

**INSTITUTIONAL PATHOLOGIES IN
THE REGULATORY STATE:
WHAT SCOTT PRUITT TAUGHT US ABOUT
REGULATORY POLICY**

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While Scott Pruitt’s aggressive deregulatory agenda while he served as Administrator of the Environmental Protection Agency got significant attention, many of his actions have been successfully challenged in the courts. This Article argues that these deregulatory efforts have been plagued by five pathologies that contributed to their legal vulnerability. First, Pruitt’s EPA was driven by political ideology and extremism. Second, he isolated himself from career staff at the EPA. Third, trade associations, which have exerted significant influence, were often dominated by extreme views within the group. Fourth, industry has been slow to adapt to how the Trump Administration has operated. And fifth, short-term political thinking has shifted focus away from long-term policy success.

These pathologies were not limited to Pruitt’s hapless tenure. They continue to hobble the work of the EPA and of other agencies in the Trump Administration and could stand in the way of the accomplishments of future administrations—both Republican and Democratic.

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I. INTRODUCTION

On July 5, 2018, after months of controversy and investigations into alleged ethics violations,¹ Scott Pruitt resigned from his position as administrator of the Environmental Protection Agency (EPA).² Though President Trump, in a tweet announcing Pruitt's resignation, praised Pruitt for the "outstanding job" he had done at the EPA,³ the questions about Pruitt were not limited to his ethics,⁴ but also extended to the long-term effectiveness of his deregulatory strategy at the EPA.⁵ In the wake of Pruitt's resignation, a narrative emerged that the EPA would finally be able to get serious about its deregulation goals under the leadership of acting administrator Andrew Wheeler.⁶ But the root causes of Pruitt's—

1. See Glenn Fleishman, *How Scott Pruitt Blew It: A List of Scandals That Led to the EPA Chief's Resignation*, FORTUNE (July 5, 2018), <http://fortune.com/2018/07/05/scott-pruitt-epa-trump-resigns-scandal/> (cataloguing the scandals that had led to sixteen investigations into Pruitt's actions at the EPA, including one investigation that had already concluded Pruitt had broken federal law).

2. See Coral Davenport et al., *E.P.A. Chief Scott Pruitt Resigns Under a Cloud of Ethics Scandals*, N.Y. TIMES (July 5, 2018), <https://www.nytimes.com/2018/07/05/climate/scott-pruitt-epa-trump.html>.

3. Donald J. Trump (@realDonaldTrump), TWITTER (July 5, 2018, 12:37 PM), <https://twitter.com/realDonaldTrump/status/1014956568129892352>.

4. See Davenport, *supra* note 2 (noting that Republican Representative Trey Gowdy, in his role as chairman of the House Oversight Committee, had initiated the first Republican-led investigation into Pruitt's actions at the EPA); Editorial, *Scott Pruitt Should Go*, NAT'L REV. (June 13, 2018, 4:59 PM), <https://www.nationalreview.com/2018/06/scott-pruitt-should-resign/> (calling for Pruitt's exit from the EPA, because his actions "make[] it practically impossible for Pruitt to make the case for the Trump administration's environmental policies"); Laura Ingraham (@IngrahamAngle), TWITTER (July 3, 2018, 3:55 PM), <https://twitter.com/IngrahamAngle/status/1014281388269408257> ("Pruitt is the swamp. Drain it.").

5. See, e.g., Coral Davenport & Lisa Friedman, *In His Haste to Roll Back Rules, Scott Pruitt, E.P.A. Chief, Risks His Agenda*, N.Y. TIMES (Apr. 7, 2018), <https://www.nytimes.com/2018/04/07/climate/scott-pruitt-epa-rollbacks.html> (describing how Pruitt's "haste" and "eagerness" to pursue his deregulatory agenda had led to "poorly crafted legal efforts"); Umair Irfan, *Scott Pruitt Is Leaving Behind a Toxic Mess at the EPA*, VOX (July 9, 2018, 12:33 PM), <https://www.vox.com/2018/7/6/17539834/scott-pruitt-resigns-andrew-wheeler-epa-legacy> (ascribing to "sloppiness" some of the failures suffered by Pruitt's EPA, including court losses, missed deadlines, and missing technical documentation).

6. See Coral Davenport, *Pruitt's Successor Wants Rollback Too. And He Wants them to Stick*, N.Y. TIMES (July 27, 2018), <https://www.nytimes.com/2018/07/27/climate/andrew-wheeler-epa.html> (noting that Wheeler's approach "may take longer, but it may be more effective in standing up to the inevitable legal challenges"); Irfan, *supra* note 5 (noting Wheeler has a combination of "inside expertise and fossil fuel loyalty" that may allow him to "continue to rapidly advance an industry-friendly agenda—without Pruitt's high-profile scandals drawing unwanted attention"); Niall Stange, *The Memo: At EPA, Pruitt Is Gone but Policies Stay*, HILL (July 7, 2018, 1:37 PM), <http://thehill.com/homenews/administration/395899-the-memo-at-epa-pruitt-is-gone-but-policies-stay> (noting that Wheeler would be expected to continue "to do the same thing, out of the limelight" (quoting Fred Krupp, president of the Environmental Defense Fund).

Wheeler, himself, promised "to provide the states and energy sector . . . regulatory certainty." Andrew Wheeler, Opinion, *EPA Offers Regulatory Certainty*, BLADE (Toledo, Ohio) (Aug. 25, 2018), <http://www.toledoblade.com/Op-Ed-Columns/2018/08/25/Andrew-Wheeler->

and the broader Trump Administration's—ineffectiveness on the regulatory front are likely to persist without more fundamental reform in how political appointees in this administration—or in future ones with similar pathologies—engage with the agencies they lead.

Despite the Trump Administration's strongly expressed commitment to deregulation and self-congratulatory rhetoric,⁷ its efforts have fared poorly in the courts. Currently, the Trump Administration has either lost or abandoned its position in thirty-four of thirty-six challenges to its regulatory actions in the courts, with a third of those being actions by the EPA.⁸ Abysmally, this overall success rate of less than 6%⁹ is far lower than the historic agency success rate of about 70%.¹⁰ The EPA's losses stem from the agency's failure to take required procedural steps, such as explaining its reasoning or allowing for public comment, or to provide adequate justifications for its decisions.¹¹

Environmental-Protection-Agency-EPA-offers-regulatory-certainty/stories/20180825054.

Not only did Wheeler provide assurances of continuing to pursue a deregulatory agenda, but his emphasis on “regulatory certainty” seems to be a repudiation of the hasty, at times unpredictable approach under Pruitt. *See, e.g.,* Hiroko Tabuchi & Lisa Friedman, *Automakers Sought Looser Rules but May Get More Than They Bargained for*, N.Y. TIMES (Mar. 30, 2018), <https://www.nytimes.com/2018/03/30/climate/epa-auto-pollution-pruitt.html> (noting that Honda and Ford opposed Pruitt's rollback of emissions standards, over concern that the rollback would force them to comply with dual standards); Eric Wolff, *Pruitt Faces Revolt in Trump Country*, POLITICO (June 15, 2018, 5:04 AM), <https://www.politico.com/story/2018/06/15/pruitt-epa-midwest-trump-ethanol-624373> (noting the backlash Pruitt faced in corn-growing states because of his support of the oil industry at the expense of ethanol).

7. As Neomi Rao, the Director of the Office of Information and Regulatory Affairs indicated: (“Our commitment to these good regulatory practices has contributed to the incredible economic boom since President Trump took office.”). Neomi Rao, *The Trump Administration's Deregulation Efforts Are Saving Billions of Dollars*, WASH. POST (Oct. 17, 2018), https://www.washingtonpost.com/opinions/the-trump-administration-is-deregulating-at-breakneck-speed/2018/10/17/09bd0b4c-d194-11e8-83d6-291fceed2ab1_story.html?utm_term=.a5c95a2b0e7e.

8. *See* INST. FOR POLICY INTEGRITY, ROUNDUP: TRUMP-ERA DEREGULATION IN THE COURTS (2018), http://policyintegrity.org/documents/Deregulation_Roundup.pdf (last updated Mar. 1, 2019) (tracking court challenges to regulatory actions by the Trump Administration). Twelve of the thirty-six challenges, and neither of the two victories, were for EPA rules. *See id.*

9. The overall success rate for the Trump Administration—two wins in thirty-six challenges—is 5.6%. *See id.* Of course, the success rate for the EPA is 0%.

10. *See* David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135, 170 (2010) (finding the agency success rate, by averaging the results of eleven studies, to be 69%).

11. *See* BETHANY A. DAVIS NOLL & ALEC DAWSON, DEREGULATION RUN AMOK: TRUMP-ERA REGULATORY SUSPENSION AND THE RULE OF LAW 3-9 (Inst. for Policy Integrity 2018), https://policyintegrity.org/files/publications/Deregulation_Run_Amok_Report.pdf; INST. FOR POLICY INTEGRITY, *supra* note 8; Connor Raso, *Trump's Deregulatory Efforts Keep Losing in Court—and the Losses Could Make It Harder for Future Administrations to Deregulate*, BROOKINGS (Oct. 25, 2018), <https://www.brookings.edu/research/trumps-deregulatory-efforts-keep-losing-in-court-and-the-losses-could-make-it-harder-for-future-administrations-to-deregulate/#footref-2>.

The poor analysis that sunk the EPA's early actions under Pruitt continued after his departure. Three rules proposed under Wheeler's leadership—involving rollbacks to the key initiatives by the Obama Administration to regulate greenhouse gases—are particularly telling. And these actions are far more significant because, whereas the court losses to date involved Pruitt's efforts to suspend the compliance the effectiveness of the Obama Administration's rules and were therefore only temporary, Wheeler's proposals are for permanent rollbacks.

First, in replacing the Clean Power Plan, which sought to reduce the greenhouse gas emissions of existing power plants, with the Affordable Clean Energy Rule, the EPA claims in part that the Clean Power Plan relied on a legal interpretation that was inconsistent with the Clean Air Act.¹² But this interpretation, far from an invention of the Obama Administration, had been followed in the past by administrations of both parties, including the George W. Bush Administration.¹³ So, perhaps understanding the weakness of this legal position, the EPA also argues that it can exercise its discretion to replace the Clean Power Plan, even if it were not constrained to do so by the Clean Air Act.¹⁴ But under the EPA's own analysis, this rollback would significantly increase greenhouse gas emissions, lead to up to 1400 additional American deaths each year, and impose billions of dollars of net harms on the American people.¹⁵ For an agency to choose to impose net harms when it is not constrained by statute to do so is the very embodiment of "arbitrary and capricious" conduct prohibited by the Administrative Procedure Act.

The second example, the rollback of the Obama Administration's limitations on fugitive methane emissions from oil and gas installations, brazenly relies on no analysis at all. Indeed, under the Obama Administration, the EPA had determined that the controls on these installations had positive net benefits. Now, the agency indicates that these estimates may have been overestimated without attempting any effort to quantify or monetize the supposed

12. Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units, 83 Fed. Reg. 44,746, 44,752-56 (Aug. 31, 2018).

13. See Denise Grab, Jack Lienke & Richard L. Revesz, *Familiar Territory: A Survey of Legal Precedents for the Clean Power Plan*, 46 ENV'T'L L. REP. 10,190 (2016).

14. See Richard L. Revesz, *On Climate, the Facts and the Law Are Against Trump*, N.Y. TIMES (Dec. 4, 2018), <https://www.nytimes.com/2018/12/04/opinion/climate-report-trump.html?action=click&module=Opinion&pgtype=Homepage>.

15. See *id.*

overestimation.¹⁶ Conclusory assertions of this type cannot substitute for the analysis required by the Administrative Procedure Act.¹⁷

And, third, the rollback to the standards limiting the greenhouse emissions of vehicles is based on an analysis that is so flawed that it defies common sense. The standards put in place by the Obama Administration require automakers to steadily increase the fuel efficiency of new passenger vehicles through 2025, limiting climate pollution while reducing consumer fuel costs. In contrast, the Trump Administration has proposed freezing the standards at 2020 levels, claiming that the resulting increases in pollution and fuel costs are justified by supposed safety benefits from rolling back the standards. To reach this conclusion, it assumes first that stricter efficiency standards raise the price of vehicles. Standard economic theory predicts that people would then buy fewer cars because each car would be more expensive. But instead, the administration's faulty analysis leads it, wholly implausibly, to the opposite conclusion: that people will buy more cars, and therefore drive more miles when cars are more expensive, and that, therefore, they will have more accidents and more people will die.¹⁸ And, embarrassingly, other errors abound as well: "The mistakes range in scope from the comical to the bizarre, from the obviously accidental to the how-did-they-miss-that. In one case, federal employees have forgotten to divide a crucial figure by four."¹⁹ Errors of this sort, if uncorrected would almost certainly lead to a loss in the courts. But, if they are corrected, the safety justification for the proposal would collapse like a house of cards.²⁰

The defeats that EPA has already suffered in the courts have not been directly related to Pruitt's alleged ethics violations or to the ensuing investigations and press coverage. And, obviously, Pruitt should not be blamed for the serious analytical shortcomings of the

16. Abby Smith, *EPA Doesn't Trust Its Own Methane Math, But Can't Prove Why*, BLOOMBERG ENV'T (Dec. 21, 2018, 4:58 PM), <https://news.bloombergenvironment.com/environment-and-energy/epa-doesnt-trust-its-own-methane-math-but-cant-prove-why>.

17. "There are no findings and no analysis here to justify the choice made, no indication of the basis on which the [agency] exercised its expert discretion. We are not prepared to and the Administrative Procedure Act will not permit us to accept such . . . practice . . ." *Motor Vehicle Mfrs Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 84 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 167 (1962)).

18. Robinson Meyer, *The Trump Administration Flunked Its Math Homework*, ATLANTIC (Oct. 31, 2018), <https://www.theatlantic.com/science/archive/2018/10/trumps-clean-car-rollback-is-riddled-with-math-errors-clouding-its-legal-future/574249/>; Abby Smith, *Trump Car Standards Rollback Knocked for Faulty Analysis*, BLOOMBERG BNA (Nov. 2, 2018, 12:27 PM), <https://news.bloombergenvironment.com/environment-and-energy/trump-car-standards-rollback-knocked-for-faulty-analysis>.

19. Meyer, *supra* note 18.

20. *See id.*

regulations proposed after his departure, which are likely to doom the recent rollback efforts. Instead, these challenges are attributable to a series of deep pathologies, embedded not only at the EPA but also throughout much of the Trump Administration. Though some commentators have pointed to “sloppiness”²¹ or “haste”²² as the cause of the EPA’s losses, these should instead be properly understood as symptoms of the deeper pathologies affecting the Trump Administration’s regulatory output, which makes it not surprising that the problems are continuing despite Pruitt’s departure.

This Article analyzes five such pathologies, prevalent in the Trump Administration, that impede effective regulatory policymaking. First, the rise of political ideology and extremism at the helm of administrative agencies will tend to undermine the quality of their decision-making. Second, disregarding the expertise of career staff within agencies will lead to rulemakings that are more vulnerable to legal challenge. Third, extremism in trade association lobbying is likely to exacerbate bias within agencies. Fourth, industry representatives have struggled to adapt to the political and governance style of the Trump Administration. Fifth, in the current political climate, short-term thinking within the leadership of agencies can stand in the way of long-term regulatory goals.

Although this Article focuses on Pruitt and the Trump Administration as an illustrative case study, these five pathologies run deeper than just the EPA and this administration. Though some of the pathologies are closely tied to the current ideology of the Republican Party, others could emerge in future Democratic administrations as well. The importance of dissecting these pathologies then, is urgent because a mere change in administration—to another Republican President or to a Democratic President—without further intervention and reform, is unlikely to fully correct these problems.

II. IDEOLOGY AND EXTREMISM

Pruitt began his position at the EPA as one of the administration’s ideological “true believers.”²³ When he was

21. See Irfan, *supra* note 5.

22. See Davenport & Friedman, *supra* note 5.

23. See Kevin D. Williamson, *Scott Pruitt’s Reformation*. NAT’L REV. (Dec. 31, 2017, 5:00 AM), <https://www.nationalreview.com/magazine/2017/12/31/scott-pruitts-epa-reformation-re-shaping-agency/> (“His critics may dismiss him as a creature of oil and gas, as an ogre who

nominated, Pruitt was in “lock step” with President Trump’s views on environmental policy,²⁴ having risen to national prominence in part due to his aggressive role as attorney general of Oklahoma in allying with the energy industry to challenge the regulatory agenda of the Obama Administration’s EPA.²⁵ Pruitt shared broader regulatory and policy views with Trump beyond just the environment: In his time as attorney general, he established Oklahoma’s first “federalism unit” to “combat unwarranted regulation and overreach by the federal government”²⁶ and participated in various other lawsuits against the Obama Administration, including challenging the Affordable Care Act, the Dodd-Frank financial reform, and the administration’s immigration policy.²⁷ Notable in Pruitt’s record is not only his ideological commitment to strongly deregulatory policies, but also his aggressive opposition to the other side—the Democratic Party, the Obama Administration, and government regulators.

Though Pruitt’s ideological views on regulatory policy obviously explain the deregulatory bent of his time at the EPA, ideological extremism may also have contributed to the “unforced errors” that accompanied his deregulatory policy. One problem with ideological extremism, documented in a body of psychological studies, is that ideologues are less likely to recognize good arguments on the other side, and the quality of their decision-making may suffer as a result of their failure to confront such arguments.²⁸ Isolation of ideological groups can drive the views of individual group members further to the extreme, leading to increasing polarization between different ideological groups.²⁹ Social cascades can lead to feedback loops

is willing to see the water and air despoiled in the service of his corporate allies, but he is in fact a true believer.”).

24. Coral Davenport & Eric Lipton, *Trump Picks Scott Pruitt, Climate Change Denialist, to Lead E.P.A.*, N.Y. TIMES (Dec. 7, 2016), <https://www.nytimes.com/2016/12/07/us/politics/scott-pruitt-epa-trump.html> (pointing to agreement between the two on climate change skepticism and criticism of the Paris accord and Obama’s Clean Power Plan).

25. See Chris Mooney et al., *Trump Names Scott Pruitt, Oklahoma Attorney General Suing EPA on Climate Change, to Head the EPA*, WASH. POST (Dec. 8, 2016), https://www.washingtonpost.com/news/energy-environment/wp/2016/12/07/trump-names-scott-pruitt-oklahoma-attorney-general-suing-epa-on-climate-change-to-head-the-epa/?utm_term=.52d23797c9 (noting Pruitt’s role in suing the EPA over the Clean Power Plan and regulations on methane emissions).

26. *Hon. Scott Pruitt*, FEDERALIST SOC’Y, <https://fedsoc.org/contributors/scott-pruitt> (last visited Sept. 3, 2018).

27. See Mooney et al., *supra* note 25 (describing Pruitt’s record as Oklahoma attorney general).

28. For a broad overview of the psychological literature on extremism and polarization, see CASS R. SUNSTEIN, *GOING TO EXTREMES: HOW LIKE MINDS UNITE AND DIVIDE* (2009).

29. See Douglas Blanks Hindman, *Mass Media Flow and Differential Distribution of Politically Disputed Beliefs: The Belief Gap Hypothesis*, 86 JOURNALISM & MASS COMM. Q. 790, 791 (2009) (describing empirical evidence of polarization in “Congressional voting records

where individuals rely largely on information from other members of their group and face reputational pressures to appeal to the ideological bent of their group.³⁰ This pathology further isolates group members from arguments made by opposing groups and reduces the quality of decision-making. As Professor Cass Sunstein has noted, group polarization explains “both extremism and error.”³¹ This dynamic, projected onto a highly politicized and ideological EPA, could support conditions for skewed informational cascades and self-reinforcing bias to affect regulatory decision-making.

Though it would be challenging to empirically prove that bias in the decision-making of Pruitt’s EPA led to mistakes, there is significant evidence that the informational inputs the agency relied on really were skewed towards ideologically consistent sources that were non-threatening to the deregulatory agenda and that often excluded opposing views. A Reuters analysis published in April 2018 showed that Pruitt held twenty-five times more meetings with industry representatives than with environmental advocates.³² The ratio was likely even more lopsided because Pruitt kept many meetings off his calendar or removed them retroactively,³³ and it seems highly unlikely that these secret meetings were with environmental groups. When Pruitt appeared in public, his staff went to great lengths to shield him from aggressive questions from opponents to his agenda.³⁴ Academic scientists were sidelined on

along party lines, an increasing trend of voter identification as strong partisans, and stronger party identification among voters than among non-voters since the 1950s, all of which imply that moderates are being driven out of the political process” (citing MARKUS PRIOR, *POST-BROADCAST DEMOCRACY: HOW MEDIA CHOICE INCREASES INEQUALITY IN POLITICAL INVOLVEMENT AND POLARIZES ELECTIONS* 18 (2007)).

30. See Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 *YALE L.J.* 71, 81–84 (2000) (describing, and highlighting research on, informational and reputational cascades); Duncan Watts, *The Kerry Cascade*, *SLATE* (Feb. 24, 2004, 3:49 PM), http://www.slate.com/articles/news_and_politics/politics/2004/02/the_kerry_cascade.html (“When *everyone* is looking to someone else for an opinion . . . it’s possible that whatever information other people might have gets lost, and instead we get a cascade of imitation that, like a stampeding herd, can start for no apparent reason and subsequently go in any direction with equal likelihood.”).

31. SUNSTEIN, *supra* note 28, at 88 (describing the related theory of groupthink before noting that polarization is “far more helpful, in explaining both extremism and error, than the idea of groupthink”).

32. Timothy Gardner & Richard Valdmánis, *Embattled EPA Chief’s Calendar Shows Industry Had His Ear*, *REUTERS* (Apr. 6, 2018, 1:19 PM), <https://www.reuters.com/article/us-usa-epa-pruitt-industry/embattled-epa-chiefs-calendar-shows-industry-had-his-ear-idUSKCN1HD2G0>.

33. See Coral Davenport et al., *EPA Aide Questioned Deleting Sensitive Meeting Details. Then She Was Fired.*, *N.Y. TIMES* (July 5, 2018), <https://www.nytimes.com/2018/07/05/climate/pruitt-epa-calendar-morris.html>.

34. See Eric Lipton & Lisa Friedman, *EPA Emails Show an Effort to Shield Pruitt from Public Scrutiny*, *N.Y. TIMES* (May 7, 2018), <https://www.nytimes.com/2018/05/07/climate/epa-pruitt-emails-secrecy.html> (“The more than 10,000 documents, made public as part of a

scientific advisory panels to the agency in favor of industry representatives,³⁵ following a pattern in the Trump Administration of cutting out outside scientific advice from decision-making more generally.³⁶ And, despite having members chosen by Pruitt, the EPA Science Advisory Board rebuked the agency for the claimed scientific basis of various deregulatory actions.³⁷

As indicated above, many of Pruitt's actions at the EPA were legally questionable. Given that Pruitt severely limited the sources of information he was exposed to, it would be no surprise if the ability of the EPA to carefully develop and effectively vet its positions suffered from this one-sided process.³⁸

III. DISREGARDING EXPERTISE OF CAREER STAFF

Another pathology common in federal agency leadership in the Trump Administration is the demonization and sidelining of career employees. Trump often decries the "deep state" as a primary threat to his administration and the wishes of the people.³⁹ As used by

Freedom of Information lawsuit by the Sierra Club, show that the agency's close control of Mr. Pruitt's events is driven more by a desire to avoid tough questions from the public than by concerns about security, contradicting Mr. Pruitt's longstanding defense of his secretiveness.").

35. See Warren Cornwall, *Trump's EPA Has Blocked Agency Grantees from Serving on Science Advisory Panels. Here Is What It Means*, SCIENCE (Oct. 31, 2017), <http://www.sciencemag.org/news/2017/10/trump-s-epa-has-blocked-agency-grantees-serving-science-advisory-panels-here-what-it> (explaining how Pruitt's actions would shift representation on science advisory panels from academic scientists to industry scientists).

36. See Coral Davenport, *In the Trump Administration, Science Is Unwelcome. So Is Advice.*, N.Y. TIMES (June 9, 2018), <https://www.nytimes.com/2018/06/09/climate/trump-administration-science.html> (describing the various ways scientific advising had been devalued in the Trump Administration compared to past administrations).

37. See Eric Roston, *EPA Science Board Rebukes Pruitt's Use of Science to Deregulate*, BLOOMBERG (May 31, 2018), <https://www.bloomberg.com/news/articles/2018-05-31/epa-science-board-rebukes-pruitt-s-use-of-science-to-deregulate> (describing the Science Advisory Board's decision to review several deregulatory actions as a rebuke).

38. See Nina A. Mendelson, *Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives*, 78 N.Y.U. L. REV. 557, 642 (2003) ("The agency may analyze technical questions more thoroughly, consider a wider range of policy options, and more fully identify concerns attending preferred policy options"—and on questions of value—"enhancing the agency's ability to perceive and respond to public preference").

39. See Matthew Cole & Jeremy Scahill, *Trump White House Weighing Plans for Private Spies to Counter "Deep State" Enemies*, INTERCEPT (Dec. 4, 2017), <https://theintercept.com/2017/12/04/trump-white-house-weighing-plans-for-private-spies-to-counter-deep-state-enemies/> (noting the distrust within the administration towards the CIA); Evan Osnos, *Trump vs. the "Deep State,"* NEW YORKER (May 21, 2018), <https://www.newyorker.com/magazine/2018/05/21/trump-vs-the-deep-state> (describing Trump's agenda as "promising to unmake the political ecosystem, eradicating the existing species and populating it anew" with a particular emphasis on the bureaucracy).

Rich Higgins, a staffer at the National Security Council and former advisor to the Trump campaign, circulated a memo within the administration that described the deep state as one of seven Marxist threats to the president and the people who voted for him. See Jana Winter & Elias Groll, *Here's the Memo that Blew Up the NSC*, FOREIGN POLICY (Aug. 10, 2017),

Trump and his supporters, the “deep state” is “an elastic label” for “a cabal of unelected leftist officials lodged deep in the government who are conspiring to thwart the administration’s policies”⁴⁰ Though admittedly the use of the term “deep state” to apply to the federal bureaucracy is partly exaggerated political rhetoric, its specific connotations are significant: Whereas presidents have long criticized bureaucracy as being hapless or dysfunctional,⁴¹ the term “deep state” suggests a secret, ruthless efficiency.⁴² The “deep state” narrative offers a broad justification for opposing the entire mission of the EPA, and Trump even suggested aggressively dismantling the agency so that there are only “little tidbits” left,⁴³ or even abolishing it altogether.⁴⁴

The result can resemble a “remarkable split-screen political reality” where the political rhetoric of the administration runs directly counter to the research and analysis being produced by career staff.⁴⁵ The most recent National Climate Assessment,

<https://foreignpolicy.com/2017/08/10/heres-the-memo-that-blew-up-the-nscl>. According to the memo, the deep state is the “bureaucratic state beholden to no one” that, unaccountable to law or the people, becomes “god bestriding the earth.” *Id.* Trump reportedly “gushed over” the memo and was “furious” when Higgins was forced to resign because of it. *Id.*

40. Jeff Nunberg, Opinion, *Why the Term “Deep State” Speaks to Conspiracy Theorists*, NPR (Aug. 9, 2018, 10:14 AM), <https://www.npr.org/2018/08/09/633019635/opinion-why-the-term-deep-state-speaks-to-conspiracy-theorists>.

41. See Julie Hirschfeld Davis, *Rumblings of a “Deep State” Undermining Trump? It Was Once a Foreign Concept*, N.Y. TIMES (Mar. 6, 2017), <https://www.nytimes.com/2017/03/06/us/politics/deep-state-trump.html?module=inline> (noting that Presidents have often “bristle[d] at what they consider to be a sluggish bureaucracy,” but that the shift in tone to suggest that civil servants are actively working to subvert the government is “jarring” for American politics).

42. See Nunberg, *supra* note 40 (contrasting the rhetoric of “the government” and “the state” as “the hapless functionaries who can never get their act together [and] the conniving ideologues who can”).

43. Brady Dennis, Juliet Eilperin & Andrew Ba Tran, *With a Shrinking EPA, Trump Delivers on His Promise to Cut Government*, N.Y. TIMES (Sept. 8, 2018), https://www.washingtonpost.com/national/health-science/with-a-shrinking-epa-trump-delivers-on-his-promise-to-cut-government/2018/09/08/6b058f9e-b143-11e8-a20b-5f4f84429666_story.html?utm_term=.179a45b48537.

44. See Arthur Neslen, *Donald Trump “Taking Steps to Abolish Environmental Protection Agency,”* GUARDIAN (Feb. 1, 2017, 8:13 PM), <https://www.theguardian.com/us-news/2017/feb/02/donald-trump-plans-to-abolish-environmental-protection-agency> (describing the rhetoric of Trump during the 2016 campaign). In his calls to abolish or seriously cut the EPA during the campaign, Trump never seemed particularly concerned about the legal infirmities to his proposal. Robert Percival, the director of the environmental law program at the University of Maryland, described the campaign rhetoric of abolishing the EPA as a “ridiculous idea” that “reflects a lack of understanding over the U.S. legal system” Oliver Milman, *Republican Candidates’ Calls to Scrap EPA Met with Skepticism by Experts*, GUARDIAN (Feb. 26, 2016), <https://www.theguardian.com/environment/2016/feb/26/republican-candidates-donald-trump-eliminate-epa-law-experts>.

45. Coral Davenport, News Analysis, *Trump Administration’s Strategy on Climate: Try to Bury Its Own Scientific Report*, N.Y. TIMES (Nov. 25, 2018), <https://www.nytimes.com/2018/11/25/climate/trump-climate-report.html> (describing the administration’s criticism of the 2018 National Climate Assessment).

released in November 2018, which reported that climate change would cause extremely serious health consequences and hundreds of billions of dollars of damages in coming decades, has been largely ignored by the administration.⁴⁶ Critics have downplayed the report as being produced by “deep state” bureaucrats and the Trump Administration seems intent to continue with its deregulatory agenda at the EPA despite the report’s findings.⁴⁷

Pruitt embraced a similar distrustful, antagonistic approach to his own agency and, in particular, the career staff working there. Brent Fewell, founder of Earth and Water Law Group, explained that, when Pruitt arrived, he “knew the agency only through litigation. He came at the agency as an overreaching entity to be tamed.”⁴⁸ During his tenure, Pruitt showed contempt for EPA career staff, bullying them and dismissing their professionalism and scientific expertise.⁴⁹ Even senior career employees rarely got to meet with Pruitt and were commonly frozen out of discussions.⁵⁰ He took the unprecedented step of making the floor on which his office was located inaccessible to career employees.⁵¹ The overwhelming impression from the reporting on Pruitt’s EPA was that his antagonism was broad reaching and demoralizing to the agency’s career staff.⁵² Though Pruitt’s opposition to the agency’s mission and distrust of the career staff seem to have been major factors in driving his antagonistic, distrustful approach to career staff, a desire to hide his alleged ethical misdeeds and corruption probably

46. *See id.*

47. *See id.* Steven J. Milloy, a member of Trump’s EPA transition team who runs the website junkscience.com, suggested the report was produced by the “deep state” and responded to the report saying, “We don’t care. . . . In our view, this is made-up hysteria anyway.” *Id.*

48. Abby Smith, *Wheeler’s Open EPA Door Contrasts with Pruitt’s Secrecy (Corrected)*, BLOOMBERG BNA (July 17, 2018), <https://www.bna.com/wheelers-open-epa-n73014477497/>.

49. Editorial Board, Opinion, *We’ll All Be Paying for Scott Pruitt for Ages*, N.Y. TIMES (July 5, 2018), <https://www.nytimes.com/2018/07/05/opinion/scott-pruitt-epa-resigns-corruption.html> (describing the career staff at the EPA as feeling “under siege, not just because of Mr. Pruitt’s policies and bullying behavior, but also because of his contempt for science and professional expertise”).

50. Rachel Leven, *“Do the Opposite Thing You Did Eighteen Months Ago”: EPA Staffers on the Agency in the Trump Era*, VOX (Nov. 10, 2017), <https://www.vox.com/energy-and-environment/2017/11/9/16619988/scott-pruitt-epa-dysfunction-staff> (noting that career staff “rarely get face time with Pruitt and frequently receive top-down orders from political appointees with little room for debate”).

51. *See* Coral Davenport & Eric Lipton, *Scott Pruitt Is Carrying Out His EPA Agenda in Secret, Critics Say*, N.Y. TIMES (Aug. 11, 2017), <https://www.nytimes.com/2017/08/11/us/politics/scott-pruitt-epa.html> (noting that career staff had much less access to Pruitt’s floor than they had enjoyed with previous administrators).

52. By the end of his tenure, even his political aides were “demoralized” by his antics. Emily Holden, *EPA Staff in “Despair” After Pruitt Blame Game*, POLITICO (Apr. 27, 2018), <https://www.politico.com/story/2018/04/27/pruitt-epa-strategy-staff-despair-507221>.

provided an additional motivation for his secrecy.⁵³ Ultimately, Pruitt's management of the EPA contributed to a significant exodus of career staff from the agency: In the first eighteen months of the Trump presidency, the EPA saw its staff shrink by eight percent, with the agency unable or unwilling to replace many of those who had left.⁵⁴

Ignoring career staff can lead to worse rulemaking in several ways. For one, as described in Part II, limiting diverse voices can drive polarization and extremism, and lead to more error-prone decision-making.⁵⁵ Perhaps more importantly, however, without the expertise of career employees, an agency is likely to struggle with some of its most basic tasks, particularly the notice-and-comment rule-making process.⁵⁶ The EPA must follow this cumbersome and highly technical procedure to amend or repeal its substantive rules.⁵⁷ Any proposed rule must carefully explain the scientific and economic basis for the new policy as well as the reasons for the change in policy. These explanations often run hundreds of pages in the *Federal Register*. A final rule must respond to all the public comments received; significant rules can receive millions. Any missteps along the way can lead to the policy change being set aside

53. See Brady Dennis & Juliet Eilperin, *Scott Pruitt Steps Down an EPA Head After Ethics, Management Scandals*, WASH. POST (July 5, 2018), https://www.washingtonpost.com/national/health-science/trump-epa-head-steps-down-after-wave-of-ethics-management-scandals/2018/07/05/39f4251a-6813-11e8-bea7-c8eb28bc52b1_story.html?utm_term=.f3709c5c3a3e (describing scandals, such as installing a soundproof phone booth and hiding details from agency staff, that could have been as much about undermining their input in policy decisions as keeping them from finding out about his other ethical misdeeds). Whether his isolation from career staff was due more to personal or policy reasons is not especially significant for the argument in this paper. Here it is sufficient to state that, whatever the reason, Pruitt was not valuing the voices of career staff in decision-making at the agency.

54. See Dennis, Eilperin & Tran, *supra* note 43 (raising concerns of a “brain drain” at the EPA, with at least one reason being that fewer than 400 people were hired to replace the nearly 1,600 who had left).

55. See *supra* Part II.

56. See 5 U.S.C. § 553 (2012). For a brief overview of the expectations of notice-and-comment procedures, see Dorit Rubinstein Reiss, *Tailored Participation: Modernizing the APA Rulemaking Procedures*, 12 N.Y.U. J. LEGIS. & PUB. POL'Y 321, 326–30 (2009). For a specific example of the kind of procedural challenge agencies face with notice-and-comment procedures, see Kristin E. Hickman & Mark Thomson, *Open Minds and Harmless Errors: Judicial Review of Postpromulgation Notice and Comment*, 101 CORNELL L. REV. 261 (2016). For this example—postpromulgation notice and comment procedures—the circuit courts have adopted at least five different legal approaches, leaving the jurisprudence “a muddle.” *Id.* at 285–86.

57. The high procedural demands for notice-and-comment rulemaking have led some commentators to conclude rulemaking has become “ossified”—excessively slow and burdensome—and there are a number of technical exceptions whereby agencies can avoid some of the complexities of notice-and-comment rulemaking. See David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut*, 120 YALE L.J. 276, 283–85 (2010) (describing both the demands of notice-and-comment rulemaking and some of the highly technical exceptions that agencies can use in some circumstances).

by the courts. There are aspects of the procedural as well as technical—scientific and economic—demands to notice-and-comment rulemaking that experienced career staff can provide valuable insight into, insights that cannot be provided by other second-best sources of information.⁵⁸

In fact, if Pruitt's distrust of career staff were warranted, his approach of sidelining them would likely have been self-defeating to his goals. If the career staff were genuinely adversarial to his policies, they would be in a position to raise uncertainty or division in the record supporting a rule. Because of the reasonableness standards that courts use to review agency decision-making, "[o]nce the degree of dissonance hits a certain threshold, it becomes more difficult for a court to avoid a conclusion that an agency's final choice was arbitrary or unreasonable."⁵⁹ When proposing controversial rules or reversals, an agency needs to be most careful with its process and record, and to give due consideration to the expertise of the career staff.

The two dozen or so Pruitt loyalists at the EPA had neither the expertise nor the bandwidth to perform these tasks. Even if career staff were not dispirited from mistreatment, they could not do their best work if they were excluded from substantive discussion about the policy changes that they were then expected to shepherd through the regulatory process.⁶⁰ For this reason, Christine Todd Whitman, a former EPA administrator, called Pruitt's strategy of sidelining career staff a big mistake,⁶¹ and it likely contributed to Pruitt accomplishing less while in office than he otherwise might have.

58. See Daniel E. Walters, *Litigation-Fostered Bureaucratic Autonomy: Administrative Law Against Political Control*, 28 J.L. & POLITICS 129, 179 (2013) (noting the "important and unique perspectives" of career staff at agencies, including "unique experiences and institutional knowledge that cannot be simulated or provided by ordinary notice-and-comment rulemaking"). Admittedly, career staff will not bring unique experience or information for every relevant question an agency confronts, but for those where institutional knowledge or experience in notice-and-comment rulemaking are valuable, their views will be hard to replace.

59. *Id.* at 132.

60. Cf. W. Neil Eggleston & Amanda Elbogen, *The Trump Administration and the Breakdown of Intra-Executive Legal Process*, 127 YALE L.J. 825, 826 (2018) (attributing other court losses in the Trump Administration to a lack of inter-agency coordination, noting that "[s]hould an executive policy be challenged in court, its chances of surviving judicial scrutiny are highest when that policy was subject to rigorous legal vetting by lawyers in all relevant executive agencies").

61. Leven, *supra* note 50. Whitman explained that "[c]areer employees are 'very dedicated to protecting human health and the environment, and they will change their ways of how they do that if they're convinced you really want to accomplish that aim.'" *Id.*

IV. TRADE ASSOCIATION CONTROL

Pruitt's distrust of EPA career staff gave rise to another, related pathology. Because the small number of political appointees cannot possibly draft the hundreds of pages of *Federal Register* materials needed to repeal or amend rules, the EPA instead had to rely on work fed to it by trade associations representing the polluting industries that the agency regulates. The involvement of trade associations, which may be organized around a particular industry sector or a shared interest of the groups' members, can raise the same concerns about developing or amplifying extreme views as for agencies.⁶²

Pruitt had already begun the practice of relying on industry lobbyists and trade associations as attorney general of Oklahoma, before joining the Trump Administration.⁶³ Pruitt's letters to the EPA complaining about the policies that, as administrator, he later vowed to repeal were written by oil-industry lobbyists, copied onto his letterhead with virtually no modifications.⁶⁴ Industry representatives continued to have Pruitt's ear while he was at the EPA. For example, representatives from coal mining and power companies were deeply connected with Pruitt—as well as with other members of the Trump Administration—lobbying to save America's fleet of aging coal-fired power plants.⁶⁵ A close relationship between regulators and industry raises pragmatic and ethics concerns, especially where policy-makers rely heavily on industry groups for

62. See *supra* Part II.

63. Coral Davenport & Eric Lipton, *The Pruitt Emails: EPA Chief Was Arm in Arm with Industry*, N.Y. TIMES (Feb. 22, 2017), <https://www.nytimes.com/2017/02/22/us/politics/scott-pruitt-environmental-protection-agency.html> (“[T]he totality of the correspondences captures just how much at war Mr. Pruitt was with the E.P.A. and how cozy he was with the industries that he is now charged with policing.”).

64. Eric Lipton, *Energy Firms in Secretive Alliance with Attorneys General*, N.Y. TIMES (Dec. 6, 2014), https://www.nytimes.com/2014/12/07/us/politics/energy-firms-in-secretive-alliance-with-attorneys-general.html?_r=0 (“The attorney general's staff had taken Devon's draft, copied it onto state government stationery with only a few word changes, and sent it to Washington with the attorney general's signature.”). Energy industry lobbyists also sought assistance with promoting state legislation to give the attorneys general clearer authority to challenge the Obama regulatory agenda.” *Id.*

65. See Benjamin Storrow, *Meet the Mining Tycoon Who Texts with Pruitt*, E&E NEWS (July 5, 2018), <https://www.eenews.net/stories/1060087757> (describing lobbying efforts by the coal industry to encourage the Trump Administration to adopt coal-friendly regulatory policies).

information and assistance.⁶⁶ At the most basic level, one-sided information from industry will tend to skew decision-making, as any biased information would.

However, the role of lobbying by industry groups creates another impediment to effective regulatory policy: Trade associations can become dominated by their most extreme members. Professor Miriam Seifter has described the problem of “second-order participation” in interest groups.⁶⁷ Second-order participation refers to the internal workings of interest groups and asks how well those groups, when they lobby agencies, represent the views of the individuals or parties for whom they claim to speak.⁶⁸ Seifter argues that many interest groups do not effectively represent the views of their constituents, in part because “traits that make a group effective at lobbying weigh against extensive member involvement.”⁶⁹ Though the representational governance structure of interest groups is not always known, Seifter highlights the U.S. Chamber of Commerce, perhaps the nation’s most powerful lobbying group and one that has taken strong stances on environmental policy,⁷⁰ as an example of an interest group offering no formal participatory structures for those members.⁷¹

This lack of representation may explain why the views of more extreme members may play an outsized role in agenda-setting within interest groups. Because the goal of trade associations is to influence political actors in furtherance of the common interests of the groups’ members, these groups can benefit from focusing on narrower or more targeted issues.⁷² Because of concern for “free-riders”—group members that may benefit from the efforts of the group without investing time or resources—smaller interest groups with narrow lobbying interests may be more successful than broader, more diffuse groups.⁷³ Seen another way, the lobbying free-rider problem is minimized where “potential rewards to the

66. See Raquel Alexander, Stephen W. Mazza & Susan Scholz, *Measuring Rates of Return on Lobbying Expenditures: Empirical Case Study of Tax Breaks for Multinational Corporations*, 25 J.L. & POLITICS 401, 408–09 (2009) (noting that lobbyists have grown in their influence such that “it is now lobbyists who drive government attention to issues and not government that drives lobbying activity”).

67. See Miriam Seifter, *Second-Order Participation in Administrative Law*, 63 UCLA L. REV. 1300 (2016).

68. See *id.* at 1303.

69. *Id.* at 1340. Seifter notes that too much participation by members of a group “may limit the group’s ability to fundraise, achieve organizational goals, and take care of day-to-day business” and that consulting with members is generally not expedient for the group in trying to achieve a policy agenda. *Id.*

70. See *infra* notes 84–85 and accompanying text.

71. See Seifter, *supra* note 67, at 1340.

72. See Alexander, Mazza & Scholz, *supra* note 66, at 405–06.

73. See *id.* at 406.

members [of the interest group] from the collective action are great.”⁷⁴ So, the most involved members are likely to be the ones that would benefit the most from departing from the status quo.

Furthermore, lobbyists may be most effective when they focus not on political actors whose minds they might want to change, but rather on those who already agree with the interest group’s position.⁷⁵ In the context of environmental regulation, more extreme actors, finding like-minded deregulatory impulses in the Trump Administration, would be expected to come to the fore at the EPA to push for the maximal benefit they can achieve for their particular interests.

Finally, private companies have an incentive not to disclose information freely and completely to governmental agencies, especially those they see as potentially adversarial.⁷⁶ Where information provided by industry might help government regulate, companies will benefit from strategically providing information to agencies or by remaining quiet.⁷⁷ Firms and trade associations that have the most at stake in upending the existing regulatory regime will also have the greatest incentives in offering biased information to the agencies, thereby increasing the probability that the regulatory output will ultimately be set aside by the reviewing courts.

There is evidence that this dynamic is in fact playing out at the EPA and with industry groups’ positions on environmental policy more generally. The Alliance of Automobile Manufacturers, the trade association representing manufacturers of cars and light trucks sold in the United States, initially pushed the EPA to completely roll back vehicle-emissions standards for model years 2022 through 2025.⁷⁸ Two of its members, Ford and Honda, broke from the group to instead urge the EPA to keep the current standards in place but to provide additional flexibility in the administration of the existing standards, a far less legally fraught

74. *Id.*

75. See Richard Hall & Alan Deardorff, *Lobbying as Legislative Subsidy*, 100 AM. POL. SCI. REV. 69, 76–78 (2006) (proposing a model of lobbying as “legislative subsidy,” rather than persuasion or exchange, which explains observations that lobbyists mostly target like-minded political allies).

76. See Cary Coglianese, Richard Zeckhouser & Edward Parson, *Seeking Truth for Power: Informational Strategy and Regulatory Policymaking*, 89 MINN. L. REV. 277, 290 (2004). Even if the current EPA is relatively friendly to the views of industry, the agency is still responsible for bringing enforcement actions and disclosures may prove to be damaging once a new administration comes in.

77. See *id.*

78. See Juliet Eilperin & Brady Dennis, *EPA to Roll Back Car Emissions Standards, Handing Automakers a Big Win*, WASH. POST (Apr. 2, 2018), https://www.washingtonpost.com/national/health-science/epa-to-roll-back-car-emissions-standards/2018/04/02/b720f0b6-36a6-11e8-acd5-35eac230e514_story.html?utm_term=.e0b978cb5c68.

alternative.⁷⁹ After the Trump Administration published the proposed rule in August 2018,⁸⁰ Honda and GM expressed concern over the proposal, with Honda openly opposing it.⁸¹ In contrast, the Alliance of Automobile Manufacturers submitted supporting comments, though primarily focusing on the importance of a consistent federal standard.⁸² Though this position is somewhat more moderate than what the group initially advocated, the Alliance still represents a more extreme view than those of some of its significant members. This saga has revealed the potential rifts within the Alliance.⁸³

As another example, the U.S. Chamber of Commerce has historically taken a more extreme stance than many of its members in denying the human role in climate change and opposing greenhouse gas regulations.⁸⁴ In 2009, over the Chamber's strong opposition to proposed "cap-and-trade" legislation, some of the largest and most prominent members of the group openly criticized

79. *See id.*

80. *See* The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks, 83 Fed. Reg. 42,986 (Aug. 24, 2018). The administration also has proposed withdrawing California's waiver from being preempted by EPA vehicle emissions rules. *See* U.S. DEPT OF TRANSP. & U.S. ENVTL. PROT. AGENCY, EPA-420-F-18-903, PROPOSED CALIFORNIA WAIVER WITHDRAWAL (2018).

81. *See* Ryan Beene & John Lippert, *GM, Honda Uneasy About Trump Plan to Dump Fuel-Economy Rules*, BLOOMBERG (Oct. 26, 2018), <https://www.bloomberg.com/news/articles/2018-10-26/gm-breaks-with-trump-in-call-for-national-electric-car-mandate> (noting that GM and Honda are concerned about the uncertainty of a protracted legal battle with California, with Toyota also supporting "adjustments" to the current standards); Timothy Cama, *Automakers Fight Trump's Auto Emissions Rollback*, HILL (Oct. 29, 2018), <https://thehill.com/policy/transportation/automobiles/413729-automakers-fight-trumps-auto-emissions-rollback> (noting various levels of opposition to the roll back by GM, Honda, Ford, and Toyota, as well as Shell Oil). Notably, eight Republican state governments have supported the rule, suggesting that the politics of the regulation are perhaps not aligned with the preferences of these companies. *Id.*

82. *See* Alliance of Automobile Manufacturers, *Automakers Call for CAFE/GHG Progress Reflecting Marketplace*, AUTO ALLIANCE (Oct. 26, 2018), <https://autoalliance.org/2018/10/26/automakers-call-cafe-ghg-progress-reflecting-marketplace/> (noting that the Alliance "appreciates" the EPA's proposal rule and supports a single national emissions standard). Though the comments were supportive of the EPA's rule, they were relatively vague and certainly more ambivalent than the Alliance's initial position had been. *See* Beene & Lippert, *supra* note 81 (describing the Alliance's position as consistent with the current demands of the major car companies for a national standard that would include California).

83. *See* John Lippert & Ryan Beene, *California Counters Trump's Car Emissions Rollback with a New Plan*, BLOOMBERG (Nov. 13, 2018), <https://www.bloomberg.com/news/articles/2018-11-13/california-counters-trump-s-car-emissions-rollback-with-new-plan> (noting that Wheeler described discussions over a California counter proposal as "positive").

84. *See* Steven Mufson, *Is the Most Powerful Lobbyist in Washington Losing Its Grip?*, WASH. POST (July 14, 2017), https://www.washingtonpost.com/business/economy/is-the-us-chamber-losing-its-grip/2017/07/14/f104d348-4f88-11e7-91eb-9611861a988f_story.html?utm_term=.4a2b2afc3dd7. Currently, the Chamber officially supports private sector investment in renewable energy and combatting climate change, but through "an approach that does not harm the economy." *Climate Change*, USCHAMBER.COM (Oct. 19, 2017), <https://www.uschamber.com/issue-brief/climate-change>.

the Chamber, quit the board, or left the group entirely.⁸⁵ However, such defections may not weaken the group's lobbying power for promoting the interests for the remaining members. If more moderate voices end their membership in a trade association it may simply drive the association further towards extreme positions.

Extremism in the views of the groups lobbying the EPA will likely have significant impacts on how the ensuing deregulatory actions are viewed by courts. Where these views are not balanced in any meaningful way by outside voices, informational cascades and group polarization are likely to worsen the quality of the decision-making.⁸⁶ Moreover, where the EPA's positions are closely aligned with narrow, extreme industry groups, courts may be more likely to find that the agency failed to adequately consider all of the evidence before taking action and that the decision-making process was arbitrary and capricious.

V. REGULATED INDUSTRY HAS NOT ADAPTED TO THE TRUMP ADMINISTRATION

A fourth pathology, related to industry group extremism and particularly problematic in Pruitt's EPA, is a tendency to give favored groups even more than they ask for, thereby making the policy change legally more vulnerable. Conservative advocates found sympathetic ears in prior Republican administrations, but their requests were still evaluated by the relevant agencies before those agencies took action. Because political actors would filter and repackage information before acting, lobbyists had the incentive to push hard behind-the-scenes for their preferred policies, expecting to ultimately get somewhat less than they asked for.⁸⁷ This administration, however, has often given conservative advocates even more than they ask for. The hasty, casual approach of the administration in forwarding the policy goals of conservative interest groups has upended the normal expectations of how the lobbying game is played. Rational actors would be expected to adapt

85. See Mufson, *supra* note 84 (noting that Apple, Pacific Gas & Electric, Hewlett-Packard, Mars, Unilever and Yahoo have all dropped out of the U.S. Chamber of Commerce in recent years, and Nike quit the Chamber's board). Reports in recent years of the U.S. Chamber of Commerce's lobbying efforts regarding international smoking laws and greenhouse gas regulations have exposed a rift between the extreme, targeted focus of the group's lobbying efforts and the public views of most of its members and even the official positions of the group itself. See Danny Hakim, *U.S. Chamber Out of Step with Its Board, Report Finds*, N.Y. TIMES (June 14, 2016), <https://www.nytimes.com/2016/06/15/business/us-chamber-of-commerce-tobacco-climate-change.html>.

86. See *supra* Part II.

87. See, e.g., Hakim, *supra* note 85 (discussing how the behind-the-scenes lobbying of the U.S. Chamber of Commerce diverged from the stated views of the group's members and even the official views of the group itself).

to changing circumstances and, as patterns begin to emerge in how the Trump Administration responds to lobbying efforts, the regulated community is likely to change its approach. However, at this point, the unpredictability of the administration still seems to occasionally surprise even allies.

For example, when President Trump signed the ban on transgender individuals serving in the military he seems to have acted beyond what was requested from his supporters who had been pushing him to take some action. In the lead up to Trump signing the ban, certain House Republicans had been demanding a ban on Pentagon-funded sex-reassignment surgeries as a condition for supporting a spending bill.⁸⁸ Trump's complete ban on transgender troops went far beyond what the House Republicans had requested and came as an unwelcome surprise.⁸⁹ Given the opposition of moderate Republicans to the complete service ban, some supporters of the more moderate surgery funding ban were hesitant to support Trump's more extreme action.⁹⁰

Similarly, the Trump Administration's aggressive approach to the rollback of vehicle emissions standards was unexpected and unwelcome for some industry insiders.⁹¹ The manufacturers who had been lobbying for lighter regulation might end up disappointed with the result because of the uncertainties about how these rollbacks would fit with California's standards and how the ensuing conflict would play out in the courts.⁹² Car companies had initially been primarily interested in some additional flexibility in determining compliance with the Obama Administration's standards and wanted to preserve a single, nationwide set of standards. One auto industry lobbyist has described the initial lobbying contacts with the administration:

We asked them to re-evaluate [the rule]. And I think what the Trump [A]dministration took from that was

88. Rachael Bade & Josh Dawsey, *Inside Trump's Snap Decision to Ban Transgender Troops*, POLITICO (July 26, 2017), <https://www.politico.com/story/2017/07/26/trump-transgender-military-ban-behind-the-scenes-240990> (noting that in the run-up to Trump's decision, "House Republicans were never debating expelling all transgender troops from the military").

89. *See id.*

90. *See id.* (noting that some supporters were having "buyer's remorse").

91. *See supra* notes 78–82 and accompanying text.

92. *See* Juliet Eilperin & Brady Dennis, *Trump Officials Prepare to Undo Fuel-Efficiency Targets Despite Some Automakers' Misgivings*, WASH. POST (Mar. 29, 2018), https://www.washingtonpost.com/national/health-science/trump-officials-prepare-to-undo-fuel-efficiency-targets-despite-some-automakers-misgivings/2018/03/29/d4043b74-32b0-11e8-8abc-22a366b72f2d_story.html?utm_term=.b4f63f3fade6 (noting that some industry groups were not expecting EPA's approach, which former EPA official Margot Oge explained, "Sometimes you dance with the devil, then you don't really like the dance.").

a wholesale acceptance from us that the Obama standards were just completely unachievable and we wanted to scrap the whole thing . . . I think they read more into it than they should have . . . It's not something any of us ever said.⁹³

Another lobbyist explained, "We've been pretty consistent . . . that we want what we considered a landing zone of splitting the difference [between the California standard and a complete rollback]."⁹⁴ The Trump Administration, by taking the extreme approach of a complete rollback, risked fracturing the national car market, with California and many states that follow California's lead planning to enforce their own stricter rules. As a lobbyist lamented, "To have two sets of standards, or a set of standards that are challenged legally, would not be good for anybody."⁹⁵

After negotiations for a compromise with California broke down in February 2019, the administration launched an "intense" lobbying campaign to try to convince car manufacturers to support the rollback, despite the manufacturers' preference for a more moderate approach grounded on firmer legal footing.⁹⁶ A group of twenty states and several large cities have promised to sue if the rollback is finalized, calling it "unlawful" and "reckless."⁹⁷ By proposing a rule more extreme than what the car companies had asked for—or, at least, picking one of the most extreme from the proposals that had been suggested—the administration may have, in fact, made the situation significantly worse for car companies, potentially requiring them to comply with two different sets of rules in the future, as well as risking the regulatory uncertainty of a protracted legal battle.

Industry lobbyists will likely learn some lessons from these interactions with the Trump Administration and may become more cautious with what they advocate for in the future. However, there will continue to be challenges for regulated parties in asking for the

93. Maxine Joselow, *Here's What Went Wrong, in the Words of Auto Lobbyists*, E&E News (Mar. 22, 2019), <https://www.eenews.net/climatewire/2019/03/22/stories/1060127907>.

94. *Id.*

95. *Id.*

96. Juliet Eilperin & Brady Dennis, *White House Presses Automakers to Back Fuel-Efficiency Rollback*, WASH. POST (Mar. 7, 2019), https://www.washingtonpost.com/climate-environment/2019/03/07/white-house-presses-automakers-back-fuel-efficiency-rollback/?utm_term=.550df3621cfc&wpisrc=nl_green&wpmm=1 (noting that car manufacturers are pushing for a compromise with California to avoid protracted legal battles).

97. David Shepardson, *White House Pressures Automakers on Fuel Rules, Blocking California: Sources*, REUTERS (Mar. 6, 2019, 11:18 AM), <https://www.reuters.com/article/us-automakers-emissions/white-house-pressures-automakers-on-fuel-rules-blocking-california-sources-idUSKCN1QN23J>.

right level of policy change from the administration. Most significantly, conflicts in trade group control can lead certain members to have outsized and polarizing control over the views of the group.⁹⁸ Additionally, industry may find it difficult to predict for which issues Trump or a political appointee will give more than what is asked, and when lobbying will simply be business as usual.

VI. POLITICAL SHORT-TERM THINKING

A final pathology is that Pruitt's actions often seemed focused more on short-term politics than on the likely long-term effects of those actions. Despite the possibility of their later reversal by the courts, he often made headlines and served as a high-profile advertisement for the Trump Administration's deregulatory agenda. After Pruitt's resignation, Trump continued to praise the "outstanding job" Pruitt had done while at the EPA.⁹⁹ By all accounts, Pruitt was forced to resign because of his ethics scandals, not because of concern over his deregulatory agenda at the EPA, demonstrating how his strategy might have served his political interests in the long run.

Short-termism has been well documented and studied in the corporate sector, particularly in the aftermath of the 2008 financial crisis.¹⁰⁰ Competitive demands on managers to maximize profits, combined with inadequate market signals to effectively predict long-term risk, incentivize "earnings management" to maximize immediate profit, compromising long-term financial stability.¹⁰¹ Emblematic of this myopic thinking, in 2007 then CEO of Citibank, Charles Prince, explained about Citi's activities that ultimately led up to the crisis, "When the music stops, in terms of liquidity, things will be complicated. But as long as the music is playing, you've got

98. *See supra* Part III.

99. Davenport et al., *supra* note 2 (noting that President Trump was reluctant to fire Pruitt because "Mr. Pruitt has done what [Trump] has wanted in terms of cutting regulations"). Pruitt also gained favor with Trump by being available as a confidant and sounding board. *See id.*

100. *See, e.g.*, ASPEN INST., OVERCOMING SHORT-TERMISM: A CALL FOR A MORE RESPONSIBLE APPROACH TO INVESTMENT AND BUSINESS MANAGEMENT 2 (2009) (explaining that in the preceding years firms had "allowed short-term considerations to overwhelm the desirable long-term growth and sustainable profit objectives of the corporation"). This report, prepared in response to the financial crisis, was signed by prominent business leaders including Warren Buffet, CEO of Berkshire Hathaway, and John Bogle, founder of the Vanguard Group, among others.

101. *See* Lynne L. Dallas, *Short-Termism, the Financial Crisis, and Corporate Governance*, 37 IOWA J. CORP. L. 265, 268 (2012) (describing "the short-termism to bolster [a firm's] current stock price or profits . . . as 'earnings management' or, alternatively, 'managerial myopia'" (footnote omitted)).

to get up and dance. We're still dancing."¹⁰² An important aspect of the research into short-termism is that from the particular myopic vantage point of the actors undertaking the behavior, it may be rational, even if the social welfare effects are negative.¹⁰³

Of course, short-termism can exist in public life as well. Political polarization and a breakdown in negotiation between political opponents, for example, may in part be explained by "negotiation myopia," where certain short-sighted biases can impede long-term thinking and compromise.¹⁰⁴ Partisan polarization, more generally, may be perfectly rational from the perspective of individual candidates winning elections, but it contributes to political gridlock that can impede long-term policy goals.¹⁰⁵ The current breakdown in political processes in Washington has been tied to what researchers call "affective polarization."¹⁰⁶ The rise of the Tea Party and its subsequent struggles to make a lasting impact with policy achievements provides an pronounced illustration of the ways in which short-term political aggrandizement may ultimately run counter to successful long-term governing.¹⁰⁷

Pruitt's approach at the EPA seemed to match this model of a political actor focused narrowly on how to best leverage his position for political advancement. In his tenure at the EPA, Pruitt was followed by reports that he had higher political aspirations. It was widely reported from early in his tenure that Pruitt wanted to run for statewide office in Oklahoma or to replace Jeff Sessions as

102. Cyrus Sanati, *Prince Finally Explains His Dancing Comment*, NY TIMES: DEALBOOK (Apr. 8, 2010, 2:04 PM), <https://dealbook.nytimes.com/2010/04/08/prince-finally-explains-his-dancing-comment/>.

103. See JOHN CASSIDY, *HOW MARKETS FAIL: THE LOGIC OF ECONOMIC CALAMITIES* 139–50 (2009) (describing "rational irrationality" that drives myopic behavior, because an investor's short-term rational conduct may lead to irrational results for the system as a whole).

104. See Cathie Jo Martin, *Conditions for Successful Negotiation: Lessons from Europe*, in AM. POLITICAL SCI. ASS'N, *NEGOTIATING AGREEMENT IN POLITICS* 121, 123 (Jane Mansbridge & Cathie Jo Martin eds., 2013) (describing a short-term focus as a potential challenge to collectively beneficial, long-term negotiation).

105. See Sarah Binder, *How Political Polarization Creates Stalemate and Undermines Lawmaking*, WASH. POST: MONKEY CAGE (Jan. 13, 2014), https://www.washingtonpost.com/news/monkey-cage/wp/2014/01/13/how-political-polarization-creates-stalemate-and-undermines-lawmaking/?utm_term=.eb28c9af125f (noting that polarization and gridlock "run in tandem").

106. See Christopher McConnell et al., *Research: Political Polarization Is Changing How Americans Work and Shop*, HARV. BUS. REV. (May 19, 2017), <https://hbr.org/2017/05/research-political-polarization-is-changing-how-americans-work-and-shop> (describing the increasing anger members of both major parties feel for the other party and how this contributes to gridlock).

107. See Benjamin Wallace-Wells, *Are the Midterms the Tea Party's Death Knell?*, NEW YORKER (Oct. 30, 2018), <https://www.newyorker.com/news/our-columnists/are-the-midterms-the-tea-partys-death-knell> (describing the Tea Party as a failure in terms of political accomplishments, but a success "[i]f the measure is how much power conservatives accrued").

attorney general.¹⁰⁸ One source even reportedly suggested that Pruitt started traveling more internationally to “build[] up the foreign-affairs part of his resume should something like Tillerson leaving [as Secretary of State] end up happening.”¹⁰⁹ Trying to bolster his reputation in conservative circles, Pruitt focused on creating a beehive of activity by rapidly delaying, staying, and suspending Obama Administration rules, and then turning to quick repeals. The rushed, sloppy nature of this work may be unlikely to survive judicial scrutiny, but it made a high-profile splash that might have well served Pruitt’s political aspirations. A public official with a long-term horizon would worry about the eventual losses, but a short-termer would plan an exit before the failure of the strategy became well understood. Then, from the perch of another office, he could blame his successor for the consequent failures, even perhaps suggesting that things would have worked out better under his leadership.

VII. CONCLUSION

Together, these five pathologies combined to undermine Pruitt’s effectiveness as administrator and his legacy will likely suffer further as a result of upcoming court decisions. But, with limited exceptions, these pathologies did not come to end when Pruitt left the scene.

For the second pathology—valuing the input of career staff—early signs suggest that Wheeler is, in fact, attempting to remedy some of Pruitt’s worst offenses. Wheeler has told career staff that he would value their input, listen to their views, and defend their work.¹¹⁰ He is taking some concrete steps to follow through on this rhetoric, for example, making a point of including career staff in policy meetings.¹¹¹ However, despite these early promises, the same

108. See Coral Davenport, *Scott Pruitt, Trump’s Rule-Cutting EPA Chief, Plots His Political Future*, N.Y. TIMES (Mar. 17, 2018), <https://www.nytimes.com/2018/03/17/climate/scott-pruitt-political-ambitions.html> (noting that Pruitt was “using his perch as Mr. Trump’s deregulatory czar to position himself for further political prominence” in Oklahoma or to replace Sessions as Attorney General).

109. Elaina Plott, *Inside Scott Pruitt’s Tumultuous Final Months as EPA Administrator*, ATLANTIC (July 6, 2018), <https://www.theatlantic.com/politics/archive/2018/07/scott-pruitt-epa-chief-resigned/564518/>.

110. See Brady Dennis & Juliet Eilperin, *Scott Pruitt’s Replacement Tells EPA Employees, “When It Comes to Leadership, You Can’t Lead Unless You Listen.”*, WASH. POST (July 11, 2018), https://www.washingtonpost.com/news/energy-environment/wp/2018/07/11/scott-pruitts-replacement-tells-epa-employees-when-it-comes-to-leadership-you-cant-lead-unless-you-listen/?utm_term=.fef839704ee2.

111. See Lisa Friedman, *Scott Pruitt’s Environmental Rollbacks Stumbled in Court. His Successor Is More Thorough.*, N.Y. TIMES (Nov. 21, 2018), <https://www.nytimes.com/2018/11/21/climate/andrew-wheeler-epa.html>.

problems that existed under Pruitt still persist. For example, the analysis supporting the replacement car fuel economy standards was riddled with mathematical errors, faulty assumptions, and flawed economic modeling, at least some of which had been identified by staff at the EPA before the rule was proposed.¹¹² NHTSA reportedly ignored these concerns and the rule was proposed, along with the error-filled analysis.¹¹³

On the fifth pathology, short-termism, Wheeler may not share the political ambitions that Pruitt harbored when he arrived at the EPA. However, it might suit the Trump Administration to continue Pruitt's short-term strategy of frantic but legally compromised activity in the run-up to the 2020 presidential election.¹¹⁴ Indeed, a vigorous show of deregulatory passion may help the administration court its supporters in the regulated community and help maximize their financial support. Continued press coverage of the EPA's regulatory rollbacks may provide a positive political feedback loop to maintain energy for Trump's political coalition and platform. Also, many Trump voters may, in fact, be more interested in the show of "dismantling the government" than the actual long-term policy implications of those actions.¹¹⁵ Climate change is predicted to adversely affect the economies of conservative states particularly strongly¹¹⁶ and recent extreme weather events, including ones that have affected conservative states, have been tied to climate change.¹¹⁷ The Trump Administration, and Republicans more

112. See Robinson Meyer, *The Trump Administration Flunked Its Math Homework*, ATLANTIC (Oct. 31, 2018), <https://www.theatlantic.com/science/archive/2018/10/trumps-clean-car-rollback-is-riddled-with-math-errors-clouding-its-legal-future/574249/> (describing a range of errors that all skew the results of the analysis in favor of the proposed rule).

113. See Friedman, *supra* note 111 (reporting that Wheeler himself had criticized the report's calculations, warning that the rule would be successfully challenged in court, but that this view was unable to block the rule).

114. See Friedman, *supra* note 111 (noting that Wheeler has "already found himself at odds not only with conservative groups but others within his own administration").

115. See Chris Kahn, *Unlike Trump, Americans Want Strong Environmental Regulator* – Reuters/Ipsos, REUTERS (Jan. 17, 2017, 6:13 AM), <https://www.reuters.com/article/us-usa-trump-environment/unlike-trump-americans-want-strong-environmental-regulator-reuters-ipsos-idUSKBN1511DU> (noting that only thirty-five percent of Republicans wanted the EPA "weakened or eliminated" with forty-seven percent either wanting it to "remain the same" or to be "strengthened or expanded"); Justin Worland, *Why Some Republicans Are Rethinking Climate Change*, TIME (July 26, 2018), <http://time.com/5348333/republicans-climate-change-carbon-tax/> (noting that young Republicans were more likely than their older counterparts to be concerned with climate change, one impetus for some Republicans to reconsider their stance on climate policy).

116. See Dana Nuccitelli, *Global Warming Will Depress Economic Growth in Trump Country*, GUARDIAN (May 7, 2018, 6:00 AM), <https://www.theguardian.com/environment/climate-consensus-97-per-cent/2018/may/07/global-warming-will-depress-economic-growth-in-trump-country> (highlighting that climate change would hit hotter, southern states particularly hard).

117. See Dino Grandoni, *The Energy 202: Some Republicans in Close Races Are (Ever So Slightly) Changing Their Tune on Climate Change*, WASH. POST: POWERPOST (Nov. 2, 2018),

generally, may benefit by maintaining the narrative of dismantling the government while avoiding the political consequences of actually following through on some of those promises.

Most importantly, the transition from Pruitt to Wheeler did not have an impact on the first, third, or fourth pathologies: ideology and extremism, trade association control, and industry's failure to adapt to the Trump Administration's style, respectively. As a result, it is not surprising, as indicated above, that Wheeler's regulatory output so far is seriously flawed and will continue to face significant legal challenges.¹¹⁸

Though Pruitt provided an ideal case study for describing these pathologies, they run much deeper than merely his leadership at the EPA. Whatever personal differences there may be between Wheeler and Pruitt, these pathologies seem likely to persist at the EPA and throughout the administration and at the EPA. Without a broader political commitment to address the pathologies, we might see less scandal, but we are likely to see more of the same ideologically driven, legally fraught policymaking from Wheeler's EPA, and from elsewhere in the Trump Administration.

https://www.washingtonpost.com/news/powerpost/paloma/the-energy-202/2018/11/02/the-energy-202-some-republicans-in-close-races-are-ever-so-slightly-changing-their-tune-on-climate-change/5bdb39a41b326b37e00b5a92/?utm_term=.6bf24cad6144 (describing recent extreme weather events as a factor that is leading some Republicans to moderate their views on climate change).

118. See, e.g., Lisa Friedman, *Cost of New E.P.A. Coal Rules: Up to 1,400 More Deaths a Year*, N.Y. TIMES (Aug. 21, 2018), <https://www.nytimes.com/2018/08/21/climate/epa-coal-pollution-deaths.html?module=inline> (noting that the replacement to the Clean Power Plan was predicted to result in up to 1,400 more deaths a year); Cass R. Sunstein, Opinion, *The Sense and Nonsense in the EPA's Mercury Rule*, BLOOMBERG (Jan. 11, 2019), <https://www.bloomberg.com/opinion/articles/2019-01-11/trump-s-epa-takes-bad-turn-on-mercury-pollution> (describing the emphasis on costs and deemphasis of benefits of the new mercury rule as arbitrary); *supra* notes 45–47 and accompanying text (describing how the EPA was downplaying or ignoring the findings of the 2018 National Climate Assessment).

