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Going Back in Time: The Search for Retroactive Rulemaking Power in Statutory Deadlines

Chris Schmitter

Note

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In 2010, American fuel refiners faced a mess. The Environmental Protection Agency (EPA) had long since missed a 2008 congressional deadline to update the rules that govern the production of renewable fuels.[1] Because EPA failed to act, the refiners started 2010 under the old rules.[2] However, by July 1 of that year, long after Congress's deadline, EPA finally implemented the new rules and, to make up for lost time, made them retroactive to all of 2010.[3] In other words, the requirements companies had to meet for January through June suddenly increased, retroactively, after July 1.[4] Refiners were outraged at these retroactive regulations[5] and challenged them in federal

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1. Nat'l Petrochemical & Refiners Ass'n v. EPA (*Nat'l Petrochemical & Refiners Ass'n I*), 630 F.3d 145, 147–52 (D.C. Cir. 2010), *reh'g denied*, 643 F.3d 958 (D.C. Cir. 2011), *cert. denied*, 132 S. Ct. 571 (2011).

2. *Id.*

3. *Id.*

4. *Id.* It is important to note that refiners could not simply have conformed their behavior to the requirements found in the statute, without waiting for EPA to act. The relevant statute sets nationwide annual goals for the volume of renewable fuels produced, but it leaves to EPA the determination of what the relevant percentage should be for individual refiners. *Id.*

5. Brief for Petitioners at 14–18, *Nat'l Petrochemical & Refiners Ass'n I*, 630 F.3d 145 (No. 10-1070) (noting the significant changes included in the new rules and arguing that a company that imported diesel fuel in February of 2010 would not have had any reporting requirements under the old rule, but would be retroactively encompassed by the new rules).

court.[6] In a surprising decision, however, the United States Court of Appeals for the District of Columbia Circuit approved EPA's retroactive action.[7]

This scenario may seem irrelevant to all but a handful of companies and curious administrative law scholars. In reality, however, many government agencies are currently facing unprecedented pressure to craft retroactive rules. In the wake of the enactment of the Patient Protection and Affordable Care Act (PPACA) and the Dodd-Frank Wall Street reform bill, agencies are promulgating a "tsunami" of new rules.[8] They are generating many of these rules by specific statutory deadlines and it is likely that agencies will miss some deadlines[9] and be forced to consider whether to give these rules retroactive effect.

Whether retroactivity appears in statutes or rules, the Supreme Court has held that "[r]etroactivity is not favored in the law."[10] Indeed, the Court has stated that retroactive rulemaking is only appropriate when Congress has explicitly authorized it.[11] Despite this prohibition, some judges, including Justice Scalia, have proposed an exception that would allow agencies to promulgate retroactive rules if they miss a statutory deadline.[12] In other words, if an agency fails to meet a deadline for implementing a rule, it could later promulgate that same rule retroactive to the statutory deadline it missed, even absent explicit congressional authorization. In response to the fuel-refiner sce-

6. *Nat'l Petrochemical & Refiners Ass'n I*, 630 F.3d at 146–47.

7. *Id.* at 162–64.

8. *See, e.g.*, James T. O'Reilly & Melissa D. Berry, *The Tsunami of Health Care Rulemaking: Strategies for Survival and Success*, 63 ADMIN. L. REV. 245, 246–47 (2011) ("There is no question that PPACA will result in a tsunami of new administrative rulemaking."); Amanda Engstrom, *Dodd-Frank Unleashes a Tsunami of Regulation: A Visual*, FREE ENTERPRISE (Jan. 24, 2011), http://www.freeenterprise.com/2011/01/dodd-frank-unleashes-a-tsunami-of-regulation-a-visual (anticipating the "regulatory tsunami" and providing a chart which lists the rulemakings that will occur during the implementation of the Dodd-Frank Wall Street reform legislation).

9. Jean Eaglesham, *Overhaul Grows and Slows*, WALL ST. J., May 2, 2011, at C1 ("The sheer number of rules still in the pipeline makes it almost inevitable agencies will miss an increasing number of deadlines over the next year." (quotations omitted)).

10. *See* Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988).

11. *Id.*

12. *See id.* at 224–25 (Scalia, J., concurring) ("If, for example, a statute prescribes a deadline by which particular rules must be in effect, and if the agency misses that deadline, the statute may be interpreted to authorize a reasonable retroactive rule despite the limitation of the [Administrative Procedure Act]."); *see also Nat'l Petrochemical & Refiners Ass'n I*, 630 F.3d at 162–63 (adopting Justice Scalia's concurring opinion in *Bowen* as authoritative).

nario described above, the D.C. Circuit adopted this very exception in *National Petrochemical & Refiners Ass'n v. EPA*, shocking many regulated parties[13] and spurring a heated debate on the D.C. Circuit.[14]

The issue at the center of this intense debate is the focus of the discussion that follows. This Note analyzes what it calls the tardy-agency problem: the unresolved question of whether an agency is authorized to promulgate a retroactive rule after missing a statutory deadline, without explicit authorization from Congress. With agencies facing myriad new deadlines, the tardy-agency problem is critically important for regulated parties. In light of *National Petrochemical & Refiners Ass'n*, regulated entities that might usually assume agency rules can only be applied prospectively, must now ask whether retroactivity is allowed when agencies miss deadlines. Furthermore, this issue carries broader implications for government effectiveness and the political struggle between the President and Congress. While allowing retroactive rulemaking might weaken the effect of statutory deadlines, barring retroactivity might allow a President who disagrees with Congress's policy to miss agency deadlines in order to grant reprieve to regulated parties and flout the will of the legislative branch.[15] Despite the urgency of this issue for regulated parties and the broader concerns it raises, there has been little scholarship on retroactive rulemaking broadly and no scholarship on the tardy-agency problem specifically.[16] And the case law on this issue includes little helpful reasoning to guide courts or parties in the future.[17] Courts

13. Petition for Writ of Certiorari at 27–30, Nat'l Petrochemical & Refiners Ass'n v. EPA (*Nat'l Petrochemical & Refiners Ass'n III*), 132 S. Ct. 571 (2011) (No. 11-102) (expressing deep concern over the D.C. Circuit's holding and its potential effect on fuel refiners and other parties facing large regulatory schemes).

14. *Compare Nat'l Petrochemical & Refiners Ass'n I*, 630 F.3d at 162–63 (stating that the D.C. Circuit has accepted Justice Scalia's view that an exception to the general rule against retroactive rulemaking exists when an agency misses a statutory deadline), *with* Nat'l Petrochemical & Refiners Ass'n v. EPA (*Nat'l Petrochemical & Refiners Ass'n II*), 643 F.3d 958, 959–62 (D.C. Cir. 2011) (Brown, J., dissenting from the denial of rehearing en banc) (arguing that the exception "conflicts with the Supreme Court's clear-statement rules, usurps legislative power, renders statutory deadlines precatory, multiples uncertainty for regulated entities, and encourages lethargic administration").

15. *See infra* Part II.F.

16. *See infra* Part I for a discussion of the existing relevant case law and scholarship.

17. *See Nat'l Petrochemical & Refiners Ass'n I*, 630 F.3d at 162–63 (adopting Justice Scalia's exception to the prohibition on retroactive rulemaking but

and regulated parties are left with only the standard reasoning and rules that apply to traditional cases of retroactive rulemaking. This critical problem demands a more nuanced solution.

This Note fills the vacuum of scholarship on the tardy-agency problem. Part I introduces the relevant case law and scholarship and reviews the Supreme Court's jurisprudence on retroactivity. Part II analyzes the reasoning courts frequently use to justify the prohibition on retroactive rulemaking and explains why this reasoning is insufficient to answer the tardy-agency problem. Part III proposes a new model that empowers agencies to use retroactive rulemaking in the tardy-agency problem scenario when Congress implicitly authorizes it. Part III concludes by explaining how this approach is consistent with administrative law principles and how it addresses the competing policy interests presented by this important problem.

I. THE TARDY-AGENCY PROBLEM AND THE DOCTRINES THAT GOVERN RETROACTIVE RULEMAKING

Before considering the doctrines that govern retroactive rulemaking, it is necessary to explain why the tardy-agency problem exists at all. Keeping in mind that that the Supreme Court has enunciated a general bar on retroactive rulemaking,[18] it is helpful to consider what makes the tardy-agency problem unique. The key distinction is the existence of a statutory deadline that the relevant agency has missed.

A. AGENCY POWER AND STATUTORY DEADLINES

Agencies consistently face a large number of statutory deadlines, requiring them to promulgate rules and take specific actions by certain dates.[19] This is especially true today, when agencies face a "tsunami" of rules required under recently enacted laws.[20] As *National Petrochemical & Refiners Ass'n* demonstrates, it is entirely possible for an agency to miss a

focusing on the unique statutory scheme in the case and failing to provide guidance on when the exception applies more broadly).

18. *See supra* note 10 and accompanying text.

19. *See* RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE 1079 (5th ed. 2010) (recognizing that Congress imposes a large number of statutory deadlines on agencies and criticizing this practice because "Congress establishes so many deadlines for so many actions by the same agency that the agency cannot possibly use the presence of a deadline as an indication that Congress attaches a priority to one or a few actions").

20. *See supra* note 8 and accompanying text.

statutory deadline.[21] As such, courts have developed principles to govern agency delay.

If an agency misses a deadline, courts must first determine whether that agency retains the power to act. One might intuitively assume that an agency, after missing a statutory deadline, would lose whatever power Congress gave it.[22] However, in response to a split amongst the federal courts of appeals on this issue,[23] the Supreme Court held in 2003 that agencies generally *do* retain the power to act.[24] In *Barnhart v. Peabody Coal Co.*, the Court considered a challenge to the Commissioner of Social Security's decision to exercise the power, under federal law, to assign retired coal workers to coal companies for retirement benefits.[25] The relevant statute required the Commissioner to complete "all assignments before October 1, 1993," but the Commissioner did not meet that deadline and assigned some 10,000 people after October 1.[26] In response, the Court held that the Commissioner still retained the power to act after the deadline passed.[27] Although the statute used strong language (e.g., the word "shall"), the Court held that, absent language from Congress dictating what penalty to apply to a tardy agency, courts would neither take away an agency's power nor impose other "coercive sanction."[28]

This counterintuitive doctrine raises important questions about agency delay and retroactivity. In a hypothetical tardy-agency problem, an agency has missed a deadline and, in moving to create a rule that still meets the intent of Congress, must decide whether to promulgate that rule back to the statutory deadline. While *Barnhart* does not address retroactivity, it does demonstrate that a statutory deadline signifies a temporal

21. *Nat'l Petrochemical & Refiners Ass'n I*, 630 F.3d at 147–52.

22. Jacob E. Gersen & Anne Joseph O'Connell, *Deadlines in Administrative Law*, 156 U. PA. L. REV. 923, 954–56 (2008) (describing the "most plausible inference" that an agency loses its power after its statutory authority expires).

23. PIERCE, *supra* note 19, at 1088.

24. *See* Barnhart v. Peabody Coal Co., 537 U.S. 149, 159–60 (2003).

25. *Id.* at 152–54.

26. *Id.* at 155–56.

27. *Id.* at 157–59.

28. *Id.* at 159. *Barnhart* extends to cases in which an agency has not promulgated a rule by a specific statutory deadline for doing so. *See* Gersen & O'Connell, *supra* note 22, at 954–56.

preference on the part of Congress and that agencies retain significant power despite the passage of a deadline.[29]

B. AGENCIES AND RETROACTIVITY

Congress has delegated significant authority to agencies, including the power to take substantive policymaking action.[30] Congress delegates this power through specific statutes, often called "organic statutes," that create and empower agencies.[31] An organic statute serves as the primary authority on an agency's power, with the Administrative Procedure Act (APA) laying out general standards and procedural rules that apply only when an organic statute leaves a gap in its coverage.[32]

Agencies can take policymaking action in one of two ways. First, agencies can interpret statutes and announce policies and standards through case-by-case adjudication.[33] Second, agencies can do the same through rulemaking, under the procedures outlined in the APA.[34] Agencies can use both of these policymaking tools to take retroactive action, but the limits on their ability to act retroactively in each context vary.

1. Adjudication

Agencies regularly engage in adjudication that covers a wide range of topics. From complex employment cases under the National Labor Relations Board to the simple processing of a Social Security claim, agencies spend a significant portion of their time and resources adjudicating claims, requests, and disputes.[35] While agency adjudication can take many forms,[36]

29. *See* Gersen & O'Connell, *supra* note 22, at 954–56 (analyzing the important implications of the holding in *Barnhart*).

30. PIERCE, *supra* note 19, at 408 (discussing the delegation of power by Congress to agencies to make substantive rules).

31. *Id.*

32. *See* Richard E. Levy & Sidney A. Shapiro, *Administrative Procedure and the Decline of the Trial*, 51 U. KAN. L. REV. 473, 486 n.59 (2003) (noting that the APA's provisions serve as gap-fillers and that the relevant organic statute trumps the APA where the two conflict).

33. *See, e.g.*, CHARLES ALAN WRIGHT & CHARLES H. KOCH, JR., FEDERAL PRACTICE AND PROCEDURE: JUDICIAL REVIEW OF ADMINISTRATIVE ACTION § 8123 (2012) (discussing the power of an agency to decide whether to use adjudication or rulemaking to make policy).

34. *Id.*

35. *See, e.g.*, PIERCE, *supra* note 19, at 702 (giving examples of agency adjudications and noting that agencies conduct "millions of adjudications each year," far more than the courts).

36. *Id.*

scholars and courts often analogize agency adjudications to the decision-making process of courts.[37] Agencies can, and often do, use adjudication to look beyond the case at hand and interpret federal statutes or announce new polices, standards, or guidelines.[38]

In response to agency policymaking through adjudication, the Supreme Court, in the landmark case *SEC v. Chenery Corp.*, held that agencies can make the interpretations and policies they announce in adjudicatory proceedings retroactive.[39] Specifically, the Court stated that the negative effects of retroactivity must be balanced against the negative effects of "producing a result which is contrary to a statutory design."[40]

There are limitations, however, on the extent of an agency's power to make adjudicatory decisions retroactive. The D.C. Circuit distinguishes between adjudicatory rules that substitute "new law for old law that was reasonably clear" and those that are merely "new applications of [existing] law, clarifications and additions."[41] While an adjudicatory rule that substitutes new law for old "may justifiably be given prospectively-only effect in order to protect the settled expectations of those who have relied on the preexisting rules,"[42] a rule that is simply a new application of existing law carries "a presumption of retroactivity" that courts adhere to unless the retroactivity leads to "manifest injustice."[43] In one of the key cases to come out of

37. *See, e.g.*, *id.* at 894 (noting that the agency adjudicatory decision-making process resembles and is often based on that of courts).

38. *See* SEC v. Chenery Corp., 332 U.S. 194, 202 (1947) (acknowledging that agencies cannot announce every principle in the form of a rule and holding that "administrative agenc[ies] must be equipped to act either" through rulemaking or adjudication); *see also* NLRB v. Bell Aerospace Co., 416 U.S. 267, 294 (1974) (summarizing court precedent and reiterating that an agency is "not precluded from announcing new principles in an adjudicative proceeding and that the choice between rulemaking and adjudication lies" with the agency in question).

39. *See Chenery Corp.*, 332 U.S. at 202 (holding that an agency must be able to make policies either by general rule or by individual order and that giving such policies retroactive effect would not automatically invalidate them); *see also* Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 224 (1988) (Scalia, J., concurring) ("[N]othing prevents the agency from acting retroactively through adjudication.").

40. *Chenery Corp.*, 332 U.S. at 203.

41. Verizon Tel. Cos. v. FCC, 269 F.3d 1098, 1109 (D.C. Cir. 2001) (quoting Pub. Serv. Co. v. FERC, 91 F.3d 1478, 1488 (D.C. Cir. 1996)).

42. *Id.* (internal quotation marks omitted).

43. Qwest Servs. Corp. v. FCC, 509 F.3d 531, 539 (D.C. Cir. 2007) (quoting AT&T v. FCC, 454 F.3d 329, 332 (D.C. Cir. 2006)).

Chenery Corp.,[44] the D.C. Circuit established a multi-factor balancing test to assess whether retroactive adjudicatory action is appropriate.[45] The *Retail, Wholesale & Department Store Union* test asks (1) whether the case is "one of first impression," (2) whether the rule is "an abrupt departure from well established practice," (3) to what extent the regulated party in question relied on the previous rule, (4) what is the burden on the regulated party, and (5) what is the "statutory interest in applying a new rule."[46] Thus, within the confines of the test above, adjudication is a process agencies regularly use to make policies and rules that have retroactive effect.

2. Rulemaking

As noted above, agencies can make substantive policy through rulemaking. Agencies largely make substantive rules, called legislative rules, through the so-called "notice-and-comment" procedures outlined in Section 553 of the APA.[47] Before discussing retroactive rulemaking, however, it is necessary to make several points. First, it is not always clear whether an agency's action is retroactive. Courts define a retroactive rule as one that "takes away or impairs vested rights acquired under existing law, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past."[48] Second, while agencies make policy through substantive legislative rules, they can frequently use interpretative rules to put forth interpretations of relevant statutes.[49] These interpretative rules do not carry the same

44. *See, e.g.*, William V. Luneburg, *Retroactivity and Administrative Rulemaking*, 1991 DUKE L.J. 106, 113 (describing the central role the test explained above has played in assessing retroactive adjudicatory actions).

45. Retail, Wholesale & Dep't Store Union v. NLRB, 466 F.2d 380, 390 (D.C. Cir. 1972).

46. *Id. But see Verizon Tel. Cos.*, 269 F.3d at 1109–10 (acknowledging the importance of the *Retail, Wholesale & Department Store Union* test but also admitting that the D.C. Circuit has applied other similar tests in assessing the reasonableness of retroactive adjudicatory action).

47. *See, e.g.*, PIERCE, *supra* note 19, at 561–69 (describing the tendency of agencies to use the procedures outlined in Section 553 of the APA, called "notice-and-comment" rulemaking, to make rules).

48. Nat'l Mining Ass'n v. Dep't of Labor, 292 F.3d 849, 859 (D.C. Cir. 2002) (quoting Nat'l Mining Ass'n v. U.S. Dep't of Interior, 177 F.3d 1, 8 (D.C. Cir. 1999)); *see also* Landgraf v. USI Film Prods., 511 U.S. 244, 280 (1994) (using a similar definition to describe retroactive statutes).

49. *See* Kenneth Culp Davis, *Administrative Rules—Interpretative, Legislative, and Retroactive*, 57 YALE L.J. 919, 928–34 (1948) (providing a still-

weight that legislative rules do and, therefore, do not fall under any bar on retroactive rulemaking.[50] The tardy-agency problem does not involve agency interpretative rules. Finally, there is a distinction between instances in which an agency proactively gives a rule retroactive effect and when an agency applies a current rule retroactively.[51] This discussion focuses on the former.

Agencies' ability to engage in retroactive rulemaking changed in 1988.[52] The Supreme Court's decision in *Bowen v. Georgetown University Hospital* reduced the ability of agencies to apply rules retroactively.[53] Although lower courts have developed the retroactive rulemaking analysis further since *Bowen*,[54] it is helpful to break down the retroactive rulemaking jurisprudence into pre- and post-*Bowen* eras.

*a. Pre-*Bowen

Prior to the *Bowen* decision in 1988, agencies regularly "engaged in retroactive rulemaking."[55] Although there is little case law dealing with retroactive rulemaking prior to *Bowen*,[56] decisions by the Supreme Court and the lower courts do provide some guidance on the issue. In *Addison v. Holly Hill Fruit Products, Inc.*, prior to the enactment of the APA, the Supreme Court considered regulatory exemptions from the Fair Labor Standards Act, promulgated by the Administrator of the Wage

illuminating discussion on the difference, both real and theoretical, between legislative and interpretative rules).

50. *See id.* at 958–59 (arguing that where interpretative rules do not change law, their retroactivity poses no problem, but that in the more common instance when they do change law, their retroactivity should be dealt with like legislative rules).

51. *See* Luneburg, *supra* note 44, at 122–23 (explaining the difference between retroactive application of a regulation and proactive efforts to promulgate a retroactive rule).

52. *See* Bowen v. Georgetown Univ. Hosp., 488 U.S. 204 (1988); *see also* PIERCE, *supra* note 19, at 482 (claiming that *Bowen* "drastically" changed the body of law governing retroactive rulemaking).

53. PIERCE, *supra* note 19, at 485 (asserting that the *Bowen* decision will likely force agencies to make retroactive policy through the adjudicatory process).

54. *Id.* at 487–95 (discussing how the lower courts have applied *Bowen* in retroactive rulemaking decisions since 1988).

55. *Id.* at 481.

56. *See* Luneburg, *supra* note 44, at 122 (pointing out that, before *Bowen*, "there were relatively few cases in which the Supreme Court directly confronted the question of agency authority to act retroactively through" rulemaking).

and Hour Division.[57] The Court held that the exemptions went beyond the reach of the statute and invalidated them.[58] The Court directed the Administrator to promulgate new regulations and to make those regulations retroactive.[59] Although the Court acknowledged the dangers of retroactive rulemaking, it ultimately found that any other result would produce outcomes "contrary to the statutory design" and held that retroactivity was the "lesser evil."[60]

While their decisions vary, the lower courts largely applied some variation of the *Retail, Wholesale & Department Store Union* test to cases of retroactive rulemaking, despite the fact that the D.C. Circuit created it for adjudication.[61] Under this test, lower courts sometimes found retroactivity permissible. In *Maxcell Telecom Plus, Inc. v. FCC*, the D.C. Circuit affirmed the FCC's decision to change an application process for certain regulated parties.[62] In doing so, the court applied *Chenery Corp.* and the *Retail, Wholesale & Department Store Union* balancing test and found that the impact on the regulated parties was minimal and that the interest of the FCC in efficiently processing applications was significant.[63] In *Citizens to Save Spencer County v. EPA*, the D.C. Circuit considered a decision by EPA to give two rules retroactive effect.[64] The court upheld EPA's actions, arguing that the retroactivity was reasonable because it minimally affected the parties, the parties had sufficient notice, and the agency qualified under the APA for a good-

57. Addison v. Holly Hill Fruit Prods., Inc., 322 U.S. 607, 608–09 (1944). While rule-like actions taken by the Wage and Hour Division are generally interpretative, the Court considers these rules as being legislative and thus the case informs the modern debate on retroactive rulemaking. *See* Davis, *supra* note 49, at 932 n.63 (stating that the Court considered the Administrator's regulation here to be legislative); *see also* Luneburg, *supra* note 44, at 122–23 (discussing *Addison*'s significance without focusing on the distinction between interpretative and legislative rules).

58. *Addison*, 322 U.S. at 619 ("[T]he regulations . . . are ultra vires.").

59. *Id.* at 620 ("The accommodation that we are making assumes . . . that the Administrator will retrospectively act . . . . To be sure this will be a retrospective judgment, and law should avoid retroactivity as much as possible. But other possible dispositions likewise involve retroactivity, with the added mischief of producing a result contrary to the statutory design.").

60. *Id.* at 620–22.

61. *See* Luneburg, *supra* note 44, at 113.

62. Maxcell Telecom Plus, Inc. v. FCC, 815 F.2d 1551, 1555–56 (D.C. Cir. 1987).

63. *Id.*

64. Citizens to Save Spencer Cnty. v. EPA, 600 F.2d 844, 879–80 (D.C. Cir. 1979).

cause exception to the law's normal procedural requirements.[65] In another case, the First Circuit upheld a retroactive Medicare regulation after comparing "the public interest in the retroactive rule with the private interests that are overturned by it."[66]

Other courts, applying the same standard, held retroactivity impermissible. In *Mason General Hospital v. Secretary of the Department of Health & Human Services*, for example, the Sixth Circuit invalidated the department's attempt to apply a rule retroactively back to 1979.[67] The court applied a modified version of the *Retail, Wholesale & Department Store Union* test, focusing largely on the need to comply with the statutory purpose underlying the regulations, the impact on the parties, and the degree of capriciousness in the agency's action.[68] The cases of the pre-*Bowen* era show that courts, through the application of complex balancing analyses, worked to effectuate statutory purpose.

b. Bowen

In 1988, the United States Supreme Court clarified the law regarding retroactive rulemaking.[69] In *Bowen*, the Court considered a challenge by hospitals in Washington, D.C. to retroactive regulations promulgated by the Secretary of Health and Human Services.[70] On June 30, 1981, the Secretary promulgated a set of regulations stating the costs for which hospitals participating in Medicare could be reimbursed.[71] After a district court invalidated those regulations for violating the procedural requirements of the APA,[72] the Secretary reissued the regulations on November 26, 1984.[73] He made the regulations retroactive to July 1, 1981, and proceeded to collect over $2 million in past over-payments to Washington hospitals.[74] The parties challenged the retroactive effect of the regulations.[75]

65. *Id.*

66. Adams Nursing Home of Williamstown, Inc. v. Mathews, 548 F.2d 1077, 1080 (1st Cir. 1977).

67. Mason Gen. Hosp. v. Sec'y of the Dep't of Health & Human Servs., 809 F.2d 1220, 1229–30 (6th Cir. 1987).

68. *Id.* at 1227–28.

69. *See* Bowen v. Georgetown Univ. Hosp., 488 U.S. 204 (1988).

70. *Id.* at 206.

71. *Id.*

72. *Id.* at 206–07.

73. *Id.* at 207.

74. *Id.*

75. *Id.*

The district court applied the balancing test found in *Retail, Wholesale & Department Store Union* and found that the retroactive rules in this case were not justified.[76] The D.C. Circuit invalidated the rules by arguing that the language of the APA forbids retroactive rulemaking.[77] The Supreme Court affirmed on different grounds, laying out a clear new standard for considering retroactive rulemaking.[78] The Court noted that "[r]etroactivity is not favored in the law" and held that "a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules *unless that power is conveyed by Congress in express terms*."[79] The Court found no such express authority in the statutory language authorizing the Secretary to make the rules in question and invalidated them.[80]

In his concurrence to the *Bowen* decision, Justice Scalia provided reasoning for the decision by examining the language of the APA.[81] He argued that the APA's definition of the term "rule," which describes a rule in part as "an agency statement of general or particular applicability *and future effect*,"[82] prohibits its rules that have retroactive effect.[83] Justice Scalia articulated a distinction between primary retroactivity, which alters "the *past* legal consequences of past actions,"[84] and secondary retroactivity, which has "exclusively future effect" but does "*affect* past transactions."[85] He asserted that rules that have secondary retroactive effect are valid unless unreasonable.[86] He reaffirmed that agencies can make retroactive policies through ad-

76. Georgetown Univ. Hosp. v. Bowen, Nos. 85-1845, 35-2545, 85-2862, 1986 WL 53398, at *7–9 (D.D.C. Apr. 11, 1986).

77. *Bowen*, 488 U.S. at 207–08.

78. *Id.* at 208.

79. *Id.* (emphasis added).

80. *Id.* at 209–16 (analyzing the relevant statutes and finding no express authorization from Congress of retroactive rulemaking).

81. *Id.* at 216 (Scalia, J., concurring) ("I write separately because I find it incomplete to discuss general principles of administrative law without reference to the basic structural legislation which is the embodiment of those principles, the Administrative Procedure Act . . . .").

82. 5 U.S.C. § 551(4) (2006) (emphasis added).

83. *Bowen*, 488 U.S. at 216–18 (Scalia, J., concurring) (arguing that other interpretations of "future effect" would render the statutory provision, or the statute's distinction between rulemaking and adjudication, meaningless).

84. *Id.* at 219.

85. *Id.* at 219–20.

86. *Id.* at 220.

judication[87] and speculated that some statutes provide implicit authorization for retroactive rulemaking.[88] Specifically, Justice Scalia raised the example of an agency missing a statutory deadline, stating that such an instance might present an exception from the general rule and implicit authorization for reasonable retroactive rulemaking.[89]

c. Post-Bowen

In the years since *Bowen*, lower courts have considered the general question of retroactive rulemaking in greater detail. The D.C. Circuit has acknowledged that the Court's retroactivity rules can be difficult to apply[90] and, in order to clarify the type of retroactivity to which *Bowen* applies, has adopted Justice Scalia's distinction between primary and secondary retroactivity.[91] Agencies have mitigated some of the effects of the bar on retroactive rulemaking by making interpretative rules,[92] claiming the good-cause exception to the requirements of the APA in order to issue rules more quickly,[93] and establishing policy through adjudication.[94]

Specifically, the D.C. Circuit has also considered Justice Scalia's proposed exception and the question of whether retroactive rulemaking is justified when an agency misses a statuto-

87. *Id.* at 224 ("[N]othing prevents the agency from acting retroactively through adjudication.").

88. *Id.* ("It may even be that implicit authorization of particular retroactive rulemaking can be found in existing legislation.").

89. *Id.* at 224–25.

90. Nat'l Mining Ass'n v. Dep't of Labor, 292 F.3d 849, 859 (D.C. Cir. 2002) ("The general legal principles governing retroactivity are relatively easy to state, although not as easy to apply.").

91. *See, e.g.*, Nat'l Cable & Telecomms. Ass'n v. FCC, 567 F.3d 659, 670–71 (D.C. Cir. 2009) (recognizing that a rule that has primary retroactive effect, by subjecting past conduct to new penalties, is invalid, while a rule that has secondary retroactive effect because it "upsets expectations," is invalid only if arbitrary and capricious).

92. *See, e.g.*, Farmers Tel. Co., Inc. v. FCC, 184 F.3d 1241, 1250 (10th Cir. 1999) ("We agree with the FCC that the question of retroactivity does not arise in the present case because its ruling is merely interpretative."). *But see* Health Ins. Ass'n of Am., Inc. v. Shalala, 23 F.3d 412, 425 (D.C. Cir. 1994) ("As for the retroactivity issue, we hold that courts cannot award HCFA recovery out of deference to interpretive rules that did not exist when the transactions at issue were conducted.").

93. *See* PIERCE, *supra* note 19, at 488 (noting that while an agency cannot give a rule retroactive effect, it can use the good-cause exception to avoid APA's procedural requirements and make the rule more quickly).

94. *See supra* Part I.B.1.

ry deadline.[95] In *National Petrochemical & Refiners Ass'n*, the D.C. Circuit considered a challenge to a set of regulations dictating the percentage of renewable fuels required in gasoline.[96] EPA had missed a statutory deadline for promulgating the regulations and applied them retroactively to the entire 2010 calendar year.[97] Without deciding whether the regulation had primary or secondary retroactive effect,[98] the court stated that Congress had implicitly authorized EPA's promulgation of retroactive rules in this case.[99] The court adopted Justice Scalia's view from the concurrence in *Bowen* that a statute might implicitly authorize reasonable retroactive rulemaking when an agency misses a statutory deadline.[100] Without discussing the concerns that usually arise when courts consider retroactive rulemaking,[101] the court supported its holding by noting that the statute in question, as written, seemed to forecast the possibility of some retroactivity.[102] Furthermore, the court supported its holding with the judgment that the "Final Rule's retroactivity does not make 'the [regulated parties'] situation worse.'"[103]

95. *See* Sierra Club v. Whitman, 285 F.3d 63, 68 (D.C. Cir. 2002) ("There may be an exception for situations in which the 'statute prescribes a deadline by which particular rules must be in effect' and the 'agency misses that deadline.' Even then, retroactivity must be 'reasonable' . . . ." (citations omitted) (quoting Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 224–25 (1988))); Celtronix Telemetry, Inc. v. FCC, 272 F.3d 585, 588 (D.C. Cir. 2001) (stating that the D.C. Circuit holds Justice Scalia's concurring opinion in *Bowen* as "substantially authoritative" (citing and quoting Bergerco Can. v. U.S. Treasury Dep't, 129 F.3d 189, 192–93 (D.C. Cir. 1997))).

96. *Nat'l Petrochemical & Refiners Ass'n I*, 630 F.3d 145, 147–52 (D.C. Cir. 2010).

97. *Id.*

98. *Id.* at 162 (neglecting to decide whether the rule had primary or secondary retroactive effect).

99. *Id.* at 162–64.

100. *Id.* at 162–63 ("This court has treated Justice Scalia's concurring opinion as substantially authoritative . . . ." (quoting *Celtronix Telemetry, Inc.*, 272 F.3d at 588) (internal quotation marks omitted)).

101. *Id.* at 163 (stating merely that traditional issues arising in the context of retroactive rulemaking are not applicable in this case).

102. *Id.* (explaining that even if EPA had promulgated rules by the applicable deadlines, the requirement of a sixty-day congressional review period would still have forced the agency to either not abide by the law in full or apply rules retroactively).

103. *Id.* (contrasting EPA's legitimate exercise of retroactive rulemaking power with the illegitimate retroactive regulation in *Sierra Club v. Whitman*, 285 F.3d 63, 68 (D.C. Cir. 2002)).

In a dissent to the decision to deny a rehearing en banc, Judge Brown argued that the holding in *National Petrochemical & Refiners Ass'n* conflicts with the Supreme Court's rule in *Bowen*.[104] She suggested that if Congress meant to fill the gap between a missed deadline and promulgation of the final rule, it could give an agency that power expressly or use other mechanisms to change the status quo rules until a final rule is promulgated.[105] She noted that the holding is not consistent with the "textual emphasis on '*future effect*'" found in Justice Scalia's APA argument against retroactive rulemaking.[106] She also reasoned that just because the statutory provision raises the possibility of retroactive action does not mean it provides the sort of express approval of retroactive action required by *Bowen*.[107] Finally, she warned against the effects of giving a "'laggard agency'" the power to resolve problems caused by its own delay.[108] In summary, while agencies generally need congressional authorization to make retroactive rules, courts are debating whether agencies can act retroactively after missing deadlines.

II. TRADITIONAL RETROACTIVE RULEMAKING REASONING FAILS TO SOLVE THE TARDY-AGENCY PROBLEM

At its core, the tardy-agency problem represents a clash of competing presumptions. And while agencies and regulated parties count on courts to resolve this tension, the reasoning courts typically use in response to retroactive rulemaking fails to address the tardy-agency problem.

104. *Nat'l Petrochemical & Refiners Ass'n II*, 643 F.3d 958, 960 (D.C. Cir. 2011) (Brown, J., dissenting from the denial of rehearing en banc) (arguing that the Scalia exception conflicts with the Supreme Court's clear rule in *Bowen*).

105. *Id.* at 961.

106. *Id.*

107. *Id.* at 962 ("[J]ust because a statutory 'provision on its face permits some form of retroactive action' does not mean Congress intended to grant general 'authority for the retroactive promulgation of . . . rules.'" (quoting Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 209 (1988))).

108. *Id.* (quoting Linemaster Switch Corp. v. EPA, 938 F.2d 1299, 1303 (D.C. Cir. 1991)).

A. COMPETING PRESUMPTIONS AND THE INSUFFICIENCY OF *BOWEN*

The general rule against retroactive rulemaking, or the *Bowen* rule, is a presumption that Congress, unless it explicitly says otherwise, does not intend to grant an agency the power to make retroactive rules.[109] In other words, without the express word of Congress, an agency is *lacking* a certain power (i.e., the power to make rules retroactively). At first glance, this presumption might seem to address any and all retroactivity cases. However, what makes the tardy-agency problem distinct is the existence of an agency deadline. The tardy-agency problem implicates another presumption: the *Barnhart* rule. Where *Bowen* presumes an agency lacks a certain power, the *Barnhart* rule presumes that, absent explicit language to the contrary, an agency retains the power to act after it has missed a statutory deadline.[110] In other words, despite the lack of an express word of Congress, an agency *does have* a certain power (i.e., the power to act even after missing a relevant deadline).

Because the *Barnhart* case did not deal with retroactivity,[111] it does not fully collide with the presumption against retroactive rulemaking. Still, the two presumptions do conflict in the sense that the *Barnhart* rule acknowledges the complex congressional intent underlying a statutory deadline and recognizes that an agency can sometimes retain the power to meet the requirements of a statute, even when the statutory deadline has passed.[112] *Barnhart* could be read to indicate that, where Congress has done the work of making precise declarations about when certain policies should apply, agencies should meet those temporal requirements, even where retroactivity is required.[113] Indeed, *Bowen* did not foreclose Congress's ability to implicitly authorize retroactivity[114] and so it is possible that

109. *See Bowen*, 488 U.S. at 208–09.

110. *See* Barnhart v. Peabody Coal Co., 537 U.S. 149, 159 (2003).

111. *See id.* at 152–53.

112. *Id.* at 159 (refusing to interpret a statutory deadline to mean that Congress intends for a grant of power or authority to end at the deadline); *see also* Gersen & O'Connell, *supra* note 22, at 954–55 (discussing the complex considerations underlying the holding in *Barnhart*).

113. *Cf.* PIERCE, *supra* note 19, at 483–85 (criticizing *Bowen*, explaining its potentially devastating effects, and arguing that agencies should retain the power to act retroactively after a deadline, unless Congress says otherwise).

114. *See, e.g.*, Brief for Federal Respondent in Opposition to Petition for Writ of Certiorari at 10–11, *Nat'l Petrochemical & Refiners Ass'n III*, 132 S.

a clear deadline from Congress could constitute authorization to act retroactively.

The possibility that Congress could implicitly authorize retroactivity and the competing presumptions inherent in the tardy-agency problem weakens the power of the *Bowen* rule. Imagine, for example, that Congress enacts a significant domestic policy program. As a part of the program, it sets a number of deadlines for relevant agencies to promulgate critical regulations. These deadlines are interdependent and it is vital that the agencies promulgate regulations that encompass the time periods that are covered by the deadlines. If the agencies miss the relevant deadlines, *Barnhart* assures them they do retain the power to act. In this scenario, the idea that *Bowen* steps in and strips the agency of the power to effectuate Congress's temporal intent seems faulty.[115] At a minimum, it calls for a deeper analysis into the reasoning that generally applies in retroactivity cases, to determine whether it adequately addresses the tardy-agency problem.

B. THE EXPRESS LANGUAGE OF THE APA

In explaining the bar on retroactive rulemaking, judges may look to the language of the APA.[116] Justice Scalia, in a concurrence explaining the rationale for the bar on retroactive rulemaking, points to the definition of the term "rule," found in Section 551 of the APA.[117] The APA defines a "rule" as "the whole or a part of an agency statement of general or particular applicability *and future effect*."[118] While the argument that this definition bars retroactive rulemaking may sufficiently address some retroactivity cases, it does not solve the tardy-agency problem.

In *Bowen*, the express language of the APA was sufficient to justify a bar on retroactive rulemaking.[119] The controversy in

Ct. 571 (2011) (No. 11-102) (pointing out that both parties agreed that *Bowen* did not foreclose implicit congressional authorization of retroactivity).

115. *See, e.g.*, PIERCE, *supra* note 19, at 483 (arguing that Congress likely does not intend to restrict retroactivity when it grants an agency extensive rulemaking power).

116. *See, e.g.*, Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 216 (1988) (Scalia, J., concurring) (justifying the bar on retroactive rulemaking by examining the express language of the APA).

117. *See, e.g.*, *id.* (examining the definition of "rule" found in Section 551 and focusing on the term "future effect").

118. 5 U.S.C. § 551(4) (2006) (emphasis added).

119. *Bowen*, 488 U.S. at 208.

that case involved the Secretary of Health and Human Services's power to promulgate rules governing to what extent Medicare reimbursed healthcare providers.[120] The statutory provision granting him this power contained no deadline.[121] A court struck down the Secretary's first rule governing the reimbursement rate for healthcare providers in Washington, D.C.[122] The Secretary then promulgated a new regulation, following the proper procedures, which *reached back* and reinstated the limit on reimbursement payments included in his earlier rule.[123] In *Bowen*, Congress provided no explicit guidance on what time frame the relevant agency should attempt to cover with its rulemaking power. When an agency has the discretion to make a rule and no direction from Congress on when the rule should apply, the only guidance a court has on the timing of a rule is the APA's general statement that rules should have "future effect."[124] In other words, a court has no indication from Congress regarding the timing of the rule, but it does know that Congress generally defines rules as having "future effect." Thus, the "future effect" language sufficiently justifies the bar on retroactive rulemaking because it provides the only indication from Congress as to the timing and applicability of the rule.

The tardy-agency problem is different because Congress has stepped in and provided specific requirements for the timing of the rule. In *National Petrochemical & Refiners Ass'n*, for example, the relevant statute sets out minimum volumes of renewable fuels, increasing the volume each successive year through 2022.[125] At the same time, the statute sets out a deadline for EPA to meet in promulgating regulations regarding the volumes of renewable fuels, stating that "[n]ot later than 1 year after December 19, 2007, the Administrator shall revise the regulations under this paragraph to ensure that transportation fuel sold or introduced into commerce in the United States . . . on an annual average basis, contains at least the applicable volume . . . ."[126] Here Congress has provided some sense of the

120. *Id.* at 205–06.

121. 42 U.S.C. § 1395x(v)(1)(A) (2006).

122. *Bowen*, 488 U.S. at 206–07 (recounting a lower court's decision to strike down the Secretary's first rule due to his failure to follow the proper procedures under the APA).

123. *Id.*

124. 5 U.S.C. § 551(4) (2006).

125. 42 U.S.C. § 7545(o)(2)(B) (2006 & Supp. I 2007).

126. *Id.* § 7545(o)(2)(A)(i).

specific requirements it plans to apply to fuel producers and refiners and has set an explicit deadline for the regulating agency to work out the details.[127]

Although the APA may define the word "rule" using the term "future effect,"[128] the relevant organic statute in the tardy-agency problem includes a specific requirement from Congress that the rule be promulgated by a certain date. Congress has indicated that, for any number of important reasons, it wishes the rule to take effect on a certain date. To hold that the definition of "rule" found in the APA would bar retroactive rulemaking in a case like *National Petrochemical & Refiners Ass'n* is to give that language far too much power.[129] It would allow the APA to neuter Congress's intent that agencies should promulgate certain policies to cover certain timeframes, simply because an agency has missed a statutory deadline.[130] Instead, where Congress has provided in the APA and the organic statute two sets of temporal guidance about a rule, it is more likely that Congress still intends for the rule to apply to the specific time period targeted in the organic statute. This is especially true because, traditionally in administrative law, if there is a conflict between the APA and the organic statute, the organic statute governs.[131] The problem with using the APA's language to justify a bar on retroactive rulemaking in the tardy-agency context is particularly apparent in the case of *National Petrochemical & Refiners Ass'n*, where Congress enacted a complex, multiyear regulatory scheme[132] and where, even if EPA had met the applicable deadlines, the agency would have needed to give

127. *Id.*

128. 5 U.S.C. § 551(4).

129. *See* PIERCE, *supra* note 19, at 484 (arguing that the "future effect" argument goes too far and misconstrues the language of the APA).

130. *See id.*

131. *See* Levy & Shapiro, *supra* note 32, at 486 n.59 (noting that the APA's provisions serve as gap-fillers and that the relevant organic statute trumps the APA where the two conflict); *see also* 5 U.S.C. § 559 (2006) (declaring that a subsequent statute will not supersede the APA unless "it does so expressly").

132. Indeed, the intervenors in *National Petrochemical & Refiners Ass'n* seize on the structure of the organic statute to argue that the EPA regulation in question does not have primary retroactive effect. *Nat'l Petrochemical & Refiners Ass'n I*, 630 F.3d 145, 159–60 (D.C. Cir. 2010) (recounting the argument of the intervenors that the level of detail in the statute essentially limits the retroactive effect of the regulation to secondary retroactiveness). The D.C. Circuit did not rule on the intervenors' argument and instead accepted that the rule has retroactive effect and validated that retroactivity. *Id.* at 163–64.

its rule some retroactive effect to cover the entire time period targeted by Congress.[133]

In the traditional retroactive rulemaking scenario, as in *Bowen*, Congress has provided no guidance regarding the timing of the promulgation of a rule. The only guidance courts have is the APA's provision that defines rules as having "future effect."[134] In the tardy-agency problem, Congress has instead provided clear guidance that the rules in question should be promulgated by certain dates and, therefore, should apply to a certain timeframe. Relying on the language of the APA to bar retroactive action in the tardy-agency context gives the APA's language greater power than it deserves and flouts congressional intent on critical policies. This key rationale for the *Bowen* rule does not justify a bar on retroactive rulemaking in the tardy-agency context.

C. THE DISTINCTION BETWEEN RULES AND ADJUDICATION AND THE AVAILABILITY OF ADJUDICATION

Courts can also justify the bar on retroactive rulemaking by pointing to the distinction between rulemaking and adjudication found in the APA. Justice Scalia, for example, argues that rulemaking is by definition prospective under the APA and that the retroactive/prospective distinction is one critical way to distinguish between rulemaking and adjudication.[135] Justice Scalia went further and pointed out that because an agency can make retroactive policy through adjudication, it has other avenues available to take needed retroactive action.[136]

This distinction, used by courts and found within the APA, is unhelpful in the context of the tardy-agency problem. Just as an excessive reliance on the words "future effect" fails to address the tardy-agency problem, a myopic focus on rules being prospective and adjudication being retroactive fails to take into account Congress's actions in the tardy-agency context. In the tardy-agency context, Congress has made a determination that a rule must be promulgated by a certain date, demonstrating

133. *Id.* at 163 ("The structure of the [organic statute] demonstrates that Congress anticipated the possibility of some retroactive impacts . . . .").

134. 5 U.S.C. § 551(4) (2006).

135. *See* Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 218–22 (1988) (Scalia, J., concurring) (examining the APA's distinction between rules and adjudicatory proceedings).

136. *See id.* at 224.

its intent that the rule apply to a certain time period.[137] Just because an agency has missed a statutory deadline does not change the fact that Congress wants a certain rule promulgated by a certain date. If an agency missed a statutory deadline and then finished promulgating a rule retroactive to that deadline, it would not confuse the distinction between rulemaking and adjudication.[138] Instead, it would merely mean that an agency was acting to meet the demands of Congress in a specific statutory provision.

In *National Petrochemical & Refiners Ass'n*, for example, EPA was not taking action that confuses the characteristics of rules and adjudication. Instead, the agency was acting to meet congressional requirements, even if later than required.[139] Furthermore, in that case, if EPA had met the relevant deadlines, its regulation would still have either had retroactive effect or not applied to the entire time period targeted by Congress.[140] This built-in possibility of retroactivity demonstrates that, in the organic statute in *National Petrochemical & Refiners Ass'n*, Congress was less concerned with a distinction between types of agency action based on their temporal applicability, and more on exercising its will through policies that take effect at certain times. The existence of an explicit statutory deadline differentiates the tardy-agency problem from the traditional retroactive rulemaking problem found in *Bowen* and shows that reliance on the distinction between adjudication and rulemaking is insufficient to justify a bar on retroactivity.

Additionally, the availability of adjudication to make retroactive policy does not address the tardy-agency problem. In *National Petrochemical & Refiners Ass'n*, for example, an agency would struggle to use individual adjudicatory proceedings to apply its specific interpretation of the statute's renewable fuels requirements to individual refiners. Neither of these traditional justifications for the bar on retroactive rulemaking sufficiently addresses the tardy-agency problem.

137. *See* Gersen & O'Connell, *supra* note 22, at 937–49 (discussing the important meaning and intent underlying statutory deadlines).

138. Indeed, some administrative law scholars have responded to the rule-adjudication distinction argument by pointing to the fact that some laws and regulations can be applied retroactively and it does not change the fact that they are laws and regulations. *See, e.g.*, PIERCE, *supra* note 19, at 483–84.

139. *See Nat'l Petrochemical & Refiners Ass'n I*, 630 F.3d 145, 163 (D.C. Cir. 2010).

140. *See id.*

D. NOTICE CONCERNS

Courts also note that the lack of notice provided by retroactive rulemaking is problematic.[141] In a case like *Bowen*, the lack of notice creates obvious hardship for the regulated parties. The statute in *Bowen* contained no statutory deadline.[142] Once the original rule was struck down procedurally, the regulated parties had no notice that the Department of Health and Human Services was going to reach back and grab $2 million in funds, years beyond when the providers had received the relevant reimbursements.[143] The facts of *Bowen* demonstrate that this lack of notice could wreak havoc on the ability of a regulated party to plan and predict costs, which Congress would presumably like to avoid.

However, the regulated parties in *National Petrochemicals & Refiners Ass'n*, as the court in the case noted, did have "ample notice" of the requirements that would be included in the ultimate retroactive regulation.[144] EPA had provided some pre-promulgation warning of its regulatory goals and the possibility that the regulation would have retroactive effect.[145] Moreover, the statute itself made clear that Congress was expanding its renewable fuels program over a multiyear period and that EPA would need to act to promulgate rules for this program by certain dates.[146] In the tardy-agency context, unlike in *Bowen*, the existence of a statutory deadline provides parties with a fair warning that regulations are coming. Granted, this warning may not include specific requirements or guidance.[147] But the statutory deadline would certainly provide more notice than the agency did in *Bowen*. Thus, a notice argument fails to thoroughly justify a bar on retroactive rulemaking in the tardy-agency context.

141. *See* Geoffrey C. Weien, Note, *Retroactive Rulemaking*, 30 HARV. J.L. & PUB. POL'Y 749, 756–57 (2007) (discussing the tendency of courts to cite the principle of fair notice as a reason for the bar on retroactive rulemaking).

142. *See* Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 205 (1988) (citing 42 U.S.C. § 1395x(v)(1)(A)).

143. *See id.* at 207 ("Respondents, a group of seven hospitals who had benefited from the invalidation of the 1981 schedule, were required to return over $2 million in reimbursement payments.").

144. *Nat'l Petrochemical & Refiners Ass'n I*, 630 F.3d at 163–64 (describing the notice provided to regulated parties through the statute and notices of proposed rulemaking).

145. *See id.*

146. *See id.*

147. *See supra* note 4.

E. THE GOOD-CAUSE EXCEPTION

Agencies have sometimes used the good-cause exception in the APA as an alternative tool that helps mitigate the effects of the bar on retroactive rulemaking.[148] Section 553 of the APA requires that agencies promulgate a substantive rule according to notice-and-comment procedures.[149] There is an exception from this requirement when an agency finds "good cause" and publishes that finding in the rule.[150] Although an agency cannot promulgate a rule retroactively, it can use the good-cause exception to promulgate a rule much more quickly, avoiding the onerous requirements of Section 553 of the APA.[151] In the context of the tardy-agency problem, if an agency were to miss a deadline, it could avoid added delay by promulgating the rule as quickly as possible.

This strategy may be an effective tactic when an agency is simply trying to move quickly and faces no deadline, but it does not do enough in the tardy-agency problem scenario. Looking again at *National Petrochemical & Refiners Ass'n*, the good-cause exception would not have helped EPA. In that case, EPA had long since missed the late 2008 deadline to promulgate regulations.[152] After announcing its final set of regulations in mid-2010 with the goal of applying them to the entire 2010 calendar year, using the good-cause exception would merely have saved EPA some additional time. EPA would still have been outside the timeframe envisioned by Congress and the delay would have obstructed Congress's desire to implement an ongoing, multiyear regulatory program. Furthermore, this assumes that EPA could have argued it actually had good cause to promulgate the rule without using the APA's notice-and-comment procedures. It is doubtful that every agency facing a tardy-agency problem would be able to prove actual good cause. As *National Petrochemical & Refiners Ass'n* demonstrates, the good-cause exception does not solve the tardy-agency problem.

148. *See* PIERCE, *supra* note 19, at 488 (explaining the tendency of agencies to use the good-cause exception in Section 553 of the APA to make rules more quickly, as an alternative to retroactive rulemaking).

149. 5 U.S.C. § 553 (2006).

150. *Id.*

151. *See* PIERCE, *supra* note 19, at 488.

152. *Nat'l Petrochemical & Refiners Ass'n I*, 630 F.3d 145, 147–52 (D.C. Cir. 2010) (recounting EPA's timeline of action under the relevant organic statute).

The preceding discussion demonstrates that the reasoning behind the *Bowen* rule, and the alternative strategies agencies use to work around the *Bowen* rule, will not sufficiently address the tardy-agency problem. The failure of these explanations, however, does not mean the bar on retroactivity should be lifted entirely in the tardy-agency context. Indeed, even before *Bowen*, courts treated retroactivity carefully and closely examined congressional intent.[153] A brief discussion of the policy concerns implicated by the tardy-agency problem shows that the solution requires more than just an unnuanced blanket approach.

F. POLICY

The tardy-agency problem implicates significant policy concerns. First, courts express the concern that allowing retroactive rulemaking will increase the tendency of agencies to miss deadlines since agencies' incentive to meet deadlines will decrease.[154] This is a relevant concern, because giving agencies the express power to promulgate retroactive rules after missing a deadline certainly could impact the urgency with which agencies approach statutory deadlines. However, the fact that retroactivity could be allowed in only limited circumstances (i.e., when the agency has not missed a deadline due to excessive delay or sloth) demonstrates that this policy concern does not compellingly support a *complete* bar on such retroactive rulemaking because it is possible to address this concern without adopting a blanket prohibition on retroactivity.

A different policy concern also warrants consideration. Barring an agency from promulgating rules retroactively could make it easier for an agency that disagrees with the policy Congress has made in the organic statute in question to try to obstruct the policy from being implemented.[155] Imagine, for example, that Congress and the President enact a policy program that requires years of implementation. However, in the midst of implementation, a new President is elected. If this new President opposes the underlying program, his or her agents throughout the executive branch may slow implementation in

153. *See supra* Part I.B.2.a.

154. *Nat'l Petrochemical & Refiners Ass'n II*, 643 F.3d 958, 958–62 (D.C. Cir. 2011) (Brown, J., dissenting from the denial of rehearing en banc) (noting that the panel's decision in *National Petrochemical & Refiners Ass'n I* "encourages lethargic administration").

155. *See* Gersen & O'Connell, *supra* note 22, at 932–37 (analyzing the reasons Congress uses deadlines and the potential administrative conflicts that can arise between a President and a Congress of different parties).

order to lessen the impact of the legislation. The agencies would know that whenever they miss a statutory deadline, the required regulations would not apply retroactively to that statutory deadline. Having the reasonable power to promulgate retroactive regulations, however, would ensure that an agency would not be able to obstruct the will of Congress through its own tardiness

The tardy-agency problem presents a clash of presumptions. Although interested parties would hope courts could resolve this tension, the reasoning courts frequently use in retroactive rulemaking cases, and the *Bowen* rule that reasoning supports, fail to address the problem. The tardy-agency problem warrants a new approach to help courts and agencies navigate the murky waters of retroactivity and statutory deadlines. But that approach should be nuanced, in order to reflect the complex policy concerns implicated by the tardy-agency problem.

III. A NEW APPROACH: FOCUSING ON CONGRESSIONAL INTENT

Any solution to the tardy-agency problem must respect existing precedent, respond to the various policy concerns presented by the issue, and find support in administrative law. Furthermore, any new approach must succeed where the traditional retroactive rulemaking reasoning and doctrines have failed, by addressing the unique issues presented by the tardy-agency problem.

A. THE CONGRESSIONAL-INTENT APPROACH REFLECTS THE UNIQUE NATURE OF THE TARDY-AGENCY PROBLEM

When faced with an agency that has missed a deadline for promulgating a rule and has promulgated that rule retroactively, a court should not apply a blanket presumption barring retroactive rulemaking.[156] At the same time, the court should not merely assume that because an agency has missed a deadline, it automatically retains the power to make a reasonable rule retroactive.[157] Instead, out from under the umbrella of *Bowen*,

156. A blanket presumption is what Judge Brown proposes. *Nat'l Petrochemical & Refiners Ass'n II*, 643 F.3d at 958–62 (Brown, J., dissenting from the denial of rehearing en banc).

157. The *Nat'l Petrochemical & Refiners Ass'n I* court comes close to allowing reasonable rules to be automatically retroactive, after focusing on the

the court should conduct a searching inquiry to determine whether Congress has implicitly granted retroactive rulemaking power in the statutory deadline provision in question.

Under this test, a court would examine whether Congress's deadline demonstrates a temporal directive to make a rule retroactive to the time period in question, trumping the *Bowen* rule. The court would make this determination by closely analyzing the statutory scheme at issue. This analysis would require a court to analyze a statute clearly and conspicuously, different than the rather opaque and muddled approach taken in *National Petrochemical & Refiners Ass'n*. Evidence of implicit congressional intent could be that a statute is complex and interdependent and that its regulatory structure, in order to be effective, requires regulations to be promulgated and applied to certain timeframes.[158] This approach could also take into account extreme hardship to the parties from retroactive rulemaking because Congress, in providing or failing to provide implicit approval for an agency to make retroactive rules, would also presumably consider the impact of such a power on the regulated parties.

This approach rejects a blanket presumption or rule. Instead, this approach is intensely focused on gauging congressional intent. If Congress has made a conscious policy choice to regulate the timeframe in question, that intention would not be upended because an agency missed a statutory deadline. The congressional intent gleaned by applying the factors above would, essentially, amount to the authorization for retroactivity required in *Bowen*. However, if Congress did not demonstrate such an intention, retroactivity would be barred, especially when the hardship on the parties is great. This approach is more systematic and reliable than the D.C. Circuit's analysis in *National Petrochemical & Refiners Ass'n*, which discussed the peculiar scenario in that case and failed to ground its holding in one line of reasoning.[159] The congressional-intent test also differs from the old *Retail, Wholesale & Department Store Union* balancing test,[160] because it is concerned solely with Con-

unique peculiarities of the statute in question and applying a weak balancing test. 630 F.3d at 162–63.

158. *See, e.g.*, *id.* at 147–52 (describing Congress's multiyear regulatory framework, which increased requirements on fuel refiners in such a way that failing to adhere to the statutory goals in one year could impact adherence to the goals in successive years).

159. *See supra* Part I.B.2.c.

160. *See supra* Part I.B.1.

gress's implicit grant of power and not with the balancing of multiple fuzzy factors. However, this test is consistent with the underlying focus, in both the pre-*Bowen* balancing test and the *Bowen* bright-line rule,[161] with gleaning the will of Congress.

Most importantly, this test provides a solution to the increasingly urgent tardy-agency problem, while taking into account both of the serious policy concerns addressed in Part II.F. Allowing retroactivity any time an agency misses a statutory deadline would render statutory deadlines meaningless. Knowing that courts under this approach will be looking closely at organic statutes to glean congressional intent, and that courts will have the power to bar retroactivity if the hardship on the parties is truly egregious, will encourage agencies to take statutory deadlines seriously and to consider carefully Congress's intent in enacting deadlines in the first place (i.e., does Congress truly mean for the regulation in question to be in place at the deadline?). However, this approach also gives agencies the power to act retroactively, reducing the likelihood that an agency might use the bar on retroactive rulemaking to delay and obstruct the implementation of a policy with which it disagrees. An agency still might purposely choose not to make retroactive rules, but, when faced with pressure from Congress and stakeholders to take action on congressional priorities, the congressional-intent test would make it much harder for agencies to hide behind the tactic of delay.

Practically, courts would implement this approach by enunciating it in a decision, which would then provide guidance to agencies. It is important to note that the congressional-intent approach would not conflict with *Bowen*. Instead, it merely clarifies the *Bowen* holding, much as other post-*Bowen* decisions have done in other ways,[162] by acknowledging that an explicit statutory deadline from Congress can, in some circumstances, amount to the required authorization from Congress to engage in retroactive rulemaking.[163] Once courts have established this new test, agencies would need to consider it in making any decision regarding the promulgation of retroactive rules. While this decision may leave some ambiguity or uncertainty for agencies as they make decisions about rulemaking, it is necessary given the wide variety of statutory and regulatory

161. *See supra* Parts I.B.2.a, I.B.2.b.

162. *See supra* note 91 and accompanying text.

163. *See supra* note 114 and accompanying text (noting that the *Bowen* case did not foreclose implicit authorization of retroactivity by Congress).

schemes. As *National Petrochemicals & Refiners Ass'n* demonstrates, statutory schemes can include complex delegations to agencies combined with specific requirements and mandates.[164] Complex statutes that require significant action on the part of agencies by particular deadlines warrant close congressional-intent analysis to determine if retroactivity is warranted.

B. OTHER AREAS OF ADMINISTRATIVE LAW SUPPORT THE CONGRESSIONAL-INTENT APPROACH

The congressional-intent test, while a break from the traditional bar on retroactive rulemaking found in *Bowen*[165] and from the vague reasoning utilized by the D.C. Circuit in *National Petrochemicals & Refiners Ass'n*,[166] is consistent with the approach taken in other areas of administrative law.

In other key cases, courts do hone in on congressional intent when considering agency power.[167] In fact, congressional intent is a key factor in the complex doctrine that determines the level of scrutiny to be applied to an agency's interpretation of a statute.[168] Agencies regularly interpret the statutes they administer.[169] But judges have long debated to what extent courts should adhere to agencies' interpretations of statutes that govern them.[170] Various levels of scrutiny exist and courts make the decision about how much deference to afford an agency's interpretation by looking to congressional intent.[171] Indeed, courts, under the test in *United States v. Mead Corp.*, look specifically to the statutory scheme in question and to the powers delegated to the agency to determine whether Congress intended for the agency to have broad interpretative powers.[172] For example, Congress might enact a statute that creates an agency and, implicitly, give the agency the power to interpret its originating statute. Conversely, Congress may create an agency and give it minimal interpretative power. Either way, under

164. *Nat'l Petrochemical & Refiners Ass'n I*, 630 F.3d 145, 147–52 (D.C. Cir. 2010) (explaining the renewable fuels program's underlying statutory and regulatory scheme, which was at issue in the case).

165. Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208–09 (1988).

166. *See Nat'l Petrochemical & Refiners Ass'n I*, 630 F.3d at 162–64.

167. *See, e.g.*, United States v. Mead Corp., 533 U.S. 218, 227–31 (2001).

168. *See* Kristin E. Hickman, *The Need for* Mead*: Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV. 1537, 1547–54 (2006).

169. *See id.* at 1548–49.

170. *See id.* at 1549.

171. *See id.* at 1548–54.

172. *Mead*, 533 U.S. at 227–31.

Mead, courts look to congressional intent to determine court scrutiny and agency power.[173]

This approach is very consistent with the congressional-intent solution to the tardy-agency problem. Just as the Court in *Mead* looks to the statutory scheme to glean the interpretative power Congress hopes to give an agency,[174] a court under the congressional-intent test would look to the scheme surrounding the statutory deadline to determine if Congress intended to give the agency retroactive rulemaking power. The *Mead* analysis supports the congressional-intent solution to the tardy-agency problem.

C. POTENTIAL CRITICISMS OF THE CONGRESSIONAL-INTENT APPROACH

One criticism of the congressional-intent approach could be that it runs counter to Supreme Court precedent in *Bowen* and is a roundabout attempt to allow retroactive rulemaking in limited circumstances. But this criticism misses a key element of the *Bowen* decision: that the organic statute in *Bowen* included no congressional deadline and left no indication of congressional intent regarding timing.[175] The Court was left with the APA and little else.[176] The tardy-agency problem is different because Congress has acted in the organic statute by providing an explicit statutory deadline. This deadline distinguished the facts of the tardy-agency problem from the facts of *Bowen* and may be seen, after a thorough analysis, to represent the required authorization from Congress to act retroactively.

Critics could also contend that this approach is repetitive or unnecessary. One could argue the approach is similar to what the D.C. Circuit used in *National Petrochemical & Refiners Ass'n* and fails to offer much more than the standard balancing test applied in pre-*Bowen* cases like *Retail, Wholesale & Department Store Union*.[177] This criticism misses the mark, however, because the D.C. Circuit failed to articulate a clear test in *National Petrochemical & Refiners Ass'n*[178] and the pre-*Bowen* balancing test included a number of complex and equal-

173. *See id.* at 218.

174. *See id.* at 227–28.

175. Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 205 (1988) (citing 42 U.S.C. § 1395x(v)(1)(A)).

176. *See id.* at 207.

177. *See supra* Part I.B.1.

178. *See supra* Part I.B.2.c.

ly important factors.[179] The congressional-intent test is not a vague pseudotest and it does not require multifactor balancing. Instead, it hones in on congressional intent, recognizing the complex meaning that can underlie statutory deadlines. This approach introduces a novel inquiry into the retroactive rulemaking jurisprudence, allowing the court the discretion to interpret congressional intent while rejecting both a bright-line rule and an excessively unpredictable balancing analysis. Any attempt to argue that the approach is unnecessary fails to take into account the importance of the tardy-agency problem. Agencies are enacting historic levels of regulations and are facing countless statutory deadlines.[180] Regulated parties are facing the prospect of retroactive action. And the standard bright-line rules fail to resolve the problem and implicate serious policy concerns.

Finally, critics might argue that the congressional-intent test fails to address the notice and uniformity concerns that regulated parties might have about any departure from the bright-line *Bowen* rule. A regulated party might argue that this approach only guarantees more unpredictable court rulings, which leaves regulated parties subject to retroactive rulemaking on a judge's whim. This critique fails to appreciate the simple nature of the congressional-intent test and the incentive effect it will have on agencies. Unlike the pre-*Bowen* multi-factor balancing test,[181] this approach focuses only on congressional intent, through an analysis of the statutory scheme. This is a predictable analysis which regulated parties will be able to follow and replicate as courts analyze statutes. More importantly, because agencies will know courts are applying this test, they will clearly lay out, in advance of any retroactive rulemaking, their analysis of a congressional statute and whether it provides implicit retroactive rulemaking power. In other words, the simplicity of this test, and its singular focus on congressional intent, will spur agencies to communicate clearly with the parties they regulate and the courts they hope to persuade. The agencies themselves will therefore offer some predictability to the regulated entities. This test strikes the right balance between providing clarity to relevant industries, while also giving agencies and courts the necessary discretion to enforce Congress's will.

179. *See supra* Part I.B.1.
180. *See supra* note 8 and accompanying text.
181. *See supra* Part I.B.1.

CONCLUSION

Congress continues to enact complex and complicated statutes, replete with rulemaking deadlines. Yet, as agencies do the work of creating rules and, from time to time, miss agency deadlines, a question remains as to whether an agency can promulgate a rule retroactive to the statutory deadline. This seemingly esoteric issue recently sparked a heated debate in the D.C. Circuit and may become a commonplace problem. The traditional response, that an agency is barred from retroactive rulemaking, fails to satisfactorily resolve the issue. But it is also not appropriate simply to grant an agency blanket power to make retroactive rules upon missing an agency deadline. Both bright-line rules fail to address the problem and carry significant policy implications.

Courts should adopt an alternative approach to solve the tardy-agency problem. Judges should focus on whether a statutory deadline represents implicit congressional intent to give an agency the power to make retroactive rules. To engage in this inquiry, courts should consider the nature, duration, and complexity of the statutory scheme. This approach gives courts flexibility that a bright-line rule does not, but it also avoids the instability of giving the courts a multi-factor balancing test. And it successfully addresses two competing policy concerns. This approach will ensure agencies do not take statutory deadlines any less seriously, while also guarding against agency efforts to use the bar on retroactivity to obstruct Congress's priorities. The time for courts to adopt the congressional-intent approach is now. Agencies are promulgating unprecedented numbers of rules and are facing countless new deadlines. All the while, key federal courts are failing to resolve the tardy-agency problem in a consistent and coherent way. The congressional-intent test provides such a way, consistent with key precedent and the principles of administrative law.