

Reforming Administrative Law to Reflect Administrative Reality

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SOME CASES ARRIVE at the Supreme Court explosively, their significance self-evident. But others arrive quietly, merely hinting at larger forces underneath—like fissures on the surface, a subtle symptom of tectonic forces working far below. Of those two categories, the recent case of *Perez v. Mortgage Bankers Association* fits into the latter.¹⁴⁸ At first glance, *Perez* presented a rather esoteric question of agency procedure (as described further below). But as the case was briefed, argued, and eventually decided in 2015, its deeper meaning became evident. The seemingly narrow dispute before the Court was but one symptom of a much more fundamental problem of today's administrative state.

The problem, simply put, is this: The laws that nominally govern our modern administrative state bear less and less resemblance to administrative *reality*, in terms of the ways in which today's agencies make law or otherwise impose policy upon the people and companies that they regulate. Our administrative state has changed profoundly in recent decades; agencies have grown ever more aggressive in their attempts to unilaterally impose their policies on the American people, too often in lieu of Congress, or in spite of it. But Congress and the courts have not reformed our administrative law—the body of laws that regulate the regulators—to reflect and respond to those changes.

Some of these developments have been discussed elsewhere in this book. This chapter focuses on two important, interrelated issues: the procedures that Congress requires agencies to undertake before imposing their policies on the public and the degree to which courts undertake review of agencies' actions afterward.

Seventy years ago, in the Administrative Procedure Act of 1946 (or APA),

Congress set standards governing the process by which agencies impose their policies on the public, through rulemaking or through agency “adjudications.” And in the APA and other statutes, Congress provided for judicial review of the agencies’ actions. In the intervening seven decades, the Supreme Court and lower federal courts have elaborated upon those statutes, especially with respect to judicial review. Most importantly, the courts have developed doctrines for judicial “deference” to the agencies’ interpretations of regulatory statutes and of the regulations themselves.

Reform is long overdue. With each passing year the APA’s 70-year-old categories and concepts, and the courts’ habit of “deference,” seem increasingly inapt in an era of unprecedented administrative power and discretion.

But reformers must avoid the mistake of treating agency process and judicial review as two separate issues. They should be reformed together. As we will see below, and as the Supreme Court’s justices saw in *Perez*, there is and must be a direct relationship between the procedural requirements that Congress imposes upon agencies in acting to formulate new law and the standards that Congress directs the courts to apply in reviewing actions taken by the agencies. *Perez* reminds us that we must think of these two sets of rules not in isolation from one another but interwoven with one another. And, as it happens, that is precisely the mindset that informed Congress’s framing of the Administrative Procedure Act seventy years ago.

It is time to reform administrative law — not to undermine the APA’s original purposes, but rather to *vindicate* the same spirit that informed its creation in the first place. The APA’s framers sought to promote not just administrative efficiency, but also individual rights and sound governance. We should follow their example, ever mindful of the connection between the procedural rules that bind agencies *ex ante* and the judicial-review standards that check agencies *ex post*. These points are best illustrated by beginning with the example of *Perez*, before turning to the APA’s history and text, and the need for broad reform.

PEREZ: A CASE STUDY IN
DOUBLY UNCHECKED ADMINISTRATION

The case of *Perez v. Mortgage Bankers Association* is well worth examining closely, not for its specific legal issue so much as for the manner in which the justices grasped those issues and reasoned through them in a set of fascinating judicial opinions.

At first glance, *Perez* presented a rather mundane technical dispute:

namely, the legal standards defining agencies' obligation to subject some policy proposals to "notice and comment" procedures before finalizing them. In this case, the proposed policy involved granting some workers a legal right to overtime pay. The Obama Labor Department decided to reverse the Bush Labor Department's prior position — as the department usually does when a Democratic administration succeeds a Republican one, or vice versa — and declared that mortgage loan officers were now entitled to overtime pay.

To achieve this, the department re-interpreted one of its own regulations under the Fair Labor Standards Act. The act itself requires the Labor Department to set minimum-wage and overtime standards for full-time employees, but it exempts people who are "employed in a bona fide executive, administrative, or professional capacity...or in the capacity of outside salesman." The exemption is generally known as the "administrative exemption," and the Labor Department further construed that exemption by concluding, in a regulation, that the exemption does *not* apply to any "employee whose primary duty is selling financial products." The department promulgated that regulation through notice-and-comment rulemaking — that is, by notifying the public of the proposal, accepting public comments, considering and responding to those comments, and then publishing a final decision.

The practical question, then is what qualifies as "selling financial products." Since 2004 (*i.e.*, in the Bush administration), the department's official interpretation of that regulation was that mortgage loan officers *do* have a primary duty of selling financial products. The department arrived upon that interpretation not by notice-and-comment rulemaking, but by the unilateral issuance of agency "guidance" announcing this interpretation.

The agency changed its policy 2010, reversing course and announcing that mortgage loan officers are not in the business of selling "financial products" — that is, the agency concluded that mortgage loan officers are *not* subject to the extension; that is, they are entitled to the act's wage-and-hour protections. The department did not subject the policy change to public scrutiny through a notice-and-comment process. Instead, the agency simply announced the new policy, in one fell swoop, in a public letter.

The Labor secretary's decision to avoid notice-and-comment proceedings was hardly unprecedented; his predecessors had taken a

similar approach. But the D.C. Circuit rejected this tack: it struck down the Labor Secretary's policy, concluding the policy change required not just a public letter but full notice-and-comment proceedings.

The D.C. Circuit's reasoning proved to be no less controversial than the Labor secretary's own action. Specifically, the court's decision seemed in tension with the text of the APA, which requires notice-and-comment for substantive rulemakings¹⁴⁹ but which contains exceptions for mere "interpretative rules" and other minor proceedings.¹⁵⁰ The Labor secretary argued—with significant justification—that this policy was itself a merely "interpretative rule," exempt from the APA's requirement, but the D.C. Circuit disagreed. Applying D.C. Circuit precedent, the court held that the Labor Department could not reverse its well-established prior policy without opening the matter to public scrutiny through notice-and-comment proceedings.¹⁵¹ Labor secretary Thomas Perez appealed to the Supreme Court, arguing that the D.C. Circuit erred in imposing such procedural requirements on the department.

But in the Supreme Court, this narrow technical case took on much greater importance. The procedural question about the agency avoiding notice-and-comment was overshadowed by a broader public debate over the amount of "deference" that courts afford agencies in interpreting regulations.

Under the doctrine of "*Auer* deference," courts give utmost deference to an agency's interpretation of the agency's own regulation. Specifically, an agency's interpretation of its own regulation is "controlling," unless it is "plainly erroneous or inconsistent with the regulation."¹⁵²

But in the justices' eyes, the Labor Department was trying to have it both ways. On the one hand, the department was arguing that its new policy didn't need to go through notice-and-comment proceedings, because the new policy was simply a matter of "interpretation" and did not itself have "the force of law" (which is the standard for the relevant procedural exemption). On the other hand, the department was arguing that the Supreme Court needed to defer to the department's new interpretation of the overtime pay regulation, because its interpretation is "*controlling*" upon the Court.

At oral argument, the justices were quite sympathetic to the Labor Department's basic position that the APA did not require notice-and-comment proceedings for this new policy change, because the new policy was simply an "interpretative rule" and thus categorically exempt

from the APA's procedural notice-and-comment requirement. But justices bristled at the agency's attempt to avoid the *ex ante* procedures of notice-and-comment while at the same time trying to minimize the *ex post* protections of undeferential judicial review.¹⁵³

"In this case," Justice Samuel Alito asked the government's lawyer, "didn't the government say explicitly that its interpretation would be entitled to *controlling* deference?"¹⁵⁴ Yes, the government lawyer replied. But, Justice Alito continued, "[i]f it has controlling deference," doesn't it rise to the level of binding legal force triggering the notice-and-comment process at the outset? "No, it doesn't," the government's lawyer urged unconvincingly.

Justice Elena Kagan, too, shone a spotlight on what had motivated the lower court to declare that the department's "non-binding" guidance should have gone through notice-and-comment proceedings, given that the resulting interpretation would receive "controlling" deference from the courts. "[P]art of what's motivating [the D.C. Circuit] is a sense that agencies more and more are using interpretative rules and are using guidance documents to make law and that...it's essentially an end run around the notice and comment provisions...[T]he government is sort of asking for it all. It's asking for a lot of deference always, [and] it's asking for the removal of [notice-and-comment requirements]."

The Supreme Court ultimately upheld the Labor Department's action, concluding that the agency's new rule fit squarely within the APA's exception for merely "interpretative rules."¹⁵⁵ But in separate "concurring" opinions, some of the justices reiterated their worries about the government's ability to both avoid notice-and-comment proceedings at the beginning of the process and enjoy immensely deferential judicial review at the end of the process.

Justice Alito, for example, acknowledged the "understandable concern about the aggrandizement of the power of administrative agencies as a result of the combined effect of (1) the effective delegation to agencies by Congress of huge swaths of lawmaking authority, (2) the exploitation by agencies of the uncertain boundary between [rules that require notice-and-comment and those that do not], and (3) this Court's cases holding that courts must ordinarily defer to an agency's interpretation of its own ambiguous regulations."

Justices Scalia and Thomas voiced similar concerns. All of them, like Kagan and others at oral argument, sensed a fundamental connection

between the procedural requirements that protect the public in the administrative process, and the substantive judicial-review standards that protect the public once an agency has taken action. The Labor secretary's ability to avoid both the APA's *ex ante* procedural protections and the *ex post* judicial-review protections struck them as discordant, even disconcerting.

And with good reason. That basic relationship between the *ex ante* protections of agency procedural requirements and *ex post* protections of judicial review was at the heart of the Administrative Procedure Act of 1946, which created the modern administrative state. And today, as we consider how to reform the law governing today's turbo-charged version of the administrative state, our reforms must be guided by the same instincts and approach.

CHECKS, IN BALANCE

When we think today of the administrative state's origins, we tend to begin with Congress's creation of the Interstate Commerce Commission (1887) or maybe the Steamboat Inspection Service (1852), the forerunners of today's regulatory agencies, vested with significant power by Congress to set substantive standards for the regulation of industry and providing for their enforcement in conjunction with the courts.¹⁵⁶ These agencies were followed in turn by Progressive Era commissions such as the Federal Trade Commission (1914), and then New Deal commissions such as the Securities and Exchange Commission (1934) and National Labor Relations Board (1935).

But this initial proliferation of agencies lacked a common set of procedural rules consistent across the growing administrative state. Instead, by the mid-1940s there were what one historian describes as "dozens of agencies and commissions, each of which possessed its own messy and complicated history, institutional structure, and political context."¹⁵⁷

Even before Franklin Roosevelt won the presidency, a debate had simmered among scholars, lawyers, and government officials over how law should constrain the administrative agencies: the powers that should be delegated to them; the procedures that they should be required to undertake in exercising those powers; and the standards by which courts should review the agencies' actions. Beginning in 1934, the American Bar Association issued a series of reports filled with blistering criticism of what it saw to be agencies' encroachments upon the province of the judiciary.¹⁵⁸ Five years later, Roosevelt himself would commission his

attorney general to appoint a committee to review the agencies' practices and recommend new rules to govern both the agencies' procedures and the courts' review of the agencies' actions.¹⁵⁹

In reporting its recommendations, the attorney general's committee stressed that its task was not simply to pursue an abstract vision of what ideal regulatory legislation or regulations should be,¹⁶⁰ but rather to grapple seriously with the actual workings of administrative agencies as they then existed—to produce criticism and recommendations that “arose from and must be tested by knowledge of the practices and procedures of each of the agencies.”¹⁶¹

The attorney general's report built on previous studies of the burgeoning administrative state, such as the 1937 report of FDR's Committee on Administrative Management (often called the “Brownlow Committee”), which studied the agencies and issued comprehensive recommendations on organizing and regulating the agencies. “Throughout our history,” the committee urged, “we have paused now and then to see how well the spirit and purpose of our Nation is working out in the machinery of everyday government with a view to making such modifications and improvements as prudence and the spirit of progress might suggest.”¹⁶² The Brownlow Committee took a close look at the actual reality of the nascent administrative state and, having studied its flaws, proposed practical reforms on many subjects, including the agencies' exercises of rule-making power.

These reports set the stage for what would become the Administrative Procedure Act of 1946, an overarching framework for administrative agencies. The APA largely requires agencies to notify the public of proposed regulations and give interested parties a meaningful opportunity to comment. It also sets basic standards for agency “adjudications.” And it sets the basic framework for judicial review of such agency actions.

But for all the intense debate and study that the APA has attracted since its inception, one must keep in mind the APA's foundation. It was the product not of abstract theorizing, but of prudence and compromise. After years of “fierce partisan and ideological debate” among the administrative state's opponents and proponents,¹⁶³ Congress eventually negotiated and passed unanimously a set of compromises intended to “resolve the conflict between bureaucratic efficiency and the rule of law,” as one historian put it.¹⁶⁴

In that respect, the Republicans and Democrats who framed the APA resembled the Federalists and Anti-Federalists who framed our

Constitution. They argued seriously and forcefully about how government actually worked, and about what rules ought to be mapped onto government in order to properly channel, restrain, check and balance the administrative agencies' energy. In that respect it was fitting for the act's sponsor, Senator Pat McCarran, to call the act "a bill of rights for the hundreds of thousands of Americans whose affairs are controlled or regulated in one way or another by agencies of the Federal Government."¹⁶⁵ He and his colleagues were thinking in constitutional terms — that is, they were trying to ascertain basic rules that could both limit the administrative state while also channeling its energy.

Of all the APA's various provisions, the balance that its framers struck between efficiency and law was most evident in standards that it applied to agency rulemaking, which are described in greater detail below. Like the justices in *Perez*, the APA's framers recognized a fundamental connection between the process of an agency's policy formulation and the substance of judicial review of the agency's action: the stronger the procedural protections up front, the safer it is to relax judicial review for the sake of efficiency; or, the stronger the judicial review after an agency takes action, the safer it is to relax procedural requirements up front for the sake of efficiency.

This basic relationship was recognized at multiple points in the APA's "legislative history" — the legislative debates and reports giving rise to the APA. The Senate Judiciary Committee, for example, explained in its report on the then-proposed APA that, although an agency's rules would normally need to undergo the notice-and-comment process before being finalized, it would be unnecessary to subject merely "interpretative" rules to that process, because interpretative rules would undergo much stricter judicial review than ordinary substantive rules: "interpretative rules — as merely interpretations of statutory provisions — are subject to *plenary* judicial review, whereas substantive rules involve a maximum of administrative discretion."¹⁶⁶ The APA's sponsor, Senator McCarran, explained similarly that the APA "exempts from its procedural requirements all interpretative, organizational, and procedural rules, because under present law interpretative rules, being merely adaptations of interpretations of statutes, *are subject to a more ample degree of judicial review*."¹⁶⁷ Because interpretative rules would undergo stricter scrutiny in court, Congress felt comfortable relaxing the *ex ante* procedural requirements that

would otherwise have restrained the agencies in promulgating those interpretative rules in the first place.

The APA's framers were not stumbling on a novel discovery in recognizing the crucial connection between *ex ante* and *ex post* protections for the public in agencies' formulation of new regulations. Years earlier, Professor Ralph Fuchs, one of the era's leading administrative-law scholars, argued that if a regulation "is subject to challenge in all of its aspects after its promulgation," then "the need of advance formalities is reduced or eliminated"; by the same token, when "a regulation presents affected parties with ...only limited opportunity" for after-the-fact judicial review, then "the need is evident for an antecedent opportunity to influence its content or be heard in regard to it."¹⁶⁸

Today, some scholars call this the "pay me now or pay me later" principle.¹⁶⁹ In 1946, Congress had it firmly in mind — along with the other balances struck between administrative energy, efficiency, and the rule of law — in passing the legislation that ultimately was enacted as the Administrative Procedure Act.

CONGRESS'S BALANCE IN PRACTICE:
AGENCY PROCEDURE AND JUDICIAL REVIEW

As noted above, the APA is the primary law governing the processes that agencies must undertake in formulating new law in rulemakings and "adjudications," and the APA is also the primarily law governing judicial review of such agency actions. Various agency- or subject-specific statutes may supersede or supplement the APA in given cases, but the APA remains the default framework for agency action. It sets a basic dichotomy between rulemaking and adjudication — and the Supreme Court has made clear that agencies have broad latitude to make policy through either process, rulemaking or adjudication.¹⁷⁰

Most rulemaking is done through the notice-and-comment process: an agency issues a "notice of proposed rulemaking" setting forth and explaining the proposed rules; interested parties submit comments to the agency; and the agency publishes the final version of its rule, including the agency's responses to all relevant comments.¹⁷¹ This process is known generally as "informal rulemaking," to distinguish it from "formal rulemaking," a process in which participants have much greater rights to present evidence and to examine and cross-examine witnesses.¹⁷² But formal rulemaking is an endangered species, if not

completely extinct, since the Supreme Court long ago strictly limited the class of issues that require “formal rulemaking.”¹⁷³ Thus, what the APA’s framers called an “informal” rulemaking process is today the most formal process that agencies actually undertake.

And, as illustrated by *Perez*, the APA also includes significant exceptions to the procedure requirement for rulemakings. The notice-and-comment process is not required for “interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice,” or in emergency situations where the agency finds upon good cause that the requirements of the notice-and-comment would be “impracticable, unnecessary, or contrary to the public interest.”¹⁷⁴

Those are the basic requirements for agencies promulgating new regulations. But, as noted, agencies can make law through an alternative approach — namely the case-by-case development of policy through an agency’s own quasi-judicial “adjudications.”¹⁷⁵ As with rulemakings, the APA’s minimalist process for “informal” adjudications is effectively the default rule, since the courts only rarely require agencies to use the heightened procedures of “formal” adjudications.¹⁷⁶

Once an agency takes final action, attention turns to the federal courts. The APA’s provisions regarding agency procedure are followed by procedures generally governing judicial review — most importantly, the standards of review that courts apply in deciding whether to affirm or nullify an agency’s action. Specifically, when an appeal arises under the APA, the courts review whether the agency’s action is “not in accordance with law,” “arbitrary, capricious, an abuse of discretion,” “contrary to constitutional right,” “without observance of procedure required by law,” or “unsupported by substantial evidence.”¹⁷⁷ Most of these standards present relatively low bars for an agency to clear. To overturn an agency’s action as “arbitrary and capricious,” the challenger must show that the agency’s reasoning is not just contestable but irrational — *i.e.*, that it is “so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”¹⁷⁸ Similarly, to overturn an agency’s action as lacking “substantial evidence,” the challenger must show that the agency’s conclusions are supported by less than “a mere scintilla” of evidence.¹⁷⁹

Given how lenient those standards are, the true bulwark of judicial review would seem to be the APA’s prohibition against agency actions that are “not in accordance with law.” As the Supreme Court has observed, “an agency literally has no power to act...unless and

until Congress confers power upon it.”¹⁸⁰ And once Congress has conferred power upon an agency, the agency must work within the limits of that legislative conferral, because “[r]egardless of how serious the problem an administrative agency seeks to address,” it “may not exercise its authority in a manner that is inconsistent with the administrative structure that Congress enacted into law.”¹⁸¹ Thus, the APA and other statutes providing for judicial review of agency action create the means by which the courts keep agencies within Congress’s limits.

But statutes are written in varying degrees of specificity. Indeed, as James Madison warned, there are often practical limits on how precise and accurate we could hope *any* written law to be. “All new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications,” he wrote in Federalist No. 37. “Besides the obscurity arising from the complexity of objects, and the imperfection of the human faculties, the medium through which the conceptions of men are conveyed to each other adds a fresh embarrassment...[N]o language is so copious as to supply words and phrases for every complex idea, or so correct as not to include many equivocally denoting different ideas.”

Those challenges are particularly acute in the context of regulatory agencies, which administer statutes that are often extremely complex in their substance or in their subject matter. When Madison observed in Federalist No. 37 that the “unavoidable inaccuracy” of written law increases in accordance with “the complexity and novelty of the objects defined,” he foreshadowed a major challenge inherent in the modern administrative state.

Beginning in the New Deal, courts began to cope with this complexity by adopting doctrines of judicial “deference” to agencies’ interpretations of regulatory statutes.¹⁸² This trend toward deference initially produced a body of inchoate deference doctrines, before culminating in the seminal *Chevron* case.¹⁸³ There the Court announced that federal courts should defer to administrative agencies’ interpretations of the statutes that they administer, so long as the statutory language is “ambiguous” and the agency’s interpretation is “reasonable.” In later cases the Court would add further caveats and nuances to the analysis, but by and large this framework remains intact today.

In *Chevron*, the Court ascribed this deferential approach to two distinctly different justifications: technocratic expertise and democratic accountability. First, the Court explained, courts should defer to agencies' interpretations of these statutes because the agencies have much greater expertise on technical regulatory subjects than judges do.¹⁸⁴ Second, agencies are more accountable to the people than courts are, because agencies are overseen and influenced by the elected president; when a statute leaves room for discretion, the legal question effectively becomes a policy question, and on such matters "it is entirely appropriate for this political branch of the Government to make such policy choices — resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities."

Similar principles informed another of the Supreme Court's deference doctrines, known as "*Seminole Rock* deference" or "*Auer* deference" — that is, the form of deference described in the beginning of this chapter. Where *Chevron* involves deference to agencies' interpretation of statutes, *Seminole Rock* or *Auer* deference pertains to agencies' interpretation of the agencies' own *regulations*. Under this doctrine, the courts must afford "controlling" deference to an agency's interpretation of its own regulation, unless the interpretation is "plainly erroneous or inconsistent with the regulation."¹⁸⁵ Like *Chevron*, this doctrine reflected the Supreme Court's view of agencies' expertise and democratic accountability, but also the fact that regulations' original author — the agency — is best positioned to accurately "reconstruct the purpose of the regulations in question."¹⁸⁶

These doctrines were defended on both sides of the political and jurisprudential aisles, from the Reagan administration and Clinton administrations that advanced them in court to Justices Scalia and Stephen Breyer (the latter a Clinton appointee), who both generally supported judicial deference to agencies' interpretations of ambiguous statutes.¹⁸⁷

And for Justice Scalia, the best justification for *Chevron* was the lived experience of actual governance, as he explained in an article published five years after *Chevron*. "I tend to think," he wrote, "that in the long run *Chevron* will endure and be given its full scope — not so much because it represents a rule that is easier to follow and thus easier to predict

(though that is true enough), but because *it more accurately reflects the reality of government, and thus more adequately serves its needs.*¹⁸⁸

ADMINISTRATIVE LAW MEETS
OUR NEW ADMINISTRATIVE REALITY

When Justice Scalia wrote of “the reality of government,” and of what “adequately serves its needs,” he was not describing a theoretical society or government. Rather, he was writing at a very specific moment, in terms of the history of the administrative state and administrative law.

In 1989, the doctrine of *Chevron* deference was only five years old. And, no less importantly, the framework for White House oversight of administrative agencies through the Office of Information and Regulatory Affairs (as described in “Modern Management for the Administrative State,” p. 33) was still in its early years, with the newly inaugurated President Bush continuing this experiment in OIRA-overseen cost-benefit analysis and interagency review.

For proponents of limited government, this was a significant achievement. And it was also a significant departure from longstanding conservative conventional wisdom as to how best to restrain the administrative state. Even after President Nixon’s efforts to assert greater presidential power over the agencies,¹⁸⁹ conservatives had believed that the best strategy for restraining agencies was to enact legislation to encumber the executive branch. The arrival of President Reagan, however forced a fundamental rethinking of this approach — as Scalia himself had recognized and stressed, while still a professor and editor of *Regulation* in 1981.

Recognizing that the nation now had an opportunity to use the executive branch itself to restrain the administrative state, then-Professor Scalia took the occasion of *Regulation*’s 1981 inauguration issue to urge his fellow conservatives to recognize that, on matters of regulatory reform, “the game has changed.”¹⁹⁰ “Executive-enfeebling measures” long pursued by Congress-focused conservatives “do not specifically deter regulation. What they deter is change,” Scalia explained. And when “imposed upon an executive that is seeking to dissolve the encrusted regulation of past decades,” they “will impede the dissolution.”

He punctuated this point in the strongest terms possible: “Regulatory reformers who do not recognize this fact, and who continue to support the unmodified proposals of the past as though the fundamental game had not been altered, will be scoring points for the other team.”

Scalia's point is instructive: Administrative law is not simply a matter of first principles; it ultimately strikes a prudential balance. At its best it reflects a set of compromises within the Constitution's broader limits. And the balance struck by Congress and the courts is not and cannot be a timeless one. For sometimes, as Professor Scalia observed, the fundamental game will change, and the rules that promote good government in one era may have precisely the *opposite* effect in another era.

And, unfortunately, that is precisely the experience of recent decades—especially the last eight years, which have witnessed a wave of lawmaking undertaken outside of either the notice-and-comment rule-making process or even the agency-adjudication process; instead, agencies increasingly make policy without meaningful public scrutiny, through amorphous “guidance” documents and other unaccountable methods, or they effectively change the law by formally “waiving” laws, adopting *de facto* policies of wholesale non-enforcement. And, at the same time, agencies' ever more aggressive pushing of their statutory boundaries have cast the problems of judicial deference in ever starker relief.

We'll consider those issues in turn, starting with “guidance,” “Dear Colleague letters,” and other forms of passive-aggressive regulation. As explained above, the APA's general notice-and-comment requirement for rulemaking is subject to a major caveat: the APA expressly exempts “interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice” from that requirement.¹⁹¹ These are often grouped together generally as “guidance.” One need not obtain a master's degree in public administration to recognize the incentive that such an exception creates: On the margin, an agency would prefer to make and revise policy through guidance than to endure the formalities of the notice-and-comment process.

To be sure, exempting guidance documents from notice-and-comment rulemaking is in many respects a good thing. Inducing agencies to publish guidance documents serves the public's interest in regulatory transparency and predictability, by keeping the public apprised of an agency's own interpretation of the statutes and regulations that it enforces. As the Government Accountability Office explained in a 2015 report, “[o]ne of the main purposes of guidance is to explain and help regulated parties comply with agency regulations,” by “explain[ing] how they plan to interpret regulations,” or to provide further clarity in “circumstances they could not have anticipated when issuing a regulation and when additional clarifications

are needed.”¹⁹² If agencies were to produce no such guidance, and simply keep their interpretations and nascent policies until applying them in agency enforcement proceedings or other adjudications, then the public would suffer the costs of regulatory uncertainty.

But just as the benefits of agency guidance documents should not be ignored or downplayed, nor should we ignore their cost, in terms of denying the public a meaningful opportunity to participate in their development.

And this problem is growing ever more evident. The GAO recently studied the practices of four major cabinet departments (Agriculture, Education, Health and Human Services, and Labor) and found that the agencies issued “varying amounts of guidance, ranging from about 10 to over 100 guidance documents each year.”¹⁹³ The GAO further found that those agencies vary widely in terms of the processes and standards — if any — that governed the issuance of guidance documents by agency personnel, and also in terms of the extent to which the agencies published even “significant” guidance documents online for public inspection and feedback.¹⁹⁴ More recently, the GAO published similar criticism of the IRS: Despite issuing hundreds of guidance documents annually,¹⁹⁵ and doing so in formats ranging from official “Internal Revenue Bulletins” to *ad hoc* “Frequently Asked Questions” documents online,¹⁹⁶ the IRS lacked reliable standards governing such policymaking by the agency.¹⁹⁷

There are myriad other examples. Former OIRA administrator John Graham and the Mercatus Center’s James Broughel highlighted the Obama administration’s efforts to change policy on implementation of the Affordable Care Act: Instead of formally publishing a proposed rule and subjecting it to notice and comment, the Treasury Department informally posted a notice on its “blog” site, simply announcing that the controversial “employer mandate” would be deferred for a year; the IRS followed this announcement with an informal “bulletin” to regulated parties.¹⁹⁸ Moreover, as Professor Josh Blackman observes, that was just one of myriad occasions on which the Obama administration unilaterally changed federal policy on implementation of the Affordable Care Act, a “cavalier approach” in which, “[m]ore often than not, the explanation of a modification would come in a social media update on the Department of Health and Human Services (HHS) blog (often on a Friday afternoon).”¹⁹⁹

Blackman calls this “Government by Blog Post.” Graham and Broughel call it “stealth regulation.” Wayne Crews, of the Competitive

Enterprise Institute, calls it a form of “Regulatory Dark Matter.”²⁰⁰ Other controversial examples include the Consumer Financial Protection Bureau’s 2013 memorandum asserting jurisdiction to regulate auto lenders,²⁰¹ a policy that raised significant questions in light of the Dodd-Frank Act’s express provision denying the CFPB jurisdiction over auto dealers.²⁰²

Most recently — and most controversially — the Department of Education’s persistent use of “Dear Colleague” letters to set education policy²⁰³ culminated with its issuance of a directive effectively ordering schools to implement the Obama administration’s policy on “transgender” students. Specifically, the Education Department ordered that teachers and staff should address students by the pronoun of their choosing even if it is not their natural gender, and further required schools to open restrooms and locker rooms up students of the opposite sex who “identify” by the other gender.²⁰⁴ Schools that do not comply with this policy are subject to the threat of lawsuits or the denial of federal funds.

When agencies are criticized for using guidance documents to avoid notice-and-comment procedures, the agencies and their proponents often downplay the actual impact of such guidance documents, asserting that that guidance documents do not legally “bind” regulated parties. But this exalts form over substance: As the GAO notes, “[e]ven though not legally binding, guidance documents can have a significant effect on regulated entities and the public, both because of agencies’ reliance on large volumes of guidance documents and the fact that the guidance can prompt changes in the behavior of regulated parties and the general public.”²⁰⁵

Congress has drawn similar conclusions on several occasions. In a 2000 investigation, the House Committee on Government Reform recognized both the benefits of guidance documents and their systemic costs:

Agencies sometimes claim they are just trying to be “customer friendly” and serve the regulated public when they issue advisory opinions and guidance documents. This may, in fact, be true in many cases. However, when the legal effect of such documents is unclear, regulated parties may well perceive this “help” as coercive — an offer they dare not refuse. Regrettably, the committee’s investigation found that some guidance documents were intended

to bypass the rulemaking process and expanded an agency's power beyond the point at which Congress said it should stop. Such "backdoor" regulation is an abuse of power and a corruption of our Constitutional system.²⁰⁶

When the House Oversight and Government Reform Committee returned to the subject in 2012, it reaffirmed these basic findings:

Guidance documents, while not legally binding, are supposed to be issued only to clarify regulations already on the books. However, under this Administration, they are increasingly used to effect policy changes. *While not technically enforceable, they often are as effective as regulations in changing behavior due to the weight agencies and the courts give them. Accordingly, job creators feel pressure to abide by them because they fear backlash from agencies.* Agencies who wish to avoid meaningful scrutiny can avoid regulatory analyses by issuing policy changes through guidance documents.²⁰⁷

That is the key point, one that Supreme Court justices, too, sensed at oral argument in *Perez*: Agencies may purport that their guidance documents are "non-binding," but as a matter of fact such documents are regularly treated as binding—and agencies are clearly aware of this. Guidance documents are effectively a form of "passive-aggressive regulation," and given their increasing prevalence the law's treatment of them should be better informed by their substance than by their mere form.

Beyond these problems of passive-aggressive guidance are agencies' half-hearted efforts at notice-and-comment rulemaking. In criticizing the lack of notice-and-comment process for guidance documents, one must not overstate the rigors of that process. As explained above, most rulemaking today is "informal" rulemaking—that is, it does not grant participants a right to an in-person hearing, the right to cross-examine agency experts, or other trial-type procedures.

Instead, the APA's standards for "informal" rulemaking are much more relaxed. The APA requires the agency to publish notice of the proposed rulemaking, including "either the terms or substance of the proposed rule or a description of the subjects and issues involved."²⁰⁸ Interested parties must be given "an opportunity to participate in the rule making through submission of written data, views, or arguments,"²⁰⁹

but this might be done simply through the submission of paper briefs. And agencies must identify the data and other technical information that its rule is premised upon, so that commenters can criticize it.

But if an agency clears that low bar, and responds to the substance of comments submitted on the proposal,²¹⁰ the courts are likely to affirm the agency's process as having afforded the public an opportunity for "meaningful" participation.²¹¹ And unless the agency decision-maker approaches the proceedings with blatant prejudice as to the intended outcome, the courts will not likely overturn the decision for lacking a sufficiently "open mind."²¹²

And again, as noted earlier, when participants submit reams of conflicting studies and analyses, the agency is not required to determine factual questions by a "preponderance of the evidence." Instead, the agency need only show that its own analysis was not "arbitrary and capricious,"²¹³ meaning that it was reasonable and that it was supported by at least *some* evidence in the record.²¹⁴

Taken together, the procedural protections of notice-and-comment rulemaking are important but could be strengthened. As a practical matter, they are perhaps least robust when the policy in question is most significant to the administration or agency. On minor rulemakings, the agency may consider significant criticism with an open mind; but on the policies most important to the administration, the agency has all the more reason to be less flexible.

For example, when the Obama administration took office eager to reverse the Bush administration's policy on the funding for embryonic stem-cell research, the National Institutes for Health's final rule refused to address comments highlighting "scientific and ethical problems" implicated by the proposed rule, because those comments disagreed with President Obama's position on embryonic stem-cell research.²¹⁵

At its worst, this can degrade the quality of notice-and-comment rulemaking to a point where the process is little more than Kabuki theater. That is how it was characterized by E. Donald Elliott, former EPA general counsel and a prominent scholar of administrative law. Elliott writes that when an agency cares enough about a policy agenda, the proposal of a regulation marks the *end* of the agency's real analysis, not the beginning; in such cases, the notice-and-comment process is merely a shadow of discussions and decisions that long preceded the agency's formal "proposal" of the regulation:

No administrator in Washington turns to full-scale notice-and-comment rulemaking when she is genuinely interested in obtaining input from interested parties. Notice-and-comment rulemaking is to public participation as Japanese Kabuki theater is to human passions—a highly stylized process for displaying in a formal way the essence of something which in real life takes place in other venues.²¹⁶

As with the question of exempting guidance documents from the usual rulemaking procedures, one must admit that there is benefit to allowing an agency to forge ahead with its policies. A president is elected by the people to carry out his policies, and, to the extent that the president's policies remain within the bounds of the agency's discretion, it may be inefficient to slow the agency down with a process that will not ultimately affect the final outcome; in addition, to require the agency to not give significant weight to the president's preference would degrade the agency's democratic accountability.

Still, the costs of this approach are equally self-evident. And when the only process required of an agency in undertaking the costliest and most controversial regulatory programs is to accept briefs from interested parties and offer cursory replies, the agency has too little incentive to approach the issue with an open mind in good faith.

As noted a few times in this report, one of the basic premises of modern administrative law is that the administrative state's legitimacy is rooted not just in the agencies' technocratic expertise, but also in their democratic accountability. A new presidency can and should create an opportunity for agencies, under new leadership, to re-evaluate old policies. As the Supreme Court observed, "a change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations. As long as the agency remains within the bounds established by Congress, it is entitled to assess administrative records and evaluate priorities in light of the philosophy of the administration."²¹⁷ For that reason, the Court gives agencies broad leeway to reverse policies, so long as they remain within the broad limits set by the statutes they administer.²¹⁸ For agencies headed by political appointees, this freedom cuts both ways: a cabinet officer has the freedom to turn his agency in a new policy direction...but, only a few years later, so will his successor.

In recent years, agencies have attempted to “lock in” a particular regulatory agenda—especially in the context of environmental regulation—through a practice known as “sue-and-settle.” An agency is sued by ideologically aligned activists, who criticize the agency for not regulating aggressively enough. But the lawsuit is not necessarily adversarial: The agency and the activists may plan the lawsuit in advance; as soon as the suit is filed in federal court and docketed before a judge, the agency and plaintiffs will agree to “settle” the case, and ask the judge to approve the settlement, known as a “consent decree.” The judge’s review is minimal, and once he signs off on the agreement, the agency is legally bound to executing it—usually an obligation to begin and complete a rulemaking within a limited period of time. Because the agreements are finalized by the court in a lawsuit, they continue to bind the agency even after its leadership changes.

Thus, as Andrew Grossman explained in a recent Heritage Foundation report, such consent decrees often “appear to be the result of collusion, with an agency’s political leadership sharing the goals of those suing it and taking advantage of litigation to achieve those shared goals in ways that would be difficult outside of court.”²¹⁹

As Grossman observes, such collusion has profound ramifications in terms of democratic accountability. Other parties interested in the subject of a sue-and-settle suit—usually the private individuals, companies, or interest groups that would oppose the regulation—have no seat at the table before the sham lawsuit is filed, and they have little or no opportunity to participate in the judicial proceeding. By the time they arrive on the scene, the court may already have signed the consent decree.

Sue-and-settle also undermines the agency’s accountability to Congress and the president, Grossman observes. Consent decrees “diminish the influence of other executive branch actors, such as the President and the Office of Management and Budget, and of Congress, which may use oversight and the power of the purse to promote its view of the public interest.”²²⁰

Meanwhile, the regulatory process required by the consent decree is too often truncated in terms of time and process, and the agreement may effectively pre-decide the substance of a rulemaking. Indeed, as Grossman notes, “[t]ossing the normal rulemaking procedures by the wayside is, in some sense, the very point of sue and settle: Doing so empowers the special-interest group that brought suit in the first place

at the expense of parties that might otherwise use their political leverage and the rulemaking process to force compromises that serve the broader public interest.”²²¹

Unsurprisingly, sue-and-settle has been used as the foundation for environmental regulations that impose hundreds of millions or even billions of dollars in compliance costs upon the regulated public, despite truncating the public’s procedural or substantive rights.²²² The U.S. Chamber of Commerce has attempted to estimate the prevalence of this practice, at the EPA specifically: “EPA chose at some point not to defend itself in lawsuits brought by special interest advocacy groups at least 60 times between 2009 and 2012. In each case, it agreed to settlements on terms favorable to those groups. These settlements directly resulted in EPA agreeing to publish more than 100 new regulations, many of which impose compliance costs in the tens of millions and even billions of dollars.”²²³

The House Oversight and Government Reform Committee condemned this practice, for its distortive impact on the regulatory process: Through collusive sue-and-settle lawsuits, activists and agencies use the courts as a weapon allowing them to “bypass the proper rulemaking process and avoid basic principles of transparency and accountability.”²²⁴

Sue-and-settle is an example of litigation affecting the *commencement* of regulatory proceedings. Even more important are the ways in which the modern administrative state distorts the litigation that comes *after* an agency decides to regulate. Some of the distortions owe to procedural or tactical advantages that the agencies wield against the parties they are regulating. But the most important advantages are doctrinal — namely, the doctrines of judicial deference to agencies’ legal interpretations.

Long ago, Alexander Hamilton recognized that the executive’s energy gives the executive branch what today we would call a “first-mover advantage” vis-à-vis the legislative branch: “The Legislature is free to perform its own duties according to its own sense of them — though the Executive in the exercise of its constitutional powers, *may establish an antecedent state of things* which ought to weigh in the legislative decisions.”²²⁵

The executive’s first-mover advantage is not limited to its dealings with Congress. The executive’s “energy” is all the more advantageous vis-à-vis the people and companies that agencies regulate. Because once an agency issues a new regulation, it has broad leeway to enforce that new regulation against the regulated parties even while the regulation’s

legality is being litigated in federal court. Regulated parties cannot normally block a rule's enforcement while the appeal is pending.

To lay observers, that fact often comes as a surprise: When a court is reviewing an agency's new regulation, should the agency not wait for the litigation to be resolved before enforcing that regulation against the litigants? Should the court not preserve the "status quo" until the appeal is decided?

Not according to the D.C. Circuit, the federal court hearing most major regulatory appeals. Under its precedents, an agency's action will be "stayed" pending appeal only in exceptional circumstances. The challenger asking the court to freeze the agency's action during the appeal must show that four things are true: first, that it has a strong likelihood of winning the lawsuit in the end; second, that the challenger will otherwise be "irreparably injured" by the agency's enforcement while the case is pending; third, that other parties to the case will not be "substantially harmed" by the court's freezing the agency's action pending appeal; and fourth, that the broader "public interest" would be served by freezing the agency's action pending appeal.²²⁶

The APA, as currently written, allows this. While the act authorizes the courts to grant this relief to parties, it leaves the courts free to set the standard for granting that relief.²²⁷

Ultimately, the courts see the relief of a stay pending appeal as an "extraordinary and drastic remedy," appropriate for only the most exceptional cases. In the vast bulk of cases, no such relief is available while the appeal is pending, and so the agency can begin to enforce its new policy against regulated parties if it so chooses, even while the policy's legality is being litigated.²²⁸

The law thus leaves the agencies with immense leverage over potential challengers to new regulation. If the agency can force the challengers to comply with the regulation while their appeal is pending, forcing the challengers to change their business practices or invest in modifications to their business operations, the challengers may conclude that even a successful lawsuit would not be worth the time and expense; having made those investments or changes, they would not likely undo their own actions even after winning their appeal.

This is not a strictly academic assumption. In *Michigan v. EPA* (2015), various parties challenged the EPA's Utility MACT Rule, which would have regulated mercury emissions from power plants. It was an

immensely costly rule: The EPA's own analysis, noted the Court, projected that the regulation "would force power plants to bear costs of \$9.6 billion per year." And the Court struck down the rule as unlawful, since the EPA had failed to consider all of the factors relevant under the applicable Clean Air Act provision before finalizing the rule.²²⁹

But the day after the EPA lost its case in court, it made a startling announcement: "EPA is disappointed that the court did not uphold the rule," the agency said in a statement, "but this rule was issued more than three years ago, investments have been made and most plants are already well on their way to compliance."²³⁰ It repeated these comments on the EPA's website.²³¹ In short, the EPA had already succeeded in cajoling the regulated power plants into investing immense sums to comply with the law, investments that the companies would not unwind even after winning the case. The EPA had lost in court but won in reality — and was not afraid to say so.

The EPA's bluntly self-congratulatory comment may already have spurred a judicial backlash in one major case. Months later, when the EPA's controversial "Clean Power Plan" for greenhouse-gas regulation was appealed to the federal courts, the Supreme Court took the extraordinary step of issuing an order staying the EPA's enforcement of that rule until all litigation could be completed.²³² (The Court's order was all the more extraordinary for the fact that the case's merits had not yet reached the Justices; it was still pending in the D.C. Circuit, where judges had denied such a stay to the challengers.)

The Court's eagerness to stay enforcement of the Clean Power Plan while the litigation was pending was taken by many to reflect the EPA's intemperate comments after *Michigan*, especially since the EPA's comments were highlighted in the brief seeking Supreme Court relief.²³³

But the relief that the Court granted in the Clean Power Plan litigation remains truly exceptional. While courts grant such a stay from time to time, they usually do not — and agencies are left free to impose their orders on people and companies even before those people and companies get meaningful judicial review. This is a blunt tool for agencies to wield against would-be challengers — especially when judicial review may take years to complete.

Agencies enjoy an even blunter tool: the basic threat of reprisal against the parties that might challenge a regulation. Most regulated parties are "repeat players" before a given agency, or before federal and

state regulators generally. If any agency facing a challenge to its regulation is poised to take retaliatory action against a regulated party in another forum or matter, then it can leverage that threat to deter the party from challenging the first regulation.

Like the problem of an agency attempting to negate judicial review by enforcing a regulation while the litigation is pending, the problem of agency threats to deter judicial review is not hypothetical. In 2009, for example, the Obama administration seized upon U.S. auto companies' perilous financial condition to secure their assent to the administration's proposals for a massive greenhouse-gas regulation program. As the House Oversight Committee later documented, White House personnel went to extreme lengths to secure the companies' agreement:

The President, joined by members of his cabinet and several state governors [in a 2009 Rose Garden ceremony], lauded the work done by his Administration, the automobile industry, environmental interest groups, and state officials in negotiating an "historic agreement" in which "everyone wins." Left unsaid by the President and virtually untold until now is the story of how the Obama Administration empowered the state of California to nearly destroy the domestic auto manufacturers, then leveraged their financial plight to set into law the unrealistically high fuel economy standards desired by environmental extremists. The Administration, assuming the mantle of the imperial presidency, acted in spite of clear congressional intent, using heavy-handed, Chicago-style tactics to achieve its ends. These tactics proved so useful that the White House employed them again two years later in developing a second round of regulations. Although many in the automobile industry recognized the overreach by the Administration, the industry found itself ultimately tied to the Obama White House, believing it would "gain nothing by publicly grousing or simply walking away."²³⁴

Specifically, as the House Oversight Committee detailed, the Obama administration threatened to authorize California regulators to impose strict new regulations on the auto companies—"a 'gun to the head' of automakers, forcing them to engage the Administration on a path toward an integrated federal-state standard."²³⁵ (This episode is detailed

in an article in the Summer 2012 issue of *National Affairs*, titled “Obama’s Cynical Energy Agenda.”)

The White House steered the auto companies and state regulators to a deal, and as the deal came together the White House presented each of the auto companies a “pre-drafted commitment letter,” and told the companies that the deal needed to be signed within a strict 24-hour deadline, with no further edits or negotiations.²³⁶ Years later, one of the White House officials who helped to push the auto companies into the deal wrote about the negotiations, favorably, as “a striking success for many reasons,” an “example of how the federal government can mobilize its resources and coordinate even the most complicated of matters when it really puts its mind to it.”²³⁷

In that article, Jody Freeman notes that the auto companies made a significant concession: They agreed not to appeal any of the regulatory standards that would ultimately flow from the agreement for years after the deal.²³⁸ But the House Oversight Committee’s report included significant details not found in Freeman’s article, such as the fact that the EPA and California’s regulators deliberately phrased this provision vaguely, “to foster confusion rather than make their true intentions clear.” As a California official wrote to his EPA counterpart, “Unless we’re trying to be over-the-top transparent by providing a potentially confusing and esoteric legal ‘test,’ I would not spell it out; auto’s attorneys can figure this out.”²³⁹

The EPA’s treatment of financially distressed U.S. auto companies is a particularly egregious example of an agency using threats to advance a regulatory program and thwart judicial review, but it is by no means the only example of what another scholar calls “administrative arm-twisting.”²⁴⁰ In 2011, law professor Tim Wu highlighted examples from the Federal Communications Commission and Federal Trade Commission.²⁴¹ Wu wrote in defense of agency threats, but suggested that concerns “that rule by threat is a means of avoiding judicial review may be overstated,” since threatened parties “can and do test the threats, forcing the agency to use its more formal powers and therefore invoke judicial review.”²⁴² (Notably, Wu was also a senior advisor to the FTC at the time he published his article.)

That mindset may well reflect the views of scholars, or of agency personnel. But to people and companies regulated by federal agencies, the risk of agency threat is all too prevalent. People and companies in highly

regulated industries often refrain from appealing even legally dubious agency actions, precisely because they recognize that a “win” in one case—or even just the decision to appeal an agency action—might cause the agency to treat the person or company less kindly in other contexts.

By the same token, regulated people and companies have every incentive to treat agencies’ nominally “voluntary compliance” or “best practices” programs as effectively mandatory. When agencies announce such programs, people and companies tend to comply with them, going above and beyond what is actually required by law, in order to avoid attracting unwelcome scrutiny (or worse) from the agencies.

The preceding two problems—agency efforts to negate judicial review by enforcing disputed rules, and agency efforts to expressly intimidate regulated parties from exercising their right of judicial review—are self-evidently problematic but perhaps relatively uncommon in the day-to-day operations of the administrative state. Another problem, by contrast, is pervasive throughout administration yet is relatively uncontroversial in modern administrative law—at least until recently. That is the problem of judicial deference to agencies’ legal interpretations.

When someone challenges an agency’s actions in federal court, the judicial playing field is not level. As described above, agencies receive significant “deference” from the courts with respect to their interpretations of laws and regulations. Under the doctrine of *Chevron* deference, a court will largely defer to an agency’s interpretation of an ambiguous statute, so long as the interpretation is reasonable. And under *Seminole Rock* or *Auer* deference, a court will defer to an agency’s interpretation of its own regulation so long as the interpretation is not blatantly contrary to the statute.

Chief Justice Roberts warned recently that judicial deference “is a powerful weapon in an agency’s regulatory arsenal.”²⁴³ Studies have demonstrated precisely how powerful that weapon is. A new study by law professors Kent Barnett and Christopher Walker finds that federal agencies enjoyed a 77% win rate when courts applied the *Chevron* deference framework to the agencies’ interpretation of statutes—as opposed to just a 66% win rate when the court did not say whether it was employing any deference framework in its review, and just a 39% win rate when the court expressly refused to grant any deference to the agency.²⁴⁴

Similarly, the Competitive Enterprise Institute’s William Yeatman surveyed two decades of cases involving agency interpretations of federal regulations, and found that government agencies enjoy a 74% win

rate when appellate courts apply *Auer* deference to the agencies' interpretations, and just a 60% win rate when the courts apply lesser forms of deference to the interpretations.²⁴⁵ Other studies make similar findings regarding the real-world impact of judicial-deference doctrines, if to varying degrees.²⁴⁶

In recent years, these doctrines have attracted increasingly vocal criticism from scholars and even some judges. This criticism falls along two lines: criticism of how deference doctrines are applied in practice, and criticism of deference doctrines in principle.

The practical criticisms are largely directed at *Chevron* deference — judicial deference to agencies' statutory interpretations — as critics argue that the deference should not apply in certain cases. This criticism is phrased in terms of congressional intent, for *Chevron* itself is premised on the presumption that Congress expressly or implicitly wanted the agency, not the courts, to “fill any gap left” in a given statute by “elucidat[ing] a specific provision of the statute by regulation.”²⁴⁷ By the same token, then, it is often argued that *Chevron* should not apply in a given case because the statute is one for which Congress would have wanted the courts to interpret the law for themselves instead of letting the agency “fill” any “gaps.”

We see this in cases where the Supreme Court or lower courts conclude that the agency is attempting to regulate an issue of such sheer political or economic magnitude that Congress cannot be presumed to have delegated interpretive responsibility to the agency instead of the court. In *King v. Burwell* (2015), for example, the Supreme Court concluded that the court, not the IRS, needed to take the lead in interpreting the Affordable Care Act's provision for health-insurance subsidies: “Whether those credits are available on Federal Exchanges is thus a question of deep ‘economic and political significance’ that is central to this statutory scheme; had Congress wished to assign that question to an agency, it surely would have done so expressly.”²⁴⁸ Even though the same justices ultimately ruled in favor of the Obama administration, they did so without explicit deference to the administration's interpretation; they decided the issue for themselves instead.

Similarly, the Supreme Court suggests that if Congress has not empowered an agency to undertake particular policymaking formalities, such as notice-and-comment rulemaking, then Congress presumably did not want the courts to give *Chevron* deference to the

agency's statutory interpretations.²⁴⁹ Moreover, other justices (though not yet a majority) have gone still further, arguing that courts should withhold *Chevron* deference for any interpretation of a statute defining the agency's "jurisdiction," since Congress should not be presumed to have given agencies the power to effectively define their own jurisdiction — which, naturally, they would define as expansively as possible.²⁵⁰

Finally, in addition to these practical criticisms of *Chevron* deference, there are practical criticisms of *Auer* deference — again, judicial deference to an agency's interpretation of the agency's own regulations. Justice Scalia pressed such a criticism forcefully in his final years. When an agency both writes the regulation and interprets it, he argued, the agency has a natural incentive to write the regulation vaguely, in order to leave itself leeway to interpret it creatively and expansively in the future.²⁵¹

These are practical criticisms of deference; in recent years, however, they have been surpassed in intensity by criticism of deference as a matter of first principles. In books, articles, and judicial opinions, critics argue that judicial deference is an abdication of judicial duty, a violation of the rule of law.

First among these critics is Justice Thomas, who in recent opinions has urged that both *Chevron* and *Auer* deference are incompatible with the Constitution's "judicial power," which, "as originally understood, requires a court to exercise its independent judgment in interpreting and expounding upon the laws."²⁵² "[W]e seem to be straying further and further from the Constitution without so much as pausing to ask why," Thomas concludes. "We should stop to consider that document before blithely giving the force of law to any other agency 'interpretations' of federal statutes."²⁵³

In criticizing judicial deference and the administrative state more broadly, Justice Thomas has invoked the research of law professor Philip Hamburger, a strong critic of *Chevron* deference — or, as he calls it, "*Chevron* bias."²⁵⁴ And Hamburger is hardly alone, as lawyers and even non-legal scholars have criticized judicial deference with increasing intensity.²⁵⁵

But while judicial deference is opposed today primarily (though not exclusively²⁵⁶) by the administrative state's critics, it is important to recognize that these doctrines of judicial deference have not always been seen as inherently pro-regulatory doctrines. Indeed, in *Chevron* the Court was affirming the Reagan administration's efforts to adopt a

much more flexible and less burdensome interpretation of the Clean Air Act's regulation of smokestacks, over the objections of the Natural Resources Defense Council and other environmentalist activists.²⁵⁷ The Supreme Court's decision pushed back against lower court judges, especially with respect to the D.C. Circuit, where judges appointed by prior Democratic presidents had been particularly unwelcoming of the Reagan administration's regulatory reforms. One Carter appointee on that court explained that the D.C. Circuit had opposed the Reagan agencies' reforms because the judges saw the agencies as insufficiently faithful to prior Democratic Congresses. "We were, if you will, a trustee for the ghosts of Congresses past," Judge Patricia Wald, a Carter appointee, later reflected. A public-interest lawyer told the *New York Times* in 1982 that the D.C. Circuit had become the federal government's "last bastion of liberalism" amid Reagan's reforms.²⁵⁸

But whatever the actual or perceived merits of judicial deference three decades ago, the passage of time has cast its very real costs in stark relief. Even Justice Scalia, the Supreme Court's most reliable defender of *Chevron* deference, reportedly began to rethink the doctrine's merits in the last years of his life.²⁵⁹ "Much as he admired the framework *Chevron* should have been," his friend Ronald Cass writes, "he had come to be more skeptical of the benefit of the decision."²⁶⁰

If these accounts are accurate, then Justice Scalia's change of mind on *Chevron* was rooted in the same reason that had first led him to endorse it—not first principles, but prudential judgment. On this question (to borrow a line from Justice Oliver Wendell Holmes, Jr.), "a page of history [was] worth a volume of logic."²⁶¹

REFORMING ADMINISTRATIVE LAW
TO REFLECT ADMINISTRATIVE REALITY

The APA is 70 years old. *Chevron* deference is 30 years old; many of the other seminal judicial precedents defining administrative law are still older. And in defining these laws, both Congress and the courts saw themselves as making practical judgments in light of the actual reality of public administration.

But today, nominal administrative law speaks less and less to the reality of our administrative state. "[T]here is an increasing mismatch between the suppositions of modern administrative law and the realities of modern regulation," two scholars recently observed. "Or to put

it another way, administrative law seems more and more to be based on legal fictions.”²⁶²

It is time to return from fiction to reality. More to the point, it is time for today’s Congress to do what its predecessors did in 1946: to legislate administrative law procedures and standards of judicial review that will meaningfully limit and channel the energies of the administrative state. Only by doing the hard work of legislating reality-based reforms can Congress once again strike the proper balance between limited government, executive energy, administrative expertise, and the rule of law. In doing this, today’s Congress would not depart from the spirit of its predecessors — rather, Congress would *vindicate* the APA framers’ spirit of realistic reforms.

Because the modern shift from republican governance to the administrative state is exacerbated by the lack of sufficient accountability and limitation at *both* ends of the process — both in the agency’s own proceedings and in subsequent judicial review — reforms should focus on both ends of the regulatory process. And not simply in isolation from one another: Some reforms require integration of both procedural reform and judicial-review reform *together*.

The rest of this chapter proposes reforms. That is sometimes easier said than done, particularly with respect to the rulemaking process, for to pile new procedural requirements upon agencies creates a risk that agencies will have greater incentives to avoid rulemaking formalities altogether, and to try instead to make law through other means. The challenge, therefore, is to make agencies more accountable while at the same time creating the incentives — both carrots and sticks — that will induce the agencies to accept the burdens of these new means of accountability.

First, even after limiting the powers delegated to agencies, Congress should improve the rulemaking process for agencies’ most significant regulations.

Through statutes delegating vast powers to regulatory agencies, Congress entrusts regulators with decisions on matters of immense public importance in forums that lack the fundamental checks and balances of our constitutional legislative process. Congress empowers agencies to bestow immense benefits and to impose immense burdens.

Problems of agency abuse are unavoidable, so long as Congress delegates such powers to agencies. Thus, the first obvious step toward reform must be for Congress to reform substantive regulatory statutes to clarify

and tighten such delegations of power, and to enact legislation such as the REINS Act to categorically withdraw the delegation of power to impose the most burdensome regulations without congressional assent.²⁶³

But even if Congress reforms its delegation of power to agencies, the agencies will inevitably retain power to impose immensely consequential regulations. Thus, Congress should also enact procedural reforms, requiring agencies to undertake additional procedures before promulgating the costliest regulations, in order to improve the quality of those regulations.²⁶⁴

The Regulatory Accountability Act, introduced by Representative Bob Goodlatte in 2015, exemplifies many of these qualities. For the most significant rules, it would require the agency to undertake procedures above and beyond those that the APA already requires for “informal rulemakings.” The public would receive extra notice of the agency’s regulatory intentions, giving interested parties an additional opportunity for commenting on the agency’s original concept for the regulation, including the rule’s basic objective and the substantive statutory authorization for the rule.

Moreover, the act would require the agency to convene an actual in-person hearing, to provide interested parties with a reasonable opportunity to cross-examine agency experts and to challenge the agency’s factual basis for the rule. To be clear, these are very broadly worded requirements, and as a practical matter Congress will have to take care to prevent abuse by interested parties and regulators alike, and this is easier said than done. And, as Oren Cass rightly observes in his recommendations for OIRA reform, defining tiers of regulatory scrutiny strictly in terms of arbitrary dollar-values entails problems of its own. Congress must be mindful of these problems; in the end, specific reforms are not ends in themselves, but means toward the greater end of improving the procedural protections afforded to the public for the most immensely consequential rules.

All of these reforms speak to the very same point discussed at the outset of this chapter: namely, that the APA’s 70-year-old provisions for “informal” rulemaking lack rigor concomitant with the magnitude of the regulations that the agencies are promulgating, as law professor Aaron Nielson observes in his own defense of the heightened protections of “formal rulemaking.”²⁶⁵

Regulators and their most emphatic supporters among administrative-law scholars too often lose sight of what should be a matter of common

sense: It strains credulity to think of billion-dollar regulations as the stuff of “informal” regulatory decisions. It is irresponsible for Congress to allow agencies to decide such matters through “informal” rulemaking.

When congressmen or other reformers suggest imposing additional requirements on agency’s rulemaking proceedings, agencies and administrative-law scholars often argue that such requirements are self-defeating. In 2015, for example, a coalition of law professors and practitioners opposed to the Regulatory Accountability Act sent a letter to Congress employing such an argument.

“We seriously doubt that agencies would be able to respond to delegations of rulemaking authority or to congressional mandates to issue rules if this bill were to be enacted,” the critics wrote. “Instead, its new hurdles would likely cause agencies to avoid rulemaking and make increasing use of underground rules, case-by-case adjudication, or even prosecutorial actions, to achieve policies without having to surmount these hurdles.”²⁶⁶

That is not a frivolous concern. When the rulemaking process becomes costlier for an agency, the agency has a natural incentive to try to make policy through other means—just as private-sector actors change their own behavior when agencies make their work costlier.

Among administrative-law scholars, this is known as the “ossification” problem: Namely, agencies’ regulations become rigid—they “ossify”—as agencies eschew the rulemaking process and seek to effectively change their policies without actually engaging the rulemaking process.²⁶⁷ All things being equal, agencies would prefer to make law and policy through the means that are least burdensome. (That is, least burdensome to the agency—not the public. “Ossification” of economic growth in the private sector seems to attract less concern from regulators and many scholars.)

But to concede that this is a problem is not to concede that it is insurmountable—far from it. If Congress determines that the most consequential rules deserve more than merely an “informal” process in the agency, then the objective must be to create incentives for agencies to comply with Congress’s additional procedural requirements instead of evading them.

Thus, this chapter’s second recommendation must be inextricably tied to the first. Congress should reward agencies that comply with the procedural requirements for rulemakings by allowing courts to

continue to afford *Chevron* deference to statutory interpretations in rulemakings. And, by the same token, Congress should direct the courts to afford no deference to agencies' statutory interpretations outside of the rulemaking process.

The House of Representatives recently passed legislation that would eliminate *Chevron* deference altogether. The Separation of Powers Restoration Act would amend the APA's judicial-review provision: Where Section 706 currently directs courts to "decide all relevant questions of law" and to "interpret constitutional and statutory provisions," the new act would direct the courts to "decide *de novo* all relevant questions of law, including the interpretation of constitutional and statutory provisions[.]" By use of the "de novo" or similar terms, Congress would instruct the courts to interpret statutes without deference to the agency.²⁶⁸

My proposal, by contrast, would not be to eliminate *Chevron* deference altogether. Instead, the APA's judicial-review provision should eliminate *Chevron* deference in judicial review of agencies' non-rulemaking actions. When agencies elect to make policy through notice-and-comment rulemaking—or, for the most consequential rules, even more rigorous procedural requirements—Congress would authorize the courts to afford them *Chevron* deference for ambiguous statutes. But when the agencies elect to regulate the public through other means, they are also electing to subject themselves to judicial review without deference.

Such an approach vindicates the basic premise of *Chevron*. As the Supreme Court explains, *Chevron* is a function of Congress's intent. In cases such as *King* and *Mead*, the Supreme Court grants or withholds *Chevron* deference based on the justices' presumptions regarding Congress's intent. *But Congress can speak for itself—and it should*, by making clear in the APA that it intends for the *Chevron* framework to continue to apply in judicial review of rulemakings, but not in judicial review of other agency actions.

This approach necessarily concedes that *Chevron* does not violate the Constitution's judicial power, or the duty of judges to interpret the law. As with Justice Scalia's defense of *Chevron* in his 1989 article, it treats judicial deference as a question of prudential line-drawing within bounds allowed by the Constitution. Thus, this approach will be unsatisfactory to Justice Thomas, Professor Hamburger, and other thoughtful critics who believe that *Chevron* deference is inherently illegitimate.

But to those who see *Chevron* as a legitimate means to the ends of vindicating congressional intent and improving public administration, this doctrine of judicial review can and must be tied to the Regulatory Accountability Act's procedural reforms.

And in that respect, this approach reflects the instincts of the Congress that enacted the original APA, and of Supreme Court justices in *Perez v. Mortgage Bankers Association*: It recognizes the practical relationship between the *ex ante* protections of agency process and the *ex post* protections of judicial review. When agencies make policy through a process that incorporates heightened public participatory rights, they can more safely receive deferential judicial review; but when agencies avoid the protections of notice-and-comment rulemaking (including the heightened standards for the most consequential rules), the courts should review their work more carefully. Agencies are given a choice, but they must “pay now” or “pay later.”

As the earlier discussion of agency “guidance documents” attempts to make clear, guidance documents are not problematic in and of themselves. Quite the contrary: When agencies publish materials further clarifying the agencies' interpretations of the statutes and regulations they administer, or previewing nascent policies that the agency intends to elaborate in future rulemakings or agency adjudications, the public *benefits*.

In other words, the problem with guidance documents isn't the guidance *per se*. The problem is that agencies formulate guidance documents with little or no transparency or public participation, and then the resulting guidance documents receive utmost *Auer-Seminole Rock* deference from the courts. The resulting guidance documents are “non-binding” in name but effectively binding in fact—and the agencies know that, and use it to their advantage.

Thus, the task of reforming guidance documents, much like the task of improving the rulemaking process for the most consequential rules, is not to deter agency guidance documents, but rather to create incentives for agencies to continue to produce guidance documents but through a more transparent, participatory process. And, as with the reform of rulemaking, the reform of guidance documents ultimately requires us to connect agency process to judicial review.

Accordingly, this chapter's third recommendation is that Congress should amend the APA to direct courts to give no deference to agencies' interpretations of their own regulations—no *Auer* or *Seminole Rock*

deference—unless the agency made those interpretations in the course of notice-and-comment rulemaking.

The APA, as it currently stands, does not require agencies to avoid notice-and-comment proceedings when they formulate guidance. Rather, the APA simply gives agencies the *option* to use notice-and-comment for guidance.²⁶⁹ They need an incentive to exercise that option more often.

The availability of more deferential judicial review would surely be such an incentive. An agency might see no need for judicial deference to a particular interpretation, if the underlying regulation is already clear, and in such a case the agency could proceed to publish guidance without process, and face un-deferential judicial review afterward. But when an agency seeks to publish guidance clarifying an unclear regulation, the agency may find great value in the promise of deferential judicial review afterward—and, indeed, the unclear regulations are precisely the ones for which an agency’s interpretive guidance needs the most public participation.

As with the preceding reform of *Chevron* deference, this reform will likely not satisfy those who believe that *Auer* or *Seminole Rock* deference is inherently illegitimate. But to others, who see judicial deference as a legitimate judicial tool in service of the public interest, the task is to make judicial deference as effective a tool as possible. The best use of deference would be to improve the administrative process, in the spirit of the APA’s original framers.

The Supreme Court’s justices saw the problem of process-deference connection in *Perez*, but they recognized that the problem was one that only Congress could solve. Congress should solve it.

Fourth, Congress should remove incentives for agencies to abuse the litigation process. As described above, the judicial system provides agencies with many tools for advancing their substantive policy aims. Because judicial review is a lengthy process, agencies can often force regulated parties to fully implement a regulatory program before the courts have had a chance to definitively decide whether the program is even lawful. And agencies can use sham “sue and settle” lawsuits to lock in a regulatory agenda, prejudicing the rights of the public at large and truncating the public’s ability to participate meaningfully in policy development.

Such gamesmanship will never be removed fully from the judicial process. But it can be reduced, with the following three reforms: First,

for the most significant rules, Congress should flip the presumption against agency enforcement of challenged rules while judicial review is pending; second, it should bifurcate judicial review for the costliest rules; and third, Congress should subject sue-and-settle consent decrees to a form of notice-and-comment public participation. We'll examine each in turn.

The law does not prohibit courts from “staying” an agency’s action while judicial review is pending; it just renders such relief extraordinary, establishing a presumption that such relief will not be granted unless the challengers can convince the court that a given case merits extraordinary relief.

Congress should reverse this presumption, at least in the case of the highest-impact rules (perhaps those costing the public \$100 million annually). Congress can accomplish this by amending 5 U.S.C. § 705 to expressly provide for an automatic stay of agency action for those rules, but then provide an exception in cases where the agency satisfies four factors akin to those faced today by challengers seeking a stay. The agency would need to show: one, that it has a strong likelihood of winning the lawsuit in the end; two, that the challenger faces no risk of being “irreparably injured” by the agency’s enforcement while the case is pending; three, that other parties to the case will be “substantially harmed” by the court freezing the agency’s action pending appeal; and four, that the broader “public interest” would be served by allowing the agency to take the extraordinary step of enforcing the challenged rule while judicial review is pending.

By its own terms, such legislation would cover only an agency’s most significant rules, not most rules, and not adjudications of any magnitude. Adjudications are not normally classified in terms of economic impact. Rather than attempt to create a new system of cost-benefit analysis for adjudications, Congress should choose either to subject all adjudications to an automatic freeze while judicial review is pending, without exception, or, to create a similar exception allowing agencies to enforce an adjudication while judicial review is pending, in the rare cases when the agency satisfies the four-factor test.

I note, however, that this provides another opportunity for Congress to create incentives for agencies to develop policy through rulemaking. If agencies’ adjudications are always subject to a stay while the appeal is pending, but not in the case of some rulemakings, then agencies

will have yet another reason (though perhaps only a small reason) to engage in rulemaking.

As the second reform to reduce gamesmanship, this chapter suggests bifurcating judicial review for the costliest rules. Judicial review of major agency actions can now take a year or more to complete, and the sheer length of judicial review contributes to the agency's ability to force compliance before the appeal is complete. Furthermore, the length and cost of litigation is a factor that can deter regulated parties from even seeking judicial review in the first place.

This problem could be mitigated in part, however, if Congress creates a process for fast-tracking the courts' review of "purely legal questions" regarding interpretation of the agency's authority, saving more complicated questions of fact to be adjudicated only if necessary. If the court holds that an agency's new regulation is unlawful, then further questions of factual adequacy become a moot point.

To that end, Congress should amend the APA to create a fast-track option. Parties challenging an agency's new rule would be given the option to litigate purely legal questions of agency authority all the way to completion, before moving on to complicated record-based questions. Challengers might prefer in particular cases not to bifurcate the case, but if they believe they have a particularly strong case on a core legal question, fast-tracking that issue could save their time and resources, and that of the courts and agencies.

This would require resolution of some related details. First, Congress would need to make clear whether, in cases involving multiple challengers, the option is held by each challenger individually or whether it requires a collective decision. Second, Congress would need to decide how this would interact with the aforementioned stay of agency action pending appeal; the purpose of bifurcating the litigation is to improve efficiency, after all, not to delay ultimate resolution of the case in order to slow the agency's enforcement. And third, Congress would need to decide whether to attempt to require the courts to decide the "fast tracked" question within a certain period of time (which is not unprecedented²⁷⁰) or whether to leave it to the courts' good-faith discretion.²⁷¹

Our third aspect of removing incentives for agencies to abuse the litigation process would be to subject sue-and-settle consent decrees to a form of notice-and-comment public participation. Agencies and pro-regulatory activists can use sham collusive sue-and-settle lawsuits — and

the judicially approved consent decrees that result from such lawsuits—to lock in an agency’s regulatory agenda. They can prejudice the rights of other affected parties and sometimes even dictate substantive regulatory outcomes. This short-circuits the normal process of notice-and-comment rulemaking.

For precisely that reason, these consent decrees should be subjected to a form of notice-and-comment participation by the public, if only to ensure that the judge hearing the sue-and-settle case is fully apprised of the full range of issues and interests implicated by the consent decree.

Sometimes, proposals for reform are framed in terms of actual notice-and-comment rulemaking.²⁷² An alternative reform, however, would be to model the public participation on the legal framework that already exists for class-action lawsuits. When a class-action lawsuit is filed, the Federal Rules of Civil Procedure provide for the notification of putative class members so that they can fully protect their own rights.²⁷³ Further notice is required at other points in the class-action litigation.²⁷⁴ And, most important for present purposes, the class members must be notified before a settlement can be concluded.²⁷⁵

That framework should serve as the model for sue-and-settle cases regarding agency action, since agency actions implicate even more diverse and widespread interests than normal class-action lawsuits do. “Notice” could be achieved through publication in the *Federal Register*.

While such legislative reforms can remove incentives for agencies to abuse the litigation process, the problem of agency threats against regulated parties may be difficult to solve through legislation, since what constitutes a “threat” depends upon the intentions and perceptions of both the agency and the putatively threatened party. But that is not a reason to eschew reform, because Congress already has a roadmap for precisely this type of issue: whistleblower protection laws.

At least 19 federal statutes provide for whistleblower protection, according to the Congressional Research Service.²⁷⁶ The Sarbanes-Oxley Act, for example, provides that no employer may “discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee” in relation to reporting corporate wrongdoing to federal agencies.²⁷⁷

This model can and should be applied to regulated persons and companies in their interactions with federal agencies. If a federal

agency or official threatens or retaliates against a person or company for exercising their procedural or substantive rights, including their rights to judicial review, then the agency and its officials should be sanctioned just as private companies and officials are sanctioned for mistreating whistleblowers.

Furthermore, as described above, agencies too often conduct nominally “public” rulemaking proceedings with tightly closed minds: An agency’s proposed rule is effectively the agency’s final decision, and the notice-and-comment process devolves into Kabuki theater.

But an agency’s closed-mindedness is not always intentional. Like all of us, agency personnel are not always aware of their own particular analytic prejudices — even when confronted with contrary evidence in the notice-and-comment process. One way to open an agency’s closed mind would be to require the agency to revisit its own past work, to assess whether its own previous predictions and other conclusions proved accurate and tenable.

The process for such re-examination is “retrospective review” or “lookback.” And the Obama administration in particular pressed its agencies to undertake such critical self-examination, to review their old regulations and see whether any were in need of reform or repeal. President Obama required his agencies to “consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned.”²⁷⁸ He stressed that “it is particularly important for agencies to conduct retrospective analyses of existing rules to examine whether they remain justified and whether they should be modified or streamlined in light of changed circumstances, including the rise of new technologies.”²⁷⁹

Congress has recognized the importance of retrospective review, too. The proposed Regulatory Accountability Act would require agencies to include in new rulemakings a lookback provision for review of the new regulation after 10 years, “to determine whether, based upon evidence, there remains a need for the rule, whether the rule is in fact achieving statutory objectives, whether the rule’s benefits continue to justify its costs, and whether the rule can be modified or rescinded to reduce costs while continuing to achieve statutory objectives.”

But retrospective review’s greatest value is not in the possibility that old regulations will be repealed. (As the American Action Forum’s Sam Batkins

observes, the Obama administration's retrospective reviews did not actually reduce regulatory burdens.²⁸⁰) Instead, its greatest value is *forward*-looking: When retrospective review forces an agency to confront the mistakes or miscalculations that it has made in the past, the agency will become more likely to develop “epistemological modesty” going forward.²⁸¹

REGULATORY REFORM FOR THE 21ST CENTURY

It would be a mistake to suggest that regulatory reform is a simple chore. As Stuart Shapiro and Deanna Moran observe in a report for the Mercatus Center, the history of regulatory reform since the APA's original enactment is largely one of failure. Time and time again, Congress has legislated new constraints on agencies, but in each iteration of the legislative process the agencies' supporters “fight constraints on agency decision making and ensure that if constraints are passed, they will contain sufficient loopholes so as to be largely ineffectual.” (Yet, “[a]bsent the loopholes, passing the constraints is impossible.”)²⁸²

The reforms proposed in this chapter, as in the other chapters, attempt a different approach. Instead of trying to prevent agencies from doing the wrong thing, these reforms primarily attempt to create a structure that will cause agencies to do the right things: by using judicial deference as a reward for procedural rigor; by removing opportunities for agencies to misuse the judicial process; and by causing agencies to look more skeptically at their own analyses, not to punish them for past mistakes and prejudices, but to encourage them to avoid those similar mistakes and prejudices next time.

The APA was enacted to reflect and govern the administrative state as it actually existed in 1946. Congress should reform the APA in a similar spirit today.

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- Davies, “Regulation and Productivity” Mercatus research paper, May 8, 2014, <http://mercatus.org/publication/regulation-and-productivity>.
146. See, for example, Austin Nichols et al., “Consequences of Long-Term Unemployment,” Urban Institute, August 20, 2013, http://www.urban.org/research/publication/consequences-long-term-unemployment/view/full_report.
147. Cf. *Motor Vehicles Manufacturers Association v. State Farm*, 463 U.S. 29, 59 (1983) (Rehnquist, J., concurring in part and dissenting in part) (“A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency’s reappraisal of the costs and benefits of its programs and regulations.”).

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TO REFLECT ADMINISTRATIVE REALITY

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149. 5 U.S.C. § 553.
150. 5 U.S.C. § 553(b)(A).
151. *Mortgage Bankers Ass’n v. Harris*, 720 F.3d 966 (D.C. Cir. 2013).
152. *Auer v. Robbins*, 519 U.S. 452, 461 (1997).
153. See Transcript of Oral Arg., *Perez v. Mortgage Bankers Ass’n*, Nos. 13-1041 *et al.* (Dec. 1, 2014).
154. Emphasis added.
155. 135 S. Ct. at 1206–07.
156. See, for example, Stephen Skowronek, *Building a New American State* (Cambridge: Cambridge University Press, 1982), 121–162; Jerry L. Mashaw, *Creating the Administrative Constitution* (New Haven: Yale University Press, 2012), 187–208.
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158. See Richard J. Pierce, *Administrative Law Treatise*, 5th ed., vol. 1 (New York: Aspen Publishers, 2009), 15.
159. See *Final Report of the Attorney General’s Committee on Administrative Procedure* (1937), 1.
160. *Ibid.*
161. *Ibid.*, 2.
162. *President’s Committee on Administrative Management* (1937), 2.
163. Pierce, *Administrative Law Treatise*, 18.
164. George B. Shepherd, “Fierce Compromise: The Administrative Procedure Act Emerges From New Deal Politics,” *Northwestern University Law Review* 90

- (1996): 1557, 1559.
165. *Administrative Procedure Act: Legislative History*, S. Doc. No. 79-248, 2d Sess. (1946), at 298.
166. *Ibid.*, 18 (Staff. of S. Comm. on the Judiciary, 79th Cong. (Comm. Print. 1945)) (emphasis added, quotation marks omitted).
167. *Ibid.*, 313 (floor statement of Sen. McCarran) (emphasis added).
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170. *SEC v. Chenery Corp.*, 332 U.S. 194 (1947).
171. 5 U.S.C. § 553.
172. 5 U.S.C. § 556.
173. *U.S. v. Fla. E. Coast Rail. Co.*, 410 U.S. 224 (1973); see also Aaron L. Nielson, “In Defense of Formal Rulemaking,” *Ohio State Law Journal* 75 (2014): 237.
174. 5 U.S.C. § 553(b).
175. 5 U.S.C. § 554.
176. See *Chem. Waste Mgmt., Inc. v. EPA*, 873 F.2d 1477 (D.C. Cir. 1989); *Dominion Energy Brayton Point, LLC v. Johnson*, 443 F.3d 12 (1st Cir. 2006).
177. 5 U.S.C. § 706(2). Technically speaking, the APA applies the “substantial evidence” standard only to formal rulemakings or adjudications, not informal rulemakings or adjudications; but the courts have held, questionably, that even informal rulemakings and adjudications must be supported by “substantial evidence” because agency action lacking such evidence would be “arbitrary and capricious,” thus failing to satisfy the APA’s other applicable standard. *Ass’n of Data Processing Serv. Orgs., Inc. v. Bd. of Governors of the Fed. Res. Sys.*, 745 F.2d 677 (D.C. Cir. 1984)
178. *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).
179. *Chrysler Corp. v. EPA*, 631 F.3d 865 (D.C. Cir. 1980) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197 (1938)).
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183. *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984).
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185. *Auer v. Robbins*, 519 U.S. 452 (1997); see also *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).
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246. See, for example, Richard J. Pierce, Jr., and Joshua Weiss, “An Empirical Study of Judicial Review of Agency Interpretations of Agency Rules,” *Administrative Law Review* 63 (2011): 515; Richard J. Pierce, Jr., “What Do The Studies of Judicial Review of Agency Actions Mean?” *Administrative Law Review* 63 (2011): 77; William N. Eskridge, Jr., and Lauren E. Baer, “The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan,” *Georgetown Law Journal* 96 (2008): 1083; Orin S. Kerr, “Shedding Light on Chevron: An Empirical Study of the Chevron Doctrine in the U.S. Courts of Appeals,” *Yale Journal on Regulation* 15 (1998): 1.
247. *Chevron*, 467 U.S. 837.
248. *King v. Burwell*, 135 S. Ct. 2480 (2015).
249. *U.S. v. Mead*, 533 U.S. 218 (2001).
250. *City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863 (2013) (Roberts, C.J., dissenting).
251. *Talk America, Inc. v. Mich. Bell Tele. Co.*, 564 U.S. 50 (2011) (Scalia, J., concurring); *Perez v. Mortgage Bankers Ass’n*, 135 S. Ct. 1199 (2015) (Scalia, J., concurring in judgment).
252. *Perez*, 135 S. Ct. 1199 (2015) (Thomas, J., concurring), *quoted in Michigan*, 135 S. Ct. 2699 (Thomas, J., concurring in judgment).
253. *Michigan*, 135 S. Ct. 2699.
254. Philip Hamburger, “Chevron Bias,” *George Washington University Law Review* 84 (2016): 1187; Philip Hamburger, *Is Administrative Law Unlawful?* (Chicago: University of Chicago Press, 2014); Philip Hamburger, *Law and Judicial Duty* (Boston: Harvard University Press, 2008).

255. Charles Cooper, “Confronting the Administrative State,” *National Affairs* (Fall 2015); Charles Murray, *By the People* (New York: Crown Forum, 2015).
256. See, for example, Jack M. Beermann, “End the Failed *Chevron* Experiment Now: How *Chevron* Has Failed and Why It Can and Should Be Overruled,” *Connecticut Law Review* 42 (2010): 779.
257. See Thomas W. Merrill, “The Story of *Chevron*: The Making of an Accidental Landmark,” in *Administrative Law Stories*, ed. Peter L. Strauss (New York: Foundation Press, 2006).
258. See Adam J. White, “The Regulatory Court,” *The Weekly Standard* (August 26, 2013); Patricia Wald, “The Contribution of the D.C. Circuit to Administrative Law,” *Administrative Law Review* 40 (1988): 507, 522; Stuart Taylor, “A Time of Transition for No. 2 Court,” *New York Times*, September 8, 1982, <http://www.nytimes.com/1982/09/08/us/a-time-of-transition-for-no-2-court.html>.
259. See, for example, Adam J. White, “The American Constitutionalist,” *The Weekly Standard* (February 29, 2016). Both before and after Justice Scalia’s passing, I was informed of the late justice’s reconsideration of the doctrine by several people who witnessed him making such comments on several occasions.
260. Ronald A. Cass, “Administrative Law in Nino’s Wake” working paper, 2016.
261. *N.Y. Trust Co. v. Eisner*, 256 U.S. 345 (1921).
262. Daniel Farber and Anne Joseph O’Connell, “The Lost World of Administrative Law,” *Texas Law Review* 92 (2014): 1137, 1140.
263. See, for example, Jonathan H. Adler, “Placing ‘Reins’ on Regulations: Assessing the Proposed REINS Act,” *New York University Journal of Legislation and Public Policy* 16 (2013): 1.
264. Cf. Aaron L. Nielson, “In Defense of Formal Rulemaking,” *Ohio State Law Journal* 75 (2014): 237.
265. *Ibid.*
266. Letter regarding H.R. 185, the Regulatory Accountability Act of 2015, from Alfred C. Aman, Jr., et al., to Representatives Bob Goodlatte and John Conyers, Jr., (January 12, 2015).
267. See, e.g., Richard J. Pierce, Jr., “Seven Ways to Deossify Agency Rulemaking,” *Administrative Law Review* 47 (1995): 59.
268. Some critics of the Separation of Powers Act have suggested that “de novo” review requires the courts to disregard not just the agency’s statutory interpretation but also all prior judicial precedents interpreting the statute at issue. But such suggestions, lacking any basis in the statute’s text or legislative history, are advanced only by the act’s cynical critics, rather than by commentators seeking in good faith to interpret the act in light of Congress’s actual intent.

- 269.5 U.S.C. §553(b)(A).
270. The Dodd-Frank Act, for example, gives the federal district court only 24 hours to hear an appeal of the government's decision to liquidate a systemically important financial institution. 12 U.S.C. § 5382. Compared to that, a six- or ten-month review period for core legal questions in ordinary agency appeals would seem rather leisurely.
271. Under the Energy Policy Act of 2005, certain decisions of federal and state agencies, regarding natural-gas infrastructure, are subject to "expedited" review in federal court, but without further specification. 15 U.S.C. § 7171(d)(5).
272. See, for example, Andrew M. Grossman, "Regulation Through Sham Litigation: The Sue and Settle Phenomenon," Heritage Foundation Legal Memorandum No. 110, February 2014, 12.
273. Fed. R. Civ. P. 23(c)(2).
274. Fed. R. Civ. P. 23(d)(1)(B).
275. Fed. R. Civ. P. 23(e).
276. Jon O. Shimbukuro and L. Paige Whitaker, *Whistleblower Protections Under Federal Law: An Overview*, Congressional Research Service, R42727, September 13, 2012.
277. 18 U.S.C. § 1514A(a).
278. Exec. Order 13563 § 6 (2011).
279. Exec. Order 13610 § 1 (2012).
280. Sam Batkins, "Three Years of Regulatory Reform: Did the President's Executive Orders Work?" *American Action Forum*, January 21, 2014, <https://www.americanactionforum.org/insight/three-years-of-regulatory-reform-did-the-presidents-executive-orders-work/>.
281. See Adam J. White, "Retrospective Review, for Tomorrow's Sake," *Yale Journal on Regulation's Notice and Comment*, November 28, 2016, <http://yalejreg.com/nc/retrospective-review-for-tomorrows-sake-by-adam-j-white/>.
282. Stuart Shapiro and Deanna Moran, "The Questionable History of Regulatory Reform Since the APA," Mercatus working paper, 2015, 43.