Litigating EPA Rules: A Fifty-Year Retrospective of Environmental Rulemaking in the Courts

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Litigating EPA Rules: A Fifty-Year Retrospective of Environmental Rulemaking in the Courts

Cary Coglianese† & Daniel E. Walters††

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Introduction

Nearly fifty years ago, Judge David Bazelon of the U.S. Court of Appeals for the District of Columbia Circuit declared a “new era” in the history of what he characterized as the “long and fruitful collaboration of administrative agencies and reviewing courts.”1 Making this declaration in a case involving the brand new U.S. Environmental Protection Agency (EPA), Bazelon noted with some disdain that, in the past, courts had “treated administrative policy decisions with great deference.”2 But in the purported new era he was celebrating, Bazelon saw courts using their powers to encourage agencies such as EPA to make management improvements that might eventually reduce the

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2. Id.
demand for judicial review. He surmised that the very prospect of judicial review would induce agencies to develop internal standards for “principled decision-making” that might obviate the need for judicial scrutiny simply “by enhancing the integrity of the administrative process.”

Twenty-five years later, Judge Patricia Wald of the D.C. Circuit affirmed Judge Bazelon’s view that, with the beginning of the 1970s, judicial review of agency action saw an important “rebirth.” Following what she described as “a legislative explosion” in the 1960s and 1970s centered on social regulation, especially on environmental protection, “newly formed (or newly energized) public interest lawyers and legal advocacy groups” started taking the government to court and the courts “began to subject agency action to much more stringent review.”

Yet Judge Wald also observed that, by the mid-1980s, the courts’ “uneasy partnership” with the administrative state had shifted somewhat in the wake of Supreme Court decisions such as *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*—a case centered on an EPA rulemaking in which the Court took “a more pro-agency stance for reviewing an agency’s interpretation of a statute it is charged with administering.” Rather than judicial scrutiny inducing internal agency changes that would eventually reduce the importance of judicial oversight, as Judge Bazelon suggested, Judge Wald saw the basic tension underlying judicial review of agency action as having remained “remarkably unchanged” over the years. Even *Chevron* still gave judges “ample room for intrusive review” at its first step.

Ultimately, Judge Wald’s view made plain an ever-present role for judicial review. She forecast that “an unavoidable and irreducible tension” between judges’ deference to and scrutiny of agencies’ decisionmaking would continue long into the future “no matter how many procedural alterations and doctrinal shifts we endure.”

With the passage of another quarter century since Judge Wald’s observations, it is possible to gain additional insight into whether judicial review has indeed diminished in importance, as Judge Bazelon

3. *See id.* at 598 (stating that judicial review will “confine and control the exercise of [agency] discretion” in such a way that can encourage agencies to improve their management processes so as to “diminish the importance of judicial review”).

4. *Id.*


6. *Id.* at 224.

7. *Id.* at 227.

8. *Id.* at 229.

9. *Id.* at 228.

10. *Id.* at 258.
implied it would, or whether the courts’ role has remained relatively unchanged, as suggested by Judge Wald’s account. EPA’s golden anniversary provides an especially appropriate occasion to reflect on the history of litigation over EPA rules because the birth and growth of EPA has coincided with the development of modern administrative law.

With EPA having issued tens of thousands of rules over the last half-century, it is no surprise that the number of judicial decisions reviewing EPA rules has grown to such a size that any effort to distill all of them in a lawyerly fashion would easily fill an entire book. We opt here instead to take an empirical approach, considering what is known quantitatively about litigation over EPA rules and how the agency has fared when its rules are subjected to judicial review.

Over the last twenty-five years, a number of quantitative studies have cast new light on litigation over EPA rules. In this article, we not only compile and synthesize the findings from these various studies but also offer new data of our own: the first quantitative comparison of all EPA rules issued since the agency’s beginning with all appellate decisions involving EPA. Our aim here is not to distill doctrinal lessons as much as to offer some empirical observations about rulemaking litigation over the last fifty years.

These patterns can and do hold doctrinal implications. Based in part on perceptions that EPA has been besieged with litigation over its rules, administrative law scholars have argued for legal changes to avoid the ossification of administrative rulemaking. But as we show here, the sweep of EPA’s history offers an empirical portrait at odds with such conventional perceptions. Judging from the sheer magnitude of EPA rules, we see little evidence that rulemaking at the agency has been ossified. Furthermore, empirical studies reveal little to suggest that EPA has ever been overwhelmed by litigation challenging its rules. Perhaps with the exception of the last few years, the agency’s rules appear remarkably resistant to reversal through litigation.

In the end, the picture is more complex than either Judge Bazelon’s or Judge Wald’s accounts might suggest. On the one hand, when considered against the backdrop of a widely held view that the overwhelming majority of EPA rules are reviewed in court, judicial review has had less of a presence than widely supposed, as Judge Bazelon might have expected would occur over time. Yet, as Judge


12. See infra notes 28–33 and accompanying text.

13. This finding of ours also contrasts with the views advanced by other scholars, based primarily on doctrinal and qualitative analysis, that
Wald’s account would imply, a more modest role for litigation over EPA rules appears to have been established from the outset. We find stability more than a shift characterizing the data on the last half century of legal challenges to EPA rules. We conclude that EPA and the courts have reached and sustained a basic equilibrium with each other throughout the last fifty years. Litigation remains a risk whenever EPA creates significant rules, but, from its earliest years, the agency appears to have learned to manage those risks through professional analysis and internal management processes that have enabled it to withstand judicial scrutiny to a far greater extent than generally acknowledged.

I. The Conventional Account of Judicial Review of EPA Rulemaking

Although much of the early legislation granting EPA authority to adopt environmental regulations passed with bipartisan support in Congress, the agency’s implementation of these statutes has been tagged as adversarial from its earliest days. Political scientist Shep Melnick’s in-depth case study of the early implementation of the Clean Air Act planted the seeds of what came to be a conventional scholarly account of an agency bombarded by litigation and subjected to intrusive judicial review. According to Melnick, the courts in the 1970s judicial review “receded” to some degree following EPA’s initial decade and a half. See, e.g., Robert Glicksman & Christopher H. Schroeder, EPA and the Courts: Twenty Years of Law and Politics, 54 L. & CONTEMP. PROBS. 249, 297 (1991) (asserting that “[j]udicial review has receded in recent years . . . .”); see id. at 249 (arguing that “[t]he stance of the federal courts toward the Environmental Protection Agency has changed substantially during this period” of the agency’s first two decades). Some quantitative evidence amassed in the wake of Chevron also suggested that “[a]s the administrative state has matured, courts and the agencies have come to know one another better; the dictates of administrative law have become clearer; and agencies have found it less difficult to satisfy reviewing courts,” Peter H. Schuck & E. Donald Elliott, To the Chevron Station: An Empirical Study of Federal Administrative Law, 1990 DUKEL.J. 984, 1011. But again, we do not see any major or dramatic changes in the overall frequency of judicial review across the fifty years of EPA’s operation.

14. We observe no statistically significant differences in the ratio of appeals court decisions to EPA rules between EPA’s first quarter century and its second quarter century. See infra notes 60–62 and accompanying text.

used EPA as a proving ground for a new theory of administrative law, with judges even sometimes playing a leading role in shaping regulatory policy.16

There were indeed a number of significant court decisions in EPA cases from this period: the previously mentioned Environmental Defense Fund v. Ruckelshaus,17 with its opinion by Judge Bazelon; the invention of what became EPA’s Prevention of Significant Deterioration program due to Sierra Club v. Ruckelshaus;18 the famous debate over the proper scope of judicial review between Judge Bazelon and Judge Harold Leventhal in their concurring opinions in Ethyl Corporation v. EPA;19 and the invalidation of new source performance standards for cement plants in Portland Cement Ass’n v. Ruckelshaus,20 among other examples.21 Especially with respect to litigation at the D.C. Circuit, where most challenges to EPA rules have historically been filed,22 litigation has often amounted simply to a second round of the rulemaking process—and, according to some observers, a politicized one at that.23

22. Cary Coglianese, CHALLENGING THE RULES: LITIGATION AND BARGAINING IN THE ADMINISTRATIVE PROCESS 91 (1994) (Ph.D. dissertation, University of Michigan) (on file with authors). This trend results from the high number of special venue statutes in environmental laws that require certain kinds of rulemaking challenges to be filed in the D.C. Circuit. For example, the Clean Air Act specifies that any number of rulemaking actions under the Act “may be filed only in the United States Court of Appeals for the District of Columbia.” 42 U.S.C. § 7607(b); see also infra note 52 and accompanying text.
23. See, e.g., Glicksman & Schroeder, supra note 13, at 255 (arguing that “judicial review of agency decisionmaking is necessarily premised on a set of contestable assumptions” and that “correlating politics and law provides the best explanation for why judicial doctrine has changed”); Richard L. Revesz, Environmental Regulation, Ideology, and the D.C. Circuit, 83 VA. L. REV. 1717 (1997) (finding evidence of strategic ideological voting on the D.C. Circuit in environmental cases); William
Starting in the mid- to late-1980s, the view began to take hold that EPA was an agency besieged by intrusive litigation. Scholars came to accept that nearly every EPA regulation was subjected to legal challenge in the courts. By the 1990s, the claim that 80 percent of EPA rules ended up in court—a claim originally put forward publicly by EPA Administrator William Ruckelshaus—had "woven its way into an exhaustive body of work by journalists, government officials, and scholars." This claim continues to be propagated.


25. *See, e.g.*, William D. Ruckelshaus, *Environmental Protection: A Brief History of the Environmental Movement in America and the Implications Abroad*, 15 ENVT. L. 455, 463 (1984–85) ("Eighty percent of what the agency does is finally decided either in a negotiated or formal court decision.").

26. Coglianese, supra note 24, at 1296. To illustrate the widespread endorsement of the 80 percent litigation claim, consider that it was accepted and repeated by some of the most highly respected judges, legal scholars, and political scientists in the United States. *See, e.g.*, Patricia M. Wald, *Regulation at Risk: Are Courts Part of the Solution or Most of the Problem*, 67 S. CAL. L. REV. 621, 624 (1994) ("Eighty percent of all major Environmental Protection Agency . . . rules are litigated in court."); Richard J. Lazarus, *The Tragedy of Distrust in the Implementation of Federal Environmental Law*, LAW & CONTEMP. PROBS., Autumn 1991, at 311, 324 (stating that EPA “has had 80 to 85 percent of its major regulations challenged in court”); JAMES Q. WILSON, *BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT* 284 (1989) ("Over 80 percent of the three hundred or so regulations EPA issues each year wind up in the courts.").

27. *See, e.g.*, Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749 (2007) (seeking to support the claim that “[m]ajor policy decisions rarely evade judicial challenge in many areas” with quotations from other scholars about an 80 to 85 percent litigation rate for certain EPA actions); Stephen M. Johnson, *Good Guidance, Good Grief!*, 72 Mo. L. REV. 695, 701 n. 28 (2007) (“Former EPA Administrator William Ruckelshaus has estimated that almost 80% of the agency’s major rules were challenged while he was Administrator. . .”); Dorit Rubinstein Reiss, *Account Me In: Agencies in Quest of Accountability*, 19 J.L. & POL’Y 611, 656 (2011) (“One source estimated that in the 1980s, about 80
The belief that almost all EPA rules are challenged has reinforced a common refrain raised by administrative law scholars about the ossification of administrative rulemaking. On this view, agencies’ notice-and-comment rulemaking process became bogged down as courts supposedly ramped up their scrutiny of agency decisions. At some agencies, the number of rulemaking proceedings purportedly declined as agency officials have grown extremely cautious about having their rules challenged in court. The concern about excessive or unpredictable judicial scrutiny has led some legal scholars and judges to urge procedural reforms that they have hoped would reduce the amount of litigation over agency rules.


30. Some proposals would modify principles of judicial review. See, e.g., Kent Barnett, Codifying Chevmore, 90 N.Y.U. L. REV. 1, 61 (2015) (urging Congress to “prevent ossification by constraining judicial review for purely discretionary decisions, agency actions that are highly likely to be products of proper agency decisionmaking, or regulatory issues that are more likely to face regular and significant changing conditions”). Others would change how agencies make rules. See, e.g., Peter H. Schuck & Steven Kochevar, Reg Neg Redux: The Career of a Procedural Reform,
These diagnoses of an ossification malady, along with proposals for its cure, were generally grounded in case studies, anecdotes, and the occasional assertion of a generalized pattern of administrative and judicial behavior—such as Ruckelshaus’s claim of an 80 percent litigation rate for EPA rules. Yet Ruckelshaus’s claim itself was never based on any systematic data analysis—rather, it was a back-of-the-envelope hunch. Still, it is not difficult to understand why such a claim could be so widely believed. Court decisions involving EPA rules have made their mark on U.S. law. EPA has been a party in over 40 Supreme Court decisions over the last fifty years. In addition, when the Supreme Court in 2016 took the unprecedented step to reject a lower court’s refusal to stay the effectiveness of a federal regulation pending litigation, it did so in a case involving the review of an EPA rule.

15 Theoretical Inquiries in Law 417, 438 (2014) (discussing an alternative to standard notice-and-comment rulemaking called negotiated rulemaking and urging its consideration as an antidote “to an increasingly ossified regulatory state”).

31. Coglianeese, supra note 22, at 85–92 (noting that “staff members indicated that the 80 percent statistic was little more than an educated guess”).

32. We list 43 cases in the Appendix to this Article. The list includes any case resulting in a Supreme Court opinion in which EPA was named as a party. It includes those cases where the United States formally was the party in lawsuits clearly prompted by EPA action, such as indicated by having EPA attorneys participate in the briefing. Not all these cases involved petitions for judicial review of an EPA rulemaking; some include appeals of environmental enforcement actions. The list does not include other Supreme Court decisions where, although EPA was not formally a party to the litigation, the agency’s regulatory authority nevertheless formed a key backdrop to the litigation. See, e.g., County of Maui, Hawaii v. Hawaii Wildlife Fund, 140 S. Ct. 1462 (2020); Decker v. Nw. Envtl. Def. Ctr., 568 U.S. 597 (2013); Coeur Alaska, Inc. v. Southeast Alaska Conservation Council, 557 U.S. 261 (2009); Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc., 484 U.S. 49 (1987). It also does not include cases such as PUD No. 1 of Jefferson County v. Washington Dep’t of Ecology, 511 U.S. 700 (1994), where the Court addressed a challenge to a state agency decision made pursuant to an EPA-approved state regulatory program. Nor does it include cases such as John R. Sand & Gravel Co. v. United States, 552 U.S. 130 (2008), which involved issues only tangentially related to EPA action (in that case, a takings claim against the federal government stemming from EPA remediation activities). Finally, it does not include Fri v. Sierra Club, 412 U.S. 541 (1973), which did not result in an opinion because an equally divided Court affirmed the judgment of the D.C. Circuit. Notably, the cases in the Appendix were not evenly divided over time. In fact, about two-thirds of these Supreme Court decisions were handed down within the first half of EPA’s existence.

When compared with a variety of other federal agencies, EPA is mentioned more frequently by name in appellate court opinions than are other major agencies. Figure 1 shows how other agencies stack up to EPA in terms of these mentions in U.S. Court of Appeals decisions. EPA has been mentioned in over 60 appellate court opinions per year of its existence, which is about 50 percent more mentions than the U.S. Food & Drug Administration (FDA) has received and roughly three times more mentions than most of the other agencies in Figure 1.

Figure 1: Mentions of Selected Federal Agencies in U.S. Court of Appeals Decisions

Figure 1 may also understate the influence that EPA-related cases have had in federal administrative law jurisprudence. It only includes instances where an agency’s name appeared in some fashion in federal court opinions (e.g., in the body of the opinion, in a footnote, or in a citation to caselaw), which means it does not include mentions of cases,

34. We computed, and report in Figure 1, the “net mentions” of the respective agencies’ names. We first searched the entire Westlaw federal court of appeals database for any reference at all to each of the agencies’ names (using both full names and their acronyms). Then we searched for cases in which the agency was a party by conducting the same search restricted to the “title” of the case (including the full caption). We then subtracted the latter measure from the former to find those instances in which courts cited to each agency in cases other than those in which the agency was a party. These net mentions were then divided by the number of years since the agency was founded.
such as *Chevron v. NRDC*, which involved the review of EPA rules but lack the agency’s name in case citations. *Chevron v. NRDC* is widely recognized as the most frequently cited administrative law decision of all time, garnering more than 14,000 citations in federal court decisions since the case was decided in 1984. By way of comparison, Figure 2 shows how many annual references other prominent administrative law decisions have received in the U.S. Courts of Appeals and the federal district courts. Consistent with the view that court decisions involving EPA rules have figured prominently in federal administrative law, we note that not only do citation rates to *Chevron* dwarf those of the other listed cases, but that three of the twelve prominent administrative law decisions in Figure 2 involved EPA.

Figure 2: Federal Court Citations to Prominent Administrative Law Decisions


36. As of July 24, 2020, a search in Westlaw for federal district and appellate cases citing *Chevron* turned up 14,351 search results.

37. We make no claim that Figure 2 contains a representative sample of all of the Supreme Court’s administrative law decisions, nor necessarily includes every possible candidate for a “canonical” administrative law decision. Other legal scholars might choose a somewhat different set of twelve prominent administrative law decisions, but we suspect most administrative law scholars would include many of these twelve cases if asked for a list of the twelve most significant administrative law decisions by the Supreme Court. For each case listed in Figure 2, we have computed a normalized citation rate based on the amount of time elapsed since the Court handed down its decision.
Beyond these legal indicators of EPA’s place within the administrative law canon, patterns of media coverage undoubtedly have reinforced the belief that EPA rules nearly always elicit legal challenge. Although relatively few EPA rules receive coverage in the media, those that do are ones that appear more prone to conflict and litigation.\textsuperscript{38} Recent efforts by the Trump Administration to modify or rescind Obama-era environmental regulations, for example, have garnered considerable media attention—including to lawsuits filed or even threatened against these deregulatory measures.\textsuperscript{39} Earthjustice, an environmental organization, brags that it alone “has filed more than a hundred lawsuits” against the Trump Administration.\textsuperscript{40} And, continuing a trend from the Obama years, state attorneys general have become active litigants in opposition to administration initiatives, most recently joining in a challenge to EPA’s rollback of tailpipe emission standards.\textsuperscript{41}

\section*{II. Reality Check: Empirical Studies of EPA Rule Challenges}

Despite a plethora of anecdotes and a widely cited hunch about the frequency of legal challenges to EPA rules, what can be said systematically about litigation over EPA rules? Over the past several decades, a number of legal scholars and social scientists have taken up the call for the quantitative study of environmental regulation, permitting a better basis for empirical conclusions about the nature of litigation challenging EPA rules.


\textsuperscript{40} Earthjustice (Jul. 20, 2020), https://earthjustice.org/features/environmental-lawsuits-trump-administration [https://perma.cc/MX6S-4HKC].


The earliest relevant social science research dates to the 1980s, but that research tended to rely on the case-study method, as exemplified by Melnick’s acclaimed narrative about the courts and the Clean Air Act. Rosemary O’Leary’s important book, *Environmental Change: Federal Courts and the EPA*, swept more broadly by including cases involving EPA rules under other statutes, such as the Clean Water Act and hazardous waste and toxic substances laws. But it too was limited largely to reporting a modest number of detailed case studies. Lettie McSpadden Wenner’s 1982 book, *The Environmental Decade in Court*, did include some quantification, but her analysis focused on published court decisions of all types of environmental cases—not just those involving EPA—and she never broke down her data by agency or type of claim.

It was not until the early 1990s that researchers started, in a more systematic fashion, to pull back the curtains on litigation challenging EPA rules. Their work has provided valuable empirical evidence on two important issues: (1) the rate at which EPA rules have been challenged in court, and (2) how often these challenges have succeeded. Although the studies that report findings on each of these issues span different time periods within EPA’s history and rely on different samples of rules and even case types, their findings tend to reinforce one another. In this Part, we not only synthesize these various studies’ snapshots, but we also provide new data that spans EPA’s fifty-year interaction with the courts. These new data tend to validate what the different snapshots show by revealing a considerable constancy to the association between EPA rules and appellate court decisions involving the agency. On the whole, the findings we present stand in contrast to the conventional account and show an agency that has not been nearly as besieged by litigation as has often been perceived.

**A. The Frequency of Litigation**

Although Ruckelshaus’s claim about the litigation of 80 percent of EPA’s rules came into public view around 1984, it took nearly ten years before anyone attempted to confirm it. In the interim, dozens of scholars accepted the claim at face value. Of course, seeking to confirm the statistic was no straightforward task. After all, Ruckelshaus was
not claiming that the courts *reviewed* 80 percent of EPA rules—something that could be checked by comparing published rules and published court decisions. Rather, he claimed that 80 percent of the agency’s rules were *challenged.* Presumably only the agency could easily know the challenge rate since it was both the issuer of its rules and the recipient of any court petitions seeking judicial review of them. What was needed was a way for an outside researcher to compute the underlying rate of legal challenge: that is, petitions for review divided by the number of rules.

In principle, the number of rules is not hard to determine, as rules are published in the *Federal Register.* But petitions for review are filed in individual courthouses and they do not get published in any central source. Petitions reside either in files within the agency’s lawyers’ offices or in the dockets maintained in the clerks’ offices of individual courthouses around the country.

The pre-enforcement nature of judicial review does provide at least one advantage to the researcher: some of the major environmental statutes dictate that petitions for judicial review of EPA rules must be filed within a fixed period of time—usually a couple of months—following the issuance of a final rule. For the researcher, this jurisdictional limitation provides assurance that any challenges that could have occurred have in fact occurred. The only difficulty is finding evidence of those challenges having been filed.

A 1994 study by one of the authors of this article was the first to make use of both agency and court records to measure systematically EPA’s challenge rate. Records from EPA’s internal defensive docket indicated the number of legal petitions filed in the U.S. Courts of Appeals from 1987 to 1991, a period during which Ruckelshaus and numerous scholars repeated the 80 percent rate. These litigation records, when compared with data on agency rules, showed that the rate of rulemaking challenges against EPA was not even close to 80 percent; at most, it was only 26 percent. Additional investigation used

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48. See, e.g., Clean Air Act, 42 U.S.C. § 7607 (petitions must be filed within 60 days of the final rule); Resource Conservation and Recovery Act, 42 U.S.C. § 6976 (petitions must be filed within 90 days of the final rule); Clean Water Act, 33 U.S. Code § 1369 (petitions must be filed within 120 days of the final rule); Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S. Code § 9613 (petitions must be filed within 90 days of the final rule); Safe Drinking Water Act, 42 U.S. Code § 300j–7 (petitions must be filed within 45 days of the final rule).

49. See Coglianese, supra note 22.

50. Challenges to rules issued under the major environmental statutes must be filed in the U.S. Courts of Appeals, not the district courts. See supra note 48.

51. See Coglianese, supra note 24, at 1298. Depending on the digital source and search used for tallying up the annual number of EPA rules, the rate
court records from the D.C. Circuit clerk’s office to assess the litigation rate for just the more significant EPA rules issued from 1980-1991 under the Clean Air Act and the Resource Conservation and Recovery Act (RCRA)—two statutes which dictate that venue for review of such significant rules lies in the D.C. Circuit. The litigation rate for these more significant rules was higher—35 percent for rules listed in the agency’s regulatory agenda, and 57 percent for rules classified as “major” under Executive Order 12,291.

In the years since this original study, research by several legal scholars has confirmed that the overall rate is considerably lower than 80 percent. The rates reported in other studies vary, as they cover somewhat different time periods and rely on different data sources. But in general, they coalesce in the sense that they indicate, for most types of rules, a much lower rate of legal challenge than had been widely supposed. Christopher Schroeder and Robert Glicksman, for example, reported a 4 percent rate from 1991-1999 based on their review of released court decisions. Stephen Johnson reported a rate of 41 percent for EPA rules that were issued from 2001-2005 and were classified as “significant” under Executive Order 12,866. Wendy Wagner, Katherine Barnes, and Lisa Peters found that only 13 percent of EPA’s air toxics rules from 1990-2010 had been challenged in court. The results of these various studies are summarized in Table 1.

Taken together, the empirical research indicates that, even though EPA finds itself in court more often than your average Joe, throughout much of the agency’s history the vast majority of its rules have never during that time period was estimated to be as low as 19 percent. See Cary Coglianese, Litigating within Relationships: Disputes and Disturbance in the Regulatory Process, 30 L. & Soc’y Rev. 735, 762 (1996).
been subjected to a petition for judicial review. Of course, even with the different time periods covered in these studies, when they are combined they span only three of EPA’s five decades—from 1980 to 2010. That led us to ask: Might it be possible to assess whether the findings from these studies hold across the sweep of EPA’s entire history?

Table 1: Rate of Legal Challenges to EPA Rules

<table>
<thead>
<tr>
<th>Study</th>
<th>Time Period</th>
<th>Rule Type</th>
<th>Number of Rules</th>
<th>Case Type (Data Source)</th>
<th>Challenge Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Coglianese (1994)</td>
<td>1987-1991</td>
<td>All</td>
<td>1,568 - 2,212</td>
<td>All appeals courts (EPA litig. docket)</td>
<td>19% - 26%</td>
</tr>
<tr>
<td></td>
<td>1980-1991</td>
<td>CAA &amp; RCRA rules in regulatory agenda</td>
<td>220</td>
<td>DC Circuit (court docket)</td>
<td>35%</td>
</tr>
<tr>
<td></td>
<td>1983-1991</td>
<td>Major CAA &amp; RCRA under EO 12291</td>
<td>21</td>
<td>DC Circuit (court docket)</td>
<td>57%</td>
</tr>
<tr>
<td>Schroeder &amp; Glicksman (2001)</td>
<td>1991-1999</td>
<td>All</td>
<td>3,553</td>
<td>All appeals courts (reported decisions)</td>
<td>3%</td>
</tr>
<tr>
<td></td>
<td>1991-1999</td>
<td>Those requiring RIA</td>
<td>75</td>
<td>All appeals courts (reported decisions)</td>
<td>33%</td>
</tr>
<tr>
<td>Johnson (2008)</td>
<td>2001-2005</td>
<td>Significant under EO 12866</td>
<td>94</td>
<td>All federal courts (decisions in Lexis/BNA)</td>
<td>41%</td>
</tr>
<tr>
<td></td>
<td>2001-2005</td>
<td>Economically signif. under EO 12866</td>
<td>16</td>
<td>All federal courts (decisions in Lexis/BNA)</td>
<td>75%</td>
</tr>
<tr>
<td>Wagner, Barnes &amp; Peters (2011)</td>
<td>1990-2010</td>
<td>Air toxics</td>
<td>90</td>
<td>All federal courts (reg. docket &amp; agenda)</td>
<td>13%</td>
</tr>
</tbody>
</table>

58. As the data in Table 1 from the Coglianese and Johnson studies make plain, the litigation rate does increase as the set of rules is narrowed to subsets of the most significant rules. Although at times Ruckelshaus and others made the 80 percent claim about all EPA rules, the staff who gave Ruckelshaus this estimate said that it was based on the number of rules appearing in the agency’s semi-annual regulatory agenda—a subset of all EPA rules with a litigation rate of 35 percent, as indicated in the Coglianese study. The narrowest category of rules—those which impose $100 million or more in economic costs—has the highest litigation rate. Although the rate of litigation for this smallest subset comprising the most significant EPA rules comes closest to 80 percent in the Johnson study, it is clear that this is not the category of EPA rules that Ruckelshaus and others included in their claim. In addition, his sample of rules derives from five years during the 2000s, which is long after the time when Ruckelshaus and others were making their claims. The data from the Coglianese study were contemporaneous to those claims and show only a 57 percent litigation rate for these most significant rules.

59. The studies listed in Table 1 are as follows: Coglianese, supra note 22; Schroeder & Glicksman, supra note 54; Johnson, supra note 28; Wendy Wagner, Katherine Barnes, & Lisa Peters, supra note 56. Beyond the studies summarized in Table 1, we note that occasional glimpses of litigation rates can be found in other studies. See, e.g., Wendy Wagner, Revisiting the Impact of Judicial Review on Agency Rulemakings: An Empirical Investigation, 53 WM. & MARY L. REV. 1717, 1745, 1791 (2012) (finding that seven out of ninety hazardous-air-pollution rules were litigated to judgment); Coglianese, supra note 57, at 743 (reporting that
Seeking to determine whether existing research might be effectively validated across the entirety of the last fifty years, we conducted our own original data collection to situate existing studies' snapshots within a longer timeframe. We began by first collecting annual data on the number of final rules that EPA published in the Federal Register across its fifty-year history—itself a first such effort in the literature, as far as we are aware. We then collected annual data on decisions of the U.S. Courts of Appeals in which EPA was a party. Figure 3 reflects data from 1970–2019 on both the annual number of EPA rules and the annual number of reported decisions from appeals courts in which EPA was a named party.

Following 1970 (which lasted less than a month for EPA, as the agency only started operating in December 1970), the number of court decisions involving EPA never came close to matching the production of agency rules. This disparity is remarkably stable over time. An alternative way of viewing these data can be found in Figure 4, which simply shows a ratio computed by dividing the annual number of appellate decisions by the annual number of EPA rules. Using this ratio, the relationship between rules and appellate decisions can be examined on a finer-grained scale, and some fluctuation is evident—but it is

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60. Data on EPA rules were obtained by searching each year in Westlaw's Federal Register database using the following search (with dates adjusted annually): advanced: DATE(aft 12-31-1969 & bef 1-1-1971) & PR(agency /5 “environmental protection”) & PR(action /5 (“final rule” or “final rulemaking”)) % PR(action /5 (“technical amendment” or “correction” or “clarification”)). As a check on our search results' validity for EPA's first decade, prior to the initial development of electronic databases of legal sources, we compared our search results with a manual review of collections of EPA documents in the Federal Register obtained both through Lexis and Westlaw using much broader searches. The results were sufficiently aligned to give us confidence in the Westlaw search results that we report in Figure 3.

61. Data on court cases also come from Westlaw searches. We searched each year in the U.S. Courts of Appeals database using the following search (with dates adjusted annually): advanced: DATE (aft 12-31-1969 & bef 01-01-1971) & TI(EPA “Environmental Protection Agency E.P.A.”). These data undoubtedly have some noise to them, as they include some appeals from cases having nothing to do with EPA rules, but we have no reason to think there is any systematic bias in that noise. We also checked to confirm that we were not missing rule challenges in district court decisions by manually reviewing all EPA cases found in the district court database in Westlaw for 1980, 1990, 2000, and 2010. We found very few rulemaking challenges, as would be expected, given that jurisdiction for petitions for review under most of the major environmental statutes generally rests with the U.S. Courts of Appeals.
fluctuation with a rather tight band that still reflects a paucity of litigation relative to the number of EPA rules.

Throughout most of the agency’s history, the annual number of appellate decisions ranged between about 5 percent to 15 percent of annual rules. Although the ratio was slightly higher in EPA’s first 25 years (10.8 percent) than in its most recent 25 years (9.8 percent), the difference is not statistically significant. The pattern shown in Figure 4 also remains substantially the same even if appellate decisions are lagged by one year or two years. This lack of difference between the first half of EPA’s history and its second supports Judge Wald’s suggestion of considerable continuity in the courts’ “uneasy partnership” over the decades, while it stands in tension with Judge Bazelon’s prediction of a tapering off in the importance of litigation over time.62

Figure 3: EPA Final Rules and Appellate Decisions, 1970–2019

62. See supra notes 3–10 and accompanying text. It is possible, of course, that any tapering off in frequency has been counteracted by a growth in the significance of environmental litigation as legislative policy avenues have been shut down due to gridlock. See Christopher McGrory Klyza & David J. Sousa, American Environmental Policy: Beyond Gridlock 141–178 (2013).
Of course, the litigation data in Figures 3 and 4 draw from decided EPA appeals, not petitions for review, so they do not directly measure the filing of litigation over EPA rules. In this regard, it must be recognized that these data, like almost any data, have some noise. On the one hand, they include a potentially substantial number of appellate decisions in EPA cases other than those centered on petitions for judicial review of agency rules. On the other hand, they also do not include all rule challenges, as many petitions for review are dismissed or settled and thus never result in an adjudicated decision by an appeals-court panel. We have no reason to believe, though, that these

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63. One study indicates that no more than a third of appellate court decisions in EPA cases actually deal with rulemaking. Schroeder & Glicksman, supra note 54, at 10,372.

64. Petitions for review can result in a wide range of possible outcomes other than reported appellate decisions. They can be held in abeyance pending further action by the agency, dismissed by the court preliminarily on jurisdictional grounds, sent to another court, or simply left to languish on the docket without any outcome at all for some period of time. In addition, as with other litigation, settlement negotiations might also lead the petitioner voluntarily to dismiss the petition. In the D.C. Circuit in the late 1980s and early 1990s, about 47 percent of petitions for review challenging EPA rules were ultimately dismissed voluntarily. Coglianese, supra note 57, at 756.
countervailing factors have varied substantially and systematically across the past fifty years. It appears from the data that the courts and the Agency have largely existed in equilibrium, with the rate of rules-to-decisions remaining consistently low across the entire sweep of the agency’s history, as would be expected from the existing research. The once widely held view of an EPA beleaguered by nearly certain rule challenges is not borne out by the empirical evidence.

B. Success Rates

The view of an agency besieged by litigation is also not borne out by how litigants actually fare when they do challenge an EPA rule. These litigants, it should be noted, comprise a mix of environmental groups, industry litigants, and, increasingly it seems, state governments. Just as Judge Wald emphasized the early use of litigation by public interest advocacy groups,65 researchers have recognized that from the agency’s earliest days it “has had to deal with as many complaints and lawsuits from environmentalists as from industry, despite the economic and political advantages industry presumably enjoys.”66 Over time, though, it appears that “industry gradually increased its demands on courts.”67 Among the major RCRA rule challenges filed from 1988–1990, 91 percent of the unique litigants in the sample were corporations or trade associations, while only 8 percent were environmental organizations.68 Among challenges to air toxics standards between 1990–2010, 42 percent were filed by industry alone, 25 percent by environmental groups alone, and 33 percent by both simultaneously.69 Ultimately, we would expect that litigants of any kind will act rationally and make decisions about whether to go to court based on whether they can expect to win.70 It is not nearly as expensive to litigate EPA rules as it is to pursue much civil litigation that involves discovery,

65. See supra note 6 and accompanying text. See also Wagner, supra note 50, at 1726–29 (noting the view that in the “early reformation period, public interest groups seemed to emerge from the woodwork to defend the rights of the diffuse public against capture and other lapses in agency judgment”); Lettie McSpadden Wenner, The Reagan Era in Environmental Regulation, in Conflict Resolution and Public Policy 43, 45–46 (Mills ed. 1990) (observing active use of litigation by public interest groups across different kinds of environmental issues).


67. Wenner, supra note 65, at 47.

68. Coglianese, supra note 22, at 101.


70. Schroeder & Glicksman, supra note 54, at 10,374.
but it is also not costless either. As a result, the relatively low rate at which rules are challenged in court suggests that expected returns may not be all that substantial. When researchers have looked at the outcomes of EPA rule challenges, they have found that the agency is very likely to succeed.\textsuperscript{71}

Table 2 presents the key findings on EPA’s success in adjudicated cases. Almost all studies have found that EPA is more likely to succeed than the challenger. Those that focus on total wins (\textit{i.e.}, cases in which EPA prevailed on all of the issues presented to the court) tend to find that EPA achieved this overall outcome at least half the time. Other studies proceed issue by issue, recognizing that one petition might raise multiple objections, and these issue-focused studies generally find an even higher win rate—nearly 70 percent in cases involving the application of \textit{Chevron} deference to the agency’s interpretations of statutes. Still other studies, as shown in Table 2, have collected data on judges’ votes—the clear majority of which are to affirm EPA’s actions or interpretations.

On the whole, the evidence indicates that EPA does reasonably well in defending its rules in court. In this respect, it is not unlike other federal agencies, which also “enjoy considerable litigation success.”\textsuperscript{72} EPA’s success is all the more apparent once it is recognized that, even when EPA or another agency formally loses a case, the court’s remedy is usually to remand the rule to the agency to cure its deficiencies—meaning that the agency is able to recover from a loss in relatively short order.\textsuperscript{73}

\begin{footnotesize}
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Table 2: EPA Success in Rule Challenges

<table>
<thead>
<tr>
<th>Study</th>
<th>Time Period</th>
<th>EPA Actions</th>
<th>Case Type</th>
<th>Court</th>
<th>Unit of Analysis</th>
<th>EPA Win Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Coglianese (1994)</td>
<td>1979-1990</td>
<td>All Rules</td>
<td>All cases</td>
<td>DC Circuit</td>
<td>Case</td>
<td>51%</td>
</tr>
<tr>
<td></td>
<td>1980-1990</td>
<td>CAA/RCRA</td>
<td>All cases</td>
<td>DC Circuit</td>
<td>Case</td>
<td>45%</td>
</tr>
<tr>
<td></td>
<td></td>
<td>rules in reg. agenda</td>
<td>All cases</td>
<td>DC Circuit</td>
<td>Case</td>
<td></td>
</tr>
<tr>
<td>Revesz (1997)</td>
<td>1970-1994</td>
<td>Any</td>
<td>All cases</td>
<td>DC Circuit</td>
<td>Vote</td>
<td>60%</td>
</tr>
<tr>
<td></td>
<td>(selected)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>Adler (2000)</td>
<td>1993-2000</td>
<td>Any envtl. actions</td>
<td>All cases</td>
<td>DC Circuit</td>
<td>Case</td>
<td>46%</td>
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<tr>
<td>Schroeder &amp; Glicksman (2001)</td>
<td>1986-1987</td>
<td>Any</td>
<td>All cases</td>
<td>All appeals courts</td>
<td>Case</td>
<td>60%</td>
</tr>
<tr>
<td></td>
<td></td>
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<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>1991-1999</td>
<td>Any</td>
<td>All cases</td>
<td>All appeals courts</td>
<td>Case</td>
<td>68%</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>All Rules</td>
<td>All cases</td>
<td>All appeals courts</td>
<td>Case</td>
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<tr>
<td>Smith &amp; Tiller (2002)</td>
<td>1981-1993</td>
<td>Any</td>
<td>Non-dismissed substantive</td>
<td>All appeals courts</td>
<td>Case</td>
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<td>Miles &amp; Sunstein (2006)</td>
<td>1990-2004</td>
<td>Any</td>
<td>Any</td>
<td>All appeals courts</td>
<td>Vote</td>
<td>62%</td>
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<tr>
<td>Carneski (2008)</td>
<td>2003-2005</td>
<td>Any</td>
<td>Any</td>
<td>All appeals courts</td>
<td>Vote</td>
<td>73%</td>
</tr>
<tr>
<td>Sautter &amp; Litvay (2011)</td>
<td>2003-2005</td>
<td>CAA rules</td>
<td>Any</td>
<td>All appeals courts</td>
<td>Vote</td>
<td>70%</td>
</tr>
<tr>
<td></td>
<td></td>
<td>CWA rules</td>
<td>Any</td>
<td>All appeals courts</td>
<td>Vote</td>
<td>79%</td>
</tr>
<tr>
<td>Barnett &amp; Walker (2017)</td>
<td>2003-2013</td>
<td>Any</td>
<td>Any</td>
<td>All appeals courts</td>
<td>Issue</td>
<td>68%</td>
</tr>
<tr>
<td>Johnson (2018)</td>
<td>2000-2016</td>
<td>Any</td>
<td>Any</td>
<td>All appeals courts</td>
<td>Issue</td>
<td>71%</td>
</tr>
</tbody>
</table>

In a study that included EPA and other agencies’ rule challenges, legal scholar Bill Jordan studied the sixty-one times from 1985–1995 that the D.C. Circuit remanded an agency’s rules back to the agency.\(^{74}\) He concluded that the typical remedy of remand “did not significantly impede agencies in the pursuit of their policy goals.”\(^{75}\) Indeed, “[w]hen rules were remanded, agencies tended to recover fairly quickly when

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75. \textit{Id.}
recovery was necessary.” 76 Jordan found that, after the conclusion of litigation, agencies “successfully implemented their policies in approximately 80% of the instances in which courts have originally remanded rules as arbitrary and capricious.” 77

This picture of considerable agency success stems from the judgments made by courts and how agencies respond to them; it does not take into account the frequent outcomes achieved through settlement. Yet “settlement negotiations are a routine part of judicial review litigation challenging EPA rules.” 78 For significant RCRA and Clean Air Act rules issued between 1980 and 1990 and challenged in court, less than half ever resulted in a decision of any kind by a court. The most frequent resolution of a petition for review has been for the petitioner to withdraw it voluntarily. The litigation process is thus not infrequently just another round of negotiations—not the kind of adversarial and intrusive inquisition that the prospect of “getting sued” typically implies in everyday settings. 79

In recent years, some observers have even claimed that officials at EPA and other agencies have used the secrecy of settlement negotiations to their advantage. A phenomenon often referred to as “sue and settle” posits that agency-friendly groups sue EPA so as to use secret settlement negotiations to set regulatory policies that would not survive scrutiny in more public fora. 80 Regardless of how frequently any such collusive strategies might occur, the possibility only reinforces the

76. Id.

77. Id. at 440. Of note, Wendy Wagner’s study of EPA’s hazardous air pollutant rules came to a similar conclusion, suggesting that what can look like major victories for environmental groups on paper turn out to be largely empty hopes after EPA simply ignored or otherwise circumvented the courts’ orders. Wagner, supra note 59, at 1750.


79. This is a core finding in Coglianese, supra note 57.

conclusion that EPA need not find the experience of getting sued to be antithetical to its goals.

Of course, EPA can and does at times lose in a very visible fashion. Recent years have seen the agency experience certain judicial setbacks over its Obama-era Clean Power Plan,81 a mercury air toxics standard,82 and a rule defining the scope of the Clean Water Act,83 among other examples. But when considered more broadly—taking into account EPA’s generally high win rate in adjudicated cases, its ability to achieve its goals on remand even after formally losing a case, and its ability to work collaboratively with outside groups through settlement—it is clear that the agency has much less to fear from potential petitions for review than has been often suggested.

III. Implications: The Courts and EPA’s Internal Processes

The empirical evidence presented here on EPA rule challenges over the last fifty years reveals a much less intrusive role for judicial review than implied by the dire claims of those legal scholars who have contributed to the ossification literature.84 The fact that litigation rates have remained low throughout the last fifty years also suggests a relatively stable equilibrium, rather than any markedly changing or evolving role for judicial review. To be sure, the relatively low rates of litigation over EPA rules, combined with the agency’s strong record of winning in court, do not deny that judicial review can be important. On the contrary, the prospect of litigation certainly does matter for the agency’s most controversial rules, and, as indicated in Part I, litigation over EPA rules has at times resulted in outcomes that have had an even broader, lasting impact on regulatory law. Moreover, judicial


review litigation can shape agency behavior even if most rules are never challenged.\textsuperscript{85} EPA staff members often act as if their rules will be challenged, shoring up the evidentiary basis for agency decisions and engaging in a dialogue with representatives of affected organizations and other interested individuals to head off disputes.\textsuperscript{86} It may well be a proper sign of the agency’s success at public engagement, regulatory analysis, and internal legal review that the majority of the agency’s rules have escaped legal challenge and change.

Over the last fifty years, the courts have arguably played the kind of role in shaping EPA’s internal handling of rules that Judge Bazelon envisioned—although it does not appear to have taken long for that role to be established. In 1970, EPA started out as an institution literally cobbled together with people and offices transferred from other federal departments. Even the very litigation in which Bazelon wrote his opinion celebrating the new era of judicial review started out as a dispute over the U.S. Department of Agriculture’s failure to ban DDT under the federal insecticide statute—a law for which EPA inherited responsibility by the time the lawsuit had reached Bazelon’s bench for a decision.\textsuperscript{87} From these humble beginnings, EPA has developed a rulemaking process that, even if still not perfect, has at least become routinized, professional, and robust.\textsuperscript{88}

For fifty years, across both Democratic and Republican administrations, EPA has issued hundreds of rules annually.\textsuperscript{89} On a consistent basis, the agency’s rules have been featured in the White House’s yearly report to Congress on the federal government’s most

\begin{itemize}
\item Even a small litigation rate—perhaps even as little as 10 to 20 percent—could certainly be enough to make an agency sit up and take note of what the courts do. \textit{See} Johnson, \textit{supra} note 55, at 773.
\item Coglianese, \textit{supra} note 24, at 1332 (noting how “public managers appear much more adept than ordinarily assumed at anticipating interests and managing conflict in the normal rulemaking process”); Daniel E. Walters, \textit{The Self-Delegation False Alarm: Analyzing Auer Deference’s Effects on Agency Rules}, 119 COLUM. L. REV. 85, 159 (2019) (observing that “[a]gencies that write a lot of rules have generally invested in an institutional infrastructure that helps them facilitate a response to the prospect of judicial review”).
\item Envtl. Def. Fund v. Ruckelshaus, 439 F.2d 584, 588 (D.C. Cir. 1971).
\item \textit{See} Thomas O. McGarity, \textit{The Internal Structure of EPA Rulemaking}, 54 L. & CONTEMP. PROBS. 57, 59 (1991) (observing that EPA’s need to address “complex scientific, economic, and technological issues must draw upon so many different kinds of expertise that no individual employee can know very much about all of the issues involved in a typical rulemaking,” and further observing that EPA has adopted a model of “bureaucratic pluralism” that allows it to integrate all of these varying perspectives).
\item \textit{See supra} Figure 3.
\end{itemize}
significant regulations. To support such an active rulemaking agenda, EPA has assembled a team of lawyers who deal specifically with rulemaking, and the agency has created an in-house staff of public engagement professionals to help solicit input when making rules. EPA also relies on internal policy analysis produced by talented environmental scientists and economists. Admittedly, other pressures, such as those emanating from the White House and Congress, have contributed to the institutionalization of EPA’s regulatory analysis and public engagement functions. Some of this professionalization might have been expected anyway as the agency matured. But judicial review has almost certainly played a role, too, even if only to reinforce other institutional factors pointing toward greater professionalization of the rulemaking process.

Yet as much as EPA has succeeded in creating a transparent, participatory, and analytic rulemaking process, the part of Bazelon’s prediction that does not appear to have come to pass has been the expectation that the development of such internal capacities and practices would “diminish the importance of judicial review.” Whatever importance judicial review had in the 1970s, it appears still to have much the same level of importance. The quantitative indicators we have presented in this article suggest that the prospect of litigation still looms today over EPA’s regulatory program as much as it has for the last half century.

In Part II, we focused on observable, quantitative patterns in litigation involving EPA. Although interesting nuances can be found in these data and are worth exploring in future research, by and large the picture that emerges from the accumulated evidence is one of stability. EPA has won some and lost some when courts have reviewed its rules over the years. But the overall risk of a rule getting challenged is modest and the chances of the agency losing completely are not great. This basic stability or equilibrium is perhaps all the more striking given that the underlying statutory basis for EPA’s rulemaking has remained largely unchanged for the last thirty years. If, as some have postulated, making old statutes fit new circumstances creates legal risk, then litigation rates presumably should have been expected to increase over EPA’s second quarter century—but they did not.

Part of what explains the stability may be changes to legal doctrine. When deciding whether to challenge a rule, potential litigants look to doctrine to estimate the prospects of prevailing. It may have appeared

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90. One need only look at virtually any year’s version of OIRA’s annual report to Congress, copies of which can be found online at https://www.whitehouse.gov/omb/information-regulatory-affairs/reports/#ORC.

91. *Ruckelshaus*, 439 F.2d at 598.

to some observers, such as Judge Bazelon, that the courts were truly entering a new doctrinal era in the early 1970s. But it appears that Judge Wald had the better account in her suggestion that legal doctrine has maintained a considerable degree of consistency—or at least it has maintained a consistent degree of tension between judicial scrutiny and judicial deference. This ever-present tension in effect produces flexibility for judges, as they can impose scrutiny on some occasions, while retreating with deference on others.

This tension does seem built into administrative law, just as Judge Wald argued. How else can one explain the Supreme Court handing down its high-scrutiny administrative law decision in Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.93 in the very same year as it issued its high-deference administrative law decision in Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.?94 As Judge Wald noted, a tension seems built into the very heart of the Chevron doctrine, which calls for high deference at Step Two but can accommodate high scrutiny at Step One. It is also clear that the Supreme Court can step in from time to time to recalibrate or redirect doctrinal tendencies, such as in Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council95 or Lujan v. Defenders of Wildlife96 interventions which may have helped promote stability.

Yet another factor explaining the rough equilibrium between EPA and the courts presumably derives from the professionalization that has occurred at EPA. The agency’s legal and policy professionals adapt to what they see by way of changes in legal doctrine or to other signals from the judiciary.97 They can adjust what the agency does depending on the degree of legal risk presented by particular policy choices. Their role, after all, is to manage the agency’s rulemaking so that legal risk stays within certain reasonable bounds, and they appear to have been able to do just that with some striking consistency throughout the agency’s history. They have done so, too, without the agency retreating from a rulemaking production schedule that has generated hundreds of rules each year.

EPA’s experience during the first several years of the Trump Administration appears to support the vital role played by agency professionals in managing legal risk. Although the ratio of court decisions to rules does not appear in recent years to be out of the typical range for EPA, it is widely accepted that EPA has not fared well during

97. McGarity, supra note 88, at 82 (discussing the role played by EPA lawyers in assessing and managing legal risk).
the Trump Administration when it comes to how courts have ruled on the challenges that have been filed.98

No detailed assessment of litigation against EPA during the Trump years has yet to emerge that traces specific EPA rules to lawsuits or court outcomes, so any robust estimate of either a challenge or win rate for the Trump Administration must await another day. But it certainly seems instructive that, according to one organization’s website tracking how the Trump Administration has fared in court, among 31 court decisions reviewing EPA actions, the agency has reportedly lost in 28.99 That kind of lopsided track record contrasts dramatically with longstanding trends.

Attorney Connor Raso has explained that many of EPA’s recent losses derive from failures to follow proper procedure or build an adequate record of decision: “In many of these cases, the EPA had dispensed with procedures such as explaining its reasoning and allowing the public an opportunity to comment.”100 Legal scholar Jonathan Adler elaborates that the agency’s losses under President Trump have often


99. These numbers are based on what has been reported on the website of the New York University (NYU) Law School’s Institute of Policy Integrity: https://policyintegrity.org/trump-court-roundup [https://perma.cc/ZGY-59XUD]. The 31 judicial decisions involving EPA were out of 106 total court decisions tracked by the Institute as of August 5, 2020. Not all of the EPA actions on the Institute’s list involved rulemaking. Overall, the Institute has put the Trump Administration’s win record across all of its tracked administrative law cases at only 11 percent. As our present article headed to print, EPA General Counsel Matthew Z. Leopold proclaimed a much higher agency win rate—“approximately two-thirds”—for suits over asserted “significant environmental actions.” Matthew Z. Leopold, Judicial Wins Reduce Regulatory Burdens, BLOOMBERG L. (Aug. 10, 2020, 4:00 AM), https://news.bloomberglaw.com/environment-and-energy/insight-epa-general-counsel-judicial-wins-reduce-regulatory-burdens [https://perma.cc/HS72-CNEF]. Although EPA released a list of cases, neither the agency nor Leopold disclosed exactly how he supported his claim, and of course his calculations could be expected to cast EPA’s litigation track record in a better light. NYU’s Bethany Davis Noll has conceded that EPA disclosed some cases not originally included in the NYU tracker. Ellen M. Gilmer, EPA Touts Winning Record, but Some Attorneys Dispute Its Numbers, BLOOMBERG L. (Aug. 26, 2020, 6:00 AM), https://news.bloomberglaw.com/environment-and-energy/epa-touts-winning-record-but-some-attorneys-dispute-its-numbers [https://perma.cc/4KZS-PQJS]. With those cases added, the NYU tracker increases EPA’s win rate during the Trump Administration from 10 percent to 19 percent, still a stark contrast with the rates in Table 2.

100. Raso, supra note 98.
arisen because the agency has acted “on the fly, without taking care of the relevant legal and procedural niceties, and got burned in court.”101 In Adler’s view, “[t]he EPA’s legal difficulties are somewhat self-created” because the agency has pursued too many “quick-and-dirty deregulatory efforts.”102 He concludes that, “[i]f the Trump administration’s environmental-policy agenda is to bloom, the EPA’s attorneys will have to up their game.”103

Of course, for the attorneys to “up their game,” EPA leadership must value professional staff work and manage processes so as to give professionals the time and resources to do their jobs well. When Scott Pruitt served as Trump’s first EPA Administrator, though, EPA civil service staff were reportedly cut out of the decision support process and could not do their normal work to manage legal risk.104 As a result, if these management failures explain exceptional court losses in the Trump Administration, they at least provide a strong endorsement of the view that expert staff work has had something to do with the rough equilibrium between EPA and the courts over the last half century.

In the end, quality staff work and robust internal processes appear not to have made judicial review decline in importance, as Judge Bazelon suggested. But at the same time, such internal efforts also appear to have kept judicial review from increasing in importance, apparently with the exception of the agency’s experience in the Trump Administration. A fifty-year equilibrium of low litigation rates and high agency win rates appears to have stemmed in good measure from the people who have provided the leadership in the agency and from their judgment to value solid, conscientious professional staff work.105

### Conclusion

As anyone who studies or practices environmental law can attest, judicial review has been an enduring feature of EPA’s first half-century. The pivotal cases involving the agency are well-known: *Chevron*,106


102. *Id.*

103. *Id.*


Massachusetts v. EPA, 107 Michigan v. EPA, 108 and more. Yet when one looks at the data, the threat of judicial review hardly seems all that great—at least not when EPA has done its homework. Relative to the large volume of EPA rules issued every year, the level of legal challenges to those rules is quite modest. Of course, EPA issues so many rules that even if just a tiny fraction result in court rulings, this still produces enough published court opinions to keep environmental lawyers busy. But as a function of all that the agency does, litigation occurs less frequently than has been often supposed, and EPA ends up winning arguments more often than not. EPA hardly appears to have grown ossified by the threat of judicial review.

This empirical retrospective on litigation over EPA rules supports some but not all aspects of the vision that Judge Bazelon articulated near the time of the agency’s founding. Judicial review of EPA rules has certainly not diminished in importance, as Judge Bazelon predicted or hoped. But this is only because judicial review’s importance appears to have remained relatively constant, but modest, at least judging from the demand for court action reflected in the volume of litigation over the years. In this respect, Judge Wald’s emphasis on continuity appears to have been borne out. That said, Judge Bazelon was surely right to emphasize the importance of responsible leadership and management within agencies, for this remains the frontline defense both against legal risk and poor policy decisions. Judicial review remains an ever-present risk should the agency fail to do its homework. That check—especially on the most egregious cases—has played a role in the way environmental policy has been made at the federal level over the last fifty years.

Will such litigation, and its risk, continue along a similar path for the next fifty years? We have no crystal ball. Much will likely depend on how many times in the future EPA will be led by individuals willing to accept “quick-and-dirty” staff work. Much may also depend on whether, or how far, the Supreme Court goes in reconfiguring doctrines that govern the administrative state. If all the Court does is overturn Chevron, perhaps little will change. 109 The best empirical evidence indicates that the courts did not shift their deference to EPA’s statutory interpretation decisions in any perceptible way after Chevron, so it is hard to see that they would likely shift if Chevron is pulled.

109. The Court might not even overturn Chevron. That it had a chance to overturn Auer but did not may be telling, as Auer seemed the much more likely case to be overturned. See Daniel E. Walters, A Turning Point in the Deference Wars, REG. REV. (July 9, 2019), available at https://www.theregreview.org/2019/07/09/walters-turning-point-deference-wars/ [https://perma.cc/V8PM-74M5].
back. Even in a world without *Chevron*, the institutional limitations that courts face when reviewing well-supported EPA rulemakings—their inability to second-guess the agency in any intelligent way—will no doubt continue. The agency will, at least when led responsibly, continue to do its homework. And so the next half-century may look much like this first one, with courts sometimes providing a forum in which to play out heated disputes over the most controversial rules, and sometimes acting as a check on egregious abuses, but otherwise presenting few obstacles that cannot be effectively managed through robust internal processes and careful analysis.

110. *See generally* Smith & Tiller, *supra* note 73 (finding that courts “were no more likely to defer to the EPA after *Chevron* than before it”).
### Appendix: EPA in the U.S. Supreme Court, 1970–2020

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<th>Case Name</th>
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