

Boston University School of Law

Scholarly Commons at Boston University School of Law

Faculty Scholarship

2005

The (Non)Uniqueness of Environmental Law

Jay D. Wexler

Boston University School of Law

Follow this and additional works at: https://scholarship.law.bu.edu/faculty_scholarship



Part of the [Administrative Law Commons](#), [Environmental Law Commons](#), and the [Judges Commons](#)

Recommended Citation

Jay D. Wexler, *The (Non)Uniqueness of Environmental Law* (2005).

Available at: https://scholarship.law.bu.edu/faculty_scholarship/1355

This Working Paper is brought to you for free and open access by Scholarly Commons at Boston University School of Law. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarly Commons at Boston University School of Law. For more information, please contact lawlessa@bu.edu.



BOSTON UNIVERSITY SCHOOL OF LAW

WORKING PAPER SERIES, PUBLIC LAW & LEGAL THEORY
WORKING PAPER NO. 05-06



THE (NON)UNIQUENESS OF ENVIRONMENTAL LAW

JAY D. WEXLER

This paper can be downloaded without charge at:

The Boston University School of Law Working Paper Series Index:

<http://www.bu.edu/law/faculty/papers>

The Social Science Research Network Electronic Paper Collection:

<http://ssrn.com/abstract=708241>

The (Non)Uniqueness of Environmental Law

Jay D. Wexler*

I.	Introduction.....	1
II.	Seven Judicial Paradigms for Environmental Law.....	7
	1. Apply Special Rules in Environmental Cases	7
	2. Modify General Rules in Environmental Cases.....	12
	3. Consider the Environment When Forming General Rules ..	13
	4. Consider Distinctive Features of Ecological Injury When Applying Facts to Law.....	15
	5. Employ Environmental Rhetoric or Provide Environmental Advice	16
	6. Reach Decisions Based on Preferred Outcome	18
	7. Do Not Consider the Environmental Aspects of the Case ..	19
	8. An Example: <i>Chemical Manufacturer's Association</i>	19
III.	Evaluating the Paradigms	25
	1. Special Rules.....	26
	2. Modify General Rules.....	32
	3. Consider the Environment When Forming General Rules ..	33
	4. Faithfully Apply Environmental Facts to Law	38
	5. Rhetoric and Advice	41
	6. Outcome-focused Decision-making.....	45
	7. Ignore Environmental Aspects of the Case	52
	8. <i>Chemical Manufacturer's Association</i> Reconsidered.....	52
IV.	Conclusion	60

I. Introduction

In everyday discourse, the label “environmental law” signifies a distinct and unique area of law.¹ Journalists, activists, and industry representatives speak, for example, about the Bush Administration’s record

* Associate Professor of Law, Boston University School of Law. The author thanks Trevor Morrison and participants at workshops held at the Boston University School of Law and the Washington University School of Law in St. Louis for extremely helpful comments on a previous draft. The author also thanks Winston Bowman for excellent research assistance.

¹ See, e.g., A. Dan Tarlock, *Is There a There There in Environmental Law?*, 19 J. LAND USE & ENV'TL. L. 213, 215 (“What we now call environmental law is very much embedded in the legal landscape.”).

on “environmental law,”² the Supreme Court’s “environmental law” cases,³ and Congress’ “environmental law” activities.⁴ Likewise, in the context of the law school curriculum, “environmental law” stands for something unique and distinct. On law school campuses across the country, students take courses in “environmental law,”⁵ join journals devoted to “environmental law,”⁶ and elect concentrations in “environmental law.”⁷ Indeed, even the esteemed⁸ U.S. News and World Report rankings contain a separate entry for “environmental law” programs.⁹

² See, e.g., Mark Grossi, *Norton Stops by Yosemite; Interior Secretary Defends Restoration*, FRESNO BEE, Apr. 23, 2004, at A1, available at 2004 WL 65880963 (“Environmentalists, who say Bush is attempting to dismantle decades of environmental law, also attended the Earth Day event.”); *Perspective*, NEWS JOURNAL, Dec. 21, 2003, at 10, available at 2003 WL 64628779 (“It seems that under President Bush, environmental law gets bent as a substitute for a truly forward-looking national energy policy.”);

³ Lee Davidson, *Green Groups Back Suit by SUWA*, DESERET MORNING NEWS, Feb. 26, 2004, at B3, available at 2004 WL 70641690 (“A virtual Who’s Who of environmental groups—plus 14 state governments—are arguing in briefs that federal environmental law would be completely undermined if the U.S. Supreme Court overturns a Utah case now before it.”); Frank Davies, *Court Hears Glades Dispute*, MIAMI HERALD, Jan. 15, 2004, at 6, available at 2004 WL 56366284 (“The Supreme Court on Wednesday wrestled with environmental law . . . in an Everglades dispute between the Miccosukee Tribe and South Florida water managers.”);

⁴ John Cornyn, *A Broken Tradition: Time to Reform Senate Rules on Filibusters*, WASH. TIMES, June 5, 2003, at A21, available at 2003 WL 7712469 (“The Senate has previously considered at least 30 proposals to eliminate filibusters altogether. In fact, there are dozens of laws on the books that prevent a minority of senators from delaying action in certain areas . . . covering such diverse subjects as . . . environmental law.”); *Environmental Law Expert to Present Salmon Lecture*, PORTLAND PRESS HERALD, Nov. 11, 2001, at 2K, available at 2001 WL 27638936 (reporting that William H. Rodgers, Jr., “who frequently testifies before Congress on environmental law matters” will be giving a lecture on protecting salmon); David L. Markell & Martha F. Kellogg, *States on the Rise: National Interests Don’t Have to Suffer as the Pendulum of Power Swings Away, For Now, From the Federal Government*, TIMES UNION, Feb. 4, 2001, at B1 (“In the environmental area, for example, during the 1970s, Congress enacted an alphabet soup of regulatory and other statutes intended to federalize environmental law.”).

⁵ See, e.g., <http://www.law.umaryland.edu/Environment/courses.asp> (linking to a list of environmental law courses offered at the University of Maryland).

⁶ See, e.g., the websites for the Ecology Law Quarterly, <http://www.law.berkeley.edu/journals/elq/>, the Stanford Environmental Law Journal, <http://elj.stanford.edu/elj/>, and the Harvard Environmental Law Review, <http://www.law.harvard.edu/students/orgs/elr/>.

⁷ See, e.g., <http://www.ggu.edu/schools/law/graduates/environment> (describing Golden Gate Law School’s LL.M. program in environmental law); <http://www.law.washington.edu/Students/Academics/ct>

Environmental.html (describing the University of Washington’s environmental law concentration); <http://www.als.edu/departments/editor.cfm?ID=415> (describing Albany Law School’s environmental law concentration).

⁸ But see Brian Leiter, *The U.S. News Law School Rankings: A Guide for the Perplexed*, <http://www.utexas.edu/law/faculty/bleiter/rankings/guide.html> (May 2003) (noting that the rankings are “meaningless”).

⁹ http://www.usnews.com/usnews/edu/grad/rankings/law/brief/lawsp03_brief.php (listing top environmental law programs). For more examples of the legal profession and academy’s treatment of environmental law as a unique subject, see Tarlock, *supra* n. 1, at 216 (pointing to, among other things, environmental law’s “own West key number,” what Tarlock calls “the ultimate recognition” for environmental law).

But in what sense, exactly, is environmental law different from both the general areas of law (particularly administrative law, but also corporate law, constitutional law, and others) in which environmental issues arise and other specific areas of law (*e.g.*, employment law, securities law) that parallel it?¹⁰ The uniqueness of environmental law stems most obviously from the subject matter of environmental legislation and regulation. Environmental law deals with the protection of the natural environment—with the control of air and water pollution, the management of hazardous wastes, and the protection of public natural resources such as land and biodiversity—while employment law and securities law, for example, deal respectively with regulating the relationship between employers and employees and regulating the functioning of securities markets. But does environmental law also differ from other areas of law with respect to how judges ought to approach deciding cases? In other words, should judges act differently somehow when they are deciding an environmental law case as opposed to, for example, a labor law or banking law case? At least one influential scholar has argued that the distinctive features of ecological injury justify treating environmental cases differently from other types of cases.¹¹ Nonetheless, at first glance, it is

¹⁰ For a sophisticated look at the question of environmental law's uniqueness from a variety of angles, see Tarlock, *supra* n. 1. There is a long history within legal scholarship of analyzing the relevant level of generality for identifying areas of legal inquiry. For a sampling of relevant literature, see, *e.g.*, Samuel D. Warren & Louis D. Brandeis, *The Law of Ponds*, 3 HARV. L. REV. 1 (1889); Oliver Wendell Holmes, *Codification and Scientific Classification of the Law*, in JUSTICE OLIVER WENDELL HOLMES, HIS BOOK NOTICES AND UNCOLLECTED LETTERS AND PAPERS 59 (Harry C. Shriver, ed. 1936); Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL F 207 (1996); Frederick Schauer, *Prediction and Particularity*, 78 B.U. L. REV. 773 (1998); Mark A. Hall & Carl E. Schneider, *Where is the "There" in Health Law? Can It Become a Coherent Field*, 14 HEALTH MATRIX 101 (2004).

¹¹ See Richard J. Lazarus, *Restoring What's Environmental About Environmental Law in the Supreme Court*, 47 UCLA L. REV. 703, 706-07 (2000) [hereinafter Lazarus, *Restoring What's Environmental*]. Although I owe much to the excellent work of Richard Lazarus, one of the leading environmental law scholars and practitioners in the country, see, *e.g.*, text accompanying notes 43-53, *infra* (describing Lazarus's account of the distinct features of ecological injury), in many ways this Article stands as a counterpoint to his influential arguments. In a book and a series of articles, Lazarus has argued for the uniqueness of environmental law. In addition to the article cited above in this footnote, see also RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW* (2004); Richard J. Lazarus, *Thirty Years of Environmental Protection Law in the Supreme Court*, 17 PACE ENVIRONMENTAL L. REV. 1 (1999) [hereinafter Lazarus, *Thirty Years*]; Richard J. Lazarus, *Environmental Law and the Supreme Court: Three Years Later*, 2002 PACE ENVIRONMENTAL L. REV. 653 (2002) [hereinafter Lazarus, *Three Years Later*]; Richard J. Lazarus, *Survey Says: Court Doesn't Get It*, ENVTL. F., Jan./Feb. 2000, at 44; Richard J. Lazarus, *Judging Environmental Law*, 18 TUL. ENVTL. L.J. 201 (2004). Specifically with respect to the judicial role and environmental law, Lazarus has argued that the Supreme Court has wrongly failed to "appreciate[e] environmental law as a distinct area of law." Lazarus, *Restoring What's Environmental*, *supra*, at 706. Lazarus concedes that some "stripping of the 'environment' out of environmental law is . . . an appropriate development," Lazarus, *Thirty Years*, *supra*, at 635, since the Court has a responsibility to reach consistent results in the underlying areas of law within which environmental problems arise (*e.g.*, administrative law, constitutional law governing federal-state relations), *id.*, but he argues that "[e]nvironmental protection concerns" ought "always to remain a relevant factor for separate consideration" and "a dispositive factor . . . in some instances." *Id.* This article, to the contrary, argues that, in large part, courts rightly treat environmental law primarily as a

by no means clear that the judicial role ought to differ depending on the subject matter being protected or regulated by legislation or administrative action. If the judicial role should differ, it is important to understand why it ought to differ, how it ought to differ, and whether it in fact has differed.

To answer these important questions, scholars must clarify, with some specificity, what it would mean for courts to treat environmental law as a distinct area of law. Although scholars have produced some excellent work focusing on the nature of environmental law decision-making,¹² no such specific attempt to chart the relationship between environmental law and administrative law (and other general areas of law) exists in the scholarly literature.¹³ This Article seeks to fill this gap by describing and evaluating seven unique paradigms that federal courts, including the Supreme Court, could adopt when deciding environmental law cases. Specifically, courts might: (1) supplant generally applicable principles from other areas of law with principles applicable only to environmental law; (2) retain general principles from other areas of law but apply them in a special manner in environmental law cases; (3) shape general principles of law through an understanding of environmental problems; (4) pay strong attention to the factual nuances of environmental problems when applying facts to general principles of law; (5) apply general principles of law to environmental law problems but employ environment-related rhetoric or provide advice relating to environmental protection; (6) decide environmental law cases on the basis of preferred outcome regarding the environment; or (7) apply generally applicable legal principles without any special concern for the environmental aspects of the case.¹⁴

subset of administrative law rather than as a radically unique or distinct area of law all to itself.

¹² See, e.g., Daniel A. Farber, *Is the Supreme Court Irrelevant? Reflections on the Judicial Role in Environmental Law*, 81 MINN. L. REV. 547 (1997) (arguing that the Supreme Court has not played an important or effective role in the environmental law area); Harold Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509 (1974); Richard E. Levy & Robert L. Glicksman, *Judicial Activism and Restraint in the Supreme Court's Environmental Law Decisions*, 42 VAND. L. REV. 343, 346 (1989) (arguing that the Supreme Court "has pursued a policy far less protective of the environment than the policy intended by Congress"). Most importantly, see also the work published by Richard Lazarus, *supra* n. 11.

¹³ Richard Lazarus has defended at length his claim that the Supreme Court fails to treat environmental law as anything more than a subset of administrative law, and in the course of his analysis, he certainly discusses in passing various ways that the Court should understand the distinctiveness of environmental law as the field compares to administrative law. See generally the works cited in n. 11, *supra*; n. 196, *infra*. In my view, however, he does not systematically chart and categorize the various possible relationships between environmental law and administrative law (or other general areas of law).

¹⁴ Although the Article will have much to say about each of these paradigms later on, for clarity it is worth giving some brief examples of the paradigms here:

- (1) In administrative law, there is a general rule that courts may not review agency decisions not to enforce statutes. See *Heckler v. Chaney*, 470 U.S. 821 (1985). Under the first paradigm, a court might apply a special rule just in environmental law cases in which it *would* review decisions not to enforce.

As the Article further argues, courts should acknowledge the unique nature of environmental law problems to some limited extent by foregoing option #7 and employing options #3 and #4 (and perhaps option #5) when the legal and factual circumstances of the case justify special consideration of the environment, but should refrain from any more radical treatment of environmental law as a unique area of law. In other words, when relevant under the appropriate legal standards, courts should consider the distinctive features of ecological injury when applying facts to law,¹⁵ and in some situations they should draw on their knowledge of those distinctive features when fashioning rules of general application. They should not, however, reach pro-environment decisions in a non-principled manner, automatically vote to protect the environment whenever the relevant legal materials prove substantially indeterminate, or otherwise act as though protection of the

-
- (2) In administrative law, courts review agency decisions to make sure they are not “arbitrary and capricious.” 5 U.S.C. § 706(2). Sometimes this analysis can be very deferential; other times it is surprisingly demanding. Under the second paradigm, courts might say that the arbitrary and capricious standard will be particularly demanding in environmental law cases.
 - (3) This paradigm goes to the time of rule formation, rather than the time of rule application. For example, when the Supreme Court was considering what the proper test should be for Article III standing, this paradigm would have had the Court consider not just the text of the Constitution and its structure and history, but also the environmental consequences that would likely have resulted from adopting any particular rule.
 - (4) According to some scholars, environmental harms are distinctive when compared to the harms encountered in other areas of law. *See, e.g.*, text accompanying notes 43-53, *infra* (discussing one scholar’s views regarding ecological injury). This paradigm would require courts to understand and acknowledge those distinctive features when applying facts to law. For example, some legal tests require courts to balance the government’s interest in taking a certain action against the private interests threatened by that action. *See* text accompanying notes 157-162, *infra* (describing test for procedural due process). In cases involving government action to protect the environment that infringes on private interests, this paradigm would call upon courts to understand and acknowledge that the environmental harms sought to be prevented may be particularly weighty due to their irreversible and potentially catastrophic nature.
 - (5) This paradigm would sanction in at least some form the use of environmental rhetoric and advice in judicial opinions, which could include anything from chastising Congress for not protecting the environment; long descriptions of water or air pollution; or pointing out how a particular provision will have real world effects on the environment that were not anticipated.
 - (6) This paradigm would have courts reach decisions in environmental cases that would promote their preferred outcome. Therefore, if a judge thinks protecting the environment is a good idea from a policy perspective, that judge should simply vote for the side of the case that will best protect the environment. There are some important variations on this paradigm that are discussed at length below, the most important of which may be to vote to protect the environment whenever a case presents significant indeterminacy.
 - (7) This paradigm would have courts treat environmental cases in just the same way they treat any other case.

¹⁵ *See* text accompanying notes 43-53, *infra* (describing Richard Lazarus’s account of the distinctive features of ecological injury).

environment is an inherent aspect of the judicial role. Nor should they fashion completely distinct rules to govern environmental law cases or alter generally applicable rules to apply differently in environmental law cases. Certain types of judicial rhetoric or advice regarding the environment are proper, but there is no principled reason to distinguish the use of pro-environment language in environmental law cases from language critiquing environmental regulation if some judge believes such language is appropriate.

This balanced view of the responsibilities of judges in environmental law cases flows from a similarly balanced vision of the judicial role generally. As the Article suggests, although judges should always strive to implement the intentions of the popularly elected Congress when those intentions are made clear by the relevant legal materials, they should also feel free to look to a variety of other factors, including the potential consequences of their decisions, when seeking to apply legal materials that involve some significant amount of indeterminacy. Nonetheless, this invitation to consider consequences along with a host of other relevant factors is not at the same time an invitation simply to decide cases in order to reach preferred outcomes, even in cases involving substantial indeterminacy. Indeed, it is unlikely that any theory would adequately justify such outcome-focused decision-making in environmental law cases. Furthermore, as the Article explains, judges are obligated to apply facts faithfully and to use non-binding language only when its purpose is closely related to the strengths and obligations of the judiciary in its role as one of three coordinate branches of the federal government.

The Article proceeds in two main parts. In Part II, the Article points the way toward a refined framework for thinking about environmental law by describing seven ways that courts can relate environmental law to other areas of law. It then illustrates these seven methodologies through consideration of the Court's 1985 decision in *Chemical Manufacturer's Association v. Natural Resources Defense Council*.¹⁶ Next, Part III explains which of the seven paradigms or methodologies courts should employ and which they should avoid, and it then returns to *Chemical Manufacturer's Association* and explains why it was in fact correctly decided. Finally, the Article concludes by observing that regardless of the proper nature of the judicial role in environmental law cases, "environmental law" should still be considered a distinct area of law due to the unique nature of its subject matter and the critical problems it seeks to solve.

¹⁶ 470 U.S. 116 (1985). As described below, I have chosen to discuss this case in particular because Richard Lazarus, who has argued at length for the uniqueness of environmental law, *see* n. 11, *supra*, discusses and criticizes the case numerous times in his work. *See, e.g.*, Lazarus, *Restoring What's Environmental*, *supra* n. 11, at 711-12, 742. My evaluation of the Court's decision and reasoning in the case differs sharply from Lazarus's. *See* text accompanying notes 219-253, *infra*.

II. Seven Judicial Paradigms for Environmental Law

Should judges treat environmental law cases differently from other types of administrative law cases?¹⁷ It is impossible even to begin answering this question without seriously considering the various ways that judges could potentially relate environmental law to administrative law and other areas of law within which environmental cases arise. In this Part, the Article takes a first step towards answering the question by sketching out a systematic way of thinking about the relationship between environmental law and more general areas of law such as administrative law, from the perspective of judicial decision-making. In subparts 1-7, the Article identifies and briefly describes seven possible judicial paradigms that courts could use when relating environmental law to the broader, so-called “crosscutting”¹⁸ areas of law in which environmental issues arise. In subpart 8, the Article illustrates more specifically these seven paradigms by explaining how they might have affected the Court’s decision-making in an important case from the mid-1980s called *Chemical Manufacturer’s Association v. National Resources Defense Council*.¹⁹ Later, in Part III, the Article will provide a normative analysis of these paradigms.

1. Apply Special Rules in Environmental Cases.

Within long-standing crosscutting areas of federal law such as administrative law, constitutional law, and the law governing access to federal courts, Congress and the courts have developed all manner of general legal principles or rules that purportedly apply regardless of the factual context of the case being decided. For example, in administrative law, the Administrative Procedure Act (“APA”) provides that courts must review agency actions of all sorts using the familiar “arbitrary and capricious”

¹⁷ This is a very different question from asking whether *policymakers* ought to take a different theoretical approach to dealing with environmental problems. One example of an important debate over this separate issue is the question of whether policymakers ought to apply the so-called “precautionary principle” to dealing with environmental problems. See, e.g., Cass R. Sunstein, *Beyond the Precautionary Principle*, 151 U. PA. L. REV. 1003 (2003); David A. Dana, *A Behavioral Economic Defense of the Precautionary Principle*, 97 NW. U. L. REV. 1315 (2003). Although one might argue that American judges ought to apply the principle when deciding environmental law cases, it would seem that such a controversial decision rightfully belongs to elected representatives rather than judges acting alone.

Indeed, it is certainly the case that environmental statutes do deal with environmental problems in ways that seem unique as compared to other areas of law. For example, they often divide responsibilities between the federal government and the states (so-called “cooperative federalism”), require agencies to consider the environmental effects of their action before deciding what to do, require mitigation of negative effects, and require agencies to consider alternatives to their planned action (or the action of private parties seeking government approval), etc. Whether these characteristics of environmental statutes appropriately respond to the remarkable features of ecological injury is an interesting question (or set of questions), but not the topic of this Article.

¹⁸ The term “crosscutting” comes from Lazarus. See Lazarus, *Restoring What’s Environmental*, *supra* n. 11, at 740.

¹⁹ 470 U.S. 116 (1985).

standard.²⁰ Absent some more specific statutory command to the contrary,²¹ the arbitrary and capricious standard applies to all agency actions, regardless of the subject matter of that action—in other words, regardless of whether the agency is regulating the environment, food and drug safety, sale of securities, labor-management relations, or the like.²² Other general principles applied by courts in the area of administrative law include deferring to reasonable agency interpretations of ambiguous statutes²³ (at least when those interpretations are the product of some kind of relatively formal decision-making process²⁴), refusing to review agency decisions not to enforce statutes under their administration against alleged violators,²⁵ and requiring that changes made by agencies between the time of issuing a proposed rule and a final rule represent logical outgrowths of the proposed rule.²⁶

In the area of constitutional law, courts have adopted similar general principles. Government action, for example, that intentionally discriminates on the basis of race, receives so-called strict scrutiny under the Equal

²⁰ 5 U.S.C. § 706(2)(A).

²¹ For example, section 309(g)(8) of the Clean Water Act specifically provides that administrative civil penalty orders issued by the EPA for violations of the Act are reviewable under a substantial evidence standard rather than the arbitrary and capricious standard. 33 U.S.C. § 1319(g)(8) (“Such court shall not set aside or remand such order unless there is not substantial evidence in the record, taken as a whole, to support the finding of a violation.”).

²² The APA judicial review provisions apply to all “agency action.” 5 U.S.C. § 706(2). The APA defines agency very broadly. 5 U.S.C. § 551(1) (defining “agency” as “each authority of the Government of the United States” other than Congress, the courts, and a few other limited categories).

Although the APA supplies the default rules for review of agency action, specific organic statutes can override the APA and provide their own standards of review, as well as their own procedures for agency decision-making. Indeed, some environmental statutes, including the Clean Air Act and Clean Water Act at times do exactly that. *See, e.g.*, 42 U.S.C. § 7413 (d)(4) (providing for substantial evidence review of civil penalties under Clean Air Act); 33 U.S.C. § 1319 (g)(8) (same, under Clean Water Act). At some point, if specific environmental law statutes so significantly provided different standards of review and different procedural requirements for agency decision-making, it might be possible to conclude that Congress has itself determined that environmental law ought to be treated differently from other areas of law, and therefore it would follow that courts ought to do so as well. In my view, however, this threshold has not been reached in environmental statutes generally.

²³ *See Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 476 U.S. 837 (1984) (holding that courts should defer to reasonable agency interpretations of ambiguous statutes).

²⁴ *See United States v. Mead Corporation*, 533 U.S. 218, 226-27 (2001) (“We hold that administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law Delegation of such authority may be shown in a variety of ways, as by an agency’s power to engage in adjudication or notice-and-comment rulemaking.”).

²⁵ *See Heckler v. Chaney*, 470 U.S. 821 (1985).

²⁶ *See, e.g., Chocolate Manufacturers Ass’n v. Block*, 755 F.2d 1098 (4th Cir. 1985).

Protection Clause,²⁷ while state action that only incidentally causes disproportionately harmful effects on some particular racial group does not receive such review.²⁸ Likewise, government action that infringes upon some fundamental right is subject to strict scrutiny under the Due Process Clause,²⁹ while run-of-the-mill state action that regulates economic activity receives only rational basis scrutiny.³⁰ These levels of judicial review apply regardless of the factual area of law in which the government acts—state action that causes disparate racial impacts in the environmental area receives the same rational basis review as state action causing disparate racial impacts in the workplace.

Finally, the numerous access-limiting doctrines in the field of federal courts—ripeness,³¹ mootness,³² standing,³³ and exhaustion³⁴—that courts have developed to ensure that the cases they hear are best fit for judicial review³⁵ apply regardless of the case’s factual context. For example, the Supreme Court’s classic *Abbott Laboratories*³⁶ two part test for ripeness—that the challenged administrative action be fit for judicial review and be causing hardship to the plaintiffs³⁷—applies whether the action is in the area of food and drug law, occupational safety, or social security administration. The same is true for other of these doctrinal rules, including the so-called “zone

²⁷ See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (“We have held that all racial classifications imposed by government ‘must be analyzed by a reviewing court under strict scrutiny.’”) (citations omitted).

²⁸ See *Washington v. Davis*, 426 U.S. 229, 242 (1976) (“Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule . . . that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations.”).

²⁹ See *Roe v. Wade*, 410 U.S. 113, 155 (1973) (“Where certain ‘fundamental rights’ are involved, the Court has held that regulation limiting these rights may be justified only by a ‘compelling state interest,’ . . . and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake.”) (citations omitted).

³⁰ See *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483, 488 (1955) (“The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.”).

³¹ See *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49 (1967) (noting that the ripeness inquiry requires the Court “to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration”).

³² See *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 189-94 (2000) (rejecting claim that plaintiff’s lawsuit had become moot because of defendant’s voluntary post-suit activities).

³³ See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (“Though some of its elements express merely prudential considerations that are part of judicial self-government, the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III.”).

³⁴ See *McCarthy v. Madigan*, 503 U.S. 140 (1992) (describing exhaustion doctrine).

³⁵ See ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* 44 (2d ed. 1994) (“[T]he justiciability doctrines are intended to improve judicial decision-making by providing the federal courts with concrete controversies best suited for judicial resolution.”).

³⁶ 387 U.S. 136.

³⁷ *Id.* at 149.

of interests” rule in the standing area, which limits plaintiffs to bringing claims to enforce interests “arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question,”³⁸ and the “capable of repetition but avoiding review” exception to the mootness doctrine.³⁹

One paradigm for judicial decision-making in environmental law would be for courts to supplant these general rules with new rules applicable only to environmental law cases.⁴⁰ For example, in the administrative law context, courts could hold that although agencies may generally make changes between their proposed rules and final rules so long as the changes represent logical outgrowths of the proposed rules, changes to environmental regulations must meet some much higher standard for them to have legal effect absent the agency opening up a new notice and comment period.⁴¹ Or, similarly, a court might hold that although agency decisions not to enforce statutes under their administration are generally not reviewable, a decision by the EPA (or the Interior Department, or other environmental agency) not to enforce a requirement established by some environmental regulation or statute, can be reviewed, under some new, and possibly stringent standard articulated by the court. In other areas of law, likewise, a court might hold that environmental decisions that have unintentional disparate racial impacts (like a decision to site a so-called “locally undesirable land use” or “LULU” in a minority neighborhood⁴²) should be subject to strict scrutiny even though such state actions are generally subject only to rational basis law. Or, they might supplant the *Abbott Labs* ripeness test with a far more lenient test to govern pre-enforcement review of environmental regulations.

Stronger and weaker versions of this paradigm can be imagined. A strong version might hold that courts should presume that a different rule will apply in environmental cases than in other areas of regulatory law. A weaker version might hold that the general principle will be the default rule unless the court finds that certain, specified conditions are met. These conditions, moreover, could themselves be more or less easily met. For example, one standard might be that the general rule will apply unless the court finds that application of that rule “will more likely than not result in the

³⁸ *Association of Data Processing Services v. Camp*, 397 U.S. 150, 153 (1970).

³⁹ *See Honig v. Doe*, 484 U.S. 305, 318 (1988) (noting that plaintiff’s claim would not be moot if the conduct complained of would be capable of repetition but evading review).

⁴⁰ Courts have in fact at times adopted special rules for other areas of law, such as federal Indian law, immigration law, water law, criminal law, and others. These instances of special rules are discussed below, *see* text accompanying note 129, *infra*.

⁴¹ In the course of my discussion here I will assume for the sake of ease and clarity that a court seeking to treat environmental interests in a special manner would treat them favorably in an effort to protect the environment rather than discounting them to protect industry or other interests. However, as a principled matter my discussion would extend to both kinds of special treatment.

⁴² For comprehensive analysis of this phenomenon, see Vicki Been, *What’s Fairness Got To Do With It? Environmental Justice and the Siting of Locally Undesirable Land Uses*, 78 CORNELL L. REV. 1101 (1993).

degradation of environmental values.” A more stringent standard might instead require the court to find with “substantial certitude” that the general rule “will result in significant environmental harm endangering the lives or safety of a substantial population of people.”

Why might courts want to apply different rules in environmental cases than in other types of cases? One possibility is suggested by Professor Richard Lazarus’s compelling analysis of what he calls the “distinctive” features of ecological injury.⁴³ In his view, it is the nature of ecological injury that most markedly distinguishes the types of problems environmental law addresses from the types of problems addressed by other areas of law. Lazarus argues that: “Ecological injury has several recurring features that render its redress through law especially difficult. These pertain to both the ‘cause’ and ‘effect’ of such injury, each of which inevitably becomes a regulatory touchstone in any legal regime for environmental protection.”⁴⁴

To begin with, Lazarus argues that the impact of ecological injury itself can be particularly significant, in the sense of being “irreversible,” “catastrophic,” and “continuing.”⁴⁵ He also suggests that ecological injury is often experienced geographically or temporally far away from the event that caused the injury, making environmental harms very difficult to control.⁴⁶ Additionally, Lazarus identifies several difficulties in tracing the causation of ecological injury. Specifically, he notes that the “sheer complexity of the natural environment” makes it difficult in many instances to understand what exactly causes environmental injuries,⁴⁷ a problem that is exacerbated by the fact that environmental harms “are more typically the cumulative and synergistic result of multiple actions”⁴⁸ than the result of a single action. Finally, Lazarus argues that ecological injuries are unique because they are not always subject to the same type of “ready monetary valuation” as other types of harms.⁴⁹ Natural resources are “distinctively nonhuman,” “nonexclusive,” and protected often “notwithstanding any notion of economic value.”⁵⁰ Because natural resources are difficult (or impossible) to value using traditional market-based formulae or mechanisms, the regulatory state, which often employs some sort of cost-benefit analysis to determine which risks to regulate,⁵¹ faces difficult challenges in handling these kinds of

⁴³ See Lazarus, *Restoring What’s Environmental*, *supra* n. 11, at 744-48.

⁴⁴ *Id.* at 745.

⁴⁵ *Id.* As examples, he points to such injuries as the destruction of a drinking water aquifer, the erosion of the ozone layer, and a gradually expanding oil spill, that are both highly costly and extremely challenging to any legal system that acts incrementally and deliberately. *See id.* at 745-46.

⁴⁶ *Id.* at 745-47.

⁴⁷ *Id.* at 747.

⁴⁸ *Id.*

⁴⁹ *Id.* at 748.

⁵⁰ *Id.* at 748.

⁵¹ *See, e.g.*, Exec. Order No. 12,866 (requiring federal agencies to consider costs and benefits of proposed regulation and to submit results of this analysis to the Office of Management and Budget); http://www.whitehouse.gov/omb/inforeg/return_letter.html (linking to

unique harms.⁵² Nonetheless, such resources, according to Lazarus, “not only exist but are worth protecting” because “there are certain results—such as species extinction or resource destruction—that humankind should strive to avoid because they fall beyond its legitimate authority.”⁵³

Part III of the Article will return to Lazarus’s description of ecological injury. There, the Article will consider whether these features of ecological injury are in fact unique to environmental law and whether they justify applying special rules to environmental law cases (or otherwise uniquely treating those cases).

2. Modify General Rules in Environmental Cases

Second, courts might apply the same general principles in all cases, regardless of topic or context, but alter them slightly in environmental cases. In other words, courts could employ the same legal formulations in environmental cases as they do in all other areas of law, but apply them somewhat differently. For example, courts and scholars have long talked about whether, under the “arbitrary and capricious” standard for judicial review of agency action, courts ought to take a “hard look” at what agencies do—requiring agencies to provide detailed and persuasive explanations for their actions, to consider all material objections raised by interested parties, to back up their decisions with hard data, etc.—or whether they ought to use a more deferential approach when reviewing agency action.⁵⁴ Under the paradigm suggested here, courts could continue to use the congressionally-mandated arbitrary and capricious review standard to review all agency actions, regardless of whether those actions involve the environment or some other area (*e.g.*, labor, securities, banking), but employ a harder look approach to environmental decisions than decisions in other fields.⁵⁵ Similarly, although courts applying the “rational basis” standard of review in

“return letters” in which OMB informs a federal agency that its regulation is, among other things, “not consistent with the regulatory principles stated in Executive Order 12866”).

⁵² Lazarus, *Restoring What’s Environmental*, *supra* n. 11, at 748.

⁵³ *Id.* at 748.

⁵⁴ For a detailed history of the “hard look” doctrine, see Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 525-61 (1985).

⁵⁵ Such a suggestion was made by prominent D.C. Circuit Judge Bazelon in the 1970s. See, *e.g.*, *Natural Resources Defense Counsel, Inc. v. United States Nuclear Regulatory Comm’n*, 547 F.2d 633, 657 (D.C. Cir. 1976) (Bazelon, J., concurring) (arguing that agency decisions “touching the environment” require “more precision . . . than the less rigorous development of scientific facts which may attend notice and comment procedures”); *Environmental Defense Fund v. Ruckelshaus*, 439 F.3d 584, 597-98 (D.C. Cir. 1971) (arguing for application of harder look in cases where “administrative action . . . touches on fundamental personal interests in life, health, and liberty”). Lazarus also appears to endorse this type of analysis. See Lazarus, *Judging Environmental Law*, *supra* n. 11, at 206 (praising Judge Skelly Wright for appreciating “what makes environmental law, like civil rights law, particularly in need of heightened judicial scrutiny to safeguard the interests of those less politically powerful (whether racial minorities or unborn future generations”). For a critique of this position, see Stephen Breyer, *Vermont Yankee and the Courts’ Role in the Nuclear Energy Controversy*, 91 HARV. L. REV. 1833 (1978).

constitutional law require only that the court be able to rationalize some post-hoc justification for challenged government action,⁵⁶ a court following this paradigm for decision-making might insist that the legislature have actually articulated its reasoning at the time of enactment even while still testing that reason for mere rationality. Finally, courts applying the two part test for ripeness⁵⁷ might continue to articulate that test in terms of fitness and hardship, but lower the legal threshold for finding one or both of these requirements in environmental cases.

3. Consider the Environment When Forming General Rules

The third potential paradigm for environmental decision-making centers on the formulation of general rules, rather than their application. Specifically, courts could consider the distinctive features of ecological injury as one set of factors among many when crafting general rules to apply in all contexts. Certainly, in some situations at least, courts form rules to some degree based on how they expect those rules will promote certain real world interests, and they evaluate, refine, and in some cases modify (or discard) those rules based on whether the rules in fact turn out to serve those real world interests.⁵⁸ To the extent that environmental cases raise somewhat different issues than other types of cases, based on the remarkable features of ecological injury, courts might consider how any proposed or already articulated general rule might affect environmental interests when crafting or modifying the rule, even though the rule will apply not only in environmental cases but in all other contexts as well.

When considering environmental issues as part of crafting general rules, courts might try to proceed all at once, or they could proceed incrementally. By proceeding all at once, courts could attempt to frame a broad and general rule to cover all (or most) relevant situations in a single case, and they could attempt to imagine the environmental ramifications of that rule even if the specific case they were considering did not arise in the environmental field (or even if the specific case was environmental but did not present the court with an opportunity to reflect upon all the unique aspects of ecological injury). For example, if the Court in *Abbott Laboratories* had been proceeding under this judicial paradigm, it would have had to at least try to consider the unique effects that its two part rule for ripeness might have in environmental contexts, even though the specific controversy it was deciding involved food and drug law.

⁵⁶ See *Tuan Anh Nguyen v. INS.*, 533 U.S. 53, 75 (2002) (“Under rational basis review, by contrast, it is ‘constitutionally irrelevant [what] reasoning in fact underlay the legislative decision.’”) (citations and internal quotations omitted).

⁵⁷ See *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49 (1967).

⁵⁸ See text accompanying notes 139-141, *infra*, for discussion of theories of statutory and constitutional interpretation that consider real world effects.

Alternatively, courts might develop their rules incrementally. Although courts sometimes announce general rules quite suddenly, in the course of deciding a single case, these rules are not always set in stone, and they do not necessarily, by their terms, cover all situations. Rather, rules often evolve over time, as courts refine the details of the rule's application, consider how the rule should apply in new contexts, reflect upon critiques of the rule raised in briefs, scholarly articles, and other commentary by experts and political actors, evaluate the real-world effects of the rule they have crafted, and even consider whether the rule ought to be discarded.⁵⁹ An example in the classic *Chevron* rule,⁶⁰ which was announced quite suddenly in the Court's 1984 decision⁶¹ but which has been refined in a series of subsequent decisions,⁶² including the recent *Christensen*⁶³ and *Mead*⁶⁴ decisions which have limited the scope of the doctrine to certain types of agency interpretations of ambiguous statutes. The Supreme Court's application of different levels of scrutiny in the areas of affirmative action⁶⁵ and commercial speech⁶⁶ provide two other examples from the constitutional law context.⁶⁷

Courts that want to ensure that general rules are informed by environmental concerns can develop general rules incrementally by considering the unique features of ecological injury as they figure out how to apply the general rule in a series of environmental cases. As they do this,

⁵⁹ For a description and consideration of so-called "judicial incrementalism," see generally, Keith J. Bybee, *The Jurisprudence of Uncertainty*, 35 LAW AND SOC'Y R. 943 (2001).

⁶⁰ *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 476 U.S. 837 (1984) (holding that courts should defer to reasonable agency interpretations of ambiguous statutes).

⁶¹ *See id.*

⁶² *See, e.g., INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987) (looking to "traditional tools of statutory construction" including legislative history to determine whether statute is ambiguous under step one of *Chevron*); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) (suggesting there might be some "extraordinary cases" in which agency interpretations are not entitled to deference). *See also* Thomas W. Merrill & Kristin H. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 838-39 (2001) (describing development of *Chevron* rule).

⁶³ *Christensen v. Harris County*, 529 U.S. 576 (2000) (holding that a Labor Department "Opinion Letter" was not entitled to deference).

⁶⁴ *United States v. Mead Corp.*, 533 U.S. 218 (2001) (holding that informal Customs Service "ruling letter" was not entitled to deference).

⁶⁵ *Compare Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 564-65 (1990) (applying intermediate scrutiny to affirmative action programs) *with Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 235 (1995) (overruling *Metro Broadcasting* and applying strict scrutiny to affirmative action programs).

⁶⁶ *Compare Valentine v. Christensen*, 316 U.S. 52, 55 (1942) (applying no heightened review to prohibition on the distribution of advertising material in or upon any street) *with Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 761-70 (determining that commercial speech does deserve some protection) *with Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 563-64 (1980) (applying intermediate scrutiny to commercial speech restrictions) *with 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 500-501 (1996) (several Justices applying stricter than intermediate level of review to regulations of truthful commercial speech).

⁶⁷ For consideration of incremental evolution of constitutional law rules, see Jay D. Wexler, *Defending the Middle Way: Intermediate Scrutiny as Judicial Minimalism*, 66 GEO. WASH. L. REV. 298, 319-20, 342-48 (1998).

they may decide to proceed in one of several directions. Specifically, courts could find that (1) the general rule fits well in various environmental contexts, and needs no modification; (2) certain aspects of the rule do not fit well in some environmental contexts, and therefore the general rule ought to be modified somewhat; (3) although certain aspects of the rule do not fit well in some environmental contexts, the interests served by the general rule, which would be undermined by modification, are weightier than the problems caused by the rule's application in the environmental context, and so the rule should remain unmodified; or (4) some combination of #2 and #3, in which some aspects of the rule are modified, and others remain the same.⁶⁸

Thus, to return to the ripeness example, the Court might have announced the fitness and hardship test in the *Abbott Laboratories* case but then reconsidered this standard, in all of its aspects, as it applied the test in various environmental cases. Perhaps the Court would have found that the test should remain entirely the same, or perhaps it would have found that some part of the test should be removed or altered, on the grounds that keeping the test in its initial form would too substantially undermine environmental interests. For instance, the Court could have found that restricting pre-enforcement review in most cases to purely legal challenges to regulations⁶⁹ would be too limiting to provide adequate protection to the environment. In this case, it would have to further balance the benefits of this aspect of the rule (reducing administrative burdens on the courts, improving judicial decision-making, etc.) against the environmental benefits of changing the rule to allow factual as well as purely legal challenges to not-yet-enforced regulations.

It is worth using this ripeness example to note the difference between this judicial paradigm and the first two paradigms discussed above. In those other paradigms, if a court were to find that the "purely legal challenge" requirement was unsuitable for environmental cases, it would either change that portion of the ripeness test for environmental cases while keeping the rule unchanged for other types of cases (paradigm #1), or broaden the notion of "purely legal" in environmental cases (but not other cases) to allow factual based challenges to proceed (paradigm #2). Under this paradigm, however, if a court were to find that some aspect of a rule is under-protective of environmental interests and does not serve a sufficiently compelling general interest that outweighs the harm to environmental interests, it would change the rule for all cases, not just environmental ones.

4. Consider Distinctive Features of Ecological Injury When Applying Facts to Law

⁶⁸ Any decision to take the law in a radical new direction, of course, should be made only after consideration of stare decisis principles. See text accompanying notes 118-122, *infra*.

⁶⁹ See *Abbott Laboratories, Inc. v. Gardner*, 387 U.S. 136, 149 (1967) (finding the case fit for review because the challenge was "a purely legal one").

This paradigm is slightly more straightforward than the previous three, in that it involves no alteration of legal rules or changes in the process of rule creation. Instead, it would simply call for courts to consider accurately and faithfully the features of ecological injury when applying a previously developed general rule of law to some set of facts. This paradigm would require courts to recognize all of the various features that Lazarus describes (and any other relevant remarkable features), including the substantial nature of ecological injury, the difficult causal relationships involved in creating these injuries, and the temporal and geographical uniqueness of the injuries as well.⁷⁰ Moreover, courts would have to consider these features both when the relevant legal test calls for some evaluation or weighing of the potential ecological injury involved, as well as when the legal test involves reviewing an agency's (or some other actor's) reasoning or explanation regarding the nature of the ecological injury. The premise behind identifying this as a distinct paradigm is that courts have in fact failed to recognize the unique features of ecological injury and have thus not considered those features appropriately when applying facts to law.⁷¹

Although the Article will have much more to say regarding this paradigm in Part III, it is worth noting at this point the difference between this paradigm for judicial decision-making and the paradigm described as #2 above—namely, that courts ought to apply general rules in a special fashion in environmental law cases.⁷² The two paradigms might result in similarly distinct types of results in environmental cases, but for different reasons. In the paradigm discussed here, any differences in result would stem from the real differences between the ecological injury at issue in the case and other types of injuries, while in the paradigm discussed above the differences would result from a change in the applicable legal standard, which would be different for all cases involving environmental issues. For example, a plaintiff might more easily be able to demonstrate ripeness in a pre-enforcement challenge to an environmental regulation than to, say, an aircraft safety regulation, under both paradigms, but for different reasons. Under this second paradigm, the plaintiff would have an easier time winning its case because the legal threshold for finding hardship (for example) would be lower in all environmental cases, while under the fourth paradigm, the plaintiff's case might be easier because the court, applying the same hardship standard that it would apply in any case, would be more willing to believe that the alleged environmental harm would be irrevocable and catastrophic, and thus more willing to find that denying pre-enforcement review would cause hardship.

5. Employ Environmental Rhetoric or Provide Environmental Advice.

⁷⁰ See text accompanying notes 43-53, *supra*.

⁷¹ See, e.g., Lazarus, *Restoring What's Environmental*, *supra* n. 11, at 706-07.

⁷² See text accompanying notes 53-57, *infra*.

The fifth paradigm focuses not on development or application of legal rules or even on application of facts to law, but on the language employed by judges in justifying, explaining, or otherwise articulating their opinions. Judges might, in addition to dispassionately laying out the grounds for their decision, also include in their opinion writing an expression of their personal views on the environmental aspect of their decision either through the rhetoric they employ⁷³ or by providing explicit advice⁷⁴ to some political actor or actors. This paradigm would approve of such expressions, at least in some form.

The strongest form of the paradigm might encourage judges to always express their personal views on the environment in all decisions, regardless of circumstances or form that these views might take. But short of this very strong position, numerous possible variations exist, each of which would approve of rhetoric or advice of some types but not others, or in some situations but not others. Judges might divide acceptable from non-acceptable language among several potential dimensions, including content, tone, type of opinion, or amount. For example, one variation might hold that pro-environmental rhetoric or advice is acceptable, while anti-environmental rhetoric or advice is not. Another might hold exactly the opposite. A third would approve of respectful, measured rhetoric and disapprove of strident or demeaning rhetorical flourishes. A fourth might endorse rhetoric in dissenting or separate opinions but not in majority

⁷³ By “rhetoric” I refer to the specific words chosen by the author of the opinion to express her result, as opposed to the result itself, including what she chooses to emphasize, what messages she attempts to communicate through her choice of words, what tone or attitude is implied by those choices, and the like. For example, when Lazarus refers to Justice Douglas’ “genuine passion” in one of his dissents (and quotes from that dissent) or to Justice Black’s “emotional dissent” in another case (also quoted from), he is referring to the specific rhetoric chosen by the authors as opposed merely to the result each would have reached. *See Id.*, at 738-39. For one discussion of judicial rhetoric in the secondary literature, see Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371 (1995) (one of several articles in a symposium on opinion writing).

⁷⁴ By “advice” I refer to specific suggestions that a court might make in its opinion as to how some actor or actors should proceed. By its nature, advice does not constitute any sort of binding requirement. For example, a court might suggest that Congress enact a certain type of environmental law or suggest that the EPA enforce an existing law differently. Advice can also come in the form of criticism or chiding; if a court criticizes Congress for not enacting a particular law, it is essentially advising the legislature to enact that law. For a comprehensive treatment of judicial advice-giving by the Supreme Court in constitutional cases, see Neal Kumar Katyal, *Judges as Advicegivers*, 50 STAN. L. REV. 1709 (1998) (defending advice-giving). Katyal defines “advicegiving” as occurring when “occurs when judges recommend, but do not mandate, a particular course of action based on a rule or principle in a judicial case or controversy.” *Id.* at 1710. My definition would exclude the portion of Katyal’s definition which limits advice giving to recommendations based on rules or principles. While I agree that principle-based advice giving is the most defensible type of advice giving, I see no reason to limit the concept of advice giving to only these types of recommendations. If a judge provides pure policy suggestions unconnected to any type of principle enunciated in his decision, that still, in my view, constitutes advice giving, though perhaps not a defensible sort.

opinions. A fifth might hold that short statements of personal opinion are suitable, but would disapprove of longer forays. A sixth might endorse the use of rhetoric but not explicit advice. Obviously, a plethora of other possible positions and combinations involving these dimensions are easy to imagine.

Perhaps the most interesting way that judges might distinguish acceptable language from unacceptable language is on the basis of the language's purpose. Judges might want to employ environmentally-centered rhetoric or advice for a variety of different reasons. For example, they may want to affect the policy choices of Congress or other political actors; to call voters' attention to policy-making deficiencies; to point out the unintended effects of statutes, regulations, or other sources of law; to praise political actors for their decisions; to encourage citizens to engage in certain kinds of non-political activities; to affect future court decisions (particularly if the writer is in the dissent); or simply to vent anger or frustration. Variations might approve of one or some of these purposes but not others. For example, one possible variation would approve of using language for the purpose of affecting the activities or choices of citizens but not of Congress; another might approve of any type of language intended to serve a non-personal (venting) purpose. Of course, purpose-based limits on the use of language might be combined with other limits (tone, type of opinion, content), to create additional permutations, such as, for example, a variation that would approve only of short statements in dissenting opinions for the purpose of affecting future court decisions.⁷⁵

6. Reach Decisions Based on Preferred Outcome.

Sixth, courts or individual judges might adopt the view that they should reach decisions in environmental law cases based on their preferred policy outcomes, regardless of the specific factual and legal context in which

⁷⁵ Professor Lazarus would have courts adopt some version of this paradigm. In his writings, Lazarus strongly urges the Court to adopt an "environmental voice." Lazarus, *Restoring What's Environmental*, *supra* n. 11, at 715. In addition to calling for the Justices to articulate an "overarching view of the environmental law field," *id.*, he would also welcome seeing some pro-environment rhetoric emerge from the Justices' opinions. This point comes through when Lazarus critiques three fairly recent Court decisions which, though reaching admirable pro-environment results, nonetheless contain no positive statements regarding the uniqueness of environmental injury or the importance of environmental protection. *Id.* at 737-38 (criticizing *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978); *City of Chicago v. Environmental Defense Fund*, 511 U.S. 328 (1994); and *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995)). In criticizing these decisions, Lazarus notes how different the opinions would read if they had been written by Justice Douglas, the "only environmental justice ever on the Court, at least in modern times," *id.* at 724, who possessed "genuine passion" for the environment. *Id.* at 738. Citing Justice Black's "emotional dissent" in another environmental law case, *id.* at 739, Lazarus urges the Justices to express "emotion" in their opinions, because it "sends an influential message" to other courts and the public. *Id.* "Rigorous, sound legal reasoning," Lazarus concludes, "need not be devoid of passion or the power of moral suasion to be legitimate or to be effective." *Id.*

the case arises. Thus, a judge who believes that the world would be a better place if the environment received maximum protection might decide to reach decisions favorable to environmental interests regardless of whether the best view of the legal materials points in that direction. Conversely, a judge who finds environmental regulation of corporate actors objectionable, for example, might decide to always rule in favor of those corporate actors regardless of circumstances.

This paradigm too has important potential variations. One set of variations would turn on the amount and type of reasoning that a judge would use in support of her outcome-based (or influenced) opinion. For example, one judge might believe that the outcome-based nature of her decision ought to be made explicit, while another might decide to rationalize an outcome-driven decision with reasoning that he or she does not necessarily believe and did not in fact rely upon. Still another judge might prefer to simply announce the result without providing much reasoning at all. A second (and more significant) set of variations would relate to the preconditions that a judge might insist upon before voting in an outcome-focused manner. For instance, a judge might decide that instead of reaching pro-environmental results in all cases, he or she will require that a certain amount of indeterminacy be present before voting in favor of protecting the environment, doing so only do so if such a result is “at all plausible,” “reasonable,” “non-laughable,” or some other self-defined standard. As Part III.F of the Article discusses in some detail, this last possibility—that judges should decide cases specifically to protect the environment whenever the case involves some significant amount of indeterminacy—is a potentially important normative position.⁷⁶

7. Do Not Consider the Environmental Aspects of the Case.

Finally, judges and courts might completely ignore (at least at a conscious level) the fact that the case happens to involve environmental issues. Such a judge would commit himself to deciding cases in an “environment-blind” manner. This means, at least, that the judge would not adopt special rules for environmental cases, apply general rules in any special manner in environmental cases, use any unique language relating to the environmental aspect of the case, or consider environmental facts to be any different than any other type of facts. Whether or not this paradigm makes actual coherent sense is an issue that will be discussed below, but one can easily imagine a judge thinking that she is in fact approaching a case without paying any attention to the environmental aspects of the case and assuming that those aspects pose no special, unique, or distinct issues or concerns.

8. An Example: *Chemical Manufacturer’s Association*

⁷⁶ See text accompanying notes 190-218, *infra*.

In this subpart, the Article uses the Supreme Court case of *Chemical Manufacturer's Association v. National Resources Defense Council*,⁷⁷ to illustrate the seven paradigms articulated in the previous Part. The discussion is meant to be illustrative rather than exhaustive. It is intended to show what it might mean for a court in each case to proceed under each of the seven paradigms, but it is possible that a court, proceeding under one of the paradigms, would do something different than precisely what is described here. The discussion in this Part is meant to be descriptive rather than normative. At the end of the next Part, the Article will briefly take up the normative questions of how the Court should have proceeded in the case and whether the Court in fact proceeded appropriately. Finally, the Article will briefly describe one important scholarly critique of the Court's decision and consider whether that critique is persuasive.

Pursuant to sections 301 and 304 of the Clean Water Act, the EPA is charged with identifying classes and categories of industrial sources and setting effluent limitations for different pollutants, including those known as "toxic pollutants," for each industrial class and category.⁷⁸ Plants are prohibited by the Act from discharging pollutants into the navigable waters without a permit,⁷⁹ and the agency is required by statute to write the effluent limitations applicable to the relevant class or category into the plant's discharge permit.⁸⁰ At the time of the *Chemical Manufacturers Association* case, section 301 of the Act included two sections authorizing EPA to modify the general effluent limitations applicable to a plant's class or category: section 301(c) modifications for plants finding it economically impossible to meet the limitations,⁸¹ and 301(g) exemptions for cases in which the limitations would not be necessary to ensure water quality.⁸² At the same time, section

⁷⁷ 470 U.S. 116 (1985).

⁷⁸ 33 U.S.C. § 1311(b); 1314(a). The Act defines "toxic pollutants" broadly to include pollutants "which after discharge and upon exposure, ingestion, inhalation or assimilation into any organism . . . will . . . cause death, disease, behavioral abnormalities, cancer, genetic mutations, physiological malfunctions . . . or physical deformations." 33 U.S.C. § 1362(13).

⁷⁹ 33 U.S.C. § 1311(a).

⁸⁰ 33 U.S.C. § 1342(a).

⁸¹ See 33 U.S.C. § 1311(c) (1984) ("The Administrator may modify the requirements of [§ 301's effluent limitations] with respect to any point source for which a permit application is filed after July 1, 1977, upon a showing by the owner or operator of such point source satisfactory to the Administrator that such modified requirements (1) will represent the maximum use of technology within the economic capability of the owner or operator; and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants.").

⁸² See 33 U.S.C. § 1311(g) (1984) ("The Administrator, with the concurrence of the State, shall modify the requirements of [§ 301's effluent limitations] with respect to the discharge of any pollutant (other than pollutants identified pursuant to section 1314(a)(4) of this title, toxic pollutants subject to section 1317(a) of this title, and the thermal component of discharges) from any point source upon a showing by the owner or operator of such a point source satisfactory to the Administrator that . . . (C) such modification will not interfere with the attainment or maintenance of that water quality which shall assure protection of public water supplies, and the protection and propagation of a balanced population of shellfish, fish, and wildlife, and allow recreational activities, in and on the water and such modification

301(l) of the Act provided that: “The Administrator may not modify any requirement of this section as it applies to any [toxic pollutant].”⁸³

Before this latter section was added in 1977, the agency had adopted by regulation the practice of occasionally granting a third type of exemption, a so-called “fundamentally different factor” or “FDF” variance, which allowed a plant to show that it was misclassified and that therefore it should be governed by a more lenient effluent limitation.⁸⁴ To get such a variance, the plant had to show that some fundamentally different factor, such as the quality of pollutants in its wastewater or the volume of that wastewater, distinguished it from the other plants with which it was classified.⁸⁵ When the agency continued to grant FDF variances after the addition of section 301(l) in 1977,⁸⁶ environmental groups sued, claiming that for toxic pollutants, 301(l) prohibited the agency from granting not only 301(c) and 301(g) modifications, but FDF variances as well.⁸⁷

Five justices for the court held, in an opinion written by Justice White, that the EPA could continue to grant the FDF variances.⁸⁸ The court applied the recently articulated *Chevron* rule⁸⁹ and deferred to the agency on the grounds that the text and legislative history of the statute was ambiguous on the question of whether 301(l) prohibited FDF variances⁹⁰ and that the agency’s interpretation of 301(l) was reasonable.⁹¹ On this latter part of the test, the Court accepted and even endorsed EPA’s rationale, which was that the FDF variance constituted a very different kind of exception than the other two exceptions. Whereas 301(c) and 301(g) allowed the agency to change a limitation applying to a properly classified plant, the FDF process authorized the agency to fix a misclassification resulting from its inevitable inability, given the strict and difficult timetables established by the Act, to consider all relevant factors when developing its classificatory scheme. As the Court put it:

will not result in the discharge of pollutants in quantities which may reasonably be anticipated to pose an unacceptable risk to human health or the environment.”).

⁸³ 33 U.S.C. § 1311(l) (1984).

⁸⁴ See *Chemical Manufacturer’s*, 470 U.S. at 120-123 & n.7 (describing the FDF variance and quoting the regulation in which it was contained).

⁸⁵ 40 CFR § 403.13(d) (1984).

⁸⁶ As the Supreme Court noted, the EPA had granted very few (only four) FDF variances at the time of the suit. *Chemical Manufacturer’s*, 470 U.S. at 124 n.12.

⁸⁷ Plaintiffs also challenged EPA’s statutory authority to issue FDF variances, even when toxic pollutants were not at issue, but the lower court did not consider the argument, and therefore the Supreme Court did not address it either, instead “assum[ing], without deciding, that EPA would have authority under the Act to issue the FDF variances . . . absent the provisions of § 301(l).” *Chemical Manufacturer’s*, 470 U.S. at 124 n.13.

⁸⁸ *Id.* at 125.

⁸⁹ See *id.* at 125 (identifying *Chevron* as relevant rule of law).

⁹⁰ See *id.* at 125-29.

⁹¹ See *id.* at 130-33.

Understandably, EPA may not be apprised of and will fail to consider unique factors applicable to atypical plants during the categorical rulemaking process, and it is thus important that EPA's nationally binding categorical treatment standards . . . be tempered with the flexibility that the FDF variance mechanism offers, a mechanism repugnant to neither the goals nor the operation of the Act.⁹²

The dissent, while agreeing that *Chevron* was the proper rule of law to govern the case,⁹³ nonetheless would have held that the statute clearly precluded all modifications to effluent limitations applicable to toxic pollutants and that the FDF variance was such a modification.⁹⁴ In the course of its discussion, the dissent placed special emphasis on the environmental costs of granting exceptions to generally applicable environmental regulations,⁹⁵ costs which it believed explained Congress's decision to preclude all such exceptions for toxic pollutants.⁹⁶

Turning to the first two of the seven paradigms, since *Chevron* is clearly the rule of law that applies in the case, courts following these paradigms would have either replaced (#1) or modified (#2) *Chevron* in environmental cases, including this case.⁹⁷ A court following the first paradigm, therefore, would have applied some different rule of law for evaluating agency interpretations of environmental statutes; perhaps it would have adopted a rule that courts should not defer to such interpretations, or that they should only afford environmental agencies a lesser kind of deference, such as the "respect" for agency interpretations afforded by the so-called *Skidmore* doctrine.⁹⁸ Either way, if the Court in *Chemical Manufacturer's* had followed this paradigm, it probably would have afforded somewhat less deference to the EPA's interpretation of section 301(l), although it is unclear whether the different legal standard would have led the Court to reach a different result.

⁹² *Id.* at 132-33

⁹³ *See id.* at 152 (Marshall, J., dissenting) ("My disagreement with the Court does not center on its reading of *Chevron*, but instead on its analysis of the congressional purposes behind § 301(l).").

⁹⁴ *See id.* at 151 ("The determination that Congress clearly intended that § 301(l) do more than just ban modifications otherwise permitted by §§ 301(c) and (g) compels the conclusion that EPA's construction to the contrary cannot stand.").

⁹⁵ *See id.* at 159-60 & n. 19.

⁹⁶ *See id.* at 160 ("In this case, Congress determined that the flexibility resulting from exceptions would interfere with the furtherance of the more important goal of controlling toxic pollution.")

⁹⁷ Clearly this would be a strange thing for the Court to do, given that *Chevron* was itself an environmental case. Nonetheless, the possibility existed, at least as a theoretical matter.

⁹⁸ *See Skidmore v. Swift & Co.*, 323 U.S. 134, 139-40 (1944) ("We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.").

Following the second paradigm, a court would have kept the *Chevron* doctrine for environmental cases, at least in name, but would have applied it somewhat differently in those cases. This different application might have entailed using a higher standard for reasonableness on the second step of the test, limiting the types of interpretations afforded deference in environmental cases,⁹⁹ or employing a different approach to determining ambiguity, such as focusing on all possible indicia of congressional intent rather than solely examining the text itself.¹⁰⁰ Again, given the substantial deference afforded under the *Chevron* doctrine as applied by the majority, any potential modification of the doctrine under this paradigm would probably have moved the Court toward giving somewhat less deference to the EPA's interpretation of section 301(l).

A court acting under the third paradigm would have considered whether the case presented any question regarding the proper application of *Chevron* to administrative action which had not yet been answered by previous cases (or which had not been answered satisfactorily), and then would have considered how the nature of ecological injury should affect the question's resolution, recognizing that this resolution would be applicable to all types of cases, not simply environmental ones.¹⁰¹ *Chemical Manufacturers Association* was decided less than a year after the Court decided *Chevron*, so not only were the stare decisis interests not very high at the time of decision, but also the Court had not yet had the opportunity to apply the *Chevron* rule in a broad range of cases posing a variety of different circumstances and potential sub-issues or peripheral issues within *Chevron*'s sphere of application.

One possible such question posed by application of the third paradigm to *Chemical Manufacturer's Association* is whether an agency ought to get the same kind of deference for its interpretation of exceptions to statutory requirements as it gets for its interpretations of the requirements themselves. On the one hand, given the traditional rationales for the *Chevron* doctrine—agency expertise and accountability,¹⁰² and an assumption that Congress intends to delegate primary interpretive authority to agencies rather than courts¹⁰³—there may be no reason to distinguish between the two types of cases. On the other hand, as Justice Marshall's dissent suggests, perhaps a different rule for exceptions is called for due to the potentially high costs of

⁹⁹ For example, maybe the Court would have decided to give deference only to regulations promulgated following notice and comment procedures, as it did nearly twenty years later, *see* *United States v. Mead Corp.*, 533 U.S. 218 (2001).

¹⁰⁰ For a debate on this issue, compare the majority and concurring opinions in *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

¹⁰¹ Of course, whether the Court would have considered creating some sort of modification or exception to the general *Chevron* rule might understandably turned on whether any party in the litigation raised the possibility of creating such a modification or exception.

¹⁰² *See* *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865 (1984) (“Judges are not experts in the field, and are not part of either political branch of the Government.”).

¹⁰³ *See* *Merrill & Hickman*, *supra* n. 62, at 870-73 (defending congressional intent theory as the best basis for *Chevron* rule).

exceptions, particularly in the environmental context.¹⁰⁴ Although Marshall did not purport to apply any broad based “exceptions exception” to *Chevron* in all (not just environmental) cases, a court proceeding under this paradigm might have decided that because of the costs of exceptions in the environmental area, it should create a *Chevron* sub-rule, precluding deference to agencies when they purport to create exceptions to regulatory requirements, in all cases and contexts. In doing so, the court would presumably want to balance the benefits of such an exception against the potential costs, such as any net decrease in expertise and accountability that would result from removing interpretational authority in this one area from agencies to courts.

Using the fourth paradigm, a court would have paid special attention to the remarkable features of ecological injury when thinking through the issues and reaching its result. Perhaps the key fact would be the magnitude of injury to water quality and to the health of humans or other species that could result from the granting of an FDF variance to a polluting plant. A court placing significant emphasis on these remarkable features of ecological injury would presumably assume that those features are indeed relevant to the resolution of the case under the applicable legal standard, *e.g.*, *Chevron*. One line of reasoning might be that the potentially catastrophic nature of ecological injury is relevant to deciding whether Congress clearly precluded the FDF variance through its enactment of 301(l); a second would be that it is relevant to whether the agency’s interpretation of the statutory provision is reasonable. The first line of reasoning is reflected in Justice Marshall’s dissent, where he argued that the possibility of disastrous consequences resulting from an FDF variance should have led the court to presume that Congress precluded the agency from granting any sort of exceptions or variances for toxic substances, particularly in light of Congress’s explicit provision prohibiting any modifications.¹⁰⁵

The fifth paradigm involves the use of judicial language to emphasize the environmental aspects of the case, either through rhetoric or advice. Since this could include potentially limitless types of linguistic emphases, descriptions, statements, and discussions—anything from images of water pollution to praise of the FDF variance procedure to discussions of the impact of water pollution on species and human health to a suggestion that EPA rescind the FDF variance regulation—there is little to be gained here from cataloging all the possibilities. It is worth noting, however, that this is a case in which the court, or some portion of the court, could plausibly have highlighted either for Congress or the voting public the costs that Congress’s

¹⁰⁴ *Cf. Chemical Manufacturer’s*, 470 U.S. at 159-60 (Marshall, J., dissenting) (noting the costs of exceptions to environmental regulations).

¹⁰⁵ *See id.*, 470 U.S. at 160 (Marshall, J., dissenting).

lack of clarity in its framing of section 301(l) had brought about in terms of uncertainty and litigation spanning the course of years.¹⁰⁶

Following a strong version of the sixth paradigm, a court would have simply reached the result it wanted to reach regardless of what it thought of the specific legal question presented and the relevant facts. Alternatively, if the court had followed one of the weaker variations described above,¹⁰⁷ it would have reached the desired result only if doing so would not have violated whatever standard it had set to limit its outcome focused approach. So, in other words, it is possible to imagine a particular judge believing that she should reach a pro-environment result in the case (*i.e.*, finding that the FDF variance was prohibited by the statute) only if the statute and the legislative history were highly indeterminate, and then concluding that because those materials were in fact highly indeterminate, she would indeed decide the case against the government. And of course, she could have provided more or less reasoning in support of her result depending on the specific contours of the paradigm she had chosen.¹⁰⁸

Finally, pursuant to the seventh paradigm, a court would have simply approached the case without paying any special attention to the environmental aspects of the case. It would certainly not have altered any generally applicable rules for use in environmental cases or modified such rules in response to lessons learned in applying the case to environmental facts. It would also not have treated the nature of the ecological injury caused by potential water pollution as being special in any way, and it would not have employed environmentally-related rhetoric or advice in any manner for any purpose.

III. Evaluating the Paradigms

In this Part, the Article evaluates the seven paradigms described in Part II. Specifically, the Article explains which of the seven paradigms courts should adopt in full, which they should adopt in part, and which they should reject. In doing so, it seeks to provide courts and scholars with some concrete guidance respecting when courts ought to treat environmental law cases in a unique fashion and when they should, as Georgetown's Richard Lazarus puts it, "stri[p] the 'environment' out of environmental law."¹⁰⁹

¹⁰⁶ Eight years passed between the congressional amendment creating section 301(l) and the Supreme Court case that resolved its meaning.

¹⁰⁷ See text accompanying notes 75-76, *supra*.

¹⁰⁸ See text accompanying notes 75-76, *supra*.

¹⁰⁹ Lazarus, *Thirty Years*, *supra* n. 11, at 635. Lazarus says that the Justices should focus "in the first instance," *id.*, on crosscutting issues and presume that "[t]here is one consistent answer applicable to all contexts within which these crosscutting issues arise." Lazarus, *Restoring What's Environmental*, *supra* n. 11, at 740. But he also argues that the Court should rethink entire areas of law "when the environmental dimension of a case illuminates a general doctrinal failing," *id.* at 741, and he suggests that when "pre-existing doctrinal solutio[ns]" "reflec[t] a balancing of competing values," the Court might apply that doctrine

After considering each of the paradigms in turn, the Article returns to the *Chemical Manufacturer's* case and argues that, for the most part, the Court rightly stripped the environment out of that particular environmental law case.

1. Special Rules.

The following paragraphs present eight reasons why courts should not adopt the first paradigm identified above, arguing that courts should not apply special legal rules in environmental law cases. The eight reasons proceed roughly in increasing order of importance. While one or even a few of the reasons might not be sufficient by themselves to defeat the case for the first paradigm, the eight reasons together are adequate, and indeed the final reason is most likely a sufficient reason itself for courts not to apply special environmental law rules.

First, adopting special rules for environmental law cases would undermine the simplicity, coherence, and consistency of the law. Applying one rule for environmental law cases but another rule for all other areas of law would undermine the law's uniformity and regularity. Such a regime would make it more difficult for courts to apply legal rules, and more difficult for attorneys, government officials, and regulated parties to understand the law and to conform their behavior to its mandates. The paradigm would increase the administrative costs of the legal system simply by increasing its complexity.¹¹⁰

A second, more specific, administrative cost raised by the first paradigm is definitional. Courts applying special rules in environmental law cases would first have to determine whether any particular case is in fact environmental, which raises the question: What counts as environmental? Surely, environmental law's focus on the natural environment makes it clear that some cases are correctly categorized as environmental. Cases involving

in a more "careful" and "different" manner "in the environmental context." *Id.* at 740. Beyond these very vague directions, however, Lazarus does not explain in any more detail how courts should decide whether the environmental aspect of the case should lead them to reach a different result than if they were deciding, say, a labor law or food and drug case. Significantly, all of Lazarus's examples involve cases or areas of law in which he criticizes the Court for failing to consider the unique features of ecological injury; he provides no examples praising the Court for applying general principles of law without considering those unique features. This failure to provide any examples of cases in which courts rightly "stripp[ed the] environment out of environmental law," Lazarus, *Thirty Years*, *supra* n. 11, at 635, will make it very difficult for courts to figure out when such stripping would be appropriate. This Article, by contrast, attempts to give a more concrete and balanced view of when courts should engage in such "stripping."

¹¹⁰ Creation of special rules in particular areas of law would by no means be a new development, however. Courts have created and applied many such rules, even in environmental law areas. *See* n. 129, *infra*. But the fact that the law is not as simple, coherent, and consistent as it might be is no argument in favor of making the law more complicated, incoherent, and inconsistent.

challenges to regulations setting standards for air quality or arguments over the interpretation of the Endangered Species Act are clearly environmental in nature. But beyond the obvious cases, more difficult questions arise. For example, which, if any, of the following legal or factual topics are properly classified as environmental? National Park Service concession contracts? Freedom of Information requests from environmental agencies? Disputes over mining rights, water allocation, or interstate land boundaries? Are all transportation and energy issues also environmental, given the close connection between the various policy areas? Is the same true for architectural issues? Although courts could certainly sort these issues out, the task would be difficult and time-consuming. It would also cause a great deal of uncertainty for interested parties and consume a great deal of resources, as industry, government, and activists argue at length in court about which cases at the margins count as environmental law cases.

Third, intimately related to the second concern, is the problem of overbreadth. If the justification for applying special rules in environmental cases turns on the unique nature of ecological injury, then it would seem inevitable that any rough definition of “environmental” will include cases which do not implicate particularly catastrophic or irreversible harms.¹¹¹ This is true not only for marginally environmental issues like the legality of the National Park Service concession regulations¹¹² or allocation of boundary rights between states,¹¹³ but also for those issues that are clearly environmental but which for some reason—perhaps they are small in scope or do not involve difficult causation patterns—do not raise the specter of particularly difficult or problematic harms. There is a big difference, after all, between large scale, programmatic environmental law controversies such as the Bush Administration’s failure to regulate carbon dioxide emissions¹¹⁴ or the looming question of whether the Endangered Species Act passes constitutional muster under the Commerce Clause,¹¹⁵ and smaller scale cases involving agency adjudications of specific and limited activities, such as the validity of a Clean Water Act permit, the failure to perform an Environmental Impact Statement for a single project, or an application to fill one acre of wetlands. The latter issues are important, of course, and the

¹¹¹ See text accompanying notes 43-53, *supra* (describing Lazarus’s characterizations of environmental injury). It is certainly true, as Lazarus says, that sometimes small changes in the environment can bring about large consequences, due to the fact that ecological harm has an “inherently threshold character.” LAZARUS, *supra* n. 11, at 11-12. But this does not mean that every action poses the same amount of risk to the environment.

¹¹² See, e.g., *National Park Hospitality Ass’n v. Department of Interior*, 538 U.S. 803 (2003) (rejecting as unripe a challenge to an aspect of the National Park Service’s concession regulations).

¹¹³ See, e.g., *New Jersey v. New York*, 523 U.S. 767 (1998) (determining border dispute between New York and New Jersey in favor of New Jersey).

¹¹⁴ See, e.g., Guy Gugliotta & Eric Pianin, *Bush Plans on Global Warming Alter Little*, WASH. POST, Jan. 1, 2004, at A1 (describing Bush’s refusal to issue mandatory limits on carbon dioxide emissions).

¹¹⁵ See, e.g., *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000) (upholding application of ESA against commerce clause attack).

interconnectedness of natural systems and the “inherently threshold character” of ecological harms¹¹⁶ makes them perhaps more important than one might otherwise first think, but they are also clearly different in kind from the large scale issues that far more clearly implicate the types of harms that Lazarus identifies. It is not clear that the harms caused by the small scale issues are sufficiently unique to justify the different application of special rules, even if it is granted that the uniqueness of some environmental harms is sufficient to justify the application of such rules, but any paradigm that would differentiate between “environmental law” issues and other types of issues would inevitably sweep those smaller scale harms into its reach.¹¹⁷

Fourth, *stare decisis* concerns counsel against a regime that would apply special rules in environmental law cases. According to the Supreme Court, principles of *stare decisis* weigh in favor of retaining existing legal rules, particularly when those rules have instilled reliance,¹¹⁸ unless the rules have become intolerably unworkable,¹¹⁹ or legal or factual circumstances have changed so significantly that the existing legal rules ought to be replaced.¹²⁰ Applying different legal rules in environmental cases than in other similarly situated types of cases runs into the problem that courts have simply not done this before.

Although replacing an administrative law rule (say, the one about refusing to review agency decisions not to enforce¹²¹) with a somewhat different rule in environmental law cases may not quite be the same as overruling that rule, and thus may not squarely implicate *stare decisis* principles, those principles nonetheless recommend against such a change. Carving out an area of law for special treatment where no special treatment has yet to be applied would represent a radical and paradigmatic change in the legal system. Before implementing such a change, courts should ask whether the change would unduly interfere with settled expectations and undermine the import of precedent. These are the same questions that are posed by the *stare decisis* inquiry. Although a full analysis of all the *stare decisis* factors will not be recited here, it is worth noting that the doctrine

¹¹⁶ See LAZARUS, *supra* n. 11, at 11-12

¹¹⁷ Of course, this problem might be avoided if the paradigm were changed to endorse special rules only for those environmental cases that implicate catastrophic and irreparable harms, but such an alteration would cause quite difficult administrative problems of its own—most notably, how would courts determine whether their particular environmental case in fact implicates catastrophic and irreparable harms?

¹¹⁸ See *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 854 (1992) (asking “whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation”).

¹¹⁹ *Id.* (“[W]e may ask whether the rule has proven to be intolerable simply in defying practical workability.”).

¹²⁰ *Id.* at 855 (asking “whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine” and “whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification”).

¹²¹ See *Heckler v. Chaney*, 470 U.S. 821 (1985).

erects a presumption against change. It is also worth observing that the current system is certainly not unworkable, that there have been no major legal or factual changes that call that system into question,¹²² and that the government has certainly relied on current administrative and constitutional law doctrine in organizing its response to environmental problems, a reliance that would likely induce hardship if the system were to suffer sudden radical change.

Fifth, to the extent that the paradigm of special treatment rests on the uniqueness of environmental harms,¹²³ it is undermined by the fact that, while ecological injuries may be remarkable, they are not clearly entirely distinct from harms in other areas of law. Indeed, other areas of law potentially involve harms that possess all of the characteristics that Lazarus points to as distinguishing ecological harms. For example, although some environmental injuries may indeed be potentially long-term and catastrophic, this may also be true of injuries in the health law field (*e.g.*, HHS regulation of biohazards and disease causing agents), in the fields of international relations and military affairs, and even in regulation of the economy, since who could deny the possible wide-ranging and catastrophic effects of, for example, a national economic depression? Likewise, environmental harms are not the only types of harms that may be geographically and temporally disconnected from the source of the harms; domestic immigration laws have substantial impacts around the globe, for example, and the effects of health regulations relating to pregnant women and children may be felt years or generations in the future. Environmental problems may often be characterized by difficult causation issues, but so are economic problems, and although environmental interests are often difficult to value economically, other types of interests—dignitary interests implicated by labor law or occupational safety law come to mind, as do equality interests raised by disability and civil rights laws—are characterized by the same valuation problems. None of this is meant to minimize the importance of ecological injury or even to suggest that environmental injuries are not quite remarkable compared generally to other types of injuries. To say that environmental injuries are entirely unique in terms of their characteristics, however, is to minimize the importance of harms involved in other areas of law.

Sixth, even if courts were to reject the previous rationale and determine that environmental injuries are different in kind from other types of injuries, they might still be faced with an important slippery slope problem. Although environmental harms may be particularly remarkable in terms of their potentially catastrophic impacts, geographical and temporal

¹²² The best counter-argument here might be that we perhaps appreciate environmental problems differently (as more significant) now than in earlier decades when much of environmental law was created. An argument might also be made that environmental problems are more significant now, although this claim would be undermined by the excellent success enjoyed by environmental regulation since the 1970s.

¹²³ See Lazarus, *Restoring What's Environmental*, *supra* n. 11, at 744-48.

fluidity, and other characteristics, surely harms in all other (or at least most other) areas of law can also plausibly lay *some* claim to uniqueness in one way or another. For example, one might argue that harms in the health law field are particularly significant since human beings rely on their health to exercise all other rights and to enjoy all other interests. Immigration and foreign relations lawyers could credibly argue that harms in their field are uniquely widespread geographically. In employment law and perhaps in some areas of business or economic law, injured parties could argue that their injuries are uniquely tied to their senses of identity. Those claiming violations of their civil rights clearly could argue with a great deal of persuasiveness that the government has injured them in a particularly harmful manner. Embracing the notion that different legal rules should apply to different areas of regulation would threaten to open a Pandora's box of claims for distinctiveness that could destabilize the legal system, cause a great deal of uncertainty, and bring about an administrative nightmare for the courts.

Seventh, it is important to realize that any special treatment for environmental law would undermine the goals served by rules that currently apply in cross-cutting areas of law like administrative or constitutional law.¹²⁴ Courts have developed these rules to serve important purposes. For example, the *Chevron* rule promotes accountability of decision-making by placing interpretive authority in the hands of presidentially-controlled agencies instead of courts¹²⁵ and promotes good decision-making by placing that authority in the hands of experts rather than judges.¹²⁶ The rule allowing changes to proposed rules that are material outgrowths of those rules ensures that agencies have the flexibility to respond to comments while also making sure they provide adequate notice to interested parties.¹²⁷ The rule that courts will generally not review agency decisions not to enforce statutes gives agencies the authority they need to prioritize scarce enforcement resources.¹²⁸ Whatever benefits might accrue from having a special rule applicable to environmental law cases would have to be balanced against whatever benefits are lost by replacing the general rule with the more specific environmental law rule. So, for example, if the *Chevron* rule were replaced in environmental cases with a rule that would afford less judicial deference to agency interpretations, then whatever gains the new rule would bring would have to be balanced against the loss of accountability and expertise that would accrue

¹²⁴ This particular point is listed seventh because it logically fits best in that position, not because it is the second most important point of the eight.

¹²⁵ See, e.g., Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. REG. 283, 309 (1986) (observing that *Chevron* is a good rule because it vests "supervisory oversight" in the "political branches, those directly accountable to the people"). Of course, this line of accountability is far more direct with respect to decisions made by the so-called executive agencies, whose heads serve at the pleasure of the President, as opposed to the independent agencies, whose heads are protected from removal by the President. For the classic cases upholding the constitutionality of independent agencies, see *Morrison v. Olson*, 487 U.S. 654 (1988); *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).

¹²⁶ See Starr, *supra* n. 125, at 309-10 (discussing agency expertise).

¹²⁷ See, e.g., *Chocolate M'frs Ass'n v. Block*, 755 F.2d 1098, 1103-04 (4th Cir. 1985).

¹²⁸ See, e.g., *Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985).

from taking interpretational authority away from agencies. Likewise, if agencies were provided with less flexibility in environmental cases to depart from proposed rules when issuing their final rules, whatever benefits would accrue from this new approach would have to be balanced against the lost benefits from the old approach, including the benefit that agencies need not enter into costly new rounds of notice and comment procedures whenever they feel it necessary to adapt their rules to insightful comments of interested parties.

Finally, and most importantly, adopting special rules for use in environmental law cases is theoretically unwarranted as a matter of principle. Rules adopted in cross-cutting areas of law are rightly uniform across subject areas because they deal with identical concerns that do not differ by subject matter. For example, administrative law rules govern (primarily) agency behavior and judicial control of agency policy-making, and are aimed at creating some sort of sensible regime given the odd location of agencies in the constitutional structure as a level of government possessing quasi-independence from the three main branches of government. Constitutional law delineates the powers and limits of government actors, as established by constitutional text and history. Federal court access doctrines are created to manage access to courts for the purpose of preserving and maximizing judicial resources and maintaining a workable separation of powers between the judiciary and the other two branches of government. In none of these areas of law is there any formal reason to differentiate rules among subject matters, because the subject matter is irrelevant to the purposes served by the rules.

The fundamental cross-cutting concerns embodied by administrative, constitutional, and federal court access rules are the same in the environmental context as in any other factual context. With regard to administrative law, for example, environmental agencies such as EPA or the Department of the Interior are not any different from non-environmental agencies such as the Treasury Department or HHS with respect to their location in the structure of American government, the amount of policy discretion they are provided, or any other concern relevant to the shaping of administrative law rules. Likewise, as a state actor, environmental agencies are subject to the same constitutional limits as any other state actor; the Constitution, in other words, does not single out environmental actors in a way that would justify the application of special rules to them. Similar analysis is applicable to federal court access doctrines.¹²⁹

¹²⁹ Of course, it is certainly the case that courts have in fact applied many special rules to particular areas of law, including some areas of environmental law. Some of these special rules—for example, the rule of lenity in criminal law, *see, e.g.*, *Muscarello v. United States*, 524 U.S. 125, 138 (1998), and the rule that requires Congress to clearly state its intent to intrude on areas of historical state concern, *see, e.g.*, *Solid Waste Agency of Northern Cook County v. United States Corps of Engineers*, 531 U.S. 159, 172-73 (2001)—are better characterized as rules intrinsic to cross-cutting areas of law like criminal law and constitutional law (much like *Chevron* is a rule intrinsic to administrative law) than as special rules applying only to certain

2. Modify General Rules.

Because it also involves applying different substantive tests to environmental cases than other types of cases, the second paradigm is subject to the same criticisms that are relevant to the first paradigm. Even though in the second paradigm, courts would be applying the same formal tests, they would be applying them somewhat differently in environmental cases than in other cases, and thus all of the problems involved with carving out a special judicial regime for environmental law cases would apply. Indeed, the second paradigm would probably be even worse than the first paradigm, in that by applying the same formal legal tests, courts would be giving the impression that they are treating environmental cases the same as other cases, which would in fact not be true. The confusion that this would engender for other courts and practitioners constitutes an independent reason for rejecting the second paradigm.

subject matters falling within those cross-cutting areas of law (even though, for example, the rule of lenity applies in some civil cases that resemble criminal ones). But other rules, such as the rule construing land grants in favor of the sovereign, *see* *Watt v. Western Nuclear, Inc.*, 462 U.S. 36, 59 (1983), the rule construing ambiguous statutes in favor of Indian tribes, *see* *Chickasaw Nation v. United States*, 534 U.S. 84, 93 (2001), and the plenary power doctrine in immigration law, *see, e.g.,* *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952), may rightfully be characterized as special rules applying only to certain subject matters or issues.

Moreover, environmental law itself has recognized some of these kinds of special rules. For example, the public trust doctrine appears to be a judicially created rule that limits the sovereign's ability to take actions harmful to navigable waters (and perhaps other natural resources as well). *See generally* Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970); Joseph D. Kearney & Thomas W. Merrill, *The Origins of the American Public Trust Doctrine: What Really Happened in Illinois Central*, 71 U. CHI. L. REV. 799 (2004). The area of "water law"—often understood as a separate area of law from environmental law, even though it concerns one of the most important aspects of the natural environment—is perhaps the most extreme example of an area of environmental law in which unique rules are applied, *see generally* JOSEPH L. SAX, BARTON H. THOMPSON, JR., JOHN D. LESHY & ROBERT H. ABRAMS, *LEGAL CONTROL OF WATER RESOURCES: CASES AND MATERIALS* (3d ed. 2000), although it is distinguishable from the field of federal environmental law that is chiefly the topic of this Article, because it is primarily an area of state law (much like tort law or property law, both of which are also relevant to environmental law generally). Federal public lands law also has seen the application of unique rules, such as the rule of *U.S. v. Midwest Oil*, 236 U.S. 459, 469 (1915) (later overruled by the Federal Land Policy Management Act), which held that the President could withdraw certain areas of land from the public domain without specific Congressional authorization, because Congress had not objected to the practice.

The existence of these special rules, however, does not counsel in favor of adopting new special rules that apply to all environmental law cases, though it does, to some extent, demonstrate that the law is able to handle the creation of some specific rules that are unique to certain factual contexts without become an unmanageable mess (though some might disagree that the law has not become such a mess). Some of the rules are long-standing elements of the American legal system which have become part of the reasonable expectations of citizens living within that system and are thus distinguishable from any new sort of fact-specific rule. Others may be justified by unique features of the legal area they govern, as may be the case with special immigration law rules which may be linked to constitutional norms. And still others may simply be unjustified as a normative matter, as would any large scale creation of special environmental law rules.

3. Consider the Environment When Forming General Rules.

Whether courts ought to embrace the third paradigm turns on whether courts properly rely on their evaluation of the real world effects of their rules when crafting them. If such reliance is proper, then it would only make sense for courts to consider possible environmental effects, taking into account the unique features of ecological injury, when crafting those rules. Otherwise, courts would be leaving out an important relevant factor from their consideration. Of course, courts would also want to consider the effects of their rules on other areas of law, to the extent that those areas present unique concerns. The amount of information that courts ideally should take into account when crafting rules of general applicability counsels in favor of developing these rules incrementally, rather than all at once.¹³⁰

The easiest case for judges relying on their evaluation of real-world effects when crafting legal rules involves the creation of rules that make no reference to external sources of law, such as when judges create prudential rules governing access to judicial fora or when they otherwise make rules which resemble federal common law. This latter category includes much of administrative law, which one prominent scholar has described as “a kind of common law of administrative procedure.”¹³¹ Sometimes courts are relatively explicit in describing these rules as primarily the result of judicial creation, as for example in the area of standing, where the Court has explicitly described the “zone of interests” and other limitations as “prudential” in nature, contrasting these limits with those derived from the text of Article III.¹³² Other times, the identification of these rules as primarily creatures of judicial creativity (as opposed to derivations from external sources of law) is more ambiguous. Examples include the ripeness doctrine, which the Court has described as being both “drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction,”¹³³ and perhaps the mootness doctrine as well, which, as the Chief Justice has explained, contains exceptions that are very hard to square with the notion that the doctrine is constitutionally based.¹³⁴ Other rules, such as the *Chevron* rule, may be superficially located by the Court in some form of external authority but are in fact created by the Court based on its own evaluation of the interests served by the rule.¹³⁵ Indeed, many (if not most) administrative

¹³⁰ See text accompanying notes 58-68, *supra*.

¹³¹ Thomas W. Merrill, *Capture Theory and the Courts: 1967-1983*, U. CHI. KENT. L. REV. 1039, 1039 (1997).

¹³² See *Elk Grove Unified School Dist. v. Newdow*, 124 S.Ct. 2301, 2308-09 (2004).

¹³³ *National Park Hospitality Association v. Department of Interior*, 538 U.S. 803, 808 (2003) (quotations and citations omitted).

¹³⁴ See *Honig v. Doe*, 484 U.S. 305, 330-31 (1988) (Rehnquist, C.J., concurring) (explaining how the “capable of repetition but evading review” exception to the mootness doctrine can only be explained if mootness is a prudential rule rather than being rooted in Article III).

¹³⁵ See David J. Barron & Elena Kagan, *Chevron’s Nondelegation Doctrine*, 2001 S.CT. REV. 201, 212 (2003) (“Chevron is a congressional doctrine only in the sense that Congress can

law rules, though formally located in some external source of law such as the APA or Article II of the Constitution, are in fact organically developed by courts based on their evaluation of the rules' practical effects.¹³⁶ When courts create such rules, they are virtually unconstrained in the types of factors they may consider. It would make little sense for courts to ignore the practical effects of their rules if there is any way for them to predict what those effects would be.

When courts are interpreting external sources of law, such as statutes and constitutional text, the question of whether reliance on real world implications is obviously more problematic. Many influential jurists and scholars have argued that courts should ignore these implications and focus their inquiries solely on more objective factors—the language of the statute's text, most notably.¹³⁷ Such a focus, it is argued, among other things, dissuades unaccountable judges from simply acting as ad-hoc mini-legislatures, enacting their political preferences into law.¹³⁸ Nonetheless, prominent theories of interpretation, both at the statutory and constitutional level, support the judicial practice of looking at real world implications of various interpretive choices. For example, in the statutory context, Professor Eskridge has developed a sophisticated interpretive approach which calls on courts to look to practical effects and consequences, among other things, when settling upon any particular statutory interpretation.¹³⁹ Other legal scholars have adopted similar pragmatic approaches to statutory

overturn it; in all other respects, Chevron is a judicial construction, reflecting implicit policy judgments about what interpretive practices make for good government.”).

¹³⁶ See *id.*; Merrill, *supra* n. 131, at 1039 (noting that in interpreting the APA, “the dominant trend has been toward the creation of a kind of common law of administrative procedure, with each generation of judges reworking the law in accordance with its perception of the ‘felt necessities of the time.’”).

¹³⁷ See, e.g., Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1184 (1989) (“[I]t is perhaps easier for me than it is for some judges to develop general rules, because I am more inclined to adhere closely to the plain meaning of a text.”); John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 675 (1997) (articulating a constitutional argument for textualist statutory interpretive theory).

¹³⁸ See Lillian R. BeVier, *The Moment and the Millennium: The Question of Time, Or Law?*, 67 GEO. WASH. L. REV. 1112, 1117 (1998) (“One reason textualists are textualists is that they are tenaciously devoted to an ideal of legitimacy that requires judicial decision making to be constrained by objective standards and criteria external to the judges themselves. To textualists, the rule of law and the premises of democratic government are unacceptably threatened by judicial subjectivity or ad hoc decision making, or by the prospect of judges yielding to the temptation to decide cases according to their own personal values solely because they have the power to issue injunctions and proclaim results.”).

¹³⁹ See, e.g., WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 175-76 (1994) (“Statutory interpretation should be pragmatic, in that the interpreter has a responsibility to take practice seriously and consider the consequences of different interpretive choices.”); William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1529 (“The role of the courts, therefore, is to be further deliberative filters, as envisioned by Hamilton, mitigating the effects of unwise laws and exploring their full consequences.”) (1987); see also William N. Eskridge, Jr. and Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990).

interpretation.¹⁴⁰ In the constitutional context, pragmatic theories which call for courts to consider the real world effects of their decisions are also highly prominent.¹⁴¹

As noted above, this Article will not address in any comprehensive manner the scholarly debates over the proper approaches that courts should adopt when interpreting constitutional text and legislative enactments. My own sympathies lie with those who argue in favor of looking to

¹⁴⁰ See, e.g., Daniel A. Farber, *Do Theories of Statutory Interpretation Matter?*, 94 NW. U. L. REV. 1409, 1414-16 (2000) (describing pragmatism of Richard Posner as well as of Eskridge); Peter C. Schank, *Understanding Postmodern Thought and Its Implications for Statutory Interpretation*, 65 S. CAL. L. REV. 2505, 2589 (1992) (“Pragmatism may now represent the principal theoretical approach to statutory interpretation in legal scholarship. Neopragmatists Richard Posner, William Eskridge, Philip Frickey, and Daniel Farber have perhaps written more extensively on this topic than anyone in the past decade. Although they differ in many respects, each is committed to a method of interpretation that recognizes the absence of a philosophical foundation to any theory of interpretation, the inadequacy of any one-dimensional guide to interpretation, and the need to take into account both the conventions of law *and the likely practical consequences accruing from an interpretation.*”) (footnotes omitted) (emphasis added); T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L. J. 943, 955-58 (1987) (describing academic support for legal pragmatism); *id.* at 957 (“Pragmatism reassured legal scholars that abandonment of the goal of formal certainty did not necessarily entail nihilism; on the contrary, it liberated scholars to develop and test new rules for new social conditions.”); Matthew A. Edwards, *Posner’s Pragmatism and Payton Home Arrests*, 77 WASH. L. REV. 299, 393 (2002) (describing Richard Posner’s pragmatism as follows: “According to Posner, legal decisionmakers, including judges, should use every tool at their disposal, especially the social sciences, to render decisions that will best serve our society’s needs. Judges can accomplish this goal only if they understand the factual contexts in which legal issues arise and are capable of determining the practical effects of their decisions.”).

¹⁴¹ See, e.g., Aleinikoff, *supra* n. 140, at 1001 (describing prominent theory of constitutional balancing (even while critiquing what balancing has become) as follows: “Balancing was a liberating methodology at the outset. It took blinders off judges’ eyes and let them openly take into account the connections between constitutional law and the real world. Preaching a pragmatic, realistic approach to constitutional law, it promised doctrine arrived at objectively and grounded in the facts of the society to which it applied.”); Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. REV. 245, 246-47 (2002) (“[M]y discussion will illustrate an approach to constitutional interpretation that places considerable weight upon consequences--consequences valued in terms of basic constitutional purposes. It disavows a contrary constitutional approach, a more ‘legalistic’ approach that places too much weight upon language, history, tradition, and precedent alone while understating the importance of consequences.”); Michael C. Dorf, *Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 8 (1998) (“What can the Court do to overcome its limited ability to adjust its doctrines to the rapidly changing world? Explicitly paying greater attention to the likely consequences of its decisions and to the empirical assumptions underlying its doctrines would be a step in the right direction, because even if one believes that courts are meant to be fora of principle rather than policy, any sound account of the role of courts should make real-world experience relevant to adjudication.”) (footnotes omitted); Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331, 1332 (1988) (“Constitutional law needs no grand theoretical foundation. None is likely ever to be forthcoming, and none is desirable. Instead, legal pragmatism is a sufficient basis for constitutional law. Legal pragmatism--which essentially means solving legal problems using every tool that comes to hand, including precedent, tradition, legal text, and social policy--renounces the entire project of providing a theoretical foundation for constitutional law.”).

consequences, at least when the relevant legal materials are indeterminate,¹⁴² but I will not defend those sympathies at length here. It is worth noting, however, that, as scholarship in the field of law and religion and elsewhere has persuasively argued, judges cannot fully bracket their personal beliefs, biases, and experiences when deciding cases,¹⁴³ at least in cases involving substantial indeterminacy.¹⁴⁴ Judges are human, and as much as some critics might like them to approach each case with a blank slate and to decide the question before them in a fully objective fashion, such decision-making in difficult cases is simply impossible in the real world. Furthermore, since this reliance on personal experience and belief is at some level inevitable in cases involving substantial indeterminacy, it makes little sense to suggest that such reliance is improper. It would be hard to argue in any but the most theoretical sense that something which is descriptively impossible is also normatively desirable.¹⁴⁵ If reliance on personal experience and belief in difficult cases is both inevitable and normatively acceptable, it seems improper, if not incoherent, to ask judges not to look also at the consequences of their decisions. And, indeed, it is probably the case that judges almost surely do rely on their evaluation of consequences when deciding difficult cases.¹⁴⁶

¹⁴² In cases when the legal materials are clear or fairly clear, I would argue that courts should seek to implement the intent of elected officials. I should make clear that I do not believe that a substantial amount of indeterminacy exists in every or even most environmental law cases, particularly those that involve interpretation of statutes as opposed to constitutional provisions. See, e.g., John C. Nagle, *Newt Gingrich, Dynamic Statutory Interpreter*, 143 U. PA. L. REV. 2209, 2220-36 (noting that as both a descriptive and normative matter, there are easy statutory interpretation cases). See also Melvin Aaron Eisenberg, *Strict Textualism*, 29 LOYOLA L.A. L. REV. 13, 35-36 (1995) (“[E]asy interpretation cases are never easy simply because of the text, but only because the text in its legal, social, and historical context is easy to interpret.”). See generally Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462 (1987). But see generally, Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L. J. 1 (1984) (describing indeterminacy theories).

¹⁴³ See, e.g., KENT GREENAWALT, PRIVATE CONSCIENCES AND PUBLIC REASONS 144 (1995) (“Can judges decide free of personal moral convictions? The answer is that they *cannot entirely*; fundamental beliefs will influence decision even when judges conscientiously try to exclude them.”); Scott C. Idleman, *The Limits of Religious Values in Judicial Decisionmaking*, 81 MARQ. L. REV. 537, 543-44 (1998) (“For the recognizably religious judge, it would appear that religious values often constitute an unavoidable source of insight and authority To the extent such values may influence judges at a subconscious level, as first principles paradigmatically do, this unavoidability may even extend to those judges who deliberately attempt to steer clear of their religious commitments when rendering decisions.”).

¹⁴⁴ See, e.g., Idleman, *supra* n. 143, at 544 (noting that reliance on religious reasons “may only be apparent in situations where the positive law is substantially underdeterminate or where the substance of the dispute directly implicates fundamental or controversial ethical issues”).

¹⁴⁵ Kent Greenawalt, *The Perceived Authority of Law in Judging Constitutional Cases*, 61 U. COLO. L. REV. 783, 786 (1990) (“Ordinarily a normative theory should not call for behavior that is impossible or extremely difficult.”).

¹⁴⁶ See, e.g., ESKRIDGE, *supra* n. 139, at 6-105 (1994) (arguing that, as a descriptive matter, courts in fact interpret statutes dynamically rather than statically); Aleinikoff, *supra* n. 140, at 953-954 (describing move in the Supreme Court in the 1920s toward “realism in constitutional adjudication”).

Of course, if one rejects the idea that courts should look beyond text to determine the meaning of constitutional or statutory provisions, then consideration of external contemporary facts, such as the unique features of ecological injury, will play little role in guiding one's interpretation. For purposes of the rest of this Article, though, I will assume that such consideration is indeed proper, as part of a larger, multi-contextual interpretive inquiry that seeks to find the most reasonable understanding of the meaning of contested text, at least in cases in which the legal text being interpreted is highly indeterminate.

If it is proper for courts to consider how their interpretations will play out in the real world, then the case for considering the unique features of ecological injury is fairly straightforward. Why would courts choose to ignore these features as a general rule? In any given case, those features might not be particularly relevant, but it would make little sense for courts to preclude consideration of them *ex ante*. In some cases, the features may in fact be quite relevant. For example, the potentially catastrophic and irreversible nature of environmental injury would seem to be a quite relevant consideration in the development of any constitutional rule that would limit plaintiffs' access to the courts to remedy environmental harms, such as the Article III standing doctrine.¹⁴⁷

Of course, if courts may consider the effects of the rules they create, either through pure construction or through creative interpretation, then ideally they should consider all of those effects in all of their aspects, including effects that have nothing to do with the environment or even that run counter to environmental goals. For example, in addition to ecological considerations, part of the Court's inquiry in crafting constitutional standing rules ought to be the economic and administrative costs of broadening or limiting access to the courts for the purpose of challenging allegedly environmentally unfriendly regulations. The Court would also ideally want to think about how whatever rules it settles on will play out in non-environmental legal contexts, such as in banking and immigration law settings, just to name two examples. Obviously, this is a difficult, probably impossible, task to fulfill in its entirety.¹⁴⁸ Nonetheless, the more courts can expand the set of potential effects they consider when fashioning rules, the more likely it is that they can create rules that not only accurately reflect the relevant text and purpose, but also are well suited to govern real world problems. The need to consider a vast array of potential contexts and effects counsels in favor of courts developing rules incrementally, through trial and error, tailoring these rules to new situations as they become more familiar

¹⁴⁷ This Article will not address the precise extent that judges ought to look at consequences as opposed to other factors when interpreting indeterminate text, but of course that is a very important question for the proper understanding of the judicial role in the environmental law context.

¹⁴⁸ It is important to realize that a court might fulfill its task of considering the practical effects of a particular rule or interpretation through discussion or thinking that does not necessarily end up reflected in the written opinion produced by the court.

with the myriad ways that the rules interact with the countless factual settings in which the law plays an important role.

4. Faithfully Apply Environmental Facts to Law.

The most apparent way that courts ought to take the unique features of ecological injury into account is by faithfully paying attention to those features when applying facts to law, if those features are relevant to the legal rule, principle, or test that the court is applying. This responsibility follows directly from the obligation that courts have to apply facts to law in specific cases. That obligation is to apply facts as they actually exist to the extent the true nature of the facts can be discerned.¹⁴⁹ Courts are not authorized to make up facts, consciously change facts that have been presented to them, or ignore facts that are relevant to whatever legal test they are applying. Thus, to the extent that the remarkable features of ecological injury happen to be relevant to the applicable legal test, courts have an obligation to apply those features accurately and faithfully.

At least three types of cases will require courts to pay special attention to the uniqueness of ecological injury. The first set of cases includes any case in which an agency is required to consider or articulate the ecological risks of some proposed government action (or government approval of a private action). In these cases, courts must assure that agencies have accurately considered the extent and nature of those environmental risks, which in turn will require the courts themselves to be cognizant of the extent and nature of the risks. For example, NEPA requires agencies preparing an environmental impact statement in connection with certain major federal actions to consider “the environmental impact of the proposed action”¹⁵⁰ and “any adverse environmental effects which cannot be avoided.”¹⁵¹ The EPA’s wetland fill permit regulations prohibit the Corps of Engineers from granting a permit if there is a practicable alternative to the proposed project that “does not have . . . significant adverse environmental consequences.”¹⁵² The Clean Water Act requires the EPA, when identifying the “best conventional pollutant control technology” that plants in certain categories must apply to the emission of certain non-toxic pollutants, to consider “the reasonableness of the relationship between the costs of obtaining a reduction in effluents and the effluent reduction benefits

¹⁴⁹ *See, e.g.*, *Sheets v. Selden*, 74 U.S. 416, 424 (1868) (“This court cannot interpolate what the contract does not contain. We can only apply the law to the facts as we find them.”); *IT Corporation v. General American Life Insurance Company*, 107 F.3d 1415, 1420 (9th Cir. 1997) (“Federal appellate judges merely apply law to facts within a framework of statutes, rules, and precedent which binds them, but because of the multifariousness of facts and complexities of application of this elaborate framework, the task often involves difficult and close questions of judgment.”)

¹⁵⁰ 42 U.S.C. § 4332(C)(i).

¹⁵¹ *Id.* § 4332(C)(ii).

¹⁵² 40 C.F.R. § 230.10(a).

derived.”¹⁵³ The Endangered Species Act requires the Fish and Wildlife Service, when deciding whether to list a particular species as endangered or threatened, to consider a variety of causes for the possible decline of the species,¹⁵⁴ including the catch-all factor “other natural or manmade factors affecting [the species’] continued existence.”¹⁵⁵ The National Park Service Organic Act requires the Park Service to “provide for the enjoyment of [the natural resources within the national parks] in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.”¹⁵⁶ All of these provisions require that the relevant agency consider the extent and nature of ecological risks in some way; courts called upon to review whether the agency has fulfilled its legal obligations will need to evaluate whether the agency has properly understood the nature and extent of the ecological risks it has considered.

A second set of cases are those that require courts themselves to balance the seriousness of potential ecological injury against some other factor or factors in determining whether a particular government or private action passes legal muster. The procedural due process inquiry under the Court’s longstanding *Mathews v. Eldridge* rule is a good example of this type of case. Under that test, a court evaluating whether the government has provided sufficient process prior to depriving some private party of a protected property or liberty interest must consider not only the importance of the private interest and the risk of erroneous deprivation of that interest that results from the alleged lack of process provided, but the strength of the government interest as well. In some cases, this could involve the government’s interest in preventing some ecological injury.¹⁵⁷

For example, in the case of *Reardon v. United States*,¹⁵⁸ the First Circuit Court of Appeals was asked to consider whether the EPA had violated a private property owner’s procedural due process rights by placing a notice of lien on the property to cover costs incurred by a government cleanup of hazardous substances on the property without a prior hearing. The majority of the court found that the lack of a hearing did violate the owner’s due process interest, noting that the government’s interest in placing the notice of

¹⁵³ 33 U.S.C. § 304(b)(4)(B).

¹⁵⁴ 16 U.S.C. § 1534(a)(1).

¹⁵⁵ *Id.* § 1534(a)(1)(E).

¹⁵⁶ 16 U.S.C. § 1.

¹⁵⁷ Another relevant example is the balancing test that courts are called on to apply when acting in equity to determine whether to issue a preliminary injunction against an activity that is allegedly harming the environment. That inquiry requires courts to consider whether the plaintiffs have demonstrated a possibility of irreparable injury. *See, e.g., Earth Island Institute v. Mosbacher*, 746 F.Supp. 964, 975 (N.D. Cal. 1990). Such an inquiry, as the Supreme Court has recognized, will ordinarily result in a finding that an injunction is necessary, due to the irreparable nature of ecological injury. *See, e.g., Amoco Production Co. v. Gambell*, 480 U.S. 531, 545 (1987) (“Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.* irreparable.”).

¹⁵⁸ 947 F.2d 1509 (1st Cir. 1991).

lien was minimal, given the fact that the government had no prior recognized interest in the property.¹⁵⁹ The dissent, on the other hand, disagreed with the majority's analysis with respect to the government's interest in protecting its large investment in the cleanup of the property, observing that without such protection the government might have fewer "resources available for response actions at other contaminated sites."¹⁶⁰ Because this would "significantly affect[t] the EPA's financial ability to cope with a health and environmental problem so massive that it hardly admits of cost quantification,"¹⁶¹ the dissenting judge concluded that the government's interest in placing the lien notice was substantial.¹⁶² The dissent's consideration of the extent of the ecological harm as one aspect of the government's interest in securing payment for its cleanup of hazardous substances was the correct approach under this paradigm of environmental law judicial decision-making.

Finally, there may be cases in which the nature of ecological injury (causation and valuation difficulties, geographical and temporal fluidity, etc.) will be relevant to the court's analysis. Professor Lazarus illustrates this in part of his critique of the Court's decision in *Lujan*. Lazarus argues that by requiring the plaintiff to "possess some particularized professional or direct physical relation to the species at issue," "[t]he Court . . . too swiftly denies the legitimacy of . . . psychological and emotional tie[s] to aspects of the natural environment."¹⁶³ Assuming, as I do, that Lazarus is right about the unique psychological and emotional ties that many people feel toward the environment, the problem could be framed as either a failure of the Court properly to follow the third paradigm (consider environmental knowledge when framing general rules) or failure to follow this paradigm. Either the problem is that the Court has framed a legal test that specifically excludes real psychological injuries even though by doing so it has effectively precluded a vast number of potential environmental lawsuits that seek to redress real problems (failure in paradigm #3), or it has framed a test that would allow for suits to redress real psychological injuries but has failed to appreciate that damage to the environment can indeed cause such injuries (failure in paradigm #4).¹⁶⁴ Expounding further on this critique of *Lujan*, one could certainly argue that the Court's failure to consider seriously the plaintiffs' "ecosystem nexus" theory for standing,¹⁶⁵ which rested on the notion that

¹⁵⁹ *Id.* at 1520-22.

¹⁶⁰ *Id.* at 1530 (Cyr, J., dissenting).

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ Lazarus, *Restoring What's Environmental*, *supra* n. 11, at 751.

¹⁶⁴ Although it is not entirely clear, I believe that the Court's failure was more of the paradigm #4 variety than the paradigm #3 variety. The Court suggests that the plaintiffs were not "directly" or "imminently" injured. See 504 U.S. at 563-4. The emotional and psychological injuries suffered by the plaintiffs, however, were direct and imminently felt; they just weren't injuries that were brought about by actually going to Sri Lanka or the Nile and not finding the endangered animals present.

¹⁶⁵ 504 U.S. at 565.

ecosystems are interconnected in a significant way, also constituted a failure of the Court to understand the true nature of ecological injury.¹⁶⁶

The remarkable features of ecological injury, however, will not be relevant to the resolution of every legal controversy involving the environment. For example, in the case of *United States v. Bestfoods*,¹⁶⁷ which Lazarus criticizes,¹⁶⁸ the Court correctly concluded that, unless the corporate veil deserves to be pierced, a parent corporation cannot be held liable under CERCLA for the acts of its subsidiary “simply because its subsidiary is subject to liability for owning or operating a polluting facility.”¹⁶⁹ In reaching this conclusion (and implicitly rejecting the district court’s suggestion that a parent corporation might be held liable under CERCLA for exerting power or influence over the subsidiary itself, as opposed to the polluting facility¹⁷⁰), the Court noted that Congress enacted CERCLA fully aware of the “venerable common-law” rule that parent corporations are generally not held liable for actions of their subsidiaries and that “nothing in CERCLA purports to reject this bedrock principle.”¹⁷¹ Although it may be the case that holding parents liable for the actions of their subsidiaries would decrease the amount of aggregate ecological injury relative to the common law rule, the fact that ecological injury has catastrophic, long-term impacts is irrelevant to the resolution of the legal question, which turns on whether Congress intended to alter the common law rule, the answer to which can be determined by reading the very clear statute (and perhaps the legislative history) and not by asking anything about the nature of ecological injury itself.

5. Rhetoric and Advice.

As noted above,¹⁷² one could imagine a practically unlimited number of variations on a judicial paradigm dealing with the use of language in opinion writing.¹⁷³ Between the diametrically opposed poles of “no rhetoric or advice” and “any rhetoric or advice” lie a number of intermediate positions that would distinguish acceptable language from non-acceptable language on a variety of axes, including purpose, type of opinion, type of language, and amount of language. Given the size of the topic, providing an exhaustive treatment here of what kinds of judicial language should be considered acceptable and non-acceptable in environmental cases would be impossible. Instead, in the following paragraphs, the Article will provide

¹⁶⁶ See Robert W. Adler, *The Supreme Court and Ecosystems: Environmental Science in Environmental Law*, 27 VT. L. REV. 249, 341, 360-61 (2003) (noting that Justice Scalia’s opinion in *Lujan*, “highlight[s] the implications of the failure of individual justices, or the Court as a whole, to consider applicable principles of ecosystem science, or to apply them properly”).

¹⁶⁷ 524 U.S. 51 (1998).

¹⁶⁸ Lazarus, *Restoring What’s Environmental*, *supra* n. 11, at 757-58.

¹⁶⁹ 524 U.S. at 62.

¹⁷⁰ See *id.* at 58-59 (quoting district court decision).

¹⁷¹ *Id.* at 62.

¹⁷² See text accompanying notes 73-75, *supra*.

¹⁷³ See nn. 73-74, *supra*.

some brief thoughts regarding what types of judicial language are most appropriate and which types of rhetoric or advice judges should avoid.

It is worth considering advice first, and then rhetoric. As Judge Mikva has pointed out, the notion that judges ought to provide other branches of government with their advice regarding possible policy alternatives is highly problematic.¹⁷⁴ Judges are not policy experts, and they are neither elected by the people nor accountable to them.¹⁷⁵ As such, not only are they not well-situated to provide much help regarding policy choices, but it is also unlikely that the political branches of government will care much about their opinions.¹⁷⁶ These three objections to judicial advice-giving—what Mikva terms “capacity,” “efficacy,” and “legitimacy”¹⁷⁷—counsel strongly against judges engaging in broad-ranging policy advice that is unrelated to the roles they play as judges.¹⁷⁸ This would include environmentally-related policy advice such as urging Congress to pass (or repeal) certain types of environmentally protective statutes or urging agencies to issue regulations to provide added protection to the natural environment (or to industry).

On the other hand, however, courts are well-situated by virtue of their location in the structure of American government and the nature of their functions to contribute certain types of insights into the policy-making process. Unlike legislators or agency decision-makers (for the most part), judges (at least theoretically) deal with specific controversies, engage in principled decision-making, listen to both or all sides of the controversy before reaching a decision, are politically unaffiliated, and generally justify their decisions with reasoned and somewhat detailed written opinions.¹⁷⁹ As a result, judges may have unique perspectives on peripheral issues that arise in cases which they could usefully articulate to the public and to the other branches of government.

If judges closely tether the rhetoric, advice, and observations that they contribute to their strengths, their roles and obligations, and their position with respect to the other branches, then much of the force of the objections to the use of advice-giving by judges falls away. For example, if the advice judges offer relates closely to their obligations to consider detailed factual circumstances and employ principled reasoning, two of their

¹⁷⁴ See Abner Mikva, *Why Judges Should Not Be Advicegivers: A Response to Professor Neal Katyal*, 50 STAN. L. REV. 1825, 1825 (1998).

¹⁷⁵ *Id.* at 1828-29.

¹⁷⁶ *Id.* at 1828.

¹⁷⁷ *Id.* at 1827-29. Mikva doesn't actually endorse the “efficacy” critique, saying instead that it “may be a criticism” of judicial advice-giving “that [he] is not willing to make.” *Id.* at 1828.

¹⁷⁸ But see generally Katyal, *supra* n. 74 (defending advice-giving in constitutional cases).

¹⁷⁹ See Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. PA. L. REV. 555, 600-07 (1991) (listing some of the unique characteristics of judicial decision-making).

strengths, as opposed simply to articulating their policy preferences, they are both more likely to be able to provide useful advice (“capacity”) and are more likely to be listened to by the citizenry and the other branches (“efficacy”). Likewise, to the extent that such types of advice are better viewed as providing assistance to the other branches as opposed to chastising or lecturing or encouraging them, the accountability problems (“legitimacy”) are also substantially reduced, as judges would simply be helping the other branches reach good policy decisions rather than dictating what those decisions ought to be.

In my view, there are at least three important areas in which courts can distribute useful and legitimate information and advice. First, courts can point out very specific problems that they notice with respect to statutes under their review which Congress might not know about or understand. The goal here would be to inform Congress of problems with its legislation that Congress could then seek to remedy by amending the statute. Judge Mikva points out in his article how the D.C. Circuit has already experimented with this idea.¹⁸⁰ Second, if a court rejects a party’s argument but sees an alternative way that the party might achieve its goal, the court might point how the party could go about pursuing its goal and what its likelihood of success would be in the courts. For example, if a court found a particular statute unconstitutional under the Commerce Clause, it could provide some rough thoughts to Congress (and parties supporting the statute) regarding how the statute might be re-worked to have a better chance of success. Such advice, to the extent it is possible to provide, serves the important goal of helping policymakers avoid wasteful efforts in devising solutions that will ultimately be invalidated by the courts. Third, if in the course of hearing and deciding a case, a court learns about some activity or inactivity, either by the government or some private party, that it believes the public and the other branches have an interest in learning about (and which is not protected by privilege or statute or other source of law), the court should disseminate and emphasize that information in its opinion. Spreading such information, far from suffering from accountability or legitimacy problems, will in fact serve to promote the transparency and accountability of government and private actors by ensuring that the public and other interested parties are fully informed.

Each of these types of advice or information-giving are relevant for environmental decision-making. With respect to informing Congress of statutory problems, environmental law is filled with poorly-drafted statutes that raise all sorts of problems which could be brought to the attention of Congress by the courts. For example, although many of its problems are by now well-known, CERCLA is a statute that suffers from countless drafting errors and ambiguities which courts might have pointed out to Congress as

¹⁸⁰ See Mikva, *supra* n. 174, at 1828.

soon as they started dealing with interpretive questions regarding the Act.¹⁸¹ The second type of judicial advice is illustrated in the environmental context by the Court's opinion in *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources*.¹⁸² There, the Court struck down a Michigan law prohibiting private landfills from accepting out-of-county waste as a violation of the Dormant Commerce Clause.¹⁸³ In responding to Michigan's argument that the law was necessary to allow counties to dispose of waste safely, the Court provided Michigan with some advice about how to achieve that goal: "Michigan could attain that objective without discriminating between in- and out-of-state waste. Michigan could, for example, limit the amount of waste that landfill operators may accept each year."¹⁸⁴ Third, because environmental cases often involve challenges to long-delayed government action or less-than-exemplary private and corporate conduct, courts may have many opportunities to inform the public regarding the inactivity of its representative government and the bad behavior of some of its corporate citizens.

The analysis for judicial rhetoric is similar to that relating to judicial advice. To the extent that judges choose rhetoric to couch decisions in a way (and for a purpose) that is closely tethered to the strengths and obligations of the judiciary, this should pose little problem. For example, if the rhetoric is aimed at enhancing the explanation of the decision, providing context for the facts, explaining why a party acted the way it did, or providing historical background for a political or regulatory enactment, then the rhetoric is most likely tethered to the judicial role and therefore acceptable. On the other hand, if the purpose of the rhetoric is not simply to enhance and contextualize the decision but instead to act as a more subtle form of policy chastisement, it becomes more problematic. For example, in a case involving the Clean Water Act, if a judge were to include a paragraph describing the state of water pollution at the time the Act was promulgated as a way of historically contextualizing the Act, that would be far more acceptable than if the judge were describing the current state of water pollution in a particularly evocative fashion as a way of critiquing Congress or an executive agency for not promulgating some law or regulation to deal with the problem. Alternatively, it would not be appropriate for a judge to detail the burdensome effects of an environmental regulatory program on an industry simply for the purpose of critiquing that program as a policy matter (as opposed to, for example, explaining how the program's burdens motivated the industry to sue or weighing those burdens as part of some legally required balancing test). When judges employ rhetoric as a form of critique, they veer dangerously close to providing pure policy advice (though in a somewhat

¹⁸¹ For an excellent catalogue and analysis of CERCLA's many problems, see John Copeland Nagle, *CERCLA's Mistakes*, 38 WILLIAM & MARY L. REV. 1405 (1997).

¹⁸² 504 U.S. 353 (1992).

¹⁸³ *Id.* at 355.

¹⁸⁴ *Id.* at 367. The Court also observed that the state could discriminate against out-of-state waste if it could demonstrate that "the imported waste raised health or other concerns not presented by Michigan waste." *Id.*

more subtle fashion than if the advice were simply dictated), and thus their use of language becomes subject to the capacity, efficacy, and legitimacy objections described above.¹⁸⁵

Finally, it is worth noting that nothing in the foregoing discussion is meant to bear on the content of the advice that judges should feel encouraged to provide or the messages that judges choose to convey through their rhetoric. In other words, nothing inherent in the judicial role speaks to whether the content of the language chosen in environmental cases ought to be pro-environment or pro-industry (or any other type), as opposed to the specific forms of advice judges should provide. Whether judges choose to include pro-environment rhetoric or pro-industry rhetoric in their opinions will be based on the personal predilections of the judge herself. Environmentalists might choose to try and persuade judges to employ pro-environment language, but this persuasive project will have to be framed in the language of policy (“it is good to protect the environment because of X, Y, and Z”) rather than in any argument rooted in the nature of the judicial role (“because you are a judge, you should protect the environment”). This follows from the conclusion explained below that protection of the environment is not an inherent aspect of the judicial function.¹⁸⁶

6. Outcome-focused Decision-making

At its most radical level—one which would endorse the idea that judges should reach pro-environment decisions regardless of what the legal materials provide—this paradigm is normatively not worth much discussion. Although protecting the environment above all other interests might be an acceptable policy position for a citizen or political decision-maker to adopt, it is generally not thought acceptable for judges simply to reach decisions based on those policy preferences. As Judge Posner has put it: “Judges should decide cases in accordance with law rather than with any express or implied commitments that they may have made Justice under law is as fundamental a part of the Western political tradition as democratic self-government and is historically more deeply rooted, having been essentially uncontested within the mainstream of the tradition since at least Cicero's time.”¹⁸⁷ If judges could completely ignore the legal authority they are called upon to interpret and apply, then they truly would be no different than legislators, except of course that, unlike legislators, judges are not popularly elected.

At a somewhat weaker level, however, this paradigm becomes more substantial. For example, what would be wrong with a judge deciding that if he finds the traditional legal materials (*e.g.*, text, structure, history) substantially indeterminate, he will simply vote in the manner that would best

¹⁸⁵ See text accompanying notes 174-177, *supra*.

¹⁸⁶ See text accompanying notes 189-218, *infra*.

¹⁸⁷ *Buckley v. Illinois Judicial Inquiry Board*, 997 F.2d 224, 227 (7th Cir. 1993).

protect the environment? After all, this Article previously endorsed the idea that judges can consider the possible consequences of their decisions when reaching a decision in a difficult case.¹⁸⁸ If a judge can consider possible consequences, why not just allow the judge to decide based on his preferred outcome? But there is a significant difference between a pragmatic approach which would have courts look to the environmental consequences of their decisions as one of many factors when deciding a case, and an approach that would endorse pro-environment decision-making in all cases involving significant indeterminacy. The former, in my view, stems from the fact that judges will inevitably be influenced by their intuitions, experiences, and biases when deciding difficult cases, and thus it makes little sense to ask them not to consider real-world consequences. The latter, however, is a more radical position, one that takes protection of the environment to be an inherent aspect of the judicial role. Such a position requires some argument or theory specific to the environment to justify its radical approach.¹⁸⁹

Under what circumstances would it be proper to understand protection of the environment as an inherent part of the judicial role? One possibility would be if there were some specific source of law—a constitutional provision, a binding treaty,¹⁹⁰ a statute—that obligated courts to place a thumb on the scale of environmental protection. For instance, if the Constitution contained a provision similar to the one found in Illinois’ Constitution, which provides that “[e]ach person has the right to a healthful environment,”¹⁹¹ perhaps one could construct an argument that judges, as the ultimate enforcers of the Constitution, must take positive acts to promote environmental protection. The U.S. Constitution, of course, lacks any such provision. Alternatively, if a statute directed federal judges to decide cases in a pro-environment fashion, such a statute, depending on how it was written, might have the same effect, assuming it did not create any separation of powers problems. Again, no such statute exists. The closest federal statute on the books is NEPA, which does mandate that “to the fullest extent possible . . . the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter,”¹⁹² and which could possibly be read to entrust judges with the obligation of ensuring that environmental laws and regulations are

¹⁸⁸ See text accompanying notes 138-146, *supra*.

¹⁸⁹ In a sense, the notion that judges should decide cases in an outcome-directed fashion in environmental cases is also an example of the first paradigm, as it is to some degree a “special rule” for environmental law. To that extent, many of the objections to the first paradigm, see text accompanying notes 110-129, *supra*, would be applicable here as well.

¹⁹⁰ For discussion of the inclusion of the so-called “precautionary principle” in international treaties, see Chris W. Backes & Jonathan M. Verschuuren, *The Precautionary Principle in International, European, and Dutch Wildlife Law*, 9 COL. J. INT’L ENV’T L. & POL’Y 43 (1998). The United States has not generally endorsed the principle as a binding restraint on American policy or activities. See, e.g., John S. Applegate, *The Taming of the Precautionary Principle*, 27 WILLIAM & MARY ENV’T L. & POL’Y REV. 13, 14-15 & n. 7 (2002); Linda O’Neil Coleman, 25 SEATTLE UNIV. L. REV. 609, 624-33 (2002).

¹⁹¹ ILL. CONST. art. 11, § 2.

¹⁹² 42 U.S.C. § 4332(1).

interpreted and applied in a pro-environment fashion,¹⁹³ but the Supreme Court has long repudiated the notion that NEPA has any substantive bite,¹⁹⁴ and Congress has failed to amend the statute in response to the Supreme Court's interpretation.

In addition, it might be possible to develop a theory based on something inherent in the judicial role or the political process or some other aspect of the American legal system in order to justify a judicial system which actively promotes environmental values. An example from a different area of law would be John Hart Ely's classic representation reinforcing theory for a system of judicial review favoring the interests of insular and discrete minorities who are effectively precluded from full participation in the political process.¹⁹⁵ In his most recent work, Georgetown's Richard Lazarus offers some tantalizing hints toward such a theory.¹⁹⁶ He argues, for

¹⁹³ See, e.g., Farber, *supra* n. 12, at 560 (noting that the Court's position that NEPA imposes only procedural requirements on agencies "simply ignored the plain language of the statute").

¹⁹⁴ *Robertson v. Methow Valley Citizens Council*, 490 US 332, 350 (1989) ("Although these [NEPA] procedures are almost certain to affect the agency's substantive decision, it is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process."); *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227-228 (1980) (per curiam) (NEPA only imposes procedural requirements, not substantive ones).

¹⁹⁵ JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 87-88 (1980).

¹⁹⁶ Although I have given it much thought, I cannot conclude with any certainty what paradigm(s) identified in this Article Lazarus's suggestions would fall into. He certainly believes that courts ought to use environmental rhetoric. See n. 75, *supra*. At times he seems to be arguing that courts should use different tests or apply existing tests more stringently in environmental law cases. See Lazarus, *Judging Environmental Law*, *supra* n. 11, at 206 (discussing need for "heightened judicial scrutiny" in environmental law cases). Sometimes, he seems to be arguing only that courts ought to appreciate the true nature of environmental harms when applying facts to law. See Lazarus, *Restoring What's Environmental*, *supra* n. 11, at 741 ("On other occasions . . . it may be only the legal doctrine's application in the environmental context that requires more careful, and different, consideration. This could occur when the pre-existing doctrinal solution has reflected a balancing of competing values. The balance struck may differ in light of the special weight the environmental context suggests should be given to particular ecological values."). Other times, he suggests that courts should adopt new general legal standards or tests when they realize that the existing standards fail to protect the environment. See *id.* (arguing the Court should rethink entire areas of law "when the environmental dimension of a case illuminates a general doctrinal failing").

Finally, although Lazarus clearly says that he is not endorsing outcome-oriented decision-making, see Lazarus, *Thirty Years*, *supra* n. 11, at 635 ("There should not always be one answer if environmental protection is at stake; and another answer if not. Such singularly outcome-dependent judicial reasoning could seriously undermine the law's essential integrity and legitimacy."), some aspects of his work give the impression that, however unintentionally, he does support some sort of outcome-influenced approach to environmental decision-making. For example, after identifying a set of one hundred cases decided between 1969 and 1999 for which it is possible to identify a pro-environment and an anti-environment result, Lazarus, *Restoring What's Environmental*, *supra* n. 11, at 723, Lazarus scores the Justices on a scale of 1-100 based on how environmentally friendly their votes reveal them to be. *Id.* at 722 ("A Justice is awarded one point for each pro-environmental

example, that, like in civil rights cases, “heightened judicial scrutiny” is required in environmental law cases “to safeguard the interests of those less politically powerful (whether racial minorities or unborn future generations).”¹⁹⁷ This suggests that judges ought to decide cases in a pro-environment fashion to protect future generations because those beneficiaries lack a vehicle to participate in the political process or to otherwise protect their interests. Moreover, Lazarus argues that because of the geographic and temporal “mismatch” of cause and effect that characterizes ecological injury,¹⁹⁸ and because of the exceedingly fragmented

protection outcome for which the Justice voted. The final score, referred to hereinafter as an ‘EP’ score,’ is based on the percentage of pro-environmental votes the Justice cast out of those cases within the 100-case sample in which that Justice participated.”). In addition to the fact that a 1-100 scale, as a matter of tone, suggests that Justices who decide more cases in a pro-environment fashion are doing somehow better than Justices with low scores, Lazarus’s discussion of the trends over time suggest that there is something normatively good about deciding cases in a pro-environment fashion regardless of the context of the case. After showing that over time the number of Justices who have high environmental protection (“EP”) scores has declined and the number of Justices with low EP scores has risen, *id.* at 735-36, Lazarus concludes that “[t]he overall trends should be troubling for those looking to the Supreme Court for an affirmative interest in promoting environmental protection.” *Id.* at 736. *See also id.* at 737 (“[E]nvironmental protection concerns seem increasingly over the past three decades to be serving a *disfavored* role in influencing the Court’s outcome. The preferred outcome is one that places less rather than more weight on the need to promote environmental protection. The Court’s decisions and the attitudes of the individual Justices reflect increasing skepticism of the efficacy of environmental protection goals and the various laws that seek their promotion. Even more fundamentally, however, the Court’s rulings and the opinions and votes of the Justices suggest the relative absence of any notion that environmental law is a distinct area of law.”). Although Lazarus does not say that he is the kind of person who looks to the Court for such an interest, it seems fairly implied. The language he uses suggests that judges should in fact have an “affirmative interest in promoting environmental protection.” This is very different from saying that judges should take into account the unique features of ecological injury when deciding cases; the latter may in fact result in more pro-environment results, but it might not, and the goal in any event would simply be to apply a correct understanding of the facts, rather than to reach a particular result in any given case.

Moreover, apart from the specific language he uses, Lazarus’s analysis of the scores also suggests an interest in outcome-focused decision-making. To the extent that Lazarus is lamenting the increase in the number of Justices who consciously reach anti-environment decisions, he would seem on very strong ground: there is little reason to believe that Justices should conceive of acting anti-environmentally as part of their judicial role. But to the extent he is lamenting the decline of Justices who consciously reach pro-environmental decisions, his ground is shakier. Without knowing more about each case decided, there is no reason to think that a pro-environment decision is any better than an anti-environment decision except that it represents a pro-environment outcome. In other words, there is no sure way of knowing whether a high EP score demonstrates that a Justice has a long history of properly considering the unique features of ecological injury when deciding cases or instead a long history of reaching otherwise poor decisions in order to maximize environmental protection.

¹⁹⁷ Lazarus, *Judging Environmental Law*, *supra* n. 11, at 206.

¹⁹⁸ *See id.* at 206-07 (“Environmental legal rules invariably regulate activities at one location and/or time in order to avoid harms or confer benefits on persons or environmental amenities at another place or time.”). *See also* LAZARUS, *supra* n. 11, at 5-28.

nature of American legal decision-making,¹⁹⁹ environmental law is particularly difficult to “maintain, and to enforce over time.”²⁰⁰ This, he suggests, justifies a “substantial, engaged, and active judicial role” in protecting the environment.²⁰¹

Of these possibilities, the argument regarding future generations would appear to have the most promise in justifying a pro-environment judicial orientation, but even this argument falls short. Even assuming that present generations have a responsibility to future generations to maintain the natural environment in habitable condition,²⁰² it is unclear why courts should be the institution to provide the voice of those generations. For one thing, given that many if not most adult participants in the political process, whether active office holders or concerned citizens, likely have or plan to have or raise children (and/or grandchildren), it is quite possible that future generations are already adequately represented in present political processes. Research has shown that people fear risks to their children even more than they fear risks to themselves,²⁰³ and this fact alone may counsel against placing even more of a thumb on the scale of future interests. Even if this were not so, Lazarus does not explain how present day judges are equipped to determine the precise interests of future generations and how those interests ought to be weighed against current interests. It is certainly possible that future generations might believe that the current generation should have sacrificed its own enjoyment for the future, but it is also quite possible that they will wish we enjoyed ourselves more and worried about them less.²⁰⁴ Absent any concrete reason to believe that future generations are in fact underrepresented and that judges can accurately gauge their interests and desires, the notion that judges ought to discard politically reached outcomes on the ground that those outcomes do not adequately protect the nebulous interests of future generations seems highly undemocratic. If the current population decides to sacrifice the future for current enjoyment, this may be a profoundly disturbing result for those who would have decided otherwise, but that hardly justifies judicial intervention on behalf of those who have lost in the political process.

¹⁹⁹ Lazarus, *Judging Environmental Law*, *supra* n. 11, at 207-08 (noting both “horizontal fragmentation”—“between and within branches of government”—and “vertical fragmentation”—“reflective of the Constitution’s commitment to principles of federalism, emphasizing the limited powers of the federal government and the general authority of the states”). *See also* LAZARUS, *supra* n. 11, at 29-42.

²⁰⁰ Lazarus, *Judging Environmental Law*, *supra* n. 11, at 206.

²⁰¹ *Id.*

²⁰² *See, e.g.*, Edith Brown Weiss, *Our Rights and Obligations to Future Generations for the Environment*, 84 AM. J. INT’L L. 198 (1990); *but see* Anthony D’Amato, *Do We Owe a Duty to Future Generations to Preserve the Global Environment*, 84 AM. J. INT’L L. 190 (1990) (describing an argument against recognizing such an obligation).

²⁰³ *See, e.g.*, DAVID ROPEIK & GEORGE GRAY, RISK! A PRACTICAL GUIDE FOR DECIDING WHAT’S REALLY SAFE AND WHAT’S REALLY DANGEROUS IN THE WORLD AROUND YOU 17 (2002) (“Adults are much more afraid of risks to their children than risks to themselves.”).

²⁰⁴ This would be particularly true if future technological developments, including perhaps space travel, were to make the risks we fear now less worrisome in the future.

Additionally, two other considerations counsel strongly against the notion that judges should vote in favor of the environment to protect future generations. First, as Lazarus himself recognizes, the various complexities (ecological, economic, etc.) that make it difficult to determine how best to protect the environment also make it impossible for policymakers to apply “bright line rules”²⁰⁵ in any given situation. To rely on such rules would likely result in “environmental laws that were unduly burdensome in many significant respects and unduly relaxed in many others, achieving the worst of both worlds.”²⁰⁶ The same holds true for any bright line rule that would have judges favor the environment whenever the legal materials prove indeterminate. If a judge were to always vote in favor of the environment, this would likely lead to many situations when, as Lazarus says, “valued human activities would be curtailed for no good reason, at least in terms of achieving environmental protection goals.”²⁰⁷ And since judges generally lack expertise in environmental science or policy, they are particularly unlikely to be able to determine when they should put a thumb on the scale for the environment and when they should not. Furthermore, as Lazarus also notes, since all regulations are costly, and since these costs themselves often have “implications for human health and welfare,”²⁰⁸ it may be that always voting for the environment in difficult cases will have in some significant subset of cases a negative impact on exactly the future generations that judges would be attempting to protect.²⁰⁹

Finally, recognizing a judicial obligation to protect future generations could not logically be cabined to the environmental law context, and therefore the recognition of such an obligation would destabilize the legal system in deleterious ways. Almost any policy decision implicates the interests of future generations; decisions about war and peace, management of the economy, development of drugs and other medical technologies, the exploration and colonization of space, and even decisions about how works of art should be protected all have important and often unknown effects on how future generations will experience their lives. If judges must act for future generations in environmental law cases, then they must act for them in nearly every legal dispute.²¹⁰ There is no principled reason to draw the line at

²⁰⁵ LAZARUS, *supra* n. 11, at 19.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 27.

²⁰⁹ See, e.g., Breyer, *supra* n. 55, at 1845 (arguing against an active judicial role in the nuclear power controversy because “one cannot reasonably argue that important health, safety, or environmental interests lie on only one side of that debate”). Clearly, these objections are not in themselves decisive; they demonstrate only that there would be considerable costs to having judges act on behalf of future generations.

²¹⁰ Nor would there be any reason to draw the line only at future generations, who are not the only arguably under-represented group in the political process. For example, certainly the citizens of other nations are under-represented in the American political process. Should judges interpret statutes to protect that group as well? What if different groups of under-

environmental cases. And this would radically change both the judicial role and the power of accountable elected officials to make legitimate decisions regarding the future. Do we really want unelected judges stepping in to stop (or to order) military actions or economic reforms that have been settled on through democratic processes, on the basis that those actions or reforms are not in the best interest of future generations? Only if the answer to this question is “yes” would it even be possible to think of justifying an activist judicial role in environmental cases on the basis of the interests of future generations.

Lazarus’s other suggestions, in my view, are not as weighty. It is certainly true, as Lazarus says, that the “mismatch of cause and effect” of ecological harms and the fragmentation of American lawmaking processes make environmental protection difficult.²¹¹ As he rightly puts it, it is “a challenge for any legal regime to impose significant costs on the here and now for the benefit of the there and then.”²¹² And it is also no doubt the case that the “structural bias within our lawmaking institutions” which “favor . . . government’s acting more slowly and incrementally” make it very difficult to deal with quickly developing and often changing environmental problems.²¹³ But neither of these facts justify incorporating environmental protection as an inherent aspect of the judicial role. Instead, they justify the development of legal mechanisms that are fine-tuned to handle the difficult problems posed by environmental law, including the delegation of environmental protection responsibilities to agencies, which can react more quickly (even if not always quickly enough) than legislatures, the federalization of environmental law to prevent spillover effects among states and ensure the optimal amount of environmental protection,²¹⁴ and the development of novel methods for monitoring and adjusting ecological protection measures to adapt to changing conditions.²¹⁵ These characteristics of ecological injury and lawmaking institutions may also justify courts acting under previously established legal mechanisms to protect the environment in emergencies, as they do when they issue injunctions to prohibit irreversible environmental damage,²¹⁶ or the creation of relaxed rules of judicial access to allow plaintiffs to sue for environmental harm even when there is some geographical or temporal distance between the plaintiff and the source of the

represented foreign citizens would have different views about how a statute should be interpreted?

²¹¹ See generally LAZARUS, *supra* n. 11, at 5-43.

²¹² Lazarus, *Judging Environmental Law*, *supra* n. 11, at 207.

²¹³ LAZARUS, *supra* n. 11, at 32-33.

²¹⁴ See Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 *YALE L. J.* 1196, 1215 (1977).

²¹⁵ For a good example, see Bradley Karkkainen, *Toward a Smarter NEPA: Monitoring and Managing Government’s Environmental Performance*, 102 *COLUM. L. REV.* 903, 938-947 (2002) (advocating changes to NEPA to better monitor environmental effects and encourage adaptation to environmental changes).

²¹⁶ See n. 157, *supra* (describing application of test for injunctive relief in environmental cases, as an example of paradigm #3).

harm.²¹⁷ But these latter judicial actions are examples of courts faithfully applying facts to law and designing legal tests and standards that are grounded in real world understandings, rather than in any notion that courts ought to vote to protect the environment regardless of the case's legal context. The latter position—which is tantamount to saying that unelected judges should second guess the decisions of the elected branches in environmental cases—is simply inconsistent with the judicial role and unjustified by any unique characteristics of environmental law.²¹⁸

7. Ignore Environmental Aspects of the Case.

Rejection of this paradigm in its pure form follows from what has been said already. Although courts should not create special legal rules for environmental cases or modify general rules for application in environmental cases, they should pay strong attention to the factual nuances of environmental cases, including the remarkable features of ecological injury, when applying facts to law, and they should consider the environmental real-world effects of their decisions, at least to some degree, when interpreting statutes and constitutional provisions and otherwise formulating general legal rules. Moreover, judges should feel free to employ environmentally related rhetoric and advice in their opinions when that language is closely tied to their role, strengths, and obligations as judges. To the extent that these activities constitute paying attention to the environmental aspects of cases before them, it follows that courts should not, as a general rule, ignore the environmental aspects of the cases they hear. Adopting this paradigm would have courts ignore completely the environmental effects of their decisions, thus entirely disengaging the lawmaking and interpretive process from real world considerations, and it would require courts essentially to misapply facts—to treat environmental injuries like any other type of injury—which would simply constitute a mischaracterization of the judicial role.

8. *Chemical Manufacturer's Association Reconsidered*

Having worked through the benefits and drawbacks of each of the seven paradigms as a general matter, the Article can now return to the *Chemical Manufacturer's Association* case to consider whether the Court's approach to the case was proper, at least in terms of the Court's treatment or non-treatment of the unique environmental aspects of the case. Initially, it is worth noting that the Court correctly chose the *Chevron* test as the relevant general test for evaluating the agency's interpretation of the statute. That test, developed the year before in an environmental case, clearly provided the framework for decision, and it would have been improper, for reasons

²¹⁷ See text accompanying notes 163-165, *supra* (describing Lazarus's persuasive critique of the Court's crabbed interpretation of Article III in *Lujan*).

²¹⁸ One way to look at this paradigm is that it would single out environmental law for special treatment—albeit special negative treatment—and thus is an example of the first paradigm and subject to all the critiques of that paradigm, *see* text accompanying notes 110-129, *supra*.

catalogued above,²¹⁹ for the Court to have decided counter-intuitively to relegate *Chevron* to non-environmental cases and to develop a new test for environmental cases. This would have been the case even if the original *Chevron* test had been articulated in a non-environmental case. Likewise, for reasons given above, the Court was right not to apply the *Chevron* test differently in environmental cases than in other types of cases.²²⁰ Finally, as noted above,²²¹ it may have been quite appropriate for the Court to have called attention in its opinion to the costs imposed by Congress by its ambiguous phrasing of section 301(l) and even to chastise Congress for these costs.

The more difficult questions involve (1) whether the Court should have crafted a generally-applicable *Chevron* sub-rule regarding agency creation or recognition of exceptions to regulatory requirements, based on the Court's evaluation of the environmental costs of such exceptions; and (2) whether the Court should have concluded, based on the costs of those exceptions, either that section 301(l) unambiguously precluded the FDF variance or that the agency's interpretation of 301(l) (to allow such variances) was unreasonable. In my view, the Court properly did neither of these things. Moreover, although the case is quite close, I argue below that the majority of the Court reached the proper result, although it could have, in one instance, paid closer attention to the unique nature of ecological injury.

It is worth considering the second set of questions first: Is the extent of the possible harms from granting an exception relevant to either step of the *Chevron* analysis? To answer this question, it is necessary at the outset to consider the nature of the FDF variance. It is both similar to the other exceptions contained in section 301 and different from those exceptions. To reiterate, section 301(c) authorized the EPA to "modify" the emission limitations relevant to a plant's "class or category" if those limitations (which were set, along with the definition of the classes and categories themselves, by EPA, after a notice and comment period) in cases of economic hardship,²²² and section 301(g) authorized EPA to "modify" a limitation when doing so would not harm water quality.²²³ The FDF variance, by contrast, was created by the agency by regulation to give plants the opportunity to demonstrate that they were improperly classified in the first place, and that because of "factors fundamentally different from those considered by EPA in setting the limitation,"²²⁴ the plant should be subject to somewhat more lenient emission limitations. The FDF variance, as the dissent pointed out, is similar to the 301(c) and 301(g) modifications, in that it provides an individual plant with the opportunity to avoid the emission

²¹⁹ See text accompanying notes 110-129, *supra*.

²²⁰ See text accompanying notes 129-130, *supra*.

²²¹ See text accompanying notes 105-106, *supra*.

²²² 33 U.S.C. § 1311(c).

²²³ 33 U.S.C. § 1311(g).

²²⁴ *Chemical Manufacturer's Ass'n*, 470 U.S. at 121.

limitations that would otherwise be applicable to it.²²⁵ However, the FDF variance is also unlike the 301(c) and 301(g) modifications, as the majority pointed out, because it is a “corrective mechanism”²²⁶ for limitations that were improperly framed in the first place rather than an excusal for correctly framed limitations. As the majority put it: “An FDF variance does not excuse compliance with a correct requirement, but instead represents an acknowledgement that not all relevant factors were taken sufficiently into account in framing that requirement originally, and that those relevant factors, properly considered, would have justified—indeed, required—the creation of a subcategory for the discharger in question.”²²⁷

The first *Chevron* question is whether the term “modify” in section 301(l)—which, again to reiterate, provided that “[t]he Administrator may not modify any requirement of this section as it applies to any [toxic] pollutant”—unambiguously precluded the agency from granting FDF variances for toxic emissions as well as 301(c) and 301(g) modifications. The question is undoubtedly a close one. On the one hand, it might be possible to read “modify” to refer to any change at all, no matter how justified or minor, to the initial emission limitation standards issued by the agency. But on the other hand, as the majority pointed out,²²⁸ this position is difficult to square with section 307(b)(2) of the statute, which allows EPA to revise certain standards if revision is justified by changes in technology, operating methods, or other relevant factors.²²⁹ Even those who challenged the agency’s authority to grant FDF exemptions conceded that 301(l) did not prohibit 307(b)(2) revisions.²³⁰ As such, it is hard to claim that 301(l) unambiguously precluded the agency from granting FDF variances. Although the dissent is correct that FDF variances differ from 307(b)(2) revisions in significant respects, most notably that 307(b)(2) revisions are subject to notice and comment requirements and are category-based rather than plant-based, thus increasing the chance that EPA will set more stringent standards under that process than the FDF process,²³¹ the two processes are nonetheless similar in that both allow the agency to revise the emission limitation standards to reflect the true circumstances of the plant or plants in question. Whether the two processes are so different that 301(l) should be read to prohibit one but not the other is simply unclear; the language and the structure of the statute, as the majority argues, is ambiguous.

²²⁵ *See id.* at 138 (Marshall, J., dissenting) (“The only view of FDF variances consistent with the scheme of the Clean Water Act is that they are individual exceptions that soften the hardship of general rules.”).

²²⁶ *Id.* at 130.

²²⁷ *Id.*

²²⁸ *Id.* at 126

²²⁹ 33 U.S.C. § 1317(b)(2).

²³⁰ *Chemical Manufacturer’s Ass’n*, 470 U.S. at 126 (noting that the National Resources Defense Council “does and must concede” that 301(l) “cannot be read to forbid every change in the toxic waste standards”).

²³¹ *See id.* at 155-58 (Marshall, J., dissenting).

Although I reach the conclusion that 301(l) does not unambiguously preclude FDF variances with some difficulty, the more important point is that the potential harm which could ensue from granting an exemption is not relevant to the legal analysis. Justice Marshall argued in dissent that the harm was relevant, noting that exceptions “are inappropriate where small errors could lead to irreversible or catastrophic costs,” and that because “[e]nvironmental problems often present thresholds . . . the cost of a relatively small mistake is very high.”²³² Citing *Chevron*, Justice Marshall then concluded from this that, “[t]he decision of when exceptions are required . . . is, in the first instance, one for Congress to make” and that “[i]t is an administrative decision only where Congress has left a gap for the agency to fill.” But this simply begs the question of whether Congress has indeed unambiguously precluded the agency from granting the FDF variance. Marshall argued that the statute clearly did preclude the agency from granting the variance, but that analysis turned on his analysis of the language, structure, and legislative history of the statute, rather than resting independently on the possible harm that granting an exception might cause.²³³ Likewise, the majority’s conclusion reached above—that 301(l) does not clearly preclude FDF variances because it clearly does not preclude the very similar (though not identically similar) 307(b)(2) revision process—rests on the text of the statute and not on the nature of the harm caused by recognizing exceptions to environmental regulations.²³⁴

The second question under *Chevron* is whether the agency’s interpretation of 301(l) was reasonable. To begin with, it is very unclear what the precise scope of this inquiry is supposed to be and whether it has any real teeth under current judicial practice. As Gary Lawson has observed: “[A]lthough courts have not articulated very well the standard(s) that they are applying at step two of *Chevron*, agencies very seldom lose at that stage of the analysis. Courts generally affirm agencies at step two in cursory fashion. . . . In the infrequent cases in which agencies lose at step two, the agency interpretations typically either fail completely to advance the goals of the underlying statute . . . or are so bizarre that close analysis is unnecessary.”²³⁵ The second step of *Chevron* is particularly empty in cases (like *Chevron* itself) in which the step one inquiry is framed as whether a statute is ambiguous as between two possible interpretations;²³⁶ if the court decides that the statute is ambiguous as between the two possible interpretations, it is hard to see how

²³² *Id.* at 159 & n.19.

²³³ *See id.* at 139-152.

²³⁴ *See* text accompanying notes 228-229, *supra*. It is worth noting that if the court had been interpreting the statute itself, rather than deciding whether the statute was ambiguous, it might have more appropriately considered the potential harm that could have resulted from construing the statute to allow FDF variances.

²³⁵ GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 517 (3d. ed. 2004) (citations omitted).

²³⁶ In *Chevron*, the relevant question was whether the phrase “stationary source” in the Clean Air Act either did or did not clearly preclude the agency from employing the “bubble” test for emissions. In *Chemical Manufacturer’s Association*, the question was whether 301(l) either did or did not preclude the agency from granting the FDF variance.

the Court would then decide that adopting one of those interpretations is unreasonable. If the step two inquiry is really intended to be this perfunctory, then clearly the extent of the potential harm posed by granting an FDF variance would not be relevant to determining whether the agency's position in *Chemical Manufacturer's Association* was a reasonable one.

Assuming, however, that the *Chevron* step two reasonableness inquiry is a broader, more substantive one, then perhaps the best argument that the agency's interpretation was not reasonable, based on the unique nature of ecological injury, would be something like Justice Marshall's observations in dissent regarding the important substantive differences between the FDF variance procedure and the 307(b) revision procedure. Marshall argued that the FDF procedure was far less protective of the environment than the 307(b) procedure because the latter requires the agency to group together all similarly situated plants and set the emissions limitations at the level determined by the "capability of the 'best' performer."²³⁷ As Marshall put it:

The FDF variance procedure leads to substantive results that are different in . . . fundamental ways from those attained through the rulemaking for categories of dischargers contemplated in § 307(b). First, it is less protective of the environment. If, for example, a discharger shows that its production processes—and, as a result, its costs of compliance—are significantly different from those taken into account in setting the categorical standards, that discharger would be eligible for an FDF variance, and EPA could set a new requirement based on the applicant's peculiar situation. . . . It may turn out, however, that there are many other dischargers in the same situation, and that all of these dischargers use production processes that make pollution control possible at a much lower cost. If EPA took into account the production processes of these more efficient dischargers—as it presumably would have to do if it proceeded through rulemaking on a categorical scale—it would set a requirement far more stringent than that adopted as part of the FDF variance mechanism.²³⁸

The argument here might go that since EPA could have used the 307(b) revision procedure to fix any inequities created by improperly framed limitation standards, it is unreasonable for the agency to also interpret the

²³⁷ *Chemical Manufacturer's Association*, 470 U.S. at 157 (Marshall, J., dissenting).

²³⁸ *Id.* at 156-57. Marshall continued: "In the aggregate, if EPA defines a new pretreatment subcategory through rulemaking, the ['Best Available Technology']-level pollution control requirement of each discharger would be determined by reference to the capability of the 'best' performer. In contrast, if EPA provides individual variances to each plant in this group, only one discharger would have a requirement based on the capability of the best performer—the best performer itself. The others would necessarily be subject to less stringent standards." *Id.* at 157.

statute to allow it to use a much more streamlined and less environmentally protective method (the FDF variance) of achieving the same goal. Part of this argument is necessarily the notion that allowing a plant to use a level of technology less protective of the environment than it might otherwise have to use under a different procedure is a significant harm that the agency has a responsibility to avoid. Framed this way, the potentially catastrophic and irreversible nature of ecological injury becomes relevant to the legal question in the case.

Because the Court did appear to engage in some substantive, non-cursory analysis of the reasonableness of the agency's interpretation, framing the inquiry as whether the "FDF variances threaten to frustrate the goals and operation of the statutory scheme,"²³⁹ the Court should have mentioned and discussed, at least briefly, the difference, in terms of environmental injury, between the 307(b) procedure and the FDF procedure in determining the reasonableness of the agency's position.²⁴⁰ Such a discussion would have enriched the Court's opinion and rendered it more persuasive. Nonetheless, several factors pointed to by the Court persuasively establish that the agency's interpretation was in fact reasonable, even given the differences between the two procedures in terms of their environmental impact. These factors include the limited and circumscribed nature of the FDF variance,²⁴¹ the cost and difficulty of establishing subcategories through the regulatory process,²⁴² the flexibility provided by the FDF variance procedure,²⁴³ and the extremely limited number of FDF variances actually granted by the agency.²⁴⁴ Although the Court could have been more persuasive if it had explicitly weighed these factors against the slight decrease in environmental protection resulting from the agency's occasional use of the FDF variance instead of the more costly and complicated revision procedure, the Court decision was nonetheless correct.

Returning now to the first question posed above, perhaps the Court should not have even applied the *Chevron* two-step framework to the agency's interpretation at all, and should have instead adopted something like an "exception exception" to the *Chevron* doctrine which would reserve for courts (rather than agencies) primary interpretive authority with regard to exceptions found in regulatory statutes. Given that *Chevron* is probably not statutorily or constitutionally based but instead best understood, in the words of Barron and Kagan, as "a judicial construction, reflecting implicit policy

²³⁹ *Id.* at 129

²⁴⁰ The Court did mention that under § 307 the EPA could create a subcategory for each FDF source, but this argument did not address the notice and comment procedure required under § 307 that would, in Justice Marshall's view, potentially result in broader categories. Compare *id.* at 131 with *id.* at 158 (Marshall, J., dissenting).

²⁴¹ *See id.* at 132 n. 24 (describing the FDF variance).

²⁴² *See id.*

²⁴³ *See id.* at 133.

²⁴⁴ *See id.* at 124, n. 12

judgments about what interpretive practices make for good government,”²⁴⁵ the Court would certainly be within its rights to tweak the doctrine somewhat if it thought that an “exception exception” was justified by some pragmatic concern. If the Court had adopted such an exception, then it would have been obligated to reach its own interpretation of section 301, rather than engaging in the more limited inquiry of deciding whether the statute was ambiguous. Given that substantial arguments exist in favor of looking to real world consequences as part of the interpretive process,²⁴⁶ a Court progressing in such a fashion might have been justified in considering the nature of ecological injury when determining whether 301(l) should have been read to bar FDF variances as well as 301(c) and 301(g) modifications.

None of the most prominent rationales for the *Chevron* doctrine, however, would justify carving out a special rule for exceptions to regulatory statutes. If the doctrine is understood as an assumption about congressional intent—that Congress intends courts to defer to ambiguous agency interpretations of ambiguous statutes²⁴⁷—there seems little reason to assume that Congress would also intend for courts to apply such an idiosyncratic exception. Such an assumption would essentially build one speculative fiction upon another. If *Chevron* is understood instead as a doctrine that promotes expert decision-making and/or political accountability,²⁴⁸ those rationales would support deference in the exception context just as strongly as in other contexts. Indeed, it is easy to see how the rationales play out in *Chemical Manufacturer’s* itself: the agency knows better than the Court the importance of having a relatively low cost safety valve mechanism for fixing misclassifications, and if the public thought that the agency had too broadly interpreted the statute, it could have held the President and his administration politically accountable, something it would have had no means of doing if the Court had interpreted the statute itself.

Perhaps one could advance the following “agency capture” argument in favor of an “exception exception”: (1) exceptions contained in regulatory statutes generally favor public interests over the private interests of regulated industries; (2) federal agencies are generally captured by the industries they regulate;²⁴⁹ (3) therefore federal agencies will be biased to interpret exceptions in a manner favorable to private industry and unfavorable to the public

²⁴⁵ Barron & Kagan, *supra* n. 135, at 212.

²⁴⁶ See text accompanying notes 137-146, *supra*.

²⁴⁷ See Merrill & Hickman, *supra* n. 62, at 870-73.

²⁴⁸ See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865 (1984) (“Judges are not experts in the field, and are not part of either political branch of the Government.”).

²⁴⁹ On capture theory, see, e.g., Merrill, *supra* n. 131; Richard Stewart, *Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1713 (1995) (“It has become widely accepted, not only by public interest lawyers, but by academic critics, legislators, judges, and even by some agency members, that the comparative overrepresentation of regulated or client interests in the process of agency decision results in a persistent policy bias in favor of these interests.”) (footnotes omitted)

interest; and thus (4) agencies should not be entrusted with primary interpretive authority with respect to statutory exceptions. Although this argument certainly has some force, ultimately it proves too much. Almost all agency interpretations, regardless of whether they concern exceptions, procedural issues, or substantive requirements, have the potential to favor the interests of regulated industries over competing concerns. If courts are going to interpret the exception sections of statutes themselves as a means of countering agency capture, they should probably interpret the rest of the statutes themselves as well. All in all, there seems to be no reason to single out exceptions from the perspective of which institution should possess primary interpretive authority over statutes.

Professor Lazarus criticizes the majority's opinion in *Chemical Manufacturer's Association* and praises the dissent. In his view, Justice Marshall's opinion "illustrates the proper use of environmental concerns in legal analysis of an issue of administrative law," because it "apprehends the relevancy for statutory interpretation of the possibility of 'small errors' leading to 'irreversible or catastrophic results'—a typical feature in environmental problems."²⁵⁰ Marshall's dissent, according to Lazarus, properly "responded to the environmental context within which the administrative law issue arose and discerned how that context should affect the issue's resolution."²⁵¹ Justice White's majority opinion, however, "falls short,"²⁵² because for him, "[t]he environmental protection aspects of the case played no apparent role of independent significance."²⁵³

In my view, Lazarus's criticism of the majority opinion is overstated. As the above discussion has suggested, the Court was largely correct in its analysis of the case, and its discussion was impoverished only slightly by its failure to consider the remarkable features of ecological injury. Justice White rightly ignored those features when determining that the statute was ambiguous under *Chevron* step one. And although he might have considered the potential harm that could ensue from a wrongly granted exemption as part of the *Chevron* step-two reasonableness inquiry, the Court's conclusion on that inquiry was nonetheless correct. In sum, despite the remarkable nature of ecological injury, the environmental protection aspects of *Chemical Manufacturer's Association* rightly played little role of independent significance in the resolution of the dispute presented to the Court.

²⁵⁰ Lazarus, *Restoring What's Environmental*, *supra* n. 11, at 742. Lazarus also praises the dissent for acknowledging "the relevancy for the judicial interpretive function of the fact that because '[e]nvironmental problems often present thresholds,' 'the cost of a relatively small mistake is very high.'" *Id.*

²⁵¹ *Id.* at 712.

²⁵² *Id.* at 740.

²⁵³ *Id.* at 712.

IV. Conclusion

When a judge sees that the next case on her docket is an environmental law case, should she immediately say to herself: “Aha, this is an environmental case! I better think differently about this case than all of the other cases that I consider”? For the most part, the answer to this question is “no.” It is true that ecological harms are in some ways quite remarkable, and judges have a responsibility to acknowledge and understand those remarkable features when they decide environmental law cases. And it is also true that courts should consider the environmental consequences of their decisions, among other kinds of consequences, and among a number of other relevant factors, when they reach their decisions and frame rules of general application. Nonetheless, for the most part the theme of the Article has been that very often the Court need not consider the remarkable features of environmental injury when deciding issues of environmental law. Courts have no basis for creating special rules to govern environmental law cases or for modifying existing legal rules in those cases. They should not vote to protect the environment whenever the legal materials are somewhat indeterminate or otherwise act as though protection of the environment is one of their judicial responsibilities. Many environmental law cases involve interpretation of statutes that are clear enough to preclude any need to resort to independent consideration of the nature of ecological injury, or review of agency action that is deferential enough to make consideration of those features unnecessary. Resolution of environmental law disputes frequently calls for nothing more than application of general principles of law that themselves are derived without much or any consideration of the remarkable features of ecological injury.

The point of the Article, however, is emphatically not to suggest that “environmental law” should not exist as a separate legal category. Saying that judges often do not need to think much about the environment to resolve environmental law cases implies nothing about whether legislators and administrators need to think about the unique challenges of environmental protection when framing legislation, promulgating regulations, and taking other administrative action to safeguard the environment. Nor does it suggest that students, teachers, journalists, or voters who naturally think of environmental law as a separate category of law because of its subject matter should somehow change the way they conceptualize the topic. Environmental law addresses a unique set of problems and seeks to protect a unique set of resources, and those facts alone suffice to set the field apart as an area of inquiry and study.²⁵⁴ But making policy is different from deciding cases, and the fact that policymakers and the citizens who hold them accountable should pay careful attention to the unique features of ecological injury does not mean that judges need always do the same.

²⁵⁴ For an excellent discussion of the uniqueness of “environmental law” from a non-court-centered perspective, *see generally* Tarlock, *supra* n. 1.