ADMINISTRATIVE INERTIA AFTER *REGENTS* AND *DEPARTMENT OF COMMERCE*

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INTRODUCTION

If it ain't broke, don't fix it, so the proverb goes.[1] Although the proverb is not a legal doctrine, *stare decisis*[2] is its legal analogue. In simple terms, the doctrine requires a Court to decide future cases in the same way it decided

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1. *See* GREGORY TITELMAN, RANDOM HOUSE DICTIONARY OF POPULAR PROVERBS & SAYINGS 155 (Random House, 1996) (attributing the phrase to Bert Lance as quoted in a May 1977 issue of *Nation's Business*).

2. Literally, "to stand by things decided." *See* Timothy Oyen, *Stare Decisis*, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/stare_decisis (last visited October 12, 2021).

past cases raising the same issues.[3] Courts may overrule old precedents, but until they do so, consistent —and predictable—application of old precedents to new cases is the expectation.[4]

During the Trump Presidency, the Supreme Court did not always live up to that expectation. As scholars and several Justices noted, the Court seemed to craft Trump-specific rules inconsistent with past cases.[5] These observers have, by necessity, looked backward—comparing the Court's Trump era decisions to older precedents. With the Trump Administration now in the

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3. *See* BLACK'S LAW DICTIONARY ONLINE (11th ed. 2019) (defining stare decisis as "[t]he doctrine of precedent, under which a court must follow earlier judicial decisions when the same points arise again in litigation"); THE FEDERALIST NO. 78 (Alexander Hamilton) ("To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them . . . .").

4. *See* Thomas Jipping & Zack Smith, *Stare Decisis 101*, HERITAGE FOUNDATION LEGAL MEMORANDUM NO. 277 (Feb. 3, 2021), https://www.heritage.org/sites/default/files/2021-02/LM277.pdf (discussing the Supreme Court's none-too-well defined framework for overruling precedent).

5. *See, e.g.*, Dep't of Com. v. New York, 139 S. Ct. 2551, 2576 (2019) (Thomas, J., dissenting) (accusing the majority of adopting "an administration-specific standard"); John Yoo, Defender In Chief: Donald Trump's Fight for Presidential Power 224 (All Prints Books 2020) (observing that *Department of Commerce* laid the groundwork for "a new world in which agency actions receive a strict examination from federal judges."); Note, *Census Act-Review of Administrative Action—Judicial Review of Pretext*—Department of Commerce v. New York, 133 HARV. L. REV. 372, 380 (2019) (struggling to reconcile *Department of Commerce* with precedents but concluding that "[t]he holding is perhaps better understood on the basis of the unusual facts of the case."); Josh Blackman, *Why Courts Shouldn't Try To Read Trump's Mind*, POLITICO (Mar. 16, 2017), https://www.politico.com/magazine/story/2017/03/why-courts-shouldnt-try-to-read-trumps-mind-214921/; Zachary Price, *Symposium: DACA and the need for symmetrical legal principles*, SCOTUSBLOG (Jun. 19, 2020), https://www.scotusblog.com/2020/06/symposium-daca-and-the-need-for-symmetrical-legal-principles/ (describing *Regents* as "deliberately designed for one day and one case only" and "essentially ad hoc reasoning to reach [] a politically significant result"); Varad Mehta & Adrian Vermeule, *John Roberts's Self-Defeating Attempt to Make the Court Appear Nonpolitical*, WASH. POST (Dec. 17, 2020), https://www.washingtonpost.com/outlook/john-roberts-self-defeating-attempt-to-make-the-court-appear-nonpolitical/2020/12/17/d3d1df5a-3fd5-11eb-9453-fc36ba051781_story.html; Ilya Shapiro, *How the Supreme Court Undermines Its Own Legitimacy*, WASHINGTON EXAMINER (July 18, 2019), https://www.washingtonexaminer.com/opinion/how-the-supreme-Court-undermines-its-own-legitimacy; Adrian Vermeule, *Two Futures for Administrative Law*, NOTICE & COMMENT BLOG, (Nov. 30, 2016), http://yalejreg.com/nc/two-futures-for-administrative-law-by-adrian-vermeule/; John Yoo, *Supreme Court Swing Vote – What's Behind John Roberts' Legal Gymnastics?*, FOX NEWS (June 29, 2020), https://www.foxnews.com/opinion/supreme-Court-john-roberts-legal-gymnastics-john-yoo.

rearview mirror, we can look forward to seeing if the Court applies its Trump era decisions consistently with respect to other administrations.

Among the Court's Trump-era cases, *Department of Homeland Security v. Regents of the University of California*[6] provides a ready-made consistency test. In *Regents*, the Court held that the U.S. Department of Homeland Security (DHS) failed to comply with the Administrative Procedure Act (APA) when it rescinded the Deferred Action for Childhood Arrivals (DACA) program.[7] Chief Justice John Roberts wrote the majority opinion holding that the APA applied to the Trump Administration's decision to rescind DACA on the grounds that the program conferred benefits on its recipients, namely, a reprieve from deportation and eligibility for Social Security, Medicare, and work permits.[8] The decision to rescind DACA would eliminate these benefits and was, therefore, subject to the APA because "access to these types of benefits is an interest courts often are called upon to protect."[9] On the merits, the Court held that the Trump Administration violated the APA because its attempt to rescind the program failed to consider recipients' reliance interests in those benefits.[10] Likewise, the Trump Administration's attempt to end the DACA program violated the APA because it did not consider DACA's various components separately or alternatives to total rescission.[11]

At a casual glance, the case may seem like a standard administrative law case. In fact, it is an unusual one made to appear usual by a bit of legal contortionism. The majority opinion twists and twirls to avoid answering the question at the heart of the case: Is the DACA program lawful?[12] Why does that question matter? If the program itself is unlawful on the merits—say, because it exceeds the agency's statutory authority—it would seem anomalous, at a minimum, to fault the government for deciding not to break the law. Only a lawyer would not find that conclusion aberrant and exasperating.

Another case from the Trump era, *Department of Commerce v. New York*,[13] also imposed hitherto unknown obligations on administrations changing their predecessors' policies. There, the Court held that an otherwise lawful agency action could be set aside simply because the reason given for the change "seem[ed] to have been contrived."[14] In so holding, the Court lowered the

6. 140 S. Ct. 1891 (2020).
7. *Id.* For a fuller discussion of this program and its creation, see *infra* PART I.
8. 140 S. Ct. at 1906.
9. *Id.* (internal quotations omitted).
10. *Id.* at 1913–14.
11. *Id.* at 1912–13.
12. *See infra* PART I.B.
13. 139 S. Ct. 2551 (2019).
14. *Id.* at 2575–76.

deference it had previously given to agency decisionmaking processes, and it may also have limited the types of rationales that an agency can rely on when it changes existing policies.[15]

And that brings to mind another old proverb: What's sauce for the goose is sauce for the gander.[16] If the Trump Administration could not undo by mere memorandum what the Obama Administration created by mere memorandum, then, in some cases, neither may future administrations, undo their predecessor's programs without complying with *Regents* and *Department of Commerce*.

At this point, we bring Sir Isaac Newton into the mix, naturally. His laws of motion describe the relationship between an object's motion and the forces acting on it.[17] These laws explain the concept of inertia—the resistance an object has to any change in its velocity—and demonstrate that the larger an object's mass, the more force is needed to change its velocity. Agency actions have inertia—a resistance to being reversed—measured in terms of the amount of effort that an agency must expend to comply with the APA when rescinding them. The principle of stare decisis implies that the amount of effort that one administration must expend to reverse a predecessor's action ought to be constant across administrations. *Regents* and *Department of Commerce*, however, added mass to certain regulatory actions thus increasing the amount of effort needed to rescind them. This Article sets about identifying those agency actions that have had their administrative mass increased and measuring just how much more force is now needed to reverse them. It then applies those observations to the Biden Administration's aggressive efforts to rescind various Trump Administration actions.

This Article proceeds in four parts. First, it recounts the history of the DACA program and the Trump Administration's attempts to rescind it and distills a set of rules from the *Regents* decision that determine whether a successor administration may rescind the agency actions of prior administrations. Second, it considers the impact of *Department of Commerce* on that set of rules and concludes that it adds additional requirements to administrative rescissions. Third, the Article applies those rules to a number of Trump administrative programs that Biden rescinded or targeted for recission and determines whether *Regents* will, if consistently applied, pose a problem for Biden's Executive Branch agenda. Finally, the Article examines two high-profile Trump Administration policies

15. *See infra* PART II. The *Department of Commerce* decision also raises the interesting question whether the Court's opinion in *Regents* could survive the scrutiny that the Court put the Commerce Department to in the *Commerce* case.

16. *See* JOHN HEYWOOD, THE PROVERBS, EPIGRAMS, AND MISCELLANIES OF JOHN HEYWOOD 82 (John S. Farmer, ed., 1906) (recounting the proverb's early formulation as "as deep drinketh the goose as the gander.").

17. SIR ISAAC NEWTON, THE PRINCIPIA: MATHEMATICAL PRINCIPLES OF NATURAL PHILOSOPHY 109–11 (I. Bernard Cohen, et al., trans., Univ. of CA. Press, 1st ed.) (2016).

that Biden targeted for rescission that are likely to escape APA review and, accordingly, the requirements of *Regents* and *Department of Commerce*. The Article concludes that these two cases will be a hurdle to successor administrations that wish to undo the acts of prior administrations. In short, *Regents* and *Department of Commerce* significantly increase the administrative inertia of agency actions that confer concrete benefits and create reliance interests, and significantly increase an agency's APA obligations when rescinding them. If applied consistently, these decisions are likely to considerably slow or even prevent President Biden from rescinding many of President Trump's agency actions, especially those that reduced the burdens imposed by environmental and commercial regulations.

I. THE *REGENTS* RULES

To distill rules from *Regents*, it is necessary to understand what the Supreme Court did, and more importantly did not do, in that case. That requires a complete picture of the DACA program's creation and attempted termination.

A. DACA's Creation and Attempted Termination

In 2012, after then-Secretary of Homeland Security Janet Napolitano issued a memorandum that, "in the exercise of our prosecutorial discretion," forbade immigration law enforcement officials from removing "certain young people who were brought to the country as children" who met several criteria.[18] The DACA Memo granted recipients two years of "deferred action," from immigration enforcement.[19] By operation of a variety of statutes and regulations that predated DACA's creation, that deferred action made DACA recipients eligible for Social Security, Medicare, work permits, and certain state benefits.[20] The DACA Memo created the DACA program without statutory authority and without complying with the APA.[21]

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18. Memorandum from Janet Napolitano, Sec'y, Dep't of Homeland Security, to David V. Aguilar, Acting Comm'r, U.S. Cust. & Border Prot., et al. (June 15, 2012) (on file with author) [hereinafter DACA Memo]. Other criteria included age requirements, educational requirements, continuous residence within the country, and no criminal record for felonies or "a significant misdemeanor." *See id.*

19. *See id.* (stating that "[U.S. Immigration and Customs Enforcement] should exercise prosecutorial discretion, on an individual basis, for individuals who meet . . . criteria by deferring action for a period of two years, subject to renewal, in order to prevent low priority individuals from being removed from the United States.").

20. *See* 8 U.S.C. §§ 1611(b)(2)–(4) (2020); 8 U.S.C. §§ 1324a(h)(3)(B); 8 C.F.R. §§ 1.3(a)(4)(vi); 8 C.F.R. §§ 274a.12(c)(14) (2020); 45 C.F.R. § 152.2(4)(vi) (2019); *see also* Ben Harrington, CONG. RSCH. SERV., R45158, AN OVERVIEW OF DISCRETIONARY REPRIEVES FROM REMOVAL: DEFERRED ACTION, DACA, TPS, AND OTHERS (April 10, 2018).

21. *See generally* DACA Memo, *supra* note 18; *see also* Department of Homeland Security

Two years after Napolitano issued the DACA Memo, her successor Jeh Johnson expanded the DACA program by lengthening the deferred action period to three years and relaxing some of the other eligibility criteria.[22] That memorandum also created a new program called Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA), which allowed unlawfully present parents to obtain deferred action if they had children who were lawfully present.[23] As with DACA recipients, DAPA recipients were eligible for a variety of state and federal welfare benefits.[24] Again, DAPA and the DACA expansion were implemented without statutory authority and without complying with the APA.

Twenty-six states sued to enjoin DAPA and the expansion of DACA on the ground, among others, that the Obama Administration was obligated to comply with the APA when implementing those two programs.[25] A district court preliminarily enjoined DAPA and the DACA expansion, and the Fifth Circuit affirmed.[26] It held that the states were likely to succeed on their claim that the Obama Administration was required to comply with the APA and on their claim that the Immigration and Nationality Act prohibited DHS from implementing the DAPA program.[27] An equally divided Supreme Court affirmed the Fifth Circuit's decision.[28]

After Donald Trump's election, his Administration formally rescinded the DAPA Memo.[29] Then-Attorney General Jeff Sessions followed-up the rescission with a letter to Elaine Duke, the acting Secretary of Homeland Security, taking the position that the original DACA program was unconstitutional and unlawful because it suffered from all the same defects that the Fifth Circuit identified in the DAPA program.[30] Accordingly, he

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v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1901 (2020).

22. *See* Memorandum from Jeh Charles Johnson, Sec'y, U.S. Dep't Homeland Sec., to León Rodriguez, Dir., U.S. Citizenship & Immigration Servs. et al. (Nov. 20, 2014) (on file with author) [herein after DAPA Memo].

23. *Id.*

24. Texas v. United States, 809 F.3d 134, 181 (5th Cir. 2015), as revised (Nov. 25, 2015) (discussing the eligibility of Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) recipients for federal and state benefits).

25. *See generally id.*

26. *Id*.

27. *See id.* at 146.

28. United States v. Texas, 136 S. Ct. 2271 (2016) (per curiam). At the time of this decision, Justice Antonin Scalia had died and the seat he held had not yet been filled.

29. Memorandum of John F. Kelly, Sec'y, U.S. Dep't Homeland Sec., to Kevin K. McAleenan, Acting Comm'r, U.S. Cust. & Border Prot., et al. (June 15, 2017) (on file with author).

30. Letter from Jefferson B. Sessions III, Att'y General of the United States, to Elaine Duke, Acting Sec'y, U.S. Dep't of Homeland Sec. (Sept. 4, 2017) (on file with author).

advised Duke that DHS "should rescind" the DACA program.[31] Duke then issued a memorandum announcing her intention to slowly rescind the DACA program in stages over a period of three-and-a-half years.[32]

The Duke Memo noted that the Fifth Circuit's analysis with respect to the DAPA program applied just as well to the DACA program.[33] First, both programs unlawfully "permit the reclassification of millions of illegal aliens as lawfully present and thereby make them newly eligible for a host of federal and state benefits."[34] And second, both programs "were not truly discretionary" and "would be substantially similar in execution."[35] Duke also noted that the Supreme Court had affirmed the Fifth Circuit in an equally divided vote, and she acknowledged that it was the Attorney General's position that DACA was unlawful.[36] Accordingly, she concluded that DACA should be terminated, but "[r]ecognizing the complexities associated with winding down the program," she directed the Department to continue adjudicating DACA requests while the program was slowly unwound in stages.[37]

Almost immediately, three district courts blocked the DACA rescission.[38] Those courts enjoined the rescission because, among other

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31. *Id.*

32. Memorandum from Elaine C. Duke, Acting Sec'y, U.S. Dep't of Homeland Sec., to James W. McCament, Acting Dir., U.S. Citizenship & Immigration Servs., et al. (Sept. 5, 2017) (on file with author) [hereinafter Duke Memo].

33. See id. (stating, that [t]he Fifth Circuit concluded that the Department's DAPA policy conflicted with the discretion authorized by Congress.").

34. *Id.* (quoting Texas v. United States, 809 F.3d at 184).

35. *Id.*

36. *Id.*

37. *Id.*

38. NAACP v. Trump, 298 F. Supp. 3d 209, 215–16, 249 (D.D.C. 2018), *adhered to on denial of reconsideration*, NAACP v. Trump, 315 F. Supp. 3d 457, 260–61, 273 (D.D.C. 2018), and *aff'd and remanded sub nom.* Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1898 (2020); Regents of Univ. of Cal. v. U.S. Dep't of Homeland Sec., 279 F. Supp. 3d 1011, 1048 (N.D. Cal. 2018), *aff'd sub nom.* Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec., 908 F.3d 476, 486 (9th Cir. 2018), *rev'd in part, vacated in part sub nom.* Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1898 (2020); Batalla Vidal v. Duke, 295 F. Supp. 3d 127, 163 (E.D.N.Y. 2017), *aff'd in part and remanded sub nom.* Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1898–99 (2020). Two of these courts issued nationwide injunctions. *See* Regents of Univ. of Cal. v. U.S. Dep't of Homeland Sec., 279 F. Supp. 3d 1011, 1048 (N.D. Cal. 2018), *aff'd sub nom.* Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec., 908 F.3d 476, 486 (9th Cir. 2018), *rev'd in part, vacated in part sub nom.* Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1898–99 (2020); Batalla Vidal v. Nielsen, 279 F. Supp. 3d 401, 437 (E.D.N.Y. 2018), *vacated and remanded sub nom.*

reasons, the Duke Memo's explanation did not satisfy the APA.[39] One of those district courts permitted DHS to "reissue a memorandum rescinding DACA, this time providing a fuller explanation for the determination that the program lacks statutory and constitutional authority."[40] Duke's successor, Kirstjen M. Nielsen, did so in a new memorandum.[41]

Nielsen "decline[d] to disturb" Duke's decision to rescind the DACA program but expounded upon why, as a matter of law and policy, Duke made the correct choice.[42] First, citing the opinion of Attorney General Sessions, Nielsen explained that "the DACA policy was contrary to law."[43] Second, she expanded Duke's analysis of how the Fifth Circuit's opinion about the DAPA program applied with equal force to the DACA program.[44] Third, she noted that "regardless of whether the DACA policy is ultimately illegal," Duke appropriately rescinded it because there are "serious doubts about its legality" and law enforcement should avoid legally dubious policies.[45] Fourth, she identified three policy reasons that supported rescission: (1) Congress, not the Executive, should deliver class-based immigration policies; (2) prosecutorial discretion should be exercised only on a case-by-case basis; and (3) the Department must "project a message that leaves no doubt regarding the clear, consistent, and transparent enforcement of the immigration laws against all classes and categories of aliens."[46] Finally, Nielsen acknowledged the "asserted reliance interests" of DACA recipients but concluded that the interests did not "outweigh the questionable legality of the DACA policy" and that "issues of reliance would best be considered by Congress."[47]

Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1898 (2020). The Court did not discuss the propriety of nationwide injunctions. *See* Paul J. Larkin Jr. & GianCarlo Canaparo, *One Ring to Rule Them All: Individual Judgments, Nationwide Injunctions, and Universal Handcuffs*, 96 NOTRE DAME L. REV. REFLECTION 55, 57, 61–62, 65 (2020) (providing a thorough examination of the topic).

39. *NAACP*, 298 F. Supp. 3d at 215–16; *Regents of Univ. of California*, 279 F. Supp. 3d at 1048; *Batalla Vidal*, 295 F. Supp. 3d at 163.

40. *NAACP*, 298 F. Supp. 3d at 245.

41. Memorandum from Kirstjen M. Nielsen, Sec'y, U.S. Dep't of Homeland Sec. (June 22, 2018) [hereinafter Nielsen Memo].

42. *Id.* at 1.

43. *Id.* at 2.

44. *Id.*

45. *Id.*

46. *Id.* at 2–3.

47. *Id.* at 3.

The Nielsen Memo did not change the mind of the district court judge who had invited DHS to revise its memo,[48] and eventually the Supreme Court consolidated the three cases.[49]

B. The Regents Decision

The first question that the Supreme Court considered in *Regents*[50] was whether the decision to rescind the DACA policy was reviewable under the APA.[51] The Court quickly concluded that it was because the original decision granted recipients "affirmative immigration relief" and eligibility for a variety of state and federal benefits including Medicare and Social Security.[52] Accordingly, the DACA program was not mere non-enforcement,[53] but was an "action to 'provide a focus for judicial review.'"[54] Although there is little discussion in this part, it appears that the DACA program's rescission was reviewable under the APA because the program provided one discrete benefit (delayed action) to recipients and access to others (welfare benefits).

Having so concluded, the Court then turned to whether the rescission was arbitrary and capricious.[55] To do that, the Court had first to decide whether it should analyze the decisionmaking outlined in the Nielsen Memo, the Duke Memo, or both.[56] The Court rejected the rationales contained in the Nielsen Memo on the grounds that they amounted to "impermissible *post hoc* rationalizations."[57] The Court then considered whether the Duke Memo's

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48. NAACP v. Trump, 315 F. Supp. 3d 457, 471–72 (D.D.C. 2018) (concluding that the Nielsen Memo "provide[d] almost no meaningful elaboration on the Duke Memo's assertion that DACA is unlawful," and that the proffered policy rationales were "conclusory.").

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

50. *Id.*

51. *Id.* at 1905.

52. *Id*. at 1906.

53. The government argued that Deferred Action for Childhood Arrivals (DACA) was a non-enforcement decision that was unreviewable pursuant to Heckler v. Chaney, 470 U.S. 821, 831 (1985), which held that "an agency's decision not to prosecute or enforce" is an unreviewable exercise of an agency's "absolute discretion." Because it concluded that DACA afforded recipients affirmative benefits, the Court did not decide whether the decision to implement or rescind DACA fell within the holding of *Chaney*. *Regents*, 140 S. Ct. at 1906.

54. *Regents*, 140 S. Ct. at 1906. The Court also quickly rejected two other arguments advanced by the government based on two provisions of the Immigration and Nationality Act that bar judicial review of certain agency actions and decisions relating to removal proceedings and orders. *Id*. at 1907.

55. *See* 5 U.S.C. § 706(2)(A) (directing that agency actions be set aside if they are "arbitrary" or "capricious").

56. *Regents*, 140 S. Ct. at 1907–08.

57. *Id*. at 1909. For the Court to have reviewed the rationales offered in the Nielsen Memo, the Department of Homeland Security (DHS) would have had to rescind the Duke

reasons for rescinding the DACA program—that the Fifth Circuit had held DAPA unlawful, and that the Attorney General had taken the position that DACA was unlawful for the same reasons—complied with the "reasoned decisionmaking" [58] required by the APA.[59]

Here is where the majority engaged in its feat of legal contortionism. It framed the issue as whether rescission of the DACA program was an appropriate response to the Administration's *conclusion* that DACA was unlawful, rather than as whether recission was a lawful response to the program *actually being* unlawful. That subtle (some might say disingenuous) distinction allowed the majority to avoid that politically fraught issue of DACA's legality[60] and the truth that "[t]he decision to rescind an unlawful agency action is *per se* lawful."[61] With that move, the Court transformed a highly unusual administrative law case into one that appeared altogether normal (provided you were not paying close attention) and required DHS to justify its decision according to standard APA requirements.

The Court held that the APA imposed three requirements on DHS, all of which the Duke Memo failed to satisfy. First, the APA required DHS to consider separately the DACA program's two major components: forbearance from removal and entitlement to benefits before rescinding the program.[62] The Fifth Circuit decision, on which the Duke Memo relied, held the DAPA program unlawful because it granted eligibility benefits to a class of otherwise removable aliens in violation of the Immigration and Nationality Act.[63] According to the majority, the Fifth Circuit's analysis did not address forbearance.[64] The majority

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Memo, cancel the rescission of the DACA program, and then immediately reinitiate the rescission with the Nielsen Memo so that the latter memo effected a separate agency action. *Id.* In dissent, Justice Kavanaugh argued that the Court's refusal to consider the Nielsen Memo was an incorrect and expansive reading of the *post hoc* justification doctrine, which, properly understood, "merely requires that courts assess agency action based on the official explanations of the agency decisionmakers, and not based on after-the-fact explanations advanced by agency lawyers during litigation (or by judges)." *Id.* at 1934 (Kavanaugh, J., dissenting) (citing State Farm, 463 U.S. at 50) ("Courts may not accept appellate counsel's post hoc rationalizations for agency action"); FPC v. Texaco Inc., 417 U.S. 380, 397 (1974) (same); NLRB v. Metropolitan Life Ins. Co., 380 U.S. 438, 443–44 (same); Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168–69 (1962) (same)).

58. Michigan v. EPA, 576 U.S. 743, 750 (2015).

59. *Regents*, 140 S. Ct. at 1910.

60. *See id.* at 1919 (Thomas, J., dissenting) ("Today's decision must be recognized for what it is: an effort to avoid a politically controversial but legally correct decision.").

61. *Id.* at 1922 (Thomas, J., dissenting).

62. *Id.* at 1910.

63. *Texas*, 809 F.3d at 184.

64. This characterization of the Fifth Circuit's opinion is open to criticism, as Justice

concluded, therefore, that it was unreasonable for DHS to rescind both parts of DACA—forbearance and benefits[65]—when the legal opinion on which that decision relied applied only to the second half of the program.[66]

Second, the majority required DHS to articulate separate APA-compliant rationales for rescinding each part of the DACA program. It reasoned that because Duke's conclusion that the program was illegal applied only to eligibility for benefits, it was arbitrary and capricious to rescind the entire program.[67] To have complied with the APA, DHS should have considered a "forbearance-only policy."[68] Finally, the majority required DHS to consider "reliance interests."[69] It noted that since the DACA program's creation in 2012, recipients enrolled in school, started jobs and businesses, married, and did other things "all in reliance on the DACA program."[70] The APA required DHS to consider those interests before rescinding the program.

To comply with these latter two requirements—considering separate parts separately and accounting for reliance interests—the Court required DHS to examine alternatives to rescission.[71] Secretary Duke's decision to wind-down

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Thomas noted in dissent. *See Regents*, 140 S. Ct. at 1929–30, n. 14 (Thomas, J., dissenting). The DACA Memo did not, by its own terms, confer eligibility for benefits on recipients. In fact, it included language expressly disclaiming that it granted recipients any rights. *See* DACA Memo, *supra* note 18, at 3 ("This memorandum confers no substantive right, immigration status or pathway to citizenship. Only the Congress, acting through its legislative authority, can confer these rights."). Recipients' eligibility for benefits was a collateral consequence of the DACA Memo's granting them deferred action, which was the method by which the Obama Administration chose to exercise forbearance. *See supra* note 20 and accompanying text. Accordingly, the two parts of the DACA program—forbearance and benefits—are, contrary to the majority's framing, intertwined.

65. It is imprecise to describe DACA as providing benefits. As explained above, *see supra* notes 20, 62 and accompanying text, deferred action made DACA recipients eligible for benefits by operation of a number of statutes and regulations that predated the program. Nevertheless, the author repeats that language here because it is the language used by the majority in this portion of the opinion. *See Regents*, 140 S. Ct. at 1912 (describing the two components of DACA as "both benefits and forbearance.").

66. *Regents*, 140 S. Ct. at 1911–12.

67. *Id.* at 1912.

68. *Id.*

69. *Id.* at 1913 ("When an agency changes course, as DHS did here, it must 'be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account.'") (quoting Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2126 (2016)).

70. *Id.* at 1914 (internal quotations omitted).

71. *Id.* at 1913 ("[W]hen an agency rescinds a prior policy its reasoned analysis must consider the alternatives that are within the ambit of the existing policy.") (internal quotations omitted); *id.* at 1914–15 (listing alternatives that DHS could have considered while accounting for reliance interests).

the DACA program rather than terminate it all at once was, to the majority, indicative of the sort of alternatives that DHS should have considered.[72] Duke could have, for example, "considered a broader renewal period" or "more accommodating termination dates."[73] The majority left vague how detailed this analysis needed to be, saying only that DHS need not consider "every alternative device and thought conceivable by the mind of man."[74]

The majority concluded that the Duke Memo failed to satisfy any of these requirements. It did not consider separately the two components of the DACA program, articulate separate rationales for ending each of the two components, consider reliance interests or weigh alternatives to rescission in order to account for them. *Regents* thus requires that when one administration attempts to rescind the policies of its predecessors, it must: (1) separately consider each component of the policy, even if all of them are intertwined; (2) for each part to be rescinded, articulate a reasoned decision that considers alternatives to complete withdrawal; and (3) consider legitimate reliance interests and alternatives that might ameliorate the injury suffered by those who relied on the original decision. What's more, all of this must be accomplished in one, and only one, decision.[75]

Finally, *Regents* stands for two more propositions that bear on those rules. First, the rationales supporting rescission must include more than the administration's sincere belief that one part of the underlying policy is unlawful. And second, whether that belief is well-founded—that is, whether the policy is, in fact, unlawful—is immaterial because the Court will not consider that argument.

II. THE *DEPARTMENT OF COMMERCE* RULE

Although *Regents*' three requirements are reasonably clear (at least in the abstract), *Department of Commerce v. New York*[76] complicates this analysis because it stands for the proposition that an agency can comply with the APA's requirements and yet still see its action set aside if a court doubts the sincerity of the otherwise adequate rationale supporting the action. In *Department of Commerce*, the Secretary of Commerce issued a memo announcing his

72. *Id.* at 1914.

73. *Id.*

74. *Id.* at 1915 (internal quotations omitted) (quoting Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 551 (1978)).

75. *See supra* note 56 and accompanying text (discussing the majority's refusal to consider the subsequent Nielsen Memo).

76. 139 S. Ct. 2551 (2019).

intention to reinstate[77] on the decennial census[78] a question asking about the respondent's citizenship.[79] As in *Regents*, Chief Justice Roberts wrote the majority opinion. The Court held that the Secretary had the power to put a citizenship question on the census,[80] that his decision to do so was supported by the evidence before him,[81] that the decision was reasonable and adequately explained,[82] that it was not improper for the Secretary "to come into office with policy preferences,"[83] but that the Secretary could not put the question on the 2020 census because his proffered reason for doing so "seem[ed] to have been contrived."[84]

The majority framed *Department of Commerce* as an easy case of apparent pretext because the record contained "no hint" that the Secretary's proffered rationale for reinstating the citizenship question—*viz.*, enforcing the Voting Rights Act—was his true rationale,[85] leaving unresolved what to do in a situation where the administrative record is not so clear.[86] Regardless, *Department of Commerce* supplies a fourth rule to the three from *Regents*: the rationales supporting a rescission of a prior administration's policy must not be pretextual.[87]

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77. A citizenship or place-of-birth question appeared on the census every year from 1820 through 2000, with the exception of 1840. *Dep't of Commerce*, 139 S. Ct. at 2561.

78. *See* U.S. CONST. Art. 1, § 2, cl. 3, *amended by* U.S. Const. amend. XIV, § 2 (requiring a decennial census); 13 U.S.C. § 141(a) (delegating to the Secretary of Commerce the job of conducting the census "in such form and content as he may determine").

79. *Dep't of Commerce*, 139 S. Ct. at 2562.

80. *Id.* at 2567.

81. *Id.* at 2569–70.

82. *Id.* at 2571.

83. *Id.* at 2574–75.

84. *Id.* at 2575–76. In Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971), the Court held that "inquiry into the mental processes of administrative decisionmakers is usually to be avoided" except where there is a "strong showing of bad faith or improper behavior." It strains logic to fit "seems to have been contrived" within the ambit of "strong showing of bad faith," and consequently *Department of Commerce* is best read as an expansion of that exception.

85. *Dep't of Commerce*, 139 S. Ct. at 2575.

86. Perhaps in such a case the *Overton* rule would spring back into effect, *see* 401 U.S. at 420, but Justice Thomas warned that this conundrum "could lead judicial review of administrative proceedings to devolve into an endless morass of discovery and policy disputes not contemplated by the Administrative Procedure Act (APA)." *Id.* at 2567 (Thomas, J., dissenting); *see also id.* at 2582 ("[A] judge predisposed to distrust the Secretary or the administration could arrange those facts on a corkboard and—with a jar of pins and a spool of string—create an eye-catching conspiracy web.").

87. To spare the reader from flipping back several pages, the three rules from *Regents* are: (1) separately consider each component of the policy, even if all of them are intertwined; (2) for each part to be rescinded, articulate a reasoned decision that considers alternatives to

The lesson of *Department of Commerce* does not end there. The case leaves behind a potential landmine for future administrations because it seems to suggest that an administration may not change a predecessor's policy simply because it disagrees with it as a matter of principle. The record before the Court showed that the Trump Administration favored a citizenship question as a matter of principle, but the Administration did not add the question to the census on that basis. The Administration theoretically could have defended the policy on, say, the principled basis that a nation should know how many citizens it has, or on the basis that, in its legal determination, only citizens could be counted for apportionment.[88] The Administration, however, chose to defend the policy on purely utilitarian grounds, claiming to need the information so that the Department of Justice could enforce the Voting Rights Act.[89] The Court blocked the policy change on the government's own terms—the record lacked facts showing that the Administration really intended to use the data for the Voting Rights Act.[90] But would a rationale based on a difference of abstract principles or legal reasoning have sufficed?

Although *Department of Commerce* does not say so explicitly, it suggests that a difference of principles cannot without more justify changing a predecessor's policies. This is so because, as Justice Clarence Thomas noted in his partial dissent, the Court, for the first time ever, set aside an agency action on the ground that it was pretextual.[91] Nothing in the APA or past precedents, however, "instructs the Court to inquire into pretext."[92] Rather than venture into this new territory, the Court could have affirmed its deferential precedents, embraced the "presumption of regularity,"[93] and declared that it would not inquire into the Secretary's state of mind. It could have affirmed that the APA's requirements are procedural, and that where, as here, the record reveals an otherwise lawful process, the motivations for that process—be they principles, legal analysis, or mere preference for one

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complete withdrawal; and (3) consider legitimate reliance interests and alternatives that might ameliorate the injury suffered by those who relied on the original decision.

88. *But see* Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891 (2020). *Department of Commerce* involved no reliance interests, but New York argued that a citizenship question might deter noncitizens from participating in the census.

89. *Dep't of Commerce*, 139 S. Ct. at 2562.

90. *See id.* at 2575–76 ("Altogether, the evidence tells a story that does not match the explanation the Secretary gave for his decision.").

91. *See id*. at 2579 (Thomas, J., concurring in part and dissenting in part).

92. *Id*. at 2578.

93. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415 (1971); *see also* FCC v. Fox Television Studios, Inc., 556 U.S. 502, 513 (2009) (stating that a Court cannot "substitute its judgment for that of the agency") (citing Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins., 463 U.S. 29, 43 (1983)) (internal quotations omitted).

policy of another—are off-limits to the courts. The Court did not. It chose to forge a new path, which may suggest that the other path is now closed.

Accordingly, an administration that wants to play it safe should not defend an agency action solely on the basis of abstract principles or legal opinions, but instead should articulate a concrete justification for doing so and make sure the record reveals that the concrete justification, in fact, motivated the change. In short, the government should honestly explain why it is taking the action it prefers.

III. THE APPLICATION OF *REGENTS* AND *DEPARTMENT OF COMMERCE* TO THE BIDEN ADMINISTRATION

When President Biden took office, he said he would strive to create "unity" among a politically fractured citizenry by embracing bipartisan solutions to national issues.[94] Despite that pledge, he has set a record for using unilateral executive authority to undo his predecessor's policies. In his first month in office, Biden signed more executive orders than his three predecessors signed in their first months combined.[95] He also issued a score of proclamations and memoranda instructing his cabinet officials to rescind various Trump Administration policies.[96] As the administrative state moves to obey those orders, it must comply with the rules set out in *Regency* and *Department of Commerce* or risk that a court will block the Administration's actions.

To date, the Biden Administration has targeted a considerable number of Trump Administration policies and rules for rescission or rewrite.[97] *Regents* and *Department of Commerce* will raise hurdles when it does. To reiterate, those two decisions impose the following requirements on agency actions taken by

94. Joseph R. Biden, Jr., Inaugural Address (Jan. 20, 2021) (appealing to "unity" no fewer than eight different times), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/a-national-day-of-unity/; Joseph R. Biden, Jr., *A National Day of Unity*, The White House (Jan. 20, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/a-national-day-of-unity/; *see also* Philip Bump, *Biden Just Set A Very High Bar for When He Thinks He Will Have Achieved Unity*, WASH. POST (Jan. 25, 2021), https://www.washingtonpost.com/politics/2021/01/25/biden-just-set-very-high-bar-when-he-thinks-he-will-have-achieved-unity/ (collecting similar statements Biden made elsewhere).

95. *See* FEDERAL REGISTER, EXECUTIVE ORDERS, https://www.federalregister.gov/presidential-documents/executive-orders (last visited Oct. 12, 2021) (in his first three weeks, Biden signed thirty executive orders whereas his three predecessors had signed a combined total of twenty-nine executive orders in their first three weeks).

96. *See generally* THE WHITE HOUSE, PRESIDENTIAL ACTIONS, https://www.whitehouse.gov/briefing-room/presidential-actions/ (last visited Oct. 12, 2021).

97. *See* Press Release, The White House, Fact Sheet: List of Agency Actions for Review (Jan. 20, 2021) https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-list-of-agency-actions-for-review/ (last visited, Oct. 12, 2020).

the Biden Administration against Trump Administration policies. The agency must:

1. separately consider each part of the policy;
2. articulate a reasoned decision for rescinding each part and consider alternatives to rescission;
3. consider reliance interests and alternatives that account for or ameliorate them; and
4. ensure that the rationale underpinning the rescission is directed at achieving a concrete outcome (in other words, is not based solely on a difference of principles, legal opinion, or policy preference) and is not pretextual.[98]

As discussed above, these requirements impose more onerous obligations on an administration than the Court's past decisions had and also reduce the level of deference agencies previously enjoyed from the Court. At the very least, therefore, these rules will increase the work required before the Biden Administration can rescind Trump Administration actions. The decisionmaking process must necessarily be more granular (each separate component of a rescinded action must be considered and alternatives weighed) and more specific (rationales must be tied to concrete aims and present in the record). This increase in workload will likely mean that rescissions of Trump Administration actions will be slower in coming than, for example, most of Trump's rescissions of Obama's actions. Some recent decisions already support this prediction and adopted an understanding of *Regents*' requirements that substantially aligns with the one set out in this Article.[99]

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98. This assumes, of course, that the action in question falls within the scope of the APA. *But see infra* PART IV (discussing President Biden's rescissions of the Trump policies that are likely not subject to APA review).

99. *See, e.g.*, Biden v. Texas, No. 21A21, 2021 WL 3732667, at *1 (U.S. Aug. 24, 2021) (citing *Regents* and denying a stay sought by the Biden Administration of a lower court order that ruled that the Administration violated the APA when it terminated a Trump era program entitled the *Migrant Protection Protocols*); State v. Biden, No. 21-10806, 2021 WL 3674780, at *15 (5th Cir. Aug. 19, 2021) (denying the Administration's request for a stay and, like the district court below it, adopting a reading of *Regents* much the same as the one articulated here); State v. Biden, No. 2:21-CV-067-Z, 2021 WL 3603341, at *15, 19 (N.D. Tex. Aug. 13, 2021) (ruling that the Administration violated the APA when it terminated the *Migrant Protection Protocols* and adopting much the same reading of *Regents* as is set forth in this Article); State v. United States, No. 6:21-CV-00016, 2021 WL 3683913, at *44 (S.D. Tex. Aug. 19, 2021) (granting a preliminary injunction against implementation of a Biden administrative rule that would narrow immigration enforcement after finding it likely to violate the APA, and adopting an understanding of *Regents*' requirements that comports with the one set out here).

A. Environmental Actions

Regents will mostly likely affect the Biden Administration's efforts to rescind the Trump Administration's environmental actions. On his first day in office, President Biden issued an executive order directing all agencies and departments to "immediately review" and "consider suspending, revisiting, or rescinding" all agency actions related to the environment promulgated during President Trump's four years in office.[100] In addition to that broad directive, President Biden targeted several specific Trump Administration policies and set deadlines by which the relevant agencies must issue new proposed rules.[101] So far, the agencies have not yet promulgated those rules, but Biden's order previews a number of ways in which the agencies may run afoul of *Regents*.

As a general rule, the targeted Trump Administration rules relaxed regulatory burdens on industry. Consequently, industries were able to expand production, mine for natural resources in previously restricted places, manufacture products at lower emissions standards, use certain fertilizers and pesticides on farms near waterways where it was previously forbidden, and so forth. Each time the Trump Administration lightened the regulatory

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100. Exec. Order No. 13990, 86 Fed. Reg. 7037 (Jan. 20, 2021).

101. *See id*. at 7037–40 (singling out, among other executive orders and proclamations, the following agency actions: Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Reconsideration, 85 Fed. Reg. 57398 (Sept. 15, 2020); The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program, 84 Fed. Reg. 51310 (September 27, 2019); The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks, 85 Fed. Reg. 24174 (Apr. 30, 2020); Energy Conservation Program for Appliance Standards: Procedures for Use in New or Revised Energy Conservation Standards and Test Procedures for Consumer Products and Commercial/Industrial Equipment, 85 Fed. Reg. 8626 (Feb. 14, 2020); Energy Conservation Program for Appliance Standards: Procedures for Evaluating Statutory Factors for Use in New or Revised Energy Conservation Standards, 85 Fed. Reg. 50937 (Aug. 19, 2020); Final Determination Regarding Energy Efficiency Improvements in the 2018 International Energy Conservation Code (IECC), 84 Fed. Reg. 67435 (Dec. 10, 2019); Final Determination Regarding Energy Efficiency Improvements in ANSI/ASHRAE/IES Standard 90.1-2016: Energy Standard for Buildings, Except Low-Rise Residential Buildings, 83 Fed. Reg. 8463 (Feb. 27, 2018); National Emission Standards for Hazardous Air Pollutants: Coal- and Oil-Fired Electric Utility Steam Generating Units—Reconsideration of Supplemental Finding and Residual Risk and Technology Review, 85 Fed. Reg. 31286 (May 22, 2020); Increasing Consistency and Transparency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process, 85 Fed. Reg. 84130 (Dec. 23, 2020); Strengthening Transparency in Pivotal Science Underlying Significant Regulatory Actions and Influential Scientific Information, 86 Fed. Reg. 469 (Jan. 6, 2021); Notice of Availability of the Record of Decision for the Final Environmental Impact Statement for the Coastal Plain Oil and Gas Leasing Program, Alaska, 85 Fed. Reg. 51754-01 (Aug. 21, 2020)).

burden, industry participants could make investments, purchase material, secure leases and contracts, and hire personnel in reliance thereon. Moreover, most of these regulations are multifaceted; indeed, they are much more complex than the DACA program. Accordingly, *Regents* looms large over the Biden Administration's efforts to undo them.

Consider, for example, Biden's order that the Secretary of the Interior place a temporary moratorium on all government activities relating to the Coastal Plain Oil and Gas Leasing Program.[102] Biden targeted that program because of "alleged legal deficiencies underlying [it]."[103] The Tax Cuts and Jobs Act of 2017 mandates the Coastal Plain Oil and Gas Leasing Program, which among other things, directs the Bureau of Land Management to lease certain lands within the Coastal Plain and the Arctic National Wildlife Refuge for oil and natural gas exploration and drilling.[104] The program determines where and under what terms exploration and drilling may occur and is highly complex. Whereas the DACA program had two components, the Coastal Plain Oil and Gas Leasing Program has scores.[105] Among other things, it provides for leaseholders to obtain the various legal rights necessary for exploration and drilling, including rights-of-way, easements, and other legal arrangements delineating where they may construct production and support facilities.[106]

The Trump Administration conducted the first sale of leases pursuant to the program on January 6, 2021,[107] and issued the first leases on

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102. *See* Notice of Availability of the Record of Decision for the Final Environmental Impact Statement for the Coastal Plain Oil and Gas Leasing Program, Alaska, 85 Fed. Reg. 51754-01. The record of decision and the myriad other documents pertaining to the program can be found on the website of the Bureau of Land Management. *See* BUREAU OF LAND MGMT., U.S. DEP'T OF THE INTERIOR, COASTAL PLAIN OIL AND GAS LEASING PROGRAM ENVIRONMENTAL RECORD OF DECISION (2020), https://eplanning.blm.gov/public_projects/102555/200241580/20024135/250030339/Coastal%20Plain%20Record%20of%20Decision.pdf (last visited Oct. 12, 2021) [hereinafter Record of Decision].

103. Notice of Availability of the Record of Decision for the Final Environmental Impact Statement for the Coastal Plain Oil and Gas Leasing Program, Alaska, 85 Fed. Reg. 51754-01. The executive order neither identified those alleged deficiencies nor cited any document that did.

104. Pub. L. No. 115-97, 131 Stat. 2054, 2235-36 (2017).

105. *See generally* Record of Decision, *supra* note 102.

106. *Id*.

107. Press Release, Bureau of Land Mgmt., Trump Administration Conducts First ANWR Coastal Plain Oil and Gas Lease Sale, U.S. Dep't of the Interior (Jan. 6, 2021), https://www.blm.gov/press-release/trump-administration-conducts-first-anwr-coastal-plain-oil-and-gas-lease-sale (last visited Oct. 12, 2021).

January 19.[108] The Bureau of Land Management called the 437,804 acres leased "some of the most highly prospective land on Alaska's North Slope"[109] and the U.S. Geological Survey estimated that excavators could gather billions of barrels of oil and trillions of cubic feet of natural gas from the Coastal Plain.[110] This king's ransom of resource wealth translates to weighty reliance interests. The companies that obtained leases would have purchased materials and machinery, hired and trained employees, secured financing, and hired various subcontractors and service providers to prepare for operations. The reliance interests are not, however, limited only to the companies that received leases. The companies that purchased leases but had not yet received them when President Biden ordered the moratorium would also have secured financing, material, and personnel in anticipation of beginning operations. What is more, as with some DACA recipients, employees of these companies likely took jobs, invested in education, and purchased or leased homes in reliance on these future jobs.[111] Subcontractors and investors, too, would have made capital outlays and other decisions in reliance on the program.

Regents, if consistently applied, will impose monumental obligations on the Secretary of the Interior's final rewrite or rescission of this program. The Secretary will have to articulate separate rationales for rescinding each of the myriad components of the program and will have to account for the significant and varied reliance interests. An agency decision that amounts to the declaration "too bad" will not pass muster. Moreover, a court applying *Regents* consistently cannot affirm a final decision to rescind the lease program on the ground that the Administration believes it suffers from "alleged legal deficiencies."[112] Neither can a court faithfully applying *Regents* uphold a decision to rescind the program on the grounds that it is, in fact, unlawful. *Regents*, after all, refused to go there.

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108. Press Release, Bureau of Land Mgmt., Leases Issued for ANWR Coastal Plain Oil & Gas Program, U.S. Dep't of the Interior (Jan. 19, 2021), https://www.blm.gov/press-release/leases-issued-anwr-coastal-plain-oil-gas-program (last visited Oct. 12, 2021).

109. *Id.*

110. Press Release, U.S. Dep't of the Interior, New Interior Department Survey Shows HUGE Increase in Recoverable Energy Resources in Federal, State and Native Lands and Waters in Alaska (Dec. 22, 2017), https://www.doi.gov/pressreleases/new-interior-department-survey-shows-huge-increase-recoverable-energy-resources (last visited Oct. 12, 2021).

111. *See* Dep't of Homeland Sec. v. Regents of Univ. of Cal., 140 S. Ct. 1891, 1914 ("[S]ince 2012, DACA recipients have enrolled in degree programs, embarked on careers, started businesses, purchased homes, and even married and had children, all in reliance on the DACA program.") (internal quotations omitted).

112. *See* Exec. Order No. 13990, 86 Fed. Reg. 7037, § 4.

This all supposes that the Secretary of the Interior issues a final rule rescinding the program, but even the temporary moratorium may present a *Regents* problem. Unlike every other agency action targeted by Executive Order 13990, President Biden did not set a deadline by which the Secretary must promulgate a replacement for the Coastal Plain Oil and Gas Leasing Program.[113] That raises the question whether the "temporary" moratorium is, in fact, a "final agency action" subject to legal challenge either because it is, *de facto*, final, or because it amounts to unlawful inaction.[114] Such a claim

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113. *See generally* Exec. Order No. 13990, 86 Fed. Reg. 7037.

114. The APA permits challenges only to "final" agency actions but does not define finality. In *Bennett v. Spear*, 520 U.S. 154 (1997), the Supreme Court set out a two-part test for finality: "First, the action must mark the consummation of the agency's decision-making process" and not be "of a merely tentative or interlocutory nature," and second, the action must determine "rights or obligations" or have "legal consequences." *Id.* at 177–78 (internal quotations omitted). A forest's-worth of paper has been covered in ink to figure out when an agency action is "final," and this paper won't contribute to that debate, its purpose, after all, being only to identify potential hurdles posed by *Regents*. Regardless, a "temporary" moratorium under these conditions may amount to a final action either because it is, in fact, permanent, or because it amounts to reviewable inaction. The latter argument hinges on the fact that the Tax Cuts and Jobs Act requires the Secretary to set up and administer a lease program for the Coastal Plain and therefore deprives him or her of discretion to refuse to do so. Where an agency has a statutory obligation to take action, a failure to do so may be challenged under the APA. *See* 5 U.S.C. § 551(13) (2020) (defining "agency action" to include "failure to act."); *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004) (holding that courts can force an agency to act only where the agency has "failed to take a discrete action that it is required to take."); *Heckler v. Chaney*, 470 U.S. 821, 832–33, 833 n.4 (1985) (holding that the courts may not review inaction where, unlike here, the decision to act is committed to the agency's discretion, but holding too that review of inaction is available when inaction amounts to "an abdication of [the agency's] statutory responsibilities."); *id*. at 854 (Marshall, J., concurring) (describing the holding as permitting judicial review of agency inaction to "assure that it is not arbitrary, capricious, or an abuse of discretion" unless Congress clearly expressed an intent to preclude review) (internal quotations omitted); Sierra Club v. Thomas, 828 F.2d 783, 793–94 (D.C.Cir.1987) (observing that Court may view inaction as final action, as abdication of duty, or as unreasonable delay); Estate of Smith v. Heckler, 747 F.2d 583, 591 (10th Cir. 1984) (holding relief appropriate where a "ministerial, clearly defined and peremptory" duty exists); *see also* Eric Biber, *The Importance of Resource Allocation in Administrative Law*, 60 ADMIN. L. REV. 1, 10 (2008) (describing the difficulties for courts in challenges to agency inaction as, in part, a problem of framing inaction as final action reviewable under § 706(2), or as "inaction" reviewable under § 706(1)); Mary M. Cheh, *When Congress Commands a Thing to be Done: An Essay on* Marbury v. Madison, *Executive Inaction, and the Duty of the Courts to Enforce the Law*, 72 GEO. WASH. L. REV. 253, 279 (2003); Steven Ostrow, *Enforcing Executive Orders: Judicial Review of Agency Action Under the Administrative Procedure Act*, 55 GEO. WASH. L. REV. 659, 674 (1987) (collecting cases for the proposition that "[a]gency inaction may also

may be bolstered by an argument, reminiscent of *Department of Commerce*, that the temporary moratorium is pretextual. Public statements by Biden and his officials arguing that the Coastal Plain program should be permanently terminated may be offered as evidence that the open-ended moratorium is, in fact, a final action.[115]

As Biden's executive agencies begin the process of reviewing and then revising or rescinding every Trump Administration environmental policy, *Regents* sets a number of high hurdles that, at the very least, will lengthen that process. The targeted policies are multifaceted, and *Regents* requires the Biden Administration to consider each and every facet separately and articulate discrete reasons for revision or rescission.[116] What is more, the reliance interests generated by these rules are often significant and diffused across many groups of people. The Biden Administration faces a more significant task accounting for these reliance interests than the Trump Administration did in considering DACA recipients' reliance interests. Finally, if the Biden Administration intends to rescind the program on the ground that it believes the program is unlawful, administration officials will need to articulate a theory that applies to each separate part of the program

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constitute 'final agency action' when it has the same effect of the rights and duties of private parties as a denial of relief."); Cass R. Sunstein, *Reviewing Agency Inaction After* Heckler v. Chaney, 52 U. CHI. L. REV. 653, 667 (1985) ("With the rise of the regulatory state . . . both action and inaction amount to decisions."); Catherine Zaller, *The Case for Strict Statutory Construction of Mandatory Agency Deadlines Under Section 706(1)*, 42 WM. & MARY L. REV. 1545, 1553–54 (2001) (arguing that where a statute sets a deadline for agency action, an agency can be compelled to act). Regardless, the temporary moratorium, if it is indeed followed up by a subsequent rescission or rewrite of the program, may be challenged at that time. *See* 5 U.S.C. § 704 (2020) ("A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action.").

115. *See, e.g.*, Tegan Hanlon, *Biden Immediately Slams The Brakes on Oil Drilling in Arctic Refuge*, ALASKA PUB. MEDIA, (Jan. 20, 2021) https://www.alaskapublic.org/2021/01/20/biden-to-immediately-slam-the-brakes-on-oil-leasing-in-arctic-refuge/ (noting that Biden campaigned on "permanently protecting" the area and "reversing Trump's attacks" on it); Trine Jonassen, *Biden Halts Arctic Refuge Oil Program*, HIGH NORTH NEWS, (Jan. 21, 2021) https://www.highnorthnews.com/en/biden-halts-arctic-refuge-oil-program (same).

116. *See, e.g.*, The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks, 85 Fed. Reg. 24,174-01 (Apr. 30, 2020) (establishing standards governing vehicle carbon dioxide emissions and corporate average fuel economy); Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43,304 (July 16, 2020); The Navigable Waters Protection Rule: Definition of "Waters of the United States," 85 Fed. Reg. 22,250 (April 21, 2020). These rules, and many more, have been targeted for rescission or rewrite by the Biden Administration. *See* Press Release, The White House, Fact Sheet: List of Agency Actions for Review, *supra* note 97.

or to the entire program. If its beliefs about the program's unlawfulness apply only to components of the program, *Regents* will prevent the administration from rescinding the program in full.

B. Commercial Actions

President Biden has instructed his department and agency heads to review a number of agency actions that affect commerce.[117] Nearly all of the targeted actions, in one way or another, loosened restrictions on particular industries.[118] Rescinding these actions might shut down some lines of business, force the termination of certain product lines, necessitate a contraction of production, or impose new compliance costs. *Regents* and *Department of Commerce* will add their full weight to these actions and increase their administrative inertia.

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117. *See* Press Release, The White House, Fact Sheet: List of Agency Actions for Review, *supra* note 97.

118. *See, e.g.*, Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to Geophysical Surveys Related to Oil and Gas Activities in the Gulf of Mexico, 86 Fed. Reg. 5,322 (Jan. 19, 2021); Standards of Performance for Volatile Organic Liquid Storage Vessels (Including Petroleum Liquid Storage Vessels) for Which Construction, Reconstruction, or Modification Commenced After July 23, 1984, 86 Fed. Reg. 5,013 (Jan. 19, 2021); Energy Conservation Program: Energy Conservation Standards for Small Electric Motors, 86 Fed. Reg. 4,885 (Jan. 19, 2021); National Primary Drinking Water Regulations: Lead and Copper Rule Revisions, 86 Fed. Reg. 4,198 (Jan. 15, 2021); Reissuance and Modification of Nationwide Permits, 86 Fed. Reg. 2,744 (Jan. 13, 2021); Energy Conservation Program for Appliance Standards: Procedures for Use in New or Revised Energy Conservation Standards and Test Procedures for Consumer Products and Commercial/Industrial Equipment, 85 Fed. Reg. 8,626 (Feb. 14, 2020); The Navigable Waters Protection Rule: Definition of "Waters of the United States," 85 Fed. Reg. 22,250 (April 21, 2020); Energy Conservation Program for Appliance Standards: Procedures for Evaluating Statutory Factors for Use in New or Revised Energy Conservation Standards, 85 Fed. Reg. 50,937 (Aug. 19, 2020); Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals From Electric Utilities; A Holistic Approach to Closure Part A: Deadline To Initiate Closure, 85 Fed. Reg. 53,516 (Aug. 28, 2020); Special Areas; Roadless Area Conservation; National Forest System Lands in Alaska, 85 Fed. Reg. 68,688-01 (Oct. 29, 2020); Energy Conservation Program: Establishment of a New Product Class for Residential Dishwashers, 85 Fed. Reg. 68,723 (Oct. 30, 2020); Pesticides; Agricultural Worker Protection Standard; Revision of the Application Exclusion Zone Requirements, 85 Fed. Reg. 68,760 (Oct. 30, 2020); Energy Conservation Program: Energy Conservation Standards for General Service Incandescent Lamps, 84 Fed. Reg. 71,626 (Dec. 27, 2019); Final Determination Regarding Energy Efficiency Improvements in ANSI/ASHRAE/IES Standard 90.1–2016: Energy Standard for Buildings, Except Low-Rise Residential Buildings, 83 Fed. Reg. 8,463 (Feb. 27, 2018).

Consider, for example, President Trump's dishwasher rule[119] and a similar rule about energy efficient lamps.[120] Biden has targeted both for potential rescission.[121] The dishwasher rule exempted certain fast-cleaning dishwashers from regulatory limits on the amount of power and water that a dishwasher could use.[122] The lamp rule rolled-back rules that required lamps to comply with various energy efficiency requirements.[123] As a result of those rolled-back rules, appliance manufacturers have been able to develop, manufacture, and market new products. Moreover, consumers have been able to acquire faster cleaning dishwashers and cheaper, brighter lamps. If the Biden Administration rescinds these rules, the manufacturers will lose the capital outlays on the new models and may not be able to sell what stock they have remaining.

Consider, too, the Department of Labor's rule regarding fiduciaries of employee benefit plans subject to the Employee Retirement Income Security Act[124] (ERISA).[125] It too has been targeted by the Biden Administration for potential rescission.[126] That rule forbids plan fiduciaries from sacrificing investment returns or increasing investment risk to promote non-pecuniary benefits or goals.[127] It also requires that the financial interests of plan participants and beneficiaries be the fiduciary's only goal.[128] The rule's purpose is to "safeguard against the risk that fiduciaries will improperly find economic equivalence and make decisions based on non-pecuniary factors without a proper analysis and evaluation."[129] As such it grants plan participants the benefits of decreased risk and assurance that their fiduciary is acting only in their best pecuniary interests. Plan beneficiaries may reasonably act in reliance on those benefits. They may, for example, choose to invest in an ERISA plan in the first place, knowing that it will be managed only for their pecuniary gain.

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119. Energy Conservation Program: Establishment of a New Product Class for Residential Dishwashers, 85 Fed. Reg. 68,723 (Oct. 30, 2020).

120. Energy Conservation Program: Energy Conservation Standards for General Service Incandescent Lamps, 84 Fed. Reg. 71,626 (Dec. 27, 2019).

121. *See* Press Release, *supra* note 97.

122. *See* Energy Conservation Program: Establishment of a New Product Class for Residential Dishwashers, 85 Fed. Reg. 68,723 (Oct. 30, 2020).

123. *See* Energy Conservation Program: Energy Conservation Standards for General Service Incandescent Lamps, 84 Fed. Reg. 71,626 (Dec. 27, 2019).

124. 29 U.S.C. § 1001, et seq.

125. Financial Factors in Selecting Plan Investments, 85 Fed. Reg. 72,846-01 (Nov. 13, 2020).

126. *See* Press Release, *supra* note 97.

127. Financial Factors in Selecting Plan Investments, 85 Fed. Reg. 72,846-01 (Nov. 13, 2020).

128. *Id.*

129. *Id.* These non-pecuniary factors may include environmental, social, and corporate governance factors associated with advancing certain political causes instead of seeking pure financial gain for the investment plan.

They may likewise increase their investment in the plan for the same reason. *Regents* will require the Biden Administration to carefully articulate a reason for rescinding the policy and to account for these reliance interests. Likewise, *Department of Commerce* will require the Biden Administration to tie rescission to some concrete objective and to show it in the record.

There are scores more agency actions targeted for rescission that affect commerce in one way or another. *Regents* and *Department of Commerce* will increase their administrative inertia. Most are complex and multifaceted. *Regents* will require carefully articulated reasons for rescinding each part that balance alternatives to rescission. Likewise, they confer benefits and create reliance interests that will have to be accounted for. Moreover, it will be insufficient for the Biden Administration to rescind them solely because the Administration thinks they are unlawful. Lastly, the decisions proffered for rescinding the actions will have to be tied to some concrete objective and the record will have to show it.

IV. RESCISSIONS LIKELY TO ESCAPE APA REVIEW

Some Trump Administration policies targeted for rescission by the Biden Administration are likely to escape APA review, and therefore are likely to avoid *Regents*' requirements.

A. Keystone XL Pipeline

The first is the Keystone XL pipeline. Executive Order 13990[130] also rescinded the presidential permit that President Trump had issued[131] for the Keystone XL pipeline, thereby terminating that project. At first blush, rescission of the presidential permit seems to run afoul of *Regents*. Biden's order relies entirely on an old study from the Obama Administration to conclude that it is not in the national interest; his order conducts no new reasoning, does not consider alternatives, and does not consider the significant reliance interests of Canada, TC Energy (the company primarily responsible for the pipeline's construction), the workers,[132] investors,

130. Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis, 86 Fed. Reg. 7,037 (Jan. 25, 2021).

131. Presidential Permit of March 29, 2019, 84 Fed. Reg. 13,101 (Apr. 3, 2019).

132. After Biden issued the order, TC Energy announced that it would be forced to lay off thousands of workers as a result of the termination of the pipeline. Press Release, TC Energy, TC Energy Disappointed with Expected Executive Action Revoking Keystone XL Presidential Permit (Jan. 20, 2021) https://www.tcenergy.com/announcements/2021-01-20-tc-energy-disappointed-with-expected-executive-action-revoking-keystone-xl-presidential-permit/ (last visited Oct. 12, 2020).

subcontractors, or anyone else. It is, nevertheless, unlikely that the cancellation of the pipeline is reviewable under the APA.

In *Franklin v. Massachusetts*,[133] the Supreme Court held that actions of the President are not reviewable under the APA.[134] This scenario does not arise frequently because most of the President's agenda is carried out by the executive agencies, but the presidential permitting process is unusual. Prior to April 2019, pursuant to an executive order issued by President George W. Bush,[135] the Secretary of State was primarily responsible for issuing presidential permits, but the President retained final decisionmaking authority if another agency or department head disagreed with the Secretary of State's decision.[136] In one of the early lawsuits over the Keystone XL pipeline, the D.C. District Court rejected an APA challenge to Bush's presidential permit on the grounds that, by keeping some decisionmaking authority for himself, the President was ultimately responsible for the issuance of a presidential permit, and thus it was a presidential action insulated from APA review by *Franklin*.[137] When Trump issued his permit for the pipeline, he removed the Secretary of State even further from the process.[138] His permit cited only his own authority for issuing the permit "notwithstanding Executive Order 13337," and made no mention of the Secretary of State.[139]

Then, in April 2019, President Trump rescinded the Bush executive order and placed sole authority for issuing presidential permits in himself.[140] Under

133. 505 U.S. 788 (1992).

134. *Id*. at 800–01 ("The President is not explicitly excluded from the APA's purview, but he is not explicitly included, either. Out of respect for the separation of powers and the unique constitutional position of the President, we find that textual silence is not enough to subject the President to the provisions of the APA. We would require an express statement by Congress before assuming it intended the President's performance of his statutory duties to be reviewed for abuse of discretion. As the APA does not expressly allow review of the President's actions, we must presume that his actions are not subject to its requirements. Although the President's actions may still be reviewed for constitutionality, we hold that they are not reviewable for abuse of discretion under the APA.") (citations omitted).

135. Exec. Order No. 13,337, 69 Fed. Reg. 25,299 (May 5, 2004).

136. *Id.*

137. Nat. Res. Def. Council, Inc. v. U.S. Dep't of State, 658 F. Supp. 2d 105, 111 (D.D.C. 2009) (ruling that the Secretary of State "stands in the President's shoes by exercising the President's inherent discretionary power under the Constitution to issue cross-border permits") (citing *Franklin,* 505, U.S. 788).

138. Presidential Permit of March 29, 2019, 84 Fed. Reg. 13101 (making no reference to the Secretary of State)

139. *Id*. (declaring the President has the "sole discretion" to terminate or amend the permit "with or without the advice provided by any executive department or agency.").

140. Exec. Order No. 13867, 84 Fed. Reg. 15491 (Apr. 10, 2019).

that order, neither the Secretary of State nor any other executive official has any role in issuing presidential permits except to give the President advice.[141] As a result, there is no room to argue that granting or rescinding a presidential permit is reviewable under the APA. No agency or officer takes any action in that process. Accordingly, President Biden's decision to rescind the presidential permit for the Keystone XL pipeline likely cannot be challenged under the APA and therefore escapes the requirements of *Regents* and *Department of Commerce*.

B. Border Wall Funding

President Biden's decision to rescind funding for the border wall is also likely to avoid APA review. In this case, President Biden's decision to rescind funding will cause the cancellation of various contracts, for which there exists "an adequate remedy in a Court,"[142] namely a breach of contract action pursuant to the Tucker Act.[143]

On January 20, 2021, President Biden issued a proclamation ending the state of emergency that President Trump had declared with respect to the southern border.[144] President Trump's emergency declaration permitted the Department of Defense to reallocate funds from other projects to the construction of a border wall.[145] Environmental groups and the states of California and New Mexico sued to block the Secretary from reallocating those funds on the grounds, among others, that the reallocation violated the APA.[146] The case was pending at the Supreme Court when President Biden ended the emergency and successfully petitioned the Court to hold the case in abeyance.[147] Over the course of the litigation, an injunction was imposed, lifted, and reimposed, but the Trump

141. *Id*. ("Any decision to issue, deny, or amend a permit under this section shall be made solely by the President.").

142. 5 U.S.C. § 704 (2020) ("Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a Court are subject to judicial review.").

143. 28 U.S.C. § 1491 (2020) (providing that the Court of Federal Claims has jurisdiction of claims by or against a contractor, including disputes regarding the termination of a contract).

144. Proclamation No. 10142, 86 Fed. Reg. 7225 (Jan. 20, 2021) (terminating the emergency and pausing construction and use of funds on the boarder wall).

145. Proclamation No. 9844, 84 Fed. Reg. 4949 (Feb. 15, 2019); *see also* 10 U.S.C. § 2808 (2020) (permitting the Secretary of Defense to reallocate any of the "total amount of funds that have been appropriated for military construction" towards "military construction projects" necessary to address the emergency).

146. *See* Brief for Respondents at 34, Trump v. Sierra Club, No. 20–138 (Jan. 12, 2021) 2021 WL 143354 at *34 (held in abeyance Feb. 03, 2021); Brief of the States of California and New Mexico at 20, Trump v. California, No. 20–138 (Jan. 12, 2021) 2021 WL 143355 at *20 (held in abeyance Feb. 03, 2021) [hereinafter Briefs].

147. Biden v. Sierra Club, 141 S. Ct. 1289 (No. 20–138) (2021) (mem.) (order granting motion to hold briefing in abeyance and remove case from argument calendar).

Administration was at least partially successful in securing construction contracts and using the diverted funds to begin construction on the wall.[148]

President Biden's proclamation instructs the Secretaries of Defense and Homeland Security to pause construction of the wall and "obligation of funds" related to the construction, assess the legality of the "funding and contracting methods used to construct the wall," assess the administrative consequences of ceasing each construction project, and develop a plan to redirect the funding or repurpose the contracts.[149] The proclamation imposes deadlines on these actions,[150] and thus likely avoids the problem of Coastal Plain Oil and Gas Leasing Program lease program, where the temporary freeze may amount to a final agency action.

As with the Keystone XL pipeline, the specter of *Regents* looms because there are significant reliance interests[151] and President Biden's order requires the Secretaries only to consider the legality of the reallocation of funds as they decide whether to cancel or repurpose the contracts.[152] When President Trump ordered the Department of Defense to reallocate funds, the Department already had on hand some funds allocated to the border wall.[153] *Regents* seems to hold that it would be arbitrary and capricious for the Biden Administration to cancel those contracts solely on the grounds that it believes that the reallocation of funds was unlawful. But President Biden's order makes clear that the anticipated

148. *See* Trump v. Sierra Club, 140 S. Ct. 1 (2019) (staying the lower court order granting an injunction); *id.* at 2 (Breyer, J., concurring in part and dissenting in part) (noting that the government was, as a result of the Court's order, now free to enter into construction contracts); Brief for Petitioner at 10–13, Trump v. Sierra Club, No. 20–138 (Dec. 2020) 2020 WL 7246570 at *10–13 (held in abeyance Feb. 03, 2021) (recounting the facts and noting that some construction has begun); *see also* Christopher Giles, *Trump's Wall: How Much Has Been Built During His Term?*, BBC News (Jan.12, 2021) https://www.bbc.com/news/world-us-canada-46748492 (noting that Trump was able to build part of the wall with the diverted funds).

149. Proclamation No. 10142, 86 Fed. Reg. 7225.

150. *Id.* (requiring construction to be paused no later than seven days after the proclamation and plan for redirecting funding and repurposing contracts be developed within sixty days of the proclamation).

151. *See Regents*, 140 S. Ct. at 1913 (reliance interests must be considered when changing policy). Like those who acquired leases or anticipated acquiring leases for the Coastal Plain Oil and Gas Leasing Program, these contractors, their employees, investors, and subcontracts will have made capital outlays, contracts, hiring, training, and relocation decisions based on the Department of Defense's contracts with them, which, of course, promise the contractors payment from the reallocated funds. *See, e.g.*, Victor Reklaitis, *Here are the Companies poised to profit from the Trump Border Wall*, Market Watch (Feb. 25, 2019), https://www.marketwatch.com/story/here-are-the-companies-poised-to-profit-from-the-trump-border-wall-2019-02-22.

152. Proclamation No. 10142, 86 Fed. Reg. 7225 at § 1(i)(A).

153. *See* Briefs cited *supra* at notes 142 & 144.

agency action is terminating or "repurposing" contracts.[154] Those actions are properly challenged by breach of contract suits where monetary damages provide an adequate remedy.[155] Moreover, it is dubious that the contractors could recast their ex-contractual claims to fit within the APA.[156]

CONCLUSION

Agency actions, like objects in motion, resist being reversed. That resistance is administrative inertia and is measured by the amount of effort an administration must expend to reverse it in compliance with the APA. *Regents* and *Department of Commerce* increase administrative inertia by requiring that, before an agency may rescind an action that confers a benefit, the agency must separately consider each part of a policy, articulate granular and specific decisions for rescission, consider reliance interests and alternatives, and ensure that the rationale is directed at a concrete outcome and that the record shows it. If the courts apply these decisions to the Biden Administration in the same way that the Supreme Court applied them to the Trump Administration, the Biden Administration will likely find it much harder to rescind many Trump Administration policies than it was for past presidents to rescind the policies of their predecessors. This increased administrative inertia will be most noticeable in agency actions that loosened environmental restrictions and relaxed regulatory burdens on commerce.

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154. Proclamation No. 10142, 86 Fed. Reg. 7225 at § 2.

155. *See, e.g.*, Brazos Elec. Power Coop., Inc. v. United States, 144 F.3d 784, 788 (Fed. Cir. 1998) (rejecting an APA claim where the remedy sought amounted to specific performance of contractual obligations and the claim fell within the scope of the Tucker Act); Ala. Rural Fire Ins. Co. v. Naylor, 530 F.2d 1221, 1230 (5th Cir. 1976) (same); Int'l Eng'g Co., Div. of A-T-O v. Richardson, 512 F.2d 573, 578 (D.C. Cir. 1975) (same).

156. *Cf.* Megapulse, Inc. v. Lewis, 672 F.2d 959, 969 (D.C. Cir. 1982) ("We are convinced that Megapulse's claims against the Government are not 'disguised' contract claims. Megapulse has gone to great lengths to demonstrate that it is not relying on the contract at all. It does not claim a breach of contract . . . it seeks no monetary damages against the United States, and its claim is not properly characterized as one for specific performance. Appellant's position is ultimately based, not on breach of contract, but on an alleged governmental infringement of property rights and violation of the Trade Secrets Act."); Robbins v. BLM 438 F.3d 1074, 1083 n.9 (10th Cir. 2006) ("It must be recognized that the plain language of the Tucker and Little Tucker Acts does not distinguish between claims founded on contracts and those founded on the Constitution, statutes, or regulations. However, our analysis in regard to the relation between these Acts and the 'impliedly forbids' exception to the APA waiver of sovereign immunity is, like those of other circuits, limited to contract claims."); *see also* Richard H. Seamon, *Separation of Powers and the Separate Treatment of Contract Claims Against the Federal Government for Specific Performance*, 43 VILL. L. REV. 155, 191–92 (1998) ("[A]lthough the text of the Tucker Act does not accord contract claims special treatment, the legal landscape in which it was enacted had already established such special treatment.").