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## Statutory Junk

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# STATUTORY JUNK

*David Schoenbrod\**

## ABSTRACT

*Much as “space junk”—the debris that past space missions have left in earth’s orbit—can disable a current space mission, obsolete statutory commands that Congress has left on the books can keep an administrative agency from accomplishing its current mission. This statutory junk has proliferated in recent decades because Congress has shifted from giving agencies open-ended authority to commanding them in exacting detail, but often fails to revise these commands after changing circumstances have made the old commands perverse. Congress fails because, contrary to the suppositions of some law professors, this delegation allows legislators to shift blame to the agency for harms that statutes do to their constituents. The Chevron doctrine provides agencies some leeway to avoid statutory junk, but is insufficient to cope with the problem, which has grown epidemic. Giving agencies leeway to disobey statutory commands, as some propose, is also not a workable solution. The solution must lie in remedying the root cause of the problem—the legislators’ current ability to avoid blame for the perverse consequences of statutory junk.*

## I. THE BANE OF STATUTORY JUNK

“Space junk” is a term for the mishmash of objects that past space missions have left in earth orbit. Traveling far faster than a bullet, even a small piece of space junk can disable a current mission or kill an astronaut. Fortunately, engineers have developed defenses against space junk.

“Statutory junk” is my term for the mishmash of obsolete statutory commands to administrative agencies that Congress has failed to revise. Enforceable in a court of law, even a few words of statutory junk can keep an administrative agency from accomplishing its current mission. Unfortunately, unlike the engineers who defend against space junk, legislators have often failed to defend us from statutory junk.

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For an example of how statutory junk can disable an agency, consider *Utility Air Regulatory Group v. EPA*.<sup>1</sup> As written decades before the case was decided in 2014, the Clean Air Act required major new sources of regulated pollutants to go through an arduous permit process.<sup>2</sup> The statute defined “major” sources as those emitting more than “250 tons per year” of regulated pollutants because, as applied to the pollutants regulated back then, this threshold would require permits for only a small number of big power plants and other huge polluters.<sup>3</sup> But decades later, EPA set out to regulate greenhouse gases.<sup>4</sup> To do so, EPA wanted to subject only the very largest sources of greenhouse gases to the permit program.<sup>5</sup> Because, however, sources generally emit greenhouse gases in immensely larger quantities than the previously regulated pollutants, the 250 tons per year statutory threshold as applied to greenhouse gases would require so many high schools, hospitals, apartment buildings, and other modest polluters to get permits that the arduous permit-granting process would grind to a halt.<sup>6</sup> No one in Congress ever intended such relatively minor sources to be subject to the permit requirement.<sup>7</sup> To avoid an administrative and economic nightmare, EPA decreed a special threshold for greenhouse gases that began at 100,000 tons per year rather than 250 tons per year.<sup>8</sup> A majority of the Supreme Court reversed, holding that an agency cannot disregard clear statutory text. To avoid this nightmare, the Court interpreted the statute to exclude greenhouse gases, no matter how large their emissions, from the pollutants that could trigger the permit requirement.<sup>9</sup> This reduced the agency’s arsenal to deal with greenhouse gases.

One might disagree with the Court’s interpretation of the statute or the agency’s finding that greenhouse gases are a danger, but not the point that the case illustrates: that statutory text written without thought of present circumstances can frustrate agencies’ pursuit of their current missions.

A second example of statutory junk is *Michigan v. EPA*.<sup>10</sup> Like the first case, it comes from a very narrow slice of agency actions: those under one statute (the

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<sup>1</sup> 134 S. Ct. 2427 (2014).

<sup>2</sup> *Id.* at 2435–36.

<sup>3</sup> *Id.* at 2435.

<sup>4</sup> *Id.* at 2434.

<sup>5</sup> *Id.* at 2442–43.

<sup>6</sup> *See id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 2444–45.

<sup>9</sup> *Id.* at 2445, 2449.

<sup>10</sup> 135 S. Ct. 2699 (2015).

Clean Air Act) upon which one court (the Supreme Court) rendered a decision in a short time span (two years). In a third case arising under the same statute and decided by the same court in the same time frame, *EPA v. EME Homer City Generation*, the agency did prevail, but only after many years of delay. It took EPA multiple administrative proceedings and judicial reviews for the agency to win approval of a way to interpret the old statute to skirt statutory text not designed for the problem at hand.<sup>11</sup>

Considering agency choices in full—decisions under all statutes in all courts in recent decades, and decisions never rendered by courts because the statutory text discouraged the agency from even trying—statutory junk frustrates agencies frequently.<sup>12</sup>

Statutory junk is almost as old as agencies themselves, but it has reached epidemic proportions only in recent decades. There could be little such junk in the short, vague statutes of the Progressive Era. Many Progressives thought Congress should say to agencies, in essence, “here’s a problem, solve it,” because they believed that agencies, staffed by experts and insulated from politics, would use scientific methods to make correct choices.<sup>13</sup>

Eventually, however, the Progressive Era’s faith in agencies insulated from politics turned into disbelief. People came to realize that elected officials in both the White House and Congress pressure agencies rather than leave them insulated from politics and that, in any event, scientific methods do not provide conclusive answers to most policy questions.<sup>14</sup> Theodore Lowi drove the point home with the publication of the first edition of *The End of Liberalism* in 1969, which argued that political interference often kept agencies from serving the public.<sup>15</sup>

Then, in *Vanishing Air* published in 1970, Ralph Nader and his associates charged that, by telling an agency to deal with air pollution in a short, vague statute, legislators had, in effect, tolerated pollution that kills people.<sup>16</sup> The finger of blame pointed particularly at Senator Edmund Muskie who had been

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<sup>11</sup> 134 S. Ct. 1584 (2014).

<sup>12</sup> Daniel T. Deacon, *Administrative Forbearance*, 125 YALE L.J. 1548, 1557–58 (2016).

<sup>13</sup> E.g., ROBERT H. WIEBE, *THE SEARCH FOR ORDER, 1877–1920*, at 169–70 (1967).

<sup>14</sup> E.g., DAVID SCHOENBROD, *SAVING OUR ENVIRONMENT FROM WASHINGTON: HOW CONGRESS GRABS POWER, SHIRKS RESPONSIBILITY, AND SHORTCHANGES THE PEOPLE* 67–73 (2005).

<sup>15</sup> THEODORE J. LOWI, *THE END OF LIBERALISM: IDEOLOGY, POLICY, AND THE CRISIS OF PUBLIC AUTHORITY* (1969).

<sup>16</sup> E.g., JOHN C. ESPOSITO & LARRY J. SILVERMAN, *VANISHING AIR: THE RALPH NADER STUDY GROUP REPORT ON AIR POLLUTION* (1970).

the Democratic Party's nominee for Vice President in 1968. In 1970, he was a leading contender for its nomination for President in the 1972 election. Known as "Mr. Environment" in Congress because he authored important pollution control statutes, he got a boost in his race for the White House with the surprisingly large turnout for the first Earth Day on April 22, 1970. Yet, published only three weeks after Earth Day, the Nader team's *Vanishing Air* charged that Muskie's air pollution statute shirked the "hard choices" needed to save lives by leaving those choices to agency officials.<sup>17</sup>

In response,<sup>18</sup> Senator Muskie authored the 1970 Clean Air Act, which unlike the vague statutes of the Progressive Era, contained many detailed commands. The commands seemed to require EPA to issue regulations sufficient to control every harmful pollutant everywhere in the United States and established deadlines by which the agency must do each part of this job.<sup>19</sup> Moreover, the statute empowered citizens to enforce these deadlines in court should EPA fail to comply.<sup>20</sup> On this basis, Muskie claimed that "all Americans in all parts of the country shall have clean air to breathe within the 1970's" and that the statute "faces the air pollution crisis with urgency and in candor. It makes hard choices."<sup>21</sup> Yet, the statute didn't really make the hard choices. Despite all the detail in the statute, Congress punted the big issues such as to what extent to protect health and how to allocate the clean-up burden among sources.<sup>22</sup>

The detailed commands in the Clean Air Act of 1970 and the many subsequent statutes modeled on it are the source of much of today's statutory junk. To see why Congress fails to clean up the statutory junk, consider how this new form of delegation affects the popularity of legislators.

The 1970 Clean Air Act seemingly enacted a judicially enforceable *right* to healthy air, but nonetheless largely delegated the job of imposing the corresponding *duties* to an agency. If it imposed these duties, it would get the blame for the resulting burdens; if it failed to impose these duties, it would get the blame for failing to deliver healthy air. This statutory design let legislators avoid blame for failing to clean the air and also for imposing the burdens necessary to clean the air.

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<sup>17</sup> *Id.* at vii–ix.

<sup>18</sup> SCHOENBROD, *supra* note 14, at 25.

<sup>19</sup> Clean Air Act Amendments of 1970, 42 U.S.C. §§ 7408–7412, 7521 (2012).

<sup>20</sup> *Id.* at § 7604.

<sup>21</sup> 116 CONG. REC. 42,381 (1970) (statement of Sen. Muskie).

<sup>22</sup> SCHOENBROD, *supra* note 14, at 23–51, 67–73.

This statutory design has shifted blame to the agency even today. After EPA recently set stricter standards for ozone under the Clean Air Act, prominent news accounts reported that environmental groups criticized the agency for failing to set the standards to protect health adequately, and private industry criticized the agency for imposing excessive burdens.<sup>23</sup> Members of Congress reinforced the shift of blame to EPA by participating in both sorts of criticisms themselves.<sup>24</sup> No one blamed the statute or those who voted for it. The 1970 Clean Air Act typifies a slew of modern, detailed statutes in which Congress shifts blame to agencies for unpopular consequences.

Congress's success in shifting blame to EPA and other agencies explains the epidemic of statutory junk. That success makes it easy for legislators to issue detailed commands to agencies and leave them in place even when they are obsolete. For example, insulated from responsibility, the legislators last revised the Clean Air Act in 1990, more than a quarter century ago.<sup>25</sup> The statute as then revised issues 940 separate commands to the EPA administrator, many of which the administrator must obey repeatedly.<sup>26</sup> The commands come when the statute addresses the word "shall" to the administrator. Many of the detailed instructions that accompany the "shalls" are based upon circumstances that have changed or understandings falsified by experience. Yet, as the author of the regulations in which the statutory junk has its perverse impacts, the agency rather than the legislators gets most of the blame for the unfortunate consequences of obsolete statutory commands. Most other environmental statutes have gone even longer without major revision.<sup>27</sup>

Statutory junk is not confined to environmental regulation, but extends to instructions that Congress gives to agencies as to all manner of regulation as well as grants and more.<sup>28</sup> As Philip K. Howard notes in *The Rule of Nobody*,

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<sup>23</sup> Amy Harder, *EPA Sets Stricter Standard for Ozone: New Limit on Pollutant Linked to Smog Draws Criticism from Industry Groups, Environmentalists*, WALL ST. J. (Oct. 1, 2015, 3:47 PM), <http://www.wsj.com/articles/epa-to-set-stricter-air-pollution-standard-for-ozone-1443715727>; Patrick Ambrosio, *EPA Strengthens Ozone Standards, Upsetting Both Sides*, BLOOMBERG: DAILY ENV'T REP. (Oct. 2, 2015), <https://www.bna.com/epa-strengthens-ozone-n57982059008/>.

<sup>24</sup> Anthony Adragna, *Reactions to Ozone Rule Familiar on Capitol Hill*, 46 ENV'T REP. 2901 (2015). Some members of Congress claimed that EPA went too far and that "it'll be important for Congress to fight back." *Id.* While others expressed disappointment with EPA for the rule being "not as strong as [they] had hoped." *Id.*

<sup>25</sup> DAVID SCHOENBROD, RICHARD B. STEWART & KATRINA M. WYMAN, *BREAKING THE LOGJAM: ENVIRONMENTAL PROTECTION THAT WILL WORK* 75 (2010).

<sup>26</sup> *Id.* at 73.

<sup>27</sup> *See id.* at 26.

<sup>28</sup> DAVID SCHOENBROD, *DC CONFIDENTIAL: INSIDE THE FIVE TRICKS OF WASHINGTON* (forthcoming 2017).

“American democracy is basically run by dead people” including “past generations of legislators.”<sup>29</sup>

One might think that the real root of statutory junk is gridlock in Congress. There is something in that, but without the legislators being able to shift blame for unpopular consequences to the agencies, the legislators would feel much greater pressure to get rid of the statutory junk. Where the legislators do get blamed for unpopular consequences, as when they fail to agree on appropriations and the government shuts down, they have generally found a way to get the appropriations passed.

## II. HOW TO PROTECT OURSELVES FROM STATUTORY JUNK

What then is to be done about the proliferation of statutory junk? Judges generally do not like to impose perverse consequences and statutory interpretation doctrines do allow some deviations from statutory text, but such doctrines have their limits, and, in any event, deciding how to apply them puts judges in the hot seat. To sidle off the hot seat, the Supreme Court announced in *Chevron v. Natural Resources Defense Council* that courts should defer to agency interpretations of ambiguous statutory text.<sup>30</sup> *Chevron* gives agencies some leeway to avoid statutory junk, but is an insufficient response to the problem for three reasons. First, *Chevron* gives Congress an excuse not to clean up its junk. Second, agencies sometimes lose despite *Chevron* and, even when they ultimately win, they and the public must first undergo years of uncertainty before administrative proceedings and judicial review produce a definitive outcome. Third, the nondelegation canon suggests that courts should require Congress to be open about delegating to agencies,<sup>31</sup> yet Congress has never as a general matter openly delegated to agencies the power to disregard statutory junk.

In *Administrative Forbearance*, published in the *Yale Law Journal*, Daniel Deacon proposes that Congress openly delegate to agencies the power to disobey statutory commands that they deem perverse.<sup>32</sup> Deacon claims that such “administrative forbearance authority” would allow agencies to avoid what I call

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<sup>29</sup> PHILIP K. HOWARD, THE RULE OF NOBODY: SAVING AMERICA FROM DEAD LAWS AND BROKEN GOVERNMENT 124 (2014).

<sup>30</sup> 467 U.S. 837 (1984).

<sup>31</sup> Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 316 (2000).

<sup>32</sup> Deacon, *supra* note 12.

statutory junk.<sup>33</sup> Yet, he does not consider why we have all this statutory junk in the first place. As a result, he fails to note the advantages to legislators of not granting forbearance authority, or at least not in the robust way needed for it to do more good than harm.

### A. *Delegation, Blame-Shifting, and Statutory Junk*

First, however, I need to deal with arguments that delegation does not increase the extent to which Congress can shift blame to agencies and so does not help cause statutory junk. The allegation that delegation lets legislators shift blame bothers defenders of delegation in general, and Deacon in particular, because his forbearance authority would increase the scope of delegation. He denies that delegation lets legislators shift blame and cites three defenders of delegation for support: Professors Jerry Mashaw, Eric Posner, and Adrian Vermeule.<sup>34</sup> The passages of their work that Deacon cites consist of several paragraphs of suppositions about how legislators and voters behave.<sup>35</sup> These suppositions are supported by neither systematic descriptions of the behavior of legislators and voters nor citations to the work of political scientists, the social scientists who do systematically describe the behavior of legislators and voters.<sup>36</sup>

The conclusions in political science literature based upon descriptions of the behavior and incentives of legislators and voters are massively contrary to the suppositions of these three law professors.<sup>37</sup> In addition, researchers have used

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<sup>33</sup> Deacon, *supra* note 12, at 1558, 1597–98.

<sup>34</sup> *Id.* at 1597–98.

<sup>35</sup> JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 146–47 (1997); Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1748–49 (2002).

<sup>36</sup> Posner and Vermeule do cite political scientists David Epstein & Sharyn O’Halloran, *The Nondelegation Doctrine and the Separation of Powers: A Political Science Approach*, 20 CARDOZO L. REV. 947 (1999), but not for the proposition that delegation does not increase the extent to which delegation allows legislators to shift blame. Posner & Vermeule, *supra* note 35, at 1749. These political scientists are cited for quite a different proposition: that enforcing the nondelegation doctrine would drive Congress to delegate to legislative bodies rather than administrative agencies and thereby undercut accountability another way. *Id.* This later proposition, if true, is relevant to the issue of whether courts should stop delegation, but not to the issue discussed in this essay: whether and in what way legislators would grant administrative forbearance authority.

<sup>37</sup> E.g., R. DOUGLAS ARNOLD, *THE LOGIC OF CONGRESSIONAL ACTION* 101 (1990) (“Sometimes legislators know precisely what the executive will decide, but the process of delegation insulates them from political retribution.”); DAVID R. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* 132 (1974) (“[I]n a large class of legislative undertakings the electoral payment is for positions rather than for effects.”); Morris P. Fiorina, *Group Concentration and the Delegation of Legislative Authority*, in *REGULATORY POLICY AND THE SOCIAL SCIENCES* 175 (Roger G. Noll ed., 1985) (offering a mathematical assessment of when it pays legislators to delegate); Morris P. Fiorina, *Legislative Choice of Regulatory Forms: Legal Process or Administrative Process?*, 39 PUB.



experimental subjects to test whether delegation of authority enables legislators to shift significant amounts of blame to agencies and found that it can.<sup>38</sup>

These observations and experimental results make sense because journalists usually address five questions:

- Who did it?
- What happened?
- Where did it take place?
- When did it take place?
- Why did it happen?

By delegating, legislators make the agency rather than themselves the “who” that took the action that produced unpopular consequences. The statute that delegated to the agency is one part of “why” it happened, but only one part along with the facts and circumstances that led the agency to act as it did. If the statute is mentioned at all in the news account, those who voted for it will usually not be listed. Their opponents in future elections may seek to pin blame on those who did vote for the statute, but they can in turn blame the agency for how it exercised its discretion. They generally have “plausible deniability.” Moreover, even where the statute gives the agency no discretion to avoid the blameworthy action, thereby rendering the denial implausible, the case against the incumbent is attenuated. Indeed, one set of experiments found that delegation lets legislators shift significant blame to an agency even when the experimental subjects were informed that the legislators had enacted direct orders that compelled the agency to act in a certain way.<sup>39</sup>

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CHOICE 33, 45, 47 (1982) (stating that legislators may pick the regulatory form that makes them look best to their constituents rather than the one that does the most good for their constituents); Justin Fox & Stuart V. Jordan, *Delegation and Accountability*, 73 J. POL. 831, 843–44 (2011); Jacob S. Hacker & Paul Pierson, *Winner-Take-All Politics: Public Policy, Political Organization, and the Precipitous Rise of Top Incomes in the United States*, 38 POL. & SOC’Y 152, 173 (2010) (stating that well-organized business interests pushing for favors from legislators at the expense of the average voter “will seek to substitute symbolic actions for real ones, for example, or manipulate complex policy designs to produce more favorable yet opaque distributional outcomes”); R. Kent Weaver, *The Politics of Blame Avoidance*, 6 J. PUB. POL’Y 371, 375, 386–87 (1986) (stating that politicians pass the buck as a means to avoid blame for unpopular actions). *But see* Epstein & O’Halloran, *supra* note 36.

<sup>38</sup> See, e.g., Adam Hill, *Does Delegation Undermine Accountability? Experimental Evidence on the Relationship Between Blame Shifting and Control*, 12 J. EMPIRICAL LEGAL STUD. 311 (2015) (answering the question affirmatively on the basis of experiments by multiple researchers).

<sup>39</sup> Of his own experiments, Hill wrote, “[e]ven in these cases, where the agent is effectively powerless to change the outcome, participants blame principals significantly less than in cases where the principal brings about the outcome directly.” *Id.* at 312.

The political science literature also suggests that politicians can more easily fool “discrete, atomized voters” than organized interests such as big corporations and trade associations because the organized interests have more information and longer attention spans.<sup>40</sup> Such discrete, atomized voters are likely to see through congressional blame-shifting only in unusual circumstances. Senator Muskie did feel pressure to produce new air pollution legislation in 1970, but Congress in the pre-1970 air pollution statute openly left the critical decisions to an agency. In contrast, Congress in many other statutes on the books today has covered its tracks by issuing detailed commands. Moreover, Nader’s criticism in 1970 came at a time when millions of people rallied on the streets to protest pollution, but few regulatory issues today would get such a rise out of the public. Finally, in 1970, Muskie was a candidate for President. In contrast, in the individual races for Congress, voters are far less conscious of blame shifting.

Legislators are experts at designing statutes to take advantage of the blind spots of “discrete, atomized voters.” Not only is the 1970 Clean Air Act a case in point, but subsequent amendments to it reflected new twists to maximize credit and minimize blame.<sup>41</sup> Unlike the pre-1970 air pollution statute, the current version is full of detailed statutory commands such as the 940 instances of “shall” in the Clean Air Act that protect Congress from accusations that it handed a blank check to the agency.

Even Deacon does not seem to really believe Mashaw, Posner, and Vermeule’s arguments that Congress cannot shift blame to agencies through delegation. Seven pages after invoking them, he asserts that Congress may sometimes delegate forbearance authority to shift blame to agencies: “With any kind of delegation, Congress sometimes may not appear to be harnessing the advantages associated with agency decision making; instead, it may be engaged in political buck-passing ‘in an attempt to shift responsibility for the negative impacts of law to other governmental branches.’”<sup>42</sup>

### *B. The Problems with “Forbearance Authority”*

The credit-claiming, blame-shifting advantages to legislators of detailed, lengthy statutory commands means that Congress is unlikely to grant forbearance authority in any wholesale way. Yet, the logic of Deacon’s

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<sup>40</sup> Hacker & Pierson, *supra* note 37, at 172.

<sup>41</sup> See SCHOENBROD, *supra* note 14, at 46–47.

<sup>42</sup> Deacon, *supra* note 12, at 1604–05 (quoting Scott Baker & Kimberly D. Krawiec, *The Penalty Default Canon*, 72 GEO. WASH. L. REV. 663, 664 (2004)).

argument for forbearance authority suggests it should be enacted wholesale because Congress cannot anticipate which commands might eventually lead to perverse results on some occasion.<sup>43</sup>

Moreover, the credit-claiming, blame-shifting advantages to legislators of detailed, lengthy statutory commands mean that, even if Congress did grant forbearance authority wholesale, it would hedge it with complicated conditions. Such complicated conditions would bring in their wake the powerful disadvantage of gumming up the administrative process. Any participant in an agency proceeding could argue that the agency should exercise forbearance authority to get rid of any statutory requirement unfavorable to it. In the course of responding to such an argument, the agency would have to decide (1) how it would apply the command, if not forborne, (2) how the statute would apply if the command were forborne, and (3) as a result, whether the complicated conditions for forbearance are met. Yet, in rulemakings or other agency proceedings, multiple participants could each ask the agency to forbear from multiple commands. To survive judicial review of its decision on forbearing from a single command as to whether a party made a thorough argument, the agency would need to explain its reasoning as to each of the “relevant factors” pertinent to each of these decisions.<sup>44</sup> Given all the detail in the statutes that we have today, participants with clashing interests could seek forbearance from many different commands. The multiplication of matters on which the agency must provide explanation would petrify the already ossified agency decisionmaking process.

And, even if Congress granted agencies freewheeling, wholesale forbearance authority and freed them from judicial review for its exercise, we would have a remedy even more dangerous than the disease. Forbearance authority promises a future in which presidents and their appointees have the power do the right thing. Before accepting the premise that they will in fact do the right thing, we should remind ourselves that the White House is not always occupied by presidents with whom we agree. (This passage was written prior to 2016.) Moreover, as Professor Bruce Ackerman writes,

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<sup>43</sup> Deacon asserts that among the reasons for granting forbearance authority is that facts may change or, even if they do not, our understanding of their policy significance may change. *Id.* at 1569–70. Both sorts of change are notoriously difficult to predict, especially over the decades long spans that Congress fails to update statutes. Yet, many pages later, Deacon recommends that Congress grant such authority when it anticipates its commands may lead to bad results, as if Congress had a crystal ball. *Id.* at 1603.

<sup>44</sup> *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 42 (1983).

[I]n America, it is not enough to be right. Before you can impose your views on the polity, you have to convince your fellow citizens that you're right. That's what democracy is all about. So it makes good sense to require the president [who acts not only personally, but also through appointees] to gain the support of Congress even when his vision is morally compelling. He should not be allowed to lead the nation on a great leap forward through executive decree.<sup>45</sup>

### III. THE SOLUTION: STOP THE BLAME-SHIFTING THAT IS THE SOURCE OF THE STATUTORY JUNK

To deal with statutory junk, we need to come to grips with its root cause, the ability of legislators to shift blame to agencies for the perverse consequences of the junk that they, the legislators, leave in the statute books.

One way to put the responsibility back on legislators was inspired by the commission that Congress set up to recommend a list of redundant military bases to be closed, with Congress voting on the list as a package.<sup>46</sup> The Progressive Policy Institute proposes setting up a parallel commission to recommend reforms in regulations with Congress voting on such reforms as a package.<sup>47</sup> The proposal has garnered bi-partisan support in Congress and from think tanks on the Left and Right.<sup>48</sup> Similarly, both Professor Donald Elliott and Philip Howard have suggested that Congress set up commissions to recommend reforms in old statutes.<sup>49</sup>

Another way to put the responsibility back on legislators comes from James Landis, the New Deal's sage of administrative law. He suggested that "it [is] an act of political wisdom to put back upon the shoulders of the Congress" responsibility for matters of "great public concern."<sup>50</sup> A way to do that, he noted, was to make Congress use the legislative process to enact the major decisions of agencies.<sup>51</sup> This, Landis argued, would marry agency expertise with legislative

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<sup>45</sup> BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* 39 (2010).

<sup>46</sup> 10 U.S.C. § 2687a (2012).

<sup>47</sup> See Michael Mandel & Diana G. Carew, *A Politically and Technically Feasible Approach for Handling Regulatory Accumulation*, PROGRESSIVE POL'Y INST. (May 21, 2014), <http://www.progressivepolicy.org/issues/economy/a-politically-and-technically-feasible-approach-for-handling-regulatory-accumulation/>.

<sup>48</sup> Kevin R. Kosar, *Is Regulatory Reform a Hopeless Cause?*, BROOKINGS INST. (May 28, 2015), <http://www.brookings.edu/blogs/fixgov/posts/2015/05/28-is-regulatory-reform-hopeless-kosar>.

<sup>49</sup> HOWARD, *supra* note 29, at 147–51; E. Donald Elliott, *Portage Strategies for Adapting Environmental Law and Policy During a Logjam Era*, 17 N.Y.U. ENVTL. L.J. 24, 51 (2008).

<sup>50</sup> JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 76 (1938).

<sup>51</sup> *Id.*

responsibility.<sup>52</sup> In 1984, then-Judge Stephen Breyer outlined a mechanism through which Congress could shoulder such responsibility and showed that it would pass constitutional muster.<sup>53</sup> Having to shoulder responsibility for either enacting or rejecting the agency's decision, legislators would have a strong reason to revise the statutes to allow agencies to propose more sensible decisions and so delete perverse statutory commands. A bill that passed the House in early 2017, the Regulations from the Executive in Need of Scrutiny Act of 2017, is an unfortunate way to pursue the Landis proposal because, as the bill's title suggests, the bill is anti-regulatory rather than pro-accountability.<sup>54</sup> A better bill would apply to major regulatory changes that render regulation either more burdensome or less protective.<sup>55</sup>

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These or other ways of making legislators responsible for the perverse consequences of statutory junk would be good medicine for the body politic, but would require legislators to taste the medicine.

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<sup>52</sup> *Id.* at 76–77.

<sup>53</sup> Stephen Breyer, *The Legislative Veto After Chadha*, 72 GEO. L.J. 785, 793–94 (1984).

<sup>54</sup> H.R. 26, 115th Cong. (2017).

<sup>55</sup> For a discussion of the problems with REINS and the design of a better bill, see SCHOENBROD, *supra* note 28, at 150–56.