

REGULATORY UNCERTAINTY AND NEW SOURCE PERFORMANCE STANDARDS ON METHANE

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Recent U.S. presidential administrations have been the apex of what scholars have identified as “the rise of executive-level power, the use of the ‘administrative presidency,’ and the growing democratic deficit.”¹ Indeed, with legislative gridlock in the U.S. Congress that seems to have no end in sight, the use of agencies in the executive branch has been adopted by both political parties as the main vehicle of policymaking.²

As then-professor, now U.S. Supreme Court Justice Elena Kagan once proposed, “[a]ll models of administration must address two core issues: how to make administration accountable to the public and how to make administration efficient or otherwise effective.”³ This Comment argues that effective administration also requires a clear regulatory framework for the regulated sector and citizens. It addresses the recent trend in the United States of regulatory uncertainty, caused by polarized politics and a pendulum of persistent rollbacks of regulations. For example, in the energy sector alone, there are several prominent issues unsolved or too unstable to recognize a durable long-term approach, such as the Clean Power Plan disputes,⁴ fracking

regulation disputes,⁵ offshore oil drilling prohibitions,⁶ and the focus of this Comment, the new source performance standards (NSPS) on methane for oil and gas.

The need to address the impacts of climate change accentuates this persistent rollback phenomenon. Indeed, despite the uncertainty that some claim,⁷ it is of course possible to assert a broad scientific consensus on climate change’s existence, causes, characteristics, and remedies.⁸ And a parallel global consensus on the need to develop sufficient regulatory frameworks to address climate change mitigation and adaptation is—thankfully—taking control of different governments’ agendas.⁹

This Comment acknowledges the ongoing regulatory uncertainty in the United States, categorizes it, and explores theoretical frameworks for presidential transitions. It then specifically analyzes the NSPS on methane for oil and gas to exemplify how this regulatory uncertainty, caused by

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1. Nancy A. Wonders & Mona J.E. Danner, *Regulatory Rollbacks and Deepening Social Inequalities*, 1 J. WHITE COLLAR & CORP. CRIME 103, 103 (2020).
2. See Bethany Davis Noll & Richard Revesz, *Regulation in Transition*, 104 MINN. L. REV. 1, 3, 10, 84, 98 (2019) [hereinafter *Regulation in Transition*]; Bethany Davis Noll & Richard Revesz, *Presidential Transitions: The New Rules*, 39 YALE J. ON REGUL. (forthcoming 2022) [hereinafter *Presidential Transitions*]; Jessica Bulman-Pozen, *Administrative States: Beyond Presidential Administration*, 98 TEX. L. REV. 265, 272 (2019).
3. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2331 (2000).
4. Ryan B. Stoa, *From the Clean Power Plan to the Affordable Clean Energy Rule: How Regulated Entities Adapt to Regulatory Change and Uncertainty*, 47 HOFSTRA L. REV. 863 (2018); John A. Ormiston, *The Clean Power Plan Autopsy: Lessons the Affordable Clean Energy Rule Can Learn From Its Deceased Predecessor*, 98 TEX. L. REV. 791 (2019); *Regulation in Transition*, *supra* note 2, at 25; Bulman-Pozen, *supra* note 2, at 324.

5. Sorell E. Negro, *Fracking Wars: Federal, State, and Local Conflicts Over the Regulation of Natural Gas Activities*, 35 ZONING & PLAN. L. REP. 1 (2012); Robert H. Freilich & Neil M. Popowitz, *Oil and Gas Fracking: State and Federal Regulation Does Not Preempt Needed Local Government Regulation*, 44 URB. LAW. 533 (2012); Michael Burger, *The (Re)Federalization of Fracking Regulation*, 2013 MICH. ST. L. REV. 1483 (2013); Barbara Warner & Jennifer Shapiro, *Fractured, Fragmented Federalism: A Study in Fracking Regulatory Policy*, 43 PUBLIUS: J. FEDERALISM 474 (2013).
6. See Exec. Order No. 14008, §208, 86 Fed. Reg. 7619, 7624 (Feb. 1, 2021); Joshua Partlow & Juliet Eilperin, *Louisiana Judge Blocks Biden Administration’s Oil and Gas Leasing Pause*, WASH. POST (June 15, 2021), <https://www.washingtonpost.com/climate-environment/2021/06/15/louisiana-judge-blocks-biden-administrations-oil-gas-leasing-pause/>.
7. See generally STEVEN E. KOONIN, UNSETTLED: WHAT CLIMATE SCIENCE TELLS US, WHAT IT DOESN’T, AND WHY IT MATTERS (1st ed. 2021); Steven E. Koonin, *Climate Science Is Not Settled*, WALL ST. J. (Sept. 19, 2014), <https://www.wsj.com/articles/climate-science-is-not-settled-1411143565>.
8. See Intergovernmental Panel on Climate Change, *Summary for Policymakers, in CLIMATE CHANGE 2021: THE PHYSICAL SCIENCE BASIS. CONTRIBUTION OF WORKING GROUP I TO THE SIXTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE* (Valérie Masson-Delmotte et al. eds., Cambridge Univ. Press 2021); Kari De Pryck, *Intergovernmental Expert Consensus in the Making: The Case of the Summary for Policy Makers of the IPCC 2014 Synthesis Report*, 21 GLOB. ENV’T POL. 108 (2021).
9. See ALINA AVERCHENKOVA ET AL., TRENDS IN CLIMATE CHANGE LEGISLATION (2017); MICHAL NACHMANY ET AL., GLOBE INTERNATIONAL & GRANTHAM RESEARCH INSTITUTE, THE GLOBE CLIMATE LEGISLATION STUDY: A REVIEW OF CLIMATE CHANGE LEGISLATION IN 66 COUNTRIES (4th ed. 2014); WORLD BANK, WORLD BANK REFERENCE GUIDE TO CLIMATE CHANGE FRAMEWORK LEGISLATION (2020); Shaikh Eskander et al., *Global Lessons From Climate Change Legislation and Litigation*, 2 ENV’T & ENERGY POL’Y & ECON. 44 (2021).

consecutive, diametrically opposed rollbacks of national policies, produces devastating impacts for the whole regulated sector, including its inability to adopt long-term climate change measures. My analysis is illustrated by how the different policies designed and deployed by the federal government on NSPS on methane for oil and gas have persistently failed to consolidate a long-term view without giving in to partisanship.

To this end, the Comment is structured in three parts. The first part delves into the concept of regulatory and scientific uncertainty by summarizing the main ideas from scholarly literature on the administrative state and the increasing role of presidential administrations. The second part analyzes the status of the NSPS on methane for oil and gas, first from a historical perspective, comprising the key milestones of its development, and then examining the issues that have arisen within it, taking into account its dynamic evolution, regulatory techniques, and uncertainty. Finally, the third part puts forth several recommendations from this author and other scholars for responding to these issues.

I. Regulatory Uncertainty in the Administrative State

The past few U.S. presidential terms have seen an increasing role of presidential administrations, policymaking within agencies instead of through Congress. Along with this renovated presidentialism, scholars identify two issues. First, political polarization has led to a lack of collaboration between parties and excessive partisanship, which has eroded the legislative process and consolidated a congressional gridlock with no foreseeable end. Second is the increasing use of regulatory rollbacks and multiple, aggressive techniques to undo or repeal the previous administration's work. This section first delves into the scientific uncertainty behind climate change, and then examines contemporary presidentialism and the current theory of regulatory uncertainty.

A. Scientific Uncertainty

Climate change as a scientific phenomenon is defined by the Intergovernmental Panel on Climate Change (IPCC) as “a change in the state of the climate that can be identified . . . by changes in the mean and/or the variability of its properties and that persists for an extended period, typically decades or longer.”¹⁰ The IPCC further describes climate change, stating that it “may be due to natural internal processes or external forcings such as modulations of the solar cycles, volcanic eruptions and persistent anthro-

pogenic changes in the composition of the atmosphere or in land use.”¹¹ Other authors report that global surface temperatures are increasing, and “there has been no reduction in the global warming trend of 0.15°C-0.20°C per decade that began in the late 1970s.”¹² Further, anthropogenic climate change is impacting multiple systems globally,¹³ and “[i]t is unequivocal that human influence has warmed the atmosphere, ocean and land,”¹⁴ and that “[w]idespread and rapid changes in the atmosphere, ocean, cryosphere and biosphere have occurred.”¹⁵

Against this broad agreement, some scientists have questioned whether climate change could be mainly attributable to human activities, challenging the modeling and notions behind the scientific agreement procedures in the IPCC, and the way the science of climate change is presented.¹⁶ For instance, Prof. Steven Koonin asserts that he has been dismayed, “[f]irst by the willingness of some climate scientists—abetted by the media and politicians—to misrepresent what the science says, and then by the many other scientists who are silently complicit in those misrepresentations.”¹⁷ Despite such claims by a small number of personalities at the international level, it is beyond doubt that climate change is worsening, and that humanity plays a key role in its causation. In this regard, there is a scientific consensus that human activity has “caused approximately 1.0°C of global warming above pre-industrial levels, with a *likely* range of 0.8°C to 1.2°C,”¹⁸ and that “[g]lobal warming is *likely* to reach 1.5°C between 2030 and 2052 if it continues to increase at the current rate.”¹⁹

Further, and apart from the discussion of to what degree countries should adopt legislation regarding climate change, there is abundant scientific literature to support empirically that the United States is suffering from the impacts of climate change.²⁰ Therefore, there is a common necessity to address this phenomenon from a regulatory perspective, including in the energy sector. Indeed, accord-

10. IPCC, *Annex I: Glossary* (J.B. Robin Matthews ed.), in *GLOBAL WARMING OF 1.5°C. AN IPCC SPECIAL REPORT ON THE IMPACTS OF GLOBAL WARMING OF 1.5°C ABOVE PRE-INDUSTRIAL LEVELS AND RELATED GLOBAL GREENHOUSE GAS EMISSION PATHWAYS, IN THE CONTEXT OF STRENGTHENING THE GLOBAL RESPONSE TO THE THREAT OF CLIMATE CHANGE, SUSTAINABLE DEVELOPMENT, AND EFFORTS TO ERADICATE POVERTY* 541, 544 (Valérie Masson-Delmotte et al. eds., Cambridge Univ. Press 2018).

11. *Id.*

12. James Hansen et al., *Global Surface Temperature Change*, 48 *REVS. GEOPHYSICS* 25 (2010). See James Hansen et al., *Global Temperature Change*, 103 *PROC. NAT'L ACAD. SCI.* 14288 (2006).

13. Cynthia Rosenzweig et al., *Attributing Physical and Biological Impacts to Anthropogenic Climate Change*, 453 *NATURE* 353, 355 (2008).

14. Intergovernmental Panel on Climate Change, *supra* note 8, at SPM-5.

15. *Id.*

16. See generally KOONIN, *supra* note 7; Koonin, *supra* note 7.

17. KOONIN, *supra* note 7, at 249.

18. IPCC, *Summary for Policymakers*, in *GLOBAL WARMING OF 1.5°C. AN IPCC SPECIAL REPORT ON THE IMPACTS OF GLOBAL WARMING OF 1.5°C ABOVE PRE-INDUSTRIAL LEVELS AND RELATED GLOBAL GREENHOUSE GAS EMISSION PATHWAYS, IN THE CONTEXT OF STRENGTHENING THE GLOBAL RESPONSE TO THE THREAT OF CLIMATE CHANGE, SUSTAINABLE DEVELOPMENT, AND EFFORTS TO ERADICATE POVERTY* 4 (Valérie Masson-Delmotte et al. eds., World Meteorological Organization 2018).

19. *Id.*

20. OFFICE OF RESEARCH AND DEVELOPMENT, U.S. ENVIRONMENTAL PROTECTION AGENCY, *THE POTENTIAL EFFECTS OF GLOBAL CLIMATE CHANGE ON THE UNITED STATES: REPORT TO CONGRESS* (Joel B. Smith & Dennis Tirpak eds., 1989); PETER SCHWARTZ & DOUG RANDALL, *JET PROPULSION LABORATORY, AN ABRUPT CLIMATE CHANGE SCENARIO AND ITS IMPLICATIONS FOR UNITED STATES NATIONAL SECURITY* (2003); U.S. GLOBAL CHANGE RESEARCH PROGRAM, *CLIMATE CHANGE IMPACTS IN THE UNITED STATES: THE THIRD NATIONAL CLIMATE ASSESSMENT* 52 (Jerry M. Melillo et al. eds., 2014); Solomon Hsiang et al., *Estimating Economic Damage From Climate Change in the United States*, 356 *SCIENCE* 1362 (2017).

ing to the “Inventory of U.S. Greenhouse Gas Emissions and Sinks,” prepared by the U.S. Environmental Protection Agency (EPA),²¹ by 2019, electricity production generated the second-largest share of greenhouse gas (GHG) emissions, with 25% of the total.²² But before analyzing U.S. energy regulations related to climate change, specifically the methane NSPS, the next section develops a framework to analyze the emerging presidentialism, and the regulatory uncertainty harnessed to it.

B. *The President and the Administrative State*

1. Presidential Administration

As Professor Kagan proposed in the early 2000s, we now live in an era of presidential administration.²³ In this era, the president controls administration, expanding the White House’s control of agencies and “making the regulatory activity of the executive branch agencies more and more an extension of the President’s own policy and political agenda.”²⁴ Indeed, Professor Kagan already identified at that time that presidents facing political hurdles in the legislative branch, like President Bill Clinton, started to turn to the bureaucracy “to achieve, to the extent it could, the full panoply of his domestic policy goals.”²⁵ This increasing presidential control over administration has been used to implement proregulatory approaches as well as deregulatory policies.²⁶ In this regard, for example, Presidents Ronald Reagan, George W. Bush, and Donald Trump used presidential administration to implement a more deregulatory policy, while on the other hand, Presidents Clinton, Barack Obama, and Joe Biden have used it to execute their policies through increasing regulations.²⁷

As other scholars have pointed out, this growing presidential administration comprises a “partisan platform carried out by political officials across federal agencies.”²⁸ Moreover, administrative growth in this way allows presidents to confront excessive partisanship, polarization, congressional gridlock, and even aging statutes.²⁹ Thus, presidents “have relied heavily on agencies to set domestic policy, and commentators have defended presidentially directed policymaking more and more attenuated from legislative authorization.”³⁰

Indeed, with the Supreme Court’s approbation, presidents have “amassed expansive powers . . . exert[ing]

increasingly tight control over the administrative state. For the most part, scholars have portrayed this development favorably, imagining that good faith chief executives aim to place their stamp on the bureaucracy and take credit for its achievements.”³¹ However, as the same scholars concede, this favorable portrayal “overlooks the dangerous potential of a powerful president bent on undermining the government’s core capacities.”³²

2. Presidential Administration Tools

The incremental reach of presidential administration through agencies has developed through the expansion of the toolset used by presidents, by implementing broader techniques to direct agencies.³³ Professor Kagan initially described three techniques³⁴: regulatory review through the Office of Management and Budget (OMB)³⁵; formal directives instructing agencies³⁶; and personal appropriation of regulatory action.³⁷ Prof. Jessica Bulman-Pozen further identified and classified these techniques: political appointments in agencies or politicization of the bureaucracy³⁸; presidential designated officials—“czars”—in the White House to oversee agency policy³⁹; agency enforcement oversight⁴⁰; oversight of budget execution through OMB⁴¹; and integrating legal and policy resources scattered throughout the agencies (pooling).⁴²

21. U.S. EPA, *Inventory of U.S. Greenhouse Gas Emissions and Sinks*, <https://www.epa.gov/ghgemissions/inventory-us-greenhouse-gas-emissions-and-sinks> (last updated Apr. 14, 2022).

22. U.S. EPA, *Sources of Greenhouse Gas Emissions*, <https://www.epa.gov/ghgemissions/sources-greenhouse-gas-emissions> (last updated Apr. 14, 2022).

23. Kagan, *supra* note 3, at 2246.

24. *Id.* at 2248.

25. *Id.*

26. *Id.* at 2247-49.

27. *Id.* at 2272-2319; Bulman-Pozen, *supra* note 2, at 272-81; *Regulation in Transition*, *supra* note 2, at 13-47; Gillian E. Metzger, *1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 77 (2017).

28. Bulman-Pozen, *supra* note 2, at 272.

29. *Id.*

30. *Id.*

31. Jody Freeman & Sharon Jacobs, *Structural Deregulation*, 135 HARV. L. REV. 585, 664 (2021). See Jerry Louis Mashaw, *Is Administrative Law at War With Itself?*, 29 N.Y.U. ENV’T L.J. 427 (2021).

32. Freeman & Jacobs, *supra* note 31, at 79.

33. Bulman-Pozen, *supra* note 2, at 303.

34. Kagan, *supra* note 3, at 2284-2303.

35. *Id.* at 2285-90. See Bulman-Pozen, *supra* note 2, at 304; Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075 (1985); Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L.J. 1337 (2012).

36. Kagan, *supra* note 3, at 2290-99. See Bulman-Pozen, *supra* note 2, at 304; Kathryn A. Watts, *Controlling Presidential Control*, 114 MICH. L. REV. 683, 691-703 (2016).

37. Kagan, *supra* note 3, at 2299-2303. See Bulman-Pozen, *supra* note 2, at 304; Watts, *supra* note 36, at 703-04.

38. Bulman-Pozen, *supra* note 2, at 276, 304. See David E. Lewis, *Revisiting the Administrative Presidency: Policy, Patronage, and Agency Competence*, 39 PRESIDENTIAL STUD. Q. 60 (2009).

39. Bulman-Pozen, *supra* note 2, at 304; Kevin Sholette, *The American Czars*, 20 CORNELL J.L. & PUB. POL’Y 219 (2010); Aaron J. Saiger, *Obama’s Czars for Domestic Policy and the Law of the White House Staff*, 79 FORDHAM L. REV. 2577 (2010); Lanora C. Pettit, *Cincinnatus or Caesar: American Czars and the Appointments Clause*, 26 J.L. & POL. 81 (2010); Blake Emerson & Jon D. Michaels, *Abandoning Presidential Administration: A Civic Governance Agenda to Promote Democratic Equality and Guard Against Creeping Authoritarianism*, 68 UCLA L. REV. DISCOURSE 418, 421 n.8 (2021).

40. Bulman-Pozen, *supra* note 2, at 304. See Kate Andrias, *The President’s Enforcement Power*, 88 N.Y.U. L. REV. 1031 (2013).

41. Bulman-Pozen, *supra* note 2, at 305. See Eloise Pasachoff, *The President’s Budget as a Source of Agency Policy Control*, 125 YALE L.J. 2182 (2015); Eloise Pasachoff, *Controlling Agencies Through the President’s Budget Process*, 43 ADMIN. & REGUL. L. NEWS 8 (2017); Eloise Pasachoff, *The President’s Budget Powers in the Trump Era*, in EXECUTIVE POLICYMAKING: THE ROLE OF THE OMB IN THE PRESIDENCY 69 (Meena Bose & Andrew Rudalevige eds., Brookings Institution Press 2020).

42. Bulman-Pozen, *supra* note 2, at 305; Daphna Renan, *Pooling Powers*, 115 COLUM. L. REV. 211 (2015).

The systematic use of this augmented toolset has allowed presidential administrations to grow stronger.⁴³ Indeed, presidents' reliance on federal agencies to execute their policies has reached a point where relevant policy-making is implemented through agencies instead of legislation.⁴⁴ For example, the Trump Administration "achieved its policy goals primarily through executive orders and administrative rulemaking and occasionally through issuance of waivers."⁴⁵ This increased reliance on agency execution of administration policies has led to predictions that these all-mighty presidential administrations "may prove dangerous, further legitimizing practices that enable and embolden future authoritarians far more adroit with the tools and language of power than Donald Trump."⁴⁶

The expansion of presidential administration—using multiple tools to ensure the development and execution of policies through federal agencies—sets the stage to debate the role and extension of regulatory rollbacks within presidential transitions. This controversial phenomenon will be analyzed in the following section through the lens of creating regulatory uncertainty in the past few presidential administrations.

C. Regulatory Uncertainty

1. A Divided Nation

As explained above, in this era of presidential administration, the increasing power of presidents over the administrative state is shown by the different tools that presidents use to mandate federal agencies and impose their agendas. This expansion of executive branch power correlates with another phenomenon: increasing partisan polarization.⁴⁷ Indeed, according to recent studies, "American voters . . . are much more likely to hold strongly negative views of the opposing party than in the past."⁴⁸ Even more, "[a] growing proportion of Americans dislike the opposing party more than they like their own party."⁴⁹ This dislike also manifests in an increasing partisanship among representatives in Congress, which has increased over the past 60 years.⁵⁰ Consequently, this partisanship has reduced the number of bills introduced for serious consideration, which has been called a "loss of Congressional innovation."⁵¹

This Comment argues that polarization and increasing partisanship produces a policy pendulum, where regula-

tory rollbacks are a common battleground between presidential administrations of opposing parties. This swinging pendulum is what I have labeled regulatory uncertainty. Certainly, the transition between Presidents Obama and Trump showed how fragile presidential administrations can be, since "their policy choices [were] immediately contested and readily subject to reversal."⁵² In summary, "[w]ith a new election, presidential administration may cannibalize itself."⁵³

Within this regulatory uncertainty, I focus only on substantive deregulation, which "aims to weaken or rescind particular agency rules or policies,"⁵⁴ and includes "regulatory rollbacks that weaken health, safety, financial, or labor standards; shifts in an agency's enforcement priorities; or legal interpretations that shrink an agency's authority or jurisdiction."⁵⁵ This is differentiated from structural deregulation, which focuses on an "agency's core capacities"⁵⁶ by eroding an "agency's staffing, leadership, resource-base, expertise, and reputation—key determinants of the agency's capacity to accomplish its statutory tasks."⁵⁷

2. Regulatory Rollbacks

Alexander Hamilton foresaw "the likelihood that new presidents would be motivated to undo the work of their predecessors."⁵⁸ Indeed, he stated:

To undo what has been done by a predecessor, is very often considered by a successor, as the best proof he can give of his own capacity and desert; and, in addition to this propensity, where the alteration has been the result of public choice, the person substituted is warranted in supposing, that the dismissal of his predecessor has proceeded from a dislike to his measures, and that the less he resembles him, the more he will recommend himself to the favor of his constituents.⁵⁹

Traditionally, before President Trump, presidencies mainly relied on two techniques to reverse policies from previous administrations. The first was issuing stop-work orders, typically by the White House chief of staff on Inauguration Day, instructing agencies to stop working on any rule not yet finalized or published in the *Federal Register*.⁶⁰ The second was by issuing regulatory repeals and replacements "to change the requirements of a prior finalized rule."⁶¹

During the Trump Administration, and now the Biden Administration, far more aggressive techniques have been

43. Bulman-Pozen, *supra* note 2, at 270.

44. *Id.* See Thomas W. Merrill, *Presidential Administration and the Traditions of Administrative Law*, 115 COLUM. L. REV. 1953, 1968 (2015).

45. Greg Goelzhauser & David M. Konisky, *The State of American Federalism 2018-2019: Litigation, Partisan Polarization, and the Administrative Presidency*, 49 PUBLIUS: J. FEDERALISM 379, 380 (2019).

46. Emerson & Michaels, *supra* note 39, at 418.

47. Noam Lupu, *Party Polarization and Mass Partisanship: A Comparative Perspective*, 37 POL. BEHAV. 331 (2015).

48. Alan I. Abramowitz & Steven Webster, *The Rise of Negative Partisanship and the Nationalization of U.S. Elections in the 21st Century*, 41 ELECTORAL STUD. 12, 21 (2016).

49. *Id.*

50. Clio Andris et al., *The Rise of Partisanship and Super-Cooperators in the U.S. House of Representatives*, 10 PLoS ONE e0123507, at 10 (2015).

51. *Id.*

52. Bulman-Pozen, *supra* note 2, at 270.

53. *Id.*

54. Freeman & Jacobs, *supra* note 31, at 3.

55. *Id.*

56. *Id.*

57. *Id.* at 2.

58. Mashaw, *supra* note 31, at 428.

59. ALEXANDER HAMILTON ET AL., *THE FEDERALIST: THE GIDEON EDITION 374* (George W. Carey & James McClellan eds., 1st ed. 2001).

60. *Regulation in Transition*, *supra* note 2, at 5.

61. *Id.*

used to undo what their predecessor did, resulting in extensive regulatory rollbacks.⁶² This aggressive use of presidential power by recent administrations has become as much a part of the attack on the administrative state as a reason to defend it.⁶³ In particular, the Trump Administration made extensive use of three relatively recent techniques to reverse regulatory policymaking.⁶⁴

First, it coordinated use of the Congressional Review Act (CRA) with a cooperative Congress. Working with Congress to identify and garner support for legislative repeal of executive branch regulations essentially allows the president to repeal rules without having to observe the Administrative Procedure Act (APA) requirements.⁶⁵ While traditionally the CRA is viewed as giving Congress an opportunity to repeal executive branch regulations, it is also an instrument the executive branch can use with a cooperative Congress to reverse regulations, since all CRA resolutions passed by Congress require a president's signature.⁶⁶ Thus, it can be a "particularly useful tool for a new president and Congress of the same party."⁶⁷

Second, the Trump Administration filed abeyances to pending litigation,⁶⁸ requesting that courts put a hold on "any briefing, argument, or decision in a challenge to a pending rule while the administration considers whether to change that rule."⁶⁹ Third, agencies under the Trump Administration suspended or delayed implementation of final regulations of the prior Administration in order to allow agencies time to repeal or amend the specific rule.⁷⁰

The Biden Administration has used the same techniques to roll back regulations imposed during the Trump Administration.⁷¹ Moreover, President Biden has innovated, adding techniques to the regulatory toolset. First, by conceding error before courts where Trump rules were challenged, the Biden Administration no longer had an obligation to defend such rules in the absence of intervenors.⁷² Second, by withdrawing affirmative appeals filed by the Trump Administration on Obama Administration regulations, the Biden Administration was able to allow those rules to become final.⁷³ Third, through the issuance of interim final rules, the Biden Administration could have some policies implemented immediately without a prior notice-and-comment period.

All of these are a result of the new challenges that polarized and powerful presidential administrations pose to new presidents, particularly political pressures to roll back regu-

lations. Indeed, given the time it takes to enact new regulations, the Biden Administration has also been pushed to act fast on its own policy priorities during the first year of its term.⁷⁴

In this sense, it is clear that both antiregulatory and pro-regulatory governments benefit from the uncertainty that comes from the use of these techniques, such as the suspension of final regulations.⁷⁵ Nevertheless, I agree with scholars calling attention to the repercussions of the increasing role and importance of presidential administrations for democracy, that this, "in the long run, only heightens the chasm between the nation-state and the public that it should serve."⁷⁶ Accordingly, the next section focuses on the consequences of this regulatory uncertainty forged by the aggressive use of rollback techniques within presidential administrations.

3. Consequences

Among the reasons to deal with this escalation of presidential reversal of previous policies is the impact of regulatory uncertainty on regulated industries and citizens. This lack of durable rules has a pervasive impact on decisions regarding how to proceed with their industries (e.g., making long-term plans) due to the uncertainty that new rules will hold up. This issue is relatively undertreated by scholars who focus on the prescriptive or theoretical analysis of regulatory rollbacks within the administrative state. Moreover, despite some proposals to seize on the uncertainty to advance clean energy projects,⁷⁷ others argue the need to attend to the risks for industries that come with these regulatory pendulums, since a "failure to consider risk and risk aversion may bias models of this sector [power generation in the United States] and others, especially where durable capital investments limit adjustment options."⁷⁸

In this regard, deregulation and uncertainty comes at a great cost for the general welfare, since it has been demonstrated that investments decrease in states with regulatory policy instability.⁷⁹ In fact, within the energy generation sector, regulatory uncertainty by legislative inaction incentivizes firms' lack of investments in "assets that are long-lived and location- and policy-specific,"⁸⁰ and promotes a "'wait-and-see' attitude among GHG emitters."⁸¹ This

62. See *Regulation in Transition*, *supra* note 2; *Presidential Transitions*, *supra* note 2; Wonders & Danner, *supra* note 1.

63. Bulman-Pozen, *supra* note 2, at 270.

64. See *Regulation in Transition*, *supra* note 2, at 13-47; Peter L. Strauss & Gillian E. Metzger, *Power Transitions in a Troubled Democracy*, in *LIBER AMICORUM D'ALBERTI* 35 (2021), available at <https://ssrn.com/abstract=3859714>.

65. *Regulation in Transition*, *supra* note 2, at 14-23.

66. *Id.* at 16.

67. *Id.* at 15.

68. *Id.* at 24-33.

69. *Id.* at 8.

70. *Id.* at 33-47. See Wonders & Danner, *supra* note 1, at 104.

71. *Presidential Transitions*, *supra* note 2, at 4-5.

72. *Id.* at 4-5, 38-42.

73. *Id.* at 34-38.

74. *Id.* at 62.

75. *Regulation in Transition*, *supra* note 2, at 46.

76. Wonders & Danner, *supra* note 1, at 109.

77. Ans Kolk & Gerhard Mulder, *Regulatory Uncertainty and Opportunity Seeking: The Case of Clean Development*, 54 CAL. MGMT. REV. 88 (2011).

78. Lin Fan et al., *Risk Aversion and CO₂ Regulatory Uncertainty in Power Generation Investment: Policy and Modeling Implications*, 60 J. ENV'T ECON. & MGMT. 193, 205 (2010).

79. Kira R. Fabrizio, *The Effect of Regulatory Uncertainty on Investment: Evidence From Renewable Energy Generation*, 29 J.L. ECON. & ORG. 765, 790 (2013) (arguing that the effect of renewable portfolio standards policy on investment in renewable generation assets was significantly lower in states with a prior repeal of electric utility industry restructuring legislation—in other words, a history of policy instability deters firms from investing in regulation-specific assets).

80. *Id.* at 790-91.

81. Marilyn A. Brown & Sharon Chandler, *Governing Confusion: How Statutes, Fiscal Policy, and Regulations Impede Clean Energy Technologies*, 19 STAN. L.

hesitancy to deploy capital has led some to assert, regarding the destabilizing effect of rollback tools, that “a move towards a regime that is defined as a result of the aggressive use of these tools cannot be normatively justified on stability grounds.”⁸²

An example of the overlooked impacts of regulatory uncertainty is the cost of reversing rules in force. For instance, President “Trump’s rollbacks of regulations affecting overtime pay, financial advice, and the fuel economy standards would cost consumers over US\$41 billion more a year than if the rules are left intact.”⁸³ Similarly, billions of dollars on investments toward renewable and clean energies could be left out because of this regulatory uncertainty.⁸⁴

Another way to exemplify the impact of rollbacks is the lengthy compliance periods that regulations consider, so that industries have enough time to plan and comply with these regulations. As Prof. Lisa Heinzerling explains, compliance dates are set “in order to give affected parties time to bring their activities into conformity with the rule.”⁸⁵ This extension of long compliance deadlines “to accommodate industry concerns that compliance would require large-scale, complex changes to their operations”⁸⁶ can play and has played a role in putting regulations at risk of suffering a rollback through a suspension and later reversal.⁸⁷

This regulatory uncertainty has extended to several cases on climate change and energy-related regulations, for example, the fracking regulation disputes⁸⁸; the lack of clear energy storage regulations⁸⁹; the Clean Power Plan dispute⁹⁰; and the discussion of whether the federal government can stop leasing offshore drilling for oil and gas,⁹¹ among other cases. The next section of this Comment will analyze this phenomenon on the NSPS on methane for the oil and gas industry.

In summary, I am arguing the need for regulatory stability, given the influence that federal regulatory approaches have on energy industries’ behavior. My argument acknowl-

edges the importance of agencies and administrations in embracing regulatory certainty, from a comprehensive “institutional environment”⁹² or culture. Without a clear regulatory pathway, the regulated sector lacks common ground to plan and run efficient operations, and this lack of certainty compromises the immediate and long-term adoption of practices and policies to fight climate change and reduce emissions.

II. The NSPS on Methane

A. Methane’s Role in Natural Gas and Climate Change

Natural gas is mainly composed of methane⁹³; hence, large deposits of methane reside within gas-hydrate reservoirs and any other formation where gas is found, such as oil reservoirs.⁹⁴ It is generally either flared or used as energy.⁹⁵ Particularly for the United States, natural gas plays a key role in its energy economy,⁹⁶ and in 2020 provided 31.5% of primary energy, destined mainly for electric power generation and industrial use and, also, in smaller part, to supply residential and commercial uses.⁹⁷

This broad use of natural gas has positioned it as a “bridge fuel”⁹⁸ to transition to lower-carbon energy. Its increased use is due to an increase in U.S. production since 2005, which led the United States in 2020 to produce 10% more natural gas than is consumed in the country.⁹⁹ Specifically, this increase began and has been sustained due to the extraordinary results of fracking, or “horizontal drilling and hydraulic fracturing techniques, notably in shale, sandstone, carbonate, and other tight geologic formations.”¹⁰⁰

& POL’Y REV. 472, 506 (2008). See *Regulation in Transition*, *supra* note 2, at 95.

82. *Regulation in Transition*, *supra* note 2, at 96.

83. Wonders & Danner, *supra* note 1, at 104; Sam Berger & Malkie Wall, *President Trump’s Regulatory Rollbacks Are an Attack on Americans’ Wallets*, CTR. AM. PROGRESS ACTION FUND (Mar. 27, 2019), <https://www.americanprogress.org/article/president-trumps-regulatory-rollbacks-attack-americans-wallets/>.

84. Cf. Friedemann Polzin, *Mobilizing Private Finance for Low-Carbon Innovation—A Systematic Review of Barriers and Solutions*, 77 RENEWABLE & SUSTAINABLE ENERGY REVS. 525 (2017) (on the necessity of a strategic vision in the clean energy sector, to encourage private investments and the need for its development within a participative process, including industries, identifying future finance needs, and transforming “uncertainty into calculable risk and returns”).

85. Lisa Heinzerling, *Unreasonable Delays: The Legal Problems (So Far) of Trump’s Deregulatory Binge*, 12 HARV. L. & POL’Y REV. 13, 27 (2018).

86. *Regulation in Transition*, *supra* note 2, at 62.

87. *Id.*

88. Negro, *supra* note 5; Freilich & Popowitz, *supra* note 5; Burger, *supra* note 5; Warner & Shapiro, *supra* note 5.

89. Amy L. Stein, *Reconsidering Regulatory Uncertainty: Making a Case for Energy Storage*, 41 FLA. ST. U. L. REV. 697 (2013).

90. Stoa, *supra* note 4; Ormiston, *supra* note 4; *Regulation in Transition*, *supra* note 2, at 25; Bulman-Pozen, *supra* note 2, at 324.

91. See Exec. Order No. 14008, §208, 86 Fed. Reg. 7619, 7624 (Feb. 1, 2021); Partlow & Eilperin, *supra* note 6.

92. Fabrizio, *supra* note 79, at 792 (this Comment highlights the relevance of the “institutional environment” influence on regulatory uncertainty presented by this author, although his research focused on legislative action instead of the executive).

93. See ROBERT L. KLEINBERG, COLUMBIA UNIVERSITY CENTER ON GLOBAL ENERGY POLICY, METHANE EMISSION CONTROLS: REDESIGNING EPA REGULATIONS FOR GREATER EFFICACY 1 (2021). See also Keith A. Kvenvolden, *A Review of the Geochemistry of Methane in Natural Gas Hydrate*, 23 ORGANIC GEOCHEMISTRY 997, 1007 (1995); Kehua You & Peter B. Flemings, *Methane Hydrate Formation and Evolution During Sedimentation*, 126 J. GEO-PHYSICAL RSCH.: SOLID EARTH e2020JB021235 (2021).

94. See Kvenvolden, *supra* note 93; Gerald R. Dickens et al., *Direct Measurement of in Situ Methane Quantities in a Large Gas-Hydrate Reservoir*, 385 NATURE 426 (1997); You & Flemings, *supra* note 93.

95. April M. Melvin et al., *Climate Benefits of U.S. EPA Programs and Policies That Reduced Methane Emissions 1993-2013*, 50 ENV’T SCI. & TECH. 6873, 6874 (2016).

96. KLEINBERG, *supra* note 93, at 1.

97. LAWRENCE LIVERMORE NATIONAL LABORATORY & U.S. DEPARTMENT OF ENERGY, ESTIMATED U.S. ENERGY CONSUMPTION IN 2020: 92.9 QUADS (2021).

98. Jason A. Delborne et al., *Dueling Metaphors, Fueling Futures: “Bridge Fuel” Visions of Coal and Natural Gas in the United States*, 61 ENERGY RSCH. & SOC. SCI. 101350 (2020).

99. U.S. Energy Information Administration, *Natural Gas Explained: Where Our Natural Gas Comes From*, <https://www.eia.gov/energyexplained/natural-gas/where-our-natural-gas-comes-from.php> (last updated Mar. 18, 2022).

100. *Id.* See DANIEL YERGIN, THE NEW MAP: ENERGY, CLIMATE, AND THE CLASH OF NATIONS 3-68 (1st ed. 2020).

Further, a key characteristic to consider for the regulatory framework of methane emissions, discussed in the following section, is that methane is frequently “co-emitted with volatile organic compounds and hazardous air pollutants from some sources, including landfills and oil and natural gas production.”¹⁰¹ This co-emission implies that “the capture and combustion targeting these other pollutants has the co-benefit of also capturing CH₄ [methane].”¹⁰²

Methane is an important GHG.¹⁰³ According to the “Inventory of U.S. Greenhouse Gas Emissions and Sinks,” it is the second most-generated GHG gas in the United States, way below carbon dioxide and above nitrous oxide, with a 15.1% decrease in its generation between 1990 and 2019.¹⁰⁴ Nevertheless, there is insufficient information to comprehend “why methane emissions are not decreasing faster.”¹⁰⁵ From this perspective, EPA estimates that oil and natural gas production contributes around 3% of national GHG emissions.¹⁰⁶ Still, different studies recognize an underestimation with a 1.5× to 2× divergence between the EPA methane estimates and others from field measurements.¹⁰⁷ This underscores the role of methane in climate change, where “[i]t holds the potential to be a primary driver of global average temperature change between now and 2050—no matter what progress is made in controlling increases of atmospheric carbon dioxide over the next thirty years.”¹⁰⁸

This Comment focuses on the regulatory approaches adopted by the U.S. federal government to tackle methane emissions, specifically for the oil and gas sector. Despite the specificity of this target, it must be noted that there are multiple sources of methane in these complex industries, in production, processing, transmission, and storage operations—so many that EPA “tracks about 250 distinct sources of methane emissions in petroleum and natural gas production, transmission, and distribution systems.”¹⁰⁹ In this sense, within the regulatory battle over NSPS for methane, awareness of these multiple sources is essential to develop an appropriate regulatory response. Prof. Robert Kleinberg, for example, suggests that the “complexities of oil and gas production do not lend themselves to prescrip-

tive regulation,”¹¹⁰ and instead argues for a restructuring of methane regulations with a performance-based approach.¹¹¹

B. A Tale of Three Administrations

This section delves into the regulatory history of NSPS on methane for oil and gas in the United States. In general, the enactment of a comprehensive set of rules for these pollutants is fairly recent and has been the subject of the past three presidential administrations. The section offers some general observations for context, and then a critique of these administrations’ attempts to regulate methane emissions in the oil and natural gas industries.

Besides the specific regulations to reduce methane emissions from the oil and natural gas industries, there are regulations that target volatile organic compounds (VOCs) and hazardous air pollutants (HAPs)¹¹² that, given the physical characteristics of methane, co-benefit from methane’s capture.¹¹³ For example, “[r]egulations providing this co-benefit include . . . the National Emissions Standards for Hazardous Air Pollutants (NESHAP) Rule established in 1999 for oil and natural gas activities and expanded in 2007 and 2012.”¹¹⁴

Specifically, methane emissions from oil and natural gas production infrastructure were recognized for the first time by EPA in 1993—during President Clinton’s Administration under his Climate Change Action Plan—with the promotion of the “Natural Gas STAR partnership program.”¹¹⁵ This program fostered public-private partnerships and “promoted the use of cost-effective technologies and practices to capture and use CH₄ within the natural gas sector.”¹¹⁶ However, it was not until 2012 that specific methane emissions restrictions from oil and natural gas were (indirectly) imposed.

1. Obama Administration

On August 16, 2012, during President Obama’s first term, EPA finalized the review process of the NSPS and NESHAP for the oil and natural gas source category.¹¹⁷ This was a “[m]ore comprehensive regulation of air pollutants from upstream and midstream crude oil and natural gas segments, including emissions of volatile organic compounds.”¹¹⁸ In particular, methane emissions were not directly addressed; however, methane reductions were cal-

101. Melvin et al., *supra* note 95, at 6874.

102. *Id.*

103. Jeffrey S. Rutherford et al., *Closing the Methane Gap in U.S. Oil and Natural Gas Production Emissions Inventories*, 12 NATURE COMM’NS 1, 2 (2021).

104. OFFICE OF RESEARCH AND DEVELOPMENT, U.S. EPA, *supra* note 20. See Melvin et al., *supra* note 95, at 6876-79.

105. Kleinberg, *supra* note 93, at 4.

106. *Id.*

107. Rutherford et al., *supra* note 103, at 8. See Kleinberg, *supra* note 93, at 2-4 (for a detailed explanation and critical analysis of the annual methane emissions estimation from U.S. upstream and midstream crude oil and natural gas activities).

108. Kleinberg, *supra* note 93, at 1. See Drew Shindell et al., *Simultaneously Mitigating Near-Term Climate Change and Improving Human Health and Food Security*, 335 SCIENCE 183, 187-88 (2012).

109. Kleinberg, *supra* note 93, at 6. See U.S. EPA, *Natural Gas and Petroleum Systems in the GHG Inventory: Additional Information on the 1990-2019 GHG Inventory* (published April 2021), <https://www.epa.gov/ghgemissions/natural-gas-and-petroleum-systems-ghg-inventory-additional-information-1990-2019-ghg> (last visited Apr. 19, 2022).

110. Kleinberg, *supra* note 93, at 1.

111. *Id.*

112. Melvin et al., *supra* note 95, at 6874.

113. See *supra* Section II.A.

114. Melvin et al., *supra* note 95, at 6874.

115. ROBERT KLEINBERG, SOCIAL SCIENCE RESEARCH NETWORK, METHANE EMISSION CONTROLS: TOWARD MORE EFFECTIVE REGULATION 8 (2021). See Melvin et al., *supra* note 95, at 6874.

116. Melvin et al., *supra* note 95, at 6874 (It must be noted that in July 2015, under the Obama Administration, “the EPA announced the Natural Gas STAR Methane Challenge, a new voluntary initiative designed to increase voluntary CH₄ abatement from oil and gas.”).

117. Oil and Gas Sector: New Source Performance Standards and National Emission Standards for Hazardous Air Pollutants Reviews, 77 Fed. Reg. 49490 (Aug. 16, 2012).

118. Kleinberg, *supra* note 93, at 2.

culated as part of the economic benefits.¹¹⁹ In fact, EPA identified a methane emissions decrease as a co-benefit from emission control measures to reduce HAPs and VOCs.¹²⁰ These benefits responded mainly to modified 40 C.F.R. Part 60, Subpart OOOO, which established the “Standards of Performance for Crude Oil and Natural Gas Production, Transmission and Distribution”¹²¹ for facilities that commence construction, modification, or reconstruction after August 23, 2011.¹²²

On June 3, 2016, during President Obama’s second term, EPA finalized amendments to the current NSPS and established new emission standards for new, reconstructed, and modified sources in the oil and natural gas sector, explicitly including methane.¹²³ These new standards for the oil and natural gas source category established standards for GHGs and VOCs,¹²⁴ maintained the methane reduction as a co-benefit,¹²⁵ and proposed new standards,¹²⁶ where methane was explicitly regulated for facilities that commence construction, modification, or reconstruction after September 18, 2015.¹²⁷

These 2016 amendments established more comprehensive regulation by consolidating the application of the NSPS to gas transmission and storage, based on a broad interpretation of the statutory authority for the source category listing under Clean Air Act (CAA) §111(b).¹²⁸ Specifically, the Agency appealed to a broad authority and discretion in the definition of “sources” by indicating that “[s]ection 111(b) of the CAA gives the EPA the broad authority and discretion to list and establish NSPS for a category that, in the Administrator’s judgment, causes or contributes significantly to air pollution which may reasonably be anticipated to endanger public health or welfare.”¹²⁹

In this context, the Agency interpretation to include transmission and storage was based on the notion that

one of the source categories listed in that 1979 Priority List generally covers the oil and natural gas industry. Specifically, with respect to the natural gas industry, it includes production, processing, transmission, and storage. The 1979 Priority List broadly covered the natural

gas industry, which was evident in the EPA’s analysis at the time of listing.¹³⁰

Further, the Agency argued that “[t]he inclusion of various segments of the natural gas industry into the source category listed in 1979 is consistent with this industry’s operations and equipment.”¹³¹

2. Trump Administration

After the 2016 rule was published in the *Federal Register*, multiple industry groups filed administrative petitions in August 2016, asking for reconsideration of the rule before EPA.¹³² In this context, in April 2017, the new Trump Administration convened a proceeding for reconsideration¹³³ and then granted a stay in June 2017.¹³⁴ Finally, two weeks later, EPA published a notice of proposed rulemaking, declaring its intention to look at the entire 2016 rule and extending the stay for two years.¹³⁵

Several environmental groups challenged this decision to stay the rule. The U.S. Court of Appeals for the District of Columbia (D.C.) Circuit ruled, in *Clean Air Council v. Pruitt*,¹³⁶ that EPA’s decision to impose a stay was arbitrary and capricious. Still, the court emphasized that nothing in the decision limited EPA’s authority to reconsider and proceed with its notice of proposed rulemaking. Finally, as detailed below, EPA completed its review and issued a new final methane rule in 2020.

The methane NSPS rule is a clear example of how the Trump Administration used a regulatory rollback technique by delaying its 2016 implementation rule on methane, and rescinding the rule and proposing a new one. This was also supported by opposing industries, which helped to strengthen the reasons behind an extended stay and review of the rule.

On September 14, 2020, EPA enacted its review amendments to the NSPS emission standards for new, reconstructed, and modified sources in the oil and natural gas sector.¹³⁷ These amendments differed from the previous administration’s interpretation, concluding that the statutory authority under CAA §111(b) was not as broad as the Agency initially argued. Specifically, the new administra-

119. Oil and Gas Sector: New Source Performance Standards and National Emission Standards for Hazardous Air Pollutants Reviews, *supra* note 117, at 49535-36.

120. *Id.* at 49535.

121. *Id.* at 49542-67. See KLEINBERG, *supra* note 115, at 8.

122. Oil and Gas Sector: New Source Performance Standards and National Emission Standards for Hazardous Air Pollutants Reviews, *supra* note 117, at 49542.

123. Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources, 81 Fed. Reg. 35824 (June 3, 2016). See KLEINBERG, *supra* note 115, at 8.

124. Through amendments to the NSPS at 40 C.F.R. Part 60, Subpart OOOO.

125. KLEINBERG, *supra* note 115, at 8; KLEINBERG, *supra* note 93, at 2.

126. 40 C.F.R. pt. 60, subpt. OOOOa (2021).

127. Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources, *supra* note 123, at 35899.

128. 42 U.S.C. §7411(b), ELR STAT. CAA §111(b).

129. Oil and Natural Gas Sector: New Source Performance Standards and National Emission Standards for Hazardous Air Pollutants Reviews—Proposed Rule, 76 Fed. Reg. 52738, 52745 (Aug. 23, 2011).

130. Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources, *supra* note 123, at 35832.

131. *Id.*

132. See, e.g., American Petroleum Institute, Request for Administrative Reconsideration of EPA’s Final Rule “Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources” 1 (Aug. 2, 2016).

133. Letter from E. Scott Pruitt, Administrator, U.S. EPA, to Howard J. Feldman, Shannon S. Broome, James D. Elliott & Matt Hite, American Petroleum Institute, Re: Convening a Proceeding for Reconsideration 2 (Apr. 18, 2017).

134. Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources: Grant of Reconsideration and Partial Stay, 82 Fed. Reg. 25730 (June 5, 2017).

135. Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources: Stay of Certain Requirements, 85 Fed. Reg. 27645 (June 16, 2017).

136. 862 F.3d 1, 47 ELR 20084 (D.C. Cir. 2017).

137. Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Review, 85 Fed. Reg. 57018 (Sept. 14, 2020).

tion argued that the previous statutory interpretation was in error,¹³⁸ and that “the record of the 1979 action indicates that the source category did not include that segment [transmission and storage], and the Agency confirmed that narrower scope of the source category in its 1984 proposal to promulgate the initial set of NSPS.”¹³⁹

Some scholars charged that these amendments mostly constituted a regulatory rollback,¹⁴⁰ which claimed to remove a “regulatory duplication”¹⁴¹ by actually looking to “remove sources in the transmission and storage segment from the source category, rescind the NSPS (including both the volatile organic compounds (VOC) and methane requirements) applicable to those sources, and separately rescind[] the methane-specific requirements of the NSPS applicable to sources in the production and processing segments.”¹⁴²

Concretely, this 2020 deregulation comprised, among other things, technical amendments that “reduced inspection and reporting requirements and simplified the process of certifying new emission detection technology. Low producing wells were exempted from regulation, and the path to regulating emissions from facilities constructed prior to September 2015 was blocked.”¹⁴³ Most important, these new rules “eliminated regulation of methane emissions in the manufacture of fossil fuels (the sector most responsible for methane emissions in the United States) entirely.”¹⁴⁴

This policy reversal was controversial, and environmental organizations alleged an endangerment of “public health and the environment.”¹⁴⁵ On the other hand, reversal supporters celebrated this decision as relieving an undue burden on fossil fuels.¹⁴⁶ Still, as Profs. Bethany Davis Noll and Richard Revesz point out, some of the biggest fossil fuel companies later supported and promoted Congress voiding these 2020 rules.¹⁴⁷ In fact, “BP, Shell, Norway’s Equinor and Total . . . said they support lawmakers using a fast-track mechanism called the Congressional Review Act to ‘disapprove’ a rule imposed under former president Donald Trump that rolled back direct methane regulations.”¹⁴⁸ This statement constituted one of the clearest recent examples of some regulated industries’ position on deregulation, as

many players within a given industry prefer regulatory certainty over a changing policy pendulum following presidential administration changes.

Although this indicator of industry support is remarkable, it can be argued that those companies supporting the Obama-era regulations are very likely those that would not be the ones bearing most of those regulations’ costs. Particularly, these companies are not themselves significantly involved in U.S. fracking, since most of the companies within the fracking industry are smaller, independent oil and gas producers.¹⁴⁹ Even more, due to Federal Energy Regulatory Commission regulations related to the prohibition of vertical integration, it is probable that these companies would not own pipelines or storage facilities regulated by the methane NSPS of the Obama Administration.¹⁵⁰

3. Biden Administration

Responding to this policy reversal, in mid-2021 the U.S. Senate and the U.S. House of Representatives, and the newly elected President Biden, used the CRA¹⁵¹ to approve a joint resolution to repeal the previous rule enacted by President Trump on September 14, 2020.¹⁵² This rollback strategy within the Biden Administration comprised a total disapproval of three regulations, including the 2020 methane rule, albeit a small part of the regulations that could have been targeted overall.¹⁵³ In contrast, the previous Trump Administration and Congress made aggressive use of the CRA, disapproving 14 of President Obama’s regulations (though not his methane rule).¹⁵⁴

On the other hand, it is interesting to note that judicial challenges to President Trump’s deregulation of NSPS on methane for the oil and natural gas sources have also been subject to other rollback strategies by President Biden. For example, in *California v. Regan*,¹⁵⁵ where plaintiffs used an abeyance request¹⁵⁶ to challenge the methane deregulation, the D.C. Court granted the Administration’s unopposed abeyance by putting on hold the challenge to the rule. This

138. *Id.* at 57027.

139. *Id.*

140. *Presidential Transitions*, *supra* note 2, at 18; KLEINBERG, *supra* note 93, at 2.

141. Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Review, *supra* note 137, at 57019.

142. *Id.* at 57018.

143. KLEINBERG, *supra* note 115, at 9.

144. *Presidential Transitions*, *supra* note 2, at 19.

145. *Id.*

146. *Id.*

147. *Id.* See Chris Knight, *Oil Executives Push Carbon Fee Idea in U.S. Senate*, ARGUS MEDIA (Apr. 14, 2021), <https://www.argusmedia.com/en/news/2205262-oil-executives-push-carbon-fee-idea-in-us-senate>.

148. Knight, *supra* note 147. See Jean Chemnick, *Methane Rule to Eclipse Past Regulations, Including Obama’s*, E&E NEWS: CLIMATE WIRE (Sept. 8, 2021), <https://www.eenews.net/articles/methane-rule-to-eclipse-past-regulations-including-obamas/>.

Companies like BP PLC, Royal Dutch Shell PLC and Exxon Mobil Corp. challenged the Trump administration’s moves to dismantle the Obama rules, which they said had created a level playing field for U.S. operators. At the same time, the American Petroleum Institute and the Independent Petroleum Association of America cheered the weaker regulations.

149. See Robert A. Hefner III, *The United States of Gas: Why the Shale Revolution Could Have Happened Only in America*, 93 FOREIGN AFFS. 9 (2014); Christopher J. Hilson, *Litigation Against Fracking Bans and Moratoriums in the United States: Exit, Voice, and Loyalty*, 40 WM. & MARY ENV’T L. & POL’Y REV. 745 (2015) (explaining how small gas and oil producers are opposing fracking bans); YERGIN, *supra* note 100, ch. 1 (on how independent companies developed the fracking industry, although “independent” could mean “a multibillion-dollar valuations down to small scrappy explorationists”).

150. JANICE E. RUBIN, CONGRESSIONAL RESEARCH SERVICE, “PRICE GOUGING,” THE ANTITRUST LAWS, AND VERTICAL INTEGRATION IN THE PETROLEUM INDUSTRY: HOW THEY ARE RELATED (2008); Jeff Makhholm, *The Theory of Relationship-Specific Investments, Long-Term Contracts, and Gas Pipeline Development in the United States*, Working Paper Presented at the First Workshop on Energy Economics and Technology (Apr. 21, 2006).

151. See *supra* Section I.C.2, for a brief systematization and explanation of regulatory rollback techniques, including the use of the CRA.

152. A joint resolution providing for congressional disapproval under chapter 8 of title 5, United States Code, of the rule submitted by the Environmental Protection Agency relating to “Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Review,” Pub. L. No. 117-23, 135 Stat. 295 (2021). See *supra* note 117.

153. *Presidential Transitions*, *supra* note 2, at 21.

154. *Id.* at 23.

155. No. 20-01357 (D.C. Cir. Feb. 12, 2021).

156. *Id.* at 27, n.136.

allowed President Biden's Administration time to consider whether to change the rule, as it eventually did.

C. Methane Rules' Effectiveness and Future Regulations

As Professor Kleinberg concludes regarding methane emissions regulations, "natural gas emission control efforts started in October 2012 have had no perceptible effect on this trend . . . [m]ethane emissions have changed little over the years following the promulgation of the OOOO rules, consistent with a long-term compound annual decline rate of about 0.3 percent."¹⁵⁷ This could be explained, according to Kleinberg, by the narrow applicability of the new standards to new sources, so "the effects of regulation might have been muted by a relatively slow turnover of oil field equipment."¹⁵⁸

In September 2021, President Biden urged other countries to join the United States in committing to cut methane gas emissions by at least 30% below 2020 levels by the end of 2030.¹⁵⁹ This could be a decisive advance, constituting "a crucial step in tackling climate change and getting the world closer to the goals of the Paris Agreement to keep global temperature rise to below 2°C."¹⁶⁰ This pledge was officially launched during the 26th Conference of the Parties (COP) of the United Nations Framework Convention on Climate Change.¹⁶¹

In this context, the Biden Administration announced new rules to reduce methane emissions on November 2, 2021,¹⁶² that would be more stringent than the 2012-2016 NSPS that was reinstated through the CRA in June 2021.¹⁶³ These new regulations would also apply to natural gas and oil infrastructure that existed before September 18, 2015,¹⁶⁴ being "[t]he first-of-a-kind proposal for older sources [that] would apply to most U.S. oil and gas infrastructure."¹⁶⁵

Specifically, after the announcement, the proposed rule was published in the *Federal Register* on November 15, 2021.¹⁶⁶ Then the comment period was extended through

January 31, 2022,¹⁶⁷ and a possible supplemental proposal could yet be issued by EPA to modify the initial proposal in response to public input. Basically, the proposed rule comprises three groups of actions under the CAA, with the intention to reduce GHG emissions and other air pollutants from the oil and natural gas source categories.¹⁶⁸

First, the review of NSPS for GHG focuses on methane emissions and VOCs, by broadening emission reduction requirements for new, modified, and reconstructed oil and gas sources, including standards that limit emissions from additional types of sources. Like the Obama Administration's proposal, this proposed rule would also include "the production, processing, transmission and storage segments."¹⁶⁹ Second, the rule proposes emissions guidelines for states in developing and implementing plans to establish performance standards to limit GHGs from existing sources. Third, it includes related actions from the joint resolution of Congress, adopted under the CRA to disapprove the 2020 methane rules.

In this sense, it is again remarkable how the biggest oil and natural gas producers have aligned with the idea of establishing regulations to reduce methane emissions in their processes—supporting one of this Comment's premises, that regulated industries prefer a durable and stable regulatory framework even if stringent, because a known framework allows them to plan ahead in their business with some certainty.¹⁷⁰ For example, the vice president of government relations of a gas producer in Wyoming, explaining their voluntary agreement to monitor their methane emissions, was quoted as saying that "[s]taying ahead of the swings of politics and regulations puts us in a position where we don't have to respond with a significant amount of unexpected capital to meet new regulations."¹⁷¹

Likewise, the U.S. Chamber of Commerce has said that it "supports the smart, balanced regulation, consistent with law, of methane emissions from the oil and gas sector, as an important element of the nation's overall commitment to continue reducing its greenhouse gas . . . emissions."¹⁷² Specifically, the Chamber states that it supports the rule "to create durable, long-term regulatory certainty for the upstream and midstream segments of the oil and gas sector."¹⁷³ On the other hand, many U.S. oil and gas inde-

157. KLEINBERG, *supra* note 93, at 4.

158. *Id.*

159. *Climate Change: Biden Urges World Leaders to Cut Methane Gas Emissions*, BBC NEWS (Sept. 17, 2021), <https://www.bbc.com/news/world-us-canada-58590194>.

160. *New Global Methane Pledge Aims to Tackle Climate Change*, UNITED NATIONS ENV'T PROGRAMME (Sept. 22, 2021), <https://www.unep.org/news-and-stories/story/new-global-methane-pledge-aims-tackle-climate-change>.

161. Matt McGrath, *COP26: US and EU Announce Global Pledge to Slash Methane*, BBC NEWS (Nov. 2, 2021), <https://www.bbc.com/news/world-59137828>.

162. News Release, U.S. EPA, U.S. to Sharply Cut Methane Pollution That Threatens the Climate and Public Health (Nov. 2, 2021), <https://www.epa.gov/newsreleases/us-sharply-cut-methane-pollution-threatens-climate-and-public-health>.

163. Chemnick, *supra* note 148.

164. Mike Lee & Carlos Anchondo, *Oil States Brace for Biden Methane Rule*, E&E NEWS: ENERGYWIRE (Sept. 27, 2021), <https://www.eenews.net/articles/oil-states-brace-for-biden-methane-rule/>. See *supra* Section II.B.1.

165. *Id.*

166. Standards of Performance for New, Reconstructed, and Modified Sources and Emissions Guidelines for Existing Sources: Oil and Natural Gas Sector Climate Review, 86 Fed. Reg. 63110 (Nov. 15, 2021).

167. Standards of Performance for New, Reconstructed, and Modified Sources and Emissions Guidelines for Existing Sources: Oil and Natural Gas Sector Climate Review; Extension of Comment Period, 86 Fed. Reg. 71603 (Dec. 17, 2021).

168. Standards of Performance for New, Reconstructed, and Modified Sources and Emissions Guidelines for Existing Sources: Oil and Natural Gas Sector Climate Review, *supra* note 166, at 63110.

169. *Id.* at 63113.

170. Lee & Anchondo, *supra* note 164.

171. *Id.*

172. U.S. Chamber of Commerce, U.S. Chamber Comments on Proposed Standards of Performance for New, Reconstructed, and Modified Sources and Emissions Guidelines for Existing Sources: Oil and Natural Gas Sector Climate Review (Jan. 31, 2022), <https://www.uschamber.com/energy/us-chamber-comments-on-proposed-standards-of-performance-for-new-reconstructed-and-modified-sources-and-emissions-guidelines-for-existing-sources-oil-and-natural-gas-sector-climate-review>.

173. *Id.*

pendent producers associations declared their support to technical amendments contained in the proposed rule,¹⁷⁴ but also expressed their concern regarding the application of the rule to existing facilities,¹⁷⁵ among other observations.

With the incoming rulemaking of stringent regulations during the Biden Administration, new questions arise. For example, whether these new rules on methane emissions will be challenged in courts, or whether the next administration, if from the opposite party, will accept them or will simply try to reverse them, using the same toolkit that recent presidential administrations have developed.¹⁷⁶ These are issues that cannot be answered yet, but that should be carefully monitored to grasp a deeper understanding of the consequences of these regulatory pendulums.

III. Recommendations

As exemplified by the NSPS on methane for the oil and natural gas industries, there has been an increasing use of presidential administrative power to impose a political agenda that not only extends to the future, but also to the work of previous administrations. The enactment of the NSPS on methane during the Obama Administration, its policy reversal during the Trump Administration, and then the restoration and enactment of the new NSPS during the Biden Administration, shows how unstable regulations can be depending on the political inclinations of the governing party,¹⁷⁷ their abilities to withstand judicial review, particularly where it requires convincing courts to uphold new interpretations of existing authorities,¹⁷⁸ and the whims of a dysfunctional legislative branch.¹⁷⁹ To confront this regulatory uncertainty, and the challenges it poses to regulated industries, this section formulates and applies different recommendations to help ensure a more stable and durable regulatory framework across presidential administrations.

First, this Comment's analysis and recommendations do not contemplate issues such as what changes could be made politically, or in the legislative or judicial branches. The recommendations are executive branch-centered, within the legal framework of regulatory uncertainty. Nonetheless, it is worth acknowledging that legislative gridlock in Congress has promoted the aggressive use of executive branch agencies, and that the pressure on agencies to supply this deficiency persists.¹⁸⁰ In fact, as Professors Davis Noll and Revesz observe, "[r]ollback pressures could be alleviated if Congress ends the filibuster rule in the Senate."¹⁸¹

This Comment also acknowledges the role of courts to control the legality of the administration, within a separation-of-powers approach in a contemporary governance model.¹⁸² Specifically, I have adhered to a "neoclassical" administrative law approach, recognizing the need to respect judicial intervention on legal matters, but discouraging its involvement in discretionary policymaking controversies.¹⁸³ In other words, the role of courts as "the ultimate arbiters of legal questions"¹⁸⁴ should be recognized, and insulated from any argument that interferes with a robust legal control of the administrative state and presidential administrations.¹⁸⁵

Second, as Professor Bulman-Pozen indicates, academics that support the administrative state sometimes tend to give up on external checks and balances and focus on proposing "tempering presidential control through bureaucracy and administrative procedure."¹⁸⁶ I agree with her on the existence of solutions beyond these constraints, such as her proposal of intergovernmental cooperation in line with cooperative federalism. Accordingly, this section offers recommendations not only to temper presidential control, but also to ensure that, even during expansive presidential administrations, there is a minimum of regulatory certainty. This is fundamental because, as described in previous sections, ensuring a minimum level of regulatory certainty is essential to promote timely investments in the private sector to prevent climate change.

Finally, all these recommendations should be considered with the realization that presidential administrations ought to increase credibility by promoting durability and stability throughout their terms. This is what I argue should be the one encompassing posture, transcending specific presidential endeavors to establish their policies through lasting administrative regulations.

A. Civic Governance and Intergovernmental Cooperation

Profs. Blake Emerson and Jon Michaels propose an alternative to these vigorous presidential administrations and their extensive policymaking regulatory toolsets: the promotion of civic governance.¹⁸⁷ This means calling "on the president to use his preeminent position in American government to more fully empower an array of elected officials, expert bureaucrats, grassroots organizers, and civic institutions,"¹⁸⁸ or, in other words, redistributing authority from the president to those actors.¹⁸⁹ Therefore, the dis-

174. Independent Petroleum Association of America et al., Comments on Environmental Protection Agency's Proposed Standards of Performance for New, Reconstructed, and Modified Sources and Emissions Guidelines for Existing Sources: Oil and Natural Gas Sector Climate Review 1-2 (Jan. 2022).

175. *Id.* at 7-9.

176. See Section I.C.2.

177. See Emerson & Michaels, *supra* note 39, at 428-29.

178. Jeffrey A. Pojanowski, *Neoclassical Administrative Law*, 133 HARV. L. REV. 852, 903 (2019).

179. *Presidential Transitions*, *supra* note 2, at 68. See Metzger, *supra* note 27, at 76.

180. *Presidential Transitions*, *supra* note 2, at 68. See Mashaw, *supra* note 31, at 424-25.

181. *Presidential Transitions*, *supra* note 2, at 68. See Metzger, *supra* note 27, at 76.

182. Pojanowski, *supra* note 178, at 903.

183. *Id.* at 884.

184. *Id.* at 919.

185. See also Daniel E. Walters, *Symmetry's Mandate: Constraining the Politicization of American Administrative Law*, 119 MICH. L. REV. 455 (2020) (for a critical analysis of the different approaches toward the role of courts on reviewing agency interpretations).

186. Bulman-Pozen, *supra* note 2, at 270.

187. Emerson & Michaels, *supra* note 39.

188. *Id.* at 423.

189. *Id.*

cretionary power aggrandizement of the president would be tempered by the redistribution of power among public actors.¹⁹⁰ More precisely, the goal of civic governance is to leave “authoritarian or antidemocratic tendencies, with fewer opportunities—and less maneuverability—to pursue objectives unilaterally.”¹⁹¹ At the same time, all the aforementioned actors should promote cooperation, to de-escalate conflicts that may arise within a growing and extended presidential administration.¹⁹²

To accomplish this proposal, they focus on two facets of civic administration.¹⁹³ First, on internal housekeeping, by proposing to rebuild and “center the civil service”¹⁹⁴ and reform the U.S. Department of Justice and the Pentagon.¹⁹⁵ Second, on outward-facing partnerships, by strengthening overseas relationships, partnering with state, local, and tribal governments, and nurturing civil society.¹⁹⁶ Specifically on building partnerships with state, local, and tribal authorities, the authors suggest that the federal government should get involved in rallying support for key reform initiatives in state legislatures,¹⁹⁷ and by ordering its agencies to work in cooperation with state, local, and tribal partners when developing major rules.¹⁹⁸

This should be complemented with Professor Bulman-Pozen’s previous proposal on intergovernmental cooperation through administrative states.¹⁹⁹ In particular, regarding the need to prevent an abrupt change in policies and enhance durability, she highlights that state policies can outlast presidential administrations, “conferring resilience that federal agency action frequently lacks.”²⁰⁰ However, it must be noted that this same reliance on state and local policymaking has been used as a tool to incentivize state actions to undo or roll back a previous administration’s policies.²⁰¹

All of these proposals should be qualified with the limits that the Supreme Court has imposed on federal agencies regarding possible instructions to states on policy matters.²⁰² For instance, the anti-commandeering principle, which was reaffirmed in *Murphy v. National Collegiate Athletic Ass’n*,²⁰³ forbids the federal executive branch to compel “states to regulate in accord with its preferences.”²⁰⁴ Therefore, the implementation of a cooperative strategy should be respectful of these legal constraints.

I agree with Professor Bulman-Pozen that, “as presidents confront judicially imposed limits on federal agency

action, intergovernmental presidential administration is likely to become even more prominent in shaping domestic policy.”²⁰⁵ Consequently, there could be a justified trend toward expanding presidential administration, or promoting civic governance, by also increasing intergovernmental cooperation through waivers, grants, and so on.²⁰⁶ In this regard, a more dynamic civic governance would ensure a more durable and stable regulation,²⁰⁷ “by allowing states to keep alive and refine regulatory policies that a new federal administration revokes.”²⁰⁸

In this context, regarding the NSPS on methane, despite ongoing uncertainty at a federal level, states have enacted several methane regulations that are even more stringent than the current federal methane regulations.²⁰⁹ Therefore, President Biden’s Administration should ensure a wider implementation of state-level standards on methane emissions to entrench a broad and stable policy against these harmful emissions.

B. Reasoned Administration

Prof. Jerry Mashaw asserts that contemporary administrative law aspires “to construct a system of administrative governance that is well-informed, highly participatory, complexly interconnected with political and legal monitors, and insulated against . . . the seizure of public power for private or partisan advantage.”²¹⁰ In this context, reasoned administration emerges as a model of administrative legitimacy focused on decisionmaking, especially within rulemaking.²¹¹

In particular, the reasoned administration model suggests the observation of multiple requirements, such as consideration of environmental effects or balancing costs and benefits.²¹² These requirements try to accomplish the goal to make “administrative action that might be instrumentally rational from the perspective of an agency’s particular mission more substantively reasonable when viewed from the broader perspective of competing public goals and values.”²¹³ In this way, Professor Mashaw’s model is closely related to democratic governance.²¹⁴

190. *Id.*

191. *Id.* at 422.

192. *Regulation in Transition*, *supra* note 2, at 54.

193. Emerson & Michaels, *supra* note 39, at 432.

194. *Id.* at 435-37.

195. *Id.* at 437-41.

196. *Id.* at 441-47.

197. *Id.* at 443.

198. *Id.* at 444.

199. Bulman-Pozen, *supra* note 2.

200. *Id.* at 298.

201. *See id.* at 303 (on how the Trump Administration used different state and local tools to undo Obama Administration environmental and healthcare policies).

202. *Id.* at 312.

203. 138 S. Ct. 1461 (2018).

204. Bulman-Pozen, *supra* note 2, at 312.

205. *Id.* at 307.

206. *Id.* at 305.

207. *See supra* Section I.B.2.

208. Bulman-Pozen, *supra* note 2, at 315. *See* William W. Buzbee, *Federalism Hedging, Entrenchment, and the Climate Challenge*, 2017 WIS. L. REV. 1037 (2017).

209. BERKELEY LAW, UNIVERSITY OF CALIFORNIA, CALIFORNIA CLIMATE POLICY FACT SHEET: METHANE (2019); Press Release, Office of Pennsylvania Governor Tom Wolf, Governor Wolf Announces New Methane Rules to Improve Air Quality, Reduce Industry Loss (Jan. 19, 2016), <https://www.governor.pa.gov/newsroom/governor-wolf-announces-new-methane-rules-to-improve-air-quality-reduce-industry-loss/>; Coloradans for Responsible Energy Development, *Colorado Leads Methane Emissions Regulation*, <https://www.cred.org/colorado-leads-methane-emissions-regulation/> (last visited Apr. 19, 2022).

210. JERRY L. MASHAW, REASONED ADMINISTRATION AND DEMOCRATIC LEGITIMACY: HOW ADMINISTRATIVE LAW SUPPORTS DEMOCRATIC GOVERNMENT 164 (1st ed. 2018).

211. Mashaw, *supra* note 31, at 9.

212. MASHAW, *supra* note 210, at 164.

213. *Id.*

214. *Id.* at 197.

I agree with the need to enhance administrative legitimacy by developing and encouraging a thorough and reasonable explanation of policymaking decisions in the federal government. Accordingly, agencies should be required to present substantive reasoning when declining an enforcement request, “and judicial review can be limited to determining—on a deferential basis—only whether they have done so.”²¹⁵ Also, reasoned administration could be achieved, as Professor Mashaw proposes, by an agency’s decision to commit to a wider use of the notice-and-comment procedure, even when faced with broad rule exemptions.²¹⁶

This greater use of public comment procedures could help ensure that regulatory rollbacks only persist and endure judicial review when an extensive and well-thought-out decision process has occurred, proving that it is not just a partisan move to remove previous rules. Although this idea of reasoned administration would challenge the broad discretion of presidential administrations, I agree that “[t]he tension between these models of administrative legitimacy can really only be managed, not resolved,”²¹⁷ proving a “dense and complexly articulated accountability regime.”²¹⁸

C. Bureaucracy and Procedural Hurdles

The aggrandizement of presidential administrations can also be constrained by acknowledging the role of bureaucratic actors and procedures as a constitutional framework to enforce “separation of powers commitments.”²¹⁹ Concretely, the adoption of bureaucracy serves also as a procedural hurdle, by promoting the implementation of procedural requirements that make policy repeals difficult.²²⁰ The role of the APA as a procedural hurdle serves to illustrate the idea of making it more difficult to roll back regulations in the executive branch.²²¹ In this sense, statutes such as the APA “increased the difficulty of overturning existing policies.”²²²

As scholars have recognized, legislation on administrative procedure can be long-lasting and useful for “insulat[ing] the current political majority against future changes in policy when control over public authority changes.”²²³ In this context, Prof. Rui de Figueiredo asserted in 2002 that, when modeling the structure politicians theoretically choose to implement their policies, there are three broad issues to consider.²²⁴ The core issues he addressed remain in

force, despite contemporary objections about polarization and gridlock and the two decades that have passed since their original formulation.²²⁵

First, when there is uncertainty about a pending election’s outcome, political groups should be more likely to cooperate on policy issues.²²⁶ Accordingly, “[u]nless all groups have an incentive to cooperate, cooperation will fail,”²²⁷ and as competition is balanced, incentives become irrelevant.²²⁸ So, “all groups value benefits when they are out of power more . . . As competition increases and uncertainty is maximized, policy cooperation . . . is most likely.”²²⁹

Second, even if there is a higher level of certainty, “groups’ incentives to insulate bureaucracies will be asymmetric: only weak groups will use an idiosyncratic opportunity to lock in programmatic benefits.”²³⁰ Third, groups that occupy more often positions of power “do not have the same incentives to pay a cost to lock in benefits. Therefore, the incentives described in the theory should only rarely create occasions for insulation from future sabotage.”²³¹

The current state of legislation on administrative procedure in the United States has institutionalized the way in which the NSPS on methane must be established. Within this framework, the existing procedural requirements have not been enough to slow the repealing of prior policies, beyond the scope of the judicial standard of review contained in the APA of “arbitrary or capricious” and requiring substantial record evidence²³² and a “reasoned analysis.”²³³ For instance, the repeal and enactment of new amendments to the NSPS in 2020 during the

225. Sangyup Choi et al., *Policy Uncertainty and Foreign Direct Investment*, 29 REV. INT’L ECON. 195, 225 (2021); Manav Raj, *A House Divided: Legislative Competition and Young Firm Survival in the United States*, 42 STRATEGIC MGMT. J. 2389, 2390 (2021).

226. de Figueiredo, *supra* note 224, at 321.

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.* See John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 613 (1996); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 969 (1992); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 511 (1989); Trevor R.S. Allan, *Judicial Deference and Judicial Review: Legal Doctrine and Legal Theory*, 127 LAW Q. REV. 96, 96 (2011). See also RONALD M. LEVIN, *THE APA AND THE ASSAULT ON DEFERENCE* 5-11 (Washington University in St. Louis School of Law, Legal Studies Research Paper Series Paper No. 21-01-01, 2021) (on why *Chevron* deference, although not foreseen when the APA was enacted, makes a reasonable extrapolation from that era’s doctrines and is consistent with APA §706, justifying the return to a proper judicial deference). Cf. Matthew C. Stephenson, *A Costly Signaling Theory of Hard Look Judicial Review*, 58 ADMIN. L. REV. 753, 801-03 (2006) (on the difficulties of judicial review and a possible solution to overcome the technical expertise in reviewing administrative actions); Wendy Wagner, *Revisiting the Impact of Judicial Review on Agency Rulemaking: An Empirical Investigation*, 53 WM. & MARY L. REV. 1717, 1720-22 (2011) (about the role of courts on helping to protect the public interest against industry capture in the rulemaking process); Melissa F. Wasserman, *Deference Asymmetries: Distortions in the Evolution of Regulatory Law*, 93 TEX. L. REV. 625, 625 (2014) (on how administrative regulations that favor its regulated entities are more likely to get judicial deference and avoid reexamination and its implications for administrative law).

233. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 13 ELR 20672 (1983).

215. *Id.* at 193 (Justice Thurgood Marshall concurrence in *Heckler v. Chaney*, 470 U.S. 821, 15 ELR 20335 (1985)).

216. *Id.* at 196.

217. Mashaw, *supra* note 31, at 16.

218. *Id.*

219. Bulman-Pozen, *supra* note 2, at 287; Metzger, *supra* note 27, at 87-91.

220. Fabrizio, *supra* note 79, at 792.

221. *Id.*

222. *Id.*

223. Rui J.P. de Figueiredo Jr. & Richard G. Vanden Bergh, *The Political Economy of State-Level Administrative Procedure Acts*, 47 J.L. & ECON. 569, 573-74 (2004).

224. Rui J.P. de Figueiredo, *Electoral Competition, Political Uncertainty, and Policy Insulation*, 96 AM. POL. SCI. REV. 321 (2002).

Trump Administration, which withstood judicial review under the APA and constituted a clear deregulation and regression of the environmental standards set during the Obama Administration, might have been prevented or made more difficult by the establishment and strategic use of new bureaucratic structures.²³⁴

In summary, by establishing a more robust rulemaking process under administrative procedure requirements, the elaboration or modification of the current NSPS on methane could be strengthened. This robustness would help first to ensure that the new rules endure a thorough judicial review, to which they will certainly be subjected by opposing parties. Second, these detailed and well-substantiated rules would also hinder the reversal process by making it harder to justify reversing a rule based on well-supported findings. Moreover, another remedy under the same conceptual framework would be to establish new procedural rules, to ensure that the reversal process of current regulations observes administrative requirements that make it harder to accomplish.

D. Reviving Rationality

Along with the previous section, another key element to ensure more durable regulations is to vigorously promote and establish the need to conduct thorough and strong cost-benefit analysis. This methodological tool is widely used in the “federal policymaking apparatus,”²³⁵ and is required through different statutes, in programs ranging from environmental issues to safety programs.²³⁶ To retake rationality would imply amendment of the cost-benefit analysis within the regulatory process, by identifying and eliminating biases against regulation that are not inherent to it, and more historical than conceptual.²³⁷ By achieving this goal, the “cost-benefit analysis would become a powerful tool for neutral policy analysis,”²³⁸ meaning the easement of “accurately identifying wealth-maximizing regulations.”²³⁹

With this strong method, the rulemaking process of NSPS on methane for the oil and gas industry would be strengthened, shielding the rules from unjustified reversals or modifications. Indeed, it could even improve the support from regulated industries, which could be more receptive to regulations based on neutral cost-benefit analysis, by assessing a more long-term durability, and therefore improving regulatory certainty for their activities.

In the current scenario, under the Biden Administration, Profs. Michael Livermore and Revesz recently declared their “hope for a more rational approach to regulatory decision-making.”²⁴⁰ This hope is based on one of the first

memoranda issued by the current Administration,²⁴¹ where the president “affirmed his administration’s commitment to cost-benefit analysis and called for a set of much-needed updates to improve the technique.”²⁴² In their opinion, this memo “made clear that his administration planned to take economic analysis of regulations seriously,”²⁴³ because it establishes “a much-needed path for reforming cost-benefit analysis by modernizing the technique and promoting justice and equity in the process of regulatory review.”²⁴⁴

E. Act Faster

As Professors Davis Noll and Revesz propose, new administrations should be able to engage in new regulatory strategies to shelter their rules from future rollbacks. These strategies are (1) transition planning (do more work during this phase before assuming government)²⁴⁵; (2) augmenting the speed of rulemaking, being careful not to lose too much quality such as strong cost-benefit analysis, while putting the timing of the more controversial regulations at the beginning of a president’s first term²⁴⁶; (3) shortening compliance deadlines, without having them be considered blatantly infeasible before a court²⁴⁷; and (4) keeping later rules uncontroversial, by satisfying broader interests, and avoiding resistance.²⁴⁸

At this point, President Biden’s Administration has turned to an aggressive push of its agenda through its first year in the White House,²⁴⁹ exemplified by the signing of Executive Order No. 13990.²⁵⁰ This Executive Order is “unusual in that, beyond merely setting out policy priorities, it also set out explicit, near-term deadlines for rolling back certain regulations.”²⁵¹ In this context, as previously explained, President Biden has already reversed President Trump’s decision on rolling back certain aspects of the NSPS 2016 rule on methane emissions and announcing stringent rules on methane.²⁵²

Of course, this necessity of advancing faster must be harmonized with two previous recommendations: first, with the promotion of a reasoned administration where several requirements must be satisfied during the rulemaking process to ensure robust regulations that endure judicial review; and second, with the idea of using bureaucracy

Analysis, YALE J. ON REGUL. (Nov. 1, 2021), <https://www.yalejreg.com/nc/symposium-reviving-rationality-part-17/>.

241. Joseph R. Biden, *Modernizing Regulatory Review*, WHITE HOUSE (Jan. 20, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/modernizing-regulatory-review/>.

242. Livermore & Revesz, *supra* note 240.

243. *Id.*

244. *Id.*

245. *Regulation in Transition*, *supra* note 2, at 66-70.

246. *Id.* at 70-72, 73-76.

247. *Id.* at 72.

248. *Id.*

249. *Presidential Transitions*, *supra* note 2, at 62-66.

250. Exec. Order No. 13990, Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis, 86 Fed. Reg. 7037, 7037-38 (Jan. 25, 2021).

251. *Presidential Transitions*, *supra* note 2, at 62.

252. See Section II.B.3.

234. See Section II.B.2.

235. RICHARD L. REVEZ & MICHAEL A. LIVERMORE, *RETAKING RATIONALITY* 11 (1st ed. 2008).

236. *Id.*

237. *Id.* at 10.

238. *Id.*

239. *Id.* at 151.

240. Michael A. Livermore & Richard L. Revesz, *Symposium on Michael Livermore and Richard Revesz’s “Reviving Rationality”: The Future of Cost-Benefit*

to establish procedural hurdles that make repeal or reversal more arduous.

F. Regulatory Commitment

It is important to note that presidential administrations should increase their credibility in durability and stability.²⁵³ In this context, one way to achieve this goal is by creating regulatory commitments between federal agencies and regulated industries.²⁵⁴ The goal should be “[t]o encourage compliance and private investment, and to achieve public policy goals.”²⁵⁵ In this way, agencies would “reduce ex post hazards by credibly committing to policy stability and predictability.”²⁵⁶

These regulatory commitments could be achieved by promoting relationships of mutual dependence or mutual reliance, through private investment protection and expansion of contractual relations.²⁵⁷ Another way is to develop regulatory environments that ease adoption of renewable energy requirements, “such as electing not to approve proposed investments in new natural gas exploration, processing, and transport.”²⁵⁸ In this regard, Profs. Brian Levy and Pablo Spiller highlight that regulatory commitments can also be achieved in problematic environments, where long-term investments are nearly impossible unless some kind of inflexible regulatory regime is established.²⁵⁹ This could be the case with the NSPS for methane. For example, regarding the energy industry, it has been suggested that in investment decisions on infrastructure and utilities, regulated industries significantly rely on a credible commitment that public authorities and regulations will not expropriate their investments.²⁶⁰

IV. Conclusion

With the strong actions of the past two presidential administrations, a growing partisanship and political polariza-

tion has reached the administrative state, with pernicious consequences. This growth is exemplified by extensive development of the presidential toolset, to reach the fullest accomplishment of their agenda by executing policies through federal agencies, including extensive and new mechanisms for regulatory rollback. In fact, policy reversals are now expected and accentuated with each change in administration, as a response to legislative gridlock in Congress, with no foreseeable end in the next several legislative sessions.

Consequently, regulatory uncertainty reigns, compromising the adoption of long-term and durable policies, and the possibility to have regulated industries adopt and execute long-term plans that typically comprise massive investments of capital. This regulatory uncertainty clearly affects the possibility to fight climate change, a scientific phenomenon that calls for urgent action, especially from massive GHG polluters like the oil and gas industry.

This Comment offers different recommendations to ensure that in the energy industry sector, regulations to secure and enforce emission reductions of methane for oil and gas sources can and must endure for more than a presidential term. For this, I propose the adoption of a civic governance and intergovernmental cooperation approach, and the establishment of reasoned administration, among other procedural solutions. Also, despite a tacit recognition of the value of bureaucracy as a procedural hurdle to resist reversals, quick solutions can only be achieved through a true regulatory commitment.

In the end, whether common sense aligns with presidential administration and federal policies will be a matter of democratic choices more than an issue of political polarization or partisanship. Only a wide rationalization of regulatory stability will ensure once and for all a long-standing policy that hopefully addresses the contemporary problems of our society, such as climate change.

253. Fabrizio, *supra* note 79, at 792-93.

254. *Id.*

255. *Id.* at 792.

256. *Id.*

257. Oliver E. Williamson, *Credible Commitments: Using Hostages to Support Exchange*, 73 AM. ECON. REV. 519, 528 (1983); Fabrizio, *supra* note 79, at 792.

258. Fabrizio, *supra* note 79, at 792.

259. Brian Levy & Pablo T. Spiller, *The Institutional Foundations of Regulatory Commitment: A Comparative Analysis of Telecommunications Regulation*, 10 J.L. ECON. & ORG. 201, 202 (1994).

260. See Alberto Asquer, *Regulatory Commitment and Investments*, in REGULATION OF INFRASTRUCTURE AND UTILITIES 149 (Springer 2018).