

ARTICLES

IN DEFENSE OF BIG WAIVER

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Congressional delegation of broad lawmaking power to administrative agencies has defined the modern regulatory state. But a new form of this foundational practice is being implemented with increasing frequency: the delegation to agencies of the power to waive requirements that Congress itself has passed. It appears, among other places, as a central feature of two signature statutes of the last decade, the No Child Left Behind Act and the Patient Protection and Affordable Care Act. We call this delegation of the power to unmake major statutory provisions "big waiver."

This Article examines the basic structure and theory of big waiver, its operation in various regulatory contexts, and its constitutional and policy implications. While delegation by Congress of the power to unmake the law it makes raises concerns, we conclude the emergence of big waiver represents a salutary development. By allowing Congress to take ownership of a detailed statutory regime—even one it knows may be waived—big waiver allows Congress to codify policy preferences it might otherwise be unwilling to enact. Furthermore, by enabling Congress to stipulate a baseline against which agencies' subsequent actions are measured, big waiver offers a sorely needed means by which Congress and the executive branch may overcome gridlock. And finally, in a world laden with federal statutes, big waiver provides Congress a valuable tool for freeing the exercise of new delegations of authority from prior constraints and updating legislative frameworks that have grown stale. We welcome this new phase of the administrative process.

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INTRODUCTION

Modern administrative law emerged in response to a now-foundational governmental practice: the delegation of broad lawmaking power to administrative agencies. Many, if not most, of the leading questions in the field address this innovation. How can such a delegation be legitimated? How can it be confined? How can it be regularized? These questions contemplate a particular type of delegation—namely, the broad delegation of the power to specify the law, through rules or decisions, where Congress has left it open-ended. At least since the New Deal, this delegation of highly discretionary regulatory power, to be exercised in an open-ended fashion, has been the archetypical form of delegation. It is

not the mere power to “fill up the details”¹ that Congress left unspecified in a policy that it otherwise clearly established. It is the power to make the policy that Congress self-consciously chose not to make. The assumption—stated in its classic form in James Landis’s *The Administrative Process*—has long been that no practicable alternative to such administrative policymaking exists in a world as complex as our own.²

This Article seeks to shift attention to a different form of delegation of broad policymaking power that is becoming increasingly important but that is presently underappreciated. This form does not give agencies the broad, discretionary power to make rules when Congress has declined to establish any of its own. Instead, it gives agencies the broad, discretionary power to determine whether the rule or rules that Congress *has* established should be dispensed with. It is the delegation, in other words, of the power to waive Congress’s rules. Or, put another way, it is the delegation of the power to unmake law Congress has made rather than to make law Congress has not.

We call this inverted delegation “big waiver,” and while it has antecedents—or, at least, analogues—that reach back to the founding, its prominence as a tool of governance has never been greater.³ One need

1. *United States v. Grimaud*, 220 U.S. 506, 517 (1911) (quoting *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825) (Marshall, C.J.)).

2. James M. Landis, *The Administrative Process* (1938).

3. The literature on big waiver is sparse. There is a large body of commentary on individual waiver provisions. One example is the literature concerning the Line Item Veto Act. See generally Lawrence Lessig, *Lessons from a Line Item Veto Law*, 47 *Case W. Res. L. Rev.* 1659 (1997) (arguing Line Item Veto Act is unconstitutional and requires constitutional amendment); Thomas O. Sargentich, *The Future of the Item Veto*, 83 *Iowa L. Rev.* 79 (1997) (discussing constitutional and policy issues relating to line item veto). Another example is the more limited writing on the measure delegating the power to waive statutory requirements to the Secretary of Homeland Security to build a border fence, which is discussed at some length *infra* Part I.C.6. See generally Daniel Kanstroom, *The Better Part of Valor: The REAL ID Act, Discretion, and the “Rule” of Immigration Law*, 51 *N.Y.L. Sch. L. Rev.* 161 (2006) (discussing impact of REAL ID Act on judicial review of discretionary immigration decisions); Gerald L. Neumann, *On the Adequacy of Direct Review After the REAL ID Act of 2005*, 51 *N.Y.L. Sch. L. Rev.* 133 (2006) (same). There is also some writing on the role that waiver plays in specific contexts, such as in the environmental law field. See, e.g., Kate R. Bowers, *Saying What the Law Isn’t: Legislative Delegations of Waiver Authority in Environmental Laws*, 34 *Harv. Envtl. L. Rev.* 257, 259–61 (2010) (examining constitutional and policy issues surrounding various waiver provisions in environmental law). The more general writing on waiver tends not to focus on the peculiar issues raised by waivers of statutes, as is this Article’s focus. See, e.g., Jim Rossi, *Waivers, Flexibility and Reviewability*, 72 *Chi.-Kent L. Rev.* 1359, 1360 (1997) (discussing agency waiver of regulations and need for judicial review); Mark Seidenfeld, *Bending the Rules: Flexible Regulation and Constraints on Agency Discretion*, 51 *Admin. L. Rev.* 429, 433 (1999) (discussing benefits of agency waiver of regulations and need for certain constraints ensuring predictability and accountability). For two forthcoming articles raising some more general issues, see Samuel R. Bagenstos, *Federalism by Waiver After the Health Care Case*, in *The Health Care Case: The Supreme Court’s Decision and Its Implications* (Gillian Metzger, Trevor Morrison & Nathaniel Persily eds., forthcoming 2013), available at http://papers.ssrn.com/so13/oaers.cfm?abstract_id=2161599 (on file with the *Columbia*

only consider the centrality of big waiver to the operation of the signature regulatory initiatives of the last two presidential administrations—the No Child Left Behind Act⁴ of President George W. Bush and the Patient Protection and Affordable Care Act⁵ of President Barack Obama. Each of these laws sets forth a fully reticulated, legislatively defined regulatory framework. And yet each has been targeted for nearly wholesale administrative revision pursuant to seemingly broad waiver provisions Congress included in the very same statutes.⁶

Big waiver figures equally prominently in other recent examples. These include another provision of the health care law that empowers an independent board to revise in substantial fashion the statutes governing reimbursement under Medicare,⁷ a law empowering the Secretary of Homeland Security to waive any statute in the course of exercising her authority to construct a fence along the U.S.-Mexico border,⁸ and a measure in the National Defense Authorization Act authorizing the President to waive all manner of statutory strictures on his treatment of enemy detainees.⁹ Alongside these recent measures stand still other high-visibility statutes in which something quite close to big waiver has been the legislative tool of choice.¹⁰ Casting a shadow over all of these laws, moreover, is what we might think of as the National Industrial Recovery Act of big waiver: the Line Item Veto Act¹¹—a law the Supreme Court, in big waiver’s very own *Schechter Poultry*,¹² struck down because it delegated (al-

Law Review) (describing effect of *National Federation of Independent Businesses v. Sebelius* on the bargaining between states and federal government over content of waivers); R. Craig Kitchen, Negative Lawmaking Delegations: Discretionary Executive Authority to Amend, Waive, and Cancel Statutory Text, *Hastings Const. L.Q.* (forthcoming), available at http://papers.ssrn.com/sol13/papers.cfm?abstract_id=2144885 (on file with the *Columbia Law Review*) (arguing bicameralism and presentment requirements should be read more widely than courts are doing, in order to limit waiver powers).

4. Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified as amended in scattered sections of 20 U.S.C.).

5. Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 26, 42 U.S.C.).

6. See *infra* Part I.C (examining big waiver in context of education, health care, and other federal regulatory schemes).

7. Patient Protection and Affordable Care Act §§ 3403, 10320, 42 U.S.C. § 1395kkk (Supp. IV 2011) (establishing “Independent Medicare Advisory Board” and defining scope).

8. REAL ID Act § 102, 8 U.S.C. § 1103 note (Supp. V 2012).

9. National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1022, 125 Stat. 1298, 1563 (2011) (to be codified at 10 U.S.C. § 801 note).

10. See, e.g., Budget Control Act of 2011, Pub. L. No. 112-25, 125 Stat. 240 (to be codified in scattered sections of 2 U.S.C.); Don’t Ask, Don’t Tell Repeal Act of 2010, 10 U.S.C. § 654 note (Supp. IV 2011) (repealing 10 U.S.C. § 654).

11. Line Item Veto Act of 1996, Pub. L. No. 104-130, 110 Stat. 1200, invalidated by *Clinton v. City of New York*, 524 U.S. 417 (1998).

12. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537–38 (1935) (“Congress cannot delegate legislative power to the President to exercise an unfettered

beit in special circumstances) the power to undo what Congress had done.¹³ In short, big waiver features prominently in many of the most important regulatory contexts of the last two decades.

The delegation of the power to do the opposite of what the delegator has itself done is a most curious kind of delegation. It is also one that the classic analysis of delegation did not contemplate, let alone explain. James Landis's portrait of a world defined by state common law principles and sophisticated private actors who could not meaningfully be checked by an institution as sclerotic and inexpert as Congress remains powerful.¹⁴ But after an era of broad delegations of just the kind Landis championed, much has changed. Congress has shown itself to be more motivated to fashion fully articulated regulatory schemes and more wary of entrusting discretionary authority to expert regulatory agencies than Landis, and many writing in the field in the years since, assumed would be the case.¹⁵ This Article thus takes up the story of administrative law now that the delegation of the power to unmake Congress's law is approaching in significance the delegation of the power to make law on Congress's behalf.

There are reasons to be wary of the distorting effects of the inversion of the traditional approach to delegation. Big waiver makes it easy for Congress to set forth a first draft of a regulatory scheme that it knows cannot serve as a workable blueprint for governance. Big waiver thus facilitates the congressional announcement of frameworks that satisfy some narrow partisan or ideological aim because legislators can have some confidence the rules will never take effect. It permits Congress to put the President—particularly one from another party—in a box, all but forcing him to bear the costs that the exercise of waiver authority uniquely requires him to incur. Big waiver in this way exacerbates age-old concerns about accountability that have long shadowed broad delegations. Rather than avoiding responsibility by authorizing an agency to make policy through a traditional delegation, Congress claims credit for establishing a new regulatory framework even though it has actually enabled an agency to nullify it. And once a statutory regime has become entrenched, big waiver also permits the legislature to avoid the range of difficult political judgments that attend the possible revision or repeal of statutory rules that have attracted their own constituents and defenders and, in so

discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade or industry.”).

13. *Clinton*, 524 U.S. at 438.

14. See Landis, *supra* note 2, at 1 (“[T]he administrative process springs from the inadequacy of a simple tri-partite form of government to deal with modern problems.”).

15. See Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 *Stan. L. Rev.* 1189, 1285–93 (1986) (discussing this shift); see also Sidney A. Shapiro & Robert L. Glicksman, *Congress, the Supreme Court, and the Quiet Revolution in Administrative Law*, 1988 *Duke L.J.* 819, 820 (stating “Congress has increasingly resorted to narrow and specific legislative grants of authority”).

doing, to grant the executive an important new realm of discretionary authority.

But there is also a more attractive account of big waiver, and one that we favor. Big waiver offers a salutary means of managing the practical governance concerns that make traditional delegation unavoidable. Through big waiver, Congress takes ownership of the first draft of a regulatory framework, confident that its handiwork will not prove to be rigid and irreversible. In this way, big waiver marries the advantages of legislative specification and administrative delegation in a single practice. In a world in which the legislative veto has been outlawed and statutory revision of major regulatory programs is exceedingly difficult, the delegation of an *administrative* veto affords Congress regulatory flexibility that enables it to codify fundamental policy choices that it otherwise might be unwilling (or unable) to specify, thereby making legislative policymaking viable—precisely because it can be monitored and altered through the administrative process. For this reason, big waiver also provides a way for the executive branch and Congress to find common ground even when partisan divisions between them might otherwise prevent legislative dealmaking.

Even when big waiver permits an agency not only to cancel the law Congress has made but also to supersede it with new regulations of its own, the inversion of the delegation is useful. Indeed, it may be most useful when it takes this form. Through big waiver, Congress can provide a precise baseline against which the agency's new regulatory framework may be measured in a way that an open-ended, *ex ante* announcement of a standard to guide future regulatory policy cannot. A power to do something as effective as a specified legislative framework is more precise than an authorization merely to do something effective. Big waiver thus permits Congress to provide agencies with more meaningful congressional policy guidance than would otherwise be possible, without thereby stultifying agency policymaking. And, of course, under big waiver, the default regulatory framework is itself a change in the status quo that is of Congress's making; in that sense, Congress is necessarily a more present regulator under big waiver than it is under the traditional form of delegation.

Big waiver is also a tool that is responsive to the federal administrative state as it matures. Congress no longer legislates on the blank slate that early delegation theory imagined. In a world thick with federal statutes, new delegations are bound to have to account for existing federal statutory impediments to the administrative mission that Congress wishes to assign to an agency. Big waiver thus enables Congress to delegate regulatory authority to address continuously problems of collective concern without first having to clear away all of the encrusted federal legislative impediments that might encumber fulfillment of the administrative mission Congress intends to promote. It gives to the agency the discretion to make such legislative revisions because Congress has decided not to

make them, perhaps because it knows it lacks the capacity to make them well. In this way, big waiver brings the advantages of administration to bear on those existing federal statutory schemes that are themselves in need of revision but that, due to legislative gridlock and the difficulties of contemporary policymaking, cannot easily be revised through the legislative process alone. Through big waiver, in other words, Congress can update delegation for an age of federal statutes.

In short, we believe big waiver functions less to undermine congressional lawmaking than to facilitate it. Moreover, big waiver serves this function at a time when impediments to legislative policymaking are, if anything, even greater than what Landis contemplated and when the existing regulatory landscape is more defined by federal statutes than it has ever been. Big waiver is not revolutionary, but it is an important institutional innovation that revises Landis's model in a way that responds to a modern world that lacks his same faith in expertise, even as it accepts administration as a unique means of addressing problems that outstrip the capacity of the private market or the legislative branch.

So understood, big waiver reconfigures traditional delegation in a manner that is more to be favored than feared by those still attracted to Landis's basic project of identifying innovative governmental techniques to facilitate collective responses at the federal level to new and pressing problems—at least if the mechanism can be legitimated by administrative law doctrines like those that have been developed to legitimate the classic type of delegation that big waiver inverts. Ironically, then, it is a device that serves a function that is nearly the opposite of the one that, on first blush, it might seem to serve. Rather than simply enabling the dismantling of regulatory structures, it helps to permit the creation of new ones. By delegating the power to unmake law, Congress clears a path for the creation of new regulatory frameworks that alter those Congress had previously put in place but that have since grown stale. And it provides a means of ensuring that the new frameworks Congress does establish have a ready means of staying fresh, a means that by virtue of its being available thus increases Congress's willingness to enact those very frameworks in the first instance. The desire to overcome the dead hand of the past was a central impetus for the modern administrative process Landis championed. Big waiver, we believe, is rooted in a similar impulse to make way for the new.

This Article begins by describing what big waiver is and how it differs from other administrative practices (including what we call little waiver) that might, at first glance, seem similar. It next examines why such a practice is taking on such prominence at the present moment. Absent a dramatic shift in political dynamics at the national level, big waiver, it argues, is likely to be an increasingly important administrative technique in the years to come.

The Article then identifies and examines some of the peculiar legal questions that the inversion of traditional delegation raises. These in-

clude constitutional concerns that big waiver transgresses bicameralism and presentment requirements, or more general separation of powers constraints, by giving agencies what seems like the power to repeal statutes. It argues that while the Court's decision in the Line Item Veto Case, as well as Justice Scalia's dissenting opinion, raise questions about big waiver's legal propriety, the constitutional concerns ultimately are misplaced. Instead, the age-old concern about overly broad delegations of administrative lawmaking power, combined with the particular configuration big waiver presents, should influence the principles that guide the proper interpretation of the scope and meaning of statutory provisions that purportedly confer big waiver authority.

These same factors have similarly significant implications for the application to big waiver of other administrative law doctrines that shape the exercise of administrative authority but that have long been organized around the classic form of delegation. Finally, these same principles also suggest the importance of attending to the details of waiver provisions in legislative drafting. For, as this Article shows, these seemingly obscure provisions are increasingly becoming the grants of administrative power that will determine how a regulatory scheme develops over time.

I. WHAT "BIG WAIVER" IS

Waiver is a long-standing administrative power—and not only when the requirement that is being waived is a regulation of the agency's own making. The power to waive a *statutory* requirement—the only kind of waiver power with which this Article is concerned—is also something administrative actors possessed very early in our history. But it is important to understand both what this waiver power is and what it is not in order to understand just how unusual "big waiver" really is. This Part begins by looking at the distinction between administrative enforcement discretion and administrative waiver authority generally. It then examines the distinction between little and big waiver.

A. *Enforcement Discretion*

All agencies have significant enforcement discretion concerning the statutes that they administer. The decision to refrain from enforcing an existing statutory requirement is an important exercise of that discretion. Such a decision may seem like an exercise of the power to waive that requirement. But that characterization would be imprecise. A run-of-the-mill decision not to enforce a statutory requirement does not absolve the offending actor of legal liability. It just means the regulated party does not incur the costs of defending against an enforcement action *at that moment*. At least until the statute of limitations period runs, the legal prohibition, whether set forth in statute or regulation, remains fully operative. The risk of liability thus remains in the event the agency changes its mind and decides to enforce. Moreover, any new action undertaken by

the regulated party resets the limitations period and thus remains subject to future enforcement of the underlying requirement.¹⁶

In accord with this analysis, judges have treated the decision not to enforce a statutory requirement in an individual case—whether due to lack of resources, concerns about the complications the particular case presents, or any of a myriad of other bureaucratic considerations—as an exercise of an agency’s general administrative discretion.¹⁷ The agency’s organic statute, therefore, need not expressly confer such a power in order for the agency to exercise it lawfully.¹⁸ Furthermore, under prevailing administrative law doctrine, the run-of-the-mill decision not to enforce is immune from judicial review.¹⁹

This treatment has a clear logic. No prosecutor (or enforcer) must bring every colorable case.²⁰ Indeed, the prioritization of some cases over others may be an important means by which a requirement’s regulatory impact is enhanced. Otherwise, trivial—or hugely expensive—cases could crowd out more important ones. Congress is thus reasonably presumed to be getting what it wants from its delegation even if an agency uses its discretion to decline enforcement in circumstances where enforcement would have been legitimate. Moreover, nonenforcement decisions—discrete, informal, and wholly revisable—pose obvious challenges for meaningful judicial supervision. In providing expressly in the Administrative Procedure Act (APA) that there shall be no judicial review

16. For discussions of nonenforcement as an important exercise of agencies’ policymaking prerogative, see generally Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. Rev. 1657, 1664–65 (2004); Daniel T. Deacon, Note, *Deregulation Through Nonenforcement*, 85 N.Y.U. L. Rev. 795 (2010).

17. See, e.g., *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (“[A]n agency’s decision not to prosecute or enforce . . . is a decision generally committed to an agency’s absolute discretion.”).

18. *Id.*; see also Eric Biber, *The Importance of Resource Allocation in Administrative Law*, 60 Admin. L. Rev. 1, 16–19 (2008) (arguing agency nonenforcement discretion is critical to resource allocation in executive process); Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 Minn. L. Rev. 689, 712 (1990) (discussing *Heckler*’s holding of presumptive unreviewability); Rossi, *supra* note 3, at 1362 (“Thus, the authority of a federal agency to grant exceptions or waivers to regulations may be implied by Congress’s directive to the agency to regulate in the public interest.”); Seidenfeld, *supra* note 3, at 441–42 (“[A]gencies enjoy plenary legal discretion to refuse to enforce rule or statutory violations.”); Cass R. Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. Chi. L. Rev. 653, 665–75 (1985) (addressing limits of discretion within regulatory state).

19. See *Heckler*, 470 U.S. at 831 (discussing agencies’ absolute discretion not to enforce); see also *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004) (holding courts could require agency action only when “an agency [has] failed to take a discrete agency action that it is required to take” (emphasis omitted)).

20. See, e.g., *Inmates of Attica Corr. Facility v. Rockefeller*, 477 F.2d 375, 379–82 (2d Cir. 1983) (holding federal courts may not compel prosecution when federal prosecutor has exercised discretion not to bring charges and that background principle of prosecutorial discretion can only be overridden by very clear statutory language).

of matters committed to agency discretion,²¹ Congress plainly contemplated an area of unreviewable agency authority. Individualized agency nonenforcement decisions, by their nature and number, seem like ideal candidates for inclusion in that discretionary zone.²²

The general rule regarding the unreviewability of enforcement discretion gives way, however, when an agency adopts an affirmative policy of not enforcing a statutory requirement.²³ Such a policy renders the underlying legal requirement effectively void for all cases within the ambit of the policy for as long as the policy remains in effect. Because a nonenforcement policy raises more starkly the chance the executive is simply dispensing with the law, it is less easily presumed that Congress necessarily conferred the authority to adopt such a policy when establishing the agency. Moreover, the very features that make a nonenforcement policy useful—its clarity and its generality—distinguish it from the kind of informal discretionary decisions in single cases that are presumed to be within the agency's unreviewable discretion and that are so difficult for courts to police. This distinction, too, makes judicial review seem more appropriate in the case of a policy of nonenforcement.²⁴

Turning now to waiver of a statutory requirement, it would be a bold claim to say that the power to grant a waiver, even in the most trivial of individual instances, could never be implied.²⁵ But even such an individual instance of waiver ought to be reviewable for its consistency with statutory purposes. A decision to waive a statutory requirement, after all, assures the regulated party that any future conduct that conflicts with the requirement will be *lawful* so long as the waiver remains in effect—even during the period prior to the expiration of the otherwise applicable limitations period. In short, waiver immunizes; nonenforcement merely looks the other way.

21. 5 U.S.C. § 701(a)(2) (2006).

22. See *Heckler*, 470 U.S. at 832–33 (discussing noncoercive nature of agency nonenforcement decisions).

23. See *id.* at 833 n.4 (reserving judgment on issue but suggesting agency's adoption of express policy of nonenforcement "so extreme as to amount to an abdication of its statutory responsibilities" might be reviewable); see also *Crowley Caribbean Transp., Inc. v. Peña*, 37 F.3d 671, 676 (D.C. Cir. 1994) (noting that, unlike "an agency's decision to decline enforcement in . . . an individual case," "an agency's statement of a *general enforcement policy* may be reviewable for legal sufficiency where [expressed] as a formal regulation after the full rulemaking process or . . . some form of universal policy statement" (citing *Edison Elec. Inst. v. EPA*, 996 F.2d 326 (D.C. Cir. 1993); *Nat'l Wildlife Fed'n v. EPA*, 980 F.2d 765 (D.C. Cir. 1992))).

24. Cf. *Crowley Caribbean Transp.*, 37 F.3d at 677 (distinguishing between nonenforcement policies and individual nonenforcement decisions for similar reasons).

25. On the mixed Supreme Court authority regarding the question whether agency *rules* must allow for waiver in individual cases, see 1 Richard J. Pierce, Jr., *Administrative Law Treatise* § 6.6 (5th ed. 2010) ("The Court has suggested in dicta that an agency should provide a procedure through which a party can obtain a waiver of a rule. . . . The Court has never so held, however, and it has upheld rules that do not provide any opportunity for waiver.").

Moreover, a waiver of a statute is often general in its effect, conferring immunity on all parties otherwise covered by the requirement being waived. In that case, it is hard to see why Congress should be presumed to have delegated waiver power to the administering agency; instead, such power should be traceable not merely to a general statutory purpose but to a relatively express statutory grant. It is agency action that, because relieving a statutory requirement, would seem to stand outside the range of discretionary judgments adequately justified as resting on an implied power.

In short, waivers and nonenforcement decisions are different.²⁶ The former are more legally consequential than the latter, and, for that reason among others, the former are less comfortably assumed to fall within implicit agency discretion than the latter. Such distinctions make a great deal of sense given administrative law's basic embrace of the delegation model.

But it turns out that there is another important distinction to draw, and this one operates within the category of the waiver power itself, even

26. At the limit, administrative waivers may be hard to distinguish from administrative decisions not to enforce. The latter can be rendered formally, and may even give rise to a form of estoppel—as with an agency no-action letter. See *Gryl ex rel. Shire Pharm. Grp. PLC v. Shire Pharm. Grp. PLC*, 298 F.3d 136, 145 (2d Cir. 2002) (discussing how no-action letters “constitute neither agency rule-making nor adjudication and thus are entitled to no deference beyond whatever persuasive value they might have”); *N.Y.C. Emps.’ Ret. Sys. v. SEC*, 45 F.3d 7, 13 (2d Cir. 1995) (treating SEC no-action letters as “interpretive rule[s]”); *Madison Consultants v. FDIC*, 710 F.2d 57, 59 n.1 (2d Cir. 1983) (“While issuance of [a no-action letter] does not estop the SEC from taking future enforcement action, the Commission has rarely taken action against an individual after its issuance of a no-action letter.”); Donna M. Nagy, *Judicial Reliance on Regulatory Interpretations in SEC No-Action Letters: Current Problems and a Proposed Framework*, 83 *Cornell L. Rev.* 921, 1013 (1998) (summarizing reasons why courts should treat regulatory interpretations in no-action letters “more like ‘lore’”). Thus, an individualized nonenforcement decision may well trigger judicial review if it starts to look like a waiver. See *Cardoza v. CFTC*, 768 F.2d 1542, 1550 (7th Cir. 1985) (reviewing Commodity Futures Trading Commission’s decision not to review disciplinary action where statute “contemplate[d] the existence of a class of CFTC decisions not to act which are judicially reviewable”); *Natural Res. Def. Council, Inc. v. FDA*, No. 11 Civ. 3562(THK), 2012 WL 1994813, at *13 & n.20 (S.D.N.Y. June 1, 2012) (holding that, even if FDA withdrawals of approval were unreviewable enforcement action, letters denying related petitions “announced a general Agency policy” and “[s]uch a broad statement of policy is subject to judicial review”); cf. *Crowley Caribbean Transp.*, 37 F.3d at 677 (stating in dicta that “[i]t is conceivable that a document announcing a particular non-enforcement decision would actually lay out a general policy delineating the boundary between enforcement and non-enforcement and purport to speak to a broad class of parties” and thus be reviewable). Conversely, waivers can be so limited in scope—at least as to an agency’s regulations—that they may be deemed impliedly authorized, or even required, by the statute, notwithstanding the lack of any express grant of waiver power. See Rossi, *supra* note 3, at 1362 (discussing FERC’s inherent authority to waive certain regulations in determining qualifying facilities and explaining that “the authority of a federal agency to grant exceptions or waivers to regulations may be implied by Congress’s directive to the agency to regulate in the public interest”).

when explicitly authorized by statute. In particular, some waivers are far more consequential than others, and some far less.

B. *Little Waiver*

Statutory grants of the power to waive statutory requirements that amount to what this Article calls “little waiver” are actually quite common. Here are a couple of examples:

The Department of Agriculture has authority to establish standards for the weighing and grading of various grains.²⁷ A subsection of the statute the agency administers then declares that no one can export grain that has not been officially inspected and designated in accordance with such standards, “*Provided*, That the Secretary may waive the foregoing requirement in emergency or other circumstances which would not impair the objectives of this chapter.”²⁸

In the Consolidated Omnibus Budget Reconciliation Act of 1985—commonly known as COBRA—Congress provided for coverage under employer-provided group health care plans to be continued for various categories of former employees.²⁹ A part of the Internal Revenue Code imposes a tax when a plan fails to meet the various specifications.³⁰ A portion of that part further states, “In the case of a failure which is due to reasonable cause and not to willful neglect, the Secretary may waive part or all of the tax imposed . . . to the extent that the payment of such tax would be excessive relative to the failure involved.”³¹

The waiver power is also frequently conferred in order to permit an agency to handle exceptional cases involving “national security.” For example, in section 504 of the Intelligence Authorization Act the Secretary of Defense is given the following power:

If the Secretary of Defense determines, in connection with a commercial activity authorized pursuant to section 431 of this title [relating to security for intelligence-gathering activities conducted abroad], that compliance with certain Federal laws or regulations pertaining to the management and administration of Federal agencies would create an unacceptable risk of compromise of an authorized intelligence activity, the Secretary may, to the extent necessary to prevent such compromise, waive compliance with such laws or regulations.³²

27. 7 U.S.C. § 76 (2006).

28. *Id.* § 77(a) (1).

29. Pub. L. No. 99-272, § 10001(c), 100 Stat. 222, 223 (1986).

30. 26 U.S.C. § 4980B (2006).

31. *Id.* § 4980B(c) (5).

32. Intelligence Authorization Act § 504(a) (2), 10 U.S.C. § 433(b) (1) (2006).

Even the Endangered Species Act contains a national security exemption,³³ and so, too, do the Toxic Substances Control Act³⁴ and the Food, Drug, and Cosmetic Act.³⁵

Although little waiver provisions range across diverse regulatory terrain, they are fundamentally similar. They delegate a limited power to handle the exceptional case. For example, Congress may not intend a general law for protecting endangered species to take precedence over the statutes empowering the defense establishment to protect the nation from foreign threats. But specifying all the cases in which the ESA would undermine national security is no easy task. Congress thus charges the agency administering the statute with making the call, expressing its intent that the ESA's requirements be lifted only when that special and likely rare contingency regarding national security is determined by the agency to be present.³⁶

Drawing on a distinction to which this Article will return, we might think of "little waiver" as the power to merely "modify" or "tinker" with a statute through the lifting of limited aspects of a requirement contained within it in order to handle an unusual application. It is not, in other words, a power that is conferred in the expectation that the heart of the statutory framework—the express provisions of it that seem most central to its effective operation as a regulatory mechanism—will be subject to administrative veto.

C. *Big Waiver*

If little waiver addresses only the exceptional and, from the point of view of the statute's purposes, small case, what does big waiver encom-

33. 16 U.S.C. § 1536(j) (2006) (requiring "exemption for any agency action if the Secretary of Defense finds that such exemption is necessary for reasons of national security").

34. Toxic Substance Control Act § 22, 15 U.S.C. § 2621 (2006) (providing EPA "shall waive compliance with any provision of this Act upon a request and determination by the President that the requested waiver is necessary in the interest of national defense").

35. Food, Drug, and Cosmetic Act § 564, 21 U.S.C. § 360bbb-3 (2006). The President can waive the requirement of prior consent to receive an "investigational new drug or a drug unapproved for its applied use to a member of the armed forces in connection with the member's participation in a particular military operation." 10 U.S.C. § 1107(f). Such a waiver requires a determination "that obtaining consent is not in the interests of national security." *Id.*

36. Whether or not agency decisions under little waiver provisions are reviewable in federal court depends on whether the specific statutory language and structure at issue commit the decision wholly to agency discretion or whether the presumption of reviewability of final agency action applies instead. Compare *Webster v. Doe*, 486 U.S. 592, 600 (1988) (finding that particular little waiver provision "fairly exudes deference to the Director, and appears to us to foreclose the application of any meaningful judicial standard of review"), with *Dickson v. Sec'y of Def.*, 68 F.3d 1396, 1404 (D.C. Cir. 1995) (finding Congress did not intend to "commit[] solely to agency discretion" different little waiver provision).

pass? At its extreme—as a model of “biggest waiver”—it might look something like this:

- The Agency has statutory authority to waive otherwise applicable statutory requirements, even absent an application for a waiver.
- The Agency’s authority to waive the otherwise applicable requirements is discretionary; the Agency “may” waive but does not have to.
- The Agency’s authority to waive does not depend on ascertaining the existence of specified factual predicates.
- The Agency can waive any part of the statute at issue.
- The Agency can waive other legal requirements as well, including legal requirements not otherwise within its jurisdiction.
- The Agency’s authority to waive pertains to issues of large legal or practical consequence.
- The Agency’s authority to waive pertains to a substantial group of outside parties.
- The Agency can condition its grant of a waiver on an applicant’s satisfying requirements not otherwise required by statute.

At this extreme, biggest waiver mirrors biggest delegation—the kind of delegation that, at the limit, proved too much for the Court to countenance in *Schechter Poultry*.³⁷ None of the examples presented below exemplifies “biggest waiver”; and as far as we know, Congress has never passed such a provision. But there are many grants of big waiver authority that mirror big delegation—the broad, open-ended grant of administrative discretion to make policy judgments. Each of these grants of big—though not biggest—waiver does have some of the features identified in our description of “biggest” waiver. Their combined appearance in a single statute—so that the agency is empowered to substantially revise and not modestly tweak—helps to distinguish each of these statutory waiver provisions as “big” in contrast to the grants of “little” waiver just described.

There are obviously issues of characterization at play here. But if we think of the waiver power as a continuum, the largest questions of constitutionality, statutory interpretation, and regulatory policy arise at the “biggest” end, just as, in the case of ordinary delegations, the largest questions of those types arise from the biggest delegations. In our view, there are a significant number of recent examples that, if plotted on a chart, fall past what we might think of as the midway point between littlest and biggest waiver. In other words, the waiver power is taking a form that makes it less like little waiver, which represents a quite modest delegation of discretion, and more akin to the Landis-like mode of big delegation, albeit in an inverted form.

37. See *supra* note 12 and accompanying text (discussing Court’s holding against delegation to President).

1. *Education.* — As this Article goes to print, perhaps the most salient assertion of a big waiver power concerns the Department of Education’s action to displace the statutory requirements of the No Child Left Behind Act (NCLB).³⁸ That act, a thorough rewriting of the Elementary and Secondary Education Act of 1965, is the major source of federal funds going to state and local educational authorities, running to billions of dollars a year. The present administration is attempting, using its statutorily conferred waiver authority, to substantially revamp the legislation—or, to put that in the administration’s own words, to allow states “to move forward with State and local reforms designed to improve academic achievement and increase the quality of instruction for all students in a manner that was not originally contemplated by the No Child Left Behind Act of 2001.”³⁹

There are many provisions of the Act, but the core of the “no child left behind” concept appears as the conditions that must be satisfied to receive the federal grant. The statute says that a State must submit a plan demonstrating that it has adopted “challenging” academic standards and has provided for testing founded on those standards; based on those tests, the State must then demonstrate “adequate yearly progress” of all its students with the ultimate objective that “not later than 12 years after the end of the 2001–2002 school year, all students . . . will meet or exceed the State’s proficient level of academic achievement.”⁴⁰ If the schools fail to improve, they are subject to what ultimately are quite dramatic corrective actions.⁴¹ But even though Congress has, through NCLB, been clear in setting forth a regulatory framework for public education at the state and local level, the Department of Education is acting now to “waive” that framework in order to give the states, and their derivative local authorities, “flexibility.” Most notably, instead of “all students” being proficient by the end of the 2013–2014 school year, a State may set “annual measurable objectives” that are “ambitious but achievable”: It will suffice if the goal is 100% proficiency by the end of the 2019–2020 school year; or a reduction by the 2016–2017 school year of one-half in the percentage of students in each group of students who are not proficient; or if the State proposes yet another method “that is educationally sound and results in ambitious but achievable” annual measureable ob-

38. Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified in scattered sections of 20 U.S.C.).

39. U.S. Dep’t of Educ., ESEA Flexibility 1 (2011) [hereinafter ESEA Flexibility].

40. 20 U.S.C. § 6311(b)(2)(F) (2006).

41. *Id.* § 6316(b) (detailing range of school improvement consequences for continuing failure to meet adequate yearly progress, including curricular reform, staffing changes, new leadership, and wholesale restructuring).

jectives.⁴² The sanctions for failing schools also need not be as stringent as the statute itself specifies.⁴³

This is not to say that the state and local educational authorities can just take the federal money and do what they please under the revised framework. Under the Secretary's substitute regulatory scheme, there are new specific requirements to develop "college- and career-ready standards" and plans for "high-quality assessment" of student achievement.⁴⁴ And it is not to say that what the Department proposes constitutes bad policy; maybe it makes sense. But it is to say that the Department proposes to substitute a new way of defining what is required to get the grant and a new way of measuring and enforcing compliance for the way that the Act itself had specified.

The statutory delineation of this asserted waiver authority is capacious and well defined. In general, "the Secretary may waive any statutory or regulatory requirement of this chapter for a State educational agency, local educational agency, Indian tribe, or school through a local educational agency, that—(1) receives funds . . . and (2) requests a waiver . . ." ⁴⁵ But the statute also lists ten specific topics that are off-limits for waiver: By and large they cover the distribution of funds, state use of funds, parental participation, and civil rights requirements.⁴⁶ The negative pregnant of the list of restrictions—the implication of its not including the statute's specifications regarding educational quality and assessment—is reinforced by the affirmative statutory specifications of a "waiver request": It has to include a description of how the waiving of requirements will "increase the quality of instruction" and "improve . . . academic achievement," and it has to specify "measurable educational goals" and "methods to be used to measure annually" students' progress in achieving them.⁴⁷

Both in terms of what the statute allows, and in terms of what the Secretary proposes to do, this waiver is clearly "big." It is, by design, a significant revision of what was spelled out in the statute. It strikes at the ordinary case as much as the unusual one. For those states that qualify for the waiver, it creates a new regime. At the moment, thirty-eight states

42. U.S. Dep't of Educ., *ESEA Flexibility: Frequently Asked Questions* 15 (2011).

43. U.S. Dep't of Educ., *What ESEA Flexibility Means for Students, Teachers, and Parents: Answering the Public's Questions* 3 (2011), available at <http://www.ed.gov/esea/flexibility/documents/answering-public-questions.doc> (on file with the *Columbia Law Review*) ("NCLB required all schools that missed their targets to implement the same set of one-size-fits-all interventions ESEA flexibility would let States move forward with innovative accountability systems that consider student growth and school progress, provide recognition and support, and focus the most dramatic interventions where they are most needed.").

44. *ESEA Flexibility*, *supra* note 39, at 7–8.

45. 20 U.S.C. § 7861(a) (2006).

46. *Id.* § 7861(c).

47. *Id.* § 7861(b).

and Washington, D.C., have requested “flexibility”; thirty-three states and Washington, D.C., have been approved so far, and one state has been denied.⁴⁸ And, finally, the articulation of this new regime is at the Secretary’s discretion. He is not required to confer any waivers, and those waivers he chooses to grant are granted on terms he defines, albeit within broad bounds.

2. *Health Care.* — Just as the No Child Left Behind Act was probably the signature domestic legislative achievement of the George W. Bush Administration, the corresponding legislative achievement of the Obama Administration is the Patient Protection and Affordable Care Act (ACA).⁴⁹ Much of that Act relies upon relatively open-ended delegations of rulemaking power to the Secretary of Health and Human Services, and, in that respect, the statute draws from the traditional paradigm of delegation. But here, too, big waiver appears prominently.

The waiver provision of the ACA—entitled “Waiver for State innovation”⁵⁰—is complex and apparently carefully drafted. It allows a state to propose a health care scheme alternative to that provided by the Act and to ask for a waiver of key provisions of the Act including those relating to health care insurance exchanges, the minimum coverage of acceptable plans, and the mandate that individuals not otherwise covered by a group plan purchase insurance or pay a penalty.⁵¹ But this apparent breadth is qualified by the further stipulation that the Secretary⁵² may

48. U.S. Dep’t of Educ., ESEA Flexibility Requests and Related Documents (2012), <http://www.ed.gov/esea/flexibility/requests> (on file with the *Columbia Law Review*); see also Joy Resmovits, No Child Left Behind Waivers Granted to 33 U.S. States, Some with Strings Attached, Huffington Post (July 19, 2012, 12:01 AM), http://www.huffingtonpost.com/2012/07/19/no-child-left-behind-waiver_n_1684504.html (on file with the *Columbia Law Review*) (describing states’ receipt of NCLB waivers, some conditional). The Secretary of Education denied Iowa’s waiver request. See Letter from Deborah S. Delisle, Assistant Sec’y, Office of Elementary & Secondary Educ., to Jason E. Glass, Dir. of Educ., Iowa Dep’t of Educ. (June 21, 2012), available at <https://governor.iowa.gov/wp-content/uploads/2012/06/Letter-to-Iowa-re-ESEA-flexibility.pdf> (on file with the *Columbia Law Review*) (denying waiver); see also Miker Wisner, Feds Deny Iowa No Child Left Behind Waiver, wcfCourier.com (June 21, 2012, 9:00 PM), http://wfcourier.com/news/local/govt-and-politics/feds-deny-iowa-no-child-left-behind-waiver/article_e035d3a-bc09-11e1-9db6-0019bb2963f4.html (on file with the *Columbia Law Review*) (reporting denial of waiver). Some states, like Nevada, have to fulfill certain conditions or their waiver will expire. See Trevon Milliard, Nevada Gets Waiver for No Child Left Behind Mandates, Las Vegas Rev.-J. (Aug. 8, 2012, 12:11 PM), <http://www.lvrj.com/news/nevada-gets-waiver-for-no-child-left-behind-mandates-165467686.html> (on file with the *Columbia Law Review*) (reporting Nevada had to finalize how its “index,” which measured student performance, would work or its waiver would expire after June 2013).

49. Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of the Internal Revenue Code and 42 U.S.C.).

50. 42 U.S.C. § 18052 (Supp. IV 2011).

51. *Id.* § 18052(a)(1)–(2).

52. Depending on the scope of the waiver request, the statutory term “Secretary” may refer to either (or both) the Secretary of Health and Human Services and the Secretary of the Treasury. *Id.* § 18052(a)(6). Neither Secretary may “waive under this section any Fed-

grant a waiver only if she determines the state's proposed plan will provide health care coverage "at least as comprehensive" and "at least as affordable" "to at least a comparable number of its residents" as that required by the Act's own scheme and "not increase the Federal deficit."⁵³

How far these stipulations allow for substantially different approaches is partly a matter of statutory interpretation and partly a matter of design ingenuity. But other stipulations of the waiver scheme suggest that waivers of some considerable importance are contemplated.⁵⁴

The Obama Administration itself has touted the waiver provisions of the Act for giving states "flexibility to innovate and implement the health care solutions that work best for them."⁵⁵ It is not yet clear what the Administration means. It may intend only to reserve the authority to tailor Congress's framework to handle unusually hard cases, or it may intend to preserve the right to make an all-things-considered judgment about whether there is some other framework, not now specified in the statute, that states may adopt as an alternative to what Congress expressly prescribed. In short, the Administration has not claimed the kind of redesign-by-waiver power it has asserted under the NCLB, but neither has it disclaimed such authority.

The rhetoric of the 2012 campaign showed the potential for using this waiver provision to support far-reaching changes. The Republican candidate, Mitt Romney, promised that (as his campaign website put it), "On his first day in office, Mitt Romney will issue an executive order that paves the way for the federal government to issue Obamacare waivers to 50 states"—apparently as an initial step towards trying to repeal the law altogether.⁵⁶ Whether the statute would in fact have supported such a broad waiver effort is, or course, simply a "what if?" of history.⁵⁷

eral law or requirement that is not within the authority of the Secretary." *Id.* § 18052(c)(2).

53. *Id.* § 18052(b)(1).

54. *Id.* § 18052(d)(2)(B) (instructing Secretary to notify "appropriate committees of Congress" when state's application for waiver is denied and to specify "the reasons therefore"). While the Secretary must make such notification to Congress upon denial of a state's waiver application, no such notification is required for waiver approvals. *Id.* § 18052(d)(2)(A). This difference in statutory structure indicates Congress's approval of waivers with broad effects; if Congress were concerned about the breadth of waivers under this provision, presumably the notification procedure would be reversed such that Congress would be notified of waiver approvals but would not require notification of denials.

55. Press Release, U.S. Dep't of Health & Human Servs., Obama Administration Takes New Steps To Support Innovation, Empower States (Mar. 10, 2011), <http://www.hhs.gov/news/press/2011pres/03/20110310a.html> (on file with the *Columbia Law Review*).

56. Health Care, Mitt Romney for President, www.mittromney.com/issueshealth-care (on file with the *Columbia Law Review*) (last visited Oct. 15, 2012).

57. Quite apart from the substantive requirements for granting a waiver, there is an important timing component. By express language in the waiver provision, it does not kick

In addition to potentially providing for the waiver of the central aspects of the ACA itself, the Act is also notable for its embrace of big waiver in yet another respect. Under the ACA, the Independent Payment Advisory Board (IPAB) will be an independent board whose purpose is to “reduce the per capita rate of growth in Medicare spending.”⁵⁸ This Board is empowered to initiate changes in the Medicare program that become law unless overturned by legislation.⁵⁹

In terms of scope, there are requirements that the Board must focus on certain areas, but these are not exclusive requirements. Any proposal by the Board must be “related” to Medicare (a term that could be fairly broad),⁶⁰ with the scope further limited by restrictions on rationing and changing benefits,⁶¹ as well as requirements to focus on cutting costs in certain areas (such as prescription drug plans).⁶² The provision limits what sections of this statute or other statutes the Board can waive to accomplish its goal. But there is little doubt that the statute is intended to empower the Board to rewrite portions of the otherwise detailed statutory framework for Medicare.

There is also little reason to doubt that it was hoped the rewriting would be consequential. The estimated savings to Medicare attributable to IPAB identified in the run-up to the ACA’s passage totaled in the billions of dollars.⁶³ And while there are concerns about whether the statu-

in until 2017, 42 U.S.C. § 18052(a)(1), thereby apparently ensuring the Act’s operation for some significant period of time before administrative revision may occur. On the other hand, given the time it takes to implement the health care law, and the agency’s capacity to signal its openness to waivers in advance of 2017, it is quite possible that the very existence of the waiver power would help shape the way states operate under the ACA in the interim period. In any case, there are proposals pending in Congress to change the date of potential waiver to 2014. See, e.g., *The Affordable Care Act: Supporting State Innovation*, HealthCare.gov (Feb. 22, 2012), <http://www.healthcare.gov/news/factsheets/2012/02/state-innovation02222012a.html> (on file with the *Columbia Law Review*) (“Although the effective date for a Waiver for State Innovation is 2017, the Administration supports bipartisan legislation that would accelerate this effective date to 2014.”); Sarah Kliff, *Waivers at Center of Health Debate*, Politico (Mar. 14, 2011, 5:32 AM), <http://www.politico.com/news/stories/0311/51208.html> (on file with the *Columbia Law Review*) (highlighting Oregon and Vermont as states expected to pursue 2014 effective date for State Innovation Waivers); Bob Semro, *Waivers in Health Care Law Often Misrepresented, Misunderstood*, HuffPost Denver (June 22, 2011, 7:23 PM), http://www.huffingtonpost.com/bob-semro/waivers-in-health-care-la_b_882608.html (on file with the *Columbia Law Review*) (explaining impact of current waivers set to expire in 2014).

58. Patient Protection and Affordable Care Act §§ 3403, 10320, 42 U.S.C. § 1395kkk (Supp. IV 2011).

59. *Id.* § 1395kkk(b)(3).

60. *Id.* § 1395kkk(c)(1)(A).

61. *Id.* § 1395kkk(c)(2)(A)(ii).

62. *Id.* § 1395kkk(c)(2)(A)(iv).

63. Letter from Douglas W. Elmendorf, Dir., Cong. Budget Office, to Hon. Nancy Pelosi, Speaker, House of Representatives, at tbl.5 (Mar. 20, 2010), available at <http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/113xx/doc11379/amendrecomp>

tory constraints on the scope of IPAB's revisory power are too tight to permit it to bring about such savings,⁶⁴ the achievement of substantial savings through Medicare's administrative revision supplied the reason to delegate the power to IPAB. A Congressional Research Service report stated that advocates of an independent board thought it was necessary because Medicare decisions made by Congress "may not be fiscally sustainable or in the best interest of beneficiaries."⁶⁵

3. *Welfare.* — To the extent there has been a major overhaul of an "entitlement" program since the War on Poverty, welfare reform is the signature example. Two key aspects of the shift in the federal welfare program were, on reflection, arguably in some tension with each other. On the one hand, a key focus of the reform was to restore control over federal welfare provision to the states—in effect, making the program more like a block grant program.⁶⁶ On the other hand, a key focus—in response to the "culture of poverty" thesis—was to remove the supposed disincentive to work that the old federal welfare system created.⁶⁷ The reform thus sought both to increase state and local control in the design of welfare programs and to ensure that such programs would promote work and a work ethic among beneficiaries.⁶⁸

There are, of course, other less charitable narratives one could use to describe the motivation for the push for welfare reform, and there is a large literature on the politics underlying its adoption that we do not mean to engage. But suffice it to say that, viewing that reform effort in its best light, there is an evident tension about how to achieve both state control and federally imposed notions of the importance of work. That tension has now come into full view through the Obama Administration's assertion of big waiver authority in this domain.

In recently issued guidance, the Secretary of Health and Human Services claims to possess the discretionary authority under the Personal

rop.pdf (on file with the *Columbia Law Review*) (attributing \$15.5 billion in deficit reduction to IPAB between 2015 and 2019).

64. See Ann Marie Marciarille & J. Bradford DeLong, *Bending the Health Cost Curve: The Promise and Peril of the Independent Payment Advisory Board*, 22 *Health Matrix* 75, 98 (2012) (noting IPAB "may not recommend rationing of health care, raising Medicare beneficiary premiums, cost sharing, or modifying eligibility criteria").

65. Holly Stockdale, Cong. Research Serv., R40915, *An Overview of Proposals To Establish an Independent Commission or Board in Medicare 1* (2010).

66. See 42 U.S.C. §§ 601–619 (2006) ("Block Grants to States for Temporary Assistance for Needy Families"). "The purpose of this part is to increase the flexibility of States in operating a program designed to . . . provide assistance to needy families . . ." Id. § 601(a).

67. See id. § 607 (creating "[m]andatory work requirements").

68. See generally Vee Burke, Cong. Research Serv., *The 1996 Welfare Reform Law 1* (2003), available at <http://royce.house.gov/uploadedfiles/the%201996%20welfare%20reform%20law.pdf> (on file with the *Columbia Law Review*) (summarizing block grant and work requirement rules of 1996 welfare reform bill).

Responsibility and Work Opportunity Reconciliation Act of 1996⁶⁹ to waive some of the provisions that set forth work requirements for funding recipients.⁷⁰ There are a host of complex interpretive questions about the scope of the statutory waiver authority raised by the Secretary's recent guidance; her interpretation, even if correct, is by no means self-evident. But the merits matter less here than does the fact of the assertion and the difficulty of the legal question of authority it raises. This example nicely demonstrates the way that waiver provisions become of central import—in much the way that grants of rulemaking power once were—to the future direction a given regulatory framework will take, even as to a seemingly central provision of a framework that Congress had specified. The waiver provision in the welfare law—and its scope—has become a central ground for contestation over just who was given the power to resolve the tension between legislative specification of certain policies and legislative desires for greater state and local program discretion.

Of course, one need not put the choice that starkly. Tellingly, the Secretary is aware of the potential legal difficulty of construing an ambiguous waiver provision in a manner that would give her the power to seemingly undermine what had been a central object of the legislative reform. She is thus careful in her guidance to insist that waivers will be granted only to those states whose applications propose to “improve” upon the statute's pro-work goals by meeting them through more effective means than would be possible absent the waiver.⁷¹ In short, the waiver is styled not as a means of cancelling or rejecting a policy choice made by Congress, but rather as an exercise of administrative discretion aimed at better implementing—in light of new experience and new economic conditions—the legislative desire to use federal welfare funding to move people off the welfare rolls and into stable employment. It is precisely this fault line, though, between assertions of regulatory authority that undermine and those that improve upon the legislative framework Congress established that the rise of big waiver makes of central concern for regulatory policy—and thus administrative law.

4. *The Budget.* — Battles over the power to control spending between the executive and Congress date back to the origins of the nation. There are, of course, still individualized policy fights over whether certain programs should be funded. These now take place, however, against the

69. Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 42 U.S.C.).

70. See Office of Family Assistance, U.S. Dep't of Health & Human Servs., TANF-ACF-IM-2012-03, Guidance Concerning Waiver and Expenditure Authority Under Section 1115 (July 12, 2012), <http://www.acf.hhs.gov/programs/ofa/resource/policy/im-ofa/2012/im201203/im201203?page=all> (on file with the *Columbia Law Review*) (“HHS has authority to waive compliance . . . and authorize a state to set approaches . . . other than those set for in section 407, including definitions of work activities and engagement, specified limitations, verification procedures, and the calculation of participation rates.”).

71. *Id.*

backdrop of larger concerns about the overall level of spending and borrowing by the federal government. These concerns have been responsible for some of the most prominent modern instances of big waiver, notably the Line Item Veto Act.⁷² Under this legislation, passed during President Clinton's administration, the executive was once again enlisted in the process of adjusting legislative enactments that Congress chose not to adjust on its own.

The statute provided for the "cancellation" of a wide range of measures Congress might enact that could in theory add to the budget deficit—specifically, new items of direct spending, grants of so-called "discretionary budget authority," and limited tax benefits (otherwise known as tax expenditures).⁷³ The statute granted the President this power to "cancel" so long as he did so within five days of that measure's enactment, and so long as he did so to reduce the budget deficit.⁷⁴

The Court invalidated the Act for violating the Presentment Clause;⁷⁵ this Article will return to the merits of the Court's constitutional analysis in Part III. For present purposes, what matters is that the Line Item Veto Act represents a grant of waiver power that is plainly "big." The President was delegated discretion to do the opposite of what Congress had done with respect to large swaths of the budget, subject only to relatively thin procedural and substantive constraints.

A more recent iteration is the Budget Control Act of 2011,⁷⁶ which addresses dysfunction on the borrowing, rather than spending, side. Until this enactment, Congress regularly passed a so-called "debt limit" statute, which imposed a ceiling on the total amount of borrowing the United States could engage in for a specified period. Without fail, as bor-

72. Pub. L. No. 104-130, § 2(a), 110 Stat. 1200, 1200-11 (1996) (codified at 2 U.S.C. §§ 691-692 (Supp. III 1998)), invalidated by *Clinton v. City of New York*, 524 U.S. 417 (1998). An earlier example, albeit of not-quite-so-big waiver, formed the backdrop of *Bowsher v. Synar*, 478 U.S. 714 (1986). There, the Court addressed an unrelated constitutional challenge to the Gramm-Rudman-Hollings deficit reduction measure, which inverted the traditional delegation. Congress enacted a budget but delegated to the Comptroller General the authority to cancel a significant portion of it upon a finding that a contingency—excess spending of a prescribed amount—occurred. The Comptroller General was then charged with identifying, pursuant to a preset statutory formula, the cuts from that enacted budget that must be made. In short, through his exercise of discretion, the budget Congress enacted was partially repealed. *Id.* at 732-34. Significantly, the Comptroller General was required to sequester upon the finding of a fact in the world that Congress preidentified in the very statute that conferred the sequestration power. Furthermore, in carrying out the "waiver" of the spending that exceeded that predetermined amount, he was bound by a formula Congress also set. His discretionary authority, then, was limited. In that respect, Gramm-Rudman-Hollings was far from the biggest waiver archetype, even as it differed as well from a classic little waiver.

73. 2 U.S.C. § 691(a) (Supp. III 1998).

74. *Id.*

75. *Clinton*, 524 U.S. at 421.

76. Pub. L. No. 112-25, § 301(a)(2), 125 Stat. 240, 251-55 (to be codified at 31 U.S.C. § 3101A).

rowing approached that ceiling, Congress would vote to raise the debt ceiling and prescribe a new, higher limit.⁷⁷ In 2011, however, Congress proved reluctant to raise the debt ceiling as borrowing approached the limit. There had been similar instances of brinkmanship before,⁷⁸ but this time resolution of the impasse took a peculiar form.⁷⁹

Congress provided that the President could increase the debt limit in 31 U.S.C. § 3101(b) initially by \$900 billion and then by a further \$1.2 to \$1.5 trillion.⁸⁰ In both situations the President must have “determined that the debt subject to limit is within \$100,000,000,000 of the limit in section 3101(b) and that further borrowing is required to meet existing commitments.”⁸¹ The first increase was required to occur by December 31, 2011. The second increase was limited to \$1.2 trillion unless there was a constitutional amendment sent to the states balancing the budget or a joint committee approved deficit reduction greater than \$1.2 trillion, in which case the increase could be up to \$1.5 trillion.⁸²

Because both scope and standard are clearly defined in the debt ceiling legislation, it can be conceived of as a classic delegation. The President is authorized to prescribe a new rule within statutorily prescribed bounds. But while the standard is limited, it is significant that Congress, in this law, chose not to repeal the existing debt limitation itself. Rather, the authority to dispense with the previously enacted limit is given to the President so that it could be said that he, and not Congress, raised this debt limit—put otherwise, that it was he who waived the ceiling that Congress had previously put in place.

5. *National Security and Foreign Affairs.* — As discussed above, the national security realm has occasioned the delegation of the little waiver power in a number of regulatory domains. What happens, however, when Congress wishes to directly regulate in the field of national security—or in its related domain of foreign affairs? One option is for Congress to follow the Landis model. In many instances, Congress proceeds in just this manner. The Authorization for Use of Military Force enacted in the

77. Mindy R. Levit et al., Cong. Research Serv., R41633, *Reaching the Debt Limit: Background and Potential Effects on Government Operations* 12–13 (2011) (describing statutory debt limits and explaining past temporary increases in debt limit—used to provide additional time to Congress to consider debt limit increases—eventually led to permanent increases).

78. See Comm. for a Responsible Fed. Budget, *Understanding the Debt Limit* 14–15 (2011), available at <http://crfb.org/document/understanding-debt-limit> (on file with the *Columbia Law Review*) (summarizing all prior legislation raising debt ceiling and noting prior attempts sometimes included substantive concessions).

79. See, e.g., Damian Paletta, *Obama Pushes for a Deficit Deal by July 22*, *Wall St. J.*, July 1, 2011, at A2 (describing negotiations over raising debt ceiling in summer 2011 during which congressional Republicans demanded large deficit reductions through spending cuts without tax increases).

80. § 301(a)(2), 125 Stat. at 251–55.

81. *Id.*

82. *Id.*

wake of the attacks of September 11, 2001 is one well-known example of such a broad delegation of national security power.⁸³ Alternatively, Congress may seek to restrict executive discretion in these areas by setting forth clear statutory restrictions on the kind of power the executive may assert, in order to rein in perceived executive abuse. But Congress relies on big waiver, too. Indeed, perhaps the earliest examples of big waiver arose in the foreign affairs realm, and, interestingly, it is from those early cases concerning international trade that the modern doctrine governing—and ultimately legitimating—the traditional delegation of lawmaking power emerged.⁸⁴ Consistent with this history, Congress followed a similar approach with respect to trade with Cuba, and the resulting restrictions that are still in force are subject to an expressly defined presidential waiver authority.⁸⁵

In the national security area, this form of delegation is particularly ubiquitous. Measures ranging from the regulation of the terms of United States participation in United Nations peacekeeping missions⁸⁶ to those regulating the specification of the rules of engagement in overseas deployments⁸⁷ have employed the big waiver technique. An especially salient example can be found in the recently enacted National Defense Authorization Act for Fiscal Year 2012.⁸⁸ The law includes a number of quite tightly drawn limitations on the authority of the President to transfer detainees currently being held at the Guantánamo Bay military facility.⁸⁹ The law also includes a mandate that certain categories of Al Qaeda and associated forces be taken into military custody rather than be held by civilian law enforcement authorities.⁹⁰ Yet, that same statute also includes extensive waiver provisions that specify the occasions and circum-

83. Authorization for Use of Military Force, Pub. L. 107-40, § 2, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 note) (authorizing President to use “all necessary and appropriate force . . . in order to prevent . . . terrorism”).

84. See the discussion of “The Past and Future of Nondelegation Doctrine,” in Peter L. Strauss, Todd D. Rakoff, Cynthia R. Farina & Gillian E. Metzger, *Gellhorn and Byse’s Administrative Law* 606–19 (11th ed. 2011), especially the treatment of *Field v. Clark*, 143 U.S. 649 (1892) and *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394 (1928).

85. 22 U.S.C. § 2370(d), (f) (2006).

86. *Id.* §§ 7422, 7424.

87. National Defense Authorization Act for Fiscal Year 1998, § 1203, 10 U.S.C. § 114 note (2006) (authorizing President to waive congressional mandate to withdraw from Bosnia).

88. Pub. L. No. 112-81, 125 Stat. 1298 (2011) (to be codified in scattered sections of the U.S.C.).

89. See *id.* § 1026, 125 Stat. at 1566 (prohibiting funds to construct or modify facilities in United States to house Guantánamo detainees); *id.* § 1027, 125 Stat. at 1566–67 (prohibiting use of funds to transfer or release Guantánamo detainees); *id.* § 1028, 125 Stat. at 1567–69 (to be codified at 10 U.S.C. § 801 note) (requiring certain certifications before transferring Guantánamo detainees to foreign countries).

90. *Id.* § 1022, 125 Stat. at 1563–64 (to be codified at 10 U.S.C. § 801 note).

stances in which the President may act free from these strictures.⁹¹ President Obama announced his waiver of some of the statute's restrictions in a lengthy presidential decision directive.⁹²

6. *Immigration.* — A final pressing field of social policy concerns immigration, and here, too, big waiver has been an important component of the regulatory structure. Indeed, Congress delegated the power to waive portions of the immigration law to the Attorney General in the 1950s in order to spare itself the burden of passing private bills to suspend deportations. It was that grant of waiver authority that precipitated *INS v. Chadha*, which prevented Congress from using a legislative veto to check that exercise of the waiver power.⁹³ But the issue has returned, now in a new form, as Congress seeks not to relax immigration restrictions but rather to make them harder to evade.

The Department of Homeland Security, as is well known, has been directed by Congress to build physical barriers on the border with Mexico to deter illegal immigration. As part of the REAL ID Act of 2005, Congress provided,

Notwithstanding any other provision of law, the Secretary of Homeland Security shall have the authority to waive all legal requirements such Secretary, in such Secretary's sole discretion, determines necessary to ensure expeditious construction of the barriers and roads under this section. Any such decision by the Secretary shall be effective upon being published in the Federal Register.⁹⁴

Further, the statute stripped the courts of any jurisdiction to review any decision made by the Secretary under this authority, except for constitutional violations.⁹⁵ Pursuant to this authority, the Secretary has

91. See *id.* § 1022(a)(4), 125 Stat. at 1563 (to be codified at 10 U.S.C. § 801 note) (permitting waiver of military custody requirement for Al Qaeda and associated forces captured by U.S. government); *id.* § 1028(d), 125 Stat. at 1568–69 (to be codified at 10 U.S.C. § 801 note) (permitting waiver of certification requirement for transfer of Guantánamo detainees to foreign countries). All told, the term “waiver” appears eighty-three times in the National Defense Authorization Act for Fiscal Year 2012.

92. Press Release, The White House, Office of the Press Sec'y, Presidential Policy Directive—Requirements of the National Defense Authorization Act (Feb. 28, 2012), <http://www.whitehouse.gov/the-press-office/2012/02/28/presidential-policy-directive-requirements-national-defense-authorization> (on file with the *Columbia Law Review*). Under the Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, § 2(b), 124 Stat. 3515, 3516 (to be codified at 10 U.S.C. § 654 note), Congress mandated that the “Don't Ask, Don't Tell” policy, 10 U.S.C. § 654 (2006), be repealed upon a finding by the Defense Secretary, the chairman of the Joint Chiefs of Staff, and the President regarding the effect on military readiness of restoring the discretion the policy took away. Plainly, Congress did not want to effectuate the repeal without some executive branch intervention. The nature of that intervention is complex. But suffice it to say, Congress opted for a mechanism that intentionally enlisted administrators in the repeal decision.

93. 462 U.S. 919, 959 (1983).

94. REAL ID Act § 102, 8 U.S.C. § 1103 note (c)(1) (Supp. V 2012).

95. *Id.* § 1103 note (c)(2)(A).

waived over thirty federal statutes, ranging from the Endangered Species Act and the Clean Water Act to the Antiquities Act and the APA.⁹⁶ The REAL ID Act was challenged for being an unconstitutional delegation of legislative power but upheld by the lower courts, with the Supreme Court denying certiorari.⁹⁷

As a matter of its formal reach, this example of big waiver may be the biggest Congress has yet passed. The statute confers a seemingly limitless power to waive any and all statutes that might interfere with the directive to build the fence. Moreover, the statute delegates this waiver power not to the separate agencies responsible for administering each of the statutes now subject to waiver, but rather to a single agency—the Department of Homeland Security.

In addition to the breadth of the waiver power conferred on a single official—sweeping as it does across seemingly the entire U.S. Code—there is also the discretion that the Secretary is afforded in its exercise. The Secretary is given no standards for picking and choosing among laws to cancel, other than the directive that she cancel them in the course of carrying out her directive to erect the fence. And compounding that grant of discretion is the curtailment of judicial review of the exercise of that discretion.⁹⁸

At the same time, the discretion conferred concerns a single, albeit large, infrastructure project—the construction of a border fence. In service of that single task, it in effect writes into any statutes that might impede completion of that specific, statutorily defined project, and only that project, a waiver provision for the special contingency the construction of a border fence presents. Still, activation of that waiver—or, understood another way, the choice of which statutes have to be avoided in order to ensure speedy construction of the fence—is left to the Secretary.

D. Conclusion

Obviously, each of these examples is different; they are cousins rather than identical twins. Some waiver provisions, like NCLB's, apply chiefly to the very statutory frameworks that contain them. Others, like the border fence measure, target statutes that stand outside the four corners of the statutory scheme conferring the waiver power.⁹⁹ But we be-

96. See, e.g., 73 Fed. Reg. 19,077 (Apr. 8, 2008) (waiving, among others, Antiquities Act and APA); 72 Fed. Reg. 2535 (Jan. 19, 2007) (waiving, among others, Endangered Species and Clean Water Acts).

97. *Defenders of Wildlife v. Chertoff*, 527 F. Supp. 119 (D.D.C. 2007), cert. denied, 128 S. Ct. 2962 (2008). The district court case and the denial of certiorari are discussed *infra* notes 272 & 275.

98. 8 U.S.C. § 1103 note (c)(2)(A).

99. See Bowers, *supra* note 3, at 288 (discussing importance of distinction between internal and external waiver provisions when considering large-scale delegation such as that in REAL ID Act).

lieve big waiver remains an identifiable technique, notwithstanding the way that particular manifestations differ.

Big waiver certainly differs from other techniques that Congress has tried to use to modify or reconfigure the abstract idea of delegating authority to the executive branch—techniques that have varied from the (approved) establishment of independent agencies to the (disapproved) legislative veto. Its operation is also clearly more legally consequential than the mere exercise of enforcement discretion, and it is substantively more consequential, by definition, than the exercise of a little waiver power. Moreover, even the distinction between big waivers that apply to statutes other than their enacting statute, and big waivers that do not, is far from sharp. NCLB is set against a prior statutory framework for federal public education funding, for example, while the IPAB is empowered through the ACA to waive Medicare reimbursement rules set out in other statutes precisely to generate the savings needed to permit the subsidies for private insurance contained in the ACA.

Therefore, we believe big waiver provisions, in all their forms, should be considered as similar in just the way we think of big delegations as essentially similar, no matter that some empower multiple agencies simultaneously while others empower only one.¹⁰⁰ They belong to a single family because they share a basic feature that has significant implications for both regulatory design and administrative law: They confer broad policymaking discretion so that the agency may choose to displace a regulatory baseline that Congress itself has established.

To be sure, the traditional form of delegation remains prominent. The recent Dodd-Frank legislation depends crucially upon broad grants of rulemaking authority,¹⁰¹ as do some aspects of both the No Child Left Behind Act and the Affordable Care Act. In the national security and foreign affairs realm, expansive and open-ended delegations remain foundational. But Congress plainly sees value in a form of delegation that is quite distinct and that reverses the usual delegation mechanism. What, then, might explain the appeal of this inversion of the classic form of delegation? Is big waiver a random occurrence or is it a technique that can be understood to be especially responsive to contemporary conditions?

100. See generally Jody Freeman & Jim Rossi, Agency Coordination in Shared Regulatory Space, 125 Harv. L. Rev. 1131 (2012) (discussing fragmented and overlapping delegations to agencies and Congress's delegation of same or similar functions to multiple agencies).

101. See, e.g., Dodd-Frank Wall Street Reform and Consumer Protection Act § 1022(b)(1), 12 U.S.C. § 5512(b)(1) (Supp. IV 2011) (establishing broad rulemaking authority of Consumer Financial Protection Bureau).

II. WHY BIG WAIVER?

James Landis rooted his theoretical justification of the classic form of delegation in the political economy of his time. The emergence of private institutional power in the form of large, national corporations was central to his theory. So, too, was a critique of laissez-faire assumptions about the need to protect private power from public power. Finally, his justification offered an institutional critique of the existing federal regulatory apparatus.¹⁰² Because Landis assumed Congress would be incapable of responding to the emergence of powerful corporate institutions through direct regulation by statute, he trained his fire on the one national institution at the time that did engage in continuous regulatory supervision—the federal courts. He sought to show why they would not be up to the task either, both by reason of their own institutional incapacity¹⁰³ and because of their adherence to the tenets of laissez-faire ideology.¹⁰⁴ From this critique emerged his call for a shift from courts to agencies, with expert administrators performing the regulatory role that the emergence of large corporations demanded. Indeed, he called for the creation of federal agencies that would mirror the corporate form—and thus not mimic the constitutional separation of powers.¹⁰⁵ So reconceived, the American constitutional system, led by these agencies, would be positioned to provide the regulatory check on private corporate power that neither Congress nor the courts could supply.¹⁰⁶

Within his framework, therefore, open-ended, broad delegations of regulatory authority to agencies were not merely something to be tolerated; they were a desirable—even a necessary—innovation. They enabled the national government, through agencies, to revise policy judgments and thus take account of experience with what worked and what did not, and of knowledge of new developments in the private market. Through such delegations, the administrative state could be responsive to modern

102. See Landis, *supra* note 2, at 10–16 (discussing downfall of laissez-faire model and need for direct regulatory intervention); see also Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 *Colum. L. Rev.* 267, 355 (1998) (describing how Landis “likened the role of the administrative agency to that of a board of directors for an industry, able to use its fact-finding powers and panoramic perch to reach judgments more balanced and farsighted than those accessible to more partial parties”).

103. See Landis, *supra* note 2, at 144 (arguing greater expertise of agencies as compared to courts should cause courts to defer to agency determinations).

104. See *id.* at 34 (noting “men who composed our judiciary too often held economic and social opinions” that were to be distrusted, such as tendency of judiciary to underenforce antitrust law).

105. See *id.* at 7–12 (noting rise of industry as motivating factor for creation of administrative state, and arguing agencies should mix traditional governmental powers in order to better superintend industries with similarly mixed powers).

106. See *id.* at 19–20 (discussing how agencies can and should play both “legislative” and “judicial” roles).

problems in a way that no existing institution of the national government could be.¹⁰⁷

Big waiver, as we have suggested, is not a repudiation of the kind of big delegation Landis championed—for it surely grants the agency a plentitude of power. But it does represent a new form. Thus the growth of big waiver raises the question as to what features of the contemporary political economy might suggest its utility. Following Landis's lead, therefore, we identify five features that might create conditions especially favorable to the development of big waiver.

First, the modern administrative state no longer exists solely to regulate the private market, as Landis seems to have assumed. Rather than operating as a negative check on private power, the federal government now is understood to exert its influence, in some ways most conspicuously, by establishing positive rights through direct welfare provision. This is done chiefly through major entitlement programs, but it is also achieved through spending programs that regulate how state and local governments supply critical public services and through large-scale, federally funded public infrastructure projects.¹⁰⁸ There are, of course, analogues to these forms of intervention from the era in which Landis wrote.¹⁰⁹ But they were not Landis's focus in defending classic open-ended delegations, and their centrality to the contemporary administrative landscape is evident in a way that, at least on Landis's account, was less true then.

Second, the current period is notable for the emergence of critiques of the old-style command and control regulations that Landis's model of ideal administration seems to presuppose. These critiques have been developed both by advocates of deregulation¹¹⁰ and by champions of a more experimentalist form of policymaking that travels under the "new governance" label.¹¹¹ They have provided intellectual support to back up

107. See *id.* at 23 (discussing need for intimate "knowledge of the details of [the] operation" of private industry in order to facilitate practical regulation); *id.* at 66–68 (praising Congress's frequent use of "broad and vague" delegations of power).

108. See Rabin, *supra* note 15, at 1272–78 (contrasting New Deal regulatory model of prescriptions on behavior with Great Society model of welfare provision); cf. Mark Tushnet, Foreword: The New Constitutional Order and the Chastening of Constitutional Aspiration, 113 *Harv. L. Rev.* 29, 29 (1999) (arguing "modern welfare states" have "turn[ed] . . . from a focus on command-and-control regulation to market-oriented regulation as the ambitions of social democracy [have] waned").

109. See, e.g., Tennessee Valley Authority Act of 1933, 16 U.S.C. § 831 (2006) (establishing contemporary infrastructure program); Social Security Act of 1935, 42 U.S.C. § 301 (2006) (establishing contemporary entitlement program).

110. See Richard B. Stewart, *The Reformation of American Administrative Law*, 88 *Harv. L. Rev.* 1667, 1689–93 (1975) [hereinafter Stewart, *Reformation*] (discussing critiques of regulation and advocating deregulation).

111. See generally Dorf & Sabel, *supra* note 102 (setting forth "democratic experimentalist" vision of regulatory state); Jody Freeman, Collaborative Governance in the Administrative State, 45 *UCLA L. Rev.* 1 (1997) (proposing model of collaborative

the political attractiveness of schemes of cooperative federalism. In combination, these developments potentially render nonuniform, easily revised problem-solving efforts highly attractive as regulatory approaches.

Third, we no longer inhabit a world in which the federal presence is relatively thin and the common law is the principal default legal framework. The modern world is thick with federal statutes, and the need for a delegation to take account of the impediments that existing federal statutory limitations impose is heightened.¹¹²

Fourth, the development of lobbying from an occasional visit to Washington into a professional craft attentive to every nuance of legislation seems likely to have had an impact, not only on the substance of policy but also on the form in which it is enacted.

Fifth, and finally, Landis seemed to think that expertise, brought to bear on problems through a national administrative apparatus, could provide a form of consensus governance. The reality of divided government—and the partisan polarization accompanying it—is a signature fact of the current regulatory landscape. It is most famous for leading to legislative gridlock. But it also contributes to wariness about open-ended delegation and to interest in greater legislative specificity—both for reasons of partisan maneuvering and out of distrust of agency policymaking.¹¹³

governance, which requires willingness to experiment with nontraditional forms of accountability); Orly Lobel, *Setting the Agenda for New Governance Research*, 89 *Minn. L. Rev.* 498, 501 (2004) (“The very core of the governance idea is applying law in a way that is sensitive to the particular context and nature of a social problem.”).

112. Philip K. Howard, *The Death of Common Sense: How Law Is Suffocating America* 10 (2011) (“[L]ook up at what we’ve built: a legal colossus unprecedented in the history of civilization, with legal dictates numbering in the millions of words and growing larger every day.”); Robert C. Ellickson, *Taming Leviathan: Will the Centralizing Tide of the Twentieth Century Continue into the Twenty-First?*, 74 *S. Cal. L. Rev.* 101, 105 (2000) (“In 1928, the unannotated version of the United States Code . . . totaled six inches in width. The 1988 version of the unannotated Code . . . spanned six feet . . . Title 42 of the Code . . . expanded from twelve pages in 1928 to 5,227 pages in 1988.” (footnote omitted)); Bayless Manning, *Hyperlexis: Our National Disease*, 71 *Nw. U. L. Rev.* 767, 767 (1977) (“Hyperlexis is America’s national disease—the pathological condition caused by an overactive law-making gland.”); Peter H. Schuck, *Legal Complexity: Some Causes, Consequences, and Cures*, 42 *Duke L.J.* 1, 6 (1992) (“[T]hat legal complexity is increasing . . . [is] not, I think, particularly controversial. Of course, I can no more demonstrate [that] . . . by merely citing examples than I can prove increased regulatory burdens by counting pages in the Federal Register (although many have purported to do so).”); Mila Sohoni, *The Idea of “Too Much Law,”* 80 *Fordham L. Rev.* 1585, 1589 (2012) (“[A]ll three branches of the federal government have begun echoing the proposition that there are too many burdensome regulations, too many wordy statutes, and, in short, too much law. And they are not just talking about the problem; they are making policy and legal decisions to attack it.”).

113. Multiple studies confirm that polarization has increased in recent decades, with corresponding increases in legislative gridlock. See David R. Jones, *Party Polarization and Legislative Gridlock*, 54 *Pol. Res. Q.* 125, 125, 129 (2001) (identifying large rise in partisan polarization since 1970 and concomitant increase in legislative gridlock); Jeffrey S. Peake, *Coalition Building and Overcoming Legislative Gridlock in Foreign Policy, 1947–98*, 32

With direct legislative policymaking difficult and broad delegations less appealing, the demand for some new device to permit pressing new problems to be addressed is substantial.

The contingent political circumstances that produced each of the examples of big waiver discussed above were complex, and many of the forces we consider in play are not the sorts of things that would overtly turn up in public advocacy or in what lawyers consider to be legislative history: the debates and reports of Congress.¹¹⁴ Our argument, instead, is based on resonances and isomorphs. These five features appear to be relatively permanent features of the present situation, and they are at least consonant with the inversion of the classic delegations of administrative power. Because they seem to make the inversion of that traditional form of delegation especially useful, they give reason to suspect big waivers will become an even more prominent feature of the administrative state in the years ahead.

A. *The Federal Provision of Positive Rights—or the Growth of Spending Programs Relative to Regulatory Ones*

The line between a positive and a negative right is, of course, difficult to discern, particularly at the margins. So, too, is the line between the public sphere of the government and the private world of the market. And so, too, is the line between a regulatory program and a spending or entitlement program. The New Deal, especially in its early phases, often mingled things on both sides of these lines. But as its more lasting results were incorporated (by Landis, among others) into legal understanding, its focus was seen to be on the public regulation of the private market through prototypical, expert-defined, prohibitory rules of market

Presidential Stud. Q. 67, 68 (2002) (observing “divided government leads to gridlock,” and noting factors such as “the degree of partisanship on Capitol Hill, ideological diversity among partisans, and ideological differences between chambers of Congress” are “clearly important” in explaining this phenomenon). The increasingly common phenomenon of partisan divides in the control of governmental institutions is also well documented, although scholars disagree as to its cause. Compare Morris Fiorina, *Divided Government* 72 (2d ed. 1996) (arguing voters may rationally prefer divided government), with Lee Sigelman et al., *Vote Choice and the Preference for Divided Government: Lessons of 1992*, 41 *Am. J. Pol. Sci.* 879, 889–90 (1997) (finding no actual voter preference for divided government in 1992 elections). Public valuation of our polarized, divided institutions has declined in response to legislative gridlock. See Thomas E. Mann & Norman J. Ornstein, *The Broken Branch: How Congress Is Failing America and How To Get It Back on Track*, at x (2006) (“Over the past two decades, we have grown more and more dismayed at the course of Congress.”).

114. One exception to this claim is the desirability of experimentation through federalism, which is overtly made plain in the text, as well as the legislative history, of some of these measures. See, e.g., *supra* notes 38–48 and accompanying text (discussing state waivers with respect to NCLB); *supra* notes 49–65 and accompanying text (discussing state waivers with respect to ACA).

conduct.¹¹⁵ The Great Society programs of the 1960s thus have been understood to represent an important change in the direction of federal regulatory interventions, notwithstanding the existence of New Deal antecedents.¹¹⁶

Through these spending and entitlement programs, the administrative state functions not simply as a check upon private power; the bureaucracy extends its authority, at Congress's behest, to regulate the direct provision of public services. In doing so, the national government delivers an enormous amount of cash assistance, usually funneled through state and local governments, into important new areas: notably, education, health care, and welfare.

As a consequence, the national government also asserts regulatory power—usually through its spending power—over state and local governments in these areas. The state and local recipients are given key roles in administering these programs and substantial funds to enable them to do so, even as they are also made subject to the strictures and obligations Congress establishes as the price of their participation.¹¹⁷ Congress thus created a number of more or less rigid frameworks in which technical administrators were expected to carry out and apply formulae that Congress had established.¹¹⁸ But that very rigidity inspired calls to modify these now-several-decades-old programs. For if the characteristic pathology of the open-ended delegation was agency “capture” and related institutional forces leading to regulatory laxness by the agency,¹¹⁹ the characteristic pathology of large federal spending programs was a statutory rigidity that precluded innovation and cost-effectiveness over time. The cure for that disease was not greater congressional micromanage-

115. See Rabin, *supra* note 15, at 1246 (“Under Roosevelt's initial conception of the New Deal, the federal regulatory role was no longer limited to policing, or even to facilitating. Any sector of the economy that was malfunctioning needed government-endorsed controls on trade practices necessary to ‘make things right.’”).

116. *Id.* at 1272–78 (describing regulatory turn towards welfare provision in Great Society).

117. Examples of this kind of structure include Medicaid, Medicare, Aid to Families with Dependent Children, and Title I funding for public schools.

118. See generally Jerry L. Mashaw & Dylan S. Calsyn, *Block Grants, Entitlements, and Federalism: A Conceptual Map of Contested Terrain*, 14 *Yale L. & Pol'y Rev.* 297, 297–98 (1996) (“[T]he general image of an entitlement program seems to be of a federal statute that imposes detailed and rigid standards of beneficiary eligibility in return for a federal contribution to state financing of transfers of cash, goods, or services.” (footnote omitted)).

119. For classic formulations of this concern, see Theodore J. Lowi, *Two Roads to Serfdom: Liberalism, Conservatism and Administrative Power*, 36 *Am. U. L. Rev.* 295, 297 (1987) (“[A]ll discretion delegated to administrative agencies, by degree, provides the conditions for the creation of private goods. This is the very essence of patronage . . .”); Stewart, *Reformation*, *supra* note 110, at 1683 (announcing end of belief in “public interest” and emergence of belief that “the exercise of agency discretion is inevitably seen as the essentially legislative process of adjusting the competing claims of various private interests affected by agency policy”).

ment—through ex post legislative revision to reduce agency discretion,¹²⁰ such as setting timelines for action¹²¹—but, rather, the delegation of administrative discretion to inject a measure of flexibility and vitality into systems that risked having run their course. Calls to make the federal funding presence less intrusive on state and local governments provided an additional political impetus.¹²² At the extreme, these forces conspired to provide support for calls to turn such programs into federal block grants to the States,¹²³ but Congress was usually not willing to go that far.¹²⁴

The employment of big waiver in recent modifications of these programs may be understood as responsive to this dynamic. The use of big waiver as a tool for fashioning federal public education policy, for example, did not originate with NCLB itself. Its roots may be traced instead to federal education reforms that began in the 1990s. Those reforms took aim at the Elementary and Secondary Education Act (ESEA),¹²⁵ the landmark federal education law that arose out of the Great Society.¹²⁶ ESEA set forth a relatively rigid system for shaping educational policy through the granting of an unprecedented amount of federal funding to state and local school systems.¹²⁷ By the 1990s, however, there was something

120. See Stewart, *Reformation*, supra note 110, at 1698–711 (exploring options for structuring administrative discretion or creating substantive rules to cabin its use).

121. See generally Jacob E. Gersen & Anne Joseph O’Connell, *Deadlines in Administrative Law*, 156 U. Pa. L. Rev. 923 (2008) (discussing role of statutory deadlines in cabin agency discretion).

122. See, e.g., *Personal Responsibility and Work Opportunity Reconciliation Act of 1996*, Pub. L. No. 104-193, tit. I, § 103, 110 Stat. 2105, 2112–61 (codified as amended at 42 U.S.C. §§ prec. 601, 601–610, 612, 613, 615–617) (reducing federal conditions and establishing block grant system for Temporary Assistance to Needy Families); David A. Super, *Rethinking Fiscal Federalism*, 118 Harv. L. Rev. 2544, 2584–85, 2589 (2005) (discussing welfare reform, decline in federal mandates, and rise in block granting).

123. See generally Michael W. McConnell, *The Politics of Returning Power to the States*, 6 Harv. J.L. & Pub. Pol’y 103, 110–12 (1982) (praising early block grant initiatives during first Reagan Administration).

124. See Michael S. Greve, *Against Cooperative Federalism*, 70 Miss. L.J. 557, 580–81 (2000) (lamenting failure of President Reagan’s attempt to revise cooperative federalism schemes due in part to Congressional opposition).

125. Pub. L. No. 89-10, 79 Stat. 27 (1965) (codified as amended in scattered sections of 20 U.S.C.).

126. See, e.g., *Improving America’s Schools Act of 1994*, Pub. L. No. 103-382, 108 Stat. 3518; *School-to-Work Opportunities Act of 1994*, Pub. L. No. 103-239, 108 Stat. 568; *Goals 2000: Educate America Act*, Pub. L. No. 103-227, 108 Stat. 125 (1994).

127. See Derek W. Black, *The Congressional Failure To Enforce Equal Protection Through the Elementary and Secondary Education Act*, 90 B.U. L. Rev. 313, 336–38 (2010) (noting ESEA targeted spending at specific categories of low-income students and conditioned federal dollars on intradistrict funding parity, maintenance of fiscal effort, and other civil rights and equal protection criteria); P. Michael Timpane, *Federal Aid to Schools: Its Limited Future*, 38 Law & Contemp. Probs. 493, 498 (1974) (noting “[t]he operation of the new federal programs [contained in the ESEA] was a great disappointment to most local officials” because it forsook general education financing for narrow

of a consensus that the federal system for providing public school funding had become too rigid.¹²⁸ A series of new statutes aimed to inject much greater flexibility into ESEA. Some of this enhanced flexibility was accomplished through statutory amendments that repealed prior statutory constraints.¹²⁹ But Congress did not attempt on its own to root out all of the unnecessary constraints embedded in the original statute; rather, the new reform laws delegated the authority to waive those residual statutory limitations to the Secretary of Education.¹³⁰ Thus, by the time NCLB was enacted, Congress was already quite familiar with the role that big waiver could play in enabling a relatively specific statutory framework for federal education policy to become more flexible over time. It was aware as well of the hazards of saddling public educational systems with an inflexible federal regulatory regime. Those hazards, moreover, were at least in part political. The pushback from state and local officials, particularly in an arena as controversial as public education, would no doubt be significant if the federal regulatory intervention was too heavy-handed. The experience with the reform of Title I generally, then, paved the way for the waiver provisions that have been used to overhaul the overhaul of Title I that the No Child Left Behind Act brought about.¹³¹

“compensatory” model that “required separate and restrictive accounting” and insisted on maintenance of local fiscal effort).

128. Criticism of onerous conditions on federal education funding has been around since such conditions first arose. See Carl F. Kaestle & Marshall S. Smith, *The Federal Role in Elementary and Secondary Education, 1940–1980*, 52 *Harvard Educ. Rev.* 384, 385 (1982) (discussing early concerns about conditions on federal funds). Such criticism became particularly widespread in the 1990s. See, e.g., Nina J. Crimm, *Core Societal Values Deserve Federal Aid: Schools, Tax Credits, and the Establishment Clause*, 34 *Ga. L. Rev.* 1, 51 (1999) (noting “[t]he strong ranks of advocates of local control have perceived categorical federal funding as more threatening than state funding . . . in part because some view federal funding programs as controversial and bureaucratically intrusive with many ‘strings’ attached”).

129. See, e.g., *Improving America’s Schools Act of 1994* tit. I (amending ESEA); *Goals 2000: Educate America Act* § 911 (repealing section 405 of *General Education Provisions Act*).

130. See *School-to-Work Opportunities Act* § 502(a)(1)(A) (creating limited waiver provision for enumerated set of statutory requirements if Secretary determines “such requirement impedes the ability of the State, or of a local educational agency to carry out the purposes of this Act”); *Goals 2000: Educate America Act* § 311(a)(1)(A) (creating nearly identical waiver provision); see also U.S. Dep’t of Educ., *Waiver Guidance for Waivers Available Under the Goals 2000: Educate America Act, Elementary and Secondary Education Act, School-to-Work Opportunities Act* (1998), available at http://www2.ed.gov/flexibility/g2k_waivers/index.html (on file with the *Columbia Law Review*) (summarizing waiver provisions, comparing requirements laid out by each statute, advising on how to prepare waiver requests, and addressing common questions about waivers).

131. See Michael Cohen, *Implementing Title I Standards, Assessments and Accountability: Lessons from the Past, Challenges for the Future*, in *No Child Left Behind: What Will It Take?* 75, 78–79 (Thomas B. Fordham Found. ed., 2002), available at http://www.edexcellencemedia.net/publications/2002/200202_nclbwillittake/NCLBrepo

A similar story can be told regarding health care. Medicare was a signature accomplishment of the post-New Deal administrative state. As an entitlement program, however, it has proved extremely costly over time. Reducing its costs has been difficult, in part because of the constituencies now dependent upon it for benefits and the felt need to provide for them. Congress was aware of the dangers that would attend an inflexible statutory entitlement program—as reflected in the limited waiver provisions that it included when enacting Medicare and Medicaid.¹³² But the overriding general reason for legislative specificity here, as with Title I, is readily apparent. In carrying out such a massive tax and transfer system, Congress was understandably loath to simply hand its purse strings over to the control of an administrator. It established tight controls over who would be eligible for reimbursement and under what conditions.

However, that legislative specificity became increasingly problematic over time. In fact, the costs imposed by that earlier statutory framework arguably impeded the ability of the government to make headway in expanding access to affordable health care—through the provision of new subsidies—to persons not eligible for Medicare. Unless ways could be found to reduce the budget outlays associated with this older statutorily established program, the subsidies needed to address new aspects of the access to health insurance problem might not be available. Thus, the new IPAB may be understood as an administrative solution to strictures Congress had itself imposed that threatened to crowd out new reform efforts. Rather than doing the work of identifying precisely which of those strictures should be repealed, the ACA delegates that task to an administrative board.¹³³

B. *The Waning Appeal of Command and Control Regulation*

The account just offered also resonates with new conceptions of successful administrative action, applicable more broadly, that have developed in recent years. While the theoretical development may be complicated, the basic impulse is easy enough to sketch.

rt.pdf (on file with the *Columbia Law Review*) (noting major lesson drawn from 1994 reforms was that waiver provisions for strict statutory requirements would be essential).

132. See 42 U.S.C. § 1315(a) (2006) (“In the case of any experimental, pilot, or demonstration project which, in the judgment of the Secretary, is likely to assist in promoting the objectives of [various Medicaid provisions] . . . [he] may waive compliance with any of the [specified] requirements . . . to the extent and for the period he finds necessary”); *id.* § 1395b-1(b) (“In the case of any experiment or demonstration project [with regards to Medicare] the Secretary may waive compliance with . . . such requirements [as] relate to reimbursement or payment”); see also Jonathan R. Bolton, Note, *The Case of the Disappearing Statute: A Legal and Policy Critique of the Use of Section 1115 Waivers To Restructure the Medicaid Program*, 37 *Colum. J.L. & Soc. Probs.* 91, 98–101 (2003) (describing origin of “demonstration project” waiver in initial Medicaid program and criticizing its increasing use to enable larger and more comprehensive programs).

133. See *supra* notes 58–65 and accompanying text (discussing ACA and IPAB).

Landis imagined that regulations would be uniform and national in scope in order to mimic the scale and form of the private institutions they address and control.¹³⁴ But his idea—associated with what has come to be thought of as “command and control” regulation—has lost much of its persuasive force.

For some, such a regulatory vision placed too little faith in market-based solutions and assumed a bureaucratic capacity that was unrealistic.¹³⁵ It thus unduly trumped private ordering, which was assumed to be superior. Whether the federal intervention took the form of direct regulation of the market, as with environmental laws,¹³⁶ or of conditional federal funding for the provision of governmental services,¹³⁷ the critique was similar. The bigger the governmental footprint, the worse. A delegation of administrative power to undo federal regulatory interventions would thus seem to represent a substantial advance and would for that reason hold appeal.

For others, however, the problem was that the national bureaucracy crowded out even better and more creative *public* interventions. The process of experimentation and continuous improvement, it was thought, could only work by empowering state and local officials, perhaps through targeted experiments fostered by the federal administrators themselves in cooperation with private actors.¹³⁸ The special appeal of experimentation fostered by placing more responsibility in lower levels of government—experimental federalism—may be traced back at least as far as Justice Brandeis’s paean to regulatory experiments by the States in his

134. See Landis, *supra* note 2, at 6–7 (arguing that growing complexity and “interdependence” in modern era means government regulation and enforcement, rather than individual private suits, must play role in establishing national standards).

135. See, e.g., Bruce A. Ackerman & Richard B. Stewart, Comment, Reforming Environmental Law, 37 *Stan. L. Rev.* 1333, 1333–34 (1985) (advocating market-based methods for achieving performance goals of environmental statutes rather than top-down technological mandates).

136. See *id.* at 1334–40 (arguing current technology mandates in environmental statutes impose large costs on business and forgo more efficient paths to meeting same goals through private ordering).

137. See Mark C. Gordon, Differing Paradigms, Similar Flaws: Constructing a New Approach to Federalism in Congress and the Court, 14 *Yale L. & Pol’y Rev.* (Symposium Issue) 187, 216 (1996) (advocating new fiscal federalism in which federal government abandons “the entire command and control relationship” of current funding streams and instead “define[s] output and performance measures” and leaves “localities . . . free to determine how they are to meet those goals”).

138. See Richard B. Stewart, Madison’s Nightmare, 57 *U. Chi. L. Rev.* 335, 352 (1990) (“Command and control regulation attempts to achieve [national] harmonization by dictating the precise outcome of specific decisions within these various [subnational] institutional systems. . . . [T]he national government can instead use more indirect methods to achieve ‘strategic coupling’ of the institutions’ decisions with national norms and goals.” (citing Gunner Teubach, *After Legal Instrumentalism?*, *Strategic Models of Post-Regulatory Law*, 12 *Int’l J. Soc. L.* 375 (1984))).

dissent in *New State Ice Co. v. Liebmann*.¹³⁹ But this proposition is straightforward only as to matters that are, from the start, within the control of the several states. To achieve the same result with national legislation, there has to be some give in the national regulatory system. That requires relaxing strictures on what states and localities may do that earlier-enacted federal statutes may contain. And if the experiments are to amount to anything, the provisions that would need to be relaxed would have to be significant in their own right.

Thus, the delegation of the power to waive such preexisting constraints could be a critical incident of contemporary regulatory design. It would enable proponents of next-wave administrative regulation to achieve the kind of reform they favor. It is not by accident that the ACA's big waiver provision, triggered by an application from state or local authorities, is entitled a grant of authority to the Secretary to promote "innovation."¹⁴⁰

The multiple origins of the critique of command and control regulation indicate that use of the big waiver technique does not have an inherent, unalterable political valence, unconnected with its precise formulation and particular context. That is one of the reasons that accounts for its prevalence, and one of the reasons we think it is here to stay. The inclusion of a big waiver power in a statute might well respond to the desires of legislators with very different political leanings. Those generally favoring greater regulation could view it as the pathway to further improvement in the mode of experimentalist or new governance thinking. Those generally opposing greater regulation, by contrast, could view it as the pathway to deregulation in the future, either in strict form by dismantling a misguided intervention or by facilitating a shift toward a block grant model. Which of these views would prevail might turn on the exact wording of the big waiver provision, but would also, of course, turn on the vagaries of future presidential elections, about which both sides might be optimistic.

C. *The Pervasive Federal Statutory Presence*

If we widen the lens yet further, the appeal of big waiver becomes increasingly clear. As much as the modern federal administrative state depends upon the delegation of regulatory discretion to make law, it also involves a dramatic upsurge in the federal statutory presence. Whole fields of the market—and of social life—that were formerly untouched by

139. 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

140. 42 U.S.C. § 18052 (Supp. IV 2011).

Congress have become the objects of its attention.¹⁴¹ One well-known consequence is the greatly increased importance of questions of preemption, that is, of questions of how much state law survives the federal statutory incursion. But as federal law becomes thicker and thicker, a similar issue arises within the corpus of federal law itself.¹⁴²

With the accretion of federal regulatory authority, the potential for conflicts between agencies, separately empowered by distinct statutory regimes, necessarily grows. The concern about regulatory overlap, and the best means of managing it, has become increasingly important to the operation of the modern administrative state as it advances in age.¹⁴³ One obvious byproduct of this heightened and overlapping regulatory complexity across fields is the increased efforts by successive presidents to assert a coordination power over these agencies, not simply to ensure they follow the President's program but also to manage the inevitable jurisdictional disputes and conflicts between and across agencies that are sure to arise as more and more federal statutes charge more and more agencies with more and more responsibility for distinct, but difficult-to-disentangle, regulatory missions.¹⁴⁴

But in a world of such regulatory complexity, it would seem inevitable that Congress too will increasingly have to determine how best to manage these overlapping missions. New delegations no longer simply empower agencies to act where no federal regulatory presence exists; instead they inevitably raise issues concerning which agency should be empowered to have a lead role, given the conflicting claims to authority that another agency may make on the basis of its own organic statute.¹⁴⁵

141. See Ellickson, *supra* note 112, at 104–10 (documenting growth of government regulation in twentieth century).

142. This corpus of law includes both increased statutory authority as well as corresponding growth in federal regulations pursuant to that authority. See J.B. Ruhl & James Salzman, *Mozart and the Red Queen: The Problem of Regulatory Accretion in the Administrative State*, 91 *Geo. L.J.* 757, 773 (2003) (“[T]he Code of Federal Regulations, the repository of the federal government’s agency and department final regulations in place at any given moment . . . has more than doubled in size, from just under 60,000 pages [in 1970] to 134,723 pages in 1998, occupying nineteen feet of shelf space.”).

143. See, e.g., Freeman & Rossi, *supra* note 100, at 1209–10 (investigating tools for agency coordination given regulatory overlap).

144. See *id.* at 1173–81 (summarizing tools of presidential coordination, including informal consultation, formal orders or memoranda, opinions of Office of Legal Counsel, procedures established by policy offices and councils, regulatory review through Office of Management and Budget, and President’s direct management authority); see also Regulatory Planning and Review, Exec. Order No. 12,866, §§ 6–7, 58 *Fed. Reg.* 51,735 (Sept. 30, 1993) (establishing procedure for centralized regulatory review and conflict resolution); Elena Kagan, *Presidential Administration*, 114 *Harv. L. Rev.* 2245, 2284–303 (2001) (describing techniques President Clinton used to coordinate agency action, including centralized OMB review, formal directives, and personally identifying agency action as his own).

145. See, e.g., Todd S. Aagaard, *Regulatory Overlap, Overlapping Legal Fields, and Statutory Discontinuities*, 29 *Va. Envtl. L.J.* 237, 242–49 (2011) (discussing overlaps be-

The more Congress finds itself delegating in policy areas already thick with federal statutes, the more its delegations of discretionary power will require it to make determinations about whether agencies should be empowered to waive statutory impediments that confront them. And given the difficulties of resolving such choices, and even of foreseeing them, the incentives to opt for delegation as the means of resolution would seem significant.

Against this larger background, one can see that both the education and health care sectors are not ones in which Congress, even if it desired to deploy Landis's preferred tool of broad delegation—and even if it was not influenced by either the deregulatory or new governance critiques—could have easily done so. That is because Congress had long ago entered those sectors, laying down thick federal statutory frameworks that would, absent their partial or wholesale legislative repeal, tightly constrain any new exercise of administrative authority.

But the phenomenon of pervasive federal legislation constraining the exercise of newly delegated administrative authority—and thus setting the stage for big waiver—can be observed even more clearly elsewhere. One need only look at the use of big waiver in major national infrastructure projects undertaken since the adoption of the federal environmental statutes. We have already described how the REAL ID Act's delegation to the Secretary of Homeland Security of the authority to oversee construction of a U.S.-Mexico border fence ran headlong into myriad statutes that could delay the carrying out of that mission.¹⁴⁶ But the REAL ID Act is not unique. Big waiver figured prominently in an earlier transnational infrastructure project, the Alyeska Pipeline.¹⁴⁷ The purpose of the Trans-Alaska Act was “to insure that . . . the trans-Alaska oil pipeline be constructed promptly without further administrative or judicial delay or impediment.”¹⁴⁸ The Act allowed for the Secretary of the Interior and other federal officers to “waive any procedural requirements

tween regulatory authorities delegated to Occupational Safety and Health Administration via Occupational Safety and Health Act of 1970 and EPA via various federal statutes); Freeman & Rossi, *supra* note 100, at 1147–49 (describing regulatory structure for “American food safety system, in which fifteen federal agencies play parts”; U.S. financial markets, where “five federal agencies, some independent and some executive, play different roles in a regime of ‘sector-based’ regulation”; and U.S. border control, where responsibility is divided among various agencies); Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 Sup. Ct. Rev. 201, 222–23 (noting courts often rely on “presumption of exclusive jurisdiction” when interpreting cases of concurrent agency jurisdiction).

146. See *supra* Part I.C.6 (describing big waiver's role in REAL ID Act).

147. See Trans-Alaska Pipeline Authorization Act (Trans-Alaska Act), Pub. L. No 93-153, § 203, 87 Stat. 584, 584–85 (1973) (codified as amended at 43 U.S.C. § 1652) (allowing Secretary of the Interior and other agency officials to waive procedural requirements to construct pipeline).

148. *Id.* § 203(a).

of law or regulation which they deem desirable to waive in order to accomplish the purposes” of the legislation.¹⁴⁹

Indeed, big waiver played an important role in the legislative resolution of the most famous conflict between environmental protection and national infrastructure development—the snail darter controversy occasioned by the Supreme Court’s decision in *TVA v. Hill*.¹⁵⁰ In *TVA*, the Secretary of the Interior had classified the snail darter as an endangered species under the Endangered Species Act of 1973 (ESA).¹⁵¹ This classification included a regulation requiring federal agencies not to take any actions that would affect the snail darter’s “critical habitat.”¹⁵² The snail darter’s habitat at the time was thought to be exclusively in an area that would be flooded as a result of the Tellico Dam—a multimillion-dollar project undertaken by the Tennessee Valley Authority (TVA).¹⁵³ The Supreme Court found that the ESA prevented completion of the dam because of the damage to the snail darter’s habitat.¹⁵⁴ As a result of this decision, Congress amended the ESA, creating a committee (irreverently termed the “God Squad”) that could exempt projects from ESA requirements.¹⁵⁵ By contrast, there was no waiver provision included in the legislation authorizing the creation of the TVA itself.¹⁵⁶ After all, there was far less chance in 1933 that the agency carrying out that statutory mission would run up against a contrary directive from Congress that had been previously established.

D. *The Growth of Professional Lobbying*

Alongside the growth of federal law is the growth of federal lobbying, an additional factor arguing in favor of the growing use of big waiver. That interest groups bring both pressure and ideas to Congress, and that legislation is at least in part responsive to the resulting field of forces, is neither new nor news.¹⁵⁷ At the same time, there is also no doubt that the scale of lobbying, especially by full-time professionals, has

149. *Id.* § 203(c).

150. 437 U.S. 153 (1978).

151. *Id.* at 172.

152. *Id.* at 162.

153. *Id.* at 161–62, 172.

154. *Id.* at 172–73.

155. See Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, § 3, 92 Stat. 3751, 3752–60 (codified as amended at 16 U.S.C. § 1536(a)–(p)) (establishing Endangered Species Committee and defining its procedures for review); see also Bowers, *supra* note 3, at 263 (discussing Endangered Species Act Amendments of 1978).

156. Tennessee Valley Authority Act of 1933, Pub. L. No. 73-17, 48 Stat. 58 (codified as amended at 16 U.S.C. § 831–831ee).

157. For a theoretical model of the process, see generally Richard L. Hall & Alan V. Deardorff, *Lobbying as Legislative Subsidy*, 100 *Am. Pol. Sci. Rev.* 69 (2006) (arguing lobbyists influence outcomes by providing policy information and legislative labor to natural allies).

greatly increased in modern times. Lobbyists are more expert, more targeted, and more dependent on success in this particular endeavor than before. It is also neither new nor news that even general federal statutes have often contained particularistic provisions that seem, in terms of scale, out of place.¹⁵⁸ These have often been explained as the results of a yielding by Congress to special interests whose cases have been pushed by particular legislators.¹⁵⁹

We suspect, although we are not sure how to prove it, that the increased specificity of many modern statutes can be in part explained in the same way. And we thus also suspect that the rise in lobbying contributes to the rise in big waiver. Of course, some lobbying concerns the big general issues—should we have a federal bureau doing this sort of thing at all? But for many lobbyists' clients, a little provision protecting their particular interest may be more important and more attainable;¹⁶⁰ and for the lobbyist himself, insertion of that provision in the statute may be more demonstrable to a client or constituency than a claim of influence on the big issue itself. At the same time, there will be opposition from those who are not favored. It is well known that those who get targeted benefits are easier to mobilize than those who suffer diffuse costs. And that is where big waiver enters the picture.

A waiver provision adds some assurance to those who fear they will suffer substantial costs: If their fears eventuate, there will be another venue in which to oppose the obligation placed on them. And the cumulative effect of those lobbying for special provisions and others fearing their effect (which may indeed be the same lobbyists as regards different provisions) may make a statute with both specified provisions and a waiver provision more likely. Further, the waiver provision will itself become a target of lobbyists. Rather than trying to avoid having a waiver provision at all, a lobbyist may push the dynamic of specificity one cycle further and try to limit the waiver provision in a specific way. It should be

158. For example, The Occupational Safety and Health Act of 1970, Pub. L. No. 91-596 (codified as amended in scattered sections of 19 U.S.C.) was so general in describing the contours of its basic substantive requirements that the Supreme Court had to work very hard to develop the limiting principles. See, e.g., *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 639–40 (1980) (plurality opinion) (massaging statutory definition to create limiting principle requiring Secretary to make threshold determination that toxic substance constituted “significant risk” requiring remedy under statute). At the same time, very near its end, it required with great specificity the installation of “emergency locator beacons” in “fixed-wing, powered aircraft” and listed numerous exceptions. Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, § 31, 84 Stat. 1590, 1619 (codified as amended at 49 U.S.C. § 44712).

159. See, e.g., Patrick M. Anderson, Note, *The Agricultural Employee Exemption from the Fair Labor Standards Act of 1938*, 12 *Hamline L. Rev.* 649, 653–55 (1989) (describing legislative history of exemption for agricultural workers and concluding it was result of lobbying).

160. See Richard L. Hasen, *Lobbying, Rent-Seeking, and the Constitution*, 64 *Stan. L. Rev.* 191, 220 (“[L]obbyists, like mushrooms, thrive in areas of low light.”).

no surprise, therefore, that we find in some of the broadest big waiver provisions, such as NCLB's, a list of items that are explicitly beyond waiver.¹⁶¹

E. *Divided Government*

A final feature of the contemporary political economy that is conducive to big waiver is perhaps the defining feature of national governance at the present time: divided government. It is difficult to think about the contemporary federal administrative state without attending to the fact of divided government in the political branches. Indeed, a standard account even suggests that divided government has made government by administration more important than ever.

With Congress stalemated, either because of internal divisions between its two houses or because the legislative branch and the executive branch are locked in partisan conflict,¹⁶² policymaking necessarily occurs, if at all, through the exercise of administrative discretion.¹⁶³ This account supports the further contention that we now live in an era of presidential administration.¹⁶⁴ Precisely because presidents can no longer count on successfully carrying out a legislative agenda, their domestic policymaking ambitions become focused on the opportunities afforded by the exercise of agency power. They therefore seek to exert greater control over the policymaking discretion of agencies. This fact, in turn, accentuates the perception that agencies do not deal in apolitical expertise.¹⁶⁵

In this situation, the idea that both houses of Congress would be interested in delegating large swaths of unstructured, discretionary authority to the executive (of another party) seems much less likely than it once did.¹⁶⁶ One possibility is that delegations to independent agencies will

161. See, e.g., No Child Left Behind Act of 2001, Pub. L. No. 107-110, § 9401(c), 115 Stat. 1425, 1973-74 (to be codified at 20 U.S.C. § 7861) (listing unwaivable requirements).

162. See Tushnet, *supra* note 108, at 50-51 (describing "new constitutional order" as highly partisan groups working in divided government with decreased emphasis on law-making through normal legislative process).

163. See Kagan, *supra* note 144, at 2311-12 (noting "the possibility of significant legislative accomplishment . . . has grown dim in an era of divided government," and policymaking is thereby increasingly relegated to "administration—a sphere in which [the President] unilaterally can take decisive action").

164. See *id.* at 2246 ("We live today in an era of presidential administration.").

165. See *id.* at 2353 (noting "[b]ureaucratic expertise . . . cannot alone or even predominantly drive administrative decisions," because those decisions depend on "value judgments" and "political choices" such that "presidential administration displaces [expertise]").

166. See Fiorina, *supra* note 113, at 168 ("[T]he legislature grants broader discretion when its preferences are more similar to the executive's. . . ."); David Epstein & Sharyn O'Halloran, The Nondelegation Doctrine and the Separation of Powers: A Political Science Approach, 20 *Cardozo L. Rev.* 947, 951 (1999) (finding as empirical matter that "[a]s political factors . . . such as . . . partisan control of the branches of government . . . change, so too will the terms of delegation"); Tushnet, *supra* note 108, at 55 ("Congress is

become increasingly attractive, as they offer a hedge against the presidential authority of an opposing party.¹⁶⁷ It is interesting in this regard that the Dodd-Frank legislation empowered independent regulators more than it did the Treasury Department.¹⁶⁸ But another possibility is that big waiver will supply a mechanism for permitting agreement in circumstances of divided government, and it is that possibility that is of interest here.

Legislators of the same party as the President can sign on to seemingly detailed and restrictive legislation that constrains him, knowing that the President's interests will be protected (if at a high cost) through the safety valve that waiver provisions afford. And legislators of the opposite party can stomach the delegation of authority to the executive precisely because they can spell out in the statute their own preferred regulatory approach, thereby saddling the President with the decision to displace it. In this way, legislators can claim credit for having solved a problem, while either downplaying the significance of the fact that the supposed "solution" is actually far from stable or highlighting to their favored constituents in relatively discrete tones the instability of those features of the framework that cause concern to those same constituents. If nothing else, a within-statute waiver makes it possible to expand the circle of support for its enactment by providing a means by which objectors to an aspect of the policy set forth in the statute can be accommodated, without thereby forcing supporters of that policy to walk away from the legislative negotiation with nothing to show for it. An example might be the generally worded waiver provisions in the ACA.¹⁶⁹ They allow the possibility of a state pursuing a single payer model,¹⁷⁰ for example, even though such a

reluctant to delegate broad authority to an executive branch controlled by a different party.”).

167. See Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 *Tex. L. Rev.* 15, 25 (2010) (“Congress uses independent agencies at least in part to keep power away from a President of the opposite party.”).

168. See *Recent Legislation, Administrative Law—Agency Design—Dodd-Frank Act Creates the Consumer Financial Protection Bureau*, 124 *Harv. L. Rev.* 2123, 2126–30 (2011) (describing Consumer Financial Protection Bureau’s sweeping regulatory powers and noting it is nonetheless more insulated than other independent agencies); see also Dodd-Frank Act § 111(b), 12 U.S.C. § 5321 (Supp. IV 2011) (establishing Financial Stability Oversight Council whose members include heads of independent agencies but only one position for Treasury Secretary).

169. 42 U.S.C. § 18052(b)(1) (Supp. IV 2011) (permitting waiver of specified requirements, particularly those pertaining to health insurance exchanges, if state’s alternative plan meets certain cost and coverage requirements).

170. Vermont recently passed legislation that will eventually create a single payer insurance system for the state and has applied for a State Innovation Waiver under the ACA to provide sufficient flexibility to implement it. See Jessica Marcy, *Vermont Edges Toward Single Payer Health Care*, *Kaiser Health News* (Oct. 2, 2011), <http://www.kaiserhealthnews.org/stories/2011/october/02/vermont-single-payer-health-care.aspx> (on file with the *Columbia Law Review*) (discussing Vermont health care legislation). Governor Schweitzer has announced that he intends to pursue a policy similar

model was not expressly validated—and was actually rejected—in the ACA on its face.¹⁷¹

Further, the executive branch may be comfortable accepting legislative terms that might otherwise be unacceptable precisely because it also receives the power to waive them. One imagines, then, that the executive branch is likely to be quite attentive—if its officials are savvy—to the precise terms of the waiver provision. As an example of this phenomenon, it is worth noting how hard the executive worked to craft the waiver provisions of the National Defense Authorization Act's detention regulations.¹⁷² It was through the negotiations over the terms of this waiver that a final bill could be enacted without provoking either constitutional clashes about the branches' relative national security powers or a legislative conclusion that the executive believed was unacceptable as a policy matter.¹⁷³

Finally, big waiver offers a way to modify existing statutes that have to be changed but cannot be easily altered because of existing partisan divides. The delegation of the authority to waive the debt ceiling limitation and the establishment of the IPAB to reform the Medicare statute provide some support for the conclusion that such a dynamic is at work—at least in the fiscal arena. Also relevant here may be the emergence of increasingly tight monitoring by polarized interest groups of congressional actions through the use of political “scorecards,” “pledges” and the

to a “public option” in Montana and to seek a similar waiver. See Matt Gouras, Schweitzer Wants Statewide Universal Health Care Program, *Missoulian* (Sept. 28, 2011, 10:45 PM), http://missoulian.com/news/state-and-regional/article_2412d7d6-ea12-11e0-8f41-001cc4c002e0.html (on file with the *Columbia Law Review*) (“Gov. Brian Schweitzer said Wednesday he will ask the U.S. government to let Montana set up its own universal health care program . . .”).

171. See Ronald Dworkin, *A Bigger Victory Than We Knew*, N.Y. Rev. Books (July 13, 2012), <http://www.nybooks.com/articles/archives/2012/aug/16/bigger-victory-we-knew/?pagination=false> (on file with the *Columbia Law Review*) (“The Affordable Care Act does not change America’s tradition of using private health insurance as the basic vehicle for financing medical care. The scheme it creates is less efficient and rational than a single-payer system . . .”); Ezra Klein, What If They Passed Single-Payer and Didn’t Tell Anyone?, *Wash. Post* (Oct. 1, 2009 4:39 PM), http://voices.washingtonpost.com/ezra-klein/2009/10/what_if_they_passed_single-pay.html (on file with the *Columbia Law Review*) (reporting Senator Ron Wyden had “quietly slipped in” section 1332 of ACA, which would “giv[e] states enormous flexibility to experiment upward” and “could be used for a public option” or “for single-payer” on state level).

172. National Defense Council Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1022, 125 Stat. 1298, 1563 (2011) (to be codified in scattered sections of U.S.C.).

173. See Press Release, Barack Obama, Statement by the President on H.R. 1540 (Dec. 31, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/12/31/statement-president-hr-1540> (on file with the *Columbia Law Review*) (stating that, although “section 1022 is unnecessary and has the potential to create uncertainty, . . . I have signed this bill on the understanding that section 1022 provides the executive branch . . . with the full and unencumbered ability to waive any military custody requirement”).

like.¹⁷⁴ Votes to repeal existing statutory provisions—provisions that, as time passes, become increasingly problematic to leave in place—become difficult if they are to be scored as votes for more debt or to cut Medicare. Delegation of the decision to “repeal” to an agency, therefore, may provide legislators some insulation from a negative score by partisan observers with clout, though in principle it need not.

Here, again, we see that big waiver does not have a fixed political valence. It can be used to gain the agreement that makes increased regulation possible. It can also be used to gain the agreement that makes deregulation—which, after all, takes action to implement—possible. But either way, the delegation of the amendatory power seems like an important means of overcoming a political stalemate in a world marked by a politics that makes stalemate ever more likely.

F. Conclusion

Even if the preceding account of the historical forces that might be at work is persuasive, it does not provide a normative justification for accepting the result. Some of the factors we have delineated might even suggest the opposite conclusion—that big waiver is a dangerous innovation. If big waiver merely results from an upsurge in lobbying capacity on behalf of narrow interests, for example, it would seem to have little to commend it on either public welfare grounds or as an attractive account of democratic self-government. And if one is skeptical of the continued intervention of the federal government in not only those areas of social life it has already addressed but also others, then one has reason to be wary of a tool that seems to facilitate the national government’s capacity to intervene in the future by overcoming obstacles to lawmaking at the present moment. Or, on the other side, if one fears what might result from dismantling existing regulatory schemes, one might similarly be wary of a tool that facilitates taking such action. Finally, one might think that even if legislative gridlock is at the root of big waiver’s rise, then the solution should not be big waiver. The aim should be to focus on reforms—of congressional procedures or campaign financing rules—that might permit Congress itself to act more responsively to pressing problems, rather than to come up with ever more “creative” ways of enabling Congress to not make the decisions that matter.

174. See Samuel Issacharoff & Daniel R. Ortiz, *Governing Through Intermediaries*, 85 Va. L. Rev. 1627, 1650 (1999) (discussing how “political intermediaries” help voters monitor their elected agents, including through use of “voting guides and ratings”); see also Michael Tomz & Robert P. Van Houweling, *Political Pledges as Credible Commitments* (Mar. 2012) (unpublished manuscript), available at <http://www.stanford.edu/~tomz/working/TomzVanHouweling-Pledges-2012-03-27.pdf> (on file with the *Columbia Law Review*) (developing formal model explaining how political pledges have strong influence on later behavior).

But if, like us, you are not inclined to think gridlock is good; you do not assume, in principle, that further regulatory intervention is unwise; you do not assume, in principle, that dismantling key aspects of prior regulatory frameworks is never warranted; and you are skeptical that there is any greater chance of solving legislative regulatory incapacity now than there was when Landis wrote; then the factors we identify do point the way towards not just an explanation but a justification for big waiver. An effective, engaged, and democratically responsive administrative state, on this view, cannot be one that is hemmed in by federal legislative baselines enacted decades ago. And, for that reason, it becomes important to facilitate the means to establish new regulatory frameworks that both render existing regulatory baselines less fixed and make newly established ones subject to continuous revision. Big waiver, we suggest, accomplishes this in our time—given the prevailing attitudes about regulation, the state of our politics, and the sheer maturity of the national regulatory system—much as Landis believed big delegation accomplished it in his.

III. THE LAWFULNESS OF BIG WAIVER

From the foregoing, two possible narratives of big waiver emerge. On one account, the practice of having Congress pass specific statutes that give the executive branch broad powers to waive their specifics, risks enacting the nightmares of the public choice theorists. Growing out of the increased importunities of lobbyists, use of big waiver facilitates the passage of statutes that deliver rents to special interests by making the practice less fearful than it would otherwise be; if the special interest reward is really, really dysfunctional, the agency will waive it. But there is always a risk that the calibrations *ex ante* will be off—and that a legislative framework no one really intended to go into effect will become law because the executive declines to pay the political price of waiving it.

More broadly, on this view big waiver—even when it results in a waiver—is problematic because it allows politicians to present themselves as really having done something (concretely!) while avoiding responsibility for the consequences of what they have done. The substantive enactment may well gather headlines, while the grant of a waiver power will be less salient. Those in Congress can delight in criticizing the executive branch's decision to exercise this waiver power even if Congress fully expected at the time of enactment that this would happen. In this respect, big waiver exacerbates the much-discussed accountability problems that attend even standard delegations. In fact, one might even be concerned that this accountability deficit is precisely why big waiver is becoming attractive and why it may become more common over time.

On another view, however, it can be said that the combination of a specified statute and a strong power to waive is less to be feared, and more to be welcomed, than the more direct delegations we now accept as

a matter of course. It might well be thought that the power to waive, however great it is, is less conducive to creating unchecked rule by administration than broad undifferentiated grants of regulatory power *per se*. In a modern world characterized by expanded notions of governmental responsibility and dense statutory law, having Congress take a first crack at deciding what a program should look like, with the agency functioning as a needed backup rather than first creator, might be an excellent way of handling the inherent tensions between the claims of democratic legitimacy and of expertise.

More broadly, assuming there is a continuing need for positive government, the very slipperiness at the core of the fearful scenario played out above may make possible some regulatory action where the alternative is none. Indeed, having Congress speak specifically, even if contingently, may well create more forceful and energetic administrative action, and certainly a kind of action that is more directly responsive to present concerns. Finally, one might think the big waiver power is indispensable in an age where there is so much federal statutory law already in place—at least, so long as one imagines traditional delegation to be a critical tool of government going forward. Some of that law has to be either obliterated or avoided if government is to remain functional.

Our assessment—or, if you like, our thesis—is that both as a matter of existing law and as a matter of the law that should be, the likelihood that big waiver will continue to be a prominent administrative technique should be welcomed. This conclusion follows from our judgment that this latter narrative of big waiver’s capacity to perform an attractive function is persuasive across a broad range of policy areas. And so, while there are certainly risks to big waiver of the sort identified above—just as there are risks with big delegation—they do not warrant an administrative law response that aims primarily to cabin or even stifle big waiver’s rise. Rather, the goal should be to structure the applicable legal regime to increase the positive consequences and limit the negative ones. This Part explains how and why such a structuring—or, better yet, restructuring—of existing administrative law makes sense of, and thus helps legitimate, big waiver.

It is possible some might think the delegation of the big waiver power is, fundamentally, just like a traditional delegation. In each instance, Congress confers on the administrative actor discretion to determine regulatory content within relatively loose statutory bounds. Since the agency’s discretion could be equally broad and equally bounded in each instance, nothing about big waiver demands any novel interpretive moves or reconsideration of the premises underlying the doctrines and rules that have grown up to legitimate delegation.

We do not subscribe to this view; for us, big waiver is a distinct animal and thus deserves distinct analytical assessment. As would be the case with any major innovation in administrative practice, existing doctrines and statutes aimed at legitimating administrative action prove to be

something of a poor fit with big waiver. Or, perhaps more precisely, such doctrines raise significant issues of interpretation once applied to the inverted form of delegation that is this Article's focus.

The remainder of this Article works through these complications, from the threshold issue of whether this unusual form of delegation is constitutional, to questions of how the authority to waive statutory requirements should be interpreted, and on to how doctrines of substantive review should be applied to exercises of waiver authority. It does so with two aims.

The first is simply to underscore how different big waiver is, a point that emerges from a close look at just how much work needs to be done to make sense of existing administrative law doctrines when they are transposed from the ordinary case of delegation to the inverted one. The second is to offer a map for developing a doctrine that facilitates the use of big waiver while mitigating its pathologies (as much as any doctrine can), much in the way administrative law itself may be understood as an effort to facilitate the use of big delegation by rendering it more legitimate and bounded.

A. *Under the Constitution*

This Article will not rehearse the entire field of argument surrounding the constitutionality of Congress's delegation of power to the executive branch.¹⁷⁵ But assuming the present law of delegation, we must ask whether delegation to the executive of a substantial power to waive law, rather than make law, looks different; or, to put the matter in light of the generative factors discussed above, whether the modern practice of delegating the power of big waiver fits appropriately within our fundamental institutional structures.

To begin, the power of the executive branch to waive a substantive statutory requirement depends on there being a distinct statutory waiver authority. One might not know that from the way in which the waiver issue has been handled by the press, which has emphasized the executive decision to grant a waiver to the virtual exclusion of its legislative authorization.¹⁷⁶ But big waiver, like ordinary delegation, represents, in the first

175. See generally Gary Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327, 335–53 (2002) (describing textualist basis for nondelegation doctrine). But see Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. Chi. L. Rev. 1721, 1725–44 (2002) (addressing common arguments used to support nondelegation doctrine and maintaining that none justify it); Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315, 317–28 (2000) (providing overview of conventional nondelegation doctrine and arguing “nondelegation canon” is superior alternative).

176. For example, the *New York Times*' headline for its lead story on the No Child Left Behind waivers was “No Child’ Law Whittled Down by White House,” followed by the subheadlines “Waivers for 26 States” and then “Maneuver Fits Pattern of Bypassing Congress to Shape Agenda.” Motoko Rich, “No Child’ Law Whittled Down by White House,” *N.Y. Times*, July 6, 2012, at A1.

instance, an exercise of legislative power in pursuit of congressional objectives.¹⁷⁷ Thus, big waiver, like big delegation, necessarily raises the question whether Congress may exercise its legislative power in this manner—particularly as it would permit the executive to displace Congress’s own legislative judgments.

To answer that question as a matter of constitutional doctrine requires consideration of *Clinton v. City of New York*.¹⁷⁸ There, President Clinton, having signed the Balanced Budget Act of 1997 and the Taxpayer Relief Act of 1997, proceeded to exercise the power given to him by the Line Item Veto Act of 1996 to cancel a specific spending provision and a single tax break set forth in those measures.¹⁷⁹

The Supreme Court held the Line Item Veto Act unconstitutional, relying on Article I, Section 7, which requires presentment of bills to the President and gives him the power to “return” them for reconsideration if he does not approve them. Justice Stevens read the constitutional provision to require the President to approve, or veto, a bill in its entirety, and read the statutory power of cancellation, which the Line Item Veto Act described as preventing the cancelled provision “from having legal force or effect,” as being a partial, and therefore unconstitutional, veto.¹⁸⁰ “[T]his Act,” he further wrote, in a passage that arguably broadened the nature of the constitutional objection, “gives the President the unilateral power to change the text of duly enacted statutes.”¹⁸¹ As such, he concluded, it authorized precisely the thing that the presentment requirement of the Constitution forbids—the vetoing of a portion of a law.

We start our analysis by noting that most examples of big waiver authority do not have the formal characteristics relied on by the Court in *Clinton*; their exercise does not obliterate the provisions being waived. One set allows an agency to carry out a particular task free of general legal restrictions that would otherwise apply; those restrictions stay on the books for all their other applications.¹⁸² That the Secretary of Homeland Security waives provisions of, say, the National Parks Act in order to build her fence on the border hardly cancels that Act as a whole. Another set allows a regulated party or grant recipient to apply to be free of otherwise applicable statutory restrictions, perhaps on stated conditions; those stat-

177. See generally Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 *Colum. L. Rev.* 369, 372–75 (1989) (“The nature of modern legislation emerges directly from its central role in articulating governmental policy and from the role of administrative agencies in implementing it.”).

178. 524 U.S. 417 (1998).

179. *Id.* at 420–21.

180. *Id.* at 438–41.

181. *Id.* at 447.

182. Examples include the REAL ID Act of 2005, see *supra* note 94 and accompanying text; the Trans-Alaska Pipeline Authorization Act, see *supra* note 147 and accompanying text; and a broad range of national security waiver provisions, see *supra* notes 32–35 and accompanying text.

utory restrictions remain in force for anyone who does not apply, or whose application is not granted.¹⁸³ This is the situation with some states having waivers under NCLB and some not. Only those statutes that provide for the complete and irrevocable suspension of an existing statutory provision for all purposes and all parties bear a direct resemblance to the problem of the *Clinton* case, formally stated.

But while this formal distinction could be used to limit *Clinton*'s reach, it is not an especially helpful or illuminating means of doing so. After all, even a statute that does grant a true cancellation power is not easily understood as evading the Presentment Clause. There is no bill at issue that has passed both houses but awaits the President's yea or nay in such a case. Congress has instead, in accord with presentment requirements, enacted a statute conferring an exercise of discretion on the President. Conversely, even a statute that confers only a partial waiver power arguably does permit the text of a statute to be changed. Absent the delegation of the power to waive, the statute would seem to impose a requirement that could not be lifted; with it, it can be.

Accordingly, we suspect, as have others (including the dissenters in *Clinton*), that there must be more to the *Clinton* decision than a purely formal desire to enforce presentment requirements.¹⁸⁴ And that suggests that *Clinton* is most fruitfully understood to rest, at bottom, on a concern about delegation.¹⁸⁵ The question, then, is whether constitutional concerns about delegation should be any greater when the thing being delegated is a power to unmake law rather than to make it. And the answer is hardly straightforward.

One can view the nondelegation doctrine as having, at its core, the simple question of whether the executive branch is being given too much power—in terms of both breadth and discretion. As a matter of binding precedent, the only cases that have struck down congressional statutes on

183. Examples include the No Child Left Behind Act, see *supra* notes 45–47 and accompanying text; and the Patient Protection and Affordable Care Act, see *supra* notes 49–54 and accompanying text.

184. See *Clinton*, 524 U.S. at 465–69 (Scalia, J., concurring in part and dissenting in part) (arguing that issue presented by Line Item Veto Act was not Presentment Clause, but rather “doctrine of unconstitutional delegation of legislative authority”); *id.* at 469–97 (Breyer, J., dissenting) (arguing Line Item Veto Act does not violate literal text of Constitution and finding Act constitutional based on “separation-of-powers principles”).

185. See, e.g., Kagan, *supra* note 144, at 2366 (“The real question in [*Clinton*], then, was whether the power granted to the President constituted an impermissible delegation.”); Leslie M. Kelleher, Separation of Powers and Delegations of Authority To Cancel Statutes in the Line Item Veto Act and the Rules Enabling Act, 68 *Geo. Wash. L. Rev.* 395, 428 (2000) (noting Court in *Clinton* “missed an excellent opportunity to define better the limits of permissible delegation by explaining why the delegation in the [Line Item Veto Act] fell outside its bounds” while empathizing with Court’s desire to “avoid casting doubt” on sixty years of precedent). But see Kitchen, *supra* note 3 (arguing that understanding of Article I, Section 7 should be reinvigorated to limit “negative lawmaking delegations”).

this basis are *Panama Refining Co. v. Ryan*¹⁸⁶ and *A.L.A. Schechter Poultry Corp. v. United States*,¹⁸⁷ both dealing with the National Industrial Recovery Act (NIRA).¹⁸⁸ Assuming, as we do, that the NIRA would still be declared unconstitutional on the ground that (in Justice Cardozo's words) "[n]o such plenitude of power is susceptible of transfer,"¹⁸⁹ one has to ask whether the power delegated by the Line Item Veto Act was similarly concerning. It would seem under ordinary delegation principles that—notwithstanding the case's outcome—the answer must be “no.” More broadly, as long as the Supreme Court continues to express confidence in “various statutes authorizing regulation in the ‘public interest,’”¹⁹⁰ it is hard to see how giving an agency power to waive specific provisions set forth in a statute, whether based on the “public interest” or any more focused finding, would be too much.

That is, unless the case of an ordinary delegation and that of an inverted one should *not* stand on an equal footing for purposes of the constitutional delegation doctrine. And one picks up strong hints that the Justices in *Clinton* were not at all convinced they should stand on the same footing.

In the course of saying that, in his view, use of delegated authority under the Line Item Veto Act presents only a nondelegation issue, and not a Presentment Clause problem, Justice Scalia remarks that he is “prepared to acknowledge” that limits on the ability of Congress to authorize the executive to reduce “congressional dispositions” may be “much more severe” than limits on its ability to authorize agencies to augment “congressional dispositions,” that is, to engage in “substantive rulemaking.”¹⁹¹ And, as one probes Justice Stevens's logic, one finds a similar intuition about the special delegation concerns posed by big waiver.

186. 293 U.S. 388 (1935).

187. 295 U.S. 495 (1935).

188. Pub. L. No. 73-90, 48 Stat. 195 (1933), invalidated in part by *A.L.A. Schechter Poultry Corp.*, 295 U.S. 495.

189. *A.L.A. Schechter Poultry Corp.*, 295 U.S. at 553 (Cardozo, J., concurring). For discussion of the viability of the NIRA opinions, see Todd D. Rakoff, *The Shape of the Law in the American Administrative State*, 11 *Tel Aviv U. Stud. L.* 9, 22–24 (1992).

190. *Whitman v. Am. Trucking Ass'ns., Inc.*, 531 U.S. 457, 474 (2001) (citations omitted).

191. *Clinton v. City of New York*, 524 U.S. 417, 464–65 (1998). Unfortunately for our purposes, he narrowed the case on other grounds, in part, it seems, to avoid having to explicate this thought further. After narrowing the case, Justice Scalia had only to address the cancellation of discretionary budget authority. He upheld that cancellation on limited grounds. He explained that there was a historically established practice of authorizing the executive branch to refuse to spend appropriated funds absent a clear congressional injunction to spend them. That led him to a conclusion that left open the possibility that he would have found the cancellation of the tax provision impermissible on delegation grounds. *Id.* at 465–69.

Stevens's discussion comes in response to the Government's suggestion that all that was at stake was a delegation of the sort present in *Field v. Clark*.¹⁹² There, the Tariff Act of 1890 had directed the President to suspend "the provisions of this act relating to the free introduction" of certain commodities when he was satisfied that the producing countries imposed "reciprocally unequal and unreasonable" tariffs on U.S. agricultural products¹⁹³—and the Court upheld the Act.¹⁹⁴ Justice Stevens distinguished *Field* from the facts before him on three grounds, none of which obviously tracks the presentment requirement, but that instead sound in concerns about the nature of the delegation: (1) that "the exercise of the suspension power was contingent upon a condition that did not exist when the Tariff Act was passed"; (2) that "under the Tariff Act . . . the President . . . had a duty to suspend"; and (3) that suspension under the Tariff Act constituted "executing the policy that Congress had embodied in the statute."¹⁹⁵

It is at this point that the peculiar nature of big waiver becomes especially important to the delegation analysis. Stevens's further discussions of the first and third distinctions each turned on the fact that, unlike in *Field*, the President's action under the Line Item Veto Act had to take place within five days of the enactment of the provision being cancelled;¹⁹⁶ for that reason, he concluded, it necessarily was not based on later developments and must "therefore constitute a rejection of the policy choice made by Congress."¹⁹⁷

As a theoretical matter, Justice Stevens's analysis (like Justice Scalia's unelaborated intuition in his opinion) might be rationalized in the following way. Congress has good reasons for delegating authority to agencies: to gain expertise, to permit attention to a mass of data and particular circumstances, and so forth. And Congress has bad reasons for delegating authority: to avoid thinking things through, to make promises while being able to blame any bad results on others, and so forth. This might suggest a doctrine approving of delegations when done for the good reasons and disapproving of them when done for the bad reasons. And the five-day constraint Congress imposed might be read as an indication that Congress could not have been delegating with the good reasons in mind since the executive could not have "learned" anything beyond Congress's ken in the interim.

192. 143 U.S. 649 (1892).

193. *Id.* at 680 (quoting Tariff of 1890, ch. 1244, § 3, 26 Stat. 567, 612 (repealed 1894)).

194. *Id.* at 694.

195. *Clinton*, 524 U.S. at 443–44.

196. Pub. L. No. 104-130, § 1021(a), 110 Stat. 1200, 1200 (1996) (requiring President to notify "Congress of such cancellation by transmitting a special message . . . within five calendar days . . . after the enactment of the law").

197. *Clinton*, 524 U.S. at 443, 444 & n.35.

But the persistent analogy to the exercise of the veto power suggests that Stevens means to endorse this argument about the importance of the five-day limit only in the context of the cancellation of a prior congressional enactment. Thus, while one might think an equivalently time-limited delegation of rulemaking authority also would be problematic, his opinion cannot be fairly read to conclude as much. It is the cancellation of an existing statute, therefore, that is ultimately central to his argument, not just as a matter of presentment, but as a matter of delegation.

This analysis likely reflects the simple intuition that once Congress has legislated with specificity, it has made its policy preference clear and demonstrated its capacity to make policy in that area. Delegating the power to say “no” within a time period too limited for circumstances to have changed from the time Congress established that policy is thus proof of abdication, pure and simple. By contrast, if Congress has not legislated with specificity in the first instance, a time-limited grant of authority to issue an initial rule may be justified on classic expertise grounds. Congress does not know enough to have a preference about the policy or even to know whether a policy is needed. It knows only that it wants an agency to consider the issue quickly.¹⁹⁸

Read this way, *Clinton* would be, at bottom, a delegation ruling and one that overturns a delegation of the power to waive a statutory provision in a situation in which the Court would not overturn a parallel delegation of the power to enact a rule. But that suggests the rationale is heavily contingent on the cancellation authority’s being so circumscribed in terms of time that it cannot possibly reflect a desire to obtain an ongoing assessment by a more nimble regulatory institution.

In our view, Justice Stevens was right to limit this stricter constitutional nondelegation doctrine for big waiver to the narrow confines suggested by *Clinton*’s rationale. As we have already argued, there are indeed good reasons for Congress to give agencies the power of big waiver, and there are bad reasons. Except perhaps at the extreme limit represented by *Clinton*, we do not see a manageable criterion for separating with confidence the one case from the other.¹⁹⁹ As with classic delegations, it is often unclear even to those involved in formulating legislation whether

198. Of course, one might also think, as other Justices did, that leaving to the executive’s discretion the actual spending of appropriated money is appropriate given the tradition of executive discretion in that realm, and thus that conferring the cancellation power under the Line Item Veto Act to the President accords with that same tradition. See *id.* at 466–67 (Scalia, J., concurring in part and dissenting in part) (“The President’s discretion under the Line Item Veto Act . . . is no broader than the discretion traditionally granted the President in his execution of spending laws.”); *id.* at 483, 488 (Breyer, J., dissenting) (“Congress has frequently delegated the President the authority to spend, or not to spend, particular sums of money.”).

199. For a discussion of the classic nondelegation doctrine in similar terms, see Stewart, *Reformation*, *supra* note 110, at 1696–97.

they desire to avoid responsibility or to reap the benefits of administrative capacity or some mixture of both.

Of course, one could say that the dangers of the bad case so outweigh the possible advantages of the good that we should outlaw the practice as a whole. But, as discussed above, big waiver is a very valuable tool for Congress to use, and, especially in light of the present-day circumstances we have discussed, often produces better statutes than attempts to use traditional delegation would produce. Thus, the judicial doctrine as to the constitutionality of big waiver should mimic the judicial doctrine applicable to traditional delegations: The courts should defer to Congress's judgment as to when the technique is "necessary and proper" in all but very extreme cases. But that doctrine—the understanding of what constitutes an extreme case—must also appropriately account for the very different way Congress delegates in the two circumstances—something that Stevens's opinion, once parsed, actually does.

B. *Subconstitutional Doctrines Governing Big Waiver*

Because the preferable constitutional test is so latitudinarian, administrative law should do what it can in framing subconstitutional doctrine to encourage the good uses of big waiver and discourage the bad. That the Constitution should not be read to impose significant constraints on Congress's ability to experiment with big waiver does not mean the judiciary's role should be kept to a bare minimum in construing what Congress has actually done, or in evaluating whether an agency has legitimately exercised the waiver power it claims has been conferred. The judiciary's relatively active role in construing and reviewing agency exercises of delegated power at the subconstitutional level has often been considered the counterweight to the constitutional judgment that Congress should have wide leeway to structure delegations as it wishes.²⁰⁰ The development of the subconstitutional law applicable to traditional delegations is well established; the effort appears in doctrines of construction, doctrines of explanation, and doctrines of deference. So, too, we think, with big waiver.

But big waiver provisions are not the same as straight delegations of lawmaking authority, as just explained in the constitutional context. For that reason, doctrines of construction, explanation, and deference also need to be rethought in light of this new practice.

It may well be that true opponents of big waiver will find inadequate comfort in this attempted reconstruction. They will conclude that agen-

200. See Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 *Colum. L. Rev.* 452, 487 (1989) ("Congress has been willing to delegate its legislative powers broadly—and the courts have upheld such delegation—because there is court review to assure that the agency exercises the delegated power within statutory limits." (quoting *Ethyl Corp. v. EPA*, 541 F.2d 1, 68 (D.C. Cir. 1976) (en banc) (Leventhal, J., concurring))).

cies will evade these doctrines when they can and judges will manipulate them to reach willful and wayward conclusions. Perhaps. But just because doctrines of regularity and constraint in administrative law are not outcome-compelling does not mean that they fail to guide judgment for both agency and court. The questions that arise both in determining whether a particular statutory provision is waivable and in deciding how to justify the resulting waiver are of great practical significance in day-to-day agency practice for those charged with advising on the agency's authority and for those involved in assessing litigation risk. These judgments will inevitably be framed, moreover, by the felt expectation that asserting big waiver authority generates headlines and that critics will seize upon weaknesses in the legal arguments. The charge that an agency is illegitimately dispensing with Congress's own requirements is not a trivial one in our political culture. And, in the courts, judges themselves will need to have some grammar through which to assess excesses of big waiver when they come to be tested and challenged for their legality, as they surely will be notwithstanding the special standing issues that may arise as to some exercises of the waiver power.²⁰¹

In turning to the basic doctrines of administrative law, we keep in mind the basic paradigm that big waiver establishes. Congress passes a statute telling an agency to accomplish, among other things, *X*, and Congress also empowers the agency to waive part or all of *X*. That requires consideration of how these two delegations should be understood to relate to each other.

As already stated, in the ordinary case there should be no judicially enforceable constitutional prohibition against making this joint delegation. But some of the reasons that might tempt one to create such a doctrine do seem to us relevant to construing the legal effect of what Congress has done, and in turn the legal obligations and degrees of freedom of the agency. We are sympathetic to the proposition that these structural, institutional relationships should be accorded their due in the lesser doctrines of statutory construction and administrative law. But how? And why? These issues arise in the first instance for the agency itself, and accordingly we consider them straight up, so to speak; we discuss the subsidiary issues regarding the proper amount of deference due to an agency's judgments as they come up.

201. Cf. *Raines v. Byrd*, 521 U.S. 811, 829–30 (1997) (finding no standing in initial challenge to Line Item Veto Act). The standing issues associated with big waiver warrant an article in their own right; suffice it to say for our purposes that the decision to dispense with a statutory requirement will, in a broad range of cases, supply enough potentially discretely injured parties to deprive agency officials—if well advised—of confidence that exercises of big waiver authority should be assumed to be immune from judicial second-guessing. And, further, denials of waivers will surely produce litigation, thereby requiring courts to engage with at least some of the kinds of administrative law interpretive issues we address here.

This initial section on subconstitutional doctrines addresses the proper construction of the agency's authority, and it does so by examining how one determines the scope or existence of a big waiver grant of power. The next section considers whether, when a big waiver exists, an agency may establish criteria that must be met in order for a waiver to be granted. The final section considers the agency's duty to explain and defend its exercise of its big waiver authority.

1. *Construing the Scope of Waiver Provisions.* — What must a statute say for an agency to have the power of big waiver? The leading case on this subject does not speak directly in these terms, in part because it concludes that the agency in question lacked that power. But it sets the contours of the problem. That case is *MCI Telecommunications Corp. v. AT&T, Co.*²⁰²

As Justice Scalia stated the issue in his opinion for the Court:

Section 203(a) of Title 47 of the United States Code requires communications common carriers to file tariffs with the Federal Communications Commission, and § 203(b) authorizes the Commission to “modify” any requirement of § 203. These cases present the question whether the Commission's decision to make tariff filing optional for all nondominant long-distance carriers is a valid exercise of its modification authority.²⁰³

The answer the majority gave was “no”; waiving the statutory requirement was beyond the Commission's power.²⁰⁴

MCI self-presents as a case turning purely on linguistic statutory interpretation. The Court, relying heavily on dictionary sources but also referring to other provisions of the statute, determines that “modify” “means to change moderately or in minor fashion.”²⁰⁵ Requiring the filing of tariffs is, however, “the heart” of the statute,²⁰⁶ and “elimination of the crucial provision of the statute for 40% of a major sector of the industry is much too extensive to be considered a ‘modification.’”²⁰⁷ Because what the agency did “goes beyond the meaning that the statute can bear,” not even *Chevron* deference could save it.²⁰⁸

Justice Stevens's dissent, however, makes a fairly strong argument that what the Commission did could be considered within the term “modify” as seen through other dictionary definitions and in light of yet other provisions of the statute,²⁰⁹ and this explanation in itself suggests that what is happening goes beyond a straight-line determination of

202. 512 U.S. 218 (1994).

203. *Id.* at 220.

204. *Id.* at 234.

205. *Id.* at 225.

206. *Id.* at 229.

207. *Id.* at 231.

208. *Id.* at 229.

209. See *id.* at 239–44 (Stevens, J., dissenting).

whether the statute is linguistically “ambiguous” for *Chevron* purposes. But we need not rest on that point, because the Court’s own later treatment of the *MCI* precedent shows that it understands the case as involving more than a particularistic interpretation of a single statute.

In *FDA v. Brown & Williamson Tobacco Corp.*, which rejected the FDA’s assertion of a power to regulate tobacco in part because that exercise of discretion would have displaced policies set forth in statutes post-dating the original delegation, Justice O’Connor said, “As in *MCI*, we are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.”²¹⁰ And in *Whitman v. American Trucking Ass’ns, Inc.*, in the course of holding that the Court would not imply into the Clean Air Act a requirement that the Environmental Protection Agency consider costs in setting air quality standards, Justice Scalia himself cites both *MCI* and *Brown & Williamson* for this proposition: “Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.”²¹¹

The aphorism that “Congress does not hide elephants in mouseholes” might be understood in two different ways. It might be simply a statement about human psychology and the use of language; in other words, it might be equivalent to saying, “No ordinary speaker hides elephants in mouseholes.” Or it might be a statement inflected by norms about how we should understand the relationships of particular institutions; it might be the equivalent of saying, “When Congress grants authority to an administrative agency, we will assume it does not hide elephants in mouseholes.” We would not be the first scholars to think that Justice Scalia’s understanding of “modify” in *MCI* is best understood as partaking of this second, substantive view of the matter. In Peter Strauss’s words, “Perhaps the root issue for Justice Scalia is one of delegation It is not merely the largeness of the change being effected, but also that accepting it will entail accepting that an agency can be empowered to change its mandate.”²¹²

If so, Scalia’s opinion (including its rejection of *Chevron* deference) may be read as objecting to the fact that the Commission was, in effect, exercising “big waiver” through a statute that, in light of its use of the word “modify,” did not clearly disclaim its intent to confer only the “little waiver” power. Even if the Act authorized the agency to relieve a particular carrier of the statutory requirement to file rates in limited circumstances, Scalia explained, it did not confer the power to waive the rate-

210. 529 U.S. 120, 160 (2000).

211. 531 U.S. 457, 468 (2001) (citing *MCI*, 512 U.S. at 231; *Brown & Williamson*, 529 U.S. at 159–60).

212. Peter L. Strauss, On Resegregating the Worlds of Statute and Common Law, 1994 Sup. Ct. Rev. 429, 495.

filing requirement for such a broad swath of the market.²¹³ After all, Justice Scalia reasoned, the Commission was seeking to undermine the heart of the specific regulatory structure that Congress had established—namely, the rate-filing requirement—for most of the market.²¹⁴ He was incredulous that Congress, after having set out such a specific regulatory structure for rate filing, would have then delegated the power to displace that very structure.²¹⁵ If Congress intended to authorize the agency to design whatever rules it thought would best promote competition, he asked, then why did it bother to fully flesh out the statutory scheme for rate filing in the first place?²¹⁶ Given that context, he argued, it was better to view “modify” as conferring the power of little waiver—a means of tailoring regulatory requirements that are, as rules generally are, bound to be both overinclusive and underinclusive—and not as a mechanism for empowering an agency to revisit and then replace the fundamental policy choices reflected in the underlying regulatory requirement that Congress had enacted.

If we accept that the statute in *MCI* was linguistically ambiguous about granting the agency the authority of little waiver or big waiver, Justice Scalia’s opinion can be read as establishing a clear statement rule for recognizing the existence of a big waiver authority. And there is much to be said for this. As discussed above, the reasons to welcome big waiver include its potential to facilitate new delegations of authority that might be stymied by partisan gridlock, to marry detailed legislation with the benefits of administrative flexibility, and to permit Congress to revise older legislative frameworks that need updating. However, there are also reasons to be concerned about its arrival, which include the potential for big waiver to lock in legislative frameworks that have become too costly for the executive to waive, but which were enacted under the assumption that waiver would be easier than it turned out to be; and the difficulty in holding Congress accountable if it enacts rules yet provides for their waiver elsewhere in the statute. In trying to strengthen the good story and weaken the bad one, giving some priority to the legislative direction to do *X* over the administrative ability to waive the doing of *X* is attractive. Otherwise, we are attributing a lack of seriousness to Congress in its specification of the agency’s obligation to do *X* (or at least to try to do *X*), and we are encouraging the type of irresponsibility that the Court may have feared was present in the Line Item Veto Act. Further, by requiring

213. *MCI*, 512 U.S. at 231–32.

214. *Id.* at 229.

215. *Id.* at 231 (“It is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion—and even more unlikely that it would achieve that through such a subtle device as permission to ‘modify’ rate-filing requirements.”).

216. *Id.* at 234 (“[T]he Act establishes a rate-regulation, filed-tariff system, and the Commission’s desire to ‘increase competition’ cannot provide [it] authority to alter the well-established statutory filed rate requirements.”).

that the waiver power be visible, through enforced clarity about its scope, we reduce the legislative temptation to arbitrage the possible asymmetry of salience that waiver provisions (in comparison to substantive provisions) present.

But while we favor this interpretive approach, it also seems to raise an issue in only a limited class of cases. It all depends on the relationship between the delegation to do and the delegation to waive. If the substantive delegation is itself very general, it would not seem to matter how the waiver power is stated; for the authority to regulate, let us suppose, “in the public interest” itself conveys Congress’s determination that the agency may make and remake the rules that it creates as it sees fit. Big waiver is all but irrelevant because there is so little statutory framework to waive. If the agency waives an existing rule of its own creation, or substitutes another for the one it previously had imposed, we might have to worry about protecting reliance, or about favoritism, but we will not have to worry about contravening express statutory intent.

And if, by contrast, the legislative rule is itself specific, but so is the authority to waive, again there is no “clear statement” problem. Congress has already clearly stated that such-and-such provisions of the statute can be (or cannot be) changed. This is, indeed, a common case. At least, the waiver provisions of both NCLB and the ACA—the two most important recent examples of waiver—each enunciate both a broad waiver authority and procedural and substantive restrictions on the agency’s waiver power,²¹⁷ and give great evidence (including length) of having been carefully drafted.

It is only when Congress has declared the law with some specificity but accorded the agency only a vague power to waive to some undefined extent that we face the question of how far the agency has the authority to remake the rules stated in the statute. This is, indeed, how Justice Scalia understood the situation in *MCI*: Congress had been quite specific in establishing a scheme of rate regulation based on filed rates, but it had spoken only indistinctly in giving the FCC the power to “modify.”²¹⁸ A clear statement rule makes sense in that situation.

This core question of whether an agency has the power of big waiver—or, put another way, whether the waiver power it has been given by Congress should be interpreted as a big waiver power—has to be answered initially by the agency and its counsel. If it then arises on judicial review, we think it ought to be decided by the courts without deference to the agency’s judgment. It belongs with the line of cases such as *MCI* and *Brown & Williamson* that in effect say that decisions that would

217. For more discussion on NCLB and the ACA, see *supra* notes 38–64 and accompanying text; *infra* notes 253–266 and accompanying text.

218. Justice Stevens’s dissent, by contrast, understood the situation as involving a general delegation in which the FCC had been given “unusually broad discretion” in its substantive authority. *MCI*, 512 U.S. at 235.

greatly enlarge the scope of an agency's power need to be decided independently in order to maintain the constitutional balance of power.

But at some point, hard to define in advance, we are no longer talking about something this large, but instead contesting the details. Once it is clear that Congress has established a big waiver regime, the subsidiary questions of determining the exact contours of the agency's waiver power, and of what conditions it is entitled to place on the waivers it grants, seem to be candidates for substantial deference.

The ACA, for example, authorizes the Secretary to grant a waiver of many of the Act's requirements in favor of a proposed state plan, but says that the waiver may be granted only if she determines (among other things) that "the State plan . . . will provide coverage to at least a comparable number of its residents as the provisions of this title would provide."²¹⁹ At least at the margins, "a comparable number" is surely an ambiguous term, and the statute does not specify at all what assurances would suffice to show that a state plan, before it goes into action, would predictably provide coverage to however many people that is. Whether we rationalize deference in terms of applied expertise or assumed delegation, these are the kinds of issues on which courts usually defer (within limits, of course).

One could, of course, establish a clear statement rule here as well. Particularly with respect to cooperative federalism programs, the pressure to interpret a waiver provision broadly will often come from the most directly regulated parties—namely the states. In that circumstance, one might think that the obstacles that ordinarily impede an agency's willingness to assert what may seem to be an extension of regulatory power are less likely to check aggressive assertions of the power to waive. Further, in many cases the assertion of the waiver power will limit rather than expand the class of actors with standing to challenge the agency's action.

But there are countervailing pressures, too. The dynamics of legislative oversight, particularly in cases of divided government, and the deep public intuitions about the impermissibility of the executive branch dispensing with the law Congress has made are not likely to be lost on those charged with deciding whether to make controversial assertions of waiver. They will know that the risks (both political and legal) from perceived errors in interpretation that favor waiver are significant. We cannot be sure how these forces will balance out in any given instance; but they seem sufficiently closely balanced that, when we get down to details,

219. Patient Protection and Affordable Care Act, 42 U.S.C. § 18052(b)(1)(C) (Supp. IV 2011).

the claims of expertise and administrative regularity normally supporting deference should still prevail.²²⁰

2. *Authority of the Agency To Create Criteria for Conditioning Waivers.* — A distinct interpretive dimension concerns not the scope of the waiver authority but the criteria for its exercise. Waivers are often granted on conditions, and statutory provisions (such as the ACA provision just discussed) may well stipulate that waivers cannot be granted except upon conditions.²²¹ The more power the agency has to establish the substantive criteria that will trigger its willingness to waive, the more authority it has to impose a new set of regulatory requirements in the course of “waiving” those on the books. The question thus arises how much authority grants of the waiver confer to set such criteria when the grants are not clear.

The choice of “waiver” as the mechanism given to the agency to exercise its judgment might be thought to signal a decision that the requirements as written by Congress are meant to be the most intrusive permitted. On this view, the agency would be authorized to move only in a deregulatory direction and thus would be barred from establishing new criteria that would have to be met in order for a waiver to be granted. But in a world of complex statutes, many of them containing elements that are meant not only to regulate but also to provide positive benefits, it is not so easy to tell up from down.²²² What appears as a regulation to one of the affected parties may well appear to be the grant of a benefit to another. And, speaking more broadly, if one of the purposes of authorizing big waiver is to make room for new experiments and greater variety in fulfilling Congress’s purposes, it is doubtful that those new ideas will be encompassed entirely within the idea of “dispensing with” requirements or “not availing oneself of” rights. The public law meaning of “waiver,” therefore, may well go beyond its private law eponym.²²³

220. We leave to the event the question of whether this is to be seen as *Chevron* deference, because the *Mead* test (or the alternative *Barnhart* test) has been satisfied, or as *Skidmore* deference at the high end of the *Skidmore* scale.

221. See, e.g., 42 U.S.C. § 18052(b)(1) (“The Secretary may grant a request for a waiver under subsection (a)(1) *only if* the Secretary determines that the State plan [meets certain criteria].” (emphasis added)).

222. See, e.g., Alfred C. Aman, Jr., *Administrative Law in a Global Era: Progress, Deregulatory Change, and the Rise of the Administrative Presidency*, 73 *Cornell L. Rev.* 1101, 1157–58 (1988) (“[I]t is impossible to see the regulation-deregulation issue simply in either/or terms. Nor does decontrol represent a single regime. Control and decontrol, and regulation and deregulation are the same side of the same coin.”); Biber, *supra* note 18, at 12 (“A decision to grant a waiver, for example, could be seen as an agency refusal to enforce, and therefore unreviewable; on the other hand, an agency denial of a waiver could be seen as agency inaction and therefore also unreviewable (or reviewable with a high degree of deference).”).

223. See the various entries under “waiver” in *Black’s Law Dictionary*:

1. The voluntary relinquishment or abandonment—express or implied—of a legal right or advantage; forfeiture The party alleged to have waived a right

Yet, at least in the archetypal formulation, what the agency has is the power to “waive” requirements. Congress could have delegated the power to “revise” the statutory rules, or told the agency it could “refashion” the program—or, indeed, could have delegated the power to “regulate” the terrain as a whole—but Congress chose to say “waive.” It is hard to escape entirely from the linguistic implications, hard to avoid saying that the agency has to frame what it is doing in terms of identifying a specific piece of statutory language it is deeming no longer in effect. And yet, again, the very way in which the statutory requirements being waived were framed, and the very decision as to the breadth of things being considered to fall under the same rule, may reflect that initial understanding of the situation by Congress that the agency, properly, wants to supersede in the light of experience—a disposition that suggests the agency should have more than a binary power to either apply the rule as laid down by Congress or dispense with it altogether.

We conclude that Congress’s choice of the mechanism of waiver, even big waiver, implies that the agency cannot simply dictate that a statutory provision has been waived and another set of requirements made mandatory instead. But where parties subject to the statutory requirements can choose between the waived and unwaived formulations, we think it is proper for an agency to condition its grant of a waiver on the recipients’ being subject to new requirements not contained in the statute as originally written. This means, of course, germane new requirements relevant to Congress’s purposes; this is not an authorization just to bargain for whatever the agency wants.

So, to return to the NCLB example, we do not believe the Secretary oversteps his bounds in specifying the kinds of programs states and localities should be undertaking to manifest the type of improvement that will count as a sufficient predicate for waiving the full proficiency requirement that Congress plainly made subject to waiver.²²⁴ Rather, in such a circumstance, the Secretary gives legitimate meaning to the grant of discretion to waive he has been afforded.

Indeed, in a real sense, it is through the specification of such criteria that the marriage between legislative specification and ongoing administrative expert assessment of new developments can occur. Otherwise, the administering agent is more like a mere adjudicator of the continuing validity of the congressional policy choice than a continuously responsible regulator of a field marked by Congress for ongoing consideration. It

must have had both knowledge of the existing right and the intention of forgoing it. Cf. estoppel

2. The instrument by which a person relinquishes or abandons a legal right or advantage.

Black’s Law Dictionary 1717–18 (9th ed. 2009).

224. Whether the Secretary is obliged under the statutory terms to consider state applications that deviate from his template—whether, that is, he can or cannot use his guidance documents to simply default alternatives—is another matter for another day.

is more consonant with the positive reasons for Congress's granting big waiver in the first place to adopt the former point of view and read generously Congress's intent in granting a big waiver power—without going beyond the meaning the words will bear. But this is, of course, subject to the specific statute having addressed the issue more directly.

3. *The Duty To Explain.* — Let us assume specific substantive statutory law and a sufficiently clear waiver provision encompassing the provisions at issue. And let us further assume an agency has now asserted the power to waive pursuant to that clear authorization. What then?

A fundamental requirement of administrative law, particularly as it has developed over time, is the agency's duty to explain the decisions it makes.²²⁵ While Congress has no general obligation to provide reasons for the rules it promulgates—and, indeed, under prevailing constitutional doctrine, courts are even obliged to invent reasons to sustain those rules in most instances—agencies do.²²⁶ In the words of the APA, the agency has to show that its action is not “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”²²⁷ We need to consider, therefore, how the ordinary justification requirements of administrative law apply to big waiver. What data, what explanation ought the agency produce to justify, to itself and to others, its use of its big waiver authority to displace the rules that Congress wrote?

There is no Supreme Court case on point. Cases in which the Court reviews agencies acting in a new field, displacing only the common law, seem far afield. There, the change an agency makes in promulgating a rule, where none previously existed, is a change Congress presumably contemplated in delegating lawmaking authority. So while a rule always needs to be justified, the justification need not explain a change in the legal regime per se. Nearer are the cases that consider agency actions that displace prior federal law, albeit law that the agencies themselves have created. They arise when the agency decides to relax preexisting regulatory requirements, as in the long-time leading case of *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*²²⁸ Or they

225. See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (“[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action.”).

226. Compare *FCC v. Beach Comm'n, Inc.*, 508 U.S. 307, 313–15 (1993) (“[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.”), with *State Farm*, 463 U.S. at 43 (explaining “review under the ‘arbitrary and capricious’ standard is narrow and a court is not to substitute its judgment for that of the agency” and “the agency must examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made’” (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962))).

227. 5 U.S.C. § 706(2)(A) (2006).

228. *State Farm*, 463 U.S. at 46 (finding National Highway Traffic Safety Administration acted arbitrarily and capriciously in revoking requirement of passive restraints in new motor vehicles).

arise when the agency decides to regulate more aggressively than it previously had, as in the relatively recent *FCC v. Fox Television Stations, Inc.*²²⁹ In either circumstance, the new regulatory action must be justified in reference to the prior regulation. Some explanation for the change in regulatory position is required. But neither of these cases is automatically a perfect fit for big waiver either, for the simple reason that when an agency waives a statutory rule, it is not changing its own regulatory position; it is departing from a regulatory baseline established by Congress. Whether that should matter—and how—are questions that have to be addressed, and to do so, we start with *Fox Television*, the Court's most recent articulation of an agency's duty to explain a regulatory change.

In *Fox Television*, the court reviewed a series of agency adjudications in which the FCC declared “for the first time that a nonliteral (expletive) use of the F- and S-Words could be actionably indecent, even when the word is used only once,”²³⁰ whereas previously the Commission had exonerated “isolated or fleeting broadcasts.”²³¹ On review, the nine Justices generated six opinions, the most important, for our purposes, being Justice Scalia's opinion for the Court and Justice Breyer's for all four dissenters.

Stated in bald doctrinal terms, the Court held, contrary to the court below, that the “arbitrary or capricious” standard is no more stringent when an agency reverses a prior position than when an agency adopts a policy in the first place.²³² And at this level of generality, Breyer did not disagree.²³³ But he insisted that the agency had to focus on the fact of change—had to “explain why it now comes to a new judgment.”²³⁴ Among other details, he faulted the Commission for failing to explain how experience under the prior indecency standard had in fact generated the ills the Commission said it feared,²³⁵ and for basing its justification for the new rule on features of the situation that had remained the same.²³⁶ He also at several points expected the Commission to produce (or discuss) more data than it did.²³⁷ Without this basis in analytic

229. 129 S. Ct. 1800, 1812 (2009) (finding FCC's change in policy providing for stricter enforcement of its indecency ban was neither arbitrary nor capricious).

230. *Id.* at 1807.

231. *Id.* at 1808 (quoting *In re Complaints Against Various Broad. Licensees Regarding the Airing of the “Golden Globe Awards” Program*, 19 FCC Rcd. 4975, 4980 (2004)).

232. *Id.* at 1810–11.

233. *Id.* at 1831 (Breyer, J., dissenting) (“Contrary to the majority's characterization of this dissent, it would not . . . require a ‘heightened standard’ of review.”).

234. *Id.*

235. *Id.* at 1838–39 (explaining FCC's argument that prior policy would allow broadcasters to evade restrictions by airing expletives in isolation had no basis in empirical fact).

236. *Id.* (noting FCC had always been aware that, for example, expletives invoke sexual images or that children's surroundings influence their behavior).

237. See *id.* at 1836–37, 1839.

rationality, he suggested, the underlying demand that agency authority have a legal structure was at risk. “Where does, and why would, the APA grant agencies the freedom to change major policies on the basis of nothing more than political considerations or even personal whim?”²³⁸

Justice Scalia, in upholding the agency adjudications, did require that it recognize that it was changing the legal standard and that the new policy was supported to the usual extent. But “it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates.”²³⁹ This different approach, when played out in the details, gave considerably greater leeway to the present-day Commission to assess the situation in light of its common sense about the world and how it works without an exhaustive comparison with the reasoning upon which the prior rule was based.²⁴⁰ Sometimes the prior state of affairs had to be addressed; the need arose when the agency’s present factual findings contradicted its prior ones, or when the prior rule had engendered substantial reliance.²⁴¹ But the problem was particular, not general; shifting assessments of what was happening, and of what was desirable, did not threaten the legal order. “In the end,” Scalia wrote, the challenge to the agency failed because the challengers “quibble[d] with the Commission’s policy choices and not with the explanation it ha[d] given.”²⁴²

That one Justice’s prohibited “political considerations” are another Justice’s permissible “policy choices” is not news. Nor is it clear which Justice’s approach will be the law of the next case. Justice Breyer’s opinion, although in dissent here, seems closer to the *State Farm* decision, which itself is seemingly still good law and which set forth a more demanding explanatory requirement. There, the government had argued that the rescission of an agency rule was like agency inaction and thus subject to only the most minimal explanatory duty. But the Court disagreed, establishing the modern “hard look” doctrine, under which (as employed in this context) an agency must explain its reasons for deciding to dispense with the regulatory decision the agency previously made.²⁴³ As applied to the rescission of a rule, any regulatory option within the ambit of the previous rule, the Court held, must be considered

238. *Id.* at 1832.

239. *Id.* at 1811 (majority opinion).

240. See *id.* at 1813–14.

241. *Id.* at 1811.

242. *Id.* at 1819.

243. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 34 (1983) (“Briefly summarized, we hold that the agency failed to present an adequate basis and explanation for rescinding the passive restraint requirement and that the agency must either consider the matter further or adhere to or amend Standard 208 along lines which its analysis supports.”).

by the agency and rejected for a reason that takes account of the reasons the agency previously had given for choosing that option.

These various opinions in *Fox Television* and *State Farm*, growing out of an agency's change in its own regulatory policy, lay out the field of argument for considering the explanatory duties of an agency that makes a change in regulatory policy by waiving a *congressional* requirement—but they are not a perfect fit. The substantive terms of Congress's statute might be thought—even as the statute also provides a waiver power—to have more presumptive legitimacy than the administratively crafted regime that will substitute for it in consequence of the exercise of the waiver power. In comparison to the rule-for-rule (or precedent-for-precedent) case, therefore, waiver looks like the substitution of lesser for greater, rather than of equal for equal. That suggests that the duty to explain should be even greater for waivers than it is for an agency's revisions of its own prior judgments. On the other hand, a statute (unlike a prior rule or governing precedent) is not born out of any well-defined record and need not come forth accompanied by an analytical statement of basis and purpose or formal opinion. There is less “there, there” (or a more contested “there, there”) in the various documents issuing from Congress with which to contrast the agency's current disposition.

These features make straightforward extrapolation of either approach in *Fox Television*—and the related doctrine of *State Farm*—difficult. With regard to Scalia's analysis, can it be that, in waiving a statute, the agency need only manifest its belief in the need to change the regulatory status quo through the very exercise of the waiver power, thereby making an act of great regulatory significance essentially exempt from the duty to explain? After all, at least in the many situations in which there are no conditions on the grant of the waiver, the agency is not promulgating any new rule. It is simply dispensing with a prior regulatory requirement. What then actually needs be explained? The decision not to regulate? Under Scalia's approach, so long as the statute authorizes waiver, such reasons would always seem to exist and to be nonarbitrary. Yet a major regulatory change—and one in some tension with the approach Congress once favored—will have plainly occurred. Why should the agency not be called upon to explain the basis for its departure from the regulatory structure that previously governed?

Breyer's approach (and the approach of the Court in *State Farm*) would favor a requirement that the agency explain itself in just this manner. But it, too, is not a perfect fit for this context. With regard to Breyer's approach, it is hard to know what analysis one should attribute to Congress as the basis for the rules it put in place, and thus hard to identify the baseline against which to measure the soundness of the reasons the agency has for deciding to waive, or the adequacy of the data on which it relies. Precisely because Congress need not establish a record for the rules it lays down, it becomes difficult to demand of an agency that it

show why it deviated from the congressional choice. Explaining one's differences with a policy that itself has not been explained is no easy task.

Of course, the statute may itself answer the question; it may, that is, specify the findings the agency must make before waiving a statutory requirement.²⁴⁴ Failing that—and statutory waiver provisions are often silent or opaque on that point—we suggest the following:²⁴⁵

(a) It is not a sufficient justification for the exercise of big waiver that the administration has a different political complexion from Congress or that a new administration with different political views has been elected. Even in the rule-for-rule substitution case, the proposition that a new administration, for that reason alone, is justified in changing the rules has never had more than fitful support in the Supreme Court.²⁴⁶ The point seems even more important as regards waiver-for-statute, and indeed verges on the reasons, suggested above, that motivated the Court in *Clinton* to declare the Line Item Veto Act unconstitu-

244. See, e.g., Patient Protection and Affordable Care Act, 42 U.S.C. § 18052(b)(1) (Supp. IV 2011) (providing list of findings Secretary of Health and Human Services must make in order to grant waiver for state innovation under 42 U.S.C. § 18052(a)(1)).

245. As stated in text, there is no Supreme Court decision on point. But there is some support for what we are about to say in Justice Scalia's own opinion in *MCI*, as reinforced by the argument made in the dissent by Justice Stevens. As much as the *MCI* decision purports to rest on a purely textualist view of the meaning of the word "modify," its judgment is in the end a function of Justice Scalia's conclusion that the rate-filing requirement is not the purposeless product of an unintelligible legislative deal but rather a self-consciously chosen means of effectuating a larger protective purpose. See *MCI Telecomm. Corp. v. AT&T Co.*, 512 U.S. 218, 229–31 (1994). That is how he is able to conclude the rate-filing requirement is the "heart" of the whole statutory scheme. So understood, a departure from that scheme could presumably be justified only by showing that such a departure was needed to effectuate that same protective purpose—that absent the waiver of the filing requirement, the purpose would in fact be frustrated. That, of course, was precisely Justice Stevens's argument in dissent. He contended that the filing requirement, as applied to the market as it had developed, had become a barrier to entry for new companies that effectively locked in the dominant carrier's monopoly position—the very thing that the filing requirement had been designed to counteract. *Id.* at 244–45 (Stevens, J., dissenting).

In *MCI* itself, this debate played out in connection with the question of whether Congress had authorized the exercise of such a broad waiver power. But we think it offers insight into how to think about an agency's duty to explain its exercise of that same power. Put otherwise, if we imagine that in *MCI* the statute had stated clearly that the FCC had the authority to "waive any requirement, including the filed-rate requirement" there would remain the question whether the waiver the FCC effectuated should survive substantive arbitrary and capricious review. We suggest it should where the agency could make a case along the lines Justice Stevens advanced.

246. Probably the best known statement of the proposition is Justice Rehnquist's in his concurrence and dissent in *State Farm*:

A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations. As long as the agency remains within the bounds established by Congress, it is entitled to assess administrative records and evaluate priorities in light of the philosophy of the administration.

463 U.S. at 59 (Rehnquist, J., concurring in part and dissenting in part).

tional.²⁴⁷ After all, even if we may assume Congress intends, when it delegates regulatory power to agencies, to permit various administrations' different attitudes towards regulation to play out in shifts in approach across time, there is less reason to indulge a similar presumption with respect to the deference agencies need to accord the initial rules Congress itself has laid down. The assumption that the initial conditions Congress established were intended to be stickier than a mere agency rule seems appropriate.

(b) Big waiver should therefore have to be justified as being within the statutory enactment, as carrying forward one or more of what can be reasonably thought to be the purposes of the statute. To satisfy this requirement, waiver should be based on an analysis of existing facts and on the nonarbitrary application of statutory factors to those facts. And departures from the statutory rules must be explicitly addressed.

(c) The agency should explain why its big waiver is not just permissible but affirmatively desirable; it should explain, that is, why the purpose of the statute will, under existing circumstances, be better satisfied by departure from the specific rules of the statute.²⁴⁸ Again, we suggest making the initial statutory rule stickier than a mere agency rule.²⁴⁹

(d) The agency should not be required to explain how the world has changed since the statute was passed nor be required to produce then-and-now data, if for no other reason than that the world imagined at the enactment may be unknown or hopelessly compromised. It may be helpful in understanding what the agency is doing for it to show how the world differs from the world that existed, or was imagined, at the enactment of the statute; however, it is sufficient for the agency to produce an assessment of the present reality that shows that in that reality its big waiver is preferable given the statute's purposes.

This list portrays a default pattern. It is what we would, as an initial matter, recommend for incorporating into a waiver statute. In the absence of specifications in that statute, it is also how we would recommend reading the judicial review provisions of the APA. This is not to say that there could not be good reasons for departing from this list. If, for example, Congress wanted to allow for waiver partly to encourage experimentation among those who are regulated, it might make sense to allow for waiver when a proposed option is as good as, though not necessarily better than, the specified statutory pattern. And of course if the statute provided that framework, it would take precedence over the APA pattern. But in the absence of Congress making that clear, we would assume

247. See *supra* notes 178–185 and accompanying text (discussing *Clinton* and its potential rationales).

248. It might also, in appropriate circumstances, consider limiting the temporal scope of the waiver and providing for its reconsideration before its renewal.

249. Assuming, that is, that Scalia's opinion in *Fox Television* states the governing law regarding the rule-for-rule or precedent-for-precedent case.

the waiver must be justified by demonstrating the agency has reasons for thinking policy would be improved by dispensing, completely or on conditions, with the regulation Congress has put in place.

Making this the default pattern, admittedly, goes beyond conclusions resting solely on actual inferences of congressional intent. In a case of true silence, after all, it is arguably ambiguous what Congress, in authorizing waivers, intended. It may have wished to facilitate the kind of agency experimentation that would render the congressionally established regulatory requirement truly provisional and thus ever subject to administrative revision on terms that would make it easily disposable. Alternatively, Congress may have wished to shape agency action by setting forth a presumptively valid regulatory framework that an agency could only supplant after determining that the purposes that Congress incorporated in the statute were now better supported by the new regulatory regime that waiver enabled.

Although congressional intent may therefore be ambiguous, we do not think it should be left to the agency to choose between the two possibilities. This conclusion is based first and foremost on grounds of legitimacy and accountability, the key values that administrative law seeks to vindicate in constructing doctrines for construing the discretion afforded agencies by delegations generally.²⁵⁰ Both in terms of the institutions involved—Congress and an agency—and in terms of the self-presentation of the structure of the statute—a rule and a waiver option—it makes sense presumptively to view the congressionally stipulated rule as primary, which is to say, as governing unless the waiver can be shown to be superior. Moreover, according this presumption creates a positive dynamic of accountability when fed back into the legislative process: It makes pure congressional shams costly. And we note that it is an approach that is workable. Some statutes expressly set it forth at present—as in NCLB’s requirements for approving state waivers.²⁵¹ And some agencies impose it on themselves, as is the case with the Health and Human Services Secretary’s statement that a welfare waiver will be given only to those states whose programs would be “more effective” in terms of leading welfare recipients to employment than strict adherence to the statutory requirements for work.²⁵²

But, insofar as one can imagine the possible policy consequences of the approach, it is superior on this ground, too. True, this tilting of the legal structure towards making the initial regulatory framework sticky is

250. See, e.g., Jody Freeman, *The Private Role in Public Governance*, 75 *N.Y.U. L. Rev.* 543, 545–46 (2000) (noting since New Deal “administrative law has been defined by the crisis of legitimacy and the problem of agency discretion” and observing “administrative law scholarship has organized itself largely around the need to defend the administrative state against accusations of illegitimacy” stemming from purported unaccountability).

251. 20 U.S.C. § 6311(b)(2)(F) (2006).

252. Office of Family Assistance, *supra* note 70, at 1.

not without hazards. Paradoxically, the more the big waiver option is employed in legislation for partisan purposes—so that responsibility for difficult judgments may be thrust onto the executive of another party while permitting legislative factions to engage in painless credit taking—the more worrisome is a doctrine that makes it difficult for the agency to dispense with the legislative framework that is subject to waiver. Such a heightened duty to explain makes sticky a regulatory framework that perhaps no one in Congress really thought would advance the social welfare. In fact, the very point of its specification—if we take the least charitable account of congressional motives—was to ensure its waiver. But there are too many circumstances in which it would seem that big waiver is a useful legislative tool for reasons other than those pathological ones to permit agencies to assume Congress wished its frameworks to be so easily removed. If that means Congress should be wary of designing such frameworks—or, more realistically, that the executive branch should push back against them more forcefully and demand the grounds of their waiver authority be made more explicit—we see that as a virtue rather than a failing of the doctrinal approach we favor.

There is a possibility, to be sure, that by forcing transparency over waiver schemes big waiver would become a less useful tool of compromise for overcoming partisan stalemates. But here, too, it is not clear that the cynical story is so plainly descriptive of a vast range of cases in which big waiver appears in statutes, or that the limitations on its availability as a means of overcoming stalemate through deception are so obviously problematic, that the doctrine we favor should be rejected. To the contrary, it strengthens the likelihood that big waiver is being used for positive, not negative, purposes.

CONCLUSION

Big waiver is an innovation, but one that is ultimately—like the classic New Deal type of delegation—of Congress's making. As explained above, it is an innovation that we believe Congress is constitutionally entitled to make, a conclusion that in itself is not particularly controversial given the wide ambit Congress has been given to delegate over the last nearly eighty years. But it remains an innovation, and one that in extreme cases can raise not only deep and difficult interpretive issues but also constitutional ones. In fact, ironically, in the one case in which the Court has invalidated a delegation of power to cancel a statute, it was the tightly circumscribed time period within which the cancellation could take place—rather than the broad discretion over time to make law—that grounded the adverse constitutional judgment. But that just reflects the fact that big waiver is different than ordinary delegation. It is a tool that Congress turns to precisely when neither the ordinary delegation of administrative discretion nor the legislative displacement of that discretion suffices to permit Congress to accomplish the outcomes it seeks.

Because we believe this tool is, in the main, perfectly lawful but under-recognized, it is also important to understand how to reconcile big waiver and the administrative law doctrines and principles that have developed in the wake of the rise of the classic delegation. To begin, to waive any, or at least major, substantive statutory provisions, there has to be explicit statutory authority. And the scope of the waiver authority should be specific—specific, at least, relative to the statute itself. A statutory waiver provision that is much more diffuse than the substantive provisions the agency is attempting to waive is in danger of being construed as providing only for little waiver—and, for the reasons we have given, appropriately so.

In the ordinary case, the statute should provide, or, if silent, should be understood to provide, for big waiver only insofar as it is in furtherance of the same basic purposes as the substantive statutory provisions to be waived. If the waiver authority is meant to serve some additional or different purpose, it should explicitly so state; if it does not do so explicitly, its silence should not be understood as an occasion for the agency to resolve the ambiguity, such that it may identify reasons more favorable to the exercise of the big waiver power.

That said, we do not believe the waiver authority should be understood to require the agency to prove that Congress made an error in the way it pursued those purposes, or that experience under the statute was worse than what Congress had expected. It is sufficient for the agency reasonably to conclude that the core purposes of the statute will be better achieved with the waiver than without. But the demand for a reasoned explanation of that comparative conclusion is warranted.

Clearly these desiderata are not satisfied by a simple statutory statement of the “agency may waive” sort. But the waiver provisions of some of the recent statutes highlighted above do not look like that. Indeed, some are very successful in meeting our demands for what big waiver should look like, and we close by reviewing why.

As an example, consider the waiver provisions of NCLB. It is explicitly a big waiver provision—“the Secretary may waive any statutory or regulatory requirement of this chapter”²⁵³—but is also explicitly tailored with a list of ten types of items that cannot be waived, such as “any statutory or regulatory requirements relating to . . . the allocation or distribution of funds to States, . . . use of Federal funds to supplement, not supplant, non-Federal funds, . . . parental participation and involvement, . . . [and] applicable civil rights requirements.”²⁵⁴ Even as to items that can be waived—which include, as discussed above, some of the core, and most publicized, features of the statute—the Act clearly distinguishes waiving a statutory requirement from obliterating it. Waivers are authorized only for state or local educational agencies, or Indian tribes, that

253. 20 U.S.C. § 7861(a).

254. *Id.* § 7861(c).

request them—the statutory rules remain in force for the rest—and can be granted for only four years at a time; extensions are authorized only if the Secretary determines that “the waiver has been effective.”²⁵⁵ Waivers are explicitly tied to furthering the core purposes of the Act. Applicants must show the Secretary how waiving identified requirements will “(i) increase the quality of instruction for students; and (ii) improve the academic achievement of students.” And, consistent with the general structure of the Act, applicants must put forth “measurable educational goals” along with “the methods to be used to measure” them “annually.”²⁵⁶ Sensibly interpreted, the words “increase” and “improve” require showing not that the proposed waiver would produce a situation better than existed before NCLB was passed—presumably Congress thinks that the statute without a waiver already furthers academic achievement—but rather that the proposed waiver would produce in practice a situation better than exists using the statutory apparatus of NCLB as the baseline.²⁵⁷ The statute, in other words, explicitly incorporates the relationship of agency and Congress we have been suggesting—and in that way adds a level of legislative guidance to the exercise of administrative discretion, and force to the statutory scheme overall, that a bland delegation of the power to establish regulations to promote educational improvement would not.

The waiver provisions of the ACA are similarly well developed. The Act specifies the substantial portions of the health insurance coverage program as to which the Secretary can allow “the waiver of all or any requirements,”²⁵⁸ and reinforces the negative pregnant by saying that the Secretary “may not waive” requirements not within her jurisdiction.²⁵⁹ Waivers depend on state application and last for five years in the first instance;²⁶⁰ states may opt out of a granted waiver (apparently at any time)

255. Id. § 7861(a)(2), (d)(1), (d)(2)(A).

256. Id. § 7861(b)(1)(B), (C).

257. See, e.g., 147 Cong. Rec. 26,592 (2001) (statement of Sen. Robert Smith) (expressing hope that proposal allowing 150 school districts to apply for waivers from federal requirements “will effectively demonstrate that less government heavy-handedness, with more local control and broader decision making power at the local level is the key to improving schools”); Michele McNeil, Education Department Pursues NCLB Waivers for Districts, *Educ. Week* (Mar. 19, 2012, 11:09 AM), http://blogs.edweek.org/edweek/campaign-k-12/2012/03/education_department_pursues_n.html (on file with the *Columbia Law Review*) (discussing potential grant of waivers from NCLB to states that sought them and noting statements from Acting Assistant Secretary in Office of Elementary and Secondary Education that “changes to accountability are best accomplished and leveraged at the state level”).

258. 42 U.S.C. § 18052(a)(1) (Supp. IV 2011).

259. Id. § 18052(c)(2). “The Secretary” for most matters is the Secretary of Health and Human Services; for some matters relating to the Internal Revenue Code, it refers to the Secretary of the Treasury. Id. § 18052(a)(6).

260. Id. § 18052(e) (setting five-year limit on initial waiver with allowance for continuation at Secretary’s discretion).

and return at will to the background rules.²⁶¹ In any case, they cannot ask for a waiver before “plan years” starting in 2017, suggesting that they have to at least start where Congress put them.²⁶²

As to the relationship of the proposed state plan with the congressionally stipulated one, the Secretary may grant a waiver only after determining the state plan provides health benefits coverage “at least as comprehensive” as that required under the Act, that will be “at least as affordable,” and that covers “at least a comparable number of its residents”; she also has to be satisfied that it “will not increase the Federal deficit.”²⁶³ In contrast to what we suggest as the default position, it thus seems that the ACA provides for waivers for plans “as good as,” and not necessarily better than, what Congress initially stipulated. The provision as a whole is entitled “Waiver for State innovation,”²⁶⁴ so it seems that Congress includes federalism-based experimentation as an additional purpose, so long as the major purposes of the Act are not subverted.

That said, the statutorily prescribed framework subject to waiver sets the baseline against which administrative discretion to approve proposals by states for waivers must be evaluated. In the other direction, when the Secretary grants a waiver, she is also directed to arrange a method for providing to the state funds “for purposes of implementing the state plan under the waiver” equivalent to what it would have received had it “not received such waiver,”²⁶⁵ a requirement that itself reinforces the substantiality of the showing a state must make in order to warrant the waiver. For Congress to fund the innovation, one would expect it wished to get as much bang for its buck—in terms of the ACA’s goals for access and affordability—as it presumptively sought through its own statutorily specified rules.²⁶⁶

By contrast, the waiver provision of the REAL ID Act of 2005, relating to building a system of “reinforced fencing” along the border with Mexico, seems poorly thought out. As a reminder, it provides,

Notwithstanding any other provision of law, the Secretary of Homeland Security shall have the authority to waive all legal requirements such Secretary, in such Secretary’s sole discretion, determines necessary to ensure expeditious construction of the barriers and roads under this section. . . . Any such decision by

261. See *id.* § 18052(b)(2)(B) (providing means to “terminate the authority provided under the waiver”).

262. *Id.* § 18052(a)(1).

263. *Id.* § 18052(b)(1).

264. *Id.* § 18052.

265. *Id.* § 18052(a)(3).

266. *Id.* § 18052(a)(4)(B) (requiring Secretary to promulgate regulations providing processes for public notice and comment, submission of reports by states, and periodic evaluation of waiver program).

the Secretary shall be effective upon being published in the Federal Register.²⁶⁷

Waiver here is not limited to statutes otherwise within the authority of the Secretary of Homeland Security but rather stretches across the U.S. Code (and the Code of Federal Regulations, for that matter).²⁶⁸ Yet the way in which the Secretary is to judge the relationship between the desire of Congress to have the fence built quickly and its purposes as incorporated in innumerable other statutes is left to the Janus-faced phrase “necessary to ensure expeditious construction.”²⁶⁹ Insofar as one emphasizes the word “necessary,” the delegation shrinks; for something to be “*necessary* to ensure expeditious construction” it arguably needs to be more needed than if it were merely “*convenient* to ensure expeditious construction.” But insofar as one emphasizes the words “to ensure” the delegation grows; something “*necessary to ensure* expeditious construction” might not be needed if the goal were merely “*to reasonably further* expeditious construction.”

Moreover, the Secretary is apparently to make these waiver decisions without any process other than publication.²⁷⁰ The accordion-like nature of the substantive standard would sit much better if the Secretary were forced to explain her decisions. Nor will that requirement be developed through the back door of judicial review, because her decisions are to be reviewed only for constitutional violation.²⁷¹

As a matter of constitutional law, there is no presentment problem in this pattern—the waived statutes are in no sense vetoed.²⁷² There is however a delegation question: Is granting the Secretary this much discretionary power over such a broad terrain without explanation and without judicial review as to its ordinary exercise akin to the problem of the *Schechter Poultry* case—or is it after all only about a fence? Perhaps there should be a constitutional doctrine that says that Congress cannot provide for big waiver and at the same time completely evade the processes that would help make it legitimate, although we are not sure where in the text or current doctrine we would anchor that standard. In

267. 8 U.S.C. § 1103 note (2006) (Improvement of Barriers at Border).

268. We would not understand the authority to “waive all legal requirements” to include “waiving” state law requirements.

269. 8 U.S.C. § 1103 note.

270. The Secretary does have a general obligation to consult with various specified groups to minimize the impact of what she does, but this is not connected with the specific decision to waive or not. *Id.* § 1103(d)(1).

271. *Id.* § 1103 note (“A cause of action or claim may only be brought alleging a violation of the Constitution of the United States.”).

272. See *Defenders of Wildlife v. Chertoff*, 527 F. Supp. 2d 119, 124 (D.D.C. 2007) (rejecting argument that waiver is unconstitutional veto, noting “[t]he Secretary has no authority to . . . repeal any law, or cancel any statutory provision, in whole or in part”).

the event, the district judges said it is constitutional,²⁷³ the statute eliminated circuit court review,²⁷⁴ and the Supreme Court denied certiorari.²⁷⁵

Whatever its constitutionality, however, the REAL ID Act seems to exemplify bad statutory design, especially if it were taken as a template for big waiver provisions more generally. We understand the underlying problem Congress faced. It wanted the fence built, and it was afraid that the fence would be slowed down by the particular effects of innumerable statutory requirements Congress itself had passed; it did not want to have to fight about, or even locate, all the requirements that ought to be waived, and so it delegated the decision. But it made no real effort to keep the waiver power within bounds. No matter what one thinks of the need for a border fence, this approach seems to undervalue the virtues of the ordinary processes. Congress in fact values the interests protected by its other statutes, and it could not reasonably think that building the fence as fast as possible, as easily as possible, should always take priority; but it did nothing to protect its other purposes, or even to make sure they were recognized.

We are closing by looking at statutes because fashioning good big waivers is first and foremost the responsibility of Congress—and secondarily of the executive branch in attending to the statutory language it will be called upon to implement. That, of course, also makes these details of interest to all those with a stake in the legislation, and that, too, is one of the points we wish to emphasize. Increasingly, it is the scope of what may be waived, and how, that will be more determinative of the regulatory scheme's ultimate impact than the scope of what has been delegated.

This Article has argued for the constitutionality of big waiver, and has continued with that theme in suggesting legal doctrines to make Congress more responsible in its efforts. And while Congress has obviously lapsed at times, we are encouraged by the seriousness of the waiver provisions in such major statutes as NCLB and the ACA.

Perhaps in a perfect world big waiver would not be necessary, and successful statutory revision through the ordinary processes of legislation could be assumed. But we do not see why. The administrative state in its usual manifestations need not be understood only as a second best. It

273. See *Save Our Heritage Org. v. Gonzales*, 533 F. Supp. 2d 58, 63 (D.D.C. 2008) (holding “the Secretary’s waiver authority is not an impermissible delegation of power to the Executive Branch and . . . is constitutional”); *Defenders of Wildlife*, 527 F. Supp. 2d at 129 (finding waiver “valid delegation of authority” and thus constitutional).

274. 8 U.S.C. § 1103 note (“A[] . . . final judgment, decree, or order of the district court may be reviewed only upon petition for a writ of certiorari to the Supreme Court of the United States.”).

275. *Defenders of Wildlife v. Chertoff*, 128 S. Ct. 2962 (2008), denying cert. to 527 F. Supp. 2d 119. One of the present authors (Rakoff) was a signatory of an amicus brief urging the Court to take certiorari in the case. See Brief of Amici Curiae William D. Araiza & Other Constitutional & Administrative Law Professors Listed Herein In Support of Petitioners, *Defenders of Wildlife*, 128 S. Ct. 2962 (No. 07-1180), 2008 WL 1803437.

may instead be understood as an institutional innovation that makes possible lawmaking for the sake of the general welfare that would simply be impossible or impracticable otherwise. So, too, does its inversion. Indeed, the combination of a specified statute and a well-thought-out provision for waiver may be far better—in terms of congressional responsibility and the play of democratic forces—than the blanket delegations to which we have become so accustomed.

There are real concerns about whether a grant of big waiver will become a means by which the executive may effectively dispense with a law Congress has enacted. The discretion that inheres in any delegation necessarily gives any administration opportunities to make judgments that can exploit ambiguous statutory language. But we must also consider whether there are real alternatives. In our view, such a comparison reinforces our defense of big waiver.

In a world without big waiver, it is not clear that we would come any closer to realizing congressional intentions, even assuming one could know them. Congress would be left with the same limited set of options that made big waiver attractive in the first instance. It could legislate with greater specificity in revising laws it had previously made—but it would then confront all the difficulties that make such revision so unlikely, with the risk that it would be stuck with a prior legislative judgment it no longer believes is wise. It could impose new regulatory frameworks of its own making without providing for a means of administrative revision, but it would then be forced to accept the consequences of a less flexible regulatory regime at the outset than it has confidence would make sense. In the alternative, it could simply delegate even more broadly, conferring on the agency not merely a power to waive pursuant to some standard, but instead the authority to make new rules against a slate Congress itself had wiped clean. But Congress opts for big waiver precisely because it believes that legislative baselines have value—so long as they are subject to modification or even more fulsome revision by an agency charged with making the goal of that prior legislation more effective in light of new conditions.

In that respect, our defense of big waiver is both affirmative and realistic. It is, like the contemporary defense of big delegation, in part a concession to the realities of modern governance—realities that now include the fact that administration occurs in a world defined by all manner of existing federal statutes and by a suspicion of unfettered administrative expertise. And while we are not so fatalistic as to think big waivers cannot be improved, both through the doctrines we describe and through careful drafting that defines standards for their exercise and provides means of ensuring effective monitoring of their consequences, neither do we think it makes sense to think of big waiver as merely an option worth choosing only if it can meet the nigh-unto-impossible standard of always carrying forward what Congress wanted. It is now well understood that big delegation serves important governmental purposes

even though there is no way of guaranteeing in particular instances that administrators will exercise the authority given to them in good fashion. Our claim is that big waiver is just as foundational to modern administrative governance—or, on the way to becoming so—and thus that it should be held to no higher standard, notwithstanding how different it may seem.

The administrative process, simply put, is not static. It is responsive to the political economy within which it operates. If an earlier time led to the innovation of the type of delegation Landis championed, ours is leading to its inversion. We should welcome this new phase of the administrative process.

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