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The New Normal: Regulatory Dysfunction as Policymaking

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THE NEW NORMAL: REGULATORY DYSFUNCTION AS POLICYMAKING

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Scholars often presume that administrative dysfunction is a deviation from the norm of regularity in administrative law. This presumption is reinforced by courts who defer to agencies on the basis of a legal fiction of idealized regularity. In reality, irregularities are common in policymaking and they make agencies vulnerable to dysfunction. Irregularities are not bugs, but features of the administrative state. Sometimes, a national emergency makes political influence unavoidable and urges departures from usual regulatory processes. At other times, however, the framing of a problem as a national emergency is a pretextual justification to pursue a pre-determined political goal that may not be otherwise attainable or attractive through regular processes—a striking example of bad faith governance. The consequences of this kind of dysfunctional policymaking can be dangerous, especially when it then becomes normalized in agency policymaking.

Building on an emerging scholarship on internal administrative law, this Article looks inside agencies to expose the phenomenon of regulatory dysfunction in policymaking. It describes the structural characteristics and logics associated with irregular policymaking and provides a typology of agency responses to irregularities ranging from bureaucratic legalism to bureaucratic rationality. Using case studies from immigration law, environmental law, and public health law, it explains how the resulting

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irregularities can lead to dysfunction. It concludes by assessing the consequences of dysfunctional policymaking for administrative law and scholarship, showing where it makes a difference to flip the starting presumption of regularity. While irregularity is predictable, the normalization of dysfunctional policymaking is worrisome. This Article seeks to shift the discourse around administrative policymaking by injecting some realism about what is, and what should be, the new normal.

INTRODUCTION

In September 2021, video and photographs of Border Patrol agents on horseback forcibly rebuffing Haitian migrants attempting to cross the Rio Grande began to circulate widely online, prompting a backlash against the Biden Administration's handling of a recent surge in asylum-seekers at the

southern border.[1] Some fifteen thousand migrants had amassed across the river from the Texas border town of Del Rio in a makeshift camp, waiting for an opportunity to cross and seek refugee status.[2] They were part of a larger group of roughly thirty thousand Haitian migrants at the southern border, some of whom were fleeing civil unrest following the assassination of President Jovenel Moïse and a major earthquake that summer, while many others had left their country years earlier following a catastrophic 2010 earthquake in search of opportunities in South and Central America.[3] Two Category Four hurricanes had struck the Americas in the fall of 2020, exacerbating the plight of those already suffering COVID-19-related precarity, prompting thousands of migrants to travel north to the U.S. border in search of relief.[4] Those Haitians that made it to the border were either forced to return to Mexico or quickly shepherded onto flights to Haiti.[5]

The sight of Border Patrol agents brandishing their reins like whips and corralling migrants chastened the Administration: "[President Biden] believes that the footage and photos are horrific," said White House press secretary, Jen Psaki, adding that "[t]hey don't represent who we are as a country."[6] Vice President Harris called the Border Patrol's actions "horrible," and said that she planned to discuss the situation with the Secretary of Homeland Security, Alejandro Mayorkas.[7] An examination was initiated at the behest of the Secretary, who assured lawmakers it would "be completed in days, and not weeks"[8]; yet for nearly two months the only public update was that the Department of Homeland Security's ("DHS") inspector general had declined to investigate the incident.[9] While the Customs and Border Protection's ("CBP") internal Office of Professional Responsibility has continued its enquiries, the policies that were used to justify the expulsions

1. Eileen Sullivan & Zolan Kanno-Youngs, *Images of Border Patrol's Treatment of Haitian Migrants Prompt Outrage*, N.Y. TIMES (Oct. 19, 2021), https://www.nytimes.com/2021/09/21/us/politics/haitians-border-patrol-photos.html.

2. Jonathan Blitzer, *How Biden Came to Own Trump's Policy at the Border*, NEW YORKER (Oct. 6, 2021), https://www.newyorker.com/news/daily-comment/how-biden-came-to-own-trumps-policy-at-the-border.

3. *Id.*; Madison Muller & Mary Biekert, *Everything You Need to Know about Title 42*, BLOOMBERG (Apr. 6, 2022, 9:39 AM), https://www.bloomberg.com/news/articles/2021-09-24/title-42-the-law-removing-haitians-from-u-s-border-quicktake.

4. Blitzer, *supra* note 2.

5. *Id.*

6. Sullivan & Kanno-Youngs, *supra* note 1.

7. *Id.*

8. Joel Rose, *The Inquiry into Border Agents on Horseback Continues. Critics See a 'Broken' System*, NPR (Nov. 6, 2021, 7:00 AM), https://www.npr.org/2021/11/06/1052786254/border-patrol-agents-horseback-investigation-haitian-immigrants.

9. Priscilla Alvarez, *DHS Inspector General Declines to Investigate Del Rio Horse Patrol Incident*, CNN (Nov. 16, 2021, 5:20 PM), https://www.cnn.com/2021/11/16/politics/border-patrol-horses-del-rio/index.html.

remain in place.[10] The border closure was precipitated by President Trump's invocation of an obscure public health order in March 2020, when COVID-19 was escalating. It remains in force more than two years later under President Biden's Center for Disease Control and Prevention ("CDC").[11]

Despite the Biden Administration's public condemnation of the Del Rio incident and its commitments to international and domestic law obligating the United States to not expel or return ("refouler") migrants who present themselves at the border seeking asylum protections,[12] a clash between the emergency public health order and asylum policy during COVID-19 has perpetuated the border crisis. More specifically, the Biden Administration has relied on the Public Health Service Act of 1944, section 265 of Title 42[13] to expel migrants from the border throughout the pandemic at alarming numbers.[14] Title 42 permits the government to summarily turn away anyone at the national borders during a health crisis if the CDC finds they pose a health risk, doing away with the normal asylum procedure of investigating credible risks of persecution as required under the Immigration and Nationality Act ("INA").[15] 1.2 million persons have been expelled or returned pursuant to Title 42 since its authorization in 2020.[16]

As a public health measure, the authority to invoke Title 42 is vested in the CDC.[17] However, the idea to use it to close the borders appears to have

10. Yang Liu & Brandon Vines, *Federal Judge Orders Biden Administration to Continue Title 42*, LAWFARE (June 27, 2022, 1:33 PM), https://www.lawfareblog.com/federal-judge-orders-biden-administration-continue-title-42.

11. *Id.*

12. *See, e.g.*, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, Dec. 10, 1984, 1465 U.N.T.S. 85, 113; S. TREATY DOC. NO. 100-20 (1988); Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980) (codified as amended in scattered sections of 8 U.S.C.). The Refugee Act provides that "[a]ny alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival . . .), irrespective of such alien's status, may apply for asylum . . . ." 8 U.S.C. § 1158(a)(1).

13. Public Health Service Act of 1944, Pub. L. No. 78-410, 58 Stat. 682 (codified at 42 U.S.C. §§ 201–300).

14. Kathleen Kingsbury et al., *It's Time to End the Pandemic Emergency at the Border*, N.Y. TIMES (Nov. 13, 2021), https://www.nytimes.com/2021/11/13/opinion/immigration-trump-biden-covid.html.

15. 42 U.S.C. § 265; *see US: End Misguided Public Health Border Expulsions*, HUM. RTS. WATCH (Apr. 8, 2021, 4:15 PM), https://www.hrw.org/news/2021/04/08/us-end-misguided-public-health-border-expulsions#.

16. *See* AM. IMMIGR. COUNCIL, A GUIDE TO TITLE 42 EXPULSIONS AT THE BORDER (May 2022), https://www.americanimmigrationcouncil.org/sites/default/files/research/title_42_expulsions_at_the_border_0.pdf. The continuing use of Title 42 is under review by the U.S. Supreme Court as of this writing.

17. *Id.*

originated with Trump's immigration policy advisor, Stephen Miller.[18] In the early days of the pandemic, Miller orchestrated a multi-agency push to slow immigration to a halt through policies such as a travel ban on primarily-Muslim countries, a "zero-tolerance" policy that enabled family separations at the border, and renewed efforts to build a wall spanning the entire U.S.–Mexico border.[19] Under pressure from the White House, lawyers from the Department of Health and Human Services ("HHS"), of which the CDC is a division, drafted an order in early March that would effectively shutter the borders with Mexico and Canada; CDC's veteran Director of Global Migration and Quarantine, Dr. Martin Cetron, refused to sign it.[20] According to a ProPublica exposé on the politicization of the CDC under the Trump Administration, Cetron had made it known that scientific evidence did not drive the decision to invoke Title 42: "It's just morally wrong to use a public authority that has never, ever, ever been used this way," he told a colleague.[21] He surmised, "[i]t's to keep Hispanics out of the country. And it's wrong."[22] Cetron's act of defiance was promptly made moot as Dr. Robert Redfield, whom Trump appointed in 2018 to run the agency, signed the order after Vice President Pence intervened on behalf of the Administration.[23]

The Biden Administration has continued to rely on the CDC's orders as a politically expedient means of dealing with the pandemic-related surge of migrants on the southern border, even as DHS Secretary Mayorkas disclaims it as an immigration policy.[24] In 2021, Border Patrol agents had approximately two million encounters at the U.S. border, roughly twice as many as in 2019 and four times as many as in 2018.[25] The White House has repeatedly insisted that the CDC rules are an appropriate response to the threat of COVID-19, yet their implementation has largely remained unchanged, even with advancements in rapid testing and the wide-spread

18. James Bandler et al., *Inside the Fall of the CDC*, PROPUBLICA (Oct. 15, 2020, 1:12 PM), https://www.propublica.org/article/inside-the-fall-of-the-cdc.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*; Jason Dearen & Garance Burke, *Pence Ordered Borders Closed After CDC Experts Refused*, AP NEWS (Oct. 3, 2020, 9:19 AM), https://apnews.com/article/virus-outbreak-pandemics-public-health-new-york-health-4ef0c6c5263815a26f8aa17f6ea490ae; Amendment and Extension of Order Under Sections 362 & 365 of the Public Health Service Act; Order Suspending Introduction of Certain Persons from Countries Where a Communicable Disease Exists, 85 Fed. Reg. 31,503 (May 26, 2020).

24. *Press Briefing by Press Secretary Jen Psaki and Secretary of Homeland Security Alejandro Mayorkas, September 24, 2021*, WHITE HOUSE (Sept. 24, 2021, 2:34 PM), https://www.whitehouse.gov/briefing-room/press-briefings/2021/09/24/press-briefing-by-press-secretary-jen-psaki-and-secretary-of-homeland-security-alejandro-mayorkas-september-24-2021/ [hereinafter *Press Briefing Sept. 24, 2021*].

25. Kingsbury et al., *supra* note 14; *see also* AM. IMMIGR. COUNCIL, *supra* note 16.

availability of vaccines.[26] Moreover, the expulsion policies are overbroad—the southern border remains open to the eight million people who legally cross each month, all of whom present substantially the same health risk.[27] Nobody is willing to take responsibility for the policy and yet it persists.

Public health experts, including former CDC officials, question the threat posed by asylum-seekers given the government's ability to screen and test migrants for COVID-19 before summarily expelling them.[28] DHS officials bemoan the fact that quick expulsions carry no consequences for unlawful border crossers, with as many as half of single adults expelled under Title 42 simply returning and attempting to cross the border again, contributing to the spike in Border Patrol encounters.[29] Internal dissent prompted two senior White House officials, Daniel Foote and Harold Koh, to resign in protest over the use of Title 42 to expel Haitian migrants seeking asylum, many thousands of whom were returned to Haiti without adequate forewarning.[30] Foote, the U.S. Special Envoy to Haiti, resigned in September of 2021, stating in a letter sent to Secretary of State Antony Blinken that he would "not be associated with the United States inhumane, counterproductive decision to deport thousands of Haitian refugees and illegal immigrants to Haiti."[31] Koh, a senior advisor to the State Department and professor of international law at Yale Law School, castigated the Administration over its handling of Haitian asylum-seekers in an internally-circulated memo.[32] Koh flatly accused the Administration of "violat[ing] our legal obligation not to expel or return ('refouler') individuals who fear persecution, death, or torture, especially migrants fleeing from Haiti"—obligations sourced in the

26. The Biden Administration has reissued the CDC order five times, with the only substantive change being the inclusion of a formal exemption for unaccompanied children from expulsion. AM. IMMIGR. COUNCIL, *supra* note 16, at 2–3.

27. Danilo Zak, *What's Happening at the Southern Border, Explained*, NAT'L IMMIGR. F. (July 20, 2021), https://immigrationforum.org/article/explainer-whats-happening-at-the-u-s-mexico-border/.

28. Letter from Jennifer Balkus, Ph. D., M.P.H., Assistant Professor Univ. of Wash. Sch. of Pub. Health et al., to Rochelle Walensky, Dir., CDC, Xavier Becerra, Sec'y, HHS, & Alejandro Mayorkas, Sec'y, DHS (Sept. 1, 2021), https://www.publichealth.columbia.edu/sites/default/files/sept_1_2021_title_42_letter.pdf.

29. Kingsbury et al., *supra* note 14.

30. Alex Thompson & Alexander Ward, *Top State Adviser Leaves Post, Rips Biden's Use of Trump-era Title 42*, POLITICO (Oct. 4, 2021, 2:23 PM), https://www.politico.com/news/2021/10/04/top-state-adviser-leaves-post-title-42-515029.

31. Nick Niedzwiadek & Jonathan Custodio, *U.S. Envoy to Haiti Resigns over Migrant Deportations*, POLITICO (Sept. 23, 2021, 5:01 PM), https://www.politico.com/news/2021/09/23/us-haiti-migrant-deportations-513833.

32. Memorandum from Harold Hongju Koh, Sterling Professor of Int'l L., Yale L. Sch., Re: Ending Title 42 Return Flights to Countries of Origin, Particularly Haiti (Oct. 2, 2021), https://www.politico.com/f/?id=0000017c-4c4a-dddc-a77e-4ddbf3ae0000 (publishing copy of Koh's memo); Thompson & Ward, *supra* note 30; *see also Harold Hongju Koh*, YALE L. SCH., https://law.yale.edu/harold-hongju-koh (last visited Nov. 21, 2022).

Convention Against Torture and the 1951 Refugee Convention.[33] Koh took pains to single out the Title 42 flights that have returned as many as 4,600 asylum-seekers to Haiti as "particularly unjustifiable" in light of the country's designation for Temporary Protected Status ("TPS"), and the ongoing "humanitarian nightmare" that residents of Haiti face.[34]

Predictably, there have been at least five legal challenges to Title 42 as applied by the CDC.[35] In one of the most high-profile cases, *Huisha-Huisha v. Mayorkas*,[36] a group of non-profit and civil liberties organizations, including the ACLU, the Center for Gender and Refugee Studies, and Oxfam, brought a class action suit on behalf of asylum-seeking families against the United States, alleging "an unprecedented and unlawful expulsion process, invoking the public health powers of the Centers for Disease Control and Prevention."[37] On September 16, 2021, Judge Emmet Sullivan of the United States District Court for the District of Columbia granted a temporary injunction over the use of Title 42 as it applies to families, but the injunction was stayed by the United States Court of Appeals for the D.C. Circuit before it could go into effect.[38] The Biden Administration tried to terminate use of the order once the CDC declared it was no longer necessary for public health purposes due to increased vaccine and testing availability in April 2022, but a federal court found the termination unlawful in May 2022.[39]

Whether or not the lawsuit is successful, the ultimate consequence of this protracted and uncertain legal battle may be too little, too late, given the many thousands of persons turned away at the border without an adequate opportunity to plead an asylum claim. Just as troubling is Congress' inaction on the matter. In February of 2021, some sixty members of Congress signed a letter to DHS Secretary Mayorkas calling on him to end the expulsion of migrants under Title 42, yet no bills *opposing* the policy have been

33. Memorandum from Harold Hongju Koh, *supra* note 32, at 1.

34. *Id.* at 3.

35. LATIN AM. WORKING GRP. EDUC. FUND, WHAT'S GOING ON AT THE U.S. BORDER & WHAT IS TITLE 42? (2021), https://www.lawg.org/wp-content/uploads/LAWGEF-Title42-Explainer-1.pdf.

36. 560 F. Supp. 3d 146 (D.D.C. 2021), *aff'd in part and rev'd in part*, 27 F.4th 718 (D.C. Cir. 2022).

37. *Huisha-Huisha*, 560 F. Supp. 3d at 163 (quoting the Plaintiffs' Motion for Preliminary Injunction).

38. *Id.* at 177; Huisha-Huisha v. Mayorkas, No. 21-05200 (D.C. Cir. Sept 30, 2021) (per curiam) (granting motion for stay pending appeal); Gabby Arias, *#WelcomeWithDignity: Court Ruling Will Endanger Families Seeking Safety; Biden Must End Title 42*, AMNESTY INT'L (Oct. 1, 2021), https://www.amnestyusa.org/press-releases/court-ruling-will-endanger-families-seeking-safety-biden-must-end-title-42/.

39. Louisiana v. CDC, No. 6:22-CV-00885, 2022 WL 1604901, at *23 (W.D. La. May 20, 2022); AM. IMMIGR. COUNCIL, *supra* note 16. The matter is under review in the U.S. Supreme Court as of this writing.

introduced in either the House or Senate.[40] However, Congresswoman Yvette Herrell, a Republican from New Mexico, introduced the Protecting Americans from Unnecessary Spread upon Entry (PAUSE) Act in January 2021, intended to *safeguard* immigration restrictions under Title 42 until federal and state COVID-19 emergency orders are lifted and the risk of introducing COVID-19 from Canada and Mexico is minimal.[41] There is bipartisan support in the Senate for maintaining the border restrictions absent a detailed plan for managing migration.[42]

The volatile policymaking made possible under Title 42 shows some of the ways that regulation can be subverted through political interference in agency policymaking, how agencies respond to such interference, and, importantly, how the resulting policies can persist even after their original contexts have passed. This policymaking episode also illustrates the faulty logic of courts that assume regular policymaking by the executive branch and routinely defer to the President and his agencies, a phenomenon exacerbated by congressional acquiescence. This particularly dramatic example of courts and Congress looking the other way as a president invokes an emergency for political gain—resulting in chaos and confusion in regulatory agencies—illustrates the false presumption of normality ensconced in both immigration law and administrative law.[43] Certainly not every presidential intervention results in this degree of regulatory dysfunction; some irregularities are

40. *Wilson, Meeks, Jayapal, and Thompson Lead More than 60 Members of Congress Calling for an End to Title 42 Expulsions*, COMM. ON HOMELAND SEC. (Feb. 23, 2021), https://homeland.house.gov/news/correspondence/wilson-meeks-jayapal-and-thompson-lead-more-than-60-members-of-congress-calling-for-an-end-to-title-42-expulsions; Letter from Gregory W. Meeks, Chairman, U.S. House of Representatives Foreign Affs. Comm. et al., to Alejandro Mayorkas, Sec'y, DHS (Feb. 23, 2021), https://www.dropbox.com/s/h96ndjuhhmh6njy/Wilson%2C%20Meeks%2C%20Jayapal%2C%20Thompson%20Letter%20to%20Mayorkas.pdf?dl=0.

41. PAUSE Act of 2021, H.R. 471, 117th Cong. (2021); Michael McDevitt, *Herrell's First Bill Seeks to Preserve Pandemic Rule Used to Swiftly Expel Migrants*, LAS CRUCES SUN NEWS (Jan. 28, 2021, 11:48 AM), https://www.lcsun-news.com/story/news/2021/01/28/border-covid-congress-immigration-yvette-herrell-new-mexico-bill/4265374001/.

42. *Judiciary Republicans Push for Hearing on Title 42 Public Health Order, Impact on Border Crisis*, SENATE COMM. ON THE JUDICIARY (Apr. 14, 2022), https://www.judiciary.senate.gov/press/rep/releases/judiciary-republicans-push-for-hearing-on-title-42-public-health-order-impact-on-border-crisis; Letter from Charles E. Grassley, Ranking Member, U.S. Senate Comm. on the Judiciary et al., to Dick Durbin, Chair, U.S. Senate Comm. on the Judiciary (Apr. 14, 2022), https://www.judiciary.senate.gov/imo/media/doc/judiciary_republicans_to_durbin_-_title_42_hearing_request.pdf.

43. Trump's declaration cited a "problem of large-scale unlawful migration through the southern border" that threatened an "invasion," which never materialized. Declaring a National Emergency Concerning the Southern Border of the United States, Proclamation No. 9844, 84 Fed. Reg. 4949, 4949 (Feb. 20, 2019); *see infra* note 108 and accompanying text.

inevitable.[44] Agencies struggle to balance the goals of stability and responsiveness. But the possibility of political actors manipulating the structure and culture of agencies' policymaking processes to the extent that it becomes dysfunctional is an ever-present reality.

Though extreme in degree, the Title 42 expulsion policy is not unusual in type. Title 42, enacted through the Public Health Service Act of 1944,[45] delegates policymaking authority to the President during public health crises; however, it persisted in subsequent policymaking even as conditions changed. It demonstrates that policymaking irregularities can turn into dysfunctional policies even with institutional safeguards from Congress and courts. Yet legal scholarship assumes a level of normality in agency regulation that deviates from reality—what Richard Pildes calls "institutional formalism."[46] Typical expressions of this idealized administrative state are ones that comport with expectations that Congress will create the agency by statute, that the agency will follow the statute, that the chief executive will appoint personnel who help faithfully execute their statutory mandate from Congress, and that the agency will maintain an internal balance of political leadership and civil service.[47] The implication of this legal fiction is to imagine an idealized administrative state rather than grappling with predictable irregularities.[48] Moreover, this idealized portrait of policymaking inflects judicial interpretations of agency action and the prescriptions for their correction.[49]

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44. For example, some emergencies result from natural disasters and other uncontrolled phenomenon—the extreme weather that precipitates flooding and fires, the terrorist attacks of September 11, 2001, and the public health crisis of COVID-19 are notable examples—and therefore do not reflect exploitative practices (at least at their points of origin).

45. Public Health Service Act of 1944, Pub. L. No. 78-410, 58 Stat. 682 (codified at 42 U.S.C. §§ 201–300).

46. Richard H. Pildes, *Institutional Formalism and Realism in Constitutional and Public Law*, 2013 SUP. CT. REV. 1, 2. For example, a leading casebook by Gellhorn & Byse opens its discussion of judicial review with a section titled "The Baseline Norm of Legal Regularity." It lays the foundation with the principle of "consistency," discussing *Shaw's Supermarkets v. National Labor Relations Board*, 884 F.2d 34 (1st Cir. 1989), the Accardi principle, enforcement choices, and issues of mass justice. PETER L. STRAUSS ET AL., GELLHORN & BYSE'S ADMINISTRATIVE LAW 1037, 1043 (12th ed. 2018).

47. *See, e.g.*, STRAUSS ET AL., *supra* note 46.

48. *See generally* Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836 (2015) (arguing that administrative supervision should be understood as part of the structure of agency policymaking); Bijal Shah, *Statute-Focused Presidential Administration*, 90 GEO. WASH. L. REV. 1165 (2022) (arguing that presidential administration of agencies is separable from the President's policy goals).

49. *See, e.g.*, Mistretta v. United States, 488 U.S. 361, 379–80 (1989) (readily finding that the United States Sentencing Commission status as an "expert body" warranted its "significant discretion"). As Pildes defines it, "formalism consists of treating the governmental institution involved as more or less a formal black box to which the Constitution (or other source of law) allocates specific legal powers and functions." Pildes, *supra* note 46, at 2.

Institutional formalism is taken for granted as a basic tenet of the rule of law, as embodied in the assumptions underlying the Administrative Procedure Act ("APA"),[50] the canonical judicial decisions that follow the APA when reviewing agency actions,[51] and the customs of judicial deference to agencies.[52] This idealized account of agency policymaking obscures the difficulties that agencies face when reconciling the twin goals of predictability and flexibility in their daily work. On one hand, institutional formalism recognizes that agencies should adhere to consistent and faithful interpretations of congressional mandates, such that regulated parties may rely on predictable patterns of agency action. On the other hand, the ideal acknowledges that agencies should be given enough flexibility to apply their expertise in a sufficiently discretionary manner so that they can respond to novel problems creatively and efficiently.[53] Agency policymaking must be simultaneously consistent with the rule of law *and* utilize discretionary expertise to satisfy the formalist ideal.

Such assumptions of policymaking regularity are unwarranted given the messy reality that agencies frequently employ irregular policymaking procedures.[54] We refer to the recognition of the gap between the ideal and the actual in policymaking procedure as "institutional realism."[55] Policymaking authority may initiate in the executive branch as a directive or memorandum rather than as a congressional delegation.[56] It may be in a bundled or omnibus

50. STRAUSS ET AL., *supra* note 46, at 1043. For example, agency policies are supposed to be based on factors enumerated in their statutory charge, to be consistent with evidence in the administrative record, and to be explained in a manner that is responsive to public input. *See, e.g.*, Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43–44 (1983) (discussing the arbitrary and capricious standard); Universal Camera Corp. v. Nat'l Lab. Rels. Bd., 340 U.S. 474, 477–78 (1951) (discussing the substantial evidence test).

51. *See, e.g.*, Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

52. In their discussion of justiciability, Strauss et al. explain that "agencies in general enjoy a broad, presumptively unreviewable discretion," citing the Supreme Court case *Butz v. Glover Livestock Commission Co.*, 411 U.S. 182 (1973). STRAUSS ET AL., *supra* note 46, at 1043; *see also* LISA SCHULTZ BRESSMAN ET AL., THE REGULATORY STATE 242–54, 268–71 (3d ed. 2020) (regarding textual canons of constitutional avoidance and absurdity).

53. *See* EUGENE BARDACH & ROBERT A. KAGAN, GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS 152–76 (1982).

54. *See generally* Abbe R. Gluck, Anne Joseph O'Connell & Rosa Po, *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789 (2015) (offering many examples of unorthodox rulemaking and a typology that permits evaluation of the costs and benefits associated with each).

55. Again, we borrow this term from Pildes but expand the concept through our grounded theory concerning agency cultures and structures as determinants of dysfunctional irregularity. Pildes, *supra* note 46, at 2.

56. *See, e.g.*, *Presidential Policy Directive/PPD-21—Critical Infrastructure Security and Resilience*, WHITE HOUSE (Feb. 12, 2013), https://obamawhitehouse.archives.gov/the-press-office/2013/02/12/presidential-policy-directive-critical-infrastructure-security-and-resil (directing that "Sector-Specific Agenc[ies]" that have institutional knowledge and specialized expertise shall determine how to implement the President's policy directive in the most-effective manner).

form of legislation in Congress. It might contain a vague statutory mandate, require joint rulemaking, or require implementation by multiple agencies. Regulations may circumvent APA notice and comment procedures and instead rely on good cause exemptions or invoke emergencies that necessitate a streamlined process.[57] Or it may be that the agency lacks sufficient funding or even confirmed political leaders. These irregularities arise from predictable pressures that can upend the structural balances necessary to manage the tension between predictability and flexibility. If agencies respond to these pressures by inhibiting the imbalances, then irregularities may not become problematic. But if they succumb to imbalance, these irregularities become dysfunctional.

Even if policymaking is not always irregular, irregularity is a more significant feature of the administrative state than both scholarly and judicial understandings admit.[58] We think that it is necessary to take account of institutional realities. Irregularity in agency policymaking is not per se nefarious, but these misunderstandings preclude clear thinking about safeguards that protect an agency from being exploited by external factors—for example, politicization to justify irregular policymaking or a president invoking an emergency beyond the conditions that required exceptional policymaking.[59] Failure to distinguish irregularity and dysfunction leads to unclear thinking about the actual challenges present in regulatory policymaking, with the ultimate result being the normalization of dysfunctional policies and policymaking procedures.

This Article flips the baseline assumption of regularity. It exposes the fallacy at the core of the formalist presumption by looking inside agencies through a realistic lens. Acknowledging that irregularity is a baseline, rather than a deviation, promotes a better understanding of how agencies respond to the stresses under which they operate and distinguishes the conditions that elevate routine irregularities into worrisome dysfunction. In doing so, this

57. *See generally* James Yates, *"Good Cause" Is Cause for Concern*, 86 GEO. WASH. L. REV. 1438 (2018).

58. Pildes says institutional realism entails "constitutional and public-law doctrines that penetrate the institutional black box and adapt legal doctrine to take account of how these institutions actually function in, and over, time." Pildes, *supra* note 46, at 2. He gives several examples of its various forms—from the evolution of structural arrangements within agencies to recognition of political polarization and gridlock in Congress—and then asks if courts should take these realities into account when responding to agency actions. *Id.* at 2–3. For an empirical account of agency actions, see Daniel A. Farber & Anne Joseph O'Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137 (2014); Gluck et al., *supra* note 54; Daniel A. Farber & Anne Joseph O'Connell, *Agencies as Adversaries*, 105 CALIF. L. REV. 1375 (2017).

59. Elizabeth Goitein calls this a pseudo-emergency. Elizabeth Goitein, *Emergency Powers, Real and Imagined: How President Trump Used and Failed to Use Presidential Authority in the COVID-19 Crisis*, *in* COVID-19: THE LEGAL CHALLENGES 31–66 (Stephen Dycus & Eugene R. Fidell eds., 2021); *see also* Robert L. Tsai, *Manufactured Emergencies*, 129 YALE L.J.F. 519 (2020); Cecilia D. Wang, *Ending Bogus Immigration Emergencies*, 129 YALE L.J.F. 620 (2020).

Article builds on the growing scholarly literature on internal administrative law.[60] Existing studies in internal administration contribute enormously to our understanding of specific agencies (in environmental law, civil rights, and workplace regulation especially). However, they tend to focus on single agencies while ignoring interagency interactions, or they focus solely on the structural dynamics that influence agencies. Other scholarship in this vein stays at a high level by not offering empirical support for its claims or limiting its evidence to statistical patterns that reveal little about *why* agencies behave the way they do. While these have been valuable, they lack the groundedness of in-depth case studies and the ability of qualitative data to delve into organizational culture.

This Article contributes to the internal administrative law scholarship by presenting in-depth case studies of multiple agencies involved in multiple episodes of policymaking. It studies agencies from the bottom-up, identifying and disaggregating the internal dynamics of agencies. Part I describes the relationships between institutional design and agency cultures using the opening vignette of Title 42. The case studies in Part II elaborate on these dynamics primarily in the immigration context with comparisons to environmental and other areas of policymaking that both support and complicate the primary case studies. The politically sensitive nature of immigration policy, and the levels of executive deference that have traditionally been afforded to the President over this policy terrain, make immigration bureaucracies particularly prone to dysfunction. Additional case studies from environmental and other policy arenas are provided to illustrate the context-dependent nature of these dynamics and the scope of regulatory responses possible. Collectively, they show the range of risks created by irregularity and how exploitation can lead to problematic regulatory dysfunction.

After typologizing the features of irregularity, Part III sets out the implications of flipping the baseline assumption from regularity to irregular policymaking, showing how and why it matters to our understandings of agency function. It follows from our realist perspective that irregular policymaking is not always—or even usually—dysfunctional. The tension within every agency to balance the normative ideals of flexibility and

60. Internal administrative law refers to the processes internal to an agency. The core tenets are laid out in an edited volume that celebrates the work of Jerry L. Mashaw, who studied the internal life of agencies early on. *See generally* ADMINISTRATIVE LAW FROM THE INSIDE OUT: ESSAYS ON THEMES IN THE WORK OF JERRY L. MASHAW (Nicholas R. Parrillo ed., 2017). It is further elaborated in law review articles by Gillian E. Metzger, Kevin M. Stack, Lisa Schultz Bressman, and Christopher J. Walker, among others. *See, e.g.*, Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239 (2017); Lisa Schultz Bressman, *Deference and Democracy*, 75 GEO. WASH. L. REV. 761 (2007); Christopher J. Walker & Rebecca Turnbull, *Operationalizing Internal Administrative Law*, 71 HASTINGS L.J. 1225 (2020).

predictability means that the cultural expressions of rule of law legalism and bureaucratic rationality remains a contested terrain within institutions, in which any equilibrium found between the two ideals is, at best, a momentary equipoise. In other words, irregularity is the predictable result of structural pressures and agency responses. Such irregularity becomes dysfunctional, however, when it is exploited for policymaking advantage, whether it arises out of genuine exceptional circumstances (such as national emergencies) or is entirely pretextual. The real problem is that, once created, such policy options become entrenched as normal pathways for future policymaking, long after their original contexts have dissipated.[61] This Article concludes by speculating what a new normal baseline assumption could mean for prescriptions to prevent or mitigate policy irregularity and to cure dysfunction in policymaking. In doing so, it is attentive to the reality that corrections need to address *both* structures and agency cultures, going beyond administrative law's typical fixation on structure and judicial doctrine alone. So doing, its goal is to shift the scholarly discourse about agency policymaking from the ideal to the real.

I. REGULARITY, IRREGULARITY, AND DYSFUNCTION IN AGENCY POLICYMAKING

Formalist presumptions of regularity in agencies differ from the empirical reality of agency action. Formalistic interpretations view agencies from the outside as black boxes engaged in the straightforward implementation of legislative policies. As Pildes explains, this high-level view takes for granted that agencies engage in textbook policymaking and "blinds courts to any more contingent, specific features of institutional behavior, or to the particular persons who happen to occupy the relevant offices, or to the ways in which the institution actually functions in particular eras in which the institution is embedded."[62] The resulting understanding of agencies is stylized and leads courts to ignore fluid features of the particular institution when reviewing agency actions. Peering inside agencies shows that irregular policymaking occurs with frequency.[63] Pildes contrasts institutional formalism with institutional realism that "penetrate[s] the

61. *See, e.g.*, National Emergencies Act, Pub. L. No. 94-412, 90 Stat. 1255 (2018) (codified at 50 U.S.C. §§ 1601–1651); Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified at 5 U.S.C. § 501 et seq.).

62. Pildes, *supra* note 46, at 2. See also Pildes' description of institutional formalism and institutional realism in notes 46, 55–58 and accompanying text.

63. See description of internal administrative law in this Article's Introduction, *supra* notes 48–60 and accompanying text.

institutional black box and adapt[s] legal doctrine to take account of how" agencies actually function.[64]

This Article takes a realist view of agency policymaking. This realist posture suggests that irregularities in policymaking flow from the structure of the agency and the agency culture that influences internal responses of actors within agencies. We refer to these features as *structure* and *agency culture*, respectively. The structure of an executive agency is forged by dueling forces: Agencies are developed by congressional statute and led by officials appointed by the President; these officials respond to policy priorities of the President while directing the actions of civil servants, who are governed by professional expertise and statutory protections meant to blunt political pressure. Agency culture represents an agency's internal reaction to those structures. The interaction of structure and agency culture determines whether agency policymaking will tend toward predictability or flexibility and whether the balance will be tipped outside of regular functional processes of the administrative state.[65]

The relationship between agency cultures and the structures in which they arise do not represent fixed or inevitable relationships; rather, we show how particular cultures leading to irregular procedures are facilitated within particular structures. Neither do our pairing of structures and cultures represent a comprehensive typology. Rather, we analyzed them because they emerged from case studies of the sprawling U.S. immigration bureaucracy: A methodology that approximates what qualitative social scientists call "grounded theory."[66] Alternative areas of administrative law are used to illustrate how other agencies' unique cultures may lead to an array of imbalances within similar structures. The comparisons highlight the extent to which the policymaking dynamics are generalizable versus context-dependent.[67]

64. Pildes, *supra* note 46, at 2.

65. *See, e.g.*, *infra* Section II.A.2 on induced dysfunction at the EPA.

66. *See* KATHY CHARMAZ, CONSTRUCTING GROUNDED THEORY 1–2 (2d ed. 2014).

67. In different policy contexts, alternative cultures may have more explanatory purchase than the ones that we have identified. In particular, independent agencies and administrative courts that display significant levels of independence from executive control, and thus are less prone to politicization or exploitation by political leaders, present a variable that is not examined in-depth in this study. However, the policymaking dynamics identified in this Article, we believe, represent common phenomena: Certain structures and agency cultures tend to facilitate irregular and dysfunctional policymaking with predictable undesirable outcomes. Recognizing the elective affinities between structures and cultures is an important first step for any project that imagines correctives to policymaking irregularities.

A. Agency Structures and Vulnerability to Dysfunction

Agency structures are the pathways through which agency cultures operate. Structures emerge through a variety of processes. For example, they can be created by deliberate agency design choices, or they can come about as the result of exogenous pressures such as judicial review. Moreover, structures can be created by the agencies themselves: as ad hoc solutions to novel problems; through the coordinated actions between, among, and within agencies; and sometimes as a result of uncoordinated "bureaucratic drift."[68] The upshot is that the principal creators of agency structures are both external to the administrative agency—Congress, the courts, and regulated parties—and internal—the executive branch and the agencies themselves. Whether deliberately or inadvertently, structures emerge to delineate the range of permissible agency action, to act as guardrails for impermissible uses of authority, and to create normal pathways for agency decision-making.

The tensions between flexibility/predictability and independence/political accountability within the administrative state have been a concern of administrative law scholars for nearly as long as there has been an administrative state.[69] Traditional scholarship has focused on the structural determinants of these tensions and the resulting separation of powers concerns, especially the dueling relationships between the President and Congress for control of the administrative state[70] and the proper allocation of executive control of agencies.[71] This scholarship analyzes structural arrangements as the basis for executive policymaking and uses structural values to either defend or challenge the expanding role of the President as a co-equal in policymaking.[72] Examples of the horizontal negotiation between the legislative and executive branch from this literature includes analysis of undelivered statutorily-mandated services and benefits

68. *Cf.* JAMES WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES 75 (1956) (warning of the kinds of "drift and default" that can unintentionally change agency functions).

69. *See, e.g.*, Matthew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431 (1989).

70. *See, e.g.*, B. Dan Wood & John Bohte, *Political Transaction Costs and the Politics of Administrative Design*, 66 J. POL. 176 (2004); Anne Joseph O'Connell, *Bureaucracy at the Boundary*, 162 U. PA. L. REV. 841 (2014).

71. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2246 (2001).

72. For a critique of pervasive presidential power, see ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY (1973). For a defense of an expanded presidential role, see JOHN YOO, DEFENDER IN CHIEF: DONALD TRUMP'S FIGHT FOR PRESIDENTIAL POWER (2020). On the capacious role of the President with respect to immigration policy in particular, see ADAM B. COX & CRISTINA M. RODRÍGUEZ, THE PRESIDENT AND IMMIGRATION LAW 163–64 (2020). These books all build on the foundation laid by Elena Kagan in *Presidential Administration*, *supra* note 71. More recently, Kagan's work has been elaborated by Jody Freeman & Sharon Jacobs, *Structural Deregulation*, 135 HARV. L. REV. 585 (2021).

that range from social security checks, to disability benefits and over- or under-enforcement of civil rights protections in schools and workplaces.[73] Examples of the vertical negotiation between the President and agencies, and the politically-appointed leaders and staff, include operational difficulties addressing severe backlogs in agency adjudication and chaotic implementation of presidential policies by the agencies.[74]

This Article begins by analyzing the relationship between structure and agency culture and the irregularities that it creates in agency policymaking. But it does not stop there. Traditions of strong judicial deference to the executive branch have left the immigration bureaucracy vulnerable to political pressure from the President. For example, such deference enabled Trump to enact the Muslim travel ban, a centerpiece of his political agenda, despite evidence suggesting pretextual motivations for enacting the policy.[75] Against these traditions of deference, horizontal structural constraints were ineffective—even those that were included alongside express delegations of authority from Congress as they were in the INA. On paper, the President and Congress battle for control over these types of foreign affairs decisions under the institutional design of the INA.[76] In reality, however, Congress often defers to the President and to agencies through its delegations of rulemaking authority and unwillingness (or inability) to supersede executive actions in a polarized environment.

The complex bureaucratic machinery involved in the activation of Title 42 illustrates the operation of vertical structural constraints: Presidents' forceful intervention in regulatory policymaking. President Trump inserted the White House into the inner workings of the CDC through Vice President Mike Pence and White House Immigration Advisor Stephen Miller to effectuate their border policies. President Biden, despite criticisms of the

73. *See, e.g.*, JERRY L. MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS (1983) (discussing issues in social security and disability benefits administration); R. SHEP MELNICK, BETWEEN THE LINES: INTERPRETING WELFARE RIGHTS (1994) (discussing the civil rights protections in the context of welfare rights).

74. *See, e.g.*, Jill E. Family, *An Invisible Border Wall and the Dangers of Internal Agency Control*, 25 LEWIS & CLARK L. REV. 71, 81–82, 116, 120, 129 (2021); *infra* note 201 and accompanying text.

75. The third iteration, Proclamation No. 9645, limited the issuance of visas to certain nationals from eight countries: Chad, Iran, Libya, North Korea, Somalia, Syria, Venezuela, and Yemen. Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats, Proclamation No. 9645, 82 Fed. Reg. 45,161, 45,163 (Sept. 27, 2017). It was upheld in *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

76. Specifically, the applicability of the INA § 212(f) suspension clause, which provides an express delegation of policymaking authority to the President in emergency situations. 8 U.S.C. § 1182(f); *see* Daniel A. Farber, *Exceptional Circumstances: Immigration, Imports, the Coronavirus, and Climate Change as Emergencies*, 71 HASTINGS L.J. 1143, 1158–64 (2020).

policy from within and outside the agency, continued Title 42's use,[77] saying it was a necessary public health directive given the many Americans who have not been fully vaccinated.[78] The episode also shows how executive authority over border policy is dispersed across departments, given the consequential determinations over continuing public health conditions justifying border closure made by CDC Director Robert Redfield and the complicity of the Biden Administration's CDC, Department of Health and Human Services, and border agencies.[79]

Continuing the analysis of vertical structural constraints, Jennifer Nou and others identify the relationship between political leaders and civil servants within an agency as important determinants of policymaking.[80] Public health experts within the CDC initially objected to the invocation of Title 42, and more than fifty health experts wrote to the CDC and the HHS urging its repeal and replacement with other public health mitigation measures such as testing and vaccinating asylum-seekers.[81] The refusal of top CDC officials to sign off on the orders eventually required intervention directly from the White House, demoralizing many rank-and-file experts that serve the bureaucracy.[82] Moreover, top State Department officials resigned over its circumvention of human rights laws that obligate the U.S. to consider credible fear of persecution from asylum-seekers and the real risk of

77. Zolan Kanno-Youngs, *Biden Under Pressure Over 'Public Health' Border Expulsions*, N.Y. TIMES (May 31, 2021), https://www.nytimes.com/2021/05/24/us/politics/biden-border-immigrants.html. The DHS Secretary insisted that "Title 42 is a public health authority and not an immigration policy." *Press Briefing Sept. 24, 2021*, *supra* note 24.

78. Liu & Vines, *supra* note 10.

79. Xavier Becerra, the Secretary of Health and Human Services under President Biden, has not offered a timeline for lifting Title 42 and instead asserted that the administration has "various missions" that include protecting the public against COVID-19 and making sure that immigration and border laws are enforced. Kanno-Youngs, *supra* note 77.

80. *See* Jennifer Nou, *Intra-Agency Coordination*, 129 HARV. L. REV. 421 (2015); *see also* Daphna Renan, *Pooling Powers*, 115 COLUM. L. REV. 211 (2015); Bijah Shah, *Uncovering Coordinated Interagency Adjudication*, 128 HARV. L. REV. 806 (2015).

81. The public health expert letter argued that the CDC order invoking Title 42 "is based on specious justifications and fails to protect public health." Letter from Leaders of Public Health Schools, Medical Schools, Hospitals, and other U.S. Institutions, to Alex Azar, Sec'y, Dep't of Health & Hum. Servs., & Robert R. Redfield, Dir., Ctrs. for Disease Control & Prevention 1 (May 18, 2020), https://www.publichealth.columbia.edu/sites/default/files/public_health_experts_letter_05.18.2020.pdf. Physician consultants for the Department of Homeland Security also sent a letter to Congress urging the government to stop Title 42 expulsions, writing that the policy prompts parents to send their children alone over the border and that there is "even less of a public health justification" for the policy now than there was when it was implemented. Letter from Scott A. Allen, MD, FACP & Pamela McPherson, MD, to Committee Chairs and Ranking Members, Senate Comm. on Homeland Sec. & Governmental Affs. & House Comm. on Homeland Sec. 6 (May 24, 2021), https://int.nyt.com/data/documenttools/doctors-letter-immigration-detention/3cb2a9e68492ea5d/full.pdf.

82. *See* Dearen & Burke, *supra* note 23.

returning migrants to dangerous conditions, further sowing internal tensions and unrest.[83]

These structural dynamics that render regulatory policymaking unstable can lead to irregularities when filtered through agency culture. Although irregularity is not inherently problematic, it can sometimes grow into dysfunction. These examples illustrate the process.

B. Agency Responses to Structural Stresses

Irregularities in policymaking arise due to a certain reality: The unstable structure of the administrative state that is then filtered through the agency's taken-for-granted norms and practices—or agency culture. We focus on agency responses because they are shaped by the softer characteristics of the political appointees and civil servants within the agency, who make choices animated by their individual and organizational beliefs and commitments, as well as by structure.

1. Bureaucratic Rationality

The culture of *bureaucratic rationality* informs agencies as they exercise the discretion vested in them by Congress and the executive. Bureaucratic rationality reflects the extent to which agencies rely on rationally designed processes and procedures that create internal structures that are stable, predictable, and impartial.[84] The extensive literature on the internal dynamics of bureaucracy begins with social theorist Max Weber and carries through socio-legal scholars like Jerry Mashaw, who describe types of agency cultures that can take on a life of their own and compete with statutory mandates to deliver services.[85] In his 1982 book, *Bureaucratic Justice*, Mashaw highlights the potential for agencies to mete out administrative justice that is rational and expertise-driven, as long as the bureaucracy is properly organized and managed. The key to just administrative adjudication, according to Mashaw, is the development of an "internal" administrative law distinct from the "external" administrative law of judicial review and the congressional mandates imposed by the APA.[86] An agency's internal administrative law, or culture of bureaucratic rationality as

83. *See supra* note 31 and accompanying text.

84. *See generally* MAX WEBER, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION (A.M. Henderson & Talcott Parsons trans., Free Press 1947) (1920) (theorizing the ideal type of rational bureaucracy).

85. *See* MASHAW, *supra* note 73; MELNICK, *supra* note 73; *see also* BARDACH & KAGAN, *supra* note 53; REGULATION AND REGULATORY PROCESSES (Cary Coglianese & Robert A. Kagan eds., 2007).

86. MASHAW, *supra* note 73, at 1, 194; *see also* ADMINISTRATIVE LAW FROM THE INSIDE OUT: ESSAYS ON THEMES IN THE WORK OF JERRY L. MASHAW, *supra* note 60.

we describe it, is characterized by jurisprudentially informed principles of bureaucratic supervision that provide accurate, efficient, and consistent outcomes, while also being attentive to the moral and professional considerations that inhere in any system of dispute resolution. These core insights are elaborated on as "internal administrative law" in subsequent writings.[87]

"New institutionalism" scholars further describe how internal norms like bureaucratic efficiency and concerns about legitimacy shape an agency's implementation of legislation.[88] Nicholas Pedriana and Robin Stryker explain how structure alone is insufficient to explain how the early iteration of the Equal Employment Opportunity Commission ("EEOC") overcame institutional hurdles to aggressively enforce Title VII of the 1964 Civil Rights Act.[89] Despite designation with no formal adjudicative or prosecutorial powers, Pedriana and Stryker found that the EEOC was able to marshal internal legal capacities and administrative resources to expand their enforcement capacities through a strategy of broad statutory construction, in response to both internal logics desiring legitimacy and social movement pressures to robustly implement Title VII.[90] Lauren Edelman shows that agency cultures can lead to the narrowing of legal requirements. Organizations develop their own "logics" that can deviate or even overtake other legal interpretations.[91] Termed "symbolic compliance," this means an employer might comply with an HR manual on sexual harassment without really satisfying the goals of gender equality specified in Title IX, thereby undermining the statutory mandate.[92] Judges defer to the organizational interpretations of what is required to satisfy Title IX, inscribing agency practices in the formal law.[93] Putting together Pedrianna, Stryker, Edelman, and other scholars, we have shown that organizations can transform statutory

87. *See generally* Metzger & Stack, *supra* note 60. On the characteristics of internal administrative law, see *supra* text accompanying notes 48–60.

88. *See, e.g.*, JOHN DAVID SKRENTNY, THE IRONIES OF AFFIRMATIVE ACTION: POLITICS, CULTURE, AND JUSTICE IN AMERICA (1996); John David Skrentny, *State Capacity, Policy Feedbacks and Affirmative Action for Blacks, Women and Latinos*, 8 RSCH. POL. SOCIO. 279 (1998). On "new institutionalism," see THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS 1–38 (Walter W. Powell & Paul J. DiMaggio eds., 1991).

89. Nicholas Pedriana & Robin Stryker, *The Strength of a Weak Agency: Enforcement of Title VII of the 1964 Civil Rights Act and the Expansion of State Capacity, 1965–1971*, 110 AM. J. SOCIO. 709, 721 (2004).

90. *Id.* at 747–48.

91. LAUREN B. EDELMAN, WORKING LAW: COURTS, CORPORATIONS, AND SYMBOLIC CIVIL RIGHTS 23 (2016).

92. *Id.* at 100.

93. *Id.* at 168–216.

implementation in either direction: They can either undermine legal requirements or further them.[94]

Recalling Title 42, the bureaucracy has struggled to align its judgments with the Trump and Biden White House policies, which has prevented the establishment of a consensus across the multiple agencies implicated. The incoherent responses and in-fighting among government officials within the CDC and the immigration agencies push the norms of interagency coordination to their limit, and they strain bureaucratic rationality because the public health directive departs from multiple experts' assessments of public health risk, human rights obligations, and appropriate mitigation measures.[95] Moreover, the CDC's struggle to retain its commitment to bureaucratic rationality in the face of its political leaders' instrumentalization of the agency's authority was not a one-off incident. The Biden Administration's unwillingness to take responsibility for the harsh immigration consequences of the policy or to openly discuss alternative public health mitigation measures continues to sit uncomfortably with the culture of bureaucratic rationality that usually informs decision making in agencies.

2. Bureaucratic Legalism

The culture of *bureaucratic legalism* within agencies can lead to a variety of policymaking irregularities. This represents a form of governmental authority that Robert Kagan describes as a formal, hierarchical command structure in which "civil servants implement[] formal rules from the top down, as is the case in many regulatory agencies."[96] In contrast to "adversarial legalism," which emphasizes the importance of participatory creation of law through party-driven litigation and particularized justice, bureaucratic legalism places a premium on the consistent and uniform

94. For example, Shannon Gleeson writes about agencies advancing immigrants' rights as the means to the ends of their professional orientation toward workplace and labor law compliance. Shannon Gleeson, *Means to an End: An Assessment of the Status-blind Approach to Protecting Undocumented Worker Rights*, 57 SOCIO. PERSPS. 301 (2014); *see also* Ming H. Chen, *Where You Stand Depends on Where You Sit: Bureaucratic Politics in Federal Workplace Agencies Serving Undocumented Workers*, 33 BERKELEY J. EMP. & LAB. L. 227 (2012); Helen B. Marrow, *Immigrant Bureaucratic Incorporation: The Dual Roles of Professional Missions and Government Policies*, 74 AM. SOCIO. REV. 756 (2009).

95. *See supra* note 81 and accompanying text.

96. Thomas F. Burke & Jeb Barnes, *Introduction: What We Talk About When We Talk About Law*, *in* VARIETIES OF LEGAL ORDER: THE POLITICS OF ADVERSARIAL AND BUREAUCRATIC LEGALISM 9 (Thomas F. Burke & Jeb Barnes eds., 2018) (summarizing Kagan's core concepts). *See generally* ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW (2001).

application of rules across cases.[97] In Eugene Bardach and Robert Kagan's classic work, *Going by the Book*, the authors discuss "regulatory unreasonableness" as the product of regulators taking their mandates too literally or inflexibly, leading to the "red tape" that is routinely critiqued by skeptics of the administrative state.[98] Bardach and Kagan identify a historical trend toward more aggressive and uniform enforcement structures in the fields of protective regulation, which compels regulators to "go by the book."[99] The differing perspectives of regulators and the regulated throws policymaking out of balance: The former are overly attentive to the letter of the law and the possibility of harm, while the latter are concerned with real problems and use experience to calculate the actual probabilities of harm.[100] The misalignment produces resistance and resentment and frustrates constructive information-sharing by both parties. This type of strict adherence to an agency's mandate ends up reinforcing the status quo and engenders resistance to change.

Such regulatory unreasonableness is made possible by the multiple levels of discretion that run throughout agencies, which can lead to over-enforcement or under-enforcement of the law. Michael Lipsky attests to the range of possible responses in the context of "street-level bureaucrats": The discretionary actions of public employees at the service level can "when taken together . . . become, or add up to, agency policy."[101] Political-institutionalist perspectives have highlighted that these bureaucrats can serve as "policy entrepreneurs," influencing the level of zeal with which they pursue their mandates.[102] In short, they can over-enforce or under-enforce the law. Mark Seidenfeld extends this discussion to the tension between flexibility in application and predictability of stable rules in the context of

97. KAGAN, *supra* note 96, at 3. Political scientist James Q. Wilson underscores the importance of leadership, arguing that the microprocesses of management—specifically the allocation of incentives—are more important to bureaucratic efficiency than laws, regulations, and structures. JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 120 (1989).

98. BARDACH & KAGAN, *supra* note 53, at 6–7, 25–29.

99. *Id.* at 19–20.

100. *Id.* at 6–7.

101. MICHAEL LIPSKY, STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES 3 (1980).

102. *See, e.g.*, William N. Eskridge, Jr. & Kevin S. Schwartz, Chevron *and Agency Norm-Entrepreneurship*, 115 YALE L.J. 2623, 2625–27 (2006). *See generally* JOHN W. KINGDON, AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES (1984).

agency policymaking.[103] Civil servants can expand on statutory mandates in some cases[104] and thwart them in other instances.[105]

The Trump Administration's culture of over-enforcement of immigration law is glaringly apparent in multiple settings. The election of Donald Trump and the selection of high-level immigration advisors in the White House brought together a team of staunch immigration restrictionists committed to maximum enforcement of immigration statutes.[106] The invocation of a public health emergency order followed an aggressive campaign to enforce immigration restrictions with "a total and complete shutdown of Muslims entering the United States"[107] and calls to close the southern border to the "caravan" of Central American asylum-seekers because of a national security emergency.[108] The use of Title 42 to achieve these goals is a stark demonstration of how functional irregularity can be exploited to achieve political goals, and the resulting dysfunction can become a ready-made option for succeeding administrations. The dysfunctional dynamics in these episodes restricting the borders are reproduced outside of emergency circumstances as well.[109] These types of predictable agency responses to institutional disruption and politicization are illustrated in greater depth in Part II.

II. CASE STUDIES OF DYSFUNCTIONAL POLICYMAKING

This Part looks inside agencies for more in-depth illustrations of political actors exploiting irregularities in agency policies to further their political goals, and the agency responses to such attempts at politicization. The case studies from modern immigration policymaking are exemplary of the generalized dynamics identified in Part I; case studies drawn from

103. Mark Seidenfeld, *Bending the Rules: Flexible Regulation and Constraints on Agency Discretion*, 51 ADMIN. L. REV. 429, 438–42 (1999).

104. Ming Hsu Chen, *Governing by Guidance: Civil Rights Agencies and the Emergence of Language Rights*, 49 HARV. C.R.-C.L. L. REV. 291, 312–20 (2014) (explaining the role civil servants played broadening Title VI national origin to cover language rights); Sophia Z. Lee, *Race, Sex, and Rulemaking: Administrative Constitutionalism and the Workplace, 1960 to the Present*, 96 VA. L. REV. 799, 810–11 (2010).

105. Jennifer Nou, *Bureaucratic Resistance from Below*, YALE J. ON REGUL.: NOTICE & COMMENT BLOG (Nov. 16, 2016), https://www.yalejreg.com/nc/bureaucratic-resistance-from-below-by-jennifer-nou/ (cataloging tactics that civil servants have historically used to defy their superiors); *see also* Chen, *supra* note 94; Gleeson, *supra* note 94; Marrow, *supra* note 94.

106. Bandler et al., *supra* note 18.

107. AP Archive, *Trump Urges 'Shutdown' on Muslims Entering US*, YOUTUBE, at 0:40 (Nov. 16, 2016), https://www.youtube.com/watch?v=Dz2wn3iPDNg&ab_channel=APArchive.

108. Scott R. Anderson, *The Constitutional Quandary Already at the Border*, LAWFARE (Jan. 22, 2019, 1:42 PM), https://www.lawfareblog.com/constitutional-quandary-already-border.

109. *See infra* Part II.

alternative areas of the administrative state demonstrate the range of agency responses to similar attempts at politicization.

A. Bureaucratic Rationality in Action

Agencies react to political control in ways that reflect their internal cultural dynamics, including their commitment to *bureaucratic rationality*. Some of the characteristics of bureaucratic rationality include an agency's reliance on cost-benefit-analysis, adherence to professional standards and norms, and other informal traditions like consultation with other stakeholders or binding the agency to prior decisions for consistency.[110] As our case studies demonstrate, an additional factor that influences levels of bureaucratic rationality is the substantive nature of the agency's mission: Agencies that are principally technical or scientific in nature, like the Environmental Protection Agency ("EPA"), tend to provide higher levels of short- and medium-term regularity due to their expertise-driven processes and therefore tend to express correlated high levels of innate bureaucratic rationality.[111] Other agencies that are primarily service-oriented, such as the U.S. Citizenship and Immigration Services ("USCIS"), or enforcement-oriented, like Immigration and Customs Enforcement ("ICE"), are more susceptible to short term shifts in policy priorities, and therefore, their levels of bureaucratic rationality are more sensitive to external stimuli.[112] Achieving an optimal amount of flexibility in agency functioning requires a President to discipline agency discretion in a context-specific manner: Too much discretion frustrates effective oversight, too little risks the dangers of politicization; both extremes result in dysfunction. Achieving the proper balance between agency discretion and political control is necessary to realize both flexibility and predictability in agency function.

Bureaucratic rationality has been a defining feature of the immigration bureaucracy dating back to the creation of the Immigration and Naturalization Service ("INS") in 1933.[113] The earliest immigration laws were punitive deportation regimes.[114] But in response to reformers'

110. *See generally* MASHAW, *supra* note 73.

111. *See infra* Section II.A.2.

112. *See infra* Section II.B.1.

113. To execute a pair of laws passed in 1921 and 1924 that established the nation's first immigration quotas, Congress vested the Bureau of Immigration with the power to arrest and deport undocumented immigrants found in the U.S., despite the fact that the agency was not designed for law enforcement. Mae M. Ngai, *The Strange Career of the Illegal Alien: Immigration Restriction and Deportation Policy in the United States, 1921–1965*, 21 L. & HIST. REV. 69, 75–76 (2003). Prior to these laws, unauthorized entry had been considered a civil or administrative affair; after their enactments, Congress created new criminal sanctions and a Border Patrol to enforce them. *Id.*; Act of March 4, 1929, Pub. L. No. 70-1018, 45 Stat. 1551.

114. Ngai, *supra* note 113, at 92–93, 99–100.

objections to the rigid and formalistic application of the laws, immigration officials were able to creatively interpret their mandates to generate a culture of adjudicatory flexibility and equitable discretion.[115] As a result, the INS was able to balance the legislative demands placed upon it with internal service-oriented professional standards that provided particularized deportation relief.[116] However, Congress restored a tougher immigration enforcement regime when it passed the Immigration Reform and Control Act ("IRCA") in 1986.[117] The statute provided broad legalization for certain categories of undocumented immigrants while prospectively seeking to deter future unlawful migration with civil penalties for employers who knowingly hired unauthorized workers.[118] IRCA was a part of a pattern of "legislative intervention setting new agency priorities and reigning in the agency's executive discretion" in response to perceived agency overreach.[119] The service side of the INS's mission was weakened as a result of the "disproportionate influence and attention given to enforcement."[120] These pressures from the legislative branch and from within the executive branch contributed to an internal work culture at the INS that devalued discretionary decision-making based on the uniform application of professional standards and norms, leading to a situation in which each field office was left to apply their own formalistic (and sometimes idiosyncratic) interpretation of the

115. *Id.* at 99–100. One of the most effective procedures was called the "pre-examination" process. In the 1930s, Labor Secretary, Frances Perkins, and the new head of the INS, Daniel MacCormick, did so by using an obscure provision of the Immigration Act of 1917 that had been intended to grant a hardship relief by readjusting the status of a small subgroup of immigrants that, for technical reasons, were excludable at the time of the Act's enactment. Immigration Act of 1917, Pub. L. No. 64-301, 39 Stat. 874; Ngai, *supra* note 113, at 100. Perkins and MacCormick's innovation was to stretch the meaning of this provision to apply to migrants who had been residing in the U.S. without documentation for a significant period of time. The procedure to adjust status was a complicated affair, requiring a "pre-examination" process and a brief sojourn into Canada before the migrant would be re-admitted with a newly issued visa. Ngai, *supra* note 113, at 100–01. For example, the pre-examination process was used to adjust the status of Europeans who were in the U.S. on student or tourist visas in the late 1930s but were unable or unwilling to return home because of the rise of fascism. *Id.* at 104.

116. Prior to its termination in 1958, the pre-examination program alone had allowed the INS to process and, for the most part, approve nearly 58,000 cases that would have otherwise been barred under the INA. Ngai, *supra* note 113, at 104. Although the pre-examination process had its drawbacks—chief among them a racially-disparate application by the INS—it is an instance in which, as S. Deborah Kang describes it, "the INS functioned not only as a law enforcement agency, but also as a lawmaking body," guided by principles of bureaucratic rationality. S. DEBORAH KANG, THE INS ON THE LINE: MAKING IMMIGRATION LAW ON THE US–MEXICO BORDER, 1917–1954, at 2 (2017).

117. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.).

118. *Id.*

119. Robert Charles Hill, *The Jordan Commission's Proposals for Structural Reform of the Immigration System*, *in* 22 IN DEFENSE OF THE ALIEN 11, 15 (Lydio F. Tomasi ed., 2000).

120. *Id.*

statute. By the mid-1990s, the former INS General Counsel, Raymond Momboisse, circulated an internal memo alleging that the agency was operating as "a feudal state," within which each of the thirty-three district offices "make their own rules, often quite different from one place to the next."[121] The INS's localized decisions were compounded by an examinations handbook and operating instructions that were "so far out of date that examiners rarely bother[ed] to consult them."[122] Moreover, the INS had no index of immigration court decisions, such that "examiners only rel[ied] on the cases they recall[ed] from memory."[123] The lack of consistency around its service functions facilitated the use of the INS by political actors to implement enforcement policies in the years leading up to the creation of the DHS following the September 11, 2001, terrorist attacks.[124]

These historical examples inform our understanding of how the structure of the immigration agencies lends itself to a push and pull between Congress writing a broad statute and the agency exercising discretion in its implementation in order to achieve rational results. The creation of the DHS alleviated much of the INS's fragmentation problems. But ultimately, the new organization further suppressed bureaucratic rationality as an enforcement mentality colonized the USCIS's service functions—a development that we address in the context of rule of law formalism below.[125]

1. Disciplining Discretion: DACA and the DREAMers

One high-profile example of a regulatory response that flows from an interaction between structures and agency culture concerns the initial passage and subsequent rescission of deferred action programs for "DREAMers."[126]

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121. Daniel W. Sutherland, *The Federal Immigration Bureaucracy: The Achilles Heel of Immigration Reform*, 10 GEO. IMMIGR. L.J. 109, 116 (1996) (first quoting Weston Kosova, *The INS Mess: How Immigration Became a Nightmare*, NEW REPUBLIC, Apr. 13, 1992, at 21; and then quoting Deborah Sontag & Stephen Engelberg, *Insider's View of the I.N.S.: 'Cold, Rude and Insensitive'*, N.Y. TIMES (Sept. 15, 1994), https://www.nytimes.com/1994/09/15/us/insider-s-view-of-the-ins-cold-rude-and-insensitive.html).

122. *Id.*

123. *Id.*

124. *See generally* Robert Charles Hill, *Restructuring the INS: Reflections on Calls for Separating Service from Enforcement*, *in* 24 IN DEFENSE OF THE ALIEN 1 (Lydio S. Tomasi ed., 2002).

125. *See infra* notes 188–192 and accompanying text.

126. The DREAM Act of 2021 was introduced in the Senate in February of 2021 by Senators Richard Durbin (D-IL) and Lindsey Graham (R-SC), "which would allow immigrant students without lawful status who were brought here as children and grew up in the United States to earn lawful permanent residence and eventually American citizenship." *Durbin & Graham Introduce the Dream Act*, OFF. OF U.S. SENATOR DICK DURBIN (Feb. 4, 2021), https://www.durbin.senate.gov/newsroom/press-releases/durbin-and-graham-introduce-the-dream-act; *see* Dream Act of 2021, S. 264, 117th Cong. (2021). The Act would provide lawful permanent residence status and a path to citizenship for those who (1) came to the U.S. as children and are

Beneath the weighty policy issues about the rights of undocumented immigrants is a story about the President's capacity to entrust policies to regulatory agencies and to control their subsequent exercises of discretion.

President Obama promised immigration reform in his early years in office. After Congress's inability to reach agreement on a Development, Relief, and Education for Alien Minors ("DREAM") Act for most of his first term, President Obama resorted to executive action.[127] In 2012, Obama announced the Deferred Action for Childhood Arrivals ("DACA") program, which provided a temporary reprieve from deportation and work permits to young people who met the eligibility requirements of the abandoned DREAM Act.[128] He spoke from the White House Rose Garden about the need to protect DREAMers and his authority to define immigration enforcement priorities and direct resources in a manner that concentrated enforcement on criminal records rather than young people.[129]

Rather than issue an executive order or wait longer for legislative reform, President Obama delegated DACA implementation to the USCIS. He worked closely with DHS Secretary Janet Napolitano to administer DACA in a manner that centralized agency discretion.[130] Under Secretary Napolitano, the agency released guidance to systematize the criteria for relief from deportation and to centralize decision-making in the four national service centers under the USCIS.[131] They committed resources to hiring USCIS officers to review DACA applications, many of whom had a background in immigrants' rights and were willing to recommit to a service-minded approach to adjudicating applications.[132] Against the objections of critics, the DACA program went into effect and enrolled 800,000 of 1.5

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without legal status; (2) graduated from high school or obtained a GED; (3) pursue higher education, work lawfully for at least three years, or serve in the military; (4) demonstrate proficiency in English and a knowledge of U.S. history; and (5) have not committed a felony or other serious crime and do not pose a threat to the U.S. *Id.*

127. *See* Barack Obama, President of the U.S., Remarks by the President on Immigration (June 15, 2012, 2:09 PM) [hereinafter President Obama Remarks on Immigration], https://obamawhitehouse.archives.gov/the-press-office/2012/06/15/remarks-president-immigration. The first iteration of the DREAM Act was introduced by Senators Richard Durbin (D-IL) and Orrin Hatch (R-UT) in 2001, which gained bipartisan support but was never enacted as law. *The Dream Act, DACA, and Other Policies Designed to Protect Dreamers*, AM. IMMIGR. COUNCIL (Aug. 27, 2020), https://www.americanimmigrationcouncil.org/research/dream-act-daca-and-other-policies-designed-protect-dreamers; *see* S. 1291, 107th Cong. (2001). A substantially similar bill has been reintroduced by Durbin in the Senate several times in the last twenty years, most recently in 2021. *See Durbin & Graham Introduce the Dream Act*, *supra* note 126; S. 264, 117th Cong. (2021).

128. President Obama Remarks on Immigration, *supra* note 127.

129. *Id.*

130. *Consideration of Deferred Action for Childhood Arrivals (DACA)*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Nov. 3, 2022), https://www.uscis.gov/DACA.

131. *Id.*

132. *Id.*

million eligible immigrants.[133] The requirements, benefits, and agency adjudication process for DACA were similar to a proposed expansion that was prevented from going into effect by litigation.[134] Also similar was the logic of centralizing enforcement discretion with higher level officials in dedicated service centers. These attempts at rationalizing the bureaucratic exercise of discretion contrasted with President Obama's earlier experiences letting ICE officers retain significant discretion over enforcement.

The Trump Administration made no secret of its desire to limit undocumented immigration or rescind the DACA program.[135] In February 2017, DHS Secretary, John Kelly, authored a priorities memo that pushed back on the previous priorities of Obama DHS Secretary Jeh Johnson.[136] Titled the "Enforcement of Immigration Laws to Serve the National Interest," the memo sought to implement Trump's executive order on interior enforcement and claimed to supersede "all existing conflicting directives" in its effort to fully enforce immigration laws.[137] The Kelly memo was implemented with vigor by ICE Director Thomas Homan, who bragged that all undocumented immigrants "should be afraid" and initiated massive raids in many parts of the country.[138] Although there was no specific mention of DACA in the memo, the groundwork for its rescission was being laid. As

133. J.J. Gallagher, *What We Know About the Nearly 800,000 Unauthorized Immigrants Protected by DACA*, ABC NEWS (Sept. 5, 2017, 12:00 PM), https://abcnews.go.com/Politics/800000-undocumented-immigrants-protected-daca/story?id=49623897.

134. In 2014, President Obama attempted to expand the program to a wider group of undocumented immigrants that included the parents of DACA recipients, the Deferred Action for Parents of Americans and Lawful Permanent Residents program ("DAPA"). Memorandum from Jeh Charles Johnson, Sec'y, Dep't of Homeland Sec., to León Rodríguez, Dir., U.S. Citizenship and Immigr. Servs. et al., Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/mgmt/law-enforcement/mgmt-dir_044-02-prosecutorial-discretion-individuals-united-states-children.pdf. The 2014 DAPA expansion fell in a legal challenge from twenty-seven conservative states that was subsequently upheld by the Fifth Circuit and left in place by a 4–4 vote in the U.S. Supreme Court. Texas v. United States, 809 F.3d 134, 146 (5th Cir. 2015), *aff'd by an equally divided court*, 579 U.S. 547 (2016).

135. Joel Rose, *Despite Supreme Court's Ruling on DACA, Trump Administration Rejects New Applicants*, NPR (July 15, 2020, 4:03 PM), https://www.npr.org/2020/07/15/891563635/trump-administration-rejects-1st-time-daca-applications-violates-scotus-order.

136. Memorandum from John Kelly, Sec'y, Dep't Homeland Sec., to Kevin McAleeneen, Acting Comm'r, U.S. Customs & Border Prot. et al., Enforcement of the Immigration Laws to Serve the National Interest (Feb. 20, 2017), https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf.

137. *Id.* at 2.

138. Tal Kopan, *ICE Director: Undocumented Immigrants 'Should be Afraid'*, CNN (June 16, 2017, 6:52 PM), https://www.cnn.com/2017/06/16/politics/ice-immigrants-should-be-afraid-homan/index.html.

expected, a coalition of conservative attorneys general threatened to bring a legal challenge against DACA unless the Trump Administration rescinded the policy on its own.[139] Bowing to the legal and political pressure, the Trump Administration rescinded the DACA program in the fall of 2017, with a public announcement from the Department of Justice ("DOJ") Attorney General Jeff Sessions and a brief memo from Acting DHS Secretary Elaine Duke stating that the program would be suspended due to questions about its legality.[140] The rescission provided for a six-month period to permit an orderly wind down of the program. Scant discussion of the substantive objectives behind the policy appeared in the memos. The rescission sparked years of subsequent litigation. Ultimately, the program was permitted to continue once the Supreme Court struck down the rescission in *DHS v. Regents of the University of California* ("*UC Regents*").[141] The Supreme Court found that the Trump Administration retained the authority to rescind the program if it followed proper administrative procedures, but they found that the agency explanation provided at the time of rescission was "arbitrary and capricious" because it contained so little reasoning and seemed not to acknowledge the considerable reliance interests of the DACA recipients and the employers and universities that relied on them.[142]

Importantly, the Court did not challenge the legal authority of the President to intervene in setting regulatory priorities or engage with the substantive policy. But the Trump Administration's effort to hold back on articulating the substantive policy differences on DACA as the rationale for rescission came back to bite the agency. Those substantive policy differences only emerged through discovery in a separate D.C. lawsuit that revealed previously undisclosed policy rationales from a later DHS Secretary, Kirsten Nielson—such as a weighing of zero-tolerance over reliance interests of immigrants who had relied on DACA for jobs—suggested the agency reasoning, but it would need to be properly raised under a new rescission.[143] In short, the federal courts were standing behind President Obama in their

139. Dara Lind, *A Group of Republican Attorneys General is Picking a Fight with Trump on Immigration*, VOX (June 30, 2017, 9:11 AM), https://www.vox.com/policy-and-politics/2017/6/29/15895458/trump-daca-dreamers-immigration. The same group of conservative attorneys general had successfully challenged the more expansive DAPA program in 2014.

140. Memorandum from Elaine C. Duke, Acting Sec'y, Dep't of Homeland Sec., to James W. McCament, Acting Dir., U.S. Citizenship & Immigr. Servs. Et al., Memorandum on Rescission of Deferred Action for Childhood Arrivals (DACA) (Sept. 5, 2017), https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca; Jeff Sessions, U.S. Att'y Gen., Attorney General Sessions Delivers Remarks on DACA, (Sept. 5, 2017), https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-daca.

141. 140 S. Ct. 1891, 1901 (2020).

142. *Id.* at 1912–13.

143. NAACP v. Trump, 298 F. Supp. 3d 209, 240 (D.D.C. 2018); JULIE HIRSCHFELD DAVIS & MICHAEL D. SHEAR, BORDER WARS: INSIDE TRUMP'S ASSAULT ON IMMIGRATION 435–37 (2019).

demand for bureaucratic rationality in the procedures of policymaking (in *Texas v. United States*[144]) and the sufficiency of reasons for policy changes (in *UC Regents*). The Biden Administration, on its first day in office, released a memorandum that restored DACA.[145] Called "Preserving and Fortifying Deferred Action for Childhood Arrivals (DACA)," the memo charged the Secretary of Homeland Security with taking "all actions he deems appropriate, consistent with applicable law, to preserve and fortify DACA."[146] However, Biden's directive does not adjust the legal status of DACA recipients, nor does it provide a path to citizenship.[147] Moreover, the group of conservative Attorneys General that was successful in blocking the implementation of the expanded deferred action program in 2014 filed suit in Texas in an attempt to end the program again, winning an injunction on new applications in 2021.[148] In recognition of this legal limbo, Biden's proposed agency rules and three alternative bills would make DACA recipients immediately eligible for lawful permanent residence status and provide an expedited path to citizenship.[149]

144. 809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided court*, 579 U.S. 547 (2016).

145. Memorandum from Joseph R. Biden, Jr., President of the U.S., to the U.S. Att'y Gen. & Sec'y of Homeland Sec., Preserving and Fortifying Deferred Action for Childhood Arrivals (DACA) (Jan. 20, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/preserving-and-fortifying-deferred-action-for-childhood-arrivals-daca/.

146. *Id.*

147. *See* Sarah Libowsky & Krista Oehlke, *President Biden's Immigration Executive Actions: A Recap*, LAWFARE (Mar. 3, 2021, 12:13 PM), https://www.lawfareblog.com/president-bidens-immigration-executive-actions-recap#DACA.

148. Emma Platoff, *Texas and 6 Other States Sue to End DACA*, TEX. TRIB. (May 1, 2018, 3:39 PM), https://www.texastribune.org/2018/05/01/texas-and-six-other-states-sue-end-daca/. The case is ongoing, with additional pleadings having been heard in December of 2020. Libowsky & Oehlke, *supra* note 147. The second challenge was lodged in the same court with the same judge and resulted in a substantially similar ruling that is being appealed at the time of this writing. Texas v. United States, No. 1:18-CV-00068, 2021 WL 3022434 (S.D. Tex. July 16, 2021), *aff'd in part and rem'd*, 50 F.4th 498 (5th Cir. 2022).

149. For ongoing updates to the DACA expansion and reinstatement, see *The Current State of DACA: Challenges Await in Litigation and Rulemaking*, NAT'L IMMIGR. F. (Apr. 15, 2022), https://immigrationforum.org/article/the-current-state-of-daca-challenges-await-in-litigation-and-rulemaking/. *See also Fact Sheet: President Biden Sends Immigration Bill to Congress as Part of His Commitment to Modernize our Immigration System*, WHITE HOUSE (Jan. 20, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-president-biden-sends-immigration-bill-to-congress-as-part-of-his-commitment-to-modernize-our-immigration-system/. The three alternative bills are contained in the Dream Act of 2021, S. 264, 117th Cong. (introduced in the U.S. Senate), the American Dream and Promise Act of 2021, H.R. 6, 117th Cong. (introduced in the U.S. House of Representatives), and the Inflation Reduction Act, H.R. 5376, 117th Cong., but ultimately were not enacted. Alondra Margarita Bribiesca, *Dreamers Bills Under Congressional Consideration*, NAT'L L. REV. (May 7, 2021), https://www.natlawreview.com/article/dreamers-bills-under-congressional-consideration; Felipe de la Hoz, *Congress Might Finally Pass Immigration Reform in a Very Strange Way*, SLATE (July 16, 2021, 2:50 PM), https://slate.com/news-and-politics/2021/07/immigration-reform-daca-reconciliation-infrastructure-bill.html.

Another example of an agency shaping enforcement decisions can be seen in President Trump's announcement of a zero-tolerance policy, which overwhelmed the formal policymaking processes in the immigration bureaucracy. Both DHS Secretary John Kelly and Attorney General Jeff Sessions called for full enforcement of immigration laws in lieu of their predecessor's enforcement priorities.[150] Immigration scholar Geoffrey Hoffman notes that this mentality not only flooded the immigration system, it generated a system of "non-priorities priorities" given the breadth of the INA and the inconsistent application of enforcement criteria.[151] The result was chaotic agency administration because of the impossibility of full enforcement in an agency with limited capacity.[152] Even after *UC Regents* sought to restore order with the revival of DACA, the Trump Administration continued to waver on the continued operation of the program. The Administration tried to curtail the program by shortening renewals and declining to accept new applications. Ensuing litigation pointed out it could not do so without explanation.[153] The Administration then issued an unusual memorandum temporarily suspending the program while "reviewing" its legality.[154] That attempt to circumvent court orders was also unsuccessful as a federal court in D.C. struck down the USCIS's temporary memo and a

150. *See* Memorandum from John Kelly, *supra* note 136. The memo was rescinded and replaced by a policy of narrower enforcement priorities during the Biden Administration; the Biden memo is facing legal challenge at the time of this writing and was argued in the U.S. Supreme Court on November 29, 2022. United States v. Texas, No. 22-58 (U.S. argued Nov. 29, 2022).

151. Geoffrey A. Hoffman, *The Non-Priorities Priorities*, IMMIGRATIONPROF BLOG (Feb. 14, 2017), https://lawprofessors.typepad.com/immigration/2017/02/the-non-priorities-priorities-by-geoffrey-a-hoffman.html; COX & RODRIGUEZ, *supra* note 72, at 163–64 (discussing the overbreadth of INS leading to executive discretion).

152. DHS capacity had been enlarged during the Trump Administration. Even so, it could not capture the eleven million undocumented persons and growing number of deportable persons under the vast grounds of the INA. Abby Budiman, *Key Findings About U.S. Immigrants*, PEW RSCH. CTR. (Aug. 20, 2020), https://www.pewresearch.org/fact-tank/2020/08/20/key-findings-about-u-s-immigrants/; *US Undocumented Immigrant Population Estimates*, BRITANNICA PROCON (June 22, 2022), https://immigration.procon.org/us-undocumented-immigrant-population-estimates/#2012.

153. Ming Hsu Chen, *Are the Dreamers Safe Now That the Supreme Court Ruled? Not Exactly. Here's What's Still Up in the Air.*, WASH. POST (June 19, 2020, 10:58 AM), https://www.washingtonpost.com/politics/2020/06/19/are-dreamers-safe-now-that-supreme-court-ruled-not-exactly-heres-whats-still-up-air/.

154. In a series of memos, Chad Wolfe declared that existing DACA recipients would only be able to renew for one year at a time and that no new applications would be accepted. For both sides of the debate over whether the DHS is obligated to accept new DACA applications, see Joel Rose, *Despite Supreme Court's Ruling on DACA, Trump Administration Rejects New Applicants*, NPR (July 15, 2020, 4:03 PM), https://www.npr.org/2020/07/15/891563635/trump-administration-rejects-1st-time-daca-applications-violates-scotus-order; Nicole Prchal Svajlenka, Tom Jawetz & Philip E. Wolgin, *The Trump Administration Must Immediately Resume Processing New DACA Applications*, CTR. FOR AM. PROGRESS (July 29, 2020), https://www.americanprogress.org/issues/immigration/news/2020/07/13/487514/trump-administration-must-immediately-resume-processing-new-daca-applications/.

subsequent court compelled the USCIS to continue operating the DACA program, unless and until it is properly rescinded.[155] The Biden Administration rescinded the zero-tolerance policy after taking office and replaced it with renewed priorities that are undergoing legal challenge as of this writing.[156]

These policymaking episodes illustrate differing agency responses to structural problems of insufficient resources and decentralized enforcement discretion. Setting aside the obvious substantive policy differences between the Obama and Trump Administrations, the defining issue flowed from the manner of a president trying to rein in agency discretion. The Obama Administration sought to centralize agency discretion within the USCIS through the issuance of agency guidance. This strategic choice threaded a needle: It permitted the President to constrain the agency's enforcement discretion, but it also rendered the policy vulnerable to continuing legal challenges on the grounds that the procedures for deciding whether a qualifying immigrant would be eligible for forbearance too closely approximated rulemaking. Moreover, the practical effect of the policy would be to shield immigrants from deportation—arguably, a change to substantive rights that should have been effectuated through the APA notice and comment process. This potential problem of using regulatory procedure came back during Trump's rescission of DACA and the Biden Administration's rescissions of Trump's rollbacks. The tumultuous policymaking journey of DACA implementation and the zero-tolerance policy demonstrate the multiple paths that can flow from attempts to discipline agency discretion—DACA formalized enforcement discretion so much that it raised questions about whether it was a new substantive policy, while the zero-tolerance memo pushed a rule of law interpretation of the INA to its limits.

It is not uncommon for a President to rationalize the bureaucracy by specifying enforcement priorities and allocating resources accordingly.[157]

155. Batalla Vidal v. Nielsen, 291 F. Supp. 3d 260, 285 (E.D.N.Y. 2018).

156. Exec. Order No. 13993, Revision of Civil Immigration Enforcement Policies and Priorities, 86 Fed. Reg. 7051 (Jan. 20, 2021); Memorandum from Tae D. Johnson, Acting Dir., U.S. Citizenship & Immigr. Servs., to All ICE Employees, Interim Guidance: Civil Immigration Enforcement and Removal Priorities (Feb. 18, 2021), https://www.ice.gov/doclib/news/releases/2021/021821_civil-immigration-enforcement_interim-guidance.pdf. The Biden priorities memo is being challenged by the States of Texas and Louisiana. Texas v. United States, No. 6:21-CV-00016, 2022 WL 2109204 (S.D. Tex. June 10, 2022), *appeal docketed*, No. 22-58 (U.S. argued Nov. 29, 2022).

157. In *The President and Immigration Law*, Adam Cox and Cristina Rodriguez claim presidential policymaking in immigration is the norm and not the exception. *See* COX & RODRIGUEZ, *supra* note 72, at 12. The view is somewhat contrary to popular depictions of Presidents Obama and Trump being unusually assertive in their use of executive enforcement in immigration. *Id.* at 12 ("[D]iscretion is an inevitable part of a legal regime and a signal feature of the structure of immigration law."). Others make similar points about DACA. *See, e.g.*, Gillian B. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836, 1927–28 (2015).

This is the essence of prosecutorial discretion in the criminal justice system. It is also not uncommon for the agency to follow policy guidance that retains some flexibility for the agency even as they articulate criteria to guide the exercise of that discretion, rather than follow rulemaking procedures.[158] For this reason, the undisciplined enforcement discretion that President Obama tried to correct and the manner of correcting it speak to common regulatory dynamics. The same questions raised by Obama's interventions were raised by President Trump's subsequent attempt to reverse the DACA policy by specifying new enforcement priorities: "the problem of a discretionary nation."[159] President Biden's attempt to stabilize DACA, if not accompanied by statutory reform, will do little to address this discretionary precarity.

2. Induced Dysfunction at the EPA

In much the same manner that the Trump Administration attempted to direct the immigration agencies with the rescission of DACA recipients and that Biden sought to restore it, the EPA became a focal point of efforts of overt politicization.[160] These attempts to control what environmental regulations would be promulgated were realized through the deliberate staffing of political appointees at the head of the EPA.[161] Ultimately, the Trump Administration's political machinations were largely unsuccessful, due to poor governance and inept policymaking, but also partly due to the result of the agency's response to politicization.[162] Trump's first pick to head the environmental agency, Scott Pruitt, Oklahoma's former Attorney General, had a long history of suing the EPA prior to joining the Trump

158. Cox and Rodriguez distinguish between centralization of discretion and control of discretion. COX & RODRIGUEZ, *supra* note 72, at 163–64. The latter is a subject of extensive discussion in administrative law scholarship. *See, e.g.*, PETER M. SHANE, MADISON'S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY 37–42 (2009); Kathryn A. Watts, *Controlling Presidential Control*, 114 MICH. L. REV. 683, 728–29 (2016); Cary Coglianese, *Presidential Control of Administrative Agencies: A Debate Over Law or Politics?*, 12 U. PA. J. CONST. L. 637, 637–38 (2010). At its most extreme, strong presidential control can turn into claims of a unitary executive. *See, e.g.*, Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1165–66 (1992).

159. COX & RODRIGUEZ, *supra* note 72, at 12.

160. *See* Emily Holden, *Trump's Environment Agency Seems to Be at War with the Environment, Say Ex-Officials*, GUARDIAN (Oct. 30, 2020, 2:20 PM), https://www.theguardian.com/environment/2020/oct/30/trump-agency-war-on-environment-former-epa-officials.

161. Rachel Leven, *A Behind-the-Scenes Look at Scott Pruitt's Dysfunctional EPA*, CTR. FOR PUB. INTEGRITY (Nov. 9, 2017), https://publicintegrity.org/environment/a-behind-the-scenes-look-at-scott-pruitts-dysfunctional-epa/.

162. *See* Michael Grunwald, *The Myth of Scott Pruitt's EPA Rollback*, POLITICO MAG. (Apr. 7, 2018), https://www.politico.com/magazine/story/2018/04/07/scott-pruitt-epa-accomplishments-rollback-217834/.

Administration.[163] Under Pruitt, the EPA systematically excluded the career bureaucrats and civil service employees from policy decisions in a concerted effort to frustrate the agency's mission.[164] A prominent example was Pruitt's decision to tap one of his former donors, banker Albert Kelly, to lead the agency's efforts to improve its Superfund cleanup program.[165] After an initial bout of consultation with staff experts, Kelly removed the process from agency-wide discussions, and instead worked with Pruitt to finalize rules that largely excluded or significantly altered the agency's expert advice.[166] Pruitt, dogged by scandals that dated back from his time as an Oklahoma senator,[167] resigned in mid-2018.[168] Despite his efforts, Pruitt's attempts at deregulation were largely unsuccessful, due in no small part to his incompetence as an administrator.[169]

His successor, former coal industry lobbyist Andrew Wheeler, was intended to be a quietly-effective replacement—touted as an industry insider that understood the political machinations at the heart of the EPA.[170] Despite his supposed competence, Wheeler's EPA initially had little success in winning the legal challenges to his deregulation agenda, in many respects due to the same deficiencies in rulemaking that plagued Pruitt's tenure.[171] However, in the waning months of the Trump presidency, Wheeler employed a bevy of political maneuvers to implement his and Trump's deregulatory plans. Like Pruitt before him, Wheeler sidelined scientists and other agency

163. Chris Mooney, Brady Dennis & Steven Mufson, *Trump Names Scott Pruitt, Oklahoma Attorney General Suing EPA on Climate Change, to Head the EPA*, WASH. POST (Dec. 8, 2016, 6:17 AM), https://www.washingtonpost.com/news/energy-environment/wp/2016/12/07/trump-names-scott-pruitt-oklahoma-attorney-general-suing-epa-on-climate-change-to-head-the-epa/.

164. Leven, *supra* note 161.

165. *Id.* (the Superfund program concerns the cleanup of the nation's worst toxic-waste sites).

166. *Id.*

167. Eli Watkins & Clare Foran, *EPA Chief Scott Pruitt's Long List of Controversies*, CNN (July 5, 2018, 4:39 PM), https://www.cnn.com/2018/04/06/politics/scott-pruitt-controversies-list/index.html; Steve Eder & Hiroko Tabuchi, *Scott Pruitt Before the E.P.A.: Fancy Homes, a Shell Company and Friends with Money*, N.Y. TIMES (Apr. 21, 2018), https://www.nytimes.com/2018/04/21/us/politics/scott-pruitt-oklahoma-epa.html.

168. Coral Davenport, Lisa Friedman & Maggie Haberman, *E.P.A. Chief Scott Pruitt Resigns Under a Cloud of Ethics Scandals*, N.Y. TIMES (July 5, 2018), https://www.nytimes.com/2018/07/05/climate/scott-pruitt-epa-trump.html.

169. *See Roundup: Trump-Era Agency Policy in the Courts*, N.Y.U. INST. FOR POL'Y INTEGRITY (Apr. 25, 2022), https://policyintegrity.org/trump-court-roundup#ref-1-a.

170. Coral Davenport, *Pruitt's Successor Wants Rollbacks, Too. And He Wants Them to Stick.*, N.Y. TIMES (July 27, 2018), https://www.nytimes.com/2018/07/27/climate/andrew-wheeler-epa.html.

171. Richard L. Revesz, *Less Scandal, Equal Dysfunction*, SLATE (Feb. 27, 2019, 8:30 AM), https://slate.com/technology/2019/02/andrew-wheeler-epa-dysfunctional-scott-pruitt-scandal.html.

experts in the agency's policymaking processes.[172] The EPA chief eliminated the agency's Office of the Science Advisor, disbanded an advisory committee on particulate matter, and packed similar advisory committees with industry-friendly participants or failed to convene them at all.[173] At the beginning of 2021, the EPA finalized a rule that limits what research it can use to craft public health protections—the "Strengthening Transparency in Pivotal Science Underlying Significant Regulatory Actions and Influential Scientific Information" rule[174] mandates that researchers disclose the raw data used in public health studies before the EPA may rely on them.[175] Because of the heavy use of confidential medical records in such studies, the rule would have the effect of excluding some of the most consequential epidemiological research on human subjects.[176] Critics argued that the rule's justification, that of transparency in the EPA's methods and findings, was a pretext for rolling back and eliminating EPA safeguards.[177]

The Biden Administration found a relatively easy means of reversing that particular rule—simply by not defending it when challenged in court[178]—but a full slate of rollbacks for Trump-era deregulations will be a lengthy and complicated process.[179] This illustrates how the disciplining of an agency's discretion by political actors may have effects that last well beyond the cycles of presidential elections.

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Some amount of enforcement discretion within agencies is necessary for the implementation and interpretation of policies set by political leaders—especially in a policy domain animated by a vast and ambiguous statute such as the INA. Although some level of flexibility is desirable to permit agencies to exercise their judgment at a level of granularity that goes beyond what a president, Congress, or court could assess, too much discretionary power can

172. Elliot Negin, *10 Ways Andrew Wheeler Has Decimated EPA Protections in Just One Year*, UNION OF CONCERNED SCIENTISTS: THE EQUATION (July 15, 2019, 9:30 AM), https://blog.ucsusa.org/elliott-negin/andrew-wheeler-decimated-epa.

173. *Id.*

174. 86 Fed. Reg. 469 (Jan. 6, 2021).

175. Transparency in Pivotal Science Underlying Significant Regulatory Actions and Influential Scientific Information, 40 C.F.R. pt. 30 (2023).

176. Juliet Eilperin & Brady Dennis, *EPA Finalizes Rule to Limit Science Behind Public Health Safeguards*, WASH. POST (Jan. 5, 2021, 10:51 AM), https://www.washingtonpost.com/climate-environment/2021/01/04/epa-scientific-transparency/.

177. *Id.*; Negin, *supra* note 172.

178. Mitch Ambrose, *Court Scraps Rule Restricting EPA's Use of Science*, AM. INST. PHYSICS (Feb. 8, 2021), https://www.aip.org/fyi/2021/court-scraps-rule-restricting-epas-use-science.

179. Coral Davenport, *Restoring Environmental Rules Rolled Back by Trump Could Take Years*, N.Y. TIMES (Oct. 6, 2021), https://www.nytimes.com/2021/01/22/climate/biden-environment.html.

result in an undisciplined application of ad hoc legal standards and cause chaos. The task for the agency's political leadership is to exert sufficient control over the immigration bureaucracy's numerous civil servants and line officers to instill the orderly administration of the law.

Under the Obama Administration, the DHS's use of deferred action to ensure fewer deportations of low-priority undocumented immigrants illustrates the use of structures to articulate rational enforcement criteria and the institutionalization of processes to apply them consistently. This system of priorities replaced the ad hoc application of pre-existing criteria that was expressed in internal agency documents and dismissed by line officers during the earlier years of the Obama Administration (e.g., the 2011 Morton memo) and contrasts with the vague directives of DHS Secretary Kelly's 2017 memos to implement enforcement in the interior and at the border.[180] In many respects, it would have been preferable that Congress be involved in making such substantive policies, but the legislative branch's stalemate over the issue required the Obama Administration to seek alternative, and irregular, means of implementing its policies. Biden faces the same dilemma of using irregular policymaking channels to stabilize policy without interfering too much.[181] To the extent that DACA can be used to effectively balance agency discretion and political control, it can defuse irregular policymaking. To the extent that DACA is exploited to circumvent formal rulemaking, irregular policymaking translates into dysfunction.

But as the example of the EPA illustrates, the ability of a president to discipline an agency partly depends on the agency itself. Many believe that Scott Pruitt was placed at the head of the EPA to intentionally disrupt policymaking within an agency that is seen as antithetical to the conservative agenda.[182] That many of his attempts at deregulation were unsuccessful is a testament to procedural and statutory guardrails, such as those provided by the APA, and is also attributable to the culture of bureaucratic rationality at the EPA. The EPA's primary mission is technical in nature; consequently, much of the staff consists of scientists and other experts that pursue their objectives to a large degree independent of political considerations, demonstrating how an agency's scientific or technical mission contributes to its culture of bureaucratic rationality.[183] In effect, the environmental agency is insulated to an extent from the President, as well as from the political

180. *See supra* note 136 and accompanying text; Memorandum from John Morton, Dir., U.S. Immigr. Customs & Enf't to All Field Office Directors, Special Agents in Charge, and Chief Counsel (June 17, 2011), https://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf.

181. *See, e.g.*, Texas v. United States, 50 F.4th 498, 524 (5th Cir. 2022).

182. *See* Mooney et al., *supra* note 163.

183. *See* Jennifer Nou, *Civil Servant Disobedience*, 94 CHI.-KENT L. REV. 349, 367–68 (2019).

appointees at the agency who oversee the career bureaucrats. The same cannot be said as strongly for the immigration agencies. The USCIS, for example, does not appear to demonstrate the same kind of institutional resiliency to political suasion as the EPA. One need only look at the politically-induced precarity of DACA recipients in the face of the Trump Administration's attempts at rescission—policies that have been reversed yet again under President Biden.[184] The upshot is that the cultural attribute of bureaucratic rationality expresses itself in agency-specific contexts.

B. Bureaucratic Legalism in Action

Faced with unstable structural pressure, agencies can exhibit *bureaucratic legalism* in pursuing their enforcement priorities.[185] In the post-9/11 world, each of the immigration bureaucracies (with the notable exception of the immigration courts[186]) are housed within the DHS, which has led to the colonization of its service functions by an enforcement mentality.[187] Political actors have taken advantage of the DHS's structure to instill these enforcement priorities and induce dysfunction at the USCIS, the result of which has been the severe limitation of its flexibility. In effect, the USCIS's response to politicization has been to exhibit the type of bureaucratic legalism that is typically more pronounced at the immigration bureaucracy's enforcement agencies, ICE and CBP.

But debates about the effectiveness of the immigration bureaucracy's service-oriented functions have long preceded the creation of the DHS's housing of USCIS alongside enforcement components such as ICE and CBP.[188] Structural reforms were proposed in Congress throughout the 1990s

184. Memorandum from Joseph R. Biden Jr., *supra* note 145; *see supra* note 150 and accompanying text.

185. On "bureaucratic legalism," see *supra* Section I.B.2.

186. Immigration courts are themselves housed within the Executive Office for Immigration Review under purview of the DOJ. *See* 8 C.F.R. § 1003.0; 8 U.S.C. § 1101(b)(4).

187. For the DHS organizational chart, see U.S. DEP'T OF HOMELAND SEC., DHS PUBLIC ORGANIZATIONAL CHART, (2021), https://www.dhs.gov/sites/default/files/publications/21_0402_dhs-organizational-chart.pdf.

188. These discussions began in earnest in 1986, when the bureaucracy's former iteration, the INS, took an enforcement turn after the passage of IRCA. *See supra* note 117 and accompanying text. IRCA is generally known for three components: legal status for unauthorized immigrants who had been present continuously in the U.S. for at least five years, tougher border enforcement provisions, and civil penalties for employers who knowingly hired unauthorized workers. Muzaffar Chishti, Doris Meissner & Claire Bergeron, *At Its 25th Anniversary, IRCA's Legacy Lives On*, MIGRATION POL'Y INST. (Nov. 16, 2011), https://www.migrationpolicy.org/article/its-25th-anniversary-ircas-legacy-lives. In response to a perceived threat of increased Latino immigration to the United States, INS saw a significant increase in its yearly congressional appropriations, new funding to increase the staff of border control agents and related enforcement personnel, and a slate of new responsibilities with respect to investigating and enforcing workplace violations. *See* Douglas S. Massey, Jorge Durand & Karen A. Pren, *Why Border Enforcement Backfired*, 121 AM.

to rebalance the INS's competing service and enforcement functions, which had come to be dominated by enforcement priorities after the passage of IRCA in 1986,[189] but the terrorist attacks of September 11, 2001, would put them on the back burner. In the post-9/11 world, national security became the agency mission, and fragmentation and diffusion of responsibility was understood as contributing to the nation's vulnerability.[190] In response, President George W. Bush proposed to subsume the INS and Border Patrol into a new Department of Homeland Security.[191] The resulting centralization of information was intended to remove barriers to efficient border security, as well as to enhance law enforcement's ability to protect vital infrastructure by facilitating more comprehensive enforcement of immigration laws.[192] In short, the DHS was created to deal with information-sharing problems by consolidating functional roles, rather than maintaining the type of operational divisibility that could effectively balance service and enforcement functions. As a result, the tensions that stemmed from INS's bifurcated nature would become more pronounced at the DHS.

Understanding the origins of the peculiar DHS structure that embeds multiple agency components in an enforcement-oriented department helps us understand why the agency evinces bureaucratic legalism.

1. Convergence of Full Enforcement and Rule of Law at the USCIS

The logic of using interagency dynamics to control the immigration bureaucracy is especially pronounced with respect to attempts to pursue unified enforcement priorities across multiple agencies. According to the INA, the USCIS is the agency within the DHS charged with adjudicating and administering immigration benefits associated with legal migration, such as visas, green cards, and naturalized citizenship, while ICE is charged with

J. SOCIO. 1557 (2016); Chishti et al., *supra*. The renewed emphasis on enforcement had profound effects on the INS. The agency had been shaped by the INA to pursue dual objectives: Its traditional service-related functions, and its border protection and interior enforcement role. According to the Government Accountability Office, the agency's dual missions were "quite different, almost opposite, organization objectives," that operated in relative harmony until the adoption of IRCA. *Making Needed Policy and Management Decisions on Immigration Issues: Hearing Before the Subcomm. on Info., Just., Transp., & Agric. of the H. Comm. on Gov't Operations*, 103rd Cong. 1 (1993) (statement of Henry R. Wray, Dir., Admin. of Just. Issues). The immediate result was a significant deterioration in the efficiency and quality of the agency's traditional bread-and-butter immigration services, as the two objectives competed with each other for institutional supremacy.

189. The most influential being the so-called Jordan Commission. *See, e.g.*, Hill, *supra* note 119, at 12–13.

190. THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 383–84 (2004), https://www.govinfo.gov/content/pkg/GPO-911REPORT/pdf/GPO-911REPORT.pdf.

191. PRESIDENT GEORGE W. BUSH, THE DEPARTMENT OF HOMELAND SECURITY 1 (2002), https://www.dhs.gov/xlibrary/assets/book.pdf.

192. *Id.* at 4–5.

enforcement. Although it has historically been a service-oriented agency, the Trump Administration's USCIS became stingier with benefit awards and more skeptical of its applicants as it got embroiled in a vast immigration enforcement policy agenda.[193] Most of this enforcement agenda was executed by ICE and the DO's Executive Office for Immigration Review ("EOIR") immigration courts, which are charged with administration of the immigration provisions that lead to detention and removal.[194]

Congress sets out the agency mandate for both the DHS and the immigration courts. The DHS claims it is committed to the rule of law.[195] Given how vast the statute is and how aggressive enforcement has been under recent administrations, ICE and the USCIS often lack the requisite resources for "maximal enforcement" and cannot keep up with statutory timetables.[196] For example, during a time when Trump's USCIS intensified vetting for immigration benefits (some called these types of policy disruptions "the invisible wall"[197] or the second wall[198]), the USCIS performance metrics showed declines and delays in nearly every category of immigration benefits awarded.[199] The American Immigration Lawyers Association reports that the

193. For example, the Trump Administration's withholding of benefits awards led to a significant increase in USCIS backlogs. U.S. GOV'T ACCOUNTABILITY OFF., U.S. CITIZENSHIP AND IMMIGRATION SERVICES: ACTIONS NEEDED TO ADDRESS PENDING CASELOAD (2021), https://www.gao.gov/assets/720/716227.pdf.

194. The policy environment has changed under the Biden Administration, which has emphasized its promotion of legal migration. *See* Exec. Order No. 14012, Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans, 86 Fed. Reg. 8277 (Feb. 2, 2021).

195. *See, e.g.*, *DHS Announces New Proposed Immigration Rule to Enforce Long-Standing Law that Promotes Self-Sufficiency and Protects American Taxpayers*, DEP'T OF HOMELAND SEC. (Sept. 22, 2018), https://www.dhs.gov/news/2018/09/22/dhs-announces-new-proposed-immigration-rule-enforce-long-standing-law-promotes-self.

196. *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 193.

197. AM. IMMIGR. LAWS. ASS'N, DECONSTRUCTING THE INVISIBLE WALL: HOW POLICY CHANGES BY THE TRUMP ADMINISTRATION ARE SLOWING AND RESTRICTING LEGAL IMMIGRATION 2 (2018), https://www.aila.org/infonet/aila-report-deconstructing-the-invisible-wall [hereinafter AILA REPORT]. Congress has requested clarification of the H1-B denials and introduced the New Deal for New Americans legislation which seeks to increase transparency and expedite processing of backlogs. Stuart Anderson, *Congress Asks USCIS to Explain Immigration Delays and Denials*, FORBES (July 17, 2019, 12:07 AM), https://www.forbes.com/sites/stuartanderson/2019/07/17/congress-asks-uscis-to-explain-immigration-delays-and-denials/?sh=763a91922a2b.

198. Ming H. Chen & Zachary New, *Silence and the Second Wall*, 28 S. CAL. INTERDISC. L.J. 549, 549–50 (2019).

199. AILA REPORT, *supra* note 197, at 3, 12; *Policy Changes and Processing Delays at U.S. Citizenship and Immigration Services: Hearing Before the Subcomm. on Immigr. & Citizenship of the H. Comm. on the Judiciary*, 116th Cong. 3 (2019). While there has been some progress during the Biden Administration, the agency reports, continuing backlogs, and revenue loss that will make it hard to catch up in its annual report to Congress without additional funding. U.S. DEP'T OF HOMELAND SEC., ANNUAL REPORT 2022: CITIZENSHIP AND IMMIGRATION SERVICES

backlog of immigration benefit cases awaiting adjudication increased in 2019, even though the total number of applications filed dropped.[200] Many of these efforts to slow down and deny applications stem from executive orders that direct frontline agency officials to implement "extreme vetting" for national security reasons or for the protection of American workers.[201]

More specifically, backlogs for naturalized citizenship doubled or tripled in many parts of the country during the last six years.[202] Congress determined that for naturalization, a delay of six months is reasonable, but that anything longer constitutes a backlog. In fiscal year 2019, delays ran ten to eighteen months on average and as long as three years in some parts of the country[203]—a situation made worse following office closures related to COVID-19 and a budget shortfall that may furlough more than half of agency staff.[204] For military naturalizations, wait times in some cases exceeded civilian applications and many applications were never filed with USCIS because intensified background checks at the Department of Defense precluded the applications from ever reaching the USCIS.[205]

Also, some of the worst delays at USCIS are with nonimmigrant visas such as the H-1B visa that enables high-skilled workers to migrate and

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OMBUDSMAN, at vii (June 30, 2022), https://www.dhs.gov/sites/default/files/2022-06/CIS_Ombudsman_2022_Annual_Report_0.pdf.

200. AM. IMMIGR. LAWS. ASS'N, RECOMMENDATIONS FOR HOW USCIS CAN DISMANTLE THE INVISIBLE WALL SLOWING CASE ADJUDICATION 1 (2021), https://www.aila.org/advo-media/aila-policy-briefs/policy-brief-recommendations-for-how-uscis.

201. Family, *supra* note 74, at 81–82, 116, 120, 129. On "extreme vetting," see *Challenging "Extreme Vetting" of Immigration Benefits Applicants:* Wagafe v. Trump, AM. IMMIGR. COUNCIL, https://www.americanimmigrationcouncil.org/litigation/challenging-extreme-vetting-immigration-benefits-applicants (last visited Nov. 13, 2022).

202. AILA REPORT, *supra* note 197, at 4.

203. NAT'L P'SHIP FOR NEW AMS., DEMOCRACY STRANGLED: SECOND WALL OF BARRIERS TO CITIZENSHIP RISKS PREVENTING HUNDREDS OF THOUSANDS OF IMMIGRANTS FROM NATURALIZING AND BECOMING VOTERS IN PRESIDENTIAL ELECTION OF 2020 (2019), https://partnershipfornewamericans.org/2nd-wall-campaign/ (click "Democracy Strangled" and follow link); COLO. STATE ADVISORY COMM. TO THE U.S. COMM'N ON C.R., CITIZENSHIP DELAYED: CIVIL RIGHTS AND VOTING RIGHTS IMPLICATIONS OF THE BACKLOG IN CITIZENSHIP AND NATURALIZATION APPLICATIONS (2019), https://www.usccr.gov/files/pubs/2019/09-12-Citizenship-Delayed-Colorado-Naturalization-Backlog.pdf (also published at 91 U. COLO. L. REV. F. 1, 5 (2019)).

204. *A Bumpy Path to U.S. Citizenship: A Survey of Changing USCIS Practices*, MIGRATION POL'Y INST. (July 16, 2020), https://www.migrationpolicy.org/events/bumpy-path-us-citizenship-survey-changing-uscis-practices; *see also* U.S. COMM'N ON C.R., COLORADO ADVISORY COMMITTEE CALLS ON THE U.S. COMMISSION ON CIVIL RIGHTS TO URGE THE U.S. CITIZENSHIP AND IMMIGRATION SERVICE TO ADDRESS NATURALIZATION BACKLOG BY MODIFYING OATH AND ALLEGIANCE CEREMONIES DURING COVID-19 CRISIS (2020), https://www.usccr.gov/files/2020-07-22-CO-SAC-Statement-on-Naturalization-Backlog-and-COVID.pdf.

205. Ming H. Chen, *Citizenship Denied: Implications of the Naturalization Backlog for Noncitizens in the Military*, 97 DENV. L. REV. 669, 678–79, 697 (2020).

perform critical jobs in the U.S. economy.[206] In 2017, Trump issued an executive order as part of his efforts to "hire American" that he promised would reform the high-skilled immigration program to "create higher wages and employment rates for workers in the United States."[207] The executive order resulted in heightened evidentiary requirements for all H1-B petitions involving third-party worksites.[208] Since then, USCIS has denied and delayed record numbers of H-1B visa petitions.[209] From June to December 2020, a presidential proclamation additionally banned foreign workers on H1-B visas from entering the country in order to protect American workers from competition in a weakening economy.[210]

206. AILA REPORT, *supra* note 197, at 8; Chen & New, *supra* note 198, at 550, 568–70; *see also* Sinduja Rangarajan, *The Trump Administration is Denying H-1B Visas at a Dizzying Rate, But It's Hit a Snag*, MOTHER JONES (Oct. 17, 2019), https://www.motherjones.com/politics/2019/10/h1b-tech-visa-denial-appeal-trump/.

207. Executive Order 13,788, Buy American and Hire American, 82 Fed. Reg. 18,837, 18,837 (Apr. 21, 2017).

208. Since Trump took office, USCIS has released several memos and directives that take a stringent view of who is eligible for work visas. U.S. CITIZENSHIP & IMMIGR. SERVS., GUIDANCE MEMO ON H1B COMPUTER RELATED POSITIONS (Dec. 22, 2000). In the past, a qualified applicant with a bachelor's degree related to their "specialty occupation" could reliably get an H-1B visa. *Id.* Yet, in a memo issued in March 2017, USCIS made it harder for people with relevant degrees to get H-1B visas, particularly computer programmers. U.S. CITIZENSHIP & IMMIGR. SERVS., PM-602-0142, POLICY MEMORANDUM: RESCISSION OF THE DECEMBER 22, 2000 "GUIDANCE MEMO ON H1B COMPUTER RELATED POSITIONS", (Mar. 31, 2017), https://www.uscis.gov/sites/default/files/document/memos/2017-3-31-PM-6002-0142-H-1bcomputerrelatedpositionsrecission.pdf. Another memo instructed USCIS officers to look at every H-1B petition as if it was being evaluated for the first time, even if the applicant had been approved in the past. U.S. CITIZENSHIP & IMMIGR. SERVS., PM-602-0151, POLICY MEMORANDUM: RESCISSION OF GUIDANCE REGARDING DEFERENCE TO PRIOR DETERMINATIONS OF ELIGIBILITY IN THE ADJUDICATION OF PETITIONS FOR EXTENSION OF NONIMMIGRANT STATUS 2 (Oct. 23, 2017). The resulting denial rate for H-1B applications went up from ten percent in 2016 to twenty-four percent in 2019. Appeals show that many of these denials lack merit. The appeals office usually sides with the agency's original decision: Between the 2014 and 2017 fiscal years, it reversed about three percent of the H-1B decisions it reviewed. Yet in 2018, it overruled USCIS in nearly fifteen percent of H-1B appeals. Family, *supra* note 74, at 85–89. This suggests that the Administration has been wrongfully rejecting qualified applicants for these coveted visas for high-skilled immigrants. *Id.*

209. A court order seeks clarifications of these denials. Vivek Punj, *US Court Orders Immigration Body to Explain Delays, Denial of H-1B Visa*, BUS. TODAY (May 15, 2019, 10:12 PM), https://www.businesstoday.in/current/world/us-court-orders-immigration-body-to-explain-delays-denial-of-h-1b-visa/story/347002.html.

210. A lawsuit brought by Indian nationals challenges this ban, which was implemented in Presidential Proclamation 10052 on June 22, 2020. Suspension of Entry of Immigrants and Nonimmigrants Who Present a Risk to the United States Labor Market During the Economic Recovery Following the 2019 Novel Coronavirus Outbreak, Proclamation No. 10,052, 85 Fed. Reg. 38,263 (June 25, 2020). On July 15, 2020, the plaintiffs in *Panda v. Wolf* filed a motion for preliminary injunction. 487 F. Supp. 3d. 48, 50–51 (D.D.C. 2020); *see also* Stuart Anderson, *Major Lawsuit Filed to Save Families from Trump H-1B Visa Ban*, FORBES (July 15, 2020, 1:30 AM), https://www.forbes.com/sites/stuartanderson/2020/07/15/major-lawsuit-filed-to-save-families-

The negative effects of mission overreach in the USCIS hit a wall during the summer 2020 USCIS budget crisis. Unlike most federal agencies, the USCIS is fee-based.[211] Because so many immigration benefits were being denied, the agency was not taking in sufficient funds to cover its expenses.[212] The congressional hearings over an emergency appropriation in August 2020 aired worries that the agency would need to shut down or furlough significant numbers of its workforce, which would exacerbate agency delays.[213]

Immigration courts also display the upstream effects of fully enforcing immigration policies. Created within the DOJ's EOIR, immigration courts hear the government's claims to the removability of immigrants and consider whether forms of relief (including asylum) should prevent deportation.[214] This means that cases flow from both the USCIS's visa and green card denials, which can render an immigrant without legal status, and ICE or CBP prosecution.[215] All over the country, immigration courts are being crushed under the weight of zero-tolerance policies in every part of the agency.[216] Wait times for immigration hearings can extend two to three years, and there have been proposals to terminate master calendar hearings (which advise a respondent of their procedural rights and other preliminary matters) in order to focus on merits hearings.[217] Sometimes the lack of coordination between ICE and immigration courts means that court dates are routinely not printed on notices to appear ("NTAs"), creating confusion and no-shows by the time a court date rolls around.[218] Once in the courtroom, immigrants frequently do not understand the charges brought against them because they lack

from-trump-h-1b-visa-ban/#34a5ed9a287f. Congress also requested an agency response. Anderson, *supra* note 197.

211. WILLIAM A. KANDEL, CONG. RSCH. SERV., R44038, U.S. CITIZENSHIP AND IMMIGRATION SERVICES (USCIS) FUNCTIONS AND FUNDING, at i, 8 (May 15, 2015), https://sgp.fas.org/crs/homesec/R44038.pdf.

212. Daimeon Shanks, *Entrance Fees: Self-Funded Agencies and the Economization of Immigration*, 93 U. COLO. L. REV. 405, 437–441 (2022).

213. *See Oversight of U.S. Citizenship and Immigration Services: Hearing Before the Subcomm. on Immigr. and Citizenship of the H. Comm. on the Judiciary*, 116th Cong. (2020) (statement of Doug Rand, Senior Fellow, Federation of American Scientists), https://www.congress.gov/event/116th-congress/house-event/110946.

214. *See supra* note 186 and accompanying text.

215. *Id.*; *see also FY 2021 Begins with Largest Immigration Court Backlog on Record*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE, SYRACUSE UNIV. (Nov. 24, 2020), https://trac.syr.edu/whatsnew/email.201124.html. Also note that questions have been raised about the reliability of government data reported to TRAC. *Incomplete and Garbled Immigration Court Data Suggest Lack of Commitment to Accuracy*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE, SYRACUSE UNIV. (Oct. 31, 2019), https://trac.syr.edu/immigration/reports/580/.

216. *See* Chen, *supra* note 205.

217. *Featured Issue: The* Pereira *Ruling and Resulting Fake NTAs*, AM. IMMIGR. LAWS. ASS'N (Aug. 13, 2020), https://www.aila.org/infonet/the-pereira-ruling.

218. *See generally* Pereira v. Sessions, 138 S. Ct. 2105 (2018) (insisting that court dates be printed on NTAs to meet statutory requirements).

representation and competent interpreters, in part because the available resources for interpretation have shrunk.[219] Compounding the problem is that the immigration judges who preside over the cases were hired quickly, trained insufficiently, and put under pressure of unreasonable performance quotas, such as those issued by Trump's Attorney General. Jeff Sessions imposed a quota system in 2018 that required judges to complete at least 700 cases per year and have fewer than 15 percent of their decisions overturned on appeal.[220] A spokeswoman for the National Association of Immigration Judges ("NAIJ"), the union that represents immigration judges, said that the quotas prevented the careful consideration of each case and prized efficiency over accuracy.[221] In other words, the emphasis on full enforcement compromises due process and rule of law values.[222]

2. Fuel Efficiency: Divergence at the EPA and the National Highway Traffic Safety Administration

Overlapping agency authority to regulate air pollution was used to circumvent statutorily prescribed fuel economy standards under the Trump Administration. In April of 2018, the White House announced its intentions to revise, through rulemaking, the federal standards that regulate fuel economy and greenhouse gas ("GHG") emissions for new passenger cars and light trucks sold in the United States.[223] Those standards—the Corporate Average Fuel Economy ("CAFE") and the Light-Duty Vehicle GHG emission standards—are promulgated by the National Highway Traffic Safety Administration ("NHTSA") and the EPA, respectively.[224] The

219. *See* HOLLY STRAUT-EPPSTEINER, CONG. RSCH. SERV., R47077, U.S. IMMIGRATION COURTS AND THE PENDING CASES BACKLOG 20 (Apr. 25, 2022), https://crsreports.congress.gov/product/pdf/R/R47077.

220. Joel Rose, *Justice Department Rolls Out Quotas for Immigration Judges*, NPR (Apr. 3, 2018, 1:09 PM), https://www.npr.org/2018/04/03/599158232/justice-department-rolls-out-quotas-for-immigration-judges. For the EOIR Performance Plan evaluative form, see *EOIR Performance Plan: Adjudicative Employees*, EXEC. OFF. FOR IMMIGR. REV. (Apr. 2018), https://cdn.cnn.com/cnn/2018/images/04/02/immigration-judges-memo.pdf.

221. Carrie Johnson, *Immigration Judges Warn Against Trump Administration Benchmarks*, NPR (Oct. 16, 2017, 4:43 PM), https://www.npr.org/2017/10/16/558160472/immigration-judges-warn-against-trump-administration-benchmarks.

222. The Biden Administration's Justice Department said it would no longer enforce strict immigration court case quotas. Erich Wagner, *Biden Admin. Suspends Immigration Judge Quotas, Prompting Similar Requests Elsewhere*, GOV'T EXEC. (Oct. 26, 2021), https://www.govexec.com/workforce/2021/10/biden-admin-suspends-immigration-judge-quotas-prompting-similar-requests-elsewhere/186396/.

223. Tom DiChristopher, *Trump EPA Will Revise Obama Fuel Efficiency, Greenhouse Gas Emissions Rules for Autos*, CNBC (Apr. 2, 2018, 7:59 PM), https://www.cnbc.com/2018/04/02/trump-epa-will-revise-obama-fuel-efficiency-rules-for-autos.html.

224. *Corporate Average Fuel Economy*, NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., https://www.nhtsa.gov/laws-regulations/corporate-average-fuel-economy (last visited Nov. 23,

NHTSA derives its authority to determine the CAFE standards under the Energy Policy and Conservation Act ("EPCA"), passed in the wake of the oil embargo crisis of the mid-1970s.[225] Amended in 2007,[226] the EPCA sets statutorily-mandated fuel economy standards, as measured by an average mile per gallon ("mpg") estimation, and directs the NHTSA to establish and amend the CAFE standards and to promulgate and enforce regulations necessary to that effect.[227] The EPA, on the other hand, derives its authority from the Clean Air Act ("CAA"),[228] which directs the agency to regulate air pollutants that may reasonably be anticipated to endanger public health or welfare.[229] Relying on the Supreme Court's determination that the EPA has the authority to regulate GHGs as air pollutants,[230] the Obama Administration directed the EPA to work with the NHTSA to align newly-issued GHG standards with the CAFE standards.[231] The Obama-era standards raised the average fuel economy standards to the congressionally-mandated 35 mpg by 2020 and required a further increase of five percent per year from 2021 through 2026.[232]

The Trump Administration's 2018 proposal, called the Safer Affordable Fuel-Efficient Vehicles Rule for Model Years 2021–2026 (the "SAFE" Rule"), amended the Obama-era CAFE and GHG standards, freezing the efficiency increase at 35 mpg in 2020 and requiring no subsequent increase for years 2021 through 2026.[233] Moreover, the SAFE Rule revoked California's waiver to promulgate its own fuel-economy standards, provided that they were at least as stringent as federal standards.[234] In promulgating its

2022); *Light-Duty Vehicle Greenhouse Gas Regulations and Standards*, ENV'T PROT. AGENCY (Dec. 2, 2022), https://www.epa.gov/greenvehicles/light-duty-vehicle-greenhouse-gas-regulations-and-standards.

225. Energy Policy and Conservation Act of 1975, Pub L. No. 94-163, 89 Stat. 871.

226. Energy Independence and Security Act of 2007, Pub L. No. 110-140, 121 Stat. 1492.

227. RICHARD K. LATTANZIO, LINDA TSANG & BILL CANIS, CONG. RSCH. SERV., R45204, VEHICLE FUEL ECONOMY AND GREENHOUSE GAS STANDARDS: FREQUENTLY ASKED QUESTIONS (June 1, 2021), https://sgp.fas.org/crs/misc/R45204.pdf.

228. 42 U.S.C. §§ 7401–7626.

229. *Id.* § 7401.

230. Massachusetts v. EPA, 549 U.S. 497, 528–32 (2007).

231. LATTANZIO ET AL., *supra* note 227.

232. Joshua H. Van Eaton et al., *EPA and NHTSA Finalize Rollback of Vehicle Fuel Economy and GHG Standards*, NAT'L L. REV. (Apr. 13, 2020), https://www.natlawreview.com/article/epa-and-nhtsa-finalize-rollback-vehicle-fuel-economy-and-ghg-standards; *Obama Administration Finalizes Historic 54.5 MPG Fuel Efficiency Standards*, WHITE HOUSE (Aug. 28, 2012), https://obamawhitehouse.archives.gov/the-press-office/2012/08/28/obama-administration-finalizes-historic-545-mpg-fuel-efficiency-standard.

233. Van Eaton et al., *supra* note 232.

234. Coral Davenport, *Justice Department Drops Antitrust Probe Against Automakers That Sided with California on Emissions*, N.Y. TIMES (Feb. 7, 2020), https://www.nytimes.com/2020/02/07/climate/trump-california-automakers-antitrust.html. California sued the EPA, but the case was dismissed because that portion of the SAFE Rule was

revised findings, the NHTSA relied on a cost-benefit analysis that "employed different compliance timelines, modeling, inputs, and underlying assumptions," to determine that the Obama-era rules would lead to thousands of additional deaths in road accidents, ostensibly because more fuel-efficient cars are lighter and thus less safe.[235] These findings led to a bitter dispute between EPA Administrator Andrew Wheeler and the authors of the proposal at the NHTSA, Jeffrey Rosen and Heidi King. Wheeler, who "sharply questioned" the auto fatality numbers, believed that the new standards were technically and legally weak and would not survive a courtroom challenge.[236] But even more than Wheeler's external resistance, the NHTSA's own statutorily-prescribed standards frustrated the complete implementation of the SAFE Rule.

In an effort to smooth out the two agencies' differences and respond to auto manufacturers' calls for greater regulatory certainty, the Trump Administration's NHTSA and EPA engaged with stakeholders in discussions to harmonize or align the two agencies' policies.[237] Automakers argued that the CAFE and GHG standards are intended to be a joint set of rules that allow manufacturers to comply to both with one fleet; however, differences in each agency's test procedures, flexibilities, and credit systems led to divergent expectations. Most of these discussions reportedly focused on the loosening of the NHTSA's statutory and regulatory requirements to better reflect the flexibilities provided by the EPA's mandate.[238]

The CAA grants the EPA wide latitude in determining what levels of GHG pollution are permissible and what regulations are appropriate to achieve compliance, whereas many of the NHTSA's rules are statutorily prescribed and thus would require congressional approval for alteration. In effect, the NHTSA's statutory mandate promoted a stronger culture of rule of law formalism in the agency that stymied attempts at deregulation. As a result, the March 21, 2020, finalized joint rule fell short of the complete regulatory freeze because of NHTSA's statutory requirements: The new CAFE and GHG standards for model year 2021 through 2026 cars and trucks increased fuel economy ratings by a modest 1.5 percent per year, included new compliance flexibilities, and extended other flexibilities that were scheduled to be phased out under the Obama-era regulations.[239]

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determined not to be a final agency action under the *Bennett* test. California v. EPA, No. 18-1114 (D.C. Cir. 2019).

235. LATTANZIO ET AL., *supra* note 227, at 17; Coral Davenport, *Top Trump Officials Clash Over Plan to Let Cars Pollute More*, N.Y. TIMES (July 27, 2018), https://www.nytimes.com/2018/07/27/climate/trump-auto-pollution-rollback.html.

236. LATTANZIO ET AL., *supra* note 227.

237. *Id.*

238. *Id.* at 37.

239. Van Eaton et al., *supra* note 232.

As part of an executive order issued on his first day in office, President Biden indicated that the NHTSA and EPA rules concerning CAFE standards and GHG emissions would be subject to "[i]mmediate review."[240] In the intervening months, the Biden Administration withdrew the SAFE Rule and replaced it with a trio of regulatory actions—reinstating California's Clean Air Act waiver, issuing new GHG standards under the EPA's mandate, and promulgating revised CAFE standards under the NHTSA's authority.[241] While the new finalized rules were not issued jointly—EPA's coming in December of 2021[242] and NHTSA's the following May[243]—they nevertheless represented a concerted effort to harmonize fuel-efficiency standards in a manner that maximized each agency's regulatory authority.[244] Moreover, the respective agencies have been responsive to state-level actions in respect of environmental protection efforts, in particular taking into account California's renewed CAA waiver and a private framework agreement that the state made with five major auto manufacturers, which voluntarily binds them to stricter GHG requirements through greater fuel efficiency standards and increased production of zero-emissions vehicles ("ZEVs").[245]

Unsurprisingly, the new fuel efficiency standards have been challenged by a coalition of Republican state attorneys general and industry actors.[246] Led by Texas Attorney General Ken Paxton, the challengers resemble the conservative bloc that recently found success at the Supreme Court in the *West Virginia v. EPA*[247] case, where the justices struck down the Obama-era EPA's Clean Power Plan as a violation of the major question doctrine.[248] In

240. Exec. Order No. 13990, Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis, 86 Fed. Reg. 7037 (Jan. 25, 2021).

241. Juan Carlos Rodriguez, *DOT Finalizes Tighter Fuel Economy Standards*, LAW360 (Apr. 1, 2022, 4:46 PM), https://www.law360.com/articles/1479945.

242. Revised 2023 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions Standards, 86 Fed. Reg. 74,434 (Dec. 30, 2021).

243. Corporate Average Fuel Economy Standards for Model Years 2024–2026 Passenger Cars and Light Trucks, 87 Fed. Reg. 25,710 (May 2, 2022).

244. *Id.* at 25,722 ("[I]n the context of the EPA standards, the analysis we have done tackles the core question of whether compliance with both standards should be achievable with the same vehicle fleet, after manufacturers fully understand the requirements from both sets of standards, and NHTSA believes that, as always, compliance with both standards will be achievable with the same vehicle fleet. It is also worth noting that the differences in what the two agencies' standards require become smaller each year, until near alignment is achieved in 2026.").

245. *Id.* at 25,721; *see also Framework Agreements on Clean Cars*, CAL. AIR RES. BD. (Aug. 17, 2020), https://ww2.arb.ca.gov/news/framework-agreements-clean-cars.

246. Maya Earls, *Texas Leads Challenge to Biden's New Fuel Economy Standards*, BLOOMBERG L. (July 1, 2022, 11:28 AM), https://news.bloomberglaw.com/litigation/texas-leads-challenge-to-bidens-new-fuel-economy-standards?context=search&index=3.

247. 142 S. Ct. 2587 (2022).

248. *Id.* at 2616 ("Capping carbon dioxide emissions at a level that will force a nationwide transition away from the use of coal to generate electricity may be a sensible 'solution to the crisis of the day.' But it is not plausible that Congress gave EPA the authority to adopt on its own such a

a 6-3 decision, the Court held that the sweeping authority claimed by the EPA under a little-used provision of the CAA went beyond the agency's authority.[249] The Court reasoned that if Congress had delegated the authority to regulate questions of major political and economic significance, it would have (or should have) provided a clear statement of that intent.[250] Conservative attorneys general, armed with this new precedent, seem poised to press their advantage at the highest court,[251] as can be inferred by Paxton's framing of the EPA's and NHTSA's regulatory actions as mandating a strict transition to electric ZEVs: "[T]he Clean Air Act 'does not vest the EPA with industry-transforming, state-displacing power.' . . . [The EPA] 'cannot restructure full industries or upend traditional state and federal environmental regulatory roles.'"[252]

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The dual function of the DHS's component agencies that emerged from the post-9/11 reorganization of the former INS fuels conflict among competing missions across the immigration bureaucracy. Given their formalistic approaches to enforcing the INA, the enforcement missions of ICE over undocumented immigrants and CBP over asylum-seekers has engulfed the service mission of USCIS. This has led to excessive backlogs and resulted in a burdensome regulatory process.[253] A similar culture of over-enforcing the exclusionary terms of the INA and curtailing immigration judges' equitable relief has led the immigration courts into crisis with years-long backlogs and the imposition of unreasonable performance quotas that rush the adjudication process and compromise due process for immigrants.[254] The USCIS's rule of law enforcement mindset might have occurred as a result of the political machinations of an executive branch intent on using the agency to implement its deportation priorities no matter what, but that

regulatory scheme in Section 111(d). A decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body." (citation omitted) (quoting New York v. United States, 505 U.S. 144, 187 (1992))); *see also* Dan Farber, *The Supreme Court Curbs Climate Action*, LEGAL PLANET (June 30, 2022), https://legal-planet.org/2022/06/30/the-supreme-court-curbs-climate-action/.

249. *West Virginia*, 142 S. Ct. at 2615–16.

250. *Id.*; Farber, *supra* note 248.

251. Dan Farber, *Climate Change and the Major Question Doctrine*, LEGAL PLANET (July 12, 2022), https://legal-planet.org/2022/07/12/the-major-question-doctrine-and-climate-change/.

252. Lesley Clark & Niina H. Farah, *Three Climate Rules Threatened by the Supreme Court's EPA Decision*, SCI. AM. (July 7, 2022), https://www.scientificamerican.com/article/three-climate-rules-threatened-by-the-supreme-courts-epa-decision/.

253. *See supra* Section II.B.1.

254. *See supra* note 220 and accompanying text.

process was undoubtedly aided by the structure of multiple component agencies being housed within the DHS.

When designed effectively, statutory guardrails and internal dynamics may limit the extent to which a President can exploit agency structures for dysfunctional policymaking. The EPA, under the leadership of Andrew Wheeler, proved less amenable to the scientifically-suspect rationales proposed to justify lower CAFE standards at the NHTSA, despite President Trump's attempts to bring them into alignment.[255] At the same time, the statutory requirements of EPCA meant that the final joint rule did not achieve quite the same level of regulatory rollback that the Administration angled for, even if it was still a significant deregulation. This example provides an important contrast to the immigration bureaucracy. While the Biden Administration's proposed Citizenship Act of 2021[256] was intended to address the backlogs for family-based immigration visas, reduce lengthy wait times, increase the per-country visa caps, and heighten immigration judges' discretion to review cases and grant relief, it did not include structural reforms of the type that were called for prior to 9/11.[257] Without structural transformation, even the most well-intentioned attempts to reform an agency's cultural attributes may be ineffective when faced with a legalistic, enforcement mindset.

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The image that emerges from these case studies reflects the complexity of institutional dynamics in the administrative state. The history of immigration law is full of examples of a president's willingness to exploit judicial deference—and relatedly, an agency head's willingness to accede to it—in the foundational cases on constitutional power that show the assertion of sovereignty, protected by the plenary power doctrine or other delegation doctrines.

The opening vignette concerning Title 42, showing the federal government using public health justifications to enact a complete closure of the southern border, is an example of a President exploiting agency policymaking through politicization and the invocation of a national

255. *See supra* Section II.B.2.

256. H.R. 1177, 117th Cong. (1st Sess. 2021).

257. *Fact Sheet: President Biden Sends Immigration Bill to Congress as Part of His Commitment to Modernize our Immigration System*, WHITE HOUSE (Jan. 20, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-president-biden-sends-immigration-bill-to-congress-as-part-of-his-commitment-to-modernize-our-immigration-system/. On calls for reform pre-September 11, 2001, see *supra* note 119 and accompanying text.

emergency.[258] The example illuminates two points: First, that common agency responses to structural constraints lead to routine irregularities, and, second, that the irregularities can turn into policy dysfunctions that become difficult to reverse. For this reason, analyzing Title 42 and the Muslim travel ban as an episode of regulatory policymaking is instructive: It shows how Presidents can use a political agenda and an emergency to exploit a system of regulation that is laid on an unstable structural foundation and, importantly, how those dynamics can persist.[259]

The other examples concerning USCIS and EPA show more moderate examples of similar dynamics in normal times. That each of these presidential interventions was eventually upheld—sometimes despite readily apparent political and even pretextual motivations—illustrates the perils of a strong executive circumventing the checks and balances of the legislative and judicial branches and the lack of discernable limits on executive power.

In short, agencies struggle to stay the course in their responses to political interference—even in the rare case when Congress contemplates and attempts to constrain a broad delegation of authority to the President and certainly in instances when Congress remains silent on the scope of delegation or an agency's execution of its policymaking authority. Agency policy motivated by this kind of politicization and unrelenting sense of emergency permits dysfunctionality and the accompanying deference from courts, which Congress normalizes. Permitting departures from the usual regulatory processes, or declining to set limits that restore those normal processes once an emergency ends, upsets the balance of powers and leaves agencies prone to a new normal of bad faith administration.

The implications of these institutional dynamics in agency policymaking are the subject of the next Part.

III. REVERSING THE ASSUMPTION OF REGULARITY IN POLICYMAKING

This Article has identified policymaking irregularity that facilitates regulatory dysfunction as a problem in agency policymaking. It has presented a typology of agency policymaking that distinguishes the structural pathways that permit the rise of dysfunction—across branches, within the executive

258. In emergency circumstances, judicial and congressional review is difficult due to the exigent nature of the intervention. The deferential posture of courts and Congress during emergency situations feeds presidential interventions into policymaking, which may become more bold or more frequent. *See generally* Farber, *supra* note 76.

259. Additional examples include the federal government's historic prejudice against Asian migrants in the Chinese Exclusion Act (deferred to in the foundational immigration cases on constitutional power), national security justifications during the Cold War, the Bush Administration's assertion of unitary executive authority over immigration after September 11 (seldom questioned by Congress or the courts), and the Obama Administration's attempted expansion of deferred action to undocumented adults (enjoined by federal courts).

branch, and within regulatory agencies—and the agency cultures that exacerbate these problems. This Part identifies the scope and limitations of the dynamics that were identified in Part II to executive agencies, primarily in the immigration bureaucracy, and across the administrative state. Moreover, it identifies potential harms that result from the normalization of policymaking irregularity, as well as suggests what interventions may be possible by flipping the assumption of regularity in policymaking.

A. Scope and Limits of Regulatory Dysfunction

A key takeaway from these case studies is that the interaction between structure and agency cultures determines the agency's policymaking. When agencies are successful in calibrating an optimal balance of flexibility and predictability, good policymaking ensues. When an agency skews to one extreme on the flexibility-predictability spectrum—for structural or organizational reasons, or the unique interaction between the two—policies are made in an irregular and sometimes dysfunctional manner with undesirable outcomes. Moreover, the interactions we identified in the case studies demonstrate a resilience to change or "stickiness."[260] The feedback loop between structure and culture amplifies small adjustments. What results is a context-dependent complexity that belies one-size-fits-all policy prescriptions.

Two potential objections concern the representativeness of the concepts that have emerged inductively from our grounded theory. The first objection might question the typicality of the Trump Administration, from which most of our examples are drawn. While Trump "intensified the use of emergency powers" through the use of the National Emergencies Act,[261] the number of these declarations of national emergency "has risen steadily in the past twenty years."[262] Given that this time period spans multiple administrations, Trump's use of exceptional circumstances may be an intensification of an already-prevalent phenomenon. Trump's proclivities constituted a difference in degree, but not of kind. President Obama's creation of DACA by informal agency action and President Biden's subsequent restoration of the program via a broadly worded executive order both give support to the idea that our theory is generalizable beyond the Trump Administration context. So does the still unfolding vignette of President Biden continuing Title 42 in the face

260. *See* PHILIP SELZNICK, TVA AND THE GRASS ROOTS: A STUDY IN THE SOCIOLOGY OF FORMAL ORGANIZATION 10 (1949).

261. Farber, *supra* note 76, at 1145, 1149–50.

262. *Id.* at 1150.

of renewed pressure to end it to accommodate Ukrainian refugees of war.[263] While these policymaking examples may be seen as merely irregular and not dysfunctional, the risk of exploitation remains due to the structural pathways that they create and employ.

The second potential objective might be that we are describing historically-situated phenomena that have only recently emerged. If that is the case, our examples are unsuitable for making more than a descriptive claim about the here and now. While acknowledging that reflexivity and the openness to being proven wrong are vital to any good faith academic endeavor, we do not believe this is the case because historical examples of policymaking irregularity are readily available. For example, the passage of IRCA in 1986 created structures that were exploited by political actors to pursue enforcement strategies in much the same manner that the USCIS has used more recently.[264] Moreover, irregular if not dysfunctional policymaking impacted the work of immigration bureaucracies in their earliest iterations—well before the creation of the DHS, let alone the installation of Trump or his political appointees.[265]

However, even if we were to concede that the current political climate is *sui generis*—for example, that a convergence of factors such as increased congressional polarization, novel uses of emergency justification, and Trump as an outlier have created a new situation with no historical precedent—we still would believe that the conceptual framework that has emerged from our grounded theory is relevant to the discussion of internal administrative law because of the risk of entrenchment. Political scientists use the concept of path dependence to describe a dynamic of "increasing returns," or "self-reinforcing or positive feedback processes" that explain the stickiness of some political phenomena.[266] The ways in which irregular policymaking has been exploited for political gain risks setting a precedent, both through example and by judicial approval, for future uses. So even if our examples reveal unprecedented dynamics (or if the Trump Administration itself were exceptional), these processes may be deepening existing grooves or digging entirely new furrows in the political landscape that may come to represent a new normal.

For these reasons, the lessons learned from the immigration bureaucracy extend to other types of executive agencies as well, notwithstanding the

263. *See* Dan Friedman, *The Plight of Ukrainian Refugees Highlights the Problem of Title 42*, HIAS (Mar. 24, 2022), https://www.hias.org/blog/plight-ukrainian-refugees-highlights-problem-title-42.

264. *See supra* note 117 and accompanying text.

265. *See supra* note 115 and accompanying text.

266. Paul Pierson, *Increasing Returns, Path Dependence, and the Study of Politics*, 94 AM. POL. SCI. REV. 251, 251 (2000); *see also* Shanks, *supra* note 212, at 450–57 (describing path dependency and its relation to the political choice to fund the USCIS through user fees).

heightened risk of politicization of the immigration agencies due to the nature of their work. The dynamics leading to dysfunction that we have identified in the immigration context, particularly in respect to situations of national emergency, provide extreme cases of the kind of irregular policymaking that is vulnerable to exploitation. However, while extreme in degree, they are not unique in type. The case studies from environmental and other substantive areas of life illustrate the point.[267]

Some of the limitations of the theory relate to the conditions of policymaking. First, the agency leadership's latitude to strengthen or weaken implementation of the agency's congressionally mandated objectives in the service of bureaucratic rationality depends on its susceptibility to partisan influences and special interests. This turns on the leadership structure, the staffing of the agency, the sufficiency of funding, and agency culture.[268]

Second, an agency's adherence to statutory mandates and commitment to formal procedures for policymaking is also impacted by the policy goal. Attributes such as the reliance on enforcement discretion, technical complexity, and the dynamic nature of the policy arena come into play. This is especially true when the substantive statutes are broad or vague. Agencies with multiple components and competing missions are especially prone to one mission dominating the others, skewing the agency's focus towards one element and away from another.[269] The ability of an agency to maintain fidelity to its multiple missions depends on balancing those missions set and defined by Congress. Moreover, the institutional design of the agency matters. Agencies that separate the distinct agency components are better equipped to avoid the types of overt politicization that can be the outcome of overzealous interagency coordination. Agencies with well-specified hierarchical relationships between the civil servants and political appointees have a greater capacity to resist political manipulation.[270]

The use of structures to politicize agency function is most acute within the framework of executive agencies. This is particularly true in "emergency" situations where presidential control of the agency is magnified and checks and balances from Congress[271] or the courts[272] are weakened. Agency culture

267. *See, e.g.*, *supra* Section II.A.2.

268. *See supra* Part I.

269. *See supra* Section II.B.1.

270. See *infra* note 273 and accompanying text.

271. Statutes have been enacted to check the power of a president attempting to supersede an agency's intended functioning, such as the NEA and the APA, but such protections have been eroded in the modern era. For example, expansive application of the INA's suspension clause that explicitly permits the President to set aside congressional determinations in the face of a national security threat. *See, e.g.*, National Emergencies Act, 50 U.S.C. § 1621.

272. Even when courts catch the most egregious abuses, experience shows that the re-establishment of boundaries—often requiring presidential self-restraint—is a difficult task, even

still plays a part in policymaking procedures, but declarations of emergency and exceptions are by their very nature irregular and thus tend to be exogenous to the normal functioning of the agency.

These dynamics express themselves differently when presidential control is buffered, such as in independent agencies or agency adjudication. Because independent agencies and administrative adjudication are designed to be insulated from political exploitation, they can better resist improper political influence. For example, the President's ability to discipline discretion may be significantly diminished in commissions or multimember boards such as the Securities and Exchange Commission ("SEC"), the Federal Election Commission, and the National Labor Relations Board. Congress commonly legislates bipartisanship requirements for commission members, along with fixed and staggered terms of service such that its composition remains stable beyond presidential election cycles. They may also include detailed provisions that establish qualifications standards for political appointees, such as relevant subject-matter experience, skills, or educational backgrounds, which blunt the politicization of political appointments.[273]

In administrative courts, an administrative law judge's independence as a quasi-judicial official is protected from removal by statute and sometimes by APA and Constitutional protections.[274] As a result of these limitations, administrative courts are somewhat insulated from politics—but not entirely. For example, the Supreme Court held in *Lucia v. SEC*[275] that administrative law judges are inferior officers of the United States; therefore, they are subject to appointment and removal by the President, courts, or heads of departments, and they lack the statutory protections afforded to "mere

after conditions return to normal and emergency justifications are no longer apposite. For an example, think of the expansion of war powers justification under the auspices of the AUMF to conduct increasingly varied military excursions during the Bush and Obama presidencies. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541); *see* Stephen I. Vladeck, *The Separation of National Security Powers: Lessons from the Second Congress*, 129 YALE L.J.F. 610, 610 (2020).

273. HENRY B. HOGUE, CONG. RSCH. SERV., RL33886, STATUTORY QUALIFICATIONS FOR EXECUTIVE BRANCH POSITIONS 2 (Sept. 9, 2015), https://sgp.fas.org/crs/misc/RL33886.pdf. Such requirements do not implicate the Appointments Clause so long as the qualifications do not de facto rise to the level of legislative designation. *Id.*

274. See *Lucia v. SEC*, 138 S. Ct. 2044 (2018), in which the U.S. Supreme Court held that the administrative law judges of the SEC are officers of the United States subject to the Appointments Clause and protections such as removal restrictions for good cause. *Id.* at 2047. *But see* Memorandum from the U.S. Solicitor General, U.S. Dep't of Just., to Agency Gen. Counsels, Guidance on Administrative Law Judges After *Lucia v. SEC* (S. Ct.) 1, 1–2 (July 23, 2018) (raising doubt over Appointments Clause challenges not raised directly by *Lucia* decision) [hereinafter Memo on *Lucia v. SEC*]. For more background, see generally Recent Guidance, *Guidance on Administrative Law Judges After* Lucia v. SEC *(S. Ct.), July 2018.*, 132 HARV L. REV. 1120 (2019).

275. 138 S. Ct. 2044 (2018).

employees."[276] The prospect of a top leader exerting pressure is therefore even stronger in immigration courts, where the immigration judge is embedded within the DOJ (an executive agency) and largely exempt from APA procedures since it is considered informal adjudication.[277] So administrative courts' responses to structural pressures are similar to other executive agencies. At most, it is a difference of degree, not type. The full implications of these and other dynamics for the administrative state writ large is a topic that requires a more systematic comparison of more case studies of more policymaking in more agencies. But the basic conceptual dynamics that we have identified in this Article—the structures and cultures that emerge as a result of institutional design and internal agency characteristics and their relative influences over policymaking processes—can inform this research.

B. Institutional Harms of Regulatory Dysfunction

Regulatory dysfunction leads to many undesirable outcomes. First, significant departures from regular policymaking procedures may limit opportunities to gather evidence, consult with experts and other impacted agencies, or receive public input prior to implementation. This can lead to ill-considered policies.[278] In addition, procedural irregularities can undermine agency effectiveness with stressful delays in the adjudication of benefits, inefficient resource allocation resulting from both over- and under-enforcement, inconsistent guidance to regulated entities, unjust outcomes, and/or a lack of cooperation from other stakeholders and agencies important to successful policy implementation.[279]

Second, dysfunction can also damage the legitimacy of administrative policymaking by thwarting congressional will, political accountability, and

276. *Id.* at 2049. The Office of the Solicitor General subsequently issued a "Guidance on Administrative Law Judges After *Lucia*" memo that extended *Lucia*'s reasoning and facilitated greater executive control of administrative courts. Memo on *Lucia v. SEC*, *supra* note 274. The memo contended that the holding applies to all ALJs and similarly situated non-ALJ adjudicators and that the government will only defend statutory removal protections so long as the protection mechanism is "suitably deferential" to department heads. *Id.* at 9.

277. The political pressure on immigration courts was previously discussed in connection with Attorney General-imposed case processing quotas that curtailed due process for immigrants defending against removal in immigration court. *See supra* notes 220–221 and accompanying text. It is also well-illustrated by Trump Attorney General Sessions's self-referral of asylum cases, which narrowed judicial precedents on the harms that qualify for asylum. *See* Stella Burch Elias & Paul Gowder, *Lawless Lawmaking: Attorney General Self-Referral and the Rule of Law* (forthcoming 2023) (on file with authors); Emma K. Carroll, *One Step Forward, Two Steps Back: How Attorney General Review Undermines Our Immigration Adjudication System*, 93 U. COLO. L. REV. 189, 190–91 (2021).

278. *See generally supra* Part II.

279. *See supra* note 199 and accompanying text.

norms of procedural fairness. The prospect of politics unduly influencing agencies feeds the worries of skeptics who question the very existence of a fourth branch of government, or at least favor small government. The invocation of emergency justifications during the issuance of quickly drafted policies that evade corrective checks and balances exacerbates these worries. Of course, political influence can serve pro-regulatory preferences when agency leadership is aligned with Congress. But either way, the agencies themselves may suffer reputational harms from a loss of credibility if their decisions are shown not to rely on the best evidence available or considered judgments from experts and instead are perceived as rushed or reliant on politics.[280]

Alternatively, agencies' repeated departures from regular policymaking can harden into an agency culture of irrationality or statutory noncompliance. Processes of legal endogeneity can forge policy feedback loops wherein pathological agency culture becomes embedded in the structure of agency decision-making—written or unwritten.[281] This interaction of structure with culture is especially troubling because it normalizes the abnormal, shifting the baseline assumption about regulatory policymaking even further from the normative ideals of policymaking.

The cumulative result of these harms is that dysfunctional policymaking renders *all* regulatory policymaking suspect. It can create the impression that policy originating in the executive branch consists of pure politics, all the time, or that the agency's claimed expertise is not to be trusted. This is especially true in a climate of political polarization. Regular policymaking that adheres to procedures and norms and routine irregularities will be unfairly associated with suspect procedures, and—like the boy who cried wolf—will undermine the public acceptance's that an agency is acting in good faith. This stymies the implementation of policies that may provide valuable solutions to societal problems.

C. Normalizing Regulatory Dysfunction

The case studies show that normality is not typical in regulatory policymaking. Flipping the default presumption of normality to one of predictable irregularity better fits the empirical reality. It also facilitates a better understanding of how to prevent dysfunctional policymaking when routine irregularities are exploited by political actors for political gain, detracting from statutory missions and jeopardizing the need for independent

280. One example is the highly visible use of the OMB to effectuate ideologically-driven policy decisions through putatively objective cost-benefits analysis. *See* Sidney A. Shapiro, *OMB and the Politicization of Risk Assessment*, 37 ENV'T L. 1083, 1095–103 (2007).

281. *See* Shanks, *supra* note 212, at 453–57.

and expert judgments in agencies.[282] Typically, agencies pull from constitutional premises such as the separation of powers, enabling and substantive statutes, and the APA to constrain irregularities at the behest of politics.[283] But the idealized constraints built into these legal sources and doctrines of judicial deference presume normality and therefore are a poor fit when applied to actual agencies. In short, flipping the presumption injects a needed realist corrective to formalist perspective that inflects much of the scholarly and judicial discourse.

Preventing the misuse of irregularity in policymaking requires developing constraints designed with the ever-present potential for regulatory dysfunction and political exploitation in mind. Foregrounding the normality of regulatory dysfunction when contemplating structural and cultural prescriptions will help expose the underlying problems that formalist interpretation often obscures. Respect for agency cultures in policymaking accompany structural examples that emerge in every branch of government.

1. Structural Fixes

Executive Branch. Presidents should respect the separation of powers and congressional delegations of policymaking to agencies by respecting the statutory mandate provided to an agency and the statutory constraints on their politically-appointed agency leaders. In some instances, however, judicial and scholarly ex-post facto legitimations obscure the President's failure to live up to these ideals. The presumption of regularity informs these legitimations. Flipping the presumption could lead to cautious consideration over the issuance of executive orders and presidential directives as a way of achieving specific policies that legislation could also achieve. This would help prevent the kind of policymaking that vacillates from administration to administration. For example, President Trump's Executive Order 13771 "two-for-one provision"[284] rescinded regulatory review provisions that had been intact for decades. On Biden's first day in office, he replaced with the "Modernizing Regulatory Review" memorandum.[285] President Trump's zero-tolerance approach toward immigration upended longstanding priorities

282. *See supra* note 18 and accompanying text.

283. See the discussion on bureaucratic legalism, *supra* Section I.B.

284. Exec. Order No. 13,771, Reducing Regulation and Controlling Regulatory Costs, 82 Fed. Reg. 9339 (Jan. 30, 2017). This executive order was overturned by the Biden Administration during its first week in office. Exec. Order No. 13,992, Revocation of Certain Executive Orders Concerning Federal Regulation, 86 Fed. Reg. 7049 (Jan. 25, 2021); Bourree Lam, *Trump's 'Two-for-One' Regulation Executive Order*, ATLANTIC (Jan. 30, 2017), https://www.theatlantic.com/business/archive/2017/01/trumps-regulation-eo/515007/.

285. Memorandum for the Heads of Executive Departments and Agencies on Modernizing Regulatory Review, 86 Fed. Reg. 7223 (Jan. 20, 2021) [hereinafter Memorandum on Modernizing Regulatory Review].

for immigration enforcement before President Biden's attempt to reinstitute them.[286] President Trump's bans on immigration through the "Muslim travel ban" executive order[287] and the "Buy American and Hire American" executive order[288] were rescinded and replaced by President Biden's more open policies toward Muslims[289] and foreign workers.[290] Each of these policy shifts has met resistance. In place of policy swings through executive orders, the President might be incentivized to instead prod Congress into enacting new legislation or amending enabling acts within existing statutes to incorporate adequate criteria to ensure agency effectiveness.[291] This would avoid encroachment on congressional power over agencies and negation of agency expertise. The President might also be chastened into exercising self-restraint when seeking partisan objectives rather than national interests. There is still a place for executive orders, such as in the face of emergencies or if Congress refuses to act in good faith on policies, but reducing reliance on executive action will make the orders that issue more stable and effective. The orders that do issue should be considered exceptions and returned to regular policymaking procedures when possible.

Politically-appointed agency leadership should respect internal separation of powers principles by recognizing civil servant protections, a goal that would be similarly served by flipping the presumption of regularity.[292] It would encourage the effort to balance politics and bureaucratic expertise to comply with administrative processes laid out in trans-substantive rules like the APA or the Federal Housekeeping Statute.[293]

286. *See supra* notes 156–159.

287. Exec. Order No. 13,769, Protecting the Nation from Foreign Terrorist Entry into the United States, 82 Fed. Reg. 8977 (Jan. 27, 2017).

288. Exec. Order No. 13,788, Buy American and Hire American, 82 Fed. Reg. 18,837 (Apr. 18, 2017).

289. Proclamation No. 10,141, Ending Discriminatory Bans on Entry to the United States, 86 Fed. Reg. 7005, 7005 (Jan. 20, 2021).

290. Exec. Order No. 14,005, Ensuring the Future is Made in All of America by All of America's Workers, 86 Fed. Reg. 7475, 7478 (Jan. 25, 2021).

291. Freeman and Jacobs suggest that these criteria might include adequate staffing, balances of political appointees and civil servants, and staff qualifications. *See* Freeman & Jacobs, *supra* note 72. They distinguish these pro-regulatory measures from deregulatory measures that undermine agency operations and administrative norms. *Id.*

292. The Pendleton Act protects civil servants and the U.S. Civil Service Commission oversees its enforcement, alongside divisions of the Office of Personnel Management, Merit Systems Protection Board, EEOC, and Federal Labor Relations Authority. Ch. 27, 22 Stat. 403 (1883) (amended 1978); *see* Jerry L. Mashaw, *Federal Administration and Administrative Law in the Gilded Age*, 119 YALE L.J. 1362, 1390–92 (2010).

293. The Federal Housekeeping Statute gives the head of an executive department the authority to "prescribe regulations for the government of his department, the conduct of its employees, [and] the distribution and performance of its business." 5 U.S.C. § 301. *But see* Lucas Guttentag, *The President and Immigration Law: The Danger and Promise of Presidential Power*, JUST SEC. (Oct. 19, 2020), https://www.justsecurity.org/72863/the-president-and-immigration-law-the-danger-and-

It may also prompt political leadership to re-evaluate how they conduct cost-benefit analyses in light of the Office of Information and Regulatory Affairs' ("OIRA") directives on regulatory review: That is, whether to conduct a cost-benefit analysis or "to advance regulatory policies that improve the lives of the American people."[294] In this way, OIRA may constrain irregularity in regulatory policymaking to better prevent dysfunction. Another effect might be greater compliance with APA procedures such as notice and comment rulemaking or reasoned decision-making that also strengthens the basis for agency policymaking.[295]

Congress. Even after recognizing the realist perspective in which agencies are understood as important sites of policymaking in their own right, Congress should expect agencies to respect its mandates by following rule of law norms, exercising appropriate levels of discretion, relying on expertise, and facilitating public accountability procedures. Sometimes agencies do not act as secondary partners to Congress in policymaking, but instead inhabit a primary role. This is especially true during periods of intense political polarization, which renders Congress unable or unwilling to enact new legislation, or too willing to acquiesce to presidential politics.[296] Sometimes Congress may be unwilling to draft clear, specific statutory text or amend existing legislation to evade political accountability. Recognizing this reality could chasten Congress into engaging more meaningfully with the substantive provisions of enabling statutes or enacting new legislation that is clear, rather than unthinkingly delegating interpretations to the executive branch ex ante or engaging in post hoc obstructionism. For example, the Citizenship Act of 2021, the American Dream and Promise Act of 2021,[297]

promise-of-presidential-power ("In *The Procedure Fetish*, Nicholas Bagley provocatively warns liberals against overemphasizing procedural norms at the expense of substantive outcomes. He explains that while proceduralism can play a role in 'preserving legitimacy and discouraging capture,' it also 'advances those goals more obliquely than is commonly assumed and may exacerbate the very problems it aims to address.' Procedural rules that hobble federal agencies or handcuff agency leaders can thwart efforts to achieve positive reform. Bagley argues for a 'positive vision of the administrative state' that advances *substantive* policy goals—a trenchant observation that is especially relevant to an immigration reform agenda." (citing Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345 (2019)).

294. Memorandum on Modernizing Regulatory Review, *supra* note 285. Biden's regulatory review goes beyond procedural criteria to specifically reference the need for agencies to confront the challenges of "a massive global pandemic; a major economic downturn; systemic racial inequality; and the . . . threat of climate change." *Id.*

295. For an updated list of Biden Administration rulemaking and executive actions, see *Tracking Regulatory Changes in the Biden Era*, BROOKINGS INST. (Nov. 18, 2022), https://www.brookings.edu/interactives/tracking-regulatory-changes-in-the-biden-era/.

296. For example, President Bush made novel use of signing statements to guide implementation and subsequent interpretation of new bills, with the tacit approval of a post-9/11 Congress. *See* Elizabeth Drew, *Power Grab*, N.Y. REV. (June 22, 2006), https://www.nybooks.com/articles/2006/06/22/power-grab/.

297. American Dream and Promise Act of 2021, H.R. 6, 117th Cong. (2021).

and the Agricultural Guest Worker Reform Initiative Act of 2021[298] would provide a legislated pathway to citizenship that would lessen agency reliance on executive enforcement discretion to either achieve policymaking goals of deporting undocumented immigrants or regularizing their legal claim to remain in the United States. This approach contrasts with the INA's overbroad enforcement measures that rely on executive discretion to temper policy excess.[299] Congress could also become more explicit about substantive provisions and procedural mechanisms that a trans-substantive statute like the APA would otherwise contain, such as specifying the types of evidence that must be consulted for a decision. This level of detail would be especially advisable after recent judicial decisions that narrow the latitude for agencies to define the terms of the statutes they enforce and require Congress to expressly authorize particular agency actions.[300]

Oversight mechanisms like the Inspector General and Government Accountability Office also deter the misuse of irregularity and serve as a means of policing improper politicization and policy dysfunction—efforts that a realist perspective would aid.

Judicial. One means of injecting realism into judicial review is already available under Supreme Court precedent. Courts can reinforce the rule of law by insisting on reasonableness in agencies through the rigorous application of hard look review to ensure that agencies have genuinely engaged in reasoned decision-making.[301] As this standard of review has become more demanding, it has required explanation of changes in policy positions.[302] This strategy was used to stabilize policy vacillations that threatened reliance interests in DACA,[303] to root out pretext in the drawn out effort to include a citizenship question on the 2020 decennial census,[304] and to enjoin numerous abruptly executed immigration and environment actions whose only purpose seemed to be reversing the prior administration's policy.[305] These more rigorous uses of arbitrary and capricious review fit with

298. Agricultural Guest Worker Reform Initiative Act of 2021, H.R. 2086, 117th Cong. (2021).

299. *See supra* Section II.B.1.

300. *See, e.g.*, West Virginia v. EPA, 142 S. Ct. 2587, 2615–16 (2022).

301. Hard look review intensified judicial scrutiny of agency decisions with decisions like *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971), and *Motor Vehicle Manufacturers Ass'n of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983).

302. FCC v. Fox Television Stations, Inc., 556 U.S. 502 (2009).

303. Dep't of Homeland Sec. v. Regents of the Univ. of Cal. (*UC Regents*), 140 S. Ct. 1891, 1892 (2020).

304. Dep't of Com. v. New York, 139 S. Ct. 2551 (2019).

305. *See, e.g.*, *supra* note 178 and accompanying text.

scholarly efforts to tailor arbitrary and capricious review to the realities of partisanship in policymaking.[306]

Other administrative law norms provide a stop gap to fill the silences in substantive statutes or congressional inaction on departures from statutory commands under the APA. For example, respect for agency expertise on fact-finding under the APA enhances regulatory policymaking.[307] A realist reframing of this requirement would enhance desirable deference to agency determinations in some instances.[308] Flipping the presumption of regularity in policymaking would better inform the discussion concerning the appropriate levels of deference afforded to agency action under the APA and the way that deference is carried out.[309]

Recent legal challenges to Biden Administration regulations and the recently invigorated major questions doctrine, dispositive in *West Virginia v. EPA*, brings a new and unpredictable wrinkle to administrative law with respect to separation of powers issues and federalism concerns.[310] State legislatures and state politicians have increasingly been important determinants of agency function, both as challengers to agency action—as in *West Virginia*—and as partners in coordinated policymaking, as in the administration's, EPA's, and NHTSA's close consideration of California's framework agreement with auto manufacturers when finalizing rules.[311] Flipping the presumption of regularity would provide a court reviewing the scope of agency function a more capacious understanding of how agencies

306. *See* Ming Hsu Chen, *Race Masked in Colorblind Administrative Procedures*, REGUL. REV. (Nov. 2, 2020), https://www.theregreview.org/2020/11/02/chen-race-masked-colorblind-administrative-procedures; Benjamin Eidelson, *Reasoned Explanation and Political Accountability in the Roberts Court*, 130 YALE L.J. 1748 (2021); Michael A. Livermore & Daniel Richardson, *Administrative Law in an Era of Partisan Volatility*, 69 EMORY L.J. 1 (2019); *see also* Nina A. Mendelson, *Disclosing 'Political' Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127 (2010); Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2 (2009); Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461 (2003). *But see* Ming Hsu Chen, *How Much Procedure Is Needed for Agencies to Change "Novel" Regulatory Policies?*, 71 HASTINGS L.J. 1127 (2020) (comparing instances where disingenuous insistence on procedural perfection and constriction of executive discretion can stymie agency action altogether).

307. "Section 706(2)(E) of the APA provides that fact-finding in formal administrative adjudication may be overturned by reviewing courts only if an agency's factual determinations are found to be 'unsupported by substantial evidence.'" Evan D. Bernick, *Is Judicial Deference to Agency Fact-Finding Unlawful?*, 16 GEO. J.L. PUB. POL'Y 27, 27 (2018). Requirements for process-keeping norms that entail disclosure of ex parte communications, influences, or competing evidence serves these ends as well.

308. *Id.* at 66.

309. *See, e.g.*, Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring) (arguing that *Chevron* and *Brand X* deference "permit[s] executive bureaucracies to swallow huge amounts of core judicial and legislative power").

310. *See supra* note 247 and accompanying text.

311. *See supra* Section II.B.2.

are often coordinated horizontally within the executive branch and vertically in relation to state action to expand, or frustrate, congressional delegations.

2. Beyond Structural Fixes: Agency Culture

In addition to structural reforms, agency cultures must align with Congress's goals for the agency and values of good administration. Among these are commitments to rule of law principles and fidelity to congressional will, bureaucratic rationality and agency effectiveness, and a commitment to democratic norms such as political accountability or fair procedures that legitimize regulatory policymaking.[312]

Although agency cultures vary, the ones that stabilize regulatory policymaking share certain features, such as clearly delegated authority, political insulation, and self-imposed norms. Out of respect for congressional delegations of rulemaking authority and rule of law values, agencies can promote a culture of fidelity to the rule of law that their statutory mandate reveals. This is facilitated by clear delegations of rulemaking authority and enabling statutes with intelligible principles, leavened by sufficient latitude for agencies to regulate in a manner that balances flexibility and predictability within their specific policy arena, thereby avoiding overzealous enforcement that can lead to unjust outcomes. At the same time, agencies' commitments to operational effectiveness, consistency, reputation, and acceptance spur them to cultivate an ethos of bureaucratic rationality. Political actors need to insulate agencies from undue political interference or politicization to encourage their expert judgment and commitments to professional standards and substantive values associated with the agency's mission and reputation. More broadly, coordination and comity between agencies, within agencies, and across branches breeds the embrace of democratic norms such as procedural fairness and political accountability.

312. James Wilson argues that agencies that are given clear objectives and high levels of autonomy are more likely to achieve congressionally-supplied goals, on the condition that the agencies are headed by "executives who correctly identified the critical tasks of their organizations, distributed authority in a way appropriate to those tasks, [and] infused their subordinates with a sense of mission." WILSON, *supra* note 97, at 365. However, given the vague and sometimes contradictory goals that are endemic to the democratic process, and the unavoidable policymaking role of street-level bureaucrats, scholars have argued that by hiring agency staff that represent the diverse interests and values of society, bureaucracy will rationally reflect the people's will. Kenneth John Meier, *Representative Bureaucracy: An Empirical Analysis*, 69 AM. POL. SCI. REV. 526, 528 (1975) ("If the administrative apparatus makes political decisions, and if the bureaucracy as a whole has the same values as the American people as a whole, then the decisions made by the bureaucracy will be similar to the decisions made if the entire American public passed on the issues. . . . [I]f values are similar, rational decisions made so as to maximize these values will also be similar."). *See generally*, LIPSKY, *supra* note 101 (regarding the unavoidable policymaking role of street-level bureaucrats).

This inter-agency cooperation relies more on self-imposed norms of restraint, comity, and respect than on top-down edicts from the other branches.

CONCLUSION

This Article opened with an example of a President intervening forcefully into immigration policymaking and a future President continuing those policy decisions. The other branches of government largely stood by on the assumption that executive primacy over Congress and the agencies is a "normal" phenomenon throughout immigration law. The additional considerations brought on by the COVID-19 health crisis only bolstered this assumption. But the cautionary example of the Trump Administration's instrumentalization of the CDC to execute long-standing immigration objectives—and the Biden Administration's difficulties reversing course—is only one aspect of the lessons that should be drawn from the ongoing pandemic. After all, the Trump Administration's interference in agency decision-making at the CDC was not an aberration.

As early as 2017, President Trump signed an executive order banning travel from Muslim-majority countries—effective immediately—justified as responding to an imminent national security risk.[313] In the rush to sign, President Trump did not consult with or warn DHS Secretary John Kelly, the U.S. Attorney General, or the State Department—those who would need to be involved in implementation and would typically have guidance at-the-ready.[314] Accordingly, affected passengers already aboard planes landed in airports where TSA and ICE officers were unclear how to enforce the policy.[315] Chaos and protest broke out at airports nationwide and federal courts issued injunctions within twenty-four hours.[316]

After 2020, the national security emergency justification was extended to the public health crisis of the COVID-19 pandemic in the form of numerous travel bans and border closures other than Title 42. The Trump Administration enacted forty-nine immigration restrictions in the first six months of the pandemic.[317] Many of these restrictions had been on the wish

313. *See supra* note 75. The resulting travel ban singled out these countries as having national security vetting processes that were said to be too lax.

314. Ryan Lizza, *Why Sally Yates Stood Up to Trump*, NEW YORKER (May 22, 2017), https://www.newyorker.com/magazine/2017/05/29/why-sally-yates-stood-up-to-trump.

315. Yeganeh Torbati, Jeff Mason & Mica Rosenberg, *Chaos, Anger as Trump Order Halts Some Muslim Immigrants*, REUTERS (Jan. 28, 2017, 10:48 AM), https://www.reuters.com/article/us-usa-trump-immigration-chaos/chaos-anger-as-trump-order-halts-some-muslim-immigrants-idUSKBN15C0LD.

316. *Id.*

317. Caitlin Dickerson & Michael D. Shear, *Before Covid-19, Trump Aide Sought to Use Disease to Close Borders*, N.Y. TIMES (May 3, 2020),

list for the Trump Administration preceding the pandemic and seemed to gain traction—or at least lose opposition—during COVID-19.[318] These bans exploited the unprecedented nature of a public health crisis and the logic of suspending rules in the midst of an emergency, along the way testing weaknesses in the immigration bureaucracy's organizational structure. For example, a January 2020 ban on travel from China, where the novel coronavirus originated, was based on the same authority invoked in the government's defense of the Muslim travel ban.[319] In quick succession, the Trump Administration issued travel bans against Iraq and, as cases worsened, against European countries and Brazil, and the borders to Canada and Mexico were closed.

The Biden Administration issued a similar public health order as the coronavirus mutated and led to variant outbreaks in the Schengen Area, the United Kingdom, the Republic of Ireland, the Federative Republic of Brazil, and the Republic of South Africa.[320] On the one hand, these restrictions went unchallenged, demonstrating to many the underlying need for some sort of border control during the pandemic.[321] On the other hand, it illustrates how policymaking innovations can become dependable, path-reinforcing

https://www.nytimes.com/2020/05/03/us/coronavirus-immigration-stephen-miller-public-health.html.

318. JORGE LOWEREE, AARON REICHLIN-MELNICK & WALTER A. EWING, AM. IMMIGR. COUNCIL, THE IMPACT OF COVID-19 ON NONCITIZENS AND ACROSS THE U.S. IMMIGRATION SYSTEM (2020), https://www.americanimmigrationcouncil.org/research/impact-covid-19-us-immigration-system.

319. Proclamation No. 9984, Suspension of Entry as Immigrants and Nonimmigrants of Persons Who Pose a Risk of Transmitting 2019 Novel Coronavirus and Other Appropriate Measures to Address This Risk, 85 Fed. Reg. 6709, 6710 (Jan. 31, 2020). INA § 212(f) provided the justification used for these travel bans. *See supra* note 76.

320. Proclamation No. 10143, Suspension of Entry as Immigrants and Nonimmigrants of Certain Additional Persons Who Pose a Risk of Transmitting Coronavirus Disease 2019, 86 Fed. Reg. 7467, 7467–68 (Jan. 25, 2021). The order states:

> In my Executive Order of January 21, 2021, entitled "Promoting COVID-19 Safety in Domestic and International Travel," I directed the Secretary of Health and Human Services, including through the Director of CDC, and in coordination with the Secretary of Transportation (including through the Administrator of the Federal Aviation Administration) and the Secretary of Homeland Security (including through the Administrator of the Transportation Security Administration), to further examine certain current public health precautions for international travel and take additional appropriate regulatory action, to the extent feasible and consistent with CDC guidelines and applicable law.

Id. at 7467.

321. *See, e.g.*, Aamer Madhani & Zeke Miller, *Biden Orders COVID-19 Travel Restrictions, Adds South Africa*, CTV NEWS (Jan. 25, 2021, 7:11 PM), https://www.ctvnews.ca/health/coronavirus/biden-orders-covid-19-travel-restrictions-adds-south-africa-1.5281420 (quoting Dr. Anthony Fauci, who said: "We have concern about the mutation that's in South Africa. . . . We're looking at it very actively. It is clearly a different and more ominous than the one in the U.K., and I think it's very prudent to restrict travel of noncitizens.").

processes that can be used—or abused—in other contexts. Title 42 is a powerful example of such exploitation. It is also an example of policy stickiness, resulting in the normalization of dysfunction, even with a new administration and a new set of substantive policy priorities, indeed, even in the face of evidence that the exceptional circumstances that gave rise to the problematic policy have given way.

Another arena of stickiness for regulatory dysfunction is in the courts, where questionable policies may receive the imprimatur of judicial deference, thereby increasing the ease with which they can be employed in the future. For example, the Muslim-travel ban was ultimately upheld at the Supreme Court—even after being struck down twice for insufficient reasoning[322]—demonstrating the general deference to which the judicial branch affords the executive over matters of national security.[323] However, the fate of the Title 42 litigation is still undecided. Although the ease with which the Biden Administration continued Trump's expulsion policies under Title 42 exhibits the stickiness of policy options when they are politically expedient,[324] there is some hope that judicial stickiness *qua* executive

322. In multiple legal challenges, federal courts pointed out the lack of evidence of national security threats provided to support the travel ban. Over the course of the litigation, the White House and the immigration agencies strained to rationalize the policy with, or provide evidence of, the threat supporting the travel ban (in some cases being fired for expressing dissent). Lizza, *supra* note 314. On March 6, 2017, the President withdrew travel ban 1.0. Exec. Order No. 13769, Protecting the Nation from Foreign Terrorist Entry into the United States, 82 Fed. Reg. 8977 (Jan. 27, 2017). He replaced it with travel ban 2.0, which exempted those who already have visas and green cards and removed Iraq from the banned countries list, but it left in place an unsubstantiated and potentially discriminatory process for determining which countries were national security threats. Exec. Order No. 13780, Protecting the Nation from Foreign Terrorist Entry into the United States, 82 Fed. Reg. 13209 (Mar. 6, 2017). Then, on September 24, 2017, the President once again withdrew his policy and substituted travel ban 3.0. Proclamation No. 9645, Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats, 82 Fed. Reg. 45161, (Sept. 24, 2017). In version 3.0, the State Department rewrote the vetting requirements involved in making national security threat assessments and recorded evidence that sending countries could not meet those requirements; the resulting list included North Korea and Venezuelan government officials. DEP'T OF STATE, IMPLEMENTATION OF PRESIDENTIAL PROCLAMATION 9645, DECEMBER 8, 2017 TO MARCH 31, 2019 (2017), https://travel.state.gov/content/dam/visas/presidentialproclamation/Combined%20-%20Report%20on%20Implementation%20of%20PP%209645%20December%2007%202017%20to%20March%2031%202019.pdf. Only the last version survived review by the U.S. Supreme Court. Trump v. Hawaii, 138 S. Ct. 2392 (2018).

323. *Trump*, 138 S. Ct. at 2400–01.

324. Critics of the Biden Administration's immigration policies point out the continuation of other Trump-era initiatives, such as the re-opening of jail-like temporary facilities (described as "cages" during the Trump years) to house migrant children at the border and Biden's recent decision to reinstate and expand Trump's "Remain in Mexico" policy (the "Migrant Protection Protocols," or "MPP") that forced migrants seeking entrance to the U.S. to wait in Mexico while waiting for a court hearing. Nicole Narea, *Biden's Incoherent Immigration Policy*, VOX (Oct. 13, 2021, 8:30 AM), https://www.vox.com/policy-and-politics/22709353/biden-border-immigration-trump-haiti-title-42; Nicole Narea, *Biden's Bewildering Decision to Expand a Trump-Era Immigration Policy*,

deference may be on the wane. In a recent empirical study, Desirée LeClercq finds that judicial review of emergency administration may be evolving such that judges are beginning to enjoy substantially more power over emergency administration.[325] Through an examination of all fifty-one lower federal court decisions concerning pandemic-related emergency administration under the APA between September 2020 and July 2021, LeClercq found that, rather than simple deference, "judges invalidated agencies' emergency policies in 57 percent of the arbitrary and capricious cases; in nearly 90 percent of the notice-and-comment cases; and in approximately 56 percent of the *Chevron* cases."[326]

While the courts may or may not extend a presumption of deference to Title 42, Congress's silence lets the usual presumption of normality stand. Given the deference already afforded by courts and Congress's indifference to the executive branch's use of Title 42 powers, these expansions have triggered a feedback loop in the immigration sphere that has normalized policymaking procedures that might not have otherwise been permitted, and that have had a significant impact on the lives of thousands of asylum-seekers. Reframing the problem of executive overreach as the opportunistic use of an emergency justification—as we have done here—and then scrutinizing expansions of those policies beyond the scope of the emergency leads to a different set of interventions than assuming the usual presumptions of regularity. It calls for greater judicial intervention rather than deference, congressional correction rather than broad delegation, and an allowance for the nonpolitical actors in the immigration bureaucracy to be involved in policy implementation.

Immigration scholars have much to teach about the difficulties of trying to administer immigration law in irregular circumstances and the instances where routine irregularity becomes dysfunction. There is a long tradition of discounting departures from normal policymaking due to the premise of

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VOX (Dec. 4, 2021, 8:30 AM), https://www.vox.com/policy-and-politics/2021/12/4/22815657/biden-remain-in-mexico-mpp-border-migrant.

325. Desirée LeClercq, *Judicial Review of Emergency Administration*, 72 AM. U. L. REV. 1 (2022).

326. *Id.* at 28. While a promising study, two factors may mitigate the optimism that it may otherwise bring to critics of an overly deferential judicial branch. First, the exceptional combination of the legitimate crisis brought on by the COVID-19 pandemic and the Trump Administration's willingness to exploit it for political gain may prove that LeClercq's findings are a temporary course correction rather than a 'new era' in emergency administration—that is, a reaction to the excesses of the Trump era. Second, complacency inspired by stronger judicial review is unwarranted given the deliberate pace of the judicial process, as we have already seen with the continuation of Title 42 under the Biden Administration. Also, many thousands of persons have been turned away at the border and forced to return to dangerous circumstances without adequate opportunity to plead for asylum protections, an "irreparable harm," in District Judge Sullivan's terms, that will not be rectified even if the federal courts eventually strike down the Title 42 expulsion rules. Huisha-Huisha v. Mayorkas, 560 F. Supp. 3d 146, 173 (D.D.C. 2021).

immigration exceptionalism, the plenary power doctrine, or the assertion of a national security emergency. But they also have much to learn from realist perspectives on agency policymaking about the risks of executive overreach rising to regulatory dysfunction. After all, immigration policy is not the only place—and the Trump Administration is not the only time—that regulatory dysfunctions have distorted policymaking. While the substance of policies can be reversed, the institutional worry is that the ways that these policies came about will contribute to the erosion of customs, distortion of principles, and departures from expertise that has sustained the administrative state. Legal scholars in both fields need to resist the temptation to consider these procedural irregularities a new normal and instead steer them toward a clear-eyed view of the policymaking process and its vulnerabilities to dysfunction.