of 1789 to grant discretion to a coordinate branch of government on a matter obviously within that branch's domain, by giving federal courts authority to make "all necessary rules for the orderly conducting of business" in the courts.[46]

Despite some argument over the way judicially-deployed constitutional constraints on delegation actually worked, the Constitution's structure and early practices—shaped by men who had participated in its framing—provide strong support for the proposition that the framers understood the Constitution to have separated legislative power from administrative and judicial power and that the early Congresses respected that separation.[47] Resolving a challenge to part of the assignment of authority to the courts over particular issues of procedure, Chief Justice Marshall in *Wayman v. Southard*[48] explained the matter in these terms:

> It will not be contended that Congress can delegate to the courts or to any other tribunals powers which are strictly and exclusively legislative.
>
> But Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself. Without going further for examples, we will take that the legality of which the counsel for the defendants admit. The 17th section of the Judiciary Act and the 7th section of the [Process Act] empower the courts respectively to regulate their practice. It certainly will not be contended that this might not be done by Congress. The courts, for example, may make rules directing the returning of writs and processes, the filing of declarations and other pleadings, and other things of the same description. It will not be contended that these things might not be done by the legislature without the intervention of the courts, yet it is not alleged that the power may not be conferred on the Judicial Department.
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> The line has not been exactly drawn which separates those important subjects which must be entirely regulated by the legislature itself from those of less interest in

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44. *See* Act of Jun. 4, 1794, 1 Stat. 372.

45. *See id.*

46. *See* Act of Sept. 24, 1789, 1 Stat. 73, 83.

47. *See, e.g.*, Cass *Delegation Reconsidered*, *supra* note 31, at Part II.C. For other discussions of early authorizations of administrative action, see Kenneth Culp Davis, *A New Approach to Delegation*, 36 U. CHI. L. REV. 713, 719–20 (1969); Harold J. Krent, *Delegation and Its Discontents*, 94 COLUM. L. REV. 710, 738–39 (1994); Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1735–36 (2002).

48. 23 U.S. 1 (1825).

> which a general provision may be made and power given to those who are to act under such general provisions to fill up the details.[49]

The courts did not always draw a clear line between "those important subjects which must be entirely regulated by the legislature itself from those of less interest in which a general provision may be made and power given to those who are to act under such general provisions to fill up the details," but until the end of the 19th Century at least the understanding of the federal courts—and, just as important, of the other branches of the government—generally was congruent with that test.[50]

III. NON-DELEGATION'S DEMISE, ADMINISTRATIVE LAWMAKING'S RISE

The consensus understanding of limitations on the authority that could be assigned to executive officers began to change when constraints on the operation of government started to weaken. The transformation of the understanding can be described as taking place in six steps.

Step One

First, start with the Supreme Court's decision in *Field v. Clark*[51] at the end of the 19th Century. Both Justice Harlan's opinion for the majority and Justice Lamar's dissenting opinion articulated strong versions of the doctrine that federal legislative power is vested in the Congress and cannot be delegated to the executive.[52] The majority's test for what constituted a delegation of legislative power was not so carefully constructed as Chief Justice Marshall's articulation in *Wayman*, and its application of the test was rightly criticized by the dissent for permitting too great a scope for executive discretion.[53] Still, the justices plainly understood the structural importance of separating the spheres of legislative and executive power.

Step Two

Thirty-six years later, disposing of a non-delegation challenge in *J.W. Hampton, Jr., & Co. v. United States*,[54] the executive-friendly Supreme Court of former Chief Executive, then Chief Justice, William Howard Taft

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49. *Id.* at 42–44.

50. *See, e.g.*, Cass *Delegation Reconsidered*, *supra* note 31, at Part II; Lawson, *Delegation*, *supra* note 41.

51. 143 U.S. 649 (1892).

52. *Id.* at 692; *see also id.* at 697 (Lamar, J., dissenting).

53. *See id.* at 696–700.

54. 276 U.S. 394 (1928).

showed less appreciation for limiting the discretionary power of the executive branch. Giving voice to some of the ideas of the Progressive Era respecting the need to have a government staffed with experts in various matters of public policy and to have government function efficiently in carrying out its missions, the Court's *Hampton* opinion stressed the existence of "an intelligible principle" to guide the exercise of administrative discretion, finding that guidance was sufficient to answer constitutional objections.[55] Far from declaring that matters of great importance must be decided through constitutionally-prescribed processes for legislating, Chief Justice Taft and the *Hampton* Court announced that a particular matter's importance was a reason for deputizing administrative officials (who have more expertise or access to more or better information) to decide what to do.[56] The decision would be subject to general guidance from the legislature, but the important tasks of elaborating, refining, and applying that guidance would fall to the administrators.

Step Three

The third step was a vast expansion of government regulation of the economy and also of many aspects of health, safety, and personal behavior (retirement savings, family and child-raising decisions, and much more) that previously had been thought beyond the ambit of federal power.[57] Much of this was the product of Franklin Delano Roosevelt's New Deal, though significant expansions in regulation took place under Presidents Lyndon Johnson, Richard Nixon, and Barack Obama.[58] This explosion in regulation was not confined to congressionally-enacted laws. Instead, the foundational laws created a network of new administrative entities and programs, deputizing officials who were not elected to Congress (or, indeed,

55. *Id.* at 404–11.

56. *See id.* at 404–05.

57. Although much of this expansion of federal regulation occurred through direct command-and-control impositions, other parts of the expansion were achieved by attaching conditions to federal benefits, such as Aid to Families with Dependent Children (AFDC). *See, e.g.*, King v. Smith, 392 U.S. 309 (1968) (striking down the so-called "man in the house" rule).

58. *See, e.g.*, DAVID M. KENNEDY, FREEDOM FROM FEAR: THE AMERICAN PEOPLE IN DEPRESSION AND WAR 1929–1945 (1999); WILLIAM E. LEUCHTENBERG, FRANKLIN D. ROOSEVELT AND THE NEW DEAL: 1932–1940 (1963); William G. Howell & David E. Lewis, *Agencies by Presidential Design*, 64 J. POL. ECON. 1095 (2002); Lawson, *Rise and Rise*, *supra* note 8; Timothy Noah, *Obama Pushing Thousands of New Regulations in Year 8*, POLITICO (Jan. 4, 2016), http://www.politico.com/agenda/agenda/story/2016/1/obama-regulations-2016.

elected at all) to make decisions, often by issuing law-like rules. The result was not simply a collection of "alphabet agencies"—CAB, FCC, SEC, SSA, FDIC, NLRB, FHA, OSHA, EPA, and dozens more—but an almost unimaginable increase in the web of rules and regulations that now bind individuals in aspects of life long thought either beyond the reach of government or plainly reserved to state, not federal, control.[59]

Step Four

The expansion of federal regulatory authority, especially in its early phase, led to the fourth step in this process. Challenges to the assertion of authority over areas previously understood to be beyond the scope of Congress's constitutionally limited powers and to the devolution of authority to officials who were understood not to be empowered to make important decisions on rules regulating private conduct and individual rights elicited push-back from the courts. The Supreme Court, for example, found expansion of federal power over the terms of employment and over the compulsory provision of retirement and pension funding—even when ostensibly functioning only as a limitation on the movement of goods in interstate commerce or on the operation of interstate transportation—to exceed Congress's constitutional authority over interstate commerce.[60] The Court also famously struck down legislation in the *Schechter Poultry* and *Panama Refining* cases on the ground that the laws at issue gave such broad authority to administrative and private decisionmakers as to essentially delegate legislative power that the Constitution vested in Congress.[61]

The decisions, though treated today by most of the academic community as eccentricities of a conservative, anti-New Deal Court, were in line with prior decisions dating back to *Wayman* and before. The Court's early New Deal era decisions recognized that deputizing others to implement legislative schemes could be done only when the Congress provided suitable direction, and the precedents discussed by the Court demonstrated that, to

59. *See, e.g.*, CREWS, *supra* note 10; Larry Alexander & Saikrishna Prakash, *Delegation Really Run Riot*, 93 VA. L. REV. 1035 (2007); Cass *Delegation Reconsidered*, *supra* note 31; Lawson, *Delegation*, *supra* note 41; Lawson, *Rise and Rise*, *supra* note 8.

60. *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238 (1936); R.R. Ret. Bd. v. Alton R.R. Co., 295 U.S. 330 (1935); Hammer v. Dagenhart, 247 U.S. 251 (1918).

61. *See, e.g.*, Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

be constitutionally acceptable, the subjects of discretionary authority had to fit within the traditional core of executive, not legislative, competence.[62]

Step Five

Fifth, judicial application of constitutional precedents led to an intense campaign designed to influence judges and to implement reforms that would reverse decisions standing in the way of an expanded scope for both the federal government and its executive officials. Roosevelt's Court-packing plan was the most visible part of this campaign, but it also encompassed broader efforts to sway academic and public opinion.[63] Whether attributable to this campaign or to other sources (such as the natural evolution of some justices' thinking about constitutional rules),[64] the end result was a near-complete collapse of doctrines implementing limitations on federal power and on the assignment of important aspects of legislative authority to administrative officials.[65]

The Supreme Court upheld legislation that expansively stretched the definition of interstate commerce (with respect to both the substance of the

62. *See, e.g.*, *Panama Ref. Co.*, 293 U.S. at 421–30. The assignments of authority were either tied to implementing certain policies subject to fact-finding respecting circumstances that triggered particular responses (contingent authority) or were tied to matters such as management of property within the government's domain or of benefit administration within a narrow compass (such as veteran's pensions) that were connected to other assigned functions (national defense) traditionally within the executive's power. *See* Cass, *Delegation Reconsidered*, *supra* note 31; Schoenbrod, *Purposes*, *supra* note 36; David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 MICH. L. REV. 1223 (1985) [hereinafter Schoenbrod, *Substance*].

63. *See, e.g.*, Barry Cushman, *The Court-Packing Plan as Symptom, Casualty, and Cause of Gridlock*, 88 NOTRE DAME L. REV. 2089 (2013); William E. Leuchtenberg, *The Origins of Franklin D. Roosevelt's "Court-Packing" Plan*, 1966 SUP. CT. L. REV. 347 (1966).

64. *See, e.g.*, Barry Cushman, *Rethinking the New Deal Court*, 80 VA. L. REV. 201 (1994); Daniel E. Ho & Kevin Quinn, *Did a Switch in Time Save Nine?*, 2 J. LEGAL ANALYSIS 69 (2010); William Leuchtenberg, *When the People Spoke, What Did They Say?: The Election of 1936 and the Ackerman Thesis*, 80 YALE L.J. 2077 (1999); G. Edward White, *Cabining the Constitutional History of the New Deal in Time*, 94 MICH. L. REV. 1392 (1996).

65. *See, e.g.*, Ronald A. Cass, *Vive la Deference? Rethinking the Balance Between Administrative and Judicial Discretion*, 83 GEO. WASH. L. REV. 1294 (2015) [hereinafter Cass, *Vive la Deference?*] (describing effective end to serious constraints based on limitation of federal authority to enumerated powers—especially the end of serious limits on the scope of interstate commerce—as well as constraints based on assignment of executive power to the President, of restraints on delegation of legislative power, and eventually of serious judicial inquiry into the limits of statutory assignments of authority). *See* text at notes 65–73.

term and its intrusion into what is plainly intrastate activity) in decisions such as *West Coast Hotel v. Parrish*,[66] *Wickard v. Filburn*,[67] and more recently, *Perez v. United States*.[68] Similarly, the Court rejected delegation doctrine challenges to exceptionally vague assignments of decisionmaking authority to administrators. For example, in *National Broadcasting, Inc. v. United States*,[69] the Court sustained administrative authority to regulate a variety of private business relationships connected to broadcasting (limited only by the instruction to make decisions to serve "the public interest, convenience, and necessity."[70] And in *Yakus v. United States*,[71] the Court permitted the Administrator of the Office of Price Administration to set prices for a wide array of products at levels the Administrator deemed to be "generally fair and equitable" and appropriate to prevent "excessive prices."[72] Following the *National Broadcasting* and *Yakus* decisions, the Supreme Court has been unwilling to strike down even the vaguest instruction, including those authorizing (or subsequently deemed to have authorized) intrusive regulation of private conduct not obviously subject to government control.[73]

Compounding the abdication of constitutional constraints on administrative power, courts expanded the scope of deference to administrative decisions under the aegis of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[74] Initially structured (in keeping with prior law) as a canon of statutory construction to frame the scope of discretion given to administrators under particular statutory commands, *Chevron* became the banner under which judges selectively allowed administrators to interpret legislative language, including sometimes reading the law creatively and unpredictably.[75] Although judicial deference to administrative decisions on

66. 300 U.S. 379 (1937).

67. 317 U.S. 111 (1942).

68. 402 U.S. 146 (1971).

69. 319 U.S. 190 (1943).

70. *See id.* at 194.

71. 321 U.S. 414 (1944).

72. *See id.* at 414.

73. *See, e.g.*, Alexander & Prakash, *supra* note 59, at 1042; Cass, *Delegation Reconsidered*, *supra* note 31; Schoenbrod, *Substance*, *supra* note 62, at 360. *See also* Mistretta v. United States, 488 U.S. 361, 372 (1989) (judicial decisions reflect "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").

74. 467 U.S. 837, 865 (1984).

75. *See, e.g.*, Jack M. Beermann, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 781–82 (2010); Cass,

matters properly within the administrators' purview and actually committed to the administrators' discretion certainly is defensible, deference to interpretation of law is an entirely different matter.[76]

Step Six

The final step in the decline of limits on delegation of legislative power to administrators is the further expansion of administrators' exercise of expansive authority in the wake of the change in legal doctrines.[77] This step goes beyond the generation of a mass of regulatory rules that fill hundreds of thousands of pages in the Code of Federal Regulations and include thousands of provisions that potentially trigger criminal sanctions on individuals and entities that disobey these administrative fiats.[78] The change that has come about in part as a consequence of the earlier steps creates a ratchet effect that exacerbates the shift of power to administrators.

As courts became progressively less willing to rein in administrative exercises of broad power over private conduct, both legislators and administrators have adjusted, largely through greater acceptance of and assertion of administrative regulatory authority. Agencies have warmed to the freedom from legislative control that comes through vaguely framed

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Vive la Deference?, *supra* note 65; Ronald A. Cass, *Is* Chevron*'s Game Worth the Candle? Burning Interpretation at Both Ends*, *in* LIBERTY'S NEMESIS: THE UNCHECKED EXPANSION OF THE STATE 57, 58–59 (2016) [hereinafter Cass, Chevron*'s Game*]; Gary Lawson & Stephen Kam, *Making Law Out of Nothing at All: The Origins of the* Chevron *Doctrine*, 65 ADMIN. L. REV. 1, 2 (2013); Thomas W. Merrill, *The Story of* Chevron*: The Making of An Accidental Landmark*, 66 ADMIN. L. REV. 253, 276–77 (2014).

76. *See, e.g.*, Cuozzo Speed Tech., LLC v. Lee, 136 S. Ct. 2131, 2148 (2016) (Thomas, J., concurring); Clark Byse, *Judicial Review of Administrative Interpretation of Statutes: An Analysis of* Chevron*'s Step Two*, 2 ADMIN. L.J. 255, 255–56 (1988); Cass, Chevron*'s Game*, *supra* note 75, at 58–59; Cynthia Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 459–60 (1989); Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking Under* Chevron, 6 ADMIN. L. REV. 187, 191–93 (1992); Antonin Scalia, Associate Justice of the U.S. Supreme Court, Judicial Deference to Administrative Interpretations of Law, Administrative Law Lecture at Duke University School of Law, January 1989, *in* 1989 DUKE L.J. 511, 511–12 (1989).

77. *See, e.g.*, Alexander & Prakash, *supra* note 59, at 1036; Linda R. Cohen & Matthew L. Spitzer, *Solving the* Chevron *Puzzle*, 57 LAW & CONTEMP. PROBS. 65, (1994); E. Donald Elliot, Chevron *Matters: How the* Chevron *Doctrine Redefined the Roles of Congress, Courts, and Agencies in Environmental Law*, 16 VILL. ENVTL. L.J. 1, 3 (2005); Herz, *supra* note 76 at 188–89; Schoenbrod, *Substance*, *supra* note 62, at 1224–25.

78. *See, e.g.*, Cass, *Overcriminalization*, *supra* note 8, at 18; Fields & Emshwiller, *supra* note 9.

legislative instructions (often contained in extremely long, complex statutes), claiming new power over matters long thought to be beyond their purview. The FCC, for example, extended its legislatively conferred authority over broadcasting first to cable television (a medium of communication that offered a solution to the perceived problem of channel scarcity)[79] and then to the Internet (which vastly increased options for communication outside the control of traditional communications businesses).[80] In the same vein, the FDA discovered that it had a hitherto unknown—in fact, often denied—power to regulate tobacco products,[81] and the EPA (in concert with judicial reinterpretation of its governing charter) found that it had authority to police global climate change.[82] Even more troubling, Congress has abandoned yet another constitutional responsibility that gave it control over executive power, effectively granting agencies such as the Consumer Financial Protection Board (CFPB) authority to fund themselves through an administrative taxing power.[83]

Not all of the examples above came after the full flowering of the most explicit judicial deference to agency decisions on matters traditionally conceded to be within the purview of the judiciary, not executive officers. But they reflect the demise of constraints of many sorts on expansive administrative discretion. In the end—after the last of the steps in the process of political decisionmaking and judicial interpretation summarized above—the carefully crafted constitutional structure that was designed to constrain unwarranted, unchecked official discretion has significantly unraveled.

IV. STAYING THE COURSE? EQUITABLE REMEDIES, EVOLVING STANDARDS, AND JUDICIAL DISCRETION

The story told above, exposing the demise, or at least dramatic weakening, of many of the constraints on unilateral official action contained in the Constitution has powerful implications for the way courts should

79. *See* United States v. Southwestern Cable Co., 392 U.S. 157, 172–74 (1968).

80. *See* Comcast Corp. v. FCC, 600 F.3d 642, 648 (D.C. Cir. 2010); Verizon v. FCC, 740 F.3d 623, 643 (D.C. Cir. 2014); United States Telecomm. Ass'n v. FCC, 825 F.3d 675, 722–73 (D.C. 2016).

81. *See* FDA v. Brown & Williamson Tobacco Corp., 521 U.S. 120, 155 (2000).

82. *See* Part IV *infra*.

83. *See, e.g.*, Michael Greve & Christopher C. DeMuth, Sr., *Agency Finance in the Age of Executive Government*, George Mason Law & Econ. Research Paper No. 16-25 1, 8–9 (June 20, 2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2798289; Christopher C. DeMuth, Sr., *Agency Taxation*, 16 ENGAGE 1, 4–5 (2015).

treat applications for stays of administrative decisions. The initial approach to staying legal proceedings or other actions was rooted in equitable principles that were compatible with modest assumptions about the function of the challenged actions themselves.[84] When those assumptions no longer apply, a different approach is required. The starting point, however, is understanding a system that is generally supportive of stays, based on considerations that have inclined the exercise of equity to support interests that are apt to be harmed by alterations of the status quo or by potential violations of individual rights that are not well-protected by damages remedies.

Equitable authority historically was separate from legal authority, both in the *locus* of the power and the *nature* of the power exercised.[85] Equity was the province of different officials than law, beginning as the prerogative of kings to dispense justice outside of law and evolving into a supplemental legal form. The primary difference between the two legal forms (aside from the identity of the decisionmaker) was the level of discretion accorded. While judges of the law courts were bound by strict rules and forms of proceeding, those wielding power on equitable ground—after the king, the Lord Chancellor in England and courts of chancery in other progeny of the English legal system (including America's states)—had a more general mandate to prevent injustice within the confines of certain rules.[86] In large measure, equity provided remedies where law—understood as a system of fixed rules and binding, though evolving, precedents—was inadequate.

Often, the inadequacy of law flowed from difficulty of crafting rules that could respond to the complex nature of different considerations relevant to resolving a dispute or to preserving a state of affairs that would provide a reasonable chance at a just resolution.[87] The more numerous, interrelated,

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84. *See, e.g.*, Subrin, *supra* note 5, at 928.

85. *See, e.g.*, Rendelman, *supra* note 5, at 1401–02; Subrin, *supra* note 5, at 919, 932.

86. *See, e.g.*, William Searle Holdsworth, *The Relation of the Equity Administered by the Common Law Judges to the Equity Administered by the Chancellor*, 26 YALE L.J. 1, 3 (1916). Both common law and equity evolved as separate legal forms, sometimes explained as alternative institutions intended to demonstrate the King's commitment to justice, in distinction to archaic forms of law that were rooted in narrower concepts of right. *See, e.g.*, George Burton Adams, *The Origin of English Equity*, 16 COLUM. L. REV. 87, 89, 93 (1916).

87. It is a matter of debate how much the deficiencies of legal remedies referenced in explaining resort to equitable rules are real and how much now reflect a more general preference for the underlying precepts of equity. *See, e.g.*, Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687, 718 (1990); Douglas Laycock, *The Triumph of Equity*, 56 LAW & CONTEMP. PROBS. 53, 55 (Summer 1993); Rendelman, *supra* note 5, at 1402–03; Henry E. Smith, *Fusing the Equitable Function in Private Law*, Harv. Pub. L. Working

complex, and fact-bound the considerations relevant to a decision, the greater the difficulty of crafting a meaningfully binding and predictable rule to guide judges.[88] Yet, given the concerns over risks of judicial license—risks heightened by the retrospective nature of judicial decisions and the potentially draconian penalties that sometimes accompanied legal determinations—it long has been a tenet of thoughtful commentary on law that judges should be bound down by rules.[89]

In keeping with that instinct, part of the history of the evolution of equity and its ultimate merger with law courts in most jurisdictions has been the gradual increase in legal constraints on equity's exercise. The rise of rules to guide decisions on equitable remedies and to channel discretion still enjoyed by equity's decisionmakers gradually narrowed the distinction between the two branches of law, though not entirely abolishing it even today, especially in the distinctive remedies associated with equity.[90]

The closer the two branches came to resemble one another and the more legal rules were identified with all forms of judicially-granted relief,

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Paper 16–27 at 26, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2783483 [hereinafter Smith, *Fusing*]; Subrin, *supra* note 5.

88. *See, e.g.*, FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISIONMAKING IN LAW AND IN LIFE (1991); Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 63, 66 (1983); Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978) (edited version of work earlier used in manuscript form). Rulecrafting issues can be exacerbated by opportunities for strategic conduct—and also can expand or contract those opportunities. *See, e.g.*, Smith, *Fusing*, *supra* note 87, at 3–4. The difficulty in creating a rule that fits the policy ideal does not necessarily mean that allowing decisions to be made under a less directive standard will be preferable; that assessment depends on a quite complicated set of considerations of its own. *See, e.g.*, Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 586–96 (1992). The problem of finding a balance between decisions that fit accepted policy preferences and guidance designed to constrain decisionmakers has been a central issue in criminal sentencing. *See, e.g.*, Mistretta v. United States, 488 U.S. 361, 417–22 (1989).

89. *See, e.g.*, RONALD A. CASS, THE RULE OF LAW IN AMERICA xvi, 4–19, 28–29 (2001); HAMBURGER, *supra* note 36, at 85–86; FRIEDRICH A. HAYEK, THE ROAD TO SERFDOM 80–87 (1944); Michael Dorf, *Prediction and the Rule of Law*, 42 UCLA L. REV. 651, 681–85 (1995); Frank H. Easterbrook, *Formalism, Functionalism, Ignorance, Judges*, 22 HARV. J.L. & PUB. POL'Y 13, 17–18 (1998); Michael Oakeshott, *The Rule of Law*, *in* ON HISTORY AND OTHER ESSAYS 119, 130–32, 136–40 (1983); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178–80, 1185–86 (1989) [hereinafter Scalia, *Rules*].

90. *See, e.g.*, Samuel L. Bray, *The System of Equitable Remedies*, 63 UCLA L. REV. 530, 551–58 (2016); John L. Garvey, *Some Aspects of the Merger of Law and Equity*, 10 CATH. U. L. REV. 59, 64–66 (1961); John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV. 525, 532 (1978).

the more exceptional were some descriptions given to equitable remedies. Recently, for example, a quite restrictive formulation of the requirements for injunctive relief was given in the U.S. Supreme Court's decision in *eBay Inc. v. MercExchange, L.L.C.*[91] The *eBay* Court explained both that any demand for an injunction is to be judged according to equitable principles (regardless of the nature of the legal claim of right) and that the hurdle to issuing an injunction is substantial:

> According to well-established principles of equity, a plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief. A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction. . . . The decision to grant or deny permanent injunctive relief is an act of equitable discretion by the district court, reviewable on appeal for abuse of discretion.[92]

The two parts of the quotation above, suggesting a strict legal test for injunctive relief but allowing that application of the test is within the discretion of the lower court judge, reflect the tension between equity's heritage and law's fundamental imperative.

The first part of the quotation, giving what is known as the *eBay* test for injunctive relief, is at least arguably misleading as a statement of precedent and practice.[93] It is noteworthy, among other things, that seven of the nine justices expressed concern about either the scope of the test itself or its over-broad application in the context that gave rise to the *eBay* case (patent litigation).[94]

Among the concerns with the *eBay* test, the remedy sought in *eBay* is a traditional remedy for violation of property rights and in patent cases long has been the primary means for enforcing those rights. Intended or not, *eBay*'s four-factor test reads as if injunctions to enforce property rights are exceptional or at least questionable remedies.[95] That would be both at

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91. 547 U.S. 388, 391, 394 (2006).

92. *Id.* at 391.

93. *See, e.g.*, Mark P. Gergen, John M. Golden & Henry E. Smith, *The Supreme Court's Accidental Revolution? The Test for Permanent Injunctions*, 112 COLUM. L. REV. 203, 204–205 (2012).

94. *See* eBay, Inc. v. MercExchange, L.L.C., 547 U.S. 388, 394–95 (Roberts, J., concurring); *id.* at 395–97 (Kennedy, J., concurring).

95. *See, e.g.*, Gergen, Golden & Smith, *supra* note 93, at 206. The traditional approach to remedying patent infringement, for example, presumed irreparable harm from infringement because the principal effect of patent grants is to confer the right to exclude

odds with the history of specific injunction remedies for property violations and especially with the history of enforcement of intellectual property rights, which can be a particularly fragile set of rights (an understanding that has supported a large part of the argument for strong protections for them).[96] Nonetheless, the *eBay* test does capture aspects of the impetus to legalize equitable practice and, in a very short time, has had a powerful impact on the way many observers and judges conceive the requisites for injunctive relief.[97]

Considerations similar to those identified as relevant to permanent injunctions were articulated in decisions respecting preliminary (or temporary) injunctions, although with differing emphasis.[98] In particular, preliminary injunction decisions, which often involved staying a proceeding or postponing the effect of a decision pending the outcome of further proceedings, gave greater emphasis to preserving the status quo. That emphasis frequently (but not always) was coupled with the question whether permitting a change in the status quo would inflict irreparable harm on the party seeking an injunction.[99] The most important difference between the tests for permanent and preliminary injunctions has been that the preliminary injunction often was available on a lesser showing of threatened harm—after all, the preliminary injunction by its very nature is temporary,

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others from use of the patented invention during the effective period for patent protection. *See, e.g.*, U.S. CONST. art. I, § 8, cl. 8; RONALD A. CASS & KEITH N. HYLTON, LAWS OF CREATION: PROPERTY RIGHTS IN THE WORLD OF IDEAS 28–31, 49–50 (2013); FRITZ MACHLUP, COMM. ON THE JUDICIARY, SUBCOMM. ON PATENTS, TRADEMARKS & COPYRIGHTS, 85TH CONG., STUDY ON AN ECONOMIC REVIEW OF THE PATENT SYSTEM 1, 20–21 (1958); Edmund W. Kitch, *The Nature and Function of the Patent System*, 20 J.L. & ECON. 265, 279 (1977).

96. *See, e.g.*, CASS & HYLTON, *supra* note 95; Gergen, Golden & Smith, *supra* note 93, at 213–14; Kitch, *supra* note 95, at 277–78. Of course, this observation does not translate into an automatically strong or unexceptional set of remedies for every property right violation. *See, e.g.*, CASS & HYLTON, *supra* note 95 (using dynamic cost–benefit analysis as the cornerstone for explaining many of the rules of intellectual property, including exclusions from eligibility for protection and limitations on the scope of protection); Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691, 1706, 1710 (2012) (using information–cost economics to explore aspects of property right protections, exceptions, and alternative forms of protection).

97. *See, e.g.*, Gergen, Golden & Smith, *supra* note 93, at 234–35.

98. *See, e.g.*, Leubsdorf, *supra* note 90, at 533–37.

99. *See id* at 534–40.

so the cost imposed by virtue of such an injunction is apt in most circumstances to be more modest.[100]

V. WHEN TO STAY: PROTECTING RIGHTS IN THE MODERN ADMINISTRATIVE STATE

A. Applying Traditional Principles to Stay Applications

Requests to stay agency action are pleas for temporary injunctions designed to preserve the status quo. Traditional equitable principles set out above would support stays in settings where the costs of moving from the status quo are large, and the prospect of success in challenging the action to be stayed is substantial.

The uncertainty attached to judicial review in an era where agency action can receive deference, not just on matters properly committed to agency discretion, but also on matters of interpretation properly reserved for courts,[101] complicates the decision on stay requests by making it more difficult to evaluate the probability of success. This uncertainty may reduce judicial willingness to grant stays. But an assessment of the impact on the parties requesting a stay and of the seriousness of the legal arguments advanced often should militate for staying agency action.

Although two other factors—the balance between harm to the moving party and the opposing party and the effect of a stay on public interests—are also considered, these tend to be less important if the first two are satisfied.[102] In those circumstances, the balance of harm factor generally will pit serious financial consequences or dislocation from forced investment

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100. Although some commentary stresses the importance of the balance-of-interests consideration—the function of equity in providing just outcomes naturally would look to the effect of an equitable remedy on *all* competing interests—that emphasis is not at odds with the protection of the status quo where the dominant factors militate in favor of a stay. *See, e.g.*, eBay, Inc. v. MercExchange, L.L.C., 547 U.S. 388, 394–95 (Roberts, J., concurring) (underscoring importance of protecting rights in ways only equitable remedies effectively can and opposing implication that regard for *eBay* factors should impede general inclination to use injunctions to protect property rights); Leubsdorf, *supra* note 90, at 550–51 (emphasizing importance of balancing interests).

101. *See, e.g.*, Beermann, *supra* note 75, at 846; Cass, Chevron*'s Game*, *supra* note 75, at 60; Herz, *supra* note 75, at 191–93; Gary Lawson, *Reconceptualizing* Chevron *and Discretion: A Comment on Levin and Rubin*, 72 CHI.-KENT L. REV. 1377, 1381 (1997) [hereinafter Lawson, *Reconceptualizing*]; Peter L. Strauss, *"Deference" Is Too Confusing—Let's Call Them "*Chevron *Space" and "*Skidmore *Weight,"* 112 COLUM. L. REV. 1143, 1158–59 (2012).

102. *See, e.g.*, Texas v. EPA, 829 F.3d 405, 434–35 (5th Cir. 2016); Ohio v. U.S. Army Corps of Eng'rs, 803 F.3d 804, 808 (6th Cir. 2015).

(in equipment, alteration of business practices, or other costly adjustments) prior to adjudication of the legality of an administrative action against modest cost from delay in implementing a rule if it is found to be legal.[103]

There also is a tendency of the balance-of-interests and public interest factors to overlap, as well as a lack of precision in the specification of the last factor. The interests to be balanced against those represented by the party moving for a stay almost inevitably are those claimed by the government to be public interests, but the interests on the other side similarly are part of the general public stake in the outcome.[104] The "public interest," in other words, axiomatically includes private interests on both sides.

Hence, the real focus of the public interest prong properly is on those interests otherwise not represented in the contest over the rule or similar government action at issue. That should distinguish between general public interests and those of, for example, competing private firms taking opposing views on the proposed administrative decision.

Contrast, for example, the following two settings. First, consider a decision to take a compulsory license in a particular, patent-protected pharmaceutical to produce a vaccine deemed essential to combat a public health crisis. In this situation, the imposition on patent rights could be significant (both diminishing control over patent use and very likely reducing revenue for the patent-holder), but the government is obligated to provide reasonable compensation to the patent holder (mitigating some of the harm) and the asserted risk to public health is both great and immediate.[105] The serious factual inquiries are apt to be how credible the threat to public health is, how imminent it is, and whether the government has taken the requisite steps to seek adequate vaccine production before asserting a compulsory license.[106] Quite often, a compulsory license is

103. *See, e.g.*, Texas v. EPA, 829 F.3d at 434; *see also* Ohio v. U.S. Army Corps of Eng'rs, 803 F.3d at 808 (discussing the serious disruption to both private parties and state interests from change in rule respecting boundaries between federal and state regulation of waters protected under the Clean Water Act). *But see* Leubsdorf, *supra* note 90, at 525–26 (presenting a more agnostic view of the ordinary balance of competing interests).

104. *See, e.g.*, Leubsdorf, *supra* note 90, at 525–26.

105. *See, e.g.*, 28 U.S.C. § 1498 (2012); CASS & HYLTON, *supra* note 95, at 168–72.

106. For different views on the costs and benefits of compulsory licenses in such settings, see, for example, Ronald A. Cass, *Compulsory Licensing of Intellectual Property: The Exception that Ate the Rule?*, CRITICAL LEGAL ISSUES SERIES, Sept. 2007, WASH. LEGAL FOUND., Working Paper No. 150 [hereinafter Cass, *Compulsory Licensing*]; Colleen Chien, *Cheap Drugs at What Price to Innovation: Does the Compulsory Licensing of Pharmaceuticals Hurt Innovation?*, 18 BERKELEY TECH. L.J. 853 (2003); Richard A. Epstein & F. Scott Kieff,

neither necessary nor even necessarily helpful in combatting the perceived harms, but at least there is a plausible claim of public harm from granting a stay in this setting.[107]

Second, think of a major environmental rule change conceived as the initial step in combatting a perceived long-term threat. That is the argument put forward in favor of a large number of rules adopted by the EPA. These rules often seek to counter effects of phenomena that are contested either in the question of their existence, their source, the relative contribution of different sources, or the effectiveness of different potential palliatives or solutions.[108] Further, the phenomena at issue—global climate change is the clearest example—often have diffuse effects for which steps are taken locally (not globally) that have minimal impact and, depending on various substitution effects, may even produce consequences that are the exact opposite of those intended.[109] In this context, with little certainty of the harm being counteracted or of the effectiveness of the proposed steps and with little or no evidence of the importance of immediate action, the public interest almost never will militate in favor of denying a stay and should not be used to support rules' effectiveness during the period of review.

B. Stays in Context: Administrative Adventurism and Private Risk

In a world where administrative agencies exercise enormous authority and often are willing to press the boundaries of their already generous mandates, the stay becomes not just a matter of equitable justice but a critical protection against government overreaching. Even where equitable-judicial discretion is the rule, appellate courts should be attentive

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Questioning the Frequency and Wisdom of Compulsory Licensing for Pharmaceutical Patents, 78 U. CHI. L. REV. 71 (2011); Cole M. Fauver, Comment, *Compulsory Patent Licensing in the United States: An Idea Whose Time Has Come*, 8 NW. J. INT'L L. & BUS. 666 (1988).

107. *See, e.g.*, Cass, *Compulsory Licensing*, *supra* note 106, at 17–19; Epstein & Kieff, *supra* note 106, at 80–85.

108. *See, e.g.*, UARG v. EPA, 134 S. Ct. 2427, 2436–38 (2014); *see also* Massachusetts v. EPA, 549 U.S. 497 (2007) (respecting Massachusetts's requested rule to regulated sources of greenhouse gasses to combat global climate change).

109. That is a separate set of observations from the more public controversy over the existence, significance, and possible causes of climate change. *See, e.g.*, Peter Ferrara, *Sorry Global Warming Alarmists, The Earth is Cooling*, FORBES (May 31, 2012), http://www.forbes.com/sites/peterferrara/2012/05/31/sorry-global-warming-alarmists-the-earth-is-cooling; William D. Nordhaus, *A Review of the Stern Review on the Economics of Climate Change*, 45 J. ECON. LIT. 686 (2007).

to the consequences of denying stays of administrative rules in the context of the modern, far-reaching administrative state.

The importance of decisions on stay applications is illustrated by the history of EPA regulations at issue in recent litigation. The EPA had for decades read its relevant governing statute, the Clean Air Act, as limited to authorizing the sort of regulation of air pollutants that fit within a framework that would permit control of specific emissions that have clear, defined health effects that can be eliminated by reduction of those emissions.[110] That framework is at odds with construing the law to authorize control of global climate change.[111] Although the Supreme Court's decision in *Massachusetts v. EPA*[112] gave a very different reading to the statute, *permitting* the agency to consider regulation of "greenhouse gases," it did not *mandate* such regulation much less explain how regulation of greenhouse gases would comport with particular regulatory provisions of the Act.[113]

Following the *Massachusetts v. EPA* decision, the EPA, under different political leadership, made regulation of greenhouse gases to address climate change a high priority. EPA officials also discovered that it was not an easy matter to fit that imperative within the legal framework of the Clean Air Act (the only legal basis on which the EPA could rest its endeavors), as even the most truncated accounting of some of the EPA's decisions in this regard shows.

Part of the EPA's effort to reach all of the major sources of greenhouse gasses relied on a reading of the Clean Air Act as allowing EPA to regulate all emitting sources as part of a unified plan, regardless of the fit with

110. Although commonly referred to as if it were a single statute, the Clean Air Act is a series of laws, starting in 1955 with significant additions and amendments in 1963, 1967, 1970, 1977, and 1990. The initial law was the Air Pollution Control Act of 1955, Act of Jul. 14, 1955, 69 Stat. 322. The Act (including its various extensions and amendments) is codified at 42 U.S.C. §§ 7401–7671q (2012).

111. For varying assessments of this point and other issues involved in the change in EPA treatment of the regulation of greenhouse gases, see, for example, Jonathan H. Adler, *Heat Expands All Things: The Proliferation of Greenhouse Gas Regulation Under the Obama Administration*, 34 HARV. J.L. & PUB. POL'Y 421 (2011); Ronald A. Cass, Massachusetts v. EPA*: The Inconvenient Truth About Precedent*, 93 VA. L. REV. IN BRIEF 75 (2007); Jody Freeman & Adrian Vermeule, Massachusetts v. EPA*: From Politics to Expertise*, 2007 SUP. CT. REV. 51 (2007); Jody Freeman, *Why I Worry About* UARG, 39 HARV. ENVTL. L. REV. 9 (2015); Andrew P. Morriss, *Litigating to Regulate:* Massachusetts v. EPA, 2006–2007 CATO SUP. CT. REV. 193, 208–11 (2006).

112. 549 U.S. 497 (2007).

113. *See id.* at 533–34.

particular regulatory programs under the Act (which has different component parts with differing standards and disparate implementing authority).[114] Trying to reach power plants releasing greenhouse gases, such as carbon dioxide, under the same structure that was designed for other sources releasing pollutants that are not natural byproducts of most energy production, however, would have meant that the EPA needed to issue an enormous number of permits—hundreds of thousands of permits (or more)—as opposed to the hundreds that were initially understood as within the relevant sections of the Act.[115] Further, although the part of the statute the EPA relied on gave it broader regulatory power in some respects, it could not reasonably apply to greenhouse gas emissions as written, both because of the costs that would have imposed on the EPA's administrative resources and because it would have threatened draconian costs to a wide swath of American industry.[116]

In fact, the decision to reach all "sources" emitting (or capable of emitting), for relevant provisions of the law, either 100 tons of any air pollutant from certain specified stationary sources or 250 tons of any pollutant from other sources annually—the statutorily prescribed levels for permitting respecting pollutants judged by the EPA to pose a threat to public health—produced practical consequences the EPA itself labelled as absurd.[117] Rather than reconsider its determination to apply the Clean Air Act to greenhouse gases as if they were "pollutants," the EPA pointed to the absurd results of adhering to the Act's commands as justification for it to adopt a "tailoring rule" that reset the triggering levels to 75,000 and 100,000 tons per year of greenhouse gases.[118] These levels, which were, respectively, 750 and 400 times the statutory standards, were the lowest

114. *See* EPA, Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514, 31,516 (Jun. 3, 2010) [hereinafter Tailoring Rule] (to be codified at 40 C.F.R. pts. 51–52, 71–72).

115. *See, e.g.*, UARG v. EPA, 134 S. Ct. 2427 (2014); EPA, *Final Rule: Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule*, 1 (Apr. 13, 2010), https://www.epa.gov/sites/production/files/2015-12/documents/20100413fs.pdf (estimating that, without the tailoring rule, tens of thousands of permits would have been required under the Prevention of Significant Deterioration part of the Clean Air Act and millions of permits would have been required under Title V of the Act).

116. *See* UARG v. EPA, 134 S. Ct. 2427, 2436–38 (2014); Tailoring Rule, *supra* note 114, at 31,533.

117. Tailoring Rule, *supra* note 114, at 31,523. Among other things, the EPA estimated that it would face additional costs of dealing with permit requests that would amount to approximately $300 million per year. *See. id.* at 31,540.

118. *See id.* at 31,524.

levels the EPA deemed reasonably consistent with greenhouse gas regulation aimed at reducing the pace of climate change.[119]

The Supreme Court, in *UARG v. EPA*,[120] struck down the EPA's "tailoring rule," concluding that it went beyond the agency's statutory authority.[121] The Court told the agency that it had the choice to apply other provisions of the law or to decide that the law was not consistent with its plan for reducing greenhouse gas emissions and seek other legislation that would not produce absurd results, but the agency could not interpret the law to produce absurd results and then adopt rules that violate the law in order to avoid the absurdity.[122]

The adoption and invalidation of the tailoring rule are only parts of the tension between the EPA's strong desire for broad restriction of greenhouse gases and the less clear legal authority available for the agency to do that. The EPA adopted a broad plan to control climate change by restricting power plant emissions, known as the Clean Power Plan.[123] This plan was challenged as exceeding EPA authority—in part because it relies on a provision of the Clean Air Act that does not seem to apply to power plants, which are covered by a different provision and seemingly exempted from the provision relied on for its more capacious authorization for agency control—and as insufficiently connected to the announced shape of the rule (failing to give adequate notice of the considerations ultimately relied on by the EPA).[124]

This is the initiative that the Supreme Court stayed in the winter of 2016 to preserve the status quo during the pendency of judicial review of its legality.[125] The Court's stay decision highlights the interrelation between the nature of judicial review and the risk to regulated entities from delayed compliance with agency rules.

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119. *See id.* at 31,523–24.

120. 134 S. Ct. 2427, 2436–38 (2014).

121. *See id.* at 2427.

122. *See id.*

123. *See* EPA, Carbon Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Plants, 80 Fed. Reg. 64,662, 64,663–65 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60).

124. *See, e.g.*, Jonathan H. Adler, *Placing the Clean Power Plan in Context*, WASH. POST (Feb. 10, 2016), [hereinafter Adler, *Context*], https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/02/10/placing-the-clean-power-plan-in-context.

125. *See* West Virginia v. EPA, 136 S. Ct. 1000, 1000 (2016); Jonathan H. Adler, *Supreme Court Puts the Brakes on the EPA's Clean Power Plan*, WASH. POST (Feb. 9, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/02/09/supreme-court-puts-the-brakes-on-the-epas-clean-power-plan.

If the agency is acting beyond its statutory authority and imposing extraordinary costs on industry, forced compliance during the period in which the rule is contested in court amounts to imposing the punishment for what may or may not constitute a crime.[126] Of course, some imposition on individuals and entities affected by a change in the governing law is inevitable, and the risk of such impositions occurring during the pendency of litigation challenging a change in the law is analytically similar in some respects to other causes of harm. But the statement that there has been a change in the law supposes a source of change that at least is recognized as a valid enactment of law. That assumption is very much in contest here.

In a mythical world in which agencies are held to standards of action that are clearly consistent with the constitutional framework—that do not allow delegated legislative authority and that limit federal regulation to matters within the constitutionally assigned sphere of federal power—the risks associated with permitting a regulation to take effect may be modest. But in the current real world, when agencies routinely exercise authority that, at a minimum, is reserved to Congress and limited by the Constitution's special structural requirements for legislative enactments, putting rules into effect without pausing to allow courts to consider challenges poses far greater risks.[127]

The problem faced by those targeted by regulations of doubtful (or at best arguable) legality can be seen most clearly, perhaps, by looking to the saga of another EPA regulation, the MATS, concerning mercury emissions from power plants.[128] In *Michigan v. EPA*, the Supreme Court invalidated the MATS rule after interpreting relevant statutory language permitting

126. Apart from the similarities between civil penalties and criminal penalties, the administrative actions referenced here as subjects of stay requests pending review often are backed up by potential criminal punishments. *See, e.g.*, Cass, *Overcriminalization*, *supra* note 8; Fields & Emshwiller, *supra* note 9; George Terwilliger, III, *Under-Breaded Shrimp and Other High Crimes: Addressing the Over-Criminalization of Commercial Regulation*, 44 AM. CRIM. L. REV. 1417 (2007); Daniel Uhlmann, *Prosecutorial Discretion and Environmental Crime*, 38 HARV. ENVTL. L. REV. 159 (2014).

127. *See, e.g.*, Alexander & Prakash, *supra* note 59; Byse, *supra* note 76, at 262–63; Cass, Chevron*'s Game*, *supra* note 75; Cass, *Deference*, *supra* note 65; Cass, *Delegation Reconsidered*, *supra* note 31; Herz, *supra* note 76; Lawson, *Delegation*, *supra* note 41; Lawson, *Reconceptualizing*, *supra* note 101; Schoenbrod, *Purposes*, *supra* note 36. Obviously, actions by the President on matters constitutionally committed to the Chief Executive would stand on different ground. So, too, would decisions that reduce impositions on those who are subject to administrative rules, for reasons explored in, for example, HAMBURGER, *supra* note 36, at 97–102, and Cass, *Delegation Reconsidered*, *supra* note 31.

128. *See* MATS, *supra* note 2, at 9305.

regulation that is "necessary and appropriate" to require consideration of the costs—in this case, estimated at roughly $10 billion per year—as well as the benefits of regulation.[129] The Court remanded the rule to the court of appeals, which returned it to the agency for reconsideration of the rule in light of its costs (without, however, vacating the rule).[130] EPA greeted this decision, not with a statement of contrition at having failed to comply with relevant legal requirements, but instead with an announcement that fans of its regulation should not be troubled, as the industry was already heavily invested in complying with the rule.[131] The clear implication was that the adoption of a rule, legal or not, would suffice to produce the desired results.

If the targets of the rule must either make a substantial investment in response to an agency determination of questionable legality or risk being sanctioned for noncompliance if the rule is not overturned, many entities will decide that the least risky alternative is to comply rather than to fight.[132] Compliance may force firms into inefficient decisions, but implementing those decisions often will be more attractive to businesses than litigating over the legality of the rules and then, perhaps, having to make the necessary changes after other competitors have already done so. A $10 billion annual cost is a problem for any industry, but a major cost of business combined with a competitive disadvantage is an even more onerous penalty for firms deciding whether to invest substantial sums in challenging an agency rule.[133] Worse yet, for some firms, the threat of having to invest in expensive equipment, redesign, or other steps necessary to comply with regulations such as MATS or the Clean Power Plan will be sufficient to induce closure of some operations or even exit from the industry.[134] This cost will be exacerbated to the extent that customers and suppliers make plans to change from current arrangements rather than

129. *See* 135 S. Ct. 2699, 2711–12 (2015).

130. *See, e.g.*, Adler, *Context*, *supra* note 124; Michael S. Greve, *Clean Power, Dirty Hands*, LIBRARY OF LAW & LIBERTY (Feb. 1, 2016), http://www.libertylawsite.org/2016/02/01/clean-power-dirty-hands/.

131. *See* Greve, *supra* note 130.

132. *See, e.g.*, Murray Energy Corp. v. EPA, Coal Industry Application for Immediate Stay, at 29–34 (Jan. 2016) (joined with West Virginia v. EPA, 136 S. Ct. 1000, 1000 (2016)).

133. Competitive considerations play a role not just in decisions respecting challenges to rules but also in the initial support for rules, one of the standard insights behind the "bootleggers and Baptists" explanation of regulations' mixed parentage. *See, e.g.*, SMITH & YANDLE, *supra* note 12; Anne O. Krueger, *The Political Economy of the Rent-Seeking Society*, 64 AM. ECON. REV. 291 (1974); George J. Stigler, *Economic Competition and Political Competition*, 13 PUBLIC CHOICE 91 (1972).

134. *See, e.g.*, Adler, *Context*, *supra* note 124; Greve, *supra* note 130.

being caught if new administratively imposed requirements make staying with present engagements uneconomic.

In this context, leaving an agency's rule in place during the period in which it is under review in the courts has significant (at times, vital) implications for the rule's targets and those who must deal with them. Failure to stay a rule to preserve the status quo signals the expectation that the rule will survive judicial review.[135] That signal, in turn, has a likely effect on those who must either comply or risk consequences—practical or legal—if the rule's provisions, including penalties, become enforceable. Having the rule overturned eventually is no guarantee that the enterprises subject to its strictures will be spared those consequences. That is the implication of the MATS saga, of EPA's response to the Supreme Court's decision, and of observers' skepticism about the degree to which EPA officials might consciously have counted on the lock-in effect of an unstayed rule.[136]

A useful analogy—though obviously drawn from a different context—is the very high-profile decision to prosecute Arthur Andersen LLP (the large and successful accounting firm) for allegedly unlawful activity in connection with its provision of accounting services to Enron Corporation.[137] The reversal of Andersen's conviction did not resurrect that firm; the firm's prosecution constituted such a strong public signal of clients' inability to rely on Andersen's credibility that the firm simply could not continue to function.[138] The same impact can attach to denying a stay of a major rule,

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135. That is implicit in the considerations that guide disposition of stay requests, in line with the considerations used in deciding when to issue other temporary injunctions. *See, e.g.*, Leubsdorf, *supra* note 90, at 533–42.

136. *See, e.g.*, Adler, *Context*, *supra* note 124; Greve, *supra* note 130.

137. Much of the story of this prosecution is recounted in the Supreme Court decision reversing Andersen's conviction on a single count of obstructing a federal investigation. *See* Arthur Andersen, LLP v. United States, 544 U.S. 696 (2005); *see also* Carrie Johnson, *U.S. Ends Prosecution of Arthur Andersen*, WASH. POST (2005), http://www.washingtonpost.com/wp-dyn/content/article/2005/11/22/AR2005112201852.html; Jonathan Weil & Alexei Barreonuevo, *Arthur Andersen is Convicted on Obstruction-of-Justice Count*, WALL ST. J. (Jun. 16, 2002), http://www.wsj.com/articles/SB1023469305374958120.

138. *See, e.g.*, *Arthur Andersen*, 544 U.S. 696; Ronald A. Cass, *Power Failures: Prosecution, Power, and Problems*, 16 ENGAGE (no. 3) 29, 34–35 (Nov. 2015); Theodore Eisenberg & Jonathan R. Macey, *Was Andersen Different? An Empirical Examination of Major Accounting Firm Audits of Large Clients*, 1 J. EMPIRICAL LEGAL STUD. 263 (2004); Richard A. Epstein, *Deferred Prosecution Agreements on Trial: Lessons from the Law of Unconstitutional Conditions*, in PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT 38, 47 (2011). *But see* Gabriel Markoff, *Arthur Andersen and the Myth of the Corporate Death Penalty:*

especially one with aggressive implementation deadlines, although the grant of a stay does not eliminate all costs associated with a rule of questionable legality.

Simply put, staying an agency rule may not be enough to prevent harm to those who must decide whether to invest in measures that would be needed for a rule's implementation, especially when the period between decision on its legality and the date when it will be applied is short, but it is often an essential step—necessary but not necessarily sufficient.

CONCLUSION

Although the Constitution assigns to Congress (along with the President, so far as his veto power is an effective check on legislative priorities) the power to craft rules regulating a limited range of private behaviors, the modern administrative state looks quite different from that carefully designed constitutional structure. Today, thousands of rules are adopted by administrative agencies, entities that often are not effectively controlled by any elected official and that make rules free from the sort of checks and balances associated with bicameralism and presentment (two essential constraints on congressional lawmaking). Administrative rules are far more numerous than the laws enacted by Congress, cover far more pages in the relevant legal codes, account for far more regulatory commands, and impose extraordinary costs on the American public in general and in concentrated fashion on particular individuals and entities.

Courts have the capacity to review the legality of the rules and, as part of their heritage of equitable remedies, also have the power to delay rules' effectiveness, a step that can reduce the costs entailed by rules of questionable legal pedigree. The tendency of courts to defer to agencies under doctrines that can be read as permitting agencies to exercise discretion over matters not self-evidently within the agencies' proper domain, however, has reinforced judicial reluctance to halt the implementation of agency rules pending review. Even if the standards applicable to preliminary injunctions often militate in favor of stays, presuming that agencies know best what rules should govern private behavior now treated as regulable by the federal government yields frequent denials of stay applications.

Corporate Criminal Convictions in the Twenty-First Century, 15 U. PENN. J. BUS. L. 797 (2013). For a thoughtful overview of the issues involved in corporate prosecutions, see, for example, Vikramaditya S. Khanna, *Corporate Criminal Liability: What Purpose Does it Serve?*, 109 HARV. L. REV. 1477 (1996).

Judges should recognize that, while administrative officials enjoy some degree of discretion, legal constraints on agency action—the size and scope of which are matters within the purview of *judicial* determination—cannot be effective in many instances unless those who are subject to administrative decisions enjoy a meaningful avenue to challenge them. Holding rules in abeyance until they can be reviewed frequently is the best vehicle for guaranteeing a meaningful review, one that can result in something more than a Pyrrhic victory.

Given the vast reach of federal administrative regulation and the concentrated impact they often have on specific individuals and entities, canons of deference to both administrative and judicial discretion should be revisited to preserve the status quo to provide space for a serious evaluation of the rules' consistency with law. Freedom from coercive acts, from government fiat outside the bounds of the law, from regulatory exactions that gain traction from the ability of officials to impose costs because the review for legality asks too little and comes too late—these are protections essential to the rule of law. Allowing the time for considered assessment whether a rule is legally sufficient and not simply a reflection of political priorities of the moment—especially priorities not set through processes long deemed essential to the adoption of rules for private conduct—protects rule-of-law values that are part of our constitutional heritage. That may not suit today's regulators, but it fits the lessons bequeathed to us by those who fought for our freedom and fashioned a government they hoped would protect it.