

ARBITRARY ARBITRARINESS REVIEW

CARRIE ROSENBAUM[†]

ABSTRACT

The Supreme Court’s recent immigration law Administrative Procedure Act (APA) jurisprudence demonstrates the anti-democratic potential of this judicial review, which has not yet been explored in scholarly literature. Courts’ application of the arbitrary and capricious standard potentially curtails the ability of new presidents to carry out policies via agency action. Scholars have argued that when the courts employ arbitrariness review, their examination of an agency’s reasons for changing a prior Administration’s policy can stymie change and inhibit the will of the people. Further, arbitrariness review can foster volatility. The Supreme Court’s reasoned approach in the Deferred Action for Childhood Arrivals (DACA) case fosters agency accountability. However, the latest chapter in the application of this standard in the Migrant Protection Protocols (MPP) litigation, which concerned discretionary enforcement decisions to make migrants wait for immigration hearings in Mexico, illustrates the potential for arbitrariness review to itself become arbitrary. The arbitrariness analysis in the MPP case suggests that the use of “hard look” review to incentivize immigration agency accountability is vulnerable to abuse. The problem necessitates a deeper examination of if, when, and how hard look review should address an agency’s political reasons for terminating or rescinding a policy.

Accordingly, this Article begins with a description of the DACA and MPP cases and then outlines the literature on arbitrariness review’s potential for furthering ossification, accountability, or volatility with respect to the role of politics in agency decision-making. It then advances a reasoned approach that avoids inhibiting new Administrations from implementing policies while fostering agency reason-giving that furthers transparency and reinforces rule of law principles.

TABLE OF CONTENTS

INTRODUCTION	774
I. THE DEFERRED ACTION FOR CHILDHOOD ARRIVALS AND MIGRANT PROTECTION PROTOCOLS LITIGATION.....	778

[†] Visiting Assistant Professor, Chapman University Fowler School of Law. I am grateful for the support of Chapman University Fowler School of Law, and for invaluable feedback from: Lawrence Rosenthal, David Rubenstein, Jill Family, Hiroshi Motomura, Shalini Ray, Jennifer Koh, Jennifer Chacón, Kevin Johnson, Pooja Dadhania, Eunice Lee, Susan Bibler Coutin, Ava Ayers; and the 2022 Immigration Law Teachers conference participants: Mark Seidenfeld, Jayanth Krishnan, Angela Banks, Shoba Sivaprasad Wadhia, Ingrid Eagly, Daniel Deacon, Glen Staszewski, Chris Walker, and William Funk.

A. Department of Homeland Security v. Regents of the University of California	778
B. Biden v. Texas.....	781
II. ARBITRARY AND CAPRICIOUS REVIEW	790
III. ARBITRARINESS REVIEW: ACCOUNTABILITY FORCING OR OSSIFYING?	796
A. <i>Ossification or Volatility</i>	797
B. <i>Encouraging Regulatory Stability</i>	799
C. <i>Agency Accountability Forcing</i>	802
D. <i>Aggrandizing Judicial Power</i>	810
CONCLUSION.....	813

INTRODUCTION

Administrative Procedure Act (APA)¹ challenges to executive agency policymaking involve the relationships between the executive, Congress, and the judiciary. During times of congressional gridlock around politically contentious issues, like immigration, APA challenges can stop an agency, and an executive, from carrying out a new policy agenda.² In recent years, such challenges have been more frequent in immigration law, and where substantive challenges have failed, APA claims have been outcome determinative.³ APA judicial review is of both procedural and substantive agency action—not just procedural.⁴ When an agency’s policy is challenged as “arbitrary and capricious,” courts engage in arbitrariness review to determine whether the policy has been effectuated properly.⁵ Depending on how arbitrariness review is deployed, it has the potential to inhibit an agency from carrying out new policies, as some alleged following the *Department of Homeland Security v. Regents of the University of California*⁶ case, or it can foster flexibility and increased volatility with shifts in policy from one Administration to the next. This inhibiting of agency action has been referred to as “ossification.”⁷ While

1. Administrative Procedure Act, 5 U.S.C. § 706(2).

2. See, e.g., Elizabeth Jacobs, *The Most Important Immigration Rulings of 2022 and the Forecast for 2023*, CTR. FOR IMMIGR. STUD. (Jan. 12, 2023), <https://cis.org/Report/Most-Important-Immigration-Rulings-2022-and-Forecast-2023> (discussing how the APA challenge in *Biden v. Texas*, 142 S. Ct. 2528 (2022), blocked the Biden Administration’s attempt to reverse Trump-era border policy).

3. See *id.*

4. 5 U.S.C. § 706(2).

5. *Motor Vehicle Mfrs. Ass’n of the U.S. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 41–43 (1983).

6. 140 S. Ct. 1891 (2020) (finding that DHS’s decision to terminate the Deferred Action for Childhood Arrivals (DACA) program was arbitrary and capricious because DHS Secretaries Duke and Nielsen did not provide adequate reasoning for the change in policy).

7. “Ossification” is a term commonly used by administrative law scholars to refer to the judiciary’s role in limiting agency rulemaking and policy changes and is often discussed in the context of “hard look” arbitrariness review. See, e.g., Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 2, 29, 41–42 (2009) (arguing that “giving politics a place could give courts another reason to defer to agencies, thereby softening the ‘ossification’ charge frequently levied against arbitrary and capricious review” and using the term “ossification” to mean

ossification is a descriptor, it implicates the accountability and rule of law⁸ problems that result when a new Administration is prevented from enacting policies via the agencies. Within these tensions between ossification and flexibility come other questions, such as whether *Regents'* style arbitrariness review can force an agency to be more accountable to the public with respect to reasons behind the policy change.

Former President Trump's Migrant Protection Protocols (MPP) program was a discretionary immigration enforcement policy authorizing Customs and Border Patrol agents to require migrants to wait in the contiguous country of Mexico, rather than entering the United States, to pursue humanitarian protection in immigration court.⁹ Even though the Supreme Court overturned the Fifth Circuit Court of Appeals' ruling in the MPP case challenging Department of Homeland Security (DHS) Secretary Mayorkas's termination of MPP,¹⁰ the circuit court's misinterpretation of *Regents'* arbitrariness reasoning raises an important issue. Can "hard look" review¹¹ vis-à-vis *Regents'* incentivize accountability in agency decision-making without leading to ossification or abuse?

limiting agency ability to make or change policies); see also William S. Jordan, III, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability to Achieve Regulatory Goals Through Informal Rulemaking?*, 94 NW. U. L. REV. 393, 397 (2000) (explaining that what we know as "hard look review" came from the 1970s and early 1980s, the arbitrary and capricious standard of review, and is faulted for causing ossification); for other discussions of "ossification," see David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut*, 120 YALE L.J. 276, 284 (2010) and Richard J. Pierce, Jr., *Seven Ways To Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 60, 71–72 (1995) (examining the problem of ossification and suggesting remedies); see also Mark Seidenfeld, *Why Agencies Act: A Reassessment of the Ossification Critique of Judicial Review*, 70 OHIO ST. L.J. 251, 307 (2009) (taking the view that judicial review and ossification may be an important check on agency discretion).

8. See PAUL GOWDER, *THE RULE OF LAW IN THE REAL WORLD* (2016); Carrie L. Rosenbaum, *Anti-Democratic Immigration Law*, 97 DENV. L. REV. 797, 797–98 (2020) (examining "whether rule of law can facilitate challenging the racializing and subordinating function of immigration plenary power"); Hiroshi Motomura, *The President's Dilemma: Executive Authority, Enforcement, and the Rule of Law in Immigration Law*, 55 WASHBURN L.J. 1, 28–29 (2015).

9. Memorandum from Kirstjen M. Nielsen, Sec'y, Dep't of Homeland Sec. on Policy Guidance for Implementation of the Migrant Protection Protocols (Jan. 25, 2019) (available at https://www.dhs.gov/sites/default/files/publications/19_0129_OPA_migrant-protection-protocols-policy-guidance.pdf).

10. *Biden v. Texas*, 142 S. Ct. 2528, 2548 (2022).

11. For a discussion of the "hard look" review, see Harold Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509, 511 (1974) (noting that the expression is generally attributed to the 1970 appellate court case *Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied*, 430 U.S. 923 (1971)). "Hard look" has been described as the court's exercise of "its supervisory role" over agency action "with particular vigilance if it 'becomes aware, especially from a combination of danger signals, that the agency has not really taken a 'hard look' at the salient problems, and has not genuinely engaged in reasoned decisionmaking.'" *Id.* Leventhal also notes that "[t]he court does not make the ultimate decision, but it insists that the official or agency take a 'hard look' at all relevant factors." *Id.* at 514. See also Louis J. Virelli III, *Deconstructing Arbitrary and Capricious Review*, 92 N.C. L. REV. 721, 721 (2014) (describing "hard look" review as more than just "a legitimizing force in a political and legal environment that is increasingly hostile to administrative government" but also a "multidimensional expression of judicial deference" that can divide "administrative policymaking into its constituent parts, such as record building, reason giving, input scope and quality, and rationality" such that such review can be seen as "a collection of more particularized inquiries into specific components of agency decision making"); Aaron L. Nielson, *Sticky Regulations*, 85 U. CHI. L. REV. 85, 85 (2018) (favoring ossification for the

At the Fifth Circuit and the Supreme Court, the *Regents'* arbitrariness ruling heavily influenced the arbitrariness ruling in the MPP case. Both immigration agency decisions concerned discretionary immigration enforcement decisions—Deferred Action for Childhood Arrivals (DACA) pertained to noncitizens already in the United States seeking a temporary deferral of removal from the United States, and the MPP case involved noncitizens seeking humanitarian relief at the U.S. border.¹² The implementation and termination of both policies were highly controversial and politicized along party lines and received extensive media attention.¹³

President Obama, who was responsible for DACA, was also known for his border enforcement policies, which were criticized as either too restrictive and punitive, or too permissive.¹⁴ His Administration effectuated more removals, primarily at the border (as opposed to interior enforcement actions via Immigration and Customs Enforcement), than any other previous Administration.¹⁵ Subsequently, President Trump's Administration provided mixed messaging around immigration matters including but not limited to DACA.¹⁶ President Trump evinced an appeal to beneficiaries of DACA by stating an intent not to disturb it, then later indicating that his Administration was obligated to terminate it.¹⁷ At the

potential as “an overlooked, proregulatory benefit” to allow “agencies to promulgate ‘sticky regulations’” or “rules that cannot be changed quickly.”)

12. Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1901 (2020); *Biden v. Texas*, 142 S. Ct. at 2534–35.

13. See, e.g., Maria Sacchetti, Kevin Sieff, & Nick Miroff, *Federal Appeals Court Blocks President Trump's 'Remain in Mexico' Policy But Stays Its Own Ruling*, WASH. POST (Feb. 28, 2020, 12:55 PM), https://www.washingtonpost.com/immigration/trump-remain-in-mexico-halted-federal-court/2020/02/28/87bbf85e-e481-11e9-b403-f738899982d2_story.html; Michael D. Shear & Emily Cochrane, *Trump Says Administration Will Try Again to End 'Dreamers' Program*, N.Y. TIMES (June 19, 2020), <https://www.nytimes.com/2020/06/19/us/politics/trump-daca.html>.

14. See, e.g., Matthew Yglesias, *The Weird Controversy over Democrats "Criticizing Obama" at this Week's Debate, Explained*, VOX (Aug. 2, 2019, 3:30 PM), <https://www.vox.com/policy-and-politics/2019/8/2/20751676/democrats-debate-criticizing-obama-immigration>; Rebecca Kaplan, *Hillary Clinton Faults Obama for Aggressive Immigration Enforcement*, CBS NEWS (Oct. 6, 2015, 10:57 AM), <https://www.cbsnews.com/news/clinton-faults-obama-for-aggressive-immigration-enforcement/>; Muzaffar Chishti, Sarah Pierce, & Jessica Bolter, *The Obama Record on Deportations: Deporter in Chief or Not?*, MIGRATION POL'Y INST. (Jan. 26, 2017), <https://www.migrationpolicy.org/article/obama-record-deportations-deporter-chief-or-not>.

15. Bill Ong Hing, *Deporter-in-Chief: Obama v. Trump* (Univ. of S.F. Sch. of L. Research Paper, Paper No. 2019-03, 2018), (available at <https://ssrn.com/abstract=3254680>).

16. Times Editorial Board, *The Only Consistent Thing About Trump's Immigration Policy Is His Animus Toward Migrants*, L.A. TIMES (June 25, 2019, 3:05 AM), <https://www.latimes.com/opinion/editorials/la-ed-trump-families-migrants-deportations-20190625-story.html>; Robert Schlesinger, *Word Salad: A Theory on Trump's Immigration Incoherence*, U.S. NEWS (Aug. 26, 2016, 3:00 PM), <https://www.usnews.com/opinion/articles/2016-08-26/trump-is-incoherent-on-immigration-because-trump-is-incoherent?context=amp>; Steve Benen, *Trump's Line on Immigration Descends Deeper into Incoherence*, MSNBC (Apr. 3, 2018, 7:20 AM), <https://www.msnbc.com/rachel-maddow-show/trumps-line-immigration-descends-deeper-incoherence-msna1085971>; Editors, *Donald Trump's Amnesty*, NAT'L REV. (Aug. 10, 2015, 10:41 PM), <https://www.nationalreview.com/2015/08/donald-trump-immigration-amnesty-build-wall/>.

17. See Joel Rose, *6 Things to Know About Trump's Reversal on 'Dreamers'*, NPR (June 16, 2017, 4:38 PM), <https://www.npr.org/2017/06/16/533255575/trump-allows-dreamers-to-stay-removes-protections-for-parents>; Schlesinger, *supra* note 16.

same time, his immigration policies were, on the whole, more restrictive within the country and at the border.¹⁸

President Trump's immigration policies departed starkly from those of the Obama Administration. Policy changes restricting migration touched on a breadth and depth of immigration and naturalization law unseen in recent history, including a travel ban impacting people from predominantly Muslim-majority countries, policies restricting access to humanitarian protections like political asylum, termination or rescission of President Obama and prior Administration's programs like Temporary Protected Status (TPS) and DACA, as well as changes to the public charge ground of exclusion, which effectively decreased the likelihood that otherwise eligible noncitizens could obtain permanent resident status or a green card.¹⁹ Many of the policies were controversial and subsequently challenged in the courts. One of these policies was the MPP, also known as Remain in Mexico.²⁰ In the continuing void of congressional action on immigration law, the Obama and Trump Administrations used executive power to implement their distinct agendas.

The implementation and attempted termination of DACA and MPP resulted from an exercise of presidential executive power. The Obama and Trump Administrations' policy preferences and perspectives were carried out via informal, agency-level, discretionary immigration enforcement decisions.²¹ Those decisions concerned core principles like how the border should be policed and enforced; whether and which immigrants should have access to applications for humanitarian protections; and more generally, immigrants' value to the nation and how they fit into that Administration's conception of national identity and belonging.²²

From the standpoint of arbitrariness review and assessing the agency's reason-giving for a policy change, a policy like MPP can be examined by how many fewer immigrants enter the United States to pursue immigration relief. However, such superficially objective questions do not represent the multitude of implications of such a policy. Political

18. See Stuart Anderson, *A Review of Trump Immigration Policy*, FORBES (Aug. 26, 2020, 2:01 AM), <https://www.forbes.com/sites/stuartanderson/2020/08/26/fact-check-and-review-of-trump-immigration-policy/?sh=c13339756c07>.

19. See Jayashri Srikantiah & Shirin Sinnar, *White Nationalism as Immigration Policy*, 71 STAN. L. REV. ONLINE 197, 200–02, 202 n.30 (2019), <https://review.law.stanford.edu/wp-content/uploads/sites/3/2019/02/71-Stan.-L.-Rev.-Srikantiah-Sinnar.pdf>; Jessica Bolter, Emma Israel, & Sarah Pierce, *Four Years of Profound Change: Immigration Policy During the Trump Presidency*, MIGRATION POL'Y INST. 2–3 (2022), <https://www.migrationpolicy.org/research/four-years-change-immigration-trump>.

20. While Title 42 is another border enforcement policy implemented by the Trump Administration and rescinded by the Biden Administration, this Article will not explore that policy or litigation. One relevant difference for the purposes of this Article is that instead of DHS, the relevant agency in the Title 42 case is the Centers for Disease Control (CDC), and the MPP case reached the Supreme Court sooner and is likely to impact future adjudication of similar issues in immigration policy termination or rescission cases, including Title 42.

21. See Kevin R. Johnson, *Trump's Latinx Repatriation*, 66 UCLA L. REV. 1444, 1468–72 (2019).

22. *Id.* at 1472–74.

ideologies, values, and moral questions shape and are implicated by these kinds of broad discretionary immigration enforcement decisions. The *Regents* arbitrariness standard effectively requires agencies to be transparent about the substantive, political, or ideological reasons for a policy change.²³ The *Regents* brand of hard look review can foster rule of law principles by requiring agency transparency in reason-giving. However, the Fifth Circuit's unbridled expansion of *Regents* tells a cautionary tale. Hard look review can create a transparency trade-off. Hard look arbitrariness review may incentivize agency transparency while allowing the courts to improperly or implicitly weigh in on executive policies under the auspices of arbitrariness review.

I. THE DEFERRED ACTION FOR CHILDHOOD ARRIVALS AND MIGRANT PROTECTION PROTOCOLS LITIGATION

The Trump Administration's attempted termination of the DACA program and the Biden Administration's attempted termination of the MPP program are examples of the arbitrariness review problems outlined here concerning volatility, ossification, and the potential for accountability. Both cases concern one Administration's attempt at changing or ending a key component of a prior Administration's immigration policy agenda both in the absence of congressional action on immigration reform and in the midst of a fraught political climate.

A. Department of Homeland Security v. Regents of the University of California

When the Supreme Court decided the *Regents* case concerning the Trump Administration's rescission or termination of the DACA program, they avoided the substantive and more political questions regarding that agency action. Former President Obama's DHS Secretary exercised prosecutorial discretion to direct immigration authorities to defer instituting removal proceedings and allow applications for work authorization for certain noncitizens brought to the United States as children.²⁴ The DACA program was controversial. Critics contended that the policy exceeded agency and executive authority, should have followed the notice and comment process, and violated the President's duty under the Take Care Clause.²⁵ The Trump Administration, hewing to some of these critiques, stated that Congress should act, and in the meantime, his Administration

23. Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1911–12 (2020).

24. See *id.* at 1901–02 (providing an overview of DACA policy).

25. See, e.g., Shoba Sivaprasad Wadhia, *Response, In Defense of DACA, Deferred Action, and the DREAM Act*, 91 TEX. L. REV. 59, 59–62, 70 (2013) (responding to Robert J. Delahunty and John C. Yoo's critique that: "(1) [T]he President has a constitutional duty to execute the laws faithfully and has breached this duty by exercising deferred action for people who qualify under the Deferred Action for Childhood Arrivals (DACA) program; (2) presidential 'prerogative' is limited to actions that are related to national security in times of a war or related crisis and not to domestic immigration policy; (3) the Administration's implementation of DACA cannot be justified by any of the various 'defenses' or exceptions that allow a President to 'breach' his duty to execute the laws faithfully; and (4) Congress, not the Administration, has the power to regulate domestic immigration law.").

sought to end the DACA program.²⁶ The Trump DHS Secretaries' attempts to end DACA were subject to extensive litigation.²⁷ Ultimately, the *Regents* Court applied a particularly heightened form of arbitrariness review to invalidate the agency action on procedural grounds.²⁸

In *Regents*, the Court specifically considered the legality of the Trump Administration's termination of the Obama Administration's DACA program.²⁹ In 2012, DHS Secretary Janet Napolitano issued a memorandum exercising discretionary authority to defer commencement of removal proceedings for two years for undocumented persons, or "unauthorized aliens," who arrived in the United States as children and met specific criteria.³⁰ Such individuals were also entitled to apply for work authorization.³¹

In 2014, Texas and twenty-five other states sued in district court to challenge the legality of an Obama Administration policy intended to expand DACA and obtained a preliminary injunction that was then upheld by the Fifth Circuit.³² Once Donald J. Trump was elected President, his DHS Secretary, Elaine C. Duke, moved to terminate DACA via a rescission memorandum.³³ Several groups and organizations, including the Regents of the University of California, sued DHS. They alleged that the decision to rescind DACA was arbitrary and capricious pursuant to the APA. They also brought Equal Protection and Due Process challenges.³⁴

The United States District Court for the District of Columbia granted partial summary judgment on the APA claim, determining that the rescission was inadequately explained.³⁵ Accordingly, the district court issued a stay but permitted DHS to reissue a memorandum to rescind DACA with

26. Doina Chiacu & Chizu Nomiya, *Trump Tells Congress: 'Get Ready to Do Your Job—DACA!'*, REUTERS (Sept. 5, 2017, 6:28 AM), <https://www.reuters.com/article/us-usa-immigration-daca/trump-tells-congress-get-ready-to-do-your-job-daca-idUSKCN1BG1PS>; see also *President Donald J. Trump Restores Responsibility and the Rule of Law to Immigration*, WHITE HOUSE (Sept. 5, 2017), <https://trumpwhitehouse.archives.gov/briefings-statements/president-donald-j-trump-restores-responsibility-rule-law-immigration>.

27. See, e.g., *Regents*, 140 S. Ct. at 1891.

28. *Id.* at 1905, 1916.

29. *Id.* at 1901.

30. Memorandum from Janet Napolitano, Sec'y, Dep't of Homeland Sec. on Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012), <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

31. *Id.*

32. *Texas v. United States*, 86 F. Supp. 3d 591, 677 (S.D. Tex. 2015), *aff'd*, 809 F.3d 134 (5th Cir. 2015).

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

34. *Regents*, 140 S. Ct. at 1901–02.

35. *Id.*

an adequate explanation regarding its alleged unlawfulness.³⁶ Subsequent DHS Secretary, Kirstjen M. Nielsen, responded by leaving Secretary Duke's rescission decision in place and offered additional justifications for the decision to rescind.³⁷ The original justification for rescission was simply that DACA was illegal; it did not frame the decision as a discretionary immigration enforcement policy decision.³⁸ The second decision included more legal analysis supporting the claim that the program was illegal and added a new policy reason for rescission; namely, that there were "sound reasons of enforcement policy" for ending the program.³⁹

In setting forth the framework for arbitrariness review, the *Regents* Court articulated the requirement that the agency provide a reasoned explanation for the policy change, including consideration of reliance interests of stakeholders.⁴⁰ The Court also considered the agency's method of communicating the policy change, including the option of either elaborating on the initial reasons or taking new agency action.⁴¹

The *Regents* Court rejected Secretary Nielsen's revised justifications.⁴² It found, pursuant to *SEC v. Chenery Corp.*,⁴³ that the agency had offered a post hoc rationalization.⁴⁴ It held that the agency had to start a new policy process or issue a new decision with new reasons.⁴⁵ It found that course necessary to promote political accountability and provide the parties and public an opportunity to know and respond to the agency's decision and reasoning.⁴⁶ The Court emphasized that the dispute was about "the procedure the agency followed" in carrying out this action.⁴⁷

In holding that the agency's rescission failed because it was arbitrary and capricious, the Court found two main agency errors in the rescission efforts. The first was the failure to provide a reasoned explanation pursuant to the *State Farm*⁴⁸ decision, in part by failing to consider the possibility

36. *NAACP v. Trump*, 298 F. Supp. 3d 209, 245–46 (D.D.C. 2018), *adhered to on denial of reconsideration*, 315 F. Supp. 3d 457 (D.D.C. 2018), and *aff'd and remanded sub nom.* Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891 (2020).

37. *Regents*, 140 S. Ct. at 1896.

38. *Id.*

39. Memorandum from Kirstjen M. Nielsen, Sec'y, U.S. Dep't of Homeland Sec., (June 22, 2018) [hereinafter Nielsen Memorandum], https://www.dhs.gov/sites/default/files/publications/18_0622_S1_Memorandum_DACA.pdf.

40. *Regents*, 140 S. Ct. at 1901–02.

41. *Id.* at 1908.

42. *Id.* at 1904.

43. 332 U.S. 194 (1947).

44. *Regents*, 140 S. Ct. at 1908–09.

45. *Id.* at 1907–08.

46. *Id.* (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 201 (1947)) (noting D.C. Circuit precedent establishing that on remand, an agency can either amplify its original reasons or take new agency action that complies with the procedural requirements for new action).

47. *Id.* at 1905 ("The dispute before the Court is not whether DHS may rescind DACA. All parties agree that it may. The dispute is instead primarily about the procedure the agency followed in doing so.").

48. *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co. (State Farm)*, 463 U.S. 29 (1983).

of terminating the program in parts rather than in its entirety.⁴⁹ The second error was the issuance of a second memorandum elaborating on the reasons for the initial action and adding new ones instead of taking new agency action.⁵⁰ The Court held that these errors were impermissible post hoc rationalization.⁵¹

B. Biden v. Texas

President Trump's DHS Secretary sought to enact immigration policies in line with the Trump Administration's agenda.⁵² The MPP program was controversial and was one of many measures taken to restrict access to the U.S. border and admission to the country. This policy was unique (in a way that ultimately mattered to the Court) because it required diplomatic engagement and coordination with Mexico.⁵³ The MPP program permitted border agents to send certain migrants to Mexico instead of admitting them to the United States to pursue applications for humanitarian protections or other paths to lawful status.⁵⁴

The Remain in Mexico program was implemented on December 20, 2018, and announced by then-Secretary Nielsen in January 2019.⁵⁵ The program was intended to decrease the number of noncitizens entering the United States via the southern border in response to recent increases in people seeking humanitarian protections at the border.⁵⁶ For certain noncitizens encountered at the border who did not have visas or documentation entitling them to enter the United States or who officers determined possessed fraudulent documents, the MPP policy directed DHS immigration officers at the southern border to issue charging documents.⁵⁷ Some of those immigrants were then sent to Mexico to await court dates for hearings before an immigration judge to set forth claims for relief.⁵⁸ The Trump Administration relied on 8 U.S.C. § 1225(b)(2)(C) as support for this policy.⁵⁹ That statute allows immigration officials to "return" particular immigrants arriving at a port of entry to a country "contiguous" to the

49. *Regents*, 140 S. Ct. at 1913–14.

50. *Id.* at 1909 (citing *SEC v. Chenery Corp.*, 318 U.S. 80 (1943)). For an explanation of the relevant foundational arbitrariness concepts pursuant to the *State Farm* and *Chenery II* precedents, see *infra* Section II.

51. *Regents*, 140 S. Ct. at 1909. For an explanation of the relevant foundational arbitrariness concepts pursuant to the *State Farm* and *Chenery* precedents, see *infra* Section II.

52. See generally *Biden v. Texas*, 142 S. Ct. 2528, 2534 (2022).

53. *Id.* at 2532–33 (“[T]he foreign affairs consequences of mandating the exercise of contiguous-territory return likewise confirm that the Court of Appeals erred.”). The court also noted that, “interpreting section 1225(b)(2)(C) as a mandate . . . impose[s] a significant burden upon the Executive’s ability to conduct diplomatic relations with Mexico.” *Id.* at 2544.

54. Nielsen Memorandum, *supra* note 39.

55. Announcement by Kirstjen M. Nielsen, Sec’y of the Dep’t of Homeland Sec., on Historic Action to Confront Illegal Immigration (Dec. 20, 2018), <https://www.dhs.gov/news/2018/12/20/secretary-nielsen-announces-historic-action-confront-illegal-immigration>.

56. *Id.*

57. *Id.*

58. *Id.*

59. 8 U.S.C. § 1225; *Biden v. Texas*, 142 S. Ct. 2528, 2531 (2022) (noting that, in 2019 the government relied on 8 U.S.C. § 1225(b)(2)(C)).

United States (here, Mexico) to await a hearing before an immigration judge.⁶⁰ Those primarily impacted were noncitizens with potential claims for political asylum or those seeking humanitarian protection pursuant to international law.⁶¹

When implementing the MPP program, the agency relied on a statute that was a congressional response to a particular case. In 1996, the Board of Immigration Appeals ruled that the Immigration and Naturalization Service (INS) lacked the authority to discretionarily return noncitizens to Mexico.⁶² Following that decision, Congress added the contiguous-territory return provision to § 1225 to provide statutory support for immigration authorities' limited, prior practice of using its discretion to return some noncitizens to Mexico.⁶³ The legislative history indicated that the addition of the contiguous-return language to the statute was meant to codify power to return noncitizens to Mexico under limited circumstances and pursuant to an exercise of discretion.⁶⁴ Prior to the MPP program, § 1225(b)(2)(C) was used in an ad hoc manner, whereas MPP was intended to be "wide-scale,"⁶⁵ which made the program particularly controversial.

In response to a challenge to the policy, the government argued that § 1225(b) empowered DHS to exercise discretion to place noncitizens at the border either in: (1) expedited removal proceedings (resulting in either release into the interior of the United States or detention), or (2) regular removal proceedings.⁶⁶ The government argued that DHS could return individuals placed in regular removal proceedings to Mexico via the contiguous-territory return provision.⁶⁷ Ultimately, the Ninth Circuit Court of

60. *Innovation L. Lab v. McAleenan*, 924 F.3d 503, 508 (9th Cir. 2019); *In re Sanchez-Avila*, 21 I & N Dec. 444, 464 (B.I.A. 1996) (en banc). The statute was not designed for situations like the COVID pandemic and MPP but evolved out of one particular Board of Immigration Appeals case and there were no particular implications in the legislative history or otherwise that it was intended to be implemented as a major border control strategy.

61. *Innovation L. Lab*, 924 F.3d at 508.

62. *Sanchez-Avila*, 21 I & N Dec. at 464.

63. See *In re M-D-C-V-*, 28 I & N Dec. 18, 25–26 (B.I.A. 2020) ("In subsequently proposing the regulation at 8 C.F.R. § 235.3(d), the [Immigration and Naturalization Service] stated that 'an applicant for admission arriving at a land border port-of-entry and subject to a removal hearing under section 240 of the Act may be required to await the hearing in Canada or Mexico.'" (quoting Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 444, 445 (Jan. 3, 1997))).

64. See generally *Biden v. Texas*, 142 S. Ct. 2528, 2532–33 (2022).

65. Explanation of the Decision to Terminate the Migrant Protection Protocols by the Dep't of Homeland Sec. (Oct. 29, 2021), https://www.dhs.gov/sites/default/files/2022-01/21_1029_mpp-termination-justification-memo-508.pdf; 84 Fed. Reg. 6811, 6811 (Feb. 28, 2019). In addition to MPP, Title 42 was a means of preventing individuals from reaching the United States border to lawfully request humanitarian protection, but Title 42 was premised on COVID-related public health measures via the Centers for Disease Control and Prevention. See Andrea Castillo, *Asylum Seekers Face Decision to Split Up Families or Wait Indefinitely Under New Border Policy*, LA TIMES (Feb. 24, 2023, 2:20 PM), <https://www.latimes.com/politics/story/2023-02-24/asylum-seeking-families-consider-separation-shortage-mobile-app-appointments>.

66. Brief for Petitioner at 5, *Innovation L. Lab v. Wolf*, 951 F.3d 1073 (9th Cir. 2020) (No. 19-1212).

67. *Id.* at 19–20.

Appeals ruled in favor of the petitioners on the substantive claims, holding that the policy violated the Immigration and Nationality Act (INA).⁶⁸

As a part of the MPP program, on January 8, 2021, the state of Texas entered a Memorandum of Understanding (MOU) with DHS whereby Texas agreed to provide information and to assist DHS with respect to “its border security, legal immigration, immigration enforcement, and national security missions.”⁶⁹ In return, DHS agreed to consult with Texas and provide written notice of any proposed action “subject to the consultation requirement” within 180 days.⁷⁰ This federal immigration policy was unprecedented in that it included a specific agreement with certain states pertaining to implementation and execution of the MPP program.⁷¹ The district and circuit courts considered this separate agreement between DHS and Texas in their review of the arbitrariness challenge to the Biden Administration’s termination of MPP, specifically with respect to the reliance component of that analysis.⁷²

The MPP program did decrease the number of noncitizens given permission to enter the United States to seek relief from removal in immigration court. In the two-year period from January 2019 to January 2021, Trump Administration DHS officials removed about 70,000 asylum seekers to Mexico pursuant to the MPP program.⁷³ Human and civil rights organizations engaged in extensive and well-publicized litigation to end the program.⁷⁴ Following implementation of Title 42, pursuant to the Centers for Disease Control and Prevention as response to the COVID-19 pandemic, DHS shifted focus from use of MPP to Title 42 to decrease the number of noncitizens given permission to enter the United States.⁷⁵

Amid continued congressional gridlock over highly politicized immigration law, President Biden’s DHS Secretary, exercising executive authority over immigration law, sought to undo some of the prior Administration’s policies. On February 2, 2021, President Biden issued an

68. See Amy Howe, *Divided Court Allows Biden to End Trump’s “Remain in Mexico” Asylum Policy*, SCOTUSBLOG (June 30, 2022, 1:13 PM), <https://www.scotusblog.com/2022/06/divided-court-allows-biden-to-end-trumps-remain-in-mexico-asylum-policy/>.

69. Agreement between DHS and the State of Texas (Jan. 8, 2021), <https://thetexan.news/wp-content/uploads/2021/01/21-0020-FINAL-TEXAS-DHS-SAFE-MOU-1.8.2021.pdf>.

70. *Texas v. Biden*, 20 F. 4th 928, 944 (5th Cir. 2021) (quoting *Texas v. Biden*, 554 F. Supp. 3d 818, 835 (N.D. Tex. 2021)). The MOU indicated that DHS would consider input by Texas in good faith and “provide a detailed written explanation” if it did not. *Id.*

71. Peter Margulies, *The Courts Restore the ‘Remain in Mexico’ Program: An End to Judicial Deference?*, LAWFARE (Sept. 3, 2021, 8:01 AM), <https://www.lawfareblog.com/courts-restore-remain-mexico-program-end-judicial-deference#>.

72. See sources cited *infra* notes 92–123 and accompanying text.

73. *The “Migrant Protection Protocols”*, AM. IMMIGR. COUNCIL (Jan. 2022), [hereinafter *The Migrant Protection Protocols*], https://www.americanimmigrationcouncil.org/sites/default/files/research/the_migrant_protection_protocols_0.pdf.

74. See generally *Innovation L. Lab v. Wolf*, 951 F.3d 986 (9th Cir. 2020) (denying stay of the lower court’s injunction terminating the MPP program pending appeal); see also *Mayorkas v. Innovation L. Lab*, 141 S. Ct. 2842 (2021) (following termination of MPP, vacating as moot a preliminary injunction entered against MPP, now stayed pending review).

75. *The Migrant Protection Protocols*, *supra* note 73.

executive order directing DHS Secretary Mayorkas to “promptly review and determine whether to terminate or modify” the and to consider a “phased strategy” with respect to those already in the MPP program.⁷⁶ On June 1, 2021, the Secretary terminated MPP pursuant to a seven-page memorandum.⁷⁷ The policy reasons supporting his decision included agency personnel and resource constraints, preference for more humane and efficient alternatives to address irregular migration, and consideration of the program’s impact on U.S.–Mexico relations.⁷⁸ After litigation commenced, on October 29, 2021, the Secretary issued a second four-page memorandum terminating MPP.⁷⁹

After the Secretary sought to terminate former President Trump’s MPP program, the states of Texas and Missouri (the States) challenged the suspension of the MPP program in district court, alleging, *inter alia*, that the original June 1 memorandum explaining the termination decision violated the APA and 8 U.S.C. § 1225.⁸⁰ The district court, holding that the termination decision violated the APA and § 1225, vacated the termination decision and ordered DHS to re-implement the program.⁸¹ DHS appealed the district court decision to the Fifth Circuit and sought a stay of the district court’s injunction while the appeal was pending.⁸² The Fifth Circuit denied the motion.⁸³ After commencement of the appeal at the Fifth Circuit, DHS considered anew whether to “maintain[], terminate[], or modif[y]” the program and set forth new reasoning in the October 29 memorandum.⁸⁴

At the circuit court, the States contended that the district court decision concerning termination of MPP via the June 1 memorandum was correct and that the termination of MPP violated the APA because the agency’s decision was arbitrary and capricious.⁸⁵ The Government contended that the DHS Secretary’s decision satisfied the APA because the

76. Exec. Order No. 14010, 86 Fed. Reg. 8267, 8269 (Feb. 5, 2021).

77. See generally Memorandum from Alejandro N. Mayorkas, Sec’y, U.S. Dept. Homeland Sec. on Termination of the Migrant Protection Protocols Program to Troy A. Miller, Acting Comm’r, U.S. Customs & Border Prot., et al. (Jun. 1, 2021) [hereinafter June 1 Memorandum], https://www.dhs.gov/sites/default/files/publications/21_0601_termination_of_mpp_program.pdf.

78. *Id.*

79. See generally Memorandum from Alejandro N. Mayorkas, Sec’y, U.S. Dept. Homeland Sec. on Termination of the Migrant Protection Protocols to Tae D. Johnson, Acting Dir., U.S. Immigr. & Customs Enf’t, et al. (Oct. 29, 2021), [hereinafter October 29 Memorandum], https://www.dhs.gov/sites/default/files/2022-01/21_1029_mpp-termination-memo.pdf.

80. *Texas v. Biden*, 544 F. Supp. 3d 818, 828 (N.D. Tex. 2021).

81. *Id.* at 857–58.

82. *Texas v. Biden*, 10 F.4th 538, 543 (5th Cir. 2021), *as revised* (Dec. 21, 2021), *cert. granted*, 142 S. Ct. 1098, (2022), *rev’d and remanded*, 142 S. Ct. 2528 (2022).

83. *Id.*

84. October 29 Memorandum, *supra* note 79.

85. *Texas v. Biden*, 20 F.4th 928, 988 (5th Cir. 2021) (“First, was the Termination Decision arbitrary and capricious under the APA? Yes.”).

decision was sufficiently reasoned and was not a post hoc rationalization because it was new agency action pursuant to *Regents*.⁸⁶

Circuit Judge Andrew S. Oldham, writing for the Fifth Circuit, held that “[t]he Termination Decision was arbitrary and capricious under the APA.”⁸⁷ Further, the Fifth Circuit did not consider the subsequent, October 29 memorandum, holding that it had no legal effect because it was not a part of the record.⁸⁸ In setting up its APA analysis, the circuit court described the Trump Administration’s representation of the program’s purpose as “to ensure that certain aliens attempting to enter the U.S. illegally or without documentation . . . will no longer be released into the country, where they often fail to file an asylum application and/or disappear before an immigration judge can determine the merits of any claim.”⁸⁹ This framing referenced the States’ characterization of the facts.

The circuit court held that “DHS failed to consider several ‘relevant factors’ and ‘important aspect[s] of the problem’ when it made the Termination Decision.”⁹⁰ The circuit court focused on the issues related to the agency’s reasoning including: “(1) the States’ legitimate reliance interests, (2) MPP’s benefits [as articulated by the prior Administration’s DHS Secretary], (3) potential alternatives to MPP, and (4) the legal implications of terminating MPP.”⁹¹

The Supreme Court’s explanation of why the Trump-era DACA termination was arbitrary and capricious is critical to understanding both the Fifth Circuit’s analysis of DHS Secretary Mayorkas’s termination of the MPP program and the Supreme Court’s ruling on the MPP termination. In both cases, a new Administration’s DHS Secretary sought to rescind or terminate a prior DHS Secretary’s immigration policy.⁹² Additionally, both Secretaries issued a second memorandum after the first failed to achieve their intended policy change.⁹³ However, the method of effectuating the intended policy change was substantively different under each Administration. The parties in the MPP litigation disagreed about what *Regents* requires as far as the agency’s second attempt at terminating MPP, and the circuit court sided with Texas.⁹⁴

86. Brief for Appellants at 16–20, *Texas v. Biden*, 20 F.4th 928 (5th Cir. 2021) (No. 21-10806), 2021 WL 4445096, at *41–53.

87. *Texas v. Biden*, 20 F.4th 928, 942 (5th Cir. 2021).

88. *Id.* at 957 (thus, the court’s analysis focused on the June 1 memorandum).

89. *Id.* at 944 (quoting *Texas v. Biden*, 554 F. Supp. 3d 818, 832 (N.D. Tex. Aug. 13, 2021)).

90. *Id.* at 989 (quoting *Michigan v. EPA*, 576 U.S. 743, 750, 752 (2015)).

91. *Id.*

92. *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1903 (2020) (challenging the Trump Administration’s termination of the DACA program); *Biden v. Texas*, 142 S. Ct. 2528, 2535–37 (2022) (challenging the termination of the Biden Administration’s termination of the MPP program).

93. *Regents*, 140 S. Ct. at 1908; *Biden v. Texas*, 142 S. Ct. 2528, 2536–38 (2022).

94. *Texas v. Biden*, 20 F.4th 928, 989–91 (5th Cir. 2021).

Ultimately, in *Biden v. Texas*⁹⁵ the Supreme Court agreed with the Government and rejected the circuit court's representation of *Regents*' arbitrariness review, although it left consideration of the agency's reason-giving to another day.⁹⁶ The *Biden v. Texas* Court agreed with the Government in finding that the agency had followed the directive of the *Regents* Court with respect to providing reasoning that complied with the APA pursuant to *State Farm*; had engaged in new agency action, not post hoc rationalizations; and had provided substantive policy reasons for the change.⁹⁷ The Court's corrective action in refocusing arbitrariness review highlights the potential for hard look review to walk a fine line between holding agencies accountable for changing course with the inception of a new Administration and decreasing transparency in judicial decision-making.

In *Biden v. Texas*, the Fifth Circuit relied on *Regents* to emphasize that while the court must not substitute its own policy judgment for that of the agency when reviewing agency action pursuant to the arbitrary and capricious standard, review is "not toothless."⁹⁸ This implies there is space between the court substituting its own policy judgments for the agency and a more deferential review. Relying on *State Farm* and *Regents*, the Fifth Circuit stated that it could not consider "*post hoc* rationalizations" and that "[a]n agency must defend its actions based on the reasons it gave when it acted."⁹⁹

The circuit court emphasized that "it is a fundamental precept of administrative law that an administrative agency cannot make its decision first and explain it later."¹⁰⁰ The circuit faulted DHS for failing to include discussion of 8 U.S.C. § 1225 in the Termination Decision and then attempting to "cure those deficiencies by offering *post hoc* rationalizations" as the *Regents* Court determined was the error of DHS Secretary Duke concerning the DACA termination attempts.¹⁰¹ The circuit court held that the October 29 memorandum was not new agency action.¹⁰²

In addressing the States' APA arbitrary and capricious claim, the Fifth Circuit only considered the June 1 memorandum's reliance reasoning and stated that DHS "failed to address whether there was legitimate reliance" by the States.¹⁰³ On this basis, it deemed the June 1 memorandum

95. 142 S. Ct. 2528 (2022).

96. *Biden v. Texas*, 142 S. Ct. 2528, 2545–47 (2022).

97. *Id.*

98. *Texas v. Biden*, 20 F.4th 928, 989 (5th Cir. 2021); *Biden v. Texas*, 142 S. Ct. 2528, 2549 (2022) (Kavanaugh, J., concurring) (incorporating the "not toothless" language from the majority opinion).

99. *Texas v. Biden*, 20 F.4th 928, 989 (5th Cir. 2021) (quoting *Regents*, 140 S. Ct. at 1909).

100. *Id.* at 993 (quoting *Wages & White Lion Invs., L.L.C. v. U.S. Food & Drug Admin.*, 16 F.4th 1130, 1140 (5th Cir. 2021)).

101. *Id.*

102. *Id.* at 951.

103. *Id.* at 989 (quoting *Regents*, 140 S. Ct. at 1913).

arbitrary and capricious.¹⁰⁴ The Court held the Government lost on the question of the reliance interest alone, even though *Regents* did not indicate that arbitrariness could hinge solely on the agency's failure to consider DACA recipients' reliance interests.¹⁰⁵

In finding that the June 1 memorandum was arbitrary and capricious for failure to address the States' reliance on MPP, the circuit court focused on the unusual agreement between the Trump Administration's DHS and the States.¹⁰⁶ It reasoned that if DHS had to consider state reliance on DACA in assessing the termination of that program, pursuant to the *Regents* decision, DHS had to similarly consider the reliance interests of the States on MPP.¹⁰⁷ The court acknowledged the Government's argument that *Regents* indicated that reliance interests were "one factor to consider" but did not "categorically" hold that States' financial costs had to be considered in undertaking "all agency actions."¹⁰⁸ The Fifth Circuit also found that DHS failed to consider its own factual findings regarding the benefits of MPP.¹⁰⁹

In the Supreme Court's June 30, 2022 decision, Justice Roberts delivered the five–four opinion and was joined by Justices Breyer, Sotomayor, Kagan, and Kavanaugh, with Justices Alito and Barrett authoring dissents respectively joined by Justices Thomas and Gorsuch.¹¹⁰ The Court held that the rescission of MPP did not violate § 1225 of the INA because the statute authorizes discretionary authority to return noncitizens to Mexico and the use of the word "may" indicates discretion and not a mandate.¹¹¹ It also held that, with respect to the APA challenge, the October 29 memorandum was a new and reviewable "final agency action" pursuant to the *Regents* decision and contrary to the circuit court's ruling.¹¹²

The Court held that when the district court vacated the June 1 memorandum, pursuant to *Regents*, the DHS Secretary had two choices—either elaborate on its original reasoning or take new agency action—and the October 29 memorandum was new agency action with new reasons that had been absent from the first June 1 memorandum.¹¹³ The Court rejected the post hoc rationalization charge because the agency did not proceed with the first option specified by *Regents*.¹¹⁴ Instead, DHS Secretary Mayorkas chose the second route when he issued a new rescission, thus

104. *Texas v. Biden*, 20 F.4th 928, 990 (5th Cir. 2021) (citing *Regents*, 140 S. Ct. at 1913).

105. *Regents*, 140 S. Ct. at 1913–14.

106. *See Texas v. Biden*, 20 F.4th 928, 989–90 (5th Cir. 2021).

107. *Id.* at 990.

108. *Id.*

109. *Id.* at 991; Benjamin Eidelson, "Pay[ing] Our Precedents No Respect": *Why the DACA and Remain-in-Mexico Rescissions Are Worlds Apart*, YALE J. REGUL. (Sept. 2, 2021), <https://www.yalejreg.com/nc/paying-our-precedents-no-respect-why-the-daca-and-remain-in-mexico-rescissions-are-worlds-apart-by-benjamin-eidelson/> (analysis of how the two cases differ).

110. *Biden v. Texas*, 142 S. Ct. 2528, 2534 (2022).

111. *Id.* at 2532–33.

112. *Id.* at 2533.

113. *Id.*

114. *Id.*

returning “to the drawing table” and avoiding the fatal post hoc rationalization of the DHS in the *Regents* case.¹¹⁵

The Court also rejected the respondent’s contention that there was a mismatch between the Secretary’s rationale and the agency’s action.¹¹⁶ The Court stated that “the agency’s *ex ante* preference for terminating MPP—like any other feature of an administration’s policy agenda—should not be held against the October 29 Memoranda.”¹¹⁷ And, citing *Department of Commerce v. New York*¹¹⁸ and *State Farm*, it stated, “It is hardly improper for an agency head to come into office with policy preferences and ideas . . . and work with staff attorneys to substantiate the legal basis for a preferred policy.”¹¹⁹ The Court also quoted Justice Rehnquist’s concurrence (and dissent in part) in *State Farm* where he stated that “[a]s long as [an] agency remains within the bounds established by Congress, it is entitled to assess administrative records and evaluate priorities in light of the philosophy of the administration.”¹²⁰ In coming to this conclusion in support of the DHS Secretary’s lawful authority in issuing the October 29 memorandum to effectuate the Administration’s preferred policy, Justice Roberts indicated that the States’ “critique is particularly weak on these facts” because sufficient time had elapsed from the agency’s announcement of the intention to reconsider the Termination Decision and the agency action.¹²¹ Citing *Chenery II*, the Court indicated that the agency was not obliged to take different action or alter its Termination Decision.¹²² The Secretary’s reexamination and reaching the same result was lawful.¹²³

Ultimately, the Court concluded that the rescission of MPP did not violate the INA and that the October 29 memorandum constituted final agency action. The Court reversed the Fifth Circuit and remanded with instruction to the district court to “consider in the first instance whether the October 29 memoranda compl[ied] with Section 706 of the APA,” citing *State Farm*.¹²⁴ In effect, this decision punted on the question of the reasonableness of the agency action.

Aspects of the circuit court’s opinion may be a window into the erroneous arbitrariness reasoning corrected by the Supreme Court. With respect to addressing the agency’s factual findings as they pertain to the arbitrariness findings, in referencing the prior administration’s description of the MPP’s success, the circuit court noted that the program had been

115. *Id.*

116. *Biden v. Texas*, 142 S. Ct. 2528, 2533, 2546–47 (2022).

117. *Id.* at 2547.

118. 139 S. Ct. 2551 (2019).

119. *Biden v. Texas*, 142 S. Ct. 2528, 2533, 2547 (2022).

120. *Id.* (second alteration in original) (quoting *Motor Vehicle Mfrs. Ass’n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 59 (1983)).

121. *Id.*

122. *Id.*

123. *Id.*

124. *Biden v. Texas*, 142 S. Ct. 2528, 2533, 2548 (2022) (citing *State Farm*, 463 U.S. at 46–57).

responsible for the “voluntary” return home of “aliens *without meritorious claims*”¹²⁵ and eliminated the “perverse incentives” resulting from allowing noncitizens “with non-meritorious claims [to] remain in the country for lengthy periods of time.”¹²⁶ However, the conditions in Mexico were reportedly so dangerous that those who left, rather than awaiting their hearings, might not reasonably be considered to have left voluntarily.¹²⁷ This factual framing also elides the potentially meritorious claims of noncitizens that missed the opportunity to have their claims heard. The circuit court stated that the Biden DHS relied on contradictory factual findings, including that: (1) “MPP had mixed effectiveness in achieving several of its central goals,” and (2) “MPP does not adequately or substantially enhance border management in a cost-effective manner.”¹²⁸ The circuit court did not credit the agency’s policy reasons, which transparently and intentionally changed course from the prior administration, nor did it address the agency’s interpretation of factual findings. These aspects of the circuit court’s ruling may be indicative of the potential for arbitrariness review to mask judicial predilection. Even though the Supreme Court overturned the circuit court’s ruling, the district and circuit courts’ attempt at expanding *Regents*’ reasoning undermines the accountability-forcing potential of hard look review.

Although the Supreme Court corrected the Fifth Circuit’s erroneous application of the *Regents* arbitrariness standard, it largely declined to address the arbitrary and capricious question of whether the agency’s reason-giving was sufficient by remanding the case to the district court. The Court did however hold that DHS Secretary Mayorkas’s second October 29 memorandum terminating the MPP program was new agency action pursuant to the *Regents* arbitrariness standard.¹²⁹ The circuit court’s arbitrariness review asserted reliance on *Regents*, but as the Supreme Court ultimately held, its analysis was untethered to the actual guidance of the

125. *Texas v. Biden*, 20 F.4th 928, 991 (5th Cir. 2021) (emphasis added) (quoting *Texas v. Biden*, 554 F. Supp. 3d 818, 883 (N.D. Tex. 2021)).

126. *Id.* at 991 (alteration in original) (quoting *Texas v. Biden*, 554 F. Supp. 3d 818, 834 (N.D. Tex. 2021)).

127. See *The Migrant Protection Protocols*, *supra* note 73. (“Given these conditions, thousands of people subjected to MPP were unable to return to the border for a scheduled court hearing and were ordered deported for missing court. Some missed hearings because the danger and instability of the border region forced them to abandon their cases and go home. Others missed hearings because they were the victims of kidnapping or were prevented from attending because their court paperwork was stolen.”); see also *Any Version of “Remain in Mexico” Policy Would Be Unlawful, Inhumane, and Deadly*, HUM. RIGHTS FIRST (Sept. 2021), <https://humanrightsfirst.org/wp-content/uploads/2022/09/MPPUnlawfulInhumaneandDeadly.pdf>; Kevin Sieff, *They Missed Their U.S. Court Dates Because They Were Kidnapped. Now They’re Blocked from Applying for Asylum.*, WASH. POST (Apr. 24, 2021, 12:16 PM), <https://www.washingtonpost.com/world/2021/04/24/mexico-border-migrant-asylum-mpp/>.

128. *Texas v. Biden*, 20 F.4th 928, 991 (5th Cir. 2021). The author notes that whether these are fact-based differences or statements of a different policy preference underscore the importance of how courts address arbitrariness review and may be using assessment of reason-giving to invalidate a subjective policy objective by mischaracterizing it as a factual finding.

129. *Biden v. Texas*, 142 S. Ct. 2528, 2533, 2544 (2022) (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 201 (1947)).

Supreme Court in that decision.¹³⁰ Thus, the Supreme Court's treatment of the MPP rescission was corrective of the way in which *Chenery II* applies in the context of arbitrary and capricious review involving an agency rescission.

The political accountability-forcing potential of the *Regents* version of hard look review, both with respect to post hoc rationalizations and aspects of the reason-giving requirements accounting for an agency's¹³¹ political motives, has the potential to further accountability, transparency, and stability. But, in the MPP case, the Fifth Circuit determined that the Biden Administration's reason-giving or justification for terminating the program failed to pass muster under the arbitrariness standard, even though it comported with the mandate of *Regents*.¹³² The possibility for the *Regents*' arbitrariness analysis to be misused to stymie a new Administration's ability to change course raises red flags that implicate the field of administrative law more broadly and supports the critique that hard look arbitrariness review can lead to ossification.

II. ARBITRARY AND CAPRICIOUS REVIEW

The APA provides procedural requirements and criteria for agency action. Pursuant to § 706 of the APA,¹³³ which establishes the scope of review of agency action, courts review agency exercises of discretion, like the DHS decisions concerning creation and termination of DACA and the MPP programs, pursuant to the "arbitrary, capricious, abuse of discretion" standard.¹³⁴ They examine whether the agency's determination is rational based on particular factors and statutory authority delegated to the agency.¹³⁵

The APA, put simply, requires agencies to make policy in a manner that is not arbitrary and capricious.¹³⁶ Courts have historically engaged in an arbitrariness review that is either more deferential to the agency or more searching and rigorous.¹³⁷ Hard look review suggests that the court requires evidence that the agency has taken a hard look at their policy decision.¹³⁸ It can be understood as a heightened form of rationality review of

130. See *id.* at 2545–46.

131. I refer interchangeably to the "executive branch" and "agencies" because my primary focus is on the DHS, an executive-branch agency. The argument does not contemplate application to independent agencies.

132. Biden v. Texas, 142 S. Ct. 2528, 2544 (2022).

133. 5 U.S.C. § 706 (2022).

134. *Judicial Review of Agency Action*, ADMIN. CONF. OF THE U.S. (May 25, 2022), https://sourcebook.acus.gov/index.php?title=Judicial_Review_of_Agency_Action&oldid=1550%22.

135. *Id.*

136. See 5 U.S.C. § 706(2)(A) (2022).

137. Virelli, *supra* note 11, at 728.

138. See generally Matthew Warren, *Active Judging: Judicial Philosophy and the Development of the Hard Look Doctrine in the D.C. Circuit*, 90 GEO. L.J. 2599, 2601 (2002) (discussing the development of hard look review); see also sources cited *supra* note 11 and accompanying text (defining hard look review); see also Watts, *supra* note 7, at 5; see generally *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984) (while not the subject of this Article, *Chevron* deference involves the court deferring to an agency's reasonable interpretation of ambiguous statutory language).

agency reasoning processes related to policy decisions.¹³⁹ The APA did not establish hard look review—it evolved in the Court’s jurisprudence and was particularly solidified in the *State Farm* decision.¹⁴⁰

In the 1960s and 1970s, the courts issued decisions¹⁴¹ with reasoning suggestive of what would become known as hard look arbitrary and capricious review, as the courts asked agencies to prove they took a hard look at their own policy and factual assertions or justifications for their policy decisions.¹⁴² Judge Harold Leventhal argued in 1974, well before the *State Farm* decision, that in the case of *Citizens to Preserve Overton Park v. Volpe*,¹⁴³ the Court articulated its role as insisting that the agency take a hard look at relevant factors.¹⁴⁴ Notably, the Court took an even harder look there because of the “paramount importance” of the government’s role in protecting the environment.¹⁴⁵

Hard look review is the iteration of arbitrariness review that was relevant in the *Regents* decision and was then used in the MPP case. The origins and contours of hard look review begin with the *State Farm* decision.¹⁴⁶ The Court’s 1983 decision in *State Farm* enshrined the hard look review doctrine and more clearly defined it.¹⁴⁷ The *State Farm* decision involved a regulation issued by the Carter Administration requiring automobile manufacturers to add one of three new “passive restraints” to all new cars after the National Highway Traffic Safety Administration (NHTSA) determined the new rule would increase seat belt usage, which justified increased costs to manufacturers.¹⁴⁸ Subsequently, the Reagan Administration NHTSA repealed the regulation.¹⁴⁹ The Court struck down the repeal as arbitrary and capricious, describing the agency’s reasoning as inadequate because it relied on unsupported conclusions.¹⁵⁰

In setting forth what have been conceptualized as substantive and procedural requirements for assessing arbitrariness, the *State Farm* Court engaged in analysis of the agency’s reason-giving, including substantive

139. Richard W. Murphy, *The Limits of Legislative Control Over the “Hard-Look”*, 56 ADMIN. L. REV. 1125, 1126 (2004).

140. Warren, *supra* note 138, at 2599–2600, 2631.

141. *See, e.g.*, *Ethyl Corp. v. EPA*, 541 F.2d 1, 35–36 (D.C. Cir. 1976) (en banc) (indicating that the court had a role in studying the record with respect to an agency’s reliance on technical or specialized information).

142. Leventhal, *supra* note 11, at 511, 514 (writing before the *State Farm* decision, that the “‘hard look’ concept [is] central to the rule of administrative law,” and means that while the court “does not make the ultimate decision . . . it insists that the official or agency take a ‘hard look’ at all relevant factors,” and describing the *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971), decision as an example but stating that there was “an even more stringent standard [used] . . . in environmental cases than is usually comprehended by the ‘hard look’ metaphor.”).

143. 401 U.S. 402 (1971).

144. Leventhal, *supra* note 11, at 512–13.

145. *Id.* at 514.

146. *See* Warren, *supra* note 138, at 2631.

147. *See generally* *Motor Vehicle Mfrs. Ass’n. of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

148. *Id.* at 35–39, 51–55.

149. *Id.* at 38.

150. *Id.* at 51–55.

consideration of the facts supporting the procedural reversal of the prior Administration's policy.¹⁵¹ In terms frequently cited since, the Court declared an agency action or decision to be arbitrary if it interpreted the action to reflect an agency's reliance on factors not intended by Congress; if the agency appeared to omit consideration of an important aspect of the problem; if the agency offered an explanation for its decision that ran counter to the evidence before the agency; or if the agency gave an explanation so implausible that it could not be ascribed to a difference in view or the result of agency expertise.¹⁵² Also considered a part of the hard look review assessment was the *State Farm* Court's conclusion that "courts may not accept appellate counsel's *post hoc* rationalizations for agency action."¹⁵³ Counsel for the agency had offered new reasons during the appellate process justifying the attempted policy change, but because those reasons were not initially provided by the agency, the Court deemed them *post hoc*.¹⁵⁴

The debates concerning hard look review are vast, and its application has not been consistent.¹⁵⁵ Professors Bijal Shah, Jacob Gersen, and Adrian Vermeule offer critiques of hard look review and its implications for the relationship between the administrative state and the judiciary relevant to understanding the DACA and MPP arbitrariness rulings.¹⁵⁶ Professor Shah is interested in the potential problem of "increasing judicial control over the administrative state" and separation of powers implications.¹⁵⁷ Shah contends that hard look review's emphasis on agency expertise may improve administrative adjudication¹⁵⁸ but cautions us not to underestimate the role of the judiciary by characterizing it as "administer[ing] the law."¹⁵⁹ She highlights the blurry boundaries between the courts moving from "administer[ing] . . . the role of custodian" to effectuating "agency compliance with law," or even sometimes, "assum[ing] administrative policymaking authority as deciders."¹⁶⁰ As the Court expands the scope of hard look review, it increasingly risks blurring the boundaries between judicial review and influencing policymaking authority.¹⁶¹

151. See Cass R. Sunstein, *Deregulation and the Hard-look Doctrine*, 1983 S. CT. REV. 177, 210 (1983) (contending that the *State Farm* ruling endorsed substantive consideration of the facts and supporting the procedural reversal of agency decisions in order to maintain efficient regulation).

152. *State Farm*, 463 U.S. at 46–47, 49–54, 56.

153. *Id.* at 50.

154. *Id.* at 49–50 (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)).

155. See Virelli, *supra* note 11, at 728. ("Since its adoption of hard look review, the Court has used relatively consistent language to describe its approach to reviewing agency policy decisions, but has in fact applied the concept of arbitrariness differently in a wide range of cases").

156. See generally Bijal Shah, *Judicial Administration*, 11 U.C. IRVINE L. REV. 1119, 1130–31 (2021); Jacob Gersen & Adrian Vermeule, *The Rationality Review*, 114 MICH L. REV. 1355, 1356 (2016).

157. Shah, *supra* note 156, at 1195.

158. Bijal Shah, *Interagency Transfers of Adjudication Authority*, 34 YALE J. REGUL. 279, 347–48 (2017) (footnotes omitted).

159. Shah, *supra* note 156, at 1195.

160. *Id.*

161. THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 2 (David Kairys ed., 3d ed. 1982) [hereinafter THE POLITICS OF LAW].

Professors Jacob Gersen and Adrian Vermeule argue in favor of “soft glance” rather than hard look review.¹⁶² They suggest that the *State Farm* decision does not expressly implicate the kind of hard look review it came to be known for and suggest that commentators suspicious of agency rule-making are to blame for “puff[ing] up *State Farm* into a synecdoche for hard look review,” thereby “contributing to a pervasive but latent culture of academic skepticism towards agency explanations and agency decisionmaking.”¹⁶³ They also highlight that agencies almost always win arbitrariness challenges at the Supreme Court (ninety-two percent of the cases between 1982 and 2016) across disciplines and do so with majority opinions by a diversity of judges like Justices Scalia, Rehnquist, Roberts, Souter, Stevens, Ginsburg, Thomas, White, Breyer, Powell, Kennedy, Blackmun, Alito, Kagan, and O’Connor.¹⁶⁴ Their primary argument is that rationality review should be (and in fact is) “thin” because, for good reasons, agencies are often forced to “depart from idealized first-order conceptions of administrative rationality” such that a thin approach is more realistic and pragmatic because it “describes the law in action” where decisions must be made under uncertainty.¹⁶⁵ Their hard look review assessment provides context for how and why the *Regents* decision was so anomalous, falling within the small percent of arbitrariness challenges an agency has lost since *State Farm*, as well as why the Fifth Circuit’s arbitrariness finding in the *Texas v. Biden*¹⁶⁶ case is similarly out of the norm.¹⁶⁷

Then-Professor Elena Kagan famously wrote about hard look review in an article on presidential administration where she proposed softening arbitrariness review.¹⁶⁸ Instead, she emphasized appreciation of the administrative state as “driven by experts,” recognizing how an agency’s relationship to the President suggests that if “the President has taken an active role” and “accepted responsibility for[] the” relevant agency decision, heightened review is not appropriate.¹⁶⁹ This view has been reflected in the majority of Supreme Court arbitrariness rulings and embraced by many scholars and commentators. Professor Cristina M. Rodríguez similarly embraces a view of “politics and politically driven decisionmaking” as an

162. Gersen & Vermeule, *supra* note 156, at 1361.

163. *Id.* at 1361, 1363 (claiming that the *State Farm* decision itself is narrow, but its symbolism has been inflated, although recognizing, via an immigration law case, that pursuant to the Court’s decision in *Judulang v. Holder*, 565 U.S. 42 (2011), “agencies have more latitude to select factors to explain or justify their decisions than has traditionally been taught” and that use of hard look review was “remarkably modest” and consistent with their interpretation of *State Farm*).

164. *Id.* at 1364.

165. *Id.* at 1355, 1357.

166. 20 F. 4th 928 (5th Cir. 2021).

167. *See Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1901 (2020); *see also Biden v. Texas*, 142 S. Ct. 2528, 2548 (2022).

168. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2380 (2001).

169. *Id.* at 2380. (“A revised doctrine would acknowledge and, indeed, promote an alternative vision centered on the political leadership and accountability provided by the President. This approach, similar to the one I have considered in discussing the *Chevron* doctrine, would relax the rigors of hard look review when demonstrable evidence shows that the President has taken an active role in, and by so doing has accepted responsibility for, the administrative decision in question.”).

appropriate justification for executive decision-making, referencing then-Justice Rehnquist's dissent in *State Farm*.¹⁷⁰ However, taken to the extreme, if policy changes ungrounded in the law or facts are sustainable because a new president is elected with the mandate to implement policy changes, we may question whether such a position fosters presidential dictatorship.¹⁷¹ Politically driven agency decision-making is hotly contested in administrative law debates and is generally considered distinguishable from technocratic decision-making.¹⁷²

There is ample controversy regarding what *State Farm* hard look mandates, if it mandates anything in particular, and its implications. The way that *State Farm* was relied on in *Regents* breaks somewhat new ground by employing hard look arbitrariness review potentially as a means of forcing political accountability.¹⁷³ But, as the MPP litigation demonstrates, the question may be less about the choice between hard or soft look review and rather how courts engage in arbitrariness review, regardless of the label.

State Farm and hard look review featured heavily in the *Regents* decision. The *Regents* Court found the Duke memorandum directing total rescission of DACA to be arbitrary and capricious because its analysis was incomplete—it failed to address the forbearance question or the issue of DHS exercising discretion to refrain from implementing removal proceedings, terminating them, or declining to execute a final order of removal.¹⁷⁴ In addressing the reasons for rescission, the majority held that the Secretary had failed to follow the instruction of the foundational *State Farm* decision¹⁷⁵ because she had not engaged in “reasoned analysis” regarding “alternative[s]” that might be possible “within the ambit of existing [policy].”¹⁷⁶

Specifically, DHS Secretary Duke failed to consider DACA's two pillars separately, the forbearance of removal and the benefit (a potential work permit), and did not consider the possibility of a forbearance-only policy.¹⁷⁷ In *State Farm*, the Court's arbitrariness finding largely hinged on the NHTSA's failure in its rescission to consider modifying an existing

170. Cristina M. Rodríguez, *The Supreme Court 2020 Term: Foreword: Regime Change*, 135 HARV. L. REV. 1, 107–08 (2021).

171. This idea originated from conversations with Mark Seidenfeld during the New Voices in Administrative Law AALS (Association of American Law Schools) session held in January 2023.

172. See sources cited *infra* notes 187–93 and accompanying text.

173. Benjamin Eidelson, *Reasoned Explanation and Political Accountability in the Roberts Court*, 130 YALE L.J. 1748, 1752–53 (2021).

174. *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1912 (2020) (noting “the DACA Memorandum could not be rescinded in full ‘without any consideration whatsoever’ of a forbearance-only policy” (quoting *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 51 (1983))).

175. *State Farm*, 463 U.S. at 51.

176. *Regents*, 140 S. Ct. at 1913 (alteration in original) (quoting *State Farm*, 463 U.S. at 42, 51).

177. *Id.* at 1912 (“[T]he DACA Memorandum could not be rescinded in full ‘without any consideration whatsoever’ of a forbearance-only policy.” (quoting *State Farm*, 463 U.S. at 51)).

policy with two components to eliminate just one.¹⁷⁸ The agency had not considered an airbags-only requirement, rather than rescinding the policy with respect to both airbags and nondetachable seatbelts.¹⁷⁹

Instead of considering a forbearance-only possibility (akin to the airbags-only option in *State Farm*), the Duke memorandum only addressed the alleged illegality of the authorization of public benefits and work authorization.¹⁸⁰ Because Secretary Duke failed to provide any reason for rescinding both the benefits component of DACA and the forbearance component, her decision was incompletely articulated and the total rescission violated the arbitrary and capricious standard.¹⁸¹ The Court emphasized that “the DACA Memorandum could not be rescinded in full ‘without any consideration whatsoever’ of a forbearance-only policy.”¹⁸²

The DACA Court emphasized that while the Attorney General needed to determine whether DACA was illegal, policy choices concerning such a finding were a matter for DHS.¹⁸³ The Court differentiated the problem of *how* the program was terminated with respect to the APA issue from the matter of DHS’s discretion to wind down the program more generally.¹⁸⁴ The Supreme Court determined that the DHS Secretary had discretion to decline to institute removal proceedings, to terminate them, or to decline to execute a final order of removal or deportation.¹⁸⁵ If Secretary Duke had therefore sufficiently explained reasons for rescinding both the forbearance and benefits components, the Court may have found that the decision was within the Secretary’s discretionary authority and properly executed for administrative law purposes.

Hard look arbitrariness review has the potential to serve an accountability-forcing role for agencies facilitating greater transparency when politics influences reason-giving. Some suggest that hard look arbitrariness review should inhibit politics as a role in agency policy change, while others contend that leads to ossification and interferes with legitimate changes in administrations. As may be the case in the MPP litigation before reaching the Supreme Court, arbitrariness review might have masked judicial predilection as much as or more than it obscured the role of politics in an agency’s decision-making.

Politics may legitimately influence a new administrative agency’s reversal of a prior administration’s policies. How courts engage in arbitrariness review of agency reason-giving can incentivize transparency around political influences, discourage such transparency, and even mask judicial

178. *State Farm*, 463 U.S. at 46.

179. *Id.* at 51. (“[T]he mandatory passive restraint rule may not be abandoned without any consideration whatsoever of an airbags-only requirement.”).

180. Duke Memorandum, *supra* note 33.

181. *Regents*, 140 S. Ct. at 1912.

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

183. *Id.* at 1910.

184. *Id.* at 1910–11.

185. *Id.*

predilection.¹⁸⁶ The Court can require agencies to identify the role of politics in new agency action. Arbitrariness review has the potential to force an executive and an agency to be more transparent about the policy reasons undergirding the change at the time the agency proposes the change. Yet when the Court evokes the hard look review standard in a way that incentivizes agency transparency and accountability, if its arbitrariness finding is opaque, policy invalidation on arbitrariness grounds has the potential to undermine transparency and rule of law principles. The circuit court opinion in the MPP case is a window into the possibility of a court misapplying or even abusing arbitrariness review.

The Court's arbitrariness findings in *Regents* and the Fifth Circuit's application of that analysis concern issues at the heart of arbitrariness review debates. Requiring explanation of policy or politically based reasoning may advance rule of law goals by fostering transparency and agency accountability. But the circuit court's push to expand arbitrariness review creates renewed concern about the role of arbitrariness in masking judicial predilection.¹⁸⁷

III. ARBITRARINESS REVIEW: ACCOUNTABILITY FORCING OR OSSIFYING?

The *Regents* case, and more specifically, the MPP case demonstrate the tensions between arbitrariness review that results in ossification, preventing new Administrations from carrying out legitimate policy agendas via an executive agency, and the opposite potential for volatility. Ossification is effectively anti-democratic if it means that elected officials cannot keep their promises to voters because courts stop them from adopting new policies. Volatility can result where arbitrariness review fails to hold agencies accountable for sufficient reason-giving and policy change comes without a check. In the absence of congressional action on immigration law, volatility has been endemic to immigration law. Within the past few Administrations, the executive policy pendulum has swung, albeit modestly, between a more hardened-border approach to a slightly more humanitarian approach. Within these two problems, volatility and ossification, lies the possibility of arbitrariness review serving as an accountability-forcing tool, so long as it does not fall victim to the same insufficient reasoning that results in transparency problems, like obscuring judicial predilection. If courts require agencies to provide transparent and

186. Within discussions of administrative agency consideration of "politics," where courts require an agency to be transparent about the role of politics in agency decision-making, political accountability can be fostered by allowing voters to connect an agency's decision with the relevant executive authority. See discussion *infra* Section III.C.

187. The problem of judicial predilection is implicated by how the judiciary exercises arbitrariness review and indicative of a problem distinct from the agency-accountability problem. See, e.g., THE POLITICS OF LAW, *supra* note 161, at 2; see also David Kairys, *Law and Politics*, 52 GEO. WASH. L. REV. 243, 244 (1984) (as an early Critical Legal Theorist, Kairys proposed "[t]he starting point of critical theory is that legal reasoning does not provide concrete, real answers to particular legal or social problems" and "[l]egal reasoning is not a method or process that leads reasonable, competent, and fair-minded people to particular results in particular cases").

substantive reason-giving, when such reasons are policy-based and influenced by the executive's agenda, the voters can theoretically channel their dissatisfaction or approval through electoral decisions.

The executive has outsized authority in immigration law and even more so when Congress fails to coalesce around comprehensive reform. As such, immigration policy has been highly volatile and shaped by the political party and occupant of the White House. The Biden Administration's decision to end the prior Administration's use of particular methods to manage irregular migration via the southern border generally matched President Biden's campaign and subsequent articulations of his immigration policy goals. He articulated a different set of values and intentions than his Republican predecessor. Former President Trump's immigration agenda aligned with his campaign and policy statements. Each President's immigration policies largely reflected their campaign statements and respective political parties.¹⁸⁸ When a court engages in arbitrariness review, it may consider the agency or Administration's representations of their policy objectives or philosophy as a part of the agency's reason-giving. Arbitrariness review of the role of politics in reason-giving following a change in Administrations can potentially foster accountability, lead to ossification, or allow the natural volatility that can accompany an Administration change. The MPP litigation tells this story, albeit with an ending that protects the potential for hard look review to hold an agency accountable without ossifying agency action.

A. Ossification or Volatility

Politics, a philosophy, a policy agenda, or an Administration's values can all shape agency decision-making, and in turn, be reviewed by courts in assessing whether sufficient reasons are given to justify the policy. Where a court engages in hard look review to scrutinize an agency's reason-giving, there can be a greater risk of stymying a new Administration's policy agenda, although this approach can decrease volatility from one Administration to the next. Such concerns arose in the *Regents* case and subsequently in the *Biden v. Texas* litigation. To the extent that the respective DHS Secretaries' reason-giving referenced the agency and the executive's philosophy or values, courts can consider those aspects of the agency's decision.

The *State Farm* and *FCC v. Fox Television Stations, Inc.*¹⁸⁹ decisions outline what a court reviews when assessing politics or policy in an agency's reason-giving, including when an agency's policy changes from one Administration to the next. *State Farm* suggests "that agencies should explain their decisions in technocratic, statutory, or scientifically driven

188. While there are some notable similarities and exceptions, generally Republicans and Democrats have differed in recent years with Democrats favoring more immigrant-friendly approaches to immigration enforcement, and Republicans preferring a more exclusionary and restrictive approach to border enforcement.

189. 556 U.S. 502 (2009).

terms, not political terms,”¹⁹⁰ and where more objective factors are relevant, they should be the focus of the reason-giving.¹⁹¹ In the arbitrariness debates and key judicial opinions, “political terms” are considered the opposite of technocratic reasons for a policy change or a particular Administration’s political or ideological preferences.¹⁹² Then-Professor Elena Kagan described politically driven agency decisions as different from the *State Farm* case where the Court “demand[ed] that the agency justify its decision in neutral, expertise-laden terms to the fullest extent possible.”¹⁹³

The Court can “act[] as overseer, seeking to ensure that there is a balance of political and technocratic factors shaping administrative policymaking.”¹⁹⁴ The partial concurrence by Justices Rehnquist, Powell, and O’Connor in *State Farm* acknowledged the validity of an agency’s changed perspective resulting from the election of a new President.¹⁹⁵ The Court deemed the “philosophy of the administration” a reasonable basis for reassessing priorities.¹⁹⁶

The Court has also confirmed that the APA does not dictate “more searching review,” nor does the agency have to justify a policy change with reasons more substantial than the reasons for implementing the policy in the first place.¹⁹⁷ Like the *State Farm* case, the *Fox* ruling emphasized that the APA does not distinguish “between initial agency action and subsequent agency action undoing or revising” the prior agency’s action.¹⁹⁸ While the APA might require an agency to “show that there are good reasons for the new policy,” it need not demonstrate that the reasons “are

190. Shah, *supra* note 156, at 1156–57 (quoting Watts, *supra* note 7, at 5 (emphasis omitted)); see also Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 470–71 (1987) (“The disagreement [in *State Farm*] . . . stemmed from contrasting views about the proper role of politics in the regulatory process.”).

191. Shah, *supra* note 156, at 1156–57 (quoting Harold H. Bruff, *Presidential Power Meets Bureaucratic Expertise*, 12 U. PA. J. CONST. L. 461, 462 (2010)).

192. See JERRY L. MASHAW, THE STORY OF MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE U.S. v. STATE FARM MUTUAL AUTOMOBILE INSURANCE CO.: LAW, SCIENCE AND POLITICS IN THE ADMINISTRATIVE STATE, IN ADMINISTRATIVE LAW STORIES 334–35 (Peter L. Strauss ed., 2006) (explaining that in *State Farm*, “politics and ideology were required to take a backseat to administrative law’s demand for reasoned policy judgment”); CHRISTOPHER F. EDLEY, JR., ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY 183 (1990) (explaining *State Farm* as concerning “a conception of politics as distinguishable from and in opposition to the required rationality of agency decision making”); JERRY L. MASHAW & DAVID L. HARFST, THE STRUGGLE FOR AUTO SAFETY 226 (1990) (“[T]he submerged yet powerful message in the Supreme Court’s decision in *State Farm* [was] that the political directions of a particular administration are inadequate to justify regulatory policy”); Kevin M. Stack, *The President’s Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263, 307 n.191 (2006) (describing *State Farm* as “common contemporary shorthand for the requirement that agencies rationalize their decisions in terms of statutory criteria, and that a change of administration is not a sufficient basis for agency action”).

193. Kagan, *supra* note 168, at 2381.

194. Shah, *supra* note 156, at 1156.

195. *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 59 (1983) (noting a change in the Executive as the result of an election “is a perfectly reasonable basis for an executive agency’s reappraisal” of a program).

196. *Id.*

197. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514 (2009).

198. *Id.* at 515.

better than the reasons for the old one.”¹⁹⁹ Absent contradictory factual findings or serious reliance interests, an agency should indicate awareness of a prior policy, recognize the departure from it, and justify the change.²⁰⁰

Some iterations of hard look review can foster agency accountability via transparency about the role of politics in reason-giving. Where arbitrariness review pushes the boundaries of hard look review, it may tend towards stymying change and ossification. The *Regents* case walked the line between accountability and ossification, whereas the Fifth Circuit’s ruling in *Biden v. Texas* ventured closer to ossification. Some commentators support decreasing volatility and holding an agency to a higher burden in reason-giving, but the justifications for that perspective are less applicable in discretionary immigration enforcement decisions like the DACA and MPP cases.

The *Regents* Court and the Fifth Circuit’s consideration of the MPP termination used *State Farm*’s hard look review, focusing on the prior and new Administration’s reasons and reliance where the agency departed from a prior policy.²⁰¹ The Fifth Circuit’s hard look seemed to require a more detailed explanation and framed Secretary Mayorkas’s factual findings as contradictory to the prior Administration’s factual findings in support of implementing the MPP program. Likely recognizing the potential for ossification and inhibiting a new Administration’s agenda, in *Biden v. Texas*, Justice Roberts quoted the *Department of Commerce* and *State Farm* opinions asserting the propriety of an agency head “com[ing] into office with policy preferences and ideas,” particularly when the agency head’s action coincides with the rationale provided for that decision.²⁰²

B. Encouraging Regulatory Stability

Professors Livermore and Richardson advance a version of arbitrariness review that encourages regulatory stability over agency flexibility, perhaps beyond the accountability-forcing *Regents* style and likely with a preference for technocratic rather than policy-based reasons for a change.²⁰³ They caution that ideologically driven policy changes are “likely to become both more common and more destabilizing as partisan volatility exerts pressure on the administrative state”²⁰⁴ akin to what has arguably transpired with immigration policy over at least the past three Administrations. For Livermore and Richardson, the Court’s arbitrariness analysis could serve as a stop-gap measure to limit this instability by focusing on facts and not policy preferences, and the agency’s initial views

199. *Id.*

200. *See id.* at 515–16.

201. *See infra* Section III.C for a discussion of the arbitrariness review in the *Regents* and MPP cases with respect to the role of politics or a president’s influence in the policy change.

202. *Biden v. Texas*, 142 S. Ct. 2528, 2547 (2022) (quoting *Dep’t of Com. v. New York*, 139 S. Ct. 2551, 2574 (2019)).

203. Michael A. Livermore & Daniel Richardson, *Administrative Law in an Era of Partisan Volatility*, 69 EMORY L.J. 1, 59–60 (2019).

204. *Id.* at 58 (suggesting that the volatility began in the early 1990s).

could be given a strong presumption whereby “a failure to require a *factual* basis for the departure from prior policy” could subject the change to greater scrutiny to discourage “elevat[ing] political responsiveness over independent expertise.”²⁰⁵

Along these lines, Livermore and Richardson embrace Justice Breyer’s *Fox* dissent, in part requiring the agency to explain *why* they changed course.²⁰⁶ They suggest that more explicitly requiring a harder look at policy reversals would align better with the Court’s potential role in decreasing the side effects of partisan volatility in agency rulemaking.²⁰⁷ Livermore and Richardson contend that “[g]reater scrutiny of reversals would mitigate the costs of political instability, leading to more incremental policymaking” and “a more forward-looking regulatory agenda.”²⁰⁸

The Livermore and Richardson approach, however, makes less sense in immigration law, particularly where political and values-laden decisions are sanctioned by electors who may vote for presidents based on their immigration policies and goals. Where partisan volatility is part of the current landscape and reflects the agenda of the president, which has shifted depending on which political party was in the White House, it might contravene democratic and rule of law principles to inhibit policy change that is based on something other than technocratic factors.²⁰⁹ If the Court embraced a Livermore and Richardson approach to arbitrariness review and used it consistently, new Administrations would be hard-pressed to carry out the agendas they communicated to the voting public. There would also be potential for this shape of hard look review to be used selectively, becoming arbitrary and a proxy for disapproval of the policy itself.

The kind of agency accountability and transparency that Livermore and Richardson favor ultimately may have manifested in the most practical form in *Regents*. The arbitrariness review in *Regents* inhibited volatility from one Administration to the next by preventing the Trump Administration from terminating DACA. The *Regents* Court’s arbitrariness finding subtly critiqued the agency’s unwillingness to articulate the termination of DACA as within the agency’s discretionary authority pursuant to executive policy preferences.²¹⁰ However, the message of the *Regents* decision resonated with the Biden DHS Secretary who articulated a more

205. *Id.* at 60; *Fox*, 556 U.S. at 541 (Stevens, J., dissenting).

206. Livermore & Richardson, *supra* note 203, at 61. (“In brief, this position starts from a simple requirement: ‘To explain a change requires more than setting forth reasons why the new policy is a good one. It also requires the agency to answer the question, “Why did you change?”’ This inquiry is necessarily more demanding than review of the initial decision, written on a blank slate. Under this approach to arbitrary and capricious review, the costs of change must be addressed on their own terms.”).

207. *Id.* at 61.

208. *Id.* at 63.

209. Rodríguez, *supra* note 170, at 63.

210. *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1910–13 (2020).

forward-looking regulatory agenda, stating the reason for the changed course with respect to the MPP termination.²¹¹

Scholars like Professors Adam Cox and Christina Rodríguez argue for arbitrariness review that does not impede new Administrations from effectuating policy change—rather than worrying about volatility, their concern is ossification.²¹² Similarly, Kathryn Watts suggests that new Administrations should be able to carry out political or policy-based objectives via their Administrations²¹³ and that political influence on agency decision-making is appropriate and should be privileged though still examined via arbitrariness review.²¹⁴ Recognizing that the line between expert opinion and political reasons can be blurry, even when presidential preferences motivate policy change, transparency regarding those changes is necessary. And hard look review can incentivize that reason-giving.²¹⁵ There may be a middle ground, however, with respect to arbitrariness review incentivizing transparency about the role of politics in an agency’s reason-giving.

Professor Watts describes President Obama, following Presidents Bush and Clinton before him, as having “turn[ed] the regulatory state into an extension of his own political agenda” characterized by overt and covert control.²¹⁶ Her analysis extends to the Trump and Biden Administrations, particularly concerning immigration policy. Arbitrariness review can be useful in incentivizing an agency’s disclosure of presidential influences in policy changes, although Watts cautions that it should be used in combination with other means of facilitating executive transparency.²¹⁷

211. June 1 Memorandum, *supra* note 77.

212. *See, e.g.*, Rodríguez, *supra* note 170, at 104–05 (“These now inevitable, procedurally grounded lawsuits with a partisan tinge threaten to exacerbate an already prevalent risk aversion among policymakers that stifles policy development that would advance a larger political vision.”). *See also id.* at 106–07 (noting “[T]he expectation that the government rigorously explain changes in its policies to satisfy a rationalist standard relies in various ways on fictions that can inhibit policy change and thus the concrete realization of democratic politics. The insistence that evolution in government policy be reasoned or grounded in evidence elides one of the chief reasons a government changes course—the shift in political ideologies and values governing the extant regime.”).

213. Watts, *supra* note 7, at 2 (arguing “for expanding current conceptions of arbitrary and capricious review beyond a singular technocratic focus so that credit would also be awarded to certain political influences that an agency transparently discloses and relies upon in its rulemaking record”).

214. Kathryn A. Watts, *Controlling Presidential Control*, 114 MICH. L. REV. 683, 737–39 (2016) [hereinafter *Controlling Presidential Control*]; *but see* Shannon Roesler, *Agency Reasons at the Intersection of Expertise and Presidential Preferences*, 71 ADMIN. L. REV. 491, 497 (2019) (arguing that agency action pursuant to “presidential directive” implicates the need for more scrutiny rather than less and contending that the line-drawing between scientific reasons versus political ones is not objectively possible because politics inherently influences ostensibly neutral scientific view points).

215. Roesler, *supra* note 214, at 554 (arguing that “a contemporary model of agency decisionmaking must balance the reality of increased presidential influence against congressional mandates to protect public health and the environment”). Consequently, given the even more socially and politically contingent nature of defining the problems relevant to migration law and policy, presidential preference in the realm of immigration law might necessitate harder look review even more than in the sciences.

216. *Controlling Presidential Control*, *supra* note 214, at 685.

217. *Id.* at 738 (noting that “reconceptualization of arbitrary-and-capricious review should be coupled with an affirmative disclosure requirement and with a statutorily facing interpretive rule”).

Volatility may in fact result from changes in Administration where arbitrariness review follows the pre-*Regents* era trend of deferring to the agency when a new Administration results in policy change. In an atmosphere of continued congressional gridlock²¹⁸ and expanding presidential power, it is realistic to expect to see continued policy shifts from one Administration to the next, particularly in immigration law. If judicial review requires clarifying reason-giving such that political impetuses are expounded upon, an agency may have to be transparent about the political nature of a policy change and the president's role in influencing that change.

Even Richardson and Livermore might not agree with the Fifth Circuit's application of hard look review in the MPP case where the agency complied with the enhanced hard look review of *Regents*.²¹⁹ Arbitrariness review as a means of limiting volatility between Administrations cannot—and should not—prevent policy change where an agency abides by reason-giving requirements, even where that reasoning is informed by a new Administration's policy-based discretionary decision-making.²²⁰ The outcome in the *Regents* case minimized volatility in line with the agency accountability principle. Conversely, the Supreme Court's subsequent *Biden v. Texas* decision allowed for agency action in a way that avoided ossification while maintaining the potential for arbitrariness review to incentivize agency accountability.

C. Agency Accountability Forcing

Hard look review can be wielded in a manner that fosters or forces agency accountability without stymying new Administrations from implementing policy changes, even if the result may reflect the greater political volatility of the prevailing political atmosphere. Professor Benjamin Eidelson contends, albeit with cautious optimism, that the Court's arbitrariness review in *Regents* took on an accountability-forcing role in requiring transparency in the agency's reason-giving with respect to the role of politics.²²¹ The *Regents* arbitrariness ruling suggests a heightened role for the Court in policing an agency's politically influenced policy changes.²²² The Fifth Circuit's ruling in the MPP case distorted the accountability-forcing potential of *Regents*, but the Supreme Court's ultimate decision left

218. See Abbe R. Gluck, Anne Joseph O'Connell, & Rosa Po, *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789, 1828–30 (2015) (gridlock in the legislative process can lead to work-around practices in the agencies).

219. The circuit court's lack of principled approach to hard look review, rather than the outcome, is likely what Richardson and Livermore would disfavor.

220. With the potential limited exception of certain immigration policy changes that implicate liberty, humanitarian, or other interests of vulnerable or marginalized persons. See discussion *infra* Conclusion.

221. Eidelson, *supra* note 173, at 1757–58.

222. *Id.* at 1825–26; Shah, *supra* note 156, at 1158 (“As Ben Eidelson notes, the Court’s refusal to accept post hoc rationalization is a ‘turn toward an accountability-forcing brand of arbitrariness review’—and that too, one the Court makes despite the accountability ostensibly fostered by the President’s interest in the rescission of the DACA program.” (quoting Eidelson, *supra* note 173, at 1797)).

Regents hard look review in place, incentivizing agency transparency around the role of politics and a president's agenda in decision-making.

Eidelson's central argument is that the Roberts Court's recent APA decisions using arbitrariness review to encourage the agency to be more transparent in its reason-giving penalized the agency (in *Regents*) for engaging in post hoc and buck-passing explanations.²²³ Eidelson optimistically proposed that "the reasoned explanation requirement" of the *Regents* (and the *Department of Commerce*) decision "can . . . ensure rationality and legality in the workings of the administrative state" and potentially "vindicate democratic, political checks on the executive branch."²²⁴ The political check is manifested in voters' ability to reelect the president responsible for the agency action. By requiring the agency to state the reasons for the policy change, the agency could be incentivized to engage in more transparent practices that account for the role of politics in the decision-making process when the decision was made. If the agency is carrying out the executive's policies and can connect the policy change with the Administration, the voting public can either sanction the executive's actions in the next election or choose a new leader. If the agency is not forced to identify accurate policy-based reasons for the change, the public lacks the ability to hold the incumbent accountable. This kind of accountability-forcing pertains to the president when the president has shaped agency policy, as was the case both at the time of implementation and termination of the DACA and MPP policies. Eidelson cogently sees rule of law value in an agency having to provide policy-based reasons for a policy-based change.

When the Supreme Court invalidated two Trump Administration executive branch initiatives, the DACA termination and the addition of a citizenship question to the census in *Department of Commerce*, Eidelson argued that the Roberts Court was intent on pushing the Trump Administration into the "political thicket" by using arbitrariness review to hold the executive accountable.²²⁵ The *Regents* decision created a novel application of arbitrariness review "as a safeguard of public or political accountability"²²⁶ that effectively prevented the Administration from being able to deflect accountability by avoiding true but politically unpopular reasoning for terminating DACA. The harder look review can potentially prevent an agency from offering more publicly digestible but less accurate reasons for this type of policy change.²²⁷ The *Regents* Court's arbitrariness review indirectly exposed and inhibited such deflection.

223. Eidelson, *supra* note 173, at 1748.

224. *Id.* at 1758.

225. *Id.* at 1748 (arguing that the Court's "use of arbitrariness review as a judicial backstop for political accountability" was "an important jurisprudential development . . .").

226. *Id.* at 1779 (describing the census case as also fitting within this reasoning).

227. *Id.* at 1800 (where the reason-giving for the DACA rescission read as "buck-passing explanation[s]" that allowed the agency to deflect political accountability).

While aspects of the Trump immigration agenda were transparently restrictionist,²²⁸ critics contended that the political context in which the Supreme Court took up the legality of DACA's rescission was shrouded in buck-passing or scapegoating.²²⁹ By and large, in spite of the anti-immigrant rhetoric surrounding his election strategy, and with some exceptions, the Trump Administration avoided responsibility for unpopular discretionary choices like the Travel Ban, the termination of Temporary Protected Status (TPS) for particular countries, and the addition of a citizenship question to the census.²³⁰ Eidelson contended that President Trump's DHS policy changes, particularly the DACA rescission, were conveyed in a manner "tempered by a belated, inconspicuous, and in-the-alternative proffer of discretionary grounds" for rescission.²³¹

There were two ways in which the Court appeared to want to hold the DHS Secretary accountable for the reason-giving related to the DACA rescission in this context of the Trump Administration's often inconsistent immigration enforcement agenda. The first was what the Court referred to as Secretary Duke's failure to "appreciate" her discretion, suggesting that

228. Britta Glennon, *Why the Trump Administration's Anti-Immigration Policies are the United States' Loss and the Rest of the World's Gain*, BROOKINGS (July 20, 2020), <https://www.brookings.edu/blog/up-front/2020/07/20/why-the-trump-administrations-anti-immigration-policies-are-the-united-states-loss-and-the-rest-of-the-worlds-gain/>; see Ted Hesson & Chris Kahn, *Trump Pushes Anti-Immigrant Message Even as Coronavirus Dominates Campaign*, REUTERS (Aug. 14, 2020, 4:03 AM), <https://www.reuters.com/article/us-usa-election-immigration-insight/trump-pushes-anti-immigrant-message-even-as-coronavirus-dominates-campaign-idUSKCN25A18W>; see also L. Darnell Weeden, *Using Rational Basis Review in an Establishment Clause Challenge to an Alleged Muslim Travel Ban Undermines Religious Liberty*, 18 CONN. PUB. INT. L.J. 165, 165 (2018) (noting "widespread public perception that President Trump's first travel ban, which he issued on January 27, 2017, was targeted at Muslims because of their religion and not about promoting national security"); Ramos v. Nielsen, 321 F. Supp. 3d 1083, 1131 (N.D. Cal. 2018) (in the context of Equal Protection litigation, "anti-immigrant, anti-Muslim comments made by President Trump").

229. Eidelson, *supra* note 173, at 1779.

230. See Dara Lind, *What Obama Did with Migrant Families vs. What Trump Is Doing*, VOX (June 21, 2018, 2:45 PM), <https://www.vox.com/2018/6/21/17488458/obama-immigration-policy-family-separation-border>; Adam Liptak & Michael D. Shear, *Trump's Travel Ban Is Upheld by Supreme Court*, N.Y. TIMES (June 26, 2018), <https://www.nytimes.com/2018/06/26/us/politics/supreme-court-trump-travel-ban.html>; Andrew Prokop, *Trump's Census Citizenship Question Fiasco, Explained*, VOX (July 11, 2019, 6:05 PM), <https://www.vox.com/2019/7/11/20689015/census-citizenship-question-trump-executive-order>. While some of President Trump's immigration policies received significant attention, like imprisoning children in border jails, prior presidents, e.g., President Obama, who used immigration jails to deter migration received more attention from the press when President Trump enacted similar policies, despite President Trump using immigration imprisonment more, and in slightly different ways than his predecessors.

231. Eidelson, *supra* note 173, at 1767; see also Memorandum from Chad F. Wolf, Acting Sec'y, Dep't of Homeland Sec. on Reconsideration of the June 15, 2012 Memorandum Entitled "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children to Mark Morgan, Senior Official Performing Duties of Comm'r, U.S. Customs & Border Prot., et al. (July 28, 2020), https://www.dhs.gov/sites/default/files/publications/20_0728_s1_daca-reconsideration-memo.pdf (indicating that Administration's relationship to the judiciary—even after the Court struck down the Trump Administration's DACA rescission, the agency that was charged with adjudicating DACA applications denounced the Court's ruling and refused to process new DACA applications); Jennifer Lee Koh, *Executive Defiance and the Deportation State*, 130 YALE L.J. 948, 951 (2021) ("United States Citizenship and Immigration Services (USCIS) refused to process new applications even prior to a July 28, 2020 memorandum from Acting Department of Homeland Security (DHS) Secretary Chad Wolf directing the agency to refuse to accept initial applications for DACA pending his 'full reconsideration of the DACA policy.'").

the Court would have preferred the agency expressly acknowledge the discretionary decision to terminate DACA as an exercise of agency immigration enforcement discretion.²³² If the Secretary had done that, the decision may have survived judicial review.²³³ In the MPP case, DHS Secretary Mayorkas did frame the decision to terminate MPP in terms of his discretionary authority to end the prior Administration's discretionary enforcement decision to erect the program.²³⁴ In *Regents*, the majority characterized the October 29 memorandum as a post hoc rationalization, which gave the parties and the public a chance to assess and respond fully to the agency's action.²³⁵ This accountability-forcing mechanism may have kept the agency and the executive accountable to the electorate via the judiciary.²³⁶ The Court's assessment of reason-giving may be of heightened importance where, even if the agency would have taken the same action regardless, the agency's reasoning included a disingenuous or erroneous ground for the decision that then distracted the public and undermined their ability "to respond fully and in a timely way to an agency's [actual] exercise of authority."²³⁷ Professor Eidelson argues that this emerging enforceability model of arbitrariness review indicates that the Court is interested in "ensuring robust political accountability . . . alongside (or perhaps ahead of) ensuring the substantive soundness or political neutrality of agency decisions."²³⁸

Not unlike Eidelson, Professor Mark Seidenfeld suggests that hard look review has a potential role in "facilitat[ing] proper operation of the political arena" and can do so "by requiring the agency to separate the empirical findings and predictions underlying its action from the value choices inherent in that action."²³⁹ But, Seidenfeld observes that while politics has a legitimate role in agency decision-making, "courts are ill-suited to evaluate the bona fides of value choices and hence of political influence."²⁴⁰ The Court's recent remand of the MPP case to consider the agency's reason-giving will again test his hypothesis.²⁴¹

Prior to the *Regents* decision where the Court used this harder look review, Professor Glen Staszewski contended that the arbitrary and capricious review was "consistent with the core principles of deliberative democratic theory" such that there is much to gain by the judiciary creating a

232. Eidelson, *supra* note 173, at 1777–78 (citing *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1896 (2020)).

233. Eidelson, *supra* note 173, at 1777–78.

234. Press Release, U.S. Dep't of Homeland Sec., DHS Issues a New Memo to Terminate MPP (Oct. 29, 2021), <https://www.dhs.gov/news/2021/10/29/dhs-issues-new-memo-terminate-mpp>.

235. Eidelson, *supra* note 173, at 1769 (citing *Regents*, 140 S. Ct. at 1909).

236. Eidelson, *supra* note 173, at 1759.

237. *Id.* at 1804 (alteration in original).

238. *Id.* at 1752.

239. Mark Seidenfeld, *The Irrelevance of Politics for Arbitrary and Capricious Review*, 90 WASH. UNIV. L. REV. 141, 160 (2012).

240. *Id.* at 159.

241. *Biden v. Texas*, 142 S. Ct. 2528, 2548 (2022) (instructing the district court to "consider in the first instance whether the October 29 Memoranda comply with section 706 of the APA.").

safe environment for political reasons to “play a larger and much more transparent role in agency decision making.”²⁴² Making more space for political reasons in agency decision-making could increase transparency, including the relationship between the agency “and public opinion or the philosophy and priorities of the existing political leadership,”²⁴³ and transparency regarding reliance on a president’s philosophy or agenda could increase democratic accountability.²⁴⁴ Professor Staszewski may agree with Eidelson that *Regents* sent the message to the agency that where a president’s agenda may have influenced the decision-making but was not conveyed in the reason-giving process, the policy can be invalidated as arbitrary and capricious.

Along the same lines, Professor Kathryn Watts proposed reconsidering arbitrary and capricious review to further political accountability via the judiciary by recognizing that when an agency reveals its political influences, transparent explication should be deemed valid reasons for a policy change.²⁴⁵ Watts also suggested that agencies may be less likely to manipulate scientific or technical data if they can instead provide political reasons for policy choices in appropriate situations.²⁴⁶ Her view is even more salient in the context of immigration law decision-making where a premium could be put on transparency around political reasons for policy choices given the lesser relevance of technical data.²⁴⁷ Two of the reasons she articulates for favoring this approach are relevant for the purposes of the *Regents* and MPP litigation and discretionary immigration enforcement policy change more generally. First, judicial consideration of the agency’s divulging the role of politics in policy changes would validate

242. Glen Staszewski, *Political Reasons, Deliberative Democracy, and Administrative Law*, 97 IOWA L. REV. 849, 897 (2012); see also Seidenfeld, *supra* note 239, at 197.

243. Staszewski, *supra* note 242, at 906.

244. *Id.* at 906–07 (“Moreover, when agencies expressly rely on legitimate political considerations, such as public opinion or the sitting President’s philosophy or priorities, to choose from among two or more roughly equal alternatives when the best course of action cannot be followed, democratic accountability is enhanced because other governmental officials and interested members of the public can better understand and evaluate the rationale for the agency’s decision.” (citing Watts, *supra* note 7, at 40–41)).

245. Watts, *supra* note 7, at 2.

246. *Id.* at 56 (explaining that “the inherent fuzziness of the line between impermissible and permissible political influences makes it possible that agencies could try to manipulate the line by spinning partisan or raw political decisions as somehow being driven by public values or policy choices”).

247. Staszewski, *supra* note 242, at 906–07, 911–912. Although Staszewski cautioned against arbitrariness review embracing a greater role for political reasons in agency decision-making, he also suggests “reforming administrative law” to “improve the transparency of the administrative process and allow agencies to incorporate political considerations into their decision making, consistent with the basic principles of deliberative democratic theory.” *Id.* at 849. Staszewski notes “several reasons to be wary of any reform proposal that would embrace a greater role for political reasons in agency decision making and . . . the best way of promoting agency legitimacy and deliberative democracy may be to retain the existing version of the arbitrary and capricious standard of judicial review.” *Id.* at 912. Additionally, Staszewski stated that “political reasons . . . play a larger and more transparent role in a decision making” because the underlying “political-control theories of administrative law are based on untenable conceptions of democracy and implausible empirical assumptions.” *Id.* at 911.

“the political control model of agency decisionmaking,”²⁴⁸ and second, it would “giv[e] politics a place” such that courts could defer to the agency, thereby softening the “ossification charge frequently” levied against arbitrary and capricious review.²⁴⁹

While the potential was there, and still may be, the Fifth Circuit’s MPP ruling illustrates the false start and the objections or risks that Eidelson and this Article outline with respect to promoting political accountability. The Fifth Circuit’s reliance on *Regents* for its arbitrariness holding was misplaced, as validated by the Supreme Court, because DHS Secretary Mayorkas’s memoranda provided reasons that were detailed and consistent with Mayorkas’s Administration’s immigration policy agenda and indicated the Secretary’s discretionary authority to terminate the discretionary immigration enforcement program implemented by Mayorkas’s predecessor Administration’s DHS Secretary.

In comparing the arbitrariness review of the Trump Administration’s DACA rescission with the Biden DHS Secretary’s termination of the MPP program, the termination of the MPP program was consistent and transparent with respect to the President’s immigration agenda. Criticism of President Biden from his constituents has focused on the Biden Administration’s failure to adhere more diligently to Biden’s campaign promises of a humane immigration policy and, by border enforcement advocates, for not doing enough to stem the flow of migrants arriving at the border.²⁵⁰ President Trump’s termination of DACA aligned with Trump’s political campaign rhetoric and other immigration policy decisions but contradicted the official memoranda and policy statements.²⁵¹ DHS Secretary Mayorkas’s official communications concerning the termination stated the policy reasons for departing from the prior policy in the manner outlined by the

248. See Watts, *supra* note 7, at 84. The political control model of the administrative state is the theory that agency decisions should be made by politically accountable institutions such that agency decision-making is legitimized because decisions are made by agencies subject to political control because agency officials are appointed by elected officials. It also more simply stands for the notion that agency decisions are inherently political. The President, as the head of the administrative state is the ultimate elected official responsible (indirectly) for political agency decisions. See *id.* at 35–39.

249. *Id.* at 84.

250. See, e.g., Julia Neusner & Kennji Kizuka, “Illegal and Inhumane”: Biden Administration Continues Embrace of Trump Title 42 Policy as Attacks on People Seeking Refuge Mount, HUM. RTS. FIRST (Oct. 21, 2022), <https://humanrightsfirst.org/library/illegal-and-inhumane-biden-administration-continues-embrace-of-trump-title-42-policy-as-attacks-on-people-seeking-refuge-mount/>; Shawna Mizelle, *Congressional Democrats Call on Biden to Review ‘Disparate and Often Inhumane Treatment’ of Black Migrants*, CNN (Feb. 17, 2022, 6:53 PM), <https://www.cnn.com/2022/02/17/politics/democrats-letter-biden-black-migrant-treatment-title-42/index.html>; Nana Gyamfi, *U.S. Policies Are Unfair to Haitian Asylum Seekers*, BLOOMBERG L. (Oct. 7, 2021, 2:01 AM), <https://news.bloomberglaw.com/immigration/u-s-policies-are-unfair-to-haitian-asylum-seekers>.

251. Times Editorial Board, *supra* note 16. One of the challenges with the Trump Administration’s agenda was that it was often internally inconsistent and rhetoric and actual policy were hard to decipher. The travel ban litigation was an example of the Administration disclaiming its own rhetoric when tested about the intentions behind an immigration policy.

Regents Court.²⁵² Secretary Mayorkas specifically chose the path of new agency action, provided a policy-based rationale for the departure from prior policy, and articulated the ways in which it aligned with the President's immigration policy.²⁵³

As the Supreme Court held, the Fifth Circuit's use of hard look arbitrariness review to characterize Secretary Mayorkas's second October 29 memorandum as a post hoc rationalization was a misinterpretation of *Regents'* decision.²⁵⁴ DHS Secretary Mayorkas's second October 29 memorandum was not a post hoc rationalization because Secretary Mayorkas followed the edict of the *Regents* Court and took new agency action, or the second path, rather than the first avenue of bolstering the original decision.²⁵⁵ While *Regents* opened the door for the Court to ratchet up hard look review in the name of accountability, if courts distort the analysis to invalidate policy changes, the accountability-forcing benefits are eliminated.

While arbitrariness review could foster political accountability, it may be hard to gauge in practice. Voters could choose not to reelect a president if they disagreed with their agencies' policies. However, measuring public satisfaction or dissatisfaction with any individual policy of a president's agencies is difficult. There still may be rule of law advantages

252. *Biden v. Texas*, 142 S. Ct. 2528, 2537 (2022) (stating that the Secretary "concluded . . . that the program's 'benefits do not justify the costs, particularly given the way in which MPP detracts from other regional and domestic goals, foreign-policy objectives, and domestic policy initiatives that better align with this Administration's values.'") (quoting the October 29 Memorandum).

253. October 29 Memorandum, *supra* note 79.

254. *Biden v. Texas*, 142 S. Ct. 2528, 2545–46 (2022) (holding that "*Regents* involved the exact opposite situation from this one"). The Court further reasoned that, by contrast as noted above, the Secretary here chose the second option from *Regents*, and:

"[D]eal[t] with the problem afresh' by taking *new* agency action." That second option can be more procedurally onerous than the first—the agency "must comply with the procedural requirements for new agency action"—but the benefit is that the agency is "not limited to its prior reasons" in justifying its decision. Indeed, the entire purpose of the October 29 Memoranda was for the Secretary to "issue a new rescission bolstered by new reasons absent from the [June 1] Memorandum,"—reasons that he hoped would answer the District Court's concerns from the first go-round. Having returned to the drawing table and taken new action, therefore, the Secretary was not subject to the charge of *post hoc* rationalization.

Id. at 2546 (quoting *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1908 (2020)).

255. *Biden v. Texas*, 142 S. Ct. 2528, 2544 (2022) ("As we explained two Terms ago in *Department of Homeland Security v. Regents of Univ. of Cal.*, upon finding that the grounds for agency action are inadequate, 'a court may remand for the agency to do one of two things. First, the agency can offer "a fuller explanation of the agency's reasoning at the time of the agency action.'" If it chooses this route, 'the agency may elaborate' on its initial reasons for taking the action, 'but may not provide new ones.' Alternatively, 'the agency can "deal with the problem afresh" by taking new agency action. An agency taking this route is not limited to its prior reasons.' Here, perhaps in light of this Court's previous determination . . . the Secretary selected the second option from *Regents*: He accepted the District Court's vacatur and dealt with the problem afresh. The October 29 Memoranda made that clear 'by its own terms,' in which the Secretary stated: 'I am hereby terminating MPP. . . . And consistent with that approach, the October 29 Memoranda offered several 'new reasons absent from' the June 1 Memorandum.'" (citations omitted).

to transparency with respect to the relationship between a president's political agenda and agency policymaking. Allowing voters to be able to trace agency decision-making to an elected official still allows for the possibility of political accountability.²⁵⁶

In *Regents*, the Court penalized the agency for failing to express its reason-giving for a policy change adequately by finding the policy change to fail the arbitrariness test.²⁵⁷ The ultimate result was that the Trump Administration's DHS Secretaries could not effectuate a policy change that could be traced back to the executive. The Court's role in using arbitrariness review for political accountability could make sense in light of the expansion of the administrative state and executive power, in addition to the environment of congressional gridlock, the divisive political state, and the public perception of decreasing legitimacy and trust in government.²⁵⁸ If bureaucrats like the DHS Secretary and other agency leaders have to be transparent about the role of politics in their decision-making, this kind of hard look review could increase accountability of otherwise important but unelected and insulated policymakers within the limitations of the critiques discussed here.²⁵⁹ However, if the judiciary is able to use arbitrariness review in a manner that masks politically influenced judicial predilection, the accountability-forcing gains may be lost. It is possible that if the Court neglects transparency in *its own reasoning* when examining the agencies, there may be a new and different transparency problem from a rule of law and liberal democracy standpoint.

In the *Regents* and *Biden v. Texas* cases, the reviewing courts parsed the agency's reason-giving. In the context of highly politicized immigration policy changes pursuant to new Administrations, there are advantages and disadvantages to following an approach that enables the continued expansion of presidential power that influences policy changes, or a path more in line with the Richardson and Livermore view, or somewhere in between, which may be what the Court did in *Regents* where it used a hard look to consider the agency's reasons for terminating a prior Administration's policy. The Fifth Circuit's misapplication, however, undermines the utility of the *Regents* hard look approach. The Supreme Court course-corrected and maintained the integrity of the *Regents* decision and its potential

256. Evan J. Criddle, *Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking*, 88 TEX. L. REV. 441, 457–62 (2010) (arguing that presidential elections are not necessarily reflective of predominantly shared voter preferences with respect to individual agency actions because of disconnects between agency actions and the electoral process). The unique question of accountability in the case of a policy that impacts a disenfranchised group like immigrants in the DACA and MPP cases will be explored below.

257. *Dep't of Homeland Sec. v. Regents of Univ. of Cal.*, 140 S. Ct. 1891, 1896 (2020).

258. See *Freedom in the World 2022: United States*, FREEDOM HOUSE (2022), <https://freedomhouse.org/country/united-states/freedom-world/2022> (rating the United States 83/100 and summarizing the state of freedom of expression and civil liberties as “in recent years its democratic institutions have suffered erosion, as reflected in rising political polarization and extremism, partisan pressure on the electoral process, bias and dysfunction in the criminal justice system, harmful policies on immigration and asylum seekers, and growing disparities in wealth, economic opportunity, and political influence.”).

259. Eidelson, *supra* note 173, at 1808–09.

to force agency accountability without stymieing agency action pursuant to a new Administration's policy agenda.²⁶⁰ As Professor Kevin Johnson declared of the Supreme Court's decision in the MPP case, that ruling "stands for the simple proposition that presidential elections matter when it comes to government policy" and so long as the "incumbent administration follows the rules—including rational deliberation of the policy choices in front of it—it can . . . change immigration policy."²⁶¹

D. Aggrandizing Judicial Power

Even if use of hard look review indirectly serves as an accountability-forcing tool, the APA does not expressly endorse this feature, nor is it clearly defined, rendering it susceptible to abuse. While appreciating the agency accountability-forcing potential of a *Regents* style hard look review, Professor Eidelson acknowledges that it "could be abused to further a judge's own political preferences or . . . aggrandize judicial power at the expense of the administrative state."²⁶² This concern is potent in the highly polarizing arena of executive and agency immigration action. Particularly with respect to departures from past practices, as Miles and Sunstein observed, the rise of hard look review was premised on the idea that the Court should have a role in "correcting agency errors and bias" and, while some touted it as a means of increasing agency accountability, others worried about disincentivizing rulemaking and creating a new path for judicial bias.²⁶³ An increased role for the courts to consider agency bias as a part of arbitrariness review came in part out of a reaction to the post-New Deal era.²⁶⁴ This shift evolved into the Court requiring agencies to provide detailed explanations and show that they had considered alternatives, particularly when justifying departures from prior practices.²⁶⁵ Whether the result of bias or just application of these principles, Professors Miles and Sunstein contend that hard look review has shaped policy.²⁶⁶ The courts' requirement that an agency take a hard look at their own policy decisions evolved into the courts themselves taking a hard look at the agency action

260. See *id.* at 1813–14; *Regents*, 140 S. Ct. at 1905, 1911–12.

261. Kevin Johnson, *Supreme Court's 'Remain in Mexico' Ruling Puts Immigration Policy in the Hands of Voters—As Long as Elected Presidents Follow the Rules*, THE CONVERSATION (June 30, 2022, 4:54 PM), <https://theconversation.com/supreme-courts-remain-in-mexico-ruling-puts-immigration-policy-in-the-hands-of-voters-as-long-as-elected-presidents-follow-the-rules-186016>.

262. Eidelson, *supra* note 173, at 1804–05 n.279 (citing David A. Strauss, *Does the Constitution Mean What It Says?*, 129 HARV. L. REV. 1, 61 (2015) (arguing that constitutional law has been subject to manipulation and abuse, as all law is)).

263. Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761, 810 (2008) (noting "in many cases, judges are voting to invalidate agency decisions as arbitrary when they would not do so if their own predilections were otherwise.").

264. *Id.* ("[T]he post-New Deal strengthening of substantial evidence review resulted from the Supreme Court's recognition of Congress's expression of a 'mood' in favor of a more aggressive approach from the courts.").

265. *Id.* at 771.

266. *Id.* at 814.

in the first instance.²⁶⁷ Critics of hard look review contend that it enables the judiciary to substitute its judgment for that of an agency in a way that undermines the functioning of the agency run by those with superior expertise over their domain.²⁶⁸ Others see the court as overstepping via hard look review by dictating policy decisions to the agency.²⁶⁹

Professors Miles and Sunstein conducted an empirical study to attempt to gauge whether Democratic- and Republican-appointed Justices' hard look review findings suggested a correlation between politics and arbitrariness findings pursuant to hard look review.²⁷⁰ Their study indicated that there was a correlation. They specifically selected EPA and NLRB published appellate rulings for a twenty-year period and concluded that there was a correlation between party affiliation and arbitrariness findings based on whether the agency policy action was liberal or conservative.²⁷¹ Regardless of whether a court applied a deferential standard or a hard look, the ideological influence and outcome was similar as far as Democratic and Republican appointees invalidating agency action by a conservative or liberal executive agency.²⁷² Thus, the Court's fidelity to a particular embodiment of arbitrariness review, whether hard look or more deferential, may not be of tantamount importance. What arbitrariness review hides may be more concerning to rule of law and transparency principles than which form of arbitrariness review is invoked.

It is also possible that concerns about accountability-forcing arbitrariness review masking a judge's political preferences may be overblown. It is generally understood that "inappropriately outcome-driven decisionmaking" is a part of judicial review and accountability-forcing arbitrariness review is not any more likely to be distorted or abused than any other doctrine.²⁷³ And arbitrariness review of immigration policy changes has not always followed the pattern observed by Miles and Sunstein. The arbitrariness finding and ultimate outcome in *Regents* is one example, and in recent years, APA claims have been more likely to yield favorable results for immigrants than substantive rights claims.²⁷⁴ Still, there is reason

267. *Id.* at 761–62, 62 n.2 (“[M]aintaining that a presumption of regularity does not protect an agency from ‘a thorough, probing, in-depth review[.]’”) (quoting *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971)).

268. Martin Shapiro, *Administrative Discretion: The Next Stage*, 92 YALE L.J. 1487, 1507 (1983).

269. Shah, *supra* note 156, at 1195 n.230; Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 558 (1985); Thomas O. McGarity, *The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 TEX. L. REV. 525, 549 (1997); Ronald A. Cass, *Massachusetts v. EPA: The Inconvenient Truth About Precedent*, 93 VA. L. REV. BRIEF 75, 75 (2007).

270. Miles & Sunstein, *supra* note 263, at 768.

271. *Id.* at 766–68.

272. *Id.* at 768.

273. Eidelson, *supra* note 173, at 1805 n.279.

274. See, e.g., Rodríguez, *supra* note 170, at 106 (“This strategic use of procedure to advance what are ultimately substantive goals that sound in equality and justice has become commonplace, not least because it may be the only tool certain litigants have to persuade courts unreceptive to the underlying substance.”); see also Carrie L. Rosenbaum, *(Un)equal Immigration Protection*, 50 SW. L. REV.

to be circumspect about arbitrariness review decreasing judicial transparency.²⁷⁵

Empirical scholarship suggests that extralegal factors, like the partisanship of the judge, can be at least one motivator in arbitrariness review. The Fifth Circuit's application of the arbitrariness reasoning of *Regents* suggests that hard look arbitrariness review is subject to distortion that could undermine accountability. Particularly when courts do not adhere to the application of arbitrariness review with fidelity to the underlying principles and precedential reasoning, arbitrariness review runs the risk of failing the political accountability-forcing feature of the agency, and at the same time, also undermining judicial accountability where opaque arbitrariness review masks the court's own political predilections.

Given the especially politicized and contentious nature of immigration policy and the increasing role of the courts in addressing arbitrariness challenges, a similar study may not yield different results, in spite of the Roberts Court's ruling in the census and DACA cases where conservative-majority Courts struck down a Republican-led agency's policies. Chief Justice Roberts's ultimate arbitrariness decision in *Regents* could be viewed as a means of ensuring procedural fairness.²⁷⁶ If that assessment is accurate, perhaps arbitrariness review can act as an accountability-forcing tool, although imperfectly and potentially with costs.

The only indicator of a court's arbitrariness finding masking judicial bias may be that the arbitrariness review reads as arbitrary based on the existing articulation of the arbitrariness standard. While in *Regents* the arbitrariness finding was understood by some to have gone too far with respect to taking a hard look at the agency's action and requiring too much

231, 260 (2021) [hereinafter (*Unequal Immigration Protection*)] (arguing that “[i]nstead of validating the substantive rights at issue and reckoning with racism, the Court continues to undermine equal protection rights by relegating remedy to procedural channels.”); Carrie L. Rosenbaum, *Systematic Racism and Immigration Detention*, 44 SEATTLE U. L. REV. 1125, 1127–28 (2021); Srikantiah & Sinar, *supra* note 19, at 207 (arguing that “[i]tigation can frame public understanding about the nature of a grievance and the definition of a cause. Whereas other legal challenges to immigration measures are often inscrutable to the public—like APA claims that DHS insufficiently explained a rule change . . . the equal protection claim articulates an intuitive harm and allows the public to grasp the stakes of a dispute.”); Jennifer M. Chacón, *The Inside-Out Constitution: Department of Commerce v. New York*, 2019 SUP. CT. REV. 231, 268–69 (2019) (explaining the significance of the problem of the Roberts Court's disinclination to grapple with substantive Equal Protection and instead invalidate policies on procedural grounds).

275. One only need reminder of the “shadow docket” to appreciate the concern about transparency in judicial decision-making. *See, e.g.*, Jennifer Lee Koh, *Removal in the Shadows of Immigration Court*, 90 S. CAL. L. REV. 181 (2017); Shoba Sivaprasad Wadhia, *The Rise of Speed Deportation and the Role of Discretion*, 5 COLUM. J. RACE & L. 1, 22 (2014); Jill E. Family, *A Broader View of the Immigration Adjudication Problem*, 23 GEO. IMMIGR. L.J. 595, 624–32 (2009).

276. Jody Freeman & Sharon Jacobs, *Structural Deregulation*, 135 HARV. L. REV. 585, 634 n.286 (2021) (describing *Dep't of Homeland Sec. v. Regents of Univ. Cal.*, 140 S. Ct. 1891, 1909 (2020), as “observing that the prohibition on consideration of post hoc agency reasoning serves important administrative law values including accountability and contemporaneous reason-giving”) (citing Kevin M. Stack, *An Administrative Jurisprudence: The Rule of Law in the Administrative State*, 115 COLUM. L. REV. 1985, 1987–89 (2015) (describing procedural fairness as relevant to rule of law requirements for administrative governance and judicial review)); *see also* Cass R. Sunstein & Adrian Vermeule, *The Morality of Administrative Law*, 131 HARV. L. REV. 1924, 1929 (2018).

fidelity to procedure or how the policy change was effectuated, perhaps a line can be drawn between *Regents*, deepening hard look review, and the Fifth Circuit's application of this standard.

The Fifth Circuit's interpretation of the *Regents* decision in the MPP litigation suggests that hard look review may increasingly be a vehicle for the Court to opaquely shape policy. The circuit court's ruling might raise questions regarding whether judges are voting to invalidate agency decisions as arbitrary based on policy or political predilections. Instead of considering whether arbitrariness review allows the courts to hold an agency politically accountable, it may be important to instead consider whether the courts are misusing hard look review to mask their substantive policy preferences. The Fifth Circuit's misapplication of *Regents* reads like an arbitrary application of arbitrariness review because the agency was transparent about its intention to exercise enforcement discretion. The Supreme Court's correction of the Fifth Circuit's error keeps this abuse of arbitrariness review in check. However, it is still cause for further consideration and is a specific concern in immigration policy matters. Given the persistent and deepening political polarity around immigration enforcement, it is hard to anticipate whether outcome-oriented reasons will distort harder look arbitrariness review, undermining the utility of arbitrariness review as accountability-forcing. The Court is not a monolith, and even in immigration enforcement, ideology and outcome are not always aligned.

With respect to judicial integrity and transparency, the courts could consider the agency's reason-giving as far as the role of politics but fail to indicate that they have done so, undermining the transparency and reasoned explanation intended by such review in the first place.²⁷⁷ If hard look review creates another avenue for political predilection, the goal of transparency and accountability are sacrificed. Perhaps hard look review to force political accountability only provides performative accountability.²⁷⁸ The *Regents* and MPP cases concern immigration policy, and it is possible that immigration law is in fact exceptional such that arbitrariness review could, or as a normative matter should, be treated differently.

CONCLUSION

While the volatile climate of immigration agency policy shifts absent congressional action and the nature of the class of persons impacted may be somewhat unique to immigration law, the post-*Regents* landscape for arbitrariness review has broader administrative law implications. Hard look review evinced the possibility of agency and executive

277. Eidelson, *supra* note 173, at 1810–11.

278. *Id.* at 1804–05. Such an account would follow the critiques of the limitations of disparate impact Equal Protection claims where proving invidious intent is illusive because of judicial blindness. See, e.g., Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779, 1784–88 (2012); Russell K. Robinson, *Unequal Protection*, 68 STAN. L. REV. 151, 172–73 (2016); Reva B. Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1139–46 (1997).

accountability-forcing pursuant to the *Regents* decision. However, the MPP litigation confirmed the potential for arbitrariness review to mask judicial bias, creating a transparency and rule of law problem. Thus, the *Regents* brand of accountability-forcing arbitrariness review is limited in its rule of law utility and comes with risks. Hard look arbitrariness review can be applied arbitrarily or in such a manner that it masks judicial bias concerning the substantive policy decisions.

Arbitrariness review of discretionary immigration enforcement suggests a related but different set of problems because of the liberty interests at stake, the historically marginalized status of immigrants, and the lack of robust constitutional remedies. Whether the right to remain in the country pursuant to DACA litigation or the right pursuant to federal and international law to seek humanitarian protection when arriving at the border, immigration policy often implicates a special kind of liberty interest. There is a normative claim to be made in favor of harder look arbitrariness review where an Administration seeks to change a prior Administration's policy or implement a new policy that disfavors a historically marginalized group. This asymmetric review is justified by the potential for arbitrariness review to be tainted by the same transparency and accountability-forcing problem it tempered in *Regents*, the outsized role of the executive in immigration law, and the historic marginalization of particularly vulnerable immigrant groups. Ultimately, the contours of arbitrariness review will be shaped by each subsequent judicial opinion, and while arbitrariness review can serve as a backstop for political accountability, it is limited and subject to potential misuse.

There may be reasons for a nuanced principled approach to arbitrariness review of DHS discretionary immigration enforcement decisions. Discretionary immigration enforcement decisions concern vulnerable and marginalized groups. Immigration law is more closely analogized to criminal law than administrative law because individual rights and liberty interests are at stake.²⁷⁹ Hard look review risks judicial predilection

279. Cf. *Padilla v. Kentucky*, 559 U.S. 356, 366 (2019) (“We have long recognized that deportation is a particularly severe ‘penalty.’”) (internal quotation omitted); *Jordan v. De George*, 341 U.S. 223, 231 (1951) (recognizing the “grave nature of deportation,” and therefore applying the vagueness doctrine to CIMTs even though not generally used in civil context); *Fong Yue Ting v. United States*, 149 U.S. 698, 739–40 (1893) (Brewer, J., dissenting) (stating deportation is “punishment cruel and severe”). In light of the harshness of deportation, another protection that is afforded in the immigration context but not generally in civil cases is the rule of lenity, whereby ambiguous statutory language in the deportation provisions of the INA is construed in favor of the noncitizen. See *INS v. St. Cyr.*, 533 U.S. 289, 320 (2001) (recognizing the “longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien” (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987))); *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948) (holding ambiguities should be resolved in favor of the noncitizen “because deportation is a drastic measure and at times the equivalent of banishment or exile”); see generally Brian G. Slocum, *The Immigration Rule of Lenity and Chevron Deference*, 17 GEO. IMMIGR. L.J. 515, 519–25 (2003) (describing rule of lenity in immigration context). Furthermore, because of the severity of deportation, the rationale behind not sweeping in convictions that do not involve moral turpitude is similar to the rationale for having a higher burden of proof for criminal cases. See Matthew C. Waxman, *Detentions as Targeting: Standards of Certainty and*

motivating outcomes, and immigration law is distinct from other administrative law fields where technocratic and data-driven decisions, rather than political ones, dominate.

While the Supreme Court reversed the Fifth Circuit's error in the MPP case and brought the arbitrariness review back to the agency accountability-forcing of *Regents*,²⁸⁰ there is still reason to give guardrails to arbitrariness review in immigration matters. Some may propose that certain kinds of immigration decisions should necessitate a version of hard look review that considers the vulnerable and historically marginalized status of some immigrants. Those concerned with such groups may advance theories in favor of harder look review of agency action taking away a right or protection.

Doctrines of deference shape judicial response to immigration law claims such that arbitrariness review has created a hint of potential accountability where constitutional claims have fallen short.²⁸¹ The APA and arbitrariness review have become a judicial backstop or default mechanism where rights claims have been validated.²⁸² Such phantom norms may however further the rule of law transparency problem where they are a proxy for substantive claims.

As a result of deferential doctrines in immigration law and current political deadlocks, Congress has little oversight of discretionary immigration policy, and the executive has outsized authority in immigration law.²⁸³ Even though arbitrariness review as an accountability-forcing

Detention of Suspected Terrorists, 108 COLUM. L. REV. 1365, 1372–74 (2008) (describing harsh penalties resulting from criminal convictions as part of rationale for avoiding false positives in criminal context).

280. *(Unequal Immigration Protection*, *supra* note 274, at 232.

281. Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 554 (1990).

282. See *Dept. Homeland Sec. v. Regents of Univ. Cal.*, 140 S. Ct. 1891, 1905 (2020); *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2567 (2019); *Chacón*, *supra* note 273, at 231 (2019); *(Unequal Immigration Protection*, *supra* note 274, at 232.

283. The President has unusually expansive power in the field of immigration law because of plenary power informed by national security and sovereignty. See, e.g., ADAM B. COX & CRISTINA M. RODRIGUEZ, *THE PRESIDENT AND IMMIGRATION LAW* 183–84 (2020). See also Hiroshi Motomura, *Making Immigration Law*, 134 HARV. L. REV. 2794, 2797 (2021) (reviewing *The President and Immigration Law* and suggesting that “Cox and Rodríguez analyze the President’s immigration power inside the United States much more completely than they analyze the President’s outward-facing power” and that “the most significant presidential decisions in responding to migration . . . are more likely to be outward-facing decisions that influence the conditions that cause people to migrate” including “through countries of transit to the United States”); Shalini Bhargava Ray, *Plenary Power and Animus in Immigration Law*, 80 OHIO ST. L.J. 13 (2019) (arguing that “[t]he United States Supreme Court reviews exclusion decisions deferentially for the existence of a ‘facially legitimate and bona fide reason,’ under *Kleindienst v. Mandel*, but explicit animus raises a key question: what effect, if any, does explicit presidential animus have on this deferential standard of review?”); see also Peter Margulies, *Taking Care of Immigration Law: Presidential Stewardship, Prosecutorial Discretion, and the Separation of Powers*, 94 B.U. L. REV. 105, 106 (2014) (contending that “DACA’s legal support stems not from prosecutorial discretion but from the President’s provisional power to protect ‘intending Americans’ from violations of law by nonfederal sovereigns”); Fatma E. Marouf, *Executive Overreaching in Immigration Adjudication*, 93 TUL. L. REV. 707, 722 (2019) (explaining that “the executive has vast authority over immigration delegated by Congress” and “[a] perceived national security

mechanism operates differently with respect to immigration law because noncitizens cannot vote, the underlying democratic principles of transparency and accountability are still relevant. Even if those immediately and most directly impacted may not be able to access the electoral system to make their opinions about executive agency immigration policy known, their families, friends, employers, and advocates can, if arbitrariness review forces such transparency, without going too far.

threat triggers some of the broadest delegations of power to the President”); Catherine Y. Kim, *Rights Retrenchment in Immigration Law*, 55 U.C. DAVIS L. REV. 1283, 1283–84 (2022) (arguing that “notwithstanding the optimistic predictions of scholars, over the last quarter century, with few exceptions, the Supreme Court has been unwilling to impose a constitutional check on the political branches’ immigration policies” but “has reaffirmed and . . . even extended the so-called plenary power doctrine” and making the normative claim that plenary power and “the continued failure to afford constitutional protections to noncitizens undermines fundamental norms of equality and the rule of law”).