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NOTE

Self-Imposed Agency Deadlines

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Abstract. Federal agencies impose deadlines on themselves through their rulemaking powers, even though these regulatory deadlines carry costs for the agencies. When an agency misses its own regulatory deadline, citizens may sue the agency to force it to act. This presents two puzzles: Why do agencies self-impose internal deadlines? And why do courts enforce them?

This Note uses two theories to explain why agencies bind themselves through internal regulatory deadlines: Deadlines allow agencies to (1) entrench their policy preferences within and across presidential administrations, and (2) make credible commitments to enforce their regulations, which signals resolve to regulated parties and incentivizes them to comply without agency intervention.

This Note also provides the first account of what law applies in regulatory-deadline suits. Most courts have held that regulatory deadlines are mandatory and thus judicially enforceable. To reach this conclusion, courts have invoked the *Accardi* doctrine, which states that agencies must follow their own rules. But this Note argues that applying the *Accardi* doctrine in regulatory-deadline suits is unwarranted under Supreme Court precedent. It then revisits the source of the *Accardi* rule and offers a different doctrinal justification for enforcing regulatory deadlines. This Note concludes by exploring the normative stakes of enforcing internal regulatory deadlines against agencies.

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Introduction

Federal agencies—like us—work under deadlines. Deadlines require agencies to complete specific actions, such as rulemaking, by certain dates. Agencies receive deadlines from the gamut of institutional actors: Congress,[1] the president,[2] and the courts.[3] Deadlines affect virtually every major agency across the spectrum of substantive regulation. For instance, the Environmental Protection Agency, the Department of Commerce, the Department of the Interior, the Department of Health and Human Services, and the Department of Agriculture have all been saddled with hundreds of deadlines over the years.[4] Deadlines have thus become a familiar feature of the modern administrative state.

It is no mystery why this is the case. While neither Congress nor the president can exert complete control over the *substance* of agency action ex ante, they can use deadlines to control the *timing* of agency action.[5] Deadlines can reshuffle agency priorities, spur regulatory action, and commit agencies to the enacting legislature's policy goals, even if those lawmakers later lose power. For its part, the judiciary enforces Congress's statutory deadlines[6] and imposes deadlines of its own under the Administrative Procedure Act's (APA) mandate that agencies act within a "reasonable time."[7]

But agencies often miss their deadlines. Agency delay is a chronic problem,[8] with federal agencies failing to meet more than 1,400 statutory

1. *See, e.g.*, Env't Def. Fund v. Thomas, 627 F. Supp. 566, 571 (D.D.C. 1986) (noting that the Hazardous and Solid Waste Amendments of 1984 set at least forty-four statutory deadlines for the EPA).
2. *See, e.g.*, Exec. Order No. 13,891, 3 C.F.R. 371, 373 (2020) (setting deadline for agencies to promulgate regulations regarding guidance documents).
3. *See, e.g.*, South Carolina v. United States, 907 F.3d 742, 763-66 (4th Cir. 2018) (upholding injunction compelling the Department of Energy (DOE) to remove at least one ton of plutonium from South Carolina within two years).
4. *See* Jacob E. Gersen & Anne Joseph O'Connell, *Deadlines in Administrative Law*, 156 U. PA. L. REV. 923, 981 tbl.2 (2008).
5. *Id.* at 925-26 (explaining that ex ante control is difficult because "[a] central premise of the administrative state is that agencies have better information and greater expertise than Congress, thus the need for delegation to agencies"); *id.* at 967 (discussing recent presidential efforts to exert greater ex ante control over agency processes).
6. *See, e.g.*, Ctr. for Food Safety v. Hamburg, 954 F. Supp. 2d 965, 966, 972 (N.D. Cal. 2013) (enforcing FDA compliance with rulemaking deadlines set by the FDA Food Safety Modernization Act).
7. 5 U.S.C. § 555(b); *see, e.g.*, Pub. Citizen Health Rsch. Grp. v. Auchter, 702 F.2d 1150, 1151, 1154 (D.C. Cir. 1983) (per curiam) (holding that a three-year delay in issuing a workplace safety rule was unreasonable and imposing a thirty-day deadline to issue a notice of proposed rulemaking).
8. *See* Gersen & O'Connell, *supra* note 4, at 927, 949 n.84 (describing delay and missed statutory deadlines as "an increasingly prominent fixture in administrative law");

footnote continued on next page

deadlines between 1995 and 2014—a success rate of less than 50 percent.[9] The causes are myriad and well-documented: Agencies must dot their i's and cross their t's as they jump through the APA's procedural hoops; they must analyze reams of data in order to draft regulatory language; they must comply with numerous executive orders; they must stretch limited resources; and they must balance competing priorities and the demands of competing interest groups.[10] And in many cases, Congress imposes statutory deadlines that are simply impossible to meet. For example, in the Nuclear Waste Policy Act, Congress set a three-year deadline for the Nuclear Regulatory Commission to process the Department of Energy's (DOE) license application to build a nuclear waste facility at Yucca Mountain.[11] The DOE submitted its application in 2008.[12] Congress then repeatedly failed to appropriate funding for either agency to complete this monumental task.[13] By 2012, the DOE had approximately $25 million left in available funds, but estimated that it would need $14 million *per month* to support its ongoing, multi-year licensing application process.[14] Needless to say, the Nuclear Regulatory Commission missed its deadline.[15]

Michael D. Sant'Ambrogio, *Agency Delays: How a Principal-Agent Approach Can Inform Judicial and Executive Branch Review of Agency Foot-Dragging*, 79 GEO. WASH. L. REV. 1381, 1383 (2011) ("Complaints about inaction and delay by government officers are almost as old as the Republic itself, but such complaints burgeoned with the dramatic expansion of the administrative state in the twentieth century.").

9. SCOTT ATHERLEY, R STREET, POL'Y STUDY NO. 39, FEDERAL AGENCY COMPLIANCE WITH CONGRESSIONAL REGULATORY DEADLINES 1 (2015), https://perma.cc/924Y-B23W.

10. *See* KEVIN J. HICKEY, CONG. RSCH. SERV., R45336, AGENCY DELAY: CONGRESSIONAL AND JUDICIAL MEANS TO EXPEDITE AGENCY RULEMAKING 1 (2018); *see also* Sant'Ambrogio, *supra* note 8, at 1390-1402 (cataloging common causes of agency delay).

11. *In re* Aiken County, 725 F.3d 255, 257-58 (D.C. Cir. 2013).

12. *Id.* at 258.

13. *Id.* at 269 & n.3 (Garland, C.J., dissenting).

14. Brief of the United States as Amicus Curiae, Submitted on Invitation of the Court at 6, *In re* Aiken County, 725 F.3d 255 (D.C. Cir. 2013) (No. 11-1271), 2012 WL 2366805, ECF No. 50.

15. *In re Aiken County*, 725 F.3d at 258. Similar examples abound. *See, e.g.*, *Executive Branch Review of Environmental Regulations: Hearings Before the Subcomm. on Env't Pollution of the S. Comm. on Env't & Pub. Works*, 96th Cong. 14-15 (1979) (statement of John Quarles, former Deputy EPA Adm'r) (explaining the EPA's six-month statutory deadline to issue hazardous waste permits to industrial plants and opining that "the likelihood of that program getting off the ground and operating smoothly in 6 months, in my judgment, is nil"). For further discussion of impossible deadlines, see Alden F. Abbott, *The Case Against Federal Statutory and Judicial Deadlines: A Cost-Benefit Appraisal*, 39 ADMIN. L. REV. 171, 180-84 (1987); Bobby Kim, Note, *Missed Statutory Deadlines and Missing Agency Resources: Reviving Historical Mandamus Doctrine*, 121 COLUM. L. REV. 1481, 1483 (2021) (explaining that Congress may hamstring an agency by setting a statutory deadline but not appropriating enough funding for the agency to comply).

When agencies fail to meet their deadlines, regulatory beneficiaries are often eager to sue.[16] For decades, missed deadlines have generated substantial litigation and, in many cases, led to thrashings from the courts.[17] To take just one example, an environmental organization sued the Environmental Protection Agency (EPA) for failing to promulgate regulations six years after its statutory deadline had passed.[18] The D.C. District Court declared that the EPA's delay was "egregious" and its brief was "devoid of justification for the agency's laggard performance of its mandatory duties."[19] The court imposed new deadlines and made clear that no further delay would be tolerated.[20]

The story of missed deadlines is thus a familiar one in administrative law. But there is one more actor that imposes deadlines: agencies. In addition to the deadlines set by Congress, the president, and the courts, agencies impose regulatory deadlines *on themselves* through their rulemaking powers.[21] As every administrative law student knows, rules are "little laws" that carry the full force and effect of federal statutes.[22] So although these deadlines come from regulations, as opposed to statutory deadlines created by Congress, they are nevertheless binding on agencies and enforceable in court by third parties.[23]

And not only do agencies enact their own deadlines—they sometimes miss them.[24] This behavior is puzzling. Given the problems that deadlines can cause, one might think that the last thing an agency would want is more of them. Agencies struggle to balance competing deadlines as it is, and are often caught

16. *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFF., GAO-17-304, ENVIRONMENTAL LITIGATION: INFORMATION ON ENDANGERED SPECIES ACT DEADLINE SUITS 13-16 (2017) (finding 141 deadline suits involving 1,441 species filed between 2005 and 2015). The Supreme Court's decision in *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004), created a doctrinal niche for such deadline suits: The Court explicitly indicated that a missed statutory deadline provides a cause of action under the APA. *Id.* at 62-65; *see also* Gersen & O'Connell, *supra* note 4, 951-64 (describing types of legal challenges brought against agencies for missing statutory deadlines).

17. *See, e.g.*, Env't Def. Fund v. Thomas, 627 F. Supp. 566, 569 (D.D.C. 1986) ("Promulgation of regulations 16 months after a Congressional deadline is highly irresponsible."); *In re* Int'l Chem. Workers Union, 958 F.2d 1144, 1150 (D.C. Cir. 1992) (per curiam) ("There is a point when the court must 'let the agency know, in no uncertain terms, that enough is enough,' and we believe that point has been reached." (citation omitted) (quoting Pub. Citizen Health Rsch. Grp. v. Brock, 823 F.2d 626, 627 (D.C. Cir. 1987) (per curiam))).

18. Nat. Res. Def. Council v. Ruckelshaus, No. 84-758, 1984 WL 6092, at *2 (D.D.C. Sept. 14, 1984).

19. *Id.* at *2, *4.

20. *Id.* at *5.

21. *See infra* Part I.A.

22. United States v. Mersky, 361 U.S. 431, 437-38 (1960).

23. *See infra* Part II.

24. *See infra* Part I.

in judicial crosshairs for noncompliance.[25] Agencies spend years litigating missed deadlines, diverting resources that they could otherwise use to work toward meeting their existing deadlines.[26] Why would agencies risk more litigation by creating additional deadlines for themselves?

Scholars have thus far focused on Congress's statutory deadlines, while regulatory deadlines have gone unnoticed.[27] This is unsurprising—regulatory deadlines are less frequently enacted than statutory deadlines, and even less frequently litigated.[28] But the study of regulatory deadlines is a more fruitful enterprise than this lack of attention may suggest. In particular, it sheds light on "one of the most vexing questions" of administrative law: "what makes an agency tick?"[29] An agency's decision to turn its regulatory powers on itself provides important hints about its ultimate ends.

Studying regulatory deadlines presents an opportunity to peek inside the black box of agency decisionmaking. In investigating the phenomenon of

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25. *See, e.g.*, Cmty. In-Power & Dev. Ass'n v. Pruitt, 304 F. Supp. 3d 212, 218 (D.D.C. 2018) (noting, in deciding whether to impose more deadlines on the EPA, that the EPA had its plate full: "[I]n March of last year, two courts from this District ordered the EPA to complete the rulemakings for seven source categories by December of 2018, another twenty source categories by March of 2020, and the remaining six source categories at issue in those cases by June of 2020").

26. *See, e.g.*, *id.*; Complaint at 3-7, Ctr. for Food Safety v. Azar, No. 19-cv-05168 (N.D. Cal. Aug. 19, 2019), 2019 WL 8014750, ECF No. 1 (recounting years of litigation to compel FDA to comply with Food Safety Modernization Act deadlines); *infra* text accompanying note 32.

27. There is less scholarship on presidential deadlines because they are very rarely litigated. Presidential deadlines are generally unreviewable because the president is not subject to the APA and executive orders are not judicially enforceable. Franklin v. Massachusetts, 505 U.S. 788, 796 (1992) ("[T]he President is not an agency within the meaning of the [APA]."); *see, e.g.*, Exec. Order No. 13,563, 3 C.F.R. 215, 217 (2012) (providing the standard disclaimer that the executive order does not create any enforceable right or benefit). For a comprehensive discussion of statutory deadlines, see Gersen & O'Connell, note 4 above. No similar article exists for regulatory deadlines. One article from 1987 suggests that forcing agencies to set their own deadlines in lieu of imposing statutory deadlines would be more economical, but it does not address any existing regulatory deadlines or reasons why the agency might adopt them voluntarily. Further, the author suggests that such deadlines would not be enforceable. *See* Abbott, *supra* note 15, at 201-03; *see also* Edward A. Tomlinson, *Report on the Experience of Various Agencies with Statutory Time Limits Applicable to Licensing or Clearance Functions and to Rulemaking*, 1978 ADMIN. CONF. U.S.: RECOMMENDATIONS & REPS. 119, 122, https://perma.cc/T2RR-UN7Q (suggesting the same, but noting that regulatory deadlines had not yet been tested).

28. The author located only a handful of regulatory deadlines and regulatory-deadline suits. *See infra* Part II. Statutory deadlines (and concomitant suits) are common in comparison. *See* Gersen & O'Connell, *supra* note 4, at 950-71.

29. Elizabeth Magill, *Agency Self-Regulation*, 77 GEO. WASH. L. REV. 859, 862 (2009) (examining why and how an agency might self-regulate).

regulatory deadlines, this Note focuses on two related puzzles: (1) Why do agencies set them, and (2) why do courts enforce them?

The payoffs from answering these questions are both practical and theoretical. As a practical matter, this Note surveys the overlapping jurisdictional bases for judicial review of deadline violations.[30] It then provides the first account of what substantive law applies to agency violations of internal regulatory deadlines. The theoretical payoffs include a better understanding of how agencies accomplish their objectives in the face of shifting politics, resources, and administrative law doctrines. The existence of self-imposed regulatory deadlines also raises the antecedent questions of whether agencies *should* be able to bind themselves to a future course of action in this way, and whether there is a sound legal basis for permitting them to do so.

These questions reach further than one might expect. Regulatory deadlines implicate foundational questions about how the "fourth branch" should operate in our government.[31] This Note does not seek to solve separation-of-powers puzzles or delve into the debate over the constitutionality of the administrative state. Rather, it suggests that the study of regulatory deadlines provides a valuable new opportunity to test and assess different theories of administrative governance.

This Note proceeds in three parts. Part I explores the first puzzle of why agencies choose to adopt regulatory deadlines at all. It offers two explanations: Although regulatory deadlines create short-term costs for agencies, they can serve agencies' (and their principals') long-term goals by (1) entrenching their policy preferences and (2) providing a credible commitment mechanism. Part II explores the second puzzle of whether, how, and why courts enforce regulatory deadlines. It first canvasses the overlapping jurisdictional hooks that allow plaintiffs to bring regulatory-deadline suits. Then, it turns to the inconsistent conclusions that courts have reached regarding whether regulatory deadlines are enforceable. For courts that do enforce them, this Note traces the doctrinal roots of enforcement to the *Accardi* principle—an old, often misunderstood doctrine that the Supreme Court has all but abandoned. Yet *Accardi* is still enjoying its heyday in the lower courts, which are applying it in unexpected ways. Part II argues that courts' existing application of the doctrine in regulatory-deadline suits appears logical at first glance, but is underdeveloped and unsupported by Supreme Court precedent. Part II then

30. This review of jurisdictional law, found in Part II.A, is not present in prior literature and is meant to be of practical use to courts and practitioners. It is not necessary to understanding this Note's theoretical arguments about why agencies adopt regulatory deadlines in Part I or its arguments about the *Accardi* doctrine in Part II.B-C.

31. *See* FTC v. Ruberoid Co., 343 U.S. 470, 487-88 (1952) (Jackson, J., dissenting) ("[Administrative agencies] have become a veritable fourth branch of the Government, which has deranged our three-branch legal theories . . . .").

offers a new rationale for judicial enforcement of regulatory deadlines under the *Accardi* rule. Finally, Part III grapples with the normative question of whether regulatory deadlines should be enforced against agencies.

I. Why Do Agencies Adopt Regulatory Deadlines?

On the surface, an agency's choice to adopt regulatory deadlines appears contrary to its interests. An agency might miss its deadline and face a lawsuit, an expensive and time-consuming prospect for both agency lawyers and other agency personnel, who may need to testify, submit declarations, or be deposed.[32] Violating deadlines can also expose agencies to harsh public criticism[33] and, in extreme cases, court-imposed sanctions.[34] Furthermore, self-imposed deadlines limit agencies' ability to adapt to changing conditions. If an agency decides that it needs to begin regulating some new phenomenon, it will be difficult to change course if the agency has set an enforceable deadline to do so. Yet against this backdrop, agencies nevertheless voluntarily adopt additional binding deadlines and risk additional litigation.

To be sure, some regulatory deadlines are easily explicable: The agency is motivated by a command from its principals—Congress or the president—in the form of a statute or executive order. For instance, the Freedom of

32. *See* FED. R. CIV. P. 26, 30(b)(6), 56.

33. Missed statutory deadlines have resulted in fierce reprimands from the courts. For example, the District Court for the District of Maryland expressed that it was "troubled by EPA's apparent unwillingness or inability to comply with its mandatory statutory duties within the timeline set by Congress." Maryland v. Pruitt, 320 F. Supp. 3d 722, 732 (D. Md. 2018). The court ordered that the agency act within ninety days, warning that "EPA and the Administrator may not take seriously the deadlines set by Congress, but this Court expects and demands that they take seriously the deadlines set by it." *Id.* at 732-33. In another case, environmental groups sued the Secretary of the Interior for failing to adhere to a statutory deadline under the Endangered Species Act. The court began:

> There can be no law, much less "the rule of law," if the administrative agencies that have been entrusted to implement the law as enacted by Congress can fail to fulfill their statutory duty without consequence. Article III courts are charged with the constitutional duty of protecting and ensuring the rule of law. On occasion, as under the statute at issue in this case, Congress has provided citizens a direct means of redress to force a government agency to comply with its statutory duty and to implement that law.
>
> If this Court were to accept the position espoused by the United States Department of Interior in this proceeding, based on the uncontested facts in the record before the Court, there would be no law. The crux of the Secretary's position is: *we did not do our job; we did not follow the law; but . . . too bad, plaintiffs did not file suit in time . . . this, despite our misrepresentations to plaintiffs and to the public to the contrary.*

Schoeffler v. Kempthorne, 493 F. Supp. 2d 805, 807 (W.D. La. 2007).

34. *See* Nicholas R. Parrillo, *The Endgame of Administrative Law: Governmental Disobedience and the Judicial Contempt Power*, 131 HARV. L. REV. 685, 691-704 (2018) (explaining that it is rare for courts to impose sanctions or hold agency heads in contempt for violating court orders—such as an order to follow a statutory deadline—but it is not unheard of).

Information Act (FOIA) requires all agencies to respond to requests for records within twenty business days.[35] Given this statutory obligation, the Department of Transportation's FOIA regulations set a matching twenty-business-day deadline to respond.[36] In these circumstances, agencies act as "agents" by adopting a regulatory deadline that matches a clear directive from their principals.[37] This Note is instead interested in a slightly different case: where an agency voluntarily adopts a regulatory deadline that goes beyond the obligations set forth by its principals.[38]

This Part employs two theories to explain why agencies choose to self-impose deadlines in the absence of a clear command. While deadlines create short-term costs, they can also advance long-term goals by entrenching the agency's policy and signaling its commitments. This signaling may induce regulated parties to comply with regulations without enforcement action. Finally, this Part addresses the effects of repeals. One might expect regulatory deadlines to be of little import because—like all regulations—they can always be repealed. But repeals take time and carry their own costs, and therefore may not always be a viable way to avoid a regulatory deadline if the agency no longer wishes to comply. This Part references several cases arising from regulatory deadline violations but defers doctrinal analysis to Part II.

A. Deadlines as Entrenchment

Suppose an environmentalist is elected as president. This president will naturally appoint, by and with Senate consent, an EPA administrator who at least partially shares her goals.[39] But gaining political power is only half the battle: Even if the administrator is able to promulgate stringent environmental regulations during her tenure, they may be repealed by her successor. To guard against the shifting sands of political fortune, those in power will seek to entrench their policy preferences.[40]

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35. 5 U.S.C. § 552(a)(6)(A)(i).
36. 49 C.F.R. § 7.31 (2021).
37. Magill, *supra* note 29, at 872.
38. Of course, we will not always be privy to conversations between agencies, the White House, and lawmakers, so it is difficult to say whether an agency is setting a regulatory deadline *sua sponte* or in response to an off-the-record command. *See* Sierra Club v. Costle, 657 F.2d 298, 400-10 (D.C. Cir. 1981) (holding that agencies are not required to disclose all political communications during rulemaking).
39. U.S. CONST. art II, § 2, cl. 2.
40. *See* Daryl Levinson & Benjamin I. Sachs, *Political Entrenchment and Public Law*, 125 YALE L.J. 400, 402-08 (2015) (describing prevailing parties' tendency to entrench their policy choices).

Entrenchment refers to the creation of rules or mechanisms that make future political change more difficult than it otherwise would or should be.[41] Examples abound: gerrymandering, voting restrictions, or the Senate's rule requiring sixty votes to end a filibuster.[42] In the context of administrative law, entrenchment is often accomplished by issuing substantive rules.[43] Once finalized, rules are costly to withdraw.[44] Thus, through a phenomenon known as "midnight rulemaking," an outgoing administration will attempt to finalize as many substantive rules as possible before Inauguration Day.[45] But midnight rulemaking has its limits. In general, administrators have no power to force their successors to enact rules or take certain actions in the future.[46] If the outgoing administration begins working on a regulation but does not finalize it, the next administration may continue working on it, or it may abandon the regulation. There is no cost to the new administration for abandoning the old administration's unfinished rule.

Regulatory deadlines provide a means to get around this problem. They allow the current administrator to obligate future administrators to take specific actions that the current administrator prefers. When an outgoing administration begins working on a rule and creates a regulatory deadline to

41. *See id.*

42. *Id.* at 413-23. Entrenchment is a familiar concept in constitutional theory as well. *See, e.g.*, Keith E. Whittington, *Against Very Entrenched Constitutions*, 2015 WIS. L. REV. FORWARD 12, 12 (2015).

43. *See* Nina A. Mendelson, *Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives*, 78 N.Y.U. L. REV. 557, 559-61 (2003) (describing "agency burrowing," where outgoing presidential administrations attempt to entrench policy and personnel preferences through various executive actions).

44. *See* Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1387, 1406 (1992); *see also* Lisa Heinzerling, *Inside EPA: A Former Insider's Reflections on the Relationship Between the Obama EPA and the Obama White House*, 31 PACE ENV'T L. REV. 325, 355-58 (2014) (discussing how the Obama administration's withdrawal of a new ozone rule "wasted tremendous agency resources and valuable time").

45. *See generally* Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889 (2008) (conducting an empirical examination of rulemaking during political transitions). Surges in midnight rules have been common across presidential administrations for nearly a century and may be especially likely when the opposite party is set to take control. *See id.* at 891-93, 957 & n.176; *see also* Jay Cochran, III, *The Cinderella Constraint: Why Regulations Increase Significantly During Post-Election Quarters* 3 (Mercatus Ctr. at George Mason Univ., Working Paper, 2001), https://perma.cc/TZ8C-UGPA ("Since 1948 in fact, the general tendency has been for regulations during the post-election quarter to increase roughly 17 percent, on average, over the volumes prevailing during the same periods of non-presidential election years.").

46. *See* FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009) (allowing agencies to change policy decisions at any time so long as "the new policy is permissible under the statute, that there are good reasons for it, and . . . the agency *believes* it to be better").

finish it, abandoning the rule is no longer cost-free for the next administration. The agency that enacts a regulatory deadline leaves its successor with three options: repeal the deadline, violate the deadline, or comply with the deadline. The new administration can still refuse to take the action required, but it will then face the costs of either repealing the deadline or violating it (and likely triggering litigation). If it is less costly to comply with the deadline, the agency will do so.

As the examples below demonstrate, this can occur both within and across presidential administrations. Deadlines allow agencies to accomplish four main objectives by forcing their successors to: (1) enact specific rules, (2) push almost-completed rules across the finish line, (3) repeal rules, or (4) implement regulatory requirements. The goal is to encourage future administrators to act in a way that the current administrator favors, under the assumption that the future administrator will prefer to take the required action rather than pay the cost of missing the deadline or repealing the underlying regulation.

1. Deadlines to enact specific rules

Agencies often set regulatory deadlines to enact certain rules. For example, in the 1990s, the EPA missed several statutory deadlines to take regulatory action to control hazardous pollutants from vehicles.[47] After the Sierra Club sued, the Clinton EPA published a proposed rulemaking for the pollutants.[48] The proposed rule identified airborne toxics from vehicles and set certain baseline requirements for toxic emissions from gasoline.[49]

Notably, the proposed rule also included a deadline to complete a future rulemaking, obligating the agency to publish a rule to control hazardous air pollutants from vehicles by the end of December 2004—well into the next presidential administration.[50] President Bush assumed office in January 2001 and appointed Christine Todd Whitman as EPA administrator.[51] Whitman was known as a moderate, and her appointment was intended in part to mollify Bush's environmental critics.[52] Administrator Whitman issued the

47. *See* Sierra Club v. Leavitt, 355 F. Supp. 2d 544, 545-46 (D.D.C. 2005).

48. *Id.*; *see also* Control of Emissions of Hazardous Air Pollutants from Mobile Sources, 65 Fed. Reg. 48,058 (proposed Aug. 4, 2000).

49. Control of Emissions of Hazardous Air Pollutants from Mobile Sources, 65 Fed. Reg. at 48,058.

50. *Id.* at 48,104-05. Sierra Club sued again to challenge this rule, but it was upheld by the D.C. Circuit. *See* Sierra Club v. EPA, 325 F.3d 374, 377 (D.C. Cir. 2003).

51. *See Chronology of EPA Administrators*, ENV'T PROT. AGENCY, https://perma.cc/7XEJ-5MW3 (last updated Apr. 26, 2022).

52. *See* Michael Grunwald & Eric Pianin, *A Mixed Environmental Bag*, WASH. POST (Dec. 23, 2000), https://perma.cc/VHY3-3RRG ("The national leaders of the Sierra Club and other environmental groups have taken a more conciliatory stance toward Whitman . . .
footnote continued on next page

final rule—including the commitment to a future rulemaking—two months later.[53] The EPA then changed hands, with Michael Leavitt, who was seen as less environmentally friendly, in charge by 2004.[54] When it came time to issue the promised regulations, the EPA failed to conduct the required rulemaking.[55] Sierra Club sued the EPA again for failing to meet its self-imposed deadline,[56] and the district court held that the EPA's regulatory deadline created a nondiscretionary duty to issue the regulations by a date certain.[57] As a result of the court's order, the EPA finally proposed the required pollution regulations in 2006[58] and submitted the final rule for publication in 2007.[59] A previous EPA thus succeeded, by setting an internal deadline, in forcing a future EPA to issue regulations it was not otherwise inclined to promulgate.

2. Deadlines to publish almost-completed rules

Deadlines can also force an incoming administration to complete a rulemaking that the previous administration initiated. For example, the DOE's "error-correction rule" creates a forty-five-day window during which the public can review a final rule and notify the DOE of technical errors.[60] After the error-correction process concludes, the DOE must promulgate the final rule within thirty days.[61]

The error-correction rule took on a prominent role during the 2016 presidential transition. The Obama DOE promulgated final rules for a multibillion-dollar overhaul of energy-efficiency standards in December 2016—just before Inauguration Day.[62] The error-correction process concluded on January 19, 2017, for one standard and on February 11, 2017, for the

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partly because they believe she is much more eco-friendly than other potential appointees by Bush . . . .").

53. *See* Control of Emissions of Hazardous Air Pollutants from Mobile Sources, 66 Fed. Reg. 17,230 (Mar. 29, 2001).
54. *See* Katharine Q. Seelye, *Bush Nominates Utah Governor To Lead Environmental Agency*, N.Y. TIMES (Aug. 12, 2003), https://perma.cc/GY6T-4NZ4; *Chronology of EPA Administrators*, *supra* note 51.
55. Sierra Club v. Leavitt, 355 F. Supp. 2d 544, 546 (D.D.C. 2005).
56. *See id.*
57. *Id.* at 557.
58. Control of Hazardous Air Pollutants from Mobile Sources, 71 Fed. Reg. 15,803, 15,809 (proposed Mar. 29, 2006).
59. Control of Hazardous Air Pollutants from Mobile Sources, 72 Fed. Reg. 8,427, 8,432 (Feb. 26, 2007).
60. 10 C.F.R. § 430.5 (2020).
61. Nat. Res. Def. Council, Inc. v. Perry, 940 F.3d 1072, 1079-80 (9th Cir. 2019).
62. Robert Walton, *Final Batch of Obama Efficiency Rules Could Test Trump Administration*, UTILITY DIVE (Jan. 4, 2017), https://perma.cc/P8T4-Z5VB.

remaining standards.[63] The Trump Administration initially refused to publish the final standards, claiming that it was "continuing to review" them.[64] The Natural Resources Defense Council sued to force the DOE to publish the final standards in accordance with its regulatory deadline.[65] The Ninth Circuit agreed, holding that the error-correction rule created a mandatory duty to publish the final energy-efficiency standards.[66] Shortly after, the Trump DOE published the disfavored standards.[67]

3. Deadlines to repeal rules

Agencies can also set deadlines with the aim of repealing rules. For instance, on the last full day of the Trump Administration, the Department of Health and Human Services (HHS) published a regulation known as the SUNSET rule.[68] The rule is no longer in effect—the Biden Administration formally repealed it on July 26, 2022.[69] But the SUNSET rule promised to automatically repeal or "sunset" old regulations unless HHS reviewed them by a deadline.[70] In its preamble, HHS stated that the purpose of the rule was to encourage retrospective review and "ensure evidence-based regulation that does not become outdated as conditions change."[71]

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63. *Perry*, 940 F.3d at 1076.

64. *Id.*

65. *Id.* at 1074-75.

66. *Id.* at 1076, 1079-80.

67. *See* Energy Conservation Program: Energy Conservation Standards for Portable Air Conditioners, 85 Fed. Reg. 1378, 1446 (Jan. 10, 2020); Energy Conservation Program: Energy Conservation Standards for Commercial Packaged Boilers, 85 Fed. Reg. 1592, 1681 (Jan. 10, 2020); Energy Conservation Program: Energy Conservation Standards for Uninterruptible Power Supplies, 85 Fed. Reg. 1447, 1503 (Jan. 10, 2020); Energy Conservation Program: Energy Conservation Standards for Air Compressors, 85 Fed. Reg. 1504, 1591 (Jan. 10, 2020); *see also* Porter Wells & Ellen M. Gilmer, *Government Must Publish Obama Era Energy Conservation Rules*, BLOOMBERG L. (Oct. 10, 2019, 11:45 AM), https://perma.cc/8UKU-WE82.

68. Securing Updated and Necessary Statutory Evaluations Timely, 86 Fed. Reg. 5694 (Jan. 19, 2021).

69. Withdrawing Rule on Securing Updated and Necessary Statutory Evaluations Timely, 87 Fed. Reg. 32,246 (May 27, 2022).

70. The deadlines are not exact dates, but instead provide that the regulations will expire if not reviewed by the end of "(1) five calendar years after the year that this final rule first becomes effective, (2) ten calendar years after the year of the Section's promulgation, or (3) ten calendar years after the last year in which the Department Assessed and, if required, Reviewed the Section, whichever is latest." Securing Updated and Necessary Statutory Evaluations Timely, 86 Fed. Reg. at 5694.

71. *Id.*

The thrust of this rule was deregulatory—HHS had to review its rules to determine if they should be repealed, and the rules would expire if this review was not completed by the deadline.[72] As HHS acknowledged in its preamble, retrospective regulatory review is a time-consuming and difficult task that many agencies are not equipped to do.[73] Thus, had the Biden Administration been unable to cobble together sufficient resources to review each rule before its deadline, its regulations would have automatically terminated.[74] Although ultimately repealed, the SUNSET rule illustrates how administrations may use deadlines to entrench their deregulatory agendas.[75]

4. Standing deadlines to implement regulatory requirements

Similarly, some agencies have enacted standing regulatory deadlines that are triggered each time the agency takes certain actions. These too can be used to entrench policy across administrations. For instance, the EPA enacted a standing regulatory deadline scheme to implement the Clean Air Act in 1975.[76] Under this scheme, each time the EPA publishes a new emissions guideline, it triggers a series of regulatory deadlines for both itself and the states to complete specific actions.[77] Once the new guideline is published, each state has nine months to submit an implementation plan to the EPA for approval.[78] If a state submits an inadequate plan or fails to submit a plan entirely, the EPA

72. *See id.*

73. *Id.* at 5697 (citing Yoon-Ho Alex Lee, Essay, *An Options Approach to Agency Rulemaking*, 65 ADMIN. L. REV. 881, 895-96 (2013)).

74. Notably, the SUNSET rule may have been unlawful because it could have required the agency to repeal rules without adhering to the APA's notice-and-comment requirements. *See* Complaint for Declaratory & Injunctive Relief at 20-32, County of Santa Clara v. U.S. Dep't of Health & Hum. Servs., No. 21-cv-01655 (N.D. Cal. Mar. 3, 2021), ECF No. 1. For HHS's response to commenters that initially raised this concern during the rulemaking, see Securing Updated and Necessary Statutory Evaluations Timely, 86 Fed. Reg. at 5715-16. Initially, the Biden Administration delayed the effective date of the rule until September 22, 2022. *See* Securing Updated and Necessary Statutory Evaluations Timely; Administrative Delay of Effective Date, 87 Fed. Reg. 12,399 (Mar. 4, 2022). The Biden Administration formally repealed the rule on May 27, 2022. *See* Withdrawing Rule on Securing Updated and Necessary Statutory Evaluations Timely, 87 Fed. Reg. 32,246 (May 27, 2022).

75. Some commenters alleged that the purpose of the regulation was to "advanc[e] the Trump Administration's conservative agenda at the expense of good regulations." Securing Updated and Necessary Statutory Evaluations Timely, 86 Fed. Reg. at 5707. HHS denied this allegation. *Id.* at 5708.

76. State Plans for the Control of Certain Pollutants from Existing Facilities, 40 Fed. Reg. 53,340-41 (Nov. 17, 1975); *see also* 42 U.S.C. § 7411(d)(1).

77. *See* 40 C.F.R. §§ 60.23-.27 (2021).

78. 40 C.F.R. § 60.23(a) (2021).

administrator must publish regulations setting forth a federal plan within six months of the state's submission deadline.[79]

The EPA's actions in the final months of Obama's presidency provide one example of how these standing regulatory deadlines can be used for entrenchment. In the fall of 2016, the EPA implemented new guidelines for landfill emissions.[80] The relevant regulatory deadlines for these guidelines extended well into the Trump Administration: States had until May 30, 2017, to submit implementation plans and the EPA had until November 30, 2017, to promulgate a federal plan.[81] Yet the Trump EPA failed to comply with this deadline.[82] Several states successfully sued to require the EPA to adhere to its deadline, with the district court issuing an injunction compelling the EPA to review state plans and issue a federal plan.[83] Eventually, the EPA published a notice in the Federal Register that forty-two states had failed to submit implementation plans[84] and published a final rule setting forth a federal implementation plan.[85] Each time the EPA makes an initial determination to issue new emissions guidelines, it thus binds itself to complete the implementation of those guidelines, even if the implementation timeline stretches across presidential administrations.

In one other permutation, agencies may enact one-off regulatory deadlines that trigger the agency's existing statutory deadlines. In the final days of the Obama Administration, the EPA revised its Regional Haze Rule, which required each state to submit a regional haze implementation plan to the EPA by July 31, 2021—again, well into a future administration.[86] When the EPA enacted this regulatory deadline for the states, it set into motion a series of statutory Clean Air Act deadlines for itself. The Clean Air Act obligates the EPA to evaluate states' plans no later than six months after the states' submission deadline.[87] But when the EPA's statutory deadline arrived—that is,

79. 40 C.F.R. § 60.27(c)-(d) (2021).

80. *See* Emission Guidelines and Compliance Times for Municipal Solid Waste Landfills, 81 Fed. Reg. 59,276 (Aug. 29, 2016) (existing landfills); Standards of Performance for Municipal Solid Waste Landfills, 81 Fed. Reg. 59,332 (Aug. 29, 2016) (new landfills).

81. *See* California v. U.S. EPA, 385 F. Supp. 3d 903, 908 (N.D. Cal. 2019).

82. *Id.*

83. *Id.* at 916.

84. *See* Notice of Finding of Failure to Submit State Plans for the Municipal Solid Waste Landfills Emission Guidelines, 85 Fed. Reg. 14,474 (Mar. 12, 2020).

85. *See* Federal Plan Requirements for Municipal Solid Waste Landfills That Commenced Construction on or Before July 17, 2014, and Have Not Been Modified or Reconstructed Since July 17, 2014, 86 Fed. Reg. 27,756 (May 21, 2021).

86. 40 C.F.R. § 51.308(f) (2021); *see also* Protection of Visibility: Amendments to Requirements for State Plans, 82 Fed. Reg. 3078 (Jan. 10, 2017).

87. 42 U.S.C. § 7410(k)(1)(A)-(B).

January 31, 2022—the EPA had not approved any state's plans and had failed to find that thirty-four states had not submitted plans at all.[88] Several environmental organizations sued on April 13, 2022, to compel the EPA to comply with its statutory duty.[89] On August 30, 2022, the EPA complied, publishing its finding that (at that point) fifteen states had failed to submit implementation plans as the deadline required.[90]

In sum, agencies can entrench policies by setting deadlines in several ways. Regulatory deadlines may be one-off requirements to act, or they may set recurring requirements. In each case, the agency may create significant costs for itself if it misses the deadline, thereby encouraging future administrators to maintain policy continuity.

B. Deadlines as Credible Commitments

Deadlines can also serve as a credible commitment mechanism which may result in more efficient enforcement. Agencies prefer that regulated parties comply with regulations without prodding, rather than wait for enforcement. The reason is simple: It is cheaper for the agency if regulated entities comply on their own initiative. But to induce pre-enforcement compliance, agencies must convince regulated parties that the agency *will* enforce its rules if they do not comply. Agencies thus need to convincingly commit themselves to a course of action if violations occur.

Commitment mechanisms have been thoroughly explored in the context of economics and international relations.[91] Armed conflict provides an apt example. If one army threatens to advance on opposing troops, it will seek to convince them that its threats are credible. The advancing army prefers that its enemy retreat, so that it does not have to pay the costs of fighting. The credibility of the advancing army's threat depends in part on its visibility and whether the threatening party creates any loopholes for itself.[92] If the advancing army threatens to attack but retains the option to easily turn around and go home, the opposing army may see the threat as empty talk. But if the advancing army lights a wall of fire behind itself with the wind at its back, its adversaries will likely see the threat of invasion as credible.[93]

88. *See* Complaint at 7-8, Nat'l Parks Conservation Ass'n v. U.S. EPA, No. 22-cv-02302 (N.D. Cal. Apr. 13, 2022), ECF No. 1.

89. *See id.* at 1.

90. *See* Finding of Failure to Submit Regional Haze State Implementation Plans for the Second Planning Period, 87 Fed. Reg. 52,856 (Aug. 30, 2022).

91. Thomas Schelling won a Nobel Prize for his work in this area. *See Thomas C. Schelling: Facts*, NOBEL PRIZE, https://perma.cc/UB8R-2SQ9 (archived Jan. 29, 2023).

92. *See* Thomas C. Schelling, *An Essay on Bargaining*, 46 AM. ECON. REV. 281, 296-97 (1956).

93. *See* THOMAS C. SCHELLING, THE STRATEGY OF CONFLICT 195-96 (1980 ed.).

In the context of administrative law, agencies' capacity to make credible commitments is limited—they are, after all, agents. Their power is cabined by their statutory delegation, and their policy choices can be reversed at a moment's notice by their principals. On the one hand, this flexibility is critical to the modern administrative state: Scholars have extolled the benefits of allowing agencies to adapt to changing circumstances, new technology, and shifts in the political winds.[94]

But flexibility is a double-edged sword.[95] On the other hand, an agency may wish to credibly bind itself in order to induce third-party reliance and regulatory compliance. For example, a regulated entity may choose to forgo investment to comply with a regulatory regime if the longevity of that regime is uncertain.[96] This is especially true for midnight regulations—regulated entities may not take an agency's midnight regulations seriously if they believe that the next president will immediately repeal them.[97] Unlike private parties, agencies cannot enter into contracts that would commit themselves to prosecute or ignore certain violations, or to issue or decline to issue specific regulations.[98] Given the weakness of agency commitment mechanisms, regulated parties will be less likely to trust regulatory incentives or take action

94. *See* Jonathan Masur, *Judicial Deference and the Credibility of Agency Commitments*, 60 VAND. L. REV. 1021, 1023 (2007) ("Scholars have long believed that flexibility—the ability to adjust policies (and statutory interpretations) in accordance with technological or economic advancements—is essential to the effective operation of administrative agencies."); Kenneth A. Bamberger, *Provisional Precedent: Protecting Flexibility in Administrative Policymaking*, 77 N.Y.U. L. REV. 1272, 1276-77 (2002) (noting that *Chevron* deference provides policy benefits in the form of agency flexibility); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517 (arguing that "one of [*Chevron*'s] major advantages from the standpoint of governmental theory . . . is to permit needed flexibility, and appropriate political participation, in the administrative process"). Proponents of flexibility celebrated the Supreme Court's decisions in *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514-16 (2009), and *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967, 982-83 (2005), which blessed agencies' ability to change their policies and statutory interpretations (notwithstanding prior judicial interpretations), respectively. *See, e.g.*, Ronald M. Levin, *Hard Look Review, Policy Change, and* Fox Television, 65 U. MIA. L. REV. 555, 560-63 (2011).

95. *See* Aaron L. Nielson, *Sticky Regulations*, 85 U. CHI. L. REV. 85, 92 (2018) ("The true dilemma is that agencies can either have long-term trustworthiness or short-term flexibility, but perhaps not both.").

96. *See* Masur, *supra* note 94, at 1022-24 (providing examples).

97. *See* O'Connell, *supra* note 45, at 891 (explaining that an incoming president will undo her predecessor's midnight regulations by issuing "crack-of-dawn" regulations or withdrawals of unfinished regulations).

98. *See* Nielson, *supra* note 95, at 115.

to avoid sanctions.[99] So how can an agency make third parties believe that it will do what it says it is going to do?

Regulatory deadlines are one answer. Deadlines are for agencies what walls of fire are for advancing armies. Agencies impose deadlines on themselves to signal their resolve to take certain actions. An agency's deadline may be understood as creating an enforceable obligation to exercise its coercive powers against regulated parties.

1. Commitments to enforce

Self-imposed regulatory deadlines signal to regulated parties that the agency is committed to pursuing regulatory action or enforcement. The EPA's regulations for landfills containing coal-combustion waste are one example. In 2020, the EPA published a final rule that set forth the procedure for coal plants to gain approval for the facilities they used to store coal-combustion waste.[100] The regulations included a series of deadlines that both operators and the EPA were required to meet. Owners were required to submit applications by November 30, 2020,[101] and the EPA was required to issue a decision on those applications within sixty days.[102] The final rule made clear that operators must "be prepared to cease receipt of waste and to begin closure in the event that the application is ultimately rejected."[103] The EPA was not obligated to bind itself to act on operators' applications by a date certain, let alone at all. But by codifying its commitment to issue a decision, the EPA created an enforceable duty to regulate. Although the coal industry probably would not sue the EPA for failing to follow through, environmental groups certainly would. The EPA heightened its credibility by exposing itself to liability in the event it failed to

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99. Nielson explains:

> This inability for agencies to inspire long-term confidence can make regulating more difficult. . . . This lack of trust harms *agencies*, not just regulated parties, because in a world in which regulated parties reasonably lack confidence in the stability of the regulatory scheme, agencies are less able to pursue policies with longer time horizons.

Id. at 91. For a discussion of how "ossification" and repeat-player dynamics can serve as commitment mechanisms, see *id.* at 111-20.

100. Hazardous and Solid Waste Management System: Disposal of CCR; A Holistic Approach to Closure Part B: Alternate Demonstration for Unlined Surface Impoundments, 85 Fed. Reg. 72,506 (Nov. 12, 2020). This regulation was prompted by a D.C. Circuit decision, although the court did not require the EPA to set these regulatory deadlines. *See* Util. Solid Waste Activities Grp. v. EPA, 901 F.3d 414, 449 (D.C. Cir. 2018) (per curiam).

101. *See* Liner Design Criteria for Existing CCR Surface Impoundments, 40 C.F.R. § 257.71(d)(2)(i) (2021).

102. *Id.* § 257.71(d)(2)(iii)(C).

103. Alternate Demonstration for Unlined Surface Impoundments, 85 Fed. Reg. at 72,512.

honor its commitment. In effect, third parties would choose to comply with the regulation because they believed their violations would be punished.

C. Potential Objections: Effects of Repeals

Unlike Congress's statutory deadlines or deadlines imposed by the president, a future agency head can always dissolve regulatory deadlines by repealing the underlying rule. But repeals are costly and may not always be a realistic option. Repealing a rule still requires the full suite of notice-and-comment procedures, and an agency may not have time to complete these procedures before the deadline.[104] Significant notice-and-comment rulemakings are generally completed in one to two years, as measured from the date of the notice of proposed rulemaking.[105] The rulemaking process itself can cost millions of dollars as well.[106] In some cases, regulatory deadlines might also attract less attention than multimillion- or billion-dollar rules, and repeals may therefore fall down the list of agency priorities. Finally, even if the agency does have sufficient time and resources to repeal a rule, it must still provide a reasoned explanation for doing so.[107] An explanation is required each time an agency either enacts or repeals a regulation.[108] This may sound like a trivial requirement, but courts have vacated countless agency decisions for failing to provide an adequate explanation.[109] If an agency is unable to repeal the rule before the deadline, it faces a dilemma: enact the disfavored rule, or pay the costs of litigation if someone sues to enforce it. As a result, complying with the deadline might sometimes be the agency's best option.

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104. *See* 5 U.S.C. § 551(5) (defining rulemaking as the "agency process for formulating, amending, or repealing a rule"). "Notice-and-comment rulemaking" refers to the process agencies must follow when enacting certain regulations. In general, notice-and-comment rulemaking procedures require agencies to issue a proposed rule, offer an opportunity for the public to comment on the rule, and publish the final rule with responses to public comments. *See generally* ADMIN. CONF. OF THE U.S., INFO. INTERCHANGE BULL. NO. 014, NOTICE-AND-COMMENT RULEMAKING (2021), https://perma.cc/4AHE-SCPE (providing an overview of the rulemaking process).

105. Sant'Ambrogio, *supra* note 8, at 1443 & n.284. These data may be overinclusive in that they do not examine the time needed to repeal a rule specifically. However, they provide a useful estimate because repeal requires the same procedures as promulgation.

106. *See* McGarity, *supra* note 44, at 1387, 1406 (noting that regulatory impact analyses—which are required for major rules—can cost millions of dollars); *cf.* U.S. GOV'T ACCOUNTABILITY OFF., GAO-14-370, NATIONAL ENVIRONMENTAL POLICY ACT: LITTLE INFORMATION EXISTS ON NEPA ANALYSES 13 (2014) (finding that the median cost to the DOE of completing an environmental impact statement, required for certain rules, is $1.4 million).

107. *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 41-43 (1983).

108. *Id.*

109. *See, e.g.*, *id.* at 50.

Furthermore, if an agency wishes to entrench its policies or make a commitment, the fact that regulatory deadlines must be formally repealed makes them more useful than an agency's usual tools. When an agency wishes to signal how it will act in the future, it typically does so by issuing a guidance document.[110] But guidance, unlike notice-and-comment rules, can be revoked quickly and painlessly.[111] Moreover, guidance is nonbinding by definition, so regulatory beneficiaries are unable to rely on it to hold an agency to its commitments.[112] Regulatory deadlines provide a means to do this, in part because of the higher costs of repeals.

II. Regulatory-Deadline Doctrines

This Part surveys regulatory-deadline suits and the doctrines that govern them. The first Subpart focuses on jurisdiction, cataloging the possible roads into court for plaintiffs seeking to challenge missed regulatory deadlines. It reveals that the APA, the Mandamus and Venue Act, or a citizen-suit provision may each provide federal jurisdiction to review an agency's deadline violation. This jurisdictional overview is not present in existing literature and is meant to provide a practical guide for courts and practitioners. The second Subpart addresses substantive law, reviewing regulatory-deadline suits and how courts have decided them. It explains that most courts have enforced regulatory deadlines under the *Accardi* doctrine, which holds that agencies are bound to follow their own regulations.[113] At first glance, the *Accardi* doctrine would seem to be a natural fit for a regulatory-deadline suit—but a closer examination

110. *See* KATE R. BOWERS, CONG. RSCH. SERV., LSB10591, AGENCY USE OF GUIDANCE DOCUMENTS 1 (2021), https://perma.cc/S32T-V797 ("[G]uidance takes a variety of forms, such as explanations of how an agency intends to regulate or use its enforcement discretion; interpretations of legislative rules, including clarifications of technical details; compliance guides; statements that are applicable to a single or small group of regulated entities; and internal training materials.").

111. *Id.* at 2 ("Agencies can issue and revoke guidance more quickly, using fewer agency resources and with less public involvement as compared to the issuance and revocation of legislative rules.").

112. U.S. GOV'T ACCOUNTABILITY OFF., GAO-15-368, REGULATORY GUIDANCE PROCESSES: SELECTED DEPARTMENTS COULD STRENGTHEN INTERNAL CONTROL AND DISSEMINATION PRACTICES 1 (2015), https://perma.cc/F8LF-F2X6 ("Agencies rely on guidance documents—which are not legally binding—to clarify statutes or regulatory text and to inform the public about complex policy implementation topics."); Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin., 452 F.3d 798, 803-05, 808-09 (D.C. Cir. 2006) (holding that NHTSA's guidance regarding regional car recalls had "no legal force"). Although guidance is never formally binding, a court may strike down an agency's guidance if it is practically binding. *See, e.g.*, Gen. Elec. Co. v. EPA, 290 F.3d 377, 382-85 (D.C. Cir. 2002).

113. *See* Thomas W. Merrill, *The* Accardi *Principle*, 74 GEO. WASH. L. REV. 569, 569 (2006).

of the Supreme Court's *Accardi* decisions casts doubt on this intuition. Despite courts' widespread reliance on *Accardi*, the doctrine provides no clear basis for enforcing a deadline that an agency sets only for itself. This Part concludes by articulating an alternative rationale for the *Accardi* rule that justifies its use in regulatory-deadline suits.

A. Getting in the Door: Jurisdictional Hurdles

There are three statutory bases for deadline suits. First, §§ 701-706 of the APA define the scope of judicial review of agency actions.[114] Missed statutory deadlines present a rare opportunity for plaintiffs to sue agencies under § 706(1), which allows courts to "compel agency action unlawfully withheld or unreasonably delayed."[115] The Supreme Court clarified the boundaries of § 706(1) in *Norton v. Southern Utah Wilderness Alliance* (*SUWA*), explaining that courts may compel action under § 706(1) "only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*."[116] The plaintiffs in *SUWA* challenged the Bureau of Land Management's failure to protect federal lands from damage caused by off-road vehicle recreation.[117] The Court rejected the plaintiffs' broad programmatic attack on the agency's failure to act, but acknowledged that third parties could compel discrete agency action if the agency failed to comply with a statutory deadline.[118] Section 706(1) has been successfully invoked in both statutory and regulatory-deadline suits.[119] Regulations create the necessary basis for a suit under *SUWA*: discrete action that the agency is required to take.

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114. *See* 5 U.S.C. §§ 701-706. Of course, the APA does not independently confer subject-matter jurisdiction. Rather, suits must be based on federal-question jurisdiction. The APA merely provides a waiver of sovereign immunity and clarifies the scope of judicial review of agency action. *See id.*; 28 U.S.C. § 1331 (federal-question jurisdiction).

115. 5 U.S.C. § 706(1); *see* Gersen & O'Connell, *supra* note 4, at 951-52.

116. 542 U.S. 55, 62-65 (2004).

117. *See id.* at 57-61.

118. *Id.* at 64-65 ("For example, 47 U.S.C. § 251(d)(1), which required the Federal Communications Commission 'to establish regulations to implement' interconnection requirements '[w]ithin 6 months' of the date of enactment of the Telecommunications Act of 1996, would have supported a judicial decree under the APA requiring the prompt issuance of regulations . . . ." (alteration in original)).

119. *See, e.g.*, Gonzalez Rosario v. U.S. Citizenship & Immigr. Servs., 365 F. Supp. 3d 1156, 1160 (W.D. Wash. 2018) (allowing regulatory-deadline suit to proceed under APA § 706(1)); Int'l Lab. Mgmt. Corp. v. Perez, No. 14CV231, 2014 WL 1668131, at *6-10 (M.D.N.C. Apr. 25, 2014) (allowing both statutory and regulatory-deadline claims to proceed under § 706(1)); Clark v. Perdue, No. 19-394, 2019 WL 2476614, at *3 (D.D.C. June 13, 2019) (treating a regulatory-deadline suit as an APA claim); Sierra Club v. Leavitt, 355 F. Supp. 2d 544, 547, 557 (D.D.C. 2005) (noting the possibility that the APA could provide jurisdiction in a regulatory-deadline suit, but not deciding the issue).

Second, plaintiffs may petition for writs of mandamus under the Mandamus and Venue Act of 1962, which codified the common-law remedy of mandamus.[120] Mandamus takes the form of a court order instructing an entity to take specific action required by law.[121] The Mandamus and Venue Act provides that "district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."[122] Litigants often invoke the Act to force agencies to comply with statutory deadlines,[123] though it has been invoked in regulatory-deadline suits as well.[124] To prevail in a suit for mandamus relief, plaintiffs must demonstrate "(1) a clear and indisputable right to relief, (2) that the government agency or official is violating a clear duty to act, and (3) that no adequate alternative remedy exists."[125]

The distinction between suits based on the mandamus statute and those based on the APA is unsettled. The Supreme Court has previously construed a mandamus petition as, "in essence," a suit to compel action under § 706(1) of the APA.[126] More recently, the Supreme Court in *SUWA* explained that § 706(1) "carried forward" the traditional practice of judicial review via mandamus.[127] The Court relied on the historical practice of using mandamus to enforce "a specific, unequivocal command" to similarly limit § 706(1) to suits to compel discrete, legally-required agency action.[128] This treatment of the statute indicates that § 706(1) and mandamus may be interchangeable. In one regulatory-deadline case, the district court accepted the parties' stipulation that "an injunction pursuant to the APA is *identical* to mandamus relief under [the

120. 28 U.S.C. § 1361; *see also* Heckler v. Ringer, 466 U.S. 602, 616-17 (1984) ("The common-law writ of mandamus, as codified in 28 U.S.C. § 1361, is intended to provide a remedy for a plaintiff only if he has exhausted all other avenues of relief and only if the defendant owes him a clear nondiscretionary duty.").

121. *Mandamus*, BLACK'S LAW DICTIONARY (11th ed. 2019).

122. 28 U.S.C. § 1361. By its terms, the Mandamus and Venue Act applies only to district courts. The All Writs Act of 1911 provides mandamus power to all federal courts. The All Writs Act provides that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a).

123. *See, e.g.*, Am. Hosp. Ass'n v. Burwell, 76 F. Supp. 3d 43, 45, 49 (D.D.C. 2014), *rev'd on other grounds*, 812 F.3d 183 (D.C. Cir. 2016).

124. *See, e.g.*, Action on Smoking & Health v. Dep't of Lab., 100 F.3d 991, 992 (D.C. Cir. 1996) ("Another panel of this court . . . ordered ASH's filing to be treated as a petition for a writ of mandamus and referred it to us for decision.").

125. Am. Hosp. Ass'n v. Burwell, 812 F.3d 183, 189 (D.C. Cir. 2016).

126. *See* Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 230 n.4 (1986).

127. Norton v. S. Utah Wilderness All., 542 U.S. 55, 63 (2004).

128. *Id.* (quoting Interstate Com. Comm'n v. N.Y., New Haven & Hartford R.R. Co., 287 U.S. 178, 204 (1932)).

Mandamus and Venue Act]."[129] Nevertheless, in statutory-deadline cases, some circuits have precluded use of the mandamus statute where the APA provides an alternative basis for relief.[130] These courts reason that the first mandamus requirement—that there be no adequate alternative—is not satisfied if the APA provides an alternative avenue for relief.[131]

Third, litigants can bring deadline suits pursuant to citizen-suit provisions in specific statutes.[132] For example, FOIA provides that, if an agency fails to timely furnish requested records, the district court has jurisdiction to "order the production of any agency records improperly withheld from the complainant."[133] Many environmental statutes likewise contain citizen-suit provisions. The Clean Water Act, for instance, permits suits "against the [EPA] Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary."[134] In both regulatory- and statutory-deadline suits, courts have held that deadline compliance is a "nondiscretionary duty" that satisfies citizen-suit requirements.[135]

129. Gonzalez Rosario v. U.S. Citizenship & Immigr. Servs., 365 F. Supp. 3d 1156, 1160 n.3 (W.D. Wash. 2018) (emphasis added). In one case, the D.C. Circuit stated that the APA "provides additional support" for jurisdiction in a mandamus action, which indicates that it does not see the two as mutually exclusive. *See* Telecomms. Rsch. & Action Ctr. v. FCC, 750 F.2d 70, 76 (D.C. Cir. 1984).

130. *See, e.g.*, South Carolina v. United States, 907 F.3d 742, 754-56 (4th Cir. 2018) (holding that the district court "correctly concluded that [the agency's] failure to comply with § 2566(c) entitled South Carolina to relief under § 706(1), which, in turn, precluded an award of mandamus relief"); Stehney v. Perry, 101 F.3d 925, 934 (3d Cir. 1996) (holding that, where the APA provides an avenue for relief, "grant of a writ of mandamus would be improper"); Hollywood Mobile Ests. Ltd. v. Seminole Tribe of Fla., 641 F.3d 1259, 1268 (11th Cir. 2011) ("The availability of relief under the Administrative Procedure Act . . . forecloses a grant of a writ of mandamus."); Sharkey v. Quarantillo, 541 F.3d 75, 93 (2d Cir. 2008).

131. *See South Carolina*, 907 F.3d at 754-55. The Ninth Circuit has treated the APA and the mandamus statute as effectively interchangeable "[b]ecause the relief sought is essentially the same." Indep. Mining Co. v. Babbitt, 105 F.3d 502, 507 (9th Cir. 1997). In a footnote, however, the court "question[ed] the applicability of the traditional mandamus remedy under the [Mandamus and Venue Act] where there is an adequate remedy under the APA." *Id.* at 507 n.6. Interestingly, the APA also allows judicial review only where there is "no other adequate remedy in a court." *See* 5 U.S.C. § 704.

132. Numerous environmental laws, such as the Clean Air Act, the Resource Conservation and Recovery Act, and the Endangered Species Act have citizen-suit provisions. *See* 42 U.S.C. § 7604; 42 U.S.C. § 6972; 16 U.S.C. § 1540.

133. *See* 5 U.S.C. § 552(a)(4)(B).

134. 33 U.S.C. § 1365(a)(2). Several courts have held that regulations, including regulatory deadlines, create mandatory duties encompassed within the phrase "under this part." *See, e.g.*, Nat. Res. Def. Council, Inc. v. Perry, 940 F.3d 1072, 1080-81 (9th Cir. 2019).

135. *See, e.g.*, Sierra Club v. Leavitt, 355 F. Supp. 2d 544, 553-56 (D.D.C. 2005) (Clean Air Act regulatory deadline); Schoeffler v. Kempthorne, 493 F. Supp. 2d 805, 808-09 (W.D. La.

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The interplay between § 706(1) and citizen suits is also unclear. Many courts have held that they have no jurisdiction over APA claims where Congress has provided another "adequate remedy," such as a citizen-suit provision.[136] In other words, where a plaintiff's APA claim duplicates one that could be brought under a citizen-suit provision, the APA claim is barred. For example, in *Brem-Air Disposal v. Cohen*, the plaintiff brought an APA claim against the Navy, alleging that it failed to comply with the Resource Conservation and Recovery Act (RCRA).[137] Although RCRA has a citizen-suit provision, the plaintiff had not complied with RCRA's sixty-day notice requirement and so could not bring a citizen suit.[138] The Ninth Circuit held that the plaintiff's APA claim was barred because it could have brought a citizen suit had it complied with the notice requirement.[139] This interpretation therefore *requires* plaintiffs to sue under a citizen-suit provision if one is available. Yet some courts nevertheless allow plaintiffs to assert claims under a citizen-suit provision or the APA, seemingly in the alternative.[140]

2007) (Endangered Species Act statutory deadline). Of course, plaintiffs must still satisfy standing requirements. *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 563-71 (1992) (plurality opinion).

136. *See* 5 U.S.C. § 704 (providing that agency action is reviewable where "there is no other adequate remedy in a court"). For example, in *Coos County Board of County Commissioners v. Kempthorne*, 531 F.3d 792 (9th Cir. 2008), plaintiffs sued the Fish and Wildlife Service under both the Endangered Species Act's citizen-suit provision and § 706(1) of the APA. The Ninth Circuit explained that plaintiffs' APA claim was precluded by its citizen suit:

> The scope of 5 U.S.C. § 706(1) tracks that of 16 U.S.C. § 1540(g)(1)(C) [Endangered Species Act citizen suit] for the purposes of this appeal, as the applicability of both provisions depends upon whether FWS has failed to act on a nondiscretionary duty to publish proposed regulations delisting the murrelets (and final regulations thereafter). Importantly, to the extent that the two causes of action are identical, the APA provision is not applicable, because "[i]f a plaintiff can bring suit against the responsible federal agencies under [a citizen suit provision], this action precludes an additional suit under the APA."

Id. at 802 (alterations in original) (quoting Brem-Air Disposal v. Cohen, 156 F.3d 1002, 1005 (9th Cir. 1998)). The Seventh, Eighth, and Tenth Circuits follow this approach as well. *See* Walsh v. U.S. Dep't of Veterans Affs., 400 F.3d 535, 537-38 (7th Cir. 2005) (FOIA citizen-suit provision precluded § 706(1) claim); Cent. Platte Nat. Res. Dist. v. U.S. Dep't of Agric., 643 F.3d 1142, 1149 (8th Cir. 2011) (same); Hayes v. Whitman, 264 F.3d 1017, 1025 (10th Cir. 2001) ("Thus, we hold that this APA claim should be dismissed because it duplicates Plaintiffs' Clean Water Act claim . . . .").

137. 156 F.3d at 1003-04; *see also* 5 U.S.C. § 702 ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.").

138. *Brem-Air Disposal*, 156 F.3d at 1004 & n.4.

139. *Id.* at 1004-05.

140. *See, e.g.*, Ctr. for Biological Diversity v. Bernhardt, 442 F. Supp. 3d 97, 100-03, 111-12 (D.D.C. 2020); Schoeffler v. Kempthorne, 493 F. Supp. 2d 805, 811 (W.D. La. 2007); Sierra Club v. Leavitt, 355 F. Supp. 2d 544, 547 (D.D.C. 2005).

Plaintiffs who wish to bring a regulatory-deadline suit thus have several tools at their disposal. Although plaintiffs should generally sue under citizen-suit provisions where available, the mandamus statute or the APA may provide alternative roads into court.

B. Inconsistent Results: Must Agencies Follow Their Own Rules?

1. The rationale behind nonenforcement of regulatory deadlines

When plaintiffs seek to compel agency action after a missed regulatory deadline, a small number of courts have refused to enforce the deadline.[141] Although there is a strong presumption of judicial review of agency action,[142] many courts dislike meddling in agency affairs.[143] This deference to agency decisions is rooted in separation-of-powers principles that counsel against dictating executive priorities and policy decisions.[144] These principles conflict with plaintiffs' requested relief in deadline suits—a court order compelling an agency to use its limited resources in a certain way within a certain timeframe. As a result, some courts have declined to enforce even Congress's statutory deadlines.[145] Courts that decline to enforce regulatory deadlines employ similar rationales.

141. *See* Action on Smoking & Health v. Dep't of Lab., 100 F.3d 991, 992-94 (D.C. Cir. 1996); Sze v. INS, No. C-97-0569, 1997 WL 446236, at *5-6 (N.D. Cal. July 24, 1997); *cf.* Clark v. Perdue, No. 19-394, 2019 WL 2476614, at *1, *4 (D.D.C. June 13, 2019) (granting voluntary remand where USDA violated its 180-day deadline to respond to complaints).

142. Abbott Lab'ys v. Gardner, 387 U.S. 136, 140 (1967) ("[J]udicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress.").

143. *See, e.g.*, Telecomms. Rsch. & Action Ctr. v. FCC, 750 F.2d 70, 80 (D.C. Cir. 1984) (explaining that, where an agency has unreasonably delayed action, courts "should consider the effect of expediting delayed action on agency activities of a higher or competing priority").

144. *See In re* Barr Lab'ys, Inc., 930 F.2d 72, 74 (D.C. Cir. 1991) ("[R]espect for the autonomy and comparative institutional advantage of the executive branch has traditionally made courts slow to assume command over an agency's choice of priorities."); Dep't of Com. v. New York, 139 S. Ct. 2551, 2583-84 (2019) (Thomas, J., concurring in part and dissenting in part) (concluding that judicial review for pretextual agency decisionmaking "implicate[s] separation-of-powers concerns insofar as it enables judicial interference with the enforcement of the laws").

145. There is a longstanding circuit split regarding whether courts *must* enforce statutory deadlines. The D.C. Circuit applies a six-factor balancing test (the *TRAC* test) to determine whether the court should compel agency compliance with a statutory deadline. *See, e.g.*, *In re Barr Lab'ys*, 930 F.2d at 74-75 (explaining that statutory deadlines are relevant to balancing the *TRAC* factors, but a missed deadline "does not, alone, justify judicial intervention"); Am. Hosp. Ass'n v. Burwell, 812 F.3d 183, 192-94 (D.C. Cir. 2016) (remanding a statutory-deadline suit so that the district court could

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For instance, in *Action on Smoking & Health v. Department of Labor* (*ASH*), an anti-smoking group sued the Occupational Safety and Health Administration (OSHA) for failing to issue a final rule governing occupational secondhand smoke within its regulatory timetable.[146] OSHA's "Cancer Policy" codified a series of deadlines for rulemaking.[147] The Cancer Policy regulations provide that, after conducting a hearing on a proposed rule, OSHA shall issue the final rule, state that no rule needs to be issued, or state that it intends to issue a final rule but cannot do so presently.[148] One of these three actions must be completed within either 120 days after the hearing or 90 days after any post-hearing comment period, whichever comes first.[149] In September 1994, OSHA initiated hearings on a proposal to regulate indoor smoking.[150] After generating the largest record in its rulemaking history, OSHA wrapped up the hearings in March 1995.[151] Then, OSHA did nothing.[152] Action on Smoking and Health petitioned the D.C. Circuit for a writ of mandamus to compel OSHA to act in accordance with its Cancer Policy deadline.[153]

OSHA's violation of its regulatory deadline was indisputable: The D.C. Circuit added 120 days to the last hearing date and 90 days to the close of the comment period, "com[ing] up with dates long gone."[154] The agency nevertheless argued that these deadlines were "aspirational only."[155] Further, OSHA claimed that its missed regulatory deadline did not provide a basis for a writ of mandamus because meeting the deadline was "impractical and

determine whether to issue a writ of mandamus under *TRAC*). By contrast, other circuits hold that the APA *requires* enforcement of statutory deadlines. *See, e.g.*, Forest Guardians v. Babbitt, 174 F.3d 1178, 1187-90 (10th Cir. 1999) (holding that where an agency misses a statutory deadline, the court has no discretion under the APA to deny injunctive relief); South Carolina v. United States, 907 F.3d 742, 758-60 (4th Cir. 2018) (issuing an injunction for an agency's failure to adhere to a statutory deadline because "the text of § 706(1) has no ambiguity and leaves no space for discretion"); Biodiversity Legal Found. v. Badgley, 309 F.3d 1166, 1177-78 & n.11 (9th Cir. 2002) (setting a deadline for the Fish and Wildlife Service to complete an endangered species listing determination within twelve months and noting that "no balancing of factors is required or permitted"). For further discussion of this circuit split, see Kim, note 15 above, at 1489-90.

146. 100 F.3d 991, 991-93 (D.C. Cir. 1996) [hereinafter *ASH*].

147. *See* 29 C.F.R. pt. 1990 (2021).

148. *Id.* § 1990.147(a).

149. *Id.*

150. *ASH*, 100 F.3d at 992.

151. *Id.* at 992-93.

152. *Id.*

153. *Id.* at 991-92.

154. *Id.* at 993.

155. *Id.*

unrealistic" considering the time needed to sort through its massive hearing record.[156] The court agreed, noting that it had previously held that OSHA's *statutory* deadlines were not mandatory.[157] The court reasoned that it would be odd to hold that OSHA's regulatory deadlines were mandatory, but its statutory deadlines were not.[158] The court went on to conclude that OSHA had created the regulatory deadlines "merely to set goals" rather than to create a mandatory schedule.[159] Moreover, the court stated that it was not prepared to "exercis[e] judicial supervision" over OSHA's efforts to process the sprawling record generated by its hearings.[160]

The D.C. Circuit's previous holding that OSHA's statutory deadlines were discretionary was all but dispositive in *ASH. ASH* suggests that jurisdictions that treat statutory deadlines as non-mandatory would be inclined to treat regulatory deadlines the same way.[161] But at least one other court has held that statutory deadlines are enforceable in mandamus actions and regulatory deadlines are not,[162] although it is not clear whether such decisions are still good law. In more recent cases, described in Part II.B.2 below, courts have interpreted regulatory deadlines as binding and enforceable. As the judiciary shifts towards focusing more on regulatory text, rather than extrinsic factors or equitable balancing, there may be less room for letting agencies off the hook.

2. Regulatory-deadline enforcement through the *Accardi* doctrine

a. The *Accardi* doctrine

Courts that enforce regulatory deadlines rely on the *Accardi* doctrine to do so. In its simplest form, the *Accardi* doctrine holds that agencies are bound by

156. *See* Brief for the Sec'y of Lab. at 7, *ASH,* 100 F.3d 991 (D.C. Cir. 1996) (No. 95-1615), 1996 WL 34483621, at *7, ECF No. 12; *see also ASH,* 100 F.3d at 993 ("The agency has offered several excuses for not bringing things to a close. Government shutdowns, budget cuts, a necessary reduction in staffing, uncertainty about future appropriations, a huge and complex record, technological problems . . . the novelty of the proposed method of regulation, changing agency priorities—all have contributed to the delay.").

157. *ASH,* 100 F.3d at 994 (citing Nat'l Cong. of Hisp. Am. Citizens v. Usery, 554 F.2d 1196, 1198-1200 (D.C. Cir. 1977)).

158. *Id.*

159. *Id.*

160. *Id.* at 995.

161. For a discussion of which jurisdictions treat statutory deadlines as non-mandatory, see note 145 above.

162. *See* Sze v. INS, No. C-97-0569, 1997 WL 446236, at *5 (N.D. Cal. July 24, 1997) ("While the court agrees that the language in the regulations, particularly Section 335.3, imposes a deadline on the INS, it is not clear that such regulatory requirements can take the place of a statutory prescription in a mandamus action.").

their own regulations.[163] The Supreme Court articulated the doctrine in 1954 in *United States ex rel. Accardi v. Shaughnessy*,[164] although antecedents had occasionally surfaced in the Court's prior administrative law jurisprudence.[165] On its face, the doctrine is unremarkable—regulations are law, and no one argues that government officials should be free to ignore the law.[166] Yet *Accardi*'s simple premise belies a great deal of confusion over its application. It is not clear which "rules" the agency must follow, whether *Accardi* applies to all proceedings or only proceedings in which individual rights are at stake, whether the petitioner needs to show prejudice, or what remedies a court should grant.[167] Nor is it clear where the doctrine originated. The Supreme Court has, in different moments, suggested either that the doctrine is grounded in the Due Process Clause[168] or that it emerged as a "judicially evolved" federal rule of administrative common law.[169]

The facts of *Accardi* illustrate how far the doctrine has been stretched from its origins. Joseph Accardi entered the United States unlawfully in 1932; the government initiated deportation proceedings against him several years later.[170] Accardi conceded his deportability, but brought a habeas corpus action challenging the denial of his application for discretionary relief by the Board of Immigration Appeals (BIA).[171] Before the BIA issued a decision on his

163. For a comprehensive discussion of the *Accardi* doctrine, see generally Merrill, note 113 above.

164. 347 U.S. 260, 266, 268 (1954).

165. *See, e.g.*, United States *ex rel.* Bilokumsky v. Tod, 263 U.S. 149, 155 (1923) (noting that "one under investigation with a view to deportation is legally entitled to insist upon the observance of rules promulgated by the Secretary pursuant to law"); Ariz. Grocery Co. v. Atchison, Topeka & Santa Fe Ry. Co., 284 U.S. 370, 389-90 (1932) (holding that, having made an order regarding interstate shipping rates, the Interstate Commerce Commission could not proceed to ignore its own order in a subsequent proceeding); CBS, Inc. v. United States, 316 U.S. 407, 422 (1942) (holding that regulations adopted in the exercise of legislative powers are "controlling alike upon the [Federal Communications] Commission and all others whose rights may be affected by the Commission's execution of them").

166. *E.g.*, United States v. Lee, 106 U.S. 196, 220-21 (1882) ("All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.").

167. *See* Merrill, *supra* note 113, at 570 (quoting Joshua I. Schwartz, *The Irresistible Force Meets the Immovable Object: Estoppel Remedies for an Agency's Violation of Its Own Regulations or Other Misconduct*, 44 ADMIN. L. REV. 653, 669-70 (1992)); Leslie v. Att'y Gen., 611 F.3d 171, 177-78 (3d Cir. 2010) (summarizing cases).

168. *See* Bridges v. Wixon, 326 U.S. 135, 152-54 (1945).

169. Vitarelli v. Seaton, 359 U.S. 535, 547 (1959) (Frankfurter, J., concurring in part and dissenting in part); *see also* Bd. of Curators of the Univ. of Mo. v. Horowitz, 435 U.S. 78, 92 n.8 (1978).

170. United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260, 262-63 (1954).

171. *Id.* at 263-64.

application, the Attorney General released a list of "unsavory characters" that he wished to deport, including Accardi.[172] Accardi argued that the list caused the BIA to unfairly prejudge his case.[173]

The Court considered whether the Attorney General's conduct "deprived [Accardi] of any of the rights guaranteed him by the statute or by the regulations issued pursuant thereto."[174] In a short, enigmatic opinion, the Court held that the Attorney General had violated the Justice Department's own regulations.[175] The regulations required the BIA to exercise "its *own* judgment" in deciding applications, precluding the Attorney General from dictating the BIA's decision.[176] By releasing the list of "unsavory characters," the Attorney General influenced the BIA such that it was unable to exercise its discretion independently as the regulations required.[177] The Court remanded the case to determine whether Accardi was entitled to a new hearing.[178]

The *Accardi* Court did not explain the foundations of this principle, but strongly suggested that it was rooted in due process: In the Court's words, Accardi was entitled to "that due process required by the regulations."[179] But *Accardi* was a habeas corpus case, not an APA case,[180] and it was not until 1979 that the Supreme Court even suggested that the APA was relevant to the *Accardi* doctrine.[181] Moreover, the facts of the case suggest that the doctrine was initially created only to protect individual rights and liberties in adversarial proceedings.[182]

The doctrine later underwent several expansions and contractions in the Court, though none is particularly illuminating.[183] The Supreme Court invoked the doctrine in *Service v. Dulles* to invalidate the Secretary of State's

172. *Id.* at 264.

173. *Id.*

174. *Id.* at 265.

175. *Id.* at 266-68.

176. *Id.* at 266 (emphasis added). The Attorney General could review and overturn the BIA's decision, but the Court held that it was unlawful for the Board to fail to exercise its discretion in the first instance. *Id.*

177. *Id.* at 267.

178. *Id.* at 268.

179. *Id.*

180. *See id.* at 263.

181. *See* United States v. Caceres, 440 U.S. 741, 753-54 (1979); *see also* Merrill, *supra* note 113, at 580-81 & n.92.

182. A subsequent *Accardi* case suggests this as well. In one of the final cases in the *Accardi* line, the Court wrote that, "[w]here the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures." Morton v. Ruiz, 415 U.S. 199, 235 (1974).

183. For further discussion of the Court's later cases, see Merrill, note 113 above, at 576-85.

dismissal of an employee in violation of State Department regulations, broadly pronouncing that "regulations validly prescribed by a government administrator are binding upon him as well as the citizen."[184] Some years later, however, the Court walked back this statement in *American Farm Line v. Black Ball Freight Service*,[185] advising that, if a regulation is not intended to "confer important procedural benefits upon individuals," *Accardi* does not apply.[186] The Court went further, stating that it was "always within the discretion of . . . an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it."[187]

Where does this leave *Accardi*? Although the Court seems to have lost interest in the doctrine, the lower courts have picked up where the Court left off. *Accardi* has been invoked in tax prosecutions,[188] immigration proceedings,[189] wrongful termination,[190] run-of-the-mill challenges to agency decisions,[191] and, apparently, regulatory-deadline suits.[192] It is perhaps surprising that a doctrine that originated in a habeas case serves today as the basis for enforcing agencies' self-imposed regulatory deadlines—even those that affect only the agency. In suits against the EPA, for example, there are no individual rights or liberties at stake as in *Accardi*. One could also argue, drawing on *American Farm Lines*, that an agency's interest in managing "the orderly transaction of business before it" should always permit it to relax its own regulatory deadlines.[193] Court enforcement also raises separation-of-powers concerns—why should courts micromanage internal deadlines that the executive branch applies to itself? After providing an example of a regulatory-deadline case where a court invoked the *Accardi* doctrine, this Note addresses these questions in Part II.C below.

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184. 354 U.S. 363, 372-73 (1957).

185. 397 U.S. 532, 538-39 (1970).

186. *See id.*

187. *Id.* at 539 (quoting NLRB v. Monsanto Chem. Co., 205 F.2d 763, 764 (8th Cir. 1953)). The doctrine was expanded again in *Ruiz*, 415 U.S. 199. *See* Merrill, *supra* note 113, at 583-84 (noting that *Ruiz* seemed to contradict *American Farm Lines*).

188. *E.g.*, United States v. Koerber, 966 F. Supp. 2d 1207, 1235-46 (D. Utah 2013).

189. *E.g.*, Leslie v. Att'y Gen., 611 F.3d 171, 173 (3d Cir. 2010).

190. *E.g.*, Vanover v. Hantman, 77 F. Supp. 2d 91, 103-09 (D.D.C. 1999).

191. *E.g.*, KLC Farm v. Perdue, 426 F. Supp. 3d 837, 850-55 (D. Kan. 2019).

192. *See infra* Part II.B.2.b.

193. Am. Farm Lines v. Black Ball Freight Serv., 397 U.S. 532, 539 (1970) (quoting NLRB v. Monsanto Chem. Co., 205 F.2d 763, 764 (8th Cir. 1953)).

b. *Accardi* in regulatory-deadline suits

Sierra Club v. Leavitt, referenced in Part I.A, provides an example of a regulatory-deadline case that relied on *Accardi*.[194] In that case, the Sierra Club sued the EPA to compel the agency to comply with its regulatory deadline to issue a rule governing toxic pollutants from mobile sources.[195] Section 80.1045 of the EPA's regulations provided that, "[n]o later than July 1, 2003, the Administrator shall propose any requirements to control hazardous air pollutants from motor vehicles and motor vehicle fuels . . . . The Administrator will take final action on such proposal no later than July 1, 2004."[196] The EPA—perhaps unsurprisingly—failed to meet its deadline.[197]

The Sierra Club brought both a citizen suit under the Clean Air Act and a § 706(1) claim, arguing that the EPA had a nondiscretionary duty to propose regulations consistent with § 80.1045 by July 1, 2003, and that the EPA violated that duty by failing to promulgate a rule.[198] To support the proposition that the EPA's regulations were legally binding on the agency, the Sierra Club cited an *Accardi* case.[199] In response, the EPA argued that its regulation established nothing more than "a schedule for the exercise of discretionary authority."[200] The EPA contended that its decision to adopt this deadline in the first place was discretionary—the Clean Air Act only requires the EPA to revise the regulations at issue "from time to time"—and so the regulatory deadline was necessarily discretionary as well.[201] In other words, the EPA argued that a mandatory duty could be created only by a clear statutory directive from the Clean Air Act itself. Moreover, the EPA claimed that it lacked sufficient information to prepare the rule, and requiring the EPA to act on incomplete

194. 355 F. Supp. 2d 544, 557 (D.D.C. 2005).

195. *Id.* at 546.

196. Control of Emissions of Hazardous Air Pollutants from Mobile Sources, 66 Fed. Reg. 17,230, 17,272-73 (Mar. 29, 2001) (codified at 40 C.F.R. § 80.1045 (2017)).

197. *Sierra Club*, 355 F. Supp. 2d at 546.

198. *Id.* at 546-47; *see also* 42 U.S.C. § 7604(a)(2) (allowing Clean Air Act citizen suits "against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary"). Because the court concluded that the Clean Air Act's citizen-suit provision conferred jurisdiction, it did not reach the plaintiff's alternative argument that the APA conferred jurisdiction. *Sierra Club*, 355 F. Supp. 2d at 545, 547, 557.

199. Opposition of Sierra Club and United States Public Interest Research Group to Defendant's Motion to Dismiss at 10, Sierra Club v. Leavitt, 355 F. Supp. 2d 544 (D.D.C. 2005) (No. 04-cv-00094), 2004 WL 2056410, ECF No. 6 (citing Service v. Dulles, 354 U.S. 363, 388 (1957)).

200. The United States' Motion to Dismiss and Memorandum in Support Thereof at 14, Sierra Club v. Leavitt, 355 F. Supp. 2d 544 (D.D.C. 2005) (No. 04-cv-00094), 2004 WL 5609478, ECF No. 4.

201. *Id.* at 14-15.

information would be tantamount to requiring the EPA to "open itself up for charges that the resulting decision was arbitrary and capricious."[202] Notably, the EPA did not directly respond to the Sierra Club's *Accardi* argument.[203]

The court began by looking to the text of the regulation to determine whether it created a mandatory duty. The court noted that "the word 'shall,' sets forth a mandatory duty—the administrator 'shall' propose vehicular air pollutant controls by July 1, 2003."[204] The court thus had no trouble concluding that "the plain language of the regulation" imposed a mandatory duty on the EPA.[205] While acknowledging that the regulation was adopted pursuant to a statute that imposed only a discretionary obligation,[206] the court explained that this did not relieve the EPA of its duty, which flowed instead from the regulation, not the Clean Air Act.[207] In support of this conclusion, the court cited the same *Accardi* case as the Sierra Club, explaining that the EPA is free to "impose upon itself 'more rigorous substantive and procedural standards' than required by statute."[208] And if it does so, it is bound by those stricter requirements.[209] The court concluded that this was exactly what the EPA did here: "[E]ven though the [Clean Air Act] proscribes a discretionary duty, . . . EPA promulgated a regulation with a mandatory one."[210] The court denied the EPA's motion to dismiss,[211] and the EPA published the regulations soon after.[212]

Other courts have relied on *Accardi* to enforce regulatory deadlines as well. They all assume *Accardi*'s premise: Rules do not become discretionary merely because they regulate the regulator.[213] In some cases, the agency conceded this

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202. The United States' Reply in Support of its Motion to Dismiss at 16, Sierra Club v. Leavitt, 355 F. Supp. 2d 544 (D.D.C. 2005) (No. 04-cv-00094), ECF No. 7.

203. For example, the EPA could have cited *American Farm Lines v. Black Ball Freight Service*, 397 U.S. 532, 539 (1970), to argue that it was permitted to relax its regulatory deadlines to serve its interest in internal efficiency and administration. It also could have cited *Action on Smoking & Health v. Department of Labor*, 100 F.3d 991, 993 (D.C. Cir. 1996), to support its argument that its deadlines did not limit its discretion.

204. *Sierra Club*, 355 F. Supp. 2d at 549.

205. *Id.* at 550.

206. *Id.* at 552.

207. *Id.*

208. *Id.* (quoting Service v. Dulles, 354 U.S. 363, 388 (1957)).

209. *Id.*

210. *Id.*

211. *Id.* at 557.

212. *See* Control of Hazardous Air Pollutants from Mobile Sources, 72 Fed. Reg. 8428, 8432 (Feb. 26, 2007).

213. *See, e.g.*, Nat. Res. Def. Council, Inc. v. Perry, 940 F.3d 1072, 1079 (9th Cir. 2019); Gonzalez Rosario v. U.S. Citizenship & Immigr. Servs., 365 F. Supp. 3d 1156, 1161 (W.D. Wash. 2018) (holding that U.S. Citizenship and Immigration Services was bound by its

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point. In *California v. EPA*, referenced in Part I.A, several states sued the EPA for missing its regulatory deadlines.[214] The EPA admitted that its deadlines were mandatory and that it failed to meet them.[215] The agency argued instead that it should not be held to the plaintiffs' proposed deadlines because it lacked the resources to comply, in part because it was burdened by other court orders to complete overdue rulemakings.[216] *Accardi* must be a potent doctrine if agencies choose to concede the point.

C. Is *Accardi* a Sound Doctrinal Basis for Enforcement?

1. Problems with *Accardi* in regulatory-deadline cases

As discussed above, courts rely on the *Accardi* doctrine to enforce regulatory deadlines. But *Accardi*'s admonition that agencies are bound by their own regulations simply begs the question of why this is so. Litigants invoke *Accardi* like a talisman, and courts (understandably) refrain from questioning its applicability or delving into its underlying rationale.[217] But based on the Supreme Court's decidedly ambivalent case law, applying *Accardi* to self-imposed regulatory deadlines strains the doctrine. To be sure, the doctrine is apposite in cases like *Accardi* itself, where an agency has created a procedural right in adversarial proceedings against an individual. In those cases, while regulations may govern internal agency conduct, they nevertheless create an external benefit for individuals.

But regulatory-deadline violations like the one in *Sierra Club* are straightforwardly distinguishable from the Supreme Court's *Accardi* cases. These regulatory deadlines do not create a substantive or procedural benefit akin to the one created by the deportation-review procedures in *Accardi*. If the doctrine is rooted in due process, as the Supreme Court repeatedly

regulatory deadline to issue work-authorization decisions within thirty days because "it is settled law that 'properly enacted regulations have the force of law and are binding on the government until properly repealed'" (quoting Flores v. Bowen, 790 F.2d 740, 742 (9th Cir. 1986))); Int'l Lab. Mgmt. Corp. v. Perez, No. 14CV231, 2014 WL 1668131, at *10 (M.D.N.C. Apr. 25, 2014) (holding that a regulatory deadline for H-2B visa decisions was binding on the Department of Labor because "the *Accardi* doctrine provides 'that when an agency fails to follow its own procedures or regulations, that agency's actions are generally invalid'" (quoting Nader v. Blair, 549 F.3d 953, 962 (4th Cir. 2008))).

214. California v. U.S. EPA, 385 F. Supp. 3d 903, 907-08 (N.D. Cal. 2019).

215. *Id.* at 909.

216. *Id.* at 912-13, 915.

217. *See, e.g.*, Jefferson v. Harris, 285 F. Supp. 3d 173, 185 (D.D.C. 2018) ("The Court fortunately need not delve into the murky waters of the [*Accardi*] doctrine and its origins.").

suggested,[218] it has no application in many regulatory-deadline suits. In *Sierra Club*, for example, the plaintiffs would have been hard-pressed to claim some right or benefit stemming from the EPA's promise to promulgate an air-pollution rule in the future. The doctrine thus provides no clear reason why courts must enforce such deadlines. Indeed, *American Farm Lines* suggested the opposite: *Accardi* is *not* properly invoked unless the regulations are intended to "confer important procedural benefits upon individuals in the face of otherwise unfettered discretion."[219] Along these lines, agencies may argue that their internal regulatory deadlines are purely for structuring their affairs, and that they should always be free to relax their own rules to serve internal administrative interests.

Even if we assume that agencies violate *Accardi* when they miss internal regulatory deadlines, it is worth considering the antecedent question as well: Are these violations subject to judicial review? Under the APA, courts lack jurisdiction to review decisions "committed to agency discretion by law."[220] This provision protects agencies' resource-allocation decisions, personnel decisions, and enforcement discretion from judicial review.[221] This carveout is rooted in part in the foundational constitutional principle that the executive branch—including executive agencies—has broad prosecutorial discretion.[222] Agencies are nearly always free to decline to enforce their regulations, and courts have no power to supervise these enforcement decisions.[223] Not only is the judiciary ill-suited for this task,[224] but the Constitution directly speaks only of the executive branch as having the power to execute the laws.[225] Although prosecutorial discretion is not directly applicable here—it would be odd to argue that an agency may exercise prosecutorial discretion on *itself*—it is certainly analogous. Viewed through this lens, judicial review of *Accardi* violations stands in tension with traditional notions of executive discretion and the separation of powers. If agencies can decline to enforce their own

218. *See supra* Part II.B.2.a.

219. *See* Am. Farm Lines v. Black Ball Freight Serv., 397 U.S. 532, 538-39 (1970).

220. 5 U.S.C. § 701(a)(2).

221. *See* Lincoln v. Vigil, 508 U.S. 182, 191-92 (1993).

222. *See* Heckler v. Chaney, 470 U.S. 821, 837-38 (1985); Wayte v. United States, 470 U.S. 598, 607 (1985) ("[T]he Government retains 'broad discretion' as to whom to prosecute." (quoting United States v. Goodwin, 457 U.S. 368, 380 n.11 (1982))).

223. *Heckler*, 470 U.S. at 837-38 (holding that agencies' decisions not to enforce their regulations are not subject to judicial review).

224. *See* Inmates of Attica Corr. Facility v. Rockefeller, 477 F.2d 375, 380 (2d Cir. 1973) ("[T]he manifold imponderables which enter into the prosecutor's decision to prosecute or not to prosecute make the choice not readily amenable to judicial supervision.").

225. U.S. CONST. art. II, § 3.

regulations against third parties, on what basis may courts enforce agency regulations against the agencies themselves?

2. A rule-of-law rationale for *Accardi*

Answering this question requires us to revisit the source of the *Accardi* doctrine. Given the Supreme Court's limited guidance, finding the source of agencies' duty to follow their own regulations inevitably requires some speculation.[226] There is widespread disagreement amongst the lower courts—some believe the doctrine is grounded in procedural due process, others substantive due process, while still others root it in the APA or suggest that it constitutes an independent cause of action.[227] Thomas Merrill has ventured a guess as to the source of the duty: Agency regulations are binding on the agency because they share the salient features of statutes.[228] Statutes, of course, are binding on their enactors, enforcers, adjudicators, and subjects.[229] Regulations share these features because agencies' power to regulate is completely derived from Congress's statutory delegations.[230] These delegations, in turn, provide agencies with the authority to promulgate rules with the force and effect of law.[231] We therefore expect regulations to be generally applicable and enforceable in the same way statutes are—that is, binding on the agency as well as the public. Merrill concedes, however, that the intuition that all actors are bound by statute-like rules cannot be traced to a source of positive law.[232] Instead, he argues that it is a foundational assumption in our legal system, a constitutional principle "in the small 'c' sense of the term."[233] In other words, the *Accardi* doctrine seems to reinforce our apprehensions of what it means to be "a government of laws, and not of men."[234]

This "rule-of-law" rationale for the doctrine supplies a reason for courts to enforce regulatory deadlines. This principle traces back to one of the original justifications for separating legislative, executive, and judicial functions. The

226. *See* Wilkinson v. Legal Servs. Corp., 27 F. Supp. 2d 32, 48 (D.D.C. 1998) (noting that "[t]he task of unearthing the *Accardi* doctrine's source requires dusting off and combing through Supreme Court precedents reaching back over 100 years, and more recent decisions from our Court of Appeals," ultimately concluding that *Accardi* is rooted in due process).

227. *See* Jefferson v. Harris, 285 F. Supp. 3d 173, 185 (D.D.C. 2018) (citing cases).

228. Merrill, *supra* note 113, at 596.

229. *Id.* at 596-97 (citing H.L.A. HART, THE CONCEPT OF LAW 42-43 (2d ed. 1994)).

230. Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988).

231. *See* Merrill, *supra* note 113, at 600.

232. *Id.* at 598-600.

233. *Id.* at 599.

234. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

rule-of-law rationale is often presented as a guard against "tyranny," because an entity that wields both law-enacting and law-enforcing power may exercise its power in an arbitrary and abusive manner against individuals.[235] This principle also guards against a closely related issue: the conflict of interest that arises when an entity has the power to both make rules and apply them. An entity with both powers could enact a generally applicable law and yet decline to apply the law to itself.[236] Yet as many have noted, executive agencies sit in an uncomfortable position within our three branches of government.[237] Because agencies have both legislative and executive power, the task of ensuring that they do not exempt themselves from the law is thus left to the courts (and, through citizen suits, private parties).

Moreover, the rule-of-law rationale for *Accardi* fits neatly into the system of agency oversight codified in the APA. The judiciary's power to compel the executive to act in accordance with law is rooted in § 706,[238] with enforcement power delegated to private citizens.[239] And as the Supreme Court indicated in *Heckler v. Chaney*, at least in the civil context, there is room for courts to step in and compel executive enforcement notwithstanding agencies' traditional prosecutorial discretion.[240]

In sum, although courts have not embraced the rule-of-law rationale, *Accardi* may be a suitable doctrine for enforcing internal deadlines. Admittedly, regulatory-deadline suits are quite unlike the circumstances in which the Supreme Court has applied *Accardi*. Agencies may advance plausible arguments that holding them to self-imposed deadlines runs afoul of their traditionally

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235. *See* THE FEDERALIST NO. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961).

236. For further discussion, see M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1191 (2000); DAVID F. EPSTEIN, THE POLITICAL THEORY OF *THE FEDERALIST* 129-30 (1984); W.B. GWYN, THE MEANING OF THE SEPARATION OF POWERS: AN ANALYSIS OF THE DOCTRINE FROM ITS ORIGIN TO THE ADOPTION OF THE UNITED STATES CONSTITUTION 16, 42 (1965).

237. *E.g.*, Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 492 (1987) ("Virtually every part of the government Congress has created—the Department of Agriculture as well as the Securities and Exchange Commission—exercises *all three* of the governmental functions the Constitution so carefully allocates among Congress, President, and Court."); FTC v. Ruberoid Co., 343 U.S. 470, 487 (1952) (Jackson, J., dissenting) (arguing that "[t]he rise of administrative bodies" has "deranged our three-branch legal theories").

238. *See* 5 U.S.C. § 706 ("The reviewing court shall . . . compel agency action unlawfully withheld or unreasonably delayed.").

239. *Id.* § 702 ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.").

240. 470 U.S. 821, 833 n.4 (1985) (suggesting that the judiciary may enjoin nonenforcement where an agency has adopted a policy that amounts to "an abdication of its statutory responsibilities" (citing Adams v. Richardson, 480 F.2d 1159 (1973) (en banc))).

broad discretion over both the content and timing of their actions. To the extent we believe that *Accardi* is a due-process doctrine, it is inapposite in many internal deadline cases. But if we instead accept *Accardi* as a separation-of-powers doctrine, its use in deadline suits appears more appropriate. Indeed, perhaps recasting the *Accardi* doctrine in new contexts is exactly what we would expect courts to do. As Justice Holmes observed, it is a "very common phenomenon" in law that we forget the original reason that gave rise to a rule, yet we find a way to reconcile it with present circumstances.[241] The rule then "adapts itself to the new reasons which have been found for it, and enters on a new career."[242] Enforcing regulatory deadlines may be one example of *Accardi*'s new career.

III. The Normative Stakes of Enforcing Regulatory Deadlines

Part I supplied several possible reasons why agencies choose to bind themselves by setting deadlines. Part II provided a doctrinal overview of regulatory-deadline suits and argued that courts' reliance on the *Accardi* doctrine for enforcement is not fully developed, suggesting instead a separation-of-powers rationale. The preceding Parts indicate that court enforcement of internal deadlines creates tension between several fundamental values in administrative law—in particular, democratic accountability, flexibility, and reliance interests. This Part gathers these threads and explores whether enforcing regulatory deadlines is desirable. This largely depends on one's view of the relative importance of regulatory stability and political accountability. The purpose of this Part is not necessarily to provide definitive answers, but rather to identify the relevant considerations and values at stake.

A. Benefits of Enforcing Regulatory Deadlines

When courts enforce regulatory deadlines, they become tools for regulating across time. As Part I suggested, agencies may choose to bind themselves via regulatory deadlines to create policy continuity and credible commitments. Deadlines can ensure that the enacting administration's objectives carry over into the next administration to some extent, even if the successor administrations would not otherwise be inclined to pursue those objectives. This continuity can increase regulatory stability, which leads to more predictable government action and better honors reliance interests.[243]

241. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 7 (Harvard Univ. Press 2009) (1881).

242. *Id.*

243. *See* Masur, *supra* note 94, at 1041 ("Scholars and courts long have noted the damage that shifts in regulatory policy may exact upon reliance interests."); Eric A. Posner & Adrian Vermeule, Essay, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665, 1672 (2002).

Enforceable deadlines signal that an agency is serious about pursuing a certain course of action, allowing third parties to adjust their affairs accordingly. For regulated entities, this could encourage more upfront investment in innovation because the agency has created a stable set of incentives and sanctions. For example, some environmental regulations are "technology-forcing," imposing more stringent requirements than current technology can achieve.[244] These regulations create strong incentives for regulated entities to develop new technologies or else risk violating the regulation's standards.[245] But these incentives only work if the regulated entity knows that the agency will not suddenly change course and weaken the standards. Regulatory deadlines can help provide this assurance.

Furthermore, although regulatory deadlines are a form of self-constraint, such measures can have the counterintuitive effect of increasing agency flexibility.[246] If regulatory deadlines are enforced, then agencies can choose between binding themselves via an enforceable regulatory deadline or promulgating a nonbinding deadline through guidance. The agency can weigh the costs and benefits of each approach. A regulatory deadline may allow the agency to better achieve its goals through entrenchment or making a credible commitment, at the cost of its ability to course-correct and potential resource losses in litigation. Guidance, by contrast, signals a weaker commitment and does not allow the agency to entrench its policies, but offers greater flexibility and less litigation risk. In a world where regulatory deadlines are enforceable, the agency has two options for setting a deadline rather than one.

Finally, as Part II argued, there seems to be something intuitively wrong about allowing agencies to break their own rules. Even where the deadline applies only to the agency and no party can legitimately claim that its rights are infringed by the agency's inaction, nonenforcement violates our basic instincts about how laws and government should work. In the cases described above, the deadlines were voluntary—the agency did not *need* to codify them. But once they become law, why should they not be enforced like any other law? To hold otherwise would erode our fundamental sense that laws are

244. Andries Nentjes, Frans P. de Vries & Doede Wiersma, *Technology-Forcing Through Environmental Regulation*, 23 EUR. J. POL. ECON. 903, 904 (2007).

245. For examples, see Thomas O. McGarity, *Radical Technology-Forcing in Environmental Regulation*, 27 LOY. L.A. L. REV. 943, 945-52 (1994).

246. The notion that an entity would be interested in limiting its options is an old one. As Jon Elster put it: "[S]ometimes *less is more*." JON ELSTER, ULYSSES UNBOUND: STUDIES IN RATIONALITY, PRECOMMITMENT, AND CONSTRAINTS 1 (2000); *see also* Magill, *supra* note 29, at 860.

generally applicable and enforceable. The erosion might be slight, but that is no reason to discount it.[247]

B. Costs of Enforcing Regulatory Deadlines

On the other hand, enforcement comes at the cost of flexibility and democratic accountability. Regulatory deadlines decrease agency flexibility in the narrow sense: The agency no longer has a choice (or at least a costless one) with respect to the specific action required by the deadline. This could prevent an agency from responding nimbly to unexpected events, which may be especially important in rapidly developing substantive areas of regulation.[248] And if the current administrator strongly disagrees with the action required by the deadline, the agency will need to sink resources into a repeal or (possibly) litigation. It seems unwise to squander resources that could otherwise be spent on meeting the current administrator's goals.

Relatedly, enforcing regulatory deadlines decreases agencies' democratic accountability by hindering their responsiveness to popular will. Shifts in the electorate's policy preferences are accounted for through presidential elections and the president's control of administrative agencies.[249] For instance, the election of President Trump can be interpreted as reflecting the public's desire to see more pro-development and pro-industry policies.[250] When courts compelled the Trump EPA to publish rules or take regulatory actions pursuant to the Obama EPA's internal deadlines, the public's policy preference was to

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247. As the Supreme Court has reminded us in an unrelated context: "Although 'it may be that it is the obnoxious thing in its mildest and least repulsive form,' we cannot overlook the intrusion: 'illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure.'" Stern v. Marshall, 564 U.S. 462, 503 (2011) (quoting Boyd v. United States, 116 U.S. 616, 635 (1886)).

248. *See* FCC v. Fox Television Stations, Inc., 556 U.S. 502, 552 (2009) (Breyer, J., dissenting) (lamenting that the Court's decision granted agencies the freedom to change their policies "on the basis of nothing more than political considerations or even personal whim"). *Fox Television* also illustrates the virtues of agency flexibility in light of changing technologies. *See id.* at 509 (majority opinion) (noting that the FCC's decision to prohibit fleeting expletives in broadcasts was motivated in part by technological advances that made it easier to "bleep out" expletives).

249. *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865 (1984) ("While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices . . . .").

250. *See* Samantha Gross, *What Is the Trump Administration's Track Record on the Environment?*, BROOKINGS (Aug. 4, 2020), https://perma.cc/HR6T-6LCB ("President Donald Trump took office promising a business-friendly, deregulatory agenda."); Drew DeSilver, *Trump's Cabinet Will Be One of Most Business-Heavy in U.S. History*, PEW RSCH. CTR. (Jan. 19, 2017), https://perma.cc/D8EK-FBB8.

some extent overridden. This concern is admittedly limited, as regulatory deadlines have thus far been rare. But a future administrator could enact dozens of regulatory deadlines to publish new rules with the intent of entrenching her policy preferences and hindering the president-elect's goals. These examples may be oversimplified and unrealistic, respectively, but the broader point is that internal deadlines can result in dead-hand control and create an accountability deficit.

Thus, one's conclusion about whether regulatory deadlines *should* be enforced largely depends on how one balances regulatory stability and political accountability. The costs and benefits may also hinge on the specific agency and program. Furthermore, it should be noted that regulatory deadlines are not necessarily a pro-regulatory, one-way ratchet. In contemporary usage, they typically require the agency to act—to publish a rule, respond to a petition, initiate enforcement, or formulate standards. But the SUNSET rule, described in Part I, provides a contrary example. Even putting aside the rule's potential unlawfulness,[251] one can easily imagine similar deadlines that require deregulatory action or repeals. From regulatory beneficiaries' perspective, the enforcement of agency deadlines may not always be desirable.

This Note does not seek to determine whether society is better served by prioritizing agency stability or democratic accountability where these values conflict. The optimal balance between them is a question of deep significance to the administrative state and is not meant to be resolved here. Instead, this Part's purpose is to demonstrate that regulatory deadlines present a new, intriguing backdrop against which this debate can play out. Future scholarship on the role and powers of the administrative state may benefit from grappling with these questions in the context of self-imposed deadlines.

Conclusion

There is still much we do not know about agency operations, but this Note seeks to illuminate a yet-unstudied tool in agency toolboxes. Regulatory deadlines can help an agency entrench its policy preferences and create enforceable future commitments. And for better or worse, courts generally agree that such deadlines are enforceable by third parties. Allowing agencies to bind their successors requires trade-offs between stability and democratic legitimacy, and deadlines themselves can be used for both pro-regulatory and deregulatory ends. But to the extent we want courts to enforce internal deadlines, this Note suggests that the *Accardi* rule could provide an adequate rationale if it is reconceived as a separation-of-powers doctrine.

251. *See supra* note 74.