

Libertarian Administrative Law

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In recent years, several judges on the nation's most important regulatory court—the United States Court of Appeals for the District of Columbia Circuit—have given birth to libertarian administrative law in the form of a series of judge-made doctrines that are designed to protect private ordering from national regulatory intrusion. These doctrines involve nondelegation principles, protection of commercial speech, procedures governing interpretive rules, arbitrariness review, standing, and reviewability. Libertarian administrative law, which has a long tradition, can be seen as a second-best option for those who believe, as some of the relevant judges openly argue, that the New Deal and the modern regulatory state suffer from basic constitutional infirmities. Taken as a whole, libertarian administrative law parallels the kind of progressive administrative law that the same court created in the 1970s and that the Supreme Court unanimously rejected in Vermont Yankee. It should meet a similar fate.

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INTRODUCTION

In the years before *Vermont Yankee Nuclear Power Corp v Natural Resources Defense Council, Inc*¹ was decided, the DC Circuit—acting through a determined subset of its judges—made a concerted effort to push administrative law in a direction that the Supreme Court was ultimately unwilling to go.² These judges believed that administrative law should show special solicitude for environmental, consumer, and other interests that the judges thought to be underrepresented in the political process, because the costs and dynamics of political organization yielded relatively greater authority to industry and producers.³ Perhaps influenced by prominent works in social science, which seemed to support the claim of underrepresentation,⁴ the judges devised a distinctly progressive approach to administrative law, featuring, among other things, hybrid procedural requirements.⁵ These innovations required agencies to offer more procedures than the Administrative Procedure Act⁶ (APA) mandated,⁷ at least when special solicitude for environmental or other interests was (in the judges’ view) necessary.

To obtain a flavor of the period, consider these remarkable words: “Several recently enacted statutes attest to the commitment of the Government to control, at long last, the destructive engine of material ‘progress.’ But it remains to be seen whether the promise of this legislation will become a reality. Therein lies

¹ 435 US 519 (1978).

² For a good discussion, see generally Antonin Scalia, *Vermont Yankee: The APA, the DC Circuit, and the Supreme Court*, 1978 S Ct Rev 345.

³ See *id.* at 348–52.

⁴ See generally Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (Harvard 1965); Burton A. Weisbrod, Joel F. Handler, and Neil K. Komesar, *Public Interest Law: An Economic and Institutional Analysis* (California 1978). For related ideas on the constitutional side, see generally Bruce Ackerman, *Beyond Carolene Products*, 98 Harv L Rev 713 (1985).

⁵ See Scalia, 1978 S Ct Rev at 348–52 (cited in note 2).

⁶ Pub L No 79-404, 60 Stat 237, codified in various sections of Title 5.

⁷ See Scalia, 1978 S Ct Rev at 348–52 (cited in note 2).

the judicial role.”⁸ The DC Circuit affirmed that role in another case, announcing that “[w]e stand on the threshold of a new era in the history of the long and fruitful collaboration of administrative agencies and reviewing courts,”⁹ in which judges would be “increasingly asked to review administrative action that touches on fundamental personal interests in life, health, and liberty.”¹⁰ The court proclaimed that such “interests have always had a special claim to judicial protection, in comparison with the economic interests at stake in a ratemaking or licensing proceeding.”¹¹

It was not coincidental that such words appeared in an opinion vindicating the claims of a prominent environmental organization, which sought to ensure implementation of regulatory requirements.¹² In a sense, the court’s approach could be seen as an effort to apply its own version of the famous footnote four in *Carolene Products*, which suggests that the judicial role should be heightened when politically vulnerable groups are at risk.¹³ The approach was a clear administrative law analogue to constitutional developments—associated above all with the Warren Court—that had an unmistakably progressive tilt.¹⁴ We might even see the DC Circuit in the relevant period as a kind of junior varsity Warren Court, enlisting principles of administrative law to protect preferred rights (“fundamental personal interests”) and correct for democratic failures (“[t]herein lies the judicial role”).

The implicit political science behind the court’s agenda, emphasizing the alleged organizational problems of dispersed interests, was not implausible, and it had some conceptual and empirical foundations.¹⁵ But the court’s theory was far from

⁸ *Calvert Cliffs’ Coordinating Committee, Inc v United States Atomic Energy Commission*, 449 F2d 1109, 1111 (DC Cir 1971).

⁹ *Environmental Defense Fund, Inc v Ruckelshaus*, 439 F2d 584, 597 (DC Cir 1971).

¹⁰ *Id* at 598.

¹¹ *Id*.

¹² See *id* at 588.

¹³ See *United States v Carolene Products Co*, 304 US 144, 152 n 4 (1938). To be sure, this famous footnote refers to “discrete and insular minorities,” *id*, rather than diffuse minorities, but the democracy-reinforcing project is the same. See generally Ackerman, 98 Harv L Rev 713 (cited in note 4).

¹⁴ See generally Alexander M. Bickel, *The Supreme Court and the Idea of Progress* (Harper & Row 1970); Alexander M. Bickel, *Politics and the Warren Court* (Harper & Row 1965).

¹⁵ See generally Olson, *The Logic of Collective Action* (cited in note 4); Weisbrod, Handler, and Komesar, *Public Interest Law* (cited in note 4).

self-evidently correct,¹⁶ and, even if correct, it did not obviously justify stringent judicial oversight.¹⁷ The more immediate problem with the lower court's agenda, however, was that it was inconsistent with the governing law. "Fundamental personal interests in life, health, and liberty" may or may not deserve some kind of priority over "economic interests," but it is a separate question whether judges may legitimately enforce any such priority. The APA does not permit judges to offer greater procedural protection to their preferred types of interests, barring a constitutional due process problem.¹⁸ The Supreme Court found it necessary to reassert control over administrative law, rebuking the lower court for its presumption—most dramatically in *Vermont Yankee* itself, which held that hybrid procedural requirements were lawless impositions with no basis in the APA or other recognized legal sources.¹⁹ That holding was accompanied by a highly unusual passage, suggesting that the Court was aware that a more general principle—about the limits of the judicial role and the allocation of policymaking power—was at stake:

Nuclear energy may some day be a cheap, safe source of power or it may not. But Congress has made a choice to at least try nuclear energy, establishing a reasonable review process in which courts are to play only a limited role. The fundamental policy questions appropriately resolved in Congress and in the state legislatures are not subject to re-examination in the federal courts under the guise of judicial review of agency action. Time may prove wrong the decision to develop nuclear energy, but it is Congress or the States within their appropriate agencies which must eventually

¹⁶ See Christopher C. DeMuth and Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 Harv L Rev 1075, 1082 (1986) (expressing concern about agency tendencies toward overregulation and arguing that, through Office of Management and Budget review, the president can implement "a broad view of the nation's economic interest"); Elena Kagan, *Presidential Administration*, 114 Harv L Rev 2245, 2264 (2001).

¹⁷ See generally Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 Yale L J 31 (1991). For a response, see generally Thomas W. Merrill, *Does Public Choice Theory Justify Judicial Activism After All?*, 21 Harv J L & Pub Pol 219 (1997).

¹⁸ See *Vermont Yankee*, 435 US at 524, 542.

¹⁹ See *id.* at 524 ("[The APA] established the maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rule-making procedures. . . . [R]eviewing courts are generally not free to impose [additional procedural rights]."). See also *Baltimore Gas & Electric Co v Natural Resources Defense Council, Inc.*, 462 US 87, 105–06 (1983) (offering a stern warning against excessively stringent arbitrariness review in the same context—nuclear power regulation—as *Vermont Yankee*).

make that judgment. In the meantime courts should perform their appointed function.²⁰

As this passages suggests, *Vermont Yankee* has both a broad meaning and a narrow one. The narrow, black-letter meaning is that courts lack common-law power to require agencies to use procedures not mandated by statutes or the Constitution. The broader meaning is the principle that courts are to respect the constitutional allocation of policymaking competence to Congress and, through statutory authorization, to administrative agencies. According to the broader meaning, *Vermont Yankee* stands as an injunction that the policy preferences of federal judges are not a legitimate part of federal administrative law. Although the Court did not refer to the particular orientation of the DC Circuit at that time—or the role of its own policy preferences—no one could have missed the Court’s meaning.

Since the Court’s decision, it has been observed that some lower-court doctrines seem to conflict with the narrow holding of *Vermont Yankee*, and perhaps with the more general principle as well. Scholars have periodically called for a *Vermont Yankee II*, or *III* or *IV*,²¹ to correct lower-court holdings that overstep the limits of the judicial role or that seem to defy the Court with respect to discrete issues of administrative law, above all by imposing procedural requirements that lack standard legal justifications.

Yet the Court has not roused itself to police the DC Circuit in any systematic way, apart from ad hoc and relatively small-bore interventions, which do not generally involve large-scale administrative law doctrines.²² From the Court’s point of view, this is a plausible allocation of resources, corresponding to a similar lack of intervention during the pre-*Vermont Yankee* period²³ (notwithstanding the DC Circuit’s frequently irreverent approach to the APA and the Supreme Court’s precedents). And

²⁰ *Vermont Yankee*, 435 US at 557–58 (emphasis omitted).

²¹ See generally Paul R. Verkuil, *Judicial Review of Informal Rulemaking: Waiting for Vermont Yankee II*, 55 Tulane L Rev 418 (1981); Richard J. Pierce Jr, *Waiting for Vermont Yankee II*, 57 Admin L Rev 669 (2005); Jack M. Beermann and Gary Lawson, *Reprocessing Vermont Yankee*, 75 Geo Wash L Rev 856 (2007).

²² In some of the relevant cases, however, the stakes have been high. See, for example, *Environmental Protection Agency v EME Homer City Generation, LP*, 134 S Ct 1584, 1593 (2014) (reversing the DC Circuit’s decision to strike down an EPA rule designed to “cope with a complex problem: air pollution emitted in one State, but causing harm in other States”).

²³ See Scalia, 1978 S Ct Rev at 348–52 (cited in note 2).

for most of the post-*Vermont Yankee* period, there has been no *systematic* lack of fidelity by the DC Circuit that would warrant a rebuke.

In the past several years, however, administrative law has entered a world that is, in important respects, the mirror image of the world before *Vermont Yankee*. The prioritizing of “fundamental personal interests” over “economic interests,” at least as the court understood those terms in the 1960s and 1970s, has been turned upside down, in part by an identifiable understanding of the dynamics of the political process. Today, a subset of judges on the DC Circuit explicitly holds a distinctive view—articulated both in extrajudicial writings and in judicial opinions—that has found its way into administrative law decisions, sometimes with questionable support in the existing legal materials and sometimes with no support whatsoever. Law being what it is, no court or even individual judge is perfectly consistent; the vagaries of litigation, the problems of aggregation of judicial views, and the need to make rules workable all ensure a degree of variation. Hence, even the relevant judges issue many ordinary decisions that are not distinctively libertarian. What we try to show is that these judges hold a distinctive view that influences their decisions overall, and that this has moved administrative law in identifiable directions, often in cases with exceptionally large stakes, and sometimes in cases striking down important federal initiatives in the interest of libertarian goals.

According to the underlying view, political distortions yield policies that depart unjustifiably, and harmfully, from the baselines set by market ordering. These policies violate liberty, properly understood, and also threaten to reduce social welfare. As a corrective, the relevant judges have articulated an approach that we call *libertarian administrative law*. This approach seeks to use administrative law to push and sometimes shove policy in libertarian²⁴ directions, primarily through judge-made doctrines that lack solid support in the standard legal sources.

²⁴ On some views, the more accurate term is “classical liberal.” See generally, for example, Richard A. Epstein, *The Classical Liberal Constitution: The Uncertain Quest for Limited Government* (Harvard 2014). There is a continuum of views among the theorists and judges that we will mention; we use “libertarian” for simplicity and to capture the common denominators among these views.

In light of the writings of some of the relevant judges, libertarian administrative law may be understood as a second-best enterprise—an attempt to compensate for perceived departures during the New Deal from the baseline of the original constitutional order.²⁵ We can understand libertarian administrative law to be inspired by a particular, highly controversial account of the Constitution—one that does not fit well with the Supreme Court’s current understanding of the Founding document. A central assumption in the argument is that the original constitutional order, as these judges envision it, was far more protective of liberty and market baselines—and thus less hospitable to politically distorted governmental decisionmaking—than is the current state of constitutional law. Libertarian administrative law, then, emerges from a long-term program to restore the “Lost Constitution”²⁶—or at least to approximate that goal as closely as possible.

We emphasize that libertarian administrative law is nothing new. On the contrary, it has long been a theme—or a sub-theme—in administrative law as a whole, and it defines one aspect of the continuing battle between agencies and the federal judiciary. Consider, for example, the idea that statutes in derogation of the common law should be narrowly construed—an idea that sometimes operated to limit the authority of administrative agencies.²⁷ Before and during the New Deal era, federal judges deployed doctrinal principles to cabin agency power, and many of the relevant decisions had an unmistakable libertarian tilt.²⁸ In the *Lochner* period, libertarian administrative law paralleled libertarian constitutional law.²⁹ We agree, moreover, that agency action that violates libertarian principles can be

²⁵ For an analysis of second-best approaches to constitutional law and adjudication, see Adrian Vermeule, *The System of the Constitution* 29–37 (Oxford 2011).

²⁶ See generally Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (Princeton 2004).

²⁷ See, for example, *Federal Trade Commission v Gratz*, 253 US 421, 427–28 (1920) (limiting the FTC’s jurisdiction to prosecution of those anticompetitive acts condemned at common law).

²⁸ See, for example, *Federal Trade Commission v American Tobacco Co*, 264 US 298, 307 (1924) (construing the agency’s investigatory powers narrowly); *Federal Trade Commission v Raladam Co*, 283 US 643, 649 (1931) (holding that the agency had to establish harm to competitors, not merely consumers, to make out a statutory violation).

²⁹ See, for example, *American Tobacco*, 264 US at 307; *Raladam*, 283 US at 649. We do not mean to suggest that the *Lochner* Court consistently decided in a libertarian fashion—only that it occasionally did so. For one perspective, see generally Richard A. Epstein, *How Progressives Rewrote the Constitution* (Cato 2006).

inconsistent with the standard requirements of administrative law, including conformity to law and nonarbitrariness. What we emphasize here is a form of administrative law that is not standard—that invokes, implicitly or explicitly, libertarian goals to give a kind of strict scrutiny to agency decisions. We suspect that libertarian administrative law will be a doctrinal subtheme, animating at least some decisions for the foreseeable future. Our concern is that, in recent years, it has attained a kind of doctrinal primacy within the DC Circuit, at least on important occasions.

Our principal aims here are descriptive and doctrinal. We seek first to establish the existence of libertarian administrative law, to sketch its contours, and to elicit the justifications that its proponents offer. This descriptive enterprise, we hope, will be valuable without regard to normative controversies. Those who are inclined to favor libertarian administrative law, and to hope that it will flourish, will doubtless approve of some, many, or all of the doctrinal developments that we catalogue.

Our evaluative comments are offered not from the external standpoint of (say) economics, political science, philosophy, or public-choice theory, but from the internal standpoint of administrative law itself. The main problem with libertarian administrative law is that it lacks sufficient respect for existing law, including, emphatically, controlling precedents of the Supreme Court—in some cases quite recent, clear, and bipartisan precedents. Across a number of doctrinal contexts, panels of the DC Circuit have acted aggressively to reshape administrative law in ways that are not easy to square with the APA or Supreme Court precedent. In some cases, the DC Circuit can claim *some* support in those precedents; in other cases, it is operating very much on its own. At the same time, many of the DC Circuit's rulings are difficult for the Court to police—as was progressive administrative law in the years before *Vermont Yankee*. In its ambitious forms, libertarian administrative law, like its progressive doppelganger, is best seen as a proposal for large-scale legal change rather than a valid interpretation of current legal sources.

For reasons that we will elaborate, we believe that any significant movement in either progressive or libertarian directions would be in grave tension with the foundations of the APA and of administrative law, properly understood—and hence that the Supreme Court would warrant criticism if it were to embrace

any such movement. American administrative law is organized not by any kind of politicized master principle but by commitments to fidelity to governing statutes, procedural regularity, and nonarbitrary decisionmaking. These commitments will sometimes result in rulings that libertarians will approve, and sometimes in rulings that libertarians will deplore. Any sustained effort to engraft libertarian thinking—or some kind of progressive alternative—onto the legal materials would be unfaithful to those materials.

Our ultimate goal is to elaborate and defend that general claim about politically inflected administrative law. But we also have a narrower goal. We aim to demonstrate that, in some important rulings, the DC Circuit has been moving in libertarian directions without sufficient warrant in existing sources of law, including the decisions of the Supreme Court itself. While most of the decisions that we discuss cannot quite be described as lawless, some can, and as a whole they go beyond the boundaries of appropriate interpretation of the law as it now stands. They do so with an identifiable ideological valence.

Part I provides a brief discussion of the context, with reference to the separate opinions of the relevant DC Circuit judges and their extrajudicial writings on constitutional questions. Part II, the heart of the Article, describes and illustrates libertarian administrative law in six doctrinal contexts: non-delegation, commercial speech, interpretive rules, arbitrariness review, standing, and reviewability. Part III offers a more general evaluation of the program of libertarian administrative law and its fit with the existing structure of American administrative law. The fit, we argue, is not good, no matter how charitably we treat the decisions.

Overall, and in its ambitious forms, libertarian administrative law is best understood as part of a movement—the “Constitution in Exile” or “Lost Constitution” movement³⁰—aimed at changing the framework of American public law more broadly. We suggest that, on a suitable occasion, the Court should excise libertarian administrative law root and branch by issuing a modern version of *Vermont Yankee*, requiring the DC Circuit to hew more closely to the APA and Supreme Court precedent, as well as reminding lower courts that administrative law lacks

³⁰ See generally Barnett, *Restoring the Lost Constitution* (cited in note 26). See also Douglas H. Ginsburg, Book Review, *Delegation Running Riot*, 18 Reg 83, 84 (Winter 1995).

any kind of ideological valence. Libertarian administrative law should be seen as illegitimately politicizing the underlying legal materials, and it should be cabined by the Supreme Court or by the DC Circuit itself.

I. BACKGROUND

A. Libertarian Constitutional Law

Some constitutional observers believe that the American Constitution is, or should be interpreted to be, libertarian in character, in the sense of protecting a specific set of rights—especially property rights and economic rights—from government intrusion.³¹ On this view, libertarianism, of a certain kind, plays a central role in the constitutional settlement. This position is sometimes taken to impose sharp limits on national power and to recognize unenumerated rights of liberty, property, and contract that go beyond existing judicial understandings.³²

This position has been understood to suggest that the Constitution is in some sense “lost” or “in exile.”³³ In academic circles, there has been a vigorous (and continuing) effort to support this suggestion, sometimes marching under the banner of “originalism.”³⁴ On one view, the document, when ratified, had strong libertarian dimensions; if we are to be faithful to the document as written, we must recover those dimensions.³⁵ On another view, the best moral reading of the document, or of the general principles that underlie it, justifies a distinctly libertarian approach. This position might invoke arguments from social science, moral philosophy, and political theory.³⁶ In either case, a central goal is to protect liberty and property, rightly understood, by diminishing the authority of powerful private groups (or factions)—which, on this view, help to account for the

³¹ See Barnett, *Restoring the Lost Constitution* at 32–52 (cited in note 26); Epstein, *The Classical Liberal Constitution* at 4 (cited in note 24).

³² For an especially detailed account, see Epstein, *The Classical Liberal Constitution* at 303–82 (cited in note 24). For a vigorous recent discussion, focused on our topic in particular, see generally Philip Hamburger, *Is Administrative Law Unlawful?* (Chicago 2014).

³³ Barnett, *Restoring the Lost Constitution* (cited in note 26); Ginsburg, Book Review, 18 Reg at 84 (cited in note 30). For a discussion in the same vein, see generally Epstein, *The Classical Liberal Constitution* (cited in note 24).

³⁴ See Barnett, *Restoring the Lost Constitution* at 89–117 (cited in note 26).

³⁵ See generally *id.*

³⁶ See Epstein, *The Classical Liberal Constitution* at 17–33 (cited in note 24).

growing, liberty-invading power of government. Whatever its merits as a matter of principle, and whatever its historical foundations, no one doubts that this position would have dramatic implications, throwing much of the modern administrative state into the dustbin.³⁷

Libertarian constitutional law has many academic defenders, even though it has not enjoyed much success at the Supreme Court. For our purposes, what is noteworthy is that several of the most prominent judges on the DC Circuit have explicitly endorsed understandings of this kind. We are keenly aware that extrajudicial writing by federal judges may not reflect their views about appropriate decisionmaking by courts as a whole. We shall turn shortly to the links between judicial behavior and the views that we describe here.

B. “The Wheels Began to Come Off”

In a speech delivered in several places and ultimately published in the *Cato Supreme Court Review*, Judge Douglas H. Ginsburg—one of the architects of some principles of libertarian administrative law, as we will see—stated that if judges are to be faithful to the written Constitution, they must try “to illuminate the meaning of the text as the Framers understood it.”³⁸ In his account, judges did exactly that from the Founding through the early twentieth century. In the 1930s, however, “the wheels began to come off.”³⁹ With the Great Depression and the Roosevelt administration’s response, the Court refused to remain faithful to the Founding document.⁴⁰ Judge Ginsburg contended that the infidelity occurred in three different ways, each of them relevant to our topic here.

The first involves the reach of the national government. In Judge Ginsburg’s view, the Court employed “loose reasoning” and indulged in “a stark break from . . . precedent” in upholding the National Labor Relations Act.⁴¹ In his view, the Court thereby expanded congressional power under the Commerce Clause in a way that fit awkwardly, and perhaps not at all, with the Constitution as written.⁴² Second, the Court allowed

³⁷ See generally *id.*

³⁸ Douglas H. Ginsburg, *On Constitutionalism*, 2002–2003 *Cato S Ct Rev* 7, 14.

³⁹ *Id.* at 15.

⁴⁰ See *id.*

⁴¹ *Id.* at 16.

⁴² Ginsburg, 2002–2003 *Cato S Ct Rev* at 16–18 (cited in note 38).

administrative agencies to wield broad discretionary power, thus violating the nondelegation doctrine as embodied in Article I, § 1.⁴³ Citing the Court's validation of a provision of the Clean Air Act⁴⁴ (CAA) that appears to grant broad discretion to the EPA, Judge Ginsburg urged that the "structural constraints in the written Constitution have been disregarded."⁴⁵ Third, he contended that the Court has "blinked away" central provisions of the Bill of Rights.⁴⁶ As a particular example, he referred to the Takings Clause, which, he lamented, has been read to provide "no protection against a regulation that deprives the nominal owner of most of the economic value of his property."⁴⁷ It seems clear that Judge Ginsburg believes that, properly interpreted, the Takings Clause would provide much stronger protection of property rights than it now does.

Three cornerstones of libertarian constitutional law involve certain conceptions of federalism, delegation, and individual rights. As early as 2003, Judge Ginsburg endorsed a version of each of them. But he is not the only judge on the DC Circuit to hold such views.

C. "Underground Collectivist Mentality"

Judge Janice Rogers Brown has spoken in even stronger terms, seeing the New Deal and the rise of modern administrative agencies as a clear betrayal of the original constitutional settlement. In a speech in 2000, for example, she contended that the New Deal "inoculated the federal Constitution with a kind of underground collectivist mentality," which transformed the Constitution "into a significantly different document."⁴⁸ She objected to Justice Oliver Wendell Holmes's celebrated dissenting opinion in *Lochner v New York*⁴⁹ as "all too famous" and lamented that, in the 1930s, the "climate of opinion favoring collectivist social and political solutions had a worldwide dimension."⁵⁰ In

⁴³ Id at 16–17.

⁴⁴ Pub L No 88-206, 77 Stat 392 (1963), codified as amended at 42 USC § 7401 et seq.

⁴⁵ Ginsburg, 2002–2003 Cato S Ct Rev at 17 (cited in note 38).

⁴⁶ Id.

⁴⁷ Id.

⁴⁸ Janice Rogers Brown, "A Whiter Shade of Pale": *Sense and Nonsense—The Pursuit of Perfection in Law and Politics*, Speech to the Federalist Society at The University of Chicago Law School (Apr 20, 2000), archived at <http://perma.cc/T2VS-4J7F>.

⁴⁹ 198 US 45 (1905).

⁵⁰ Brown, "A Whiter Shade of Pale" (cited in note 48).

these ways, she suggested that the New Deal was essentially unconstitutional and that Holmes's deferential approach was unjustified.

But she also offered a more specific critique of the New Deal era. In her view, the collectivist (communist?) creed that "differences between the few and the many can, over time, be erased," should be seen as "a critical philosophical proposition underlying the New Deal."⁵¹ That creed was fatally inconsistent with the Founding document. Indeed, it worked "not simply to repudiate, both philosophically and in legal doctrine, the framers' conception of humanity, but to cut away the very ground on which the Constitution rests."⁵²

For Judge Brown, the upshot is that "the economic convulsions of the late 1920's and early 1930's . . . consumed much of the classical conception of the Constitution."⁵³ Notably, and with a judgment that overlaps Judge Ginsburg's, she contended that "[p]rotection of property was a major casualty of the Revolution of 1937."⁵⁴ As a result, it "became government's job not to protect property but, rather, to regulate and redistribute it."⁵⁵ In the current era, moreover, "there are even deeper movements afoot. Tectonic plates are shifting and the resulting cataclysm may make 1937 look tame."⁵⁶ Needless to say, this statement was meant as a warning.

Judge Brown went further still. Speaking of government authority, she said, "[W]e no longer find slavery abhorrent. We embrace it."⁵⁷ In another speech, she cautioned, "[I]f we can invoke no ultimate limits on the power of government, a democracy is inevitably transformed into a Kleptocracy—a license to steal, a warrant for oppression."⁵⁸

D. Off the Bench, On the Bench: "Property Is at the Mercy of the Pillagers"

There is a gulf between extrajudicial statements made by federal judges and actual behavior on the bench. It would be

⁵¹ Id.

⁵² Id.

⁵³ Id.

⁵⁴ Brown, "A Whiter Shade of Pale" (cited in note 48).

⁵⁵ Id.

⁵⁶ Id.

⁵⁷ Id.

⁵⁸ Janice Rogers Brown, *Fifty Ways to Lose Your Freedom*, Speech to the Institute for Justice *4 (Aug 12, 2000), archived at <http://perma.cc/E2MC-3U48>.

wrong and unfair to think that any extrajudicial statement is necessarily a helpful guide to judicial behavior, because role greatly matters, and because the judicial role imposes constraints that judges do not face when they are giving speeches. A judge might firmly believe that the New Deal, the Great Society, and the Affordable Care Act were serious mistakes, while also believing, quite firmly, that those personal beliefs play no legitimate role in legal interpretation. A judge might even believe that the Supreme Court has taken some gravely wrong turns, or even gone off the rails, while also following the very decisions that she abhors. But off-the-bench speeches that demonstrate a shared antipathy to the New Deal and its constitutional legitimation are at least relevant data points.

In any event, the judges at the core of the libertarian movement in administrative law have not declined to enlist their beliefs while on the bench as well. Of course it would be wrong and unfair to suggest that those beliefs have generally driven their votes and writings. But in some important opinions, the relevant judges have explained their constitutional project, its limits under the current New Deal constitutional order, and the second-best administrative law project that flows from these beliefs. We will discuss majority opinions shortly. For now, we will focus on the startling concurrence filed by Judges Brown and David Sentelle in the 2012 case *Hettinga v United States*.⁵⁹ The *Hettinga* concurrence is best understood as a kind of manifesto of libertarian administrative law.

Hettinga involved the Milk Regulatory Equity Act of 2005,⁶⁰ which “subjected certain large producer-handlers of milk to contribution requirements applicable to all milk handlers.”⁶¹ Under the complex and highly reticulated federal regulatory scheme that governs the production and sale of milk, the *Hettinga* family operated two enormous industrial dairy farms that enjoyed a special regulatory exemption from federal milk-marketing orders.⁶² In 2006, however, this new statute extended the regulatory scheme to cover the *Hettingas*’ operations, although it left in place the exemptions for large firms in other areas.⁶³ Indeed, the *Hettingas* claimed that their operations were in practice the

⁵⁹ 677 F3d 471 (DC Cir 2012) (per curiam).

⁶⁰ Pub L No 109-215, 120 Stat 328 (2006).

⁶¹ *Hettinga*, 677 F3d at 474.

⁶² *Id* at 475.

⁶³ *Id* at 476.

only ones currently covered by the statutory extension, although the terms of the statute did not mention them by name and used facially neutral criteria tied to the size and location of firms.⁶⁴ The Hettingas attacked the statute on constitutional grounds, claiming that it amounted, in effect, to a forbidden bill of attainder and that it violated the constitutional guarantee of equal protection of the laws.⁶⁵

In a per curiam opinion, the panel unanimously disposed of the Hettingas' claims under settled constitutional law.⁶⁶ Even if the extension captured only the Hettingas, it was in principle facially neutral and open-ended and would cover any firm that in the future met the statutory criteria; for that reason, it lacked the targeting and closure necessary to constitute a bill of attainder.⁶⁷ As for the equal protection argument, the statute did not impinge on any fundamental right or deploy any suspect classification and thus needed only to survive rational-basis review.⁶⁸ And there was easily a rational basis for the law. The statute closed loopholes in the scheme of dairy regulation by removing a regulatory exemption that the Hettingas' massive operations had previously enjoyed.⁶⁹

Under then-current law, the case was easy and might have been disposed of summarily.⁷⁰ Judge Brown, however, offered a separate opinion—joined by Judge Sentelle, and thus signed by a majority of the panel—that heatedly criticized the fundamental premises underpinning the whole New Deal constitutional order.⁷¹ For Judge Brown, the case revealed “an ugly truth: America’s cowboy capitalism was long ago disarmed by a democratic process increasingly dominated by powerful groups with economic interests antithetical to competitors and consumers. And the courts, from which the victims of burdensome regulation sought protection, have been negotiating the terms of surrender since the 1930s.”⁷² On this view, “the judiciary’s refusal to consider the wisdom of [a given] legislative act[]—at least to

⁶⁴ Id.

⁶⁵ *Hettinga*, 677 F3d at 476. The Hettingas also advanced a due process claim, but this is not relevant for our purposes. Id at 479–80.

⁶⁶ See id at 477–79.

⁶⁷ Id at 477–78.

⁶⁸ Id at 478–79.

⁶⁹ *Hettinga*, 677 F3d at 479.

⁷⁰ See id at 477–79.

⁷¹ See id at 480–83 (Brown concurring).

⁷² Id at 480 (Brown concurring).

inquire whether its purpose and the means proposed are ‘within legislative power’” amounts to the Court “abdicat[ing] its constitutional duty.”⁷³ Most remarkably of all, and consistent with her speeches, Judge Brown attempted to connect her economic libertarianism with a version of originalism:

This standard [rational-basis review of economic regulation] is particularly troubling in light of the pessimistic view of human nature that animated the Framing of the Constitution—a worldview that the American polity and its political handmaidens have, unfortunately, shown to be largely justified. . . . Moreover, what the Framers theorized about the destructive potential of factions (now known as special or group interests), experience has also shown to be true. . . . The judiciary has worried incessantly about the “countermajoritarian difficulty” when interpreting the Constitution. But the better view may be that the Constitution *created* the countermajoritarian difficulty in order to thwart more potent threats to the Republic: the political temptation to exploit the public appetite for other people’s money—either by buying consent with broad-based entitlements or selling subsidies, licensing restrictions, tariffs, or price fixing regimes to benefit narrow special interests.⁷⁴

In this vision, the “countermajoritarian Constitution,” enforced by searching judicial review, protects the public interest both from broad-based entitlements that corrupt the citizenry and also from exploitation by narrow special interests, whereas “[r]ational basis review means property is at the mercy of the pillagers.”⁷⁵

It is not obvious who the “pillagers” are supposed to be or exactly what goods Judge Brown thinks that a countermajoritarian judiciary, protecting economic liberty, is supposed to produce. Might not the “narrow special interests” themselves use the judiciary to protect their privileged position?⁷⁶ If the problem is with human nature, judges are human too and thus by hypothesis prone to abuse the expanded power that Judge Brown

⁷³ *Hettinga*, 677 F3d at 481 (Brown concurring).

⁷⁴ *Id* (citations omitted) (Brown concurring).

⁷⁵ *Id* at 483 (Brown concurring).

⁷⁶ See Elhauge, 101 *Yale L J* at 67 (cited in note 17) (“[T]he litigation process cannot be treated as exogenous to interest group theory: it too is susceptible to interest group influences.”).

would give them.⁷⁷ Perhaps there are plausible answers to such questions, and, to her credit, Judge Brown is candid in acknowledging that binding constitutional precedent was inconsistent with her vision of the constitutional order.⁷⁸

Our thesis, however, is that on important occasions, Judge Brown and a critical mass of her colleagues on the DC Circuit—especially Judges Ginsburg and Sentelle, joined on occasion by Judges Karen Henderson, A. Raymond Randolph, Laurence Silberman, and Stephen Williams—have turned their efforts elsewhere. Unable or unwilling to make significant progress on the constitutional margin (except insofar as constitutional doctrines and administrative law doctrines plainly overlap), some of the relevant opinions can be understood as efforts to protect the market from its would-be “pillagers” by means of administrative law. In several cases, they have been willing to criticize the Supreme Court itself. Consider, for example, Judge Brown’s remarkable attack on *Massachusetts v Environmental Protection Agency*⁷⁹ in the context of a plea for Supreme Court reconsideration: “I do not choose to go quietly. . . . [I] engage[] *Massachusetts’s* interpretive shortcomings in the hope that either Court or Congress will restore order to the CAA.”⁸⁰

Of course it is true, and important, that libertarian administrative law is a product of a *subset* of the judges on the DC Circuit. It does not command a consensus, and, with recent appointments,⁸¹ there is a good chance that its authority within the court will not grow over time, at least not in the short run. But on the nation’s most important regulatory court—whose decisions are typically made in three-judge panels, and whose doctrinal departures have a degree of momentum—even a small subset of judges can have an enduring impact. As we shall see, some of the relevant doctrines are becoming well entrenched, at least within that court, though others are vulnerable to rethinking.⁸²

⁷⁷ See Eric A. Posner and Adrian Vermeule, *Inside or Outside the System?*, 80 U Chi L Rev 1743, 1753–54 (2013).

⁷⁸ See *Hettinga*, 677 F3d at 480 (Brown concurring).

⁷⁹ 549 US 497 (2007).

⁸⁰ *Coalition for Responsible Regulation, Inc v Environmental Protection Agency*, 2012 WL 6621785, *3 (Brown dissenting from the denial of rehearing en banc).

⁸¹ See Sheldon Goldman, Elliot Slotnick, and Sara Schiavoni, *Obama’s First Term Judiciary: Picking Judges in the Minefield of Obstructionism*, 97 *Judicature* 7, 29–36 (2013).

⁸² See, for example, *American Railroads*, 721 F3d 666, cert granted, 134 S Ct 2865; *Mortgage Bankers*, 720 F3d 966, cert granted, 134 S Ct 2820.

In short, Judge Brown and some of her colleagues, generally stymied on the constitutional front, have pursued a second-best project—one that attempts to move the apparently nonideological and recalcitrant materials of administrative law in libertarian directions. We will demonstrate that these judges have attempted to fold disfavored modes of constitutional libertarianism, such as substantive due process protection of property rights and economic liberty, into constitutional law itself, especially with nondelegation and commercial speech law; that, too, is a kind of substitute for the ideal. We now turn to documenting their second-best project and its problems.

II. LIBERTARIAN ADMINISTRATIVE LAW

Suppose that a libertarian view of the Constitution is correct, but that existing legal materials give lower-court judges limited room to implement it. If so, administrative law would seem to be fertile terrain. Administrative law cases often involve technical doctrines that have, or seem to have, a degree of flexibility. To the extent that constitutional law and administrative law overlap (as, for example, in nondelegation, commercial speech, and standing cases), the doctrinal artillery might not seem to have the same ideological charge that can be found in cases that involve (say) the Commerce Clause or the Takings Clause. For judges who are sympathetic to the idea of a “lost Constitution,” or a “Constitution in exile,” libertarian administrative law has evident appeal.

To establish the existence of libertarian administrative law, we could imagine a range of strategies. Perhaps the most obvious would be quantitative. We might compile a large dataset and investigate voting behavior. Suppose, for example, that certain judges rarely, or never, vote in favor of environmental or labor organizations when those groups argue for more-aggressive regulation. Suppose that the same judges vote always, or almost always, for companies that seek to invalidate regulations. If so, we might have a strong hint that those judges would be practicing at least some form of libertarian administrative law. Indeed, it might be thought that we have a smoking gun.

In fact, quantitative studies of this general kind do exist. They tend to show a significant asymmetry between the voting behavior of Republican and Democratic appointees, with the former showing a distinctive tendency in what is, broadly speaking, the libertarian direction, and the latter showing a

distinctive tendency in what is, broadly speaking, the progressive direction.⁸³ For example, Republican appointees are more likely to vote to uphold agency action taken under a Republican president, when such action is more likely to be deregulatory; Democratic appointees exhibit the opposite pattern. If we code judicial decisions by asking whether a regulated entity is seeking to fend off regulation, or whether some kind of public interest group is seeking to impose heightened regulatory requirements, we will see an unmistakable skew on both sides. Within the DC Circuit, the same patterns have been observed in the past, though we lack recent data.⁸⁴ On the basis of these findings, we might reasonably speculate that Democratic appointees are drawn to some form of progressive administrative law, whereas Republican appointees vote in more-libertarian directions.

But it is important to be careful with such findings. By themselves, they might be too coarse grained to demonstrate any kind of progressive or libertarian administrative law. Perhaps one or another side is simply right, on the basis of the existing legal materials, and ideological predispositions are unimportant or less important. Perhaps some kind of tendency, measured by votes, tells us nothing about progressive or libertarian inclinations, at least if it is unaccompanied by an analysis of the legal foundations for those votes. To date, moreover, we do not have more-specific evidence showing differences across individual judges. (Nor do we have contrary evidence; the relevant questions have not been investigated in sufficient detail.) Any such evidence would be helpful, assuming that statistical power could be achieved; if some judges almost always vote in favor of challenges by regulated entities, some kind of libertarian inclination might plausibly be inferred. But even large datasets, tabulating mere votes, would raise questions about appropriate generalizations across an inevitably heterogeneous range of disputes. Votes alone may be uninformative unless they are in

⁸³ See Richard L. Revesz, *Environmental Regulation, Ideology, and the DC Circuit*, 83 Va L Rev 1717, 1717–19 (1997); Frank B. Cross and Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 Yale L J 2155, 2168–69 (1998); Thomas J. Miles and Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U Chi L Rev 823, 825–26 (2006); Thomas J. Miles and Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U Chi L Rev 761, 765–68 (2008).

⁸⁴ See Revesz, 83 Va L Rev at 1719 (cited in note 83); Cross and Tiller, 107 Yale L J at 2168–69 (cited in note 83).

tension with the governing legal materials (such as the APA or decisions of the Supreme Court), which a tabulation as such cannot demonstrate.

There is an additional point. However convincing such findings would be as social science, they would necessarily provide only an external perspective. Our method here is internal and doctrinal rather than quantitative. If it were possible to show that certain judges embrace distinctively libertarian doctrinal principles, we would be able to establish the existence of libertarian administrative law, and the demonstration would be more powerful still if current legal materials, from authoritative statutes and the Supreme Court, did not support those doctrinal principles. To a significant extent, we hope to establish exactly that. At the same time, some doctrinal categories cannot be self-evidently categorized along a libertarian-nonlibertarian continuum. Nonetheless, we hope to show that the linkage is sufficiently clear.

Three qualifications must be offered at the outset, lest we take on a greater burden of proof than we should have to carry. First, we do not claim that the DC Circuit, or some subset of its judges, have invariably ruled in libertarian directions in blatant defiance of the APA and the Supreme Court. Judges operate within constraints, and many of the DC Circuit's decisions are not libertarian at all. We could devise an imaginary court whose decisions would be far more predictable and uniform—with, for example, new principles that always deny standing to those seeking more-aggressive regulation, or arbitrariness review that proves to be a systematic barrier to regulatory intervention, or changes in existing doctrines that deny agencies any kind of deference whenever they interpret statutes so as to increase their regulatory authority. The DC Circuit is not that imaginary court, and no subset of its members can be counted as such. It would be easy to find DC Circuit rulings, joined by all its members (including those who we single out here), that uphold agency decisions that libertarians abhor, or that invalidate agency decisions that libertarians approve. Because of their distinctive role, judges care about the law, and they cannot and do not act in a single-minded way. Statutes and doctrinal principles impose serious limits on any effort to act single-mindedly. Nonetheless, we do hope to show unmistakably libertarian patterns, paralleling the progressive patterns of several decades ago.

Second, the nature of legal doctrine is such that most doctrines can rest on multiple rationales; they are overdetermined by arguments. Given that fact, it will rarely be possible to demonstrate that any particular doctrine is dictated, necessarily and exclusively, by the project of libertarian administrative law. In the aggregate, however, over a set or series of doctrinal questions, a convincing pattern may emerge.

Schematically, suppose that there are three independent doctrinal questions: 1, 2, and 3. On question 1, the panel adopts a position whose possible rationales are L (the libertarian rationale) or O^1 (some other rationale). On question 2, the panel adopts a position whose possible rationales are L or O^2 (different from O^1). On question 3, the panel adopts a position whose possible rationales are L or O^3 (different from both O^1 and O^2). As to *any particular one* of these doctrinal questions, libertarianism is not the only possible reading of the panel's position. Over *all* of them, however, because the alternative rationales are *different* in each case, the libertarian reading becomes more convincing. It is no valid objection to our account, therefore, to show that the libertarian program is not the sole plausible explanation for any given doctrine. The evidence must be viewed in the aggregate.

Third, the nature of judicial decisionmaking in Article III courts is such that the doctrinal questions fairly presented are rarely perfectly tailored to advance an ideological agenda. Judges have to resolve questions presented by parties in messy factual and legal contexts, and they have to implement their broader understandings of administrative and constitutional law through doctrinal devices—rules, presumptions, qualified standards, and so forth—that are not perfectly calculated to capture all and only the outcomes that a libertarian judge would want to capture. It suffices if the holding, and an associated doctrine, are better calculated to capture libertarian outcomes, on average and in the long run, than are the feasible alternative holdings. Furthermore, because appellate judging is irreducibly collective, well-known problems of aggregation (both preference aggregation and judgment aggregation) inevitably arise on

judicial panels.⁸⁵ Such problems ensure that multimember courts can never act in a wholly consistent fashion over time.⁸⁶

It is not a sufficient objection to our account, therefore, to point out that we do not discuss doctrines and holdings that cannot be characterized as libertarian, or that the doctrines and holdings that we discuss do not capture certain outcomes that libertarians would like, or sweep in certain outcomes that libertarians do not like. Real doctrines will rarely if ever be perfectly tailored to capture libertarian (or progressive) outcomes or to promote libertarian (or progressive) aims. Instead, our proper burden is to show that the relevant doctrines and holdings are plausibly calculated to produce libertarian outcomes and promote such aims in a rough, aggregate, long-run way, relative to the available alternatives.

A. Nondelegation

1. Preliminaries.

The nondelegation doctrine is widely understood to forbid Congress from delegating its legislative power.⁸⁷ On the standard view, Congress may not grant discretionary authority to the executive branch, to independent agencies, or to private parties without imposing an “intelligible principle” to constrain that authority.⁸⁸ An extreme example, often offered to suggest that the standard view must be correct, is a statute authorizing the president to do “whatever he deems appropriate to make the United States a better nation by his lights.”⁸⁹

Congress has never given a public or private institution that degree of discretion, but, since the beginning of the Republic, it has allowed agencies to exercise a great deal of open-ended authority.⁹⁰ Contrary to a widespread view, there is nothing new

⁸⁵ For an overview, see Adrian Vermeule, *The Judiciary Is a They, Not an It: Interpretive Theory and the Fallacy of Division*, 14 J Contemp Legal Issues 549, 558–59 (2005).

⁸⁶ See Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 Harv L Rev 802, 811–13 (1982).

⁸⁷ See Eric Posner and Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U Chi L Rev 1721, 1721 (2002).

⁸⁸ *J.W. Hampton, Jr, and Co v United States*, 276 US 394, 409 (1928).

⁸⁹ But see Posner and Vermeule, 69 U Chi L Rev at 1741–43 & n 81 (cited in note 87) (criticizing the use of this worst-case hypothetical as a premise for formulating rules of constitutional law).

⁹⁰ See *id.* at 1735–36; Jerry Mashaw, *Creating the Administrative Constitution: The Lost One Hundred Years of American Administrative Law* 44–48 (Yale 2012).

about legislative grants of discretion, and the New Deal did not, with respect to such grants, break radical new ground.⁹¹ For that reason, the originalist argument on behalf of the nondelegation doctrine remains controversial and contested, with some of the most recent and detailed historical accounts raising serious doubts about that argument.⁹² It is worth underlining that point: as a matter of history, the originalist embrace of the nondelegation doctrine is not simple to explain.

For its part, the Supreme Court has shown little enthusiasm for the nondelegation doctrine. It is often remarked that the first year in which the Court invoked the doctrine to strike down an act of Congress was 1935—notably, at the height of the New Deal era, when the executive branch and the Court were at war.⁹³ But that was also the last year in which the Court invoked the doctrine to strike down an act of Congress. The Court's unbroken record of nonuse over the past eighty years is especially noteworthy in light of the fact that the Court has had numerous opportunities to invoke the doctrine, having dealt with many arguably open-ended grants of discretionary authority.⁹⁴

Despite the Court's lack of interest in the nondelegation doctrine, libertarians have long shown considerable enthusiasm for it and have argued vigorously for its revival.⁹⁵ Their suspicion of governmental power and their desire to preserve a sphere of private autonomy help to account for that enthusiasm.⁹⁶ At first glance, however, the libertarian focus on the nondelegation doctrine might seem a bit puzzling, because the doctrine is designed to promote accountability, whose relationship to libertarian goals is not entirely clear.⁹⁷ Through specific legislation, Congress might well authorize significant intrusions on private rights as libertarians understand them. In such cases, the

⁹¹ See Posner and Vermeule, 69 U Chi L Rev at 1735–36 (cited in note 87); Mashaw, *Creating the Administrative Constitution* at 44–48 (cited in note 90).

⁹² See Mashaw, *Creating the Administrative Constitution* at viii–ix (cited in note 90).

⁹³ See *A.L.A. Schechter Poultry Corp v United States*, 295 US 495, 551 (1935).

⁹⁴ See, for example, *Whitman v American Trucking Associations, Inc.*, 531 US 457, 472–76 (2001). See also *id.* at 474 (collecting cases).

⁹⁵ See, for example, Christopher Demuth, *OIRA at Thirty*, 63 Admin L Rev 15, 16–21 (2011); Douglas H. Ginsburg and Steven Menashi, *Nondelegation and the Unitary Executive*, 12 U Pa J Const L 251, 261–64 (2010).

⁹⁶ See Peter H. Aranson, Ernest Gellhorn, and Glen O. Robinson, *A Theory of Legislative Delegation*, 68 Cornell L Rev 1, 36–37, 63–67 (1982).

⁹⁷ See Posner and Vermeule, 69 U Chi L Rev at 1748 (cited in note 87).

nondelegation doctrine provides scant comfort. Indeed, some statutes do contain clear standards and do intrude on what libertarians regard as private rights.

Put in its best light, libertarian enthusiasm for the nondelegation doctrine can be explained in the following terms. Suppose that we believe (with Judge Brown, among many others) that a central goal of the Constitution is to safeguard private liberty, and that it should do so by constraining the influence of private factions. If so, then there is a plausible argument for the nondelegation doctrine as a way of achieving that goal. It might well be thought that, by requiring members of Congress to surmount the difficulty of agreeing on a specific form of words and by forbidding legislation that lacks such agreement, the nondelegation doctrine reduces the likelihood that law will be enacted at all.⁹⁸ If national law itself is seen as potentially a threat to liberty, this constraint will seem appealing. A supplemental idea is that whenever Congress gives discretionary authority to the executive branch, it unleashes a risk of interest group capture.⁹⁹ The safeguards that are built into the structure of the national legislature serve to reduce that risk. When Congress grants open-ended discretionary power to others, it allows those safeguards to be evaded.

So understood, the libertarian enthusiasm for the nondelegation doctrine ceases to be a mystery. But there is a further puzzle, both because the nondelegation doctrine would block open-ended delegations of discretion to deregulate, and because constraining delegations at the *federal* level does nothing to prevent liberty-restricting regulation at the *state* level. We will take up these two points in turn.

As for deregulation, many libertarian arguments in favor of the nondelegation doctrine tacitly assume the baseline of 1789—a baseline that no longer exists. In a world already chock-full of federal regulations, consistent libertarians should consider the possibility that administrative discretion to deregulate—and self-conscious deregulation did occur in the 1980s and 1990s in some regulated industries¹⁰⁰ and has occurred periodically since that time—should be promoted, not hampered.

⁹⁸ See Aranson, Gellhorn, and Robinson, 68 Cornell L Rev at 63–65 (cited in note 96).

⁹⁹ See id at 63–67.

¹⁰⁰ See, for example, Airline Deregulation Act of 1978, Pub L No 95-504, 92 Stat 1705, codified at 49 USC § 1371 et seq.

As for federalism, the libertarian view must also come to terms with the complexity of the federal system, in which vigorous, affirmative federal lawmaking may well be necessary—and has historically often been necessary—to prevent local oppression that is itself deeply objectionable on libertarian premises, or ought to be. Jim Crow was not a libertarian policy. By raising the barriers to the enactment of federal legislation, the nondelegation doctrine might make it more difficult for the national government to protect against intrusions on liberty by the states. Perhaps the libertarian view, rightly conceived, is that the nondelegation doctrine *generally* protects against unjustified intrusions on liberty and does little to restrict liberty-protecting, state-controlling action at the national level, especially if the Constitution is taken to create independent barriers to intrusions on liberty at the state level.

2. Doctrinal departures.

Our principal goal here is to outline the libertarian argument, not to evaluate it. For present purposes, the important point is that the DC Circuit has twice developed its own nondelegation doctrine, operating independently of the Supreme Court's and in the face of that Court's noticeable lack of enthusiasm for the doctrine.

The DC Circuit's first forays into this domain occurred in the 1990s, when the court, quite remarkably, raised serious constitutional doubts about central provisions of both the Occupational Safety and Health Act¹⁰¹ and the CAA.¹⁰² The court relied on two different ideas. The first was that if Congress failed to impose real bounds on agency discretion—in the form of floors and ceilings that were not too far apart—it would run afoul of the nondelegation doctrine.¹⁰³ The second idea was that, in the face of an otherwise-unconstitutional grant of discretion,

¹⁰¹ Occupational Safety and Health Act of 1970, Pub L No 91-596, 84 Stat 1590, codified at 29 USC § 651 et seq.

¹⁰² *American Trucking Associations, Inc v United States Environmental Protection Agency*, 175 F3d 1027, 1034 (DC Cir 1999) (“ATA”) (holding that the “EPA has construed §§ 108 & 109 of the Clean Air Act so loosely as to render them unconstitutional delegations of legislative power”); *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW v Occupational Safety and Health Administration*, 938 F2d 1310, 1313 (DC Cir 1991) (“Lockout/Tagout I”) (holding that the Occupational Safety and Health Administration’s construction of its organic statute was unreasonable “in light of nondelegation principles”).

¹⁰³ See *ATA*, 175 F3d at 1034; *Lockout/Tagout I*, 938 F2d at 1316–17.

agencies could solve the problem by adopting clear rules that would constrain their own discretion.¹⁰⁴

If the Supreme Court had not rejected both these ideas in emphatic terms,¹⁰⁵ they could have been exceedingly important. As the lower court's rulings suggested, the first might well throw a great deal of modern legislation into serious doubt. If the nondelegation doctrine threatens core provisions of the Occupational Safety and Health Act and the CAA—arguably, in fact, *the* core provisions—then there is little doubt that it threatens many regulatory statutes in a way that fits well with the libertarian agenda. The second idea, by contrast, provides a kind of lifeline to agencies, authorizing them to “solve” the nondelegation problem by cabining their own discretion. From the standpoint of libertarian aspirations, the lifeline is nothing to celebrate, and it is constitutionally troublesome to boot. Nonetheless, there are real advantages to situations in which agencies are required to cabin their discretion. If they do so, they promote clarity and predictability—especially for members of regulated classes—and perhaps that approach is a sufficiently satisfactory second-best on libertarian (and other) grounds, or at least an improvement over a situation in which agency discretion is not so cabined.¹⁰⁶

The problem is that both these ideas utterly lacked support in Supreme Court doctrine, and hence it was not surprising when a unanimous Court rejected them.¹⁰⁷ The Court noted that the point of the nondelegation doctrine is to require *Congress* to offer an intelligible principle, and that if it has failed to do so, the problem cannot be cured if the agency itself offers such a principle.¹⁰⁸ More fundamentally, the Court made plain its lack of enthusiasm for essentially any modern use of the nondelegation doctrine. The Court largely relied on its own precedents, pointedly quoting its statement to the effect that it has “almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those

¹⁰⁴ See *ATA*, 175 F3d at 1038; *Lockout/Tagout I*, 938 F2d at 1313.

¹⁰⁵ See *Whitman*, 531 US at 472–76.

¹⁰⁶ See generally Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry* (Louisiana State 1969). See also *ATA*, 175 F3d at 1038 (“If the agency develops determinate, binding standards for itself, it is less likely to exercise the delegated authority arbitrarily.”).

¹⁰⁷ See *Whitman*, 531 US at 472–76.

¹⁰⁸ See *id.* at 472.

executing or applying the law.”¹⁰⁹ The Court added that it had “found an ‘intelligible principle’ in various statutes authorizing regulation in the ‘public interest.’”¹¹⁰ After the Court’s unanimous decision, it would be fair to say this of the nondelegation doctrine: dead again.

But the DC Circuit has yet to receive the coroner’s certificate. In an extraordinary decision in 2013, on which the Supreme Court recently granted certiorari, the lower court—with Judge Brown writing for the panel¹¹¹—invoked a version of the nondelegation doctrine to strike down an important federal statute. *Association of American Railroads v United States Department of Transportation*¹¹² involved a provision of the Passenger Rail Investment and Improvement Act of 2008¹¹³ (PRIIA), which was designed, among other things, to promote the interests of Amtrak, which Congress has long considered to be of central importance to the nation’s railroad system.¹¹⁴ Under federal law, railroads are required to make their tracks available for use by Amtrak.¹¹⁵ Under the Act, the Federal Railroad Administration (FRA) and Amtrak must jointly “develop new or improve existing metrics and minimum standards for measuring the performance and service quality of intercity passenger train operations.”¹¹⁶ In the event of disagreement between the FRA and Amtrak, either may petition the Surface Transportation Board, which can appoint an arbitrator to help the parties reach an agreement through binding arbitration.¹¹⁷ These metrics and standards matter because they help determine whether Amtrak, rather than another rail carrier, should be entitled to use the tracks.

¹⁰⁹ Id at 474–75, quoting *Mistretta v United States*, 488 US 361, 416 (1989) (Scalia dissenting).

¹¹⁰ *Whitman*, 531 US at 474.

¹¹¹ Judge Brown’s views about the “intelligible principle” test, and her distance from the mainstream, are best illustrated by her dissent in *Michigan Gambling Opposition v Kempthorne*, 525 F3d 23 (DC Cir 2008). She urged that the Indian Reorganization Act failed the “intelligible principle” test. Id at 35 (Brown dissenting). Eight justices of the Supreme Court later disagreed. See *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v Patchak*, 132 S Ct 2199, 2210–12 (2012). Thanks to Ron Levin for the citation.

¹¹² 721 F3d 666 (DC Cir 2013), cert granted, 134 S Ct 2865 (2014).

¹¹³ Pub L No 110-432, 122 Stat 4907, codified at 49 USC § 24101 et seq.

¹¹⁴ *American Railroads*, 721 F3d at 668–69.

¹¹⁵ Id at 669, citing 49 USC § 24308(a).

¹¹⁶ *American Railroads*, 721 F3d at 669, quoting PRIIA § 207(a), 112 Stat at 4916, codified at 49 USC § 24101 (note).

¹¹⁷ *American Railroads*, 721 F3d at 669, quoting PRIIA § 207(d), 112 Stat at 4917, codified at 49 USC § 24101 (note).

The problem in the case arose when the FRA, working together with Amtrak, issued metrics and standards to which the Association of American Railroads objected.¹¹⁸ As a standard nondelegation case, the outcome would be simple to resolve. The Act does not give the FRA anything like a blank check. In authorizing the agency to develop metrics and minimum standards, it provides a series of intelligible principles for the agency to consider.¹¹⁹ For the court, however, the key problem lay in the fact that the Act effectively delegated public power to Amtrak, which the court called a “private” organization.¹²⁰ The court noted that it was as if Congress had “given to General Motors the power to coauthor, alongside the Department of Transportation, regulations that will govern all automobile manufacturers.”¹²¹

In reaching its conclusion, the court broke a good deal of new doctrinal ground. First, it asserted that, even if Congress set out an intelligible principle, it could not delegate public power to private groups: “Even an intelligible principle cannot rescue a statute empowering private parties to wield regulatory authority.”¹²² Second, the court ruled that Amtrak is a private corporation,¹²³ notwithstanding several contrary indicators: Amtrak’s board of directors includes the secretary of transportation, seven other presidential appointees, and the president of Amtrak (who is appointed by the eight other board members); the federal government owns *all* 109 million shares of Amtrak’s preferred stock; and, without congressional largesse, Amtrak would face financial ruin.¹²⁴ In addition, the Supreme Court had itself ruled, without the slightest ambiguity, that Amtrak “is part of the Government for purposes of the First Amendment,”¹²⁵ and hence that Amtrak is a state actor at least for those constitutional purposes.

To escape the force of these points, the court emphasized what it took to be first principles. In its view, “delegating the government’s powers to private parties saps our political system

¹¹⁸ *American Railroads*, 721 F3d at 669–70.

¹¹⁹ See *id.* at 674 (“[I]f [Amtrak] is just one more government agency—then the regulatory power it wields under § 207 is of no constitutional moment.”).

¹²⁰ *Id.* at 668.

¹²¹ *Id.*

¹²² *American Railroads*, 721 F3d at 671.

¹²³ See *id.* at 677.

¹²⁴ *Id.* at 674.

¹²⁵ *Id.* at 676, quoting *Lebron v National Railroad Passenger Corp.*, 513 US 374, 400 (1995).

of democratic accountability,” and such delegations are “particularly perilous” in view of “the belief that disinterested government agencies ostensibly look to the public good, not private gain.”¹²⁶ Under the Act, Amtrak is given “a distinct competitive advantage” in the form of an ability to limit “the freight railroads’ exercise of their property rights over an essential resource.”¹²⁷ For this reason, the corporation might devise “metrics and standards that inure to its own financial benefit rather than the common good.”¹²⁸

Some of these abstractions have force, but it is hard to resist the conclusion that the court is engaging in a kind of free-form doctrine building, with a distinctive libertarian cast. Congress has undoubtedly made a judgment—indeed, a repeated series of judgments, over decades—that Amtrak is in the national interest, perhaps because Amtrak reduces congestion on the roads and in the air, perhaps because it creates external benefits of other kinds (such as reduction of air pollution), or perhaps because it has cultural benefits. In support of that fundamental judgment, Congress funds Amtrak, creates a special structure of government oversight for it, and also allows it to play a part in producing metrics and standards. Indeed, Congress made a deliberate, considered choice to build in an advantage for Amtrak, a priority over competitors. The court did not adequately describe—or perhaps simply found objectionable—the very point of the statutory scheme. It is not as though that statutory scheme was itself created by Amtrak; rather, it was created by “presumptively disinterested”¹²⁹ public officials, namely legislators, who believed that giving Amtrak a preferred legal position would create desirable incentives for enforcement of a scheme that those legislators found socially desirable.

In any event, and perhaps most fundamentally, the priority for Amtrak is hardly unbounded; Amtrak is constrained in multiple ways, and, under the Act, there is no grant of open-ended discretion to make law and policy. The Act specifies relevant factors, thus limiting any capacity for self-dealing;¹³⁰ judicial review is available both for consistency with law and for

¹²⁶ *American Railroads*, 721 F3d at 675.

¹²⁷ *Id.*

¹²⁸ *Id.* at 676.

¹²⁹ *Carter v Carter Coal Co*, 298 US 238, 311 (1936) (objecting to delegations to private persons and distinguishing them from delegations to “presumptively disinterested” public officials).

¹³⁰ PRIIA § 207(a), 122 Stat at 4916, codified at 49 USC § 24101 (note).

arbitrariness;¹³¹ the FRA must agree;¹³² in the face of disagreement, Amtrak must submit to arbitration.¹³³ The facts of *American Railroads* make clear that there was no disagreement between the FRA and Amtrak.¹³⁴

We should be able to accept the proposition that Congress cannot delegate *adjudicatory* authority to an interested party, at least if that adjudication directly affects protected interests in liberty or property. That proposition is entrenched in current doctrine—under the Due Process Clause of the Fifth Amendment,¹³⁵ not the nondelegation doctrine. Insofar as rulemaking is involved, the modern understanding is that whatever process Congress provides is due process, and the Due Process Clause drops out as a separate constraint¹³⁶ (as the DC Circuit seemed to misunderstand¹³⁷). We can appreciate the view that, in light of the risk of interest group power, a grant of rulemaking authority to private groups might create more-serious objections than an equivalent grant to a public agency. But that was not the situation in *American Railroads*. The court's decision is best seen as a new effort to reanimate a dead doctrine, an effort rooted not in existing rulings but in abstractions from one (controversial) reading of constitutional and political theory, evidently connected with the views that we traced in Part I.

The Supreme Court has a number of possible routes by which to reject the lower court's decision. It could, for example, conclude that Amtrak is a public agency for nondelegation purposes or otherwise emphasize the role of public institutions at multiple stages in the statutory scheme,¹³⁸ thus eliminating the need to offer a broad ruling on permissible grants of authority to

¹³¹ 5 USC § 706(2).

¹³² PRIIA § 207(a), 122 Stat at 4916, codified at 49 USC § 24101 (note).

¹³³ PRIIA § 207(d), 122 Stat at 4917, codified at 49 USC § 24101 (note).

¹³⁴ See *American Railroads*, 721 F3d at 669–70, 673.

¹³⁵ See *Tumey v Ohio*, 273 US 510, 523 (1927).

¹³⁶ See *Bi-Metallic Investment Co v State Board of Equalization*, 239 US 441, 445 (1915). *Carter Coal* suggested that any delegation of rulemaking power to a private actor—allowing it to participate in making rules that govern competitors—would necessarily violate due process principles. See *Carter Coal*, 298 US at 311 (ascribing this rule to “the very nature of things”). That suggestion, however, does not survive the many later cases that have upheld delegations of this sort. See, for example, *Sunshine Anthracite Coal Co v Adkins*, 310 US 381, 399 (1940); *United States v Rock Royal Co-operative, Inc.*, 307 US 533, 577–78 (1939); *Currin v Wallace*, 306 US 1, 15–17 (1939).

¹³⁷ See *American Railroads*, 721 F3d at 675.

¹³⁸ This is the principal submission of the United States. See Brief for the Petitioners, *Department of Transportation v Association of American Railroads*, No 13-1080, *16–18 (US filed Aug 14, 2014) (available on Westlaw at 2014 WL 4059775).

private groups. But its decision is an opportunity to bring home the message that the DC Circuit has repeatedly failed to hear: at least outside very extreme circumstances, invalidation on non-delegation grounds is not permissible in contemporary administrative law.

B. Commercial Speech and Disclosure

First Amendment cases are typically treated as part of constitutional rather than administrative law, and for good reason. The principal free speech doctrines grew out of cases that involved political dissent and that had nothing to do with administrative law as such.¹³⁹ But in the modern era, regulatory policy often involves speech, particularly efforts to regulate or compel disclosure.¹⁴⁰ It would be possible, of course, to deem such efforts to be arbitrary and capricious under the APA, or see them as invading the constitutionally protected property rights of regulated firms. But those two avenues are more costly for judges; in particular, as we will see, the DC Circuit's aggressive use of arbitrariness review of SEC (or "the Commission") actions has drawn increasing scrutiny.¹⁴¹ Thus, in some of the key cases, the Circuit has invoked principles that protect "commercial speech."¹⁴² And in so doing, it has imposed a kind of libertarian administrative law on regulators that are responding to unambiguous congressional mandates.

A key example involves graphic warnings on cigarette packages. Congress explicitly called on the FDA to require such warnings,¹⁴³ which the FDA imposed after an extensive rulemaking process.¹⁴⁴ In a decision conflating political speech and

¹³⁹ See, for example, *Brandenburg v Ohio*, 395 US 444, 448–49 (1969) (holding unconstitutional under the First Amendment a state statute that criminalized mere advocacy and assembly to advocate because the statute failed to distinguish mere advocacy from incitement to imminent lawless action).

¹⁴⁰ For a discussion, see generally Omri Ben-Shahar and Carl E. Schneider, *More Than You Wanted to Know: The Failure of Mandated Disclosure* (Princeton 2014).

¹⁴¹ See Part II.D.

¹⁴² See, for example, *R.J. Reynolds Tobacco Co v Food and Drug Administration*, 696 F3d 1205, 1222 (DC Cir 2012); *National Association of Manufacturers v Securities and Exchange Commission*, 748 F3d 359, 372 (DC Cir 2014) ("Conflict Minerals Case"). Professor Sunstein worked on the underlying regulation while serving as the administrator of the Office of Information and Regulatory Affairs during the first term of the Obama administration.

¹⁴³ Family Smoking Prevention and Tobacco Control Act § 201(a), Pub L No 111-31, 123 Stat 1776, 1842–45 (2009), codified at 15 USC § 1333.

¹⁴⁴ Food and Drug Administration, Required Warnings for Cigarette Packages and Advertisements, 76 Fed Reg 36628 (2011).

commercial advertising,¹⁴⁵ the court struck down those warnings. Judge Brown, writing for the court, began her opinion as if it were protecting political dissenters: “Both the right to speak and the right to refrain from speaking are ‘complementary components of the broader concept of individual freedom of mind’ protected by the First Amendment.”¹⁴⁶ Carefully navigating its way through the precedents, the court said that the “inflammatory images . . . cannot rationally be viewed as pure attempts to convey information to consumers. They are unabashed attempts to evoke emotion (and perhaps embarrassment) and browbeat consumers into quitting.”¹⁴⁷

Remarkably, the court invalidated the warnings on the ground that the “FDA has not provided a shred of evidence—much less the ‘substantial evidence’ required by the APA—showing that the graphic warnings will ‘directly advance’ its interest in reducing the number of Americans who smoke.”¹⁴⁸ Offering its own view of the record—a view inconsistent with that of many experts who had studied the matter in detail¹⁴⁹—the court struck down the rule because the FDA offered “no evidence showing that such warnings have *directly caused* a material decrease in smoking rates in any of the countries that now require them.”¹⁵⁰ The FDA’s evidence, which largely consisted of studies showing reductions in smoking after graphic warnings were required in Canada, did involve inferences, rather than a randomized controlled trial.¹⁵¹ But no such trial was available to the FDA, and the inferences were very much within the administrators’ competence. As we will see when we discuss arbitrariness review—and the “commercial speech” cases are to a large degree arbitrariness review under a more impressive constitutional rubric—the Supreme Court has recently, and pointedly, warned lower courts not to interfere with agencies’

¹⁴⁵ See *Reynolds Tobacco*, 696 F3d at 1211.

¹⁴⁶ *Id.*, quoting *Wooley v Maynard*, 430 US 705, 714 (1977).

¹⁴⁷ *Reynolds Tobacco*, 696 F3d at 1216–17.

¹⁴⁸ *Id.* at 1219.

¹⁴⁹ For a valuable discussion, see generally Christine Jolls, *Product Warnings, Debiasing, and Free Speech: The Case of Tobacco Regulation*, 169 J Inst and Theoretical Econ 53 (2013). See also *Reynolds Tobacco*, 696 F3d at 1225 (Rogers dissenting), quoting 76 Fed Reg at 36696–97 (cited in note 144) (explaining that the FDA’s reliance on graphic warnings is based on findings “well-established in the scientific literature”).

¹⁵⁰ *Reynolds Tobacco*, 696 F3d at 1219.

¹⁵¹ See *id.* at 1219–20.

prerogative to draw unprovable causal and empirical inferences under conditions of uncertainty.¹⁵²

In a similar, but even more aggressively libertarian, ruling, the court struck down an SEC regulation¹⁵³ mandated—not merely authorized—by the Dodd-Frank Wall Street Reform and Consumer Protection Act¹⁵⁴ (“Dodd-Frank”), which required disclosure of the origin of “conflict minerals.”¹⁵⁵ The specific goal of the statute is to require disclosure of materials that originate from the Democratic Republic of the Congo.¹⁵⁶ The National Association of Manufacturers challenged the requirement that an issuer disclose whether its products are “DRC conflict free” in the report that it files with the SEC and post the same on its website.¹⁵⁷ Burdens on commercial speech are ordinarily given intermediate scrutiny.¹⁵⁸ In striking down the implementing regulation, the court seemed to apply something close to strict scrutiny, even though the disclosure requirements involved mere matters of fact, and nothing graphic. The court’s chief objection was that the SEC had not provided “evidence that less restrictive means would fail.”¹⁵⁹

What the court sought was not “the ‘conflict free’ description the statute and rule require,” but instead a looser legal regime in which “issuers could use their own language to describe their products, or the government could compile its own list of products that it believes are affiliated with the Congo war, based on information the issuers submit to the Commission.”¹⁶⁰ Under one version of this regime, the SEC would not regulate speech but would compile its own information about affiliated products and make the resulting list available to consumers and investors. In the court’s judgment, this approach could be equally effective, and indeed, “a centralized list compiled by the Commission in one place may even be more convenient or trustworthy to

¹⁵² See Part II.D.

¹⁵³ See generally Securities and Exchange Commission, Conflict Minerals, 77 Fed Reg 56274 (2012), codified at 17 CFR §§ 240, 249b.

¹⁵⁴ Pub L No 111-203, 124 Stat 1376 (2010).

¹⁵⁵ *Conflict Minerals Case*, 748 F3d at 363. See also Dodd-Frank § 1502, 124 Stat at 2213–18, codified at 15 USC § 78m (note).

¹⁵⁶ See *Conflict Minerals Case*, 748 F3d at 363–64.

¹⁵⁷ *Id.* at 370.

¹⁵⁸ See *Central Hudson Gas and Electric Corp v Public Service Commission of New York*, 447 US 557, 563 (1980).

¹⁵⁹ *Conflict Minerals Case*, 748 F3d at 372.

¹⁶⁰ *Id.*

investors and consumers.”¹⁶¹ What the court required was “evidence” that the alternative would not work.¹⁶² In the process, the court objected to the regulation on the ground that the “label ‘conflict free’ is a metaphor that conveys moral responsibility for the Congo war. It requires an issuer to tell consumers that its products are ethically tainted, even if they only indirectly finance armed groups.”¹⁶³

In general, it is certainly reasonable to ask for evidence, and intermediate scrutiny can be read to require it. But in this context, what would such evidence look like? The scheme of regulation involved a novel factual setting rife with uncertainty,¹⁶⁴ in which a demand for proof necessarily dooms the regulation. Under such conditions, Congress thought that it would be appropriate—and simplest and most effective—to require companies to make the relevant disclosure, perhaps on the entirely reasonable theory that such disclosure would be both highly credible and easily accessible, while government disclosure might not be. The intrusion on the companies’ legitimate interests would be minimal¹⁶⁵—at least as minimal as in the context of nongraphic, and constitutionally acceptable, warnings on cigarette packages. On the court’s own logic, it would not be much of a stretch to suggest that those very warnings violate the First Amendment.

These are First Amendment cases, to be sure, but they belong squarely in the world of (libertarian) administrative law because they raise grave questions about compulsory disclosure, which is an increasingly popular (and minimally intrusive) regulatory tool.¹⁶⁶ One of the ironies of these decisions is that they suggest that the court will use constitutional artillery against disclosure requirements while resorting to more-modest subconstitutional principles to strike down mandates and bans. There is no legitimate reason for courts to embark on a kind of constitutional war against a regulatory tool that is modest, promising,

¹⁶¹ Id at 373.

¹⁶² Id (“The Commission has failed to explain why (much less provide evidence that) [these] intuitive alternatives to regulating speech would be any less effective.”).

¹⁶³ *Conflict Minerals Case*, 748 F3d at 371.

¹⁶⁴ Dodd-Frank § 1502(a), 124 Stat at 2213, codified at 15 USC § 78m (note) (characterizing the “emergency humanitarian situation” in the Congo as one of “extreme levels of violence”).

¹⁶⁵ See *Conflict Minerals Case*, 748 F3d at 373.

¹⁶⁶ See, for example, Ben-Shahar and Schneider, *More Than You Wanted to Know* at 4 (cited in note 140) (describing mandated disclosure as “the principal regulatory answer to some of the principal policy questions of recent decades” and listing several such requirements).

and characteristic of a wide range of congressional programs. In any case, the libertarian underpinnings of the relevant decisions are unmistakable. These “free speech” decisions use a form of aggressive review of administrators’ causal and evidentiary judgments. Such an approach is, plausibly, a substitute for grounds of review—such as substantive due process protection of property rights, or stringent arbitrariness review under the APA—that are either off limits in the current constitutional regime or else far more difficult to justify, as we will discuss when we examine the DC Circuit’s recent arbitrariness jurisprudence.¹⁶⁷

A needed correction seems to come from the court’s en banc decision in *American Meat Institute v United States Department of Agriculture*.¹⁶⁸ In that case, the court adopted a lower standard of review for disclosure mandates challenged on free speech grounds than the standard used in the conflict-minerals decision.¹⁶⁹ Indeed, the en banc court specifically mentioned and overruled that decision, at least insofar as it adopted a more demanding standard of review.¹⁷⁰ Unfortunately, the holding itself appears to remain intact, and the graphic-warnings decision has not yet been rethought.

C. Interpretive Rules

The APA recognizes the existence of two kinds of rules: legislative rules, which are generally a product of formal (“on the record”) or informal (not “on the record”) rulemaking processes; and interpretive rules, which agencies may issue without invoking such processes.¹⁷¹ If an agency wishes to publish an interpretive rule tomorrow, offering its understanding of what its organic statute or its own prior legislative rule means, it is entitled to do so (although there is a separate question whether that rule will receive the deference accorded to legislative rules under *Chevron USA, Inc v Natural Resources Defense Council, Inc*,¹⁷²

¹⁶⁷ See Part II.D.

¹⁶⁸ 760 F3d 18 (DC Cir 2014) (en banc).

¹⁶⁹ *Id* at 21–23.

¹⁷⁰ *Id* at 22–23.

¹⁷¹ See 5 USC § 553. When “good cause” or certain other exceptions are present, agencies may issue legislative rules without formal or informal rulemaking process. See 5 USC § 553(a)–(b).

¹⁷² 467 US 837 (1984).

some other kind of deference, or no deference at all).¹⁷³ It is agreed that agencies cannot change legislative rules simply by issuing interpretive rules; any such change must be preceded by some kind of process (typically, notice and comment).¹⁷⁴ On these questions, the APA is straightforward.

But what if an agency rescinds an interpretive rule and replaces it with a new interpretive rule? Suppose that the Department of Labor issues a legislative rule at Time 1 (say, 1999) and then issues an interpretive rule at Time 2 (say, 2008) to clarify its understanding of its own prior legislative rule. Then, at Time 3 (say, 2015), the Department rescinds the old interpretation and issues a new interpretive rule, perhaps reflecting changed circumstances, a new assessment of relevant facts, or the values of a new administration. Must the new interpretive rule be preceded by some kind of APA process?

The correct answer is straightforwardly “no.” The APA does not require any such process. It authorizes agencies to issue interpretive rules immediately and without notice and comment or any other kind of process.¹⁷⁵ It is hard to imagine more explicit text than § 553(b)(3), which states that “this subsection”—the one requiring notice-and-comment rulemaking—“does not apply [] to interpretative rules.”¹⁷⁶ If courts required notice and comment for interpretive rules that revise previous interpretive rules, they would impose a procedural requirement beyond those contained in the APA—a clear violation of the restriction explicitly laid down in *Vermont Yankee*.

Nonetheless, the DC Circuit has spoken unambiguously: agencies must use notice-and-comment procedures in order to change interpretive rules that construe the agency’s own prior legislative rules, at least so long as the agency previously took a

¹⁷³ See *Auer v Robbins*, 519 US 452, 461 (1997), quoting *Robertson v Methow Valley Citizens Council*, 490 US 332, 359 (1989) (holding that an interpretive rule construing the agency’s own regulations is “controlling unless plainly erroneous or inconsistent with the regulation”); *Gonzales v Oregon*, 546 US 243, 268 (2006) (holding that, when an interpretive rule construes a regulation that merely restates the terms of a statute and was not promulgated in exercise of congressionally delegated authority, the rule is entitled to *Skidmore* deference).

¹⁷⁴ See, for example, *Catholic Health Initiatives v Sebelius*, 617 F3d 490, 494 (DC Cir 2010) (“If the rule cannot fairly be seen as interpreting a statute or a regulation, and if . . . it is enforced, ‘the rule is not an interpretive rule exempt from notice-and-comment rulemaking.’”).

¹⁷⁵ 5 USC § 553(b)(3)(A).

¹⁷⁶ 5 USC § 553(b)(3)(A).

definitive position.¹⁷⁷ In *Paralyzed Veterans of America v D.C. Arena LP*,¹⁷⁸ the court concluded that, so long as the original interpretive rule was “authoritatively adopted,”¹⁷⁹ the agency could not change it without a full notice-and-comment process.¹⁸⁰ The court squarely rejected the government’s argument that “an agency is completely free to change its interpretation of an ambiguous regulation so long as the regulation reasonably will bear the second interpretation.”¹⁸¹

The DC Circuit has asserted this basic principle governing interpretive rules in a series of cases and, after a brief wobble, actually reaffirmed and strengthened the principle in an important recent decision. The wobble occurred in 2009, when the court gave an apparent signal that it would at least qualify the principle, suggesting the possibility that those who would invoke *Paralyzed Veterans* would have to show that significant reliance interests in the agency’s previous interpretation were at stake.¹⁸² With this signal, the court indicated that a showing of reliance interests might amount to a separate requirement, independent of the requirement that the original interpretive rule be definitive.¹⁸³ But in 2013, in *Mortgage Bankers Association v Harris*,¹⁸⁴

¹⁷⁷ The decisions seem to say, in dicta, that the logic does not extend to interpretive rules that construe the underlying statute itself rather than a prior legislative rule. See, for example, *Alaska Professional Hunters Association, Inc v Federal Aviation Administration*, 177 F3d 1030, 1034 (DC Cir 1999) (“[A]n agency has less leeway in its choice of the method of changing its interpretation of its regulations than in altering its construction of a statute.”). It is not clear, however, why the logic should stop short in this manner, and the issue has not been squarely addressed.

¹⁷⁸ 117 F3d 579 (DC Cir 1997).

¹⁷⁹ *Id.* at 587.

¹⁸⁰ See *id.* at 586 (“Once an agency gives its regulation an interpretation, it can only change that interpretation as it would formally modify the regulation itself: through the process of notice and comment rulemaking.”).

¹⁸¹ *Id.* The court went on to uphold the interpretation because it was not inconsistent with any prior interpretation. *Id.* at 587. Although on one view that makes the announced rule dictum, on another view it does not; and in any event the court has applied the rule in a number of later cases. See, for example, *Alaska Professional Hunters*, 177 F3d at 1033–36.

¹⁸² See *MetWest Inc v Secretary of Labor*, 560 F3d 506, 511 & n 4 (DC Cir 2009).

¹⁸³ See *id.* at 511 (“A fundamental rationale of *Alaska Professional Hunters* was the affected parties’ substantial and justifiable reliance on a well-established agency interpretation.”); *id.* at 511 n 4 (“This is a crucial part of the analysis. To ignore it is to misunderstand *Alaska Professional Hunters*.”).

¹⁸⁴ 720 F3d 966 (DC Cir 2013), cert granted, *Perez v Mortgage Bankers Association*, 134 S Ct 2820 (2014), *Nickols v Mortgage Bankers Association*, 134 S Ct 2820 (2014). One of us (Professor Vermeule) is a signatory to an amicus brief on behalf of seventy-two administrative law scholars in support of the certiorari petition in the case. See generally Amicus Curiae Brief of Administrative Law Scholars in Support of the Petitions, *Perez v*

the court unambiguously reaffirmed the *Paralyzed Veterans* principle, ruling that definitiveness is the sole requirement and that reliance is relevant *only* insofar as it might inform the question of definitiveness.¹⁸⁵

Mortgage Bankers invalidated an interpretive rule issued during the Obama administration that would have expressed a more expansive view of the coverage of the Fair Labor Standards Act¹⁸⁶ (FLSA) than had been announced by the Bush administration.¹⁸⁷ The court stated the rule plainly: “Once a court has classified an agency interpretation as such, it cannot be significantly revised without notice and comment rulemaking.”¹⁸⁸ And in explaining the practical effect of that rule, the court said that it “may very well serve as a prophylactic that discourages agencies from attempting to circumvent notice and comment requirements in the first instance.”¹⁸⁹ Similarly, in an earlier case in the sequence, the court said that “[w]hen an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish without notice and comment.”¹⁹⁰

In light of standard legal sources, the court’s approach is exceedingly difficult to defend. It is question begging to say that in such situations agencies are attempting to “circumvent” notice-and-comment requirements; the question is whether there *are* such requirements when agencies change their interpretive rules, and the answer is that there are not. The court did refer to “the belief that a definitive interpretation is so closely intertwined with the regulation that a significant change to the former constitutes a repeal or amendment of the latter.”¹⁹¹ But that belief is wrong. An interpretation issued at Time 1 can be definitive, in the (limited) sense that it certainly reflects the agency’s current considered view, while also lacking the force of law (as

Mortgage Bankers Association, Nickols v Mortgage Bankers Association, Nos 13-1041, 13-1052 (US filed Mar 26, 2014) (available on Westlaw at 2014 WL 1275189).

¹⁸⁵ See *Mortgage Bankers*, 720 F3d at 970 (“[R]eliance is but one factor courts must consider in assessing whether an agency interpretation qualifies as definitive or authoritative.”).

¹⁸⁶ Fair Labor Standards Act of 1938, 52 Stat 1060, codified as amended at 29 USC § 201 et seq.

¹⁸⁷ See *Mortgage Bankers*, 720 F3d at 968.

¹⁸⁸ *Id* at 971.

¹⁸⁹ *Id* at 969 n 4.

¹⁹⁰ *Alaska Professional Hunters*, 177 F3d at 1034.

¹⁹¹ *Mortgage Bankers*, 720 F3d at 969 n 3 (emphasis omitted).

interpretive rules do) and without becoming merged or intertwined with the underlying regulation—a mystical notion in any event. Likewise with the notion that the revised interpretation “in effect” amends the underlying legislative rule—a notion that collapses the APA’s clear distinction between rulemaking and rule interpreting.¹⁹²

There is an analogy here to the *Chevron* doctrine, in which a recurring question has been whether agencies’ initial interpretations of statutes are frozen, or instead may be changed by subsequent interpretations and, if so, by what procedure.¹⁹³ In that setting, recent decisions of the Court have emphatically settled the issue: new agency interpretations are not in any way disfavored, and no extra burdens of justification are placed on those interpretations. In *National Cable and Telecommunications Association v Brand X Internet Services*,¹⁹⁴ the Court held not only that agencies may freely change their interpretations as far as *Chevron* is concerned, but also that those new interpretations will oust prior contrary judicial interpretations, so long as the relevant statute contains a gap or ambiguity.¹⁹⁵ And in *Federal Communications Commission v Fox Television Stations, Inc.*,¹⁹⁶ the Court rejected the notion that arbitrariness review requires agencies to offer additional justifications for a change of interpretation over and above the baseline obligation to justify the new interpretation itself.¹⁹⁷ The doctrinal context of *Paralyzed Veterans* and *Mortgage Bankers* is slightly different, of course, but the larger point is that the DC Circuit’s law-freezing

¹⁹² In *Alaska Professional Hunters*, the panel seemed to argue that, because the APA’s definition of “rulemaking” includes agency action that “modifies” a rule, see 5 USC § 551(5), it follows that, “[w]hen an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish without notice and comment.” *Alaska Professional Hunters*, 177 F3d at 1034. This too is question begging, however; the court is assuming the conclusion by saying that the revised interpretation is in effect an amendment. As far as the APA is concerned, it is a revised interpretation and not an amendment at all. The court seems to be confusing two ideas: (1) an interpretation is “definitive” in the sense that the agency is committed to it, and (2) an interpretation is “definitive” in the sense that it has the force of law. An interpretive rule can lawfully be definitive in the former sense without becoming a legislative rule (which must be preceded by notice and comment).

¹⁹³ See *Chevron*, 467 US at 863–64.

¹⁹⁴ 545 US 967 (2005).

¹⁹⁵ *Id.* at 982.

¹⁹⁶ 556 US 502 (2009).

¹⁹⁷ See *id.* at 514.

approach is inconsistent with the underlying premises of the Court's emphatic recent pronouncements.

In this light, the *Paralyzed Veterans* rule is best seen as a form of federal common law that goes beyond, or is even contrary to, the Supreme Court's decisions—as the Court will have an opportunity to make perfectly clear when it takes up *Mortgage Bankers* next Term. The rule is a throwback to the era before *Vermont Yankee*, in which lower courts (especially the DC Circuit) developed constraints on agency action that had little or nothing to do with the APA and far more to do with the courts' own judgments about appropriate restrictions.

What underlies that approach? What is motivating it? We cannot say that the answer is necessarily libertarian at a conceptual level. In the abstract, the *Paralyzed Veterans* rule has a degree of neutrality. If, for example, the Clinton administration issued an expansive interpretation of the Fair Labor Standards Act, the Bush administration would be forbidden from changing it without notice and comment. But there is nonetheless a clear connection with libertarian principles. Largely out of solicitude for the reliance interests of regulated entities, which often have the most at stake when interpretive rules are changed, the court seems to be attempting to promote predictability and consistency on the part of agencies. The court is imposing on agencies a kind of stare decisis principle, even for their own nonbinding interpretations.

The idea seems to be that, because agencies exercise discretionary power and are vulnerable to the power of well-organized private groups (the public-choice problem), agency interpretations must be taken as binding, at least on agencies themselves, until they are changed through notice-and-comment procedures. Though reliance by the regulated class is not an independent requirement, it does seem to drive the court's reasoning, as indicated by its suggestion that “regulated entities are unlikely to substantially—and often cannot be said to justifiably—rely on agency pronouncements lacking some or all the hallmarks of a definitive interpretation,” and, hence, “significant reliance functions as a rough proxy for definitiveness.”¹⁹⁸

As a matter of doctrine, this reasoning is a bit of a mess. The court is conflating the issue of reliance on interpretive rules with the separate question whether the rule is “definitive.” The

¹⁹⁸ *Mortgage Bankers*, 720 F3d at 970.

APA does require so-called legislative rules—which, if valid, have the force of law and thus bind both the agency and all the world—to go through notice-and-comment procedures.¹⁹⁹ But it expressly exempts “interpretative” rules from this requirement,²⁰⁰ and any rule that counts as interpretive may be changed without notice and comment as far as the APA is concerned. There is an elaborate body of law that sorts legislative rules from interpretive rules,²⁰¹ but that body of law was agreed by all concerned to be irrelevant in these cases; the court’s position is *not* that the relevant rule was actually legislative.²⁰² Rather, the court’s position is that, even though the rule is concededly interpretive, it may be changed only through notice-and-comment procedures—an additional, judge-made requirement that the APA nowhere contains.

Furthermore, the court failed to recognize that reliance and its reasonableness are at least partly endogenous—that is, products of the legal rules themselves. Knowing that interpretive rules need not be changed by notice-and-comment procedures, regulated entities should discount their reliance accordingly. If they do not, it is unclear why their unjustified reliance ought to constrain agencies’ legal choices. What counts as justified reliance is ultimately itself an endogenous product of the law—at least in part, rather than something that just happens extralegally, especially when the regulated parties are legally sophisticated firms.

The most promising justification for the court’s conclusion might be that it is arbitrary and capricious to change a reliance-inducing interpretive rule without full notice and comment. Perhaps agencies act without rational foundation when they casually, without rigorous process, change interpretations on

¹⁹⁹ 5 USC § 553(b)–(c).

²⁰⁰ 5 USC § 553(b)(3)(A).

²⁰¹ See, for example, *American Mining Congress v Mine Safety and Health Administration*, 995 F2d 1106, 1112 (DC Cir 1993) (establishing a four-part test for distinguishing legislative from interpretative rules); *American Hospital Association v Bowen*, 834 F2d 1037, 1045–46 (DC Cir 1987) (noting that the difference is a “hazy continuum” but suggesting that it turns on whether the agency is “adding substantive content of its own”); *Jerri’s Ceramic Arts, Inc v Consumer Product Safety Commission*, 874 F2d 205, 208 (4th Cir 1989) (“[T]ests distinguishing legislative and interpretive rule-making are largely concerned with intent and effect.”); *Hoctor v United States Department of Agriculture*, 82 F3d 165, 167 (7th Cir 1996).

²⁰² See, for example, *Paralyzed Veterans*, 117 F3d at 587–88 (characterizing the analysis of whether the rule was a legislative rule as “independent” of the analysis of whether the change in interpretation required notice and comment).

which regulated entities have (justifiably?) relied. But there are two difficulties with this attempt to justify the court's approach, even apart from the issue of the endogeneity of reliance. One is that the court nowhere articulates an arbitrariness rationale for its rule—perhaps because such a rationale implies that agencies need only give an adequate reason for refusing to use notice and comment when changing an interpretive rule. The court, of course, wants to impose a mandatory procedural *requirement* of notice and comment, not a mere obligation to give reasons for the agency's procedural choices.

Second, and no doubt related, agencies will often have perfectly valid reasons to decline to use notice and comment when changing interpretive rules. Precisely because those rules are not legally binding, agencies may see the benefits of additional procedure as low, while the time and cost of a notice-and-comment proceeding are frequently nontrivial. While the adequacy of these agency justifications cannot be evaluated in the abstract, they are quite likely to be sufficient in many cases.

The APA does not require agencies to use notice and comment to alter interpretive rules, whether or not they are definitive (and whether or not they induce reliance). Nor could the court possibly say that nondefinitive interpretive rules could be changed only through notice-and-comment procedures. Any such rules should count as lawful interpretive rules or perhaps as general policy statements, lacking any kind of binding effect. No one argues that general policy statements cannot be altered in the absence of notice and comment. The court must therefore be insisting that regulated entities can substantially and justifiably rely on definitive interpretations, even if those interpretations lack the force of law. But if this is true, it is only because the court has so held, in a bootstrapped doctrinal development that can be fairly described as lacking legal foundations.

D. Arbitrariness Review

In the era of progressive administrative law that pre-dated, and provoked, *Vermont Yankee*, certain agencies were highly vulnerable. Chief among these was the Nuclear Regulatory Commission (NRC) (née the Atomic Energy Commission), which became a punching bag for judges on the DC Circuit concerned about the health and environmental risks of nuclear power and convinced that the congressionally specified procedures for NRC

rulemaking offered inadequate protection from those risks.²⁰³ The Supreme Court's rebuke to the DC Circuit in *Vermont Yankee* made both a general point that judges lack authority to require agencies to employ procedures over and above the procedures mandated by constitutional or statutory command²⁰⁴ and a more specific point: the DC Circuit's systematically skeptical stance toward nuclear power was unacceptable in light of Congress's consistent policy and contrary instructions.²⁰⁵

Today's disfavored agency is the SEC. A series of recent decisions from the DC Circuit,²⁰⁶ culminating in *Business Roundtable v Securities and Exchange Commission*,²⁰⁷ suggests that the SEC ought not to be able to institute new regulation of securities markets and corporate affairs unless the Commission either provides a full, quantified cost-benefit analysis demonstrating that the regulation is net beneficial or else explains why quantification is impossible.²⁰⁸ Moreover, the court has questioned whether the SEC may regulate in the face of "mixed empirical evidence" about the benefits of regulation.²⁰⁹ To be sure, the cases are not uniform. A recent decision, involving not the SEC but the Commodity Futures Trading Commission (CFTC), seemingly reins in the burgeoning case law a bit,²¹⁰ perhaps in reaction to the widespread criticism that the court has received for *Business Roundtable*.²¹¹ But the decisions involving the NRC

²⁰³ See, for example, *Natural Resources Defense Council, Inc v Nuclear Regulatory Commission*, 547 F2d 633, 653 (DC Cir 1976), revd, *Vermont Yankee*, 435 US 519.

²⁰⁴ See *Vermont Yankee*, 435 US at 524.

²⁰⁵ See *id.* at 558 ("The fundamental policy questions appropriately resolved in Congress and in the state legislatures are *not* subject to reexamination in the federal courts under the guise of judicial review of agency action.")

²⁰⁶ See generally, for example, *American Equity Investment Life Insurance Co v Securities and Exchange Commission*, 613 F3d 166 (DC Cir 2010); *Chamber of Commerce of the United States v Securities and Exchange Commission*, 412 F3d 133 (DC Cir 2005). See also John C. Coates IV, *Cost-Benefit Analysis of Financial Regulation: Case Studies and Implications* *3 (European Corporate Governance Institute, Law Working Paper No 234/2014), archived at <http://perma.cc/QE92-6TJ4>.

²⁰⁷ 647 F3d 1144 (DC Cir 2011).

²⁰⁸ See *id.* at 1148–49.

²⁰⁹ *Id.* at 1151 (quotation marks omitted).

²¹⁰ See *Investment Co Institute v Commodity Futures Trading Commission*, 720 F3d 370, 377–78 (DC Cir 2013).

²¹¹ See, for example, Grant M. Hayden and Matthew T. Bodie, *The Bizarre Law and Economics of Business Roundtable v. SEC*, 38 J Corp L 101, 102 (2012) (criticizing *Business Roundtable* as a judicial "misapplication of law and economics principles"); Case Comment, *DC Circuit Finds SEC Proxy Access Rule Arbitrary and Capricious for Inadequate Economic Analysis*, 125 Harv L Rev 1088, 1095 (2012) (criticizing *Business Roundtable* as "impos[ing] unattainable standards that bar agency action"); Bruce Kraus and Connor Raso, *Rational Boundaries for SEC Cost-Benefit Analysis*, 30 Yale J Reg 289,

were hardly uniform either,²¹² and, if anything, the SEC may well have lost cases more consistently than did the NRC. Indeed, then-Professor Antonin Scalia, writing in the late 1970s, suggested that the DC Circuit had tacked back and forth in its NRC decisions, delivering mixed results and ambiguous rationales, with the effect and possible intention of presenting a smaller target for intervention by the Supreme Court.²¹³

The relevant line of decisions began, at the latest, with *Chamber of Commerce v Securities and Exchange Commission*²¹⁴ in 2005. The SEC required that, “in order to engage in certain transactions otherwise prohibited by the [Investment Company Act], an investment company—commonly referred to as a mutual fund—must have a board (1) with no less than 75% independent directors and (2) an independent chairman.”²¹⁵ The panel—in an opinion by Judge Ginsburg, whose views on the “Constitution in exile” we discussed earlier,²¹⁶ and who would later author *Business Roundtable*—invalidated the regulation on the ground that the agency had declared certain costs unquantifiable and therefore had failed adequately to consider them.²¹⁷ The agency had discussed the costs, explained the attendant uncertainty, and stated that it had no reliable basis for estimating the costs quantitatively but decided to proceed on the basis of an overall judgment that the regulation would do more good than harm.²¹⁸

The panel, in an ambiguous discussion, seemed to suggest that the agency had a statutory duty to make “tough choices” by “hazard[ing] a guess”²¹⁹ and “do[ing] what it c[ould].”²²⁰ This

293 (2013) (calling *Business Roundtable*'s criticism of the SEC's empirical economic analysis “unfounded”).

²¹² Compare, for example, *Citizens for Safe Power, Inc v Nuclear Regulatory Commission*, 524 F2d 1291, 1301 (DC Cir 1975) (upholding the NRC's issuance of an operating license for a nuclear plant and not requiring the agency to implement additional procedures), with *Natural Resources Defense Council v Nuclear Regulatory Commission*, 547 F2d at 653 (reversing the NRC's issuance of an operating license and requiring the agency to implement additional procedures).

²¹³ See Scalia, 1978 S Ct Rev at 372–75 (cited in note 2) (“The pattern of dicta, alternate holdings, and confused holdings out of which the D.C. Circuit's principle of APA hybrid rulemaking so clearly and authoritatively emerged had the effect, if not the purpose, of assuring compliance below while avoiding accountability above.”).

²¹⁴ 412 F3d 133 (DC Cir 2005).

²¹⁵ Id at 136.

²¹⁶ See Part I.B.

²¹⁷ See *Chamber of Commerce*, 412 F3d at 143–44.

²¹⁸ See id at 142–44.

²¹⁹ Id at 143, quoting *Public Citizen v Federal Motor Carrier Safety Administration*, 374 F3d 1209, 1221 (DC Cir 2004).

²²⁰ *Chamber of Commerce*, 412 F3d at 144.

seemed to require a quantified guesstimate, insofar as feasible.²²¹ The legal basis for this judicially imposed requirement, however, was left unstated. As we will see shortly, *Chamber of Commerce v Securities and Exchange Commission* was a first step toward the obligation eventually imposed, in a more general form, by *Business Roundtable*—a presumptive agency obligation to quantify costs and benefits insofar as possible.

Also aggressive, but with somewhat different concerns, was the decision in *American Equity Investment Life Insurance Co v Securities and Exchange Commission*,²²² decided in 2010 and written by Judge Sentelle. The panel invalidated the SEC's attempt to define an "annuity contract" for purposes of the federal securities laws in a way that extended the protections of those laws; the panel reasoned that the agency had failed adequately to consider the effects on "efficiency, competition, and capital formation."²²³ The panel's principal rationale, as pertinent here, was that the SEC had failed to consider whether there were sufficient protections for investors under the extant state-law regime and had thus failed to show that new regulation was necessary.²²⁴ The relevant statutes, however, said nothing to suggest that the SEC had to consider whether—assuming that the regulation was otherwise justified in light of "efficiency" and "competition"—state law was already sufficient.²²⁵ The panel injected a note of federalism into statutes that had seemed to have other concerns altogether.

Business Roundtable, decided in 2011, went farther than any of its predecessors by imposing a presumptive obligation to perform quantified cost-benefit analysis.²²⁶ The case involved the question of "proxy access" in corporate-shareholder voting—whether the proxy materials sent to shareholder-voters by publicly traded firms must include nominees of the shareholders, or whether they may instead be confined to the slate of nominees

²²¹ See Coates, *Cost-Benefit Analysis of Financial Regulation* at *24–26 (cited in note 206).

²²² 613 F3d 166 (DC Cir 2010).

²²³ Id at 167–68.

²²⁴ See id at 178–79.

²²⁵ The statute that the court relied on to strike down the SEC's rule requires the SEC to consider "whether the action will promote efficiency, competition, and capital formation" but makes no mention of existing state law. See id at 177, citing 15 USC § 77b(b).

²²⁶ One of us is highly sympathetic to this decision. See generally Cass R. Sunstein, *Valuing Life: A Plea for Disaggregation*, 54 Duke L J 385 (2004).

designated by the incumbent directors.²²⁷ In a 2009 rulemaking, the SEC elected to require shareholder proxy access and accompanied its decision with a lengthy cost-benefit analysis that considered effects on efficiency, competition, and capital formation.²²⁸ Not all elements of the analysis were quantified, however; the SEC clearly noted that some of those elements were uncertain, in the sense that available information did not suffice to conduct a quantified cost-benefit analysis.²²⁹ As to those issues, the SEC simply discussed the relevant considerations and resolved the issues through an exercise of expert judgment about the balance of advantages. It is worth quoting a specimen of the SEC's own words, which do not appear in the *Business Roundtable* opinion:

We also recognize the possibility that certain quantifiable benefits for shareholders, such as a nominating shareholder's or group's savings in the direct costs of printing and mailing proxy materials, may be less than the quantifiable costs for a company subject to the new rules. We note, however, that *the benefits of the new rules are not limited to those that are quantifiable (such as the direct savings in printing and mailing costs) and instead include benefits that are not as easily quantifiable (such as the possibility of greater shareholder participation and communication in the director nomination process), as discussed below. We believe that these benefits, collectively, justify the costs of the new rules.*²³⁰

Along the way, the SEC discussed the state of the empirical evidence, examining dozens of studies in peer-reviewed journals of economics and finance.²³¹ It concluded that the evidence was mixed, that a number of the studies had methodological flaws,

²²⁷ See *Business Roundtable*, 647 F3d at 1146–48.

²²⁸ See Securities and Exchange Commission, Facilitating Shareholder Director Nominations, 74 Fed Reg 29024 (2009) (proposed rule). For the final rule, see Securities and Exchange Commission, Facilitating Shareholder Director Nominations, 75 Fed Reg 56668 (2010).

²²⁹ See *Business Roundtable*, 647 F3d at 1149, citing 75 Fed Reg at 56761 (cited in note 228).

²³⁰ 75 Fed Reg at 56755 (cited in note 228) (emphasis added).

²³¹ See 75 Fed Reg at 56753–71 (cited in note 228) (discussing the agency's cost-benefit analysis). See also Final Brief of the Securities and Exchange Commission, Respondent, *Business Roundtable v Securities and Exchange Commission*, No 10-1305, *13 (DC Cir filed Feb 25, 2011) (available on Westlaw at 2011 WL 2014799) (summarizing studies consulted by the agency).

and that uncertainty afflicted the whole topic.²³² Yet the Commission ultimately found most persuasive a cluster of studies suggesting that proxy-access rules would discipline incumbent management and thus enhance shareholder value.²³³

In its petition for review, Business Roundtable ignored some of the relevant empirical issues and focused on a series of other claims²³⁴—probably in the belief that on any ordinary approach to burdens of proof and standards of review in administrative law, the SEC must prevail given the uncertainty and conflicting state of the evidence. After all, the Supreme Court has been very clear that lower courts are to afford maximum deference to agencies’ expert judgments on questions at the research frontier—questions for which scientific methods are unable to provide conclusive evidence one way or another.²³⁵ In 2009, two years before *Business Roundtable*, the Court had warned in *Fox Television Stations* that “[i]t is one thing to set aside agency action under the Administrative Procedure Act because of failure to adduce empirical data that can readily be obtained. . . . It is something else to insist upon obtaining the unobtainable.”²³⁶ This statement is important both in its insistence on the importance of considering information “that can readily be obtained”—which of course says nothing about quantification—and in its emphasis on the fact that agencies must sometimes decide whether to act in the face of uncertainty.²³⁷

²³² See *Business Roundtable*, 647 F3d at 1151.

²³³ See *id.*, citing 75 Fed Reg at 56762 & n 921 (cited in note 228).

²³⁴ See Opening Brief of Petitioners Business Roundtable and Chamber of Commerce of the United States of America, *Business Roundtable v Securities and Exchange Commission*, No 10-1305, *28–30 (DC Cir filed Feb 25, 2011) (available on Westlaw at 2011 WL 2014800) (summarizing petitioners’ arguments on appeal but not claiming that the agency’s reliance on particular empirical studies was in violation of the law).

²³⁵ See *Baltimore Gas & Electric Co v Natural Resources Defense Council, Inc*, 462 US 87, 103 (1983). More generally, under *Motor Vehicle Manufacturers Association of the United States, Inc v State Farm Mutual Automobile Insurance Co*, 463 US 29 (1983) (“State Farm”), an agency rule is arbitrary and capricious if, among other things, it is “so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Id.* at 43. This implies that, for questions on which experts differ, the agency is permitted to select any reasonable viewpoint, so long as it articulates a “rational connection between the facts found and the choice made.” *Id.* at 52. See also *id.* (“It is not infrequent that the available data do not settle a regulatory issue, and the agency must then exercise its judgment in moving from the facts and probabilities on the record to a policy conclusion.”).

²³⁶ *Fox Television Stations*, 556 US at 519 (citations omitted).

²³⁷ See generally Cass R. Sunstein, *The Limits of Quantification*, 102 Cal L Rev 1369 (2014).

The DC Circuit granted the petition, scrutinized the evidence in some detail, and invalidated the Commission's conclusions on the basis of that evidence. As to the major claimed benefit of the proxy-access rules—that the anticipated threat from shareholder nominees would discipline incumbent directors and improve their performance—the panel held that the Commission had failed to comply with its statutory obligation to consider the rule's effect on “efficiency, competition, and capital formation” and had acted arbitrarily by failing “adequately to assess the economic effects of a new rule.”²³⁸ But why was the Commission's assessment inadequate? As we shall see, the panel offered numerous answers but, at bottom, it had two basic objections. One was that the agency was obligated either to provide a quantitative cost-benefit analysis or to explain why doing so would be infeasible.²³⁹ The other was that the evidence did not suffice to support the Commission's conclusion that the rule's benefits would materialize and outweigh its costs.²⁴⁰ Either holding would, alone, suffice for reversal.

* * *

At this point, we have somewhat different views about the *Business Roundtable* decision, and we will present those separately. We agree that the decision was a form of libertarian administrative law and that the court overreached. But we differ about the authority of courts to require agencies to engage in quantified cost-benefit analysis, especially under the rubric of arbitrariness review. Sunstein believes that even if statutes do not clearly require agencies to conduct quantified cost-benefit analysis, there exist conditions under which courts could require it anyway, as part of arbitrariness review. Vermeule rejects that possibility.

Sunstein:

As a matter of policy, there are reasonable objections to the proxy-access rule. The evidence is admittedly uncertain, and the SEC could have concluded that the rule was not, on the basis of

²³⁸ *Business Roundtable*, 647 F3d at 1148.

²³⁹ See *id.* at 1149.

²⁴⁰ See *id.* (rebuking the agency for “neglect[ing] to support its predictive judgments”); *id.* at 1151 (criticizing the agency's use of “mixed empirical evidence”) (quotation marks omitted).

that evidence, adequately justified. But there are also reasonable arguments on behalf of the rule. In these circumstances, *Business Roundtable* represents an excessively aggressive exercise of the power of judicial review, with undue second-guessing of the complex administrative record.

As part of that second-guessing, the court appears to have concluded that the SEC's obligation to consider the effects of a rule on "efficiency, competition, and capital formation" effectively required it to conduct, and make transparent, some form of quantitative cost-benefit analysis.²⁴¹ On its face, the statute does no such thing. The reason is that the agency could consider those effects without conducting any such analysis. At the very least, a mandate to consider the effects of a regulation on "efficiency, competition, and capital formation" does not, by itself, unambiguously require formal analysis of benefits. Indeed, it is not entirely clear that, to show the requisite consideration, the agency must provide a quantitative analysis of costs.

In these circumstances, the best justification for the court's general approach might take the following form. The agency is required to consider the effects of a rule on "efficiency, competition, and capital formation,"²⁴² and the agency would not meet that obligation if its consideration took the form of vague, general conclusions. To the extent that available evidence permits quantification, it would be arbitrary not to quantify. The procedural obligation to consider those effects requires a serious effort, consistent with what the evidence allows. To the extent that *Business Roundtable* stands for this general principle, it is on firm ground. More than that, it would also be arbitrary—within the meaning of the APA—for the agency to proceed if the effects on "efficiency, competition, and capital formation" were adverse and significant, at least if they were not justified by compensating quantified benefits. It would follow that, if a rule has net costs (or no net benefits) or if the SEC cannot show that a rule will have quantified benefits (if relevant evidence is available), the court should invalidate that rule as arbitrary. Indeed, it would generally seem arbitrary for an agency to issue a rule that has net costs (or no net benefits), at least unless a statute requires it to do so.

To be sure, this argument is not self-evidently correct. Plausible questions might be raised by an effort to link arbitrariness

²⁴¹ Id at 1148–49.

²⁴² 15 USC § 78c(f).

review to the statutory requirement to consider the relevant effects and thus to impose a requirement of quantified cost-benefit balancing (subject of course to a feasibility constraint, when quantification is not possible). But as a matter of principle, that approach has considerable appeal, and it would not be beyond the pale.

The real problem with the court's approach lies not in its general principles, but in its flyspecking of the administrative record. Notably, the court appears to have invalidated the regulation on at least eight grounds: (1) the agency did not adequately explain its conclusion (relevant to its assessment of costs) that directors might not choose to oppose shareholder nominees; (2) the agency did not have adequate evidence to support its conclusion that the rule would improve board performance and increase shareholder value (this might be the most important of the eight grounds); (3) the agency unreasonably discounted the costs, but not the benefits, of the rule by reference to the traditional state-law right to elect directors; (4) the agency did not adequately respond to comments suggesting that special interests, including unions and state and local governments, would use the rule to pursue self-interested objectives, rather than the interests of shareholders; (5) the agency did not adequately calculate the effects of the rule on the total number of election contests; (6) the agency did not adequately explore whether, in view of special statutory requirements, the rule should be applied to investment companies; (7) the agency did not deal adequately with the objection that the rule would impose increased costs on investment companies; and (8) the agency did not adequately address the concern that, as applied to investment companies, the rule would have no net benefits.²⁴³

By invoking these eight separate objections, the court offered what looks far more like a set of comments on a proposed rule than a standard judicial opinion. Moreover, a fair reading of the rule and its underlying rationale suggests that the SEC offered plausible and nonarbitrary (which is not necessarily to say convincing) answers to most, and perhaps even to all, of those questions. As a matter of standard arbitrariness review, the SEC's justifications were generally sufficient. With respect to (2), for example—and, as noted, this was probably the court's most important holding—the SEC made a reasonable judgment in the face

²⁴³ See *Business Roundtable*, 647 F3d at 1149–54.

of conflicting and uncertain evidence.²⁴⁴ When an agency has quantified what can be quantified and explained that some factors cannot be quantified, it has not acted arbitrarily, so long as its judgments have factual support and its policy choices are reasonable. It is important to emphasize that there are plausible policy objections to the SEC's approach in the case, but with the breadth and sheer number of its holdings, the court exceeded its appropriate role.

Vermeule:

To understand the problems with the *Business Roundtable* opinion, a bit of legal background is necessary. The Commission is subject to the binding legal obligation—created in the National Securities Markets Improvement Act of 1996,²⁴⁵ as a part of the Contract with America—to consider the effect of its rules on “efficiency, competition, and capital formation.”²⁴⁶ (Following other commentators,²⁴⁷ we will call this the “ECCF obligation” for convenience.) It is plausible to read this obligation to require the agency to conduct an analysis of how its rules affect efficiency, competition, and capital formation. But there is no reason to read into the ECCF obligation a further, distinct obligation to carry out *quantified* cost-benefit analysis, even presumptively, as long as doing so is “feasible.”

The ECCF obligation is a standard type of statutory provision, one that identifies relevant factors that agencies must consider when making decisions. Were the agency to refuse to consider factors, its refusal would not only violate the direct statutory obligation but would also amount to “arbitrary” and “capricious” agency action within the meaning of § 706 of the APA.²⁴⁸ But the duty to consider the relevant factors, by itself, simply does not impose any obligation to proceed quantitatively, not even as a presumptive matter. The statute simply does not say that the Commission may enact a new regulation only if it can either show, with quantified cost-benefit analysis, that the benefits exceed the costs, or else

²⁴⁴ See note 278.

²⁴⁵ Pub L No 104-290, 110 Stat 3416, codified as amended at 15 USC § 77 et seq.

²⁴⁶ National Securities Markets Improvement Act § 106, 110 Stat at 3424, codified at 15 USC § 77b(b).

²⁴⁷ Kraus and Raso, 30 Yale J Reg at 292 (cited in note 211).

²⁴⁸ See *Citizens to Preserve Overton Park, Inc v Volpe*, 401 US 402, 416 (1971) (holding that an agency's failure to consider relevant factors may indicate that its decision was arbitrary and capricious).

explain why quantification is impossible. Congress knows how to require agencies to conduct quantified cost-benefit analysis and has expressly done so in a number of statutes.²⁴⁹ But Congress did not require such analysis in the ECCF obligation. Were Congress to clearly and specifically require monetized cost-benefit analysis, that command would of course prevail, but Congress has not done so in any general way with respect to the SEC.²⁵⁰

Nor is there any warrant for reading a presumptive requirement of quantification—to provide quantified cost-benefit analysis or show it to be impossible—directly into § 706 of the APA under the rubric of arbitrary and capricious review. There are two independent problems with such an approach. The first is that it is inconsistent with congressional instructions, rightly understood.²⁵¹

²⁴⁹ See, for example, Safe Drinking Water Act Amendments of 1996, Pub L No 104-182, 110 Stat 1613, 1621, codified at 42 USC § 300g-1(b)(3)(C)(i)(I) (requiring agency findings on “quantifiable and nonquantifiable” health risks and benefits); Unfunded Mandates Reform Act of 1995 § 423(c)(2), Pub L No 104-4, 109 Stat 48, 54, codified at 2 USC § 658b(c)(2) (requiring “a qualitative, and if practicable, a quantitative assessment of costs and benefits anticipated from the Federal mandates”); Unfunded Mandates Reform Act § 202(a)(2), 109 Stat at 64, codified at 2 USC § 1532(a)(2) (requiring “qualitative and quantitative assessment of the anticipated costs and benefits”); Clean Air Act Amendments of 1990, Pub L No 101-549, 104 Stat 2399, 2691, codified as amended at 42 USC § 7612(a) (requiring the agency to “consider the costs, benefits and other effects associated with compliance with each standard issued”). Indeed, Congress can be extremely precise in specifying different forms of cost-benefit analysis within the same statute. For example, the Clean Water Act specifies several forms of cost-benefit analysis. Compare 33 USC § 1314(b)(1)(B) (requiring “consideration of the total cost of application of technology in relation to the effluent reduction benefits to be achieved”), with 33 USC § 1314(b)(4)(B) (requiring “consideration of the *reasonableness* of the relationship between the costs of attaining a reduction in effluents and the effluent reduction benefits derived”) (emphasis added), with 33 USC § 1314(b)(2)(B) (requiring consideration only of “the cost of achieving such effluent reduction,” and not requiring any cost-benefit comparison). Thanks to Jeff Gordon for providing the first two citations. See Jeffrey N. Gordon, *The Empty Call for Benefit-Cost Analysis in Financial Regulation*, 43 J Legal Stud S351, S367 n 10 (June 2014).

²⁵⁰ The qualifier “in any general way” is to cover statutes like the Paperwork Reduction Act, Regulatory Flexibility Act, and Congressional Review Act. These require the SEC to include some information relevant to quantified cost-benefit analysis in various filings or documents, yet none imposes a general obligation that SEC rulemaking quantify costs and benefits insofar as possible. See Coates, *Cost-Benefit Analysis of Financial Regulation* at *20–22 (cited in note 206). Nor have executive orders done so; as an “independent” agency, the SEC is exempt from the major cost-benefit orders. See Executive Order 12,866 § 3(b), 58 Fed Reg 51735 (1993). See also Marshall J. Breger and Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 Admin L Rev 1111, 1201 (2000). The scare quotes around “independent” are explained in Adrian Vermeule, *Conventions of Agency Independence*, 113 Colum L Rev 1163, 1166–67 (2013). See also generally Note, *The SEC Is Not an Independent Agency*, 126 Harv L Rev 781 (2013).

²⁵¹ There is an open question whether *Chevron* deference applies to an agency’s interpretation of its organic statute with respect to these issues. After the Court’s recent

Suppose that the agency's organic statutes require consideration of economic factors but do not require the agency to quantify its consideration of costs and benefits (even presumptively), while other statutes *do* contain such a requirement. Then it would render Congress's careful calibration of requirements pointless were judges to read the open-ended language of § 706 to impose a global mandate of quantification or even a presumptive quantification. Arbitrariness review is not a license to impose indirectly a set of procedural requirements—like (presumptive) quantification—that Congress refused to impose directly. *Entergy Corp v Riverkeeper, Inc*²⁵² indicates that *Chevron* governs the question whether an agency is *authorized* to engage in cost-benefit analysis.²⁵³ Presumably, discretion to use cost-benefit analysis subsumes the discretion not to use it. (Note that *Chevron* itself has neither a libertarian nor an antilibertarian tilt, consistent with our central claims about administrative law; it applies regardless of whether an agency is intruding on the private sector, deregulating, or engaging in action that cannot easily be characterized along some libertarian axis.)

The second problem is that a presumptive requirement of quantification is inconsistent with § 706 itself and with the approach to judicial review and the judicial role that the APA embodies and presupposes. Arbitrariness review does not permit judges to require agencies to use whatever decision procedure the judges happen to think is best, declaring all other decision procedures “irrational.” Rather, it leaves space for any decision procedure that can be defended among reasonable professionals,²⁵⁴ and strictly qualitative cost-benefit analysis surely passes that threshold, given its ubiquity both in policymaking and in life. It is demonstrable that reasonable disagreement flourishes—both among experts and the interested public generally—about the superiority of quantified cost-benefit analysis to other decision procedures; even mainstream proponents of quantified cost-benefit analysis do not usually say that no rational mind could disagree

decision in *City of Arlington, Texas v Federal Communications Commission*, 133 S Ct 1863 (2013), the answer should be that *Chevron* deference does apply. We bracket that issue for purposes of the current discussion, however. The ECCF obligation, even read de novo and without deference to the agency, does not plausibly impose a presumptive requirement of quantification.

²⁵² 556 US 208 (2009).

²⁵³ See *id.* at 217–18, 223.

²⁵⁴ See *State Farm*, 463 US at 43.

with their views.²⁵⁵ If that requirement could be imposed under the rubric of § 706, then so could the opposite. Judges of a different cast of mind could require agencies to use feasibility analysis instead,²⁵⁶ perhaps declaring it arbitrary and irrational to use quantified cost-benefit analysis when values are so obviously incommensurable.²⁵⁷

At bottom, quantified cost-benefit analysis is just one decision procedure among others. But *Vermont Yankee* held that judges have no authority to require agencies to impose more or different procedures than Congress itself imposed,²⁵⁸ and the ECCF obligation is, straightforwardly, a mere obligation to consider certain factors. Nor may arbitrariness review be used as a way to smuggle a controversial decision procedure in through the back door and foist it on agencies. In a successor case to *Vermont Yankee*, the Supreme Court rebuked the DC Circuit again, also in the nuclear-power setting, for a similar maneuver.²⁵⁹ We will return to that part of the story shortly. For now, what matters is that *Business Roundtable* ignored all these distinctions and problems, briskly subjecting the Commission to the presumptive requirement that we have mentioned, demanding quantified cost-benefit analysis or a showing that quantification would be impossible.²⁶⁰

* * *

Bracketing the questions just discussed, there is another problem: the panel in *Business Roundtable* erred by erecting a legally unfounded burden of proof. The panel stated in general terms that “the Commission inconsistently and opportunistically framed the costs and benefits of the rule; failed adequately to

²⁵⁵ See Matthew D. Adler and Eric A. Posner, *Rethinking Cost-Benefit Analysis*, 109 Yale L J 165, 167 (1999) (“Many law professors, economists, and philosophers believe that [cost-benefit analysis (CBA)] does not produce morally relevant information and should not be used in project evaluation. A few commentators argue that the information produced by CBA has some, but limited, relevance.”). See also id at 170–72 & nn 10–18 (discussing the history of cost-benefit analysis and collecting works).

²⁵⁶ Feasibility studies have been used by many agencies. See generally, for example, *Vital Steps: A Cooperative Feasibility Study Guide* (US Department of Agriculture Rural Business-Cooperative Service, Dec 2010), archived at <http://perma.cc/MS9C-PSB7>; *A Guide to Developing and Documenting Cost Estimates During the Feasibility Study* (EPA and US Army Corps of Engineers, July 2000), archived at <http://perma.cc/KE7Z-8VPC>.

²⁵⁷ See generally Frank Ackerman and Lisa Heinzerling, *Priceless: On Knowing the Price of Everything and the Value of Nothing* (New Press 2004).

²⁵⁸ See *Vermont Yankee*, 435 US at 524.

²⁵⁹ See generally *Baltimore Gas & Electric*, 462 US 87.

²⁶⁰ See *Business Roundtable*, 647 F3d at 1148–49.

quantify the certain costs or to explain why those costs could not be quantified; neglected to support its predictive judgments; contradicted itself; and failed to respond to substantial problems raised by commenters.”²⁶¹ But the Commission’s detailed discussion of the peer-reviewed scholarship, its methodological cautions, and its explanation that the relevant rules involved unquantifiable benefits²⁶² did provide a legally adequate explanation of the limits of feasible analysis. In the face of the record, the panel had to fall back on impeaching the Commission’s substantive view of the evidence:

The Commission instead relied exclusively and heavily upon two relatively unpersuasive studies In view of the admittedly (and at best) “mixed” empirical evidence, . . . we think the Commission has not sufficiently supported its conclusion that increasing the potential for election of directors nominated by shareholders will result in improved board and company performance and shareholder value.²⁶³

It is not a valid move in American administrative law for judges to decide that peer-reviewed economic studies supporting the agency’s view are “unpersuasive,” or for judges to bar agencies from proceeding in the face of “mixed evidence.” The panel’s discussion is not without ambiguity, but it seems to imply that the antonym of “mixed” evidence is “clear” evidence, so that the Commission would have to give “clear” evidence in support of its views. Analytically, this collapses two distinct administrative law questions: (1) the *standard of proof* under which the agency must demonstrate its conclusions (to its own satisfaction), and (2) the *standard of review* under which judges examine the adequacy of the agency’s conclusions.²⁶⁴ Even if “mixed” evidence would not suffice for the former, it may well survive the latter, just as a dubious jury verdict may not be so clearly invalid as to survive the permissive standard for judicial review.

²⁶¹ *Id.*

²⁶² See 75 Fed Reg at 56753–64 (cited in note 228) (discussing the agency’s detailed cost-benefit analysis).

²⁶³ *Business Roundtable*, 647 F3d at 1151 (citations omitted).

²⁶⁴ See *Concrete Pipe & Products of California, Inc v Construction Laborers Pension Trust for Southern California*, 508 US 602, 622–23 (1993):

[A standard of review is] customarily used to describe, not a degree of certainty that some fact has been proven in the first instance, but a degree of certainty that a factfinder in the first instance made a mistake in concluding that a fact had been proven under the applicable standard of proof.

In any event, there is *no* conceivably valid legal ground for suggesting that agencies generally, or that the Commission in particular, may not regulate because the evidence that supports their claims about the benefits of regulation is “mixed.” When predictions are required, evidence is often mixed, and a decision to proceed is not arbitrary for that reason.

Ideally, of course, an agency would know both probabilities and expected outcomes. To speak in stylized fashion, it might believe that a regulation is 80 percent likely to produce \$500 million in benefits, and 20 percent likely to produce \$0 in benefits; or 50 percent likely to produce \$400 million in benefits, and 50 percent likely to produce \$0 in benefits; or 20 percent likely to produce \$500 million in benefits, and 80 percent likely to produce \$0 in benefits—with expected values, in such cases, of \$400 million, \$200 million, and \$100 million, respectively. In all such cases, a judgment in favor of regulation would be acceptable (unless the agency were also required to balance costs, and even then, only if the costs exceeded the benefits). In actual practice, precise assignments are usually not possible, and, as a matter of law, a reasoned agency decision in favor of one view, in the face of conflicting evidence, is acceptable.

It is true that an agency’s decision might well be deemed arbitrary if it proceeded with a small probability of producing any benefits at all. But there is no constraint on proceeding in the face of mixed evidence in the statutory ECCF obligation to consider certain economic factors, in the APA burden of proof, or in the APA scheme of reasoned decisionmaking and judicial review for arbitrariness. It is hardly arbitrary for an agency to decide, in the face of mixed evidence and, in that sense, uncertainty, that it favors regulation over inaction.²⁶⁵ Although the presence of uncertainty may make such a decision irreducibly arbitrary in a decision-theoretic sense, it is not arbitrary and capricious in a legal sense.²⁶⁶

Administrative law has been here before. In the last case involving a systematically disfavored agency, the NRC, the DC Circuit shifted its ground after *Vermont Yankee*. Abandoning the “hybrid proceduralism” that the Supreme Court had so severely

²⁶⁵ See *State Farm*, 463 US at 52 (“It is not infrequent that the available data do not settle a regulatory issue, and the agency must then exercise its judgment in moving from the facts and probabilities on the record to a policy conclusion.”).

²⁶⁶ See Adrian Vermeule, *Rationally Arbitrary Decisions (in Administrative Law)*, 44 J Legal Stud *7 (forthcoming 2015), archived at <http://perma.cc/UJT2-TL9Q>.

rebuked, the lower court bent its efforts to stringent arbitrariness review of NRC decisions, a course that *Vermont Yankee* had left open, perhaps incautiously. Five years later, in 1983, the Court had to step in again to restrain the lower court's interference. In *Baltimore Gas & Electric Co v Natural Resources Defense Council, Inc.*,²⁶⁷ the issue was whether the NRC could make a "zero-release" assumption about spent nuclear fuel in long-term storage²⁶⁸—in other words, whether the agency could make an optimistic assumption about the effects of nuclear-waste policy under irreducible uncertainty, just as the SEC did with respect to the proxy-access rule. The DC Circuit had denounced the agency for arbitrariness on the ground that its zero-release assumption was unsupported.²⁶⁹ But the Supreme Court was emphatic that, when agencies act at the frontiers of knowledge, courts should be extraordinarily reluctant to intervene. "A reviewing court," it said, "must remember that the Commission is making predictions, within its area of special expertise, at the frontiers of science. When examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential."²⁷⁰

Baltimore Gas & Electric involved natural science, whereas predicting the effects of the proxy-access rule involved economics and social sciences; this is not a relevant difference, and otherwise the cases are on all fours. An agency acted at the frontiers of the known and the knowable, and the DC Circuit—in a progressive cause in one case, a libertarian cause in the other—demanded that the agency supply evidence that it reasonably claimed that it did not have.²⁷¹ Administrative law no more tolerates that stance today than it did before.

Most recently, in *Investment Co Institute v Commodity Futures Trading Commission*, the DC Circuit upheld against an arbitrariness challenge a new CFTC rule regarding derivatives trading.²⁷² The new rule,²⁷³ enacted under the authority of and in

²⁶⁷ 462 US 87 (1983).

²⁶⁸ Id at 91–92.

²⁶⁹ See *Natural Resources Defense Council, Inc v United States Nuclear Regulatory Commission*, 685 F2d 459, 478–85 (DC Cir 1982), revd, *Baltimore Gas & Electric*, 462 US 87.

²⁷⁰ *Baltimore Gas & Electric*, 462 US at 103.

²⁷¹ See id at 94–95.

²⁷² See *Investment Co Institute*, 720 F3d at 372–73.

²⁷³ Commodity Futures Trading Commission, Commodity Pool Operators and Commodity Trading Advisors: Compliance Obligations, 77 Fed Reg 11252 (2012).

the spirit of Dodd-Frank, narrowed the exclusions from the CFTC's regulatory scheme for derivatives trading, bringing "registered investment companies" (mutual funds and others) within the regulatory ambit.²⁷⁴ The rule would subject regulated entities to data-disclosure obligations and other regulatory programs.²⁷⁵ Citing *Business Roundtable* and its predecessors, the regulated entities complained that the agency had failed to adequately consider the costs and benefits of the rule.²⁷⁶ The CFTC's organic statute requires it to "consider the costs and benefits of its actions" and to "evaluate[] those costs and benefits in light of," among other factors, "considerations of the efficiency, competitiveness, and financial integrity of futures markets."²⁷⁷

As in *Business Roundtable*, a crucial issue involved the non-quantifiable benefits of the regulation. The problem arises in the financial domain when both the regulated behavior and the regulatory responses have a speculative character. When agencies act to prevent a large-scale crisis and no crisis occurs in some period of reference, was the regulation helpful or useless? And what, if anything, was the *marginal* contribution of the particular regulations at issue? These questions could easily be asked with a raised eyebrow and in a pointed way, so as to suggest that the agency had behaved arbitrarily. The issues are likely to have a degree of uncertainty, as the *Investment Co Institute* panel recognized—in words that could have been written in *Business Roundtable* as well:

The appellants further complain that CFTC failed to put a precise number on the benefit of data collection in preventing future financial crises. But the law does not require agencies to measure the immeasurable. CFTC's discussion of unquantifiable benefits fulfills its statutory obligation to consider and evaluate potential costs and benefits. See *Fox*, 556 U.S. at 519, 129 S.Ct. 1800 (holding that agencies are not required to "adduce empirical data that" cannot be obtained). Where Congress has required "rigorous, quantitative economic analysis," it has made that requirement clear in the agency's statute, but it imposed no such requirement here. *American Financial Services Ass'n v. FTC*, 767 F.2d 957, 986 (D.C.Cir.1985); *cf.*, *e.g.*, 2 U.S.C. § 1532(a)

²⁷⁴ *Investment Co Institute*, 720 F.3d at 372–75.

²⁷⁵ See *id.*

²⁷⁶ See *id.* at 377.

²⁷⁷ *Id.*, quoting 7 USC § 19(a)(1)–(2) (quotation marks omitted).

(requiring the agency to “prepare a written statement containing . . . a qualitative and quantitative assessment of the anticipated costs and benefits” that includes, among other things, “estimates by the agency of the [rule’s] effect on the national economy”).²⁷⁸

All this is exactly correct under current law. The hard question is what its significance might be. It is simply unclear—too soon to tell—whether *Investment Co Institute* portends a broader retrenchment in the DC Circuit or instead a mere tacking backward, an instance of *reculer pour mieux sauter*. *Investment Co Institute* relies, in part, on a putative distinction of *Business Roundtable*,²⁷⁹ but we find that distinction less than convincing. Moreover, the two cases are inconsistent on a deeper level: *Investment Co Institute* displays a tolerance of regulation under conditions of uncertainty that is entirely foreign to its predecessor. It displays a different “mood.”²⁸⁰

But we should not make too much of what is, after all, merely one data point.²⁸¹ A striking feature of the progressive

²⁷⁸ *Investment Co Institute*, 720 F3d at 379. On the general issue of nonquantifiable benefits, see generally Sunstein, *The Limits of Quantification*, 102 Cal L Rev 1369 (cited in note 237).

²⁷⁹ The putative distinction is that, in *Business Roundtable*, the SEC had failed to explain why its new rule was necessary in light of extant regulation. See *Investment Co Institute*, 720 F3d at 378. See also Gordon, 43 J Legal Stud at S371–73 (cited in note 249). This is unconvincing because it is a post hoc redescription of the rationale of *Business Roundtable*, in which the central point was not regulatory overlap with extant rules but the SEC’s failure either to quantify fully the benefits of its regulation (which was impossible) or to explain why the benefits could not be quantified (which the SEC had actually done, as explained earlier). See *Business Roundtable*, 647 F3d at 1148–51. See also *id.* at 1154 (holding that, because the rule was arbitrary and capricious on its face due to the improper cost-benefit analysis, the rule was “assuredly invalid as applied specifically to investment companies,” but then going on to explain that the rule as applied to investment companies would also be invalid because the SEC had failed to explain why the rule was necessary in light of the extant regulation).

²⁸⁰ See *Universal Camera Corp v National Labor Relations Board*, 340 US 474, 485–87 (1951) (Frankfurter) (suggesting that Congress had expressed a “mood” in enacting the “substantial evidence” test).

²⁸¹ Another recent data point is the *Conflict Minerals Case*, the decision that invalidated a congressionally mandated SEC disclosure regulation on commercial speech grounds. See text accompanying notes 153–68. Before reaching the commercial speech issue, the panel—Judge Sentelle writing for himself and Judge Randolph, with a partial concurrence by Judge Srinivasan—upheld the SEC rule against an arbitrariness attack. *Conflict Minerals Case*, 748 F3d at 365–70. The opinion cited *Investment Co Institute* for the proposition that “[a]n agency is not required ‘to measure,’ and need not conduct a ‘rigorous, quantitative economic analysis’ unless the statute explicitly directs it to do so.” *Conflict Minerals Case*, 748 F3d at 369, quoting *Investment Co Institute*, 720 F3d at 379. On several grounds, however, it is unclear whether this portends a retrenchment. First, the panel did, after all, invalidate the regulation on constitutional

administrative law of the DC Circuit before *Vermont Yankee* was that it displayed exactly this quality of tacking, of advances followed by partial retrenchments, of alternative holdings and ambiguous doctrine. Cynics might see such a pattern as a deliberate strategy, on the part of the lower court, to present the smallest possible target for reversal by the Supreme Court—a suggestion offered by then-Professor Scalia about the DC Circuit’s ambiguous case law before *Vermont Yankee*.²⁸² (Scalia acutely observed that “[t]hese same devices that inhibit Supreme Court review facilitate the development of inconsistency among the various panels of the D.C. Circuit itself.”²⁸³) But we favor a different explanation, which is structural rather than strategic: it is in the nature of multimember courts that no course of action will be followed with iron consistency,²⁸⁴ because of the vagaries of voting, the problems of aggregating preferences and judgments, and the path-dependent presentation of cases. Whichever explanation one prefers, it is premature to decide that the judges who power libertarian administrative law have changed course.

E. Standing

For many decades, the law of standing was built largely on private law foundations.²⁸⁵ The central idea was that if government agencies intruded on common-law rights, those subject to

grounds, *Conflict Minerals Case*, 748 F3d at 370–73, so the decision may actually portend that libertarian administrative law is moving into an even more aggressive phase, in which the label “free speech” is used as a substitute for stringent arbitrariness review and for substantive due process protection of property rights and economic interests. Second, it would be open to a future panel to distinguish the *Conflict Minerals Case* as a case in which the underlying regulation was itself explicitly mandated by Congress, in Dodd-Frank. See *id.* at 363, citing 15 USC §§ 78m(p), 78m (note). Indeed, Congress itself had already found that the benefits of the regulation—unquantifiable benefits—justified the costs. See *Conflict Minerals Case*, 748 F3d at 369. In such a case, arbitrariness review might be relaxed or even suspended. Bracketing questions of constitutional arbitrariness review under due process, such review is extremely deferential as to administrative rulemaking. See *Pacific States Box & Basket Co v White*, 296 US 176, 185–86 (1935).

²⁸² See Scalia, 1978 S Ct Rev at 372 (cited in note 2) (“The pattern of dicta, alternate holdings, and confused holdings out of which the D.C. Circuit’s principle of APA hybrid rulemaking so clearly and authoritatively emerged had the effect, if not the purpose, of assuring compliance below while avoiding accountability above.”).

²⁸³ *Id.* at 373 n 128.

²⁸⁴ See generally Easterbrook, 95 Harv L Rev 802 (cited in note 86).

²⁸⁵ See generally Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 Colum L Rev 1432 (1988).

that intrusion would have access to the courts, above all in order to require a showing of legislative authorization.²⁸⁶ In two respects, the private law model had distinctive libertarian features. First, it protected private rights against government intrusion. Second, it did not allow people to have access to court if they did not have such rights and if they sought to promote or to increase government regulation.²⁸⁷ Under the private-law model, for example, consumers and environmental groups would have a great deal of difficulty establishing standing.

The APA allows standing for private rightholders, but it does not embrace the private-law model; it grants standing to all those who suffer a “legal wrong” because of agency action or who are “adversely affected or aggrieved by agency action within the meaning of a relevant statute.”²⁸⁸ In the 1970s, the Supreme Court interpreted these provisions expansively, granting all those with an “injury in fact” access to court, so long as they were also “arguably within the zone of interests to be protected or regulated” by the underlying statute.²⁸⁹ It is clear that the Court meant to broaden, by a large margin, the class of persons and organizations that would have access to court, and that those complaining of insufficient regulatory activity would often be entitled to have their say.²⁹⁰

In the decades since that time, it is an understatement to say that the Court’s decisions have not followed a clear path.²⁹¹ Nor can it be said that a clear path emerges from the decisions of the DC Circuit. But a number of rulings by that court have moved toward reasserting the private law foundations of standing doctrine. In the relevant cases, the court has invoked the injury-in-fact test to deny standing to environmental, labor, and

²⁸⁶ See *Chicago Junction Case*, 264 US 258, 266–69 (1924).

²⁸⁷ See Sunstein, 88 Colum L Rev at 1438 (cited in note 285).

²⁸⁸ 5 USC § 702.

²⁸⁹ *Association of Data Processing Service Organizations, Inc v Camp*, 397 US 150, 152–53 (1970).

²⁹⁰ See id at 154 (“Where statutes are concerned, the trend is toward enlargement of the class of people who may protest administrative action.”).

²⁹¹ See, for example, *Lujan v Defenders of Wildlife*, 504 US 555, 571–78 (1992) (dismissing the argument that, absent actual injury, agency action or inaction grants a “procedural injury” conferring standing); *Federal Election Commission v Akins*, 524 US 11, 21–25 (1998) (holding that voters have standing to sue the Federal Election Commission); *Friends of the Earth, Inc v Laidlaw Environmental Services (TOC), Inc*, 528 US 167, 181 (2000) (“An association has standing to bring a suit on behalf of its members when its members would otherwise have standing to sue in their own right.”). See also Charles A. Wright and Mary Kay Kane, § 13 “Case or Controversy”—*Standing to Litigate*, 20 Fed Prac and Proc Deskbook § 13 (Apr 2011).

consumer organizations complaining of what they see as insufficient regulation. The resulting pattern is very far from unbroken, but some important cases display an unmistakably libertarian character.

Here is a stylized description of that pattern: If regulated entities complain of agency action and seek to fend it off, they are generally entitled to bring suit. All the core Article III requirements are met. These entities are readily found to show an injury in fact that is likely to be redressed by a decree in their favor. The other requirements for standing are also met. Regulated entities can generally show that they are “arguably within the zone of interests” protected or regulated by the underlying statute, and also that their interests are not widely generalized.

By contrast, public interest groups sometimes have had a difficult time meeting the relevant requirements, even if some of their members advance plausible claims of injury. To some extent, this asymmetry is unobjectionable because it is built into existing doctrine. If a group called Environmental Defenders, with no members in Utah, complains of a development project in Utah, there is no injury in fact, and hence no standing.²⁹² But the DC Circuit has gone well beyond the Supreme Court’s instructions. It has erected barriers when existing law is ambiguous or arguably cuts the other way.

In a large number of cases, the court has applied an expansive notion of standing to the claims of regulated entities that have sought to challenge federal regulations, even when those challenges were not clearly authorized under existing standing doctrine. For example, it is hardly obvious that private investors have standing to challenge system-level decisions by financial regulators, at least when the effects of those decisions on particular investors are necessarily speculative. Nonetheless, in such a case, the DC Circuit had no difficulty granting standing.²⁹³ Or consider the question whether a competitor may challenge an agency decision that might impose economic harm. While the Supreme Court has generally been willing to grant standing in such cases,²⁹⁴ we can readily imagine situations in which the

²⁹² For cases involving similar facts, see *Lujan*, 504 US at 560; *Sierra Club v Morton*, 405 US 727, 734–35 (1972).

²⁹³ *Stilwell v Office of Thrift Supervision*, 569 F3d 514, 518 (DC Cir 2009) (holding that a private investor has standing to challenge a decision by the Office of Thrift Supervision, since economic harm was “substantially probable”).

²⁹⁴ See, for example, *Clarke v Securities Industry Association*, 479 US 388, 401–03 (1987).

harm might be considered impossibly speculative and in which it might be objected that competitors are not even arguably within the zone of interests. Nonetheless, the DC Circuit has been conspicuously open to such challenges, especially when the defendant is the EPA. Cases in which the court has granted standing to regulated entities are plentiful, and so far as we have been able to ascertain, the pattern is nearly unbroken.²⁹⁵

By contrast, public interest groups have a far more mixed record. In many cases, public interest groups have been denied standing even when their members made a plausible claim of injury in fact. In *Vietnam Veterans of America v Shinseki*,²⁹⁶ for example, the court held that a veterans advocacy group lacked standing to challenge delays by the Department of Veterans Affairs in processing claims for disability benefits.²⁹⁷ The central conclusion was that a delay in the average time of review could not be counted as an individual injury²⁹⁸—a conclusion that is not directly in conflict with Supreme Court precedent, but that is in some tension with prominent rulings.²⁹⁹

In *Commuter Rail Division of Regional Transportation Authority v Surface Transportation Board*,³⁰⁰ the court held that the Sierra Club lacked standing to challenge the Surface Transportation Board's approval of a merger of railroad companies, notwithstanding a plausible argument that the merger would have

²⁹⁵ See, for example, *Honeywell International, Inc v Environmental Protection Agency*, 705 F3d 470, 472 (DC Cir 2013) (holding that a regulated entity has standing to challenge the EPA's approval of competitors' allowance transfers); *Holistic Candles and Consumers Association v Food and Drug Administration*, 664 F3d 940, 943 (DC Cir 2012) (holding that regulated entities have standing to challenge FDA actions that would allegedly outlaw the manufacture of their products); *Lake Carriers' Association v Environmental Protection Agency*, 652 F3d 1, 5 n 2 (DC Cir 2011) (holding that trade associations have standing to challenge the EPA permit system); *Lichoulas v Federal Energy Regulatory Commission*, 606 F3d 769, 774 (DC Cir 2010) (holding that a regulated entity has standing to challenge FERC's termination of a license to operate a hydropower project); *Affum v United States*, 566 F3d 1150, 1158 (DC Cir 2009) (holding that a regulated entity has standing to challenge a decision of the Food and Nutrition Service); *Alvin Lou Media, Inc v Federal Communications Commission*, 571 F3d 1, 7 (DC Cir 2009) (holding that a radio station applying for a license has standing to challenge the FCC's denial of reconsideration of the application); *Comcast Corp v Federal Communications Commission*, 579 F3d 1, 6 (DC Cir 2009) (holding that regulated cable companies have standing to challenge an FCC rule).

²⁹⁶ 599 F3d 654 (DC Cir 2010).

²⁹⁷ *Id.* at 661–62.

²⁹⁸ See *id.*

²⁹⁹ See, for example, *Japan Whaling Association v Cetacean Society*, 478 US 221, 230 n 4 (1986).

³⁰⁰ 608 F3d 24 (DC Cir 2010).

harmful environmental consequences.³⁰¹ The court concluded that there was a lack of causation and redressability. In *Association of Flight Attendants-CWA, AFL-CIO v United States Department of Transportation*,³⁰² the court held that a flight attendant union lacked standing to challenge the Department of Transportation's decision to certify Virgin Airlines, finding an absence of causation between that decision and adverse effects on union members.³⁰³

In *Young America's Foundation v Gates*,³⁰⁴ the court ruled that an advocacy group lacked standing to challenge the Department of Defense's grants to state universities that deny access to military recruiters, concluding that the injury was too speculative.³⁰⁵ In *Defenders of Wildlife v Perciasepe*,³⁰⁶ the court held that an environmental advocacy group lacked standing to challenge the EPA's delays in promulgating revisions to guidelines under the Clean Water Act,³⁰⁷ because the group "provides no more than speculation to support its argument."³⁰⁸ And in *Equal Rights Center v Post Properties, Inc.*,³⁰⁹ the court concluded that a fair-housing advocacy group lacked standing to sue for violations of the Fair Housing Act,³¹⁰ because the facts were insufficient to establish "concrete and particularized" or "actual or imminent" injury.³¹¹

We do not contend that these decisions are implausible or that a majority of the Supreme Court would disagree with all or most of them; the Court's decisions leave significant ambiguities and gaps. But it is reasonable to say that almost all of them could have gone the other way. It is well-known that whether an injury is "speculative" depends on how it is characterized. If an injury is characterized as an opportunity or a risk, it may well count for purposes of standing even if it would seem implausibly

³⁰¹ Id at 30–31.

³⁰² 564 F3d 462 (DC Cir 2009).

³⁰³ Id at 465–66.

³⁰⁴ 573 F3d 797 (DC Cir 2009).

³⁰⁵ Id at 800–01.

³⁰⁶ 714 F3d 1317 (DC Cir 2013).

³⁰⁷ Pub L No 92-500, 86 Stat 816 (1972), codified as amended at 33 USC § 1251 et seq.

³⁰⁸ *Defenders of Wildlife*, 714 F3d at 1327.

³⁰⁹ 633 F3d 1136 (DC Cir 2011).

³¹⁰ Pub L No 90-284, 82 Stat 81 (1968), codified as amended at 42 USC § 3601 et seq.

³¹¹ *Equal Rights Center*, 633 F3d at 1141.

speculative if characterized more narrowly.³¹² And in principle, the requirements of causation and redressability are double-edged swords. They might well be used to prevent regulated entities from having access to court on the ground that it is purely speculative whether a judicial ruling—for example, requiring compliance with some procedural requirement—will actually redress the alleged injury. But we have been unable to find even a single case in which the court of appeals has used standing doctrine in that way. With respect to standing, administrative law has a clear libertarian dimension in a number of important rulings by the DC Circuit.

F. Reviewability

1. When does “shall” mean “must”?

Even if parties have standing, the APA withholds judicial review when statutes preclude review or when agency action is “committed to agency discretion by law.”³¹³ These provisions are not self-interpreting, and the Supreme Court has developed an elaborate body of precedent governing reviewability of agency action.³¹⁴ The law of reviewability in the DC Circuit, however, relates uneasily to that body of precedent, in part because the Circuit’s reviewability decisions sometimes display a distinct libertarian valence. We will examine one particularly telling pair of cases in detail.

It is common ground that in a hierarchical judicial system, lower courts should follow the decisions of higher courts in legally identical cases. The DC Circuit came very close to simply declining to follow controlling Supreme Court precedent on reviewability of agency action in a 2013 case, *Cook v Food & Drug Administration*.³¹⁵ The case is important not so much for itself, but as evidence of the willingness of some of the Circuit’s most

³¹² Compare, for example, *Northeastern Florida Chapter of Associated General Contractors of America v City of Jacksonville, Florida*, 508 US 656, 666 (1993) (holding that a plaintiff challenging a municipal procurement policy need only show that the policy denied him the chance to compete on an equal footing, not that he would have actually received the benefit absent the policy), with *Allen v Wright*, 468 US 737, 755 (1984) (holding that the plaintiffs lacked standing because they failed to allege an “injury suffered as a direct result of having personally been denied equal treatment”).

³¹³ 5 USC § 701(a).

³¹⁴ See Charles H. Koch and Richard Murphy, 4 *Administrative Law and Practice* § 12:10–14 (West 3d ed 2010).

³¹⁵ 733 F3d 1 (DC Cir 2013).

influential judges more or less to ignore the instructions of the Supreme Court by means of irrelevant distinctions. And the libertarian valence of that willingness emerges when we compare *Cook* with a strikingly similar case, *Sierra Club v Jackson*,³¹⁶ from 2011.

Cook involved the reviewability of an agency nonenforcement decision.³¹⁷ In 1985, in *Heckler v Chaney*,³¹⁸ the Court had held such decisions presumptively unreviewable.³¹⁹ *Chaney* arose out of an attempt, by opponents of capital punishment, to obtain judicial review of the FDA's refusal to begin enforcement proceedings to prevent states from using lethal drugs as a method of execution.³²⁰ The plaintiffs claimed that use of the drugs in capital punishment violated the Food, Drug, and Cosmetic Act³²¹ (FDCA).³²²

The *Chaney* Court held that agency enforcement decisions are presumptively "committed to agency discretion by law" within the meaning of § 701 of the APA, and thus unreviewable.³²³ Although the Court said that the presumption could be overcome by a sufficiently clear statutory command to enforce in a particular class of cases,³²⁴ it found no such command in the FDCA.³²⁵ Despite the seemingly mandatory terms of the Act, the Court was very clear about a point that the DC Circuit later disregarded: mandatory text need not always be taken at face value in this setting.³²⁶ Rather, even facially mandatory commands take on a special legal meaning when read in light of the need to allocate enforcement resources among the myriad tasks that agencies face and in light of the robust quasi-constitutional tradition of executive discretion over enforcement decisions.³²⁷

³¹⁶ 648 F3d 848 (DC Cir 2011).

³¹⁷ *Cook*, 733 F3d at 3.

³¹⁸ 470 US 821 (1985).

³¹⁹ *Id* at 831.

³²⁰ *Id* at 823.

³²¹ Pub L No 75-717, 52 Stat 1040 (1938), codified as amended at 21 USC § 301 et seq.

³²² *Chaney*, 470 US at 826.

³²³ *Id* at 837–38.

³²⁴ *Id* at 832–34.

³²⁵ *Id* at 835–37.

³²⁶ See *Chaney*, 470 US at 835 (construing a statutory requirement that violators "shall be imprisoned . . . or fined" as a permissive grant of authority to the agency, not a mandatory requirement to prosecute).

³²⁷ See *id* at 831–32.

Cook presented strikingly similar facts. The main difference was that the case involved foreign rather than domestic commerce; the plaintiffs were challenging the FDA's decision not to initiate an enforcement action against a company that imported lethal drugs from abroad.³²⁸ That distinction is not legally relevant to the reviewability issue, and the obvious resolution would have been to apply *Chaney* and be done with it. The panel—Judges Ginsburg, Sentelle, and Rogers—nonetheless allowed judicial review.³²⁹

The relevant provisions of the FDCA state that the FDA “shall request” samples of drugs produced at unregistered foreign facilities, and then, “[i]f it appears’ an article offered for import violates a substantive prohibition of the FDCA, [] ‘such article shall be refused admission.’”³³⁰ A critical provision of the law at issue in *Chaney*, however, had also used “shall,” yet the Court had held that language insufficient to override the agency's enforcement discretion.³³¹ The Court was “unwilling to attribute such a sweeping meaning”³³² to this language, despite its facially mandatory terms. So it is not obvious, at best, how *Cook* and *Chaney* could be distinguished.

Judge Ginsburg, writing for the panel in *Cook*, tried the following tack:

The plaintiffs begin by arguing simply that “the ordinary meaning of ‘shall’ is ‘must.’” The case law provides ample support. . . . Citing *Chaney*, the FDA objects that “in the enforcement context . . . [the word ‘shall’] may not be properly read to curtail the agency’s discretion.” In *Chaney*, however, the word “shall” appeared in the consequent of a section providing for criminal sanctions: A violator “shall be imprisoned . . . or fined.” . . . The criminal statute in *Chaney* did not use “shall” in connection with the antecedent condition of prosecution The “enforcement” discretion held unreviewable in *Chaney*, therefore, was whether to recommend prosecution [to the Attorney General]. . . . *Here, by contrast, the word “shall” appears in both an antecedent (“shall*

³²⁸ See *Cook*, 733 F3d at 4 (noting that the drugs in question were imported from the United Kingdom).

³²⁹ *Id.* at 10.

³³⁰ *Id.* at 6–7, quoting 21 USC § 381(a).

³³¹ *Chaney*, 470 US at 835.

³³² *Id.*

request . . . samples”) and the consequent (“shall be refused admission”).³³³

In the abstract, the distinction makes sense, but it is unconvincing in context. The panel writes as though the antecedent of “shall be refused admission” is “shall request samples.” It is not. (Actually, the panel writes “*an* antecedent,”³³⁴ a misleading formulation made necessary by the unfortunate fact that the request procedure comes well before the sanction of refusing admission.) What the provision does say is that, “[i]f it appears from the examination of such samples or otherwise that . . . such article is adulterated, misbranded, or [an unapproved new drug] . . . , then such article shall be refused admission.”³³⁵ The FDA argued straightforwardly that the antecedent in this provision, phrased in conditional rather than mandatory terms, allows the FDA conventional regulatory discretion to decide whether the statutory criteria were met, and thus whether to trigger the sanctions in the consequent.³³⁶

Nothing in *Chaney* suggests that the agency’s discretion would be displaced by such a provision. There is also an undeveloped implication in Judge Ginsburg’s discussion that enforcement discretion is less subject to statutory override when criminal sanctions, rather than merely (civil) regulatory sanctions, are at issue.³³⁷ But the implication is left undeveloped because it would be extremely dubious, or even indefensible, as a general proposition. Certainly *Chaney* drew no such distinction; it lumped together regulatory and criminal sanctions under the rubric of “enforcement actions”³³⁸ and held that the agency enjoyed unreviewable discretion over the nonuse of all such sanctions.³³⁹

But bracket all these issues. The larger point of *Chaney*, which the panel ignored, is that in the context of statutory sanctions, whatever their nature, a congressional specification that

³³³ *Cook*, 733 F3d at 7–8 (emphasis added).

³³⁴ *Id* at 8 (emphasis added).

³³⁵ 21 USC § 381(a) (emphasis added).

³³⁶ See *Cook*, 733 F3d at 8–9.

³³⁷ See *id* at 8 (“The ‘enforcement’ discretion held unreviewable in *Chaney*, therefore, was whether to recommend prosecution. . . . Here, by contrast, the word ‘shall’ appears in both an antecedent (‘shall request . . . samples’) and the consequent (‘shall be refused admission’).”).

³³⁸ See *Chaney*, 470 US at 824 (listing “various investigatory and enforcement actions” at issue, most of which were regulatory rather than criminal).

³³⁹ See *id* at 837–38.

the sanction “shall be X” is not by itself enough to obligate the relevant enforcer to impose the sanction (or to recommend that another agency impose the sanction) at every possible opportunity. The *Chaney* Court held that, to override the executive’s retained enforcement discretion, Congress must do more than merely specify sanctions; it must clearly and specifically remove the agency’s retained discretion *over the determination whether to trigger the sanctions*, and there is no such clear statement in *Cook*.³⁴⁰ There is a hint in *Cook* that the panel meant to distinguish discretion over *whether* to enforce from the *mode* of enforcement.³⁴¹ But the *Chaney* Court said expressly that despite the mandatory language, the FDA’s discretion extended to both the question whether to enforce and the question how to enforce.³⁴² In effect, the *Cook* panel refused to acknowledge that in the enforcement context, according to the Court in *Chaney*, it is just not true that “shall” ordinarily means “must.”³⁴³ Whatever the literal meaning of “shall,” its legal meaning, in a complex regulatory scheme, is affected by the institutional context.

The troubling thing is not so much the decision itself, which rests on somewhat peculiar facts unlikely to be frequently at issue. The troubling thing is the court’s attitude toward controlling precedent, squarely on point, from a hierarchical superior. The panel appears to see that precedent as something to be brushed aside with a misleading distinction rather than a binding command to be internalized and obeyed.

From a certain perspective, one might see *Cook* as a counterexample to the thesis of libertarian administrative law. After

³⁴⁰ See id at 832–33:

[An enforcement] decision is only presumptively unreviewable; the presumption may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers. . . . Congress may limit an agency’s exercise of enforcement power if it wishes, either by setting substantive priorities, or by otherwise circumscribing an agency’s power to discriminate among issues or cases it will pursue.

³⁴¹ See *Cook*, 733 F3d at 8–9 (providing the example that “the FDA may detect a violation through a method other than ‘examination,’ such as electronic screening of entry data that importers submit to Customs”).

³⁴² *Chaney*, 470 US at 831 (“[A]n agency’s decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency’s absolute discretion.”).

³⁴³ Id at 835 (noting that the statutory language “shall”—which, in the context of “shall be liable to be proceeded against” and “shall be imprisoned . . . or fined,” is “permissive”—“commit[s] complete discretion to the Secretary to decide how and when they should be exercised”).

all, the panel allowed review of an agency decision not to enforce law—arguably a decision-forcing agency intervention of a sort. Yet this description is oblivious to the context of the case. In substantive terms, the decision is classically libertarian; opposition to the death penalty is a cause on which many libertarians of left and right converge.³⁴⁴ Here there is a clear split between law-and-order conservatives, on the one hand, and conservative libertarians on the other. Edward Crane, founder of the Cato Institute, professes the following view on capital punishment: “[I]t is morally justified but . . . the government is often so inept and corrupt that innocent people might die as a result. Thus, I personally oppose capital punishment.”³⁴⁵ In that sense, *Cook* has a particular libertarian valence. But the possible valences of reviewability law become fully apparent only when we bring in another case to provide contrast.

2. When does “shall” mean “may” after all?

Now imagine a case involving precisely the same legal issue: whether mandatory statutory language, stating that the agency “shall” take enforcement action, suffices to overcome the *Chaney* presumption against unreviewability of agency decisions not to enforce. Suppose also, however, that the relevant agency refusal to enforce involved an agency declining to enforce environmental laws against a regulated industrial entity, so that the libertarian instinct would now pull in favor of the *Chaney* presumption and against reviewability. A consistently textualist judge would decide the two cases consistently, all else equal, depending on the details of the statutory scheme. But a consistently libertarian judge would be inclined to treat the two cases differently and conclude that the presumption of unreviewability is not overcome in the case of environmental enforcement, even though it had been in *Cook*.

³⁴⁴ See, for example, Ben Jones, *The Libertarian Case against the Death Penalty* (Libertarianism.org, Oct 24, 2013), archived at <http://perma.cc/3R7H-YSJ5>; Zenon Evans, *Ron Paul Endorses Anti-Death Penalty Group* (Reason.com, Aug 7, 2013), archived at <http://perma.cc/EB7N-3LN9>. But see Murray N. Rothbard, *The Libertarian Position on Capital Punishment* (Mises Institute, July 13, 2010), archived at <http://perma.cc/LN57-WZJV> (“[W]e advocate capital punishment for all cases of murder, *except* in those cases where the victim has left a will instructing his heirs and assigns *not* to levy the death penalty on any possible murder.”).

³⁴⁵ *Editorial, 4/22: Conservatives and Death Penalty* (Lincoln J Star, Apr 21, 2013), archived at <http://perma.cc/T9LQ-9APB>.

Et voila: Sierra Club, decided in 2011. The panel—Judges Brown, Ginsburg, and Sentelle—held that the Sierra Club could not obtain judicial review³⁴⁶ of the EPA Administrator’s refusal to initiate action to prevent the construction of three major pollution-emitting facilities in a CAA attainment area.³⁴⁷ In such areas, the statute creates a permitting scheme in order to prevent significant deterioration of air quality.³⁴⁸ The critical statutory provision, titled “Enforcement,” states as follows: “*The Administrator shall, and a State may, take such measures, including issuance of an order, or seeking injunctive relief, as necessary to prevent the construction or modification of a major emitting facility . . . proposed to be constructed*” in an attainment area.³⁴⁹

The emphasized language cuts more strongly in favor of overcoming the presumption of unreviewability than does the language in *Cook*. The quoted provision not only says that the agency “shall” enforce but also says, in pointed contrast, that states “may” enforce, suggesting by negative implication that the former was deliberately chosen to be a mandatory command. And the provision, read in the ordinary way, extends the range of possible “measures” to encompass only those measures necessary to prevent construction of the major emitting facility. It gives the administrator no discretion over whether to take steps to prevent construction in the first place; the obvious point is that the administrator must do so.

The panel, however, held that the presumption of unreviewability was not overcome, allowing the major polluting facilities to be built unchallenged. Decisive here, the panel said, was the larger “context and structure” of the statute:

Congress’s mandate to the Administrator is that she shall “take such measures, including issuance of an order, or seeking injunctive relief, as necessary” There is no guidance to the Administrator or to a reviewing court as to what action is “necessary.” Granted, the statute further says, “as necessary to prevent the construction or modification of a major emitting facility . . . proposed to be constructed” in an attainment area, but that nonetheless leaves it to the Administrator’s discretion to determine what action

³⁴⁶ *Sierra Club*, 648 F3d at 856–57.

³⁴⁷ *Id.* at 851–52.

³⁴⁸ See *id.* at 852.

³⁴⁹ 42 USC § 7477 (emphasis added).

is “necessary.” [Here, the Administrator] has apparently made the decision that no action is necessary.³⁵⁰

The literalistic textualism of *Cook*, in which the panel insisted that “shall” means “shall,” here finds its Carroll-esque counterpoint: a statute commanding that the agency “shall” take action as “necessary to prevent the construction of” a major polluting facility apparently allows the agency to opt for no action at all.

Sierra Club and *Cook* may be consistent from a libertarian standpoint, but they are legally irreconcilable. This is not to say which decision is correct, which incorrect. It is even possible that both are wrong. More plausible than the actual outcomes would have been the opposite pair of holdings: that the presumption of unreviewability was overcome in *Sierra Club* but not overcome in *Cook*. Whatever the legal merits, however, the larger point is clear: recent reviewability cases, decided by judges in the core libertarian cadre on the DC Circuit, have an unmistakable libertarian valence.³⁵¹

III. FIRST PRINCIPLES

A. Libertarianism, Progressivism, and Administrative Law

As it now stands, there is a sense in which administrative law does have libertarian features, certainly insofar as it enables regulated entities to challenge the legality of agency action. But under appropriate circumstances, parties may also challenge agency refusal to regulate others,³⁵² or challenge agency decisions to deregulate.³⁵³ Review of agency action for conformity to organic statutes, for procedural regularity, and for arbitrariness or substantial evidence is available, and occurs in the same fashion, in all these different contexts.³⁵⁴ And it is clear that when agency action is authorized by law and consistent with procedural requirements, it must be upheld even if it runs afoul

³⁵⁰ *Sierra Club*, 648 F3d at 856.

³⁵¹ For other recent examples, see *Cohen v United States*, 650 F3d 717, 722–24 (DC Cir 2011) (en banc) (finding reviewability because IRS notice was a substantive rule that constrained its own discretion); *Association of Irrigated Residents v Environmental Protection Agency*, 494 F3d 1027, 1028 (DC Cir 2007) (Sentelle) (denying—over Judge Rogers’s dissent—community and environmental groups’ petition for review of EPA agreements with noncompliant animal-feeding operations).

³⁵² See *Dunlop v Bachowski*, 421 US 560, 566 (1975).

³⁵³ See *State Farm*, 463 US at 41–42.

³⁵⁴ See, for example, *id.*

of libertarian strictures (at least if there is no constitutional objection).

The consequence is that the APA and surrounding doctrines cannot be counted as libertarian in any general or systematic way. To be sure, we could imagine a statute that would fall squarely in the libertarian camp, perhaps by protecting property rights by requiring compensation for certain types of regulatory action, or perhaps by imposing novel burdens of justification for intrusions on private rights. But the APA is not that statute, and the Supreme Court has not read it as if it were.

It is true that some doctrines at the intersection of constitutional law and administrative law—including the commercial speech doctrine—have a distinctive libertarian flavor. But there is a significant difference between the commercial speech doctrine as it now stands and the commercial speech doctrine as libertarian panels of the DC Circuit have portrayed it.³⁵⁵ It is also true that the Supreme Court has occasionally deployed arbitrariness review in a fairly aggressive way,³⁵⁶ and no one would be shocked if it did so in the future. But as the law now stands, arbitrariness review, as undertaken by the Court, does not have any kind of libertarian tilt.³⁵⁷

Nor is administrative law generally and systematically progressive, or proregulatory, or anything else—though here as well, we could imagine a statute, or a set of implementing doctrines, that tilted in that direction. As the Supreme Court understands it, administrative law, as law, has *no* systematic and general valence that can be explained in terms of any identifiable political theory or any single theory of regulation. In that modest sense, it is a genuinely, although only partly, autonomous body of rules, standards, and principles—autonomous in the sense that it has not been systematically captured by any one political or ideological approach.

Administrative law thus cannot be neatly characterized in libertarian or nonlibertarian terms. The basic error of the recent DC Circuit decisions is to attempt to engraft a particular controversial theory—a libertarian theory of the legitimate role of the state, itself rooted in a particular controversial interpretation of

³⁵⁵ This changed after the recent en banc decision in *American Meat Institute*, 760 F3d 18. See Part II.B.

³⁵⁶ See Part II.B.

³⁵⁷ On the contrary, the leading case struck down an effort at deregulation. See note 281.

public-choice economics—onto legal materials that have remained recalcitrant.

We do not deny that a hypothetical Supreme Court could begin embracing such a theory. But the existing materials strongly resist the imposition of any particular, controversial political vision (whether progressive, as in the 1970s, or libertarian), and the reason is simple: American administrative law is fundamentally a compromise. The APA itself reflects a compromise between the New Dealers, enthusiastic about the emergence of new regulatory institutions, and the New Deal critics, seeking to strengthen procedural and judicial checks on those institutions.³⁵⁸ Recall the very first sentence of *Vermont Yankee*:

In 1946, Congress enacted the Administrative Procedure Act, which as we have noted elsewhere was not only “a new, basic and comprehensive regulation of procedures in many agencies,” *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950), but was also a legislative enactment which settled “long-continued and hard-fought contentions, and enacts a formula upon which opposing social and political forces have come to rest.” *Id.*, at 40.³⁵⁹

Here, *Vermont Yankee*'s author, then-Justice William Rehnquist, pays tribute to the justice for whom he clerked, Justice Robert Jackson, the author of *Wong Yang Sung*. The vision underpinning both cases is that the APA should be treated as an organizing charter for the administrative state—a super-statute, if you will³⁶⁰—not because it is a grand statement of principles with a specific ideological valence, but precisely because it is a compromise document. The political, social, and economic forces that swirl around the administrative state—not only the APA but also the legalism of the organized bar, the technocratic and economic approaches to regulatory policymaking, and the demands for democratic oversight by elected officials and for democratic participation by affected groups and citizens—have produced a

³⁵⁸ See generally Nathaniel L. Nathanson, *Some Comments on the Administrative Procedure Act*, 41 Ill L Rev 368 (1946). See also *id.* at 419 (“[T]he compromises worked out in the drafting of the Act between advocates of uniformity in administrative procedure and the defenders of diversity and flexibility, did not always result in a product that is crystal clear.”).

³⁵⁹ *Vermont Yankee*, 435 US at 523 (citations omitted).

³⁶⁰ See Scalia, 1978 S Ct Rev at 363, 406 (cited in note 2); Adrian Vermeule, *Super-statutes* (New Republic Online, Oct 26, 2010), archived at <http://perma.cc/Y555-RXJ3>. See also generally Kathryn Kovacs, *Superstatute Theory and Administrative Common Law*, 90 Ind L J (forthcoming 2015), archived at <http://perma.cc/N6D3-RT2R>.

set of rules that in effect reconcile and calibrate these cross-cutting considerations. It is inconsistent with that basic settlement to select one of the APA's multiple commitments and elevate it as the master principle that should animate administrative law.

In the 1960s and 1970s, however, a cadre of lower-court judges did just that. Those judges built up a body of administrative law principles that had a distinctive political tilt, in the sense that they operated, apparently by design, to counteract what the judges saw as antiregulatory pressures within the federal bureaucracy. Recall these remarkable words: "Several recently enacted statutes attest to the commitment of the Government to control, at long last, the destructive engine of material 'progress.' But it remains to be seen whether the promise of this legislation will become a reality. Therein lies the judicial role."³⁶¹ In the end, the Supreme Court was not enthusiastic about this conception of the judicial role nor about the idea that judges should oppose themselves to "the destructive engine of material 'progress'" (with the last word in scare quotes).

We have attempted to show that a number of DC Circuit decisions reflect a mirror image of the previous approach—a form of libertarian administrative law. We can find that mirror image in distinctive receptivity to (sometimes plausible) objections from regulated entities, and in far less receptivity to (also plausible) objections from public interest groups. We can also find it in a series of doctrines that erect special barriers to regulatory activity—barriers that might make sense from the best account of political economy but that cannot claim firm roots in the existing legal materials, and that in some cases affirmatively contradict those materials, as we have tried to show.

The contradiction is not accidental or contingent. It will inevitably occur when a judicial panel treats administrative law as though it embodies a controversial and politicized account of its function—the protection of property from interest group pillage, spurring progressive regulation in the face of interest group resistance, or any similar high-level concern. Because administrative law is "a formula upon which opposing social and political forces have come to rest,"³⁶² it embraces no such account, and it

³⁶¹ *Calvert Cliffs' Coordinating Committee, Inc v United States Atomic Energy Commission*, 449 F2d 1109, 1111 (DC Cir 1971).

³⁶² *Vermont Yankee*, 435 US at 523, quoting *Wong Yang Sung*, 339 US at 40.

is a form of infidelity (not “integrity”³⁶³) to treat it as though it does. Put in Dworkinian terms, no master principle will “fit” the legal materials of administrative law without serious distortion.³⁶⁴

To be sure, the rules of administrative law contain a high degree of open texture and flexibility. But only within bounds; and libertarian administrative law, like progressive administrative law before it, cannot help but transgress those bounds. Just as the progressive judges of the 1970s crossed a line by inventing a form of “hybrid rulemaking” that directly contradicted the APA’s two-tier procedural structure of formal and informal rulemaking, so the libertarian judges of today have crossed a similar line—perhaps most flagrantly by inventing the doctrine that agencies are required (at least in some cases) to use notice-and-comment rulemaking to change an interpretive rule. The lines of compromise in the APA will not accept any such mandate, nor the vision that animates it.

B. Possible Futures

A different question is whether administrative law might *become* increasingly libertarian. The public-choice and related concerns that account for libertarian administrative law are best understood as proposals for a large-scale change of the legal regime, rather than legal arguments within the current regime, as we attempted to document earlier. With imaginable developments over time, especially on the Supreme Court itself, movements in libertarian directions could certainly occur. With respect to the law of standing, for example, the doctrine could easily move in more or less libertarian directions, as it has in the past.³⁶⁵ Revival of the nondelegation doctrine seems highly unlikely, but, in an extreme case, it is not out of the question.

Likewise, the Court could well fortify the protection accorded to commercial advertising. The graphic-warnings decision is, in our view, a large step beyond existing doctrine, but no one would be stunned if five justices were willing to take that step. Strengthened arbitrariness review, designed to protect those subject to regulation, seems out of keeping with the Court’s

³⁶³ See Ronald Dworkin, *Law’s Empire* 176–275 (Harvard 1986).

³⁶⁴ See *id.*

³⁶⁵ See Part II.E.

instructions,³⁶⁶ and even with prominent decisions of the DC Circuit itself.³⁶⁷ But we cannot rule out the possibility that the Supreme Court itself would take a hard line against regulations from the SEC, perhaps with the assistance of arbitrariness review.³⁶⁸

There is a recent constitutional analogy. For a long period, it seemed as if the Court would defer to essentially any decision of Congress under the Commerce Clause.³⁶⁹ Some people, interested in the “lost Constitution,” deplored the Court’s posture of deference.³⁷⁰ Whether they believed that the Constitution had been “lost,” a majority of the Court began reasserting what it saw as genuine constitutional limitations.³⁷¹ Those who approved of those steps hoped that large-scale constitutional change was underway.³⁷²

Their hopes have not been realized, but in the setting of constitutional debates over the Affordable Care Act,³⁷³ the novel arguments advanced to show that Congress lacked power to regulate “inaction” were not (in our view) best understood as arguments within the regime of constitutional law that has prevailed since the New Deal. Rather, these arguments were an effort to strike a blow at the regime itself, with a view to (partially) returning to the “lost Constitution.” The approach won five votes in *National Federation of Independent Business v Sebelius*,³⁷⁴ but not a full victory, because of the presence of an alternative holding (upholding the statute as an exercise of the

³⁶⁶ See generally, for example, *Environmental Protection Agency v EME Homer City Generation*, 134 S Ct 1584 (2014).

³⁶⁷ See, for example, *Center for Biological Diversity v Environmental Protection Agency*, 749 F3d 1079, 1086–89 (DC Cir 2014).

³⁶⁸ The Supreme Court recently unanimously rejected the SEC’s position regarding the statute of limitations for bringing enforcement actions. See *Gabelli v Securities and Exchange Commission*, 133 S Ct 1216, 1224 (2013).

³⁶⁹ See generally, for example, *Wickard v Filburn*, 317 US 111 (1942).

³⁷⁰ See, for example, Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 Va L Rev 1387, 1387–88 (1987).

³⁷¹ See, for example, *United States v Morrison*, 529 US 598, 601–02 (2000) (invalidating the Violence against Women Act’s private right of action).

³⁷² See, for example, Barnett, *Restoring the Lost Constitution* at 317 (cited in note 26); Randy E. Barnett, *Limiting Raich*, 9 Lewis & Clark L Rev 743, 750 (2005) (“[T]hose who admired *Lopez* and *Morrison* . . . hoped these cases presaged a broader New Federalism revolution.”).

³⁷³ Pub L No 111-148, 124 Stat 119 (2010), codified in various sections of Title 42.

³⁷⁴ 132 S Ct 2566 (2012).

taxing power),³⁷⁵ which could allow some future Court to describe the commerce holding³⁷⁶ as unnecessary to the decision.

As things now stand, it is unlikely that libertarian administrative law will win even so qualified a victory, certainly in the short run. One reason is political. The environment in which libertarian administrative law evolved was one in which the DC Circuit was short of its full complement of judges for years³⁷⁷ because Republicans in the Senate blocked new appointments to the Court.³⁷⁸ The result was a partisan split of active judges within the DC Circuit, a split that tilted in a heavily Republican direction for some time.³⁷⁹ More recently, however, the Senate filibuster rules have been modified to allow judicial appointments by a simple majority,³⁸⁰ and President Barack Obama has appointed a clutch of new judges to the Circuit.³⁸¹

To be sure, libertarian administrative law does not perfectly track party lines, especially because many Republican appointees have no enthusiasm for it. But there is a powerful correlation, and it seems likely that the growth phase of libertarian administrative law is over, at least for the short term. Perhaps the precedents will remain as they are, but perhaps they will be narrowly cabined or overturned outright. As mentioned, a potentially important portent is the recent en banc decision in *American Meat Institute v United States Department of Agriculture*.³⁸²

³⁷⁵ See id at 2594–95.

³⁷⁶ See id at 2585–93.

³⁷⁷ For example, of the three judges that President Obama appointed in 2013, Judge Patricia Millett's seat had been vacant since 2005, Judge Sri Srinivasan's since 2008, and Judge Cornelia Pillard's since 2011.

³⁷⁸ For an example of the press coverage on Republicans filibustering President Obama's nominees, see Burgess Everett, *Republicans Block Third Judicial Appointee* (Politico, Nov 18, 2013), archived at <http://perma.cc/5CBG-QDW6>.

³⁷⁹ From the time that Judge Williams took senior status in 2001 until the time that now-Chief Justice John Roberts was appointed to the DC Circuit in 2003, the DC Circuit was evenly split between four judges appointed by Democratic presidents (Judges Edwards, Garland, Rogers, and Tatel) and four judges appointed by Republican presidents (Judges Ginsburg, Sentelle, Randolph, and Henderson). From 2006 to 2008, there were ten active judges on the Circuit. Three (Judges Garland, Rogers, and Tatel) were appointed by Democratic President Bill Clinton, and the remaining seven (Judges Ginsburg, Sentelle, Randolph, Henderson, Brown, Griffith, and Kavanaugh) by Republican presidents. Aside from Judge Randolph taking senior status in 2009, the composition of the DC Circuit remained constant from 2008 until Obama made his first appointments in 2013. See Goldman, Slotnick, and Schiavoni, 97 *Judicature* at 29–36 (cited in note 81).

³⁸⁰ See Janet Hook and Kristina Peterson, *Democrats Rein in Senate Filibusters*, *Wall St J A1* (Nov 22, 2013).

³⁸¹ Since the change in the filibuster rule, the Senate has confirmed three new nominees by Obama: Judges Millett, Pillard, and Robert Wilkins.

³⁸² 760 F3d 18 (2014) (en banc).

There, the court adopted a lower standard of review for disclosure mandates challenged on free speech grounds than the standard adopted in the conflict-minerals decision.³⁸³ Indeed, the en banc court specifically mentioned and overruled that decision to the extent that it embraced a more demanding standard of review.³⁸⁴

In light of decisions like this one, we do not expect significant new additions to the corpus of libertarian administrative law. It is imaginable, of course, that a Republican president, elected in 2016, could appoint judges with great enthusiasm for libertarian administrative law, which would make such developments more likely. But for the immediate future, the only significant question is whether, and how swiftly, libertarian administrative law will be stopped or undone.

In our view, however, it is not enough for libertarian administrative law not to grow, or even to be pruned back. It should be repudiated in principle, and all its works overthrown. A *Vermont Yankee II*³⁸⁵ is called for to inscribe into the law the principle that no abstract political theory, whatever its valence, may be elevated to a master principle of administrative law. Administrative law enjoys a partial autonomy from both quotidian politics and political theories, in the modest but important sense that no political view or theory can properly claim to have captured the whole terrain or to describe all the rules.

As Justice Rehnquist underscored in *Vermont Yankee* itself, the master metaprinciple of administrative law is that it has no single theoretical master principle, at least not with any kind of ideological valence. And as he explained, “The fundamental policy questions appropriately resolved in Congress and in the state legislatures are *not* subject to reexamination in the federal courts under the guise of judicial review of agency action.”³⁸⁶ In an appropriate case, the Court should declare authoritatively for a new generation of judges that the libertarian approach, no less than the progressive approach that preceded it, defies the basic commitments of American administrative law. Libertarian administrative law lacks support in the authoritative materials,

³⁸³ Id at 27.

³⁸⁴ See id at 22–23.

³⁸⁵ See generally Verkuil, 55 Tulane L Rev 418 (cited in note 21); Pierce, 57 Admin L Rev 669 (cited in note 21); Beermann and Lawson, 75 Geo Wash L Rev 856 (cited in note 21).

³⁸⁶ *Vermont Yankee*, 435 US at 558.

and it is far too sectarian to provide an organizing theme for doctrinal innovations.

CONCLUSION

In recent decades, an extraordinary amount of academic energy has been devoted to the idea that the Constitution is in some sense “lost” or “in exile,” and that large-scale doctrinal change is necessary in order to assure its restoration. This idea can be found in academic efforts to transform contemporary understandings of the Commerce Clause, the Necessary and Proper Clause, the Contracts Clause, and the Takings Clause (among others). There is no question that the academics who endorse this idea believe that the Constitution has a distinctive libertarian valence, sometimes captured in the phrase “classical liberalism,” which is sharply contrasted with the supposedly illegitimate operations of modern government.³⁸⁷ And while these sets of ideas have enjoyed a recent rebirth, they are an enduring theme in American debates about the nature of constitutional law.

Our goal here has been to show that a number of doctrines developed by the DC Circuit reflect the birth of libertarian administrative law, operating as a kind of substitute or second-best for the broader project, with which some of the relevant judges have evident sympathy. We have little doubt that a statistical analysis of voting behavior would support this conclusion, with predictable variations across judges. But our approach here has been from an internal point of view. We have identified a series of doctrines and decisions—some high profile, some relatively obscure—that are, at least in the aggregate, best understood in libertarian terms.

Our suggestion is not that the DC Circuit has invariably or systematically imposed a libertarian overlay onto the doctrinal materials; case law does not work that way. Nonetheless, the general tendency is clear. Some of the resulting doctrines—including nondelegation, commercial advertising, and standing—reflect the distinctive kinds of constitutional questions that are an organizing part of administrative law. Others purport to be interpretations of the APA itself. Whatever the legal source,

³⁸⁷ See generally, for example, Epstein, *The Classical Liberal Constitution* (cited in note 24).

the movement toward libertarian principles and outcomes is unmistakable.

It is no news to say that in the 1970s, the DC Circuit developed a form of progressive administrative law with an identifiable political tilt. Though the tilt was on the surface of some of the key opinions, it was generally more subtle, camouflaged in decisions that leaned on a tendentious reading of the organic statute at issue, imposed new procedural requirements, or found agency decisions to be arbitrary when reasonable people could differ. At the time, it was not so easy to step back from the details to see the general pattern, though it is evident in retrospect. We have attempted to show that something similar is happening today.

As we have emphasized, libertarian administrative law is hardly new; it has been a theme, or subtheme, in administrative law from the beginning. In particular, it played a role in early decisions attempting to cabin the authority of administrative agencies.³⁸⁸ But in recent years, the more-than-occasional success of the project on the nation's most important regulatory court deserves serious attention.

Our principal goal has been descriptive rather than normative. It remains possible to celebrate one or more of the doctrinal developments that we have explored, or even to say that an accelerated movement in libertarian directions would be desirable. As in the 1970s, however, we believe that the underlying developments are at best in serious tension with both the underlying sources of law and the governing decisions of the Supreme Court. A dose of legal realism, acknowledging the presence and even the inevitability of the occasional "tilt," has its place, but in a hierarchical court system, respect for the governing rules is not optional.

³⁸⁸ See generally, for example, *Natural Resources Defense Council, Inc v United States Nuclear Regulatory Commission*, 685 F2d 459 (DC Cir 1982); *Natural Resources Defense Council, Inc v United States Nuclear Regulatory Commission*, 547 F2d 633 (DC Cir 1976); *Federal Trade Commission v Gratz*, 253 US 421 (1920).