

THE ADMINISTRATIVE LAW OF REGULATORY SLOP AND STRATEGY

Robert L. Glicksman* & Emily Hammond**

Abstract

[To be added]

Modern administrative law relies heavily on the premise that federal agencies are responsive to judicial review. Whether prompting an internalization of the norms of reason-giving,¹ contributing to ossification,² or ensuring the existence of a record for review,³ judicial review matters for its connection to agency activities *ex ante*. This claim is especially strong with respect to judicial willingness to demand compliance with basic procedural requirements comprising the black-letter component of administrative law; we can expect agencies to follow these requirements because they are so clearly established.

Until now. In its first year and a half, the Trump Administration has doggedly ignored at least some settled administrative-law expectations for agency decisionmaking.⁴ Examples of clear procedural violations include improperly suspending the effective dates of final rules,⁵

* J.B. & Maurice C. Shapiro Professor of Environmental Law, The George Washington University.

** Glen Earl Weston Research Professor of Law, The George Washington University. The authors thank Jarryd Page for his excellent research assistance.

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 behaviors”).

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 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* James N. Saul, Comment, *Overly Restrictive Administrative Records and the Frustration of 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) (“The 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 agency’s reliance on Clean Air Act as authority for precluding rule’s finality); *see also* *Natural Resources Def. Council v. Nat’l Hwy. Traffic Safety Admin.*, 894 F.3d 95 (2d Cir. 2018) (vacating indefinite delay of 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 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 rule that delayed effective date of 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. 2018) (vacating agency’s postponement of published rule’s compliance date for failure to undergo notice and comment); *Becerra v. U.S. Dep’t of Interior*, 276 F. Supp. 3d 953 (N.D. Cal. 2017) (holding postponement of final rule’s compliance date violated notice-and-comment requirements, but declining to vacate action where replacement rule was set to take effect within three days).

failing to provide for notice and comment,⁶ failing to meet mandatory 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 with numerous actions pending.

As our title suggests, we refer to such blatant disregard of administrative law as “regulatory slop.” A few observations about our meaning are in order. First, we view the most concerning administrative action to be the kind that purposefully disregards the procedural and reason-giving requirements that lend legitimacy to administrative actions.¹⁰ In our examinations of judicial opinions to date, we look to both our understanding of what is settled in administrative law, and the courts' jurisprudential and rhetorical choices, to identify examples. Second, some of these examples may stem from ignorance as new political appointees lacking prior government experience acclimate to the culture of the administrative state. Such examples still count as slop when the administrative law is clear because they suggest a lack of respect for the legitimacy of our institutional structure. Alternatively, it is perfectly reasonable for 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.¹¹ We put these actions into the category of “strategy” and are far less concerned, as an administrative law matter, that such actions strain the rule of law too far.¹²

⁶ In addition to sources cited *supra* note 5, see *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), *appeal filed* (9th Cir. Feb. 16, 2018) (issuing preliminary injunction to block interim final rules for failure to follow notice-and-comment procedures).

⁷ See Compl., *California v. U.S. Env'tl. Protection Agency*, No. 4:18-cv-03237, 2018 WL 2446133 (N.D. Cal. filed May 31, 2018) (alleging 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) (vacating order denying petition to revoke pesticide tolerance under the Federal Food, Drug, and Cosmetic Act because EPA presented “no arguments in defense of its decision” in the face of petitioners' claims that the decision was not supported by scientific evidence); *Pol'y & Research, LCC v. U.S. Dep't Health & Human Servs.*, 313 F. Supp. 3d 62 (D.D.C. 2018) (holding agency was arbitrary and capricious in failing to make required “for cause” finding prior to terminating grants); *Karnoski v. Trump*, 2017 WL 6311305 (W.D. Wash. Dec. 11, 2017) (granting preliminary injunction against prohibition on transgender military service because it was announced on Twitter without any evidence of reason or deliberation).

⁹ *E.g.*, *Sierra Club v. U.S. Dep't of Interior*, 899 F.3d 260 (4th Cir. 2018) (vacating as arbitrary and capricious 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) (among other things, vacating and remanding as arbitrary and capricious Forest Service's Record of Decision in connection with a natural gas pipeline permitting).

¹⁰ 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 features of legitimacy).

¹¹ 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); Standards of Performance for Greenhouse Gas Emissions from New Stationary Sources: Electric Generating Units (“New Source Standards”, 79 Fed. Reg. 1430 (Oct. 23, 2015).

¹² 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 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.

Many of the procedural requirements at issue in the cases arising from challenges to Trump Administration decisions thus far have long been settled as a matter of administrative law, and early results suggest that the courts are holding firm.¹³ Still, the current landscape invites questions about the long-term impacts to administrative law. First, are there any discernable, incremental shifts in the judicial approach to long-settled procedural principles? Much of the “common law”¹⁴ 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 authority,¹⁵ and political choice theory’s later skepticism of such delegations, undergird two such shifts.¹⁶ The Trump Administration’s pervasive failure to abide by settled administrative law norms presents the possibility that another common-law “moment” may be in the offing. Thus, part of our motivation in 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.

Second, how does the issue of remedies interact with regulatory slop? Many courts have vacated agency actions, even though remand without vacatur is an accepted remedy even for

¹³ See, e.g., Coral Davenport & Lisa Friedman, *In His Haste to Rollback Rules, Scott Pruitt, EPA Chief, Risks His Agenda*, N.Y. TIMES, Apr. 7, 2018 (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”); Heinzerling, *supra* note ___ (detailing prior law and losses with respect to attempts to delay final agency rules); Eric Lipton, *Courts Thwart Administration’s Effort to Rescind Obama-Era Environmental Regulations*, N.Y. TIMES, Oct. 6, 2017 (describing successful judicial challenges to environmental rollbacks); Amanda Reilly & Sean Reilly, *Court losses pile up for EPA*, GREENWIRE, Apr. 13, 2018, <https://www.eenews.net/stories/1060093967>; see also William W. Buzbee, *The Tethered Presidency: Consistency and Contingency in Administrative Law*, 98 BOSTON U. L. REV. (forthcoming 2018) (describing 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 *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (upholding travel ban on certain foreign nationals in light of national security justification).

¹⁴ See generally Kathryn Kovacs, *Superstatute Theory and Administrative Common Law*, 90 IND. L.J. 1207 (2015); Gillian E. Metzger, *Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293 (2012) [hereinafter Metzger, *Embracing*]; Jack M. Beermann, *Common Law and Statute Law in Administrative Law*, 63 ADMIN. L. REV. 1 (2011); Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479 (2010); John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 114 (1998).

¹⁵ 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.”).

¹⁶ See 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); 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); Robert L. Glicksman & Christopher H. Schroeder, *EPA and the Courts: Twenty Years of Law and Politics*, 54-AUT. L. & CONTEMP. PROBS. 249, 276-81 (1991) (documenting shift in approach to judicial review of agency decisions based on public choice theory); see also Richard B. Stewart, *Administrative Law in the Twenty-First Century*, 78 N.Y.U. L. REV. 437 (2003); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669 (1975).

procedural violations.¹⁷ Furthermore, the proper geographic scope of injunctive relief is an issue that has become more salient¹⁸ as the lower courts are increasingly asked to exercise their constitutional role of checking the executive branch.¹⁹ We contend that courts' equitable powers with respect to remedies—which include considering the disruptive impact of the proposed remedy²⁰—are at their height with respect to 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.²¹ That is, agency legitimacy is not something to

¹⁷ 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); Benjamin W. Tettlebaum, Note, “*Vacation*” at *the Farm: Why Courts Should Not Extend “Remand Without Vacatur” to Environmental Deregulation*, 97 CORNELL L. REV. 405 (2012) (arguing that remand without vacatur is an inappropriate remedy for invalid deregulatory actions); Laura H. Sheely, Note, *The Environmental Protection Agency on Thin Air, Michigan v. EPA: The Problem of Regulations on Remand Without Vacatur*, 35 MISS. C. L. REV. 514, 515 (2017) (highlighting the “burdens imposed on the regulated community” of complying with regulations that have been remanded without vacatur).

¹⁸ See *Trump v. Hawaii* (“Travel Ban Case”), 138 S. Ct. 2392, 2424-25 (2018) (Thomas, J., concurring) (expressing skepticism that the district courts have authority to issue nationwide injunctions). For discussion of whether nationwide injunctions are an appropriate response to regulatory slop, see *infra* Part IIIB.2.

¹⁹ Compare *S.C. Coastal Conservation League v. Pruitt*, 318 F. Supp. 3d 959 (D. S.C. 2018) (issuing nationwide injunction against agency rule suspending prior final rule), with *Georgia v. Pruitt*, 2018 WL 2766877 (S.D. Ga. 2018) (issuing preliminary injunction for eleven plaintiff states challenging 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); *National 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. 2d 1244 (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, 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); *W. Watersheds Project v. Kraayenbrink*, 538 F. Supp. 2d 1302, 1324-25 (D. Idaho 2008) (no), with *In re Polar Bear Endangered Species Act Listing and 4(d) Rule Litig.*, 818 F. Supp. 2d 214, 239 (D.D.C. 2011) (yes).

²⁰ E.g., *Allied Signal, Inc. v. Nuclear Regulatory Comm’n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993) (internal quotations omitted) (“The decision whether to vacate depends on the seriousness of the order’s deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed.”). 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); *California Communities Against Toxics v. EPA*, 688 F.3d 989, 992 (9th Cir. 2012).

²¹ 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 APPROACH*, 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. Alejandro E. Camacho & Robert L. Glicksman, *Legal Adaptive Capacity: How Program Goals and Processes Shape Federal Land*

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,²² using bureaucratic controls,²³ and maintaining ongoing relationships with stakeholders.²⁴ 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.²⁵ That culture, of course, can differ dramatically from administration to administration.²⁶

This Article will proceed as follows. Part I begins with a brief overview of what we consider to be settled principles of administrative law, of the sort that agencies viewed as obvious boundaries prior to the new administration, emphasizing the rules that apply to the adoption of legislative rules.²⁷ Next, Part II develops a typology of regulatory slop thus far and demonstrates the many departures by Trump Administration agencies and officials from settled

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); 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)

²² Shapiro & Wright, *supra* note 21, at 587-88, 592-95.

²³ *Id.* at 580, 586.

²⁴ Hammond & Markell, *supra* note 1, at 355.

²⁵ *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 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.*, 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”); Eric Biber & John 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.”).

²⁶ *See, e.g.*, Gillian E. Metzger, *Through the Looking Glass to A Shared Reflection: The Evolving Relationship Between Administrative Law and Financial Regulation*, 78 L. & CONTEMP. PROBS. 129, 143 (2015) (asserting that “an 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”).

²⁷ “[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.” ROBERT L. GLICKSMAN & RICHARD E. LEVY, *ADMINISTRATIVE LAW; AGENCY ACTION IN LEGAL CONTEXT* 663 (2d ed. 2015).

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. Part III delves into the second question, focusing on the interaction between remedies and regulatory slop. Part IV concludes, drawing 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 and 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 diamond anniversary. While some of its provisions make agencies’ rulemaking obligations clear, others are less so and have been the subject of judicial interpretation.²⁸ 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.”²⁹ Whether or not one applauds³⁰ or decries³¹ these judicial interpretive efforts, there is little debate that the APA has

²⁸ 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.”).

²⁹ *Id.* at 451; see also Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 108 (1998) (noting that “[t]he 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 that “some of those obligations have been articulated by federal courts in the course of judicial interpreting of the APA’s provisions”).

³⁰ 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 __, at 1295, 1296-7. 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) [hereinafter Metzger, *Foreword*]. 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 Professional Hunters Ass’n, Inc. v. FAA*, 177 F.3d 1030 (D.C. Cir. 1997). The Supreme Court found that doctrine to be irreconcilable with the APA. *Perez v. Mortgage Bankers Ass’n*, 135 S. Ct. 1199, 1206 (2014).

³¹ 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 League, Inc. v. FCC*, 524 F.3d 227, 248 (D.C. Cir. 2008) (Kavanaugh, J., concurring and dissenting) (arguing that 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.”).

taken on the status of a “super statute.”³² As 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.”³³ 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 ‘altered substantially the then-existing regulatory baselines with a new principle or policy.’ ”³⁴ 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.”³⁵

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 rules³⁶ and the standards under which courts review challenges to those rules.³⁷ This section summarizes those provisions, highlighting those whose violation has been the basis for judicial reversal of Trump Administration administrative actions.

1. Notice and Comment Requirements

³² See 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.”); Eric Berger, *Individual Rights, Judicial Deference, and Administrative Law Norms in Constitutional Decision Making*, 91 B.U. L. REV. 2029, 2054–55 (2011) (“The APA, after all, is a ‘super-statute’ entrenching governmental structures and quasi-constitutional norms,” which operate to “contain administrative discretion” and balance considerations of responsiveness and efficient administration”). 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 that term 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.

³³ 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).

³⁴ Kathryn E. Kovacs, *Leveling the Deference Playing Field*, 90 OR. L. REV. 583, 606-07 (2011) (quoting Eskridge & Ferejohn, *supra* note __, at 1230-31).

³⁵ Steven Davidoff Solomon & David Zaring, *After the Deal: Fannie, Freddie, and the Financial Crisis Aftermath*, 95 B.U. L. REV. 371, 415 (2015); see also Mila Sohoni, *A Bureaucracy—If You Can Keep It*, 131 HARV. L. REV. F. 13, 20 (2017) (“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. . .”).

³⁶ 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 *Securities and Exchange Comm’n v. Chenery*, 332 U.S. 194, 202-03 (1947) (explaining when adjudication may be an appropriate policymaking mechanism).

³⁷ 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”).

The basic requirements for the adoption of 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.³⁸ During the 1970s the courts developed these requirements into “paper hearing” procedures to ensure a meaningful opportunity for input by those affected.³⁹ 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.”⁴⁰ The courts have identified three functions served by the notice requirement: (1) improving the quality of rulemaking by exposing the agency to diverse public comment, (2) assuring fairness to affected parties, and (3) enhancing the quality of judicial review by giving affected parties an opportunity to submit information and make arguments in response to the proposal.⁴¹ The notice must provide “sufficient factual detail and rationale for the rule to permit interested parties to comment,”⁴² 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.”⁴³ Courts have found procedural violations when agencies have failed to make available to the public important information upon which they based the proposed rules.⁴⁴ These glosses on § 553’s notice requirement induce agencies to build an

³⁸ 5 U.S.C. § 553(b)-(c) (2012).

³⁹ See Glicksman & Schroeder, *supra* note ___, at 264-68.

⁴⁰ LEGISLATIVE HISTORY OF THE ADMINISTRATIVE PROCEDURE ACT, S. DOC. NO. 79-248, at 200 (1946).

⁴¹ *Small Refiners Lead Phase-Down Task Force v. EPA*, 705 F.2d 506 (D.C. Cir. 1987); see also *Natural 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”).

⁴² *Honeywell Int’l, Inc. v. EPA*, 372 F.3d 441, 445 (D.C. Cir. 2004).

⁴³ *Prometheus Radio Project v. FCC*, 652 F.3d 431, 451 (3d Cir. 2011); see also *Connecticut Light & Power Co. v. Nuclear Regulatory Comm’n*, 673 F.2d 525, 530-31 (D.C. Cir. 1982) (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.” *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 632 & n.51 (D.C. Cir. 1973); see also *South 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 v. Block*, 755 F.2d 1098, 1104 (4th Cir. 1985); *South Terminal Corp. v. EPA*, 504 F.2d 646, 659 (1st Cir. 1974); 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”). 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 (9th Cir. 1996); see also *Environmental Integrity Project v. EPA*, 425 F.3d 992 (D.C. Cir. 2005).

⁴⁴ See, e.g., *American Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 236-40 (D.C. Cir. 2008) (finding violation of § 553(b) when agency released only redacted versions of staff-prepared scientific studies and redacted materials amounted to “critical factual material” because of the agency’s reliance on them); *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 251 (2d Cir. 1977) (holding that the agency must “notify interested persons of the

administrative record they regard as sufficient to survive judicial review which, under the APA, is conducted exclusively on the basis of that record.⁴⁵ 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.⁴⁶

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.”⁴⁷ 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 statement of basis and purpose.” While courts often repeat that the duty to provide such a statement “was not meant to be particularly onerous,”⁴⁸ 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.⁴⁹ These preambles can easily run to hundreds of pages for complex rules. An agency’s failure to provide a fulsome statement of basis and purpose can lead to remand or invalidation of the rule.⁵⁰

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.”⁵¹ Although the requirement to accompany a final rule with a statement of basis and purpose is a procedural requirement,⁵² the failure to provide an adequate

scientific research upon which the agency” relies); *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”).

⁴⁵ 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 . . .”).

⁴⁶ *Securities and Exchange Comm'n v. Chenery*, 318 U.S. 80 (1943).

⁴⁷ 5 U.S.C. § 553(c).

⁴⁸ *E.g.*, *American Petroleum Inst. v. Johnson*, 541 F. Supp. 2d 165, 182 (D.D.C. 2008).

⁴⁹ *See Delaware Dep't of Natural Res. and 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 Clean Air Act rule arbitrary and capricious); *Automotive Parts & Accessories Ass'n., Inc. v. Boyd*, 407 F.2d 330, 338 (D.C. Cir. 1968).

⁵⁰ *See, e.g., Central and S.W. Servs. v. EPA*, 220 F.3d 683 (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).

⁵¹ *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”); *Citizens to Save Spencer County v. EPA*, 600 F.2d 844, 883-84 (D.C. Cir. 1979).

⁵² *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117 (2016), for example, appears to treat the failure to provide adequate reasons for an agency action as a procedural defect.

statement is also grounds for invalidation on substantive grounds under the arbitrary and capricious standard or, if applicable, the substantial evidence standard.⁵³

3. *Provisions Concerning the Effective Date of Rules*

The APA addresses the timing of a rule's effective date, providing that, unless the agency provides good cause to the contrary, legislative rules may not become effective sooner than 30 days after their publication in the Federal Register.⁵⁴ 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.⁵⁵ 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 comment procedures.⁵⁶ Similarly, an agency may not revise a legislative rule through the adoption of an interpretive rule or a policy statement, which are not binding.⁵⁷

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 it was enacted using notice and comment procedures. The courts have been of two minds about agency reversals of position. The Supreme Court has addressed the question in the course of reviewing agency statutory interpretations. On one hand, when reviewing the validity of agency statutory interpretations found in nonbinding documents such as nonlegislative rules, inconsistency is a factor that weighs against judicial deference.⁵⁸ On the other hand, in the iconic

⁵³ See, e.g., *City of Waukesha v. EPA*, 320 F.3d 228, 258 (D.C. Cir. 2003) (stating that an agency's failure to respond to comments in its statement of basis and purpose "is significant only insofar as it demonstrates that the agency's decision was not based on a consideration of the relevant factors"); see also *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (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. v. Bd. of Governors*, 745 F.2d 677, 683 (D.C. Cir. 1984) (Scalia, J.) (equating the standards).

⁵⁴ 5 U.S.C. § 553(d) (2012).

⁵⁵ See *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009) ("The [APA] makes no distinction . . . between initial agency action and subsequent agency action undoing or revising that action."); *National Family Planning and Reproductive Health Ass'n, Inc. v. Sullivan*, 979 F.2d 227, 234 (D.C. Cir. 1992) (stating that "an 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 (D.C. Cir. 2017).

⁵⁶ *Clean Air Act Council v. Pruitt*, 862 F.3d 1, 6 (D.C. Cir. 2017); see also *Natural 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 standard[]."); *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.").

⁵⁷ See *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979) (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) (stating that "[t]he hallmark of an interpretive rule or policy statement is that they cannot be independently legally enforced").

⁵⁸ See *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (emphasis added) ("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."); see also *Boykin v. KeyCorp*, 521 F.3d 202 (2d Cir. 2008) (rejecting

Chevron case, the Supreme Court deferred to EPA’s interpretation of a key Clean Air Act provision governing the scope of the new source review permit program even though the agency had changed its mind about the meaning of that term numerous times.⁵⁹

An agency’s reversal of its own previous positions also may be relevant to judicial review under the arbitrary and capricious standard of an agency’s implementation of a statute whose meaning is not in dispute. The leading case is the *State Farm* decision.⁶⁰ 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, such as by rescinding a rule, it must “supply a reasoned analysis for change beyond that which may be required when an agency does not act in the first instance.”⁶¹ More recently, the Court reinforced the obligation of agencies that reverse their own prior determinations to justify doing so. 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.”⁶²

State Farm also identified several examples of arbitrary and capricious reasoning. These include reliance on factors which Congress did not intend it to consider, failure to consider an important aspect of the problem being addressed, and decisionmaking that 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.⁶³ Agency decisions in formal proceedings governed by the substantial evidence standard⁶⁴ are likely to be vulnerable on the same grounds.⁶⁵

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 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.

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).

⁵⁹ *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

⁶⁰ *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

⁶¹ *Id.* at 42. .

⁶² *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2271, 2125-26 (2016).

⁶³ *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

⁶⁴ 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).

⁶⁵ *See, e.g., City of Santa Monica v. Federal Aviation Admin.*, 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. Federal Aviation Admin.*, 547 F.3d 1257, 1260 (11th Cir. 2008) (reciting *State Farm* factors in describing court’s task under the substantial evidence test).

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 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.⁶⁶ The applicable principles are as follow. 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.⁶⁷ For prolonged periods of time, however, courts have been clear: postponing a regulation’s effective date constitutes rulemaking and requires notice and comment.⁶⁸ Furthermore, courts take the same approach for compliance dates as for effective dates.⁶⁹ These principles can be modified by statute, and Section 705 of the APA provides that

⁶⁶ For a detailed analysis of the Trump Administration’s delay-related activities during the first year or so of the administration, see generally Heinzerling (*Unreasonable Delays*), *supra* note >>. 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) (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, at http://www.progressivereform.org/articles/Trump_Rule_Delays_Chart_071917.pdf (itemizing examples across multiple agencies).

⁶⁷ Heinzerling, *supra* note >>, 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.*, *Natural Resources Def. Council v. EPA*, 683 F.2d 752, 755 (3d Cir. 1982) (describing challenge to indefinite postponement but noting with respect to sixty-day postponement, “No challenge has been made . . .”).

⁶⁸ *Natural Resources Def. Council v. EPA*, 683 F.2d 752 (3d Cir. 1982) (ordering EPA to reinstate rules regarding toxic discharges to publicly owned treatment works where EPA had indefinitely postponed the effective date of the rules).

⁶⁹ *See, e.g.*, *Sierra Club v. Pruitt*, 293 F. Supp. 3d 1050 (N.D. Cal. 2018) (vacating rule delaying compliance dates beyond deadlines established by the Formaldehyde Standards in Composite Wood Products Act); Heinzerling, *supra* note >> at 26-27 (detailing the differences between effective dates and compliance dates).

agencies may stay the effective dates of not-yet-effective rules pending litigation.⁷⁰ But the courts are also careful to police these statutory parameters.⁷¹

The following example demonstrates the courts' general approach and provides a window into potential remedies.⁷² In *California v. Bureau of Land Management*, tribal and citizen groups challenged the Bureau of Land Management's action postponing compliance dates for the Obama-era Waste Prevention Rule governing waste of natural gas on federal lands.⁷³ The postponement came following President Trump's Energy Independence executive order,⁷⁴ which instructed executive agencies to review rules with the aim of reducing the regulatory burden on domestic energy sources.⁷⁵ In its Notice announcing the postponement, the Bureau of Land Management (BLM) explained that it was invoking Section 705 of the APA in order to "preserve the status quo" while the Waste Prevention Rule was undergoing judicial review⁷⁶ and the BLM was reconsidering the rule.⁷⁷ The court 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

⁷⁰ 5 U.S.C. § 705 (2012).

⁷¹ *E.g.*, *Clean Air Council v. Pruitt*, 862 F.3d 1 (D.C. Cir. 2017) (rejecting agency's reliance on Clean Air Act as authority for stay of rule).

⁷² For further examples, see *Natural Res. Def. Council v. Nat'l Hwy. Traffic Safety Admin.*, 894 F.3d 95 (2d Cir. 2018) (vacating indefinite delay of 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 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 rule that delayed effective date of previously published rule for failing to undergo notice and comment).

⁷³ *California v. U.S. Bureau of Land Mgmt.*, 277 F. Supp. 3d 1106 (N.D. Cal. 2017).

⁷⁴ Exec. Order No. 13,783, 82 Fed. Reg. 16,093 (Mar. 28, 2017).

⁷⁵ *Id.*

⁷⁶ 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 Interior*,

⁷⁷ Waste Prevention, Production Subject to Royalties, and Resource Conservation; Postponement of Certain Compliance Dates, 82 Fed. Reg. 27,430, 27,431 (June 15, 2017). 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 (Dec. 8, 2017). It later issued a final rule that 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).

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.⁷⁸

In addition, the court reasoned that the 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.⁷⁹

Turning to the remedy, the court determined that vacatur of the postponement notice was proper.⁸⁰ Applying the two-part *Allied Signal* framework,⁸¹ 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.⁸² Further, leaving the postponement in place would undermine the benefits of the Waste Prevention Rule—nor was the court sympathetic to the industry’s compliance-related protestations because any difficulties achieving compliance were “to some extent [a problem] of their own making.”⁸³ The court expressed discomfort with the 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.”⁸⁴ Finally, the court distinguished its prior remedy in *Becerra v. Department of the Interior*, 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.⁸⁵

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 these 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.”⁸⁶ When the National Highway Traffic Safety Administration (NHTSA), without notice and comment, indefinitely delayed fuel-economy standards pending its reconsideration of a final rule, for example, the court in rejecting the agency’s action emphasized that the agency “could [not] plausibly” argue it had statutory authority given the clear terms of the statutory mandate,⁸⁷ nor could it succeed when it offered “no authority—statutory or otherwise” for its failure to engage proper procedures.⁸⁸ Further, the court emphasized that prior precedent already made clear that

⁷⁸ 277 F. Supp. 3d at 1120 (internal citation omitted).

⁷⁹ *Id.* at 1123.

⁸⁰ *Id.* at 1127.

⁸¹ In *Allied-Signal v. Nuclear Regulatory Comm’n*, 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.” 988 F. 2d 146, 150–51 (D.C. Cir. 1993) (internal quotations omitted).

⁸² 277 F. Supp. 3d at 1125.

⁸³ *Id.* at 1126.

⁸⁴ *Id.*

⁸⁵ *Becerra v. Dep’t of Interior*, 276 F. Supp. 3d 953, 967 (N.D. Cal. 2017); *see also Nat’l Venture Capital Ass’n v. Duke*, 291 F. Supp. 3d 5 (D. D.C. 2017) (vacating rule that improperly delayed effective date of final rule).

⁸⁶ *Air Alliance Houston v. EPA*, --Fed. Appx. --, 2018 WL 4000490 (D.D.C. 2018) (vacating rule delay).

⁸⁷ *Natural Res. Def. Council v. Nat’l Hwy. Traffic Safety Admin.*, 894 F.3d 95, 111 (2d Cir. 2018).

⁸⁸ *Id.*

there was no inherent authority for an agency to act as had NHTSA.⁸⁹ Similarly, in rejecting a rule delay by the Department of Homeland Security, 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.⁹⁰ In doing so, it rejected agencies' "concern for their own bottom line" as good cause,⁹¹ and intimated that the agency itself recognized the "weakness" of its justification.⁹² Likewise, another district court called the Department of 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."⁹³ 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.⁹⁴ Early efforts by the Trump Administration to rely on those exceptions have largely failed.⁹⁵ For example, in *California v. Department of Health & Human Services*, 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.⁹⁶ The agencies relied on the good-cause exception to the APA,⁹⁷ arguing that they were justified in 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.⁹⁸

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.⁹⁹ 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.¹⁰⁰ Similarly, the court rejected the defendants' argument that it should apply the exception because the defendants

⁸⁹ *Id.* at 112 (quoting *Natural Res. Def. Council v. Abraham*, 355 F.3d 179, 202 (2d Cir. 2004)) (referencing "'well-established principle that an agency literally has no power to act unless and until Congress confers power upon it.'").

⁹⁰ *Nat'l Venture Capital Ass'n v. Duke*, 291 F. Supp. 3d 5, 16-17 (D.D.C. 2017) ("Defendants' justification for their delay remains vague.").

⁹¹ *Id.* at 17.

⁹² *Id.* at 19.

⁹³ *Becerra v. U.S. Dep't of Interior*, 276 F. Supp. 3d 953, 964-65 (N.D. Cal. 2017).

⁹⁴ 5 U.S.C. § 553(b) (2012).

⁹⁵ 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.

⁹⁶ 281 F. Supp. 3d 806, 813 (N.D. Cal. 2017), *appeal filed* (9th Cir. Feb. 16, 2018). The defendant agencies were the Departments of Health and Human Services, Labor, and Treasury.

⁹⁷ 5 U.S.C. § 553(b)(B).

⁹⁸ 281 F. Supp. at 827.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 828.

were planning to undertake notice and comment in the future.¹⁰¹ 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.”¹⁰² The new breadth of scope, the introduction of an entirely new basis for objection, and the “dramatic broadening” of eligibility for the contraceptive exemption all underscored the need for public input.¹⁰³

Turning to the appropriate remedy, the court concluded that the balance of the equities supported a preliminary injunction.¹⁰⁴ 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.¹⁰⁵ 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.¹⁰⁶ 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 be uncertain.¹⁰⁷ And it emphasized that the nationwide injunction would not conflict with any other case.¹⁰⁸

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.¹⁰⁹ 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 directed agency personnel to discard such procedures with respect to leasing decisions.¹¹⁰ 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.¹¹¹ Whereas state and field offices were required to provide for public participation during the 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.¹¹²

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.¹¹³ In addition to

¹⁰¹ *Id.* at 828.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 832.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*; *see also* 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 strengthened regulations concerning certification and use of restricted use pesticides due to failure to comply with notice and comment requirements; agency had unsuccessfully relied on good cause exemption).

¹⁰⁹ *W. Watersheds Project v. Zinke*, -- F. Supp. 3d --, 2018 WL 4550396 (D. Idaho 2018).

¹¹⁰ *Id.* at *2.

¹¹¹ *Id.* at *4.

¹¹² *Id.*

¹¹³ *Id.* at *11-12.

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.¹¹⁴ 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.¹¹⁵ 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.¹¹⁶ Moreover, the court reasoned that the substance of the memo likely violated NEPA and FLPMA because of its restrictive public participation provisions, which contravened the statutes’ requirements.¹¹⁷ 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.”¹¹⁸

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.¹¹⁹ Second, the geographic scope of the injunction was limited to areas affecting greater sage grouse habitats.¹²⁰ For proposed leases meeting these requirements, the agency was therefore required to meet the requirements of the Obama-era IM.¹²¹

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.¹²² For example, the Clean Water Rule, discussed in Part >> below, concerned the Army Corps of Engineers’ and EPA’s abject failure to solicit comment on the merits of suspending an Obama-era rule and reviving previous regulations.¹²³ 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.”¹²⁴ And though it acknowledged the prerogative of each presidential administration to change policy, it admonished, “To allow the type of administrative evasiveness that the agencies demonstrated in implementing the Suspension Rule would allow

¹¹⁴ *Id.* at *12-13. The court also determined that the petitioners’ claim was ripe. *Id.* at 13-14.

¹¹⁵ *Id.* at *17-18.

¹¹⁶ *Id.* at *18.

¹¹⁷ *Id.* at *20 (“Discretionary public participation opportunities are not consistent with FLPMA and NEPA.”).

¹¹⁸ *Id.* at *22.

¹¹⁹ *Id.* at *24-25.

¹²⁰ *Id.* at *25-26. Further tempering the scope of its relief, the court imposed a \$10,000 bond on the petitioners. *Id.* at 27-28.

¹²¹ *Id.* at *1. This component of the preliminary injunction was part of the relief sought, and was not further discussed by the court.

¹²² In addition to the examples noted here, see *infra* Part III.A.1 (discussing, in connection with attorneys’ fees, Nat’l Venture Capital Ass’n v. Nielson, 318 F. Supp. 3d 145 (D.D.C. 2018)).

¹²³ *S.C. Coastal Conservation League v. Pruitt*, 318 F. Supp. 3d 959 (D. S.C. 2018); see *infra* Part >> (discussing nationwide injunction in *S.C. Coastal*).

¹²⁴ *Id.* at 964.

government to become “a matter of the whim and caprice of the bureaucracy. . . . The court cannot countenance such a state of affairs.”¹²⁵

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.¹²⁶ In fact, a number of the delays and failures to undergo notice-and-comment rulemaking described above were poorly justified if at all.¹²⁷ Others provide superficial reasoning, while still others cannot be readily distinguished from the kind of record-heavy agency decisionmaking that is the hallmark of the modern administrative state. As of this writing, it seems 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 administrative law. Scores of cases are pending, and we expect their review will be a fruitful area for future research.

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*, for example, EPA issued an order denying a petition to revoke the tolerances for the pesticide chlorpyrifos on food products.¹²⁸ 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 2016 mandamus for EPA to finally propose revoking the tolerances in November 2015.¹²⁹ Still the agency delayed, until finally the Trump EPA denied the petition in April 2017.¹³⁰ 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.¹³¹ Moreover, the agency refused to defend its actions on the merits in federal court, arguing instead that the agency’s administrative process operated to deprive the court of jurisdiction.¹³²

¹²⁵ *Id.* at 967 (internal quotations and citations omitted).

¹²⁶ One prominent example, which turns on constitutional law rather than administrative law, is *Karnoski v. Trump*, 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.*

¹²⁷ 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. *Cf.* *Air Alliance Houston v. EPA*, -- Fed. Appx. --, 2018 WL 4000490 (D.D.C. 2018) (holding agency acted arbitrarily and capriciously for failing to properly justify its delay of prior rule).

¹²⁸ 899 F.3d 814, 817 (9th Cir. 2018).

¹²⁹ *Id.* at 820.

¹³⁰ *Id.*

¹³¹ *Id.* at 820-21.

¹³² *Id.* at 821.

The Ninth Circuit first determined that there were no barriers to review before turning to the merits—and concluding that EPA had forfeited any merits-based arguments.¹³³ Even so, the court considered the administrative record and statutory language to conclude that EPA had failed to make the requisite statutory findings.¹³⁴ Notable in the opinion was the court’s commentary on EPA’s behavior. The court noted how EPA’s 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.”¹³⁵

But other examples cannot easily be chalked up to “slop” because they involve agency actions accompanied by voluminous records, within which courts found defects in reasoning or support. Thus, the Fourth Circuit vacated the Forest Service’s decisions in connection with two natural gas pipeline permitting proceedings for failing to consider important aspects of the problem in *Sierra Club v. U.S. Dep’t of Interior*¹³⁶ and *Sierra Club v. U.S. Forest Service*.¹³⁷ 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.¹³⁸ We expect that a significant portion of future decisions will fall into this category,¹³⁹ and it remains to be seen what new lessons might be learned.

¹³³ *Id.* at 829.

¹³⁴ *Id.*

¹³⁵ *Id.* at 817. For a further example, complete with strong language disapproving the agency’s actions, see Pol’y & Research, LCC v. U.S. Dep’t 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)).

¹³⁶ 899 F.3d 260 (4th Cir. 2018).

¹³⁷ 897 F.3d 582 (4th Cir. 2018).

¹³⁸ *Crow Indian Tribe v. United States*, 2018 WL 4568418, No. CV 17-89-M-DLC (D. Mont. Sept. 24, 2018).

¹³⁹ 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. 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). 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. See Maxine Joselow, *EPA wanted its logo removed from the controversial rollback*, CLIMATEWIRE, Aug. 16, 2018, <https://www.eenews.net/climatewire/stories/1060094235>; Zack Colman & Maxine Joselow, *EPA argued rollback could mean more deaths—documents*, CLIMATEWIRE, Aug. 15, 2018, <https://www.eenews.net/stories/1060094161>; Doug Obey, *EPA Critiques Could Heighten Legal Risk for Vehicle GHG Rollback Plan*, INSIDEEPA ENVTL. POLICY ALERT, Aug. 29, 2018; Jennifer A. Dlouhy, *EPA’s Own Science Advisers to Rebuke Agency Over Auto Rollback*, BLOOMBERG ENV’T & ENERGY REP., May 29, 2018, <https://www.bloomberg.com/news/articles/2018-05-29/epa-s-own-science-advisers-to-rebuke-agency-over-auto-rollback>.

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, 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); see Emily Flitter & Alan Rappeport, *Bankers Hate the Volcker Rule. Now, It Could be Watered Down*, N.Y. TIMES, May 22, 2018, <https://www.nytimes.com/2018/05/21/business/volcker-rule-fed-banks-regulation.html> (noting the absence of evidence that the rule stanch market liquidity of disrupted core bank functions). Yet another is the 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. See

Despite the uncertainty associated with this category of agency actions, we contend that enough of the Trump Administration’s activities deviate from established norms of administrative law—as evidenced by both our independent review, and the courts’ review, of the governing principles, and the strong judicial language accompanying such review—that strong judicial remedies are all the more important. We now turn to that topic.

III. APPROPRIATE REMEDIES FOR CLEANING UP REGULATORY SLOP

Agency officials who do not prioritize careful adherence to established administrative law norms are likely to forge ahead with efforts to pursue their substantive agendas in ways that flout those norms unless it is clear that they, their agencies, and the constituencies whose interests they seek to promote 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.¹⁴⁰ 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 complying with the law.

The federal courts have broad discretion to fashion remedies, especially when shaping injunctive relief.¹⁴¹ This section considers a series of remedies that may be well suited to fostering adherence to rule of law values in response to agency actions reflecting disregard of well-established administrative law norms.

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; Dino Grandoni, *The Energy 202: Unintentional email dump shows Trump team's intentions with national monuments*, POWERPOST, 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.

¹⁴⁰ 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 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”).

¹⁴¹ United States v. Oakland Cannabis Buyers’ Co-op., 532 U.S. 483, 496 (2001) (quoting Hecht Co. v. Bowles, 321 U.S. 321, 329–330 (1944)) (stating that “when 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.”).

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.¹⁴² Fee awards under these statutes may provide an effective deterrent to the adoption of rules in disregard of these requirements. 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.”¹⁴³ Thus, the money comes from the agency's own coffers, not from general Treasury assets.¹⁴⁴

Congress enacted EAJA precisely to discourage agencies from taking frivolous positions.¹⁴⁵ 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.¹⁴⁶ Like EAJA, some agency organic statutes include judicial review provisions that explicitly limit fee-shifting to prevailing parties.¹⁴⁷ 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[] that such award is appropriate.”¹⁴⁸ But the courts have interpreted such provisions to limit awards to prevailing parties as well.¹⁴⁹

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

¹⁴² See *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975); *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714 (1967).

¹⁴³ 28 U.S.C. § 2412(d)(4) (2012).

¹⁴⁴ 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) (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.” *Id.* R. 11(c)(1). Courts have imposed Rule 11 Sanctions on attorneys representing federal agencies. See, e.g., *Assiniboine & Sioux Tribes of Fort Peck Indian Reservation v. United States*, 16 Cl. Ct. 158 (1989). They have also imposed sanctions on the agency itself. See, e.g., *Smith v. Heckler*, 1985 WL 71735 (E.D. Cal. May 1, 1985). Indeed, deterrence for government attorneys “is particularly important . . . due to the presumption that federal government . . . officials perform their duties in good faith.” *Coastal Envtl. Grp., Inc. v. United States*, 118 Fed. Cl. 15, 37 (2014).

¹⁴⁵ See, e.g., *Miles v. Bowen*, 632 F. Supp. 282, 283 (M.D. Ala. 1986); *Citizens for Responsible Res. Dev. v. Watt*, 579 F. Supp. 431 (M.D. Ala. 1983).

¹⁴⁶ 28 U.S.C. § 2412(b).

¹⁴⁷ E.g., 33 U.S.C. §§ 1365(d), 1369(b)(3) (2012) (Clean Water Act).

¹⁴⁸ E.g., 16 U.S.C. § 1540(g)(4) (2012) (Endangered Species Act); 42 U.S.C. §§ 7604(d), 7607(f) (2012) (Clean Air Act).

¹⁴⁹ See, e.g., *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 688 (1983); *Center for Biological Diversity v. Marina Point Dev. Co.*, 566 F.3d 794 (9th Cir. 2009); *Marbled Murrelet v. Babbitt*, 182 F.3d 1091, 1095 (9th Cir. 1999).

parties.”¹⁵⁰ A litigant to whom a court issued a preliminary injunction blocking enforcement of an agency rule qualifies.¹⁵¹ 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”) if the litigant was provided an additional opportunity to comment on the repropoed rule.¹⁵²

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.”¹⁵³ 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.”¹⁵⁴ 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 question.”¹⁵⁵ If a court finds that the government’s position inexplicably conflicts with the views of its own experts, a finding of substantial justification is also unlikely.¹⁵⁶ 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 requirements¹⁵⁷ and delaying rules that had already gone into effect without undergoing further notice and comment rulemaking on the

¹⁵⁰ See, e.g., *Autor v. Pritzker*, 843 F.3d 994, 996 (D.C. Cir. 2016) (holding that this test, which originated in *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep’t of Health & Human Res.*, 532 U.S. 598, 605 (2001), a case involving the fee-shifting provisions of the Fair Housing Act of 1988, 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); *Perez-Arellano v. Smith*, 279 F.3d 791, 794 (9th Cir. 2002); *Roberts v. Berryhill*, 310 F. Supp. 3d 529, 535 (E.D. Pa. 2018).

¹⁵¹ See *Select Milk Producers*, 400 F.3d at 947.

¹⁵² See, e.g., *Washington 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); see also *Select Milk Producers*, 400 F.3d 939 (awarding fees based on violation of notice and comment procedures).

¹⁵³ 28 U.S.C. § 2412(d)(1)(A).

¹⁵⁴ *Id.* § 2412(d)(2)(D); see also *Western Watersheds Project v. Ellis*, 697 F.3d 1133 (9th Cir. 2012); *Wyoming Wildlife Fed’n v. United States*, 792 F.3d 981, 985 n.1 (10th Cir. 1986). The “special circumstances” exception is designed to remove disincentives for the government to advance novel arguments in good faith. See *U.S. 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 Prod., 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 agency “appears to have been aware that it was proceeding in an improper manner” in bypassing statutory notice and comment procedures).

¹⁵⁵ See, e.g., *Animal Lovers Volunteer Ass’n, Inc. v. Carlucci*, 867 F.2d 1224, 1226 (9th Cir. 1989).

¹⁵⁶ See *Native Ecosystems Council v. Weldon*, 921 F. Supp. 2d 1069, 1075 (D. Mont. 2013).

¹⁵⁷ 5 U.S.C. § 553(b)(B) (2012); see *Envntl. Def. Fund, Inc. v. EPA*, 716 F.2d 915, 921 (D.C. Cir. 1983); *Washington All. of Tech. Workers*, 202 F. Supp. 3d at 26.

spurious ground that repeal of a rule is not rulemaking.¹⁵⁸ Outraged at 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.”¹⁵⁹ The courts have looked similarly askance at substantial justification defenses in the face of such blatant procedural violations,¹⁶⁰ especially when it seems clear that the agency knew it was playing fast and loose with administrative law requirements.¹⁶¹

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.¹⁶² Among the situations in which arbitrary and capricious 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.”¹⁶³

Perhaps more to the present point in light of the frequent disavowals by agencies under the Trump Administration of Obama agency actions, courts have also rejected a substantial justification defense in cases involving an unexplained reversal of position.¹⁶⁴ The absence of support for the agency’s decision in the evidence before it is also problematic,¹⁶⁵ particularly if the administrative record included documents that directly contradicted the agency’s conclusions, which may prompt a court to conclude that the agency’s conclusions and decision were “objectively unreasonable.”¹⁶⁶ Failure to consider relevant statutory factors, one of the grounds for reversing agency action under the arbitrary and capricious test,¹⁶⁷ also has been a basis for

¹⁵⁸ *Natural Res. Def. Council, Inc. v. EPA*, 703 F.2d 700 (3d Cir. 1983).

¹⁵⁹ *Id.* at 712.

¹⁶⁰ *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 and remanded*, 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).

¹⁶¹ *See Int’l Custom Prod., 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.”); *Natural Res. Def. Council*, 703 F.3d at 712 (EPA knew all along that its position was legally untenable.”).

¹⁶² *See, e.g., Mager v. Heckler*, 621 F. Supp. 1009, 1012 (D. Colo. 1985); *see also Weber v. Weinberger*, 651 F. Supp. 1379, 1388 (W.D. Mich. 1987) (finding that “the 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’ ”).

¹⁶³ *LePage’s 2000, Inc. v. Postal Regulatory Comm’n*, 674 F.3d 862, 866 (D.C. Cir. 2012).

¹⁶⁴ *Id.* at 867-68.

¹⁶⁵ *See, e.g., Haselwander v. McHugh*, 797 F.3d 1, 4 (D.C. Cir. 2015) (finding agency decision that was “devoid of any evidentiary support” in the administrative record was not substantially justified).

¹⁶⁶ *See, e.g., Lynom v. Widnall*, 222 F. Supp. 2d 1, 6 (D.D.C. 2002).

¹⁶⁷ *See State Farm*, 463 U.S. at 43.

fee-shifting.¹⁶⁸ Failure to consider an important aspect of a problem, another indicia of arbitrary and capricious decisionmaking,¹⁶⁹ should be treated the same way.

Trump Administration 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 Obama-era immigration rule¹⁷⁰ which would have allowed foreign entrepreneurs to temporarily enter the United States despite lacking a visa or green card.¹⁷¹ The court found precisely the sort of utter disregard of clear-cut regulatory procedures that characterizes "regulatory slop." It declared that the Department of Homeland Security (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."¹⁷² 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 IE Final Rule were to take effect. Neither position 'substantially justified' jettisoning the APA's notice-and-comment requirements."¹⁷³ The first excuse did not justify bypassing notice and comment procedures because "this was not a close call."¹⁷⁴ 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."¹⁷⁵ 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.¹⁷⁶

The courts have also already invalidated some Trump Administration rules on substantive grounds.¹⁷⁷ Petitions for fee awards 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

¹⁶⁸ See, e.g., *Olenhouse v. Commodity Credit Corp.*, 922 F. Supp. 489, 494 (D. Kan. 1996). *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'").

¹⁶⁹ *State Farm*, 463 U.S. at 43.

¹⁷⁰ *International Entrepreneur Rule*, 82 Fed. Reg. 5238 (Jan. 17, 2017).

¹⁷¹ *Nat'l Venture Capital Ass'n v. Nielson*, 318 F. Supp. 3d 145 (D.D.C. 2018).

¹⁷² *Id.* at 149.

¹⁷³ *Id.* at 150.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* (quoting 82 Fed. Reg. at 5274).

¹⁷⁶ *Id.* at 150-51.

¹⁷⁷ See, e.g., *Crow Indian Tribe v. United States*, 2018 WL 4568418 (D. Mont. Sept. 24, 2018).

award.¹⁷⁸ 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.”¹⁷⁹ Accordingly, one court found in a 1983 case that EPA “utterly failed” to establish justification because “[t]he point at issue in this case was the agency’s decision to dispense with notice and comment rulemaking. The law was already well settled that this could not lawfully be done.”¹⁸⁰

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 propriety of nationwide injunctions¹⁸¹ has been the subject of recent judicial, political, and scholarly debate over various actions concerning immigration policy taken by both the Obama and Trump Administrations.¹⁸² The proposed Injunctive Authority Clarification Act, for example, which was introduced in the 115th Congress and referred to the House Judiciary Committee, would prohibit 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.”¹⁸³

The issue had been brought into focus when a federal district court issued a nationwide temporary restraining order enjoining enforcement of several key provisions of President

¹⁷⁸ 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*, 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.), *reh’g denied*, 857 F.2d 793 (D.C. Cir. 1988) (stating that failure to consider relevant factor may not vitiate substantial justification defense).

¹⁷⁹ *Martinez v. Sec’y of Health & Human Servs.*, 815 F.2d 1381, 1383 (10th Cir. 1987).

¹⁸⁰ *Natural Res. Def. Council*, 703 F.2d at 712.

¹⁸¹ “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, Prepared Testimony of Professor Michael T. Morley before the U.S. House of Representatives Judiciary Committee, Subcommittee on Courts, Intellectual Property and the Internet 3 (Nov. 30, 2017), <https://judiciary.house.gov/wp-content/uploads/2017/11/Tesitmony-Morley.pdf>. Cf. Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 482 (2017) (stating that “the real point of distinction is that the injunction protects nonparties”).

¹⁸² 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”); Ronald A. Cass, *Nationwide Injunctions’ Governance Problems: Forum-Shopping, Politicizing Courts, and Eroding Constitutional Structure* (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3231456 (criticizing the expanding use of nationwide injunctions).

¹⁸³ H.R. 6730, 115th Cong. 2d Sess. (2018).

Trump’s Executive Order No. 13769, Protecting the Nation From Foreign Terrorist Entry Into the United States.¹⁸⁴ The President then revoked the initial Order and replaced it with another one with the same title.¹⁸⁵ Two different district courts entered nationwide preliminary 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 the Order violated the Establishment Clause.¹⁸⁶ Both district courts relied on a Fifth Circuit decision upholding a nationwide injunction against the Obama Administration’s program for Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA). The Fifth Circuit stated flatly that “the Constitution vests the District Court with ‘the judicial Power of the United States.’ That power 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.”¹⁸⁷ 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.”¹⁸⁸ He asserted that “a court’s role is ‘to provide relief’ only ‘to claimants ... who have suffered, or will imminently suffer, actual harm.’”¹⁸⁹

In 2018, Attorney General Jeff Sessions issued a memorandum containing guidelines for attorneys representing the government in cases in which a nationwide injunction is a possible remedy.¹⁹⁰ The memo was prompted by the Attorney General’s concern over “judges acting outside the bounds of their authority and granting relief that reaches far beyond the confines of the particular case or controversy before them.”¹⁹¹ Based on “the longstanding position of the

¹⁸⁴ 82 Fed. Reg. 8977 (Jan. 27, 2017). *See* Washington v. Trump, 2017 WL 462040 (W.D. Wash. 2017), *stay pending appeal denied*, 847 F.3d 1151 (9th Cir. 2017), *reconsideration en banc denied*, 858 F.3d 1168 (9th Cir. 2017).

¹⁸⁵ Exec. Order No. 13780, Protecting the Nation from Foreign Terrorist Entry Into the United States, 82 Fed. Reg. 13209 (Mar. 6, 2017).

¹⁸⁶ Hawaii v. Trump, 245 F.Supp.3d 1277 (D. Haw. 2017), *aff’d*, 871 F.3d 646 (9th Cir. 2017), *vacated and remanded*, 138 S. Ct. 377 (2017); International Refugee Assistance Project v. Trump, 241 F.Supp.3d 539 (D. Md. 2017), *subsequent determination*, 245 F. Supp. 3d 1227 (D. Md. 2017), *aff’d*, 871 F.3d 646 (4th Cir. 2017), *vacated and remanded*, 138 S. Ct. 377 (2017).

¹⁸⁷ Texas v. United States, 809 F.3d 134, 187-88 (5th Cir. 2015), *aff’d by an equally divided Court*, 136 S. Ct. 906 (2016) (citing Earth Island Inst. v. Ruthenbeck, 490 F.3d 687, 699 (9th Cir. 2006), *aff’d in part & rev’d in part on other grounds sub nom.* Summers v. Earth Island Inst., 555 U.S. 488 (2009); Chevron Chem. Co. v. Voluntary Purchasing Grps., 659 F.2d 695, 705–06 (5th Cir.1981); Brennan v. J.M. Fields, Inc., 488 F.2d 443, 449–50 (5th Cir.1973); Hodgson v. First Fed. Sav. & Loan Ass’n, 455 F.2d 818, 826 (5th Cir. 1972)). 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 ___, at 16.

¹⁸⁸ Trump v. International Refugee Assistance Project, 137 S. Ct. 2080, 2090 (2017) (Thomas, J., concurring in part and dissenting in part).

¹⁸⁹ *Id.* (quoting Lewis v. Casey, 518 U.S. 343, 349 (1996)).

¹⁹⁰ Memorandum from the Attorney General to Heads of Civil Litigating Components United States Attorneys, Litigation Guidelines for Cases Presenting the Possibility of Nationwide Injunctions (Sept. 13, 2018), <https://www.justice.gov/opa/pr/attorney-general-sessions-releases-memorandum-litigation-guidelines-nationwide-injunctions> [hereinafter Sessions Memo].

¹⁹¹ *Id.* at 1.

Executive Branch under Administrations of both parties,” the memo announced the Justice Department’s opposition to the issuance of nationwide injunctions.¹⁹² It directed U.S. attorneys to argue that nationwide injunctions:

(1) exceed the constitutional limitations on judicial power;¹⁹³ (2) deviate from longstanding historical exercise of equitable power;¹⁹⁴ (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.¹⁹⁵

The final section of the Attorney General’s memo addresses the issuance of nationwide injunctions in cases challenging regulations under the APA. It directs U.S. attorneys to argue that courts should not interpret the APA “to displace the traditional equitable limitation of relief to the parties before the court.”¹⁹⁶ It asserts that the APA’s delegation to the federal courts of the authority to “hold unlawful and set aside agency action, findings, and conclusions” on various grounds prohibits them from issuing broad remedies such as vacating regulations in their entirety.¹⁹⁷ This provision only allows courts to preclude application of a regulation to the parties before the court, consistent with the traditional and limited role of equitable relief to determine the rights of the parties.¹⁹⁸

Some scholars have elaborated on the arguments that nationwide injunctions are both unconstitutional and inconsistent with the limited authority vested by the APA to grant relief in cases challenging agency regulations. Some contend, for example, 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.”¹⁹⁹ Under this view, nationwide injunctions redirect the function of injunctive relief from protecting individual rights to wielding judicial control over political decisionmaking.²⁰⁰ 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

¹⁹² *Id.*

¹⁹³ 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 __, at 6 (contending that “expanded 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 separation of functions among the branches of government”).

¹⁹⁴ The memo claims that “the recent rise in nationwide injunctions is an ahistorical anomaly.” Sessions Memo, *supra* note __, at 3.

¹⁹⁵ *Id.* at 2.

¹⁹⁶ *Id.* at 7.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 7-8. *Cf.* Zayn Siddique, *Nationwide Injunctions*, 117 COLUM. L. REV. 2095 (2017) (arguing that the geographic scope of an injunction should be limited to what is necessary to provide complete relief to the plaintiffs).

¹⁹⁹ Cass, *supra* note __, at 36-37.

²⁰⁰ *Id.* at 50.

constitutionally assigned authority by invading the turf of another, such as when an agency ignores statutory directives imposed by a co-equal branch of government.

Other scholars have responded that the courts have ample authority to issue nationwide injunctions. Professor Amanda Frost, for example, contends 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.”²⁰¹ She adds that courts have the authority under Article III to issue “broad equitable relief affecting nonparties in response to sweeping executive orders and action.”²⁰² Exercises of agency rulemaking power are examples of actions that often have such sweeping effects.

Existing judicial precedents appear to support the validity of nationwide injunctions under both Article III and the APA.²⁰³ Both the Fifth Circuit in the DAPA case and the Supreme Court in the 2017 travel ban case upheld nationwide injunctions, and the Fifth Circuit explicitly confirmed the lower courts’ authority to provide that kind of relief.²⁰⁴ In other cases, the Supreme Court has overturned nationwide injunctions because they were inappropriate in the circumstances, but not because the entire practice is illegitimate or unauthorized.²⁰⁵ The courts in

²⁰¹ Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 101, 104 (forthcoming) [hereinafter Frost, *Defense*]; *id.* at 114 (contending that “tradition 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 103.

²⁰² *Id.* at 115.

²⁰³ As to the APA, see Frost, *Defense*, *supra* note ___, at 133 (arguing that § 706(2) of the APA “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); Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 VA. L. REV. 933, 1012-13 (2018) (“This statutory power to ‘set aside’ agency action is more than a mere non-enforcement remedy. It is a veto-like power that enables the judiciary to formally revoke an agency’s rules, orders, findings, or conclusions—in the same way that an appellate court formally revokes an erroneous trial-court judgment. In these situations, the courts *do* hold the power to ‘strike down’ an agency’s work, and the disapproved agency action is treated as though it had never happened.”); 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/> (noting that “a final rule is an ‘agency action’ under the APA, so it seems it can be ‘set aside.’ The effect of that is the invalidation of the final rule—in essence, a nationwide injunction.”); 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/> (“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.”). Professor Mitchell adds that one court’s refusal to give effect to another’s nationwide injunction against implementation of agency action engages in a collateral attack on the issuing court’s judgment which is impermissible except in “extremely rare circumstances.” Mitchell, *supra*, at 1014-15. He also states, however, that the existence of the power to issue nationwide injunctions based on violations of the APA does not answer the question of whether they should exercise that power in a particular case. *Id.* at 1014.

²⁰⁴ *Texas v. United States*, 809 F.3d 134, 187-88 (5th Cir. 2015), *aff’d by an equally divided Court*, 136 S. Ct. 906 (2016). *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”).

²⁰⁵ *See, e.g., Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010).

particular have endorsed the practice of issuing nationwide injunctions against invalid regulations.²⁰⁶

Unless and until the Supreme Court adopts Justice Thomas’s view that nationwide injunctions are outside the scope of the judicial power or conflict with limits imposed by the APA on courts’ traditional equitable powers, those remedies remain available. Our focus in this Article therefore, is on the relationship between regulatory slop and the issuance of nationwide injunctions.²⁰⁷ We conclude that, at least in some challenges to agency rules, courts, after comparing the costs and benefits of a nationwide injunction in the particular circumstances, should consider the issuance of such an injunction as an appropriate response to agency action reflecting disregard of fundamental administrative law principles.²⁰⁸

Aside from taking the position that the federal courts lack the authority to issue nationwide injunctions, the Attorney General’s memo argues that exercising nationwide injunctions have adverse consequences that make them inappropriate. A nationwide injunction “seriously impedes decision-making in the federal courts by interfering 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.”²⁰⁹ It also interferes with operation of the class actions system and its capacity to protect the interests of both parties.²¹⁰ A nationwide injunction, according to the Attorney General, is “lopsided” because “a win for the plaintiff resulting in a nationwide injunction binds the government, but a win by the government allows additional plaintiffs to continue to challenge a law or policy until one of them succeeds.”²¹¹ In addition, nationwide injunctions violate “the principle . . . that legal

²⁰⁶ See, e.g., *Harmon v. Thornburgh*, 878 F.2d 484, 495 (D.C. Cir. 1989) (“When 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.”).

²⁰⁷ For an example of a case providing a geographically limited injunction after finding that the BLM violated notice and comment rulemaking procedures, see *Western Watersheds Project v. Zinke*, 2018 WL 4550396, *25-26 (D. Idaho Sept. 21, 2018) (limiting scope of injunction to the agency’s sage grouse habitat management areas); see *supra* notes ___-___ for discussion of this case.

²⁰⁸ 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*, Testimony of Amanda Frost before the U.S. House of Representatives, Committee on the Judiciary, Subcommittee on the Courts, Intellectual Property and the Internet 11 (Nov. 30, 2017), <https://judiciary.house.gov/wp-content/uploads/2017/11/Tesitmony-Frost.pdf> [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.” *Id.* at 476 n.333.

²⁰⁹ Sessions memo, *supra* note ___, at 4. Similarly, the memo argues that a nationwide injunction may discourage other litigants from challenging a rule or policy, “exacerbating the isolation of the first, purportedly definitive ruling.” *Id.*

²¹⁰ See also Michael T. Morley, *Nationwide Injunctions, Rule 23(b)(2), and the Remedial Powers of the Lower Courts*, 97 B.U. L. REV. 615, 621 (2017) (arguing that “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”).

²¹¹ Sessions memo, *supra* note ___, at 5.

issues involving the federal government should be subject to litigation in different circuits,” preventing the government from pursuing additional opportunities to relitigate an issue it lost in the first lawsuit.²¹² Further, nationwide injunctions may create conflicting obligations for the government, such as when one nationwide injunction invalidates a policy while another confirms its validity.²¹³ Finally, the memo asserts that the availability of nationwide injunctions undermines public confidence in the judiciary by inducing forum shopping by plaintiffs and creating the perception that different courts display a lack of respect for other courts.²¹⁴

At least one court has found many of these arguments unpersuasive. A district court issued a nationwide injunction barring the federal government’s imposition of conditions designed to exclude sanctuary cities from qualifying for federal grants to state and local governments administering criminal justice programs.²¹⁵ The Seventh Circuit upheld the injunction over the opposition of the Attorney General. Though it acknowledged that “nationwide injunctions should be utilized only in rare circumstances,” it found that they “for issues of widespread national 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.”²¹⁶ The district court had the authority to craft an injunction whose scope it deemed necessary to protect the public interest in light of the plaintiffs’ likelihood of prevailing on their claim that the challenged action was constitutionally infirm.²¹⁷

Moreover, the Seventh Circuit identified the existence of structural checks on potential abuses of nationwide injunctions. The appellate process minimizes the potential for overbroad injunctions by providing the opportunity for multiple judges to assess whether a single district court judge was “too willing” to issue a nationwide injunction, and by enhancing the likelihood of Supreme Court review.²¹⁸ Even aside from the leavening effect of appellate review, “courts are capable of weighing the appropriate factors while remaining cognizant of the hazards of forum shopping and duplicative lawsuits.”²¹⁹ At the behest of the Attorney General, however, the Seventh Circuit granted rehearing en banc and vacated the portion of the opinion concluding that a nationwide injunction was appropriate.²²⁰

Each of the Attorney General’s reasons for opposing the issuance of nationwide injunctions is contestable, particularly in the context of challenges to “regulatory slop.” Sessions asserts that nationwide injunctions interfere with percolation of contested legal issues through the lower courts. In a 1979 decision, however, the Supreme Court rejected the claim that nationwide class certifications are inappropriate because they prevent percolation of judicial treatment of an

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.* at 6-7; *see also* Bray, *supra* note __, at 457-61.

²¹⁵ *City of Chicago v. Sessions*, 888 F.3d 272 (7th Cir. 2018), *reh’g en banc granted in part, opinion vacated in part*, 2018 WL 4268817 (7th Cir. 2018), *vacated*, 2018 WL 4268814 (7th Cir. 2018).

²¹⁶ *Id.* at 288.

²¹⁷ *Id.* at 289-90.

²¹⁸ *Id.* *See also* Frost, *Defense*, *supra* note __, at 133 (claiming that a benefit of nationwide injunctions “is that they avoid duplicative litigation that would needlessly sap the resources of litigants and courts”).

²¹⁹ *City of Chicago v. Sessions*, 888 F.3d at 290.

²²⁰ *City of Chicago v. Sessions*, 2018 WL 4268814 (7th Cir. 2018).

issue through multiple lower courts. Agreeing 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 factual contexts,”²²¹ it nevertheless refused “to adopt the extreme position that such a class may never be certified.”²²² Instead, it concluded that the geographic scope of a class certification is a matter committed to the district court’s discretion, and that the court, in exercising that discretion, “should take care to ensure that nationwide relief is indeed appropriate in the case before it, and that certification of such a class would not improperly interfere with the litigation of similar issues in other judicial districts.”²²³ 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.²²⁴

The Attorney General also contends that the government should have the opportunity to bring an issue before the courts even after it has lost in one forum. Some regulations, however, may only be challenged in one forum.²²⁵ At a minimum, this reason for barring nationwide injunctions is inapposite in those circumstances. Even some strong critics 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.²²⁶ Statutory assignment of exclusive statutory jurisdiction to one court reflects “a commitment . . . to entrust nationwide authority over those matters to that entity and, necessarily, to allow remedies with nationwide effects to issue from that court.”²²⁷ In such cases, the impact of an injunction “necessarily will be more global—when it finds an agency action unlawful for reasons unrelated to the specific application of an agency rule, precedent, or practice.”²²⁸ But this rationale extends beyond cases in which a court has exclusive jurisdiction. Other courts are also in a position to invalidate 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.

²²¹ *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979).

²²² *Id.* at 702-03.

²²³ *Id.*

²²⁴ The Seventh Circuit in the sanctuary cities case 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 at 290; *see also Frost, Defense, supra* note __, at 119 (“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 __, 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.*

²²⁵ *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) (Clean Air Act provision requiring that all challenges to EPA’s “nationally applicable regulations” be filed in the D.C. Circuit).

²²⁶ *E.g.*, Cass, *supra* note __, at 47 (“For these special cases, Congress can choose to assign the sole authority of initial appellate review to a specific court”).

²²⁷ *Id.* at 48.

²²⁸ *Id.* at 55.

While the Attorney General’s arguments against the exercise of agency discretion to issue nationwide injunctions may be persuasive in many instances, they lose some force in the context of judicial determinations that an agency has ignored well established administrative law requirements.²²⁹ 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.²³⁰ 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 statutory term is less likely to benefit from duplicative litigation.²³¹ 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 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.²³²

Yet another objection to nationwide injunctions is their potential to put impose conflicting obligations on government defendants.²³³ 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 jurisdiction. Different courts, for example, may attach different conditions to implementing a regulation or invalidate and approve a different mix of regulatory provisions.

The contention that nationwide injunctions will spur undesirable forum shopping²³⁴ also loses force in the context of judicial determinations that an agency flouted foundational

²²⁹ 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 __, at 58; Morley, *supra* note __, at 622 (stating that nationwide relief may be defensible when plaintiffs assert rights that are “clearly established”). Many of the cases described in Part II involved violations of “clearly established” administrative law principles. *See also 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”).

²³⁰ *City of Chicago v. Sessions*, 888 F.3d at 291.

²³¹ *City of Chicago v. Sessions*, 888 F.3d at 291; *see also Malveaux, supra* note __, 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).

²³² The benefits of percolation more generally are also uncertain. *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.”); *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. Courts do not exist simply to refine legal principles.”); William H. Rehnquist, *The Changing Role of the Supreme Court*, 14 FLA. ST. L. REV. 1, 11 (1986) (questioning the value of percolation “in the legal world in which we live”).

²³³ *See, e.g., Bray, supra* note __, at 462-64. *But see Amdur & Hausman, supra* note __, at 52 (asserting that “the risk of conflicting injunctions is vanishingly low”).

²³⁴ Professor Cass elaborates on this contention. Cass, *supra* note __, at 18-27; *see also Getzel Berger, Note, Nationwide Injunctions Against the Federal Government: A Structural Approach*, 92 N.Y.U. L. REV. 1068, 1091

administrative law norms. Banning nationwide injunctions would not eliminate forum shopping or the specter of different courts reaching opposing results on a single issue.²³⁵ The Seventh Circuit concluded in the sanctuary cities case that the 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.”²³⁶ Splintered litigation over the validity of agency rules can produce multi-jurisdictional chaos whether or not courts issue nationwide injunctions.²³⁷

Nationwide injunctions of invalid agency rules can avoid placing some regulated firms at a competitive disadvantage.²³⁸ 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.²³⁹

An example of the issuance of a nationwide injunction to foster uniformity involves the litigation challenging the Obama Administration’s Clean Water Rule (better known as the “waters of the United States” or WOTUS rule), which defined the scope of the regulatory jurisdiction of EPA and the U.S. Army Corps of Engineers under the federal Clean Water Act.²⁴⁰ The Sixth Circuit, after consolidating four separate suits stayed the rule, finding that petitioners demonstrated a substantial possibility of showing that the rulemaking process was “facially suspect” both procedurally (failure to comply with notice and comment procedures) and

(2017) (arguing that “nationwide injunctions . . . incentivize[] an extreme race to the more sympathetic to the plaintiff’s position”).

²³⁵ See Malveaux, *supra* note __, at 57 (arguing that an anti-injunction rule would not eliminate the “vice” of forum shopping); Frost Testimony, *supra* note __, at 6 (“[F]orum shopping is pervasive and is not limited to cases involving nationwide injunctions”).

²³⁶ *City of Chicago v. Sessions*, 888 F.3d at 292.

²³⁷ Judicial treatment of the Obama Administration’s Clean Water Rule (discussed at notes __-__ below provides a useful example. Compare *S.C. Coastal Conservation League v. Pruitt*, 318 F. Supp. 3d 959 (D.S.C. 2018) (issuing nationwide injunction) with *Texas v. U.S. EPA*, 2018 WL 4518230 (S.D. Tex. 2018) (refusing to issue a nationwide injunction); *Georgia v. Pruitt*, 2018 WL 2766877 (S.D. Ga. 2018) (enjoining the rule in 11 states). See also *Amdur & Hausman*, *supra* note __, 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. The number of lawsuits over some policies might have to increase dramatically.”).

²³⁸ See Cass, *supra* note __, at 37-38 (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).

²³⁹ See Frost Testimony, *supra* note __, 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 __, 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.*

²⁴⁰ *Clean Water Rule: Definition of “Waters of the United States,”* 80 Fed. Reg. 37054 (June 29, 2015). See Frost, *Defense*, *supra* note __, at 113.

substantively (failure to engage in reasoned decisionmaking).²⁴¹ The court took into account “the burden—potentially visited nationwide on governmental bodies, state and federal, as well as private parties—and the impact on the public in general” that would result from the rule’s purported expansion of the two agencies’ regulatory authority.²⁴² It justified the issuance of a nationwide stay on the disruptive consequences of the existing plethora of rulings in other suits:

In light of the disparate rulings on this very question issued by district courts around the country—enforcement of the Rule having been preliminarily enjoined in thirteen states—a stay will, consistent with Congress’s stated purpose of establishing a national policy, 33 U.S.C. § 1251(a), restore uniformity of regulation under the familiar, if imperfect, pre-Rule regime, pending judicial review.²⁴³

Finally, issuance of a nationwide injunction may be an appropriate mechanism for promoting rule of law values,²⁴⁴ especially when 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.²⁴⁵ In such cases, a nationwide injunction may provide a strong deterrent against future flouting of fundamental administrative law norms.²⁴⁶ Some critics of nationwide injunctions regard them as appropriate mechanisms to block regulatory overreach.²⁴⁷ Nationwide injunctions, however, seem no less appropriate in circumstances in which agencies deviate from statutory commands by adopting *inadequate* regulatory strategies

²⁴¹ In re EPA, 803 F.3d 804, 807 (6th Cir. 2015), *vacated sub nom.* In re U.S. Dep’t of Def., 713 Fed. Appx. 489 (6th Cir. 2018).

²⁴² *Id.* at 808.

²⁴³ *Id.* See also Frost, *Defense*, *supra* note __, at 124 (“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.”); The court in the WOTUS rule case later vacated the stay after the Supreme Court determined that the Sixth Circuit lacked subject matter jurisdiction over the case. In re U.S. Dep’t of Def., 713 Fed. Appx. 489, 490 (6th Cir. 2018) (citing Nat’l Ass’n of Mfrs. v. Dep’t of Defense, 138 S. Ct. 617 (2018)).

²⁴⁴ See Malveaux, *supra* note __, 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.”); Frost, *Defense*, *supra* note __, at 150 (“[F]or those who perceive the federal judiciary as a check on the political branches, nationwide injunctions are an essential tool.”).

²⁴⁵ See Amdur & Hausman, *supra* note __, at 50 (contending that “preventing widespread harm . . . is probably [the] most important function of nationwide injunctions”). Amdur and Hausman 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, there is ample time for issues to percolate up through multiple cases in multiple circuits.” *Id.* Compare Bray, *supra* note __, 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.”).

²⁴⁶ One justification for nationwide injunctions is the need to provide “complete relief” to a prevailing plaintiff. “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 __, at 60-61.

²⁴⁷ See Cass, *supra* note __, at 38.

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 of the critics notes, the courts' role is to "giv[e] effect to rules set by others."²⁴⁸

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 a 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.²⁴⁹

C. Specific Injunctions and Orders

The federal courts have broad equitable discretion in fashioning remedies, including other attributes of injunctions.²⁵⁰ For example, they can choose to remand unlawful regulations with or without vacatur.²⁵¹ They can bar implementation of certain provisions of challenged regulations while allowing others to remain in force.²⁵² When they vacate regulations, they can declare regulations that were amended or repealed by the invalid regulations once more in effect, as discussed further below.²⁵³ 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.²⁵⁴ 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

²⁴⁸ *Id.* at 40-41.

²⁴⁹ 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.”).

²⁵⁰ *United States v. Oakland Cannabis Buyers’ Co-op.*, 532 U.S. 483, 496 (2001) (quoting *Hecht Co. v. Bowles*, 321 U.S. 321, 329-30 (1944)) (“For ‘several hundred years,’ courts of equity have enjoyed ‘sound discretion’ to consider the ‘necessities of the public interest’ when fashioning injunctive relief.”).

²⁵¹ See Levin, *supra* note __; Rodriguez, *supra* note __.

²⁵² See, e.g., *Am. Petroleum Inst. v. EPA*, 862 F.3d 50 (D.C. Cir. 2017) (upholding in part and vacating in part rule defining scope of regulatory program for hazardous waste management), *modified on reh’g*, 883 F.3d 918 (D.C. Cir. 2018).

²⁵³ See, e.g., *In re Polar Bear Endangered Species Act Listing and 4(d) Rule Litig.*, 818 F. Supp. 2d 214, 239 (D.D.C. 2011).

²⁵⁴ See, e.g., *Middle Rio Grande Conservancy Dist. v. Norton*, 294 F.3d 1220, 1226 (10th Cir. 2002) (ordering agency to prepare an environmental impact statement on a proposed critical habitat designation under the Endangered Species Act instead of to reconsider whether such preparation was appropriate in light of the precarious position of the species and overwhelming evidence of significant environmental impacts); see also Robert L. Glicksman & Emily Hammond, *Agency Behavior and Discretion on Remand*, 32 J. LAND USE & ENVTL. L. 483, 490 (2017) (“Injunctions can take many forms, ranging from a complete prohibition to an authorization if the agency adheres to conditions specified in the injunction.”).

relatively detailed remand order.²⁵⁵ Finally, when a court finds that an agency has engaged in unlawful withholding of mandatory action or unreasonable delay,²⁵⁶ it can issue a mandamus order requiring the agency to take action on an accelerated timeline.²⁵⁷

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 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.²⁵⁸ 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 in remand,²⁵⁹ and, in instances of unwarranted delay in complying with statutory deadlines, provides a schedule for agency action on remand rather than providing an open-ended order.²⁶⁰

D. Reinstatement of Repealed Rules and Other Decisions

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 regulations are reinstated, without engaging in any detailed analysis.²⁶¹ Occasionally, courts reference the Supreme Court decision in *Burlington Northern, Inc. v United*

²⁵⁵ See, e.g., *High Sierra Hikers Ass'n v. Blackwell*, 390 F.3d 630, 644 (9th Cir. 2004); *Oregon Natural Res. Council v. U.S. Forest Serv.*, 445 F. Supp. 2d 1211, 1232 (D. Or. 2006). On the dialogic nature of such serial litigation, see Emily Hammond *Deference and Dialogue in Administrative Law*, 111 COLUM. L. REV. 1722 (2011).

²⁵⁶ See 5 U.S.C. § 706(1) (2012) (authorizing courts to compel agency action in such circumstances).

²⁵⁷ See *Telecommc'ns 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 Commc'ns, Inc.*, 531 F.3d 849, 862 (D.C. Cir. 2008) (in face of seven-year "egregious delay," ordering agency to issue a final order within four 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 72, 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").

²⁵⁸ See *Daimler Trucks N. Am LLC v. EPA*, 737 F.3d 95, 103 (D.C. Cir. 2013) (declaring that "the court typically vacates rules when an agency 'entirely fails[s] to provide notice and comment'").

²⁵⁹ See Glicksman & Hammond, *supra* note __, 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).").

²⁶⁰ *But cf. id.* 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 "[j]udicial ire is greatest when an agency misses its own timetable").

²⁶¹ E.g., *In re Polar Bear Endangered Species Act Listing and 4(d) Rule Litig.*, 818 F. Supp. 2d 214, 239 (D.D.C. 2011) (reinstating prior rule); *The Fund for Animals v. Norton*, 294 F. Supp. 2d 92, 115 (D.D.C. 2003) (reinstating prior rule). *But see* *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 554 (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 this decision, the court ameliorated the resulting regulatory void by delaying its mandamus to give EPA the opportunity to issue an emergency rule.

States,²⁶² which involved rates set by the Interstate Commerce Commission for shipments of coal by rail. 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.²⁶³ Twice the ICC modified the rates, and ultimately the D.C. Circuit reasoned that upon vacating those two modified rates, the initial temporary rate was reinstated.²⁶⁴ 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.²⁶⁵ 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.²⁶⁶

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 reinforced by 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 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.

E. 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.²⁶⁷ For example, in *Sierra Club v. Thomas*,²⁶⁸ a district court harshly admonished EPA for its “longstanding unwillingness to comply with the Clean Air Act.”²⁶⁹ 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.²⁷⁰ At yet another delay, the court threatened to do so again.²⁷¹

²⁶² 459 U.S. 131 (1982).

²⁶³ *Id.* at 133.

²⁶⁴ *Id.* at 137-38.

²⁶⁵ *Id.* at 143-44.

²⁶⁶ *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 ESA, NEPA, and FLPMA; 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) (reaching similar result; court enjoined implementation of rule where agency failed to follow proper rulemaking procedures but did not pass on the revival effect of the prior rule).

²⁶⁷ *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”).

²⁶⁸ 658 F. Supp. 165 (N.D. Cal. 1987).

²⁶⁹ *Id.* at 175.

²⁷⁰ *Id.*

As Nick Professor Parillo explains, courts are indeed willing to invoke the power of contempt against agency officials who have failed to comply with orders requiring that they take specific actions.²⁷² Although there appears to be little appellate support for sanctions like fines or imprisonment, Professor Parillo emphasizes the shaming power of a contempt finding for achieving compliance.²⁷³ Indeed, strong judicial language may also be found in contempt orders, which offers a signal not just to the agency but to Congress, the President, the media, and the (voting) public.

IV. CONCLUSIONS

The federal courts have invalidated a considerable number of agency actions taken in the first year and a half 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 *some* findings must justify rulemaking. Dozens of 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 and the chaos of the transitions between administrations. Relatedly,

²⁷¹ *Id.* (“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.”).

²⁷² Nicholas R. Parillo, *The Endgame of Administrative Law: Governmental Disobedience and the Judicial Contempt Power*, 131 HARV. L. REV. 685 (2018).

²⁷³ *Id.* at 770.

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.²⁷⁴ We are unable to ascertain the motivations for agency actions that courts have determined are invalid.²⁷⁵ 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. A finding that judges appointed by presidents of both political parties have invalidated Trump Administration actions based on violated 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.

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 be responding to successful challenges to Trump agency regulatory actions. Systemic disregard for the 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. A pattern

²⁷⁴ Perceptions of agency capture have prompted application of hard look review. *See* Glicksman & Schroeder, *supra* note __, 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.”); *id.* at 268 (finding that to reduce the prospects for 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* Lindsey Dillon, *The Environmental Protection Agency in the Early Trump Administration: Prelude to Regulatory Capture*, 108 AM. J. PUB. HEALTH 589 (2018).

²⁷⁵ 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 such formal findings and it may be that the only way there can be effective judicial review is by examining the decisionmakers themselves”). Perhaps it is time to resort to this neglected remedy.

of skirting judicial remand orders in cases finding 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 in that the government's claim that its positions were substantially justified would weaken. A judicial determination that an agency intentionally flouted the law might cut in favor of both Rule 11 and contempt sanctions.

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.