

WHEN CAN YOU TEACH AN OLD LAW NEW TRICKS?

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This article considers the distinctive legal and institutional dynamics involved when agencies interpret existing statutes for novel purposes. It argues that courts take into account policy-specific institutional factors, such as legislative dysfunction, when they consider the propriety of such novel interpretations, rather than employing universal ideas about institutional competencies. Where Congress has shown an inability to legislate in a policy area, courts are more likely to sympathize with changes in interpretation as partial substitutes for new legislation, but relying on old statutory language creates problems of statutory mismatch. The article contends that many arguments over statutory meaning mask disagreements about the appropriate roles of agencies, Congress, and courts—some of which could be resolved through systematic empirical investigation. The article’s institutional perspective is used to reconcile two of the most important statutory interpretation decisions in recent years, FDA v. Brown & Williamson Tobacco Corp. (2000) and Massachusetts v. EPA (2007).

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INTRODUCTION

“A law . . . never produces exactly the results that anyone would have desired. It falls short, overshoots, or goes clean off in some other direction.”

—William Letwin (1965)¹

If you can't teach an old dog new tricks, how about old laws? Statutes, unlike canines or constitutions, can be straightforwardly amended by legislatures. But amendments have all the same procedural requirements as new laws, and so in a sense every amended law is new again. In this article, I consider attempts to turn unamended laws to new ends through changes in legal interpretation, thereby changing policy without changing law. In doing so, I draw attention to an underappreciated dynamic of policy change, provide insight into who is likely to spearhead efforts to reinterpret statutes and when courts are likely to be sympathetic to the novel interpretations, and provide a coherent explanation reconciling two of the Supreme Court's most consequential statutory interpretation cases in recent years, *FDA v. Brown & Williamson Tobacco Corp.* (2000)² and *Massachusetts v. EPA* (2007),³ which has proven to be a difficult feat.⁴

Studying the dynamics of “old law, new trick” illuminates how relative institutional capacities determine the demands on, and limits of, legal interpretation. In some idealized versions of our constitutional policymaking system (both simplified theoretical models⁵ and

1. WILLIAM LETWIN, *LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ANTITRUST ACT* vi (1965).

2. 529 U.S. 120 (2000).

3. 549 U.S. 497 (2007).

4. See Abigail R. Moncrieff, *Reincarnating the “Major Questions” Exception to Chevron Deference as a Doctrine of Noninterference (Or Why Massachusetts v. EPA Got It Wrong)*, 60 *ADMIN. L. REV.* 593, 595 (2008) (“There is . . . no coherent story about the legal and political circumstances underlying *Massachusetts* and *Brown & Williamson* that would reconcile the two holdings.”).

5. For example, many leading accounts of delegation in the political science literature see law in terms of principal-agent models, in which the legislative principal chooses limits (often treated as self-enforcing) on the choice-sets of bureaucratic agents. See generally DAVID EPSTEIN & SHARYN O'HALLORAN, *DELEGATING POWERS: A TRANSACTION COST APPROACH TO POLICY MAKING UNDER SEPARATE POWERS* (1999); JOHN D. HUBER & CHARLES R. SHIPAN, *DELIBERATE DISCRETION?* (2002). In other models, the relationship between law and policy is simplified even further, such that a legislature's choice of a law entirely determines the ensuing policy. See, e.g.,

normative accounts⁶), legal interpretation is conceived of as a limited endeavor confined to working out details of implementation and fitting life's endless complexities into existing legal categories. Momentous questions of policy substance, though, are the domain of the legislature, the body most directly accountable to the public and most able to balance competing priorities. Reality, however, is not so neat. Congress resembles many things, but an ideal of a unified lawmaker willing and able to address every policy problem in a timely manner is not among them. Where Congress is unwilling or unable to effect policy changes through new legislation, other actors seek alternative routes of securing change, one of which is to offer novel legal interpretations of existing laws. This technique offers an attractive means of adaptation, but if these reinterpretations become too extreme they threaten to drain statutory text of its meaning, leaving the interpreter effectively unconstrained.

In many ways, evaluating old law, new trick interpretations is no different from evaluating an interpretation of a brand new statute. Judges will accept a construction of a statute when presented with convincing evidence that the statutory text, intent, and purpose support it.⁷ In the cases discussed in this article, however, the evidence is insufficient to dispel ambiguity about the statute's requirements. As a general rule, aging several decades makes a statute less likely to dispositively resolve interpretive difficulties as they arise.⁸ Opponents of a new interpretation characterize it as a sharp turn that the law's fram-

John Ferejohn & Barry Weingast, *A Positive Theory of Statutory Interpretation*, 12 INT. REV. L. & ECON. 263, 267 (1992). However, these authors, unlike some others, recognize this equation of law with policy as "naïve textualism." *Id.* at 268.

6. Popular discourse about the law often assumes that the role of judges and bureaucrats is simply to "follow the law, period." This creed, which Brian Leiter characterizes as "vulgar formalism," has such a deep hold on American political discourse that our federal judicial nominees almost all espouse a deep commitment to it, at least in their confirmation hearings, despite its obvious shortcomings as a matter of description. *Legal Formalism and Legal Realism: What is the Issue?*, 16 LEGAL THEORY 111 (2010). For a limited defense of this way of thinking, see Steven D. Smith, *Believing Like a Lawyer*, 40 B.C. L. REV. 1041 (1999) (arguing that the attitude may be a necessary component of the rule of law).

7. If a novel application of a law is sufficiently straightforward, it may not even require any judicial ratification. See *infra* note 48 and accompanying text.

8. See GUIDO CALABRESI, *A COMMON LAW FOR AN AGE OF STATUTES* (1982) (discussing, throughout, the problem of "statutory obsolescence"); Peter L. Strauss, *Statutes that are not Static: The Case of the Administrative Procedures Act*, 14 J. CONTEMP. LEGAL ISSUES 767 (2005) (discussing how events intervening since the passage of a statute are likely to complicate straightforward application of statutory text).

ers would never have countenanced.⁹ Text, purpose, and intent, and even the doctrine of *Chevron*¹⁰ deference may all be indeterminate,¹¹ leaving judges to rely on other factors in making their decision.

In such hard cases, I argue that judges often use institutional factors to weigh old law, new trick interpretations. Judges are likely to reject interpretations they see as likely to displace a healthy, functioning legislative process. When they believe institutional frictions and dysfunctions necessitate circumventing the normal lawmaking process, however, they will accept old law, new trick as a second-best, pragmatic substitute for statutory changes made by a directly accountable legislature. Judicial disagreement centers on just how much friction is tolerable—as well as how decisive the legislature must be to make a conscious choice of government inaction.

I argue that practicing judges are unlikely to base their decisions on such sweeping judgments about institutional capacities,¹² and as such my argument leads me to criticize theories of statutory interpretation that make universal assumptions about institutional capacities.¹³ Instead, judges will assess the institutional capacities relevant to the case at hand. When they believe that a legislature is unlikely to address the problem at hand, they are more likely to allow less obvious readings of a statute as a way of ensuring that something is done. While the assumptions underlying such decisions can certainly be criticized,¹⁴ it strains plausibility to do so by saying that Congress is always uniformly capable. Faced with situations that strike them as

9. See, e.g., *infra* notes 165–168 and accompanying text; notes 271–274 and accompanying text.

10. *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984). See discussion *infra* Part I.C.

11. One of the central ambiguities surrounding *Chevron* is when the doctrine should even be applied—the so-called “Step Zero” question. See Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187 (2006); *infra* note 156.

12. For a similar argument, see Todd D. Rakoff, *Statutory Interpretation as a Multifarious Enterprise*, 104 NW. U. L. REV. 1559 (2010) (arguing that in fact the search for a single correct theory of interpretation is misguided).

13. For example, Adrian Vermeule’s *Judging Under Uncertainty*, justly recognized as one of the strongest statements in favor of textualism, argues that judges should strictly adhere to textual requirements but then modestly defer to executive branch constructions where there are statutory ambiguities. ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY* 4–5, 205–208 (2006). He justifies this position by arguing that judges are likely to commit as many errors of commission as of omission if they allow themselves to think more ambitiously about the constructive role that creative interpretation might play; in other words, they would begin to “correct” problems rightly left to the legislature to address, if indeed they require addressing at all. *Id.* at 77–80, 156–60.

14. For instance, see *infra* notes 330–332 and the discussion contained in the accompanying text.

messy and unlikely to receive clear legal guidance, judges are more likely to adopt the attitude of “muddling through,” allowing what strike them as pragmatic actions as long as they do not openly flout statutory text.¹⁵

Section I of this article develops an abstract framework for considering the dynamics of old law, new trick, as well as providing (largely in the footnotes) many real-world examples to substantiate its claims. Sections II and III then contrast two of the highest profile episodes in which old statutes were asked to perform new tricks in recent years: the Clinton Administration Food and Drug Administration’s (FDA) attempt to use the Food, Drug, and Cosmetic Act to regulate tobacco, which was ultimately rejected by the Supreme Court in *FDA v. Brown & Williamson Tobacco Corp.*,¹⁶ and the attempt of various environmentalists and state attorneys general to force the Environmental Protection Agency (EPA) to combat global warming through regulation of greenhouse gases, which culminated in a victory over the reluctant agency in *Massachusetts v. EPA*.¹⁷ Close examination of these cases shows us the importance of institutional context, and gives a sense of both the potential and perils of asking old laws to perform new tricks. Section IV offers concluding analysis, including additional implications for theories of statutory interpretation.

I.

“OLD LAW, NEW TRICK” – WHO, WHEN, AND WHY

Suppose policymakers have decided that some social ill is being inadequately addressed by current government policy—either because the problem is novel or because their priorities and judgments about which social problems are worth addressing differ from those of their predecessors. Policymakers can diagnose the existing shortcoming as an enforcement problem, an interpretive problem, or a legislative problem.

Enforcement Problem: Policymakers might decide existing laws and existing interpretations are entirely adequate to deal with the problem, but enforcement capacity or will is lacking.¹⁸ To address such a problem, Congress could increase the appropriations dedicated to en-

15. Charles E. Lindblom, *The Science of Muddling Through*, 19 PUB. ADMIN. REV. 79 (1959).

16. 529 U.S. 120 (2000).

17. 549 U.S. 497 (2007).

18. For a classic treatment of how discretion is used in setting enforcement priorities, especially in prosecutorial judgment, see KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* (1969).

forcement capacity at the agency, pass a narrowly targeted amendment or appropriations rider instructing the agency to place a greater priority on enforcing a specific provision of a law, or use its oversight or reauthorization powers to influence enforcement choices.¹⁹ The President or the administrator of the agency may also have the ability to reallocate resources to enforcement without a change in funding levels through various internal mechanisms.²⁰ In the longer term, a President can seek to improve enforcement in a specific area by appointing personnel to the agency who share his priorities and will zealously pursue the goal in question.²¹

Interpretive Problem: Alternatively, policymakers could decide that the substance of existing laws is adequate to address the problem in question, but the currently accepted interpretations of the laws have prevented them from being used to their full potential. The solution to such interpretive problems is straightforward: interpret some law differently so that it can legitimate the actions necessary to address the problem.²² This will be an especially appealing option when there is some broadly-worded statute that is germane to the issue at hand. Since the action of interpretation, or reinterpretation, can sound rather slippery, those pursuing this strategy are likely to brand their actions as merely applying the law as it is written.²³ Utilizers of this strategy

19. See JOEL D. ABERBACH, *KEEPING A WATCHFUL EYE: THE POLITICS OF CONGRESSIONAL OVERSIGHT* (1990) (providing an extensive survey of ex post congressional oversight of bureaucratic activities); JAMES H. COX, *REVIEWING DELEGATION: AN ANALYSIS OF THE CONGRESSIONAL REAUTHORIZATION PROCESS* (2004) (exploring how the reauthorization process for statutes requiring it provides an opportunity for congressional influence); RICHARD FENNO, *THE POWER OF THE PURSE* (1966) (providing a classic treatment of appropriations politics); MICHAEL W. KIRST, *GOVERNMENT WITHOUT PASSING LAWS* 9 (1969) (providing a broad overview of “non-statutory” devices used by Congress to direct executive branch activity, including “guidance through letters, telephone calls, field trips, ad hoc committee-agency sessions, and procedures for prior committee notification”).

20. Eric Biber, *The Importance of Resource Allocation in Administrative Law*, 60 *ADMIN. L. REV.* 1, 17 (2008) (noting that Congress makes many decisions about resource allocation through legislation, but those in the executive branch must make many more). Changes are likely to be much easier if the agency’s external constituencies share the priority, or if the change is (or can be characterized as) incremental and building on the agency’s core competencies. See JAMES Q. WILSON, *BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT* 207–09, 221–32 (1989).

21. See generally DAVID E. LEWIS, *THE POLITICS OF PRESIDENTIAL APPOINTMENTS: POLITICAL CONTROL AND BUREAUCRATIC PERFORMANCE* (2008).

22. For a discussion of who in the modern administrative state actually has this power, see Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 *U. PENN. L. REV.* 549, 551 (1985) (discussing “whether administrative agencies or courts should exercise greater authority over statutory interpretation”).

23. See *infra* Parts II.B, III.B.

are right to suggest that the line between a change in enforcement mechanisms and interpretation is a blurry one.²⁴

However the new use of a law is rhetorically branded, the question is whether it is based on a reasonable, appropriate, and permissible reading of the existing statutory text. Opponents will argue that the problem is actually a statutory one, requiring legislative attention to address (if indeed it needs addressing). From their perspective, applying an existing statute to justify the contemplated action is an end-run around the proper legislative process, attempted precisely because there are not sufficient votes in Congress to support the new policy.²⁵ If judges can be convinced that the new interpretation impermissibly strains the existing statutory text they will reject it and restore the interpretive status quo.

Legislative Problem: Finally, there may simply be no law on the books that provides a means of addressing the problem—such is the downside of observing the rule of law.²⁶ The solution is to utilize the constitutionally-prescribed legislative process, complete with bicameralism and presentment and enact new legislation.²⁷ The benefit of this approach is new legislative language that has the clear sanction of democratically elected officials, is as well-adapted to the particular

24. Cf. Ashutosh Bhagwat, *Modes of Regulatory Enforcement and the Problem of Administrative Discretion*, 50 HASTINGS L.J. 1275, 1277 (1999) (“What is affected by the choice of enforcement mechanism is not only the relative positions and authority of the agency and regulated entities, but also the actual, practical scope and substance of the regulatory regime.”).

25. For example, in contesting the application of Federal Communication Commission (FCC) rules prohibiting broadcasts of lotteries to their broadcasts of “give-away” programming, broadcasters noted that the FCC had previously sought congressional amendment of their laws without success but “now seeks to accomplish the same result through agency regulations.” The Supreme Court held that the Commission’s attempt to broaden the existing statute’s applicability through reinterpretation “overstepped the boundaries of interpretation.” *FCC v. American Broadcasting Co.*, 347 U.S. 284, 296–97 (1954).

26. Cf. LETWIN, *supra* note 1, at 101 (“It seems clear, however, that a prosecutor who sought to stretch statutes beyond their ordinary meaning in order to prohibit the widest range of conduct . . . would be weakening the presumption of innocence and overly extending the power of government. Equipped with enough resources, such an officer might turn any modern society into a police state without invoking any authority beyond the already existing statutes.”).

27. That is, Congress should play the role of “problem solver.” See David R. Mayhew, *Congress as Problem Solver*, in *PROMOTING THE GENERAL WELFARE: NEW PERSPECTIVES ON GOVERNMENT PERFORMANCE* 219, 221 (Alan S. Gerber & Eric M. Patashnik eds., 2006) (defining Congress’s problem-solving mode as “involv[ing] a widespread, shared perception that some state of affairs poses a problem and that policymaking should entail a search for a largely agreed on solution” and cautioning that, for most matters of policy, there will be disagreement about whether a problem truly exists).

circumstances that elicited the legislation as possible, and draws on the newest and best knowledge about how to address the problem sensibly. At the same time, the hurdles to passing new legislation amidst a crowded agenda are high, especially in the current age of polarization and procedural brinksmanship.²⁸

The manner in which the problem is cast will have a direct bearing on which institutional actors are empowered to address it—and which actors may be rendered impotent without the cooperation of others.²⁹ If we think of law as creating crystal-clear requirements, the three categories might be thought of as mutually exclusive: enforcement problems represent executive branch enforcers “failing to do their job”; interpretive problems (which should be rare) represent interpreters, either executive or judicial, “getting the law wrong”; and legislative problems mean changes in the law are entirely necessary. But if we think of law as frequently indeterminate, and full enforcement as an idealized aspiration rather than a reality ever realized, then the three perspectives may be potential substitutes.

Casting any problem as a legislative problem may seem like the most straightforward approach, since pulling the congressional lever to change the law directly targets the problem. However, this option may not be as efficacious as it first seems since change in the law will not always be necessary or sufficient to secure the desired change in government action. Unless the change made to the law creates extremely clear requirements, the amendment may not accomplish its goals, particularly where executive branch interpreters are committed to substantive ends in tension with the language of existing laws. Executive branch interpreters’ attempts to turn the law to their own purposes through “creative” interpretations may gain traction with courts.³⁰ On the other hand, if the problem really is an enforcement problem,³¹ changing legislative language will not be ameliorative and

28. For excellent discussions of contemporary congressional dysfunction, see THOMAS E. MANN & NORMAN J. ORNSTEIN, *THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA AND HOW TO GET IT BACK ON TRACK* (2006) and *IT’S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM* (2012).

29. See Cass Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 474–76 (1989) (describing various “interpretive principles respond[ing] directly to institutional concerns and . . . designed to improve the performance of governmental entities,” several of which involve the appropriate attitude for judges to take when considering statutory language and executive branch interpretations).

30. See *infra* notes 37–39.

31. There are certainly cases in which existing laws unambiguously offer options that have simply never been utilized (or have been underutilized) to that point in time. In that case, officials need merely to announce that they will be enforcing the law on

Congress may need to support enforcement through increased appropriations in order to achieve a solution.³²

More to the point, in reality there is no generic omnipotent “policymaker” deciding which institutional mechanisms to use to address a problem. Rather, there are only government officials variously situated. “Congress is a ‘they,’ not an ‘it,’” and a factious and overburdened “they” at that.³³ From the perspective of someone hoping to address a problem, asking Congress to amend their controlling statutes may be a first-best option, but sitting legislators may well be unwilling or unable to act. Especially if there is divided government, a majority of legislators (or legislators in just one house of Congress) may be firmly opposed to the policy change in question, in which case passing a suitable amendment or new law will be impossible. Just as likely, though, is that some potential coalition of lawmakers exists to support legislative change, but that for any number of reasons it fails to coalesce.³⁴

the books more energetically than their predecessors. As an example, consider New York City Mayor Rudolph Giuliani announcing that various petty crimes previously overlooked—subway turnstile jumping, aggressive panhandling, prostitution—would be zealously enforced to the full extent of the law, which proved to be an effective way to target many criminals with outstanding warrants. See George James, *Police Project on Street Vice Goes Citywide*, N.Y. TIMES (July 6, 1994), available at <http://www.nytimes.com/1994/07/06/nyregion/police-project-on-street-vice-goes-citywide.html>. See generally GEORGE L. KELLING & CATHERINE M. COLES, *FIXING BROKEN WINDOWS: RESTORING ORDER AND REDUCING CRIME IN OUR COMMUNITIES* (1996); Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551 (1997).

32. To carry out their statutory responsibilities, agencies may sometimes need additional resources rather than changes in their legal powers. But because of the political incentives facing Congress, it is likely to pile up responsibilities and then fail to adequately provide for carrying them out. See Richard Pierce, Jr., *Judicial Review of Agency Actions in a Period of Diminishing Agency Resources*, 49 ADMIN. L. REV. 61, 69 (1997) (“The path of least resistance for any politician is to enact or retain the politically valuable rhetoric embodied in absolutist regulatory statutes; to decline to appropriate the funds necessary to implement the statutes; and then to chastise the agencies for failing to perform their statutorily assigned tasks.”).

33. Kenneth Shepsle, *Congress is a “They,” Not an “It”*: *Legislative Intent as Oxymoron*, 12 INT. REV. L. & ECON. 239 (1992).

34. This may be because the issue is of relatively low salience and is never a high enough priority to move through the right committees and then secure floor time; because there is agreement in principle but an inability to compromise on the details of the legal change in a way that secures passage; because a lack of technical knowledge or institutional wherewithal handicaps Congress’s ability to draft (or perhaps digest) a suitable bill; or because of any combination of these factors. There are many ways for bills to die in Congress, and so interpreting prolonged inaction on a policy question as a revealed preference of a majority of the members is often problematic. See Frank H. Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533, 538 (1983) (“There are a hundred ways in which a bill can die even though there is no opposition to it.”).

If Congress offers no immediate legislative solution, framing the problem as an interpretive one gives other actors an opportunity to change policy without statutory change by effecting new interpretations of extant statutes.³⁵ Executive branch agency officials, who are the primary interpreters of most laws,³⁶ are in a position to effect policy change through new interpretations and have done so on numerous occasions. For example, the Justice Department applied the Sherman Antitrust Act extensively against labor disputes contrary to Congressional intent for labor to be exempt from the law;³⁷ the Treasury Department used the Exchange Stabilization Act to guarantee domestic financial instruments although the statute was enacted to stabilize foreign exchange rates for U.S. currency;³⁸ and the Food and Drug Ad-

35. In other words, rather than being a policy entrepreneur through effecting statutory change, various people may try to become legal entrepreneurs promoting new interpretations. For an explanation of political entrepreneurship, see generally DANIEL CARPENTER, *THE FORGING OF BUREAUCRATIC AUTONOMY: REPUTATIONS, NETWORKS, AND POLICY INNOVATION IN EXECUTIVE AGENCIES, 1862–1918* (2001); Adam D. Sheingate, *Political Entrepreneurship, Institutional Change, and American Political Development*, 17 *STUDS. IN AM. POL. DEV.* 185 (2003).

36. See generally Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 *ADMIN. L. REV.* 501, 513 (2005) (describing agencies as “implementers of non-self-executing legislation, laws that are not capable of application as rules of conduct until the agency gives them meaning by adopting binding interpretations.”); Peter L. Strauss, *When the Judge is Not the Primary Official with Responsibility to Read: Agency Interpretation and the Problem of Legislative History*, 66 *CHI.-KENT L. REV.* 321 (1990) (explaining that in the modern administrative state a growing portion of legal interpretation is done by agencies charged with making policy on a continuing basis).

37. The Sherman Antitrust Act was applied extensively to labor disputes, despite evidence suggesting that the Congress which enacted it intended labor to be exempt. See, e.g., Louis B. Boudin, *The Sherman Act and Labor Disputes: I*, 39 *COLUM. L. REV.* 1283, 1283–93 (1939) (noting the Justice Department’s aggressive interpretation of the Act for use against various labor practices under the leadership of Thurman Arnold). See generally EDWARD D. BERMAN, *LABOR AND THE SHERMAN ACT* (1930) (providing a comprehensive inquiry into the legislative intent and subsequent interpretation of the Act).

38. The Exchange Stabilization Fund, designed to help stabilize U.S. foreign exchange rates, was creatively used by the Treasury Department to offer loan guarantees to Mexico in 1995 and to guarantee money market funds in 2008. See C. RANDALL HENNING, *THE EXCHANGE STABILIZATION FUND: SLUSH MONEY OR WAR CHEST?* 61–66 (1999) (explaining the Clinton Administration’s legal rationale for using the ESF to aid Mexico); Steven M. Davidoff & David Zaring, *Regulation by Deal: The Government’s Response to the Financial Crisis*, 61 *ADMIN. L. REV.* 463, 506–07 (2009) (explaining Treasury Secretary Henry Paulson’s legal rationale for applying the ESF to money market funds, despite the fairly clear statutory purpose to deal in non-dollar-denominated assets); cf. HENRY PAULSON, JR., *ON THE BRINK: INSIDE THE RACE TO STOP THE COLLAPSE OF THE GLOBAL FINANCIAL SYSTEM* 3935–46 (Kindle ed. 2010); *Treasury Announces Guaranty Program for Money Market Funds*, PRESS CENTER (U.S. Dep’t of the Treasury, Washington D.C.), Sept. 19, 2008, available at <http://www.treasury.gov/press-center/press-releases/Pages/hp1147.aspx>.

ministration provided the impetus for tobacco to be regulated under the Food, Drug and Cosmetic Act.³⁹ In doing so, executive agency interpreters treat public policy issues as if there is no legislative problem at all when one considers the text, legislative history, and underlying purpose of the relevant statute in the right light.

Novel interpretations may come from less centralized actors as well. Federal prosecutors may take the initiative in advancing a new interpretation as a way to increase the charges available to them in targeting wrongdoers. Such was the case in applying several criminal statutes to novel contexts, including the Refuse Act of 1899,⁴⁰ the federal mail fraud statute,⁴¹ Racketeer Influenced and Corrupt Organizations Act (RICO)⁴² and various money laundering statutes.⁴³

39. Agency officials provided the motivating force for the new interpretation in the case of the FDCA and tobacco, discussed *infra* Part II.

40. Ch. 425, 30 Stat. 1152 (1899) (codified as amended at 33 U.S.C. § 407 (Supp. 2011)). Various prosecutors concerned with water pollution problems in the 1960s advanced an innovative reading of the Refuse Act, which had originally been passed for the purpose of keeping America's waterways unobstructed for the purposes of navigability. Eventually, the Justice and Interior Departments under President Nixon also advanced this reading, which was ultimately superseded by the Clean Water Act of 1972, but had an important impact on that law's architecture by changing the policy status quo that preceded it. See PAUL C. MILAZZO, UNLIKELY ENVIRONMENTALISTS: CONGRESS AND CLEAN WATER, 1945-1972, 164-70 (2006); William H. Rodgers, Jr., *Industrial Water Pollution and the Refuse Act: A Second Chance for Water Quality*, 119 U. PA. L. REV. 761 (1971) (applauding the novel trend in interpreting the Act and describing how the Justice Department, Army Corps of Engineers, and President Nixon became involved in its interpretation); cf. Robert L. Potter, Comment, *Discharging New Wine into Old Wineskins: The Metamorphosis of the Rivers and Harbors Act of 1899*, 33 U. PITT. L. REV. 483 (1971) (criticizing the trend as inappropriately distorting the statute).

41. 18 U.S.C. § 1341 (Supp. 2011). See Jed S. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 DUQUESNE L. REV. 771, 771-72 (1980) (describing how prosecutors gradually turned the mail fraud statute into a general purpose anti-fraud statute); see also Peter J. Henning, *Maybe It Should Just Be Called Federal Fraud: The Changing Nature of the Mail Fraud Statute*, 36 B.C. L. REV. 435 (1995) (further describing the mail fraud statute's various adaptations and suggesting limits to the scope of its jurisdiction).

42. 18 U.S.C. §§ 1961-1968 (Supp. 2011). See Gerard E. Lynch, *RICO: The Crime of Being a Criminal, Parts I & II*, 87 COLUM. L. REV. 661 (1987); Barry Tarlow, *RICO: The New Darling of the Prosecutor's Nursery*, 49 FORDHAM L. REV. 165 (1980) (explaining how prosecutors sought to gain procedural benefits by including RICO charges against all manner of linked defendants). But see G. Robert Blakely & Thomas A. Perry, *An Analysis of the Myths That Bolster Efforts to Rewrite RICO and the Various Proposals for Reform: 'Mother of God—Is This the End of RICO?'* 43 VAND. L. REV. 851 (1990) (defending broad interpretations of RICO as consistent with original legislative intent).

43. Money Laundering Control Act of 1986, 18 U.S.C. §§ 1956-1957 (Supp. 2011); Bank Secrecy Act of 1970, 31 U.S.C. §§ 5311-5324 (Supp. 2011); Annunzio-Wylie Anti-Money Laundering Act of 1992, Pub. L. 102-550, §§ 1500-1565, 106 Stat. 3627, 4044-74 (codified as amended in scattered sections of 12 U.S.C., 18

Predictably, such prosecutorial efforts are applauded by the enforcement community and decried by the defense bar as causing overcriminalization where Congress never intended it.⁴⁴ Private litigants are the other group capable of providing novel interpretations of old statutes, as they did in resuscitating the Reconstruction-era Ku Klux Klan Act for a variety of purposes,⁴⁵ expanding the civil application of

U.S.C., and 22 U.S.C.); Money Laundering Prosecution Improvements Act of 1988, Pub. L. No. 100-690, §§ 6181–6187, 102 Stat. 4181, 4354–59 (codified as amended in scattered sections of 12 U.S.C., 18 U.S.C., and 31 U.S.C.). See Robert B. Morvillo & Barry A. Bohrer, *Checking the Balance: Prosecutorial Power in an Age of Expansion Legislation*, 32 AM. CRIM. L. REV. 137 (1995) (arguing that the 1986 Act's broad definitions of 'transactions' and of the underlying crimes are so ambiguous as to allow application of the statute to all manner of criminal offenses, such that prosecutors increasingly add money laundering charges to gain leverage over defendants in all sorts of contexts); G. Richard Strafer, *Money Laundering: The Crime of the '90s*, 27 AM. CRIM. L. REV. 149 (1990) (explaining the emergence of the 1986 Act and its open-ended nature); Teresa E. Adams, Note, *Tacking on Money Laundering Charges to White Collar Crimes: What Did Congress Intend, and What Are the Courts Doing?*, 17 GA. ST. U. L. REV. 538 (2000) (arguing that the legislative history of these money laundering statutes suggests that Congress never meant for the laws to apply outside the context of organized crime and drug trafficking).

44. See *supra* notes 41–43. Of course, there are some significant differences between the context of regulatory and criminal enforcement. In exercising discretion, prosecutors face almost no oversight; individual prosecutors may reach novel interpretations entirely on their own, rather than having to achieve interpretive consistency in their offices, and prosecutors may keep their interpretive stance toward any statutory provision flexible and informal rather than codifying it. Prosecutors do, however, act as important lobbyists for changes in the law; see William Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 545 (2001). Novel interpretations and effective advocacy for legal change may sometimes act as substitutes; see *infra* note 49, discussing the strained use of money laundering statutes until Congress passed more suitable legislation.

45. Arguably, these represent cases of teaching an old statute the old tricks it was always meant to perform, but was barred by courts from doing. See Eugene Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323 (1952). In any case, it is certain that old statutes were dusted off and put to quite extensive uses for purposes their drafters never anticipated. See David Achtenberg, *A 'Milder Measure of Villainy': The Unknown History of 42 U.S.C. § 1983 and the Meaning of 'Under Color of' Law*, 1999 UTAH L. REV. 1 (1999) (arguing that § 1983 suits against state and local government officials who abused their positions was entirely consistent with legislative intent); Jack M. Beermann, *The Unhappy History of Civil Rights Legislation, Fifty Years Later*, 34 CONN. L. REV. 981 (2002) (chronicling the latter-day revival of § 1983 as the rights protected expanded, as well as the limited revival of §§ 1981, 1982, and 1985(3)); see also *Maine v. Thiboutot*, 448 U.S. 1 (1980) (allowing § 1983 suits to proceed to enforce Medicaid entitlements); *Brian J. Dunne, Enforcement of the Medicaid Act under 42 U.S.C. § 1983 after Gonzaga University v. Doe: The 'Dispassionate Lens' Examined*, 74 U. CHI. L. REV. 991 (2007) (reflecting on the past and future of § 1983 suits); Bradford C. Mank, *Suing Under § 1983: The Future After Gonzaga University v. Doe*, 39 HOUS. L. REV. 1417 (2003) (same).

RICO,⁴⁶ and pushing to use the Clean Air Act to combat global warming.⁴⁷ In each case, the actors pushing the new trick hope to advance their favored policy through having the status quo interpretation treated as the problem, rather than framing the problem as a statutory one susceptible only to a change in the law that may be harder for them to effect.

Not all such instances of statutory reinterpretation are controversial. Innumerable statutes have been so adapted without ever bothering anyone. Just as, in the constitutional context, few originalists manage to get excited about the seeming unconstitutionality of the Air Force,⁴⁸ many (and perhaps most) adaptations of static statutory text to a dynamic world are unlikely to ruffle many feathers.⁴⁹ However, when the reinterpretation in question creates distinct losers—often interests who will face more stringent regulation—it is likely to be chal-

46. See Philip A. Lacovara & Gregory F. Aronow, *The Legal Shakedown of Legitimate Business People: The Runaway Provisions of Private Civil RICO*, 21 NEW ENG. L. REV. 1 (1985) (explaining the expanded scope of civil RICO actions and criticizing this interpretation as contrary to the Act's true purposes). *But see* Blakely & Perry, *supra* note 42 (who argue for the propriety and manageability of these suits).

47. Private environmental litigants, joined by state attorneys general, were the ones demanding that the Clean Air Act be interpreted to include greenhouse gases. *See* discussion *infra* Part III.

48. For a discussion of this question, including citations to scholars arguing that an independent air force *ought* to trouble strict originalists in spite of the apparent absence of originalists who are so troubled, see, e.g., Samuel Issacharoff, *The Elusive Search for Constitutional Integrity*, 57 STAN. L. REV. 727, 727 (2004); Erwin Chemerinsky, *The Vanishing Constitution*, 103 HARV. L. REV. 92, 103 (1989). The Court has taken little notice of the issue; for an exception (albeit dicta in a dissent), see *Laird v. Tatum*, 408 U.S. 1, 17 (Douglas, J., dissenting) (“The Army, Navy, and Air Force are comprehended in the constitutional term ‘armies.’”).

49. A challenge to the new interpretation might fail to materialize either because nobody was bothered by it, or because nobody had standing to challenge the action. The case of the Exchange Stabilization Fund provides an instructive example of a situation in which nobody seems to have had standing to bring suit challenging the government's novel interpretation. As a result, no case law exists about permissible interpretations of the underlying statute. *See generally* Henning, *supra* note 38, at 52–55; Anna J. Schwartz, *From Obscurity to Notoriety: A Biography of the Exchange Stabilization Fund* (Nat'l Bureau of Econ. Research, Working Paper No. 5699, 1996), available at <http://www.nber.org/papers/w5699>. More generally, a sense of emergency is likely to lead courts to be more accepting of legally strained interpretations, as the alternative of waiting for the normal lawmaking process to play out seems less viable. One example, subsequently enacted into law, is the use of money laundering statutes, designed to retrospectively punish financial transactions used to support crime, for the purpose of prospectively freezing potential terrorist assets in the wake of the attacks of September 11, 2001. *See* Eric J. Gouvin, *Bringing Out the Big Guns: The USA Patriot Act, Money Laundering, and the War on Terrorism*, 55 BAYLOR L. REV. 955 (2003) (recounting the interpretive changes advanced through an executive order by President Bush and expressing skepticism about the efficacy of using the statutes for this new purpose).

lenged as an impermissible stretching of the statute. Consequently, the question becomes: what will lead judges to accept or reject the new interpretation?

Answering this question is not entirely different from trying to understand why judges make any ruling in cases of statutory interpretation. Judges will have to weigh the merits of arguments about what the text of the statute requires; what intent led Congress to enact the law, and what purpose it was meant to serve; and, if there is ambiguity, whether executive branch interpreters should receive deference. When evaluating new interpretations of old statutes, each of these familiar dimensions is likely to present itself in distinctive ways, and I consider each in turn.

A less familiar criterion which I will argue plays a central role in judges' decision-making in these types of cases is a contextual empirical assessment of institutional competencies. Judges may share executive branch interpreters' sense that the problem in question does indeed deserve new attention, but they may feel more inclined to hold out for the first-best option of fresh congressional action rather than supporting what may be an awkward reinterpretation of an existing statute.⁵⁰ This inclination, though, will not be unlimited; where the contemporary Congress seems incapable of acting without some external stimulus, judges are likely to be more sympathetic to executive branch interpreters' reinterpretation as a way to move policy forward.

A. *Statutory Text*

In deciding whether a new interpretation of an extant statute is permissible, judges look at numerous factors including the statutory language, congressional intent at the time of the enactment, legislative history, and the statute's purpose, as well as the institutional competency factors I will discuss shortly. However, the primary factor in a judge's analysis will almost certainly be the plain language of the law—regardless of whether the judge thinks of herself as a committed textualist.⁵¹ The first question a judge must ask when confronted with a novel interpretation of an old statute is: can the text of the statute in question be reasonably read to support the action in question? Put con-

50. *E.g.*, *Carden v. Arkoma Assocs.*, 494 U.S. 185, 197 (1990) (“[A]ccommodation [of changing realities] is not only performed more legitimately by Congress than by courts, but it is performed more intelligently by legislation than by interpretation [of a single contested statutory term].”).

51. Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL’Y 61, 61 (1994) (“All judges follow a simple rule: when the statute is clear, apply it.”).

versely: is it clear that the statute does not, on its face, rule out the action in question?⁵²

If they find that the text of the statute is clearly at odds with the interpretation proposed, then judges will reject the interpretation as impermissible, except in unusual circumstances such as when an absurd result would come from closely following the text.⁵³ The very concept of having laws capable of exerting meaningful constraints requires this, and the principle has also been famously codified in the seminal administrative law case *Chevron v. NRDC*,⁵⁴ Step One of which says that if the language of the statute unambiguously answers the relevant legal question, then the judge's responsibility is always to adhere to that meaning.⁵⁵

In old law, new trick situations, the statute offered as support for the contemplated action will most likely be supportive of the action—indeed, the relevant statutory text's ability to support the novel interpretation and action is the whole reason it has been chosen. On the other hand, if the old statute was designed for purposes other than the one to which the new interpreters are seeking to put it, the statutory text is unlikely to resolve the question at hand decisively in favor of the novel usage, and judges will consider factors beyond language.⁵⁶ Judges may simply weigh textual factors less heavily than considerations of statutory purpose or deference, each of which is discussed in turn, below. They may also hesitate to follow apparently clear statutory text, however, because they believe that the interpretation is only “seemingly” straightforward, and in fact represents a deliberate distortion of the statutory language when taken in its proper context.⁵⁷

52. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) (“First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”).

53. See generally John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387 (2003).

54. 467 U.S. 837 (1984).

55. *Id.* at 842–43.

56. Cf. *United States v. Haggard Apparel Co.*, 526 U.S. 380, 392 (1999) (providing that “[a] statute may be ambiguous, for purposes of *Chevron* analysis, without being inartful or deficient” when applied to circumstances not clearly addressed by Congress).

57. For example, in the famous case of *Church of the Holy Trinity v. United States*, 143 U.S. 457, 458–59 (1892), the Court held that although the plain language of an act of 1885 made it unlawful for any person or corporation to facilitate a foreigner's immigration “to perform labor or service of any kind,” it believed that a church's immigration assistance to an English rector was nevertheless not intended to be covered: “It is a familiar rule, that a thing may be within the letter of the statute and yet

Judges reasoning in this mode may decry excessive clause-bound literalism as the enemy of sound textualism. If a judge feels that a particular word may only be stretched to include a novel application by ignoring the way in which that word is used within the context of the statute as a whole and in relation to connected sections, then she may try to reject a purportedly textualist interpretation as impermissible.⁵⁸

B. *Statutory Intent and Purpose*

If the statutory text is open-ended or ambiguous such that it can plausibly be applied to the new circumstances, the judge's next inquiry is likely to be whether the interpretation is also consistent with the underlying intent of the Congress that enacted the law and consonant with the purposes embodied in the act.⁵⁹ In controversial cases of novel statutory interpretation, the new interpretation can rarely be justified straightforwardly on the grounds that the enacting Congress specifically intended the act to be used in this new manner, otherwise there would be little cause for controversy. Consequently, actors push-

not within the statute, because not within its spirit, nor within the intention of its makers." For a critique of this reasoning, see VERMEULE, *supra* note 13, at 86–100.

58. See *Public Citizen v. Department of Justice*, 491 U.S. 440, 454 (1989) ("Where the literal reading of a statutory term would 'compel an odd result,' we must search for other evidence of congressional intent to lend the term its proper scope." (citation omitted)).

59. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 208 (1985) ("The purpose of Congress is the ultimate touchstone."); *Chevron*, 467 U.S. at 842–43. Legislative intent, and especially its representation in official legislative histories prepared by Congress, became a famously contentious subject in the 1980s and has remained a source of dispute. Textualist scholars and judges, prominently including future Supreme Court Justice Antonin Scalia and Judge Frank Easterbrook, drew on public choice scholarship questioning majority voting procedures' ability to elicit a unique consensus to call into doubt the existence of any meaningful "intent" on the part of the legislature. For accounts of these debates, see Robert A. Katzmann, *Madison Lecture: Statutes*, 87 N.Y.U. L. REV. 637, 661–681 (2012); Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423 (1988); William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice for Statutory Interpretation*, 74 VA. L. REV. 200 (1988); and the other articles in the *Symposium on the Theory of Public Choice: Public Choice Speculations on the Item Veto*, 74 VA. L. REV. 403 (1988). See also McNollgast, *Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation*, 57 LAW & CONTEMP. PROB. 3 (1994).

It should be noted that most judges and scholars who strongly oppose the use of legislative history do not despair in trying to understand the purposes of the enacting Congress. Rather, they merely believe that materials such as committee reports are unreliable guides to understanding these purposes, which they argue can be ascertained more reliably by turning to the text of the statute itself. See John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 9 (2001) ("Textualists . . . believe that judges cannot accurately distill legislative intent from a complex legislative process; hence, by disregarding the clear terms of an enacted text, strong Purposivism disregards the most reliable indicium of statutory meaning.").

ing for the new interpretation are more likely to argue that the enacting Congress deliberately framed the law in an open-ended manner so that its broad purpose could be realized in as-yet-unforeseen circumstances.⁶⁰

Unless one takes the position that Congress is incapable of delegating the power to apply existing laws to novel circumstances, which only a few commentators are willing to do,⁶¹ then legislators must have the option to empower executive branch actors to recognize and address cognate situations as they develop. Legislators utilize ambiguous and open-ended language as a tool in the creation of strong, forward-looking regulatory regimes. As a result, it may be possible to realize Congress's purposes in enacting an open-ended regulatory law only by applying the law to new situations. The proponents of the new interpretation will certainly argue as much: that the new interpretation is faithful to the statute's original visionary framers.⁶²

While this argument has its merits, it also has pitfalls. Congress's purpose in enacting any particular statute cannot have been to empower any part of the government to address *every* problem, nor even to confer an unlimited creativity to meet every problem within a particular policy area. Almost no statutes take the form, "The agency may regulate problem X as it sees fit"⁶³; such a statutory abdication of responsibility to the executive branch would probably be found unconstitutional under the non-delegation doctrine, even given the decrepitude into which that strand of law has fallen.⁶⁴ As a result, judges

60. See *United States v. Article of Drug . . . Bacto-Unidisk*, 394 U.S. 784, 798 (1969) ("[T]he well-accepted principle that remedial legislation such as the Food, Drug, and Cosmetic Act is to be given a liberal construction consistent with the Act's overriding purpose to protect the public health . . ."); *Reves v. Ernst & Young*, 494 U.S. 56, 60–61 (1990) (characterizing the Securities Acts as "painted with a broad brush" so as to accommodate itself to "the virtually limitless scope of human ingenuity").

61. For one example, see generally DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY* (1993).

62. For example, in arguing for the propriety of using the Refuse Act of 1899 to combat water pollution in 1970, Representative Henry Reuss (D-WI), Chairman of Subcommittee on Conservation and Natural Resources of the House Committee on Government Operations, declared that "The wise men in these seats in 1899 did it all . . ." Potter, *supra* note 40, at 522 n.159.

63. Perhaps a possible exception is the Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, 122 Stat. 3765, better known as TARP. Section 101(a)(3)(C) of the Act states: "The [Treasury] Secretary is authorized to take such actions as the Secretary deems necessary to carry out the authorities in this Act . . ." It then listed some suggestions but unusually left the door open for the Secretary to pursue almost any other action he believed was "necessary."

64. For a review of the current state of the beleaguered non-delegation doctrine that argues the Court is still concerned with non-delegation issues today, see Michael C.

reasoning in a purposivist mode will likely focus on whether the open-endedness of the statutory terms in question justifies the novel application of the law.

They may decide that it does not for several reasons. The first is that the judge may believe that the enacting Congress would not have countenanced the proposed usage of the law—that the legislators at the time of enactment contemplated exactly such an application and decided against it, even if such an application is clearly within the realm of reasonable possibilities.⁶⁵ A judge can claim to understand the real content of the legislative compromise reached in the statutory enactment either through legislative history, other parts of the relevant statute, or contemporaneous enactments.⁶⁶

Supposing the enacting legislature did not specifically rule out the novel application of the law, a judge may still reject the new interpretation because it stretches the original purpose past its breaking point. In other words, the results of the new interpretation would be unacceptable in light of the purposes the statute was actually crafted to meet.⁶⁷ Additionally, even if the particular application being pursued might plausibly seem to fit within the original enactment's purposes, accepting the new interpretation could have the consequence of forcing acceptance of future actions predicated on identical logic that would clearly be at odds with the statute's purposes. Those opposed to the new interpretation will invariably invoke a slippery slope argument, warning that allowing the broad interpretation is but the first

Pollack, *Chevron's Regrets: The Persistent Vitality of the Nondelegation Doctrine*, 86 N.Y.U. L. REV. 316, 323–27 (2011).

65. See, e.g., *Bob Jones University v. United States*, 461 U.S. 574, 600 (1982) (stating that although “[o]rdinarily, and quite appropriately, courts are slow to attribute significance to the failure of Congress to act on particular legislation,” when Congress has considered the “precise issue” being contested and decided not to include it in legislation such nonaction may be “significant”).

66. Anticipating the arguments *infra*, Part I.D., relating to judges' sensitivity to institutional realities, Judge Katzmman, *supra* note 59, at 655, argues that judges should use all of the reliable information at their disposal, including an understanding of the realities of congressional process.

67. For example, in *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993), the Supreme Court refused an attempt to extend section 1985(3) of the Ku Klux Klan Act to the protection of the suggested class of “women seeking abortions.” Justice Scalia, writing for the majority, stated that if the court accepted such a claim the following would occur:

[I]nnumerable tort plaintiffs would be able to assert causes of action under § 1985(3) by simply defining the aggrieved class as those seeking to engage in the activity the defendant has interfered with. This definitional ploy would convert the statute into the “general federal tort law” it was the very purpose of the animus requirement to avoid.

Id. at 269.

step toward allowing the law to be applied to nearly any situation.⁶⁸ Such arguments create an awkward situation for the new interpreters, especially if they are hoping to gain significant new powers through their application of the old law. They must argue that they will not seek to use the law as a pretext for an unlimited power grab while simultaneously claiming that the assertion of power they are currently making is a reasonable one under the act. This dynamic plays out in numerous old law, new trick scenarios.⁶⁹

C. Ambiguity and Deference

If neither the statutory text nor an analysis of statutory purposes clearly resolves the ambiguity, judges may be inclined to defer to the expert judgment of executive branch interpreters, whose day-to-day experience in administering the statute arguably puts them in the best position to apply the law to real-world problems.⁷⁰ Judicial deference to bureaucrats is a long-standing trend in American administrative law, but, again, the rule is now most associated with *Chevron v. NRDC*.⁷¹ In the *Chevron* analysis, where a statute does not clearly resolve a particular interpretive question, Step Two of the analysis requires the executive branch's interpretation be given deference as long as it is based on a "permissible construction of the statute."⁷² In practice, Step Two review of a statutory interpretation is often similar to arbitrary and capricious analysis under the Administrative Procedures Act.⁷³

In old law, new trick contexts, however, the question facing courts is somewhat more complicated than normal matters of statutory interpretation. Rather than deciding on the particulars of applying the

68. See, e.g., *infra* note 274.

69. For example, the argument over the proper application of RICO follows these lines precisely. Opponents of the broad reading argue that prosecutors inappropriately add RICO charges, creating the potential for larger criminal penalties, whenever more than one person was involved in alleged criminal activity, while defenders of the broad reading say that deterring white collar crime was among the real purposes of enacting the law. See *supra* notes 42, 46; see generally Michael Goldsmith, *Resurrecting RICO: Removing Immunity for White-Collar Crime*, 41 HARV. J. ON LEGIS. 281 (2004) (arguing that RICO provides an attractive and appropriate tool for combating an even larger swathe of white collar offenses).

70. See VERMEULE, *supra* note 13, at 205–09; see generally Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81 (1985).

71. 467 U.S. 837 (1984).

72. *Id.* at 843.

73. See Ronald M. Levin, *The Anatomy of Chevron: Step Two Reconsidered*, 72 CHI-KENT L. REV. 1253, 1254–55 (1997) (arguing that the Step Two and "arbitrary and capricious" tests "should be deemed not just overlapping, but identical").

law to a specific situation, the new interpreter is proposing to apply the law to a novel class of cases, thereby expanding agency jurisdiction and substantive power. This makes the normal rationale for *Chevron* Step Two deference problematic for three reasons. First, whereas normally an agency can claim long experience of administering a statute as a source of relevant expertise, here the agency is attempting to break new ground. Although agency administrators can argue that their experience with the statute to that point has helped them form a sound estimation of the consequences of applying the law in a new context, this claim is necessarily more speculative than when an agency is speaking from more direct experience. Second, for an agency to decide its own jurisdiction has the feel of being the judge in one's own case, a situation inimical to the rule of law.⁷⁴ Opponents of the new interpretation are sure to make this point, alleging that deference in the case of a power grab is wholly inappropriate.⁷⁵ Third, the idea behind deference to executive branch interpreters is not simply to empower bureaucrats instead of judges. Rather, *Chevron* deference is meant to facilitate Congress's ability to delegate primary interpretive responsibility to agencies in specific contexts.⁷⁶ Since no act of delegation can permissibly be interpreted as wholly open-ended, it is problematic to allow an agency seeking to expand delegation to determine just how broad the delegation is.

Textualist, purposivist, and deferential approaches to problems of interpretation are not mutually exclusive alternatives. Judges normally take all of these factors into account as they attempt to determine whether an interpretation is permissible.⁷⁷ The relative weight that a judge gives to each consideration may systematically differ from one judge to the next—this may be part of what is sometimes seen as judicial ideology. Of equal importance is that judges are likely to give different weight to each of these factors in different contexts, includ-

74. See Paul R. Verkuil, *Separation of Powers, The Rule of Law and the Idea of Independence*, 30 WM. & MARY L. REV. 301, 305–07 (1989) (explaining the deep roots in Anglo-American jurisprudence of the principle that no man can be a judge in his own cause).

75. See Timothy K. Armstrong, *Chevron Deference & Agency Self-Interest*, 13 CORNELL J. L. & PUB. POL'Y 203, 234–46 (2004) (discussing the history of subjecting agency interpretations that expand the agency's jurisdiction to extra scrutiny).

76. See Note, "How Clear is 'Clear'?" in *Chevron's Step One*, 118 HARV. L. REV. 1687, 1689 n.7 (2005).

77. Todd D. Rakoff, *Statutory Interpretation as a Multifarious Enterprise*, 104 NW. U. L. REV. 1559, 1560 (2010) (arguing that judges and others who interpret the law "pursu[e] their craft by choosing the right tools for the varying tasks at hand," rather than staying faithful to universal "theories" of statutory interpretation).

ing institutional contexts, which will be of special importance in old law, new trick scenarios.

D. Institutional Considerations

Whenever courts resolve interpretive dilemmas about statutory law they are compelled to decide, at least implicitly, which institution will be the primary policymaker in the relevant area. Put in the terms offered above, in passing judgment on the permissibility of a novel statutory interpretation, judges will be determining whether the policy-makers asserting the new interpretation were right to view their problem as interpretive, or whether in fact the obstacle to the new interpretation is actually a legislative one which can be remedied only by Congress. In neither case will the court be saying that the contemplated policy is off limits for all time,⁷⁸ but it will be determining the limits of policy under the legal status quo.

Sometimes, this institutional consequence of judicial decisions may only be a by-product of judicial interpretations made wholly on the basis of other factors, like the ones discussed above. I argue, however, that especially in the context of old law, new trick interpretations, judges are likely to be keenly attuned to the institutional implications of their decisions, such that the policy-specific competencies of Congress and executive branch agencies will become important determinants of judicial opinions.⁷⁹ Judges are fully aware that institutional competencies will largely determine the practical effects of their decision.⁸⁰ Classifying a problem as legislative and making Congress responsible for driving policy change is likely to lead directly to new legislation in some contexts, while it may be met with legislative indifference or inefficacy in others. A judicial declaration that “this

78. This differs from the constitutional context, in which the Supreme Court’s substantive judgments about an issue are more like the “last word” on a particular interpretive question—though for a problematization of judicial supremacy in the constitutional context, see KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY* (2007).

79. *But see* David J. Barron & Elena Kagan, *Chevron’s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 212–13, 223 (2001) (arguing that “[b]ecause Congress so rarely makes its intentions about deference clear, *Chevron* doctrine at most can rely on a fictionalized statement of legislative desire, which in the end must rest on the Court’s view of how best to allocate interpretive authority,” and asserting that application of *Chevron* has always been responsive to institutional competencies).

80. *See, e.g.*, Jon O. Newman, *Between Legal Realism and Neutral Principles: The Legitimacy of Institutional Values*, 72 CAL L. REV. 200, 208–14 (1984) (explaining why the author, an appellate judge, believes “institutional . . . values that concern the judge’s conception of the role of the courts and other sources of law” may legitimately inform judicial deliberation).

problem is legislative, making it Congress's to fix, and we believe that Congress is more than capable of addressing this problem through the legislative process"⁸¹ relies upon an assessment of legislative capabilities that will be accurate in some situations and wildly Pollyannaish in others.⁸² If Congress has consistently proved itself to be too divided or distracted to address some problem with new focused legislation, judges may be more favorably disposed to permit a novel interpretation of an old statute, even if the fit of that old law is less than perfect.⁸³

In some cases, permitting such changes in interpretation will dramatically increase the chances that Congress will stir itself to act on a particular problem. Although the legal status quo prior to the new interpretation may have had the (at least passive) acceptance of a major-

81. A very common formulation of this idea is for judges to say that a problem is "for Congress, not the courts." A Westlaw search of all federal cases in the last fifty years for this exact phrase yields 299 results, and of course there are many other ways to formulate the same idea.

82. Alternatively, if the text seems to support a broad interpretation, the court may tell litigants seeking a more restrictive interpretation that *their* problem is a legislative one. For one such declaration in the context of civil RICO, see *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499 (1985), which held that, although the statute was certainly being put to uses not intended by the enacting Congress, the situation "is inherent in the statute as written, and its correction must lie with Congress," as courts would have no way of effectively fashioning a test to ensure that actions only be brought in cases of "real" organized crime and thus honored the original statute's intent.

83. See *infra* Part III.C. To be sure, the "vulgar formalist," as characterized by Leiter, *supra* note 6, at 111, who bases arguments entirely on a simple understanding of the relevant institutions' formal competencies, will reject this argument out of hand. The law is how it is, powers are allocated as they are, and that's just the way the world is; we can't wish ourselves some other sort of constitutional structure just because it seems to have led to bad consequences in one particular case.

That being said, most advocates of textualism try to argue less dogmatically (since it is clear that if people reject the necessity of this perspective, simply insisting on its necessity won't resolve anything). Few textualists, and especially few practitioners, are really willing to defend their position's logical extreme. Instead, they generally argue that textualism leads to the best system-wide consequences by preserving the legislature's prerogative and disciplining judges.

The following hypothetical clarifies the dilemma facing the strictest textualist: there is some ambiguity about what the text permits, though the weight of the evidence suggests that it should not permit the action in question. However, if the new interpretation is not accepted, there is convincing evidence that disaster will ensue, with no possible timely legislative solution. Is it still the proper course of action to insist on interpreting the statute only in light of its framing, or is it appropriate in this case to also think about the consequences, and therefore accept the interpretation that seems less well-supported, though still plausible?

If the strict textualist is willing to make a concession in this extreme case, the question simply becomes how clear and extreme indications of institutional deficiencies must be before they are willing to concede that textualism does not always trump other values.

ity of legislators, the change brought about by the new interpretation may prod Congress to act in certain contexts.⁸⁴ But judges may only want to give weight to such pragmatic considerations if they believe legislative dysfunction is the likely alternative. If a textbook-civics response to the problem, characterized by congressional leadership, is likely to emerge without any judicial prodding, then judges are more likely to frown on strained adaptations.

Debate about questions of interpretation is almost never couched in exactly these institutionally sensitive terms. Instead, these institutional considerations enter when judges consider whether Congress has spoken clearly to the issue. Two parts of this inquiry can be potentially controversial. First, how clear is “clearly”? Second, how directly to the issue must Congress’s speaking have been? The clarity of a statute depends on the precision of its language. Roughly speaking, greater consensus and a clearer sense of congressional purpose will lead to more precise language, since ambiguous language is used to achieve compromise between legislators with conflicting purposes.⁸⁵ Language will be more precise when Congress was able to master the subject matter of the statute, agree on the means to be employed as well as the ends of the legislation, and win a strong consensus for a particular approach.

The functional precision of language is also likely to have something to do with the recentness of the statutory enactment. In a changing world, new situations may arise that fit into the static classifications of a statute only awkwardly, and so, *ceteris paribus*, newer laws are clearer laws.⁸⁶ When judges are tasked with determining whether an existing statute clearly resolves the interpretive question at hand, they are more likely to find that things are clear if a broad coalition of legislators has recently produced legislation on the subject.⁸⁷ Additionally, there are epistemic reasons why newer text is

84. This belief proved true in the case of using the Refuse Act to combat water pollution. Once judges accepted the new interpretation and thus changed the legal status quo, there was considerable pressure to create a powerful new water quality law that would achieve many of the same substantive purposes without any of the policy awkwardness. See MILAZZO, *supra* note 40.

85. For some insight into why this is the case, see generally Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733 (1995) (explaining how many times ambiguity, even regarding basic purposes, is a necessary ingredient for compromise).

86. See *supra* note 8.

87. For a more practical reason why interpreters of a fairly clear recent law would want to hew close to the law’s clear meaning, see William N. Eskridge & Philip P. Frickey, *Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 57–58 (1994) (“An interpretation in 1994 slighting the apparent meaning of a statute enacted in 1991 is

likely to seem clearer to recent interpreters; figuring out what a statute is supposed to mean is simply easier when the context of legislation is recent and thus easier to understand.⁸⁸

Similarly, when deciding whether existing statutes speak directly enough to the issue at hand to be treated as dispositive, judges will have to consider institutional factors. In an idealized world, the legislative body could be consulted and produce a clear pronouncement in every situation, but the reality is that Congress is factious with severely limited resources. Thus, in old law, new trick cases, judges, in deciding what fit will be considered good enough,⁸⁹ will almost certainly be making an implicit comparison to the prospects of future legislation that will address the issue more squarely. Once again, if Congress has shown itself consistently capable of channeling political will toward a policy area in recent memory, then “good enough” may require clearing a fairly high bar. Judges will have to be convinced that applying the old law in question isn’t much of a stretch. On the other hand, if Congress seems capable only of dithering, then “good enough” may only require a plausible textual hook.⁹⁰

Once again, judges themselves do not generally reason using these institutional terms; rather, opposing camps thunder at each other, with one saying that, through the old law, Congress clearly covered the case at hand, and the other declaring that this is sheer nonsense. I will argue that such heated exchanges, much in evidence in both *FDA v. Brown & Williamson* and *Massachusetts v. EPA*, mask deeper divides about the proper role of the courts in the context of a supine legislature. Strong textualists consistently make the case that Congress must be the driver of large scale policy change by arguing that the legal status quo “clearly” bars the interpretive innovation.⁹¹

likely to upset the coalition that produced the statute and, if the coalition is still powerful, subject the Court to the risk of a conflictual override.”).

88. See Easterbrook, *supra* note 34, at 534 (“Inferences [about ambiguous statutory meaning] almost always conflict, and the enacting Congress is unlikely to come back to life and ‘prove’ the court’s construction wrong. The older the statute, the more the inferences will be in conflict, and the greater the judges’ freedom.”).

89. Recent congressional inaction is not a strictly necessary precondition for old law, new trick. The Refuse Act of 1899 was quite consciously invoked in favor of the more clearly applicable and less potent Water Quality Act of 1970. In sympathy with this maneuver, William H. Rodgers muses: “That the solons of the nineteenth century appear to have surpassed their modern successors in fashioning useful tools for combatting water pollution is a curious commentary on the accidents of legal history and on the vitality of the current drive to secure water quality.” Rodgers, *supra* note 40, at 762. As I argue below, however, the availability of a more recently produced statute is likely to make courts less sympathetic to the creative use of the old law.

90. *Supra* note 80 and accompanying text.

91. See generally *infra* Parts II.C, III.C.

Purposivists see broad statutes as giving the government broad responsibilities and are inclined to allow innovation, often by finding that the old statute “clearly” does apply to the new circumstances.⁹² As a close examination of the two cases will show, “clarity” in such cases is very much in the eye of the beholder.

Before finally moving on to examine the cases in detail, it is worth noting that even if proponents of a novel interpretation lose in court, their willingness to pursue a new interpretation may still represent a tactical victory for them by increasing the policy area’s salience and highlighting Congress’s recent inaction on the issue. Once a court decisively rejects their attempt to frame the issue in terms of an interpretive problem, proponents of policy change must frame it as a solely legislative problem, which clarifies Congress’s institutional responsibility. If the public was ultimately supportive of the goals of the novel interpretation, a loss in court may mobilize them and their representatives to seek the same goals through new legislative means.⁹³ If the public was not ultimately supportive, perhaps they had little to lose.

Supposing the new interpretation is accepted as permissible, what are the benefits and costs for the proponents of the new interpretation? The benefits are clear enough: the new interpretation will lead to substantive policy changes, possibly far more quickly than they could have hoped to get any new legislation passed.⁹⁴ There may be ongoing costs, though. Most speculatively, it is possible that by changing the policy status quo the impetus for fresh legislation could be diminished. This could be especially problematic in light of the policy awkwardness that is likely to be created by using an old law as the basis for novel actions for which it was not specifically designed. Such awkwardness may diminish the agency’s efficacy in achieving its policy goals as well as generating litigation, which can be used as a stalling tactic as well as a means of continuously re-opening the question of whether the new interpretation was really permissible, appropriate, and prudent.⁹⁵ Finally, especially if the new interpretation survives the ruling of a divided court, there may be costs in terms of the agency’s legitimacy in the eyes of both the public and its “constituency” of

92. *Id.*

93. This is exactly what happened in the case of tobacco, though it took nearly a decade for Congress to finally pass a law. See *infra* notes 186–190 and accompanying text.

94. As the aftermath of *Massachusetts v. EPA* will show, however, if the drivers of the new interpretation are outsiders, the implementation of the new policy may be far from instantaneous. See *infra* Part III.D.

95. See, e.g., *infra* Part III.D.

regulated firms. Although successfully asserting its power might cheer sympathizers and represent a show of force, cultivating a reputation for unpredictability or needless provocation could ultimately damage an agency's ability to effectively pursue its core mission.⁹⁶

To better flesh out our understanding of the dynamics of "old law, new trick," in the remainder of this article I probe the details of two of the most prominent recent examples.

II.

FDA AND TOBACCO

In this section, I explore the institutional and legal logic of the FDA's assertion of jurisdiction over tobacco during the Clinton Administration, explaining the factors that led to the novel interpretation of the FDCA as well as its ultimate rejection by the courts. I then consider the subsequent policy history of tobacco regulation, including the passage of the Family Smoking Prevention and Tobacco Control Act of 2009, and reflect on the lessons for old law, new trick.

A. *Background Context*

Beginning in the 1960s, a broad-based cultural shift in the perception of smoking tobacco spurred policymakers to think about ways of mitigating the drug's harms, including quite a few congressional enactments directly targeting tobacco usage.⁹⁷ In 1965, Congress enacted the Federal Cigarette Labeling and Advertising Act ("FCLAA"), which required health warnings on cigarette packages, advertising, and billboards.⁹⁸ The basic provisions of this law were reaffirmed by the Public Health Cigarette Smoking Act of 1969 and later by the Comprehensive Smoking Education Act of 1984, each of which made minor substantive amendments to the labeling requirements.⁹⁹ Congress considered making the FDA responsible for these regulations but instead chose to empower the Federal Trade Commission (FTC) and

96. See DAN CARPENTER, REPUTATION AND POWER: ORGANIZATIONAL IMAGE AND PHARMACEUTICAL REGULATION AT THE FDA 33–70, 47 (2010) (explaining how agencies' reputations can empower or constrain them, and specifically noting that an agency's "legal-procedural reputation" is one of the major components of its reputation).

97. *Brown & Williamson Tobacco Corp. v. Food & Drug Admin.*, 153 F.3d 155, 171–76 (4th Cir. 1998).

98. Pub. L. No. 89-92, 79 Stat. 282 (1965) (codified at 15 U.S.C. §§ 1331–1340).

99. Pub. L. No. 91-222, 84 Stat. 87 (1970) and Pub. L. No. 98-474, 98 Stat. 2200 (1984). See *Brown & Williamson*, 155 F.3d at 173–74 (discussing the effects of these statutes).

Federal Communications Commission (FCC).¹⁰⁰ The Alcohol and Drug Abuse Amendments of 1983 required the Secretary of Health and Human Services to investigate tobacco's addictive nature and recommend appropriate action.¹⁰¹ In 1986, Congress passed and President Reagan signed a law requiring health warnings on smokeless tobacco packaging, to be administered by Health and Human Services.¹⁰² Finally, the Alcohol, Drug Abuse, and Mental Health Administration Reorganization Act of 1992 incentivized states to pass and enforce laws preventing minors from purchasing cigarettes by making mental health block grants conditional on these actions.¹⁰³ Nevertheless, many believed that the regulatory regime jointly created by these programs was far too lenient on tobacco, leaving the public, and especially the young, with much too easy access to cigarettes and smokeless tobacco.¹⁰⁴

Running parallel to these many tobacco-specific congressional enactments, there was also a long history of interpreting the broadly-worded Food, Drug, and Cosmetics Act (FDCA). Given its modern form in 1938,¹⁰⁵ the Act's coverage of all drugs and medical devices certainly made it seem as though cigarettes might fall within the FDA's jurisdiction. And over the years, federal courts had accepted FDA assertions of expanded jurisdiction over a wide range of products, even including a phonograph recording of a soothing voice

100. *Brown & Williamson*, 155 F.3d at 171–73 (discussing various congressional deliberations regarding which agency to give control over the regulation of tobacco products and labeling).

101. Pub. L. No. 98-24, 97 Stat. 175, 178 (1983) (codified at 42 U.S.C. §§ 290aa *et seq.*).

102. Comprehensive Smokeless Tobacco Health Education Act of 1986, 15 U.S.C. §§ 4401–4408; *see also Smokeless Tobacco Warnings*, 42 CQ ALMANAC 267 (1986), available at <http://library.cqpress.com/cqalmanac/cqal86-1150310>.

103. Pub. L. No. 102-321, 106 Stat. 394 (1992) (codified at 42 U.S.C. § 300x-26).

104. *See, e.g., Philip J. Hilts, Clinton Says Government Needs to Combat Smoking by Youths*, N.Y. TIMES, August 4, 1995, at A11.

Apart from issues related to regulating future tobacco usage, there was also the huge question of who should bear the cost of treating the many ailments caused by smoking. State attorneys general were most active on this front, pursuing claims that tobacco companies should be held responsible for the medical costs incurred dealing with tobacco-related illnesses. Negotiations meant to produce a “global settlement” involved Congress, though in the end the attempt to get a bill through failed, in part because of an inability to agree on the FDA's role in tobacco regulation going forward. *While Congress Debates Bill, Court Rules Against FDA's Power To Regulate Tobacco*, 54 CQ ALMANAC 15-3 -15-15 (1998). Eventually, the agreement between tobacco manufacturers and the states would be concluded without congressional sanction, and so of course included no definitive legislative resolution on the question of regulatory authority. *See also MARTHA DERTHICK, UP IN SMOKE: FROM LEGISLATION TO LITIGATION IN TOBACCO POLITICS* (2002).

105. Pub. L. No. 75-717, 52 Stat. 1040 (1938).

“guaranteed” to put its listeners to sleep.¹⁰⁶ The Agency had also managed to extend its reach over many novel medical developments without any statutory amendments to its charter, including “genetically modified foods, bioengineered drugs, nanotechnology, tissue engineering, and regenerative medicine, gene therapy, and pharmacogenics.”¹⁰⁷

At the same time, the FDCA makes no mention of tobacco, and the FDA repeatedly averred that it did not believe the Act included tobacco unless some particular manufacturer made health claims on behalf of their product.¹⁰⁸ An official FDA Bureau of Enforcement Guideline in 1963 clearly stated that tobacco products did not fall under the act’s definition of a drug unless therapeutic claims were made on its behalf.¹⁰⁹ In 1972, FDA Commissioner Charles Edwards testified in Congress that applying the FDCA to cigarettes would require their removal from the market, since it would be impossible to

106. *United States v. 23, More or Less, Articles*, 192 F.2d 308 (2d Cir. 1951) (sustaining FDA regulation of phonograph records called “Time to Sleep”); *see also United States v. Halogenic Prods. Co.*, 714 F. Supp. 1159, 1161–66 (D. Utah 1989) (sustaining FDA jurisdiction to regulate surgical instrument sterilizer as medical device, in spite of indirect connection to human health); *United States v. 25 Cases, More or Less, of an Article of Device*, 942 F.2d 1179 (7th Cir. 1991) (upholding FDA assertion that “sensor pad” claimed to improve women’s ability to conduct breast self-exam was a medical device under the FDCA); *United States v. An Undetermined No. of Unlabeled Cases*, 21 F.3d 1026 (10th Cir. 1994) (upholding FDA assertion that specimen-collection containers were devices under meaning of Act, thereby creating jurisdiction, but rejecting FDA classification of the containers as “new”). These cases all dealt with cases in which manufacturers made subjective claims about the effects of their products on human health, in contrast to the case of tobacco products. *But see 62 Cases, More or Less, Each Containing Six Jars of Jam v. United States*, 340 U.S. 593, 600 (1951) (holding that “imitation jam,” so labeled, was not “misbranded” under FDCA and cautioning “not to extend the scope of the statute beyond the point where Congress indicated it would stop”).

107. Lars Noah, *The Little Agency that Could (Act With Indifference to Constitutional and Statutory Strictures)*, 93 CORNELL L. REV. 901, 917–18 (2008) (sharply criticizing the agency’s tendency to view its organic statute as “a broad ‘constitution’ authorizing it to protect the public health by any necessary and proper means, rather than a limited and precise delegation of power from Congress.”).

108. *See Brown & Williamson Tobacco Corp. v. Food & Drug Admin.*, 153 F.3d 155, 168–170 (4th Cir. 1998) (describing the FDA’s position until 1996 that it had no jurisdiction over tobacco). Supporting the FDA’s longstanding position, though not addressing it directly, was *Federal Trade Commission v. Liggett and Myers Tobacco Company*, 108 F. Supp. 573 (D.D.C., 1952) (rejecting an attempt to force the FTC to regulate advertising claims made on behalf of cigarettes, on the grounds that cigarettes did not fall within the definition of drug under the FTC Act).

109. Letter to Directors of Bureaus and Divisions and Directors of Districts from FDA Bureau of Enforcement (May 24, 1963), *reprinted in Public Health Cigarette Amendments of 1971: Hearings Before the Consumer Subcomm. of the Senate Comm. On Commerce on S. 1454*, 92d Cong. 240 (1972).

prove their safety, and again told legislators that the power to create future regulations was theirs, and not his agency's.¹¹⁰

Challenging the FDA's disavowal of jurisdiction, an anti-smoking advocacy group petitioned the FDA to regulate tobacco in 1979.¹¹¹ When the FDA demurred, the group sued, leading ultimately to the case of *Action on Smoking and Health (ASH) v. Harris*.¹¹² A unanimous D.C. Circuit panel found that since the petitioners had no way of establishing, as required by § 201(g)(1)(C), that cigarettes were intended to have an effect on the body, the FDA's interpretation of this section, which emphasized lack of claims by cigarette marketers (which was not rebutted by petitioners), deserved deference.¹¹³ The Court concluded by insisting that "[i]f the statute requires expansion, that is the job of Congress."¹¹⁴ This legal status quo was once again reinforced in 1989, when FDA Commissioner Frank Young reaffirmed for Congress the agency's position that it was unable to regulate tobacco under its statute's current form.¹¹⁵ Throughout this period, Congress showed signs of understanding the FDA's apparent lack of jurisdiction as it pursued its own tobacco-related agenda. Many bills were proposed to explicitly subject tobacco to regulation under the FDCA, but none ever reached the floor.¹¹⁶

B. The Novel Interpretation

At this point, President George H.W. Bush's new FDA commissioner, David Kessler, entered the scene. Early in his tenure, Kessler decided to broach the question of whether the FDA could use its statutory authority to pursue a more aggressive tobacco policy, but he found many agency veterans reluctant. These staffers worried that taking on tobacco would be costly, burn up the agency's political capital, and make powerful political enemies. A younger cadre of idealists in the agency hoped for action, but Kessler's initial sounding out of the

110. *Id.* at 242.

111. *Citizen Petition*, FDA Docket No. 78P-0338 (Oct. 2, 1978).

112. 655 F.2d 236 (D.C. Cir. 1980).

113. *Id.* at 239–41.

114. *Id.* at 243.

115. *Hearings Before the Subcomm. on Rural Development, Agriculture, and Related Agencies of the House Comm. on Appropriations*, 100th Cong., 2d Sess. 409 (1989).

116. These include S. 1468, 71st Cong. (1929); H.R. 11280, 84th Cong. (1956); S. 1682, 88th Cong. (1963); H.R. 2248, 89th Cong. (1965); S. 3317, 95th Cong. (1978); H.R. 279, 96th Cong. (1979); H.R. 3294, 100th Cong. (1987); S. 769, 101st Cong. (1989); H.R. 5041, 101st Cong. (1990); S. 2298, 102nd Cong. (1992); H.R. 2147, 103rd Cong. (1993).

agency led him to disavow jurisdiction.¹¹⁷ For a little while, the issue was put on the agency's back burner even as it received a steady stream of citizen petitions from anti-tobacco activists.¹¹⁸ In the fall of 1992, an internal FDA study group on tobacco introduced Kessler to the idea of regulating nicotine as a drug under the FDCA (rather than figuring out a way to regulate tobacco more broadly), and it struck him as "a dramatic new way to approach an old problem."¹¹⁹ Thanks to his zeal in enforcing labeling laws against food manufacturers, Kessler was kept on by President Clinton,¹²⁰ and soon his inclination to go after the tobacco companies was sharpened by the emergence of a whistleblower, codenamed "Deep Cough," who revealed that the tobacco companies were keenly interested in controlling nicotine levels even as they instructed employees never to discuss nicotine for fear that it could open them to FDA regulation.¹²¹ Kessler hoped to use such evidence to establish that tobacco manufacturers satisfied the intent requirement of the FDCA, even if cigarettes were not explicitly marketed as delivering a pharmacological effect.¹²² As the FDA's investigation continued, Kessler wrote an open letter to anti-tobacco groups indicating the agency's changed position,¹²³ hoping to "goad legislators into action" while the FDA built its own case for unilateral action.¹²⁴ Over the next two years the FDA conducted an extensive investigation, drawing increasingly strong congressional ire along the way.¹²⁵ After convincing themselves that tobacco companies centrally

117. DAVID KESSLER, *A QUESTION OF INTENT: A GREAT AMERICAN BATTLE WITH A DEADLY INDUSTRY* 35–36 (2001).

118. *Id.* at 51. In addition, see also the Citizen Petition submitted by the American Heart Association, the American Lung Association and the American Cancer Society, acting as the Coalition on Smoking or Health, to the U.S. Food and Drug Administration, requesting Classification of "NEXT" and other DeNicotinized Cigarettes as drugs under the Food, Drug, and Cosmetic Act. FDA Docket No. 91P-0144 (submitted Apr. 8, 1991).

119. KESSLER, *supra* note 117, at 63.

120. Christopher O'Connell, *Food and Drug Regulator Staying on Under Clinton*, ASSOCIATED PRESS NEWS ARCHIVE (Feb. 27, 1993, 12:33 AM), <http://www.apnewsarchive.com/1993/Food-and-Drug-Regulator-Kessler-Staying-On-Under-Clinton/id-e5c22702b3cf66ee34feda692ff619ec>.

121. KESSLER, *supra* note 117 at 80, 82–84. See also Sheryl Gay Stolberg, *War on Nicotine Began With a Cough*, N.Y. TIMES, August 15, 1998, at A9.

122. KESSLER, *supra* note 117, at 85–88.

123. Letter from David Kessler, Comm'r of the FDA, to Scott D. Ballin, Chairman of the Coal. on Smoking or Health (February 25, 1994), available at <http://www.legacy.library.ucsf.edu/documentStore/a/x/c/axc91f00/Saxc91f00.pdf>.

124. KESSLER, *supra* note 117 at 88.

125. *Id.* at 163, 247–48, 284–86. Kessler would come to characterize this struggle (in the subtitle of his book) as "a Great American Battle with a Deadly Industry" and retells it as a sort of detective story. See also Robert Dreyfuss, *Tobacco Enemy Number One*, MOTHER JONES (May/June 1996), <http://www.motherjones.com/politics/>

conceived themselves as selling nicotine delivery devices, Kessler and other top FDA officials began to reformulate their interpretation of the FDCA, and specifically its requirement of manufacturer intent.¹²⁶

President Clinton only became actively involved in 1995, at which point dramatic action against tobacco presented one way for his administration to regain momentum after the Republican takeover of Congress in the 1994 elections.¹²⁷ In August 1995, Clinton announced that he would be supporting “broad executive action” aimed to curtail youth smoking, and after the FDA finalized its rule in 1996 he trumpeted its importance in a Rose Garden ceremony.¹²⁸

The FDA’s 1995 proposed rule,¹²⁹ which (including its jurisdictional appendix) ran about three hundred pages in the Federal Register, laid out the FDA’s youth-prevention-targeted policies: federal control of the minimum smoking age, prohibition of vending machines and free samples, and strong restrictions on advertising that could reach children or adolescents.¹³⁰ The agency asserted jurisdiction over tobacco products not as drugs, but as medical devices, drawing an analogy between cigarettes and metered-dose inhalers.¹³¹ Their justification was laid out in a three part argument: (1) nicotine’s addictive and other pharmacological properties are effects on the “structure or any function of the body” within the meaning of the FDCA’s definition of a drug;¹³² (2) tobacco manufacturers intend their products to have these effects within the meaning of the Act;¹³³ (3) regulation of cigarettes and smokeless tobacco products as devices is most appropriate at this time.¹³⁴ The first two parts of this argument seemed to jus-

1996/05/tobacco-enemy-number-one (“Alan Slobodin, a lawyer at the Washington Legal Foundation before the Republican landslide, now is counsel to the Commerce Committee’s Subcommittee on Oversight and Investigations, which has jurisdiction over the FDA. In his new post, Slobodin wages an unrelenting campaign against the agency, holding innumerable hearings and draining agency resources with his demands for documents and testimony.”).

126. KESSLER, *supra* note 117, at 270–72.

127. *Id.* at 322–24, 331–33.

128. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2282–83 (2001) (discussing President Clinton’s press conference announcing the proposed rule to protect youth from tobacco).

129. Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco Products To Protect Children and Adolescents, 60 Fed. Reg. 41,314, 41,314 (proposed Aug. 11, 1995) (to be codified at 21 C.F.R. pts. 801, 803, 804, and 897).

130. 60 Fed. Reg. at 41,315, 41,322–42.

131. *Id.* at 41,346–49.

132. Analysis Regarding the Food and Drug Administration’s Jurisdiction Over Nicotine-Containing Cigarettes and Smokeless Tobacco Products, 60 Fed. Reg. 41,453, 41,467–70 (Aug. 11, 1995).

133. *Id.* at 41,471–520.

134. *Id.* at 41,521–25.

tify the FDA regulating nicotine as a drug, at which point the agency would be compelled to evaluate its safety and efficacy,¹³⁵ but the third argued that the agency was entitled to regulate cigarettes as drugs, medical devices, or both, and that for prudential reasons the agency would choose to regulate them only as medical devices.¹³⁶ The agency acknowledged that removing cigarettes from the market entirely would be inappropriate in light of the needs of 40 million addicted Americans.¹³⁷

The most radical interpretive shift was the move from the traditional, subjective understanding of intent, in which only manufacturer claims on behalf of a product were considered, to a new standard of objective intent based on reasonable expectations about how a product would affect consumers.¹³⁸ According to this argument, the FDA's changed interpretation of the FDCA to apply it to tobacco did not rest entirely on a change of policy priorities, but rather was premised on the newly available information the FDA's investigations into the tobacco companies' internal workings had uncovered.¹³⁹ Defenders of the FDA's action asserted that this adjustment to new information is just how law should work in the context of the modern administrative state, especially for those parts of the executive branch charged with administering broad statutes.¹⁴⁰ In an article defending the agency's action, Cass Sunstein declared that "[w]ithout much fanfare, agencies

135. *Id.* at 41,523–25.

136. *Id.* at 41,521–24.

137. Proposed Rule, Jurisdictional Statement, 61 Fed. Reg. at 41,523–24. For a more thorough examination of the proposed rule's logic, see Ann Mileur Boeckman, *An Exercise in Administrative Creativity The FDA's Assertion of Jurisdiction over Tobacco*, 45 CATH. U. L. REV. 991, 1018–23 (1996).

138. The FDA's argument about intent is laid out in Part II of its Jurisdictional Statement. 61 Fed. Reg. 44,632–44,649 (Aug. 28, 1996); 61 Fed. Reg. 44,686–45,204 (Aug. 28, 1996) (full arguments with responses to comments). These 518 pages make up the bulk of the agency's jurisdictional argument.

139. For a critique of this strategy, see Margaret Gilhooley, *Tobacco Unregulated: Why the FDA Failed, and What to Do Now*, 111 YALE L. J. 1179, 1197–98 (2002) (arguing that Kessler wrongly fixated on the question of manufacturer intent and thereby lost track of congressional intent, and that as a result Kessler needlessly led the FDA into a difficult legal position, where it might have been able to better stake claim over a narrower slice of tobacco policy related to youth prevention). Gilhooley nicely summarizes the courts' dilemma in such cases:

The challenge of statutory interpretation is to determine when the agency's resolution of a new issue is so far beyond the legislative aims that, even in light of Congress's implicit delegation to agencies of the authority to adapt the laws they administer to new situations unless inconsistent with the specific provisions, the agency's innovation should be found to be unauthorized.

Id.

140. *Infra* note 141.

have become America's common law courts, and properly so," given their superior ability to set out broad principles and then apply them to changing contexts.¹⁴¹

Why did the FDA ultimately choose to pursue a strategy of "old law, new trick" in the case of tobacco? Kessler's account emphasizes a genuine sense of conviction that the agency had an obligation to protect the public's health from tobacco and beat the tobacco companies, who conducted themselves so as to win Kessler's undying enmity.¹⁴² He stood not in the place of a generic policymaker contemplating how best to engineer a public policy dealing with tobacco, but rather as an agency executive with certain tools at his disposal. Kessler originally thought that being given new legislative tools was crucial, but as his investigation progressed and Congress looked increasingly unlikely to cooperate, especially after the Republican victory in the 1994 midterm elections, he decided that his agency should act on the basis of its existing powers.¹⁴³ For his part, President Clinton was looking for opportunities to assert his continuing relevance after that setback, and Kessler's enthusiasm for applying the FDCA to tobacco companies presented him with an appealing opportunity.¹⁴⁴ Though a deal with the tobacco companies and their congressional allies might have been possible—especially on the issue of youth smoking prevention—neither Clinton nor Kessler was in the mood to patiently bargain and risk coming away with the policy status quo unaltered.¹⁴⁵

The opposition to the FDA's new interpretation was swift and emphatic. Tobacco companies and their congressional allies decried

141. Cass Sunstein, *Is Tobacco a Drug? Administrative Agencies as Common Law Courts*, 47 DUKE L.J. 1013, 1019 (1998). Sunstein conceded that the original statute was not explicitly intended to cover tobacco, and that this was not merely a case of reacting to completely new information, and that it would be reasonable to imagine opinions about applying the FDCA to tobacco going either way. *Id.* at 1040. But he argued that principles of *Chevron* deference give good reason to defer to FDA's judgment given its expertise.

142. Throughout his book, Kessler describes the tobacco companies' demonizing rhetoric (for example, suggesting that the FDA was waging a "war on 50 million American smokers,") and underhanded tactics (for example, making unfounded legal accusations against important FDA policymakers). Kessler, *supra* note 117, at 335, 346–48.

143. Kessler, *supra* note 117, at 267 (explaining that while he first "thought the real goal of FDA action was to push Congress to enact legislation," he eventually told his FDA colleagues "[n]ew legislation should remain an option, but it is not key.").

144. *Supra* note 128 and accompanying text.

145. According to Kessler, Clinton continued to seek a compromise with key legislators up until his announcement of support for the FDA's policies in 1995, but abandoned the effort due to doubts that the "fractious" tobacco industry would really come together enough to make a compromise viable. *Supra* note 117 at 332–33.

the FDA's legal imperialism and its disregard for the limits of its statutory authority.¹⁴⁶ They emphasized the policy implication of applying the FDCA to tobacco, which is that cigarettes might not be long for the market given the statute's requirements of medical safety and efficacy.¹⁴⁷ Congressional opposition had geared up even before publication of the FDA's proposed rule, with several bills being introduced by tobacco-state legislators to declare explicitly that the FDA's actions were out of bounds.¹⁴⁸

Opponents of the new interpretation also made their displeasure known during the notice and comment process of the FDA's rulemaking. Apart from extensively challenging the science underlying the FDA's findings about tobacco's pharmacological effects and addictiveness, tobacco company complaints challenged the agency's assertion of jurisdiction by questioning its interpretation of "intended to have an effect," emphasizing that the FDA was dramatically reversing the agency's earlier position, while simultaneously pointing out the difficulties of bringing tobacco under the FDCA's regulatory requirements.¹⁴⁹ The FDA universally rebutted these comments in its final rulemaking, making only relatively minor changes in the policy specifics of the programs proposed.¹⁵⁰

146. See, e.g., Rep. L.F. Payne (D-VA), Op-Ed., *Bypassing Congress to Regulate Tobacco Is a Dangerous Precedent*, RICHMOND TIMES-DISPATCH, Sept. 25, 1995, at A11, available at <http://legacy.library.ucsf.edu/tid/ujz62e00/pdf;jsessionid=3EB78DA7AD267D88DB32C26207E91CAA.tobacco03>; John Carey, *The FDA Vs. Big Tobacco*, BUSINESSWEEK ARCHIVES (August 27, 1995), <http://www.businessweek.com/stories/1995-08-27/the-fda-vs-dot-big-tobacco>.

147. See, e.g., *id.* (quoting R.J. Reynolds' attorney saying, "The FDA's true goal is not to stop at restricting youth smoking but to ban cigarettes," and Tobacco Institute Vice President Walker Merryman saying that if the FDA takes on tobacco, its "only alternative is to ban it").

148. S. 1262, 104th Cong. (1st Sess. 1995); S. 1295, 104th Cong. (1st Sess. 1995), H.R. 2265, 104th Cong. (1st Sess. 1995), H.R. 2283, 104th Cong. (1st Sess. 1995), H.R. 2414, 104th Cong. (1st Sess. 1995).

149. For an able rendering of all of tobacco companies' arguments, see Richard A. Merrill, *The FDA May Not Regulate Tobacco Products as 'Drugs' or as 'Medical Devices'*, 47 DUKE L. J. 1071 (1998). Merrill was FDA Chief Counsel from 1975–1977 and was Lorillard Tobacco's lawyer in the challenge against FDA's assertion of authority. Merrill's argument directly rebuts Sunstein, *supra* note 141, criticizing Sunstein's vision of agencies constrained only by explicit prohibitions as a radical rethinking of the structure of American government.

150. 61 Fed. Reg. 44,396, at 44,417–26 (Aug. 28, 1996) (final rule); 61 Fed. Reg. at 44,670–85, 44,995–45,097, 45,126–204 (Aug. 28, 1996) (jurisdictional determination). These arguments are treated in greater detail *infra*, Part II.C.

C. Judicial Reactions

The first court to hear a challenge to the FDA's rule was the Middle District of North Carolina.¹⁵¹ Judge William Osteen found that there was no statutory basis for FDA regulation of tobacco advertising,¹⁵² but he otherwise ruled entirely for the FDA, accepting the agency's justification for interpreting the FDCA to include tobacco.¹⁵³ Citing *Chevron*, Judge Osteen declared that deference to the agency's reasonable position was appropriate in light of the ambiguity in the statute, which gave no clear indication as to its applicability to tobacco.¹⁵⁴

The majority of a 4th Circuit panel reversed,¹⁵⁵ calling out Judge Osteen's opinion for having framed the issue as whether Congress had clearly withheld jurisdiction over tobacco from the FDA. Instead, the inquiry under *Chevron* should begin with whether Congress had ever evidenced any affirmative intent to delegate such jurisdiction to the agency.¹⁵⁶ The court found that the FDCA's text did not provide evidence for such a delegation unless one "examine[s] only the literal meaning of the statutory definitions of drug and device."¹⁵⁷ While ad-

151. *Coyne Beahm, Inc. v. U.S. Food & Drug Admin.*, 966 F. Supp. 1374 (M.D.N.C. 1997).

152. *Id.* at 1398–1400.

153. *See id.* For a useful summary of the action through *Coyne Beahm*, see also David A. Rienzo, *About-Face: How FDA Changed Its Mind, Took on the Tobacco Companies in Their Own Back Yard, and Won*, 53 *FOOD & DRUG L. J.* 243 (1998).

154. 966 F. Supp. at 1380, 1392.

155. *Brown & Williamson Tobacco Corp. v. Food & Drug Admin.*, 153 F.3d 155 (4th Cir. 1998).

156. *Id.* at 161–62. *See* Marguerite M. Sullivan, *Brown & Williamson v. FDA: Finding Congressional Intent through Creative Statutory Interpretation—A Departure From Chevron*, 94 *Nw. U. L. Rev.* 273 (1999) (criticizing the Fourth Circuit's decision not to rely on *Chevron* and defer to the FDA's interpretation). *See* Ernest Gellhorn & Paul Verkuil, *Controlling Chevron-Based Delegations*, 20 *CARDOZO L. REV.* 989 (1999) (defending the Fourth Circuit's decision). Gellhorn and Verkuil argue that *Chevron* deference should apply only to interstitial gap-filling, and not to basic questions about the scope of an agency's jurisdiction. They also offer a rule of thumb: "The more significant the question and the greater the impact that expansion of the agency's jurisdiction is likely to have, the greater the likelihood that Congress did not intend implicitly to delegate that determination to an agency." *Id.* at 1008. Other scholars also believed that *Brown & Williamson* effectively announced a "major questions" exception to *Chevron*. *See* Sunstein, *supra* note 11, at 231–47; Moncrieff, *supra* note 4. However, I argue that we learn from the Supreme Court's decision in *Massachusetts v. EPA* that importance is not necessarily the critical element compared to legislative assertiveness. *Infra* note 266. Perhaps working against all of these exceptions is *City of Arlington v. FCC*, 133 S. Ct. 1863 (2013) (holding that the *Chevron* framework must be applied to an agency's interpretation of its jurisdictional scope when faced with an ambiguous statutory provision).

157. *Brown & Williamson*, 153 F.3d at 163.

mitting that tobacco seems to fall within these “literal” definitions, the court insisted that the proper way of understanding the text was “in view of the language and structure of the Act as a whole.”¹⁵⁸ To show that the literal reading of these definitions was misguided, the majority cited the many difficulties created by trying to address tobacco under the FDCA’s requirements and concluded that the evidence intrinsic to the statute suggested that it was never intended to cover tobacco.¹⁵⁹

The court also relied on evidence extrinsic to the act itself to discern congressional intent, including legislative history, the FDA’s historical stance against asserting jurisdiction, and, most pertinent to the discussion here, a discussion of Congress’s actions pertaining to tobacco *after* the passage of the FDCA. In a passage dealing with smokeless tobacco, the court declared that “the detailed scheme created by Congress evidences its intent to retain authority over regulation of smokeless tobacco,”¹⁶⁰ and its logic was identical when discussing Congress’s various enactments regulating cigarettes.¹⁶¹ The court concluded by insisting that the message of the case was that “neither federal agencies nor the courts can substitute their policy judgments for those of Congress.”¹⁶²

A five-member majority of the Supreme Court closely followed the Fourth Circuit majority’s logic, again finding the FDA’s novel interpretation to be impermissible.¹⁶³ Justice O’Connor, writing for the majority in *FDA v. Brown & Williamson Tobacco*, bent over backwards to emphasize the seriousness of smoking as a social problem worth addressing by labeling smoking as “one of the most troubling public health problems facing our Nation today” in the very first sentence of her opinion.¹⁶⁴ Nevertheless, the majority once again found that the intrinsic evidence of the statute’s true meaning “clearly” precluded covering tobacco, if one avoids the pitfall of “examining a particular statutory provision in isolation.”¹⁶⁵ O’Connor relied more

158. *Id.*

159. *Id.* at 167.

160. *Id.* at 175.

161. *Id.* at 175–76.

162. *Id.* at 176.

163. *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

164. *Id.* at 125.

165. *Id.* at 132. O’Connor does not follow the Fourth Circuit in decrying “literalism,” but the tenor of her opinion’s discussion about interpreting the FDCA’s definitions is much the same. John F. Manning argues that the spectacle of these avowedly textualist Supreme Court justices wriggling out of a straightforward reading of the language at issue shows that the Court was willing to privilege non-delegation concerns, which suggest that such a large transfer of regulatory authority without pain-

heavily on the difficulties of reconciling tobacco's effects with the FDCA's requirements of safety, saying that "if [tobacco products] cannot be used safely for any therapeutic purpose, and yet they cannot be banned, they simply do not fit."¹⁶⁶ And, like the Fourth Circuit, she heavily emphasized the evidentiary value of repeated congressional enactments specifically addressing tobacco.¹⁶⁷ The creation of "a distinct regulatory scheme" for tobacco, which at all times was informed by the FDA's disavowal of jurisdiction, made it impossible to believe that the question was still an open one.¹⁶⁸

Justice Breyer penned a sharp dissent, as well as taking the unusual step of reading portions of his opinion from the bench.¹⁶⁹ As a starting point, he emphasized the literal applicability of the FDCA's definitions as well as the FDCA's broad scope and purpose of protecting public health, both of which suggested the propriety of the FDA's interpretation.¹⁷⁰ Given these facts, Breyer suggests it is hard to take seriously the majority's finding that the statute *clearly* excludes tobacco.¹⁷¹ He then rebuts the majority's finding that tobacco could only awkwardly be fit into the statute's framework, arguing that if the definitions fit and the intent to affect the body has been clearly established,¹⁷² then the FDA has jurisdiction and the question of how to fashion the most effective remedy is left to the agency. Therefore, although the statute could be used to support a ban of tobacco products, the agency's decision to proceed with less draconian measures—in part out of a concern for the black markets that would arise to supply smokers' demands—must not be ruled unlawful simply for being prudent.¹⁷³ Meanwhile, Breyer argued that the tobacco-specific legis-

fully clear evidence of explicit legislative intent is problematic. John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223 (2000). Manning believes that the Court's adherence to the doctrine is fundamentally misguided, though, and ultimately "creates the perverse result of attempting to safeguard the legislative process by explicitly disregarding the results of that process" by substituting judicial lawmaking for legislative. *Id.* at 256. He argues that judges should respect Congress's ability to leave future resolution of important questions to agencies through broad statutes. *Id.* at 256.

166. *Brown & Williamson*, 529 U.S. at 142–43.

167. *Id.* at 143–59.

168. *Id.* at 157.

169. Steve Lash, *Court Ruling Favors Makers of Cigarettes—Sharply Split Justices Deal Blow to Federal Control of Industry*, Hous. CHRON., Mar. 22, 2000, at 1.

170. *Brown & Williamson*, 529 U.S. at 162–63.

171. *Id.* at 170–71.

172. *Id.* at 167–74.

173. *Id.* at 174–81. Breyer's thinking here is remarkable, suggesting that executive branch agencies are permitted to act on their own expectations of perverse consequences, Congress's direct instructions to the contrary notwithstanding. Following this logic, any time executive officials believed legal requirements would produce

lation enacted after the FDCA unvaryingly failed to include any explicit declarations about FDA jurisdiction, and so whatever presumptions about that jurisdiction legislators may have had, their actions should be regarded as having left FDA jurisdiction untouched.¹⁷⁴

D. Responding to the Supreme Court's Ruling

In the immediate aftermath of the Supreme Court's ruling, the FDA made provisions to quietly wind down and end the programs that had been set in motion under its tobacco rule.¹⁷⁵ Some groups petitioned the agency to make a new attempt to regulate the marketing of those cigarettes whose manufacturers claimed contained fewer toxins than competitor brands', since such claims had served as the basis for

negative net social consequences, they would be justified in setting aside the law in the name of the public good. This more closely resembles the hoary doctrine of royal prerogative, e.g., JOHN LOCKE, SECOND TREATISE OF GOVERNMENT, ch. XIV (C.B. McPherson ed., Hackett Pub. Co., 1980) (1690), than it does any accepted doctrine of modern American administrative law. Breyer justifies this position by briefly asserting that the issue's high profile would assure that the public would associate the policy with the President, thereby mitigating any problems of democratic accountability. *Brown & Williamson*, 529 U.S. at 190–91. Once again, a few sources support this plebiscitarian view, e.g., Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J. OF L., ECON. & ORG. 81, 95–99 (1985), but most scholars would see cutting the people's representatives in Congress out of the loop as raising deep constitutional issues. For a deeper exploration of these issues in another context, see Philip A. Wallach, *Policy Responses to the Financial Crisis of 2008 and the Rule of Law*, Presentation at the 2010 Annual Meeting of the American Political Science Association (2010) (on file with the author).

174. *Brown & Williamson*, 529 U.S. at 181–86. Manning agrees with Breyer that the Court's argument is quite weak, since "enacting a statute based on an assumption about law does not amount to enacting that assumption." Manning, *supra* note 165, at 264. If, as I suggest, the recent enactments are relevant as evidence about institutional competencies rather than as indicia of the FDCA's purpose and meaning, this point becomes less relevant. Manning goes on to argue that treating the recent enactments as controlling, such that they should not be implicitly repealed by a novel interpretation of an older and more general statute, is a more sensible argument for the majority. He views such a move as a proper application of the principle of "the specific controls the general," which he believes better promotes values of accountability and democratic process than does the non-delegation doctrine. *Id.* at 276–77. To put this canon in the language of this essay, all one has to do is read "the specific" as recent targeted legislative actions and "the general" as older, broadly-worded statutes. *Cf.* *Patterson v. McLean Credit Union*, 491 U.S. 164, 181 (1989) ("We should be reluctant . . . to read an earlier statute broadly where the result is to circumvent the detailed remedial scheme constructed in a later statute.").

175. *Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents; Revocation*, 65 Fed. Reg. 17,135 (Mar. 31, 2000).

FDA jurisdiction in the distant past.¹⁷⁶ The agency took no immediate action on these petitions, though.

While it ended the executive-branch-initiated program to regulate tobacco under an old law, the Supreme Court's ruling also spurred a great deal of political agitation for a new law tailored to address tobacco. Signs of consensus seemed promising, especially on the narrow issue of youth smoking prevention.¹⁷⁷ Responding to the Supreme Court's decision, President Clinton called on Republicans to join with him in curbing tobacco sales and marketing and endorsed a bill sponsored by Senators Bill Frist (R-TN) and John McCain (R-AZ); Presidential candidate and Vice President Al Gore called on his opponent, Texas Governor George W. Bush, to join him in supporting the effort to empower the FDA to regulate tobacco.¹⁷⁸ Bush responded by also calling for increased regulation of tobacco.¹⁷⁹ Surprisingly, the tobacco companies themselves were also softening their position by admitting the need for some regulation. The giant Philip Morris corporation, in particular, had already begun to welcome anti-youth smoking measures even before the ruling.¹⁸⁰ For all this talk, the bill never made it out of the Health, Education, Labor and Pensions Com-

176. Gordon Fairclough, *Health Groups File Petitions with FDA, Seeking Rules for New Tobacco Products*, WALL ST. J., Dec. 19, 2001, at B17. Their claims were based in part upon the fact that the FDA had successfully, and uncontroversially, asserted its jurisdiction in two cases in which cigarette manufacturers marketed their products as weight-loss aids. *United States v. 46 Cartons, More or Less, Containing Fairfax Cigarettes*, 113 F. Supp. 336 (D.N.J. 1953); *United States v. 354 Bulk Cartons, More or Less, Trim Reducing-Aid Cigarettes*, 178 F. Supp. 847 (D.N.J. 1959).

177. Harold A. Pollack & Peter D. Jacobson, *Political Economy of Youth Smoking Regulation*, 98 ADDICTION 123, 126 (2000) (noting that during the late 1990s, "youth prevention became a popular goal in both the public rhetoric of tobacco control and in the design of specific legislation at all levels of American government," with 40 states restricting cigarette vending machines in order to diminish youth access).

178. Mary Otto, *Court Says FDA Can't Regulate Tobacco as a Drug*, SALT LAKE TRIB., Mar. 22, 2000, at A1.

179. Editorial, *Tobacco Ruling Must Inspire Congress to Act*, MORNING CALL (Allentown, PA), Mar. 24, 2000, at A24. Many leading Republicans voiced their doubts about entrusting such power to the FDA. *E.g.*, House Majority Leader Tom DeLay (R-TX), who declared, "I oppose legislation that would expand the bureaucratic reach of the very agencies so intent on circumventing the role of Congress on important matters of public policy." Lash, *supra* note 169.

180. Philip Morris began actively positioning itself as favoring policies to prevent youth smoking even before the Supreme Court ruled on *Brown & Williamson*—though it was always insistent that it was improper to classify tobacco as a "drug" under the FDCA, even as it admitted the addictive nature of nicotine. *See Verbatim; Big Tobacco's Changing Tune*, WASH. POST, Mar. 5, 2000, at B4; James Flanigan, *Philip Morris' Tactic: FDA Regulation*, L.A. TIMES, Apr. 22, 2001, at C1.

mittee in the Senate.¹⁸¹ Similar efforts garnered bipartisan support in 2001, but the bills once again died in committee.¹⁸² George W. Bush's presidency saw serious action taken on a bill in 2003, with Philip Morris again supporting the effort.¹⁸³ Senators sought to fashion a compromise fusing a bill to give the FDA jurisdiction with a bill to end the New Deal-era tobacco subsidy program, but smaller tobacco companies' opposition to an expanded FDA role—largely because they felt the new, more-regulated regime would help to lock in Philip Morris' market dominance—helped to doom the attempt that year.¹⁸⁴ A similar drama played out in 2008, when a bill to give the FDA jurisdiction over tobacco passed in the House, but Senator Ted Kennedy's (D-MA) bill in the Senate never received a floor vote due to various camps in opposition.¹⁸⁵

Finally, the Family Smoking Prevention and Tobacco Control Act (FSPTCA) was enacted in June 2009.¹⁸⁶ Though some Republicans championed an alternative that would have created a new agency for regulating tobacco, in the end advocates of FDA jurisdiction won the day.¹⁸⁷ The law created a dedicated tobacco unit within the FDA to receive its own budget and administer specially tailored rules with different requirements than the "safety and efficacy" required by the FDCA.¹⁸⁸ In what must have been a satisfying moment for Kessler and Clinton, the FSPTCA specifically required the FDA to reinstate the substance of the 1996 tobacco rule's youth smoking sections.¹⁸⁹ Crucially, though, the FSPTCA also contains an explicit limitation on

181. S. 2566, 106th Cong. (2000), available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d106:S.2566:@@X>.

182. H.R. 1043, H.R. 1097, H.R. 2180, 107th Cong. (2001).

183. *FDA's Role Scuttles Tobacco Bill*, 59 CQ ALMANAC 11-18-11-19 (2003), available at <http://library.cqpress.com/cqalmanac/cqal03-835-24327-1083684>.

184. *Id.*

185. *Conflicting Interests Kill Tobacco Bill*, 64 CQ ALMANAC 3-14-3-16 (2008), available at <http://library.cqpress.com/cqalmanac/cqal08-1090-52022-2174783>. Once again, opponents included the smaller tobacco companies, but at least a few Republican Senators claimed to ground their opposition on a desire for a stricter bill.

186. Pub. L. 111-31, 123 Stat. 1776 (2009).

187. *FDA Authorized to Regulate Tobacco*, 65 CQ ALMANAC 17-4-17-6 (2009), available at <http://library.cqpress.com/cqalmanac/cqal09-1183-59547-2251476>.

188. § 901(e) of the statute calls for the creation of the Center for Tobacco Products. For an approving summary of the Act, see Gregory D. Curfman et al., Editorial, *Tobacco, Public Health, and the FDA*, 361 NEW ENG. J. MED. 402 (2009).

189. H.R. 1256, 111th Cong. § 102(a)(2) (2009). See also Roseann B. Termini, *The Family Smoking Prevention and Tobacco Control Act: A 'Look Back' to Understand the Future*, REGULATORY FOCUS, June 2011, available at <http://ssrn.com/abstract=1091540>.

the FDA's powers: the agency may not ban cigarettes or require nicotine levels to be reduced to zero.¹⁹⁰

E. Analysis

What does the FDA's attempt to assert jurisdiction over tobacco under the FDCA indicate about the dynamics of old law, new trick? First, in the choice to adapt an old law rather than focusing on passing new legislation, it is important to consider policymakers not as an undifferentiated, unitary body, but rather as an aggregate of individuals situated within particular governmental institutions. Kessler's FDA acted on its own initiative, and then won the support of the President, quite independently of Congress. It chose to adapt the FDCA to its present purposes because doing so provided a promising opportunity to empower itself—but there is no reason to view this decision as cynically motivated. Rather, the people within the FDA had ideas about their role and their agency's mission that pushed them to embrace responsibility for regulating tobacco.¹⁹¹ Due to the presence of opposition, they recognized that their action would have the appearance of teaching the FDCA a new trick and they consequently sought to portray the move as growing organically out of their agency's mission and legal obligations.¹⁹² Clearly the new interpretation would lead to a large expansion of agency power, but their conviction was that the law was on their side regardless of what past interpreters thought about tobacco.¹⁹³

Why did the courts ultimately decide that this new trick was impermissible? The opinions of the 4th Circuit and Supreme Court majorities lay out three main reasons for the judges' rejection of the FDA's position. First, there is the policy awkwardness created by attempting to fit tobacco into the FDCA's provisions.¹⁹⁴ The judges were certainly right that incongruities and difficulties would exist—but if the statute decisively required regulating tobacco, it seems hard

190. H.R. 1256, 111th Cong. § 907(d)(3) (2009).

191. For much more on the sense of mission within the FDA and its relationship to the agency's external reputation, see CARPENTER, *supra* note 96. Carpenter argues that Kessler attempted to use the FDA's reputation as a "gatekeeper" to justify its jurisdiction, even if he "knew he was appropriating a legal, political, and conceptual architecture established for other purposes." *Id.* at 745. Carpenter (briefly) frames the issue in terms of reputation; here, and in general, this useful outlook does not always give much consideration to the ways in which the agency remains a creature of law and particular statutory authorities and limitations. *Id.*

192. *Id.*

193. *Id.* (emphasizing that Kessler felt that it was appropriate to bring tobacco into the framework of FDA pharmaceutical regulation).

194. See *Brown & Williamson*, 153 F.3d at 162–67; 529 U.S. at 133–37.

to believe that the judges would take it upon themselves to fashion such a monumental exemption. Many statutes apply awkwardly to new situations presented by a changing world (apart from any old law, new trick situations), and courts frequently express the idea that Congress must be the one to provide amendments to diminish the awkwardness.¹⁹⁵

Second, and related, is the assertion that the FDCA “clearly” precludes any jurisdiction over tobacco.¹⁹⁶ From this angle, the awkwardness is evidence that the statute’s true nature is incompatible with regulating tobacco, an argument which is supported by examining the structure and history of the FDCA.¹⁹⁷ Here, Justice Breyer and the dissent have the better argument: the Act’s broad language seems to encompass tobacco and it was Congress’s choice to make the statute a broad and flexible one. At the very least, this makes it hard to accept that the statute *clearly* precludes regulating tobacco. Of course, the majority is probably correct that it is clear that Congress never specifically anticipated the FDCA applying to tobacco as it contemplated enacting the FDCA,¹⁹⁸ but such a fact is quite beside the point in trying to understand a broad statute. Requiring that sort of foresight defeats Congress’s ability to create flexible authority capable of responding to new information. And information really had changed; Kessler’s FDA put together very impressive evidence on manufacturer intent that had never before been publicly known.¹⁹⁹

The third and strongest argument offered by the majority rests on their citation of the many tobacco-specific congressional enactments over the years, all enacted in the shadow of the FDA’s disclaiming any authority over tobacco under the FDCA.²⁰⁰ Although the majority sometimes talks about these as if they speak directly to the question of whether the FDCA can be applied to tobacco, this is something of a stretch; the working assumptions of legislators writing amendments do not in any way become a part of the law unless they are directly included into the statutory text, which they were not in this case.²⁰¹ A far more convincing way to understand this evidence is to imagine

195. *See, e.g., supra* note 82.

196. *Brown & Williamson*, 529 U.S. at 125.

197. *See id.* at 133–39, 142.

198. *Id.* at 142 (“Considering the FDCA as a whole, it is clear that Congress intended to exclude tobacco products from the FDA’s jurisdiction.”).

199. *Supra* notes 121 to 126 and accompanying text.

200. *Brown & Williamson*, 529 U.S. at 143–56.

201. Justice Breyer establishes this in his dissent. *Id.* at 181–86 (“Do those laws contain language barring FDA jurisdiction? The majority must concede that they do not.”).

executive creativity as a practical substitute for legislative action, at least in situations where the legislature has conferred broad authority in a relevant area. As discussed in Part I, this way of thinking posits “normal” lawmaking, complete with bicameral approval and presentment to the President, as the first-best, most preferred means of policymaking, but recognizes that applying this model to every issue that arises may be practically impossible. Where legislative action is not forthcoming, either because issues are not salient enough to garner congressional attention or because Congress proves itself incapable of action on a particular issue, courts are then likely to be indulgent of bold legal interpretations to support novel executive branch actions. In the case of tobacco, the Court apparently viewed Congress as capable of leading the development of policy itself. The citations to Congress’s many tobacco-specific laws provided strong support for this position, which the subsequent passage of the FSPTCA proved to be justified. Given such robust congressional activity in this policy area, no executive-initiated old law, new trick substitute was needed or warranted.

From this perspective, the idea that subsequent events showed that the court erred in *FDA v. Brown & Williamson* seems quite nonsensical. Although the final law did reinstate the 1996 law that the court struck down, in one crucial aspect the 2009 Act was not a close substitute for an FDA victory in the earlier case. Had the FDA prevailed, it would have been difficult to find any legal (and not merely prudential) reason why the agency would be constrained from laying waste to the legal trade in tobacco at any time. Indeed, such a remedy would have always been the most natural way of applying the FDCA to tobacco, which is unlikely ever to be safe in the sense required by that law. Such an outcome would undoubtedly have embroiled the agency in years of bitterly contested litigation as well as making it the target of political backlash. The FSPTCA, on the other hand, enacted a more workable compromise, giving the agency tobacco-specific powers and responsibilities and clarifying that its actions are not to effectively promulgate any ban or requirement that nicotine levels be reduced to zero.²⁰² The law, therefore, represents a far more sustainable and coherent foundation for ongoing policymaking efforts.

202. See *supra* note 190 and accompanying text. There are some outstanding free speech challenges to the FSPTCA concerning the constitutionality of its warning label requirements and advertising restrictions. See Alina Selyukh & Jeremy Pelofsky, *U.S. Judge Blocks Graphic Cigarette Warnings*, REUTERS (Nov. 8, 2011, 10:23 AM), www.reuters.com/article/2011/11/08/us-fda-tobacco-idUSTRE7A63V120111108.

Given the ultimate outcome, it is certainly possible to think that the FDA's attempt to teach an old law new tricks ultimately paid dividends in terms of policy change, even if the new trick was itself rejected. Although imagining the counterfactual world in which the FDA never took its case to court is quite difficult, the FDA's novel interpretation of the FDCA may have been the crucial ingredient in jump-starting meaningful policy change. In his book, former FDA Commissioner Kessler takes this stance. He laments that the Court's majority had been "unable to recognize how much had changed" to justify the change in the FDA's interpretative position, and concluded that the majority had simply followed its "attitudes toward government regulation" in voting against his agency.²⁰³ Nevertheless, he was heartened by what he perceived as a changed tone of debate regarding tobacco, signified by Philip Morris' public reversal and the large punitive damages that juries were beginning to assess against cigarette manufacturers.²⁰⁴ Knowing how policy has developed since, his assessment of the FDA's impact seems quite defensible.

III.

THE CLEAN AIR ACT AND GREENHOUSE GASES

The Court again considered institutional competencies in its decision regarding the applicability of the Clean Air Act to greenhouse gases. In this section, I examine the push by various environmentalists and states to compel the EPA to classify greenhouse gases (GHGs) as pollution agents so that they would be covered by the Clean Air Act (CAA). These parties litigated their claim against a resistant Environmental Protection Agency, eventually triumphing with a narrow Supreme Court majority ordering the agency to cover GHGs under the CAA in *Massachusetts v. EPA*.²⁰⁵ I consider the ongoing response to the ruling and analyze why the Court ultimately ruled in favor of old law, new trick in this context, despite its many similarities to *Brown & Williamson*. Once again, I argue that institutional considerations provide the best grounds for understanding the Court's decision.

A. *Background Context*

The public gradually became aware of, and concerned about, global warming in the 1980s and 1990s. As the science establishing global warming became better established, recognition of global

203. KESSLER, *supra* note 117, at 383–84.

204. *Id.* at 385–87.

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

warming and support for government action to address it both grew steadily through the early 2000s,²⁰⁶ though during the past decade public opinion has become increasingly polarized.²⁰⁷

Congress had responded to global warming concerns by sporadically funding research on the subject. The National Climate Program Act of 1978²⁰⁸ required the creation of a research program which eventually issued a report stating that current trends seemed to be leading to significant warming.²⁰⁹ The next action came with the Global Climate Protection Act of 1987,²¹⁰ which requested that various cabinet departments and the EPA formulate a response plan to global warming.²¹¹ President George H.W. Bush signed, and the Senate unanimously ratified, the 1992 United Nations Framework Convention on Climate Change (UNFCCC), a nonbinding agreement to work toward preventing and mitigating the damages of global warming.²¹² When the UNFCCC convened again in 1997 in Kyoto, Japan, the resolution they eventually approved would have bound the United States and other developed economies to make significant reductions in their GHG emissions, while simultaneously creating much more modest requirements for developing nations.²¹³ Disfavoring these terms, the U.S. Senate passed a resolution, 95-0, expressing its disapproval of the emerging Kyoto treaty on July 25, 1997.²¹⁴

The Clinton Administration remained an ardent supporter of the Kyoto Protocol that was eventually approved by the Convention, signing it in late 1998,²¹⁵ but supporters recognized that they had failed to secure a treaty that the U.S. Senate would approve, and so never sub-

206. Matthew C. Nisbet & Teresa Myers, *The Polls – Trends: Twenty Years of Public Opinion about Global Warming*, 71 PUB. OP. Q. 444 (2007).

207. Aaron M. McCright & Riley E. Dunlap, *The Politicization of Climate Change and Polarization in the American Public's Views of Global Warming*, 52 SOC. Q. 155, 176–78 (2011). The divergence between educated Democrats and Republicans is especially notable; nevertheless, levels of concern remain higher than they were in earlier decades.

208. Pub. L. No. 95–367, 92 Stat. 601. This discussion of congressional activity is drawn largely from the majority opinion in *Massachusetts v. EPA*, 549 U.S. at 507–09.

209. CLIMATE RESEARCH BOARD, CARBON DIOXIDE AND CLIMATE: A SCIENTIFIC ASSESSMENT VIII (1979).

210. Pub. L. No. 100–204, 101 Stat. 1407.

211. 15 U.S.C. §§ 2902, 2904 (1986).

212. May 9, 1992, S. Treaty Doc. No. 102–38, 1771 U.N.T.S. 107.

213. Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 11, 1997, S. Treaty Doc. No. 102–38, 1771 U.N.T.S. 107.

214. S. Res. 98, 105th Cong. (1997); see also *The Senate Vote on a Climate Treaty*, WASH. POST, Jul. 29, 1997, at A14.

215. John H. Cushman, Jr., *U.S. Signs Pact to Reduce Gases Tied to Warming*, N.Y. TIMES, Nov. 13, 1998, at A1.

mitted the treaty to a vote.²¹⁶ Following Kyoto, Congress showed considerable interest in global warming issues, with members introducing hundreds of bills in the late 1990s and early 2000s, though none led to legislation.²¹⁷ In total, then, legislative action addressing global warming remained quite limited, especially in comparison to the statutes regulating tobacco.

During this period, the EPA was also mostly quiet on the global warming front. Still, in two instances in which the agency was asked to express its opinion about whether it was capable of addressing global warming given its current set of policy tools, it indicated that its interpretation of the CAA gave it such a power. At a hearing in March 1998, EPA Administrator Carol Browner had testified to Congress that the agency already possessed jurisdiction to regulate carbon dioxide (CO₂).²¹⁸ In response, Congressman Tom DeLay (R-TX) asked the agency to produce a legal justification for this position.²¹⁹ This led to the so-called “Cannon Memorandum,” in which EPA General Counsel Jonathan Cannon briefly outlined for Administrator Browner the basis for asserting EPA jurisdiction over GHGs.²²⁰ In just a few paragraphs, Cannon explained that the definition of “air pollutant” found in § 302(g) of the CAA²²¹ seems to clearly encompass CO₂, that CO₂’s natural occurrence is irrelevant to the determination of whether CO₂ is a pollutant, and that therefore the EPA has jurisdiction to regulate power plants’ CO₂ emissions if it makes a finding that CO₂ endangers public health or welfare.²²² He then noted that while the EPA then had no specific plans of making such a finding, the requirements for regulation “could be met” if the Administrator determined that harm could

216. BARRY RABE, *STATEHOUSE AND GREENHOUSE: THE EMERGING POLITICS OF AMERICAN CLIMATE POLICY* 15 (2004).

217. See Moncrieff, *supra* note 4, at 636.

218. Memorandum from Jonathan Z. Cannon, EPA General Counsel, to Carol M. Browner, EPA Administrator, EPA’s Authority to Regulate Pollutants Emitted by Electric Power Generation Sources (Apr. 10, 1998), available at <http://www.virginia-lawreview.org/inbrief/2007/05/21/cannon-memorandum.pdf>.

219. *Id.*

220. *Id.*

221. 42 U.S.C. § 7602(g) (2012), which states in full:

The term ‘air pollutant’ means any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive (including source material, special nuclear material, and byproduct material) substance or matter which is emitted into or otherwise enters the ambient air. Such term includes any precursors to the formation of any air pollutant, to the extent the Administrator has identified such precursor or precursors for the particular purpose for which the term ‘air pollutant’ is used.

222. Cannon Memorandum, *supra* note 218, at 3. “Welfare” is defined at 42 U.S.C. § 7602(h) (2012).

be “reasonably anticipated.”²²³ Congress followed up with a hearing devoted specifically to this question,²²⁴ at which new EPA General Counsel, Gary Guzy, reaffirmed the agency’s belief that it had the power to regulate CO₂.²²⁵ The Clinton Administration never did take the decisive step of asserting jurisdiction before leaving office, though.

B. *The Novel Interpretation*

Instead, unsatisfied with congressional actions and hoping to convert the Cannon Memorandum’s nonbinding legal judgment into action, various environmental groups petitioned the EPA to regulate GHGs under the CAA in 1999.²²⁶ The petitioners, who would come to include twelve states, three cities, and one territory in addition to the environmental groups,²²⁷ asked the EPA to regulate mobile sources’ (mostly automobiles) greenhouse gas emissions under § 202(a)(1) of the CAA, which requires that the EPA shall enact regulations for air pollutants from motor vehicles that are injurious to public health or welfare.²²⁸ The key term “air pollutant” is defined by CAA § 302(g) to include “any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive . . . substance or matter which is emitted into or otherwise enters the ambient air.”²²⁹ The petitioners argued that this section should certainly be interpreted to include GHGs, since, in their view, these emissions’ contribution to

223. Cannon Memorandum, *supra* note 218, at 4.

224. *Is CO₂ A Pollutant and Does EPA Have the Power to Regulate It?: Joint Hearing Before the Subcomm. on Nat’l Environmental Growth, Natural Resources and Regulatory Affairs of the H. Comm. on Gov’t Reform and the Subcomm. on Energy and Environment of the H. Comm. on Science*, 106th Cong. (1999).

225. *Id.* (testimony of Gary S. Guzy, General Counsel, U.S. Env’tl. Prot. Agency).

226. INTERNATIONAL CENTER FOR TECHNOLOGY ASSESSMENT, ET AL., PETITION FOR RULEMAKING AND COLLATERAL RELIEF SEEKING THE REGULATION OF GREENHOUSE GAS EMISSIONS FROM NEW MOTOR VEHICLES UNDER § 202 OF THE CLEAN AIR ACT (1999). Note that the petition came well before the end of the Clinton administration, but was not addressed until after President Bush’s first term began in 2001.

227. *Massachusetts v. EPA*, 415 F.3d 50, 53 (D.C. Cir., 2005). For a listing of the nineteen original petitioners, see *Control of Emissions from New and In-use Highway Vehicles and Engines*, 66 Fed. Reg. 7486 n.1 (Jan. 23, 2001).

228. 42 U.S.C. § 7521(a)(1) (2012) (“[B]y regulation prescribe . . . standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.”).

229. *Id.* § 7602(g).

global warming was clear enough to make designating them as “air pollution agents” entirely natural.²³⁰

Once again, we see that the impetus for pursuing a novel interpretation came from participants in the policymaking process who did not possess the leverage to push through legislative change. Although environmental groups are certainly not without staunch congressional allies, on the issue of global warming in the late 1990s, they (probably correctly) understood that there was not a sufficiently large political consensus to address what might most naturally be treated as a legislative problem.²³¹ They also managed to enlist a number of state attorneys general to their cause—another group of actors who has sought to shift policy through litigation at the national level.²³² Both of these groups saw an opportunity to present the lack of GHG regulation as an interpretive problem rather than a legislative one. Similar to the case of the FDCA and tobacco, they argued that the Clean Air Act is a classic example of a broadly worded statute designed to include new

230. More specifically, petitioners argued that various EPA statements made on its official website and in other agency documents provided sufficient evidence of the connection between GHGs, global warming, and potential harms to the public health and welfare to justify treating GHGs as pollutants. See Notice of Denial of Petition for Rulemaking, Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,923 (Sept. 8, 2003) [hereinafter Notice of Denial].

231. The fact that Republicans controlled both houses of Congress in the late 1990s, as well as the overwhelming vote against Kyoto, *supra* note 214, are strongly suggestive.

232. Paul Nolette, *Advancing National Policy in the Courts: The Use of Multistate Litigation by State Attorneys General* 296–300 (Aug. 2011) (unpublished dissertation, Boston College). As Nolette describes, the State AGs originally took a different approach in their suit against the EPA, which was originally filed as *Massachusetts v. Whitman*, No. 03-1361 (D. Conn. June 4, 2003). This original complaint attempted to force the EPA to list CO₂ as a criteria pollutant under § 108, which would automatically trigger a number of statutory requirements to regulate emissions from stationary sources, but was withdrawn after the EPA officially denied the environmental groups’ petition and the State AGs decided that they would be better off joining them in suing over the § 202 denial. Nolette also describes a parallel old law, new trick strategy pursued by the State AGs as the litigation against the EPA proceeded. In this case, the law was common law—specifically, the doctrine of public nuisance, which the state AGs proposed to turn against various electric utilities for their contribution to global warming. This approach was ultimately rejected by a unanimous Supreme Court in *American Electric Power v. Connecticut*, 131 S. Ct. 2527 (2011). Justice Ginsburg’s opinion more or less said that there was enough action on other fronts to make entertaining such an ambitious common law challenge superfluous, fitting in nicely with the overall argument being advanced here. See Nolette, at 301–06, 322–30. See also Colin Provost, *When is AG Short for Aspiring Governor? Ambition and Policy Making Dynamics in the Office of State Attorney General*, 40 *PUBLIUS* 597 (2010) (explaining how State AGs’ political ambitions can motivate their involvement).

substances or threats as they become scientifically established.²³³ Like the Clinton FDA, they therefore took the position that the novel interpretation they were insisting upon was not really a new trick at all—rather, it was simply a logical reading of the obligations the CAA creates for the EPA.

In this case, however, advocates of a new reading did not have the executive branch agency as an ally. The Clinton administration EPA's cautious expression of support for asserting EPA jurisdiction gave way to a Bush administration EPA that struggled with the question of legal authority, but ultimately chose to deny the petitions. The agency charged with administering the regulatory statute thus became the most important opponent of this particular attempt to teach an old statute a new trick.

The EPA, first in an internal memorandum²³⁴ and then in expanded and formalized form in a Federal Register notice,²³⁵ argued that the CAA did not confer the authority to deal with global climate change, especially under the precedent of *Brown & Williamson v. FDA*.²³⁶ Citing the plain text of the CAA, the EPA pointed out that the Act contained no explicit language encouraging regulation targeted at global climate change, and in fact such a provision was considered as a part of the 1990 CAA Amendments and subsequently left out of the act.²³⁷ Given that the only explicit mentions of GHGs or CO₂ in the CAA pertain exclusively to research²³⁸ and an assertion of agency authority would have profound economic consequences, the Court's majority decision in *Brown & Williamson* suggested that the agency should not look to drastically expand the scope of its regulatory authority without more explicit congressional sanction.²³⁹ This was es-

233. INTERNATIONAL CENTER FOR TECHNOLOGY ASSESSMENT, PETITION FOR RULEMAKING AND COLLATERAL RELIEF SEEKING THE REGULATION OF GREENHOUSE GAS EMISSIONS FROM NEW MOTOR VEHICLES UNDER § 202 OF THE CLEAN AIR ACT 8–11, available at <http://www.andrewkimbrell.org/doc/ghgpet2.pdf>.

234. Memorandum from Robert Fabricant, General Counsel, U.S. Env'tl. Prot. Agency, to Marianne L. Horinko, Acting Administrator (Aug. 28, 2003) (EPA's Authority to Impose Mandatory Controls to Address Global Climate Change under the Clean Air Act).

235. Notice of Denial, *supra* note 230.

236. *Supra* notes 163–168 and accompanying text.

237. Notice of Denial, *supra* note 230, at 52,925–26.

238. 42 U.S.C. § 7403(g) encourages EPA research into the effects of CO₂; 42 U.S.C. § 7671a(e) requires that the EPA determine the “global warming potential” of various chemicals addressed in Title VI, which generally aims to protect the stratospheric ozone layer—a quite distinct goal from combating global warming. The provision in Title VI explicitly states that it is not to be used as the basis for additional regulation.

239. Notice of Denial, *supra* note 230, at 52,928.

pecially so given various mismatches between the CAA's locally-oriented structure and the global nature of climate change.²⁴⁰

Much like opponents of applying the FDCA to tobacco, the EPA also cited other relevant government efforts to effectively regulate GHGs already underway under other authorities. Noting Congress's various efforts to spur GHG research,²⁴¹ the United States' participation in the first UNFCCC,²⁴² as well as assorted failed attempts to legislate more ambitious policies,²⁴³ the EPA argued that "this backdrop of consistent congressional action to learn more about the global climate change issue before specifically authorizing regulation to address it" made it clear that EPA was not permitted to simply cover GHG emissions under the CAA by a change in interpretation.²⁴⁴ Relatedly, the EPA pointed to the likely redundancy of regulating automobile CO₂ emissions given already existing fuel economy standards enforced by the Department of Transportation.²⁴⁵ The EPA argued that the totality of these actions demonstrated Congress's ability to sensibly steer the development of climate change policymaking, just as Congress had addressed tobacco policy.²⁴⁶ As the Supreme Court majority would later summarize, "In essence, EPA concluded that climate change was so important that unless Congress spoke with exacting specificity, it could not have meant the Agency to address it"—any literalistic argument from the statutory text notwithstanding.²⁴⁷

Next, the EPA insisted upon its own ability to interpret the CAA for itself and claimed that its judgments should receive deference. Even if one were to find that the CAA could cover CO₂, they explained, § 202(a)(1) provides discretionary authority to the Administrator rather than creating a mandatory duty through use of the phrase "in his judgment."²⁴⁸ Because the Administrator had never exercised such judgment, and might find that regulation under the CAA was imprudent for any number of reasons, the petitioners' attempt to force the agency to adopt the novel reading should be rejected.²⁴⁹ The agency further justified a wait-and-see posture by reiterating the presence of continued scientific uncertainty about the causes and conse-

240. *Id.* at 52,927.

241. *Id.* at 52,927–28.

242. *Id.* at 52,928.

243. *Id.*

244. *Id.* at 52,926, 52,928.

245. *Id.* at 52,929.

246. *Id.* at 52,928.

247. *Massachusetts v. EPA*, 549 U.S. 497, 512 (2007).

248. 42 U.S.C. § 7521(a)(1) (2012).

249. Notice of Denial, *supra* note 230, at 52,929–30.

quences of global warming.²⁵⁰ The EPA was essentially arguing that if their old law was going to learn a new trick, they should be the ones to decide that.²⁵¹

Finally, the EPA concluded its notice with a rather peculiar apologetics explaining how an absence of EPA action would not be equivalent to a lack of any administrative action targeted at climate change issues. Pointing to a number of speeches and voluntary initiatives advanced by President Bush, as well as continuing non-regulatory actions being taken by the federal government, the agency seems to have been hoping to reassure those onlookers most worried about global warming that adequate tools already existed to meaningfully address the problem.²⁵² This is telling; rather than simply insisting that the problem was a legislative one, capable of being addressed only through congressional action, the EPA framed the problem here as susceptible to a change in enforcement strategies given already existing powers. If its arguments about congressional actions regarding global warming were found unconvincing, judges might satisfy themselves with knowing that some kinds of executive action on the issue were underway and thus reject the interpretive framing of the problem *vis-à-vis* the CAA that the petitioners were offering.

C. Judicial Reactions

The D.C. Circuit was the first to review EPA's denial of the petition, and the three-judge panel fractured on the question of whether the matter was properly before the court, with Judge Sentelle arguing for dismissal of the petitions.²⁵³ The judges on the D.C. Circuit panel also disagreed on the merits, with Judge Randolph basically accepting the EPA's arguments about deference²⁵⁴ and Judge Tatel accepting the petitioners' arguments about the CAA's requirements.²⁵⁵ The three judges produced three separate opinions, with Judge Randolph's serv-

250. Notice of Denial, *supra* note 230, at 52,930–32. It should be noted that, in making the case for patience, the EPA did not take the hardest line against applying the CAA to global warming possible. That is, the agency did not argue that there could be no changes in the scientific understanding of climate change sufficient to justify applying the CAA to the issue, only that such an understanding did not currently exist. *See id.*

251. Of course, for those who believed the agency was in dereliction of its already existing statutory duties and that the public was suffering as a result, this argument would seem arrogant and unconvincing. *See, e.g.,* Lisa Heinzerling, *Climate Change, Human Health, and the Post-Cautionary Principle*, 96 GEO. L.J. 445 (2008).

252. Notice of Denial, *supra* note 230, at 52,932–34.

253. *Massachusetts v. EPA*, 415 F.3d 50 (D.C. Cir. 2005).

254. *Id.* at 58.

255. *Id.* at 62.

ing as the majority because of Sentelle's concurrence in the denial of the petitions, which he justified as reaching the consequence most similar to his own judgment of dismissal.²⁵⁶

Given the importance of the issue and the lack of agreement among the D.C. Circuit judges, it was no surprise when the Supreme Court granted cert. The Supreme Court's decision in April 2007 would also prove fractured on both standing and the merits—but their split at least had the property of producing a tidy majority.²⁵⁷ The split was nearly identical to that in *Brown & Williamson*: Justice Stevens wrote for the dissenters in that case plus Justice Kennedy, while this time the court's conservatives (Scalia, Thomas, and now Roberts and Alito) dissented with two opinions: Justice Roberts writing that the plaintiffs' standing should never have been recognized,²⁵⁸ and Justice Scalia writing that even given standing, the plaintiffs should have lost on the merits.²⁵⁹ Examining each opinion illuminates why old law, new trick prevailed in the case of regulating greenhouse gases under the CAA where it fell short in regulating tobacco under the FDCA.²⁶⁰

After determining that petitioners had standing,²⁶¹ the majority's opinion closely follows the dissent from *Brown & Williamson* in its defense of reading statutes broadly. Once again, against claims that the old law in question had not been intended to deal with the new trick now contemplated, the Court's liberals insisted that it was Congress's prerogative to create flexible statutory instruments that could be adapted to changing information.

While the Congresses that drafted § 202(a)(1) might not have appreciated the possibility that burning fossil fuels could lead to global warming, they did understand that without regulatory flexibility, changing circumstances and scientific developments would soon render the Clean Air Act obsolete. The broad language of § 202(a)(1)

256. *Id.* at 60–62.

257. *Massachusetts*, 549 U.S. 497 (2007).

258. *Id.* at 535.

259. *Id.* at 549.

260. An obvious thought here, which goes a long way toward deflating this article's pretensions, is that the most salient thing we can say changed from *Brown & Williamson* to *Massachusetts v. EPA* is that Justice Kennedy changed his vote. Since Justice Kennedy did not author an opinion in either case, I do not hazard any guesses about his exact thinking. Rather, I provide what I believe is the best principled reason for treating the two cases differently by emphasizing the institutional contexts of the two cases. *Contra* Moncrieff, *supra* note 4, at 595 (“There is . . . no coherent story about the legal and political circumstances underlying *Massachusetts* and *Brown & Williamson* that would reconcile the two holdings”).

261. *Massachusetts*, 549 U.S. at 520–26.

reflects an intentional effort to confer the flexibility necessary to forestall such obsolescence.²⁶²

The CAA, like the FDCA, could be read as creating a broad charter for its administering agency, making a lack of specific intentionality on the part of the enacting legislators quite irrelevant.

Justice Stevens' majority opinion resembles the *Brown & Williamson* majority opinion in a different and revealing way: it finds that the statutory language is clearly incompatible with the agency's action, in spite of the dissent's professions of ambiguity.²⁶³ Like Justice O'Connor in the earlier case, Justice Stevens is quite insistent about just how decisive the statutory text is, saying that the court has "little trouble" finding that "[t]he statutory text forecloses EPA's reading."²⁶⁴ The definition of "air pollutant" found in § 302(g), he explained, "unambiguous[ly]" "embraces all airborne compounds of whatever stripe," leaving no valid room for doubting that CO₂ should come under the statute's regulatory power.²⁶⁵ Given this finding of clear applicability, the majority argues that the statute itself refutes the EPA's argument that it retains discretion not to regulate; the reliance in § 202(a)(1) on administrative "judgment" must be limited to the question of whether a threat is posed, rather than giving the administrator "a roving license to ignore the statutory text."²⁶⁶

The majority also comes face to face with the *Brown & Williamson* majority and its extensive discussion of post-enactment legislative history. Stevens adamantly rejects the EPA's argument that, just as many congressional enactments had regulated tobacco and thus rendered an old law, new trick interpretation of the older FDCA problematic, so too had congressional enactments after the passage of the CAA shown that it was never intended to address global warming.²⁶⁷ These other attempts to promote "collaboration and research" could only be understood as "complements" to strong regulatory action, Ste-

262. *Id.* at 532.

263. *Id.* at 528 n.26 (discussing the dissent's claim that the statute's ambiguity should have received *Chevron* deference).

264. *Id.* at 528.

265. *Id.* at 529.

266. *Id.* at 533. Note that by being so entirely dismissive of any possibility of statutory ambiguity, the majority could ignore the idea that the statute would need to be absolutely explicit to justify undertaking such an economically consequential program of regulation. The majority thus failed to endorse the reading of *Brown & Williamson* that would have boiled its precedential value down to "in the case of very important policy matters, err on the side of executive branch restraint."

267. *Id.* at 529–31.

vens argued, not conflicting substitutes.²⁶⁸ The “unbroken series of congressional enactments” that arguably implicitly prohibited the FDA from exercising jurisdiction in *Brown & Williamson* had no real parallel in the case of GHG regulation.²⁶⁹

The Scalia dissent (joined by all four dissenters) takes issue with the majority’s conclusions at nearly every juncture. (Chief Justice Roberts’ dissent, also joined by all the dissenters, would have rejected standing and thus avoided reviewing the EPA’s interpretation.)²⁷⁰ Scalia’s dissent expresses disbelief in the court’s ability to find so much clarity in the statute that the EPA’s judgment should be rejected as contrary to the law. First, Scalia insists that nothing in the statute would compel the Administrator to make a judgment simply because a petition had been filed requesting he do so; instead, he would accept as compelling the reasons offered by the EPA establishing that prudence dictated delaying a final judgment as the other policy responses they described proceeded.²⁷¹ Scalia then excoriates the majority for its conclusion that the CAA’s definition of “air pollutant” in § 302(g) necessarily includes CO₂ and other GHGs.²⁷² He points out that the definition includes a substance only if it is an “air pollution agent,” a term which the act does not define.²⁷³ Given this crucial ambiguity, the agency’s reasonable interpretation, which states that there is ongoing uncertainty as to whether GHGs really do constitute harmful pollution akin to lung-choking industrial emissions, ought to be given *Chevron* deference.²⁷⁴

D. Responding to the Supreme Court’s Ruling

The majority’s holding did not explicitly decide any regulatory questions for the EPA; rather, the Court required that EPA must directly confront the issue of regulating GHGs under § 202 and “ground its reasons for action or inaction in the statute.”²⁷⁵ The Bush administration began moving toward an endangerment finding for § 202, pub-

268. *Id.* at 530. For a similar argument responding to the EPA’s citation of *Brown & Williamson*, see Christopher J. Baird, *Trapped in the Greenhouse? Regulating Carbon Dioxide after Brown & Williamson Tobacco Corp.*, 54 DUKE L. J. 147 (2004).
269. *Massachusetts*, 549 U.S. at 531.

270. *Id.* at 546–49.

271. *Id.* at 549–54.

272. *Id.* at 555–57.

273. *Id.* at 557–58.

274. *Id.* at 559–60. Scalia points out that the question of whether a substance is actually an “air pollution agent” is crucial to making sense of the definition, which otherwise would include “everything airborne, from Frisbees to flatulence.” *Id.* at 558.

275. *Id.* at 534–35.

lishing an Advance Notice of Proposed Rulemaking (ANPR) in July 2008 and thereby setting the regulatory process in motion.²⁷⁶ This notice showed that the Bush administration was taking the Court's demand seriously as it ran to 167 pages in the Federal Register.²⁷⁷ At the same time, it shows that the agency was moving rather tentatively in determining exactly what complying with the Court's mandate would entail. The published notice includes letters from Susan Dudley, then Administrator of the Office of Information and Regulatory Affairs, as well as from the Secretaries of Agriculture, Commerce, Energy, and Transportation, all of whom expressed serious reservations about regulating GHGs under the CAA.²⁷⁸ The ANPR solicited comments from the public regarding ways of meeting their concerns while also satisfying the Court's mandate.²⁷⁹ Faced with these difficulties, the Bush administration left office without further action.

When one begins to delve into the statutory details of the CAA, the embarrassments caused by having to regulate CO₂ as an "air pollutant" are serious enough to make the EPA's delay understandable. The implications of making an endangerment finding under § 202 are legion. Once GHGs have been designated as an air pollutant under the definition in § 302(g), it seems nearly impossible to offer a principled justification for failing to regulate industrial emissions. Specifically, it seems that EPA should have to create new source performance standards (NSPS) under § 111(b)(1)(A), which requires regulation of new sources (meaning new or modified plants) in any category which "causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare."²⁸⁰ Additionally, it seems hard to justify not listing GHGs as a "criteria" air pollutant under § 108(a)(1), which requires inclusion of every air pollutant whose presence in the ambient air "may reasonably be anticipated to endanger public health or welfare."²⁸¹ Such a listing would trigger a host of other statutory requirements. Most importantly, it would require the EPA to set both primary and secondary National Ambient Air Quality Standard (NAAQS) for GHGs under § 109 based on a judgment of what concentrations of GHGs in the atmosphere would be "requisite to protect the public health" (for primary) and "requisite to protect the public welfare from any known or anticipated

276. Advance Notice of Proposed Rulemaking, Regulating Greenhouse Gas Emissions Under the Clean Air Act, 73 Fed. Reg. 44,354 (Jul. 30, 2008).

277. 73 Fed. Reg. 44,354–520.

278. *Id.* at 44,356–61.

279. *Id.* at 44,354–55.

280. 42 U.S.C. § 7411(b)(1)(A) (2006).

281. 42 U.S.C. § 7408(a)(1).

adverse effects associated with the presence of such air pollutant in the ambient air” (for secondary).²⁸² That standard having been set, it would trigger a requirement for states to devise state implementation plans (SIPs) capable of bringing their local concentrations of GHGs into compliance with the NAAQS.²⁸³

This statutory design is intended to force state and local governments to take actions to mitigate localized issues with breathable air, and threatens to create an absurd and impossible set of requirements when applied to the global problem of rising GHG concentrations. If the EPA set the NAAQS at any concentration lower than the prevailing worldwide concentration of GHGs, then the CAA’s literal requirements would require states to adopt a series of increasingly draconian measures to reduce their GHG emissions—which is to say, to reduce their industrial activities and energy consumption toward zero.²⁸⁴ In addition, best-technology standards would be required for nearly every new industrial source under § 111²⁸⁵ and related language in § 165,²⁸⁶ and the permitting requirements of Title V would extend this requirement to all “major” sources (defined as emitting more than 250 tons per year and 100 tons per year of the regulated pollutant, respectively for each section).²⁸⁷ For CO₂, this would include some 82,000 sources for § 165,²⁸⁸ and approximately six million sources (including many residential and commercial buildings) for Title V.²⁸⁹ Such an inclusive scope of regulation would utterly swamp the EPA’s administrative capacity.²⁹⁰

The EPA under President Obama has done its best to work through these many problems and deliver functioning regulation, but

282. 42 U.S.C. § 7409(b)(1)–(2).

283. 42 U.S.C. § 7410.

284. See Arnold Reitze, Jr., *Federal Control of Carbon Dioxide Emissions: What are the Options?*, 36 B.C. ENVTL. AFF. L. REV. 1, 3–6 (2009). Of course, if the standard was set below prevailing concentrations, that would imply that all states were in compliance, thereby requiring no further action and defeating the purpose of the standard-setting.

285. 42 U.S.C. § 7411.

286. 42 U.S.C. § 7475.

287. 42 U.S.C. §§ 7661–7661f.

288. U.S. ENVTL. PROT. AGENCY, OPERATING PERMITS BURDEN REDUCTIONS 2 (2010), available at <http://www.epa.gov/NSR/documents/20100413piecharts.pdf> (PSD Permitting Burden Reductions with and without the Tailoring Rule).

289. *Id.* at 1 (Operating Permits Burden Reductions with and without the Tailoring Rule).

290. See Jonathan H. Adler, *Heat Expands All Things: The Proliferation of Greenhouse Gas Regulation Under the Obama Administration* 12–16 (Case Research Paper Series in Legal Studies, Working Paper 2011-4, 2011), available at <http://ssrn.com/abstract=1783664>.

at every stage its choices have been met with litigated challenges.²⁹¹ The EPA proposed its § 202 endangerment finding in April 2009²⁹² and finalized the rule in December of that year.²⁹³ A gaggle of dissatisfied industrial firms and trade groups, joined by a number of sympathetic states, quickly submitted petitions for agency review, which the EPA denied,²⁹⁴ leading to litigation.²⁹⁵ The petitioners challenged the adequacy of the science behind EPA's endangerment finding.²⁹⁶ When the EPA followed with substantive regulation under § 202,²⁹⁷ it was also rapidly followed by litigation.²⁹⁸

Several of EPA's other decisions were perhaps more vulnerable to challenges. In the so-called Timing Rule, the EPA proposed to reinterpret several sections of the act, including § 165 and its "prevention of significant deterioration" requirement, such that CO₂ would be covered even if EPA did not issue a NAAQS for CO₂ under §§ 108 and 109.²⁹⁹ Industry petitioners challenged this rule, claiming that EPA has inappropriately concluded CO₂ is "regulated" for the purposes of

291. The following discussion is drawn in large part from Gregory Wannier, *EPA's Impending Greenhouse Gas Regulations: Digging Through the Morass of Litigation* (Columbia Law School Center for Climate Change Law, White Paper, 2010), available at https://www.law.columbia.edu/null/download?&exclusive=filemgr.download&file_id=542157/.

292. Proposed Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 18,886 (proposed Apr. 24, 2009) (to be codified at 40 C.F.R. ch. 1).

293. Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, Final Rule, 74 Fed. Reg. 66,496 (Dec. 15, 2009) (to be codified at 40 C.F.R. ch. 1). Apparently, Administrator Jackson believed that the Supreme Court's mandate in *Massachusetts v. EPA* straightforwardly obligated the EPA to make the endangerment finding. See Adler, *supra* note 290, at 8 n.27.

294. Denial of the Petitions to Reconsider the Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 75 Fed. Reg. 49,556 (Aug. 13, 2010) (to be codified at 40 C.F.R. ch. 1).

295. The cases were consolidated as *Coalition for Responsible Regulation v. EPA*, 684 F.3d 102 (D.C. Cir. 2012) (No. 09-1322).

296. See Adler, *supra* note 290, at 9; Wannier, *supra* note 291, at 3.

297. Proposed Rulemaking To Establish Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 74 Fed. Reg. 49,454 (proposed Sept. 28, 2009) (to be codified at 40 C.F.R. pts. 86, 600; 49 C.F.R. pts. 531, 533, 537, 538); Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 75 Fed. Reg. 25,323 (May 7, 2010) (to be codified at 40 C.F.R. pts. 85, 86, 600; 49 C.F.R. pts. 531, 533, 536-38).

298. These cases are also consolidated under the case name of *Coalition for Responsible Regulation v. EPA*, 684 F.3d 102 (D.C. Cir. 2012) (No. 10-1092).

299. Prevention of Significant Deterioration (PSD): Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by the Federal PSD Permit Program, 74 Fed. Reg. 51,535 (proposed Oct. 7, 2009) (to be codified at 40 C.F.R. pt. 52); Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs, 75 Fed. Reg. 17,004 (Apr. 2, 2010) (codified at 40 C.F.R. pts. 50, 51, 70, 71).

the whole act as a result of its activities under § 202, and that an absurd system would result if EPA is allowed to use § 165 to control GHG emissions.³⁰⁰

Finally, confronting those purported absurdities directly, the EPA issued the so-called Tailoring Rule, which sought to tailor the CAA's statutory requirements to the needs of sensible GHG regulation.³⁰¹ To do this, the EPA forthrightly says that it will ignore certain statutory requirements and adjust statutory thresholds for applicability based on the doctrine that an agency should avoid absurd results,³⁰² the doctrine that agencies may act out of "administrative necessity,"³⁰³ and a general appeal to broad discretionary powers entrusted to the agency under the CAA, especially by its "necessary and proper"-clause-equivalent in § 301(a).³⁰⁴ Challenges to this rule emphasized that EPA's actions do not simply massage some minor procedural points—they run directly counter to the Act's explicit text as well as its intent.³⁰⁵ They argued that the agency's legal improvisation in trying to use the CAA to regulate GHGs shows how fundamentally ill-suited it is to that task and asked that the agency's rules be invalidated.³⁰⁶

The D.C. Circuit resolved all of these questions in EPA's favor, at least temporarily, on June 26, 2012 in *Coalition for Responsible Regulation v. EPA*.³⁰⁷ A per curiam opinion by Judges Sentelle, Rog-

300. See Wannier, *supra* note 291, at 14. The consolidated case is *Coalition for Responsible Regulation v. EPA*, 684 F.3d 102 (D.C. Cir. 2012) (No. 10-1131).

301. Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 74 Fed. Reg. 55,292 (proposed Oct. 27, 2009) (to be codified at 40 C.F.R. pts. 51, 52, 70, 71); Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514 (June 3, 2010) (to be codified at 40 C.F.R. pts. 51, 52, 70, 71).

302. *Id.* at 31,542–43.

303. *Id.* at 31,543–44.

304. 75 Fed. Reg. 31,516 ("EPA also has authority for this Tailoring Rule under CAA section 301(a)(1)"). Section 301(a)(1), codified at 42 U.S.C. § 7601(a)(1), reads in full:

The Administrator is authorized to prescribe such regulations as are necessary to carry out his functions under this Act. The Administrator may delegate to any officer or employee of the Environmental Protection Agency such of his powers and duties under this Act, except the making of regulations subject to section 307(d), as he may deem necessary or expedient.

305. Joint Opening Brief of Non-State Petitioners and Supporting Intervenors at 9–11, 15–17, *Coal. for Responsible Regulation v. EPA*, 684 F.3d 102, 102 (D.C. Cir. 2012), (docket 10-1073), available at http://www.nam.org/~media/8E6135120977443DB9E2F3185A779796/NAM_Industry_Brief_in_Coalition_for_Responsible_Regulation_Inc_v_EPA.pdf.

306. *Id.* at 18–20, 40–41. Cases are consolidated with the challenges to the Timing Rule, *supra* note 299.

307. *Coal. for Responsible Regulation*, 684 F.3d 102 (D.C. Cir. 2012).

ers, and Tatel strongly rejected the challenges to the endangerment finding, ratifying the EPA's scientific approach to determining that GHGs pose a threat.³⁰⁸ In similarly emphatic terms, they rejected the challenge to the regulation under § 202, concluding that the EPA was simply following through on the requirements of *Massachusetts v. EPA*.³⁰⁹ The court was little more sympathetic to challenges to EPA's application of § 165, deciding that GHGs are now unambiguously regulated pollutants under all parts of the CAA.³¹⁰ Finally, the court refused to address the merits of the challengers' strongest claims, finding that petitioners lacked standing to challenge the Timing and Tailoring rules because they could show no injury-in-fact.³¹¹ The court considered the idea that EPA's moderation of the law's effects deprived petitioners of a golden opportunity to demand congressional intervention, but ultimately deemed this harm too speculative to justify standing.³¹² A petition for rehearing en banc was denied in December 2012, though two vigorous dissents from denial show that the legal difficulties with applying the Clean Air Act to GHG emissions are far from permanently settled.³¹³

On other fronts, the EPA has not been quick enough to satisfy environmentalists (and their state allies) hoping to see the promise of *Massachusetts v. EPA* realized.³¹⁴ After suing the EPA to force action under § 111, various groups entered into settlements outlining timetables for EPA regulation of power plants and oil refineries.³¹⁵ The EPA missed agreed-upon deadlines for both power plants³¹⁶ and refin-

308. *Id.* at 117–19.

309. *Id.* at 121–22.

310. *Id.* at 136.

311. *Id.* at 146.

312. *Id.* at 147–48.

313. *Coal. for Responsible Regulation, Inc. v. E.P.A.*, No. 09-1322, 2012 WL 6621785 (D.C. Cir. Dec. 20, 2012). The dissents were from Judge Janice Rogers Brown, who explicitly challenges the Supreme Court's judgment in *Massachusetts v. EPA* and suggests that the Endangerment finding itself was inconsistent with the statute, and Judge Brett Kavanaugh, who questioned EPA's application of PSD standards to GHGs.

314. For a fuller summary of recent disputes over government responsibility for climate change, see ROBERT MELTZ, CONGRESSIONAL RESEARCH SERVICE, CLIMATE CHANGE AND EXISTING LAW: A SURVEY OF LEGAL ISSUES PAST, PRESENT, AND FUTURE (2012), available at <http://www.hsdl.org/?view&did=718675>.

315. See *Settlement Agreement*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/airquality/cps/settlement.html> (last updated Mar. 27, 2012).

316. John M. Broder, *Greenhouse Gas Rule Delayed*, N.Y. TIMES GREEN BLOG (Sep. 15, 2011, 12:04 PM), <http://green.blogs.nytimes.com/2011/09/15/greenhouse-gas-rule-delayed/>.

eries,³¹⁷ which the agency insisted was due to the complexity of the rules being formulated rather than because of any political considerations.³¹⁸ Presumably, the difficulties of applying the CAA's rules to CO₂ play a large part. On April 13, 2012, the EPA proposed a rule for power plants;³¹⁹ but this rule was not finalized even as another settlement-imposed deadline passed in April 2013, and will apparently be re-proposed in a new form in September 2013.³²⁰ Finally, the EPA is also likely to face challenges from the most vehement environmentalists, who insist that it should formally list GHGs as criterion pollutants under § 108, issue NAAQS under § 109, and finally require SIPs under § 110. Apparently, the Center for Biological Diversity is committed to this position, despite the many apparent difficulties it poses.³²¹

In the process of actually executing its old law, new trick with the CAA and greenhouse gases, it has been tough going for the EPA. All the while, its efforts have engendered significant enmity from industry and their allies on the political right, who have decried the new regulations as hindrances to an already struggling economy that are likely to produce little benefit.³²² A divided Congress, meanwhile, has failed to produce any legislation resolving the developing difficulties in one way or another. While passing a cap-and-trade bill that would have created a comprehensive regulatory system for GHGs, complete with emission credit trading markets, was an early priority of the Obama administration, in the end it floundered in the Senate as other matters (especially healthcare) won out.³²³ Since the Republican takeover of

317. Timothy Gardner, *EPA Delays Carbon Limits on Oil Refineries*, REUTERS (Nov. 21, 2011, 3:20 PM), <http://www.reuters.com/article/2011/11/21/us-usa-epa-carbon-idUSTRE7AK1H520111121>.

318. *Id.* (quoting an EPA spokesperson who cites difficulties in formulating policy as the source of delay).

319. Standards of Performance for Greenhouse Gas Emissions for New Stationary Sources: Electric Utility Generating Units, 77 Fed. Reg. 22,392 (April 13, 2012).

320. Juliet Eilperin, *It's Official: EPA Delays Climate Rule for New Power Plants*, WASH. POST POST POLITICS BLOG (Apr. 12, 2013, 4:17 PM), <http://www.washingtonpost.com/blogs/post-politics/wp/2013/04/12/its-official-epa-delays-climate-rule-for-new-power-plants/>.

321. See Adler, *supra* note 290, at 21.

322. For an early and well-informed such criticism, see, e.g., Steven F. Hayward, *The EPA's Power Grab*, WKLY. STANDARD Dec. 28, 2009, available at <http://www.aei.org/article/energy-and-the-environment/climate-change/the-epas-power-grab/>.

More heated versions of the argument abound.

323. *House Reaches Milestone with Cap-and-Trade Climate Change Bill*, 65 CQ ALMANAC 10-3-10-7 (2009), available at <http://library.cqpress.com/cqalmanac/cqal09-1183-59541-2251356>; Ryan Lizza, *As the World Burns*, NEW YORKER (Oct. 10, 2010), available at http://www.newyorker.com/reporting/2010/10/11/101011fa_fact_lizza?currentPage=all (providing a detailed account of the demise of the cap-and-trade

the House of Representatives in the 2010 midterm elections, there has been a flurry of activity in that chamber designed to explicitly strip the EPA of any power to regulate GHGs.³²⁴ Though many of these actions have won House majorities, none has had much traction in the Democrat-controlled Senate.

E. Analysis

What does the successful effort to force the EPA to apply the CAA to global warming teach us about the dynamics of old law, new trick? As discussed above,³²⁵ the impetus for advancing a novel interpretation came because of how various actors were situated institutionally rather than out of any belief that applying the old statute to the problem at hand was the first-best policy solution. Increasingly alarmed by the problem of global warming, environmentalists would have been quite happy to see Congress pass new, well-tailored legislation of some kind. Failing that, they were not content to settle for inaction when existing statutory language presented them some leverage to force the government's hand by insisting the problem could be treated as an interpretive one.

Why did the Supreme Court ultimately accept this push for the new trick, where less than a decade before they had denied an effort that had the added benefit of an agency's backing?³²⁶ Like the *Brown & Williamson* majority, the majority in *Massachusetts v. EPA* found that the broadly worded regulatory statute was nevertheless clear enough to foreclose the agency's favored interpretation.³²⁷ As in the tobacco case, the dissent seems to have the stronger case in arguing that the statute was genuinely ambiguous. Justice Scalia's dissent powerfully assaults the idea that the definitional language of § 302(g) of the CAA self-evidently includes CO₂ and other GHGs. Like Justice O'Connor's *Brown & Williamson* majority opinion, he can accuse the other side of "literalism" in the face of a great deal of evidence from

bill, including the way that the animosities created by the healthcare debate doomed cross-party coalition-building in the Senate).

324. For an exhaustive, if rhetorically loaded, presentation of anti-EPA legislative activity in the 112th House, see the Energy and Commerce committee's Democratic minority website, *Legislative Database: The Most Anti-Environment House in History*, COMM. ON ENERGY & COMMERCE DEMOCRATS (last updated Nov. 14, 2012), <http://democrats.energycommerce.house.gov/index.php?q=news/legislative-database-the-most-anti-environment-house-in-history>.

325. *Supra* note 232 and accompanying text.

326. Undoubtedly, some reader is here thinking, "Only Justice Kennedy can know for sure." See *supra*, note 260.

327. *Supra* notes 165–172 and accompanying text.

the structure of the act pushing in the other direction.³²⁸ Once again, however, the awkwardness of fitting the existing statute to the problem seems to be insufficient in itself to resolve the issue.

The clearest point of commonality between the two majorities is the analysis of the institutional context in which the new trick was being advanced. The *Massachusetts v. EPA* majority explicitly considered whether other congressional enactments made a change in interpretation unreasonably disruptive, as it had in the case of tobacco regulation, and they concluded that they did not.³²⁹ Where opponents of regulating tobacco under the FDCA could point to a number of powerful regulations already governing the market in tobacco, the best that opponents of applying the CAA to global warming could muster were a few scattered efforts to promote research on the issue. While the tobacco regulations could certainly be criticized as inadequate, global warming regulations could plausibly be portrayed as non-existent, creating a vacuum that a novel interpretation of the CAA could potentially fill.

The existence of this vacuum is certainly contestable—and indeed the Chief Justice’s dissent does directly contest it, giving much greater weight to congressional and presidential deliberations that had not yet produced any actions.³³⁰ It is telling that the Court’s conservatives join this issue directly, rather than simply conceding the institutional point but still insisting upon the constitutional procedures of bicameralism and presentment. The opening paragraphs of Chief Justice Roberts’ dissent are especially relevant: he begins by conceding the potential gravity of global warming, but insists, contra the majority, that “[i]t is not a problem, however, that has escaped the attention of policymakers in the Executive and Legislative Branches of our Government, who continue to consider regulatory, legislative, and treaty-based means of addressing global climate change.”³³¹ The argument that Congress was on the job is certainly not wholly implausible. Between 1999 and 2007, Congress introduced more than 200 bills to

328. *Supra* note 165 and accompanying text.

329. *Supra* notes 267–269 and accompanying text.

330. Moncrieff, *supra* note 4, also argues that Congress and the Executive branch were actively addressing the issue of global warming prior to the Court’s decision, and on that basis argues that the Court’s holding was misguided and disruptive. She ultimately reaches a conclusion similar to this article’s: “Perhaps the greatest challenge for a reincarnated noninterference rule is to develop a standard for distinguishing serious congressional deliberation from strategic congressional posturing.” *Id.* at 642.

331. *Massachusetts v. E.P.A.*, 549 U.S. 497, 535 (2007).

regulate GHGs, though none were enacted.³³² Sustaining this line of argument is made more difficult, though, by EPA's pointing to a whole host of unilateral executive actions being taken by President Bush as it defended its decision not to apply the CAA.³³³ Apparently, by late 2006 and early 2007, when the Supreme Court decided the case, five justices were prepared to accept the idea that old law, new trick was better than the alternative combination of smaller-scale executive branch action and legislative inaction.³³⁴

332. See Reitze, *supra* note 284, at 1.

333. See *supra* note 252 and accompanying text.

334. A useful contrast can be drawn with another even more ambitious attempt by environmentalists to regulate GHGs through an "old law, new trick" maneuver. As the CAA battle was being waged, the Center for Biological Diversity (and other environmental groups) argued that in order to protect polar bears from extinction, the Fish and Wildlife Service (FWS) (part of the Interior Department) must promulgate regulations under the Endangered Species Act (ESA) to protect their habitat from the ravages of global warming, which requires nothing less than complete regulation of GHG emissions. KASSIE SIEGEL & BRENDAN CUMMINGS, CTR. FOR BIOLOGICAL DIVERSITY, PETITION TO LIST THE POLAR BEAR (*URSUS MARITIMUS*) AS A THREATENED SPECIES UNDER THE ENDANGERED SPECIES ACT (2005), available at http://www.biologicdiversity.org/species/mammals/polar_bear/pdfs/15976_7338.pdf. Although the FWS under President Bush would eventually agree to list the polar bear as a threatened species, Determination of Threatened Status for the Polar Bear, 73 Fed. Reg. 28,212 (May 15, 2008), it also issued a Special Rule for the Polar Bear, 73 Fed. Reg. 76,249 (Dec. 16, 2008), which outlined protective measures to be taken that did not include regulation of GHG emissions. The Center for Biological Diversity sued to force such regulations after President Obama's Interior Secretary, Ken Salazar, affirmed the previous administration's choice. See Jim Tankersley, *Warming Rules Won't Change for Polar Bears*, L.A. TIMES, May 9, 2009, at A20. The litigation led to a recent decision, *In re Polar Bear Endangered Species Act Listing and § 4(d) Rule Litigation*, 818 F. Supp. 2d 214 (D.D.C. 2011), in which District Court Judge Emmet G. Sullivan found that the Interior Department's interpretations of the ESA were permissible, granting summary judgment on those points (the Judge did grant environmentalists a lesser victory by finding that the FWS erred by failing to prepare a full environmental impact statement under the National Environmental Protection Act).

In this case, unlike the case of the CAA, the statute at issue would neither give the agency guidance in how to control emissions nor set any clear limits on the scope of regulations permitted (or required) under its auspices. It is also impossible to draw a tight causal connection between a particular source's emissions and identifiable damage to polar bear habitat, *In re Polar Bear*, 818 F. Supp. 2d. at 231. These factors alone were apparently sufficient to doom the challenge to the FWS interpretation of the ESA, as Judge Sullivan's opinion is confined entirely to considering the propriety of the agency's interpretation given its statutory requirements. Considering institutional competencies can also provide a strong reason for rejecting their challenge, though. The FWS has no expertise in regulating ambient levels of atmospheric compounds comparable to that of the EPA, but just as importantly this attempt to have an old law perform a new trick came in the shadow of the already successful old law, new trick campaign that culminated in *Massachusetts v. EPA*. Given the ongoing development of a regulatory system covering GHG emissions under the CAA, it would seem to be superfluous (and possibly quite confusing) to ask for a parallel regime of regulation to be built upon the ESA.

How does the series of legal controversies sparked by this choice reflect on the Supreme Court's decision? Opinions vary, no doubt. Arguably, something is better than nothing. Institutionally speaking, it is not clear that it is appropriate to hold the Supreme Court responsible for the burgeoning legal difficulties in trying to apply the act, since at every moment Congress has had the power to set things straight one way or another. Indeed, politically speaking, "Congress will have to do *something* now, or else burdensome CAA regulation will follow" was one of the most politically effective arguments used to support the Waxman-Markey cap-and-trade bill that received House approval in 2009 but failed to win Senate approval.³³⁵ As of this writing six years after *Massachusetts v. EPA*, legislative recalibration has yet to arrive, and does not appear to be imminent.³³⁶ A political bargain remains to be made, but in the meantime the United States' GHG emissions policy becomes ever more tangled.³³⁷

CONCLUSION

Although I have argued that a single coherent logic can support the holdings in *Brown & Williamson* and *Massachusetts v. EPA*, there is certainly the temptation to read the two cases' divergent aftermaths as figures in a cautionary tale against accepting old law, new trick maneuvers. Although anti-tobacco activists were undoubtedly disappointed by the result in *Brown & Williamson*, it enabled them to proceed without any illusions that existing statutes provided a sufficient statutory resource for addressing their issue. Although a durable com-

335. H.R. 2454, 111th Cong. (2009), available at <http://thomas.loc.gov/cgi-bin/query/z?c111:H.R.2454.EH:/>. Title VIII, Part C of the bill would have removed EPA jurisdiction of GHG emissions from stationary sources, though the EPA could still regulate mobile source emissions. See *id.* Phil Barnett, Congressman Waxman's top aide in the Energy and Commerce Committee, confirms that support for the bill was significantly bolstered by the sense that impending CAA regulation would be problematic. Interview with Phil Barnett in Princeton, N.J. (Apr. 4, 2012). Some have questioned whether the "threat" of CAA regulation would effectively force Congress to act. See, e.g., Robert Stavins, *The Real Options for U.S. Climate Policy*, ROBERT-STAVINSBLOG.ORG (June 23, 2010), <http://www.robertstavinsblog.org/2010/06/23/the-real-options-for-u-s-climate-policy/> ("[I]t is reasonable to ask whether this is a credible threat, or will instead turn out to be counter-productive (when stories about the implementation of inflexible, high-cost regulatory approaches lend ammunition to the staunchest opponents of climate policy).").

336. Alternatively, one can imagine how the sense that "something is happening" could lessen the impetus for compromise on new action in Congress, but there seems to be little evidence that this effect has occurred in the case of greenhouse gases.

337. For a more thorough look at the current situation, see PHILIP A. WALLACH, BROOKINGS INSTITUTION, U.S. REGULATION OF GREENHOUSE GAS EMISSIONS (2012), available at <http://www.brookings.edu/~media/Research/Files/Papers/2012/10/26%20climate%20change%20wallach/26%20climate%20change%20wallach.pdf>.

promise took a decade to hammer out, it was eventually forthcoming. Now that the FSPTCA is in place, the FDA is equipped with statutory tools much better suited to the purpose of tobacco regulation than those the FDCA could have provided. For the environmentalist winners of *Massachusetts v. EPA*, though, achieving policy change without statutory change has been a decidedly mixed bag. Regulation has proceeded onerously, confronted by litigation at every turn. Many thousands of man-hours are being devoted to devising an awkward application of the CAA apparatus to global warming. Whether there is eventually a bipartisan compromise or a Republican-sponsored-and-signed bill depriving the EPA of its jurisdiction, this monumental effort is likely to be rendered more or less meaningless (at least as policy, rather than as a source of political leverage). This must be a source of tremendous frustration for those laboring within the EPA and it certainly represents a deadweight loss for our society.

Those who advocated teaching the CAA this new trick are nevertheless likely to say: what choice did we have? Faced with an ineffectual legislature and a dithering agency, they decided the prospect of action using existing statutory tools was appealing. It is easy to wonder if they made the right choice—but hard to say what the best alternative was for advocates of policy change, pragmatically speaking. Many environmentalists assert without hesitation that the CAA program fighting global warming is far superior to no program at all.³³⁸ When they think of the majority opinion in *Massachusetts v. EPA*, they see five justices muddling through by supporting the best available option, given the all-too-human Congress we have. They are likely to be quite dismissive of theoretical arguments that would insist that judicial actors should always conceive of themselves as agents of the Platonic ideal of the Congress we would want.

Keeping this perspective in mind, we should avoid over-reading the two cases and see that the right question to ask isn't *whether* old laws should ever be taught new tricks, but *when* doing so is appropriate. However one is inclined to answer this question, judgments about institutional capacities are likely to be at the heart of the matter. These judgments are unlikely to displace considerations of statutory text, in-

338. E.g., Kassie Siegel, Bill Snape, & Matt Vespa, *No Reason to Wait: Reducing Greenhouse Gas Emissions Through the Clean Air Act* (Climate Law Institute, Working Paper No. 1, 2009), available at http://www.biologicaldiversity.org/programs/climate_law_institute/legislating_for_a_new_climate/pdfs/NoReasonToWait.pdf; DANIEL A. LASHOF ET AL., NAT'L RES. DEF. COUNCIL, CLOSING THE POWER PLANT CARBON POLLUTION LOOPHOLE: SMART WAYS THE CLEAN AIR ACT CAN CLEAN UP AMERICA'S BIGGEST CLIMATE POLLUTERS (2013), available at <http://www.nrdc.org/air/pollution-standards/files/pollution-standards-report.pdf>.

tent, or purpose, though given a dramatic enough circumstance, they might.³³⁹ Judges differ in the weight they give to each of these factors, but few forsake any of them; when we talk about “textualists,” “purposivists,” and “pragmatists” among practitioners we are really talking about differences in emphasis rather than kind.

Apart from these different weightings, judges also have different visions about what a well-functioning policymaking system looks like. Conservatives (in the Burkean sense³⁴⁰ and in the anti-regulatory sense) are more likely to believe that inaction on some “problem” represents an acceptable working of the Madisonian separation of powers and that status quo bias is a generally healthy thing. Those who are less certain about the ongoing fitness of our constitutional regime, as well as those inclined to view regulation as indispensable in the modern world, are likely to see inaction as evidence of dysfunction. While these disagreements may seem arcane, in fact they go directly to the nature of our federal government.

It would be instructive to survey judges directly about the importance of contextual institutional thinking. Judges are undoubtedly conditioned to reject the idea that they would put institutional pragmatism before the law, but perhaps some would admit entertaining the kinds of considerations discussed here as secondary or tertiary considerations when text and intent prove indeterminate. It would also be interesting to see if those judges whose professional backgrounds gave them greater experience with legislative process were more likely to think that adjusting to specific institutional contexts is legitimate.

To the extent that thinking in the institutional vein is already widespread, if rarely trumpeted by judges themselves, merely discussing these issues explicitly is unlikely to lead to any particularly dramatic changes. Such discussions could, however, help to open a new horizon for useful empirical research. Judges are forced to make determinations about institutional competencies almost entirely based on

339. If a court somehow came to hear a challenge to the Treasury Department’s use of the Exchange Stabilization Fund to stabilize money market funds, *supra* note 49, the institutional superiority of the executive department over Congress in addressing an extremely grave and time-sensitive threat would undoubtedly have weighed heavily on the judges’ minds, perhaps leading them to overlook the near non-existence of support for the action in statutory text, intent, or purpose.

340. Mike Dorf, *Burkean Constitutionalism*, DORF ON LAW BLOG (Apr. 10, 2012), <http://www.dorfonlaw.org/2012/04/burkean-constitutionalism.html> (“Today ‘Burkeanism’ is simply a signal for something like the following view: *Social institutions are highly complex and often reflect the accumulated but tacit wisdom of long experience. Therefore, proposals for rapid, radical change should be met with skepticism, because they will frequently have unintended and undesirable consequences.*” (emphasis in original)).

their own casual empiricism (a phrase I do not use disparagingly). This fact helps to explain how different judges can see things so differently, since each must rely on her own impressions. Scholars should aspire to provide systematic empirical accounts of policymaking patterns and consequences, addressing questions such as whether old law new trick maneuvers in a particular policy domain tend to lead to bad outcomes, and whether legislatures are in fact spurred to action (or even serious deliberation) by judicial decisions finding that a problem is theirs to solve. Doing so would constructively provide judges with the evidence needed to move toward a more rational and consensus-based policymaking system.

