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RESTRUCTURING AMERICA'S GOVERNMENT TO CREATE SUSTAINABLE DEVELOPMENT

JEFFREY RUDD*

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- A. EPA's Mercury Emissions Rule—Executive "Legislation"
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I. INTRODUCTION AND BACKGROUND

If this were an ordinary case, I would join the opinion and the Court's judgment and be quite content.

But this is not ordinary, run-of-the-mill litigation. The case poses—if only we choose to acknowledge and reach them—significant aspects of a wide, growing, and disturbing problem, that is, the Nation's and the world's deteriorating environment with its resulting ecological disturbances. Must our law be so rigid and our procedural concepts so inflexible that we render ourselves helpless when the existing methods and the traditional concepts do not quite fit and do not prove to be entirely adequate for new issues?¹

In the 1960s and '70s, Congress enacted environmental legislation reflecting the public's interest in an improved "quality of life."² The legislative changes associated with this environmental

¹ *Sierra Club v. Morton*, 405 U.S. 727, 755-56 (1972) (Blackmun, J., dissenting).

² SAMUEL P. HAYS, *BEAUTY, HEALTH, AND PERMANENCE: ENVIRONMENTAL POLITICS IN THE UNITED STATES, 1955-1985*, at 5 (1987) ("An interest in the environmental quality of life is to be understood simply as an integral part of the drives inherent in persistent human aspiration and achievement.").

The conservation movement was an effort on the part of leaders in science, technology, and government to bring about more efficient development of physical resources. The environmental movement, on the other hand, was far more widespread and popular, involving public values that stressed the quality of human experience and hence of the human environment. Conservation was an aspect of the history of production that stressed efficiency, whereas environment was a part of the

movement may be conceived in terms of three overlapping "phases."³ Lasting roughly from 1957 to 1965,⁴ the initial phase of social and legislative change emphasized Americans' "natural-environment values in outdoor recreation, wildlands, and open space."⁵ These values continued to influence legislation through the late-1960s and into the 1970s,⁶ producing numerous statutes including the Wilderness Act of 1964,⁷ National Wildlife Refuge

history of consumption that stressed new aspects of the American standard of living.

Id. at 13. *See generally id.* at 13-39 (elaborating on the changes in American values reflected in the transition from the conservation to the environmental movement).

³ *Id.* at 54-57.

⁴ *Id.* at 54.

⁵ HAYS, *supra* note 2, at 54.

⁶ *Id.* ("Such general legislation as the Eastern Wilderness Act of 1974, the Federal Land Policy and Management Act of 1976, and the Alaskan [National Interest] Lands [Conservation] Act of 1980 testified to the strength of the perennial public concern for natural-environment areas."). The findings and purposes of the legislation listed by Hays and included *infra* notes 7-22 and accompanying text provide a glimpse of the social, political and economic forces of change materializing in law during the Environmental Era. They also point to an important theme in this article: Sustainable development at the national level does not provide a new set of abstract goals. Americans wrestled with the need to balance economic growth against social and ecological values in the 1960s and '70s; socio-ecological values prevailed to produce a myriad of legislation advancing collective public values and aspirations emphasizing the needs of future generations. America's current institutional structure corrupts the implementation of environmental legislation by allowing administrative agency decisions to unjustly favor the influence of industries' short-term economic interests over the public's long-term socio-ecological values. *See infra* Parts III and IV.

⁷ *See* Wilderness Act, 16 U.S.C. §§ 1131-36 (2000).

In order to assure that an increasing population, accompanied by expanding settlement and growing mechanization, does not occupy and modify all areas within the United States and its possessions, leaving no lands designated for preservation and protection in their natural condition, it is hereby declared to be the policy of the Congress to secure for the American people of present and future generations the benefits of an enduring resource of wilderness.

Id. § 1131(a).

Administration Act of 1966,⁸ Wild and Scenic Rivers Act of 1968,⁹ National Environmental Policy Act of 1969¹⁰ ("NEPA"),

⁸ See National Wildlife Refuge Administration Act, 16 U.S.C. §§ 668dd-ee (2000). Section 668dd provides in part:

(2) The mission of the [National Wildlife Refuge] System is to administer a national network of lands and waters for the conservation, management, and where appropriate, restoration of the fish, wildlife, and plant resources and their habitats within the United States for the benefit of present and future generations of Americans.

Id. § 668dd.

⁹ See Wild and Scenic Rivers Act, 16 U.S.C. §§ 1271-87 (2000 & Supp. II 2002).

It is . . . the policy of the United States that certain selected rivers of the Nation which, with their immediate environments, possess outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values, shall be preserved in free-flowing condition, and that they and their immediate environments shall be protected for the benefit and enjoyment of present and future generations.

Id. § 1271.

¹⁰ See National Environmental Policy Act, 42 U.S.C. §§ 4321-70 (2000).

The purposes of this chapter are: To declare 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 the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

Id. § 4321.

The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government . . . to use all practicable means and measures . . . in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the

Endangered Species Act of 1973¹¹ ("ESA"), National Forest Management Act of 1976 ("NFMA"),¹² and the Alaska National Interest Lands Conservation Act of 1980.¹³

social, economic, and other requirements of present and future generations of Americans.

Id. § 4331(a).

¹¹ See Endangered Species Act, 16 U.S.C. §§ 1531-44 (2000). "The purposes of this chapter are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species . . ." *Id.* § 1531(b).

¹² See National Forest Management Act, 16 U.S.C. §§ 1600-14 (2000). The Fourth Circuit Court of Appeals held in *West Virginia Division of the Izaak Walton League of America, Inc. v. Butz*, 522 F.2d 945 (1975) (the *Monongahela* decision), that the Forest Service had authorized clear-cut sales in violation of the 1897 Forest Service Organic Act's statutory language, 16 U.S.C. § 476 (repealed 1976). *Butz*, 522 F.2d at 947-50. *Monongahela* virtually halted the agency's logging operations and forced Congress to heed public outcry directed at the Service's forest management practices. Congress's decision to enact NFMA reflected the federal legislature's growing "recognition of the importance of biodiversity." Julie A. Weis, *Eliminating the National Forest Management Act's Diversity Requirement as a Substantive Standard*, 27 ENVTL. L. 641, 641 (1997) (reviewing the historical events leading to NFMA's passage and examining the statute's biodiversity requirements); see also Charles F. Wilkinson & H. Michael Anderson, *Land and Resource Planning in the National Forests*, 64 OR. L. REV. 1, 295-306 (1985). NFMA's legislative findings illustrate Congress's growing awareness in the 1970s of the importance of ecology and future generations' interests to natural resource management. "[T]he new knowledge derived from coordinated public and private research programs will promote a sound technical and ecological base for effective management, use, and protection of the Nation's renewable resources." 16 U.S.C. § 1600(4) (2000). "[The United States] Forest Service has both a responsibility and an opportunity to be a leader in assuring that the Nation maintains a natural resource conservation posture that will meet the requirements of our people in perpetuity." *Id.* § 1600(6).

¹³ See Alaska National Interest Lands Conservation Act, 16 U.S.C. §§ 3101-3233 (2000). Its purpose was "to preserve for the benefit, use, education, and inspiration of present and future generations certain lands and waters in the State of Alaska that contain nationally significant natural, scenic, historic, archeological, geological, scientific, wilderness, cultural, recreational, and wildlife values . . ." *Id.* § 3101(a).

It is the intent of Congress in this Act to preserve unrivaled scenic and geological values associated with natural landscapes;

The second phase, which lasted from 1965 to 1972,¹⁴ marked a rise in Americans' concern "about the adverse impact of industrial development, with a special focus on air and water pollution."¹⁵ This phase led to the creation of the Clean Air Act of 1970,¹⁶ Clean Water Act of 1972,¹⁷ pesticide control legislation, and

to provide for the maintenance of sound populations of, and habitat for, wildlife species of inestimable value to the citizens of Alaska and the Nation, including those species dependent on vast relatively undeveloped areas; to preserve in their natural state extensive unaltered arctic tundra, boreal forest, and coastal rainforest ecosystems; to protect the resources related to subsistence needs; to protect and preserve historic and archeological sites, rivers, and lands, and to preserve wilderness resource values and related recreational opportunities including but not limited to hiking, canoeing, fishing, and sport hunting, within large arctic and subarctic wildlands and on freeflowing rivers; and to maintain opportunities for scientific research and undisturbed ecosystems.

Id. § 3101(b).

[T]he designation and disposition of the public lands in Alaska pursuant to this Act are found to represent a proper balance between the reservation of national conservation system units and those public lands necessary and appropriate for more intensive use and disposition, and thus Congress believes that the need for future legislation designating new conservation system units, new national conservation areas, or new national recreation areas, has been obviated thereby.

Id. § 3101(d).

¹⁴ HAYS, *supra* note 2, at 55.

¹⁵ *Id.* at 54.

¹⁶ See Air Pollution Prevention and Control Act (Clean Air Act), 42 U.S.C. §§ 7401-7431 (2000). "The Congress finds . . . that the growth in the amount and complexity of air pollution brought about by urbanization, industrial development, and the increasing use of motor vehicles, has resulted in mounting dangers to the public health and welfare." *Id.* § 7401(a)(2).

The purposes of this subchapter are—

- (1) to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population;
- (2) to initiate and accelerate a national research and development program to achieve the prevention and control of air pollution;

additional laws targeting the ecologically disruptive effects of industrial activities.¹⁸ The third phase, which spanned the 1970s, was characterized by public reaction to industrial discharge of toxic chemicals threatening human health.¹⁹

During the third phase, economic and political events encouraged the re-emergence of industry associations' power over Congress's lawmaking machinery.²⁰ The 1973-74 energy crisis helped to quiet the environmental movement as energy industries politically touted the need for new energy exploration projects.²¹ "Demands for the development of new energy sources increased significantly the political influence of the energy industries, which had long chafed under both natural-environment and pollution-control programs. Now environmental leaders often could scarcely be heard."²² Amory Lovins' prophetic emphasis on long-term energy policies fell on political ears deafened by industries' control over public policy.²³

(3) to provide technical and financial assistance to State and local governments in connection with the development and execution of their air pollution prevention and control programs; and

(4) to encourage and assist the development and operation of regional air pollution prevention and control programs.

Id. § 7401(b).

"A primary goal of this chapter is to encourage or otherwise promote reasonable Federal, State, and local governmental actions, consistent with the provisions of this chapter, for pollution prevention." *Id.* § 7401(c).

¹⁷ See Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. §§ 1251-1387 (2000) ("The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.").

¹⁸ HAYS, *supra* note 2, at 54. For a comprehensive list of environmental legislation from the 1960s and 1970s, see CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE 27 (1990) [hereinafter SUNSTEIN, AFTER THE RIGHTS REVOLUTION].

¹⁹ HAYS, *supra* note 2, at 55-56.

²⁰ *Id.* at 56.

²¹ *Id.*

²² *Id.*

²³ In 1976, Amory Lovins warned that America's energy consumption policies ignored the long-term consequences of fossil fuel addiction. Amory B. Lovins,

The United States has forgotten the environmental policy lessons of the 1960s and '70s that suggest a cautious assessment of the rewards purportedly offered by economic growth. The temporal and political separation afforded by a generation has diluted history's lessons and fostered a nation in denial about short- and long-term socio-ecological harms. The situation is aggravated by the current socio-economic and political climate, which marginalizes the ability of environmental advocates to influence national policies. The war on terror's preeminent policy status helps shield Congress and the President from accountability for failing to alleviate socio-ecological risks that threaten the country's long-term stability.²⁴ Government agencies have relied on the war on terror to justify restrictions on public access to information,²⁵ military exceptions to environmental laws and regulations,²⁶ and "emergency measures" which undermine civil liberties.²⁷

Energy Strategy: The Road Not Taken?, 55 FOREIGN AFF. 65, 66 (Oct. 1976). "Conservation, usually induced by price rather than by policy, is conceded to be necessary but it is given a priority more rhetorical than real." *Id.* Lovins argued that America's energy policies, often characterized "as the bastion of free enterprise and free markets," should be based on a socio-political strategy that freed Americans from their addiction and enhanced institutional stability through government support for conservation and alternative energy technologies. *Id.* at 92.

²⁴ Military operations abroad and the socio-political impacts of the Homeland Security Act of 2002 alter relations among the American people and the government, limit funds available for social, economic and environmental programs, and tear at the fabric of society through death, injury, and the social separation caused by military deployments. Homeland Security Act, Pub. L. No. 107-296, 116 Stat. 2135 (codified in scattered sections of 6 U.S.C.).

²⁵ See, e.g., Patricia Salkin Address at *William & Mary Environmental Law & Policy Review* Symposium (Feb. 5, 2005).

²⁶ See, e.g., Stephen Dycus Address at *William & Mary Environmental Law & Policy Review* Symposium (Feb. 5, 2005).

²⁷ See generally Laurence H. Tribe & Patrick O. Gudridge, *The Anti-Emergency Constitution*, 113 YALE L.J. 1801, 1842-67 (2004) (discussing the historical relationship between "emergency measures" during times of war, including the "war on terror," and the Constitution).

Terrorism's information fall-out further complicates efforts to enhance the public's weak interest in national environmental policies.²⁸ However, terrorism is not the primary reason America's socio-ecological conscious has been in a coma during the past several decades. The prospect of inspiring Americans' appreciation for socio-ecological issues is imperiled by the continued expansion of executive authority over environmental regulatory policy and a tradition of government emphasis on economic growth sporadically interrupted by concern for the environment.²⁹ The executive's expansion has coincided with a dangerous resurgence of administrative agency authority—environmental regulatory agencies now function as executive legislators susceptible to factional pressures.³⁰ Simply put, socially progressive environmental policies do not stand a chance unless they are supported by the institutional restructuring of American government to combat corruption in the administration of environmental law and policy.

National sustainable development strategies attempting to place economic, environmental, social, and national security issues on one policy platform³¹ divert attention from more pressing

²⁸ See Marc A. Levy, *Is the Environment a National Security Issue?*, 20 INT'L SECURITY 35, 45 (1995) (noting that "[p]ublic opinion is notoriously out of touch with the relative seriousness of environmental problems.").

²⁹ See *infra* Part III.

³⁰ See *infra* Parts III and IV.

³¹ See, e.g., John C. Dernbach, *Toward a National Sustainable Development Strategy*, 10 BUFF. ENVTL. L.J. 69 (2002-03) [hereinafter Dernbach, *National Sustainable Development*] (arguing that the United States should adopt a national sustainable development strategy integrating "social, economic, environmental, and security goals in ways that are more and more mutually reinforcing . . . over time"). *Id.* at 72.

Sustainable development would change the purposes of national governance as they have been understood in the postwar period to include protection of the environment and natural resources, and to preserve not only the environment but also existing social and economic attainments for future generations. In addition, sustainable development would result in greater equity within and among nations.

John C. Dernbach, *Sustainable Development as a Framework for National Governance*, 49 CASE W. RES. L. REV. 1, 8-9 (1998).

institutional problems. Moreover, broad national proposals face insurmountable conceptual and pragmatic challenges caused by the amorphous nature of sustainable development.³² The practical problems facing national sustainable development proposals are a function of asking too much of all-encompassing platforms,³³

³² The Brundtland Commission defined the phrase as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs." WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, OUR COMMON FUTURE 43 (1987) [hereinafter OUR COMMON FUTURE]. Essentially, "sustainable development is a process of change in which the exploitation of resources, the direction of investments, the orientation of technological development, and institutional change are all in harmony and enhance both current and future potential to meet human needs and aspirations." *Id.* at 46 (1987); see also John C. Dernbach, *Making Sustainable Development Happen: From Johannesburg to Albany*, 8 ALB. L. ENVTL. OUTLOOK J. 173, 174-78 (2004) [hereinafter Dernbach, *Making Sustainable Development Happen*]. Professor Dernbach traces the history of "sustainable development" and asserts that "[i]n a sustainable world, progress is defined not just in terms of economic development, peace and security, human rights, or national governance; it is also defined by the extent to which we protect and restore the environment." *Id.* at 177. "[Sustainable development] does not subordinate the environment to development, nor development to the environment. It is about achieving both, while giving each equal significance. Sustainable development is not about economic growth now and environmental protection later; it is about achieving both simultaneously." *Id.* at 177-78; see also John C. Dernbach, *Targets, Timetables and Effective Implementing Mechanisms: Necessary Building Blocks for Sustainable Development*, 27 WM. & MARY ENVTL. L. & POL'Y REV. 79, 86 (2002) ("Sustainable development is premised on the interdependence and essential equality of economic development, social well-being, peace and security, and environmental protection."); J.B. Ruhl, *Sustainable Development: A Five-Dimensional Algorithm for Environmental Law*, 18 STAN. ENVTL. L.J. 31, 39 (1999) ("The objective of sustainable development, in other words, is to achieve a social framework in which economy, environment, and equity all are sustainable in perpetuity over all geographic scales."). *But see*, Sabine U. O'Hara, *Internalizing Economics: Sustainability between Matter and Meaning*, 25 INT'L J. OF SOC. ECON. 175, 175 (1998) (arguing that the "term sustainability has, in fact, taken on such vague denotations that it has become meaningless; so much so that . . . a new word is needed to express the challenging relationship between economic and environmental sustainability").

³³ See, e.g., Ruhl, *supra* note 32, at 38-39 (noting that "[a]t the core of this [sustainable development] concept is 'a process of change in which the exploitation of resources, the direction of investments, the orientation of

especially when the platforms' legislative progenitors already express sufficient environmental aspirations.³⁴ In an important pragmatic sense, sustainable development policies cannot "cut[] across artificial boundaries between economic, environmental, social, and national security issues;"³⁵ the epistemological and

technological development, and institutional change are all in harmony and enhance both current and future potential to meet human needs and aspirations" (quoting OUR COMMON FUTURE, *supra* note 32, at 46)).

³⁴ See, e.g., *supra* notes 6-23 and accompanying text. Mark Dernbach's discussion of the relationship between sustainable development and NEPA signals his agreement.

The National Environmental Policy Act of 1969 (NEPA) (footnote omitted) could provide a mechanism for further integration, but its implementation has not changed significantly since 1992. Under NEPA, Congress declared the "continuing policy of the Federal Government" to "create and maintain conditions under which man and nature can exist in productive harmony, and to fulfill the social, economic, and other requirements of present and future generations of Americans" (citing 42 U.S.C. § 4331(a)). This and other language in the statute endorse what is now called sustainable development.

Dernbach, *National Sustainable Development*, *supra* note 31, at 115; see also Douglas A. Kysar, *Law, Environment, and Vision*, 97 NW. U. L. REV. 675, 678 (2003).

[E]nvironmental law does not suffer from a lack of well-designed, well-studied policy tools to achieve its goals, but rather from a lack of urgency among policymakers and the public concerning the necessity to achieve those goals. Such urgency simply does not follow from a preanalytic [economic] worldview in which nature is assumed to be boundless.

Id.

³⁵ Dernbach, *National Sustainable Development*, *supra* note 31, at 87.

Sustainable development cuts across artificial boundaries between economic, environmental, social, and national security issues. As a result, it involves several goals that need to be accomplished simultaneously, and it is important to find ways of furthering each goal that do not impede or interfere with the accomplishment of other goals. Without some strategic sense of how the nation's security, economic, environmental, and social objectives are related, and should be realized together, the country will be less able to effectively realize those objectives. Efforts by federal agencies that further social, economic, and

institutional boundaries separating those issues are *real* at a fundamental level that precludes dissolution into an overarching conceptual framework.³⁶

Sustainable development umbrellas targeting antiterrorism and national security issues³⁷ risk further empowering an Executive

environmental goals at the same time are likely to be more efficient than efforts directed at only one goal. An integrated approach is also likely to prevent problems that would cost much more to alleviate later. Most importantly, perhaps, the daunting scope of many of these problems means that they can be resolved only if the government and others act efficiently.

Id.; see also Dernbach, *Making Sustainable Development Happen*, *supra* note 32, at 182 (citing STUMBLING TOWARD SUSTAINABILITY 728-30 (John C. Dernbach ed., 2002) (arguing that a national sustainable development strategy should "integrate social, economic, environmental, and security goals, in a coherent and cost-effective manner")). Substantive policy connections between sustainable development, national security, and terrorism are generally limited to context-specific examples. One such example is the need to protect certain infrastructures (e.g., power grids) essential for America's national security. See generally Thomas Homer-Dixon, *The Rise of Complex Terrorism*, FOREIGN POL'Y 52-62 (Jan./Feb. 2002).

³⁶ National policies should not be based on a sustainable development model aiming to achieve an equally apportioned mix of economic, security, environmental and social goals—a hypothetical and ultimately unattainable conceptual framework. The practical aspects of sustainable development require consideration of knowledge produced by the same disciplines guiding "development" over the course of the last fifty years, such as: ecology, biology, physics, chemistry, economics, sociology, political science and law. The knowledge bearing on development decisions has changed, but the method for balancing the claims produced continues to hinge on value judgments. All-encompassing sustainable development proposals suffer the illusions of theoretical cohesion and practical utility. See Jeffrey Rudd, *J.B. Ruhl's "Law and Society System: Burying Norms and Democracy Under Complexity Theory's Foundation"*, 29 WM. & MARY ENVTL. L. & POL'Y REV. 551 (2005) [hereinafter Rudd, *Burying Norms and Democracy*]. The further removed sustainable development is from a specific problem requiring the balancing of economic, social, and ecological values, the easier it should be to understand that at the national level, sustainable development is an integrated, interdisciplinary ideal piled on top of disciplinary ideals.

³⁷ See, e.g., Dernbach, *National Sustainable Development*, *supra* 31, at 72 ("[S]ustainable development is premised on the interconnected nature of security, economic, social, and environmental issues. The sustainable development framework would suggest that a full and effective response to terrorism

already insufficiently accountable for national security and environmental regulatory decisions.³⁸ Proposals that increase executive control over environmental issues will raise the bar on public access to information relevant to environmental policy,³⁹ curtail deliberative decision-making, and further reduce government accountability.⁴⁰ The essential institutional problem plaguing fair consideration of socio-ecological issues will remain: agency administrators are unwilling to take regulatory action reflecting a legitimate level of concern for ecological and social values relative to economic interests. Sustainable development advocates should narrow their focus and call for the rejuvenation of deliberative democracy in the design and implementation of government's environmental legislation.⁴¹

must address the role that economic, social, and environmental conditions may play in contributing to terrorism.”). “When we also realize that sustainable development requires an antiterrorism effort to achieve peace and security, and that the world's social, economic, security, and environmental problems are related, it makes sense to see that the antiterrorism campaign should be part of a broader sustainable development effort.” *Id.* at 88.

³⁸ See HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 5 (1990) (arguing that since the Iran-Contra Affair, the “three-part combination of executive initiative, congressional acquiescence, and judicial tolerance has broadly insulated the president from foreign affairs accountability”). See generally *id.* at 117-49; see also *infra* Part II.A.

Professor Farina notes a similar trend in the relations between the Executive and administrative government. “[A] potent combination of constitutionally granted powers, congressional acquiescence (taking the form of both custom and statute) and institutional and organizational factors have contributed to the emergence of the President as the dominant force in regulatory policy making (footnote omitted).” Cynthia Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 503 (1989).

³⁹ See, e.g., Salkin, *supra* note 25.

⁴⁰ See *infra* Parts III and IV.

⁴¹ For a discussion of the principles of deliberative democracy, see Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1530, (1992) and Cass Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988).

Under republican approaches to politics, laws must be supported by argument and reasons; they cannot simply be fought for or be the product of self-interested “deals.” Private-regarding reasons

Environmental advocates should marshal their resources to support the restructuring of institutions⁴² that govern the implementation of environmental legislation.⁴³ Currently, administrative

are an insufficient basis for legislation. Political actors must justify their choices by appealing to a broader public good. This requirement has a disciplining effect on the sorts of measures that can be proposed and enacted. The requirement of appeal to public-regarding reasons may make it more likely that public-regarding legislation will actually be enacted. (footnote omitted)

The central idea here is that politics has a deliberative or transformative dimension. Its function is to select values, to implement "preferences about preferences," or to provide opportunities for preference formation rather than simply to implement existing desires.

Id. at 1544-45.

⁴² "Institutions" refer to the formal and informal rules constituting the "underlying rules of the game." DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 5 (1990). "The purpose of the rules is to define the way the game is played." *Id.* at 4.

Institutions include any form of constraint that human beings devise to shape human interaction. Are institutions formal or informal? They can be either . . . formal constraints—such as rules that human beings devise—and in informal constraints—such as conventions and codes of behavior. Institutions may be created, as was the United States Constitution; or they may simply evolve over time, as does the common law. . . .

Institutional constraints include both what individuals are prohibited from doing and, sometimes, under what conditions some individuals are permitted to undertake certain activities. . . . [T]hey therefore are the framework within which human interaction takes place. They are perfectly analogous to the rules of the game in a competitive team sport.

Id. at 5.

⁴³ The restructuring is necessary to ensure that principles of deliberative democracy govern agency decisions in implementing statutes. See Mark Seidenfeld, *A Syncopated Chevron: Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83, 126-27 (1994) [hereinafter Seidenfeld, *A Syncopated Chevron*].

agencies exercise too much discretion over environmental law and policy to be fairly considered part of a deliberative democratic process.⁴⁴ Administrators function as legislators largely unaccountable for advancing the public good, with virtually unfettered discretion to maximize the Executive's legislative authority and dilute the Constitution's framework for deliberative democracy.⁴⁵ "There is no question but that agency rulemaking is lawmaking in any functional or realistic sense of the term."⁴⁶

This Article argues the New Deal produced an institutional framework that encouraged Executive expansion over national security, fostered the growth of Executive authority over environmental law, and inadvertently contributed to administrative agencies' corrupt implementation of environmental legislation. Part II examines the institutions in American government that organize power over national security and argues that broad sustainable development platforms risk increasing Executive control over environmental issues under the guise of national

The administrative bureaucracy plays an essential role in at least some versions of deliberative democratic theory. The structure of agencies allows for public participation, political influence, and reasoned decision-making as part of the regulatory discourse. In fact, the administrative "branch" of government may hold the greatest promise for implementing the deliberative democratic ideal. Deliberative democratic theory, however, also suggests the need for certain changes in the manner in which the federal government makes and enforces law, and achievement of that ideal still requires some restructuring of the administrative state. The three constitutionally specified branches of government must reconceptualize their relationships to administrative agencies to ensure the proper balance between political responsiveness and reasoned decisionmaking.

Id.

⁴⁴ The American people pay an unacceptable price for administrators' failure to advance the goals of existing legislation, as do government agencies' employees who believe in and strive to implement the legislative principles. *See infra* Parts III.C. and IV.

⁴⁵ *See infra* Parts III and IV.

⁴⁶ *INS v. Chadha*, 462 U.S. 919, 986 (1983) (White, J., dissenting).

security. The institutional goal should be to reduce, not enhance, the Executive's power over environmental law and regulation. The history of constitutional conflicts over national security issues points to the institutional problems that confront overly-broad proposals integrating national security and environmental policies.⁴⁷ National sustainable development proposals aim too high, losing touch with the fundamental purpose of environmental legislation: the restraint of economic development to protect and advance *collective* socio-ecological values.

Sustainable development advocates should move away from overreaching proposals and direct their attention to the insidious malady threatening the socio-ecological values expressed through environmental legislation. Part III argues that New Deal justifications for administrative discretion challenged certain principles of Madisonian republicanism,⁴⁸ creating a political atmosphere ripe for exploitation by 21st century Executives. The Executive has filled the Constitution's "zone of twilight"⁴⁹ with environmental agency administrators functioning as an unchecked, legislative arm of the Executive branch. Environmental agencies' authority over critical issues is exercised without sufficient constitutional accountability or deliberation.⁵⁰ Revisiting James Madison's

⁴⁷ See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

⁴⁸ SUNSTEIN, *AFTER THE RIGHTS REVOLUTION*, *supra* note 18, at 16.

[T]he distribution of national powers served as a major guarantor of private ordering and also as a check against the twin dangers to a republic that Madison himself feared most. The first was factionalism: the usurpation of government by powerful and self-interested groups. The second was self-interested representation: the distortion of governance by the selfish motivations of public officials.

Id.

⁴⁹ *Youngstown*, 343 U.S. at 637 (1952) (Jackson, J., concurring); see also *infra* notes 106-41 and accompanying text.

⁵⁰ Cass Sunstein's work from the late 1980s on the relationship between the administrative state and deliberative democracy provides important (albeit indirect) support for one of this Article's central themes: environmental agencies

account of States' legislative corruption under the Articles of Confederation illuminates the fundamental constitutional principles that should reinvigorate government's institutions.⁵¹

Part IV examines corruption in environmental law and regulation, understood as the evisceration of American constitutional and environmental legislative values through agencies functioning as a legislative conduit for Executive power. It contextualizes the corruption issue through a discussion of two agency rulemaking examples that demonstrate the need for comprehensive institutional change. The discussion begins with an inside look, courtesy of the Environmental Protection Agency's ("EPA") Office of Inspector the General ("OIG") and the General Accounting Office ("GAO"), at the EPA's rulemaking process for the mercury emissions rule.⁵² The corruption evident in EPA's rulemaking process is consistent with the United States Fish and Wildlife Service's ("FWS") rulemaking process a decade earlier, which forestalled the listing of the Canada Lynx as a "threatened" species under the ESA.⁵³

Part V concludes with suggestions for structural change in government that are necessary to curtail corruption in environmental regulation and restore the just implementation of environmental law through agency decisions. Congress and the judiciary are responsible for restoring a sense of constitutional order to administrative agency decision-making processes.⁵⁴ Congressional

function without sufficient accountability to the American people due to the corrupt influence of industry factions. *See infra* Part III. *See generally* SUNSTEIN, *AFTER THE RIGHTS REVOLUTION*, *supra* note 18; Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421 (1987) [hereinafter Sunstein, *Constitutionalism After the New Deal*]; Cass R. Sunstein, *Factions, Self-Interest, and the APA: Four Lessons Since 1946*, 72 VA. L. REV. 271 (1986); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985) [hereinafter Sunstein, *Interest Groups in American Public Law*]; CASS R. SUNSTEIN, *WHY SOCIETIES NEED DISSENT* 145-65 (2003).

⁵¹ *See infra* Part III.A.

⁵² National Emission Standard for Mercury, 40 C.F.R. §§ 61.50-61.56 (2005). *See infra* Part IV.A.

⁵³ *See infra* Part IV.B.

⁵⁴ *See infra* Part IV.C.

investigations should guide institutional modifications necessary to curtail the Executive's "backdoor" legislation and increase administrators' constitutional and professional accountability. Judicial review of environmental agency decisions should rely upon constitutional principles of accountability and deliberation to invigorate the "hard look" doctrine.⁵⁵

National sustainable development proposals aim for lasting synergy between the United States' and other nation-states' environmental, economic, social, and security policies. Although global issues merit attention, America's natural resources are threatened by Executive lawmaking accomplished through administrative rulemaking. The United States' current institutional structure compromises deliberation about environmental law and policy. National sustainable development platforms send the wrong political, social, and scientific message, and undermine the effectiveness of current environmental statutes. Long-term environmental values hinge upon fundamental institutional changes that constrain administrators' authority and restore deliberation and accountability to the political process.

II. EXECUTIVE AUTHORITY IN THE "ZONE OF TWILIGHT"⁵⁶

The Founders of this Nation were not imbued with the modern cynicism that the only thing that history teaches is that it teaches nothing. They acted on the conviction that the experience of man sheds a good deal of light on his nature. It sheds a good deal of light not merely on the need for effective power, if a society is to be at once cohesive and civilized, but also on the need for limitations on the power of governors over the governed.⁵⁷

⁵⁵ See *infra* notes 196-243 and accompanying text; see also *infra* Part IV.

⁵⁶ *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

⁵⁷ *Id.*, 343 U.S. at 593 (Frankfurter, J., concurring).

The Executive's power over national security⁵⁸ is rooted in traditional notions of sovereignty, secrecy, and unilateral action not always well contained by constitutional principles of deliberation and accountability.⁵⁹ The deterioration of the Nation's socially progressive, ecologically responsible legislation is largely attributable to the erosion of institutions meant to ensure that the Executive and its administrative agencies function according to those same constitutional principles. Over the past several decades, the President's authority over national security and environmental policies has expanded significantly relative to that of Congress.⁶⁰ Proposals that seek to integrate sustainable development and national security⁶¹ risk further strengthening

⁵⁸ See LOUIS HENKIN, *FOREIGN AFFAIRS AND THE US CONSTITUTION* 53 (2d ed. 1996) ("National security" is not a constitutional term and it is a concept too uncertain to support authority beyond what can be distilled from the responsibilities and powers bestowed on the President by the Constitution."); *Curtiss-Wright*, 299 U.S. 304 (1936); KOH, *supra* note 38, at 74 ("The term 'national security' was not officially coined until the cold war. Nevertheless, no fewer than twenty-five of the first thirty-six Federalist Papers concerned national insecurity, with most linking the young republic's international weakness to the incapacity of the national government." (citing THE FEDERALIST NO. 75 (Alexander Hamilton) (Modern Library ed., 1937) (footnote omitted))). "Nos. 3, 4, 14, 23-32, 34, 36 (military and other external weakness); 5-8, 18-20 (fear of foreign intervention and dissolution of the union); 11-12, 22-23 (need to retaliate against foreign restrictions on trade); 22 (treaty enforcement))." *Id.*; see also *id.* at 74 n.23

(Although the phrase was first used in the National Security Act of 1947, there is no official definition of the term. The only quasi-official definition, prepared for a dictionary used by the Joint Chiefs of Staff, is: "a military or defense advantage over any foreign nation or group of nations, or . . . a favorable foreign relations position, or . . . a defense posture capable of successfully resisting hostile or destructive action from within or without, overt or covert.").

⁵⁹ See *infra* Part II.B.

⁶⁰ See KOH, *supra* note 38, at 5; see also *infra* Part II. A parallel expansion has occurred in Executive authority over United States regulatory policy. See Farina, *supra* note 38, at 503.

⁶¹ See, e.g., Dernbach, *supra* notes 31-32, see *infra* notes 117-49 and accompanying text.

Executive control of environmental policy through its national security authority.

Sustainable development advocates unwittingly aggravate a tenuous situation for environmental legislation by insisting that "antiterrorism" strategies lie within the ambits of national sustainable development policies.⁶² They have been led astray by the World Commission's discussion of "peace and security" in 1987.⁶³ The Commission suggested that new conceptions of national security and sovereignty were necessary to achieve sustainable development goals.⁶⁴ The Commission's work and

⁶² See, e.g., Dernbach, *National Sustainable Development*, *supra* note 31, at 88. Professor Dernbach argues that a national sustainable development policy's success depends on "peace and security" and is therefore closely linked to America's antiterrorism operations.

When we also realize that sustainable development requires an antiterrorism effort to achieve peace and security, and that the world's social, economic, security, and environmental problems are related, it makes sense to see that the antiterrorism campaign should be part of a broader sustainable development effort. The purposes of sustainable development, after all, are human quality of life, opportunity, and freedom. Our nation has long stood behind these purposes.

Id.

⁶³ See OUR COMMON FUTURE, *supra* note 32, at 290-307; *id.* at 19 ("Certain aspects of the issues of peace and security bear directly upon the concept of sustainable development."); see also Tim O'Riordan, *Environmental Science, Sustainability and Politics*, 29 TRANSACTIONS INST. BRITISH GEOGRAPHERS 234, 239 (2004).

Maybe the best bet for environmental science projections of planetary well-being is to lock the diagnosis into the wider political theatres of military security, conventional economic investment, poverty alleviation, hunger removal and the eradication of public health dangers, notably HIV/AIDS, malaria and dysentery and the steady onslaught of chronic enslavement of many cumulative deceases. Revealing the common agendas of the environmental policy think tanks with the security pundits, the economic lobbies and the global strategic analysts is a possible way forward.

Id.

⁶⁴ OUR COMMON FUTURE *supra* note 32, at 290 ("[A] comprehensive approach to international and national security must transcend the traditional emphasis on military power and armed competition . . .").

government reports may be interpreted to support the inclusion of antiterrorism strategies in national sustainable development proposals, and the reshaping of environmental security as a national security issue.⁶⁵ “The whole notion of security as traditionally understood—in terms of political and military threats to national sovereignty—must be expanded to include the growing impacts of environmental stress—locally, nationally, regionally, and globally. There are no military solutions to ‘environmental insecurity.’”⁶⁶

The Commission's presumptions favoring “sustainable development goals,” however, avoid critical institutional issues. Conceptions of nation-states' sovereignty are intricately related to principles of nationalism and national security policies that emerge through actions guided by formal and informal rules.⁶⁷ The

⁶⁵ *Id.* at 19; see also Robert F. Durant, *Whither Environment Security in the Post-September 11 Era? Assessing the Legal, Organizational and Policy Challenges for the National Security State*, 62 PUB. ADMIN. REV., 115, 116 (2002) (arguing that during the Clinton Administration, national security was redefined to include “‘environmental security:’ the recognition that global, regional, or subnational environmental degradation and scarcities abroad and at home” can threaten the interests of the United States); O’Riordan, *supra* note 64, at 236 (reporting that “[a] leaked Pentagon report, obtained by *The Observer* . . . concluded that ‘climate change should be elevated beyond a scientific debate to a US [sic] National Security concern’”). “Environmental degradation and human misery do go hand in hand, and are now of such significance for economic and military security that they are on the agendas of the highest politics.” *Id.*

⁶⁶ OUR COMMON FUTURE *supra* note 32, at 19. But see Levy, *supra* note 28, at 53. Reflecting on his analyses of ozone depletion and global climate change as “direct environmental threats to U.S. security,” Marc Levy concluded that in each case the analysis “moved away from the literature that explicitly attempts to link environment and security, and toward a more self-contained environmental literature.” *Id.*

What would we have gained by considering the ozone depletion problem [identified in the 1970s] as a security problem? Contrary to a key assumption underlying the environment and security literature, the ozone case suggests that as a society we managed to cope with a serious environmental problem fairly well without labeling it a “security problem.”

Id. at 50.

⁶⁷ See NORTH, *supra* note 42.

resolution of particular historical conflicts among economic, social, political, and national security actors illuminates the role of institutions in determining the balance of power in United States government.⁶⁸ Revisiting several of the Supreme Court's landmark national security decisions demonstrates the importance of history and institutions to substantive political change and highlights the risks of enhancing Executive power to achieve environmental objectives.⁶⁹ The Court's relatively recent redistribution of

Institutions are the rules of the game in a society or, more formally, are the humanly devised constraints that shape human interaction. In consequence they structure incentives in human exchange, whether political, social, or economic. Institutional change shapes the way societies evolve through time and hence is the key to understanding historical change.

Id. at 3; *see also id.* at 47 ("Formal rules include political (and judicial) rules, economic rules, and contracts. The hierarchy of such rules, from constitutions, to statute and common laws, to specific bylaws, and finally to individual contracts defines constraints, from general rules to particular specifications.").

[F]ormal rules . . . make up a small (although very important) part of the sum of constraints that shape choices; a moment's reflection should suggest to us the pervasiveness of informal constraints. In our daily interaction with others, whether within the family, in external social relations, or in business activities, the governing structure is overwhelmingly defined by codes of conduct, norms of behavior, and conventions.

Id. at 36.

⁶⁸ *See* STEPHEN M. GRIFFIN, *AMERICAN CONSTITUTIONALISM: FROM THEORY TO POLITICS* 26 (1996).

Political authority in the United States is diffused and the doctrine of popular sovereignty does not help us understand the constitutional system that ensures this diffusion. The doctrine should be abandoned in favor of the concept of political authority. When we seek the location of political authority in America in a practical sense, a plausible answer is that authority lies in a complex governmental system in which the people participate Saying that all political authority lies in the people, however, is clearly inaccurate. Popular sovereignty points toward an ideal of direct democracy that has never existed in the United States and avoids crucial issues of state authority.

Id.

⁶⁹ Institutions governing the implementation of environmental legislation are ill-suited to conduct national security analysis or accommodate sustainable

legislative authority to the Executive should raise red flags for sustainable advocates prone to overlook the institutional framework governing environmental law's implementation.⁷⁰

Political developments occurring in the 1930s marked the modern expansion of American presidential power.⁷¹ Following the Depression, President Franklin Delano Roosevelt ("FDR") transformed the United States into a world leader in military, economic, and diplomatic affairs,⁷² while creating a new bureaucracy capable of managing and dispersing Executive authority.⁷³

development policies encompassing national security issues. *See Levy, supra* note 28, at 54.

U.S. environmental policy-making has historically been characterized by high reliance on legislative instruments and judicial review sparked by litigation. This has resulted in an environmental policy style characterized by high reliance on scientific judgments and, where these are absent, on rigid legislative criteria capable of strict interpretation by the courts. This policy style would be singularly unsuited to coping effectively with big security risks, which require complex judgments concerning highly uncertain phenomena. They require long-term strategies that may not be justifiable with reference to science, and flexibility that may be incompatible with rigid legislation.

Id.

⁷⁰ *See* NORTH, *supra* note 42, at 5.

⁷¹ HENKIN, *supra* note 58, at 85 (noting that "[t]he Executive is sometimes carried away by ready opportunity and initiative, by expertise, by responsibility, and by the security of secrecy, to invade where Congress has its claims"); NORTH, *supra* note 42, at 93 (arguing that the New Deal era "redefined the constitutional politics of American foreign affairs").

⁷² *See* Richard A. Falk, *The Extension of Law to Foreign Policy: The Next Constitutional Challenge*, in CONSTITUTIONALISM: THE PHILOSOPHICAL DIMENSIONS 209-10 (Alan S. Rosenbaum ed., 1988).

⁷³ *See* KOH, *supra* note 38, at 97.

[F]ollowing the recommendations of the President's Committee on Administrative Management, Roosevelt created an Executive Office of the President that would eventually embrace the Council of Economic Advisers in 1946; the National Security Council in 1947; the Special Trade Representative in 1963 (now the U.S. Trade Representative); the Council of Environmental Quality in 1970 . . . and the White House Office of Science and Technology Policy in 1976.

Id.

FDR demonstrated the Executive's "functional superiority in responding to external events,"⁷⁴ which helped future presidents gain control over the policymaking process "while Congress accepted a reactive, consultative role."⁷⁵

In *United States v. Curtiss-Wright Export Corp.*,⁷⁶ the Supreme Court reinforced FDR's expansion of executive authority over national security. In 1936, Congress issued a Joint Resolution authorizing the President to investigate and determine whether to issue a proclamation making it "unlawful to sell . . . any arms or munitions of war in any place in the United States to the countries now engaged in [the Chaco] armed conflict."⁷⁷ Justice Sutherland's majority opinion upheld FDR's proclamation⁷⁸ against the challenge that the Joint Resolution was an unconstitutional delegation of legislative power to the President;⁷⁹ the opinion formally recognized extensive, highly discretionary Executive power over national security.⁸⁰ Sutherland's argument was based on the President's constitutional responsibility to defend American

⁷⁴ *Id.* at 79.

⁷⁵ *Id.*

⁷⁶ 299 U.S. 304 (1936).

⁷⁷ *Id.* at 312. Violations of such a proclamation would be punishable as a criminal offense carrying the potential for fine and imprisonment. *Id.*

⁷⁸ *Id.* at 312-13.

⁷⁹ *Id.* at 314-15, 329.

⁸⁰ 299 U.S. at 329.

We deem it unnecessary to consider, *seriatim*, the several clauses which are said to evidence the unconstitutionality of the Joint Resolution as involving an unlawful delegation of legislative power. It is enough to summarize by saying that, both upon principle and in accordance with precedent, we conclude there is sufficient warrant for the broad discretion vested in the President to determine whether the enforcement of the statute will have a beneficial effect upon the reestablishment of peace in the affected countries; whether he shall make proclamation to bring the resolution into operation; whether and when the resolution shall cease to operate and to make proclamation accordingly; and to prescribe limitations and exceptions to which the enforcement of the resolution shall be subject.

Id.

interests and the critical role of confidential information to national security decisions.⁸¹

Justice Sutherland's opinion opened the door for presidents to test the limits of their constitutional authority over national security. President Truman was the first to push this envelope.⁸²

⁸¹ "Secrecy in respect of information gathered by [confidential sources] may be highly necessary, and the premature disclosure of it productive of harmful results." *Id.* at 320-21.

[The President's action] may well depend, among other things, upon the nature of the confidential information which he has or may thereafter receive, or upon the effect which his action may have upon our foreign relations. This consideration, in connection with what we have already said on the subject, discloses the unwisdom of requiring Congress in this field of governmental power to lay down narrowly definite standards by which the President is to be governed. As this court said in *Mackenzie v. Hare*, 239 U.S. 299, 311, "As a government, the United States is invested with all the attributes of sovereignty. As it has the character of nationality it has the powers of nationality, especially those which concern its relations and intercourse with other countries. *We should hesitate long before limiting or embarrassing such powers.*"

Id. at 321-22. *Curtiss-Wright* has been criticized on a number of grounds, including (1) Justice Sutherland's "key language was dicta," (2) the historical inaccuracies in Sutherland's "extra-constitutional theory of paramount unenumerated presidential power in foreign affairs," and (3) the decision's ambiguous language leads to conclusions inconsistent with Sutherland's claims concerning the extent of presidential authority in foreign affairs. KOH, *supra* note 38, at 94 (citing *Youngstown*, 343 U.S. at 635-36 n.2). Commentators' extensive criticism of Justice Sutherland's opinion has not, however, dissuaded FDR's successors from arguing that the Supreme Court's decision in *Curtiss-Wright* was "an effective *judicial* amendment of Article II of the Constitution," that significantly enhanced the President's enumerated powers in foreign affairs. *Id.* at 94. Professor Harold Hongju Koh, a former attorney-advisor in the Justice Department's Office of Legal Counsel, notes that "[a]mong government attorneys, Justice Sutherland's lavish description of the president's powers is so often quoted that it has come to be known as the '*Curtiss-Wright*, so I'm right' cite . . ." *Id.*

⁸² After World War II, the Soviet Union and the United States began positioning themselves to influence world events politically and militarily. "In the unsettlement of two World Wars and the rise of the Russian challenge, we put a higher premium on community security than we had since our colonial years."

The power of both the Constitution and the Supreme Court to vitalize institutional change in government was never more apparent than after President Truman issued an Executive Order directing "the Secretary of Commerce to take possession of most of the steel mills and keep them running."⁸³ Truman intervened in an ongoing conflict between steel mill corporations and unionized labor to resolve a dispute over the terms of collective bargaining agreements.⁸⁴ When the 650,000 steelworkers went on strike,⁸⁵ President Truman ignored the Taft-Hartley Act and seized the mills.⁸⁶

At some eighty-eight steel mills across the country, the morning of April 9, 1952, things appeared the same as usual. The morning shifts arrived, production continued, the mills worked by the same men and managed by the same officials. The one clearly

JAMES WILLARD HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH CENTURY UNITED STATES* 107 (1956). The United States retained a strong military presence in Europe and generally viewed social and political unrest in the Third World as a national security threat caused by the Soviet Union and the spread of Communism. KOH, *supra* note 38, at 99-100, 105-06.

⁸³ *Youngstown*, 343 U.S. at 583. President Truman's decision to seize the mills was preceded by his declaration of a national emergency pursuant to the Trading with the Enemy Act of 1917 ("TWEA").

The national emergency most often invoked in connection with exercises of TWEA powers was the emergency that had been declared on December 16, 1950, by President Truman in response to the developing Korean conflict. . . . That Proclamation warned of the threat of Communist aggression. Because of this declaration of emergency, the President retained broad authority of indefinite duration to respond to anything that logically could be related to the general threat of the spread of Communism.

Regan v. Wald, 468 U.S. 222, 245-46 (1983) (Blackmun, J., dissenting).

⁸⁴ *Youngstown*, 343 U.S. at 582. Truman considered the position adopted by the Wage Stabilization Board which recommended a 26¢/hour increase in employees' wages to be a reasonable one. See DAVID MCCULLOUGH, *TRUMAN*, 897-98 (1992). The steelworkers had not received a pay raise since 1950, in spite of the mills' production of "record tonnage" and rising profits. *Id.* The United Steelworkers of America union agreed, but the industry demanded an increase in steel prices. *Id.*

⁸⁵ *Id.* at 897.

⁸⁶ See *Youngstown*, 343 U.S. at 656-58 (Jackson, J., concurring).

visible sign of change were the American flags that flew over the mills. In Washington, the Secretary of Commerce, Charles Sawyer, had assumed legal command of the industry.⁸⁷

The seizure of the steel mills threw constitutional principles into a temporary state of disarray, reconfiguring the institutions relied upon by millions of Americans, and uprooting political, economic, and social relationships.⁸⁸

Truman's decision to seize the mills was challenged as an unconstitutional exercise of executive power.⁸⁹ Justice Black's majority opinion noted that President Truman perceived the steel mill strike as an immediate threat to national security,⁹⁰ but

⁸⁷ MCCULLOUGH, *supra* note 84, at 899.

⁸⁸ See NORTH, *supra* note 42, at 25 ("Institutions exist to reduce the uncertainties involved in human interaction.").

Stability is accomplished by a complex set of constraints that include formal rules nested in a hierarchy, where each level is more costly to change than the previous one. They also include informal constraints, which are extensions, elaborations, and qualifications of rules and have tenacious survival ability because they have become part of habitual behavior. They allow people to go about the everyday process of making exchanges without having to think out exactly the terms of an exchange at each point and in each instance. Routines, customs, traditions, and conventions are words we use to note the persistence of informal constraints, and it is the complex interaction of formal rules and informal constraints, together with the way they are enforced, that shapes our daily living and directs us in the mundane (the very word conjures up images of institutional stability) activities that dominate our lives. Although the mix of rules and norms varies . . . the combination nevertheless provides us with the comfortable feeling of knowing what we are doing and where we are going.

Id. at 83.

⁸⁹ *Youngstown*, 343 U.S. at 584-87.

⁹⁰ "The indispensability of steel as a component of substantially all weapons and other war materials led the President to believe that the proposed work stoppage would immediately jeopardize our national defense and that governmental seizure of the steel mills was necessary in order to assure the continued availability of steel." *Id.* at 583; see also MCCULLOUGH, *supra* note 84, at 896-97.

rejected the argument that the President had inherent power to seize the steel plants.⁹¹ The majority concluded that the President's order infringed upon Congress's lawmaking powers.⁹² "The President's order does not direct that a congressional policy be executed in a manner prescribed by Congress—it directs that a presidential policy be executed in a manner prescribed by the President."⁹³

Justice Jackson's concurrence in *Youngstown* presents a classic analysis⁹⁴ of the constitutional limits of presidential powers and his opinion's significance extends well beyond national security issues.⁹⁵ Jackson's opinion emphasizes the important

⁹¹ *Youngstown*, 343 U.S. at 584, 587. Compare the President's lawyers' argument that "in meeting this grave emergency the President was acting within the aggregate of his constitutional powers as the Nation's Chief Executive and the Commander in Chief of the Armed Forces of the United States," and "Presidential power should be implied from the aggregate of his powers under the Constitution," with Justice Jackson's discussion of "inherent" presidential powers in his concurring opinion in *Youngstown*. 343 U.S. at 582, 587, 647. (Jackson, J., concurring). "The claim of inherent and unrestricted presidential powers has long been a persuasive dialectical weapon in political controversy. . . . But prudence has counseled that actual reliance on such nebulous claims stop short of provoking a judicial test." *Id.* at 647.

⁹² *Id.* at 588-89 ("The Constitution did not subject this law-making power of Congress to presidential or military supervision or control."); *id.* at 585 ("The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself."). But see HENKIN, *supra* note 58, at 91 n.15 (suggesting that "[i]t is not unfair to assume that the majority of the Justices in the case might have upheld the President's power had Congress not acted at all.").

⁹³ *Youngstown*, 343 U.S. at 588.

The executive action we have here originates in the individual will of the President and represents an exercise of authority without law. No one, perhaps not even the President, knows the limits of the power he may seek to exert in this instance and the parties affected cannot learn the limit of their rights.

Id. at 655 (Jackson J., concurring).

⁹⁴ KOH, *supra* note 38, at 105.

⁹⁵ *Youngstown*, 343 U.S. at 634-55 (Jackson, J., concurring). Justice Jackson's three-part analytical framework states:

interactions of law and human decisions not only in the exercise and evaluation of Executive authority over national security,⁹⁶ but also in the day-to-day operation of government.⁹⁷

We may well begin by a somewhat over-simplified grouping of practical situations in which a President may doubt, or others may challenge, his powers, and by distinguishing roughly the legal consequences of this factor of relativity.

1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said (for what it may be worth), to personify the federal sovereignty. If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power. . . .

2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.

3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. . . . Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.

Id. at 635-38 (footnote omitted).

⁹⁶ Jackson cautioned that human beings may often be driven by passions that cloud reasonable evaluation of the constitutional exercise of presidential power.

Id. at 634 (Jackson, J., concurring).

⁹⁷ See KOH, *supra* note 38, at 105 (arguing that "the opinion's enduring value derives less from its presidential weight than from the unusual clarity with which it articulates the concept of balanced institutional participation" over national security affairs); HENKIN *supra* note 58, at 95 n.24 (arguing that "*Youngstown* has not been considered a 'foreign affairs case' . . . the majority of

The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity. Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.⁹⁸

One of Jackson's great contributions to American government flows from his honest appraisal of the difficulties facing those who attempt to locate, in advance, the institutional limits on authority emerging from a foundational Constitution.⁹⁹ The legal determination of the President's power depends on the illumination of the constitutional "zone of twilight"; the distribution of constitutional authority does not occur in a contextual vacuum.¹⁰⁰

The last few decades have again witnessed the growth of Executive power over national security policy, in spite of Congress's attempts to assert its constitutional authority. In the 1970s, Congress enacted numerous statutes with procedural mechanisms constraining the Executive's unilateral control over national security policy.¹⁰¹

the Supreme Court did not treat the case as involving the reach of [the President's] foreign affairs power.").

⁹⁸ *Youngstown*, 343 U.S. at 635.

⁹⁹ *Id.* at 635-38.

¹⁰⁰ *Id.* at 635-39.

¹⁰¹ KOH, *supra* note 38, at 46.

In addition to the War Powers Resolution and the Case-Zablocki Act, the list included the 1977 International Emergency Economic Powers Act (IEEPA) and the National Emergencies Act to govern exercises of emergency economic power; the Arms Export Control Act of 1976 to regulate arms sales; the International Development and Food Assistance Act of 1975 and the 1974 Hughes-Ryan amendment to the Foreign Assistance

These "foreign affairs framework statutes"¹⁰² generally included notification, reporting, and certification requirements designed to ensure congressional participation in foreign policy decisions.¹⁰³ In short, the legislative reforms were enacted to check Executive actions by requiring that the President participate with Congress in policy discussions and provide Congress unfettered access to important information.¹⁰⁴ However, resurfacing Cold War tensions allowed the Executive to reassert its authority by emphasizing military alternatives that included the need to conduct secret operations "beneath the banner of 'national security.'"¹⁰⁵ By the 1980s, the Executive had successfully ignored Congress's "procedural strictures"¹⁰⁶ and resumed expanding its constitutional powers.¹⁰⁷

Congressional failure to successfully check Executive authority eventually resulted in a more formal shift of constitutional power. In the 1981 case, *Dames & Moore v. Regan*,¹⁰⁸ the

Act to regulate foreign and military aid; the Trade Act of 1974 and the Export Administration Act of 1979 to manage import and export trade; and the Foreign Intelligence Surveillance Act of 1978 and the Intelligence Oversight Act of 1980 to oversee intelligence activities.

Id. (footnote omitted).

¹⁰² *Id.* at 104.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 104-05.

¹⁰⁵ See Falk, *supra* note 72, at 212-14 (arguing that "the secret, decisive character of [the president's] prerogative to shape nuclear weapons policy . . . without prior discussion, without guidelines for use, and without notions of accountability, is an unprecedented erosion of both popular sovereignty and separation of powers").

¹⁰⁶ KOH, *supra* note 38, at 46.

¹⁰⁷ *Id.*; see also Falk, *supra* note 72, at 215; HENKIN, *supra* note 58, at 83-84 (describing the presidential tendency to continually test congressional resistance to expansion of executive power). Falk succinctly describes the inherent limitation of procedural statutes: "[B]y way of secrecy, the national security doctrine, the manipulation of information and the media, the projection of bureaucratic influence, and the undermining of congressional independence by special interest to lobbies . . . the main effect [of procedural legislation] is to alter the *form* of interaction without touching on its substance." Falk, *supra* note 72, at 215.

¹⁰⁸ *Dames & Moore v. Regan* 453 U.S. 654 (1981).

Supreme Court reinforced the view that Justice Frankfurter expressed in *Youngstown* that "a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned . . . may be treated as a gloss on 'Executive Power' vested in the President by § 1 of Art. II."¹⁰⁹ In *Dames & Moore*, the Supreme Court upheld President Carter's implementation and President Reagan's subsequent ratification of the terms of an agreement between Iran and the United States¹¹⁰ which nullified attachments and suspended all claims against Iran.¹¹¹ The Court found that the congressional "history of acquiescence in executive claims settlement"¹¹² raised a presumption that the President was also authorized to suspend claims against Iran.¹¹³ *Dames & Moore* magnified the impact of Congress's past informal acquiescence to the exercise of greater presidential discretion by executive orders governing foreign policy.¹¹⁴ In effect, the Court

¹⁰⁹ 453 U.S. at 686, (quoting *Youngstown*, 343 U.S. at 610-11 (Frankfurter, J., concurring)).

¹¹⁰ Iran released the hostages on January 20, 1981 contingent on the United States' agreement "to terminate all legal proceedings in United States courts involving claims of United States persons and institutions against Iran" and "to nullify all attachments and judgments obtained therein, to prohibit all further litigation based on such claims, and to bring about the termination of such claims through binding arbitration." 453 U.S. at 664-65.

¹¹¹ *Id.* "On November 4, 1979, the American Embassy in Tehran was seized and [United States] diplomatic personnel were captured and held hostage." Ten days later, President Carter declared a national emergency and issued an Executive Order blocking the removal or transfer of property belonging to Iran which was or became subject to United States jurisdiction. *Id.* at 662-63.

¹¹² *Id.* at 686.

¹¹³ 453 U.S. at 688-89. The Court acknowledged "that although the [International Economic Emergency Powers Act] authorized the nullification of the attachments, it cannot be read to authorize the suspension of the claims." *Id.* at 675. The Court reasoned that if the President issued an Order interfering with Congress's constitutional responsibilities, Congress would act; if Congress did not act, the Court could reasonably conclude that Congress implicitly approved the President's actions. *Id.* at 685-88. The Court bolstered its position by noting that Congress did not express formal disapproval of the President's Orders. *Id.* at 686.

¹¹⁴ KOH, *supra* note 38, at 139-40.

shifted the burden to Congress to demonstrate that the Constitution's "zone of twilight" was *not* within the province of the Executive.¹¹⁵

Prevailing constitutional doctrine grants the Executive wide latitude to unilaterally identify situations or events that may uproot America's institutional structure and to take unilateral action to improve national security.¹¹⁶ Ironically, Congress's attempts to check executive actions and participate more fully in policy discussions have created practical problems contributing to the executive's expansion. Congress has become "too decentralized and democratized to generate its own coherent program of foreign policy initiatives."¹¹⁷ The expansion of executive authority over national security has created a "growing sense that Congress is grasping awkwardly after power, but without the will or capacity to perform successfully . . . beyond a distinctly subordinate and essentially passive role."¹¹⁸ Congress rarely drafts "legislative

¹¹⁵ *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

¹¹⁶ Professor Koh argues that since the Iran-Contra affair, the Executive has expanded its constitutional powers over national security with haphazard resistance from Congress and general tolerance by the Supreme Court. KOH, *supra* note 38, at 134-49. Recent history in the areas of "war making, treaty affairs, emergency economic powers, arms sales, military aid, and covert operations . . . reveals a consistent pattern of executive circumvention of legislative constraint in foreign affairs that stretches back to the Vietnam War and persists after the Iran-contra affair." *Id.* at 38; *see also id.* at 38-64; Sunstein, *Constitutionalism After the New Deal*, *supra* note 50, at 453-54 (noting that "recent Presidents [i.e., Nixon, Carter, Ford and Reagan] have steadily increased their control of the bureaucracy"). In comparison to members of Congress, the President is more "visible and hence accountable to the electorate," better suited to "energize and direct policy," "well-positioned to centraliz[e] and coordinat[e] foreign policy decisions, and able to respond quickly to foreign and domestic crises." KOH, *supra* note 38, at 119. The early stages of the War on Terror appear likely to favor continued executive expansion by forcing the re-assessment of traditional notions of executive power over national security; post-9/11, the execution of national security policy on American soil entered a new dimension.

¹¹⁷ KOH, *supra* note 38, at 121, (citing Norman J. Ornstein, *The Constitution and the Sharing of Foreign Policy Responsibility*, in *THE PRESIDENT, THE CONGRESS AND FOREIGN POLICY* 61 (E. Muskie et al. eds., 1986)).

¹¹⁸ Falk, *supra* note 72, at 208. The 9/11 Commission recommended unifying and strengthening Congressional oversight of the Executive's intelligence network. *See Nat'l Comm'n on Terrorist Attacks Upon the United States*, *THE 9/11*

controls" that do more than simply "shift executive activity into a new pattern of evasion."¹¹⁹

Conclusion

That comprehensive and undefined presidential powers hold both practical advantages and grave dangers for the country will impress anyone who has served as legal adviser to a President in time of transition and public anxiety. While an interval of detached reflection may temper teachings of that experience, they probably are a more realistic influence on my views than the conventional materials of judicial decision which seem unduly to accentuate doctrine and legal fiction.¹²⁰

Justice Jackson's succinct, pragmatic expression of the relation between law and executive decisions points to the limitations of national sustainable development proposals that attempt to include national security within their broad parameters. No one should contest the dependence of progressive legislation on peace and security,¹²¹ but we are challenged to imagine the sustainable development net pragmatically promoting social, ecological, economic, and security ideals.¹²² Jackson's opening remarks in his *Youngstown* concurrence remind us that the formulation and implementation of national security policy is a distinctly human affair, characterized by human fallibility.

COMMISSION REPORT 417-19 (2004), *available at* <http://www.9-11commission.gov/report/911Report.pdf>. "Of all our recommendations, strengthening Congressional oversight may be among the most difficult and important." *Id.* at 419.

¹¹⁹ KOH, *supra* note 38, at 63. Koh argues that congressional tolerance of expanding executive authority "has institutional roots in legislative myopia, inadequate drafting, ineffective legislative tools, and an institutional lack of political will." *Id.* at 123.

¹²⁰ *Youngstown*, 343 U.S. at 634 (Jackson, J., concurring).

¹²¹ See Dernbach, *National Sustainable Development*, *supra* note 31, at 88; OUR COMMON FUTURE, *supra* note 32, at 290-307.

¹²² See *supra* notes 35-38 and accompanying text.

National sustainable development proposals depend on novel understandings of sovereignty and national security that require diminution in executive authority and greater exercise of congressional will to promote formal, multilateral agreements with other nation-states. The push to develop new conceptions of national security and sovereignty are well-intentioned, but they overlook the critical importance of history and constitutional government to their development.

In at least one sense, sustainable development advocates wisely appeal to executive power by integrating security into their policy proposals. Antiterrorism strategies¹²³ and variants of "environmental security" provide an apparent link between national sustainable development proposals and executive authority.¹²⁴ The Executive is able to legitimately interfere with private property rights to advance national security interests, conceivably benefitting environmental programs.¹²⁵ The issue, however, is whether the Executive will exercise democratically its constitutional power to achieve reasonable social and ecological objectives in the name of national security. Further expansion of executive power through modification of traditional understandings of national security and sovereignty move America closer to a Security State, placing the country at the wrong end of the democracy-tyranny continuum.

In essence, national sustainable development proposals undermine their own cause by enhancing executive power. Policies attempting to integrate security, economic, ecological, and social equity goals risk increasing executive control over social and ecological issues under the guise of national security. This raises the bar on public access to information bearing on socio-ecological policies,¹²⁶ shields the executive branch from accountability for its decisions, and erodes deliberative democratic institutions. The President's ability to lawfully and expeditiously terminate

¹²³ See, e.g., *supra* notes 37 and 62.

¹²⁴ See *supra* notes 64-66.

¹²⁵ See *supra* Part II, discussing *Curtiss-Wright*, *Youngstown*, and *Dames & Moore*. The "War on Terror" may eventually justify the seizure of a religious establishment or private business in spite of the result in *Youngstown*.

¹²⁶ See, e.g., Salkin, *supra* note 25.

business practices or advance social policies in the name of national security is an attractive "hook" for sustainability development advocates, but the long-term institutional cost of contributing to the growth of the Security State far surpasses the short-term rewards.¹²⁷

III. THE INSTITUTIONAL ROOTS OF CORRUPTION IN ENVIRONMENTAL REGULATION

The doctrine of the separation of powers was adopted by the convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.

—Justice Brandeis in *Myers v. United States*¹²⁸

¹²⁷ See, e.g., *Dames & Moore*, *supra* notes 108-13 and accompanying text; *Regan* 468 U.S. at 240-42 (holding that restrictions on travel-related transactions with Cuba did not violate the Due Process Clause of the Fifth Amendment). Highlighting "the traditional deference to executive judgment in the realm of foreign policy," the Court held that "there is an adequate basis under the Due Process Clause to sustain the President's decision to curtail, by restricting travel, the flow of hard currency to Cuba that could be used in support of Cuban adventurism." *Id.* at 223. Writing in dissent, Justice Blackmun criticized presidents' use of "emergencies" to expand executive authority. *Id.* at 248-49.

It is clear that Congress intended to curtail the discretionary authority over foreign affairs that the President had accumulated because of past "emergencies" that no longer fit Congress' conception of that term. To accomplish this goal, Congress amended the TWEA [Trading with the Enemy Act] and enacted the IEEPA [International Emergency Economic Powers Act] The substantive reach of the President's power under the IEEPA is slightly narrower than it had been under the TWEA, and Congress placed several procedural restrictions on the President's exercise of the national-emergency powers, including congressional consultation, review, and termination.

Id.

¹²⁸ 272 U.S. 52, 293 (1926) (quoted in *Youngstown*, 343 U.S. at 614 (Frankfurter, J., concurring)).

The infusion of power into the Executive and its agencies is proving unsustainable for the reasons James Madison advanced over two centuries ago.¹²⁹ The President exercises power over the regulatory apparatus by appointing agency “heads”¹³⁰ who promulgate regulations implementing the Executive’s legislative-policy agenda.¹³¹ Their legal and political decisions affect environmental law and regulation through a process largely devoid of any practical “checks” from government’s constitutional branches. Congress insufficiently oversees environmental agency policies on behalf of the American public, thus allowing administrative agencies to become the Executive’s legislative authority over environmental issues.¹³² National environmental policies striving toward socio-ecological goals will reverse course unless Congress and the courts compel environmental regulatory agencies to balance their tendency toward economic favoritism with practices respecting collective, socio-ecological values.¹³³

¹²⁹ See *infra* Part III.A. through Part III.C.

¹³⁰ See Farina, *supra* note 38, at 504.

The appointment of agency heads illustrates how custom has combined with the Constitution to strengthen the President’s hand. Control over the power to appoint key government officials was an issue of intense concern for the Framers. Article II, section 2 of the Constitution, providing for presidential appointment of major officers with Senate consent, represented a deeply considered and much debated attempt to balance executive and legislative involvement in the selection process.

Id.

¹³¹ See *infra* Part III.C.

¹³² See *infra* Part IV.A., discussing the Bush Administration’s use of EPA’s rulemaking authority to accomplish objectives unavailable through Congress. When Congress did not enact the Bush Administration’s Clear Skies legislation, the Administration directed the EPA to change the administrative rules and adopt the Administration’s legislative preferences—a classic example of “backdoor” (and closed door) legislation. *Id.*

¹³³ Agencies’ shift in emphasis should attend to the ecological processes essential for social well-being. See COMM. OF SCIENTISTS, U.S. DEP’T OF AGRI., SUSTAINING THE PEOPLE’S LANDS: RECOMMENDATIONS FOR STEWARDSHIP OF THE NATIONAL FORESTS AND GRASSLANDS INTO THE NEXT CENTURY 19 (1999), available at <http://www.fs.fed.us/emc/nfma/includes/cosreport/Committee%20of%20Scientists%20Report.htm> [hereinafter COMM. OF SCIENTISTS REPORT].

In sum, although Congress theoretically holds ultimate power over the content of regulatory policy, in fact the President has a singular ability to exploit the opportunity for social and economic policy making presented by broadly delegative statutes . . . [F]ew observers would disagree that the President is likely to come out significantly ahead of any other branch in harnessing and directing the stream of regulatory policy-making power.¹³⁴

National sustainable development proposals attempting to integrate idealistic goals downplay the importance of the institutional framework necessary to achieve fundamental regulatory change that advances collective environmental values. In the absence of specific measures to realign the power structure affecting regulatory decisions, the Executive will continue to dominate administrative agencies' legislative power over the implementation of national environmental policy.¹³⁵ Agency administrators function without the accountability necessary to ensure that their decisions reflect a deliberative process advancing environmental legislations' values. Administrators are too far removed from Congress and the electoral process to be true representatives of the

¹³⁴ Farina, *supra* note 38, at 510.

¹³⁵ See *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 487-88 (2001) (Stevens & Souter, JJ., concurring).

The Court has two choices. We could choose to articulate our ultimate disposition of this issue by frankly acknowledging that the power delegated to the EPA is "legislative" but nevertheless conclude that the delegation is constitutional because adequately limited by the terms of the authorizing statute. Alternatively, we could pretend, as the Court does, that the authority delegated to the EPA is somehow not "legislative power." Despite the fact that there is language in our opinions that supports the Court's articulation of our holding, I am persuaded that it would be both wiser and more faithful to what we have actually done in delegation cases to admit that agency rulemaking authority is "legislative power."

Id. at 488.

people's interests.¹³⁶ Sustainable development advocates should shift their resources from overreaching, national integrative platforms to a focused, institutional strategy designed to restore constitutional values¹³⁷ to the administration of environmental law and policy.¹³⁸

This Part also turns to history and the New Deal to illuminate the conflict between environmental agency autonomy and Madisonian republicanism. It begins with a discussion of Madison's notion of "checks and balances"—designed to limit corruption in government—before examining the historical justifications for agency authority.¹³⁹ The New Deal Era altered the

¹³⁶ See Sunstein, *supra* note 50, at 447 ("The second problem is that agency actors lack electoral accountability and often are not responsive to the public as a whole. Because of the absence of the usual electoral safeguards, agencies are peculiarly susceptible to factional pressure and often likely to act in their own interests."); see also Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1688 (1975) ("The ultimate problem is to control and validate the exercise of essentially legislative powers by administrative agencies that do not enjoy the formal legitimation of one-person one-vote election.").

¹³⁷ See Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 94 (1994) (arguing that the "central values of the Framers' original executive" were "accountability and avoidance of factionalism").

¹³⁸ This Article relies on a broader understanding of "institutions" than Professor Dernbach explains, but his views nonetheless point to the importance of the institutional issue. See Dernbach, *National Sustainable Development*, *supra* note 31, at 112 ("There is no permanent institutional mechanism (in the executive branch or in Congress) that is used to foster, encourage, or coordinate sustainable development activities."); *id.* at 115-18 (noting the absence of "an institutional basis for further integration of social, economic, and environmental policy in the United States"); *id.* at 118 ("There is no institutional mechanism, analogous in some ways to an independent federal agency, that is capable of ensuring any kind of long term thinking or action for sustainable development.").

¹³⁹ We should not underestimate the importance of Madison's contribution to the Constitution nor his relevance to current controversies in environmental law and regulation.

Decisions about the nature and direction of a constitutional democracy cannot be made in the abstract and acontextually; they must appeal to reasons. Interpretation of the meaning of

tripartite system of government by constructing politically independent, administrative agencies that relied upon unrealistic conceptions of administrative agencies' expertise to identify and correct socio-economic problems in society. The Environmental Era's legislation restrained agency authority and reorganized the institutional framework governing public and private acts affecting the environment. However, current regulatory institutions unreasonably support agency discretion, especially in the context of an agency's alleged reliance upon its scientific or technical expertise to resolve areas of purported uncertainty.¹⁴⁰ Administrative agencies' legislative authority displaces Madisonian institutions that were designed to inhibit corruption, and it also encourages executive exploitation of agency discretion to achieve political goals that are at odds with environmental legislative purposes.¹⁴¹

A. *James Madison's Remedy for Political Corruption*

We cannot be too often reminded that constitutions are not literary compositions but ways of ordering society.¹⁴²

Madison's constitutional position emerged from his "philosophical conservatism, largely absent from Jefferson's formal thought, in which the dead and the living—as well as the past, the present, and the future—were inextricably and on the

the relevant tradition is always an important method of social criticism; an understanding of inherited beliefs is an inevitable part of the project of constitutionalism. The future of American public law depends in significant part on the way that its tradition is understood—a theme highly congenial to republicanism. And the republican elements of the framers' thought deserve credit for helping to launch many reforms that were in retrospect highly desirable.

Sunstein, *Beyond Republican Revival*, *supra* note 41, at 1563 (footnote omitted).

¹⁴⁰ See *infra* Part IV.

¹⁴¹ *Id.*

¹⁴² FELIX FRANKFURTER, *THE PUBLIC AND ITS GOVERNMENT* 39 (1930).

whole happily bound together.”¹⁴³ Madison envisioned a republic regulated by a system of institutional checks and balances that would support deliberation among policymakers and stifle natural human tendencies to seek money (or other forms of property) and power.¹⁴⁴ The government's three branches would functionally check one another's ambitions through mechanisms designed to ensure accountability, limited but ultimately equal power, and deliberative processes honoring minority and majority viewpoints.¹⁴⁵ His political thought was grounded in empirical work that examined the problems of government under the Articles of Confederation. Madison's *Vices of the Political System of the United States*¹⁴⁶ focused on the State's failure to follow the Articles'

¹⁴³ DREW R. MCCOY, *THE LAST OF THE FATHERS: JAMES MADISON AND THE REPUBLICAN LEGACY* 58-59 (1989).

¹⁴⁴ See *THE FEDERALIST* NO. 51, at 290 (James Madison) (Clinton Rossiter ed., 1961).

If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.

Id.

¹⁴⁵ *Id.* at 320-25.

¹⁴⁶ JAMES MADISON, *Vices of the Political System of the United States* (April 1787) in JAMES MADISON: *WRITINGS* 69-80 (The Library of America 1990) [hereinafter MADISON: *WRITINGS*]. Madison drafted a list of 12 “vices” characterizing State actions.

1. Failure of the States to comply with the Constitutional requisitions.
2. Encroachments by the States on the federal authority.
3. Violations of the law of nations and of treaties.
4. Trespasses of the States on the rights of each other.
5. Want of concert in matters where common interest requires it.
6. Want of guaranty to the States of their Constitutions & laws against internal violence.
7. Want of sanction to the laws, and of coercion in the Government of the Confederacy.

provisions or acts of Congress,¹⁴⁷ and anticipated his more comprehensive contributions to the Federalist Papers.

The republicans in late-19th century America considered politics to be essentially deliberative.¹⁴⁸ Madison's analysis of states' "vices" and the complaints of those sharing his contempt for states' administration of public policy¹⁴⁹ raised concerns about the

8. Want of ratification by the people of the articles of Confederation.

9. Multiplicity of laws in the several States.

10. Mutability of the laws of the States.

11. Injustice of the laws of States.

12. Impotence of the laws of the States.

Id. Madison's "vices" anticipated his arguments in the Federalist Papers. Jack N. Rakove, *Law and Political Culture: The Madisonian Moment*, 55 U. CHI. L. REV. 473, 480 (1988) [hereinafter *Law and Political Culture*].

The heart of the Madisonian program . . . [is] the way in which his observations about the 'vices' of state politics influenced his thinking on four major issues: the nature of representation in the extended republic; the demand, closely related to the representation issue, for the apportionment of seats in both houses of a bi-cameral Congress; the need to enhance the authority of the weaker branches of government, the executive and judiciary, against an overreaching legislature; and most difficult of all, the basis and extent of the supremacy that he clearly hoped the union would henceforth enjoy over the states in the "compound republic" of a federal system.

Id.

¹⁴⁷ *Id.* at 479. Madison's "analysis of the problem of faction *within the states* was decidedly empirical and experiential, in the dual sense of lessons drawn from both the evidence of recorded history and the experience of republican government in America since 1776." See also Sunstein, *Interest Groups in American Public Law*, *supra* note 50, at 40.

¹⁴⁸ Sunstein, *Interest Groups in American Public Law*, *supra* note 50, at 31 ("Dialogue and discussion among the citizenry were critical features in the governmental process.").

¹⁴⁹ THE FEDERALIST NO. 10, at 77-78 (James Madison) (Clinton Rossiter ed., 1961).

Complaints are everywhere heard from our most considerate and virtuous citizens, equally the friends of public and private faith and of public and personal liberty, that our governments are too unstable, that the public good is disregarded in the conflicts of rival parties, and that measures are too often decided, not according to the rules of justice and the rights of the

future of deliberation in the infant Nation. He was alarmed by State legislators' unchecked and unethical exercise of discretion, illustrated in part by powerful constituents' influence over legislative decisions.¹⁵⁰ Madison's investigation revealed that legislators' self-interested representation¹⁵¹ produced a "multiplicity of laws"¹⁵²

minor party, but by the superior force of an interested and overbearing majority. . . . These must be chiefly, if not wholly, effects of the unsteadiness and injustice with which a factious spirit has tainted our public administration.

Id.

¹⁵⁰ Madison did not confine his displeasure to the legislators—a significant cause of states' unjust legislation was "lies among the people themselves." MADISON: WRITINGS, *supra* note 146, at 76. See Rakove, *supra* note 146, at 492 (arguing that "in Madison's analysis, since most wrongful legislation could be traced not to legislative irresponsibility but . . . to the very fidelity with which lawmakers were obeying the wishes of interested majorities, it was naive to expect the community to mobilize itself against the excesses of its duly elected representatives").

¹⁵¹ Madison identified three motives responsible for citizens' aspiration to represent the States' people in "legislative Councils:" ambition, personal interest, and public good; ambition and personal interest were "proved by experience to be [the] most prevalent." MADISON: WRITINGS *supra* note 146, at 75-76.

Hence the candidates who feel them, particularly, [personal interest], are most industrious, and most successful in pursuing their object: and forming often a majority in the legislative Councils, with interested views, contrary to the interest, and views, of their Constituents, join in a perfidious sacrifice of the latter to the former.

Id. at 76.

¹⁵² *Id.* at 74-75.

As far as laws are necessary, to mark with precision the duties of those who are to obey them, and to take from those who are to administer them a discretion, which might be abused, their number is the price of liberty. As far as the laws exceed this limit, they are a nuisance: a nuisance of the most pestilent kind. Try the Codes of the several States by this test, and what a luxuriancy of legislation do they present. . . . A review of the several codes will shew that every necessary and useful part of the least voluminous of them might be compressed into one tenth of the compass, and at the same time be rendered tenfold as perspicuous.

Id.

often characterized by their "mutability."¹⁵³ The injustice resulting from the multiplicity and mutability of the states' laws caused Madison to "question the fundamental principle of republican Government, that the majority who rule in such Governments, are the safest Guardians both of public Good and of private rights."¹⁵⁴

Madison analyzed the problem of interest groups' corrupt influence on legislation, and legislators' susceptibility to corruption, through the prism of government's responsibilities to its citizenry. Neither a pure democracy nor a traditional republican government was likely to prevent an empowered group from organizing with an objective "adverse to the rights of other citizens, or to the permanent and aggregate interests of the community."¹⁵⁵ Moreover, legislators' corrupt political practices supported Madison's arguments that education and civic virtue were insufficient to restrain a majority from violating the rights of a minority.¹⁵⁶ He focused on government's fundamental obligation to protect liberty, not only as individual liberty (as liberty is often

¹⁵³ *Id.* at 75.

This evil [i.e., mutability] is intimately connected with [the multiplicity of laws] yet deserves a distinct notice as it emphatically denotes a vicious legislation. We daily see laws repealed or superseded, before any trial can have been made of their merits: and even before a knowledge of them can have reached the remoter districts within which they were to operate.

MADISON: WRITINGS, *supra* note 146, at 75.

[Madison] decried the abundance and inconsistency of the laws which, by shifting as rapidly as public opinion and the unstable coalitions of interests in the legislatures, tended to sow discord and confusion among the people. This unsteadiness in the laws often reflected, moreover, the narrow, illiberal, even ignorant views of inexperienced legislators who seemed alarmingly oblivious both to private rights and to any broader notion of the public good.

MCCOY, *supra* note 143, at 40-41.

¹⁵⁴ MADISON: WRITINGS, *supra* note 146, at 75.

¹⁵⁵ *Id.* at 78.

¹⁵⁶ See Sunstein, *Interest Groups in American Public Law*, *supra* note 50, at 40. "Such devices would be unable to overcome the natural self-interest of men and women, even in their capacity as political actors." *Id.* (citation omitted).

understood today) but also as collective liberty.¹⁵⁷ The “common interest was not . . . simply the sum or consensus of the particular interests that made up the community. It was rather an entity in itself, prior to and distinct from the various private interests of groups and individuals.”¹⁵⁸

Madison's revolutionary approach to republican government rests on a novel institutional structure designed to preserve the notion of the State as a moral actor responsible for advancing collective liberty to cultivate individual liberty: “Indeed, the private liberties of individuals depended upon their collective public liberty.”¹⁵⁹ Republican institutions' aimed to minimize government officials' tendency toward self-interested corruption and to resist factional subversion of public liberty.¹⁶⁰ Factions¹⁶¹

¹⁵⁷ GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 58 (1998).

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 61.

¹⁶⁰ See *THE FEDERALIST* NO. 10, *supra* note 149; see also *THE FEDERALIST* NO. 51, *supra* note 144; Sunstein, *Interest Groups in American Public Law*, *supra* note 50, at 32.

[T]he problem of faction assumes a distinct form and has a distinct solution. The problem is rooted in corruption: the elimination of civic virtue and the pursuit of self-interest by political actors. If corruption occurs, groups seeking to use government power to promote their own private ends might come to dominate the political process. If private groups were permitted to subvert government in this way, political power would supplant political discussion and debate. Corruption thus threatens to undermine the republican conception of politics.

Id.

¹⁶¹ *THE FEDERALIST* NO. 10, at 78.

By a faction I understand a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.

Id. at 78. The Constitutional form of government should “secure the public good and private rights against the danger of such a faction, and . . . preserve the spirit and the form of popular government.” *Id.* at 80. Madison argued that the causes of factions are “sown in the nature of man,” but he did not conclude that human nature would necessarily corrupt all political processes. *Id.* at 79.

generally developed from unequal property distributions placing individuals' interests in wealth preservation and enhancement in varying degrees of opposition to society's collective well-being.¹⁶² Legislators responded to factional influence with legislation serving to "judge"¹⁶³ among competing special interests. The "mutability"¹⁶⁴ and "multiplicity"¹⁶⁵ of laws characterizing State codes represented the outcome of "deals" orchestrated by legislators, violating their ethical and legal obligations to serve all the people.

Madison argued that the Constitution should provide a framework resisting the concentration of executive, legislative, and judicial power in the same branch.¹⁶⁶ Factional threats to liberty and governmental stability led Madison to favor a Constitution sharply curtailing legislative power; mere "parchment barriers"¹⁶⁷ would never suffice to check a "legislative department . . . everywhere extending the sphere of its activity and drawing all power

"[F]ederalists rejected the notion that political actions were inevitably self-interested: 'As there is a degree of depravity in mankind which requires a certain degree of circumspection and distrust, so there are other qualities in human nature which justify a certain portion of esteem and confidence.'" Sunstein, *Interest Groups in American Public Law*, *supra* note 50, at 43 (quoting THE FEDERALIST NO. 55 at 371 (Alexander Hamilton) (P. Ford ed., 1898)).

¹⁶² Madison recognized the need to "regulate" powerful propertied interests in order to protect collective liberty. The origin of most factious conflict within society "has been the verious [sic] and unequal distribution of property. . . . [producing] distinct interests in society." THE FEDERALIST NO. 10, at 79. "Shall domestic manufacturers be encouraged, and in what degree, by restrictions on foreign manufacturers? Are questions which would be differently decided by the landed and the manufacturing classes, and probably by neither with sole regard to justice and the public good." *Id.* at 80. The Constitutional form of government should "secure the public good and private rights against the danger of . . . a faction, and . . . preserve the spirit and the form of popular government." *Id.*

¹⁶³ THE FEDERALIST NO. 10, at 79 ("[Y]et what are many of the most important acts of legislation but so many judicial determinations, not indeed concerning the rights of single persons, but concerning the rights of large bodies of citizens?").

¹⁶⁴ See *supra* notes 153-54

¹⁶⁵ See *supra* note 152.

¹⁶⁶ See generally THE FEDERALIST NO. 51.

¹⁶⁷ THE FEDERALIST NO. 48, at 308.

into its impetuous vortex."¹⁶⁸ The new government would advance the collective liberty by checking public officials' potential for corruption through an institutional structure "supplying, by opposite and rival interests, the defect of better motives."¹⁶⁹ Madison proposed countering the strength of the legislature by dividing the Congress into different political bodies that would serve different constituencies for different terms, thereby minimizing their ability to coalesce into a single body and satisfy legislators' natural thirst for power.¹⁷⁰ The Supreme Court was responsible for ensuring that the implementation of laws was consistent with the Constitution and with congressional purpose.¹⁷¹

¹⁶⁸ *Id.* at 308-09.

Will it be sufficient to mark, with precision, the boundaries of these departments in the constitution of the government, and to trust to these parchment barriers against the encroaching spirit of power? This is the security which appears to have been principally relied on by the compilers of most of the American constitutions. But experience assures us that the efficacy of the provision has been greatly overrated; and that some more adequate defense is indispensably necessary for the more feeble against the more powerful members of the government. The legislative department is everywhere extending the sphere of its activity and drawing all power into its impetuous vortex.

Id.

¹⁶⁹ The members of each branch should have the "necessary constitutional means and personal motives to resist encroachments of the others. . . . Ambition must be made to counteract ambition." THE FEDERALIST NO. 51, at 321-22; see also Ralph L. Ketcham, *James Madison and Judicial Review*, 8 SYRACUSE L. REV. 159, 163 (1957) ("The fear of final power is inherent in the concept of separation of powers, the basic intent of which is to prevent any agency of government from becoming strong enough to endanger public liberty.").

¹⁷⁰ THE FEDERALIST NO. 51, at 322. "The remedy for this inconveniency is to divide the legislature into different branches; and to render them, by different modes of election and different principles of action, as little connected with each other as the nature of their common functions and their common dependence on the society will admit." *Id.*

¹⁷¹ See THE FEDERALIST NO. 78, at 467 (Alexander Hamilton).

[C]ourts were designed to be an intermediate body between the people and the legislature in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of

Although Madison's revolutionary views of republicanism developed in a socio-political, economic, and technological society far removed from today's world, his discussions of corruption in government are all the more remarkable for withstanding the test of time. Madison observed and publicized human tendencies toward corruption that are no less prevalent today than they were in the 18th century. His system of checks and balances was undermined, however, by the New Deal's modification of republican institutions to increase the government's efficiency.¹⁷² New Dealers' motives were pure, they hoped to restore Americans' economic and social welfare, but the institutional changes produced unintended consequences for environmental legislation enacted decades later.¹⁷³ The New Deal's institutional remnants are currently manipulated to sacrifice environmental legislation's socio-ecological values in favor of short-term economic interests.¹⁷⁴

B. *The Genesis of Administrative Agency Power*

The 20th century ushered in "the first grant of substantial rule-making, rule-enforcement, and adjudicative powers to executive offices and independent administrative agencies."¹⁷⁵ In his classic article, *The Reformation of American Administrative Law*, Professor Stewart designates the widely accepted doctrine that emerged near the turn of the 20th century "the traditional

the courts. A constitution is, in fact, and must be regarded by the judges as, a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body.

Id.

¹⁷² See SUNSTEIN, AFTER THE RIGHTS REVOLUTION, *supra* note 18, at 22-24.

¹⁷³ See *supra* Part II.

¹⁷⁴ See Kysar, *supra* note 34, at 703. Kysar argues that environmental statutes "and their judicial interpretations, may be seen as reflecting a concern that ecological values do not receive due consideration under a strict cost-benefit analysis. To combat such potential shortchanging, legislators seek to remove certain environmental goods from utilitarian balancing altogether." *Id.*

¹⁷⁵ *Id.* at 40-41.

model of administrative law.”¹⁷⁶ Initially, an administrative agency was viewed “as a mere transmission belt for implementing legislative directives in particular cases;”¹⁷⁷ the prospect of agency mistake or abuse was presumably checked by the judiciary.¹⁷⁸ However, government’s inability to corral industry’s influence over public policy or to effectively address the Great Depression’s injustice led to the New Deal’s restructuring of the Executive’s administrative authority, paralleling changes in Executive power over national security.¹⁷⁹ New Dealers targeted government’s

¹⁷⁶ Stewart, *supra* note 136, at 1669.

The traditional model of administrative law . . . has sought to reconcile the competing claims of governmental authority and private autonomy by prohibiting official intrusions on private liberty or property unless authorized by legislative directives. To promote this end, the traditional model affords judicial review in order to cabin administrative discretion within statutory bounds, and requires agencies to follow decisional procedures designed to promote the accuracy, rationality, and reviewability of agency application of legislative directives.

Id. at 1669-70. Four essential elements, characterize the traditional model:

1. The imposition of administratively determined sanctions on private individuals must be authorized by the legislature through rules which control agency action.
2. The decisional procedures followed by the agency must be such as will tend to ensure the agency’s compliance with requirement (1). If agencies may exercise delegated powers only in accordance with legislative directives, and if effective limitation on administrative power is not to be more theoretical than real, agency procedures must be designed to promote the accurate, impartial, and rational application of legislative directives to given cases or classes of cases.
3. The decisional processes of the agency must facilitate judicial review to ensure compliance with requirements (1) and (2).
4. Judicial review must be available to ensure compliance with requirements (1) and (2).

Id. at 1672-74.

¹⁷⁷ Stewart, *supra* note 136, at 1675.

¹⁷⁸ *Id.* at 1676. The “transmission belt” analogy lost steam as it became clear that Congress’s vague statutes lacked the specific directives necessary to proscribe agency discretion. *Id.* at 1676-77.

¹⁷⁹ See *supra* Part II.

administrative dysfunction, proposing a novel form of administration constructed around a politically powerful, insulated Executive and its expert administrators.¹⁸⁰

The New Deal's institutional program was premised on dissatisfaction with the traditional constitutional framework—the common law, checks and balances, and traditional notions of federalism.¹⁸¹ New Dealers, led by FDR, proposed a number of structural changes intended to advance America's economic condition (and prevent another depression) by breaking down stereotypes and accepted wealth distributions, placing more power and responsibility in an enlarged presidency served by new administrative agencies, and shifting commercial power and responsibility from the states to the federal government.¹⁸² Proponents argued that a strong Executive would benefit society socially and economically by enhancing the pace and effectiveness of government change.¹⁸³ The dramatic expansion of executive powers and the creation of a multitude of administrative agencies represented a philosophical shift from deliberative democracy and Madison's "checks and balances" system.¹⁸⁴

In short, a system of centralized and unified powers, bypassing the states and the judiciary, seemed indispensable to allow for dramatic and frequent governmental regulation. In the new circumstances the system of checks and balances no longer appeared to be a necessary safeguard of private property and

¹⁸⁰ James O. Freedman, *Expertise and the Administrative Process*, 28 ADMIN. L. REV. 363, 363-64 (1976).

¹⁸¹ *Id.* at 18-24. The New Deal resulted in a "dramatic increase in the power of the President," and an extensive "grant of authority to regulatory agencies," Sunstein, *Constitutionalism After the New Deal*, *supra* note 50, at 440.

¹⁸² See SUNSTEIN, AFTER THE RIGHTS REVOLUTION, *supra* note 18, at 20-25; Sunstein, *Constitutionalism After the New Deal*, *supra* note 50, at 423-25.

¹⁸³ See SUNSTEIN, AFTER THE RIGHTS REVOLUTION, *supra* note 18, at 22-23.

¹⁸⁴ *Id.* at 24. "We might use the term 'New Deal Constitutionalism' to describe the resulting structure of social and economic regulation—a structure that renovated the original constitutional regime in favor of new understandings of individual rights, checks and balances, the role of the judiciary, and federalism." *Id.*

liberty from factualism, but instead—and this was the crucial point—a faction-driven obstacle to social change in the public interest.¹⁸⁵

Administrative agencies' extensive discretionary authority was justified by the perception that agencies would be "politically insulated, self-starting, and technically sophisticated."¹⁸⁶ An optimistic outlook on the complicated nature of the Era's problems fueled the notion that agencies would function as "neutral experts."¹⁸⁷ Administrative agency design combined the constitutional functions of the executive, legislative, and judicial branches,¹⁸⁸ in part due to a culturally naïve understanding of the relationship between pragmatic knowledge and political decisions. The "expert model of administration [assumed that] . . . government officials had the requisite technical expertise, were free from any bias, and would do the right thing under an unfathomable array of circumstances."¹⁸⁹ The Administrative Procedure Act ("APA") institutionalized the mid-20th century's "expert model" of administration, granting agencies broad legal authority subject to limited judicial review.¹⁹⁰

¹⁸⁵ *Id.* at 23.

¹⁸⁶ See Freedman, *supra* note 180 at 363-65.

¹⁸⁷ Philip J. Harter, *In Search of Goldilocks: Democracy, Participation, and Government*, 10 PENN ST. ENVTL. L. REV. 113, 116-17 (2002); see also SUNSTEIN, *AFTER THE RIGHTS REVOLUTION*, *supra* note 18, at 23.

¹⁸⁸ See SUNSTEIN, *AFTER THE RIGHTS REVOLUTION*, *supra* note 18, at 23 ("The new agencies often combined the traditionally separated powers of legislation, adjudication, and execution; and they often were given broad policymaking authority by Congress."); see also Stewart, *supra* note 136, at 1677 n.30 (quoting *FTC v. Ruberoid Co.*, 343 U.S. 470, 487-88 (1952) (Jackson, J., dissenting) ("The mere retreat to the qualifying 'quasi' is implicit with confession that all recognized classifications have broken down, and 'quasi' is a smooth cover which we draw over our confusion as we might use a counterpane to conceal a disordered bed.")).

¹⁸⁹ Harter, *supra* note 187, at 117.

¹⁹⁰ The APA generally requires courts to approve agency decisions unless the challenged action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (2000).

The "expert model" was an integral piece of FDR's New Deal¹⁹¹ economic recovery program and his proposal for a "second Bill of Rights."¹⁹² The "second Bill of Rights" advanced collective values and other New Deal reforms intended to offset factional oppression of individuals' social and economic rights.¹⁹³ The

¹⁹¹ See Sunstein, *Constitutionalism After the New Deal*, *supra* note 50, at 423 n.6. Sunstein includes an important comment from FDR:

President Roosevelt described the origin of the term "New Deal" in this way:

The word "Deal" implied that the government itself was going to use affirmative action to bring about its avowed objectives rather than stand by and hope that general economic laws alone would attain them. The word "New" implied that a new order of things designed to benefit the great mass of our farmers, workers and business men would replace the old order of special privilege in a Nation which was completely and thoroughly disgusted with the existing dispensation.

Id. (citing 2 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT, THE YEAR OF CRISIS, 1933, at 5 (1938)).

¹⁹² See SUNSTEIN, *AFTER THE RIGHTS REVOLUTION* *supra* note 18 at 21-22, (citing F.D. ROOSEVELT, *Message to the Congress on the State of the Union* (Jan. 11, 1944), in 13 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT, VICTORY AND THE THRESHOLD OF PEACE, 1944-45, at 41 (1969)).

FDR's "second Bill of Rights:"

The right to a useful and remunerative job in the industries or shops or farms or mines of the Nation;

The right to earn enough to provide adequate food and clothing and recreation;

The right of every farmer to raise and sell his products at a return which will give him and his family a decent living;

The right of every businessman, large and small, to trade in an atmosphere of freedom from unfair competition and domination by monopolies at home or abroad;

The right of every family to a decent home;

The right to adequate medical care and the opportunity to achieve and enjoy good health;

The right to adequate protection from the economic fears of old age, sickness, accident, and unemployment;

The right to a good education.

Id.

¹⁹³ See *id.*

liberal exercise of agency discretion was necessary to "restore health to the various sectors of the economy for which they were responsible."¹⁹⁴ The economy was no longer perceived as an invisible hand surfacing through market ordering and market values; regulatory experts would re-organize the institutional framework for business and government decisions to enhance policies grounded in collective social values.¹⁹⁵

C. *The Environmental Era—Questioning Agency Authority*

The expert model of administration was still in its infancy when the 1960s and '70s marked a "revolution in the category of legally protected rights—a revolution that built on and materially expanded the New Deal."¹⁹⁶ The environmental movement was an

¹⁹⁴ See Stewart, *supra* note 136 at 1677-78 (footnote omitted); see also James O. Freedman, *Expertise and the Administrative Process*, 28 ADMIN. L. REV. 363, 364 (1976) ("Those who rationalized the New Deal's regulatory initiatives regarded expertise and specialization as the particular strengths of the administrative process.").

¹⁹⁵ See SUNSTEIN, *AFTER THE RIGHTS REVOLUTION*, *supra* note 18, at 20. FDR's social programs were grounded in wealth distribution values not unlike those advanced by anti-poverty positions tied to sustainable development proposals; see also Sunstein, *Constitutionalism After the New Deal*, *supra* note 50, at 444.

There was a powerful Madisonian dimension to the New Deal enthusiasm for insulated and technically expert agencies. Just as the framers designed the original constitutional system in part to insulate national representatives in order to increase the likelihood of deliberative government, so the New Deal conception of administration sought to insulate public officials in order to protect governmental processes against the distortions produced by factionalism. In both the original system and the New Deal reformulation, reformers believed that protection from factionalism, through a measure of insulation, was highly desirable.

Id.

¹⁹⁶ *Id.* at 24. President Nixon may be largely responsible for the notion that environmental values should be recognized as rights: "Clean air, clean water, open spaces—these should again be the birthright of every American." SUNSTEIN, *AFTER THE RIGHTS REVOLUTION*, *supra* note 18, at 29 (quoting the Message to the Congress on the State of the Union (Jan. 22, 1970), in PUBLIC PAPERS OF THE PRESIDENT: RICHARD M. NIXON 8, 13 (1970)). "The need for an

integral part of the revolution that "constituted an expression of demand for new research in science, acceptance of new social values, and technological change."¹⁹⁷ Congress institutionalized the movement's core values with a comprehensive series of legislative acts.¹⁹⁸ Congress recognized that government action is necessary to overcome free-market consumption patterns that "may have long-term, world transforming effects reflect[ing] a kind of collective myopia in the form of emphasis on short-term considerations at the expense of the future."¹⁹⁹ Courts established the legitimacy of environmental legislation and altered the institutional framework governing public and private sector decisions affecting the environment.²⁰⁰

During the Environmental Era, Congress rolled back New Deal delegations to administrative agencies with legislative measures compelling agencies to execute specific, timely acts and to remain functionally accountable to Congress.²⁰¹ Congressional experience since the New Deal suggested sharply curtailing administrative autonomy to avoid the self-interested representation and factionalism targeted by Madisonian republicanism.²⁰²

active federal role in protecting the environment is among the most striking themes of the Nixon presidency; it recurs throughout his statements between 1969 and 1972." *Id.* at n.25.

¹⁹⁷ HAYS, *supra* note 2, at 488.

¹⁹⁸ See *supra* notes 6-22 and accompanying text.

¹⁹⁹ SUNSTEIN, AFTER THE RIGHTS REVOLUTION, *supra* note 18, at 59.

²⁰⁰ See Hays, *supra* note 2, at 488.

²⁰¹ See SUNSTEIN, AFTER THE RIGHTS REVOLUTION, *supra* note 18, at 29.

²⁰² *Id.* at 139 (describing Madisonian republicanism as "designed to ensure a measure of deliberation in government" and giving rise to the "norm [that] proscribes legislative efforts to transfer resources from one group to another simply because of political power"); see also Stewart, *supra* note 136, at 1684.

Once the function of agencies is conceptualized as adjusting competing private interests in light of their configuration in a given factual situation and the policies reflected in relevant statutes, it is not possible to legitimate agency action either by the "transmission belt" theory of the traditional model, or the "expertise" model of the New Deal period.

The legislative branch reasserted its constitutional relationship with the people through enhanced supervision and monitoring of agency decisions.²⁰³ "In this respect, Congress rejected the institutional learning of the New Deal and produced a partial revival of original notions of checks and balances. It did so, however, without rejecting the New Deal belief in active governmental controls in the interest of economic productivity and protection of the disadvantaged."²⁰⁴

The judiciary also raised the bar on the legitimate exercise of administrative discretion, reacting against factionalism and the complementary problem of self-interested representation.²⁰⁵ Commentators generally agree that agency capture played a significant role in the courts' aggressive posture toward agency discretion between the mid-1960s and the late '70s (or early '80s).²⁰⁶ The matter is more complicated than depicted by cursory

Id. (citing Schwartz, *Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility*, 67 HARV. L. REV. 436, 472 (1954)).

²⁰³ SUNSTEIN, *AFTER THE RIGHTS REVOLUTION*, *supra* note 18, at 29-30.

²⁰⁴ *Id.* at 30.

²⁰⁵ *Id.* at 99; *see also id.* at 98. ("[T]here is no question that well-organized groups have often exerted a disproportionate influence over the regulatory process, partly because of their political capital and organizing capacities, partly because of the agencies' ultimate dependence on good relations with them and on the information that only they can provide."); *see also* Thomas W. Merrill, *Capture Theory and the Courts: 1967-1983*, 72 CHI.-KENT L. REV. 1039, 1050-53, 1059-67 (1997) (discussing the "capture theory era" of administrative law between 1967-1983 and its impact upon the relations between administrative agencies and courts).

²⁰⁶ *See* SUNSTEIN, *AFTER THE RIGHTS REVOLUTION*, *supra* note 18, at 98-99; *see also* Merrill, *supra* note 205, at 1059-67.

[C]apture theory also suggests that aggressive judicial oversight and control of agencies is needed in order to counteract the distortions of the administrative process introduced by interest group capture and other pathologies. Specifically, by forcing agencies to adopt an administrative process that is more open and to give greater consideration to underrepresented viewpoints in that process, courts may be able to counteract the distortions emphasized by the theory.

If capture theory was indeed the dominant attitude toward the administrative state in the period from roughly 1967 to 1983, then we would expect to see a very different administrative

versions of "capture" theory,²⁰⁷ but enhanced agency insulation and authority has often been a "source of vulnerability to the pressures of well-organized groups."²⁰⁸ During the initial stages of designing

common law during this period. Generally speaking, the balance of power should shift perceptibly from agencies to courts. Thus, courts should tilt toward an expansive view of the availability of review and perhaps also a more intrusive scope of review.

Id. at 1052. Although he wrote his treatise in the middle of what Thomas Merrill calls the "capture theory era [i.e., 1967-1983]," Professor Stewart described the tendency among observers to adopt "capture theory" explanations for agency behaviors.

Critics have repeatedly asserted, with a dogmatic tone that reflects settled opinion, that in carrying out broad legislative directives, agencies unduly favor organized interests, especially the interests of regulated or client business firms and other organized groups at the expense of diffuse, comparatively unorganized interests such as consumers, environmentalists and the poor.

Stewart, *supra* note 136 at 1684-85 (footnotes omitted).

[T]he fact that agency policies may tend to favor regulated interests does not in itself demonstrate that such policies are unfair or unjustified, since protection of regulated interests may be implicit in the regulatory scheme established by Congress. Nonetheless, the critique of agency discretion as unduly favorable to organized interests—particularly regulated or client firms—has sufficient power and verisimilitude to have achieved widespread contemporary acceptance.

Id. at 1687.

²⁰⁷ Stewart, *supra* note 136 at 1684-87 ("At its crudest, this thesis [claims that] . . . administrations are systematically controlled, sometimes corruptly, by the business firms within their orbit of responsibility, whether regulatory or promotional."); see also Sunstein, *Constitutionalism After the New Deal*, *supra* note 50, at 449 (noting that "the precise sources and nature of the 'capture' phenomenon are sharply contested").

²⁰⁸ Sunstein, *Constitutionalism After the New Deal*, *supra* note 50, at 449. James Willard Hurst eloquently and succinctly describes the political and constitutional problems legislative bodies cause by placing administrative agencies in the line of interest group fire.

By sweeping delegations of policy discretion, both Congress and state legislatures deflected from themselves onto their delegates much of the pressure that special interests otherwise would turn onto the legislators. . . . In a given agency there were fewer responsible actors to spread the burden of special pressures; the

an environmental regulatory scheme, the regulated industries' employees often know more about the technical practices affecting environmental quality than most regulators.²⁰⁹ Agencies lack the resources of regulated industry and depend on regulated groups for information,²¹⁰ cooperation,²¹¹ and even policy development and political support.²¹² Agencies may also tend to become "regulation minded"²¹³ and sacrifice flexibility in management to maintain the status quo balance of power among regulated interests.²¹⁴

agency specialization meant that its heads had fewer opportunities to play pressure in one program area against pressure in another; agency officials had no general voter constituency out of which to build political capital to offset the economic prestige and arguments that a regulated group could bring to bear. . . . Back of the constitutional doctrine that said a legislature might not delegate powers save within carefully defined standards to guide and confine its delegate lay practical political wisdom: the legislature should not expose a separate agency to more heat of interest combat than it fairly could be expected to bear.

JAMES WILLARD HURST, *LAW AND SOCIAL ORDER IN THE UNITED STATES* 151 (1977).

²⁰⁹ See Stewart, *supra* note 136, at 1686.

²¹⁰ See *id.* at 1686; see also OFFICE OF THE EPA INSPECTOR GENERAL, REP. NO. 2005-P-00003, ADDITIONAL ANALYSES OF MERCURY EMISSIONS NEEDED BEFORE EPA FINALIZES RULES FOR COAL-FIRED ELECTRIC UTILITIES (2005), available at <http://www.epa.gov/oig/reports/2005/20050203-2005-P-00003.pdf> (discussing EPA's process of acquiring information from industry to assess the availability of mercury-specific emissions control technologies).

²¹¹ See Stewart, *supra* note 136, at 1685.

²¹² *Id.* at 1686.

²¹³ *Id.* at 1685.

²¹⁴ See *id.* at 1684-87; SUNSTEIN, *AFTER THE RIGHTS REVOLUTION*, *supra* note 18, at 99 ("Administrative officials are often resistant to change as well, tending to resolve conflicts among competing [interest] groups not necessarily in favor of those with the best arguments, but instead those whose demands require the least drastic departure from established responses."); Sunstein, *Interest Groups in American Public Law*, *supra* note 50, at 74-75 (noting that "administrative inaction is often produced by the capture of governmental power by well-organized groups—often the very industry the relevant agency is entrusted to regulate," and concluding that "political checks are insufficient safeguards against that prospect").

Courts reinforced the doctrine that judicial review should check administrators' tendency to favor private, economic interests in decisions²¹⁵ by aggressively defending the collective values Congress intended to protect with legislation.²¹⁶ The judiciary promoted incremental, institutional change through the interpretation and application of the APA's arbitrary and capricious standard, culminating with the "most important doctrinal innovation in administrative law,"²¹⁷ the hard look doctrine.²¹⁸ The hard

²¹⁵ See Sunstein, *Interest Groups in American Public Law*, *supra* note 50, at 65 ("In both administrative and constitutional law, judge-made doctrines, applicable to legislators and bureaucrats, are designed to ensure against the dangers of faction.").

²¹⁶ See SUNSTEIN, *AFTER THE RIGHTS REVOLUTION* *supra* note 18, at 30.

²¹⁷ Sunstein, *Interest Groups in American Public Law*, *supra* note 50, at 61.

²¹⁸ Compare Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2150 n.210 (2004), describing "the elements that constitute the modern 'hard look' paradigm of reasoned decisionmaking:"

[A]gencies have been required to adhere to their own regulations, to explain deviations from past precedents, to disclose to interested parties the factual assumptions underlying their decisions, and to respond to material comments by parties who object to the proposed course of action, *citing e.g.*, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 31 (1983) (requiring agency to give reasoned explanation for rejecting alternatives to proposed action); *Atchison, Topeka & Santa Fe Ry. v. Wichita Bd. of Trade*, 412 U.S. 800, 808 (1973) (requiring agency to explain departure from prior norms); *Conn. Light & Power Co. v. Nuclear Regulatory Comm'n*, 673 F.2d 525, 530-31 (D.C. Cir. 1982) (requiring that agency disclose technical basis for proposed rules in order to afford meaningful basis for comment). The result has been vigorous judicial review that serves as a check on agency action, without regard to whether Congress has laid down any particular statutory standard to structure the agency's action.

With Cass Sunstein's description of the "hard-look doctrine" in 1987:

[T]he hard-look doctrine requires agencies to consider all statutorily relevant factors, to justify departures from past practices, to furnish detailed explanations of their decisions, to explain the rejection of alternatives, and to show connections

look doctrine originated in the D.C. Circuit Court of Appeals,²¹⁹ and was subsequently endorsed by the Supreme Court in *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*,²²⁰ and incorporated into NEPA analysis

between statutory purposes and regulatory policies. The hard-look doctrine sometimes entails a close look at the ultimate outcome as well.

Sunstein, *Constitutionalism After the New Deal*, *supra* note 50, at 469-70 (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983)) (footnote omitted). Consider former D.C. Circuit Court of Appeals Judge Harold Leventhal's thoughts about "hard look" review:

There is no doubt that the scope of judicial review on the merits is a narrow one, which must repose full latitude in the agency, provided it has shown that it has taken a "hard look" at the problems. It is not likely to be of great consequence whether the formula is put in terms like the need for "substantial evidence" or a "substantial inquiry" into whether the order was so lacking in a reasoned basis as to be "arbitrary." . . . In any event, the court will not be confined to bare formalities but will probe the entire record to identify the choices made by the agency, to determine whether there has been a disregard of ascertainable legislative intent, to assure itself that the parties were offered a reasonable opportunity to present their position, and to find whether there has been a reasonable assessment of the interrelated policy and legal questions.

Harold Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509, 540-41 (1974) (footnote omitted); *see also* Sunstein, *Interest Groups in American Public Law*, *supra* note 50, at 61-64 (discussing the impact of the hard-look doctrines on notice-and-comment rulemaking and ex parte contacts in rulemaking).

²¹⁹ *See* Merrill, *supra* note 205, at 1093-94; Sunstein, *Interest Groups in American Public Law*, *supra* note 50, at 61 n.138.

²²⁰ 463 U.S. 29 (1983).

The scope of review under the "arbitrary and capricious" standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choice made." In reviewing that explanation, we must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Normally, an agency rule would be

by legislative provision and judicial decision.²²¹ The hard look doctrine's application of the arbitrary and capricious standard may be understood as a constitutional mechanism designed to ensure agencies do not exceed or abuse their political or legal authority.²²²

arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. The reviewing court should not attempt itself to make up for such deficiencies; we may not supply a reasoned basis for the agency's action that the agency itself has not given.

Id. at 43 (citations omitted).

²²¹ *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989); *Kleppe v. Sierra Club*, 427 U.S. 390 (1976).

The statutory requirement that a federal agency contemplating a major action prepare such an environmental impact statement serves NEPA's "action-forcing" purpose in two important respects. It ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decision-making process and the implementation of that decision. . . . The sweeping policy goals announced in § 101 of NEPA are thus realized through a set of "action-forcing" procedures that require that agencies take a "hard look" at environmental consequences, *Kleppe*, 427 U.S., at 410, [sic] n. 21, and that they provide for broad dissemination of relevant environmental information.

Robertson v. Methow Valley Citizens Council, 490 U.S. at 347-50 (citations omitted). "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.'" *Kleppe v. Sierra Club*, 427 U.S. at 410 n.21 (citing *Natural Res. Def. Council v. Morton*, 458 F.2d 827, 838, 148 U.S. App. D.C. 5, 16 (1972)).

²²² See Sunstein, *Interest Groups in American Public Law*, *supra* note 50, at 65.

The statutory prohibition set out in the APA applies to decisions that are "arbitrary and capricious," but that standard is by no means self-defining. Certainly the standard suggests that some decisions may be unlawful although they are not prohibited by statute: the APA calls for a reasonably aggressive judicial role

In the context of applying the standard, "the principal justification for judicial scrutiny is a fear of agency subversion of statutory purposes."²²³

State Farm provides an example of the Reagan Administration's attempt to justify deregulation and to subvert statutory purposes, actions that favored private industry. *State Farm* arose when an administrator with the National Highway Traffic Safety Administration ("NHTSA") reinterpreted the National Traffic and Motor Vehicle Act.²²⁴ The Court considered whether the NHTSA administrator "acted arbitrarily and capriciously in revoking the requirement in Motor Vehicle Safety Standard 208 that new motor vehicles produced after September 1982 be equipped with passive restraints to protect the safety of the occupants of the vehicle in the event of a collision."²²⁵

In 1978, Secretary of Transportation Brock Adams "issued a new mandatory passive restraint regulation, known as Modified Standard 208," which provided automobile manufacturers with the option of either installing airbags or passive seatbelts.²²⁶ The Modified standard withstood judicial review²²⁷ and congressional scrutiny; Congress "did not exercise its authority under the legislative veto provision of the 1974 Amendments."²²⁸ In 1981, President Reagan's new Secretary of Transportation interrupted the phasing in of passive restraints by rescinding the Modified

for review of discretion even where the governing statute is silent. A central purpose of the standard is to ensure that agency decisions are not simply bows in the direction of powerful private groups. This general instruction in the APA provides a "background rule" against which any legislative "deal" must be read.

Cass R. Sunstein, *Factions, Self-Interest, and the APA: Four Lessons Since 1946*, 72 VA. L. REV. 271, 284 (1986) (citations omitted).

²²³ Sunstein, *Constitutionalism After the New Deal*, *supra* note 50, at 470.

²²⁴ *State Farm*, 463 U.S. at 36-37.

²²⁵ *Id.* at 34.

²²⁶ *Id.* at 37 (citing 42 Fed. Reg. 34,289 (July 5, 1977) and 49 C.F.R. § 571.208 (1978)).

²²⁷ *State Farm*, 463 U.S. at 37.

²²⁸ *Id.* at 37 (footnote omitted).

Standard requirement.²²⁹ NHTSA's rescission was foreshadowed by Secretary Andrew Lewis' decision to re-open the rulemaking process "due to changed economic circumstances and, in particular, the difficulties of the automobile industry."²³⁰ NHTSA contended that contrary to the agency's 1977 conclusion, the Modified Standard would produce "minimal safety benefits," saddle manufacturers with unreasonable costs, and "might have an adverse effect on the public's attitude toward safety."²³¹

The *State Farm* Court's endorsement of the hard-look doctrine included a thorough analysis of agency arguments favoring an expansive interpretation of administrative power.²³² The Court carefully compared the record with agency claims and conclusions to determine whether the agency's explanation was sufficient "to conclude that the rescission was the product of reasoned decisionmaking."²³³ The Court's detailed analysis provides important background principles for understanding the legitimate application of the arbitrary and capricious standard. The Court rejected several NHTSA arguments designed to capitalize on institutions supporting agency discretion and expertise by enhancing the agency's legal authority over rulemaking and policy decisions.²³⁴

²²⁹ *Id.* at 38.

²³⁰ *Id.* at 38 (citing 46 Fed. Reg. 12,033 (Feb. 12, 1981)).

²³¹ *Id.* at 39. In a priceless illustration of self-serving arguments twisted to benefit the American people, the Agency claimed that its decision was justified by the desire to improve American attitudes toward safety regulation. "Given the high expense and limited benefits of detachable belts, NHTSA feared that many consumers would regard the Standard as an instance of ineffective regulation, adversely affecting the public's view of safety regulation and, in particular, 'poisoning . . . popular sentiment toward efforts to improve occupant restraint systems in the future.'" *Id.* (citing 46 Fed. Reg. 53,419, at 53,424 (Oct. 29, 1981)).

²³² *State Farm*, 463 U.S. at 36-37.

²³³ *Id.* at 52. "To reach this conclusion, we do not upset the agency's view of the facts, but we do appreciate the limitations of this record in supporting the agency's decision." *Id.*

²³⁴ See *infra* notes 235-41 and accompanying text.

First, the Court dismissed the agency argument that constitutional presumptions afforded congressional legislation under the Due Process Clause should govern judicial review of agency regulations.²³⁵ Second, the Court denounced agency claims that rescission was justified because different legal standards should apply to deregulation and rulemaking decisions caused by agencies' need to adapt to changing circumstances.²³⁶ Third, the Court noted the agency's misguided efforts to claim that *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*,²³⁷ was a "talisman under which any agency decision is by definition unimpeachable."²³⁸ Finally, the Court rejected NHTSA arguments relying upon agency "expertise"²³⁹ or "substantial uncertainty"²⁴⁰ to support its decisions. In each instance, the Court reiterated the need for vigorous judicial review of agency reasoning processes.²⁴¹ The Court's reasoning, taken as a whole, illustrates

²³⁵ *State Farm*, 463 U.S. at 44. "We do not view as equivalent the presumption of constitutionality afforded legislation drafted by Congress and the presumption of regularity afforded an agency in fulfilling its statutory mandate." *Id.* at 43 n.9.

²³⁶ *See id.* at 41-44.

[T]he forces of change do not always or necessarily point in the direction of deregulation. In the abstract, there is no more reason to presume that changing circumstances require the rescission of prior action, instead of a revision in or even the extension of current regulation. If Congress established a presumption from which judicial review should start, that presumption—contrary to petitioners' views—is not *against* safety regulation, but *against* changes in current policy that are not justified by the rulemaking record.

Id. at 42.

²³⁷ 435 U.S. 519 (1978).

²³⁸ *State Farm*, 463 U.S. at 50. "Petitioners both misread *Vermont Yankee* and misconstrue the nature of the remand that is in order. In *Vermont Yankee*, we held that a court may not impose additional procedural requirements upon an agency." *Id.*

²³⁹ *Id.* at 48.

²⁴⁰ *Id.* at 51.

²⁴¹ *See, e.g., id.* at 53-56. The Court declined to give the NHTSA the authority sought to re-write rules, i.e., laws, governing matters within the Agency's expertise. *Id.* at 46-49. Expert discretion is the lifeblood of the administrative

its willingness to defend legislation advancing collective social values against powerful business factions attempting to control agency decisions.²⁴²

process, but "unless we make the requirements for administrative action strict and demanding, *expertise*, the strength of modern government, can become a monster which rules with no practical limits on its discretion." *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167 (1962) (citing *New York v. United States*, 342 U.S. 882, 884 (dissenting opinion)). Similarly, agencies cannot dictate the outcome of judicial decisions by reciting the phrase "substantial uncertainty" and pleading agency discretion.

Petitioners [argue] . . . "substantial uncertainty" that a regulation will accomplish its intended purpose is sufficient reason, without more, to rescind a regulation. We agree with petitioners that just as an agency reasonably may decline to issue a safety standard if it is uncertain about its efficacy, an agency may also revoke a standard on the basis of serious uncertainties if supported by the record and reasonably explained. . . . Recognizing that policymaking in a complex society must account for uncertainty, however, does not imply that it is sufficient for an agency to merely recite the terms "substantial uncertainty" as a justification for its actions. As previously noted, the agency must explain the evidence which is available, and must offer a "rational connection between the facts found and the choice made."

State Farm, 463 U.S. at 51-52.

²⁴² See Sunstein, *Constitutionalism After the New Deal*, *supra* note 50 at 471.

The majority's approach . . . should be seen . . . as an effort to "flush out" illegitimate or unarticulated factors—perhaps solicitude for an ailing automobile industry or a general antiregulatory animus—and to ensure that those factors are available for discussion and comment during and after the rulemaking process. In this respect, the hard-look doctrine might be regarded as a means of limiting impermissible influences in the regulatory process.

Id.

The automobile industry has opted for the passive belt over the airbag, but surely it is not enough that the regulated industry has eschewed a given safety device. For nearly a decade, the automobile industry waged the regulatory equivalent of war against the airbag and lost—the inflatable restraint was proved sufficiently effective. Now the automobile industry has decided to employ a seatbelt system which will not meet the safety

Since the early 1980s, the hard look doctrine has “withered on the vine,”²⁴³ allowing the executive and its administrative agencies to re-establish their power over environmental law and policy. The shift in institutional power was prompted by political and economic developments similar to those giving rise to the New Deal. The United States faced economic recession and high inflation aggravated by an energy crisis, military engagements in the Middle East characterized by cultural and religious conflict, and increased economic competitiveness overseas.²⁴⁴ President Reagan’s policies favored powerful economic interests while eroding social and environmental protections. The primary political reactions to economic struggles were deregulation and increased reliance upon private markets and private enterprise to promote economic productivity.²⁴⁵

D. Conclusion

The New Deal vision of successful government administered by technical experts was prompted by a different worldview than many professionals hold today; the conceptual divisions between “science” and “values,” and “political” and “administrative,”²⁴⁶ were

objectives of Standard 208. This hardly constitutes cause to revoke the Standard itself. Indeed, the Act was necessary because the industry was not sufficiently responsive to safety concerns. The Act intended that safety standards not depend on current technology and could be “technology-forcing” in the sense of inducing the development of superior safety design.

State Farm, 463 U.S. at 49.

²⁴³ Merrill, *supra* note 205, at 1095. Merrill argues that as the “capture theory era” was replaced by public choice theory’s conception of government, courts retreated into “an apolitical, lawfinding function,” but “[t]here is no logical reason” for the shift to judicial review “turn[ing] on statutory interpretation, not an examination of agency procedures or reason-giving.” *Id.*

²⁴⁴ SUNSTEIN, *AFTER THE RIGHTS REVOLUTION*, *supra* note 18, at 30-31.

²⁴⁵ *Id.* at 31.

²⁴⁶ Lessig & Sunstein, *The President and the Administration*, *supra* note 137, at 99 (arguing that the post-New Deal view questions the very presupposition of this nineteenth century model; the presupposition that the political can be so sharply separated from the administrative).

much sharper fifty years ago. The "expert" model was justified as a sophisticated, "apolitical"²⁴⁷ management technique that assumed an agency's legislative goal could be realized through the application of knowledge acquired from specialized experience; i.e., "expertise."²⁴⁸ The New Deal's rapid and extensive creation of agencies "breached"²⁴⁹ the constitutional safeguards of electoral accountability and separation of powers.²⁵⁰ Over time, Congress quietly fostered the growth of agency authority,²⁵¹ often resulting in greater control over public policy by private interests exerting their influence on agency lawmakers²⁵² working for the Executive Branch.

²⁴⁷ Stewart, *supra* note 136, at 1678 n.36.

²⁴⁸ *Id.* at 1678. Agency discretion was considered to be "bound by an ascertainable goal, the state of the world, and an applicable technique." *Id.* at 1684.

There may be a trial and error process in finding the best means of achieving the posited goal, but persons subject to the administrator's control are no more liable to his arbitrary will than are patients remitted to the care of a skilled doctor. This analysis underlay the notion that administrators were not political, but professional, and that public administration has an objective basis.

Id. (footnotes omitted).

²⁴⁹ Sunstein, *Interest Groups in American Public Law*, *supra* note 50, at 60.

²⁵⁰ *Id.* at 60. "That executive and administrative power developed so relatively late and at so hard a pace has unsettled separation-of-powers values in the late twentieth century." HURST, *supra* note 208, at 147.

²⁵¹ Congressional exposure to a range of "diverse interests fostered inertia" more often than legislation calculated to advance the public good. HURST, *supra* note 208, at 147. "Especially the lateness and speed of executive-administrative growth help to explain, though they do not justify, the extent to which the legislative branch gave ground by default." *Id.*

²⁵² See *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 488 (2001) (Stevens & Souter, JJ., concurring).

The Court has two choices. We could choose to articulate our ultimate disposition of this issue by frankly acknowledging that the power delegated to the EPA is "legislative" but nevertheless conclude that the delegation is constitutional because adequately limited by the terms of the authorizing statute. Alternatively, we could pretend, as the Court does, that the authority delegated to the EPA is somehow not "legislative power." Despite the fact that there is language in our opinions that supports the Court's articulation of our holding, I am

"The constitutional status of administrative agencies has been uncertain precisely because they evade the ordinary constitutional safeguards against domination by powerful private groups."²⁵³

Environmental legislation institutionalized collective values sacrificed by an inadequate regulatory system rooted in agencies' expertise and discretion. Notwithstanding the successful efforts to institutionally restructure agency authority during the 1960s and 1970s, the reach and significance of agencies' discretionary power has expanded considerably; the legislative power feared by Madison is now highly concentrated in administrative agencies controlled by the Executive.²⁵⁴ Administrators are well-insulated and function with a notable absence of the Madisonian institutions designed to minimize corrupt influences on Congress's legislative decisions. Madison's work indirectly anticipated that administrative authority would serve as a conduit for the Executive's

persuaded that it would be both wiser and more faithful to what we have actually done in delegation cases to admit that agency rulemaking authority is "legislative power."

Id. (citations omitted).

²⁵³ Sunstein, *Interest Groups in American Public Law*, *supra* note 50, at 66.

²⁵⁴ Lessig & Sunstein, *The President and the Administration*, *supra* note 137, at 95 (1994) ("Lawmaking and law-interpreting authority is now concentrated in an extraordinary array of regulatory agencies."); *see also* HURST, *supra* note 208, at 271.

In the twentieth century, the most significant competition for policy-making position went on between legislatures and executive and administrative officers. The legislative branch continued to hold a great potential of authority, especially by its right to control the public purse and its powers of investigation. But, partly because of the complexity of the service and regulatory demands that the growth of the society made on government and partly because of defaults of leadership, legislators have delegated more and more discretion to executive and administrative officers, without keeping firm checks on their delegates. After some seventy-five years of this course, the prime issue over the character of government power is whether the legislature can muster the will, courage, and skill to use its potential capacity to call executive and administrative authority to account.

Id.

legislative, majoritarian impulses. The seeds for corruption in environmental law and policy were planted by the New Deal's uprooting of the Constitution's checks and balances.

IV. AGENCY RULEMAKING: A CORRUPT OUTLET FOR EXECUTIVE LEGISLATION

The accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority.²⁵⁵

—Justice Felix Frankfurter

Administrative agencies are plagued by constitutional problems of accountability and deliberation.²⁵⁶ Constitutional principles continue to deteriorate through the corrupt exercise of agencies' discretion in the promulgation and implementation of rules interpreting congressional legislation.²⁵⁷ Unchecked agency power constitutes the greatest threat to collective value protections

²⁵⁵ *Youngstown*, 343 U.S. at 594 (Frankfurter, J., concurring).

²⁵⁶ SUNSTEIN, *AFTER THE RIGHTS REVOLUTION*, *supra* note 18, at 101.

²⁵⁷ *Id.*

A principal goal of the New Deal period was to ensure that regulatory policy would be made through a democratic process that would reflect the public will. But in the implementation process these aspirations are often defeated. Systems devised to promote democratic goals can be undermined by factional power or administrative self-interest. The result is a perversion of the democratic aspirations of regulatory reformers—perhaps the principal complaint of post-New Deal administrative law.

Id. (footnote omitted). Environmental legislations' procedural strictures are generally insufficient to ensure the roots of agency decisions are grounded in reasonable consideration of ecological principles and social well-being, and not illegitimately influenced by private industry. "The prognosis that procedural requirements may be largely ineffective in controlling agency tendencies to favor organized interests where the record does not focus decision, and where the weighting of key variables is left unresolved, is confirmed . . . by experience under the National Environmental Policy Act." Stewart, *supra* note 136, at 1780.

in environmental law.²⁵⁸ Environmental regulatory agencies' discretionary authority, coupled with the expansion of Executive power over the past half-century, subverts the constitutional protections against corruption of public policy. Socio-ecological objectives spanning across generations require institutional restructuring to help reverse America's trend toward oligarchy.

Examples from the EPA and the FWS illustrate corrupt practices at work within environmental quality and public land management agencies.²⁵⁹ Congress instructed the office of the

²⁵⁸ See Sunstein, *Constitutionalism After the New Deal*, *supra* note 50, at 452.

This decline in faith in the institutional program of the New Deal is entirely justified. The New Deal attack on checks and balances was not a necessary part of its institutional framework and was largely a mistake. An aggressive role for each of the constitutionally specified branches—even a form of checks and balances—can promote those substantive goals of the New Deal that have a claim to contemporary support. The current task is to devise institutional structures and arrangements that will accomplish some of the original constitutional purposes in an administrative era; this is no small ambition in light of the continuing rejection of the traditional notion of “limited government” with which the original distribution of powers was closely allied.

Id.

²⁵⁹ This Article focuses on two rulemaking decisions, but they are certainly not the only examples available. Administrative agency rulemaking and rule implementation is too often characterized by highly suspect rationalizations ultimately favoring private industry. Agency decisions may fail to provide any explanation for a particular decision. *See, e.g.,* *Vigil v. EPA*, 381 F.3d 826, 844-45 (9th Cir. 2004) (“In short, EPA’s approval of the rejection of CARB diesel under the BACM standard referred to a nonexistent justification and was therefore arbitrary and capricious.”). Agencies may ignore their own scientists’ claims. *See, e.g.,* *Idaho Sporting Cong., v. Rittenhouse*, 305 F.3d 957, 972 (9th Cir. 2002) (finding that “the Forest Service’s own scientific evidence invalidates the use of the proxy-on-proxy approach,” and “the record demonstrates that the Forest Service’s methodology for dedicating old growth is so inaccurate that it turns out there is no old growth at all in management area 35, where the Forest Service has purported to dedicate 1,280 acres of old growth”). Agencies fail to perform cumulative analysis. *See, e.g.,* *Klamath-Siskiyou Wildlands Ctr. v. BLM*, 387 F.3d 989, 991-92 (9th Cir. 2004) (finding “analyses performed by the BLM do not

sufficiently consider the cumulative impacts posed by the timber sales"). Agencies erroneously delay regulatory action. *See, e.g.,* Friends of the Wild Swan v. EPA, 130 F. Supp. 2d 1184 (D. Mont. 1999) ("[At] its current pace, the [State of Montana] will need over one hundred years to develop the 3000 TMDLs [total maximum daily loads] required for the WQLSs [water quality limited segments] identified in 1998. The net result will be to put off for another generation a mandate that Congress required be taken years ago . . . the EPA acted arbitrarily and capriciously when it failed to disapprove of Montana's inadequate submission of TMDLs."). Agencies claim regulatory justifications that challenge credulity. *See, e.g.,* Sierra Club v. EPA, 346 F.3d 955 (9th Cir. 2003). In spite of EPA's claims that air pollution in California's Imperial Valley originated in Mexico, "there simply is no possibility that Mexican transport could have caused the observed PM-10 exceedences." *Id.* "EPA's notion of what constitutes a southerly wind in the windroses is . . . at the least, expansive and . . . positively incorrect. Second, the 'southerly component' EPA professes to locate in the wind data would appear to be inconsistent with its theory . . . the wind data does not support the theory of transport from Mexico." *Id.* at 962-63. Finally, agencies create new legal standards contravening Congress's express statutory enactments. *See, e.g.,* Gifford Pinchot Task Force v. Fish & Wildlife Serv., 378 F.3d 1059, 1069-70 (9th Cir. 2004) (holding that FWS changed an ESA legal standard by altering the definition of "adverse modification").

[T]he regulatory definition of "adverse modification" contradicts Congress's express command. As the Fifth and Tenth Circuits have already recognized, the regulatory definition reads the "recovery" goal out of the adverse modification inquiry; a proposed action "adversely modifies" critical habitat if, and only if, the value of the critical habitat for *survival* is appreciably diminished. . . . This cannot be right.

Id. (citations omitted). *Waterkeeper Alliance v. EPA*, 399 F.3d 486, 498-506 (2d Cir. 2005) (finding that EPA arbitrarily and capriciously violated the express terms of the CAA by altering the regulatory relationship between National Pollutant Discharge Elimination System authorities and the regulated group consisting of "concentrated animal feeding operations"); *see also infra* Part B. The exercise of agency authority during the rulemaking and rule implementation processes should raise concerns about the real justification for the agency's decisions. Moreover, court case results are generally a poor indicator of the extent of a social problem. *See* SUNSTEIN, *AFTER THE RIGHTS REVOLUTION* *supra* note 18 at 101-02 ("The problems . . . include the secrecy of the process, the power of parochial interests, and the absence of accountability to the public."). Agencies serve the public, yet obscure or irrational justifications for their decisions illustrate a cultural tendency to preserve authority by revealing as little as possible about their decision-making processes. This administrative approach to government not only abuses the public trust, but also sacrifices the

Inspector General ("OIG") for the EPA and the Government Accountability Office ("GAO") to conduct an investigation of the EPA rulemaking process leading to the May 18, 2005 Clean Air Mercury Rule ("CAMR").²⁶⁰ The investigation yielded records providing a rare and important look inside the EPA.²⁶¹ The Canada Lynx saga lasted almost a decade before the FWS was, in effect, ordered by a U.S. District Court to follow the FWS scientists' recommendation to list the Lynx as threatened or endangered under the ESA.²⁶²

The EPA and FWS histories show how corruption may disrupt the institutions providing for just implementation of environmental legislation.²⁶³ Agency discretion allows the Executive to pursue backdoor legislation with few, if any, potential consequences for agency employees²⁶⁴ or political appointees deviating

interests of most agency employees who are dedicated to advancing environmental legislations' collective values.

²⁶⁰ 2005 Clean Air Mercury Rule, 70 Fed. Reg. 28,606 (May 18, 2005) (to be codified at 40 C.F.R. pts. 60, 72, 75).

²⁶¹ See UNITED STATES EPA, OFFICE OF THE INSPECTOR GENERAL, REP. NO. 2005-P-00003, ADDITIONAL ANALYSES OF MERCURY EMISSIONS NEEDED BEFORE EPA FINALIZES RULES FOR COAL-FIRED ELECTRIC UTILITIES (2005), *available at* <http://www.epa.gov/oig/reports/2005/20050203-2005-P-00003.pdf> [hereinafter OIG EVALUATION REP.]; U.S. GOVERNMENT ACCOUNTABILITY OFFICE, REP. NO. 05-252, OBSERVATIONS ON EPA'S COST-BENEFIT ANALYSIS OF ITS MERCURY CONTROL OPTIONS, (2005) *available at* <http://www.gao.gov/cgi-bin/getrpt?GAO-05-252> [hereinafter OBSERVATIONS].

²⁶² See ESA, *supra* note 11; see also *infra* Part III.B.

²⁶³ This Article does not claim to cover all instances of corruption—the available information is far from complete. The abuse of agency authority adversely impacting environmental law and regulation warrants a comprehensive, congressionally-mandated investigation.

²⁶⁴ The following point warrants repetition—most agency employees are honorable individuals who were drawn to work with environmental quality or land management agencies by the statutory purposes defining an agency's mission. Many of these career-minded, federal civil servants are placed in undesirable positions by political appointees seeking to change rather than implement statutory provisions governing agency decisions. The political and legal rollercoaster caused by corrupt influences at the top (in the agency or at the Department level) should not be associated with agency workers who are often disheartened (or worse) by corrupt practices undermining environmental legislation's collective, socio-ecological values.

from statutory responsibilities or accepted agency practices. Administrators seek to optimize their lawmaking authority by framing the justification for final rule decisions in terms of their discretionary exercise of expertise.²⁶⁵ Administrators also tend to exploit scientific uncertainty to suit their political agendas, rather than resolve issues of uncertainty by engaging the broader scientific community in a constitutionally and epistemologically sound deliberative process.²⁶⁶ Finally, administrators control the information and the knowledge bearing upon reasonable intra-agency and public review of rule proposals. Agencies unilaterally decide whether relevant information becomes part of the public record as well as the context for public review.

A. *EPA's Mercury Emissions Rule—Executive Legislation*

On March 15, 2005, the EPA issued the final CAMR.²⁶⁷ The rule regulates mercury emissions from coal-fired steam generating utility units through a national cap-and-trade program implemented under section 111 of the Clean Air Act. The agency proposed an interim 2010 cap based on the maximum amount of mercury reductions that could be achieved with technological controls reducing sulfur dioxide and nitrous oxide emissions; i.e., the mercury co-benefit achievable through implementation of the Clean Air Interstate Rule ("CAIR").²⁶⁸ The first phase cap of 38

²⁶⁵ See, e.g., *State Farm*, 463 U.S. at 46-49; see also *supra* notes 234-36 and accompanying text.

²⁶⁶ See, e.g., *State Farm*, 463 U.S. at 53-56. See generally Jeffrey Rudd, *The Forest Service's Epistemic Judgments*, 23 TEMP. ENV. L. & TECH. J. 145, 185-211 (2004) (arguing that the Forest Service's 'best available science' regulation requires the agency to engage the broader scientific community when resolving issues of scientific uncertainty).

²⁶⁷ 2005 Clean Air Mercury Rule, *supra* note 260. This Article does not assess the legal implications and/or shortcomings of the final rule except to the extent that agency decisions corrupted the rulemaking process. The OIG and GAO reports reveal a number of concerns that will likely (as they should) support arguments that the CAMR is the product of EPA's "arbitrary and capricious" rulemaking procedures.

²⁶⁸ *Id.*

tons per year becomes effective in 2010, and a second phase cap of 15 tons per year becomes effective in 2018.²⁶⁹

The administrative process that culminated with the final rule's publication presents an unusual opportunity to examine the constitutional problems presented by administrators' subservience to the lawmaking desires of the executive branch. Senators from the Senate Environment and Public Works Committee directed the EPA's OIG to review the "process used to develop the [EPA's] January 2004 proposed rule for regulating mercury emissions from coal-fired, steam generating electric utility units."²⁷⁰ The OIG report reveals significant legal and political issues surrounding the Rule's preparation and publication. EPA senior staff rigidly controlled the analysis performed pursuant to the CAA,²⁷¹ inhibiting intra-agency and public deliberation and limiting dissent in order to attain the desired political goal: backdoor enactment of the Clear Skies legislation that had failed to pass congressional inspection and analysis.²⁷² EPA actively skirted the institutional framework designed to ensure that administrative regulations

²⁶⁹ *Id.*

²⁷⁰ OIG EVALUATION REP., *supra* note 261, at 1. "OIG conducted interviews of staff for EPA offices and outside organizations to gain an understanding of the rule as it developed, other options considered, and the rule development process." *Id.* at 6. They also "reviewed data and analysis developed in support of the rule . . . [and] related information provided by both EPA and non-EPA officials." *Id.* at 8-9. OIG requested, but did not receive, "several important documents" from the agency. *Id.* at 9.

²⁷¹ *Id.* at 13-16.

²⁷² *Id.* at 15 ("EPA has stated its intent to implement its multi-pollutant (mercury, [sulfur dioxide], and [nitrous oxide]) cap-and-trade programs, originally included in stalled Clear Skies legislation, through the proposed CAIR and mercury regulations.").

When the Clear Skies legislation stalled, EPA decided to address the Clear Skies program in a regulatory manner instead. This led to EPA including a mercury cap-and-trade option, similar to Clear Skies, in its proposed mercury rule. As focus on the cap-and-trade approach increased, EPA began to de-emphasize the mercury MACT [maximum achievable control technology] development process.

OIG EVALUATION REP., *supra* note 261, at 27.

reasonably implement legislation and result from public deliberation about relevant issues. Simply put, the OIG investigation reveals a pattern of corrupt practices designed to enact Executive legislation.

The EPA's mercury emissions rulemaking process lacked scientific integrity and institutional legitimacy. "EPA senior management instructed [agency] staff to develop a MACT [maximum achievable control technology] standard for mercury that would result in national emissions of 34 tons annually,"²⁷³ which violated the CAA requirement to base the MACT standard "on the emissions levels achieved by the top performing 12 percent of units, not a targeted national emissions result."²⁷⁴ EPA conducted "at least three Integrated Planning Model (IPM) runs"²⁷⁵ before producing a technical analysis that supported its preferred standard.²⁷⁶ On its first two runs, the integrated model produced floor standards of twenty-nine and twenty-seven tons per year; EPA excluded these analyses from the proposed and final rule.²⁷⁷ "An Agency source indicated that these results were not acceptable to senior management because they were not close enough to the 34-tons target."²⁷⁸ According to an EPA official, an unbiased analysis would have produced a range between "about 15 tons per year to the low 20s for this MACT, and that anything above or below those numbers was a stretch."²⁷⁹ EPA withheld the alternative scientific

²⁷³ *Id.* at 11.

²⁷⁴ *Id.* "The 34-tons-per-year target was based on the co-benefits expected to be achieved from implementation of NO_x and SO₂ controls under the proposed CAIR." *Id.* The EPA engaged in a similar practice when implementing the Clean Water Act. See *Citizens Coal Council v. EPA*, 385 F.3d 969, 981-82 (6th Cir. 2004).

²⁷⁵ 70 Fed. Reg. at 28,619 ("IPM is a multi-regional, dynamic, deterministic linear programming model of the U.S. electric power sector.").

²⁷⁶ OIG EVALUATION REP., *supra* note 261, at 13.

²⁷⁷ *Id.* at 14. The "third run . . . showed 31 tons. EPA cited the 31-tons model results in the proposed rule, but explained in the preamble that 34 tons is the more probable emissions level because the model used to estimate emissions was underestimating the amount of mercury emissions that would occur." *Id.*

²⁷⁸ *Id.*

²⁷⁹ OIG EVALUATION REP., *supra* note 261, at 15. "This includes the 34 tons proposed by the Agency. These statements about the possible range of MACT

analyses from the public domain in order to preserve the pre-determined, thirty-four tons per year MACT target.²⁸⁰

EPA's corrupt MACT analysis was consistent with other agency decisions bypassing scientific-technical analyses likely to generate dissent. EPA failed to comply with its year 2000 finding that trading programs must ensure the health and safety of communities located near an emissions source.²⁸¹ OIG determined that EPA failed to reasonably analyze the risks to local populations of "hot spots" caused by the cap-and-trade alternative²⁸² and to

floors are supported by results of different MACT floor limits and/or varying model assumptions used by some organizations providing comments to the proposed rule." *Id.* at 15-16.

²⁸⁰ OIG concluded that "EPA's approach for developing the MACT floor was compromised." *Id.* at 16.

We recommend that the Assistant Administrator for Air and Radiation: ¶2-1 Conduct an unbiased analysis of the mercury emissions data to establish a MACT floor in accordance with the requirements of CAA section 112(d). ¶2-2 Re-negotiate with the court petitioner for an extension of the final rulemaking deadline sufficient to solicit and accept public comments on the unbiased analysis of mercury emissions data in an open, public, and transparent manner.

Id. The CAMR's final MACT floor is thirty-eight tons per year, rather than the lower, biased standard of thirty-four tons per year. The Final Rule ignores OIG's concerns about the legitimacy of the rulemaking process.

²⁸¹ See OIG EVALUATION REP., *supra* note 261, at 6.

[I]n its December 2000 notice, EPA cited concerns about the potential local impact of emissions trading and noted that any trading program must be constructed in a way that assured communities nearest a source were adequately protected. The Notice stated:

Thus, in developing a standard for utilities, the EPA should consider the legal potential for, and the economic effects of, incorporating a trading regime under section 112 in a manner that protects the local populations.

Id.

²⁸² *Id.* at 20 ("EPA did not fully analyze the potential for hot spots (i.e., areas of elevated pollutant concentrations) to occur under its proposed cap-and-trade option.").

"adequately evaluate the environmental health effects of the proposed rule on children."²⁸³

EPA's scientific methodology developed within a contrived institutional framework that limited potential challenges to the Executive's legislative objectives. OIG's investigation reveals EPA "senior management"²⁸⁴ or "higher level"²⁸⁵ authorities dictated significant deviation from past rule development practices, precluding reasonable intra-agency and public participation in the rulemaking process.²⁸⁶ EPA's circumvention of the "normal intra-agency review process"²⁸⁷ reduced the risk that internal agency

²⁸³ *Id.* at 33.

²⁸⁴ *Id.* at 32 ("EPA staff told OIG that senior management instructed them not to undertake certain scientific and technical analyses that they thought necessary."); *see also id.* at 11, 14.

²⁸⁵ OIG EVALUATION REP., *supra* note 261, at 31.

Several EPA staff who were involved in the abbreviated intra-agency work group review process told the OIG that it was made clear to them by their managers, and in the case of one work group representative, by the work group chair, that decisions about this rule were being made at a "higher level." For example, in an e-mail discussing intra-agency comments, a member of the work group was told:

The decision was made at a much higher level than mine to "bypass" the normal EPA Work Group procedure prior to the proposal and we have been told that all the Office directors were contacted about both the process change and rulemaking.

Id.

²⁸⁶ For example, EPA unexpectedly terminated communication with Federal Advisory Committee Act ("FACA") members, failing to honor its commitment to provide the group with "additional analyses using the IPM to further explore the cost-benefit of different MACT proposals as presented by the working group members." *Id.* at 29. Congressman Waxman subsequently contacted EPA about the status of the working group's request for additional IPM runs. In July 2003, EPA Administrator Christine Whitman "stated that it was the Agency's intention to convene an additional FACA meeting when the IPM analyses were complete." *Id.* An EPA Assistant Administrator later advised, however, that "the Agency would not provide the additional MACT IPM analyses and would instead focus resources on developing a cap-and-trade alternative, the administration's preferred regulatory approach." *Id.*

²⁸⁷ OIG EVALUATION REP., *supra* note 261, at 27.

views might oppose the administration's preference.²⁸⁸ Established internal rulemaking practices²⁸⁹ were abandoned, constraining the intra-agency working group's ability to participate in the rulemaking process.²⁹⁰ Senior management limited the group to two meetings and deterred "meaningful feedback on the proposed rule."²⁹¹ The group was directed to review and comment on a draft analytical blueprint for the rulemaking²⁹² and an "early version of

²⁸⁸ *Id.* at 16.

²⁸⁹ The agency's accepted procedures are described in its *EPA's Action Development Process: Guidance for EPA Staff on Developing Quality Actions*. OIG EVALUATION REP., *supra* note 261, at 27 [hereinafter *Action Development Process*]. The Action Development Process "outlines steps EPA staff and management are to follow when developing Agency actions, such as rules, policy statements, and statutorily mandated reports to Congress." *Id.*

The Action Development Process guidance contains five key elements, which are summarized below. These include steps for:

- planning sound scientific and economic analysis;
- developing and selecting regulatory options based on relevant scientific, economic, and policy analyses;
- involving affected Headquarters and Regional managers early and continuing involvement until the final action is completed;
- ensuring active and appropriate cross-Agency participation; and
- encouraging appropriate and meaningful consultation with stakeholders through substantive consultative procedures.

Id. at 27-28. For additional details of the rule development process applicable for the CAMR, see *id.* at 44-45 app. D.

²⁹⁰ OIG EVALUATION REP., *supra* note 261, at 30.

²⁹¹ *Id.*

²⁹² OIG EVALUATION REP., *supra* note 261, at 30. "According to EPA's Action Development Plan, an analytical blueprint is 'a document that spells out a work group's plans for data collection and analyses that will support development of a specific action,' and is intended to be developed as 'a collaborative effort.'" *Id.* The draft blueprint listed the rulemaking's minimum analytical requirements.

The draft blueprint stated, "the intent of the rule is to require that oil-and-coal-fired units achieve a MACT-level of control," and it listed the "minimum analytical needs" for the rulemaking:

- A regulatory impact analysis, assessing the economic impact on industry of levels beyond the MACT floor.

the draft (July 3, 2003) preamble.”²⁹³ In a noteworthy deviation from past practices, the working group did not receive “feedback or modified drafts of any work products based on their comments and input,”²⁹⁴ nor was the group given “the opportunity to concur or nonconcur with the proposed rule.”²⁹⁵ The intra-agency review process was less collaborative, substantive, and inclusive than in the past, thus effectively insulating the administration’s preference from challenge.

The GAO report also highlights the Executive’s ability to withhold information, control analysis, and curtail opposition through the institutional structure enhancing agency authority relative to other stakeholders, including non-upper level employees. GAO “identified four major shortcomings” in the economic analysis EPA relied upon to compare the MACT and cap-and-trade alternatives to justify CAMR.²⁹⁶ First, EPA did not provide

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- Assessment of multi-pathway concerns.
 - A regulatory flexibility analysis addressing small business concerns.
 - Assessment of environmental justice concerns.
 - Children’s health concerns.
 - Unfunded mandate assessment, evaluating the impact of the rulemaking on State/local/tribal governments, some of which own or operate coal-fired units.
 - ICR issues.

Id. at 30-31.

²⁹³ *Id.* at 31.

²⁹⁴ *Id.*

²⁹⁵ OIG EVALUATION REP., *supra* note 261, at 31. From a substantive perspective, EPA failed to adequately satisfy the draft blueprint’s “minimum analytical” requisites pertaining to children’s health, “tribal concerns,” and cost-benefit analyses. *Id.* at 24, 30-34. *See generally* OBSERVATIONS, *supra* note 261.

²⁹⁶ OBSERVATIONS, *supra* note 261, at 8. First, EPA did not consistently analyze each of its two mercury policy options or provide estimates of the total costs and benefits of the two options, making it difficult to ascertain which policy option would provide the greatest net benefits. *Id.* “EPA’s estimates of the costs and benefits of its two proposed policy options are not comparable because the agency used inconsistent approaches in analyzing the two options.” *Id.* at 8; *see id.* at 8-10. Second, EPA did not document some of its analysis or provide consistent information on the anticipated economic effects of different mercury control levels under the two options. *Id.* at 8; *see id.* at 10-12. Third, [EPA] the

estimates of total costs and benefits associated with the MACT and cap-and-trade options.²⁹⁷ Second, economic analysis of the two options' effects under different mercury control levels was incomplete and inconsistent.²⁹⁸ Third, EPA "did not estimate the economic benefits directly related to decreased mercury emissions."²⁹⁹ Finally, the agency failed to analyze and describe "key uncertainties underlying its cost-and-benefit estimates."³⁰⁰ The defects in EPA's analysis "limit its usefulness for informing decision makers and the public about the economic trade-offs of the two options."³⁰¹

EPA's rulemaking decisions contravene OMB guidance under Executive Order 12,866,³⁰² which "direct[s] agencies to

agency did not estimate the economic benefits directly related to decreased mercury emissions. OBSERVATIONS, *supra* note 261, at 8; *see id.* at 12-13. "Finally, [EPA] did not analyze some of the key uncertainties underlying its cost-and-benefit estimates." *Id.* at 8; *see id.* at 13-15.

²⁹⁷ *Id.*

²⁹⁸ *Id.*

²⁹⁹ OBSERVATIONS, *supra* note 261, at 8; *see id.* at 12-13.

Because the two options in the proposed rule differed significantly in both the amount of mercury emission reductions and the time frames in which these reductions would occur, the lack of estimates of the mercury-specific benefits of each policy option represents a significant limitation of EPA's economic analysis. That is, to the extent that each proposed option would yield measurable mercury-specific health benefits, EPA's analysis may underestimate the total expected benefits of both options. Moreover, because the options may yield different mercury-related health benefits, the lack of estimates of these benefits makes it difficult to weigh the relative merits of the two proposed options.

Id. at 12.

³⁰⁰ *Id.* at 8; *see id.* at 13-15.

³⁰¹ OBSERVATIONS, *supra* note 261, at 8.

³⁰² Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993); *see also* OBSERVATIONS, *supra* note 261, at 2.

Office of Management and Budget (OMB) has developed guidance and best practices under Executive Order 12866 that, among other things, direct agencies to explore alternative regulatory approaches, taking into consideration different levels

conduct their economic analysis in accordance with the principles of full disclosure and transparency,"³⁰³ and also "analyze and present information on uncertainties with their cost-and-benefit estimates."³⁰⁴ EPA's economic analysis required information about future electricity demand, fuel prices, industry cost, technology development, and performance of emissions control technologies.³⁰⁵ EPA's assumptions about future demand, price, cost, and performance parameters generated uncertainties affecting the cost-benefit scenarios' reliability.³⁰⁶ However, EPA did not disclose the uncertainties produced by such assumptions,³⁰⁷ pre-empting both

of stringency, and identify the policy that would maximize net benefits (total benefits minus total costs), unless another approach is required by statute. OMB guidance states that identifying the policy option with the greatest net benefits is useful information for decision makers and the public, even when maximizing net benefits is not the only or overriding policy objective. In addition, OMB guidance directs agencies to conduct their economic analyses in accordance with the principles of full disclosure and transparency. Furthermore, in cases such as the final mercury rule, where expected economic impacts would exceed \$1 billion annually, OMB guidance directs agencies to identify and quantitatively analyze key uncertainties in their economic analysis.

Id. (footnotes omitted).

³⁰³ OBSERVATIONS, *supra* note 261, at 11, 13-14. EPA's failure to include in the proposed MACT rule the IPM analysis producing more stringent mercury limits "is inconsistent with EPA's analysis of the cap-and-trade option, in which it provided a range of costs and benefits associated with different levels of stringency." *Id.* at 11; *see also supra* notes 276-88 and accompanying text.

³⁰⁴ OBSERVATIONS, *supra* note 261, at 13.

³⁰⁵ *Id.* at 13.

³⁰⁶ *Id.* at 13-14.

³⁰⁷ *Id.* "EPA did not assess how the distribution of estimated benefits and costs would differ given changes in its assumptions about the availability, cost, and performance of mercury control technologies, even though the agency believes that these assumptions could affect its economic modeling." *Id.* at 13. "Furthermore, EPA's economic analysis states that the benefits analysis has many sources of uncertainty, including those associated with emissions data, air quality modeling, and the effect of emissions on human health. The agency did not, however, formally assess the impact of these uncertainties." *Id.* at 14.

reliable, scientific analysis and the opportunity for the general public (and EPA staff) to meaningfully evaluate the model's conclusions. In scientific analyses, uncertainties and their implications warrant discussion, not simply authoritative resolution.³⁰⁸

According to senior EPA officials responsible for analyzing the mercury proposal, changes in these assumptions could have a sizable impact on the agency's cost-and-benefit estimates. This acknowledgment of key uncertainties in its economic modeling highlights the need to determine how they could affect the overall cost-and-benefit estimates for each proposed option.³⁰⁹

The OIG and GAO reports show that EPA's corrupt "scientific" analysis, information suppression and institutional modifications were part of a broader regulatory strategy to control deliberation and dissent affecting CAMR promulgation under the CAA. The CAMR investigation reveals that the Executive overran Congress to grant the status of law to a policy agenda appeasing private industry. EPA's approach to the scientific analysis process and its deviation from past rulemaking practices point to a fundamental institutional malady; the OIG and GAO reports provide a

³⁰⁸ Science is a discursive process and the scientific claims of legitimacy as knowledge hinge on the opportunity for critical discourse in relevant scientific communities. See HELEN E. LONGINO, *SCIENCE AS SOCIAL KNOWLEDGE: VALUES AND OBJECTIVITY IN SCIENTIFIC INQUIRY* 69 (1990).

What is called scientific knowledge, then, is produced by a community (ultimately the community of all scientific practitioners) and transcends the contributions of any individual or even of any subcommunity within the larger community. Once propositions, theses, and hypotheses are developed, what will become scientific knowledge is produced collectively through the clashing and meshing of a variety of points of view.

Id.; see also Holly Doremus, *Listing Decisions Under the Endangered Species Act: Why Better Science Isn't Always Better Policy*, 75 WASH. U. L.Q. 1029, 1061-62 (1997).

³⁰⁹ OBSERVATIONS, *supra* note 261, at 14.

compelling argument for a full-scale congressional investigation of EPA's rulemaking process. Agencies exercise their political and legal authority to control the reasonable evaluation of proposed rules by minimizing dissent³¹⁰ or opposition to Executive preference—agencies may redefine the institutions governing their constitutional and legislative responsibilities to achieve corrupt objectives. Unfortunately, EPA shares the spotlight with other federal agencies dominated by political appointees intent on functionally superseding environmental legislation with either carefully crafted rules or representing Executive fiat.

B. Lynx I: The Illusion of Scientific Uncertainty

The Canada Lynx saga lasted over ten years and implicates top officials at FWS as participants in the steady erosion of environmental legislation's socio-ecological values. In the mid-1990s, the *Lynx I* conflict developed between FWS and numerous environmental organizations over listing the Canada Lynx as endangered or threatened under the ESA.³¹¹ The conflict reignited several years later in *Lynx II* after FWS failed to comply with a U.S. District Court decision requiring the agency to designate critical habitat for the lynx.³¹² The *Lynx I* Court described the admirable scientific investigation conducted by agency scientists and FWS administrators' corrupt efforts to overcome the scientists'

³¹⁰ For a discussion of the risks of conformist, majoritarian pressures and the role of "dissent" in democracy, see generally CASS SUNSTEIN, WHY SOCIETIES NEED DISSENT 145-65 (2003). "Institutions are far more likely to succeed if they subject leaders to critical scrutiny and if they ensure that courses of action will face continuing monitoring and review from outsiders—if, in short, they use diversity and dissent to reduce the risks of error that come from social influences." *Id.* at 148.

³¹¹ *Defenders of Wildlife v. Babbitt*, 958 F. Supp. 670 (D.D.C. 1997) [hereinafter *Lynx I*].

³¹² *Defenders of Wildlife v. Norton*, 239 F. Supp. 2d 9 (D.D.C. 2002) [hereinafter *Lynx II*].

conclusions. The administrators revised customary agency interpretations of the ESA,³¹³ withheld FWS scientists' research and conclusions from the public domain,³¹⁴ and deceptively applied a non-agency scientist's report out-of-context in an attempt to prevent listing the Lynx.³¹⁵

³¹³ The ESA was designed to ensure "better safeguarding, for the benefit of all citizens, the Nation's heritage in fish, wildlife and plants." 16 U.S.C. § 1531(a)(5) (2000). Congress intended the ESA to "provide a means whereby the ecosystems upon which endangered and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species." *Id.* § 1531(a)(1)(B). The ESA requires FWS to evaluate five factors to determine whether to list a species as "threatened" or "endangered."

- (A) the present or threatened destruction, modification, or curtailment of its habitat or range;
- (B) over-utilization for commercial, recreational, scientific, or educational purposes;
- (C) disease or predation;
- (D) the inadequacy of existing regulatory mechanisms; or
- (E) other natural or manmade factors affecting its continued existence.

Id. § 1533(a)(1). "[T]hreatened species" are species that are "likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." *Id.* § 1533(20). "[E]ndangered species" refers to any species "which is in danger of extinction throughout all or a significant portion of its range." *Id.* § 1533(6). The Secretary of the Interior (through the United States Fish and Wildlife Service) determines whether species should be listed as endangered or threatened "solely on the basis of the best available scientific and commercial data." 16 U.S.C. § 1533(b)(1)(A) (2000). FWS must respond within ninety days after receiving an interested person's petition to add a species to the list of endangered and threatened species. *Id.* § 1533(b)(3)(D)(i). If the agency determines that the petition presents "substantial scientific or commercial information indicating that the petitioned action may be warranted," FWS must review the species' status within twelve months of the agency's receipt of the petition to determine whether listing is warranted. *Id.* § 1533(b)(3)(D)(i). FWS decisions that petitions are without merit—referred to statutorily as "negative findings"—are subject to judicial review. 16 U.S.C. 1533(b)(3)(C)(ii) (2000). The agency must publish its review of the species' status within twelve months from the date FWS receives the petition. 16 U.S.C. 1533(b)(5) (2000).

³¹⁴ *Lynx I*, 958 F. Supp. at 685; see also *infra* notes 326-40 and accompanying text.

³¹⁵ See *infra* notes 342-45 and accompanying text.

In mid-1994, the Biodiversity Legal Foundation ("BLF") filed a petition with FWS requesting that the "conterminous United States population of the 'North American' lynx . . . be listed as a threatened or endangered species."³¹⁶ FWS's 90-day finding³¹⁷ indicated that all five ESA criteria for listing a species as endangered were applicable to lynx and that listing "may be warranted."³¹⁸ The finding "emphasized that habitat destruction

³¹⁶ 90-Day Finding for a Petition to List as Endangered or Threatened the Contiguous United States Population of the Canada lynx and to Emergency List a Southern Rocky Mountain Population, 59 Fed. Reg. 44,123 (Aug. 26, 1994) (to be codified at 50 C.F.R. pt. 17) [hereinafter 90-Day Finding for a Petition]. The Foundation argued that the following reasons justified listing the lynx:

1. Intensive logging that eliminates foraging and denning habitat for Canada lynx and snowshoe hare . . . creates openings in the forest that Canada lynx avoid, and causes habitat fragmentation that creates barriers to dispersal and colonization;
2. Logging roads allow human accessibility that may increase incidental trapping . . . and disrupt Canada lynx travel and hunting;
3. Forest fire suppression adversely affects Canada lynx through the reduction of hare habitat;
4. Few comprehensive management plans for Canada lynx have been developed or implemented by government agencies;
5. State agencies have not adequately modified their furbearer regulations;
6. The Canada lynx's inherent characteristics, including naturally low population densities, specialized prey requirements, and large home ranges, make it vulnerable to extinction;
- and 7. The southern Rockies population is further threatened by ski area developments that may reduce habitat and prey base and increase human disturbance and accidental trapping.

Id.

³¹⁷ See 12-Month Finding for a Petition to List as Endangered or Threatened the Contiguous United States Population of the Canada Lynx, 59 Fed. Reg. 66,507, 66,507-09 (Dec. 27, 1994) (to be codified at 50 C.F.R. pt. 17) [hereinafter 12-Month Finding].

³¹⁸ 90-Day Finding for a Petition, 59 Fed. Reg. at 44,123-24. FWS's pertinent "listing" conclusions included:

A. The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range

The suppression of forest fires and intensive logging prescriptions have had a detrimental effect on Canada lynx

and fragmentation, due particularly to heavy logging, threatened the continued existence of the Lynx."³¹⁹

The FWS Region Six Office³²⁰ assumed the principal duties for researching the lynx's "biological status"³²¹ and for drafting a proposed 12-month listing decision in response to the Foundation's petition.³²² In October 1994, the Region Six biologists concluded "that the Lynx should be listed throughout its range in the conterminous United States."³²³ The FWS biologists' recommendation was supported by an extensive analysis of the Lynx's current status;³²⁴ no FWS biologist or lynx expert disagreed with the

habitat, and logging roads have increased human accessibility to the species.

B. Overutilization for Commercial . . . Scientific or Educational Purposes

Past overharvest has had a detrimental effect on Canada lynx populations.

C. Disease or Predation

Canada lynx may be displaced or eliminated when competitors, such as the bobcat or coyote, expand into the range of the Canada lynx.

D. The Inadequacy of Existing Regulatory Mechanisms

[Many States] either prohibit or control the "take" of Canada Lynx, but their laws are relative[ly] ineffective in controlling the loss or modification of the species' habitat.

E. Other Natural or Manmade Factors Affecting Its Continued Existence

Human development has had a detrimental effect on the Canada lynx habitat and population.

Id. (emphasis added).

³¹⁹ *Lynx I*, 958 F. Supp. at 675.

³²⁰ "Region 6 . . . comprises a significant portion of the Lynx's historical range, including Colorado, Montana, North Dakota, Utah, and Wyoming." *Lynx I*, 958 F. Supp. at 674.

³²¹ Notice of Status Review for the Lynx, 59 Fed. Reg. 4887 (Feb. 2, 1994) (to be codified at 50 C.F.R. pt. 17).

³²² *Id.* at 676. Region Six biologists reviewed the public comments and additional scientific information while also conducting their own review of "available scientific and commercial information." *Id.*

³²³ *Id.* The potential listing affected FWS Regions 1, 3, 5, and 6.

³²⁴ *Id.*

Region Six biologists' 50-page recommendation to list the lynx under the ESA.³²⁵

The Acting Director of FWS, Richard Smith, however, "rejected Region 6's proposal in a five-page memorandum which summarily concluded that the 'listing of the Lynx in the 48 contiguous States is not warranted.'"³²⁶ FWS justified its decision not to list the lynx by claiming the Region Six biologists' report "did not provide any *conclusive evidence* of the biological vulnerability or real threats to the species in the contiguous 48 states."³²⁷ Smith's memorandum did not cite any scientific study, lynx expert, or any other reliable source to support claims that directly

The [FWS Region 6] biologists drafted a [proposed 12-month finding] to list one segment of the Lynx population, in the Northwest and Northern Rockies, as threatened, and a second population, in the Southern Rockies, Great Lakes, and Northeast, as endangered. This recommendation was accompanied by an extensive, 50-page analysis of the Lynx's history and current status. The Region 6 biologists concluded that "Canada lynx populations in the contiguous United States have suffered significant declines due to trapping and hunting and habitat loss" . . . and that at least four of the five statutory criteria for listing a species under the ESA apply to the Lynx. . . . Relying on extensive citations of scientific evidence, the biologists concluded that Lynx habitat is currently being destroyed, degraded, and fragmented by a number of factors including timber harvest, fire suppression, road construction, and clearing of forests for urbanization, ski areas, and agriculture.

Id. The Region Six biologists circulated their draft "12-month finding" for review by FWS biologists in three other FWS regions containing lynx populations. *Lynx I*, 958 F. Supp. at 676. FWS scientists in the Great Lakes area (Region 3) and the Northeast area (Region 5) supported the Region Six biologists' opinion. *Id.* The Director of Region One, which encompasses the Pacific Northwest, was the only director to oppose the Region Six biologists' scientific position. *Id.* However, "[e]ven within Region 1, the FWS biologists in the agency's field office in Washington State—the state with the largest Lynx population in Region 1—supported the proposed rule." *Id.*

³²⁵ *Id.*

³²⁶ *Id.*

³²⁷ *Id.* at 679.

contradicted the Region Six biologists' conclusions.³²⁸ Acting Director Smith stated that "[t]here is little evidence that lynx populations have suffered significant declines due to trapping and hunting' and that 'hunting and trapping pressure on the lynx in the U.S. has always been low.'"³²⁹ On December 27, 1994, FWS published a 12-month finding consistent with Smith's five-page memo that officially disagreed with petitioner's position and concluded that the lynx should not be listed as threatened or endangered.³³⁰ FWS's ruling did not disclose Region Six's scientific data and conclusions, their draft proposal, or their 50-page recommendation, and it contradicted each of the agency's conclusions in the 90-day finding.³³¹ The agency's 12-month finding suggested that (1) contiguous United States lynx populations were never biologically viable, and (2) any fluctuations in lynx populations were due to "dispersal" events.³³²

³²⁸ *Lynx I*, 958 F. Supp. at 676.

³²⁹ *Id.* (citations omitted).

³³⁰ 12-Month Finding, 59 Fed. Reg. 66,507, 66,509 (Dec. 27, 1994) (to be codified at 50 C.F.R. pt. 17). "After carefully evaluating the best available scientific and commercial information regarding the past, present and future threats faced by this species, the Service finds that listing of the Canada lynx in the contiguous U.S. is not warranted." *Id.*

³³¹ Compare 12-Month Finding, 59 Fed. Reg. at 66,507-09, with 90-Day Finding, 59 Fed. Reg. at 44,123-24. For instance, the majority of the FWS biologists agreed that by 1996, the lynx population in the lower 48 states had declined dramatically for many reasons, including habitat degradation, trapping, logging, road building and other development. But FWS's 12-month finding did not specifically state whether "existing regulatory mechanisms" were "inadequate," choosing instead to simply describe laws that protected lynx or limited hunting and trapping. 12-Month Finding, 59 Fed. Reg. at 66,508. Nor did FWS discuss petitioner's claims that the absence of agency management plans and current state "furbearer regulations" contributed to FWS scientists' view that lynx were "in danger of extinction throughout all or a significant part of its range." See 50 C.F.R. § 424.02(e) (2005). FWS did not publish any data quantifying past, present or future lynx populations, claiming that "[Canada] [l]ynx distribution has not significantly changed from historic ranges except for periodic peripheral shifts of distribution . . . and local losses due to loss of habitat in southern-most areas." 12-Month Finding, 59 Fed. Reg. at 66,509; see also *Lynx I*, 958 F. Supp. at 679.

³³² 12-Month Finding, 59 Fed. Reg. at 66,508. "Historically, lynx populations were minimal in the contiguous U.S. due to a lack of suitable habitat. . . . There

The agency defined all problems bearing upon the environmentalists' petition in terms of scientific certainty (i.e., conclusive evidence).³³³ The agency's strategy necessarily precluded any petition from resulting in a species listing as threatened or endangered; the agency constructed an unattainable standard at odds with the institutions that were developed to implement the ESA. On January 30, 1996, Defenders of Wildlife and other environmental groups sued FWS, claiming that FWS's 12-month "not warranted" finding was arbitrary and capricious.³³⁴ On March 27, 1997, United States District Court Judge Gladys Kessler agreed with petitioners, concluding that FWS's decisions consistently violated the ESA and the institutions governing the endangered species listing process.³³⁵

FWS has consistently ignored the analysis of its expert biologists as to each of the five statutory factors, basing its decision on unsupported conclusory statements as well as facts which are directly contradicted by undisputed evidence in the Administrative Record. The FWS decision not to list the Canada Lynx and grant it the protections of the ESA is arbitrary and capricious, applied an incorrect legal standard, relied on glaringly faulty factual premises, and ignored the views of its own experts.³³⁶

Judge Kessler's analysis highlights FWS administrators' corrupt efforts to change the institutional framework governing the ESA listing process. The Acting Director's institutional position

is evidence that the increased presence of lynx in the contiguous U.S. corresponds to cyclic dispersals from Canada." *Id.* FWS's ruling also concluded that "[h]unting and trapping pressure on the lynx has been historically low in the U.S. and there is little evidence that these activities pose a threat to the continued existence of this species in the wild." *Id.*

³³³ *Id.* at 681.

³³⁴ See *Lynx I*, 958 F. Supp. at 673.

³³⁵ *Id.* at 685.

³³⁶ *Id.*

“contrast[ed] starkly” with the FWS’s legally accepted interpretation of the ESA’s “best scientific and commercial data available” standard.³³⁷ Judge Kessler noted that “[j]udicial and administrative interpretations of the ESA have consistently construed the [ESA’s] ‘best available data’ standard as requiring far less than ‘conclusive evidence.’”³³⁸ In the past, “FWS itself has taken the position that it need not, and must not, wait for conclusive evidence in order to list a species.”³³⁹ The agency’s senior management invented a new standard in direct conflict with FWS’s historical position.³⁴⁰ The depth of the administrator’s institutional charade is illustrated by Judge Kessler’s comments on the novel conclusive evidence standard.

Assuming *arguendo* that [conclusive evidence] was the standard, it is not at all clear that the Region 6 biologists’ report was not conclusive. Given the thorough and extensively documented 50-page analysis of the Region 6 biologists, concluding that the Lynx has been reduced from a range encompassing one-third of the contiguous United States to a few remnant, scattered populations, and the overwhelming consensus among the biologists, after evaluating

³³⁷ 958 F. Supp at 679.

³³⁸ *Id.* at 680. Judge Kessler clearly identified the lawyers’ strategy as an attempt to re-interpret or re-frame FWS administrators’ comments in an unreasonably charitable light.

[T]he government attempted to argue that even though the agency’s decision repeatedly used the phrase “conclusive evidence,” it was actually applying the “best available data” standard required by the ESA. Defendant [has], however, pointed to nothing in the Administrative Record to indicate that the agency applied anything other than the “conclusive evidence” standard it plainly states in its final decision. It is well-established that this kind of “post hoc rationalization” by an agency’s lawyer cannot sustain a decision upon review.

Id. at 681 (citation omitted).

³³⁹ *Id.* at 680.

³⁴⁰ *Id.*

the existing scientific evidence, that the Lynx must be listed, it is difficult to imagine how much more evidence would be needed to qualify as "conclusive."³⁴¹

Finally, FWS used a scientist's opinion to accomplish ethically questionable, legal and political objectives. The agency claimed that a biologist supported the proposition that lynx could exist in concert with continued logging.³⁴² However, as Judge Kessler pointed out, the agency took the scientist's report out-of-context, reframing its import in a misleading manner, in order to argue for a political position inconsistent with the scientific opinion.³⁴³ Contrary to agency representations, the biologist did not advocate maintenance of the status quo institutional framework governing the lynx's regulation.³⁴⁴ Instead, "the thrust of the [biologist's] article [was] that limited logging, conditioned on proper timber management, would not damaged the Lynx population *if the Lynx was listed and properly protected*."³⁴⁵

C. Conclusion

In *Lynx I*, FWS administrators created the illusion of scientific uncertainty by revising the informal rules governing the agency's interpretation of the ESA's "best available science" standard. FWS restructured the institutions determining the legal significance of agency scientists' conclusions about listing the lynx, just as EPA did a decade later to suppress the IPM results contradicting EPA's legislative goal.³⁴⁶ Corrupt practices that undermine environmental legislation and invade Congress's constitutional authority cross party lines; the causes of factionalism emerge from within people in unrestrained positions of

³⁴¹ *Id.* at 679 n.2.

³⁴² *Lynx I*, 958 F. Supp. at 683.

³⁴³ *Id.*

³⁴⁴ *Id.*

³⁴⁵ *Id.* (emphasis added).

³⁴⁶ See *supra* notes 327-44 and accompanying text.

legislative power interacting with powerful subsets of the legislated. Contemporary arrangements of political power guarantee that environmental agencies will continue to produce unsound, politically motivated regulatory decisions. Until Congress institutionally proscribes the Executive's authority to enact backdoor legislation through its agencies' power, judicial intervention will be necessary to hold administrators accountable for their corrupt decisions.

V. CONCLUSION—CHECKING CORRUPTION

A Constitution is only so far good, as it provides a remedy against mal-administration.³⁴⁷

—David Hume, *That Politics May Be Reduced to a Science*

It is a matter of both wonder and regret that those who raise so many objections against the new Constitution should never call to mind the defects of that which is to be exchanged for it. It is not necessary that the former should be perfect: it is sufficient that the latter is more imperfect.³⁴⁸

—James Madison, THE FEDERALIST NO. 38

Signs of corrupt influence in government decisions tend to be discounted until catastrophes or crises develop. The Civil Rights and Environmental Eras were sparked by citizens' outrage at the use of government's power to tacitly or overtly support actions destroying lives and threatening liberty. The American Revolution shared similar features of initial public dismay, followed by outrage and eventually armed revolt. Madison publicly described what many citizens had observed or suspected, corruption in State

³⁴⁷ David Hume, *That Politics May Be Reduced to a Science*, in DAVID HUME POLITICAL ESSAYS 14 (Knud Haakonssen ed., 2003).

³⁴⁸ THE FEDERALIST NO. 38, at 205 (James Madison).

legislatures under the Articles of Confederation.³⁴⁹ The multiplicity and mutability of laws, produced by the collusion of self-interested legislators and powerful propertied interests, alarmed Madison and inspired the creation of the Constitution's checks and balances.³⁵⁰ The Constitution is the institutional foundation for collective and individual liberty,³⁵¹ providing a means to ensure stability in government as culture and technology evolve in a changing world.

Traditional public distrust of government's authority, a remnant of the American Revolution, was harshly adjusted by the Great Depression.³⁵² Franklin Delano Roosevelt strengthened Executive power over national security and the new administrative state. He championed social justice initiatives grounded in practical New Deal programs targeting socio-economic barriers that suppressed individual economic security and national unity.³⁵³ The New Deal's institutional costs were borne by Americans through the transfer of autonomy to administrative, centralized authority. Americans placed their trust in administrative agencies' large-scale creation, which significantly diminished the ongoing responsibilities of Congress and the courts.³⁵⁴ Administrative agencies' expertise promised a new efficiency in government benefiting all sectors of society.

As social conditions improved, Americans became increasingly concerned about the quality of life generated by an economically efficient society.³⁵⁵ The Environmental Era showed solid indications of making progress against industrial power through congressional legislation designed to protect long-term, socio-ecological values from short-term economic interests.³⁵⁶ Economic sacrifice was accepted by Congress and the populace as a necessary

³⁴⁹ See *supra* notes 146-57 and accompanying text.

³⁵⁰ See *supra* notes 153-72 and accompanying text.

³⁵¹ See *id.*

³⁵² See *supra* notes 179-95 and accompanying text.

³⁵³ See *supra* notes 192-95 and accompanying text.

³⁵⁴ *Id.*

³⁵⁵ Hays, *supra* note 2, at 3.

³⁵⁶ See *supra* notes 6-22 and accompanying text.

means to advance collective values and ecological essentials across generations. The highly successful legislation created conditions for positive technological and environmental change.³⁵⁷ The institutional means necessary to promote collective liberty through environmental legislation's purposes and provisions were not sufficient, however, to ensure lasting cultural change in administrative government. Agency power and susceptibility to factional control demonstrates the wisdom of Madison's system of checks and balances³⁵⁸ and renders a monumental fiction the popular notion that the elected Executive ensures environmental agencies' accountability to the public.³⁵⁹

Since the 1980s, administrative agencies have provided the institutional avenue necessary for the Executive to deviate from the letter and spirit of environmental legislation. Agencies exist in a "zone of [constitutional] twilight"³⁶⁰ characterized by numerous, unchecked opportunities for the Executive to create environmental law and policy affecting Americans' collective values. The Executive's legislative power, exercised through agency authority dating to the New Deal, produced a new institutional framework undermining the socio-ecological values of the 1960s and 1970s. Congressional inertia and judicial reticence to apply the hard look doctrine invited the Executive to use administrative agencies to enact legislative agendas rejected by Congress. The net result has often been new law; environmental legislation's progressive institutions are fast becoming cultural relics.³⁶¹ In the 21st century, environmental

³⁵⁷ SUNSTEIN, *AFTER THE RIGHTS REVOLUTION*, *supra* note 18, at 77-79 ("The United States faced an enormous problem of air and water pollution in the 1960s, posing a variety of short-term and long-term threats to safety and health. Largely as a result of environmental controls in the 1960s and 1970s, the problem has been substantially reduced."). American government should build on environmental legislation's success and compel industry to continue to make technological changes fostering improvements in natural resource conditions.

³⁵⁸ See *supra* notes 160-74 and accompanying text.

³⁵⁹ See Farina, *supra* note 38, at 504.

³⁶⁰ *Youngstown*, 343 U.S. at 637 (1952) (Jackson, J., concurring).

³⁶¹ See *INS v. Chadha*, 462 U.S. 919, 985-86 (White, J., dissenting).

For some time, the sheer amount of law—the substantive rules that regulate private conduct and direct the operation of

regulatory agencies have become the Executive's backdoor legislative authority.

The creation of a balance of power in government fundamentally shapes a society's social, economic, and political relations.³⁶² Contemporary institutional constraints are employed inadequately to curtail factional influence over environmental policy. Broad sustainable development platforms fail to sufficiently address problems posed by the Executive's runaway authority over environmental law. Sustainable development advocates aggravate the situation by proposing the unattainable, holistic integration of ecological, social, economic, and national security goals. Political headway for these notions risks further empowering the Executive and diverting valuable resources from the pressing problem of corruption in government.

New institutions are necessary to promote technological and cultural adaptation consistent with socio-ecological values. The future success of environmental law and policy hinges on whether Congress and the judiciary restructure the institutional framework allocating power among the various branches of government.³⁶³ First, Congress should reassert its constitutional authority and rein in administrative agency discretion.³⁶⁴ Congress should expand the OIG and GAO investigation of the EPA into federal land management agencies' rulemaking and rule implementation processes.³⁶⁵

government—made by the agencies has far outnumbered the lawmaking engaged in by Congress through the traditional process.

Id.

³⁶² HURST, *supra* note 82, at 42.

³⁶³ See Seidenfeld, *supra* note 41, at 126-27.

³⁶⁴ HURST, *supra* note 208, at 153-54.

³⁶⁵ Specifically, oversight should extend to the Bureau of Land Management and the Forest Service. A thorough investigation of the Forest Service's rulemaking process that resulted in the 2005 Rule 219 is warranted to develop information about the influence of factions on Forest Service rulemaking and rule implementation decisions. The Final Rule 219 differs substantially from any proposed rule's description of ecological and species diversity. The Rule arguably eliminated the practical import of NFMA's "diversity" provision; *see also* HURST, *supra* note 208, at 153-54.

These investigations will reveal institutional shortcomings that create opportunities for the corruption in environmental law and policy. The investigations should also yield insights about the role of ex parte contacts in the deliberative process of environmental law's implementation.³⁶⁶

Second, Congress should enact specific legislation describing civil and criminal penalties for agency employees who willfully violate environmental laws governing information disclosure to the public or scientific analysis procedures. Agencies' authoritative control over information and knowledge poses a severe threat to constitutional values of deliberation and accountability. The EPA's mercury emissions rule and the FWS decision not to list the lynx each turned on upper-level management's unilateral authority to withhold from the public scientific or technical information relevant to the reasonable review of the agency's rulemaking decision.³⁶⁷ The current institutional framework is virtually barren of enforcement characteristics necessary to steer government decisions toward environmental legislation's long-term values and overcome agency vulnerability to corruption.³⁶⁸ Congress enhances deliberation and accountability with legislation targeting corruption in environmental law and policy.

The 1970's [sic] brought more urgent meaning to the judgment Woodrow Wilson had passed in 1885: "It is the proper duty of a representative body . . . to be the eyes and the voice, and to embody the wisdom and will of its constituents. Unless Congress have and use every means of acquainting itself with the acts and the disposition of the administrative agents of the government, the country must be helpless to learn how it is being served . . . [and] remain in embarrassing, crippling ignorance of the very affairs which it is most important that it should understand and direct."

Id. at 154 (quoting WOODROW WILSON, CONGRESSIONAL GOVERNMENT 303 (9th ed., Houghton Mifflin 1894)).

³⁶⁶ See Sunstein, *Interest Groups in American Public Law*, *supra* note 50, at 74 (arguing that hard look doctrine justifies "disclosure of at least some ex parte contacts in informal rulemaking").

³⁶⁷ See generally *supra* Part IV.A.

³⁶⁸ See NORTH, *supra* note 42, at 33. See generally *supra* note 50 and accompanying text.

Madison did not aim solely for inter-branch accountability in government, but also for individual accountability for unjust government decisions compromising collective liberty. Public officials need to be reminded that deliberation over sensitive environmental rulemaking requires transparent and complete communication with the American people. The potential for political appointees or their underlings' public appearance to explain a decision in a United States District Court (or Court of Appeals) would serve as a substantial deterrent to factional influence on agency behavior. Faced with the possibility of appearing before a federal judge to explain a corrupt decision, agencies' senior management will become less likely to issue edicts from the backroom demanding particular results that contravene statutory provisions and constitutional values.³⁶⁹

Courts should complement congressional actions by exercising their constitutional responsibilities to breathe new life into the dormant hard look doctrine.³⁷⁰ The judiciary should apply

³⁶⁹ See THE FEDERALIST NO. 78, *supra* note 171, at 438.

³⁷⁰ For a discussion of the hard look doctrine, see *supra* notes 218-43 and accompanying text. In 1985, Cass Sunstein advocated less deferential judicial review in administrative law based upon a "Madisonian conception of politics." Sunstein, *Interest Groups in American Public Law*, *supra* note 50 at 68. Professor Sunstein's view on the issue of aggressive judicial review are particularly applicable to the contemporary states of environmental law and policy.

There is an apparent anomaly in relying on principles of Madisonian republicanism as a basis for a vigorous judicial role. Those principles are rooted in a conception of politics which does not easily accommodate judicial intrusions. But those intrusions become defensible when they are based on constitutional and statutory provisions whose purpose and effect are to improve a political process that amounts in the circumstances to lawmaking by powerful private groups. The judicial role . . . is justified in part by the need for some institution of government to incline politics in Madisonian directions.

Id. at 79 (footnote omitted). Hamilton's views on the judicial role are noted:

But it is not with a view to infractions of the constitution only that the independence of the judges may be an essential safeguard against the effects of occasional ill humours in the society. . . . It not only serves to moderate the immediate mischiefs of those which may have been passed, but it operates

the doctrine aggressively to assess whether administrators reasonably considered all "relevant factors" affecting an agency's determination.³⁷¹ Deliberative democracy requires judicial satisfaction that all affected groups have been treated equally throughout the rulemaking process.³⁷² Courts should grant liberal discovery to promote accountability in environmental law's implementation. Courts should also construe the hard look doctrine to incorporate constitutional principles of equal protection

as a check upon the legislative body in passing them; who, perceiving that obstacles to the success of an iniquitous intention are to be expected from the scruples of the courts, are in a manner compelled by the very motives of the injustice they meditate, to qualify their attempts. This is a circumstance calculated to have more influence upon the character of our governments, than but few may be aware of.

THE FEDERALIST NO. 78 (Alexander Hamilton) (Terrence Ball ed., 2003).

³⁷¹ *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402, 416 (1971). The judiciary should apply the hard look doctrine when reviewing agency decisions to determine whether administrators reasonably considered all "relevant factors" affecting an agency's determination. *Id.*; see also *State Farm*, 463 U.S. 29, 39-43; *Overton Park*, 401 U.S. at 403. See Sunstein, *Interest Groups in American Public Law*, *supra* note 50, at 74, suggesting that courts should

continue the development of substantive and procedural devices designed to ensure against factional tyranny in the implementation process. Such devices would include general application and extension of the four basic requirements of the current hard-look doctrine—to require, for example, disclosure of at least some *ex parte* contacts in informal rulemaking. The basic goal would be to ensure that agency outcomes reflect some form of deliberation on the part of agency officials. The deliberative process should in turn involve statutorily relevant factors.

Id.

³⁷² "In a deliberative democracy, the exercise of public power must be justified by legitimate reason—not merely by the will of some segment of society, and indeed not merely by the will of the majority." SUNSTEIN, *WHY SOCIETIES NEED DISSENT* 150; see also Sunstein, *Interest Groups in American Public Law*, *supra* note 50, at 53. The Madisonian "conception of politics—that legislators have a deliberative responsibility—is quite broad. It captures a theme that pervades American constitutional law. Indeed, that conception is the most plausible candidate we have for a unitary understanding of the sorts of conduct forbidden by the Constitution." *Id.*

and due process in order to assess the legitimacy of rulemaking decisions representing Executive legislation.³⁷³

Courts should be especially wary of agencies' "expert" decisions.³⁷⁴ Administrators' choices among different spatial and temporal dimensions critically determine the relevance of the scientific and social consequences of a particular policy. Judicial deference to agencies' scientific decisions too often ignores the nature of scientific investigation and analysis, and the impact of values upon the process of declaring an approach to be based upon the best available science or the maximum achievable technology.³⁷⁵ The mercury emissions rulemaking process and the

³⁷³ See Sunstein, *Interest Groups in American Public Law*, *supra* note 50, at 75. ("One way to take the Madisonian understanding more seriously would be for courts to reform the doctrines of standing, reviewability, and scope of review so as to treat the beneficiaries of regulation generally in the same way as regulated entities."). Sunstein argues that most of the developments in administrative law have occurred without constitutional compulsion. They must be understood either as a species of statutory interpretation—of the Administrative Procedure Act and of governing substantive statutes—or as federal common law. But the developments are strikingly similar in both form and ultimate aim to developments under equal protection review.

Id. at 64-65 (footnote omitted).

³⁷⁴ *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 647 (1971).

A court does not depart from its proper function when it undertakes a study of the record, hopefully perceptive, even as to the evidence on technical and specialized matters, for this enables the court to penetrate to the underlying decisions of the agency, to satisfy itself that the agency has exercised a reasoned discretion, with reasons that do not deviate from or ignore the ascertainable legislative intent.

Id. at 648 (citing *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 850, *cert. denied*, 403 U.S. 923 (1971)) (footnote omitted).

³⁷⁵ See Cary Coglianese & Gary E. Marchant, *Shifting Sands: The Limits of Science in Setting Risk Standards*, 152 U. PA. L. REV. 1255 (2004). "When agencies rely on science to explain the policy decisions they make, they . . . escape their duty to provide a principled account of their decision making." *Id.* at 1359.

Lynx I case poignantly illustrate that agencies make the value judgment necessary to decide how scientific uncertainty should affect policy decisions.³⁷⁶ In the EPA and FWS cases, the agencies exploited their authority over scientific knowledge relevant to a rulemaking decision, engaging in a form of epistemological authoritarianism to achieve political objectives.³⁷⁷ Institutional change that promotes deliberation in administrative rulemaking processes protects environmental law's norms and the credibility of legitimate scientific knowledge claims.

Regulatory agency decisions that deny deliberation and subvert accountability threaten the well-being of present and future generations. Environmental legislation enacted in the 1960s and '70s aimed to restructure institutions responsible for protecting Americans' interests in biodiversity and environmental quality.

In short, EPA's use of a science-based rhetoric enabled it to avoid responsibility for providing any clear, consistent reasons for its policy choices in setting air quality standards. The Agency's shifting and incoherent approach to its NAAQS decisions ultimately failed to live up to the aspiration for reasoned decision making that undergirds contemporary administrative law.

Id. at 1260-61 (citations omitted). *See generally id.* at 1290-1323.

³⁷⁶ *See supra* Parts IV.A. and IV.B.

³⁷⁷ Rudd, *The Forest Service's Epistemic Judgments*, *supra* note 266, at 163 (describing the "the exercise of the [Forest Service's] institutional power to unilaterally deny knowledge claims accepted as 'scientific' by the broader scientific community").

[T]he Forest Service is in the enviable position of writing its own rules *and* determining how knowledge claims should be identified and evaluated before being judged "scientific" for NFMA purposes. . . . The Service's institutional power to write its own rules insulates it from public concerns that its management decisions may unfairly disregard "new knowledge." In the process, Forest Service scientists are also proscribed from effectively participating in the broader scientific communities' intersubjective and transformative criticism of new knowledge claims. Forest Service administrators dictate which scientific claims to accept as valid, irrespective the views of the broader scientific community *or* agency scientists.

Id. at 181-82 (footnote omitted).

Congress overlooked, however, the power of special interests to reconfigure distributions of authority and undermine environmental law's purposes through administrative rules. The American public pays the ultimate price for the Executive's authority to enact "backdoor" legislation; the loss of individual freedom to participate in government decisions that may constrain one's health and welfare. The vast majority of environmental regulatory agency employees suffer an additional indignity through the sequestration of their professional, credible, and diligently prepared reports and contributions to the rulemaking process. A renaissance in environmental law's collective values calls for the restructuring of administrative institutions that dominate American environmental policy.