SIDESTEPPING SUBSTANCE: HOW ADMINISTRATIVE LAW PLAYS AN OUTSIZED ROLE IN SHAPING ENVIRONMENTAL POLICY AND WHY RECALIBRATION IS NECESSARY

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Administrative law and environmental law are companion fields. Still, they are not interchangeable. They promote different values. And yet, sometimes when courts resolve environmental disputes by relying on administrative doctrines, courts elevate the values of administrative law over those codified in environmental statutes. This is particularly concerning when courts rely on judicially-created administrative law doctrines to sidestep congressional intent as expressed by the substantive aims of environmental statutes.

To reduce the risk of sidestepping—whether inadvertent or intentional—this Article critically examines how administrative law doctrines can undermine environmental law. Drawing on prominent case examples, including the Supreme Court decision in Sackett v. EPA*, this Article shows how administrative law can be operationalized to destabilize environmental law, thwart the law's need for predictability, and otherwise create pathways for judicial activism. This Article goes on to examine the three features of administrative law that allow courts to use it as a tool for sidestepping environmental law's normative aims: fluidity in individual application, evolution over time, and roots in tenuous textual tethers.*

Ultimately, this Article calls for a recalibrated approach to the relationship between administrative law and environmental law in judicial review—one that puts administrative law in its place and gives due respect to the values that Congress codified in the underlying environmental statutes. Doing so will foster the integrity of both fields.

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INTRODUCTION

Not everyone is a fan of environmental regulation.[1] But individual

1. Antoine Dechezleprêtre & Misato Sato, *The Impacts of Environmental Regulations on Competitiveness*, 11 REV. OF ENV'T ECONS. & POL'Y 183, 183–206 (2017) ("Ever since the first major environmental regulations were enacted in the 1970s, there has been much debate about their potential impacts on the competitiveness of affected firms."); *see* Yujuan Wu & Jacquline Tham, *The Impact of Environmental Regulation, Environment, Social and Government Performance, and Technological Innovation on Enterprise Resilience Under a Green Recovery*, HELIYON, Oct. 2023, at 1, 3 ("There exist two overarching schools of thought regarding environmental regulation and technological innovation. The first . . . is rooted in neoclassical economics and posits that such

opinion and ideology are not the measure of what law means. And yet, the judiciary—the very branch of government that is supposed to exhibit the greatest amount of arms-length discipline in respecting congressional intent—has sometimes fallen prey to a strange brand of disregard, or outright disdain, for the public interest values of environmental law.

The U.S. Supreme Court's handling of environmental cases, in particular, has invited study and critique by law several prominent scholars. Oliver A. Houck has suggested a "Dark Cannon" plagues environmental cases at the Supreme Court: "By the end of the 1970's, the Court was turning unmistakably hostile, creating a canon of jurisprudence that was not only negative but marked by questionable reasoning, mischaracterization of fact and law, and an evident bias against environmental programs and those who argued in their favor."[2] Likewise, in his book *Environment in the Balance: The Green Movement and the Supreme Court*, Johnathan Z. Cannon observes that the Supreme Court largely embraced environmental values at the start of the modern environmental movement but "has since distanced itself and adopted a more neutral and often even skeptical stance in its environmental decisions."[3] Richard J. Lazarus has made similar observations: "The Supreme Court's attitude towards environmental law during the past three decades has generally been marked by apathy, but with the Justices exhibiting increasing signs of skepticism and some hostility."[4] Each of these scholars, and others, have grappled to make sense of the puzzling disregard for laws meant to enhance quality of life and human survival.[5]

If true, these observations are both troubling and perplexing. After all, many generations of jurists have counseled restraint when asked to play too heavy a role in shaping policy—a task better left to the elected branches.[6] And

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regulations impose a heavy burden on enterprises while impeding their progress.").

2. Oliver A. Houck, *Arbitrary and Capricious: The Dark Canon of the United States Supreme Court in Environmental Law*, 33 GEO. ENV'T L. REV. 51, 52 (2020).

3. JOHNATHAN Z. CANNON, ENVIRONMENT IN THE BALANCE: THE GREEN MOVEMENT AND THE SUPREME COURT 2 (2015).

4. Richard J. Lazarus, *Restoring What's Environmental About Environmental Law in the Supreme Court*, 47 UCLA L. REV. 703, 771 (2000); *see also* Richard J. Lazarus, *The Scalia Court: Environmental Law's Wrecking Crew Within the Supreme Court*, 47 HARV. ENV'T L. REV. 407, 441 (2023) ("[F]or his three decades on the Court, Scalia practiced what he had previously preached. He promoted a dramatically scaled back version for environmental law[.]").

5. *See* MARY CHRISTINA WOOD, NATURE'S TRUST: ENVIRONMENTAL LAW FOR A NEW ECOLOGICAL AGE 108 (2014) ("The judiciary has made a dramatic retreat in the field of environmental law over the last few decades."); J.B. Ruhl, *The Endangered Species Act's Fall from Grace in the Supreme Court*, 36 HARV. ENV'T L. REV. 487, 490 (2012).

6. *See* J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 255 (2009) ("[W]hen the channels of democracy are functioning properly, judges

so, faced with the prospect that courts, or at least the Supreme Court, employ a different version of judicial restraint in the area of environmental law, one might logically presume the laws themselves allow for such a pattern of disregard. Perhaps one might ask: Was Congress unclear about the protectionist values embodied in these laws? Not so. The depth, breadth, and longevity of the major federal environmental statutes counsel an approach that heeds their public-minded purpose and gives them appropriate respect as intentional counterweights to unregulated consumption.[7]

How is it, then, that courts can be strangely reticent to champion these codified commitments without tripping the alarm bells of judicial activism?[8] For answers, this Article turns its gaze upon administrative law.[9] In particular, this work asserts that the nature of administrative law—fluid in individual

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should be modest in their ambitions and overrule the results of the democratic process only where the constitution unambiguously commands it."); *see also* United States v. Richardson, 418 U.S. 166, 188 (1974) (Powell, J., concurring) ("The public confidence . . . may well erode if we do not exercise self-restraint in the utilization of our power to negative the actions of the other branches. We should be ever mindful of the contradictions that would arise if a democracy were to permit general oversight of the elected branches of government by a nonrepresentative, and in large measure insulated, judicial branch."). *See generally* Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CAL. L. REV. 519 (2012) (offering a typology and history of judicial restraint).

7. *See generally* Sanne H. Knudsen, *The Exoskeleton of Environmental Law: Why the Breadth, Depth, and Longevity of Environmental Law Matters for Judicial Review*, 2023 UTAH L. REV. 1 (2023).

8. At least one prominent scholar has identified the judicial retreat from upholding environmental law's objectives as its own form of activism. *See* Robert L. Glicksman, *A Retreat from Judicial Activism: The Seventh Circuit and the Environment*, 63 CHI.-KENT L. REV. 209, 210 (1987) ("To the extent the recent reduced judicial promotion of environmental objectives is attributable to these beliefs, the courts are engaging in a kind of activism which may improperly elevate the judges' own policy preferences over legislative policy decisions.").

9. At times, other scholars have also criticized how various features of administrative law undermine the public interest values of environmental law. *See, e.g.*, WOOD, *supra* note 5, at 110–12 (in what she calls the "Judicial Deference Syndrome," criticizing courts for giving agencies too much deference in their implementation of environmental statutes); LISA A. KLOPPENBERG, PLAYING IT SAFE: HOW THE SUPREME COURT SIDESTEPS HARD CASES AND STUNTS THE DEVELOPMENT OF LAW 39 (2001) (calling the Supreme Court's use of "standing" an "avoidance strategy [that] thwarted congressional intent [of environmental statutes] by substantially limiting the ability of citizen plaintiffs to enforce environmental laws"); *see also* Daniel E. Walters, *Symmetry's Mandate: Constraining the Politicization of American Administrative Law*, 119 MICH. L. REV. 455, 484–509 (2020) (outside the environmental law context, critiquing the asymmetry in administrative law's approach to agency action and inaction); Scott A. Keller, *Depoliticizing Judicial Review of Agency Rulemaking*, 84 WASH. L. REV. 419, 424 (2009) ("Quite simply, administrative law doctrines need to be modified to prevent unelected judges from using their policy preferences to invalidate agency rulemaking.").

application, evolving over time, rooted in tenuous textual tethers—allows courts to use it to obscure environmental law's normative aims, whether intentionally or inadvertently.[10] Indeed, many of the choices driven by administrative law are potentially backdoor paths for courts to set environmental policy without having to directly engage the normative choices written into laws themselves.[11]

Consider that administrative law controls the role that courts will assume in reviewing agency actions—whether to give agency deference on issues of statutory and regulatory interpretation,[12] how critical of a hard look is required by the arbitrary and capricious standard of review,[13] how clearly Congress must speak in order to be heard on issues "of vast economic and political significance."[14] Administrative law also controls access to the courts—shaping the standing threshold,[15] determining when agency action constitutes final agency action subject to review,[16] or articulating when review of agency inaction is appropriate.[17] Because of the power wielded by administrative law to shape substantive outcomes, the failure to think critically about its role in resolving disputes increases the risk that courts sidestep the public-minded values embodied in federal environmental statutes.

An example might help illustrate the point. Consider the Supreme Court's decision in *West Virginia v. EPA*.[18] The central issue of statutory substance was whether § 111 of the Clean Air Act[19] permits the Environmental Protection Agency (EPA) to regulate carbon emissions from existing power plants by imposing so-called "beyond the fence line" measures that would effectively shift power generation from coal-fired plants to natural gas plants

10. *See infra* Part II.B.

11. *See infra* notes 18–31 and accompanying text.

12. *See, e.g.*, Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024); Kisor v. Wilkie, 139 S. Ct. 2400, 2414 (2019); Auer v. Robbins, 519 U.S. 452, 461 (1997); Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 863–64 (1984); Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

13. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins., 463 U.S. 29, 43 (1983); Fed. Commc'ns Comm'n v. Fox Television Stations, Inc., 556 U.S. 502, 514 (2009).

14. West Virginia v. EPA, 142 S. Ct 2587, 2605 (2022).

15. *See, e.g.*, Lujan v. Defs. of Wildlife, 504 U.S. 555, 559–60 (1992); Summers v. Earth Island Inst., 555 U.S. 488, 491–93 (2009); Friends of Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167, 180–81 (2000).

16. U.S. Army Corps of Eng'rs v. Hawkes Co., 578 U.S. 590, 597 (2016).

17. Norton v. S. Utah Wilderness All., 542 U.S. 55, 57–58 (2004).

18. 142 S. Ct at 2587.

19. Clean Air Amendments of 1970, Pub. L. No. 91-604, § 111, 84 Stat. 1676 (codified as amended at 42 U.S.C. § 1857b).

or renewables.[20] On its face, this case presents a technical issue under a complex statute[21] that prioritizes protecting the public health and welfare with a precautionary approach[22] and gives EPA authority to regulate greenhouse gas emissions to combat the dangers of climate change.[23]

With such a case in hand, one would expect the Court to have wrestled with the statutory intricacies of the Clean Air Act: engaging in a sophisticated discussion about the role of § 111 in regulating stationary sources alongside the complementary and sometimes overlapping authorities available to EPA under other sections of Act; recounting the precautionary nature of the Clean Air Act and Congress's decision throughout the Act not just to allow, but require, government regulation of mobile and stationary sources for emissions found to endanger the public health and welfare;[24] respecting that EPA made such an expert determination for greenhouse gases in 2009;[25] examining how the technology-facing nature of the Act serves the ultimate purpose of protecting public health;[26] or considering that the breadth of the Act reflects a delegation of power that is flexible not ambiguous.[27]

But not so. The majority opinion spent most of its intellectual energy on unveiling and defending the major questions doctrine.[28] According to the

20. *See* Rachel Reed, *Supreme Court Preview:* West Virginia v. EPA, HARVARD LAW TODAY (Feb. 28, 2022), https://hls.harvard.edu/today/scotus-preview-west-virginia-v-epa ("These building blocks included not only reducing the carbon intensity of electricity generation at a power plant, but also actions that occur 'beyond the fence line' of any individual power plant, such as shifting power generation from coal-fired plants to natural gas plants or renewables."); *see also West Virginia*, 142 S. Ct. at 2602–04.

21. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 848 (1984) ("The Clean Air Act Amendments of 1977 are a lengthy, detailed, technical, complex, and comprehensive response to a major social issue.").

22. *See* Lead Indus. Ass'n v. EPA, 647 F.2d 1130, 1155 (D.C. Cir. 1980) (noting "the Act's precautionary and preventive orientation"); *see also* Coal. for Responsible Regul., Inc. v. EPA, 684 F.3d 102, 122 (D.C. Cir. 2012).

23. *See* Massachusetts v. EPA, 549 U.S. 497, 532 (2007).

24. *See id.* at 533 ("Under the clear terms of the Clean Air Act, EPA can avoid taking further action only if it determines that greenhouse gases do not contribute to climate change . . . .").

25. Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496, 66,497 (Dec. 15, 2009).

26. Massachusetts v. EPA, 549 U.S. at 531.

27. *Id.* at 532 ("The broad language of § 202(a)(1) reflects an intentional effort to confer the flexibility necessary to forestall such obsolescence" (citing Pa. Dep't of Corr. v. Yeskey, 524 U.S. 206, 212 (1998) ("[T]he fact that a statute can be 'applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.'"))).

28. *Cf.* Jonathan H. Adler, West Virginia v. EPA*: Some Answers About Major Questions*, 2021–2022 CATO SUP. CT. REV. 37, 38–39 ("By skimping on statutory analysis and front-

Court, some questions are so politically and economically significant that courts should not recognize agency authority unless Congress speaks with particular clarity.[29] In the end, that doctrine provided the Court a mechanism for avoiding a more substantive, expert-driven discussion steeped in the broader goals of the Act. The Court also avoided deferring to EPA if the Act proved ambiguous and the agency interpretation proved reasonable.[30]

West Virginia v. EPA illustrates how administrative law can be used as a powerful tool in shaping environmental policy. By invoking the major questions doctrine, the Court cabined EPA's options for regulating greenhouse gases with fairly minimal engagement of a complex statute.[31] Under the cover of administrative law, the Court positioned itself at the apex of power.[32] It did so by creating a doctrine that demands greater clarity from Congress on certain issues and then assigning itself the power to identify those issues on an ad hoc basis. In this way, the newly minted doctrine produces a curious outcome: it leaves the judiciary—a less politically accountable branch of government—exercising more power on more politically important

loading consideration of whether a case presents a major question, Chief Justice Roberts's opinion failed to provide much guidance for lower courts.").

29. *See* West Virginia v. EPA, 142 S. Ct. 2587, 2608 (2022). *Id.* at 2634 (Kagan, J., dissenting) ("It is not until page 28 of a 31-page opinion that the majority begins to seriously discuss the meaning of Section 111. And even then, it does not address straight-up what should be the question: Does the text of that provision, when read in context and with a common-sense awareness of how Congress delegates, authorize the agency action here?").

30. *See* Adler, *supra* note 28, at 54 (turning to the major questions doctrine "allowed for a shorter and less technical opinion and avoided any need to consider whether the EPA's interpretation of Section 7411 could qualify for *Chevron* deference, but it also left the Court majority vulnerable to the criticism that it had abandoned textualism in favor of a result-oriented, purposivist analysis.").

31. *Id.*

32. *See* Josh Chafetz, *The New Judicial Power Grab*, 67 ST. LOUIS U. L.J. 635, 648 (2023) (detailing how the Court has used "anti-Congress rhetoric in administrative law cases to aggrandize themselves at both of the other branches' expense").

questions.[33] It is no surprise that *West Virginia* has already drawn so much ire.[34]

While *West Virginia* is a particularly stark example of how administrative law can be used to draw power to courts and facilitate the sidestepping of federal environmental statutes, the major questions doctrine is only one example. There are enough prominent examples of courts deploying administrative law doctrines to undermine the public interest aims of environmental law[35] that one ought to stop, take stock, and ask if a more principled path is possible. And even if one were to disagree with the idea that courts use administrative law as modes of power redistribution and self-aggrandizement, one should at the very least ask whether the legitimacy of the justice system or the field of administrative law are imperiled by the perception that it could.[36]

With these broad observations in mind, this Article proceeds in four Parts. Part I examines the different values that animate administrative and environmental law. Part II provides examples of how courts operationalize administrative law to sidestep the substance of environmental law, that is, how courts amplify administrative law values in ways that undermine environmental law values. Part II goes on to examine the core features of administrative law that facilitate this sidestepping. Part III then explores in greater

33. Lazarus, *supra* note 4, at 407 ("Under the ironic guise of promoting democracy, the branch of government least accountable to the voters has invented a sweeping doctrine of statutory interpretation—the 'Major Questions Doctrine'—to place the equivalent of a constitutional straightjacket on the ability of Congress and the executive branch . . . to enact laws necessary to address the nation's most pressing public health and environmental problems."); Jody Freeman & Matthew C. Stephenson, *The Anti-Democratic Major Questions Doctrine*, 2022 SUP. CT. REV. 1, 1–2 (2022) ("While the [major questions doctrine's] proponents claim that this doctrine protects separation-of-powers principles and the prerogatives of Congress, in fact the new [major questions doctrine] is more likely to weaken democratic accountability by shifting power from the elected branches to the courts, undermining transparency, and exacerbating the already excessive tendency toward minoritarian obstruction in Congress.").

34. "[T]he major questions doctrine ha[s] garnered substantial criticism from academics. Many have questioned the doctrine's legitimacy and suggested the Court merely fabricated the doctrine as part of an anti-administrative state agenda." Louis J. Capozzi III, *The Past and Future of the Major Questions Doctrine*, 84 Ohio St. L.J. 191, 195 (2023) (collecting the scholarship on the major questions doctrine and its legitimacy).

35. *Infra* Part II.

36. *Cf.* Jacob Loshin & Aaron Nielson, *Hiding Nondelegation in Mouseholes*, 62 ADMIN. L. REV. 19, 60 (2010) ("Unfortunately, because the elephants-in-mouseholes doctrine cannot be administered in a consistent way, its invocation '[is] likely to suffer from the appearance, and perhaps the reality, of judicial hostility to the particular program at issue.'") (alteration in original).

depth the constellation of legitimacy problems that arise when administrative law is allowed, whether intentionally or inadvertently, to play an outsized role in driving environmental policy. Finally, Part IV sketches a recalibrated approach for the shared space of administrative and environmental law, one that puts administrative law in its place and gives due respect to the values that Congress codified in the underlying environmental statutes. Ultimately, the aim is to develop a more nuanced set of judicial review doctrines that produce a more consistent resolution of environmental cases with a more predictable respect for the public interest values that lie at the heart of environmental and natural resource statutes.

I. THE SHARED SPACE BUT DISTINCT VALUES OF ADMINISTRATIVE AND ENVIRONMENTAL LAW

When courts resolve disputes arising under environmental law, courts often serve more than one set of values. On the one hand, they are guardians of congressional intent as codified in individual environmental statutes.[37] On the other hand, they must also uphold the foundational aspects of government that animate the field of administrative law.[38] In particular, administrative law doctrines, rooted in separation of powers principles, are meant to ensure that courts adequately check the power of the administrative state without claiming that power for themselves.[39] In this way, sitting at the intersection of administrative and environmental law, judges are sometimes in a double bind.

If both sets of values are important, then getting the balance right between upholding the will of Congress and checking the power delegated by Congress is critical. To get the balance right, one has to detangle the two areas from one another, asking where the fields are complementary and where they serve different functions. To that end, this Part explains why, though intertwined, these two areas are theoretically distinct and need to be mindfully applied to avoid giving courts the power to rewrite environmental policy in the United States.

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37. *See* Richard H. Ottinger, *When Is Broad Too Broad? Environmental Legislation and Interpretation of Government Liability at Federal Facilities*, 19 WM. & MARY ENV'T. L. & POL'Y REV. 131, 138 (1994) (highlighting the importance of the role of the courts with regard to congressional intent of environmental statutes).

38. *See id.* (discussing the difficulties courts face when interpreting environmental legislation).

39. *See, e.g.*, Sackett v. EPA, 143 S. Ct. 1322, 1361–62 (2023) (Kagan, J., concurring) (criticizing the Court's approach in both *West Virginia* and *Sackett* by noting that "[t]he vice in both instances is the same: the Court's appointment of itself as the national decision-maker on environmental policy").

A. The Simultaneous Rise of the Administrative State, Birth of Federal Environmental Statutes, and Need for Judicial Review

The close relationship between administrative law and environmental law makes sense. Most obviously, the two areas of law are inevitably bound by their common relationship to agencies—environmental law gives power and is implemented by agencies; administrative law serves as a check on the power of agencies.[40] More specifically, Congress has written environmental statutes containing broad mandates whose implementation depends on the expertise of numerous federal agencies.[41] Agencies wield substantial discretion to make policy choices with significant potential to help or hinder environmental progress. Indeed, the breadth of the statutes, the complex nature of environmental problems, and the need for specificity in implementation have spawned countless regulations.[42] And the inevitable tension between private and public interests that is inherent in environmental regulation frequently leads to litigation. Legislate, regulate, litigate, some might say.[43]

It is not uncommon for courts to answer questions about the fundamental reach of major environmental regulatory programs.[44] Naturally, to help

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40. ROBERT V. PERCIVAL, CHRISTOPHER H. SCHROEDER, ALAN S. MILLER & JAMES P. LEAPE, ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 169 (7th ed. 2013) ("[A]gencies generally have considerable discretion over both the substance of regulatory policy and the procedures used to formulate it . . . . Thus, the study of rulemaking process and agency decision making is critical to understanding environmental policy."); TODD AAGAARD, DAVE OWEN & JUSTIN PIDOT, PRACTICING ENVIRONMENTAL LAW 89 (2017) ("Environmental law is largely administrative law. . . . [T]he overwhelming majority of environmental law is created, implemented, and adjudicated by federal and state administrative agencies.").

41. *See* RICHARD J. LAZARUS, THE MAKING OF ENVIRONMENTAL LAW 38–41 (2004) (detailing the challenges Congress faces in implementing environmental statutes); *see also* Edward H. Stiglitz, *Delegating for Trust*, 166 U. PA. L. REV. 633, 635 (2018) ("[T]he dominant explanation of and justification for the administrative state is based on administrative agencies' expertise and expansive rulemaking and adjudicatory capacities."); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 516–17 ("Broad delegation to the Executive is the hallmark of the modern administrative state; agency rulemaking powers are the rule rather than, as they once were, the exception; and as the sheer number of modern departments and agencies suggests, we are awash in agency 'expertise.'").

42. *See* KRISTIN E. HICKMAN, RICHARD J. PIERCE, JR. & CHRISTOPHER J. WALKER, FEDERAL ADMINISTRATIVE LAW CASES AND MATERIALS 26 (4th ed. 2023) ("Statutes have been drafted to confer broad discretion on agencies to issue and enforce rules of conduct as necessary to implement statutory programs.").

43. *See* Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1385–87 (1992) (highlighting the challenges of regulating private interests through informal rulemaking).

44. The Supreme Court has tackled the meaning of "waters of the United States" four

answer these questions, courts turn to canons of statutory construction as well as principles of administrative law to sort out congressional intent and the appropriate degree of respect agencies are owed as the experts chosen by Congress to carry forth various statutory commands.[45] It goes without saying that administrative law doctrines play a substantial role in shaping judicial review of agency decisions. And by extension, the judiciary wields quite a lot of influence in shaping environmental law in the United States.[46]

The closeness of environmental law and administrative law makes sense for another reason, too.[47] That is, they grew up together (at least in their modern forms). The rise of the administrative state in the late 1960s and early 1970s coincided with the passage of major federal environmental statutes.[48] That time period was also met with the rise of rulemaking as the dominant form of agency policymaking.[49] Inevitably, this convergence of change meant that courts were wrestling with the fundamental question of how to divide power between courts and agencies at the same time agencies were tasked with using newly assigned power to implement sometimes sweeping environmental mandates.[50]

Lazarus offers yet another idea as to why environmental law and administrative law might be so linked: the stakes are high, and, therefore, the

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times. United States v. Riverside Bayview Homes, 474 U.S. 121 (1985); Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 162 (2001); Rapanos v. United States, 547 U.S. 715, 722 (2006); Sackett v. EPA, 143 S. Ct. 1322, 1329 (2023).

45. *See* Michigan v. EPA, 576 U.S. 743, 751–53 (2015).

46. *See* PERCIVAL ET AL., *supra* note 40, at 168 ("A wide range of interests seek to influence how agencies implement the environmental statutes . . . . The umpire lurking in the background is the judiciary.").

47 *See generally* David S. Tatel, *The Administrative Process and the Rule of Environmental Law*, 34 HARV. ENV'T L. REV. 1 (2010) (detailing the significant relationship between environmental law and administrative law).

48. *See* HICKMAN ET AL., *supra* note 42, at 3, 24 ("This explosive growth of regulatory statutes and administrative agencies [in the 1960s and 1970s] was accompanied by significant developments in agency practices and administrative law doctrine. Interestingly, at the same time that Congress was again dramatically expanding the administrative state, skepticism of agency action was growing."); *see also* Lazarus, *supra* note 41, at 67 (describing the birth of modern environmental statutes at that same time and examining how the 1970s were revolutionary for environmental law).

49. *See* Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 546 (2002) (describing the history behind and the scholarship in support of the rise of rulemaking as the dominant form of policy setting in the 1950s, '60s, and '70s).

50 *See generally* Lazarus, *supra* note 41, at 68–82 (illustrating how the Supreme Court wrestled with environmental mandates while also being tasked with administering agencies' powers).

matters of institutional legitimacy take on elevated importance.[51] "Because, moreover, the distributional stakes of alternative resolutions are so great, any institutional efforts to fashion environmental protection rules are invariably plagued by competition both between sovereign authorities and between branches of government within any one sovereign, which raises another array of legal issues."[52]

For these various reasons, it is not surprising that the implementation of environmental law has been wrapped up in administrative law principles for some time. In fact, judicial review of environmental decisionmaking has inspired a number of important and enduring administrative law principles. The *Chevron*[53] doctrine itself—which was one of the most recognizable frameworks for dividing responsibility between courts and agencies on issues of statutory interpretation—stems from a dispute over EPA's decision as to how to regulate air emissions from aging industrial plants under the Clean Air Act.[54] Even the Supreme Court's decision to overrule the *Chevron* doctrine forty years later arose in the context of a fisheries management statute.[55] *Citizens to Preserve Overton Park v. Volpe*,[56] the leading Supreme Court decision marking out the scope of review under the Administrative Procedure Act (APA), involved a Department of Transportation decision to fund a six-lane highway through a treasured Memphis city park.[57] And in the development of standing doctrine, environmental disputes provide a frequent backdrop for the Supreme Court's views on what kinds of alleged injuries are appropriately resolved by courts.[58]

Perhaps because of the well-trodden dynamic between administrative law and environmental law, the relationship between the two areas of law has largely been accepted as an inevitable partnership. And yet, when the administrative law doctrines undermine values embodied in democratically enacted legislation, this relationship is not always healthy.

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51. Lazarus, *supra* note 4, at 706 (highlighting the demands of environmental protection and the administrative state).

52. *Id.*

53. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

54. *Id.*

55. *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2254–56 (2024).

56. 401 U.S. 402 (1971).

57. *Id.*

58. *See, e.g.*, Lujan v. Defs. of Wildlife, 504 U.S. 555 (1992); Sierra Club v. Morton, 405 U.S. 727 (1972).

B. The Distinct Values Served by Each Field

On some level, the concern about using administrative law to resolve environmental disputes boils down to the understanding that administrative law and environmental law serve distinct values. Because they serve distinct values, deciding cases on the basis of administrative law does not necessarily mean that the normative aims of environmental law will be served.

1. Environmental Law Values

At this point, some readers might question whether concerns about sidestepping are unique to environmental law. Truth be told, they may not be. It is quite possible one ought to be concerned any time a trans-substantive framework like administrative law undermines congressional intent, regardless of the subject matter.[59] Still, there are reasons to be *uniquely concerned* with the use of administrative law doctrines to sidestep environmental statutory commands—especially if one accepts that environmental law serves a foundational and indispensable purpose in an ordered society.[60] Put simply and most dramatically, if one accepts environmental law as necessary for human survival, one might approach with particular seriousness the possibility that judicial review may undermine its implementation.

To be sure, it is not easy to reach consensus on the values that drive environmental law. Trade-offs and tensions are inherent when trying to live well on the land. Because of the inherent trade-offs, some scholars have observed that there is no unifying set of values advanced by environmental law.[61] On some level, that is true. Environmental law is not necessarily one thing with a singular aim. How could it be? Even setting the additional landscape of state law and common law aside, many federal environmental statutes address a wide range of regulatory issues, from clean water to forest management to waste disposal.[62] And the many statutes contain vast infrastructure and many accompanying commands. Some provisions are focused on public

59. *See, e.g.*, Brian Galle & Stephen Shay, *Admin Law and the Crisis of Tax Administration*, 101 N.C. L. REV. 1645, 1650 (2023) (asserting that "procedural and administrative law surrounding the substantive tax law creates a structural bias for the IRS to forego actions that would preserve or increase revenue").

60. *See* Knudsen, *supra* note 7, at 4; *see also* Sanne H. Knudsen, *Reclaiming Control*, 40 ENV'T F. 32 (2023).

61. *See* Knudsen, *supra* note 7, at 12–13 nn.57–58 (collecting the literature); *id.* at 13 (citing A. Dan Tarlock, *Is There a There There in Environmental Law?*, 19 J. LAND USE & ENV'T LAW 213, 217–18 (2004)).

62. *See, e.g.*, 33 U.S.C. § 1251; 16 U.S.C. § 1531; 42 U.S.C. § 6901.

health outcomes exclusively;[63] others bypass health metrics and instead turn to technology.[64] Others call for the balancing of economic interests alongside environmental protection.[65] It is true then—to speak of environmental law is not to speak of a single issue or a single approach, even within a single statute.

Still, if one steps back from the minutiae of individual provisions within individual statutes and considers the broader purpose statements codified by Congress in these statutes; if one considers the patterns of bold congressional responses to environmental problems over the decades-long arc of the modern statutory era; if one considers environmental law as a necessary response to the biophysical limits of nature; then one might appreciate environmental law as existing for a more unified purpose: "Self-restraint for self-preservation."[66] While broad, it captures the idea that Congress has made repeated commitments to impose restraint as a necessary means to protect public health and welfare.[67] And while the statutes tend to be complex, that complexity may simply reflect the machinery necessary to tackle issues of collective action and cumulative impacts. Still, the idea that environmental injuries are complex does not mean the foundational aims are wavering or confused. Many are, in fact, "eerily direct."[68]

The most straightforward way of understanding the ethic of self-restraint that lies at the heart of federal environmental law is to look at the enacted purpose statements codified as part of the statutes.[69] Consider, for example, the National Environmental Policy Act's (NEPA's) declaration that it means to set "a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate

63. *See, e.g.*, 42 U.S.C. § 7409(a)–(b); Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 465 (2001) (concluding that national ambient air quality standards set under the Clean Air Act are public health standards that preclude the consideration of cost).

64. *See, e.g.*, David M. Driesen, *The Ends and Means of Pollution Control: Toward a Positive Theory of Environmental Law*, 2017 Utah L. Rev. 57, 73 (2017) (citing EPA v. Cal. *ex rel.* State Water Res. Control Bd., 426 U.S. 200, 202–03 (1976), as an example of Congress taking a technology-based approach).

65. *Id.* at 75 (discussing the role of cost balancing in environmental law but noting the role is more easily found discussed in court decisions and executive orders than found in the statutory text).

66. *See* Knudsen, *supra* note 7, at 1.

67. *Id.* at 26–29.

68. *Id.* at 15.

69. *Id.* at 53 ("[E]nacted purpose statements are important textual tethers. They provide judges and regulators with an explicit benchmark for measuring the relative validity or desirability of competing interpretations and decisions.").

the health and welfare of man . . . ."[70] The Act then sets forth an unequivocal set of national environmental policies, declaring, among other things, that the federal government has a continuing responsibility to serve as "trustee of the environment for succeeding generations"; to ensure Americans have "safe, healthful, productive, and esthetically and culturally pleasing surroundings"; and to assure that the environment is used in a manner "without degradation, risk to health or safety, or other undesirable and unintended consequences."[71] These directives apply to all federal agencies[72]—which is to say that Congress made environmental stewardship a priority across the whole government.

NEPA does not exist in isolation. Throughout the many federal environmental statutes, Congress sets out bold visions for environmental protection.[73] To give another example, in the Clean Water Act, Congress's aim was nothing short of "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters."[74] To achieve that goal, Congress called for the elimination of pollutant discharges by 1985 and the prohibition on discharges of toxins in toxic amounts.[75]

These broadly stated goals can provide clarity in the implementation of the technical details of the individual statutory provisions.[76] Many scholars have extolled the usefulness of these enacted purpose statements in sorting out the meaning of ambiguous statutory text.[77] In his article *Enacted Legislative*

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70. 42 U.S.C. § 4321.

71. 42 U.S.C. § 4331(b).

72. *Id.* § 4333.

73. *See, e.g.*, Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1202(a) (declaring its purpose is to "establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations"); Marine Mammal Protection Act, 16 U.S.C. § 1361 (declaring that "marine mammals have proven themselves to be resources of great international significance, esthetic and recreational as well as economic," and "that the primary objective of their management should be to maintain the health and stability of the marine ecosystem"); The Wilderness Act, 16 U.S.C. § 1131(c) (protecting wilderness as "an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain"); The Endangered Species Act, 16 U.S.C. § 1531(b) (noting one declared purpose is to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved").

74. 33 U.S.C. § 1251(a).

75. *Id.* § 1251(a)(1), (3).

76. *See* Knudsen, *supra* note 7, at 52–56.

77. Jarrod Shobe, *Enacted Legislative Findings and Purposes*, 86 U. CHI. L. REV. 669, 671 (2019); *see also* Kevin M. Stack, *The Enacted Purposes Canon*, 105 IOWA L. REV. 283, 317 (2019) (arguing that judges should use purpose statements to narrow the range of permissible choices available to agencies under a statute); *see also* Robert W. Adler, *The Decline and (Possible) Renewal*

Findings and Purpose, Jarrod Shobe suggests that "it may be that enacted findings and purposes . . . best reflect members' understanding of why a bill was drafted and what it was meant to accomplish."[78]

Importantly, it is not just the purpose statements that reflect bold congressional designs on environmental protection. The legal infrastructure and numerous statutory commands that support each individual statute; the comprehensive reach of legislative commands in fundamental areas of air pollution control, water pollution control, solid and hazardous waste management, chemicals regulation, and natural resource management; the downward ratcheting of technological standards; all are indicia of the seriousness with which Congress has approached environmental protection and natural resource management.[79] More to the point, all are indicia of normative aims—certainly, this amount of repeated, legislative commitment was not undertaken without some expectation that there would be a less polluted world with more sustainable resource management at the end of it.

The bottom line here is that environmental laws are meant to serve distinct values. Indeed, the idea that society would need to devise a set of rules to regulate natural resources—whether in the form of laws that limit extraction of resources from the natural world or laws that limit addition of waste pollution to the natural world—is not surprising. To that end, Herman E. Daly, one-time World Bank economist and founder of the International Society for Ecological Economics, has long observed that the economic system is subservient to biophysical limits of nature.[80] Namely, Daly explains that "the economy is a subsystem of a larger system, the ecosphere, which is finite, non-expanding, materially closed."[81] This means that limitless growth of the economy is not possible. As Daly explains this claim is consistent with the work of classical economists—John Stuart Mill, for example, assumed the economy would grow and eventually arrive at a stationary state.[82] That is

of Aspiration in the Clean Water Act, 88 WASH. L. REV. 759, 761 (2013) ("At times, however, this degree of complexity obscures the relatively straightforward" goals of the Clean Water Act).

78. Shobe, *supra* note 77, at 672–73.

79. Knudsen, *supra* note 7, at 11–32.

80. HERMAN E. DALY, BEYOND GROWTH: THE ECONOMICS OF SUSTAINABLE DEVELOPMENT 7–8, 33–35 (1996); *see also* Ed Shanahan, *Herman Daly, 84, Who Challenged the Economic Gospel of Growth, Dies*, N.Y. TIMES (Nov. 8, 2022), https://www.nytimes.com/2022/11/08/business/economy/herman-daly-dead.html.

81. Herman Daly & Benjamin Kunkel, *Ecologies of Scale*, 109 NEW LEFT REV. 81, 88 (2018); *see also* DALY, *supra* note 80, at 108 (providing similar explanation of his theory of ecological economics).

82. DALY, *supra* note 80, at 7; *see also* Knudsen, *supra* note 7, at 10 n.42 ("explaining that Adam Smith's Wealth of Nations was as much a commentary on limits on abundance; and similarly discussing the works of various classical economists like David Ricardo, John Stuart

because when one moves from what Daly called an "empty-world" (one capable of supporting growth) to a "full-world" (one where the ecological price of economic growth is unsupportable), the economy eventually bumps up against the limits of nature.[83] In what Daly calls a "full-world," there are limits to economic growth.[84]

From those observations by Daly, one might begin to understand why laws that limit waste and conserve resources are necessary for self-preservation—eventually there will be moment when incremental growth exacts too high a price on ecological systems (and by extension human survival and economic stability). In an oversimplified way, that is why environmental law serves a foundational and unique purpose in an ordered society.[85] If one accepts that as true, and Mother Nature would provide a strong rebuttal to any skeptics on that matter, one ought to be especially concerned when the values underlying those laws are sidestepped.

Because environmental laws serve a distinct normative purpose, they cannot be sidestepped for decisional frameworks that purport greater objectivity. Douglas A. Kysar, in his book *Regulating From Nowhere: Environmental Law and the Search for Objectivity*, makes this very point in his examination of why cost-benefit analysis is not an appropriate decisional substitute for the normative, "precautionary" aims of environmental law.[86] Wendy E. Wagner and Holly Doremus, in examining how science is used to obscure politically motivated choices, each have similarly cautioned against the naïve acceptance of seemingly value-neutral frameworks to drive environmental policy.[87] Lisa Heinzerling and Frank Ackerman, in their book *Priceless: On Knowing The Price of Everything and the Value of Nothing*, have criticized the use of cost-benefit analysis as an appropriate proxy for addressing difficult moral choices on how to balance consumption and preservation.[88] There is no easy way to make hard decisions.

Mill, Stanley Jevons, and Thomas Malthus, all of whom cautioned that resources are not infinite and neither then is economic productivity" (citing DONALD WORSTER, SHRINKING THE EARTH: THE RISE AND DECLINE OF AMERICAN ABUNDANCE 41–56 (2016))).

83. DALY, *supra* note 80, at 7–8.

84. *Id.*

85. *See* Knudsen, *supra* note 7, at 4.

86. DOUGLAS A. KYSAR, REGULATING FROM NOWHERE: ENVIRONMENTAL LAW AND THE SEARCH FOR OBJECTIVITY 16–17 (2010) (critiquing the false objectivity of welfare economics as a value-neutral decisional tool for implementing environmental laws).

87. *See* Holly Doremus, *Scientific and Political Integrity in Environmental Policy*, 86 TEXAS L. REV. 1601, 1620 (2008); *see also* Wendy E. Wagner, *The Science Charade in Toxic Risk Regulation*, 95 COLUM. L. REV. 1613, 1629–31, 1719 (1995); *see also* WOOD, *supra* note 5, at 22–23 (discussing the Bush Administration's strategy for sowing doubt in climate science in an effort to avoid regulation).

88. *See* FRANK ACKERMAN & LISA HEIZERLING, PRICELESS: ON KNOWING THE PRICE OF

It is certainly true that environmental regulation is shaped by many discourses. Many provisions codified in environmental statutes look to science and economics as benchmarks for decisions.[89] It is also true that these laws impose procedures for how to advance their substantive goals.[90] And they operate against a backdrop of administrative law rules that divide power between Congress and agencies, between agencies and courts.[91] Still, the point of these statutes is not advancement of science for science sake, nor is the purpose of the statutes to set economic policy. The statutes do not exist to impose process requirements without some value-laden substantive end in mind. They do not exist to answer questions about power balance between governmental branches. Instead, they take on the formidable, if ultimately impossible task, of balancing consumption with preservation, impulsivity with restraint, flexibility with planning, short-term gains with long-term survival, a defined present with an unknown future.

How does this relate to administrative law? For the bold visions of Congress to be realized, courts must serve as guardians of the normative aims of environmental laws. For courts to do that, they must ensure that trans-substantive frameworks, like administrative law, do not inadvertently undermine those normal aims.[92] Otherwise, the courts impose costs on the lawmaking process and invite concerns about the legitimacy of the judiciary.[93]

2. Administrative Law Values

While deciphering congressional intent in the context of sometimes technocratic and science-driven conflicts over resource protection, courts must also safeguard the tripartite system of government.[94] After all, the administrative state, made up of numerous federal agencies operating in the

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EVERYTHING AND THE VALUE OF NOTHING 3–5 (2004).

89. *See* Wagner, *supra* note 87, at 1656 (highlighting agencies' use of science in rulemaking).

90. *See id.* (discussing how the use of scientific language in rulemaking and its effect on limiting public participation).

91. *See* Administrative Procedure Act, 5 U.S.C. §§ 551–559, 561–570a, 701–706; *see also* A. A. Berle, Jr., *The Expansion of American Administrative Law*, 30 HARV. L. REV. 430, 439 (1917) ("There is, then, this field called administrative law. It concerns the machinery of transmission of governmental will from the point of its origin to the point of its application. In its application to such machinery it cannot be referred to any one division of government; it is applicable alike to courts, legislatures, and executive. This is the range within which we are working.").

92. Loshin & Nielson, *supra* note 36, at 63–64.

93. *Id.*

94. Jud Mathews, *Minimally Democratic Administrative Law*, 68 ADMIN. L. REV. 605, 607 (2016) ("The notion that administrative power threatens democratic governance persists.").

Executive Branch, wields sizeable authority through power delegated by Congress.[95] Not only is that power substantial in a collective sense, but that power also flows from sometimes broad text.[96] This is why courts have long sought tools to ensure the power of agencies is transparently wielded and adequately checked so as to promote nonarbitrary decisionmaking within the bounds of properly delegated authority.[97] Of course, whilst ensuring that agency power is adequately checked, courts must not claim that power for themselves.[98]

Administrative law is nothing short of a quixotic quest to find the appropriate balance of power between the branches.[99] Though difficult, it is important work. At its core, administrative law advances a number of values foundational to the U.S. Constitution and the rule of law itself.[100] In his book examining the *Chevron* doctrine's rise and future, Thomas W. Merrill distills the values animating administrative law into four categories: those upholding

95. Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 499 (2010) ("The growth of the Executive Branch . . . now wields vast power and touches almost every aspect of daily life."); *see also* HICKMAN ET AL., *supra* note 42, at 3 ("[I]ndividual agencies are responsible for administering federal statutes covering everything from immigration, environment, workplace safety, and employment discrimination to patents, securities, taxes, and pension benefits.").

96. Mistretta v. United States, 488 U.S. 361, 373–74 (1989) (collecting cases in which the Court has upheld "Congress's ability to delegate power under broad standards"); *see also* GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 5 (9th ed. 2022) ("The entire machinery of the executive arm of the United States government below the level of the President is the result of congressional action.").

97. Jonathan H. Adler & Christopher J. Walker, *Delegation and Time*, 105 IOWA L. REV. 1931, 1934, 1993 (2020) (citing Gundy v. United States, 139 S. Ct. 2116, 2141 (2019) (Gorsuch, J., dissenting) ("When one legal doctrine becomes unavailable to do its intended work, the hydraulic pressures of our constitutional system sometimes shift the responsibility to different doctrines. And that's exactly what's happened here. We still regularly rein in Congress's efforts to delegate legislative power; we just call what we're doing by different names.")); *see also* Paul v. United States, 140 S. Ct. 342, 342 (2019).

98. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH (2d ed. 1986); Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 465 (2003) ("Bickel cast judicial review as 'deviant' precisely because it undermines policy decisions made by government officials who represent and answer to the people.").

99. *See* KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE 1 (1978) ("Administrative law is the law concerning the powers and procedures of administrative agencies, including especially the law governing judicial review of administrative action.").

100. *See id.* at 2–3 ("Administrative law is law about the machinery of the government . . . . Administrative law consists of constitutional law, statutory law, common law, and agency-made law.").

the rule of law (like stability and predictability), those upholding the constitutional structures (like separation of powers and federalism), those promoting accountability (like ensuring politically accountable institutions take a heavier hand in shaping policy at the interstices of discretion), and those that encourage high-quality agency decisionmaking (like transparency in reasoning and public participation in rulemaking).[101]

Other prominent administrative law scholars and jurists have emphasized similar values and challenges driving the heart of administrative law.[102] More than seventy-five years ago, for example, James M. Landis spoke of the deep connection between administrative process as a response to the shortcomings of the tripartite form of government: "The insistence upon the compartmentalization of power along triadic lines gave way in the nineteenth century to the exigencies of governance. Without too much political theory but with a keen sense of the practicalities of the situation, agencies were created whose functions embraced the three aspects of government."[103]

When understood as an exercise in balancing power between branches of government (and matching up power with accountability and competency), one might observe that administrative law is as old as the Republic itself.[104] Indeed, the first Congress delegated power to the President to create regulations on providing pensions to wounded Revolutionary War veterans.[105] The first Congress also created the first agencies—"a Post Office and Departments of War, Navy, Foreign Affairs, and Treasury."[106] And though some still debate what the early delegations say about the legitimacy of delegation,[107] there is little doubt that administrative law was firmly on the map by

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101. THOMAS W. MERRILL, THE *CHEVRON* DOCTRINE: ITS RISE AND FALL AND THE FUTURE OF THE ADMINISTRATIVE STATE 10–32 (2022).

102. See James O. Freedman, *Crisis and Legitimacy in the Administrative Process*, 27 STAN. L. REV. 1041, 1046–51 (1975) (discussing separation of powers challenges that the administrative process faces).

103. JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 1–2 (1938).

104. *See* HICKMAN ET AL., *supra* note 42, at 18 ("[F]ederal administrative activity in the United States extends back at least to the founding, and debates and decisions of that era remain part of the administrative law discussion today.").

105. *Id.* at 19.

106. Peter L. Strauss, *How the Administrative State Got to This Challenging Place*, DAEDALUS, Summer 2021, at 17, 18.

107. *Compare* Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 280 (2021) (arguing that the "Constitution at the Founding contained no discernable, legalized prohibition on delegations of legislative power"), *and* Christine Kexel Chabot, *The Lost History of Delegation at the Founding*, 56 GA. L. REV. 81, 81 (2021) ("Alexander Hamilton, James Madison, and the First Congress all approved of legislation that delegated some of our nation's most consequential policy decisions to the Executive Branch."), *with*

1887, when Congress created the Interstate Commerce Commission.[108]

Regardless of its precise emergence, most would probably agree that the challenges lying at the heart of administrative law are longstanding, foundational, and ongoing.[109] Take the nondelegation doctrine as a particular example. Nearly 200 years ago, Chief Justice John Marshall summed up the challenge of articulating the limits on congressional delegations of power:

> The difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes the law; but the maker of the law may commit something to the discretion of the other departments, and the precise boundary of this power is a subject of delicate and difficult inquiry.[110]

Much more recently, Richard A. Epstein revisited this famous passage and concluded that "Marshall thus establishes a rebuttable presumption in favor of the delegations Congress can make to the two other branches of government, while accepting as binding the tripartite division of powers set out in Articles I, II, and III of the Constitution."[111] Notably, Epstein had occasion to revisit Marshall's words because the delegation debate raged on.[112] While delegation may be an accepted feature of the U.S. tripartite structure, the bounds of that delegation continue to inspire scholars and jurists to dig into history and urge caution against an unchecked administrative state.[113] And the concerns animating skepticism about too much or too vague delegation find outlets in other administrative law doctrines as well—most notably

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Richard A. Epstein, *Delegation of Powers: A Historical and Functional Analysis*, 24 CHAP. L. REV. 659, 663 (2021) (criticizing Mortensen and Bagley, arguing that "[i]t is hardly evident that the operation of the delegation doctrine at the Founding should bear any close similarity with the nondelegation doctrine today").

108. Bruce Wyman, *The Rise of the Interstate Commerce Commission*, 24 YALE L.J. 529, 530–32 (1915) ("The constitution of the Interstate Commerce Commission in 1887 marks the beginning of federal regulation in this intimate way by delegated power of the businesses affected by a public interest subject to the jurisdiction of the national government.").

109. *See* Jack M. Beermann, *The Never-Ending Assault on the Administrative State*, 93 NOTRE DAME L. REV. 1599, 1599 (2018) ("The administrative state is under attack. It is always under attack. Even decades after the main contours of the administrative state were sustained by the Supreme Court, it is still under attack.").

110. Wayman v. Southard, 23 U.S. 1, 46 (1825).

111. Epstein, *supra* note 107, at 669.

112. *See* sources cited *supra* note 107 (discussing different schools of thought on whether the Constitution supports delegation today).

113. *See, e.g.*, PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014) (suggesting that the use of doctrines, such as delegation, to defend administrative power overlooks the substantive dangers of doctrinal arguments).

the major questions doctrine.[114]

The deeply rooted concerns about delegation manifest too in the enduring and vigorous discourse on the deference owed to agencies upon judicial review: *Skidmore v. Swift & Co.*,[115] *Bowles v. Seminole Rock & Sand Co.*,[116] *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[117] *United States v. Mead*,[118] *Auer v. Robbins*,[119] *Kisor v. Wilkie*,[120] *West Virginia v. EPA*,[121] *Loper Bright Enterprises v. Raimondo*.[122] To defer or not to defer, that is the ever-illusive question.[123] The answer, as with delegation, depends on foundational views about power-sharing between agencies, courts, and Congress.[124] In oral arguments heard by the Supreme Court in *Loper Bright Enterprises*—a case in which the Court ultimately overruled *Chevron*—an exchange between the Justices through counsel poignantly captured what lies at the heart of deference discourse.[125] Justice Brett Kavanaugh, in response to Justice Elena Kagan's characterization of *Chevron* as a doctrine of humility (or restraint), says, "I think the flip

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114. *See* Daniel E. Walters, *Decoding Nondelegation After* Gundy*: What the Experience in State Courts Tells Us About What to Expect When We're Expecting*, 71 EMORY L.J. 417, 432 (2022) ("[I]t is possible to hear echoes of the central concerns of the nondelegation doctrine in other, less freighted contexts."); *see also* Blake Emerson, *Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation*, 102 MINN. L. REV. 2019, 2044 (2018) ("[T]he major questions doctrine is a clear statement rule which reinforces the nondelegation doctrine.").

115. 323 U.S. 134, 140 (1944) (holding that courts may defer to agency rulings, statutory interpretations, and opinions that "constitute a body of experience and informed judgment").

116. 325 U.S. 410 (1945) (setting the early standard for agency interpretations of their own regulations).

117. 467 U.S. 837 (1984) (prescribing the well-known framework for deferring to agencies on ambiguous matters of statutory interpretation).

118. 533 U.S. 218 (2001) (limiting the reach of *Chevron* to agency rules carrying the force and effect of law).

119. 519 U.S. 452 (1997) (reaffirming strong form of *Seminole Rock* deference).

120. 139 S. Ct. 2400 (2019) (declining to overrule *Auer* deference but narrowing the approach).

121. 142 S. Ct. 2587 (2022) (invoking the major questions doctrine to avoid *Chevron* deference).

122. 144 S. Ct. 2244 (2024).

123. *See* MERRILL, *supra* note 101, at 4–5 (discussing the scholarly debate on virtues and challenges of *Chevron*); *see also* Jonathan R. Siegel, *The Constitutional Case for* Chevron *Deference*, 71 VAND. L. REV. 937, 940 n.19 (2018) (collecting scholarly critiques of *Chevron*).

124. *See* MERRILL, *supra* note 101, at 18 (remarking that "in a sense[,] the entire book [on *Chevron*] is devoted to answering" the question of whether "the power to say what the law is as Marbury put it" can be shared) (internal quotations omitted).

125. *See* Transcript of Oral Argument at 35, 40–41, Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024) (No. 22-451).

side, why this is hard, the other concern for any judge is abdication to the executive branch running roughshod over limits established in the Constitution or, in this case, by Congress."[126] Finding the line between restraint and abdication—in other words, finding the balancing in power sharing—lies at the heart of the problem.

Decades of government operating under a large administrative state has not quelled the concerns of some members of the Court.[127] In fact, constant vigilance might be the unspoken motto of some Justices when it comes to checking agency power. To that end, there has, in fact, been a spate of cases under the Roberts Court in which various Justices openly lamented the size and power of the administrative state.[128] *Gundy v. United States*[129] was one particularly notable case—not for its outcome but for the signals sent by concurring and dissenting opinions on the breadth and depth of their concerns about the administrative state. While concurring in the judgment, Justice Samuel Alito expresses a willingness to revisit the Court's lenient approach to delegation: "If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort."[130] Justice Neil Gorsuch, in dissent, admits to no such patience. He describes unchecked delegation as dangerous because it allows bodies other than Congress to limit the liberties of the people.[131] That power, he says, was vested in Congress alone.[132] "No one, not even Congress, had the right to alter that

126. *Id.*

127. *See* Gillian E. Metzger, *The Roberts Court and Administrative Law*, 2019 SUP. CT. REV. 1 (2020) ("Administrative law today is marked by the legal equivalent of mortal combat, where foundational principles are fiercely disputed and basic doctrines are offered up for 'execution.'").

128. *See, e.g.*, Axon Enters. v. FTC, 143 S. Ct. 890 (2023); Collins v. Yellen, 141 S. Ct. 1761 (2021); United States v. Arthrex, 141 S. Ct. 1970 (2021); Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2192 (2020); Kisor v. Wilkie, 139 S. Ct. 2400, 2425 (2019); Gundy v. United States, 139 S. Ct. 2116, 2131 (2019); Free Enter. v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 484 (2010); *see also* Blake Emerson, *Liberty and Democracy Through the Administrative State: A Critique of the Roberts Court's Political Theory*, 73 HASTINGS L.J. 371, 373 (2022) ("The conservative Justices explicitly reinforce their criticism of administrative agencies with normative judgments concerning the proper allocation of rights, obligations, and powers amongst citizens and state institutions.").

129. 139 S. Ct. 2116 (2019); *see* Metzger, *supra* note 127, at 5 ("The case in which the anti-administrativist view gained the most traction was *Gundy v[.] United States*, where four Justices signaled sympathy for a full-bore assault on the constitutionality of broad delegations.").

130. *Gundy*, 139 S. Ct. at 2131 (Alito, J., concurring).

131. *Id.* at 2135 (Gorsuch, J., dissenting).

132. *Id.*

arrangement."[133] Whether one agrees with Justice Gorsuch's view or not, one thing is obvious in the discourse—the stakes are high.

That the stakes are high, that administrative law is driven by constitutionally rooted concerns about government structure, helps explain the power of the impulse to look to administrative law as a driver in resolving disputes. In other words, it helps explain why jurists might focus on the issues that animate administrative law and inadvertently overlook the normative choices that Congress makes in substantive areas like environmental law.

And yet, there are compelling reasons why courts should approach with caution the impulse to reach for administrative law as a way through environmental disputes. Those reasons—namely, the risk of transferring too much power to the least democratic branch—are more fully explored in Part III. For now, the point is simply that environmental law and administrative law serve distinct values and are not interchangeable. Each of those sets of values are important in their own right: the stakes are high in ensuring that the tripartite democracy functions properly, and the stakes are high in ensuring that the natural systems upon which humanity depends are thriving. When courts layer administrative law frameworks on top of the relevant substantive statutes that lie at the heart of the cases before them, it is the duty of courts to ensure both sets of values are upheld to the fullest extent possible. As the next Part examines, that has not happened. And that is why change is necessary.

II. HOW AND WHY ADMINISTRATIVE LAW HAS PLAYED AN OUTSIZED ROLE IN SHAPING ENVIRONMENTAL POLICY

While judges may be in a bit of a double bind as they balance the sometimes-competing values of environmental and administrative law, the two legal frameworks are not currently working together to ensure the success of environmental law. Administrative law, at least in the realm of environmental and natural resources laws, has overflowed its banks and is playing an outsized role in shaping normative environmental policy. The result is detrimental to environmental law, undermining the many commands and bold visions set out in congressional statutes.

This Part starts by considering various case examples to show how the Supreme Court has pulled on the levers of administrative law to undermine the codified purpose of environmental laws. This Part goes on to examine the features of administrative law that allow such outsized influence to happen.

133. *Id.* at 2133.

A. Prominent Supreme Court Examples

While administrative law can operate at all levels of the judicial system to undermine environmental law, the Supreme Court sits at the apex of power and has a particular responsibility in ensuring administrative law doctrines uphold the integrity of both administrative and environmental law. Therefore, this Part examines four prominent cases (or lines of cases) in which the Supreme Court has substantially diminished the vigor or reach of federal environmental law through the application of administrative law: *Lujan v. Defenders of Wildlife*[134] and the standing line of cases that keep environmental plaintiffs out of court; *Robertson v. Methow Valley Citizens Council*[135] and the sidelining of NEPA's substantive commands; *Michigan v. EPA*[136] and the use of administrative law's imprecision to write cost considerations into a statute; *Sackett v. EPA*[137] and the waters of the United States (WOTUS)[138] line of cases that create regulatory instability by taking inconsistent approaches to agency deference and statutory interpretation more generally.

1. Lujan v. Defenders of Wildlife*: Using Standing to Restrict Judicial Review of Environmental Law's Public Interest Values*

Much has been said about the judiciary's use of the standing doctrine to close the gates on environmental public interest litigation and, more generally, as a nefarious tool for advancing ideologies.[139] The Supreme Court's 1992 decision in *Lujan v. Defenders of Wildlife*[140] is a prime example of how Article III standing is used to diminish the public interest values at the heart of environmental laws.[141]

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134. 504 U.S. 555 (1992).

135. 490 U.S. 332, 351 (1989).

136. 576 U.S. 743 (2015).

137. 143 S. Ct. 1322 (2023).

138. The phrase "WOTUS" comes from the Clean Water Act's (CWA's) definition of "navigable waters," which covers "the waters of the United States, including the territorial seas." *See* 33 U.S.C. § 1362(7).

139. *See* Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741, 1742–43 (1999) (finding support for the proposition that "judges provide [standing] to individuals who seek to further the political and ideological agendas of judges"); Nancy C. Staudt, *Modeling Standing*, 79 N.Y.U. L. REV. 612, 669 (2004) (concluding after empirical study that federal courts of appeal decide standing cases based on ideology when there are insufficient precedents and judicial oversight to make a threat of reversal substantial); *see also* Jeffrey T. Hammons, Note, *Public Interest Standing and Judicial Review of Environmental Matters: A Comparative Approach*, 41 COLUM. J. ENV'T L. 515, 516 (2016).

140. 504 U.S. 555 (1992).

141. *See* Houck, *supra* note 2, at 70 (providing in-depth case study of *Lujan* and the

In *Lujan*, international dam projects threatened the survival of three iconic species: the Asian elephant, the leopard, and the Nile crocodile.[142] Those dam projects received funding from a U.S. federal agency.[143] The Endangered Species Act (ESA) requires all federal agencies to consult with the U.S. Fish and Wildlife Service before taking any action that "may" (as in, could or might) "jeopardize the continued existence of any endangered species."[144] There was no question that the agency, here, the U.S. Agency for International Development, failed to consult with the U.S. Fish and Wildlife Service before approving funds.[145] There was also no question that § 7 of the ESA generally applies when an agency provides funding for the kind of projects at issue in *Lujan*.[146] But there was one hitch: because these dam projects were located in Sri Lanka and Egypt, there was a question as to whether the ESA requires consultation under § 7 for projects located outside the United States.[147]

The Supreme Court never reached the merits of that question.[148] Instead, in a splintered decision, the Court dismissed the case on standing.[149] In doing so, Justice Scalia advanced an asymmetrical theory of standing that intentionally made it more difficult for public interest plaintiffs to advance their claims.[150] Under Justice Antonin Scalia's view, a plaintiff like Defenders of Wildlife should have a tougher time seeking judicial review than a plaintiff like Exxon:

> When the suit is one challenging the legality of government action or inaction, the nature and extent of facts that must be averred (at the summary judgment stage) or proved (at the trial stage) in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue. If he is, there is ordinarily little question that the action or inaction has caused him injury,

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"weaponization of standing" in environmental law); *see also* Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1992); Karin P. Sheldon, Lujan v. Defenders of Wildlife*: The Supreme Court's Slash and Burn Approach to Environmental Standing*, 23 ENV'T L. REP. NEWS & ANALYSIS 10031 (1993).

142. *Lujan*, 504 U.S. at 563.

143. *Id.*

144. 16 U.S.C. §§ 1533, 1536(a)(2) (ESA § 7(a)(2) consultation requirement).

145. *Lujan*, 504 U.S. at 562–63.

146. *Id.* at 558, 562–63.

147. *Id.* at 558–59. The demand for consultation was "modest" considering the U.S. Fish and Wildlife Service had regulations on point (which were promogulated in response to earlier litigation efforts by Defenders of Wildlife). *See* Houck, *supra* note 2, at 70.

148. *See generally Lujan*, 504 U.S. at 558–59 (discussing the different interpretations of § 7 without concluding whether it applies outside the United States).

149. *Id.* at 562.

150. *See* Houck, *supra* note 2, at 91.

> and that a judgment preventing or requiring the action will redress it. When, however, as in this case, a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of someone else, much more is needed . . . . Thus, when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily "substantially more difficult" to establish.[151]

In this way, Justice Scalia created an access-to-justice gap in environmental law and stated a preference for the judiciary's role in vindicating the rights of corporate plaintiffs over public interest plaintiffs. Asymmetric access to courts, after all, means asymmetric checks on agency decisions. *Lujan* opened the door for courts to become a more powerful venue for asserting agency overreach rather than challenging underreach (or inaction).[152] In that sense, *Lujan* advances a deregulatory agenda.

The asymmetric standing in favor of regulated entities is at odds with the normative aims of environmental law. Congress enacted the major federal environmental statutes to protect public health and conserve natural resources for the benefit of future generations.[153] To back up those public interest values, Congress wrote citizen suit provisions into many of the major federal environmental statutes—specifically so that private citizens who are not regulated entities can fortify the resources of the Executive Branch in enforcing these public interest laws.[154] This central feature of many environmental statutes, as well as the APA's presumption in favor of judicial review,[155] is sidelined in the Court's use of standing to selectively limit access to public interest litigants.[156] While Justice Scalia addressed whether citizen suit provisions can alone create a path to judicial review,[157] he did not explain why citizen suit provisions—as a symbol of congressional intent to encourage

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151. *Lujan*, 504 U.S. at 561–62.

152. *See* Houck, *supra* note 2, at 72 ("In [*Lujan*], the Court took to a new level one of the most contentious, malleable, and politicized concepts in American law: standing to sue.").

153. *See* Knudsen, *supra* note 7, at 4.

154. *See, e.g.*, 33 U.S.C. § 1319(g)(6)(B); 42 U.S.C. § 7604.

155. Abbott Lab'ys v. Gardner, 387 U.S. 136, 146 (1967).

156. In his review of *Lujan* on its role in cabining standing and undermining citizen suits, Oliver Houck did not mince words: "Leading administrative law scholars since the 1960's have welcomed citizen suits as a necessary check on government. They have refuted the Court's treatment of standing as baseless in its claim to historical pedigree, and wrong in its fabrication of elements that are both unnecessary and antagonistic to the rule of law." Houck, *supra* note 2, at 91; *see also* Sidney A. Shapiro & Richard E. Levy, *Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons For Agency Decisions*, 1987 DUKE L.J. 387, 395 (1987) ("In this country, judicial review and the legitimacy of administrative government are inextricably intertwined.").

157. Lujan v. Defs. of Wildlife, 504 U.S. 555, 572 (1992).

public interest litigation—should be cast aside when assessing whether an asymmetrical view of standing is defensible, necessary, or even wise.

In a second blow to congressional intent, the Court brushed aside the codified purpose of the ESA in the course of considering which cognizable harms ought to support standing: "It makes no difference," Justice Scalia said, "that the general-purpose section of the ESA states that the Act was intended in part 'to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved.'"[158] Again, it makes sense that a purpose statement alone cannot create particularized injury, but it is less clear why the congressional stated concern for species and their ecosystems would be irrelevant to whether the ecosystem nexus theory of harm asserted by the plaintiffs can satisfy the injury-in-fact requirement.[159]

To be very clear, none of this is to suggest that the very existence of a citizen suit provision or the public interest purpose of the ESA could excuse an individual plaintiff from showing concrete and particularized harm in satisfaction with Article III.[160] It is worth remembering, however, that the Article III standing requirement is born from fairly skimpy text: that the judicial power is limited to actual "Cases" or "Controversies."[161] As Cass R. Sunstein observed: There is nothing in the Constitutional text that would require the Supreme Court to ignore Congress when evaluating whether a dispute presents a case or controversy.[162] Justice Anthony Kennedy, in fact, wrote separately in *Lujan* to emphasize his view that congressional intent is not at all

158. *Id.* at 566 (quoting 16 U.S.C. § 1531(b)).

159. See id. at 562–63.

160. *See* TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2205 (2021) ("Congress may enact legal prohibitions and obligations. And Congress may create causes of action for plaintiffs to sue defendants who violate those legal prohibitions or obligations. But under Article III, an injury in law is not an injury in fact. Only those plaintiffs who have been *concretely harmed* by a defendant's statutory violation may sue that private defendant over that violation in federal court.") (emphasis in original). *But see* William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 229 (1988) (concluding that Article III standing requirements are satisfied when Congress provides a citizen suit cause of action).

161. U.S. CONST. art. III, § 2.

162. Sunstein, *supra* note 141, at 191, 236 ("Whether an injury is cognizable should depend on what the legislature has said . . . . The Court should abandon the metaphysics of injury-in-fact. It should return to the question whether a cause of action has been conferred on the plaintiff . . . . Despite the holding of *Lujan,* Congress should be permitted to grant standing to citizens. The text and history of Article III provide no support for judicial invalidation of congressional grants of citizen standing."); *see also* Pierce, *supra* note 139, at 1765 ("This history has convinced each of the scholars who have studied it that absolutely no historical support exists for the proposition that Article III imposes limits on the types of plaintiffs that can obtain access to federal courts.").

beside the point: "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before, and I do not read the Court's opinion to suggest a contrary view."[163] Some scholars have even urged that Congress has not just the power but also the knowledge to identify cognizable injuries: "Standing often depends on attributes of the injury alleged that are better evaluated by Congress than by the judiciary."[164]

It is also worth remembering that more is not better when exacting standing requirements. Administrative law's transparency and accountability—those furthered by the very prospect of judicial review—are diminished by an unnecessarily demanding standing doctrine. Indeed, some have questioned whether the Constitutional text can even support, let alone require, the level of judicially-sponsored arbitrariness that comes from selectively opening and closing access to courts based on increasingly exacting standards of what constitutes injury-in-fact.[165] In other words, standing—if it becomes too demanding—overflows the banks of its assignment (to prevent courts from issuing advisory opinions) and actually undermines other values at play (accessing courts to balance the power of agencies and uphold the intent of Congress).[166]

All of which is to say that judicial restraint would have counseled for an approach to Article III standing that respects both the constitutional text and congressional intent where possible. In *Lujan*, the Court did not proceed with restraint. Instead, it adopted an aggressive and asymmetrical reading of Article III with the effect of sidestepping congressional intent.[167] In doing so,

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163. *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring).

164. Mark Seidenfeld & Allie Akre, *Standing in the Wake of Statutes*, 57 ARIZ. L. REV. 745, 749 (2015); *see id.* at 748 (urging that Congress should retain a role in Article III standing through its "power to elevate the status of legally cognizable concrete injuries 'that were previously inadequate in law'").

165. *See* Houck, *supra* note 2, at 93 ("Their elaborate geometry (e.g. not only 'injury' but 'immediate' injury to a 'particular individual' and a 'particular place') is flexible at every joint, which admits no end of mischief.").

166. *Compare Lujan*, 504 U.S. at 577 (majority opinion) ("To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an 'individual right' vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed.'" (quoting U.S. CONST. art. II, § 3)), *with id.* at 602 (Blackmun, J., dissenting) ("In fact, the principal effect of foreclosing judicial enforcement of such procedures is to transfer power into the hands of the Executive at the expense—not of the courts—but of Congress, from which that power originates and emanates.").

167. *See* Sunstein, *supra* note 141, at 218 ("Asymmetry on this point would simply translate judicial antipathy to regulation into administrative law.").

the standing doctrine, as created and applied by the Supreme Court in *Lujan*, offends values at the heart of both environmental law and administrative law.[168] To anyone doubtful that the plurality was taking particular aim at environmental law, consider Justice Harry Blackmun's dissent, where he cautions that "environmental plaintiffs are under no special constitutional standing disabilities"[169] and describes the Court's opinion as a "slash-and-burn expedition through the law of environmental standing."[170] Justice Blackmun understood correctly that this case was an assault on environmental standing.[171]

In the end, *Lujan* illustrates how the doctrine of standing can be applied in ways that undermine both environmental law and administrative law. Most importantly, *Lujan*'s use of standing to diminish the public interest voice implementing environmental laws is fundamentally at odds with the public-minded values undergirding those laws to begin with.[172] In addition, the selective closing of the courthouse doors is at odds with the access that Congress affords nonregulated entities through citizen suits provisions contained in many federal environmental statutes, the accountability values of administrative law, and the presumption in favor of judicial review that is a bedrock feature of the federal APA.

2. Robertson v. Methow Valley Citizens*: Using Vague Notions About the Court's Role in Judicial Review to Sideline Substantive NEPA*

Standing, though perhaps the most recognizable tool for sidestepping the substance of environmental law, is not the only lever that courts pull to downgrade the force of environmental law.[173] In the next case example—*Robertson v. Methow Valley Citizens*—administrative law plays a more subtle but no less devastating role in the judiciary's rewriting of the NEPA.[174] Indeed, in this

168. *See id.* at 236 ("The *Lujan* Court's unprecedented invalidation of a provision for citizen standing has no basis in Article III.").

169. 504 U.S. at 595 (Blackmun, J., dissenting).

170. *Id.* at 606.

171. Houck, *supra* note 2, at 92 ("Several members of the Court have made no secret of this hostility to environmentalists and environmental plaintiffs.").

172. *See id.* at 91–92.

173. *See* Sidney A. Shapiro & Richard Murphy, *Politicized Judicial Review in Administrative Law: Three Improbable Responses*, 19 GEO. MASON L. REV. 319, 320–21 (2012) ("Subconstitutional administrative law, too, is festooned with multipart general tests that open the door for more than one reasonable outcome.").

174. Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989); 42 U.S.C. § 4321. For a modern account of NEPA's history, see Brigham Daniels, Andrew Follett & James Salzman, *Reconsidering NEPA*, 96 IND. L.J. 865 (2021).

1989 decision, one can appreciate how broad-brush administrative law truisms can creep into environmental law with significant consequences for otherwise clear (albeit broad) congressional commands.

All students of environmental law are familiar with the Supreme Court's catchy admonishment that "NEPA merely prohibits uninformed—rather than unwise—agency action."[175] That is, NEPA is procedural, not substantive.[176] But when charged with actually reading the statute, these same students rightfully scratch their heads and wonder how the Court could be so confident that NEPA is purely procedural when § 101 declares that "it is the continuing responsibility of the Federal Government to use all practicable means" to among other things "attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences."[177]

Students who read this language and presume a substantive duty are not alone. In the early days, lower courts and scholars alike had read this text to establish an affirmative duty on federal agencies to make environmental protection part of their mission.[178] One of the most prominent examples of how early courts accepted NEPA as imposing substantive duties is found in the D.C. Circuit's *Calvert Cliffs' Coordinating Committee, Inc. v. U.S. Atomic Energy Commission* decision.[179] In this 1971 decision penned by Judge J. Skelly Wright, the D.C. Circuit starts by acknowledging that § 101 sets out the "basic substantive policy" of NEPA.[180] And while the court understood that the court's precise role in reviewing the substance of the agency's decision was more limited than the court's role in policing NEPA's procedural requirements, some review of the substance was undoubtedly presumed:

> [I]t remains to be seen whether the promise of this legislation will become a reality. Therein lies the judicial role. In these cases, we must for the first time interpret the broadest and perhaps most important of the recent statutes: the [NEPA]. We must assess claims that one of the agencies charged with its administration has failed to live up to the congressional mandate. Our duty, in short, is to see that important legislative

175. *Robertson*, 490 U.S. at 351.

176. *Id.* at 350 ("[I]t is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process. If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs.") (citations omitted).

177. 42 U.S.C. § 4331(b).

178. Calvert Cliffs' Coordinating Comm'n, Inc. v. U.S. Atomic Energy Comm'n, 449 F.2d 1109, 1112 (D.C. Cir. 1971); Bernard S. Cohen & Jacqueline Manney Warren, *Judicial Recognition of the Substantive Requirements of the National Environmental Policy Act of 1969*, 13 B.C. INDUS. & COM. L. REV. 685, 691–94 (1972).

179. *Calvert Cliffs'*, 449 F.2d 1109.

180. *Id.* at 1112.

> purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy.[181]

During the course of its discussion, the court suggested that the arbitrary and capricious standard of review would provide the appropriate framework for the court's role in ensuring § 101's substantive demands were respected.[182] Other circuit courts followed the lead of *Calvert Cliffs'*, applying an arbitrary and capricious standard not just to the question of whether agencies examined all relevant impacts under NEPA but also as to whether the chosen alternative respected the substantive policies set out in § 101.[183] In the early days, the Council of Environmental Quality did too.[184]

The upshot is that, in the early days, lower courts and the federal agency charged with implementing NEPA understood it to contain reviewable substantive commands.[185] As Judge Wright understood in his examination of NEPA in *Calvert Cliffs'*, there was no doubt that reviewing the substance of agency decisions would be tricky business for courts.[186] Still, short of a decision that such a congressional command is too vague to be enforced,[187] one ought to struggle mightily to accept the judiciary's prerogative to read substance entirely out of a statute without a solid theory and thorough explanation.

And yet, today, judicial opinions are left with the oft-repeated and rarely challenged mantra that NEPA is procedural only. So where did this rewrite come from—the one that prompted the Supreme Court in *Robertson* to announce in dicta that "it is now well settled" that NEPA is procedural only?[188]

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181. *Id.* at 1111.

182. *Id.* at 1115 ("The reviewing courts probably cannot reverse a substantive decision on its merits, under Section 101, *unless* it be shown that the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values.") (emphasis added); *see also* Houck, *supra* note 2, 59–60 (discussing *Calvert Cliffs'* and its relationship to *Robertson v. Methow Valley*).

183. *See* Houck, *supra* note 2, at 59–60 (discussing the early NEPA decisions that reviewed agency decisions for their adherence to NEPA's substantive commands).

184. Houck, *supra* note 2, at 60 (citing 1978 COUNCIL ON ENV'T QUALITY ANN. REP. 8, at 121).

185. *See generally* LINDA LUTHER, CONG. RSCH. SERV., RL33152, THE NATIONAL ENVIRONMENTAL POLICY ACT (NEPA): BACKGROUND AND IMPLEMENTATION 7–10 (2011).

186. *See Calvert Cliffs'*, 449 F.2d at 1115 ("The reviewing courts *probably* cannot reverse a substantive decision on its merits[] under Section 101[.]") (emphasis added).

187. *See* Harvey Bartlett, *Is NEPA Substantive Review Extinct, or Merely Hibernating? Resurrecting NEPA Section 102(1)*, 13 TUL. ENV'T L.J. 411, 441 (2000) (discussing whether the APA's limitation on judicial review would apply to a substantive NEPA or whether there is actually law to apply).

188. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989).

Several scholars have puzzled over the loss of substantive NEPA.[189] In his detailed retelling of how NEPA lost its substantive thrust, Houck traces the missteps of *Robertson* back to the compounding imprecision of dicta.[190] That dicta, it turns out, is particularly relevant here because the dicta stemmed predominately from general observations about a court's role in judicial review and less from direct examination of particular legislative commands.[191] Drawing heavily from Houck's work, what follows here is a shortened version of the history to highlight how the compounding dicta, centered on administrative law—not the relevant environmental statutory text—ends up playing a key role in NEPA's demise.

The most direct route to appreciating how such a consequential policy change manifested from so little is to start with *Robertson*'s iconic conclusion:

> [I]t is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process . . . . If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs.[192]

In support for this "well settled" pronouncement, the Court cited three Supreme Court cases.[193] None of the cases actually considered whether NEPA imposed substantive commands. Neither in *Kleppe v. Sierra Club*[194] (a case considering whether the scope of NEPA's procedural obligations extended to preparing a comprehensive impact statement for coal development in a four-state region), nor *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*[195] (a case predominantly about rulemaking procedures),

189. *See* Houck, *supra* note 2, at 53–70; Nicholas C. Yost, *NEPA's Promise—Partially Fulfilled*, 20 ENV'T L. 533 (1990); Sam Kalen, *The Devolution of NEPA: How the APA Transformed the Nation's Environmental Policy*, 33 WM. & MARY ENV'T L. & POL'Y REV. 483 (2009); Bartlett, *supra* note 187.

190. Houck, *supra* note 2, at 55 ("Step by step, fueled by its own dicta, it was eviscerating the Act and leaving the shell.").

191. *Id.* at 55, 66–69.

192. *Robertson*, 490 U.S. at 350 (first citing Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227–28 (1980) (per curiam); then Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, 435 U.S. 519, 558 (1978); and then Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976)).

193. *Id.*

194. 427 U.S. 390 (1976).

195. 435 U.S. 519 (1978). As discussed by Houck, *supra* note 2, at 62, any comments made by the Court in *Vermont Yankee* about NEPA's procedural reach were extraneous to the case and oddly tied to the Court's earlier decision in *United States v. Students Challenging Reg. Agency Pros. (SCRAP)*, 412 U.S. 669 (1973) (a case that made no mention of NEPA's substantive reach).

nor *Strycker's Bay Neighborhood Council v. Karlen*[196] (a case decided without argument and per curiam that reversed the lower court's conclusion that certain environmental factors should have been given "determinative weight" in the Department of Housing and Urban Development's (HUD's) decision to fund an urban renewal project), did the Court ever squarely take up the question of whether NEPA was substantive.

The decision in *Strycker's Bay*[197] comes closest. There, the Court of Appeals conceded that HUD's analysis passed procedural muster under NEPA.[198] Nevertheless, the Court reversed the agency decision on the grounds that when HUD considers such projects, "environmental factors, such as crowding low-income housing into a concentrated area, should be given determinative weight."[199] The Supreme Court reversed, citing *Vermont Yankee*'s description of NEPA as "essentially procedural."[200] In this short opinion, one finds no analysis to speak of. No examination of NEPA's text. No discussion of NEPA's purpose. Only cursory conclusion and reliance on *Vermont Yankee*.

If the layers of the onion are peeled back a bit more, one might observe that *Vermont Yankee* was largely devoted to administrative law-centered questions about whether courts can graft additional rulemaking procedures on those required by Congress in the APA.[201] Once again, the substantive provisions of NEPA were not at issue.[202] No doubt that the Supreme Court harbored concerns about the lower court's willingness to insert itself in not just the procedure but also the substance of the agency's decision to grant Vermont Yankee a permit.[203] To that end, the tail end of *Vermont Yankee* admonishes the lower court that it no doubt forgot it must not substitute its own judgment for that of the agency.[204] And in a last effort to rein in the lower court by making some "further observation[s] of some relevance," the Court concludes without analysis that NEPA is "essentially procedural."[205]

Poof. Something out of nothing. Four cases cited in *Robertson* for a well-settled proposition that was never properly considered. And the magic ingredient? A truism courtesy of administrative law.

To get the full appreciation of how compounding dicta snowballed to bury

196. 444 U.S. at 227 (per curiam).
197. *Id.* at 228.
198. *Id.* at 227.
199. *Id.* (quoting Karlen v. Harris, 590 F.2d 39, 44 (2d Cir. 1978)).
200. *Id.* (quoting *Vt. Yankee Nuclear Power Corp.*, 435 U.S. at 558).
201. *See* 435 U.S. at 525.
202. *See generally id.*
203. *See id.* at 554–55.
204. *See id.* at 555.
205. *Id.* at 557–58.

NEPA, consider not just *Robertson*'s general reliance on *Kleppe v. Sierra Club* but consider *Roberston's* particular reliance on *Kleppe v. Sierra Club*'s footnote twenty-one:

> Neither the statute nor its legislative history contemplates that a court should substitute its judgment for that of the agency as to the environmental consequences of its actions. The only role for a court is to insure that the agency has taken a "hard look" at environmental consequences; it cannot "interject itself within the area of discretion of the executive as to the choice of the action to be taken."[206]

This footnote, incidentally, was also relied on by the Court in *Strycker's Bay* and *Vermont Yankee*.[207] And yet, in this footnote, one finds nothing remarkable. It seems fairly obvious that courts would not be invited to substitute their own conclusions for work assigned by Congress to an agency.[208] That much is written into the APA's "arbitrary [and] capricious" standard of review, which governs NEPA challenges and which the D.C. Circuit already presumed (in *Calvert Cliffs'*) would be applied to the substantive commands of NEPA.[209] Equally important, nowhere in this footnote does the Court discuss NEPA's substantive commands. A court, in other words, would be equally advised not to substitute its own conclusions for that of an agency as to whether NEPA was procedural in nature (that is, NEPA requires agencies to assess impacts) or whether NEPA was substantive in nature (that is, NEPA requires agencies to select less environmentally destructive alternatives when feasible).[210]

No additional comfort is forthcoming if one keeps following the trail of citations. If one reads the two cases cited in footnote twenty-one, one encounters simply more dead ends on the quest to find some analysis of NEPA and its history to determine whether Congress meant to impose substantive commands.[211] Both cases can better be described as early 1970s cases where

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206. 427 U.S. 390, 410 n.21 (1976) (first quoting Scenic Hudson Preservation Conference v. Fed. Power Comm'n, 453 F.2d 463, 481 (2d. Cir. 1971), *cert denied*, 407 U.S. 926 (1972); and then Nat. Res. Def. Council v. Morton, 458 F.2d 827, 838 (D.C. Cir. 1972)).

207. Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227–28 (1980) (per curiam); *Vt. Yankee Nuclear Power Corp.*, 435 U.S. at 555.

208. *See* Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1970) (holding that a court cannot substitute its judgment for an agency).

209. *See* 5 U.S.C. § 706(2)(A); Calvert Cliffs' Coordinating Comm'n, Inc. v. U.S. Atomic Energy Comm'n, 449 F.2d 1109, 1129 (D.C. Cir. 1971) (applying the arbitrary and capricious standard to substantive NEPA commands).

210. One caveat to this assertion: *Calvert Cliffs'* suggested a more aggressive review of procedural rather than substance, though that is a far cry from disavowing substance at all. *See Calvert Cliffs'*, 449 F.2d at 1114–16.

211. *See* Scenic Hudson Pres. Conf. v. Fed. Power Comm'n, 453 F.2d 463 (2d Cir. 1971) (declining to analyze NEPA or Congress's intent regarding the substantive aspects of the

lower courts were wrestling with the appropriate approach to judicial review of agency decisions in a more general sense.

The Second Circuit's decision in *Scenic Hudson Preservation Conference v. Federal Power Commission*[212] involved a challenge to a pump storage project approved by the Federal Power Commission along the Hudson River. The Commission had granted the original license for the project before NEPA was even enacted.[213] The environmental plaintiff had successfully challenged the grant of the original license under § 10 of the Federal Power Act, which lays down certain substantive limits on the Commission's authority to issue licenses.[214] In the meantime, while the Commission was undertaking the work to comply with the remand order, NEPA was enacted.[215] Most of the Second Circuit's opinion was devoted to the question of whether, in regranting the license after making significant changes to the original project, the Commission had violated § 10 of the Federal Power Act and the court's previous remand order.[216]

Eventually, the court took up plaintiffs' contentions that the substantive commands of NEPA required a different decision by the Commission.[217] In addressing this claim, the court did not engage in any robust examination of the discussion about NEPA or congressional intent in the passage of NEPA on the issue of substance. The court simply offered a conclusory statement, with no citation, that:

> The policy statement in Section 101 envisions the very type of full consideration and balancing of various factors which we, by our remand order, required the Commission to undertake. Like our remand, the Act does not require that a particular decision be reached but only that all factors be fully explored. The eventual decision still remains the duty of the responsible agency.[218]

To be fair, this statement—made without support and buried in the depths of a decision devoted to addressing not the substantive limits of NEPA but the Federal Power Act—is actually related to the claim eventually made in *Robertson*.[219] Still, one can hardly go so far as to assert that it supports the

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statute); Nat. Res. Def. Council v. Morton, 458 F.2d 827 (D.C. Cir. 1972) (withholding comment on whether NEPA contains any substantive commands).

212. 453 F.2d 463 (2d Cir. 1971).

213. *See id.* at 465.

214. *See* Scenic Hudson Pres. Conf. v. Fed. Power Comm'n, 354 F.2d 608, 612, 625 (2d Cir. 1965).

215. *See* Scenic Hudson Pres. Conf., 453 F.2d at 467 ("The Commission is now obligated also to consider the environmental factors covered by [NEPA].").

216. *See id.* at 469.

217. *See id.* at 481.

218. *Id.*

219. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989).

notion that NEPA's procedural nature is "well settled."[220]

Footnote twenty-one's citation to *Natural Resources Defense Council v. Morton*[221] is no more useful a hook for NEPA's eventual undoing. The case involved a NEPA challenge to an oil lease granted by the Department of Interior in the Gulf of Mexico. The entire opinion is devoted to issues properly categorized as procedural NEPA, mostly focused on whether the agency adequately addressed a range of alternatives.[222] At the end of the opinion, Judge Harold Leventhal—in dicta—offers a view of how courts should balance their roles with agencies. He says:

> A final word. In this as in other areas, the functions of courts and agencies, rightly understood, are not in opposition but in collaboration, toward achievement of the end prescribed by Congress. So long as the officials and agencies have taken the "hard look" at environmental consequences mandated by Congress, the court does not seek to impose unreasonable extremes or to interject itself within the area of discretion of the executive as to the choice of the action to be taken.[223]

That is it. Nothing in the opinion or this quotation appears to comment on whether NEPA contains substantive commands. It is simply a general observation about the boundaries that one would expect from courts when applying the arbitrary and capricious standard of judicial review.

Pulling out from the details of this jurisprudential swirl, a few summative observations. First, *Robertson* was wrong to conclude that NEPA was procedural only or that such a conclusion was "well settled." The confluence of cases giving rise to NEPA's demise is not—individually or in the aggregate—robust in their examination of NEPA. Rather, one finds but a series of general observations by courts about their role in judicial review. The cases relied on by *Robertson* (directly or indirectly) are best thought of as reflecting a broader set of administrative law concerns animating courts during a particular era. The era was the early 1970s. NEPA was new. Many statutes delegating broad power to agencies, both in and outside the environmental context, were newly enacted.[224] Rulemaking as a form of setting policy was on the rise.[225] In short, courts were naturally wrestling with the scope of judicial review and their role in it. In remarking on the propriety of courts

220. *Id.*

221. 458 F.2d 827 (D.C. Cir. 1972).

222. *See id.* at 829 ("This appeal raises a question as to the scope of the requirement of [NEPA] that environmental impact statements contain a discussion of alternatives.").

223. *Id.* at 838.

224. *See* Houck, *supra* note 2, at 62–63 (highlighting the considerable "leeway" given to EPA in the 1970s through many statutes).

225. *See* Ralph F. Fuchs, *Agency Development of Policy Through Rule-Making*, 59 NW. UNIV. L. REV. 781, 781 (1965).

substituting their judgment for that of agencies, these courts were not necessarily wrestling with the question of whether NEPA imposed substantive commands. Those are two very different issues, ones that the Supreme Court ultimately conflated in *Robertson*.

At worst, the policy that emerged from *Robertson* can be said to be contrary to legislative text.[226] At best, the policy that emerged without critical examination of the relevant text. Either way, a bedrock environmental statute was stripped bare of its substantive commands by a vague recitation of a court's role in judicial review. To be fair, it is not clear whether the downgrading of NEPA in *Robertson* was entirely intentional.[227] But that is beside the point. The potential for administrative law to blur the focus of courts on congressional commands, even if inadvertent, is relevant to examining whether administrative law can overflow its banks.

3. Michigan v. EPA*: Using the Flexibility in Deference and Judicial Review Doctrines to Write Additional Terms into Statute*

Michigan v. EPA[228]—a 2015 decision involving EPA's decision to regulate mercury from coal-fired power plants—is a good example of how the flexibility of administrative law's judicial review and deference doctrines allow courts to inject themselves into environmental policy. More specifically here, the imprecise arbitrary and capricious standard of review, alongside the ill-defined lines between the *Chevron* doctrine's two steps, created a pathway for the Supreme Court to read cost into the Clean Air Act in ways that are not obviously required given the law's underlying public health commands.

The broad contours of the case are fairly straightforward:[229] The Clean Air Act directs EPA to regulate hazardous air pollutants from power plants when doing so is "appropriate and necessary."[230] In 2012, EPA adopted a final rule setting mercury and other emission standards for power plants.[231]

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226. *See* 42 U.S.C. § 4331(b) ("[I]t is the continuing responsibility of the Federal Government to . . . attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences.").

227. *See* Bartlett, *supra* note 187, at 431–32.

228. 576 U.S. 743, 747 (2015).

229. The case presentation here is adapted from the author's previous work. *See* Sanne H. Knudsen, *The Flipside of* Michigan v. EPA*: Are Cumulative Impacts Centrally Relevant?*, 2018 UTAH L. REV. 1 (detailing the case and its effects in full). For another in-depth case critique and more robust history of mercury regulation, see Oliver A. Houck, *Polluters Paradise: The Dark Canon of the United States Supreme Court in Pollution Control Law*, 72 AM. U. L. REV. 61, 76–97 (2022) [hereinafter *Polluter's Paradise*].

230. 42 U.S.C. § 7412(n)(1)(A).

231. The Mercury Air Toxics Standards Rule, 77 Fed. Reg. 9,304, 9,367 (Feb. 16, 2012),

In deciding whether regulating mercury emissions was indeed appropriate and necessary, EPA focused on public health issues.[232] The Clean Air Act was silent as to whether EPA needed to consider costs when determining whether it was appropriate and necessary to regulate. EPA interpreted the Act such that it did not require the agency to consider costs.[233] Rather, EPA chose to consider costs later in the regulatory process when setting the limits of mercury emissions.[234] The Supreme Court held that EPA should have considered cost when deciding whether to regulate, not merely in considering how much to regulate, because cost is a "centrally relevant factor" to regulatory decisionmaking.[235] Failure to consider cost before concluding it was appropriate and necessary to regulate rendered EPA's decision arbitrary and capricious, according to the Court.[236]

The Supreme Court's decision is remarkable in a couple of ways that show how administrative law frameworks shape substance. First, in the face of congressional silence, the Court injects a pro-cost presumption into a public health statute. The Court reached this conclusion even though in two previous decisions interpreting the Clean Air Act the Court had concluded that congressional silence as to cost either meant EPA could not consider cost,[237] or meant EPA had the choice to make that call.[238] Second, the case is remarkable because of the Court's use of flexibility in administrative law's judicial review frameworks to achieve that substantive outcome.

The case presented a classic dispute over statutory interpretation that would be resolved through application of the well-established *Chevron* doctrine.[239] Under that doctrine, one would have expected the Court to either find that congressional intent to require cost was clear or to defer to EPA's

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invalidated by Michigan v. EPA, 576 U.S. at 751.

232. *See id.* at 9,362–63.

233. *See id.* at 9,326–27 (explaining that it is "reasonable" to regulate mercury emissions from power plants without considering cost). In fact, EPA made clear that its Regulatory Impacts Analysis, which it had prepared as part of the Office of Information and Regulatory Affairs review process and which estimated costs and benefits of the proposed regulation, played no role in the "appropriate and necessary" finding. *Id.* at 9,323.

234. For a discussion on how EPA considered cost, see *Polluter's Paradise*, *supra* note 229, at 90–93.

235. Michigan v. EPA, 576 U.S. at 752–53.

236. *Id.* at 751 (holding that "EPA strayed far beyond [the] bounds" of reasonable interpretation in determining it could ignore costs when deciding whether to regulate power plants).

237. Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 486 (2001).

238. Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208, 233 (2009).

239. The *Chevron* doctrine has since been overruled by the Supreme Court in Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024).

interpretation if it were reasonable.[240] But the Court did not take a straightforward path. Instead of emphasizing ambiguity, deference, and agency expertise, the Court focused on the breadth of the term "appropriate" as "the classic broad and all-encompassing term that naturally and traditionally includes consideration of all the relevant factors."[241] Having determined that EPA was required to consider all relevant factors, the Court explained that "the phrase 'appropriate and necessary' requires at least some attention to cost."[242] Appealing to something of a common sense line of argument, the Court remarked: "One would not say that it is even rational, never mind 'appropriate,' to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits."[243]

In reaching this conclusion—in a case that seemed to squarely present an issue of statutory interpretation—the Court found a path that seems to follow neither step one nor step two of *Chevron*. On the one hand, the Court concluded that cost must be considered, and in so holding implies there is no other rational approach to the statute.[244] This only-one-way reading is classically step one. On the other hand, when arriving at the conclusion that there is only one rational way to read the statute, the Court used its common sense as the primary guide, not the traditional tools of statutory construction that have long been tied to step one analysis.[245] The flexibility of reasoning suggests a step two analysis.

There is a strategic reason why the Court may not have wanted to differentiate its analysis as to step one or step two. By muddying the methodological waters, the Court could introduce yet another multi-factored review framework (and its attendant flexibility) to the mix. That is, in discussing the reasonableness of the agency's interpretation, the Court reached for the arbitrary and capricious standard of review. By enlisting this standard, the Court gained access to the well-known *State Farm*[246] factors, which make "fail[ure] to consider an important aspect of the problem" one of the

240. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984) (holding that courts should defer to an agency's interpretation when there are ambiguities in the statute, so long as the interpretation is reasonable).

241. 576 U.S. at 752.

242. *Id.*

243. *Id.*

244. *See id.* at 759 ("The Agency must consider cost—including, most importantly, cost of compliance—before deciding whether regulation is appropriate and necessary.").

245. *See Chevron*, 467 U.S. at 843 n.9 ("If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.").

246. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins., 463 U.S. 29, 40–44 (1983).

hallmarks of arbitrary decisionmaking.[247] And with that factor in hand, the Court was free to pontificate on what are important aspects of the problem (namely cost).

On its face, *Michigan v. EPA* seems to logically follow established frameworks. This gives its analysis an air of legitimacy. It would not exactly have been news at the time that the arbitrary and capricious standard of review is sometimes imported in step two of the *Chevron* inquiry.[248] There is, after all, logical overlap in the questions of whether an agency interpretation is reasonable and whether it is nonarbitrary. Still, by switching tracks and importing the arbitrary and capricious standard, the Court behaved unusually. Namely, the Court managed to avoid the deference usually afforded agencies under step two[249] while at the same time avoiding the usually deferential standard of arbitrary and capricious review.[250] All without expressly stating whether congressional intent (and opposed to judicial preference) was clear.

In the end, one cannot help but sense that the Court engaged in a sleight of hand through a choose-your-own-adventure approach to judicial review. The Court engaged the judicial review doctrines with a deftness that allowed it to avoid the direct issue of whether congressional intent was clear (a classic step one question) while also avoiding the deference that would typically have been afforded to agencies in the face of statutory ambiguity (a most typical step two outcome) as well as avoiding the deferential approach and longstanding admonishment that "[t]he court is not empowered to substitute its judgment for that of the agency"[251] when applying the arbitrary and capricious standard of review. When the Supreme Court eventually overruled *Chevron* in *Loper Bright*, it did so partly because *Chevron* and the ambiguous concept of ambiguity were too malleable and therefore prone to

247. *Id.* at 43.

248. Lawson, *supra* note 96, at 895–98 (providing an in-depth summary of cases and scholarship on the importing of hard look review to *Chevron* step two); *id.* at 897 ("Judicial discussions of the relationship between *Chevron* and arbitrary or capricious review often remains somewhat mysterious.").

249. Lawson, *supra* note 96, at 728 ("One comprehensive study finds that when courts of appeals reach Chevron step two, the agency wins 93.8 percent of the time." (citing Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 MICH. L. REV. 1, 6 (2017))); *id.* ("In the infrequent cases in which agencies lose at step two, the agency interpretations typically either fail completely to advance the goals of the underlying statute, or are so bizarre that close analysis is unnecessary.") (citation omitted).

250. *See* Fed. Commc'ns Comm'n v. Prometheus Radio Project, 141 S. Ct. 1150, 1158 (2021) ("Judicial review under that standard is deferential, and a court may not substitute its own policy judgment for that of the agency.").

251. Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971); *see also Prometheus Radio Project*, 141 S. Ct. at 1158.

arbitrariness.[252] In many ways, the *Michigan v. EPA* decision is a testament to that idea.

Not only that, but in this opinion, Justice Scalia gave a master class in how to operationalize administrative law to drive the values of environmental law.[253] The Court navigated the interstices of administrative law frameworks in a way that let the Court's own perception of common sense drive the statutory requirements rather than the traditional tools of statutory construction—even when the outcome flows unnaturally from the public health goals of the underlying statute. The outcome surely was not required by the structure, text, or history of the statute (or by the Court's own precedent).[254]

4. Rapanos *and* Sackett*: Creating Regulatory Instability Through Moving Targets of Statutory Interpretation and Deference*

The next example of how the Supreme Court has operationalized administrative law to undermine environmental law comes from the so-called "WOTUS" lines of cases. In these cases—which span from 1985 to 2023—the Supreme Court sought multiple times to clarify the jurisdictional reach of the Clean Water Act. In *United States v. Riverside Bayview Homes, Inc.* (1985),[255] *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (*SWANCC*) (2001),[256] *Rapanos v. United States* (2006),[257] and *Sackett v. EPA* (2023),[258] the Court tackled the same basic question of statutory interpretation: what is the meaning of the phrase "waters of the United States" as it relates to the jurisdictional reach of the Clean Water Act? The question of wetlands regulation proved particularly contentious. Time and time again, questions arose about the extent to which those wetlands must be connected—hydrologically, functionally, or otherwise—to traditionally navigable waters in order to be covered by the Clean Water Act.[259]

In the nearly forty years that it has taken for the Court to clarify, confuse, and reclarify this singular question, some useful insights may be gained. First,

252. *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2271 (2024).

253. *See* Michigan v. EPA, 576 U.S. 743, 752–57 (2015).

254. *See id.* at 752–57, 760.

255. 474 U.S. 121 (1985).

256. 531 U.S. 159 (2001).

257. 547 U.S. 715 (2006).

258. 143 S. Ct. 1322 (2023).

259. *See, e.g.*, *Riverside Bayview Homes*, 474 U.S. at 123 (addressing whether the CWA authorizes the Army Corps of Engineers to regulate "wetlands adjacent to navigable bodies of water and their tributaries"); *Rapanos*, 547 U.S. at 729 (considering whether wetlands "that eventually empty into traditional navigable waters, constitute 'waters of the United States' within the meaning of the Act").

the Supreme Court has not been consistent in its approach to deference or power-sharing with EPA when it comes to wetlands regulation.[260] Second, the Supreme Court reaches for extra-statutory canons when it wishes to assign itself more power in setting environmental policy.[261] Third, when the Court takes inconsistent approaches to statutory interpretation and deference, regulatory instability ensues.[262] That instability undermines the success of the Clean Water Act by perpetuating uncertainty and sowing frustration among regulated entities.

A full dissection of the WOTUS line of cases could be, and has been, a body of scholarship in and of itself.[263] Nonetheless, a brief summary of these cases and their approaches highlight how the Supreme Court—particularly through inconsistent methodology and approach to deference over time—has contributed to the regulatory uncertainty that has plagued certain aspects of the Clean Water Act.

In 1985, the Supreme Court decided *United States v. Riverside Bayview Homes*.[264] The issue presented was whether "wetlands adjacent to navigable bodies of water and their tributaries" are subject to the Clean Water Act's permitting requirements.[265] The Court's decision is notable for several reasons that would eventually set it apart from later opinions tackling virtually the same question. First, the opinion was unanimous. The issue presented, Justice Byron White said, was "an easy one."[266] Second, respect for agency expertise and judicial restraint took center stage in the Court's analysis. To that end, guided by the *Chevron* doctrine, the Court noted that "our review is limited to the question whether it is reasonable, in light of the language, policies, and legislative history of the Act for the Corps to exercise jurisdiction" over the adjacent wetlands.[267] Third, in recognizing that it is "no easy task" to determine where "water ends and land begins" and that linguistics

260. *Compare Riverside Bayview Homes*, 474 U.S. at 126, 132, 139 (giving more deference to the agency because the Court recognized the agency's expertise), *with Rapanos*, 547 U.S. at 738–39 (declining to use the *Chevron* two-step framework for reviewing statutory interpretation and declining to defer to the agency's interpretation of WOTUS), *and Sackett*, 143 S. Ct. at 1338 (refusing any deference to agency expertise and establishing a strong position for the Court in resolving statutory ambiguities).

261. *See Sackett*, 143 S. Ct. at 1338–41.

262. *See infra* note 399 and accompanying text.

263. *See, e.g.*, William W. Buzbee, *The Antiregulatory Arsenal, Antidemocratic Can(n)ons, and the Waters Wars*, 73 CASE W. RES. L. REV. 293, 295 (2022) ("This Article traces key moves and developments in this multi-decade battle over Waters protections.").

264. 474 U.S. 121 (1985).

265. *Id.* at 123.

266. *Id.* at 129.

267. *Id.* at 131.

provided no ready answer, the Court turned to the purpose of the Clean Water Act to assist in determining whether the agency's judgment was reasonable.[268] That purpose, set out in statutory text, is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[269] Recognizing the Act "constituted a comprehensive legislative attempt"[270] to protect and enhance water quality, and recognizing the agency's expert conclusion that adjacent wetlands play a key role in doing just that, the Court concluded that the agency's "ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act."[271]

That unanimous conclusion reflects the tenor of the opinion as a whole. Throughout the opinion the Court focused on two things: giving voice to congressional intent and giving due respect to agency expertise on what the Court clearly understands are complex ecological determinations.[272] The Court does not insert itself or its view any more than necessary. The Court does not strain to make this a case where congressional intent is clear because the Court does not bristle at sharing power with agency expertise.

In 2001, in *SWANCC*, the Supreme Court again tackled the meaning of the phrase "waters of the United States."[273] At issue in *SWANCC* was the applicability of the Clean Water Act to an abandoned gravel pit with no hydrologic connections to any interstate waters.[274] That pit had been filled in and, over time, reverted to successional forest and seasonal ponds used as habitat for migratory birds.[275] Under the so-called "Migratory Bird Rule," the agencies asserted jurisdiction over even these wholly intrastate ponds because they supported migratory birds.[276] Writing for a 5–4 majority in an opinion delivered by Chief Justice William Rehnquist, the Court held this was a bridge too far.[277]

In concluding that wholly intrastate and hydrologically isolated wetlands fell outside the reach of the Clean Water Act, the Court started with the familiar purpose of the Clean Water Act: "Restor[ing] and maintain[ing] the

268. *Id.* at 132.

269. *Id.* (quoting 33 U.S.C. § 1251).

270. *Id.* at 132.

271. *Id.* at 134.

272. *See id.* at 129–35.

273. Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 163 (2001).

274. *Id.* at 162.

275. *See id.* at 162–63.

276. *Id.* at 164–65; 51 Fed. Reg. 41,217 (Nov. 13, 1986).

277. 531 U.S. at 166–69.

chemical, physical, and biological integrity of the Nation's waters."[278] That purpose was critical to determining why isolated wetlands, with no hydrologic connection to interstate waters, were different from those considered in *Riverside Bayview Homes*. As the Court characterized its previous opinion in *Riverside Bayview Homes*, it was "Congress'[s] concern for the protection of water quality and aquatic ecosystems [that] indicated its intent to regulate wetlands 'inseparably bound up with the "waters" of the United States.'"[279] In other words, the Court went on, "It was the significant nexus between the wetlands and 'navigable waters' that informed our reading of the CWA in *Riverside Bayview Homes*."[280]

From this, two more observations can be made. First, in *SWANCC*, the Court was still looking to the purpose of the Act—namely, water quality protection—as a fundamental component of determining how far Congress intended the Clean Water Act to reach.[281] Second, the phrase "significant nexus" is introduced by the Court as a relevant touchstone for determining what kinds of wetlands appropriately fall within the Clean Water Act's jurisdiction.[282]

One more aspect of *SWANCC* is useful when considering the broader story of how the Court's involvement in shaping the Clean Water Act's jurisdiction has evolved. Recall *Riverside Bayview Homes* and the deferential role it assumed in recognizing the reasonableness of the Army Corps' "ecological judgment."[283] *SWANCC* turns away from the more judicially restrained approach taken in *Riverside Bayview Homes* and, in contrast, finds no deference is warranted.[284] How can this be, when the governing judicial review framework was the *Chevron* doctrine and the statutory phrase at issue was "waters of the United States"?

SWANCC justifies refusing deference in two ways. First, the Court says, "[w]e find § 404(a) to be clear."[285] The Court does not elaborate why the phrase "waters of United States" is clear in *SWANCC* but not in *Riverside Bayview Homes*. Presumably, the Court meant that the question of whether wholly isolated intrastate wetlands constituted "waters of the United States" was clear, whereas the question of whether adjacent wetlands constituted

278. *Id.* at 166 (quoting 33 U.S.C. § 1251).

279. *Id.* at 167 (quoting United States v. Riverside Bayview Homes, 474 U.S. 121, 134 (1985)).

280. *Id.*

281. *Id.*

282. *Id.*

283. 474 U.S. at 134.

284. 531 U.S. at 172.

285. *Id.*

"waters of the United States" was not. Still, the Court did not qualify its statement in this way. Instead, the Court went on to explain why—even absent clarity—no deference would be warranted.[286] This is a shift from *Riverside Bayview Homes* and one that will carry through to *Rapanos* and *Sackett*.[287] To that end, the Court declares that "[w]here an administrative interpretation of a statute invokes the outer limits of Congress'[s] power, we expect a clear indication that Congress intended that result."[288] The Court adds that the federalism concerns raised by a broader reach of the Clean Water Act also counsel for a less deferential approach.[289] Here, one sees a first glimpse at how turning to extra-statutory cannons allows the Court to defer less and talk more.[290] That approach, Justice John Stevens observes in dissent, "is unfaithful to both *Riverside Bayview* and *Chevron*," doing "violence to the scheme Congress chose to put into place."[291]

At the end of the day, *SWANCC* is not remarkable because of its outcome. The idea that wholly isolated intrastate wetlands are not covered is not too surprising, especially if one takes the view that the purpose of the Act is not to provide general habitat protection for nonaquatic species. Still, one wonders whether the Court could have arrived at the same conclusion through other, less meddlesome means. What is more remarkable is the reasoning of *SWANCC*. First, in the way that the Court creates a larger and more permanent role for itself in shaping environmental policy by framing the question of deference as one required by federalism and lurking constitutional concerns.[292] Second, in the way that the Court inserts a new touchstone into the

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286. *Id.*

287. Rapanos v. United States, 547 U.S. 715, 738–39 (2006) (ignoring the *Chevron* framework for judicial review of statutory interpretations and the power-share of interpretation between courts and agencies); Sackett v. EPA, 143 S. Ct. 1322, 1338 (2023) (reinforcing *Rapanos*, extinguishing any deference to agency expertise, and giving the Court a strong position in resolving ambiguities).

288. 531 U.S. at 172.

289. *Id.* at 173. *But see id.* at 191 (Stevens, J., dissenting) ("Contrary to the Court's suggestion, the Corps' interpretation of the statute does not 'encroac[h]' upon 'traditional state power' over land use . . . . The CWA is not a land-use code; it is a paradigm of environmental regulation. Such regulation is an accepted exercise of federal power.") (alteration in original).

290. *Cf.* LIN MANUEL MIRANDA, *Aaron Burr, Sir*, *on* HAMILTON: AN AMERICAN MUSICAL (Original Broadway Cast Recording) (Atl. Recording Corp. 2015).

291. 531 U.S. at 191 (Stevens, J., dissenting).

292. *See* Buzbee, *supra* note 263, at 333 ("The SWANCC majority replaced the actual statutory reticulated choices and decades of rulemakings and adjudicatory proceedings with the judicial view that federal regulation unduly impinged on state interests and had to be limited in the absence of a 'clear statement.' No record was cited in support of this critically important empirical assertion. The Court basically rejected the federalism balance struck by

examination of wetlands jurisdiction—significant nexus.[293] This touchstone, the Court explains, is "inseparably bound"[294] with the purpose of the Act.

Just five years later, in its 2006 opinion in *Rapanos*,[295] the Court capitalizes on the "defer less, talk more" groundwork that it laid in *SWANCC*. Some members tried anyway. *Rapanos* is a badly splintered decision that raises more questions than it answers. Justice Scalia wrote for a four-Justice plurality; he was joined by Chief Justice John Roberts, Justice Clarence Thomas, and Justice Alito.[296] Justice Kennedy filed a separate concurrence, as did Chief Justice Roberts.[297] Justice Stephen Breyer and Justice Stevens each filed their own dissents.[298] The interpretive issue again turned on the breadth of the operative phrase "the waters of the United States." More specifically, the two consolidated cases before the Court presented "whether four Michigan wetlands, which lie near ditches or man-made drains that eventually empty into traditional navigable waters, constitute 'waters of the United States' within the meaning of the Act."[299]

Taking an atomistic view of both nature and statutory text,[300] Justice Scalia bristled at the breadth of the Clean Water Act with respect to both wetlands and non-navigable tributaries.[301] He focused on the word "the" and the statute's use of the plural form "waters" to argue that EPA's authority did not extend to all water but to some more limited subset of waters—a subset that did not include certain non-navigable tributaries and wetlands

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Congress in the statute.").

293. Robert W. Adler, *A Unified Theory of Clean Water Act Jurisdiction*, 73 CASE W. RES. L. REV. 235, 289 (2022) ("[T]he term 'significant nexus' appears nowhere in the CWA. It is not a scientific concept because the word 'significant' involves value judgments that are difficult to define. Nor is it the proper role of the judiciary to create extra-statutory tests or to assume the scientific and related policy responsibility Congress assigned to the agencies.").

294. 531 U.S. at 167.

295. 547 U.S. 715 (2006).

296. *Id.* at 719.

297. *Id.* at 757 (Roberts, C.J., concurring); *id.* at 759 (Kennedy, J., concurring in judgment).

298. *Id.* at 787 (Stevens, J., dissenting); *id.* at 811 (Breyer, J., dissenting).

299. *Id.* at 729.

300. Buzbee, *supra* note 263, at 334 ("The Scalia plurality's microtextual, decontextualizing focus on 'the' and 'waters,' as well as dictionaries, is inattentive to the CWA's actual larger statutory context, structure, express goals, or national uniformity goals."); *see also* Robert W. Adler & Brian House, *Atomizing the Clean Water Act: Ignoring the Whole Statute and Asking the Wrong Questions*, 50 ENV'T L. 45, 69 (2020).

301. 547 U.S. at 722 ("Because they include the land containing storm sewers and desert washes, the statutory 'waters of the United States' engulf entire cities and immense arid wastelands.").

adjacent to those tributaries notwithstanding their water quality impacts on more traditionally navigable waters.[302] He concluded that "*only* those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands, are 'adjacent to' such waters and covered by the Act."[303] And, "on its only plausible interpretation, the phrase 'the waters of the United States' includes only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,] . . . oceans, rivers, [and] lakes.'"[304] In the course of coming to this conclusion in which he narrows the covered wetlands and the covered waters, Justice Scalia spends most of his effort dissecting the dictionary and engaging in various linguistical acrobatics.[305]

As a departure from *Riverside Bayview Homes* and *SWANCC*, Justice Scalia gives little purchase to Congress's desire to protect water quality or the role of wetlands in serving that purpose. In fact, he criticizes the dissent for giving too much consideration to "strictly ecological" reasons.[306] By contrast, Justice Scalia did find instructive Congress's stated purpose of preserving the primary rights and responsibilities of States, which he used to set up a clear statement rule demanding more clarity from Congress and less deference to the agencies as the Court had in *SWANCC*.[307]

As to deference, any citation to the governing administrative law framework for judicial review of statutory interpretations is absent in Justice Scalia's opinion. That is, he does not cite to *Chevron* nor invoke its frame other than to conclude his proffered interpretation is the "only plausible"[308] reading of the statute and that "[e]ven if the term 'waters of the United States' were ambiguous" the clear statement cannons would render the

302. *Id.* at 732.

303. *Id.* at 742.

304. *Id.* at 739 (alterations in original).

305. *See id.* at 732, 734.

306. *Id.* at 749. ("The dissent's exclusive focus on ecological factors, combined with its total deference to the Corps' ecological judgments, would permit the Corps to regulate the entire country as 'waters of the United States.'").

307. *Id.* at 738 ("We ordinarily expect a 'clear and manifest' statement from Congress to authorize an unprecedented intrusion into traditional state authority . . . . Even if the term 'the waters of the United States' were ambiguous as applied to channels that sometimes host ephemeral flows of water (which it is not), we would expect a clearer statement from Congress to authorize an agency theory of jurisdiction that presses the envelope of constitutional validity.").

308. *Id.* at 739.

Corps' interpretation impermissible.[309] Clearly, the *Chevron* frame is at play in the background here, but the obscurity signals that the Court is reticent to acknowledge, let alone apply, a power-sharing framework here.[310]

Justice Kennedy concurred in the judgment. He agreed the Clean Water Act did not reach the wetlands at issue in *Rapanos*, but he offered a different test that would eventually become the one preferred by both the agencies and the lower courts.[311] Kennedy would have extended jurisdiction to waters or wetlands with a significant nexus to traditional waters.[312] This "significant nexus" test retained a focus on the function of wetlands in protecting water quality. Like in *Riverside Bayview Homes*, Justice Kennedy was mindful that "[i]mportant public interests are served by the Clean Water Act in general and by the protection of wetlands in particular."[313] To that end, he took note of the "plurality's overall tone and approach,"[314] which he characterized as "unduly dismissive of the interests asserted by the United States in these cases."[315]

At least two relevant observations flow from the splintered *Rapanos* decision. First, Justice Scalia's approach in *Rapanos* stands in marked contrast with *Riverside Bayview Homes*. In *Riverside Bayview Homes*, the Court was guided by the purpose of the Clean Water Act to protect aquatic ecosystems, and it heeded the expertise of the agency delegated responsibility to implement the Act.[316] Second, the inability of the Court to provide a cohesive answer in *Rapanos* created regulatory uncertainty.[317] EPA and the U.S. Army Corps of

309. *Id.* at 738.

310. *Id.* at 752–53; *see also id.* at 778 (Kennedy, J., concurring) ("The limits the plurality would impose, moreover, give insufficient deference to Congress'[s] purposes in enacting the Clean Water Act and to the authority of the Executive to implement that statutory mandate.").

311. *Id.* at 767 (Kennedy, J., concurring) (discussing the "significant nexus" test).

312. *Id.* at 759.

313. *Id.* at 777.

314. *Id.*

315. *Id.*

316. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 131–34 (1985).

317. *See* Ashleigh Allione, Comment, *The Battle over U.S. Water: Why the Clean Water Rule "Flows" Within the Bounds of Supreme Court Precedent*, 66 AM. U. L. REV. 145, 150 (2016) ("In the wake of *Rapanos*, the EPA received hundreds of requests from elected officials, local agency associations, nongovernmental organizations, and businesses seeking clarification on the scope of the 'waters of the United States.'"); Kevin P. Pechulis, *Scope of "Waters of the United States" Unclear After* Rapanos v. United States, 38 ABA TRENDS, no. 2, Nov./Dec. 2006, at 4 ("[T]he lack of a majority opinion and the use of a subjective test by the concurrence means that uncertainty will continue regarding the scope of the term and, absent regulatory amendments, lower courts will have to continue to decide such matters on a case-by-case basis, with likely inconsistent results, costs and delays for the regulated community."); Norman M. Semanko,

Engineers struggled to craft a rule that colored within the lines of Supreme Court jurisprudence and could withstand either legal challenges or changing political winds.[318]

Most recently, in *Sackett v. EPA*,[319] the Supreme Court sought once more to provide clarity on nearly the same issue raised in *Rapanos*.[320] This time, a new makeup of the Court sought to finish what Justice Scalia started in *Rapanos*—that is, to limit the reach of the Clean Water Act to wetlands with a hydrological connection to traditional waters. Indeed, the holding of *Sackett* is merely a series of quotes and citations to *Rapanos*.[321]

Like Justice Scalia's opinion in *Rapanos*, *Sackett* is a far cry from *Riverside Bayview Homes*. Characterizing the Clean Water Act as a "potent weapon"[322] (as opposed to, say, a valuable public health statute), Justice Alito derides EPA for having the audacity to take an expansive view of the Act's jurisdictional reach.[323] Justice Alito even chides Congress for its poor drafting choices that have left so much confusion in its wake.[324] There is little attempt to disguise where this Court believes the locus of power should lie or the respect that should be afforded congressional intent.[325] Any deference to agency expertise or semblance of respect for the purpose of the Clean Water Act is long gone. The clear statement canons of construction give the Court space to take a heavy hand in resolving ambiguities and diminishing the voice

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Red Paddle-Blue Paddle: Clean Water Act Ping Pong, 64 ADVOCATE 22, 22 (2021) ("Over the past 20 years, key rulings by the U.S. Supreme Court have resulted in uncertainty regarding the scope of federal jurisdiction under the Act.").

318. *See* Sackett v. EPA, 143 S. Ct. 1322, 1334–35 (2023) (providing a succinct flavor of the various rulemakings and litigation since *Rapanos* was decided); *see also id.* at 1365 (Kavanaugh, J., concurring in judgment) (providing history of the historical rulemaking efforts and noting "throughout those 45 years and across all eight Presidential administrations, the Army Corps has *always* included in the definition of 'adjacent wetlands'" certain classes of wetlands).

319. *See* 143 S. Ct. at 1329.

320. *Id.* ("This case concerns a nagging question about the outer reaches of the [CWA] . . . .").

321. *Id.* at 1341.

322. *Id.* at 1330.

323. *Id.* at 1338 ("It is hard to see how the States' role in regulating water resources would remain 'primary' if the EPA had jurisdiction over anything defined by the presence of water.").

324. *Id.* at 1336 ("This frustrating drafting choice has led to decades of litigation, but we must try to make sense of the terms Congress chose to adopt.").

325. *Id.* at 1360 (Kagan, J., concurring) ("Congress, the majority scolds, has unleashed the EPA to regulate 'swimming pools and puddles,' wreaking untold havoc on a 'staggering array of landowners.' Surely something has to be done; and who else to do it but this Court?") (citation omitted).

of Congress.[326] The Court sidelined the basic water quality concerns driving the Act. In fact, Justice Alito chastises EPA for raising the ecological consequences of an adverse decision—ecological consequences are swept aside as "policy arguments."[327] This after Justice Alito spends seven pages raising policy concerns before "start[ing], as we always do, with the text . . . ."[328] The vitriol drips from the page, and one is left to wonder how clean water became so distasteful.

As Justice Alito tells it in *Sackett*, EPA and the U.S. Army Corps of Engineers are to blame for the regulatory uncertainty (and overreach) that has characterized wetlands regulation under the Clean Water Act.[329] In recounting the history of regulation on these issues, the Court begins by noting that EPA took a broad view of its jurisdiction out of the gate.[330] And though the Court credited the Army Corps with an initially constrained view of its jurisdictional reach, the narrower view "did not last."[331] Rather, EPA and the Army Corps eventually converged on "expansive" views and adopted "technical" terms for what constituted covered wetlands.[332] From there, more expansion followed *Riverside Bayview Homes*.[333] Then, vague rules and an "array of expansive interpretations" endorsed by lower courts followed *SWANCC*.[334] After *Rapanos*, more "grey areas" were implemented through guidance, and then a "flurry of rulemaking" took a "muscular approach" in 2015.[335] After a failed attempt to replace that "sweeping rule," a more recent rulemaking returned to a "broader" rule relying on "open-ended factors."[336]

No doubt the two agencies responsible for implementing the Clean Water Act have had a difficult time arriving at clear rules about what does and does not constitute covered waters. Still, Justice Alito only tells part of the story—leaving out the part where the courts have embraced, even required, an aggressive reach of the Act.[337] At the beginning of the opinion, when Justice

326. *Id.* at 1341–42 (majority opinion) ("[T]his Court 'requires Congress to enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power and the power of the Government over private property.'" (quoting U.S. Forest Serv. v. Cowpasture River Pres. Ass'n, 140 S. Ct. 1837, 1849–50 (2020))).

327. *Id.* at 1343.

328. *Id.* at 1336.

329. *See id.* at 1332–35.

330. *Id.* at 1332.

331. *Id.*

332. *Id.* at 1332–33.

333. *Id.* at 1333.

334. *Id.*

335. *Id.* at 1334.

336. *Id.* at 1335.

337. *See, e.g.*, Nat. Res. Def. Council, Inc. v. Callaway, 392 F. Supp. 685, 686 (D.D.C.

Alito recounts that the U.S. Army Corps of Engineers' narrower reading of the Clean Water Act's jurisdiction "did not last,"[338] he fails to mention that the United States District Court for the District of Columbia had vacated the Corps' regulations on the grounds that Congress intended a more expansive reach than the traditional "navigable waters" test would permit.[339] Indeed, the D.C. Circuit held that Congress intended the Act to reach "to the maximum extent permissible under the Commerce Clause of the Constitution."[340] The Army Corps, therefore, had erred in limiting its authority to anything short of what the Constitution would allow.[341] No doubt this decision shaped the agencies' approach early on.

There is another important part of the story absent from Justice Alito's retelling of the history—namely, the part where the Supreme Court has contributed to the uncertainty of the Act's reach. Indeed, to read Justice Alito's regulatory history, the agencies have been consistent in their adherence to the so-called expansive view. It is the Supreme Court that can be said to have introduced inconsistency and uncertainty into the picture: The Court, in *Riverside Bayview Homes*, took a deferential approach, clearly accepted as relevant the function of wetlands in serving the water quality protection goals of the Act, and confirmed that Congress intended an aggressive reading of the statute—one that went to the constitutional limit.[342] The Court, in *SWANCC*, introduced the relevance of a wetland's "significant nexus," which would reappear as a touchstone in Justice Kennedy's concurrence in *Rapanos*.[343] It was the Court that, in *Rapanos*, delivered such a splintered decision, leaving it to agencies and lower courts to figure out the appropriate approach to wetlands jurisdiction.[344] The lower courts, doing what they could with the sometimes overlapping and sometimes divergent messages, largely concluded that Justice Kennedy's "significant nexus" test was

1975) (holding that Congress intended to assert federal jurisdiction over the nation's waters "to the maximum extent permissible"); United States v. Holland, 373 F. Supp. 665, 672 (M.D. Fla. 1974).

338. *Sackett*, 143 S. Ct. at 1332.

339. *Callaway*, 392 F. Supp. at 686.

340. *Id.*

341. *Id.*

342. *See supra* notes 264–271 and accompanying text.

343. *See* Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 167 (2001) ("It was the significant nexus between the wetlands and 'navigable waters' that informed our reading."); *see also* Rapanos v. United States, 547 U.S. 715, 759, 767 (2006) (Kennedy, J., concurring).

344. *See* U.S. ENV'T PROT. AGENCY, CLEAN WATER ACT JURISDICTION FOLLOWING THE U.S. SUPREME COURT'S DECISION IN RAPANOS V. UNITED STATES (2007), https://www.epa.gov/sites/default/files/2016-04/documents/rapanosguidance6507.pdf.

governing.[345] The agencies, taking up Justice Breyer's suggestion that they clarify the Court's mess through rulemaking, attempted to do just that.[346]

And what a mess it was. No one was a fan of this uncertainty.[347] But that is not the point. The point is that in the past forty years, the Court has taken an increasingly heavy hand in shaping the precise lines of Clean Water Act jurisdiction. In the course of it, the Court has been inconsistent in its approach to statutory interpretation and deference. It has gone from deference to derision. It has gone from considering the ecological consequences of the question before it to dismissing those consequences as mere "policy arguments" worthy of very little examination.[348] It has gone from robust discussion about the purpose of the Act and the will of Congress to the use of clear statement canons as a way of sidelining Congress's voice.

In short, the Supreme Court has been complicit in creating ambiguity and regulatory uncertainty under the Act by failing to take a consistent approach to statutory interpretation and deference. If ever there was a story to illustrate how the unsettled levers of administrative law create moving targets for agencies and Congress alike—leaving power fundamentally in the hands of the Supreme Court—this is a story worth paying attention to.

B. Features of Administrative Law Allowing It to Undermine Codified Environmental Laws

Having set the table with some examples, this Part examines why administrative law allows courts to shape environmental policy, sometimes in ways that undermine the normative aims of the environmental statutes. In doing so, this Part suggests that a constellation of three features facilitate the sidestepping of environmental law: First, administrative law is borne from imprecise text and is largely shaped by courts. Second, administrative law

345. KATE R. BOWERS, CONG. RSCH. SERV., LSB10981, SUPREME COURT NARROWS FEDERAL JURISDICTION UNDER CLEAN WATER ACT 2 (2023), https://crsreports.congress.gov/product/pdf/LSB/LSB10981 ("Following *Rapanos* . . . [e]very court of appeals to consider the two standards has held either that Justice Kennedy's significant nexus standard is controlling or that jurisdiction may be established under either standard.").

346. *Rapanos*, 547 U.S. at 811 (Breyer, J., dissenting) ("[The Court] has left the administrative powers of the Army Corps of Engineers untouched. That agency may write regulations defining the term—something that it has not yet done."); *see, e.g.*, Revised Definition of "Waters of the United States," 88 Fed. Reg. 3,004 (Jan. 18, 2023).

347. *See, e.g.*, Adler, *supra* note 293, at 236 ("[W]e still lack clarity regarding the most basic questions about the law's reach. That causes massive uncertainty for regulated businesses and landowners, the federal and state agencies that implement the law, and members of the public Congress intended to protect.").

348. *See* Sackett v. EPA, 143 S. Ct. 1322, 1343 (2023).

discourse is ongoing, and the doctrines animating administrative law values oscillate over time. Third, administrative law doctrines are shape shifters in practice—which is to say that administrative law doctrines are not only unsettled and still undergoing major philosophical changes over time but that in any given moment, the doctrines are flexible enough for jurists to reach for and apply the doctrines in ways that produce quite different outcomes.

Together, these features provide flexibility. That flexibility allows courts to choose their own adventure in creating doctrines, shaping the rigor with which doctrines are applied, ultimately setting policy while maintaining appearances of playing a more arms-length role. Some combination of these features was at work in each of the cases just examined.

1. The Imprecise Textual Origins of Administrative Law

Whether the U.S. Constitution or the APA, administrative law has little in the way of guiding text.

Take, for instance, the separation of powers principles that undergird much of administrative law values.[349] Article I vests "All legislative Powers" in Congress, Article II vests the executive power in the President, and Article III vests the judicial power in the Supreme Court.[350] Still, "with respect to structural provisions, the Constitution contains some remarkable gaps."[351] The Constitution is silent on the propriety of delegation; the text itself creates no agencies. There is room for disagreement.[352] While some scholars and jurists focus on the vesting of "all" legislative powers in Congress to cast a shadow on delegations,[353] others note that Congress's powers are augmented

349. *See supra* Part Administrative Law Values.

350. *See* U.S. CONST. arts. I, II, III; STEVEN GOW CALABRESI & GARY LAWSON, THE U.S. CONSTITUTION: CREATION, RECONSTRUCTION, THE PROGRESSIVES, AND THE MODERN ERA 144–45 (2020) ("The Constitution did not need an express 'separation of powers' clause because the scheme of enumerated institutional power secures that separation by giving to each institution and actor only a certain subset of the total mass of potential governmental powers.").

351. *See* MERRILL, *supra* note 101, at 17.

352. Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 489 (1987).

353. Touby v. United States, 500 U.S. 160, 164–65 (1991); Mistretta v. United States, 488 U.S. 361, 371–72 (1989) ("The Constitution provides that '[a]ll legislative Powers herein granted shall be vested in a Congress of the United States,' and we long have insisted that 'the integrity and maintenance of the system of government ordained by the Constitution' mandate that Congress generally cannot delegate its legislative power to another Branch." (quoting Field v. Clark, 143 U.S. 649, 692 (1892))).

by the Necessary and Proper Clause.[354] Peter L. Strauss, for example, has argued that the Constitution's "silence about the shape of the inevitable, actual government was a product both of drafting compromises and of the explicit purpose" of the Necessary and Proper Clause.[355]

There are also gaps in Article II. While establishing the offices of the President and Vice President, it otherwise "creates rather minimal and poorly defined powers."[356] As Merrill tells it, the contrast between the expansive powers granted to Congress and the minimal powers granted to the President creates an implied hierarchy in which the legislative powers are meant to be given primacy if ever there was a direct conflict between "what a statute says and what the President does."[357] Nonetheless, "There is . . . a latent ambiguity about the meaning of legislative supremacy."[358] It is unclear whether Congress has exclusive power to set policy, whether Congress has the exclusive ability to choose whether to exercise or delegate the power to set policy, or whether Congress simply retains the final word on matters of policy.[359] Which meaning is correct has implications for the propriety of congressional delegations of power to agencies and, therefore, implications for how much deference courts owe agencies when operating in that delegated space. The ambiguities in the Constitution are directly relevant to the role of courts when they engage in judicial review of agency actions.

Looking beyond constitutional text, one might consider whether the APA has anything useful to offer. Adopted by Congress in 1946 in response to the rise of the administrative state during the New Deal Era,[360] the APA does a few important things. It sets out the default procedural requirements for agency rulemaking and adjudication.[361] It establishes a presumption in favor of judicial review, providing "aggrieved" persons a cause of action to

354. U.S. CONST. art. I, § 8, cl. 18; *see* Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2130 (2004). *But see* Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 276–85 (1993) ("The [Necessary and Proper Clause] gives Congress power '[t]o make all Laws which *shall be* necessary and proper' for carrying federal powers into execution. This mandatory language clearly implies that such laws must *in fact* be necessary and proper and not merely *thought by Congress* to be necessary and proper.") (alteration and emphasis in original).

355. Strauss, *supra* note 352, at 493.

356. MERRILL, *supra* note 101, at 19.

357. *Id.* at 20.

358. *Id.*

359. *Id.*

360. *Id.* at 45–46.

361. *E.g.*, 5 U.S.C. §§ 553–56.

challenge final agency actions.[362] It requires courts to "set aside" agency decisions that are "arbitrary, capricious, . . . or otherwise not in accordance with law."[363] And it expressly requires reviewing courts to make sure agencies are operating within their delegated authority.[364]

Still, the APA is the product of legislative compromise and contains surprisingly few details.[365] The barebones text continues to inspire debate about the basis for procedural requirements that courts impose on notice-and-comment rulemaking.[366] In addition, while the APA sets out the "arbitrary and capricious" review standard, it says little about what that standard means.[367] Similarly, while it instructs courts to "decide all relevant questions of law,"[368] it does not answer directly the question of what courts are supposed to do when faced with mixed issues of law and fact.[369]

What Congress meant by "decide *all* relevant questions of law" was at the heart of the Supreme Court's recent decision to overrule *Chevron*.[370] On the one hand, the APA contained this language when the Supreme Court decided *Chevron* in 1984.[371] At least some prominent scholars understood that language to support deference doctrines like *Chevron*: As Merrill explained, "[T]he APA's directive to 'decide all questions of law' was ambiguous, in that

362. 5 U.S.C. § 702.

363. 5 U.S.C. § 706(2).

364. 5 U.S.C. § 706(2)(C).

365. *See* Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, 435 U.S. 519, 524 (1978) (recognizing that the APA was borne from great legislative compromise, leaving agencies to fill in gaps on procedure).

366. *See* Am. Radio Relay League v. Fed. Commc'ns Comm'n, 524 F.3d 227, 246 (D.C. Cir. 2008) (Kavanaugh, J., concurring) ("Put bluntly, the *Portland Cement* doctrine cannot be squared with the text of § 553 of the APA." (citing Jack M. Beermann & Gary Lawson, *Reprocessing* Vermont Yankee, 75 GEO. WASH. L. REV. 856, 894 (2007) (arguing that *Portland Cement* is "a violation of the basic principle of *Vermont Yankee* that Congress and the agencies, but not the courts, have the power to decide on proper agency procedures.")).

367. *See* Sidney A. Shapiro & Richard E. Levy, *Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decisions*, 44 DUKE L.J. 1051, 1065–66 (1995) ("[T]he arbitrary and capricious standard is relatively open-ended."); *see also Am. Radio Relay League*, 524 F.3d at 248 (D.C. Cir. 2008) (Kavanaugh, J., concurring) ("Application of the beefed-up arbitrary-and-capricious test is inevitably if not inherently unpredictable—so much so that, on occasion, the courts' arbitrary-and-capricious review itself appears arbitrary and capricious.").

368. 5. U.S.C. § 706.

369. *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2261 n.4 (2024) ("The dissent observes that Section 706 does not say expressly that courts are to decide legal questions using 'a de novo standard of review.' That much is true.").

370. *See id.* at 2265 (quoting Administrative Procedure Act, 5 U.S.C. § 706).

371. *Id.* (noting with disfavor the failure of the Court in *Chevron* to "reconcile its framework with the APA"); *see also id.* at 2264.

it did not foreclose all forms of deference."[372] And yet, forty years after *Chevron* was decided, the Supreme Court examined this same text and concluded "it prescribes no deferential standard for courts to employ in answering those legal questions."[373] Because the *Chevron* doctrine "cannot be reconciled with the APA,"[374] the Court concluded that *Chevron* was a "mistake" and should be overruled.[375]

As underscored by the *Loper Bright* decision, courts are largely left to write their own scripts for judicial review.[376] The nondelegation doctrine.[377] The *Skidmore* factors.[378] The *Chevron* doctrine.[379] *Mead*'s narrowing of *Chevron*.[380] The major questions doctrine's pathway to avoiding *Chevron* entirely.[381] *Loper Bright's* decision to overrule *Chevron*.[382] Not to mention the *State Farm* factors on what it means to engage in "arbitrary and capricious" decisionmaking.[383] Or the *Auer*,[384] now *Kisor*,[385] deference doctrine for agency interpretations of their own regulations. All of these foundational doctrines define the role of courts, the limits of congressional delegations, and an agency's freedom to use the powers it has been delegated. All of these doctrines are largely constructed, deconstructed, and reconstructed by the Supreme Court over time.

In *Lujan*, the lack of text translates into Supreme Court power to erect barriers to judicial review through standing.[386] The standing doctrine and

372. MERRILL, *supra* note 101, at 48; *see also id.* at 46–49 (discussing ambiguities in various provisions of the APA and the lack of legislative history as a guide); *see also Loper Bright*, 144 S. Ct. at 2295 (Kagan, J., dissenting) (the majority opinion rests on the text of the APA, "[b]ut the Act makes no such demand. Today's decision is not one Congress directed. It is entirely the majority's choice.").

373. *Loper Bright*, 144 S. Ct. at 2261.

374. *Id.* at 2265.

375. *Id.* at 2272.

376. Thomas W. Merrill, *Capture Theory and the Courts: 1967–1983*, 72 CHI.-KENT L. REV. 1039, 1039 (1997) ("The [APA] is a framework statute, not a complete code. Its central provisions are rather spare, and a number of important questions are not covered at all. It comes as no surprise, therefore, that the judicial gloss on the APA has taken on a large significance over time.").

377. Gundy v. United States, 139 S. Ct. 2116, 2133–43 (2019) (Gorsuch, J., dissenting).

378. 323 U.S. 134 (1944).

379. 467 U.S. 837 (1984).

380. 533 U.S. 218 (2001).

381. West Virginia v. EPA, 142 S. Ct. 2587 (2022).

382. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024).

383. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins., 463 U.S. 29, 52 (1983).

384. Auer v Robbins, 519 U.S. 452 (1997).

385. Kisor v. Wilkie, 139 S. Ct. 2400 (2019).

386. See *supra* Section II.A.1.

all of its modern machinations derive from Article III's "case or controversy" requirement.[387] From that simple phrase, the Court is able to justify some fairly exacting standards that have served to keep environmental plaintiffs out of court.

In *West Virginia v. EPA*, as well as the WOTUS line of cases, the lack of guiding text gives the Supreme Court flexibility in deciding when to defer to agencies on issues of statutory construction, when to demand more clarity from Congress, and when to simply take the lead in saying how far a law extends.[388] Despite the well-established *Chevron* doctrine in existence at the time these decisions were made, the Court managed to avoid the doctrine entirely.

In *Robertson*, the Supreme Court got tangled up in dicta derived from general notions that courts should not substitute their judgment for that of agencies.[389] The lack of precision in the underlying intuition about the role of courts translated into a lack of precision as to the correct interpretation of NEPA. In *Michigan v. EPA*, doctrines and standards tethered to imprecise text allowed the Court to choose its own adventure of review, ultimately writing cost into the Clean Air Act based on the Court's common-sense observations rather than firm evidence of congressional intent.[390]

In all these cases, the glide path for the Court to shape environmental policy is set by imprecise textual foundations of administrative law. The flexibility that is afforded by the imprecise text, in other words, creates space for courts to insert values, requirements, or barriers that are not necessarily reflected in underlying environmental statutes.

2. The Unsettled Nature of Foundational Doctrines

Not only are administrative law doctrines built from imprecise text, but they oscillate over time. The nondelegation doctrine, long-considered a weak form of control on Congress, could find new life if the dissent in *Gundy v. United States*[391] is any an indicator.[392] The *Chevron* doctrine, a stable center piece of judicial review since 1984, was overruled after forty years of

387. U.S. CONST. art. III, § 2.

388. See *supra* Section II.A.4.

389. See *supra* Section II.A.2.

390. See *supra* Section II.A.3.

391. 139 S. Ct. 2116 (2019).

392. See Daniel E. Walters, *Decoding Nondelegation After* Gundy*: What the Experience in State Courts Tells Us About What to Expect When We're Expecting*, 71 EMORY L.J. 417, 440 (2022) (discussing the uptick in nondelegation doctrine scholarship and noting that "litigants [too] have begun appealing to the nondelegation doctrine at an historically abnormal clip, hoping the Court will take the step it has forecasted").

service[393] despite the fact that it purportedly served a "stabilizing purpose" in law.[394] Even before the Supreme Court formally overruled *Chevron*, the deference landscape was unsettled given the growing number of cases where the Supreme Court simply ignored the doctrine altogether.[395]

In some ways, one might expect that these doctrines would be unstable. After all, without anchoring text, many of these doctrines trace back to separation of powers concerns,[396] an area where "sharply divided decisions employ[s] a bewildering array of inconsistent methodologies."[397] In fact, "[t]here is general consensus among scholars that the Court has exhibited a 'split personality' in separation of powers cases."[398] Needless to say, if the foundation of many administrative law doctrines is separation of powers, it is no wonder that doctrines built from unstable roots have themselves been somewhat unsteady over time.

To be clear, the problem is not that doctrines can change over time. One expects law to change over time as it reacts to more nuanced questions, raising more sophisticated problems in emerging factual contexts. At the same time, instability of foundational doctrines capable of shaping substance can send destabilizing ripples to many corners of government regulation. For a poignant example, consider the frenetic speculation about the future stability of regulatory action caused by the Supreme Court's decision to overrule the

393. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024).

394. City of Arlington v. Fed. Commc'ns Comm'n, 569 U.S. 290, 307 (2013); *see also* Kent Barnett, Christina L. Boyd & Christopher J. Walker, *Administrative Law's Political Dynamics*, 71 VAND. L. REV. 1463, 1466 (2018) ("By giving agencies policymaking space and reducing judicial interpretive space, *Chevron* deference should lead federal courts across the country to accept agency statutory interpretations more often and thus reach uniform results (regardless of panel composition)."); *see also Loper Bright*, 144 S. Ct. at 2310 (Kagan, J., dissenting) (discussing the "disruptive" effects of the majority decision to overrule *Chevron*). *But see id.* at 2272 (majority opinion) (rejecting the idea that *Chevron* served rule of law values in practice).

395. *See, e.g.*, Sackett v. EPA, 143 S. Ct. 1322 (2023) (Alito, J.) (cabining the reach of the Clean Water Act on an issue of statutory interpretation without citing *Chevron*); Am. Hosp. Ass'n v. Becerra, 142 S. Ct. 1896 (2022) (Kavanaugh, J.) (employing all tools of statutory construction, a unanimous court finds meaning of statute and rejecting agency interpretation without citing *Chevron*); Becerra v. Empire Health Found., for Valley Hosp. Med. Ctr., 142 S. Ct. 2354, 2358 (2022) (Kagan, J.) (following the same methodology to uphold an agency interpretation, again without citing *Chevron*).

396. *See* MERRILL, *supra* note 101, at 18–19 (discussing why deference issues in judicial review, as well as delegation issues, are separation of powers issues).

397. Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 CAL. L. REV. 853, 854 (1990).

398. Peter B. McCutchen, *Mistakes, Precedent and the Rise of the Administrative State: Toward a Constitutional Theory of the Second Best*, 80 CORNELL L. REV. 1, 5 (1994).

Chevron doctrine.[399]

Another way to think about this is that administrative law's flux gives it capacity to generate moving targets. Those moving targets undermine substantive law by sowing confusion and regulatory uncertainty through inconsistent methodologies.

For an overt example of administrative law's capacity to create moving targets, consider *Loper Bright.*[400] There, the Court overruled *Chevron* and told lower courts to "exercise their independent judgment in deciding whether an agency has acted within its statutory authority."[401] The Court did so despite claims that overruling *Chevron* would substantially disrupt the default balance of power against which Congress has been legislating for forty years.[402] While the Court justified this blockbuster move in part by pointing to the "eternal fog of uncertainty" created when *Chevron* leaves agencies free to flip-flop positions,[403] the Court may in the end have accomplished nothing but swapping one form of unpredictability for another. To that end, while the particular consequences of *Loper Bright* will unfold in the coming years, it is probably safe to say that the reversion to a *Skidmore*-like approach will give lower courts wide latitude in determining how much respect to afford agencies; and the unstructured nature of *Skidmore* respect will give rise to concerns about judicial review that is prone to manipulation and marked by inconsistency.[404]

In the end, the Court is surely right to observe that "[a] rule of law that is so wholly 'in the eye of the beholder' invite[d] different results in like cases and is therefore 'arbitrary in practice.'"[405] But, if past is prologue, swapping *Skidmore* for *Chevron* is not likely to solve that problem. The real question after *Loper Bright* is whether the Court succeeded in creating more stability and predictability by putting courts in charge of making policy calls in the interstices of ambiguity as opposed to expert agencies. And one is left to wonder

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399. *See* Transcript of Oral Argument at 77, Relentless, Inc. v. Dep't of Com., 144 S. Ct. 2244 (2024) (Nos. 22-1219 & 22-451) (arguing that overruling *Chevron* would be an "unwarranted shock to the legal system."); *see also* Adam Liptak, *Conservative Justices Appear Skeptical of Agencies' Regulatory Power*, N.Y. TIMES, https://www.nytimes.com/2024/01/17/us/supreme-court-chevron-case.html (June 28, 2024); Adam Liptak, *Justices Limit Power of Federal Agencies, Imperiling an Array of Regulations***,** N.Y. TIMES (June 28, 2024), https://www.nytimes.com/2024/06/28/us/supreme-court-chevron-ruling.html.

400. Loper Bright Enters. v. Raimondo,144 S. Ct. 2244 (2024).

401. *Id.* at 2273.

402. *See id.* at 2294 (Kagan, J., dissenting); *see also* Brief of Respondents at 10, Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024) (No. 22-451), 2023 WL 8812790.

403. *Loper Bright*, 144 S. Ct. at 2272.

404. *See infra* notes 435–439 and accompanying text.

405. *Loper Bright*, 144 S. Ct. at 2270.

whether the simple act of shifting methodologies itself creates its own kind of uncertainty and potential for arbitrariness.

While *Loper Bright* provides an overt example of how administrative law can create moving targets, there are more subtle ways as well. Here, again, the WOTUS line of cases provides a nice example of how—in the context of the same question of statutory interpretation—philosophical shifts about the role of the courts in judicial review drove significantly different substantive outcomes over time.[406] Consider that in the forty years between the Court's decision in *Riverside Bayview Homes* and *Sackett*, the underlying governing framework—*Chevron*—did not change. And the clear statement rules introduced in *SWANCC*, and then more fervently invoked in *Sackett*, were not new. Rather, it was the Court's use of them that shifted within the exact same legal context. That shifting methodology on administrative law issues—in the deference owed to agencies and the clarity required from Congress—changed the underlying substantive environmental policy by first sowing confusion in and then narrowing the reach of the Clean Water Act.[407] In this way, the flux in the administrative law methodology was used to destabilize the underlying substantive law.

In *West Virginia v. EPA*, the Court introduced yet one more moving target—the major questions doctrine.[408] In doing so, the Court switched up the drafting rules on Congress and created uncertainty for agencies looking to understand the bounds of their own power. For questions that the Court finds important enough, Congress will have to be extra clear about the bounds of agency power that Congress chooses to delegate.[409] Even if that drafting rule makes sense,[410] it only makes sense prospectively. What good—other than to put a thumb on the scale of a deregulatory agenda—is a newly minted drafting rule applied retroactively to a piece of legislation that has been ably and stably serving the Nation for over half a century? If administrative law is meant to provide stability and predictability to the rule of law, it is hard to see how a doctrine as vague as the major questions doctrine serves those values.

Three prior Supreme Court decisions had addressed and upheld EPA's

406. *See* discussion *supra* Section II.A.4.

407. *See id.*

408. West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022).

409. *Id.*

410. *Id.* at 2643 (Kagan, J., dissenting) ("[W]hen it comes to delegations, there are good reasons for Congress (within extremely broad limits) to get to call the shots. Congress knows about how government works in ways courts don't. More specifically, Congress knows what mix of legislative and administrative action conduces to good policy. Courts should be modest.").

power to regulate greenhouse gases to address climate change under the Clean Air Act: *Massachusetts v. EPA*[411] upheld the authority of EPA to regulate greenhouse gases under the Clean Air Act generally;[412] *American Electric Power Co. v. Connecticut*[413] concluded that Congress intended to preempt federal common law on greenhouse gas regulation through the Clean Air Act;[414] and *Utility Air Regulatory Group v. EPA* (*UARG*)[415] directly engaged the question of how EPA had chosen to regulate greenhouse gases from major stationary sources.[416] None of those cases rested on new doctrine. None of those cases created a new moving target.

That the Court needed new doctrine in *West Virginia* is telling. That the Court chose not to take a route rooted in existing tools of statutory construction suggests one of two things. Either the Court was looking for a reason to announce a new doctrine that would allow it to assert control over how Congress ought to write laws, or the Court could not find clarity from Congress on the issue of statutory interpretation before it. Either way, the use of the major questions doctrine seems like a manufactured opportunity for the Court to claim power where existing doctrines would have told it to share. If one were to indulge a bit of hyperbole, one might say *West Virginia* is nothing more than a powerful Court assigning itself more power while introducing unclear, moving targets that undermine public health missions of settled legislation. Then again, hyperbole might not be necessary. One could reach a similar conclusion simply by reading Justice Kagan's dissent.[417]

Like in *Rapanos*, introducing uncertainty into the legal standards sows confusion and creates regulatory unrest. This unrest, which undermines the forward momentum in accomplishing the ultimate goals of substantive law, occurs in part because administrative law's own animating values are up for grabs even if environmental law's values are not. Ultimately, this feature of administrative law—instability—and the consequence—instability in environmental law—are relevant when weighing the risk of letting administrative

411. 549 U.S. 497 (2007).

412. *Id.* at 532.

413. 564 U.S. 410 (2011).

414. *Id.* at 423.

415. 573 U.S. 302 (2014).

416. *Id.* at 333.

417. West Virginia v. EPA, 142 S. Ct. 2587, 2628 (2022) (Kagan, J., dissenting) ("The limits the majority now puts on EPA's authority fly in the face of the statute Congress wrote."); *id.* at 2641 ("The current Court is textualist only when being so suits it. When that method would frustrate broader goals, special canons like the 'major questions doctrine' magically appear as get-out-of-text-free cards."); *see also* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2295 (2024) (Kagan, J., dissenting) ("The majority disdains restraint, and grasps for power.").

law drive substantive outcomes.

3. The Flexibility of Administrative Law Doctrines in Application

One last feature of administrative law is important to understanding why courts should approach the use of administrative law when resolving environmental disputes with caution: many administrative law doctrines or standards are shapeshifters in practice. That is, not only do the doctrines change over time, but they can also be applied differently, and to different effect, in any given moment.

Consider that arbitrary and capricious review—the foundational standard applied to countless agency actions—is described as both "narrow" and as "searching and careful."[418] It can support a court taking a hard look, leaning in for a scrupulous examination of the agency decision.[419] It can also support a court staying at arms-length and vowing not to "substitute the opinion of the court for that of the agency."[420] Indeed, arbitrary and capricious review comes in so many different flavors that at least one sitting member of the Supreme Court has commented that "on occasion, the courts' arbitrary-and-capricious review itself appears arbitrary and capricious."[421] Standing, too, has this problem.[422]

The same can be said for the *Chevron* doctrine, until recently a decades-

418. Citizens to Pres. Overton Park v. Volpe, 401 U.S. 402, 416 (1971).

419. See Adam Babich, *Fun with Administrative Law: A Game for Lawyers and Judges*, 4 MICH. J. ENV'T & ADMIN. L. 341, 349–53 (2015) (collecting cases in tabular form to show that for every guiding principle of administrative law, there is contrasting principle that can be used to urge an opposite result).

420. *See* Richard M. Alston, U.S. FOREST SERV., INT-128, FOREST - GOALS AND DECISIONMAKING IN THE FOREST SERVICE 54 (1972); *see also* Babich, *supra* note 419, at 349–53.

421. Am. Radio Relay League v. Fed. Commc'ns Comm'n, 524 F.3d 227, 248 (D.C. Cir. 2008) (Kavanaugh, J., concurring); *see* Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761, 768 (2008) ("[W]e provide significant evidence of a role for judicial ideology in judicial review of agency decisions for arbitrariness."); Keller, *supra* note 9, at 428 (noting that the Supreme Court has "left the doctrine for reviewing agency rulemaking in shambles").

422. There is enough "play in the joints" in the standing doctrine to make the rigor of gatekeeping flexible depending on how a court's approach to causation, imminence, or particularized harm. *See* Daniel A. Farber, *A Place-Based Theory of Standing*, 55 UCLA L. REV. 1505, 1507 (2008) ("[T]o the dismay of judges, litigants, and law students, each has proved remarkably tricky in practice." (citing William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 223 (1988) ("[T]he apparent lawlessness of many standing cases when the wildly vacillating results in those cases are explained in the analytic terms made available by current doctrine."))).

long mainstay in administrative law. This doctrine, adopted at a time when there was notable backlash against courts for the manipulative nature of *Skidmore* deference,[423] can itself be deployed in various modes depending on how much a court is willing to work to uncover congressional intent and which tools it uses to do so.[424] Indeed, anytime statutory interpretation lies at the heart of a case, which it does often in administrative law, judges apply "a kind of situation sense in shifting from text to purpose."[425] The shapeshifting of *Chevron* was ironic, given that it was created in part because "[c]ourts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences."[426]

Again, the WOTUS line of cases is a useful example. Beyond the fact that inconsistent methodologies can have a destabilizing effect lies the more basic observation that, when doctrines are so malleable, the courts can shape substantive outcomes by adjusting the application of the doctrine. When intentional, the malleability becomes a pathway for judicial activism. When inadvertent, the malleability facilitates a reckless substitution of one set of values for another, increasing the risk that the effectiveness of underlying substantive law to fulfill the goals of Congress is stunted in application.

The Supreme Court's decision in *Michigan v. EPA* is another good example of how the flexibility in the application of deference doctrines and standards of review can be used by courts to take a heavy hand in setting policy.[427] There, the Supreme Court delivered an opinion on an issue of statutory interpretation that managed to combine the *Chevron* doctrine and the arbitrary and capricious standard of review in a way that avoided the most deferential parts of both those doctrines.[428] The Court never did find that Congress's intent was clear as to whether cost should be considered.[429] Using the

423. MERRILL, *supra* note 101, at 53–54.

424. *See, e.g.*, Kent Barnett & Christopher J. Walker, Chevron *Step Two's Domain*, 93 NOTRE DAME L. REV. 1441, 1468 (2018).

425. MERRILL, *supra* note 101, at 14.

426. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865–66 (1984).

427. *See* Miles & Sunstein, *supra* note 421, at 765 n.34 (citing Joseph L. Smith & Emerson H. Tiller, *The Strategy of Judging: Evidence from Administrative Law*, 31 J. LEGAL STUD. 61, 64 n.9, 81 (2002)) (strategic reasons animate a judge's decision to invoke *Chevron* or *State Farm* as the basis for their decisions).

428. Some scholars have argued that *Chevron* step two should be collapsed with arbitrary and capricious review, *see* Catherine M. Sharkey, *Cutting in on the* Chevron *Two-Step*, 86 FORDHAM L. REV. 2359 (2018), while others have urged they should remain separate because the two frameworks serve different functions. *See* Gary Lawson, *Outcome, Procedure and Process: Agency Duties of Explanation for Legal Conclusions*, 48 RUTGERS L. REV. 313 (1996); *see also* Barnett & Walker, Chevron *Step Two's Domain*, *supra* note 424, at 1473 (discussing the literature).

429. *See* Michigan v. EPA, 576 U.S. 743, 751–52 (2015) (discussing whether the statutory

variable standards, however, the Court was able to center its own belief that cost should be considered.[430]

As noted earlier, this observation about *Chevron*'s flexibility was one of the Supreme Court's justifications for overruling it.[431] To that end, in discussing the difficulty of determining when a statute is ambiguous and would require deference, the Court noted that "[o]ne judge might see ambiguity everywhere; another might never encounter it."[432] Because such a rule invites arbitrariness, "Such an impressionistic and malleable concept [of ambiguity] 'cannot stand as an every-day test for allocating' interpretive authority between courts and agencies."[433]

Of course, one could observe that the flexibility embodied in various administrative law doctrines is necessary or, at a minimum, unavoidable. Certainly, there is no formulaic approach to statutory interpretation that could absolve jurists from the need to resolve questions in ways befitting to the problem before them. At the same time, balance is paramount. Flexibility, when it swings too far, exists in tension with the rule of law values seeking to promote stability and predictability.

The need for balance between flexibility and structure, and the difficulty of finding the sweet spot, is apparent in the longer arcs of administrative law's evolution. *Skidmore* deference, once the dominant framework, conferred deference on a sliding scale ultimately based on the agency interpretation's "power to persuade."[434] As Merrill describes the world under *Skidmore*'s "hodgepodge of factors,"[435] "there was no uniform understanding about how much weight or respect would be attached to an agency interpretation if one of the discrete factors was applicable."[436] Eventually, this lack of predictability gave way to mounting critiques about the "unwieldy and manipulative nature of the Court's doctrine."[437] *Chevron*'s two-step approach was borne

requirement that EPA regulate power plants if EPA "finds such regulation is appropriate and necessary" requires the agency to consider the costs of regulation (quoting Clean Air Act, 42 U.S.C. § 7412(n)(1)(A))).

430. *Id.* at 753.

431. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2270–71 (2024).

432. *Id.* at 2270.

433. *Id.* at 2270–71 (internal quotations omitted).

434. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

435. MERRILL, *supra* note 101, at 51.

436. *Id.* at 52.

437. *Id.* at 53; *see also* Transcript of Oral Argument at 32, Loper Bright Enters. v. Raimondo (2024) (No. 22-451) (Justice Kagan remarking: "*Skidmore* means, if we think you're right, we'll tell you you're right. So the idea that *Skidmore* is going to be a backup once you get rid of *Chevron*, that *Skidmore* means anything other than nothing, *Skidmore* has always meant nothing.").

from this "hodgepodge" to provide some structure.[438] After *Loper Bright*, which instructs lower courts to revert to a *Skidmore*-style review,[439] there will undoubtedly be another surge of discussions and cases trying to find the right balance of flexibility and structure. Perhaps the courts will look to *Kisor* as an example, a case where the Court imposed structure to lend more legitimacy to the court's role in review.[440] A correction to a world where courts had more reflexively signed off on agency interpretations of their own regulations:[441] *Kisor* looked to the structure of *Chevron* (ironically, now) to ramp up expectations for when lower courts should lean into more rigorous de novo review.[442]

While it is nothing new to say that finding balance between flexibility and structure is paramount in administrative law, it is important to be clear-eyed about when the flexibility can operate to undermine substantive law. It is important to acknowledge that at the intersection of administrative and environmental law, the shapeshifting nature of administrative law has, at times, allowed courts to take a heavy hand in shaping policy.[443] That is true even though "[m]ost judges—certainly the better ones—understand that they have no authority to manipulate the meaning of a statute to achieve some policy objective they regard as desirable."[444] Indeed, even if jurists are not trying to shape environmental policy but are simply reflecting their own sensibilities about how administrative law ought to operate, even a decision driven by administrative law is going to have consequences for the natural world. And so, it is worth taking stock of how administrative law doctrines can be used, whether intentionally or inadvertently, to shape outcomes.

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This Part has provided a few choice examples of how administrative law has played a heavy hand in shaping environmental law. Building on the

438. MERRILL, *supra* note 101, at 53.

439. *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2259, 2262 (2024); *id.* at 2309 (Kagan, J., dissenting) ("[T]he majority makes clear that what is usually called *Skidmore* deference continues to apply.").

440. 139 S. Ct. 2400 (2019).

441. *Id.* at 2415. *See generally* Sanne H. Knudsen & Amy J. Wildermuth, *Unearthing the Lost History of* Seminole Rock, 65 EMORY L.J. 47 (2015) (providing a detailed history for how the reflexive nature of this doctrine came to be).

442. 139 S. Ct. 2400 (2019).

443. Keller, *supra* note 9, at 422 ("[A]dministrative law doctrines for judicial review of agency rulemaking have become a 'judicially created obstacle course' that gives judges far too much leeway to reach results based on their partisan policy preferences." (quoting Am. Radio Relay League, Inc. v. Fed. Commc'ns Comm'n, 524 F.3d 227, 248 (D.C. Cir. 2008) (Kavanaugh, J., concurring in part, concurring in the judgment in part, and dissenting in part))).

444. MERRILL, *supra* note 101, at 14.

zoomed-in view of each of those cases, this Part has also zoomed out to suggest that certain features of administrative law make it a useful vehicle for courts to play a heavy hand if they so choose. Along the way, this Part has made some observations about the risks to both administrative law and environmental law when administrative law is allowed to function in ways that sidestep environmental law without demanding a full examination of its core purpose and text. In the end, these may be additional reasons to hesitate when administrative law is elevated over values of environmental law.

III. THE ANTI-DEMOCRATIC RISK OF ALLOWING ADMINISTRATIVE LAW TO DRIVE ENVIRONMENTAL POLICY

When one considers that administrative law and environmental law promote distinct values, and when one considers that courts have some ability to elevate one set of values over another, one ought to consider the risks of giving courts the power to shape environmental policy through administrative law. Part II.B has already examined some of the ways that administrative law can be operationalized to destabilize environmental law, thwart the law's need for predictability, and otherwise create pathways for judicial activism. This Part rounds out the discussion by giving voice to the anti-democratic risks that arise when administrative law is used as the dominant decisional frame in environmental law.

Not surprisingly, questions about how far judicial review should extend from the least democratic branch have been raised by scholars and jurists for some time.[445] To add modestly to that discourse, this Part offers a few observations that may be particular to the well-being of administrative and environmental law. The takeaway is not a rejection of judicial review, for the virtues of courts checking the power of agencies are well-founded.[446] Still,

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445. *See, e.g.*, Jesse H. Choper, *The Supreme Court and the Political Branches: Democratic Theory and Practice*, 122 U. PA. L. REV. 810 (1974) ("The reconciliation of judicial review with American representative democracy has been the subject of powerful debate since the early days of the Republic."); Samuel Issacharoff, *Judicial Review in Troubled Times: Stabilizing Democracy in A Second-Best World*, 98 N.C. L. REV. 1, 3 (2019) ("Too much American constitutional law engages a ritualized set of exchanges over judicial review . . . . At bottom is always the concern over the legitimacy of judicial arrogation of the power to set aside the desired objectives of the democratically accountable political branches."); Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35, 37 (1993) ("Elected officials in the United States encourage or tacitly support judicial policymaking both as a means of avoiding political responsibility for making tough decisions and as a means of pursuing controversial policy goals that they cannot publicly advance through open legislative and electoral politics.").

446. *See generally* Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and*

those virtues are not unbounded. It follows that the doctrines should not be either.

In considering the anti-democratic risks of using administrative law to drive environmental policy, one might start by observing that the values of environmental law are codified in statutes enacted by Congress—the democratic body that holds "[a]ll legislative [p]owers."[447] By contrast, the values of administrative law, though they serve obviously important functions, are largely given dimension and applied by courts.[448] This means that when courts decide cases that sit at the interstices of agency discretion or statutory ambiguity, courts sit in a position of power—to interpret the will of Congress and to shape the decisions of Congress's agents. That creates one kind of risk. Namely, a court that takes too heavy a hand in statutory interpretation upsets the democratic will.[449]

There is a more serious risk as well. Because administrative law values are constitutionally rooted and because the Supreme Court is the accepted authority on the Constitution, for many administrative law questions, the Supreme Court sits at the apex of power. "By presenting its doctrine as grounded in the Constitution, the Court . . . further limit[s] the possibility of a legislated solution as well."[450] When the Court sits at the height of power—with only the tool of constitutional amendment as a check—the Court has time and again recognized the need for restraint.[451] Given that administrative law doctrines flow largely from separation of powers principles, the same rule of restraint ought to guide the Court whenever the Constitution is called upon to cabin access to review or statutory text.[452]

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the Fourth Branch, 84 COLUM. L. REV. 573 (1984) (arguing that an analysis of checks and balances should be one favored approach for issues concerning government structure and the power of agencies); Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363 (1986) (examining the governing principles affecting how courts approach and review regulatory actions by agencies).

447. U.S. CONST. art. I., § 1.

448. *See supra* Section II.B.1.

449. *See* Wilkinson, *supra* note 6, at 254–55 (noting that courts who fail to exercise judicial restraint and deference risk-taking power from elected branches of government and the people they represent); *see also* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2294–95 (2024) (Kagan, J., dissenting) ("In recent years, this Court has too often taken for itself decision-making authority Congress assigned to agencies.").

450. *See* Houck, *supra* note 2, at 94 n.343 (in reference to Article III standing).

451. *See* Posner, *supra* note 6, at 521 ("[J]udges are *highly* reluctant to declare legislative or executive action unconstitutional—deference is at its zenith when action is challenged as unconstitutional (call this 'constitutional restraint').").

452. *Cf. id.* at 521 ("[T]he doctrine that statutes should be interpreted to avoid raising constitutional questions reduces the frequency with which statutes are held unconstitutional,

Standing doctrine is a good example of how the more serious anti-democratic risks can play out to undermine environmental law. To that end, the Supreme Court has used the constitutional and unchecked dimensions of its power to tamp down "the judiciary's long love affair with environmental litigation."[453] The intention is all but laid out in a law review article penned by Antonin Scalia before his appointment as Justice.[454] In that writing, Scalia took particular aim at the D.C. Circuit's judicial philosophy in the 1971 *Calvert Cliffs'* case interpreting NEPA, in which the court explained "[o]ur duty, in short, is to see that important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy."[455] To counter the D.C. Circuit's impulse to play a supporting role to the public interest, Scalia turned to standing. In particular, Scalia turned to the constitutional dimensions of standing.[456] That much is well accepted.[457]

During Justice Scalia's tenure on the Court, this strategy of using Article III standing to deny access to public interest environmental plaintiffs played out most prominently in cases like *Lujan*.[458] Indeed, the courts' use of standing as a way to selectively influence the substantive outcome of cases has long been criticized.[459] Richard J. Pierce Jr. commented decades ago that "[t]he Supreme Court is making [it] increasingly difficult" to "teach standing with reference to legal doctrines" as opposed to political ideologies.[460] Pierce went on to conclude that the "pattern of decisionmaking demonstrates the high degree of doctrinal malleability and result-oriented doctrinal manipulation that characterizes modern standing law."[461] Lisa A. Kloppenberg, in her book *Playing it Safe*, explores the particular use of the standing doctrine's

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but does so by reducing the scope of legislation and thus the power of legislatures."); *id.* at 524 ("[A]uthorizing courts to invalidate laws enacted by the national legislature was an American innovation with a thin basis in the constitutional text . . . .").

453. Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK L. REV. 881, 884 (1983).

454. *See id.* at 881–82 (advocating for "courts to accord greater weight" to the requirement that a "plaintiff's alleged injury be a particularized one").

455. *Id.* at 884 (quoting Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n, 449 F.2d 1109, 1111 (D.C. Cir. 1971)).

456. See id. at 881 (asserting that disregarding judicial doctrine of standing leads to "an overjudicialization of the processes of self-governance").

457. Farber, *supra* note 422, at 1531 ("Much of the credit for this shift [in standing doctrine] belongs to Justice Scalia.").

458. See supra Section II.A.1.

459. *See, e.g.*, Pierce, *supra* note 139, at 1742–43.

460. *Id.*

461. *Id.* at 1744.

results-oriented capability to conclude the use of standing is an avoidance strategy designed specifically to asymmetrically disadvantage environmentally friendly plaintiffs with a: "In environmental cases, the barrier is often deployed against environmentalist plaintiffs, but not against plaintiffs charging that environmental protection harms their rights."[462]

There are two lessons from this example—both relevant to concerns about allowing an anti-democratic institution to set environmental policy through administrative law. First, because constitutional values undergird much of administrative law, courts can simultaneously amplify and insulate the power of the judiciary. Second, if the laws are a lever that courts can pull to further insulate their decisions from checks by other branches, those levers are available to be pulled for ideological reasons. In this way, the standing doctrine has become a lever that can be pulled for ideological reasons to create uneven substantive outcomes, all while marching to the drumbeat of judicial restraint and concerns about separation of powers.[463]

Even outside of standing, the Supreme Court has created pathways for courts to assume a lead role in setting policy. Here, the major questions doctrine and invocation of other so-called clear statement rules are good examples. Under these rules the Court selectively announces, on a we'll-tell-you-when-we-see-it-basis, when Congress must be especially clear about the precise nature of the power that it delegates.[464] Intuitively, such rules make sense as a means of ensuring that the powers exercised by agencies are approached with appropriate caution—especially on issues that would tread on the traditional province of States or on issues of vast economic or political significance. But the vague nature of these rules and their selective use mean these rules can be operationalized to create moving targets for agencies and Congress alike.

It is true that, in large measure, Congress can regain control of its voice by amending statutes to be clearer about the power that it delegates.[465] But that is an incomplete answer. First off, "[W]hen [members of the Supreme Court] exercise the power to declare unconstitutional legislative, executive

462. KLOPPENBERG, *supra* note 9, at 43.

463. *See* Pierce, *supra* note 139, at 1742–43. Ironically, and in furtherance of the proposition that there is no easy answer to the limits of judicial review, Pierce explains that "the roots of modem standing law lie in a perceived need to insulate democratic institutions from activist, politically unaccountable judges who were hostile to the new preferences expressed by the people and their elected representatives." *Id.* at 1767.

464. See supra notes 28–34 and accompanying text.

465. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2268 (2024) (majority opinion) (acknowledging that Congress has the power to "confer discretionary authority on agencies"); see also id. at 2295 (Kagan, J., dissenting) ("Congress could always overrule the [Chevron] decision . . . .").

or administrative action, they reject the product of the popular will by denying policies formulated by the majority's elected representatives or their appointees."[466] Second, while it is true that Congress can, in some cases, clarify its intent in subsequent legislation, there is no guarantee that it will be replicated, given the deliberately onerous process of enacting legislation.[467] Third, one should consider that the modern Supreme Court has chosen to create the major questions doctrine and discard *Chevron* deference at the precise moment in history when Congress is widely understood to have lost its voice as the Nation's lawmaker.[468] The Court, in other words, is assigning itself power at the moment when it knows that power is even less likely to be checked.[469] Administrative law is the vehicle that makes this possible.

In her dissent in *Loper Bright*, Justice Kagan does not hesitate to share her view that the Court has made a mistake in elevating its own voice over that of agencies. She laments that "[a] rule of judicial humility gives way to a rule of judicial hubris."[470] She elaborated by saying that "[i]n one fell swoop, the majority today gives itself exclusive power over every open issue—no matter how expertise-driven or policy-laden—involving the meaning of regulatory law."[471]

The potential for unchecked power raises one kind of anti-democratic risk. But it is not the only one. If one shifts their gaze specifically to administrative law's accountability values—that is, "the importance of having discretionary policy decisions made by politically accountable institutions"[472]—one should also be concerned about power wielded by an institution that is not politically accountable. Merrill got it exactly right when he concluded that "if we want interpretations that involve discretionary interpretive choice to be made by the relatively more accountable decision maker, and the relevant choice is between an agency and a court, the agency wins hands down."[473]

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466. Choper, *supra* note 445, at 811.

467. *Cf.* Gundy v. United States, 139 S. Ct. 2116, 2134 (2019) (Gorsuch, J., dissenting) (The Framers' decision to "[r]estrict[] the task of legislating to one branch characterized by difficult and deliberative processes was . . . designed to promote fair notice and the rule of law, ensuring the people would be subject to a relatively stable and predictable set of rules.").

468. Issacharoff, supra note 445, at 6 ("Rather than assuming the operation of a healthy democracy running on all of its institutional gears, I begin with the real-world observation that all is not well in the house of democratic governance.").

469. *Id.*

470. *Loper Bright*, 144 S. Ct. at 2294 (Kagan, J., dissenting).

471. *Id.* at 2295.

472. MERRILL, *supra* note 101, at 24.

473. *Id.* at 26. Justice Kagan expressed the same view in her dissent in *Loper Bright*, urging that *Chevron* was correct in presuming that Congress would want agencies, not courts, to make the policy choices that usually sit in the gaps of legislative text. *Loper Bright*, 144 S. Ct. at 2294

To be fair, agencies are not directly politically accountable either. But heads of agencies are at least political appointees that, for many executive agencies, can be removed at will and are thus beholden to the President.[474] Moreover, agencies are the creatures chosen by Congress to carry out statutory commands, and they are the experts.[475] And they are certainly more accountable than courts.[476] Agency heads turn over at least as often as election cycles.[477] Article III judges serve for life.[478] Agencies are also subject to continuing oversight by Congress, and their choices are constrained by the power of the purse.[479] That is, even after statutory commands are written in legislation, agencies are tethered to Congress by the appropriations process and the need for sufficient budgets to do their work. In addition, agency officials can be hauled in for questioning before congressional oversight committees,[480] and, in some limited circumstances, agency regulations can be revoked through relatively streamlined measures under the Congressional Review Act.[481]

(Kagan, J., dissenting) ("And the rule is right. This Court has long understood *Chevron* deference to reflect what Congress would want . . . .").

474. *See* Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 492 (2010); *see also Loper Bright*, 144 S. Ct. at 2294 (Kagan, J., dissenting) ("Agencies report to a President, who in turn answers to the public for his policy calls"). *But see* Cass R. Sunstein, Correspondence, *Article II Revisionism*, 92 MICH. L. REV. 131, 135 (1993) ("[T]he alleged constitutional commitment to a strongly unitary executive—a president who was to be in charge of all of what we now call implementation of the law—seems . . . to have been greatly oversold.").

475. See Loper Bright, 144 S. Ct. at 2298 (Kagan, J., dissenting) ("Agencies are staffed with 'experts in the field' who can bring their training and knowledge to bear on open statutory questions." (quoting Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865 (1984))).

476. MERRILL, *supra* note 101, at 25 ("As political scientists have elaborated, agencies are also subject to a number of constraints that make them more accountable to elected politicians relative to judges."); *see also Loper Bright*, 144 S. Ct. at 2294 (Kagan, J., dissenting) ("[C]ourts have no such accountability and no proper basis for making policy.").

477. MERRILL, *supra* note 101, at 25 ("[A]gency heads turn over fairly frequently, usually at a minimum at the end of each four-year presidential term . . . .").

478. *Id.*; U.S. CONST. art. III, § 1.

479. Josh Chafetz, *Congress's Constitution*, 160 U. PA. L. REV. 715, 723–24 (2012) (categorizing congressional powers over agencies as "hard powers" (legislation, the power of the purse, impeachment) and "soft powers"); Kevin M. Stack & Michael P. Vandenbergh, *Oversight Riders*, 97 NOTRE DAME L. REV. 127, 132 (2021) ("One of Congress's main tools to push back at such presidential unilateralism . . . is its control of the purse." (citing Gillian E. Metzger, *Taking Appropriations Seriously*, 121 COLUM. L. REV. 1075, 1153 (2021))).

480. *See generally* Brian D. Feinstein, *Congress in the Administrative State*, 95 WASH. U. L. REV. 1187 (2018) (exploring the untapped potential of Congress's soft oversight powers).

481. 5 U.S.C. §§ 801–808.

One last difference between courts and agencies that is relevant to the institutional concerns related to anti-democratic risk: Agencies have missions in line with the public interest values that they are charged with upholding under environmental statutes. EPA's mission is to "protect human health and the environment."[482] The U.S. Fish and Wildlife Service's mission is to "work[] with others to conserve, protect, and enhance fish, wildlife, plants, and their habitats for the continuing benefit of the American people."[483] The mission of the U.S. Forest Service is "to sustain the health, diversity, and productivity of the nation's forests and grasslands to meet the needs of present and future generations."[484]

By contrast, the courts have no particular duty to ensure the world is sustainable for future generations. Courts are tasked with upholding the law. But given that administrative law and environmental law are so intertwined, this means that jurists can claim to do their job in upholding the law even when they elevate administrative law values over environmental values. Moreover, because courts have no particular expertise in the functioning of the natural world, they have no comparative decisional advantage in setting environmental policy. Not on the science nor on other technical issues that often drive environmental law.[485] That point is well documented in the literature.[486]

Unchecked power and lack of political accountability. Lack of institutional competency on scientific and technical issues and no particular mission to uphold public-minded values at the heart of environmental law. All this adds up to a powerful actor wielding a powerful sword on issues that the actor may not know much about or care much about.

Though in the extreme, one might be reminded of the famous words of Lord Acton that "absolute power corrupts absolutely,"[487] most likely, that is

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482. *Our Mission and What We Do*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/aboutepa/our-mission-and-what-we-do (May 1, 2024).

483. *Mission and Vision*, U.S. FISH & WILDLIFE SERV., https://www.fws.gov/about/mission-and-vision (last visited Aug. 11, 2024).

484. *Meet the Forest Service*, U.S. FOREST SERV., https://www.fs.usda.gov/about-agency/meet-forest-service (last visited Aug. 11, 2024).

485. *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2298 (2024) (Kagan, J., dissenting) ("[A]gencies often know things about a statute's subject matter that courts could not hope to.")

486. *See* Emily H. Meazell, *Super Deference, the Science Obsession, and Judicial Review as Translation of Agency Science*, 109 MICH. L. REV. 733 (2011).

487. *See* Sydney E. Ahistrom, *Lord Acton's Famous Remark*, N.Y. TIMES (Mar. 13, 1974), https://www.nytimes.com/1974/03/13/archives/lord-actons-famous-remark.html; *see also* THE FEDERALIST NO. 47, at 323–31 (James Madison) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and

not going to be the case with most judges on most cases. A more subtle but still worrisome risk is that issues of administrative law become the prime pathways to policy because they are more comfortable and within the court's competency. It is easy to see how jurists might inadvertently sidestep the detailed technocratic, scientifically uncertain decisions of agencies and prefer a resolution of cases on more familiar terrain—terrain that wrestles with intuitions about separation of powers and the appropriate role of courts in applying various standards of judicial review. That impulse to reach for administrative law also happens to place more power in the hands of the court.

For all these reasons, one might approach with caution the ability of courts to turn to administrative law as a pathway to drive outcomes in environmental disputes. Doing so might be benign in many instances, but not always so. And based on the cases examined in Part II.A, one ought to remember that it takes but a few cases to significantly undermine the functioning of environmental law.

None of this means that courts should not play an influential role in upholding environmental law values. Undoubtedly, courts are a critical check on the power of agencies.[488] And courts have, at times, been important stewards of the bold visions set out by Congress in the numerous federal environmental statutes.[489] Certainly, no one would argue that environmental law would be better served by weaker judicial review of agency decisions. Mary Christina Wood has argued that the Judicial Branch's "dramatic retreat" from vigorous review of agency decisions is part of the problem.[490] She calls out the standing doctrine as a particular tool used to "sidestep" or avoid ruling on environmental issues.[491] She also criticizes administrative law's deference doctrines as giving agencies too much room and discouraging courts from "examining political motivations or conflicts of interest that may have inappropriately shaped the agencies' scientific conclusions."[492] In other words, Wood tells a story in which the judiciary has become a weak check

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whether hereditary, selfappointed, or elective, may justly be pronounced the very definition of tyranny.").

488. *See, e.g.*, Cass R. Sunstein, *On the Costs and Benefits of Aggressive Judicial Review of Agency Action*, 1989 DUKE L.J. 522, 529 (1989) ("[A] world without aggressive judicial review might well suffer from increases in lawlessness, carelessness, overzealous regulatory controls, and inadequate regulatory protection.").

489. *See, e.g.*, Tenn. Valley Auth. v. Hill, 437 U.S. 153, 194 (1978) (holding that the Endangered Species Act requires federal agencies ensure that actions do not jeopardize the existence of listed species).

490. WOOD, *supra* note 5, at 108.

491. *Id.* at 109.

492. *Id.* at 111.

on agency wrongdoing.[493]

Still, a stronger hand in judicial review is not useful if the decisions are not serving environmental law values. That is why there needs to be bumpers on the courts' power in shaping environmental policy through the application of administrative law. As sketched out in Part IV, that means looking for ways to approach judicial review in a way that centers the environmental protection goals and needs that drove the enactment of the laws in the first place.

IV. SKETCHES OF HOW TO RECALIBRATE THE SHARED SPACES OF ADMINISTRATIVE LAW AND ENVIRONMENTAL LAW IN JUDICIAL REVIEW

This Article has argued that there is a problem in the shared space of administrative and environmental law. With particular regard to environmental law, one might observe that there are not enough constraints on the flexibility of administrative law to safeguard either the public interest values of environmental law or the consistency and predictability values of administrative law.

What can be done? Simply put, administrative law needs bumpers. That is, the doctrines of judicial review should have built-in mechanisms for driving substantive outcomes in the direction of congressionally codified normative aims. The goal here is not to provide a detailed roadmap but simply to sketch some principles courts could follow in resolving questions of environmental law. More specifically, these guiding principles aim to provide a more methodical or reliable voice for congressional intent to find a more stable foundation for environmental law:

1. Use enacted statutory purpose statements as required check on the reasonableness of statutory interpretations. It is likely that people across a wide spectrum of jurisprudential views would agree with the general observation that the closer judges adhere to the text of the statutes in rendering their decisions, the fewer the problems. However, sticking to the text is easier said than done. Text, if taken out of context, is prone to manipulation.[494] On this point, as argued elsewhere, enacted purpose statements can serve as a useful touchpoint for checking statutory interpretation in environmental law.[495]

Though simple, the consistent use of enacted purpose statements to guide judicial review would better align the values of administrative law and environmental law. On the one hand, using enacted purpose statements as indispensable reference points for review would ensure that the normative aims of the relevant statute have a certain and clear place in the judicial review

493. *Id.* at 113.

494. Orrin Hatch, *Legislative History: Tool of Construction or Destruction*, 11 HARV. J. L. & PUB. POL'Y 43, 43 (1988).

495. Knudsen, *supra* note 7, at 52.

methodology for the normative aims of the relevant statute. This diminishes the risk of courts undermining environmental law values in the course of applying administrative law doctrines or standards of review. At a minimum, it would require courts to address expressly the question of whether agency decisions are appropriately protective of the environment.

2. Tether the hard look doctrine to statutory purpose. Like the methodology used by courts in statutory interpretation, arbitrary and capricious review can be a lot of different things to a lot of different jurists. The range of rigor with which courts apply the hard look doctrine—from those taking seriously the command for a "searching and careful" review to those who treat it as a quite deferential approach—is almost comedically ironic for a standard of review whose purpose is to mete out arbitrary decisionmaking.[496]

Consistent with the suggestion for statutory interpretation, cabining arbitrary and capricious review of agency reasoning should also be given focus. To that end, one may envision a version of hard look that contains bumpers to ensure that judicial review is at once serious and focused: As practiced in the late 1970s and early 1980s, the hard look doctrine helped ensure that administrative law—namely, arbitrary and capricious review—was bounded by the normative aims of the relevant statute.[497] Hard look review was not a tool for scratching a deregulatory itch or devising a reason to substitute the court's judgment for that of an expert agency. In theory, it required jurists to engage foundational questions of whether the agency was making reasoned decisions in furtherance of congressional goals. To that end, Merrick Garland observed that the hard look doctrine itself was deployed in the late 1970s specifically "to ferret out—and reject—agency actions motivated by considerations inconsistent with legislative purpose."[498] In the field of environmental law, there was an open recognition that public interest commands drove the foundational federal statutes and that courts had an obligation to

496. *See* Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971); *see also* Thomas O. McGarity, *The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 TEX. L. REV. 525, 549 (1997) ("To advocate hard look review in the context of the courts' prescriptive substantive review function is really to advocate greater discretion on the part of judges to substitute their views of appropriate statutory policies and analytical methodologies for those of the agency.").

497. Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 548 (1985); *see also* Matthew Warren, *Active Judging: Judicial Philosophy and the Development of the Hard Look Doctrine in the D.C. Circuit*, 90 GEO. L.J. 2599, 2611 (2002) ("Significantly, a Leventhal-like harder look at some agency actions was acceptable to judges across the ideological spectrum."). *But see id.* at 2600 ("Others have seen hard look review as judicial activism—an act of aggrandizement in which courts imposed their own substantive policy judgments on agencies.").

498. Garland, *supra* note 497, at 553.

ensure those public-minded commands were followed.

To be clear, this suggestion is modest. It is simply an articulation of what one would hope jurists are doing today—ensuring that environmental law's normative aims do not get lost in the open-ended mantras of administrative law that have accumulated to provide boundless flexibility.[499] This is not an open invitation to roving judicial musings and purposivism run amok.[500] Still, a version of the "hard look" doctrine that requires courts to tether a reasonableness inquiry to statutory purpose would be more likely to uphold the congressional intent of environmental laws. In that way, the purpose statement serves to check both agency decisions and the judicial role. Other scholars, too, have urged that this kind of "[r]ational basis with bite" review can keep courts and agencies in their lanes.[501]

3. Be skeptical of regulatory back-sliding. When an agency decision reverses course in a way that weakens protections for public health or the environment, courts should scrutinize those decisions more deeply. More nuance is required and should be articulated in the standards. In other words, reversals that amount to back-sliding should be viewed more skeptically in the area of environmental law.

The reason is this: By and large, environmental statutes work as one-way ratchets to drive greater protection for public health and the environment over time.[502] Agency decisions that weaken existing protections ought to be more heavily scrutinized even if the agency decision is still technically within the bounds of what is theoretically permitted by statute. In other words, if the expert agency charged with implementing the statute could articulate a

499. Keller, *supra* note 9, at 422 ("[A]dministrative law doctrines for judicial review of agency rulemaking have become a 'judicially created obstacle course' that gives judges far too much leeway to reach results based on their partisan policy preferences." (quoting Am. Radio Relay League, Inc. v. Fed. Commc'ns Comm'n, 524 F.3d 227, 248 (D.C. Cir. 2008) (Kavanaugh, J., concurring in part, concurring in the judgment in part, and dissenting in part))).

500. For some discussion on the wisdom of encouraging judicial review with an eye towards statutory purpose, see David M. Driesen, *Purposeless Construction*, 48 WAKE FOREST L. REV. 97, 117–27, 132–34 (2013); Anita S. Krishnakumar, *Backdoor Purposivism*, 69 DUKE L.J. 1275, 1281, 1290–91, 1299 (2020); Buzbee, *supra* note 263, at 348.

501. *See* Keller, *supra* note 9, at 425 ("Rational basis with bite would require the agency, at the time it promulgates a rule, to articulate its actual statutory purpose in promulgating the rule and explain how the rule is rationally related to that purpose.").

502. *See generally* Carol M. Browner, Adm'r, U.S. Env't Prot. Agency, Address at the Harvard University John F. Kennedy School of Government (Apr. 17, 2000), https://www.epa.gov/archive/epa/aboutepa/30-years-us-environmental-protection.html. Browner was the longest-serving EPA Administrator in the agency's history. *Biography of Carol M. Browner*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/archive/epa/aboutepa/biography-carol-m-browner.html (Sept. 12, 2016).

nonarbitrary basis earlier in time for greater protection.

Nothing in the APA or administrative law foundational values prevents applying this kind of nuance to the arbitrary and capricious standard of review if the relevant statute supports it. Of course, *Federal Communications Commission v. Fox Television Stations, Inc.*[503] articulates a singular standard.[504] Still, that standard can accommodate the approach proposed here. Surely the determination of what constitutes arbitrary decisionmaking is a function of the normative aims of the relevant statute. Indeed, the *State Farm* factors expressly state that agency decisions are ordinarily arbitrary if the agency has "entirely failed to consider an important aspect of the problem" or "relied on factors which Congress has not intended it to consider."[505] Those factors exist in reference to the relevant substantive framework. Putting these well-settled pieces of the existing standard together, one might simply observe that when it comes to environmental law, if the relevant statute states a public interest set of values, then it would follow from the substantive law that the circumstances under which a decision is arbitrary or capricious would be able to and, indeed, should take account of whether the agency decision amounts to back-sliding.

* * *

These guiding principles are not necessarily new suggestions in the world of environmental law. Some are methods that jurists have applied with some consistency in the past but have dropped out of favor for one reason or another. With five decades of experience with which to observe some of the drawbacks of judicial review that have emerged without these principles as guides, we might now take stock and consider whether a different path would have been better suited to administrative law does not play an outsized role in shaping environmental policy.

Notably, the wisdom of these guiding principles largely rests on the idea that environmental law does, in fact, have underlying and identifiable normative aims that favor environmental protection, conservation of resources, public health, and precaution in the face of unbridled consumption, extraction, and pollution. In the *Exoskeleton of Environmental Law*, this author urges a view of environmental law as a body of legislatively backed congressional commitments to a certain kind of public interest.[506] At least some jurists and scholars have, in the past, laid similar claims in the past and concluded that

503. 556 U.S. 502 (2009).

504. *Id.* at 514 (explaining that the Court's "opinion in *State Farm* neither held nor implied that every agency action representing a policy change must be justified by reasons more substantial than those required to adopt a policy in the first instance.")

505. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins., 463 U.S. 29, 43 (1983).

506. *See generally* Knudsen, *supra* note 7.

courts have a role to play in upholding those values.[507] Judge Leventhal, a prominent member of the D.C. Circuit during the 1970s whose "forte was administrative law,"[508] urged nearly half a century ago that the power of agencies to administer environmental statutes does not eclipse the role of courts, and that for courts to do their job in this space they must see themselves as partners in upholding the public interest values of environmental law:

> The legislative burst which kindled the present blaze [of environmental law] differs in two significant respects from legal developments in the common law setting . . . . Under the current arrangement the courts no longer have the major role they once discharged in the direction formulation of the pertinent legal rules . . . . Primary responsibility has been vested in executive officials and independent regulatory agencies. But this is not to say that the courts do not have an important role. They have a role of review which has been of major significance. In exercising this role, they have shared the public sense of urgency reflected in the new laws, and working within the framework of existing legal doctrine, have exerted a pervasive influence over the legislation's implementation . . . . [Judicial review] is conducted with an awareness that agencies and courts together constitute a "partnership in furtherance of the public interest" and that the two are collaborative instrumentalities under which the "court is in a real sense part of the total administrative process, and not a hostile stranger to the office of first instance."[509]

Judge Leventhal's observation comes down to two things: one, a recognition that environmental law ultimately serves a public interest mission and two, an acceptance that courts have an important role to play in upholding that mission.

The appeal to Judge Leventhal is not an appeal to the brand of judicial activism often associated with the D.C. Circuit of the 1970s.[510] At the same

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507. *See* Glicksman, *supra* note 8, at 210.

508. Upon his death, Judge Leventhal was celebrated as understanding "that environmental values held a special place in the hierarchy of concerns for which a reviewing court must insure adequate agency consideration." Warren E. Burger, Chief Justice, U.S. Sup. Ct., Judge Leventhal's Portrait Ceremony Received in Chief Judge Mikva's Chambers (Nov. 20, 1991) (https://dcchs.org/wp-content/uploads/2019/02/Leventhal-Portrait-Transcript.pdf).

509. Harold Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PENN. L. REV. 509, 510–12 (1974) (quoting Greater Bos. Television Corp. v. Fed. Commc'ns Comm'n, 444 F.2d 841, 852 (D.C. Cir. 1970)); *see also Greater Bos. Television Corp.*, 444 F.2d at 851–52 (Judge Leventhal urging that a demanding yet supportive judiciary is critical to the integrity of the administrative process); Samuel Estreicher, *Pragmatic Justice: The Contributions of Judge Harold Leventhal to Administrative Law*, 80 COLUM. L. REV. 894, 902 (1980).

510. Matthew Warren, *Active Judging: Judicial Philosophy and the Development of the Hard Look Doctrine in the D.C. Circuit*, 90 GEO. L.J. 2599, 2600 (2002) ("Others have seen hard look review as judicial activism—an act of aggrandizement in which courts imposed their own substantive policy judgments on agencies." (citing Antonin Scalia, Vermont Yankee*, the APA, the D.C.*

time, the bulk of this Article has been devoted to showing (hopefully) that a recalibration is necessary between administrative law and environmental law. Together, these guiding principles offer a recalibrated approach to the relationship between administrative law and environmental law in judicial review by giving the normative aims of environmental law a consistent and deliberate home in the judicial review methodology. In that way, these suggestions offer an approach that puts administrative law in its place and gives due respect to the values that Congress codified in the underlying environmental statutes.

All of these suggestions are versions of anchoring review to the enacted purpose of congressional statute with a presumption that environmental laws are fundamentally enacted to inject precaution and protection into what would otherwise be a default pattern of unregulated extraction and degradation of the natural environment. Put differently, many of the environmental statutes are precautionary in nature. Judicial review of agency actions should reflect that. And in that way, the partnership that Judge Leventhal envisioned still deserves a serious place in today's approach to applying administrative law to environmental disputes.

Circuit, and the Supreme Court, 1978 SUP. CT. REV. 345, 359 (1978))).