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Patricia M. Wald

I. BACKGROUND AND PLAYERS

In the United States the framework for environmental protection is primarily a statutory one. In the past two decades, Congress has passed laws requiring that all federal agencies take account of the environmental consequences of their decisions and mandating that the United States Environmental Protection Agency (EPA) act to improve the quality of our air and water, control the disposal of our wastes, and preserve our natural resources from exploitation. Congress often has gone into great detail in these laws on its goals and the means and the time frames for their accomplishment. For example, the Clean Air Act (CAA) established a joint federal-state program to set standards for air quality and develop effective enforcement mechanisms to attain those standards; similarly, the Clean
Water Act\(^3\) (CWA) relies on federal and state programs to set effluent limits and water quality standards and embodies an enforcement mechanism at both the federal and state level to attain those standards.

Congress has recognized both the rapidly changing state of our knowledge about environmental dangers\(^4\) and its own short attention span and inevitably political orientation in dealing with any one subject, even the environment. As a result, it has delegated authority and discretion under those laws to the executive, and primarily to the EPA, to create and operate the apparatus for carrying out the laws' goals. For instance, over the past twenty years Congress has revisited the CAA for major overhauls only twice, in 1977 and in 1990. In the interim, it has relied on the EPA and the courts to keep the United States's environmental protection programs on track.

There is no question that, over the years, Congress has followed major court decisions closely in making amendments to federal environmental laws. Litigation serves to point out the ambiguities and counterproductive provisions in a particular law, the gaps and loopholes in its regulatory scheme, or the unanticipated effects of one of its provisions. The reports of Congress on its amendments to these environmental laws are peppered with citations to court decisions that the legislators wish either to affirm or to overrule. Moreover, judges often pointedly suggest in their opinions that Congress specifically address a problem an existing law raises.\(^5\)

How do the courts enter the picture? In each of its environmental laws Congress has specified—with varying degrees of clarity—which actions of the EPA or other agencies a party can challenge in court and what the challenger must prove. Because Congress often has been at odds with the executive branch over the implementation of environmental legislation, the provisions for court review of the EPA's actions are unusually detailed. In many statutes, Congress has included provisions regarding judicial review to preempt the less specific Administrative Procedure Act (APA) review provisions that typically govern challenges to regulatory statutes.


\(^4\) See, e.g., Doctor Now Doubts Dioxin Danger, WASH. TIMES, May 27, 1991, at A2 (federal health official who recommended in 1982 that town be evacuated because of contamination by dioxin no longer views it as danger).

\(^5\) For example, Justice Powell suggested in his dissent in *Tennessee Valley Authority v. Hill* that Congress might need to amend the ESA to avoid the result in that case: an injunction against the construction of a dam, to ensure the snail darter's habitat. See 437 U.S. 153, 210 (1978) (Powell, J., dissenting).
In general, the prominent place accorded judicial review in federal environmental statutes must be viewed in the context of our overall concepts of limited government and the separation of powers. There must be a neutral forum in which to decide disputes over whether the executive branch is carrying out the will of Congress as set out in the laws, whether it is exercising authority it was never given, whether it is declining to follow mandates it was given, and whether it is making unreasonable decisions when it has rulemaking discretion. When Congress originally passed the major environmental laws in the early 1970s, there was widespread suspicion among its members that the executive branch would not move fast enough on its own—that it had become a "captive" of private industry. Again in the mid-1980s there was profound disenchantment with the way the EPA was doing (or not doing) its business. Congress therefore gave the courts the important role of watchdog in order to insure fidelity to the laws' strictures. The fact that, during much of the past two decades, the presidency and Congress have been in the hands of different political parties has intensified the constitutionally embedded tensions between the branches.

In addition to the several environmental players within the federal government, state agencies and state courts are major participants in the implementation of environmental laws. Until 1970 Congress and the states considered environmental protection to be primarily a local concern. Decentralized environmental decisionmaking was thought to conform best to principles of federalism because it allowed value-laden policy choices to occur at the level of government closest to the region and the citizens that these decisions would affect.6 Warring political factions within and among states, competition between states for natural resources, and pollution that cut across state lines, however, ultimately led to widespread recognition of the need for an overarching national policy of environmental protection.7

In response to that need, Congress passed many federal environmental laws that simultaneously embody national goals and rely on states to implement federal guidelines through the exercise of state police powers.8 At first blush, imposing national rules might seem at odds with the traditional principles of federalism. The cooperation that these dual enforcement schemes envisioned between the federal


government and the states, however, was designed to encourage
more political responsibility and more awareness of each govern­
ment's concerns by the other and to avoid the parochialism that
would occur if each government dealt only with what was in its own
back yard. 9

The 1970 CAA was the first of many so-called "cooperative fed­
eralism" statutes. It changed the federal-state relationship into one
in which the states became the prime enforcers of the statute but
the federal government assumed the authority to exercise vigilant
oversight and intervene if state enforcement was inadequate. 10 Origi­
nally, Congress intended cooperative federalism to both diffuse the
possibility of duplicate efforts by federal and state agencies and solve
the dilemma of finite resources at both the federal and state level
by allocating responsibilities. Unfortunately, however, state agen­
cies have received greater responsibility to enforce federal laws but
have not always secured the necessary funding to accomplish this
task. 11

Close coordination among the federal and state governments and
proper allocation of responsibilities among federal and state agencies
are important aspects of cooperative federalism. For example, there
are both federal and state statutes that govern cleanup and disposal
of hazardous wastes; the question of who will be responsible for a
cleanup can be a major impediment to getting the job done. Another
example is the CWA which provides for two tiers of water quality
rules: state and federal. A state must establish water quality stan­
dards and set up a permit program that at least embodies the na­
tional water effluent limitations, and must enforce both the state
standards and the national standards. The state may enact water
quality standards that are stricter than the national effluent limita­
tions, so long as these standards do not conflict with the federal
law. 12 Although in some cases the EPA has delegated authority to

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9 See Robert L. Glicksman, Federal Preemption and Private Legal Remedies for Pollution,

10 See Randall S. Schipper, Note, Administrative Preclusion of Environmental Citizen
Suits, 1987 U. Ill. L. Rev. 163, 163–64.

11 See David Schnapf, State Hazardous Waste Program Under the Federal Resource Con­
servation and Recovery Act, 12 ENVTL. L. 679, 682 (1982); B. Drummond Ayers Jr., New
Federalism Gets Down to Cases, N.Y. Times, Aug. 16, 1981, § 4, at 4; see also Karen L.
Florini, Issues of Federalism in Hazardous Waste Control: Cooperation or Confusion?, 6
HARV. ENVTL. L. REV. 307, 323 (1982) (noting that "in order to bring sites up to applicable
environmental regulations, states may be forced to spend their own money to continue work
at sites at which cleanup began under Superfund").

implement the national effluent limitations to the states, if a state elects not to enforce the national standards through its own water quality permit program, the EPA will step in and enforce both the state and national standards. Thus, some critics have suggested that, although the CWA conforms to federalist principles at a symbolic level, the Act represents "a classic case of federal takeover, stemming from Congress's dissatisfaction with cleanup efforts by the States." 

Courts play an important role in clarifying the uncertainties that cooperative federalism creates. Courts often must determine which statute, federal or state, applies when there is a conflict and simultaneous enforcement of both laws is impossible. For example, the cost of cleaning up a hazardous waste landfill can be recovered only once—either under a state superfund law or the federal superfund statute, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). In addition to determining whether federal or state law or both govern in a particular situation, courts may also have to decide which agency—federal or state—has the authority to enforce the particular laws.

The question of whether states can hold federal agencies liable for violating state environmental laws also often faces courts. In one case, a state agency was allowed to enforce its own laws regarding the treatment and disposal of hazardous waste against a federal facility. The United States Supreme Court held in another case that the CAA obligates federal installations discharging air pollutants to comply with state regulations, although the installations need not obtain state permits. Indeed, the Supreme Court recently

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13 See generally id. § 1319.


agreed to hear a case to determine whether the United States has sovereign immunity, respectively, from civil penalties under the CWA for violation of state water pollution control laws, and from federal civil penalties under the Resource Conservation and Recovery Act (RCRA). On the other hand, parties may call upon courts to determine whether and when the federal government, under certain statutes, has authority to enforce both federal and state laws against a state. For example, under the CWA, the EPA has asserted the authority to enforce both the state and federal water quality standards against any violator including the state government.

It is not always clear which court, federal or state, will have jurisdiction over a particular case. For the most part, federal courts will hear a case if there is a federal interest at stake, such as the enforcement of national environmental standards. There always has been an understandable concern that too great an exercise of federal jurisdiction will undermine the ends of federalism, such as the encouragement of local initiative and experimentation, because federal courts may be predisposed to advancing the goals of national environmental policy over state interests. On the other hand, federal courts tend to diffuse state and local impediments to environmental problems. For example, the siting of hazardous waste treatment facilities is often subject to a "not-in-my-back-yard" reaction from local citizens. Moreover, in the typical interstate pollution case, in which one state or its citizen brings a claim for property damage caused by interstate pollution against another state or its citizen who was liable for the pollution, the federal courts are the best positioned to hear the case. When there is no enforcement of national standards for air or water quality in a particular state, a federal court may be the appropriate forum to ensure the minimum enforcement necessary to fulfill the goals of Congress's legislation.

Grassroots enforcement of national policy, through citizen propositions and citizen suits supplementing the government's implement-

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21 Id. at 1063.
22 For example, the federal government is suing the state of Florida for its failure to meet state water quality standards established pursuant to the CWA. See Laura Parker, Candor by Gov. Chiles Aids Everglades Cleanup; Concession Made in Federal Suit on Pollution, WASH. POST, May 31, 1991, at A4.
24 See Glicksman, supra note 9, at 153–54.
tation of its laws, produces yet another set of environmental cases for the courts. Most federal environmental laws include a special citizen suit provision that allows any citizen to sue the EPA to compel it to do its duty under the law. The theory behind the citizen suit provision is that citizen enforcers who are on the spot sometimes can make better decisions than distant bureaucrats about what needs to be done. There is also a notion that over time enforcers and polluters, who deal with one another constantly, may work out “agreements” that are not necessarily true to the spirit of the environmental law in question. The citizen outsider acts as a goad in such cases.

Citizen suits have been useful tools for enforcing statutory deadlines for reports and regulations, requiring action on state implementation plans under the CAA, and gaining the inclusion of certain sources in emissions regulations. Generally, these suits seek to compel the EPA administrator to perform a nondiscretionary duty under the particular statute. Where, however, the administrator has discretion under the law—for example, to revise standards or approve variances—citizen suits are not appropriate. A court may dismiss a citizen suit if the judge determines that compliance with the statute or regulation already is being “diligently pursued” in a court action. Under the CWA, citizens most often have used citizen suits to challenge developers acting without the appropriate permits, determine what projects require what permits, challenge departures from permit conditions, and compel the listing of violations or the publication of guidelines within a given statutory time period. Citizen suits, however, do not encompass actions to make the agency take enforcement action against a polluter.

Citizen propositions and citizen suits are often effective means of keeping the government on its toes. They also have the potential, however, to jeopardize the delicate balance of enforcement and oversight that exists between the state and federal government, because they remove local enforcement from the confines of federal agency oversight and attempt to resolve local concerns without the intervention of federal agencies. For example, the citizens of California voted to pass a citizen initiative called the “Safe Drinking Water and Toxic Enforcement Act,” which imposed effluent stan-


standards that are more stringent than federal and then existing state standards,\textsuperscript{27} and created incentives for "citizen bounty hunters"—citizens that report violations in order to receive a monetary reward. Thus, if the minimum standards that federal or state authorities have established are insufficient in the eyes of the public, there is an opportunity through the public initiative process to set stricter standards and compel their enforcement. Moreover, if a federal agency is failing to enforce minimum federal standards, an individual citizen may go to court to require the agency to enforce the standards through a citizen suit.\textsuperscript{28}

Yet, ordinary citizens rarely if ever have the financial resources and know-how to undertake a major challenge to an official government action.\textsuperscript{29} Environmental litigation is time-consuming, the statutes are complex, and it often takes several years before a court challenge is decided. Fortunately, in addition to citizens, there are powerful environmental organizations that have the skill, expertise, and money to present environmental challenges in court. These organizations bring suits to induce agencies to undertake actions, challenge agency interpretations of law that they believe are too restrictive, and even intercede on the EPA or another agency's behalf if the agency is challenged by industry for overregulating.\textsuperscript{30} The Sierra Club Legal Defense Fund, National Wildlife Federation, Wilderness Society, Audubon Society, Environmental Defense Fund, Natural


\textsuperscript{28} Actually, the number of citizen suits has been quite small under the CAA (four to five per year); these suits have been somewhat more numerous under the CWA (349 between 1970 and 1986). See 1 RODGERS, supra note 14, § 3.4, at 212–13 (1986). See generally Friends of the Earth v. Consolidated Rail Corp., 768 F.2d 57 (2d Cir. 1985); William S. Jordan, III, Citizen Litigation Under the Clean Water Act: The Second Circuit Renews Its Leadership Role in Environmental Law, 52 BROOK. L. REV. 829 (1986).

\textsuperscript{29} To encourage citizen suits, Congress has included in many of the federal environmental statutes provisions allowing courts to order defendants, including the government, to pay attorney fees to successful plaintiffs. See, e.g., 15 U.S.C. § 2619(c)(2) (1988) (under TSCA, court may award costs and reasonable fees to prevailing party if court determines award is appropriate); 33 U.S.C. § 1365(d) (1988) (under CWA, court may award costs, including fees, to any prevailing party whenever court determines award is appropriate).

\textsuperscript{30} The citizen suit provisions have not played anywhere near as important a role as have the major environmental organizations acting under regular review provisions. One commentator has described citizen suits as "perpetually clinging to the perimeters of policy." 1 RODGERS, supra note 14, § 3.4, at 213. Basically, these suits have been useful to correct only gross departures from the law by the EPA. Under some federal environmental statutes, citizens may bring suits against not only federal and state governments but also private polluters. See, e.g., 42 U.S.C. § 7604 (1988) (CAA). Citizens undertaking such suits must give notice to the violator or the EPA. See, e.g., 33 U.S.C. § 1365 (1988) (under CWA, 60 days notice).
Resources Defense Council (NRDC), Friends of the Earth, Earth Island Institute, and Greenpeace—all privately supported membership organizations—are familiar figures on the environmental law landscape. Almost every important case brought to court has three parties: the environmental groups, the government, and the regulated industry. The expertise of these environmental organizations assures the court that it is receiving all relevant data and arguments on both sides of the question. Otherwise, candidly, the court often would be putty in the hands of the government.

II. WHAT KIND OF DECISIONS DOES A JUDGE MAKE AND HOW?

A. Jurisdiction over Various Cases

Our laws channel different environmental decisions to different courts. In general, there are three types of cases that are distributed among the federal courts: cases that involve nationally applicable law and that the United States Court of Appeals for the District of Columbia reviews; cases that involve rules or decisions affecting only certain regions or localities, such as the approval of state implementation plans, and that the United States Court of Appeals in that region reviews;32 and cases that address violations of standards and failures to fulfill administrative duties and are left to the district courts.

In general, only final decisions of the EPA administrator, accompanied by a complete record of the agency's decision, go directly to a federal appeals court.33 These include such decisions as the promulgation of air emission or water quality standards, the issuance of industry work practice regulations, and the granting or denying of permits for private and government projects. Agency inaction also may be final for purposes of judicial review if the inaction is tantamount to a denial of relief.34 The requirement that agency actions

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31 More conservative “public interest” groups like Pacific Legal Foundation and Middle States Legal Foundation also have emerged, sometimes taking what might be viewed as an “anti-environmental” position in court. For example, they have filed suit to prevent the EPA from requiring Los Angeles to treat sewage before dumping it into the ocean.


33 See, e.g., 42 U.S.C. § 7607(b) (1988) (CAA). There has been much litigation over what constitutes a “final” order. “Jurisdictional badminton” often goes on as to whether certain decisions are reviewable in appellate or trial courts. Cf. 7 U.S.C. § 136n(b) (1988) (under FIFRA, appellate review only allowed of “any order” issued “after a public hearing”).

be final before a court will review them protects the integrity of the administrative process and prevents the waste of judicial resources through the premature consideration of agency positions that may change. Court of Appeals review usually requires that there already be a developed record on the basis of which the court can evaluate the reasonableness of an agency's decision.

Other kinds of environmental challenges go first to the district courts, where parties by right can appeal decisions to a Court of Appeals and from there petition the Supreme Court, which has discretion in taking cases. For example, civil and criminal enforcement cases that an agency has brought must go first to a district court in order for a factual record to be made. Citizen suits, which seek to require the administrator to perform nondiscretionary duties, also must begin in district court. In addition, parties challenging agency actions such as refusing to suspend hazardous waste permits or releasing trade secrets must make these challenges first in district court.

State courts generally hear cases regarding intrastate pollution claims, constitutional challenges to state environmental regulations, challenges to state agency actions such as permitting and enforcement pursuant to state regulations, and criminal enforcement by state agencies. In addition, a state court may review the adequacy of a CAA-required state implementation plan or the failure to carry out that plan, and may hear a petition by the EPA to enforce state rules under that plan. Generally, a case involving a national issue of environmental law, while it may be brought in state court, will be removed to federal court. As a result, the state courts primarily are concerned with more parochial issues of environmental policy affecting their region.

Thus, ours is a system of judicial diffusion, with divisions between upper and lower federal courts, between a federal appeals court centrally located in Washington, D.C. and regional federal appeals courts, and between federal and state courts. The division between the upper and lower federal courts, though it works imperfectly, has

a rational basis: the desire to put cases requiring the development of a factual record into a trial court and allow those with an already complete agency record to proceed directly to review by an appellate court.\textsuperscript{40} The division between the District of Columbia Court of Appeals and the regional appeals courts is more an expression of anti-Washington sentiment, at least where nationally applicable regulations are concerned. In the past, there was apprehension that a liberal District of Columbia Circuit would tilt too much toward the pro-environmental plaintiff. This decentralization has taken its toll in many false starts, divided opinions, and multiple answers to the same question. It also has had the effect of diluting the influence of Washington-based environmental litigation groups.\textsuperscript{41} Many believe that, for these reasons, centralized review of air pollution regulations has produced more rigorous oversight than the scattered review of water regulations among the circuits. With regard to the federal-state division, federal review is considered more nationally oriented than state court review because state courts generally are more concerned about the issues affecting their localities. Commentators have noted, however, that state courts are less deferential to state agencies and more protective of their states' industries and property interests: a stance that often results in more searching review of those agencies' rulemaking and enforcement actions.\textsuperscript{42}

So far the United States has rejected the notion of a single environmental court, basically for the reason that environmental decisions are considered so value-laden that they should not be left to "experts." The District of Columbia Circuit, however, is preeminent in the environmental law field because that court hears the majority of the challenges to the EPA's clean air and waste disposal regulations. In 1989, fourteen of ninety-seven appeals from federal district courts on environmental matters were in this circuit—a number

\textsuperscript{40} The Courts of Appeals generally perform a moderating function for any extreme decisions of the district courts. Courts of Appeals are more distant from the immediate localities and tend toward a national viewpoint.

\textsuperscript{41} Research has suggested that some Courts of Appeals, at least during the 1970s, were more pro-environmental than others. During that period, the District of Columbia Circuit decided 16% of all environmental cases and was considered to be the most pro-environmental court. See Lettie McSpadden Wenner, The Environmental Decade in Court 106 (1982). The courts in the Northeast and Midwest were distinctly more pro-environmental than the Western and Southern courts. See id. at 110. With the advent of a new administration and new judicial appointees in the 1980s, that picture may have changed. In any political climate, "forum shopping" goes on. See generally William E. Kovacic, The Reagan Judiciary and Environmental Policy: The Impact of Appointment to the Federal Court of Appeals, 18 B.C. ENVTL. AFF. L. REV. 669 (1991).

\textsuperscript{42} 2 Rodgers, supra note 14, § 4.43, at 630–34.
exceeded only by the thirty-five appeals in the large Ninth Circuit. Of 141 appeals filed directly in all eleven Courts of Appeals, ninety-nine went to the District of Columbia Circuit, with no more than nine in any other circuit. Thus, in some areas there is a de facto environmental court in the District of Columbia Circuit, and indeed, some believe that may be necessary for meaningful judicial oversight. Because federal environmental statutes are byzantine in structure and complexity, and the scientific concepts are not easy to absorb in one dose, a judge only feels in familiar territory after ten to twelve engagements. The Supreme Court takes relatively few environmental cases, so consistent oversight, if it is to be at all, must lie in the lower courts. The more experience a court has with environmental law, the easier it is to exercise that oversight.

In my view, the threshold fighting over which court—district court or Court of Appeals, District of Columbia Circuit or regional Court of Appeals—has jurisdiction to review a particular EPA action or failure to act consumes far too much litigator and court time. In a recent case, mercifully vacated because of new legislation, a panel of three judges split three ways on jurisdiction, consuming forty-six pages of reporter text in the process of creating no precedent.

B. How Do Courts Approach Review of Different Kinds of Cases and Issues?

1. Rulemaking

Rulemaking review is the kind of case with which I am most familiar. Every major environmental statute expressly delegates authority to an agency, usually the EPA, to make rules to implement the statute's goals. The agency can issue such a rule only after it has provided public notice of its proposed rule in the Federal Register and allowed time—usually several months—for comment by interested parties. After the comment period, the agency must give notice, again in the Federal Register, of the final rule's promulgation.
with a statement of the rule's rationale and purpose. The statutes typically require that challenges to these rules be brought within a specified time—sixty days under the CAA, ninety under the CWA—but leave room for exceptions if genuinely new information arrives later that justifies a challenge. The trick, of course, is to distinguish between "late-breaking news" and "newly-discovered strategies."\(^\text{46}\)

Most major environmental rules face a challenge at some point. The usual pattern is for industry to challenge some portions and the major environmental organizations to challenge others. Often the government defends one rule against assaults from both sides.\(^\text{47}\) A challenge to an agency's rule typically occurs for one of four reasons: the rule appears to violate the statute, and the court must decide if the agency's interpretation of the law is wrong;\(^\text{48}\) the rule was adopted in violation of statutorily mandated procedural requirements;\(^\text{49}\) there is no substantial evidence in the record to support the rule;\(^\text{50}\) or, if there is substantial evidence, either the agency's reasoning based on that evidence is so defective as to be arbitrary, or the agency did not adequately defend challenges that interested parties raised against its reasoning during the comment period.\(^\text{51}\)

Federal courts tend to defer to an agency's authority and expertise if these manifest themselves in the agency's rationale.\(^\text{52}\) Courts also give credence to the consistency of the agency's position, the thoroughness of the process through which the agency reached its final decision, and the presence or lack of any action by Congress to compel the agency to alter its position. An agency rule is more likely to get in trouble with a reviewing court when there is a dispute regarding whether the statute in question allows the agency to do

\(^{46}\) See, e.g., 33 U.S.C. § 1317(b)(1) (1988). Similarly, the CAA provides that a challenge not brought within the specified time may be precluded as a defense to enforcement proceedings. See 42 U.S.C. § 7607(d)(7)(B) (1988). Many of the valid excuses for late challenges are based on newly discovered information gotten by way of FOIA requests.

\(^{47}\) See Natural Resources Defense Council, Inc. v. EPA, 907 F.2d 1146, 1152, 1160 (D.C. Cir. 1990) (EPA regulations under RCRA challenged by industry as too strict and by Natural Resources Defense Council as too lenient).

\(^{48}\) See id. (finding agency's interpretation of statute unreasonable). For examples of cases in which the court found the agency's interpretation of a statute reasonable, see National Wildlife Fed'n v. Lujan, 928 F.2d 453, 463 (D.C. Cir. 1991); Chemical Mfr.'s Ass'n v. EPA, 919 F.2d 158, 170 (D.C. Cir. 1990).


\(^{50}\) See, e.g., id.


\(^{52}\) See, e.g., National Wildlife Fed'n v. Gorsuch, 693 F.2d 156, 170 (D.C. Cir. 1982).
what it seeks to do, when the agency's logic seems to ignore any relevant concerns, or when the court simply cannot make heads or tails of the agency's reasoning. When such a dispute occurs, courts do not always invalidate the rule, but often merely send it back for reconsideration or a better explanation. Reviewing courts use this remand technique when it is necessary either to understand what the agency did or to ensure the integrity of decisionmaking below.

Although most rules are challenged, the courts rarely strike rules down. Between 1970 and 1986, the Supreme Court heard only eleven air pollution cases and decided for the government in all but two. In nineteen water pollution cases that the Court decided in the same period, the government won on twenty issues and lost on five, industry had fifteen wins and nine losses, and environmentalists won only six out of fifteen. As between the various environmental laws, the survival rates of rules on review differ. For example, the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) fares worse than the CAA. This could be a function of the lack of centralized review for FIFRA rules or of the courts' less deferential attitude toward the EPA's expertise in an area that traditionally has been the province of the Department of Agriculture.

When a court does strike down an agency rule, it is often because the notice of rulemaking failed to tell its readers enough about what the agency was proposing, so that they could comment intelligently. Other reasons include an agency's unreasonable explanations for what it did, its reliance on undecipherable data, its use of inconsistent rationales, its failure to analyze or explore the costs and benefits of an option, its nondisclosure of data, and its failure to come to grips with important contradictory evidence. These reasons all add up to an agency responsibility to convince an educated generalist judge that the agency's rule is the product of intelligent policymaking, not sloppy work or pure political ideology.

Now, it might sound as though judges have overwhelming power over environmental administrators, but in reality this is not so. The

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56 See 1 RODGERS, supra note 14, § 3.5, at 228–29.
57 See 2 id. § 4.6, at 87–89.
58 See 3 id. § 5.4, at 59.
Supreme Court has been quite deferential to agency rulemaking power. It has held that a court cannot impose any procedural requirement on the rulemaking process that Congress itself has not imposed. Moreover, according to the Court, unless it is crystal clear that Congress intended a certain interpretation of a statute, courts must defer to any reasonable interpretation of the law that an agency puts forth. In addition, in the areas of agency utilization of resources and establishment of enforcement priorities, the Court has told lower courts to leave an agency alone unless it has violated a specific statutory mandate.

Still, even within such strictures, overrulings of agency rules occasionally do occur. Perhaps the most frequent ground for sending a rule back to an agency is that the rule does not reflect "reasoned decisionmaking," that is, the agency's explanation for what it did does not pass muster with the court. Either the agency failed to justify its assumptions in the public record, it failed to take account of important considerations, it did not answer critical comments by participants in the rulemaking, or it has relied on logic that makes no sense. What courts look for in reasoned decisionmaking is that an agency has spelled out the problem, plotted its options, calculated

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60 See 42 U.S.C. § 7607(d)(9)(D) (1988) (under CAA, any procedural error must be so serious or of such central relevance that rule likely would have been changed if error had not been made to warrant reversal); Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 524–25 (1978).

61 See Chevron United States Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842–43 (1984). This was not always so. In the early days of environmental law, courts were more active in promoting environmentalist values. They subjected agencies to procedural requirements that the laws did not explicitly set out. See, e.g., Kennecott Copper Corp. v. EPA, 612 F.2d 1232, 1236 (10th Cir. 1979) (court required statement of basis and purpose more detailed than APA required). Courts interpreted environmental laws expansively. See, e.g., Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 391–92 (D.C. Cir. 1973) (court required emission reductions to level achievable only through technology not yet in use), cert. denied, 417 U.S. 921 (1974). Overall, they engaged in rigorous "hard looks" at agencies' reasons for deciding as they did. The courts also interpreted statutory terms for themselves, giving an agency only the deference they thought it deserved.

Judges often expressed a special concern for the environment. According to one court, "[a]gency decisions in the environmental area touch on fundamental personal interests in life and health, and these interests have always had a special claim to judicial protection." Scientists' Inst. for Pub. Info., Inc. v. Atomic Energy Comm'n, 481 F.2d 1079, 1094 (D.C. Cir. 1973); see also Environmental Defense Fund v. Ruckelshaus, 439 F.2d 584, 598 (D.C. Cir. 1971).

Some commentators are critical of the new judicial nonactivism. See, e.g., Robert L. Glickman, A Retreat from Judicial Activism: The Seventh Circuit and the Environment, 63 CHI.-KENT L. REV. 209, 210 (1987). "A judiciary unwilling to review in any meaningful way the faithfulness of agency decisions to statutory goals invites executive branch subversion of the legislature's will. A judiciary that refuses to carry out the responsibilities delegated to it in regulatory legislation itself infringes upon congressional authority." Id.

the consequences of the major options, provided support in the record for the option it chose, and addressed the major objections to that choice. In the end, it comes down to what one commentator has called "good thought processes and intuitively convincing outcomes."63

Many courts, particularly the District of Columbia Circuit, still employ the "hard look" review—they vigorously scrutinize an agency's rationale for a rule to make sure the agency has reached a conclusion based on facts in the public record, not on secret or hidden reasons. Thus, judicial review "on the record" prevents agency officials from considering the secret ex parte contributions of lobbyists, superior officials, or members of Congress.64

Hard look review also means close inquiry into the completeness and soundness of an agency's analysis and reasoning—analysis and reasoning that must be on the record. Congress adopted the hard look doctrine as the appropriate standard for review in the CAA, which expressly requires that the EPA disclose all of the data supporting a proposed rule, rebut all serious objections to the rule, and publicly explain its rationale.65 On the other hand, courts are generally more deferential to agencies regarding the methodologies the agencies use to analyze data and the policy choices they make. In sum, the standard for review that will ensure reasoned decision-making "is not whether the agency analysis is impeccable, but whether it is reasonable; not whether most of the evidence supports the agency's position but whether enough of it does; [and] not whether the agency's policy choices are wise but whether they are rational."66

There is an interesting synergistic relationship between agencies and courts in our system. Courts often lecture agencies in their opinions, chastising and warning them about agency policies or reasoning without actually overruling the challenged rules. No one has ever measured the effects of such lectures. We do know, however, that agencies often draft their rules and rationales with judicial review in mind—some say too much so. The prospect of judicial review may be a healthy deterrent to agency politicalization or bureaucratic insensitivity.

63 2 RODGERS, supra note 14, § 4.3, at 35.
There is, however, some sentiment in the United States that the specter of judicial review inhibits and impedes rulemakers. Some say that the courts, despite Supreme Court admonitions, dig too deeply into the record, looking for minute mistakes, or worse still, that they substitute their own policy preferences for an agency's under the guise of detecting flaws in the agency's reasoned decision-making. Critics on the other side complain equally vociferously that, in most instances, the courts bow cursorily toward agencies and give them no real testing at all. Still others complain that it is the luck of the draw—which judges sit on review—as to whether an agency decision will receive a hard look or a soft glance.

From my own experience, judging is an art, not a science. Judges are rarely totally naive about the political aspects of major environmental decisions—they read the papers, listen to the radio, and watch television. They are also cognizant of their generalist background and education and their limited expertise in specific areas. If an agency sets out the evidence in favor of its rule and explains cogently why it rejected competing evidence or drew the inferences it did from that evidence, and if the evidence is not intuitively unconvincing or incomplete, few judges will overrule the agency's rule. The evidence upon which the agency relies, however, must be in the public record and not accessible to the agency alone.

Most judges also realize that no one environmental issue can be decided in a vacuum. The law of the environment, like the environment itself, is a seamless web: "[p]lue at any one point in the intricate fabric of our ecosystem and the web of relationships changes shape, disrupting the previous equilibrium so that further changes must be made to offset both intended and unintended effects."67

One particularly difficult area for courts to review is risk assessment. Neither agencies, scientists, nor courts yet know the ultimate effects on the global environment of acid precipitation, thermal pollution, or hazardous waste disposal; nor do they know on whom any discernible risks will fall. Yet, both agencies and courts must make decisions regarding these risks in the face of uncertainty.

In the Toxics Substance Control Act (TSCA), for instance, Congress used the phrase "unreasonable risk" thirty-eight times as a standard for regulating toxics. Where the statute does not define or modify the word "risk," the courts themselves have introduced the

adjective “unreasonable” to fashion a standard.\textsuperscript{68} If there is an “unreasonable” social, economic, or physical risk, then the EPA must engage wholesale in assessments of those risks, and the courts must review those assessments. “Unreasonable” necessarily means that the agency’s choices will be intensely value-laden.

At the end of the process of identifying hazards and assessing dose responses and exposure levels, the EPA must describe the nature and magnitude of the human risk that a particular toxic substance poses, including attendant uncertainties, in a way that judges can follow. The agency need not show the risk with certainty, given the inevitable uncertainties stemming from the flawed state of knowledge about the long-term and chronic effects of many toxic substances.\textsuperscript{69} The “proof” of a risk often will be a mix of scientific theories, modeling exercises, trend projections, and facts extrapolated from one body of data to another. Moreover, uncertainty about the threshold levels of exposure to a substance that causes harm is unavoidable. Nonetheless, one can expect judges to be deeply interested in the risk assessment process and to insist that they be able to understand it. In the final analysis, courts can look only for a reasonable basis for concluding that a substance significantly contributes to an unreasonable risk to health and the environment.

It is interesting to note that the delays and frustrations of rulemaking review have given rise to a movement of some momentum called “negotiated rulemaking” or “reg-neg.”\textsuperscript{70} In “reg-neg,” the interested players sit down and negotiate a rule with the agency, then sign a stipulation of their agreement. This process, which Congress specifically authorized and encouraged in the Negotiated Rulemaking Act of 1990,\textsuperscript{71} largely circumvents any court challenge to a negotiated rule. Use of the technique has resulted in some spectacular successes under the CAA with regard to alternative fuels in dirty cities and the quality of air in the Grand Canyon region. Though practically limited to disputes where the affected interests are limited in number

\textsuperscript{68} See Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607, 639--52 (1980) (to issue health and safety standard under Occupational Safety and Health Act, Secretary of Labor first must determine “that it is reasonably necessary and appropriate to remedy a significant risk . . . ”).

\textsuperscript{69} See Ethyl Corp. v. EPA, 541 F.2d 1, 24--25 (D.C. Cir.) (en banc), cert. denied, 426 U.S. 941 (1976).


and their differences not irreconcilable, parties have used the procedure effectively over twenty times. Whether or not “reg-neg” will enjoy any advantage in judicial review sought by nonconsenting parties has yet to be seen.

2. Failure to Engage in Rulemaking

The EPA's rulemaking responsibilities under current federal environmental laws are gargantuan. For example, one commentator has described TSCA in the following way:

> the statute is perceived simultaneously as vast and puny; it is all-encompassing from one view, a mere “gap-filler” from another. Comparisons of regulatory potential with actual output underscore these sharp contrasts. TSCA is often mentioned in close proximity to the universe of known chemicals (5 million), the numbers of new compounds produced annually (250,000), those finding their way each year into the commercial market place (1,000), numbers of chemicals to which Americans are exposed (60,000 to 70,000), percentage of these inadequately tested for health and environmental effects (84%), and estimates of human cancers attributable to environmental contaminants (60 to 90 percent). Those thinking big are inclined to associate TSCA with huge benefits, crushing costs ($8.2 billion by the decade ending in 1988), and sweeping new rules (visiting the prospects of “sudden, complete regulation” on the entire chemical industry). 72

Legislators are prone to both broadly worded mandates and statutory goals and unreasonable deadlines for achieving them. When appropriation time comes around, however, they are not so willing to provide agencies with the personnel and funding to complete their assigned tasks. As a result, agencies are forced to prioritize. When an agency is perceived to lose direction, will, and even integrity, however, Congress will move in to tell it what to do. For example, the Hazardous and Solid Waste Amendments (HSWA) to RCRA, addressing RCRA's “cradle-to-grave” scheme for waste disposal, had seventy-nine deadlines for agency action. 73 Some of this legislative micromanaging was an understandable reaction to periods of insufferable miasma and even corruption at the EPA in the mid-1980s. Under the HSWA, unless the EPA took action through rulemaking within a certain time, the hammer of statutory prescriptions was to fill the administrative void.

72 3 Rodgers, supra note 14, § 6.1, at 373–74 (citations omitted).
73 Id. § 7.1, at 512.
Despite Congress's use of this "hammer" technique, parties often have called upon courts to enforce statutory deadlines, for the promulgation of rules, that the EPA says it cannot meet. In the face of such impasses, courts sometimes have extended the time for rule-making for a specified period; more often they have become mediators, using the prestige of the court to force the parties to agree to a new timetable that both parties find tolerable. Almost always courts are faced with the agency defense that mandating the rule-making at issue will mean costly delay in the agency's addressing some even more important priority. Unfortunately, agencies rarely have, or at least rarely provide the court with, a concrete table of priorities to back up their claims.\footnote{EPA, however, recently has engaged in a "worst risk" assessment that lists its priorities for regulation.}

Where a statute does not include any deadlines, courts still entertain appeals from environmentalists challenging the EPA's refusal to initiate rulemaking on request. In these instances, courts show the greatest deference to agencies; a challenger must prove overwhelmingly that the agency, by not engaging in rulemaking on a particular subject, is circumventing the statute in question. In some cases, Congress has lifted that burden. For example, section 21 of TSCA specifically provides for petitions to the EPA for the issuance of rules and a \textit{de novo} trial in court if the agency declines.\footnote{See 15 U.S.C. \$ 2620 (1988).}

3. NEPA Review

The National Environmental Policy Act (NEPA), passed in 1970, provides that "in all major federal actions significantly affecting the quality of human environment," federal agencies must prepare environmental impact statements (EISs) that analyze the environmental costs and benefits of the intended action and all reasonable alternatives.\footnote{See 42 U.S.C. \$ 4332 (1988).} Although an agency's decisionmakers must consider the contents of the EIS for the agency's proposed action, NEPA does not compel them to come to any one conclusion.

The courts have played a significant role in deciding which actions require an EIS and whether an EIS for a particular project is adequate. In one of the first NEPA cases to come to court, \textit{Calvert Cliffs' Coordinating Committee, Inc. v. United States Atomic Energy Commission},\footnote{449 F.2d 1109, 1128 (D.C. Cir. 1971).} Judge Skelly Wright of the District of Columbia...
Circuit insisted that an EIS be a complete and thoughtful document, and that it expressly be made a part of the decisionmaking process. The Calvert Cliffs’ case illustrates how “a court can construe a tightly worded statute so loosely that it can . . . be safely ignored by an understaffed and underfunded agency,” or make a general direction “into a stringent mandate.”78 In writing NEPA, Congress did not describe the precise contents of an EIS or specify the weight that an agency was to give to an EIS that it had prepared. The court in Calvert Cliffs’ filled those gaps.

Although NEPA does not require that an agency base its proposed action on its EIS, in fact several of the EISs that courts have found insufficient or incomplete have resulted in the agency taking a second look and either modifying or abandoning the project. In the first decade after its passage, NEPA generated more cases than any other statute: almost 900 in all, most involving proposed highways or dams, oversight of oil drilling, or Forest Service sale of timber lands. In most cases, courts were sympathetic to environmentalists when there was a question as to whether a particular project required an EIS, but less sympathetic when the case turned on whether a completed EIS was satisfactory. By the end of the statute’s first decade, NEPA litigation had declined, presumably because environmental activists had realized that it could not compel any outcome, and because agencies had learned how to write EISs that courts would accept.

When a court reviews an EIS for adequacy, it does not substitute its own policy judgment for that of the agency. Its only task is to “ensure that the statement contains sufficient discussion of the relevant issues and opposing viewpoints to enable the decisionmaker to take a ‘hard look’ at environmental factors and to make a reasoned decision.”79 As a result, it may be difficult to challenge an agency action on the grounds that its EIS is inadequate. For example, an environmental group recently challenged an EIS, arguing that the agency discussed only a “no project” alternative in the EIS, rather than any other feasible sites.80 Although the EIS merely stated that the agency eliminated all alternative sites from consideration for nonenvironmental reasons and did not compare the environmental impacts of these possible alternatives, the District of Columbia

78 HOBAN & BROOKS, supra note 67, at 60.
Circuit upheld the EIS as adequate. It appears then that an agency need provide only the barest explanation in an EIS for its decision.

4. Settlements

In the ongoing relationship between the major environmental groups and the EPA, litigation is just one aspect of a complex bargaining process that encompasses agency processes, legislative advocacy, and court challenges. Often, once a suit is filed or discovery completed, settlement negotiations begin in earnest. Sometimes, new legislation makes the prospect of litigation less attractive for one of the parties. Almost always, because environmental litigation is so costly and time-consuming, and because it is conducted primarily by institutional players who deal with each other continually, both sides are anxious to settle. The court-approved consent decrees that result often redefine the responsibilities of the agency just as surely as a formal opinion, and settlements of large environmental disputes, especially class actions, can have enormous implications not just for the parties but also for the law.

For example, Judge Weinstein of New York, an innovative federal district court judge, effected a settlement of a huge and legally complex class action involving the individual and group claims of both Vietnam veterans exposed to the herbicide Agent Orange and their families. He took over a slow-moving suit against several pesticide manufacturers and promptly set a trial date for six months later, insisted that the federal government be joined with the manufacturers in the case, and revealed tentative rulings on key legal issues to both sides. Judge Weinstein also hired a consultant to develop a strategy for creating an aggregate fund from which claims would be paid, allocating contributions to that fund among different manufacturers, and setting forth criteria for distribution to claimants. Finally, he appointed three settlement masters and personally participated in around-the-clock negotiations inside the courthouse.

Judge Weinstein's distinctive role in the Agent Orange settlement negotiations is thought to have been the key to their success. He did not hesitate to use his authority to display his knowledge of the key factors relevant to settlement or announce his commitment to settlement as the best way to resolve the case. The settlement resulted in the establishment of a $180-million fund to pay claimants exposed to Agent Orange without ever requiring a ruling that Agent Orange caused their injuries. One commentator has said that "Agent Orange exemplifies a class of cases, likely to grow in the future,
whose complexity, costliness and controversial nature generate strong incentive for settlement among parties, lawyers, and judges.81

Another example of a judge playing a proactive role in the settlement process was Judge H. Russel Holland's response to the initial Exxon Valdez settlement proposal, which would have allowed Exxon to pay $1 billion to resolve its civil liability to the state and federal governments over the next fourteen years. Exxon also would have agreed to plead guilty to four criminal violations and pay a fine of $100 million in settlement of its criminal liability. That settlement would have been the largest settlement ever for damage resulting from an environmental disaster. Judge Holland rejected the $100-million criminal fine, saying that the environmental damage resulting from the 1989 oil spill was "off the charts compared to other environmental disasters in this country," and that "the fines that were proposed were simply not adequate. They do not adequately achieve deterrence."82 After Judge Holland rejected the criminal part of the settlement package, the civil settlement for the remaining $1 billion fell through.

Another unusual aspect of the proposed Exxon Valdez settlement was its provision allowing members of the public to express their views by mail directly to Judge Holland as he decided whether to approve the plea agreement on the criminal charges. Judge Holland noted that the letters he received criticized the criminal penalty as too small.83 Although settlement may have prevented a costly trial, thereby saving the government and Exxon litigation expenses, Judge Holland believed the settlement was not a fair one, and therefore refused to give his approval. He later accepted another settlement proposal.

A judge, in approving a consent decree that settles a case, must ensure that the decree is fair to all of the major interests, or at least that it does not preclude the right of these interests to sue separately.84 The judge usually schedules a hearing on the proposed settlement for all interested parties to voice their objections. This

83 Keith Schneider, Judge Rejects $100 Million Fine for Exxon in Oil Spill as Too Low, N.Y. Times, Apr. 25, 1991, § A, at 1.
can be an extremely important stage for the main challenger, who may be settling for reasons that are not in the interests of others. Environmental advocates usually represent largely anonymous classes of litigants and on occasion may be tempted to elevate their own institutional agendas over those of their unknown clients.

Settlements substantially can restrict the EPA as it makes decisions about establishing priorities and utilizing resources. One settlement between the EPA and the NRDC effected structural changes in the agency's pesticide registration processes, revised its procedures for developing standards, and provided for the reassessment of earlier decisions on thirteen chemicals. Such detailed and complex settlements leave the EPA with little discretion. Indeed, the government unsuccessfully attempted to extricate itself from one such consent decree by arguing that a new Administration should not have its hands tied by decrees that its predecessor had negotiated.

The judge's role in supervising settlements is vitally important in the environmental area, because the EPA's and the environmental groups' resources are so limited that they can make a dent in their agendas only by settling large numbers of cases. As a result, many cases avoid a judge's hand at the trial and appellate level, but are still subject to a judge's approval at the settlement stage. Because a judge often will hold the fate of many unrepresented but injured parties in her hand when a consent decree comes before her for approval, the judge's role in environmental law through settlement is a significant one indeed.

5. Remedies

The judge also figures prominently in the creation of remedies for the violation of environmental laws. Most environmental statutes provide for both civil and criminal liability. Creating remedies is primarily a task for district court judges once they have found individual violations by polluters, whether private or public. Some of

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the remedies ordered over the years have been extremely controversial.

Back in the early 1970s, for example, a trial judge enjoined the Reserve Mining Company from dumping its taconite tailings into Lake Superior. On the basis of speculative but as yet unproven health risks, the regional Court of Appeals modified the injunction and gave the company time to find a land-based disposal site before enjoining any more dumping into the water. The company's primary argument was that it would have to shut down its plant if the injunction went into effect, thereby causing the community to lose thousands of jobs.

In a more recent example, a court-ordered remedy required the Commonwealth of Massachusetts, which had violated the CWA, to give its Water Resources Authority the power to acquire a suitable landfill site, and forbade the state to hook up any new sewer lines emptying into Boston Harbor until it did so. Similarly, in California, the city of Los Angeles had been dumping sludge from its sewage treatment plant into the Santa Monica Bay. The federal government, citing obvious environmental concerns, sued the city; the court forced the city to halt its dumping practice in late 1987, and assessed $4 million in fines against the county of Los Angeles. Although the city of Los Angeles since has reduced its waste water pollution to historically low levels, the county still has been unable to treat its sludge to remove the required ninety percent of contaminants and has tried to obtain a waiver from the requirements under the CWA.

89 Reserve Mining Co. v. EPA, 514 F.2d 492, 537 (8th Cir.) (en banc), modified, en banc, 7 Env't Rep. Cas. (BNA) 1782, 1783 (8th Cir. 1975).
90 See United States v. Metropolitan Dist. Comm'n, 930 F.2d 132, 137 (1st Cir. 1991). The federal task of policing state and local governments, in the words of an EPA official, may tend to breed a "nonenforcement culture" at the agency. A recent Washington Post exposé on the enforcement of safe drinking water laws reported that, between 1988 and 1990, the EPA imposed only 41 fines, recommended civil litigation in only 36 cases, and issued 507 stop orders and 1714 other enforcement orders—in the wake of an estimated 60,000 present violations. Thus, any kind of enforcement occurred in only 8.3% of known or suspected violations. Moreover, it was primarily the states that undertook these enforcement measures. See Michael Weisskopf, EPA Falls Far Short in Enforcing Drinking Water Laws, WASH. POST, May 20, 1991, at A1.
92 See Tom Hayden, County Drags Its Feet and the Bay Still Suffers, L.A. TIMES, Sept. 11, 1988, § 5, at 5.
93 See id.
The well-known Love Canal case is a classic example of a court-ordered remedy to an environmental problem. The Love Canal was a six-block-long pit left over from an abandoned canal in what had been designed as a model city near Niagara Falls, New York. The abandoned canal became a landfill for about 22,000 tons of hazardous wastes which a chemical company buried there between 1947 and 1953. In 1953, the company capped the landfill and sold the property to the city of Niagara Falls, and homes and a school were built around the edge of the old canal bed. After it became evident that the site could pose a serious danger, the state declared a health emergency and evacuated residents from the area. Finally, in February 1988, federal District Court Judge John Curtin found Occidental Chemical Corporation, the successor to the chemical company that had created the landfill, liable and ordered it to pay the cost of the cleanup, then estimated at $250 million.94

More recently, a federal judge in Washington suspended all future timber sales there because timber companies were clear-cutting old-growth trees, which are the habitat of the northern spotted owl, an endangered species. The decision, it is reported, may cost tens of thousands of jobs. The judge in question answered that "[t]he argument that the mightiest economy on Earth cannot afford to preserve old-growth forests for a short time, while it reaches an overdue decision on how to manage them, is not convincing today."95 The judge gave the Forest Service nine months to draft a protection plan for the owl. In the meantime timber sales have been suspended.

In many cases, then, it seems to take a life-tenured judge to enforce the law as written.

III. Conclusion

Environmental law in the United States is a product of the interaction among the three branches of the federal government and between the federal government and the individual states. The judiciary's unique role in ensuring that states and federal agencies carry out the will of Congress derives in large part from our theory of the separation of powers. In a parliamentary system of government, in which the executive is more immediately responsible to the

legislature, the judicial mission in implementing legislative intent might be a less urgent one.

In the early days of our environmental law, judges played an activist role, establishing procedures for agencies to follow and meticulously examining their reasons for taking actions. The Supreme Court has put a damper on such activist review, and courts are now more deferential to agencies, although they generally still insist that agencies follow the statutes and make their rationales intelligent and complete. Today, the impossibility of legislating minutely in the environmental area, combined with the tremendous discretion accorded the agencies implementing the laws, makes the court's role even more important. The court must be a neutral, impartial arbiter, ensuring the execution and uniform application of the laws as written and providing for citizen redress against autocratic or arbitrary actions by the bureaucracy.

Some of the power of the courts in the environmental area arises from our system of stare decisis or precedent, that is, what one court decides in one case binds future courts in similar cases. This ability to set precedent increases the clout of the courts, so that agencies must follow their directions. The courts' preoccupation with fairness and process acts as a restraint on agency preoccupation with science and technical concerns. The need for agency specialists to convince generalist judges of the rightness of what they are doing requires the agencies to think about the results of their actions in more general, human terms. Finally, judicial opinions often best reflect society's environmental goals and the tradeoffs involved in reaching them: the everpresent struggle of increased development, housing needs, and heightened production against the preservation of natural resources and the protection of air and water quality, endangered species, and wetlands.

Although some worry that nonspecialist judges cannot understand the arcane subject matter of environmental law, for the most part judges have proven themselves capable of mastering its essentials in the same degree as elected legislators and agency policymakers. In cases brought to compel the federal or state government to act, trial courts on occasion have exercised dramatic powers, stopping timber sales, immediately enjoining all disposal of wastes, or barring the addition of new sewer hookups. Such rulings have a significant effect on agency decisionmaking, but in the absence of such judicial exercises of power, it is difficult to see how agencies can be controlled. Legislative oversight is too sporadic for such a task. Fortunately, judicial oversight is possible because of the major environ-
mental organizations that can go face to face with the government in court. Ordinary citizens rarely have the resources to conduct such litigation because of the excessive time and money that trials and appeals consume.

In the end, the court’s role in environmental law assists the legislators and agency decisionmakers in answering four basic questions. How and when do we compensate those who suffer loss from environmental change, and how do we extract payment from those who gain by it? How do we control the technologies that promise so much, and ensure that they do not simply leave us with damage and uncertainty? And, how do we adapt our traditional legal concepts to a world of increasing scientific complexity? Those decisions require the application of equity as well as expertise and, in the United States at least, benefit from judicial input.

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96 See Hoban & Brooks, supra note 67, at 10.