DEREGULATING ARBITRATION

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In the aftermath of the November 2016 election, commentators predicted that regulation of arbitration by federal administrative agencies would halt in its tracks. But something more interesting happened. Instead of stopping agency arbitration regulation, Trump's election and Republicans' defense of their House and Senate majorities balkanized it. The new administration has rolled back some Obama-era rules, but other efforts to undo agency arbitration regulations have faltered at the administrative level or in the courts. This Article—based on remarks delivered at the Loyola Consumer Law Review *2017 symposium—maps the terrain of agency arbitration regulation under Trump and discusses why some efforts to roll back Obama-era regulations have succeeded while others have failed.*

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INTRODUCTION

In the final years of the Obama administration, a flurry of federal administrative agencies undertook the task of regulating mandatory arbitration in areas that they regulate.[1] The agency interventions took the form of rules issued under § 553 of the Administrative Procedure Act (APA),[2] principles announced in agency adjudications,[3] and litigating positions.[4] They responded to an increase in the use of arbitration—particularly in consumer and employment contracts[5]—following a string of Supreme Court decisions that required arbitration agreements to be enforced according to their terms.[6] In an effort to limit arbitration's effects

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[1] *See* David L. Noll, *Regulating Arbitration*, 105 CALIF. L. REV. 985, 988-89 (2017) (cataloging agency actions). By "mandatory" arbitration, this Article refers to arbitration that is ordered pursuant to an agreement to arbitrate that the parties entered into in advance of a dispute.

[2] 5 U.S.C. § 553.

[3] *See* Murphy Oil USA, Inc., 361 NLRB No. 72 (2014); D.R. Horton, Inc., 357 NLRB No. 184, (2012).

[4] *See* EEOC's Response in Opposition to Doherty Enterprises, Inc.'s Motion to Dismiss, EEOC v. Doherty Ents., 126 F. Supp. 3d 1305 (S.D. Fla. 2015), No. 9:14-cv-81184-KAM (Jan. 6, 2015).

[5] *See* CONSUMER FIN. PROT. BUREAU, 201503, ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(a) (2015); Alexander J.S. Colvin & Kelly Pike, *Access to Justice in Employment Arbitration: A Critical Look*, in BEYOND ELITE LAW: ACCESS TO CIVIL JUSTICE IN AMERICA (Samuel Estreicher & Joy Radice eds., 2016).

[6] *See, e.g.*, Am. Exp. Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013) (holding that a contractual waiver of class arbitration is enforceable under the Federal Arbitration Act when the plaintiff's cost of individually arbitrating a federal statutory claim exceeds the potential recovery); AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011) (holding that the FAA prohibits States from conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures); Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662 (2010) (holding that imposing class arbitration on parties whose arbitration clauses are "silent" on that issue violates the Federal Arbitration Act); Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444 (2003) (considering but not resolving whether a contract that did not expressly provide for class arbitration allowed class arbitration). For analysis of the rationale for the arbitration revolution, see Noll, *supra* note 1, at 993-99. *See also* David L. Noll, *The New Conflicts Law*, 41 STAN. J. COMPLEX LIT. 41, 69-72 (2014) (analyzing the Court's

on rights they enforced and programs they administered, agencies imposed conditions on the use of arbitration—for example, requiring that arbitration clauses not be used to block class actions—or completely barred the use of arbitration in specific domains. Commenters described the flurry of agency arbitration regulation as the next battle in the United States' "arbitration wars."[7]

The November 2016 election presented a serious threat to agencies' efforts to regulate arbitration. The Supreme Court's preference for mandatory arbitration and distaste for litigation is shared by many congressional Republicans, who successfully defended their majorities in the House and Senate. The incoming President ran on a platform of deregulating business. One of his top advisors spoke of "deconstruct[ing]" the "administrative state" (i.e., the federal bureaucracy).[8] With opponents of federal regulation controlling both Congress and the Presidency, it was reasonable to expect that regulation of arbitration by federal administrative agencies would stop in its tracks.[9] This Article refers to this prediction as the "U-Turn hypothesis." According to that hypothesis, Trump's election meant the end of federal administrative agencies regulating arbitration.

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arbitration cases as a response to the problem of inter-jurisdictional regulatory conflict).

[7] *See* David O. Horton, *Arbitration About Arbitration*, 70 STAN. L. REV. (forthcoming 2018) (manuscript at 6).

[8] Jeremy W. Peters, *All Is on Track, Bannon Tells Conservatives*, N.Y. TIMES, Feb. 24, 2017, at A1.

[9] *See, e.g.*, Alison Frankel, *Business Lobby Hopes Trump Undoes Regulation, Limits Litigation*, (Nov. 9, 2016) (quoting a conservative lawyer to the effect that "President Trump and a Republican Congress have a chance to roll back federal agency prohibitions on mandatory arbitration clauses, enact legislation to restrict private lawsuits and undo laws already on the books"), http://www.reuters.com/article/us-frankel-otc/business-lobby-hopes-trump-undoes-regulation-limits-litigation-idUSKBN1343MY; David L. Noll, *The CFPB's Arbitration Rule: The Road Ahead*, in PROCEEDINGS OF THE NYU 69TH ANNUAL CONFERENCE ON LABOR: MEDIATION AND ARBITRATION OF EMPLOYMENT AND CONSUMER DISPUTES (forthcoming 2017) (examining the prospects for the Consumer Financial Protection Bureau's arbitration rule under Trump and concluding that they were poor), https://ssrn.com/abstra ct=2873866.

In fact, something more interesting happened. Instead of halting agency arbitration regulation, the 2016 election balkanized it. Ten months into the new administration, the Trump administration has successfully rolled back some Obama-era arbitration regulations. But the administration's efforts to roll back other regulations have faltered at the administrative level, or are at risk of being reversed by the courts. Meanwhile, the National Labor Relations Board (NLRB) continued its longstanding effort to regulate the use of arbitration clauses to block employees from joining together to assert workplace grievances—a position that setup an extraordinary conflict within the executive branch over the agency's regulatory authority. Thus, under Trump, agency arbitration regulation has not stopped but fragmented, with different agencies taking different tracks, and their efforts provoking legal challenges from both supporters and critics of their work.

This Article, based on remarks delivered at the *Loyola Consumer Law Review*'s 2017 symposium, maps the terrain of agency arbitration regulation under Trump and discusses why some efforts to roll back Obama-era regulations have succeeded and others have failed. A central theme, as expressed by Terry Moe, is that "[w]hatever is formalized will tend to endure."[10] Regulations issued via relatively formal forms of administrative policymaking, which have been in place long enough to anchor reliance interests and avoid congressional review under the Congressional Review Act (CRA), have proved relatively more difficult to roll back. Conversely, less formal regulations and those promulgated within the window for congressional review have proved less durable. The Article also shows how legal uncertainty over agencies' power to regulate arbitration has provided the White House and Justice Department appointees with a second opportunity to influence agency policy by attacking agencies' authority to regulate arbitration.

Part I describes the two areas where the Trump administration's effort to deregulate arbitration has unequivocally succeeded: the repeal of arbitration provisions in federal procurement regulations issued under the Fair Pay and Safe Workplaces Executive

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[10] Terry M. Moe, *Political Institutions: The Neglected Side of the Story*, 6 J. L. ECON. & ORG. 213, 240 (1990).

Order, and the repeal of the Consumer Financial Protection Bureau (CFPB) Arbitration Rule. Part II describes efforts by the Centers for Medicare and Medicaid Services, Department of Education, and Department of Labor to roll back Obama-era arbitration rules, and the difficulties those agencies encountered doing so. Part III describes the NLRB's continued regulation of arbitration notwithstanding the change in administrations, and the Justice Department's attacks on the agency in the U.S. Supreme Court.

I. SUCCESSFUL DEREGULATION: THE FAIR PAY AND SAFE WORKPLACES EXECUTIVE ORDER AND CFPB ARBITRATION RULE

The agency regulations that most closely follow the U-Turn hypothesis are the ones that have been repealed via the CRA: the Fair Pay and Safe Workplaces Executive Order and its implementing regulations, and the CFPB Arbitration Rule.

A. The Fair Pay Order

The Fair Pay order grew out of concerns that federal contractors were using arbitration to avoid accountability for sexual violence in the workplace.[11] In response to the alleged assault of Haliburton contractor Jamie Leigh Jones and the company's attempt to force her to arbitrate her legal claims, Congress began in 2010 to bar defense contractors from requiring arbitration of certain employment-related claims.[12] The prohibition took the form of riders to defense appropriations bills that prevented federal money from being awarded to contractors who mandated arbitration.[13]

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[11] Exec. Order No. 13673, 79 Fed. Reg. 150 (July 31, 2014), *amended in* Executive Order 13683, 79 Fed. Reg. 241 (Dec. 11, 2014).

[12] *See, e.g.*, Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 8097, 129 Stat. 2242 (2015) (barring defense contractors from mandating arbitration of claims for sexual assault, sexual harassment, and violations of Title VII of the Civil Rights Act of 1964); Pub. L. No. 111-118, § 8116, 123 Stat. 3409, 3454-3455 (2010). *See also* Jeffrey Adams, *The Assault of Jamie Leigh Jones: How One Woman's Horror Story is Changing Arbitration in America*, 11 PEPPERDINE D.R J. 253 (2011) (describing the provisions' history).

[13] *See id.*

The Fair Pay order, issued in July 2014, extended the arbitration bar to all federal contractors.[14] It directed federal procurement officers to ensure that contractors selected for jobs worth more than $500,000 did not require employees to arbitrate claims for sexual abuse or violations of Title VII of the Civil Rights Act of 1964. The Department of Defense, General Services Administration, and NASA issued implementing regulations and guidance in August 2016, which gave effect to the Fair Pay order by setting out new language for procurement officers to include in bid solicitations.[15] Together, the order and its implementing regulations leveraged the federal government's position as a market participant to prevent uses of arbitration that, the White House judged, frustrated the enforcement of job discrimination law.

On March 27, 2017, Trump signed an executive order that rescinded the Fair Pay order.[16] The same day, he signed a congressional resolution of disapproval that repealed the order's implementing regulations via the CRA.[17] The effect of these actions was to erase the Fair Pay order's restrictions on federal contractors' ability to mandate arbitration of employment-related claims.[18] Going forward, federal contractors who did not do business with the Defense Department would be free to require employees to arbitrate workplace claims on the same terms as private-sector employers.

The successful repeal of the regulations implementing the Fair Pay order reflects the confluence of three factors. First, the repeal of the order did not disrupt serious reliance interests. Before the implementing regulations effect, a district judge preliminarily

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[14] Exec. Order No. 13673, 79 Fed. Reg. 150 (July 31, 2014).

[15] Fair Pay and Safe Workplaces Final Rule, 81 Fed. Reg. 58,562 (Aug. 25, 2016) (to be codified at 48 C.F.R. pt. 1, 4, 9, 17, 22, 42 and 52); Fair Pay and Safe Workplaces Final Guidance, 81 Fed. Reg. 58,654 (Aug. 25, 2016) (to be codified at 48 C.F.R. pt. 22 and 52).

[16] Exec. Order No.13782, 82 FR 15,607 (Mar. 27, 2017).

[17] H.R.J. Res. 37, 115th Cong. (2017). *See* 5 U.S.C. §§ 801-808.

[18] *See* 5 U.S.C. § 801(b)(1). Under the CRA, the repeal of the Fair Pay order's implementing regulations also bars the General Services Administration, Department of Defense, and NASA from issuing new regulations that are "substantially similar" to the repealed regulations. *Id.* § 801(b)(2). *See generally* SAMUEL ESTREICHER & DAVID L. NOLL, LEGISLATION AND THE REGULATORY STATE 330-31 (2d ed. 2017).

enjoined the order on the ground that it conflicted with the Federal Arbitration Act (FAA).[19] As a result of the preliminary injunction, the main effect of rescinding the order was to remove the uncertainty about non-defense contractors' ability to mandate arbitration of workplace claims.

Second, the implementing regulations were promulgated within the window for Congress to act under the CRA. The CRA provides expedited procedures through which Congress may repeal an agency regulation through majority votes in the House and Senate.[20] But it requires that Congress act within 60 legislative days of a regulation being transmitted to Congress and published in the *Federal Register*.[21] Because the regulations implementing the Fair Pay order were published within the 60-day window, congressional leaders were able to take advantage of the act's expedited repeal procedures.

Third, the procedures that the administration used to repeal the Fair Pay order's arbitration restrictions insulated the repeal from judicial review. Executive orders generally are exempt from judicial review under the APA,[22] and the CRA provides that "No determination, finding, action, or omission under this chapter shall be subject to judicial review."[23] As such, there was no obvious avenue through which the Fair Pay order's defenders could challenge the repeal of its implementing regulations.

B. The CFPB Arbitration Rule

The same mix of factors facilitated the administration's roll back of the CFPB Arbitration Rule, although the rule nearly escaped repeal. Published in July 2017, the Arbitration Rule would have barred consumer financial companies from invoking arbitral class action waivers to block class actions filed in public court.[24] It

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[19] Am. Health Care Ass'n v. Burwell, 217 F. Supp. 3d 921, 928 (N.D. Miss. 2016).

[20] *See* 5 U.S.C. § 802.

[21] *Id.*

[22] 5 U.S.C. § 551 (defining "agencies" whose actions are subject to judicial review in a manner that excludes the President).

[23] 5 U.S.C. § 805.

[24] 12 C.F.R. § 1040 (2017).

also required firms to submit data about arbitral filings and case outcomes to the CFPB to be included in a database.[25]

The rule built on a large empirical study of consumer arbitration that the 2010 Dodd-Frank Act directed the Bureau to perform.[26] It reflected the Bureau's findings that class action litigation is an important mechanism for enforcing consumer financial protection laws, that arbitration clauses effectively block access to class litigation, and that individual claiming and public enforcement by regulatory agencies and criminal prosecutors does not make up for the enforcement drop-off caused by the widespread use of arbitral class action waivers.[27] To correct arbitration's effects on enforcement of consumer financial protection laws, the rule barred firms from using arbitration clauses to block class litigation.

Although the Trump administration fumbled in its early efforts to kill the rule, the administration snatched victory from the jaws of defeat months before the rule would have taken effect. Shortly after Trump was sworn in, he reportedly considered firing CFPB Director Richard Cordray for a grab-bag of alleged misdeeds.[28] Dismissing Cordray would have allowed Trump to appoint a Director who shared his regulatory philosophy before Cordray's term expired in 2018. But the White House's threats

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[25] *See id.*

[26] *See* CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(a) (Mar. 2015), http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf; CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY PRELIMINARY RESULTS: SECTION 1028(A) STUDY RESULTS TO DATE (2013), http://files.consumerfinance.gov/f/201312_cfpb_arbitration-study-preliminary-results.pdf. *See also* 12 U.S.C. § 5518(a) (2015) (directing the CFPB to "conduct a study of, and . . . provide a report to Congress concerning, the use of agreements providing for arbitration of any future dispute between covered persons and consumers in connection with the offering or providing of consumer financial products or services.").

[27] Arbitration Agreements, 81 Fed. Reg. 32,830, 32,855 (proposed May 24, 2016).

[28] Steve Eder, Jessica Silver-Greenberg & Stacy Cowley, *Watchdog Targeted as an Obama-Era Holdover*, N.Y. TIMES, Sept. 1, 2017, at A1.

came to nothing, apparently because it was unwilling to risk a constitutional showdown over the President's removal authority.

After the CFPB released the final Arbitration Rule in July 2017, Trump's Acting Comptroller of the Currency, Keith A. Noreika, threatened to petition the Financial Services Oversight Council to block the rule on the ground that it posed a threat to the financial system's stability.[29] That challenge also went nowhere. In late July, the deadline for FSOC review passed with no action from Noreika.

The CRA, however, provided a viable procedural pathway for deregulation. On July 25, 2017, the House passed a CRA resolution disapproving the Arbitration Rule.[30] The repeal effort "stalled" in the Senate after Sen. Lindsay Graham (R-SC) announced he would oppose it because of its effect on members of the military.[31] The Wells Faro and Equifax scandals—both of which highlighted problematic uses of arbitration—presented another obstacle to the repeal.[32] But on October 24, 2017, Majority Leader Mitch McConnell called a vote on the repeal resolution after the Republican Senate leadership succeeded in whipping 50 votes for it. Late that evening, the Senate passed the resolution by a 51-50 vote, with Vice President Pence casting the tie-breaking vote.[33]

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[29] *See* Letter from Keith A. Noreika, Acting Comptroller of the Currency, to Richard Cordray, Director, Consumer Financial Protection Bureau (July 17, 2017), available at https://www.consumerfinancemonitor.com/wp-content/uploads/sites/14/2017/07/Noreika-letter-July-17.pdf. Noreika, a former senior attorney for Wells Fargo, was temporarily appointed as a "special government employee" in an apparent effort to avoid Senate confirmation and ethics restrictions on government service by employees of regulated parties. *See* David Dayen, *More Trump Populism: Hiring a Bank Lawyer to Attack CFPB Bank Rules*, THE INTERCEPT, July 20, 2017, https://theintercept.com/2017/07/20/more-trump-populism-hiring-a-bank-lawyer-to-attack-cfpb-bank-rules/.

[30] H. J. Res. 111, 115th Cong. (2017).

[31] Eder, Silver-Greenberg, & Cowley, *supra* note 28.

[32] *See* Elizabeth Dexheimer, *Democrats Use Equifax, Wells Fargo to Defend Rule on Bank Suits*, BLOOMBERG, Sept. 27, 2017, https://www.bloomberg.com/news/articles/2017-09-27/democrats-use-equifax-wells-fargo-to-defend-rule-on-bank-suits.

[33] *See* Jessica Silver-Greenberg, *Consumer Bureau Loses Fight to Allow More Class-Action Suits*, N.Y. TIMES, Oct. 25, 2017, at A1.

President Trump is expected to sign the resolution in November 2017.

Like the regulations issued under the Fair Pay order, the arbitration rule did not engender serious reliance interests, because it had not taken effect when Congress repealed it via the CRA. The CRA again provided a streamlined pathway for rolling back the rule. And repealing the rule via the CRA prevented the rule's supporters from challenging the lawfulness of the repeal. Indeed, because Congress acted through the CRA, the CFPB is now barred from issuing "a new rule that is substantially the same" as the original arbitration rule "unless the reissued or new rule is specifically authorized by a [later] law."[34]

II. STUMBLING DEREGULATION

The combination of the lack of serious reliance interests, an easy pathway for repeal, and insulation from judicial review proved fatal to the regulations implementing the Fair Pay order and the CFPB Arbitration Rule. But those same factors have complicated the Trump administration's efforts to rollback other Obama-era arbitration regulations.

A. The Fiduciary Rule

One example is provided by the Fiduciary Rule, issued by the Department of Labor (DOL) in April 2016.[35] The product of a six-year rule making process, the rule expands the definition of a "fiduciary" under the Employee Retirement Income Security Act of 1974 (ERISA) to cover most firms that give advice to employees who invest in retirement savings plans. The new definition requires plan advisors to act in employees' best interests—for example, by recommending investments that will maximize an employee's investment returns after accounting for her risk tolerance—and to avoid conflicts of interest that compromise the advisor's ability to act in employees' best interests.

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[34] 5 U.S.C. § 801(b)(2).

[35] Definition of the Term "Fiduciary," 81 Fed. Reg. 20,946 (Apr. 8, 2016), *amended by* 82 Fed. Reg. 16,902 (Apr. 7, 2017) [hereinafter Fiduciary Rule].

ERISA fiduciaries ordinarily cannot be compensated through commissions, which create an incentive to recommend investments that are not in the investor's best interests. But the DOL, acting under a statutory provision that authorizes it to grant class-wide exemptions from fiduciary status, issued an exemption allowing advisors to use commission-based compensation if an advisor satisfies a number of conditions.[36] Among those conditions is that the advisor forego the use of arbitral class action waivers to block class actions filed in public court. DOL reasoned that the "option to pursue class actions in court is an important enforcement mechanism for Retirement Investors," because class litigation addresses "systemic violations affecting many different investors" and "creates a powerful incentive for Financial Institutions to carefully supervise individual Advisers, and ensure adherence to the Impartial Conduct Standards."[37] Another exemption that allows investment advisors to sell their own securities to retirement plan participants contains a similar condition limiting advisors' use of arbitration.[38]

The Fiduciary Rule originally was scheduled to take effect on April 16, 2017. On February 3, 2017, Trump issued a "Presidential Memorandum" directing DOL to re-examine the Fiduciary Rule to ensure that it was "consistent with the policies of my Administration."[39] Although Trump's appointee to head the DOL, Alexander Acosta, is an accomplished administrative lawyer, the Department's effort to roll back the rule has faltered. Nine days before the rule's effective date, the DOL issued a regulation suspending it for 60 days.[40] Observers expected the DOL to delay the rule indefinitely. But the next month, Secretary Acosta announced

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[36] *See also* Best Interest Contract Exemption, 81 Fed. Reg. 21,002 (Apr. 8, 2016) (to be codified at 29 C.F.R. pt. 2550).

[37] *Id.* On the tension between class action waivers and the cost-spreading rationale for class litigation, see generally David L. Noll, *Rethinking Anti-Aggregation Doctrine*, 88 NOTRE DAME L. REV. 649 (2012).

[38] 81 Fed. Reg. 21,002.

[39] *Presidential Memorandum on Fiduciary Duty Rule* (Feb. 3, 2017), https://www.whitehouse.gov/the-press-office/2017/02/03/presidential-memorandum-fiduciary-duty-rule.

[40] Definition of the Term Fiduciary, 82 Fed. Reg. 16,902 (Apr. 7, 2017) (to be codified at 29 C.F.R. pt. 2510).

that the DOL could not lawfully do so.[41] Instead, Acosta said, the DOL would open a new rulemaking to develop changes to the rule.

The formal rulemaking has not yet begun. But on August 31, 2017, the DOL published a notice of proposed rulemaking that proposed to put off the arbitration provision's effective date for another year and a half, until July 2019, when the Department predicted its new rule would be complete.[42] In the meantime, courts upheld the original Fiduciary Rule's arbitration provisions as a valid exercise of the DOL's delegated authority in high-profile challenges to the rule.[43]

The same factors that allowed the Trump administration to roll back the Fair Pay order and CFPB Arbitration Rule complicated its efforts to roll back the Fiduciary Rule. Because the Fiduciary Rule was finalized outside the window for congressional review under the CRA, it could only be modified through legislation (a near-impossibility given the complexity of the subject matter) or a fresh round of notice-and-comment rulemaking. A new rulemaking, however, requires the Department to compile an administrative record that provides a reasoned explanation for any changes to the rule.[44] It also ensures that the Department's actions will be

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[41] Alexander Acosta, *Deregulators Must Follow the Law, So Regulators Will Too*, WALL. ST. J., (May 22, 2017, 7:00 PM), https://www.wsj.com/articles/deregulators-must-follow-the-law-so-regulators-will-too-1495494029.

[42] Extension of Transition Period and Delay of Applicability Dates, 82 Fed. Reg. 41,365 (Aug. 31, 2017) (to be codified at 29 C.F.R. pt. 2550).

[43] *See* Chamber of Commerce of the United States of Am. v. Hugler, No. 3:16-CV-1476-M, 2017 WL 514424 (N.D. Tex. Feb. 8, 2017) (upholding the rule on cross motions for summary judgment); Nat'l Ass'n for Fixed Annuities v. Perez, 217 F. Supp. 3d 1 (D.D.C. 2016) (upholding rule on cross motions for preliminary injunction and summary judgment); Mkt. Synergy Grp., Inc. v. United States Dep't of Labor, No. 16-CV-4083-DDC-KGS, 2017 WL 661592 (D. Kan. Feb. 17, 2017) (upholding rule on cross-motions for summary judgment).

[44] *See* FCC v. Fox, 129 S. Ct. 1800, 1810 (2009) (agency changing its prior position must "examine the relevant data and articulate a satisfactory explanation for its action" (quoting Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co., 463 U.S. 29, 43 (1983)).

subject to review under *FCC v. Fox* and *Motor Vehicle Manufacturers v. State Farm*, which instruct courts to scrutinize the adequacy of an agency's reasons for changing administrative policy.[45]

Withstanding such a challenge will be difficult because the Department compiled a massive record to support the original Fiduciary Rule, which showed among other things that investment advisors' conflicted advice cost retirement plan participants billions of dollars in lost savings.[46] The original rule also gave rise to significant reliance interests as firms such as Vanguard, TIAA, and Transamerica adapted their systems to comply with the rule.[47] Under *Fox*, such interests increase the burden an administrative agency must carry to justify changing a regulation.[48]

B. The Borrower Defense Rule

The same mix of factors has frustrated efforts of the Trump Department of Education (DOE) to roll back the Borrower Defense rule. Prompted by the collapse of the for-profit Corinthian Colleges, the rule establishes uniform federal standards for the circumstances in which a student can discharge federal student loans because of fraud or misrepresentations about a school's educational program. The rule also establishes new internal agency procedures for resolving discharge claims that arise from a common course of conduct. Finally, in an effort to prevent future Corinthian-style collapses, the rule bars schools from using a number of contract provisions that diminish the effectiveness of private civil

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[45] *See* 5 U.S.C. § 704 (authorizing judicial review "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court").

[46] *See* Definition of the Term Fiduciary; Conflict of Interest Rule—Retirement Investment Advice, 80 Fed. Reg. 21928, 21930 (Apr. 20, 2015) (to be codified at 29 C.F.R. pt. 2509 and 2510). (proposed rule) ("The underperformance associated with conflicts of interest—in the mutual funds segment alone—could cost IRA investors more than $210 billion over the next 10 years and nearly $500 billion over the next 20 years.").

[47] *See* Letter from Sen. Elizabeth Warren to Edward Hugler, Acting Secretary of Labor (Feb. 7, 2017) (highlighting financial institutions' expressions of support for the fiduciary rule), https://www.warren.senate.gov/files/documents/2017-2-7_Warren_Ltr_to_DOL.pdf.

[48] 129 S. Ct. at 1811.

litigation to enforce students' rights. They include arbitration clauses, class-action waivers, and "gag clauses" that require students to make use of a school's internal dispute resolution facilities before seeking assistance from the courts and government officials.

After the change in administrations, the DOE simply stopped processing administrative applications for loan discharges, leaving some 45,000 discharged applications that had been filed but not yet processed in limbo.[49] Despite indicating that it intended to revise the Borrower Defense rule in January 2017,[50] the department took no action on the rule until mid-June, two weeks before it was scheduled to take effect. On June 14, 2017, the Department announced without prior notice that it was delaying the rule indefinitely, ostensibly in response to "legal uncertainty" created by a legal challenge to the Borrower Defense rule.

Indefinitely staying a final agency rule without notice and an opportunity for comment violates the APA,[51] and on July 6, 2017, a coalition of nineteen states filed suit against the DOE seeking a declaration that the stay is invalid.[52] The DOE secured an extension to answer the states' complaint until October 18, 2017.[53] On October 24, the Department issued an interim final rule that formally stayed the original Borrower Defense rule until July 1, 2018.[54] Until then, the Department would neither enforce the Borrower Defense rule's standards nor process administrative discharge petitions.

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[49] *See* Andrew Kreighbaum, *Long Wait for Loan Forgiveness*, INSIDE HIGHER EDUCATION (Sept. 14, 2017), https://www.insidehighered.com/news/2017/09/14/students-waiting-borrower-defense-claims-face-challenges-credit-obstacles-education.

[50] *See* Final Regulations; Delay of Effective Dates, 82 Fed. Reg. 8669 (Jan. 30, 2017) (to be codified at 2 C.F.R. pt. 347434; 99; 200; 299). (Identifying borrower defense rule as one of several rules that the Department intended to revisit).

[51] *See* Clean Air Council v. Pruitt, 862 F.3d 1, 9 (D.C. Cir. 2017).

[52] Complaint, Massachusetts v. DeVos, No. 1:17-CV-01331 (D.D.C. July 6, 2017).

[53] Minute Order, Massachusetts v. DeVos, No. 1:17-CV-01331 (D.D.C. Aug. 30, 2017).

[54] Student Assistance General Provisions, 82 FR 49114 (Oct. 24, 2017) (interim final rule).

Like the Fiduciary Rule, the Borrower Defense rule was promulgated outside of the window during which it could be repealed via the CRA. Modifying the rule therefore required the DOE to engage in a new rulemaking, which will be subject to a *State Farm* challenge. The rule also gave rise to serious reliance interests on the part of students who sought to invoke it to obtain discharges from loans that schools persuaded students to secure loans through fraudulent marketing. Students and their allies have an accessible avenue to challenge the rule's stay and repeal, because any actions the Department takes with respect to the rule are subject to judicial review under the APA.

This is not to say that the DOL and DOE will necessarily fail in their efforts to roll back the Fiduciary and Borrower Defense Rules and their arbitration provisions. Whether the agencies succeed or fail will only be clear after they finalize changes to the original rules and the courts resolve challenges to those changes. Thus far, however, the agencies have struggled to identify persuasive rationales for changing the regulatory status quo, made procedural mistakes that created a significant risk of adverse judicial review, and provoked influential constituencies that have a strong interest in preserving the rules in their original form. If DOL and DOE succeed in repealing the Fiduciary and Borrower Defense Rules, the process will be slow, messy, and the subject of protracted legal disputes.

III. CONTINUED REGULATION: THE NLRB'S *MURPHY OIL* RULE

If the arbitration regulations discussed thus far are to varying degrees consistent with the U-Turn hypothesis, the actions of the NLRB are flatly inconsistent with it. That agency's continued efforts to regulate mandatory arbitration notwithstanding the change in administrations has led the Justice Department to attack its authority to regulate, giving rise to an extraordinary conflict that pits one executive agency against another.

The NLRB's regulation of arbitration took the form of holdings in unfair labor practice proceedings that an employment agreement which waives the employee's right to engage in any form of collective dispute resolution violates the right to engage in "other concerted activities for the purpose of . . . mutual aid or protection" under section 7 of the National Labor Relations Act

(NLRA).[55] The Board first announced this conclusion in 2012 in *In re D.R. Horton*.[56] The Fifth Circuit rejected the Board's view as incompatible with the FAA,[57] but the Board in *In re Murphy Oil* declined to "acquiesce" in the court of appeals' view.[58] The Seventh and Ninth Circuits endorsed the Board's reading of the NLRA in later cases where the Board followed *Horton*, creating a circuit split over the lawfulness of an employment agreement that waives the employee's right to engage in any form of collective dispute resolution.[59]

In January 2016, the Supreme Court granted certiorari in *Murphy Oil* and two other cases to resolve the conflict.[60] In the meantime, the NLRB continued to bring enforcement actions against employers who use employment agreements that waive employees' right to participate in any form of collective litigation.[61]

The Trump administration's inability to influence the NLRB's stance toward arbitration results most obviously from the agency's insulation from presidential control. The Board's members may only be removed "for cause."[62] At all relevant times, the NLRB was headed by Democratic appointees who do not share the President's regulatory philosophy. Their insulation from direct presidential control enabled the Board to continue regulatory efforts that the White House opposes.[63]

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[55] 29 U.S.C. § 157 (1947).

[56] In Re D. R. Horton, Inc., 357 NLRB 2277, 2285 (2012).

[57] D.R. Horton, Inc. v. N.L.R.B., 737 F.3d 344, 348 (5th Cir. 2013).

[58] Murphy Oil USA, Inc., 361 N.L.R.B. No. 72 (Oct. 28, 2014).

[59] Morris v. Ernst & Young, LLP, 834 F.3d 975 (9th Cir. 2016); Lewis v. Epic Sys. Corp., 823 F.3d 1147 (7th Cir. 2016). *See also* NLRB v. Alternative Entm't, Inc., 858 F.3d 393 (6th Cir. 2017) (following the Board's view after the Supreme Court granted certiorari in *Morris* and *Lewis*).

[60] N.L.R.B. v. Murphy Oil USA, Inc., 137 S. Ct. 909 (2017).

[61] *See* Memorandum from Beth Tursell, Assoc. to the Gen. Counsel, NLRB, re: Impact on pending cases due to Supreme Court's grant of certiorari in NLRB v. Murphy Oil USA (Jan. 26, 2017).

[62] *See* 12 U.S.C. § 5491(c)(3); 29 U.S.C. § 153(a).

[63] Republican appointees only gained a voting majority on the Board on September 26, 2017, six days before the Supreme Court heard argument in *Murphy Oil* and *Epic Systems*. The new majority understandably did not attempt to reverse the Board's position after the cases had been fully briefed, and before the majority had an opportunity to reconsider the Board's position in the ordinary course. *See* Eric Morath,

The administration's inability to influence the NLRB's stance on arbitration also reflects some of the factors that affected its efforts to roll back other Obama-era arbitration rules. The NLRB's decisions in *D.R. Horton* and *Murphy Oil* are not subject to congressional review under the CRA. The Board used a form of administrative policymaking—adjudication—that will require it to offered a reasoned explanation for changes in the agency's position. This procedural choice lends the force of inertia to agency positions advanced against the White House's wishes.

Although the relative formality of the NLRB's arbitration regulation protects it from being reversed at the administrative level, questions about the Board's authority provide the administration with a second opportunity to challenge its position. The Solicitor General's office petitioned for certiorari on behalf of the NLRB in *Murphy Oil*. Following the change in administrations, the office reconsidered its position and determined that its earlier advocacy for the NLRB was mistaken, because its petition for certiorari did not "g[i]ve adequate weight to the congressional policy favoring enforcement of arbitration agreements that is reflected in the FAA."[64] The office accordingly ceased representing the NLRB and filed an *amicus curiae* brief opposing its former client.[65] When the Supreme Court heard argument in *Murphy Oil* on October 2, 2017, two agencies of the U.S. government faced off against one another. The SG sided with employers seeking to bar employees from collective litigation; the NLRB, with employees in defending its own rule.

The emergence of intra-executive branch disputes about the lawfulness of agency arbitration regulation is a new development in U.S. arbitration law. For decades, the prototypical arbitration dispute has pitted a firm seeking to enforce an arbitration agreement against a counter-party, employee, or consumer seeking

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Senate Confirms William Emanuel for National Labor Relations Board, WALL ST. J.,

Sept. 25, 2017, https://www.wsj.com/articles/senate-confirms-william-emanuel-for-national-labor-relations-board-1506379617.

[64] *See* Brief for the United States as Amicus Curiae at 13, Epic Systems v. Lewis, Nos. 16-285, 16-300, and 16-307 (U.S. 2017).

[65] *See id.*

access to the courts. The government would take a single position, sometimes siding with the party seeking enforcement of an arbitration agreement according to its terms, sometimes siding with the party seeking access to the courts.

The executive branch's stance toward the NLRB is different. In this case, different components of the government with different missions, statutory authority, and jurisdiction took divergent positions on the Board's authority to regulate the use of arbitration and the necessity of doing so. Their conflicts suggest the elusiveness of a single "government" position on the policy and legal response to arbitration. When it comes to arbitration, the government is a "they," not an "it."

CONCLUSION

The examples this Article discusses are not the only cases where the Trump administration has attempted to roll back Obama-era agency arbitration regulations.[66] And a definitive analysis of the Trump administration's effort to roll back Obama-era

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[66] On June 8, 2017, the Centers for Medicaid/Medicare Services (CMS) announced that it intended to modify a provision of their 2016 Long-Term Care Rule that barred nursing homes from using mandatory arbitration clauses in their admission contracts. Where the 2016 rule completely barred nursing homes from using arbitration in admission contracts, the new provision required arbitration provisions to be written in plain language and explained to new residents. *See* Revision of Requirements for Long-Term Care Facilities: Arbitration Agreements, 82 Fed. Reg. 26649 (proposed June 8, 2017) (to be codified at 42 C.F.R. pt. 483). The proposed revision mooted a challenge to the original Long-Term Care rule's arbitration rule by the American Health Care Association, which led a district court to preliminarily enjoin the Long-Term Care rule's arbitration bar. Am. Health Care Ass'n v. Burwell, 217 F. Supp. 3d 921, 928 (N.D. Miss. 2016). But it is too soon to say whether the revision—if it takes effect—will succeed in deregulating nursing homes' use of arbitration. The new provision is based on the same statutory authority and same administrative record as the original Long-Term Care rule. A challenge to the revised rule could result in a court upholding the rule, ordering CMS to reinstate the original rule, or holding that CMS lacks any authority to regulate nursing homes' use of arbitration.

The Equal Employment Opportunity Commission provides another example. Under President Obama, the Commission took the position in

regulations will not be possible until the agency actions described here are finalized and subject to judicial review.

Nonetheless, the cases this Article describes suffice to show that—contrary to predictions immediately following the November 2016 election—Trump's election and the Republicans' defense of their congressional majorities did not spell the end of federal agencies' efforts to regulate arbitration. The new administration successfully rescinded some Obama-era regulations, but others may prove difficult to roll back. Insulated from presidential control, the NLRB has pressed ahead with pre-existing efforts to regulate arbitration.

The persistence of agency arbitration regulation and the conflicts that it has given rise to under Trump reflect deeper divisions about the federal administrative state. Political actors have long recognized that the procedures and institutions through which the law is enforced are as important to the real-world meaning of the law as the content of substantive regulatory mandates.[67] A strong substantive mandate may be weakened or completely undermined by weak enforcement mechanisms. Conversely, strong enforcement mechanisms can amplify the force of a law and give rise to coalitions that support and strengthen a regulatory regime over time. Recognizing this, debate over federal regulatory policy proceeds at two levels, substance and procedure, that often are difficult to disentangle.

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enforcement actions and amicus filings that mandatory arbitration clauses violated Title VII when they were part of a pattern and practice of employment discrimination. *See* EEOC v. Doherty Ents., 126 F. Supp. 3d 1305 (S.D. Fla. 2015). It is not clear whether the Commission will continue to take this position under Trump.

[67] As memorably expressed by Representative John Dingell: "I'll let you write the substance . . . you let me write the procedure, and I'll screw you every time." *Regulatory Reform Act: Hearing on H.R. 2327 Before the Subcomm. on Admin. Law & Governmental Relations of the H. Comm. on the Judiciary*, 98th Cong. 312 (1983) (statement of Rep. John Dingell, Chairman, H. Comm. on Energy & Commerce). *See generally* Terry M. Moe, *The Politics of Bureaucratic Structure*, in CAN THE GOVERNMENT GOVERN? 267 (John E. Chubb & Paul E. Peterson, eds., 1989); Terry M. Moe, *Political Institutions: The Neglected Side of the Story*, 6 J. LAW. ECON. & ORG. 213 (1990).

The basic premise of arbitration is to privatize control over an important set of decisions about the institutions and procedures through which the law is enforced. As such, we should not be surprised that political actors with strikingly different views about the role and function of the federal government take divergent positions on the merits of arbitration, the need to regulate it, and agencies' legal authority to do so. What would be surprising is if the election of a reactionary President who holds extreme views on federal regulatory policy somehow brought an end to those conflicts. Far from eliminating controversy over federal agencies' regulation of arbitration, the 2016 election guaranteed that controversy would continue.