ARTICLE

UNWRITTEN ADMINISTRATIVE LAW AND THE REGULATORY LAST MILE

ANTHONY B. DERRON†

Programs like the Clean Water Act, Clean Air Act, and Resource Conservation and Recovery Act are ostensibly federal. But once they change hands from national to subnational, they're implemented through state statutes and regulations, not direct enforcement of the United States Code. As a result, state, not federal, administrative law governs in many bread-and-butter situations. Through a comprehensive fifty-state survey, I find that this body of law is largely unwritten.

Yet cooperative federalism relies on the capacity of state institutions to function. And equally critical is the existence of law that shepherds a program from congressional subcommittee to the very ends—the last mile—of state implementation. Throughout the country, however, questions of when an agency can make policy through adjudication, what counts as guidance versus a rule, which standard governs the revocation of a rule as compared to initial promulgation, and what, if any, restrictions there are when an agency refuses to promulgate a rule, have often gone unanswered by state supreme courts and state legislatures. To compound matters, states rarely publish anything other than formal regulations.

The consequence is that the last mile of cooperative federalism—the part that decides who receives a permit, when and if enforcement actions are taken, and where

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agencies make policy—is radically underspecified. In other words, because federal statutes are implemented through state law, federal law is unwritten, too. Untangling and identifying these patterns demonstrates that both the virtues of administration, such as notice and reason-giving, and the benefits of federalism, like participation and experimentation, are diminished when national programs are executed through undeveloped state law.

INTRODUCTION

Federalism has a last-mile problem. Known in industries ranging from telecommunications[1] to transportation,[2] the "last mile" is the issue of how to bring the remaining bit of some good to its end consumer. So, while a city might have robust public transportation from the outskirts in, if the train doesn't get a commuter close enough to work, she still needs to navigate that last mile on her own. So too with federal programs delegated to states for implementation. Although the federal government will set out the broad contours through substantive guidelines—the robust public transit from the outskirts in—exactly how that program is put into action is handled by the states. But how states get a commuter off the train and into the office is radically underspecified.

Take, for example, the Clean Water Act (CWA). States can, and typically do, implement and enforce the CWA's permitting program.[3] Imagine that, for decades, Connecticut has interpreted the CWA to require certain boat-rental companies to secure a permit to reduce the discharge of pollutants.[4] Then, the relevant state agency changes its interpretation of the CWA and no longer requires them. However, the agency doesn't publish or otherwise announce the change anywhere, meaning neither the public nor the EPA is aware. Rental companies simply find out when they go to renew their permits, all of whom are happy to go along with the new interpretation, which saves them time and money. Years later, a concerned resident begins noticing more boats on her local river, a decrease in wildlife, and the smell of diesel. After much fruitless outreach, she identifies the state official who knows about the policy change. She wants to sue, but the Connecticut Supreme Court has never tackled the issue of a change in agency position that occurs outside an adjudication.[5] As a result, at the last mile of the CWA in Connecticut, there

1 *See* Christopher Witteman, *Net Neutrality from the Ground Up*, 55 LOY. L.A. L. REV. 65, 68 (2022) (invoking the last-mile concept while discussing broadband); Snezhana Stadnik Tapia, *The Global "Last Mile" Solution: High Altitude Broadband Infrastructure*, 4 GEO. L. TECH. REV. 47, 49-51 (2019) (explaining the last-mile problem faced by telecommunication providers).

2 *See* Kelly Grosshuesch, *Solving the First Mile/Last Mile Problem*, 44 WM. & MARY ENV'T L. & POL'Y REV. 847, 850 (2020) (describing the "first mile/last mile problem" in public transportation); Hai Wang & Amedeo Odoni, *Approximating the Performance of a "Last Mile" Transportation System*, 50 TRANSP. SCI. 659, 659-61 (2016) ("The Last Mile Problem . . . refers to the provision of travel service from a public transportation node to a home or workplace ('last mile') or vice versa ('first mile').").

3 *See* 33 U.S.C. §§ 1313, 1342(b); Arkansas v. Oklahoma, 503 U.S. 91, 101 (1992) ("The Clean Water Act anticipates a partnership between the States and the Federal Government . . . [with] '[w]ater quality standards' . . . promulgated by the States . . . .").

4 The CWA defines a "point source" as including a "vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).

5 Connecticut has addressed the question as to adjudications. *See* Shea v. State Emps. Ret. Comm'n, 368 A.2d 159, 162 (Conn. 1976).

is little law to apply to the reversal of agency interpretation and few means to track agency action because the agency elects not to publish a meaningful portion of its decisions.

While stylized,[6] this isn't all that far from reality. For example, in *PNW Metal Recycling*, the Oregon Supreme Court addressed what a "rule" is under the state administrative procedure act.[7] It had occasion to do so because the Oregon Department of Environmental Quality (ODEQ) decided to change its longstanding interpretation of the federal Resource Conservation and Recovery Act (RCRA).[8] According to this new interpretation, Oregon cash-for-cars dismantlers must get a state-issued permit if they want to not only dismantle cars but also dispose of other solid waste.[9] But ODEQ had previously exempted auto-dismantlers from the requirement since it began enforcing RCRA.[10] A trash fire at a dismantling facility changed all that.[11] ODEQ thus reversed its interpretation, alerting two dismantlers (not the fire starters) in separate, unpublished letters that they would need to apply for RCRA permits.[12] ODEQ didn't promulgate a new rule or develop this interpretation in the course of an adjudication.[13] It just told these dismantlers of the change while informing them that it "intended" to apply the requirement to others.[14] The dismantlers sued, arguing that ODEQ changed its mind as to a new regulation without going through notice and comment.[15] A routine environmental and administrative dispute by most metrics.

But it wasn't routine. Instead, the case raised a question of first impression for the Oregon Supreme Court: what counts as a "rule" under the Oregon Administrative Procedures Act?[16] Whatever a rule might be, the court reasoned that ODEQ's new interpretation wasn't one, primarily because the interpretation wasn't issued as one and hadn't yet been applied "generally."[17] In other words, it wasn't a rule because it didn't go through notice and comment; it was simply an unpublished interpretive decision of ODEQ that was, at the time, limited to the two dismantlers who received letters.

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6 Although not when it comes to the lack of Connecticut case law. *See infra* subsection II.B.4.

7 *See* PNW Metal Recycling, Inc. v. Dep't of Env't Quality, 540 P.3d 523, 526 (Or. 2023) ("Petitioners initiated this challenge . . . contending that DEQ's change of position constituted a 'rule' under the Oregon Administrative Procedures Act (APA).").

8 *Id.* at 530.

9 *Id.*

10 *Id.*

11 *Id.*

12 *Id.*

13 *Id.*

14 *Id.*

15 *Id.* at 526.

16 *Id.* at 532 ("This court has not previously decided a case turning on the definition of 'rule,' although we have observed that the definition is broad.").

17 *Id.* at 538-40.

The decision is remarkable, and not because the holding is a bit circular. First, despite Oregon adopting the initial iteration of its administrative procedure act in 1965,[18] the Oregon Supreme Court did not answer the basic question of what a "rule" is until December 7, 2023.[19] And to do so, it was required to patch together somewhat disparate strands of state administrative law. Second, it had no case law to draw from governing the standard of review when an Oregon agency reverses its prior determination.[20] Third, the agency adopted its new interpretation in an informal document that it did not publish, even though it intended to apply it broadly. Fourth, and finally, this was a change of interpretation pursuant to *federally* delegated power under RCRA. In other words, a change in federal law (as applied in Oregon) occurred through an unpublished state agency decision that raised a novel question of state administrative law, all the result of a perfectly sensible policy requiring those who dismantle cars and dispose of other solid waste to get permits for both. Taken together, several interweaving parts of RCRA's last mile in Oregon—guidance, adjudication, reversals in position, and definitions of a "rule"—were undeveloped until late 2023.[21]

While this particular question might not have been routine for Oregon, it is a familiar pattern in state administrative law. Across the states, questions of what I call "agency process," or the means by which an agency comes to a decision (or the "process" of agency policymaking), remain unanswered by state statutes and supreme courts. Issues such as when an agency can make policy through adjudication,[22] what counts as guidance versus a rule,[23] which standard governs the revocation of a rule as compared to its initial promulgation,[24] and what, if any, restrictions there are when an agency refuses to promulgate a rule,[25] remain undeveloped, even as most states have said

18 *See* OR. REV. STAT. § 183.310 (2023).

19 *PNW Metal Recycling*, 540 P.3d at 532.

20 *Id.*

21 In purely economic terms, the last mile might feel like a misnomer in that it may not be more costly to reduce waste through RCRA because Oregon had not answered these questions. But the regulatory and federalism costs—here, the costs of implementing RCRA—do rise, as outlined in Part IV. More importantly, the last mile is a useful analogy for describing the host of problems that arise at the very ends of delivery.

22 SEC v. Chenery Corp., 332 U.S. 194, 203 (1947) ("[T]he choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency.").

23 Chrysler Corp. v. Brown, 441 U.S. 281, 301 (1979) ("In order for a regulation to have the 'force and effect of law,' it must have certain substantive characteristics and be the product of certain procedural requisites.").

24 Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins., 463 U.S. 29, 57 (1983) ("An agency's view of what is in the public interest may change, either with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis . . . .").

25 Massachusetts v. EPA, 549 U.S. 497, 527-28 (2007) ("Refusals to promulgate rules are thus susceptible to judicial review, though such review is 'extremely limited' and 'highly deferential.'").

something on issues of timing (ripeness and mootness), deference (to regulations or statutory interpretation), and substance (like arbitrary and capricious review of rules).[26]

This lack of clarity about the frameworks governing agency process collides with another common practice: state agencies rarely publish guidance, adjudications, or denials of petitions for rulemaking. They often do just what ODEQ did in *PNW Metal Recycling*, which is alert only the regulated entities and no one else. Courts have thus given state agencies little direction in their decisionmaking, and state agencies don't notify the public of those decisions, either. State administrative law is, in other words, unwritten.

This isn't just some quirk of the states. Enormously consequential federal programs like the Clean Air Act (CAA),[27] the CWA,[28] and, as demonstrated by *PNW Metal Recycling*, RCRA,[29] are implemented through state statutes and regulations, not direct enforcement of the United States Code.[30] And state agencies, in service of federal law but pursuant to state authority, interpret federal law with little ex-post supervision from either the courts or the public. How or when permits will be issued, what enforcement actions will be taken, and who the relevant regulated entity is are nuances that aren't necessarily determined by national law but, rather, through the interstices of state interpretation. While RCRA might establish a cradle-to-grave waste disposal program, once a state receives delegated authority, it is the state that determines whether the local car junker is also a local solid waste disposer. So, although the EPA has a broad oversight role, the bread-and-butter of cooperative administration is through state law, with the EPA having little ability or desire to police all the cars, trucks, or buses. That means federal law's last mile is governed not by the norms and procedures of federal law but by those of state law,[31] which is itself undeveloped.

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26 An entire symposium in the *Harvard Journal of Law and Public Policy* was dedicated to issues of "Administrative Law in the States." *See generally* Symposium, *Administrative Law in the States*, 46 HARV. J.L. & PUB. POL'Y 303 (2023). The symposium showcased the writing of several state supreme court justices, who all focused on substance, deference, and timing, with no mention of process. *Id.*; *see also, e.g.*, Michael Pappas, *No Two-Stepping in the Laboratories: State Deference Standards and Their Implications for Improving the* Chevron *Doctrine*, 39 MCGEORGE L. REV. 977, 984-86 (2008) (identifying various deference regimes in the states).

27 42 U.S.C. §§ 7401–7671q.

28 33 U.S.C. §§ 1251–1387.

29 42 U.S.C. §§ 6901–6992k.

30 *See infra* Part I.

31 I focus on states and state administrative procedure and do not analyze tribal nations, even though many may implement federal environmental law much like a state would. *See* Rebecca Tsosie, *Tribal Environmental Policy in an Era of Self-Determination*, 21 VT. L. REV. 225, 233-34 (1996). Tribal nations, however, maintain separate and distinctive sovereignty rights from states, making a claim about the norms and purposes of administrative law needing to filter down to tribal nations difficult

Although the devolution,[32] delegation,[33] cooperation,[34] coordination,[35] and interactive nature[36] of administration is well documented, analysis tends to stop at the formal line between federal and state authority.[37] After the lead is passed from national to subnational, a state will often need to enact its own set of laws, promulgate its own guidance, and adjudicate matters according to state law, even if it's in the service of a larger federal program. To say that a state cooperates in or implements a federal program fails to scrutinize what that means as a legal matter. And once it's shown that states are given the federal reins, it becomes curious that doctrines long established and debated in the D.C. Circuit, Supreme Court, and law reviews haven't made their way down to where federal law spends a great deal of its time.

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and complicated. *See, e.g.*, *id.* at 227, 243-68 (outlining the impact of predominantly white Anglo-Saxon land ethic on environmental law); *see also* Elizabeth Hidalgo Reese, *Tribal Representation and Assimilative Colonialism*, 76 STAN. L. REV. 771, 783 (2024) (describing the coerced and "manufactured . . . incompatibility between tribes or tribal identity and American political power" as "assimilative colonialism"); Angela R. Riley & Kristen A. Carpenter, *Owning Red: A Theory of Indian (Cultural) Appropriation*, 94 TEXAS L. REV. 859, 866 (2016) ("[T]he U.S. legal system has historically facilitated and normalized the taking of all things Indian for others' use, from lands to sacred objects, and from bodies to identities."); Gregory Ablavsky, *Sovereign Metaphors in Indian Law*, 80 MONT. L. REV. 11, 12 (2019) ("[The] narrative about what tribes *lack* when compared to other sovereigns . . . has become a constant, and pernicious, trope within the discourse of Indian law."). Doing justice to those issues would require an article of its own.

32 *See* Martin A. Kurzweil, *Disciplined Devolution and the New Education Federalism*, 103 CALIF. L. REV. 565, 587 (2015) (arguing for a mode of disciplined devolution of federal programs).

33 *See* Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 HARV. L. REV. 553, 557 (2001) (outlining various benefits and drawbacks to delegated environmental programs); Susan Rose-Ackerman, *Environmental Policy and Federal Structure: A Comparison of the United States and Germany*, 47 VAND. L. REV. 1587, 1607-10 (1994) (same).

34 *See* Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663, 665 (2001) ("[C]ooperative federalism envisions a sharing of regulatory authority between the federal government and the states that allows states to regulate within a framework delineated by federal law.").

35 *See* Bridget A. Fahey, *Coordinated Rulemaking and Cooperative Federalism's Administrative Law*, 132 YALE L.J. 1320, 1324 (2023) ("Distinctive and widely used, coordinated rulemaking stitches together federal and state agency action to produce rules binding on both those governments and the third parties they regulate.").

36 *See* Robert A. Schapiro, *From Dualist Federalism to Interactive Federalism*, 56 EMORY L.J. 1, 8 (2006) ("[I]nteractive federalism explores how the federal and state governments can work together to advance a variety of policy goals.").

37 Of course, that's not universally true, with terrific scholarship drilling down past formal state boundaries. *See, e.g.*, Fahey, *supra* note 35; Miriam Seifter, *Understanding State Agency Independence*, 117 MICH. L. REV. 1537, 1539-43 (2019) (describing the varied structures of independent state agencies and the questions they raise); Justin Weinstein-Tull, *Abdication and Federalism*, 117 COLUM. L. REV. 839, 841 (2017) (discussing how states can abdicate powers delegated to them by the federal government). *See generally* David Schleicher, *Federalism and State Democracy*, 95 TEXAS L. REV. 763 (2017) (discussing how state-level democratic processes are crucial to understanding federalism); Abbe R. Gluck, *Intersystemic Statutory Interpretation*, 120 YALE L.J. 1898 (2011) (discussing how the *Erie* doctrine should govern questions of statutory interpretation).

I explore these complications and questions in four Parts. In Part I, I demonstrate how deeply enmeshed federal law is with state law through the CAA, the CWA, and RCRA, three manifestations of cooperative federalism's regulatory last mile. *PNW Metal Recycling* was only possible because states have adopted federal law as their own. At the same time, I outline the stakes of leaving these sorts of decisions unwritten. For example, what happens when an agency issues substantive rules through hard-to-find guidance or elects to set policy through adjudication?

Then, in Part II, I present my primary descriptive finding: state agency process is generally undeveloped. That finding is the result of a comprehensive fifty-state survey of state administrative law. I examined whether each state has a statewide legal framework for governing the four means by which agencies make decisions—through (1) rules or adjudication, (2) rules or guidance, (3) revocation of previous rules, and (4) regulatory inaction. If a state has no statewide legal framework, I call it a gap. The top-line result is that each of the fifty states has a gap in at least one of the four metrics.

In Part III, I offer explanations for why, despite decades of state administration, unwritten administrative law is possible. State governmental structure and political culture, usually distinguished by a strong executive[38] and weak civil society,[39] present one possible answer. In a world where executive action is high profile but watchdog groups are incapable of policing administrative action, resources might be better spent at the ballot box instead of in the courtroom. Another explanation is the types of actions at issue. By their nature, they evade judicial review. If guidance and adjudications aren't published, only regulated entities will be aware of them. But those entities generally don't challenge guidance or certain enforcement actions,[40] meaning courts won't be given many opportunities to craft doctrine around large buckets of administrative law. Had the dismantlers in *PNW Metal Recycling* acquiesced, it might have been another sixty years before the Oregon Supreme Court finally had the opportunity to define what a "rule" is.

Finally, in Part IV, I address how gaps in law at the regulatory last mile implicate both the virtues of administrative law and the benefits of federalism. For decades, scholars have aimed to identify descriptively correct

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38 *See* Miriam Seifter, *Gubernatorial Administration*, 131 HARV. L. REV. 483, 488-91 (2017) (identifying the rise of "gubernatorial administration" whereby governors exert outsized control over state governance).

39 *See* Miriam Seifter, *Further from the People? The Puzzle of State Administration*, 93 N.Y.U. L. REV. 107, 109-10 (2018) (demonstrating civil society's diminished oversight role at the state level).

40 Nicholas R. Parrillo, *Federal Agency Guidance and the Power to Bind: An Empirical Study of Agencies and Industries*, 36 YALE J. ON REGUL. 165, 174 (2019) (finding that "[r]egulated parties often face overwhelming practical pressure to follow what a guidance document 'suggests' . . . .").

and normatively preferred accounts of the administrative state.[41] But adding to the mix an unreviewed and unpublished state bureaucracy in service of federal law demonstrates the costs to both administration and federalism. For example, some level of deviation between federal circuit courts is permitted because the decisions are published and resolvable by the Supreme Court. If the Third Circuit didn't publish its opinions,[42] and there was little occasion to know about wayward interpretations, we would reasonably question the benefits of allowing each circuit to go its own way. Unwritten administrative law is, in essence, a circuit court system with no Supreme Court or written opinions, raising the costs of some essential functions of federal law.[43]

I. STATE AS FEDERAL (OR FEDERAL AS STATE)

Federal law, for all its national scope, lives much of its life in the states. Although it's no novel point that many federal programs could not exist without the delegation,[44] cooperation, and implementation of the states, how that action occurs is underappreciated. As a result, gaps in enforcement, or deviations from a supposed federal ideal, are often attributed to the cynical

41 *See, e.g.*, Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1675 (1975) (depicting the early account of agency legitimacy as simply implementing congressional intent); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2246 (2001) ("[A]t different times, one or another [entity] has come to the fore and asserted at least a comparative primacy in setting the direction and influencing the outcome of administrative process. In this time, that institution is the Presidency.").

42 The practice of "unpublished opinions" in the circuit and district courts doesn't mean they're unavailable; rather, they lack precedential value. They're still almost entirely published in the usual databases and, at a minimum, on CM/ECF, NextGen Courts, and PACER. Though, whether the pay-to-access PACER system is sufficient is open to criticism. *See* Merritt E. McAlister, *Missing Decisions*, 169 U. PA. L. REV. 1101, 1105 (2021) ("'Missing decisions' are available on the publicly accessible . . . PACER, but they are not available for *free*.").

43 *Cf.* Leonard G. Ratner, *Congressional Power over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157, 161 (1960) (arguing that one essential function of the Supreme Court is to provide "the ultimate resolution of inconsistent or conflicting interpretations of federal law").

44 Describing federal programs as "delegated" is contested as to some portions of federal law. *See* Fahey, *supra* note 35, at 1357-61 (challenging the view that certain administrative relationships are hierarchical because of the existence of a "shared regulatory space").

explanation that states are clumsy at best[45]: an amalgam of partisan elected judges,[46] incompetent legislators,[47] and unprofessional bureaucrats.[48]

Even if this were true, it's neither an explanation for a persistently undeveloped administrative state nor an evaluation of its impacts. Both are crucial, given that this isn't just a concern for California, Arkansas, or Maryland. Indeed, the entire basis of Congress's authority to regulate in many spheres is interstate effects.[49] Federal programs are built on the assumption of a national policy floor, with states tackling the day-to-day administration. But when states implement many federal programs, they do so through their own law, not the United States Code.

And this is no small part. States do the "lion's share of governance affecting people's day-to-day lives."[50] States and their constituent parts "form the engines that move state and federal decisions from the planning stages to the details of policies, programs, and processes."[51] They are the over 5.3 million state government employees, with an annual payroll of more than $250 billion.[52] States spend around $1.7 trillion to provide services.[53] They have come a long way from the "generally recognized" need for "state administrative reorganization" called for a century ago.[54]

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45 *See* JON C. TEAFORD, THE RISE OF THE STATES: EVOLUTION OF AMERICAN STATE GOVERNMENT 2 (2002) (quoting Robert Allen as describing state government as "the tawdriest, most incompetent and most stultifying unit of the nation's political structure").

46 *See* Aaron-Andrew P. Bruhl & Ethan J. Leib, *Elected Judges and Statutory Interpretation*, 79 U. CHI. L. REV. 1215, 1217 n.1 (2012) (noting that roughly ninety percent of state court judges "face the voters in some form of election").

47 *See* Graeme T. Boushey & Robert J. McGrath, *Experts, Amateurs, and Bureaucratic Influence in the American States*, 27 J. PUB. ADMIN. RSCH. & THEORY 85, 88 (2017) ("[A]s state governments have made considerable investments to maintain a professionalized and expert public workforce but have largely neglected commensurate investments in their legislatures.").

48 *See* Aaron Saiger, Chevron *and Deference in State Administrative Law*, 83 FORDHAM L. REV. 555, 567 (2014) ("A state-elected education or insurance commissioner . . . might also be, in part because of the fact of her election, inexpert as well; certainly she could well be less expert than the technocratic bureaucracies that *Chevron* postulates are working in the federal context.").

49 U.S. CONST. art. I, § 8, cl. 3; *see also, e.g.*, Wickard v. Filburn, 317 U.S. 111, 119-20 (1942) (emphasizing that an act's "actual effects" on interstate commerce determine Congress's authority under the Commerce Clause); United States v. Lopez, 514 U.S 549, 560-61 (1995) ("Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained."); United States v. Morrison, 529 U.S. 598, 610-13 (2000) (stating that congressional acts are upheld when the regulated economic activity substantially affects interstate commerce).

50 Seifter, *supra* note 39, at 109.

51 Cynthia J. Bowling, *State Bureaucracies*, *in* POLITICS IN THE AMERICAN STATES: A COMPARATIVE ANALYSIS 503, 503 (Virginia Gray, Russell L. Hanson & Thad Kousser eds., 11th ed. 2018).

52 *Id.*

53 *Id.*

54 John M. Mathews, *State Administrative Reorganization*, 16 AM. POL. SCI. REV. 387, 387 (1922).

A. *The Primacy of State Law*

States run the day-to-day life of the CAA, the CWA, and RCRA. And that's true throughout environmental law, where states conduct roughly ninety percent of inspections and enforcement actions.[55] For RCRA, fifty states and territories have been given the authority "to implement the base, or initial, program."[56] In the ever-increasing jargon of environmental law, that means states are given primacy in implementing and enforcing these statutes.[57] The exact contours of that primacy may change depending on the statute (and the program within the statute), but they all follow roughly the same formula,[58] with each statute containing explicit language for state participation.[59]

This structure isn't groundbreaking. Countless scholars and courts have analyzed and dissected the federalist nature of environmental law.[60] As Philip Weiser put it, "while recognizing the need for a federal framework, these

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55 *See* David L. Markell, *The Role of Deterrence-Based Enforcement in a "Reinvented" State/Federal Relationship: The Divide Between theory and Reality*, 24 HARV. ENV'T L. REV. 1, 32 (2000) ("States conduct roughly ninety percent of the inspections in this country, and . . . they bring approximately eighty to ninety of all enforcement actions."); SARAH GRACE LONGSWORTH, BRENDAN JOHNS & CAROLYN HANSON, ENV'T COUNCIL OF THE STATES, STATE DELEGATION OF ENVIRONMENTAL ACTS 1 (2016) (explaining how states assume control of federal environmental programs through legislation and resources, and by gradually taking primary responsibility for permitting, inspections, monitoring, and enforcement); Robert V. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141, 1174 (1995) (describing how states may administer the EPA's national standards through the CAA, the CWA, and RCRA instead of federal implementation).

56 *State Authorization Under the Resource Conservation and Recovery Act (RCRA)*, U.S. ENV'T PROT. AGENCY, http://www.epa.gov/rcra/state-authorization-under-resource-conservation-and-recovery-act-rcra [https://perma.cc/SE7W-XQTM] (last visited Oct. 14, 2023).

57 Markell, *supra* note 55, at 32; *see also* Will Reisinger, Trent A. Dougherty & Nolan Moser, *Environmental Enforcement and the Limits of Cooperative Federalism: Will Courts Allow Citizen Suits to Pick Up the Slack?*, 20 DUKE ENV'T L. & POL'Y F. 1, 2-8 (2010) (defining cooperative federalism and discussing its interaction with citizen enforcement); Matthew D. Zinn, *Policing Environmental Regulatory Enforcement: Cooperation, Capture, and Citizen Suits*, 21 STAN. ENV'T L.J. 81, 91 (2002) (noting that the states "perform most environmental enforcement as a function of their 'primacy'").

58 One notable difference is state implementation plans under the CAA. *See* Fahey, *supra* note 35, at 1346. However, even in this coordinated forum, as Fahey notes, state implementation plans are adopted in *state* statutes and regulations. *Id*.

59 *See, e.g.*, Clean Air Act, 42 U.S.C. §§ 7411(a)(1), (c)(1); Clean Water Act, 33 U.S.C. §§ 1313(d), 1342(b); Arkansas v. Oklahoma, 503 U.S. 91, 101 (1992) ("The Clean Water Act anticipates a partnership between the States and the Federal Government . . . [with] '[w]ater quality standards' . . . promulgated by the States . . . ."); 42 U.S.C. § 6926(b) (RCRA); U.S. Dep't of Energy v. Ohio, 503 U.S. 607, 611 (1992) (noting that, when RCRA is properly delegated, it is "displac[ed] by an adequate state counterpart").

60 *See supra* notes 55–59; *see also* John P. Dwyer, *The Practice of Federalism Under the Clean Air Act*, 54 MD. L. REV. 1183, 1194, 1196-97 (1995) (discussing the CAA's federalism structure); Ellen R. Zahren, *Overfiling Under Federalism: Federal Nipping at State Heels to Protect the Environment*, 49 EMORY L.J. 373, 376-80 (2000) (noting that major environmental statutes maintain state primary responsibility yet provide for EPA involvement and federal oversight authority).

regimes rely on existing state agencies to administer and implement federal law."[61] Scholars debate the benefits of overlapping regulatory authority[62] versus local regulation,[63] and the need to consider history and context.[64] The Supreme Court, D.C. Circuit, and other courts are well aware.[65]

The problem is that the analysis tends to end at the formal line between state and federal. While scholars consider the benefits of devolution or note that states implement federal programs, the legal import of that conclusion is unreflectively dismissed. In many cases, federal law is executed through *state* law. And those who do realize that it's state law only mention it as a descriptive reality, rather than interrogate what that might mean on the ground. For example, Will Reisinger, Trent Dougherty, and Nolan Moser explain that "states may draft and implement their own programs," but don't take the analysis a step further.[66] Matthew Zinn argues that states provide "most environmental enforcement" when he discusses the import of administrative discretion but doesn't consider how state law and state administrative procedure would govern in such situations.[67] Even in outlining the practice of federalism under the CAA, John Dwyer notes that a "cursory review" demonstrates that the states are "important actors in its implementation," but the article doesn't cover the state laws that make it happen.[68]

Yet to say that a state "implements" a federal program like RCRA, the CAA, or the CWA is to say that a state passes its own statutes that contain the substance, even if not the exact text, of federal law.[69] Those statutes then

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61 Weiser, *supra* note 34, at 671.

62 *See* Kirsten H. Engel, *Harnessing the Benefits of Dynamic Federalism in Environmental Law*, 56 EMORY L.J. 159 (2006).

63 *See* Revesz, *supra* note 33, at 557; Jonathan H. Adler, *Jurisdictional Mismatch in Environmental Federalism*, 14 N.Y.U. ENV'T L.J. 130, 133-37 (2005) (arguing that, generally, it is optimal to address environmental problems through regulatory schemes targeted to their scope).

64 William W. Buzbee, *Contextual Environmental Federalism*, 14 N.Y.U. ENV'T L.J. 108, 114 (2005).

65 *See, e.g.*, Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 290 (1981) (noting that states may enforce the Surface Mining Control and Reclamation Act through laws "that the state legislature has enacted"); New York v. United States, 505 U.S. 144, 167 (1992) (approving of Congress's ability to offer states the choice of regulating activity according to federal standards or having their law preempted); Michigan v. EPA, 268 F.3d 1075, 1078 (D.C. Cir. 2001) (explaining that the CAA is an "experiment in federalism" that gives the EPA the authority to develop standards and the states the power to implement them).

66 *See* Reisinger, *supra* note 57, at 2, 25.

67 *See* Zinn, *supra* note 57, at 91.

68 *See* Dwyer, *supra* note 60, at 1193.

69 One example of a scholar who does look beyond the formal bounds between state and federal law is Abbe Gluck, who notes that "state actors have been enacting state laws and regulations, creating new state and local bureaucracies, and participating directly in the federal regulatory process." Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 YALE L.J. 534, 538 (2011).

authorize the relevant state agencies to act just as the EPA would by promulgating regulations, presiding over adjudications, issuing guidance, interpreting federal law, and the like. So, in Oregon, after *PNW Metal Recycling*, that means auto-dismantlers now must get a RCRA permit.

This transfer of power mostly happened decades ago. The 1970s saw the bulk of state delegation.[70] California, for example, received authority to implement the National Pollutant Discharge Elimination System (NPDES) under the CWA[71] in May 1973.[72] Other states received authority in the 1980s (Kentucky and Utah, for example), and a few in the 1990s (e.g., Texas, South Dakota, and Louisiana).[73] But not all delegations are modern relics; Idaho didn't receive primacy until 2018.[74] In other contexts, like the National Ambient Air Quality Standards (NAAQS),[75] the process is iterative, with the EPA setting national air quality targets and states submitting plans (called state implementation plans, or SIPs) for how they will meet those targets.[76] RCRA is much of the same, with initial delegation having occurred for most states in the 1980s.[77] But the EPA continually gives authority to states to implement new standards and rules.[78]

The key point isn't that these programs are delegated, but that the delegation has legal consequences, specifically as it applies to administrative law. More than being a complex maze of interlocking regulations and statutes, as much of even pure federal administration is, this regulatory labyrinth is further complicated by the concurrent authorization and authority of both state and federal law.

RCRA provides the cleanest example. Consider a 2018 revised authorization for Alabama.[79] From 2005 to 2015, the EPA changed a plethora

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70 *NPDES State Program Authority*, U.S. ENV'T PROT. AGENCY, http://www.epa.gov/npdes/npdes-state-program-authority [https://perma.cc/6WNA-LE67] (last visited Oct. 21, 2023).

71 The NDPES system is one of the main control measures under the CWA, requiring facilities under its ambit to receive a permit before discharging a pollutant into regulated waters. *See generally* 33 U.S.C. § 1342.

72 *NPDES State Program Authority*, *supra* note 70.

73 *Id.*

74 *Id.*

75 The broad strokes of the NAAQS program are that the federal government sets air quality standards—numerical concentrations of pollutants in the air that are acceptable under the CAA—and then the states are tasked with designing a program to reduce air pollution to those levels. *See, e.g.*, 42 U.S.C. §§ 7409, 7411, 7412.

76 *See* Fahey, *supra* note 35, at 1346-47.

77 U.S. ENV'T PROT. AGENCY, STATS DATA AS OF SEPTEMBER 30, 2024 (2024), https://www.epa.gov/system/files/documents/2023-05/authall.pdf [https://perma.cc/B35B-WJML].

78 *See id.*

79 Alabama: Authorization of State Hazardous Waste Management Program Revisions, 83 Fed. Reg. 63461 (proposed Nov. 16, 2018) (to be codified at 40 C.F.R. pt. 271).

of guidelines and regulations.[80] As it stated in the Federal Register, "[a]s the federal program changes, states must change their programs . . . ."[81] Alabama did just that. But that change came by way of new *state* statutes and regulations.[82] Dozens of them, ranging from sampling methods to manifest instructions, wastewater treatment exemptions, generator standards, and manuals.[83] Over ten years, the EPA issued seventeen notices in the Federal Register with updates to various portions of RCRA.[84] All that while, even before the EPA gave formal approval, Alabama was interpreting federal law, passing statutes, promulgating regulations, and enforcing RCRA through state law. Figure 1 on the next page is a snapshot of the EPA's formal approval and authorization of several parts of Alabama's RCRA program. It provides a visual representation of the iterative relationship between the EPA's evolving RCRA rules and Alabama's corresponding adoption of those rules through state law. And this figure is only the first page of one authorization; Alabama had seven previous updates since 1997.[85] Even a casual perusal of various state authorizations makes the point: federal law is state law.[86]

It's not just RCRA. The CWA and the CAA are also implemented by an intricate network of state statutes and regulations. CWA authorizations are particularly long and thorny.[87] For example, Minnesota's water quality standards, which include the CWA, are 221 pages.[88] Even if the EPA grants initial approval, once the CWA is enshrined in Minnesota statute, it is Minnesota administrative law that governs its enforcement and implementation. While federal law might set the statute's substantive contours, Minnesota law determines who gets into court, how agencies organize their rulemaking, and the formality of agency decisions (such as rulemaking, guidance, or adjudication). In other words, the thousands of *PNW Metal Recycling*-type decisions that a state agency might make when it comes to the CWA.

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80 *Id.* at 63462-63.

81 *Id.* at 63461.

82 *Id.* at 63462-63.

83 *Id.*

84 *Id.*

85 *Federal Register Notices and State Authorization Tracking System (StATS) Reports for State Authorization Under the Resource Conservation and Recovery Act*, U.S. ENV'T PROT. AGENCY, http://www.epa.gov/rcra/federal-register-notices-and-state-authorization-tracking-system-stats-reports-state [https://perma.cc/SA93-AWAK] (last visited Oct. 21, 2023).

86 *Id.*

87 *See State-Specific Water Quality Standards Effective Under the Clean Water Act (CWA)*, U.S. ENV'T PROT. AGENCY, http://www.epa.gov/wqs-tech/state-specific-water-quality-standards-effective-under-clean-water-act-cwa [https://perma.cc/FM7A-39N9] (last visited Oct. 14, 2023) (providing a database of state CWA authorizations).

88 MINN. R. 7050.0110-.0470 (2024).

Figure 1: RCRA Program Revisions[89]

Federal Requirement	Federal Register Citation	Analogous State Authority in ALA. ADMIN. CODE
Checklist 206.1, Nonwastewaters from Dyes and Pigments (Correction).	70 Fed. Reg. 35032 (June 16, 2005).	335–14–2–.04(3)(d)2., (3)(d)3.(iv)(II).
Checklist 207, Uniform Hazardous Waste Manifest Rule.	70 Fed. Reg. 10776 (Mar. 4, 2005); 70 Fed. Reg. 35034 (June 16, 2005).	335–14–1.–02(1)(a)70., (1)(a)164.–165.; 335–14–2.01(7), (7)(b)(iii)(II); 335–14–3–.02(1)(a), (2)(a)–(b), (2)(b)1.–2., (8); 335–14–3–.03(3)(b), (4), (5)(k); 335–14–3–.05(5)(c), (5)(e); 335–14–3–.06(1)(c)–(e); 335–14–3 Appendix I–Uniform Hazardous Waste Manifest and Instructions; 335–14–4–.02(1)(a)1.–3., (1)(g), (2)(b); 335–14–5–.05(1), (2)(a)1.(i)–(v), (2)(a)2., (2)(b)4., (2)(e), (3)(a)–(e), (3)(f)1.–7., (3)(g), (7)(a); 335–14–6–.05(1)(a), (2)(a)1.(i)–(iv), (2)(b)4., (2)(e), (3)(a)–(g), (7)(a).
Checklist 208, Methods Innovation Rule and SW–846 Update IIIB.	70 Fed. Reg. 34538 (June 14, 2005); 70 Fed. Reg. 44150 (Aug. 1, 2005).	335–14–1–.02(2); 335–14–1–.03(1)(d); 335–14–2–.01(3)(a)2.(v); 335–14–2–.03(2)(a)1.–2.; 335–14–2–.04(6)(b)2.(iii)(I)–(II); 335–14–2 Appendix I–Representative Sampling Methods; 335–14–2 Appendix II–III [Reserved]; 335–14–5–.10(1)(a); 335–14–5–.14(15)(c); 335–14–5–.27(c)(5); 335–14–5–.28(c)(14); 335–14–5 Appendix IX–Groundwater Monitoring List; 335–14–6–.10(1)(a); 335–14–6–.14(15)(d); 335–14–6–.27(5); 335–14–6–.28(14); 335–14–6–.29(2), (5); 335–14–7–.08(1), (3), (7), (13); 335–14–7 Appendix IX–Methods Manual for Compliance with the BIF Regulations; 335–14–8–.02(2)(b)2.(i)(III)–(IV), (10)(c)1.(iii)–(iv), (13)(a)2.(ii)(II); 335–14–8–.06(5)(c)2.(i)–(ii); 335–14–9–.04(1), (8); 335–14–9 Appendix IX–Extraction Procedure (EP) Toxicity Test Method and Structural Integrity Test (SW–846, Method 1310); 335–14–17–.02(1)(b)1.(ii); 335–14–17–.05(6)(c); 335–14–17–.06(4)(c); 335–14–17–.07(4)(c).
Checklist 209, Universal Waste Rule: Specific Provisions for Mercury Containing Equipment.	70 Fed. Reg. 45508 (Aug. 5, 2005).	335–14–1–.02(1)(a)12., (1)(a)154., (1)(a)166., (1)(a)254., (1)(a)295.; 335–14–2–.01(9)(c); 335–14–5–.01(1)(g)12.(iii); 335–14–6–.01(1)(c)14.(iii); 335–14–8–.01(1)(c)2.(ix)(III); 335–14–9–.01(1); 335–14–11–.01(1)(a)3., (4)(a)–(c); 335–14–11–.02(4)(c), (5)(d); 335–14–11–.03(3)(b)4.–5.; 335–14–11–.03(4)(c), (5)(d).
Checklist 211, Revision of Wastewater Treatment Exemptions for Hazardous Waste Mixtures ("Headworks exemptions").	70 Fed. Reg. 57769 (Oct. 4, 2005).	335–14–2–.01(3)(a)2.(iv)(I)–(II), (IV), (VII)–(VIII).
Checklist 213, Burden Reduction Initiative.	71 Fed. Reg. 16862 (Apr. 4, 2006).	335–14–1–.03(11)(b)1.–7.; 335–14–2–.01(4)(a)9.(iii)(v), (4)(f)9.; 335–14–5–.02(6)(b)4., (7)(a)4.; 335–14–5–.04(3)(b), (7)(i); 335–14–5–.05(4)(b)1.–2., (4)(b)6., (4)(b)8., (4)(b)10., (4)(b)18.–19.; 335–14–5–.06(9)(d), (9)(g)2.–3.; 335–14–5–.06(10)(f)–(g), (11)(g); 335–14–5–.07(4)(e)5., (6), (11); 335–14–5–.08(4)(i), (6)(i), (8)(e); 335–14–5–.09(5); 335–14–5–.10(2)(a), (2)(b)5.(ii), (3)(a)–(b), (4)(a), (4)(i)2., (6)(b)–(g), (7)(f); 335–14–5–.12(2)(c); 335–14–5–.13(11)(b); 335–14–5–.14(15)(f); 335–14–5–.15(4)(a)2., (8)(d); 335–14–5–.19(5)(c)2.; 335–14–5–.23(2)(a)–(c); 335–14–5–.23(4)(a)4.(ii), (4)(g), (5)(a); 335–14–5–.28(12)–(13); 335–14–5–.30(1), (2)(c)2., (2)(c)4.; 335–14–6–.02(6)(b)4., (7)(a)4.; 335–14–6–.04(3)(b), (7)(j); 335–14–6–.05(4)(b); 335–14–6–.06(1)(d)1., (1)(d)3., (4)(d)2., (4)(d)5.; 335–14–6–.07(4)(e)5., (6), (11); 335–14–6–.08(4)(h), (6)(h), (8)(e); 335–14–6–.09(5); 335–14–6–.10(2)(a), (2)(b)5.(ii), (3)(a)–(b), (4)(a), (4)(i)2., (6)(a)–(f), (7)(f), (12)(c)–(g); 335–14–6–.11(2)(a), (5); 335–14–6–.12(10)(a); 335–14–6–.13(11)(e); 335–14–6–.14(2)(a), (4)(a); 335–14–6–.14(15)(b)–(g); 335–14–6–.23(2)(a)–(c), (4)(a)4.(ii), (4)(g), (5)(a); 335–14–6–.28(12)–(13); 335–14–6–.30(1), (2)(c)2., (2)(c)4.; 335–14–7–.08(3)–(4); 335–14–8–.02(5)(a), (7)(a), (17)(c)15.; 335–14–9–.01(7), (9).
Checklist 220, Academic Laboratories Generator Standards.	73 Fed. Reg. 72912 (Dec. 1, 2008).	335–14–2–.01(5)(c)6.–7.; 335–14–3–.01(j), (j)1.–2.; 335–14–1–.02(1)(a)30., (1)(a)38., (1)(a)84., (1)(a)111., (1)(a)140.–142., (1)(a)181., (1)(a)222., (1)(a)277., (1)(a)298., (1)(a)322.; 335–14–1–.12; 335–14–3–.12(2)–(17).

[89] The contents of this Figure are copied directly from Alabama: Authorization of State Hazardous Waste Management Program Revisions, *supra* note 79, at 63462, with slight modifications for style and clarity.

Colorado's experience with its 2023 SIP revision under the CAA helps demonstrate the complexity of this dynamic. The Colorado Air Quality Commission—a multimember, nontechnical rulemaking body[90]—made numerous revisions to Regulation 7, which contains some of Colorado's ozone rules.[91] Although these regulations were duly passed and enshrined in state law, not all of them were approved by the EPA.[92] But that doesn't mean Colorado's regulations aren't enforceable in *state* court. They are just not "federally enforceable"[93] because they won't serve to meet the NAAQS.[94] Regulated entities still must abide by them, and the Colorado Department of Public Health can still issue guidance and interpretations under them. In other words, even though these regulations were promulgated to meet federal law yet will not do so, they are still enforceable through state law, substantive *and* administrative.[95]

Colorado's SIP is just one example of the ways that state law governs even when it diverges from federal guidelines. In the CWA context, state variances in water-quality sampling methods make it incredibly difficult to determine whether waters are statutorily "impaired."[96] That's because "states use sampling methodologies that are inconsistent with each other and, as a result, the information in the EPA's database of impaired waters is of 'questionable reliability.'"[97] In other words, once states are granted primacy, their own laws

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90 The Commission has nine people, COLO. REV. STAT. § 25-7-104(1) (2023), with varying scientific, technical, and legal expertise. *See AQCC Commission Profiles*, COLO. DEP'T PUB. HEALTH & ENV'T, http://cdphe.colorado.gov/aqcc-commissioner-profiles [https://perma.cc/Z8C5-3KDQ] (last visited Oct. 26, 2023).

91 *See, e.g.*, 5 COLO. CODE REGS. § 1001-9:A.I (LexisNexis 2025).

92 Air Plan Approval, Conditional Approval, Limited Approval and Limited Disapproval; Colorado; Serious Attainment Plan Elements and Related Revisions for the 2008 8-Hour Ozone Standard for the Denver Metro/North Front Range Nonattainment Area, 88 Fed. Reg. 29827 (May 9, 2023) (to be codified at 40 C.F.R. pt. 52).

93 U.S. ENV'T PROT. AGENCY, GUIDANCE AN ENFORCEABILITY REQUIREMENTS FOR LIMITING POTENTIAL TO EMIT THROUGH SIP AND §112 RULES AND GENERAL PERMITS (1995), https://www.epa.gov/sites/default/files/2015-08/documents/potoem.pdf [https://perma.cc/F6ZW-25FZ].

94 *Id.*; *see also* 42 U.S.C. § 7410(k)(5) (describing the EPA Administrator's approval obligations); Env't Comm. of Fla. Elec. Power Coordinating Grp., Inc. v. EPA, 94 F.4th 77, 85 (D.C. Cir. 2024) ("[W]hen EPA signs off on a new or revised SIP, it incorporates the SIP into the Code of Federal Regulations, which makes it a federally enforceable regulation.").

95 That these provisions would be insufficient under federal law was known to Colorado and the EPA yet approved by both. *See* Chase Woodruff, *EPA Sued Again by Environmental Groups over Colorado Ozone Plan Approval*, COLO. NEWSLINE (July 10, 2023, 12:35 PM), http://coloradonewsline.com/briefs/epa-sued-environmental-colorado-ozone [https://perma.cc/URP4-XVZL].

96 Sidney A. Shapiro & Rena Steinzor, *Capture, Accountability, and Regulatory Metrics*, 86 TEXAS L. REV. 1741, 1772 (2008).

97 *Id.* (quoting U.S. GEN. ACCT. OFF., GAO-02-186, WATER QUALITY: INCONSISTENT STATE APPROACHES COMPLICATE NATION'S EFFORTS TO IDENTIFY ITS MOST POLLUTANT WATERS 3 (2002)).

make it so that "the numbers of impaired waters cannot be compared from one state to the next."[98] The general thrust is the same across a variety of environmental media and delegated programs: "At least twelve states have enacted legislation either forbidding their programs from promulgating standards that are tougher than federal minimum requirements or imposing additional procedures that must be satisfied before such requirements become effective."[99]

The critical point is that, because states are making federal law their own, it is state law that determines how federal law is implemented in the last mile. As I show in Part II, it's not just that it's "difficult to ensure that states devote sufficient resources to administer and enforce federal programs,"[100] but that, *even if they did*, there isn't necessarily administrative law governing how those resources are spent. Once a federal program is made into a state one, the well-trodden guardrails of administrative law may not exist. And there might be little that the organic statute can do to change that. As one court put it in a challenge to an air permit that allegedly violated the CAA, the state agency "applied state law, not federal law . . . . [because] the definitions became state law when they were adopted by" the state legislature and state environmental agency.[101]

The results, as a substantive environmental matter, aren't necessarily bad. Presumably, requiring auto-dismantlers in Oregon to get RCRA permits when disposing of solid waste will lead to better disposal (or at least fewer trash fires). But they're not necessarily good, either. Without any record or stakeholder participation, it's hard to know whether the dismantler permit requirement is either a sound policy or an appropriate interpretation of RCRA. The unwritten nature of state administrative law thus leaves much of what *federal* law expects in the shadows. To say that a state "implements" a program, without more, fails to appreciate the legal significance of state law. Once that significance is identified, it becomes peculiar that state administrative law remains unwritten, while the nooks and crannies of federal administrative law are so frequently litigated in the courts and dissected in the literature.

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98 *Id.*

99 Ronald J. Krotoszynski, Jr., *Cooperative Federalism, the New Formalism, and the Separation of Powers Revisited:* Free Enterprise Fund *and the Problem of Presidential Oversight of State-Government Officers Enforcing Federal Law*, 61 DUKE L.J. 1599, 1635 (2012) (quoting William L. Andreen, *Delegated Federalism Versus Devolution: Some Insights from the History of Water Pollution Control*, *in* PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM'S CORE QUESTION 257, 260 (William W. Buzbee ed., 2009)).

100 Percival, *supra* note 55, at 1175.

101 Sierra Club v. Wis. Dep't of Nat. Res., 787 N.W.2d 855, 867 (Wis. Ct. App. 2010).

B. *Process and Administration*

The focus here is on what I call "agency process." I want to distinguish between the process by which an agency comes to a decision, substantive review of that decision, and the timing for seeking such review. Administrative law tends to blend these elements, such as in "hard look"[102] and pre-enforcement review,[103] but there's an analytical difference. Timing doctrines, like ripeness[104] and exhaustion,[105] look to when you can get into court to challenge an agency decision. Substantive review looks to the quality of decisionmaking to see if there was a reasoned basis in the record, if the agency considered relevant alternatives, and so on.[106] Of course, these look like "process" in the sense that they are procedural. But because identifying a reasonable alternative or a reasoned basis in the record requires examining the substance of the policy itself, the crux of the inquiry is "substantive." Process, as I define it here, is the actual means by which the agency makes its decision: Did it go through rulemaking? Was there an adjudication? Is the agency's view set out in guidance or an interpretive rule? Has the agency's policy choice been expressed as an action or as a decision not to act? These questions raise distinct concerns separate and apart from the substance of the action and when it should be challenged. And, as becomes relevant in Part II, process issues generate different pathologies that make them less likely to be challenged.

To say that these questions have been debated at the federal level is not controversial. As Kathryn Kovacs put it, the federal Administrative Procedure Act (APA) is "foundational or axiomatic to our thinking."[107] In that foundational statute, there are two main ways for agencies to make decisions: rulemaking and adjudication. The former is the heart of federal agency policymaking, requiring public notice and participation to consummate the agency's decision.[108] In adjudication, on the other hand, the agency acts

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102 *See, e.g.*, Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins., 463 U.S. 29, 52 (1983) (requiring agencies to "explain the evidence . . . available, and . . . offer a 'rational connection between the facts found and the choice made'").

103 *See* Abbott Lab'ys v. Gardner, 387 U.S. 136 (1962) (permitting pre-enforcement review of regulations under certain conditions).

104 *See* Dalton v. Specter, 511 U.S. 462, 469 (1994) (discussing the point at which agency action can be subject to judicial review).

105 *See, e.g.*, Sackett v. EPA, 566 U.S. 120 (2012) (explaining how administrative remedies must be exhausted before judicial review is permitted).

106 *See, e.g.*, Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 419 (1971) (establishing the scope of judicial review of the administrative record).

107 Kathryn E. Kovacs, *Leveling the Deference Playing Field*, 90 OR. L. REV. 583, 606 (2011).

108 5 U.S.C. §§ 553(b)–(d).

"much like a common law court," developing "case law" that applies to future proceedings.[109]

The Supreme Court sanctioned an agency's choice between these methods of policymaking almost eighty years ago.[110] It clarified that "the choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency."[111] Through the 1960s and 1970s, agencies typically chose adjudication.[112] It wasn't until the "rulemaking revolution" in those decades that agencies started to favor rules as the primary means of setting policy.[113] Nonetheless, it remains a "'fundamental' . . . principle of administrative law" that an agency can choose whether to make policy on a case-by-case basis or through a rule.[114]

Although the choice lies with the agency, when and how an agency should make that choice, and what factors they should consider when doing so, are the subject of extensive commentary.[115] Rulemaking is said to increase stakeholder participation, grant legitimacy to an agency, and promote the rule of law.[116] An adjudication, on the other hand, only gives "those persons who are actually parties to a particular dispute" notice and an ability to participate in the proceeding, even if others "may subsequently be affected by the

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109 Robert L. Glicksman & David L. Markell, *Unraveling the Administrative State: Mechanism Choice, Key Actors, and Regulatory Tools*, 36 VA. ENV'T L.J. 318, 329 (2018).

110 SEC v. Chenery Corp., 332 U.S. 194, 203 (1947).

111 *Id.*

112 Henry J. Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards*, 75 HARV. L. REV. 1263, 1295 (1962) ("Historically, policy has evolved mainly from a case-by-case approach."); M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1398 (2004) ("In the decades immediately following the passage of the APA in 1946, most agencies relied on adjudicatory, case-by-case methods to make policy.").

113 Wendy Wagner, William West, Thomas McGarity & Lisa Peters, *Dynamic Rulemaking*, 92 N.Y.U. L. REV. 183, 193 (2017) ("The so-called rulemaking revolution of the late 1960s and 1970s was in part voluntary as agencies responded to widespread criticisms of their reliance on case by case adjudication and to heightened pressures to achieve regulatory results.").

114 Kevin M. Stack, *The Constitutional Foundations of* Chenery, 116 YALE L.J. 952, 955 (2007); Kristin E. Hickman & Aaron L. Nielson, *Narrowing* Chevron's *Domain*, 70 DUKE L.J. 931, 950 (2021) (noting that agencies "can and do create policy through adjudication").

115 *See, e.g.*, Andrew P. Morriss, Bruce Yandle & Andrew Dorchak, *Choosing How to Regulate*, 29 HARV. ENV'T L. REV. 179, 183 (2005) (advocating for the use of regulation-by-litigation and regulation-by-negotiation as alternatives to agency rulemaking); Martin Shapiro, *Administrative Discretion: The Next Stage*, 92 YALE L.J. 1487, 1510 (1983) ("[T]he existence of rulemaking authority may actually reduce an enforcement agency's discretion . . . ."); Peter L. Strauss, *Rules, Adjudications, and Other Sources of Law in an Executive Department: Reflections on the Interior Department's Administration of the Mining Law*, 74 COLUM. L. REV. 1231, 1238 (1974) ("It is inherently easier for either Congress to exercise oversight responsibilities or private individuals to acquire information about policy from a collection of current regulations than from a series of adjudications . . . .").

116 *See* David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921, 947 (1965) (arguing that agencies are not particularly committed to notions of stare decisis in adjudications).

precedential value" of the adjudication.[117] Moreover, an adjudicatory policy is only challengeable once final, rather than in the pre-enforcement stage as with a rulemaking.[118] These considerations lead Kevin Stack to argue that agencies should be required to, "at a minimum, justify opting for adjudication instead of rulemaking."[119] Others, like Todd Philips, forcefully argue that adjudications have a valid place in agency policymaking, suggesting that they can ground decisions in the "concrete . . . benefits or harms that private-sector behaviors are causing."[120] Adjudications can also promote flexibility and increase opportunities to modify and develop policy.[121] Justifying the decision to proceed either by rulemaking or by adjudication is critically important because of these tradeoffs, and because both courses of action "can be even more consequential than statutes—they actually execute the relevant policy choices."[122]

Concerns like these are equally valid at the state level, including when a state is administering a federal program. Yet, as I demonstrate in Part II, the law governing the choice of policymaking forum is undeveloped in the states. This means that a state agency, when presented with "concrete . . . benefits or harms"[123] within their delegated authority during an adjudication, may not know whether crafting a broadly applicable policy is legally appropriate. Regulated entities and stakeholders, too, lack the certainty to know when and how policies might be generated.

Moreover, state agencies aren't frequent publishers of their adjudications. As a result, it's difficult to even have a debate over rulemaking versus adjudication in the states: whatever rulemaking's pitfalls or adjudication's benefits, there must be a way to compare them. But when adjudications are difficult to find and analyze, the benefits that come from flexibility and concrete application are difficult to square with the lack of generalized notice to stakeholders.

A set of related concerns stems from informal agency decisions that lack the "force and effect of law,"[124] like guidance, policy statements, and

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117 Arthur Earl Bonfield, *State Administrative Policy Formulation and the Choice of Lawmaking Methodology*, 42 ADMIN. L. REV. 121, 123 (1990).

118 *See* Glicksman & Markell, *supra* note 109, at 338 ("[L]itigants may be able to challenge legislative rules at the 'pre-enforcement' stage, before the agency has initiated an enforcement action, but policies adopted in an adjudication are subject to challenge only upon issuance of a final order.").

119 Kevin M. Stack, *An Administrative Jurisprudence: The Rule of Law in the Administrative State*, 115 COLUM. L. REV. 1985, 1988 (2015).

120 Todd Phillips, *A Change in Policy: Promoting Agency Policymaking by Adjudication*, 73 ADMIN. L. REV. 495, 518 (2021).

121 *Id.* at 516-20.

122 Jennifer Nou & Julian Nyarko, *Regulatory Diffusion*, 74 STAN. L. REV. 897, 938 (2022).

123 Phillips, *supra* note 120, at 518.

124 Shalala v. Guernsey Mem'l Hosp., 514 U.S. 87, 99 (1995).

interpretive rules. Rather than offering strict methods of enactment, the objective of the APA for these sorts of decisions is to force publication, "putting an end to secret law,"[125] so-called "publication rules."[126]

On the whole, guidance and the like are a good thing.[127] They permit an agency to "advise responsible bureaucrats how they should apply agency law,"[128] provide notice to citizens about what action an agency will take, and offer the knowledge that the law will be applied equally in like circumstances.[129] All products that serve rule-of-law values.[130] On a more practical level, guidance and its kin are "a means for supplying additional detail unreasonable to expect at the level of the agency head, and in a form sufficiently flexible to permit relatively fast and easy change."[131]

Guidance, however, has its downsides. Peter Strauss's seminal account of the Department of Interior demonstrates how a vast web of guidance and memoranda can be "applied with increasing vigor and traumatic consequences."[132] The guidance ranged from "[m]anual directives, temporary directives, Solicitor's opinions, . . . [to] case adjudication under the pressure of day-to-day emergencies."[133] Those manual provisions contained "several requirements, unmentioned in the regulations,"[134] were "unwieldy" and "outdated," "rather poorly indexed[,] and compris[ed] several looseleaf volumes."[135] Such functionally binding, hard-to-find agency policy decisions might "lead[] the frustrated potential regulatee to wonder whether 'secret law' [was] at play . . . ."[136] This concern is exacerbated, on some accounts, by the "ossification" of the rulemaking process, or the increased impediments required to issue rules.[137] Faced with the "additional procedural, analytical, and substantive hurdles of informal rulemaking," agencies might "channel

125 Peter L. Strauss, *Publication Rules in the Rulemaking Spectrum: Assuring Proper Respect for an Essential Element*, 53 ADMIN. L. REV. 803, 806 (2001).

126 *Id.*

127 *See, e.g.*, *id.* at 818 ("Knowledge of an agency's interpretations, policies, etc., is a positive good, and voluntary agency creation of publication rules, therefore, ought not be discouraged."); Stack, *supra* note 119, at 1988 (expounding on the importance of "notice values" for regulated parties).

128 Strauss, *supra* note 125, at 808.

129 *Id.*

130 Stack, *supra* note 119, at 1988. Stack argues that, given the many benefits of guidance, agencies "have an obligation to issue prospective guidance as a second-best option when rulemaking is not practicable." *Id.* at 2002.

131 Peter L. Strauss, *The Rulemaking Continuum*, 41 DUKE L.J. 1463, 1478 (1992).

132 Strauss, *supra* note 115, at 1236.

133 *Id.* at 1238.

134 *Id.* at 1240.

135 *Id.*

136 Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1395 (1992).

137 *Id.* at 1440.

policymaking into less formal vehicles."[138] The end result is to "severely reduce public participation in the policymaking process."[139]

The other pitfall is that regulated entities tend to follow guidance, whether or not it formally has the force and effect of law. The "unwelcome practical consequences of failure" to follow guidance leads regulated entities to go along with its directives, even if they might disagree with it.[140] There is "overwhelming practical pressure" to follow the suggestions contained in guidance, and agencies can be "inflexible" in that "they are not practically open to entertaining regulated parties['] arguments for . . . individual dispensations."[141] And this might be particularly troubling when guidance looks an awful lot like a full-on rule.[142]

The negative consequences are particularly acute when guidance goes unpublished, like it does in many states. For example, while Interior's guidance in Strauss's account was unwieldy and complex, it was at least compiled.[143] That meant there was some body of law that Interior officials could turn to and that the public could analyze before turning to those officials. When guidance is unpublished, regulated entities are at the mercy of officials, who themselves may not be clear on where the guidance currently stands. The public is even worse off, for without technical or insider knowledge of the inner workings of any particular program, it is difficult to ask the right questions needed to get the guidance. This compounds the danger that regulated entities tend to follow guidance, regardless of its legal informality. If regulated entities follow unpublished guidance, the steps required for a nonregulated entity to find out how an agency views a specific action are dramatically more challenging. Simply put, how can one know to ask for a particular policy if there is no indication it exists, has changed, or is applicable?

The final categories of process by which an agency comes to a decision are changes in position and decisions not to act. Inaction has a long historical pedigree, going back as far as *Marbury v. Madison*, which involved the failure to deliver Marbury's commission.[144] Policy reversals are a more modern

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138 *Id.* at 1441.

139 *Id.*

140 *Id.* at 1442.

141 Parrillo, *supra* note 40, at 174.

142 *See* Eric Biber & J.B. Ruhl, *The Permit Power Revisited: The Theory and Practice of Regulatory Permits in the Administrative State*, 64 DUKE L.J. 133, 157 (2014) ("The EPA once issued a 135 page 'guidance' just to explain the inner workings of but one requirement for permitting a refinery under the Clean Air Act.").

143 Strauss, *supra* note 115, at 1240.

144 *See* Antonin Scalia, *The Role of the Judiciary in Deregulation*, 55 ANTITRUST L.J. 191, 194 (1986) ("Now, there has always been review of agency inaction. *Marbury v. Madison* was a case of agency inaction . . . .").

phenomenon—still forty years old—stemming from *State Farm*.[145] As then-Judge Scalia put it, *State Farm* involved "an agency's decision not to go with airbags, as it had decided before, but to go with seat belts instead."[146] The Court determined that, while an agency may change its position, it must supply a "reasoned analysis" for that change.[147] Such an analysis "insist[s] . . . that administrative action be animated by the legislative purposes underlying each agency's organic statute."[148] The Supreme Court affirmed that principle in 2009, and today changes in position are increasingly common and increasingly litigated.[149] Judicial review is intended to "ensure that agencies offer genuine justifications for important decisions . . . ."[150] In other words, it brings daylight to changes in policy.

Refusals to initiate action are a bit different. They might come up in a formal way, such as via a petition for rulemaking,[151] or through more informal channels, like requests to friendly regulators from regulated entities or beneficiaries. Alternatively, inaction could be based on enforcement discretion. In 1985, the Supreme Court determined that enforcement decisions are committed to agency discretion and presumptively unreviewable.[152] For rulemaking, the D.C. Circuit addressed the issue of reviewing denials in 1987, concluding that denials of rulemaking petitions are subject to judicial review under the APA.[153] The Supreme Court, however, didn't take it up until 2007, agreeing that they are reviewable in certain circumstances.[154]

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145 Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins., 463 U.S. 29, 57 (1983) (quoting Greater Bost. Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970)) ("An agency's view of what is in the public interest may change, either with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis . . . .").

146 Scalia, *supra* note 144, at 192.

147 *State Farm*, 463 U.S. at 57.

148 Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 512 (1985).

149 Bethany A. Davis Noll & Richard L. Revesz, *Regulation in Transition*, 104 MINN. L. REV. 1, 4 (2019) ("As long as legislative victories remain difficult to obtain, we are likely to see presidents make important changes to adjust to the new threats in order to continue to preserve the output of their regulatory policy.").

150 Dep't of Com. v. New York, 139 S. Ct. 2551, 2575-76 (2019).

151 *See* Massachusetts v. EPA, 549 U.S. 497, 527 (2007) ("Some debate remains, however, as to the rigor with which we review an agency's denial of a petition for rulemaking.").

152 *See* Heckler v. Chaney, 470 U.S. 821, 832 (1985) ("[A]n agency's decision not to take enforcement actions should be presumed immune from judicial review . . . .").

153 *See* Am. Horse Prot. Ass'n v. Lyng, 812 F.2d 1, 4 (D.C. Cir. 1987) ("*Chaney* therefore does not appear to overrule our prior decisions allowing review of agency refusals to institute rulemakings.").

154 *Massachusetts*, 549 U.S. at 527-28 ("Refusals to promulgate rules are thus susceptible to judicial review . . . .").

Even so, commentators have criticized the doctrine and practice for decades.[155] Cass Sunstein, for example, claims that the mere availability of judicial review has distinct impacts on regulatory behavior.[156] Relatedly, Lisa Bressman argues that a doctrine of nonreviewability motivates faction by allowing those harmed by agency action to seek judicial review while preventing those harmed by agency inaction from doing the same.[157] Insufficient judicial review "creates an unwarranted asymmetry between the legal treatment of regulated entities and regulatory beneficiaries."[158] Sharon Jacobs, on the other hand, provides a rich account of when, how, and why agencies "sometimes simply decide *not* to decide."[159] Drawing from Alexander Bickel's passive virtues, Jacobs contends that agencies may rationally, and rightfully, put off acting to maintain legitimacy, reserve options for later, or ensure their continued existence.[160]

With respect to reversal, publication and gloss keep agencies in check. If there is no standard for when an agency may reverse itself, and that reversal isn't published, there is little to prevent an agency from charting a new course for reasons outside its statutory mandate. In *PNW Metal Recycling*, the interpretation change, at least as a policy matter, seems reasonable. If a car dismantler is going to dispose of solid waste, it should have a solid waste permit like any other solid waste operation. But that change in interpretation wasn't published anywhere, creating the risk that litigation is the only avenue for bringing the policy change to light. Yet litigation requires insider knowledge that may only be known to the agency or particular regulated entities. Moreover, the *PNW Metal Recycling* court had nothing to say about how or when an agency can change its mind, and effectively authorized the lack of publication. The ability to see how ODEQ interprets federal law in the last mile is hampered when there's no requirement for it to either announce or justify policy reversals.

Inaction relies on publication and gloss, too. Bressman's critique is exacerbated when there's no record of an agency refusing to act and no guidelines for when doing so is appropriate. At least when affirmative action

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155 *See generally, e.g.*, Raymond Murphy, *The Scope of Review of Agencies' Refusals to Enforce or Promulgate Rules*, 53 GEO. WASH. L. REV. 86 (1985) (discussing then-recent decisions concerning judicial review of agencies' refusal to promulgate rules and agencies' decisions not to enforce pre-existing standards).

156 Cass R. Sunstein, *Reviewing Agency Inaction After* Heckler v. Chaney, 52 U. CHI. L. REV. 653, 666-67 (1985).

157 Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. REV. 1657, 1692 (2004).

158 Glen Staszewski, *The Federal Inaction Commission*, 59 EMORY L.J. 369, 370 (2009).

159 Sharon B. Jacobs, *The Administrative State's Passive Virtues*, 66 ADMIN. L. REV. 565, 568 (2014).

160 *Id.* at 578-83.

is taken, regulated parties, even if it's only one or two auto-dismantlers, will know about it. An informal refusal will create no such record. Jacobs is certainly right that putting off a decision can lead to a better outcome, but to operationalize it requires some standard of oversight and at least the publication of refusals to act.

The preceding analysis has been broad rather than deep. The goal, however, is only to show that basic issues of agency process come with real costs and benefits. In other words, the issues I've identified do not lie in some small corner of the administrative state. If courts and critics are so concerned with how federal agency process plays out, they should also be concerned with the operation of state agencies, where much of the daily implementation of federal law happens. But as the next Part demonstrates, states generally haven't taken up the mantle in the same way.

II. UNWRITTEN ADMINISTRATIVE LAW

Many states, whether in court opinions or statutes, still need to address questions of agency process. At the same time, state agencies could be better publishers; finding guidance, adjudicatory decisions, and denials of rulemaking petitions is supremely challenging in most states. While making any claim about the fifty states runs the risk of oversimplification, a parochial focus on a single state forgoes the benefits of analyzing state institutional design and the broader effects on cooperative federal programs.[161] Of course, states differ, and some have robust publication norms (or rules) and meaningful judicial oversight. But, still, much state administration trudges along with little judicial and public supervision. More to the point, even if some states perform better than others, the overall costs and consequences are noteworthy.

To make those effects explicit and to concretize the stakes from Part I, I first offer several cases that, like *PNW Metal Recycling*, exemplify the sorts of policies that can remain unwritten and unpublished. Then, based on a comprehensive fifty-state survey, I present my primary finding that every state has a gap in at least one means of agency process. Finally, I review state practices toward the publication of guidance and adjudication.[162]

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161 *Cf.* Jim Rossi, *Overcoming Parochialism: State Administrative Procedure and Institutional Design*, 53 ADMIN. L. REV. 551, 551-54 (2001) ("[A]wareness of state institutional design provides a powerful way to explain and help understand many key features and details of administrative procedure.").

162 Before diving into the case law, it's worth acknowledging the unstated premise that the current level of litigation around these issues isn't socially optimal. Helen Hershkoff made a related point regarding arguments against increasing access to state courts, claiming that this "version of the familiar floodgate argument[] rests on an implicit assumption that the present level of adjudication is socially optimal, so that any increase in the number of state court cases would represent a misuse of social resources." Helen Hershkoff, *State Courts and the "Passive Virtues":*

A. *Unwritten in Action*

Unknown policy decisions occur every day. The state bureaucrat's decision to grant a permit under slightly changing circumstances, to implement a new statute with little statutory guidance, or to modify a budget are all examples of difficult-to-track policy decisions that have regulatory impacts. When the legal framework governing these decisions remains unwritten, the primary virtues of administrative law go unfulfilled. As inconsequential as the dispute in *PNW Metal Recycling* seems, one hundred similar decisions could mean millions in either compliance costs or environmental harm, all without public notice and input. The nub is that stakeholders, courts, and regulated entities don't know when these decisions are made and have little occasion to find out. While *PNW Metal Recycling*'s recency makes it particularly striking—Oregon only supplied the definition of a rule under its APA in December 2023—unpublished policies do crop up in other courts.

A Colorado case offers another example, albeit not of the cooperative variety.[163] While Colorado courts had initially identified the difference between "interpretive rules" (what it considers guidance or statements of policy) and "legislative rules" (things that must be promulgated through notice and comment) in 1988, the Colorado Supreme Court didn't address that distinction until 2019, with only sporadic treatment by the lower courts prior.[164] When the issue finally came up, the court was called on to address physician licensing in the politically fraught context of medical marijuana.[165] The relevant state agency had an unpublished referral policy that set out "guidelines" for when certain physicians would become eligible for referral to a licensing board for investigation and possible adjudication if suspected of issuing too many medical marijuana cards.[166] The policy contained strict numerical cutoffs,[167] yet the agency developed it without "provid[ing] the

Rethinking the Judicial Function, 114 HARV. L. REV. 1833, 1932 (2001) (footnote omitted). In one respect, that's fair and true. I need not delve into the intricacies of the benefits of judicial review to make the basic point that "[j]udicial review affords public visibility," *id.* at 1933, and "ensures that the agency bases its decision on a reasoned analysis of relevant information," Catherine M. Sharkey, State Farm *"With Teeth": Heightened Judicial Review in the Absence of Executive Oversight*, 89 N.Y.U. L. REV. 1589, 1605 (2014).

163 While not my focus here, unwritten administrative law is an issue for the states in their own right. In addition to implementing critical federal programs, states administer their own programs that are implemented through incomplete statewide legal frameworks.

164 Doe 1 v. Colo. Dep't Pub. Health & Env't, 451 P.3d 851, 857 (Colo. 2019); Colo. Motor Vehicle Dealer Licensing Bd. v. Northglenn Dodge, Inc., 972 P.2d 707, 712 (Colo. App. 1998) (discussing the difference between a "legislative" rule and an "interpretive" rule); Hammond v. Pub. Emps. Ret. Ass'n, 219 P.3d 426, 428 (Colo. App. 2009).

165 *Doe 1*, 451 P.3d at 854.

166 *Id.*

167 The cutoffs involved whether a physician saw more than 3,521 patients where medical marijuana was recommended, whether the physician recommended greater plant counts for more

public with notice of . . . meetings or calls."[168] The court had little precedent to draw from when evaluating the policy's legality, giving short shrift to the guidance-versus-rule debate and essentially blessing the agency's decision to issue unpublished, mandatory guidelines that did not go through notice and comment, even when those guidelines might cause a physician to lose her license.[169]

Montana had a similar experience in dealing with agency changes of position. After meekly commenting on the question in 1997,[170] the issue arose again for the first time twenty-two years later.[171] The court ruled that the Montana Public Service Commission could issue a new policy in an adjudication, even if it was characteristically different from the Commission's previous position.[172] The court held that, so long as a statute provides an agency "discretion" to pursue the purpose of the organic statute, the agency can utilize that discretion in an adjudication.[173] This is true even if the agency is changing a previous practice, so long as it provides a reason for the change.[174] In this case, that meant considering competition in the garbage-hauler market in a different forum—in the midst of an adjudication—than it ever had previously.[175]

Some unwritten actions intersect with each other. Take, for example, an unpublished administrative adjudication combined with an unpublished and abrupt change in policy. Under a state's SIP, certain "major" sources of air pollution need to receive permits to prevent further air quality degradation.[176] Whether something is a major source, however, isn't always straightforward. When presented with the question of whether two sources with contractually intertwined operations should be considered one major source or two minor ones, the Kentucky Division of Air Quality (KDAQ) waffled.[177] For five years, KDAQ said they were separate.[178] Then, it changed its mind.[179] One of the

than thirty percent of his caseload, and whether more than thirty-three percent of the patients were under the age of thirty. *Id.*

168 *Id.*

169 *Id.* at 857-58.

170 Waste Mgmt. Partners of Bozeman, Ltd. v. Mont. Dep't of Pub. Serv. Regul., 944 P.2d 210, 217 (Mont. 1997).

171 McGree Corp. v. Mont. Pub. Serv. Comm'n, 438 P.3d 326, 334 (Mont. 2019).

172 *Id.*

173 *Id.*

174 *Id.* at 333-34.

175 *Id.*

176 40 C.F.R. § 52.21 (2025).

177 *See* Harsco Corp. v. Nat. Res. Env't Prot. Cabinet, No. 2003-CA-000025-MR, 2004 WL 1103594, at *2 (Kt. Ct. App. May 14, 2004) ("[K]DAQ has not been consistent in making [the single-source] determination with these two entities.").

178 *Id.*

179 *Id.*

sources sued, and an administrative law judge (ALJ), in an unpublished decision, interpreted federal law to require the sources to be treated separately, as the agency had done before.[180] KDAQ disagreed, overturned the ALJ, and a source sued again.[181] In reversing KDAQ, the Kentucky Court of Appeals found that KDAQ had failed to justify this change in interpretation, with it being inappropriate to rely on unpublished "internal policy" to adjust duly promulgated regulations and statutes.[182]

Unwritten state policies can impact federal enforcement as well. The CWA empowers the EPA to step in whenever a state isn't "diligently" prosecuting a violation of its state-law equivalent.[183] But for the EPA to know that a state is being diligent, or choosing not to, requires something to be written. If the policy is not published, the EPA has no occasion to know about a potential violation. In *United States v. Smithfield Foods, Inc.*, for example, the Virginia State Water Control Board made a deal with a permit holder to allow the company to refrain from complying with phosphorous limitations.[184] That deal was contained in a board order, but not in the permit.[185] Per the terms of the permit, the permittee was violating the phosphorous limits, even though it had an exemption from the state board. But because the state didn't require Smithfield to comply, and only the state board and Smithfield were aware of the exemption, the EPA wasn't alerted to Smithfield's violations.[186] It was only years later that the EPA discovered the violations and was able to initiate an enforcement action.[187]

The problem, then, is that there is superlatively little case law supplying the scaffolding for where and how a state agency can make policy, and the decisions resulting from agency process are rarely published. While rules and regulations are published, compiled, and "available in public libraries and law libraries in all communities in the state," everything else generally isn't.[188] Even if some documents and decisions are, that should provide little comfort when thinking about either a body of secret law or the consistent application of federal law.

This is particularly true given that underspecified law and unpublished agency action don't necessarily control the substantive outcome. Colorado's referral policy might be grounded in both sound reasoning and its medical

180 *Id.*
181 *Id.*
182 *Id.* at *4.
183 33 U.S.C. § 1319(g)(6)(A)(ii).
184 191 F.3d 516, 520-22 (4th Cir. 1999).
185 *Id.* at 522.
186 *Id.*
187 *Id.* at 522-24.
188 Bonfield, *supra* note 117, at 125.

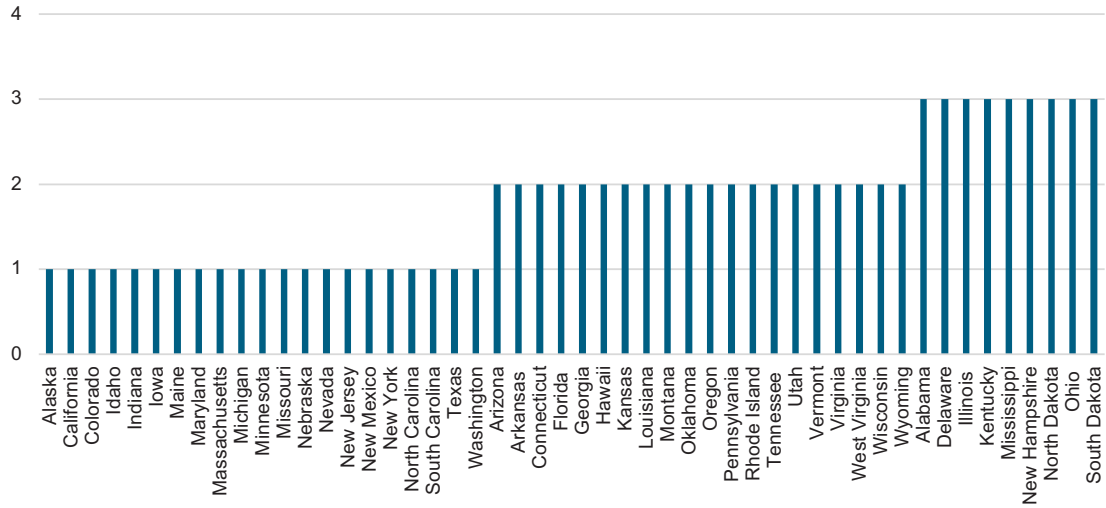
marijuana statute; KDAQ's treatment of two sources as one might have resulted in better environmental outcomes and have been more faithful to the CAA; and Smithfield Foods might have deserved temporary relief from its permit requirements. The issue is that the decisions were made in the shadow of administrative law, and in the last mile of implementation. And because state judicial doctrine is unwritten, courts lack robust doctrinal history based on each state's own APA. This means that agency decisions are often permitted, resulting in a further cycle of unwritten law.

B. *Unwritten Judicial Review*

Unwritten administrative law as a function of judicial review is widespread among the states. This means that, whenever process questions make it into the hands of state courts, those courts have little to draw from either their own state or, to the extent they want to, others.

To put a finer point on this, I conducted a comprehensive survey of all fifty states. In each state, I evaluated whether there were well-developed statewide legal frameworks governing four questions of agency process: (1) When can an agency make policy by rulemaking and when can it do so by adjudication? (2) What's the difference between a rule and guidance? (3) What standard of judicial review applies to a rule that changes or reverses a previous policy? And (4) what standard of judicial review applies to an agency's decision not to act at all? The result is that every state has at least one gap in the four metrics of agency process. This pattern occurs even in states that otherwise have robust administrative infrastructure, whether measured by the bureaucracy's size, its professionalized nature, or the general development of administrative law.

Figure 2: Gaps per State



The starting point for my survey was whether a state cited the relevant federal precedent, although this was insufficient to identify a gap. Those cases stand for multiple propositions, and a citation says little about whether a state adopted the federal doctrine. Another initial step was to familiarize myself with each state's particularities as to jargon, which was critical to designing my searches. Some states refer to "adjudications" as such, others refer to them as "adjudicatory proceedings," "contested cases," or some other term.[189] Others don't use the word "rule" and only use "regulation" when discussing inaction or revocation.[190] This difference in jargon required me to examine each state's APA. Doing so also helps frame whether a state has a gap: if the state APA allows for policymaking in an adjudication, then there's no gap. It also directed me toward relevant statutory provisions, such as petitions for rulemaking and state treatises. For example, Arthur Bonfield wrote an influential law review article on the Iowa Administrative Procedure Act, which continues to be cited in modern cases and formed the basis of many early decisions.[191]

189 *See, e.g.*, *S. Nev. Operating Eng'rs Cont. Compliance Tr. v. Johnson*, 119 P.3d 720, 726 (Nev. 2005) (discussing "ad hoc rulemaking within the context of a contested case").

190 *See, e.g.*, *Edisto Aquaculture Corp. v. S.C. Wildlife & Marine Res. Dep't*, 426 S.E.2d 753, 755 (S.C. 1993) (analyzing the issue of non-promulgation and only referring to regulations).

191 *See generally* Arthur E. Bonfield, *The Iowa Administrative Procedure Act*, 60 IOWA L. REV. 731 (1975).

Finding a gap required piecing together the relevant state administrative jargon with keystone cases and state APA citations. For example, to identify whether an agency could make policy during adjudication, I might use a search involving "adjudication" and "choice."[192] However, not every state referred to its adjudications as adjudications, which meant substituting "adjudication" for "contested case" or "order." And, of course, not every state describes the choice between adjudication and rulemaking as a "choice," requiring different search terms such as "ad hoc," "required," "improper," or "policy." Many states don't use the term "promulgate" but, instead, "issue."[193] States also have a dizzying array of agency names, so I changed terms based on the types of potential agencies in the state (e.g., agency, board, commission, enterprise) and the phrases the state used to describe the agency's action; some states compel agency action while others issue writs of mandamus. Additionally, I conducted various levels of proximity searches for each compilation of phrases.[194] And to be sure that a doctrine didn't develop using another state's term under a different line of cases, I also searched for all terms that could be used to describe the agency, action, or doctrine. Once cases and statutory provisions were compiled, I did a qualitative review to determine whether a gap in fact existed.

1. Defining a Gap

Identifying a gap requires a definition: no statewide legal framework for when, how, or why an agency may choose, or decline to choose, a particular means of decisionmaking. Two words require further precision.

First, framework. Gaps can only exist if the state APA doesn't provide a means of directing agency action. For example, in 2010, Kansas amended its APA to expressly state that "[a]n agency may . . . establish policies, and interpret statutes or regulations by order in an adjudication" subject to specific limitations.[195] As of my survey, then, Kansas doesn't have a gap in

192 As an example, one preliminary search was often "adv: agency /p rule! /p adjudic! & choice."

193 Whether an agency refused to promulgate a rule might look like "adv: agency /p refuse /p promulgate /p rule," "adv: commission /p decline /p issue /p rule!" or "adv: board & refuse & rule!"

194 That is, /p versus /s versus &.

195 *See* KAN. STAT. ANN. § 77-415(b)(2) (2010).

whether an agency can make policy through an adjudication.[196] Rhode Island did something similar in 2016 as to guidance.[197]

So, framework encompasses more than judicial doctrine; it also includes statutory guidelines. Critically, then, the state legislature is equally as responsible for filling a gap as are the courts.

Second, statewide. I'm interested in frameworks that apply to the entire state, not particular agencies or regions. Thus, a solitary agency providing guidance or issuing a regulation as to when it would refuse to promulgate a rule is insufficient to fill a gap.[198] Similarly, because many state courts of appeals operate with geographic or jurisdictional limitations, I typically only consider state supreme court resolution sufficient, with two limitations.

First, if a state has a specialized court of appeals, its judicial treatment is sufficient to fill a gap. Pennsylvania provides one example. The Pennsylvania Supreme Court generally considers its specialized appellate court authoritative: "[W]e assume that the Commonwealth Court—as the intermediate court with specialized expertise in the administrative-law field—will remain abreast . . . and analyze their merits relative to the Pennsylvania scheme in appropriate circumstances and in due course."[199] In other words, I won't create a gap where, based on the particularities of state law, the state doesn't consider there to be one.[200]

Second, longstanding, repeat, analytical treatment of an issue by a nonspecialized statewide court of appeals can also fill a gap. Simply citing a doctrine but not applying it, or stating a proposition such as "not all agency action must go through rulemaking" without analyzing the circumstances of

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196 Kansas had already judicially filled the gap in 2004, when the Kansas Supreme Court addressed the issue. The Kansas Supreme Court first touched on the question in 1993, essentially permitting direct, plain-language interpretations to be set out in adjudication. *In re* Appeal of Morton Thiokol, Inc., 864 P.2d 1175, 1183 (Kan. 1993). But it wasn't until 2004 that the court answered the broader question of policymaking in adjudication. Hallmark Cards, Inc. v. Kan. Dep't of Com. & Hous., 88 P.3d 250, 257 (Kan. Ct. App. 2004).

197 *See* 42 R.I. GEN. LAWS § 35-2.12 (2024) (laying out the required procedures a state agency must follow when issuing a guidance document).

198 If there were a statewide agency that could direct processes for many others, its regulations and guidance could fill a gap. However, I did not find a state with such a transubstantive agency that in fact answered questions of agency process.

199 Nw. Youth Servs., Inc v. Dep't Pub. Welfare, 66 A.3d 303, 313 (Pa. 2013).

200 There is, of course, the possibility that a statute or judicial opinion is a gap-filler in name only. As a result, my decision not to note a gap where state law doesn't consider there to be one leaves open the possibility that, as a practical matter, agencies can do what they want, regardless of any formal statute or ruling. While I don't ignore this possibility, my methodology included a qualitative review to ensure that a gap was indeed filled; I didn't just leave it to the state APA but also examined court opinions, guidance, and so on. Even so, this is still a risk and one worth examining in future work through a case-study method that looks even more closely into on-the-ground practices of state administrative law.

when, will not fill a gap. But, if a court of appeals does concretize the doctrine and apply the rule, with some consistency and frequency, it is not a gap.

These exceptions help serve the ultimate goal: determining when basic questions of where and how an agency can act have been answered. If a court of appeals provides longstanding treatment of an issue, then it is possible to determine, more likely than not, how an agency is supposed to act. Conversely, if a framework has been gestured to in a state supreme court opinion, such as "there are circumstances when an agency may proceed by ad hoc adjudication to set policy," but the opinion doesn't describe those circumstances and the facts of the case don't generate a rule, then there is a gap. And, if the relevant statute says that "internal agency memoranda" need not go through notice and comment, as many state APAs do, but there is no definition of internal agency memoranda in the statute or in the state's case law, then there is a gap.

This won't satisfy everyone. One category of dissatisfaction will come from my reading of the cases and the exclusion of certain materials. Some will place more emphasis on courts of appeals. Others might, upon reading a particular state supreme court decision, conclude in their estimation that the question is sufficiently answered. Others still will think that the phrase "internal agency memoranda" is crisp on its face (although few state courts themselves think so).[201] That said, even if I adopted a more generous definition of judicial treatment or statutory resolution, it still wouldn't defeat the central finding. No matter how expansive, the fact remains that most states have still not answered some basic questions of agency process. And even if there were a definition that changed my finding from "most" to "many," the consequences outlined in Part IV still stand.

A second category of objection is a type of realist claim. One could fairly argue that there isn't a gap if agencies and regulated entities have entered some sort of equilibrium, such that people on the ground know when Agency A will issue guidance and Agency B will proceed through adjudication. Or, relatedly, that there isn't a gap because states will follow federal doctrine, and everyone knows as much.

As to the equilibrium argument, a generally recognized practice is not a legal framework. But, more importantly, it does not mean that the practice comports with the state APA or constitution, or that it militates the concerns described in Part IV. State courts addressing the adjudication or rulemaking debate often look to state due process principles to determine whether an agency may set out a general policy in an adjudication.[202] That a limited set

201 *See, e.g.*, *infra* subsection II.B.3.

202 *See, e.g.*, Rincover v. Dep't of Fin., Sec. Bureau, 866 P.2d 177, 180 (Idaho 1993) ("This would undermine the requirement of definite warnings that is the fundamental premise of the concept of

of regulated entities and government officials know that Agency B proceeds by adjudication says nothing of whether it *should* or *can* proceed by adjudication. Similarly, an agency issuing unpublished guidance could very well not satisfy the state APA, as is the case in Maryland.[203] And when that general practice is finally challenged, the agency will be tied up in litigation, and the equilibrium will be thrown off. *PNW Metal Recycling* and the cases in Section II.A demonstrate as much.

This latter point supports my claim in Part IV: the costs of administration and values of federalism are diminished when agencies act through undeveloped and unpublished state law. Large, repeat players will likely be the only ones to know of the practice, putting at a disadvantage small, regulated entities and public-interest groups. So, while agency insiders might know where to find Agency A's guidance, the benefits of administration, like reason giving and expertise, and the values of federalism, such as participation and experimentation, are diminished when only a select group is privy to agency action.

California also helps to address the second realist objection, that states will follow federal doctrine. California doesn't follow federal law at all when it comes to guidance. Rather, it has a rigid test, requiring full notice and comment.[204] And Michael Asimow has shown that California agencies don't particularly follow this requirement,[205] supporting critics of ossification and its potential to create a body of secret law. But it's not just California. Some states don't allow agencies to make policy by adjudication,[206] some have their own doctrines of mandamus to compel agency action,[207] and others strip the

unconstitutional vagueness."); Hallmark Cards, Inc. v. Kan. Dep't of Com. & Hous., 88 P.3d 250, 257 (Kan. Ct. App. 2004) (quoting Clark v. Ivy, 727 P.2d 493, 497 (Kan. 1986)) ("When an agency is charged with implementing or interpreting legislation . . . fundamental fairness and due process generally dictate that any 'standard' or 'statement of policy' be expressed in a rule or regulation filed and published pursuant to law.").

203 Eng'g Mgmt. Servs., Inc. v. Md. State Highway Admin., 825 A.2d 966, 978 (Md. 2003) ("[T]he Maryland APA does not follow the federal APA's exceptions to the rulemaking procedures, and indeed expressly rejects most of the federal APA exceptions.").

204 Tidewater Marine W., Inc. v. Bradshaw, 927 P.2d 296, 303-04 (Cal. 1996).

205 Michael Asimow, *California Underground Regulations*, 44 ADMIN. L. REV. 43, 58 (1992) ("As a result of the costs, delays, and general aggravation attendant upon complying with the APA, agencies often adopt no rules—legislative or nonlegislative. Similarly, they frequently decide not to revise existing rules, manuals, bulletins, and the like even when these are outdated. Instead, agency staff members make a conscious decision to get by in some other way than issuing a rule.").

206 *See, e.g.*, Trans Shuttle, Inc. v. Pub. Utils. Comm'n, 89 P.3d 398, 408 (Colo. 2004); Aluli v. Lewin, 828 P.2d 802, 804 (Haw. 1992).

207 *See, e.g.*, Thom v. Barnett, 967 N.W.2d 261, 296-97 (S.D. 2021); State *ex rel.* Mo. Growth Ass'n v. State Tax Comm'n, 998 S.W.2d 786, 789 (Mo. 1999).

courts of jurisdiction to review huge swaths of administrative action.[208] It isn't a foregone conclusion that a state will follow the path of federal law. How a state court—or legislature—might resolve outstanding questions of agency process is unclear ex ante.

2. Metric #1: Policy by Adjudication

The "foundational"[209] principle that an agency can make policy through both adjudication and rulemaking is not so foundational in the states. As demonstrated in Figure 3, fifteen states have never addressed the question, and others only began to fill in the gap as recently as 2019.

To add further context, this subsection and the ones that follow will describe those states and cases that are demonstrative of both gaps and gap-filling. Doing so illustrates the uncertainty that exists across the states.

California and Alaska are clear examples of developed doctrine. The California Supreme Court sanctioned the choice of policymaking forum in 1976.[210] The court called it a "well-settled principle of administrative law" and cited *Chenery*.[211] In affirming the choice in 2017, the court reasoned that "[f]inding otherwise would . . . cut against the grain of our previous decisions and the importance they ascribe to the agency's expertise in deciding how it makes policy."[212] Similarly, the Alaska Supreme Court first permitted an agency to proceed through adjudication in 1986, also citing *Chenery*.[213] The doctrine has continued to develop, with the court holding that, while the initial choice is up to the agency, an agency can't amend an already promulgated regulation,[214] or impose any new substantive requirements,[215] through adjudication.

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208 *See* Ark. Dep't of Educ. v. McCoy, 624 S.W.3d 687, 691-93 (Ark. 2021) (dismissing petitioners' APA claim because it "falls outside the limited parameters where a circuit court has subject-matter jurisdiction over an agency's rule-making authority").

209 Stack, *supra* note 114, at 955 n.3; Hickman & Nielson, *supra* note 114, at 950.

210 Agric. Lab. Rels. Bd. v. Superior Ct., 546 P.2d 687, 701 (Cal. 1976).

211 *Id.*

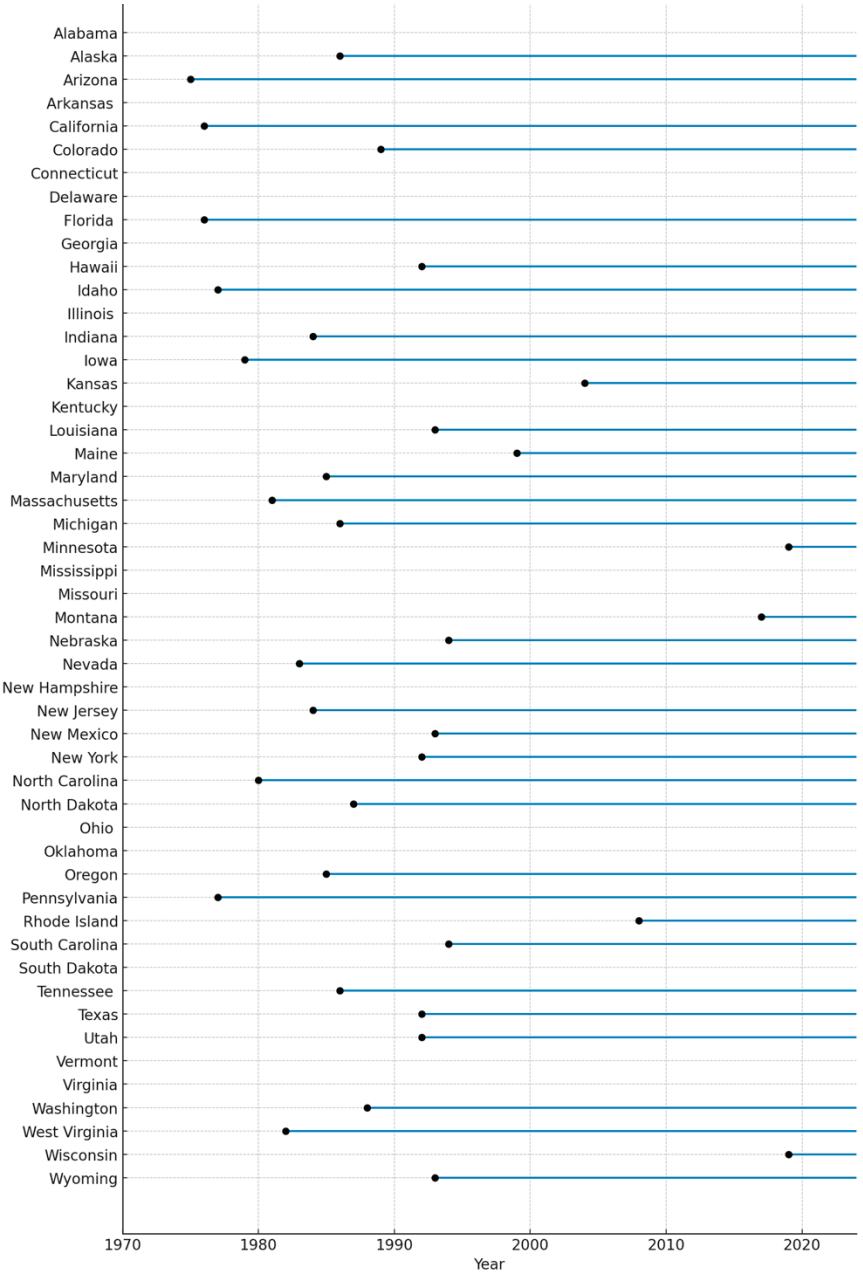
212 Ass'n of Cal. Ins. Cos. v. Jones, 386 P.3d 1188, 1199 (Cal. 2017).

213 Amerada Hess Pipeline Corp. v. Alaska Pub. Utils. Comm'n, 711 P.2d 1170, 1178 (Alaska 1986).

214 *See* Burke v. Hous. NANA, L.L.C., 222 P.3d 851, 867 (Alaska 2010).

215 Marathon Oil Co. v. Dep't Nat. Res., 254 P.3d 1078, 1086-87 (Alaska 2011).

Figure 3: Gaps in Policy by Adjudication[216]



[216] The black dot represents when the initial gap-filling occurred. The longer the line, the longer the gap-filling process. No dot (or line) represents a gap.

Alabama's Supreme Court, on the other hand, has never addressed the issue, leaving it to a single court of appeals case in 1985.[217] A generous reading of Alabama's case law is that the adjudication-versus-rule debate falls under the broader question of whether something is a "rule" at all.[218] But even that question wasn't addressed until 2002, first by the court of appeals, and soon after, by the supreme court.[219] In 1977, the Connecticut Court of Common Pleas held that a rule of general applicability cannot be laid out in an adjudication,[220] but there's no corresponding Connecticut Supreme Court case adopting that standard, even though interpretations laid out in an adjudication can receive deference.[221] And in Illinois, although a state court of appeals adopted the *Chenery* principle in 1988,[222] the state supreme court hasn't. The only other reference to the doctrine involves the interpretation of federal statutes, but even there, the court doesn't adopt the *Chenery* principle or comment on its application in Illinois.[223]

Ohio first determined that it didn't want to follow *Chenery* in 1972.[224] The court of common pleas, which is a trial court but also handles appeals from agency action, provided a relatively detailed explanation of why it wouldn't adopt *Chenery*,[225] and the court of appeals affirmed that reasoning the following year.[226] The Ohio Supreme Court then cited *Chenery* in 1976, embracing *Chenery*'s reasoning without mentioning the court of appeals' previous holding.[227] While the Ohio Supreme Court has commented on the doctrine on a handful of occasions,[228] it hasn't done so since 2000. The closest Delaware has come is opaquely suggesting that a rule or statute must be in

217 *See* Potts v. Bennett, 487 So.2d 919, 921 (Ala. Civ. App. 1985).

218 *See, e.g.*, Families Concerned About Nerve Gas Incineration v. Ala. Dep't Env't Mgmt., 826 So.2d 857, 868-69 (Ala. Civ. App. 2002).

219 Ala. Dep't Env't Mgmt. v. Coosa River Basin Initiative, Inc., 826 So.2d 111, 115-16 (Ala. 2002).

220 Chesire Convalescent Ctr., Inc. v. Comm'n on Hosps. & Health Care, 386 A.2d 264, 268 (Conn. C.P. 1977).

221 Sarrazin v. Coastal, Inc., 89 A.3d 841, 861-62 (Conn. 2014) (explaining that an administrative interpretation hadn't been "articulated pursuant to any adjudicatory procedures," among other requirements, such that it could receive deference).

222 Boffa v. Ill. Dep't Pub. Aid, 522 N.E.2d 644, 648 (Ill. App. Ct. 1988).

223 *See* Price v. Philip Morris, Inc., 848 N.E.2d 1, 44-45 (Ill. 2005).

224 *See* Application of Blue Cross, 296 N.E.2d 305, 309 (Ohio C.P. 1972).

225 *Id.* at 307-09.

226 Blue Cross of Nw. Ohio v. Superintendent of Ins., 319 N.E.2d 212, 216-17 (Ohio Ct. App. 1973).

227 Duff Truck Line, Inc. v. Pub. Util. Comm'n, 348 N.E.2d 127, 131 (Ohio. 1976) (per curiam).

228 *See, e.g.*, Hamilton Cnty. Bd. of Mental Retardation & Developmental Disabilities v. Pros. Guild of Ohio, 545 N.E.2d 1260, 1265 (Ohio 1989) (addressing whether an agency's rules were "improperly promulgated because they were adopted in an adjudication process rather than pursuant to" the agency's rulemaking authority).

place before a regulated entity can be held liable in an adjudication.[229] And although Florida adopted the broad posture that an agency is "not required to institute rulemaking procedures each time a new policy is developed," the Florida Supreme Court has stated that changes to policy should generally not go through adjudication.[230]

Hawaii ruled in 1992 that agencies cannot proceed through adjudication when the "subject matter . . . encompasses concerns that transcend those of individual litigants and implicates matters of administrative policy."[231] Since then, the issue has been a frequent topic of litigation, pushing back against the realist critique of the sufficiency of agency practice as a gap filler.[232] And though the Arizona Supreme Court set out general principles in 1975,[233] only the court of appeals addressed the issue after, albeit not until 1994 and 1998.[234] The court of appeals has continued to weigh in, filling what would otherwise be a gap. New Hampshire cited *Bell Aerospace* (a *Chenery* progeny) in a parenthetical in 2009 but otherwise doesn't have a standard.[235]

3. Metric #2: Rule or Guidance

Guidance, interpretive rules, and the like (what Strauss calls "[p]ublication rules"[236]) fare little better than the adjudication question. Ten states have no framework for determining the difference between a rule and guidance, and nine others only addressed it for the first time in the last ten years.

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229 *See* Del. Real Est. Comm'n v. Patterson-Schwartz & Assocs., 344 A.2d 242, 244-45 (Del. 1975) (citing *Chenery* to support its finding that "[t]he general mandate, either statutory or administrative must precede the specific violation").

230 Fla. Cities Water Co. v. Fla. Pub. Serv. Comm'n, 384 So.2d 1280, 1281 (Fla. 1980).

231 Aluli v. Lewin, 828 P.2d 802, 804 (Haw. 1992).

232 *See, e.g.*, *In re* Application of Haw. Elec. Co., 918 P.2d 561, 570 (Haw. 1996) (citing *Chenery* and noting its position that "agencies are allowed the broad discretion to choose whether to develop policy by rule-making or adjudication"); *In re* Water Use Permit Applications, 9 P.3d 409, 481-82 (Haw. 2000) (addressing the U.S. Supreme Court's holding in *Chenery* alongside its own holding "that giving precedential effect to prior commission decisions . . . does not constitute rulemaking"); Pilaa 400, LLC v. Bd. of Land & Nat. Res., 320 P.3d 912, 930-31 (Haw. 2014) ("This court has held that rule-making is inappropriate where an agency lacks experience with a particular problem.").

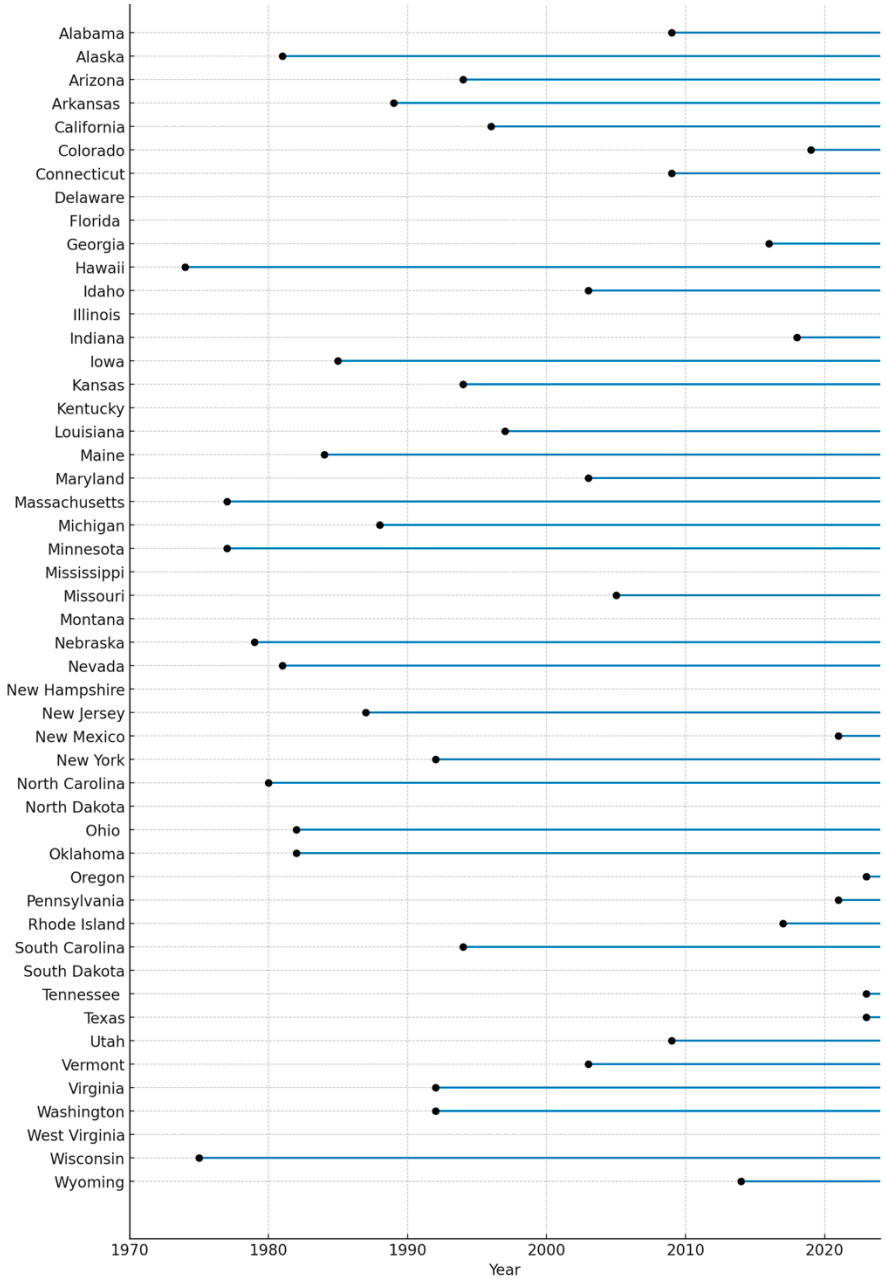
233 Ariz. Corp. Comm'n v. Palm Springs Util. Co., 536 P.2d 245, 249-51 (Ariz. 1975).

234 Carondelet Health Servs., Inc. v. Ariz. Health Care Cost Containment Sys. Admin., 895 P.2d 133, 141 (Ariz. Ct. App. 1994); Shelby Sch. v. Ariz. State Bd. Of Educ., 962 P.2d 230, 238-39 (Ariz. Ct. App. 1998).

235 *In Re* Concord Tchrs., 969 A.2d 403, 410 (N.H. 2009).

236 Strauss, *supra* note 125, at 804.

Figure 4: Gaps in Guidance and Policy Statements[237]



[237] The black dot represents when the initial gap-filling occurred. The longer the line, the longer the gap-filling process. No dot (or line) represents a gap.

Alaska, again, illustrates what gap-filling can look like. The supreme court drew the first distinction between rules and guidance in 1981,[238] with continual refinement and adjustments afterward.[239] Texas provides another example, but by its court of appeals. Although the Texas Supreme Court made a perfunctory note in 1994 that "[n]ot every statement by an . . . agency is a rule,"[240] the court of appeals expressed in 2011 that "[p]recisely when those circumstances exist has sometimes been difficult to discern under the relevant case law."[241] The court made various attempts to delineate those boundaries,[242] but a full resolution didn't occur until 2023, on which the state supreme court notably denied certiorari, perhaps signaling that the supreme court endorses the court of appeals' treatment of the doctrine.[243] Another state with a clear statewide framework is New Jersey, which adopted a six-part balancing test in 1984, with further adjustments following afterward.[244] Massachusetts also tackled guidance early, in 1977,[245] and continues to delineate the edges of the doctrine.[246]

Montana folds its analysis of whether some "guidance" is an improper rule into its analysis of when an action can proceed by adjudication, but that framework wasn't laid out until 2017.[247] That late change led immediately to more litigation.[248] And, as discussed above, Colorado made passing mention of the distinction in 1988[249] but otherwise didn't clarify it until 2019.[250] (Although it did reject *Chevron*-type deference in 2021, unanimously and with

238 Kenai Peninsula Fisherman's Coop. Ass'n v. State, 628 P.2d 897, 904-05 (Alaska 1981).

239 *See, e.g.*, Alaska Ctr. for the Env't v. State, 80 P.3d 231, 243-44 (Alaska 2003); Alyeska Pipeline Serv. Co v. Dep't of Conservation, 145 P.3d 561, 573 (Alaska 2006); Chevron U.S.A., Inc. v. Dep't of Revenue, 387 P.3d 25, 37 (Alaska 2016); Exxon Mobil Corp. v. Dep't of Revenue, 488 P.3d 951, 956-57 (Alaska 2021).

240 Tex. Educ. Agency v. Leeper, 893 S.W.2d 432, 443 (Tex. 1994).

241 Tex. Dep't of Transp. v. Sunset Transp., Inc., 357 S.W.3d 691, 703 (Tex. Ct. App. 2011).

242 *See, e.g.*, Teladoc, Inc. v. Tex. Med. Bd., 453 S.W.3d 606, 607-08 (Tex. Ct. App. 2014) ("We again confront the recurrent question of whether an 'informal' written agency pronouncement regarding law or policy constitutes a 'rule' as the Administrative Procedure Act . . . defines that term."); Trinity Settlement Servs., LLC v. Tex. State Sec. Bd., 417 S.W.3d 494, 501-02 (Tex. Ct. App. 2013) (holding that when an agency publicly announced its interpretation of a federal statute during a lawsuit, it did not issue an "ad hoc rule" because the statements "were limited solely" to the specific adjudication).

243 *See* Tex. Comm'n on Env't Quality v. Friends of Dry Comal Creek, 669 S.W.3d 506, 519-22 (Tex. Ct. App. 2023), *cert. denied*, No. 03-21-00204-CV (Tex. 2023).

244 *See* Metromedia, Inc. v. Dir., Div. of Taxation, 478 A.2d 742, 750-52 (N.J. 1984); *In re* Request for Solid Waste Util. Customer Lists, 524 A.2d 386, 391 (N.J. 1987).

245 *See* Mass. Gen. Hosp. v. Rate Setting Comm'n, 359 N.E.2d 41, 43-44 (Mass. 1977).

246 *See* Carey v. Comm'r of Corr., 95 N.E.3d 220, 225 (Mass. 2018).

247 *See* S. Mont. Tel. Co. v. Mont. Pub. Serv. Comm'n, 395 P.3d 473, 477 (Mont. 2017).

248 *See, e.g.*, McGree Corp. v. Mont. Pub. Serv. Comm'n, 438 P.3d 326, 333-34 (Mont. 2019). Curiously, both the 2017 and 2019 decisions involve the Public Service Commission.

249 Carries Ass'n v. Pub. Util. Comm'n, 761 P.2d 737, 748-49 (Colo. 1988).

250 Doe 1 v. Colo. Dep't Pub. Health & Env't, 451 P.3d 851, 857 (Colo. 2019).

little analysis.[251]) Similarly, the Utah Supreme Court in 1984 made the cursory statement that rulemaking is sometimes unnecessary, but it didn't say when.[252] It wasn't until a complicated issue with a CAA SIP that the court finally provided clarity.[253] The West Virginia Supreme Court, meanwhile, has self-consciously recognized that "[m]ost of our cases fail to make a distinction between legislative and interpretive rules," even though the structure of the state APA makes the existence of guidance suspect.[254]

As previously alluded to, Alabama didn't address the problem until 2002,[255] and full treatment didn't come until 2009.[256] Connecticut didn't explicitly resolve it until 2009, following other states and folding it into the adjudication-versus-rulemaking debate.[257] Wyoming ostensibly answered the question in 1983 and 1988. However, in the former year, the court ruled that, because the agency didn't have the power to issue a binding regulation, the agency's interpretation was necessarily a type of nonbinding interpretive guidance.[258] Similarly, in 1988, the court ruled that, where a statute requires a particular outcome, it necessarily isn't guidance.[259] That, of course, leaves open a huge gap where guidance is often found: an interpretation of an unclear statutory requirement by an agency that has the power to issue binding regulations. This question wasn't answered until 2014, and the court drew heavily on D.C. Circuit precedent, not its own 1980s cases.[260]

4. Metric #3: Revocation or Change in Position

Revocations and changes in policy positions are particularly uneven. While a sizable number of states tackled the issue soon after or even before *State Farm*, slightly more than half of the states have never answered the question of how searching—or not searching—review should be when an agency reverses a prior position, whether in rulemaking or guidance.

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251 Nieto v. Clark's Market, Inc., 488 P.3d 1140, 1148-49 (Colo. 2021).

252 Gray v. Dep't of Emp. Sec., 681 P.2d 807, 815-16 (Utah 1984).

253 Utah Chapter of Sierra Club v. Air Quality Bd., 226 P.3d 719, 735-36 (Utah 2009). Even though there was no framework for determining the relative informality of agency action until 2009, Utah did generally have a rule that informal guidelines were unreviewable due to their informality. Mountain Fuel Supply Co. v. Pub. Serv. Comm'n, 861 P.2d 414, 420 (Utah 1993).

254 Appalachian Power Co. v. State Tax Dep't, 466 S.E.2d 424, 435 (W. Va. 1995).

255 *See supra* notes 217–219 and accompanying text.

256 Byrne v. Galliher, 39 So. 3d 1049, 1055-58 (Ala. 2009).

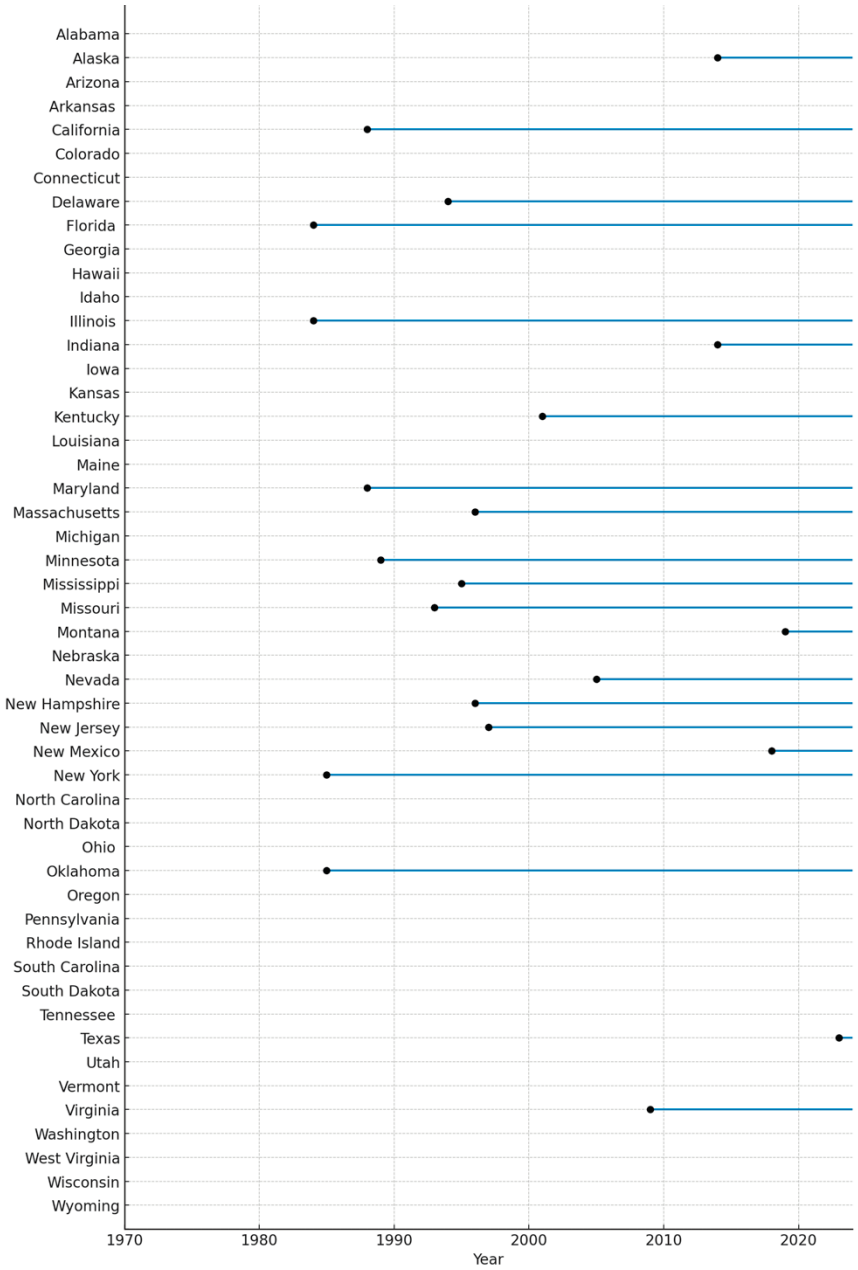
257 Pierce v. Lantz, 965 A.2d 576, 578-80 (Conn. App. Ct. 2009) (relying on precedent involving adjudications to determine whether an administrative policy was an improper regulation).

258 Battlefield, Inc. v. Neely, 656 P.2d 1154, 1160 (Wyo. 1983).

259 Wyo. Mining Ass'n v. State, 748 P.2d 718, 723-24 (Wyo. 1988).

260 Mountain Reg'l Servs., Inc. v. State *ex rel.* Dep't of Health, 326 P.3d 182, 185 (Wyo. 2014).

Figure 5: Gaps in Agency Reversal[261]



[261] The black dot represents when the initial gap-filling occurred. The longer the line, the longer the gap-filling process. No dot (or line) represents a gap.

While not the specific focus of my search, a fair number of states do specify standards of review for policy changes during adjudications, primarily concerned with retroactivity and due process. For example, Connecticut dealt with adjudications in 1976.[262] In those situations, an agency can change its mind to address materially different circumstances or to correct errors.[263] Although both factors raise the question of whether the agency is really changing its mind, reversing course, or just applying an already established policy to new circumstances. In other states, the fact that an agency changes its mind is of little to no consequence to the reviewing court, as in *PNW Metal Recycling*.[264]

The states that do speak to it outside adjudications are haphazard. In 1996, the Supreme Judicial Court of Massachusetts noted that an agency can change its mind so long as rulemaking procedures are followed.[265] But it did not offer anything more. The only gloss came a year later in a parenthetical, stating that an agency must show a "reasoned basis" for a change but that "even changed circumstances would not justify a departure from the text and plain meaning of the statute."[266] And while Montana originally dealt with the issue at around the same time—reasoning that "[i]t is a well-established principle of agency law that an agency has a duty to either follow its own precedent or provide a reasoned analysis explaining its departure"[267]—it did not address the question again for another twenty-two years, citing its 1997 precedent as well as the federal case *FCC v. Fox*.[268]

On its face, Alabama appears to have strict rules requiring notice and comment for an agency's change in position, but it folds the analysis into its strong deference scheme, whereby even reversals receive considerable deference.[269] The state supreme court hasn't directly answered the question,

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262 *See* Shea v. State Emps. Ret. Comm'n, 368 A.2d 159, 162 (Conn. 1976).

263 *Id.*

264 This might raise a definitional dispute: if the reversal itself is of no consequence to a reviewing court, is that not demonstrative of a rule? That is, there is no difference in review as to promulgation, revocation, or reversal. But it seems odd to fill a decisional gap through silence, particularly when the court otherwise recognized it had little case law to draw from.

265 *See* Comm'r of Revenue v. BayBank Middlesex, 659 N.E.2d 1186, 1189 (Mass. 1996).

266 Mass. Bay Transp. Auth. v. Lab. Rels. Comm'n, 680 N.E.2d 556, 560 (Mass. 1997).

267 Waste Mgmt. Partners of Bozeman, Ltd. v. Mont. Dep't of Pub. Serv. Regul., 944 P.2d 210, 217 (Mont. 1997).

268 *See* McGree Corp. v. Mont. Pub. Serv. Comm'n, 438 P.3d 326, 334 (Mont. 2019).

269 *See, e.g.*, Hartford Healthcare, Inc. v. Williams, 751 So. 2d 16, 22 (Ala. 1999) (referring to the "general principle that reviewing courts should accord deference to the decisions of administrative agencies"); Health Care Auth. of Athens v. Statewide Health Coordinating Council, 988 So. 2d 574, 589 (Ala. Civ. App. 2008) (emphasizing that deference should be awarded to an agency's interpretation of revision); Columbiana Health & Rehab. LLC v. Statewide Health Coordinating Council, 138 So. 3d 305, 310-11 (Ala. Civ. App. 2013) (explaining that an agency's

except to say that "inconsistent" determinations are tested against the arbitrary and capricious standard.[270] Arizona hasn't addressed it either, even when directly presented with the issue.[271] When the court of appeals mentions a reversal of agency position, it has no Arizona precedent to discuss and skips right over it.[272] The Colorado Supreme Court has never spoken to it, although a lower court recently held that an agency needn't go through notice and comment to revise a regulation if the revision is based on a determination that the regulation conflicts with the statute, as the regulation was invalid from the outset.[273] Curiously, the only Georgia case on point is a court of appeals decision from 1996 that implies that rulemaking procedures are only required for promulgation, and not repealing, revoking, or changing a rule, despite the state APA's definition of a rule explicitly encompassing more than just initial promulgation.[274] Idaho has only gone so far as saying that an agency "may have the discretion to change its rules from time to time."[275] This didn't occur until 2022, which is perhaps unsurprising, given the Idaho Supreme Court's own acknowledgment of the limited body of administrative law from which it can draw.[276]

While the Florida Supreme Court has never approached the issue, the courts of appeal have consistently held that, due to the definition of a rule, a repeal can only be subject to challenge if it creates a new rule.[277] And a policy reversal is subject to the same standard as initial promulgation.[278] Delaware adopted something similar to *Fox*, although predating *Fox* in 1990, saying that

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interpretation carries "controlling weight," especially when consistent with the plain language of the rule).

270 *See Ex parte* Shelby Med. Ctr., Inc., 564 So. 2d 63, 68 (Ala. 1990).

271 *See* Sun City Home Owners Ass'n v. Ariz. Corp. Comm'n, 496 P.3d 421, 424-26 (Ariz. 2021); Sun City Home Owners Ass'n v. Ariz. Corp. Comm'n, 460 P.3d 283, 298 (Ariz. App. 2020) (Brown, J., dissenting).

272 *See* T.P. Racing, L.L.L.P. v. Ariz. Dep't of Gaming, No. 1 CA-CV 22-0224, 2022 WL 17684565, at *2 (Ariz. Ct. App. Dec. 15, 2022) (opting not to discuss any precedent regarding "unexplained change[s] in agency position[s]").

273 *See* Fontanari v. Colo. Mined Land Reclamation Bd., 529 P.3d 615, 624 (Colo. App. 2023). A case from 1987 also mentions the general principle that an administrative agency may "alter its own rules." Mayberry v. Univ. of Colo. Health Sci. Ctr., 737 P.2d 427, 430 (Colo. App. 1987).

274 *See* Corner v. State, 477 S.E.2d 593, 594 (Ga. Ct. App. 1996).

275 *See* Pizzuto v. Idaho Dep't of Corr., 508 P.3d 293, 296 (Idaho 2022).

276 *See* Wood v. Idaho Transp. Dep't, 532 P.3d 404, 415 (Idaho 2023) ("Wood contends that there is no precedent from this Court to draw from that deals with rulemaking under the APA in this area. Wood is correct.").

277 *See* Fed'n of Mobile Home Owners of Fla., Inc. v. Fla. Manufactured Hous. Ass'n, 683 So. 2d 586, 590-91 (Fla. Dist. Ct. App. 1996) ("A repeal that does not have the effect of creating or implementing a new rule or policy is not a 'rule' subject to challenge.").

278 *See, e.g.*, Dep't of Admin. v. Albanese, 445 So. 2d 639, 642 (Fla. Dist. Ct. App. 1984) (explaining that an agency is not limited by its initial construction of a rule); Cleveland Clinic Fla. Hosp. v. Agency for Health Care Admin., 679 So. 2d 1237, 1241-42 (Fla. Dist. Ct. App. 1996) (applying the same standard to a policy change as an amended rule).

an "agency is not forever bound by its prior determinations, but if an agency does depart from prior precedent, it 'must either distinguish or rationally explain its departure.'"[279]

5. Metric #4: Nonpromulgation and Inaction

Of the process questions, nonpromulgation, or agency inaction in the face of a statutory mandate or request, is the most underspecified. Given that the United States Supreme Court only addressed the issue in 2007 in *Massachusetts v. EPA*,[280] this might be expected. That said, most state decisions regarding agency inaction predate the Supreme Court, some by decades. At the same time, that's only thirteen states, despite most state APAs having a specific provision providing the opportunity to review a refusal to promulgate a rule. But what that review is supposed to look like isn't clear.

For those states that do offer some sort of review, the judicial scrutiny of agency inaction is often imprecise. For example, in 2019, Colorado at least formally adopted federal precedent.[281] In practice, though, the peculiarities of the case—utilizing the legislative declaration to force administrative action to curb greenhouse gas emissions—rendered the actual application of that standard not particularly important.[282] Similarly, in 2021, the Arkansas Supreme Court determined that refusals to issue rules of "general applicability" are reviewable,[283] but requests for specific or "individualized" ones are not.[284] The difference, however, wasn't described.[285] New Hampshire, in an unpublished denial of certiorari in 2023 (without corresponding citations to precedent), simply held that an agency must follow the state APA when refusing to promulgate rules.[286] South Dakota implies that it has always had a framework, holding that "[m]andamus is not a new cause of action; it was available at common law and has been broadened by statute."[287] Yet, when it made this statement in 2021, it didn't cite a single case involving the use of mandamus to compel the promulgation of a regulation.[288]

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279 E. Shore Nat. Gas Co. v. Del. Pub. Serv. Comm'n, 637 A.2d 10, 18 (Del. 1994) (quoting City of Alma v. United States, 744 F. Supp. 1546, 1562 (S.D. Ga. 1990)).

280 *See* Massachusetts v. EPA, 549 U.S. 497, 527-28 (2007).

281 *See* Colo. Oil & Gas Conservation Comm'n v. Martinez, 433 P.3d 22, 27-28 (Colo. 2019).

282 *See id.* at 27-33.

283 Ark. Dep't of Educ. v. McCoy, 624 S.W.3d 687, 691-92 (Ark. 2021) (emphasis omitted).

284 *Id.* (emphasis omitted).

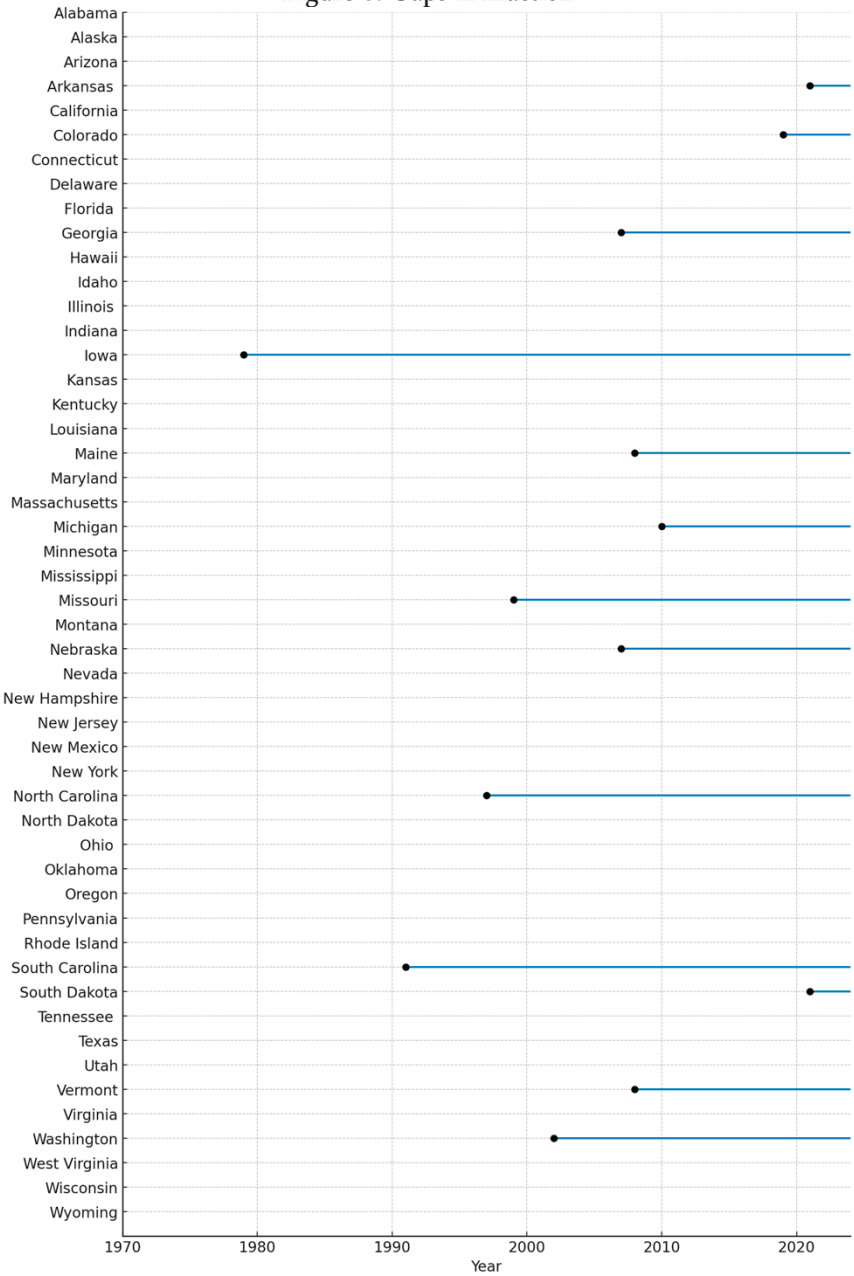
285 *Id.*

286 *See In re* Avery, No. 2022-0208, 2023 WL 2344292, at *2 (N.H. Mar. 3, 2023).

287 Thom v. Barnett, 967 N.W.2d 261, 296-97 (S.D. 2021).

288 *See generally id.*

Figure 6: Gaps in Inaction[289]



[289] The black dot represents when the initial gap-filling occurred. The longer the line, the longer the gap-filling process. No dot (or line) represents a gap. One unpublished Connecticut court of appeals case from 2005 says that because the agency "stated its reasons in writing," its denial

The older cases offer somewhat more direction. Because the Iowa APA requires that denials occur within sixty days and "on the merits," the Iowa Supreme Court had early cause to address the question in 1979.[290] The court adopted a "fair consideration" standard, which "does not require the agency to take a stand on the substantive issues that might prompt the proposal of a rule."[291] Even so, it has only come up sparingly, once in 1998 and again in 2002,[292] although the court of appeals has dealt with the issue more recently.[293] Hawaii has contemplated a flavor of nonpromulgation, holding that the refusal to issue a declaratory ruling, which is different than a rule, is reviewed for abuse of discretion if the declaratory ruling is within the statutory grant of discretion.[294] A concurring opinion did hint at a standard in 2005.[295] Maine only requires that a denial happen within thirty days, with highly deferential review,[296] although no case cites the state's petition for rulemaking provision in its APA. And Alaska initially addressed the nonpromulgation issue in 1985, well before *Massachusetts v. EPA*, adopting a "non-arbitrary" standard.[297] But that lay dormant until 2022, with the Alaska Supreme Court explicitly noting the gap and punting on fully settling the standard.[298]

* * *

While brisk, the preceding snapshot should make the picture clear: there is gappiness in state law governing agency process. The claim isn't that all states lack statewide frameworks. Rather, a lot of them do, or at least complete ones. As a result, depending on the state, there are vastly different means of policing agency policymaking. On average, state agencies seemingly have few

complied with the state APA. Missionary Soc. of Conn. v. Bd of Pardons & Paroles, No. CV054009492S, 2005 WL 1092435, at *4 (Conn. Super. Ct. Apr. 8, 2005). Even those that have definitional disagreement would likely consider this insufficient as a gap filler.

290 *See* Cmty. Action Rsch. Grp. v. Iowa State Com. Comm'n, 275 N.W.2d 217, 219-20 (Iowa 1979).

291 *Id.* at 220.

292 *See* Bernau v. Iowa Dep't of Transp., 580 N.W.2d 757, 766 (Iowa 1998); Litterer v. Judge, 644 N.W.2d 357, 361 (Iowa 2002).

293 *See* Filippone *ex rel.* Filippone v. Iowa Dep't of Nat. Res., 829 N.W.2d 589, 589 (Iowa Ct. App. 2013).

294 *See* Citizens Against Reckless Dev. v. Zoning Bd. of Appeals, 159 P.3d 143, 153 (Haw. 2007).

295 *See* Lingle v. Haw. Gov't Emps. Ass'n, 111 P.3d 587, 599-600 (Haw. 2005) (Acoba, J., concurring) ("Orders refusing to issue a declaratory ruling would fall within the definition of actions 'disposing' of petitions.").

296 Friedman v. Bd. of Env't Prot., 956 A.2d 97, 101 (Me. 2008).

297 *See* Johns v. Com. Fisheries Entry Comm'n, 699 P.2d 334, 339-40 (Alaska 1985).

298 *See* Sagoonick v. State, 503 P.3d 777, 804-05 (Alaska 2022) (explaining that the court had "never . . . described [its] power to review an agency's denial of a proposed regulation" beyond procedural due process review).

ex-ante guideposts for their process decisions, and no ex-post supervision either. It's not that diversity isn't a feature or virtue of cooperative federalism, but that this feature rests on the assumption that there is law—statewide legal frameworks—behind it. Without those frameworks, how that diversity manifests is left primarily to agency discretion. As a result, implementation may not depend on local conditions or preferences, as cooperative federalism anticipates, but on the gaps in the law that are meant to see state implementation through the last mile.

C. *Unwritten Policy*

Much agency policy remains unwritten across the states. While notice-and-comment rulemaking (or the state equivalent) is disseminated, more informal actions often are not. So, while undeveloped judicial doctrines might not create cause for concern if at least the substance of an informal policy could be debated, there is little chance for deliberation to happen. Of course, this problem isn't unique to the states; federal guidance and adjudications can be difficult to find. But, on the whole, tracking them down is easier. And even if it weren't, doing so requires contacting, searching through, and interacting with a small subset of agencies, not a mishmash of fifty different states, each of which might have several agencies implementing various pieces of a single federal statute. More importantly, just because parts of federal law are unwritten, that doesn't make the problem in the states better. It only deepens the complexity of monitoring agency action.

Some states, of course, do have relatively well-run systems of publication. The New York Department of Environmental Conservation publishes both its adjudicatory orders[299] and its guidance.[300] While the compilation of guidance documents appears comprehensive,[301] information on adjudications only goes back to 2005, depending on which database you access.[302] Colorado, at least in the environmental division of the Department of Public Health and Environment, publishes some guidance on its website. However, it is sprinkled throughout various webpages, and its transparency depends on the division within the agency. The water quality division makes its guidance easy

299 *See Hearings*, N.Y. DEP'T ENV'T CONSERVATION, http://www.dec.ny.gov/hearings/395.html [https://perma.cc/AQP2-ZWNT] (last visited Feb. 27, 2025).

300 *See Guidance and Policy Documents*, N.Y. DEP'T ENV'T CONSERVATION, http://www.dec.ny.gov/regulations/397.html [https://perma.cc/SRH8-EGSL] (last visited Oct. 24, 2023).

301 An entire article could be devoted to analyzing the guidance of one agency to determine how much is actually covered.

302 See *Hearings*, *supra* note 299 (outlining one database for "Hearing Decisions" that goes back ten years, and another, called the "Docket Management System," that goes back to 2005).

to find,[303] but the air division requires tabbing through various programs to find something relevant.[304] This is combined with the Colorado Supreme Court's relaxed jurisprudence on rulemaking versus guidance.[305] Adjudications, however, are generally unpublished.[306] While some adjudications are seemingly available, many lead to broken links, are unsearchable, or only go back so far.[307] The Wyoming Department of Environmental Quality doesn't post its guidance, and adjudications need only be served on the parties to the adjudication.[308] The Iowa Department of Natural Resources posts some guidance, but only sporadically.[309] And it doesn't publish its adjudications.[310]

A recent and promising trend requires the publication of guidance documents. For example, as of 2017, the Nebraska APA requires guidance to be "available at one public location and on the agency's website."[311] Agencies seem to be complying, with guidance easily found on and downloadable from various agency websites.[312] But that rule doesn't extend to adjudications, with

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303 *See Water Quality Regulations, Policies and Guidance*, COLO. DEP'T PUB. HEALTH & ENV'T, http://cdphe.colorado.gov/water-quality-regulations-policies-and-guidance [https://perma.cc/A3P9-UY9N] (last visited Oct. 24, 2023).

304 *See Air Pollution*, COLO. DEP'T PUB. HEALTH & ENV'T, http://cdphe.colorado.gov/apcd [https://perma.cc/AC8F-NU2C] (last visited Oct. 23, 2023).

305 *See supra* notes 164–169 and accompanying text.

306 *See* OFF. ADMIN. CTS., https://oac.colorado.gov [https://perma.cc/G8VB-XRQW] (last visited Oct. 23, 2023) (providing no access to past adjudicatory orders). Workers' compensation cases are published, although somewhat haphazardly and only after 2015. *See Decisions and Orders – WC*, COLO. OFF. ADMIN. CTS., https://oac.colorado.gov/proceedings-services/workers-compensation/decisions-and-orders-wc [https://perma.cc/FQV5-9T5J] (last visited Feb. 27, 2025).

307 *See, e.g.*, *Colorado Air Quality Settlements and Orders*, COLO. DEP'T PUB. HEALTH & ENV'T, https://cdphe.colorado.gov/compliance-and-enforcement/colorado-air-quality-settlements-and-orders [https://perma.cc/KM8F-H8EK] (last visited Feb. 27, 2025) (orders from only 2019 to present); *Water Quality: Penalty Orders*, COLO. DEP'T PUB. HEALTH & ENV'T, https://cdphe.colorado.gov/water-quality/clean-water/actions-and-public-notices/enforcement-actions/water-quality-penalty [https://perma.cc/D88W-NVNZ] (last visited Feb. 27, 2025) (orders from 2010 to present, many of which lead to broken URLs).

308 270–2 WYO. CODE R. §§ 27–29 (LexisNexis 2025).

309 *See, e.g.*, *Water Quality Standards*, IOWA DEP'T NAT. RES., https://www.iowadnr.gov/Environmental-Protection/Water-Quality/Water-Quality-Standards [https://perma.cc/VG3P-JJ64] (last visited Oct. 24, 2023) (providing guidance only on a limited range of issues).

310 *See* IOWA DEP'T INSPECTIONS, APPEALS & LICENSING, https://dial.iowa.gov/hearings/admin-hearings [https://perma.cc/QFX4-3ZXJ] (last visited Oct. 24, 2023) (providing no access to past adjudicatory orders).

311 NEB. REV. STAT. § 84-901.03(1) (2024).

312 *See, e.g.*, *Publications, Grants & Forms*, NEB. DEP'T ENV'T & ENERGY, https://dee.nebraska.gov/forms/publications-grants-forms [https://perma.cc/RLV3-AYJY] (last visited Dec. 18, 2023); *Environmental Guidance Library*, NEB. DEP'T TRANSP., https://dot.nebraska.gov/projects/environment/environmental-guidance-library [https://perma.cc/KX98-MKG3] (last visited Dec. 18, 2023).

only a handful of enforcement actions published, and only ones from 2024.[313] Oregon has a comparably opaque database, providing the violator, general context of the violation, and program, but leaving to guesswork how the agency reached its decision (that is, pursuant to which statute, policy, or interpretation).[314] As of 2018, Tennessee also requires agencies to submit an annual list of new policies to state legislators,[315] and agency guidance can be found easily enough.[316] Vermont, too, as of 2024, requires guidance to be available.[317] But for states without these provisions, securing guidance and adjudications requires proactively asking an agency for them. That might be simple if you're already investigating a particular issue or starting up operations for the first time. But how will the other car dismantlers or the public have occasion to know when to ask for them?

* * *

Much of state administrative law is unwritten. At first blush, it might be possible to brush this off as a parochial concern for those states that haven't addressed certain issues—let Florida and Massachusetts deal with the fallout of open questions and unknowable policy. If state law was just that, *state* law, this might be a perfectly reasonable response for someone in California or Alabama. But as Part I demonstrates, that isn't the case. Federal statutes and regulations operate under the guise of state law. The assumption in empowering states to implement federal programs is that there will be legal frameworks for ensuring that states meet federal baselines while considering local conditions and preferences. But that law is underspecified, rendering much of federal law unwritten, too.

Of course, large, repeat players are often aware of policy changes; they have in-house compliance officers and maintain frequent contact with regulators. However, as discussed below, they have little incentive to blow the whistle. It's the smaller regulated entities and civil society in general that will be most impacted and yet least in the know about the informal policies affecting them. In other words, even if practice on the ground did comport

313 *Enforcement Actions*, NEB. DEP'T ENV'T & ENERGY, https://dee.nebraska.gov/news-events/enforcement-actions [https://perma.cc/9LPZ-HPHK] (last visited Feb. 27, 2025).

314 *See Enforcement Database Search*, OR. DEP'T ENV'T QUALITY, https://www.deq.state.or.us/programs/enforcement/EnfQuery.asp [https://perma.cc/5ZUX-MYGH] (last visited Jan. 5, 2024).

315 TENN. CODE ANN. § 4-5-230 (2024).

316 *See, e.g.*, *Guidance*, TENN. STATE BD. EDUC., https://www.tn.gov/sbe/rules--policies-and-guidance/guidance.html [https://perma.cc/5P8P-9SPL] (last visited Jan. 8, 2024); *Policy & Guidance Documents*, TENN. DEP'T ENV'T & CONSERVATION, https://www.tn.gov/environment/about-tdec/policy-guidance.html [https://perma.cc/NVP5-7QXC] (last visited Jan. 8, 2024).

317 VT. STAT. ANN. tit. 3, § 835 (2024).

with state constitutional and administrative law—resolving one response to the realists—there would still be distributional impacts on those least funded and connected. For example, how would smaller entities know about KDAQ's decision to change its source grouping requirements until they were informed that the policy was not only changed but also applied to them, and right at the point when they needed to renew? How would a nonprofit, concerned citizen, or business association know? They could call up the agency and ask or go through a lengthy state open-records request. But on what basis would they know to ask about that particular permitting circumstance? And this is true whatever the substantive or normative side you're on for any particular environmental dispute. The trend, at a minimum, is striking. And it raises a simple question: how could there be such a decided lack of development across so many states?

III. SUPPLY AND DEMAND FOR STATE ADMINISTRATIVE LAW

States are no strangers to administrative agencies. The state administrative apparatus has ballooned alongside its national counterpart.[318] And it's been around for about as long.[319] Yet the framework surrounding how an agency comes to a decision—what I call "process"—has remained undeveloped or underdeveloped. How can an aspect of government so crucial to the day-to-day operation of states, especially one that is exponentially larger and more complex than it was fifty years ago, fly under the judicial and legislative radar? In other words, how is unwritten administrative law possible?

In this Part, I sketch out tentative explanations for why administrative law goes unwritten. I don't shy away from the fact that these descriptions are imperfect. There are fifty states, each with varying sets of governmental structures, civil societies, and institutions. While it's easy enough to describe a pattern across the states, it is more difficult to assign a specific causal explanation for that pattern in any particular state. One thing is clear: population is a poor indicator. California has 39 million people, Iowa roughly 3 million, and Alaska about 740,000.[320] And each only has one gap.

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318 *See* Cynthia J. Bowling & Deil S. Wright, *Public Administration in the Fifty States: A Half-Century Administrative Revolution*, 30 STATE & LOC. GOV'T REV. 52, 53 (1998) ("[P]ublic administration has become a core component of contemporary governance in the states.").

319 *See* Mathews, *supra* note 54, at 387 ("Writing in 1919, Mr. W. F. Willoughby declared that 'at the present time few reforms of government in the United States are more urgent than that of the reorganization of the administrative services of our state governments, so as to put them upon the integrated or departmental basis.'").

320 *QuickFacts: Alaska; Iowa; California*, U.S. CENSUS BUREAU, http://www.census.gov/quickfacts/fact/table/AK,IA,CA/PST045222 [https://perma.cc/2KWV-B95F] (last visited Feb. 19, 2025).

Still, sufficient similarities allow lessons to be drawn. In doing so, I focus on one aspect of unwritten administrative law: the absence of judicial review. The other parts—unwritten guidance, adjudications, and so on—have easier and less interesting answers. Unlike judicial review, there's a clearer correlation with population and funding. New York and California post their adjudications and guidance, while Iowa effectively doesn't. But New York and California are also significantly larger and more well-funded than the Hawkeye State.[321] Other possible, neutral explanations include a lack of coordination between parent agencies and divisions, no perceived need, and path-dependent history. Or, pessimistically, it could benefit the agencies to have a body of secret law, both to hide from the federal government and to trap regulated entities.

So, I focus on judicial review, offering two explanations. First, state governmental structure and political culture, with weak civil society and a strong governor, lead to dollars being better spent at the ballot box rather than on court filings. Second, the types of actions I highlight are naturally susceptible to evading judicial review.

A. *State Structure*

States are distinctive political creatures. While the federal constitution grants authority, a state constitution limits it; a state legislature's power is plenary, but Congress's is not.[322] Over ninety percent of state judges "face the voters in some form of election."[323] Unlike the federal executive (the

321 Always the small-state contrarian, Alaska does post at least some of its guidance and adjudications. *See Office of Administrative Hearings: Category List*, ALASKA DEP'T ADMIN., https://aws.state.ak.us/OAH?_ga=2.126869707.772809404.1625605822-1137594216.1611621525 [https://perma.cc/F34E-DDFX] (last visited Feb. 27, 2025). Another population-esque metric is resources. But even that doesn't fully answer the question. Alaska has a high level of state employees per capita, and California does not. *See* Bowling, *supra* note 51, at 508 tbl.17-2. Wyoming similarly has a high employee-to-population ratio and doesn't post its adjudications or guidance. *Id.*

322 *See* Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 VAND. L. REV. 1167, 1230 (1999); U.S. CONST. art. I, § 1 ("All legislative powers herein *granted* shall be vested in a Congress of the United States . . . ." (emphasis added)).

323 Bruhl & Leib, *supra* note 46, at 1217 n.1. While this is true, I don't want to overemphasize the point. The elected nature of state judges often rubs lawyers' and academics' intuitions the wrong way. But how closely do any of us pay attention to the election of judges, other than a few high-profile examples of actual partisan elections? The fact is that, for most state judges, the job functionally comes with life tenure. *See id.* at 1232-33 (noting that, during a thirty-year period, only about one percent of judges were defeated in retention elections and more than one-third of voters, while voting for other candidates, skipped voting for judges). At the same time, I don't want to underemphasize the point by suggesting that the federal and state judiciary are the same. Indeed, there is a body of literature that reveals that, at least on certain hotly contested topics like the death penalty, elected judges' rulings tend to trend towards the median voter the closer a judge is to election. *See* Maria Ponomarenko, *Substance and Procedure in Local Administrative Law*, 170 U. PA. L. REV. 1527, 1565 & n.196 (2022) (collecting sources).

President), which is unitary,[324] states have "unbundled" executives.[325] State citizens elect all sorts of executives, from governors and attorneys general[326] to secretaries of state[327] and local boards.[328] At the same time, these elections are increasingly "second-order."[329] State electorates often vote along national party lines, resulting in "many state and local elections hav[ing] little to do with . . . past performance of state government, or candidates' positions on issues in front of the state or local governments."[330] With starkly different legislative, executive, and judicial configurations, it might not be much of a surprise that states do administrative law differently.

But what is it about structure, elections, and the states that leads to both a lack of demand for (litigants bringing cases involving process) and low supply of (state supreme courts granting certiorari) answers to questions of agency process? Drawing from a growing body of scholarship on the states, I suggest that there are two main drivers: weak civil society and strong governors.

1. Weak Civil Society

Much like "the states" are different than the "United States," state civil society is different as well. Miriam Seifter provides a rigorous analysis of how and why state agencies are less prone to citizen oversight.[331] The byline is that "state agencies are, on the whole, less transparent than their federal counterparts, less closely followed by watchdog groups, and less tracked by the shrinking state-level media."[332] Unpacking why this occurs provides insights into how weak civil society might lead to less demand for process litigation. That is, in a world where citizens can't track agency decisions, the types of interest groups that would bring litigation are underfunded and

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324 I don't use this term in the normative or consequential sense in which it is used when discussing the unitary executive theory. *See, e.g.*, Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the First Half-Century*, 47 CASE W. RES. L. REV. 1451, 1452-53 (1997) ("The first camp consists of so-called unitary executive theorists . . . who support a broad presidential power of removal and control over law execution."). Rather, I use it descriptively to note that we have only one elected executive. *Cf.* U.S. CONST. ART. II, § 1 ("The executive Power shall be vested in *a* President of the United States of America." (emphasis added)).

325 Christopher R. Berry & Jacob E. Gersen, *The Unbundled Executive*, 75 U. CHI. L. REV. 1385, 1386 (2008) ("The unbundled executive is a plural executive regime in which discrete authority is taken from the president and given exclusively to a directly elected executive official.").

326 Bowling, *supra* note 51, at 509-11.

327 *Id.*

328 *Id.*

329 Schleicher, *supra* note 37, at 765.

330 *Id.* at 767.

331 Seifter, *supra* note 39, at 110.

332 *Id.*

understaffed, and state media doesn't track agency action, there's little that potential litigants can glom onto to bring process suits.

On Seifter's account, a working oversight system needs three parts: "(1) state agencies that are visible and accessible; (2) a civil society with the capacity to monitor state agencies; and (3) a media 'megaphone' for amplifying findings."[333] In general, states fail on these three metrics. As to the first, Seifter's suggestion that states don't share information readily is borne out by my descriptive account in Part II. On the whole, states keep guidance and adjudications close to their chest; while some states make them accessible, others provide no information at all, requiring citizens and regulated parties to contact the state agency directly for information.[334] But, as discussed above, there's little reason for any particular person to have occasion to ask for or know about an unpublished decision. Why would a member of the Sierra Club reach out to a state agency about a particular permit requirement if that requirement was the same for decades and there was no indication that it had changed? Or what about a regulated entity in the middle of its compliance period? This results in a mutually reinforcing cycle, with non-rulemaking agency decisions remaining unwritten because there aren't any requirements to make them accessible, rendering them harder to track, and resulting in less litigation that might raise their visibility.

The exacerbating factor is that interest groups—the ones that would usually track and bring litigation—are relatively weak at the state level. Although scholars have brought increasing attention to state administrative work, "[t]he public is not deeply engaged with the work of state agencies."[335] It's true that there are many local chapters of various groups, particularly environmental ones.[336] The Sierra Club has chapters all over the country, along with the Wilderness Society and the Audubon Society.[337] But these are primarily chapters of local activists, not lawyers. That "[c]ommunity-based conservation" may have "always been at the heart of the Audubon movement" doesn't mean that the Audubon Society is tracking state-level considerations of whether a business is a small, medium, or large generator of waste under RCRA, something often specified by state guidance and regulations.[338] These

333 *Id.* at 128.

334 Moreover, states are often not required to publish this information electronically or to have it readily accessible. *Id.* at 131 ("[M]any states have neither a systematic scheme for collecting and sharing agency data nor a requirement that agencies keep electronic records.").

335 *Id.* at 147.

336 *See* Revesz, *supra* note 33, at 569 (describing the different regional presences of the Sierra Club, Wilderness Society, National Wildlife Federation, and National Audubon Society).

337 *Id.*

338 *Id.*

local chapters are generally not concerned with the dribble of regulatory interpretation.

Even if a particular organization were interested in narrow issues of state administrative law, litigation would require local chapters to know that concerns exist in the first place, which is hard to find out from the agency itself and often isn't amplified by state media. State-level journalism, as a whole, is decreasing in volume and quality.[339] The result is that it "disproportionality imperils investigative journalism about state and local government."[340] That's only part of the story, though. Even in a stylized heyday of state media, it is unlikely that investigative journalism about state governments would have examined the specific means by which agencies were coming to a decision. A local paper might come across an adjudication regarding multiple source modeling under the CAA in pursuit of a story on increased phosphorous emissions in the state, but that would only be a consequence of the investigation, not its goal. And with state-level media declining in general, the chance that these add-on effects would catch unpublished process decisions dwindles even further.

Relatedly, the groups that are active in the states and that might be aware of agency process are regulated entities. They must comply with state guidance, whether or not it is published, so businesses have the incentive to seek out, understand, and implement agency interpretations of law.[341] But regulated parties might not challenge guidance or process decisions. Because they work day-to-day with state agencies, corporate and regulated interests are often closer to agency process decisions.[342] Indeed, they're often the ones asking for guidance in the first place. These "satisfied consumers" don't show up in court to challenge guidance.[343]

A final note on civil society and interest groups is that "state interest groups," or those representing the states en masse, don't feel particularly compelled to discuss the nitty-gritty of implementation.[344] Their institutional

339 Seifter, *supra* note 39, at 141.

340 *Id.*

341 Strauss, *supra* note 131, at 1483.

342 Justin Weinstein-Tull, *State Bureaucratic Undermining*, 85 U. CHI. L. REV. 1083, 1123 (2018) ("[P]ublic interest groups . . . have not effectively balanced out the influence of corporate interests at the state administrative level.").

343 Strauss, *supra* note 131, at 1483 ("A difficulty, of course, is that these satisfied consumers of publication rules tend not to appear in court, and the valuable functions publication rules perform, especially in constraining the behavior of agency operatives, consequently appear in court opinions only as asides.").

344 *See* Miriam Seifter, *States as Interest Groups in the Administrative Process*, 100 VA. L. REV. 953, 996 (2014) ("[S]tate interest group input is problematic for information gathering for the simple reason that a single group position mutes states' varied knowledge, experiences, and perspectives in favor of one generally agreeable viewpoint.").

heft comes from their ability to speak as "a unified voice."[345] But uniformity across politics, geographies, priorities, and institutions is unrealistic. Thus, those that do have cross-state information on process don't have an incentive to make these issues known. And restricting discussion of these issues to individual contact between states further reinforces state agency opacity.[346]

2. Strong Governors

In addition to her work on state civil society, Seifter has noted that governors "have emerged as the drivers of state government."[347] Although they were once simple figureheads, the result of disillusionment with strong executives pre-Founding,[348] many governors today have both ex-ante and ex-post control of agency action.[349] Governors are visible,[350] their elections high profile,[351] and their regulatory decisions often considered final.[352] All of this adds up to the public and media frequently blaming governors for regulatory action, and state agencies, much like their federal counterparts, can be considered "part of the '[Governor's name]' Administration."[353]

If true, then accountability is achieved through the governor, rather than through direct citizen oversight of agency action. Citizens and interest groups can effectively take agencies to task at the ballot box instead of in the courtroom. Indeed, if people are generally unaware of the specific process decisions that agencies make—and the cost of finding them too great—the better practice might be to vote for a governor who will generally implement preferred policies. In other words, if the cost of search and oversight is high, the second-best option is gubernatorial politics.[354] Interest groups can then

345 *Id.* at 958.

346 A related but distinct point on the lack of civil society is the lack of experts to draw from. Experts "shap[e] legal meanings and suggest[] legal boundaries." Miriam Seifter, *Extra-Judicial Capacity*, 2020 WIS. L. REV. 385, 392. One reason Iowa might be more well developed than other states is that it's home to Arthur Bonfield, an academic, a drafter of model uniform state administrative procedure acts, and a writer of a treatise on Iowa administrative law. Iowa courts frequently pull from his treatise and expertise. *See generally* Bonfield, *supra* note 117.

347 Seifter, *supra* note 38, at 487.

348 GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 148-50 (1969) (finding that state constitutions at the Founding reflected a strong aversion to executive power).

349 Seifter, *supra* note 38, at 499.

350 *Id.* at 502.

351 Schleicher, *supra* note 37, at 775-76.

352 Seifter, *supra* note 38, at 502.

353 *Id.* at 500-02, 536.

354 Another explanation might be broader executive-branch politics. As mentioned at the beginning of this Section, states have different governmental structures and varying forms of the separation of powers. In states with separately elected executive agency heads, control of agency action is more directly tied to the political process, meaning it could be easier and quicker to secure policy outcomes through elections than through litigation.

spend time and money lobbying governors' mansions, sending pamphlets to voters, and going door-to-door.[355]

While this might be a rational response to agency opacity, stilted state media, and the rise of governors, it's far from second-best as an oversight mechanism. Guidance, adjudication, inaction, and revocation are not the sorts of things that governors use their bully pulpit for. They're inherently untraceable, diffuse, and technical, such that they're unlikely to garner the attention of a governor. What are the chances that the Oregon Governor was involved in her state's dismantler interpretation?[356] Or the Kentucky Governor in his state's major source determination?[357] As a result, although the rise of so-and-so's administration's agency will shift the incentives to focus on the Governor, perhaps resulting in less litigation, it won't provide a robust means of monitoring agency process.

B. *Nature*

Agency process, on its own terms, is inherently difficult to police and litigate. Even in a world with strong civil society oversight, weak governors, or some combination of societal conditions that would make administrative action more visible, that wouldn't necessarily be the case for agency process. For the federal government, guidance "dwarf[s] that of actual regulations by a factor of twenty, forty, or even two hundred."[358] Even if all the guidance, memos, statements of policy, and bulletins were published somewhere, the most well-funded watchdog group couldn't keep up. Inaction, too, is difficult to pin down. An agency not responding to a petition for an extended period, or responding and not publishing its decision, or not taking a statutorily required step, isn't easily knowable unless the agency announces that it's not acting. As mentioned in Part I, agencies often aren't required to give notice to other potentially regulated parties, let alone interested parties, when they set out a new rule in an adjudication. If the decision isn't published, there are few means to discover that the agency has a new policy, unless the agency makes a public showing of its enforcement action or the regulated entity discloses the adjudicatory action.

The result is that, on average, regulated entities remain the only ones with any knowledge of agency process. Regulated entities have little incentive to

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355 This same logic might apply to legislative action as well. As Matthew Zinn explains, in the enforcement context where states have primacy, the "higher costs of participation in the administrative arena" might lead "cash-strapped environmental groups [to] target only state legislatures and thus might influence state agencies only indirectly." Zinn, *supra* note 57, at 123.

356 *See supra* notes 7–14 and accompanying text.

357 *See supra* notes 177–182 and accompanying text.

358 Parrillo, *supra* note 40, at 167-68.

speak out, though. Or at least they feel like they shouldn't speak out because they consistently fear bad publicity.[359] If a state agency doesn't publish or announce its enforcement action and reasoning, there is no incentive for the subject of the action to do so either. Why would a company announce that it violated its CWA discharge permit and was hit with a fine or cleanup action?

These pathologies exist in much of agency process. Nicholas Parrillo provides an account of the tendency to follow guidance and accept adjudications in the federal context—a sphere with robust interest groups and media presence. He finds that regulated entities, all else being equal, generally follow guidance and forgo duking it out in an adjudication or litigation. Parrillo explains that "[r]egulated parties often face overwhelming practical pressure to follow what a guidance document 'suggests.'"[360] The rational concern is that "agencies are sometimes inflexible about guidance."[361] In other words, guidance isn't a suggestion but a command. Parrillo offers four situations in which a regulated party will comply rather than challenge: (1) pre-approval permitting; (2) continuous monitoring and evaluations; (3) the existence of compliance personnel within the regulated entities; and (4) the possibility of ex-post enforcement.[362] On his account, if all or most of these are present, then "guidance will quite likely be followed by regulated parties."[363] At least three (one, two, and four) are frequently present in the sorts of federal programs that states implement, particularly environmental ones.

Look at the CWA NPDES program, which most states administer.[364] The CWA prevents "the discharge of any pollutant by any person" unless specifically authorized.[365] The NPDES program is one of those specific authorizations. It enables the permitting authority (a state, in almost all circumstances) to "issue a permit for the discharge of any pollutant, or combination of pollutants."[366] Violations of a permit are enforceable, either through revocation or an enforcement action, and compliance is continuous, with self-reporting and potential inspections.[367] Thus, one of the main

359 *Id.* at 210.

360 *Id.* at 174.

361 *Id.*

362 *Id.* at 177.

363 *Id.* at 178.

364 *See supra* Part I.

365 33 U.S.C. § 1311(a).

366 *Id.* § 1342(a)(1).

367 *See, e.g.*, 40 C.F.R. pt. 123 (2024) (outlining general state NPDES requirements); CAL. ENV'T PROT. AGENCY, STATE WATER RES. CONTROL BD., WATER QUALITY ENFORCEMENT POLICY (2009), https://www.waterboards.ca.gov/water_issues/programs/enforcement/docs/enf_policy_final111709.pdf [https://perma.cc/3DW5-UE63] (outlining California's NDPES enforcement program).

programs administered through the states meets three of the four conditions ripe for following guidance.[368] The same situation occurs with Title V permitting and new source review under the CAA as well as waste management (of the hazardous and solid varieties) under RCRA. The nature of the delegation is to implement and enforce,[369] meaning a significant portion of state administrative practice contains factors that might lead the only stakeholders that know about agency process to shy away from challenging it.

But why do these factors lead regulated parties to go along with an agency? For pre-approval permitting, the benefits of following guidance will increase with both the costs of not receiving the permit and the uncertainty of what the agency might want for approval.[370] If a regulated party—say, a factory that needs to discharge into a river or produce air emissions—can't operate without a permit, it will be particularly important that the entity actually receives the permit. In those situations, following guidance is paramount, especially if startup costs are high. Combine this with regulatory gray areas, that is, compliance measures not explicitly set out in the regulations or the authorizing statute, and a party applying for a permit will have almost no choice but to follow the guidance. Otherwise, it risks having the permit withheld.[371]

On the side of continuous monitoring, regulated entities "have a strong incentive to follow guidance . . . under a regulatory scheme that is so complicated that the regulated party will inevitably engage" in noncompliant conduct.[372] Following guidance in these situations helps "build up goodwill and mutual trust with the agency."[373] This is precisely the context in which regulated entities operate when dealing with state-implemented federal environmental programs. RCRA is a prime example. Depending on the amount of hazardous waste a permitted entity generates, it will have different requirements.[374] But complying with those requirements is no easy task. Kansas in fact publishes its "Hazardous Waste Generator Handbook,"[375] guidance that is 101 pages long.[376] And it specifically states that "[c]omplying

368 This isn't to say that the fourth, compliance officers, isn't present. But without specific details on each state and the entities that operate there, it's difficult to know.

369 *See supra* Part I.

370 Parrillo, *supra* note 40, at 185.

371 *Id.*

372 *Id.* at 191.

373 *Id.* at 192.

374 *See* 40 C.F.R. § 262.10 (2024).

375 *See* KAN. DEP'T HEALTH & ENV'T, HAZARDOUS WASTE GENERATOR HANDBOOK (2014), https://www.kdhe.ks.gov/DocumentCenter/View/4882/Hazardous-Waste-Generator-Handbook-PDF [https://perma.cc/K3QR-N3RY].

376 *Id.*

only with the federal regulations . . . *will not* allow you to operate in full compliance with the Kansas regulations."[377] The guidebook emphasizes how challenging compliance is, stating that "[h]azardous waste determinations can be complicated, and must be done for every waste stream generated at the facility."[378] The only exempted waste is "office trash."[379]

Far from being an abstract guide, the handbook lists percentage mixtures for types of waste and which category they might fall under, such as "acetone (65%), toluene (6%), and MEK (5%)."[380] In other words, depending on the precise ratio of chemical compounds generated by waste, there might be different processes for disposal. Entities are under a continuous obligation to monitor their waste streams and follow specific regulations for their generator size, with agencies popping in for random inspections. Violations can come from failing to "mark the date upon which each period of accumulation begins" or from forgetting to label something as hazardous.[381] These sorts of violations are easy to generate, and a good working relationship with the agency might result in favorable settlement terms, such as a reduction in penalty. And "little restrains a state from pursuing, or not pursuing, enforcement in whatever form it chooses."[382] Under those conditions, a firm is unlikely to challenge the state's guidance or adjudicatory policy as unduly legislative or beyond the statute's purview. The better practice is to follow directions and not worry about the precise outer bounds of RCRA.

The final relevant category is the possibility of ex-post enforcement. The "crude" version is that, because guidance outlines what an agency considers unlawful, regulated entities "can greatly reduce the risk associated with enforcement by following guidance."[383] As Parrillo explains, though, actual incentives will vary depending on the chance of getting caught; the likelihood, cost, and viability of an enforcement action; and the cost of sanctions.[384] While the influence of any one of these factors varies depending on the situation, at least in the state environmental context, the conditions tend toward firms going along with guidance. State agencies are not afraid to issue notices of violation under either RCRA or the CAA.[385] Texas, for

377 *Id.* at 5 (emphasis added).
378 *Id.* at 6.
379 *Id.*
380 *Id.* at 11.
381 *Id.* at 16.
382 Zinn, *supra* note 57, at 96.
383 Parrillo, *supra* note 40, at 208.
384 *Id.*
385 *See* Zinn, *supra* note 57, at 94 tbl.1.

example, has issued thousands of such notices.[386] Given the self-reporting obligations, continual oversight, and significant discretion given to state agencies, regulated parties are likely to be caught if out of compliance. The sanctions are often low enough[387] that it makes little sense to incur the expense of protracted litigation over the content of guidance or the possibility that a new policy was issued during an enforcement action.

As a result, the nature of these issues means they're generally known only to the regulated entities, and the regulated entities have little incentive to challenge them. When combined with a weak civil society and a strong governor, it's likely that the subnational demand for agency process litigation is low. What's more, these same incentives might also create a cycle of increasing informality. Because regulated entities need goodwill and continued compliance to operate, they will seek out informal modes of agency direction that lower the stakes. Formally mandatory legislative rules will require greater engagement from regulated entities, meaning more opportunities for friction and, ultimately, a higher chance for litigation, which they would prefer to avoid. At the same time, the public interest groups who might otherwise advocate for legislative rules that would make their watchdog roles easier are relatively weak and placing their bets elsewhere.[388] The result is a reduction in not only process litigation but also rulemaking overall, which then leads to more informal agency action.

This isn't without complications. In particular, RCRA, the CWA, and the CAA aren't the only statutes and regulations that state agencies administer. While the enforcement mechanisms and guidance produced in federal environmental implementation might lead regulated entities to avoid litigation, that says nothing about the scores of other statutes and regulations that state agencies enforce. The true drivers might be weak civil society and an inability to track guidance, adjudications, and inaction.

C. *Supply*

The supply of litigation is trickier. Peering into the minds of any state supreme court or justice to decipher why it or they don't take agency process questions is speculative. But rather than demand driving low levels of litigation, it could be that agency process questions are making it to state

386 *TCEQ Notices of Violation: Data Visualizations*, TEX. COMM'N ENV'T QUALITY, https://www.tceq.texas.gov/compliance/notices-of-violation [https://perma.cc/6W4M-YQW9] (last visited Oct. 18, 2023).

387 For example, in Texas, the average assessed penalty across all environmental media in 2024 was around $17,400. *See, e.g.*, *Annual Enforcement Report: Fiscal Year 2024*, TEX. COMM'N ENV'T QUALITY (Nov. 18, 2024), https://storymaps.arcgis.com/stories/701bb62bf1814626936a5d92b7695583 [https://perma.cc/23UK-UA88] (tbl.2). But the average payable penalty was about half that. *Id.*

388 *See supra* notes 331–340 and 344–346 and accompanying text.

supreme courts, and the courts are denying certiorari. One possible explanation is that there is no state D.C. Circuit from which to cross-pollinate administrative decisions, as often happens among states.[389] State supreme courts could be reluctant to address questions without a shared network or understanding of the best state administrative procedure. This, however, seems unlikely, given state courts' willingness to implant both federal substance and timing. If substance and timing are importable, there is little reason to believe process is not.

Another possibility is that the pool of lawyers who run for elected judicial office, throw their hats in the ring for state nominating commissions, or are appointed by governors are not administrative attorneys, which is already a somewhat small bar. Administrative law is often viewed as a federal venture. This not only results in the problems I identify throughout this Article but also means that there are fewer attorneys attuned to administrative law in the states.[390] If that's the case, state supreme court justices either (1) might not see a statewide problem when a drab administrative law question is presented in cert, except in the most politically salient or fraught decisions (think medical marijuana in Colorado[391]), or (2) have no desire to get up to speed.

Although plausible, the causality in these explanations is less clear than for the explanations for low demand. Moreover, there are often only a few lower court decisions, which generally points to a demand problem and not a supply one. Regardless of the potential causes, the implications for federalism and the virtues of administrative law are clear.[392]

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389 *See* Shane A. Gleason & Robert M. Howard, *State Supreme Courts and Shared Networking: The Diffusion of Education Policy*, 78 ALBANY L. REV. 1485, 1487 (2014) (highlighting state supreme courts' role in sustaining policy networks).

390 Nestor M. Davidson, *Localist Administrative Law*, 126 YALE L.J. 564, 568-69 (2017) (describing the federal focus of much administrative law scholarship).

391 *See supra* notes 164–169 and accompanying text.

392 This Part raises two related but distinct questions: (1) Why do these pathologies only decrease the potential for process litigation? (2) Why are some process doctrines especially undeveloped?

As to the first, the other administrative law doctrines (arbitrary and capricious review, timing, deference) are significantly more public and formal. While it might be difficult for a local interest group to track unpublished guidance or reversals, rulemaking decisions are posted broadly, often with several public outreach sessions and either a comment period or a formal hearing. When a rule is finally promulgated, it won't be hidden, drastically reducing the search costs for the interested public. In other words, there is occasion to know about and challenge the agency action. Relatedly, timing and deference are tied directly to these public and formal decisions: whether to defer to an agency's interpretation of the statute will stem directly from an already known rulemaking. And the timing of challenging agency action—whether a rule or a permit—is tied to a substantive decision affecting a particular regulated party or industry. So although regulated entities are reluctant to challenge informal decisions for the reasons discussed, those same incentives don't arise when an agency denies a permit or promulgates a rule.

As to the second, this ties into Bressman's idea that agency inaction generally favors the regulated over regulatory beneficiaries. *See* Bressman, *supra* note 157, at 1692. Under circumstances

IV. THE REGULATORY LAST MILE

Administrative law is approximately fifty times muddier than previously realized.[393] Across several metrics of agency process, state law is under- or undeveloped. Martin Shapiro once remarked, "[b]ecause American administrative law represents such a tardy reaction, it has never pretended to be a complete body of law."[394] But cooperative federalism does pretend that there is a complete body of law in the regulatory last mile of state implementation. Indeed, when a federal agency delegates a program to a state, it conducts a substantive review to ensure that the proposed state apparatus, including statutes and regulations, contains federal *substantive* law.[395] The implicit assumption is that there is a sufficiently detailed body of state *administrative* law to carry that federal baseline from the train to the office. But this assumption is misplaced.

So while everyone accepts, knows, and theorizes that there is variation between states, scholars haven't considered the gappiness of the law surrounding that variety. How should cooperative federalism account for unwritten administrative law in the regulatory last mile? I offer two suggestions.[396] The first is that, even if variety in substance is baked in, the norms that administrative law has been striving for should filter through the states. The conceptions that drive administration should play a role in how stakeholders—courts, regulated entities, civil society—monitor the last mile of implementation. Second, the values of federalism, whether normative, descriptive, or expressive, are potentially diminished when the last mile is unwritten.

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in which civil society is weak and governors are high profile, watchdog groups will be particularly unable to track a *lack* of agency action. And industry is often not clamoring for more regulation.

393 *Cf.* William F. West, *Inside the Black Box: The Development of Proposed Rules and the Limits of Procedural Controls*, 41 ADMIN. & SOC'Y 576, 578-80 (2009) (arguing that efforts to impose greater control over federal rulemaking have made it less transparent).

394 Shapiro, *supra* note 115, at 1487.

395 *See, e.g.*, 42 U.S.C. § 7410(a) (requiring SIPs to contain measures "to meet the applicable requirements" of the CAA, as well as "necessary assurances" that a state has "adequate personnel, funding, and authority" to do so).

396 While my descriptive account has focused on environmental statutes, the ramifications are broader. Medicaid is a joint project between states and the federal government and partly executed through state law. *See* Fahey, *supra* note 35, at 1334-43 (describing the Medicaid approval process). Section 1983 claims against a host of state actors—from prisons to police officers—often must first wend their way through the state administrative process, gaps and all, even though the underlying claim is based on the U.S. Constitution. *See* Jones v. Bock, 549 U.S. 199, 218-19 (2007) (concluding that "[c]ompliance with prison grievances procedures" is required to exhaust administrative remedies). But given environmental law's regulatory reach, its diverse set of stakeholders, and the tendency to undervalue environmental harms, it is a superlative starting point for analyzing the consequences of gappiness.

A. *Administrative Norms and Virtues*

It's perfectly reasonable to support states having a say in the programs that directly impact them. States should have adequate voice in the administrative process;[397] exercise influence within national programs;[398] utilize administrative doctrine to ensure they receive sufficient respect;[399] and gain new roles provided by Congress.[400] But the administrative state as we generally conceive it—for all its flaws—relies on certain norms and values. These norms and values shouldn't be thrown off the train simply because some substantive variation attending to specific state circumstances is valuable. Returning to the hypothetical at the start, it might be that Connecticut has its own state marine diesel rules that make it environmentally unnecessary to require a CWA permit for boat rental companies. But does the fact that such a permit might be substantively unnecessary change whether there should be a framework for reaching that conclusion? One that is reasoned, open, written, and published? Or that provides certainty to both the agency and regulated entities?

These values, broadly encompassed in "the rule of law," but more granularly, things like notice, discourse, participation, and reason-giving, should filter down to the last mile. First, and most importantly, they're valuable on their own terms. The administrative state, whether federal, state, or local, should strive for these principles. As I demonstrated in Section I.B, process decisions come with risks, ones that are equally valid, and sometimes more acute, for states implementing federal law. Ensuring adequate notice, discourse, and reason in the last mile will better ensure faithfulness to the enabling statute, predictability for both agencies and regulated entities, and enhanced accounting of the costs and benefits of the interstices of administrative implementation. Second, because states implement federal

397 *See, e.g.*, Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1258-59 (2009) (suggesting that states may be uncooperative in federalist programs); Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023, 2028 (2008) (arguing that federalism's goals can be and are best met through administrative law); Amy Widman, *Advancing Federalism Concerns in Administrative Law Through a Revitalization of State Enforcement Powers: A Case Study of the Consumer Product Safety and Improvement Act of 2008*, 29 YALE L. & POL'Y REV. 165, 167 (2010) (describing how the enforcement powers of states can be used to reinforce federalism); *see also* Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1079-80 (2014) (claiming that partisanship is a driving force in state–federal relationships); Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1560-61 (1994) (claiming that the political process will safeguard federalism values).

398 Bulman-Pozen & Gerken, *supra* note 397, at 1259.

399 Metzger, *supra* note 397, at 2028.

400 Abbe R. Gluck, *Our [National] Federalism*, 123 YALE L.J. 1996, 1998 (2014) ("[S]tates today may exert their greatest powers from within these federal statutory endeavors . . . . [F]ederalism's primary source is *Congress*.").

law, and because federal law assumes that there is law in the last mile, it is critical that gappiness is attended to. A substantive review of a state's program that doesn't examine whether there is adequate administrative law, and not just personnel staffing, programmatic capacity, and substantive obligations, fails to take seriously the task handed to the states.

These ambitions, both the rule of law and the establishment of an administrative framework, have been a throughline since the early days of the administrative state. The earliest accounts of administration rested on a backdrop of procedure and judicial review.[401] Because of the strict procedures governing agency action, which would be reviewed by courts, agency decisions could be cabined to legislative directive, thereby protecting citizens from agency overreach.[402] The issue, as identified by Richard Stewart and others, is that the statutes of the New Deal era failed to include sufficiently detailed instructions such that agencies could actually be constrained in their discretion.[403] The solution was to rely on the expertise of bureaucrats, where, as Bressman describes, "[a]gencies could be trusted . . . much as a doctor would" to solve national problems.[404] But that hardly answered the issue of insufficient management of agency decisionmaking. Indeed, it essentially responded that unbridled discretion wasn't a problem because it wasn't a problem: agencies do good work, so why bother constraining them?

In a rebuke to expertise and a turn back to the values of the earliest accounts—procedure and judicial review—the APA was born.[405] Where expertise relies solely on values and skills internal to the agency, the APA combines bureaucratic know-how with the requirement that agency decisions be explained and reviewable.[406] Through the APA, participatory values were tossed into the procedural bucket through notice and comment and, where not required, "publication" rules to alert the public and allow them to participate in a less formal way.[407] By requiring reasoned discourse alongside reasoned decisionmaking, administration was meant to become more

401 *See* Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1675 (1975).

402 *Id.* at 1673-75.

403 *Id.* at 1669-77; Jerry L. Mashaw, *Small Things Like Reasons Are Put in a Jar: Reason and Legitimacy in the Administrative State*, 70 FORDHAM L. REV. 17, 22-23 (2001) ("Moreover, as those who decry the toothlessness of the non-delegation doctrine constantly remind us, the vacuity of statutory terms stretches the thread that binds administrative action to electoral preferences virtually to the breaking point.").

404 Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1759 (2007); *see also* Stewart, *supra* note 401, at 1676-78 (describing appeals to expertise in the design of administrative procedure).

405 Bressman, *supra* note 404, at 1760.

406 *See* 5 U.S.C. § 706 (describing the scope of judicial review of agency action).

407 *Id.* § 553 (outlining the process for informal rulemaking and publication rules).

democratic.[408] Judges and courts were expected to ensure that the result of that discourse was commensurate with the democratic bargain initially fought for and enshrined in the enabling legislation.[409] Much animated our foundational administrative "super-statute" so that agencies could be held accountable through both democracy and law.[410]

These core values continue to provide the backdrop for more modern descriptive and normative accounts of administration. For example, these virtues are front and center in Mark Seidenfeld's prescriptive civic republicanism.[411] Seidenfeld places his administrative bets on the ideal "that government decisions are a product of deliberation that respects and reflects the values of all members of society."[412] Rather than ensuring any particular outcome, the government's goal "is to enable the citizenry to deliberate about altering preferences and to reach consensus on the common good."[413] For Seidenfeld, it is administrative agencies that can best fit this model because they have "greater expertise and fewer immediate political pressures."[414] Deliberate government means there must be public discourse, reasoned explanation, and "meaningful opportunities to engage in discussion about the action."[415] Due to procedure, notice, and judicial review of agency action, Seidenfeld posits that agencies are in the best position to meet the ideal of civic republicanism.[416]

Rather than fear political pressures, a modern and popular account looks to politics, specifically the President.[417] Presidential administration is said to be pragmatic, attuned to democratic will, and based in the Constitution to boot.[418] Proponents argue that it inspires greater sensitivity to costs and benefits by putting regulation in the hands of one dynamic executive and solves the enduring fourth branch problem by locating administration in

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408 Shapiro, *supra* note 115, at 1487.

409 *Id.* at 1498.

410 *Cf.* William N. Eskridge Jr. & John Ferejohn, *The APA as a Super-Statute: Deep Compromise and Judicial Review of Notice-and-Comment Rulemaking*, 98 NOTRE DAME L. REV. 1893, 1895 (2023) ("[T]he APA is a part of the foundation of the modern American state.").

411 *See generally* Mark Seidenfeld, *Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511 (1992).

412 *Id.* at 1514.

413 *Id.*

414 *Id.* at 1515.

415 *Id.* at 1528-30.

416 *Id.* at 1542.

417 Kagan, *supra* note 41, at 2246; Miriam Seifter, *States, Agencies, and Legitimacy*, 67 VAND. L. REV. 443, 481 (2014) ("The dominant model of administrative legitimacy is presidential control.").

418 Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 485-90 (2003).

Article II.[419] But a primary virtue is that agency decisionmaking can and should reflect the national will.[420] The high-profile nature of the President makes such reflection possible, while also enabling agency action to be "transparent and easy . . . to follow."[421]

Although these accounts vary in their descriptive force over time, the normative ideals behind them are quite alike: notice, discourse, participation, dynamism, accountability, and predictability. Early accounts envisioned that enabling statutes would provide sufficient guideposts for agency action and judicial review and that expertise would help fill in the gaps. Later descriptions focus on marrying participation with the rule of law—notice and comment, presidential action, and publication. The goal was, and still is, to enable expert agencies to solve problems through sufficient discourse, thereby alerting the relevant stakeholders and coming to a substantively reasonable decision, with the courts as enforcers of the rules of the game.

The issue is that agency process is a critical means of achieving each of these values, yet the law guiding it is missing in the regulatory last mile. Gappiness pervades the states. Depending on which state and which issue (choice policymaking forum, guidance, reversal of position, or inaction), the outcomes might differ dramatically. If those outcomes diverged due to local circumstances—say, the presence of alluvial versus non-alluvial soil in determining the bounds of a CWA permit—it would be a virtue. But variation due to a lack of law risks failing to meet not only the ideals that administration has been striving toward for decades but also the core comparative advantage of administration over pure politics. To make matters worse, the lack of publication means that agency action is far from "transparent and easy . . . to follow."[422] The two primary methods for ensuring that agency action is easy and transparent, publication and judicial review, are missing in the states. And because state law is federal law, that means following federal law isn't easy and transparent, either. Demanding that states take seriously the rule of law values and norms that administration embodies is only to say that, when the law runs out, the ability to ensure notice, discourse, accountability, and predictability is significantly diminished.

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419 *Id.*; *see also id.* at 489 ("[A]dvocates of the unitary executive theory did not need to rely on creative constitutionalism. They could point to the original understanding of the constitutional structure that contains only three branches and not an unenumerated fourth.").

420 *Id.* at 490; Kagan, *supra* note 41, at 2335; Seifter, *supra* note 417, at 482 ("The model's most important premise and value is that federal agencies *should* respond to 'majoritarian preferences and interests.'").

421 Seifter, *supra* note 417, at 482.

422 *Id.*

In other words, it is a variation of "desk-clerk law," which Elizabeth Emens describes as "what the person at the desk tells you the law is.[423] Emens examined the changing of names in the marital context, documenting that "the government functionaries who answer questions and direct choosing behavior around marital names seem to frequently give incorrect or normatively driven responses that discourage unconventional choices."[424] The desk clerks "effectively" make the law.[425] Agencies already make law. But when administrative law is unwritten, we grant agencies—and sometimes individual "desk-clerk" civil servants—discretion to determine *how* they make it. But the how is precisely what promotes reasoned discourse, expertise, and the rule of law. It's certainly correct that guidance is better in some circumstances and adjudications in others. But when an agency can pick and choose in the shadows, without providing notice or a justification for its decision, the risk of poor agency decisionmaking goes up. Of course, it won't always be a net negative to grant agencies discretion in agency process. In some areas, a desk-clerk model might be preferable by reducing ossification, promoting efficiency, and engendering quick responses to dynamic problems. But that might not always be the case, and the current system doesn't promote the types of discussions needed to figure out the when and where. Picking and choosing requires more than what the states currently provide.

Additionally, these concerns take on new meaning when the vehicle for federal law is recognized as not just the "states" but state law. One immediately appealing response is to say that states are different, or that state administrative law was built out for the states. True enough. But pointing out that states are different governmental creatures, initially designed for their own administrative purposes, begs the question of whether that's a good thing when it comes to monitoring the implementation of national programs.

To be clear, I am not suggesting that state process frameworks must look like the federal APA. Nor am I offering a ringing endorsement of federal administrative law, which can struggle in its content and application.[426] A state need not, and perhaps should not, treat rules and guidance the same as federal law might, but there should at least be law behind that decision. A state could, like California, completely get rid of publication rules.[427] Or it

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423 Elizabeth F. Emens, *Changing Name Changing: Framing Rules and the Future of Marital Names*, 74 U. CHI. L. REV. 761, 765 (2007).

424 *Id.*

425 *Id.*

426 As just one example, the FCC has a penchant for "view[ing] issues in isolation" and "suboptimal procedures and processes" that can lack notice and participation. Philip J. Weiser, *Institutional Design, FCC Reform, and the Hidden Side of the Administrative State*, 61 ADMIN. L. REV. 675, 679-80 (2009).

427 *See supra* notes 204–205 and accompanying text.

could, like Hawaii, prohibit policymaking in an adjudication.[428] These decisions, according to the specific variances of state law, such as its constitution or administrative procedure act, are active decisions grounded in state preferences and legal conditions. And they are a type of law that strives for the same administrative values and norms the federal bench and bar have been developing for decades. Moreover, by having law rather than gaps, these choices empower stakeholders at both the federal and state levels to question and critique the best means of achieving a well-run administrative state.[429]

But gappiness isn't a net positive. So to say that states are different is not an answer to whether we should expect those different governmental institutions to import the expectations of administration writ large, particularly when they're implementing programs meant to impact the entire nation. Having differential implementation of federal law depend not on substance—alluvial or non-alluvial—but on unknown answers to questions of agency process thwarts an essential goal of cooperative administration.

A possible mitigating factor is the relatively high build-out in substance, timing, and deference throughout the states. That is, because the most formal agency actions have well-worn guardrails, extreme exercises of poor decisionmaking can be litigated, debated, and tested. While that's true, process is thorny because it is diffuse, hard to track, and bleeds into substance. Is the Montana Public Service Commission's choice to set a new rate calculation through adjudication more process-based or substance-based?[430] What about the Colorado Department of Public Health's license referral guidance?[431] And ODEQ's requirement for auto-dismantlers to get a RCRA permit?[432] The line between process and substance is often murky. When so much of the specifics of how and what federal law will look like in practice are left to the discretion of state agencies, and that discretion is underspecified, the goals of both the substantive statute and administration more broadly start to lose out.

At the same time, states might be doing better at the democracy part of administration, at least when it comes to notice-and-comment-like rulemaking. When a federal program filters down to the states, the state legislature, a democratically elected body, enacts federal law as state law.[433]

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428 *See supra* notes 231–232 and accompanying text.

429 In other words, gappiness can increase the costs of slack in cooperative administration. The already increasing number of tools and complexity involved in environmental law "has the potential to increase accountability and transparency concerns." *See* David Markell, *Slack in the Administrative State*, 84 OR. L. REV. 1, 48 (2005). When combined with undeveloped doctrines of agency process, the challenges of accountability and transparency raise these costs even higher.

430 *See supra* notes 171–175 and accompanying text.

431 *See supra* notes 164–169 and accompanying text.

432 *See supra* notes 7–20 and accompanying text.

433 *See supra* Part I.

From there, the democratic connection might be stronger than that of federal agencies. State attorneys general, whose law departments are responsible for vetting regulations and guidance and representing agencies in litigation,[434] are almost universally elected.[435] On top of that, the rulemaking bodies of states aren't necessarily unelected administrators. They might be elected members of the community, appointed by governors or legislatures, or they might be technical experts.[436] Competing executives jostling for interpretive authority and citizen rulemaking commissions engaging with expert agencies in crafting rules might result in public discourse, reasoned explanation, and meaningful public engagement, just not for process decisions. States can advance their gloss on federal law with more democratic legitimacy.[437]

But this democratic connection only goes so far. Mere participation is not enough. Administrative law seeks reasoned discourse and decisionmaking. Majority votes don't inherently contain either, particularly if state elections are "second-order"[438] and substantive outcomes are determined through opaque and informal processes. Moreover, two significant means of ensuring that expertise is part of the participatory bundle are publication and judicial review. Helping reason and discipline win out over greed and horse trading requires knowing what agencies are doing and having some means of correction.

But both publication and judicial review are lacking in significant corners of state administration, particularly given that *State Farm* and *Massachusetts v. EPA* are expertise-reinforcing,[439] and neither doctrine is particularly prevalent in the states. Even if these considerations were put aside, without

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434 Saiger, *supra* note 48, at 566 (quoting Scott M. Matheson, Jr., *Constitutional Status and Role of the State Attorney General*, 6 U. FLA. J.L. & PUB. POL'Y 1, 18, 21 (1993)) (finding that states might even provide "exclusive constitutional authority to employ and supervise all lawyers involved in legal matters for executive agencies of state government" to state attorneys general).

435 Bowling, *supra* note 51, at 510 ("Attorneys general . . . are also elected in forty-three states . . . . [and] provide interpretation of laws, rules, and policy as they are implemented.").

436 *See, e.g.*, *supra* note 90; CAL. EDUC. CODE § 69510 (West 2024) (outlining the composition of the California Student Aid Commission, which includes students, members of the public, and legislative appointees).

437 Margaret Lemos makes a related point in discussing the state interpretation and enforcement of purely federal law that isn't implemented by the states but that state attorneys general may directly enforce through the U.S. Code. *See* Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. REV. 698, 702 (2011) ("[E]nforcement authority can serve as a potent means of state influence by enabling states to adjust the intensity of enforcement and to press their own interpretations of federal law.").

438 Schleicher, *supra* note 37, at 765.

439 *See* Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 19 (2009) ("Ever since *State Farm*, courts . . . have searched agency decisions to ensure they represent expert-driven, technocratic decisionmaking."); Jody Freeman & Adrian Vermeule, Massachusetts v. EPA*: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 52 ("[T]he majority's solution in *MA v. EPA* was a kind of *expertise-forcing* . . . .").

law behind state democracy, there is no way to ensure that democratic bargains, even the state ones, will be enforced. As Jacobs put it, "[a]gencies must be faithful to the will of the enacting Congress as embodied in a piece of legislation" until that legislation is amended or superseded.[440] When there's no law because both the framework and the actions themselves are unwritten, then there's little means to ensure faithfulness.

And so, administrative law should be written. More specifically, courts and legislatures should build out the statewide legal frameworks that direct how, when, and where agencies make decisions. Doing so will reinforce the values of administration and ensure that cooperative programs make it through the regulatory last mile. In writing it, state courts, scholars, advocates, and civil servants need not borrow directly from federal law. States can and should borrow from other states that have tested new methods of administration. Moreover, I'm not simply calling for more procedure. As Nicholas Bagley points out, "[t]here is no neutral, value-free way to calibrate the stringency of . . . administrative procedure . . . ."[441] But constructing a "positive vision of the administrative state"[442] requires knowing what the administrative state is doing. To choose "the type and quantity of procedures"[443]—notice and comment, guidance, adjudication—requires knowing how those procedures are used. The states offer a plethora of options from which we can plumb the best ones. "[K]nowing more about the effects of particular procedures at particular agencies"[444] requires written law in the last mile.

B. *Federalism*

If administrative law has been a tardy reaction,[445] scholars of federalism have engaged deeply to catch up and fill in the gaps. They have attended to state elections,[446] partisan politics,[447] congressional grants of federalism,[448] local dissent,[449] and state-federal coordination,[450] among others. Adding unwritten administrative law to the list offers a new descriptive reality that should be accounted for when describing our administrative federalism: state

440 Jacobs, *supra* note 159, at 605.
441 Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345, 346 (2019).
442 *Id.* at 350.
443 *Id.* at 352.
444 *Id.* at 387.
445 Shapiro, *supra* note 115, at 1487.
446 Schleicher, *supra* note 37, at 765.
447 Bulman-Pozen & Gerken, *supra* note 397, at 1079-80.
448 Gluck, *supra* note 400, at 1998-99.
449 Bulman-Pozen & Gerken, *supra* note 397, at 1261.
450 Fahey, *supra* note 35, at 1362.

agencies often have significant discretion that is unreviewed, unpublished, and untested.

This discretion complicates the various, sometimes tidy, views of federal-state interactions. Whatever form of federalism is descriptively or normatively correct, it is difficult to square the benefits of any with the unwritten regulatory last mile. Gappiness in the last mile elevates concerns over notice, reasoned decisionmaking, participation, and open discourse, each of which is implicit or explicit in the variegated forms of our federalism. As Ernest Young has written, nearly all the values of federalism, "such as regulatory diversity, political participation, and restraints on tyranny[,] turn on the capacity of the states to exercise self-government . . . ."[451] While the regulatory last mile might not impugn the ability of states to exercise self-government, it does raise the question of whether states are exercising it well. More to the point, how would we know that they're doing it well such that regulatory diversity, political diversity, and restraints on tyranny are both happening and properly functioning?

An enduring view of federalism is one of separate or dual sovereigns, with the states and the federal government acting as "separate entit[ies]" that govern in their own "distinct sphere[s] of authority."[452] States are thus "not relegated to the role of mere provinces or political corporations," but have an irreducible minimum of sovereignty over which they preside, even if they lack full authority over every aspect of it.[453] This Brandeisian view[454] has inspired scholars across the spectrum to tout the benefits of the arrangement. It is meant to create laboratories of democracy whereby states can test new ideas before they're ready for the national spotlight,[455] foster participation between and among citizens,[456] and splinter power between multiple governments.[457]

These layer-cake federalists[458] have mostly lost the descriptive battle. As Weiser put it, federal programs are primarily cooperative, not separate.[459] In defining a set of administrative processes where notice-and-comment rulemaking is insufficient, called "coordinated rulemaking," Bridget Fahey

451 Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEXAS L. REV. 1, 4 (2004).

452 Weiser, *supra* note 34, at 665.

453 Alden v. Maine, 527 U.S. 706, 715 (1999).

454 *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory . . . .").

455 *See id*.

456 *See* Young, *supra* note 451, at 58-59.

457 *See* Akhil Reed Amar, *Five Views of Federalism: "Converse-1983" in Context*, 47 VAND. L. REV. 1229, 1235-40 (1994).

458 Bulman-Pozen & Gerken, *supra* note 397, at 1262 ("[D]ual federalism's 'layer cake' of clearly delineated state and federal realms of power.").

459 Weiser, *supra* note 34, at 665.

argues that dual federalism has little purchase.[460] Even Jessica Bulman-Pozen and Heather Gerken's account of "uncooperative" federalism relies on states within a federal regime resisting national norms in a way that belies a strict concept of dual federalism.[461] Abbe Gluck has even stronger medicine, calling the vast sphere in which states exert their influence a federalism by the "grace of Congress."[462] To say that the states maintain a distinct minimum of sovereignty in these interpretations, which bring many political and operational realities to life, would be a misnomer.

The normative and expressive benefits of these descriptive accounts are as varied and hopeful as the proponents of dual sovereignty. To meet large, national goals, cooperative federalism seeks to enlist both the deep personnel base and robust local knowledge of the states with the administrative efficiency of smaller units. In the Supreme Court's words, it empowers states "to enact and administer their own regulatory programs, structured to meet their own particular needs."[463]

On the other end of the spectrum is a normative conception of federalism that supports contestation. It enables "minority rule without sovereignty"[464] so that "state interests are pursued through not only political channels, but also administrative ones."[465] This contestation creates the chance for "interstitial, secondary implementation questions"[466] to be brought to the fore. Doing so can "prod national change"[467] and "creat[e] pressure for state officials not to go along with federal authority."[468] This "uncooperative" federalism is a vision of using the authority granted by the national government to challenge the national government from within.

Whatever vision is either descriptively correct or normatively preferred, the unwritten last mile forces us to ask whether the advantages of federalism are being realized. While all visions of federalism focus on the values of *variation*, gappiness in the form of unwritten law is problematic.[469] It prevents the actors within the scheme (federal, state, and local) from knowing about,

460 *See* Fahey, *supra* note 35, at 1324 (defining "coordinated rulemaking"); *id.* at 1362 (commenting on dual federalism).

461 Bulman-Pozen & Gerken, *supra* note 397, at 1261.

462 Gluck, *supra* note 400, at 1999.

463 Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 289 (1981).

464 Heather K. Gerken, *Federalism All the Way Down*, 124 HARV. L. REV. 4, 9-10, 45-46 (2010).

465 Bulman-Pozen & Gerken, *supra* note 397, at 1286.

466 *Id.* at 1294.

467 *Id.* at 1277.

468 *Id.* at 1270.

469 Even in the world of international law, where there are distinctly separate sovereigns, nation-states expect some minimum level of process, judicial access, and fairness, regardless of the capacity of the state in which an investor or alien is operating. *See* Haneul Jung & Nu Ri Jung, *Unraveling the Longstanding Riddle About the Doctrine of Legitimate Expectation Under International Investment Law*, 42 NW. J. INT'L L. & BUS. 189, 193-196 (2022).

participating in, and exerting influence in processes such that there can be beneficial regulatory diversity, political discourse, and restraints on governmental abuse. It's a bug, not a feature.

Take dual sovereignty. It's meant to foster variation and innovation, create space for political participation, and diffuse governmental power.[470] But gappiness can harm each of these. It's true that states are still empowered to test out new policies before they make the national spotlight—for example, requiring a RCRA permit for auto-dismantlers[471]—but the way these policies come into existence often remains unknown. How are stakeholders meant to appraise them before any adverse effects run rampant? If there's little state law governing how agencies may go about changing policies and interpreting federal law, then there will be no record of the costs and benefits, environmental or economic. And when there's no measuring stick, how to know when a new policy should be tried out elsewhere? Gappiness in the last mile also creates the potential for reduced political participation and increased governmental abuse, two ills that dual sovereignty is meant to guard against. When there is little law to guide agency action, and the action at issue is scattered and untraceable, governmental power is expanded vis-a-vis citizens and the federal government. And there's less room for participation because civil society is unaware of governmental action.

This is particularly true with environmental programs, the exemplar of cooperative federalism. These statutes don't contemplate a vast system of unchecked state administrative discretion. They rely on restrained discretion within federally set boundaries to marry the safety net of national baselines with the benefits of diffuse, local expertise and efficiency to "overcom[e] stubborn local particularism."[472]

But once a program is handed over to the states, robust federal supervision isn't possible. The EPA could never take over a state program,[473] and it often lets states continue defining and interpreting federal law for years before it jumps in, as demonstrated by Alabama's RCRA regulations.[474] Indeed, the "threat of withdrawal is almost completely unrealistic, creates too much tension, and might discourage some states from adopting a program at all."[475] Even so, it often remains the only available remedy. As one court put it,

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470 *See supra* notes 454–457 and accompanying text.

471 *See supra* notes 7–20 and accompanying text.

472 *See* Percival, *supra* note 55, at 1171 (internal quotation marks omitted).

473 Zahren, *supra* note 60, at 418.

474 *See supra* Part I.

475 Zahren, *supra* note 60, at 418; *see also* David R. Hodas, *Enforcement of Environmental Law in a Triangular Federal System: Can Three Not Be a Crowd When Enforcement Authority Is Shared by the United States, the States, and Their Citizens?*, 54 MD. L. REV. 1552, 1586 (1995) (quoting an EPA official stating that "even if only a small number of delegated states returned their programs to EPA," it could not "cope with the new responsibilities").

"because the permit was properly reissued under the state's . . . authority, [it] necessarily complies with federal law—unless and until the EPA determines otherwise."[476] Which means that, even when a state has gaps in its ability to get a program through the last mile, there are few remedial tools available.[477] Without law forcing the production of knowledge—such as judicial or statutory doctrines that police informal agency action—potential federal supervision and the benefits of a national baseline are diminished.

Moreover, it's not only state agencies that are "cooperating" in federal law but state ALJs, too. For many states, ALJs are housed in a "central panel."[478] That means that generalist ALJs, rather than subject-specific experts at state agencies, are crafting potentially unpublished interpretations of federal law, which is what occurred in Kentucky's CAA permitting dispute.[479] It also happened recently in a wide-ranging CWA lawsuit, with a state ALJ determining that the CWA requires underground water monitoring at factory farms even though the EPA has never said as much and the connection to waters of the United States is unclear.[480] These hardly seem like intended features or benefits of cooperative federalism.

Even the promise of *un*cooperative federalism, which emphasizes the ability of a state to make decisions contrary to federal law, is weakened when considering gaps in the last mile. The normative hook is that the discretion granted through these programs allows states to administratively go against national interests, pushing local conversations into the spotlight and accentuating the value of a pluralistic, federal system.

But this presupposes both that states and their agencies are purposefully acting contrary to federal law and that there's some way to know about it. Indeed, Bulman-Pozen and Gerken say as much, reasoning that it should "create opportunities for debate over issues that may be neglected under the political safeguards model," particularly those "interstitial, secondary implementation questions."[481] But not only are these somewhat drab technical questions not the subject of any sort of grand debate at the level of federal

476 Andersen v. Dep't of Nat. Res., 796 N.W.2d 1, 17 (Wis. 2011).

477 This isn't to say there are no remedies. But they are limited, time intensive, and often up to the discretion of the EPA in coordination with the state agency. As Emily Hammond and David Markell demonstrate, while the EPA is loath to withdraw a state program, it does conduct informal investigations in response to citizen petitions to withdraw programs, with some positive results. *See* Emily Hammond & David L. Markell, *Administrative Proxies for Judicial Review: Building Legitimacy from the Inside-Out*, 37 HARV. ENV'T L. REV. 313, 333-53 (2013).

478 Rossi, *supra* note 161, at 568.

479 *See supra* notes 177–182 and accompanying text.

480 Ctr. for Biological Diversity, No. WQ 2022-001 (Colo. Off. Admin. Cts. May 16, 2023) (on file with author).

481 Bulman-Pozen & Gerken, *supra* note 397, at 1294.

passage,[482] they are often completely submerged at the state level. To reap the benefits of uncooperative federalism, we need to see how the states are being uncooperative, and those states must choose to be uncooperative. This isn't to say there's no value in states testing the metes and bounds of federal policy through their implementation of federal law, but those benefits require state administrative law in the last mile.[483]

While part of federalism's payout is variation, it doesn't stem from something inherent to variation, but rather from what variation can provide. The sort of variance the system is designed to handle is one that can be noted and corrected when needed, and borrowed when desired. Equally important, if there is meant to be value in state experimentation, then it benefits the national to know about it, not for it to be lost in unpublished adjudication, untested in the courts, and unknown to the public. As William Eskridge and Philip Frickey put it: "The key to good government is not just figuring out the best policy, but also identifying which institutions should be making which decisions and how the different institutions can collaborate most productively."[484] Whatever the appropriate balance between state and federal power is, the current distribution is skewed toward state institutions that are permitted to operate in the obscurities of agency process. That isn't to say that the states shouldn't be where regulatory power is located, but that it's not clear how we would know. It should be uncontroversial to suggest that less information about how our institutions work is not the ideal configuration for identifying the proper balance of state–federal implementation and regulation.

In other words, gaps in the regulatory last mile are not intrinsic to or necessarily required by any form of federalism. Nor should gappiness be taken as an indictment of the states, which do superlative work across any number of issues. But to secure all the benefits of federalism, the regulatory last mile

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482 *Id.* ("Uncooperative federalism will often be directed toward interstitial, secondary implementation questions—the sorts of issues that do not lend themselves to the type of grand, thematic debates that are typically aired when a statute is being passed.").

483 A similar dynamic occurs with what Erin Ryan has called "negotiated federalism" and Dave Owen the "Negotiable Implementation of Environmental Law." *See* Erin Ryan, *Negotiating Federalism*, 52 B.C. L. REV. 1, 6 (2011); Dave Owen, *The Negotiable Implementation of Environmental Law*, 75 STAN. L. REV. 137, 153 (2023). Each demonstrates the importance of negotiation, either when there is regulatory uncertainty about whose authority prevails, Ryan, *supra*, at 5-7, or in complying with environmental programs more generally, Owen, *supra*, at 153-82. Both are correct that much of federalism, and environmental law, is negotiated. But once that negotiated bargain is struck, it is state administrative law that enforces it. And, in the environmental context that Owen discusses, at least for programs over which states have primacy, it is state administrative law that determines how opaque or available the content and results of those negotiations are, rendering the regulatory last mile equally as important.

484 William N. Eskridge, Jr. & Philip P. Frickey, *The Making of the Legal Process*, 107 HARV. L. REV. 2031, 2033 (1994).

must be closed. Reducing the gaps won't hamper states but can serve to showcase their innovative ideas, substantive know-how, and greater political capital.

CONCLUSION

State bureaucracy, expertise, and savvy will continue to grow. And as states continue to innovate and drive regulatory change, Congress will funnel more and more tasks to them. For all the good this might generate, we need to be realistic about how the "implementation" of federal law often works: it is the adoption of federal law as state law, which, so long as state administrative law remains unwritten, creates room for state administration to operate unbound. Even if there were an easy and concrete way to encourage more litigants to bring process claims or to force legislatures to take state administration seriously, it wouldn't be quick. It will be a slow march to writing administrative law. Decades of federal administration demonstrates as much.

In the meantime, we can use fresh eyes to analyze, support, and critique federalism and administrative law, if we recognize that the full lifecycle of state administration does not walk or talk like federal administration. The invitation for states to adopt federal law as their own includes an invitation for them to do much of what they like. By identifying gaps in the last mile, we can ensure that, whatever states do, there is regulation in the regulatory last mile.