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Turning Square Corners: *Regents* and Arbitrary-and-Capricious Review's Distributional Stakes

ABSTRACT. A new era for the judicial review of agencies' reversals in course has dawned.

For the past few decades, courts have tended to review most changes in agency policy deferentially, reserving careful scrutiny for cases in which agencies plan to impose liability for previously lawful conduct or otherwise upend regulated parties' reliance interests. But after *Department of Homeland Security v. Regents of the University of California*, courts have intensified their scrutiny of changes in agency policy and have struck down measures that upset the expectations of regulatory beneficiaries as well as regulated parties.

This Note explains and defends this development. It begins by reviewing the D.C. Circuit's "hard-look" review, which was animated by a belief that the agencies effecting deregulation were insufficiently responsive to regulatory beneficiaries. Courts eventually relaxed this exacting style of review, but judges did not embrace a deferential posture across the board. Instead, courts focused their attention on regulated parties, and they crafted overlapping doctrines that triggered heightened review of policy changes that upset the regulatory background against which regulated industry entered contracts and made investments. *Regents* blends this approach with the earlier hard-look approach. Like many of the cases that preceded it, *Regents* treats the upheaval of concrete interests in the administrative status quo as a trigger for heightened judicial review. At the same time, like hard-look review, *Regents* instructs agencies to pay greater heed to regulatory beneficiaries and their expectations of regulatory continuity. This salutary combination seems likely to incentivize agencies to modulate damaging policy whiplashes without unduly curtailing agencies' freedom of action.

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INTRODUCTION

The question of how stringently courts ought to apply arbitrary-and-capricious review to agencies' changes of direction has become one of the most important and contested questions in administrative law.[1] The Supreme Court's decision in *Department of Homeland Security v. Regents of the University of California*, striking down the Trump Administration's rescission of the Deferred Action for Childhood Arrivals program (DACA), has only intensified the debate between those who defend executive dynamism and those who believe that the Court is right to make agencies changing course "turn square corners."[2]

The crucial portion of that decision comprises two mutually reinforcing and question-provoking holdings. First, citing the Supreme Court's seminal hard-look-review decision in *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, Chief Justice Roberts reasoned that the Department of Homeland Security (DHS) had arbitrarily and capriciously neglected to consider a more measured alternative to rescinding DACA in toto.[3] But while *State Farm* has a central place in administrative-law textbooks, the Court had almost never cited *State Farm* to second-guess an agency's choice among policy alternatives or to strike down a reversal in an agency's approach—that is, until *Regents*.[4]

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1. *Compare* Cristina M. Rodríguez, *Foreword: Regime Change*, 135 HARV. L. REV. 1, 106-07 (2021) ("[T]he expectation that the government rigorously explain changes in its policies to satisfy a rationalist standard relies in various ways on fictions that can inhibit policy change and thus the concrete realization of democratic politics."), *with* William W. Buzbee, *The Tethered President: Consistency and Contingency in Administrative Law*, 98 B.U. L. REV. 1357, 1442 (2018) ("The web of doctrines making up consistency law are well founded . . . and should endure, checking unjustified and unaccountable agency policy shifts.").

2. 591 U.S. 1, 24 (2020) (quoting St. Regis Paper Co. v. United States, 368 U.S. 208, 299 (1961) (Black, J., dissenting)); *see id.* at 9, 35-36 (holding that the Trump Administration's rescission of the Deferred Action for Childhood Arrival Programs (DACA) was unlawful). *Compare* GianCarlo Canaparo, *Administrative Inertia After* Regents *and* Department of Commerce, 6 ADMIN. L. REV. 315, 342 (2021) (criticizing *Regents*'s logic for excessively restraining the executive branch), *and* Zachary Price, *Symposium: DACA and the Need for Symmetrical Legal Principles*, SCOTUSBLOG (June 19, 2020, 3:51 PM), https://www.scotusblog.com/2020/06/symposium-daca-and-the-need-for-symmetrical-legal-principles [https://perma.cc/N3NA-ETTN] (same), *with* Peter Margulies, *The DACA Case: Agencies' "Square Corners" and Reliance Interest in Immigration Law*, 2019 CATO SUP. CT. REV. 127, 127-29 (defending *Regents* as promoting responsible policymaking).

3. *Regents*, 591 U.S. at 25-33 (citing Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 51 (1983)).

4. *See* Thomas W. Merrill, *Capture Theory and the Courts: 1967-1983*, 72 CHI.-KENT L. REV. 1039, 1095 (1997) ("The Supreme Court has invoked *State Farm* to reverse an agency action only once, in 1986."). But that may be changing after *Regents*. *See, e.g.*, Loper Bright Enters. v. Raimondo, 603 U.S. 369, 395 (2024); Ohio v. EPA, 603 U.S. 279, 293-95 (2024).

Second, Chief Justice Roberts reasoned that DHS illegally "failed to address whether there was 'legitimate reliance' on the DACA memorandum,"[5] and he invoked that failure as exacerbating DHS's failure to address alternatives.[6] Roberts indicated that DHS needed to recognize its disruption of DACA recipients' lives,[7] and he supported that holding with citations to a line of cases requiring an agency reversing course to address regulated parties' reliance on the agency's prior approach.[8] In addition, in a portion of the opinion that scholars have largely overlooked, Roberts indicated that the expectations of DACA recipients' families, employers, and communities about the program's continuity also constituted "noteworthy" reliance-interest claims that DHS was required to acknowledge.[9] These constituencies are regulatory beneficiaries: unregulated parties who benefit indirectly from agency action targeted at others—here, at the DACA recipients. Until *Regents*, the Supreme Court had never required an agency to acknowledge the reliance of such regulatory beneficiaries on regulatory stability. This portion of the opinion would therefore seem to mark a significant doctrinal shift.

While some scholars initially doubted that the case would have wide-ranging impact,[10] *Regents* has proven highly influential. Lower courts now frequently second-guess agencies' changes in policy, insist that reliance claims require agencies to pay closer attention to incremental policy alternatives than they otherwise might,[11] and do so on the basis of reliance claims made by regulatory

5. *Regents*, 591 U.S. at 29-31.

6. *Id.* at 31-33 ("Had Duke considered reliance interests, she might, for example, have considered a broader renewal period . . . more accommodating termination dates for recipients . . . [o]r she might have instructed immigration officials to give salient weight to any reliance interests engendered by DACA when exercising individualized enforcement discretion.").

7. *Id.* at 31-34.

8. *Id.* at 29-31 (citing Encino Motorcars, LLC v. Navarro, 579 U.S. 211, 222 (2016); Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 742 (1996)).

9. *Id.* at 31-33.

10. *See, e.g.*, Price, *supra* note 2 ("Chief Justice John Roberts' opinion seems deliberately designed for one day and case only.").

11. *See, e.g.*, Texas v. Biden, 10 F.4th 538, 554 (5th Cir. 2021) ("While considering alternatives, [the Department of Homeland Security (DHS)] '*was* required to assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns.'" (quoting *Regents*, 591 U.S. at 33)); District of Columbia v. U.S. Dep't of Agric., 496 F. Supp. 3d 213, 249-50 (D.D.C. 2020) ("Such radical changes in long-standing policies, on which States, their agencies and others have long relied for such a critical purpose as necessary nutritional assistance, requires that the agency adequately consider 'the "alternative[s]" that are "within the ambit of the existing [policy]."'" (alterations in original) (quoting *Regents*, 591 U.S. at 30)).

beneficiaries.[12] This pattern has emerged most prominently in the series of challenges made to the Biden Administration's reversals of Trump-era immigration policies,[13] but it has hardly been limited to the conservative Fifth Circuit or to immigration cases.[14]

Arbitrary-and-capricious review will likely play an even more important role in administrative law after the Supreme Court's momentous 2024 Term. For the past several decades, courts have reviewed changes to an agency's policy differently from changes to an agency's interpretation of a statute, with the latter reviewed under the deferential *Chevron* standard.[15] In *Loper Bright*, however, the Supreme Court did away with *Chevron*'s obligatory judicial deference to reasonable agency constructions of ambiguous statutes.[16] In its stead, the Court instructed lower courts to apply arbitrary-and-capricious review to agency interpretations of statutes that "expressly delegate" interpretive authority to agencies and to select the "best" meaning of statutes that contain no such delegation.[17] As a result, cases of express delegation that were once resolved under *Chevron* may now be determined under *State Farm* and, when the agency changes its interpretation of a statutory provision, under *Regents*.

Many scholars have criticized this heightening of judicial scrutiny of agencies' changes in position, favoring narrower interpretations of the Court's

12. *See, e.g.*, United Farm Workers v. Perdue, No. 20-cv-01452, 2020 WL 6318432, at *9-11, *14 (E.D. Cal. Oct. 28, 2020) (granting relief against agency action on the basis of regulatory beneficiaries' reliance claims); Tice-Harouff v. Johnson, No. 22-cv-201, 2022 WL 3350375, at *10-11 (E.D. Tex. Aug. 12, 2022) (same).

13. *See, e.g.*, Texas v. Biden, 589 F. Supp. 3d 595, 620 (N.D. Tex. 2022) ("Here, neither the July 2021 nor the August 2021 Orders demonstrate any sort of specific, meaningful consideration of Texas's potential reliance interests."); Texas v. Biden, 20 F.4th 928, 989-90 (5th Cir. 2021) ("DHS 'failed to address whether there was legitimate reliance on' MPP. . . . That alone is fatal." (quoting *Regents*, 591 U.S. at 5)), *rev'd*, 597 U.S. 785 (2022); Texas v. United States, 606 F. Supp. 3d 437, 491 (S.D. Tex. 2022) ("But DHS does not demonstrate that it actually considered the costs its decision imposes on the States, nor their reliance interests on mandatory detention. 'That alone is fatal.'" (quoting Texas v. Biden, 20 F.4th at 989)), *rev'd*, 599 U.S. 670 (2023).

14. *See, e.g.*, Nat'l Urb. League v. Ross, 977 F.3d 770, 778-79 (9th Cir. 2020) (recognizing a reliance interest in the performance of the census on the Department of Commerce's announced timeline and requiring consideration of alternatives to complete a reversal of the announced timeline extension); Int'l Org. of Masters v. NLRB, 61 F.4th 169, 179-80 (D.C. Cir. 2023) (reversing a decision by the National Labor Relations Board on the basis of the unions' reliance interest in a stable legal background against which to bargain with employers).

15. *See* Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 364-65, 372 (1986).

16. Loper Bright Enters. v. Raimondo, 603 U.S. 369, 412 (2024) ("*Chevron* is overruled. Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires.").

17. *Id.* at 394-95, 400.

decision in *Regents*. Haiyun Damon-Feng, for example, argues that *Regents* has been read "too expansively" and warns that striking down informal agency action on the basis of reliance claims made by downstream regulatory beneficiaries "[s]wallow[s]" *Regents*'s "rule."[18] Daniel T. Deacon similarly presents *Regents* as a "straightforward" application of prior Supreme Court precedent and cautions lower courts against requiring agencies to consider modifying existing programs rather than doing away with them.[19] His argument is consistent with the thrust of the recent literature on arbitrary-and-capricious review, which has generally urged greater judicial deference in the name of political accountability and policymaking dynamism.[20]

This Note takes a different view, arguing that *Regents* ushered in a new and salutary form of heightened judicial review of agencies' changes in course. This new regime includes mutually reinforcing requirements that agencies account for regulatory beneficiaries' reliance interests and evaluate incremental policy measures that would have a less detrimental effect on those expectations than total rescission. Influenced by a rapidly growing literature that has produced key insights into major administrative-law doctrines by studying their real-world consequences,[21] this Note will defend the *Regents* decision — and the line of cases it has spawned — by carefully analyzing its distributional implications.

Scholars have traditionally characterized agency action as interfacing with three principal groups: (1) regulated parties, who are directly subject to

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18. Haiyun Damon-Feng, *Administrative Reliance*, 73 DUKE L.J. 1743, 1781, 1793 (2024); *see also* Rodríguez, *supra* note 1, at 103-05 (criticizing courts' and state litigants' invocation of *Regents* to restrain policy change).

19. Daniel T. Deacon, *Responding to Alternatives*, 122 MICH. L. REV. 671, 685, 703-04 (2024).

20. *See, e.g.*, Rodríguez, *supra* note 1, at 96-97; Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345, 346-47 (2019).

21. *See, e.g.*, Bagley, *supra* note 20, at 346 ("The distribution of resources, risk, and power in the United States is partly a function of an administrative law that is supposed to be agnostic as to that distribution."); Gregory A. Elinson & Jonathan S. Gould, *The Politics of Deference*, 75 VAND. L. REV. 475, 551 (2022) (analyzing *Chevron* deference from a perspective that "deemphasize[s] abstract values like expertise and accountability in favor of showing how the doctrine relates to material interests in regulatory outcomes"); Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law*, 82 U. CHI. L. REV. 393, 394-98 (2015) (arguing that the D.C. Circuit once structured its administrative-law decisions around "special solicitude for environmental, consumer, and other [related] interests" but, in the 2010s, came to depart unjustifiably from the Administrative Procedure Act (APA) to advance libertarian goals and protect regulated parties). For earlier examples of scholars writing in this vein, see generally Merrill, *supra* note 4; and Reuel E. Schiller, *Enlarging the Administrative Polity: Administrative Law and the Changing Definition of Pluralism, 1945-1970*, 53 VAND. L. REV. 1389 (2000).

regulation and liability;[22] (2) benefit recipients, who directly receive agency payments or in-kind benefits like permits;[23] and (3) regulatory beneficiaries, who benefit indirectly from agency action directed at another party.[24] As this Note will demonstrate, courts have often invoked this framework when setting out the standard of review that they will apply in evaluating an agency's change in course.[25] However, the role of this tripartite framework in shaping judicial review has gone largely unexamined in the literature.[26] This Note seeks to correct that omission. A review of more than four decades of administrative-law decisions shows that courts have long understood agencies' obligations to consider reliance interests and to evaluate policy alternatives to be mutually constitutive. But courts have disagreed about *whose* reliance interests should be cognizable and should thus trigger careful judicial scrutiny along with an agency's obligation to look for incremental policy alternatives. That disagreement has translated into considerable discontinuity in the shape of the relevant doctrine.[27]

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22. Regulated parties have traditionally been the focal point of scholars' discussion of administrative reliance. *See, e.g.*, Cass R. Sunstein & Adrian Vermeule, *The Morality of Administrative Law*, 131 HARV. L. REV. 1924, 1947-48 (2018) [hereinafter Sunstein & Vermeule, *The Morality of Administrative Law*] (noting with approval administrative law's traditional solicitude for "reliance by regulated parties"); CASS R. SUNSTEIN & ADRIAN VERMEULE, LAW & LEVIATHAN: REDEEMING THE ADMINISTRATIVE STATE 63-64, 77 (2020) [hereinafter SUNSTEIN & VERMEULE, LAW & LEVIATHAN] (same).

23. For a seminal article about benefit recipients, see generally Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964), which advocates for due-process protections for benefit recipients.

24. *See* Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397, 414 (2007); Landyn Wm. Rookard, *Misplaced Reliance: Recalibrating the Role of Reliance Interests in Judicial Agency Policy Changes*, 92 UMKC L. REV. 355, 358 (2023).

25. *See, e.g.*, Kisor v. Wilkie, 588 U.S. 558, 579 (2019) ("[A] court may not defer to a new interpretation . . . that creates 'unfair surprise' to regulated parties." (quoting Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 170 (2007))); Mingo Logan Coal Co. v. EPA, 829 F.3d 710, 736 (D.C. Cir. 2016) (Kavanaugh, J., dissenting) ("The Supreme Court requires a 'more reasoned' or 'more detailed' justification in those circumstances because an agency change that undermines serious reliance interests disrupts settled expectations, thereby imposing a significant cost on regulated parties and contravening basic notions of due process and fundamental fairness.").

26. *See, e.g.*, Rookard, *supra* note 24, at 356 ("Courts (and scholars) treat reliance interests the same without addressing or distinguishing among the parties that assert them.").

27. The author reviewed every Supreme Court and D.C. Circuit opinion that cited *Motor Vehicle Manufacturers Ass'n of the United States v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983), until January 27, 2024. The author also reviewed every published decision—across all circuits and district courts—published before January 27, 2024, that cited *Department of Homeland Security v. Regents of the University of California*, 591 U.S. 1 (2020). The author complemented this sample with a thorough review of D.C. Circuit cases from the 1960s and 1970s that invoked an agency's obligation to consider alternatives, as well as a selection of circuit-court cases from outside the D.C. Circuit that invoked that obligation after *State Farm* and before *Regents*.

Before *Chevron*, the D.C. Circuit — and the Supreme Court in *State Farm* — carefully scrutinized agencies' changes in policy when they appeared to threaten regulatory beneficiaries' expectations of continued regulatory protection. They did so largely on the basis of assumptions about Congress's proregulatory intent and the need to amplify marginalized voices in the administrative policymaking process. After *Chevron*, courts broadly declined to second-guess agencies' selection among reasonable policy alternatives, but the Supreme Court soon carved out exceptions to this deferential review of alternatives. In cases involving claims of investment-backed reliance by regulated parties, the Court reintroduced a heightened standard of review, but this heightened review was not available to regulatory beneficiaries. In *Regents*, the Supreme Court finally extended this heightened protection to regulatory beneficiaries, requiring DHS to consider more measured policy alternatives than a wholesale rescission of the program on which both regulated parties — childhood arrivals to the United States — *and* regulatory beneficiaries — these childhood arrivals' communities — had relied. *Regents*'s expansion has, in turn, prompted lower courts to expand their consideration of regulatory beneficiaries' reliance interests.

That is not to say the distinctions between regulated parties, benefit recipients, and regulatory beneficiaries perfectly map onto the complexities of administrative action. Critics, for instance, have pointed out that agency action often generates a "bundle of rights and obligations" rather than simply conferring benefits or imposing restrictions.[28] Take DACA. Participants in that program were both the objects of immigration regulation and the recipients of federal benefits.[29] But even as many have questioned the distinction between regulated parties and benefit recipients, courts and scholars have sensibly continued to insist on a distinction between these two constituencies and those who are affected only indirectly by agency action. This Note will insist on that distinction as well.

Indeed, the 2024 Term's *Corner Post* decision looked to this distinction in construing the Administrative Procedure Act (APA). That case clarified the boundary between these first two groups — regulated parties and benefit recipients — and a third group — those who are unregulated but may suffer downstream effects from agency action.[30] The Court drew this line by looking to the relief available to the parties.[31] Those in the first two categories — like DACA participants — may bring "as-applied" challenges to adjudications of their particular rights in

28. *See, e.g.*, Mendelson, *supra* note 24, at 414 n.96 (characterizing the position of Cass R. Sunstein in Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1992)).

29. *See Regents*, 591 U.S. at 8-9.

30. *See* Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys., 603 U.S. 799, 809 n.2, 824 n.9 (2024).

31. *Id.* at 824 n.9.

targeted agency action, like a deportation or benefit determination.[32] But because those in the third group—like DACA participants' family members—are never similarly subject to direct agency action, they may only bring facial challenges to agency action.[33] Regulatory beneficiaries, then, are those who indirectly benefit from agency action targeted at others and who could never themselves obtain as-applied relief from that action.

As Justice Kavanaugh illustrated in his concurrence in *Corner Post*, there is an expansive variety of parties who fall into this category—parties with whom administrative law must contend yet who have not been the focus of legal scholarship.[34] Because the category of regulatory beneficiaries is so broad, permitting members of this diffuse class to challenge agency action raises a serious line-drawing problem.[35] Instead of addressing this problem by differentiating between different types of regulatory beneficiaries, courts and agencies have tended to shut the entire constituency out of the administrative policymaking process. Beneficiaries, for instance, often have trouble establishing standing to challenge deregulation[36] and convincing courts to induce agencies to act in the first place.[37] A number of studies have revealed that it is far more difficult for regulatory beneficiaries to place policy options on policymakers' radar ex ante than it is for regulated parties to do the same.[38] That there is a narrower path for regulatory

32. *Id.* at 806.

33. *Id.* at 824 n.9. Justice Kavanaugh emphasized this point in his concurrence. *See id.* at 828-29 (Kavanaugh, J., concurring).

34. *Id.* at 831 & n.3 ("Most of the recent academic and judicial discussion of this issue has addressed suits by regulated parties. That discussion has largely missed a major piece of the issue—suits by unregulated but adversely affected parties."); *see also* Mendelson, *supra* note 24, at 402 ("Scholars have largely ignored another important component of the 'public' affected by agency regulation: regulatory beneficiaries.").

35. Mendelson, *supra* note 24, at 415-16 (surveying challenges like determining who has Article III and statutory standing and declining to offer "a comprehensive typology of regulatory beneficiaries").

36. *See id. See generally* Elizabeth Magill, *Standing for the Public: A Lost History*, 95 VA. L. REV. 1131 (2009) (tracing the evolution of standing doctrine).

37. *See* Sidney A. Shapiro, *Rulemaking Inaction and the Failure of Administrative Law*, 68 DUKE L.J. 1805, 1816-23 (2019).

38. *See, e.g.*, Wendy Wagner, William West, Thomas McGarity & Lisa Peters, *Deliberative Rulemaking: An Empirical Study of Participation in Three Agency Programs*, 73 ADMIN. L. REV. 609, 635 (2019) (reporting that the Environmental Protection Agency (EPA) designed "key provisions of its rules" in conversation with industry); Susan Webb Yackee, *The Politics of* Ex Parte *Lobbying: Pre-Proposal Agenda Building and Blocking During Agency Rulemaking*, 22 J. PUB. ADMIN. RSCH. & THEORY 373, 374 (2011) ("[*E*]*x parte* contacts [with regulated parties] are a potential factor in causing the withdrawal of regulation from consideration, which implies that interest group activity during the pre-proposal stage helps to block unwanted policy changes from moving forward.").

beneficiaries to challenge agency action ex post than for regulated parties only magnifies the impact of this ex ante imbalance.[39] In short, regulatory beneficiaries have been relegated to "second-class" status in administrative law.[40]

This pervasive disadvantaging of regulatory beneficiaries is unfortunate. Regulatory beneficiaries—like patients seeking reproductive health care from regulated hospitals in the wake of *Dobbs*—often have an equally concrete stake in agency action as do regulated parties and benefit recipients.[41] In addition, regulatory beneficiaries can play a vital role in spurring agencies to fulfill—and to continue fulfilling—their mandates to protect health, the environment, and human beings.[42] Regulatory beneficiaries also often hold valuable information about the potential impact of regulations that can help agency officials make policy more responsibly.[43] Requiring agencies to consider regulatory beneficiaries' reliance interests before upending existing regulatory frameworks may induce agencies to pay these beneficiaries and their needs greater attention, as one scholar has already argued.[44]

At the same time, however, requiring agencies to attend to every claim of reliance by every downstream beneficiary would increase agencies' explanatory burden under the APA to an intolerable degree, especially with respect to

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39. *See, e.g.*, Mendelson, *supra* note 24, at 412, 415-16 (noting that as-applied challenges to enforcement suits enable regulated parties to "litigate the legality and rationality" of guidance that may be difficult for beneficiaries to challenge, and that courts almost "automatically conclude that a regulated party has standing").

40. Shapiro, *supra* note 37, at 1838; *see* Mendelson, *supra* note 24, at 415-16; Rookard, *supra* note 24, at 358.

41. *See* Mendelson, *supra* note 24, at 415; *see also* Rookard, *supra* note 24, at 358 (offering other comparable examples).

42. *See* Mendelson, *supra* note 24, at 417 ("'[E]nforcement of public policy directives is a crucial task of modern government,' and regulatory beneficiaries have an enormous stake in the proper implementation of those directives." (quoting Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073, 2105 (2005))); Shapiro, *supra* note 37, at 1808, 1810-11.

43. *See* Blake Emerson, *The Claims of Official Reason: Administrative Guidance on Social Inclusion*, 128 YALE L.J. 2122, 2206-07 (2019).

44. Rookard, *supra* note 24, at 377. While it coincides with this Note on this point, Landyn Wm. Rookard's piece differs in fundamental ways. For instance, it overlooks that courts are already according such reliance claims increased solicitude, *id.* at 356, sharply critiques *Regents* and the due-process framing of reliance, *id.* at 366-67, and proposes a return to D.C. Circuit-style hard-look review, *id.* at 360. Further, Rookard insists that regulatory beneficiaries' reliance interests are the primary expectations that merit consideration by agencies. *Id.* at 358. By contrast, this Note demonstrates that after *Regents*, lower courts employing a due-process approach are giving regulatory beneficiaries' reliance claims equal weight to those made by regulated parties, and it defends this development. *See infra* Part IV.

informal agency action.[45] This Note does not undertake to offer a complete solution to this problem or to offer "a comprehensive typology of regulatory beneficiaries"[46] and the serious reliance interests they may hold. It instead makes the more limited claim that *Regents* and the cases it has generated have thus far struck an appropriate balance by requiring agencies to attend to some, but not all, regulatory beneficiaries' reliance claims, and that there accordingly exists no reason to heed scholars' call to trim agencies' deliberative obligations when reversing course.[47] Through careful review of the *Regents* line of cases, this Note surfaces several implicit—if still somewhat fuzzy—limiting principles regarding the types of reliance claims made by regulatory beneficiaries that agencies must consider. By identifying these limits and undertaking a preliminary analysis of them, this Note provides lower courts essential guidance on how to operate within the *Regents* framework, and it offers a starting point for future scholarship to sharpen the contours of this evolving doctrine.

This Note proceeds in four Parts. Part I demonstrates that the D.C. Circuit in the 1960s to the mid-1980s, as well as the *State Farm* Court, intentionally wielded hard-look review to safeguard regulatory beneficiaries' expectations of continued regulatory protection. Part II argues that after the *Chevron* decision, courts were initially more deferential and more balanced in their review of policy alternatives but soon carved out exceptions for heightened review of regulated parties' reliance claims based on a due-process-like justification. Part III argues that *Regents* modified this paradigm by extending that heightened form of review to regulatory beneficiaries. Part IV shows that many lower courts have indeed read *Regents* as a call to apply heightened review in cases involving claims of reliance by some regulatory beneficiaries. Finally, Part IV describes the limiting principles that emerge from those lower-court decisions and defends these developments on distributional grounds.

One methodological note is in order. *Regents*—like *Loper Bright* and many of the lower-court decisions that this Note will review—was a politically salient decision that many have described in legal-realist terms.[48] It may well be true that

45. *See* Damon-Feng, *supra* note 18, at 1814-15 (articulating this concern).

46. Mendelson, *supra* note 24, at 415-16.

47. *See, e.g.*, *supra* notes 18-20 and accompanying text. Several scholars have argued that agencies must consider only reliance interests of *intended* regulatory beneficiaries. *E.g.*, Rookard, *supra* note 24, at 358 ("If anyone's reliance interests should matter, it is those of the intended beneficiaries of a regulatory scheme."); Damon-Feng, *supra* note 18, at 1809. This approach is flatly inconsistent with *Regents*, and, as Part IV will show, creates serious administrability problems of its own.

48. *See, e.g.*, Cristina M. Rodríguez, *Reading* Regents *and the Political Significance of Law*, 2020 SUP. CT. REV. 1, 9 (arguing that Chief Justice Roberts sought to find "a political sweet spot" with his opinion); *see also* Elinson & Gould, *supra* note 21, at 551-52 (arguing that *Chevron* deference was shaped in large part by political considerations).

political influences shaped these decisions, but this Note's analysis will put political considerations to the side. This Note will focus on the theoretical and doctrinal substance of the Court's opinions because it is that material—and not the Justices' motivations—that binds the agencies and lower courts handling the bulk of day-to-day administrative law. Moreover, even if one were to inquire into the Court's motivations for ruling the way it did, one would likely find that legal argument and political considerations overlap to such a degree that it makes little sense to separate the two.[49]

I. ADMINISTRATIVE RELIANCE AND THE OBLIGATION TO CONSIDER ALTERNATIVES BEFORE *CHEVRON*

We owe the shape of much of today's administrative law to the midcentury D.C. Circuit's common-law-making prowess.[50] From the late 1960s until the 1980s, the D.C. Circuit deployed an aggressive form of judicial oversight that drew the curtain on two decades of deference to federal agencies' policy choices.[51] That aggressive approach to judicial review combined the imposition of procedural requirements intended to improve the quality of agency decision-making ex ante with ex post scrutiny of agencies' substantive reasoning.[52] This "hard-look" review mandated fidelity to statutory directives and, when those directives were unclear, required agencies to develop policies with the entire

49. Consider concerns about regulatory "whiplash." This might be characterized as a rule-of-law argument about the importance of predictable legal norms, or as solicitude toward industry's pursuit of a more favorable investment environment. *See* Coral Davenport, *How Abrupt U-Turns Are Defining U.S. Environmental Regulations*, N.Y. TIMES (Apr. 26, 2024), https://nytimes.com/2024/04/26/climate/biden-trump-environmental-regulations.html [https://perma.cc/UN9Z-LFT2] (quoting industry representatives expressing concern about the "whiplash" in environmental regulation across presidential administrations).

50. *See* Merrill, *supra* note 4, at 1042 n.23, 1093-95.

51. *See id.* at 1043; Schiller, *supra* note 21, at 1398-1410.

52. These overlapping approaches were somewhat at odds with one another. For an overview of this tension, see Patricia Wald, *The Contribution of the D.C. Circuit to Administrative Law*, 40 ADMIN. L. REV. 507, 514-19 (1988).

spectrum of affected parties in mind, not just industry.[53] In so doing, hard-look review aimed to make agencies more democratically responsive.[54]

One semiprocedural requirement calculated to advance these goals was an agency's obligation to consider "obvious alternatives" to the course of action it selected.[55] The D.C. Circuit did not deploy this obligation to consider alternatives evenly. Section I.A will show that the court specifically scrutinized alternatives to Reagan-era rescissions of longstanding regulations, and it will contend that the court's belief that agency policymakers were insufficiently attentive to regulatory beneficiaries' expectations of regulatory stability drove this exacting scrutiny. By contrast, the court did not tend to apply similarly careful scrutiny when agencies' reversals in course instead threatened regulated parties. As Section I.B shows, the Supreme Court in *State Farm* adopted this hard-look style of review and expressed similar concern about industry capture.

A. Protecting Regulatory Beneficiaries

The D.C. Circuit invoked the obligation to consider alternatives selectively, engaging in exacting review of deregulatory measures that the court viewed as undermining the expectations of public-interest groups while reviewing more deferentially policy changes that threatened to defeat regulated industries'

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53. *See, e.g.*, Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 63 (1985) ("Reviewing courts are attempting to ensure that the agency has not merely responded to political pressure but that it is instead deliberating in order to identify and implement the public values that should control the controversy. . . . Those values may be found in the statute, which must of course be taken as authoritative. If, as is often the case, the statute is ambiguous, the values must be ascertained by the agency through a more open-ended process. In this process, the agency must ensure public scrutiny and review and thereby guard against outcomes imposed by dominant factions."); *see also* Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1713 (1975) ("It has become widely accepted, not only by public interest lawyers, but by academic critics, legislators, judges, and even by some agency members, that the comparative overrepresentation of regulated or client interests in the process of agency decision results in persistent policy bias in favor of these interests.").

54. *See, e.g.*, THEODORE J. LOWI, THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES, at xvi (2d ed. 1979) (criticizing the pluralist approach to governance for leading to an "impotent government"); *see also* Merrill, *supra* note 4, at 1062 (describing Nader's Raiders and their polemics in the 1960s and 1970s, which "castigat[ed] various agencies for cozying up to big business and ignoring the public interest").

55. Yakima Valley Cablevision, Inc. v. FCC, 794 F.2d 737, 746 (D.C. Cir. 1986); *see also* Nat'l Ass'n of Home Builders v. EPA, 682 F.3d 1032, 1042 (D.C. Cir. 2012) (describing this requirement as "quasi-procedural" because "[it] focus[es] not on the kind of procedure that an agency must use to generate a record, but rather on the kind of decisionmaking record the agency must produce to survive judicial review" (quoting Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 530 (1985))).

expectations. Although the D.C. Circuit did not use the term regulatory beneficiaries in its opinions, the public-interest groups to which it showed special concern fell within that category. As we will see, these groups represented constituencies that benefited indirectly from agency action targeted at others — typically industry — and as a result could obtain relief only through facial challenges.

In the late 1960s, a judicial and scholarly consensus emerged that influence campaigns waged by industry had "captured" agencies, blunting their will to regulate vigorously, and that judicial intervention was required to restore democratic control over agencies.[56] This push to increase agencies' democratic responsiveness had two facets. If there was a statutory directive on point, courts were tasked with ensuring administrative fidelity to its underlying purpose, which courts often believed to be bolstering regulation.[57] And if there was no discernible legislative purpose on point, courts required agencies to engage in a genuinely participatory policymaking process that factored in the interests of regulatory beneficiaries.[58] The latter aspect of hard-look review reflected both a recognition that collective-action problems and resource limitations hindered public-interest groups' ability to influence agency action ex ante as well as an optimism in the ability of courts to identify these limitations in action and nudge agencies to ameliorate their impact.[59]

Several scholars have canvassed the administrative-law doctrines developed by the D.C. Circuit that could be said to serve probeneficiary ends.[60] Even so, no one has yet investigated how distributional bias shaped the early stages of administrative-reliance doctrine. This Section will elucidate that link and will contrast the D.C. Circuit's concern that agencies attend to regulatory beneficiaries' expectations of regulatory continuity with its relative lack of concern about agency action that undermined regulated parties' reliance interests. Regulatory beneficiaries' expectations sometimes took the form of concrete or "classic" reliance interests backed by economic investment.[61] At other times, regulatory

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56. *See, e.g.*, Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 183-84 (1992); LOWI, *supra* note 54, at xvi; Merrill, *supra* note 4, at 1060 ("By the time the late 1960s rolled around, agency capture had come to be regarded as something more akin to the universal condition of the administrative state.").

57. *See, e.g.*, Sunstein, *supra* note 53, at 63; Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 509 (1985) ("[A] concern for ensuring fidelity to congressional intent, and particularly for protecting the intended beneficiaries of statutory programs, has shaped the evolution of the elements of deregulation review.").

58. *See* Sunstein, *supra* note 53, at 63.

59. Sunstein, *supra* note 56, at 184; Stewart, *supra* note 53, at 1713-15.

60. *See, e.g.*, Schiller, *supra* note 21, at 1417-43; Merrill, *supra* note 4, at 1040.

61. This Note borrows the "classic" label from William N. Eskridge Jr., *Reliance Interests in Statutory and Constitutional Interpretation*, 76 VAND. L. REV. 681, 683 (2023).

beneficiaries' expectations were more diffuse and fell outside the scope of what today's Court would likely treat as "serious" reliance.[62] Nonetheless, the D.C. Circuit often accorded these diffuse expectations greater solicitude than it did to concrete, investment-backed reliance claims made by regulated industry. It typically did so on the assumption that protecting unregulated parties was the overriding purpose behind the wave of health, safety, and environmental statutes that Congress had passed, and it viewed deregulation as a danger signal that this congressional intent was being ignored. And even when the relevant statute was ambiguous or its purpose was unclear, the D.C. Circuit seemed to assume that industry had sufficient ex ante influence with policymakers to protect its own reliance interests, whereas regulatory beneficiaries needed courts' help to do so.

We begin with an example that illustrates just how "hard" hard-look review could be when the D.C. Circuit suspected that an agency's change of direction was responsive to special interests. In *Public Citizen v. Steed*, the D.C. Circuit struck down the National Highway Traffic Safety Administration's (NHTSA's) indefinite suspension of a tire-treadwear grading program that had been promulgated pursuant to a section of the National Traffic and Motor Vehicle Safety Act (Safety Act) that aimed to "provide consumers useful information in selecting tires."[63] The program required manufacturers to assign grades to their own tires, but this had led to variable grading practices.[64] In 1981, NHTSA issued, but did not follow through on, an advance notice of proposed rulemaking that suggested a methodology to standardize the grades.[65] Then, in 1983, NHTSA suspended the entire tire-grading program for the stated reason of preventing "dissemination of potentially misleading tire grading information to

62. *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 288 (2022) (holding that these reliance interests arise in "cases involving property and contract rights" (quoting Payne v. Tennessee, 501 U.S. 808, 828 (1991))). William N. Eskridge, Jr. would call the more diffuse reliance claims not rooted in property or contract "societal" reliance. *See* Eskridge, *supra* note 61, at 687-88 ("Assumptions held by a social group can be just as concrete and knowable as classic private reliance, and they are potentially more important. Societal reliance also speaks to our democracy's fragile pluralism; an established accommodation respecting the dignity and rights of one or more social groups ought not be lightly disturbed . . . ."); *see also* Emerson, *supra* note 43, at 2208-09 (defending a broad understanding of reliance interests in public law that encompasses the state's extension of "official recognition" and "social inclusion" to marginalized social groups).

63. 733 F.2d 93, 94 (D.C. Cir. 1984).

64. *Id.* at 95-96.

65. *Id.* at 96.

consumers."[66] In issuing that suspension, NHTSA "explicitly considered" but ultimately rejected the option of retaining the program in its current form.[67]

Judge Mikva began by explaining that the provision of the Safety Act calling for the tire-grading program was "primarily, if not solely . . . a consumer provision."[68] He then argued that NHTSA had failed to comply with this statutory mandate to develop a program that would advance the interests of these regulatory beneficiaries in accurate information. This was because, notwithstanding its consideration of retaining the program in its existing form, the agency had failed to contemplate the option of retaining the program and "correct[ing] the deficiencies in the program which the agency relied upon to justify the suspension."[69] Mikva's analysis focused on the discarded 1981 rulemaking.[70] NHTSA had explained that it did not follow through on the rule because commenters "pointed out a variety of shortcomings."[71] But Mikva noted that NHTSA had subsequently developed—but ultimately declined to propose—a fix for those shortcomings.[72] And he argued that implementing this discarded draft fix was an "important alternative to suspension" that NHTSA was obligated to consider, even though no comment in the suspension rulemaking at issue had suggested that NHTSA implement the draft fix.[73] Mikva capped off his rebuke of NHTSA's substantive reasoning with a firm reprimand: "It is hard to imagine a more sorry performance of a congressional mandate than that carried out by NHTSA and its predecessors under section 203 of the Act."[74]

The D.C. Circuit applied a similar formula time and again to reject deregulation that it perceived to be the result of insufficient fidelity to statutory mandates. In these cases, the court equated protecting the interests of consumers and

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66. *Id.* (quoting Federal Motor Vehicle Safety Standards; Termination of Rulemaking Proceeding, 47 Fed. Reg. 30084, 30084 (proposed July 12, 1982)).

67. *Id.* at 97.

68. *Id.* at 94.

69. *Id.* at 99.

70. *Id.* at 104.

71. *Id.* at 104 (quoting Consumer Information Regulations; Uniform Tire Quality Grading, 48 Fed. Reg. 5690, 5698 (Feb. 7, 1983)).

72. *Id.*

73. *Id.* at 104-05. The National Highway Traffic Safety Administration (NHTSA) briefly mentioned the 1981 advance notice of proposed rulemaking in its final rule announcing the suspension. *Id.* ("[C]ommenters on that proposal pointed out a variety of shortcomings, particularly with respect to its failure to properly account for undergrading. No commenter in the present [suspension] rulemaking proceeding has suggested that the procedure *as proposed in February 1981* be adopted at this time." (alterations in original) (quoting Consumer Information Regulations; Uniform Tire Quality Grading, 48 Fed. Reg. at 5698 (emphasis added))).

74. *Id.* at 105.

of labor, environmental, and public-health organizations with heeding Congress's intent in passing the relevant statute, and it struck down total rescissions of longstanding regulatory programs for insufficient fidelity to that legislative intent.[75] It inferred a derogation of the agency's statutory mandate both from agencies' failures to consider less disruptive modifications suggested in comments and hearings,[76] as well as from failures to address policy options identified by the court itself.[77] And in some cases, the D.C. Circuit appears to have engaged in a combination of the two, striking down agency action for failure to engage sufficiently with alternatives that were both raised by the comments and identified as especially important by the court.[78]

The wave of health and safety legislation in the 1960s not only mandated agency action in new areas but also embraced a novel theory of agency design that provided new pathways for regulatory beneficiaries to participate more robustly in agency decision-making.[79] The D.C. Circuit—evidently of the view that these pathways were an important antidote to agency capture—advanced this congressional project by liberalizing standing rules and rigidly enforcing these participatory requirements.[80] Sometimes it went even further. Even when there existed no clear proregulatory statutory mandate, in certain cases the D.C.

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75. *See, e.g.*, *id.* at 94 (detailing legislative intent to protect consumer interests); Int'l Ladies' Garment Workers' Union v. Donovan, 722 F.2d 795, 800-01 (D.C. Cir. 1983) (describing legislative intent to protect labor interests); Aeschliman v. NRC, 547 F.2d 622, 629 (D.C. Cir. 1976) (finding that the Atomic Energy Commission's "rejection of energy conservation" was "capricious and arbitrary" and contrary to congressional intent in the National Environmental Policy Act), *rev'd sub nom.* Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519 (1978).

76. *See, e.g.*, *Aeschliman*, 547 F.2d at 629; *Donovan*, 722 F.2d at 815.

77. *See, e.g.*, *Steed*, 733 F.2d at 104; Off. of Commc'n of United Church of Christ v. FCC, 707 F.2d 1413, 1440 (D.C. Cir. 1983); Nat'l Black Media Coal. v. FCC, 775 F.2d 342, 357 (D.C. Cir. 1985).

78. *See, e.g.*, Nat'l Citizens Comm. for Broad. v. FCC, 567 F.2d 1095, 1112-14 (D.C. Cir. 1977) (remanding a Federal Communications Commission (FCC) action for failure to give sufficient consideration to a public-interest group's proposal because that proposal, which FCC cursorily rejected, "has desirable aspects that the Commission may have overlooked"); *see also* Ctr. for Sci. in the Pub. Int. v. Dep't of Treasury, 573 F. Supp. 1168, 1176-77 (D.D.C. 1983) (holding that the agency "acted in an arbitrary and capricious manner, especially in light of industry comments" proposing an alternative that "[d]efendants did not consider" because, in the court's judgment, that alternative "undermines the cost arguments advanced by defendants"), *vacated in part sub nom.* Ctr. for Sci. in the Pub. Int. v. Regan, 727 F.2d 1161 (D.C. Cir. 1984).

79. Jerry L. Mashaw & David L. Harfst, The Struggle for Auto Safety 4-5 (1990).

80. Off. of Commc'n of United Church of Christ v. FCC, 359 F.2d 994, 1004 (D.C. Cir. 1966) (permitting a church communications office and civil-rights leaders to intervene in radio-license renewal proceedings in light of the "Congressional mandate of public participation"); *see also* Magill, *supra* note 36, at 1151, 1153-56 (describing the importance of this decision).

Circuit sought to safeguard the expectations of regulatory beneficiaries regarding their continued regulatory protection, participation, and recognition.[81]

For instance, in *United Church of Christ v. FCC*, the D.C. Circuit struck down the Federal Communications Commission's (FCC's) rescission of its nearly fifty-year-old requirement that radio stations maintain publicly available program logs for failure to consider less disruptive alternatives.[82] "Citizen groups," Judge Wright explained, "have found the program logs to be essential to obtain the concrete information necessary to demonstrate a radio station's inadequate performance in a petition to deny" renewal of that station's public license.[83] Accordingly, FCC was obligated to take into account those citizen groups' "unchanged [informational] needs" and, at a minimum, explain why those needs would "be met without access to some type of programming logs."[84]

This requirement that agencies explicitly consider alternatives to the rescission of longstanding regulations that would be less disruptive to regulatory beneficiaries, even when those regulatory beneficiaries did not hold what today's courts would consider cognizable reliance interests, repeated itself across a variety of fact patterns. In some cases, the D.C. Circuit's invocation of this obligation appears to have functioned as a nod to the likelihood that regulatory beneficiaries had made life plans, such as a choice of profession, that depended on the perpetuation of existing regulatory regimes.[85] In other cases, the existence of those regulatory protections may have given rise to groups' more diffuse expectations that they would continue to be recognized and treated with dignity by regulators.[86]

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81. *See* Emerson, *supra* note 43, at 2207-08. Blake Emerson reads the lower-court cases preceding *Regents* as protecting a particular form of reliance that he deems "reliance on official recognition." *Id.* He defines this as an interest in continued governmental "acknowledgment that some aspect of a person's identity is worthy of official regard, or that some harms count as legal wrongs in the eyes of the state." *Id.* at 2209. Regardless of whether the Roberts Court would recognize this category, Emerson's analysis is persuasive and sheds light retrospectively on what the D.C. Circuit may have been considering when it protected these groups' expectations.

82. 707 F.2d at 1439. Notably, program logs were *not* required by the substantive statute. *Id.*

83. *Id.* at 1441.

84. *Id.* at 1440. It is worth pointing out, however, that Judge Wright upheld other aspects of FCC's change in course. *See, e.g.*, *id.* at 1435.

85. *See* Int'l Ladies' Garment Workers' Union v. Donovan, 722 F.2d 795, 799-816, 824 n.65 (D.C. Cir. 1983) (striking down the rescission of "longstanding restrictions on the employment of workers in their homes (homeworkers) in the knitted outwear industry" and faulting the Secretary of Labor for failing to consider differences between currents operators' working conditions and operations in rural and urban areas).

86. *See* Action on Smoking & Health v. Civ. Aeronautics Bd., 699 F.2d 1209, 1219 (D.C. Cir. 1983) (striking down the rescission of a regulation on smoking on airplanes that protected nonsmokers); *see also* Proposed Restrictions on Smoking Aboard Aircraft, 44 Fed. Reg. 29486,

Robbins v. Reagan offers another illustration of this careful judicial scrutiny of agencies' reversals in course, albeit with an eye toward protecting benefit recipients.[87] At issue in that case was a decision by the Department of Health and Human Services (HHS) to revoke the nongovernmental organization (NGO) Community for Creative Non-Violence's informal authorization to operate a homeless shelter in Washington, D.C., and to renege on an agreement with the NGO to fund the building's renovation.[88] The NGO and occupants of the shelter sued to stop the closure.[89] The trial court rejected their APA challenges, but it required HHS to immediately "devis[e] appropriate interim and long range plans to eliminate homelessness in the Nation's Capital" as well as to "act with dispatch in coming up with reasonable [housing] alternatives so as to meet the entire needs of each and every resident of the shelter."[90] The D.C. Circuit rejected the instruction to HHS to devise plans to eliminate homelessness as beyond the district court's authority.[91] But, over a dissent, the D.C. Circuit insisted that HHS *did* have an obligation to locate alternative housing arrangements for the current occupants of the shelter.[92] Even though the D.C. Circuit conceded that the shelter residents had not relied to their detriment on the promise of a spot at the shelter,[93] the order that it affirmed seemed clearly animated by a perception that HHS had unfairly surprised this group of unhoused individuals by stripping them of their lodging as winter approached.[94]

The D.C. Circuit and other courts of appeals did not display a similar interest in protecting regulated parties and their material stakes in regulatory stability against agency reversals. In a series of important decisions, the courts insisted that agencies could abrogate regulated parties' property rights via rulemaking with little fuss.[95] Consistent with that position, the courts of appeals—and the

29486-87 (May 16, 1979) (to be codified at 14 C.F.R. pt. 252) (discussing the protection of individuals who are "unusually susceptible to tobacco smoke").

87. 780 F.2d 37, 39 (D.C. Cir. 1985).

88. *Id.* at 39-41.

89. *Id.* at 39 & n.1, 40.

90. Robbins v. Reagan, 616 F. Supp. 1259, 1280 (D.D.C. 1985).

91. *Robbins*, 780 F.2d at 51.

92. *Id.* at 51, 53. Judge Bork, by contrast, deemed this portion of the majority's opinion "an impermissible judicial intrusion into the administrative process." *Id.* at 59 (Bork, J., dissenting).

93. *Id.* at 53 (majority opinion).

94. *Robbins*, 616 F. Supp. at 1279.

95. *See, e.g.*, Gen. Tel. Co. of the Sw. v. United States, 449 F.2d 846, 864 (5th Cir. 1971) ("The property of *regulated industries* is held subject to such limitations as may reasonably be imposed upon it in the public interest and the courts have frequently recognized that new rules may abolish or modify pre-existing interests." (emphasis added)); Air Line Pilots Ass'n, Int'l

D.C. Circuit in particular—tended to be quite unsympathetic to regulated parties' reliance-interest and unfair-surprise claims.[96] In fact, it often struck down agency action for excessively protecting the status quo.[97] Several panel opinions even went so far as to hold that an agency's expression of concern for industry's reliance interests was itself a basis for striking down the agency's action as arbitrary and capricious.[98]

Consider an example that shows how, while judges often read an obligation to attend to regulatory beneficiaries' expectations *into* ambiguous statutes, they sometimes read the obligation to safeguard regulated parties' reliance interests *out* of the same laws. In *Farmers Union Central Exchange v. Federal Energy Regulatory Commission*, the D.C. Circuit faced a challenge to the Federal Energy Regulatory Commission's (FERC's) decision to uphold a fifteen-percent raise in an oil pipeline's rates.[99] FERC arrived at this decision by applying a "fair value" methodology that had been ratified by the Supreme Court three times[100] but that had been criticized in a more recent Supreme Court opinion[101] and that the D.C.

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v. Quesada, 276 F.2d 892, 896 (2d Cir. 1960) ("All private property and privileges are held subject to limitations that may reasonably be imposed upon them in the public interest."); Am. Airlines, Inc. v. Civ. Aeronautics Bd., 359 F.2d 624, 628 n.13 (D.C. Cir. 1966) ("Administrative regulations often limit in the public interest the use that persons may make of their property without affording each one affected an opportunity to present evidence upon the fairness of the regulation.").

96. *See, e.g.*, Kan. State Network, Inc. v. FCC, 720 F.2d 185, 188 (D.C. Cir. 1983) (rejecting a regulated party's unfair-surprise claim because it should have anticipated the agency's change of course and could have sought further clarification from the agency before proceeding); Gen. Am. Transp. Corp. v. ICC, 872 F.2d 1048, 1061 (D.C. Cir. 1989) (permitting retroactive application of a policy change because the regulated party was aware of the previous policy's vulnerability).

97. *See, e.g.*, Associated Gas Distribs. v. FERC, 824 F.2d 981, 1044 (D.C. Cir. 1987); Clark-Cowlitz Joint Operating Agency v. FERC, 826 F.2d 1074, 1091 (D.C. Cir. 1987) (striking down agency action that "would appear invariably to favor the *status quo*").

98. *Associated Gas Distribs.*, 824 F.2d. at 1041 ("So far as appears, however, FERC grandfathered these transactions with no more than references to the desirability of a smooth transition to a new order, to the reliance the parties placed on this transportation, and to the authorized duration of the transactions and the need to avoid undue infringement on them. These phrases do not seem to us to meet the modest standard implicit in the concept of reasoned decisionmaking." (citations omitted)); *see also* Farmers Union Cent. Exch., Inc. v. FERC (*Farmers Union II*), 734 F.2d 1486, 1518 n.65 (D.C. Cir. 1984) (criticizing FERC's argument that a rate-calculation formula be retained so as not to frustrate regulated parties' expectations).

99. Farmers Union Cent. Exch. v. FERC (*Farmers Union I*), 584 F.2d 408, 410-11 (D.C. Cir. 1978).

100. *See* Smyth v. Ames, 169 U.S. 466, 546-47 (1898); Sw. Bell Tel. Co. v. Mo. Pub. Serv. Comm'n, 262 U.S. 276, 287 (1923); St. Louis & O'Fallon Ry. Co. v. United States, 279 U.S. 461, 484-85 (1929).

101. *See* Fed. Power Comm'n v. Hope Nat. Gas Co., 320 U.S. 591, 601 (1944).

Circuit rejected in this case as an "artifact[] of a bygone era."[102] The D.C. Circuit first remanded the case for further consideration and then, when FERC stuck to its initial decision, struck down FERC's action for affording undue weight to "the pipelines' reliance on an outdated rate base formula," which, it held, "should not justify a continuation of [the] error" of using this outdated formula.[103] It elaborated in a footnote:

> We believe FERC's principal duty under the statute is to ensure "just and reasonable" rates. Accordingly, the frustration of the expectation that this excessively "permissive" and "indulgent" methodology would continue in force is a "factor[] which Congress has not intended [FERC] to consider." We therefore do not condone FERC's reliance on these expectations.[104]

The D.C. Circuit thus forbade FERC from giving weight to regulated industry's reliance interests, at a time when the court often *required* agencies to give weight to the reliance interests of regulatory beneficiaries and some benefit recipients.

The trichotomy of regulated parties, benefit recipients, and regulatory beneficiaries does not perfectly capture the dynamics of the D.C. Circuit's administrative-reliance decisions, however. At times, industry was simultaneously regulated by and the beneficiary of a regulatory regime that kept out new market entrants. As the Carter and Reagan Administrations began to dismantle these restrictions on competition, companies frequently turned to the courts to protect their privileged positions.[105] In these situations, courts tended not to look favorably on industry plaintiffs' claims.[106] In addition, this Section does not mean to suggest that the D.C. Circuit and its sister courts of appeals invariably rejected

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102. *Farmers Union I*, 584 F.2d at 414, 416.

103. *Farmers Union II*, 734 F.2d at 1518. On remand, FERC had stuck to its original position precisely because of regulated parties' well-founded reliance interests. "[H]owever jaundiced the court's view of the [Interstate Commerce Commission's] methodology, the fact is that that methodology has been in place for a long time and that drastic conceptual changes would be disruptive." *Id.* at 1518 n.65 (quoting Williams Pipe Line Co., 21 FERC 61260, 61721 n.373 (1982)).

104. *Id.* (alterations in original) (internal citation omitted) (quoting Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)).

105. Telocator Network of Am. v. FCC, 691 F.2d 525, 526-27 (D.C. Cir. 1982) (challenging unsuccessfully an agency order lowering barriers to entry to the mobile-telephone industry); Comput. & Commc'ns Indus. Ass'n v. FCC, 693 F.2d 198, 206 (D.C. Cir 1982) (challenging unsuccessfully deregulation of the telecommunications industry).

106. *See, e.g.*, Malrite T. V. of N.Y. v. FCC, 652 F.2d 1140, 1150, 1152 (2d Cir. 1981) (rejecting a challenge to deregulation of the cable-television industry and rejecting the industry's call for a grandfathering period); Nat'l Cable Television Ass'n v. FCC, 747 F.2d 1503, 1510-11 (D.C. Cir. 1984) (rejecting a challenge to deregulation of the cable-television industry in rural areas).

industry's reliance-interest claims.[107] This Section claims only that the D.C. Circuit's justification for hard-look review — ensuring democratic responsiveness — went hand in hand with a body of case law that, in the main, displayed less concern for the expectations of industry than for the expectations of public-interest groups.

B. The State Farm *Decision*

The various strands of the D.C. Circuit's hard-look jurisprudence — concern about agency capture, public-minded readings of Congress's intent, and solicitude for regulatory beneficiaries and their expectations — combined to produce the strong form of the obligation to consider alternatives that the Supreme Court wielded in *State Farm* and purported to resurrect in *Regents*.

In *State Farm*, the Supreme Court considered NHTSA's rescission of a regulation requiring that new vehicles be installed with airbags or automatic seatbelts in order to protect passengers in the event of a crash.[108] NHTSA's stated rationale for rescinding the regulation was that it was not likely to produce safety benefits.[109] This was because manufacturers planned to comply by installing automatic seatbelts, and these automatic seatbelts were far less efficacious safety devices than airbags.[110]

The D.C. Circuit struck down NHTSA's rescission of that safety rule.[111] The court faulted NHTSA for "allow[ing] itself to become captive to the way in which it predicted automobile manufacturers would comply with" the standard and thereby "artificially foreclos[ing] attempts to further the purpose of the Safety Act."[112] Substantively, it held that NHTSA erred by failing "to consider or analyze obvious alternatives to rescission," such as an airbags-only regulation.[113] That alternative was sufficiently obvious to merit agency consideration because

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107. *See, e.g.*, Yakima Valley Cablevision, Inc. v. FCC, 794 F.2d 737, 745-46 (D.C. Cir. 1986) (striking down agency action on the basis of a reliance-interest claim asserted by the regulated industry).

108. *State Farm*, 463 U.S. at 34.

109. *Id.* at 38. Beneath the surface, the Reagan Administration hoped to relieve the regulatory burden on the struggling automotive industry. *See id.* (gesturing to the "approximately $1 billion" in compliance costs that NHTSA hoped to avoid imposing on manufacturers). While judicial review of pretextual agency rationales raises fascinating questions, it is beyond the scope of this Note.

110. *Id.* Those seatbelts, moreover, were to be installed in such a way that they would be easily detachable, further undermining the regulation's efficacy. *Id.* at 38-39.

111. State Farm Mut. Auto. Ins. Co. v. Dep't of Transp., 680 F.2d 206, 242 (D.C. Cir. 1982).

112. *Id.* at 230, 233.

113. *Id.* at 230.

NHTSA had originally pitched the regulation as an airbags-only regulation and because both Congress and the courts had previously "consider[ed] airbags the central aspect of the passive restraint system."[114] The D.C. Circuit complemented this holding by alluding to the importance of respecting the private ordering of the insurance markets that had developed around the Carter Administration's passive-restraint mandate.[115] The court appears to have been reluctant to disrupt the planned premium reductions that were "based only on the introduction of passive restraints,"[116] and it pointed to these premium reductions as evidence that the safety measures NHTSA sought to discard had proven to be effective.[117]

Although the Supreme Court disagreed with the heightened standard of review for deregulation applied by the D.C. Circuit, it echoed many of the same themes as the D.C. Circuit opinion.[118] The Supreme Court signaled its intent to check car manufacturers' influence over the agency[119] and to ensure NHTSA's fidelity to "the mandate of the [Safety] Act to achieve traffic safety."[120] And while the Court expressed reticence about imposing specific decisional procedures on the agency, it upheld the D.C. Circuit's holding as to NHTSA's failure to consider an airbags-only standard.[121] As the Court explained, "[T]he airbag is more than a policy alternative to the passive restraint Standard; it is a technological alternative within the ambit of the existing Standard."[122] Furthermore, airbags were an alternative that NHTSA itself had previously declared "an effective and cost-beneficial life-saving technology."[123]

Justice White's majority opinion did not explicitly invoke regulatory beneficiaries' expectations that the passive-restraint requirement would come into

114. *Id.* at 237.

115. *Id.* ("[A] number of insurance companies *already* offer a 30 percent discount on policies for vehicles equipped with airbags." (emphasis added)). The D.C. Circuit returned to the theme of preventing disruption to planned reductions in insurance premiums several times in the opinion. *See id.* at 214 n.8, 237 n.37.

116. *Id.* at 237 n.37.

117. *Id.* at 237-38.

118. Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 40-41 (1983). *State Farm* established that *de*regulation was subject to the same arbitrary-and-capricious standard as regulation. *Id.* at 41.

119. *Id.* at 49 ("If, under the statute, the agency should not defer to the industry's failure to develop safer cars, which it surely should not do, *a fortiori* it may not revoke a safety standard which can be satisfied by current technology simply because the industry has opted for an ineffective seatbelt design.").

120. *Id.* at 48.

121. *Id.* at 50-51 (citing Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 551 (1978)).

122. *Id.*

123. *Id.*

force as a reason for striking down NHTSA's rescission, even though the respondent insurance companies explained in their briefs just how disruptive that rescission would be.[124] The Court did, however, discuss the value of regulatory continuity in holding that the same standard of arbitrary-and-capricious review applied to the promulgation and the rescission of rules.[125] The Court explained that a "settled course of [agency] behavior" creates a "presumption" that Congress's "policies will be carried out best if the settled rule is adhered to."[126] For that reason, agencies changing course were obligated to supply an explanation supported by the record that would rebut that presumption.[127] It is true that this passage commends the value of regulatory continuity generally rather than focusing on the importance of respecting regulatory beneficiaries' expectations specifically. Nonetheless, it is important to recognize that the *State Farm* Court—just like the D.C. Circuit in many of the decisions reviewed in the previous Section—defined Congress's "policies" in terms of the well-being of regulatory beneficiaries.[128] Indeed, commentators have suggested that the *State Farm* Court was implicitly concerned with protecting consumers' and insurance companies' expectations that carmakers would continue to be required to produce safe vehicles.[129]

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124. *See* Brief for Respondent Superintendent of Insurance of the State of New York at 3, *State Farm*, 463 U.S. 29 (Nos. 82-354, 82-355, 82-398) ("Premium discounts for vehicles equipped with passive restraints have already been adopted by insurers . . . ."); *id.* at 9, 13 (noting that New York State had planned to require all insurers to offer passive-restraint discounts upon implementation of the regulation that NHTSA attempted to rescind and that insurance regulators and the insurance industry "acted with rare unanimity" in opposing NHTSA's "irresponsible" action); Brief of Respondents State Farm Mutual Automobile Insurance Co. et al. at 37, *State Farm*, 463 U.S. 29 (Nos. 82-354, 82-355, 82-398) (expressing consternation that NHTSA had suddenly abandoned its "12-year commitment to auto safety"). It is perhaps in light of these expectations that Cass R. Sunstein speculated that *State Farm* may best be understood "as an effort to protect expectations and reliance." Cass R. Sunstein, *Deregulation and the Hard-Look Doctrine*, 1983 SUP. CT. REV. 177, 204.

125. *State Farm*, 463 U.S. at 41-42.

126. *Id.*

127. *Id.* at 42.

128. *See id.* at 33, 49 (discussing the National Traffic and Motor Vehicle Safety Act of 1966's purpose).

129. *See, e.g.*, Sunstein, *supra* note 124, at 204; Damon-Feng, *supra* note 18, at 1774 ("Although the Court did not explicitly consider reliance interests in *State Farm*, its searching review of agency action and justification laid the foundation for potentially stringent judicial oversight of such action, particularly with respect to agency action that changes course on previously established rules or policies."); *cf.* Eskridge, *supra* note 61, at 706-07 (arguing that insurance companies' reliance interests played a key role in the contemporaneous *Gilbert* decision).

II. THE WORLD OF *CHEVRON*

In the previous Part, I charted the role of distributional concerns in the development of the *State Farm* standard of review that applies to agencies' changes in course in matters of policy. Now, I pick up where Part I left off chronologically and engage in a similar analysis of the rise and fall of the *Chevron* doctrine — that is, the deferential standard of review that courts formerly applied to questions of law. As many readers will know, *Chevron* was recently overturned by the Supreme Court's decision in *Loper Bright*, and courts are no longer obligated to defer to agencies' reasonable constructions of ambiguous statutory terms.[130] Even so, *Chevron*'s rise and fall remains of central interest to our story. Although the Supreme Court has formally distinguished between review of matters of law and policy, these doctrinal spheres have overlapped in practice and confront similar questions of institutional competence, democratic legitimacy, and due process; the answers that courts have given in one area have tended to affect their approaches in the other.[131] Indeed, in its heyday, *Chevron* displaced *State Farm* as the overarching guidepost for judicial review of agency action, and it seemed to cause a major relaxation of judicial scrutiny of matters of both policy and law, even as it purported to address only the latter.[132]

In *Chevron*, the Supreme Court, reversing the D.C. Circuit, upheld the Environmental Protection Agency's (EPA's) departure from its existing, more restrictive reading of the Clean Air Act and adoption of a more industry-friendly interpretation.[133] Like the decisions discussed in Part I, the D.C. Circuit's decision in this case reflected that court's tendency to discern a proregulatory intent in ambiguous statutory language and to review carefully any departures from that perceived intent.[134] In his opinion for the Supreme Court, Justice Stevens comprehensively rejected those impulses. In contrast to *State Farm*'s concern for agency capture, he insisted that agencies — and not courts — were the politically accountable actors best positioned to "resolv[e] the competing interests" underlying the choice among policy alternatives left open by the statutory text.[135]

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130. Loper Bright Enters. v. Raimondo, 603 U.S. 369, 412-13 (2024).

131. For a contrasting discussion of this relationship, see Breyer, *supra* note 15, at 394, 397-98.

132. *See* Merrill, *supra* note 4, at 1095-96.

133. *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S 837, 864-66, 864 n.38 (1984), *overruled by Loper Bright Enters.*, 603 U.S. 369.

134. CHRISTOPHER P. BANKS, JUDICIAL POLITICS IN THE D.C. CIRCUIT 76-79 (1999) (relating the Supreme Court's decision in *Chevron* to *Vermont Yankee*'s "upbraid[ing]" of the D.C. Circuit for "acting like judicial legislators" "when it overturned an agency's policy decision").

135. *Chevron*, 467 U.S. at 865.

Doctrinally, *Chevron* called for courts to review agencies' interpretations in two steps. Courts were first to consider whether Congress had spoken clearly to the issue at hand or whether the statutory provision was ambiguous.[136] If the provision was clear, its plain meaning controlled.[137] If it was ambiguous, courts were to move to step two and consider whether the agency's interpretation was reasonable.[138] If it was, courts were to defer to it.[139]

Over the next several decades, *Chevron*'s insistence on judicial deference to agencies slowly eroded and, as we will see in subsequent Parts, has now been replaced by a regime of heightened judicial scrutiny of matters of both law and policy. This Part adds to the already-voluminous scholarly discussion of *Chevron*'s demise by surfacing the intersection of judicial thought about *Chevron* with thinking about administrative reliance and distributional concerns. Section II.A will argue that the emergence of *Chevron* deference coincided with a relaxation of judicial scrutiny of policy alternatives and the cessation of judicial privileging of regulatory beneficiaries. Section II.B will show that the Supreme Court repeatedly carved out exceptions to *Chevron*'s minimalist form of review, exceptions that principally safeguarded regulated parties and their contract- or investment-backed expectations. And Section II.C will contrast the Court's solicitude to regulated parties' claims of reliance with its refusal to recognize a comparable reliance interest held by regulatory beneficiaries in a challenge to the addition of a citizenship question to the 2020 census. This Part will thus set the stage for us to evaluate later the significance of *Regents* and its holding that courts must consider regulatory beneficiaries' reliance interests.

A. Responding to Alternatives in the Wake of Chevron

In the pre-*Chevron* cases that we encountered in Part I, reviewing courts inferred the congressional purpose behind environmental, health, and safety statutes at high levels of generality, without considering that certain ambiguous provisions of those laws may have represented invitations to agencies to weigh those overarching proregulatory purposes against competing values that were also embedded in these statutes, like limiting the compliance costs imposed on industry. These reviewing courts then required agencies to pay careful attention to policy alternatives and the reliance interests of regulatory beneficiaries as a means of safeguarding that inferred legislative intent in favor of expansive regulatory

136. *Id.* at 845.

137. *Id.*

138. *Id.*

139. *Id.*

regimes.[140] Even though *Chevron* did not cast doubt directly on *State Farm*, the two cases' premises are in obvious tension, and courts in the wake of *Chevron* embraced *Chevron*'s reasoning at the expense of *State Farm*.[141] Whereas *State Farm*'s presumption of a proregulatory statutory intent yielded rather stringent hard-look review, *Chevron*'s insistence that some statutes are deliberately ambiguous translated into a far more forgiving form of arbitrary-and-capricious review that tested whether an agency action fell within the "zone of reasonableness."[142]

Even the D.C. Circuit, which has traditionally demanded more of agencies than the Supreme Court, significantly relaxed the stringency of its review in the decades following *Chevron*.[143] This Section will explore that trend. It will show, for instance, that the D.C. Circuit largely ceased to strike down agency action for failure to engage with "obvious" alternatives that did not feature prominently in the administrative record. Instead, the D.C. Circuit typically only required agencies to consider those alternatives flagged by comments, and even then, only those alternatives that commenters addressed in depth.[144] Even when it did

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140. *See supra* text accompanying note 75.

141. *See* Merrill, *supra* note 4, at 1095-96 ("Since 1983, however, the idea of hard look review has gradually withered on the vine. The Supreme Court has invoked *State Farm* to reverse an agency action only once, in 1986 . . . . In effect, the *State Farm* approach to review of agency action has been largely superseded by the *Chevron* doctrine.").

142. FCC v. Prometheus Radio Project, 592 U.S. 414, 423 (2021); *cf.* Jacob Gersen & Adrian Vermeule, *Thin Rationality Review,* 114 MICH. L. REV. 1355, 1358 (2016) ("[Administrative law textbooks] typically suggest that *State Farm* inaugurated an era of stringent judicial review of agency decisionmaking for rationality . . . . [T]hat suggestion is flatly wrong at the level of the Supreme Court. At that level, agencies almost never lose.").

143. *See* Gersen & Vermuele, *supra* note 142, at 1358-59.

144. *See, e.g.*, City of Brookings Mun. Tel. Co. v. FCC, 822 F.2d 1153, 1169 (D.C. Cir. 1987) ("It is well settled that an agency has 'a duty to consider responsible alternatives to its chosen policy and to give a reasoned explanation for its rejection of such alternatives.' Of course, as the Commission emphasizes in its defense, this duty extends only to 'significant and viable' alternatives . . . ." (quoting Farmers Union Cent. Exch., Inc. v. FERC, 734 F.2d 1486, 1511 & n.54 (D.C. Cir. 1984))); Reytblatt v. NRC, 105 F.3d 715, 722 (D.C. Cir. 1997) ("Petitioners' primary contention is that the NRC [Nuclear Regulatory Commission] failed to respond adequately to Dr. Reytblatt's concerns about the reporting requirements under the performance-based approach. These concerns, however, were mentioned in the May 4, 1995, letter only in general (and highly abusive) terms . . . . Under the circumstances, we find the NRC's response to Dr. Reytblatt's concerns over the reporting rules and his accusation that the NRC had maliciously intended to preclude the public from obtaining access to test data to be entirely adequate."); Nat'l Shooting Sports Found., Inc. v. Jones, 716 F.3d 200, 217 (D.C. Cir. 2013) ("Although NSSF [National Shooting Sports Foundation] has carefully combed through ATF's [Bureau of Alcohol, Tobacco, Firearms, and Explosives's] data and suggested an alternative targeting mechanism, the fact that ATF could have narrowed the scope of the demand letter does not

require an agency to attend to a policy alternative, the D.C. Circuit usually deemed cursory attention sufficient.[145] Likewise, the D.C. Circuit insisted that the onus was on affected parties to flag their reliance interests to an agency pondering a reversal in course.[146]

These developments represent a dramatic departure from the pre-*Chevron* case law. The first important development in the period after *Chevron* was courts' newfound reluctance to deem an alternative sufficiently "obvious" to require agency consideration absent a detailed comment.[147] A decision by then-Judge Roberts during his brief stint on the D.C. Circuit exemplifies the strict application of the doctrine of issue exhaustion that pervaded the case law of this period.[148] In that case, the Sierra Club—a quintessential voice among regulatory beneficiaries—challenged EPA's promulgation of an emissions standard for copper smelters on the grounds that EPA did not take into account the stricter emissions standards that it had imposed on other industries.[149] Even though no commenter had challenged this aspect of the agency's decision-making, the Sierra Club's position would seem to have considerable force, for it is hornbook

mean that its failure to do so was arbitrary and capricious, particularly because NSSF has failed to point to any evidence showing that narrowing the geographic scope of the demand letter was a serious issue raised by any commenter.").

145. *See* Pub. Citizen, Inc. v. FAA, 988 F.2d 186, 197 (D.C. Cir. 1993) ("[T]he agency's response to public comments need only 'enable us to see what major issues of policy were ventilated . . . and why the agency reacted to them as it did.'" (second alteration in original) (quoting Auto. Parts Accessories Ass'n v. Boyd, 407 F.2d 330, 335 (D.C. Cir. 1968))); *see also, e.g.*, Clinton Mem'l Hosp. v. Shalala, 10 F.3d 854, 855-56, 859 (D.C. Cir. 1993) ("While the Secretary plainly provided adequate reasons for moving away from the old criteria, and for seeking more objective ones, the explanation of the new criteria was skimpy. In context, however, we believe we can 'discern' the Secretary's path."); City of Portland v. EPA, 507 F.3d 706, 714 (D.C. Cir. 2007) ("Though New York and Portland cogently attack the merits of EPA's responses, the Agency clearly thought about the cities' objections and provided reasoned replies—all the APA requires.").

146. Mingo Logan Coal Co. v. EPA, 829 F.3d 710, 719-20 (D.C. Cir. 2016).

147. *See, e.g.*, Edison Elec. Inst. v. EPA, 2 F.3d 438, 449 (D.C. Cir. 1993) ("The second alternative, the use of a mathematical model known as the 'Monte Carlo' technique, was not raised by the petitioners in any of its comments to the Agency. Thus, EPA was not obligated to address this alternative."); Wold Commc'ns, Inc. v. FCC, 735 F.2d 1465, 1477 (D.C. Cir. 1984) ("Apart from the status quo, however, the petitioners fail to state sensibly what else the Commission should have considered. Nor is there evidence in the record that 'alternatives' other than 'no change' were suggested to the Commission. *State Farm* is therefore inapposite to the situation presented here.").

148. *See* Ronald M. Levin, *Making Sense of Issue Exhaustion in Rulemaking*, 70 ADMIN. L. REV. 177, 186-87 (2018) (explaining that this doctrine requires agencies to "explore alternatives to its proposed rule if the alternatives were obvious or if they were suggested by commenters" (emphasis omitted)).

149. Sierra Club v. EPA, 353 F.3d 976, 978 (D.C. Cir. 2004).

administrative law "that an agency must treat similar cases in a similar manner unless it can provide a legitimate reason for failing to do so."[150] But Roberts was not persuaded, holding that "EPA was not required to give an affirmative justification for differences with regulations governing other industries" and so had no obligation to consider the policy alternative that the Sierra Club first raised in litigation.[151]

The second *Chevron*-era development was the limitation that courts placed upon which comments agencies were required to consider. For example, in an influential 1991 decision authored by then-Judge Thomas, the D.C. Circuit held that agencies were not required to attend to alternatives that disserved the agency's stated policy objectives.[152] Agencies needed only consider reasonable alternatives, which Thomas defined as those falling within the agency's stated goals for its action.[153] Justifying that position, Thomas advised judges to "[r]ecogniz[e] the harm" that requiring agency attention to "[f]ree-floating 'alternatives'" would cause.[154] The D.C. Circuit mostly heeded his advice, and, in addition to requiring that proposed alternatives be consistent with the agency's stated goals, the court also typically required that they be well supported by a comment.[155]

Third, even when the D.C. Circuit did require an agency to attend to an alternative, it imposed a very light explanatory burden on the agency, only requiring a more detailed response when an alternative was supported by an especially-detailed comment. In *Clinton Memorial Hospital v. Shalala*, for example, the D.C. Circuit faced a challenge to the promulgation of a regulation modifying the criteria under which "sole community hospitals" qualified for an exemption from Medicare's cost cap.[156] The court conceded that the agency's "explanation of the new criteria was skimpy," but it deemed that "skimpy" explanation of the agency's choice among policy options sufficient, due in part to "the failure of any

150. Republic Airline Inc. v. U.S. Dep't of Transp., 669 F.3d 296, 300 (D.C. Cir. 2012) (quoting Kreis v. Sec'y of the Air Force, 406 F.3d 684, 687 (D.C. Cir. 2005)).

151. *Sierra Club*, 353 F.3d at 986.

152. Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 195 (D.C. Cir. 1991) ("[T]he proposed alternative is reasonable only if it will bring about the ends of the federal action . . . ."); *see also* Deacon, *supra* note 19, at 723-24 (considering this case and this issue).

153. *Citizens Against Burlington*, 938 F.2d at 195 ("The goals of an action delimit the universe of the action's reasonable alternatives.").

154. *Id.*

155. *See, e.g.*, City of Brookings Mun. Tel. Co. v. FCC, 822 F.2d 1153, 1169 (D.C. Cir. 1987); Reytblatt v. NRC, 105 F.3d 715, 722 (D.C. Cir. 1997); Nat'l Shooting Sports Found., Inc. v. Jones, 716 F.3d 200, 217 (D.C. Cir. 2013).

156. 10 F.3d 854, 855-56 (D.C. Cir. 1993).

rulemaking participants to suggest alternatives."[157] The D.C. Circuit, however, imposed a higher explanatory burden on agencies in cases in which commenters made more robust suggestions. When the court struck down agency action in these cases, it pointed to the agency's failure to fulfill its procedural mandate to respond to well-reasoned comments, rather than to errors in the agency's substantive reasoning.[158]

This relaxed degree of scrutiny and stringent application of issue exhaustion after *Chevron* limited the extent to which courts could nudge agencies in favor of regulatory beneficiaries, as seen in the *Sierra Club* decision.[159] It also restricted courts' capacity to force agencies to attend to claims of reliance, and this limitation sometimes proved controversial.

In *Mingo Logan Coal Co. v. EPA*, for instance, the D.C. Circuit wielded a strong form of issue exhaustion to preclude consideration of an industry group's reliance claim, over then-Judge Kavanaugh's dissent.[160] In *Mingo Logan*, the majority rejected a coal-mine operator's challenge to EPA's revocation of its permits to discharge dredged material in certain locations.[161] The operator argued that the revocation was arbitrary and capricious because the agency took no account of "the costs [the operator] incurred in reliance on the permit."[162] EPA conceded that it had not considered the petitioner's reliance interest but insisted that this argument was forfeited because the company did not clearly raise it before EPA or the district court.[163] The D.C. Circuit agreed with EPA, even though the court acknowledged that the coal-mine operator had alleged in its complaint that "[a]fter receiving its Permit, Mingo Logan spent millions of dollars preparing the site and commencing construction and operations."[164] The court insisted that parties were obligated to "forcefully present[]" their arguments before the agency and held that Mingo Logan had not met that requirement.[165] As a result,

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157. *Id.* at 859-60.

158. *See, e.g.*, Appalachian Power Co. v. EPA, 135 F.3d 791, 821 (D.C. Cir. 1998) ("This failure to respond adequately to key questions about the reasonableness of the agency's position requires a remand."); Ohio v. EPA, 997 F.2d 1520, 1542 (D.C. Cir. 1993) ("The Agency's failure to offer any reasoned explanation is particularly troubling given that several states commented on the blanket exclusion and suggested alternative procedures during the rulemaking proceedings.").

159. *See supra* notes 148-151 and accompanying text.

160. 829 F.3d 710, 720-24 (D.C. Cir. 2016).

161. *Id.* at 713.

162. *Id.* at 719.

163. *Id.*

164. *Id.* at 721 (quoting Complaint at 10, *Mingo Logan*, 829 F.3d 710 (No. 10-cv-00541)).

165. *Id.* at 722 (alteration in original) (quoting Village of Barrington v. Surface Transp. Bd., 636 F.3d 650, 655 (D.C. Cir. 2011)).

the opinion continued, EPA had not been given a chance to balance its environmental rationales against the asserted reliance costs.[166] Echoing the *Chevron* Court, the D.C. Circuit refused to second-guess EPA's policy choice in view of the limited information with which the agency had been presented.[167]

Writing in dissent, then-Judge Kavanaugh blasted both the agency's reasoning and the majority's invocation of issue exhaustion to preclude remediation of an error that he presented as verging on a denial of due process. He insisted that agencies ought to face a higher explanatory burden when their changes in policy threaten reliance interests than when agencies take new action.[168] The agency would have failed that heightened standard of review, he reasoned, because "EPA considered the benefits to animals of revoking the permit, but EPA never considered the costs to humans—coal miners, Mingo Logan's shareholders, local businesses, and the like—of revoking the permit."[169] Kavanaugh argued that EPA's issuance of the permit induced Mingo Logan to incur substantial investment costs that the agency's reversal "rendered all but worthless."[170] He concluded that EPA needed to provide a more detailed explanation in this case because it sought to "impos[e] a significant cost on regulated parties" and because freely permitting it to reverse course "contraven[ed] basic notions of due process and fundamental fairness."[171]

B. Reliance Interests and Exceptions to Deference

Even though then-Judge Kavanaugh's argument about "due process and fundamental fairness" did not carry the day in *Mingo Logan*, his dissenting position

166. *Id.* at 723.

167. *Id.*

168. *Id.* at 736 (Kavanaugh, J., dissenting) ("Put another way, when an agency changes position in a way that frustrates reliance interests, the agency's action is more costly to regulated parties than when the agency develops a policy or announces a decision on a clean slate, all else being equal. . . . The agency must consider the reliance cost and must justify its action despite that additional cost.").

169. *Id.* at 732 (emphasis omitted).

170. *Id.* at 737.

171. *Id.* at 736. Though Mingo Logan would seem to be more accurately described as a benefit recipient than a regulated party in this case, then-Judge Kavanaugh didn't draw that fine-grained distinction. *See id.* at 731 (noting, as is mentioned throughout the decision, that the case focused on the issuance and revocation of a permit). Kavanaugh also sensibly criticized EPA's failure to consider the costs of its decision to "coal miners," "local businesses," and other parties downstream of the permit extended to Mingo Logan. *Id.* at 732. But this criticism was limited to the section of his dissent in which he addressed the cost-benefit calculus that he read the statute at issue to require; his reliance-interest analysis was narrowly focused on Mingo Logan itself. *See id.* at 737.

urging an exception to issue exhaustion and to deferential review of alternatives when reliance interests were present steadily gained traction at the Supreme Court, which has created a host of exceptions to deference regimes in administrative-reliance cases. This Section will begin by providing a high-level overview of what I will refer to as the "procedural-fairness" approach to judicial review of agencies' reversals and will explain how it differs from the D.C. Circuit's democratic-responsiveness rationale. It will then turn to Supreme Court case law and demonstrate that the Supreme Court has tended to invoke this procedural-due-process-like rationale almost exclusively in cases involving regulated parties, even though regulatory beneficiaries may have equally concrete interests in regulatory continuity.

Unlike the D.C. Circuit's pre-*Chevron* approach, which sometimes recognized diffuse reliance claims not backed by material investment, then-Judge Kavanaugh's dissenting opinion in *Mingo Logan* argued that "investment-backed reliance" claims, such as those rooted in contract or property, have the strongest claim to recognition in modern law.[172] His position was consistent with the Supreme Court's precedents from the previous several decades, which recognized that reliance claims are most potent in contexts where "advance planning of great precision is most obviously a necessity."[173] Although this trend is not without its critics, in *Dobbs* the Court confirmed that reliance claims must be "very concrete,"[174] and it indicated that "very concrete" reliance claims include those premised on "property and contract rights."[175] One key function of modern reliance doctrine, then, seems to be facilitating coherent private-market ordering despite the frequency with which the government—and agencies in particular—may change position.

The Supreme Court and the courts of appeals have also articulated a second function of reliance doctrine: safeguarding parties' due-process right to "fair

172. *Id.* at 735-37.

173. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 855-56 (1992); *see also, e.g.*, Payne v. Tennessee, 501 U.S. 808, 828 (1991) ("Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved . . . ."); Encino Motorcars, LLC v. Navarro, 579 U.S. 211, 222-23 (2016) (recognizing reliance interests in a case involving contract rights).

174. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 288 (2022).

175. *Id.* (quoting *Payne*, 501 U.S. at 828). *But see, e.g.*, Nina Varsava, *Precedent, Reliance, and* Dobbs, 136 HARV. L. REV. 1845, 1847-48 (2023) (arguing that "so-called 'intangible' forms of reliance on precedent should factor into a stare decisis analysis" and insisting that the *Dobbs* majority adopted a too-narrow understanding of what it means to be a "concrete" reliance claim).

notice" of liability risk.[176] Unlike the private-ordering function, which would appear to admit reliance claims made by regulatory beneficiaries as long as they are sufficiently concrete, the fair-notice rationale for protecting reliance is limited to regulated parties. The problem with this rationale is that there are already administrative-law principles that address in a more targeted way the problem of agencies imposing sanctions on regulated parties for conduct that was not clearly proscribed at the time it was committed.[177] Courts' repeated invocation of reliance when the principles of fair notice or antiretroactivity would suffice has helped obscure the fact that reliance, properly understood, safeguards the expectations of regulatory beneficiaries as well as the expectations of regulated parties.

Most scholars have not yet adequately appreciated the danger of reliance doctrine collapsing into fair-notice doctrine.[178] To be sure, they have argued that the procedural-fairness approach to reliance vindicates the rule-of-law value of a stable legal framework,[179] protects agencies' democratic legitimacy,[180] and improves the quality of agencies' decision-making.[181] And they have recognized that restricting the potential scope of cognizable reliance claims minimizes counterproductive judicial intrusion into agency decision-making.[182] But even as scholars have explored these facets of reliance, they have treated it as a doctrine principally — if not exclusively — protecting regulated parties.[183]

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176. The Supreme Court has done so implicitly in cases like *Encino Motorcars*, 579 U.S. at 223, where the Court focused on liability risk in a reliance case, whereas lower courts have often done so explicitly, *see, e.g.*, Wages & White Lion Invs., LLC v. FDA, 90 F.4th 357, 374-81 (5th Cir. 2024) (exploring fair notice and its relationship to administrative reliance), *cert. granted*, 144 S. Ct. 2714.

177. *See, e.g.*, Gen. Elec. Co. v. EPA, 53 F.3d 1324, 1328-29 (D.C. Cir. 1995) (explaining the "fair notice" principle and offering examples of its application); Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988) (explaining the doctrine of antiretroactivity).

178. The exception to this trend is Rookard, *supra* note 24, at 371-72. Rookard correctly points out that the principle of fair notice is distinct from that of reliance, and this Section will build on that observation. But Rookard is wrong to argue that removing the "due process bricks of the Court's reliance interests tower" will "bring the whole edifice down," and that this is a welcome development. *Id.* at 372. As this Section will instead show, reliance-interest doctrine rests on the distinct and important foundation of enabling private ordering.

179. *See* Sunstein & Vermeule, *The Morality of Administrative Law*, *supra* note 22, at 1947-49.

180. *See* Damon-Feng, *supra* note 18, at 1766-68.

181. *See* Margulies, *supra* note 2, at 128.

182. *See* Damon-Feng, *supra* note 18, at 1814 (arguing that only "concrete or specific" reliance claims should be of concern to courts).

183. Cass R. Sunstein and Adrian Vermeule have, for example, extensively defended the Supreme Court's pre-*Regents* administrative-reliance decisions. They argue that "protecting justified reliance is a core aim of administrative law doctrines" but read those doctrines as limited to

These scholars' understandings of reliance were—until *Regents*—consistent with Supreme Court case law. The Court had weighed in on administrative reliance three times before *Regents*. In all three cases, the Court seemed to infuse its administrative-reliance analysis with the related but distinct doctrine of fair notice. In *Smiley v. Citibank*, Justice Scalia indicated that *Chevron* deference would be unavailable to an agency if its interpretation "[did] not take account of legitimate reliance on prior interpretation."[184] For that proposition he cited two Supreme Court fair-notice cases that wrestled with the lawfulness of agencies' imposition of liability on regulated parties after the agencies changed their policies.[185] Then, in a pair of related cases, the Court rejected a reliance claim when the petitioners had not been subjected to liability[186] but accepted a claim raising similar due-process concerns once the petitioners *had* been subjected to liability and thus could claim a lack of fair notice.[187]

This reliance-interest/fair-notice hybrid then moved from dicta to holding in *Encino Motorcars*, the first case in which the Supreme Court explicitly invoked reliance interests in striking down an agency's action.[188] *Encino Motorcars* also represents an early indication of the Court's willingness to depart from the deference we observed in the *Chevron*-era case law and to return to requiring agencies to consider "obvious" features of the problems before them.

In that case—the first of two related decisions—Justice Kennedy employed the procedural-fairness rationale for safeguarding reliance to strike down the Department of Labor's (DOL's) changed interpretation of the Fair Labor Standards Act (FLSA).[189] The case turned on whether the FLSA required car

"reliance by regulated parties." SUNSTEIN & VERMEULE, LAW & LEVIATHAN, *supra* note 22, at 63-64; *see also* Sunstein & Vermeule, *The Morality of Administrative Law*, *supra* note 22, at 1947-48 (making the same argument).

184. Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 742 (1996).

185. *Id.* (citing United States v. Pa. Indus. Chem. Corp., 411 U.S. 655, 670-75 (1973); NLRB v. Bell Aerospace Co., 416 U.S. 267, 295 (1974)); *see also Pa. Indus. Chem. Corp.*, 411 U.S. at 674 ("[T]o the extent that the regulations deprived [the defendant] of *fair warning* as to what conduct the Government intended to make criminal, we think there can be no doubt that traditional notions of fairness inherent in our system of criminal justice prevent the Government from proceeding with the prosecution." (emphasis added)); *Bell Aerospace Co.*, 416 U.S. at 295 ("The possible reliance of industry on the Board's past decisions with respect to buyers does not require a different result. . . . [T]his is not a case in which some new liability is sought to be imposed on individuals for past actions which were taken in good-faith reliance on Board pronouncements. *Nor are fines or damages involved here*." (emphasis added)). For a discussion of these cases, see Rookard, *supra* note 24, at 368.

186. FCC v. Fox Television Stations, Inc., 556 U.S. 502, 517-18 (2009).

187. FCC v. Fox Television Stations, Inc., 567 U.S. 239, 257-58 (2012).

188. Encino Motorcars, LLC v. Navarro, 579 U.S. 211, 222 (2016).

189. *Id.*

dealerships to pay overtime to service advisors or whether those advisors fell within the Act's exception for "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles."[190] DOL issued an opinion letter in 1978 stating that service advisors fell within the statutory exemption and confirmed this interpretation in 1987 guidance.[191] In 2008, DOL issued a notice of proposed rulemaking to enshrine this interpretation more firmly in law, but in 2011, DOL reversed course, issuing a rule that interpreted "salesman" to exclude service advisors.[192]

Explaining that *Chevron* deference required that agency decisions be adequately reasoned and that attending to reliance interests was a prerequisite for "reasoned explanation," Justice Kennedy refused to defer to DOL's interpretation because it lacked sufficient consideration of car dealerships' reliance interests.[193] Kennedy then went on to hold that "salesman" included service advisors.[194] Notably, Kennedy did so even though he identified only a single comment on the 2008 proposal that made even a cursory reference to reliance interests.[195] We saw in Part II that, in the years after *Chevron*, courts moved away from requiring agencies to respond to alternatives that judges themselves deemed obvious but that may not have been flagged by commenters. Courts focused instead on the significance and viability of the comment raising that alternative, and they repeatedly declined to require agencies to attend to generic or cursory comments even when those comments seemed to gesture toward valid points.[196] In striking down DOL's change in course for failure to engage with the issue of reliance despite there being only a cursory reference to reliance in a comment, Kennedy seemed to revert back to the pre-*Chevron* approach.

Justice Kennedy's discussion invoked both the market-ordering and fair-notice rationales for reliance. He began by noting that DOL's revision would have

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190. *Id.* at 215 (quoting Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, § 209, 80 Stat. 830, 836).

191. *Id.* at 217.

192. *Id.* at 217-18.

193. *Id.* at 224.

194. *Id.* at 222.

195. *Compare id.* (providing just one example of a comment letter submitted to the Department of Labor (DOL) referencing reliance interests but faulting DOL's failure to consider those reliance interests), *with id.* at 226 n.2 (Ginsburg, J., concurring) ("In response to its 2008 proposal, the Department received only conclusory references to industry reliance interests. . . . An agency cannot be faulted for failing to discuss at length matters only cursorily raised before it.").

196. *See, e.g.*, City of Brookings Mun. Tel. Co. v. FCC, 822 F.2d 1153, 1169 (D.C. Cir. 1987) (explaining that the agency's duty to consider alternatives "extends only to 'significant and viable' alternatives" (quoting Farmers Union Cent. Exch., Inc. v. FERC, 734 F.2d 1486, 1511 n.54 (D.C. Cir. 1984))).

necessitated "systemic, significant changes to the dealerships' compensation arrangements."[197] Kennedy also argued that "[d]ealerships whose service advisors are not compensated in accordance with the Department's new views could also face substantial FLSA liability."[198] The problem with the latter argument is that the FLSA included a safe-harbor provision that appeared to shelter the employers, and that the Court's antiretroactivity doctrines provided yet another shield against liability.[199] In other words, unfairly surprising dealers with liability was a problem, but Kennedy had at his disposal tools more precisely suited to the problem than reliance. Even though he recognized these protections, however, Kennedy construed administrative reliance to offer the employers an additional, independent layer of protection.[200]

The Court has also, in its treatment of *Auer* deference,[201] emphasized the importance of avoiding the imposition of liability when agencies change course. *Auer* deference refers to the principle that courts should defer to agencies' interpretations of their own rules and regulations.[202] *Auer* deference has proven controversial, in part because it facilitates agencies' changes in position, and the Court has repeatedly narrowed the doctrine in recent years.[203] In *Christopher v. SmithKline Beecham Corp.*, for example, Justice Alito explained that *Auer* deference would be unavailable when an agency's new position resulted in "unfair surprise."[204] In justifying that position, Alito focused on fair-notice arguments for administrative stability tailored to regulated parties, rather than making more comprehensive arguments about enhancing all parties' ability to plan. For example, he invoked "the principle that agencies should provide regulated parties 'fair warning of the conduct [a regulation] prohibits or requires.'"[205] And he seemed to indicate agencies should not ordinarily "impose potentially massive liability . . . for conduct that occurred well before" the agency announced a new

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197. *Encino Motorcars*, 579 U.S. at 222-23.

198. *Id.* at 223.

199. *See id.* (conceding that the "risk of liability may be diminished in some cases by the existence of a separate [Fair Labor Standards Act (FLSA)] exemption for certain employees paid on a commission basis" and that "a dealership could defend against retroactive liability by showing it relied in good faith on the prior agency position").

200. *Id.*

201. Auer v. Robbins, 519 U.S. 452, 461 (1997).

202. *Id.*

203. *See, e.g.*, Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 126 (2015) (Thomas, J., concurring) ("This accumulation of governmental powers allows agencies to change the meaning of regulations at their discretion and without any advance notice to the parties.").

204. 567 U.S. 142, 156 (2012).

205. *Id.* (alteration in original) (quoting Gates & Fox Co. v. Occupational Safety & Health Rev. Comm'n, 790 F.2d 154, 156 (D.C. Cir. 1986)).

position prohibiting that conduct.[206] The nexus between these justifications and regulated parties' interests was not lost on Justice Kagan who, in summarizing the limits of *Auer* deference in a later case, reiterated that courts would not defer to a new agency interpretation of an existing rule that "creates 'unfair surprise' *to regulated parties*."[207]

The takeaway of this Section, then, is that even as the Supreme Court developed sensible doctrinal tools designed to guard against whiplashes in agencies' policies and promote legal subjects' ability to plan their affairs, it needlessly limited those tools' application to instances where agencies' reversals resulted in liability to regulated parties.

C. The Census Case

The panoply of protections extended to regulated parties' expectations marks a stark contrast with the meager protections extended to regulatory beneficiaries' expectations by the Court in the decades after *Chevron*, even when the two classes of claimants asserted comparable contract- or property-backed claims. The set of cases we just encountered suggests that agencies who reversed course without consulting regulated parties — or at least without taking regulated parties' reliance interests into account when acting informally — faced considerable litigation risk. Without similar litigation risk from regulatory beneficiaries' challenges, agencies faced no comparable incentive to take that constituency's expectations into account when considering a regulatory course reversal. Unsurprisingly, this seems to have unbalanced agencies' incentives.[208] These uneven incentives appear, at times, to have had detrimental effects on the quality of agencies' decision-making, as agencies were left free to disregard what should have been key factors in their decision-making process, namely the serious reliance interests of regulatory beneficiaries.

This Section will focus on the census case, the high-profile litigation concerning Secretary of Commerce Wilbur Ross's choice to reinstate a citizenship question on the 2020 census, supposedly at the behest of the Department of Justice and in order to obtain citizenship data to better enforce the Voting Rights Act.[209] It had long been the Department of Commerce's policy *not* to include a citizenship question on the census for the sake of boosting response rates and

206. *Id.* at 155-56.

207. Kisor v. Wilkie, 588 U.S. 558, 579 (2019) (emphasis added) (quoting Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 170 (2007)).

208. *See* Rookard, *supra* note 24, at 372-77 (discussing these "perverse incentives").

209. *See* Dep't of Com. v. New York, 588 U.S. 752, 761-62 (2019).

improving the overall accuracy of the census.[210] Secretary Ross's decision to abandon that longstanding policy prompted public outcry and immediate legal challenges.[211] In resolving those challenges, the Supreme Court ultimately rejected the agency's stated rationale for its reversal in course as pretextual and remanded the case to the agency.[212] Before doing so, however, Chief Justice Roberts and the four conservative Justices indicated that Secretary Ross's decision to reverse Commerce's policy would have survived arbitrary-and-capricious review had the stated rationale been genuine.[213] It is that half of the opinion that will be the subject of this Section.

Chief Justice Roberts's opinion began by recognizing that the state and municipal plaintiffs had standing to challenge the addition of the citizenship question because a depressed response rate could cause them to "lose out on federal funds that are distributed on the basis of state population."[214] But Roberts did not consider whether these plaintiffs also had a reliance interest in the continued accuracy of the census.[215] With respect to the operation of the census, the state and municipal plaintiffs are classic regulatory beneficiaries: they derive benefits indirectly from the regulation of census takers, who must either take the census or face a fine.[216] These regulatory beneficiaries' reliance interests were substantial and widely shared, as the district court demonstrated through its thorough treatment of their dependence on the continued accuracy of the census and on federal funds distributed according to census results.[217] Indeed, state and local governments underscored the importance of the census to their appropriations decisions in briefs before the Court.[218] Philanthropic organizations made similar

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210. *Id.* at 804-05 (Breyer, J., concurring in part and dissenting in part).

211. *See, e.g.*, Emily Baumgartner, *Despite Concerns, Census Will Ask Respondents if They Are U.S. Citizens*, N.Y. TIMES (Mar. 26, 2018), https://www.nytimes.com/2018/03/26/us/politics/census-citizenship-question-trump.html [https://perma.cc/VAQ4-NTBF]; Complaint at 1, California v. Ross, 358 F. Supp. 3d 965 (N.D. Cal. 2019) (No. 18-01865).

212. *Dep't of Com.*, 588 U.S. at 783-85.

213. *Id.* at 773-77.

214. *Id.* at 767.

215. *Id.* at 766-68.

216. 13 U.S.C. § 221(a) (2018) (threatening a fine of "not more than $100" for anyone who "refuses or willfully neglects" census questions).

217. New York v. Dep't of Com., 351 F. Supp. 3d 502, 611-15 (S.D.N.Y. 2019) ("[S]tates have long relied on federal decennial census data for countless sovereign purposes, and many of the State Plaintiffs here even *require* the use of such data by law; in some instances, it is written into their state constitutions.").

218. Brief for 190 Bipartisan Elected Officials, Counties, and Cities from Arizona et al. as Amici Curiae Supporting Respondents at 3, *Dep't of Com.*, 588 U.S. 752 (No. 18-966) ("An undercount will, therefore, reduce federal funding available to these states for numerous public

reliance claims,[219] and the Nielsen Company, an analytics firm, made a powerful reliance-interest claim backed up by substantial capital investment and a web of contracts.[220]

Nonetheless, the Court did not recognize these beneficiaries as making a cognizable reliance claim, and it did not fault Secretary Ross for failing to consider these groups' expectations as an important aspect of the problem before him.[221] Indeed, in the memorandum announcing his decision to reinstate the citizenship question, Secretary Ross briefly reviewed and then unpersuasively rejected an incremental option for improving Commerce's citizenship data.[222] It is difficult to imagine that such reasoning would have sufficed had the Court recognized the challengers' reliance interests in the continued accuracy of the census. As it stood, four Justices already objected to the manner in which Secretary Ross had discounted the value of the census's accuracy.[223] Had Secretary Ross recognized the extent of stakeholders' dependence on accurate census data, he might have concluded that miscalculating the effect of the citizenship question on the overall response rate carried asymmetric error costs.[224] In any event, the government plaintiffs' reliance interests would have been another data point pushing

programs—programs that provide vital services to Americans across the nation."); Brief of County of Santa Clara et al. as Amici Curiae in Support of Respondents at 2, *Dep't of Com.*, 588 U.S. 752 (No. 18-966) ("[L]ocal governments and school districts provide many essential services using federal government funding that is set based on census-based population data. . . . A decennial census that differentially undercounts Amici's populations will inappropriately reduce funding for these important services—with no corresponding reduction in actual population or need.").

219. Brief of Amici Curiae Foundations and Philanthropy-Serving Organizations in Support of Respondents at 2-3, *Dep't of Com.*, 588 U.S. 752 (No. 18-966).

220. Brief of the Nielsen Co. (US), LLC as Amicus Curiae in Support of Respondents at 1-3, *Dep't of Com.*, 588 U.S. 752 (No. 18-966) ("The integrity of Nielsen's projection process—and thus the integrity of the data relied upon by Nielsen's myriad clients—depend on a baseline assumption that census data is accurate and reliable.").

221. *Dep't of Com.*, 588 U.S. at 774-75.

222. *See* Memorandum from Wilbur Ross, Sec'y, U.S. Dep't of Com., to Karen Dunn Kelley, Under Sec'y for Econ. Affs., U.S. Dep't of Com. 4 (Mar. 26, 2018), https://www.commerce.gov/sites/default/files/2018-03-26_2.pdf [https://perma.cc/36E4-GVWR] (explaining that relying on administrative records to determine citizenship in place of a census question "could be more accurate than self-responses in the case of non-citizens" and that the Census Bureau was able to "match 88.6 percent of the population with what the Bureau considers credible administrative record data" but nonetheless declining to rely on this strategy alone).

223. *Dep't of Com.*, 588 U.S. at 800-01 (Breyer, J., concurring in part and dissenting in part) ("In short, the Secretary's decision to add a citizenship question created a severe risk of harmful consequences, yet he did not adequately consider whether the question was necessary or whether it was an appropriate means of achieving his stated goal.").

224. *See* Gersen & Vermeule, *supra* note 142, at 1395-96 (considering asymmetric error costs in administrative law).

Secretary Ross away from what many experts consider to have been a poor policy choice.[225] Before *Regents*, however, the Supreme Court did not treat regulatory beneficiaries' reliance claims as warranting the same heightened scrutiny as did regulated parties' claims. As a result, Secretary Ross did not have a strong incentive to meaningfully weigh the impact of his policy choice on the stakeholders it would most affect.

III. *REGENTS* AND REGULATORY BENEFICIARIES' RELIANCE INTERESTS

Just one year after writing the majority opinion in the census case, Chief Justice Roberts authored a majority opinion that recognized incidental regulatory beneficiaries' claims of reliance and employed a startlingly exacting standard of arbitrary-and-capricious review: *Regents*.[226] Rather than speculate on the judicial politics that inspired these different approaches, this Part takes *Regents*'s doctrine at face value and compares it with the precedents discussed above. Under this analysis, *Regents* represents an important doctrinal turning point: it constitutes the first recognition by the Supreme Court that the procedural-fairness rationale for administrative reliance requires attention to downstream regulatory beneficiaries' reliance claims, so long as they hold property-like interests in regulatory continuity.

Chief Justice Roberts's majority opinion is also significant because it linked agencies' obligation to consider these reliance interests to agencies' obligation to consider less disruptive alternatives to total rescissions of existing policies.[227] This dimension of the opinion built on *Encino Motorcars*'s departure from the *Chevron*-era case law's lax arbitrary-and-capricious review.[228] In place of judicial deference, the *Regents* majority displayed a confidence, reminiscent of the early D.C. Circuit and the *State Farm* Supreme Court, that judges are sometimes competent to identify policy alternatives that the agency should have considered, even in informal matters that lack a body of comments.

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225. *See, e.g.*, William H. Frey, *America Wins as Trump Abandons the Citizenship Question from the 2020 Census*, BROOKINGS (July 12, 2019), https://www.brookings.edu/articles/america-wins-trump-abandons-the-citizenship-question-from-2020-census [https://perma.cc/MLN8-JLCV].

226. Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 591 U.S. 1, 24-33 (2020).

227. *Id.* at 32-33.

228. *See supra* text accompanying notes 188-200.

The setup of *Regents* was intricate. In 2012, the Obama Administration's DHS announced an immigration-relief program known as DACA.[229] Under DACA, childhood arrivals to the United States who satisfied certain objective criteria were eligible to apply for a two-year period of forbearance from removal as well as authorization to work in the United States.[230] Two years later, the Obama Administration issued a policy statement announcing a similar program for undocumented parents of American citizens and permanent residents known as Deferred Action for Parents of Americans (DAPA).[231] In 2015, the Fifth Circuit upheld a preliminary injunction barring implementation of the DAPA memorandum.[232] In that decision, the Fifth Circuit held that DAPA was not an unreviewable exercise of enforcement discretion because the program would "affirmatively confer 'lawful presence' and associated benefits on a class of unlawfully present aliens."[233] It also held that DAPA was a legislative rule that should have gone through notice and comment.[234] The Supreme Court then affirmed the decision below by an equally divided vote.[235] In 2017, Attorney General Jeff Sessions sent a letter advising Acting Secretary of DHS Elaine Duke that DACA "has the same legal . . . defects" and should be rescinded.[236] Acting Secretary Duke issued a barebones memorandum rescinding the program the next day.[237]

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229. Memorandum from Janet Napolitano, Sec'y, U.S. Dep't of Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs & Border Prot. et al., Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children 1 (June 15, 2012), https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf [https://perma.cc/RR7G-6PX3].

230. *Id.* at 2-3.

231. Memorandum from Jeh Charles Johnson, Sec'y, U.S. Dep't of Homeland Sec., to León Rodríguez, Dir., U.S. Citizenship & Immigr. Servs., Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action_1.pdf [https://perma.cc/QYV6-V9YX].

232. Texas v. United States, 809 F.3d 134, 179-86 (5th Cir. 2015).

233. *Id.* at 166.

234. *Id.* at 177-78.

235. United States v. Texas, 579 U.S. 547, 548 (2016) (per curiam).

236. Letter from Jefferson B. Sessions III, Att'y Gen., U.S. Dep't of Just., to Elaine C. Duke, Acting Sec'y, U.S. Dep't of Homeland Sec. (Sept. 4, 2017), https://www.dhs.gov/sites/default/files/publications/17_0904_DOJ_AG-letter-DACA.pdf [https://perma.cc/C4W7-67ZU].

237. Memorandum from Elaine C. Duke, Acting Sec'y, U.S. Dep't of Homeland Sec., to James W. McCament, Acting Dir., U.S. Citizenship & Immigr. Servs. et al., Rescission of the June 15, 2012 Memorandum Entitled "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children" (Sept. 5, 2017), https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca [https://perma.cc/BR2Y-TMCQ].

Three lower courts found that rescission likely arbitrary and capricious because DHS had impermissibly assumed DACA's unlawfulness.[238] In the *Regents* Court's opinion, Chief Justice Roberts and the four liberal Justices agreed with that result but relied on a novel rationale: DHS "repeated the error" from *State Farm*.[239] Like NHTSA's rescission of the entire passive-restraint rule due to flaws with the automatic-seatbelt component without considering the retention of an airbags-only option, DHS had erroneously rescinded DACA based on the presumed unlawfulness of its benefits prong "'without any consideration whatsoever' of a forbearance-only policy."[240] These were indeed separate prongs, the Court explained, because "forbearance and benefits are legally distinct and can be decoupled,"[241] because the Fifth Circuit solely addressed itself to and held unlawful "the benefits associated with DAPA,"[242] and because forbearance had long been presented as DACA's "centerpiece."[243] Notably, however, Attorney General Sessions's direction to Acting Secretary Duke to rescind the program did not distinguish between forbearance and benefits—and appears to have deemed the program illegal in its entirety.[244] Nor would an observer have deemed the two facets of DACA entirely distinct, as receipt of forbearance was a precondition for the receipt of benefits, even if the reverse was not true.[245]

The Court also pointed to another flaw in DHS's reasoning: the Duke Memorandum rescinding DACA "failed to address whether there was 'legitimate

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238. *See* Regents of the Univ. of Cal. v. Dep't of Homeland Sec., 908 F.3d 476, 510 (9th Cir. 2018), *aff'd*, 591 U.S. 1 (2020); Batalla Vidal v. Nielsen, 279 F. Supp. 3d 401, 423 (E.D.N.Y. 2018), *vacated*, Regents of the Univ. of Cal. v. Dep't of Homeland Sec., 591 U.S. 1 (2020); NAACP v. Trump, 298 F. Supp. 3d 209, 238-40 (D.D.C. 2018), *aff'd sub nom.* Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 591 U.S. 1 (2020) The district court opinions also raised other objections to the rescission that this Note does not address. *See, e.g.*, *NAACP*, 298 F. Supp. 3d at 242 (rejecting the Administration's argument that rescission was required to prevent the possibility of a more chaotic ending to the program via a potential adverse holding as "strain[ing] credulity").

239. *Regents*, 591 U.S. at 28 (citing Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 37-38 (1983)).

240. *Id.* at 29 (quoting *State Farm*, 463 U.S. at 51).

241. *Id.* at 30. The Court noted that the benefits associated with DACA flow from a regulation separate and apart from the DACA memorandum. *Id.* at 30 n.6.

242. *Id.* at 27.

243. *Id.* at 30.

244. *See* Letter from Jefferson B. Sessions III to Elaine C. Duke, *supra* note 236; *see also* Rodríguez, *supra* note 1, at 101-02 (making this observation).

245. *Cf., e.g.*, 8 C.F.R. § 1.3(a)(4)(vi) (2024) (entitling individuals to apply for Social Security benefits after receiving deferred action because they belonged to a "class[] of aliens permitted to remain in the United States" by DHS "for humanitarian or other public policy reasons").

reliance'" on the DACA memorandum.[246] This aspect of the *Regents* opinion has received significant scholarly attention, but scholars have focused on the opinion's treatment of DACA recipients' reliance interests and have neglected the importance of the expectations of the recipients' families, employers, and communities to the Court's result.[247] The text of the opinion, however, indicated that DHS was required to attend to the expectations of DACA recipients *and* those of some downstream parties.[248] DHS itself seems to have read the opinion to require consideration of those downstream interests, as it explicitly canvassed them in its proposal to formalize DACA.[249] This reading of *Regents* is further bolstered by the oral argument in the case, which indicates that some of the Justices deemed regulatory beneficiaries' reliance interests to be significant separate and apart from those of DACA recipients.[250]

Consider the crucial paragraph from *Regents*:

> The consequences of the rescission, respondents emphasize, would "radiate outward" to DACA recipients' families, including their 200,000 U.S.-citizen children, to the schools where DACA recipients study and teach, and to the employers who have invested time and money in training them. In addition, excluding DACA recipients from the lawful labor force may, they tell us, result in the loss of $215 billion in economic activity and an associated $60 billion in federal tax revenue over the next ten

246. *Regents*, 591 U.S. at 30 (quoting Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 742 (1996)).

247. *See, e.g.*, Damon-Feng, *supra* note 18, at 1790 (arguing that the Court's reasoning "turned on the reliance of parties regulated by the policy"); Zachary S. Price, *Federal Nonenforcement at a Crossroads*, 78 N.Y.U. ANN. SURV. AM. L. 101, 130-31 (2023) (criticizing the recognition of recipients' reliance interests).

248. *Regents*, 591 U.S. at 31.

249. Deferred Action for Childhood Arrivals, 86 Fed. Reg. 53736, 53745 (Sept. 28, 2021) (to be codified at 8 C.F.R. pts. 106, 236, 274a) ("In developing this proposed rule, DHS has considered a wide range of potential reliance interests. . . . Such interests can include not only the reliance interests of DACA recipients, but also those indirectly affected by DHS's actions, including DACA recipients' family members, employers, schools, and neighbors, as well as the various States and their other residents.").

250. Transcript of Oral Argument at 24, *Regents*, 591 U.S. 1 (Nos. 18-587, 18-588, 18-589) (statement of Breyer, J.) (listing such claims of reliance, noting that they "are not quite the same as those of the 700,000 who have never seen any other country," and pressing the Solicitor General about the "broad range of [reliance] interests" at play in the case). While the comments of the Justices at oral argument do not control how the Court's opinion ought to be read, these comments amplify concerns invoked by the Court in the text of its opinion.

> years. Meanwhile, States and local governments could lose $1.25 billion in tax revenue each year.[251]

While Chief Justice Roberts did not use the term "regulatory beneficiary" in this passage, he invoked the concept by discussing the material benefits that these groups indirectly derived from the recipients' participation in DACA. DACA provides for both enforcement forbearance and benefits like work authorization; these components together enable DACA recipients to assume jobs and generate tax revenue.[252] The groups canvassed by the decision, then, were the beneficiaries of both administrative forbearance and the affirmative conferral of benefits on DACA recipients.[253] As such, *Regents* did not clearly hold that nonenforcement, a form of agency inaction, alone could engender a cognizable reliance interest on the part of regulatory beneficiaries. Nonetheless, there is no reason that this could not be so, at least for system-wide nonenforcement policies like DACA.[254] Indeed, forbearance is a form of regulation[255] and enjoys equal status to affirmative modes of policymaking under the APA.[256] Even though regulatory beneficiaries can assert reliance interests most commonly in the context of challenges to the relaxation of regulations on regulated parties,[257] this need not always be the case.[258] Courts have routinely insisted that the important point

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251. *Regents*, 591 U.S. at 31 (internal citations omitted) (quoting Brief for Respondents the Regents of the University of California et al. at 42, *Regents*, 591 U.S. 1 (Nos. 18-587, 18-588, 18-589)).

252. *See id.* at 9.

253. *See id.* at 30 ("The lead dissent acknowledges that forbearance and benefits are legally distinct and can be decoupled." (citing *id.* at 59 n.14 (Thomas, J., concurring in part and dissenting in part))).

254. For a discussion of the distinction between policy and "established but unofficial practice" as it pertains to reliance interests, see Damon-Feng, *supra* note 18, at 1777-78.

255. *See* Matías Dewey & Donato Di Carlo, *Governing Through Non-Enforcement: Regulatory Forbearance as Industrial Policy in Advanced Economies*, 16 Regul. & Governance 930, 931 (2022).

256. 5 U.S.C. § 551(13) (2018) ("'[A]gency action' includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, *or failure to act* . . . ." (emphasis added)).

257. *See, e.g.*, Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys., 603 U.S. 799, 826-28 (2024) (Kavanaugh, J., concurring).

258. Take the abortion issue. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Supreme Court invoked women's reliance on the availability of abortion as a basis for striking down a Pennsylvania law that increased regulations on abortion providers. *See* 505 U.S. 833, 856 (1992); *see also id.* at 903-04 (reproducing the relevant law and its penalty scheme for noncompliant physicians). Of course, *Dobbs v. Jackson Women's Health Organization* overruled *Casey*, criticizing the case's approach to reliance. *See* 597 U.S. 215, 288 (2022). But it did so only because it deemed women's reliance interests insufficiently "concrete." *Id.* at 289. The Court

for purposes of judicial review of agency action and reliance interests is whether the regulatory baseline changed—not in which direction that change occurred.[259]

In addition to implicitly identifying DACA recipients' families, schools, and employers as regulatory beneficiaries, Chief Justice Roberts's discussion offered several clues about why the Court deemed these parties' reliance interests to require DHS's attention. First, Roberts stressed the magnitude of the investments these groups had made based on their assumptions regarding DACA's continuity and, by extension, the havoc that DACA's rescission would wreak.[260] Second, Roberts emphasized that these reliance claims were shared broadly across several classes of beneficiaries, which, though not dispositive, further spoke to the instability that DACA's rescission would cause.[261] Review of the transcript from oral argument confirms that these considerations were front and center for the Justices.[262]

At oral argument, both the Justices and the Solicitor General appeared to define a serious reliance interest as one that would constitute an "important aspect of the problem" before the agency and demand its attention.[263] This definition helps to surface one potential rationale for the Court's focus on the gravity and extent of the regulatory beneficiaries' reliance interests: the foreseeability of these interests to the agency at the time it reversed course. The Court seemed to have judged the rescission of DACA to be so impactful and the reliance interests at stake to be so substantial as to have constituted an obvious aspect of the problem that DHS either was or should have been aware of, even if DACA was not

never indicated that a regulatory beneficiary could not assert a reliance interest in a less intrusive regulatory framework that had been upended, and it would have been quite odd for the Court to focus on the tangibility of the plaintiffs' reliance claim if it believed someone in their position could never assert a cognizable reliance claim.

259. *See* Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42 (1983); *see also* Int'l Ladies' Garment Workers' Union v. Donovan, 722 F.2d 795, 813 (D.C. Cir. 1983) ("The standard of judicial review is not altered by the fact that the agency has rescinded a regulation, rather than moved in some other direction.").

260. Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 591 U.S. 1, 31 (2020).

261. *Id.*

262. *See* Transcript of Oral Argument, *supra* note 250, at 23-24 (statement of Breyer, J.) ("I counted briefs in this Court, as I'm sure you have, which state different kinds of reliance interests. There are 66 healthcare organizations. There are three labor unions. There are 210 educational associations. There are six military organizations. There are three home builders, five states plus those involved, 108, I think, municipalities and cities, 129 religious organizations, and 145 businesses."); *id.* at 21 (statement of Gorsuch, J.) ("[G]iven the *extent* of the reliance interests and the *size of the class*, more needed to be said, more could be said, and it wouldn't be a huge burden to require the government on remand to—to say more." (emphasis added)).

263. *Id.* at 25 (statement of Noel Francisco, Solicitor General) (quoting *State Farm*, 463 U.S. at 43); *see also id.* at 23 (statement of Breyer, J.) (calling consideration of "serious reliance interests" a "very old principle").

implemented with an eye to benefiting these downstream groups. This lines up with what we saw in *Encino Motorcars*[264] and in then-Judge Kavanaugh's dissent in *Mingo Logan*.[265]

Even though it is well accepted that agencies must address at least regulated parties' reliance interests, the Supreme Court's decision in *Regents* has proven quite controversial. Some have criticized the Court for recognizing reliance interests rooted in an informal policy of nonenforcement.[266] Informal here means a policy that is not legally binding and that accordingly may be issued (and revoked) outside of the elaborate participatory mechanisms that the APA requires for rulemaking.[267] For critics, this charge is particularly important in light of doubts about DACA's consistency with the text of the Immigration and Nationality Act (INA).[268]

But these concerns are misplaced. Informal agency action is the "lifeblood" of the modern administrative state, and it must have some reliance-generating force to fulfill its function.[269] The nonbinding guidance that agencies issue is a critical means of clarifying the rights and responsibilities of legal subjects, and such guidance routinely prompts parties to change their positions despite disclaimers that the guidance is nonbinding on the agency.[270] Permitting agencies to abandon without explanation the positions they publicly stake out in such informal actions would rob this guidance of its utility, smack of arbitrariness,

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264. Encino Motorcars, LLC v. Navarro, 579 U.S. 211, 222-23 (2016) (striking down agency action for failure to consider reliance interests that were not clearly flagged by comments); *id.* at 226 n.2 (Ginsburg, J., concurring) (noting that comments contained "only conclusory references to industry reliance interests").

265. Mingo Logan Coal Co. v. EPA, 829 F.3d 710, 737-38 (D.C. Cir. 2016) (Kavanaugh, J., dissenting) (criticizing EPA's failure to consider a benefit recipient's reliance interests and rejecting the majority's invocation of issue exhaustion).

266. *See, e.g.*, Price, *supra* note 247, at 235.

267. For an introduction to the notion of informal agency action, see Damon-Feng, *supra* note 18, at 1753-54.

268. Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 591 U.S. 1, 54-58 (2020) (Thomas, J., concurring in part and dissenting in part).

269. Alfred C. Aman, Jr., *Informal Agency Action and U.S. Administrative Law—Informal Procedure in a Global Era*, 42 AM. J. COMPAR. L. 665, 665 (1994).

270. *See* Nicholas R. Parrillo, *Federal Agency Guidance: An Institutional Perspective*, ADMIN. CONF. OF THE U.S. 7 (Oct. 12, 2017), https://www.acus.gov/sites/default/files/documents/parrillo-agency-guidance-final-report.pdf [https://perma.cc/5D58-NKN8]; Nicholas Parrillo, *Federal Agency Power and the Power to Bind*, 36 YALE J. ON REGUL. 165, 174 (2019) ("Regulated parties often face overwhelming pressure to follow what a guidance document 'suggests' . . . . [T]he sources of pressure on regulated parties to follow guidance are mostly hard-wired into the structure of the regulatory scheme that Congress has imposed on them.").

and impose undue costs on the parties incentivized to adjust their behavior in light of even nonbinding agency pronouncements.[271]

At the same time, critics of the administrative-reliance regime are correct to insist that agencies should be able to abandon an informally announced position more easily than a formally promulgated one.[272] Still, the *Regents* majority took this consideration into account by stating that the informal quality of agency action factors into the strength of an asserted reliance interest.[273] This makes good sense. Some longstanding informal positions—like the 1978 opinion letter at issue in *Encino Motorcars* that formed the background against which the retail-automotive industry had structured its compensation plans for decades—can engender quite weighty reliance interests.[274] By contrast, courts have sensibly dismissed claims of reliance on more recently announced and less categorical agency positions.[275]

Scholars are generally of two minds regarding *Regents*'s alternative holding that DHS should have evaluated DACA's forbearance and benefits components separately. Some criticize the holding as excessive judicial intrusion into the agency process.[276] Others concede that the holding represents rather exacting judicial review but argue that this review was no more intrusive than that in *State Farm*.[277] This Note takes a different stance: like its approach to reliance interests,

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271. For one recent influential argument about the value of guidance, see Emerson, *supra* note 43, at 2134, which advocates for guidance to be viewed as "a form of internal administrative law that can rightfully shape official and private deliberation."

272. *See* Damon-Feng, *supra* note 18, at 1812-16.

273. *Regents*, 591 U.S. at 30-31.

274. Encino Motorcars, LLC v. Navarro, 579 U.S. 211, 221 (2016).

275. *See, e.g.*, Am. Petroleum Inst. v. U.S. Dep't of the Interior, 81 F.4th 1048, 1060 (10th Cir. 2023) ("[P]resent and continuing reliance will likely require a more detailed agency explanation than historical reliance that has faded over time." (citing *Encino Motorcars*, 579 U.S. at 221)); Avail Vapor, LLC v. FDA, 55 F.4th 409, 422-34 (4th Cir. 2022) (rejecting a reliance claim because a close reading of the guidance document in question revealed "a more complicated story" than the petitioners believed); Gripum, LLC v. FDA, 47 F.4th 553, 559 (7th Cir. 2022) (similar). It is an open question how courts will approach reliance interests on agency action that lacked statutory authority. In his separate opinion in *Regents*, for instance, Justice Thomas argued that DHS lacked statutory authority to institute DACA in the first instance, and so did not did need to discuss reliance interests when rescinding the program. *Regents*, 591 U.S. at 60 (Thomas, J., concurring in part and dissenting in part). The majority, by contrast, suggested that an agency's conclusion that a program was illegal did not obviate the obligation to consider reliance. *See id.* at 33 (majority opinion). But it is important to recall that the majority did not ultimately decide the question of DACA's legality and might have approached the issue of reliance differently if it had.

276. *See* Price, *supra* note 247, at 128-32; Rodríguez, *supra* note 1, at 102-03.

277. *See, e.g.*, Deacon, *supra* note 19, at 685 ("The analogy to *State Farm* is fairly straightforward, and any distinctions between the two cases don't require a different end result.").

the *Regents* majority's approach to evaluating policy alternatives was both novel and defensible. Unlike *State Farm*, which required agencies to consider whether to keep programs in their entirety, to jettison discrete components, or to do away with them entirely, *Regents* appears to require an agency contemplating a reversal in course to consider modifying existing programs and softening the impact of a reversal. *State Farm* addressed two already-distinct technical components of an existing policy and for decades marked the outer boundary of agencies' obligation to consider alternatives.[278] *Regents*, by contrast, imposed an even more stringent standard, requiring DHS to consider bifurcating legally intertwined components of an administrative program on the basis of contestable interpretations of precedent and of the agency record.[279]

Scholars have suggested a range of answers for why Chief Justice Roberts required DHS to consider modifying DACA, from forcing the Trump Administration to take political ownership of the rescission[280] to deferring a decision on DACA's legality.[281] This Note does not aim to weigh in on debates about the underlying judicial politics but rather suggests that, doctrinally, the Court's novel invocation of a very strong form of the obligation to consider policy alternatives went hand in hand with Roberts's recognition of the strength of the reliance interests at stake. Roberts indicated as much when he explained that "particularly when so much is at stake . . . the Government should turn square corners in dealing with the people."[282] Roberts, in turn, defined the case's stakes in terms of the strong reliance interests in DACA's continuity held by migrants facing deportation *and* by downstream beneficiaries.[283] Roberts then went on to suggest that had DHS attended to the reliance interests engendered by its

278. Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 51 (1983) ("[T]he airbag is more than a policy alternative to the passive restraint standard; it is a technological alternative within the ambit of the existing standard.").

279. *Regents*, 591 U.S. at 58 & n.15 (Thomas, J., concurring in part and dissenting in part) (arguing that the majority "cites no authority for the proposition that arbitrary and capricious review *requires* an agency to dissect an unlawful program piece by piece" and contesting the majority's reading of Texas v. United States, 809 F.3d 134 (5th Cir. 2015)); *see also, e.g.*, Rodríguez, *supra* note 48, at 13 (explaining that the analogy relies on an arguable "underreading" of the Sessions letter); Benjamin Eidelson, *Reasoned Explanation and Political Accountability in the Roberts Court*, 130 YALE L.J. 1748, 1776 (2021) (arguing that Chief Justice Roberts "could (and perhaps should) have just read the Duke Memorandum more generously").

280. Eidelson, *supra* note 279, at 1776-77.

281. Rodríguez, *supra* note 1, at 9, 102-03; *see also* Price, *supra* note 2 ("*Regents* also seems to reflect an impulse among at least some justices to advertise their good faith, and perhaps lower the political temperature, by distributing wins and losses across partisan lines.").

282. *Regents*, 591 U.S. at 24 (quoting St. Regis Paper Co. v. United States, 368 U.S. 208, 229 (1961) (Black, J., dissenting)); *see also* Margulies, *supra* note 2, at 147 (emphasizing this aspect of the opinion).

283. *Regents*, 591 U.S. at 31-32.

previous approach, it may have developed other incremental policy alternatives.[284] This reasoning seems to confirm that DHS's obligation to devise and evaluate less disruptive alternatives grew out of Roberts's emphasis on both promoting regulatory consistency and considering the parties affected by policy reversals.

Regents, then, combined both the exacting standard of arbitrary-and-capricious review and the focus on regulatory beneficiaries that we encountered in Part I with the procedural-fairness rationale that we encountered in Part II. Like some of the early D.C. Circuit cases we addressed, the *Regents* Court independently assessed the universe of policy options that DHS should have considered and did so without a record of comments directing the agency's attention to the alternative that the Court's opinion advanced. As in the early D.C. Circuit cases and in *State Farm*, the Court did so at least in part on the basis of regulatory beneficiaries' expectations of continued regulatory stability. However, like the more recent Roberts Court administrative-reliance cases, the *Regents* Court's consideration of reliance was explicitly founded on regulatory beneficiaries' property-like interests in DACA's continuity, not on the democratic-responsiveness rationale of the earlier D.C. Circuit cases and *State Farm*. The Court's approach would nonetheless appear to have the salutary effect of requiring DHS to attend to marginalized voices and honor the fact that DACA recipients—and those in their familial, educational, and professional environments—had been invited to "'trust' that the government would adhere to its policy" absent a reasoned explanation for its departure.[285]

This is not to say that Chief Justice Roberts intended all of this. In fact, it is very possible that he meant *Regents* to be a case that was good for "one day and case only."[286] The next Part will argue that, regardless of how the Court intended that *Regents* be perceived, the decision's reasoning is consistent with later Supreme Court case law and has prompted lower courts to consider a broader range of administrative-reliance arguments and to employ elevated forms of review to vindicate those claims. It will also argue that, notwithstanding scholarly criticism, these are positive developments.

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284. *Id.* at 32-33 ("Had Duke considered reliance interests, she might, for example, have considered a broader renewal period based on the need for DACA recipients to reorder their affairs. Alternatively, Duke might have considered more accommodating termination dates for recipients caught in the middle of a time-bounded commitment, to allow them to, say, graduate from their course of study, complete their military service, or finish a medical treatment regimen. Or she might have instructed immigration officials to give salient weight to any reliance interests engendered by DACA when exercising individualized enforcement discretion.").

285. Emerson, *supra* note 43, at 2204.

286. Price, *supra* note 2.

IV. THE POST-*REGENTS* LANDSCAPE

Subsequent Supreme Court and lower-court case law has been consistent with the broader reading of *Regents* that this Note advances. Section IV.A will argue that the Supreme Court's 2024 decisions in *Loper Bright*, *Ohio v. EPA*, and *Corner Post* signal further increases in judicial scrutiny of agency action and reiterate the Court's commitment to making judicial review available to groups beyond regulated industry. The Court's moves in these cases are consistent with lower courts' careful review of agencies' changes in course post-*Regents*, as Section IV.B will show. Section IV.C defends the practicability of this elevated approach to judicial review, and Section IV.D argues that the heightening of judicial review in these cases helps to avoid perverse distributional consequences and promotes democratic responsiveness.

A. Loper Bright *and the 2024 Term*

While scholars initially disputed whether *Regents* would have broad doctrinal impact, it has emerged as part and parcel of a larger project by the Roberts Court to intensify judicial review of administrative agencies, particularly in cases where agencies change course. That project emerged most clearly in a series of watershed administrative-law decisions issued at the close of the 2024 Term that, taken as a whole, signal a further increase in judicial scrutiny of administrative agencies and continued solicitude towards constituencies beyond regulated industry.

In *Loper Bright*, the Supreme Court overturned *Chevron* as inconsistent with Section 706 of the APA.[287] As we saw in Part II, *Chevron* required courts to defer to reasonable agency constructions of ambiguous statutes.[288] Under *Loper Bright*, by contrast, courts must now "exercise independent judgment in determining the meaning of statutory provisions."[289] *Chevron* granted agencies the flexibility to toggle between competing statutory interpretations over time, a feature that defenders of the framework have often pointed to as promoting democratic responsiveness.[290] In rejecting *Chevron*, the Supreme Court insisted that statutes have a single, fixed, judicially discoverable best meaning and treated agencies' changes in course on statutory meaning as a bug that "affirmatively destroys" reliance interests.[291] Writing separately in concurrence, Justice

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287. Loper Bright Enters. v. Raimondo, 603 U.S. 369, 398-99 (2024).

288. *See supra* notes 135-139 and accompanying text.

289. *Loper Bright*, 603 U.S. at 394.

290. *See, e.g.*, Anya Bernstein & Cristina Rodríguez, *Working with Statutes*, 103 TEX. L. REV. 921, 939-40 (2025).

291. *Loper Bright*, 603 U.S. at 410-11.

Gorsuch added to Chief Justice Roberts's criticism of *Chevron*'s "antireliance harms."[292] Making a distributional claim of the sort that should by now be familiar, Gorsuch distinguished between "sophisticated entities" who could "lobby for new 'reasonable' agency interpretations and even capture the agencies that issue them" and "ordinary people" who could not and so "suffer the worst kind of regulatory whiplash *Chevron* invites."[293]

Even as the Court maintained that final "interpretation of the laws" falls within the judicial province,[294] it recognized a class of statutes that "expressly delegate" interpretive authority to agencies.[295] Under *Loper Bright*, agencies delegated such authority appear to be afforded latitude to adjust their interpretations, so long as their interpretive moves fall within the scope of their lawful authority and are predicated on "reasoned decision making."[296] Early estimates are that there are many such statutes, and while it is too soon to see cases in which agencies have toggled between preferred interpretations, it seems likely that the question of how courts apply arbitrary-and-capricious review to novel agency statutory interpretations—and factor in reliance interests—will assume even greater importance in administrative law.[297]

Two other cases from the 2024 Term suggest that the standard of review in such cases will be exacting and will account for the interests of regulatory beneficiaries. In *Ohio v. EPA*, the Supreme Court deployed an aggressive form of arbitrary-and-capricious review in granting emergency relief to a coalition of states and industry groups challenging an air-pollution rule issued by EPA under the Clean Air Act.[298] The rule limited the amount of pollutants that upwind states like Ohio could emit, in order to ensure adequate air quality in downwind states.[299] Writing for the majority and citing *State Farm*, Justice Gorsuch deemed EPA to have offered an inadequate response to comments critiquing the methodology EPA used to develop the emissions-control measures included in the rule.[300] Writing in dissent and echoing the more forgiving standard of review

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292. *Id.* at 438-39 (Gorsuch, J., concurring).

293. *Id.*

294. *Id.* at 385 (majority opinion) (quoting THE FEDERALIST NO. 78, at 525 (Alexander Hamilton) (Jacob E. Cooke ed., 1961)).

295. *Id.* at 394 (quoting Batterton v. Francis, 432 U.S. 416, 425 (1977)).

296. *Id.* at 395 (quoting Michigan v. EPA, 576 U.S. 743, 750 (2015)).

297. Nicholas Bagley, X (formerly TWITTER) (July 3, 2024, 10:52 AM), https://twitter.com/nicholas_bagley/status/1808514215872741806 [https://perma.cc/8KY8-SXJZ].

298. 603 U.S. 279, 299-300 (2024).

299. *Id.* at 283-84.

300. *Id.* at 292-93 (citing Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)).

from the *Chevron*-era cases we reviewed, Justice Barrett conceded that the agency could have better justified its position but argued that EPA's action was lawful because its path could "reasonably be discerned."[301] This was especially so, she maintained, because the one comment that had directly flagged the methodological issue had been "purely speculative" and lacked any "factual or policy basis."[302]

Even though the Supreme Court ruled against the regulatory-beneficiary downwind states in *Ohio v. EPA*, it would be a mistake to read that case as signaling an aversion to judicial safeguards for regulatory beneficiaries in administrative law. In its contemporaneous decision in *Corner Post*, the Supreme Court's conservative bloc adopted a plaintiff-friendly construction of the APA's statute of limitations, in part because this would facilitate lawsuits by parties downstream of the rule being challenged.[303] In fact, Justice Kavanaugh emphasized the importance and ubiquity of APA lawsuits by unregulated parties in his concurrence.[304] In that concurrence, Kavanaugh stressed the importance of affording judicial remedies to "unregulated but adversely affected parties"[305] and argued that there should be no "asymmetry" in the availability of judicial review afforded to regulated and unregulated parties who have suffered comparable injuries from agency action.[306]

B. Regents *and the Rise of Heightened Judicial Scrutiny in the Lower Courts*

As we saw in the last Section, since *Regents* the Supreme Court has reiterated a preference for strong judicial oversight of agency action and has doubled down on the importance of affording judicial review of agency action to regulatory beneficiaries. This is broadly consistent with the manner in which, after *Regents*, lower courts across political leanings have elevated the standard of arbitrary-and-capricious review that they apply to agencies' changes of course.[307] In many

301. *Id.* at 317 (Barrett, J., dissenting).

302. *Id.* at 318.

303. Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys., 603 U.S. 799, 812, 824 & n.9 (2024) (noting that, without this construction, the plaintiff would have "no other way to obtain meaningful review of [agency action]").

304. *Id.* at 833-37 (Kavanaugh, J., concurring).

305. *Id.* at 827 (emphasis omitted).

306. *Id.* at 832.

307. *See, e.g.*, Texas v. Biden, 10 F.4th 538, 554 (5th Cir. 2021) ("While considering alternatives, DHS '*was* required to assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns.'" (quoting Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 591 U.S. 1, 33 (2020))); District of

cases, lower courts have pointed to agencies' insufficient consideration of policy alternatives in cases that do not implicate reliance interests,[308] and many reliance-interest cases have involved regulated parties and benefit recipients rather than regulatory beneficiaries.[309] Nevertheless, the most marked change post-*Regents* has been in the level of scrutiny that lower courts apply to agencies' reversals in course in challenges brought by regulatory beneficiaries.[310] Though these cases have, at times, made somewhat inconsistent doctrinal moves, careful review demonstrates the workability of the overarching *Regents* framework and helps to clarify its implicit limiting principles. Specifically, review of these lower-court cases reveals the following limiting principles to *Regents*'s requirement that agencies consider the reliance interests of regulatory beneficiaries: these reliance interests must be (1) concrete, or backed by a pecuniary investment or property interest; (2) widely shared; (3) substantial; and (4) foreseeable to the agency at the time it reversed course.

Application of these principles can be seen, for instance, in the Fifth Circuit's recognition of border states' reliance interests in the perpetuation of the Migrant Protection Protocols (MPP) in *Texas v. Biden*.[311] In 2018, Secretary Kirstjen Nielsen announced that, under MPP, DHS would return undocumented

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Columbia v. U.S. Dep't of Agric., 496 F. Supp. 3d 213, 249-50 (D.D.C. 2020) ("Such radical changes in long-standing policies, on which States, their agencies and others have long relied for such a critical purpose as necessary nutritional assistance, require[] that the agency adequately consider 'the alternative[s]' that are 'within the ambit of the existing [policy].'" (second and third alterations in original) (quoting *Regents*, 591 U.S. at 30)); Amalgamated Transit Union, Int'l v. U.S. Dep't of Lab., 647 F. Supp. 3d 875, 904 (E.D. Cal. 2022) ("The Department simply did not address how much transit agencies had relied on the status quo, and as a result, it did not consider how to avoid the harshest negative consequences of its policy change. If the Department had followed the ordinary procedure, it could likely have taken steps to avoid the negative consequences of a policy change for those who had relied on the past policy."), *vacated*, Nos. 23-15503, 23-15617, 2024 WL 3565264 (9th Cir. July 29, 2024).

308. *See, e.g.*, Louisiana v. U.S. Dep't of Energy, 90 F.4th 461, 476 (5th Cir. 2024); Red River Valley Sugarbeet Growers Ass'n v. Regan, 85 F.4th 881, 888-90 (8th Cir. 2023) (invoking *Regents* to strike down agency action for failure to consider more limited alternatives than revoking regulations in toto).

309. *See, e.g.*, Clarke v. Commodity Futures Trading Comm'n, 74 F.4th 627, 641 (5th Cir. 2023) (invoking the reliance interest of an online marketplace on a Commodity Futures Trading Commission no-action letter and discussing liability risk); Wages & White Lion Invs. v. FDA, 90 F.4th 357, 377-81 (5th Cir. 2024) (discussing the reliance interest of e-vapor manufacturers on the Food and Drug Administration's (FDA's) guidance regarding applications for FDA approval), *cert. granted*, 144 S. Ct. 2714.

310. *See, e.g.*, Texas v. Biden, 10 F.4th at 554 (discussing the reliance interest of states on federal immigration policy); Int'l Org. of Masters v. NLRB, 61 F.4th 169, 179 (D.C. Cir. 2023) (discussing the reliance interests of unions on a stable labor-law background against which to contract).

311. Texas v. Biden, 20 F.4th 928, 989-90 (5th Cir. 2021), *rev'd*, 597 U.S. 785 (2022).

immigrants, including those seeking asylum, to Mexico during the pendency of their removal proceedings and explained that this program was authorized by language in the INA.[312] After the change in presidential administrations, Secretary Alejandro Mayorkas terminated MPP, explaining that the program did not "adequately . . . enhance border management in such a way as to justify the program's extensive operational burdens and other shortfalls."[313]

Texas and Missouri sued, arguing, among other things, that the termination of MPP violated the INA and the APA.[314] As to the APA claims, the district court cited *Regents* and held that Secretary Mayorkas's rescission of MPP was unlawful because he "failed to consider the costs" to Texas and Missouri's "reliance interests in the proper enforcement of federal immigration law"[315] and because he "failed to meaningfully consider more limited policies than the total termination of MPP."[316] The Fifth Circuit, relying on *Regents*, denied the government's request for a stay of the district court's order staying MPP's rescission.[317] It reasoned in terms now familiar to us that linked the salience of policy alternatives to the existence of reliance interests: "While considering alternatives, DHS 'was required to assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns.'"[318] Several months later, the Fifth Circuit went on to affirm on the merits, holding that DHS unlawfully ignored those reliance interests and that DHS erred by evaluating only the "binary decision whether to keep or reject MPP" rather than considering "possible changes to MPP."[319] The Supreme Court then reversed and remanded that decision on the grounds that the Fifth Circuit erroneously interpreted the INA and erroneously declined to treat Secretary

312. Biden v. Texas, 597 U.S. at 791; *see* Memorandum from Kirstjen M. Nielesen, Sec'y, U.S. Dep't of Homeland Sec., to L. Francis Cissna, Dir., U.S. Citizenship & Immigr. Servs. et al., Policy Guidance for Implementation of the Migrant Protection Protocols 1 (Jan. 25, 2019), https://www.dhs.gov/sites/default/files/publications/19_0129_OPA_migrant-protection-protocols-policy-guidance.pdf [https://perma.cc/U35H-5LRZ].

313. Biden v. Texas, 597 U.S. at 793. He did so by way by of a June 2021 memorandum and a subsequent October 2021 memorandum. *See id*. at 793, 795. The significance of these multiple memoranda was the subject of the Supreme Court's intervention in this case and is not relevant for our purposes. *See id*.

314. Texas v. Biden, 554 F. Supp. 3d 818, 828 (N.D. Tex. 2021).

315. *Id.* at 848 (citing Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 591 U.S. 1, 31 (2020)).

316. *Id.* at 849 (citing *Regents*, 591 U.S. at 30).

317. Texas v. Biden, 10 F.4th 538, 543 (5th Cir. 2021).

318. *Id.* at 554 (emphasis omitted) (quoting *Regents*, 591 U.S. at 33).

319. Texas v. Biden, 20 F.4th 928, 992 (5th Cir. 2021) (emphasis omitted), *rev'd*, 597 U.S. 785 (2022).

Mayorkas's second rescission memorandum as reviewable, final agency action.[320] However, the Supreme Court did not comment on the merits of the Fifth Circuit's APA analysis, and on remand, the district court doubled down on its position that DHS insufficiently considered Texas's reliance interests in MPP's continuation.[321]

Haiyun Damon-Feng labels this "[t]he case that [s]wallowed the [r]ule" because Texas was neither regulated by MPP nor the direct beneficiary of that policy.[322] That critique misses the mark: *Regents* clearly indicated that DHS ought to have taken account of states' budgetary interests when rescinding DACA, giving DHS ample notice that it needed to do the same with respect to MPP.[323] Further, DHS's own records clearly indicate its awareness that Texas might make major policy decisions based on DHS's policies, demonstrating the unambiguous foreseeability of these reliance interests to DHS at the time it rescinded MPP.[324] And as the Fifth Circuit identified, Texas belongs to a group of border states that the Supreme Court has explained "bear[] many of the consequences of unlawful immigration."[325] In other words, Texas's reliance interests were not only foreseeable but also widespread. It is also plausible that they were concrete: the Fifth Circuit explained that Texas made fiscal allocations in reliance on the continuity of MPP.[326] On the other hand, neither court detailed exactly what fiscal allocations Texas made in reliance on MPP's continuity, let alone described why those plans were of sufficient magnitude to warrant heightened judicial protection. Indeed, the courts appeared to equate a fiscal harm sufficient to confer Article III standing with a reliance interest that triggered heightened review.[327] Still, it is likely that Texas could have made the requisite showing if the lower courts had demanded it: supporting a sudden influx of migrants is expensive, and financing such expenditures may have caused Texas to abandon investments

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320. Biden v. Texas, 597 U.S. at 814.

321. Texas v. Biden, 646 F. Supp. 3d 753, 778-80 (N.D. Tex. 2022).

322. Damon-Feng, *supra* note 18, at 1793, 1799.

323. *Regents*, 591 U.S. at 31 ("States and local governments could lose $1.25 billion in tax revenue each year [from DACA's rescission].").

324. Texas v. Biden, 20 F.4th at 989 ("The Agreement between DHS and Texas underscores the reliance interests at play—and DHS's awareness of them. The Agreement stipulated, *inter alia*: 'Texas, like other States, is directly and concretely affected by changes to DHS rules and policies that have the effect of easing, relaxing, or limiting immigration enforcement. *The harm to Texas is particularly acute where its budget has been set months or years in advance and it has no time to adjust its budget to respond to DHS policy changes*.'" (emphasis added)).

325. *Id.* (alteration in original) (quoting Arizona v. United States, 567 U.S. 387, 397 (2012)).

326. Texas v. Biden, 10 F.4th 538, 553-54 (5th Cir. 2021); *see* Texas v. Biden, 554 F. Supp. 3d 818, 848-49 (N.D. Tex. 2021).

327. *See* Texas v. Biden, 554 F. Supp. 3d at 848-49; Texas v. Biden, 20 F.4th at 989-90.

it made and programs it sponsored based on assumptions about MPP's continuity.[328]

While Damon-Feng is correct that some regulatory beneficiaries are so far downstream as to render their reliance claims incognizable,[329] Texas is not such a claimant: it made arguments that supported the existence of a reliance interest that was widely shared and foreseeable to the agency, as well as plausibly concrete and substantial. This is not to suggest that the Fifth Circuit's ultimate disposition of the case was correct, though. Texas could and should have supported aspects of its reliance claims with greater specificity. And even if the Fifth Circuit was correct in holding that Texas could have had a plausible reliance claim, it erred by overlooking the fact that Secretary Mayorkas amply addressed those claimed reliance interests in his operative rescission memorandum.[330]

Daniel T. Deacon also objects to the Fifth Circuit's decision in this case on the grounds that it required DHS to consider modifying MPP in place of jettisoning it, which he argues extends the obligation to consider alternatives beyond what *Regents* would support.[331] But, again, the flaw with the decision was not its invocation of *Regents* for the proposition that DHS must consider more limited alternatives to rescission, which, as we saw in Part III, was exactly what Chief Justice Roberts's opinion in *Regents* required DHS to do.[332] Once again, the Fifth

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328. *Cf.* Grace Ashford & Claire Fahy, *$2.4 Billion Is Not Enough for New York's Migrant Crisis, Adams Says*, N.Y. Times (Feb. 6, 2024), https://www.nytimes.com/2024/02/06/nyregion/adams-albany-migrant-crisis.html [https://perma.cc/K7RU-8K2C] ("Testifying at the State Capitol in Albany, the mayor told lawmakers that the state would need to pony up at least half the cost of caring for migrants to keep the city from making drastic budget cuts, a figure his team put at $4.6 billion.").

329. Damon-Feng, *supra* note 18, at 1808-09.

330. *See Explanation of the Decision to Terminate the Migrant Protection Protocols*, U.S. Dep't of Homeland Sec. 26 (Oct. 29, 2021), https://www.dhs.gov/sites/default/files/2022-01/21_1029_mpp-termination-justification-memo-508.pdf [https://perma.cc/A7UH-WQHE]. In *Biden v. Texas*, the Supreme Court held that the second rescission memorandum constituted final agency action and that it, not the leaner first rescission memorandum, should have been the focal point of the lower courts' analysis. 597 U.S. 785, 814 (2022). Had the lower courts looked at that memorandum, they would have found a thoughtful—but brief—discussion of the state's reliance interests that more than satisfied DHS's explanatory burden. Indeed, the agency pointed out that there were a number of factors—including the short time that the Migrant Protection Protocols (MPP) were in operation and the small percentage of immigrants enrolled in the program—that undermined the strength of Texas's asserted reliance interest and ameliorated the need for a drawn-out discussion. *See supra* notes 272-274 (discussing the variable strength of reliance claims).

331. Deacon, *supra* note 19, at 703 ("[A]s a matter of court-enforced obligation, agencies should not have to cook up this-or-that modification[] in order for their actions to survive review." (emphasis omitted)).

332. *See* Texas v. Biden, 10 F.4th 538, 554-55 (5th Cir. 2021); *supra* text accompanying notes 239-243.

Circuit's error was instead that it overlooked that DHS's operative rescission memorandum did in fact comply with this prudent obligation.[333]

I will now review two other lower-court decisions to draw out further the limiting principles guiding courts' application of *Regents*. In the first case, the D.C. Circuit invoked *Regents* to strike down the National Labor Relations Board's (NLRB's) change in course regarding whether certain employees were protected by the National Labor Relations Act (NLRA), which regulates employers and benefits employees and unions.[334] The petitioner in that case was a union that had bargained for decades with shipowners on behalf of a class of sailors known as licensed deck officers (LDOs).[335] In 2017 and 2018, the union sought information from the shipowners regarding their treatment of LDOs that the union believed it was entitled to under its collective-bargaining agreement, and, when the shipowners refused, the union filed a complaint with NLRB.[336] But NLRB held that the shipowners had no obligation to bargain with the union because the shipowners *believed* that LDOs were "supervisors" who did not meet the NLRA's test for employees,[337] even though the shipowners had voluntarily recognized the union as the LDOs' representative and entered into the collective-bargaining agreement that they now asserted they were not bound by.[338]

Relying on *Regents*'s discussion of reliance interests, the D.C. Circuit reversed NLRB for failing to acknowledge the union's reliance on the agency's old policy that employees *must in fact* be covered by an exemption to fall outside the aegis of the NLRA.[339] Echoing *State Farm*'s treatment of insurance premiums, the D.C. Circuit explained that permitting the new reasonable-belief rule to stand "might easily destabilize established bargaining relationships."[340] Requiring that NLRB consider those bargaining relationships falls well within the limiting principles that this Note has identified. These relationships are contractual in nature and therefore concrete. These bargaining relationships often involve large sums of money and a number of parties, so they are both substantial and

333. *See Explanation of the Decision to Terminate the Migrant Protection Protocols*, *supra* note 330, at 36 (considering "reimplementation of a modified MPP in lieu of termination" but explaining that this approach would "fail to address the fundamental problems with MPP").

334. Int'l Org. of Masters v. NLRB, 61 F.4th 169, 179 (D.C. Cir. 2023).

335. *Id.* at 173.

336. *Id.*

337. *Id.* at 177.

338. *Id.* at 173-74.

339. *Id.* at 179 (citing Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 591 U.S. 1, 30 (2020)).

340. *Id.* at 180; *see supra* notes 115-117 and accompanying text.

widespread.[341] And, given that NLRB's stated goal is to "encourage collective bargaining,"[342] NLRB clearly could have foreseen that its reversal in course could impact bargaining relationships.

The next case I consider arises out of a body of facts similar to that which gave rise to the census case, and which therefore offers an interesting window into how lower courts have read *Regents* to supersede the census case.[343] To simplify, in April 2020, the Department of Commerce announced a plan to delay the census timeline in view of the COVID-19 pandemic.[344] In August 2020, Secretary Ross reversed course, issuing a press release that significantly shortened the previously announced timeline for completing the census and cited a statutory deadline as the basis for the acceleration.[345] Municipalities and public-interest organizations who had advertised the initial, extended timeline sought a preliminary injunction against this acceleration.[346] Judge Koh, then on the district court, ruled in their favor, invoking *Regents* to critique the agency's failure to consider both reliance interests[347] and more measured policy alternatives than complete abandonment of the earlier plan.[348] The Ninth Circuit ultimately affirmed Judge Koh on both fronts.[349]

While Judge Koh's decision for the district court—like the Fifth Circuit's decision in the MPP case—may go too far in certain respects, it ultimately

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341. Although the collective-bargaining agreement at issue in this particular case seems to have involved a small fleet of ships, collective-bargaining agreements in the maritime industry can be much broader in scope. *See, e.g.*, Seafarers Int'l Union, *IBF Agreement Boosts Wages for Mariners, Secures Other Gains*, AFL-CIO (Sept. 25, 2023), https://www.seafarers.org/ibf-agreement-boosts-wages-for-mariners-secures-other-gains [https://perma.cc/V49Q-PQGU] (announcing a "four-year agreement that will see significant wage increases . . . for over 250,000 seafarers[] serving on more than 10,000 vessels").

342. *About NLRB*, Nat'l Lab. Rels. Bd., https://nlrb.gov/about-nlrb/rights-we-protect/the-law [https://perma.cc/LU7A-C9EN].

343. Nat'l Urb. League v. Ross, 489 F. Supp. 3d 939 (N.D. Cal. 2020), *modified*, 491 F. Supp. 3d 572.

344. *Id.* at 953-54.

345. *Id.* at 957.

346. *Id.* at 960.

347. *Id.* at 999.

348. *Id.* at 993-96 ("Like the Secretary in *Regents*, Defendants argue that binding law compels their decision. Similarly, the Court agrees that the Census Act's statutory deadlines bind Defendants. Even so, Defendants should have 'appreciate[d] the full scope of their discretion' to preserve other statutory and constitutional objectives while striving to meet the deadlines in good faith. By not appreciating their discretion, Defendants failed to consider important aspects of the problem before them. That failure was likely arbitrary and capricious under the APA." (alteration in original) (quoting Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 591 U.S. 1, 26 (2020))).

349. Nat'l Urb. League v. Ross, 977 F.3d 770, 777-79 (9th Cir. 2020).

demonstrates the normative desirability and practical workability of requiring that agencies attend to certain regulatory beneficiaries' reliance interests. Judge Koh, for instance, may have erred when she recognized public-interest organizations' reliance interest in the extended timeline by virtue of their advertisements thereof.[350] Absent facts demonstrating that these organizations held a property-like, or concrete, interest in that earlier plan, the mere fact that those organizations had publicized the longer timeline would not seem to constitute a cognizable reliance interest under the Supreme Court's precedents.

That is not to say, however, that Judge Koh's disposition of the case was incorrect, for she also invoked the reliance interests of municipalities, who, in addition to pointing to substantial investment promoting the earlier timeline, did allege a concrete, investment-backed reliance interest in the accuracy of the census that the accelerated timeline would threaten.[351] Like the union's reliance interests in stable NLRB policy, moreover, these municipalities' reliance interests fell within the other limiting principles this Note has identified. For instance, those reliance interests involved the continuity of important public services backed by sizable municipal appropriations and were shared across a number of municipalities—in other words, the reliance interests were substantial and widespread.[352] Moreover, the municipalities' reliance on the accuracy of the census advanced by the extended timeline ought to have been foreseeable to the agency. Although Judge Koh did not emphasize this point in her opinion, several factors support this conclusion. First, the Census Act requires that the Bureau consult with and deliver redistricting data to the states, which should have put the Bureau on notice that subfederal governments rely on accurate census data.[353] Second, the administrative record displays evidence that officials were actually aware that delivering inaccurate data to these governments would affect their "apportionment, redistricting, and funding decisions."[354]

Judge Koh was on equally sure footing in holding that the agency violated the APA by neglecting to consider incremental policy measures that would

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350. *Ross*, 489 F. Supp. 3d at 1000.

351. *See id.* at 967 ("The local government Plaintiffs allege that the Replan will degrade granular census data that they rely on to deploy services and allocate capital.").

352. *See id.* at 965-66 (explaining that a census undercount would threaten to cut off federal funds on which these municipalities rely "for programs that affect . . . daily life" in the communities, like the $108 million in transit grants that the Seattle region received in 2019 and the $90 million in federal-funded grants that Harris County disbursed in 2019 and used to manage the COVID-19 pandemic for 4.7 million people).

353. *See* 13 U.S.C. § 141(c) (2018).

354. *See, e.g.*, *Ross*, 489 F. Supp. 3d at 959 (quoting the administrative record).

ameliorate the impact of its change in course on the relying municipalities.[355] This is because the policy measure Judge Koh put forward — sticking to the status quo and adhering to the old timeline even if it potentially meant missing the statutory deadline — clearly ought to have been on the agency's radar, as this was precisely the course of action the agency itself had initially selected. Further, the agency should have known that courts have repeatedly blocked agencies from cutting corners in an attempt to meet unrealistic statutory deadlines.[356]

C. Reflecting on Limiting Principles

I turn now more squarely to the issue of the practicability of requiring that agencies consider regulatory beneficiaries' reliance interests and incremental modifications to existing programs when weighing whether to make a regulatory reversal in course. Several scholars writing on related topics have expressed concern that elevating the arbitrary-and-capricious standard of review in this way threatens to permit courts and partisan litigants to veto policy change, especially given the diffuse nature of regulatory beneficiaries as a constituency.[357] While this Note shares that concern, it finds that *Regents* and the line of cases relying on *Regents* have thus far stayed within the bounds of a sensible set of limiting principles regarding the sorts of reliance interests and policy alternatives that agencies must consider when changing course.

The previous Section aimed to identify and defend those general limits, rather than offer a comprehensive typology of regulatory beneficiaries or the possible serious reliance claims they might present. Through its canvassing of *Regents* and the lower-court case law *Regents* has generated, the preceding Section demonstrated that courts have required agencies to take account of downstream regulatory beneficiaries' claims of serious reliance only when they were concrete, substantial in magnitude, widely shared, and foreseeable to the agency at the time it reversed course on a significant policy.

Requiring that agencies consider only concrete, substantial, widely shared, and foreseeable reliance interests held by regulatory beneficiaries dovetails with agencies' obligation to consider obvious aspects of the problem before them, even when acting informally or when that problem was not flagged by commenters[358] — a requirement we have persistently encountered in our review of

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355. *See id.* at 993-94 ("Defendants similarly failed to consider an alternative here: not adopting the Replan while striving in good faith to meet statutory deadlines.").

356. *Id.* at 994-96 (canvassing some of those decisions).

357. *See supra* notes 18-20 and accompanying text.

358. *See* Levin, *supra* note 148, at 187 (citing Dep't of Transp. v. Pub. Citizen, 541 U.S. 752, 764-65 (2004)).

agencies' obligation to consider policy alternatives.[359] As then-Judge Kavanaugh argued in his *Mingo Logan* dissent, upsetting reliance interests is an obvious factor to be considered when an agency reverses course, even if the affected parties did not assert their reliance forcefully before the agency.[360] As we have seen time and again throughout this Note, some regulatory beneficiaries' expectations can be just as concrete as regulated parties' and ought to be just as salient a factor in reasoned agency decision-making, especially when agencies are reversing course on flagship policies whose wide-ranging effects either clearly were or ought to have been foreseeable to the agency.

Rather than helping to flesh out the implicit limiting principles in *Regents*, scholars have argued for cabining that case and imposing a more restrictive rule that agencies must only consider the reliance interests of "intended" regulatory beneficiaries.[361] Not only is this suggestion flatly inconsistent with *Regents*, but it also presents serious administrability concerns of its own. This distinction between intended and incidental beneficiaries is consistent with how contract law approaches reliance interests. Recent contracts scholarship, however, has criticized this distinction as outdated[362] and "an analytic mess,"[363] and a group of scholars has advocated for replacing the distinction with a foreseeability standard of the sort this Note urges.[364] Furthermore, it is hard to imagine an intent-based standard working any more predictably in the public-law domain than in contract law, given the modern reluctance to invoke legislative intent.[365]

This Note also does not advocate for a rule that would require agencies considering a reversal in course to take into account a limitless array of policy alternatives. It instead makes the more limited claim that before agencies make a regulatory U-turn, they ought to at least consider implementing incremental modifications to their existing approach, especially when that U-turn threatens

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359. *See supra* text accompanying notes 113-123, 147-151, 192-197.

360. Mingo Logan Coal Co. v. EPA, 829 F.3d 710, 735-41 (D.C. Cir. 2016) (Kavanaugh, J., dissenting).

361. *See, e.g.*, Rookard, *supra* note 24, at 358.

362. Alan Schwartz & Robert E. Scott, *Third-Party Beneficiaries and Contractual Networks*, 7 J. LEGAL ANALYSIS 325, 359 (2015) (describing the intended-beneficiary doctrine as adopting a "nineteenth-century lens").

363. David G. Epstein, Alexandra W. Cook, J. Kyle Lowder & Michelle Sonntag, *An "APP" for Third Party Beneficiaries*, 91 WASH. L. REV. 1663, 1667 (2016); *see also id.* ("Any doctrine based on intent is inherently ambiguous from the start.").

364. *Id.* ("[T]he operative question should be whether [the defendants] had reason to know at the time of their contract that [the plaintiff] could be an additional possible plaintiff ('APP').").

365. *See generally* John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419 (2005) (describing the courts' shift away from reliance on notions of legislative intent and toward textualism).

to upset reliance interests. More consistent enforcement of this obligation will help to ameliorate the perverse effects of regulatory whiplash, as well as produce substantively better and more distributionally balanced policy outcomes, without unduly curtailing agencies' freedom of action.[366]

Consider a recent example of regulatory reversal in a case from the Ninth Circuit, albeit a case involving a challenge brought by a regulated party rather than a regulatory beneficiary. In that case, the Ninth Circuit considered a challenge arising out of the Public Utility Regulatory Policies Act.[367] That statute created a new category of "energy producers known as 'Qualifying Facilities' or 'QFs'" and accorded these QFs certain benefits.[368] In 2020, FERC promulgated a rule that purported to narrow the definition of QFs, prompting a challenge from a group of solar producers that previously benefited from that status, as well as a challenge from a group of environmental organizations.[369] The industry challengers argued that the revision was arbitrary and capricious because FERC had insufficiently considered their reliance interests.[370]

The Ninth Circuit ultimately sided with FERC—and permitted the agency's policy reversal.[371] In its discussion, the court noted that agencies are routinely tasked with choosing policy options from a menu of reasonable alternatives and that the APA empowers agencies to change course as circumstances change.[372] The court explained that agencies needed to take account of reliance interests before making those changes and that FERC had done so not only by "acknowledging the existence of [those] reliance interests" but also by "incorporating measures to limit the harm to the relying parties," namely exempting some existing facilities from application of the new rule.[373] Here, then, we see that the *Regents* framework both enabled FERC to reverse course on a major policy and induced it to modulate the impact of that reversal on relying parties, without licensing the court to second-guess the agency's choice from among an array of reasonable options.[374]

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366. *See, e.g.*, Davenport, *supra* note 49 (arguing that this whiplash both damages the economy and limits regulations' "capacity to protect the environment").

367. Solar Energy Indus. Ass'n v. FERC, 80 F.4th 956, 969 (9th Cir. 2023).

368. *Id.*

369. *Id.*

370. *Id.* at 980.

371. *Id.* at 969.

372. *Id.* at 978-79.

373. *Id.* at 981.

374. *See* Order Addressing Arguments Raised on Rehearing and Clarifying Prior Order in Part, 173 FERC ¶ 61,158, at ¶¶ 298, 318, 324-26 (Nov. 19, 2020).

D. Regents*'s Distributional Stakes*

The preceding Sections made the descriptive claims that *Regents* has caused lower courts to elevate the standard of arbitrary-and-capricious review they apply when reviewing agencies' changes in course, that this has included moves to protect regulatory beneficiaries' reliance interests and to require agencies to consider measured policy alternatives, and that these developments have incorporated a set of practicable limiting principles. Now, I will argue that these developments are normatively desirable because they encourage agencies to take greater stock of regulatory beneficiaries' reliance interests ex ante.

Some of the D.C. Circuit's historical concerns about excessive industry influence over agencies[375] prove true today. Industry is the regulated party in most administrative-law cases, and industry often controls the information that agencies need to fulfill their statutory mandates.[376] Industry wields this informational advantage to keep disfavored proposals off of agencies' agendas,[377] to shape agencies' proposed policies before they are subject to public comment,[378] and to defeat agencies' efforts to pursue unfavorable initiatives.[379] As a result, the present policymaking process is stacked against regulatory beneficiaries,[380] who do not possess the same ex ante influence and informational advantage and therefore must often rely on lawsuits to make their influence felt ex post.[381]

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375. *See supra* Part I.

376. Wendy Wagner, Katherine Barnes & Lisa Peters, *Rulemaking in the Shade: An Empirical Study of EPA's Air Toxic Emission Standards*, 63 ADMIN. L. REV. 99, 102 (2011) ("Business groups further benefit from the agencies' need for information that only regulated interests can provide.").

377. Yackee, *supra* note 38, at 374 (finding "suggestive evidence that *ex parte* contacts [with regulated parties] are a potential factor in causing the withdrawal of regulations from consideration, which implies that interest group activity during the pre-proposal stage helps to block unwanted policy changes from moving forward").

378. Wagner et al., *supra* note 38, at 635 (reporting that EPA designed "key provisions of its rules" in conversation with industry).

379. Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321, 1328 (2010) (discussing industry's tactic of overwhelming policymakers with information to inhibit unfavorable agency action).

380. *See, e.g.*, Kimberly D. Krawiec, *Don't "Screw Joe the Plummer": The Sausage-Making of Financial Reform*, 55 ARIZ. L. REV. 53, 80 (2013) ("[W]hereas financial industry representatives met with federal agencies on the Volcker Rule a total of 351 times, there were only 31 meetings with entities or groups that might reasonably be expected to act as a counterweight to industry representatives . . . .").

381. *See* Mendelson, *supra* note 24, at 419-20 ("[W]hether regulatory beneficiaries can hold an agency accountable for implementing a particular statutory program will depend on the ability of beneficiaries to invoke external mechanisms of control. Courts are especially

The structure of administrative-reliance doctrine before *Regents* aggravated rather than ameliorated this asymmetry, since regulated parties could articulate reliance claims in challenges against increases in regulation, but courts did not recognize regulatory beneficiaries as having similar interests in regulatory stability that would allow them to challenge relaxations or alterations of restrictions. Vindicating regulatory beneficiaries' reliance interests and requiring agencies to consider more incremental policy alternatives to rescission in toto can help reverse this fundamental imbalance and induce agencies to be more responsive to regulatory beneficiaries ex ante, as the D.C. Circuit sought to do in the cases reviewed in Part I.[382]

Consider on this point the D.C. Circuit's decision in the NLRB case reviewed above.[383] In that decision, the court noted that the agency's failure to consider the union's reliance interests was intimately linked with the agency's decision to afford "affected parties no opportunity to address [the proposed change] or offer relevant evidence."[384] NLRB is not alone in shutting regulatory beneficiaries out of formative stages of its policymaking process, but courts until recently have not routinely required agencies to adjust their agendas to reflect this constituency's priorities.[385] Threatening agencies that exclude these constituencies from consideration with the risk of reversal in court promises to change this dynamic—at least in cases where agencies significantly change course. For instance, in striking contrast to DHS's rash decision to rescind DACA in 2017 without taking account of downstream stakeholders' interests, DHS's recent rule fortifying the program displayed awareness of the "wide range of potential reliance interests" at stake, including "not only the reliance interests of DACA recipients, but also those indirectly affected by DHS's actions."[386]

When agencies take formal action, as DHS did in promulgating this rule, regulatory beneficiaries can avail themselves of the APA's formal participatory requirements. But absent careful judicial review to ensure that agencies have paid heed to regulatory beneficiaries, the mere existence of those pathways is unlikely

important . . . ."); Wagner et al., *supra* note 376, at 136-38 (finding that public-interest groups principally influenced EPA policymaking by bringing lawsuits to enforce statutory deadlines).

382. *See supra* Section I.A.

383. Int'l Org. of Masters v. NLRB, 16 F.4th 169 (D.C. Cir. 2023); *see supra* notes 334-342 and accompanying text.

384. *Int'l Org. of Masters*, 16 F.4th at 180.

385. *See, e.g.*, Shapiro, *supra* note 37, at 1818-20 (criticizing courts' "soft" review of rulemaking petitions); California v. EPA, 72 F.4th 308, 311 (D.C. Cir. 2023) (rejecting regulatory beneficiaries' challenge to EPA's agenda in a nonreliance case).

386. Deferred Action for Childhood Arrivals, 87 Fed. Reg. 53152, 53289 (Aug. 30, 2022) (to be codified at 8 C.F.R. pts. 106, 236, 274a).

to render agencies responsive to this relatively disempowered constituency.[387] Judicial review is even more important in the arena of informal agency action, such as issuing guidance, where the APA mandates no such public participation.[388] Scholars have long called for agencies to invite greater participation from downstream stakeholders before taking informal action.[389] They have noted that such participation can bolster the information available to agencies as well as increase their democratic legitimacy and build public support for their policies.[390] A few scholars have noted that courts can and should play an important role in obligating agencies to consult with a wide array of stakeholders.[391] Of course, there is a danger that increased judicial scrutiny of agency actions could lead to regulatory ossification,[392] but there is little reason to fear such an outcome if courts adhere to the limiting principles that this Note has outlined.

Indeed, strong judicial enforcement of agencies' obligation to identify regulatory beneficiaries' reliance interests and factor them into policymaking decisions appears already to have had a salutary deliberation-forcing effect on agency decision-making without handcuffing agencies to their prior positions.[393]

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387. *See, e.g.*, Marissa Martino Golden, *Interest Groups in the Rule-Making Process: Who Participates? Whose Voices Get Heard?*, 8 J. PUB. ADMIN. RSCH. & THEORY 245, 245-46 (1998); Richard Murphy, *Enhancing the Role of Public Interest Organizations in Rulemaking via Pre-Notice Transparency*, 47 WAKE FOREST L. REV. 681, 682-83 (2012).

388. 5 U.S.C. § 553(b)(A) (2018).

389. *See, e.g.*, Mendelson, *supra* note 24, at 416 ("[W]e should focus more consciously on the interests of regulatory beneficiaries in the design of administrative procedures."); Michael Sant'Ambrogio & Glen Staszewski, *Public Engagement with Agency Rulemaking*, ADMIN. CONF. OF THE U.S. 11 (Nov. 19, 2018), https://www.acus.gov/sites/default/files/documents/Public%20Engagement%20in%20Rulemaking%20Final%20Report.pdf [https://perma.cc/2QQH-J282] (arguing for agencies to take steps to increase public participation in the rulemaking process and noting that beneficiaries can "provide agencies with information about the problems agencies seek to address").

390. Sant'Ambrogio & Staszewski, *supra* note 389, at 9-16.

391. *See, e.g.*, Emerson, *supra* note 43, at 2206 (arguing that a "judicial-review procedure" on the question whether agencies sufficiently attended to reliance interests would "have benefits for the deliberative quality" of the agency's underlying policy choice, such as by enabling "wider public deliberation"); Mendelson, *supra* note 24, at 442 (proposing that regulatory beneficiaries be entitled to petition agency officials for action, as the agency's response to such petitions would be subject to "meaningful judicial review," which "would encourage an agency to thoughtfully consider each petition").

392. *See* MASHAW & HARFST, *supra* note 79, at 225.

393. *See, e.g.*, Employee or Independent Contractor Classification Under the Fair Labor Standards Act, 89 Fed. Reg. 1638, 1639, 1660 (Jan. 10, 2024) (to be codified at 29 C.F.R. pts. 780, 788, 795) (rescinding the 2021 Trump-era definition of "independent contractor" under the FLSA because "it had upset decades of precedent the regulated community and workers had previously been relying on to distinguish between employees and independent contractors");

Consider, for example, the Biden Administration's decision to reaffirm the Obama EPA's position that mercury-pollution standards ought to be applied to coal-fueled power plants.[394] Commenters on the Biden measure criticized the Trump Administration, which had moved to abandon the regulations, for failing to consider a wide array of reliance interests—and called for "regulatory certainty" to enable "future planning" by industry and others alike.[395] EPA agreed with the commenters. Echoing the Court in *Regents*, the agency explained that "regulated industry, states, and other stakeholders, and the public" would all benefit from its reaffirmation of the need for regulations in this space.[396] Utilities and other industries made important business choices against the background of EPA policy,[397] states incorporated federal policy into their own decision-making,[398] and electricity customers also asserted a reliance interest in the regulatory scheme that impacted the prices they paid.[399] These are the very sort of expectations—held by regulated parties and regulatory beneficiaries alike—that agencies should take into account when weighing whether to abandon a long-held regulatory position. After the Supreme Court's intervention in *Regents*, it seems that some agencies are doing exactly that.

CONCLUSION

Department of Homeland Security v. Regents of the University of California stands to become one of the defining administrative-law cases of our time. It could be treated as an aberration, as a case that is good for "one day and case only."[400] So construed, we may see further crystallization of arbitrary-and-capricious review's fissure into a heightened form of review for regulated-party challengers and a more deferential standard for regulatory beneficiaries,

Deferred Action for Childhood Arrivals, 87 Fed. Reg. 53152, 53289 (Aug. 30, 2022) (explaining that "DHS . . . considered a wide range of potential reliance interests" before deciding to formalize DACA, including states' countervailing interest in federal enforcement); *Explanation of the Decision to Terminate the Migrant Protection Protocols*, *supra* note 330, at 26 (considering states' claims of reliance).

394. National Emission Standards for Hazardous Air Pollutants: Coal- and Oil-Fired Electric Utility Steam Generating Units—Revocation of the 2020 Reconsideration and Affirmation of the Appropriate and Necessary Supplemental Finding, 88 Fed. Reg. 13956, 13956 (Mar. 6, 2023) (to be codified at 40 C.F.R. pt. 63).

395. *Id.* at 14002-03.

396. *Id.* at 13959 n.6.

397. *Id.* at 14003.

398. *Id.* at 14003-04.

399. *Id.*

400. Price, *supra* note 2.

exacerbating the already-severe imbalance in these parties' ability to be heard by agencies. On the other hand, *Regents* could be taken at face value to stand for the proposition that judicial enforcement of administrative law's sometimes-byzantine requirements must protect the populations least likely to have ex ante influence with agency decision makers. As this Note has shown, many lower courts have adopted the latter view, reading *Regents* as protecting regulatory beneficiaries as well as regulated parties. We should welcome that development.