

THE ADMINISTRATIVE LAW OF REGULATORY SLOP AND STRATEGY

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ABSTRACT

Judicial review of agency behavior is often criticized as either interfering too much with agencies' domains or doing too little to ensure fidelity to statutory directives and the rule of law. But the Trump administration has produced an unprecedented volume of agency actions that blatantly flout settled administrative-law doctrine. This phenomenon, which we term "regulatory slop," requires courts to reinforce the norms of administrative law by adhering to established doctrine and paying careful attention to remedial options. In this Article, we document numerous examples of regulatory slop and canvass how the Trump agencies have fared in court thus far. We contend that traditional critiques of judicial review carry little force in such circumstances. Further, regulatory slop should be of concern regardless of one's political leanings because it threatens the rule of law. Rather than argue for a change to substantive administrative-law doctrine, therefore, we take a close look at courts' remedial options in such circumstances. We conclude that a strong approach to remedies can send corrective signals to agencies that reinforce both administrative-law values and the rule of law.

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INTRODUCTION

Modern administrative law relies heavily on the premise that federal agencies are responsive to judicial review. Whether insisting that agencies give reasons for their decisions,¹ contributing to ossification,² or ensuring the existence of a record for review,³ judicial

1. *E.g.*, Emily Hammond & David L. Markell, *Administrative Proxies for Judicial Review: Building Legitimacy from the Inside-Out*, 37 HARV. ENVTL. L. REV. 313, 355 (2013) (arguing that “the mere chance of review—albeit remote—may supply the impetus for . . . legitimizing behavior[s]”).

2. *E.g.*, Thomas O. McGarity, *The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 TEX. L. REV. 525, 528 (1997) (arguing that judicial scrutiny has led to rulemaking ossification). *But see* Mark Seidenfeld, *Why Agencies Act: A Reassessment of the Ossification Critique of Judicial Review*, 70 OHIO ST. L.J. 251 (2009) (expressing skepticism about ossification); Jason Webb Yackee & Susan Webb Yackee, *Testing the Ossification Thesis: An Empirical Examination of Federal Regulatory Volume and Speed, 1950–1990*, 80 GEO. WASH. L. REV. 1414 (2012) (same).

3. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). *See generally* James N. Saul, Comment, *Overly Restrictive Administrative Records and the Frustration of*

review matters for its connection to agency activities *ex ante*. The impact is especially strong when judges demand compliance with the basic, black-letter procedural requirements of administrative law; we can expect agencies to follow these requirements because they are so clearly established.

Until now. In its two years, the Trump administration has doggedly ignored some settled administrative-law expectations for agency decisionmaking.⁴ Examples of clear procedural violations include: improperly suspending the effective dates of final rules;⁵ failing to provide for notice and comment;⁶ failing to meet mandatory

Judicial Review, 38 ENVTL. L. 1301 (2008) (arguing that judicial requirements that agencies complete the administrative record contribute to meaningful judicial review).

4. See Lisa Heinzerling, *Unreasonable Delays: The Legal Problems (So Far) of Trump's Deregulatory Binge*, 12 HARV. L. & POL'Y REV. 13, 15 (2018) (“[T]he Trump Administration has not obeyed these basic rules.”).

5. *E.g.*, *Clean Air Council v. Pruitt*, 862 F.3d 1 (D.C. Cir. 2017) (rejecting the agency's reliance on the Clean Air Act as authority for precluding the rule's finality); see also *Nat. Res. Def. Council v. Nat'l Highway Traffic Safety Admin.*, 894 F.3d 95 (2d Cir. 2018) (vacating an indefinite delay of a previously published rule for exceeding statutory authority and failing to undergo notice and comment); *Sierra Club v. Pruitt*, 293 F. Supp. 3d 1050 (N.D. Cal. 2018) (vacating a rule delaying compliance dates beyond deadlines established by the Formaldehyde Standards in Composite Wood Products Act); *Nat'l Venture Capital Ass'n v. Duke*, 291 F. Supp. 3d 5 (D.D.C. 2017) (vacating a rule that delayed the effective date of a previously published rule for failing to undergo notice and comment); *California v. U.S. Bureau of Land Mgmt.*, 277 F. Supp. 3d 1106 (N.D. Cal. 2017), *appeal dismissed*, 2018 WL 2735410 (9th Cir. Mar. 15, 2018) (vacating an agency's postponement of a published rule's compliance date for failure to undergo notice and comment); *Becerra v. U.S. Dep't of the Interior*, 276 F. Supp. 3d 953 (N.D. Cal. 2017) (holding that the postponement of a final rule's compliance date violated notice-and-comment requirements, but declining to vacate the action where the replacement rule was set to take effect within three days).

6. See *supra* note 5; *California v. Azar*, 911 F.3d 558, 575–78 (9th Cir. 2018) (rejecting agency's invocation of good cause exception in adoption of rules providing exemptions from the Affordable Care Act's mandate to employers to provide contraceptive coverage); *Puget Soundkeeper All. v. Wheeler*, No. C15-1342-JCC, 2018 WL 6169196 (W.D. Wash. Nov. 26, 2018) (vacating a rule based on an agency's refusal to allow comments on relevant issues, which deprived the public of a meaningful opportunity to comment); *E. Bay Sanctuary Covenant v. Trump*, 349 F. Supp. 3d 838, 860–63 (N.D. Cal. 2018), *stay pending appeal denied*, 909 F.3d 1219 (9th Cir. 2018) (concluding that the plaintiffs raised serious questions as to whether the Department of Homeland Security improperly invoked the foreign-affairs and good-cause exceptions to notice-and-comment rulemaking in adopting a rule barring asylum for immigrants who enter the country outside a port of entry); *Piñeros y Campesinos Unidos del Noroeste v. Pruitt*, 293 F. Supp. 3d 1062 (N.D. Cal. 2018) (vacating various rules reversing recently issued rules that restricted pesticide use due to failure to comply with notice-and-comment requirements); *California v. Health & Human Servs.*, 281 F. Supp. 3d 806 (N.D. Cal. 2017), *aff'd in part, vacated in part on other grounds, and remanded sub nom.* *California v. Azar*, 911 F.3d 558 (9th Cir. 2018) (issuing a preliminary injunction to block interim final rules for failure to follow notice-and-comment procedures).

deadlines;⁷ and failing to make required findings.⁸ Added to this mix are substantive violations related to agencies' failures to sufficiently justify or support their actions.⁹ Numerous lawsuits alleging substantive flaws are pending.¹⁰

There are several possible explanations for an administration's widespread violations of core administrative law.¹¹ First, agencies may purposefully disregard the procedural and reason-giving requirements

7. *See* States' Complaint for Declaratory and Injunctive Relief, *California v. EPA*, No. 4:18-cv-03237, 2018 WL 2446133 (N.D. Cal. May 31, 2018) (alleging the failure to meet mandatory deadlines with respect to landfill emission regulations).

8. *E.g.*, *League of United Latin Am. Citizens v. Wheeler*, 899 F.3d 814, 829 (9th Cir. 2018), *reh'g en banc granted*, 914 F.3d 1189 (9th Cir. 2019) (vacating an order denying a petition to revoke pesticide tolerance under the Federal Food, Drug, and Cosmetic Act because the EPA presented "no arguments in defense of its decision" in the face of the petitioners' claims that the decision was not supported by scientific evidence); *Indigenous Env'tl. Network v. U.S. Dep't of State*, 347 F. Supp. 3d 561, 583–84 (D. Mont. 2018), *motion to amend granted in part*, 2018 WL 7352955 (D. Mont. Dec. 7, 2018), *motion for stay granted in part and denied in part*, 2019 WL 652416 (D. Mont. Feb. 15, 2019) (enjoining further action to construct the Keystone XL Pipeline in part because of the agency's failure to provide a reasonable explanation of why prior factual findings about the pipeline's impact on climate change were erroneous); *Policy & Research, LLC v. U.S. Dep't of Health & Human Servs.*, 313 F. Supp. 3d 62 (D.D.C. 2018), *appeal dismissed*, No. 18-5190, 2018 WL 6167378 (D.C. Cir. Oct. 29, 2018) (holding that an agency was arbitrary and capricious in failing to make required "for cause" finding prior to terminating grants); *Karnoski v. Trump*, No. C17-1297-MJP, 2017 WL 6311305 (W.D. Wash. Dec. 11, 2017), *clarification denied*, No. C17-1297-MJP, 2017 WL 6733723 (W.D. Wash. Dec. 29, 2017), *order stayed*, No. 18A625, 2019 WL 271944 (U.S. Jan. 22, 2019) (granting a preliminary injunction against the prohibition on transgender military service because it was announced on Twitter without any evidence of reason or deliberation).

9. *E.g.*, *Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 908 F.3d 476, 508–10 (9th Cir. 2018) (affirming a preliminary injunction preventing termination of the Deferred Action for Childhood Arrivals Act ("DACA") on the ground that the plaintiffs were likely to succeed in showing that the termination was based on an erroneous view of what the law required, and was therefore arbitrary and capricious); *Sierra Club v. U.S. Dep't of the Interior*, 899 F.3d 260 (4th Cir. 2018) (vacating as arbitrary and capricious the Forest Service and National Park Service's actions in connection with natural gas pipeline permitting); *Sierra Club, Inc. v. U.S. Forest Serv.*, 897 F.3d 582 (4th Cir. 2018) (vacating and remanding as arbitrary and capricious the Forest Service's Record of Decision in connection with natural gas pipeline permitting); *E. Bay Sanctuary*, 349 F. Supp. 3d at 858 (finding unexplained the "extreme departure from prior practice" in adopting a rule restricting asylum).

10. Professor William Buzbee has thoughtfully documented agencies' statutory abnegation as a deregulatory strategy. Under that strategy, agencies deny that they have the statutory authority to take actions others have requested or sought. William W. Buzbee, *Agency Statutory Abnegation in the Deregulatory Playbook*, 68 DUKE L.J. 1509 (2019). His focus is on actions that utterly fail to explain statutory abnegation, which are a subset of our category of failing to make required findings.

11. The explanations provided below will not always reflect discrete categories. Rather, they are likely to provide a spectrum whose boundaries are blurred or overlapping in some instances. Examples of what we are calling "regulatory slop" are also likely to differ in the degree of egregiousness by which they deviate from settled administrative law norms.

that lend legitimacy to administrative actions as a means of prioritizing rapid advancement of the administration's substantive agenda.¹² Second, and relatedly, even if agencies are not aware that they are violating the law in an effort to implement a substantive agenda with as little resistance as possible, they may not care enough about the legitimacy of their actions to make an effort to determine what the law requires. We view both of these reasons to be extremely concerning, although the first might be incrementally more problematic. As our title suggests, we refer to either of these two forms of blatant disregard of administrative law as "regulatory slop." To identify examples of slop, we examine judicial opinions in light of our understanding of settled administrative law and the courts' jurisprudential and rhetorical choices. Third, some violations may stem from ignorance that comes not from lack of concern but from lack of experience, as new, inexperienced political appointees acclimate to the culture of the administrative state.¹³ Such violations still count as slop when the administrative law is clear because, like the first two reasons, they suggest a lack of respect for the legitimacy of our institutional structure.

Fourth, administrative-law violations may be the product of a perfectly reasonable effort by agency officials to "push" the law in furtherance of an administration's policies—that is, to take some legal risks notwithstanding uncertainties about how they will fare in court.¹⁴ We put these actions into the category of "strategy" and are far less concerned, as an administrative law matter, that such actions strain the

12. This could be democratic, statutory, or procedural legitimacy, all of which have significant roles in constitutional legitimacy. See Hammond & Markell, *supra* note 1, at 316–17 (discussing the features of legitimacy). Moreover, as Professor Buzbee explains, positive political theory offers further insights into the "why" of regulatory slop. See Buzbee, *supra* note 10, at 1562–63.

13. In addition, some officers' vacancies remain unfilled, and there is significant uncertainty about the status of many adjudicatory officials following the Supreme Court's decision in *Lucia v. SEC*, 138 S. Ct. 2044 (2018). See Ellen M. Gilmer, Michael Doyle & Dylan Brown, *In-House Judges Stumble After Supreme Court Ruling*, E&E NEWS (Oct. 22, 2018), <https://www.eenews.net/stories/1060103949> [<https://perma.cc/T9TV-WK6S>] (reporting on significant agency delays owing to uncertainty about adjudicatory officials' status).

14. The Obama administration provides notable examples. See, e.g., Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units ("the Clean Power Plan"), 80 Fed. Reg. 64,662 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60); Standards of Performance for Greenhouse Gas Emissions from New Stationary Sources: Electric Utility Generating Units ("New Source Standards"), 79 Fed. Reg. 1430 (Jan. 8, 2014) (to be codified at 40 C.F.R. pts. 60, 70, 71 & 98).

rule of law too far.¹⁵ Such efforts may be less problematic than purposeful disregard or lack of care—and the agency capture that may induce or accompany them—because they do not necessarily reflect disrespect for legal norms and processes and are, therefore, less corruptive of rule-of-law culture. At the same time, a strategy of intentionally flouting legal norms and requirements would be extremely problematic.¹⁶

Thus far, many of the cases challenging Trump administration decisions involve procedural requirements that have long been settled as a matter of administrative law, and early results suggest that the courts are holding firm.¹⁷ Still, the current landscape invites questions about the long-term impacts of a pattern of noncompliance with administrative law. First, on what basis (and to what extent) are the

15. We must acknowledge the potential critique that our own normative priors influence our understanding of “slop” in the context of the Trump administration’s activities. First, we acknowledge that prior administrations of both parties have engaged in slop; nevertheless, the focus of this Symposium is on the Trump administration. Second, we have attempted to justify our conclusions that some actions constitute slop based on settled legal doctrine and judicial rhetoric. Finally, we acknowledge that a number of the reason-giving flaws (such as erroneous statutory interpretations) found to date—and perhaps to be identified in the future—are better described as unproblematic strategy, regardless of any normative beliefs we might hold as to the soundness of the policies they reflect.

16. Such a strategy is an example of the blurring of categories referred to *supra* note 11.

17. *See, e.g.*, Heinzerling, *supra* note 4 (detailing prior law and losses with respect to attempts to delay final agency rules); Fred Barbash et al., *Federal Courts Have Ruled Against Trump Administration Policies at Least 63 Times*, WASH. POST, Mar. 19, 2019, https://www.washingtonpost.com/graphics/2019/politics/trump-overruled/?utm_term=.898c9d8400f9 [<https://perma.cc/P7JC-GFGS>]; Coral Davenport & Lisa Friedman, *In His Haste to Roll Back Rules, Scott Pruitt, E.P.A. Chief, Risks His Agenda*, N.Y. TIMES (Apr. 7, 2018), <https://www.nytimes.com/2018/04/07/climate/scott-pruitt-epa-rollbacks.html> [<https://perma.cc/PTN7-WWBJ>] (reporting that Pruitt has been “less than rigorous in following important procedures, leading to poorly crafted legal efforts that risk being struck down in court”); Eric Lipton, *Courts Thwart Administration’s Effort to Rescind Obama-Era Environmental Regulations*, N.Y. TIMES (Oct. 6, 2017), <https://www.nytimes.com/2017/10/06/climate/trump-administration-environmental-regulations.html> [<https://perma.cc/S9KH-RWPF>] (describing successful judicial challenges to environmental rollbacks); Amanda Reilly & Sean Reilly, *Court Losses Pile Up for EPA*, E&E NEWS (Aug. 13, 2018), <https://www.eenews.net/stories/1060093967> [<https://perma.cc/X8CW-PM4A>] (same); *see also* William W. Buzbee, *The Tethered Presidency: Consistency and Contingency in Administrative Law*, 98 B.U. L. REV. 1357 (2018) (describing the body of law constituting “consistency doctrine” and critiquing current efforts to use presidential power and politics to undermine that doctrine). Of course, the Trump administration has also enjoyed some success in the courts, though the tally with respect to administrative law appears to be heavily weighted against it. *See, e.g.*, *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (upholding the travel ban on certain foreign nationals in light of a national security justification); *Gill v. U.S. Dep’t of Justice*, 913 F.3d 1179 (9th Cir. 2019) (concluding that the Department of Justice did not violate APA procedural or substantive duties in promulgating standards for sharing terrorism-related information).

courts halting agency actions that reflect regulatory slop? Are there any discernable, incremental shifts in the judicial approach to long-settled procedural principles, or has the preexisting judicial review infrastructure been up to the task of responding to such slop? Much of the “common law”¹⁸ of administrative law arose from major shifts in the theoretical underpinnings and the practical expectations of the administrative state. The New Deal’s embrace of broad delegations of authority¹⁹ and political choice theory’s later skepticism of such delegations undergird two such shifts.²⁰ The Trump administration’s pervasive failure to abide by settled administrative-law norms presents the possibility that another common-law “moment” may be on the horizon. Thus, part of our motivation for this project is to evaluate what the initial court battles over presidential and agency actions taken during the Trump presidency might portend, though a final conclusion will require further experience with the scores of cases still pending. If the courts do not continue to insist on adherence to core administrative-law requirements, or provide remedies that are too weak to alter agency behavior, there is a risk that the mindset and behavior that engender slop may become embedded in the

18. See generally Jack M. Beermann, *Common Law and Statute Law in Administrative Law*, 63 ADMIN. L. REV. 1 (2011) (exploring the way that federal courts craft administrative law based on principles external to the structure of the APA); Gillian E. Metzger, *Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293 (2012) [hereinafter Metzger, *Embracing*] (acknowledging the existence of administrative common law and arguing for explicit judicial acceptance); Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479 (2010) (discussing the linkage between constitutional common law and administrative law).

19. See Leslie M. Kelleher, *Separation of Powers and Delegations of Authority to Cancel Statutes in the Line Item Veto Act and the Rules Enabling Act*, 68 GEO. WASH. L. REV. 395, 424 (2000) (noting that the Supreme Court “began to uphold routinely the broad delegations of discretion to administrative agencies that became common in the decades following the New Deal”).

20. See Robert Glicksman & Christopher H. Schroeder, *EPA and the Courts: Twenty Years of Law and Politics*, 54 LAW & CONTEMP. PROBS. 249, 276–81 (1991) (documenting the shift in approach to judicial review of agency decisions based on public choice theory); Richard J. Pierce, Jr., *The Role of the Judiciary in Implementing an Agency Theory of Government*, 64 N.Y.U. L. REV. 1239, 1245 (1989) (describing public choice theorists’ view that legislators enact broad delegations to avoid taking positions on policy issues that may cost them votes from constituencies with conflicting policy preferences); David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 GEO. L.J. 97, 134 (2000) (noting public choice theorists’ support of a revived nondelegation doctrine); see also generally Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669 (1975) (recounting the history of the traditional model of U.S. administrative law and describing the development of the interest representation model).

administrative state, with potentially devastating rule-of-law consequences.

Second, how do judicial remedies interact with regulatory slop? Many courts have vacated agency actions, even though remand without vacatur is an accepted remedy even for procedural violations.²¹ Furthermore, the proper geographic scope of injunctive relief is an issue that has become more salient²² as the lower courts are increasingly asked to exercise their constitutional role of checking the executive branch.²³ We contend that courts' equitable powers with respect to remedies—which include considering the disruptive impact of the proposed remedy²⁴—are at their height with respect to

21. For theoretical and normative support for this approach, see Ronald M. Levin, "Vacation" at Sea: Judicial Remedies and Equitable Discretion in Administrative Law, 53 DUKE L.J. 291 (2003). Compare Daniel B. Rodriguez, *Of Gift Horses and Great Expectations: Remands Without Vacatur in Administrative Law*, 36 ARIZ. ST. L.J. 599 (2004) (contending that remand without vacatur and similar remedial devices may encourage more interventionist judicial review), with Benjamin W. Tettlebaum, Note, "Vacation" at the Farm: Why Courts Should Not Extend "Remand Without Vacation" to Environmental Deregulation, 97 CORNELL L. REV. 405 (2012) (arguing that remand without vacatur is an inappropriate remedy for invalid deregulatory actions).

22. See *Trump v. Hawaii*, 138 S. Ct. at 2424–25 (Thomas, J., concurring) (expressing skepticism that the district courts have the authority to issue nationwide injunctions). For discussion of whether nationwide injunctions are an appropriate response to regulatory slop, see *infra* Part III.B.2.

23. Compare *Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 908 F.3d 476, 511–12 (9th Cir. 2018) (upholding nationwide injunction against termination of DACA); *Puget Soundkeeper All. v. Wheeler*, No. C15-1342-JCC, 2018 WL 6169196 (W.D. Wash. Nov. 26, 2018) (issuing a nationwide injunction against the delay in implementing the Obama administration's water pollution rule); *E. Bay Sanctuary Covenant v. Trump*, 349 F. Supp. 3d 838, 866 (N.D. Cal. 2018), *stay pending appeal denied*, 909 F.3d 1219 (9th Cir. 2018) (issuing a nationwide injunction against the implementation of a rule narrowing asylum claims), and *S.C. Coastal Conservation League v. Pruitt*, 318 F. Supp. 3d 959 (D.S.C. 2018) (issuing a nationwide injunction against an agency rule suspending the prior final rule), with *Georgia v. Pruitt*, 326 F. Supp. 3d 1356 (S.D. Ga. 2018) (issuing a preliminary injunction for eleven plaintiff states challenging the agency action as arbitrary and capricious and in excess of statutory authority). For a sampling of earlier cases either issuing or upholding issuance of nationwide injunctions, see, e.g., *California ex rel. Lockyer v. U.S. Dep't of Agric.*, 575 F.3d 999, 1020 (9th Cir. 2009); *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1408–10 (D.C. Cir. 1998); *Sequoia Forestkeeper v. Tidwell*, 847 F. Supp. 2d 1217 (E.D. Cal. 2012); *Heartwood, Inc. v. U.S. Forest Serv.*, 73 F. Supp. 2d 962, 980 (S.D. Ill. 1999), *aff'd on other grounds*, 230 F.3d 947 (7th Cir. 2000).

As discussed *infra* Part III.C.2, courts are split as to whether enjoining regulations that replace those of an earlier administration revive the earlier regulations. Compare *Am. Petroleum Inst. v. EPA*, 862 F.3d 50, 75 (D.C. Cir. 2017), *modified on reh'g*, 883 F.3d 918 (D.C. Cir. 2018) (reinstating regulations amended by invalid regulations), and *W. Watersheds Project v. Kraayenbrink*, 538 F. Supp. 2d 1302, 1324–25 (D. Idaho 2008), with *In re Polar Bear Endangered Species Act Listing and § 4(d) Rule Litig.*, 818 F. Supp. 2d 214, 239 (D.D.C. 2011).

24. E.g., *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993) ("The decision whether to vacate depends on 'the seriousness of the order's deficiencies

regulatory slop. Indeed, in such circumstances, disruption is exactly what is needed.

Finally, what do these developments mean for agency culture? In recent years, legal scholars have increasingly attended to insights from public administration to understand the internal legitimizing norms of federal agencies.²⁵ That is, agency legitimacy is not something to be reinforced only through the external checks of judicial review, congressional control, presidential control, or civil society. Agencies also build their own legitimacy from within, for example, by developing cultures of professionalism and expertise,²⁶ using bureaucratic controls,²⁷ and maintaining ongoing relationships with stakeholders.²⁸ It bears emphasis that regulatory slop impacts both traditional administrative law—that stemming from judicial doctrine—and our contemporary understanding of agency culture as a component of administrative law.²⁹ That culture, of course, can differ dramatically

(and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed.” (quoting *Int’l Union, United Mine Workers of Am. v. Fed. Mine Safety & Health Admin.*, 920 F.2d 960, 967 (D.C. Cir. 1990))). Other courts have applied versions of the *Allied-Signal* test. *See, e.g.*, *Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Eng’rs*, 781 F.3d 1271, 1290 (11th Cir. 2015); *Cal. Cmty. Against Toxics v. EPA*, 688 F.3d 989, 992 (9th Cir. 2012).

25. *E.g.*, Hammond & Markell, *supra* note 1; Sidney A. Shapiro & Ronald F. Wright, *The Future of the Administrative Presidency: Turning Administrative Law Inside-Out*, 65 U. MIAMI L. REV. 577 (2011); *see also* ALEJANDRO E. CAMACHO & ROBERT L. GLICKSMAN, *REORGANIZING GOVERNMENT: A FUNCTIONAL AND DIMENSIONAL FRAMEWORK* Introduction (NYU Press, forthcoming 2019) (noting the value of insights drawn from public administration scholarship, including empirical work, in determining how to structure intergovernmental relations); *id.* at Conclusion (noting public administration’s recognition of the value of empirical studies and arguing that the training of public administration professionals makes them well-suited to engaging in careful assessment of the values tradeoffs involved in alternative allocations of regulatory authority among agencies); *cf.* William L. Andreen, *Motivating Enforcement: Institutional Culture and the Clean Water Act*, 24 PACE ENVTL. L. REV. 67, 93–98 (2007) (considering the impact of agency culture on EPA enforcement policies and practices); Alejandro E. Camacho & Robert L. Glicksman, *Legal Adaptive Capacity: How Program Goals and Processes Shape Federal Land Adaptation to Climate Change*, 87 U. COLO. L. REV. 711, 812–14 (2016) (positing that the difference between the records of the U.S. Forest Service and the Bureau of Land Management in responding to climate change may be due in part to differing cultures at the two agencies); Robert L. Glicksman, *Wilderness Management by the Multiple Use Agencies: What Makes the Forest Service and the Bureau of Land Management Different?*, 44 ENVTL. L. 447, 460–69 (2014) (making a similar point concerning the two agencies’ approaches to wilderness management).

26. Shapiro & Wright, *supra* note 25, at 587–88, 592–95.

27. *Id.* at 580, 586.

28. Hammond & Markell, *supra* note 1, at 355.

29. *Cf.* Robert Knowles, *National Security Rulemaking*, 41 FLA. ST. U. L. REV. 883, 939–40 (2014) (arguing that the cultures of different agencies with national security-related

from administration to administration.³⁰ As Professor Jennifer Nou explores, for example, the Trump administration seems to have spawned a deep bureaucratic resistance that differs from the past in that it is publicly defiant.³¹

Keeping these questions in mind, this Article proceeds as follows. Part I begins with a brief overview of what we consider to be settled principles of administrative law—the sort that, prior to the new administration, agencies viewed as obvious boundaries—with an emphasis on procedures for adopting legislative rules.³² Next, Part II develops a typology of regulatory slop and demonstrates the Trump administration’s many departures from settled expectations of agency behavior. This Part is primarily concerned with (a) further distinguishing “slop” from “strategy” and (b) providing an analysis that will aid future efforts to answer the first question introduced above, that is, the extent to which courts are intervening when confronted with slop. Part III delves into the second question, focusing on the interaction between remedies and regulatory slop. Last, Part IV draws

responsibilities may affect whether they are willing to abide by notice-and-comment procedures even if they are not required to do so); Katherine A. Trisolini, *Decisions, Disasters, and Deference: Rethinking Agency Expertise After Fukushima*, 33 YALE L. & POL’Y REV. 323, 344 (2015) (“Despite its place in a trans-substantive vision of administrative law, [the National Environmental Policy Act’s] effectiveness varies by context and agency culture.”). Though agency culture may affect the ways in which agencies apply legal rules, those rules also may influence agency culture. See, e.g., Eric Biber & Josh Eagle, *When Does Legal Flexibility Work in Environmental Law?*, 42 ECOLOGY L.Q. 787, 794 n.23 (2015) (“Scholars and managers often argue that the rigidity of environmental and administrative law contributes to agency cultures that avoid risk taking and decision making, again problematic in a world of a changing climate.”); Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032, 1078 (2011) (“Legal rules and institutional structures that empower scientists or engineers will conduce to a technocratic agency culture, while rules and structures that empower lawyers will carry in their wake the distinctive culture of lawyers.”); Philip J. Weiser, *Institutional Design, FCC Reform, and the Hidden Side of the Administrative State*, 61 ADMIN. L. REV. 675, 701 (2009) (arguing that if the Federal Communications Commission were to use administrative law judges “to conduct proceedings and develop an evidentiary record through open testimony under oath, it could radically change the agency’s culture”).

30. See, e.g., Gillian E. Metzger, *Through the Looking Glass to a Shared Reflection: The Evolving Relationship Between Administrative Law and Financial Regulation*, 78 LAW & CONTEMP. PROBS. 129, 143 (2015) (“[A]n agency’s culture and regulatory approach varies tremendously according to the presidential administration in power and particular agency leaders; simply compare the EPA of Anne Gorsuch under President Reagan with the EPA of Lisa Jackson under President Obama.”).

31. Jennifer Nou, *Civil Servant Disobedience*, 94 CHI.-KENT L. REV. 349 (2019).

32. ROBERT L. GLICKSMAN & RICHARD E. LEVY, *ADMINISTRATIVE LAW: AGENCY ACTION IN LEGAL CONTEXT* 663 (2d ed. 2015) (“[T]he essential difference between legislative and nonlegislative rules is in their legal effects. Legislative rules are legally binding on the parties, the agency, and (assuming they are valid) the courts. Nonlegislative rules are not binding.”).

some preliminary conclusions about the nature of the problems posed by persistent lack of adherence to fundamental administrative law norms and the appropriate responsive judicial remedies, while also identifying further research that will enrich our understanding of the phenomenon of regulatory slop.

I. THE ESTABLISHED LAW OF ADMINISTRATIVE RULEMAKING

The Administrative Procedure Act (“APA”) is approaching its seventy-fifth anniversary. While some of its provisions are clear in defining agencies’ rulemaking obligations, others are less so and have been the subject of judicial interpretation.³³ Perhaps the most influential impacts of that interpretation have been “the increasing procedural complexity of agency rulemaking and the heightening of judicial scrutiny of the agency’s substantive decision.”³⁴ Whether one applauds³⁵ or decries³⁶ these judicial interpretive efforts, there is little

33. See David M. O’Brien, Marbury, *the APA*, and *Science-Policy Disputes: The Alluring and Elusive Judicial/Administrative Partnership*, 7 HARV. J.L. & PUB. POL’Y 443, 449 (1984) (“The APA’s relatively vague requirements for agency rulemaking . . . invited judicial oversight and elaboration.”).

34. *Id.* at 451; see also Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 108 (1998) (“The finer aspects of agencies’ rulemaking obligations—especially as concerns the much more common informal rulemaking—do not always appear on the face of the virtually unamended APA[.]” and “some of those obligations have been articulated by federal courts in the course of judicial interpretation of the APA’s provisions.”).

35. Gillian Metzger, for one, has argued that “administrative common law represents a legitimate instance of judicial lawmaking” which functions “as a central mechanism through which to ameliorate the constitutional tensions raised by the modern administrative state.” Metzger, *Embracing*, *supra* note 18, at 1296, 1297. She concedes that some administrative common law is “in tension with statutory text.” *Id.* at 1311; see also Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 38 (2017). An example is the D.C. Circuit’s imposition of a requirement that agencies use notice-and-comment rulemaking to alter interpretive rules. See *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579 (D.C. Cir. 1997); *Alaska Prof’l Hunters Ass’n v. FAA*, 177 F.3d 1030 (D.C. Cir. 1999). The Supreme Court held that doctrine to be irreconcilable with the APA. *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1206 (2015).

36. Some have charged that the courts have created procedural requirements and judicial review doctrines that cannot reasonably be rooted in the APA’s text and that their application has had ill effects on rulemaking. See, e.g., JERRY L. MASHAW & DAVID L. HARFST, *THE STRUGGLE FOR AUTO SAFETY* 225 (1990) (“The result of judicial requirements for comprehensive rationality has been a general suppression of the use of rules.”); see also Sidney A. Shapiro & Richard W. Murphy, *Arbitrariness Review Made Reasonable: Structural and Conceptual Reform of the “Hard Look,”* 92 NOTRE DAME L. REV. 331, 371 (2016) (arguing that courts have “radically transform[ed] notice-and-comment rulemaking”). Judges and scholars alike have attributed the ossification of the rulemaking process to judicially declared requirements for producing an informal rule under § 553 of the APA. See, e.g., Am. Radio Relay

debate that the APA has taken on the status of a “super statute.”³⁷ As Professor Kristin Hickman puts it, “[t]he APA is the law. The judicial doctrines elaborating the requirements of APA section 553 are fairly settled, even if they permit the courts some flexibility in their application.”³⁸ Those attaching this moniker to the APA do so because, among other things, “the principles it established . . . have become ‘foundational or axiomatic to our thinking[,]’ . . . whether or not the entire statute ‘alter[ed] substantially the then-existing regulatory baselines with a new principle or policy.’”³⁹ Thus, “the APA has developed an arguably sub-constitutional status as a baseline law that provides rights that are both fundamental and unlikely to be revisited.”⁴⁰

League, Inc. v. FCC, 524 F.3d 227, 248 (D.C. Cir. 2008) (Kavanaugh, J., concurring in part and dissenting in part) (arguing that the judicial interpretation of § 553 “transformed rulemaking . . . from the simple and speedy practice contemplated by the APA into a laborious, seemingly never-ending process”); Frank B. Cross, *Pragmatic Pathologies of Judicial Review of Administrative Rulemaking*, 78 N.C. L. REV. 1013, 1014 (2000) (claiming that the threat of judicial review “ossifies the rulemaking process, . . . disrupts administrative agendas, forces misallocation of resources, operates without regard to political and practical constraints on administrative action, and reduces the quality of promulgated rules”).

37. See generally Kathryn E. Kovacs, *Superstatute Theory and Administrative Common Law*, 90 IND. L.J. 1207 (2015) (applying the superstatute theory to the APA); see also Eric Berger, *Individual Rights, Judicial Deference, and Administrative Law Norms in Constitutional Decision Making*, 91 B.U. L. REV. 2029, 2054–55 (2011) (noting that “[t]he APA, after all, is a ‘super-statute’ entrenching governmental structures and quasi-constitutional norms[,]” which operates to “contain administrative discretion” and balance considerations of responsiveness and “efficient administration”); Jeremy K. Kessler, *The Political Economy of “Constitutional Political Economy,”* 94 TEX. L. REV. 1527, 1550 (2016) (“Hailed at the time in manifestly constitutional terms as a ‘bill of rights for the administrative state,’ the APA is recognized today as [a] ‘super-statute’ of constitutional significance.” (footnotes omitted)). The term “super statute” originated in William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215 (2001). Professors Eskridge and Ferejohn define a “super statute” as:

[A] law or series of laws that (1) seeks to establish a new normative or institutional framework for state policy and (2) over time does “stick” in the public culture such that (3) the super-statute and its institutional or normative principles have a broad effect on the law—including an effect beyond the four corners of the statute.

Id. at 1216. For discussion of the similarities in interpreting constitutional provisions and the APA, and particularly the potential use of originalist interpretive techniques in construing the APA, see Evan D. Bernick, *Envisioning Administrative Procedure Act Originalism*, 70 ADMIN. L. REV. 807 (2018).

38. Kristin E. Hickman, *Coloring Outside the Lines: Examining Treasury’s (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 82 NOTRE DAME L. REV. 1727, 1795 (2007).

39. Kathryn E. Kovacs, *Leveling the Deference Playing Field*, 90 OR. L. REV. 583, 606–07 (2011) (alteration in original) (quoting Eskridge & Ferejohn, *supra* note 37, at 1230–31).

40. Steven Davidoff Solomon & David Zaring, *After the Deal: Fannie, Freddie, and the Financial Crisis Aftermath*, 95 B.U. L. REV. 371, 415 (2015) (footnote omitted); see also Mila Sohoni, *A Bureaucracy—If You Can Keep It*, 131 HARV. L. REV. F. 13, 20 (2017) (“The

A. Procedural Requirements for Rulemaking

The core provisions of the APA, as the courts have interpreted and applied them, establish norms for both the processes by which agencies adopt rules⁴¹ and the standards under which courts review challenges to those rules.⁴² This Section summarizes those provisions, highlighting those that, once violated, have been the basis for judicial reversal of the Trump administration's agency actions thus far.

1. *Notice-and-Comment Requirements.* The basic requirements for adopting rules in informal rulemaking proceedings are set forth in § 553 of the APA. That section requires agencies to publish notice of a proposed rule in the Federal Register, provide an opportunity for public comment, and accompany publication of the final rule with a concise statement of basis and purpose.⁴³ During the 1970s the courts developed these requirements into “paper hearing” procedures to ensure a meaningful opportunity for input by those affected.⁴⁴ Whether or not the courts appropriately extrapolated the meaning of § 553's three basic requirements in this manner, the resulting procedural mandates are well established.

The APA's legislative history indicates that the notice of proposed rulemaking must be “sufficient to fairly apprise interested persons of the issues involved, so that they may present responsive data or argument.”⁴⁵ The courts have identified three functions served by the

administrative constitution is rooted in the enactment of such statutes—most importantly the APA—and in the meaning and conventions encrusted around those statutes by agency practice and judicial elaboration . . .” (footnote omitted)).

41. With some regret, we limit the scope of our discussion to rulemaking. Adjudication, of course, is also a critical way in which agencies make policy. See *SEC v. Chenery Corp.*, 332 U.S. 194, 202–03 (1947) (explaining when adjudication may be an appropriate policymaking mechanism).

42. Jeff Bowen & Susan Rose-Ackerman, *Partisan Politics and Executive Accountability: Argentina in Comparative Perspective*, 10 SUP. CT. ECON. REV. 157, 196 (2003) (“In 1946 Congress passed the [APA] establishing norms of nonpartisan oversight for executive branch rulemaking.”); see also Olivier Sylvain, *Wireless Localism: Beyond the Shroud of Objectivity in Federal Spectrum Administration*, 20 MICH. TELECOMM. & TECH. L. REV. 121, 161 (2013) (referring to “deference norms” that “operate alongside a structure under the [APA] that explicitly provides for the participation of ‘interested persons’ of the public in agency deliberations, including rulemakings”).

43. 5 U.S.C. § 553(b)–(c) (2012).

44. See Glicksman & Schroeder, *supra* note 20, at 264–68 (describing the “agency capture theory” of the 1950s and 1960s, which encouraged greater judicial review of agency decisions, ultimately forcing agencies such as the EPA to adopt more detailed decisionmaking procedures).

45. LEGISLATIVE HISTORY OF THE ADMINISTRATIVE PROCEDURE ACT, S. DOC. NO. 79–248, at 200 (1946).

notice requirement: (1) improving the quality of rulemaking by exposing the agency to diverse public comment; (2) assuring “an essential component of ‘fairness to affected parties;’” and (3) “enhanc[ing] the quality of judicial review” “by giving affected parties an opportunity to” submit information and make arguments in response to the proposal.⁴⁶ The notice must provide “sufficient factual detail and rationale for the rule to permit interested parties to comment,”⁴⁷ and include “enough information about what [the agency] was planning to do, or the options it was considering, to provide the public with a meaningful opportunity to comment.”⁴⁸ Courts have found procedural violations when agencies have failed to make available to the public important information upon which they based the proposed rules.⁴⁹ These glosses on § 553’s notice requirement

46. *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983) (quoting *Nat’l Ass’n of Home Health Agencies v. Schweiker*, 690 F.2d 932, 949 (D.C. Cir. 1982)); *see also Nat. Res. Def. Council, Inc. v. EPA*, 822 F.2d 104, 121 (D.C. Cir. 1987) (stating that the function of notice “is to ensure public participation in administrative ‘legislating’ and thereby, in theory, minimize the dangers of arbitrariness and inadequate information”).

47. *Fla. Power & Light Co. v. United States*, 846 F.2d 765, 771 (D.C. Cir. 1988).

48. *Prometheus Radio Project v. FCC*, 652 F.3d 431, 451 (3d Cir. 2011); *see also Conn. Light & Power Co. v. Nuclear Regulatory Comm’n*, 673 F.2d 525, 530 (D.C. Cir. 1982) (stating that notice must provide the public with an “accurate picture of the reasoning” used by the agency to develop the proposed rule). The courts have required agencies to restart the notice-and-comment process under certain circumstances. An agency need not start over in this manner “merely because the rule promulgated by the agency differs from the rule it proposed, partly at least in response to submissions.” *Int’l Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 632 (D.C. Cir. 1973); *see also S. Terminal Corp. v. EPA*, 504 F.2d 646, 659 (1st Cir. 1974) (“Parties have no right to insist that a rule remain frozen in its vestigial form.”). But courts have required additional rounds of notice and comment if the final rule is not a “logical outgrowth” of the proposal, such that interested persons were not on notice that the agency was considering the outcome it ultimately reached. *Chocolate Mfrs. Ass’n of the U.S. v. Block*, 755 F.2d 1098, 1105–07 (4th Cir. 1985); *see also Daimler Trucks N. Am. LLC v. EPA*, 737 F.3d 95, 100 (D.C. Cir. 2013) (indicating that a final rule would not be a logical outgrowth if a new round of notice and comment would provide commentators with “their first occasion to offer new and different criticisms which the agency might find convincing” (quoting *Int’l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 626 F.3d 84, 95 (D.C. Cir. 2010))). Courts are likely to require an additional round if the agency relies on new information whose accuracy is contested. *See, e.g., Ober v. EPA*, 84 F.3d 304, 314–15 (9th Cir. 1996); *see also Env’tl. Integrity Project v. EPA*, 425 F.3d 992, 998 (D.C. Cir. 2005) (refusing to accept the EPA’s “decision to repudiate its proposed interpretation and adopt its inverse” as a valid “logical outgrowth” of the proposed rule).

49. *See, e.g., Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 239–40 (D.C. Cir. 2008) (finding a violation of § 553(b) when the agency released only redacted versions of staff-prepared scientific studies, noting “that the Commission’s partial reliance [on the redacted materials] made [them] ‘critical factual material’” (quoting *Owner-Operator Indep. Drivers Ass’n v. Fed. Motor Carrier Safety Admin.*, 494 F.3d 188, 201 (D.C. Cir. 2007))); *United States v. N.S. Food Prods. Corp.*, 568 F.2d 240, 251 (2d Cir. 1977) (“If the failure to notify interested persons of the scientific research upon which the agency was relying actually prevented the presentation of relevant

induce agencies to build an administrative record they regard as sufficient to survive judicial review which, under the APA, is conducted exclusively on the basis of that record.⁵⁰ Among other things, courts may not uphold a rule based on a post hoc explanation or a reason that would have been sufficient if the agency had relied on it at the time of adoption but did not do so.⁵¹

Section 553(c) requires the agency to “give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation.”⁵² The submission of written comments allows affected parties to protect their interests, subjects the agency’s data and reasoning to scrutiny, and becomes part of the administrative record that provides the basis for judicial review. Without a meaningful opportunity to comment, the functions of the notice requirement would be thwarted.

2. *The Concise Statement of Basis and Purpose.* Section 553(c) does not specify the required content of the “concise general statement of . . . basis and purpose.”⁵³ While courts often repeat that the duty to provide such a statement was “not meant to be particularly onerous,”⁵⁴ agency responses now routinely include fairly elaborate explanations. Agencies almost always accompany the text of a final rule with a “preamble,” which typically discusses the agency’s authority to adopt the rule, explains how the final rule promotes statutory purposes and how it differs (if at all) from the proposed rule, and responds to significant comments submitted during the public comment period.⁵⁵ These preambles can easily run hundreds of pages for complex rules.

comment, the agency may be held not to have considered all ‘the relevant factors.’”); *Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 375, 400 (D.C. Cir. 1973) (stating that if an agency relies on scientific literature, it “should indicate which particular findings of that literature are significant”).

50. 5 U.S.C. § 706(2) (2012) (providing that, in determining whether an agency action is unlawful, “the court shall review the whole record or those parts of it cited by a party”).

51. *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943).

52. 5 U.S.C. § 553(c).

53. *Id.*

54. *Nat’l Mining Ass’n v. Mine Safety & Health Admin.*, 512 F.3d 696, 700 (D.C. Cir. 2008).

55. *See Del. Dep’t of Nat. Res. & Env’tl. Control v. EPA*, 785 F.3d 1, 13–18 (D.C. Cir. 2015) (holding that EPA’s failure to respond to significant comments, including comments proposing an alternative regulatory approach, rendered the Clean Air Act rule arbitrary and capricious); *Auto. Parts & Accessories Ass’n v. Boyd*, 407 F.2d 330, 338 (D.C. Cir. 1968).

An agency's failure to provide a fulsome statement of basis and purpose can lead to remand or invalidation of the rule.⁵⁶

The explanation that accompanies a final rule must be sufficient to allow a reviewing court to “see what major issues of policy were ventilated by the . . . proceedings and why the agency reacted to them as it did.”⁵⁷ Although the requirement to accompany a final rule with a statement of basis and purpose is a procedural requirement,⁵⁸ the failure to provide an adequate statement is also grounds for invalidation on substantive grounds under the “arbitrary and capricious” standard or, if applicable, the “substantial evidence” standard.⁵⁹

3. *Provisions Concerning the Effective Date of Rules.* The APA addresses the timing of a rule's effective date. Unless the agency provides good cause to the contrary, legislative rules may not become effective sooner than thirty days after their publication in the Federal Register.⁶⁰ Once a rule becomes effective, its obligations may not be deferred without amending the rule using the same notice-and-comment procedures used in the rule's initial adoption.⁶¹ An effort to delay the effective date of a rule that has already gone into effect is “tantamount to amending or revoking a rule,” which cannot be accomplished without compliance with the full range of notice-and-

56. See, e.g., *Cent. & S.W. Servs. v. EPA*, 220 F.3d 683, 692 (5th Cir. 2000) (finding that the statement accompanying an EPA rule concerning chemical waste disposal was inadequate because EPA did not respond to comments on an issue on which it had solicited comments).

57. *Boyd*, 407 F.2d at 338; see also *Cement Kiln Recycling Coal. v. EPA*, 493 F.3d 207, 225 (D.C. Cir. 2007) (stating that “an agency must ‘demonstrate the rationality of its decision-making process’” (quoting *Grand Canyon Air Tour Coal. v. FAA*, 154 F.3d 455, 468 (D.C. Cir. 1998))).

58. For example, *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2120 (2016), appears to treat the failure to provide adequate reasons for an agency action as a procedural defect.

59. See, e.g., *Thompson v. Clark*, 741 F.2d 401, 409 (D.C. Cir. 1984) (Scalia, J.) (“The failure to respond to comments is significant only insofar as it demonstrates that the agency's decision was not ‘based on a consideration of the relevant factors.’” (citation omitted) (quoting *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971))). For our purposes, the arbitrary and capricious and substantial evidence standards impose equivalent reason-giving obligations. See *Ass'n of Data Processing Serv. Orgs., Inc. v. Bd. of Governors of the Fed. Reserve Sys.*, 745 F.2d 677, 683 (D.C. Cir. 1984) (equating the standards).

60. 5 U.S.C. § 553(d) (2012).

61. See *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (“The [APA] makes no distinction . . . between initial agency action and subsequent agency action undoing or revising that action.”); *Nat'l Family Planning & Reprod. Health Ass'n v. Sullivan*, 979 F.2d 227, 234 (D.C. Cir. 1992) (“[A]n agency issuing a legislative rule is itself bound by the rule until that rule is amended or revoked. . . . [and] may not alter [such a rule] without notice and comment”); see also *Clean Air Council v. Pruitt*, 862 F.3d 1, 8–9 (D.C. Cir. 2017).

comment procedures.⁶² Similarly, an agency may not revise a legislative rule through the adoption of an interpretive rule or a policy statement, both of which are nonbinding.⁶³

B. Judicial Review of The Substance of Agency Policy Reversals

An agency's alteration of the substantive content of an adopted legislative rule may be at risk even if the agency used proper notice-and-comment procedures. The judicial stance toward agency reversals of position depends somewhat on the precise agency action at issue.

With respect to agencies' statutory interpretations found in nonbinding documents such as nonlegislative rules, inconsistency is a factor that weighs against judicial deference.⁶⁴ When such interpretations are part of legislative rules, however, the agency need only reasonably explain its new view.⁶⁵ In the iconic *Chevron* case, for example, the Supreme Court deferred to the Environmental Protection Agency's ("EPA") interpretation of a key Clean Air Act ("CAA") provision governing the scope of the New Source Review

62. *Clean Air Council v. Pruitt*, 862 F.3d at 6; *see also* *Nat. Res. Def. Council v. Abraham*, 355 F.3d 179, 194 (2d Cir. 2004) ("[A]ltering the effective date of a duly promulgated standard could be, in substance, tantamount to an amendment or rescission of the standards . . ."); *Env'tl. Def. Fund, Inc. v. EPA*, 716 F.2d 915, 920 (D.C. Cir. 1983) ("[S]uspension or delayed implementation of a final regulation normally constitutes substantive rulemaking under APA § 553.").

63. *See Morton v. Ruiz*, 415 U.S. 199, 232, 235, 236 (1974) (suggesting that, unlike nonlegislative rules, legislative rules "affect[] individual rights and obligations," are "binding," or have the "force of law"); *Iowa League of Cities v. EPA*, 711 F.3d 844, 874 (8th Cir. 2013) ("The hallmark of an interpretative rule or policy statement is that they cannot be independently legally enforced.").

64. *See Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) ("The weight of [the agency's] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, *its consistency with earlier and later pronouncements*, and all those factors which give it power to persuade, if lacking power to control." (emphasis added)); *see also* *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001) ("The fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position." (footnotes and citation omitted) (citing *Skidmore*, 323 U.S. at 139–40)); *Boykin v. KeyCorp*, 521 F.3d 202, 210–11 (2d Cir. 2008) (rejecting the agency's interpretation of the limitations period for filing a claim alleging discrimination in violation of the Fair Housing Act because, among other things, it was inconsistent with the agency's prior interpretations).

65. Of course, if a court has previously held that the statute's meaning is clear, the agency is bound by that determination. *See, e.g., Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005) (holding that a court's prior construction precludes an agency's contrary construction "only if the prior judicial decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion").

permit program even though the agency had changed its mind about the meaning of that provision numerous times.⁶⁶

An agency's reversal of its own previous positions also may be subject to judicial review under the arbitrary and capricious standard. The leading case is the *State Farm* decision.⁶⁷ After concluding that the arbitrary and capricious standard applies to the rescission of a rule as well as to its adoption, the Supreme Court stated that if an agency changes course, it must "supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance."⁶⁸ More recently, the Court reinforced the agencies' obligation to justify reversals of their own prior determinations. It declared that "[a]gencies are free to change their existing policies as long as they provide a reasoned explanation for the change," but "the agency must at least 'display awareness that it is changing position' and 'show that there are good reasons for the new policy'" and "be cognizant that longstanding policies may have 'engendered serious reliance interests that must be taken into account.'"⁶⁹

State Farm also identified several examples of arbitrary and capricious reasoning. These include reliance on factors that Congress did not intend the agency to consider, failure to consider an important aspect of the problem being addressed, and decisionmaking that either runs counter to the evidence before the agency or is otherwise sufficiently implausible that the agency forfeits the judicial deference that courts normally afford to agency fact-finding and policy determinations.⁷⁰ Agency decisions in formal proceedings governed by

66. See *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 863 (1984) ("The fact that the agency has from time to time changed its interpretation of the term 'source' does not, as respondents argue, lead us to conclude that no deference should be accorded the agency's interpretation of the statute.").

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

68. *Id.* at 42.

69. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125–26 (2016) (quoting *FCC v. Fox Television Stations*, 556 U.S. 502, 515 (2009)). An agency must supply a reasoned explanation for a policy change in its regulatory approach even if the change is reflected in an interpretive rule. *Saget v. Trump*, 345 F. Supp. 3d 287, 300 (E.D.N.Y. 2018).

70. *State Farm*, 463 U.S. at 43. In crafting their rulemaking records, agencies are well advised to avoid one of these grounds for remanding agency rules based on the application of § 706(2)(A) of the APA.

the substantial evidence standard⁷¹ are likely to be vulnerable on the same grounds.⁷²

Thus, agency decisions are at risk of judicial reversal if they lack evidentiary foundation, reflect gaps in reasoning because they neglect to consider relevant considerations, or are based on factors that are not germane under the organic statute provisions from which the agency derives its decisionmaking authority. When an agency reverses either its interpretation of organic statute provisions or its policy determinations in applying those provisions, it must supply a reasoned explanation for the about-face and acknowledge the reliance that resulted from its disavowed position. As the next Part demonstrates, the Trump administration's frequent reversals of Obama administration rules have prompted numerous challenges seeking invalidation on these grounds.

II. THE TRUMP ADMINISTRATION'S REGULATORY SLOP

The norms established by the principles summarized above have been put to the test by the Trump administration. Thus far, the flaws identified by courts include: (1) unlawful postponement of effective and compliance dates in final rules; (2) failure to undertake notice-and-comment rulemaking; and (3) failure to make required findings. The cases in which the courts have found, or are being asked to find, agency action to be inconsistent with basic administrative-law doctrines appear to reflect a pattern. The agency first attempts to stop Obama-era administrative actions in their tracks, notwithstanding that at least in some instances they have already gone into effect. Typically, the agency has based delayed implementation on its plans (often dictated by presidential decree) to review and repeal or revise the previous action. At the same time, or shortly thereafter, the agency proposes the repeal or revision. The bulk of the decided cases to date involve review of agency delays or attempted repeals. As Trump agencies finalize regulations that repeal or weaken Obama agency rules, the courts will begin to address litigants' claims of substantive invalidity, including

71. Under the APA, the substantial evidence standard applies to rulemaking or adjudication subject to the procedures found in §§ 556 and 557 of the APA. 5 U.S.C. § 706(2)(E) (2012).

72. See, e.g., *City of Santa Monica v. FAA*, 631 F.3d 550, 557–58 (D.C. Cir. 2011) (inquiring whether agency's conclusions were based on irrelevant factors in applying substantial evidence test); *Aerial Banners, Inc. v. FAA*, 547 F.3d 1257, 1260 (11th Cir. 2008) (reciting *State Farm* factors in describing the court's task under the substantial evidence test).

lack of evidentiary foundation, unexplained reversals of position, reliance on improper factors, and other forms of flawed reasoning.

A. Improperly Suspending Effective or Compliance Dates

Perhaps the most clear-cut flouting of established principles has been the Trump administration's many attempts to improperly suspend the effective or compliance dates set forth in regulations.⁷³ The applicable principles are the following. First, as Professor Heinzerling explains, it is common for new presidential administrations to temporarily delay rules finalized under the prior administration but not yet effective to afford time for the new administration to evaluate such rules.⁷⁴ For prolonged periods of time, however, courts have been clear: postponing a regulation's effective date constitutes rulemaking and requires notice and comment.⁷⁵ Furthermore, courts take the same approach with compliance dates as with effective dates.⁷⁶ These principles can be modified by statute; section 705 of the APA provides that agencies may stay the effective dates of not-yet-effective rules

73. For a detailed analysis of the Trump administration's delay-related activities during the first year or so of the administration, see generally Heinzerling, *supra* note 4. For examples, see *Delay of Effective Date for 30 Final Regulations Published by the Environmental Protection Agency Between October 28, 2016 and January 17, 2017*, 82 Fed. Reg. 8499 (Jan. 26, 2017) (to be codified at 40 C.F.R. pts. 22, 51, 52, 61, 68, 80, 81, 124, 127, 147, 171, 239, 259, 300, & 770) (listing thirty regulations delayed for sixty days pursuant to Executive Order); Rena Steinzor & Elise Desiderio, *The Trump Administration's Rulemaking Delays*, CTR. FOR PROGRESSIVE REFORM (2017), http://www.progressivereform.org/articles/Trump_Rule_Delays_Chart_071917.pdf [<https://perma.cc/S5C4-7A96>] (itemizing examples across multiple agencies).

74. Heinzerling, *supra* note 4, at 16–17. The Office of Legal Counsel has opined that such practice (typically for a sixty-day period) is lawful, and the approach seems to go unchallenged. *See, e.g.*, *Nat. Res. Def. Council, Inc. v. EPA*, 683 F.2d 752, 755 (3d Cir. 1982) (describing a challenge to indefinite postponement but noting that, with respect to sixty-day postponement, “[n]o challenge has been made”).

75. *Nat. Res. Def. Council, Inc. v. EPA*, 683 F.2d at 764 (“Because the indefinite postponement of the effective date of a final rule fits the APA definition of ‘rule’ . . . we conclude that the postponement challenged in this case was subject to the rulemaking procedure of the APA.”); *Nat. Res. Def. Council v. U.S. Dep’t of Energy*, No. 17 Civ. 6989, 2019 WL 858748, at *17 (S.D.N.Y. Feb. 22, 2019) (noting that § 705 “does not allow agencies to suspend a rule that has already taken effect”).

76. *See, e.g.*, *Sierra Club v. Pruitt*, 293 F. Supp. 3d 1050, 1061 (N.D. Cal. 2018) (vacating a rule delaying compliance dates beyond deadlines established by the Formaldehyde Standards in Composite Wood Products Act); Heinzerling, *supra* note 4, at 27 (detailing the differences between effective dates and compliance dates).

pending litigation.⁷⁷ Notably, the courts are careful to police these statutory parameters.⁷⁸

The following example demonstrates the courts' general approach and provides a window into potential remedies.⁷⁹ In *California v. Bureau of Land Management*,⁸⁰ tribal and citizen groups challenged the Bureau of Land Management's ("BLM") action postponing compliance dates for the Obama-era Waste Prevention Rule governing waste of natural gas on federal lands.⁸¹ The postponement came following President Trump's Energy Independence executive order,⁸² which instructed executive agencies to review rules with the aim of reducing the regulatory burden on domestic energy sources.⁸³ In its Notice announcing the postponement, the BLM explained that it was invoking section 705 of the APA in order to "preserve the regulatory status quo"⁸⁴ while the Waste Prevention Rule was undergoing judicial review⁸⁵ and the BLM was reconsidering the rule.⁸⁶ The Northern

77. 5 U.S.C. § 705 (2012).

78. See e.g., *Clean Air Council v. Pruitt*, 862 F.3d 1, 14 (D.C. Cir. 2017) (rejecting the agency's reliance on the Clean Air Act as authority for a stay of rule); *Nat. Res. Def. Council v. U.S. Dep't of Energy*, 2019 WL 858748, at *17–18 (holding that agency's invocation of § 705 to stay the effective date of an adopted rule was improper); *Bauer v. DeVos*, 325 F. Supp. 3d 74, 107–10 (D.D.C. 2018) (holding arbitrary and capricious the Department of Education's reliance on § 705 to delay the Borrower Defense Regulations where the agency's explanation failed to offer a reasoned analysis).

79. For further examples, see *Nat. Res. Def. Council v. Nat'l Highway Traffic Safety Admin.*, 894 F.3d 95, 116–17 (2d Cir. 2018) (vacating the indefinite delay of a previously published rule for exceeding statutory authority and failing to undergo notice and comment); *Sierra Club v. Pruitt*, 293 F. Supp. 3d at 1061 (vacating a rule delaying compliance dates beyond deadlines established by the Formaldehyde Standards in Composite Wood Products Act); *Nat'l Venture Capital Ass'n v. Duke*, 291 F. Supp. 3d 5, 20 (D.D.C. 2017) (vacating a rule that delayed the effective date of a previously published rule for failing to undergo notice and comment).

80. *California v. U.S. Bureau of Land Mgmt.*, 277 F. Supp. 3d 1106 (N.D. Cal. 2017).

81. *Id.* at 1111–12.

82. Exec. Order No. 13,783, 82 Fed. Reg. 16,093 (Mar. 28, 2017).

83. *Id.*

84. Waste Prevention, Production Subject to Royalties, and Resource Conservation; Postponement of Certain Compliance Dates, 82 Fed. Reg. 27,430, 27,431 (June 15, 2017) (to be codified at 43 C.F.R. pt. 3170).

85. As of this writing, the Waste Prevention Rule is subject to a preliminary injunction, the appeal of which is pending in the Tenth Circuit. See *Wyoming v. U.S. Dep't of the Interior*, No. 18-8027, No. 18-8029, 2018 WL 2727031 (10th Cir. June 4, 2018).

86. Waste Prevention, Production Subject to Royalties, and Resource Conservation; Postponement of Certain Compliance Dates, 82 Fed. Reg. at 27,431. The BLM subsequently issued a final rule that "temporarily" postponed implementation of the compliance requirements for certain aspects of the Obama rule. Waste Prevention, Production Subject to Royalties, and Resource Conservation; Delay and Suspension of Certain Requirements, 82 Fed. Reg. 58,050, 58,050 (Dec. 8, 2017) (to be codified at 43 C.F.R. pts. 3160 & 3170). It later issued a final rule that

District of California rejected these explanations as contrary to the language of the APA; moreover, it rejected the BLM's arguments regarding regulatory certainty in strong terms:

Defendants' policy argument that the Court should construe Section 705 to include "compliance dates" because Section 705 is meant to allow an agency to maintain the status quo pending judicial review is equally unpersuasive. Indeed, Defendants' position undercuts regulatory predictability and consistency. After years of developing the Rule and working with the public and industry stakeholders, the Bureau's suspension of the Rule five months after it went into effect plainly did not "maintain the status quo." To the contrary, it belatedly disrupted it. Regulated entities with large operations had already needed to make concrete preparations after the Rule had not only become final but had actually gone into effect. The uncertainty that can arise from this kind of sudden agency reversal of course is illustrated by its impact on the regulated entities here.⁸⁷

In addition, the court reasoned that BLM's justifications for postponing the rule were arbitrary and capricious for failing to give adequate reasons, including failing to consider the benefits of the postponed provisions of the rule.⁸⁸

Turning to the remedy, the court determined that vacatur of the postponement notice was proper.⁸⁹ Applying the two-part framework from *Allied-Signal v. U.S. Nuclear Regulatory Commission*,⁹⁰ the court reasoned that the agency's error was serious based on its "illegal[]" invocation of the section 705 provision and circumvention of notice-and-comment requirements.⁹¹ Further, leaving the postponement in

revised the Obama rule and reinstated the regulatory provisions it had replaced. Waste Prevention, Production Subject to Royalties, and Resource Conservation; Rescission or Revision of Certain Requirements, 83 Fed. Reg. 49,184 (Sept. 28, 2018) (to be codified at 43 C.F.R. pts. 3160 & 3170).

87. *California v. U.S. Bureau of Land Mgmt.*, 277 F. Supp. 3d 1106, 1120 (N.D. Cal. 2017) (citation omitted).

88. *Id.* at 1123; *see also* Nat. Res. Def. Council v. U.S. Dep't of Energy, No. 17 Civ. 6989, 2019 WL 858748, at *14–15 (S.D.N.Y. Feb. 22, 2019) (holding arbitrary and capricious an agency's reliance on § 705 to stay portions of a regulation adopted by the previous administration which set energy efficiency standards for air conditioners).

89. *California v. U.S. Bureau of Land Mgmt.*, 277 F. Supp. 3d at 1127.

90. *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146 (D.C. Cir. 1993). In *Allied-Signal*, the D.C. Circuit framed the test as hinging on (1) the seriousness of the agency's error and (2) "the disruptive consequences of an interim change that may itself be changed." *Id.* at 150–51 (quoting *Int'l Union, United Mine Workers of Am. v. Fed. Mine Safety & Health Admin.*, 920 F.2d 960, 967 (D.C. Cir. 1990)).

91. *California v. U.S. Bureau of Land Mgmt.*, 277 F. Supp. 3d at 1125.

place would undermine the benefits of the Waste Prevention Rule. Nor was the court sympathetic to BLM's compliance-related protestations because any difficulties achieving compliance were "to some extent [a problem] of their own making."⁹² The court expressed discomfort with leaving the postponement in place because doing so "could be viewed as a free pass for agencies to exceed their statutory authority and ignore their legal obligations under the APA, making a mockery of the statute."⁹³ Finally, the court distinguished its prior remedy in *Becerra v. Department of the Interior*,⁹⁴ in which it had rejected BLM's attempt to postpone a different rule's effective date, but had declined to vacate the postponement because the agency was only days away from issuing a rule to replace the one it had attempted to postpone.⁹⁵

Are examples such as this properly categorized as "regulatory slop?" We think the moniker is defensible in this context because the law concerning delays and suspensions has always been so clear. A review of the courts' language in *Becerra* and other cases lends support to this proposition. When EPA improperly delayed the effective date of a Chemical Disaster Rule, the court baldly stated that the agency's approach "makes a mockery of the statute."⁹⁶ In another example, the Second Circuit rejected the National Highway Traffic Safety Administration's ("NHTSA") indefinite delay of fuel-economy standards pending its reconsideration of a final rule, without notice and comment.⁹⁷ The court emphasized that the agency "could [not] plausibly" argue it had statutory authority given the clear terms of the statutory mandate,⁹⁸ nor could it succeed when it offered "no authority—statutory or otherwise" for its failure to engage proper procedures.⁹⁹ Further, the court emphasized that prior precedent already made clear that there was no inherent authority for an agency to act as had NHTSA.¹⁰⁰ Similarly, in rejecting a rule delay by the

92. *Id.* at 1126.

93. *Id.*

94. *Becerra v. U.S. Dep't of the Interior*, 276 F. Supp. 3d 953 (N.D. Cal. 2017).

95. *Id.* at 967; *see also* Nat'l Venture Capital Ass'n v. Duke, 291 F. Supp. 3d 5, 9 (D.D.C. 2017) (vacating a rule that improperly delayed the effective date of the final rule).

96. *Air All. Hous. v. EPA*, 906 F.3d 1049, 1064 (D.C. Cir. 2018) (vacating the rule delay).

97. *Nat. Res. Def. Council v. Nat'l Highway Traffic Safety Admin.*, 894 F.3d 95 (2d Cir. 2018).

98. *Id.* at 111.

99. *Id.*

100. *Id.* at 112 (referencing the "well-established principle that an agency literally has no power to act unless and until Congress confers power upon it" (quoting *Nat. Res. Def. Council v. Abraham*, 355 F.3d 179, 202 (2d Cir. 2004))).

Department of Homeland Security (“DHS”), a district court underscored the strong precedent rejecting agencies’ attempts to invoke the good-cause exemption to notice-and-comment rulemaking when the agencies themselves delayed in implementing their decisions.¹⁰¹ In doing so, it rejected agencies’ “concern for [their] own bottom line” as good cause,¹⁰² and intimated that the agency itself recognized the “weakness” of its justification.¹⁰³ Likewise, the court in *Becerra* called the Department of the Interior to task for failing to cite any “precedent or legislative history” to support bypassing the APA procedures required to repeal a “duly promulgated regulation.”¹⁰⁴ Whether these flaws were motivated by a purposeful disregard of clear law or an ignorant failure to research clear law, they suggest that the courts’ rhetoric and remedies are justifiable attempts to bring the agencies to heel.

B. *Failing to Provide Notice and Comment*

The APA’s notice-and-comment rulemaking requirements are generally applicable to agency rulemaking unless otherwise specified by statute or unless the agency action falls within a specified exception.¹⁰⁵ Early efforts by the Trump administration to rely on those exceptions have largely failed.¹⁰⁶ For example, in *California v. Department of Health & Human Services*,¹⁰⁷ plaintiff states challenged two interim final rules that would have exempted certain entities from complying with the Affordable Care Act’s mandate that employers provide insurance for contraceptives.¹⁰⁸ The agencies relied on the good-cause exception to the APA,¹⁰⁹ arguing that they were justified in

101. *Nat’l Venture Capital Ass’n v. Duke*, 291 F. Supp. 3d 5, 17 (D.D.C. 2017) (“Defendants’ justification for their delay remains vague.”).

102. *Id.*

103. *Id.* at 19.

104. *Becerra v. U.S. Dep’t of the Interior*, 276 F. Supp. 3d 953, 964–65 (N.D. Cal. 2017).

105. 5 U.S.C. § 553(b) (2012).

106. Some of the postponement examples in subpart A above can also be characterized as failures to undergo notice-and-comment rulemaking. *See, e.g., Becerra*, 276 F. Supp. 3d at 965–66 (taking this approach). In this subpart, we focus on agency reliance on the exemptions for activities other than such postponements.

107. *California v. Health & Human Servs.*, 281 F. Supp. 3d 806 (N.D. Cal. 2017), *aff’d in part, vacated in part, and remanded sub nom.* *California v. Azar*, 911 F.3d 558 (9th Cir. 2018). On remand, the district court issued a preliminary injunction blocking implementation of the exemptions. *California v. Health & Human Servs.*, 351 F. Supp. 3d 1267 (N.D. Cal. 2019).

108. *California v. Health & Human Servs.*, 281 F. Supp. 3d at 813. The defendant agencies were the Departments of Health and Human Services, Labor, and Treasury. *Id.*

109. 5 U.S.C. § 553(b)(B).

foregoing notice and comment because of pending lawsuits regarding the Obama-era rules, a desire to comply with the law, and the desire to avoid delay, among other things.¹¹⁰

Rejecting these arguments, the court reasoned that the defendants had failed to show why they could not achieve the same objectives using notice-and-comment procedures.¹¹¹ The court expressed concern that, were defendants permitted to use the good-cause exception simply out of the desire to provide prompt guidance, the exception would swallow the rule.¹¹² Similarly, the court rejected the defendants' argument that it should apply the exception because the defendants were planning to undertake notice and comment in the future.¹¹³ Overall, the court emphasized that notice and comment was especially important because the new rules "represent[ed] a direct repudiation of Defendants' prior well-documented and well-substantiated public positions."¹¹⁴ The new breadth of scope, the introduction of an entirely new basis for objection, and the "dramatic[] broaden[ing]" of eligibility for the contraceptive exemption all underscored the need for public input.¹¹⁵

Turning to the appropriate remedy, the court concluded that the balance of the equities supported a preliminary injunction.¹¹⁶ Moreover, because all of the public—not just the plaintiff states—had been denied the opportunity to comment, the court reasoned that a nationwide injunction was appropriate.¹¹⁷ The court noted that the effect of vacating a rule is to revive the prior rule, so it also required that the prior regulatory regime remain in place pending the resolution of the litigation on the merits.¹¹⁸ It worried that to do otherwise would create a "regulatory vacuum" in which both the rights of women seeking contraceptives and employers with religious objections would

110. *California v. Health & Human Servs.*, 281 F. Supp. 3d at 827; *see also* *Bauer v. DeVos*, 325 F. Supp. 3d 74, 84 (D.D.C. 2018) (rejecting similar arguments where the agency failed to undergo statutorily-required negotiated rulemaking).

111. *California v. Health & Human Servs.*, 281 F. Supp. 3d at 827–28; *see also* *Nat. Res. Def. Council v. U.S. Dep't of Energy*, No. 17 Civ. 6989, 2019 WL 858748, at *17 (S.D.N.Y. Feb. 22, 2019) (rejecting agency's reliance on the APA's good cause exception and the exception for procedural rules to bypass notice-and-comment procedures).

112. *California v. Health & Human Servs.*, 281 F. Supp. 3d at 828.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* at 832.

117. *Id.*

118. *Id.*

be uncertain.¹¹⁹ And it emphasized that the nationwide injunction would not conflict with any other case.¹²⁰

On appeal, the Ninth Circuit upheld the district court's preliminary injunction, agreeing that there was a likelihood that the plaintiff could demonstrate that DHS had improperly invoked the APA's good-cause exception.¹²¹ The court concluded that "an agency's desire to eliminate more quickly legal and regulatory uncertainty is not by itself good cause It is always the case that an agency can regulate—or in this case, de-regulate—faster by issuing an [interim final rule] without notice and comment."¹²² Still, though it agreed that the agency's error was not harmless,¹²³ the court ruled that the district court's nationwide injunction was overbroad.¹²⁴

While the appeal was pending before the Ninth Circuit, the agencies used notice-and-comment procedures to promulgate the Religious Exemption and Moral Exemption Final Rules in November 2018, which were "nearly identical" to the interim final rules held to be procedurally unlawful.¹²⁵ Therefore, on remand from the Ninth Circuit, the Northern District of California reached the merits of the rules, and determined that they were not in accordance with the statutory mandate.¹²⁶ Given the Ninth Circuit's "high threshold for a nationwide injunction," however, the district court declined to issue a nationwide injunction.¹²⁷

Similarly, the District of Idaho preliminarily enjoined a BLM Instructional Memo ("IM") that would have constrained environmental review of—and public participation in—the BLM's oil and gas leasing decisions that would impact the sage grouse or its habitat.¹²⁸ As explained by the BLM, the purpose of the IM was to expedite the oil and gas leasing process; to that end, the agency issued the IM without any notice and comment or environmental review and

119. *Id.*

120. *Id.*; see also *Piñeros y Campesinos Unidos del Noroeste v. Pruitt*, 293 F. Supp. 3d 1062, 1067 (N.D. Cal. 2018) (noting instances of rule reversal for pesticide regulations after the agency unsuccessfully relied on the good cause exemption).

121. *California v. Azar*, 911 F.3d 558, 576–78 (9th Cir. 2018).

122. *Id.* at 576–77.

123. *Id.* at 580–81.

124. *Id.* at 582–84.

125. *California v. Health & Human Servs.*, 351 F. Supp. 3d 1267, 1279 (N.D. Cal. 2019).

126. *Id.* at 1285.

127. *Id.* at 1300. The scope of judicial authority to issue nationwide injunctions is discussed further in Part III.B.2 below.

128. See *W. Watersheds Project v. Zinke*, 336 F. Supp. 3d 1204, 1247–48 (D. Idaho 2018).

directed agency personnel to discard such procedures with respect to leasing decisions.¹²⁹ For example, whereas the Obama-era IM called for timeframes that were “adequate” to “conduct comprehensive parcel reviews,” the new IM capped review periods at 6 months.¹³⁰ Whereas state and field offices were required to provide for public participation during the National Environmental Policy Act (“NEPA”) process under the Obama IM, the Trump IM provided only that such offices “may” provide for public participation, and they could foreclose public comment altogether under some circumstances.¹³¹

First, the court rejected the agency’s claim that the IM was not final and reasoned that the IM was worded like an edict rather than a general statement of policy.¹³² In addition to representing the consummation of the agency’s decisionmaking process, the IM also determined rights and obligations because it definitively altered the agency’s approach to the NEPA process and public participation.¹³³ As to the merits, the court determined that the IM failed to follow procedures required by law because it did not undergo notice-and-comment rulemaking.¹³⁴ As referenced in the finality discussion, the IM was not a mere policy statement because it established binding norms by directing the agency how to implement its obligations under the relevant statutes, without room for discretion.¹³⁵ Moreover, the court reasoned that the substance of the memo likely violated NEPA and the Federal Land Policy and Management Act (“FLPMA”) because of its restrictive public participation provisions, which contravened the statutes’ requirements.¹³⁶ Indeed, the court expressed strong concern that “the intended result of the at-issue decisions was to dramatically reduce and even eliminate public participation in the future decision-making process.”¹³⁷

129. *Id.* at 1213.

130. *Id.* at 1214.

131. *Id.* at 1215.

132. *Id.* at 1225–26.

133. *Id.* at 1227–28. The court also determined that the petitioners’ claim was ripe. *Id.* at 1228–30.

134. *Id.* at 1232–33.

135. *Id.* at 1234.

136. *Id.* at 1236 (“Discretionary public participation opportunities are not consistent with FLPMA and NEPA.”).

137. *Id.* at 1238; *see also* Nat’l Lifeline Ass’n v. FCC, 915 F.3d 19, 32–35 (D.C. Cir. 2019) (vacating FCC rules limiting tribal access to enhanced communications support because the final rules were not an outgrowth of the proposed rules and the agency otherwise violated notice-and-comment procedures).

Notwithstanding these conclusions, the court determined that the scope of its relief should be cabined in two key ways. First, the injunction did not extend to nearly-completed third-quarter leases (which involved reliance interests), though it reached fourth-quarter leases.¹³⁸ Second, the geographic scope of the injunction was limited to areas affecting greater sage grouse habitats.¹³⁹ For proposed leases meeting these requirements, the agency was therefore required to meet the requirements of the Obama-era IM.¹⁴⁰

Once again, the administration's widespread failure to provide notice and comment suggests that at least some of these examples are candidates for our category of "regulatory slop." The courts' rhetorical choices are consistent with this instinct.¹⁴¹ For example, the Clean Water Rule concerned the Army Corps of Engineers' ("USACE") and EPA's abject failure to solicit comment on the merits of suspending an Obama-era rule and reviving previous regulations.¹⁴² The court repeatedly emphasized that the administration's approach departed from "clear" authority holding that "an agency's suspension of a set of regulations and reinstatement of another set of regulations qualifies as 'rule making' under the APA, triggering notice and comment requirements."¹⁴³ And though the court acknowledged the prerogative of each presidential administration to change policy, it admonished, "[t]o allow the type of administrative evasiveness that the agencies demonstrated in implementing the Suspension Rule would allow government to become 'a matter of the whim and caprice of the bureaucracy.' . . . The court cannot countenance such a state of affairs."¹⁴⁴

138. *Zinke*, 336 F. Supp. 3d at 1242–43.

139. *Id.* at 1243–44. Further tempering the scope of its relief, the court imposed a \$10,000 bond on the petitioners. *Id.* at 1247.

140. *Id.* at 1211–12. This component of the preliminary injunction was part of the relief sought and was not further discussed by the court.

141. In addition to the examples noted here, see *infra* Part III.A (discussing, in connection with attorneys' fees, *Nat'l Venture Capital Ass'n v. Nielson*, 318 F. Supp. 3d 145 (D.D.C. 2018)).

142. See *S.C. Coastal Conservation League v. Pruitt*, 318 F. Supp. 3d 959 (D.S.C. 2018).

143. *Id.* at 964.

144. *Id.* at 967 (footnote omitted) (quoting *N.C. Grower's Ass'n v. United Farm Workers*, 702 F.3d 755, 772 (4th Cir. 2012) (Wilkinson, J., concurring)); see also *infra* Part III.A (discussing the court's use of a fee-shifting statute and strong judicial rhetoric in *Nat'l Venture Capital Ass'n v. Nielson*, 318 F. Supp. 3d 145 (D.D.C. 2018)).

C. *Failing to Make Required Findings*

This final category of administrative-law flaws under the Trump administration defies easy characterization. Some examples easily fit within our definition of “regulatory slop” because they so completely fail to attend to even the most rudimentary reason-giving requirements.¹⁴⁵ In fact, a number of the delays and failures to undergo notice-and-comment rulemaking described above were poorly justified, if at all. In other words, some failed agency actions fall within the failure of reason-giving category as well as the other categories we have already discussed. Here, we focus on agency actions that are not otherwise included in the categories above.¹⁴⁶ Some of our examples reveal superficial reasoning,¹⁴⁷ but others cannot be readily distinguished from the kind of record-heavy agency decisionmaking that is the hallmark of the modern administrative state. Every modern administration can expect at least some judicial reversals when courts take a hard look at these kinds of voluminous records.¹⁴⁸ As of this writing, it may be too early to tell whether the administration’s substantive justifications—and the courts’ review thereof—point to any general conclusions about regulatory slop or new developments in

145. One prominent example, which turns on constitutional law rather than administrative law, is *Karnoski v. Trump*, No. C17-1297-MJP, 2017 WL 6311305 (W.D. Wash. Dec. 11, 2017), in which a district court granted a preliminary injunction against the Trump administration’s prohibition on military service by transgender people. The court refused to afford deference under *Rostker v. Goldberg*, 453 U.S. 57 (1981), in which the Court had deferred to Congress’s adoption of compulsory draft registration only for men, in part because President Trump announced the decision on Twitter with no accompanying findings. *Id.*

146. *Cf.* *Air All. Hous. v. EPA*, 906 F.3d 1049, 1069 (D.C. Cir. 2018) (holding that EPA acted arbitrarily and capriciously for failing to properly justify its delay of a prior rule).

147. *See, e.g., California v. Ross*, 358 F. Supp. 3d 965, 1041 (N.D. Cal. 2019) (“Secretary Ross’s failure to investigate and consider the likely effects of the citizenship question on the accuracy of the Census Bureau’s enumeration—and therefore on congressional apportionment and the allocation of federal funding—was an abdication of his duty to consider all relevant factors before making his decision.”); *New York v. U.S. Dep’t of Commerce*, 351 F. Supp. 3d 502, 647, 651 (S.D.N.Y. 2019) (enjoining Secretary of Commerce’s decision to include a citizenship question on the 2020 census questionnaire because, among other things, “in a startling number of ways, Secretary Ross’s explanation for his decision were unsupported by, or even counter to, the evidence before the agency,” and the Secretary “failed to consider, let alone coherently address,” several important aspects of the problem); *see also Kravitz v. U.S. Dep’t of Commerce*, No. GJH-18-1041, 2019 WL 1510449 (D. Md. Apr. 5, 2019) (reaching similar conclusion).

148. The seminal decision is *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983), discussed *supra* at Part I.B.

administrative law. Scores of cases are pending, and we expect their review will be a fruitful area for future research.¹⁴⁹

Certainly, when agencies fail to give any reasons at all, courts are quick to hold their actions unlawful. In *League of United Latin American Citizens v. Wheeler*,¹⁵⁰ for example, EPA issued an order denying a petition to revoke the tolerances for the pesticide chlorpyrifos on food products.¹⁵¹ EPA's history with respect to this issue is long; despite the agency's own significant record supporting concerns about the safety of such tolerances, it took multiple trips to court and a 2015 mandamus¹⁵² for EPA to finally propose revoking the tolerances in November 2015.¹⁵³ Still the agency delayed, until finally the Trump EPA denied the petition in April 2017.¹⁵⁴ In its order, EPA did not refute its own previous scientific findings or conclusions that chlorpyrifos violated the applicable statutory safety standard, and explained instead that further research was necessary.¹⁵⁵ Moreover, the agency refused to defend its actions on the merits in federal court, arguing instead that its administrative process operated to deprive the court of jurisdiction.¹⁵⁶

After determining that there were no barriers to review, the Ninth Circuit concluded that EPA had forfeited any merits-based arguments.¹⁵⁷ The court then considered the administrative record and statutory language and concluded that EPA had failed to make the requisite statutory findings.¹⁵⁸ Notable in the opinion was the court's commentary on EPA's behavior. The court noted how EPA's

149. Early results suggest that the Trump administration's poor track record continues for review of substantive decisions. As this Article was going to press, for example, the Northern District of California decided *California v. U.S. Department of the Interior*, No. C17-5948-SBA (N.D. Cal. Mar. 29, 2019), which held arbitrary and capricious and vacated the administration's repeal of the Obama-era Valuation Rule for coal, oil, and gas royalties on federal and tribal lands, for failing to provide a reasoned explanation, among other things.

150. *League of United Latin Am. Citizens v. Wheeler*, 899 F.3d 814 (9th Cir. 2018). The Ninth Circuit granted rehearing en banc in this case, specifying that the panel decision not be cited as precedent. *League of United Latin Am. Citizens v. Wheeler*, 914 F.3d 1189 (9th Cir. 2019).

151. *Wheeler*, 899 F.3d at 817.

152. *In re Pesticide Action Network N. Am. v. EPA*, 798 F.3d 809, 811 (9th Cir. 2015).

153. *League of United Latin Am. Citizens*, 899 F.3d at 819.

154. *Id.* at 820.

155. *Id.* at 820–21.

156. *Id.* at 821.

157. *Id.* at 829.

158. *Id.*

approach to the case was “its latest tactic,” and stated that the “the time has come to put a stop to this patent [statutory] evasion.”¹⁵⁹

Instances in which the Trump administration reverses decisions by its predecessor also provide grist for judicial reversal based on inadequate explanation.¹⁶⁰ One example is the reversal of the Obama administration’s denial of a presidential permit for the Keystone XL Pipeline.¹⁶¹ In denying the permit, the Obama State Department relied heavily on the pipeline’s impact on climate change. The court acknowledged that the Trump administration has the authority to place more weight on energy security than the State Department had done in denying the permit, but concluded the “Department did not merely make a policy shift in its stance on the United States’ role on climate change,” rather, “[i]t simultaneously ignored” an entire section of the record of decision supporting the initial denial titled “Climate Change-Related Foreign Policy Considerations,” and provided no explanation or acknowledgment at all.¹⁶² The agency’s “conclusory statement” that action on climate change was not critical at present “falls short of a factually based determination, let alone a reasoned explanation, for the course reversal.”¹⁶³ Because the State Department “simply discarded

159. *Id.* at 817. For a further example, complete with strong language disapproving the agency’s actions, see *Policy & Research, LCC v. U.S. Dep’t of Health & Human Servs.*, 313 F. Supp. 3d 62, 83 (D.D.C. 2018) (“The most striking thing about the agency action that Plaintiffs challenge in this case is the fact that HHS *provided no explanation whatsoever* for its decision” (emphasis in original)). See also *Nat’l Lifeline Ass’n v. FCC*, 915 F.3d 19, 22 (D.C. Cir. 2019) (holding that the FCC’s adoption of restrictions on the availability of subsidies to Native Americans was arbitrary and capricious because the agency failed to provide “a reasoned explanation for its change of policy that is supported by record evidence”); *California v. Ross*, 358 F. Supp. 3d 965, 1040 (N.D. Cal. 2019) (finding that “Secretary Ross violated the APA by failing to disclose the basis for his decision to add a citizenship question to the 2020 Census” and that his purported purpose to enforce section 2 of the Voting Rights Act “was a mere pretext”).

160. For further discussion of “the conflict between political will and informed expert analysis in the context of judicial review of administrative change,” particularly under the Trump administration, see Barry Sullivan & Christine Kexel Chabot, *The Science of Administrative Change*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3335558 [<https://perma.cc/B5DD-SKVR>] (arguing that courts should insist on expert decisionmaking and reasoned analysis of record evidence when reviewing policy changes).

161. See generally *Indigenous Environt. Network v. U.S. Dep’t of State*, 347 F. Supp. 3d 561 (D. Mont. 2018), *motion to amend granted in part*, 2018 WL 7352955 (D. Mont. Dec. 7, 2018), *motion for stay granted in part and denied in part*, 2019 WL 652416 (D. Mont. Feb. 15, 2019) (addressing environmental groups’ challenge of Trump administration’s granting of a presidential permit for the Keystone XL Pipeline).

162. *Id.* at 583.

163. *Id.* at 584.

prior factual findings related to climate change to support its course reversal,” the court remanded its approval of the project.¹⁶⁴

A further example is provided by *Council of Parent Attorneys and Advocates, Inc. v. DeVos*,¹⁶⁵ in which a public interest group challenged the Department of Education’s (“DoED”) “Delay Regulation,” which rolled back the Obama administration’s 2016 approach to guarding against overrepresentation of minority students in special education programs.¹⁶⁶ In contrast to some early attempts to delay regulations, this time the Trump administration used notice-and-comment procedures to delay the Obama rule. The 2016 rule had set forth a set of metrics by which school districts were to assess the potential overrepresentation of minority students in disability programs, and it had specifically addressed the concern that school districts might develop de facto racial quotas and fail to provide disability services to minority students who were indeed disabled under the statutory definition.¹⁶⁷ Moreover, the 2016 rule had afforded flexibility to school systems that made certain showings consistent with the statute’s policies.¹⁶⁸

When the Trump DoED sought comment on its Delay Rule, it expressly stated that it would consider comments addressed only to the merits of a delay, but not to the substance of the rule itself.¹⁶⁹ In the final rule, the agency explained that it was delaying the 2016 rule because it wanted to further study the possibility of a de facto system of racial quotas.¹⁷⁰ The court held that the Delay Rule was arbitrary and capricious for both failing to give adequate reasons and failing to consider the costs of delay.¹⁷¹ Whereas the 2016 rulemaking had thoroughly considered and addressed the de facto racial quota concern, the Delay Rule relied merely on “concerns” that were “drenched in qualification,”¹⁷² inconsistent with the record, and unsupported by evidence. Nor had the agency adequately considered the costs of the

164. *Id.*

165. *Council of Parent Attorneys & Advocates, Inc. v. DeVos*, No. 16-cv-1636 (TSC), 2019 WL 1082162 (D.D.C. Mar. 7, 2019).

166. *See generally id.*

167. *Id.* at *3.

168. *Id.* at *2, 3, 9.

169. *Id.* at *4.

170. *Id.*

171. *Id.* at *13.

172. *Id.* at *15.

delay.¹⁷³ These included the reliance costs of school districts that had already worked toward compliance for eighteen months¹⁷⁴ and the loss of calculated benefits to children with disabilities, their parents, and the public associated with the 2016 rule.¹⁷⁵ The court granted vacatur of the Delay Rule after weighing the *Allied-Signal* factors.¹⁷⁶

Yet another example of a successful challenge to a Trump administration initiative based on reasoning that failed to pass muster under the APA's arbitrary and capricious standard was a case in which the Southern District of New York invalidated Commerce Secretary Wilbur Ross's decision to add a citizenship question to the 2020 census questionnaire.¹⁷⁷ The court concluded that Secretary Ross "violated the APA in multiple independent ways," including failure to consider important aspects of the problem; ignoring, "cherry-pick[ing]," or misconstruing the evidence in the record; and "fail[ing] to justify significant departures from past policies and practices—a veritable smorgasbord of classic, clear-cut APA violations."¹⁷⁸ On the last point, the court held that the addition of the citizenship question was arbitrary and capricious "because, in multiple ways, it represented a dramatic departure from the standards and practices that have long governed administration of the census, and [Secretary Ross] failed to justify those departures."¹⁷⁹ Indeed, the court found that the secretary and his aides "took active steps to downplay, if not conceal, [these departures] from scrutiny."¹⁸⁰ The court also found—in what it deemed the "most egregious" APA violation—clear evidence that Secretary Ross's rationale for the departure was "pretextual—that is, that the real reason for his decision was something other than the sole reason he put forward" in justifying addition of the citizenship question.¹⁸¹ As a result, Ross violated the APA's mandate that an agency disclose the

173. Professor Caroline Cecot provides a thoughtful study of agencies' cost-benefit analytical obligations when pursuing a deregulatory agenda. Caroline Cecot, *Deregulatory Cost-Benefit Analysis and Regulatory Stability*, 68 DUKE L.J. 1593 (2019).

174. *Council of Parent Attorneys*, 2019 WL 1082162, at *18.

175. *Id.*

176. *Id.* at *19–20.

177. *New York v. U.S. Dep't of Commerce*, 351 F. Supp. 3d 502 (S.D.N.Y. 2019), *cert. granted*, 139 S. Ct. 953 (2019).

178. *Id.* at 516.

179. *Id.* at 654.

180. *Id.* at 655.

181. *Id.* at 660 (also noting that "courts have not hesitated to find that reliance on a pretextual justification violates the APA"); *see also id.* at 661 ("[C]ourts frequently rely on evidence of false or misleading statements to draw inferences of pretext.").

basis of its decision.¹⁸² According to the court, Ross acted “with an ‘unalterably closed mind’ in that he was ‘unwilling or unable to rationally consider argument.’”¹⁸³

We anticipate that many additional judicial decisions will grapple with questionable factual findings.¹⁸⁴ For example, NHTSA and EPA jointly proposed delaying the tightening of corporate average fuel-economy standards for passenger cars and light trucks that the two agencies had adopted during the Obama administration.¹⁸⁵ Numerous press reports suggested that EPA career officials took strong issue with the accuracy of the factual determinations concerning the impact of tightening fuel-economy standards on vehicle safety (which contradict those on which the Obama rules were based) on which NHTSA relied in the proposal. Some reports even suggested that EPA had sought to remove its logo from the announcement of the proposal.¹⁸⁶

Another initiative whose evidentiary foundations are questionable is the Trump administration’s effort to loosen restrictions on the ability of financial institutions to engage in proprietary trading in hedge funds or private equity funds.¹⁸⁷ Yet another is the

182. *Id.* at 664.

183. *Id.* at 663 (quoting *Miss. Comm’n on Env’tl. Quality v. EPA*, 790 F.3d 138, 183 (D.C. Cir. 2015)).

184. A related topic concerns agencies’ misuse of science in furtherance of deregulatory policies, which receives excellent treatment in Thomas O. McGarity & Wendy E. Wagner, *Deregulation Using Stealth “Science” Strategies*, 68 DUKE L.J. 1719 (2019).

185. The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks, 83 Fed. Reg. 42,986 (Aug. 24, 2018) (to be codified at 40 C.F.R. pts. 85 & 86 & 49 C.F.R. pts. 523, 531, 533, 536 & 537).

186. See Zack Colman & Maxine Joselow, *EPA Argued Rollback Could Mean More Deaths—Documents*, CLIMATEWIRE (Aug. 15, 2018), <https://www.eenews.net/climatewire/2018/08/15/stories/1060094161> [<https://perma.cc/HP3C-P82E>]; Jennifer A. Dlouhy, *EPA’s Own Science Advisers to Rebuke Agency Over Auto Rollback*, BLOOMBERG (May 29, 2018, 4:00 AM), <https://www.bloomberg.com/news/articles/2018-05-29/epa-s-own-science-advisers-to-rebuke-agency-over-auto-rollback> [<https://perma.cc/GU8P-5RQZ>]; Maxine Joselow, *EPA Wanted Its Logo Removed from Controversial Rollback*, CLIMATEWIRE (Aug. 16, 2018), <https://www.eenews.net/climatewire/stories/1060094235> [<https://perma.cc/J76H-LZPW>]; Doug Obey, *EPA Critiques Could Heighten Legal Risk for Vehicle GHG Rollback Plan*, INSIDEEPA.COM (Aug. 20, 2018), <https://insideepa.com/daily-news/epa-critiques-could-heighten-legal-risk-vehicle-ghg-rollback-plan> [<https://perma.cc/LYT3-9XHA>].

187. See Proposed Revisions to Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds, 83 Fed. Reg. 33,432 (July 17, 2018) (to be codified at 12 C.F.R. pts. 44, 248 & 351 & 17 C.F.R. pts. 255 & 75); Emily Flitter & Alan Rappeport, *Bankers Hate the Volcker Rule. Now, It Could be Watered Down*, N.Y. TIMES (May 21, 2018), <https://www.nytimes.com/2018/05/21/business/volcker-rule-fed-banks-regulation.html> [<https://perma.cc/SVZL-XSYD>] (noting the absence of evidence that the rule stanch market liquidity of disrupted core bank functions).

administration's efforts to shrink the size of some national monuments under the Antiquities Act, which allegedly proceeded in the face of evidence that the existing sites boosted tourism and spurred archaeological discoveries.¹⁸⁸ We anticipate that courts will carefully scrutinize such matters; the existing standards of review are sufficient to address flawed factual findings.¹⁸⁹ Particularly egregious examples of decisions devoid of factual support in the record are candidates for especially strong remedies, as discussed in more detail below.

Other examples are not necessarily attributable to "slop" because they involve agency actions accompanied by voluminous records that do not necessarily raise the same red flags as the examples above. Thus, the Fourth Circuit vacated the Forest Service's decisions in connection with two natural gas pipeline permitting proceedings¹⁹⁰ for failing to consider important aspects of the problem in *Sierra Club v. U.S. Department of Interior*¹⁹¹ and *Sierra Club v. U.S. Forest Service*.¹⁹² The same was true with respect to the Fish and Wildlife Service's action delisting the Greater Yellowstone population of grizzly bears for failing to consider important aspects of the problem and failing to use best available science.¹⁹³ We expect that a significant portion of future decisions will fall into this category, and it remains to be seen what new lessons might be learned.

* * *

Although it is too early to make a full assessment of this final category of agency actions, we contend that many of the Trump administration's activities deviate from established norms of

188. See Juliet Eilperin, *Trump Administration Officials Dismissed Benefits of National Monuments*, WASH. POST (July 23, 2018), https://www.washingtonpost.com/national/health-science/trump-administration-officials-dismissed-benefits-of-national-monuments/2018/07/23/5b8b1666-8b9a-11e8-a345-a1bf7847b375_story.html?noredirect=on&utm_term=.baa50f9d0762 [https://perma.cc/TKF4-GLGS]; Dino Grandoni, *The Energy 202: Unintentional Email Dump Shows Trump Team's Intentions with National Monuments*, WASH. POST. POWERPOST (July 24, 2018) https://www.washingtonpost.com/news/powerpost/paloma/the-energy-202/2018/07/24/the-energy-202-unintentional-email-dump-shows-trump-team-s-intentions-with-national-monuments/5b55fd041b326b1e646954d7/?utm_term=.e10ee85657e8 [https://perma.cc/AXQ7-WBQ6].

189. See *supra* Part I.B (discussing standards of review).

190. Although these proceedings are adjudications, their voluminous records and the scope of review invite comparisons to rulemaking for purposes of this Article.

191. *Sierra Club v. U.S. Dep't of the Interior*, 899 F.3d 260, 294 (4th Cir. 2018).

192. *Sierra Club, Inc. v. U.S. Forest Serv.*, 897 F.3d 582, 605 (4th Cir. 2018).

193. *Crow Indian Tribe v. United States*, 343 F. Supp. 3d 999, 1021 (D. Mont. 2018).

administrative law—as evidenced by our independent review, the courts’ applications of the governing principles, and the strong judicial language accompanying such review.¹⁹⁴ Courts have always had access to strong remedies under such circumstances, and we believe they should consider such remedies all the more salient when faced with regulatory slop. We now turn to that topic.

III. CLEANING UP REGULATORY SLOP

Agency officials who are willing to flout administrative-law norms in order to pursue their substantive agendas are likely to forge ahead unless it is clear that they have much to lose if they do so. If the only consequence of violating the law is a judicial slap on the wrist in the form of a remand order, especially if the remand is without vacatur of the offending action, the message that proper administrative process is not optional may fall on deaf ears. Judges intent on promoting the rule of law need to respond to the kinds of practices sketched out in Part II with remedies that have bite and that are able to convince responsible officials that timely and successful pursuit of the agency’s policy agenda depends on adherence to administrative-law requirements, no matter how inconvenient they appear to be.¹⁹⁵ We view the combination of rigorous judicial review and appropriate legal remedies as a form of cost internalization that, if wielded effectively, can create a strong deterrent effect against the disregard of administrative law norms.¹⁹⁶

194. The courts have also characterized Trump agencies’ erroneous statutory interpretations in strong terms. *See, e.g.*, *E. Bay Sanctuary Covenant v. Trump*, 349 F. Supp. 3d 838, 858 (N.D. Cal. 2018), *stay pending appeal denied*, 909 F.3d 1219 (9th Cir. 2018) (concluding that regulation restricting asylum claims “flout[s] the explicit language of the statute” and “represents an extreme departure from prior practice”). *Cf.* *Pennsylvania v. Trump*, 351 F. Supp. 3d 791, 821 (E.D. Pa. 2019) (holding that the administration’s interpretation of the Affordable Care Act failed at step one of *Chevron*); *Am. Hosp. Ass’n v. Azar*, 348 F. Supp. 3d 62, 79–85 (D.D.C. 2018) (holding that rule changing the scope of Medicare reimbursement to private institutions was *ultra vires*); *Grace v. Whitaker*, 344 F. Supp. 3d 96, 125–27 (D.D.C. 2018) (refusing to defer under *Chevron* step two to statutory interpretation used to justify Attorney General’s policy memorandum establishing a near-blanket rule against positive credible fear determinations based on domestic violence and gang-related threats against asylum applicants because it was arbitrary and capricious).

195. As noted above, some courts have made this point explicitly. *See California v. U.S. Bureau of Land Mgmt.*, 277 F. Supp. 3d 1106, 1126 (N.D. Cal. 2017) (refusing to leave an invalid regulatory postponement in place because doing so “could be viewed as a free pass for agencies to exceed their statutory authority and ignore their legal obligations under the APA, making a mockery of the statute”).

196. *Cf.* Sanne Knudsen, *A Precautionary Tale: Assessing Ecological Damages After the Exxon Valdez Oil Spill*, 7 U. ST. THOMAS L.J. 95, 110 (2009) (“Law and economics scholars explain that punitive damages fulfill deterrence functions by providing additional compensation to ensure that full cost internalization is achieved.”).

This Part explores whether recent agency actions taken in disregard of basic administrative-law requirements call for a shift in the approach courts have taken in responding to similar past failures. It then identifies some of the remedies that may be capable of persuading agency officials that they have more to lose by ignoring than by complying with the law.

But first, two brief notes on the impact of judicial review on agency behavior are warranted. We see judicial review as an important (but not the exclusive) means of promoting rule-of-law and administrative-law values in the administrative state.¹⁹⁷ By requiring adherence by government officials to the rule of law, judicial review provides a key bulwark against the arbitrary exercise of power.¹⁹⁸ Judicial review, along with the remedies available to courts when they detect deviations from the rule of law, can be a powerful vehicle for enforcing rule-of-law norms.

Second, numerous scholars have criticized judicial approaches that apply searching review to agency actions because of their potential to ossify the rulemaking process, among other things.¹⁹⁹ We acknowledge the serious concerns underlying the ossification critique, but contend that they lack force in the context of regulatory slop. In particular, when agencies fail to engage in notice-and-comment rulemaking or fail to give any reasons at all to justify their actions, there is no real rulemaking with which judicial review has interfered. Moreover, we are not advocating an increase in judicial scrutiny—that is, an approach that is less deferential than hard look review—so much

197. Scholars have attributed different meanings to the term “rule of law.” See Todd S. Aagaard, *Agencies, Courts, First Principles, and the Rule of Law*, 70 ADMIN. L. REV. 771, 778–81 (2018) (providing examples). Among the values that scholars have gathered under the umbrella of the “rule of law” are equality of application, certainty, predictability, and participatory deliberation. Professors Puig and Shaffer argue that “[t]he goal of the rule of law is to create restraints on government in order to provide security and predictability so that individuals and firms can plan their pursuits and do so without fear. Its basic conception is opposition to the arbitrary exercise of power.” Sergio Puig & Gregory Shaffer, *Imperfect Alternatives: Institutional Choice and the Reform of Investment Law*, 112 AM. J. OF INT’L L. 361, 377 (2018); see also *id.* (“From a socio-legal perspective, the rule of law provides restraints on arbitrary state behavior, backed by norms that enable people to reasonably know what is required of them, combined with the institutionalization of these norms so that they ‘count as a source of restraint and a normative resource’ that may be used in practice.”).

198. See generally Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461 (2003) (explaining constitutional role of administrative law in promoting rule-of-law safeguards against arbitrariness). Cf. Aagaard, *supra* note 197, at 781 (“At a minimum, the Rule of Law fundamentally requires authority exercised as law to have principled justification.”).

199. See, e.g., sources cited *supra* notes 2, 36.

as careful consideration of remedies when courts find blatant disregard of solidly established administrative-law principles.

Indeed, the federal courts have broad discretion to fashion remedies, especially when shaping injunctive relief.²⁰⁰ This Section considers a series of remedies that are well suited to fostering adherence to rule-of-law values and established administrative-law norms. These include the use of fee-shifting provisions, nationwide injunctions, tailored instructions on remand, reinstatement of prior regulations, and use of the contempt power.

A. *Fee-Shifting*

Courts can provide incentives for agencies to abide by basic administrative-law requirements by awarding attorneys' fees to litigants who succeed in suits challenging agency regulations. Both the Equal Access to Justice Act ("EAJA") and some agency organic statutes include fee-shifting provisions that allow courts to depart from the American Rule that requires each litigant to foot the bill for its own expenses regardless of the outcome of the lawsuit.²⁰¹ A fee award can have real bite—EAJA provides that fee awards "shall be paid by any agency over which the party prevails from any funds made available to the agency by appropriation or otherwise."²⁰² Thus, fee awards may

200. *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 496 (2001) ("[W]hen district courts are properly acting as courts of equity, they have discretion unless a statute clearly provides otherwise. For 'several hundred years,' courts of equity have enjoyed 'sound discretion' to consider the 'necessities of the public interest' when fashioning injunctive relief." (quoting *Hecht Co. v. Bowles*, 321 U.S. 321, 329–30 (1944))).

201. *See Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 283–84 (1975) (discussing the discretionary fee-award provision of Title II of the Civil Rights Act of 1964 and the attorneys'-fee provision in § 718 of the Education Amendments Act of 1972 and applying similar reasoning in a non-statutory context). *But see Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718–19 (1967) (discussing judicial equitable fee-shifting, but rejecting such equitable actions in statutory cases with prescribed legal remedies).

202. 28 U.S.C. § 2412(d)(4) (2012). The imposition of sanctions on government attorneys who offer frivolous justifications in court for an agency's administrative law shortcomings is another possibility. *See* FED. R. CIV. P. 11(b)(2)–(3) (treating filing of pleadings or motions as the attorney's certification that "the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law" and that "the factual contentions have evidentiary support"). Courts have broad discretion to "impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation." FED. R. CIV. P. 11(c)(1). Courts have imposed Rule 11 sanctions on attorneys representing federal agencies. *See, e.g., Assiniboine & Sioux Tribes of the Fort Peck Indian Reservation v. United States*, 16 Cl. Ct. 158, 166 (1989) (finding that the government attorney's motion to dismiss or, in the alternative, for summary judgment, violated Rule 11 of the Rules of the United States Court of Federal Claims and requiring "officials responsible for the administrative programs and litigation effort that incurred the financial

reduce the funds available to agencies to pursue their deregulatory agendas.

Congress enacted EAJA precisely to discourage agencies from taking frivolous positions.²⁰³ It provides that, unless prohibited by statute, “a court may award reasonable fees and expenses of attorneys . . . to the prevailing party” in a civil action against the government.²⁰⁴ Like EAJA, some agency organic statutes include judicial-review provisions that explicitly limit fee-shifting to prevailing parties.²⁰⁵ The judicial-review provisions of some organic statutes appear to make fee awards available in a wider range of cases, granting courts the discretion to award fees “whenever [they] determine[] such award is appropriate.”²⁰⁶ But the courts have interpreted such provisions to limit awards to prevailing parties as well.²⁰⁷

A litigant qualifies as a prevailing party if, among other things, it secures a judgment on the merits such that there is a “judicially sanctioned change in the legal relationship of the parties.”²⁰⁸ A litigant to whom a court issued a preliminary injunction blocking enforcement

burden” to compensate the plaintiff for expenses incurred as a result of the filings). One problematic aspect of both Rule 11 and contempt sanctions is that they are likely to be imposed on career agency attorneys who are not responsible for developing the legal strategy with which the courts have taken issue and may even have been opposed to the pursuit of that strategy. These kinds of sanctions may create little if any deterrent effect on political appointees whose directives the staff attorneys must implement. On the other hand, they may enable staff attorneys to “speak truth to power” and push back against unreasonable instructions from political appointees.

203. See *Miles v. Bowen*, 632 F. Supp. 282, 283 (M.D. Ala. 1986); *Citizens for Responsible Res. Dev. v. Watt*, 579 F. Supp. 431, 445 (M.D. Ala. 1983); see also H.R. REP. NO. 96-1418, at 12 (1980) (“By allowing a decision to contest Government action to be based on the merits of the case rather than the cost of litigating, [EAJA] helps assure that administrative decisions reflect informed deliberation. In so doing, fee-shifting becomes an instrument for curbing excessive regulation and the unreasonable exercise of Government authority.”).

204. 28 U.S.C. § 2412(b) (2012).

205. E.g., 33 U.S.C. §§ 1365(d), 1369(b)(3) (2012).

206. 16 U.S.C. § 1540(g)(4) (2012); see also 42 U.S.C. §§ 7604(d), 7607(f) (2012).

207. See *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 694 (1983); *Ctr. for Biological Diversity v. Marina Point Dev. Co.*, 566 F.3d 794, 805 (9th Cir. 2009); *Marbled Murrelet v. Babbitt*, 182 F.3d 1091, 1095 (9th Cir. 1999).

208. See *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Human Res.*, 532 U.S. 598, 605 (2001) (creating this test in the context of the Fair Housing Act of 1988); see also *Autor v. Pritzker*, 843 F.3d 994, 996 (D.C. Cir. 2016) (holding that the test created in *Buckhannon* also applies to the definition of “prevailing party” under EAJA); *Select Milk Producers, Inc. v. Johanns*, 400 F.3d 939, 945 (D.C. Cir. 2005) (stating that a preliminary injunction may sufficiently change a legal relationship between parties such that the plaintiff is a “prevailing party” under a statute like EAJA); *Perez-Arellano v. Smith*, 279 F.3d 791, 794 (9th Cir. 2002) (stating that the test from *Buckhannon* applies to attorney’s fees under the EAJA); *Roberts v. Berryhill*, 310 F. Supp. 3d 529, 535 (E.D. Pa. 2018) (“Because there was a judicially-sanctioned change in the relationship, Roberts is a prevailing party under the EAJA.”).

of an agency rule qualifies.²⁰⁹ Courts have determined that litigants qualify as prevailing parties even if an agency readopts the same rule on remand that a court declares unlawful based on noncompliance with notice-and-comment rulemaking requirements—which one court called “a serious procedural deficiency”²¹⁰—if the litigant was provided an additional opportunity to comment on the repropose rule.²¹¹

Under EAJA, courts may award such fees and expenses in proceedings for judicial review of agency action “unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.”²¹² Moreover, the “position of the United States” includes not only its litigating position, but also “the action or failure to act by the agency upon which the civil action is based.”²¹³ Thus, in determining whether an agency’s position was substantially justified, the court may consider the merits of the justifications the agency advances in a rule’s statement of basis and purpose as well as in its defense of the challenged rule in court.

If a court rejects an agency rule based on flagrant procedural violations or serious substantive deficiencies, it generally should not conclude that the government’s position was substantially justified. Courts have awarded fees to prevailing litigants when the case did not involve a “close or novel question.”²¹⁴ If a court finds that the government’s position inexplicably conflicts with the views of its own

209. See *Select Milk Producers*, 400 F.3d at 947–48.

210. *Wash. All. of Tech. Workers v. U.S. Dep’t of Homeland Sec.*, 156 F. Supp. 3d 123, 148 (D.D.C. 2015), *vacated*, 650 F. App’x 13 (D.C. Cir. 2016).

211. See, e.g., *Wash. All. of Tech. Workers v. U.S. Dep’t of Homeland Sec.*, 202 F. Supp. 3d 20, 24–25 (D.D.C. 2016), *aff’d*, 857 F.3d 907 (D.C. Cir. 2017), *cert. denied*, 138 S. Ct. 1276 (2018) (“Even if an agency later repromulgates the same rule, a party prevails when it gains the opportunity to provide comment”); see also *Select Milk Producers*, 400 F.3d at 943, 950 (awarding fees based on violation of notice and comment procedures).

212. 28 U.S.C. § 2412(d)(1)(A) (2012).

213. *Id.* § 2412(d)(2)(D); see also *W. Watersheds Project v. Ellis*, 697 F.3d 1133, 1136 (9th Cir. 2012) (stating that when determining whether the position of the United States was substantially justified under the EAJA, a court must consider the government’s position during litigation and an agency’s action or lack of action upon which the civil action is based); *Wyo. Wildlife Fed’n v. United States*, 792 F.2d 981, 985 n.1 (10th Cir. 1986) (same). The “special circumstances” exception is designed to remove disincentives for the government to advance novel arguments in good faith. See *SEC v. Zahareas*, 374 F.3d 624, 627 (8th Cir. 2004). Agencies that have engaged in flagrant violations of fundamental administrative law requirements should not be able to avail themselves of that defense. See *Int’l Custom Prods., Inc. v. United States*, 77 F. Supp. 3d 1319, 1332 (Ct. Int’l Trade 2015), *aff’d*, 843 F.3d 1355 (Fed. Cir. 2016) (finding no special circumstances when the agency “appears to have been aware that it was proceeding in an improper manner” in bypassing statutory notice and comment procedures).

214. *Animal Lovers Volunteer Ass’n v. Carlucci*, 867 F.2d 1224, 1226 (9th Cir. 1989).

experts, a finding of substantial justification is also unlikely.²¹⁵ The courts have based fee awards on both procedural and substantive deficiencies in the administrative process, finding that these defects were not substantially justified. The procedural irregularities that triggered fee-shifting have included improper invocation of the good-cause exception to notice-and-comment rulemaking requirements²¹⁶ and delaying rules that had already gone into effect without undergoing further notice-and-comment rulemaking on the spurious ground that repeal of a rule is not rulemaking.²¹⁷ Outraged by the latter practice by EPA during the early Reagan administration, the Third Circuit rejected a substantial justification defense, concluding that “[i]f ever a case fit precisely the mold of bureaucratic arbitrariness which one senator after another stated as the target of [EAJA], this is the case.”²¹⁸ The courts have looked similarly askance at substantial justification defenses in the face of such blatant procedural violations,²¹⁹ especially when it seems clear that the agency knew it was playing fast and loose with administrative-law requirements.²²⁰

The courts have also rejected agencies’ substantial justification defenses when the underlying administrative-law violation was substantive in nature, such as when an agency’s reasoning or ultimate decision was arbitrary and capricious or not supported by substantial evidence.²²¹ Among the situations in which arbitrary and capricious

215. *See* *Native Ecosystems Council v. Weldon*, 921 F. Supp. 2d 1069, 1075 (D. Mont. 2013).

216. *See* 5 U.S.C. § 553(b)(B) (2012) (providing for the good cause exception); *Wash. All. of Tech. Workers*, 202 F. Supp. 3d at 26–28 (awarding fees when a party improperly invoked the good cause exception); *see also* *Env’tl. Def. Fund, Inc. v. EPA*, 716 F.2d 915, 921 (D.C. Cir. 1983) (same).

217. *Nat. Res. Def. Council, Inc. v. EPA*, 703 F.2d 700, 712 (3d Cir. 1983).

218. *Id.* at 712.

219. *See, e.g., Nat’l Ass’n of Mfrs. v. U.S. Dep’t of Labor*, 962 F. Supp. 191, 197 (D.D.C. 1997), *aff’d*, 159 F.3d 597 (D.C. Cir. 1998) (“A government agency that overtly disregards the notice requirements of the APA cannot credibly argue that their underlying actions were substantially justified.”). *But cf. In re Long-Distance Tel. Serv. Fed. Excise Tax Refund Litig.*, 901 F. Supp. 2d 1, 12 (D.D.C. 2012), *aff’d*, 751 F.3d 629 (D.C. Cir. 2014) (finding substantial justification for the Internal Revenue Service’s decision to bypass notice and comment procedures).

220. *See Int’l Custom Prods., Inc. v. United States*, 843 F.3d 1355, 1362 (Fed. Cir. 2016) (“Customs was aware that notice and comment was required but, despite the legal ramifications, deliberately decided to forego it.”); *Nat. Res. Def. Council, Inc. v. EPA*, 703 F.2d at 712 (“EPA knew all along that its position was legally untenable.”).

221. *See, e.g., Weber v. Weinberger*, 651 F. Supp. 1379, 1388 (W.D. Mich. 1987) (“[T]he legislative history suggests that where an agency action is tested under a deferential standard of review and is subsequently set aside as arbitrary and capricious or not supported by substantial evidence, the Government’s position can rarely be said to be ‘substantially justified.’”); *Mager v.*

decisionmaking is unlikely to be substantially justified are an agency's unjustifiably disparate treatment of similarly situated parties, its failure to apply a rule in a situation to which it obviously should have done so, and issuance of a decision that is "flatly at odds with controlling case law."²²²

Perhaps more to the present point in light of the frequent disavowals by Trump agencies of Obama agency actions, courts have also rejected a substantial justification defense in cases involving an unexplained reversal of position.²²³ An absence of support for the agency's decision in the evidence can also be problematic,²²⁴ particularly if the administrative record includes documents that directly contradict the agency's conclusions. This defect may prompt a court to determine that the agency's conclusions and decision were "objectively unreasonable."²²⁵ Failure to consider relevant statutory factors—one of the grounds for reversing agency action under the arbitrary and capricious test²²⁶—also has been a basis for fee-shifting.²²⁷ Failure to consider an important aspect of a problem—another indicator of arbitrary and capricious decisionmaking²²⁸—should be treated the same way.

Trump agencies have already begun to accrue attorneys' fee liability based on unlawful adoption of regulations. In one case, a court imposed fees under EAJA for delaying implementation of a late

Heckler, 621 F. Supp. 1009, 1011–12 (D. Colo. 1985) (holding that attorney's fees were appropriate because the government's decision was unsupported and arbitrary).

222. *LePage's 2000, Inc. v. Postal Regulatory Comm'n*, 674 F.3d 862, 866 (D.C. Cir. 2012) (quoting *Hill v. Gould*, 555 F.3d 1003, 1008 (D.C. Cir. 2009)).

223. *See id.* at 867–68 (holding that the Post Regulatory Commission's position was not substantially justified when their position was inexplicably inconsistent).

224. *See, e.g., Haselwander v. McHugh*, 797 F.3d 1, 1, 4 (D.C. Cir. 2015) (holding that an agency decision which was "devoid of any evidentiary support" in the administrative record was not substantially justified (quoting *Haselwander v. McHugh*, 774 F.3d 990, 992 (D.C. Cir. 2014))).

225. *See, e.g., Lynom v. Widnall*, 222 F. Supp. 2d 1, 6 (D.D.C. 2002) (holding that a decision was "objectively unreasonable" where "the record contained numerous documents that directly contradicted" it).

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

227. *See, e.g., Olenhouse v. Commodity Credit Corp.*, 922 F. Supp. 489, 494 (D. Kan. 1996) (awarding fees where the previous court found that the agency failed, among other things, to take into consideration the relevant statutory factors). *But cf. F.J. Vollmer Co. v. Magaw*, 102 F.3d 591, 595 (D.C. Cir. 1996) (stating that "a determination that an agency acted arbitrarily and capriciously because it failed to provide an adequate explanation or failed to consider some relevant factor in reaching a decision 'may not warrant a finding that [the] agency's action lacked substantial justification.'" (alteration in original) (quoting *Wilkett v. ICC*, 844 F.2d 867, 871 (D.C. Cir. 1988))).

228. *State Farm*, 463 U.S. at 43.

Obama-era immigration rule²²⁹ which would have allowed foreign entrepreneurs to temporarily enter the United States despite lacking a visa or green card.²³⁰ There, the court found precisely the sort of utter disregard of clear-cut regulatory procedures that amounts to “regulatory slop.” It declared that DHS “promulgated that Rule without adhering to the APA’s most basic requirements: that they provide ‘[g]eneral notice of [its] proposed rule making’ in the Federal Register, as well as ‘an opportunity’ for the public to comment before promulgating a rule.”²³¹ The agency sought to justify its departure from APA strictures by claiming an emergency that provided “good cause” to forgo notice and comment. The court did not buy it: “In a total of three paragraphs in the Federal Register, DHS offered two rationales for invoking the good-cause exception: (1) expense to the agency; and (2) potential confusion if the [International Entrepreneur] Final Rule were to take effect. Neither position ‘substantially justified’ jettisoning the APA’s notice-and-comment requirements.”²³² The first excuse did not justify bypassing notice-and-comment procedures because “this was not a close call.”²³³ DHS failed to cite a single case for the proposition that an agency can invoke the good-cause exception simply to save money and it provided no factual support to substantiate the threat it said the rule posed to its fiscal integrity. Indeed, upon initially issuing the rule, DHS had previously found that the rule would not “generate additional processing costs to the government to process applications.”²³⁴ On the second point, the court pointed out the obvious—that undergoing notice-and-comment procedures to alert the public that the rule might be rescinded would help minimize the confusion the government purported to be concerned about.²³⁵

The courts have also already invalidated some Trump administration rules on substantive grounds.²³⁶ Petitions for fee awards

229. International Entrepreneur Rule, 82 Fed. Reg. 5238 (Jan. 17, 2017) (to be codified at 8 C.F.R. pts. 103, 212, & 274a).

230. Nat’l Venture Capital Ass’n v. Nielson, 318 F. Supp. 3d 145, 148 (D.D.C. 2018).

231. *Id.* at 149 (alterations in original) (quoting 5 U.S.C. § 553(b)–(c) (2012)).

232. *Id.* at 150 (citation omitted).

233. *Id.*

234. *Id.* (quoting International Entrepreneur Rule, 82 Fed. Reg. at 5274).

235. *Id.* at 150–51.

236. *See, e.g.,* Crow Indian Tribe v. United States, 343 F. Supp. 3d 999, 1021 (D. Mont. 2018) (invalidating the United States Fish and Wildlife Service’s decision to delist the Great Yellowstone Grizzly, stating it was “arbitrary and capricious because it [was] both illogical and inconsistent with the cautious approach demanded by the ESA”); *supra* Part II.C. (providing further examples).

will certainly follow in some of those cases, and we expect fruitful opportunities to explore the connection between fee awards and possible substantive regulatory slop. After all, the nature of the agency's error (such as whether its conduct was a good faith misapplication of the law or reflected disregard for settled law) should have a strong bearing on whether its position was substantially justified and therefore does not justify a fee award.²³⁷ As one court put it, “[f]or purposes of the EAJA, the more clearly established are the governing norms, and the more clearly they dictate a result in favor of the private litigant, the less ‘justified’ it is for the government to pursue or persist in litigation.”²³⁸ Accordingly, one court found in a 1983 case that EPA “failed utterly” to establish justification because “[t]he point at issue in this case was the agency’s decision to dispense with notice and comment in rulemaking. The law was already settled that this could not lawfully be done.”²³⁹

Attorneys’ fee awards under EAJA and agency organic statutes can be a potent judicial tool for aligning agency incentives with rule-of-law values. In the face of demonstrable agency disregard of the requirements for adopting legislative rules, courts should not hesitate to wield this tool.

B. Nationwide Injunctions

The courts’ equitable power includes the ability to issue nationwide injunctions,²⁴⁰ but the propriety of that remedy has been

237. Compare *Corbin v. Apfel*, 149 F.3d 1051, 1053 (9th Cir. 1998) (stating that “the defense of basic and fundamental errors . . . is difficult to justify”); *Jones v. Berryhill*, No. CIV 15-2528-PHX-MHB, 2017 WL 4124046, at *3 (D. Ariz. Sept. 18, 2017) (“[T]he Ninth Circuit has consistently found that when an ALJ commits fundamental procedural errors, the defense of these errors lacks substantial justification.”), with *Wilkett v. ICC*, 844 F.2d 867, 871 (D.C. Cir. 1988) (stating that the failure to consider a relevant factor may not vitiate substantial justification defense).

238. *Spencer v. NLRB*, 712 F.2d 539, 559 (D.C. Cir. 1983).

239. *Nat. Res. Def. Council, Inc. v. EPA*, 703 F.2d 700, 712 (3d Cir. 1983).

240. See, e.g., Brief of Amici Curiae Legal Historians in Support of Plaintiff and Appellee the City of Chicago at 1, *City of Chicago v. Whitaker*, No. 18-2885 (7th Cir. Nov. 15, 2018) (concluding that “preventive injunctions protecting the rights of non-parties, of which nationwide injunctions are a special case, are traditional equitable remedies”). “The term ‘nationwide injunction’ is . . . commonly used to refer to an order that purports to prevent a federal agency or official from enforcing a federal law, regulation, executive order, or other policy against any person, anywhere in the nation.” *The Role and Impact of Nationwide Injunctions by District Courts: Hearing Before the Subcomm. on Courts, Intellectual Prop. and the Internet of the H. Comm. on the Judiciary*, 115th Cong. 3 (2017) (statement of Michael T. Morley, Assistant Professor, Dwayne O. Andreas School of Law at Barry University); cf. Samuel L. Bray, *Multiple Chancellors: Reforming the*

the subject of recent judicial, political, and scholarly debate.²⁴¹ In this subsection, we elaborate the controversy, which stems in part from various actions concerning immigration policy taken by both the Obama and Trump administrations. Our focus here is on the propriety and value of nationwide injunctions as a response to regulatory slop, and in particular to administrative law violations in the adoption of agency rules. After comparing the costs and benefits of nationwide injunctions, we conclude that the issuance of a nationwide injunction is an appropriate, if not universal, response to agency action reflecting disregard of fundamental administrative-law principles.

1. *Nationwide Injunctions and Immigration Controversies.* The propriety of nationwide injunctions became a salient issue as a result of cases involving immigration law and policy. In 2015, the Fifth Circuit upheld a nationwide injunction against the Obama administration's Deferred Action for Parents of Americans ("DAPA") program. It stated flatly that the judicial power under the Constitution "is not limited to the district wherein the court sits but extends across the country. It is not beyond the power of a court, in appropriate circumstances, to issue a nationwide injunction."²⁴² Relying on that decision, a federal district court later issued a nationwide temporary restraining order²⁴³ enjoining enforcement of several key provisions of President Trump's first executive order limiting entry into the country of suspected terrorists.²⁴⁴ The President then revoked the initial Order

National Injunction, 131 HARV. L. REV. 417, 419 n.5 (2017) ("[T]he real point of distinction is that the injunction protects nonparties").

241. See Suzette M. Malveaux, *Class Actions, Civil Rights, and the National Injunction*, 131 HARV. L. REV. F. 56, 56 (2017) (characterizing the propriety of nationwide injunctions as "one of the most salient issues of our modern legal system"). See generally Ronald A. Cass, *Nationwide Injunctions' Governance Problems: Forum-Shopping, Politicizing Courts, and Eroding Constitutional Structure* (Geo. Mason Legal Studies Research Paper No. LS 18-22 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3231456 [<https://perma.cc/9RG2-7HTC>] (criticizing the expanding use of nationwide injunctions).

242. *Texas v. United States*, 809 F.3d 134, 187–88 (5th Cir. 2015), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016) (footnote omitted). Dean Cass argues that, in concluding that a nationwide injunction was appropriate because a narrower injunction might provide no relief at all, the court in *Texas* simply applied "the traditional balancing test for injunctive relief, attending to the specific interests of the parties before the court even if the remedy ultimately had nationwide scope." Cass, *supra* note 241, at 16.

243. *Washington v. Trump*, No. C17-0141JLR, 2017 WL 462040, at *1 (W.D. Wash. Feb. 3, 2017), *appeal dismissed*, No. 17-35105, 2017 WL 3774041 (9th Cir. 2017), *reconsideration en banc denied*, 858 F.3d 1168 (9th Cir. 2017).

244. Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017).

and replaced it with another one with the same title.²⁴⁵ Two different district courts entered preliminary nationwide injunctions barring the government from enforcing portions of the second Order against foreign nationals on the ground that the plaintiffs were likely to prevail on their claim that it violated the Establishment Clause.²⁴⁶ The Supreme Court narrowed the scope of the two district courts' injunctions but left other aspects of the nationwide injunctions in effect. Justice Thomas, joined by Justices Alito and Gorsuch, concurred in part and dissented in part, arguing that the injunctions should have been left in effect as to the named respondents, but not as to "an unidentified, unnamed group of foreign nationals abroad."²⁴⁷ He asserted that "a court's role is 'to provide relief' only 'to claimants . . . who have suffered, or will imminently suffer, actual harm.'"²⁴⁸ Like the Justices, scholars have differed on the fit between preliminary injunctions and nationwide relief.²⁴⁹

In another case stemming from Trump administration efforts to limit immigration, a district court issued a nationwide injunction barring the federal government's imposition of conditions designed to bar sanctuary cities from receiving federal criminal justice program grants.²⁵⁰ In upholding the injunction, the Seventh Circuit acknowledged that "nationwide injunctions should be utilized only in rare circumstances," but found that "for issues of widespread national

245. Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017).

246. *Hawaii v. Trump*, 245 F. Supp. 3d 1227 (D. Haw. 2017), *aff'd*, 871 F.3d 646 (9th Cir. 2017), *vacated and remanded*, 138 S. Ct. 377 (2017); *Int'l Refugee Assistance Project v. Trump*, 241 F. Supp. 3d 539, 566 (D. Md. 2017), *aff'd*, 871 F.3d 646 (4th Cir. 2017), *vacated and remanded*, 138 S. Ct. 377 (2017).

247. *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2090 (2017) (Thomas, J., concurring in part and dissenting in part).

248. *Id.* (quoting *Lewis v. Casey*, 518 U.S. 343, 349 (1996)).

249. Professor Frost has urged courts to be particularly wary about issuing nationwide preliminary injunctions, whose costs may be high "because they may prevent other lower courts from addressing the issue and force the Supreme Court to decide a case without the benefit of multiple viewpoints from the lower courts and a record below." *The Role and Impact of Nationwide Injunctions by District Courts: Before the Subcomm. on Courts, Intellectual Prop. and the Internet of the H. Comm. on the Judiciary*, 115th Cong. 11 (2017) (statement of Amanda Frost, Professor, American University Washington College of Law) [hereinafter Frost Testimony]. In contrast, Professor Bray concludes that the "case for national injunctions is strongest for preliminary injunctions, because they preserve the status quo in the sense of ensuring that the plaintiff is not irreparably injured before judgment and the court is not robbed of its ability to decide the case." Bray, *supra* note 240, at 476–77 n.333.

250. *City of Chicago v. Sessions*, 888 F.3d 272 (7th Cir. 2018), *reh'g en banc granted in part, opinion vacated in part*, No. 17-2991, 2018 WL 4268817 (7th Cir. 2018), *vacated*, Nos. 17-2991, 18-2649, 2018 WL 4268814 (7th Cir. 2018).

impact, a nationwide injunction can be beneficial in terms of efficiency and certainty in the law, and more importantly, in the avoidance of irreparable harm and in furtherance of the public interest.”²⁵¹ The court insisted that “courts are capable of weighing the appropriate factors while remaining cognizant of the hazards of forum shopping and duplicative lawsuits.”²⁵² At the behest of then-Attorney General Jeff Sessions, however, the Seventh Circuit granted rehearing en banc and vacated the portion of the opinion concluding that a nationwide injunction was appropriate.²⁵³

No doubt spurred by these episodes, the Trump administration took the position that nationwide injunctions are both largely unauthorized and ill-advised. Attorney General Sessions issued a memorandum announcing the Justice Department’s opposition to the issuance of nationwide injunctions and directing U.S. attorneys to oppose their use.²⁵⁴ The memo argues that nationwide injunctions:

- (1) exceed the constitutional limitations on judicial power;²⁵⁵ (2) deviate from longstanding historical exercise of equitable power; (3) impede reasoned discussion of legal issues among the lower courts; (4) undermine legal rules meant to ensure orderly resolution of disputed issues; (5) interfere with judgments proper to the other branches of government; and (6) undermine public confidence in the judiciary.²⁵⁶

The memo specifically directs U.S. attorneys to oppose nationwide injunctions in APA cases, asserting that its judicial-review provisions only allow courts to preclude application of an invalid regulation to the

251. *Id.* at 288.

252. *Id.* at 290.

253. *City of Chicago v. Sessions*, No. 17-2991, No. 18-2649, 2018 WL 4268814, at *2 (7th Cir. Aug. 10, 2018).

254. Memorandum from the Att’y Gen. to Heads of Civil Litigating Components U.S. Attorneys, *Litigation Guidelines for Cases Presenting the Possibility of Nationwide Injunctions* (Sept. 13, 2018) [hereinafter *Sessions Memo*].

255. The memo asserts that nationwide injunctions are beyond the scope of the judicial power vested in the federal courts by Article III. *Id.* at 2–3. It also contends that nationwide injunctions interfere with judgments of the political branches, such as by depriving the Executive Branch of the opportunity “to determine whether or how to apply a particular ruling beyond the parties in the case.” *Id.* at 6; *see also* Cass, *supra* note 241, at 5 (“[E]xpanded use of nationwide injunctions . . . undermines rule-of-law values, threatens the operation of courts as impartial arbiters of disputes over legal rights, and erodes the Constitution’s careful separation of functions among the branches of government.”).

256. *Sessions Memo*, *supra* note 254, at 2.

parties before the court, consistent with the limited role of equitable relief to determine the rights of the parties.²⁵⁷

2. *Judicial Authority to Issue Nationwide Injunctions.* Some scholars have taken the position, along with the Attorney General, that nationwide injunctions are both unconstitutional and inconsistent with the limited authority vested in courts by the APA to grant relief in cases challenging agency regulations. They claim that nationwide injunctions are inconsistent with the Constitution's delegation to Congress and the President of the exclusive power to make national policy choices because they place the courts in the role of "overall political overseers."²⁵⁸ Under this view, nationwide injunctions redirect the function of injunctive relief from protecting individual rights to wielding judicial control over political decisionmaking.²⁵⁹ The judicial role is not limited to protecting individual rights, however. It also includes ensuring that one branch, such as the executive, does not exceed the scope of its constitutionally assigned authority by invading the turf of another, such as when an agency ignores statutory directives imposed by Congress, a co-equal branch of government. Thus, Professor Amanda Frost has argued that "[n]othing in the Constitution's text or structure bars federal courts from issuing a remedy that extends beyond the parties; to the contrary, such injunctions enable federal courts to play their essential role as a check on the political branches."²⁶⁰ She adds that courts have the authority

257. *Id.* at 7–8; cf. Zayn Siddique, *Nationwide Injunctions*, 117 COLUM. L. REV. 2095, 2095 (2017) (arguing that the geographic scope of an injunction should be limited to what is necessary to provide complete relief to the plaintiffs). Congress has also eyed the matter of nationwide injunctions. The proposed Injunctive Authority Clarification Act of 2018, for example, which was introduced in the 115th Congress and referred to the House Judiciary Committee, would have prohibited any federal court from "issu[ing] an order that purports to restrain the enforcement against a non-party of any statute, regulation, order, or similar authority, unless the non-party is represented by a party acting in a representative capacity pursuant to the Federal Rules of Civil Procedure." H.R. 6730, 115th Cong. (2d Sess. 2018).

258. Cass, *supra* note 241, at 39; see also Nicholas Bagley & Samuel Bray, *Judges Shouldn't Have the Power to Halt Laws Nationwide*, ATLANTIC (Oct. 31, 2018), <https://www.theatlantic.com/ideas/archive/2018/10/end-nationwide-injunctions/574471> [<https://perma.cc/T2GP-TW5L>].

259. Cass, *supra* note 241, at 50.

260. Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065, 1069, 1080 (2018) ("[T]radition and precedent suggest that broad remedial injunctions are constitutionally permissible, and in some cases essential, as a means of enabling the courts to check the political branches."). Frost takes the position, however, that "[n]ationwide injunctions come with significant costs and should never be the default remedy in cases challenging federal executive action." *Id.* at 1069. Alan M. Trammell argues that courts should issue nationwide injunctions

under Article III to issue “broad equitable relief affecting nonparties in response to sweeping executive orders and action.”²⁶¹ Exercises of agency rulemaking power are examples of actions that often have such sweeping effects.

Notwithstanding claims that nationwide injunctions exceed judicial authority, current law supports their availability under both Article III and the APA. The Supreme Court has overturned nationwide injunctions because they were inappropriate in particular circumstances, but not because the entire practice is illegitimate or unauthorized.²⁶² As one district court recently declared, “it is well established that a district court sitting in equity has the *authority* to enter a nationwide injunction.”²⁶³ Indeed, the lower courts have long endorsed the practice of issuing nationwide injunctions against invalid regulations.²⁶⁴ The courts have resorted to that remedy with considerable frequency in recent cases finding administrative-law violations by Trump administration agencies.

In *Regents of the University of California v. Department of Homeland Security*,²⁶⁵ the Ninth Circuit found rescission of the Deferred Action for Childhood Arrivals program to be unlawful and, to that end, upheld the district court’s nationwide injunction. The court reasoned that, although its precedents limited the scope of preliminary

when the government acts in bad faith, such as when government officials fail to comply with settled law. Alan M. Trammell, *Demystifying National Injunctions*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3290838 [<https://perma.cc/MA4L-N9ZF>].

261. Frost, *supra* note 260, at 1081.

262. See, e.g., *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010); cf. *Steele v. Bulova Watch Co.*, 344 U.S. 280, 289 (1952) (holding that “the District Court in exercising its equity powers may command persons properly before it to cease or perform acts outside its territorial jurisdiction”).

263. *Pennsylvania v. Trump*, 351 F. Supp. 3d 791, 830 (E.D. Pa. 2019) (emphasis in original). There, the court determined that a preliminary nationwide injunction was appropriate to bar enforcement of regulations granting exemptions from the Affordable Care Act’s requirement that health care plans cover women’s preventive services. *But see California v. Health & Human Servs.*, 351 F. Supp. 3d 1267, 1299–1301 (N.D. Cal. 2019) (finding, on remand from *California v. Azar*, 911 F.3d 558 (9th Cir. 2018), that a nationwide preliminary injunction against invalid Trump administration regulations creating exemptions from the Affordable Care Act’s contraceptive mandate was inappropriate based on the Ninth Circuit’s directive that injunctive relief “must be no broader and no narrower than necessary to redress the injury shown by the [plaintiffs]”).

264. See *Harmon v. Thornburgh*, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989). One explanation for the injunctions restraining nationwide enforcement of invalid laws before 1976 was a general waiver of sovereign immunity until amendments to the APA were adopted in 1976. See Brief of Amici Curiae Legal Historians, *supra* note 240, at 20 (citing Jonathan R. Siegel, *ACUS and Suits Against Government*, 83 GEO. WASH. L. REV. 1642, 1649 (2015)).

265. *Regents of the Univ. of Cal. v. U.S. Dep’t of Homeland Sec.*, 908 F.3d 476 (9th Cir. 2018).

injunctive relief to no more than what is necessary to provide complete relief to the plaintiffs, precedent had not established a general requirement that an injunction only affect parties in the suit.²⁶⁶ The court noted the importance of the fact that the underlying claim was an arbitrary and capricious challenge to the rule under the APA. Citing a twenty-year-old D.C. Circuit precedent, it declared that “[w]hen a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed.”²⁶⁷ Quoting Justice Blackmun’s opinion in a 1990 standing case, *Lujan v. National Wildlife Federation*,²⁶⁸ the court agreed that if a challenged agency action is “a rule of broad applicability,” the result of a successful challenge is “that the rule is invalidated, not simply that the court forbids its application to a particular individual.”²⁶⁹ The court concluded by characterizing nationwide injunctive relief as “commonplace in APA cases.”²⁷⁰

Within three weeks, more evidence emerged to support the accuracy of the Ninth Circuit’s characterization. In issuing a temporary restraining order against a joint DHS-DOJ rule barring asylum for immigrants who enter the country outside a port of entry, the Northern District of California rejected the government’s plea that it limit relief to the plaintiffs alone.²⁷¹ The court deemed a nationwide injunction against an invalid rule to be “compelled by the text of [section 706 of the APA].”²⁷² Nine days later, the Western District of Washington, in

266. *Id.* at 511.

267. *Id.* (quoting Nat’l Min. Ass’n v. U.S. Army Corps of Eng’rs, 145 F.3d 1399, 1409 (D.C. Cir. 1998)).

268. *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871 (1990).

269. *Regents of the Univ. of Cal.*, 908 F.3d at 511 (quoting *Lujan*, 497 U.S. at 913 (Blackmun, J., dissenting)); see also *California v. Health & Human Servs.*, 281 F. Supp. 3d 806, 832 (N.D. Cal. 2017) (quoting *Paulsen v. Daniels*, 413 F.3d 999, 1008 (9th Cir. 2005) (“Ordinarily when a regulation is not promulgated in compliance with the APA, the regulation is invalid.”)).

270. *Regents of the Univ. of Cal.*, 908 F.3d at 512. The Ninth Circuit has also declared that “[i]n immigration matters, we have consistently recognized the authority of district courts to enjoin unlawful policies on a universal basis.” *E. Bay Sanctuary Covenant v. Trump*, 909 F.3d 1219, 1255 (9th Cir. 2018). It adhered to that view notwithstanding “a growing uncertainty about the propriety of universal injunctions.” *Id.* at 1255.

271. *E. Bay Sanctuary Covenant v. Trump*, 349 F. Supp. 3d 838, 852–53 (N.D. Cal. 2018), *stay pending appeal denied*, 909 F.3d 1219 (9th Cir. 2018).

272. *Id.* at 867. The court cited the same *National Mining Ass’n* case that the Ninth Circuit had cited, as well as an earlier Ninth Circuit decision, *Earth Island Inst. v. Ruthenbeck*, 490 F.3d 687, 699 (9th Cir. 2007), *aff’d in part, rev’d in part on other grounds sub nom. Summers v. Earth Island Inst.*, 555 U.S. 488 (2009). The court later issued a preliminary injunction to block implementation of the rule. *E. Bay Sanctuary Covenant v. Trump*, 354 F. Supp. 3d 1094 (N.D. Cal.).

enjoining an EPA-USACE rule purporting to delay an Obama EPA Clean Water Act rule, interpreted section 706 to require the court to set aside an unlawful agency action in its entirety, “as opposed to a more limited remedy particular to the plaintiffs in a given case.”²⁷³ The court concluded that “as the unlawful Applicability Date Rule is nationwide in scope, so too is the remedy the Court must grant under [section 706(2)(A)].”²⁷⁴

The analysis in these cases is consistent with the interpretation of the APA’s judicial-review provisions provided by some scholars who claim, for example, that section 706(2) “appears to authorize nationwide injunctions in cases challenging federal agency action” by vesting in the federal courts the power to “hold unlawful and set aside” invalid agency action.²⁷⁵ As Chris Walker has put it, the effect of invalidation of a final rule is “in essence, a nationwide injunction.”²⁷⁶

3. *Nationwide Injunctions as an Appropriate Response to Regulatory Slop.* The legality of nationwide injunctions is a contested matter, although current law supports their availability.²⁷⁷ A second order question, assuming their legality, is when courts should exercise their equitable discretion to issue them.²⁷⁸ Whatever the merits (and

273. *Puget Soundkeeper All. v. Wheeler*, No. C15-1342-JCC, 2018 WL 6169196, at *7 (W.D. Wash. Nov. 26, 2018).

274. *Id.* One justification for nationwide injunctions is the need to provide “complete relief” to a prevailing plaintiff. Professor Malveaux asserts that this requires “a judge to identify the extent of the violation, which for unlawful executive orders and regulations or unconstitutional federal statutes will be national.” Malveaux, *supra* note 241, at 60–61.

275. Frost, *supra* note 260, at 1094, 1100; see also Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 VA. L. REV. 933, 1012 (2018) (arguing that the power to “set aside” agency action “enables the judiciary to formally revoke an agency’s rules, orders, findings, or conclusions”).

276. Chris Walker, *Quick Reaction to Bray’s Argument that the APA Does Not Support Nationwide Injunctions*, 36 YALE J. ON REG.: NOTICE & COMMENT (May 8, 2018), <http://yalejreg.com/nc/quick-reaction-to-brays-argument-that-the-apa-does-not-support-nationwide-injunctions> [<https://perma.cc/749M-2TNP>]; see also Ronald M. Levin, *The National Injunction and the Administrative Procedure Act*, REGULATORY REV. (Sept. 18, 2018), <https://www.theregreview.org/2018/09/18/levin-national-injunction-administrative-procedure-act> [<https://perma.cc/J4FU-HSF2>] (“Virtually everyone understands ‘set aside’ to connote total nullification of the unlawful agency action. In the context of judicial review of regulations, this means that a rule that is ‘set aside’ no longer applies to anyone.”).

277. The Seventh Circuit’s forthcoming decision on rehearing in the *City of Chicago* case discussed above may or may not conform to this characterization.

278. Both defenders and opponents of nationwide injunctions recognize that the decision whether to issue them should be context-specific. See, e.g., Malveaux, *supra* note 241, at 58; Michael T. Morley, *Nationwide Injunctions, Rule 23(b)(2), and the Remedial Powers of the Lower Courts*, 97 B.U. L. REV. 615, 622 (2017) (stating that nationwide relief may be defensible when plaintiffs assert rights that are “clearly established”). Many of the cases described in Part II

demerits) of nationwide injunctions may be in general, we think they are an appropriate and important response to regulatory slop. The reasons for urging courts to be cautious when deciding whether to issue nationwide injunctions lose much of their force when the court has found an agency's promulgation of a rule to have violated significant procedural or reason-giving requirements.

One commonly expressed objection to nationwide injunctions is that they interfere with "percolation of a contested legal issue," short-circuiting "the ongoing dialogue that develops over time among the lower courts," and preventing the flow of "useful information to the Supreme Court in the form of multiple reasoned lower court opinions and the consequences that have flowed from them."²⁷⁹ This argument is easily dismissed if a statute provides exclusive jurisdiction over challenges to an agency's issuance of a rule in one court—say, the Federal Circuit or the D.C. Circuit.²⁸⁰ Even some strong foes of nationwide injunctions recognize that the statutory direction to funnel all cases of a certain kind to a single court reflects Congress's determination that uniformity of determinations outweighs the benefits of regionally limited decisions.²⁸¹

But this rationale extends beyond cases in which a court has exclusive jurisdiction. In a 1979 decision, the Supreme Court rejected the claim that nationwide class certifications are inappropriate because they prevent percolation of judicial treatment of an issue through multiple lower courts.²⁸² The Court agreed that "[i]t often will be preferable to allow several courts to pass on a given class claim in order to gain the benefit of adjudication by different courts in different

involved violations of "clearly established" administrative law principles. *See id.* at 654 (arguing that nationwide injunctions are appropriate when "fairminded jurists' would be unable to disagree about the challenged legal provision's invalidity or proper interpretation").

279. Sessions Memo, *supra* note 254, at 4.

280. *E.g.*, 28 U.S.C. § 1295(a)(4) (2012) (vesting the Federal Circuit with exclusive jurisdiction over certain patent issues); 42 U.S.C. § 7607(b)(1) (2012) (requiring that all challenges to "nationally applicable regulations" issued by EPA under the CAA be filed in the D.C. Circuit).

281. *E.g.*, Cass, *supra* note 241, at 49 ("For these special cases, Congress can choose to assign the sole authority of initial appellate review to a specific court."); *id.* at 50 (arguing that the statutory assignment of exclusive statutory jurisdiction "allow[s] some remedies with nationwide effect to issue from that court").

282. Opponents of nationwide injunctions have asserted that they interfere with operation of the class actions system and its capacity to protect the interests of both parties. *See, e.g.*, Morley, *supra* note 278, at 621 ("[A] Plaintiff-Oriented Injunction, tailored to enforcing only the rights of the plaintiffs before the court, is the appropriate type of relief in nonclass cases."); Bagley & Bray, *supra* note 258 (arguing that nationwide injunctions sidestep class action rules).

factual contexts.”²⁸³ Nevertheless, the Court concluded that the geographic scope of a class certification is a matter committed to the district court’s discretion.²⁸⁴ Likewise, the benefits of allowing multiple courts to address an issue and provide diverse responses to it does not justify an across-the-board ban on nationwide injunctions.²⁸⁵

Even in the absence of exclusive jurisdiction, courts often address challenges to regulations and other agency actions for reasons that are not context- and fact-specific, such as an agency’s failure to abide by statutory procedures or its issuance of a regulation based on factors that a statute prohibits it from considering. The importance of allowing issues to percolate through multiple lower courts is perhaps least compelling in cases in which litigants bring facial challenges to a government action or policy and the issues are primarily legal rather than fact dependent.²⁸⁶ As the Seventh Circuit has recognized, legal issues that need to be resolved in the context of different factual scenarios “will better inform the legal principle,” but resolution of an issue such as the meaning of a statutory term is less likely to benefit from duplicative litigation.²⁸⁷ Thus, when a court determines that the flaw in an agency’s rulemaking endeavors is based on resolution of a pure question of law—such as whether the APA permits agencies to

283. *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979).

284. *Id.*

285. The Seventh Circuit also concluded that limiting nationwide injunctions to class actions would be inconsistent with the Supreme Court’s 2017 decision in the travel ban case “and the myriad cases preceding it in which courts have imposed nationwide injunctions in individual actions.” *City of Chicago v. Sessions*, 888 F.3d 272, 290 (7th Cir. 2018); *see also* *Frost*, *supra* note 260, at 1086 (“If class actions are constitutionally permissible, then it would seem that Article III does not prevent federal courts from ordering defendants to cease taking action as it affects individuals who would not have had standing to sue.”). Professor Malveaux has argued that judicial and legislative narrowing of the ability of plaintiffs to pursue class actions creates an important role for nationwide injunctions. Malveaux, *supra* note 241, at 59 (“To the extent that the Rule 23(b)(2) injunctive class action has been and continues to be compromised, the national injunction fills a void that is worth protecting.”). The obstacles she identifies include “the [Supreme] Court’s heightened commonality requirement for class certification, hostility toward monetary relief for (b)(2) classes, and deference to the enforceability of class action bans, within litigation and arbitration.” *Id.* (footnotes omitted).

286. *See City of Chicago v. Sessions*, 888 F.3d at 291 (noting that narrow questions of law are more likely to lend themselves to broad injunctive relief). *But see* *California v. Azar*, 911 F.3d 558, 583 (9th Cir. 2018) (quoting *L.A. Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 664 (9th Cir. 2011)) (noting that “nationwide injunctive relief may be inappropriate where a regulatory challenge involves important or difficult questions of law, which might benefit from development in different factual contexts and in multiple decisions by the various courts of appeals”).

287. *Id.*; *see also* Malveaux, *supra* note 241, at 58 (contending that courts should consider how important factual records are in “ruling on the validity of a government’s uniform conduct or policy”).

defer the “applicability date” of a rule that has already gone into effect—the issuance of a nationwide injunction may be an effective mechanism for halting further divergence from clear administrative-law principles, notwithstanding the impact that remedy may have on incremental judicial resolution of the issue. Moreover, the benefits of percolation more generally are also uncertain in the absence of empirical evidence, and they may be outweighed by the need to provide a rapid and effective remedy to prevent the unlawful action from causing further harm.²⁸⁸

A second frequently expressed objection to nationwide injunctions is that they spur undesirable forum shopping.²⁸⁹ Attorney General Sessions’s memo, for example, asserts that the availability of nationwide injunctions undermines public confidence in the judiciary by inducing forum shopping by plaintiffs and creating the perception

288. See Spencer E. Amdur & David Hausman, *Nationwide Injunctions and Nationwide Harm*, 131 HARV. L. REV. F. 49, 52 (2017) (“The question [of whether allowing an issue to percolate produces better-reasoned decisions] is ultimately an empirical one, and we are not aware of persuasive evidence on either side.” (footnote omitted)); *id.* (contending that the advantages of “narrow relief—slower deliberation, more forums and judges weighing in—do not always outweigh the need to prevent real-world harm” and that “[c]ourts do not exist simply to refine legal principles”); William H. Rehnquist, *The Changing Role of the Supreme Court*, 14 FLA. ST. U. L. REV. 1, 11 (1986) (questioning the value of percolation “in the legal world in which we live”).

Amdur & Hausman contend that “preventing widespread harm . . . is probably [the] most important function” of nationwide injunctions. Amdur & Hausman, *supra* note 288, at 50. They elaborate as follows:

Some government policies, like President Trump’s travel ban, threaten immediate and lasting damage. They go into effect quickly, and their impact cannot be reversed at the end of a lawsuit. Anyone who does not or cannot bring her own case can only be protected if a court concludes the policy is illegal and fully enjoins it. Preventing widespread and illegal injuries is a good thing, especially when the government and others would not be much harmed in the process.

Id. at 51. A nationwide injunction is less justifiable when harm is “remote or reversible, [because] there is ample time for issues to percolate up through multiple cases in multiple circuits.” *Id.*; *cf.* *Pennsylvania v. Trump*, 351 F. Supp. 3d 791, 834–35 (E.D. Pa. 2019) (quoting Amdur & Hausman, *supra* note 288, at 53 n.27) (stating that “in practice, nationwide injunctions do not always foreclose percolation”). *But see* Bray, *supra* note 240, at 420 (“A federal court should . . . enjoin[] the defendant’s conduct only with respect to the plaintiff. No matter how important the question and no matter how important the value of uniformity, a federal court should not award a national injunction.” (footnote omitted)).

289. *California v. Azar*, 911 F.3d at 583 (“Nationwide injunctions are also associated with forum shopping, which hinders the equitable administration of laws.”); Getzel Berger, Note, *Nationwide Injunctions Against the Federal Government: A Structural Approach*, 92 N.Y.U. L. REV. 1068, 1091 (2017) (arguing that “nationwide injunctions . . . incentivize[] an extreme race to courthouses . . . more sympathetic to the plaintiff’s position”). Dean Cass elaborates on this contention. Cass, *supra* note 241, at 17–27 (acknowledging that “[t]he first judge to decide a matter frequently has an outsized impact on the development of the law with respect to that specific issue” (footnote omitted)).

that different courts display a lack of respect for other courts.²⁹⁰ This contention also loses force, however, in the context of judicial determinations that an agency flouted foundational administrative-law norms in the course of issuing regulations. Banning nationwide injunctions would not eliminate forum shopping or the specter of different courts reaching opposing results on a single issue.²⁹¹ The Seventh Circuit concluded in the Sanctuary Cities case that “[t]he public interest would be ill-served . . . by requiring simultaneous litigation of [a] narrow question of law in” multiple jurisdictions, especially if the nature of the issue makes it likely that such litigation would be “widespread and simultaneous.”²⁹² Splintered litigation over the validity of agency rules can produce multi-jurisdictional chaos whether or not courts issue nationwide injunctions.²⁹³

A third ground for opposing nationwide injunctions is their potential to impose conflicting obligations on government defendants.²⁹⁴ Allowing many courts to rule on the validity of an agency regulation, however, and forcing the reviewing court to confine any injunctive relief granted to the parties before the court, or to regulatory implementation in the jurisdiction in which the case is brought, can likewise force agencies to apply different versions of a regulatory program in multiple jurisdictions. Different courts, for example, may attach different conditions to implementing a regulation or invalidate and approve a different mix of regulatory provisions.

290. Sessions Memo, *supra* note 254, at 6–7; *see also* Bray, *supra* note 240, at 457–61.

291. *See* Frost Testimony, *supra* note 249, at 9 (“[F]orum shopping is pervasive and is not limited to cases involving nationwide injunctions.”); Malveaux, *supra* note 241, at 57 (arguing that an “anti-injunction rule” would not eliminate the “vice” of forum shopping).

292. *City of Chicago v. Sessions*, 888 F.3d at 292.

293. *See, e.g., In re EPA*, 803 F.3d 804, 808 (6th Cir. 2015), *vacated sub nom. In re U.S. Dep’t of Def.*, 713 Fed. App’x. 489 (6th Cir. 2018) (referring to “the disparate rulings” concerning the Obama administration’s Clean Water Rule “issued by district courts around the country”). *Compare* S.C. Coastal Conservation League v. Pruitt, 318 F. Supp. 3d 959, 961 (D.S.C. 2018) (issuing nationwide injunction against that regulation), *with* Texas v. EPA, No. 3:15-CV-00162, 2018 WL 4518230, at *2 (S.D. Tex. Sept. 12, 2018) (refusing to issue a nationwide injunction relating to the same regulation) *and* Georgia v. Pruitt, 326 F. Supp. 3d 1356, 1370 (S.D. Ga. 2018) (enjoining the rule in eleven states); *see also* Amdur & Hausman, *supra* note 288, at 54 (arguing that if injunctions were confined to the parties before the court, “[n]o one would be protected from an illegal policy without bringing their own challenge and that “[t]he number of lawsuits over some policies might have to increase dramatically”); Frost, *supra* note 260, at 1091 (“Challenges to policies that cross state lines—such as regulations concerning clean air and water, as well as some immigration policies—also require broad injunctions.”).

294. *See, e.g.,* Bray, *supra* note 240, at 462–64 (describing historical and current examples of conflicting injunctions). *But cf.* Amdur & Hausman, *supra* note 288, at 52 (asserting that “the risk of conflicting injunctions is vanishingly low”).

The principal arguments against nationwide injunctions are therefore less than compelling in the context of invalid agency rules. In addition, nationwide injunctions of invalid agency rules can have beneficial effects. For one, they can avoid placing some regulated firms at a competitive disadvantage.²⁹⁵ If one jurisdiction issues an injunction blocking implementation of a rule that applies only to the entities that challenged it or that is limited to the issuing jurisdiction, regulated entities covered by such a narrow injunction will be free of regulatory constraints that continue to apply to regulated entities in other jurisdictions. Indeed, the desire to procure equal freedom to operate free of a rule's constraints is likely to generate precisely the kind of forum shopping that the opponents of nationwide injunctions decry. The benefits of a uniform and consistent interpretation of federal law seems particularly salient in this context.²⁹⁶

Perhaps most importantly, issuance of a nationwide injunction has the capacity to promote rule-of-law values,²⁹⁷ especially if an agency has flouted established principles of administrative law when taking actions such as the issuance (or repeal) of regulations with the capacity to inflict widespread injury. In such cases, a nationwide injunction may provide a strong deterrent against future flouting of fundamental administrative-law norms. Some critics of nationwide injunctions concede that they are appropriate mechanisms to block regulatory *overreach*.²⁹⁸ Nationwide injunctions, however, seem no less

295. See Cass, *supra* note 241, at 40–41, 61 (discussing the need for nationwide injunctions to prevent some but not other regulated entities from choosing between complying with regulations and risking large penalties if they do not).

296. See Frost Testimony, *supra* note 249, at 6 (“Nationwide injunctions are also consistent with rule-of-law values, such as providing uniformity in the interpretation and implementation of federal law and ensuring that similarly-situated individuals are treated alike.”); Michael T. Morley, *De Facto Class Actions: Plaintiff-and-Defendant-Oriented Injunctions in Voting Rights, Election Law, and Other Constitutional Cases*, 39 HARV. J.L. & PUB. POL’Y 487, 490 (2016). *But cf.* Bray, *supra* note 240, at 476 (asserting that allowing a rule to continue in effect in jurisdictions other than the one invalidating and enjoining it is “not a nightmare”). Professor Bray concedes, however, that piecemeal invalidation of an entrenched regulatory program that has engendered irreversible changes in the behavior of regulated entities “is perhaps the strongest case for a national injunction.” *Id.*

297. See Frost, *supra* note 260, at 1119 (“[F]or those who perceive the federal judiciary as a check on the political branches, nationwide injunctions are an essential tool.”); Malveaux, *supra* note 241, at 62 (“Article III judges are empowered to curb executive branch abuse of power. When values counter to what many Americans aspire characterize the executive branch, it is comforting that the federal courts have a method for intervening sooner rather than later.” (footnote omitted)).

298. See Cass, *supra* note 241, at 40–41 (asserting that courts facing regulatory overreach can enter injunctive relief that is broader than staying the rule with respect to specific litigants).

appropriate in circumstances in which agencies deviate from statutory commands by adopting *inadequate* regulatory strategies that impose nationwide harm on consumer, environmental, and other public interests or subvert the public participation opportunities that procedures such as notice-and-comment rulemaking are designed to ensure. As one critic notes, the courts' role is to "giv[e] effect to rules set by others."²⁹⁹

One might wonder whether an agency not disposed to worry about whether its rulemaking activities satisfy basic administrative-law commitments would also be inclined to flout a nationwide injunction. Scorning a court order in a particular case, however, presents different concerns and consequences than disregarding general principles of administrative law rooted in statutes such as the APA. Thus, there is reason to believe that an agency might pay more attention to administrative-law fundamentals if it has already been called on the carpet and enjoined from doing so, particularly if the court determined that the need to prevent future violations was sufficiently weighty to justify a nationwide injunction.³⁰⁰

C. *Other Remedies*

More generally, the federal courts have broad equitable discretion in fashioning remedies, including other attributes of injunctions.³⁰¹ In this Section, we briefly discuss three matters: (1) some of the specific features of mandates that courts might consider; (2) reinstatement of prior rules; and (3) contempt penalties.

1. *Specific Injunctions and Orders.* When courts hold agency actions unlawful, they can choose to remand unlawful regulations with or without vacatur.³⁰² Although the APA arguably instructs courts to vacate agency actions, the common practice is to apply a balancing approach to determine whether vacatur is appropriate, with the

299. *Id.* at 43.

300. See Stephen G. Breyer, *Judicial Independence in the United States*, 40 ST. LOUIS U. L.J. 989, 995 (1996) ("[T]he threat that federal marshals will knock on the door of any individual official specifically identified in a court order remains quite real.").

301. *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 496 (2001) ("For 'several hundred years,' courts of equity have enjoyed 'sound discretion' to consider the 'necessities of the public interest' when fashioning injunctive relief." (quoting *Hecht Co. v. Bowles*, 321 U.S. 321, 329–30 (1944))).

302. See generally Levin, *supra* note 21 (arguing that remand without vacatur is a valid exercise of judicial discretion).

seriousness of the violation being an important consideration.³⁰³ Indeed, we find support for our characterization of regulatory slop in judicial determinations that vacatur is the appropriate remedy for many Trump deregulatory actions.³⁰⁴ This point interacts with our observations about hard look review. Specifically, scholars have justified remanding without vacatur as a means of offsetting the stringency of hard look review.³⁰⁵ But where regulatory slop is at issue, the agency's disregard for administrative law is so blatant that critiques of hard look review have little force or even applicability. This, in turn, further supports the remedy of vacatur.³⁰⁶

The usual remedy when agency action is invalidated is to remand to the agency to reconsider the action the court has set aside as unlawful. Courts have recognized, however, that there are circumstances in which a more specific directive on remand is appropriate.³⁰⁷ Evidence of a pattern of agency failures to comply with the law, or of other forms of past agency recalcitrance to abide by statutory mandates, also may prompt a court to provide a relatively detailed remand order.³⁰⁸ Finally, when a court finds that an agency has engaged in unlawful withholding of mandatory action or unreasonable delay,³⁰⁹ it can issue a mandamus order requiring the agency to take action on an accelerated timeline.³¹⁰

303. For a discussion of the vacatur controversy, see Emily Hammond, *Deference and Dialogue in Administrative Law*, 111 COLUM. L. REV. 1722, 1738–39 (2011).

304. See, e.g., *supra* text accompanying notes 89–95 (discussing an example).

305. E.g., Levin, *supra* note 21, at 371.

306. Courts can limit vacatur to certain portions of rules, allowing other portions to remain in force. See, e.g., *Am. Petroleum Inst. v. EPA*, 862 F.3d 50, 75 (D.C. Cir. 2017) (upholding in part and vacating in part a rule defining the scope of a regulatory program for hazardous waste management), *modified on reh'g*, 883 F.3d 918 (D.C. Cir. 2018).

307. See, e.g., *Middle Rio Grande Conservancy Dist. v. Norton*, 294 F.3d 1220, 1231 (10th Cir. 2002) (holding that the district court did not abuse its discretion when it ordered the U.S. Fish and Wildlife Service to prepare an environmental impact statement, instead of to reconsider whether such preparation was appropriate); see also Robert L. Glicksman & Emily Hammond, *Agency Behavior and Discretion on Remand*, 32 J. LAND USE & ENVTL. L. 483, 490 (2017) (“[I]njunctive orders can take many forms, ranging from a complete prohibition to an authorization if the agency adheres to conditions specified in the injunction.” (footnote omitted)).

308. See, e.g., *High Sierra Hikers Ass'n v. Blackwell*, 390 F.3d 630, 644 (9th Cir. 2004); *Or. Nat. Res. Council Action v. U.S. Forest Serv.*, 445 F. Supp. 2d 1211, 1232 (D. Or. 2006). On the dialogic nature of such serial litigation, see generally Hammond, *supra* note 303.

309. See 5 U.S.C. § 706(1) (2012) (authorizing courts to compel agency action in such circumstances).

310. See *Telecomms. Research & Action Ctr. v. FCC*, 750 F.2d 70, 79 (D.C. Cir. 1984) (“In the context of a claim of unreasonable delay, the first stage of judicial inquiry is to consider whether the agency’s delay is so egregious as to warrant mandamus.”); see also *In re Core*

In cases in which the courts determine that an agency has not made a legitimate effort to comply with basic administrative-law requirements, it should consider using all of these mechanisms to provide a strong incentive for the agency to avoid similar scofflaw-like behavior in the future. The goal should be to impress on the agency the court's determination to ensure that the agency has something to lose by ignoring its legal duties; it will not reap the benefits of delay or noncompliance by simply being given the chance for a do-over. Instead, the court should be reluctant to remand without vacatur.³¹¹ It should also consider crafting a mandamus order that restores regulations that the agency has unlawfully replaced, curtails the agency's discretion on remand by providing appropriately detailed instructions with which it must comply,³¹² and, in instances of unwarranted delay in complying with statutory deadlines, provides a schedule for agency action rather than providing an open-ended order.³¹³

2. *Reinstatement of Repealed Rules and Other Decisions.* When courts vacate regulations, they can declare regulations that were amended or repealed by the invalid regulations to be once more in effect. Courts do not take a single approach to deciding whether vacating regulations that replace those of an earlier administration revive the earlier regulations. Many courts simply declare that the prior

Commc'ns, Inc., 531 F.3d 849, 850, 862 (D.C. Cir. 2008) (calling a seven-year delay "egregious," ordering the agency to issue a final order within six months explaining legal authority for intercarrier compensation rules, and stating that "[n]o extensions of this deadline will be granted"); Maryland v. Pruitt, 320 F. Supp. 3d 722, 733 (D. Md. 2018) (granting extension for EPA to respond to CAA petition, but warning that "no further delays will be tolerated nor extensions granted").

311. Courts "typically vacate[] rules when an agency entirely fails[s] to provide notice and comment." *Daimler Trucks N. Am. LLC v. EPA*, 737 F.3d 95, 103 (D.C. Cir. 2013) (alteration in original) (quotation omitted).

312. See Glicksman & Hammond, *supra* note 307, at 491 ("The more specifically the court describes the nature of the agency's required response, the less flexibility the agency has in how it chooses to respond (and perhaps in whether it responds at all)."). For more on whether invalidation of a regulation that repealed or amended an earlier regulation restores the original regulation, see *infra* Part III.C.2.

313. *But cf.* Glicksman & Hammond, *supra* note 307, at 511 ("Although we generally appreciate swift agency corrections to flawed actions, it is important that courts be realistic in setting time limits. Too short a time—which is a strict cabining of discretion—may be to the detriment of the rule's long-term success."); Sidney A. Shapiro & Robert L. Glicksman, *Congress, the Supreme Court, and the Quiet Revolution in Administrative Law*, 1988 DUKE L.J. 819, 834–86 (identifying disadvantages of imposing unrealistic deadlines, but noting that "judicial ire is greatest when an agency misses its own timetable").

regulations are reinstated, without engaging in any detailed analysis.³¹⁴ Occasionally, courts reference the Supreme Court decision in *Burlington Northern, Inc. v United States*,³¹⁵ which involved rates set by the Interstate Commerce Commission (“ICC”) for shipments of coal by rail.³¹⁶ Following a petition by a purchaser of coal, the ICC set a temporary rate to enable commerce to continue, noting that the parties could petition for modification of the rate order should circumstances change.³¹⁷ Twice the ICC modified the rates, and ultimately the D.C. Circuit decided that, upon vacating those two modified rates, the initial temporary rate was reinstated.³¹⁸ The Supreme Court, however, applied the doctrine of primary jurisdiction and decided that because primary jurisdiction lay with the ICC to determine just and reasonable rates, the appeals court could not lawfully reinstate any rate.³¹⁹ Lower courts following this pattern have similarly reasoned that the authority to consider whether to adopt a prior regulation lies in the first instance with the agency.³²⁰

On the other hand, reinstating a prior rule can be an effective remedy to maintain the status quo or ensure that at least minimal statutory protections remain in place pending further agency action. Doing so could also send strong signals to reinforce the democratic and procedural legitimacy that are inherent in the notice-and-comment rulemaking process. That is, any prior rule will have been vetted through that process and supported by a record—and may have survived judicial scrutiny as well. Regulated parties and statutory beneficiaries alike will have relied on the provisions of the prior rule

314. *E.g.*, *In re Polar Bear Endangered Species Act Listing & § 4(d) Rule Litig.*, 818 F. Supp. 2d 214, 239 (D.D.C. 2011) (reinstating the prior rule); *Fund for Animals v. Norton*, 294 F. Supp. 2d 92, 115 (D.D.C. 2003) (same). *But see* *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 553 (D.C. Cir. 1983) (refusing to reinstate a prior rule that would be irrational in light of the court’s analysis of the challenged rule). Note that in the *Small Refiner* decision, the court ameliorated the resulting regulatory void by delaying its mandamus to give EPA the opportunity to issue an emergency rule. *Id.* at 554.

315. *Burlington N., Inc. v. United States*, 459 U.S. 131 (1982).

316. *Id.* at 133.

317. *Id.*

318. *Id.* at 137–38.

319. *Id.* at 143–44.

320. *E.g.*, *W. Watersheds Project v. Kraayenbrink*, 538 F. Supp. 2d 1302, 1324 (D. Idaho 2008) (refusing to revive prior grazing regulations on federal lands where current regulations violated several environmental protection statutes because the decision whether to revive lay in the first instance with BLM); *Citizens for Better Forestry v. U.S. Dep’t of Agric.*, 481 F. Supp. 2d 1059, 1100 (N.D. Cal. 2007) (enjoining the implementation of a rule where the agency failed to follow proper rulemaking procedures, but not passing on the revival effect of the prior rule).

and likely already have invested in that reliance. Because the prior rule could be rescinded or replaced only through the same procedures, it follows that the default should be revival of the prior rule, absent special circumstances.

3. *Contempt Penalties.* The contempt power is not a remedy a court would impose upon a finding that agency action is invalid under section 706, but it is available—and sometimes exercised—when an agency fails to comply with a court order to take some specified action.³²¹ For example, in *Sierra Club v. Thomas*,³²² the Northern District of California harshly admonished EPA for its “longstanding unwillingness to comply with the Clean Air Act.”³²³ After EPA repeatedly missed statutory deadlines for promulgating regulations for nitrogen oxides under the CAA’s Prevention of Significant Deterioration (“PSD”) mandate, the court twice ordered EPA to comply, and held the administrator in contempt.³²⁴ At yet another delay, the court threatened to do so again.³²⁵

As Professor Nick Parrillo explains, courts are indeed willing to invoke the power of contempt against agency officials who have failed to comply with orders requiring specific actions.³²⁶ Although there appears to be little appellate support for sanctions like fines or imprisonment, Professor Parrillo emphasizes the shaming power of a contempt finding for achieving compliance.³²⁷ Indeed, strong judicial language may also be found in contempt orders, offering a signal not just to the agency but to Congress, the President, the media, and the voting public.

321. *E.g.*, *Cobell v. Norton*, 334 F.3d 1128, 1145 (D.C. Cir. 2003) (“Civil contempt is ordinarily used to compel compliance with an order of the court . . .”).

322. *Sierra Club v. Thomas*, 658 F. Supp. 165 (N.D. Cal. 1987).

323. *Id.* at 175.

324. *Id.*

325. The court stated:

Defendant is hereby placed on notice that failure to comply with the terms of this order will not be tolerated, and that in the event of such a failure, the Court will promptly issue an order to show cause why Administrator Thomas should not be held in civil contempt and subjected to appropriate sanctions pending full compliance.

Id.

326. Nicholas R. Parrillo, *The Endgame of Administrative Law: Governmental Disobedience and the Judicial Contempt Power*, 131 HARV. L. REV. 685, 691 (2018).

327. *Id.* at 770.

CONCLUSION

The federal courts have invalidated a considerable number of agency actions taken in the first two years of the Trump administration, many of which involved efforts to delay, repeal, or weaken regulations issued under the Obama administration. In many of these instances, the courts found violations of fundamental administrative law requirements, such as the APA's notice-and-comment rulemaking procedures for the adoption of legislative rules or the requirement that rulemaking must be justified by at least *some* findings. Many challenges are pending in cases in which litigants have alleged similar efforts to avoid or skirt procedural requirements or to proceed with deregulatory actions in the absence of supporting evidence or policy-based reasoning.

Is the volume of litigation alleging Trump administration agency failures to abide by both procedural and substantive administrative law unusually high? What about the number of cases in which those challenges have succeeded thus far? To determine whether the performance of Trump agencies is indeed anomalous, it would be useful to compare the number of cases in which litigants challenged agency action on administrative-law grounds in previous administrations, and to determine whether the rate of successful challenges to Trump administration agency actions is higher than in previous administrations. We were not able to undertake that inquiry for our contribution to this symposium, as both our time and the permissible length of our contribution were limited. We intend to undertake that empirical inquiry in the future.

Regardless of whether Trump agency actions have fallen in higher numbers and at a higher rate than under previous administrations, the cases discussed in Part II above demonstrate that these agencies have run afoul of important administrative-law basics to an alarming degree. That track record may be the result of any variety of different phenomena. For example, agencies may have made good faith efforts to comply but failed to do so because they were ignorant of what the law demands, perhaps in part because of the appointment of officials with little experience in these matters, the failure of political appointees to consult with or abide by the recommendations of career officials such as agency attorneys, or the chaos of the transition between administrations. Relatedly, delays in filling important policymaking positions also may have played a role. Alternatively, agency officials may have thought that their actions were governed by

doctrines of unsettled applicability, and hoped that, if challenged, the courts would resolve close questions in their favor.

There are more troubling possibilities as well. The administration's zeal to pursue a deregulatory agenda also may have prompted agency officials to charge ahead with little regard for administrative-law constraints. Responsible officials may have lacked any respect for or commitment to rule-of-law norms or been captured by those subject to the regulatory actions being weakened or repealed.³²⁸ We are unable to ascertain the motivations for agency actions that courts have determined are invalid.³²⁹ Additional empirical analysis might provide insights, however. We intend in future work, for example, to assess whether Trump agency track records in defending their actions in cases alleging administrative-law violations have changed over time. A finding that the early challenges succeed at a higher rate than subsequent suits might lend credence to the lack of experience and transitional chaos theories. It would also be useful to know whether determinations of invalidity are confined to a limited number of agencies or stretch across the landscape of the federal government. The more widespread those determinations have been, the more likely it is that they are attributable to an administration-wide culture that devalues rule-of-law norms.

The manner in which the courts respond to regulatory slop is likely to affect agency culture—in particular, the relative policymaking clout

328. Perceptions of agency capture have prompted application of hard look review. *See* Glicksman & Schroeder, *supra* note 20, at 266 (“Legislators, judges, and academics alike called for judicial ‘supervision’ of EPA’s performance to combat the agency’s susceptibility to capture by special interests whose objectives did not coincide with legislative policy.” (footnote omitted)); *id.* at 268 (finding that to reduce the likelihood of agency capture, “the courts steeped themselves in the process of assessing the adequacy of EPA’s procedures, and often found them wanting”). Concerns that officials at EPA, among other agencies, have been captured by regulated entities have resurfaced. *See generally* Lindsey Dillon et al., *The Environmental Protection Agency in the Early Trump Administration: Prelude to Regulatory Capture*, 108 AM. J. PUB. HEALTH 589 (2018).

329. Judges have some tools that may be helpful in ascertaining the motivations of agency officials, however, including ordering the depositions or testimony of responsible officials. *See* *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971) (stating that district courts “may require the administrative officials who participated in [a] decision to give testimony explaining their action,” especially if “there are no . . . formal findings and it may be that the only way there can be effective judicial review is by examining the decisionmakers themselves”). Although the Court warned that this remedy should be invoked only in exceptional cases, *id.*, perhaps it is time to resort to this neglected remedy. *But see In re Dep’t of Commerce*, 139 S. Ct. 16, 17 (Mem.) (2018) (Gorsuch, J., concurring in part and dissenting in part) (opposing extra-record discovery to determine the motives of the Secretary of Commerce in adding a question relating to citizenship in census documents). Congressional oversight hearings are another forum in which evidence of policymakers’ motivations may emerge.

of those inside the agency—going forward. For example, a vigorous judicial response, in which courts regularly strike down agency initiatives that depart from rule-of-law values, is likely to bolster the role of agency lawyers. Agency attorneys have the capacity to send a strong message to political appointees that actions driven by political goals without regard to legal or factual support are not likely to survive. They also have the skills needed to build an administrative record and supporting rationale that enhances the prospects of successful defense against legal challenges.³³⁰ Likewise, a string of judicial reversals of agency actions that lack evidentiary support may enhance the influence of agency scientists and other officials with technical expertise who are capable of distinguishing between those actions consistent with the relevant scientific record and those that are indefensible.³³¹ On the other hand, a weak judicial response to slop almost certainly would embolden political appointees intent on pursuing the administration's policy agenda to ram through actions based on flimsy supporting rationales.

A finding that judges appointed by presidents of both political parties have invalidated Trump administration actions based on violations of core administrative-law requirements would provide a stronger signal that compliance with the rule-of-law is not an administration priority than if only judges expected to align ideologically with those challenging agency deregulatory decisions have done so.³³² To get a sense of this point, we informally mapped

330. See, e.g., Logan E. Sawyer, III, *Why the Right Embraced Rights*, 40 HARV. J.L. & PUB. POL'Y 729, 755 (2017) (book review) (citing DANIEL R. ERNST, *TOCQUEVILLE'S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900–1940* (2016) for noting that “lawyers inside the government generated political influence by leveraging the practical reality that the administrative state needed approval from courts” and “used that influence to create an administrative state that receives largely deferential review from the judiciary, but which also follows a host of legalistic procedures and norms that lawyers themselves valued”).

331. See, e.g., Wendy E. Wagner, *The Science Charade in Toxic Risk Regulation*, 95 COLUM. L. REV. 1613, 1635 n.75 (1995) (quoting R. SHEP MELNICK, *REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT 280* (1983)) (noting that court decisions have “increased the autonomy and the influence of the scientists responsible for writing the criteria document [under the CAA] and making policy recommendations to agency political executives”).

332. Our informal analysis of shows that more challengers prevailed against agencies before Democrat-appointed judges than before Republican-appointed judges. Likewise, KEITH B. BELTON & JOHN D. GRAHAM, AM. COUNCIL FOR CAPITAL FORMATION, *TRUMP'S DEREGULATORY RECORD: AN ASSESSMENT AT THE TWO-YEAR MARK 28* (Mar. 2019), http://accf.org/wp-content/uploads/2019/03/ACCF-Report_Trump-Deregulatory-Record-FINAL.pdf [<https://perma.cc/2DGP-XVFD>], based on a different cohort of cases than ours, concluded that challenges to Trump agency regulatory actions fared better before judges appointed by Democratic presidents than Republican presidents, but that “[e]ven when the

judges' appointing presidents' parties to the outcomes of sixty decisions that we reviewed for this Article.³³³ Of the forty district court opinions in which the agencies lost, twenty-eight were written by Democrat-appointed judges, and ten by Republican-appointed judges.³³⁴ For eleven successful³³⁵ challenges in circuit courts, seven panels were majority-Democrat, four were majority-Republican, and one was evenly split.³³⁶ Of the unsuccessful challenges in circuit courts, one was majority-Democrat and one was majority-Republican. This accounting has not been tested by statistical methods and reflects a small number of observations. But we think it notable that it is not solely Democratic appointees who are rejecting Trump administration actions.

The frequency of judicial invalidation, the distribution of remanded actions among agencies, and the reasons for falling short of administrative-law requirements are all relevant to how the courts should respond to successful challenges to agency regulatory actions. Systemic disregard for the rule of law calls for a different set of judicial responses than isolated instances of noncompliance. The higher the frequency of successful challenges, the more important a vigorous judicial response is to impress on government officials the importance of doing things the right way, both because failing to do so slows down an agency's pursuit of its agenda and because of the need to foster a culture in which respect for the rule of law is a priority. Issuance of nationwide injunctions may be an appropriately strong response to the adoption of invalid regulations even if it is problematic in other contexts. A pattern of skirting judicial remand orders in cases finding

Trump administration was fortunate enough to argue a case before a judge that was appointed by a Republican president, the administration won only 38% (3/8) of those judicial decisions.”

333. We excluded from our counts decisions that we evaluated but which did not involve judicial review of agency action under the APA.

334. Three opinions were issued with the parties' consent to a decision written by a magistrate judge. *See* *W. Watersheds Project v. Zinke*, 336 F. Supp. 3d 1204 (D. Idaho 2018); *California v. Bureau of Land Mgmt.*, 277 F. Supp. 3d 1106 (N.D. Cal. 2017); *Becerra v. U.S. Dep't of the Interior*, 276 F. Supp. 3d 953 (N.D. Cal. 2017). The *Zinke* decision was written by Judge Ronald E. Bush, who was appointed in 2008. The other two decisions were written by Judge Elizabeth D. Laporte, who was appointed in 1998. Magistrate judges are appointed by a majority of the district judges of a particular district. *See* 28 U.S.C. § 631(a) (2012).

335. We considered a challenge successful if the challenger prevailed on at least one argument. We did not count among our totals the voluntary remand in *Waterkeeper Alliance v. EPA*, No. 18-01289 (D.C. Cir. Mar. 13, 2019), which was decided by a majority-Democrat panel.

336. In *Air Alliance Houston v. EPA*, 906 F.3d 1049 (D.C. Cir. 2018), then-Judge Kavanaugh did not participate in the opinion. We counted Judge Judith W. Rogers as a Republican appointee because she was appointed by President Reagan as an Associate Judge before being appointed by President Clinton as a Judge.

violations of the law might justify the issuance of relatively specific injunctions that appropriately reduce agency discretion. The more settled the doctrine is that an agency has disregarded, the more appropriate an award of attorneys' fees against the government would appear to be, because the government's claim that its positions were substantially justified would be weaker. A judicial determination that an agency intentionally flouted the law might cut in favor of both Rule 11 and contempt sanctions.

Regardless of whether the courts have begun to shift the manner in which they apply administrative-law principles in response to persistent flouting of those principles (or may do so in the future), any revision of the doctrines that govern judicial review of agency action is likely to affect judicial responses to regulatory slop. Such shifts may cut in opposite directions. For example, some scholars and legislators have urged the courts to return to the less aggressive form of review of agency action that predated the adoption of hard look review in the 1970s.³³⁷ Were the courts to revert to this more deferential regime—by, for example, concluding that insistence on detailed regulatory preambles is inconsistent with the APA's requirement that legislative rules be accompanied by “a concise statement of basis and purpose”³³⁸—flawed or incomplete agency explanations that might now be deemed inadequate to support their decisions might suffice.³³⁹

On the other hand, litigants and legislators have urged courts and Congress to overturn administrative-law doctrines that require deferential review of agency determinations.³⁴⁰ The Supreme Court is currently considering whether to overrule the longstanding deferential approach to judicial review of agency interpretations of their own regulations.³⁴¹ Congress has considered (but not enacted) legislation to

337. See, e.g., Bernick, *supra* note 37, at 809 (footnotes omitted):

In recent years, scholars have produced a number of articles questioning the consistency of long-settled administrative common law doctrines and agency practices with the APA's original meaning. As of this writing, Congress is considering amendments to the APA which rest upon the premise that the Supreme Court has departed from the original APA in developing common law doctrines of judicial deference to agency interpretations of statutes and regulations.

338. 5 U.S.C. § 553(c) (2012).

339. Still, some violations are so flagrant that they would likely fail even under less-rigorous standards.

340. Under *Auer v. Robbins*, 519 U.S. 452 (1997), courts must defer to agency interpretations of their own ambiguous regulations unless they are clearly erroneous.

341. *Kisor v. Shulkin*, 869 F.3d 1360 (Fed. Cir. 2017), *reh'g and reh'g en banc denied*, 880 F.3d 1378 (Fed. Cir. 2018), *cert. granted*, 139 S. Ct. 657 (2018).

overrule *Chevron*.³⁴² Some Supreme Court Justices have made their unremitting hostility to *Chevron* abundantly clear.³⁴³ Should the Court (or Congress) overrule *Auer*, overrule *Chevron*, or continue the process of whittling away at the scope of these deference doctrines,³⁴⁴ those challenging agency actions based on allegedly improper regulatory or statutory interpretations would face a more daunting task. At least some agency interpretations that would not withstand judicial scrutiny under current law would survive, perhaps inducing the willingness of political appointees to approve actions (and accompanying justifications) that we would characterize as regulatory slop.

Courts have ample authority to design remedies that counter persistent agency noncompliance with fundamental administrative-law requirements and deviate from statutory dictates. The Trump administration may provide an unwelcome test case for the willingness of courts to exercise that authority and the effectiveness of their efforts to do so.

342. See, e.g., Separation of Powers Restoration Act of 2016, H.R. 4768, 114th Cong.

343. See, e.g., *BNSF Ry. Co. v. Loos*, 139 S. Ct. 893, 908 (2019) (Gorsuch, J., dissenting) (characterizing “mounting criticism of *Chevron* deference” as “all to the good”); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring) (“But the fact is *Chevron* and *Brand X* permit executive bureaucracies to swallow . . . core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers’ design. Maybe the time has come to face the behemoth.”).

344. See, e.g., *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (exempting questions of deep “economic and political significance” from *Chevron* step two deference).