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STATUTORY HAMMERS: LEGISLATIVE DRAFTING IN AN AGE OF CYNICAL LITIGATION

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ABSTRACT

Over the past decade, cynical litigation in our federal courts has fundamentally altered the operation of the administrative state. Agency rulemaking now unfolds against a backdrop of forum shopping and activist judging that often derails regulation from ever taking effect. This Article argues that Congress should respond to this dynamic by deploying strong statutory default provisions—"hammers"—that take effect absent timely agency action. While prior scholarship has treated hammers primarily as deadline-enforcement tools for administrative agencies, this Article emphasizes their structural function in this era of cynical litigation: hammers reshape incentives for agencies, regulated entities, and judges, channeling disputes out of court and into a productive rulemaking process. A comparative case study of mortgage lending and debit-card interchange-fee regulation under the Dodd-Frank Act illustrates how legislative design can determine whether Congress's intent gets reflected in policy or instead is an empty gesture. Finally, the presence of statutory hammers in existing law should affect the calculus of regulators in crafting regulations and other stakeholders, such as public interest groups, in choosing rules to challenge.

I. INTRODUCTION

Over the past decade, cynical litigation in our federal courts has fundamentally altered the operation of the administrative state. Regulated parties now possess unprecedented power to delay, derail, or eliminate agency rules. Meanwhile, participation in notice-and-comment rulemaking increasingly serves not to shape policy, but to preserve "gotchas" for judicial review. The

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threat of forum-shopped litigation now looms over even long-settled regulations.[1]

This essay argues that Congress should respond to these developments through an underappreciated tool: strong statutory default rules, also known as "hammers,"[2] that take effect after some period of time in the absence of timely agency action. While prior scholarship has explored the costs and benefits of hammer provisions primarily as deadline-enforcement mechanisms for administrative agencies, this essay advances a different claim. In an era of cynical litigation, statutory hammers reshape the incentives of agencies, regulated parties, and judges—channeling policy choices and debates out of court and back into the rulemaking process, discouraging obstructionist litigation, and producing more durable and democratically legitimate regulatory outcomes.

It is undoubtedly often easier for Congress to delegate the details of legislation to the Executive Branch than to come to agreement on strong statutory default rules. Agencies have a wealth of valuable technical expertise, and deferring to an agency can push off political disagreements. But whatever merits this legislative strategy has had, we must recognize that things have changed. In the current litigation environment, delegating important decisions to the Executive Branch is often closer to not legislating at all. New laws receive celebratory bill-signings and rosy press releases, but they often accomplish very little because courts block their implementation.

Statutory hammers fundamentally shift the baseline for regulation in a particular area. Hammers allow Congress to delegate the details of policy to the Executive Branch but, crucially, ensure that the baseline outcome will not be no rule at all. Hammers give agencies leverage to elicit good-faith engagement from industry during an actually meaningful rulemaking process. Hammers also productively shift incentives for litigation. Instead of a lawsuit challenging a rule having nothing but upside for industry trade associations, hammers require industry to seriously consider whether the regulation is worse than the statutory baseline. Hammers may also split the incentives of trade association members, forcing them to consider trade-offs before suing, rather than bringing a case just because they have nothing to lose.

And hammers discourage judicial activism. Without a hammer, nearly any agency action can cynically be portrayed by litigants and willing judges as executive overreach. In contrast, a hammer makes Congress's rough intent clear, so that there is a yardstick by which to assess the agency rule. Without hammers, striking down an agency rule may appear neutral, like it just preserves the status quo. In reality, it often undermines congressional intent to regulate and serves an ideological preference for government inaction. If instead a statutory default rule will spring into effect, no disingenuously "neutral" option is available.

The use of this drafting strategy has wide-ranging significance in a number

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[1] *See infra* notes 18–19 and accompanying text.

[2] *See* M. Elizabeth Magill, *Congressional Control over Agency Rulemaking: The Nutrition Labeling and Education Act's Hammer Provisions*, 50 FOOD & DRUG L.J. 149, 150 (1995).

of domains. Although statutory hammers have been used here and there in various contexts, Congress has not consistently incorporated them into the law.[3] That needs to change. As Congress continues to consider legislation on everything from artificial intelligence to privacy, it will be tempting to punt difficult decisions to federal agencies along the way. But in the absence of statutory hammers, this may be closer to no regulation at all on these crucially important issues.

Additionally, the presence of statutory hammers in existing law should affect the calculus of regulators and other stakeholders, such as public interest groups. For example, regulators should consider removing rules that deviate from statutory hammers to "reset the baseline" before rulemaking in a particular area.

This essay illustrates these claims through a comparative analysis of two provisions of the Dodd-Frank Act: rules on mortgages and debit card interchange fees. More than a decade after Congress enacted Dodd-Frank, some of its most consequential financial regulations are firmly entrenched, widely accepted by industry, and rarely litigated. Others addressing conduct no less central to the operation of our financial markets remain precarious. The difference between these two fates lies in legislative design.

II. CASE STUDY 1: MORTGAGE RULES UNDER DODD-FRANK

The Dodd-Frank Act's regulation of the mortgage market, Title XIV, provides a clear example of Congress using strong default rules to ensure a meaningful rulemaking process and democratically legitimate outcome. In the wake of the 2008 financial crisis, Dodd-Frank imposed a range of rigorous new standards for mortgage lending. The significance of mortgage loans at that time can hardly be overstated, as predatory mortgage lending had just caused the Great Financial Crisis. Notably, on this extraordinarily important issue, Dodd-Frank built strict standards directly into the statute as a default rule, effective on a tight timetable.[4] The law gave the new consumer protection agency that it created, the Consumer Financial Protection Bureau ("CFPB"), authority to deviate from these standards.[5] The result was a robust rulemaking process and ultimately durable regulatory regime.

Dodd-Frank provided an eighteen-month deadline from the opening of the CFPB's doors, after which many of the Act's strict mortgage provisions would

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[3] *See* KEVIN J. HICKEY, CONG. RSCH. SERV., R45336, AGENCY DELAY: CONGRESSIONAL AND JUDICIAL MEANS TO EXPEDITE AGENCY RULEMAKING 14 (2018) (noting "infrequent use of hammer provisions" in existing law).

[4] *See* Jonathan Gould & Rory Van Loo, *Legislating for the Future*, 92 U. CHI. L. REV. 375, 401–02 (2025) (describing Dodd-Frank mortgage rules specifically and some of the benefits of "strong statutory default rules" in general).

[5] *See, e.g.*, 15 U.S.C. § 1639c(a)(1) ("In accordance with regulations prescribed by the Bureau . . . ."); *id.* § 1639c(b)(3)(A) ("The Bureau shall prescribe regulations to carry out the purposes of this subsection.").

automatically take effect if the agency failed to issue implementing rules.[6] Specifically, Dodd-Frank included, for example, stringent requirements for mortgage lenders to assess borrowers' ability to repay that would take effect automatically.[7] Additionally, the law specified that the effective dates of any rules deviating from these statutory defaults could be no later than one year from issuance.[8] This ensured that industry could not lobby for endless extensions.

These default rules created a powerful incentive for the agency to act promptly and, crucially, for industry to engage meaningfully in the rulemaking process. The mortgage industry provided voluminous data and arguments, which significantly shaped the rules' final form. For example, industry commenters raised concerns about the proposal's treatment of points and fees for smaller loans under the ability-to-repay mandate.[9] They warned that the proposed approach would reduce access to credit or raise costs for borrowers of small loans and advocated that points and fees not be considered at all for such loans. In response, the CFPB did not fully exempt points and fees for small loans but did implement revised points and fees limits for them.[10] These adjustments helped preserve credit availability for smaller loans while still honoring Congress's intent to curb excessive fees.

No lawsuits followed. Unlike many regulations resulting from Dodd-Frank, the mortgage regulations actually took effect. And more than a decade later, those rules have become an accepted baseline in the industry. In fact, the mortgage industry now defends these regulations—which, again, they actually engaged substantively on creating—as essential to market functioning. For instance, when the CFPB's existence was threatened in a recent constitutional challenge, a coalition of mortgage industry groups filed an amicus brief urging the Supreme Court to preserve the CFPB's mortgage rules, warning of "catastrophic consequences" if those rules were undone.[11]

Dodd-Frank's mortgage rules show that when Congress clearly articulates strict default standards, the regulatory system can achieve both flexibility and durability. The stringent default encourages engagement in the rulemaking process. And once the regulatory scheme is in place, it faces less likelihood of legal challenge.

III. CASE STUDY 2: DEBIT CARD INTERCHANGE FEES

Dodd-Frank's regulation of debit card interchange fees took a very different approach that, in hindsight, reveals the pitfalls of not having a clear statutory

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[6] Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 § 1400(c)(3), Pub. L. No. 111–203, tit. XIV, 124 Stat. 1376, 2136 (codified at 15 U.S.C. § 1601 note).
[7] *See, e.g.*, 15 U.S.C. § 1639c.
[8] 15 U.S.C. § 1601 note.
[9] Ability-to-Repay and Qualified Mortgage Standards Under the Truth in Lending Act (Regulation Z), 78 Fed. Reg. 6,408, 6,530–31 (Jan. 30, 2013) (final rule).
[10] *See id.* at 6,531.
[11] Brief for the Mortgage Bankers Ass'n et al. as Amici Curiae Supporting Petitioners at 3, Consumer Fin. Prot. Bureau v. Cmty. Fin. Servs. Ass'n of Am., Ltd., 601 U.S. 416 (2024) (No. 22-448).

default. In the United States, merchants are charged a fee whenever a consumer pays with a debit or credit card. The explosion of debit card fees before Dodd-Frank led Congress to pass the so-called Durbin Amendment, which directed the Federal Reserve to limit debit card interchange fees to an amount "reasonable and proportional to the cost incurred."[12] However, the statute itself did not specify a numeric cap or formula to use when regulating these fees. The law left the details to the Fed's rulemaking, specifying certain things that the Fed should consider.[13] Because Congress did not set a "default" interchange fee cap amount in the statute, the stakes of litigation were asymmetric. Banks knew from the outset of the rulemaking process that challenging the Fed's rule could only help them, as overturning it would cause the market to revert to effectively unregulated (and much higher) fees.

In 2011, the Fed issued a regulation governing debit card interchange fees, setting a cap of 21 cents per transaction plus 0.05% of the transaction's value.[14] This final threshold was substantially higher than the Fed's original proposal of 12 cents,[15] which the Fed may have raised in the final rule in fear of a legal challenge from banks. The result was that the supposed "cap" on interchange fees ended up being far higher than any fees actually present in the market, making the cap essentially meaningless.[16] Several merchant trade associations promptly sued to challenge the rule, seeking a lower limit. Relying on the provision's open-ended "reasonable and proportional" standard, the DC Circuit eventually upheld the Fed's rule as a permissible interpretation of the statute.[17]

Nearly a decade later, industry plaintiffs tried again by launching a new lawsuit—the ongoing *Corner Post, Inc. v. Board of Governors of the Federal Reserve System* litigation—to attack the same Federal Reserve rule. The case was essentially a repeat of the DC litigation, except that the litigants filed in North Dakota. The Supreme Court ruled in 2024 that the trade associations in question could proceed with their suit under the Administrative Procedure Act ("APA"), notwithstanding the extended passage of time since the rule's issuance, because their co-plaintiffs in the case included Corner Post, a company that allegedly had been recently injured by the rule.[18] (This holding was contrary to the view of every Circuit to have considered the APA's statute of limitations and means that "there is effectively no longer any limitations period for lawsuits that challenge agency regulations."[19]) On remand, the district court vacated the

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[12] 15 U.S.C. § 1693o-2(a)(2).
[13] *See* 15 U.S.C. §§ 1693o–2(a)(3)(A); 1693o–2(a)(4).
[14] Debit Card Interchange Fees and Routing (Regulation II), 12 C.F.R. § 235.3 (2026).
[15] Debit Card Interchange Fees and Routing, 75 Fed. Reg. 81,722, 81,726 (proposed Dec. 28, 2010).
[16] *See* Brief of Consumer Groups as Amici Curiae in Support of Respondents at 9–11, Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys., No. 25-3000 (8th Cir. Feb. 20, 2026), *available at* https://smallbusinessmajority.org/sites/default/files/policy-docs/2026.2.20-Corner-Post-Consumer-Groups-Amicus-final.pdf [https://perma.cc/J7VM-L5JE].
[17] NACS v. Bd. of Governors of the Fed. Reserve Sys., 746 F.3d 474, 477 (D.C. Cir. 2014).
[18] Corner Post, Inc. v. Bd. of Governors of the Fed. Reserve Sys., 603 U.S. 799, 825 (2024).
[19] *Corner Post*, 603 U.S. at 835, 843 (Jackson, J., dissenting).

Fed's interchange rule on a nationwide basis.[20] The case is now on appeal.[21] In short, over a decade after Dodd-Frank and despite clear congressional intent therein to limit debit interchange fees, it remains in doubt whether there will be any meaningful regulation of those fees.

How might this rulemaking and the industry's response have played out differently if Congress had structured the Durbin Amendment with a hammer, i.e., a strong statutory default? Imagine if the statute had capped debit interchange fees at 10 percent per transaction, unless and until the Federal Reserve deviated from that number by rule. Such a provision—even if harsh from the banks' perspective—would have fundamentally flipped the incentives for the rulemaking process, as well as litigation. The Fed would not have felt pressure to select a higher limit to insulate itself from legal challenges from banks. And any legal challenge from either merchants or banks would have at least left a 10-cent cap in place.

The debit card interchange fee rule is just one of several relevant examples in the field of financial services. Many of the hundreds of rulemakings required or authorized by Dodd-Frank have been unsuccessful or languished in the absence of statutory hammers.[22] And that barely scratches the surface of the relevance of hammers across policy areas.[23]

IV. EXISTING STATUTORY HAMMERS: REGULATORS AND OTHER STAKEHOLDERS

In addition to the relevance of statutory hammers for future legislation, hammers that are already present in at least some areas of existing law offer a range of opportunities for regulators and other stakeholders, such as public interest groups, to revisit deviations from statutory defaults. Regulators should think carefully about whether a productive rulemaking process should include "resetting the baseline" by revoking agency rules that deviate from statutory hammers. And stakeholders should consider challenging rules that deviate from statutory defaults.

Consider credit card late fees, another example in financial services. Congress in 2009 required those fees to be "reasonable and proportional" to credit card companies' costs and, importantly, provided specific criteria actually

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[20] Corner Post, Inc. v. Bd. of Governors of the Fed. Reserve Sys., 794 F.Supp.3d 610, 640 (D.N.D. 2025).

[21] Amended Notice of Appeal, Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys., No. 1:21-cv-00095-DMT-CRH, (D.N.D. Oct. 28, 2025).

[22] *See, e.g.*, 12 U.S.C. § 5641 (requiring rulemaking on executive compensation within "9 months after July 21, 2010"). No such rules have ever been finalized. *See* Incentive-Based Compensation Arrangements, Notice of Proposed Rulemaking, Office of the Comptroller of the Currency, Federal Deposit Insurance Corporation, Federal Housing Finance Agency & National Credit Union Administration (May 6, 2024), *available at* https://www.fdic.gov/sites/default/files/2024-05/2024-05-03-fed-reg-incentive-based-compensation-agreements_0.pdf [https://perma.cc/6V9V-Y23J].

[23] *See* Gould & Van Loo, *supra* note 4, at 402 (describing examples from environmental law). *But see* HICKEY, *supra* note 3, at 14 (noting "infrequent use of hammer provisions" in existing law).

governing that standard—not just considerations for a rulemaking.[24] The law allowed but did not require the Federal Reserve Board (and now the CFPB) to create a "safe harbor" late fee level that is "presumed to be reasonable and proportional."[25] This provision was a statutory hammer, at least as the regulatory history has played out. The Federal Reserve acted swiftly in 2010 to create a safe harbor (up to a $25 fee for the first late payment, and $35 for subsequent late payments, with regular adjustments for inflation).[26] Today, it seems that literally all credit card companies set their late fees based on this safe harbor.[27] This strongly suggests that the regulation deviates downward from a more stringent statutory standard.

When the CFPB issued new regulations about credit card late fees in 2024, it simultaneously revoked the existing safe harbor and created a new safe harbor that was significantly lower (typically $8, without inflation adjustment).[28] A Texas court eventually enjoined the CFPB rule, finding that the new safe harbor was inconsistent with the statute.[29]

In retrospect, instead of revoking and revising the safe harbor all in one go, it may have been wiser for the CFPB to first have revoked the safe harbor and reverted to the more stringent statutory default. A targeted rulemaking to remove a discretionary safe harbor should be more straightforward for an agency than coming up with a new regulatory scheme. (Indeed, the Trump Administration is pushing the frontier on the process for removing regulations.[30]) And while industry would presumably have challenged the revocation, at least in theory a challenge to the removal of a discretionary safe harbor should be relatively difficult.[31] Removing the safe harbor would have reset the baseline to the statutory standard. The CFPB could then have launched a rulemaking, perhaps before the revocation even went into effect, to come up with a new safe harbor. This second rulemaking would have proceeded with the benefits of the statutory hammer.

Likewise, where there is an existing regulatory regime that deviates from a

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[24] Credit Card Accountability Responsibility and Disclosure Act of 2009, 15 U.S.C. § 1665d(a), (c).
[25] *Id.* § 1665d(b), (e).
[26] Truth in Lending, 75 Fed. Reg. 37,526, 37,527 (June 29, 2010) (final rule). As of 2024, due to inflation adjustments, these amounts were ($30 for the first late payment, and $41 for subsequent late payments. Credit Card Penalty Fees (Regulation Z), 89 Fed. Reg. 19,128, 19,128 (Mar. 15, 2024) (final rule).
[27] *See* Credit Card Penalty Fees, 89 Fed. Reg. at 19,129–30.
[28] *See id.* at 19,128.
[29] *See* Chamber of Commerce of U.S. v. Consumer Fin. Prot. Bureau, 767 F. Supp. 3d 357, 365–67 (N.D. Tex. 2024).
[30] *See* Sam Callahan, Andrew Tutt, John P. Elwood, Elisabeth S. Theodore, Sam Ferenc, Travis Annatoyn & Sonia Tabriz, *Deregulatory Executive Orders: Issues Under the Administrative Procedure Act*, ARNOLD & PORTER (Apr. 9, 2025), https://www.arnoldporter.com/en/perspectives/advisories/2025/04/deregulatory-eos-issues-under-the-apa [https://perma.cc/HS8Z-CNWC].
[31] *See* Seven Cnty. Infrastructure Coal. v. Eagle Cnty., 605 U.S. 168, 181 (2025) (indicating that courts "should afford substantial deference" to agency decisions within the agency's discretionary authority).

statutory hammer, public interest groups or other stakeholders should consider challenging that regime. *Corner Post* enables challenges to those rules regardless of when they were issued. The agency can then reconsider a new deviation from the statutory regime if appropriate, with all the benefits of the statutory default.

V. CONCLUSION: WHY HAMMERS, WHY NOW

Professor Elizabeth Magill's seminal 1995 article on statutory hammers in food nutrition labeling rules stresses a variety of benefits and drawbacks to such provisions.[32] As others have also emphasized, statutory hammers push agencies to meet statutory deadlines.[33] Magill also notes, somewhat briefly, that "the hammer strengthened the agency at each stage of the rulemaking process."[34] But on the other hand, statutory hammers can pull agency resources from other activities and provide an inflexible timeline for rulemaking.[35]

Fast forward three decades, and what was once something of an afterthought in the analysis now looms decidedly large. While hammers were once thought of primarily as a tool of accountability for federal agencies, now they also operate significantly as a shield against cynical litigation and activist courts. Doctrinally, the Supreme Court has done a complete 180 on agency deference.[36] Even more striking is the degree of forum-shopping and strategic gamesmanship in litigation. Whereas it was previously uncommon for companies to "sue their regulator," industry trade associations now shamelessly bring cynical lawsuits against agency rules. [37] They routinely cherry-pick favorable courts, even creating new entities solely to manufacture standing.[38] And rather than engage productively in the rulemaking process, industry has learned to "seed" rulemaking records with vague objections that can later be used to invalidate rules.[39] In an especially egregious example, the Supreme Court recently seized on a single, ambiguous sentence buried in the EPA's voluminous public comment record to justify blocking a major air-quality regulation.[40]

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[32] *See* Magill, *supra* note 2, at 178–89.
[33] *See, e.g.*, Jacob E. Gersen & Anne Joseph O'Connell, *Deadlines in Administrative Law*, 156 U. PA. L. REV. 923, 955–56 (2008); Mark Seidenfeld, *A Big Picture Approach to Presidential Influence on Agency Policy-Making*, 80 IOWA L. REV. 1, 8 n.40 (1994).
[34] Magill, *supra* note 2, at 184.
[35] *See* Magill, *supra* note 2, at 180–82, 187–89.
[36] *See* Loper Bright Enters. v. Raimondo, 603 U.S. 369, 412 (2024) (overturning the *Chevron* doctrine).
[37] *See* Seth Frotman & Brad Lipton, *The Greatest Trick John Roberts Ever Pulled: Convincing the World that Rigged Courts Are Neutral*, CALIF. L. REV. ONLINE BLOG (Aug. 2025), https://www.californialawreview.org/online/rigged-courts [https://perma.cc/YCA9-JHF6].
[38] *See id.*
[39] *See* Seth Frotman & Brad Lipton, *The 100 Days That Put the Nail in the Coffin of Administrative Law*, YALE J. ON REG.: NOTICE & COMMENT (May 21, 2025), https://www.yalejreg.com/nc/the-100-days-that-put-the-nail-in-the-coffin-of-administrative-law-by-seth-frotman-brad-lipton/ [https://perma.cc/V685-864C].
[40] *See* Ohio v. Env't Prot. Agency, 603 U.S. 279, 288 (2024); *see also id.* at 308 (Barrett, J., dissenting) ("The closest comment that the Court can find—which it quotes repeatedly—is one sentence.").

It is fair to say that, when Congress directs an agency to regulate industry without a default provision, the result is often no regulation. Congressional intent—the will of the people—is foiled.

At the same time, agency rulemaking documents have grown remarkably in length as agency lawyers steel themselves for judicial review.[41] The need to incentivize faster rulemaking has only grown.

Court reform or revisions to the Administrative Procedure Act may well be warranted to remedy some of the significant problems with judicial review across the board. But hammers offer a complementary path, which may be a lighter lift politically. Hammers allow Congress to roughly articulate a baseline, without the expectation that it will necessarily go into effect or the politically challenging task of reaching agreement on all the details.

Congress has employed statutory hammers here or there over the years, but it is fair to say that it has not consistently incorporated them into the law.[42] This failure may have caused avoidable negative consequences. To take just one example, the No Surprises Act of 2020 was intended to protect people from unexpected medical billing. That law establishes a preliminary amount that health care providers will be paid, but it also authorizes the creation of a dispute resolution process to allow further refinement of that amount.[43] The executive branch wrote rules to govern the dispute resolution process, and industry sued, demanding rules that would favor larger payments. Over several years, a court in Texas ruled in favor of the industry multiple times,[44] and the agency is again engaged in rulemaking. If Congress had taken the relatively minimal step of creating the hammer that the preliminary payment amount would be binding *unless* agency rules regarding the dispute resolution process were in place, a regulatory standard for this important provision would likely have been established by now. Indeed, it may be appropriate for Congress to now add hammers to existing statutory provisions such as this one where rulemaking has stalled.

Scholars have also advocated for other statutory structures that are broadly similar to hammers that may have value in certain contexts. For instance, scholars have pointed to "big waiver" regimes in which Congress delineates detailed statutory schemes that federal agencies can waive,[45] as well as statutory floors or "regulatory minimums" from which agencies can deviate with more stringent rules.[46] Yet the relative benefits of hammer provisions should not be

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[41] Mark Febrizio, *Federal Agencies Are Publishing Fewer but Larger Regulations*, GEO. WASH. UNIV.: REGULATORY STUD. CTR. (Dec. 20, 2021), https://regulatorystudies.columbian.gwu.edu/federal-agencies-are-publishing-fewer-larger-regulations [https://perma.cc/5DE5-ZANM]

[42] *See* Hickey, *supra* note 3.

[43] *See* 42 U.S.C. §§ 300gg-111(a)(3)(E) (preliminary payment amount) and 300gg-111(c) (dispute resolution process).

[44] *See* Tex. Med. Ass'n v. U.S. Dep't of Health & Hum. Servs., No. 6:22-cv-372-JDK, slip op. at 2–3 (E.D. Tex. Feb. 6, 2023) (mem. op. & order) (describing litigation history).

[45] *See generally* David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 COLUM. L. REV. 265 (2013).

[46] *See* Gould & Van Loo, *supra* note 4, at 400.

overlooked.

A detailed statutory scheme that an agency can waive will be useful when Congress actually has the ability to generate such a regime. But devising the details of a regulatory scheme often requires technical expertise and policy compromise—the exact reasons why Congress often delegates to agencies. Indeed, the difficulty of actually settling on a rule is also probably one of the biggest obstacles to the passage of hammer provisions. But a benefit of hammers is that Congress can do "rough justice," settling on a single number or simplified regime with a delegation to the agency to modify it as necessary. Congress does have to make a decision about what the default will be, but it is just a default. As noted, in the current litigation environment, the choice for Congress is often not really between a hammer provision and rules designed fully by an agency, but between a hammer provision and no rule at all.

Floors from which agencies can deviate only upward with more stringent rules also certainly have their place. Where Congress can agree on a floor, it should do so. The *Federal Register* is littered with instances of agencies creating exceptions and carve-outs from statutory requirements that undermine congressional intent.[47] Congress should avoid handing that authority over to the Executive Branch where possible. But, depending on the context, agreeing on a statutory floor may be more challenging for Congress than creating a hammer. Hammers allow legislators to answer objections to the law with the truthful assertion that modifications can be made in the rulemaking process.

Finally, while this essay focuses on Congress, the imperative to ensure that the law is effective will also inevitably fall to presidential administrations as well. As major legislation is shepherded by the White House, the idea of punting to the regulatory process will almost certainly arise, especially because that administration will get the first bite at the apple for such regulation. But it is crucial for those whose role it is to help the President accomplish his or her goals—such as the Department of Justice—to ensure that the law's drafting actually lives up to the administration's ambitions. That means having a plan for effective legislation.

Statutory hammers can be a blunt instrument. They must be crafted thoughtfully, with due regard to potential unintended consequences. And it will undoubtedly be harder for Congress to reach agreement on strong default rules than to delegate the details of legislation to administrative agencies. But the alternative leaves vital policy subject to a stunted rulemaking process, cynical litigation, and activist judging that undermine the public interest and the democratic process itself.

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[47] *See, e.g.*, Overdraft Lending: Very Large Financial Institutions, 89 Fed. Reg. 106,768, 106,768 (Dec. 30, 2024) (final rule) (describing "non-statutory exceptions in Regulations Z and E that have allowed very large financial institutions to avoid statutory consumer credit protection requirements when extending certain overdraft credit").