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Jamison E. Colburn

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THE CYNIC AT THE CIRCUS

Jamison E. Colburn*

The October 2008 Term at the United States Supreme Court involved five cases nominally bearing on “environmental law” in the United States. In addition to yet another standing case¹ and a preliminary injunction case,² the Court heard three statutory interpretation cases—one involving the Superfund cleanup statute,³ two involving the Clean Water Act (CWA).⁴ From that vantage, it should have been a notable term that changed casebooks, changed environmental law doctrine, or resolved some long-burning questions.⁵ But the Court did nothing of the sort. It framed up five meticulously rendered issues and authored narrow—even technical—opinions on the tightly constrained questions raised therein.⁶ This has been the pattern for some time at the Supreme Court and it is becoming the pattern in the courts of appeal, too.⁷

When our appellate courts decide ‘environmental’ cases today, they enter a world where no one is in charge, where no single institutional actor actually sets the major value priorities, and where there is no single overarching point. They enter a nexus of competing themes, attractions, and distractions—a circus. And they are constantly invited to provide that which they will *never* provide: the overarching priorities.

* Professor of Law, Penn State University. My thanks to Jim May and Mike Dorf for helpful comments on an earlier draft.

1. *Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1147 (2009). Obviously, standing cases are not necessarily “environmental” in nature. A disproportionate share of the Court’s contemporary standing doctrine, however, has come in response to the “citizen suit” litigation so characteristic of our environmental statutes. See e.g. *Mass. v. EPA*, 549 U.S. 497, 517–518 (2007); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 174 (2000); *Steel Co. v. Citizens for a Better Env.*, 523 U.S. 83, 86 (1998); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 558 (1992).

2. *Winter v. Natl. Resources Def. Council*, 129 S. Ct. 365, 370 (2009).

3. *Burlington Northern & Santa Fe Ry. Co. v. U.S.*, 129 S. Ct. 1870, 1874 (2009).

4. *Coeur Alaska, Inc. v. S.E. Alaska Conserv. Council*, 129 S. Ct. 2458, 2463 (2009); *Entergy v. Riverkeeper*, 129 S. Ct. 1498, 1502 (2009).

5. October 2008 ranks among the leading modern Supreme Court Terms for its environmental fare, certainly. The only other similar Term in recent memory is October 2006, where the Court also heard fully five environmental cases. See *Mass. v. EPA*, 549 U.S. at 517–518; *Envtl. Def. v. Duke Energy*, 549 U.S. 561, 65–66 (2007); *United Haulers Assn. v. Oneida-Herkeimer Solid Waste Mgt. Auth.*, 550 U.S. 330, 334 (2007); *U.S. v. Atlantic Research Corp.*, 551 U.S. 128, 131 (2007); *National Assn. of Homebuilders v. Defenders of Wildlife*, 551 U.S. 644, 649 (2007).

6. *Coeur Alaska*, for example, involved the Court in a somewhat moribund internecine struggle between EPA and the Army Corps of Engineers over the propriety of a CWA permit the Corps had issued for a discharge of mining waste. *Coeur Alaska*, 129 S.Ct. at 2463. Not only was this chiefly a matter of interpreting EPA rules on CWA permitting authority, it also came down to some of the finer details of the Court’s own deference doctrines. *Id.* at 2471–2477, 2479.

7. Imagine this Supreme Court handling the issues that divided the justices in *Sierra Club v. Morton*, 405 U.S. 727 (1972). Today, the opinions in environmental cases are becoming as “granular” in the courts of appeal as they usually are at the Supreme Court.

The Cynics of ancient Greece, especially Diogenes, viewed their culture's dominant values with disdain and sought to discount categorically what, in their view, was at the root of so much social discord, dispute, and strife.⁸ Theirs was not a self-standing philosophy, tradition, or school, but rather a series of "philosophizing" gestures that were "hostile and parodic incursions onto the territory" of the true philosophers like Plato.⁹ Cynicism since Burke, though, is perhaps most noted for discrediting Rousseau and other revolutionaries who had invoked its teachings against the eighteenth century's dominant ideologies.¹⁰ Modern cynics are those who presume the insincerity of others and doubt everyone's motives.¹¹ "The modern cynic—whose attributes include distrust, disbelief, shameless indifference, and contempt for all motives besides self-interest and pursuit of power—appears in a society in which opinions circulate, but in ways that ensure that they have no particular force or effect upon its political direction."¹² Our somewhat cynical appellate judges enter the environmental law circus doubting everyone's motives, viewing the combat they are called to referee with a special form of contempt that is now manifesting itself at a systemic level.

Perhaps not surprisingly, then, the five cases of the 2008 Term reaffirmed how conflicted federal "environmental law" is growing in the U.S. if we assess it as *either* (1) a field of practice that is meant to foster positive change on behalf of something called "the environment," or (2) a field of practice wherein norms being cultivated by "environmental lawyers" (be they norms of statutory interpretation, the valuation of nature, etc.) make a practical difference. Indeed, these cases perhaps best demonstrate the normative and political malfunctioning of our 'system' of environmental laws wherein gigantic, programmatic statutes leave all the major questions of valuation and priority unanswered—questions that then constantly arise in the very institutional settings where they cannot be resolved; that is, before administrative agencies and courts. And, to be sure, the jurisdictional landscape of modern environmental law does not match its normative pretensions. The 2008 Term provided us all with a cynical perspective of this mismatch, but this is also an opportunity to glimpse what may be on the distant horizon. I take each of these claims in turn and use two of the Court's five most recent cases to make the argument.

I. A TWENTY-FIRST CENTURY FIELD OF "ENVIRONMENTAL" LAW

U.S. environmental law is overwhelmingly statutory and regulatory in source. Indeed, at the very moment that our common law courts were beginning to adapt to our enhanced consciousness of environmental damage and loss, many courts took to labeling the matter a legislative—political—problem.¹³ Thus, the mechanics of environmental law in America have always boiled down to the construction and implementation of

8. See Bertrand Russell, *The History of Western Philosophy* 228–233 (Simon and Schuster 1945).

9. See David Mazella, *The Making of Modern Cynicism* 41 (U. of Va. Press 2007).

10. See *id.* at 143–175 (describing Burk's harsh critique of Rousseau and Rousseau's use of Diogenes' teachings).

11. See *id.* at 4.

12. *Id.* at 174.

13. See *e.g.* *Boomer v. Atlantic Cement Co.*, 257 N.E.2d 870, 871 (N.Y. 1970).

enacted texts.¹⁴ This is not the place to analyze statutory interpretation as such, so a simple over-generalization of the field will have to do. There are at least two contrasting modes of statutory construction in our tradition. The first is avowedly positivistic. It prescribes that judges should read and apply the statute as they expect, prove, or simply hypothesize our tri-partite legislature (House, Senate, and President) would have understood it to mean. Our founders bequeathed to us perhaps the most trying legislative process the world has ever known,¹⁵ and this can easily become an involved (and trying) interpretive exercise.¹⁶ For example, the Senate is a famously distortive institution that ensures that our national legislative processes pay inordinate attention to the voters of Alaska, the Dakotas, Delaware, Montana, Vermont, and Wyoming.¹⁷ Our Presidency is even more curious: besides the “dreadful” process we have for selecting our Presidents,¹⁸ the Presidential veto Article I, § 7 protects arguably creates one of the most potent opportunities around for “special interest” frustration of the majority’s will.¹⁹ Interpreting the legislation that is finally wrought in this crucible entails a substantial capacity for creative construction and perhaps even “deal” reconstruction.²⁰

Thus, another type of interpretive method altogether is avowedly normative by nature. This method allows for the judiciary to serve an important corrective function in interpreting statutes and ought to impose things like default rules or even clear value preferences on legislation precisely because there are important norms or values that would otherwise go under-expressed in society.²¹ This form of statutory interpretation can range from preference-eliciting approaches (based on a belief that legislators want most of all to avoid taking firm positions)²² to outright outcome-oriented judging wherein a variety of “normative” canons like liberality toward Native American tribes,

14. See generally Richard J. Lazarus, *The Making of Environmental Law* (U. of Chi. Press 2004).

15. See e.g. Sanford Levinson, *Our Undemocratic Constitution* 36 (Oxford U. Press 2006) (“If one is especially fearful of bad legislation—and especially if one believes that most bad legislation is worse, on some relevant measure, than offsetting good legislation that might otherwise be passed—then one will obviously want to make it quite difficult to pass any legislation at all.”). In fact, good arguments have been made that a general skepticism of legislative authority—and of legislative action in general—animated the founders collectively and that that coincided with the rise of a philosophical tradition which survives still today. See e.g. Gordon Wood, *The Creation of the American Republic, 1776-1787* (U. of N.C. 1969); see Don Herzog, *Poisoning the Minds of the Lower Orders* 13–23 (Princeton U. Press 1998).

16. See e.g. Jeremy Waldron, *Law and Disagreement* 142–146 (Clarendon Press 1999).

17. See Levinson, *supra* n. 15 at 50–51.

18. *Id.* at 81–83.

19. See e.g. Keith Krehbiel, *Pivotal Politics: A Theory of U.S. Lawmaking* (U. of Chi. Press 1998) (hypothesizing that, for the money, time, and effort it takes, the single most efficient investment for so-called special interests to make in affecting the U.S. legislative process is in convincing the President to exercise or to threaten to exercise a veto). The “fable” of a nationally representative Presidency that opposes a parochial Congress is demolished in Jide Nzelibe, *The Fable of the Nationalist President and the Parochial Congress*, 53 U.C.L.A. L. Rev. 1217 (2005).

20. See e.g. Frank Easterbrook, *Statutes’ Domains*, 50 U. Chi. L. Rev. 533, 540–541 (1983) (suggesting a theory of statutory interpretation wherein judges attempt to reconstruct the “deal” reached among the partisans who formed the supermajority that gained its passage and then to elaborate that deal’s terms and conditions).

21. See e.g. John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 43 (Harv. U. Press 1980). Professor Mashaw, for example, offers a theory of judicial review of agency action predicated on “public choice” theory’s diagnosis of our whole system’s ills. It boils down, in substantial part, to the judiciary’s insinuation of various values into the statutory regimes that govern so much of modern life. See Jerry L. Mashaw, *Greed, Chaos and Governance: Using Public Choice to Improve Public Law* (Yale U. Press 1997).

22. See e.g. Einer Elhauge, *Statutory Default Rules: How to Interpret Unclear Legislation* 7 (Harv. U. Press 2008).

lenity in criminal cases, etc., are used to “construe” a statute and extract something other than its strictest sense.²³

These two forms of statutory interpretation—positive and normative—are common in federal court and arguably have been so throughout modern environmental law’s history. And they are in deep tension with one another even though it is often hard to tell the two apart in real opinions. Indeed, the contrast between these two approaches to statutes only grows more jagged and intractable as our courts confront the single most dominant facet of environmental law: the ubiquity of agencies and agency authority. Deference to administrative agencies’ interpretations complicates the whole project.²⁴ Administrative agencies’ legal authority has lately become one of the most litigious and complex fields of federal law.²⁵ Due in no small part to the pretensions of generality and method found in Supreme Court opinions like *Chevron U.S.A., Inc. v. NRDC, Inc.*²⁶ (a Clean Air Act case!), a mountain of Supreme Court precedents speaking to the lower federal courts have now made allocating interpretive authority as between courts and agencies into a labyrinthine enterprise of doctrinal navigation.²⁷ Congress’s intentions are perhaps unclear by nature²⁸ and, in some reported cases, it has been the very complexity of the underlying statute that has augured for more or less deference to agency interpretations.²⁹

But the real trouble with deference to agency interpretations has always been its justification.³⁰ Virtually every serious justification—every reason given for a court’s deferring to an agency interpretation—is obviously overbroad. Agencies are not always expert, not always more “accountable” than courts, and do not always have Congress’s

23. Normative canons have been around for many, many years and have been dubbed a variety of names. See e.g. Guido Calabresi, *A Common Law for the Age of Statutes* 31–43 (Harv. U. Press 1982); William N. Eskridge & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 78 Geo. L.J. 321, 322–323 (1989); James N. Landis, *Statutes and the Sources of Law*, 2 Harv. J. on Legis. 7, 7–8 (1965); John F. Manning, *Deriving Rules of Statutory Interpretation from the Constitution*, 101 Colum. L. Rev. 1648, 1648–1649 (2001); Adrian Vermeule, *Judging Under Uncertainty: An Institutional Theory of Legal Interpretation* (Harv. U. Press 2006).

24. For contrasts between these two modes of interpretation in the review of agency action, see Kenneth A. Bamberger, *Normative Canons in the Review of Administrative Policymaking*, 118 Yale L.J. 64, 66–67 (2008).

25. See generally *A Guide to Judicial and Political Review of Federal Agencies* (John F. Duffy & Michael Herz eds., ABA 2005) [hereinafter *Guide*].

26. 467 U.S. 837 (1984).

27. See e.g. *FCC v. Fox TV Stations, Inc.*, 129 S.Ct. 1800 (2009) (a 4-1-4 judgment upholding an FCC interpretation against challenge that the FCC had changed its interpretation without adequately explaining its reasoning); *Gonzales v. Or.*, 546 U.S. 243 (2006) (a 5-4 judgment invalidating the Attorney General’s interpretation of a Justice Department regulation and the underlying statute based on finding that the “structure” of statute was intended to preclude the Attorney General from regulating parties and practices that had traditionally been regulated by states); *Natl. Cable & Telecomm. Assn. v. Brand X Internet Servs.*, 545 U.S. 967, 982–983 (2005) (holding that prior judicial interpretations of statutes agencies administer can bind an agency only where court held that the statute’s meaning was unambiguous and therefore foreclosed any alternative interpretation); *U.S. v. Mead*, 533 U.S. 218 (2001).

28. See Matthew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice Between Agencies and Courts*, 119 Harv. L. Rev. 1036, 1036–1037 (2006).

29. See *Chevron*, 467 U.S. at 844–845; *Natl. Cable & Telecomm. Assn. v. Gulf Power Co.*, 534 U.S. 327, 339 (2002) (observing that “as a general rule, agencies have authority to fill gaps,” especially where the statute and/or subject matter is “technical, complex, and dynamic”).

30. See David M. Hasen, *The Ambiguous Basis for Judicial Deference to Administrative Rules*, 17 Yale J. Reg. 327, 339–362 (2000).

authorization (implicit or otherwise) when they act.³¹ Indeed, the same dichotomy of interpretive purposes that marks the judiciary's approach to statutes could easily be used to characterize agencies' interpretive approaches as well.³² And this perhaps further encourages the courts to engage in their own version of the latter, overtly normative form of statutory interpretation in cases involving agency interpretations.³³ Agencies are often in perceptible states of collapse. And, in fact, whatever pretensions to rule-like deference the Supreme Court may have signaled over the years, the lower federal courts, like the Supreme Court, still treat agency interpretations as loose and only partly effective constraints.³⁴

Take the purest recent example. Confronted with an Environmental Protection Agency (EPA) interpretation of the Clean Air Act's (CAA) definition of "air pollutant" which categorically excluded greenhouse gases, the Supreme Court reversed and remanded to the agency with specific instructions that its interpretation of the statute comport with the Court's.³⁵ On the agency finding that greenhouse gases ought not to be governed according to the CAA as structured, the Court held that the "statutory text foreclose[d] EPA's reading"³⁶—notwithstanding an at least colorable claim from the Executive that one of the Court's own precedents endorsed the agency's interpretive method³⁷ and that, in the agency's "judgment," the CAA was just not the right tool for this job.³⁸

What was most striking in *Massachusetts v. EPA*, however, was the majority's implicit insistence that it was doing nothing but reading the statute in its strictest sense. The Court did not, for example, *express* any values or norms into its analysis that it found insufficiently protected by the political process.³⁹ Indeed, against the backdrop set

31. This perhaps explains why the single largest category of cases decided with full opinions by the Supreme Court from 1984-2005 involved not only no provision of *Chevron* deference to an agency's interpretation, but also no provision of *any* deference to the agency's interpretation. See William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 Geo. L.J. 1083, 1190 (2008).

32. Agencies are at least as capable of what Joseph Raz has called "interpretation as discovery"—a kind of interpretation "without retrieval," so to speak—as are courts. See Joseph Raz, *Interpretation Without Retrieval*, in *Law and Interpretation: Essays in Legal Philosophy* 155, 166–171 (Andrei Marmor ed., Oxford U. Press 1995). The fact that courts and most commentators pay almost no attention to agencies' interpretive methods, however, establishes nothing at all about those methods. See Jerry L. Mashaw, *Norms, Practices and the Paradox of Deference: A Preliminary Inquiry Into Agency Statutory Interpretation*, 57 Admin. L. Rev. 501, 502–503 (2005).

33. See e.g. *Rapanos v. U.S. Army Corps of Engineers*, 547 U.S. 715, 737–738 (2007); *Solid Waste Agency of N. Cook Co. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 173 (2001).

34. See Eskridge & Baer, *supra* n. 31, at 1098; Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 Colum. L. Rev. 1235, 1271 (2007). Hickman and Krueger identified 104 court of appeals' cases applying *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), in lieu of *Chevron* from 2001–2006. Hickman & Krueger, *supra* n. 34, at 1259–1267. Their findings were principally that *Skidmore* turns out to be quite similar to *Chevron* in operation, although this is a curious finding given the supposed polarity of the two doctrines. *Id.* at 1271. Importantly, they separated out cases that applied *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), on the theory that it falls into some other category of deference. *Id.* at 1262.

35. *Mass. v. EPA*, 549 U.S. at 528–535.

36. *Id.* at 528.

37. EPA had argued from its first denial of the rulemaking petitions that greenhouse gases were to the CAA what tobacco was to the Food, Drug and Cosmetic Act as held in *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000); *Mass. v. EPA*, 549 U.S. at 530–531; see e.g. 68 Fed. Reg. 52922, 52927 (Sept. 8, 2003).

38. *Mass. v. EPA*, 549 U.S. at 532–535.

39. See *id.* at 528–532.

by *Chevron* and other deference doctrines, it would almost certainly have undermined the Court's *authority* if it had confessed that the Act as authored meant one thing and the Act as interpreted by the Court meant another.⁴⁰

To be sure, the Court could easily have argued that the gravity and/or asymmetry of the harms global warming will cause justified a heightened scrutiny of so obviously "politicized" an agency interpretation.⁴¹ And perhaps the obvious politicization of the issue would even have justified a holding that purported to finally and authoritatively interpret the Act opposite the Agency's interpretation. Yet, just as surely, the Court authored no such holding. In what has since been described as a "signal," as easily the "most important environmental law decision in well over a decade,"⁴² and as a "bellweather," the Court purported simply to read the statute as its legislators wrote it and to hold that it could not mean what the agency said it meant.⁴³

Of course, how legislation ought to be interpreted—either as a normative or as an institutional matter—has never been noticeably different in "environmental" law. If anything, the statutes, procedures, and precedents that wind up in American environmental law classrooms are but tokens of the broader type. The same issues, methods, and agents that appear in environmental law's formative sources and cases also appear in labor law, tax law, immigration law, and a crowd of other regulatory fields. These other fields have agencies that are "independent" in some sense, yet are checked by both judicial and political review (to a greater or lesser extent),⁴⁴ state and local regulators who also bear down on their subjects,⁴⁵ and hard choices of valuation and/or propriety to make where the statutes that empower them are equivocal.

The feature of environmental law supposedly distinguishing it from other fields is that it concerns "the environment" and how we value it. But if that is the field's distinguishing feature, the one thing American environmental law ought to have is its

40. See e.g. Hasen, *supra* n. 30, at 339–357.

41. For example, Professor Johnston has argued that the best cost-benefit curves for global warming yet derived—wherein costs are born disproportionately by Arctic, tropical, and island peoples and actual benefits accrue to middle-latitude and specifically North American places for decades to come—suggest that the 1970s and 1980s legislating coalitions that enacted the CAA could not possibly have meant to force rapid reductions of greenhouse gases in the U.S. this century. See Jason Scott Johnston, *Climate Change Confusion and the Supreme Court: The Misguided Regulation of Greenhouse Gas Emissions Under the Clean Air Act*, 84 *Notre Dame L. Rev.* 1, 9–56 (2008). Of course, that interpretation of the Act is easily overcome with the right "canons" of interpretation—*normative* canons, that is. Cf. Bamberger, *supra* n. 24, at 111–113 (suggesting a use of canons of constructions within the overarching framework of *Chevron* deference to reach normatively superior ends).

42. Jonathan H. Adler, *Massachusetts v. EPA Heats Up Climate Policy No Less than Administrative Law: A Comment on Professors Watts and Wildermuth*, 102 *Nw. U. L. Rev. Colloq.* 32, 32 (2007).

43. Professor Adler (rightly) observes that the language of CAA § 202—mandating that the EPA "shall" set emissions standards for "any air pollutant" it finds causes or contributes to air pollution "which may reasonably be anticipated to endanger public health or welfare"—makes the "air pollutant" designation into a critical pivot. Adler, *supra* n. 42, at 35–38. Once greenhouse gases were labeled as such, the underlying consensus on global warming virtually guaranteed an "endangerment" finding of some kind. *Id.* And, if *Natl. Resources Def. Council v. Train*, 545 F.2d 320, 325–326 (2d Cir. 1976), is read to control Title II of the Act as it does Title I, the endangerment finding is, in effect, a mandate to set applicable standards, as well. The only gap in this logic is timing—how long the EPA has to do all of this before a court compels it to act—and the diversity of the federal judiciary that would hear any such plea for relief. In my view, these are substantial gaps.

44. See generally *Guide*, *supra* n. 25.

45. See generally *Preemption Choice: The Theory, Law, and Reality of Federalism's Core Question* (William W. Buzbee ed., Cambridge U. Press 2009).

own normative principle or canon of interpretation that produces correct, appropriate, or just better valuations of nature in some sort of systematic way. And the field has no such principle. Indeed, given an institutional structure wherein courts and administrative agencies now struggle with each other to avoid the responsibility of *authoring* America's environmental values, the prospects seem slim for such a principle ever solidifying in our federal environmental law. Part II uses *Entergy v. Riverkeeper*,⁴⁶ one of the CWA cases from last Term, to make the point.

II. *ENTERGY*: A HYDRA THAT WOULD NOT DIE?

For as long as we have had statutory behemoths like the CAA and the CWA, we have had arguments over the role that costs and practicability ought to play in how they are implemented. There has never been any shortage of partisans on either side of the struggle.⁴⁷ These statutes each delegate power to the EPA by authorizing it to prohibit or mediate behaviors of a certain kind which it finds too risky given the probabilities of harmful consequences.⁴⁸ Before it can act, however, the EPA normally must make certain required findings or determinations based on evidence and usually according to disparate criteria fixed (or implied) by the underlying statute(s) and subject to judicial review.⁴⁹ And for as long as the EPA has been making these determinations, advocates have been charging it with illicitly considering factors the statutes exclude, ignoring factors the statutes prefer or mandate, or employing some otherwise mistaken method of choice that demands judicial reversal.⁵⁰

Not surprisingly, these programs have become—with help from contemporary administrative law—entrenched in the parametric controversies of epidemiological inference,⁵¹ cost/benefit analysis,⁵² time discounting,⁵³ the metaphysics of statistical lives,⁵⁴ and a slew of other ethical dilemmas that arise when we try to quantify and regulate risk. As many times as efforts to quantify the important variables in these debates have been dismissed as ill-conceived or inherently biased, though, they keep coming back with enhanced rigor and, thus, broader appeal—demonstrating an

46. 129 S.Ct. 1498.

47. See generally John D. Graham, *Saving Lives Through Administrative Law and Economics*, 157 U. Pa. L. Rev. 395 (2008); Sidney A. Shapiro & Robert L. Glicksman, *Risk Regulation at Risk: Restoring a Pragmatic Approach* (Stanford U. Press 2003).

48. See e.g. Natl. Research Council, *Science and Decisions: Advancing Risk Assessment* 26–58 (Natl. Academies Press 2009) (describing the evolution and use of risk assessment at the EPA).

49. See generally *Guide*, *supra* n. 25.

50. As the Supreme Court observed in *Motor Vehicle Mfrs. Assn. of the U.S. v. State Farm Mutual Auto. Ins. Co.*, an agency's rulemaking is normally "arbitrary and capricious" under 5 U.S.C. § 706(2)(a) where "the agency has relied on factors which Congress has not intended it to consider . . . 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." 463 U.S. 29, 41, 43 (1983).

51. See generally Kenneth J. Rothman & Sander Greenland, *Causation and Causal Inference in Epidemiology*, 95 *Amer. J. Pub. Health* 144 (2005).

52. See generally Mark Swofford, *The Economy of the Earth: Philosophy, Law and Environment* 32–35 (2d ed., Cambridge U. Press 2008).

53. See generally *Risk Versus Risk: Tradeoffs in Protecting Health and the Environment* (John D. Graham & Jonathan Baert Wiener eds., Harv. U. Press 1995).

54. See generally Frank Ackerman & Lisa Heinzerling, *Priceless: On Knowing the Price of Everything and the Value of Nothing* 44–47 (The New Press 2004).

unparalleled “staying power.”⁵⁵ Quantification keeps coming back stronger than ever, often with counterintuitive results.⁵⁶ Indeed, even standing doctrine could be submerged in the details of risk quantification and what they ought to mean to traditional legal concepts.⁵⁷ Much to environmental nonprofits’ chagrin, though, the Court may have rejected such “probabilistic” injury theories in *Earth Island Institute v. Summers*.⁵⁸ (A robust commitment to quantify has no particular friend or foe in the circus!)

EPA leads all federal agencies in its use of quantified risk- and cost-benefit analyses, perhaps reflecting the nature of the decisions it has been delegated.⁵⁹ A recent report from the National Research Council recommended keeping EPA’s time-tested dichotomization of risk assessment and risk management, wherein cost-benefit balancing is conducted *after* a risk is assessed as a kind of “decision-support product” for risk managers (who should play no role in risk assessments).⁶⁰ That conclusion was reached despite great foment surrounding risk-benefit analysis and, especially, surrounding “regulatory review” of action agencies like EPA by the Office of Information and Regulatory Affairs.⁶¹ But the essence of the foment comes down to the trite observation that it matters a great deal *who* quantifies and balances the disparate choice factors at work in modern environmental law.⁶²

Large power plants concentrate some of the worst environmental harms our societies generate. Besides the harms from the extraction and transportation of their fuels, the air and water pollution most of them generate (many at disproportionate levels) serve as stark reminders of the costs that attend the provision of so much electricity. Not surprisingly, these plants’ emission into the ambient air of sulfur- and nitrogen-oxides, particulate matter, mercury and other trace metals, and a variety of organic compounds from the combustion of their fuels have occupied U.S. environmental lawyers for

55. See e.g. Matthew D. Adler & Eric A. Posner, *New Foundations of Cost-Benefit Analysis* 1–2 (Harv. U. Press 2006); Richard L. Revesz & Michael A. Livermore, *Retaking Rationality: How Cost-Benefit Analysis Can Better Protect the Environment and Our Health* (Oxford U. Press 2008).

56. So-called “cost-benefit analysis,” for example—so often denounced as a tool of the “deregulatory” agenda—actually justifies a relatively immediate, robust, and economy-wide deployment of many greenhouse gas reduction technologies. See Hannah Choi Granade et al., *Unlocking Energy Efficiency in the U.S. Economy* 1–5, http://www.mckinsey.com/client-service/ccsi/pdf/US_energy_efficiency_full_report.pdf (July 2009).

57. See Bradford Mank, *Standing and Statistical Persons: A Risk-Based Approach to Standing*, 36 *Ecol. L.Q.* 665 (2009); see also Lisa Heinzerling, *The Rights of Statistical People*, 24 *Harv. Envtl. L. Rev.* 189–207 (2000).

58. See *Summers*, 129 S. Ct. at 1151–1152. Prior to *Summers*, a probabilistic future injury to unknown plaintiff-members had sufficed against standing challenges in: *Maine People’s Alliance and Nat. Resources Def. Council v. Mallinckrodt* 471 F.3d 277 (1st Cir. 2006), *cert. denied*, 128 S.Ct. 93 (2007); *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149 (4th Cir. 2000); *Ecological Rights Round v. Pacific Lumber Co.*, 230 F.3d 1141 (9th Cir. 2000); and also in *Mountain States Legal Fund v. Glickman*, 92 F.3d 1228 (D.C. Cir. 1996). The Court’s rejection of “statistical standing” for so-called “facial” challenges to agency rules in *Summers* was arguably *dicta* because the plaintiffs did not assert a claim of statistical standing. Thus, the Court’s considered judgment may still be forthcoming.

59. See Natl. Research Council, *supra* n. 48, at 16.

60. See *id.* at 66. That structure traces to the National Research Council’s own 1983 report. See *id.* at 48.

61. Cf. *id.* at 269 (“The committee is mindful of concerns about political interference in the process, and the framework [proposed] maintains the conceptual distinction between risk assessment and risk management articulated in [1983].”); see also Lisa Heinzerling, *Markets for Arsenic*, 90 *Geo. L.J.* 2311 (July 2002).

62. See e.g. Sidney A. Shapiro & Christopher H. Schroeder, *Beyond Cost-Benefit Analysis: A Pragmatic Reorientation*, 32 *Harv. Envtl. L. Rev.* 433, 446–462 (2008) (purporting to criticize cost-benefit analysis as such but ultimately conceding its permanence and settling on a critique of its conduct by uninformed people).

decades.⁶³ Likewise, their emissions of sediment, toxics, and the same organic compounds into our waters have occupied (other) U.S. environmental lawyers for decades.⁶⁴ And one subchapter of *that* story is the cooling water these plants use to regulate their thermal balances—cooling water most of them withdraw from neighboring surface waters that they then return, usually in a significantly warmer state.⁶⁵

These massive withdrawals of water annually “entrain” billions of fish larvae and micro-organisms, killing them, and trap millions of larger fish which are vacuumed onto the screens covering the intakes and killed.⁶⁶ Section 316(b) directed the EPA to set standards for these “cooling water intake structures” that “reflect the best technology available for minimizing adverse environmental impact.”⁶⁷ The first effort to do so ended in a misfire, the Fourth Circuit having found procedural fault with EPA’s rulemaking.⁶⁸ The next version, occasioned by another lawsuit,⁶⁹ came before the Second Circuit in two pieces⁷⁰ and then to the Supreme Court last Term. A quick overview of the choices framed up in EPA’s rulemaking will suffice.

Three basic types of cooling technology have been in use for decades: once-through (what it sounds like), closed-cycle (cycled reuse of the same water), and so-called dry-cooling (what it sounds like).⁷¹ With the exception of dry-cooling, the technologies are distinguished by the volumes of water used. What the “best available” technology is for minimizing the “adverse environmental impact” of existing power plants hinges, of course, on the value(s) for which one is optimizing. While dry-cooling essentially eliminates impingement and entrainment of aquatic organisms, it comes at a substantial cost—an energy penalty—and increases greenhouse gas emissions, perhaps substantially. Closed-cycle cooling technologies were projected to achieve variable rates of impingement/entrainment mortality reduction (between 72 and 98%) depending on the facility.⁷² But they were also projected to cost several billion dollars nationwide and

63. See Natl. Research Council, *Air Quality Management in the United States* 174–215 (Natl. Acad. Press 2004).

64. See e.g. Robert W. Adler et al., *The Clean Water Act 20 Years Later* (Nat. Resources Def. Council 1993). Certainly in some cases the same lawyers do the air work as well as the water work—but not necessarily so.

65. In 1973, the first time EPA set about to regulate these harms, it determined that power plants and other large industrial facilities combined to withdraw roughly 70 trillion gallons of cooling water annually. 38 Fed. Reg. 34409, 34410 (Dec. 13, 1973). By the time the rulemaking at issue in *Entergy* was underway, that number had risen to over 100 trillion gallons annually.

66. See 66 Fed. Reg. 65256, 65262–65263, 65292 (Dec. 18, 2001).

67. See 33 U.S.C. § 1326(b) (2006).

68. See *Appalachian Power Co. v. Train*, 566 F.2d 451 (4th Cir. 1977). The court held that a “Development Document” underlying the rule’s design specifications should have been published in the Federal Register and was not. *Id.* at 457. It remanded the rule to the agency and the agency never followed up with a re-promulgation of the rule.

69. See *Cronin v. Browner*, 898 F. Supp. 1052 (S.D.N.Y. 1995) (enjoining the EPA to initiate CWA § 316(b) rulemaking).

70. See *Riverkeeper Inc v. EPA*, 358 F.3d 174 (2d Cir. 2004) [hereinafter *Riverkeeper I*]; *Riverkeeper, Inc. v. EPA*, 475 F.3d 83 (2d Cir. 2007) [hereinafter *Riverkeeper II*]. *Riverkeeper I* dealt with the rules applicable to new facilities while *Riverkeeper II* dealt with the rules applicable to existing facilities. *Id.* at 91–93.

71. James R. May & Maya K. van Rossum, *The Quick and the Dead: Fish Entrainment, Entrapment, and the Implementation and Application of Section 316(b) of the Clean Water Act*, 20 Vt. L. Rev. 373, 378–379 (1995).

72. 67 Fed. Reg. 17122, 17189 (April 9, 2002).

result in the closure of about nine power plants.⁷³ EPA finally chose to array the varieties of closed-cycle and once-through technologies along a spectrum, allowing for different screening mechanisms around the intake structures themselves, and required that every installation somehow meet a performance standard of 80-95% reduction in impingement⁷⁴ together with a 60-90% reduction in entrainment⁷⁵ beyond some facility-set baseline. This, the agency maintained, balanced the costs and benefits of impingement/entrainment reduction together with other “adverse environmental impact.”⁷⁶

In reviewing the rulemaking, the Second Circuit held that CWA § 316(b)’s “best technology available” (BTA) standard more resembled the CWA’s “best available technology” (BAT) standards than it did other CWA standards and that, because the courts have interpreted the BAT provisions as constraining the consideration of costs, § 316(b) did, too.⁷⁷ Fair enough. In one sense, though, this was a curious holding. Technological “availability” is almost certainly an *ambiguous* statutory standard.⁷⁸ The EPA could even point to the single occurrence in the legislative record where § 316(b) was ever expressly *mentioned* to support its conclusion that relative costs must factor into any determination that a technology is “available.”⁷⁹ A court purporting either to (1) read the CWA strictly, or (2) defer to the *reasonable* interpretations of the agency, would run headlong into that barrier.⁸⁰ And the Second Circuit recognized as much.⁸¹ So,

73. *Id.* at 17155. In the finalized rule, the cost projections for mandating closed-cycle cooling rose to \$3.5 billion per year. 69 Fed. Reg. 41576, 41605 (July 9, 2004).

74. *See* 40 C.F.R. § 125.94(b)(1) (2008).

75. *Id.* at § 125.94(b)(2).

76. Aggregating the total environmental harm and the propensity of a water pollution control standard to simply shift the harms to other media are perennial subjects of dispute under the Act’s Subchapter III. *See e.g. Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1044–1053 (D.C. Cir. 1978).

77. CWA § 316(b) actually cross-references both § 301 and § 306—provisions of the statute requiring the setting of most other types of CWA technology standard. The precedents where reviewing courts have scrutinized the use of cost and feasibility information in setting those other standards are numerous and open to conflicting interpretations. *See e.g. Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486 (2d Cir. 2005) (holding that EPA permitted to avoid indefinitely imposing technologies that would be cost-prohibitive to some facilities); *Texas Oil & Gas Assn. v. EPA*, 161 F.3d 923 (5th Cir. 1998) (holding that EPA must give decreasing weight to cost considerations as dischargers are permitted longer intervals of time to install retrofit technologies to meet standards); and *Weyerhaeuser Co.*, 590 F.2d 1011 (holding that cost considerations in a variance from the general standards are appropriately broken down to a facility-by-facility approach only if the same substantive standards of “availability” are employed). In *Riverkeeper I*, the court of appeals held, consistent with several past precedents, that the BTA standard allows EPA to consider cost, “but only in a limited fashion and not as a primary consideration.” *Riverkeeper II*, 475 F.3d at 99 (characterizing the holding of *Riverkeeper I*). In *Riverkeeper II*, the court held as much for the Phase II rules (the rules for existing facilities), and expanded that holding’s specificity by remanding to the EPA so that it could “explain its conclusions” that led it to undertake the cost-benefit analysis it apparently undertook. *Id.* at 98–103.

78. *See Entergy*, 129 S.Ct. at 1506 n.5 (“Respondents concede that the term “available” is ambiguous, as it could mean either technologically feasible or economically feasible.”).

79. *See Riverkeeper II*, 475 F.3d at 101 (“The EPA took this ‘economically practicable’ concept [underlying its interpretation of ‘available’ in CWA § 316(b)] directly from the text of a floor speech of a single representative—the only specific reference to § 316(b) in the congressional debates.”).

80. It would be insufficient to claim that “precedent” bound the Second Circuit to interpret CWA § 316(b) as it did. As the Supreme Court has made clear, prior precedent constrains an agency *only* to the extent that the court has held the statutory provision in question to have an unambiguous meaning and § 316(b) was not at issue in any of the prior BAT cases. *See Natl. Cable & Telecomm. Assn. v. Brand X Internet Servs.*, 545 U.S. 967 (2004).

81. This perhaps explains why the court allowed that the agency could consider costs up to the supposed threshold at which the rulemaking became “cost-driven” instead of “technology-driven.” *Riverkeeper II*, 475

rather than rule that the EPA improperly considered the relative efficiencies of the various technologies, it resorted to an old judicial gambit: it held that the Agency had not sufficiently explained its deliberations and that it was “difficult for judges or interested parties to determine the propriety of the Agency’s action without a justification for the action supported by clearly identified substantial evidence whose import is explained.”⁸² The court remanded for that better explanation⁸³ and certain regulated parties sought review from the Supreme Court.⁸⁴

Of course, CWA § 316(b) does not explicitly state what choice factors ought to be weighed when the EPA sets its standard(s). Interpreting “availability” in the context of cooling water withdrawals, though, almost certainly involves weighing apples and oranges: when/how does dry-cooling technology become “unavailable”? For example, how much more carbon dioxide is too much for the aquatic mortality/morbidity that mandatory dry-cooling would avert? We could quantify these variables quite precisely, but we would still face some rather tricky problems of commensurability. Moreover, the harms from the greenhouse effect will almost certainly befall different people than the harms from more impingement/entrainment. For all its perceived illegitimacy,⁸⁵ thus, the monetization of relative costs and benefits in such contexts is arguably the *essence* of rationality—at least in its standard sense—because it seeks to unite the relevant choice factors under a single measuring variable.⁸⁶ Money is an obviously inadequate metric for the things that matter most. But whether the EPA’s interpretation was a “reasonable” interpretation of a statute that does not close the list of permissible choice factors hinges on much more than the inadequacy of money as a metric. It hinges on the kind of agent the EPA is, the possibilities for its actions, and, more specifically, the precise method employed to do the actual weighing for the simple reason that the law supplies no default rules of method in this context.⁸⁷ Many foundational provisions in the CWA, CAA, and other environmental statutes leave the list of *permissible* choice factors open just as § 316(b) did, either by using language like “including” or by being deliberately vague.⁸⁸

F.3d at 99.

82. *Id.* at 104. I assume that the use of “substantial evidence” in the quoted passage was a casual, non-technical usage. If it was intended to suggest the rulemaking was subject to “substantial evidence” review pursuant either to the CWA or the APA, that holding was clearly erroneous. For an in-depth look at the ‘better explanation’ gambit, see Jerry Mashaw & David Harfst, *The Struggle for Auto Safety* (Harv. U. Press 1990).

83. *Riverkeeper II*, 475 F.3d at 103.

84. *Entergy*, 129 S.Ct. at 1502 n. 1 (2009).

85. See Daniel A. Farber, *Rethinking the Role of Cost-Benefit Analysis*, 76 U. Chi. L. Rev. 1355,1373 (2009) (arguing that there is a legitimacy gap in the use of cost-benefit analysis).

86. See e.g. Jon Elster, *Solomonic Judgments: Studies in the Limitations of Rationality* 175–216 (Cambridge U. Press 1989) (contrasting parameterization of relevant variables to the “radical cognitive indeterminacy” of multi-factored social choices left to the intuition of all possible decision-makers).

87. Even the dissent in *Entergy* argued not that a clear and relevant rule of law precluded the EPA’s use of cost-benefit analysis in general but, rather, that a “fair” interpretation of the CWA and its legislative history excluded the analysis in this exact context. *Entergy*, 129 S.Ct. at 1516 (Stevens, J., joined by Souter and Ginsburg, JJ., dissenting). Moreover, Justice Breyer’s separate concurrence made no mention of default rules—or canons of interpretation—which would *ensure* the consideration of costs when statutory language was as “deliberately nuanced” as CWA § 316(b). See *id.* at 1512 (Breyer, J., concurring). *Entergy* was perhaps the ideal case through which to press such a default rule given Justice Breyer’s long-standing objections to agencies’ “tunnel vision” and consequent skewing of their perspectives on risk regulation. See e.g. Stephen Breyer, *Breaking the Vicious Cycle* (Harv. U. Press 1993).

88. The factoring that actually goes into agency standard-setting in such contexts is, thus, often shielded from public view. See Patricia Ross McCubbin, *The Risk in Technology-Based Standards*, 16 Duke Envtl. L. &

Not surprisingly, given its nature (and especially with respect to the CWA's opaque conceptual structure on point⁸⁹), EPA's standards have wavered in their stringency.⁹⁰

Still, given the Supreme Court's case law on the point, the "environmentalists"⁹¹ who oppose the consideration of "cost" in decisions like EPA's cooling water intake structures rulemaking must answer the following question: if not cost or other metrics that quantify the variables comprising such decisions, then what? One supposed alternative still in vogue among many is a so-called "feasibility" approach: is the standard being set "feasible" for the market actors it governs?⁹² But this just subtly shifts the factors of choice regulators must weigh from a relatively standard assessment of project costs and expected benefits to an assessment of the *ingenuity* and *sincerity* of regulated actors when we ask them whether they can achieve x, y, or z.⁹³ That kind of assessment, in other words, boosts the influence of the weakest elements of traditional cost-benefit analyses, increasing the information burdens on regulators and arguably strengthening the hands of the regulated.⁹⁴

More importantly, if environmental law aims merely to blunt the consequences of practices like our widespread provision of electricity, then weighing costs and benefits is probably inevitable. The standard account of this entailment is that there are simply too many such practices and too little societal will (or capital) to invest in blunting their consequences.⁹⁵ That is what so often returns us to a project-oriented cost-benefit analysis in regulatory decision-making.⁹⁶ But another way to characterize that necessity is with the burden of proof. Arguments against the use of quantified costs and benefits in such decisions normally reduce down to the following: (1) monetized variables are much

Policy Forum 1 (2005).

89. See e.g. *E.I. Du Pont de Nemours v. Train*, 430 U.S. 112 (1977) (construing Subchapter III and finding that it was meant to allow the EPA to create industry-by-industry standards binding on all members of covered industries that control their pollution based on assessments of their context and competition).

90. See Wesley A. Magat et al., *Rules in the Making: A Statistical Analysis of Regulatory Agency Behavior* 1 (RFF Press 1986). After multiple regression analyses and a robust sample set, Magat and colleagues concluded that neither efficiency nor equity accounted very well for the substantial variations in the "best practicable technology" standards the EPA was setting under CWA §§ 301 and 306. *Id.* at 154.

91. Riverkeeper and its allies challenging the "Phase II" cooling water intake rules called themselves the "environmental" petitioners, as if it was a good strategic move to turn the matter into the partisan struggle of some who defend "the environment" against others who defile it. *Riverkeeper II*, 475 F.3d at 96 n. 8.

92. See e.g. David M. Driesen, *Distributing the Costs of Environmental, Health, and Safety Protection: The Feasibility Principle, Cost-Benefit Analysis, and Regulatory Reform*, 32 B.C. Envtl. Aff. L. Rev. 1 (2005).

93. To accept that this inquiry is somehow "cost sensitive" while arguing that it is not driven by cost (as then-Judge Sotomayor did in her opinion for the panel in *Riverkeeper II*), *Riverkeeper* seems to concede most of the ground taken by cost-benefit analysis's critics. *Riverkeeper II*, F.3d at 99; see generally Driesen, *supra* n. 92 at 11. Moreover, whether a technology is, in concept, "feasible" will inevitably involve regulators in exactly the kinds of inquiry for which no experts—living or dead—have ever existed. Cf. Howard Latin, *Ideal Versus Real Regulatory Efficiency: Implementation of Uniform Standards and "Fine-Tuning" Regulatory Reforms*, 37 Stan. L. Rev. 1267 (1985) (arguing that the mere mortals who comprise regulatory agencies normally work best when optimizing for a strictly limited number of concerns).

94. See Jamison E. Colburn, *The Future of Air Pollution Control in the Corporatist State*, 34 Envtl. L. Rptr. 10577, 10590-10594 (2004).

95. See e.g. Cass R. Sunstein, *Risk and Reason: Safety, Law and the Environment* (Cambridge U. Press 2002).

96. Cf. Revesz and Livermore, *supra* n. 55, at 12-13 (arguing that cost-benefit analysis is the most rational way to prioritize and select actions against risk). Indeed, risk-benefit balancing funded from a limited "budget"—either of federal appropriations or from a hypothetical fund of societal will—is perhaps the only kind of risk-benefit balancing done in democratic societies today. See Dan M. Kahan et al., *Fear of Democracy: A Cultural Evaluation of Sunstein on Risk*, 119 Harv. L. Rev. 1071 (2006).

less determinate than they seem and they obscure the distributive aspects of most choices; (2) monetization requires that we put a price on the priceless (like healthy streams or clean air); and (3) quantitative analysis generally excludes the public from the processes of government because it is so opaque. Each of these is an important objection to cost-benefit analysis as it too often has been practiced. Yet the *actual* argument these critiques obscure—the argument that progressives still hope to avoid—is whether quantification with metrics like expenditures versus increments of harm-prevention can be used to *improve* the making of necessarily tragic decisions. And it is virtually impossible to prove the negative that such techniques cannot improve our decision making.⁹⁷ Progressives hope to avoid that purer form of the argument because they do not concede that the “circus” we call environmental law is just about blunting (some of) the harsher consequences of American life. As currently institutionalized, though, this is self-evidently our environmental law’s horizon. Thus, whatever flaws characterized EPA’s decisionmaking process on cooling water technologies (and there were many), they had more to do with the precise values EPA assigned to its variables (too many of which were assigned *no* value) than with quantification *per se*.⁹⁸ And *that* sort of objection is likely to: (1) lose in court under prevailing deference doctrines;⁹⁹ (2) excite fewer donors in the environmentalists’ struggles against “evil”;¹⁰⁰ and, therefore, (3) require a far more robust investment of human and other capital resources to mount effectively.

As it happened, the psuedo-question the *Entergy* litigants brought to the Court ended up looking close: a 5-1-3 split. A cynic views how these questions are being processed as precisely what our “lawmakers” seek: ambiguous statutory delegations and a lack of binding default rules which combine to empower individual parties (or politicians who have appropriation or other powers over the subject agencies) to maximize their influence therein.¹⁰¹ The cynic looks at this circus and sees “iron triangles,”¹⁰² bureaucratic turf wars,¹⁰³ repeat players who’s special interest is “the

97. Cf. Matthew D. Adler & Eric A. Posner, *New Foundations of Cost-Benefit Analysis* 1–24 (Harv. U. Press 2006) (making the justification out in this way). Indeed, if anything, it is a further, better quantification that will enable the public to recognize and agree to address lingering distributional and meta-ethical issues. See Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 Colum. L. Rev. 1260, 1324–1329 (2006).

98. Virtually any of nature’s parts or functions can be valued—in one way or another. See A. Myrick Freeman III, *The Measurement of Environmental and Resource Values* (2d ed., RFF Press 1993). The fact that money is an inadequate measure for many of them does not, however, render the valuation suspect root and branch. The price of admission to an amusement park is no measurement of the joy it brings to a toddler’s heart to ride the merry-go-round, but that is hardly reason to change the price of admission.

99. See e.g. *Natl. Coalition Against Misuse of Pesticides v. Thomas*, 809 F.2d 875 (D.C. Cir. 1987); *Baltimore Gas & Elec. Co. v. Nat. Resources Defense Council, Inc.*, 462 U.S. 87 (1983).

100. See e.g. Ted Nordhaus & Michael Shellenberger, *Break Through: From the Death of Environmentalism to the Politics of Possibility* 201–204 (Houghton Mifflin Co. 2007) (Critiquing the dominant modes of fundraising used by environmental nonprofits as unnecessary scare-mongering wherein certain enemies of the environment are publicly targeted.).

101. See e.g. Steven P. Croley, *Regulation and Public Interests: The Possibility of Good Regulator Government* 17 (Princeton U. Press 2008) (calling this the “cynical” view of institutional settings like CWA § 316(b)). “Political” influence can be both congressional and Presidential in origin. See e.g. John Ferejohn & Charles Shipan, *Congressional Influence on Bureaucracy*, 6 J.L., Econ., & Org. 1 (1990); Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245 (2001).

102. See James Q. Wilson, *Bureaucracy: What Government Agencies Do and Why They Do It* 118–119 (Basic Books 1989).

environment,”¹⁰⁴ and just the plain-old evasion of our Madisonian heritage.¹⁰⁵ Minimalistic jukes and jibes just look like the judiciary’s dominant strategy.¹⁰⁶

Worse still, there seems to be no conclusive answer to this cynical interpretation. The more often our hard questions of priorities and valuation blow up into major battles, as occurred over cooling water intakes (where a majority of the Court returned to its supposed rule of “deference” to agency interpretation¹⁰⁷), the less able we seem to be to collaborate on the harder, more detail-oriented work of *accurately* quantifying *all* the variables that rightly enter the consideration of environmental harms and their avoidance. It is at these points that we stop collaborating to produce more and/or better information and shift instead to a different kind of interactivity: the interactions where we draw up into factions that are internally confident, united, and too often wrong.¹⁰⁸ In short, the conflict over pseudo-questions primes people to misunderstand their putative “adversaries” and miss opportunities to collaborate rather than contend and contest.

III. A *WINTER* OF DISCONTENT: MARINE MAMMAL PROTECTION GOES TO WAR?

Like so many of our threats to nature’s composition and function, high energy “active” SONAR empowers us to do some rather extraordinary things. Locating and tracking an ultra-quiet submarine at distance, for example, has become a critical element of sea warfare (and, thus, a deterrent to sea warfare) precisely because our navy has gotten good at it.¹⁰⁹ The trouble is the collateral damage to the marine environment. Researchers have traced firm causal connections between this SONAR and serious harms to different sea creatures, especially whales.¹¹⁰ Different elements of the government have studied this conflict between military preparedness and marine mammal protection for years.¹¹¹ The evidence mounted so quickly recently that even the Navy

103. William A. Niskanen, Jr., *Bureaucracy and Representative Government* 36–42 (Aldine, Atherton 1971).

104. See e.g. Jonathan H. Adler, *Clean Politics, Dirty Profits: Rent-Seeking Behind the Green Curtain*, in *Political Environmentalism: Going Behind the Green Curtain* 1 (Terry L. Anderson ed., Hoover Instn. Press 2000).

105. Cf. James Madison, *The Federalist No. 51*, in *The Federalist Papers* 318–319 (Clinton Rossiter ed., Signet 1999) (“The great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others.”).

106. See generally Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Harv. U. Press 1999).

107. *Entergy*, 129 S.Ct. at 1510 (“We conclude that the EPA permissibly relied on cost-benefit analysis in setting the national performance standards and in providing for cost-benefit variances from those standards as part of the Phase II regulations.”).

108. See e.g. Cass R. Sunstein, *Infotopia: How Many Minds Produce Knowledge* 52–65 (Oxford U. Press 2006) (A key aspect of group deliberation is the promotion of uniformity by decreasing the range of views within groups.).

109. The U.S. Navy maintains that active SONAR is vital to its sea warfare strategies today given the proliferation of submarine technology and the increased “geopolitical” probability that future maritime battles will be fought in near-shore waters. See U.S. Navy, *Understanding Sonar*, <http://www.navy.mil/oceans/history.html> (last accessed March 22, 2010). Active sonar generates powerful pulses of sound and then listens to that sound travel through aquatic space. *Id.* Other sources seem to corroborate the Navy’s account. See e.g. Gordon D. Tyler, Jr., *The Emergence of Low-Frequency Active Acoustics as a Critical Antisubmarine Warfare Technology*, 13 Johns Hopkins APL Technical Dig. 145 (1992).

110. See *Nat. Resources Def. Council v. Winter*, 518 F.3d 658, 665–667 (9th Cir. 2008) (reviewing the literature).

111. See e.g. Dept. of Commerce & Sec. of the Navy, *Jt. Interim Rep. Bahamas Marine Mammal Stranding Event of 15-16 March 2000* (Dec. 2001) (available at <http://www.nmfs.noaa.gov/pr/pdfs/health/>)

institutionalized environmental reviews for (most) peace-time uses of active SONAR in an effort to minimize that damage.¹¹²

But who is to say when the disruption and damage outweigh the marginal improvements in naval preparedness they bring? That was the substantive issue behind *Winter v. Natural Resources Defense Council, Inc.*,¹¹³ a case that reached the Court as a question of preliminary injunctions (PIs) and their availability for alleged violations of three separate statutes—the Marine Mammal Protection Act (MMPA), the Endangered Species Act (ESA), and the National Environmental Policy Act (NEPA).¹¹⁴ Thinly veiled by certain doctrinal details, in other words, the underlying risks shot through the litigation from the outset. The Navy had planned a series of active SONAR exercises and it had determined in an “environmental assessment” (EA)—as allowed under the NEPA guidelines¹¹⁵—that by observing its own mitigation measures during its exercises, it would not cause a “significant impact” on the environment, thereby avoiding the duty to prepare a full environmental impact statement (EIS).¹¹⁶ Indeed, avoiding NEPA’s required impact statements through such a “mitigated FONSI” (Finding Of No Significant Impact) has become commonplace.¹¹⁷

Because the exercises were imminent, the Natural Resources Defense Council (NRDC) sought a PI. Now, according to the *Winter* majority, a plaintiff seeking a PI must establish: (1) that s/he is likely to succeed on the merits; (2) that s/he is likely to suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in his or her favor; and (4) that an injunction is in the public interest.¹¹⁸ And *Winter* seems to have cut at least some ice in that the Supreme Court (finally) explicitly

stranding_bahamas2000.pdf); U.S. Gen. Accounting Off., *Defense Acquisitions: Testing Needed to Prove SURTASS/LFA Effectiveness in Littoral Waters* (June 10, 2002) (available at <http://www.gao.gov/new.items/d02692.pdf>).

112. The Natural Resources Defense Council played a commendable role in that process. See e.g. Michael Jasny, *Sounding the Depths: Supertankers, Sonar, and the rise of Undersea Noise* (Nat. Resources Def. Council 1999); Michael Jasny et al., *Sounding the Depths II: The Rising Toll of Sonar, Shipping and Industrial Ocean Noise on Marine Life* vii (Nat. Resources Def. Council 2005).

113. 129 S.Ct. 365 (2008).

114. These were the claims for injunctive relief that were originally pursued in the case. See *Nat. Resources Def. Council v. Winter*, 527 F. Supp. 2d 1216 (C.D. Cal. 2007).

115. See e.g. *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1334 (9th Cir. 1992) (holding that an agency could rely on the mitigative effects of its own adopted measures to reach a finding of “no significant impact” that then cancelled its responsibility to generate an EIS, consistent with 40 C.F.R. § 1506). The Ninth Circuit was hardly a pioneer when it first accepted this mitigated FONSI as an alternative to an EIS. See Albert I. Herson, *Project Mitigation Revisited: Most Courts Approve Findings of No Significant Impact Justified by Mitigation*, 13 *Ecol. L.Q.* 51 (1986).

116. See *Winter*, 518 F.3d at 660–662.

117. See Bradley C. Karkkainen, *Toward a Smarter NEPA: Monitoring and Managing Government’s Environmental Performance*, 102 *Colum. L. Rev.* 903, 928 (2002). As the Solicitor General observed in its petition for certiorari, the EA/FONSI in this case was extensive (293 pages) and was accompanied by a “consistency determination” under the Coastal Zone Management Act, 16 U.S.C. § 1456(c)(1)(A)–(C) (2006), a National Defense Exemption under the Marine Mammal Protection Act, 16 U.S.C. § 1371(f) (2006), a ‘no-jeopardy’ biological opinion under Section 7 of the Endangered Species Act, 16 U.S.C. § 1536(b)(4) (2006), and an extensive informal consultative process between the Council on Environmental Quality and the Department of the Navy. See *Pet. for a Writ of Cert., Winter*, 129 S.Ct. 365 (available at 2008 WL 859374) [hereinafter *Petition*]. Given their conclusions and supposed biases, however, none of this analysis was going to convince NRDC that the Navy had accurately assessed the factors involved.

118. *Winter*, 129 S. Ct. at 374 (citing *Munaf v. Geren*, 128 S.Ct. 2207 (2008); *Amoco Prod. Co. v. Gambell*, 480 U.S. 531, 532 (1987); *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982)).

endorsed this four-factored test, perhaps even turning the four factors into *elements*.¹¹⁹ Long thought to reside in the “sound discretion” of the district courts,¹²⁰ the very availability of a PI “recognizes that the task of protecting legal entitlements cannot be postponed until the conclusion of the litigation concerning the assignment of those entitlements.”¹²¹

Applying these disparate choice factors to actual cases and doing so in a hurry, however, can be challenging. Thus, the supply of PI’s is notoriously uneven,¹²² subject to misappropriation,¹²³ and of a perennially-questioned legal pedigree.¹²⁴ In the winding, grinding proceedings of the whale/SONAR litigation, NRDC had convinced a federal court that the Navy—indeed, that the President of the United States (who ultimately issued a special exemption under the MMPA¹²⁵)—had misinterpreted the law so badly as to merit a PI not once, but *twice*.¹²⁶ The Solicitor General then convinced the Supreme Court to hear the Navy’s appeal and balance the factors for itself. In November 2008, based on its deference to the Navy and “the documented risks to national security” should the SONAR exercises be postponed, the Court held that the factors “clearly” weighed in favor of the Navy.¹²⁷ Characteristically, NRDC’s attorneys have already published a post-mortem accusing the Court of misapplying the law on preliminary injunctions¹²⁸—specifically, of giving insufficient weight to the probable harms NRDC had alleged while giving too much weight to the Navy’s claims of national security¹²⁹—

119. The circuit split before *Winter* involved some courts having adopted a more traditional use of the listed factors and some courts having molded those factors into a unitary “sliding” scale. See Richard R.W. Brooks & Warren F. Schwartz, *Legal Uncertainty, Economic Efficiency, and the Preliminary Injunction Doctrine*, 58 Stan. L. Rev. 381, 388–394 (2005). The *Winter* majority, however, said that the plaintiff must “establish” each of the four factors, and that sounds much more like an elements approach. *Winter*, 129 S.Ct. at 374; cf. Brooks & Schwartz, *supra* n. 119, at 409 (observing that the availability of PIs can either make them more like liability rules or more like property rules and that the tests used to assign PI’s ought to reflect the value of the PI to the movant by requiring a movant to pay for damages the PI may create).

120. See Morton Denlow, *The Motion for a Preliminary Injunction: Time for a Uniform Federal Standard*, 22 Rev. Litig. 495, 533 (2003). Federal Rule of Civil Procedure 65 states that “[N]o preliminary injunction shall be issued without notice to the adverse party.” Fed. R. Civ. P. 65(a)(1). But Rule 65 “does not provide much guidance” on the appropriateness of preliminary injunctions. Denlow, *supra* n. 120, at 504.

121. Brooks & Schwartz, *supra* n. 119, at 384.

122. See e.g. John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 Harv. L. Rev. 525 (1978).

123. See Denlow, *supra* n. 120, at 533 (“The failure to adopt [a uniform] standard has led to confusion by the courts and possible forum shopping by parties.”).

124. *Weinberger*, 456 U.S. 305, for example, was a case involving the denial of injunctive relief for no given reason other than some ineffable balance of equities. See e.g. Jason David Fregeau, *Statutes and Judicial Discretion: Against the Law . . . Sort Of*, 18 B.C. Envtl. Aff. L. Rev. 501 (1991).

125. *Petition*, *supra* n. 117, at 10–11.

126. Following the issuance of the first PI, the Navy filed an immediate appeal and the Ninth Circuit issued a stay pending that appeal. *Winter*, 502 F.3d 859, 862. Following the briefing and a hearing, the Ninth Circuit sustained the PI but ordered that it be modified to allow the Navy to proceed with its training exercises in “mitigated” form. *Winter*, 508 F.3d 885, 887. On remand to the district court, Judge Cooper amended but upheld the order and then was asked to reconsider in light of the President’s specially-issued “National Defense Exemption” under the MMPA and CEQ’s specially-issued exemption under its NEPA Guidelines, 40 C.F.R. § 1506.11. See *Winter*, 527 F. Supp.2d at 1221–1224. That request was denied. *Id.* at 1238. In rejecting an appeal from the denial, the Ninth Circuit panel notably took the opportunity to reiterate its own rather unique interpretation of NEPA as to the avoidance of impact statements. See *Winter*, 518 F.3d 658, 687–696; *infra* notes 137–141 and accompanying text.

127. *Winter*, 129 S.Ct. at 381 n. 5.

128. See Joel Reynolds et al., *No Whale of a Tale: Legal Implications of Winter v. NRDC*, 36 Ecol. L. Q. 753 (2009).

129. *Id.* at 762–767. The basic error alleged in the article is that the Court paid insufficient deference to the

while simultaneously evading the substantive questions.¹³⁰

It may be helpful, though, to recall the underlying violation of law the plaintiffs alleged (which the district court adjudicated and which the Ninth Circuit upheld as the chief predicate for the injunction): the Navy's use of an EA instead of the more detailed EIS under NEPA. Now, if it was just the NEPA claim that gave rise to the PI, it is demonstrably inaccurate to assert—as Justice Ginsburg may have in dissent¹³¹—that NEPA commanded the Navy to complete an EIS prior to its exercises. For most of its forty years we have been reminded of NEPA's many shortcomings, including its confinement to a purely “procedural” existence,¹³² its slippery jurisdictional terms,¹³³ its over- and under-inclusion,¹³⁴ and its often counterproductive structure.¹³⁵ And the *precise* finding in *Winter* that led to the EA over the EIS—and which was challenged as such—was that the environmental harms from the mitigated SONAR exercises were of

district court and its comparatively “expert” fact-finding capacities. While some deference was probably appropriate under the governing standard of review, the Supreme Court has made clear repeatedly that it will decide for itself on the legal issues underlying any grant of a preliminary injunction. *See e.g. McLucas v. DeChamplain*, 421 U.S. 21 (1975); *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000). Whether this independence of judgment is justified or not, it was hardly unprecedented that the Court paid little-to-no deference to the lower courts in *Winter*, 129 S. Ct. 365.

130. Reynolds et al., *supra* n. 128, at 772 (“The Supreme Court’s opinion leaves unanswered a number of broader questions posed by the Navy’s position [like] the limits of judicial deference to military claims in NEPA cases when, in its view, national security is threatened[.]”).

131. “If the Navy had completed the EIS before taking action, as NEPA instructs, the parties and the public could have benefited from the environmental analysis—and the Navy’s training could have proceeded without substantial interruption.” *Winter*, 129 S. Ct. at 387 (Ginsburg, J., dissenting). Reynolds and colleagues make this out to be Justice Ginsburg’s major point of departure from the majority. Reynolds et al., *supra* n. 128, at 770–771. Yet neither Justice Ginsburg nor Reynolds et al. specify where this command of NEPA’s can be found. In fact, nowhere does NEPA § 102 define its operative terms—the causing of a “significant effect” on the “human environment.” 42 U.S.C. § 4331 (2006). CEQ’s Guidelines—which are authoritative and, for all practical purposes, binding (even though they were authored under a contrary expectation)—provide none of the clarity that NEPA warriors have so long advocated. *See e.g. Dinah Bear, NEPA at 19: A Primer on an ‘Old’ Law with Solutions to New Problems*, 19 *Envtl. L. Rptr.* 10060, 10064 (stating that “disagreement about whether a proposed action has ‘significant effects’ has been the most frequent reason for NEPA litigation” and that “CEQ’s regulations do not define which particular federal actions are ‘significant,’” but instead identify a list of factors for the agency to consider, including effects on the public and health and safety). We might, indeed, go further and conjecture that Senator “Scoop” Jackson himself—a vocal supporter of the Vietnam War who was sometimes disparaged as the “Senator from Boeing”—would have been surprised to learn that *mitigated* military training exercises would necessitate the “detailed statement” his legislation created. For this reason, I prefer to interpret the quoted passage from Justice Ginsburg’s dissent not as addressed to the *merits* of the underlying claim but rather as having *assumed* the lower courts’ holdings on the motion for preliminary injunction and perhaps as a reflection of the abbreviated record that accrued in the litigation.

132. *See e.g. William L. Andreen, In Pursuit of NEPA’s Promise: The Role of Executive Oversight in the Implementation of Environmental Policy*, 64 *Ind. L.J.* 205 (1989); Matthew Lindstrom & Zachary A. Smith, *The National Environmental Policy Act: Judicial Misconstruction, Legislative Indifference & Executive Neglect* (Texas A&M U. Press 2001); Joseph L. Sax, *The (Unhappy) Truth About NEPA*, 26 *Okla. L. Rev.* 239 (1973). Of course, good arguments have been made that, combined with administrative law’s central tenets, NEPA’s procedures actually factor its underlying (substantive) concerns into agency deliberations in a deep and meaningful way. *See e.g. Jason J. Czarneski, Revisiting the Tense Relationship Between the U.S. Supreme Court, Administrative Procedure, and the National Environmental Policy Act*, 25 *Stan. Env’tl. L.J.* 3 (2006).

133. *See e.g. Thomas McGarity, The Courts, the Agencies, and NEPA Threshold Issues*, 55 *Tex. L. Rev.* 801 (1977).

134. Karkkainen, *supra* n. 117, at 909–932; Bradley C. Karkkainen, *Wither NEPA?* 12 *N.Y.U. Env’tl. L.J.* 333 (2004).

135. By naïvely assuming that future effects of actions can be predicted accurately and by only subjecting these documents to *ex ante* “procedural” judicial review, NEPA arguably encourages agencies to “bullet proof” their NEPA documents in anticipation of litigation, not necessarily to improve their predictive capacities. *See NEPA Task Force, Rept. to the Council on Env’tl. Quality: Modernizing NEPA Implementation* (Sept. 2003) (available at <http://ceq.hss.doe.gov/ntf/report/index.html>).

unknown magnitude but were *probably* below NEPA's supposed "significance" threshold.¹³⁶ The implicit threat lurking beneath that finding—which the Solicitor General made manifest in its petition for certiorari—was that *the Executive*, at the time "engaged in war, in two countries," had decided that an in-depth EA *should* suffice. The government, in other words, focused the inquiry into the tradeoffs involved quite narrowly: was the EIS (instead of an EA) really worth a preliminary injunction that precluded exercises the Navy maintained were vital to military preparedness?

Interestingly enough, in the Ninth Circuit—unlike most other circuits—such a decision to forego an EIS cannot follow from a finding that the effects of the action(s) in question will be of *uncertain* significance.¹³⁷ In other words, to conclude that an EIS is not required by NEPA in the Ninth Circuit, the action agency must *know* that its mitigation measures will be effective and will render the effects of the action insignificant.¹³⁸ Going back as early as 2001, a panel of the Ninth Circuit (expanding on an earlier holding that involved "highly uncertain," "unique," and "unknown" risks) maintained that an agency that lacks *proof* that its mitigated actions will be insignificant in effect must produce an EIS and not an EA.¹³⁹ And notwithstanding a footnote to the contrary, that 2001 holding—which underlay the Ninth Circuit's holding in *Winter*—arguably overruled an earlier Ninth Circuit precedent.¹⁴⁰ That interpretation of NEPA arguably transformed acknowledged uncertainties in forecasting into findings of significant impact—a view of NEPA that adds substantially to the text of § 102 as written.¹⁴¹

So what is the force of such a precedent in weighing factors for the grant of a PI? Surely there is ample reason to be suspicious of a court that turns uncertainty into an

136. See *Winter*, 527 F. Supp.2d at 1238 ("The Court is satisfied that its injunction stands firmly on NEPA grounds."). The precedents on the "significantly" term and on its definition in the NEPA Guidelines are voluminous, to say the least. See Daniel R. Mandelker, *NEPA Law and Litigation* §§ 8.48–51 (2d ed., West 2007).

137. See *Natl. Parks & Conserv. Assn. v. Babbitt*, 241 F.3d 722 (9th Cir. 2001); *Winter*, 518 F.3d at 687–688.

138. While *Babbitt* cited a number of Ninth Circuit NEPA precedents in reaching this holding, including *Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146 (9th Cir. 1998), *Blue Mountains Biodiversity Proj. v. Blackwood*, 161 F.3d 1208 (9th Cir. 1998), and *Sierra Club v. U.S. Forest Serv.*, 843 F.2d 1190 (9th Cir. 1988), none of them involved the choice between a mitigated FONSI and an EIS, as was at issue in *Babbitt*. Thus, none of them squarely addressed the precise issue of uncertainty in mitigation.

139. *Babbitt*, 241 F.3d at 733 ("The [agency] proposes to increase the risk of harm to the environment and then perform its studies Before one brings about a potentially significant and irreversible change to the environment, an EIS must be prepared that sufficiently explores the intensity of the environmental effects it acknowledges." (citation omitted)).

140. See *Franklin*, 14 F.3d at 1335 (ruling that mitigation measures, even though of uncertain efficacy, can serve to keep the action's "significance" level below the EIS threshold); *but cf. Babbitt*, 241 F.3d at 732 n. 9 ("Greenpeace Action v. Franklin . . . is not to the contrary.").

141. *Babbitt* has turned the Ninth Circuit uniquely skeptical of agency decisions to forego EIS's by way of a "mitigated FONSI." Precedents in the D.C. Circuit and most of the other regional circuits have tended to view such uses of uncertainty within a FONSI quite deferentially. In *Babbitt* and a series of cases involving National Forest Management Act land planning, the Ninth Circuit has been spinning a web of barriers around the FONSI 'exit' from NEPA. *Babbitt* held that "the absence of currently available information does not excuse the [agency] from preparing an EIS when there is a reasonable possibility that such information can be obtained in connection with the preparatory process." *Babbitt*, 241 F.3d at 737. Certain panels of the Ninth Circuit cite it routinely, most notably in *Center for Biological Diversity v. Natl. Hwy. Traffic Admin.*, 508 F.3d 508, 558 (9th Cir. 2007) (striking down a weak fuel economy rule for SUVs and light trucks because, among other things, the National Highway Traffic Administration failed to prepare an EIS).

obligation to generate an EIS,¹⁴² especially where the action agency has (1) completed an EA, (2) generated a mitigated-FONSI, and (3) committed to gathering more data on the action or series of actions that NEPA alone—by acclamation—cannot prohibit in any event. NEPA is famously aimed at “better decisions, not better documents,”¹⁴³ and a rule that requires an EIS in this context is not necessarily contributing to either.¹⁴⁴ Jarring uncertainties are ubiquitous in forecasting environmental futures and, even where information is actually *generated* or better *integrated* for an EIS, “it appears that relatively little NEPA-generated information is transmitted unfiltered from government to the citizenry and back again.”¹⁴⁵

So what is this interpretation’s connection to NEPA? It makes a certain amount of sense as an intuitive extension of NEPA’s deliberative ethos (at least if you believe the Executive is predisposed to avoiding deliberation in public). But ought the federal courts to engage in that sort of *remedial* interpretive enterprise? The whale/SONAR litigation casts it in an unfavorable light, at least. It is not that the values or other motivations behind the Ninth Circuit’s NEPA doctrine were especially exotic; it is not that its normative statutory interpretation was immodest or even especially “countermajoritarian.” It is its epistemic weaknesses that stand out. Institutionally, a federal court is in no position to insist on this sort of prolonged executive branch deliberation categorically, especially when the nation’s defense preparations are the tradeoff.¹⁴⁶ And the Ninth Circuit’s rule would perhaps be better justified if it were not *just* the Ninth Circuit’s rule.

If an EIS were capable of generating high quality information at little or no cost, and could arrive in time to influence the agency decision, then an EIS might be preferable to a mitigated FONSI. But if, as the evidence suggests, EISs are typically costly, cumbersome, largely uninformative, and arrive too late in the process to shape the real decision, then perhaps we could do with fewer of them—and all the more so if the trade off is demonstrable environmental benefits arising from the mitigation measures

142. When reviewing the “significance” determination, courts must apply the arbitrary and capricious standard of review. See *Marsh v. Or. Nat. Resources Council*, 490 U.S. 360, 376 (1989). This standard of review is generally quite deferential, in large part because the determination is so likely to be uncertain. See e.g. *Spiller v. White*, 352 F.3d 235, 240 (5th Cir. 2003); *Grand Canyon Trust v. FAA*, 290 F.3d 339 (D.C. Cir. 2002); *Soc. Hill Towers Owners’ Assn. v. Rendell*, 210 F.3d 168 (3d Cir. 2000); *Natl. Audubon Socy. v. Hoffman*, 132 F.3d 7 (2d Cir. 1997); *River Rd. Alliance Inc. v. Corps of Engrs. of U.S. Army*, 764 F.2d 445, 448–449 (7th Cir. 1985); And on the precise question at issue in *Babbitt*—whether mitigation measures the efficacy of which is uncertain may serve to keep an action’s effects below NEPA’s “significance” threshold—a general notion of reasonableness also seems to be the norm. See Mandelker, *supra* n. 136, at § 8.49.

143. 40 C.F.R. 1502.15 (2006).

144. The use of a “categorical exclusion” by action agencies, for example, would easily nullify the *Babbitt* doctrine with respect to covered actions—like SONAR exercises—and would almost certainly thereby lose whatever information the Navy had committed to collecting in its “mitigated FONSI.”

145. Karkkainen, *supra* n. 117, at 916 (“Far more frequently, organized groups serve as a mediating agent, repackaging and translating the often highly technical information contained in an EIS for dissemination to the broader citizenry, and offering their services as the vehicle through which citizens may attempt to hold their government accountable.”).

146. *Cf. Cabinet Mts. Wilderness v. Peterson*, 685 F.2d 678, 684 (D.C. Cir. 1982) (“The agency concluded the proposal as modified would not cause any significant environmental impacts. Appellants have not identified any deficiencies in the agency’s decision. For us to overturn it under these circumstances would require an unjustifiable intrusion into the administrative process.” (citing *Vt. Yankee Nuclear Power Corp. v. Nat. Resources Def. Council*, 435 U.S. 519, 556 (1978))).

undertaken by agencies to avoid EIS production.¹⁴⁷

Indeed, digging into NEPA and summoning its implications to motivate some kind of permanently critical stance toward agency decision making is, as Professor Kalen has observed, precisely what the D.C. Circuit had done—and precisely what the Supreme Court so pointedly denounced—in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*.¹⁴⁸ Of course, administrative lawyers know all too well that the Court itself is probably to blame for not having shut down just this kind of statutory interpretation in *Vermont Yankee*.¹⁴⁹ The Second Circuit’s “better explanation” gambit in *Entergy*, for example, was precisely the Court’s own move in *Massachusetts v. EPA*: the Court denied, after all, that it was *forcing* EPA to regulate green house gases (GHGs) by holding that GHGs are “air pollutants” under the CAA.¹⁵⁰ And *Massachusetts* perhaps imposed a measure of accountability that would otherwise have been lost in EPA’s twisted approach to GHGs.¹⁵¹ But at what cost to the coherence of standing doctrine, or deference doctrine, or even to today’s prospects for meaningful climate change legislation that is tailored to GHGs as a *global* environmental harm?¹⁵² These are the considerations that enter into judicial factoring on complex questions like default rules for NEPA. And our non-centralized judiciary, overseen by a Supreme Court with too little of itself to spread around, may just reproduce the diversity of interpretations present in the public at large unless and until some more systemic factoring and/or rulemaking is done. Given the state of statutory interpretation in our federal courts today, that seems unlikely any time soon.

For all their contrasts, in other words, positive and normative statutory interpretations will probably persist indefinitely in our environmental law because there are plausible justifications for both of them across a vast array of interpretations of our Constitution. Yet, as Joseph Raz has argued,

[T]he authoritative laying down of standards is the decisive moment in the legal process not merely because in it new reasons [for action] are created. It is the decisive moment because those new standards, those new reasons, are there to put an end to the argument and struggle about what is to be done, to resolve the argument and the struggle by replacing them for the time being. . . . The argument and struggle can and often do continue. But now they are about whether and how to change the new law, and no longer about whether to adopt it.¹⁵³

147. Karkkainen, *supra* n. 117, at 935.

148. 435 U.S. at 557–558; see Sam Kalen, *The Devolution of NEPA: How the APA Transformed the Nation’s Environmental Policy*, 33 Wm. & Mary Envtl. L. & Policy Rev. 483, 531–540 (2009).

149. See Jack M. Beerman & Gary Lawson, *Reprocessing Vermont Yankee*, 75 Geo. Wash. L. Rev. 856, 901 (2007) (arguing that another holding like *Vermont Yankee* is needed to counteract all the signals from the Court that undermine what *Vt. Yankee* held).

150. See *Mass. v. EPA*, 549 U.S. at 534–535.

151. See Jonathan Martel, *Climate Change Law and Litigation in the Aftermath of Massachusetts v. EPA*, 7 Daily Env. Rpt. no. 214, 1 (Nov. 6, 2007).

152. Cf. Kate Sheppard, *Energy Industry Stall Tactic: Embrace EPA*, <http://washingtonindependent.com/59889/energy-industry-stall-tactic-embrace-epa> (Sept. 18, 2009) (arguing that industry sectors that had previously opposed EPA regulation of GHGs under the CAA have pivoted to embrace EPA regulation under the CAA as a way of forestalling the enactment of further legislation that regulates more quickly and comprehensively).

153. Joseph Raz, *Between Authority and Interpretation* 109 (Oxford U. Press 2009).

Thus, as our environmental priorities are set for us within the chaotic nexus of judicial review of agency interpretations of legislation that is, in many if not most cases, authored to avoid definitive resolution of exactly those priority questions, we have to wonder what this practice is worth. In all probability, the more often such questions of valuing nature's composition and function are brought to our appellate courts, the more frequently they will tell us that they cannot author the nation's priorities—even as they do so by default and without any systemic or methodologic coherence over time. Their judgments add to the attractions and distractions of the circus, perhaps, but they do little to improve its underlying structure.

IV. CONCLUSION

At least since Mark Dowie published his unflinching indictment of the environmental “movement” in America, it has been *de rigueur* to criticize “environmentalists” for thinking tactically and not strategically.¹⁵⁴ Even putting that meme aside, though, there is ample reason to conclude that the questions being litigated today lack focus, even vitality. Categorical arguments against cost-benefit analysis, strategic uses of NEPA as delay tactic: ‘environmentalism’ today more resembles a circus than a movement.¹⁵⁵ It boasts its own travelling companies of theatrical performers: nonprofits that wage mythical struggles against Goliath—the multinational enterprise that protests it has already spent too much for the environment to remain ‘competitive.’ And, acutely aware of the subtle ways in which trans-jurisdictional reform has become the real driver of “environmental” progress today (and that they are poorly suited to the superintending of that reform), our courts have called out the circus’s ringleaders.¹⁵⁶ The problem is that there are no ringleaders. And the obvious alternative audience for thinking and talking about our environmental norms and priorities—the American public in all of its jurisdictional and institutional diversity—is too daunting a prospect for all but the most strategically-minded.¹⁵⁷

Given the state of our political lives, reforming attitudes wholesale hardly seems like a job for Congress, the President, or even for their administrative agencies.¹⁵⁸ “At

154. See Mark Dowie, *Losing Ground: American Environmentalism at the Close of the Twentieth Century* (MIT Press 1995); see also Andrew P. Morriss & Benjamin D. Cramer, *Disestablishing Environmentalism*, 39 *Envtl. L.* 309 (2009); Nordhaus & Shellenberger, *supra* n. 100.

155. The most disparaging comparison is usually to the civil rights movement, as if civil rights advocates executed masterfully and with unexceptionable tactics and strategy. This is surely a caricature of both, though, and we could go even further and argue that environmentalism as a singular “movement” has always been misconceived. See e.g. Douglas Kysar, *The Consultant’s Republic*, 121 *Harv. L. Rev.* 2041, 2047–2066 (2008). Besides, there is reason to think that the civil rights movement was neither especially effective in strategy nor in tactics as long as we include the *pace* of change occasioned by the civil rights movement in the assessment of its efficacy. See Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (Oxford U. Press 2004).

156. See e.g. *Rapanos v. U.S.*, 547 U.S. 715, 758 (2006) (Roberts, C.J., concurring) (accusing the EPA and the Corps of shirking responsibilities by not having clarified the definitions of “waters of the United States” following *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*, 531 U.S. 159 (2001).

157. See e.g. Albert C. Lin, *Evangelizing Climate Change*, 17 *N.Y.U. Env’tl. L.J.* 1135 (2009) (proposing a communications strategy for radicalizing the American public on climate change that would include Biblical parables, storytelling, “witnessing” and other techniques aimed at appealing to “values voters”).

158. See James A. Gardner, *What Are Political Campaigns For? The Role of Persuasion in Electoral Law and Politics* (Oxford U. Press 1959).

the heart of republican electoral practice lay the belief that the people are incompetent to evaluate either public policy or the job performance of hierarchically superior government officials.”¹⁵⁹ Moving Americans to change how they value nature’s composition and function or their longer-term resilience is, and will probably remain, an inherently multi-scalar, multi-generational endeavor. Unfortunately, we do not conceive of the CAA or the CWA in such terms and did not structure them accordingly. Especially given the power of time as a variable, though, the bulk of our actions balancing risk, equity, and efficiency under these statutes are provisional at best.¹⁶⁰ These goals are simply too big and too demanding to think that even our expert agencies can pursue them equally or evenly.

Still, while multi-factored decision-making is perhaps messy by nature, we have reason to believe that it can be improved significantly by continuous and progressive quantification—by a commitment to estimating relevant quantities.

We have no grounds for thinking our intuitions about very large numbers are reliable. On the contrary, we have good grounds for mistrusting them. The evidence is that they are often wrong because our imagination is not able to grasp just how big numbers can be. For example, many people’s intuition tells them that the process of natural selection, however many billions of years it continued for, could not lead from primordial slime to creatures with intelligence and consciousness. But they are wrong. Four billion years will do it.¹⁶¹

Categorical denunciations of “cost benefit analysis,” in short, share something in common with the increasingly pre-textual uses of NEPA’s EIS requirement: they are both beginning to cast the public as the *object* of “public” deliberation, as a mostly perceptual agent prone more to cultural polarization than to collective action. And cynics have reason to believe the public is just such an agent.¹⁶² But we have even better reasons to control the cynical behaviors that encourage the public in that direction. Indeed, as David Schoenbrod has argued, the confluence of cynical behaviors within the current institutional structure of our environmental law is yielding a perfectly *uncooperative* environment in which these inherently messy decisions must be made.¹⁶³ And there is blame enough to go around. A case like *Winter v. NRDC* reminds us how often a group like NRDC can take its show (in this case, whales and SONAR) to the Supreme Court and give that essentially conservative—arguably *cynical*—institution yet another opportunity to make “bad” law, “bad” headlines, and big mistakes.

Environmental law in our appellate courts, in this regard, is becoming a curious thing. It is neither a means nor an end in itself. A virtual mountain of work confronts our

159. *Id.* at 14 (“Instead, republicanism credited the people with a much narrower and more limited kind of skill and judgment—the ability to judge character.”).

160. On the potency of discount rates and discounting of future harms and benefits generally, see John Broome, *Discounting the Future*, 23 *Phil. & Pub. Affairs* 128 (1994).

161. John Broome, *Weighing Lives* 58 (Oxford U. Press 2004).

162. Indeed, we all have reason to so believe. See e.g. Dan M. Kahan, *The Cognitively Illiberal State*, 60 *Stan. L. Rev.* 115 (2007) (developing a “cultural cognition” theory of why and how different cultural groups perceive risks differently and choose political adversaries and/or allies accordingly).

163. See generally David Schoenbrod, *Saving Our Environment from Washington: How Congress Grabs Power, Shirks Responsibility, and Shortchanges the People* (Yale U. Press 2005). “Making it a secret that practicality counts turns public discussions of environmental issues into stale cartoons that insult everyone’s intelligence.” *Id.* at 195.

legal system today and it consists most of all in the institutional choices we make on matters like preemption,¹⁶⁴ the costs and benefits of information,¹⁶⁵ the pervasive biasing in our legal system's agents,¹⁶⁶ and the structure of legal entitlements.¹⁶⁷ Would it help if any single interpreter were to offer up the "purposes" behind our environmental statutes? What purpose is there in splitting the authority to permit "fill" discharges as between the Corps of Engineers and the EPA?¹⁶⁸ What purpose is there in the CWA's use of "waters of the United States" as its jurisdictional geography?¹⁶⁹ What purpose is there in a text that directs the EPA to require the best technology "available" on an industry-by-industry basis?¹⁷⁰ In truth, there probably are no ordered, intelligible purposes behind these texts. They aggregate the overlapping, conflicting, and too often equivocal purposes of their many different authors, some of whom are at generational removes from each other.¹⁷¹ The decisions that must be made in implementing them are inherently under-determined, multi-dimensional, and representative in at least the following sense: they reflect back to the public what the public itself has authored. But this underscores what is perhaps the most pressing challenge of all in environmentalism today: establishing a new form of *agency* that is inherently multi-lateral, multi-generational, and institutionally complex. It will demand fewer purely "federal," "state," or "local" institutions and more "diagonal" institutions that combine public officials from all levels into new organizational forms. Collecting principals who respond to different electorates and, therefore, to different priorities in a diagonal matrix of some kind could empower them to aggregate their information and judgments in ways our current institutions do not. That kind of agent probably has no recognizable principal, but it can be self-governing with the right (motivationally-effective) deliberation.¹⁷² It can exist—but it probably will not so long as courts and agencies dominate the ways in which we collectively imagine ourselves and our environment.

164. Preemption choices are, encouragingly, attracting much more attention from institutionalists. See e.g. William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. Rev. 1521 (2007); Robert A. Schapiro, *Polyphonic Federalism: Toward Protection of Fundamental Rights* (U. of Chicago Press 2009).

165. See e.g. Bradley C. Karkkainen, *Bottlenecks and Baselines: Tackling Information Deficits in Environmental Regulation*, 86 Tex. L. Rev. 1409 (2008).

166. See e.g. *Caperton v. A.T. Massey Coal Co.*, 129 S.Ct. 2252 (2009).

167. See e.g. Jamison E. Colburn, *Splitting the Atom of Property: Rights Experimentalism as Obligation to Future Generations*, 77 Geo. Wash. L. Rev. 1411 (2009).

168. Cf. *Coeur Alaska*, 129 S.Ct. at 2467 ("The decision of the Court of Appeals [interpreting the term "fill material"] in effect reallocated the division of responsibility that the Corps and the EPA had been following We now hold that the decision of the Court of Appeals was incorrect.").

169. See Jamison E. Colburn, *Waters of the United States: Theory, Practice and Integrity at the Supreme Court*, 34 Fla. St. U. L. Rev. 183 (2007).

170. See *supra* nn. 64–90 and accompanying text.

171. See generally Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. Rev. 204 (1980).

172. See Michael E. Bratman, *Structures of Agency: Essays* 21–46 (Oxford U. Press 2007) (sketching a theory of temporally-extended agency that relies on planning and self-governing policies).

