Deregulation: Too Big for One Branch, But Maybe Not for Two

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I. INTRODUCTION

When President Trump took office in 2017, he pursued a deregulatory agenda that exceeded even that of President Reagan.[1] Environmental rules and policies were a major target of the Administration.[2] The President deployed a mix of traditional tools, such as executive orders, guidance documents and policies, and rulemaking to suspend or reverse longstanding regulations and policies of the Environmental Protection Agency (EPA), the Department of the Interior, and other environmental agencies.[3] The Administration also utilized the Congressional Review Act as it had not been used before and aggressively sought abeyances in litigation challenging disfavored rules and policies to advance its deregulatory

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[1] *See* Stephen M. Johnson, *Indeconstructible: The Triumph of the Environmental "Administrative State"*, 86 U. CIN. L. REV. 653, 665 n.68 (2018) [hereinafter Johnson, *Indeconstructible*]; *see also* Bethany A. Davis Noll & Richard L. Revesz, *Regulation in Transition*, 104 MINN. L. REV. 1, 37 (2019) [hereinafter Noll & Revesz, *Regulation in Transition*]; Z. Byron Wolf, *Steve Bannon Outlines His Plan to 'Deconstruct' Washington*, CNN (Feb. 24, 2017, 1:28 AM), http://www.cnn.com/2017/02/23/politics/steve-bannon-world-view (discussing top White House adviser Steve Bannon's remarks at the Conservative Political Action Conference on February 23, 2017).

[2] *See* Johnson, *Indeconstructible*, *supra* note 1, at 653; *see also* Jeremy Symons, *Trump's War on the EPA: Deconstruction*, HUFFPOST (Mar. 2, 2017, 4:13 PM), https://www.huffpost.com/entry/trumps-war-on-epa-part-ii-deconstruction_b_58b88953e4b02b8b584df981.

[3] *See* Bethany A. Davis Noll, *"Tired of Winning": Judicial Review of Regulatory Policy in the Trump Era*, 73 ADMIN. L. REV. 353, 365 n.62 (2021) (citing Exec. Order No. 13,783, 82 Fed. Reg. 16,093, 16,095 (Mar. 28, 2017)) ("directing the EPA and the Interior to begin review of the Clean Power Plan, the Waste Prevention Rule, the Fracking Rule, and many other rules, and, 'if appropriate,' to publish proposed rules suspending, revising, or revoking them") [hereinafter Noll, *"Tired of Winning"*]; *see also* Noll & Revesz, *Regulation in Transition*, *supra* note 1, at 4–5; Johnson, *Indeconstructible*, *supra* note 1, at 660, 670–72, 694–95.

agenda.[4] In the short-term, its substantive deregulatory record was impressive.[5]

By the end of President Trump's term in office, his Administration reversed, revoked, or rolled back more than 100 environmental rules,[6] including rules that were designed to reduce carbon dioxide emissions[7] and toxic metal discharges from power plants,[8] cut emissions of methane from oil and gas facilities,[9] protect

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[4] *See* Noll & Revesz, *Regulation in Transition*, *supra* note 1, at 2–3; *see also infra*, Part IV.B.

[5] *See* Stephen M. Johnson, *Whither the Lofty Goals of the Environmental Laws?: Can Statutory Directives Restore Purposivism When We Are All Textualists Now?*, 49 PEPP. L. REV. 285, 293 (2022) [hereinafter Johnson, *Statutory Directives*].

[6] *See* Nadja Popovich et al., *The Trump Administration Rolled Back More Than 100 Environmental Rules. Here's the Full List.*, N.Y. TIMES (Jan. 20, 2021), https://www.nytimes.com/interactive/2020/climate/trump-environment-rollbacks-list.html. Multiple organizations maintained trackers of President Trump's actions to roll back regulations and the outcome of judicial challenges to the rollbacks. *See, e.g.*, *Regulatory Tracker*, HARV. L. SCH. ENV'T & ENERGY L. PROGRAM, https://eelp.law.harvard.edu/portfolios/environmental-governance/regulatory-tracker (last visited May 30, 2022); *Roundup: Trump Era Agency Policy in the Courts*, N.Y.U. SCH. L. INST. FOR POL'Y INTEGRITY, https://policyintegrity.org/trump-court-roundup (last visited May 30, 2022); *Climate Deregulation Tracker,* COLUM. L. SCH. SABIN CTR. FOR CLIMATE CHANGE L., https://climate.law.columbia.edu/climate-deregulation-tracker (last visited May 30, 2022). The Harvard Environmental and Energy Law Program also maintains a website that lists environmental law and policy trackers. *See Tracking the Trackers*, HARV. L. SCH. ENV'T & ENERGY L. PROGRAM, https://eelp.law.harvard.edu/2018/07/tracking-the-trackers (last visited May 30, 2022).

[7] *See* Clean Power Plan, 80 Fed. Reg. 64,662, 64,662 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60). The Trump Administration repealed and replaced The Clean Power Plan in 2019. *See* Affordable Clean Energy Rule, 84 Fed. Reg. 32,520, 32,520 (July 8, 2019) (to be codified at 40 C.F.R. pt. 60).

[8] *See* Postponement of Certain Compliance Dates for Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category, 82 Fed. Reg. 19,005, 19,006 (Apr. 25, 2017) (to be codified at 40 C.F.R. pt. 423).

[9] *See* Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources, 85 Fed. Reg. 57,018 (Sept. 14, 2020) (to be codified at 40 C.F.R. pt. 60). The Trump Administration later repealed the Emission Standards. *See* Mid-Term Evaluation of Greenhouse Gas Emissions Standards for Model Year 2022–2025 Light-Duty Vehicles, 83 Fed. Reg. 16,077, 16,077 (Apr. 13, 2018).

wetlands and water quality,[10] and conserve public lands.[11] Often, the Administration sought to roll back environmental protections even though the regulated entities did not support the rollbacks.[12]

The Administration sought to achieve long-term deregulatory goals by instituting fundamental changes to the way the EPA and other agencies adopt rules and make policies. Specifically, the Trump administration adopted, or attempted to adopt, rules that would (1) prevent agencies from relying on important scientific studies when adopting rules;[13] (2) change the manner in which agencies conducted cost-benefit analysis when adopting rules to protect air quality;[14] and (3) increase the procedures required for agency adoption of guidance documents.[15]

The Administration also engaged in structural deregulation of the EPA and Department of the Interior by appointing leaders to those agencies who opposed the agencies' missions,[16] attempting to

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[10] *See* Clean Water Rule, 80 Fed. Reg. 37,054, 37,054 (June 29, 2015) (to be codified at 33 C.F.R. pt. 328, 40 C.F.R. pts. 110, 112, 116, 117, 120, 122, 230, 232, 300, 302, 401). The Trump administration's Navigable Waters Protection Rule replaced the Clean Water Rule. *See* The Navigable Waters Protection Rule: Definitions of "Waters of the United States", 85 Fed. Reg. 22,250, 22,250 (Apr. 21, 2020) (to be codified at 33 C.F.R. pt. 328, 40 C.F.R. pts. 110, 112, 116, 117, 120, 122, 230, 232, 300, 302, 401).

[11] *See* W. Watersheds Project v. Schneider, 417 F. Supp. 3d 1319, 1328, 1335 (D. Idaho 2019) (discussing the reductions in regulations encouraging conservation on public lands), *appeal dismissed*, *sub nom.* W. Watersheds Project v. Schneider v. Bernhardt, No. 19-36065, 2020 WL 3256842, at *1(9th Cir. Mar. 27, 2020).

[12] *See* Geoff Dembicki, *From Auto Manufacturers to Tech Giants, Business Is Opposing Rollbacks on Climate Change Regulations*, GREENBIZ (Oct. 3, 2019), https://www.greenbiz.com/article/auto-manufacturers-tech-giants-business-opposing-rollbacks-climate-change-regulations; *see also* Greg McGann, *Even Regulated Industries Oppose Environmental Rollbacks*, GAINESVILLE SUN (Sept. 18, 2019, 2:00 AM), https://www.gainesville.com/story/opinion/columns/more-voices/2019/09/18/greg-mcgann-even-regulated-industries-oppose-environmental-rollbacks/2757360007.

[13] *See* Strengthening Transparency in Pivotal Science Underlying Significant Regulatory Actions and Influential Scientific Information, 86 Fed. Reg. 469, 470 (Jan. 6, 2021) (to be codified at 40 C.F.R. pt. 30).

[14] *See* Increasing Consistency and Transparency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process, 85 Fed. Reg. 84,130, 84,130 (Dec. 23, 2020) (to be codified at 40 C.F.R. pt. 83).

[15] *See* EPA Guidance; Administrative Procedures for Issuance and Public Petitions, 85 Fed. Reg. 66,230, 66,230 (Oct. 19, 2020) (to be codified at 40 C.F.R. pt. 2).

[16] *See* Johnson, *Indeconstructible*, *supra* note 1, at 657, 660–63.

significantly cut the budgets of the agencies,[17] and drastically restructuring the scientific advisory boards. These boards counseled the agencies to increase representation of regulated entities, decrease representation by academic scientists,[18] and demoralize the career employees at the agencies who were not driven out of the agencies or otherwise marginalized.[19]

Although President Trump's short-term deregulatory record was impressive (and depressing to environmentalists), his long-term record is not. What his efforts ultimately demonstrated is that deregulation by the executive branch without the support of Congress or the judicial branch is extremely difficult.[20] With a stroke of the pen, an incoming President can reverse executive orders and guidance documents that roll back environmental protections, as the transition from President Trump to President Biden has vividly demonstrated.[21]

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[17] Johnson, *Indeconstructible*, *supra* note 1, at 657, 667–68 (discussing proposals to cut EPA's funding by one third, cut the Agency's staff by one-fifth, and "eliminate[] [fifty] programs administered by the agency").

[18] *See* John McQuaid, *Trump Officials Act to Tilt Federal Science Boards Toward Industry*, SCI. AM. (May 16, 2017), https://www.scientificamerican.com/article/trump-officials-act-to-tilt-federal-science-boards-toward-industry; *see also* Johnson, *Indeconstructible*, *supra* note 1, at 663–64.

[19] *See* Johnson, *Indeconstructible*, *supra* note 1, at 663–65.

[20] Johnson, *Indeconstructible*, *supra* note 1, at 704–05.

[21] *See* Johnson, *Statutory Directives*, *supra* note 5, at 297 ("On his first day in office, [] President [Biden] temporarily halted oil and gas drilling in the Arctic National Wildlife Refuge, revoked a permit for the Keystone XL oil pipeline, and announced that the United States would rejoin the Paris Climate Accord."); *see, e.g.*, Eliza Relman, *Biden Reverses Trump's Major Environmental Rollbacks with Executive Orders Rejoining the Paris Accord, Cancelling the Keystone Pipeline, and Ending Drilling in the Arctic Wildlife Refuge*, BUS. INSIDER (Jan. 20, 2021, 5:30 PM), https://www.businessinsider.com/biden-takes-immediate-action-climate-rejoins-paris-accord-keystone-2021-1; Exec. Order No. 13,990, 86 Fed. Reg. 7037, §§ 4, 6 (Jan. 20, 2021) (addressing the moratorium on leases in the Arctic National Wildlife Refuge (ANWR) in section 4 and revoking the Keystone XL Permit in section 6); Exec. Order No. 13,990, § 2 (requiring federal agencies to review more than 100 rules that were adopted during the past four years to weaken protections for the environment and natural resources); Coral Davenport, *Restoring Environmental Rules Rolled Back by Trump Could Take Years*, N.Y. TIMES (Jan. 22, 2021), https://www.nytimes.com/2021/01/22/climate/biden-environment.html. For trackers of President Biden's progress in rolling back the environmental rollbacks from the Trump Administration, see Juliet Eilperin, Brady Dennis & John Muyskens, *Tracking Biden's Environmental Actions*, WASH. POST (Sept. 15, 2022, 6:04 PM), https://www.washingtonpost.com/graphics/2021/climate-environment/biden-climate-environment-actions (identifying over 100 actions taken during the Trump Administration that adversely affect the environment and were still in effect at the time that President Trump left office).

Regulations that roll back environmental protections are more durable, as long as they are adopted in accordance with the procedures required by law and are consistent with the laws under which they are adopted.[22] The Trump Administration, however, frequently ignored those procedural and statutory limits, so many of his Administration's deregulatory rules were overturned even before he left office.[23] While federal agencies are generally successful defending their regulations in almost 70 percent of the cases in which they are challenged,[24] the Trump Administration prevailed in only about 20 percent of those

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[22] *See infra* Part III.C.

[23] *See infra* Part III.C.3.

[24] *See* Cary Coglianese & Daniel E. Walters, *Litigating EPA Rules: A Fifty-Year Retrospective of Environmental Rulemaking in the Courts*, 70 CASE W. RSRV. L. REV. 1007, 1026–27 (2020) (reviewing eleven studies that found EPA success ranging from 45 percent to 79 percent and generally around 70 percent in cases involving *Chevron* deference); *see also* Tucker Higgins, *The Trump Administration Has Lost More Than 90 Percent of its Court Battles over Deregulation*, CNBC: POLITICS (Jan. 24, 2019, 12:22 PM), https://www.cnbc.com/2019/01/24/trump-has-lost-more-than-90-percent-of-deregulation-court-battles.html (noting that the government wins about 69 percent of the time in cases involving challenges to agency action).

cases.[25] Although the motivations for the Administration's "regulatory slop" are unclear,[26] the judicial response was unequivocal.[27]

President Trump's reliance on the traditional rollback tools (executive orders, guidance documents, and regulations) did not yield long-term environmental deregulation, and his deployment of new rollback tools (the Congressional Review Act and increased use of abeyances in litigation) may, paradoxically, make it more difficult for

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[25] *See* N.Y.U. SCH. L. INST. FOR POL'Y INTEGRITY, *supra* note 6 (according to the N.Y.U. Institute for Policy Integrity, as of April 25, 2022, agencies were successful in 54 of the 246 cases (22 percent) in which their decision were challenged in court). For purposes of tracking the success rate of the agencies, the N.Y.U. website says:

> An outcome is considered unsuccessful for the Trump administration if (1) a court ruled against the agency or (2) the relevant agency withdrew the action after being sued. If there are different rulings on the same agency action, the entry is assigned an "X" as long as one court ruled against the agency.

Id. See also Noll, *"Tired of Winning"*, *supra* note 3, at 357 (concluding that courts upheld Trump actions in 23 percent of the cases in which they were challenged); Higgins, *supra* note 24 (noting that "more than 90 percent of the Trump administration's deregulatory efforts have been blocked in court, or withdrawn after a lawsuit . . ."); Coglianese & Walters, *supra* note 24, at 1032–33 n.99 (reporting that out of thirty-one court appearances reviewing EPA actions under the Trump administration, the Agency has lost in twenty-eight).

[26] Professors Robert Glicksman and Emily Hammond coined the term "regulatory slop" to refer to purposeful disregard of legal requirements or lack of concern for compliance with legal requirements. *See* Robert L. Glicksman & Emily Hammond, *The Administrative Law of Regulatory Slop and Strategy*, 68 DUKE L.J. 1651, 1651 (2019). Professors Glicksman and Hammond suggest that there are several possible reasons why an administration might violate core principles of administrative law, including (1) the administration purposefully disregards the requirements in order to implement its agenda quickly; (2) the administration is not aware that it is violating the requirements, but doesn't care enough about the legitimacy of their actions to determine what the law requires; (3) the administration lacks experience in administering the laws; and (4) the administration is aware of the requirements, but is making a "good faith" effort to test the boundaries of the requirements. *Id.* at 1654–56. Not all of those reasons constitute "regulatory slop." *Id.* at 1654 n.11, 1655–56; *see also* Noll, *"Tired of Winning"*, *supra* note 3, at 369. Professors Glicksman and Hammond determined, however, that more research was required to ascertain the reasons for the Trump Administration's failure to comply with long-standing principles of administrative law. *See* Glicksman & Hammond, *supra*, at 1712–13.

[27] Professors Glicksman and Hammond raise concerns, though, that traditional judicial remedies, like remand without vacatur, may not be sufficient to prevent an administration from engaging in "regulatory slop." *See* Glicksman & Hammond, *supra* note 26, at 1686. Consequently, they propose several remedies that courts could impose in order to restrain "regulatory slop," including (1) awarding attorneys' fees to litigants who successfully challenge agency rules; (2) nationwide injunctions; (3) remand with vacatur; (4) reinstatement of repealed rules; and (5) contempt. *Id.* at 1688, 1694–95, 1709–11.

future Presidents to deregulate.[28] After all, those tools can be used equally effectively to roll back deregulatory actions as to roll back regulatory actions. And the Biden Administration is utilizing those tools for that purpose.[29] Thus, when future Presidents adopt a deregulatory agenda, they will have to take their deregulatory actions much earlier in their term of office in order to minimize the ability of a future Executive to utilize the new rollback tools to undo those actions.[30]

While the Trump administration's failure to effect long-term environmental deregulation may demonstrate that it is extremely difficult for a President to deregulate without the support of Congress or the judicial branch, it could, unfortunately, become easier for futures Executives to deregulate. It is unlikely that Congress will join forces with the executive branch to dismantle environmental protections, as congressional gridlock has prevented Congress from enacting much legislation in recent years,[31] and opinion polls still indicate strong public support for environmental protection, including environmental regulation.[32] The executive branch,

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[28] *See infra* Part IV.

[29] *See infra* Part IV.

[30] *See infra* note 221.

[31] *See, e.g.*, Joel A. Mintz, *Thinking Beyond Gridlock: Towards a Consistent Statutory Approach to Federal Environmental Enforcement*, 46 ENV'T L. 241, 242 (2016) (discussing Congressional gridlock). During the 1970s and early 1980s, Congress adopted more than two dozen environmental laws with broad support across the political spectrum. *See* David M. Uhlmann, *Back to the Future: Creating a Bipartisan Environmental Movement for the 21st Century*, 50 ENV'T L. REP. 10800, 10801 (2020); Madeline June Kass, *Presidentially Appointed Environmental Agency Saboteurs*, 87 U. MO.-KAN. CITY L. REV. 697, 701 n.22 (2019); Johnson, *Indeconstructible*, *supra* note 1, at 654; Mintz, *supra*, at 242; Robert V. Percival, *Environmental Law in the Twenty-First Century*, 25 VA. ENV'T L.J. 1, 2–3 (2007). Over the subsequent half century, Congress has not taken any steps to significantly diminish the protections provided by those laws or reduce the powers provided to federal agencies to interpret and enforce those laws. *See* Johnson, *Indeconstructible, supra* note 1, at 654.

[32] *See, e.g.*, Kristen Bialik, *Most Americans Favor Stricter Environmental Laws and Regulations*, PEW RSCH. CTR. (Dec. 14, 2016), http://www.pewresearch.org/fact-tank/2016/12/14/most-americans-favor-stricter-environmental-laws-and-regulations (citing a Pew Research survey conducted between November 30, 2016 and December 5, 2016, in which 59 percent of respondents indicated that "stricter environmental laws and regulations [were] worth the cost"); Chris Kahn, *Unlike Trump, Americans Want Strong Environmental Regulator*, REUTERS: ENV'T (Jan. 17, 2017, 6:13 AM), https://www.reuters.com/article/us-usa-trump-environment-idUSKBN1511DU (citing a Reuters/Ipsos poll conducted between December 16, 2016, through January 12, 2017, in which more than 60 percent of respondents indicated that they would like to see the EPA's powers "preserved or strengthened" under President Trump). In a

however, may soon have a deregulatory ally in the judicial branch. Although federal courts repeatedly stymied President Trump's environmental deregulatory efforts by enforcing traditional principles of administrative law and statutory law,[33] the complexion of the federal judiciary is changing. During his four years in office, President Trump appointed 30 percent of the judges now serving in the federal appellate courts and one-third of the Justices on the Supreme Court, targeting conservative judges vetted by the Federalist Society for those appointments.[34] In addition, over the past few terms, the Supreme Court has expressed increasing skepticism toward principles of deference to administrative agencies and appears poised to make significant changes to the important principles of administrative and statutory law which have limited the executive branch's ability to dismantle environmental regulatory protections.[35] If the Court arrogates greater power to itself in interpreting environmental laws without according deference to the views of the EPA and other

separate March 2017 Gallup poll, 56 percent of respondents indicated that protection of the environment should be given priority over protection of the economy, 69 percent of respondents indicated that they favor "more strongly enforcing federal regulations," 59 percent said that the government was doing "too little to protect the environment," and 57 percent said that they thought the quality of the environment was getting worse. *See Environment*, GALLUP, http://www.gallup.com/poll/1615/environment.aspx (last visited May 30, 2022).

[33] *See* Noll, *"Tired of Winning"*, *supra* note 3, at 358–60, 368–70, 384–91, 397–405; Glicksman & Hammond, *supra* note 26, at 1653–59, 1669–85. During the Trump Administration, the courts provided a vital check on the executive branch's arbitrary abuse of power. *See* Glicksman & Hammond, *supra* note 26, at 1687–88.

[34] *See* Shira A. Scheindlin, *Trump's Judges Will Call the Shots for Years to Come. The Judicial System Is Broken*, GUARDIAN (Oct. 25, 2021, 6:15 PM), https://www.theguardian.com/commentisfree/2021/oct/25/trump-judges-supreme-court-justices-judiciary (noting that the President appointed 28 percent of all of the federal judges and that the average age of the appellate judges that he appointed was forty-seven); *see also* John Gramlich, *How Trump Compares with Other Recent Presidents in Appointing Federal Judges*, PEW RSCH. CTR. (Jan. 13, 2021), https://www.pewresearch.org/fact-tank/2021/01/13/how-trump-compares-with-other-recent-presidents-in-appointing-federal-judges (noting that President Trump appointed fifty-four appellate judges in four years, while President Obama appointed fifty-five in eight years); Ian Millhiser, *What Trump Has Done to the Courts, Explained*, VOX (Sept. 29, 2020, 10:32 PM), https://www.vox.com/policy-and-politics/2019/12/9/20962980/trump-supreme-court-federal-judges (describing the role of the Federalist Society in the selection process and the reasons why the Trump Administration was far more successful than the Obama Administration in securing federal judicial appointments). For a complete list of federal judges that President Trump appointed, see *Federal Judges Nominated by Donald Trump*, BALLOTPEDIA, https://ballotpedia.org/Federal_judges_nominated_by_Donald_Trump (last visited May 30, 2022).

[35] *See infra* Part V.

environmental agencies, and maintains the conservative bent that has been reflected in recent opinions,[36] executive efforts to roll back, rescind, or revoke environmental regulatory protections may be met with significant support in the judicial branch.[37]

This Article focuses primarily on the roadblocks to Presidential efforts to deregulate without the support of Congress or the judicial branch, but concludes with an exploration of the role that the judicial branch might play in fostering executive branch deregulatory efforts in the environmental arena. Part II of the Article discusses executive power generally and the manner in which the power can be used to advance a President's regulatory or deregulatory goals. Part III examines the manner in which President Trump used traditional tools, including executive orders, guidance documents, and suspension and revocation of regulations and new tools—including the Congressional Review Act—to attempt to roll back environmental regulations and policies of former administrations. It also outlines the fundamental limitations on those tools which prevented the Administration from achieving its long-term deregulatory goals. Part IV explores how the Trump Administration's abuse or misuse of some of the "deregulatory" tools is inspiring the Biden Administration to use those tools more effectively to roll back deregulatory efforts, and how that could make it more difficult for future Presidents to implement long-lasting deregulatory efforts. Finally, Part V considers the potential for significant changes in judicial deference toward administrative agencies and the impact that such changes may have on future Presidential deregulatory efforts.

II. PRESIDENTIAL ADMINISTRATION

Congress frequently delegates broad authority to agencies to exercise discretion to implement laws because (1) agencies have expertise that Congress lacks; (2) agencies can respond more quickly and flexibly to new information when implementing laws; (3) Congress does not have time to address the issues covered in laws in detail; and (4) Congress cannot reach agreement on the resolution of some issues, instead deferring resolution of those issues to politically

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[36] *See* Millheiser, *supra* note 34*; see also* Sandra Zellmer, *Treading Water While Congress Ignores the Nation's Environment*, 88 NOTRE DAME L. REV. 2323, 2384 (2013) (noting that federal courts are now "more sympathetic to conservative, anti-regulatory arguments than progressive ones").

[37] *See infra* Part V.

accountable agencies.[38] For decades, courts have deferred to agencies' exercise of that discretion because agencies have expertise, are politically accountable, and Congress intended agencies to exercise their discretion to resolve issues not directly addressed by Congress.[39]

The delegation of authority in most statutes is a delegation to an agency, rather than the President.[40] Presidents, however, exercise significant control over agencies and have increasingly relied on agencies to implement policies that advance their political preferences.[41] The trend has accelerated as congressional gridlock has prevented Presidents from implementing policies through legislation.[42] At the turn of the century, Justice Elena Kagan (then Professor Kagan) praised the trend, which she labeled "presidential administration," because it furthered regulatory effectiveness, transparency, and political accountability.[43] She outlined President Clinton's expanded control over regulatory agendas, centralized review of agency regulations, use of formal directives, and appropriation of responsibility for agency actions in public

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[38] *See, e.g.*, STEPHEN M. JOHNSON, WETLANDS LAW: A COURSE SOURCE 50–51 (CALI eLangdell Press, 4th ed. 2021); Cary Coglianese & Christopher S. Yoo, *The Bounds of Executive Discretion in the Regulatory State*, 164 U. PA. L. REV. 1587, 1597 (2016); J.R. DeShazo & Jody Freeman, *The Congressional Competition to Control Delegated Power*, 81 TEX. L. REV. 1443, 1452 (2003); David Epstein & Sharyn O'Halloran, *Administrative Procedures, Information, and Agency Discretion*, 38 AM. J. POL. SCI. 697, 698–702 (1994).

[39] *See, e.g.*, Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980–83 (2005); Auer v. Robbins, 519 U.S. 452, 462 (1997); Chevron v. Nat'l Res. Def. Council, 467 U.S. 837, 843 (1984).

[40] *Compare* 42 U.S.C. § 6912 (provisions of the Resource Conservation and Recovery Act delegating authority to the administrator), *and* 33 U.S.C. § 1361 (provisions of the Clean Water Act delegating authority to the administrator), *with* 42 U.S.C. §§ 9604, 9606 (provisions of Comprehensive Environmental Response, Compensation, and Liability Act delegating authority to the President).

[41] *See* Noll, *"Tired of Winning"*, *supra* note 3, at 356, 361; *see also* Peter L. Strauss, *The Trump Administration and the Rule of Law* 433, 440 (Colum. Pub. L. Rsch., Paper No. 14-650, 2019), https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=3601&context=faculty_scholarship; PETER M. SHANE, MADISON'S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY 152–53 (2009).

[42] Noll, *"Tired of Winning"*, *supra* note 3, at 361; Noll & Revesz, *Regulation in Transition*, *supra* note 1, at 3.

[43] *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2246, 2264, 2384 (2001); *see also* Sharon B. Jacobs, *The Statutory Separation of Powers*, 129 YALE L.J. 378, 380–81 (discussing democratic accountability and efficiency benefits); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 2 (1994) (citing "accountability, coordination, and uniformity in the execution of the laws" as benefits of a unitary conception of executive power).

communications as examples of the trend.[44] The trend continued through subsequent Democratic and Republican administrations.

Critics of "presidential administration," though, raise concerns that it leads to policies that are (1) adopted without the public input and transparency required by law; (2) based on politics, rather than science or agency expertise; and (3) insulated from effective judicial review.[45] "Presidential administration," thus, is at odds with the rationales for congressional delegation of broad authority to agencies.[46]

Justice Kagan applauded the expansion of presidential control over agency decision-making as a means of improving agency regulation.[47] The same expansion of presidential control, however, enhances the Chief Executive's ability to deregulate.[48] At the extreme, the expanded presidential power can facilitate what Professor David Noll describes as "administrative sabotage," nullification or elimination of an agency, or a statutory program that the President cannot eliminate with the support of Congress.[49] While President

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[44] *See* Jody Freeman & Sharon Jacobs, *Structural Deregulation*, 135 HARV. L. REV. 585, 628 (2021).

[45] *See* Noll, *"Tired of Winning"*, *supra* note 3, at 362; *see also* Jacobs, *supra* note 43, at 380 (noting also that Presidential controls can "undermine rather than promote [agency] efficiency"); Catherine Y. Kim, *Presidential Control Across Policymaking Tools*, 43 FLA. STATE U. L. REV. 91, 92 (2015); SHANE, *supra* note 41, at 121–32; *see generally* David J. Barron, *From Takeover to Merger: Reforming Administrative Law in an Age of Agency Politicization*, 76 GEO. WASH. L. REV. 1095 (2008); Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 51 (2007); Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47 (2006); Nina A. Mendelson, *Disclosing "Political" Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127 (2010); Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263 (2006); Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461 (2003). Critics have also raised constitutional concerns regarding "presidential administration." *See* Noll, *"Tired of Winning"*, *supra* note 3, at 362.

[46] *See supra* notes 38–39.

[47] *See supra* note 43; *see also* Freeman & Jacobs, *supra* note 44, at 589, 628.

[48] *See* Freeman & Jacobs, *supra* note 44, at 589.

[49] *See* David L. Noll, *Administrative Sabotage*, 120 MICH. L. REV. 753 (2022). Professors Jody Freeman and Sharon Jacobs similarly pointed out that Justice Kagan's praise for "presidential administration" assumed "a good faith chief executive committed to maintaining the authority and legitimacy of the bureaucracy[,]" as opposed to a President bent on dismantling an agency or its statutory programs. *See* Freeman & Jacobs, *supra* note 44, at 628. Professor Noll argues that "administrative sabotage" can be distinguished from "good governance" in that "[a]dministrative sabotage is defined by intent: an agency aims to kill or nullify a statutory program." *See*

Trump fashioned "administrative sabotage" into an art form,[50] President Reagan was one of its earliest adherents.[51] Critics of administrative sabotage argue that it is unconstitutional and anti-democratic,[52] but many forms of administrative sabotage evade judicial review.[53]

Noll, *supra*, at 761. Good governance reforms, on the other hand, are "intended to improve the government's performance, cut costs, or streamline cumbersome procedures." *See* Freeman & Jacobs, *supra* note 44, at 592. Professor Noll suggests that several factors have contributed to the rise of administrative sabotage, including (1) political and ideological opposition to an activist federal government; (2) the stickiness of statutory and regulatory programs; (3) the unwillingness of Congress to eliminate or reduce agencies or their statutory programs; (4) the rise of presidential administration; (5) the unwillingness or inability of Congress to interfere with administrative sabotage; and (6) the willingness of courts to support, or at least not interfere with, administrative sabotage. *See* Noll, *supra*, at 776–84.

[50] *See* Freeman & Jacobs, *supra* note 44, at 594.

[51] *See id.* at 588–89, 628. President Reagan appointed Anne Gorsuch, an opponent of federal environmental regulation, as the Administrator of the EPA after he was elected and reduced the Agency's budget by more than 35 percent over the next two years. *See* Noll, *Administrative Sabotage*, *supra* note 49, at 760. Professor David Noll suggests that administrative sabotage is most likely to occur under conservative Presidents, since "opposition to federal legislation and regulation comes predominantly from the right." *Id.* at 776.

[52] *See* Noll, *Administrative Sabotage*, *supra* note 49, at 758, 765; Freeman & Jacobs, *supra* note 44, at 630–36. Critics argue that administrative sabotage encroaches on Congress's Article I powers in violation of the separation of powers. *See* Freeman & Jacobs, *supra* note 44, at 630–36. Critics also argue that it violates the President's duty under the Constitution to "take care that the laws be faithfully executed." *See* Noll, *Administrative Sabotage*, *supra* note 49, at 765–66. In addition, critics argue that administrative sabotage is undemocratic. As Professor David Noll suggests:

> The programs that sabotage undermines are enacted through a legislative process that is designed to accommodate competing interests and provide opponents of those programs the opportunity to voice their objections. . . . Insofar as sabotage privileges the President's views about the desirability of maintaining statutory programs over congressional judgments expressed in law, sabotage is undemocratic.

Id. at 766. Professors Freeman and Jacobs also assert that "structural deregulation's informality and opacity conflict with administrative norms favoring process, reason-giving, accountability, and transparency." *See* Freeman & Jacobs, *supra* note 44, at 630.

[53] *See* Noll, *Administrative Sabotage*, *supra* note 49, at 769–75; Freeman & Jacobs, *supra* note 44, at 590. Professor Noll argues that courts will rarely review and halt administrative sabotage because (1) it is extremely difficult to produce evidence that an agency has failed to carry out a statutory mandate in good faith and would require utilization of discovery methods that courts have refrained from using when reviewing agency decision-making; and (2) courts are reluctant to examine the motivation for an agency decision if the decision can otherwise be supported as reasonably based on the explanation that the agency provides. *See* Noll, *Administrative Sabotage*, *supra* note 49, at 769–75. Professors Freeman and Jacobs note that the Administrative Procedure

Administrative sabotage encompasses both substantive deregulation and structural deregulation. Substantive deregulation involves efforts to weaken or rescind specific agency rules or policies through executive orders, legislative and non-legislative rules, exercise of enforcement discretion, and litigation strategies.[54] President Trump utilized all of those tools to weaken, revoke, or replace environmental rules and policies, and this Article addresses those tools.[55] Structural deregulation involves efforts to systematically undermine or dismantle agencies or statutory programs through methods such as appointing agency heads who oppose the programs they administer, declining to fill staff positions within agencies, cutting the budgets of agencies and limiting their spending authorities, changing the rules and procedures that govern the manner in which agencies make decisions or changing the factors agencies consider when making decisions, and disseminating propaganda to discredit the reputation of agencies.[56] President Trump utilized all of those tools to weaken his environmental agencies,[57] and the effects of his structural deregulatory

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Act (APA) is not a useful tool to restrain the President because the statute exempts the President from coverage under the statute as an agency. *See* Freeman & Jacobs, *supra* note 44, at 591. The Supreme Court's recent skepticism regarding the legitimacy of administrative power and a more general "anti administrativist" political movement have also contributed to judicial reluctance to interfere with administrative sabotage. *See id.* at 630. Further, Professors Freeman and Jacobs note that administrative sabotage evades judicial review at times because Presidents can undermine agencies powers incrementally and with very little formality or transparency. *See id.* at 629.

[54] *See* Freeman & Jacobs, *supra* note 44, at 588. Substantive deregulation "aims to weaken or rescind particular agency rules or policies but falls short of a wholesale attack on agency capacity." *Id.*

[55] *See infra* Parts III and IV.

[56] *See* Noll, *Administrative Sabotage*, *supra* note 49, at 788–89; 794, 797–800, 810–11; Freeman & Jacobs, *supra* note 44, at 591–610; Noll, *"Tired of Winning"*, *supra* note 3, at 363–64. As Professors Freeman and Jacobs note, structural deregulation "erodes an agency's staffing, leadership, resource base, expertise, and reputation — key determinants of the Agency's capacity to accomplish its statutory tasks." *See* Freeman & Jacobs, *supra* note 44, at 587. Many of the structural deregulation tools are designed to undermine the expertise of agencies, which is the reason Congress delegated broad authority to the agencies. *See id.* at 592, 615–20.

[57] *See supra* notes 16–19. The White House proposed deep budget cuts for the EPA, encouraged resignations and imposed hiring freezes, restructured the Agency's scientific advisory panels, and criticized the Agency's scientific and technical judgments, and the EPA adopted rules to limit the types of scientific data the Agency could use to make rules and to change the manner in which the Agency conducted cost-benefit analyses when making air quality rules, and censored Agency scientists and rewrote scientific reports. *See* Noll, *Administrative Sabotage*, *supra* note 49, at 800–11; Noll, *"Tired of Winning"*, *supra* note 3, at 369.

efforts are probably more long-lasting than the effects of his substantive deregulatory efforts.[58] This Article, however, focuses on the Trump Administration's substantive deregulatory efforts, rather than its structural deregulatory efforts.[59]

III. THE TOOLS OF SUBSTANTIVE DEREGULATION IN THE TRUMP ADMINISTRATION

In order to implement its deregulatory agenda, the Trump Administration utilized a mix of conventional tools, such as executive orders, non-legislative rules (guidance documents, policy statements, etc.), legislative rules, and less conventional tools, such as the Congressional Review Act.[60] While the conventional tools yielded short-term success, they each had limitations that prevented them from being effective instruments of long-term deregulation, as demonstrated by the Biden Administration's swift actions to roll back the rollbacks.[61] The changes that were implemented through the Congressional Review Act are more durable, but there are still

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[58] Professors Freeman and Jacobs contrast structural deregulation with substantive regulation, which they suggest is much more easily reversed. *See* Freeman & Jacobs, *supra* note 44, at 664. Professor David Noll notes that the indirect nature of structural deregulation tools, which he identifies as "[t]ools of systemic sabotage . . . obscures their effects on statutory policy" and makes them more durable, as they are less likely to provoke a response from Congress, courts, or the public. *See* Noll, *Administrative Sabotage*, *supra* note 49, at 800. Professors Freeman and Jacobs agree that structural deregulation works incrementally, invisibly, and unaccountably, and they point out that long term harm to an agency's reputation can make it "more difficult for the [A]gency to secure funding from Congress, influence regulated entities and . . . prevail in court." *See* Freeman & Jacobs, *supra* note 44, at 620, 664.

[59] For useful analyses of the history, reasons for, criticisms of, and reforms to address structural deregulation and administrative sabotage, see generally Noll, *Administrative Sabotage*, *supra* note 49, and Freeman & Jacobs, *supra* note 44. Professors Freeman and Jacobs suggest that the best response to structural deregulation is likely to be a legislative response (even though congressional gridlock prevents most legislative responses), as existing public law has proven to be ineffective. *See* Freeman & Jacobs, *supra* note 44, at 591, 638. Professor David Noll proposes changes to specific statutes, including more limited delegations of authority to agencies—as a response to administrative sabotage—as opposed to an attempt to reform the APA (which might limit administrative sabotage but simultaneously frustrate legitimate agency activity). *See* Noll, *Administrative Sabotage*, *supra* note 49, at 813–23. He counsels, "when designing statutory programs, policymakers should not assume that the programs will be administered in good faith by officials who are committed to a program's objectives." *Id.* at 816.

[60] *See* discussion *supra* notes 3–4.

[61] *See* sources cited *supra* note 21.

significant limits on when that law can be used.[62] This Part outlines the benefits of the conventional deregulatory tools and the Congressional Review Act, as well as the significant limitations on those tools.

A. *Executive Orders and Non-legislative Rules*

Executive orders and non-legislative rules (guidance documents, policy statements, interpretive rules, etc.) are useful short-term deregulatory tools because (1) the executive branch can implement them quickly, as very few procedural requirements apply;[63] (2) the executive branch can act unilaterally, without cooperation of other branches; and (3) judicial review of the actions is limited.[64]

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[62] *See infra* Part III.

[63] There are no procedures required for issuance of an executive order by the Constitution or any statute. *See* JONATHAN M. GAFFNEY, CONG. RSCH. SERV., R46738, EXECUTIVE ORDERS: AN INTRODUCTION 2 (2021) [hereinafter CRS Report 46,738]. Similarly, while there are some publication requirements that apply to non-legislative rules, the APA exempts interpretive rules, general statements of policy, and rules of agency organization, procedure or practice from the notice and comment procedures that apply to legislative rules. *See* 5 U.S.C. §553(b)(3)(A). As a result, agencies can set forth important interpretations of laws and regulations with minimal procedures and minimal public input. *See* Johnson, *Indeconstructible*, *supra* note 1, at 664; *see also* Stephen M. Johnson, *Ossification's Demise? An Empirical Analysis of EPA Rulemaking From 2001–2005*, 38 ENV'T L. 767, 76878–679 (2008) [hereinafter Johnson, *Ossification's Demise*]; Stephen M. Johnson, *Good Guidance, Good Grief!*, 72 MO. L. REV. 695, 700–01 (2007); Stephen M. Johnson, *The Internet Changes Everything: Revolutionizing Public Participation and Access to Government Information Through the Internet*, 50 ADMIN. L. REV. 277, 283–84 (1998) [hereinafter Johnson, *Internet*]; Thomas O. McGarity, *The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 TEX. L. REV. 525, 528 (1997); Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 82 (1995). The ossification of the notice and comment rulemaking process, *see infra* Part III.C., has sparked a sharp increase in agencies' reliance on non-legislative rules to make regulatory and deregulatory policy. *See* Aaron L. Nielson, *Sticky Regulations*, 85 U. CHI. L. REV. 85, 88–89 (2018); Johnson, *Indeconstructible, supra* note 1, at 768–69; Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1385–86 (1992). In some agencies, interpretive rules and policy statements comprise more than 90 percent of the Agency's "rules." *See* Pierce, *supra*, at 82.

[64] The President is not an "agency" under the APA, *see* Franklin v. Massachusetts, 505 U.S. 788, 800 (1992), so the President's issuance of an executive order or presidential memorandum cannot be challenged under the Act, although final actions that agencies take pursuant to the order can be challenged under the Act. Prior to the Trump Administration, it was rare for litigants to directly challenge executive orders, as opposed to challenging actions taken in response to executive orders. *See* Lisa Manheim & Kathryn A. Watts, *Reviewing Presidential Orders*, 86 U. CHI. L. REV. 1743, 1769 (2019). Although direct challenges to executive orders have become more frequent after the Trump Administration, there is not a coherent framework for courts to follow when reviewing such direct challenges. *See id.* at 1747. There are also

Like many prior administrations,[65] the Trump administration issued a "stop work" order promptly after the President took office, ordering all agencies—for a period of time—to cease working on rules, to withdraw final rules that had not yet been published in the Federal Register, and to suspend—for sixty days—the effective date of rules that had been published in the Federal Register, but had not yet become effective, while the new Administration reviewed the rules.[66] "The directive delayed the implementation of at least [thirty] environmental rules."[67] Over the next four years, the President used the executive order as a centerpiece of his deregulatory program, frequently ordering agencies to review and revise or rescind

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roadblocks to judicial challenges to non-legislative rules. *See* Johnson, *Ossification's Demise*, *supra* note 63, at 779; Johnson, *Good Guidance*, *supra* note 63, at 701. Guidance documents, policy statements, interpretive rules, and other non-legislative rules are frequently not reviewable under the APA because they are not "final agency action." *See* Bennett v. Spear, 520 U.S. 154, 177–78 (1997) (providing that an action must be the consummation of agency decision-making and determine rights or obligations or impose legal consequences in order for it to be a "final agency action" subject to review under 5 U.S.C. § 704).

[65] *See* Jody Freeman, *The Limits of Executive Power: The Obama-Trump Transition*, 96 NEB. L. REV. 545, 549 (2017); Noll & Revesz, *Regulation in Transition*, *supra* note 1, at 5; Johnson, *Indeconstructible*, *supra* note 1, at 672.

[66] *See* Memorandum for the Heads of Executive Departments and Agencies; Regulatory Freeze Pending Review, 82 Fed. Reg. 8,346 (Jan. 24, 2017). The memo also indicated that agencies should, where appropriate and as permitted by applicable law, consider proposing for notice and comment a delay of the effective date of regulations beyond the sixty days. *Id.* at § 3. The "stop work" order is a tool that most administrations have used for decades to slow the implementation of "midnight rules," which are adopted at the end of the term of the outgoing Administration. *See* Noll and Revesz, *Regulation in Transition*, *supra* note 1, at 5 (citing Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4,435 (Jan. 26, 2009) (President Obama); Memorandum for the Heads and Acting Heads of Executive Departments and Agencies, 66 Fed. Reg. 7,702 (Jan. 24, 2001) (President Bush); Regulatory Review, 58 Fed. Reg. 6,074 (Jan. 25, 1993) (President Clinton); Postponement of Pending Regulations, 46 Fed. Reg. 11,227 (Feb. 6, 1981) (President Reagan)). For a discussion of the "midnight rulemaking" that occurs at the end of each presidential administration, see Anne Joseph O'Connell, *Agency Rulemaking and Political Transitions*, 105 NW. L. REV. 471, 472–73 (2011) (discussing the phenomena and noting that the number of rulemakings finalized at the end of a presidential administration increases even when the new President is a member of the same political party as the outgoing President); Jack M. Beermann, *Presidential Power in Transitions*, 83 B.U. L. REV. 947, 954 (2003) (citing a study that noted that regulatory output usually increases by 27.4 percent in the last three months of an administration). The "stop work" order is most effective for halting proposed rules. *See* Noll & Revesz, *Regulation in Transition*, *supra* note 1, at 5.

[67] Johnson, *Indeconstructible*, *supra* note 1, at 672.

environmental regulations.[68] In the spirit of presidential administration, some of the executive orders included very specific directives regarding the rules to be adopted by the Agency. For example, there was an Executive Order that required the EPA and the U.S. Army Corps of Engineers to consider revising their definition of "waters of the United States" under the Clean Water Act to be consistent with a Supreme Court plurality opinion definition that no federal appellate court adopted after the Court's decision.[69]

President Trump also relied heavily on non-legislative rules to relax environmental requirements not formalized as legislative rules. The Administration adopted guidance that reduced the requirements for agencies to consider climate change effects under the National Environmental Policy Act (NEPA),[70] weakened limits on regional haze adopted under the Clean Air Act,[71] eliminated the use of Supplemental Environmental Projects as settlement tools in environmental lawsuits,[72]

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[68] *See, e.g.*, Exec. Order No. 13,868, 84 Fed. Reg. 15,495, 15,496–97 (Apr. 15, 2019); Exec. Order No. 13,792, 82 Fed. Reg. 20,429, 20,430 (May 1, 2017); Exec. Order No. 13,783, 82 Fed. Reg. 16,093 (Mar. 31, 2017) (ordering review of the Clean Power Plan rule and several oil and gas regulations). In addition to executive orders, President Trump has relied on presidential memoranda to make significant rollbacks on environmental protection and conservation of public lands. *See, e.g.*, Proclamation No. 9681, 82 Fed. Reg. 58,081, 58,085 (Dec. 8, 2017) (reducing the size of Bears Ears National Monument). Presidential memoranda provide similar benefits as executive orders in that there are few procedures required for such memoranda, and they are difficult to challenge in court.

[69] *See* Exec. Order No. 13,778, 82 Fed. Reg. 12,497 (Feb. 28, 2017). The Executive Order directed the agencies to consider adopting the definition of "waters of the United States" advocated by Justice Scalia in his plurality opinion in *Rapanos v. United States,* 547 U.S. 715, 757 (2006). None of the federal appellate courts that have addressed the issue of the scope of Clean Water Act jurisdiction over "waters of the United States" after *Rapanos* have relied on the plurality's test as the sole basis for determining jurisdiction. *See* Stephen M. Johnson, *Killing WOTUS 2015: Why Three Rulemakings May Not Be Enough*, 64 ST. LOUIS U. L.J. 373, 385 (2020).

[70] *See* Draft National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions, 84 Fed. Reg. 30,097, 30,097 (June 26, 2019).

[71] *See* Memorandum from Peter Tsirigotis, Dir., EPA Off. of Air Quality Plan. & Standards, to Reg'l Air Div. Dirs., (Aug. 20, 2019), https://www.epa.gov/sites/default/files/2019-08/documents/8-20-2019_-_regional_haze_guidance_final_guidance.pdf.

[72] *See* Memorandum from Jeffrey Bossert Clark, Assistant Att'y Gen., U.S. Dep't of Just. Env't and Nat. Res. Div., to ENRD Deputy Assistant Att'y Gen. and Section Chiefs, (March 12, 2020).

and rolled back environmental enforcement during the early days of the COVID-19 pandemic,[73] among other actions.

Although those tools produced a flurry of short-term deregulatory successes, there are important limitations to their usefulness. First, Presidents cannot make law or change the law through executive orders or presidential proclamations.[74] They can only direct agencies to exercise the discretion that they have already been provided by law in particular ways that are within the authorities provided by law.[75] Thus, when the Trump Administration, in its "stop work" order, directed agencies to suspend the effective date of rules that had been published in the Federal Register but were not yet effective, agencies had to justify the suspensions through either the "good cause" exception to the notice and comment rulemaking requirements of the APA or Section 10(d) of the APA, 5 U.S.C. § 705, which authorizes an agency—when justice so requires—to postpone the effective date of agency actions.[76] In many cases, Trump agencies suspended the effective dates of rules in ways that exceeded their authority under those provisions, and courts invalidated the suspensions.[77]

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[73] *See* Memorandum from Susan Parker Bodine, Assistant Adm'r, EPA Off. of Enf't & Compliance Assurance, to All Governmental and Priv. Sector Partners, (March 26, 2020).

[74] *See* CRS Report 46,738, *supra* note 63, at 4–6.

[75] *Id.*; 5 U.S.C. § 705.

[76] *See* 5 U.S.C. § 705; Johnson, *Indeconstructible*, *supra* note 1, at 673–74. The "good cause" exception is a very limited exception, though, and agencies are unlikely to be able to justify delaying the effective date of rules for a more substantial period of time under that exception. *See* Michael A. Rosenhouse, *Construction and Application of Good Cause Exception to Notice and Comment Rulemaking Under Administrative Procedure Act (APA), 5 U.S.C. § 553(b)(B)*, 26 A.L.R. Fed. 2d 97, § 2 (2008); Beermann, *supra* note 66, at 983. *See also* Nat. Res. Def. Council v. Abraham, 355 F.3d 179, 204–06 (2d Cir. 2004) (holding that the Department of Energy's indefinite suspension of the effective date of a rule violated APA notice and comment requirements). There are also important limits on an agency's authority to suspend the effective date of a rule under Section 10(d) of the APA. In order to justify delay under that section, an agency must satisfy the four-part test that applies to the request for a preliminary injunction. *See* Sierra Club v. Jackson, 833 F. Supp. 2d 11, 30 (D.D.C. 2012). Under that test, the proponent of an injunction "must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *See* Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008).

[77] *See, e.g.*, Pineros y Campesinos Unidos del Noroeste v. Pruitt, 293 F. Supp. 3d 1062, 1063 (N.D. Cal. 2018) (granting plaintiff's motion for summary judgment); State v. U.S. Bureau of Land Mgmt., 277 F. Supp. 3d 1106, 1110, 1125–26 (N.D. Cal. 2017); Becerra v. U.S. Dep't of Interior, 276 F. Supp. 3d 953, 966–67 (2017). For a good overview of the limitations on delaying rules, see Lisa Heinzerling, *Laying Down the Law*

The same problem arises with non-legislative rules, which agencies can only use to interpret and implement existing laws but cannot use to impose new obligations. Thus, the executive branch cannot use executive orders or non-legislative rules to eliminate regulatory requirements that a statute or legislative rule has imposed. Second, to the extent that agencies use non-legislative rules to loosen regulatory requirements, the non-legislative rules will not have the force of law, and courts will not accord agencies *Chevron* deference if the rules are challenged in court.[78]

Most importantly, though, the lack of procedural requirements for adoption of executive orders and non-legislative rules that makes them attractive deregulatory tools also guarantees that the changes adopted by the executive branch through those tools can, and will, be rescinded just as easily when a new administration takes over the White House. That is precisely what happened when President Biden took office in 2021 and issued Executive Order 13990, which revoked nine executive orders issued by President Trump that rolled back environmental protections; ordered agencies to review over 100 environmental rules, guidance documents, and policies adopted during the Trump Administration; and also directed agencies to consider suspending, rescinding, or revising them.[79] In addition, in its first year, the Biden administration reversed most of the significant guidance the Trump administration adopted to roll back environmental protections.[80]

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on Rule Delays, REGUL. REV. (June 4, 2018), https://www.theregreview.org/2018/06/04/heinzerling-laying-down-law-rule-delays.

[78] *See* Johnson, *Indeconstructible*, *supra* note 1, at 675; Johnson, *Internet*, *supra* note 1, at 285. The Supreme Court has held that most non-legislative rules, which lack the force of law, are not entitled to *Chevron* deference. *See* Christensen v. Harris Cnty., 529 U.S. 576, 577 (2000).

[79] *See* Exec. Order No. 13,990, 86 Fed. Reg. 7,037, 7,037, 7,041, 7,042 (Jan. 20, 2021). The Executive Order also (1) directed the Secretary of Interior to review the presidential proclamations that reduced the boundaries of Bears Ears National Monument and other national monuments to determine whether the proclamations should be revoked or revised; (2) directed the Secretary of Interior to place a temporary moratorium on oil and gas leasing in the Arctic National Wildlife Refuge; and (3) revoked the Keystone XL Pipeline permit. *Id.* at 7,039, 7,041. *See* Noll & Revesz, *Regulatory Transitions*, *supra* note 1, at 6.

[80] *See* Memorandum from Peter Tsirigotis, Dir., EPA Off. of Air Quality Plan. & Standards, to Reg'l Air Div. Dirs. (July 8, 2021) (amending the regional haze guidance); Notice of Rescission of Draft Guidance, 86 Fed. Reg. 10,252 (Feb. 19, 2021) (rescinding the NEPA climate change guidance); *see also* Memorandum from Jean E. Williams, Deputy Assistant Att'y Gen., U.S. Dep't of Just., Env't and Nat. Res. Div., to ENRD Section Chiefs and Deputy Section Chiefs, U.S. Dep't of Just. (Feb. 4, 2021)

Ultimately, therefore, although a President can achieve high-profile, short-term deregulatory success using executive orders and non-legislative rules, those tools are largely ineffective in producing enduring deregulation.[81]

B. *Congressional Review Act*

While the Trump administration could only achieve short-term deregulatory success with executive orders and non-legislative rules, it achieved more permanent rollbacks of some environmental regulations using the Congressional Review Act (CRA), a less conventional tool.[82] There are, however, significant limitations on the use of the Act as a broader tool for deregulation.

Congress enacted the CRA in 1996 as part of the Small Business Regulatory Enforcement Fairness Act[83] and authorizes Congress, through a streamlined legislative process, to disapprove regulations adopted by agencies.[84] If Congress disapproves of a regulation, the CRA prohibits an agency from adopting another rule that is

(withdrawing nine Trump era environmental enforcement policies, including the SEP policy). It was not necessary for the Biden Administration to withdraw the COVID-19 enforcement rollback policy, as the Trump Administration phased it out in 2020. *See* Memorandum from Susan Parker Bodine, Assistant Adm'r, EPA Off. of Enf't & Compliance Assurance, to All Governmental and Priv. Sector Partners, (June 29, 2020). Several organizations maintain trackers to detail the Biden Administration's progress in rolling back the environmental rollbacks of the Trump Administration. *See, e.g.*, *Executive Reaction*, GRIST, https://grist.org/project/accountability/trump-rollbacks-biden-climate-tracker (last visited May 30, 2022); *Tracking Regulatory Changes in the Biden Era*, BROOKINGS (Sept. 12, 2022), https://www.brookings.edu/interactives/tracking-regulatory-changes-in-the-biden-era; *Tracking the Biden-Harris Climate & Environmental Agenda,* HARV. L. SCH. ENV'T & ENERGY L. PROGRAM, https://eelp.law.harvard.edu/portfolios/environmental-governance/biden-climate-environmental-tracker (last visited May 30, 2022); Juliet Eilperin, Brady Dennis, & John Muyskens, *Tracking Biden's Environmental Actions*, WASH. POST (Sept. 15, 2022, 6:04 PM), https://www.washingtonpost.com/graphics/2021/climate-environment/biden-climate-environment-actions.

[81] The deregulatory gains that the Trump Administration achieved through executive orders and non-legislative rules were as ephemeral as the streams that the Administration refused to protect under the Clean Water Act. *See* The Navigable Waters Protection Rule: Definition of "Waters of the United States", 85 Fed. Reg. 22,250, 22,251 (Apr. 21, 2020) (to be codified at 33 C.F.R pt. 328, 40 C.F.R. pts. 110, 112, 116, 117, 120, 122, 230, 232, 300, 302, 401) (excluding ephemeral streams, swales, gullies, rills, and pools from jurisdiction under the Clean Water Act).

[82] *See* Noll & Revesz, *Regulation in Transition*, *supra* note 1, at 7–8, 14.

[83] *See* Contract with America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847, 868 (codified at 5 U.S.C. § 601).

[84] 5 U.S.C. § 801(b)(1).

"substantially the same" as the rule that was disapproved.[85] As a deregulatory device, this tool is significantly different from executive orders and non-legislative rules because it requires the cooperation of the executive branch and Congress to be effective.[86] Consequently, it is likely only useful when the President and both chambers of Congress are politically united or when a veto-proof majority of both chambers of Congress decides to take action the White House opposes.

There are a few significant benefits associated with using the CRA as a deregulatory tool. First, it provides the permanence and stability that are unavailable through executive orders and non-legislative rules. Congress is, in essence, rescinding an agency rule by passing a law that prohibits the Agency (and future administrations) from re-adopting the rule.[87]

The other clear benefit is that the law eliminates many of the legislative procedural requirements that could derail the disapproval resolution.[88] Specifically, the law limits the use of the filibuster in the Senate,[89] prohibits amendments and limits debate in the Senate,[90] and limits the power of any party to keep the resolution in a committee in either congressional chamber.[91] Thus, although significant procedural roadblocks often limit the adoption of legislation that is not supported by a super-majority in the Senate, the CRA facilitates a legislative process that can make it quicker and easier to revoke a rule through legislation rather than having the Agency revoke the rule through notice and comment rulemaking.[92]

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[85] *Id.* § 801(b)(2). There is, however, some uncertainty regarding the meaning of "substantially the same," as it is not defined in the statute and has not been litigated. *See* Noll & Revesz, *Regulation in Transition*, *supra* note 1, at 21–22.

[86] Pursuant to the bicameralism and presentment clauses of the Constitution, laws can only be adopted with the approval of both chambers of Congress and the President, although Congress can enact legislation without the approval of the President if two-thirds of the members of each Chamber vote to overrule a Presidential veto of legislation. *See* U.S. CONST. art. I, §§ 1, 7, cl. 2, 3.

[87] *See supra* notes 84–85.

[88] *See* Noll & Revesz, *Regulation in Transition*, *supra* note 1, at 15; Johnson, *Indeconstructible*, *supra* note 1, at 677–78. The net effect of the streamlined procedures, though, is reduced transparency and reduced deliberation in the legislative process. *See* Johnson, *Indeconstructible*, *supra* note 1, at 678.

[89] 5 U.S.C. § 802(d).

[90] *Id.* § 802(d)(1)–(2).

[91] *Id.* §§ 802(c)–(d)(1), (f)(1).

[92] *See* Noll & Revesz, *Regulation in Transition*, *supra* note 1, at 14–15; Johnson, *Indeconstructible, supra* note 1, at 667–78.

When President Trump assumed office in 2017, he had the support of a Republican majority in the House of Representatives and the Senate, so the Administration was able to use the CRA to disapprove sixteen administrative regulations, including four environmental rules.[93]

While the CRA provides long-term deregulatory benefits that are not provided by Executive orders and non-legislative rules, there are important limits on the usefulness of the law. First, as noted above, it is only an effective tool when the President and both chambers of Congress are united in their pursuit of specific deregulatory goals.[94] In the first two decades during which the law was in effect prior to the Trump Administration, it was only used successfully once to disapprove of a regulation.[95]

Even when the President and Congress have a unified deregulatory agenda, there are limits on the reach of the law.[96] The CRA requires agencies to notify Congress when they adopt rules[97] and requires Congress to introduce a resolution to disapprove of a rule

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[93] *See Congressional Review Act Resolutions in the 115th Congress*, COAL. FOR SENSIBLE SAFEGUARDS, https://sensiblesafeguards.org/cra (last visited May 30, 2022). The environmental rules were a Department of Interior rule called the Stream Protection Rule, H.R.J. Res. 38, 115th Cong. (2017) (enacted) (codified Pub. L. No. 115-5), a Bureau of Land Management land use planning rule, H.R.J. Res. 44, 115th Cong. (2017) (enacted) (codified Pub. L. No. 115-12), a Department of Interior rule governing predator control and other issues in the Alaska National Wildlife Refuge, H.R.J. Res. 69, 115th Cong. (2017) (enacted) (codified Pub. L. No. 115-20), and a rule from the Securities and Exchange Commission that required disclosure of payments by resource extraction issuers: H.R.J. Res. 41, 115th Cong. (2017) (enacted) (codified Pub. L. No. 115-4). Congress targeted twenty-two other rules for disapproval but was unsuccessful in enacting legislation to disapprove those rules. *See Congressional Review Act Resolutions in the 115th Congress*, *supra*. One of those rules targeted for disapproval was an Interior Department rule that limited methane emissions from oil and gas drilling on public lands. *See* Johnson, *Indeconstructible*, *supra* note 1, at 679 n. 149. The disapproval resolution passed the House but "was rejected in the Senate by a vote of 51-49." *Id.*

[94] *See supra* note 86.

[95] *See* S.J. Res. 6, 107th Cong., Pub. L. No. 107-5, 115 Stat. 7 (2001). It should be noted that there were opportunities to use the Act at other times: three times since the law was passed, a President was elected from a political party different from his predecessor at a time when the President's party controlled both the House and Senate at the time that the President took office. *See* Noll & Revesz, *Regulation in Transition*, *supra* note 1, at 17.

[96] *See* Johnson, *Indeconstructible*, *supra* note 1, at 678–80.

[97] *See* 5 U.S.C. § 801(a)(1)(A).

within sixty legislative days after the Agency notifies Congress.[98] Thus, when a new President wants Congress to use the law to eliminate rules that the previous Administration adopted, Congress can only use the law to target rules the agencies adopted within the last few months of the previous Administration.

In addition to those limits, legislators can only use the procedures in the CRA to disapprove of an entire rule and cannot use the procedures to modify the rule.[99] Further, while the legislative procedures under the Act are streamlined, the law still requires ten hours of debate in the Senate for each resolution of disapproval.[100] The time that Congress devotes to disapproval resolutions cannot be devoted to other legislation or important matters that arise at the beginning of a new presidential administration, such as the appointment of the President's Cabinet and other agency officials.[101] It is not surprising, therefore, that the Trump Administration was only able to revoke four environmental rules out of the approximately 100 rules or policies that it eventually targeted using the CRA.[102]

C. *Legislative Rulemaking*

The most powerful deregulatory tool in any President's arsenal is, paradoxically, notice and comment rulemaking. In fact, if the regulatory requirements that a President wants to eliminate were imposed through legislative rulemaking, the President does not have any other option, short of legislation, to eliminate the requirements. An agency can only change a rule adopted via legislative rulemaking through subsequent use of the same process.[103] If a President wants to

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[98] *Id.* § 802(a). When Congress begins a new term, the review period restarts for rules finalized within the last sixty days of the last Congress, and the law provides Congress with an addition seventy-five legislative days within which to introduce a resolution of disapproval. *Id.* § 801(d).

[99] *Id.* § 802(a).

[100] *Id.* § 802(d)(2).

[101] *See* Noll & Revesz, *Regulation in Transition*, *supra* note 1, at 21.

[102] As Professors Noll and Revesz note, President Obama prioritized quick appointment of agency officials over disapproval of rules under the Congressional Review Act, while President Trump adopted the opposite course of action. *Id.* George Washington University maintains a resource page and tracker that focuses on Congressional Review Act disapprovals. *See Congressional Review Act*, GEORGE WASHINGTON UNIV.: REGUL. STUD. CTR., https://regulatorystudies.columbian.gwu.edu/congressional-review-act (last visited May 30, 2022).

[103] *See* Johnson, *Indeconstructible*, *supra* note 1, at 685; Beermann, *supra* note 66, at 982–83. *See also* Tunik v. Merit Sys. Prot. Bd., 407 F.3d 1326, 1345–46, (Fed. Cir. 2005); Am. Fed'n of Gov't Emps., AFL-CIO v. Fed. Lab. Rels. Auth., 777 F.2d 751, 759 (D.C.

eliminate regulatory requirements and the President does not have the support of Congress, notice and comment rulemaking offers significant advantages over executive orders and non-legislative rules.

First, presuming that an agency has the statutory authority to adopt legislative rules, those rules will have the force of law that executive orders and non-legislative rules lack.[104] Equally important, the next Administration will not be able to eliminate the rules with the flick of a pen, as an administration can do with respect to executive orders and non-legislative rules.[105] The rules will remain in force (and the deregulation will continue) until a subsequent administration devotes the time and resources to a new rulemaking process to reverse the rules. For reasons discussed later in this section, notice and comment rulemaking is very time consuming and resource intensive.[106] Consequently, as scholars have noted, legislative rules are "sticky" and provide stability and durability that only legislation surpasses.[107]

A second advantage of legislative rules is that the executive branch can adopt them unilaterally without cooperation from Congress.[108] In

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Cir. 1985). If an agency is merely clarifying ambiguous terms in a rule, rather than changing it (or revoking it), the Agency can use non-legislative rules, such as interpretive rules or guidance, to clarify the meaning of the rule. *See* Johnson, *Indeconstructible*, *supra* note 1, at 685 n.188.

[104] *See*, *e.g.*, Nat'l Latino Media Coal. v. FCC, 816 F.2d 785, 788 (D.C. Cir. 1987).

[105] *See supra* notes 79–80.

[106] *See* discussion *infra* notes 114–123.

[107] As Aaron Nielson has pointed out, while critics often complain that the procedures imposed on notice and comment rulemaking by all three branches of government have "ossified" the rulemaking process, the "ossification" has real benefits for agencies. *See* Nielson, *supra* note 63, at 91–92. The "ossification," he argues, allows agencies to adopt regulations that are difficult to change quickly, which provides motivation for regulated entities to comply with the rules and, thus, allows agencies to regulate across time, the fourth dimension. *Id.* at 90–92, 104. As he notes, "to the extent that regulated parties know that regulators cannot quickly change regulatory schemes, they can proceed with greater confidence to do what an agency . . . would like them to do." *Id.* at 92. Without that stability, regulated entities will invest less in complying with the agency's rules, hoping that they will be reversed in the short term. *Id.* at 91; *see also* Noll, *"Tired of Winning"*, *supra* note 3, at 371. Thus, he notes, if the notice and comment rulemaking process was not ossified, agencies would have additional flexibility to quickly and easily change rules (which would benefit agencies), but that flexibility would reduce the willingness of regulated entities to devote resources to long-term compliance with rules that could change imminently (which would not benefit agencies). *See* Nielson, *supra* note 63, at 92–93.

[108] Congress can, however, overturn agency rules either through the Congressional Review Act, *supra* notes 82–86, or through the normal legislative process.

that regard, they have advantages similar to executive orders and non-legislative rules.

A final advantage of legislative rules is that courts will accord the decisions that agencies make in those rules greater deference than guidance documents, policy statements, and interpretive rules when the decisions are challenged in court.[109] Historically, courts have upheld agencies' legislative rules in more than 70 percent of the cases in which they have been challenged, regardless of whether the rules are imposing or eliminating regulatory requirements.[110]

For all of those reasons, the Trump Administration relied heavily on notice and comment rulemaking to deregulate. Although the President railed against regulation and adopted an Executive Order that required agencies to eliminate two rules for every new rule that

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[109] *See* Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984).

[110] *See, e.g.*, Noll, *"Tired of Winning"*, *supra* note 3, at 356; Stephen M. Johnson, *The* Brand X *Effect: Declining* Chevron *Deference for EPA and Increased Success for Environmental Groups in the 21st Century*, 69 CASE W. RSRV. L. REV. 65, 69 (2018) (between 2000 and 2016, circuit courts affirmed the EPA's statutory interpretation under *Chevron* 70.9 percent of the time); Kent Barnett & Christopher J. Walker, Chevron *Step Two's Domain*, 93 NOTRE DAME L. REV. 1441, 1444 (2018) (finding that agencies win 77.4 percent of cases under *Chevron* review); Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 MICH. L. REV. 1, 28 (2017) (finding that agencies prevailed on 71.4 percent of interpretations in statutory interpretation cases); David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135, 170 (2010) (finding an "overall agency validation rate" of 69 percent); William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1099 (2008) (finding that agencies won 76.2 percent of cases under *Chevron* review); Jason J. Czarnezki, *An Empirical Investigation of Judicial Decisionmaking, Statutory Interpretation, and the* Chevron *Doctrine in Environmental Law*, 79 U. COLO. L. REV. 767, 796 (2008) (finding that agencies won 69.55 percent of cases under *Chevron* review); Christopher H. Schroeder & Robert L. Glicksman, Chevron*,* State Farm*, and EPA in the Courts of Appeals During the 1990s*, 31 ENV'T L. REP. 10371, 10372, 10377 (2001) (finding that the EPA prevailed in 67 percent of cases in which they were a party in federal court during the 1990s and in 75.7 percent of cases that involved challenges subject to *Chevron* review); Orin S. Kerr, *Shedding Light on* Chevron*: An Empirical Study of the* Chevron *Doctrine in the U.S. Courts of Appeals*, 15 YALE J. ON REGUL. 1, 30 (1998) (finding that agencies prevailed in 73 percent of the cases decided in federal courts between 1995 and 1996 involving *Chevron* review); Peter H. Schuck & E. Donald Elliott, *To the* Chevron *Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1003 (1990) (finding that agencies prevailed in 76.7 percent of the cases decided in the federal appellate courts in 1984 and 1985 involving *Chevron* review). *See also* Richard J. Pierce, Jr., *What Do the Studies of Judicial Review of Agency Actions Mean?*, 63 ADMIN. L. REV. 77, 78, 84 (2011) (reviewing ten studies of agency validation rate and finding that courts upheld agency actions "in a narrow range" of 64 percent to 81.3 percent).

they adopted,[111] President Trump's EPA actually adopted more final rules than the Agency adopted during the first four years of the Obama administration,[112] and almost as many final rules as the Agency adopted during the first four years of the George W. Bush Administration.[113]

Although notice and comment rulemaking provides several advantages as a deregulatory tool and is the only tool available to the President to eliminate requirements that have been implemented through previous legislative rulemaking, several factors significantly limit the ability of a President to use it as a long-term deregulatory mechanism.

First and most importantly, as noted above, the notice and comment rulemaking process is extraordinarily "time consuming and resource intensive."[114] Much ink has been spilled describing the "ossification" of informal rulemaking[115] caused by congressional

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[111] Exec. Order No. 13,771, 82 Fed. Reg. 9339 (Jan. 20, 2017).

[112] Based on a search of Federal Register website, the EPA published 1,999 final rules in the Federal Register between January 20, 2017, and January 20, 2021, which was President Trump's term in office. *See* FED. REG., https://www.federalregister.gov (searched for "environmental protection agency" and then filtered by Agency for Environmental Protection Agency, by Type for Rule, and by Publication Date between January 20, 2017, and January 20, 2021). The EPA published 2,034 final rules in the Federal Register during the first four years of President Obama administration. *See id.* (searched for "environmental protection agency" and then filtered by Agency for Environmental Protection Agency, by Type for Rule, and by Publication Date between January 20, 2009, and January 20, 2013).

[113] While President Trump's EPA published 1,536 final rules, *see* FED. REG., *supra* note 112, the EPA published 2,250 final rules in the Federal Register during the first four years of the George W. Bush Administration. *See id.* (searched for "environmental protection agency" and then filtered by Agency for Environmental Protection Agency, by Type for Rule, and by Publication Date between January 20, 2001, and January 20, 2005).

[114] Johnson, *Indeconstructible*, *supra* note 1, at 686. *See also* Noll, *"Tired of Winning"*, *supra* note 3, at 371.

[115] *See, e.g.*, Nielson, *supra* note 63, at 86–88; Johnson, *Indeconstructible*, *supra* note 1, at 685; Johnson, *Ossification's Demise*, supra note 63, at 768; Johnson, *Good Guidance*, *supra* note 63, at 700–01; Johnson, *Internet*, *supra* note 63, at 282–84; McGarity, *Response*, *supra* note 63, at 528–36; Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483, 483–90 (1997); Pierce, *Seven Ways*, *supra* note 63, at 60–62; McGarity, *Some Thoughts*, *supra* note 63, at 1385–86. Professor E. Donald Elliott, former General Counsel of the EPA, is credited with labeling the transformation of the rulemaking process as "ossification." *See* McGarity, *Some Thoughts*, *supra* note 63, at 1385–86.

procedures,[116] the executive branch,[117] and the courts.[118] Scholars frequently have asserted that the notice and comment process for major rules often takes five years or more.[119] In addition, agencies

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[116] *See* Johnson, *Indeconstructible*, *supra* note 1, at 686 (describing analytical and procedural requirements imposed by the Small Business Regulatory Enforcement Fairness Act, the Information Quality Act, the Paperwork Reduction Act, and other laws); Nielson, *supra* note 63, at 101; Johnson, *Ossification's Demise*, *supra* note 63, at 769.

[117] *See* Johnson, *Indeconstructible*, *supra* note 1, at 685–86 (discussing requirements under Executive Order 12,866 for OMB review and approval of agency rules and agency evaluation of the costs and benefits of rules; requirements under Executive Order 12,630 to consider the takings impacts of rules; requirements under Executive Order 13,132 to consider the federalism impacts of rules; and requirements under Executive Order 13,045 to consider the effect of rules on children's health); Nielson, *supra* note 63, at 99; Johnson, *Ossification's Demise*, *supra* note 63, at 769.

[118] *See* Johnson, *Indeconstructible*, *supra* note 1, at 686–87; Nielson, *supra* note 63, at 97–98; Johnson, *Ossification's Demise*, *supra* note 63, at 774.

> While courts have not imposed additional procedural requirements on agencies, they have interpreted the provisions of the APA broadly to require agencies to provide significant amounts of information in proposed rulemakings, to limit the extent to which final rules deviate from proposed rules, to consider and reply rationally to comments from the public, and to supply detailed explanations for final rules, indicating that they have considered all of the relevant factors and alternatives in crafting the final rule.

Johnson, *Indeconstructible*, *supra* note 1, at 687. For examples of the broad interpretation of the procedural requirements, see Chocolate Mfrs. Ass'n v. Block, 755 F.2d 1098, 1105 (4th Cir. 1985) (interpreting the notice and comment requirements to limit the changes that an agency can make to rules, in that the final rule must be a "logical outgrowth" of a proposed rule); United States v. N.S. Food Prod. Corp., 568 F.2d 240, 252–53 (2d Cir. 1977) (interpreting the concise general statement requirement in the APA to require agencies to respond to all material or significant comments that they receive); Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 386, 402 (D.C. Cir. 1973) (requiring agencies to disclose data on which a rule is based as part of the notice of proposed rulemaking, in order to ensure that the public has an "opportunity . . . to comment" on the data). Aaron Nielson notes that the procedural requirements of the APA were not always considered to be particularly onerous, as the concise general statement of the basis and purpose for EPA's Clean Air Act ambient air quality standards was one-page long when the Agency adopted the standards in 1971. *See* Nielson, *supra* note 63, at 95.

[119] *See* McGarity, *Some Thoughts*, *supra* note 63, at 1388–90 (OSHA and FTC rulemakings generally took more than five years to complete); *see also* Noll & Revesz, *Regulation in Transition*, *supra* note 1, at 57 (noting that promulgating a major rule could frequently take an entire presidential term); Cornelius M. Kerwin & Scott R. Furlong, *Time and Rulemaking: An Empirical Test of Theory*, 2 J. PUB. ADMIN. RES. & THEORY 113, 134 (1992) (finding the average start-to-finish time for the EPA to promulgate a rule was 1,108 days). Although the five-year time period is frequently cited, other studies suggest that it takes twenty-eight months. *See* Jason Webb Yackee & Susan Webb Yackee, *Delay in Notice and Comment Rulemaking: Evidence of Systemic*

routinely spend several years preparing a rule before issuing a notice of proposed rulemaking.[120] The most significant procedural limits arise from the Administrative Procedure Act (APA), which requires agencies to provide notice and an opportunity for comment when adopting a rule,[121] and then to respond to any comments and rationally explain why they are adopting those rules.[122] The statutes that authorize agencies to make rules also impose important procedural and substantive limits on the agencies' rulemaking authority.[123]

A presidential administration has limited resources and time and cannot eliminate all environmental regulations, or even a significant number, in one or even two terms, even if the Administration devoted all of its resources to that deregulatory goal, to the detriment of all other policy objectives.[124] The process simply takes too long. Administrations will be especially likely to run out of time to use notice and comment rulemaking as a deregulatory tool if the President only serves one term.[125] In addition, for reasons discussed above,

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Regulatory Breakdown?, in REGULATORY BREAKDOWN: THE CRISIS OF CONFIDENCE IN U.S. REGULATION 163, 168 (Cary Coglianese ed., 2012). Other studies suggest it could take as few as eighteen months for EPA to finalize major rules. *See* Johnson, *Ossification's Demise*, *supra* note 63, at 784.

[120] *See* Johnson, *Indeconstructible*, *supra* note 1, at 688; Noll & Revesz, *Regulation in Transition*, *supra* note 1, at 55–56 (suggesting that the average time to develop proposed rules at DOT, EPA, and the FDA was at least two years, according to GAO data); Wendy Wagner, Katherine Barnes, & Lisa Peters, *Rulemaking in the Shade: An Empirical Study of EPA's Air Toxic Emission Standards*, 63 ADMIN. L. REV. 99, 143–44 (2011) (finding that the EPA spent, on average, four years developing air toxic standards under the Clean Air Act before issuing notices of proposed rulemaking for those standards).

[121] *See* 5 U.S.C. § 553(b).

[122] *See* Johnson, *Indeconstructible*, *supra* note 1, at 685; Glicksman & Hammond, *supra* note 26, at 1666.

[123] *See* Noll, *"Tired of Winning"*, *supra* note 3, at 373–74.

[124] *See* Nielson, *supra* note 63, at 89 (describing the resource and time demands of notice and comment rulemaking); Noll & Revesz, *Regulation in Transition*, *supra* note 1, at 7 (noting that agencies are limited by resources in the number of rules that they can change at one time). Professor Adrian Vermeule notes that administrative procedures impose opportunity costs, as agencies are forced to delay regulatory action in order to comply with procedures. *See* Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1144 (2009).

[125] *See* Noll & Revesz, *Regulation in Transition*, *supra* note 1, at 56–57 (noting that as a result of the timeframe required for notice and comment rulemaking, administrations will likely be finalizing most major rules sufficiently close to the end of their presidential terms and that the incoming administration may be able to use many of the tools described in this Article to stop or overturn the rules). The

administrations may frequently encounter resistance to deregulatory efforts, even from regulated entities that have invested significant time and money into compliance with environmental rules.[126]

The prospect of judicial review provides another significant roadblock to the effectiveness of notice and comment rulemaking as a deregulatory tool. Presidents understand that the rules agencies adopt will be challenged in court.[127] Scholars have frequently suggested that 80 percent of the EPA's major rules are challenged in court.[128] Consequently, agencies must take extra care during the rulemaking process to build a record to support their rules that will survive the inevitable judicial challenge.[129] That contributes to the extended time period required to develop and promulgate rules through notice and

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"stickiness" of rules, thus, acts as a barrier to administrative sabotage outlined above as well as widespread deregulation.

[126] *See supra* note 12; *see also* Noll & Revesz, *Regulation in Transition*, *supra* note 1, at 7 (discussing the difficulty of changing rules when regulated industries have already purchased durable equipment or modified production processes to comply with the rules and cannot recover those sunk costs if the rules are eliminated).

[127] *See* Johnson, *Indeconstructible*, *supra* note 1, at 687; Johnson, *Ossification's Demise*, *supra* note 63, at 768; Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255, 1296 (1997). There are ample opportunities to challenge the EPA under the APA or the judicial review of citizen suit provisions in environmental laws. *See, e.g.*, 33 U.S.C. § 1365 (Clean Water Act citizen suit provision); 33 U.S.C. § 1369 (Clean Water Act judicial review provision); 42 U.S.C. § 6972 (RCRA citizen suit provision); 42 U.S.C. § 6976 (RCRA judicial review provision). *See also* 5 U.S.C. § 704 (presumption of reviewability of final agency actions).

[128] Johnson, *Indeconstructible*, *supra* note 1, at 687; *see also* Johnson, *Ossification's Demise*, *supra* note 63, at 768–69; Lawrence Susskind & Gerard McMahon, *The Theory and Practice of Negotiated Rulemaking*, 3 YALE J. ON REGUL. 133, 134 (1985) (citing William D. Ruckelshaus, Address to Conservation Foundation's Second National Conference on Environmental Dispute Resolution, *Environmental Negotiation: A New Way of Winning* (Oct. 1, 1984) (on file with the Yale Journal on Regulations)). Former EPA Administrators William Ruckelshaus, Lee Thomas, and William Reilly have each suggested that 75 percent or more of the Agency's major rules were routinely challenged. *See* Johnson, *Ossification's Demise*, *supra* note 63, at 772, n.33; ROSEMARY O'LEARY, ENVIRONMENTAL CHANGE: FEDERAL COURTS AND THE EPA 17 (1993). In a study of EPA rules finalized between 2001 and 2005, I found that 75 percent of EPA's "economically significant" rules were challenged. *See* Johnson, *Ossification's Demise*, *supra* note 63, at 104. Based on a review of EPA rules adopted between 1987 and 1991, however, Cary Coglianese determined that only 26 percent of EPA's rules were challenged during that time and only 35 percent of EPA's "significant" rules, adopted between 1980 and 1991, were challenged throughout that period. *See* Coglianese, *supra* note 127, at 1298–1300.

[129] *See* Johnson, *Indeconstructible*, *supra* note 1, at 688; Nielson, *supra* note 63, at 88–89.

comment rulemaking. Judicial challenges to rules provide additional obstacles to the effectiveness of notice and comment rulemaking as a deregulatory tool on the back end, as well. Even if a President is fortunate enough to serve two terms, judicial challenges to rules may extend beyond the lifetime of a President's term. After the President has left office, a new President can use the litigation process strategically to reduce the chances that the rule will survive the judicial challenge, as noted in Part III of this Article.

There is another significant roadblock that arises when a President attempts to use notice and comment rulemaking to deregulate by revoking and revising existing legislative rules. Although agencies have discretion to change legislative rules by adopting a new legislative rule, agencies are required to acknowledge that they are changing the rules or the underlying factual or legal justifications for the rules and must explain reasonably why they are making those changes.[130] If they do not, courts will invalidate the changes as "arbitrary and capricious" in violation of the APA.[131] When factual findings and cost-benefit analyses support a prior rule, it may be more difficult for an administration to justify the change.[132]

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[130] *See* Encino Motorcars, L.L.C. v. Navarro, 136 S. Ct. 2117, 2126 (2016); F.C.C. v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009); Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005); Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42–43 (1983); *see also* Johnson, *Indeconstructible*, *supra* note 1, at 659; Glicksman & Hammond, *supra* note 26, at 1667–69. While a change in administration is an appropriate basis for re-evaluating prior rules, policies, and statutory interpretation, *see State Farm*, 463 U.S. at 59 (Rehnquist, J., concurring and dissenting), a change in administration alone is not a sufficient basis for a change in the rules, policies, or interpretations. Ultimately, agencies must explain how and why their factual, legal, or policy interpretations have changed and must demonstrate that the changes are both reasonable and within their statutory authority. *See* Johnson, *Indeconstructible*, *supra* note 1, at 689–90.

[131] Courts routinely apply "hard look" arbitrary and capricious review to agency rulemakings, requiring the agency to consider all of the relevant factors and alternatives to the choices that they make in adopting rules, regardless of whether the agency is changing an existing rule. *See, e.g.*, *State Farm*, 463 U.S. at 42–44. "'[H]ard look' review forces agencies to justify their actions on technocratic, statutory or scientific bases," rather than political bases. *See* Johnson, *Indeconstructible*, *supra* note 1, at 690; Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 5–7, 14 (2009). An agency's failure to provide a "concise general statement" of the basis and purpose for a final rule can also be grounds for a judicial declaration that the agency's conduct is arbitrary and capricious. *See* Glicksman & Hammond, *supra* note 26, at 1665–66.

[132] Noll & Revesz, *Regulatory Transitions*, *supra* note 1, at 6–7; *see* Johnson, *Indeconstructible*, *supra* note 1, at 692–93 (describing the rigorous explanation required when agencies change, repeal, or reverse a rule after building a strong record to

Finally, even if a presidential administration follows all of the procedures required by law to adopt rules, promulgates rules that are fully within agencies' statutory authority, and both acknowledges and rationally explains the reasons for reversing prior factual, legal, or policy justifications for rules that are being revoked, legislative rules are not laws; they can be revoked and replaced by a future Administration in the same way that they were adopted by a deregulatory Administration.[133]

President Trump's use of notice and comment rulemaking as an environmental deregulatory tool, and his ultimate long-term failure in that regard, vividly illustrates all of the limitations of the tool. A review of all of the environmental rules identified by the EPA in its regulatory agendas and finalized during the four years of the Trump Administration[134] demonstrates that (1) the Administration ignored

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support it); *see generally* Bethany A. Davis Noll & Denise A. Grab, *Deregulation: Process and Procedures That Govern Agency Decisionmaking in an Era of Rollbacks*, 38 ENERGY L.J. 269 (2017). The agency will need to discuss why the prior justifications for the rule are no longer supportable or why the agency has prioritized other factors within its discretion than were prioritized in the past to justify the decision. *See* Johnson, *Indeconstructible*, *supra* note 1, at 693. The Supreme Court has suggested that an agency may have to provide a more detailed justification for a change in policy when the new policy rests on factual findings that contradict those behind its earlier policy. *See Fox*, 556 U.S. at 515–16.

[133] *See* Noll & Revesz, *Regulatory Transitions*, *supra* note 1, at 57.

[134] In support of this Article, in order to compare EPA rulemaking under the Trump Administration to prior EPA rulemaking, I reviewed the regulations adopted by the EPA during the four years of the Trump Administration in the same manner as I reviewed the regulations adopted by the EPA from 2001 through 2005 in my article, *Ossification's Demise? An Empirical Analysis of EPA Rulemaking from 2001-2005*, *supra* note 63, at 780–82 (describing the research design). Specifically, I reviewed the regulatory agendas published by the EPA in the Federal Register between January 20, 2017 and January 20, 2021 and identified 214 rules that the EPA adopted as final rules during that time period. *See* Microsoft Excel Spreadsheet: *EPA Regulations 2017-2021*, https://www.envirolawteachers.com/eparegs17-21.html (last accessed June 14, 2022) [hereinafter EPA Regulations Spreadsheet]. I coded each regulation for the dates of publication of the proposed and final rules; effective date; whether the rule was a significant or economically significant rule; whether OMB reviewed the rule; whether the rule was a direct, final rule; statutory authority for the rule; and the amount of time it took the EPA to finalize the rule. *Id.* I also searched the Federal Register online to double-check that my search identified all of the "significant" or "economically significant" rules that the EPA adopted during the Trump Administration. *See* OFF. OF FED. REG. & U.S. GOV'T PUBL'G OFF., federalregister.gov (last visited Oct. 9, 2022) (I searched for "environmental protection agency" and then filtered by agency for environmental protection agency, type for rule, significance for "associated unified agenda deemed significant under EO 12866," and publication date between January 20, 2001 and January 20, 2005). Although the online search of the Federal Register

statutory procedures to develop rules faster than the EPA developed rules in the past;[135] (2) the EPA's significant and economically significant rules during the Trump Administration were challenged as frequently as the EPA's rules had been challenged in the past;[136] (3) federal courts upheld the significant and economically significant rules adopted by the EPA during the Trump Administration in only about 20 percent of the cases in which they were challenged, as opposed to the historical rate of about 70 percent;[137] and (4) the Biden Administration is revoking and replacing many of the environmental rollbacks that the Trump Administration achieved through legislative rules that courts did not invalidate.[138] In most of the cases where courts invalidated the rules of President Trump's EPA, the courts concluded that the Agency did not follow the procedures of the APA or environmental statutes, did not provide a reasonable explanation for the rules, or adopted rules that exceeded the Agency's authority under the environmental statutes.[139] The Administration was particularly sloppy in its aggressive attempts to suspend rules that had been finalized and became effective before President Trump took office.[140]

Accordingly, while the President achieved short-term deregulatory successes with the publication in the Federal Register of each rule eliminating environmental safeguards, the success was fleeting in light of the eventual judicial invalidation of the rules.

1. Pace of Rulemaking

While prior studies of EPA rulemaking found that it generally took the EPA two-and-a-half to three years to finalize major rules after publishing them as proposed rules,[141] my review, in 2008, of rules adopted by the EPA between 2001 and 2005 found that the Agency moved more quickly, finalizing rules identified as "significant" under

identified ninety-three significant or economically significant rules, I reviewed each of the rules identified by that search and discovered that fifteen of them were not "significant" or "economically significant" rules under Executive Order 12866.

[135] *See infra* Part III.C.1.

[136] *See infra* Part III.C.2.

[137] *See infra* Part III.C.3.

[138] Several organizations maintain trackers that identify the actions that the Biden Administration is taking to rescind, reverse, and revise environmental rollbacks of the Trump Administration. *See supra* note 80.

[139] *See infra* Part III.C.3.

[140] *See infra* Part IV.A.

[141] *See supra* note 119.

Executive Order 12866[142] in an average of 651 days[143] (just under two years) and rules identified as "economically significant" under that order[144] in an average of 566 days[145] (just over a year and three quarters).

During the Trump Administration, though, the EPA worked even faster. A review of the significant and economically significant rules adopted by the EPA during the Administration demonstrates that the Agency finalized significant rules in an average of 408 days (just over a year),[146] while they finalized economically significant rules in an average of 438 days.[147] On average, for all of the rules listed in the Agency's regulatory agendas that required notice and comment rulemaking, the Agency finalized the rules in 370 days.[148] While the

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> "Significant regulatory action" means any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order.

Proclamation No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993).

[143] *See* Johnson, *Ossification's Demise*, *supra* note 63, at 784.

[144] "Economically significant" rules are rules that may "[h]ave an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities." Proclamation No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4,1993).

[145] *See* Johnson, *Ossification's Demise*, *supra* note 63, at 784. For rules included in the regulatory agendas that were not significant rules or direct final rules, it took the EPA, on average, 605 days to finalize the rules. *Id.*

[146] *See EPA's Significant Regulations 2017-2021 (Excel File)*, THE ENV'T L. TCHRS. CLEARINGHOUSE, https://www.envirolawteachers.com/eparegs17-21.html (last accessed June 14, 2022) (follow hyperlink, then click on excel file "EPA's Significant Regulations 2017-2021"). The agency finalized sixty-five "significant" rules during the Trump Administration. *Id.* The median time for the agency to finalize those rules was 356 days. *Id.*

[147] *Id.* The agency finalized thirteen "economically significant" rules during the Trump Administration. *Id.* The median time for the agency to finalize those rules was 429 days. *Id.*

[148] *See EPA's Regulations That Used Notice and Comment Procedures 2017-2021 (Excel File)*, THE ENV'T L. TCHRS CLEARINGHOUSE, https://www.envirolawteachers.com/eparegs17-

Agency finalized rules much quicker than the George W. Bush administration did, Trump's EPA utilized the technique of adopting rules as "direct final rules"[149] far less frequently than President Bush's EPA did between 2001 and 2005.[150] The accelerated pace of Trump's EPA, coupled with the Agency's willful avoidance of APA-required procedures and environmental statutes, contributed to the agency's dismal record in judicial challenges.[151]

2. Challenges to Rulemaking

While Trump's EPA was far less successful in defending its regulations in court than the agency had been during prior administrations, the Agency's rules were challenged almost as frequently as they had been in the past. As noted above, several EPA administrators have asserted that about 75 percent of the Agency's

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21.html (last accessed June 14, 2022) (follow hyperlink; then click on excel file "EPA's Regulations That Used Notice and Comment Procedures 2017-2021"). The median time for the agency to finalize those rules was 300 days. *Id.*

[149] The Administrative Conference of the United States described this process as involving:

> [A]gency publication of a rule in the Federal Register with a statement that, unless an adverse comment is received on the rule within a specified time period, the rule will become effective as a final rule on a particular date. . . . However if an adverse comment is filed, the rule is withdrawn, and the agency may publish the proposed rule under normal notice-and-comment procedures.

Administrative Conference of the United States Adoption of Recommendations, 60 Fed. Reg. 43,108, 43,110 (Aug. 18, 1995). The process, which the EPA invented, is used for routine and noncontroversial rules as an alternative to issuing the rule without any notice and comment procedures, pursuant to the "good cause" exception to the notice and comment process for rules where the agency finds notice and public procedure "impracticable, unnecessary, or contrary to the public interest." *See* Administrative Procedure Act, 5 U.S.C. § 553(b)(3)(B).

[150] Only 8.4 percent of the rules reviewed for the Trump Administration (18 of 214) were adopted as "direct final rules." *See EPA's Regulations 2017-2021: Direct Final Rules (Excel File)*, THE ENV'T L. TCHRS CLEARINGHOUSE, https://www.envirolawteachers.com/eparegs17-21.html (last accessed June 14, 2022) (follow hyperlink, then click on excel file "EPA's Regulations 2017-2021: Direct Final Rules"), while more than a quarter of the rules reviewed for the Bush EPA in 2005 were adopted as "direct final rules," *see* Johnson, *Ossification's Demise*, *supra* note, 63 at 783. Trump's EPA, however, dispensed with notice and comment procedures for 17 percent of the rules reviewed in my study (37 of 214) (17 percent is calculated by counting up the rules that say "none" in the "proposed rule date" column and then adding the rules that say "yes" in the "direct final rule" column, excluding those already counted because they say "none" in the proposed rule date column, arriving at 37 rules). *See* EPA Regulations Spreadsheet, *supra* note 134.

[151] *See infra* Part III.C.3.

major rules are routinely challenged in court.[152] My 2008 review of EPA rules adopted between 2001 and 2005 found that approximately 40 percent of the significant rules adopted by the Agency during that time period were challenged in court,[153] but that 75 percent of the economically significant rules adopted during that time period were challenged in court.[154]

During the Trump administration, the EPA adopted thirteen "economically significant" rules and *every one of the rules* (100 percent) was challenged in court.[155] The Agency adopted seventy-eight significant or economically significant rules while President Trump was in office, and fifty-two of those rules (67 percent) were challenged in court.[156] Thus, Trump's EPA was sued almost as frequently as the Agency had been sued in the past.

3. Success in Rulemaking

Numerous studies across decades have consistently found that courts uphold agencies' actions about 70 percent of the time, or more, when they are challenged in court.[157] Several scholars have noted, however, that agencies in the Trump Administration fared far worse in court than those in the past. In reviewing agency actions taken during the first two years of the Trump Administration, Professors Robert Glicksman and Emily Hammond noted that agencies were routinely violating APA procedural requirements by improperly suspending the effective dates of final rules, failing to provide for notice and comment rulemaking, failing to meet mandatory deadlines, and failing to make

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[152] *See supra* note 128 and accompanying text.

[153] *See* Johnson, *Ossification's Demise*, *supra* note 63, at 785, n.116. Of the economically significant rules that were challenged, half were issued under the Clean Air Act. *Id.*

[154] *Id.* Half of those rules were rules issued under the Clean Air Act. *Id.*

[155] *See EPA's Significant Regulations 2017-2021: Judicial Challenges (Excel File)*, THE ENV'T L. TCHRS CLEARINGHOUSE, https://www.envirolawteachers.com/eparegs17-21.html (last accessed June 14, 2022) [hereinafter Judicial Challenges Spreadsheet] (follow hyperlink, then click on excel file "EPA's Significant Regulations 2017-2021: Judicial Challenges"). More than half of those rules challenged were adopted under the authority of the Clean Air Act. *Id.*

[156] *Id.* Thirty-nine of the sixty-five "significant" rules adopted by the EPA during the Trump Administration (60 percent) were challenged in court. *Id.* Not surprisingly, in light of the time required to adopt rules through notice and comment rulemaking, forty-four of the agency's "significant" or "economically significant" rules (56 percent) were adopted in 2020 or the first month of 2021. *See supra* note 146.

[157] *See supra* note 110 and accompanying text.

findings required by law when acting.[158] In addition, they noted that agencies were routinely failing to sufficiently justify or support their actions.[159] In particular, they noted that the Administration routinely attempted to suspend the effective dates or compliance dates for regulations without complying with the procedural or substantive requirements of the APA or other laws.[160] They lamented the "regulatory slop" of agencies but were pleased that courts seemed to be standing pat on traditional administrative and statutory law principles, invalidating agencies' actions that ignored those requirements.[161] They did not, however, attempt to quantify the rate at which courts were invalidating those actions.[162]

While Glicksman and Hammond did not quantify the judicial success rate of President Trump's agencies, many non-profit organizations kept a running tally of the Administration's failures during the four years that President Trump was in office and found that courts were upholding agencies decisions only about 20 percent of the time.[163] After the President left office, Bethany A. Davis Noll reviewed all of the Administration's agency actions that were challenged in court, and she concluded that the validation rate for agencies' actions was 23 percent.[164] She found that the validation rate was similar regardless of the subject matter or agency involved in the

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[158] *See* Glicksman & Hammond, *supra* note 26, at 1653–54.

[159] *Id.* at 1653–54, 1679–81.

[160] *Id.* at 1670.

[161] *See id.* at 1656. They were concerned, though, that their review was merely a preliminary review and that courts might not continue to strike down the Administration's actions, as a new "common law" of administrative law could be evolving. *Id.* at 1656–58.

[162] *Id.* at 1712 (suggesting that this would be a good topic for future research).

[163] *See* Institute for Policy Integrity Tracker, *supra* note 6 (agencies were successful in 54 of 246 challenges—21.9 percent—of the time).

[164] *See* Noll, *"Tired of Winning"*, *supra* note 3, at 357. Noll reviewed 278 agency actions that reached a resolution in court—either through a court decision or because the agency withdrew the action after it was challenged—and found that agencies prevailed in sixty-five cases. *Id.* at 385. If cases where agencies withdrew an action before the court resolved the challenge were excluded, Noll noted that agencies' success rate would still only be 26 percent. *Id.* at 386. Noll's study examined challenges to agency actions across all agencies in district court or a court of appeals. *Id.* at 379. She did not include lawsuits that were dismissed for reasons other than a finding that the agency complied with the law. *Id.* at 379. The largest category of cases in her study centered on the environment, energy, and natural resources. *Id.* at 382. Unlike my study, she did not limit her focus to agency regulations.

judicial challenge.[165] She also found that the validation rate did not improve over time, as some critics argued would happen when Trump administration agencies became more experienced in applying the APA and other laws.[166] In addition, she concluded that the low validation rate was not caused by activist and ideological judicial rulings.[167] Instead, she concluded—as Glicksman and Hammond had suggested earlier—that agencies' losses were caused in most cases by their failure to follow notice and comment requirements and other procedural requirements of the APA and other statutes, their failure to provide a reasoned explanation for decisions, and their failure to act within the authority granted to them by statute.[168] Courts were reliably imposing long-standing principles of administrative and statutory law.[169]

My review of the significant and economically significant rules adopted by President Trump's EPA confirms what Professor Noll and the non-profits found regarding challenges to actions by Trump Administration agencies generally. The EPA's success rate in cases challenging their significant and economically significant rules was 23

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[165] *See* Noll, *"Tired of Winning"*, *supra* note 3, at 389–90.

[166] *Id.* at 390–91.

[167] *Id.* at 359–60. Noll found that "while the Trump administration did have a higher win rate in front of partisan-aligned judges, its win rate in front of them was much lower than the average norm, suggesting that judicial ideology does not explain the overall loss rate." *Id.* at 360. Noll indicated that she measured the rates at which Democratic-appointed judges and Republican-appointed judges ruled for the Trump Administration agencies as part of her study. *Id.* at 393. While prior studies from other eras found validation rates between 68 percent to 80 percent when agency decisions match the political affiliation of judges, Noll found that the validation rate for Trump's agencies was only 45 percent in front of Republican-appointed judges. *Id.* Significantly, she noted that "no study has ever found that a presidential administration loses at this high of a rate in front of judges that are partisan-aligned with the president." *Id.* Professors Glicksman and Hammond informally reviewed sixty judicial opinions as part of the research for their article and noted that they found it "notable that it is not solely Democratic appointees who are rejecting Trump administration actions." Glicksman & Hammond, *supra* note 26, at 1715.

[168] Noll, *"Tired of Winning"*, supra note 3, at 358, 384, 401–02. Noll found that agencies lost on statutory issues in 63 percent of the cases and that 42 percent of the agencies' losses implicated the failure to provide a reasoned explanation for the agency's action. *Id.* at 397, 401. The agencies had significant problems justifying changes to the cost-benefit analyses adopted for rules that they were revoking or replacing. *Id.* at 358, 402–05.

[169] *See id.* at 360–61, 368–70 (courts consistently found that Trump agencies failed to provide a reasoned explanation for their decisions or acted outside of their statutory authority).

percent,[170] and in most cases, courts invalidated the EPA's rules because the Agency did not follow the procedures of the APA or environmental statutes, did not provide a reasonable explanation for the rules, or adopted rules that exceeded the Agency's authority under the environmental statutes.[171]

As noted above, the EPA adopted thirteen economically significant rules during the Trump administration, and every rule was challenged.[172] By the summer of 2022, though, courts had issued opinions upholding or invalidating the EPA's rules in only three of those cases.[173] Significantly, the EPA's success rate in those cases was *0 percent*, as courts remanded, and sometimes vacated, the Agency's rule in *every case*.[174] The Agency fared a little better when focusing on

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[170] *See infra* note 176.

[171] *See infra* notes 178–181 and accompanying text.

[172] *See supra* note 155.

[173] *See Judicial Challenges Spreadsheet*, *supra* note 155. As noted in Part III of this Article, litigation challenging many of the EPA rules adopted during the Trump Administration (including economically significant rules and significant rules) has been held in abeyance by courts at the request of the Biden Administration or has been dismissed. *See infra* Part IV.B. *See also Judicial Challenges Spreadsheet*, *supra* note 155.

[174] *See* A Cmty. Voice v. EPA, 997 F.3d 983, 985–86, 995 (9th Cir. 2021) (remanding, without vacatur, EPA's review of the dust lead hazard standards under TSCA); Am. Lung Ass'n v. EPA, 985 F.3d 914, 930 (D.C. Cir. 2021) (vacating and remanding the Affordable Clean Energy rule and repeal of the Clean Power Plan); *see, e.g.*, Am. Fuel & Petrochemical Mfrs. v. EPA, 937 F.3d 559 (D.C. Cir. 2019) (remanding, without vacatur, EPA's renewable fuel volume standards for 2018 and biomass). On June 30, 2022, though, the Supreme Court reversed the D.C. Circuit's decision that vacated the Affordable Clean Energy rule and repeal of the Clean Power Plan, and the Court remanded the case to the D.C. Circuit. *See* West Virginia v. EPA, No. 20-1530, 2022 WL 2347278, at **10, 18 (June 30, 2022). Several courts vacated and remanded a fourth rule, the navigable waters protection rule, but none issued an opinion that addressed the validity of the rule. *See, e.g.*, Pueblo of Laguna v. Regan, No. 1:21-cv-00277, 2021 U.S. Dist. LEXIS 179489, at *2–3 (D.N.M. Sept. 21, 2021); Pasqua Yaqui Tribe v. EPA, 557 F. Supp. 3d 949, 956–57 (D. Ariz. 2021); Memorandum and Order of Dismissal at 1–3, Conservation L. Found. V. EPA, No. 1:20-cv-10820 (D. Mass. Sept. 1, 2021), ECF No. 122; Order Granting Motion to Remand at 1–2, California v. Regan, No. 20-cv-03005 (N.D. Cal. Sept. 16, 2021), ECF No. 271; Order Granting Motion to Remand, Waterkeeper All., Inc. v. EPA, No. 18-cv-03521 (N.D. Cal. Sept. 16, 2021), ECF No. 125. *See also* S.C. Coastal Conservation League v. Reagan, No. 2:20-cv-01687, 2021 U.S. Dist. LEXIS 132031, at *3 (D.S.C. July 14, 2021) (remanding without vacatur). Before the rule was vacated, a district court in Colorado issued a stay of the rule, Colorado v. EPA, 445 F. Supp. 3d 1295, 1313 (D. Colo. 2020), but the stay was overturned on appeal when the Tenth Circuit concluded that the plaintiffs had failed to demonstrate irreparable injury from implementation of the rule. *See* Colorado v. EPA, 989 F.3d 874, 890 (10th Cir. 2021).

judicial challenges to significant rules in addition to economically significant rules. Although fifty-three of the significant or economically significant rules adopted by the EPA during the Trump Administration were challenged in court, courts issued opinions upholding or invalidating the rules in only fifteen of those cases by the summer of 2022.[175] As of that time, courts upheld the EPA's actions in *23 percent* of those cases.[176] Courts upheld the Agency's rules in three cases, invalidated or vacated the rules in ten cases, and upheld portions of the rules—while invalidating other portions—in two cases.[177]

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[175] *See Judicial Challenges Spreadsheet, supra* note 155. In calculating validation rates for EPA, my study only focused on cases where a court reached a determination regarding whether the EPA complied with statutory requirements or adequately explained its decision and did not include cases where a plaintiff voluntarily dismissed the lawsuit or the EPA voluntarily withdrew its action before the court ruled on the validity of the agency's action. *See, e.g.*, All. for Affordable Energy v. EPA, No. 21-01059 (D.C. Cir. Feb. 11, 2021) (plaintiffs voluntarily dismissed the lawsuit); Env't Def. Fund v. EPA, No. 19-01222 (D.C. Cir. Oct. 23, 2019) (court vacated rule and remanded to the EPA at the agency's request).

[176] Courts upheld EPA rules in three of the thirteen cases where it was clear that the court was upholding or invalidating the agency's rule. *See, e.g.*, Clean Water Action v. EPA, 936 F.3d 308 (5th Cir. 2019) (upholding a rule postponing compliance dates for effluent limit guidelines for steam electric power generating point sources); Idaho Conservation League v. Wheeler, 930 F.3d 494 (D.C. Cir. 2019) (upholding challenges to financial responsibility rules under Section 108(b) of CERCLA for the hardrock mining industry); Safer Chems. v. EPA, 791 F. App'x 653 (9th Cir. 2019) (upholding challenges to the prioritization rule and granting the EPA's request to voluntarily remand three provisions of the rule). Including the three cases involving challenges to economically significant rules identified above, courts vacated or invalidated the EPA's rules in ten cases where it was clear that the court was upholding or invalidating the agency's rule. *See, e.g.*, Am. Fuel & Petrochemical Mfrs. v. EPA, 3 F.4th 373 (D.C. Cir. 2021) (vacating a portion of the E15 flexibility rule under the Clean Air Act); Sierra Club v. EPA, 985 F.3d 1055 (D.C. Cir. 2021) (vacating several provisions of EPA's 2015 and 2018 rules implementing the NAAQS for ozone); Air All. Hous. v. EPA, 906 F.3d 1049 (D.C. Cir. 2018); S.C. Coastal Conservation League v. Pruitt, 318 F. Supp. 3d 959 (D.S.C. 2018) (enjoining the rule suspending the 2015 WOTUS rule); Sierra Club v. Pruitt, 293 F. Supp. 3d 1050 (N.D. Cal. 2018) (vacating the formaldehyde delay rule); State of New York v. EPA, 781 F. App'x 4 (D.C. Cir. 2019) (vacating the good neighbor rule under the Clean Air Act); Env't Def. Fund v. EPA, 515 F. Supp. 3d 1135 (D. Mont. 2021) (finding that the EPA unlawfully made the transparency rule effective upon publication). In addition to those thirteen cases, in two other cases courts upheld some portion of significant rules that the EPA adopted while striking down other portions of the rules. *See, e.g.*, NRDC v. EPA, 961 F.3d 160 (2d Cir. 2020) (vacating portions of the EPA's mercury reporting rule and upholding other portions of the rule); Safer Chems. v. EPA, 943 F.3d 397 (9th Cir. 2019) (upholding some portions of the EPA's risk evaluation rule under TSCA and invalidating others). Those two rules were not included in the calculation of the validation rate for EPA rules.

[177] *See Judicial Challenges Spreadsheet, supra* note 155.

In 70 percent of the cases where courts invalidated or vacated the EPA's significant or economically significant rules, courts found that the EPA acted outside of their statutory authority.[178] In 30 percent of the cases where courts invalidated or vacated those rules, courts found that the EPA violated procedures of the APA or an environmental statute.[179] Similarly, in 30 percent of the cases where the courts invalidated or vacated those rules, courts concluded that the EPA acted

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[178] Seven of the ten opinions invalidating or vacating the EPA's significant or economically significant rules held that the agency acted outside of statutory authority when adopting the rule. *See Am. Fuel*, 3 F.4th at 384 (the EPA did not have authority under 42 U.S.C. § 7545(h)(4) to grant a waiver for E15 gasoline in its rule, as the Section only authorizes waivers for E10 gasoline); *A Cmty. Voice*, 997 F.3d at 986 (finding that the EPA failed, as required by statute, to identify all levels of lead that resulted in adverse health effects in setting the dust-lead hazard standards, lead-based paint definition and soil lead hazard standards, and that the EPA violated a statutory duty to update the lead-based paint hazard standard); *Sierra Club*, 985 F.3d at 1056 (finding that provisions of the EPA rule establishing inter-precursor trading for permitting offsets violated 42 U.S.C. § 7503, the provisions regarding contingency measures violated 42 U.S.C. § 7502(c)(9), and that the EPA's milestone compliance determination methodology violated 42 U.S.C. § 7511a(g)(1)); Am. Lung Ass'n v. EPA, 985 F.3d 914, 995 (D.C. Cir. 2021) (finding that the EPA misconstrued Section 111 of the Clean Air Act as requiring that air quality standards under that Section must be limited to controls within the fence line); *Air All. Hous.*, 906 F.3d at 1053 (delay rule violated 42 U.S.C. § 7607(d)(7)(B) which explicitly limited the agency's authority to postpone the effectiveness of the rule); *Pruitt*, 293 F. Supp. 3d at 1061 (the EPA's rule delaying the compliance deadline for formaldehyde emission standards exceeded the agency's authority under the Composite Wood Products Act); *State of New York v. EPA*, 781 F. App'x at 6 (the EPA's rule diminished, but would not eliminate, states' significant contribution to downwind non-attainment when 42 U.S.C. § 7410(a)(2)(D)(i)(I) requires elimination of the contribution).

[179] In three of the ten opinions invalidating or vacating the EPA's significant or economically significant rules, the court held that the agency failed to follow procedures required by the APA or an environmental statute. *See Am. Fuel*, 3 F.4th 373 (the EPA failed to consult with the Fish and Wildlife Service and National Marine Fisheries Service and did not determine whether the rule would affect endangered or threatened species or critical habitat as required by the Endangered Species Act); *Env't Def. Fund*, 515 F. Supp.3d at 1152 (D. Mont. 2021) (the EPA violated the APA by making the final rule effective immediately, instead of delaying the effective date for 30 days); *S.C. Coastal Conservation League*, 318 F. Supp.3d at 969 (the EPA violated the APA by refusing to solicit public comment on the merits of suspending the Waters of the United States (WOTUS) rule and replacing it with previous regulations and guidance).

arbitrarily and capriciously.[180] In several of the cases, courts rejected the EPA's attempts to suspend or delay the effective dates of rules.[181]

My study also briefly explored the issue of partisan judicial decision-making in a manner similar to that employed by Professor Noll in her study of judicial review of Trump agency actions generally,[182] as I examined the rate at which Democratic and Republican-appointed judges upheld the EPA's rules in the cases where courts made a determination regarding whether the EPA acted within its statutory authority, followed procedural requirements, or acted unreasonably.[183] In the thirteen cases where it was clear that the court either upheld or invalidated the Agency's rule,[184] judges appointed by a Democratic president upheld the EPA's action 21 percent of the time, while judges appointed by a Republican president

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[180] In three of the ten opinions invalidating or vacating the EPA's significant or economically significant rules, the court held that the agency acted arbitrarily and capriciously. *See A Cmty. Voice*, 997 F.3d at 986 (finding that the EPA's failure to update the lead-based paint definition without adequately explaining why the agency lacked the data to update the definition was arbitrary and capricious); *Am. Lung Ass'n*, 985 F.3d at 930 (finding that EPA's extension of the compliance deadlines under Section 111(d) of the Clean Air Act were arbitrary and capricious because the agency failed to consider an important aspect of the problem—the need for speed in compliance to limit harm to health and the environment); Air All. Hous. v. EPA, 906 F.3d 1049 (D.C. Cir. 2018) (the EPA did not adequately explain its change in position regarding the timing of the effective date and compliance dates for the chemical disaster rule). In addition to those cases, a South Carolina district court held that the EPA's failure to provide an opportunity for comment on the rule suspending the WOTUS rule violated the APA procedures *and* was arbitrary and capricious. *See S.C. Coastal Conservation League*, 318 F. Supp.3d at 967 (the EPA failed to provide a reasoned analysis to support its suspension of the WOTUS rule).

[181] *See Am. Lung Ass'n*, 985 F.3d at 930 (finding that the EPA's extension of the compliance deadlines under Section 111(d) of the Clean Air Act was arbitrary and capricious because the agency failed to consider an important aspect of the problem—the need for speed in compliance to limit harm to health and the environment)*; Air All. Hous.*, 906 F.3d at 1053 (delay rule violated 42 U.S.C. § 7607(d)(7)(B), which explicitly limited the agency's authority to postpone the effectiveness of the rule); *S.C. Coastal Conservation League*, 318 F. Supp. 3d at 969 (the EPA violated the APA by refusing to solicit public comment on the merits of suspending the WOTUS rule and replacing it with previous regulations and guidance); *Pruitt*, 293 F. Supp. 3d at 1061 (the EPA's rule delaying the compliance deadline for formaldehyde emission standards exceeded the agency's authority under the Composite Wood Products Act).

[182] *See* Noll, *"Tired of Winning"*, *supra* note 3, at 360.

[183] *See* Microsoft Excel Spreadsheet: *Political Affiliation of Judges,* https://www.envirolawteachers.com/eparegs17-21.html (last accessed June 14, 2022) [hereinafter Political Affiliation Spreadsheet].

[184] *See supra* notes 174 and 176.

upheld the EPA's action 42 percent of the time.[185] Although judges appointed by Republican presidents were more likely to uphold rules adopted by Trump's EPA, the validation rate for those judges was significantly lower than the 68 percent to 80 percent validation rates found in prior studies examining partisan judicial review of agency actions in other time frames.[186]

Overall, therefore, while legislative rulemaking is often the most enduring tool for deregulation available to a president acting without the assistance of other branches of government, President Trump's EPA was not able to use the tool effectively because the Agency ignored bedrock rules of administrative and statutory law, and courts enforced those rules frequently without respect to the political affiliation of the judges deciding the cases.

IV. RISE OF UNCONVENTIONAL ROLLBACK TOOLS

While the Trump administration utilized traditional tools to roll back environmental protections, it also employed less traditional tools, like the Congressional Review Act, and it employed suspensions and litigation abeyances much more aggressively than prior Administrations in an effort to deregulate.[187] Although the Congressional Review Act rescissions survived beyond the Administration and the litigation abeyances provided the Administration with strategic advantages as it moved forward to revoke or replace the rules that were being challenged in court, many of the

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[185] In the three cases where courts upheld the EPA's rules, six judges appointed by Republican presidents and three judges appointed by Democratic presidents joined the majority opinions, and there were no dissenting judges. *See* Political Affiliation Spreadsheet, *supra* note 183. In the ten cases where courts invalidated the EPA's rules or enjoined or remanded the rules because the agency failed to follow required procedures, eleven judges appointed by Republican presidents and eleven judges appointed by Democratic presidents joined the majority opinions, while two judges appointed by Republican presidents dissented from those opinions. *Id.* Overall, therefore, judges appointed by Democratic presidents ruled in favor of the EPA three times and against the agency eleven times, so they voted to uphold the agency in 21.43 percent of the cases (three of fourteen). Judges appointed by Republican presidents ruled in favor of the EPA eight times and against the agency eleven times, so they voted to uphold the agency in 42.1 percent of the cases (eight of nineteen).

[186] *See* Noll, *"Tired of Winning", supra* note 3, at 393.

[187] *See* Noll & Revesz, *Regulatory Transitions*, *supra* note 1, at 3. *See also* Bethany Davis Noll & Richard L. Revesz, *Presidential Transitions: The New Rules*, 39 YALE J. ON REG. 1043, 1045 (2022).

suspensions were judicially overturned before President Trump left office.[188]

Paradoxically, though, the Administration's use of the Congressional Review Act and its increased use of suspensions and litigation abeyances as deregulatory tools could actually make it more difficult for future Administrations to deregulate without the assistance of Congress or the courts. After all, the Congressional Review Act, suspensions, and litigation abeyances can be used equally effectively to roll back executive actions that loosen regulatory requirements as they can be used to roll back *regulatory* requirements. In fact, the Biden Administration has done just that,[189] and its efforts demonstrate that when agencies follow the procedures required by law and adhere to the limits of their statutory authority, the suspension tool can be used much more effectively than the Trump Administration used it. To some degree, therefore, the Trump Administration weaponized several tools that can now be used more effectively to reverse deregulatory efforts of an outgoing administration.[190]

A. *Suspensions*

It is not unusual for a President to order agencies to suspend work on rules that have not been published as final rules and to suspend—for a short time period—the effective date of rules that have been published as final rules in the Federal Register but have not yet taken effect.[191] The Trump Administration went further, however, suspending rules that had already taken effect and suspending them for indefinite periods of time.[192] Suspension of a rule that an agency wants to change is beneficial to agencies because it is usually harder to change rules after they have been implemented, and regulated entities have changed their behavior in reliance on the rules.[193] In addition, if

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[188] *See supra* note 77.

[189] *See* Noll & Revesz, *Presidential Transitions, supra* note 187, at 1046.

[190] *See* Noll & Revesz, *Regulatory Transitions, supra* note 1, at 4–5; Noll & Revesz, *Presidential Transitions, supra* note 187, at 1043. Professors Noll and Revesz argue that future administrations are likely to continue to rely on the Trump Administration's aggressive strategies because congressional gridlock and the filibuster will force Presidents to rely on executive action to advance policies, and because the increasing polarization of political parties will lead to increased pressure on Presidents to aggressively roll back the policies of their predecessors. Noll & Revesz, *Presidential Transitions, supra* note 187, at 1101.

[191] *See supra* notes 65–67.

[192] *See* Noll & Revesz, *Regulatory Transitions, supra* note 1, at 3, 9, 33–34.

[193] *Id.* at 33–34.

a rule that strengthens regulatory requirements is suspended, when the agency ultimately repeals it, the lack of implementation may make the repeal seem less significant, while the cost savings of the repeal will be inflated (since the rule was never fully implemented).[194] Finally, even if suspensions are overturned in court, a President can win short-term political points by suspending rules.[195]

The Trump Administration, however, did not use suspensions effectively to achieve long-term deregulatory success because the Administration failed to comply with traditional principles of administrative and statutory law when suspending rules after they had already gone into effect. The APA explicitly addresses the effective date of rules, and agencies cannot defer the responsibilities of regulated entities to comply with rules that are effective without going through notice and comment rulemaking.[196] Although courts previously ruled that suspensions of rules that had already taken effect and indefinite suspensions of rules were the equivalent of rule revocations and could only be accomplished through notice and comment rulemaking,[197] the Trump Administration frequently attempted to justify the suspensions as exempt from the notice and comment requirements under the "good cause" exception or under Section 10 of the APA, 5 U.S.C. § 705.[198] Courts repeatedly rejected those defenses, finding that the Administration's suspensions violated the procedures of the APA or were outside the Agency's statutory authority.[199] Although the Trump Administration failed to adhere to

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[194] *Id.* at 9–10, 43–45. If the rule had not been suspended, and regulated entities had already spent money on compliance, revocation of the rule would not save the regulated entities the money they had already spent on compliance. *Id.* at 44. When a rule is suspended, agencies can also rely on "implementation uncertainties" to justify the repeal. *Id.* at 46. For instance, if a deregulatory agency wants to repeal a rule that might create market uncertainties if implemented, it will be easier for the agency to repeal the rule if the rule was never implemented than if the rule was implemented and did not cause any market volatility. *Id.* at 46. Professors Bethany Davis Noll and Richard Revesz argue that anti-regulatory Presidents can achieve other benefits from suspensions, even though courts quickly overturn many of the suspensions because the judicial losses discredit the legitimacy of agencies, which may be a goal of an anti-regulatory administration. *Id.* at 46.

[195] *Id.* at 46.

[196] *See* Glicksman & Hammond, *supra* note 26, at 1666–67.

[197] *See* Noll & Revesz, *Regulatory Transitions*, *supra* note 1, at 36–37.

[198] *Id.* at 37–40. *See also* Johnson, *Indeconstructible, supra* note 1, at 673–74.

[199] *See* Noll & Revesz, *Regulatory Transitions*, *supra* note 1, at 37–40. *See, e.g.*, Clean Air Council v. Pruitt, 862 F.3d 1 (D.C. Cir. 2017); California v. U.S. Bureau of Land Mgmt., 277 F. Supp. 3d 1106 (N.D. Cal. 2017).

fundamental principles of administrative and statutory law, future administrations might utilize the tool to effectively roll back deregulatory efforts of prior Administrations, leading to what Professors Bethany Davis Noll and Richard Revesz refer to as "rollback whiplash."[200] Future administrations, though, may have incentives to utilize suspensions even when the suspensions are legally suspect, as short-term suspensions may evade judicial review either because more permanent regulatory action supercedes them[201] or because judicial barriers prevent legal challenges.[202]

B. *Abeyances*

The Trump Administration also expanded the use of abeyances in litigation as a deregulatory tool.[203] Most administrations have sought to have judicial challenges to actions taken by prior administrations held in abeyance if the new Administration plans to revoke or reverse the action taken by the prior Administration.[204] The reasons for this are straightforward. First, abeyances save judicial resources (and administration resources) because the new Administration is taking actions that will obviate the need for a court to decide the legality of the actions of the prior Administration.[205] Second, if a court has stayed the action of the prior Administration while reviewing it, the new Administration benefits because the abeyance extends the duration of the stay.[206] Third, abeyances can prevent a court from upholding the action of the prior Administration, which may make it more difficult for the new Administration to revoke or reverse the action.[207] Furthermore, the Justice Department is generally reluctant to abandon

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[200] *See* Noll & Revesz, *Presidential Transitions, supra* note 187, at 1102.

[201] *See* Noll & Revesz, *Regulatory Transitions*, *supra* note 1, at 10, 41. For instance, when the EPA relied on 5 U.S.C. § 705 to indefinitely suspend a wastewater discharge limit rule and the agency was sued, it followed notice and comment procedures to suspend the rule before the court ruled on the challenger's summary judgment motion—the court ultimately upheld the agency's suspension. *See* Clean Water Action v. EPA, 936 F.3d 308 (5th Cir. 2019).

[202] *See* Noll & Revesz, *Regulatory Transitions*, *supra* note 1, at 10, 41–43 (discussing the cost and time required for litigation and standing limitations).

[203] *See id.* at 3. Abeyances are court orders that suspend briefing, argument, and decisions in pending cases during the period of abeyance. *Id.* at 24.

[204] *Id.* at 8–9.

[205] *See id.* at 24–25. If the agency decides, on the other hand, to not change the rule being challenged, the court can proceed with the challenge at that time. *Id.*

[206] *Id.* at 9.

[207] *Id.* at 25–26.

a litigation position in support of a rule until a new Administration has repealed or modified the rule.[208]

While most Administrations have utilized abeyances in litigation in light of the benefits outlined above, Administrations usually only sought abeyances in cases where briefing had not been completed.[209] The Trump Administration, in contrast, often sought abeyances in cases where briefing was completed *and* oral argument was completed.[210] Unlike the judicial response to Trump's suspensions, though, courts generally agreed to hold cases in abeyance, even when intervenors supporting the rules or petitioners challenging the rules opposed abeyance.[211]

Although the Administration was able to effectively expand the use of abeyances to facilitate the rollback of environmental rules through other means, the tool can be used equally effectively in the future by administrations that seek to hold challenges to deregulatory actions in abeyance while the administration uses other tools to effect longer term rollbacks of the deregulatory rollbacks.

C. *Use of the New Strategies by the Biden Administration*

Although the Trump Administration broke new ground in the manner that it used the Congressional Review Act, suspensions and abeyances as deregulatory tools have been institutionalized as the Biden administration has effectively utilized them to roll back many of the Trump Administration's deregulatory efforts.[212] While the Biden Administration did not use the Congressional Review Act as frequently as the Trump Administration, Congress used it to overturn three of President Trump's rules within months after President Biden took office.[213] This is significant, as it marks the first time since the law was

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[208] Noll & Revesz, *Regulatory Transitions*, *supra* note 1, at 25–26. *See also* Jody Freeman, *Limits of Executive Power*, *supra* note 65, at 551.

[209] Noll & Revesz, *Regulatory Transitions*, *supra* note 1, at 8–9, 27–28.

[210] *Id.* at 9, 28–29.

[211] *See id.* at 30.

[212] *See* Noll & Revesz, *Presidential Transitions*, *supra* note 187, at 1046.

[213] *See* Act of June 30, 2021, Pub.L. No. 117-24, 135 Stat. 296 (disapproval of a lender rule from the Comptroller of the Currency); Act of June 30, 2021, Pub.L. No. 117-23, 135 Stat. 295 (disapproval of the EPA rule addressing methane emissions from the oil and gas sector); Act of June 30, 2021, Pub.L. No. 117-22, 135 Stat. 294 (disapproval of EEOC rule revising settlement process). Congress introduced resolutions to rescind six rules of the Trump Administration but only three made it to the President for signature. Noll & Revesz, *Presidential Transitions*, *supra* note 187, at 1046.

enacted almost three decades ago that a Democratic President used it to rescind a rule.[214]

The Biden Administration also continued the expanded use of suspensions to roll back deregulatory efforts of the TrumpAadministration.[215] Unlike the Trump Administration, though, the Biden Administration has generally utilized notice and comment procedures to suspend the deregulatory provisions or has properly justified the suspensions under section 10 of the APA, 5 U.S.C. § 705.[216] In addition, the Biden Administration has avoided, in most cases, using suspensions to extend compliance dates for rules that were already in effect.[217]

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[214] *See* Noll & Revesz, *Presidential Transitions*, *supra* note 187, at 1046. Although it was significant that the Biden Administration was able to use the Act to rescind three rules, many organizations hoped that it would be used more broadly. *See, e.g.*, Issac Arnsdorf et al., *Tracking the Trump Administration's "Midnight Regulations,"* PRO PUBLICA (Feb. 8, 2021), https://projects.propublica.org/trump-midnight-regulations (identifying eighty-one controversial rules that were eligible for rescission under the Congressional Review Act after President Biden took office). The Democrats, however, held a very slim majority in Congress and focused their energy and resource on confirming executive nominations and approving a budget in lieu of rescinding Trump-era rules. *See* Noll & Revesz, *Regulatory Transitions*, *supra* note 1, at 21.

[215] *See* Noll & Revesz, *Presidential Transitions*, *supra* note 187, at 1084–85.

[216] *Id.* at 1081. President Biden's Chief of Staff, Ronald Klain, issued guidance to agencies on inauguration day that urged agencies to consider postponing, for sixty days, the effective dates of rules that were not yet effective and to consider opening a thirty-day comment period on suspensions of rules pursuant to the guidance. *See* Memorandum for the Heads of Executive Departments and Agencies, 86 Fed. Reg. 7424 (Jan. 20, 2021). The Biden Administration has also relied on the "good cause" exception to notice and comment rulemaking procedures to adopt "interim final rules" to suspend rules. *See* Noll & Revesz, *Presidential Transitions*, *supra* note 187, at 1094. By using this process, as long as the Agency can demonstrate that it is adopting an interpretive rule, statement of policy, or procedural rule, or has "good cause" to dispense with the notice and comment procedures, the Agency can rescind or replace a rule first and then undergo the notice and comment procedures. *Id.* at 1091. The Biden Administration used the "interim final rule" approach to rescind a Trump-era EPA rule outlining best practices for "cost-benefit" analyses in Clean Air Act rulemaking, *see* Rescinding the Rule on Increasing Consistency and Transparency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process, 86 Fed. Reg. 26,406, 26,407 (May 14, 2021); to extend the deadline for agencies to develop procedures to implement Trump-era revisions to environmental reviews under the National Environmental Policy Act (which the Biden Administration planned to rescind), *see* Deadline for Agencies to Propose Updates to National Environmental Policy Act Procedures, 86 Fed. Reg. 34,154 (June 29, 2021); and to revoke a rule that limited the use of guidance documents by the Department of Interior. *See* Procedures for Issuing Guidance Documents, 86 Fed. Reg. 19,786 (Apr. 15, 2021).

[217] *See* Noll & Revesz, *Presidential Transitions*, *supra* note 187, at 1090.

Finally, the Biden Administration has continued the expanded use of litigation abeyances as a tool to rollback policies of a prior administration. The new Administration has sought and received abeyances in lawsuits after the parties have briefed and argued the case as frequently as the Trump Administration, and the new Administration has sought abeyances over the objection of petitioners and intervenors.[218] The Biden Administration has used other litigation strategies to rollback Trump-era policies as well. For instance, in cases where courts previously invalidated rules from President Trump's agencies, the Biden Administration has withdrawn appeals of those decisions.[219] Further, the Biden Administration has asked courts to vacate, as legally invalid, Trump-era rules that are being challenged and to remand them to the agency, even when the Administration has not taken final action to reverse or rescind the challenged rules.[220]

While the Trump Administration aggressively expanded the use of the Congressional Review Act, suspensions, and abeyances to deregulate, the Biden Administration has used the same tools to roll back the deregulatory efforts of the Trump Administration. By expanding those strategies, the Trump Administration ultimately made it more difficult for future administrations to deregulate without the assistance of Congress or the courts.[221]

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[218] *Id.* at 1062–63, 1065–67. The Biden administration received abeyances in at least six cases where the court had already heard oral argument, while the Trump administration only secured an abeyance of litigation after oral argument once. *Id.* at 1066–67.

[219] *Id.* at 1072. Since it is necessary for all parties to agree to the withdrawal of the appeal, an Administration usually does not use this tool if there are intervenors involved in the litigation who would like to defend the challenged action in the absence of defense from the government. *Id.*

[220] *Id.* at 1063, 1075, 1077. The Biden administration used this strategy to roll back four deregulatory policies adopted by the Trump administration EPA. *Id.* at 1077–79. An Administration might also seek remand of a rule to the agency *without vacatur* as a litigation strategy to roll back the rules of a prior Administration. *Id.* at 1070. This strategy has advantages similar to abeyance of litigation, in that it suspends judicial consideration of the rule while the agency takes other actions to revoke or revise it. *Id.* at 1070–71. While challenges that are in abeyance can be revived by courts at any time, opponents will need to file new lawsuits to challenge agency rules when courts have remanded the rules to the agency. *Id.* at 1071.

[221] As Professors Bethany Davis Noll and Richard Revesz note, the expanded use of these tools has increased the scope of Executive actions that can be easily rolled back by a subsequent Administration. Whereas rules and policies adopted during the last few months of an Administration have always been vulnerable to reversal through traditional tools and the less conventional tools used by the Trump administration, the expanded use of less conventional tools makes it easier for a new Administration to

V. LEAVE IT TO THE JUDICIARY

While a President may find it very difficult to deregulate without the assistance of Congress or the judicial branch, there are some ominous signs that suggest that deregulatory Presidents may not be acting alone in the future. Federal district courts and circuit courts stymied many of President Trump's deregulatory efforts by striking down his Administration's actions that violated bedrock principles of administrative and statutory law. Some of those bedrock principles, however, seem to be eroding because the Supreme Court has taken several steps to arrogate power to the judicial branch, which is becoming exceedingly conservative and anti-regulatory.[222] This is happening in several ways.

First, the Court has gradually moved away from according *Chevron* deference to legislative rules that agencies adopt. The last time the Court upheld an agency's legislative rule using the *Chevron* analysis was during the 2015 term.[223] Since then, the Court has had numerous opportunities to uphold agencies' rules under *Chevron* but has instead created new exceptions to the application of *Chevron* or has found that the Congressional language in the statutes being interpreted is clear, so that the Court has not needed to accord deference to the agencies'

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reach back further in time during the prior Administration to roll back rules and policies. *See* Noll & Revesz, *Regulatory Transitions*, *supra* note 1, at 65. Rules that are completed but are not effective before an Administration leaves office can be suspended. *See* Noll & Revesz, *Presidential Transitions*, *supra* note 187, at 1047, 1080. Even if a rule is adopted early enough that it cannot be rescinded under the Congressional Review Act, it could be challenged in court, and if it is not upheld through a final order that is not subject to appeal prior to the change in Administration, the incoming Administration could use abeyances and other litigation strategies to suspend it while the Administration uses other tools to rescind and revise it. *See* Noll & Revesz, *Regulatory Transitions*, *supra* note 1, at 12. In order to maximize the durability of Executive actions, therefore, Presidents have more incentives to adopt rules and policies within their first two years in office. *See id.* at 11, 66. Paradoxically, though, it may be difficult to install the agency leaders, develop the policies, and adopt the rules in a durable fashion within that time frame. *See id.* at 11–12, 55, 66–70. Consequently, it may be necessary for a President to serve two terms in order to adopt any long-standing rules or policies. *See id.* at 4, 55; Noll & Revesz, *Presidential Transitions*, *supra* note 187, at 1047.

[222] *See* Nathan Richardson, *Deference is Dead (Long Live* Chevron*)*, 73 RUTGERS U. L. REV. 441, 509 (2021); Cass R. Sunstein, Chevron *as Law*, 107 GEO. L.J. 1613, 1618 (2019) (describing the struggle over *Chevron* as part of "a larger battle over the legitimacy of the administrative state"); *see generally* Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1 (2017) (describing the administrative state as "under siege").

[223] *See* Cuozzo Speed Techs., LLC v. Lee, 579 U.S. 261, 276–77, 280 (2016).

statutory interpretations.[224] This is a stark contrast to the approach that the Court took even a few years before the last opinion upholding agency action under *Chevron*. Indeed, a majority of the Court relied on *Chevron* to uphold agencies' actions twice during each of the 2011–2013 terms.[225]

While *Chevron* deference was once a bedrock principle of administrative law, the Supreme Court and lower federal courts have created numerous exceptions to the doctrine over the years.[226] In addition, over time, courts have increasingly ignored the doctrine "in cases where it should be used without acknowledging *Chevron* or justifying the decision to ignore it with reference to any exception."[227]

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[224] *See, e.g.*, Johnson v. Guzman Chavez, 141 S. Ct. 2271, 2291–92 n.9 (2021) (stating that *Chevron* does not apply when the statute is clear); HollyFrontier Cheyenne Refin., LLC v. Renewable Fuels Ass'n, 141 S. Ct. 2172, 2180 (2021) (declining to apply *Chevron* because the government did not request *Chevron* deference); Sturgeon v. Frost, 139 S. Ct. 1066, 1080 n.3 (2019) (determining that the statute is clear); Pereira v. Sessions, 138 S. Ct. 2105, 2113 (2018) (noting that the statute is clear).

[225] *See* Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 331 (2014) (7-2 decision with Justices Thomas and Alito dissenting in part); EPA v. EME Homer City Generation, L.P., 572 U.S. 489, 496, 524 (2014) (6-2 decision in which Justices Scalia and Thomas dissented and Justice Alito took no part); City of Arlington v. FCC, 569 U.S. 290, 293, 307 (2013) (6-3 decision with Roberts, Kennedy, and Alito dissenting); Sebelius v. Auburn Reg'l Med. Ctr., 568 U.S. 145, 157–58, 161 (2013) (unanimous decision); Holder v. Martinez Gutierrez, 566 U.S. 583, 591, 598 (2012) (unanimous decision); Astrue v. Capato, 566 U.S. 541, 545, 558 (2012) (unanimous decision). In another case, six Justices upheld an agency's action using the *Chevron* analysis but reached their conclusions for different reasons, resulting in a plurality opinion by three Justices and a concurring opinion by two Justices. *See* Scialabba v. Cuellar de Osorio, 573 U.S. 41, 57, 69, 75 (2014).

[226] *See* Johnson, *Brand X Effect*, *supra* note 110, at 77–78, 80–81 (discussing the erosion of *Chevron* deference in the Supreme Court and lower federal courts, as well as judicial criticism of the doctrine and legislative attempts to rescind it); Note, *The Rise of Purposivism and Fall of* Chevron*: Major Statutory Cases in the Supreme Court*, 130 HARV. L. REV. 1227, 1238–42 (2017) (discussing the "major questions" doctrine and the Court's increasing practice of ignoring *Chevron* without comment). The United States Court of Appeals for the District of Columbia Circuit has held, for instance, that the *Chevron* analysis should not be used if an agency disavows *Chevron* deference for its decision. *See* Glob. Tel*Link v. FCC, 866 F.3d 397, 407–08 (D.C. Cir. 2017). The D.C. Circuit has also held that courts should not defer to agencies' statutory interpretation when an agency does not recognize that the statute it is interpreting is ambiguous. *See* Prill v. NLRB, 755 F.2d 941, 956 (D.C. Cir. 1985).

[227] Johnson, *Brand X Effect*, *supra* note 110, at 78 (citing Michael Kagan, *Loud and Soft Anti-*Chevron *Decisions*, 53 WAKE FOREST L. REV. 37 (2018)); *see* Eskridge & Baer, *supra* note 110, at 1124–25 (concluding, in their study of Supreme Court decisions between 1984 and 2006, that the Court applied *Chevron* deference only about one quarter of the time that it should have been applied); Thomas W. Merrill, *Judicial*

Several of the Supreme Court Justices have expressed skepticism toward the precedent.[228] Significantly, the Court decided the last case upholding an agency action under *Chevron* before Justices Gorsuch, Kavanaugh, and Barrett joined the Court.

Two decisions from the Supreme Court's most recent term suggest that the Court has essentially abandoned *Chevron* without explicitly overturning it. The first case, *American Hospital Association v. Becerra*, involved a challenge to a rule adopted by the Department of Health and Human Services that established reimbursement rates for prescription drugs that hospitals provided to Medicare patients.[229] The question upon which the Court granted certiorari was whether *Chevron* deference permitted the Department to vary the rates for a group of hospitals when the Department did not conduct a survey as the Medicare statute required.[230] During oral argument on the case, six of the Justices asked the advocates whether *Chevron* applied, whether it should be overruled, and if so, what test should replace it.[231] Although it appeared at the argument that the Court was preparing to jettison *Chevron* deference, a unanimous Court ultimately concluded that the Agency's interpretation of the statute violated the clear text and structure of the statute—the Court decided the case without mentioning *Chevron*.[232] In fairness, though, application of *Chevron* would not have changed the result of the case in any way. Under *Chevron*, a court only defers to an agency's interpretation of a statute

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Deference to Executive Precedent, 101 YALE L.J. 969, 970, 982 (1992) ("[T]he Chevron framework is used in only about half the cases that the Court perceives as presenting a deference question."); *see also* Richardson, *supra* note 222, at 445–46.

[228] *See* Johnson, *Brand X Effect*, *supra* note 110, at 79–80 (discussing the constitutional objections raised by Justices Gorsuch and Thomas, as well as Justice Breyer's advocacy for a more contextualized usage of *Chevron*); Burlington N. Santa Fe Ry. Co. v. Loos, 139 S. Ct. 893, 904, 908–09 (2019) (Gorsuch, J., dissenting) (criticizing *Chevron* and joined by Justice Thomas); Pereira v. Sessions, 138 S. Ct. 2105, 2120–21 (2018) (Kennedy, J., concurring) (criticizing *Chevron*); Michigan v. EPA, 576 U.S. 743, 760–61 (2015) (Thomas, J., concurring) (criticizing *Chevron*); City of Arlington v. FCC, 569 U.S. 290, 312 (2013) (Roberts, C.J., dissenting) (expressing skepticism toward *Chevron*).

[229] *See* Am. Hosp. Ass'n v. Becerra, No. 20-1114, slip op. at 5 (U.S. June 15, 2022).

[230] *See* Order List: 594 U.S. at 2, Am. Hosp. Ass'n v. Becerra, No. 20-1114 (U.S. July 2, 2021), https://www.supremecourt.gov/orders/courtorders/070221zor_4gc5.pdf; Petition for Writ of Certiorari at i, Am. Hosp. Ass'n v. Cochran, No. 20-1114 (U.S. Feb. 10, 2021) (identifying the question presented).

[231] *See* Transcript of Oral Argument at 5, 28, 30–31, 35, 61–62, Am. Hosp. Ass'n v. Becerra, No. 20-1114 (U.S. Nov. 30, 2021).

[232] *See Am. Hosp. Ass'n*, slip op. at 13–14.

if, at Step One of the analysis, a court concludes, using the traditional tools of statutory interpretation, that Congress did not address the precise question at issue.[233] Writing for the Court in the *American Hospital Association* case, Justice Kavanaugh noted that the Court employed "the traditional tools of statutory interpretation" to conclude that Congress's intent in the statute was clear and that the Agency's interpretation of the statute violated that clear intent.[234] Under *Chevron*, therefore, the Court would have concluded its analysis at Step One, so no deference would have been accorded to the Agency.

The second case that implicated *Chevron* was *Becerra v. Empire Health Foundation*, another case involving the Department of Health and Human Services' interpretation of the Medicare statute.[235] The Department had adopted a rule establishing Medicare reimbursement rates for hospitals to implement a statutory provision that was designed to reimburse hospitals "at higher-than-usual rates when they serve[d] a higher-than-usual percentage of low income patients."[236] In a 5-4 decision, the Court upheld the Agency's interpretation of the statute, but again did not cite *Chevron*.[237] Until the past decade, this case would likely have been a clear *Chevron* case, as the majority noted the complexity of the statute and began its analysis by suggesting that "[t]he ordinary meaning of the [words of the statute] . . . does not exactly leap off the page."[238] While Justice Kagan authored the majority opinion, however, Justice Thomas joined it, so it is unsurprising that the Court did not mention *Chevron*.[239] Instead of concluding that the Medicare statute was ambiguous at *Chevron* Step One and upholding the Agency's interpretation of the statute as reasonable at Step Two, the Court concluded that the text and structure of the statute clearly supported the Agency's interpretation.[240] While a traditional *Chevron* opinion would have

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[233] *See* Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984).

[234] *See Am. Hosp. Ass'n*, slip op. at 13–14.

[235] *See generally* Becerra v. Empire Health Found., No. 20-1312, slip op. at 1 (U.S. June 24, 2022).

[236] *Id.*

[237] *Id.* at 2.

[238] *Id.* at 7.

[239] Justices Kavanaugh, Alito, Roberts, and Gorsuch dissented and had no reason to cite *Chevron*, as the majority did not cite the case, and the case would not have supported their reading of the statute as contrary to the agency's reading. *Id.* at 4.

[240] *See Empire Health Found.*, slip op. at 18–19.

upheld the Agency's reading of the statute based on the agency's expertise in administering it, the *Becerra* Court instead suggested that when a court is interpreting technical provisions of a statute, it should recall "Justice Frankfurter's injunction that when a statute is 'addressed to specialists, [it] must be read by judges with the minds of the specialists.'"[241]

In light of these two cases, it appears that the Supreme Court has silently conflated the *Chevron* two step into one step. Rather than overrule or even mention *Chevron*, the Court, as it is currently constituted, appears likely to decide future cases involving agency interpretations of statutes at *Chevron* Step One, using the traditional tools of statutory interpretation to find whatever "clear" meaning will appeal to five or more Justices.[242] As the Supreme Court moves away from according *Chevron* deference to agency actions, it accretes to itself more power to overturn the regulations of the EPA and other agencies.

Second, whether intentionally or not, the Court has shifted the nature of lower federal courts' judicial application of the *Chevron* test through its decision in *National Cable & Telecommunications Ass'n v. Brand X Internet Services ("Brand X")*.[243] That case focused on whether courts should accord *Chevron* deference to an agency interpretation of a statute that was adopted after a court had already interpreted the statute.[244] In *Brand X*, the Supreme Court held that a court should accord an agency *Chevron* deference even when an agency's statutory interpretation conflicts with a prior judicial interpretation of a statute unless the court, in the prior decision, concluded that the meaning of the statute was clear and unambiguous.[245] Although the decision, on its face, seems like an expansion of deference to agencies, the decision's real-world impact has been just the opposite. The obvious way for federal courts to maintain the power to interpret statutes after *Brand X* is to decide statutory interpretation questions at *Chevron* Step One when first faced with such questions, negating any *Chevron* deference for agencies if they re-interpret the statutes after the courts' decisions. My review of all the published federal circuit court decisions

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[241] *Id.* at 7.

[242] For *Chevron* supporters, a dormant *Chevron* is likely preferable to a *Chevron* that has been overruled. After all, if there is a change in the composition of the Supreme Court in the future, it will be easier to reinvigorate a dormant *Chevron* than a deceased one.

[243] 545 U.S. 967, 982–83 (2005).

[244] *Id.* at 979–82.

[245] *Id.* at 982–83.

between 2000 and 2016 that applied *Chevron* to review a challenge to an EPA interpretation found that federal courts increasingly decided cases at *Chevron* Step One after the *Brand X* decision and deferred to the agency at a rate that was about 10 percent lower after *Brand X* than the rate at which they deferred to the agency before *Brand X*.[246]

Professor Daniel Walters recently pointed out, though, that the reduction in judicial deference to agencies is asymmetrical, meaning that courts are becoming more willing to strike down agency actions that increase regulation but continue to accord deference to agency actions that decrease regulation.[247] In addition, Professor Walters and two other scholars note that many of the tools that agencies use to under-enforce regulatory requirements (which they call "unrules")—such as individual waivers, exemptions and variances, and industry-wide carveouts and exemptions—evade meaningful judicial review.[248]

The Supreme Court has reduced deference to agencies in other important ways over the last few years. In 1945, the Supreme Court held, in *Bowles v. Seminole Rock & Sand Co.*, that an agency's interpretation of its own regulation is "of controlling weight unless it is plainly erroneous or inconsistent with the regulation."[249] A half century later, the Court retained that approach in *Auer v. Robbins*.[250] The *Auer* standard was generally believed to be the most deferential standard of review that applied to agency actions.[251] Over time, though, the Supreme Court and lower federal courts carved out exceptions to *Auer*, refusing to apply it when an agency interpreted a regulation that merely parrots the language of a statute;[252] when regulated parties did not have fair notice of the conduct that was required or prohibited by the agency's interpretation of a regulation;[253] when the agency's interpretation was not a settled or authoritative expression of the agency's position;[254] when the

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[246] *See* Johnson, *Brand X Effect*, *supra* note 110, at 69–70.

[247] *See* Daniel E. Walters, *Symmetry's Mandate: Constraining the Politicization of American Administrative Law*, 119 MICH. L. REV. 455, 461 (2020).

[248] *See* Cary Coglianese, Gabriel Scheffler & Daniel E. Walters, *Unrules*, 73 STAN. L. REV. 885, 888–89, 957, 959 (2021).

[249] Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945).

[250] Auer v. Robbins, 519 U.S. 452, 461 (1997).

[251] *See* Richard J. Pierce, Jr. & Joshua Weiss, *An Empirical Study of Judicial Review of Agency Interpretations of Agency Rules*, 63 ADMIN. L. REV. 515, 515–16 (2011).

[252] *See* Gonzales v. Oregon, 546 U.S. 243, 256–57 (2006).

[253] *See* Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 155–56 (2012).

[254] *See* Gose v. U.S. Postal Serv., 451 F.3d 831, 837–38 (Fed. Cir. 2006).

interpretation did "not reflect the agency's fair and considered judgment on the matter in question";[255] or when the regulation being interpreted was clear and unambiguous.[256] Even as courts whittled away at the standard, Supreme Court Justices continued to criticize it.[257]

Then in 2019, in *Kisor v. Wilkie*, the Court significantly reduced the deference accorded to agencies' interpretations of their own regulations as it redefined the *Auer* test without explicitly overruling the precedent.[258] The Court recast the test in a manner resembling *Chevron*, indicating that a court should not afford an agency interpretation *Auer* deference until the court concludes, using the traditional tools of statutory construction, that the regulation is ambiguous.[259] Then, the Court stressed that the agency's interpretation of an ambiguous regulation will only be upheld if it is reasonable in that it falls within the zone of ambiguity identified through using the traditional tools of statutory construction.[260] Further, the Court suggested that before an agency's interpretation of its own regulation is entitled to *Auer* deference, it must be the agency's authoritative position, implicate the agency's expertise, and reflect the agency's fair and considered judgment.[261] As with the Supreme Court's erosion of *Chevron* deference, the Court accretes to itself more power to overturn agencies' regulatory actions as the Court neuters *Auer* deference.[262]

Perhaps most significantly, though, the Supreme Court is reducing the amount of deference owed to agencies and accreting more policymaking authority to itself by expanding the use of the

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[255] *See Auer*, 519 U.S. at 462.

[256] *See* Christensen v. Harris Cnty., 529 U.S. 576, 588 (2000).

[257] *See* Stephen M. Johnson, *Advancing* Auer *in an Era of Retreat*, 41 WM. & MARY ENV'T L. & POL'Y REV. 551, 551 n.5–8 (2017) (citing criticisms from Justices Scalia, Thomas, Roberts, and Alito).

[258] *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2414 (2019).

[259] *Id.* at 2415 (noting the similarities to *Chevron* Step One).

[260] *Id.* at 2415–16. The Court stressed that deference at this stage of the *Auer* test was no greater than the deference that courts accord to agencies' interpretations of statutes under *Chevron*, despite some courts' claims to the contrary. *Id.* at 2416.

[261] *Id.* at 2416–18.

[262] Justice Gorsuch's concurring opinion in *Kisor* suggests that the Court may yet return to completely overrule *Auer* in a future case. *See Kisor*, 139 S. Ct. at 2425–26 (Gorsuch, J., concurring) (describing the Court's decision as a "stay of execution" and indicating that the Court's decision "all but guarantees we will have to pass this way again").

"major questions doctrine," a canon of statutory interpretation that the Court originally established in *MCI Telecommunications Corp. v. AT&T*[263] and *FDA v. Brown & Williamson Tobacco Corp.*[264] Under the major questions doctrine, when an agency's statutory interpretation involves a decision of vast economic and political significance, a court will be reluctant to find that Congress intended for the agency to interpret the statute (and receive deference) unless the statute clearly authorized the agency to interpret it in that manner.[265] Professor Lisa Heinzerling has referred to the canon as a "power canon" because it embodies "a politically inspired shift in power from the executive branch to the courts," inspired by the Court's "distrust of an active administrative state."[266]

Although the Court first articulated the canon in 1994, it was not used very often over the next two-and-a-half decades. Until the most

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[263] 512 U.S. 218, 231 (1994).

[264] 529 U.S. 120, 159–62 (2000). A law review article by then Judge Stephen Breyer is also credited as an early inspiration for the major questions doctrine. *See* Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986). Commentators have also suggested that the origins of the doctrine lay in an earlier Supreme Court decision, Industrial Union Dep't v. American Petroleum Institute, 448 U.S. 607 (1980). *See also* Cass R. Sunstein, *There Are Two "Major Questions" Doctrines*, 73 ADMIN. L. REV. 475, 484–85 (2021).

[265] *See* King v. Burwell, 576 U.S. 473, 485–86 (2015). As the the major questions doctrine is still relatively new, there is some disagreement regarding whether it prohibits agencies from making decisions of vast economic or political significance at all, because delegation of such decision-making authority to agencies would violate the nondelegation doctrine, or whether the major questions doctrine prohibits agencies from making such decisions unless Congress has clearly authorized them to make the decisions. Justices Gorsuch, Thomas, and Alito appeared to take that position in their concurring opinion in *National Federation of Independent Business v. Department of Labor*, No. 21A244, slip op. at 2 (U.S. Jan. 13, 2022) (Gorsuch, J., concurring) (per curiam). Many scholars have discussed a close relationship between the major questions doctrine and the nondelegation doctrine. *See* Freeman & Vermeule, *supra* note 45, at 76; Jacob Loshin & Aaron Nielson, *Hiding Nondelegation in Mouseholes*, 62 ADMIN. L. REV. 19, 52–53, 60–63 (2010). Professor Cass Sunstein suggests that it is not yet clear how a court should interpret a statute pursuant to the major questions doctrine if it finds that there is no clear delegation of authority to an agency to address the major question. *See* Sunstein, *supra* note 264, at 476–77. He argues that under a "weak" version of the doctrine, courts would interpret the statute independently, without deference to an agency's interpretation of the statute, because the doctrine is simply another *Chevron* Step Zero exception. *See id.* at 477–78. By contrast, he argues that under a "strong" version of the doctrine, courts would resolve the statutory interpretation question in the manner disfavored by the agency. *See id.* at 477.

[266] *See* Lisa Heinzerling, *The Power Canons*, 58 WM. & MARY L. REV. 1933, 1937 (2017).

recent term, the Court utilized the canon in only five cases.[267] As scholars have noted, the Court utilized the canon sparingly and was limited in those cases to situations where there was "a significant expansion of the agency's asserted authority and an important departure from prior agency practices."[268] In several cases, the Court was concerned that the agency interpreting the statute was not the primary agency empowered to administer the statute and was seeking to regulate in areas outside of its expertise.[269]

Since August 2021, however, the Court applied the doctrine in three more cases, signaling an expansion. In *Alabama Association of Realtors v. Department of Health and Human Services*, the Court invalidated a moratorium that the Centers for Disease Control (CDC) imposed, pursuant to the Public Health Service Act, on eviction of tenants during the COVID-19 pandemic.[270] The statutory provision that the Agency relied on authorized the Surgeon General and the Secretary of the Department of Health and Human Services to "make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession."[271] The Court, however, noted that the CDC's moratorium was an exercise of powers of "vast economic and political significance," in that it affected at least 80 percent of the country and intruded into an area that is the particular domain of state law: the landlord-tenant relationship.[272] Accordingly, the Court held that the Agency's action could not be upheld unless Congress clearly authorized it.[273] When the Court focused on the rest of the statute's language, which identified measures that the CDC could address through rules (fumigation, disinfection, sanitation, and pest extermination), the Court concluded that Congress did not clearly authorize the CDC to impose an eviction moratorium, which

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[267] In addition to *MCI*, *Brown & Williamson*, and *King*, cited above, see Gonzales v. Oregon, 546 U.S. 243, 267 (2006) and Utility Air Regulatory Group v. EPA, 573 U.S. 302, 324 (2014).

[268] *See* Natasha Brunstein & Richard L. Revesz, *Mangling the Major Questions Doctrine*, 74 ADMIN. L. REV. 217, 224 (2022).

[269] *See, e.g.*, *King*, 576 U.S. at 474; *Gonzales*, 546 U.S. at 262.

[270] *See* Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2486 (2021) (per curiam).

[271] *See* 42 U.S.C. § 264(a).

[272] *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489 (quoting *Util. Air Regul. Grp.*, 573 U.S. at 324).

[273] *Id.* at 2490.

was markedly different from the other measures authorized in the statute.[274] The Court also found that it was significant that the statutory provision upon which the Agency relied was enacted in 1944, had been rarely invoked, and had never been invoked to justify an eviction moratorium.[275]

In some ways, the decision was consistent with earlier applications of the doctrine because it involved an agency asserting significantly expanded authority that it had not asserted before, asserting it in an area that seemed outside of its expertise.[276] In other ways, though, the decision expanded the canon in that the Court relied, in part, on the Agency's interference with traditional state powers to conclude that the action was one of vast "economic and political significance."[277]

The Court again relied on the major questions doctrine in *National Federation of Independent Business v. Department of Labor* when the Court stayed an emergency standard adopted by OSHA that required employers with at least 100 employees to ensure that their employees were vaccinated against COVID-19 or tested negative at least once per week.[278] The Agency adopted the standard pursuant to a statutory provision that authorized standards if the Secretary of Labor could show "that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards" and the standard "is necessary to protect employees from such danger."[279] The Court noted that the standard was "a significant encroachment into the lives—and health—of a vast number of employees" and that the Court expects Congress "to speak clearly when authorizing an agency to exercise power of vast economic and political significance."[280] Although the Court acknowledged that COVID-19 was a risk that occurred in workplaces, the Court held that

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[274] *Id.* at 2488.

[275] *Id.* at 2487, 2489.

[276] In dissent, Justices Breyer, Sotomayor, and Kagan argued that the statute grants the CDC the authority to design measures that are essential to contain disease outbreaks, and that, at the time that the statute was originally enacted, public health agencies had "intervened in the housing market by regulation, including eviction moratoria, to contain infection by preventing movement of infected people." *Id.* at 2491 (Breyer, J., dissenting).

[277] *Id.* at 2489.

[278] *See* Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., No. 21A244, slip op. at 1, 3 (U.S. Jan. 13, 2022) (per curiam).

[279] 29 U.S.C. § 655(c)(1).

[280] *Nat'l Fed'n of Indep. Bus.*, slip op. at 5–6 (quoting Ala. Ass'n of Realtors v. Dep't of Health and Hum. Servs., 141 S. Ct. 2485, 2489 (2021) (per curiam)).

OSHA's authority was limited to addressing occupational hazards, as opposed to "day to day dangers" that persons face both inside and outside of the workplace.[281] Significantly, the Court noted that "[i]t is telling that OSHA, in its half century of existence, has never adopted a broad public health regulation of this kind—addressing a threat that is untethered, in any casual sense, from the workplace."[282] Unlike the *Alabama Association of Realtors* case, the *National Federation of Independent Business* case involved an agency acting within its area of expertise and, as the dissent pointed out, regulating in a way that was not dissimilar from actions it took in the past, such as facilitating vaccinations or requiring medical examinations and face covering for employees.[283] To that extent, the Court applied the doctrine in a case that seemed qualitatively different from the cases in which the doctrine was applied in the past. It is not clear how broadly the canon will be applied, though. While the Court indicated that the emergency standard clearly was an example of a regulation of "vast economic and political significance," it provided very little additional clarification regarding the manner in which the Court determines what constitutes "vast economic and political significance."[284] By not clarifying the scope of the standard, though, the Court retains substantial power to apply the major questions doctrine in cases where the Court disagrees with an agency's adopted policies.[285]

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[281] *Nat'l Fed'n of Indep. Bus.*, slip op. at 6–7. The Court held that OSHA's standard was more of a "general public health measure" than an "*occupational* safety or health standard." *Id.* at 7.

[282] *Id.* at 8.

[283] *Id.* at 9–10 (Breyer, J., dissenting).

[284] *Id.* at 6.

[285] As noted above, Justices Gorsuch, Thomas, and Alito wrote a concurring opinion in *National Federation of Independent Business*, asserting that if the Occupational Safety and Health Act were broad enough to authorize OSHA's vaccination or test standard, the statute would constitute "an unconstitutional delegation of legislative authority." *Id.* at 6 (Gorsuch, J., concurring). Justices Gorsuch and Thomas are leading an effort on the Court to rejuvenate the non-delegation doctrine, another tool that gives courts more power to interpret statutes independently when they disagree with policies adopted by agencies interpreting the statutes. The Court appears to be on the verge of expanding the use of that doctrine, just as it has expanded the use of the major questions doctrine. In 2019, the Supreme Court upheld, against a non-delegation challenge, a provision of the Sex Offender Registration and Notification Act (SORNA) that authorized the Attorney General to specify the applicability of the statute to sex offenders convicted before the enactment of the law. *See* Gundy v. United States, 139 S. Ct. 2116, 2121 (2019). While a four-Justice plurality of the Court upheld the statute, citing decades of case law upholding broad delegations of authority to agencies against non-delegation challenges, Justice Alito concurred with the plurality because he could

The Court applied the doctrine most recently in *West Virginia v. EPA* when it determined that the EPA did not have authority under the Clean Air Act to set air pollution standards for coal-fired power plants that were designed to encourage utilities to shift energy generation away from coal to natural gas, solar and wind power.[286] Chief Justice Roberts authored the opinion for a 6-3 Court, which provides some clarification regarding when an agency action is of sufficient "economic and political significance" to trigger the major question doctrine's clear statement rule. Roberts argued that the doctrine applied in the case because (1) the EPA's action would substantially restructure the American energy market;[287] (2) the EPA did not have

not distinguish the statutory provisions in SORNA from the broad provisions upheld in prior Supreme Court decisions. *See id.* at 2129–31 (Alito, J., concurring). He stressed, however, that "[i]f a majority of [the] Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort." *Id.* at 2131. Justice Kavanaugh did not participate in the Court's consideration of the case, but Justice Gorsuch, joined by Chief Justice Roberts and Justice Thomas, dissented, arguing for a reinvigorated non-delegation doctrine and finding the standard set forth in SORNA to be an unconstitutional delegation of legislative authority. *See id.* at 2131 (Gorsuch, J., dissenting). Although it is not clear how Justice Kavanaugh would have ruled in *Gundy*, he provided some insight into his views when he filed a statement respecting the Court's denial of a petition for a writ of certiorari in Paul v. United States, 140 S. Ct. 342 (2019). In that statement, he noted that Justice Gorsuch's dissenting opinion in *Gundy* would preclude Congress from delegating the resolution of "major policy questions" to agencies, and that "Justice Gorsuch's thoughtful . . . opinion raised important points that may warrant further consideration in future cases." *Id.* at 342. As a result, there appear to be four Justices, and perhaps a majority if Justice Kavanaugh joins, that would be willing to significantly expand the application of the non-delegation doctrine in the near future to narrow delegations of regulatory authority to agencies.

[286] *See* West Virginia v. EPA, No. 20–1530, slip op. at 31 (U.S. June 30, 2022). Section 111 of the Clean Air Act authorizes EPA to set air quality standards for certain pollutants based on the "best system of emission reduction" that the agency has determined to be adequately demonstrated for the category of point sources being regulated. *See* 42 U.S.C. § 7411(a)(1). In the rulemaking challenged in the case, the EPA determined that the "best system of emission reduction" for existing coal-fired power plants was a system that would replace generation of power through burning coal with generation of power using alternative energy sources. *See West Virginia v. EPA*, slip op. at 2. The EPA set the standard based on the assumption that it would be feasible to have coal provide 27 percent of electricity generation by 2030, down from 38 percent in 2014. *See id.* at 9. The majority indicated that the issue in the case was "whether restructuring the Nation's overall mix of electricity generation, to transition from 38 percent coal to 27 percent coal by 2030, can be the best system of emission reduction within the meaning of Section 111." *Id.* at 16.

[287] *See id.* at 20.

expertise in restructuring the energy market;[288] (3) the EPA's regulatory approach was significantly different than the approach that it had consistently taken for several decades in applying the provision upon which it was relying ("the provision");[289] (4) the Court described the provision to be an "ancillary," or gap-filling, provision";[290] and (5) Congress considered and rejected the approach that the Agency was taking in several legislative proposals after the provision was initially enacted.[291] The majority argued that the application of the doctrine was consistent with its use in prior cases and repeatedly noted that the doctrine only applies in "extraordinary cases."[292] The majority did not identify the potential interference with traditional state powers as a trigger for the doctrine, as it did in *Alabama Association of Realtors*, but Justice Gorsuch identified that factor as a trigger in his concurring opinion in *West Virginia v. EPA*, which advocated for a broader application of the canon.[293] Applying the major questions doctrine in *West Virginia v. EPA*, the majority ultimately concluded that there was

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[288] *See id.* at 25. The majority asserted that the EPA admitted, in a congressional budget request, that understanding trends in electricity transmission, storage and distribution "requires technical and policy expertise not traditionally needed in EPA regulatory development." *Id.*

[289] *See id.* at 20. The majority noted that prior to 2015, the EPA had always set pollution limits under Section 111 based on using measures that would reduce pollution "by causing the regulated source to operate more cleanly . . . [and] never . . . by looking to a 'system' that would reduce pollution simply by shifting polluting activity from dirtier to cleaner sources." *Id.* at 20–21.

[290] *Id.* at 5– 6, 20. The majority suggested that it was "only a slight overstatement for one of the architects of the 1990 amendments to the Clean Air Act to refer to Section 111(d) as an 'obscure, never-used section of the law,'" *id.* at 6 (quoting *Clean Air Act Amendments of 1987: Hearing on S. 300 Before the Subcomm. on Env't Prot. Of the S. Comm. on Env't and Pub. Works*, 100th Cong. 13 (1987) (statement of Sen. Durenberger)), and that "extraordinary grants of regulatory authority are rarely accomplished through 'modest words,' 'vague terms,' or 'subtle devices.'" *West Virginia v. EPA*, slip op. at 18 (quoting Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001)).

[291] *See id.* at 27–28. In his opinion, Chief Justice Roberts described the EPA's challenged regulation as basically adopting a set of cap-and-trade schemes for carbon, and he argued that "Congress . . . has consistently rejected proposals to amend the Clean Air Act to create such a program." *Id.* at 27.

[292] *West Virginia v. EPA*, slip op. at 17, 19.

[293] *See id.* at 7–8, 10 (Gorsuch, J., concurring). Justice Alito joined Justice Gorsuch's concurrence. They argued that the doctrine should apply whenever an agency is resolving a question of great political significance, ending an earnest or profound debate across the country, or when an agency is seeking to regulate "a significant portion of the American economy," as well as when the agency action intrudes into an area that is the particular domain of state law. *Id.* at 9–11.

no clear statement of congressional authority for the EPA to set the power plant pollution limits under Section 111 of the Clean Air Act,[294] based upon the "generation shifting" approach the Agency used to encourage utilities to substitute energy generated through natural gas, wind, or solar power for energy generated by coal-fired power plants.[295]

While Justice Roberts' majority opinion attempted to portray the use of the major questions doctrine in the case as consistent with the Court's prior decisions, lower federal courts might read and apply the opinion more expansively for several reasons. First, although the *West Virginia v. EPA* majority suggested that the major questions doctrine was reserved for extraordinary cases, the Roberts opinion stressed that separation of powers principles require Congress, rather than agencies, to make major policy decisions,[296] and that "'enabling legislation' is . . . not an 'open book to which the agency [may] add pages and change the plot line.'"[297] As Justice Kagan noted in her dissent, under a traditional textualist approach, without the major question doctrine's clear statement rule, the Court would have upheld the EPA's action because the plain meaning of the language used in the Clean Air Act and the structure of the statute clearly supported the EPA standards challenged in the case[298] and because subsequent legislative inaction would provide no insight into the intent of the legislature that enacted the Clean Air Act provision interpreted by the EPA.[299] The majority agreed that the plain meaning of the language used in the statute supported the Agency's reading of the statute but

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[294] *Id.* at 31.

[295] *Id.* at 8, 26.

[296] *See id.* at 20.

[297] *Id.* (quoting Ernest Gellhorn & Paul Verkuil, *Controlling* Chevron*-Based Delegations*, 20 CARDOZO L. REV. 989, 1011 (1999)).

[298] *See West Virginia*, slip op. at 7–13 (Kagan, J., dissenting). The dissenting Justices stressed that "Congress . . . knows to speak in . . . capacious terms when it wishes to enlarge[] agency discretion" and that Congress did so in Section 111 of the Clean Air Act. *Id.* at 12 (quoting City of Arlington v. FCC, 569 U.S. 290, 296 (2013)). "[W]hen Congress uses 'expansive language' to authorize agency action," the dissenting Justices argued, "courts generally may not 'impos[e] limits on [the] agency's discretion.'" *West Virginia v. EPA*, slip op. at 13 (Kagan, J., dissenting) (quoting Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2381 (2020)).

[299] *West Virginia v. EPA*, slip op. at 27–28 (Kagan, J., dissenting). Since it is the enacting legislature's intent that matters, the dissenting Justices argued, "failed legislation 'offers a particularly dangerous basis on which to rest an interpretation of an existing law a different and earlier Congress' adopted." *Id.* at 27.

rejected the Agency's reading because the statute did not *explicitly* address the Agency's *specific* approach.[300]

Justice Kagan and the dissenting Justices argued that the Court expanded the major questions doctrine because the Court, in prior cases, only used the doctrine when (1) the agency whose action was being challenged regulated an area outside of its expertise, and (2) the challenged agency action would conflict with, or wreak havoc on, the statutory scheme.[301] The dissenters further argued that the EPA was regulating in an area that was clearly within its expertise and in a way that was perfectly consistent with the structure of the Clean Air Act.[302] For those reasons, the dissenting Justices viewed the decision as a significant expansion of the doctrine.[303]

The dissenting Justices raised significant concerns regarding the impact of the Court's decision on administrative agencies. In dissent, Justice Kagan stressed that Congress historically delegated broad authority to agencies to interpret and implement statutes, and courts upheld those delegations because agencies have expertise that Congress lacks and can act quicker than Congress to respond to changing circumstances over time.[304] Congress and administrative agencies are politically accountable, while courts are not.[305] By utilizing the major questions doctrine, however, Justice Kagan argued that the majority arrogated to itself the authority to make important policy decisions on questions that Congress assigned to agencies and on which the courts have no expertise.[306] As she noted, through the application of the doctrine in that case, "[t]he Court appoints itself—

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[300] *Id.* at 28–29 (Roberts, C.J.). Although the majority conceded that generation shifting is a "system" capable of reducing emissions, Justice Robert's opinion stresses that "such a vague statutory grant is not close to the sort of clear authorization required by our precedents." *Id.* at 28.

[301] *Id.* at 13 (Kagan, J., dissenting).

[302] *Id.* at 13–14.

[303] *See id.* at 28–29.

[304] *See id.* at 29–31. Justice Kagan's description of the role of administrative agencies contrasts markedly with the description provided by Justice Gorsuch in his concurring opinion. *See id.* at 19 (Gorsuch, J., concurring). As Justice Kagan noted, the "anti-administrative-state stance . . . suffuses the concurrence." *Id.* at 29 (Kagan, J., dissenting).

[305] *See West Virginia v. EPA*, slip op. at 31–32 (Kagan, J., dissenting). *See also* Richard Lazarus, Opinion, *The Supreme Court Just Upended Environmental Law at the Worst Possible Moment*, WASH. POST (June 30, 2022, 12:00 PM), https://www.washingtonpost.com/opinions/2022/06/30/supreme-court-just-upended-environmental-law-worst-possible-moment.

[306] *See West Virginia v. EPA*, slip op. at 32–33 (Kagan, J., dissenting).

instead of Congress or the expert agency—the decision-maker on climate policy."[307]

Supporters of the major questions doctrine argue that Congress should be vigilant in updating statutes or passing new laws to address issues as they arise, rather than delegating broad authority to agencies to address the issues.[308] For decades, however, Congress has been incapable of achieving consensus to enact legislation on any important environmental policy issues, so the expansion of the major questions doctrine is truly an expansion of judicial policymaking.[309]

In addition to expanding the major questions doctrine, the Supreme Court has gone out of its way to review regulatory decisions of the EPA and federal environmental agencies after the agencies abandoned actions that provoked litigation, so that there was seemingly no live dispute to adjudicate. In *West Virginia v. EPA*, for instance, the Court agreed to review the legality of the Obama Administration's Clean Power Plan after the rule was rescinded and replaced by another rule during the Trump Administration, even though the Biden Administration had no intention of reinstating the

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[307] *Id.* at 33. Justice Kagan wrote:

> Some years ago, I remarked that "[w]e're all textualists now." It seems I was wrong. The current Court is textualist only when being so suits it. When that method would frustrate broader goals, special canons like the "major questions doctrine" magically appear as get-out-of-text-free cards. Today, one of those broader goals makes itself clear: Prevent agencies from doing important work, even though that is what Congress directed.

Id. at 28–29 (internal citation omitted).

[308] *See* Lazarus, *supra* note 305.

[309] *Id.* Professor Blake Emerson's take on the Court's *West Virginia* decision is even more stark. *See* Blake Emerson, *The Real Target of the Supreme Court's EPA Decision*, SLATE (June 30, 2022, 4:08 PM), https://slate.com/news-and-politics/2022/06/west-virginia-environmental-protection-agency-climate-change-clean-air.html. He argues:

> In the constitutional crisis we are entering, the [C]ourt combines all three powers—legislative, executive and judicial—to limit the scope of federal power. . . . [S]uch a combination of powers creates the risk of tyranny. It enables an unelected body to exercise arbitrary and unaccountable power. The real threat to republican government today is not the administrative state. It is the [C]ourt.

Id. Justice Gorsuch, in his concurrence, acknowledged that it would frequently be difficult for Congress to enact laws that combat the problems that the major questions doctrine would remove from agencies' jurisdiction, but he argued that the Framers of the Constitution intended that such impediments to lawmaking should exist. *See West Virginia v. EPA*, slip op. at 3–6 (U.S. June 30, 2022) (Gorsuch, J., concurring).

Clean Power Plan.[310] Similarly, in *Sackett v. EPA*, the Court agreed to hear a challenge to the EPA's assertion of jurisdiction over a body of water under the Clean Water Act—even though the Agency withdrew the compliance order that asserted jurisdiction over the water, rescinded and revised the rules upon which the agency based the determination that the water was regulated under the Clean Water Act, and is currently revising the rules again to redefine jurisdiction under the Act.[311]

The Supreme Court is making these changes to traditional principles of administrative and statutory law at a time when the federal courts are becoming increasingly conservative and hostile to administrative agencies and government regulation.[312] Although, a future anti-regulatory President may find it difficult to deregulate without the assistance of Congress or the judicial branch, they are likely to have a deregulatory ally in the judicial branch unfortunately.

For supporters of environmental regulation, though, all hope is not yet lost. Although the federal environmental statutes delegate broad authority to the EPA and other agencies to protect the environment and public health, the statutes frequently are quite clear regarding the scope of the agencies' authority, and the Supreme Court has failed to apply the major questions doctrine to EPA decisions under the Clean Air Act at least three other times in the last fifteen years.[313] Courts may yet adopt a narrow reading of "deep economic and political significance."[314] In addition, although the Supreme Court may be applying the *Chevron* doctrine less frequently, the lower federal courts appear to continue to apply the doctrine with vigor.[315]

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[310] *Id.* at 1–2, 11, 13. As Justice Kagan noted when the Court issued its opinion, they essentially issued an advisory opinion on the scope of future EPA rulemaking under the Clean Air Act. *See id.* at 4 (Kagan, J., dissenting).

[311] *See* Sackett v. EPA, 8 F.4th 1075, 1079 (9th Cir. 2021); 86 Fed. Reg. 69,372 (Dec. 7, 2021).

[312] *See* sources *supra* note 222 and accompanying text.

[313] *See* Jonas J. Monast, *Major Questions About the Major Questions Doctrine*, 68 ADMIN. L. REV. 445, 462–69 (2016) (discussing Massachusetts v. EPA, 549 U.S. 497 (2007), EPA v. EME Homer City Generation, L.P., 572 U.S. 489 (2014), and Michigan v. EPA, 576 U.S. 743 (2015)).

[314] *See* Kent Barnett & Christopher J. Walker, *Short-Circuiting the New Major Questions Doctrine*, 70 VAND. L. REV. EN BANC 147, 153 (2017) (noting the vagueness of the terms); David Gamage, *Foreword:* King v. Burwell *Symposium: Comments on the Commentaries (and on Some Elephants in the Room)*, 2015 PEPP. L. REV. 1, 5 (2015); Kristin E. Hickman, *The (Perhaps) Unintended Consequences of* King v. Burwell, 2015 PEPP. L. REV. 56, 57 (2015).

[315] *See* Barnett & Walker, *supra* note 110, at 9.

Further, although President Trump appointed conservative jurists to the federal bench at unprecedented rates,[316] President Biden has moved quickly to fill a substantial number of federal judicial vacancies halfway through his first term.[317] Perhaps the executive branch may be left to deregulate on its own after all.

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[316] *See supra* note 34.

[317] *See* Carrie Johnson, *Biden Had a Productive Year Picking Federal Judges. The Job Could Get Tougher in 2022*, NPR (Dec. 28, 2021, 5:00 AM), https://www.npr.org/2021/12/28/1067206141/biden-federal-judges-nominations-diverse; *see also* Brittony Maag, *Biden Has Appointed Most Federal Judges Through March 1 of a President's Second Year*, BALLOTPEDIA (Mar. 4, 2022, 11:08 AM), https://news.ballotpedia.org/2022/03/04/biden-has-appointed-most-federal-judges-through-march-1-of-a-presidents-second-year (noting that Congress had approved forty-six judges by March of President Biden's second year in office, compared to twenty-six judges approved in a similar time frame during President Trump's presidency).