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## The Law of “Not Now”: When Agencies Defer Decisions

Cass R. Sunstein\* and Adrian Vermeule\*\*

### Abstract

*Administrative agencies frequently say “not now.” They defer decisions about rulemaking or adjudication, or decide not to decide, potentially jeopardizing public health, national security, or other important goals. Such decisions are often made as a result of general Administration policy, may be highly controversial, and are at least potentially subject to legal challenge. When is it lawful for agencies to defer decisions? A substantial degree of agency autonomy is guaranteed by a recognition of resource constraints, which require agencies to set priorities, often with reference to their independent assessments of the relative importance of legislative policies. Agencies frequently defer decisions because they do not believe that certain policies warrant prompt attention. Unless a fair reading of congressional instructions suggests otherwise, agencies may defer decisions because of their own judgments about appropriate timing. At the same time, agencies may not defer decisions, or decide not to decide, if Congress has imposed a statutory deadline, or if their failure to act amounts to a circumvention of express or implied statutory requirements, counts as an abdication of the agency’s basic responsibility to promote and enforce policies established by Congress. Difficult questions are raised by moratoria, formal or informal, on regulatory activity, especially if they are motivated by political considerations. Difficult questions are also raised when statutory deadlines are not possible to meet, consistent with the agency’s obligation to engage in “reasoned decisionmaking.”*

Every day of every year, administrative agencies must decide what and whether

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to decide. An agency might be asked to decide, now, whether to initiate a rulemaking in which it will have to decide what the relevant rule will be on a given topic -- involving, for example, air quality, automobile safety, airport security, health care, homeland security, for-profit education, or financial stability. An agency might be asked to decide, now, whether to initiate an adjudicatory proceeding that will require the agency to decide later whether a regulated party has violated a statute or regulation. The number of potential rulemakings is very high, and the same is true for adjudications, and agencies must necessarily defer numerous decisions until a later time. In ways both formal and informal, decisions to decide are ubiquitous in the administrative state. At least some of those decisions are made in light of general Administration policy and reflect the views and priorities of the President personally, who is unique in his constitutional responsibility to oversee implementation of “a mass of legislation,”<sup>1</sup> and who may decide that for a period, a significant delay in implementation is the best approach.

Sometimes agencies make a public, or at least a formal, decision not to decide. They conclude that they will not decide, or that they will defer their decision; they announce that decision in public. Alternatively, agencies might decide not to decide, and those inside the government are well aware of that decision (indeed many people might have participated in it), but it is not publicly announced. More simply, agencies might not decide, in the sense that they have focussed on other matters, not at all on the topic at hand. We focus principally on actual decisions not to decide, but most of what we say bears on not deciding as well.<sup>2</sup>

With respect to rulemaking and adjudication, how does law shape and constrain agency decisions whether to decide? The Administrative Procedure Act requires courts to compel agency action “unlawfully withheld or unreasonably delayed.”<sup>3</sup> It also allows people to file petitions to make rules; agency responses to such petitions are subject to judicial review, albeit with an unusual degree of deference.<sup>4</sup> The Supreme Court has addressed the issue of deferred action on several occasions,<sup>5</sup> most formally in

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<sup>1</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 702 (1952) (Vinson, J., dissenting). The full sentence is as follows: “Unlike an administrative commission confined to the enforcement of the statute under which it was created, or the head of a department when administering a particular statute, the President is a constitutional officer charged with taking care that a ‘mass of legislation’ be executed.” Needless to say, the mass is far more massive than it was in 1952.

<sup>2</sup> In the cases on which we focus, agencies have made a formal decision not to decide, and courts evaluate the legality and rationality of that decision under the Administrative Procedure Act, 5 U.S.C. §551 et seq. Under the Act, any “interested person” may petition agencies to give a brief statement of reasons for their decisions not to decide; see §553(e) (rulemaking), §553(b), (e) (all agency proceedings). In that sense, interested persons may convert simple non-decisions into decisions not to decide.

<sup>3</sup> 5 U.S.C. § 706(1) (2006).

<sup>4</sup> See *Mass. v. EPA*, 549 U.S. 497, 527 (2007).

<sup>5</sup> See, e.g., *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55 (2004); *Heckler v. Chaney*, 470 U.S. 821 (1985).

Massachusetts v. Environmental Protection Agency, which held *inter alia* that the Environmental Protection Agency had not given adequate reasons for its denial of a petition to initiate a rulemaking with respect to carbon dioxide emissions from new automobiles.<sup>6</sup>

As we will see, however, Massachusetts v. EPA is ambiguous in crucial respects. On a broad reading, supported by important passages in the opinion, the Court seems to hold that in deciding whether to decide, agencies *may consider only the same factors that would be relevant to the primary decision itself*.<sup>7</sup> This is a puzzling holding, one that is flatly inconsistent with precedent, not to mention the realities of agency behavior and the larger structure of administrative law. Agencies frequently decline to initiate rulemaking because of resource constraints, even if such constraints are legally irrelevant to the agency's permissible judgment, on the merits, about the the appropriate content of the rule, if it is issued. And as we shall see, agencies frequently defer decisions for other reasons -- including the state of the economy, Administration-wide priorities, the views and commitments of the President, or the relationship between agency decisions and other projects or rulemakings at the federal or state level -- that arguably may not lawfully be taken into account when they are promulgating rules or issuing orders.

Since Massachusetts v. EPA, lower courts and commentators have wrestled with the problem of how to assess agency decisions about whether to decide,<sup>8</sup> and have recognized the legitimacy of considering resource constraints and other factors not relevant to the decision how to proceed, given a decision to proceed.<sup>9</sup> Yet no clear account has emerged on the crucial question: what are the permissible grounds on which agencies may, or may not, defer decisions? When are agencies authorized to say "not now"? The question is especially in light of widespread discussion, in both

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<sup>6</sup> 549 U.S. at 534.

<sup>7</sup> *Id.* at 533-35.

<sup>8</sup> Two circuit court cases seem to have politely ignored the controversial holding of *Massachusetts v. EPA*; these courts have upheld agency denials of rulemaking petitions without asking whether the denials were justifiable in light of the statutory factors relevant to the underlying decision itself. See *Preminger v. Sec'y of Veterans Affairs*, 632 F.3d 1345, 1353-54 (Fed. Cir. 2011) (not asking whether agency's reasons for denial were statutorily permissible or relevant to the subject of the rulemaking petition); *Defenders of Wildlife v. Gutierrez*, 532 F.3d 913, 921 (D.C. Cir. 2008) (same). As for commentary, a useful treatment of related issues is Sharon Jacobs, *The Administrative State's Passive Virtues* (Oct. 29, 2013) (unpublished manuscript) (on file with the authors). For an earlier effort by one of us, see Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 51 (2007). An analysis that predates *Massachusetts v. EPA*, but is still illuminating, is Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. REV. 1657 (2004).

<sup>9</sup> See, e.g., *Defenders of Wildlife*, 532 F.3d at 921 (upholding an agency rejection of a rulemaking petition based on preserving resources for another rulemaking), *DiGiovanni v. Fed. Aviation Admin.*, 249 F. App'x 884, 844 (2d Cir. 2007) (accepting resource constraints and competing agency priorities as valid reasons for rejecting a rulemaking petition).

academic and popular circles, of whether agency actions, and particularly rules, have been illegitimately delayed, perhaps for political or even electoral reasons.<sup>10</sup> That discussion raises, in turn, large questions about self-government, the separation of powers, and the nature of democratic and judicial controls over the operations of the administrative state. Is it a troubling challenge to democratic accountability, or a reflection of accountability in action, if agencies defer decisions because the President wants them to do so?

Our aim here is to offer an account of the law of “not now” -- of the conditions under which, and the grounds on which, agencies may defer action or decide not to decide.<sup>11</sup> As we shall see, the easiest cases involve resource constraints. Agencies have limited budgets and a large menu of options, and they may legitimately decide to pursue some options but not others. If an agency declines to engage in rulemaking not because it thinks that any rule would be a bad idea but because it has higher priorities, it is entitled to defer its decision.

This principle of priority-setting<sup>12</sup> in the face of limited resources captures a significant amount of the territory of decisions not to decide. It ensures that most such decisions are legally unobjectionable, even if those in the private sector believe, rightly, that the issue is important and deserves official attention. Especially in a period in which agencies are required or authorized to engage in a dazzling number of tasks, and in which they have limited budgets, they may legitimately decline to decide, or defer decisions, on resource-allocating grounds.

Somewhat more controversially, but also consistent with the principle of priority-setting, we suggest that agencies are generally permitted to defer decisions because of policy judgments that do not involve resource constraints and that are, in a sense, extrinsic to the statutes involved. An agency might believe, for example, that a particular regulatory action would adversely affect our nation’s relationships with our trading partners, or that it would impose high costs on a sector that is now facing serious

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<sup>10</sup> See Juliet Eilperin, *Policies Delayed Before Election*, WASH. POST, Dec. 15, 2013, at A01, available at

<sup>10</sup> [http://www.washingtonpost.com/politics/white-house-delayed-enacting-rules-ahead-of-2012-election-to-avoid-controversy/2013/12/14/7885a494-561a-11e3-ba82-16ed03681809\\_story.html](http://www.washingtonpost.com/politics/white-house-delayed-enacting-rules-ahead-of-2012-election-to-avoid-controversy/2013/12/14/7885a494-561a-11e3-ba82-16ed03681809_story.html).

<sup>11</sup> We do not distinguish between executive agencies and “independent” agencies, such as the Federal Trade Commission, the Federal Reserve Board, and the Federal Communications Commission. In our view, the analysis is the same for the two sets of agencies. We acknowledge that for those who emphasize the importance of continuing presidential control, and the distinctive electoral accountability of the President, the analysis might be different. We spend some time on that control and that accountability, but for our purposes here, and under existing doctrine, the differences between the two kinds of agencies do not much matter.

<sup>12</sup> Priority-setting and resource allocation are discussed in Eric Biber, *The Importance of Resource Allocation in Administrative Law*, 60 ADMIN. L. REV. 1 (2008), and Eric Biber, *Two Sides of the Same Coin: Judicial Review of Administrative Agency Action and Inaction*, 26 VA. ENVTL. L.J. 461 (2008).

economic difficulty, or would work poorly or not at all with other regulatory actions that are under current consideration (perhaps because the result would be to impose excessive burdens or create uncertainty). It is relevant in this regard that the executive branch is a “they, not an it,” with multiple offices and departments having a wide range of perspectives and expertise.<sup>13</sup> Consideration of those perspectives, and that expertise, might lead an agency to decide not to decide. It is also relevant that the President is highly accountable, and the decisions of executive agencies, including their decisions not to decide, are likely to reflect his leadership.

The legality of an agency’s decision to defer its decision, motivated by considerations of this kind, depends on the best reading of congressional instructions. We suggest that unless the context suggests otherwise, agencies may generally invoke extrinsic considerations if Congress has merely authorized, but not mandated, agency action. But the analysis must be different where the underlying statute expressly states or else presupposes, by necessary implication, that the agency may not defer decisions or must decide one way or another. If so, agencies may not defer decision or refuse to decide.

With these points in mind, we suggest that broad though it is, agency discretion to defer decisions is subject to three important constraints. First, and most obviously, no such decision may violate statutory deadlines, at least as a general rule.<sup>14</sup> If a statute requires an agency to reach a decision by a date certain, the agency must respect that requirement.<sup>15</sup> Second, even in the absence of a statutory deadline, agencies are subject to a general anti-circumvention principle: when deciding whether to decide, agencies may not circumvent express or implied congressional instructions by deferring action.<sup>16</sup> Suppose, for example, that Congress has conditioned a policy on whether agencies make certain findings and made clear that agencies may not decline to make such findings, or that Congress has said that agencies “shall” take certain action. If so, agencies retain some control over timing, and that control may be significant, but they may not indefinitely defer such action simply because they would prefer not to take it, or because they disagree with the policy judgment incorporated in the statute. We acknowledge that there might be a thin line between illegitimate policy disagreement and legitimate priority-setting, based on a belief that a certain policy is not worth pursuing at the present time. But the line is nonetheless important.

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<sup>13</sup> For relevant discussion, see Adrian Vermeule, Local and Global Knowledge in the Administrative State (Harvard Public Law Working Paper 12-01, 2012); Cass R. Sunstein, The Office of Information and Regulatory Affairs: Myths and Realities, 126 Harv. L. Rev. 1838 (2013).

<sup>14</sup> We offer some qualifications where compliance with deadlines is not possible. See *infra* Part II.B.1.

<sup>15</sup> See *Ctr. for Food Safety v. Hamburg*, No. C 12-4529 PJH, 2013 WL 1741816, at \*2-3 (N.D. Cal. Apr. 22, 2013).

<sup>16</sup> See Freeman and Vermeule, *supra* note \_\_\_\_, 2007 S. Ct. Rev. at 83-88.

Third, and generalizing from an idea already found in one corner of administrative-law doctrine, we will suggest, with some ambivalence, an ultimate constraint: Agencies may not invoke their ability to allocate limited resources in such a way as to abdicate their statutory responsibilities. While application and enforcement of the principle are complex, the core idea is simple: resource allocation is an entirely legitimate ground for moving particular agency action to the end of the queue, but the best reading of certain statutes is that resource allocation may not be repeatedly invoked in order to keep a particular action at the back of the queue forever. The risk with such repeated invocations is that they might be inconsistent with congressional instructions, which may be best read to require due consideration of the relevant issues, even while allowing agencies substantial flexibility with respect to timing.

This anti-abdication principle is admittedly vague and not easily subject to judicial administration, but as we shall see, it has already been made part of the law of reviewability of administrative (in)action. Because of the difficulties in administering the principle, it will usually amount to a judicially underenforced constraint, but it remains an important backstop that judges may invoke in extreme cases. Whether or not courts are involved, it is a limitation that agencies must nonetheless obey if they are to remain faithful to the law. We will flesh out the principle through illustrative cases.

Much of our discussion consists of an elaboration of these principles and understandings, which will (we hope) help to bring a degree of clarity and order to an area of the law that lacks both, and that will undoubtedly develop significantly in the coming years, not least in light of the extraordinarily wide range of requirements that Congress has imposed on agencies. Many agencies, and the executive branch as a whole (including the President), are faced with constant and difficult management tasks, made in the midst of difficult economic and political circumstances.

In explaining and defending the governing principles, we also draw attention to some cases that are especially difficult. Suppose, for example, that it is not possible for an agency to comply with statutory deadlines while also complying with APA requirements of reasoned decisionmaking. May the agency disregard the deadline? Or suppose that an Administration adopts something like a moratorium on regulatory activity -- perhaps because of an economic downturn, perhaps because of a desire not to complicate congressional debates over important legislation (by stirring up complaints or producing requests for a quid pro quo), or perhaps because of an upcoming midterm or presidential election. Practices of these kinds are not exactly hypothetical. Are they lawful?

The rest of the discussion is organized as follows. Part I motivates our discussion. We introduce some stylized problems, all based on real problems that agencies have faced, and give a brief primer on relevant doctrine. Part II explores both priority-setting and constraints on priority-setting, based on the anti-circumvention and anti-abdication principles. To illustrate those principles, Part III turns to a large number of imaginable cases, easy and hard. A brief conclusion follows.

## **I. Problems and Precedents**

We begin in Part I.A with a series of stylized problems in which agencies decide whether to decide, ultimately saying, “not now.” The stylization is an expositional convenience that allows us to bring out the legally relevant features of the problems cleanly; all the problems have messier real-world analogues, as we will make clear. Part I.B sketches the relevant administrative law doctrine, which has important silences and ambiguities.

### **A. Problems**

#### **1. “Genocide”?**

Transylvanistan is a democratic state and an ally of the United States. The United States has long supplied Transylvanistan with annual grants of foreign aid, principally in the form of “foreign military assistance” -- grants to fund cooperation and joint training between the armed forces of Transylvanistan and the United States. A federal statute on the books specifies that if the Secretary of State determines that a “genocide” is occurring in any nation receiving foreign military assistance, the aid must be cut off unconditionally.

In 2014, the Transylvanistanian government initiates what most people consider to be a genocide against a minority group in that nation. Defenders of that group call on the United States, through the Department of State, to make a determination, under the relevant statute, that there has been a “genocide” in Transylvanistan. The State Department issues a press release stating that “the Secretary of State has decided that she will not, at this time, make a determination whether there has been a ‘genocide’ in Transylvanistan in the legal sense.” Foreign military assistance continues to flow to Transylvanistan.<sup>17</sup> (There is little question that the Secretary has made her

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<sup>17</sup> This hypothetical example has evident similarities to the question raised in 2012 about whether the United States was required to cut off funds to Egypt on the ground that a military coup had occurred in that nation. We do not mean to express any view here on the Egypt question, which involves an



determination after close consultation with others in the executive branch, including the President himself; in fact it is safe to assume that the essential decision has ultimately been made by the President.)

On what grounds may the Secretary make such a decision not to decide? Would it matter if the Secretary believed strongly that cutting off military assistance to Transylvanistan would seriously harm United States interests in the region and indeed throughout the world? That cut-off would compromise our relationships with China and Russia? Would it matter if the Secretary was simultaneously coping with serious emergencies elsewhere?

## **2. Workplace Safety**

With respect to toxic substances, the Occupational Safety and Health Administration (OSHA) is required to issue standards that meet two conditions: they must address a “significant risk”; and they must be economically and technologically “feasible.”<sup>18</sup> OSHA has been asked to consider issuing a new standard for pilene, a carcinogenic substance. OSHA has concluded that the new standard would be expensive, costing at least \$1 billion per year. The monetized benefits are disputed, but preliminary work suggests that they would range between \$700 million and \$1.6 billion. It seems clear that at current levels, pilene imposes a significant risk on workers; it also seems clear that even at a cost of \$1.6 billion, a new standard would be feasible.

Nonetheless, OSHA decides to defer its decision. It does so on the ground that the nation is in the midst of serious economic difficulties, and much of the cost of a new pilene standard would be borne by the construction industry, which continues to struggle. OSHA believes that it should focus on rules and actions that would not have adverse effects on sectors of the economy that are facing serious economic troubles, in part because such rules and actions would ultimately hurt workers. It acknowledges that if it decided to proceed, it would be forbidden to consider the potentially adverse effects of costly regulation on workers themselves; but it denies that the same prohibition applies at the stage of deciding to defer a decision.

Is it unlawful for OSHA to decline to act at this time? May OSHA invoke the stated rationale in response to a petition to initiate rulemaking? Does it matter if OSHA is issuing, in the relevant period, a significant number of other rules designed to promote workplace safety? Would it matter if state governments were taking action with respect to pilene?

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assortment of factual and other complexities.

<sup>18</sup> See *Indus. Union Dep’t v. Am. Petroleum Inst.*, 448 U.S. 607, 639-40 (1980).

### 3. Nitrogen Oxide

Under the Clean Air Act, the Environmental Protection Agency (EPA) must decide whether to establish new national ambient air quality standards every five years.<sup>19</sup> The EPA also has discretion to establish new standards before the five-year period has elapsed.<sup>20</sup> With respect to the stringency of the standards that it issues, the EPA is forbidden from considering costs.<sup>21</sup> It must select standards that are “requisite to protect the public health,” with “an adequate margin of safety.”<sup>22</sup> In issuing standards, the EPA must consider public health without reference to the cost of achieving it.<sup>23</sup>

Three years after finalizing a nitrogen standard, the EPA receives scientific evidence that a significantly more stringent standard for nitrogen oxide would be “requisite to protect the public health.” The EPA is convinced by that evidence, but it is nonetheless reluctant to issue a new standard, because it believes that its costs would be too high to justify its benefits. It concludes that the monetized costs of the resulting rule would be \$6 billion and that the monetized benefits would be \$700 million. EPA defers its decision on precisely that ground. It is aware that comparison of costs and benefits is not legitimate when it is deciding on the stringency of national ambient air quality standards, but it insists that it is permitted to engage in that comparison when it is deciding whether to proceed, when it has discretion not to do so. Until the 5-year deadline is reached, EPA believes, it does have that discretion.

Has the EPA acted unlawfully? Would the answer be different if in the relevant period, the agency was issuing a large volume of air pollution rules?

### 4. FDA and Genetically Modified Food

Many people are concerned about genetically modified food, and they believe that they have a “right to know” whether the food that they are purchasing is genetically modified.<sup>24</sup> For that reason, they have petitioned the FDA to require labeling. The FDA consults the relevant statute and finds that the underlying questions are reasonably disputed; it believes that the key provisions are ambiguous and if it were seriously to

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<sup>19</sup> 42 U.S.C. § 7409(d)(1) (2012).

<sup>20</sup> *Id.*

<sup>21</sup> See *Whitman v. Am. Trucking Assn.*, 531 U.S. 457, 471 (2001).

<sup>22</sup> 42 U.S.C. § 7409(b)(1).

<sup>23</sup> See *Whitman*, 531 U.S. at 471.

<sup>24</sup> See, e.g., Kyung M. Song, *GMO food-label vote may have consequences in Congress*, SEATTLE TIMES (Oct. 29, 2013), [http://seattletimes.com/html/localnews/2022149481\\_gmofederalxml.html](http://seattletimes.com/html/localnews/2022149481_gmofederalxml.html).

engage the underlying questions, it is not sure how it would resolve the ambiguity.<sup>25</sup> The FDA declines to decide because of an extrinsic factor: any labelling requirement would have serious implications for international trade.<sup>26</sup> The FDA's judgment to that effect is informed by its discussions with the Department of State and the Office of the United States Trade Representative, both of which have encouraged the FDA not to decide. The FDA ultimately decides to defer decision because it does not want to complicate ongoing discussions with important trading partners. The FDA acknowledges that effects on international trade would not be a legitimate consideration if it had initiated rulemaking on the labeling issue.

It is unlawful for FDA to give consideration to those effects? Does it matter if the United States Trade Representative (USTR) and the Department of State are strongly supportive of its decision to defer its decision?

## **B. Some Realism About Delay**

For much of our discussion, we will proceed as if "the agency" is deferring its decision, and often that is the correct way to understand the situation. In many cases, however, a decision not to decide is a product of a complex process, involving multiple actors within the executive branch. We are unaware of any general academic discussion of that process, and will simply offer a few general notes here.<sup>27</sup>

For large and important questions within the executive branch, many officials are likely to be involved, and not merely the agency itself. Within the White House, the Domestic Policy Council helps to oversee a wide range of issues, including health care reform, food safety, the environment, energy, immigration, and civil rights. The National Economic Council plays a large role on issues that involve transportation, housing, and

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<sup>25</sup> In fact the FDA has concluded that it lacks the authority to require labelling: "FDA has also been asked whether foods developed using techniques such as recombinant DNA techniques would be required to bear special labeling to reveal that fact to consumers. . . . The agency is not aware of any information showing that foods derived by these new methods differ from other foods in any meaningful or uniform way, or that, as a class, foods developed by the new techniques present any different or greater safety concern than foods developed by traditional plant breeding. For this reason, the agency does not believe that the method of development of a new plant variety (including the use of new techniques including recombinant DNA techniques) is normally material information within the meaning of 21 U.S.C. 321(n) and would not usually be required to be disclosed in labeling for the food." Statement of Policy: Foods Derived From New Plant Varieties, 57 Fed. Reg. 22984-01, 22991 (May 29, 1992).

<sup>26</sup> See, e.g., Letter from Max Baucus, Chairman, Senate Fin. Comm., to Ron Kirk, U.S. Trade Representative (Feb. 12, 2013), <http://www.finance.senate.gov/newsroom/chairman/release/?id=17b2fd73-067d-4a4a-a50f-a00265efbf67> ("Broad bipartisan Congressional support for expanding trade with the EU depends, in large part, on lowering trade barriers for American agricultural products . . . including the EU's restrictions on genetically engineered crops . . .").

<sup>27</sup> Sunstein, *supra* note \_\_\_\_, has relevant discussion.

other areas with important implications for the economy. The Office of Management and Budget has particular responsibility for all matters having budgetary implications. Within the Office of Management and Budget, the Office of Information and Regulatory Affairs has a special role in overseeing the regulatory process, and it may also play a role in a decision to defer decisions, especially in the domain of rulemaking.<sup>28</sup> On issues involving international trade, the Office of the United States Trade Representative is especially important. The Council on Environmental Quality is a significant voice on environmental questions. The President's Chief of Staff may well be the most important voice of all, insofar as he has special access to the President, and is likely to know his priorities and concerns. If the Chief of Staff is convinced that a decision should be deferred, it is highly likely that it will be deferred, though he will of course listen to a wide range of voices (and is of course ultimately subject to the President himself).

Agencies may also be engaged in sustained discussions with one another. On environmental questions, the Environmental Protection Agency and the Department of Agriculture may be in close contact. If the Federal Aviation Administration (FAA) is contemplating action that affects other nations, it will almost certainly consult the Department of State and the National Security Council. A decision by the FAA to defer some decision that involves (say) Afghanistan or Iraq may in reality reflect the views of the Department of State or the President's National Security Adviser. If the issue involves food safety, the Food and Drug Administration may well be in close contact with the Department of Agriculture, which may have serious reservations about a planned course of action.

In these circumstances, a decision to defer a decision, or not to decide, may well involve many agencies and officials, especially on important or high-visibility questions. Such a decision is likely to be a product of a deliberative process -- a form of "government by discussion"<sup>29</sup> -- that focuses attention on questions that a particular agency may neglect, or that emphasizes the state of the economy, or that stresses what particularly concerns the President, and where he wants his Administration to focus. The process overseen by the Office of Information and Regulatory Affairs might uncover serious substantive problems with a draft rule -- involving, for example, the need to coordinate multiple agency decisions or to avoid undue burdens on small business.<sup>30</sup> Managerial issues may be exceedingly important; high-level officials might decide that they want to center their action on (say) homeland security, health reform, and immigration, and that other issues have lower priority. Political considerations may or may not play a role. For example, an agency may be discouraged from issuing

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<sup>28</sup> See *id.*

<sup>29</sup> See Amartya Sen, *Development As Freedom* (1991).

<sup>30</sup> See Sunstein, *supra* note.

controversial rules during a period in which Congress is debating important and contested legislation; the Administration might fear that such rules will divert attention and make enactment less likely. Problems of the sort sketched in Section A above may well be an outcome of a deliberative process of this general kind.

### C. Precedents

What does administrative law say about such problems? It says a great deal, but it leaves central questions unresolved. Current administrative law structures the analysis in useful ways, but it also contains important silences and ambiguities.

1. *Programs vs. discrete action*. What sort of agency behavior may be challenged, in court, on the ground that the agency has failed to do or decide something that it should have done, or should have decided<sup>31</sup>? Not everything that agencies do or fail to do may be challenged at all, because not everything that agencies do or fail to do counts as “agency action” within the meaning of the Administrative Procedure Act. The Court has held that the APA reaches only discrete agency action, as opposed to broad administration of programs.<sup>32</sup> The APA is triggered if, but only if, agency administration of a program culminates in discrete action such as adjudication or rulemaking, or in failure or refusal to take a discrete action.

The Court has also said that discrete agency inaction may be challenged as “action unlawfully withheld” under APA § 706 only if the action is mandatory and required by law, as opposed to discretionary.<sup>33</sup> By contrast, action committed to agency discretion is, by the terms of § 706(a), unreviewable in court. But this further holding should not be read too broadly. In particular, there is an entirely separate set of questions about when parties aggrieved by agency failure to take discrete and entirely discretionary action may challenge the reasons that agencies give for declining to take action, or the grounds on which agencies defer a decision. If, for example, an agency acts or fails to act for reasons that are constitutionally objectionable, judicial review is highly likely to be available.<sup>34</sup> One way to read this principle is to suggest that agencies are under a mandatory duty to rely on legitimate reasons, or under a mandatory duty not to rely on illegitimate reasons.

As we will see, in both adjudication and rulemaking, there are conditions under

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<sup>31</sup> We are also concerned with the legality of decisions to defer even if judicial review is unavailable, but the principles governing judicial review of such decisions capture most of the relevant territory (with the qualification that the anti-abdication principle is broader than its feasible judicial enforcement, see below).

<sup>32</sup> *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 62 (2004).

<sup>33</sup> *Id.* at 63.

<sup>34</sup> See *Webster v. Doe*, 486 U.S. 592, 603-604 (1988); *Heckler v. Chaney*, 470 U.S. 821, 832-33 (1985).

which courts will allow parties to argue that agencies have given invalid grounds for the exercise of discretion not to take action, including decisions not to decide. Under Overton Park,<sup>35</sup> agencies subject to arbitrariness review must “consider the relevant factors” and avoid a “clear error of judgment.” Where an agency gives an invalid reason for discretionary action, it has -- absent any special circumstances -- acted unlawfully under § 706 of the APA, and while inaction and decisions to defer raise special considerations, courts are sometimes authorized to review the agency’s decisionmaking or non-decisionmaking on that score.<sup>36</sup>

2. *Enforcement vs. adjudication.* Suppose that a discrete action or inaction is indeed at issue. What sort of discrete action exactly? Under the APA, there are two possibilities. Agency action may be rulemaking, if the action satisfies the APA’s definition of a “rule,” or it may be adjudication, the process leading to the formulation of an “order” -- defined in catchall terms as anything that is not a rule.<sup>37</sup> We will use the term “enforcement” to refer to an agency decision to initiate an adjudication that may lead to an order finding liability against a regulated party or enjoining a regulated party to take or not to take action.

The Court has examined agency decisions not to initiate enforcement proceedings, an important species of decisions not to decide, and has declared those decisions presumptively off-limits to the courts. In Heckler v. Chaney,<sup>38</sup> the FDA was asked to initiate an enforcement proceeding to bar states that conduct capital punishment from using regulated drugs for lethal injections; the petitioners argued that this was an off-label use of the drugs that was unlawful under the relevant statute.<sup>39</sup> The Court would have none of it, refusing even to entertain the challenge on the merits. Agency decisions not to enforce, it announced, are presumptively non-reviewable under § 701(a)(2) of the APA, because they are presumptively “committed to agency discretion by law.”<sup>40</sup>

The Court acknowledged that clear statutory commands trump everything else. Reviewability might obtain -- the presumption of unreviewability might be overcome -- if Congress clearly mandated enforcement in certain circumstances or otherwise

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<sup>35</sup> Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971).

<sup>36</sup> See *generally infra*.

<sup>37</sup> 5 U.S.C. § 551 (2012). We are bracketing a wide range of agency actions that do not count as regulations or orders, such as general statements of policy and interpretative rules. See 5 USC § 553 (2012).

<sup>38</sup> 470 U.S. 821 (1985).

<sup>39</sup> 470 U.S. at 823-24.

<sup>40</sup> *Id.* at 835 (quoting 5 U.S.C. § 701(a)(2) (2012)).

constrained the agency's discretion to decide whether to enforce.<sup>41</sup> Yet in the ordinary case, in which statutes are silent or unclear on such questions, agencies will not have to justify, to courts, their decisions not to undertake enforcement. Any "not now" is presumed unreviewable. A concurrence by Justice Brennan warned that under the Court's approach, agencies might abdicate their enforcement responsibilities entirely.<sup>42</sup> A concurrence by Justice Marshall argued that the decision was reviewable, but was also clearly justifiable under arbitrary-and-capricious review, because the agency had perfectly good reasons not to let its regulatory agenda be hijacked by suits of this sort.<sup>43</sup>

Both the majority and the concurrences in Heckler emphasized two crucial principles that we will generalize and adapt to other settings, and that -- as the Marshall concurrence argues -- are relevant to the merits of arbitrariness review as well as to the threshold issue of reviewability. The first is resource allocation and priority-setting. In the Court's view, enforcement decisions must be presumed to be unreviewable because agencies inevitably face scarcity and constraints on resources that can be devoted to enforcement. Thus agencies must necessarily set priorities among possible actions, based on a myriad of imponderable factors that courts are ill-suited to assess.<sup>44</sup> As the Court explained:

the agency must not only assess whether a violation has occurred, but whether agency resources are better spent on this violation or another, whether the agency is likely to succeed if its act, whether the particular enforcement action best fits the agency's overall policies, and indeed, whether the agency has enough resources to undertake the action at all . . . . The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities.<sup>45</sup>

Although this point may have special force where enforcement is concerned, it is relevant more broadly as well. It is sometimes suggested that the Heckler Court saw a unique connection between enforcement and resource-allocation, but the opposite is actually true. The Court itself said that resource allocation underpins two other critical administrative-law doctrines: the Vermont Yankee holding that bars courts from adding procedural requirements to the informal rulemaking procedures of the APA,<sup>46</sup> and the

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<sup>41</sup> See *Dunlop v. Bachowski*, 421 U.S. 560, 566-68 (1975).

<sup>42</sup> See *Heckler v. Chaney*, 470 U.S. 821, 839 (1985) (Brennan, J., concurring).

<sup>43</sup> *Id.* at 840-41 (Marshall, J., concurring in the judgment).

<sup>44</sup> See *Heckler*, 470 U.S. at 831-32.

<sup>45</sup> *Id.*

<sup>46</sup> *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 523-25 (1978). This holding was later extended to include informal adjudication. See *Pension Ben. Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 653-55 (1990).

principle -- now known as the Chevron doctrine<sup>47</sup> -- that courts will generally defer to an agency's construction of the statute that it is charged with implementing.<sup>48</sup> Both of these doctrines explicitly reflect the Court's understanding that agencies have limited resources and must proceed in light of those limitations, which may not be easily visible to reviewing courts.

Both the Heckler Court and the concurrences made reference to the anti-abdication principle. In a footnote, the Court raised the possibility that the presumption of unreviewability might not apply in "a situation where it could justifiably be found that the agency has consciously and expressly adopted a general policy that is so extreme as to amount to an abdication of its statutory responsibilities."<sup>49</sup> The Court said that "in these situations the statute conferring authority on the agency might indicate that such decisions were not 'committed to agency discretion.'"<sup>50</sup> In so saying, the Court cited a case that invalidated an agency's apparently wholesale refusal to implement a civil rights statute over a lengthy period of time.<sup>51</sup> But the Court otherwise gave little indication of what might count as abdication, how abdication relates to priority-setting, or how courts are supposed to recognize abdication when it occurs. We will return to these questions.

3. *Rulemaking*. Do the principles announced in Heckler apply to rulemaking, as opposed to adjudication? In one sense, the answer is now plain: notwithstanding Heckler, courts may review an agency's negative response to a petition to initiate rulemaking. But in some respects, the full answer is "yes and no."

The currently governing law stems from Massachusetts v. EPA,<sup>52</sup> decided in 2007. We will suggest that the decision is ambiguous in critical respects, and that the broadest possible reading of the decision fits poorly with the larger structure of administrative law (and has been correctly ignored<sup>53</sup>). Yet Massachusetts v. EPA can be understood to stand for a critical principle -- the anti-circumvention principle -- that we will incorporate into our suggested framework.

As relevant here, the main question in Massachusetts v. EPA was whether the agency could lawfully decline to make a "judgment" about whether emissions of

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<sup>47</sup> Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

<sup>48</sup> See Heckler, 470 U.S. at 832. For a more recent suggestion that resource allocation justifies deference to agency statutory interpretations under Chevron, see Massachusetts v. EPA, 549 U.S. 497, 527 (2007).

<sup>49</sup> Heckler, 470 U.S. at 833 n.4 (citation and internal quotation marks omitted).

<sup>50</sup> *Id.*

<sup>51</sup> See Adams v. Richardson, 480 F.2d 1159 (D.C. Cir. 1973).

<sup>52</sup> 549 U.S. 497 (2007).

<sup>53</sup> See *supra* notes \_\_\_\_.



greenhouse gases from new automobiles amounted to “air pollutants” within the meaning of the Clean Air Act. The petitioners asked the EPA to initiate a rulemaking to make that judgment, but the EPA refused to do so, offering two main reasons. First, the agency stated its belief that it lacked statutory authority to regulate greenhouse gas emissions from new automobiles as air pollutants. The Court rejected that position, but on this count, its ruling is tangential to our question and we will not discuss it here.

Second -- and this is crucial for our purposes -- the EPA assumed that it had statutory authority to proceed, but announced that it would nonetheless exercise its discretion to decline to make the relevant judgment. By way of explanation, the EPA cited a series of reasons, including residual scientific uncertainty about the effects of greenhouse gases, ongoing study of the relevant policy questions by other agencies, and a reluctance to interfere with ongoing foreign negotiations by the administration over climate change treaties and policy.

The Court thus had two questions to decide. The first was whether there could be judicial review at all of an agency decision to deny a petition for rulemaking. By analogy to Heckler, might this not be a situation in which agency discretion to allocate resources among different rulemaking efforts implies that courts should stay out, unless Congress directed otherwise? The second question was whether the agency’s proffered discretionary reasons for declining to initiate a rulemaking were adequate, or instead arbitrary and capricious or violative of the underlying statute.

As to the first question, the Court held that denials of petitions to initiate a rulemaking were reviewable, although that review would be “extremely limited” and “highly deferential.”<sup>54</sup> The Court rejected the analogy to Heckler’s presumption of unreviewability for enforcement decisions. “In contrast to nonenforcement decisions,” the Court said, “agency refusals to initiate rulemaking are less frequent, more apt to involve legal as opposed to factual analysis, and subject to special formalities, including a public explanation.”<sup>55</sup>

On the second question, the Court rather brusquely rejected EPA’s discretionary grounds for declining to decide whether to regulate. Here is the major ambiguity in the opinion; the Court’s discussion can be read in a number of ways, from narrow to broad. We will examine the possibilities in that order.

Most narrowly, the Court seemed to suggest that EPA had articulated reasons

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<sup>54</sup> *Massachusetts v. EPA*, 549 U.S. at 527 (quoting *National Customs Brokers & Forwarders Assn. of America, Inc. v. United States*, 883 F.2d 93, 96 (C.A.D.C.1989)).

<sup>55</sup> *Massachusetts v. EPA*, 549 U.S. at 527 (citation and internal quotation marks omitted).

that, by statute, had been made the province of other agencies. EPA argued that making a judgment about greenhouse gases would interfere with ongoing negotiations over climate-change treaties, and more generally with the foreign policy of the United States, but the Court saw this as none of EPA's business: "In the Global Climate Protection Act of 1987, Congress authorized the State Department—not EPA—to formulate United States foreign policy with reference to environmental matters relating to climate."<sup>56</sup> On this narrow reading, the simple problem was that other statutes, fairly read, unmistakably committed the relevant decision elsewhere. To this extent, EPA was relying on prohibited factors -- on factors that were placed off-limits by relevant statutes.

So long as the views of the State Department had not been offered, the case would merely stand for the proposition that (absent unusual constitutional problems) Congress may allocate decisionmaking authority among agencies as it sees fit.<sup>57</sup> For our purposes, that general proposition might be of interest insofar as it suggests that agencies may not invoke, as a basis for deferring decisions, interests that are properly the province of other offices or departments of government. Perhaps agencies can respond to that problem by showing that the relevant offices or departments agree with them.<sup>58</sup> If so, the Court's reasoning might be understood to promote, at once, interagency coordination and public accountability.<sup>59</sup>

A second narrow reading of the opinion is that EPA simply failed to explain, with sufficient clarity, that it had a valid reason to defer the making of a judgment. Justice Scalia's dissent argued that EPA had given a perfectly good reason for delay, namely that the scientific uncertainty about the effects of greenhouse gases was too great.<sup>60</sup> The Court's response is cryptic, but may best be understood to say, simply enough, that EPA had not articulated that reason with sufficient force or clarity.<sup>61</sup> Whoever has the better of that debate, majority or dissent, the opinion would, on this view, raise no theoretically interesting questions of administrative law. The dispute would be entirely fact-bound.

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<sup>56</sup> *Id.* at 534.

<sup>57</sup> Of course, this proposition would raise further questions. As a general rule, EPA is highly unlikely to take a position on a question of international relations without consulting the Department of State. Would *Massachusetts v. EPA* have come out differently if EPA could refer to statements from that Department, endorsing its position, or even indicating that EPA was merely following it? We believe so. Parenthetically, we note that the question whether and how to regulate greenhouse gases is of course an exceedingly important one, and it is most unlikely that it did not receive Administration-wide attention.

<sup>58</sup> See *Massachusetts v. EPA*, 549 U.S. at 534.

<sup>59</sup> There is, however, a question whether a judicial opinion was necessary to promote coordination, which occurs in any case. See note 57 *supra* and text accompanying note *supra*.

<sup>60</sup> *Id.* at 553-55 (Scalia, J., dissenting).

<sup>61</sup> See *Massachusetts v. EPA*, 549 U.S. at 534.

There is also, however, a much broader and more consequential reading of the opinion. On this view, the Court’s rationale was that the agency’s reasons for deciding not to make a judgment “rest[ed] on reasoning divorced from the statutory text . . . . [T]he use of the word ‘judgment’ is not a roving license to ignore the statutory text. It is but a direction to exercise discretion within defined statutory limits . . . . [O]nce EPA has responded to a petition for rulemaking, its reasons for action or inaction must conform to the authorizing statute.”<sup>62</sup> In other words, the Court’s idea is that at least in a (formal and public) response to a petition for rulemaking, the legally relevant factors, on the question whether to make a judgment, are the same factors that the statute makes substantively relevant when the judgment itself is made. Remarkably, the Court seems to collapse the decision whether to decide into the underlying decision on the merits; it appears to say that the factors made relevant by the statute to the latter are the only factors that the agency may consider with respect to the former.

From the standpoint of administrative law, this conclusion seems absurd, and some commentators dismiss it on that ground, labeling Massachusetts v. EPA as wrongly decided or impossibly confused.<sup>63</sup> How could the same factors be relevant at both levels of decision? Surely there might be perfectly good and legally permissible reasons not to decide, or to defer decision, that differ from reasons about how much to regulate, given a decision to regulate. As we shall see, this objection is ultimately correct, as lower courts have implicitly recognized,<sup>64</sup> but there is a legitimate concern underlying the approach of Massachusetts v. EPA, which is that EPA was in effect circumventing the statutory scheme. We take up this point shortly, as we elicit the principles behind the doctrine. Let us now turn to that discussion.

## II. Governing Principles

Having examined some strands of doctrine and some incompletely theorized principles that seem to underlie existing law, we will lay out our account. We emphasize that agencies must respect statutory commands, but that when Congress has not said otherwise, their authority to allocate scarce resources authorizes them to defer decisions, even when their decision to do so rests on their own independent judgments of policy (acknowledging that those judgments might have emerged from some kind of interagency process). It follows that agencies may decide that they will not devote limited resources to implement statutory programs that they believe to be low-priority.

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<sup>62</sup> *Id.* at 533-34.

<sup>63</sup> See, e.g., Jacobs, *supra* note \_\_ (manuscript at 47, 53-54).

<sup>64</sup> See *supra* notes \_\_\_\_.

Indeed, and perhaps more controversially, we suggest that apart from the allocation of limited resources, agencies may use their control over timing to set priorities and hence to defer decisions, even if they are relying on factors that could not legitimately be taken into account if agencies did in fact choose to proceed. It follows that the FDA might defer a decision because of concerns over international trade implications; that OSHA might defer a decision because it does not want, in the current period, to impose high costs on an economically troubled sector; and that EPA might defer action because several large states are about to impose regulatory controls in the same general area.

At the same time, the general principle of priority-setting is subject not only to any constraints that come from statutory deadlines but also to a competing principle of anti-circumvention. That principle aims to prevent agencies from using their discretion over decisionmaking to sidestep the fair import of congressional instructions, whether express or implied. The principle of priority-setting is also subject to a further constraint, involving the illegitimacy of agency abdication, which we interpret as a sustained series of deferrals or nondecisions, over time, that relegates a certain policy to a perpetual status of low priority. As we will see, the anti-abdication principle has important ambiguities and is not easily subject to judicial enforcement, but it is nonetheless a principle that agencies must consider if they seek to remain faithful to the law.

### **A. Statutory Commands**

The first point is simple but fundamental: agency discretion over decisions whether to decide, like agency discretion generally, is subject to statutory limitations -- barring discrete categories of questions as to which there is an independent claim of constitutionally-grounded executive power under Article II. Absent constitutional constraints, Congress may specify, if it so chooses and if it speaks with sufficient clarity, which agencies are entitled to make which decisions and when. Congress may impose deadlines for decisionmaking, may require findings as conditions precedent to decisionmaking, and in a myriad of other ways may structure the processes of decisionmaking so as to promote policy goals. If, for example, a statute requires an agency to issue a rule by a specific date, the agency must comply with the requirement, even if it has competing priorities and even if it would much prefer not to do so.<sup>65</sup> Statutory deadlines are the simplest and most common restriction on the general discretion conferred by the inevitability of priority-setting.

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<sup>65</sup> See, e.g., *Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1169 (9th Cir. 2002); *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1193 (10th Cir. 1999); *Ctr. for Food Safety v. Hamburg*, No. C 12-4529 PJH, 2013 WL 1741816, at \*2-3 (N.D. Cal. Apr. 22, 2013).

Despite its fundamental character, this principle is easy to overlook. We have seen that one strand in Massachusetts v. EPA suggests a narrow reading: relevant statutes were best read, albeit only by implication, to say that the considerations on which EPA relied to justify its nondecision were the province of another entity entirely, the State Department. On this reading, no matter how reasonable the EPA's views, they were not views on a topic EPA was authorized to consider. Of course other readings of Massachusetts v. EPA are at least equally plausible, as we have mentioned, but the structure of the analysis is the important thing. The first question is always what Congress has specified.

In some cases, however, even this principle might run into difficulties. To see why, note that under the Dodd-Frank Wall Street Reform and Consumer Protection Act, some regulations have been seriously delayed, and in well over one hundred cases, the delay has extended well past the statutory deadlines.<sup>66</sup> Is this unlawful? The obvious answer is that it is, and the obvious answer might be the right one. Suppose, however, that Congress has imposed a large number of deadlines, and that agencies have limited resources, and that in light of those limits, and the demands of producing rules that are consistent with the requirements of the APA and that will survive judicial review, agencies cannot do what Congress has directed. If it is actually impossible for the agency to meet its deadlines while otherwise complying with the law, there is a plausible argument that the deadlines must yield. We will return to this point shortly.

## **B. Priority-Setting: Resource Constraints and Timing**

1. *Priorities and resources.* We have emphasized that agencies are generally authorized to engage in a large number of actions, and they have limited resources. Many agencies cannot possibly undertake rulemaking or adjudicatory action in all cases in which they have both the legal authority and the desire to do so. No less than ordinary people, agencies face a “bandwidth” constraint,<sup>67</sup> and they may and indeed

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<sup>66</sup> Dodd-Frank requires a total of 398 rulemakings, 280 of which specify deadlines, according to an analysis done by the Davis Polk law firm. As of January 2, 2014, all of the specified deadlines had passed. Of the 280 required rulemakings with statutorily specified deadlines, agencies had released final rules by the deadline for 148 rulemakings (53%) and missed deadlines for 132 rulemakings (47%). No proposals have been released as of January 2, 2014 for 56 of the 132 rulemakings (42%) where the deadline has been missed. Davis Polk, *Dodd-Frank Progress Report, January 2014*, 2, 7 (2014), [http://www.davispolk.com/download.php?file=sites/default/files/Jan2014\\_Dodd.Frank\\_Progress.Report\\_0.pdf](http://www.davispolk.com/download.php?file=sites/default/files/Jan2014_Dodd.Frank_Progress.Report_0.pdf). Deadlines that regulators have missed include, for example, the October 21, 2011 statutory deadlines for the Volcker Rule, Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 619, 124 Stat. 1376, 1620-21 (2010), and concentration limits on large financial firms, *id.* at § 622, 1632-34.

<sup>67</sup> See SENDHIL MULLAINATHAN & ELDAR SHAFIR, SCARCITY: WHY HAVING TOO LITTLE MEANS SO MUCH 39-66 (2013).

must focus on those problems that seem to them most pressing.<sup>68</sup>

As noted, some regulations come with statutory deadlines; of these, some such deadlines are challenging to meet in view of the complexity of the underlying issues. Whether or not they want to do so, agencies must generally respect those deadlines, which consume scarce resources.<sup>69</sup> In other cases, Congress has not established any kind of deadline, but has said that agencies “shall” undertake certain action,<sup>70</sup> and thus signaled a stronger requirement than is contained in the word “may.” In some cases, regulatory actions fit with presidential or Administration-wide priorities, and thus have a particular claim on the agency’s attention (and the agency might well be informed of that fact by the White House).

In the aftermath of attacks of 9/11, for example, protection of homeland security was a high priority for the Bush Administration, and agencies devoted a great deal of attention to that goal.<sup>71</sup> In the Obama Administration, implementation of the Affordable Care Act, including promulgation of a large number of relevant regulations, has also been a high priority.<sup>72</sup> Agencies are alert both to statutory requirements and to presidential goals, both of which ensure that they will have to say, with respect to many problems, either “as soon as possible” or “now now.” Agencies may receive direct

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<sup>68</sup> For discussion in the context of the executive branch in general, see Cass R. Sunstein, On Not Revisiting Official Discount Rates: Institutional Inertia and the Social Cost of Carbon, *Am Econ Rev* (forthcoming 2014), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2343379](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2343379)

<sup>69</sup> See cases cited *supra* note \_\_\_\_.

<sup>70</sup> See Cameron Gulbransen Kids Transportation Safety Act of 2007, Pub. L. No. 110-189, § 2, 4, 122 Stat. 639, 639, 642 (requiring that the Secretary of Transportation issue rules on motor vehicles and child safety, but allowing the Secretary to “establish new deadlines” an unlimited number of times upon notification and explanation to Congress); *Cobell v. Norton*, 240 F.3d 1081, 1095-97 (D.C. Cir. 2001) (holding that even though the statute did not set specific deadlines, the agency unreasonably delayed addressing plaintiff’s rights by failing to discharge their legally obligatory duties for more than six years); *Brower v. Evans*, 257 F.3d 1058, 1068-70 (9th Cir. 2001) (holding that the Secretary of Commerce unreasonably delayed research that the statute stated “shall” be the basis for a finding); *Pub. Citizen Health Research Grp. v. Aucter*, 702 F.2d 1150, 1154 (D.C. Cir. 1983) (holding that an agency’s more than three year delay in commencing a rulemaking was unreasonable, where the statute instructed that “the Secretary shall give due regard to the urgency of the need for [worker safety standards]”).

<sup>71</sup> See Robert L. Strayer, *Making the Development of Homeland Security Regulations More Democratic*, 33 OKLA. CITY U. L. REV. 331, 345-55 (2008) (describing examples of post-9/11 homeland security regulations); OFFICE OF INFO. & REGULATORY AFFAIRS, OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, *INFORMING REGULATORY DECISIONS: 2003 REPORT TO CONGRESS ON THE COSTS AND BENEFITS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES* 66-80 (2003) (listing 69 proposed and final regulations reviewed by the Office of Information and Regulatory Affairs between September 11, 2001 and May 2003).

<sup>72</sup> See, e.g., Exchange, Premium Stabilization Programs, and Market Standards, 78 Fed. Reg. 65,046 (Oct. 30, 2013) (to be codified at 45 C.F.R. pts. 144, 146, 147, 153, 155, and 156); Expanding Coverage of Children Under the Federal Employees Health Benefits Program, 78 Fed. Reg. 64,873 (Oct. 30, 2013) (to be codified at 5 C.F.R. pts. 890, 892, 894); Incentives for Nondiscriminatory Wellness Programs in Group Health Plans, 78 Fed. Reg. 33,158 (June 3, 2013) (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, 26 C.F.R. pts. 146-47).

guidance to this effect from relevant White House offices.

In view of the high volume of potential actions and the limitations in agency resources, agencies are entitled to set priorities, consistent with statutory requirements.<sup>73</sup> If the Department of Transportation is considering a large number of rules to promote traffic safety, it is entitled to proceed with those rules that seem to it most pressing. In setting priorities, the Department is permitted to consider a wide range of factors, includes its own judgments about what should be done soon and what should be done later.<sup>74</sup> It might decide, for example, that it would like to focus on retrospective review of existing regulations, because such review is required by Executive Order 13,563,<sup>75</sup> and because it believes that streamlining regulatory requirements, and eliminating unjustified regulatory burdens, are exceedingly important in the current period. Any such focus might well reflect the priorities of the President, who is of course accountable for what his Administration prioritizes.

If the Department devotes its resources to retrospective review of regulations, and issues a number of rules that streamline or eliminate existing rules, some potential rulemakings might be moved to the back of the queue. More generally, the Department might stress that it is part of the Administration, with particular priorities and emphases, and it might concentrate its rulemaking activity in areas that fit with those priorities and emphases. As noted, the White House or the President himself might direct it to do so.<sup>76</sup>

Alternatively, the Department might conclude that it should proceed only in cases in which regulations would have clear or high net benefits, perhaps because of an Administration-wide commitment to cost-benefit balancing.<sup>77</sup> Forced to choose among a menu of options, the Department might believe that rules with no net benefits, or low net benefits, should be delayed. It might decide to defer decision in such cases, even if analysis of costs and benefits is not relevant to its decision how to proceed, if it decided to do so. In general, and subject to qualifications that we will introduce shortly, there is no legal objection to judgments of this kind. No statute forbids agencies from making such judgments, and it is certainly not arbitrary for them to do so.

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<sup>73</sup> See Biber, *The Importance of Resource Allocation in Administrative Law* and Biber, *Two Sides of the Same Coin* *supra* note \_\_\_\_, for extended explorations of this point.

<sup>74</sup> Cf. *supra* text accompanying notes 39-40

<sup>75</sup> Exec. Order No. 13,563 § 6, 3 C.F.R. 215, 217 (2012), reprinted in 5 U.S.C. §601 app. at 101-02 (2006 & Supp. V 2011).

<sup>76</sup> On relationships within the executive branch, see Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838 (2013).

<sup>77</sup> See *id.* at § 1(b), 215. Executive Order 13,563 requires that a regulation's benefits justify its costs, to the extent permitted by law; our suggestion here is that even if agencies may not impose a cost-benefit test in deciding how to proceed, *given a decision to proceed*, they may do so in deciding *whether* to proceed (unless Congress has said otherwise).

As noted, the existence of resource constraints raises questions about the seemingly clear principle that agencies must respect statutory deadlines. If resources are literally too limited to enable agencies to do what Congress has required, then there is an evident conflict between the deadline and the limits in the agency's budget. More realistically, however, the agency may be facing a conflict between deadlines and pragmatic constraints that involve budgets, the need for consensus, the need to produce a sensible rule, the need to respond to public comments, and the need to deal with the risk of judicial invalidation. In such cases, it is plausible to say that the agency must respect any deadlines, and if the rule is not as carefully developed as the agency would like, so be it; the deadline has priority.

In general, that is probably the correct answer. The only question is whether in some cases, there might be an implicit congressional understanding that the deadline should be treated as an aspiration rather than as something fixed and firm. And if it is impossible, practically speaking, for the agency to meet a deadline while also complying with the APA -- by, for example, adequately responding to public comment and otherwise engaging in reasoned decisionmaking -- there is a good argument that the deadline must yield.

2. *Timing without resource constraints.* Suppose that an agency decides to defer action not because of resource constraints, but because of its own assessment of policy priorities and appropriate timing. Recall our previous illustrations: An agency might believe that it is not appropriate to go forward with a particular regulation, at a particular time, because of economic difficulties faced by the relevant sector; because of the need to proceed with other, related regulations first; because of the need to coordinate the action with that of other agencies, perhaps including state and local governments; or because of pending discussions or negotiations with other nations. Let us stipulate that in each of these cases, the agency's own limited resources do not impose constraints.

Whether this sort of reasoning is legally acceptable depends on the underlying statute. In many cases (and notwithstanding Massachusetts v. EPA), statutes impose absolutely no constraints on agencies that invoke reasons of this sort. When Congress has been silent, the best assumption is that it is well aware of the assortment of questions that agencies must ask in deciding whether to decide, and it has not forbidden agencies from asking those questions. Priority-setting, informed by the agency's judgments about policy, is entirely legitimate.

If, by contrast, there is a clear statutory deadline or an express command to decide, the case is easy; the agency must act. Even in the absence of such constraints,



it may become apparent that the necessary, albeit implied, premises of the statutory scheme require an agency decision one way or another, as may be the case in the genocide case discussed earlier. We now turn to the relevant principles.

### C. Anti-Circumvention

1. *Reconstructing Massachusetts v. EPA*. Suppose Congress has not clearly indicated, one way or another, how or when agencies should make decisions whether to decide. Under standard principles of administrative law, agencies enjoy discretion with respect to those questions. Yet agency discretion is not unbounded. Assuming that agency action is reviewable in court, the background constraint arises from § 706(2)(A) of the APA: courts will set aside agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” At the level of decisions to decide, no less than at the level of the underlying decision itself, agencies must “consider the relevant factors” and avoid any “clear errors of judgment” (assuming that judicial review is available)

The “relevant factors” question implicates Chevron. It requires agencies not to consider any irrelevant factors, and it requires them to consider all relevant ones. Under *Chevron*, agencies have some discretion to decide which factors count as relevant, at least in the face of statutory silence or ambiguity; but it is possible that agency interpretations will fail under either Step 1 or Step 2.

The difficult question, however, is what the “relevant factors” are where the issue is a decision to defer decision. We have seen that, on the broadest possible reading of Massachusetts v. EPA, the Court should be understood to have held that the relevant factors for a decision whether to initiate a rulemaking are the same factors that would be relevant, under the applicable statute, to the first-level substantive decision about what rule to make. Justice Scalia’s dissent condemned that holding, if holding it was, and his condemnation at first glance has a great deal of force. Why on earth would the Court collapse the two levels of decisionmaking in such an implausible way? Surely the considerations that typically bear on the second-order question whether to decide are not necessarily the same as the considerations that bear on the decision itself.

Charitably reconstructed, however, the Court was pursuing a concern that might be legitimate in some cases, whether or not it was legitimate in Massachusetts v. EPA. The legitimate concern is that decisions not to decide, or to defer decisions, might become a license for circumvention by agencies of policy choices that Congress was entitled to make and did make, solely on the invalid ground that the agency disagrees

with those policy choices.<sup>78</sup>

Suppose that EPA really thought that it would just be stupid, from the policy point of view, to regulate greenhouse gases as air pollutants. Suppose also that the relevant statute, properly interpreted, defined greenhouse gases as air pollutants, and thus made the opposite judgment in principle, while also leaving EPA discretion as to the “manner, timing, content, and coordination of its regulations with those of other agencies.”<sup>79</sup> It would then betray the necessary -- albeit implicit -- premises of the statutory instructions, and undermine the statutory scheme, for EPA indefinitely or perpetually to defer judgment on the critical questions. EPA might have valid reasons to defer making a judgment about regulation, but it might also be the case that EPA is indefinitely delaying for no other reason than disagreement with Congress’ underlying policy judgments.

Here the structure of the problem is the same as in the genocide case, discussed earlier (even if the answer is much less clear). Congress there granted foreign aid, but specified that the aid would be cut off if the agency were to find that a “genocide” had occurred. Taken literally, the statute does not command the agency to do anything. May the agency then indefinitely refuse to make a finding, either way, about whether a “genocide” has occurred? Certainly not. As we have devised the scenario, it is an unspoken, but unavoidable, premise of the entire statutory scheme -- a necessary implication -- that the agency will and must make a finding one way or another. Even though there is neither a statutory deadline for making the finding nor an express statutory command to make the finding, the agency is circumventing or sidestepping the necessary import of the congressional instructions; its refusal to decide is based solely on a suppressed or covert policy disagreement with Congress.

2. *Beyond a prophylactic rule.* If circumvention is the concern, the Court’s aim in Massachusetts v. EPA becomes more comprehensible. Its critical holding was essentially prophylactic: by tying down agency decisions to decide, confining them to the same factors that govern the underlying first-level decision, the Court was hoping to erect a judicially administrable barrier to administrative circumvention of statutory policies. Like all prophylactic rules, the Court’s barrier, understood in this way, is overbroad; it will necessarily cover some cases in which agencies really do have good reasons to defer a decision.

The concern about circumvention is legitimate, but the commentators who

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<sup>78</sup> Freeman and Vermeule, *supra* note \_\_\_\_, 2007 S. CT. REV. at 83-88.

<sup>79</sup> Massachusetts v. EPA, 549 U.S. 497, 533 (2007).

criticize Massachusetts v. EPA<sup>80</sup> may be understood to make a fair point in their turn. The Court's prophylactic holding (on this interpretation, putting aside the other interpretations we have mentioned) is erroneous to the extent that it prevents agencies from offering reasonable, legitimate, and indeed common justifications for deciding not to decide at a certain time. As we have seen, agencies are usually permitted to offer many such justifications, including but not limited to concerns about limited resources. The problems introduced by what we are describing as the Court's prophylactic holding are unnecessary and avoidable if and so long as the concern over circumvention can be accommodated in a more targeted, narrowly tailored fashion. We think that it can. Courts need not use such a drastic prophylactic approach; rather they can examine the relationship between the underlying statute and the agency's explanation to give more fine-grained answers.

If, for example, a statute requires the agency to make some finding of fact as a predicate for deciding whether to take action, and imposes a deadline on the agency, the agency cannot simply refuse to make that finding.<sup>81</sup> The same conclusion might well hold if the statute requires the agency to act but does not impose an explicit deadline, as in the genocide case. When a statute explicitly says that the agency "shall" make a determination, or else says the same by necessary implication, the agency is engaged in circumvention if it fails to act on the ground that it disagrees with Congress' policy judgment.

To be clear, the content of the resulting obligation imposed on the agency is not that the agency has to "regulate" or "take action" or anything of the sort. What the agency must do is to engage in first-order decisionmaking, through the ordinary procedures of rulemaking or adjudication. If the express or implied statutory command is to make rules, the agency will have to initiate (say) notice-and-comment in the ordinary fashion, receiving and responding to comments. Doing so guarantees that the agency is not using non-decision as a device of circumvention.

Yet it is an entirely separate question -- an ordinary administrative-law question -- whether the agency, upon making a first-order decision, has any obligation to regulate, or not, to take action, or not. That question depends on the agency's statutory discretion (under Chevron), on whether it has considered relevant factors (under Overton Park) and on whether it has rationally analyzed relevant policy alternatives (under State Farm<sup>82</sup>). For example, an agency might be required to make some finding of fact on a scientific question, but it might find a fact that obliges it to do nothing. When the agency

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<sup>80</sup> See, e.g., Jacobs, *supra* note \_\_ (manuscript at 47, 53-54).

<sup>81</sup> *Env'tl. Def. Fund v. Thomas*, 870 F.2d 892, 900 (2d Cir 1989).

<sup>82</sup> *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48 (1983).

has arrived at this ordinary first level of decisionmaking, the anti-circumvention principle has already done its work and dropped out of the picture. We will explore examples below.

#### D. Anti-Abdication

1. *The central idea.* The final principle we will examine is a generalization from Heckler v. Chaney. Recall that the Heckler Court raised the possibility that the presumption of non-reviewability for agency enforcement decisions could be overcome on a showing that the agency had abdicated its statutory responsibilities.<sup>83</sup> The Court did not decide that issue, but it did cite, with apparent approval, a court of appeals case that reviewed, and invalidated, an agency's apparently wholesale refusal to implement a civil rights statute over a long period of time.<sup>84</sup> Lower court decisions have not greatly clarified the meaning of the "abdication" exception to the presumption of unreviewability, but the exception appears to be alive and well.<sup>85</sup>

As potential examples, imagine a failure of the Department of Justice to issue a rule to implement the Prison Rape Elimination Act,<sup>86</sup> or a refusal by the Federal Reserve Board to promulgate rules to implement core provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act,<sup>87</sup> or a refusal by the Department of Health and Human Services to issue rules to implement the Affordable Care Act.<sup>88</sup> As we have suggested, such cases are straightforward in the face of statutory deadlines or in the face of evident circumvention (made clear by the statutory text and context). But even without deadlines or such circumvention, might agencies be forbidden from moving

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<sup>83</sup> See Heckler v. Chaney, 470 U.S. 821, 833 n.4 (1985) (noting that the presumption of unreviewability would not apply in "a situation where it could justifiably be found that the agency has consciously and expressly adopted a general policy that is so extreme as to amount to an abdication of its statutory responsibilities.").

<sup>84</sup> Adams v. Richardson, 480 F.2d 1159 (D.C. Cir. 1973).

<sup>85</sup> Many cases have noted *Heckler's* anti-abdication exception to the presumption of unreviewability for enforcement decisions, although most of the cases -- quite appropriately -- decline to find a policy of abdication. See, e.g., Jerome Stevens Pharm., Inc. v. Food & Drug Admin., 402 F.3d 1249, 1256-58 (D.C. Cir. 2005); Riverkeeper, Inc. v. Collins, 359 F.3d 156, 165-71 (2d Cir. 2004) (considering a potential case of abdication but holding that the Nuclear Regulatory Commission did not abdicate its responsibility to keep nuclear plants safe by declining to initiate enforcement in one case); Baltimore Gas & Elec. Co. v. F.E.R.C., 252 F.3d 456, 460-61 (D.C. Cir. 2001) (FERC's decision to settle a case was not an abdication); Sierra Club v. Larson, 882 F.2d 128, 132-33 (4th Cir. 1989) (holding that FHWA did not abdicate responsibility to control advertising along highways); Mass. Pub. Interest Research Grp., Inc. v. U.S. Nuclear Regulatory Comm'n, 852 F.2d 9, 19 (1st Cir. 1988). In N. Indiana Pub. Serv. Co. v. FERC, 782 F.2d 730, 745-46 (7th Cir. 1986), the court embraced the anti-abdication principle, holding an agency nonenforcement decision arbitrary and capricious, but without citation to *Heckler's* footnote.

<sup>86</sup> Pub. L. No. 108-79, 117 Stat. 972 (2003).

<sup>87</sup> Pub. L. No. 111-203, 124 Stat. 1376 (2010).

<sup>88</sup> Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

certain statutes indefinitely to the end of the queue, and in that sense abdicating their statutory responsibility?

The question generalizes beyond the enforcement setting. In particular, there is or should be an analogous principle for rulemaking and indeed for all agency action, in any form. Suppose that a statute gives the agency discretion to make decisions whether to decide, and that the agency offers valid reasons -- related to resource-allocation and priority-setting -- for deferring the relevant decisions. Suppose also, however, that the agency repeatedly gives those same reasons, repeatedly moving the decision to the back of the queue. Over time, the consequence will be that the statutory scheme is effectively nullified, in practice if not openly. The question of judicial enforcement is real, for reasons that we will explore. But if so, there may well be a strong argument that the agency is violating the underlying statute.

Nothing in this proposition is inconsistent with the suggestion that agencies have valid, and broad, discretion to set priorities. The difference between the anti-circumvention principle and the anti-abdication principle is that the former seeks to bar agencies from making decisions to decide that are premised on a suppressed invalid reason -- a raw disagreement with a policy choice that Congress was entitled to make and in fact did make. The latter principle may apply even if the agency has repeatedly invoked valid reasons for moving a particular decision to the bottom of the decisionmaking agenda. The abdication problem is that even if the agency, at any given time, does have valid reasons for postponing a decision, a repeated series of such decisions will result in the agency's entirely abandoning its responsibility to address the relevant issue. That is a problem even if each of the agency's discrete decisions to postpone decisionmaking are premised on reasons that are valid, taken in isolation.

2. *Rules, standards, and administrability.* To see the argument for an anti-abdication principle, both here and in the related setting of Heckler v. Chaney, imagine a simpler, more easily administrable, and more rule-based approach, one that cannot be lightly rejected. On that approach, agencies are entitled to defer decisions, or not to decide, unless Congress sets an explicit statutory deadline (mandating that the agency "shall" or "must" decide, one way or another, by a date certain) or requires a decision by necessary implication (as in the "genocide" case). In the absence of such constraints, agencies have perpetual and unbounded discretion to move issues to the back of the queue. The responsibility would lie on Congress to force the issue to the top of the agency's agenda by express language. If Congress merely says that an agency "may" address a problem or is "authorized" to adopt rules with respect to a certain problem, on this view, the agency may simply decide to keep the problem at the back of the queue forever, perhaps because of continuing resource constraints, or perhaps because the

agency thinks the problem is not a real one, and that Congress was wrong to think that the problem might be worth addressing.

An approach of this kind is not entirely without appeal. Among other things, it would make it unnecessary for courts to explore some hard questions -- what, exactly, is abdication, and when, exactly, can it be said to occur? -- and it would put Congress on clear notice about what it must do to compel decisions. The problem is that for some statutes, such a regime would not represent the best reading of congressional instructions, and it would put to Congress a kind of a Hobson's choice: issue an express or implied command to move an issue up the agenda, or else abandon all control of the agency's agenda in perpetuity. Even if Congress desires neither extreme, the moderate course is in effect foreclosed.

In other words, a regime of this sort may indirectly require Congress to exert more control over the agency's agenda than Congress desires. Suppose that with respect to a given issue, Congress thinks as follows (personifying Congress for ease of exposition): "We think there might be a problem, P; we're not sure, and we want the agency to take a look to decide whether P is indeed a problem. But we don't want to dictate exactly when the agency must look at P, even with an outer deadline; and we don't want the agency to have to drop or sideline other priorities in order to focus on P. On the other hand, we don't want the agency to ignore the issue until the end of time. What we want -- and we mean this to be vague -- is for the agency to give the issue its due place on the agenda, to give the issue its due weight as a potential problem, and to move the P-decision along in the queue in the ordinary way." A regime with an anti-abdication principle makes this tempered approach possible, whereas the simpler rule-based regime constrains Congress either to do more, or to do nothing at all. It thereby prevents Congress from adopting a moderate course.

The resulting tradeoff, of course, is a familiar one -- a choice between standards and rules. The regime with the anti-abdication principle requires a more complex inquiry and thus demands more of courts (and of agencies as well, forced to decide when they may no longer keep certain problems at the back of the queue). We have said that it may well be unclear, in the abstract, when the agency should be deemed to have acted legitimately or instead to have abdicated. Faced with a claim of abdication, the court will have to examine a long and detailed course of agency behavior to see whether the agency is repeatedly shuffling the question to the end of the queue. And in some cases, such shuffling might be permissible -- as, for example, where a single provision of a lengthy statute does not seem, to the agency, to warrant its attention. The simpler rule-based regime would pretermitt that inquiry and thus be easier for courts to apply.

Yet whatever the abstract virtue of rules in this setting, administrative law seems to have crossed that bridge. Heckler raised the possibility that even in the enforcement context, where agency discretion to set priorities is at a maximum, it is worthwhile for courts to take on the burden of applying an anti-abdication principle -- in the form of a standard -- as a backstop. In the enforcement setting, likewise, we could imagine a simpler regime in which enforcement discretion is unbounded unless Congress commands enforcement expressly or by necessary implication. The Court, however, suggested that an additional anti-abdication backstop might be justified, and the lower courts have said that it is in many cases; a fortiori, an analogous judgment seems plausible here. And even if judicial enforcement of an anti-abdication principle seems difficult, at least it is important for the executive branch to recognize, in virtue of its obligation to take care that the laws be faithfully executed,<sup>89</sup> that abdication would betray Congress' legitimate instructions.

3. *Content.* The content of the obligation resulting from the anti-abdication principle is strictly procedural. It is an obligation to decide the issue -- eventually, when the issue is given its due place on the agenda and naturally rises to the top -- through ordinary processes of rulemaking or adjudication. In the notice-and-comment setting, the agency will have to solicit and respond to comments on whether P is a problem, and if it is, what if anything to do about it. Nothing in that obligation necessarily requires the agency to "regulate" P; whether it must do so is an independent question of ordinary administrative law.<sup>90</sup> If the agency considers the factors made relevant to the first-order decision by statute, and gives rational reasons for deciding to do nothing, that is the end of the matter. The anti-abdication principle was already satisfied when the issue P was brought up for full consideration.

Most generally, the anti-abdication principle constrains priority-setting in order to create a prophylactic measure against perpetual circumvention. Recall that the anti-circumvention principle applies where it is clear, from the statutory text and context, that agencies must act; by contrast, the anti-abdication principle is a backstop where such clarity is absent. Courts may not be able directly to observe abdication by agencies, but must use indirect proxies. Indefinite delay of the implementation of a statutory program suggests agency policy disagreements with congressional judgments -- the core concern behind the anti-circumvention principle of Massachusetts v. EPA. The anti-abdication principle, however, improves on the overly broad prophylactic approach of Massachusetts v. EPA by providing a standard, rather than a rule, and thus sweeping in

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<sup>89</sup> See U.S. CONST. art. II.

<sup>90</sup> The agency must of course comply with any statutory instructions relevant to the merits, including specification of relevant factors (or exclusion of irrelevant factors). We abstract from that separate question in order to focus on the decision to decide.

fewer cases in which agencies genuinely do have good reasons to defer decisionmaking.

This is of course a contestable judgment, with which others may disagree. A critical question is whether courts applying the anti-abdication principle will be able to sort abdication from genuinely justified delay with sufficient accuracy (low error costs) and without excessively burdensome inquiry (low decision costs), relative to the prophylactic alternative (or to an approach that does not include an anti-abdication principle).<sup>91</sup> There is no way to prove in the abstract that this is or is not possible or likely. However, we can motivate our judgment by offering an example: the Second Circuit's decision in Environmental Defense Fund v. Thomas.<sup>92</sup> In that case, the court rejected the EPA's claim that it had unreviewable discretion to decide whether to make a decision to revise national ambient air quality standards. The court said that "the Administrator must make *some* decision regarding the revision."<sup>93</sup> Having published scientific documents on the subject (as it was required to do), it "triggered a duty to address and decide whether and what kind of revision is necessary."<sup>94</sup> And to those who remain concerned about the genuine difficulty of judicial enforcement of an anti-abdication principle, we emphasize that the principle might be adopted by agencies who are concerned to comply with their statutory responsibilities.

### III. Cases: Easy, Potentially Hard, and Hardest

With these principles in hand, let us return to the sort of problems that we laid out at the beginning. Some of the cases are easy; others are potentially hard (depending on the details); still others count as exceedingly difficult. No set of principles can produce an infallible algorithm, but the principles can structure the analysis and specify what one would have to know, or decide, in order to resolve the hard cases. We go further, however, and indicate how, in our view, the cases should be resolved, whether they are easy, hard, or hardest.

#### A. Easy Cases

(1) A statute requires the FDA to issue certain tobacco-related regulations by a specific date. The FDA fails to do so. It has a number of regulations to consider; it believes that the relevant regulations are not of the highest priority; and it wishes to

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<sup>91</sup> See generally Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885 (2003).

<sup>92</sup> 870 F.2d 892 (2d Cir 1989).

<sup>93</sup> *Id.* at 896.

<sup>94</sup> *Id.* at 900.



focus on other matters. This is an easy case. The FDA must respect a statutory deadline. Clear statutes trump the resource-allocation principle. To be sure, any litigation may pose difficult issues of standing, reviewability, and remedy.<sup>95</sup> But the unlawfulness of the agency's decision is plain.

(2) A statute requires the FDA to issue certain tobacco-related regulations by a specific date, but adds that if it fails to do so, it must notify the Majority and Minority Leaders of the Senate and the House; the notification must explain the reasons for its failure to issue the regulations. The context makes it clear that the FDA need not issue the regulations if it is able to produce an adequate explanation of its failure to do so. The FDA misses the statutory deadline and also fails to issue the required notice. This is an easy case; the FDA is acting unlawfully.

(3) Same as (2), except the FDA produces the notice, explaining that the underlying issues are exceedingly difficult and the FDA continues to work on them. Unless the explanation is a mere façade, the FDA has acted lawfully.

(4) Return to the genocide case, discussed earlier. As the case has been constructed, the Department is behaving unlawfully, because it is circumventing the plain requirements of the statute. Its justification has nothing to do with resource allocation; the rationale is premised solely on disagreement with a policy judgment that Congress was entitled to make, and did make. The structure of the statute necessarily implies that the relevant agency will make a decision, one way or another, about the critical question, at least within a reasonable time.

(5) The Clean Air Act requires EPA to make a determination about whether to revise national ambient air quality standards every five years.<sup>96</sup> With respect to particulate matter, the EPA fails to make that determination by the specified deadline. It contends that it is continuing to study the underlying science. As in case (1), the agency is violating a clear statutory command and therefore acting unlawfully.

(6) A statute authorizes the EPA to issue certain regulations when, and only when, the benefits justify the costs.<sup>97</sup> The EPA declines a petition to initiate rulemaking under that statute, explaining that the costs of any resulting regulation would exceed the benefits. The explanation might be questioned on the merits, but so long as it is not

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<sup>95</sup> See, e.g., *Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1171-73, 1177-78 (9th Cir. 2002); *In re Barr Labs., Inc.*, 930 F.2d 72, 74-77 (D.C. Cir. 1991); *Telecomms. Research & Action Ctr. v. FCC*, 750 F.2d 70, 79-81 (D.C. Cir. 1984); *Ctr. for Food Safety v. Hamburg*, No. C 12-4529 PJH, 2013 WL 1741816, at \*6-7 (N.D. Cal. Apr. 22, 2013).

<sup>96</sup> 42 U.S.C. § 7409(d)(1) (2012).

<sup>97</sup> See *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201 (5th Cir. 1991).

arbitrary, the agency's decision will stand. (This is a clear inference from Massachusetts v. EPA, because the agency has acted on the basis of statutorily relevant factors.)

(7) The Food and Drug Administration has been petitioned to begin a rulemaking to require genetically modified foods to be labeled. It declines on the ground that it lacks the statutory authority to do so, finding that genetically modified food is not relevantly different from other food, and contending that labeling cannot be required in the absence of such differences.<sup>98</sup> If its interpretation of the statute is valid, it has acted lawfully.

### **B. Potentially Hard Cases**

(8) Same as (3), except that food safety groups believe, not implausibly, that the delay will be indefinite and that the FDA has concluded that the tobacco-related regulations would not be a good idea. In their view, the reason for the delay is FDA's rejection of Congress' judgment in favor of those regulations (which are, by hypothesis, mandatory). If they are right, this may be a case of circumvention, though it might be difficult for a court to be confident about that conclusion in the face of an apparently reasonable explanation by the FDA. An additional question is whether the statute, by allowing the FDA to explain its inaction to the Senate and the House, actually authorizes the FDA to conclude (on the basis of a suitable explanation) that regulations are not a good idea.

(9) A statute authorizes the Department of Transportation to issue rules to promote highway safety. Truck drivers want the Department to issue new rules to increase the safety of heavy-duty vehicles. The Department declines on the ground that it has limited resources and is focused on other problems that seem to it more pressing – in part because it must meet statutory deadlines, in part because the Administration as a whole is prioritizing those other problems, in part because the other problems require prompt resolution.

The Department has acted lawfully. It is permitted to devote its resources to those problems that seem to it most serious, at least where (1) Congress has not specified that it must act by a date certain; (2) Congress has not enacted instructions necessarily premised on the agency making a decision, one way or another; and (3) there is no reason to suspect the Department of permanently abdicating its authority to promote highway safety. The case is potentially difficult only because of Massachusetts v. EPA and the need to investigate the precise relationship between the statute and the Department's justification.

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<sup>98</sup> See *supra* note \_\_\_\_.

(10) Same as (9), except that the Department emphasizes not limited resources, but the existence of a well-functioning market for safety, the absence of any kind of market failure that might justify regulation, and also the difficulties faced by the trucking industry and the Department's desire to avoid regulation that would compound those difficulties. Emphasizing the importance of acting only in the face of a clear market failure, the Department argues broadly that where Congress has not imposed a statutory deadline, or used the word "shall," it is authorized to defer action on grounds of this sort.

Whether this case is difficult, and how difficult it is, depends on the underlying statute and the agency's precise rationale. To be sure, the Department is on stronger ground than in the "genocide" case, where, by hypothesis, some kind of action is a necessary implication of the statute. But if the Department is effectively relying on a broad judgment that exercising its statutory authority to regulate highway safety is a bad idea, from the social point of view, it would appear to be circumventing the underlying statute (and perhaps abdicating its statutory authority). This conclusion would be easiest to reach if the Department is (1) claiming that a market failure is a predicate for regulation and (2) denying that any such failure can be found in a domain in which (3) Congress has clearly reached the contrary conclusion.

(11) Same as (9), except that the Department relies on a single and much narrower argument, to the effect that in the current economic environment, it is appropriate to defer action on the particular rule in question. If the Department's judgment is genuinely one of timing, and based on an economic situation that is temporally bounded, it is on much firmer ground.

(12) Same as (7), except that the FDA says that it will not exercise its discretion to begin a rulemaking to require labeling of genetically modified food (assuming that it has statutory authority so to require). The agency's rationale is that it does not want to compromise our relationships with our trading partners. The agency argues that where Congress has not imposed a statutory deadline, or used the word "shall," the FDA is authorized to defer action on grounds of this sort.

The case is close to Massachusetts v. EPA, and under the Court's ruling, the FDA seems to be acting inconsistently with law. But as we have indicated, there is good reason to think that Massachusetts v. EPA is overbroad on this score, inconsistent with the larger structure of administrative law, and (thus) vulnerable to subsequent reconsideration. Certainly the few relevant decisions to date in the courts of appeals

have more or less ignored that aspect of Massachusetts v. EPA.<sup>99</sup> Absent a demonstrable problem of circumvention -- which is not evident on the facts as stated -- we believe that they are correct to have done so.

(13) Same as (5), except that there is no deadline. After five years, EPA declines to make a determination about particulate matter, saying that it is attending to more serious issues that deserve its current attention. On its face, and for reasons we have elaborated, the refusal to take action is lawful. But at some point -- exactly when is unclear, difficult, and highly fact-specific -- there is a reasonable argument that courts should be prepared to entertain an argument that EPA has abdicated its statutory responsibilities.

(14) Same as (13), except that EPA declines to make a determination about particulate matter, saying that the costs of any action would exceed the benefits, and the agency does not want to take cost-unjustified action "at the present time." If the agency is setting priorities in the face of limited resources, this is a legitimate approach, subject to the objection that deferring action "at the present time" cannot become an indefinite excuse for delay.

### **C. Hardest Cases**

(15) An Administration declares a one-year moratorium on the issuance of economically significant rules (defined as those imposing an economic impact of more than \$100 million per year<sup>100</sup>). It does so because the nation faces significant economic difficulty, and in order to promote growth, it believes the moratorium will serve as a desirable means of promoting business confidence and reducing uncertainty.<sup>101</sup> If the moratorium is intended to apply to statutes with deadlines, it is clearly unlawful. But if it exempts such deadlines, it should probably be upheld, certainly if it is bound in time (we are assuming for one year). The strongest objection would be that a moratorium counts as a both circumvention and abdication. But if it a genuinely short-term effort to respond to a period of significant economic difficulty, it is not inconsistent with any congressional judgment, and it cannot be fairly counted as abdication of authority.

(16) An Administration establishes (in public or in its internal deliberations) a qualified moratorium on rulemaking, in which it decides that it will issue only those rules that have statutory deadlines or that the President has personally endorsed. It does so

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<sup>99</sup> See cases cited *supra* note \_\_\_\_.

<sup>100</sup> See Exec. Order 12,866, 3 C.F.R. 638 (1993) (offering a similar definition).

<sup>101</sup> Regulatory moratoria have in fact been common in recent decades; consider, for example, a one-year moratorium issued by President George H.W. Bush. See Kathryn A. Watts, *Regulatory Moratoria*, 61 Duke L.J. 1884, 1885-86 (2012).

not for economic reasons, not for purposes of priority-setting (narrowly conceived), and not to impose a sensible management structure on rulemaking, but for political reasons. The mid-term elections are four months away, and the Administration does not want to take action that would compromise the electoral prospects of members of the President's own political party. There is a strong argument that this is a case of circumvention as we have understood it here.

(17) An Administration has, as its top priority, enactment of a comprehensive reform bill. It might involve health care; it might involve the environment; it might involve immigration. The Administration makes a general judgment that while the reform bill is being debated, it will not issue any regulations that might complicate that debate. It issues a general "not now," because of the shared views of the Domestic Policy Council, the White House Office of Legislative Affairs, and the Office of the Chief of Staff. If this decision applies to statutory deadlines, it is unlawful. If it applies only to statutes without deadlines, it is probably lawful, though there is a potential argument that circumvention is involved.

(18) Under a large-scale reform statute, an agency is directed to issue over two hundred regulations, many of them in coordination with other agencies. Some of those regulations are exceedingly complex, and many of them face deadlines. The process of interagency coordination proves time-consuming and difficult, and it is exceptionally challenging to come to terms with public comments. The agency's general judgment is this: "We will make our best efforts to meet those deadlines, but we will not propose rules that are not ready for prime time, nor will we finalize rules that do not deal adequately with substantive issues, public comments, or interagency concerns. One reason is that we do not wish to issue rules that are half-baked. Another is that we will not issue rules that cannot survive judicial review. For these reasons, we will not be able to meet some deadlines."

An argument of this kind raises genuinely hard questions, because deadlines must generally be respected. Perhaps an agency must issue a less-than-perfect rule, and thus meet the deadline, rather than spend its time on perfecting the details. But if Congress has asked the agency to do something on a timeline that is unrealistic, given the nature of the task, the agency's decision to fail to meet the deadline is probably lawful. No less than a party to a contract, an agency has an "impossibility defense," and if compliance is literally possible but would produce a rule that is in some relevant sense inadequate, perhaps the deadline should be treated as an aspiration rather than as a rule.

## **Conclusion**

Agencies must often decide when to decide, and whether to act imminently or instead to defer their decisions. Much of the agencies, agencies say “not now.” Indeed, such decisions are among the most common and important that agencies make. Because agencies have limited budgets and a large menu of alternatives, it is generally necessary, and therefore legitimate, for them to set priorities. The need for priority-setting in the face of limited budgets ensures that agencies will make judgments about which problems are most pressing and which are properly deferred for another day. Many of these judgments are made in concert with other agencies and indeed the White House itself, which has a large managerial task in overseeing a “mass of legislation,” and which is of course accountable to the public as a whole.

Contrary to the apparent holding of Massachusetts v. EPA, agencies are entitled to decide whether to proceed for reasons that would not be legally relevant if they were deciding how to proceed -- certainly if they are setting priorities in the face of scarce resources. Going beyond this principle, we have suggested that even if agencies are not animated by a concern about scarce resources, they may legitimately decide to defer decisions on the ground that for any number of reasons, the timing is not right.

There are three main constraints on agency discretion in this area. First, and most obviously, agencies must obey clear statutory deadlines. Realistically, such deadlines will account for most cases involving unlawful decisions to defer. Second, agencies must obey a more general anti-circumvention principle. Although it is neither necessary nor sufficient, the word “shall” is a good indicator that agencies are constrained in their ability to defer decisions, certainly not for lengthy periods of time. In other cases, the statutory scheme will best be read to contain an implicit, but necessary and unavoidable, command that agencies must make a determination one way or another (as in the genocide example we have discussed). Third, agencies may not abdicate their statutory authority, even if Congress has used the word “may “ rather than “shall.”

The anti-circumvention and anti-abdication principles are hardly self-defining. To apply them, it will be necessary to explore both the statutory context and the particular grounds for the agency’s decision to defer its decision. In some cases, the problem of judicial administrability will be formidable, especially when it is alleged that agencies have abdicated their authority; in some cases, agencies may be violating their obligations even though courts will not and should not say so. Nonetheless, the anti-circumvention and anti-abdication principles have the signal virtue of recognizing the ultimate primacy of congressional instructions, while also acknowledging the inevitability and the legitimacy of a large measure of what amounts to policymaking discretion on

the part of agencies.