UNORTHODOX LAWMAKING, UNORTHODOX RULEMAKING

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The Schoolhouse Rock! *cartoon version of the conventional legislative process is dead, if it was ever an accurate description in the first place. Major policy today is often the product of "unorthodox lawmaking" and "unorthodox rulemaking"—deviations from traditional process marked by frequent use of omnibus bills and multiple agency implementation; emergency statutes and regulations issued without prior comment; outsourcing to lawmaking commissions and unconventional delegates; process shortcuts outside of emergencies; presidential policymaking; and outside drafters, some nonpartisan and others hyperpartisan. These unorthodoxies are everywhere, and they have shifted the balance in the elected branches and beyond, often centralizing power in actors—like party leadership and the White House—not traditionally part of the core lawmaking and rulemaking processes. These unorthodoxies are the new textbook process.*

The theories and doctrines of legislation and administrative law, however, have paid little attention to these evolutions. The limited commentary that does exist tends to lump all unorthodox policymaking together or to preserve an artificial divide between their legislative and administrative manifestations. But omnibus policymaking is different from emergency policymaking—not only in process and product, but in the challenges that each poses for courts. And both forms of policymaking are different from presidential policymaking, and so on. Unorthodoxies in one branch are also closely linked to unorthodoxies in the other.

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The "law crowd"—a group in which the value of process is deeply instilled—tends to look upon these modern changes with suspicion. But some unorthodoxies may in fact be beneficial to democracy, and any assessment requires a much clearer understanding of what legislative and administrative doctrines are for than we currently have. Unorthodox policymaking may make the job of courts more difficult by, for instance, making law messier or less transparent, but is the role of courts to reflect how policy is made? Improve how policy is made? Or advance different values altogether?

This Essay develops an account of today's unorthodox lawmaking and unorthodox rulemaking and substantiates the link between them. It utilizes a new typology of unorthodoxies to explore the causes, costs and benefits, and winners and losers associated with each different kind of policymaking, and plays out the ways that the theories and doctrines of legislation and administrative law might respond to the modern context in which they now unquestionably operate.

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INTRODUCTION

Over a lifetime of work as a scholar who is unequalled in his simultaneous devotion to the fields of administrative law and legislation, Peter Strauss's insistence that legal theory and doctrine must take into account the realities of the modern lawmaking and rulemaking processes has charted the course for the next generation of work in the two fields. Strauss was among the first to identify the functional overlap among Congress, courts, and the executive when it comes to how laws are actually made, implemented, and interpreted,[1] and is one of the most insightful

1. See, e.g., Ronald A. Cass & Peter L. Strauss, The Presidential Signing Statements Controversy, 16 Wm. & Mary Bill Rts. J. 11, 14–21 (2007) (identifying President's dual roles

and institutionally realist scholars in understanding the challenges for courts in developing doctrines to respond to the increasing complexity of the modern regulatory state.[2]

These questions loom ever larger today. Our regulatory landscape looks very different than it did just a few decades ago, but the theories and doctrines of legislation and administrative law still remain structured around the then-revolutionary innovations in policymaking of the 1970s. Those earlier innovations—marked by the entrenchment of congressional committees as the primary loci of law crafting and the rise of notice-and-comment rulemaking by agencies[3]—often stand in stark contrast to the more centralized and less transparent processes that have emerged to meet the political and regulatory challenges of our times.

And so the big questions are these: How important is it for the theories and doctrines of legislation and administrative law to reflect how Congress and agencies actually work? What role, if any, should legal doctrine play in attempting to influence the lawmaking and rulemaking processes themselves? What is the value of these processes and what institutions and interests do they serve? Could legal doctrine ever be up to the task of capturing the complexity of the modern regulatory state?

A few familiar recent scenarios set the stage:

- The Patient Protection and Affordable Care Act of 2010 (ACA) is a 2700-page statute worked on by five congressional committees; it delegates not to a single federal agency but to multiple federal agencies, as well as to states, quasi-public actors, and an independent commission, to which it outsourced the

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in interpreting and implementing legislation); Peter L. Strauss, Foreword: Overseer, or "The Decider"? The President in Administrative Law, 75 Geo. Wash. L. Rev. 696, 712–13 (2007) [hereinafter Strauss, Overseer or Decider] (identifying dual roles for President and framing question of interpretive deference to President); Peter L. Strauss, The Place of Agencies in Government: Separation of Powers and the Fourth Branch, 84 Colum. L. Rev. 573, 575–79 (1984) (emphasizing functional overlap among branches); Peter L. Strauss, When the Judge Is Not the Primary Official with Responsibility to Read: Agency Interpretation and the Problem of Legislative History, 66 Chi.-Kent L. Rev. 321, 329–31 (1990) [hereinafter Strauss, When the Judge] (identifying agencies as statutory interpreters).

2. See Peter L. Strauss, "Deference" Is Too Confusing—Let's Call Them "*Chevron* Space" and "*Skidmore* Weight," 112 Colum. L. Rev. 1143, 1144–48 (2012) (mapping each doctrine and Supreme Court's role); Peter L. Strauss, One Hundred Fifty Cases per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action, 87 Colum. L. Rev. 1093, 1094–96 (1987) [hereinafter Strauss, 150 Cases per Year] (framing *Chevron* as realist doctrinal response from Supreme Court needing to ensure tolerable legal uniformity).

3. These processes were entrenched by, among other things, the Legislation Reorganization Act of 1970, Pub. L. No. 91-510, 84 Stat. 1140, which targeted congressional committees, and the Supreme Court's 1973 decision in United States v. Florida East Coast Railway Co., 410 U.S. 224 (1973), which held that agencies need only use formal, trial-like proceedings in limited circumstances and so turned agencies to notice-and-comment rulemaking as their primary mode of action.

controversial question of cutting Medicare.[4] The Supreme Court recently called it "inartful[ly] drafted" and lacking "the type of care and deliberation that one might expect of such significant legislation."[5]

- In November 2014, President Obama directed the Department of Homeland Security (DHS) to accomplish controversial immigration reform in the face of Congress's unwillingness to do so.[6] DHS did not use notice-and-comment rulemaking to announce the new policy—a process that was later found invalid by a federal court.[7] Congressional Republicans responded by trying to condition the entire DHS budget on the reversal of the executive actions.[8]
- In December 2014, Congress enacted a $1.104 trillion spending bill to avert a government shutdown.[9] The bill included a temporary Homeland Security budget—used to give the Republicans more time to try to undo the Obama Admin-

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4. See generally Abbe R. Gluck, Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond, 121 Yale L.J. 534, 576–94 (2011) [hereinafter Gluck, Intrastatutory Federalism] (describing complex implementation structure of ACA); Timothy Stoltzfus Jost, The Independent Medicare Advisory Board, 11 Yale J. Health Pol'y L. & Ethics 21, 24–27, 31 (2011) (calling Independent Payment Advisory Board (IPAB) attempt by Congress to "lash itself to the mast to keep the siren song of special interest lobbyists from distracting it from its task of controlling Medicare cost growth").

5. Abbe R. Gluck, Imperfect Statutes, Imperfect Courts: Reading Congress's Plan in the Era of Unorthodox Lawmaking, 129 Harv. L. Rev. (forthcoming Nov. 2015) (manuscript at 26–27) [hereinafter Gluck, Imperfect Statutes] (on file with the *Columbia Law Review*) (explaining Congress did not pass ACA through "textbook legislative process").

6. See Executive Actions on Immigration, U.S. Citizenship & Immigration Servs., http://www.uscis.gov/immigrationaction [https://perma.cc/88L9-PRXW] (last visited Aug. 15, 2015) (explaining immigration action); see also Lauren Gambino, Immigration Crisis Forces Obama to "Act Alone" with Executive Orders, Guardian (Aug. 4, 2014), http://www.theguardian.com/world/2014/aug/04/us-immigration-obama-executive-order-options-deportation [http://perma.cc/EMM3-8NPQ] (reporting "frustrated [President] Obama['s]" announcement he would initiate executive immigration reform due to congressional deadlock).

7. See Texas v. United States, No. B-14-254, 2015 WL 648579, at *62 (S.D. Tex. Feb. 16, 2015) (granting preliminary injunction), stay denied, No. B-14-254, 2015 WL 1540022 (S.D. Tex. Apr. 7, 2015), aff'd, 787 F.3d 733 (5th Cir. 2015).

8. Josh Hicks, Why Congress Can't Stop a Federal Hiring Blitz Tied to Obama's Immigration Actions, Wash. Post (Dec. 8, 2014), http://www.washingtonpost.com/blogs/federal-eye/wp/2014/12/08/why-congress-cant-stop-a-federal-hiring-blitz-tied-to-obamas-immigration-actions [http://perma.cc/57ER-545G] (reporting Republican "effort to force compromise").

9. See Bill Chappell, "Cromnibus" Spending Bill Passes, Just Hours Before Deadline, NPR (Dec. 11, 2014, 2:29 PM), http://www.npr.org/sections/thetwo-way/2014/12/11/370132039/house-poised-to-vote-on-controversial-cromnibus-spending-bill (on file with the *Columbia Law Review*); Ashley Parker & Jonathan Weisman, Congressional Leaders Reach Deal on Spending, N.Y. Times (Dec. 9, 2014), http://www.nytimes.com/2014/12/10/us/politics/congressional-leaders-reach-deal-on-spending.html (on file with the *Columbia Law Review*).

> istration's immigration reforms in the final budget bill[10]—as well as eleven different appropriations bills, which, according to one Democrat, made it "a Christmas tree bill."[11] Among them was a provision that quietly undid a controversial mandate in the Dodd-Frank Act—with "no hearings, . . . and no chance for debate . . . in the last days of a lame-duck Congress."[12]

And so it seems that the *Schoolhouse Rock!*[13] cartoon version of the conventional legislative process is dead. It may never have accurately described the lawmaking process in the first place. This is not news to anyone in the halls of Congress or the executive branch. But it may be news for law. The Court's first opinion directly confronting these modern developments—*King v. Burwell*,[14] the recent challenge to the ACA—was issued just before this Essay went to press. Until then, most of the doctrines, theories, and casebooks had overlooked—or perhaps intentionally ignored—the fact that the textbook understandings that form the basic assumptions underlying the doctrines and theories of both fields are woefully outdated. Just as the now-textbook 1970s model was once itself revolutionary, ours is again a world of both "unorthodox lawmaking"[15] and "unorthodox rulemaking." These unorthodoxies are everywhere and they are not exceptions.[16] They are the *new* textbook process.

The "law crowd"—a group in whom the value of process is deeply instilled—tends to view these changes as disconcerting, as the Court did in *King*. But evaluating them is quite complex. Arguably, some of these modern unorthodoxies are beneficial to democracy, particularly insofar as they enable the enactment of policy that otherwise could not occur in an age of gridlock or under considerable fiscal constraints.[17] What is more, what is

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10. See Susan Milligan, The GOP's "Cromnibus" Compromise, U.S. News (Dec. 8, 2014, 12:01 AM), http://www.usnews.com/news/articles/2014/12/08/house-gop-pushes-cromnibus-to-combat-obama-on-immigration [http://perma.cc/A8D2-5H37] (explaining aim of budget compromise is to counteract President Obama's executive action on immigration).

11. Robert Pear, In Final Spending Bill, Salty Food and Belching Cows Are Winners, N.Y. Times (Dec. 14, 2014), http://www.nytimes.com/2014/12/15/us/politics/in-final-spending-bill-salty-food-and-belching-cows-are-winners.html (on file with the *Columbia Law Review*).

12. Robert Lenzner, A Christmas Present for the Banks from the Omnibus Bill, Forbes (Dec. 13, 2014, 12:35 PM), http://www.forbes.com/sites/robertlenzner/2014/12/13/wall-street-reverses-ban-on-trading-derivatives-backed-by-uncle-sam [http://perma.cc/8WLV-NW23].

13. Schoolhouse Rock!, I'm Just a Bill, YouTube (Sept. 1, 2008), https://www.youtube.com/watch?v=tyeJ55o3El0 [https://perma.cc/TF4K-KR6F]; cf. Saturday Night Live, Capitol Hill Cold Open, Youtube (Nov. 23, 2014), https://www.youtube.com/watch?v=JUDSeb2zHQ0 [https://perma.cc/J487-HDW8] (explaining process of Executive Orders).

14. 135 S. Ct. 2480 (2015).

15. Barbara Sinclair coined this term in her important book with the same title. See Barbara Sinclair, Unorthodox Lawmaking: New Legislative Processes in the U.S. Congress (1st ed. 1997) [hereinafter Sinclair, Unorthodox Lawmaking (1st ed.)].

16. Cf. Gluck, Imperfect Statutes, supra note 5 (manuscript at 28) (illustrating how *King* implied ACA's process was unusual).

17. See infra Part III (evaluating normative implications of unorthodox process).

orthodox today may have been unorthodox yesterday. The Administrative Procedure Act[18] (APA) and *Chevron* deference[19]—two core modern institutions of administrative lawmaking—were considered unorthodox when first proposed.[20] Office of Information and Regulatory Affairs (OIRA) review, one of the unorthodoxies we discuss, may now be close to orthodox status, despite its lack of statutory and judicial recognition.[21]

Another question is who are we—the lawyers—to judge? The Constitution gives to *Congress* the power over its own procedures.[22] Congress organized itself into committees and passed rules such as the filibuster, the fast-track budget process, and the rules that govern the omnibus bills that give rise to many of the unorthodoxies we see today.[23] Congress also passed the APA, which explicitly permits agencies to regulate without notice and comment—a practice today viewed as unorthodox because of its increased use and de facto binding effect on regulated entities.[24]

This Essay develops a modern account of unorthodox lawmaking and unorthodox rulemaking and, in the Strauss tradition, substantiates

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18. Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in 5 U.S.C. §§ 500–706 (2012)).

19. See Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984) (explaining principle of judicial deference to agencies where statute delegating regulatory authority is ambiguous).

20. See Stephen Breyer, Judicial Review of Questions of Law and Policy, 38 Admin. L. Rev. 363, 381 (1986) (calling *Chevron* deference to reasonable agency interpretations "greater abdication of judicial responsibility . . . than seems wise"); George B. Shepherd, Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics, 90 Nw. U. L. Rev. 1557, 1560 (1996) (describing passage of APA as "pitched political battle for the life of the New Deal . . . le[aving] many . . . far from completely satisfied"); cf. Thomas W. Merrill, The Story of *Chevron*: The Making of an Accidental Landmark, *in* Administrative Law Stories 399 (Peter L. Strauss ed., 2006) (documenting no one thought *Chevron* had major significance when first decided).

21. See infra section I.E (describing executive role in legislative and regulatory processes).

22. See U.S. Const. art. I, § 5, cl. 2 ("Each House may determine the Rules of its Proceedings . . . ."); see also Josh Chafetz & Michael J. Gerhardt, Debate, Is the Filibuster Constitutional?, 158 U. Pa. L. Rev. PENNumbra 245, 258–59, 263 (2010), http://www.pennlawreview.com/online/158-U-Pa-L-Rev-PENNumbra-245.pdf [http://perma.cc/YP4X-G5Z3] (debating constitutionality of filibuster in context of congressional control of own rules).

23. See generally David H. Rosenbloom, 1946: Framing a Lasting Congressional Response to the Administrative State, 50 Admin. L. Rev. 173, 178–82 (1998) (outlining passage of APA and internal reorganization of Congress as congressional attempt to manage expanding administrative state during New Deal era).

24. See, e.g., Nicholas Bagley & Helen Levy, Essential Health Benefits and the Affordable Care Act: Law and Process, 39 J. Health Pol. Pol'y & L. 441, 442 (2014) (discussing phenomenon in context of ACA); Roberta Romano, Further Assessment of the Iron Law of Financial Regulation: A Postscript to Regulating in the Dark 34–36 (European Corp. Governance Inst., Working Paper No. 273, 2014), http://ssrn.com/abstract=2517853 [http://perma.cc/WH8S-U4PN] [hereinafter Romano, Iron Law] (criticizing Consumer Financial Protection Bureau (CFPB)'s use of guidance instead of notice-and-comment rulemaking).

the link between them. For example, both lawmaking and rulemaking often now bypass the hurdles of transparency that have become familiar. Both use outside delegates for many controversial issues. Both also have generated significant jurisdictional overlap: The "deal making" required to surmount political division leads to bundling unrelated bills, drafted by multiple congressional committees, which in turn creates overlap across administrators and gives a more prominent role to the White House because it takes on the role as coordinator-in-chief.[25]

Who wins and who loses from these deviations? Power inures to party leaders and the President—who wears two different, but equally powerful, hats as legislator and chief administrator. On the other hand, policy experts in committees and agencies, as well as those who favor decentralized power, may get the short end of the stick. From a democracy perspective, the process loses transparency and public input and sometimes obfuscates accountability. But it may also gain in efficiency and productivity.

"Unorthodox lawmaking" was first brought to the attention of the academy by political scientist Barbara Sinclair, in her eponymous book.[26] Subsequent editions empirically documented the increase in legislative-process deviations,[27] a phenomenon elaborated on in a coauthored empirical study of congressional drafters by one of us.[28] On the administrative law side, separate work by two of us has begun to develop the modern unorthodox rulemaking account.[29]

Until now, these two accounts mostly have been discussed in isolation and have themselves relied on fairly simplified description.[30] In contrast,

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25. See supra note 4 and accompanying text (explaining creation, purpose, and process of IPAB).

26. See Sinclair, Unorthodox Lawmaking (1st ed.), supra note 15, at xii.

27. See Barbara Sinclair, Unorthodox Lawmaking 261–65 & tbls.10.1, 10.2, 10.3 & 10.4 (4th ed. 2012) [hereinafter Sinclair, Unorthodox Lawmaking (4th ed.)] (presenting empirical findings showing increase in unorthodox process).

28. Lisa Schultz Bressman & Abbe R. Gluck, Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation and the Canons: Part II, 66 Stan. L. Rev. 725, 758–63 (2014) [hereinafter Bressman & Gluck, Part II]; Abbe R. Gluck & Lisa Schultz Bressman, Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation and the Canons: Part I, 65 Stan. L. Rev. 901, 979–82 (2013) [hereinafter Gluck & Bressman, Part I].

29. Daniel A. Farber & Anne Joseph O'Connell, The Lost World of Administrative Law, 92 Tex. L. Rev. 1137, 1154–73 (2014); Rosa Po, Unorthodox Rulemaking: The New Regulatory Process in Administrative Agencies 33–45 (June 2015) (unpublished manuscript) (on file with the *Columbia Law Review*) [hereinafter Po, New Regulatory Process].

30. To the extent that the practices of the legislation and rulemaking side have been linked, it has been only through a recently emerging story of partisan gridlock. See, e.g., Michael S. Greve & Ashley C. Parrish, Administrative Law Without Congress, 22 Geo. Mason L. Rev. 501, 535 (2015) (discussing "deep partisan division" in which Congress must legislate and resulting agency action); Gillian E. Metzger, Agencies, Polarization, and the States, 115 Colum. L. Rev. 1739, 1757–58 (2015) [hereinafter Metzger, Agencies, Polarization, and the States] (examining agency action in polarized political environment); David E. Pozen, Self-Help and the Separation of Powers, 124 Yale L.J. 2, 41

we argue here that the legislative and rulemaking processes are inextricably linked, and that each set of unorthodoxies feeds into and illuminates the other. We also argue that it would be a return to the *Schoolhouse Rock!* fiction to fail to appreciate the sheer variety of deviations from the textbook process that fall under the general umbrella of unorthodox policymaking. Omnibus bills and rules are different from emergency bills and rules; both are different from unorthodox delegations; and so on.

Part I expands the preexisting descriptive account by developing a new typology of these deviations and roughly surveying their scope empirically. Part II explores these connections as well as other ways in which common motivations, such as gridlock, institutional complexity, and fiscal constraints, give rise to the deviations in both branches. The final two Parts investigate the normative and legal implications of our descriptive account. As Part III explains, these unconventional practices allow certain institutional actors to gain and lose power and offer benefits and drawbacks for social welfare and democratic legitimacy. Part IV looks to doctrine and details how, in the contexts of both statutory interpretation and administrative law, these unorthodoxies have been largely invisible, even as the courts seem obsessed with ensuring that judicial decisions in statutory cases reflect how Congress legislates or that agencies otherwise faithfully execute Congress's commands.

Two brief examples will illustrate our direction. On the legislation side, take the simple example of one of the Court's favorite interpretive rules—that a term used in one part of a statute means the same thing when used in another part.[31] While this "presumption of consistent usage" may make sense for very short statutes, or statutes involving a single subject matter drafted by a single congressional committee, it makes little sense for omnibus deals that put together diverse statutes, drafted at different times, by different institutional actors. On the administrative law side, to take another basic example, the Supreme Court has yet to decide how its central deference doctrine—*Chevron*—applies when multiple agencies share authority.[32]

(2014) (discussing increased polarization of Senate and "widespread fear" of "breakdown of our system of representative government" and implications for presidential self-help); Josh Blackman, Gridlock and Executive Power 23 (July 15, 2014) (unpublished manuscript), http://ssrn.com/abstract=2466707 [http://perma.cc/G38P-8Z3V] (last updated Aug. 12, 2014) (noting link between perceived legislative breakdown and increased use of unorthodox executive maneuvers); Po, New Regulatory Process, supra note 29 (examining passage and implementation of ACA through gridlock lens).

31. See, e.g., W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 97–99 (1991) (applying same meaning of "attorney's fees" across U.S. Code).

32. See Jacob E. Gersen, Overlapping and Underlapping Jurisdiction in Administrative Law, 2006 Sup. Ct. Rev. 201, 221 [hereinafter Gersen, Overlapping and Underlapping] (highlighting uncertainty under *Chevron* "about whether deference is warranted for agency views of a statute that multiple agencies . . . administer").

One goal of the Essay is simply to set the record straight. Given that so much scholarship and legal doctrine at least purports to rely on an understanding of how Congress and the executive branch actually function, an accurate account of the modern policymaking process seems vital. At a broader level, the Essay's goal is to question the capacity of and role for courts in taking this amount of process variation into account. Part of this inquiry is motivated by an interest in the jurisprudential foundations of statutory law. When it comes to legislation, the Court has never been consistent in its articulation of what the role of interpretive doctrine is supposed to be in the first place. Sometimes the Court tells us that its doctrines aim to reflect how Congress drafts—for instance, the rule that Congress does not write with redundancies. Other times, the Court tells us that legislation doctrine helps Congress draft "better" or encourages legislative deliberation. Still other applications of interpretive doctrine aim to impose on legislation external values, like federalism, that Congress might not have considered.[33] These potential normative frameworks are often in tension in any given case.

On the administrative law side, the Court has been less interested in engaging in a shared interpretive conversation with agencies and more interested in questions of accountability.[34] But even there, the theoretical basis has been fuzzy, since the Court seems to measure accountability against the APA, and not against actual agency and White House practices.[35] Obviously, all of these different norms have different implications for a theory that would take unorthodox processes into account.

One caveat at the outset is that we do not engage *judicial* unorthodoxies, or unorthodoxies related to agency enforcement and agency adjudications. A comprehensive study of unorthodox mechanisms in law might well include these, for instance, examining court innovations such as the increasing use of unpublished and thus nonprecedential opinions[36] and the rise of specialty courts.[37] These developments, while fascinating, are outside the scope of this Essay, which trains its focus on the public lawmaking processes. Even with respect to Congress and the executive branch,

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33. See, e.g., Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 237 (1947) (establishing presumption against preemption).

34. See, e.g., Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865–66 (1984) (linking deference to agencies with accountability).

35. See Farber & O'Connell, supra note 29, at 1170, 1185–88 (noting discrepancy and suggesting possible doctrinal changes to incorporate modern practices).

36. See generally Unpublished Judicial Opinions: Hearing Before the Subcomm. on Courts, the Internet & Intellectual Prop. of the H. Comm. on the Judiciary, 107th Cong. 94–113 (2002), http://commdocs.house.gov/committees/judiciary/hju80454.000/hju80454_0.htm [http://perma.cc/SQN9-5RKC] (discussing increasing use of unpublished opinions in federal court system).

37. See generally Panel Discussion: Specialized Courts: Lessons from the Federal Circuit, 8 Chi.-Kent J. Intell. Prop. 317 (2009), http://scholarship.kentlaw.iit.edu/cgi/viewcontent.cgi?article=1076&context=ckjip [http://perma.cc/66Z2-T75R] (presenting transcript of discussion on merits of increasing number and types of specialty courts).

one Essay cannot possibly tackle all unorthodox practices and we recognize omissions: For instance, we do not discuss foreign affairs. In addition, we focus mostly on *action* by policymakers. One could also develop an account of unorthodox inaction in lawmaking and rulemaking.[38]

Our efforts, as noted, build on Strauss's contributions. Strauss has always written with both modern legislation and administration—and their connections—front and center.[39] He was an early identifier of the varied unorthodox roles played by the President and the potential doctrinal implications of those different roles.[40] He was one of the first scholars to consider the question of *Chevron* deference for presidential interpretations, and also the link between agency statutory interpretation and the legislative history debate raging on the statutory side.[41] And his pathbreaking work on *Chevron* as a judicial management tool is a rare realist analysis of doctrinal development in response to the sprawl of regulation.[42] He has been a consistent voice in pushing back against those who turn a blind eye toward the political and legislative context of statutes, and we aim to follow his example here.[43]

I. THE MANY FORMS OF UNORTHODOX LAWMAKING AND RULEMAKING

Unorthodox policymaking is now often the norm rather than the exception. But not all unorthodox policymaking is the same. This Part focuses on these two themes, documenting the modern prevalence of unorthodox policymaking and resisting the way in which the limited accounts that do exist tend to lump together all deviations from conventional process as a single phenomenon.[44] Omnibus actions are different from emergency actions, not only in motivation and in how the final product looks, but also in the distinct challenges each poses for courts. Outsourcing difficult legislative and regulatory questions to special processes, commissions, and unconventional delegates raises its own set of

38. For instance, individual "holds" on bills by members might qualify as unorthodox legislative practices when it comes to inaction. On the rulemaking side, withdrawals of rulemakings or not responding to rulemaking petitions might count as unorthodox mechanisms.

39. See, e.g., Strauss, When the Judge, supra note 1, at 329 ("Legislative history has a centrality and importance for agency lawyers that might not readily be conceived by persons . . . accustomed to considering its relevance only to actual or prospective judicial resolution of discrete disputes.").

40. Strauss, Overseer or Decider, supra note 1 (analyzing multiplicity of presidential roles with regard to administrative process).

41. Id. at 748–57; Strauss, When the Judge, supra note 1, at 321.

42. Strauss, 150 Cases per Year, supra note 2, at 1117–22.

43. See Peter L. Strauss, The Courts and the Congress: Should Judges Disdain Political History?, 98 Colum. L. Rev. 242, 266 (1998) (defending importance of considering political history of legislation).

44. Sinclair herself does not attempt to make distinctions *within* the world of legislative unorthodoxy that she identifies. See, e.g., Sinclair, Unorthodox Lawmaking (4th ed.), supra note 27, at 132 tbl.5.1 (combining all unorthodox practices and procedures in tabulation of special unorthodox practices for major legislation).

questions for law, as do the simultaneously regulatory and legislative roles of the modern President, and the increasing use of nonformal means, such as guidance, for regulation. Direct democracy is yet another type of lawmaking whose differences from the norm courts seem to prefer to ignore.

A. *Unorthodox Lawmaking and Rulemaking on the Rise: An Empirical Snapshot*

Lest there be any doubt about the importance of the subject matter, a few descriptive statistics should suffice to document the prevalence of the phenomenon. The point is not that these tools are new, or that our categories are necessarily exclusive. Rather, the point is that these vehicles are being used in many instances for different purposes than those for which they were initially introduced, and often with increasing frequency. For instance, we see Congress legislating substantively through the omnibus appropriations process, which was initially conceived only to distribute money to already enacted programs.[45] We see agencies using "good-cause rulemaking," incorporated in the APA for rare instances, more than one-third of the time to implement significant binding regulatory policy.[46] And we see the President increasingly turning to more informal means such as directives and memoranda to shape substantive domestic policy. A brief snapshot highlights some of these moves, by way of example:

TABLE 1: EMPIRICAL SNAPSHOT OF UNORTHODOX PRACTICES

- *Legislative bundling* through *omnibus vehicles* has increased dramatically, both for substantive legislation and for appropriations.[47] In recent Congresses, omnibus packages have made up about 12% of major legislation.[48]
- *Overlapping delegations* to multiple agencies[49] and *joint rulemaking* have risen in recent years.[50]
- *Process deviations* are prevalent. As one example, in the first year of the 112th Congress, fewer than 10% of enacted laws proceeded through the "textbook" legislative process (first passing through committees on each side, then moving to debate and vote in each chamber, followed by conference between the chambers, and concluding with a final vote by both chambers before passage). More than 40% of enacted statutes did not go through the committee process in *either* chamber, but proceeded directly from the floor or were shepherded through by party leadership or the White House.[51] Although variable by year, legislation bypassed committees much more in the 1990s and 2000s than in the preceding decades.[52]
- *Unconventional rulemaking* also appears to be on the rise. More than one-third of major rules in recent years were promulgated without prior notice and comment, often citing the good cause exemption to APA notice-and-

45. See Susan Rose-Ackerman, Judicial Review and the Power of the Purse, 12 Int'l Rev. L. & Econ. 191, 193–94 (1992) (discussing purposes for appropriating funds through omnibus bills).

46. U.S. Gov't Accountability Off., GAO-13-21, Federal Rulemaking: Agencies Could Take Additional Steps to Respond to Public Comments 8 (2012) [hereinafter GAO, Federal Rulemaking].

comment mandates.[53]

- The *unorthodox President* now uses more executive memoranda and directives for major policy moves[54] and his role in rulemaking itself has also increased considerably since the 1970s: The White House's OIRA now reviews between 500 and 700 significant proposed and final rules each year[55] and often changes draft rules.[56]

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47. Jessica Tollestrup, Cong. Research Serv., RL32473, Omnibus Appropriations Acts: Overview of Recent Practices 4 (2014), https://www.hsdl.org/?view&did=750138 [https://perma.cc/RBH7-M4MP] (noting, of 345 appropriations bills enacted into law between FY 1986 and FY 2014, 154 were done through omnibus legislation).

48. Sinclair, Unorthodox Lawmaking (4th ed.), supra note 27, at 113.

49. See Sean Farhang & Miranda Yaver, Divided Government and the Fragmentation of American Law, 59 Am. J. Pol. Sci. (forthcoming 2015) (manuscript at 7–8) (on file with the *Columbia Law Review*) (measuring overlap in administrative function over sixty years).

50. Joint rulemaking is still small in absolute terms. See Jody Freeman & Jim Rossi, Agency Coordination in Shared Regulatory Space, 125 Harv. L. Rev. 1131, 1166–67 & n.167 (2012) (noting joint rulemaking made up only approximately 4% of all rulemaking in 2010, climbing from 98 such rules in 2008 to 139 in 2010).

51. For further documentation, see Bressman & Gluck, Part II, supra note 28, at 762–63 & nn.139–143. Our own research is consistent with these accounts; the numbers for the 113th Congress are virtually identical. Memorandum from Rosa Po, student, Yale Law Sch., to Abbe R. Gluck, Professor of Law, Yale Law Sch. & Anne Joseph O'Connell, George Johnson Professor of Law, Univ. of Cal. Berkeley Sch. of Law 1 (Sept. 12, 2015) [hereinafter Po, Memorandum] (on file with the *Columbia Law Review*). Unorthodox practices appear more common in the first year of a congressional session. Id.

52. Sinclair, Unorthodox Lawmaking (4th ed.), supra note 27, at 54 ("[I]n the Congresses of the 1960s through the 1980s . . . the committee was bypassed . . . on 7 percent of major measures; for the 103rd through 110th Congresses, the average increased to 26 percent; in the 111th Congress it was 45 percent.").

53. GAO, Federal Rulemaking, supra note 46, at 8; Connor Raso, Agency Avoidance of Rulemaking Procedures, 67 Admin. L. Rev. 65, 69 (2015) (examining rulemaking between 1995 and 2012 and finding "[a]gencies exempted approximately 50% of rules from the APA notice-and-comment process.").

54. See Kenneth S. Lowande, After the Orders: Presidential Memoranda and Unilateral Action, 44 Presidential Stud. Q. 724, 725 & 730 fig.1 (2014) ("[O]ver the last 50 years, published memoranda have surged . . . ."); Nina A. Mendelson, Disclosing "Political" Oversight of Agency Decision Making, 108 Mich. L. Rev. 1127, 1148 & n.109 (2010) [hereinafter Mendelson, Political Oversight] (noting extensive use of "presidential statements directing agencies to take action of one sort or another" from 1993 to 2008 based on search of Westlaw "Presidential Daily" database).

55. Curtis W. Copeland, Cong. Research Serv., RL32397, Federal Rulemaking: The Role of the Office of Information and Regulatory Affairs 1 (2011), https://www.fas.org/sgp/crs/misc/RL32397.pdf [https://perma.cc/7J72-3KWV] (discussing OIRA review of agency rules). The number of regulations reviewed has not increased since the 1970s; indeed, previous administrations examined more than 2,000 a year. Id. at 10 & fig.1.

56. Id. at 17–18; see also U.S. Gov't Accountability Off., GAO-03-929, Rulemaking: OMB's Role in Reviews of Agencies' Draft Rules and the Transparency of Those Reviews 5 (2003), http://www.gao.gov/new.items/d03929.pdf [http://perma.cc/FQL7-SAG9] (finding "significant[]" changes to 25 of 85 rules examined). Presidential signing statements also dramatically increased until recently, and may now be in some decline. Daniel B. Rodriguez et al., Executive Opportunism, Presidential Signing Statements, and the Separation of Powers 10 (Cornell Law Sch., Paper No. 15-20, 2015), http://ssrn.com/abstract=2564824 [http://perma.cc/2LE3-R64G]. Currently, signing statements are almost

- New *unorthodox delegations* outside of traditional federal actors to states, private, and quasi-private actors have been widely observed by scholars.[57] Other measures support these conclusions, including a more-than-tenfold rise in federal grants-in-aid to states;[58] a dramatic tripling, to 18 million, in the total number of state and local government employees, while the size of the federal civil service has remained roughly constant at 2 million;[59] and an increase in private outsourcing.[60] As one example, DHS at times has used more contract employees than federal employees.[61] Strauss has tracked another example—the increase in private standards in rulemaking,[62] which nearly doubled between 2011 and 2012 alone.[63]
- *Unorthodox workarounds* that outsource controversial issues to boards and commissions were introduced in recent decades and include base realignment and closure,[64] the new Medicare-cutting board created by the ACA, and the fast-track trade and budget processes.

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at pre–Reagan levels. See id. at 10–11 & 38 fig.1 (depicting recent decline of ratio of signing statements to laws passed); see also Todd Garvey, Cong. Research Serv., RL33667, Presidential Signing Statements: Constitutional and Institutional Implications 2–13 (2012), https://www.fas.org/sgp/crs/natsec/RL33667.pdf [https://perma.cc/X9UF-54PN] (finding decline of signing statements without conditioning on pieces of legislation under President Obama).

57. See Kevin R. Kosar, Cong. Research Serv., RL30533, The Quasi Government: Hybrid Organizations with Both Government and Private Sector Legal Characteristics 5–6 (2011), https://www.fas.org/sgp/crs/misc/RL30533.pdf [https://perma.cc/2P3B-XZ6D] (discussing privatization of government services and quasi-official agencies); Farhang & Yaver, supra note 49 (manuscript at 7–8); Gluck, Intrastatutory Federalism, supra note 4 (detailing state implementation of federal law); Margaret H. Lemos, State Enforcement of Federal Law, 86 N.Y.U. L. Rev. 698, 704–07 (2011) (discussing public versus private enforcement regimes); Gillian E. Metzger, Privatization as Delegation, 103 Colum. L. Rev. 1367, 1377–94 (2003) [hereinafter Metzger, Privatization as Delegation] (giving contemporary examples of privatization); Jon D. Michaels, Privatization's Progeny, 101 Geo. L.J. 1023, 1040–44 (2013) (recounting "generational expansion" of contracting with private entities to provide government services); Anne Joseph O'Connell, Bureaucracy at the Boundary, 162 U. Pa. L. Rev. 841, 855–61 (2014) [hereinafter O'Connell, Bureaucracy at the Boundary] (noting variety of government and quasi-government entities with both public- and private-actor features).

58. John J. DiIulio, Jr., Bring Back the Bureaucrats 16 (2014) (adjusted for inflation).

59. Id.

60. See Stephen Minicucci & John D. Donahue, A Simple Estimation Method for Aggregate Government Outsourcing, 23 J. Pol'y Analysis & Mgmt. 489, 504–05 (2004) (finding significant increases in spending on outsourcing of government services in 1980s and 1990s).

61. DiIulio, supra note 58, at 21.

62. Peter L. Strauss, Private Standards Organizations and Public Law, 22 Wm. & Mary Bill Rts. J. 497 (2013) [hereinafter Strauss, Private Standards].

63. See Nathalie Rioux, Nat'l Inst. of Standards and Tech., U.S. Dep't of Commerce, NISTIR 7930, Sixteenth Annual Report on Federal Agency Use of Voluntary Consensus Standards and Conformity Assessment 1 (2013), http://nvlpubs.nist.gov/nistpubs/ir/2013/NIST.IR.7930.pdf [https://perma.cc/L9GM-3BP8] ("In FY 2012, federal agencies reported 423 new uses of [voluntary consensus standards], which is nearly double the number (261) reported in FY 2011.").

64. U.S. Gov't Accountability Off., GAO-08-341T, Military Base Realignments and Closures: Estimated Costs Have Increased and Estimated Savings Have Decreased 4 n.8 (2007), http://www.gao.gov/new.items/d08341t.pdf [http://perma.cc/WMS6-YRY2].

- *Quasi-rulemaking*—regulation by guidance, rather than notice-and-comment rules—is now more common than notice-and-comment regulation.[65]
- *State initiatives* have become extremely popular.[66] From 1904 through 2008, according to one study, 2,306 statewide initiatives were put to a vote, and voters approved 936 of them—more than half of these proposed initiatives dated since the 1970s.[67]

More empirical work certainly would provide a more complete picture. But the prevalence of these practices seems clear—as does their variety, the subject to which we now turn.

B. *Omnibus Policymaking: Complexity and Overlap*

Omnibus legislation is the most familiar type of unorthodox lawmaking and perhaps the least common type of unorthodox rulemaking. But what we call "omnibus implementation" is indeed quite common. What unites omnibus vehicles in both branches is their length, complexity, and the way in which they often bring together multiple congressional and administrative stakeholders. In addition, they seem to transfer power away from conventional lawmakers on both sides. The need to coordinate among multiple committees, stakeholders, and agencies has given a heightened role to party leaders and the White House to coordinate or even direct this kind of policymaking in ways that legal doctrine does not currently account for.

From a statutory interpretation standpoint, omnibus bills pose particular challenges for common doctrinal assumptions of legislative perfection: These are often long and messy bills. They may have errors or linguistic inconsistencies that statutory interpretation doctrine does not usually tolerate. Legislative history for omnibus bills also is often outdated, because parts of such bills often are drafted years before—as part of earlier, failed bills that later are bundled into an omnibus package as part of a bigger deal. Sometimes omnibus legislative history is simply nonexistent, because many omnibus bills bypass the committee stage, where reports are typically produced. From an administrative law perspective, omnibus

65. Connor N. Raso, Note, Strategic or Sincere? Analyzing Agency Use of Guidance Documents, 119 Yale L.J. 782, 785–86 (2010) [hereinafter Raso, Strategic or Sincere]; see also, e.g., Greve & Parrish, supra note 30, at 532–33 (noting agencies' shift away from notice-and-comment procedures and giving example of Food and Drug Administration, which has "largely forsworn regulation through notice-and-comment rulemaking" in favor of "never-finalized 'draft' guidance documents"); supra note 24 and accompanying text (giving examples of reliance on guidance by CFPB and agencies implementing ACA).

66. See Richard G. Niemi & Joshua J. Dyck, Guide to State Politics and Policy 77 fig.6.1 (2014) (documenting rise of state ballot initiatives from 1904 through 2012). There is some evidence their frequency may now be waning. See John G. Matsusaka, 2014 Ballot Propositions, *in* The Book of States, at 292 (forthcoming 2015) (noting 2014 total is lowest of any even-numbered year in this century).

67. Robert D. Cooter & Michael D. Gilbert, A Theory of Direct Democracy and the Single Subject Rule, 110 Colum. L. Rev. 687, 695–96 (2010).

implementation and oversight challenge different doctrinal assumptions, including those of administrative simplicity, rather than the complex and overlapping delegations that now are prevalent.

1. *Omnibus Legislation.* — There is no single definition of omnibus legislation, but there is consensus that legislation that "packages together several measures into one or combines diverse subjects into a single bill" fits the label,[68] as do so-called "money bills," including omnibus appropriations bills and budget bills.[69] Some experts, including Sinclair, add to this definition legislation that is "usually highly complex and long" and that takes on numerous issues, even within a single subject area—for example the 800-page Clean Air Act and the 2,700-page health reform statute, the ACA.[70] Omnibus legislation has "proliferated" since the 1970s.[71]

Omnibus bills that bring together many different subjects depart from conventional process in multiple ways. Omnibus legislation often comprises "mini-bills"—separate pieces of legislation, or at least separate topics within a single subject, drafted by different committees and linked together. As noted, some parts of an omnibus bill might have been drafted years earlier. The 2008 financial bailout legislation,[72] for example, included the Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008,[73] which was originally introduced but failed to make it through Congress in 2007.[74] Even omnibus bills that are drafted all at once and deal with a single subject can have a wide array of authors. The 1990 Clean Air Act[75] was initially drafted by the Bush I Administration and ultimately included the work of at least nine different congressional committees.[76]

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68. C-Span Congressional Glossary, Omnibus Bill, C-SPAN, http://legacy.c-span.org/guide/congress/glossary/omnibus.htm [http://perma.cc/RKE5-W3P4] (last visited Aug. 15, 2015).

69. Sinclair, Unorthodox Lawmaking (4th ed.), supra note 27, at 112–13.

70. Id.

71. Glen S. Krutz, Hitching a Ride: Omnibus Legislating in the U.S. Congress 12 (2001); see also Sinclair, Unorthodox Lawmaking (4th ed.), supra note 27, at 154.

72. Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, 122 Stat. 3765 (codified in scattered titles of the U.S.C. (2012)).

73. Id. §§ 511–512, 122 Stat. at 3881–93 (codified in scattered sections of 26, 29, and 42 U.S.C.).

74. See Summary: S.558—110th Congress (2007–2008), Library of Cong., https://www.congress.gov/bill/110th-congress/senate-bill/558 [https://perma.cc/JVH7-9APD] (last visited Aug. 15, 2015) (listing Senate passage date of September 18, 2007); Robert Pear, Bailout Provides More Mental Health Coverage, N.Y. Times (Oct. 5, 2008), http://www.nytimes.com/2008/10/06/washington/06mental.html (on file with the *Columbia Law Review*).

75. Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399.

76. See Sinclair, Unorthodox Lawmaking (4th ed.), supra note 27, at 3 (noting involvement of conferees from seven House committees and two Senate committees); Theodore L. Garrett & Sonya D. Winner, Chapter 14. Legislative History of the Clean Air Act Amendments, 22 Envtl. L. Rep. (Envtl. Law Inst.) 10,321, 10,321 (1992), http://elr.info/sites/default/files/articles/22.10321.htm [http://perma.cc/XX4X-FJAH] (describing process and

Omnibus vehicles also sometimes mask transparency for certain objectives. The 2008 bailout, for instance, had a variety of individual goodies attached to it, ranging from subsidies for wooden arrow makers to those for racetrack owners.[77] Omnibus bills also sometimes quietly *reverse* both legislation and delegation. As we have noted, the latest omnibus spending bill undid a controversial Dodd-Frank mandate. With respect to undoing delegation, omnibus bills often contain appropriations riders, which prevent agencies from using funding to carry out previously delegated authority. As another example from the spending bill, a rider prohibited the Secretary of the Interior from using congressional appropriations to "issue further rules to place sage-grouse on the Endangered Species List."[78]

2. *Omnibus Rules.* — There are some omnibus regulations too, although they are far less familiar to commentators and, thus far, less frequent than omnibus legislation. To start, agencies rarely use the term "omnibus."[79] The Department of Health and Human Services (HHS) recently did use the term, however, when it released a rule under the general policy umbrella of strengthening privacy and security protections for health information.[80] Although all the components addressed the same broad subject matter, the omnibus rule combined four final rules that were promulgated under different legal authorities and that originated from different proposed and interim final rules.[81] Similarly, in 2002, the Federal Communications Commission (FCC) engaged in an omnibus rulemaking that took on a range of issues related to media ownership.[82] HHS also recently released what it called an "omnibus

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noting "given the lengthy and elaborate evolution of the amendments, it is difficult to determine the source of many provisions of the final Act").

77. Spoonful of Pork May Help Bitter Economic Pill Go Down, CNN (Oct. 4, 2008, 12:19 PM), http://www.cnn.com/2008/POLITICS/10/02/bailout.pork/ [http://perma.cc/K6RH-Y5CY].

78. Press Release, U.S. House of Representatives Comm. on Appropriations, Rogers: Omnibus Package Responsibly Funds the Federal Government, Avoids a Shutdown, Makes Good-Government Policy Changes (Dec. 9, 2014), http://appropriations.house.gov/news/documentsingle.aspx?DocumentID=393925 [https://perma.cc/SAG5-TQ8Y].

79. A search of the Federal Register and other sources for "omnibus rulemaking/rule" or "omnibus regulation" yielded very few results. It is possible that agencies are combining multiple regulations in a single rulemaking under different terminology, but searches for "consolidated" or "combined" rulemakings also did not produce considerable results.

80. Modifications to the HIPAA Privacy, Security, Enforcement, and Breach Notification Rules, 78 Fed. Reg. 5566, 5566 (Jan. 25, 2013) (to be codified at 45 C.F.R. pts. 160, 164) (referring to regulation as "omnibus final rule").

81. Id.

82. See Review of the Commission's Broadcast Ownership Rules & Other Rules, 18 FCC Rcd. 13,620, ¶ 327 (2003) (addressing cross-ownership rules for both newspaper-broadcast and radio-television in single action); Kathleen A. Kirby & Matthew L. Gibson, The Newspaper-Broadcast Cross-Ownership Rule: The Case for Regulatory Relief, Comm. Law., Spring 2007, at 22, 23 (describing FCC "omnibus proceeding" in which FCC "sought comment on a broad list of questions").

guidance," a ninety page nonregulation-regulation in omnibus form, as we detail below.[83]

Agencies do also consolidate rulemaking efforts. For example, the Nuclear Regulatory Commission (NRC) announced earlier this year that it was consolidating post-Fukushima rulemaking efforts into one rule.[84] In addition, on remand from the Court's decision in *Massachusetts v. EPA*, the EPA "initially opened a single regulatory docket, issuing a unified advance notice of proposed rulemaking to deal comprehensively with questions of greenhouse gas emissions controls."[85] (After President Obama took office, the EPA changed to four separate proceedings.[86]) Nevertheless, the scope of these omnibus and consolidated rulemakings seems narrow for now. We suspect also that because the White House reviews significant regulations, executive agencies may face different incentives when it comes to bundling than members of Congress: Executive agencies may prefer to split apart rulemaking to avoid oversight.[87]

3. *Omnibus Implementation.* — Although omnibus and consolidated rules may be relatively exceptional, there is now much of what we call *omnibus implementation*: Several agencies are often jointly responsible for implementing a single piece of very long legislation.[88] This joint implementation could be the authority for any one of a number of agencies to issue a rule, the joint issuance of regulations, or the issuance of a rule that has to then be followed by others. One of the most famous administrative law cases, *Lujan v. Defenders of Wildlife*, involved a rule jointly promulgated by the Departments of Interior and Commerce;[89] similarly, the Internal Revenue Service regulation at issue in the recent challenge to the ACA, *King v. Burwell*, involved a statutory term that first was interpreted by HHS, which shares implementing authority with the IRS and several other agencies over the ACA.[90]

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83. 340B Drug Pricing Program Omnibus Guidance, 80 Fed. Reg. 52,300, 52,300 (Aug. 28, 2015); see also infra notes 136–137 and accompanying text (describing HHS issuance of omnibus guidance).

84. See Mitigation of Beyond-Design-Basis Events, U.S. NRC, http://www.nrc.gov/reactors/operating/ops-experience/japan-dashboard/emergency-procedures.html [http://perma.cc/RHJ8-M94G] (last updated July 13, 2015) (announcing Nuclear Regulatory Commission approval of consolidation of post-Fukushima rulemaking).

85. Greve & Parrish, supra note 30, at 507.

86. Id.

87. See Jennifer Nou, Agency Self-Insulation Under Presidential Review, 126 Harv. L. Rev. 1755, 1792 (2013) (stating agencies may split rules into parts to avoid "economic significance" designation and thus avoid OIRA review); Note, OIRA Avoidance, 124 Harv. L. Rev. 994, 999–1003 (2011) (examining how and why agencies avoid OIRA review).

88. See Freeman & Rossi, supra note 50, at 1145–49 (providing examples where Congress divides implementation for same program between different agencies).

89. 504 U.S. 555, 558–59 (1992) (explaining combined delegation to Secretaries of Interior and of Commerce).

90. 135 S. Ct. 2480, 2486–87 (2015).

Another recent example from the ACA involves one of the statute's most central reforms—the development of coordinated health care delivery systems known as Accountable Care Organizations (ACOs).[91] The ACO rules were initially a confused mess as the many overlapping agencies involved—including the Federal Trade Commission (FTC), the Department of Justice's (DOJ) Antitrust Division, the IRS, and HHS—issued conflicting guidance. Although HHS was the only agency authorized by statute to promulgate the ACO rule itself,[92] the antitrust enforcement role for the other agencies led HHS to explicitly create via regulation a role for the FTC and DOJ in scrutinizing ACOs that exceeded defined market share thresholds.[93] In Dodd-Frank, as detailed by Jacob Gersen, Congress not only created the Financial Stability Oversight Council—an agency of agencies—to regulate in particular areas, but it also gave both the Securities and Exchange Commission (SEC) and the Commodities Futures Trading Commission (CFTC) independent authority to regulate over the same turf.[94] Robert Kaiser has explained how that overlapping delegation was the result of two congressional committees, with their own overlapping jurisdiction, each wanting "its" agency in control.[95]

C. *Emergency Policymaking*

Emergency legislation and rules—statutes passed under unusual time pressure and regulations enacted without prior notice and comment for good cause, often in reaction to a system shock—pose different (indeed, in some ways opposing) challenges down the road than omnibus practices. This is the case even though both types of practices rely heavily on centralized leadership.

Unlike potential governance challenges posed by the length and detail of omnibus bills, emergency practices bring challenges in their brevity and generality. There are risks of imputing the same level of

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91. See John K. Iglehart, The ACO Regulations—Some Answers, More Questions, 364 New Eng. J. Med. e35(1), e35(1) (2011) (listing agencies involved in ACO rules); see generally Thomas L. Greaney, Accountable Care Organizations—The Fork in the Road, 364 New Eng. J. Med. e1(1), e1(1)–e1(2) (2011) (discussing "delicate task" of agencies responsible for rules governing ACOs).

92. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 3022, 124 Stat. 119, 395 (2010) (codified at 42 U.S.C. § 1395jjj (2012)).

93. FTC & Dep't of Just., Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations Participating in the Medicare Shared Savings Program 6–8 (2011), http://www.justice.gov/atr/public/health_care/276458.pdf [http://perma.cc/C7T7-M68F] (defining market share "safety zone" for ACOs).

94. Jacob E. Gersen, Administrative Law Goes to Wall Street: The New Administrative Process, 65 Admin. L. Rev. 689, 709–12 (2013) [hereinafter Gersen, New Administrative Process] (explaining Dodd-Frank's "web-of-authority" mechanisms).

95. Robert Kaiser, Act of Congress 88–89 (2013) (recounting how "[g]iv[ing] both agencies identical laws and rules to enforce" allowed Dodd-Frank to avoid "jurisdictional fight[ing]" between committees).

attention to detail to legislation and regulation enacted under harried circumstances as to legislation that passes through months of deliberation in committee and regulation that seeks prior comment before being finalized. Consider the September 14, 2001, Authorization for the Use of Military Force (AUMF). Despite its brevity and the unique pressures under which it was enacted, the AUMF has (controversially) served as the legal foundation for nearly every dimension of U.S. counterterrorism policy since its enactment,[96] although Congress was almost certainly not thinking ahead to future uses of the AUMF at the time.[97] Emergency financial legislation provides a more recent example; scholars have argued that lawmaking in the shadow of financial crises leads to particularly poor financial policy.[98] A very different example comes in what we describe later in this section as *emergency staffing*—unorthodox moves to fill administrative vacancies in the face of partisan division.

1. *Emergency Legislation.* — Like omnibus bills, emergency legislation often bypasses conventional process, including committee deliberation and report writing. The AUMF, for example, passed Congress just three days after the September 11 attacks,[99] without going through the foreign relations committees in the House and Senate. Instead, the majority and minority leaders of both chambers conducted the negotiations, and the AUMF was drafted jointly by White House and congressional lawyers beginning just hours after the attacks.[100] As a result, there is no formal

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96. The 2001 AUMF has also served as the key statutory authority for counterterrorism detention. See generally Oona Hathaway, Samuel Adelsberg, Spencer Amdur, Philip Levitz, Freya Pitts & Sirine Shebaya, The Power to Detain: Detention of Terrorism Suspects After 9/11, 38 Yale J. Int'l L. 123, 129–40 (2013) (analyzing detention authority under AUMF). Although the statute does not explicitly state that it authorizes detention, "all three branches of government have since affirmed that the statute authorizes detention." Id. at 129.

97. See generally Jennifer K. Elsea & Michael John Garcia, Cong. Research Serv., R41156, Judicial Activity Concerning Enemy Combatant Detainees: Major Court Rulings (2014) (addressing all major U.S. court decisions regarding scope of 2001 AUMF with respect to detaining enemy combatants); Jay M. Zitter, Annotation, Construction and Application of Authorization for Use of Military Force, 16 A.L.R. Fed. 2d 333 (2007) (providing overview of how AUMF has been interpreted and applied).

98. See, e.g., Roberta Romano, Regulating in the Dark, *in* Regulatory Breakdown: The Crisis of Confidence in U.S. Regulation 86, 88 (Cary Coglianese ed., 2012) (arguing regulations enacted during crises should include "procedural mechanisms that require automatic subsequent review and reconsideration").

99. Authorization for the Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

100. See Richard F. Grimmett, Cong. Research Serv., RS22357, Authorization for Use of Military Force in Response to the 9/11 Attacks 2–3 (2007) ("Between September 12 and 14, 2001, draft language of a joint resolution was discussed and negotiated by the White House Counsel's Office, and the Senate and House leaders of both parties."); Trent Lott, Herding Cats: A Life in Politics 222–25 (2005) (recalling passage of AUMF "[w]ithin minutes" of it being introduced in Senate); David Abramowitz, The President, the Congress, and Use of Force: Legal and Political Considerations in Authorizing Use of Force Against International

legislative history for the AUMF that can be found in committee reports or conference reports, and there was minimal floor debate.

The Hurricane Katrina Relief legislation[101] came on September 2, 2005, just four days after the hurricane hit land, under circumstances so rushed there was not even a quorum of senators present for the vote.[102] The Troubled Asset Relief Program (TARP)—the "bailout" legislation responding to the financial crisis—was a 450-page bill[103] that was drafted first by the Secretary of the Treasury as a three-page, $700 billion request, then given to Congress to flesh out the details, and brought to a vote just fourteen days after Lehman Brothers filed for bankruptcy.[104] The initial version did not pass the House, but a revised version—sweetened with additional pieces of legislation, including the Wellstone Mental Health Parity Act and provisions for rural schools—passed just four days later.[105] After watching the Dow Jones industrial average drop more than 700 points after the bill's failure to pass the House the first time, the House moved quickly on the second turn.[106] In the 113th Congress, many of the bills that were enacted in less than a month were appropriations bills.[107]

2. *Emergency Rulemaking.* — Whereas omnibus bills are more common than omnibus rules, emergency or good-cause rulemaking appears to be more common than emergency legislation. Examining a random sample of rules between 2003 and 2010, the Government Accountability Office found that "agencies published about 35 percent of major rules and about 44 percent of nonmajor rules without [a notice of proposed rulemaking (NPRM)] during those years."[108] We discuss below the use of good cause rulemaking for nonemergency situations, but even just considering arguably genuine emergencies, the use of emergency rulemaking is frequent. Some emergencies requiring rulemaking are unexpected

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Terrorism, 43 Harv. Int'l L.J. 71, 71 (2002) ("While consideration of such legislation would normally have gone through the Committee, in this case the majority and minority leaders of both chambers conducted the negotiations.").

101. Emergency Supplemental Appropriations Act to Meet Immediate Needs Arising from the Consequences of Hurricane Katrina, 2005, Pub. L. No. 109-61, 119 Stat. 1988.

102. See 151 Cong. Rec. 19,422 (2005) (discussing absence of Senate quorum); Sinclair, Unorthodox Lawmaking (4th ed.), supra note 27, at 20 ("[T]he bill was passed by unanimous consent without a recorded vote, which would have revealed the lack of a quorum.").

103. TARP ultimately became part of the broader bailout legislation. See Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, tit. I, 132 Stat. 3765, 3767–99 (codified at 12 U.S.C. §§ 5211–5241 (2012)).

104. See Kaiser, supra note 95, at 6, 11–14 ("Dodd and Frank went to work in their committees and converted [the Secretary of the Treasury's three-page bill] into a 450-page bill . . . .").

105. Archit Shah, Emergency Economic Stabilization Act of 2008, 46 Harv. J. on Legis. 569, 575–76 (2009); see also supra notes 72–74 and accompanying text (giving background on passage of act).

106. See Kaiser, supra note 95, at 14 (noting growth of consensus in support of bailout, especially following "cataclysmic[]" Dow drop of 777 points).

107. Po, Memorandum, supra note 51, at 1.

108. GAO, Federal Rulemaking, supra note 46, at 8.

external events, such as the 2010 Deepwater Horizon oil spill in the Gulf of Mexico.[109] But other emergencies are necessitated because of tight deadlines imposed by Congress itself. For example, in 2009, the Department of Education issued an interim final rule addressing eligibility for education grants, citing a July 1 statutory deadline from a 2008 statute.[110]

As on the legislative side, many textbook steps are skipped. In particular, as noted, the solicitation of public comment is bypassed. Commenting would in such situations ideally be shifted until *after* an emergency rule is issued. But in fact, the GAO found that less than ten percent of nonmajor and only about half of the major rules that skipped prior comment permitted ex post comment.[111]

We recognize that the APA explicitly contemplates rulemakings that will skip notice-and-comment procedures because of an emergency. But this "orthodox" exception was intended to be narrow.[112] It is the frequency of its use that has led us to label the practice unorthodox.

3. *Non-Emergency Emergency Rulemaking (and Lawmaking).* — Not all emergency legislation and good cause rulemaking is really emergency-driven. Of course, for both, there can always be disagreement over whether a true emergency exists. Precisely such a debate occurred over the Ebola outbreak in 2014.[113] But here we focus on use of the same emergency procedures, and the way they bypass conventional process, for utterly routine matters—the very opposite of emergencies. Here, too, the letter of the APA's good-cause exception allows for this, permitting that prior notice and comment be skipped if "impracticable" or "contrary to the public interest," as well as if "unnecessary."[114] Direct final rules, which take effect after a certain time once published in the Federal Register unless "adverse" comments are received, would not be considered emergencies.[115] But their prevalence today would not have been anticipated by

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109. Id. at 16–17.

110. Id. at 16.

111. See id. at 13 ("[A]gencies issued 47 percent of all major final rules and 8 percent of all nonmajor rules without an NPRM as interim rules.").

112. Ellen R. Jordan, The Administrative Procedure Act's "Good Cause" Exemption, 36 Admin L. Rev. 113, 119, 169 (1984). Despite courts' claimed adherence to this view, see, for example Tenn. Gas Pipeline Co. v. FERC, 969 F.2d 1141, 1141 (D.C. Cir. 1992), agencies continue to rely on the exception.

113. See Tony Pugh, "Epidemic of Fear" Has Driven Ebola Debate, Experts Say, Emergency Mgmt. (Nov. 11, 2014), http://www.emergencymgmt.com/health/Epidemic-Fear-Driven-Ebola-Debate-Experts-Say.html [http://perma.cc/KB3d-YB5W] (contrasting congressional hearings on urgency of Ebola response with public health officials' statements on limited danger of Ebola in United States).

114. 5 U.S.C. § 553(b)(3)(B) (2012).

115. See generally Ronald M. Levin, Direct Final Rulemaking, 64 Geo. Wash. L. Rev. 1, 2 (1995) (advocating for increased use of direct final rulemaking due to resource constraints and "cumbersome" nature of regular rulemaking process).

the drafters of the APA. The GAO study found that many of the rules issued without an NPRM between 2003 and 2010 fell into this category.[116]

Interestingly, Congress also has similar procedures. The House "suspends" its rules; the Senate has "unanimous consent" agreements; these procedures allow for expedited proceedings to bypass conventional process if two-thirds of House members or all Senators agree.[117] Unlike the case in which process is bypassed to fight a true emergency, when unanimous consent is deployed it usually (but not always) is for mundane and non-urgent legislation.[118]

4. *Emergency Staffing.* — There also is what we call *emergency staffing* in the administrative state. The Federal Vacancies Reform Act of 1998, the latest in a series of such statutes, allows the President to forgo Senate confirmation to fill temporary vacancies in certain agencies.[119] Although Congress has allowed acting officials since the Founding, their use has skyrocketed in recent decades as staffing delays have increased.[120] Like many other categories we highlight, this is an "orthodox" exception (in that it has a longstanding statutory history), although it is now being used much more broadly than initially intended.

Recent Presidents also appear to be relying more on "czars," or policy advisors in the White House,[121] sometimes specifically for emergency situations. President Obama named an Ebola Czar, Ron Klain, last fall to lead the government's response.[122] Analogous to the centralization of

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116. See GAO, Federal Rulemaking, supra note 46, at 14 (finding many rules sampled were explicitly termed by issuing agencies as direct final rules, or variations thereof).

117. See Valerie Heitshusen, Cong. Research Serv., 98-310, Senate Unanimous Consent Agreements: Potential Effects on the Amendment Process 1 (2014) (explaining Senate ununanimous consent agreements); Christopher M. Davis, Cong. Research Serv., 95-563, The Legislative Process on the House Floor: An Introduction 8 (2010) (outlining procedure for "suspension of the rules" in House of Representatives).

118. See Sinclair, Unorthodox Lawmaking (4th ed.), supra note 27, at 25–26, 67–71 ("Much of the legislation considered under suspension is narrow in impact and minor in importance."). For instance, in the 113th Congress, forty-two bills were enacted in less than a month, twenty-nine of that number using the unanimous consent procedure. Some of those involved mundane matters, such as naming a bridge, see H.R. 2383, 113th Cong. (2013); others were more substantial, see H.R. 130, 113th Cong. (2013), which was a continuing appropriations act. See Po, Memorandum, supra note 51, at 1.

119. Federal Vacancies Reform Act of 1998, Pub. L. No. 105-277, § 151, 112 Stat. 2681, 2681-611 (codified as amended at 5 U.S.C. §§ 3345–3349d).

120. See Anne Joseph O'Connell, Shortening Agency and Judicial Vacancies Through Filibuster Reform? An Examination of Confirmation Rates and Delays from 1981 to 2014, 64 Duke L.J. 1645, 1645, 1660–61, 1692–93 (2015) (showing increase in nomination failure rates for two most recent Presidents and arguing confirmation delays may lead to higher use of acting officials).

121. See Peter L. Strauss et al., Gelhorn & Byse's Administrative Law: Cases and Comments 761 (11th ed. 2011) (noting President Obama's reliance).

122. Jake Tapper, Obama Will Name Ron Klain as Ebola Czar, CNN (Oct. 19, 2014, 2:07 PM), http://www.cnn.com/2014/10/17/politics/ebola-czar-ron-klain/ [http://perma.cc/36L3-MYUU].

controversial bills in the hands of party leaders, emergency czars may be more expert at managing than in the subject matter at issue. Klain was criticized for this reason.[123] In addition, with emergency staffing there may be less accountability to Congress, both at the front end because there is no Senate confirmation, and once in place, because the White House official may not be willing to testify or, even if she is appointed as an acting agency official, may feel less responsibility to satisfy congressional wishes.

D. *Unorthodox Outsourcing: Legislative Workarounds and Unorthodox Delegations*

Unorthodox outsourcing raises different questions altogether. When Congress pushes lawmaking outside of itself and even outside the federal government, or out of government entirely, concerns about process, transparency, and accountability arise. At the same time, unorthodox outsourcing can provide speed, flexibility, expertise, and an apolitical approach that often elide congressional policymaking. The two salient types of orthodox outsourcing that we address here—automatic lawmaking that avoids gridlock within Congress and unorthodox delegations beyond federal agencies to state and private actors—raise all of these issues.

From a doctrinal perspective, these outsourced policymakers generally do not have legal doctrines to police their work or to assist courts in interpreting their statutory innovations when questions arise down the line. The most obvious example is that there is no *Chevron* doctrine for private implementers. But constitutional concerns also have been raised when Congress outsources automatic lawmaking to other entities, such as the Medicare-cutting commission. APA concerns have been raised for "quasi-rulemaking"—soft law expressly sanctioned by the APA but that today is frequent and has real practical bite for regulatory entities. Another controversial move comes in the form of congressional incorporation of private standards or state law into federal law: These moves effectively allow federal law to change over time, without Congress or the executive branch touching it.

1. *"Automatic" Lawmaking as a Legislative Workaround.* — Congress has increasingly resorted to what might be called *automatic lawmaking processes.*[124] Automatic lawmaking processes establish procedures that

123. Id. Unconventional staffing is not limited to unexpected events. One of us has tracked the massive vacancies in top positions in federal agencies. In recent administrations, on average between one in four and one in six jobs that require Senate confirmation have sat empty or filled with an acting official. See Anne Joseph O'Connell, Vacant Offices: Delays in Staffing Top Agency Positions, 82 S. Cal. L. Rev. 913, 962–65 (2009) (estimating and counting total number of days Senate-confirmed positions in executive agencies were not filled by confirmed official in recent administrations).

124. Elizabeth Garrett, who has written extensively on these processes calls them "framework legislation," a term we avoid because of its potential confusion with major framework statutes like the APA. See Elizabeth Garrett, Conditions for Framework Legislation, *in* The Least Examined Branch: The Role of Legislatures in the Constitutional

effectively make law without Congress having to do anything other than set up the initial framework. These procedures both overcome the structural vetogates that Congress has created for itself to intentionally slow down lawmaking in most instances—vetogates such as the multistage legislative process or specialized debate and amendment rules—and also allow legislators to avoid having to engage with particularly controversial issues.

The Base Realignment and Closure Commissions (BRAC) of the 1990s are common examples;[125] the ACA's Medicare-cutting board, the Independent Payment Advisory Board (IPAB), is a more recent one.[126] In both cases, Congress enacted a statute that charges an outside board to decide an extremely difficult question—no member would agree to closing a naval base in her own state and cutting Medicare is similarly a political third rail. The recommendations of the board take effect automatically unless Congress adopts a joint resolution of disapproval, in the case of BRAC,[127] or a substitute provision to reduce Medicare spending, in the case of IPAB.[128] This mechanism conveniently prevents any legislator from having to say that he or she voted *for* the unpopular policy decision.

On the one hand, these devices allow members of Congress to commit credibly to particular policy goals, without being tempted by political concerns. On the other, they intentionally allow members to avoid accountability for any actual vote on the controversial issue. Again, these measures are common: Even as constitutional concerns have been raised about IPAB as part of the fierce political opposition to the ACA, similar structures have been proposed or implemented to address many other problems, including congressional salaries, the budget deficit, radioactive waste facilities, and Amtrak stations. Any IPAB legal challenge would have a ripple effect across a variety of federal public processes.

"Fast track"-type rules—such as the special rules for the budget process and fast-track trade deals—are related unorthodox workarounds.

State 294 (Richard W. Bauman & Tsvi Kahana eds., 2006); Elizabeth Garrett, The Purposes of Framework Legislation, 14 J. Contemp. Legal Issues 717 (2005) [hereinafter Garrett, Purposes of Framework Legislation].

125. See Garrett, Purposes of Framework Legislation, supra note 124, at 725–26 (explaining BRAC structure as example of congressional means of addressing otherwise "especially difficult" issue of military base closures).

126. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, §§ 3403, 10320, 124 Stat. 119, 489–506, 949–52 (2010) (codified at 42 U.S.C. § 1395kkk (2012)); see also Jost, supra note 4, at 24 (detailing purpose and structure of IPAB).

127. Defense Base Closure and Realignment Act of 1990, Pub. L. No. 101-510, §§ 2903–2904, 104 Stat. 1485, 1810–13 (codified at 10 U.S.C. § 2687 note (2012)); see also Garrett, Purposes of Framework Legislation, supra note 124, at 725–26 ("The base closure rules require that Congress affirmatively reject the recommendations, as a package, through a joint resolution in order to stop the recommendations from being implemented.").

128. See Jost, supra note 4, at 27–28 ("Congress cannot consider any amendment to [an IPAB] proposal that does not achieve the cost-reduction requirements that [IPAB] is required to meet unless both vote to waive this provision . . . .").

Congress has created expedited procedures for both areas to prevent common legislative bottlenecks, including filibusters.[129] But here, the expedited procedures seem motivated less by the hot politics of the topic and more by a normative judgment that certain types of special policy-making (including budgets and trade deals) must happen in a timely fashion. Earlier this year, Congress approved controversial fast-track legislation giving the President the power to submit trade deals to Congress for an up-or-down vote without amendments.[130]

2. *Quasi-Rulemaking as an Administrative Workaround.* — On the rulemaking side, agencies can fast-track policy decisions by issuing guidance instead of rules. The IRS, for example, has increasingly turned to informal guidance (such as FAQs) to help taxpayers understand changes in the law because it lacks the resources to engage in more formal process.[131] We recognize some tension in categorizing these soft rules as "unorthodox," because this *is* a specific category of listed regulatory activity in the APA.[132] But whereas the APA imagines guidance as an exception to notice-and-comment rulemaking[133] (and it frequently avoids OIRA attention as well[134]), in practice, however, it is much more common than notice-and-comment regulation.[135]

As noted, there is now even what HHS recently called "omnibus guidance." In August 2015, HHS released a ninety page mega-guidance on its 340B Drug Pricing Program, which involves drug discounts under the Public Health Service Act.[136] Interestingly, like a traditional rulemaking,

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129. See Aaron-Andrew P. Bruhl, Using Statutes to Set Legislative Rules: Entrenchment, Separation of Powers, and the Rules of Proceedings Clause, 19 J.L. & Pol. 345, 346–48 (2003) (attributing popularity of expedited procedures to "increasingly sclerotic nature of the usual 'slow track' legislative process"); Garrett, Purposes of Framework Legislation, supra note 124, at 723–24, 727–28 (tracing history of congressional usage of "statutory framework law" in budget process and "'fast track' procedure" for free trade agreements).

130. William Mauldin, Fast-Track's Passage Sets Up Round Two on Obama's Trade Agenda, Wall St. J. (June 25, 2015), http://www.wsj.com/articles/fast-tracks-passage-sets-up-round-two-on-obamas-trade-agenda-1435178359 (on file with the *Columbia Law Review*) (describing Senate's 60-38 passage of fast-track).

131. See Eric Kroh, Growing IRS Reliance on Informal Guidance Sows Uncertainty, Law360 (Aug. 6, 2015), http://www.law360.com/articles/688113/growing-irs-reliance-on-informal-guidance-sows-uncertainty (on file with the *Columbia Law Review*) (attributing IRS reliance on guidance to instruct taxpayers to decreased funding).

132. See 5 U.S.C. § 553(b)(A) (creating exemption to notice-and-comment rule-making procedures for "interpretative rules" and "general statements of policy").

133. See id.

134. Nou, supra note 87, at 1788–89 (noting variety of instruments agencies can choose "that are more likely as a class to bypass presidential review").

135. Raso, Strategic or Sincere, supra note 65, 785–86.

136. 340B Drug Pricing Program Omnibus Guidance, 80 Fed. Reg. 52,300, 52,300 (Aug. 28, 2015).

the latest guidance called for comments and indicated the guidance would be finalized after the agency received them.[137]

Technically these guidances are not binding. But in fact, this type of nonregulation-regulation has real bite in many contexts. It has been the primary way, for example, that agencies have delivered instructions to state officials implementing the ACA.[138] Michael Greve and Ashley Parrish point out that the FDA has regulated through soft rules for some time and that regulated entities follow these directives despite their lack of formal process because they play an important role in agency enforcement actions.[139] Like the unorthodox workarounds we already have described, quasi-rulemaking thus bypasses the transparent and time-consuming sticking points in the relevant administrative process.

It also is worth noting how such regulatory workarounds relate to the rise of omnibus legislation. Soft rules may be necessary responses to the challenges of implementing a major omnibus bill. Both the ACA and Dodd-Frank required unprecedented volumes of agency action under tight timelines and intense political scrutiny,[140] making timely use of the ordinary process likely impossible.[141] Second, because of their informality, workarounds allow some policy flexibility when implementing complex programs. Bagley and Levy have argued that guidance-based implementation of health reform allowed for a soft release of regulations that allowed them to be piloted, absorbed, and even tweaked in advance of later formalization.[142] Others have been more critical.[143]

3. *Unorthodox Delegations: States, Private Actors, Private Standards, and Waivers.* — The process workarounds already described clearly eschew some traditional accountability mechanisms. But there are more dramatic ways that Congress and agencies push responsibility for federal

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137. Id.

138. See Bagley & Levy, supra note 24, at 442–43 (observing HHS "sidestep[ped] conventional administrative procedures" by relying on guidance to implement ACA); Christine Monahan, Safeguarding State Interests in Health Insurance Exchange Establishment, 21 Conn. Ins. L.J. 375, 386 (2014–2015) (documenting "near constant *informal* communications between state and federal officials" during ACA implementation (emphasis added)).

139. Greve & Parrish, supra note 30, at 532–33.

140. See Curtis W. Copeland & Maeve P. Carey, Cong. Research Serv., R41586, Upcoming Rules Pursuant to the Patient Protection and Affordable Care Act 1–2 & n.4 (2011) (noting ACA's many rulemaking deadlines); Romano, Iron Law, supra note 24, at 2 (attributing missed rulemaking deadlines under Dodd-Frank to "vast number of required rules[,] . . . complexity of issues[,] . . . [and] intensive lobbying by affected parties").

141. Greve & Parrish, supra note 30, at 505 ("The Dodd-Frank Act requires close to 400 rulemakings, often accompanied by tight deadlines. That has not been done, because it cannot be done.").

142. Bagley & Levy, supra note 24, at 446–49 (explaining how HHS guidance on benchmark plans gave states flexibility to test benchmarking health care plans before HHS formalized benchmarking through NPRM).

143. Romano, Iron Law, supra note 24, at 34–36 (criticizing extensive use of guidance by CFPB).

programs further afield, even where textbook procedures are in play. Most salient is the use of *nonfederal delegates.* Two of us have documented the pervasive but often overlooked landscape of legislative and administrative delegations of regulatory authority to state administrators, quasi-governmental bodies, and even private bodies.[144] Although such delegations have existed for centuries, there is evidence that they have been much more prevalent in recent decades.[145]

These unorthodox delegations have many overlapping motivations. For instance, Congress delegates to the states often out of deference to federalism values or simply due to path dependence. States historically had control over most policy matters in which Congress now routinely intervenes—including criminal law, health, and education. Passing a federal statute with a central role for state implementation is both a "federalism" nod to the historical importance of state control and the value of local variation in these programs and also a way for Congress to take advantage of decades of state expertise in the area.[146] But at least some of the time, these delegations also derive from a desire to shift accountability for difficult decisions or costs outside of the federal government, or to rest regulatory process in bodies, such as the private sector, less hamstrung by legal rules and structures. There is no APA, for example, for private implementers.

Sometimes these unorthodox delegations come directly from Congress. For example, the ACA delegates much of insurance implementation to the states, and one of the thorniest questions of insurance—what percent of profits insurance companies can take home—to a quasi-public entity: the National Association of Insurance Commissioners.[147] In the Occupational

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144. Gluck, Intrastatutory Federalism, supra note 4, at 537 (discussing state government); O'Connell, Bureaucracy at the Boundary, supra note 57, at 857–61 (discussing quasi-agencies).

145. See DiIulio, supra note 58, at 5–6 (arguing such delegations vastly increased after 1960); Farhang & Yaver, supra note 49 (manuscript at 10–11) (finding spikes in delegation outside federal government in 1960s and 1990s); O'Connell, Bureaucracy at the Boundary, supra note 57, at 850, 870 tbl.1 (displaying taxonomy of unorthodox delegates and giving examples).

146. See Gluck, Intrastatutory Federalism, supra note 4, at 572 (arguing using state delegates allows Congress to "claim the field" for itself while "rely[ing] on state expertise and state political cover"); see also Abbe R. Gluck, Federalism from Federal Statutes: Health Reform, Medicaid, and the Old-Fashioned Federalists' Gamble, 81 Fordham L. Rev. 1749, 1749 (2013) [hereinafter Gluck, Federalism from Federal Statutes] (detailing how use of states in ACA is modern form of federalism).

147. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1333(a)(1), 124 Stat. 119, 206 (2010), amended by Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (codified at 42 U.S.C. § 18053) ("[T]he Secretary shall, in consultation with the National Association of Insurance Commissioners (NAIC), issue regulations for the creation of [multi-state] health care choice compacts under which 2 or more States may enter into an agreement . . . ."); id. § 1341(b) (codified at 42 U.S.C. § 18061) (requiring HHS to consult with NAIC in developing standards related to state reinsurance programs); id. § 2701(a)(3) (codified at 42 U.S.C. § 300gg) ("The Secretary, in consultation

Safety and Health Act, as Nina Mendelson has noted, "Congress authorized the newly created Occupational Safety and Health Administration (OSHA) to adopt so-called 'national consensus standards' for worker safety," which the Act specified were to be developed by nationally recognized standards-producing organizations.[148]

Other times, agency administrators themselves make the unorthodox delegations. In the ACA, Congress delegated to HHS the responsibility to define the content of "essential health benefits" that all insurers must cover.[149] HHS, however, ducked that controversial decision by delegating the question to the states.[150] Mendelson also has called attention to the ways in which regulatory agencies are adopting private standards on their own initiative in order to "reduce demands on their own resources" and to "take advantage of private sector expertise."[151] Agency use of private standards got a boost in the late 1970s, when the Administrative Conference of the United States recommended agencies adopt them.[152] Legislation (specifically, the 1995 National Technology Transfer and Advancement Act) and executive directives (specifically, OMB Circular A-119) furthered this push.[153] Private standards now appear in a wide variety of agency regulations, "ranging from toy safety to Medicare prescription-drug-dispensing requirements to nuclear power plant operation."[154] A recent Department of Commerce report tracking these standards found "423 new uses of [voluntary consensus standards], which is nearly double the number (261) reported in FY 2011."[155]

Finally, *statutory waivers* are a different kind of unorthodox delegation. The delegates are conventional—federal agencies—but their power is not. Rather than giving agencies broad discretionary power to make rules in instances of statutory ambiguity, many statutes give agencies broad powers to

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with the National Association of Insurance Commissioners, shall define the permissible age bands for [insurance-]rating purposes . . . ."); see also id. § 2718(d) (codified at 42 U.S.C. § 300gg-18) (requiring "Secretary, in consultation with the National Association of Insurance Commissioners, [to] establish uniform definitions" for calculating medical-loss ratio).

148. Nina A. Mendelson, Private Control over Access to the Law: The Perplexing Federal Regulatory Use of Private Standards, 112 Mich. L. Rev. 737, 749 (2014) [hereinafter Mendelson, Private Control]; see also 29 U.S.C. § 655(a) (2012) ("[T]he Secretary shall . . . by rule promulgate as an occupational safety or health standard any national consensus standard . . . .").

149. Patient Protection and Affordable Care Act § 1302(b)(1), 124 Stat. at 163.

150. Cf. Monahan, supra note 138, at 382–86 (outlining executive and congressional attempts to include state input in rulemaking).

151. Mendelson, Private Control, supra note 148, at 750.

152. Recommendations of the Administrative Conference of the United States, 44 Fed. Reg. 1357, 1358 (Jan. 5, 1979); Emily S. Bremer, Incorporation by Reference in an Open-Government Age, 36 Harv. J.L. & Pub. Pol'y 131, 149 (2013).

153. Bremer, supra note 152 at 147–48. Agencies have to use these volunteer standards unless impractical. Id. at 147.

154. Mendelson, Private Control, supra note 148, at 740; see also Strauss, Private Standards, supra note 62, at 499–500 (providing additional examples of private standards).

155. Rioux, supra note 63, at 1.

determine whether Congress-made law should effectively be dispensed with altogether.[156] Of late, these waivers have become a common regulatory strategy and have been deployed in a more unorthodox fashion.

The most familiar story is that Congress builds waiver provisions into statutes to give the agency space to allow for special types of policy experimentation—for example, HHS's grant of an ACA waiver to Vermont to adopt a single-payer health insurance system.[157] But agencies now also use waivers in less conventional ways. Sometimes, agencies use waivers to get around the same partisan gridlock that may incentivize unorthodox lawmaking in the first place. In other words, to get around Congress itself. A prominent recent example is President Obama's announcement—expressly motivated by the inability of Congress to pass adequate reforms to the No Child Left Behind Act—directing the Department of Education to offer statutory waivers from that Act to states that could devise a better policy plan.[158]

The waiver process itself is also a legal black box. For the most part, there are no laws, procedures, or assurances of transparency that regulate the state–federal negotiations that result in these large exemptions from federal statutory mandates.[159]

E. *The Unorthodox President: President as Both Legislator and Regulator*

In the textbook account of legislation, the President is understood as the last stop (the signature) in the Article I, Section 7 path to formal law. In the parallel regulatory account, the President is, under the Constitution, the Chief Administrator, but the President is missing from the APA. In contrast, the unorthodox President takes on aspects of Congress, shaping legislation and sometimes using executive tools to manipulate the congressional process itself. The unorthodox President is actively involved in rulemaking

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156. See Eric Biber, Two Sides of the Same Coin: Judicial Review of Administrative Agency Action and Inaction, 26 Va. Envtl. L.J. 461, 501–02 (2008) (outlining wide latitude for inaction afforded agencies in environmental context).

157. See Marea B. Tumber, The ACA's 2017 State Innovation Waiver: Is ERISA a Roadblock to Meaningful Healthcare Reform?, 10 U. Mass. L. Rev. 388, 405–07 (2015) (explaining Vermont's adoption of single-payer system and request for ACA waiver from HHS).

158. See David J. Barron & Todd D. Rakoff, In Defense of Big Waiver, 113 Colum. L. Rev. 265, 279 (2013) (discussing Obama Administration's practice of "allow[ing] states 'to move forward with . . . reforms . . . in a manner that was not originally contemplated by the No Child Left Behind Act of 2001'"); see also U.S. Dep't of Educ., ESEA Flexibility 1 (2012), http://www2.ed.gov/policy/eseaflex/approved-requests/flexrequest.doc (on file with the *Columbia Law Review*) (explaining waiver process).

159. For a recent important exception, see Sidney D. Watson, Out of the Black Box and Into the Light: Using Section 1115 Medicaid Waivers to Implement the Affordable Care Act's Medicaid Expansion, 15 Yale J. Health Pol'y L. & Ethics, 213, 215 (2015) (noting how new disclosure requirements for section 1115 waiver requests have increased transparency and process).

too, sometimes drafting regulations or using his or her own tools to substitute for them.[160]

Understanding the unorthodox President also reveals important gaps in legal doctrine. Courts do not generally conceive of the President as a statutory interpreter, or as an agency. The President has no APA, no oversight, no rules of construction, no established account of the deference, or not, that his or her legislative-regulatory actions receive. These actions also are exceedingly difficult to challenge in court because of current standing doctrine.

1. *Signing Statements.* — The most familiar example of President as simultaneous legislator and regulator comes when the President issues "signing statements" at the moment of enacting legislation. These statements sometimes give specific, often controversial, interpretations to disputed statutory provisions and even read sections out of the legislation entirely.[161] The President thus uses what might be understood as an amalgam of legislative and administrative powers to effectively *change* legislation after it has been enacted. Presidents George W. Bush and Barack Obama both have used signing statements to read provisions out of legislation that appear to curtail presidential power.[162]

The way in which signing statements blur legislative and regulatory lines has received scant attention. How should we view this activity? Is it part of the legislative process itself? After all, the bill would not exist if the President had not signed it without a veto override. Or do we view it as part of implementation? Does it deserve *Chevron*-type deference? As with other forms of untraditional lawmaking, the timing is quite unorthodox: The President signs the bill that Congress agreed to, thus making it a law but at

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160. Professor Strauss's work is an exception: He was an early identifier of the President's many and often conflated roles. See Peter L. Strauss & Cass R. Sunstein, The Role of the President and OMB in Informal Rulemaking, 38 Admin. L. Rev. 181, 188–92 (1986) (developing account of presidential roles); see also Strauss, Overseer or Decider, supra note 1, at 696–705 (noting dual roles are "often unremarked" in academic commentary and explaining differences). Indeed, Strauss had written about the President's role in rulemaking even a decade earlier:

> [T]he President is simply in error and disserves the democracy he leads when he behaves as if rulemakings were *his* rulemakings. The delegations of authority that permit rulemaking are ordinarily made to others, not him—to agency heads whose limited field of action and embeddedness in a multi-voiced framework of legislature, President, and court are the very tokens of their acceptability in a culture of law.

Peter L. Strauss, Presidential Rulemaking, 72 Chi.-Kent L. Rev. 965, 984 (1997).

161. See generally Curtis A. Bradley & Eric A. Posner, Presidential Signing Statements and Executive Power, 23 Const. Comment. 307, 312–21 (2006) (recounting history of signing statements by American Presidents through George W. Bush).

162. For a recent example, for example., Off. of the Press Sec'y, Statement by the President, WhiteHouse.gov (Apr. 18, 2014) http://www.whitehouse.gov/the-press-office/2014/04/18/statement-president [http://perma.cc/BXV9-57HF] (interpreting amendment to section 407 of Foreign Relations Authorization Act as "advisory," not binding, in circumstances where it would interfere with President's powers over foreign relations).

the same time effectively *changing* the bill at a moment Congress can no longer respond to the interpretation advanced in the statement without passing a new law. It is a workaround of bicameralism and presentment at the same time that it is statutory interpretation and policy implementation. This is an area in which Strauss has provided trenchant observations.[163]

2. *President as Initiator of Legislation.* — Contrary to the textbook story, the White House is often the first, not last, step in the legislative process. It frequently initiates and drafts legislation—as it did, for example, with the Dodd-Frank financial reform legislation;[164] or intervenes with high-level summits during the drafting process to save legislation—as it did, for example, with the ACA.[165]

The White House can also take less direct administrative action that sometimes is overtly aimed at affecting the legislative process. Sometimes such efforts are aimed at spurring Congress itself to legislate. President Obama's recent directive on cybersecurity provides one example.[166] Issued because Congress had failed to legislate in the area, the directive itself—as intended—galvanized the business community to push Congress to pass its own law, because the business community could shape and influence legislation in ways it could not shape an executive directive.[167] Conversely, the President may use such tools to *preempt* legislation. For instance, President Reagan's famous Executive Order 12,532, imposing sanctions on South Africa, headed off a stronger proposal with congressional momentum that would have frustrated his policy of "constructive engagement."[168] In such contexts, presidential action can, often intentionally, take the wind out of the sails of related congressional efforts.

3. *President as Legislation Substitute.* — Modern Presidents also have increasingly used executive orders and memoranda as *substitutes* for failed domestic-policy legislative efforts. We might call this *quasi-*

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163. E.g., Strauss & Sunstein, supra note 160, at 182–83 ("[T]he delegated authority for lawmaking remains where it was put by Congress, in the agencies, and is part of the 'law' which the President is to execute faithfully.").

164. See Kaiser, supra note 95, at 37, 75, 84, 94, 112, 151 (cataloging Obama Administration's significant involvement in drafting Dodd-Frank).

165. See Jesse Lee, A Bipartisan Meeting on Health Reform: The Invites Are Out, WhiteHouse.gov Blog (Feb. 12, 2010, 4:35 PM), https://www.whitehouse.gov/blog/2010/02/12/a-bipartisan-meeting-health-reform-invites-are-out [http://perma.cc/3E49-MF6Z] (announcing meeting about ACA with high-level officials).

166. Exec. Order No. 13,636, 78 Fed. Reg. 11,737 (Feb. 19, 2013).

167. See Eric A. Fischer et al., Cong. Research Serv., R42984, The 2013 Cybersecurity Executive Order: Overview and Considerations for Congress 14 (2013) ("E.O. 13636 was issued in the wake of the lack of enactment of cybersecurity legislation in the 112th Congress, apparently at least in part as a response to that.").

168. Exec. Order No. 12,532, 3 C.F.R. 387 (1986), revoked by Exec. Order No. 12,769, 3 C.F.R. 342 (1992); John R. Bond & Richard Fleisher, The President in the Legislative Arena 66–67 (1990); see also Kenneth R. Mayer, With the Stroke of a Pen: Executive Orders and Presidential Power 90 (2001) (noting Presidents may use executive orders to "preempt legislation or undercut Congress").

legislation. Here, the President may take liberties in construing the expanse of delegation, interpreting statutes to authorize administrative action that was not foreseen by the enacting Congress.[169] President Obama's "We Can't Wait" initiative espouses this philosophy.[170] The recent climate change directive, already discussed, is one example of it.[171] For another, President Clinton issued a controversial directive to the FDA to interpret the Food, Drug, and Cosmetic Act to regulate tobacco.[172] While these moves have been recognized as part of the modern age of "presidential administration,"[173] their place as part of the President's *legislative* role has received much less engagement.[174]

4. *President as Delegator.* — Congress is not the only delegator. The White House has made significant efforts to rearrange the structure of the administrative state through czars and task forces, and has done so even after formal power to do so was removed. From 1932 to 1984, with some exceptions, Presidents had used authority delegated to them by reorganization acts to establish agencies under only the threat of a legislative veto, a practice no longer permitted post–*Chadha.*[175] Congress has not given the White House new similar authority, despite a recent call by President Obama for it.[176] Nevertheless, as Daphna Renan has recently

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169. See Farber & O'Connell, supra note 29, at 1155–57 (giving examples, including President Obama's climate change order, issued despite Clear Air Act "not [having been] enacted to address climate change").

170. See Charlie Savage, Shift on Executive Power Lets Obama Bypass Rivals, N.Y. Times (Apr. 22, 2012), http://www.nytimes.com/2012/04/23/us/politics/shift-on-executive-powers-let-obama-bypass-congress.html (on file with the *Columbia Law Review*) (describing President's unilateral "We Can't Wait" initiative). See generally We Can't Wait, WhiteHouse.gov, https://www.whitehouse.gov/economy/jobs/we-cant-wait [http://perma.cc/7PZB-6XTZ] (last visited Aug. 16, 2015).

171. Memorandum on Power Sector Carbon Pollution Standards, 2013 Daily Comp. Pres. Doc. 457 (June 25, 2013), http://www.gpo.gov/fdsys/pkg/DCPD-201300457/pdf/DCPD-201300457.pdf [http://perma.cc/M5AB-CV5J] [hereinafter Carbon Pollution Memorandum].

172. See FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 126 (2000) (invalidating FDA's regulations of tobacco products).

173. See, e.g., Elena Kagan, Presidential Administration, 114 Harv. L. Rev. 2245, 2385 (2001) ("[A]n era of presidential administration has arrived.").

174. For a notable exception, see Kevin M. Stack, The Statutory President, 90 Iowa L. Rev. 539, 599–600 (2005) [hereinafter Stack, Statutory President] (discussing presidential authority to act "pursuant to a statute" and insisting "Congress is in charge" (internal quotation marks omitted)).

175. See Reorganization Act Amendments of 1984, Pub. L. No. 98-614, 98 Stat. 3192 (codified as amended at 5 U.S.C. §§ 901–912 (2012)) (requiring joint resolution approving of presidential reorganization of government before such reorganization could take effect).

176. See Danielle Kurtzleben, Obama to Merge 6 Government Agencies, Cut 2,000 Employees, U.S. News (Jan. 13, 2012, 5:25 PM), http://www.usnews.com/news/articles/2012/01/13/obama-to-merge-6-government-agencies-cut-2000-employees [http://perma.cc/W4QH-CU53] ("[T]he White House is asking Congress to grant it authority to make cuts to the executive branch—authority that Congress rescinded in 1984.").

documented, the President has "pool[ed] . . . legal and other resources" to create joint structures that were not intended by Congress and otherwise reshaped the executive branch with special coordinating personnel.[177]

5. *President as Rulemaker—or Quasi-Rulemaker.* — Finally, the White House also can be the primary mover on agency regulation. One type of tool here is a prompt letter from OIRA;[178] much more common are presidential directives.[179] Since 1981, executive orders have mandated that executive agencies seek prior approval from OIRA for many rulemakings.[180] Besides enabling OIRA to function as a gatekeeper, the requirement allows OIRA to intensively engage with the regulatory drafting process.[181] These regulatory review directives are also legislative, creating procedural mandates much like the APA.[182] Empirical evidence documents that presidential directives also are increasing.[183] President Obama's environmental initiative is a prime recent example.[184] Strauss has long recognized the ambiguities attendant to the President's direct engagement with deciding regulatory matters.[185]

Moreover, even beyond rulemaking, the President engages in his own quasi-regulatory behavior. The White House is now a frequent source of quasi-rules such as guidance, bulletins, FAQs, policy statements, memoranda, and letters to state officials.[186]

F. *Unorthodox Drafters: The People, Lobbyists, CBO, and Many More*

A single introductory Essay cannot possibly capture the full range of unorthodox practice, and we have focused on the most salient departures. But one important category we have not yet discussed and do

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177. Daphna Renan, Pooling Powers, 115 Colum. L. Rev. 211, 219 (2015).

178. See Robert W. Hahn & Cass R. Sunstein, A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis, 150 U. Pa. L. Rev. 1489, 1494–95 (2002) (noting Bush II Administration's use of prompt letters and calling for expanded OIRA role).

179. See Farber & O'Connell, supra note 29, at 1155–56 (observing "presidential directives compel agency action" at times).

180. See Exec. Order No. 12,866, 3 C.F.R. 638 (1994), reprinted as amended in 5 U.S.C. § 601 app. at 802–06 (2012); Exec. Order No. 12,291 §§ 7–9, 3 C.F.R. 127, 131–34 (1982), revoked by Exec. Order No. 12,866 § 11, 3 C.F.R. at 649 (1994).

181. See Lisa Heinzerling, Inside EPA: A Former Insider's Reflections on the Relationship Between the Obama EPA and the Obama White House, 31 Pace Envtl. L. Rev. 337, 356–57 (2014) (recounting OIRA involvement in EPA rulemaking on ozone standards).

182. Farber & O'Connell, supra note 29, at 1160, 1162.

183. See Lowande, supra note 54, at 725 ("Analyzing memoranda issued between 1946 and 2013, [shows] memoranda are increasingly significant, measurable outputs of executive action.").

184. Carbon Pollution Memorandum, supra note 171.

185. See Strauss, Overseer or Decider, supra note 1, at 697.

186. See, e.g., Po, New Regulatory Process, supra note 29, at 22–26 ("[A]gencies and the White House are no longer distinct actors when promulgating rules . . . .").

wish to highlight is unorthodox drafters outside of government. The people—direct democracy—are a very important example. Lobbyists and private and nonprofit interest groups also loom large in the day-to-day work of legislation, as do certain entities inside of Congress itself, such as the Congressional Budget Office (CBO): All of these actors regularly draft, review, and advise on bills,[187] but the legal literature about statutory interpretation and legislation doctrine rarely grapples with their roles.

1. *Direct Democracy.* — Direct democracy is, of course, only a state-level phenomenon when it comes to legislation, but state legislation passed by initiative comes often before the federal courts for statutory interpretation and, like the other categories, initiatives have not been treated differently by courts from textbook legislation.[188] Initiative movements also usually emerge for the same reasons as other types of unorthodox lawmaking, including overcoming partisan gridlock or tackling policies too controversial for the ordinary political process.[189]

But initiatives have significant differences from legislature-led legislation. They lack legislative history, for instance, and instead voters rely heavily on formal brochures or even advertisements to understand the law on which they vote.[190] Also, unlike ordinary legislation, proposed initiatives cannot be amended to respond to ambiguities identified during the process of public deliberation before the vote. There are high-profile instances of initiative "baits and switches"—public statements that described a law in ways that do not reflect the actual text.[191] Initiatives also are not typically drafted with an eye to consistency with the rest of a state statutory code and thus, for example, may use statutory terms in ways inconsistent with other provisions of the law of which they will ultimately be a part.

There is nothing akin to direct democracy on the rulemaking side, but it is worth noting that federal agencies recently have turned to mechanisms that gesture in that direction. The rise of e-rulemaking, for instance, has the

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187. Bressman & Gluck, Part II, supra note 28, at 747 (highlighting noncongressional drafters of legislation).

188. See Michael D. Gilbert, Interpreting Initiatives, 97 Minn. L. Rev. 1621, 1627 (2013) ("[C]ourts interpreting initiatives behave much like courts interpreting ordinary legislation."); Jane S. Schacter, The Pursuit of "Popular Intent": Interpretive Dilemmas in Direct Democracy, 105 Yale L.J. 107, 130 (1995) (explaining judicial interpretation of initiatives as dominated by statutory language, despite voters' reliance on other sources and "substantial[] incomprehensib[ility]" of text to most voters).

189. See Julian N. Eule, Judicial Review of Direct Democracy, 99 Yale L.J. 1503, 1511–12 (1990) (describing direct democracy as means of bypassing possible hurdles and corruption of legislative process).

190. Schacter, supra note 188, at 120–21 (describing informative sources for initiatives).

191. See William N. Eskridge Jr., Abbe R. Gluck & Victoria F. Nourse, Statutes, Regulation, and Interpretation: Legislation and Administration in the Republic of Statutes 695 (2014) [hereinafter Eskridge et al., Statutes, Regulation, and Interpretation] (noting "bait-and-switch" argument of Michigan voters with regard to same-sex marriage amendment in National Pride at Work, Inc. v. Governor of Michigan, 748 N.W.2d 524 (Mich. 2008)).

potential to increase public participation in agency decisions,[192] something Strauss himself predicted.[193] For example, the FCC's recent NPRM on net neutrality drew over three million comments.[194] The comments are not binding in the same way as a vote, of course, and many agencies simply dismiss them as not being materially cogent and thus not requiring a response.[195] Sometimes, agencies do take mass public input seriously, typically when they actively seek such input outside of the traditional commenting process. For instance, as part of a rulemaking to discourage tobacco use, the FDA conducted public surveys on potential images for new warnings on packages of cigarettes.[196]

2. *Lobbyists, CBO, and Others.* — It is an interesting contrast that, on the administrative law side, there has been more direct engagement with the role played by outside stakeholders in federal policymaking. One obvious reason is that they are given a more formal role in the process, through notice and comment. But there is also a wide literature on topics such as agency capture that grapples with how outside stakeholders affect regulation.[197] Although there is a rich political science literature on lobbying and Congress, the legislation literature has not made much use of it. The scope of this Essay does not permit a deep treatment of this subject, but it deserves its own study.

We also have not detailed the nuances of how legislation is drafted inside Congress and how that differs from the textbook account. On the one hand, there are deviations of which most are aware, even if legal doctrine does not take them into account. The fact that staff, not elected members, draft most legislation is an example. But there are deeper insights. One is the role of the professional drafting offices inside Congress—the Offices of House and Senate Legislative Counsel—and how their "translation" of policy deals into formal statutory text is very

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192. See Cary Coglianese, Citizen Participation in Rulemaking: Past, Present, and Future, 55 Duke L.J. 943, 952–59 (2006) (summarizing empirical studies finding some evidence e-rulemaking increased citizen participation); Beth Simone Noveck, The Electronic Revolution in Rulemaking, 53 Emory L.J. 433, 516–17 (2004) (describing potential for e-rulemaking to increase number of public comments).

193. Peter L. Strauss, Implications of the Internet for Quasi-Legislative Instruments of Regulation, 28 Windsor Y.B. Access to Just. 377, 391–93 (2010) (summarizing e-rulemaking initiative and emphasizing potential for "a kind of dialogue about proposed rulemaking that simply could not have been imagined in paper format").

194. Kat Greene, FCC Gets More than 3M Net Neutrality Comments, Law360 (Sept. 15, 2014, 9:21 PM), http://www.law360.com/articles/577563/fcc-gets-more-than-3m-net-neutrality-comments [http://perma.cc/C9VD-WBXJ].

195. Nina A. Mendelson, Foreword: Rulemaking, Democracy, and Torrents of E-Mail, 79 Geo. Wash. L. Rev. 1343, 1359 (2011) (raising specter of "dismissal or pro forma treatment of significant number of public comments" by agencies in favor of "technically and scientifically oriented comments").

196. Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. 36,628, 36,638–39 (June 22, 2011) (describing survey).

197. See Steven P. Croley, Regulation and Public Interests: The Possibility of Good Regulatory Government 307–12 (2008) (collecting citations).

different from what most lawyers understand the statutory drafting process to be. Other offices also have an enormous impact on how legislation is drafted. The CBO is an important example: Because of statutory and internal requirements,[198] legislation is now drafted in the "shadow" of the congressional budget score.[199] CBO comments on draft bills, and drafters frequently change legislation in response to CBO's comments to bring it within a specific budget target. Space does not permit full treatment of these internal drafters here; the Gluck–Bressman study provides more details,[200] but a full understanding of the modern lawmaking context requires this broader picture.

198. See Bill Heniff Jr., Cong. Research Serv., RL31943, Budget Enforcement Procedures: Senate Pay-As-You-Go (PAYGO) Rule 2 (2010), http://assets.opencrs.com/rpts/RL31943_20100112.pdf [http://perma.cc/QAD9-2CWR] (explaining internal Senate PAYGO rule); see also Philip G. Joyce, The Congressional Budget Office: Honest Numbers, Power and Policymaking 224 (2011) (describing role of CBO in wake of rules requiring CBO to score budgetary impact of most legislation); The Statutory Pay-As-You-Go Act of 2010: A Description, White House Off. of Mgmt. & Budget, http://www.whitehouse.gov/omb/paygo_description [http://perma.cc/FJZ2-45H8] (last visited Aug. 16, 2015) (same) [hereinafter OMB, Statutory PAYGO Act].

199. Bressman & Gluck, Part II, supra note 28, at 777–78.

200. Id. at 764.

TABLE 2: SUMMARY TYPOLOGY OF UNORTHODOX POLICYMAKING

Type of Unorthodoxy	Process	Product	Challenges for Courts
Omnibus • Laws • Rules • Implementation	Centralized	Long, complex, bundled	Overlapping jurisdictions, potential inconsistency and errors, little legislative history (LH)
Emergency • Laws • Rules • Staffing	Process stages skipped, rushed, centralized	Brief laws, interim final rules, acting officials, czars	Little detail, no notice and comment (N&C), often no LH
Outsourcing • Legislative Workarounds • Unorthodox Delegations	Substitute and fast-track process, APA often skipped, non-federal actors	Automatic legislation, quasi-regulation, waivers, nonfederal laws, rules	Lack of accountability, often no N&C, no LH
Presidential • Lawmaking • Rulemaking	Unorthodox timing, OIRA led	Signing statements, executive orders and directives, rules with White House influence	Unreviewability, lack of record
Other drafters • The People • Lobbyists • Legislative Counsel • CBO • Others	Drafting by outsiders and insiders not directly accountable to members	Initiatives as well as traditional laws and rules	Lack of accountability, less expertise, less interest in consistency with existing landscape

II. WHAT DRIVES UNORTHODOX PRACTICES AND HOW ONE LEADS TO ANOTHER

Lawmaking and rulemaking, whether traditional or unorthodox, often share common drivers and can influence one another. These linkages write another chapter in the growing account of the inextricability of the theories and doctrines of legislation from those of administrative law. It makes no sense to talk about overlapping delegations, for instance, without understanding the overlapping jurisdiction of congressional committees. Every committee wants a piece of the action, and often a committee wants to control implementation by having "its agency" as a lead implementer.[201] These overlapping delegations, in turn, may

201. See Kaiser, supra note 95, at 88–89 (describing turf battles in passage of Dodd-Frank between House Agricultural and Financial Services Committees over control of derivatives trading).

contribute to the White House taking a significant role in coordinating across agencies.

The goal of this Part is not to offer a comprehensive account of the linkages among unorthodox practices but, rather, to provide some illustrative examples of how the regulatory and legislative contexts connect. The account begins with gridlock, which thus far has received the most attention, including by Gillian Metzger in this Symposium.[202] But there are other less familiar but important institutional drivers of unorthodoxies. Overlapping jurisdiction across Congress and agencies is one example; longstanding vertical relationships among federal and state actors is another. Both influence the design of legislation and administration. Fiscal structures also create incentives for unorthodox policymaking, including the incentive to legislate through appropriations statutes and to regulate through off-budget vehicles. The identity of statutory drafters also likely has an effect on what delegations look like: The President, for example, may be more interested in drafting statutes with heavy agency roles than party leaders or private actors are. Unorthodox practices also contribute to the very circumstances that drive more unorthodox practices. The risk of an aggressive signing statement, for example, can contribute to gridlock.[203] Omnibus legislation, by giving power to party leaders, can add to polarization.[204]

Of course, there also are connections between orthodox and unorthodox practices, but our focus here is on the connections across unorthodoxies. Mapping these connections has various payoffs apart from the obvious descriptive value of understanding the present landscape. For instance, scholars who study one side of the policymaking process might enrich their account by seeing the connections to the other. As one example, scholars who focus on federalism rarely delve deeply into the prevalence of administrative delegations to states in federal statutes.[205] Another payoff is that for courts (or policymakers) interested in curtailing these practices, understanding the ripple effect across them is critical.

Keep in mind, too, that orthodox legal doctrine also shapes unorthodox practices. The courts' creation of a robust, and consequently costly, notice-and-comment procedure and application of a "hard look"

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202. Metzger, Agencies, Polarization, and the States, supra note 30.

203. See Rodriguez et al., supra note 56, at 6 (discussing connection between signing statements and gridlock).

204. Cf. Richard H. Pildes, Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America, 99 Calif. L. Rev. 273, 319 (2011) [hereinafter Pildes, Center Does Not Hold] (noting connection between power of party leaders and polarization).

205. One of us has detailed this phenomenon. Gluck, Intrastatutory Federalism, supra note 4.

to agency action may make traditional rulemaking less attractive.[206] Similarly, the strong presumption against the retroactivity of rulemaking may foster incentives to find faster ways to regulate.[207] On the other hand, giving more deference to agency interpretations of ambiguous statutes in notice-and-comment regulations encourages agencies to use the APA process.[208] And new legal doctrines more forgiving of unorthodoxies might have their own effect on modern policymaking: If courts altered current doctrine to accept or even encourage unorthodox practices, it could remove any incentive for Congress and the executive branch to curtail them. For now, however, we bracket the role of doctrine; we return to it in Part IV.

A. *Gridlock*

The increase of legislative gridlock over the last several decades is well documented.[209] Sinclair's path-breaking work identifies a hostile political climate and gridlock as key causal factors that have altered the context in which Congress functions.[210] The Gluck–Bressman study corroborates that leaders have been forced to modify traditional legislative practices to achieve their goals in this hyperpartisan environment.[211]

Our new account of unorthodox rulemaking is tightly bound to this legislative account.[212] Agencies tasked with promulgating controversial policies in politically sensitive environments have likewise needed to develop their own unconventional tactics to achieve their goals.[213] First, as

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206. See Thomas O. McGarity, Some Thoughts on "Deossifying" the Rulemaking Process, 41 Duke L.J. 1385, 1441 (1992) (explaining attractiveness of soft regulation in part due to "judicially imposed record-assembling" required for APA rulemaking).

207. Cf. Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208–09 (1988) (requiring clear statement by Congress to make regulation retroactive).

208. See United States v. Mead Corp., 533 U.S. 218, 246 (2001) (Scalia, J., dissenting) (linking deference for notice-and-comment regulation to "increase" in such rulemaking).

209. See, e.g., Sarah Binder, The Dysfunctional Congress, 18 Ann. Rev. Pol. Sci. 85, 97 (2015) ("[L]evels of legislative deadlock have steadily risen over the past half century.").

210. See Sinclair, Unorthodox Lawmaking (4th ed.), supra note 27, at 142–65 (explaining partisanship can contribute to gridlock but gridlock can result from other factors including Senate cloture rules, split party control of Congress or an agency, and interest-group pressures); id. at 159–65 (linking rise of unorthodox lawmaking to rise of partisan polarization).

211. See Bressman & Gluck, Part II, supra note 28, at 793–94 (discussing rise of unorthodox legislative practices, notably with "aggregate statutes"); Gluck & Bressman, Part I, supra note 28, at 1000–01 (noting seventy-six percent of respondents indicated party in White House was always, often, or sometimes relevant to delegation decisions).

212. Since the first presentation of this project at the University of Pennsylvania Law School in October 2014, other related projects have surfaced in parallel. Greve & Parrish, supra note 30; Metzger, Agencies, Polarization, and the States, supra note 30; Pozen, supra note 30; Blackman, supra note 30.

213. See Farber & O'Connell, supra note 29, at 1161–64 (summarizing literature on unorthodox agency tactics for avoiding OIRA review); Po, New Regulatory Process, supra

detailed above, agencies increasingly have resorted to policymaking outside of the APA and often outside of the OIRA process for their most controversial actions.[214] These less formal missives often bypass the stage of the rulemaking process—notice and comment—where one frequently sees the most public dissent.[215] Sometimes agencies must get around their own internal gridlock as well. For instance, at the Federal Election Commission, two Democratic commissioners recently filed a formal petition for rulemaking at their own agency.[216]

Second, gridlock often leads to legislative bundling and a high degree of legislative punting on Congress's side. This in turn leads to more overlapping delegations to agencies—because more committees are involved in the legislative deal—and often more utilization of unorthodox delegates, like states and private actors. These unorthodox delegations are in a sense the ultimate punt of a controversial topic: They move the implementation outside of the federal government altogether.[217] Moreover, as work in political science substantiates, when the President is a member of a different party, majorities in Congress may prefer to have legislation implemented by the states rather than by an executive branch with different views.[218]

The massive legislative deals that now typify major legislation also mean that agencies have to use more creative regulatory strategies to deal with the unexpected ambiguities, errors, and other complexities that may come with omnibus bills or with bills that do not go through the complete multi-stage legislative process.[219] The ambiguities often attendant to such legislation also can create opportunities for opponents to seize on "inartful drafting"[220]—as in the recent ACA challenge—to try to

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note 29, at 29–33 (listing four types of unorthodox rulemaking used by agencies implementing ACA).

214. See supra section I.E.5 (describing phenomenon of quasi-rulemaking outside normal APA procedures).

215. See Bagley & Levy, supra note 24, at 442–43 (arguing quasi-regulation permits soft launches).

216. Colby Itkowitz, Corporations Are People. But Are FEC Commissioners People Too?, Wash. Post: PowerPost (June 18, 2015), http://www.washingtonpost.com/news/powerpost/wp/2015/06/18/corporations-are-people-but-are-fec-commissioners-people-too/ [http://perma.cc/Y5CZ-E8P3].

217. See supra section I.D.3 (discussing unorthodox delegations to nonfederal actors).

218. See David Epstein & Sharyn O'Halloran, Delegating Powers: A Transaction Cost Politics Approach to Policy Making Under Separate Powers 80, 157 (1999) ("[N]on-executive actors . . . receive a greater percentage of delegations during divided government.").

219. See Bagley & Levy, supra note 24, at 444–46, 453–54 (suggesting unorthodox ACA lawmaking processes created imperative for unorthodox rulemaking for ACA's Essential Health Benefits).

220. King v. Burwell, 135 S. Ct. 2480, 2492 (2015). The regulation at issue in *King* was unorthodox in the sense that it was the output of an overlapping delegation, but it was orthodox in the sense that it went through prior notice and comment.

impede agency implementation. This, in turn, may even incentivize more unorthodox rulemaking by the agency.[221]

Finally, sometimes Congress cannot break through the gridlock, motivating a different kind of unorthodox rulemaking entirely. As detailed in Part I, agencies themselves have jumped into the gap in such circumstances—frequently led by the President—adapting a statute in innovative ways to solve problems not necessarily anticipated at the time of the statute's passage. President Obama's waiver directive for the No Child Left Behind Act and his greenhouse-gas order, as we have discussed, are examples.[222]

B. *Horizontal and Vertical Institutional Complexity*

Institutional structures also have enormous influence on the modern lawmaking context. The increasingly overlapping jurisdictions of congressional committees, which we have already emphasized, may contribute to the rise in omnibus policymaking. Although Congress heavily consolidated its committee structure in the Legislative Reorganization Act of 1946, since then, subcommittees have proliferated, and existing committees have fought to expand their turf.[223] For instance, approximately eighty committees and subcommittees have jurisdiction over some part of homeland security.[224]

The horizontal complexity of Congress leads to horizontal complexity in the administrative state, too.[225] It should not be surprising that the 9/11 Commission found similar redundancies in the legislative and executive branches when it came to intelligence functions.[226] The FDA and the Department of Agriculture each play major roles in food

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221. See Po, New Regulatory Process, supra note 29, at 40–45 (developing account of pressures leading to increased unorthodox agency action).

222. See Carbon Pollution Memorandum, supra note 171 (instructing EPA to regulate "carbon pollution from the power sector"); see also Farber & O'Connell, supra note 29, at 1155 (identifying greenhouse-gas order as example of presidential attempt to "direct agency action that the current Congress does not support or has not ordered"); supra note 158 and accompanying text (describing No Child Left Behind Act's state waiver process).

223. See David C. King, Turf Wars: How Congressional Committees Claim Jurisdiction 105–20 (1997) (discussing turf war phenomenon); Anne Joseph O'Connell, The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World, 94 Calif. L. Rev. 1655, 1712–13 (2006) [hereinafter O'Connell, Smart Intelligence] (noting 1946 consolidation and later jurisdictional conflicts).

224. CSIS-BENS Task Force on Cong. Oversight of the Dep't of Homeland Sec., Untangling the Web: Congressional Oversight and the Department of Homeland Security 2 (2004), http://csis.org/files/media/csis/events/041210_dhs_tf_whitepaper.pdf [http://perma.cc/4F5T-4P2W].

225. See Jonathan B. Bendor, Parallel Systems: Redundancy in Government 256 (1985) (discussing effect of strong and weak agencies of representation on bureaus); O'Connell, Smart Intelligence, supra note 223, at 1699 ("[T]he structure of the intelligence community at least somewhat affects the effectiveness of congressional oversight, and vice versa . . . .").

226. See O'Connell, Smart Intelligence, supra note 223, at 1664–65 (summarizing proposed reforms for both branches).

safety.[227] Under Dodd-Frank the Department of the Treasury, the Federal Reserve, the Federal Deposit Insurance Corporation, and the SEC had to issue regulations to implement the Volcker Rule.[228] Examples abound.[229]

This horizontal complexity not only spurs omnibus policymaking,[230] but also opens the door to strong, often-unorthodox coordinators. The Gluck–Bressman study documents how multiple committees working on a single bill are often not in communication with one another; committees even have different drafting practices from one another.[231] Party leadership has taken on the critical coordinating role as a result, but the increased involvement of party leadership has generally also meant less emphasis on traditional committees and traditional process.[232] On the regulatory side, in parallel, the White House's OIRA has stepped into the void to play this coordinating role in the face of the horizontal administrative complexity.[233]

Vertical complexity, in contrast to this horizontal complexity, is in some ways highly orthodox in our system. The central role for states in American governance is constitutionally prescribed. States have always been our nation's default lawmakers, and as the federal legislative state grows, it has necessarily been layered atop a landscape of state law.[234] This is at least in part a legislative path-dependence story: Congress tends to rely on states to implement federal laws when it legislates in areas of traditional state dominance.[235] But this history has led to some of the unorthodoxies we identify, most notably administrative delegations to states.

Similarly, when it comes to private actors, federal intervention has generally been the exception to the rule in our libertarian nation, and Congress has long relied on private markets and actors for important policy developments and implementation. Thus, it would not be surprising

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227. Farber & O'Connell, supra note 29, at 1157.

228. See Volcker Rule Implementation Frequently Asked Questions, Off. Comptroller Currency (July 16, 2015), http://www.occ.gov/topics/capital-markets/financial-markets/trading/volcker-rule-implementation/volcker-rule-implementation-faqs.html [http://perma.cc/5VX4-929D] (listing agencies with implementation authority over Volcker Rule).

229. See, e.g., Gersen, Overlapping and Underlapping, supra note 32, at 208–09 (outlining jurisdictional "overlap" and "underlap").

230. See Krutz, supra note 71, at 14 (finding "jurisdictional quagmire" in health policy has contributed to "attachments to omnibus measures").

231. Bressman & Gluck, Part II, supra note 28, at 747–53.

232. See id. at 793–94 (linking increased influence of party leadership to decreased use of traditional process, including committees).

233. See Cass R. Sunstein, Commentary, The Office of Information and Regulatory Affairs: Myths and Realities, 126 Harv. L. Rev. 1838, 1840 (2013) (positioning OIRA as "collect[or] [of] widely dispersed information" and coordinator of agency functions).

234. See Gluck, Federalism from Federal Statutes, supra note 146, at 1760–63 (elaborating on how federal government often relies on states to implement federal laws where new federal statutes cover areas of traditional state control).

235. See supra note 146 and accompanying text (noting congressional delegation to states of certain traditionally state-dominated areas of law).

that, even where there is no political need to punt, Congress and agencies would rely on these outside, historically expert entities in policymaking.

C. *Fiscal Constraints*

One cannot realistically talk about policymaking without talking about money. Separate from partisanship, it is difficult to get legislation through conventional channels that would add to government deficits because voters of both parties view the federal budget deficit as a major problem.[236] After the major government deficits of the 1980s,[237] pressures mounted on both political branches to do more for less. These pressures drive their own unorthodoxies that help to reduce or mask cost implications.[238]

For instance, Congress now imposes fiscal constraints on itself, which can result in government shutdowns. But shutdowns are politically unpopular, and avoiding them creates incentives to cut omnibus deals in appropriations bills, which are less likely to be vetoed.[239] The need to get past gridlock when it comes to budgets also motivated the Senate to create the special fast-track budget process, detailed in Part I.[240] These fiscal constraints also incentivize unorthodox use of emergency legislation. Because emergencies, by their nature, may allow Congress to overcome these constraints, sometimes nonemergency measures are appended to emergency legislation—for instance, all the "pork" attached to the financial bailout legislation.[241]

Massive appropriations bills have other unorthodox legislative implications, notably their use as vehicles to bury and pass controversial policies that then becomes difficult to remove without destroying the larger deal. Federally financed stem-cell research is a prominent example. A pre-stem-cell-era restriction that has been part of an annual appropriations rider since 1996 has impeded federal financing of this important research. Unable to extract the provision from the rider, both

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236. Andrew Kohut, Debt and Deficit: A Public Opinion Dilemma, Pew Research Ctr. (June 14, 2012), http://www.people-press.org/2012/06/14/debt-and-deficit-a-public-opinion-dilemma/ [http://perma.cc/2Y2E-UAHA].

237. See, e.g., Philip G. Joyce & Robert D. Reischauer, Deficit Budgeting: The Federal Budget Process and Budget Reform, 29 Harv. J. on Legis. 429, 433 (1992) (describing mid-1980s deficits as "alarming").

238. See Sinclair, Unorthodox Lawmaking (4th ed.), supra note 27, at 111, 164 (noting how fiscal pressures drive omnibus legislation in unified government).

239. See, e.g., David Rogers, Should President Obama Veto Spending Bills?, Politico (June 25, 2014), http://www.politico.com/story/2014/06/president-obama-spending-bills-veto-108301.html [http://perma.cc/8GH5-NV7A] (noting congressional Democrats' desire to avoid presidential veto of spending bill).

240. See supra text accompanying note 129 (describing fast-track budget process in Senate).

241. See Shailagh Murray & Paul Kane, Congress Passes Stimulus Package, Wash. Post (Feb. 14, 2009), http://www.washingtonpost.com/wp-dyn/content/article/2009/02/13/AR2009021301596.html [http://perma.cc/45QZ-84EZ] (summarizing "dozens of narrow spending provisions that survived in the final bill").

Presidents George W. Bush and Obama had to use their own unorthodox tools—creative presidential directives—to find ways to provide the financing.[242]

Congress's enactment of PAYGO (the "pay-as-you-go" rule)—which requires that legislation that increases spending or reduces revenues not increase projected deficits[243]—is another result of budget pressures that have produced unconventional legislative moves. PAYGO has dramatically increased the influence of CBO in the drafting process, as we noted in Part I. It also leads to unorthodox legislative design. The ACA, for instance, mandated an extended implementation time frame that may be less than ideal for policy but keeps the budget numbers constant. Tim Westmoreland also has noted how these rules can lead to nonsensical legislative policy: Taking another health-related example, he notes that policies that increase the average lifespan for some groups are a "negative" from a budget perspective—because they increase the cost to government by keeping Americans on the Medicare rolls for longer.[244] PAYGO also creates sometimes skewed incentives between designing new programs as discretionary spending (where spending authority originates from annual appropriation acts) and mandatory spending (where spending authority originates from laws other than annual appropriations), because only mandatory programs are subject to this kind of budget scrutiny.[245]

OIRA itself is a product of this kind of budget pressure. Although now widely known and with considerable trappings of a formal process, OIRA appears nowhere in the APA or any other statute, is not discussed in any meaningful way by the courts in reviewing agency action, and was highly unorthodox when it first appeared.[246] Although the process had earlier manifestations, it took off in the Reagan Administration, as

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242. See Balanced Budget Downpayment Act, Pub. L. No. 104-99, § 128, 110 Stat. 26, 34 (1996). The Dickey-Wicker Amendment was initially proposed in response to fears about cloning. See Harold E. Varmus, The Art and Politics of Science 206–08 (2009); see also Removing Barriers to Responsible Scientific Research Involving Human Stem Cells, Exec. Order No. 13,505, 74 Fed. Reg. 10,667 (Mar. 11, 2009) (removing limitations on funding for research involving human embryonic stem cells); George W. Bush, Opinion, Stem Cell Science and the Preservation of Life, N.Y. Times (Aug. 12, 2001), http://www.nytimes.com/2001/08/12/opinion/stem-cell-science-and-the-preservation-of-life.html (on file with the *Columbia Law Review*) (announcing policy of limiting federal funding to existing stem cell lines).

243. OMB, Statutory PAYGO Act, supra note 198.

244. Tim Westmoreland, Standard Errors: How Budget Rules Distort Lawmaking, 95 Geo. L.J. 1555, 1595–99 (2007) (referring to such analysis as "budgetary euthanasia").

245. Frequently Asked Questions About CBO Cost Estimates, Cong. Budget Off., https://www.cbo.gov/about/products/ce-faq [http://perma.cc/L6KS-BA2X] (last visited Aug. 16, 2015).

246. See Farber & O'Connell, supra note 29, at 1164 (explaining explicit bar of judicial review of OIRA review of proposed agency action).

deficits exploded,[247] and allowed the executive branch to exert more centralized policy control over rulemaking. And now, as we have detailed, there is a second layer of administrative unorthodoxy aimed at avoiding OIRA review.[248]

These budgetary pressures also alter oversight relationships, with both traditional and nontraditional administrators. Since the late 1960s, the federal government generally has had a unified budget, which gets reported and debated.[249] A large attraction of quasi-agencies to politicians is their off-budget status.[250] Unorthodox delegations to the states and to the private sector also allow the government to act without adding federal employees.[251]

Even with federal agencies, increased reliance on appropriations bills to enact policy alters oversight dynamics. Agencies fearing the punishing (or seeking the rewarding) "power of the purse" may want to please appropriations committees and party leaders more than their oversight committees.[252] In addition, when agencies rely on fees to fund their activities because government funding has not been allocated, members of Congress lose oversight authority. Because Immigration and Customs Enforcement is largely funded by fees, congressional Republicans could not use appropriations riders to limit recent executive action on immigration.[253]

D. *Unorthodox Drafters, Unorthodox Delegations*

Finally, we suspect that delegations to agencies may differ significantly depending on who is the primary drafter of the legislation. For instance, congressional committees are likely to prefer traditional delegations, in non-omnibus vehicles, with notice-and-comment rulemaking procedures: Those procedures provide more opportunities for intervention by com-

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247. Exec. Order No. 12,291 §§ 7–9, 3 C.F.R. §§ 127, 131–134 (1982), revoked by Exec. Order No. 12,866 § 11, 3 C.F.R. at 649 (1994); James C. Miller III, The Early Days of Reagan Regulatory Relief and Suggestions for OIRA's Future, 63 Admin. L. Rev. 93, 95–96 (2011) (describing precursors to OIRA and Reagan's economic policy priorities leading to OIRA's creation).

248. See supra section I.D.2 (explaining ways quasi-rulemaking may avoid regulatory procedures).

249. See Cheryl D. Block, Congress and Accounting Scandals: Is the Pot Calling the Kettle Black?, 82 Neb. L. Rev. 365, 423–24 (2003) (describing origins of unified budget). Only Social Security and the Postal Service have been taken off that budget, by specific statute. Taxes and the Budget: What Does It Mean for a Government Program to Be "Off-Budget"?, Tax Pol'y Ctr., http://www.taxpolicycenter.org/briefing-book/background/taxes-budget/off-budget.cfm [http://perma.cc/N9F5-5A27] (last updated Dec. 13, 2007).

250. O'Connell, Bureaucracy at the Boundary, supra note 57, at 879–80.

251. DiIulio, supra note 58, at 35 (noting "for decades," Congress "has used proxy administration to spare the public from reckoning with the federal government's ever-increasing size and scope").

252. Cf. Rose-Ackerman, supra note 45, at 192 (highlighting dangers of making substantive law through appropriations process).

253. Hicks, supra note 8.

mittee members (rather than the Appropriations Committee) as well as by interest groups that members of those committees care about.[254]

In contrast, when the executive branch is the primary drafter of legislation, it may want to give executive agencies a primary role. Party leaders, on the other hand, may be less focused on agency implementation than either the President or committees that oversee agencies. States and private actors—who also draft federal legislation and regulations—might be prone to using state or private implementers and private standards.[255] We do not have empirical evidence to corroborate these hypotheses, although there is some evidence that delegation does change depending on the parties in the mix.[256] Some outside actors may prefer unconventional regulatory process, too: For instance, private parties often seek guidance from agencies rather than notice-and-comment rulemaking for speed and flexibility.[257]

III. WINNERS, LOSERS, AND NORMATIVE IMPLICATIONS

To evaluate these developments, we require a defined vantage point: From what perspective does one assess the desirability of unorthodox policymaking and who "wins" and "loses" in the process? Do we consider these developments from the perspective of members of Congress? The White House? The courts? The public? A related and central question is whether or why it should matter to courts how Congress or agencies make law. If congressional and administrative lawmaking do not fit the models that courts assume they do, why should we care? If we do care, are the courts supposed to change, or is Congress (or the administrative state)?

These are big questions with relevance for theories of legislation and administrative law well beyond the scope of this Essay. Even within the textbook models, as each of us has shown, the courts make assumptions about legislative drafting and administration that do not hold up to reality. The deep question here is that of the judicial role—what kind of

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254. Cf. Mathew D. McCubbins et al., Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies, 75 Va. L. Rev. 431, 444 (1989) (noting APA's deck-stacking attributes).

255. See Mendelson, Private Control, supra note 148, at 739–43 (noting wide use of private standards and discussing consequences). Direct democracy—the people as drafters—may encourage the use of unorthodox delegates by creating new hybrid organizations to carry out initiatives. See, e.g., Cal. Const. art. XXXV, § 1 (creating California Institute of Regenerative Medicine).

256. See Epstein & O'Halloran, supra note 218, at 157–58 (showing Congress delegates more to actors further from presidential control when President is of different party). The Administrative Conference of the United States is currently studying agency drafting practices as well. See Technical Assistance by Federal Agencies in the Legislative Process, Admin. Conf. U.S., https://www.acus.gov/research-projects/technical-assistance-federal-agencies-legislative-process [https://perma.cc/49YN-YL7E] (last visited Sept. 25, 2015).

257. Nina A. Mendelson, Regulatory Beneficiaries and Informal Agency Policymaking, 92 Cornell L. Rev. 397, 406–09 (2007) [hereinafter Mendelson, Regulatory Beneficiaries].

relationship the courts and legal doctrine should have to the actual policymaking process. Courts can try to be passive but accurate reflectors of the lawmaking process, or they can actively try to shape it. The active vision requires courts to normatively evaluate lawmaking on some metric, which must be chosen. Is "good law" being produced? Are process values being protected? Are lawmakers sufficiently accountable? Or courts could ignore the sausage factory entirely in favor of concentrating on other roles—for instance, the duty to make law simple, transparent, and predictable for the public. From that perspective, we might evaluate the rise of unorthodox lawmaking and rulemaking through a very different lens: not whether it produces good policy but, for instance, whether it produces policy that judges can understand and make coherent.

As we discuss in Part IV, the federal courts have not been able to resist the urge to intervene in the lawmaking process even under the conventional policymaking account. Important doctrines in both legislation and administrative law aim to make the coordinate branches more deliberate, more accountable, more perfect. To contemplate how courts might translate these concerns to the unorthodox context—or whether they should do so in the first place—it is worth thinking broadly about what values and stakeholders unorthodox lawmaking serves and undermines. (This examination, of course, is valuable outside of its implications for the courts' role as well—it might shape reforms in the political branches, a topic that this Essay does not take on.)

We focus in this Part on two norms that law has traditionally tried to advance: social welfare and democratic legitimacy. We also examine the political realities of how these practices shape the distribution of power. Other perspectives could certainly be added, but these three suffice to introduce the complexity of the valuation. We train mostly on how unorthodoxies serve or subvert these norms, and defer to the next Part whether doctrine might intervene to shape them.

A. *Social Welfare*

Our definition of social welfare is narrow and will surely be disputed by some, but for present purposes we view social welfare as the result of good lawmaking. Do unorthodox practices lead to policies with higher net benefits for society than conventional methods of legislation and regulation?

1. *Policy Gets Made.* — Perhaps the primary social welfare gain of most forms of unorthodox lawmaking and rulemaking is that *policy gets made.* Most of the unorthodoxies we have identified—including omnibus deals, workarounds, and emergency policy—can be viewed at least some of the time as increasing social welfare in this way, and as overcoming barriers to doing so in difficult political or institutional circumstances. Sinclair herself, although originally critical of unorthodox lawmaking,

has become more favorably disposed for precisely this reason.[258] Of course, sometimes unorthodox practices like omnibus policymaking and delegation to states simultaneously make it harder to create policy due to coordination and political costs.[259]

From a judicial perspective, even if one does not think it proper for a court to care about what *kind* of policy gets made, a court might indeed desire that Congress has *the ability to act* when it needs to. A court that does not wish to take a leading role as policymaker or gap filler, or that wants Congress to serve as a check on agencies or on judicial decisions, will want a Congress capable of speaking. In recent testimony to a House Appropriations subcommittee, Justice Kennedy dismissed the idea that political gridlock should affect how courts interpret statutes: "We have to assume we have three fully functioning branches of the government that are committed to proceed in good faith and with good will toward one another to resolve the problems of this republic."[260] In other words, part of the way that courts currently think about their own role is that they assume Congress and agencies can act.

2. Policy May (?) Be Improved. — In at least some instances, unorthodox practices may promote better policymaking. Outsourcing policy to states, private actors, and congressionally created commissions like the IPAB or BRAC can be an act of delegating to entities with deeper expertise, with more time to make decisions, or more free from special interests. In this vein, direct democracy has been shown to enhance social welfare on issues where political actors are captured by very narrow interests or where political actors' self-interests are at stake, such as in the cases of term limits or government salaries.[261] Outsourced policymakers also are often more flexible and dynamic because of market pressures or because they operate subject to fewer governmental constraints.[262]

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258. Compare Sinclair, Unorthodox Lawmaking (4th ed.), supra note 27, at 276 (contending unorthodox lawmaking "has made it possible for our most representative branch to continue to perform its essential function of lawmaking in a time of popular division and ambiguity"), with Sinclair, Unorthodox Lawmaking (1st ed.), supra note 15, at 231 (contending unorthodox lawmaking presents some "tension among the values of representation, responsiveness and responsibility").

259. See Lisa Heinzerling, Divide and Confound: The Strange Allocation of U.S. Regulatory Authority over Food, *in* Food and Drug Regulation in an Era of Globalized Markets (forthcoming 2015), http://ssrn.com/abstract=2507346 [http://perma.cc/42LE-3N6Y] (identifying coordination issues in food regulation due to such "fragmentation").

260. Jeff Overley, Kennedy's Gridlock Comments Spook ACA Backers, Law360 (Mar. 23, 2015, 6:34 PM), http://www.law360.com/articles/634801/kennedy-s-gridlock-comments-spook-aca-backers [http://perma.cc/2X8T-52BM].

261. See Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2690 (2015) (citing cases); John G. Matsusaka, Direct Democracy Works, 19 J. Econ. Persp. 185, 200 (2005) ("[T]erm limits[] [are] an issue where legislators' self-interest conflicts with the desires of their constituents.").

262. See O'Connell, Bureaucracy at the Boundary, supra note 57, at 888–89.

White House-led policymaking also may have special benefits, including coordination within the executive branch and potentially with Congress. OIRA itself was established in social welfare terms, to ensure that agencies promulgate regulations whose benefits trump their costs.[263] Even quasi-regulation, such as policymaking through FAQs and the like, has what Bagley and Levy have described as the analogous benefit of a soft release that enables the agency to tweak the policy to improve it.[264]

Of course, there may be substantial quality costs to rushed or log-rolled policymaking. Emergency actions may cater to political realities at the expense of effectiveness.[265] It is also certainly the case that the White House is not always a social welfare maximizer; what may be gained in the White House's efforts at coordination may be lost to its raw political motivations.[266] The same goes for states and private implementers, which have their own interests; states also have other limitations, including that many state legislatures meet infrequently and have budget restraints that prevent certain types of spending, tax increases, and countercyclical budgeting. With respect to outsourcing in general, what may be gained from liberation from the legislative process may be lost if unorthodox policymaking results in an expertise deficit; specifically, policy design by the subject-matter-expert committees and agency staffers may disappear when generalist, and arguably more political, party leaders and the President, or outsiders, write laws.

Related to this is a particular kind of loss in which courts have a special interest: Nonexperts are less likely to draft with the rest of the landscape of relevant law in mind, creating less consistent and coherent law than courts often presume or desire. Even unorthodox legislation drafted inside Congress may be more textually messy, less thoroughly deliberated, and less likely to have been reviewed and understood by all

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263. Exec. Order No. 12,866 § 1(b)(5), 3 C.F.R. 639 (1994), reprinted as amended in 5 U.S.C. § 601 app. at 86–91 (2012) ("When an agency determines that a regulation is the best available method of achieving the regulatory objective, it shall design its regulations in the most cost-effective manner to achieve the regulatory objective.").

264. Bagley & Levy, supra note 24, at 453–56 (describing HHS's outreach to affected parties *after* issuing bulletin announcing benchmarking policy); see also Tim Wu, Agency Threats, 60 Duke L.J. 1841, 1857 (2011) (arguing guidance used to threaten can be particularly effective in changing industries where agencies prefer not to set inflexible policy nor wait to get involved).

265. See, e.g., Juliet Eilperin, Ebola Presents Health, Political Challenges for Obama, Wash. Post (Oct. 16, 2014), http://www.washingtonpost.com/politics/2014/10/16/1b2c1636-556d-11e4-892e-602188e70e9c_story.html [http://perma.cc/MM38-9FNX] (reporting criticisms of President Obama's response to Ebola outbreak and travel ban discussions). Critics of recent financial regulation claim that many "crisis-driven" rules have not been adequately vetted. See Daniel Wilson, CFTC Commissioner Slams Finance Regulation "Explosion," Law360 (Nov. 20, 2014), http://www.law360.com/articles/598060/cftc-commissioner-slams-finance-regulation-explosion [http://perma.cc/K9P4-5WS8] (quoting CFTC Commissioner criticizing his own agency for this reason).

266. See Farber & O'Connell, supra note 29, 1138–39, 1162–67 (summarizing studies and examples of OIRA's political motivations).

stakeholders. From the courts' perch, these deficiencies can make a judge's job more difficult.

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Not everyone agrees that more government policy is a benefit. A common view of the textbook system of vetogates is that it laudably embraces a libertarian impulse to restrain government action.[267] Taking that view, unorthodox policymaking may diminish social welfare to the extent that it does make lawmaking easier. Not all emergencies require government intervention. Perhaps the states would step in to regulate more if the federal government did not do so, or private actors would otherwise fill the void.

B. *Democratic Legitimacy: Accountability, Transparency, and Public Input*

Democratic legitimacy is another very broad term. Although efficiency and legitimacy are often set in conflict,[268] we do not presume that unorthodox practices will necessarily promote one at the cost of the other. For our purposes, we focus on legitimacy values that are common currency for courts in this field: public participation, transparency, and accountability. This metric seems to pose some of the biggest challenges for unorthodox practices.[269]

1. *For the Public.* — When lawmakers bypass committees, floor debate, and other stages of the process, they skip typical opportunities for public and expert input.[270] Moreover, the paucity or confused nature of the legislative history for many unorthodox laws also deprives the public (both the general public and experts working in a field) of what can be important explanatory reports about complicated legislation. Because omnibus bills are aggregations of different committees' work, individual policy decisions also may be less accountable, and the end result can be legislation that, as a whole, is impossible for any member of the public or Congress to completely absorb or answer for.

There is a parallel story on the administrative side, with deadline-driven regulation and quasi-rulemaking more often skipping prior public

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267. See William N. Eskridge, Jr., Phillip P. Frickey & Elizabeth Garrett, Cases and Materials on Legislation: Statutes and the Creation of Public Policy 66–68 (4th ed. 2007).

268. See Pildes, Center Does Not Hold, supra note 204, at 331 (suggesting "American democracy" may "involv[e] an unfortunate tradeoff between accountability and governability").

269. Cf. O'Connell, Bureaucracy at the Boundary, supra note 57, at 892 (noting efficiency and accountability can be in conflict but are not necessarily so, and considering these two metrics for quasi-agencies).

270. Cf. Sinclair, Unorthodox Lawmaking (4th ed.), supra note 27, at 269 (pointing out orthodox practices can also be exclusionary).

participation.[271] Moreover, omnibus implementation may make it harder to blame any particular agency when policy failures occur.[272] President-led rulemaking may promote accountability because the President is elected; on the other hand, according to a former Deputy Secretary of the Interior, it "can cause real damage by introducing a false sense of engagement and oversight into a process where accountability and responsibility need to be clearly lodged at the agency level."[273]

Legislation and regulations that rely on workarounds or nonfederal and nonpublic entities pose additional questions. With respect to transparency and accountability, state and private actors are often not subject to government disclosure and process mandates such as the Freedom of Information Act (FOIA) or the APA, and do not have the same direct lines of accountability to federal overseers as most federal actors.[274] It has also proved difficult under current standing and administrative law doctrine for citizens to challenge the policy implementation efforts of outsourced delegates in federal court.[275] These problems may be more pervasive for private entities than for states, since state governments are electorally accountable and have their own administrative procedures and public-records acts.[276] Strauss, in both scholarship and in public advocacy, has critiqued how the public often cannot even access incorporated private standards in federal regulation without paying the relevant private body.[277]

White House involvement raises similar issues. Presidential directives do not require summaries of the ex parte meetings held by OIRA,[278] and

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271. See Jacob E. Gersen & Anne Joseph O'Connell, Deadlines in Administrative Law, 156 U. Pa. L. Rev. 923, 943–44 (2008) ("Among significant actions, deadline actions are issued with significantly fewer comment periods.").

272. See O'Connell, Smart Intelligence, supra note 223, at 1722–23 ("[R]edundant structures may decrease accountability because the public cannot call upon any single agency to account for the failure of the entire community.").

273. David J. Hayes, The White House Needs to Learn When to Delegate, Wash. Monthly: Ten Miles Square Blog (July 15, 2015, 10:21 AM), http://www.washingtonmonthly.com/ten-miles-square/2015/07/the_white_house_needs_to_learn056594.php [http://perma.cc/S4TT-VQ9X].

274. See O'Connell, Bureaucracy at the Boundary, supra note 57, at 891, 916–17 (noting insulation and arguing it may lead to less transparency and fewer consequences for "boundary" organizations under traditional administrative law).

275. See Abbe R. Gluck, Our [National] Federalism, 123 Yale L.J. 1996, 2016 (2014) [hereinafter Gluck, Our [National] Federalism] (emphasizing "inadequacy of the doctrines invoked by the Court" in recent case law, which suggest states may be shielded from citizens' challenges to states' implementation of federal Medicaid statute).

276. See Open Government Guide, Reporters Comm. for Freedom of the Press, http://www.rcfp.org/open-government-guide [http://perma.cc/YL3Y-Z96S] (last visited Aug. 15, 2015) (listing state freedom of information legislation).

277. See Strauss, Private Standards, supra note 62, at 559 (advocating for "citizen's right" to access private standards incorporated into regulatory standards).

278. See Exec. Order No. 12,866 § 6(b)(4)(C), 3 C.F.R. 638 (1994), reprinted as amended in 5 U.S.C. § 601 app. at 802–06 (2012) (detailing what has to be disclosed about ex parte meetings with OIRA).

the White House is not an agency for purposes of FOIA.[279] Even with respect to presidential requirements, OIRA has not been meeting the mandates of Executive Order 12,866, notably on the disclosure of exchanged documents and on the timeliness of review.[280] The Executive Order, however, permits no judicial review,[281] and the White House's role in rulemakings often is not part of the record that can be contested in court under the APA.[282]

But in the end, these are empirical questions. It is possible, for example, that BRAC spends more time holding public hearings and producing its public reports for its base-closing actions than committees spend on a major statute. Or that an agency spends more time soliciting comments on guidance than engaging in notice-and-comment rulemaking in some instances. Party leaders may hold detailed "summits" that surpass what might have been gained in the committee process. Such complexity also suggests that no legal doctrine designed to address these questions will ever be a perfect "fit."

The Court also has noted a different type of accountability problem when it comes to outsourced legislation: The public may not be aware of whom to blame for controversial policy choices.[283] For example, when Congress or HHS alters a federal program like Medicaid, the public may erroneously hold the states accountable for policy choices that states did not make, because the states are the program's frontline implementers and are thus the "government" that the public associates with the program.[284] The Court has yet to address legal issues related to legislative workarounds like BRAC and IPAB, but they pose the same issue. Because they take effect automatically unless Congress votes "no," members never have to vote "yes" on the tough decisions. As a result, even with benefits that they do bring, these special processes intentionally obfuscate accountability.

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279. See Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 156 (explaining FOIA applies to Executive Office of the President but not to Office of the President).

280. Farber & O'Connell, supra note 29, at 1164–67 (noting "discrepancies" between what OIRA does and what Executive Order 12,866 requires it to do).

281. Exec. Order No. 12,866, § 10, 3 C.F.R. 638 (1994), reprinted as amended in 5 U.S.C. § 601 app. at 802–06. It is notoriously difficult to challenge executive orders in court. See Erica Newland, Note, Executive Orders in Court, 124 Yale L.J. 2026, 2075–79 (2015) (discussing general nonjusticiability of executive orders).

282. See Sierra Club v. Costle, 657 F.2d 298, 406–08 (D.C. Cir. 1981) (declining to consider possible presidential intervention in rulemaking as part of usual APA review); Farber & O'Connell, supra note 29, at 1185–88 (summarizing criticisms of judicial refusal to consider presidential role in rulemaking when evaluating regulations).

283. See Nat'l Fed'n Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2660 (2012) (Scalia, Kennedy, Thomas & Alito, JJ., dissenting) ("When Congress compels the States to do its bidding, it blurs the lines of political accountability.").

284. DiIulio, supra note 58, at 111 (quoting Alice Rivlin's observation that when programs "are 'administered by the state or locality' with funds that 'are commingled with money from other sources, there is no way for citizens to know which level of government to hold accountable for results'").

Finally, voter-led lawmaking may "empower[] the majority of citizens and enfeeble[] special interests."[285] To the extent that participation is part of legitimacy, direct democracy fares well.[286] But voters are notoriously poorly informed and use only rough proxies to make decisions on initiatives.[287] Because many initiatives are driven by special-interest groups rather than "repeat players," proponents themselves have less motivation to be honest brokers during the pre-election process.[288]

At the same time, there is a different kind of legitimacy that this variety of unorthodox policymaking may indeed advance: the legitimacy of *government getting its work done.* Sometimes, precisely what drives Congress and agencies to forgo process may be the legitimacy of the resulting outcome.[289] Politicians rush to act in crises because voters expect them to.[290] In emergencies, such as national security crises, we expect the political branches to act.[291] We expect Congress to pass a budget. Initiatives, too, can fill important needs for dynamic or controversial lawmaking. David Pozen and Matthew Stephenson have independently suggested that unitary executive action becomes more legitimate if Congress cannot act or refuses to act.[292] The obvious challenge for any normative evaluation of account-

285. Cooter & Gilbert, supra note 67, at 688.

286. See Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2668 (2015) (calling initiative transferring redistricting authority from legislature to independent commission "State's empowerment of its people").

287. See Ilya Somin, Democracy and Political Ignorance: Why Smaller Government Is Smarter 3–4, 97–99 (2013) ("[P]olitical ignorance is extensive and poses a very serious threat to democratic theory.").

288. See Eskridge et al., Statutes, Regulation, and Interpretation, supra note 191, at 695 (discussing risk of direct democracy if proponents say one thing during initiative campaigns but draft actual legislative text to mean another).

289. See Sinclair, Unorthodox Lawmaking (4th ed.), supra note 27, at 275–76 (arguing unorthodox lawmaking enables "our most representative branch to continue to perform its essential function of lawmaking"). But claims to an emergency may "enabl[e] already-powerful actors to extend and entrench their power." Jennifer C. Rubenstein, Emergency Claims and Democratic Action, Soc. Phil. & Pol'y (forthcoming 2015) (manuscript at 5), https://www.law.berkeley.edu/files/Emergency_claims_and_Democratic_Actions____GALA_workshop_11.20.14-1.pdf [http://perma.cc/2WCL-UUMP].

290. See Romano, Iron Law, supra note 24, at 27 (faulting legislators for rushing to "off-the-rack solutions" because of their "high visibility" without regard to appropriateness).

291. See Eric A. Posner & Adrian Vermeule, Accommodating Emergencies, 56 Stan. L. Rev. 605, 609 & n.10 (2003) (noting pressure on executive to act quickly in emergencies).

292. See Pozen, supra note 30, at 8 (reframing certain executive actions in face of congressional inaction as "self-help"); Matthew C. Stephenson, Can the President Appoint Principal Executive Officers Without a Senate Confirmation Vote?, 122 Yale L.J. 940, 971–72 (2013) (suggesting President may appoint key officials without Senate confirmation where legislators refuse to vote on appointment). In the oral argument on the constitutionality of recess appointments, Justices expressed skepticism of the government's argument (which was not advanced in its briefs) that such appointments countered congressional "intransience." See Blackman, supra note 30, at 10–13. The public may also expect unilateral action. Cf. Dan Balz, In Washington, Political Dysfunction and Grim Outlooks Are the New Normal, Wash. Post (Dec. 13, 2014), http://www.washingtonpost.com/politics/political-dysfunction-the-new-normal/2014/12/13/da774e32-82ec-11e4-9f38-95a187e4c1f7_story.html [http://perma.cc

ability is that deliberation and public input are one type of measure, but direct legislative accountability is another, and the ability of government to respond and act is yet another. These values are often in tension, and which are salient is likely to be context specific.

2. *For the Courts.* — Judicial review might add an additional set of criteria to a normative assessment of how unorthodoxies fare in terms of democratic legitimacy. We know that courts are interested in the public values already discussed, and that courts may devise doctrines to further those values, like deliberation and accountability. But from a self-interested perspective, courts might also find that unorthodox lawmaking simply *makes their job more difficult* and thus poses legitimacy concerns of a different sort.

First, unorthodox lawmaking may make it more difficult for courts to determine what Congress or an agency was actually trying to do. Interpretation in a black box raises legitimacy issues for many theorists. The ACA and its resulting legal challenges, as noted, offer one example of this problem. Similarly, emergency legislation may be written in imprecise language that can be difficult for courts to interpret—or, more cynically, in language sufficiently broad that courts or agencies can interpret it however they wish. With respect to outsourced or multiple delegations, it can be very difficult for judges to determine just how much leeway Congress intends for outsourced or overlapping delegates to have.[293] The stakes are high because many unorthodox delegates are not directly accountable to Congress. And no judge interpreting a provision of an omnibus bill reads all of the statute. Trying to understand the myriad legislative deals would be an impossibility.

Unorthodox lawmaking also throws a wrench in the judicial desire to bring coherence to the corpus juris. This is a different—more court-oriented—way of furthering the value of transparency in legislation and regulation. By interpreting laws more consistently or coherently, courts arguably make law more accessible to the public. Unorthodox laws, whether omnibus, emergency, or initiatives, often defy these coherence norms and so raise a different question about legitimacy: Should courts impose coherence even where the lawmaker (Congress or the voters) did not? This is a doctrinal question we address in the next Part.

At the moment, the federal courts generally do not apply special interpretive rules to omnibus legislation, emergency legislation, initiatives, or anything else. Instead, they continue to apply the same presumptions of internal consistency, congressional perfection, and legislative omnis-

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/G25A-5ULR] (noting most Americans do not expect parties to cooperate in meaningful ways).

293. See Gluck, Intrastatutory Federalism, supra note 4, at 607 (noting "under- and overinclusivity problems" when existing canons are applied to multiple-agency-delegating statutes).

cience.[294] *King v. Burwell* was a major recent exception.[295] There is an obvious tradeoff: Tailoring interpretive practices to particular statutory circumstances pits one kind of accountability value—connecting interpretation to Congress's (or direct democracy's) work product—against another: making law simpler to understand and predict.

C. *Distribution of Political Power*

Finally, the political system has its own winners and losers from unorthodox policymaking. One way to view the modern evolution is as a triumph of centralization over decentralization; another may be as a triumph of politics over policy or expertise. Still another view, this time from a judicial perspective, is that power is shifting precisely to those entities that law currently does not have established ways to hold accountable. Indeed, it may be shifting for that very reason. This should make these shifts in power of interest even for judges who say it is not the role of courts to affect the distribution of political power.

To start, the President, party leaders, and potentially regulated entities often gain power at the expense of agencies and congressional committees in the unorthodox practices we describe.[296] In the orthodox world,

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294. See Gluck, Imperfect Statutes, supra note 5 (manuscript at 26–28) (elaborating general judicial practice of applying same interpretive rules to all types of legislation).

295. See id. (manuscript at 4, 26) (stating Supreme Court does not "fully appreciate that the kinds of deviations from conventional legislative process that it regrets in the ACA are the norm, not the exception").

296. Cf. Richard H. Pildes, Romanticizing Democracy, Political Fragmentation, and the Decline of American Government, 124 Yale L.J. 804, 809–10 (2014) (arguing America is currently characterized by "political fragmentation," meaning "external diffusion of political power away from the political parties as a whole and the internal diffusion of power away from the party leadership to individual party members and officeholders"). To be sure, individual party members can exert tremendous power (such as when Senator Rand Paul delayed the party leaders' extension of National Security Agency (NSA) surveillance in May 2015). See Jennifer Steinhauer & Jonathan Weisman, N.S.A. and Other Matters Leave McConnell's Senate in Disarray, N.Y. Times (May 23, 2015), http://www.nytimes.com/2015/05/24/us/politics/nsa-and-other-matters-vex-senate-leader-and-leave-disarray.html (on file with the *Columbia Law Review*). In addition, Senate Majority Leader Mitch McConnell promised to "largely cease [the Senate's] habit of jamming through legislation worked out between congressional leaders and go back to committees writing bills." Id. Finally, the selection process of the next Speaker of the House in Fall 2015 is showing the fragmentation of the Republican Party. See Carl Hulse & David M. Herszenhorn, After Boehner, House Hard-Liners Aim to Weaken Speaker's Clout, N.Y. Times (Oct. 10, 2015), http://www.nytimes.com/2015/10/11/us/politics/after-boehner-house-hard-liners-aim-to-weaken-speakers-clout.html (on file with the *Columbia Law Review*). Nevertheless, we do not believe that parties have, on net, lost power since the 1970s to individual members and committees, at least when it comes to unorthodox policymaking and likely overall. See Thomas E. Mann & E.J. Dionne, Jr., The Futility of Nostalgia and the Romanticism of the New Political Realists: Why Praising the 19th-Century Political Machine Won't Solve the 21st Century's Problems, Brookings Inst. 11 (June 2015), http://www.brookings.edu/~/media/Research/Files/Reports/2015/06/futility-nostalgia-romanticism-new-political-realists-mann-dionne/new_political_realists_mann_dionne.pdf [http://perma.cc/W8GY-SCLH] (criticizing Pildes' claim of declining party power by

Congress is the major player in the administrative state and it authorizes agency action.[297] In the unorthodox world, the President takes an active role in drafting legislation, which then may bypass committees and remain in the hands of party leadership.[298] It is the White House, often through OIRA, that now may direct the rulemaking process, instead of the agency focusing exclusively on statutory factors.[299] Interest groups have followed, lobbying extensively in front of both OIRA and agencies.[300]

In this way, the President displaces congressional power. Ironically, Congress's own organization may be the cause. Complexity within Congress itself—specifically, the extent of overlapping committee jurisdiction—may give individual members more "turf" but contributes to the President's influence by making him the coordinator-in-chief.[301] Here, too, the evaluation is context-specific. For instance, some unorthodox practices, such as emergency policymaking, often place more power in the hands of the White House. But others, such as quasi-regulation, may allow agencies to exert authority they have given up to OIRA in traditional rulemaking.

Congress also has given great swaths of power to the states and private entities.[302] Commentators contest whether states economically

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showing "scholarly studies of parties and Congress over the last half century provide little support" for it).

297. Farber & O'Connell, supra note 29, at 1144–45 ("In challenges to an agency's action, a generally unspoken assumption is that the action must be authorized by a congressional enactment.").

298. Sinclair, Unorthodox Lawmaking (4th ed.), supra note 27, at 128–31 ("When the president and congressional majority share a partisan affiliation . . . informal processes are likely to be adequate for reaching agreements.").

299. Farber & O'Connell, supra note 29, at 1138–40 (noting FSMA example where comments were even directed to be sent to Office of Management and Budget); Po, New Regulatory Process, supra note 29, at 22–23 (detailing increased influence of White House before formal OIRA review).

300. See Simon F. Haeder & Susan Webb Yackee, Influence and the Administrative Process: Lobbying the U.S. President's Office of Management and Budget, 109 Am. Pol. Sci. Rev. 507, 518 (2015) ("[O]ur investigations suggest a statistically and substantively meaningful association between interest group lobbying and regulatory policy change during OMB Final Rule review."); Lydia DePillis, Inside the Battle to Overhaul Overtime – and What It Says About How Lobbying Has Changed, Wash. Post (Sept. 4, 2015), http://www.washingtonpost.com/news/wonkblog/wp/2015/09/04/inside-the-battle-to-overhaul-overtime-and-what-it-tells-us-about-how-lobbying-works-now [http://perma.cc/FG3R-GLL3] ("As the Obama Administration has resorted to executive action as an end run around a gridlocked and hostile Congress, lobbyists have turned their attention to the more complex and obscure world of cabinet agencies, because rulemaking and regulation is where today's policy-making wars are fought.").

301. See Joshua D. Clinton et al., Influencing the Bureaucracy: The Irony of Congressional Oversight, 58 Am. J. Pol. Sci. 387, 397 (2014) (documenting "strong correlation between the number of involved congressional committees and relative presidential influence").

302. See supra section I.D.3 (discussing recent delegations of federal power to nonfederal actors). Some argue that the states have lost power in taking on so much of the federal government's work. See, e.g., DiIulio, supra note 58, at 25 ("[S]tate and local

benefit from these additional responsibilities, but their importance in the administration of federal lawmaking is now indisputable.[303] Scholars have also noted the real political leverage that these outsiders often exert in this process of federal statutory design and implementation.[304]

This is not to say that agencies and committees do not still have important legislative roles. The bailout was initially drafted by the Secretary of the Treasury;[305] much of the ACA was drafted in committee.[306] But the irony is that even as the rise of many unorthodox processes has empowered Congress and the agencies to get more policy work done, those same processes may ultimately undermine the institutional structures that safeguard the role of the full Congress and the decentralized and expert landscape of agency regulators in the policymaking process.[307]

IV. IMPLICATIONS FOR DOCTRINE AND THEORY

The relevance for courts of the evolving landscape we have detailed is the big legal question. If one thinks at least some of the unorthodoxies we have detailed are problematic, it may not be necessarily the judiciary's role to change them. We could leave reform to the executive branch or to Congress—which, recall, the Constitution entrusts with control over its

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governments function ever less like sovereign civic authorities and even more like Washington's administrative appendages.").

303. For recent scholarship documenting this centrality, see generally Jessica Bulman-Pozen, Federalism as a Safeguard of the Separation of Powers, 112 Colum. L. Rev. 459 (2012); Gluck, Intrastatutory Federalism, supra note 4; Lemos, supra note 57.

304. For discussion of states, see, for example, Barron & Rakoff, supra note 158, at 279–84 (giving examples of state power through waivers); Samuel R. Bagenstos, Federalism by Waiver After the Health Care Case, *in* The Health Care Case 227, 231–35 (Nathaniel Persily et al. eds., 2013) (discussing leverage by states in ACA implementation); Theodore W. Ruger, Health Policy Devolution and the Institutional Hydraulics of the Affordable Care Act, *in* The Health Care Case, supra, at 359, 366–69, 372–74 (same). For discussions of the private context, see, for example, Jody Freeman, The Private Role in Public Governance, 75 N.Y.U. L. Rev. 543, 551–56 (2000) (emphasizing pervasiveness of private role in public governance); Martha Minow, Public and Private Partnerships: Accounting for the New Religion, 116 Harv. L. Rev. 1229, 1239–41 (2003) (situating "new privatization" in historical context); Michael P. Vandenbergh, The Private Life of Public Law, 105 Colum. L. Rev. 2029, 2030 (2005) (arguing "agreements entered into between regulated firms and other private actors in shadow of public regulations" form key component of current administrative state).

305. Kaiser, supra note 95, at 6, 12, 14.

306. Sinclair, Unorthodox Lawmaking (4th ed.), supra note 27, at 188–93.

307. For instance, if the White House and party leaders shape major legislation, members of Congress likely have fewer incentives to develop their own expertise (and senior staff members are often lured away to higher salaries on K Street). Cf. Kaiser, supra note 95, at 25, 131 (noting congressional staff departing to financial institutions and organizations representing them).

own procedures.[308] It may be true that unorthodox practices make a judge's job harder, or brush up against legal norms favoring linguistic and regulatory coherence, but why privilege those legal-system-oriented preferences over what may be driving the other branches to engage in unorthodox practices in the first place?

The answer to these questions pivots on the biggest jurisprudential question of all—namely, what the role of courts is when deciding statutory and regulatory cases, period. On the legislation side, as one of us has detailed, the Court has not given a clear answer.[309] The Court has told us that some statutory interpretation doctrines aim to reflect how Congress drafts; others aim to influence, or improve, the drafting process; still others impose policy presumptions atop legislation that Congress may not have considered; and still others are about imposing a coherence and rationality on the U.S. Code that Congress did not. Depending on which of these often-conflicting roles one embraces, the relevance of unorthodox lawmaking for doctrine changes. The rise of unorthodox lawmaking itself may influence the answer to that question. Does unorthodox lawmaking make Congress too complex for courts to accurately understand or reflect? Alternatively, does unorthodox lawmaking create a greater need for courts in helping to fill gaps and fix legislative errors?

On the administrative law side, the courts' role has been less murky, but still not crystal clear. On the one hand, the Court has moved in recent decades to take a more realist approach to delegation. The Court specifically has held that it wishes to "tailor deference" to the different ways in which Congress actually delegates.[310] But the doctrines still rest on unrealistic assumptions. "Arbitrary and capricious" review under the APA, for example, limits consideration to the agency record and statutory factors.[311] And the Court still layers atop the *Chevron* doctrine the infamously malleable inquiry into whether the "traditional tools of statutory construction" clarify the statute. And that brings us back to the legislation context, in which those "traditional tools" are numerous, conflicting, and embrace different visions of the judicial role and only a tenuous connection to Congress itself.

The simple, but critical, point we wish to make at the outset is that, until now, the unorthodox accounts we have identified have barely penetrated the doctrines of either field. *King v. Burwell*, as noted, was a watershed moment—the most explicit recognition ever from the Court that unorthodox lawmaking may require alterations in common inter-

308. Cf. Farber & O'Connell, supra note 29, at 1180–88 (examining feasible reforms of unorthodox rulemaking by all three branches).

309. Gluck, Imperfect Statutes, supra note 5.

310. United States v. Mead Corp., 533 U.S. 218, 236 (2001).

311. See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

pretive presumptions.[312] That moment has additional significance in signaling something about how at least six Justices saw the judicial role in at least that one case—as central and as tethered to how Congress actually legislates. The Court in *King* took it on *itself*—rather than leave it to the agency—to deal with the ACA's imperfections. The opinion implicitly also seemed to adopt a more forgiving doctrine of statutory mistakes, and a more robust role for courts (rather than agencies) in dealing with statutory messes. It is a more realist opinion, with more confidence in the Court's capacity, than we have seen in decades.[313]

It is too soon to know whether *King* was an exception for an exceptional statute. We therefore take the world for purposes of this analysis as it existed before *King*: one in which lawyers and judges showed little interest in understanding how Congress or the modern regulatory state actually works. Ironically, lawyers and judges have taken that position even as legislation doctrine has appeared on the surface to be obsessed with effectuating legislative supremacy and the courts' role as Congress's "faithful agents."[314] It is possible that this oversight has been deliberate: Courts may be concluding that legal doctrine cannot capture, or should discourage, these deviations from conventional process and delegation. But no court to our knowledge has been explicit about making that choice or about what legitimizes it.

Another point that we have emphasized is the sheer variety of unorthodox processes themselves.[315] Crafting special legal doctrines for a multiplying array of legislative and administrative vehicles may be impossible, or at least make doctrine intolerably complex. We note here the recent work of Richard Pildes, who has mapped parallel tensions between "institutional realism" and "institutional formalism" across areas of public law.[316] One way to think about the argument of this Essay is as part of that broader struggle on the part of courts to determine when to enter the governmental "black box,"[317] and when other values counsel instead for a more formalist approach. In fact, it is these precise considerations that gave rise to textualism—the Court's now-dominant interpretive methodology. Textualists, heavily influenced by the legal realists, concluded that Congress was too complicated to understand and so embraced formalism as a second-best response.[318] In practice, however,

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312. For a detailed exposition of the arguments in this paragraph, see Gluck, Imperfect Statutes, supra note 5 (manuscript at 3).

313. See generally id. (manuscript at 1–6).

314. See Gluck & Bressman, Part I, supra note 28, at 910–19 (presenting empirical findings on disconnect between congressional drafters' views and traditional interpretive canons).

315. See supra Part I (detailing at least five such unorthodox categories).

316. Richard H. Pildes, Institutional Formalism and Realism in Constitutional and Public Law, 2013 Sup. Ct. Rev. 1, 2–4.

317. Id. at 2.

318. See, e.g., John F. Manning, Inside Congress's Mind, 115 Colum. L. Rev. 1911, 1917–19, 1925–26 (2015) (providing account of textualism grounded in "intent skepticism").

textualism's formalist principles have not been fully implemented. They remain unpredictable and even textualists have justified their rules of interpretation as reflecting legislative drafting practice or as drafting conventions that Congress shares,[319] and so even textualists are institutional realists much of the time.

It is also particularly intriguing that the approaches to these questions on the legislation and administrative-law sides are not always the same, despite how linked these two sides of the policymaking process are. Legislation doctrine heavily emphasizes rules that purport to reflect how Congress drafts or that otherwise serve as a set of shared conventions that increase communication and predictability across the branches. In contrast, when it comes to administrative law, courts have shown little interest in understanding how different "agency statutory interpretation"[320] is from the judicial analogue or in communicating with agencies themselves to establish background assumptions.[321] This is not to say that courts do not make assumptions about how agencies work, but they do not describe those assumptions as a coordinating set of conventions across the branches.

In the agency context, the courts have been more focused on furthering accountability, mainly through forcing agencies to give reasons that match with the statutory framework (ignoring political reasons), interrogating procedural choices, and using deference doctrines as carrots to encourage agencies to act with more formal processes.[322] These values, as we detail below, are almost entirely eschewed on the legislation side. Federal courts have refused to pierce the veil of statute-making to deem certain statutes more legitimate than others by virtue of the processes deployed.[323] Nor do federal courts claim to use legislation doctrine to improve the legislative process or legislative accountability. There is no doctrine of "due process in lawmaking"—Justice Hans Linde's famous suggestion that courts should consider the quality of deliberation and process attendant to legislation in judging it.[324] As an interesting contrast, in the constitutional law context, the Court has required Congress to justify its reasoning when it legislates under the Fourteenth Amendment

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319. See id. at [PP manuscript at 15] (linking textualist tools of interpretation to "shared social and linguistic conventions that enable the relevant linguistic community to convey meaning").

320. See Jerry L. Mashaw, Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation, 57 Admin. L. Rev. 501, 505–24 (2005) (discussing institutional features affecting agency statutory interpretation); Strauss, When the Judge, supra note 1, at 329–35 (highlighting importance of legislative history to agency statutory interpretation).

321. Cf. Christopher J. Walker, Inside Agency Statutory Interpretation, 67 Stan. L. Rev. 999 (2015) (presenting results of survey of agency interpretive practices and suggesting implications for doctrine).

322. See United States v. Mead Corp., 533 U.S. 218, 229 (2001) (emphasizing deference due to regulations promulgated through notice-and-comment procedure).

323. See infra note 364 and accompanying text (explaining enrolled bill doctrine).

324. Hans A. Linde, Due Process of Lawmaking, 55 Neb. L. Rev. 197 (1976).

or the Commerce Clause.[325] (It is not at all clear how much the Court defers to those factfindings in the end.[326])

Clearly, all of these different norms are relevant to the question of the role that a realist understanding of modern policymaking should play in doctrine. For instance, importing administrative law concerns about accountability into legislation doctrine might tune courts into thinking more about how omnibus bills are made. Importing the legislation value of reflecting how Congress works into administrative doctrine might make more apparent to courts the non-federal sources and informality of much modern agency policymaking.

Each of us has done previous work on these questions, and this Essay does not permit a definitive treatment of them. Our goal here is to further develop a guiding framework for these inquiries and suggest how the unorthodoxies we have identified fit into the various values of both fields. For instance, if the goal of legal doctrine is to discourage unorthodoxies, what kinds of doctrines might courts apply? If the goal instead is to reflect how policymaking actually happens, what doctrines then? What doctrines to advance accountability? Or coordinate the legal system? Or further the rule of law? In the sections that remain, we begin to play out these different scenarios to explore the ways that law might answer these questions.

A. *Doctrine to Reflect Policymaking Practice*

The Court has indeed suggested that reflecting statute-drafting practice is the purpose of at least some of the presumptions that it applies to statutory interpretation, particularly presumptions about how drafters use language—for instance, the rule that Congress does not draft with surplusage.[327] As noted, in the administrative law context, the

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325. See, e.g., United States v. Morrison, 529 U.S. 598, 627 (2000) (finding Congress lacked authority under Commerce Clause and Section 5 of Fourteenth Amendment to enact statute awarding civil remedies to victims of gender motivated crimes); Katzenbach v. Morgan, 384 U.S. 641, 658 (1966) (holding categorical congressional ban on literacy tests "appropriate legislation" to enforce Section 5 of the Fourteenth Amendment); Wickard v. Filburn, 317 U.S. 111, 124–29 (1942) (determining regulation of wheat industry under Agricultural Adjustment Act of 1938 was permitted under Commerce Clause).

326. See Pamela S. Karlan, Foreword: Democracy and Disdain, 126 Harv. L. Rev. 1, 65–66 (2012) (arguing modern Justices see "the political process as perhaps irredeemably flawed, [and] see the legislative process as an inferior substitute for judicial analysis"); Bertrall L. Ross II, The State as Witness: *Windsor*, *Shelby County*, and Judicial Distrust of the Legislative Record, 89 N.Y.U. L. Rev. 2027, 2046–55 (2014) (tracing Court's questioning of legislative records).

327. See, e.g., Kungys v. United States, 485 U.S. 759, 778 (1988) (noting "cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant"). Such a canon is, of course, at odds with actual drafting. Cf. Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253 (1992) ("Redundancies across statutes are not unusual events in drafting, and so long as there is no 'positive repugnancy' between two laws, a court must give effect to both." (internal citation omitted)).

Court has even more explicitly stated, in *United States v. Mead Corp.*, that it wishes to "tailor" administrative deference doctrine to the "variety" of ways in which Congress actually delegates.[328] So understood, one goal for legislation and administrative law is simply for courts to get the statute "right," a goal consistent with the widely accepted notion that the courts' role is best characterized as the "faithful agent" of the legislature.[329]

But were this value actually applied to unorthodox policymaking, one would expect to see courts thinking about whether it actually makes sense to apply the rule against superfluities to statutes that are long and cobbled together by different committees,[330] or other presumptions of perfection already discussed—such as presumptions of consistency, legislative omniscience, and precise drafting—to omnibus and emergency laws.[331] Similarly, courts might pay less attention to legislative history for statutes that did not go through committee or that are the product of different bills drafted at different times.

The question that comes to mind immediately, of course, is whether this kind of interpretive tailoring would be too difficult for courts. John Manning suggests in this Symposium that this kind of detailed look inside of Congress may reduce reliance on text in ways that would be detrimental.[332] Manning fears we will be back in the clutches of legislative history. But that, in our view, overstates the difficulty. The Court itself in *King* was able to use a common sense understanding of unorthodox lawmaking to reject the consistent usage and surplusage canons without resorting to any nontextual material.[333] And there are other structural and objective factors that are accessible to courts that have nothing to do with legislative history that can help courts understand complex statutes. For instance, the presence of multiple committee drafters is an objective factor that courts could use to help address questions about overlapping delegations or the realism of consistent usage presumptions.

The *King* litigation also was the first to incorporate another unorthodox, but objective, structural influence that the Gluck–Bressman study identified: the CBO score. Numerous sources had pointed to how the CBO very publicly, throughout the drafting of the ACA, "scored" the

328. 533 U.S. 218, 236 (2001).

329. See, e.g., James J. Brudney, Faithful Agency Versus Ordinary Meaning Advocacy, 57 St. Louis U. L.J. 975 (2013) (contrasting faithful agency with plain meaning interpretation).

330. For an exception to the judicial lack of interest in how Congress drafts, see Loving v. IRS, 742 F.3d 1013, 1019 (D.C. Cir. 2014) (Kavanaugh, J.) (recognizing Congress is sometimes redundant and so rejecting application of presumption against superfluities to tax-code question at issue).

331. See supra sections III.B.1, III.B.2 (detailing complicated normative questions that could influence interpretations of omnibus and emergency legislation).

332. See Manning, supra note 318, at 1916 (arguing theories of statutory interpretation should continue to build on intent skepticism).

333. See Gluck, Imperfect Statutes, supra note 5 (manuscript at 3) (noting Court's analysis was textual and structural, not dependent on legislative history).

statute based on assumptions at the center of the case.[334] Lower courts were able to look at those assumptions as evidence of what Congress drafted. For another example of the possibilities, in the first ACA case, *National Federation of Independent Business v. Sebelius*, the four dissenters argued that omnibus bills merit a special presumption against severability, the opposite from the usual presumption that courts apply to statutes.[335] Will courts always get it right? Probably not. But if the goal is to reflect how Congress works, shouldn't they try?

On the administrative law side, if courts took *Mead* seriously in its admonition to tailor deference to the variety of ways in which Congress delegates, we also would expect more judicial deference to how Congress actually does delegate. When Congress gives multiple agencies notice-and-comment rulemaking authority in a single statute, without discussing judicial review,[336] one cannot justify not according *Chevron* deference to *any* agency simply because there are multiple agencies in the picture without bringing in some additional, trumping norm like accountability or expertise.[337] Is the Court actually resisting multiple delegations through doctrine or just shying away from the question? In *King*, the Court suggested that a better rule might be to accord deference to the agency with more expertise. The Gluck–Bressman staffers suggested that deference to multiple agencies simultaneously may be more often Congress's intention than courts have ever acknowledged.[338]

As another example, one that Kevin Stack suggests, why not give the President *Chevron* deference for executive actions when Congress

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334. See Abbe R. Gluck, The CBO Canon and the Debate over Tax Credits on Federally Operated Health Insurance Exchanges, Balkinization (July 10, 2012, 8:55 PM), http://balkin.blogspot.com/2012/07/cbo-canon-and-debate-over-tax-credits.html [http://perma.cc/V6TL-82VN] (introducing idea that CBO's "budget score" might be "useful tool of modern statutory interpretation" to apply to ACA); Theda Skocpol, Why Congressional Budget Office Reports Are the Best Evidence of Congressional Intent About Health Subsidies, Scholars Strategy Network (Jan. 2015), http://www.scholarsstrategynetwork.org/content/why-congressional-budget-office-reports-are-best-evidence-congressional-intent-about-health [http://perma.cc/PCX2-NCFW] (suggesting lack of CBO analysis of partial subsidies suggests "no one in Congress considered premium subsidies [were] restricted to certain states").

335. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2675–76 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting) (2012) ("When we are confronted with such a so-called 'Christmas tree,' a law to which many nongermane ornaments have been attached, we think the proper rule must be that when the tree no longer exists the ornaments are superfluous.").

336. In Dodd-Frank, Congress specified in some joint delegations that no agency would be entitled to deference. See Gersen, New Administrative Process, supra note 94, at 719–21 (listing sections including judicial deference rules).

337. Gersen, Overlapping and Underlapping, supra note 32, at 220 ("Although accountability and expertise are no longer sufficient to support *Chevron* deference, they remain relevant variables in the Step Zero inquiry if expertise or accountability would be reasons that Congress would prefer courts to defer to agencies."); see also infra section IV.D (discussing accountability).

338. Gluck & Bressman, Part I, supra note 28, at 1006–10.

delegates directly to him or her?[339] Courts may give too little weight in general to presidential intent if reflecting the intention of real shapers of policy is the doctrinal goal. *Mead* itself, it should be noted, pushes more agency action into the President's arms, even as it celebrates congressional intent, by encouraging agencies to use notice-and-comment rulemaking in making decisions, which then often triggers White House review through OIRA.[340] If as a normative matter courts would prefer that congressional intent, rather than presidential intent, control agency implementation, then it may be that *Mead*, in its insistence on particular procedure, may have undesired effects.

Similarly, if *Mead* tells courts to respect how Congress delegates, why not give more doctrinal weight to state or even private implementers' policy choices when Congress delegates to them? The Gluck–Bressman staffers corroborated that Congress does sometimes intend to delegate to both multiple agencies and state actors.[341] Moreover, states, in fact, do implement federal law "with the force of law" (*Mead*'s magic phrase for deference): They pass state laws to do so.

Private implementers, of course, do not act with the same force of law—but they could, at least in theory, be subject to APA-like restrictions for their federal-law duties.[342] This is not to say there are not good reasons why *Congress* might prefer that private implementers forgo more formal procedures, and by doing so forgo *Chevron* deference. Congress might prefer that private implementers preserve the flexibility, secrecy, and removal from politics that makes them attractive implementers. But at the moment, this is not Congress's choice to make because the courts do not recognize private implementers and so have not created a doctrinal space that gives Congress a choice in deciding how much power to delegate to them.[343]

From a democracy perspective, we would also emphasize that it is the *courts* that gain power when courts do not defer to Congress's choice of implementer, or when they do not treat more informal means of agency policymaking as binding.[344] Courts step into that gap, supplying the law themselves in the absence of a *Chevron*-worthy agency act. We

339. Stack, Statutory President, supra note 174, at 585–98.

340. Farber & O'Connell, supra note 29, at 1172 ("*Mead* can be seen as an attempt by the courts to bring agency action more in line with the lost world; though by imposing procedural requirements to get *Chevron* deference, it might push more agency action into OIRA's ambit.").

341. Gluck & Bressman, Part I, supra note 28, at 1006–07.

342. Metzger, Privatization as Delegation, supra note 57, at 1453 n.298 (citing proposals for extending APA procedures to private entities wielding certain kinds of public power).

343. Gluck, Intrastatutory Federalism, supra note 4, at 560 ("We have no *Chevron*, *Mead*, or anything else, for private implementers either.").

344. Cf. Peter L. Strauss, Revisiting *Overton Park*: Political and Judicial Controls over Administrative Actions Affecting the Community, 39 UCLA L. Rev. 1251, 1254 (1992) (arguing judicial review of highly politicized agency decisions is not necessarily fairer or more democratically desirable).

might justify such an outcome with other democratic values, like the accountability, transparency, and public input missing from non-traditional rulemaking; but our point is that the courts have not been explicit in making those decisions. Indeed, one might assume that the more unorthodox lawmaking becomes, the less comfortable courts will be intervening in it. But here, too, *King v. Burwell* offers a surprising twist. The Court there responded to the ACA's messiness not by holding that the statute's complexity was all the more reason to rely on the agency but rather, by holding the question was too big to assume an implicit delegation, pushing the agency aside and taking the decision for *itself*.[345]

B. *Doctrine to Promote Shared Conventions for Interbranch Conversation*

A different way to think about the role of doctrine is as a set of shared conventions that facilitate interbranch communication. This is one kind of "rule of law" justification. And it may be the case that an upshot of unorthodox lawmaking is precisely this: to convince the courts that this more formalist, coordinating role for doctrine is the best that courts can do in a messy lawmaking environment. Judge Frank Easterbrook has defended textualism on these grounds, as a second-best system-coordinating regime. Elizabeth Garrett also has argued as much when it comes to omnibus statutes: that their complexity makes purposive interpretation impossible and that the best courts can do is a strictly textual approach.[346] The Court itself has said on multiple occasions that many statutory interpretation doctrines and *Chevron* should work in this way—as shared conventions that everyone knows and against whose background everyone drafts and interprets, even if they are sometimes fictitious.[347] Manning, in this Symposium, emphasizes that the best understanding of interpretive doctrine is precisely as such a set of "shared . . . conventions."[348]

Nevertheless, the idea that interpretive doctrine serves as a coordinating mechanism is an empirical claim. The Gluck–Bressman staffers

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345. See King v. Burwell, 135 S. Ct. 2480, 2488–89 (2015) (applying major questions rule to hold *Chevron* deference not appropriate).

346. See Elizabeth Garrett, Attention to Context in Statutory Interpretation: Applying the Lessons of Dynamic Statutory Interpretation to Omnibus Legislation, Issues in Legal Scholarship, Dec. 2002, at 1, 6–15, http://www.degruyter.com/view/j/ils.2002.2.issue-2/ils.2002.2.2.1020/ils.2002.2.2.1020.xml?format=INT (on file with the *Columbia Law Review*).

347. See, e.g., Lockhart v. United States, 546 U.S. 142, 148 (2005) (Scalia, J., concurring) (referencing "background canons of interpretation of which Congress is presumptively aware"); Stephen Breyer, Making Our Democracy Work: A Judge's View 119 (2010) (describing *Chevron* as a background assumption Congress likely intends because it facilitates a "workable partnership" with courts); Antonin Scalia, Judicial Deference to Administrative Interpretations of Law, 1989 Duke L.J. 511, 517 ("Congress now knows that the ambiguities it creates, whether intentionally or unintentionally, will be resolved, within the bounds of permissible interpretation, not by the courts but by a particular agency, whose policy biases will ordinarily be known.").

348. Manning, supra note 318, at 1926.

did not know many of the most common canons of construction and, even with respect to those they did know, they often resisted them as conventions that Congress could or would ever adopt. The canons cannot serve as a common language across branches if Congress does not know or follow them.[349] The Gluck–Bressman staffers emphasized institutional obstacles to coordinated drafting—particularly time pressures, the omnibus process and the lack of communication across committees—that make many judicial presumptions unrealistic.[350] Manning acknowledges that this empirical work poses a wrinkle for a coordinating account, but argues that canons could still coordinate the *legal system* even if not interactions between the courts and Congress. But, as one of us has detailed, the courts have never been consistent enough in their application of statutory interpretation doctrine for those doctrines to truly perform even that kind of coordinating function.[351]

On the administrative side, Jerry Mashaw has masterfully pointed out the very different assumptions and approaches that courts and agencies apply to their interpretive tasks, even when they interpret the same provision of a statute.[352] In addition, the White House is not part of the interbranch conversation as the courts view it. The courts' failure to acknowledge the President's role in policymaking prevents the courts from even trying to establish explicit presumptions about statutes essentially directed by the President or from attempting to establish a set of interpretation-coordinating rules with the President. States and private actors are ignored even more. One of us has shown that the states have their own interpretive rules and administrative deference doctrines that do not always line up with those of the federal courts and of which the courts often seem unaware.[353]

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349. Gluck & Bressman, Part I, supra note 28, at 927–28, 931 figs.1, 2 & 3 (presenting findings).

350. But cf. Garrett, Purposes of Framework Legislation, supra note 124, at 742 ("Frameworks often create expert staffs within Congress that produce and analyze relevant information for the entire body.").

351. See Abbe R. Gluck, Intersystemic Statutory Interpretation: Methodology as "Law" and the *Erie* Doctrine, 120 Yale L.J. 1898, 1901 (2010) [hereinafter Gluck, Intersystemic] (arguing courts do not treat statutory interpretation as precedential "law"); cf. Gluck & Bressman, Part I, supra note 28, at 962 (reporting drafters' observations that Court does not treat interpretive rules as precedential).

352. See Mashaw, supra note 320, at 535 (contrasting "highly nuanced" agency interpretation of statutes with judicial reliance on pure textual analysis).

353. Abbe R. Gluck, The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism, 119 Yale L.J. 1750, 1799 (2010) [hereinafter Gluck, States as Laboratories] (detailing different interpretive principles utilized by state and federal courts). See generally Gluck, Intersystemic, supra note 351, at 1960–65 (detailing apparent federal-court ignorance of state methods).

C. *Doctrine to Incentivize Better Process*

A different role entirely for doctrine is to try to *affect* or *improve* the lawmaking or rulemaking process. The courts have seemed more interested in using doctrine this way in the administrative law context than for legislation. In *Mead*, the Court essentially told agencies that if they wish to receive *Chevron* deference, they must proceed through very formal APA proceedings (under sections 556 and 557) or more likely notice-and-comment rulemaking—in other words, to make policy with the "force of law."[354] Courts could use *Mead* in this way to discourage unorthodox rulemaking, particularly in the form of quasi-regulation, such as guidance and interpretive rules.[355] Another way to encourage notice-and-comment rulemaking would be for courts to revise their presumption against retroactivity. Under current doctrine, which makes it very difficult for agency rules to apply retroactively,[356] agencies may skip process to rush out a policy to take effect as soon as possible.

The courts are certainly wrestling with quasi-regulation, even in defining it. The Court has not meaningfully weighed in on what distinguishes guidance and interpretive rules from legislative rules. For example, should they be judged ex ante—from the text of the quasi-regulation[357]—or ex post—once we have information on how the quasi-regulation is being applied by the agency?[358] The recent challenge to the DHS's deportation policy has teed up this question,[359] but the case is still

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354. United States v. Mead Corp., 533 U.S. 218, 226–27 (2001). *Mead* thus accomplishes through incentivizing interpretive doctrine what the Court said in *Vermont Yankee* it could not require as a matter of court-made law. See Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 525 (1978) (holding federal courts exceeded authority by adding procedural requirements for agency statutory implementation beyond APA requirements); see also Abbe R. Gluck, What 30 Years of *Chevron* Teach Us About the Rest of Statutory Interpretation, 83 Fordham L. Rev. 607, 624–25 (2015) (calling *Mead* "an end run around *Vermont Yankee*").

355. The Court, as Strauss has argued, has arguably done something similar when it comes to the APA, reading in more stringent requirements than the text of the statute seemed to imply—an example of how even an old "orthodoxy" might be updated by legal doctrine. Peter L. Strauss, Statutes that Are Not Static—The Case of the APA, 14 J. Contemp. Legal Issues 767, 797 (2005). Strauss prefers Congress to do the updating, and one question is whether courts should have a role to play when Congress cannot or chooses not to do so.

356. Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988) ("Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result.").

357. See Mora-Meraz v. Thomas, 601 F.3d 933, 940 (9th Cir. 2010) (examining whether interpretive rule as issued was consistent with existing regulatory framework).

358. See Am. Bus. Ass'n v. United States, 627 F.2d 525, 529–30 (D.C. Cir. 1980) (discussing previous cases using both ex ante and ex post analysis of guidance).

359. Specifically, whether a court should look at the language of the policy that specifies that the agency retains discretion to prevent deportation or instead look at how many applications for relief are not granted. See Texas v. United States, No. B-14-254, 2015 WL 648579, at *54–55 (S.D. Tex. Feb. 16, 2015), stay denied, 2015 WL 1540022 (S.D. Tex. Apr. 7, 2015), aff'd 787 F.3d 733 (5th Cir. 2015).

some way from the certiorari stage. Courts also are struggling with the level of deference for quasi-rules. On the one hand, some Justices have been calling for the end of *Auer* deference—deference to agency interpretations of ambiguous regulations (typically done without notice and comment but increasingly having the force of law, as a functional matter). *Auer* likely encourages unorthodox practices[360]: If it were abandoned, substantive review would become more onerous and quasi-regulations (that interpret regulations) less attractive.[361] On the other hand, the D.C. Circuit has been shutting the courthouse door to challenges over policy statements (which interpret both statutes and regulations), concluding that they lack the requisite finality under the APA and dismissing challenges to them as unreviewable.[362] This procedural move arguably *encourages* the use of quasi-rules.

When it comes to the President, courts could require agencies to include more information about the White House's role in the record so that congressional or other outside pressure could be brought to bear to curb executive interventions. Or courts could be more willing to question their well-established presumption of regularity surrounding agency action, which restricts judicial review to the record produced by the agency. But presidential rulemaking may have its own process benefits; Cass Sunstein has stated, for instance, that OIRA will meet with any stakeholder who asks.[363]

The legislation side—at least on the surface—looks quite different. Ever since the Supreme Court's 1892 holding in *Field v. Clark*,[364] the federal courts have largely refused to enter the sausage factory. They have expressly refused to consider whether Congress engages in "due process of lawmaking"—for example, whether Congress was sufficiently deliberate, transparent, or coherent in the enactment of a piece of legislation—in evaluating a statute's legitimacy or even its meaning.[365] And yet, at the same time, despite its public stance to the contrary, the Court does actually try to influence the legislative process. As one of us has detailed, many of the

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360. See Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1211–12 (2015) (Scalia, J., concurring in the judgment) ("By supplementing the APA with judge-made doctrines of deference, we have revolutionized the import of interpretive rules' exemption from notice-and-comment rulemaking. Agencies may now use these rules not just to advise the public, but also to bind them."). Justice Scalia first raised concerns about *Auer* deference in Talk America, Inc. v. Michigan. Bell Telephone Company., 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring).

361. Under *Mead*, agency interpretations of ambiguous *statutes*, which do not go through notice and comment, often receive lesser *Skidmore* deference.

362. Ass'n of Flight Attendants v. Huerta, 785 F.3d 710, 712–14 (D.C. Cir. 2015); Nat'l Mining Ass'n v. McCarthy, 758 F.3d 243, 253 (D.C. Cir. 2014). See generally Mark Seidenfeld, Substituting Substantive for Procedural Review of Guidance Documents, 90 Tex. L. Rev. 331, 343 (2011) ("[P]olicy statements are generally not reviewable when issued.").

363. Sunstein, supra note 233, at 1860.

364. Marshall Field & Co. v. Clark, 143 U.S. 649, 672 (1892) ("[A]n enrolled act, thus authenticated, is sufficient evidence of itself . . . that it passed Congress.").

365. Linde, supra note 324, at 199.

Court's interpretive rules aim to improve how Congress drafts. Take one very popular type of interpretive presumption—the Court's "clear statement" rules.[366] Clear statement rules require Congress to make its intention known with unmistakable clarity on particularly salient matters, such as federalism.[367] They are designed to make drafters of legislation put their colleagues *on notice*, rather than allow contentious moves to be buried in ambiguous statutory language. Justice Kennedy in *Boumediene v. Bush* described these rules as helping "Congress . . . make an informed legislative choice."[368] Textualists have long argued that one salutary effect of a text-centric approach is that it teaches Congress to draft better the next time.

These efforts reveal that courts are capable of, and sometimes interested in, engaging more with the lawmaking process. That said, whereas the Court's interest in *Mead* and the rulemaking contrast seems to be in process qua process, its process interests in legislation have largely seemed unmotivated by the value of the legislative process itself. Instead, the Court seems most interested in protecting certain highly valued norms, like federalism, outside of it.

D. *Doctrine to Further Accountability*

Accountability has played a more central role on the administrative side, but mostly through *Chevron*. *Chevron* deference is at least partially justified by the notion that the President and agencies are more democratically accountable than courts.[369] Indeed, Justice Elena Kagan, as an academic, called for *Chevron* to apply only to agency interpretations (of ambiguous statutes) shaped by "presidential involvement."[370] The so-called "major questions" rule—under which courts do not presume that Congress intends to delegate important policy or economic questions to agencies without a clear statement[371]—is similarly grounded in accountability. *Mead*, too, with its emphasis on notice-and-comment rulemaking, can be understood as a judicial mechanism to encourage accountability and transparent administrative procedures.

At the same time, the efforts of state and private entities to implement federal law are neither given *Chevron* deference nor easily reviewed in the courts under current doctrine.[372] If *Chevron* is based on accountability, perhaps the current state of affairs makes sense: The

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366. See Gluck, Imperfect Statutes, supra note 5 (manuscript at 32–33).

367. Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985) (requiring "unmistakably" clear statement of intent to abrogate sovereign immunity); see also Gregory v. Ashcroft, 501 U.S. 452, 460–61 (1991) (same for displacement of traditional state functions).

368. Boumediene v. Bush, 553 U.S. 723, 738 (2008).

369. Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865–66 (1984).

370. Kagan, supra note 173, at 2376.

371. MCI Telecomms. Corp. v. AT&T Co., 512 U.S. 218, 228–32 (1994).

372. See supra notes 341–343 and accompanying text (discussing doctrinal difficulty in accounting for state or private implementers of federal statutes).

public may lose track of who is responsible when Congress outsources federal administration. But as we and others have chronicled, without some kind of formal deference and delegation rules for state and private implementers, it is very hard to challenge their actions in Court.[373]

State implementation of federal law does not even always give rise to federal-question jurisdiction under current standards, which means those efforts cannot be challenged in federal courts.[374] In addition, the Court has resisted developing a right of action for individuals to sue the states over their federal statutory-implementation efforts.[375] Instead, the Court has directed litigants to bring an APA action against the *federal* agency overseeing the state implementation.[376] If the federal agency refuses to challenge the state action, it is almost impossible for individuals to question that choice, whether under the APA or through a private right of action.[377] In short, the delegated work of the states is often insulated from judicial review on either jurisdictional or administrative law grounds.

With respect to private actors, Metzger has pointed out that such entities are generally not assumed to be "state actors" in the eyes of the law, and so are not subject to APA review or constitutional standards.[378] Although some courts have developed or assumed a "quasi-federal agency" doctrine that would subject hybrid entities (such as interstate compacts) to the APA,[379] other courts have refused to do so.[380] It is unclear whether the courts have made these actions of nonfederal delegates difficult to challenge in response to their recognition, and perhaps dislike, of

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373. Gluck, Our [National] Federalism, supra note 275, at 2016, 2037.

374. See Gluck, Intrastatutory Federalism, supra note 4, at 614–15 (highlighting "exceedingly blurry" jurisdictional boundaries); O'Connell, Bureaucracy at the Boundary, supra note 57, at 913–15 (listing major jurisdictional issues for boundary organizations).

375. See, e.g., Douglas v. Indep. Living Ctr. of S. Cal., Inc., 132 S. Ct. 1204, 1210–11 (2012) (refusing to recognize right of action for doctors wishing to sue California for Medicaid implementation).

376. Id. at 1210.

377. Id. at 1211 (declining to address whether Supremacy Clause provides cause of action to challenge agency inaction and remanding to consider whether such cause of action exists after agency action); id. at 1212 (Roberts, C.J., dissenting) (arguing Supremacy Clause does not authorize challenges of agency inaction absent specific congressional authorization); see also Armstrong v. Exceptional Child Ctr., 135 S. Ct. 1378, 1385 (2015) (declining to find private right of action for doctors to challenge Medicaid rates where Congress has created detailed enforcement scheme on federal side).

378. See Metzger, Privatization as Delegation, supra note 57, at 1370.

379. O'Connell, Bureaucracy at the Boundary, supra note 57, at 917 & n.427 (citing Am. Trucking Ass'ns, Inc. v. Del. River Joint Toll Bridge Comm'n, 458 F.3d 291, 304 (3d Cir. 2006))(noting Third, Eighth, and D.C. Circuits have adopted this view); Heard Commc'ns, Inc. v. Bi-State Dev. Agency, 18 F. App'x 438, 439–40 (8th Cir. 2001); Elcon Enters., Inc. v. Wash. Metro. Area Transit Auth., 977 F.2d 1472, 1479–80 (D.C. Cir. 1992)).

380. O'Connell, Bureaucracy at the Boundary, supra note 57, at 917 & n.429 (citing New York v. Atl. States Marine Fisheries Comm'n, 609 F.3d 524, 534 (2d Cir. 2010))(observing Second Circuit has rejected doctrine due to skepticism of "judge-created concept").

unorthodox delegations, or whether these cases are simply a byproduct of other jurisprudence on implied causes of action and standing.[381]

Even on the federal administrative side, agency action accomplished through nonformal means, like FAQs and bulletins, may not be subject to APA review. As mentioned above, the D.C. Circuit recently appears to have made it harder for agency guidance to satisfy the APA's finality requirement.[382] If an agency's action is not final, there is no judicial review under the APA.[383] In addition, the courts sometimes invoke ripeness doctrine to prevent pre–enforcement review of agency decisions.[384] Roberta Romano suggests that these concerns may be especially heightened when it comes to unorthodox rulemaking by independent agencies; without the President as a check on their work, the absence of APA review makes the insulation of such policymaking especially striking.[385] In the context of agency use of private standards, Strauss and Mendelson have each argued for policies that bring more transparency and public input to that process.[386]

Presidential lawmaking and rulemaking present their own accountability problems. To start, they are very hard to challenge in court because of notoriously difficult standing problems.[387] Even assuming reviewability, as a matter of doctrine, many presidential moves fall in something of a doctrinal abyss. When it comes to signing statements, there is no *Chevron* for the President—no formal deference doctrine for presidential statutory interpretations—nor is it clear that the President is

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381. Cf. *Douglas*, 132 S. Ct. at 1210–11 (omitting reference to any particular doctrines or modern practice as basis for decision).

382. Nat'l Mining Ass'n v. McCarthy, 758 F.3d 243, 253 (D.C. Cir. 2014) (holding statements of policy unreviewable prior to enforcement).

383. See, e.g., FTC v. Standard Oil Co. of Cal., 449 U.S. 232, 246 (1980) ("Because the Commission's issuance of a complaint averring reason to believe that Socal has violated the Act is not 'final agency action' under § 10(c) of the APA, it is not judicially reviewable before administrative adjudication concludes.").

384. See, e.g., Abbott Labs. v. Gardner, 387 U.S. 136, 148–50 (1967) (discussing ripeness as rationale for "prevent[ing] the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies"). The Court has recently expressed some doubts about the "continued vitality" of the ripeness doctrine. Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334, 2347 (2014).

385. Romano, Iron Law, supra note 24, at 31–40; cf. Catherine M. Sharkey, *State Farm* 'with Teeth': Heightened Judicial Review in the Absence of Executive Oversight, 89 N.Y.U. L. Rev. 1589, 1591 (2014) ("[J]udicial review of certain types of determinations by independent agencies should be more stringent because those determinations are not subject to executive oversight and are thus less likely to be premised on reasons backed by empirical support.").

386. Mendelson, Private Control, supra note 148, at 747–48; Strauss, Private Standards, supra note 62, at 507.

387. See Newland, supra note 281, at 2098–99 ("[E]stablishing taxpayer standing to challenge activities conducted pursuant to an executive order may be even more challenging than establishing taxpayer standing to challenge statutory law."); cf. Stack, Statutory President, supra note 174, at 542, 557 (arguing "there is no accepted framework for review of the president's claims of statutory authority" but President should be "subject to administrative law on the same terms as agencies").

even properly wearing an *administrative* hat in that context, which is really the final step in the *legislative* process.[388] With respect to executive orders and other presidential directives, they often result in policies with the force of law, but the directives themselves are not laws or regulations subject to the APA.[389]

In addition, current doctrine on "political intervention" fails to reflect the President's role in unorthodox rulemaking in ways that arguably undermine accountability. *Sierra Club v. Costle* is the classic case on political intervention in agency decisionmaking.[390] In that case, the D.C. Circuit distinguished technical information, which needs to be included in the agency record, from political information, which does not.[391] Thus, agency records now say almost nothing about significant and opaque presidential involvement. Several scholars have called for greater transparency of executive influence over significant rulemaking decisions. Mendelson has suggested an ex ante disclosure regime,[392] while Kathryn Watts has advocated for a more tailored judicial acceptance of political intervention so long as the intervention reinforces "accountability, public participation, and representativeness."[393] Lisa Heinzerling has recently argued for dismantling the *Sierra Club* "charade," claiming that it has unhealthy consequences for administrative agencies and disrespects the professional integrity of agency experts.[394] One of us has called for disclosure of these political influences in the agency record, within the bounds of Article II, hoping "that by bringing some of the perspectives of political actors into view, agencies would have fewer incentives to make disingenuous use of evidence to support outcomes that are really based on political priorities."[395]

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388. See, e.g., Note, Context-Sensitive Deference to Presidential Signing Statements, 120 Harv. L. Rev. 597, 600 (2006) ("[C]ourts have rarely relied on signing statements and have ruled on neither their constitutionality . . . nor the amount of judicial deference they should receive.").

389. See Kevin M. Stack, The Statutory Fiction of Judicial Review of Administrative Action in the United States, *in* Effective Judicial Review: A Cornerstone of Good Governance 317, 325 (Christopher Forsyth et al. eds., 2010) (noting common law doctrines remain to challenge presidential action but they are restricted to "existence of authority" and do not encompass "exercise of authority").

390. 657 F.2d 298, 397–98 (D.C. Cir. 1981).

391. See id. at 401 (requiring EPA to "justify its rulemaking solely on the basis of the record it compiles and makes public" and declining to require EPA to disclose ex parte communications by EPA during its deliberations).

392. See Mendelson, Political Oversight, supra note 54, at 1163–65.

393. Kathryn A. Watts, Proposing a Place for Politics in Arbitrary and Capricious Review, 119 Yale L.J. 2, 83 (2009).

394. See Lisa Heinzerling, Response, Classical Administrative Law in the Era of Presidential Administration, 92 Tex. L. Rev. See Also 171, 178–79 (2013), http://www.texaslrev.com/wp-content/uploads/Heinzerling-92-SeeAlso.pdf [http://perma.cc/D3NQ-D2TC] .

395. Farber & O'Connell, supra note 29, at 1185.

There is not even a settled set of principles in the *Chevron* context to account for increasingly prevalent overlapping delegations.[396] Similarly, arbitrary-and-capricious review under *State Farm* (and the APA) presumes that a single agency is the relevant actor that executes the regulatory action, capable of fully documenting the basis for the decision.[397] As another example, courts generally require agencies to give reasoned explanations at the time of agency action.[398] Stack has suggested that this *Chenery* principle may promote accountability,[399] but it is at odds with a whole class of practical agency decisions involving post-hoc explanations.

In sum, current administrative law doctrine largely ignores unorthodox rulemaking in promoting accountability, other than notably encouraging notice-and-comment procedures for *Chevron* deference. It may be the case that courts are using other kind of doctrines, including structural constitutional law principles, to promote accountability. For instance, the Court found the creation of the Public Company Accounting Oversight Board, a nonprofit corporation within the SEC, violated separation of powers principles but then eliminated one of the "for cause" removability restrictions on its leaders to let it continue operating.[400] As another example, (one Professor Strauss recently pointed out) in the Court's recent opinion upholding delegation of federal power to Amtrak[401] there are "[s]trong concurrences" that raise other "accountability" questions, particularly under the Appointments Clause.[402]

E. *Rule of Law*

Finally, we can invoke a different set of doctrinal values under a "rule-of-law" mantle: the idea that law should be accessible, consistent, and predictable for the benefit of both institutional players and the public. There are big picture rule-of-law issues in both legislation and administrative law that come into play here. The Court's notorious lack of consistency when it comes to applying the statutory interpretation

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396. See City of Arlington v. FCC, 133 S. Ct. 1863, 1883–84 (2013) (Roberts, C.J., dissenting) ("When presented with an agency's interpretation of such a statute, a court cannot simply ask whether the statute is one that the agency administers; the question is whether authority over the particular ambiguity at issue has been delegated to the particular agency."); Gersen, Overlapping and Underlapping, supra note 32, at 207–08 (referring to multiple delegation questions as "emerging doctrine known as *Chevron* Step Zero").

397. Farber & O'Connell, supra note 29, at 1156–57 ("[A]dministrative law tells too simple a story of congressional delegation of particular regulatory authority over nonfederal entities to a single agency.").

398. SEC v. Chenery Corp., 318 U.S. 80, 93–94 (1943).

399. Kevin M. Stack, The Constitutional Foundation of *Chenery*, 116 Yale L.J. 952, 993, 996 (2007).

400. Free Enter. Fund v. Pub. Co. Accounting. Oversight Bd., 130 S. Ct. 3138, 3151 (2010).

401. Dep't of Transp. v. Ass'n of Am. R.R.s, 135 S. Ct. 1225 (2015).

402. Peter L. Strauss, Recent Developments in Administrative Law: The Tremors of March 9, 2015, at 3 (2015) (unpublished manuscript) (on file with the *Columbia Law Review*).

presumptions and the various administrative deference rules is well chronicled.[403] Although we do not engage those problems here, we note that without any consistency, the value of these doctrines in general is significantly diminished. The problem more specific to the unorthodox context is the accessibility problem: the idea that doctrine will become too complex to be efficient, predictable, or transparent enough for the public and even some institutional actors to follow if the courts incorporate all of the nuances we have identified. We also recognize the infinite regression issue: Why, for example, create new rules for emergency legislation or quasi-rulemaking when there will always be *more* potential sub-rules within those categories? Perhaps emergency domestic policy legislation is different from emergency national security legislation, or agency policymaking through FAQs is different from agency policymaking through letters to state officials, and so on.

Legislation doctrine has generally steered clear of these questions about the balance between a realist perspective and the benefits of doctrinal simplicity. Here, again, administrative law is somewhat different, at least in theory. The Justices have been in a high-pitched battle over these questions ever since a divided Court in *Mead* effectively created a two-track system of deference between *Chevron* and *Skidmore*—opting for a realist approach that, as the majority put it, emphasized the "breadth" of real-world agency action over the simpler binary *Chevron*-or-no-*Chevron* choice that had emerged before *Mead*.[404] That set of doctrines has been further complicated by additional sub-rules, such as the major questions rule, already discussed, and special deference doctrines for specific subject-matter areas, such as foreign affairs.[405] At the same time, the future of these sub-rules seems uncertain, in light of recent counter-punching efforts to simplify.[406] Moreover, even this post–*Mead* realist approach, as we have shown, is still quite fictionalized against the backdrop of significant unorthodox practices.[407]

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403. For discussions of those matters, see generally William N. Eskridge, Jr. & Lauren E. Baer, The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from *Chevron* to *Hamdan*, 96 Geo. L.J. 1083, 1090, 1098–120 (2008) ("[T]he Court's deference practice functions along a *continuum* . . . ."); Gluck, States as Laboratories, supra note 353, at 1757 ("[P]ersistent interpretive divides and a refusal to treat methodological statements as precedential have made interpretive consensus [in the Supreme Court] seem impossible.").

404. United States v. Mead Corp., 533 U.S. 218, 236 (2001).

405. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936) ("[T]he President alone has the power to speak or listen as a representative of the nation.").

406. See City of Arlington v. FCC, 133 S. Ct. 1863, 1869 (2013) (refusing to carve out another special exception to *Chevron* deference for jurisdictional questions); Mayo Found. for Med. Educ. & Research v. United States, 131 S Ct. 704, 714 (2011) (holding *Chevron*, not special tax deference rule, applies in tax cases as well).

407. See supra section IV.A (discussing current failure of courts to adjust *Mead*'s realism to unorthodox delegations).

Tailoring statutory interpretation to the categories of unorthodox policymaking that we have introduced would be a sea change in legislation doctrine. On the administrative law side, it would add more layers to the more specialized approach already in place. Our suggested typology of unorthodox policymaking is merely a starting point. Whichever categories might emerge, we do believe there is value to incorporating the existence of unorthodox policymaking into doctrine and theory, at least to some extent. To opt instead for massive simplification would be to privilege an intense rule-of-law or predictability norm over the other field norms that we have identified, including congressional and administrative intent, interbranch dialogue, process, and accountability.

One of us has supported such a rule-of-law approach in theory, but in practice it seems unrealistic.[408] A truly formalist response to the policymaking complexity we have identified would put enormous pressure on the courts to truly *follow through* with a rule-of-law approach in ways that they have not done before: for example, by being much more consistent in their application of interpretive and deference doctrines and reducing their numerosity. We think it unlikely that courts will succeed in that effort or be interested in it, and so do not think a full-bore rule-of-law approach is a useful answer to the complexities this Essay highlights, at least not for now. We also believe that the courts' emphasis on democratic values—in particular on using its interpretive doctrines to serve rather than to usurp the coordinate, accountable branches—would make it difficult, if not impossible, for courts to wholesale abandon an approach that aims, at least in part, to reflect and effectuate the real world of policymaking. There also might be separation of powers concerns, as well as institutional competency considerations. For instance, in moments of legislative gridlock agencies may be better updaters of old statutes than the courts.[409]

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These questions about the role of doctrine in legislation and administrative law are big jurisprudential questions and have implications far beyond the arguments in this Essay. Indeed, these questions likely have remained unanswered because the stakes are so high. For instance, there have been questions lurking beneath the surface of legislation theory for some time about the *source* of the doctrines of statutory interpretation. Courts have been reluctant to acknowledge those rules as "federal common law" for a variety of reasons, including the implications of such

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408. See generally Abbe R. Gluck, The Federal Common Law of Statutory Interpretation: *Erie* for the Age of Statutes, 54 Wm. & Mary L. Rev. 753 (2013) [hereinafter Gluck, Federal Common Law] (detailing judicial resistance to treating interpretive doctrine as real common law).

409. See Jody Freeman & David B. Spence, Old Statutes, New Problems, 163 U. Pa. L. Rev. 1, 76 (2014) ("[I]t may be more 'democratic' to defer during fallow legislative periods to the agencies . . . .").

an acknowledgement for theories of methodological stare decisis and for questions of whether Congress can overrule the doctrines of interpretation by statute.[410] It has been much easier for federal courts to embrace the fiction that their interpretive doctrines derive from Congress itself: specifically, that they simply are reflective of congressional drafting practice. That is clearly not the case, and may never be the case. But for courts to use legal doctrine to directly try to influence the frequency or type of unorthodox policymaking would be for courts to acknowledge they are playing a much bigger role in this landscape than they have wished to acknowledge or take on.

CONCLUSION

The primary goal of this Essay has been to establish that unorthodox lawmaking and rulemaking are widespread and consequential modern policymaking practices—and that these legislative and administrative deviations from the textbook process themselves are linked. We also have emphasized that not all unorthodox policymaking is the same. There is great variation among the forms, and we have aimed to deepen the limited descriptive account in current circulation. Our expanded typology helps not only to reveal the different motivations for different types of unorthodox policymaking, but also to illustrate how any normative assessment of them will likely be highly contextual. Finally, we have struggled with the doctrinal implications of these developments. We need theoretical and jurisprudential clarity to understand what the role for doctrine is in the first place. In the end, we expect that there must be some balance between actual practice and long-held frameworks, and between the unorthodox and the conventional, when it comes to incorporating these descriptive and normative accounts into the everyday workings of the law. That is because unorthodox lawmaking and unorthodox rulemaking are now themselves, at least much of the time, the everyday way in which government works.

410. Gluck, Federal Common Law, supra note 408, at 801.