

ARTICLES

AGENCIES, COURTS, FIRST PRINCIPLES, AND THE RULE OF LAW

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An inherent tension exists between the roles of agencies and courts in administrative enforcement cases. Those cases are initiated by agencies to enforce the statutes and regulations they administer but are then subject to judicial review by courts. Agencies tend to focus on creating and then implementing administrative enforcement systems that produce consistent results pursuant to the agency's bureaucratic processes and informed by the agency's expertise. In reviewing such decisions, by contrast, courts tend to focus on ensuring that the agency's administrative system comports with fundamental legal principles. The two roles embody different goals: for agencies, rendering predictable and consistent outcomes that achieve the goals of the statute; for courts, adhering to the values of government accountability and protection of fundamental rights. All of these goals—predictability, consistency, government accountability, protection of rights—reflect different components of the Rule of Law, the idea that legitimate authority requires certain attributes that accomplish a threshold level of fairness. Effectuating the multifaceted Rule of Law requires creating a relationship between administrative enforcement and judicial review that fully empowers both agencies and courts to fulfill their respective roles, but without undermining the other.

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INTRODUCTION

In the modern legal system of the United States, most governmentally adjudicated disputes are decided by either judicial courts or administrative agencies, each with its own characteristic advantages and disadvantages as an adjudicative body. The relative advantages of agencies and courts as adjudicators can be described in terms of different attributes of the Rule of Law. The Rule of Law is one of the core features of a well-functioning civil society.¹ That said, as with most foundational concepts, there are many different understandings of what the Rule of Law entails, and little agreement as to its precise contours and requirements.²

Agencies, which by virtue of specialization are able to create bureaucratic processes tailored to particular kinds of cases, instantiate those components of the Rule of Law that require predictable, consistent, and efficient justice. Courts, which are defined by their independence from the Legislative and Executive Branches, exemplify requirements of the Rule of Law

1. See, e.g., *United States v. Nixon*, 418 U.S. 683, 708 (1974) (noting “our historic commitment to the rule of law”); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 171 (1972) (“The rule of law . . . is the great mucilage that holds society together.”); Richard H. Fallon, Jr., “The Rule of Law” as a Concept in Constitutional Discourse, 97 COLUM. L. REV. 1, 1 (1997) (“The Rule of Law is a much celebrated, historic ideal”); Cass R. Sunstein, *Five Theses on Originalism*, 19 HARV. J.L. & PUB. POL’Y 311, 311 (1996) (describing “rule of law values” as a “fundamental goal[]” of American constitutionalism).

2. See, e.g., Martin Krygier, *Marxism and the Rule of Law: Reflections After the Collapse of Communism*, 15 LAW & SOC. INQUIRY 633, 640 (1990) (describing the Rule of Law as “a notoriously contested concept”); Francois Venter, *The Rule of Law as a Global Norm for Constitutionalism*, 38 IUS GENTIUM 91, 99 (2014) (“The value-laden issues surrounding the rule of law therefore ineluctably elicit subjective considerations which can abruptly close down the channels of communication between discussants with divergent perspectives.”).

that hold the government accountable and protect fundamental rights. Both agencies and courts can thus lay claim to justification via their ability to effectuate aspects of the Rule of Law. Their differences, however, highlight the complexity of the task of implementing the Rule of Law in a real-world legal system: by virtue of both the variegated nature of the Rule of Law and divided power within government, implementation of the Rule of Law necessarily depends on a network of institutions, each with its own strengths and weaknesses in advancing requisite Rule of Law values.

The differences between agencies and courts manifest themselves with particular acuteness in the realm of administrative enforcement. Especially in regulatory areas such as environmental law, law enforcement overwhelmingly occurs within internal administrative systems, created and implemented by Executive Branch agencies, rather than in courts. Agencies initiate action through internal administrative processes to enforce requirements set forth in agency regulations or the statutes agencies are delegated to implement. Upon completion of the administrative process, however, decisions made within these administrative enforcement systems are subject to judicial review by an Article III court.

Thus, agencies and courts play different yet equally crucial roles with respect to administrative enforcement, and in doing so, each institution is able to draw on its own comparative advantages. Agencies create and employ administrative processes that leverage their experience and expertise to provide consistent and informed decisions through bureaucratic decisionmaking. Courts, by contrast, draw on their independence to review administrative systems to ensure they are consistent with broader first principles.

Both agencies and courts face challenges in performing their roles. Specialization and routinization, while important for agency expertise and consistency, can also lead agencies to neglect broader first principles. Independence, while important for courts to maintain an outsider's perspective, can impair courts' ability to understand the agency decisions they review. The challenge for agencies and courts is to operate in ways that leverage the benefits of their positions—for agencies, expertise and specialization that enable predictability, consistency, and efficiency; for courts, independence that begets accountability—without undermining the advantages of the other. Because the Rule of Law is ultimately multifaceted and inclusive of both predictability, consistency, and efficiency on the one hand and accountability to core values on the other hand, effectuating the Rule of Law requires empowering both agencies and courts.

The remainder of this Article proceeds in five brief parts. Part I explains the tension that arises with respect to administrative enforcement: agencies require deference if they are to freely exercise their expertise and specializa-

tion, but courts need to scrutinize agencies to evaluate compliance with first principles. Each role is crucial, but in different ways. Part II explores the concept of the Rule of Law, highlighting both the diversity of attributes ascribed to the Rule of Law and some important commonalities. Characteristics of agency enforcement and of judicial review each correspond with different Rule of Law attributes. Part III examines the administrative process, explaining how agency expertise and specialization promote the Rule of Law virtues of predictability, consistency, and efficiency. Part IV turns to the judicial review process, arguing that the independent and generalist perspective of courts allows them to promote the Rule of Law by holding agencies accountable to core values of our legal system that specialized agencies may neglect. Part V synthesizes Part III and Part IV, by positing ways to manage the tension between administrative and judicial roles and their respective contributions to the Rule of Law.

I. AGENCIES AND COURTS

To illustrate the difference between the perspectives of agencies and courts in enforcing regulatory statutes, consider the following story:

In the 1990s, an elderly man named John Tarkowski lived on a sixteen-acre parcel of property in Wauconda, Illinois, in a once rural area that had become an affluent suburb.³ Tarkowski built his own home out of surplus materials, burned wooden pallets for heat, and made retaining walls out of used tires and culverts out of old drums.⁴

The majority of Tarkowski's property was wetlands.⁵ Tarkowski had filled about two acres of it with tires, scrap metal, car batteries, drums of antifreeze, refrigerators, lawnmowers, paint cans, and drums labeled to contain pesticides.⁶ A neighbor complained, and eventually the United States Environmental Protection Agency (EPA) asked Tarkowski to allow access to the property in order to assess the property for environmental contamination.⁷ Tarkowski refused the EPA's request for access.⁸

The EPA obtained a warrant for entry and investigation of the property

3. *United States v. Tarkowski*, 248 F.3d 596, 597–98 (7th Cir. 2001). Most of this narrative is drawn from the documents of the case—primarily the government's appellate brief and the Seventh Circuit's decision—as indicated by citations to each. In a few places, I relied on my own recollection for aspects of the case that do not appear in the record. I indicated those places with discussions in the first person.

4. *Id.* at 598.

5. Brief of Appellant at 7, *Tarkowski*, 248 F.3d 596 (Nos. 00-2393 & 00-2473).

6. *Id.*

7. *Id.*

8. *Id.*

pursuant to its authority under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)⁹ and subsequently entered the property and obtained samples of soil and of various materials found on the site.¹⁰ On the basis of the sampling results and information from an earlier report prepared by the Illinois Environmental Protection Agency, the EPA determined that a response action was warranted for further testing to determine the extent of environmental contamination and, if necessary, clean up contamination.¹¹ The EPA requested access for the response action, Tarkowski refused, and the EPA sued under CERCLA § 104.¹²

In the district court, the EPA argued that CERCLA gave the agency clear right to access the property for whatever activities it deemed necessary to address contamination. CERCLA § 104 authorizes the EPA and its representatives to enter property when the EPA determines that “there is a reasonable basis to believe there may be a release or threat of release of a hazardous substance or pollutant or contaminant.”¹³ Once the EPA determines that those grounds exist, the agency has far-reaching rights of entry and access to effectuate its cleanup authority.¹⁴ And CERCLA specifically precludes courts from stopping the EPA to question its choice of response action—CERCLA § 113(h) generally deprives federal courts of jurisdiction to review challenges to ongoing removal or remedial actions.¹⁵ Despite these arguments, the district court denied the EPA’s request for access to Tarkowski’s property on the ground that it had not proffered sufficient evidence of contamination that warranted cleanup.¹⁶

The government appealed to the Seventh Circuit.¹⁷ As an attorney in the Justice Department’s Environment and Natural Resources Division, I

9. 42 U.S.C. §§ 9601–9675 (2012).

10. *Id.*

11. Brief of Appellant at 8, *Tarkowski*, 248 F.3d 596 (Nos. 00-2393 & 00-2473).

12. *Id.*

13. 42 U.S.C. §§ 9604(e)(1), (3).

14. *See, e.g., id.* § 9604(b)(1) (authorizing the United States Environmental Protection Agency (EPA) to “undertake such investigations, monitoring, surveys, testing, and other information gathering as [it] may deem necessary or appropriate to identify the existence and extent of the release or threat thereof, the source and nature of the hazardous substances, pollutants or contaminants involved, and the extent of danger to the public health or welfare or to the environment”); *id.* § 9604(e)(4)(A) (authorizing the EPA “to inspect and obtain samples”).

15. *Id.* § 9613(h).

16. Brief of Appellant at 9–11, *Tarkowski*, 248 F.3d 596 (Nos. 00-2393 & 00-2473).

17. *See Tarkowski*, 248 F.3d at 597.

represented the government on appeal.¹⁸ We were confident that the court of appeals would see the need to defer to the EPA's expertise and would allow the agency access to Tarkowski's property.

The day of the oral argument in Chicago arrived. Judge Richard Posner was on the panel.¹⁹ I took this as a positive sign, as he had authored previous Seventh Circuit opinions addressing CERCLA § 113(h) and ruling in favor of the government.²⁰ As I began to address the court, Judge Posner almost immediately interrupted me. "Counsel," he asked, "is it your position that CERCLA § 113(h) precludes courts from inquiring into whether the EPA's plans for its response action are arbitrary and capricious, even when they require entry onto private property?"²¹ Perfect, I thought, he understands our argument. This could not be going any better. "Yes," I answered. "That is absurd," he curtly replied.

The opinion the court issued two months later was no gentler. In rejecting the EPA's request for access and affirming the district court, the Seventh Circuit expressed dismay at the government's arguments:

The EPA makes no pretense that the position it advocates serves a public purpose, strikes a reasonable balance between property rights and community rights, rationally advances the agency's mission, or even comports with the limitations that the Constitution has been interpreted to place on federal regulation of purely local activities, not to mention the limitations that the Fourth Amendment places on searches and seizures.²²

The court went on to contend that the EPA's position would "nullify judicial control," "spell[ing] the abolition of the right of judicial review . . . [and] giv[ing] the agency in effect an unlimited power of warrantless search and seizure."²³

What went wrong? How had what seemed like such a favorable and straightforward case to the EPA and the Justice Department generated such a strong and unequivocal rejection from the courts?

The agency and the court simply approached the case from fundamen-

18. *See id.*

19. *Id.*

20. *See, e.g.,* N. Shore Gas Co. v. EPA, 930 F.2d 1239 (7th Cir. 1991) (holding that the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) § 113(h) precluded public utility from suing to enjoin a portion of the EPA remediation plan); United States v. Fisher, 864 F.2d 434 (7th Cir. 1988) (citing CERCLA § 113(h) and holding that the landowner's objection to the EPA's request for access on the ground that the access would be so disruptive as to constitute a taking of the property was not a defense to the EPA's request for access).

21. Although my memory of the oral argument is vivid, I am paraphrasing here.

22. *Tarkowski*, 248 F.3d at 599.

23. *Id.* at 602.

tally different perspectives. Whereas the EPA had focused on the apparently broad text of CERCLA § 113(h) and the EPA's need to address contamination quickly and without interference, the court saw the EPA as seeking absolute and unrestrained authority to come onto Tarkowski's property and disrupt his life. The court sympathized with Tarkowski, noting that his neighbors, who had instigated the complaint to the EPA about Tarkowski's property, had "been harassing him for many years."²⁴ Tarkowski was an "elderly, impecunious man" who was "disabled by injuries"; his neighbors were "affluent."²⁵ The junk, about which his neighbors complained and the EPA was concerned, provided essential means for Tarkowski to scratch out his existence. The EPA's position made sense within its system of CERCLA enforcement, but it seemed excessive and arbitrary in the eyes of the court looking at that administrative system from the outside.

The *Tarkowski* case aptly illustrates a tension in the role that the Rule of Law plays in administrative enforcement. On the one hand, agencies such as the EPA advance the Rule of Law by creating and implementing administrative systems that leverage their experience and expertise to provide consistent and informed decisions that accomplish statutory objectives. The Rule of Law thus justifies letting the EPA, the expert agency, decide whether John Tarkowski's property poses a danger to public health that warrants a government response that includes access to the property.

But, on the other hand, the very specialization and routinization that makes the EPA an effective and knowledgeable expert also can have a downside, sometimes leading agencies to miss the application of broader first principles that comprise the Rule of Law.²⁶ Thus, the Rule of Law also justifies the intervention of a court to decide whether the administrative system the EPA is implementing comports with the core values of our legal system, such as fairness, privacy, due process, and liberty. This role, reflecting the comparative advantage of courts, legitimates courts' authority to scrutinize agency decisions even with respect to matters as to which agencies clearly have more expertise and experience than the judiciary.

The challenge for agencies and courts, and indeed for our legal system generally, is to balance these two orientations in a way that allows each institution to exercise its advantages without trammeling the other's ability to perform its role.

24. *Id.* at 598.

25. *Id.* at 597–98.

26. See Louis L. Jaffe, *The Illusion of the Ideal Administration*, 86 HARV. L. REV. 1183, 1188 (1973) (contending that "highly rationalized administrations embody . . . the defects of rigidity and displacement of objectives by bureaucratic routine").

II. THE RULE OF LAW

The United States prides itself on fidelity to law and commitment to justice, often expressed as an adherence to the Rule of Law.²⁷ We even have significant programs aiming to export the Rule of Law abroad to developing countries.²⁸ At the same time, we sometimes express concerns about our domestic situation in terms of whether the Rule of Law is eroding.²⁹

But what we mean by the term “Rule of Law” is unclear.³⁰ It is, as one

27. Fallon, *supra* note 1, at 1 (“The Rule of Law is a much celebrated, historic ideal”); Judith N. Shklar, *Political Theory and the Rule of Law*, in *THE RULE OF LAW: IDEAL OR IDEOLOGY* 1, 1 (Allan C. Hutchinson & Patrick Monahan eds., 1987) (referring to the Rule of Law as “just another of those self-congratulatory rhetorical devices that grace the public utterances of Anglo-American politicians”).

28. See Okezie Chukwumerije, *Rhetoric Versus Reality: The Link Between the Rule of Law and Economic Development*, 23 *EMORY INT’L L. REV.* 383, 384–85 (2009) (noting Rule of Law initiatives of the World Bank, International Monetary Fund, government agencies, and nongovernmental organizations); *Office of the Rule of Law Coordinator*, DEP’T OF JUST., <https://www.justice.gov/archive/iraq/rule-of-law.htm> (last updated Mar. 2018) (noting that the Rule of Law Coordinator “works closely with members of the Iraqi judiciary and the relevant law enforcement institutions (the Ministry of the Interior and the Ministry of Justice), to ensure collaboration and cooperation in the reconstitution of essential law enforcement and security institutions throughout the Republic of Iraq”); U.S. GOV’T ACCOUNTABILITY OFFICE, *GAO/NSIAD-99-158, RULE OF LAW FUNDING WORLDWIDE FOR FISCAL YEARS 1993–1998* (1999) (reporting information on U.S. Rule of Law assistance programs and activities); *What Is the Rule of Law?*, U.S. INST. OF PEACE (Mar. 1, 2012), <https://www.usip.org/publications/2012/03/what-rule-law> (explaining “the ways that USIP works to promote the rule of law around the world”).

29. See e.g., Diane P. Wood, *The Rule of Law in Times of Stress*, 70 *U. CHI. L. REV.* 455 (2003); Adam Liptak, *Trump Declarations Seen as Threat to Rule of Law*, *N.Y. TIMES*, June 4, 2016, at A1; Robert Alt, *Obama’s Erosion of the Rule of Law*, *WASH. TIMES* (Aug. 31, 2011), <https://www.washingtontimes.com/news/2011/aug/31/alt-obamas-erosion-of-the-rule-of-law/>; Johanna Kalb, *Does the Trump Administration Believe in the Rule of Law?*, *BRENNAN CTR. FOR JUST.* (Mar. 24, 2017), <https://www.brennancenter.org/blog/does-trump-administration-believe-rule-law>; *GOP Leaders’ Complicity Grows as Their Members Undermine the Rule of Law*, *WASH. POST* (Jan. 25, 2018), https://www.washingtonpost.com/opinions/congressional-republicans-stay-silent-as-partisans-undermine-the-rule-of-law/2018/01/25/03a69370-0211-11e8-9d31-d72cf78dbee_story.html?noredirect=on&utm_term=.d47571973f2e.

30. GEORGE P. FLETCHER, *BASIC CONCEPTS OF LEGAL THOUGHT* 12 (1996) (“[W]e are never quite sure what we mean by ‘the rule of law.’”); BRIAN Z. TAMANAHA, *ON THE RULE OF LAW: HISTORY, POLITICS, THEORY* 3 (2004) (describing the Rule of Law as “an exceedingly elusive notion”); Ronald Dworkin, *Political Judges and the Rule of Law*, 64 *PROC. OF THE BRIT. ACAD.* 259, 261 (1978) (“Lawyers (and almost everyone else) think that there is a distinct and important political ideal called the rule of law. But they disagree about what that ideal is.”); Katie R. Eyer, *Administrative Adjudication and the Rule of Law*, 60 *ADMIN. L. REV.*

author notes, an “oft-used but ill-defined” term.³¹ There are many particularized understandings of what the Rule of Law means, and what specific conditions the Rule of Law requires.³²

Consider the following examples:

Ronald Dworkin contrasts two conceptions of the Rule of Law: the “rule-book conception” which requires that laws be explicitly stated in a publicly available rule book, and the “rights conception,” which requires the law to protect individual moral and political rights.³³

Judith Shklar, like Dworkin, contrasts two distinct understandings of the Rule of Law: one posits the Rule of Law as a pervasive commitment to acting justly, the other understands the Rule of Law as a more limited restraint on governmental oppression.³⁴

The World Justice Project defines the Rule of Law with four principles: accountability, just laws, open government, and accessible and impartial dispute resolution.³⁵

Rachel Kleinfeld Belton has identified five conditions of the Rule of Law: (a) making the government comply with law; (b) ensuring legal equality; (c) enforcing law and order; (d) meting efficient and impartial justice; and (e) upholding basic human rights.³⁶

Richard Fallon highlights five elements that constitute the Rule of Law: (a) laws must be comprehensible; (b) laws must be efficacious; (c) laws must be stable; (d) laws must

647, 654 (2008) (“[T]here is broad disagreement among scholars and popular users regarding the necessary components of a rule-of-law society.”); Fallon, *supra* note 1, at 1 (noting that “the precise meaning of [Rule of Law] may be less clear today than ever before” and that “the meaning of the phrase ‘the Rule of Law’ . . . has always been contested”); Michel Rosenfeld, *The Rule of Law and the Legitimacy of Constitutional Democracy*, 74 S. CAL. L. REV. 1307, 1308 (2001) (noting that “there is no consensus on what ‘the rule of law’ stands for”). *But see* Todd J. Zywicki, *The Rule of Law, Freedom, and Prosperity*, 10 SUP. CT. ECON. REV. 1, 3 (2003) (“Commentators on the rule of law often insist that it is difficult to define the concept of the rule of law. This is untrue.”) (footnote omitted).

31. Kristafer Ailsieger, *Building the Rule of Law in Iraq*, J. KAN. B. ASS’N, May 2009, at 19.

32. *See* Rachel Kleinfeld Belton, *Competing Definitions of the Rule of Law*, in CARNEGIE PAPERS RULE OF LAW SERIES 1, 5 (Carnegie Endowment for Int’l Peace, Rule of Law Ser. No. 55, 2005) (“Read any set of articles discussing the rule of law, and the concept emerges looking like the proverbial blind man’s elephant—a trunk to one person, a tail to another.”).

33. Dworkin, *supra* note 30, at 261–62.

34. Shklar, *supra* note 27, at 1–2.

35. *What Is the Rule of Law?*, WORLD JUST. PROJECT, <https://worldjusticeproject.org/about-us/overview/what-rule-law> (last visited Oct. 30, 2018).

36. Belton, *supra* note 32, at 8–15.

apply to everyone; and (e) laws must be impartially applied.³⁷

Brian Tamanaha classifies six different theories of the Rule of Law.³⁸ The “thinnest” theory of the Rule of Law requires mere formal legality, which entails certain minimal elements that exclude arbitrary authority—for example, laws must be “prospective, general, clear, public, and relatively stable.”³⁹ The “thickest” theories require formal legality, enactment by a democratic process, protection of individual rights, and protection of social welfare rights.⁴⁰

Lon Fuller proposed eight principles that embody the Rule of Law.⁴¹ According to Fuller, laws should be of general application, promulgated through procedure, prospective in application, clear, not conflicting, feasibly complied with, constant over time, and applied as declared.⁴²

Joseph Raz also posits eight principles derived from the Rule of Law, although his eight principles differ somewhat from Fuller’s.⁴³ According to Raz, laws should be prospective, open, and clear; laws should be relatively stable; specific laws should be guided by more general rules; courts should be independent; principles of natural justice should be followed; courts should have power to review government actions; courts should be accessible; and enforcement discretion should not undermine the law.⁴⁴

Robert Summers postulates eighteen specific principles of the Rule of Law, which include that laws must “conform to established criteria of validity,” “be uniform” in application, and “clear and determinate in meaning.”⁴⁵

Jeremy Waldron has formulated a list of twenty-two elements of the Rule of Law, consisting of eight formal elements (Fuller’s eight principles), ten procedural elements including such things as a right to counsel and a right to appeal, and four substantive

37. Fallon, *supra* note 1, at 8–9.

38. TAMANAHA, *supra* note 30, at 91–113.

39. *Id.* at 92–93 (citing Joseph Raz, *The Rule of Law and its Virtue*, in *THE AUTHORITY OF LAW* 210, 214 (2009)).

40. *Id.* at 112–13. Whereas individual rights operate generally as a negative restraint on government, social welfare rights “impose[] on the government an affirmative duty to help make life better for people.” *Id.* at 113; *see also* Jeremy Waldron, *The Rule of Law and the Importance of Procedure*, in *GETTING TO THE RULE OF LAW* 3, 4–5 (James E. Fleming, ed. 2011) (differentiating between substantive and procedural visions of the Rule of Law).

41. LON L. FULLER, *THE MORALITY OF LAW* 46–91 (rev. ed. 1964).

42. *Id.* Although Fuller did not label his principles as embodying the Rule of Law—he described them as “eight kinds of legal excellence toward which a system of rules may strive,” *id.* at 41, his principles have generally been construed as elements of the Rule of Law. *See, e.g.*, Waldron, *supra* note 40, at 5–6.

43. Raz, *supra* note 39, at 214–18.

44. *Id.*

45. Robert S. Summers, *The Principles of the Rule of Law*, 74 *NOTRE DAME L. REV.* 1691, 1693–95 (1995).

elements including private property, liberty, and democracy.⁴⁶

In light of the diversity that just this small sample illustrates, it is not surprising that some scholars contend that trying to distill a single set of conditions that constitutes the Rule of Law is a fruitless task. Just as there is no single perfect definition of justice that works in all usages, there is no single perfect definition or formulation of the Rule of Law. Richard Fallon, for example, has argued that “[i]t is a mistake to think of particular criteria as necessary in all contexts for the Rule of Law.”⁴⁷ Rather, the Rule of Law comprises “multiple strands” that are “complexly interwoven.”⁴⁸ Indeed, the Rule of Law’s “very generality is the reason for its durability.”⁴⁹

That said, there are clear commonalities across the various definitions and conditions identified by scholars. At a minimum, the Rule of Law fundamentally requires authority exercised as law to have principled justification—that is, the Rule of Law exists only to the extent that actions taken by or with the support of legal authorities have some principled justification beyond mere power.⁵⁰ The Rule of Law is often distinguished from “rule of men.”⁵¹ In this context, “rule of men” means power vested in the person; in contrast to “rule of law,” meaning authority derived from principle. The Rule of Law differentiates legitimate governmental authority from illegitimate governmental authority.⁵²

46. Waldron, *supra* note 40, at 5–7.

47. Fallon, *supra* note 1, at 6.

48. *Id.*

49. Allan C. Hutchinson & Patrick Monahan, *Introduction*, in *THE RULE OF LAW: IDEAL OR IDEOLOGY* ix, ix (Allan C. Hutchinson & Patrick Monahan eds., 1987).

50. See, e.g., Steven J. Burton, *Normative Legal Theories: The Case for Pluralism and Balancing*, 98 IOWA L. REV. 535, 548 (2013) (“[T]he Rule of Law requires a minimally adequate justification for the law.”); Ofer Raban, *The Rationalization of Policy: On the Relation Between Democracy and the Rule of Law*, 18 N.Y.U.J. LEGIS. & PUB. POL’Y 45, 58 (2015) (“The rule of law, however, requires that there be justifications for the specific categories drawn by the law.”); Kevin M. Stack, *An Administrative Jurisprudence: The Rule of Law in the Administrative State*, 115 COLUM. L. REV. 1985, 1992–93, 2009–12 (2015) (“An important strain of thought about the rule of law focuses on the role of justification and argumentation in law.”); Jeremy Waldron, *The Concept and the Rule of Law*, 43 GA. L. REV. 1, 11 (2008) (“The Rule of Law aims to correct abuses of power by insisting on a particular mode of the exercise of political power: governance through law.”).

51. See, e.g., Fallon, *supra* note 1, at 2–3 & n.10; Hutchinson & Monahan, *supra* note 49, at ix; Rosenfeld, *supra* note 30, at 1313 n.25; Wood, *supra* note 29, at 456 (agreeing with Professor Rosenfeld’s explanation).

52. Rosenfeld, *supra* note 30, at 1313; cf. Larry Catá Backer, *From Constitution to Constitutionalism: A Global Framework for Legitimate Public Power Systems*, 113 PENN ST. L. REV. 671, 716 (2009) (noting that the Rule of Law “distinguish[es] despotism or tyranny, oligarchy, and

Thus, any governmental authority, to be legitimate and to embody the Rule of Law, must have a principled justification.⁵³ Since the Rule of Law defines essential characteristics of a just government, any important institution within a government that purports or aspires to exercise legitimate authority must be able to justify the authority it exercises as consistent with the Rule of Law. The nature of that justification, as Fallon suggests, may vary with the context in which the authority is exercised.⁵⁴ Fallon's observation is borne out in administrative enforcement decisions made by Executive Branch agencies and judicial decisions made by courts reviewing agency decisions. Both types of decisions—administrative and judicial—have principled justifications rooted in the Rule of Law for the authority they exercise. But the nature of those justifications differs between agencies and courts, because of key differences between an administrative system and a judicial process. These differences are functionally beneficial, in that each institution is in a position to leverage the strengths of certain characteristics of its context. Yet those differences also create an inevitable tension, if not conflict. How to manage the differences between administrative enforcement systems and judicial systems—leveraging the advantages of each without undermining the other—is one of the most vexing and important challenges of the modern regulatory state.

III. ADMINISTRATIVE PROCESS

Administrative processes draw their justification and institutional advantages from those aspects of the Rule of Law that emphasize predictability, consistency, and efficiency within a legal system. These three features—predictability, consistency, and efficiency—are common to most formulations of the Rule of Law.⁵⁵ A legal system that produces predictable

mob rule (illegitimate) from constitutionalist (legitimate) states”).

53. Cf. JERRY L. MASHAW, *BUREAUCRATIC JUSTICE* 24–25 (1983) (describing justice, a term sometimes used similarly to Rule of Law, as “those qualities of a decision process that provide arguments for the acceptability of its decisions”).

54. See generally Fallon, *supra* note 1.

55. See *McGinley v. Houston*, 361 F.3d 1328, 1331 (11th Cir. 2004) (“The rule of law requires ‘fair and expeditious adjudication’”) (quoting *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 403 (1970)); *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (“Stability and predictability are essential factors in the proper operation of the rule of law.”); Belton, *supra* note 32, at 14 (“Predictability and efficiency are important and accepted rule-of-law ends.”); Yoav Dotan, *Making Consistency Consistent*, 57 ADMIN. L. REV. 995, 996 (2005) (noting the importance of consistency “to the integrity of legal systems under the idea of the rule of law”); Rosenfeld, *supra* note 30, at 1313 (“At a minimum, . . . the rule of law requires . . . a substantial amount of legal predictability”); Antonin Scalia, *The Rule of*

and efficient decisions is more justified than a system that does not, and decisions in a legal system are justified if and only if they reach consistent outcomes without unduly or unnecessarily burdensome processes. Predictability and efficiency do not alone justify a legal decision or a system, but they are necessary for a legal decision or system to function effectively—that is, they are necessary, even if not sufficient, to the Rule of Law.

Judiciaries may generally produce predictable and efficient decisions. The use of publicly announced and available decisions, for example, allows courts, counsel, and parties to compare new cases to prior cases and to anticipate the likely results of disputes. The hierarchical pyramid structure of most judicial systems also fosters predictability and efficiency. At the initial trial court level, numerous judges, located in local jurisdictions, have the capacity to render decisions relatively quickly and at lower cost to the parties.⁵⁶ On appeal, this diffuse system concentrates, with a much smaller number of appellate judges sitting on a small number of courts, facilitating more consistent and coherent case law. Thus, the attributes of the judiciary seem relatively likely to yield consistency and predictability at an acceptable level over the wide variety of matters they adjudicate.

For some specialized types of matters, however, administrative systems are likely to be much more effective than court systems in achieving predictability, consistency, and efficiency.⁵⁷ A well-functioning administrative system produces efficient and predictable decisions in the domain of cases it adjudicates, likely more so than a judicial system. To understand why this is so, we can look at the reasons that agencies were created in the first place. Administrative agencies address complex and technical matters that courts are ill-equipped to understand.⁵⁸ Max Weber, the great German sociologist

Law as a Law of Rules, 56 U. CHI. L. REV. 1175, 1179 (1989) (“Predictability . . . is a needful characteristic of any law worthy of the name.”).

56. See *Court Role and Structure*, U.S. CTS., <http://www.uscourts.gov/about-federal-courts/court-role-and-structure> (last visited Oct. 30, 2018) (noting that there are ninety-four federal district courts, thirteen courts of appeals, and one Supreme Court in the United States); *Authorized Judgeships—From 1789 to Present*, U.S. CTS., <http://www.uscourts.gov/sites/default/files/allauth.pdf> (last visited Sept. 15, 2018) (noting that, as of 2017, there were 663 authorized federal district court judgeships, 179 authorized federal courts of appeals judgeships, and 9 Supreme Court justices).

57. See AM. BAR ASS’N SECTION ON INT’L & COMPARATIVE LAW, *THE RULE OF LAW IN THE UNITED STATES* 35 (1958) (noting that certain decisions “cannot be made by a legislature or court but only by bodies of specialists exercising flexible quasi-judicial powers” because “[c]ourts dealing with all aspects of society are less well equipped to acquire special competence essential to solution of problems arising out of specific limited activity”).

58. See *O’Donnell v. Shaffer*, 491 F.2d 59, 62 (D.C. Cir. 1974) (“Much agency action involves technical expertise—indeed, that is a major reason for the delegation of rulemaking

and scholar of bureaucracy, described bureaucracies as “firmly ordered system[s]” staffed with persons of “thorough and expert training” who render decisions according to prescribed standards.⁵⁹ Fifty years later, Louis Jaffe observed that “highly rationalized administrations embody the advantages of stability, equality of treatment, order, comprehensibility and predictability.”⁶⁰

These observations point to certain characteristics of administrative systems that lead to predictability and efficiency. First, agencies are experts. Agency expertise takes many forms. Agencies hire employees with specialized education, training, and experience relevant to the agency’s mission; by working in the agencies, the employees acquire additional training and experience.⁶¹ In addition to substantive specialized expertise, agencies develop institutional expertise through the accreted wisdom of experience in administering their systems, which include interdisciplinary decisionmaking under conditions of uncertainty and conflicting demands from Congress, the President, courts, the public, and the regulated industries.⁶² Agencies, by virtue of their specialization and standardization, thus are able to leverage their experience toward effective enforcement of the statutes they are charged with implementing.

Second, agencies are fairly adept at reaching consistent decisions—as Justice Breyer has noted, they tend to resolve “roughly similar problems in

authority to agencies.”).

59. Max Weber, *Bureaucracy*, in CLASSICS OF PUBLIC ADMINISTRATION 43, 43 (Jay M. Shafritz & Albert C. Hyde, eds., 6th ed. 2007).

60. Jaffe, *supra* note 26, at 1188.

61. See Louis J. Virelli III, *Administrative Abstention*, 67 ALA. L. REV. 1019, 1047–48 (2016) (noting that agency employees come to their positions with “ex ante expertise—the specialization in education and training that administrators and agency employees bring to their offices” and acquire “ex post” expertise—the knowledge and experience gained through the process of performing its administrative functions”); see also Amanda Frost, *Judicial Review of FDA Preemption Determinations*, 54 FOOD & DRUG L.J. 367, 370 (1999) (“Agencies are experts because their personnel usually have special training and significant experience in a particular field.”).

62. Gillian E. Metzger, *Administrative Constitutionalism*, 91 TEX. L. REV. 1897, 1922 (2013) (noting that agencies work “from a background of expertise in the statutory schemes they implement and the areas they regulate”); Sidney A. Shapiro, *The Failure to Understand Expertise in Administrative Law: The Problem and the Consequences*, 50 WAKE FOREST L. REV. 1097, 1099 (2015) (noting agency expertise acquired through a “richer, discursive decision-making process in which persons trained in various disciplines interact with each other inside and outside of the agency to debate and dispute arguments and information” and “reconciling and accounting for conflicting evidence and arguments, disciplinary perspectives, political demands, and legal commands”).

roughly similar ways.”⁶³ As both Weber and Jaffe observed,⁶⁴ the structure of administrative processes, by virtue of its specialization and bureaucratization, intentionally promotes rational decisionmaking that yields consistent results. Agencies issue detailed regulations, guidance documents, and procedures to create generalized principles of decision and routinized processes.⁶⁵ This structure creates a more centralized process and standards than the structure of judicial systems. Moreover, whereas district courts are not bound by each other’s precedent,⁶⁶ and circuit courts are not bound by other circuits’ precedent,⁶⁷ agencies act arbitrarily and capriciously if they render inconsistent decisions.⁶⁸ Thus, outside of the few issues on which the Supreme Court grants certiorari, the federal judicial system countenances considerably more variation than administrative systems do.⁶⁹

63. STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* 62 (1995).

64. *See supra* notes 59–60 and accompanying text.

65. *See, e.g.*, Policy Guidance on Supervisory and Enforcement Priorities Regarding Early Compliance With the 2016 Amendments to the 2013 Mortgage Rules Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z), 82 Fed. Reg. 29,713 (June 30, 2017) (Bureau of Consumer Financial Protection); Guidance for Industry: Enforcement Policy Regarding Investigational New Drug Requirements for Use of Fecal Microbiota for Transplantation To Treat *Clostridium difficile* Infection Not Responsive to Standard Therapies, 79 Fed. Reg. 10,814 (Feb. 26, 2014) (Food and Drug Administration); Regulatory Guidance Concerning Applicability of the Federal Motor Carrier Safety Regulations to Mobile Cranes Operated in Interstate Commerce, 74 Fed. Reg. 43,640 (Aug. 27, 2009) (Federal Motor Carrier Safety Administration); FAA Order 2150.3B, Compliance and Enforcement Program, 72 Fed. Reg. 55,853 (Oct. 1, 2007) (Federal Aviation Administration); Interim Guidance for Community Involvement in Supplemental Environmental Projects, 68 Fed. Reg. 35,884 (June 17, 2003) (EPA).

66. *See Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011) (“A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case.”) (citing 18 JAMES WM. MOORE ET AL., *MOORE’S FEDERAL PRACTICE* § 134.02[1] [d] (3d ed. 2011)).

67. *See Int’l Custom Prod., Inc. v. United States*, 843 F.3d 1355, 1360 (Fed. Cir. 2016) (noting that “decisions from other circuits are not binding on this court”) (quoting *Amerikohl Mining, Inc. v. United States*, 899 F.2d 1210, 1214 (Fed. Cir. 1990)).

68. *See Spitzer Great Lakes, Co. v. EPA*, 173 F.3d 412, 416 (6th Cir. 1999) (holding that unjustified departure from prior practice rendered agency’s decision arbitrary and capricious).

69. *See Frank B. Cross, Shattering the Fragile Case for Judicial Review of Rulemaking*, 85 VA. L. REV. 1243, 1250 (1999) (noting that the Supreme Court’s very limited docket of cases does little to resolve inconsistencies in the law arising from circuit splits); Jonathan R. Siegel, *Guardians of the Background Principles*, 2009 MICH. ST. L. REV. 123, 131 (2009) (arguing that the goal of “maintain[ing] coherence in the law . . . could be thwarted if different courts take

Third, agencies are able to create processes that, through specialization and routinization, make decisions with greater speed and at lower cost than courts do. This enables agencies to process decisions at a much faster rate than courts do.⁷⁰ Specialization and routinization allow agencies to create administrative systems that are simpler and less formal than typical judicial proceedings, thereby making administrative systems more accessible and affordable to litigants.⁷¹

Building on these observations, a brief examination of how agencies work makes clear how administrative systems are well suited to meting out predictable and efficient decisions within their defined domains. Agencies handle high volumes of cases within their specialized jurisdictions. For example, at the EPA, the number of administrative enforcement cases eclipses the number of civil enforcement cases brought in court by more than an order of magnitude.⁷² Because of their high volumes of cases and specialization, agencies develop standardized procedures and criteria for deciding cases.⁷³ These standardized criteria and processes allow agencies to decide cases consistently and efficiently.⁷⁴ Perhaps more important, standardized criteria allow the regulated community to anticipate and predict an agen-

different views” on an issue, whereas agencies “are not plagued by the ‘coordination’ problem”).

70. See *infra* note 72 and accompanying text.

71. See KENNETH F. WARREN, *ADMINISTRATIVE LAW IN THE POLITICAL SYSTEM* 282 (4th ed. 2004) (“The agency hearing process is usually less elaborate or formal than typical court trials.”); *id.* (noting that “most agency adjudications are quite informal”).

72. See *Enforcement Annual Results Numbers at a Glance for Fiscal Year 2016*, U.S. ENVTL. PROTECTION AGENCY (last updated Feb. 8, 2018), <https://archive.epa.gov/epa/enforcement/enforcement-annual-results-numbers-glance-fiscal-year-2016.html> (noting that the EPA filed 1,369 administrative penalty complaints in Fiscal Year 2016, compared with 93 civil judicial complaints filed by the Justice Department on behalf of the EPA).

73. See, e.g., Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. §§ 22.1–.52 (2010); *Enforcement Policy, Guidance & Publications*, U.S. ENVTL. PROTECTION AGENCY (last updated Nov. 21, 2018), <https://www.epa.gov/enforcement/enforcement-policy-guidance-publications> (providing links to numerous EPA enforcement-related policies).

74. See Daniel Carpenter, *Internal Governance of Agencies: The Sieve, the Shove, the Show*, 129 HARV. L. REV. F. 189, 191 (2016) (noting that agencies reduce the costs of decisionmaking “by means of centralization, specialization, separation, standardization, or procedures such as internal clearance or priority setting”) (citing Jennifer Nou, *Intra-Agency Coordination*, 129 HARV. L. REV. 421, 451 (2015)); Daniel A. Farber, *Basic Compensation for Victims of Climate Change*, 155 U. PA. L. REV. 1605, 1649 (2007) (explaining that “agency expertise” can “produce more efficient decisions” and that agencies can use “standardized protocols . . . [to] simplify the adjudicatory process”).

cy's decisions, which allows regulated businesses ex ante to order their decisions accordingly.⁷⁵ Indeed, an agency's extensive standards and guidance may be more important to the regulated community than specific agency decisions applying those standards and guidance.

Agency staff also are integral to the consistency, predictability, and efficiency of agency decisions. Agency personnel are chosen for their specialized education and training, and receive additional training and experience in the agency.⁷⁶ EPA staff, for example, includes thousands of scientists, economists, and lawyers.⁷⁷ Agency staff understand how the world works in their area. This allows agencies to make decisions with a deep insight into the consequences of those decisions.⁷⁸ Agencies operate in the real world.⁷⁹

Courts, by contrast, face constraints from their generalist background

75. See Waldron, *supra* note 50, at 6 (emphasizing the importance to the Rule of Law of allowing “people [to] know in advance how the law will operate, and they must act to avoid its having a detrimental impact on their affairs”).

76. See Louis J. Virelli III, *Administrative Abstention*, 67 ALA. L. REV. 1019, 1047–48 (2016) (stating that agency employees come to their positions with “ex ante expertise—the specialization in education and training that administrators and agency employees bring to their offices” and acquire “ex post” expertise—“the knowledge and experience gained through the process of performing its administrative functions”).

77. See Marcia R. Gelpe, *Exhaustion of Administrative Remedies: Lessons from Environmental Cases*, 53 GEO. WASH. L. REV. 1, 19 (1984) (noting that EPA staff contains “many highly trained scientists, engineers, and lawyers”).

78. See Frost, *supra* note 61, at 370 (“Because they have an institutional memory of the success and failure of past policies, agencies are uniquely situated to understand the consequences of their actions.”).

79. Katie Eyer has made somewhat similar arguments with respect to administrative adjudication—which would encompass the administrative enforcement systems that are the focus of this paper—as compared with administrative rulemaking. See Eyer, *supra* note 30. Eyer contends that administrative adjudication promotes several aspects of the Rule of Law at least as well as rulemaking does. See, e.g., *id.* at 651. These aspects of the Rule of Law include the existence of rules, consistency, limitation of discretion, prospectivity, notice or publicity, stability, and predictability. See *id.* at 657–68. Thus, Eyer argues, Rule of Law principles provide a potential justification for administrative adjudication. See *id.* at 701. This paper somewhat similarly argues that certain aspects of the Rule of Law provide support for administrative enforcement systems, and in particular indicate how administrative systems may in some ways outperform judicial systems. Instead of comparing administrative adjudication to administrative rulemaking, it compares administrative adjudication to judicial adjudication. But this paper also argues that judicial systems are likely to better effectuate other aspects of the Rule of Law. Thus, instead of using the Rule of Law as an outright justification for administrative adjudication, this paper uses the Rule of Law to highlight tensions within the administrative–judicial relationship. Promoting the Rule of Law requires addressing these tensions.

and perspective. Without a substantial reservoir of prior training or experience in a regulatory field, judges are far less equipped than agencies to understand the technical facts and law of the cases they decide. In confronting such cases, judges will tend to have to rely on precedent from other courts, which may itself be of uneven quality and insight because the judges who decided those cases faced similar limitations. Of course, courts rely on the evidence and arguments raised by the parties to the case. But the stakes in individual enforcement cases are often relatively low, leading the parties to limit the resources they invest in litigating, which in turn affects the quality of the evidence and arguments presented.

The administrative enforcement process is fundamentally replicative in its nature. Matters are delegated for agency adjudication in significant part because a category of situations arises with sufficient frequency that it makes sense, in order to leverage the beneficial virtues of administrative systems, to create a bureau of experts that makes decisions according to standardized substantive and procedural rules. Within this administrative system, the decisions in individual cases get justified by reference to their place in the system—that is, the outcome in a particular case is presumptively justified by the fact that the outcome is consistent with other outcomes the system generates. Instead of justifying the outcome of each case individually, which would undermine the efficiency and consistency of decisionmaking, we can justify the outcome of each case by its consistency with the outcomes of other cases in the system.⁸⁰

IV. JUDICIAL REVIEW

Turning away from agencies and toward courts, we see characteristics that reflect a different aspect of the Rule of Law. It is difficult to imagine the Rule of Law without internal consistency and effectiveness, but it also is clear that the Rule of Law requires more than just those factors.⁸¹ This seems true as well applied to the case of administrative systems. A well-functioning administrative system that yields predictable and consistent outcomes can be unjust if those outcomes are inconsistent with core values not adequately reflected in the system. The idea that legal systems are bound to pursue certain fundamental principles implicates two other essential aspects of the Rule of Law: binding the government to rule by law⁸² and

80. BREYER, *supra* note 63, at 62.

81. *See supra* note 55 and accompanying text.

82. AM. BAR ASS'N SECTION ON INT'L & COMPARATIVE LAW, *supra* note 57, at 30 (identifying “[s]ubstantive and procedural limitations on governmental power” as a key component of the Rule of Law); Belton, *supra* note 32, at 9 (“Binding the government to rule *by* law is the sine qua non of the rule *of* law.”); Fallon, *supra* note 1, at 8 (“The fourth element of the

protecting substantive rights.⁸³

These are functions that are particularly well suited to courts. When they are at their most effective, courts do not merely review agency decisions for errors. Indeed, it is not even clear that courts are particularly good at finding and correcting mistakes in agency decisions.⁸⁴ Judges are generalists and ill-equipped to check the accuracy of matters within agency expertise,⁸⁵ which is why courts appropriately give deference to agency judgments as to technical questions.⁸⁶

Were courts limited to reviewing agency action for errors, there might be a close question as to whether judicial review is even worthwhile. Indeed, Frank Cross has argued against judicial review of agency rulemaking, offering reasons that would apply to agency adjudicatory decisions as well.⁸⁷ But the same attributes that hobble courts' ability to detect agency errors

Rule of Law is the supremacy of legal authority. The law should rule officials, including judges, as well as ordinary citizens.”); Raz, *supra* note 39, at 212 (characterizing the Rule of Law as the principle “that the government shall be ruled by the law and subject to it”); WORLD JUST. PROJECT, *supra* note 35 (listing government accountability as one of four universal principles that comprise the Rule of Law).

83. Belton, *supra* note 32, at 14–15 (tying this understanding of Rule of Law to Locke’s theory that governments exist to protect preexisting natural rights, giving the Rule of Law “substantive, values-driven content”); Dworkin, *supra* note 30, at 262 (describing the “rights conception” which includes substantive justice as a component of the Rule of Law); Waldron, *supra* note 40, at 7 (identifying respect for private property, prohibitions on torture and brutality, presumption of liberty, and democratic enfranchisement as substantive protections of the Rule of Law).

84. See William N. Eskridge, Jr. & John Ferejohn, *Structuring Lawmaking to Reduce Cognitive Bias: A Critical View*, 87 CORNELL L. REV. 616, 629 (2002) (“According to Mashaw and Harfst, not only did judicial review fail to correct agency mistakes, but it induced mistakes.”) (citing JERRY L. MASHAW & DAVID L. HARFST, *THE STRUGGLE FOR AUTO SAFETY* 84–105, 224–54 (1990)).

85. See Siegel, *supra* note 69, at 130 (noting that “courts lack expertise in any particular field of law presided over by an administrative agency” because “judges are generalists”).

86. See *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 377 (1989) (“Because analysis of the relevant documents ‘requires a high level of technical expertise,’ we must defer to ‘the informed discretion of the responsible federal agencies.’”) (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976)); *Fed. Power Comm’n v. Fla. Power & Light Co.*, 404 U.S. 453, 463 (1972) (“Particularly when we consider a purely factual question within the area of competence of an administrative agency created by Congress, and when resolution of that question depends on ‘engineering and scientific’ considerations, we recognize the relevant agency’s technical expertise and experience, and defer to its analysis unless it is without substantial basis in fact.”).

87. Frank B. Cross, *Shattering the Fragile Case for Judicial Review of Rulemaking*, 85 VA. L. REV. 1243, 1252 (1999).

can place them in an advantageous position to police for other problems, most importantly to require agencies to justify their administrative systems as consistent with broader first principles such as due process and access to justice.⁸⁸ Courts can intercede to ask agencies to answer precisely the types of questions about their administrative systems that agencies, focused on applying those systems, are most apt to miss.

Other aspects of the Rule of Law exhibited by courts are also instrumental to courts' ability to check whether agencies are acting consistently with first principles and core values. First, courts exercise independent review. By design, courts are separated from the parties whose disputes they adjudicate. Judicial independence gives courts an outsider's perspective and fresh viewpoint, which on the one hand makes it more difficult for courts to understand the issues but on the other hand makes it easier for courts to take a broader perspective that focuses on core values. Judicial independence is a core attribute of the Rule of Law.⁸⁹ Regardless of whether they are appropriately impartial and fair, administrative law judges are not intended to exercise independent judgment in the way that the judiciary does. To the contrary, administrative law judges are obligated to follow and to enforce agency policy.⁹⁰

Second, judicial decisionmaking is founded on the principle of reasoned justification, which itself is a core feature of the Rule of Law.⁹¹ As Micah

88. See *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1328–34 (D.C. Cir. 1995) (holding that the EPA deprived the company of due process by imposing a fine for violation of the regulation without providing fair notice of the agency's interpretation on which the violation was based); *Wash. Hosp. Ctr. v. Bowen*, 795 F.2d 139, 148–49 (D.C. Cir. 1986) (holding that the Secretary of Health and Human Services erred by requiring hospitals to await completion of cost year before they could pursue an administrative appeal challenging prospective payment system payments under Medicare).

89. See *New York State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 212 (2008) (Kennedy, J., concurring) (“The rule of law . . . presupposes a functioning judiciary respected for its independence”); Judge Louraine C. Arkfeld, *The Rule of Law and an Independent Judiciary*, *JUDGES' J.*, Fall 2007, at 12, 13 (conveying “the importance of an independent judiciary to the rule of law”); David Boies, *Judicial Independence and the Rule of Law*, 22 *WASH. U. J.L. & POL'Y* 57, 58 (2006) (identifying “the principle of judicial independence” as an “important underpinning[] to the rule of law”); Pamela S. Karlan, *Judicial Independences*, 95 *GEO. L.J.* 1041, 1059 (2007) (arguing that “judicial independence . . . is a means of ensuring freedom and the rule of law”).

90. See James E. Moliterno, *The Administrative Judiciary's Independence Myth*, 41 *WAKE FOREST L. REV.* 1191, 1192 (2006) (“[A]dministrative judges are not to function in a judicially independent way. Instead, they must recognize that their role demands adherence to agency policy and goals.”).

91. See David Dyzenhaus & Michael Taggart, *Reasoned Decisions and Legal Theory*, in

Schwartzman has explained:

[J]udges are charged with the responsibility of adjudicating legal disagreements between citizens. As such, their decisions are backed with the collective and coercive force of political society, the exercise of which requires justification. It must be defended in a way that those who are subject to it can, at least in principle, understand and accept.⁹²

Herbert Wechsler further observed, “the main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved.”⁹³ Courts, he went on to note, have a “special duty . . . to judge by neutral principles.”⁹⁴ And these principles must embody the fundamental values of a society.⁹⁵

Courts, especially federal appellate courts, take this task seriously. Their judicial opinions frequently invoke first principles to decide cases.⁹⁶ Consistency with first principles is a key justification courts use in their reasoning.⁹⁷ As one ascends the judicial hierarchy, reliance on first principles becomes more important,⁹⁸ and courts are freer to depart from precedent.⁹⁹

COMMON LAW THEORY 134, 136 (Douglas E. Edlin ed., 2007) (noting that, “for [Jeremy] Bentham it is a requirement of the rule of law that judges be under a duty to give reasons”); Chad M. Oldfather, *Writing, Cognition, and the Nature of the Judicial Function*, 96 GEO. L.J. 1283, 1285 (2008) (stating that “longstanding conceptions of the judicial role, in which reasoned analysis stands as the core feature of legitimate judging”) (citing Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 366–67 (1978)); Stack, *supra* note 50, at 1989, 1992–93 (positing justification as one of “five elements or dimensions of the rule of law”).

92. Micah Schwartzman, *Judicial Sincerity*, 94 VA. L. REV. 987, 990 (2008).

93. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15 (1959).

94. *Id.* at 16.

95. *Id.* at 19.

96. See, e.g., *Boumediene v. Bush*, 553 U.S. 723, 797 (2008) (invoking “fidelity to freedom’s first principles”); *United States v. Lopez*, 514 U.S. 549, 552 (1995) (asserting that in determining the scope of congressional regulatory power under the Commerce Clause “[w]e start with first principles”); *Widmar v. Vincent*, 454 U.S. 263, 288 (1981) (White, J., dissenting) (“In my view, therefore, resolution of this case is best achieved by returning to first principles.”); *State Tax Comm’n of Utah v. Aldrich*, 316 U.S. 174, 182 (1942) (Frankfurter, J., concurring) (“A case of this kind recalls us to first principles.”).

97. *Gordon v. Holder*, 721 F.3d 638, 648 (D.C. Cir. 2013) (“Finding no conclusive precedent, we turn to first principles and there find support for Gordon’s argument that due process requires minimum contacts with the state or local government that defines the tax.”); *United States v. Whitten*, 610 F.3d 168, 198 (2d Cir. 2010) (“We start with first principles”); *United States v. Kay*, 513 F.3d 461, 465–66 (5th Cir. 2008) (“To be clear, we return to first principles.”).

98. See Charles Fried, *The Supreme Court, 1994 Term—Foreword: Revolutions?*, 109 HARV. L.

Supreme Court decisions are replete with references to first principles such as freedom,¹⁰⁰ due process,¹⁰¹ federalism,¹⁰² liberty,¹⁰³ private property rights,¹⁰⁴ and privacy.¹⁰⁵

To explore these ideas in greater depth and in the specific context of judicial review of agency adjudicatory decisions, we will now examine four contemporary examples of cases in which the Supreme Court has ruled against an administrative agency based in part on first principles or core values.

REV. 13, 16 (1995) (observing that “the pages of the United States Reports . . . ring with calls to examine, or reexamine, first principles”).

99. See, e.g., Richard M. Re, *Narrowing Precedent in the Supreme Court*, 114 COLUM. L. REV. 1861, 1863 (2014) (noting the Court’s willingness to narrow precedent—that is, to “interpret the precedent in a way that is more limited in scope than what you think is the best available reading”).

100. See *McDonald v. City of Chicago*, 561 U.S. 742, 863 (2010) (Stevens, J., dissenting) (opining that “no legal document” can “claim to be the source of our basic freedoms”); *In re Winship*, 397 U.S. 358, 379 (1970) (Black, J., dissenting) (defining the scope of protection under the Due Process Clause by reference to “basic freedoms” protected since the Magna Carta).

101. See *Oregon v. Elstad*, 470 U.S. 298, 318 (1985) (holding “that a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite Miranda warnings,” but averring that the holding does not endorse coercive confessions that deprive a suspect of due process).

102. See *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (reasoning that “federalism concerns” favored narrow construction of federal preemption of state-law causes of action); *Steffel v. Thompson*, 415 U.S. 452, 460 (1974) (citing “principles of equity, comity, and federalism” to support the principle that “federal courts should ordinarily refrain from enjoining ongoing state criminal prosecutions”).

103. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 844 (1992) (plurality opinion) (“Liberty finds no refuge in a jurisprudence of doubt.”).

104. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426–35 (1982) (holding that government appropriation of real property is a per se taking that requires just compensation).

105. See *California v. Ciraolo*, 476 U.S. 207, 211 (1986) (“The touchstone of Fourth Amendment analysis is whether a person has a ‘constitutionally protected reasonable expectation of privacy.’”) (quoting *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring)); *Roe v. Wade*, 410 U.S. 113, 152–53 (1973) (finding a “right of privacy” embedded in “the Fourteenth Amendment’s concept of personal liberty”).

*A. Four Case Studies of Judicial Review**1. Solid Waste Agency of Northern Cook County v. Army Corps of Engineers (SWANCC) (2001)*

In *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*,¹⁰⁶ the Solid Waste Agency sought to locate a solid waste landfill on a 533-acre parcel that was the former site of a sand and gravel pit mining operation.¹⁰⁷ Trenches excavated during the mining operation had over time transitioned to ponds.¹⁰⁸ Because the planned landfill would require filling some of these ponds, the Solid Waste Agency inquired whether it was required to obtain a permit under § 404 of the Clean Water Act.¹⁰⁹ Section 404 authorizes the Army Corps of Engineers to issue permits “for the discharge of dredge or fill material into the navigable waters.”¹¹⁰ The Clean Water Act defines “navigable waters” as “the waters of the United States, including the territorial seas.”¹¹¹ At the time, the Corps of Engineers defined “waters of the United States” to include, inter alia, waters used as habitat by migratory birds that cross state lines.¹¹²

The Corps initially determined that the ponds on the proposed landfill site were not “waters of the United States” covered by the Clean Water Act, but then changed its position when the Illinois Nature Preserve Commission pointed out the presence of migratory bird species on the property.¹¹³ Based on this new information, the Corps concluded that the ponds were “waters of the United States.”¹¹⁴ The Solid Waste Agency applied to the Corps for a § 404 permit.¹¹⁵ The Corps rejected the Solid Waste Agency’s permit request due to the environmental impacts of the landfill, including risks to drinking water supply and harm to sensitive species.¹¹⁶

The Solid Waste Agency sued, arguing that the ponds did not fall within the definition of “waters of the United States” covered by the Clean Water Act and therefore did not require a permit, because the ponds were isolated

106. 531 U.S. 159 (2001).

107. *Id.* at 163.

108. *Id.*

109. *Id.*

110. 33 U.S.C. § 1344(a) (2000).

111. *Id.* § 1362(7).

112. 531 U.S. at 164 (quoting 51 Fed. Reg. 41,217 (1986)).

113. *Id.*

114. *Id.*

115. *Id.* at 165.

116. *Id.*

from any navigable waters.¹¹⁷ In response, the Corps of Engineers highlighted the importance of addressing water pollution in all waters whose degradation or destruction could affect interstate commerce, even where those waters are not navigable in fact and have no surface connection to waters that are navigable in fact.¹¹⁸

The Supreme Court sided with the Solid Waste Agency.¹¹⁹ The Court held that intrastate, isolated ponds such as those on the landfill site are not “waters of the United States” subject to Clean Water Act regulation.¹²⁰ In reaching this conclusion, the Court relied in part on the concern that the Corps’ interpretation of the Clean Water Act would encroach upon traditional state power.¹²¹

2. *Rapanos v. United States (2006)*

*Rapanos v. United States*¹²² was the sequel to *SWANCC*, again examining the reach of the Clean Water Act. John Rapanos was a real estate developer who, with others, owned three parcels of land near Midland, Michigan, each of which contained wetlands with surface hydrologic connections to non-navigable tributaries of traditional navigable waters.¹²³ In defiance of warnings from state environmental authorities and the EPA, Rapanos directed his contractors to conduct extensive land clearing, earth moving, and construction on the wetlands.¹²⁴

The United States filed a civil enforcement action in federal court for filling “waters of the United States” without a permit in violation of § 301 of the Clean Water Act.¹²⁵ Rapanos argued that the wetlands he filled did not fall within the definition of “waters of the United States” covered by the Clean Water Act and therefore did not require a permit, because the wet-

117. *Id.* at 165–66.

118. Brief for the Federal Respondents at 13–18, 21–28, *SWANCC*, 531 U.S. 159 (No. 99-1178).

119. 531 U.S. at 174. Justice Stevens, joined by Justice Souter, Justice Ginsburg, and Justice Breyer, dissented. *Id.*

120. *Id.* at 172.

121. *See id.* at 173 (noting the Court’s concern with statutory interpretations that “alter[] the federal-state framework by permitting federal encroachment upon a traditional state power”). The Court also relied on the inclusion of the word “navigable” in the Act, while conceding that its own precedent interpreted “waters of the United States” to include non-navigable wetlands. *Id.* at 172.

122. 547 U.S. 715 (2006).

123. Brief for the United States at 9–10, *Rapanos*, 547 U.S. 715 (No. 04-1034).

124. *Id.* at 10–12.

125. 33 U.S.C. § 1311 (1988); *see Rapanos*, 547 U.S. at 729.

lands were not traditional navigable waters.¹²⁶ In response, the government argued, consistent with EPA and Corps of Engineers regulations, that “waters of the United States” includes wetlands adjacent to tributaries of traditional navigable waters.¹²⁷ In defense of this interpretation, the government highlighted the importance of protecting water quality by preventing upstream discharges.¹²⁸

In a fractured decision, a plurality of the Supreme Court held that wetlands are not “waters of the United States” subject to Clean Water Act regulation unless they have a continuous surface connection to a waterbody with a relatively permanent flow.¹²⁹ In reaching this conclusion, the plurality reiterated and expanded upon its concern stated in *SWANCC* that the Corps’ interpretation of the Clean Water Act constituted an “immense expansion of federal regulation of land use.”¹³⁰ The plurality also noted the costs to landowners of obtaining a Clean Water Act permit.¹³¹

126. *Rapanos*, 547 U.S. at 730.

127. Brief for the United States at 15, *Rapanos*, 547 U.S. 715 (No. 04-1034).

128. *See, e.g., id.* (arguing that the Clean Water Act should be interpreted to cover tributaries of traditional navigable waters because “pollution of the tributary has the potential to degrade the quality of the traditional navigable waters downstream”).

129. *Rapanos*, 547 U.S. at 757.

130. *Id.* at 722; *see also id.* at 738 (opining that “the Corps’ interpretation stretches the outer limits of Congress’s commerce power and raises difficult questions about the ultimate scope of that power”).

131. *Id.* at 721. Justice Scalia’s plurality opinion garnered the support of only three other Justices. *Id.* at 718. Justice Kennedy concurred in the judgment, but proposed a test that is significantly broader than the plurality’s test. *Id.* at 759–87. Justice Kennedy’s test requires a showing of a “significant nexus” between wetlands and navigable waters. *Id.* at 779. According to Justice Kennedy, “wetlands possess the requisite nexus, and thus come within the statutory phrase ‘navigable waters,’ if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable.’” *Id.* at 780. Because no opinion garnered the support of a majority of the Court, there is some uncertainty about what test controls the interpretation of “waters of the United States.” In his dissent, Justice Stevens suggested that, given that all four dissenting Justices would uphold Clean Water Act jurisdiction in any case that satisfies either the plurality’s standard or Justice Kennedy’s standard, courts should find jurisdiction under either standard. *Id.* at 810. Most circuits have followed Justice Stevens’s suggestion. *See* Robin Kundis Craig, *Agencies Interpreting Courts Interpreting Statutes: The Deference Conundrum of a Divided Supreme Court*, 61 EMORY L.J. 1, 59–60 (2011).

3. Sackett v. EPA (2012)

Sackett v. EPA,¹³² which like *SWANCC* and *Rapanos* arose under the Clean Water Act, posed a question regarding access to judicial review rather than the scope of the statute's regulatory jurisdiction. The Sacketts owned a residential lot near Priest Lake in Idaho, on which they planned to construct a house.¹³³ They placed apparently significant amounts of dirt and rock on the surface of the site to prepare it for construction, without seeking a Clean Water Act permit.¹³⁴ The EPA concluded that the property included wetlands that were "waters of the United States" covered by the Clean Water Act and issued a compliance order requiring the Sacketts to restore their property.¹³⁵ The Sacketts sued the EPA to challenge the compliance order, arguing that their property did not include "waters of the United States" subject to regulation under the Clean Water Act.¹³⁶

The EPA argued that its compliance order was not subject to immediate judicial review, contending that Clean Water Act compliance orders "fall within the broad range of communications that agencies use to inform regulated parties of governing legal requirements and existing violations, to encourage voluntary compliance or remedial measures, and to initiate consultation between the agency and the regulated person."¹³⁷ Thus, the agency argued, allowing judicial review would thwart the agency's use of administrative orders to induce compliance with the Clean Water Act.¹³⁸ Instead, judicial review should await the agency's decision whether to file a civil enforcement action in court.¹³⁹

The Supreme Court unanimously disagreed, holding that the compliance order was final agency action subject to judicial review under the Administrative Procedure Act (APA).¹⁴⁰ Important to the Court's decision was the presumption that people aggrieved by an agency decision have a right

132. 566 U.S. 120 (2012).

133. *Id.* at 124.

134. *Id.*

135. *Id.*

136. *Id.* at 125.

137. Brief for the Respondents at 10, *Sackett*, 566 U.S. 120 (No. 10-1062); *see also id.* at 13 (noting that a compliance order "may obviate the need for judicial intervention, either by inducing voluntary implementation of the measures specified therein, or by triggering a process of consultation between the agency and the alleged violator that produces a mutually acceptable alternative resolution").

138. *Id.* at 39–40 ("Treating compliance orders as immediately reviewable would create a significant disincentive to their use . . .").

139. *Id.* at 27.

140. *Sackett*, 566 U.S. at 131.

to challenge that decision in a court.¹⁴¹ In response to the EPA's argument that allowing judicial review would threaten the agency's ability to use compliance orders, the Court recast the agency's position as an attempt "to enable the strong-arming of regulated parties into 'voluntary compliance' without the opportunity for judicial review."¹⁴²

4. *Army Corps of Engineers v. Hawkes Co.* (2016)

*Army Corps of Engineers v. Hawkes Co.*¹⁴³ raised again a question of access to judicial review to challenge an agency decision under the Clean Water Act. Three companies owned a parcel of land in Minnesota on which they planned to mine peat, an organic material found in wetlands and bogs that can be used for soil improvement, burning for fuel, and maintaining greens on golf courses.¹⁴⁴ The companies applied to the Corps of Engineers for a § 404 permit to conduct peat mining operations on the land.¹⁴⁵ In response, the Corps indicated that the permitting process would be expensive and time-consuming.¹⁴⁶ As part of the permitting process, the Corps issued a jurisdictional determination finding that wetlands on the property were "waters of the United States" subject to regulation under the Clean Water Act.¹⁴⁷ The companies sued the Corps to challenge the jurisdictional determination.¹⁴⁸

The Corps argued that its jurisdictional determination was not "final agency action" subject to judicial review under the APA, contending that judicial review should await the conclusion of the permitting process.¹⁴⁹ The Corps noted that the Clean Water Act does not require the agency to issue stand-alone jurisdictional determinations and that, if the agency did not issue stand-alone jurisdictional determinations but rather simply included jurisdictional determinations as part of the permitting process, landowners such as the Sacketts could not seek judicial review until the conclu-

141. *Id.* at 128–29.

142. *Id.* at 131; *id.* at 132 (Alito, J., concurring) ("The position taken in this case by the Federal Government—a position that the Court now squarely rejects—would have put the property rights of ordinary Americans entirely at the mercy of Environmental Protection Agency (EPA) employees.").

143. 136 S. Ct. 1807 (2016).

144. *Id.* at 1812.

145. *Id.* at 1812–13.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* at 1813.

sion of the permitting process.¹⁵⁰ The Corps issues stand-alone jurisdictional determinations “to assist landowners and others in evaluating their potential statutory obligations.”¹⁵¹ To subject jurisdictional determinations to judicial review and thereby disincentivize the agency from issuing them as stand-alone decisions would merely deprive the landowners of the benefits of a stand-alone decision.¹⁵²

The Supreme Court unanimously disagreed, holding that the jurisdictional determination was final agency action subject to judicial review under the APA.¹⁵³ Again as in *Sackett*, the presumption in favor of judicial review factored strongly in the Court’s decision.¹⁵⁴ The Court expressed a strong concern for landowners if they were unable to challenge a jurisdictional determination, forcing them to face the risk of criminal or civil penalties or undergo an “arduous, expensive, and long” permitting process.¹⁵⁵ The Court acknowledged what it referred to as the Corps’ “count your blessings” argument that landowners were better off with an unreviewable jurisdictional determination than without a stand-alone jurisdictional determination at all, but concluded that the argument’s practicalities were “not an adequate rejoinder to the assertion of a right to judicial review under the APA.”¹⁵⁶

B. Observations

Collectively, *SWANCC*, *Rapanos*, *Sackett*, and *Hawkes* exhibit a strong common pattern—and not just because they all involve the Clean Water Act. EPA and the Corps developed an administrative system that enforced a statute (the Clean Water Act). The administrative system was composed of elements that included interpretations of regulatory jurisdiction, administrative compliance orders, and jurisdictional determinations. The agencies created their administrative enforcement system with the aim of achieving the statutory goal of redressing water pollution. The administrative system effectively accomplished the statutory objectives and led to internally consistent outcomes in which the agencies applied their substantive and procedural standards to adjudicate individual cases. Outcomes of individual cases were justified by reference to their consistency within the administrative system. None of the cases involved an argument that the agencies were act-

150. Brief for the Respondents at 21–22, *Hawkes*, 136 S. Ct. 1807 (No. 15-290).

151. *Id.* at 21.

152. *Id.* at 24.

153. *Hawkes*, 136 S. Ct. at 1816.

154. *Id.*

155. *Id.* at 1815.

156. *Id.* at 1816.

ing inconsistently with their standards. Rather, the cases challenged the standards themselves.

On judicial review, the Supreme Court rejected some aspects of the agencies' administrative system based on perceived inconsistencies with broader first principles. In *SWANCC* and *Rapanos*, the relevant first principle was limited federal regulatory authority. In *Sackett* and *Hawkes*, the principle was protecting access to judicial review. All four cases implicate even broader principles that can be framed as restraining governmental power and protecting private property rights. Unlike the agencies, the Supreme Court was not focused primarily on whether the agencies' administrative enforcement system was redressing water pollution or achieving consistently adjudicated outcomes across individual cases—that is, on the system's internal consistency. Instead, the Court was focused on whether the system itself was justified in reference to fundamental principles—the system's external consistency.

In this sense, each case exemplifies the remarkable reorientation that a case undergoes as it moves through the administrative system and then up through the courts during judicial review.¹⁵⁷ In the initial stages, the agency is focused on applying its statute, regulations, and policies to the facts of the particular case. In doing this, the agency's objective is to achieve internal consistency by treating the particular case as it has treated other similar cases. The agency is understandably not focused on whether the requirements and policies it is applying are appropriate as evaluated by reference to some external standard. Indeed, were the agency to approach each case by rethinking its entire administrative system, this would undo many of the key advantages of creating the system in the first place, including efficiency and predictability. As the case proceeds through judicial review and ascends the judicial hierarchy, the issues narrow, facts become fixed, and the evaluative perspective broadens. Courts begin to question core assumptions previously unexamined.

To defend the role of courts in enforcing first principles, as the Court did in *SWANCC*, *Rapanos*, *Sackett*, and *Hawkes*, is not to say that those cases were necessarily correctly decided. Indeed, the plurality opinion in *Rapanos* in particular stands out as especially erroneous, including among other reasons that it seems premised on misunderstandings of hydrology¹⁵⁸ and the

157. Cf. Dyzenhaus & Taggart, *supra* note 91, at 148 (“As cases progress up the hierarchy of the courts, the primacy of the dispute-resolution function gives way to the lawmaking function.”).

158. For example, in defending its condition that waters must be “relatively permanent” to fall within the scope of the Clean Water Act, the plurality carefully distinguished “seasonal rivers,” which it conceded might qualify as “waters of the United States,” from

science of water pollution.¹⁵⁹ In this sense, the cases also illustrate the dangers of an active judicial role in reviewing agency decisions that rely so heavily on agency expertise in a technical area of law that judges do not understand. But even acknowledging that courts may err, judicial review remains a powerful and essential mechanism to require agencies to justify how their administrative systems are consistent with first principles.

Despite the consistent outcomes across *SWANCC*, *Rapanos*, *Sackett*, and *Hawkes*—in each case, the agency lost—agencies will not inevitably lose authority when courts evaluate administrative systems through the lens of first principles. The 2010 D.C. Circuit case of *General Electric v. Jackson*,¹⁶⁰ in which the EPA successfully defended its CERCLA enforcement regime

“intermittent” rivers, which would not. *Rapanos v. United States*, 547 U.S. 715, 732 n.5 (2006). It, moreover, equated “intermittent” rivers with “ephemeral” rivers. *Id.* at 726–27 (noting cases involving “intermittent” waters as examples of cases in which the Corps made “sweeping assertions of jurisdiction over *ephemeral* channels and drains”) (emphases added). Hydrologically, however, seasonal and intermittent rivers mean the same thing, and both differ significantly from ephemeral rivers. An “[i]ntermittent or seasonal” stream is “[o]ne that flows only at certain times of the year when it receives water from springs or from some surface source such as melting snow in mountainous areas.” 1 W. B. LANGBEIN & KATHLEEN T. ISERI, *MANUAL OF HYDROLOGY* 18 (U.S. Geological Survey, 1960). An “[e]phemeral” stream, by contrast, is “[o]ne that flows only in direct response to precipitation, and whose channel is at all times above the water table. *Id.* Thus, although the plurality was clear in its intent to include perennial waters—that is, waters “which flow[] continuously,” *id.*—and to exclude ephemeral waters, its treatment of waters in between these two extremes is internally contradictory.

159. The *Rapanos* plurality contended that the Army Corps of Engineers and the EPA had defined “waters of the United States” to extend federal jurisdiction beyond what legitimately could be called water pollution. *See* 547 U.S. at 722. The plurality reasoned that depositing fill material in areas excluded from the plurality’s definition generally would not pollute rivers, streams, and lakes because fill material “does not normally wash downstream.” *See id.* at 744. The plurality’s assertion rested solely on statements made in three amicus briefs. *Id.* at 744 n.11. Those amici primarily relied on a single package of training materials, posted on a private corporation’s website, and contained no indication of the extent to which the scientific community had tested or accepted the assertion. *See* Brief for Foundation for Environmental and Economic Progress et al. as Amici Curiae in Support of Petitioners at 29 n.53, *Rapanos*, 547 U.S. 715 (Nos. 04-1034 & 04-1384), 2005 WL 3322931, at *29; Brief of Pulte Homes, Inc. et al. as Amici Curiae in Support of Petitioners at 20, *Rapanos*, 547 U.S. 715 (Nos. 04-1034 & 04-1384), 2005 WL 3308790, at *20. The fact that these amicus briefs primarily relied on one unpublished document raises suspicion that the assertion is not generally accepted in the scientific community. *See generally* Todd S. Aagaard, *Factual Premises of Statutory Interpretation in Agency Review Cases*, 77 *GEO. WASH. L. REV.* 366, 368–69 (2009).

160. 610 F.3d 110 (D.C. Cir. 2010).

against a due process challenge, provides an apt example of what a positive experience with first principles can look like for the agency. In the case, General Electric challenged the EPA's use of unilateral administrative orders requiring a potentially responsible party to undertake a cleanup of a contaminated site, pursuant to CERCLA § 106.¹⁶¹ A potentially responsible party who has received a unilateral administrative order must either comply with the order or refuse to comply, risking fines of \$37,500 per day if a court subsequently finds that the noncompliance lacked a good-faith basis.¹⁶² General Electric argued that this scheme deprived potentially responsible parties of their right to due process because the specter of a heavy fine essentially forced them to comply even with invalid orders.¹⁶³ The D.C. Circuit rejected General Electric's challenge, holding that the statute adequately protected potentially responsible parties by imposing fines only for willful violations of orders without sufficient cause.¹⁶⁴

Similarly, the Supreme Court's decision in *Massachusetts v. EPA*¹⁶⁵ also shows that judicial review based in first principles can support, rather than limit, agency regulatory authority. In *Massachusetts v. EPA*, the Court held that the EPA had failed to justify its decision under the Clean Air Act not to regulate greenhouse gas emissions from the tailpipes of new automobiles.¹⁶⁶ Although the agency putatively lost the case, the ultimate effect of the Supreme Court's ruling is to support broader regulatory authority. As Jody Freeman and Adrian Vermeule have written, the case can be understood as an affirmation of the principle of agency expertise and a rejection of politicization of agency decisionmaking.¹⁶⁷ In that sense, *Massachusetts v. EPA* exemplifies, albeit in an unusual posture, judicial review based on first principles that supports agency regulatory authority.

Part III described administrative adjudication as fundamentally replicative, in that it focuses on replicating the administrative enforcement system through internally consistent outcomes. Judicial adjudication, as opposed to administrative adjudication, is thus fundamentally creative in nature. At least at the appellate court level—for the EPA, the circuit courts of appeals

161. *Id.* at 114 (citing 42 U.S.C. § 9606 (2012)).

162. *Id.* at 115 (citing 42 U.S.C. § 9606 and 73 Fed. Reg. 75,340, 75,340–46 (Dec. 11, 2006)).

163. *Id.* at 118.

164. *Id.*

165. 549 U.S. 497 (2007).

166. *Id.* at 528–35.

167. See Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 52 (2007) (arguing that the case is “best understood” as an example of the Justices’ willingness “to override executive positions that they found untrustworthy, in the sense that executive expertise had been subordinated to politics”).

and Supreme Court—courts do not merely ensure that similar cases are being decided similarly or that adequate evidence supports the decision. Rather, courts, if they are to play their role in ensuring that agencies' decisions are justified, fundamentally deconstruct and then reconstruct the agency's process to make sure that the agency is abiding by first principles. In this context, the court's inexperience and ignorance, which limit its ability to find and correct errors, turn out to be important advantages that strengthen the process of justification the agency must undertake. Agencies need to be tested, and courts focused on first principles are well placed to do the testing. The same traits that allow agencies to make predictable, consistent, and efficient decisions also render them susceptible to "rigidity and displacement of objectives by bureaucratic routine."¹⁶⁸

Courts overstep their bounds and undermine agencies; however, when they fail to defer to the agency's expertise in understanding the context in which the agency is operating. It is one thing for the Supreme Court to be concerned that the EPA and the Corps are acting without sufficient regard for private property rights, and to force the agencies to justify their enforcement programs. It is quite another for the Court to assert that it can restrict the agencies' regulatory jurisdiction without impairing the effectiveness of the agencies' ability to protect water quality—essentially, to avoid the hard questions by disregarding the agencies' expertise. That is judicial hubris, which is no improvement over blindered thinking at the agency.

V. SYNTHESIS

Agencies and courts each have crucial roles to play in implementing the Rule of Law. Agencies are expert specialists, which agencies use to create administrative systems that decide matters accurately and consistently. Courts are generalists, which courts use to scrutinize administrative systems to ensure they adhere to first principles that reflect the core values of our legal system. Given the respective advantages—but also the inherent tension—between specialist agencies and generalist courts, the legal system must appropriately balance the authorities and roles of the two institutions.¹⁶⁹

One way to balance agencies and courts is to equalize but differentiate their roles, consistent with the checks-and-balances framework that is a pil-

168. Jaffe, *supra* note 26, at 1188.

169. Michel Rosenfeld has somewhat similarly argued that "at least in the context of constitutional democracy, the rule of law appears to rest on a paradox" in that the Rule of Law requires an "institutional framework" by which government exercises authority against citizens to enforce the law but also requires "protection of fundamental constitutional rights" that protects citizens against the state. Rosenfeld, *supra* note 30, at 1309.

lar of our constitutional system. Checks and balances reflect an understanding that the same traits that give agencies and courts their advantages can also lead to errors in judgment. Agencies' focus on the internal effectiveness of their systems can lead them to overlook discrepancies with broader principles, which is why the role of courts in judicial review of agency decisions is so important. Similarly, courts' focus on core principles instead of specialization impairs their capacity to understand the practicalities or technicalities of an area of law, which is why deference to agencies is so important. The checks-and-balances approach thus places a heavy burden on the judgment of courts to exercise rigorous oversight while maintaining deference—and to understand that they can do both. Agencies, in turn, must be ready to explain themselves to courts, recognizing that deference can constrain and focus courts' oversight but does not absolve agencies from having to justify their systems' consistency with first principles to the court.

Another way to balance the administrative and judicial roles is to hybridize the roles of agencies and courts—that is, for agencies to think more like courts and for courts to think more like agencies. Such an approach admittedly runs contrary to the inherent and in many ways beneficial orientations of agencies and courts, which have been discussed throughout this Article. But agencies surely can, and do to some extent, pay more attention to first principles such as due process without sacrificing the advantages of expert specialization. For example, agencies exercise enormous prosecutorial discretion in deciding what violations to pursue and what penalties to seek. In exercising this discretion, agencies can consider factors such as first principles. And courts surely can, and do to some extent, show contextual flexibility and a focus on practical consequences in the application of general principles without sacrificing the advantages of an outsider's perspective.

The effectiveness of an agency's efforts to integrate first principles likely depends on the depth of the integration. Agencies that consider first principles only in litigating defenses to their decisions or in exercising their prosecutorial discretion are engaging in half measures that relegate what should be core values to mere interstitial spaces in agency decisionmaking—better than nothing, but falling far short of full effectuation. Agencies looking to incorporate first principles into their administrative systems should instead look to embed the principles in agency rules, policies, and procedures alongside more program-specific policy objectives. The shortcomings identified by the Court in *Sackett* and *Hawkes* stemmed not from agency decisions about which enforcement cases to pursue, but rather from creating programs that withheld opportunities for citizens to contest the ba-

ses for the government's actions.¹⁷⁰

With either a checks-and-balances approach or a hybridization approach, agencies and courts must be respectful toward each other and on constant guard against hubris and overreach. Properly understood, the relationship between agencies and courts is not hierarchical. Rather, agencies and courts should be engaged in a constructive and mutually respectful dialogue that leverages each institution's advantages.¹⁷¹ Even when agency decisions are subjected to judicial review, courts should be deferential to the agency's practical understanding of the context in which it operates and to the necessities of administering a bureaucratic system.

CONCLUSION

Agencies in their role as expert administrators enjoy great advantages over other government institutions. But agencies, even as they focus on their specialized areas in order to exercise their expertise, also face challenges not to lose sight of broader principles and core values. Judicial review of agency action is thus vital to the integrity of the administrative system, not so much to correct errors, but to check whether the administrative

170. Of course, any principle can be taken too far or misused. For example, EPA Administrator Scott Pruitt has been accused, for example, of undermining science and integrity with policies promulgated under the banner of first principles. *Compare* Strengthening Transparency in Regulatory Science, 83 Fed. Reg. 18,768 (proposed Apr. 30, 2018) (proposing, on the ground of transparency, a rule that would limit the EPA to using publicly available data as the basis for regulation), *with* Jeff Tollefson, *EPA Science Advisors Question "Secret Science" Rule on Data Transparency*, SCI. AM. (June 1, 2018), <https://www.scientificamerican.com/article/epa-science-advisors-question-secret-science-rule-on-data-transparency/> ("Scientists and environmentalists have decried the EPA's proposal, noting that many important epidemiological studies are based on public-health data that cannot legally be released due to privacy concerns."); *compare also* Memorandum from E. Scott Pruitt, Adm'r, Env'tl. Prot. Agency, to Assistant Adm'rs, Adhering to the Fundamental Principles of Due Process, Rule of Law, and Cooperative Federalism in Consent Decrees and Settlement Agreements (Oct. 16, 2017) (terminating certain agency settlement practices on the ground that they "appear to be the result of collusion with outside groups"), *with* Timothy Cama, *Former EPA Attorneys Slam 'Sue and Settle' Policy*, THE HILL (Nov. 13, 2017, 4:42 PM), <https://thehill.com/policy/energy-environment/360164-former-epa-attorneys-slam-sue-and-settle-policy> (reporting letter from fifty-seven former EPA attorneys that "accused EPA Administrator Scott Pruitt of deliberately misrepresenting legal settlement practices" in his policy memorandum).

171. *See* Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1550 (1992) (advocating judicial review of agency action that "would become a meaningful dialogue between court and agency in which the court stands in for the knowledgeable citizen that the agency must persuade to accept the regulatory policy").

system is functioning in accordance with our national values. The cases summarized in this Article¹⁷² illustrate the challenge that agencies face when forced to justify their systems by reference to criteria that might not be front of mind to the agency personnel charged with implementing the agency's administrative enforcement system. Just as the Rule of Law requires courts to justify their decisions with principled reasoning, the Rule of Law also requires agencies to justify their administrative systems as consistent with first principles. Because ultimately it is the process of pursuing principled justification that distinguishes the Rule of Law from the mere "rule of men."

As Jeremy Waldron has observed, "[t]he Rule of Law is a multi-faceted ideal."¹⁷³ There are many formulations of what the Rule of Law requires, and each particular formulation includes multiple tenets.¹⁷⁴ The task of institutionalizing the Rule of Law therefore requires effectuating its multiple facets. The difficulty of this task is exacerbated by the fact that the elements of the Rule of Law are sometimes operationally in tension with one another. The focused expertise of the agency renders it susceptible to blindered thinking, and the expansive purview of the court hobbles the court's ability to understand specific context, especially when scientific or technical detail is involved. There is no easy answer to resolving this tension. Agencies and courts can start by being more cognizant of their limitations and blind spots. After that, perhaps the most we can hope for is a continuing messy and iterative dialogue between two sets of institutions who deal on a daily basis with very real-world problems.

Many examinations of the Rule of Law proceed abstracted from any particular instantiation of the concept. Such philosophical inquiries are important to the development of scholarship and knowledge, and they befit the Rule of Law's idealism. Too little attention, however, has examined the institutionalization of the Rule of Law—how real-world institutions making decisions under constraints can reflect fundamental aspects of the Rule of Law, even as they inevitably fall short of fully achieving the ideal. There exists a danger that abstracted analyses of the Rule of Law will perpetuate a Nirvana Fallacy.¹⁷⁵ Without understanding better how to balance and to

172. See *supra* Part IV.

173. Waldron, *supra* note 50, at 6.

174. See *supra* Part II; see also Stack, *supra* note 50, at 1990 (observing that "rule-of-law theories have a tendency toward lists of elements"); Waldron, *supra* note 40, at 5 ("Theorists of the Rule of Law are fond of producing laundry lists of demands.").

175. See ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 1, 10 (2006) (cautioning against falling prey to the "nirvana fallacy," a description of analyses which "juxtaposes a romantic picture of one in-

effectuate the competing demands of the Rule of Law in the complex reality in which government institutions operate, there is a danger that we will buy into the misperception that both everything is possible and that nothing is done well, sowing naïve expectations on the one hand and cynical critique on the other.

stitution . . . with a jaundiced picture of others”); Harold Demsetz, *Information and Efficiency: Another Viewpoint*, 12 J.L. & ECON. 1, 1 (1969) (advocating comparative institutional analysis, which chooses among “alternative real institutional arrangements,” over a “nirvana approach,” which merely chooses between “an existing ‘imperfect’ institutional arrangement” and “an ideal norm”).