Saint Louis University Law Journal

Volume 66
Number 3 *Teaching During a Changing Administration (Spring 2022)*

Article 4

2022

Teaching Constitutional Law, Administrative Law, and Health Law as Presidential Administrations Change

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TEACHING CONSTITUTIONAL LAW, ADMINISTRATIVE LAW, AND HEALTH LAW AS PRESIDENTIAL ADMINISTRATIONS CHANGE

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ABSTRACT

When elections bring about changes in the political party of the president, the shifts frequently involve a change in the philosophies that inform the approach to governing. In teaching constitutional law, administrative law, and health law, this author cautions students to consider the political content of agency actions underlying the judicial opinions studied. Examining the political and discretionary judgment government officials exercise may provide an explanation for the results or an analysis when the law does not seem to account for the agency action or court decision. This Article examines the opportunities available to an incoming administration to undo the work of its predecessor and the constraints the law imposes on the exercise of discretion. After surveying the increasing use of the Congressional Review Act to reverse the regulatory actions of a predecessor administration, Part I of the Article explores other administrative law tools available to halt or redirect regulatory actions with which an incoming administration disagrees. Part II examines some of the signature cases involving judicial review of agency action to illustrate the constraints courts may impose on changes in administrative policy. Parts III, IV, and V examine how courts have dealt with policy changes in federal health care programs and the potential impact of changes in the presidential approach to the appointment of administrative adjudicators. The Article closes with some reflections on how this author's experiences working in state and federal government have informed her view of government decision-making.

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INTRODUCTION

The substantive content of some fields of law may change markedly depending on the policies and practices of a presidential administration. At the federal level, the last two decades have brought shifts in policies and approaches four times when the political party occupying the White House changed. In 2000, Republican George W. Bush succeeded Democrat Bill Clinton who had in turn defeated Republican George H.W. Bush; in 2008, Democrat Barack Obama succeeded Bush; in 2016, Republican Donald Trump succeeded Obama; and in 2020, Democrat Joseph R. Biden defeated Trump. While all of these shifts involved a changing political party and governing philosophies, the transitions from Obama to Trump and Trump to Biden have presented exceptionally sharp, substantive contrasts in the administration of federal programs and approaches to policy. In teaching constitutional law, administrative law, and health law over the years, I have always cautioned students to consider the political content of agency actions underlying the opinions of reviewing courts. Especially when legal principles and doctrine do not seem to account fully for the agency action or the court decision, the political or discretionary judgment government officials have exercised may provide an explanation. The legitimacy of government depends on political accountability; thus, election outcomes should have consequences for the direction and implementation of policy. Examining which constraints the law imposes on the exercise of official discretion and how courts use that law to evaluate whether official actions have followed the law are the salient questions. The transitions between presidential administrations representing different political parties provide rich opportunities to understand the interaction between law and politics.

I. USING THE CONGRESSIONAL REVIEW ACT TO RESCIND REGULATIONS & POLICIES ADOPTED BY A PRECEDING ADMINISTRATION

The George W. Bush Administration began with Congress using authority under the Congressional Review Act ("CRA") for the first time to rescind an agency regulation.[1] In November 2000, during the last few weeks of the Clinton Administration, the Occupational Safety and Health Administration ("OSHA") issued an expansive regulation aimed at preventing ergonomic injuries in the workplace. The rule was unpopular with business interests, and Bush was willing to sign the resolution of disapproval in March 2001 after taking office.[2] While OSHA had worked on the rule for ten years, Congress spent less than a week considering the disapproval resolution.[3] The transition in presidential

1. Congressional Review Act, 5 U.S.C. §§ 801–808 (adopted in 1996 as part of the Contract with America Advancement Act, Pub. L. 104-121).

2. S.J. Res. 6, 107th Cong. (2001) (enacted).

3. MICHAEL ASIMOW & RONALD M. LEVIN, STATE AND FEDERAL ADMINISTRATIVE LAW 479 (West Acad. 5th ed. 2020).

administrations provided the opportunity and political will required to rescind the workplace safety regulation.

The CRA was Congress's response to the Supreme Court's decision in *Immigration and Naturalization Service v. Chadha*. [4] In *Chadha*, the Court invalidated a statute authorizing either house of Congress to reject an action suspending an individual's deportation because the process did not conform to the constitutional requirements of bicameralism and presentment to the President.[5]

The CRA requires that all rules of general applicability be submitted to Congress and the Government Accountability Office ("GAO"). Major rules cannot take effect for at least sixty days after submission—"legislative" days in the House and "session" days in the Senate. Congress can nullify or rescind any rule by enacting a joint resolution passed by both houses and signed by the President or enacted by overriding a Presidential veto. In addition to regulations adopted through notice and comment rulemaking, the CRA applies to other agency documents including interpretive rules and policy statements.

A rescission enacted using the CRA process has the effect of prohibiting an agency from adopting a regulation substantially similar to the disapproved rule unless Congress enacts legislation allowing the agency to do so.[6] This effect is known as "salting the earth behind the nullification."[7]

One obvious limitation on Congress's ability to use the CRA to overturn regulations is that a President is unlikely to sign a resolution disapproving of an action their administration has taken. Further, amassing the requisite two-thirds majority in each house to override a Presidential veto may be challenging for agency actions having some reservoir of public support. These constraints meant that no CRA disapproval actions occurred during the remainder of the Bush and Obama Administrations. Fast-forward to the transition from the Obama Administration to the Trump Administration, President Trump took office with an aggressive deregulatory agenda. Ten days after the inauguration, President Trump signed Executive Order 13,771, which required agencies proposing to

4. 462 U.S. 919 (1983).

5. *Id*. at 923, 928; U.S. CONST. art. I, § 7, cl. 1–3 (requiring that bills must pass the House and the Senate and be presented to the President, that joint resolutions or actions of the House and Senate together be presented to the President for approval, and if disapproved by the President, that they be repassed by a two thirds majority each of the House and Senate).

6. 5 U.S.C. § 801(b)(2).

7. *See, e.g.*, ASIMOW & LEVIN, *supra* note 3, at 479; Keith Bradley and Larisa Vaysman, *CRA Resolutions Against Agency Guidance Are Meaningless*, REG. REV. (Sept. 20, 2018) ("A 'rule that does not take effect (or does not continue)' thanks to a CRA resolution 'may not be reissued in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued.' Some lobbyists have called this feature salting the earth on that rule").

promulgate a new regulation identifying two regulations to be repealed.[8] The Executive Order also provided that the net cost of new regulatory activity for the fiscal year could be no greater than zero.[9] Further, he appointed Neomi Rao, a conservative lawyer and law professor, to lead the Office of Information and Regulatory Affairs ("OIRA") in the Office of Management and Budget ("OMB"), the component of the White House that oversees agency rulemaking activities.[10] Rao explained the Trump Administration deregulatory agenda in a lecture published by the Heritage Foundation in October 2017.[11] The document, available on the Heritage Foundation website, identifies "key points" from the lecture:

- America needs a much smaller and more effective regulatory state and a much more accountable and responsive administration.
- Far too many regulations are a solution in search of a problem rather than a response to an actual market failure.
- Administrative agencies that operate on their own inertia often create regulations that are overly burdensome and fail to deliver any real benefits.
- Excessive regulation impedes individual liberty for all Americans, makes it harder to get a job, and makes it harder to start and maintain a small business. It makes ordinary goods and services much more expensive and limits choice in the marketplace. Expansive social regulations can impede choices that are fundamental to religious exercise and freedom of conscience.
- Reducing these overall regulatory burdens is part of returning government to its proper and limited role and giving the American people greater control over their lives, their work, and their property.[12]

8. Proclamation No. 9339, 82 Fed. Reg. 13,711 (Feb. 3, 2017), https://www.federalregister.gov/documents/2017/02/03/2017-02451/reducing-regulation-and-controlling-regulatory-costs (reducing regulation and controlling regulatory costs).

9. *Id.* at Sec. 2(a), (b).

10. Steven Mufson, *Trump's pick for rules czar would hand more power to Trump*, WASH. POST (Apr. 20, 2017), https://www.washingtonpost.com/business/economy/trumps-pick-for-rules-czar-is-expected-to-hand-over-more-power-to-trump/2017/04/19/8b33b176-206f-11e7-a0a7-8b2a45e3dc84_story.html. Rao was confirmed by the Senate for the position on July 10, 2017. Josh Siegel, *Senate confirms Neomi Rao to lead White House office overseeing regulations*, WASH. EXAMINER (July 10, 2017, 8:21 PM), https://www.washingtonexaminer.com/tag/donald-trump?source=%2Fsenate-confirms-neomi-rao-to-lead-white-house-office-overseeing-regulations. Subsequently, Trump nominated Rao to fill the seat on the United States Court of Appeals for the District of Columbia Circuit, vacated by the elevation of Brett Kavanaugh to the Supreme Court. She joined the court in March 2019. *Biography of Neomi Rao*, D.C. CIR., https://www.cadc.uscourts.gov/internet/home.nsf/Content/VL+-+Judges+-+NJR (last visited Nov. 9, 2021).

11. Neomi Rao, The Administrative State and the Structure of the Constitution, Lecture Delivered to the Heritage Foundation (Oct. 4, 2017), https://www.heritage.org/the-constitution/report/the-administrative-state-and-the-structure-the-constitution.

12. *Id.*

In the lecture, she criticized what she identified as a move away from the structure for administration of laws established in the Constitution "to a regulatory state that often operates with minimal congressional guidance, inconsistent presidential direction, and deferential judicial review."[13] She called on Congress to reform its oversight of the regulatory process and for the judiciary to exercise more probing judicial review, noting that President Trump had launched the aforementioned regulatory reforms. She wrote, "If each branch succeeds in its sphere in limiting the reach of regulation, it will promote individual liberty, restore more accountable government, and ultimately benefit the American people."[14]

Missing from this agenda for dismantling the administrative state is any explicit recognition that regulations are creatures of congressional authorization, responsible for meat inspections and safety, require that drugs approved for marketing be safe and effective, and protect consumers from unfair banking, securities, and financial practices, or that industrial activity should not despoil the air and water to the detriment of public health.[15] Additionally absent is the recognition that a sound regulatory process would focus on reasoned, scientifically-informed regulatory decisions that honestly balance the costs and benefits—including unquantifiable benefits—of specific regulations.[16] Erecting barriers to any regulation for the simplistic sake of reducing regulation is a recipe for returning this nation to the conditions portrayed by Upton Sinclair in *The Jungle*.[17] In addition, the Rao vision would inhibit progress in a myriad of areas, such as effecting environmental quality, reducing racial disparities across a wide range of regulatory activities, and reimagining the application of cost/benefit analysis.[18] As I tell my students: the Constitution enshrines no right to buy cheap

13. *Id*.

14. *Id.*

15. Sally Katzen, *Regulations: The Unsung Heroes*, 42 ADMIN. & REG. L. NEWS 13, 13–14 (2017) (noting that Katzen is Professor of Practice and Distinguished Scholar in Residence, Co-Director of the Legislative and Regulatory Process Clinic, New York University Law School; also noting Katzen was Director of OIRA during the Clinton Administration).

16. *Id*.; *see also* Jonathan S. Masur, *Cost-Benefit Analysis Under Trump: A Comment on Dan Farber's Regulatory Review in Anti-Regulatory Times*, 94 CHI.-KENT L. REV. 665, 665, 668 (2019).

17. A 1906 novel describing the meat industry and its working conditions, which ultimately led to the adoption of the Meat Inspection Act and the Pure Food and Drug Act. UPTON SINCLAIR, THE JUNGLE 38 (Grosset & Dunlap 1906).

18. *See generally Symposium on Race and Administrative Law*, YALE J. ON REGUL., NOTICE & COMMENT BLOG (Oct. 27, 2020), https://www.yalejreg.com/topic/racism-in-administrative-law-symposium/. For a critique of the current impact of cost-benefit analysis, see Melissa J. Luttrell & Jorge Roman-Romero, *Regulatory (In)Justice: Racism and CBA Review*, in the same symposium, arguing that, "[b]y increasingly relying on formal CBA as decision-making criterion in health, safety, and environmental risk regulation, agencies exacerbate racial bias in a socio-economic landscape already afflicted with systemic racism." *See also* Masur, *supra* note 16, at 668.

stuff, nor does it establish a right to make as much money as possible in any given business or economic transaction. The rights for workers who produce the stuff and the impact of economic activity on the environment are the legitimate objects of government redress.

Because of the amount of regulatory activity concluded during the final months of the Obama administration, and because the CRA subjects regulations to disapproval actions for sixty days on legislative calendars however determined by each house, any regulation adopted by an Obama Administration agency after about May 25, 2016, was vulnerable to a CRA disapproval resolution when Trump succeeded Obama in January 2017. This window to eliminate rules antithetical to the regulatory philosophy of the new administration closed in mid-May 2017.

By the time Rao took office as OIRA Director, just four months into the Trump Administration, Congress had adopted, and President Trump had signed, fourteen disapproval resolutions. Among the regulations rescinded were the Federal Communication Commission ("FCC") regulation protecting consumer privacy[19] and a Department of Health and Human Services ("HHS") rule protecting access to federal funding for reproductive health care organizations that provide abortions.[20] Other rules rescinded included several environmental protections and financial services rules.[21] One proposed disapproval resolution failed when three Republican Senators joined all Democrats in voting against the effort to rescind a methane emissions rule promulgated by the Department of the Interior, Bureau of Land Management.[22]

In addition to these regulations rescinded in the early months of the Trump Administration, Congress and President Trump worked together to use the CRA to rescind a Consumer Financial Protection Bureau ("CFPB") guidance bulletin on auto lending and compliance with the Equal Credit Opportunity Act.[23] The CFPB adopted this bulletin in March 2013 under the leadership of Richard Cordray, who was appointed director by President Obama.[24] Even though this

19. Exec. Order No. 87,274, 47 C.F.R. § 64 (2016), *overturned by* S.J. Res. 34, 115th Cong. (2017) (enacted).

20. Exec. Order No. 91,852, 42 C.F.R. § 59 (2016), *overturned by* H.J. Res. 43, 115th Cong. (2017) (enacted).

21. For a complete list of federal agency rules repealed under the CRA through June 30, 2021, see *Federal Agency Rules Repealed Under the Congressional Review Act*, BALLOTPEDIA (2021), https://ballotpedia.org/Federal_agency_rules_repealed_under_the_Congressional_Review_Act.

22. Juliet Eilperin & Chelsea Harvey, *Senate Unexpectedly Rejects Bid to Repeal a Key Obama-era Environmental Regulation*, WASH. POST (May 10, 2017), https://www.washingtonpost.com/news/energy-environment/wp/2017/05/10/senates-poised-to-repeal-a-final-obama-era-rule-as-soon-as-wednesday/.

23. MAEVE P. CAREY & CHRISTOPHER M. DAVIS, CONG. RSCH. SERV., R43992, THE CONGRESSIONAL REVIEW ACT (CRA): FREQUENTLY ASKED QUESTIONS 26 (2021).

24. Bureau of Financial Protection notice that the bulletin had been rescinded. *See also* Kris D. Kully et al., *Congress Invalidates CFPB's Indirect Auto Lending Guidance*, CONSUMER FIN.

rescission did not occur during a transition period, this example fits the pattern of a subsequent administration overturning the predecessor's regulatory position.

The Congressional Research Service estimated that rules submitted to Congress by the Trump Administration on or after August 21, 2020, would be vulnerable to CRA review in the 117th Congress elected in 2020 with Democratic majorities in both houses and with a Democrat, Joseph R. Biden, as President.[25] Three regulations have been subject to disapproval under the CRA process during the Biden Administration.[26] In addition, on January 20, 2021, President Biden issued an Executive Order revoking the executive orders relating to regulatory practices issued by President Trump.[27] In a four year span, the CRA has been used extensively to reject the regulatory enactments of the immediately preceding administration. If one of the goals of the regulatory state is to establish consistent and predictable standards, compliance with which regulated entities and the public are able to rely in structuring their activities, then the increased reliance on the ability to undo what the previous President has done is not serving that purpose. Commentators have noted that the CRA process advantages well-organized industry and other interest groups by providing an opportunity to overturn a regulatory outcome they find disagreeable.[28] On the other hand, responding to the views of the electorate as divined from the outcomes of presidential elections seems to be consistent with some notions of political accountability. How a society and an economy can function with such dramatic fluctuations in regulatory policy causes one to consider what the constraints are on politics and regulatory ideology as the guideposts for acceptable administrative action.

Before use of the CRA emerged as a major tool for reversing regulatory outcomes, incoming administrations routinely employed a variety of mechanisms to prevent the implementation of policies propounded by prior

SERVS. REV. (May 18, 2018), https://www.cfsreview.com/2018/05/congress-invalidates-cfpbs-indirect-auto-lending-guidance/.

25. MAEVE P. CAREY & CHRISTOPHER M. DAVIS, CONG. RSCH. SERV., R46690, CONGRESSIONAL REVIEW ACT ISSUES FOR THE 177TH CONGRESS: THE LOOK-BACK MECHANISM AND EFFECTS OF DISAPPROVAL (2021).

26. *See supra* note 21 (showing Regulations of the Equal Employment Opportunity Commission, the Environmental Protection Agency, and Office of the Comptroller of the Currency were all rescinded on June 30, 2021).

27. Exec. Order No. 13,992, 86 Fed. Reg. 7049 (Jan. 25, 2021) (revoking six executive orders issued by President Trump related to administrative regulation). *See also Presidential Executive Order 13992 (Joe Biden, 2021)*, BALLOTPEDIA, https://ballotpedia.org/Presidential_Executive_Order_13992_(Joe_Biden,_2021) (last visited Oct. 24, 2021). To the extent that agencies may have acted in response to the Trump executive orders, the agencies may need to take further steps to comply with the Biden executive order. For example, an agency that issued any rules issued using notice and comment rulemaking would need to use that same process to revoke those policies.

28. *See, e.g.*, ASIMOW & LEVIN, *supra* note 3, at 479.

administrations. The incoming president's chief of staff typically issued instructions in a memorandum to agencies, ordering the withdrawal, modification, or replacement of final rules published but with delayed effective dates.[29] New administrations have also abandoned the defense of statutes or regulations to which the administration is opposed, for example, the Biden Administration's refusal to continue supporting the challenge to the Affordable Care Act ("ACA") initiated by numerous states after Congress reduced the tax penalty for failure to comply with the requirement to have health insurance to zero.[30] A successor administration could also diminish the impact of a rule to which it is opposed through lax enforcement without repealing rules. A new administration can slow down or curtail rulemakings in progress. One obvious step would be to initiate new rulemakings to rescind existing regulations or adopt new ones. The Trump Administration's EPA replacing the Obama Clean Power Plan with a different rule is one example of this approach.[31] Emphasizing this range of options serves to prepare law students for future situations that may call for identifying or using these techniques to maintain or change regulatory directions.

II. JUDICIAL REVIEW & LEGAL CONSTRAINTS ON ADMINISTRATIVE ACCOUNTABILITY

Beyond the internal agency processes, resort to judicial review has been the traditional source of constraint on the actions of administrative agencies despite Neomi Rao's skepticism about its utility. What role political justifications should play in that process is an interesting issue for students to explore.

The situation leading to the Supreme Court's decision in *Massachusetts v. Environmental Protection Agency* is one example where the judiciary confronted the intersection of law and politics.[32] Massachusetts, along with other states, local governments, and private organizations, petitioned the EPA to regulate certain emissions of motor vehicles to help reduce global warming.[33] A provision of the Clean Air Act ("CAA") required the EPA administrator to issue

29. Reince Preibus (Trump), Rahm Emanuel (Obama), and Andrew Card (George W. Bush) issued similar memoranda.

30. Letter from Edwin S. Kneedler, Deputy Solic. Gen., to Scott S. Harris, Clerk of the U.S. Supreme Court (Feb. 10, 2021), https://www.supremecourt.gov/DocketPDF/19/19-840/168649/20210210151147983_19-840%2019-1019%20CA%20v%20TX.pdf ("Following the change in Administration, the Department of Justice has reconsidered the government's position in these cases. The purpose of this letter is to notify the Court that the United States no longer adheres to the conclusions in the previously filed brief of the federal respondents.").

31. Umair Irfan, *Trump's EPA Just Replaced Obama's Signature Climate Policy with a Much Weaker Rule*, VOX (June 19, 2019), https://www.vox.com/2019/6/19/18684054/climate-change-clean-power-plan-repeal-affordable-emissions.

32. 549 U.S. 497, 516 (2007).

33. *Id.* at 505.

regulations prescribing standards for emissions of air pollutants from new motor vehicles upon determining "in his judgment" that the emissions "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare. . . ."[34] A separate section of the statute defined the term "air pollutant."[35] The EPA under President George W. Bush refused to regulate new motor vehicle emissions because it determined that the term "air pollutant" did not encompass greenhouse gases, such as carbon dioxide, and because the connection between greenhouse gases and global warming had not been "unequivocally established."[36] As additional justification for its refusal to act, the agency cited the policy approaches of the President, indicating that regulations "would conflict with the President's comprehensive approach to the problem of climate change, such as the creation of nonregulatory programs to encourage voluntary private sector reductions in greenhouse gas emissions, and might hamper the President's ability to persuade developing nations to reduce emissions."[37]

After first concluding that Massachusetts had standing to challenge the EPA's denial of the rulemaking petition,[38] the Court then ruled that the definition of "air pollutant" in the statute encompassed greenhouse gases, such as carbon dioxide, and that the EPA Administrator was required to exercise "judgment" "within defined statutory limits."[39] The Court stated that "once EPA has responded to a petition for rulemaking, its reasons for action or inaction must conform to the authorizing statute."[40] According to the Court, under the CAA,

> EPA can avoid taking further action only if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do. . . . *To the extent that this constrains agency discretion to pursue other priorities of the Administrator or the President, this is the congressional design*.[41]

The Court rejected the reasons the EPA offered for not regulating as being irrelevant to the statutory instruction that the EPA render "a scientific judgment" and ruled that the agency's failure to reach a conclusion was arbitrary and capricious.[42]

In his dissent, Justice Scalia wrote that the reasons the EPA provided for not acting "are surely considerations executive agencies *regularly* take into account

34. 42 U.S.C. § 7521(a)(1).
35. *Id.* § 7602(g).
36. *Massachusetts*, 549 U.S. at 513.
37. *Id.* at 513–14.
38. Massachusetts v. Environmental Protection Agency, 549 U.S. 497, 520–21, 526 (2007).
39. *Id.* at 532–33.
40. *Id.* at 533.
41. *Id*. at 533 (emphasis added).
42. *Id*. at 535.

(and *ought* to take into account) when deciding whether to consider entering a new field: the impact such entry would have on other Executive Branch programs and on foreign policy."[43] The dissenters did not read the statute as imposing a requirement that the Administrator reach a judgment. Additionally, the dissent did not read the statute as foreclosing the policy justifications the EPA offered for refusing to act.[44] The dissent did not discuss the purpose of the CAA provision of improving air quality and promoting health in the long term. Perhaps this omission was a signal that the Justices in the dissent did not agree with the congressional objective embodied in the provision of the CAA.

After the Supreme Court decision in *Massachusetts*, the Bush Administration managed to avoid acting before leaving office. Soon after taking office in 2009, the Obama Administration made the finding that greenhouse emissions endanger public health and welfare as the Court's decision seemed to direct.[45] The *Massachusetts* majority viewed its role as enforcing the congressional directive that the government act with more urgency to mitigate climate change and its effects, imposing a legal constraint on the exercise of political discretion by the Bush Administration.

Earlier, in *Motor Vehicle Manufacturers Association v. State Farm*, the U.S. Supreme Court reviewed a rulemaking decision of the National Highway Traffic Safety Administration ("NHTSA") regarding whether the agency would require installation of airbags or seatbelts—passive restraints—to reduce the number of deaths and injuries resulting from motor vehicle accidents.[46] Michael Asimow and Ronald M. Levin give an account of the rulemaking proceeding which involved sixty rulemaking notices spanning across the Carter and Reagan Administrations.[47] "A passive restraint requirement was imposed, amended, rescinded, and reimposed."[48] In 1977, NHTSA adopted a standard requiring that cars produced after 1982 be equipped with passive restraints.[49] After the Reagan Administration took office in 1981, the agency delayed the effective date of the requirement and then rescinded it after notice and comment rulemaking.[50] To make a long story short, in the *State Farm* decision, the Court ruled that NHTSA's rescission of the standard was arbitrary and capricious.[51]

43. Massachusetts v. Environmental Protection Agency, 549 U.S. 497, 552 (2007) (Scalia, J., dissenting).

44. *Id.*

45. Proposed Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 18,886 (Apr. 24, 2009).

46. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 34–35 (1983).

47. ASIMOW & LEVIN, *supra* note 3, at 665.

48. *Id.*

49. *Id.*

50. *Id.*

51. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 46 (1983).

Significantly, in his opinion, concurring in part and dissenting in part, then-Justice Rehnquist described the NHTSA rulemaking with refreshingly honest reference to the impact of politics on the agency's decision to rescind the passive restraints standard:

> The agency's changed view of the standard seems to be related to the election of a new President of a different political party. It is readily apparent that the responsible members of one administration may consider public resistance and uncertainties to be more important than do their counterparts in a previous administration. A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations. *As long as the agency remains within the bounds established by Congress, it is entitled to assess administrative records and evaluate priorities in light of the philosophy of the administration*.[52]

The Rehnquist opinion acknowledged in a footnote that "[o]f course, a new administration may not refuse to enforce laws of which it does not approve, or to ignore statutory standards in carrying out its regulatory functions."[53]As Christopher F. Edley, Jr., has observed,

> Justice Rehnquist's opinion in *State Farm* is striking for two reasons. It is both a *descriptive* acknowledgment that politics was an ingredient of the deregulatory decision at issue *and* a *normative* assertion that politics has a legitimate place in sound agency decision making. These points are all the more striking because they contrast sharply with the total absence from Justice White's majority opinion of any mention of politics. . . . President Reagan's electoral victory, which included a significant campaign emphasis on deregulation, was simply irrelevant. . . . There was . . . no mention of politics.[54]

Edley goes on to note that Rehnquist's observation is an implicit acknowledgement "that the political reality which is often the explanation for a major policy shift should not be ignored in the process of judicial review."[55] As I have instructed students, "the political story is just as important to understanding the 'reasons and findings' of the agency and the 'basis and purpose' of its action."[56]

Elsewhere in his analysis, Edley points out the implicit role of politics and the preferences or "bias[es]" of the decision-maker in the cases regarding whether strongly held policy views disqualify an agency official from participating in a rulemaking proceeding.[57] "Impartial, however, does not mean

52. *Id.* at 59 (Rehnquist, J., concurring in part and dissenting in part) (emphasis added).
53. *Id.* at 59 n.8.
54. CHRISTOPHER F. EDLEY, JR., ADMINISTRATIVE LAW 183 (1990).
55. *Id*.
56. *Id*.
57. *Id*. at 179–80.

uninformed, unthinking, or inarticulate."[58] A concurring opinion in *Association of National Advertisers* noted that an agency could not even begin to conduct a rulemaking proceeding unless it had formed an opinion that some problem existed requiring a regulatory response.[59] Similarly, in an opinion by Judge Patricia Wald in *Sierra Club v. Costle*, the D.C. Circuit noted the desirability of presidential supervision and influence on agency decision-makers and the legitimacy of congressional communications of viewpoints in rulemaking proceedings.[60] This role for politics is consistent with the rule of law if agency decision-makers hew to their statutory mandates and reviewing courts hold agencies accountable.[61]

III. LAW & POLITICS RELATING TO MEDICAID WORK REQUIREMENTS

One issue on which Republican Presidents and governors have pursued different objectives than Democrats is in the administration of the Medicaid program. The most striking example of this difference in viewpoint is the failure of twelve states led by Republican officials to adopt the expansion of the Medicaid program authorized in the ACA.[62] Outside the expansion opportunity that the ACA made available, state Medicaid programs exhibit a great deal of variation, and the Medicaid statute additionally makes provision for states to apply for waivers from certain program elements for demonstration projects.[63] States have used waivers to experiment with different coverage options, financing, and delivery reforms.[64] The statute authorizes the Secretary of HHS to approve "any experimental, pilot, or demonstration project which, in the judgment of the Secretary, is likely to assist in promoting the objectives" of

58. Ass'n of Nat'l Advertisers v. Federal Trade Comm'n, 627 F.2d 1151, 1173–74 (D.C. Cir. 1983). In this case, the court rejected the notion that the rules ensuring the impartiality of adjudicators should apply in rulemaking situations.

59. *Id.* at 1176 (Leventhal, J., concurring).

60. 657 F.2d 298, 311, 406, 409 (D.C. Cir. 1981).

61. *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 59 (1983) (Rehnquist, J., dissenting).

62. States were able to decline to participate in the Medicaid expansion as a result of the Supreme Court's decision in *National Federation of Independent Business v. Sebelius*, which held that the federal government could not condition continued receipt of a state's payment under the traditional Medicaid program on the state's agreement to cover the expansion population of certain low-income adults. 567 U.S. 519, 588 (2012). *See Status of State Medicaid Expansion Decisions: Interactive Map*, KAISER FAM. FOUND. (Oct. 8, 2021), https://www.kff.org/medicaid/issue-brief/status-of-state-medicaid-expansion-decisions-interactive-map/. While some states having Republican leadership have adopted the Medicaid expansion, all of the remaining states have Republican governors or legislative majorities, or both.

63. BARRY R. FURROW ET AL., THE LAW OF HEALTH CARE ORGANIZATION AND FINANCE 435 (8th ed. 2018).

64. *Id.*

Medicaid.[65] During the Trump Administration, the Centers for Medicare and Medicaid Services in HHS approved state requests to attach work requirements to the eligibility criteria for Medicaid.[66] The notion of work requirements echoes the efforts since colonial times to ensure that public support is not expended on the "sturdy beggar," "the able-bodied [adult]," or the freeloader who just chooses not to maintain gainful employment.[67]

In February 2020, the D.C. Circuit in *Gresham v. Azar* invalidated the Arkansas waiver approved by HHS Secretary, Alex Azar, which authorized Arkansas to impose work requirements as inconsistent with the primary purpose of the Medicaid statute.[68] The statute provides that the purpose of Medicaid is

> [T]o furnish (1) medical assistance on behalf of families with dependent children and of aged, blind, or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services, and (2) rehabilitation and other services to help such families and individuals attain or retain capability for independence or self-care.[69]

The HHS letter approving the Arkansas waiver identified three objectives that Secretary Azar asserted Arkansas Works would promote: improving health outcomes; addressing behavioral and social factors that influence health outcomes; and incentivizing beneficiaries to engage in their own health care and achieve better health outcomes. The approval letter opined that the Arkansas community engagement requirements would encourage beneficiaries to obtain and maintain employment or other activities that correlate with improved health and wellness.[70]

65. *Medicaid Waiver Tracker: Approved and Pending Section 1115 Waivers by State*, KAISER HEALTH NEWS (Nov. 1, 2021), https://www.kff.org/medicaid/issue-brief/medicaid-waiver-tracker-approved-and-pending-section-1115-waivers-by-state/.

66. *See, e.g.*, *Trump Administration Approves Innovative State-Led Health Reform to Expand and Strengthen Coverage for Georgia Residents*, CTR. FOR MEDICARE & MEDICAID SERVS. (Oct. 15, 2020), https://www.cms.gov/newsroom/press-releases/trump-administration-approves-innovative-state-led-health-reform-expand-and-strengthen-coverage. Federal officials have approved work requirement proposals in seven states—Arizona, Arkansas (invalidated by court), Indiana, Kentucky (invalidated/withdrawn), Michigan (invalidated), New Hampshire (invalidated), and Wisconsin. In each of those states, the requirements would apply only to people who gained Medicaid coverage under the expansion authorized by the ACA. "Ten other states—Alabama, Kansas, Mississippi, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Utah and Virginia—also have requested approval. Some of those states have not expanded Medicaid and are seeking to add work requirements to their regular programs." Phil Galewitz, *Judge Vows to Rule on Medicaid Work Requirements by End of March*, KAISER HEALTH NEWS (Mar. 19, 2019), https://khn.org/news/judge-vows-to-rule-on-medicaid-work-requirements-by-end-of-march/.

67. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 49, 185 (Oxford Univ. Press 4th ed. 2019).

68. 950 F.3d 93, 93, 97, 102 (D.C. Cir. 2020).

69. 42 U.S.C. § 1396–1.

70. *Gresham*, 950 F.3d at 97.

In the *Gresham* opinion by Judge Sentelle, the D.C. Circuit panel also rejected HHS's argument that the Secretary's discretion in granting waivers was unreviewable[71] and certified that the APA exception from judicial review for an action committed to agency discretion is "very narrow."[72] The court stated that the Medicaid statute reflected Congress's clear purpose to provide health care coverage, and that under *Chevron*, the agency was required to give effect to the unambiguously expressed intent of Congress.[73] The opinion rejected an effort to characterize the Secretary's approval as helping the Medicaid population gain financial resources to purchase insurance, calling it a "post hoc rationalization[]" by the agency.[74]

The final part of the court's opinion concluded that the approvals of the Arkansas work requirements were arbitrary and capricious for failure to address important aspects of the problem.[75] Here, the court noted the agency's failure to account for loss of coverage—"a matter of importance under the statute."[76] About twenty-five percent of persons subject to work requirements lost coverage in five months. The court noted that while "it is not arbitrary and capricious to prioritize one statutorily identified objective over another, it is an entirely different matter to prioritize non-statutory objectives to the exclusion of the statutory purpose."[77]

The *Gresham* case demonstrates that while reviewing courts may acknowledge political philosophy or politics as a motivation or component of a regulatory decision, courts are capable of requiring agencies to stay within the confines of the statutory mandate. Thus, a new administration does not have license to disregard what Congress has enacted, however much it might disagree with the policy.[78]

71. *Id.* at 98 (citing Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971)).

72. *Id.* (citing Dep't of Commerce v. N.Y., 139 S. Ct. 2551, 2568 (2019)).

73. Gresham v. Azer, 950 F.3d 93, 100 (D.C. Cir. 2020) (citing Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984)).

74. *Id.* at 101 (citing Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 50, 103 (1983)).

75. *Id.* at 102–03 (citing *State Farm*, 463 U.S. at 43).

76. *Id.* at 102.

77. *Id.* at 102, 104.

78. As discussed in Part III of this Article, the Arkansas work requirement demonstration project had been invalidated in the *Gresham* case. Based on the D.C. Circuit decision in *Gresham*, the HHS approval of New Hampshire work requirements was also invalidated. *Philbrick v. Azar*, No. 19-773 (D. D.C., July 29, 2019). The Supreme Court granted petitions to review the cases in December 2020. Subsequent events illustrate the impact of the transition from a president of one political party to another on substantive policy. On March 17, 2021, after President Biden took office, HHS informed Arkansas and New Hampshire that it would withdraw approval of the work requirements. Based on these developments, on April 1, 2022, the government asked the Court to vacate the judgments below with instructions to dismiss the cases as moot and remand the

IV. OBAMA & TRUMP RULEMAKING ON NONDISCRIMINATION IN HEALTHCARE

Section 1557 of the ACA, enacted in 2010, specifically prohibits discrimination on the basis of race, color, national origin, sex, age, or disability in certain health programs or activities. This provision builds on other federal civil rights laws—Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, and the Age Discrimination Act of 1975—and extends nondiscrimination protections to individuals participating in any of the following:

- Any health program or activity receiving funding from HHS
- Any health program or activity that HHS itself administers
- Health insurance marketplaces and all plans offered by issuers that participate in those marketplaces.[79]

During the Obama Administration, the HHS Office of Civil Rights engaged in a rulemaking process to implement Section 1557. In an extensive Final Rule issued in 2016, HHS addressed existing nondiscrimination requirements and turned a particular focus on the prohibition of sex discrimination in health programs.[80] The principal area of contention focused on the regulation's definition of sex discrimination as a source of protection for lesbian, gay, bisexual, and transgender individuals who, like people of color, society has historically categorized as "other."

A coalition of states and healthcare providers successfully challenged the 2016 Rule in the Northern District of Texas, arguing that HHS exceeded its authority under Section 1557 in defining discrimination "on the basis of sex" to include discrimination based on gender identity. In *Franciscan Alliance, Inc. v. Burwell*, the court enjoined enforcement of that provision of the rules on December 31, 2016, holding that the HHS definition was not entitled to *Chevron* deference because the text of the statute was neither silent nor ambiguous.[81] After Trump took office in January 2017, HHS did not appeal the preliminary injunction and the rules were subsequently vacated.[82]

By 2020, HHS had completed a rulemaking to replace the vacated 2016 Rule. The 2020 Rule eliminated the provision protecting patients from discrimination on the basis of sexual orientation or gender identity.[83] After HHS

underlying matters to the Secretary of HHS. Suggestion of mootness and motion to vacate the judgments of the court of appeals and to remand. The Court granted this motion on April 18, 2022.

79. 42 U.S.C. § 18116.

80. FURROW ET AL., *supra* note 63, at 223 (describing Final Rule, Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31,375 (May 18, 2016) (codified at 45 C.F.R. Part 92)).

81. 227 F. Supp. 3d 660, 670, 685, 687, 695 (N.D. Tex. 2016) (discussed in Walker v. Azar, 480 F. Supp. 3d 417, 421 (E.D.N.Y. 2020)).

82. *Walker*, 480 F. Supp. 3d at 421–22.

83. Nondiscrimination in Health and Health Education Programs or Activities: Delegation of Authority, 85 Fed. Reg. 37,160–62 (June 19, 2020) (effective Aug. 18, 2020).

submitted the new rule for publication, but before its effective date, the Supreme Court issued its decision in *Bostock v. Clayton County, Georgia*, which concluded that discrimination on the basis of sex encompassed discrimination based on both sexual orientation and gender identity.[84] HHS stubbornly declined to withdraw the rule despite the Supreme Court's decision.

On August 17, 2020, in a challenge brought by two transgender women, a federal district court in New York enjoined the 2020 repeal of the definition of discrimination on the basis of sex in the 2016 Rule, holding that the repeal was contrary to law and arbitrary and capricious because the agency failed to consider what would be an important aspect of the problem under the *State Farm* decision—the *Bostock* decision.[85] Along the way to this seemingly obvious conclusion, the district judge noted that the agency's apparent confidence that the Supreme Court would endorse the administration's interpretation of sex discrimination "was misplaced" and that the agency's argument that the rule remained valid was "disingenuous."[86] The upshot is that the *Walker* decision did not revive the "gender identity" protection previously vacated in the *Franciscan Alliance* case, but the 2016 definitions of "gender identity" and "sex stereotyping" remain in effect.[87]

V. POLITICIZING THE APPOINTMENT OF ADMINISTRATIVE JUDGES IN THE VETERANS ADMINISTRATION

One additional area in which the Trump Administration entered new territory was in asserting an enlarged role for the White House in the process for appointing administrative law judges serving on the Board of Veterans Appeals. These administrative judges rule on applications by veterans for compensation based on claims of service-related disabilities. While examining the considerable practical and constitutional issues that plague the appointment processes for administrative law judges and other agency adjudicators is beyond the scope of this Article, interjecting the consideration of political party affiliations and other political activities has not been a part of the vetting process historically. In October 2018, the *Washington Post* reported that the White House had rejected half of the candidates the Veterans Administration presented for appointment as administrative law judges.[88] According to the article, the

84. 140 S. Ct. 1731, 1744 (2020).

85. *Walker*, F. Supp. 3d at 424, 430.

86. *Id.* at 424, 428.

87. Katie Keith, *Court Vacates New 1557 Rule That Would Roll Back Antidiscrimination Protections for LGBT Individuals*, HEALTH AFF. BLOG (Aug. 18, 2020), https://www.healthaffairs.org/do/10.1377/hblog20200818.468025/full/.

88. Lisa Rein, '*I've never seen these positions politicized': White House Rejection of Veterans Judges Raises Concerns of Partisanship*, WASH. POST (Oct. 23, 2018), https://www.washingtonpost.com/politics/ive-never-seen-these-positions-politicized-white-house-rejection-of-veterans-

White House asked candidates to "provide links to their social media profiles and disclose whether they had ever given a speech to Congress, spoken at a political convention, appeared on talk radio, or published an opinion piece in a conservative forum such as Breitbart News or a liberal one such as Mother Jones."[89] The rejected applicants were three Democrats and one independent, while the four accepted were three Republicans and an independent who had voted in GOP primaries.[90] The article recounted other efforts to neutralize the "nonpartisan civil service" and place people loyal to the administration in positions not typically the focus of the White House appointments process.[91] This approach to routine appointments, if it persists, has the potential to result in hollowing out the expertise of the career civil servants whose knowledge of the work of agencies keeps the government functioning through the transitions from one presidential administration to another. In addition, politicization of administrative adjudicators could undermine public confidence in the fair administration of programs, such as Veterans Administration or Social Security benefits.

VI. REFLECTIONS INFORMED BY PERSONAL EXPERIENCE WITH FEDERAL AGENCIES

In November 1993, I took a hiatus from teaching law to serve as Deputy Assistant Attorney General in what is now the Office of Legal Policy in the U.S. Department of Justice ("DOJ") during the Clinton Administration. I arrived after the transition from the George H.W. Bush Administration, and the institution was still adjusting to a new set of governing priorities after twelve years of Republican administrations, starting with Ronald Reagan in 1980. Different ideas about nominations for federal judicial positions and for litigating positions on civil rights cases required some recalibration by the career employees of the Department to account for the differing views of the new Democratic President whose political appointees brought diverse backgrounds to the Administration.

For example, President Clinton appointed the first woman to lead the DOJ as Attorney General, Janet Reno, and a woman, Jamie Gorelick, was the Deputy Attorney General. Of the eleven Assistant Attorneys General, seven were women.[92] Emphasizing enforcement of new laws such as the Violence Against Women Act and the Child Support Enforcement Act in addition to longstanding federal prosecutorial efforts changed as a result.

judges-raises-concerns-of-partisanship/2018/10/23/f488046a-ce51-11e8-920f-dd52e1ae4570_story.html.

89. *Id.*

90. *Id.*

91. *Id.*

92. Victoria L. Radd, *Women of Justice: Reflections*, HARV. WOMEN'S L.J. 2, 4 (1995).

In 1995, I became Deputy General Counsel of the Department of HHS, serving with Harriet S. Rabb, who was General Counsel, and Secretary Donna Shalala. I am not one to think that all women bring different leadership styles to organizations than men; like Maureen Dowd said, it does depend on the person,[93] but working for organizations led by women was a unique and refreshing experience.

Shortly after starting, DOJ held a conference for all the U.S. Attorneys. After dinner one evening, I found myself in the women's restroom washing my hands next to the Attorney General. A prosaic example, but it was the first time—perhaps the only time—where I have shared a restroom with the head of the organization where I worked. The most important thing I learned from Attorney General Reno was that law does not provide an answer to all of society's ills. Most significantly, good schools, social work supports, and economic security provide the foundations for productive lives. The criminal justice system often addresses society's failure to sustain the aspirations and vitality of ordinary Americans.

Secretary Shalala always saw the path forward for making practical progress. She believed in having lawyers at the table from the beginning of a project—her rationale was that it was not helpful to the project or the reputation of lawyers to have them come in when a proposal was already formed, only to explain why the law did not permit whatever was proposed. The General Counsel, Harriet Rabb, was an amazing boss. She referred to everyone who worked "with" her as a "colleague"—we were all a team; we did not "work for her."

What remarkable examples these women were. I am glad to be writing these reflections as a reminder to myself of how to conduct my own professional relationships now. These experiences also confirmed what I knew from having worked in Massachusetts State Government before going to law school—the career employees at every level of government are reliable anchors amidst the fluctuations in policy emphasis and political philosophies that arrive periodically after elections. The public is fortunate to be able to rely on people who are dedicated to the mission of their agencies and to the rule of law.

After leaving the government and a return trip through private practice, I became a law professor again in 2002, after the transition from Clinton to Bush. As the nation marks the 20th anniversary of the 9/11 attacks and the new era of security surveillance, that transition appears more significant in the rear-view mirror than it did at the time.

93. Maureen Dowd, *Manning Up, Letting Us Down*, N.Y. TIMES (Sept. 11, 2021), https://www.nytimes.com/2021/09/11/opinion/september-11-masculinity.html ("I'm not one of those people who think women make naturally better leaders than men, more collegial and collaborative. I've covered enough women in the upper ranks, and worked for and with enough women, to know that it depends on the individual.").

These experiences have given me some sense of what the transition in administrations is like from the inside. As a law teacher, I have had experience adapting course content to account for the different perspectives of administrations. My aim in this Article was to convey some of the ways in which changes in administration, illustrated by examples from the transitions of Bush-to-Obama-to-Trump-to-Biden, provide the opportunity to help students understand the interplay among politics, law, and policy and the obligations of government lawyers and other employees in navigating the shifts. The examples also illustrate that who the people are in government roles makes a difference. Appointees in administrations may bring ideological viewpoints and particular governing philosophies, but the statutes to be enforced and procedures they are required to follow impose real constraints.[94] The ability of the officials of any administration to use the required procedures to achieve their goals and to justify their actions reflects on their ability to govern competently and effectively.[95] Substantively, officials have some obligation to fulfill the missions of the agencies they lead according to the terms of the governing statutes.[96] Carl Sandburg's poem, *Government,* describes directly through examples that "Everywhere . . . Government is a thing made of men":

GOVERNMENT

THE Government—I heard about the Government and I went out to find it. I said I would look closely at it when I saw it.

Then I saw a policeman dragging a drunken man to the callaboose. It was the Government in action.

I saw a ward alderman slip into an office one morning and talk with a judge. Later in the day the judge dismissed a case against a pickpocket who was a live ward worker for the alderman. Again I

94. *See, e.g.*, Administrative Procedure Act, 5 U.S.C. § 551 (requiring agencies to follow certain procedures in promulgating rules and to provide reasoned decisions for the rulemaking decisions made. Failure to adhere to these requirements will often cause reviewing courts to invalidate agency decisions); Fred Barbash & Deanna Paul, *The Real Reason the Trump Administration Is Constantly Losing in Court*, WASH. POST (Mar. 19, 2019), https://www.washingtonpost.com/world/national-security/the-real-reason-president-trump-is-constantly-losing-in-court/2019/03/19/f5ffb056-33a8-11e9-af5b-b51b7ff322e9_story.html.

95. Barbash & Paul, *supra* note 94.

96. *See, e.g.*, discussion *supra* Section II regarding *Massachusetts* and Section III regarding *Gresham*.

> saw this was the Government, doing things.
>
> I saw militiamen level their rifles at a crowd of workingmen who were trying to get other workingmen to stay away from a shop where there was a strike on. Government in action.
>
> Everywhere I saw that Government is a thing made of men, that Government has blood and bones, it is many mouths whispering into many ears, sending telegrams, aiming rifles, writing orders, saying "yes" and "no."
>
> Government dies as the men who form it die and are laid away in their graves and the new Government that comes after is human, made of heartbeats of blood, ambitions, lusts, and money running through it all, money paid and money taken, and money covered up and spoken of with hushed voices.
>
> A Government is just as secret and mysterious and sensitive as any human sinner carrying a load of germs, traditions and corpuscles handed down from fathers and mothers away back.[97]

The effect of transitions in presidential administrations on law and policy are further evidence that the quality and integrity of the people appointed to lead make all the difference.

97. Carl Sandburg, *Government*, CARL SANDBURG POEMS, http://www.carl-sandburg.com/government.htm (last visited Oct. 29, 2021).