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Response

Assessing Asymmetries

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I. Introduction

One of the best litmus tests for a “big idea” is whether it causes people to see the familiar in a new and different way. Usually the big idea isolates a phenomenon or feature that was previously invisible. But once the discovery is made and explained, one cannot see the system in the same way again. After winning the Nobel Prize in economics for his pioneering work on asymmetrical information,¹ for example, George Stiglitz remarked that “much of what economists believed—what they thought to be true on the basis of research and analysis over almost a century—turned out not to be robust to considerations of even slight imperfections of information.”²

While Professor Wasserman may not win a Nobel Prize for deference asymmetries (although who knows), her idea is a big one. It promises to change the way administrative lawyers and academics think about the rules of judicial review, a procedural innovation that beats at the very heart of administrative process in the U.S.

Before Professor Wasserman’s article, it was acceptable to focus on the courts’ explicit deference tests as the primary indicator of how interest groups might fare in holding agencies accountable through judicial review.

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1. *Joseph E. Stiglitz—Biographical*, THE NOBEL FOUNDATION, http://www.nobelprize.org/nobel_prizes/economic-sciences/laureates/2001/stiglitz-bio.html (last modified Dec. 2002), archived at <http://perma.cc/G5N8-REN3>.

2. Joseph E. Stiglitz, *The Contributions of the Economics of Information to Twentieth Century Economics*, 115 Q. J. ECON. 1441, 1461 (2000).

After her article, these narrow “[d]octrinal discussions . . . seem like cartoons when laid beside the occasional empirical investigation of agency operation.”³ Professor Wasserman’s discovery of deference asymmetries makes it impossible to ignore the fact that the larger design of the system can be as or more influential than the minute variations in deference tests embedded in individual cases.

After briefly reviewing Professor Wasserman’s *Deference Asymmetries*, this Response examines the concept from various vantage points. The objective is to continue Professor Wasserman’s effort to integrate her new idea even more firmly into our understanding of administrative process by beginning to construct a larger framework for how we might think about deference asymmetries.

II. An Overview of Professor Wasserman’s Deference Asymmetries

Professor Wasserman’s article provides a clear and succinct explanation of deference asymmetries, and interested readers are referred to her article for a full exposition of the concept and illustrations.⁴ This Part provides only a short synopsis, summarizing the features of deference asymmetries that are particularly relevant to the commentary that follows.

The defining feature of deference asymmetries is that they alter the relative ability of different constellations of interested parties to challenge agency policies in court.⁵ As administrative lawyers well know, the accountability of agencies is ensured in part through interest group oversight that takes place through judicial review. Yet with respect to this important ability to hold the agency accountable, Professor Wasserman identifies tilts or asymmetries among groups in their relative ability to use the courts. Moreover, these “deference asymmetries” can occur in many different ways; some are hardwired into the design of a regulatory program and others can arise more surreptitiously.⁶ In exploring the phenomenon, Professor Wasserman provides examples of deference asymmetries in such diverse areas of administrative law as benefit programs,⁷ patents,⁸ and environmental-standard setting.⁹

3. Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501, 536 (2005).

4. Melissa F. Wasserman, *Deference Asymmetries: Distortions in the Evolution of Regulatory Law*, 93 TEXAS L. REV. 625 (2015).

5. *See id.* at 627–28.

6. *See id.* at 656–58.

7. *See id.*

8. *Id.* at 658–66.

9. *Id.* at 666.

At the extreme, deference asymmetries can serve to counteract the explicit deference tests in a statute and might undermine the statutory structure altogether. For example, the courts may be directed by a statutory mandate to defer to the agency when it errs on the side of the public health, but in practice, the institutional design of the process may lead to the opposite result. In a variety of subject areas, in fact, practical access to the courts by the public beneficiaries of government regulation is more restricted than for the parties the agency regulates.¹⁰ This creates an asymmetry that can result in a pro-patient, pro-benefit, or pro-industry tilt irrespective of the intention embedded in the underlying statutory design.

Professor Wasserman's discovery of deference asymmetries is reinforced by her ingenious way of isolating when they occur within the larger, chaotic administrative landscape. Specifically, a deference asymmetry exists when one set of parties—usually regulated parties or a discrete set of high stakes groups—enjoys objectively different deference tests during at least one stage in the administrative process as compared with more diffuse parties, like the general public.¹¹ These asymmetries can arise implicitly from limits in practical access to courts as well as explicitly, but in all cases, the asymmetries are identified by examining relative, discrete advantages in deference tests or court access between affected groups.

III. Building a Framework for Assessing Asymmetries

Professor Wasserman's discovery of deference asymmetries forces administrative scholars to look beyond isolated deference tests applied by courts in assessing whether judicial review may skew the ability of different sets of interests to hold the agencies accountable. The next set of challenges lies not in identifying whether such asymmetries exist—Professor Wasserman has established that—but in developing an analytical framework for cataloging them and tracing out their implications. There are many reasons why some groups are disadvantaged in their ability to challenge an agency policy relative to other affected groups, and not all of these asymmetries are necessarily problematic or even unintended as a matter of legislative design. In the remainder of this Response I set out a few preliminary suggestions for different ways we might think about deference asymmetries.

A. *Intended Asymmetries*

Within the larger, undifferentiated set of deference asymmetries one important distinguishing feature is whether differences in the relative ability

10. *See id.* at 667–68.

11. *Id.* at 644–45.

of parties to seek review of an agency policy is the result of conscious legislative choice or not. If Congress intends some of the deference asymmetries and incorporates them into regulatory programs explicitly, these “intended” asymmetries would seem to be less problematic than asymmetries that arise more invisibly and unintentionally through the course of judicial review.

Intended asymmetries, moreover, may be a relatively common occurrence in many regulatory programs when Congress chooses to place a thumb on the scales that favor one set of interests over others. For example, Congress may frame the agency’s mandate in ways that attempt to avoid false positives (overregulation) or, in other cases, to avoid false negatives (underregulation). The regulation of chemicals versus pesticides provides a case in point. In pesticide regulation, the statute has been read to create a presumption in favor of regulation, a deference that tilts against manufacturers and in favor of the general public.¹² The statutory mandate governing the regulation of chemicals, by contrast, has been read to provide the opposite advantage—erring in favor of manufacturers by requiring agencies to support all rules regulating chemicals with substantial evidence, which in turn demands a multilayered risk and cost–benefit analysis.¹³ Some of Professor Wasserman’s own illustrations of deference asymmetries may also fall into this intended legislative category. For due process and other reasons, Congress may lean more heavily in favor of beneficiaries of federal benefits as compared with the general public, who may seek to change the general eligibility criteria for receiving benefits.¹⁴

Separating out the deliberate asymmetries designed into the program from those that are less intentional would seem an important step in a deference asymmetry analysis for several reasons. First, intended asymmetries are easier to identify and catalog since their existence is the product of legislative drafting. In a number of statutes, Congress makes choices in the legislation that favor one set of interests over another, and these asymmetries are relatively unambiguous.¹⁵ In key sections of the Clean

12. *See* *Env’tl. Def. Fund v. EPA*, 548 F.2d 998, 1002–05 (D.C. Cir. 1976) (interpreting the Federal Insecticide, Fungicide, and Rodenticide Act as placing the burden of proof on the party arguing against the suspension of a pesticide).

13. *See, e.g., Corrosion Proof Fittings v. EPA*, 947 F.2d 1201, 1213–15 (5th Cir. 1991) (finding that the EPA did not provide enough evidence to justify a ban on asbestos).

14. *See* Wasserman, *supra* note 4, at 657 (describing how “asymmetry in appeal rights . . . may lead to excessive granting of benefits” in federal benefit programs, veteran benefits, immigration, and tax).

15. *See generally* *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Public interest groups will thus find it far easier to mount a Chevron Step 1 *de novo* challenge against agency rules when the agency’s interpretation leans against Congress’s explicit instructions to “protect the public health” with “an adequate margin of safety” than will industry in arguing a standard is too stringent. *See, e.g., Nat’l Env’tl. Dev. Ass’n’s Clean Air Project v. EPA*, 686 F.3d

Air Act, for example, courts begin their review of challenges to agency rules with Congress's explicit directive that the agency err on the side of protecting the public health.¹⁶ While this explicit deference test does not necessarily counteract deference asymmetries arising at earlier stages of the judicial review process (e.g., practical access to the courts), it does tend to stack the deck—once a case is in court—in favor of the public interest.¹⁷ As just discussed, the converse is true in other programs governing chemicals and consumer products in which regulated industry, by statute, enjoys a presumption in its favor in the course of judicial review.¹⁸

Second, the evaluation of whether a deference asymmetry is problematic is also facilitated by considering Congress's express intentions. If Congress passes a statute that instructs the agency to err heavily in favor of health protection, and yet a series of invisible deference asymmetries occurring at other stages of administrative process favor regulated parties instead, then this is cause for concern.¹⁹ By contrast, if cumulative, albeit largely invisible, asymmetries tend to reinforce the favoritism Congress incorporated into the authorizing statute, this asymmetrical drift may be less concerning. While even these legislatively intended deference asymmetries may warrant reform or debate once held in sharper focus by Professor Wasserman's larger conception of deference asymmetries,²⁰ it is legislative policy, and not administrative process, that is under the spotlight and subject to reform in these settings.

Finally, the fact that some deference asymmetries are built into the design of the statutory programs underscores the need to account for asymmetries that not only favor regulated parties but also those that favor the general public. Professor Wasserman seems to assume—perhaps reasonably given her bird's-eye view of the regulatory state—that an important role for the courts is to counteract industry capture, and a judicial review process that tips the scales in favor of regulated industries is problematic or at least worth

803, 810, 812 (D.C. Cir. 2012) (granting the agency great leeway to set standards below documented adverse health effects levels). Indeed, industry in this situation will generally be relegated to advancing the much more difficult argument that the agency's fact-finding is "arbitrary" based on the research supporting the standard. *See id.* at 809–10. Conversely, the agency will find it has much less deference to promulgate expensive regulations under statutes that require elaborate evidence and analytical requirements from the agency that are designed to protect against costly regulation. *See, e.g., Gulf S. Insulation v. CPSC*, 701 F.2d 1137, 1142–43 (5th Cir. 1983).

16. 42 U.S.C. § 7409(b)(1) (2012).

17. *See, e.g., Clean Air Project*, 686 F.3d at 812.

18. *See Gulf S. Insulation*, 701 F.2d at 1142–43.

19. *See* Wasserman, *supra* note 4, at 666–69.

20. Apparently at least some of the asymmetries in patent appeals were corrected by the America Invents Act. *See id.* at 659 & n.107.

highlighting.²¹ However, her important finding that locates a pro-regulated drift in the judicial review process would be even more persuasive if it was supported by an active search for counterexamples of deference asymmetries that tilt in favor of the public to ensure there are not other deference tests that counterbalance the pro-regulated asymmetries she identifies.²² Even more important, a fuller inventory of all types of deference asymmetries—intentional or not, public-benefiting or not—will provide a richer base of information from which to understand what is going on in this black box of judicial review.

In sum, if deference asymmetries become a source of empirical work in the future (which I very much hope they will), the appropriate first step would seem to be locating whether a particular deference asymmetry is embedded explicitly in the congressional design of the regulatory program. While this is not always a simple determination as an empirical matter,²³ it is a step that should not be skipped.

B. When Might Deference Asymmetries Arise?

In the course of discussing the wide variation in types of asymmetries, Professor Wasserman also identifies several key stages in administrative process when deference asymmetries can arise. Making these stages even more explicit will facilitate an even better understanding of the phenomenon, and I attempt to do just that, drawing in large part from Professor Wasserman's article.

Asymmetries in Rules Governing Access. At the first stage of judicial review, legal rules can limit access to the courts in ways that handicap some

21. *See, e.g.*, Thomas W. Merrill, *Capture Theory and the Courts: 1967-1983*, 72 CHI.-KENT L. REV. 1039, 1040 (1997) (describing how liberalized standing requirements and expanded judicial review attempted to root out industry capture of agency officials by regulated parties).

22. My own research revealed at least one set of rules in which public interest groups appealed less than 10% of the total rules, for example, and yet, I also discovered that when the public interest groups do appeal, the courts found rather egregious violations of the statute by the EPA. *See* Wendy Wagner, *Revisiting the Impact of Judicial Review on Agency Rulemakings: An Empirical Investigation*, 53 WM. & MARY L. REV. 1717 (2012). Yet for a claim that judicial review may lead to a pro-regulated industry bias more systematically through cumulative deference asymmetries, more research is needed in EPA rules, as well as in many others.

23. For example, Congress mandated in the Occupational Safety and Health Act that “to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life.” 29 U.S.C. § 655(b)(5) (2012). Yet, the Supreme Court interpreted the mandate to mean the agency must first establish that there is a significant risk to workers in order to ensure that the manufacturing sector is not subject to crippling regulatory burdens. *Indus. Union Dept., AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 614–15 (1980). After the Supreme Court opinion, the deference is now understood to tip away from worker protection to avoid burdening industry, yet this tilt would not be clear from reading the statute alone, as Justice Marshall noted in his dissent. *Id.* at 710 (Marshall, J., dissenting).

interested parties more than others.²⁴ Professor Wasserman dedicates a section of her article to teasing out some of these rule-based access asymmetries arising in diverse areas like social security benefits and patent law.²⁵ Yet another potential asymmetry that might be added to her list is the difficulty of challenging agency inaction in court. In administrative law, agency inaction is generally granted extreme deference except in cases when Congress sets a specific deadline for an agency rule. In statutes that purport to err on the side of protecting the public but do not hold the agency's feet to the fire with a mandatory deadline, this higher level of deference to agencies for inaction creates asymmetries that generally favor regulated parties.²⁶

Practical Asymmetries in Access. A second stage at which deference asymmetries might arise results from practical realities associated with gaining access to the courts.²⁷ These practical features are distinct from access tests that take the form of rules. As Professor Wasserman discusses, the best documented of these practical constraints arise from the disparate abilities of different interest groups to gain access to the courts because of resource limitations.²⁸ Public interest groups, which may have high stakes that rival those of industry, may lack the collective resources to challenge every problematic rule, even when deference tests in the statute tip in their favor.²⁹ Beyond resource and collective action problems, there could also be difficulties for the more thinly-financed groups to obtain timely information about agency rules, which similarly impair their ability to appeal deficient regulations.

Asymmetries in Deference Tests. Third, as noted in the prior subsection, the explicit deference test that the court applies in a given case is also part of the larger deference equation.³⁰ Some statutory mandates provide the agency with a great deal of deferential slack provided it errs in the same direction—whether pro-public or pro-industry—that Congress specifies in the authorizing legislation.³¹

Asymmetries in Remedial Relief. Fourth and finally, the remedies that the courts provide may involve some asymmetries in implementation that translate into deference asymmetries. When a court vacates and remands a

24. See, e.g., Wasserman, *supra* note 4, at 656.

25. See *id.* at 655–66.

26. See Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. REV. 1657, 1661 (2004).

27. Wasserman, *supra* note 4, at 666–69.

28. *Id.* at 667.

29. Cf. *Mossville Envtl. Action Now v. EPA*, 370 F.3d 1232, 1238–40 (D.C. Cir. 2004) (finding that the public interest groups' failure to file comments precluded their ability to challenge the rule in court).

30. See Wasserman, *supra* note 4, at 637–38.

31. See, e.g., 42 U.S.C. § 7409(b)(1) (2012).

rule, it does not always set a deadline for the revised rule, or the deadline may be a moving target.³² Moreover, if the agency fails to repair a remanded rule in a timely way, the courts may be hamstrung in forcing the agency's hand.³³ As a result, during vacatur of a rule, regulated parties may face effectively no regulation, which provides them with still more asymmetrical advantages as a result of judicial review, albeit at the end of the process during the remedies stage.³⁴

C. *Do Asymmetries Matter to Agency Policy Making?*

In building a framework for thinking about deference asymmetries, one must also take into account whether and how the asymmetries might impact agency decision making; if the agency remains relatively unaffected by judicial review, for example, than asymmetries are likely to have only a limited impact on agency behavior. At least for the time being, as Professor Wasserman acknowledges, more grounded conclusions about the practical effects of deference asymmetries on agency behavior must be heavily qualified.³⁵ As an empirical matter, we still know very little about the extent to which agencies are actually influenced by judicial challenges, reversals, or both (and the two risks can be very different).³⁶ To take just one example, if the President asks an agency administrator to change a rule in a way that increases the risk of judicial challenge, then this pressure is likely to override the agency's anticipation of the long-term risks of judicial reversal.³⁷ The same empirical uncertainty applies to whether relatively slight variations in

32. See Wagner, *supra* note 22, at 1750–56.

33. See, e.g., Emily Hammond Meazell, *Deference and Dialogue in Administrative Law*, 111 COLUM. L. REV. 1722, 1781 (2011) (observing how many remands “fizzle into nothingness” with regard to the agency's ultimate response and wondering “whether judicial review really matters”).

34. See *Natural Res. Def. Council v. EPA*, 489 F.3d 1250, 1265–67 (D.C. Cir. 2007) (Rodgers, J., concurring in part and dissenting in part) (bemoaning this problem).

35. Cf. Jerry L. Mashaw, *Agency-Centered or Court-Centered Administrative Law? A Dialogue with Richard Pierce on Agency Statutory Interpretation*, 59 ADMIN. L. REV. 889, 893 (2007) (“It seems to me not only odd, but perverse, that articles parsing the exquisite subtleties of *Chevron* or *Skidmore* deference fill our law reviews, while virtually nothing is said about the ways in which agencies should and do interpret the statutes in their charge.” (internal citation omitted)).

36. The nonacquiescence literature highlights the apparently limited role of the courts in influencing agency behavior, at least in some settings. See Nancy M. Modesitt, *The Hundred-Years War: The Ongoing Battle Between Courts and Agencies over the Right to Interpret Federal Law*, 74 MO. L. REV. 949, 961–62 & n.79 (2009) (reporting evidence of agency nonacquiescence in more recent years). See generally Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679 (1989) (describing the nonacquiescence phenomenon in detail).

37. See ROBERT J. HUME, *HOW COURTS IMPACT FEDERAL ADMINISTRATIVE BEHAVIOR* 74 (2009) (quoting from interviews with agency officials who acknowledge the influence that politics may have on agency rulemaking even when it may leave the agency vulnerable to appeal).

deference tests ultimately impact agency decisions *ex ante*.³⁸ Given these behavioral uncertainties, Professor Wasserman makes the reasonable assumptions that differences between different groups' ability to challenge decisions will matter to the agencies and that agencies tend to be aware of these asymmetries in the course of their decision making.³⁹ This is an appropriate way to proceed, but her explicit assumptions underscore the need for further empirical research on agency behavior to better understand the interactions between courts and agency decisions.⁴⁰

If we assume that agency decisions will be impacted in some way by the knowledge that some groups enjoy greater access to and use of the courts than others, the most significant consequences are likely to arise from asymmetries that fall at the extremes in ways that undermine the regulatory design. If the cumulative asymmetries tend to guide the agency in a direction diametrically opposed to the deference tests built explicitly into the statute, then this is a skew worth examining further. By contrast, if there is modest and complementary reinforcement of the legislatively intended deference asymmetries at other stages of judicial review—perhaps the statutory tilt in the program is oriented towards regulated parties, and they tend to be the primary litigants in challenges, for example—then the asymmetries may be less problematic to the extent they seem consistent with congressional intent.⁴¹ Again, however, devising methods to evaluate the cumulative significance of deference asymmetries will benefit from more research and discussion.

IV. Future Research on Deference Asymmetries

Professor Wasserman's discovery of deference asymmetries carries a number of important implications for administrative process, but three features in particular are worth spotlighting. Each of these features is not only an important finding in and of itself, but generates research questions that should be added to the short list on the research agenda for administrative law.

First and foremost, Professor Wasserman suggests from her analysis that deference asymmetries in the aggregate may lead agencies to be more attentive to the interests of regulated parties than would be the case without

38. See Wasserman, *supra* note 4, at 643 (noting that other scholars have questioned whether the differing standards of review matter in practice).

39. See *id.* at 674–76 (discussing the effects deference asymmetries may have on various agencies).

40. Cf. HUME, *supra* note 37, at 74.

41. Yet, even if some of these asymmetries emerge from the design of the regulatory program, spotlighting the aggregate asymmetries in deference could suggest a problematic approach from the standpoint of the resulting policies.

judicial review.⁴² If this is in fact occurring, it is a very important finding. Contemporary judicial review is premised in significant part on the idea that courts will hold agencies accountable to the general public, not favor the parties the agencies are charged with regulating.⁴³ If the net impact of judicial review is to compound the advantages that regulated parties enjoy in agency policy making, then something may be going very wrong with the underlying institutional design.

Indeed, lying just under the surface of Professor Wasserman's discovery of deference asymmetries is a larger insight about administrative law. Over time, through trial and error, procedural imbalances will inevitably arise in administrative process. But the natural corrective for these asymmetries—the political process—is more accessible to the well-financed, high-stakes groups than to the diffuse public. As a result, when imbalances in process arise that favor the diffuse public, they are likely to be spotlighted in campaigns by well-heeled groups that bemoan the resulting procedural unfairness and seek swift legislative and related reform. By contrast, process tilts that disadvantage the diffuse public—even in ways that run counter to the explicit terms of protective statutes—are more likely to remain unnoticed and unaddressed as they accrete over time. Even public catastrophes may not be sufficient to spotlight these embedded deference asymmetries that favor the haves over the have nots.

Precisely because it is such an important conclusion with respect to the impacts of judicial review, Professor Wasserman's claim of pro-regulatory deference asymmetries merits further research. There is building evidence of this pro-regulatory skew in environmental law, for example, but even in this setting there are further issues to investigate, as Professor Wasserman herself acknowledges.⁴⁴ Ultimately, this additional research might strengthen the case of a systematic, pro-regulated bias rather than weaken the support for Professor Wasserman's findings. But at this point, the information is too incomplete to allow for definitive conclusions.

Another significant research project that follows from Professor Wasserman's discovery of deference asymmetries—less dramatic but perhaps just as important—is the need for more systematic data tracking of the judicial appeals of agency rulemakings. Data is surprisingly difficult to collect on the fate of rules that are subject to judicial review. Limited data collection requirements, ideally implemented by the agencies themselves,

42. See Wasserman, *supra* note 4, at 627 (identifying as a key insight “that in a surprising number of contexts, when an agency’s legal interpretation overly favors its regulated constituency, the legal interpretation is either less likely to be subjected to judicial reexamination, or if it is subjected to judicial challenge, will be afforded a more deferential standard of review”).

43. See Merrill, *supra* note 21, at 1049. The same may not be true for benefits, or perhaps even tax or patents, however.

44. See Wasserman, *supra* note 4, at 666.

such as logging in the challenges, collecting summaries of the resultant decisions, and tracking the agencies' response to the courts' orders in a central database, might be relatively inexpensive and yet provide a great deal of valuable information on some of the interactions between agencies and courts.

Finally, Professor Wasserman suggests promising legislative reforms with respect to some of the most problematic deference asymmetries. For example, she proposes discrete legislative reforms to ensure broader access to the courts by all groups.⁴⁵ Legislative correctives could also address deference asymmetries arising from agency delays in issuing protective rulemakings.⁴⁶ Again, her discovery of deference asymmetries opens up an entirely new area for research on reforms of administrative process.

V. Conclusion

Professor Wasserman has pioneered a valuable new way to think about the impact of judicial review on agency accountability by highlighting how various, often invisible, asymmetrical advantages are embedded into our basic institutional design. While Professor Wasserman's article lays the groundwork for further study, it is up to the rest of us to rise to the challenge and learn more about the ways the judicial review process may skew advantages for some affected parties over others in ways that are neither intended nor very well understood.

45. *Id.* at 674–78.

46. *See generally* Bressman, *supra* note 26 (listing the problems associated with agency delays in creating protective rulemakings).